Public consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights: Intermediaries

Fields marked with * are mandatory.

Objectives and General Information

The views expressed in this public consultation document may not be interpreted as stating an official position of the European Commission.

You are invited to read the privacy statement for information on how your personal data and contribution will be dealt with.

Please complete this section of the public consultation before moving to other sections.

Respondents with disabilities can request the questionnaire in .docx format and send their replies in email to the following address: GROW-IPRCONSULTATION@ec.europa.eu.

If you are an association representing several other organisations and intend to gather the views of your members by circulating the questionnaire to them, please send us a request in email and we will send you the questionnaire in .docx format. However, we ask you to introduce the aggregated answers into EU Survey. In such cases we will not consider answers submitted in other channels than EU Survey.

If you want to submit position papers or other information in addition to the information you share with the Commission in EU Survey, please send them to GROW-IPRCONSULTATION@ec.europa.eu and make reference to the "Case Id" displayed after you have concluded the online questionnaire. This helps the Commission to properly identify your contribution.

Given the volume of this consultation, you may wish to download a PDF version before responding to the survey online.

★ Please enter your name/organisation and contact details (address, e-mail, website, phone)

Telefonica, S.A.
Gran Vía, 28
20813 Madrid
Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its Code of Conduct.

If you are a registered organisation, please indicate your Register ID number. Your contribution will then be considered as representing the views of your organisation.

If your organisation is not registered, you have the opportunity to register now. Then return to this page to submit your contribution as a registered organisation.

Submissions from organisations that choose not to register will be treated as ‘individual contributions’ unless they are recognized as representative stakeholders via relevant Treaty Provisions.

- Yes
- No
- Non-applicable

Register ID number:

52431421–12

In the interests of transparency, your contribution will be published on the Commission’s website. How do you want it to appear?

- Under the name supplied? (I consent to the publication of all the information in my contribution, and I declare that none of it is subject to copyright restrictions that would prevent publication.)
- Anonymously? (I consent to the publication of all the information in my contribution except my name/the name of my organisation, and I declare that none of it is subject to copyright restrictions that would prevent publication).
- No publication - your answer will not be published and in principle will not be considered.

"Please note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001."

A. Identification

You are an intermediary or an association representing intermediaries?

- Intermediary
- Association
**What kind of intermediary service do you provide/represent?**

For the purpose of this consultation:

- "Advertising service provider"

Advertising agencies, advertising broker

- "Contract manufacturing service provider"

Contract manufacturing is an outsourcing of certain production activities previously performed by the manufacturer to a third-party. This may concern certain components for the product or the assembly of the whole product.

- "Business-to-business data storage provider"

Data storage space and related management services for commercial user.

- "Business-to-consumer data storage provider"

File-storing or file-sharing services for personal media files and data

- "Content hosting platform"

Platforms providing to the user access to audio and video files, images or text documents.

- "Press and media company"

Newspaper, broadcaster

- Advertising service provider
- Business-to-consumer data storage provider
- Contract manufacturing service provider
- Domain name registrar
- Internet Access Provider
- Online marketplace
- Payment service provider
- Retailer
- Social media platform
- Wholesaler
- Business-to-business data storage provider
- Content hosting platform
- DNS hosting service provider
- Domain name registry
- Mobile apps marketplace
- Other
- Press and media company
- Search engine
- Transport and logistics company

**Please specify**

*500 character(s) maximum*

Telefonica is answering this questionnaire giving priority to their functions as “an intermediary service provider” in particular in its role as Electronic Communication Service (ECS) provider, delivering users internet Access Services as well as being a cloud service hosting provider.

**Please indicate your country of establishment?**

- [ ] Austria
- [ ] Belgium
- [ ] Bulgaria
- [ ] Croatia
- [ ] Cyprus
- [ ] Czech Republic
- [ ] Denmark
- [ ] Estonia
- [ ] Finland
- [ ] France
- [x] Germany
- [ ] Greece
- [ ] Hungary
- [ ] Ireland
What is the size of your company and the level at which it operates its business?

- **SME**

According to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC: enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million (SME Definition).

- EU based SME providing services in one EU Member State
- EU based company (other than SME) providing services in one Member State
- Non-EU based SME providing services in one EU Member State
- Non-EU based company (other than SME) providing services in one EU Member State
- Company, part of multinational corporate group
- EU based SME providing services in various EU Member States
- EU based company (other than SME) providing services in various EU Member States
- Non-EU based SME providing services in various EU Member States
- Non-EU based company (other than SME) providing services in various EU Member States
- Other

In which Member States do you offer services?

- All EU member states
- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Spain
- Sweden
- United Kingdom

B. Exposure to and impact of infringements
Do you experience use of your services by third parties resulting in infringement of IPR?

- Yes
- No

How do you become aware of infringements?

- In-house investigation
- Use of external service provider
- Notification by customs
- Notification by police or other enforcement authority
- Notification by customer
- Notification by rightholder
- Other
- No opinion

How do infringements impact on your business?

- Loss of turnover
- Reputational damage
- Enforcement costs
- Other
- No opinion

Please specify

500 character(s) maximum

Reputational damage, enforcement cost. For instance, in Germany, in case rightholders will win pending litigations the obligation on access providers to block access to copyright infringing websites will increase costs reaching several millions of € for implementing such measures. If legislators fails to establish statutory provisions according to which a court has to judge upon the question whether a website has to be blocked, other additional costs would arise.

What is the overall financial impact of IPR infringements?

- Positive
- Negative
- No opinion

Please provide an estimation of the impact in percentage of the overall turnover:

% 

How did IP infringements develop over last 10 years?

- Decreased
- Increased
- Unchanged
- Don't know
C. Functioning of key provisions of Directive 2004/48/EC on the enforcement of intellectual property rights

This section aims to provide the Commission with stakeholder’ views, opinions and information about the functioning of the overall enforcement framework and of key provisions of IPRED.

C.1. Overall functioning of the enforcement framework

★ Do you think that the existing rules have helped effectively in protecting IP and preventing IP infringements?

☐ Yes
☐ No
☐ No opinion

★ Do you consider that the measures and remedies provided for in the Directive are applied in a homogeneous manner across the MS?

☐ Yes
☐ No
☐ No opinion

★ Please explain:

1500 character(s) maximum

Each Member State has unilaterally decided which national measures have to be applied in order to protect intellectual property rights and therefore, the result has been the application of many and different laws across member states to ensure effective protection of copyright. Authorities and courts of member states must interpret the transposed Directive in a manner consistent with the national laws and that leads to different interpretations of the Directive and other general principles of community law, such us the principle of proportionality. There are also differences in order to achieve a fair balance between the different rights involved.

There is no harmonization with respect to the single requirements of an injunctive relief, the bearing of costs of court procedures and previous legal prosecution, the dimension of reasonableness and the bearing of costs of technical prevention measures and the consequences of an accidental breach of the injunctive duties by the intermediary. Intermediaries in the different member states seem to meet different strictly provisions, with different impact on the competitive position. Germany (and Spain) is in need of a statutory provision, according to which a court judges upon the question of blocking a website and the access provider just has to follow the court ruling and all costs will be reimbursed by the rightholder applying for the court order.

C.2. Measures, procedures and remedies provided for by IPRED
Responses to this section should be based on the overall experience with the measures, procedures and remedies provided for by IPRED as implemented and applied at national level. If appropriate please specify in your response, to the extent possible, particular national issues or practices and the jurisdiction concerned.

C.2.1. Right of information (Article 8)

Have you received a request for information?
- Yes
- No

The request for information concerned what kind of infringement?
- Online
- Offline

Where did the request originate from and how often did you receive such requests in the past 5 years?

<table>
<thead>
<tr>
<th>From your country of establishment - Against alleged infringer incorporated or resident in your country of establishment</th>
<th>Never</th>
<th>Once</th>
<th>Rarely (in average not more than once a year)</th>
<th>Occasionally (between 1 and 5 times a year)</th>
<th>Frequently (more than 5 times a year)</th>
</tr>
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</tr>
<tr>
<td>From your country of establishment - Against alleged infringer incorporated or resident in another Member State</td>
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<tr>
<td>From another EU Member States (seat or residence of the alleged infringer)</td>
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</tbody>
</table>


Did you face problems when dealing with a request for information in a cross-border situation (judicial authority in your country of establishment and intermediary established in another Member State and/or judicial authority of another EU Member State)?

- Yes
- No

Which information had been requested?

- Origin and distribution network of the infringing product
- Names and addresses
- Quantities and price
- Other

Has the information been submitted?

- Yes
- No

What was the reason/were the reasons for not submitting the information?

- Request without judicial decision
- Protection of confidentiality of information
- Right to respect for private life and/or right to protection of personal data
- Information not available (anymore)
- Information provided in the request inaccurate
- Other

★ Please specify
500 character(s) maximum

Some M S have gone beyond the IPRED Directive and provide for the right of information even before the formal judicial proceedings, as a provisional measure. Telefónica thinks caution is needed when ISPs are required, as a provisional measure, to provide some information on personal data (e.g. IP address). A prior judicial order should be necessary when providing personal data since other fundamental rights such as data protection could be threatened.

★ Do you consider the application of the rules on the right of information to be clear and unambiguous?

- Yes
- No
- No opinion

★ Please explain:
1500 character(s) maximum

National Courts have submitted to the CJEU several queries on the interpretation of this right. The CJEU has held in different judgements the
following criteria on how to disclose personal data in order to enable them to bring civil proceedings for copyright infringements and how to interpret the Article 8(3) of Directive 2004/48, Case 462/2010 Bonnier; Promusicae; Case C 557/07, LSG-Gesellschaft): 1. the authorities and courts of MS must not only interpret their national law in a manner consistent with the Directive 2004/48, but must also make sure that they do not rely on an interpretation which would conflict with fundamental rights or with the other general principles of EU law, such as the principle of proportionality and data protection. 2. They have to ensure a fair balance between the protection of IPRs enjoyed by copyright holders and the protection of personal data enjoyed by internet subscribers or users. 3. The Court considers that an order for disclosure of data is fair if there is clear evidence of an infringement of an intellectual property right, if the access to this information and the reasons to overtake the measure outweigh the nuisance or other harm that this measure may entail to the person affected by it or with some other conflicting interest. These principles contribute to clarify the application of the right of information, but at the same time it means that the Court has had to analyze this right several times because of the lack of clarity.

In view of your experience with the application of the right of information do you think that the existing rules have helped effectively in protecting IP and preventing IPR infringements?

- Yes
- No
- No opinion

In view of your experience with the application of the right of information do you see a need to adjust the provisions for the application of that measure?

- Yes
- No
- No opinion

Please explain:

1500 character(s) maximum

The application of the right of information is not always easy to implement from the point of view of the Internet Access Service Provider (ISP). The authority who requires the information sometimes does not provide the proper information needed to accomplish with requirement. The (ISP) does not identified the “user”. Given the technical nature of the processes it rather assigns “lines” through which it provides access to resources. We must highlight the technical complexity of identifying IP addresses with “users”, this is, the connection protocols and the configuration of the technical nature of the systems determines that the “line” through which the Internet Access Service Provider delivers services to third parties is identified, but it only, exclusively, identifies the “lines” and in no event assigns any “user” identification, making it necessary to know the original connection port to determine a safe technical operative, in order for the operations not to cause general Internet Access Service unavailability to users.
Operations that are intended to maintain, extract and elaborate, from a technical standpoint, identification of lines with Internet access, imply devoting and investing in resources not associated to the core business of an information society service provider, therefore, incurring in operating costs that must be compensated without delay since the moment of its incurrence by the information society service provider.

Do you see a need to clarify the criteria used to reconcile the requirements of the right to respect for private life/right to protection of personal data on the one hand and the right to effective remedy on the other hand when assessing requests for disclosure of personal data for the purpose of initiating judicial proceedings?

- Yes
- No
- No opinion

Please explain:

1500 character(s) maximum

It has to be clarified that court orders regarding a right of information must be issued with regard to each single relevant data processing operation. This is very relevant with regard to constellation in which access-providers and resellers are involved. (cf. Art. 8 (3) (d) IPRED).

C.2.2. Procedures and courts, damages and legal costs (Articles 3, 13 and 14)

Have you been subject to legal action in cases of IPR infringements?

- Yes, as an applicant
- Yes, as a defendant
- No

The legal action concerned what kind of infringement?

- Online
- Offline

Where and how often have you been involved in legal action in the past 5 years?

<table>
<thead>
<tr>
<th></th>
<th>Never</th>
<th>Once</th>
<th>Rarely (in average not more than once a year)</th>
<th>Occasionally (between 1 and 5 times a year)</th>
<th>Frequently (more than 5 times a year)</th>
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<tbody>
<tr>
<td>Within your country of establishment</td>
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<tr>
<td>In another EU Member States</td>
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</table>
What was the reason for legal action?
- Provisional and precautionary measures
- Injunction
- Damages
- Other

★ Please specify
500 character(s) maximum

Injunctions in order to block access to copyright infringing websites, to save traffic data in order to identify copyright infringing customers, to store of internet usage data (IP addresses) in order to allow for information on alleged copyright infringement by customers and injunctive relief (disclosure of customer stock data on the grounds of alleged copyright infringements on the internet.).

Did you face problems when being involved in legal action in a cross-border situation (judicial authority in your country of establishment and other party incorporated or resident in another Member State and/or judicial authority of another EU Member State)?
- Yes
- No

Did you claim reimbursement of legal costs incurred in proceedings related to IPR infringements?
- Yes
- No

Were the legal costs requested usually granted, at least partly?
- Yes
- No

★ Please explain:
1500 character(s) maximum

They were granted in Germany, in Spain, there is no decision yet. According to German and Spanish law in principle the losing party has to bear all legal costs (statutory lawyer’s fees of the winning party, court fees, own lawyer’s costs). Sometimes, there are measures to be taken that imply some costs, which we cannot claim because we are not part on the judicial process.

Did the reimbursement of legal costs cover the following expenses?

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<tr>
<td>Court fees for instituting proceedings</td>
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</table>
Was the reimbursement of legal costs sufficient?
- Yes
- No
- No opinion

*Please explain:*

**1500 character(s) maximum**

In Germany, Telefonica only get reimbursed the statutory lawyer’s fees according to the lawyer’s consideration law (RVG) but not all billed hours we paid according to the contract we have with our lawyers. In Spain, still unknown in all cases. Some Court proceedings are pending final resolution, there is not a decision yet. Nevertheless in those cases in which ISPs have not been part of the litigation case the law should be clarified in order to make rightholders reimburse all the costs necessary to implement legal measures.

Have you been subject to a claim for damages by an IP rightholder for alleged active and knowing facilitation of IPR infringements?
- Yes
- No

Has the claim been successful, in full or in part?
- Yes
- No

What was the reason for the dismissal of the claim?

**1500 character(s) maximum**

Court proceedings are pending final resolution, there is not a decision yet.

*In view of your experience with the application of the rules for the reimbursement of legal costs do you see a need to adjust the application of that measure?*

- Yes
- No
- No opinion
The Directive should explicitly recognize that rightholders should be the ones to bear all the costs. In particular, in those cases in which ISPs have not been part of the litigation case, the law should clearly clarify that rightholders should reimburse all the costs arising from the implementation of any kind of measure or action taken by the IASPs. (i.e, information/blocking measures).

The Directive 2004/48 states that the costs of identification and research are examples of expenses incurred by the rightholder, that should be compensated by the infringer (recital 26), but Courts have not always taken into account this provision and have ordered to ISP to block certain sites and other measures, without ordering that these costs will be paid by the rightholder who has asked for them.

In view of your experience with the application of the rules for the calculation of damages do you see a need to adjust the application of that measure?

- Yes
- No
- No opinion

C.2.3. Provisional and precautionary measures and injunctions (Articles 9 and 11)

Provisional and precautionary measures

Have you been subject to an application for provisional and precautionary measures in case of an alleged IPR infringement?

- Yes
- No

The application concerned what kind of infringement?

- Online
- Offline

Where and how often have you been subject to an application for provisional and precautionary measures in the past 5 years?

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<td>Frequently (more than 5 times a year)</td>
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From your country of establishment - Applicant
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<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
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<tr>
<td>Did you face problems when being subject to an application for provisional and precautionary measures in a cross-border situation (applicant established in another Member State and/or judicial authority of another EU Member State)?</td>
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<td>What was the scope of the provisional and precautionary measures applied for?</td>
<td>Prevent an imminent infringement</td>
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<td>☑ Forbid the continuation of an alleged infringement</td>
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<td>☐ Lodging of guarantees</td>
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<td>☐ Seizure or delivery up of the goods suspected of infringing an IPR</td>
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<td>☐ Blocking of the alleged infringer's bank accounts and other assets</td>
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<td>☐ Precautionary seizure of other movable and immovable property of the alleged infringer</td>
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<tr>
<td>These answers do only apply in Germany where Telefónica operates: The provisional and precautionary measures consist on an injunction in order to block access to copyright infringing website, to save traffic data in order to identify copyright infringing customers, to store of internet usage data (IP addresses) in order to allow for information on alleged copyright infringement by customers and an injunctive relief (disclosure of customer stock data on the grounds of alleged infringement.</td>
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<tr>
<td>Were the provisional and precautionary measures usually granted?</td>
<td>Yes</td>
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<td>What was the geographical scope of the provisional and precautionary measures?</td>
<td>Domestic</td>
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<td>☑ Other EU Member State</td>
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</tbody>
</table>
Did the interlocutory injunction specify the exact measures to be implemented by you in order to stop the continuation of the alleged infringement?

- Yes
- No

How did the implementation of the provisional and precautionary measures impact on your operations?

- Additional staff
- Additional costs
- Adjusting service offer
- No particular impact
- Other

★ Please specify

500 character(s) maximum

If Telefónica is obliged to implement blocking methods this will lead to costs in the amount of several Million EUR. We need additional technical equipment and need to restructure our infrastructure. In addition to that, we need additional staff to implement and monitor blocking measures, as well as staff for customer services. Also, blocking measures lead to load increase (that again leads to the need for additional technical equipment).

Injunctions

Have you been subject to an injunction in case of an IPR infringement?

- Yes
- No

The application concerned what kind of infringement?

- Online
- Offline

Where and how often have you been subject to an application for an injunction in the past 5 years?

<table>
<thead>
<tr>
<th></th>
<th>Never</th>
<th>Once</th>
<th>Rarely (in average not more than once a year)</th>
<th>Occasionally (between 1 and 5 times a year)</th>
<th>Frequently (more than 5 times a year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>From your country of establishment - Applicant established in your country of establishment</td>
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</tbody>
</table>
Did you face problems when being subject to an application for an injunction in a cross-border situation (applicant established in another Member State and/or judicial authority of another EU Member State)?

- Yes
- No

★ Please explain:
1500 character(s) maximum

Telefonica has never been subject to an application for an injunction in a cross-border situation. In Germany, right holders (such as record labels, companies of the film industry) issued in the past (and these right holders as well as right holders with regard to trademarks or individuals with regard to personal rights) and will do so in future claims for injunctions with the clear aim that courts hold that access-providers are obliged to implement blocking methods.

In your experience what are the main reasons for applying for an injunction?

<table>
<thead>
<tr>
<th>Reason</th>
<th>Very relevant</th>
<th>Relevant</th>
<th>Less relevant</th>
<th>Not relevant</th>
<th>Don't know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Block access to infringing content online</td>
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<tr>
<td>Stay down of infringing content online</td>
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<td>Adopt technical measures such as filtering</td>
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<td>De-indexing infringing websites</td>
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<td>Permanent termination of domain</td>
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<td>Permanent termination of subscriber account</td>
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In Spain, the IP Act has been recently modified. This law has established the Commission on Intellectual Property at the Ministry of Culture, which is in charge of safeguarding intellectual property rights. It is a government body with powers to force ISPs to block sites in the way that the law says (requires prior judicial Order). In Germany, there are cases in which they are not granted. The FCJ in Germany holds that access-providers are being obliged to implement blocking methods.

Did the injunction usually specify the exact measures to be implemented by you in order to stop the continuation of the alleged infringement?  
○ Yes  
○ No

How did the implementation of the injunction impact on your operations?  
☒ Additional staff  
☒ Additional costs  
☒ Adjusting service offer  
☐ No particular impact  
☒ Other

★ Please specify  
500 character(s) maximum
If Telefónica is obliged to implement blocking methods this will lead to costs in the amount of several Million EUR. We need additional technical equipment and need to restructure our infrastructure. In addition to that, we need additional staff to implement and monitor blocking measures, as well as staff for customer services. Also, blocking measures lead to load increase (that again leads to the need for additional technical equipment).

★ In view of your experience with the application of the rules for provisional/permanent injunctions do you see a need to adjust the application of that measure?
- Yes
- No
- No opinion

★ Should the Directive explicitly establish that all types of intermediaries can be injunctioned?
- Yes
- No
- No opinion

Please explain:

1500 character(s) maximum

- Directives 2001/29/CE and 2004/48/CE already establish this idea, so it won’t be necessary to introduce it here. In particular, we consider the liability regime under the e-Commerce Directive still fit for purpose for those intermediaries whose primary role is limited to merely transmitting third party data or providing user access to the Internet, and therefore, they are exempted from liability for copyright infringement. This is the case of Telefónica in its “mere conduit passive role” as a network access service provider and in its role as hosting cloud service provider. By the contrary, Telefónica ask for clarification and guidance over other agents (“false intermediaries”) who have an active role on piracy activities. The introduction of specific search engines by default in the Internet Browsers can influence the internet information that is accessed by users, this feature determines that the developers of the internet browsers and search engines should be considered as intermediaries whose activity could not be neutral and could affect the content. This is also the case of “false intermediaries” which are hosting illegal contents under a “mere technical, automatic, passive and neutral hosting” appearance and therefore, they should be injunctioned.

★ Should the Directive explicitly establish that no specific liability or responsibility (violation of any duty of care) of the intermediary is required to issue an injunction?
- Yes
- No
- No opinion

Please explain:

1500 character(s) maximum
Stipulations in this regards are already part of Directive 2000/31 that is not affected by IPRED (cf. recital 15). Moreover, Directive 2004 includes very different types of intermediaries (exceeding 3 cases provided by art. 12-14 of the Directive on Electronic Commerce). For the remaining intermediaries which are not included in Directive 2000/31, it should be necessary to analyze on a case by case basis their activity in order to assess their legal status. Provide a general rule without setting a clear differentiation between the different types of intermediaries may lead to results that are not fair.

★ Should the Directive explicitly establish that national courts must be allowed to order intermediaries to take measures aimed not only at bringing to an end infringements already committed against IPR using their services, but also at preventing further infringements?

☐ Yes
☐ No
☐ No opinion

Please explain:
1500 character(s) maximum

Stipulations in this regards are already part of Directive 2000/31 that is not affected by IPRED (cf. recital 15).

★ In that respect should the Directive establish criteria on how preventing further infringements is to be undertaken (without establishing a general monitoring obligation under the E-Commerce Directive)?

☐ Yes
☐ No
☐ No opinion

★ Do you see a need for criteria defining the proportionality of an injunction?

☐ Yes
☐ No
☐ No opinion

Please explain:
1500 character(s) maximum

First of all, a clear and undoubtable definition of “injunction” is needed. In many jurisdictions, for example Spain, can be translated in different ways (mandate, request, preliminary measure…). As a result of that, is no easy to determine the reach of the measure.

The rightholder have a duty to in first place eliminate every other way of contacting the website operator or host platform.. This would require (i) a legal framework for procedures (“sufficient and clear legal basis”, Rec. 59 Directive 2001/29, Art. 52 Charter), (ii) inclusion of all stakeholders/those affected by action (cf. CJEU “kino.to”, Rec. 57), (iii) provision on cost allocation to right holders (cf. § 101 GCA), (iv) ISP-protection against claims for compensation).
Do you see a need for a definition of the term "intermediary" in the Directive?
- Yes
- No
- No opinion

Please explain:
1500 character(s) maximum

Intermediaries cover a wide range of activities with different natures. A definition would be unlikely able to cover all market realities and be future-proof as the dynamic market could render it obsolete, generating legal uncertainties. If the definition remain specific for the purpose of each different consultation (and therefore, within each subsequent legislative or regulatory measure) we would run the risk to have a duplication and overlapping of applicable rules. Telefonica does not believe that IPRED should give a definition of intermediaries.

Do you see a need for a clarification on how to balance the effective implementation of a measure and the right to freedom of information of users in case of a a provisional measure or injunction prohibiting an internet service provider from allowing its customers access to allegedly IPR infringing material without specifying the measures which that service provider must take?
- Yes
- No
- No opinion

Please explain:
1500 character(s) maximum

Article 3 of the Directive 2004/48 states that the measures, proceedings and resources needed for granting respect to IPRs shall be fair and equitable, effective, proportionate and dissuasive, and shall not be unnecessarily complicated or costly. It also adds that they should be applied in such a way to avoid creating barriers to legitimate trade and should provide safeguards against their abuse. This article should be clarified in order to implement those principles. In this sense, we consider that proportionality will not be fulfill if ISPs has to bear with the costs to stop or prevent the infringement of the IP right, that have been committed by a third party.

In relation with the “right of information”, the IPRED Directive provides for this Right only in the context of judicial proceedings. However, some Member States have gone beyond the Directive and provide for the right of information even before the formal judicial proceedings, as a provisional measure. In Telefonica’s opinion we have to be very cautious when internet service providers are required, as a provisional measure, to provide some information on personal data (e.g. IP address). We believe that a prior judicial order is necessary when providing personal data since other fundamental rights such as data protection could be threatened.
Particular attention should be given to the effectiveness of those blocking measures if we take into consideration the negative impact on other fundamental rights.

**Do you see a need for other amendments to the provisions on provisional and precautionary measures and on injunctions?**

- Yes
- No
- No opinion

**Please explain:**

*1500 character(s) maximum*

A clear and undoubtful definition of “injunction” is needed. In many jurisdictions, for example Spain, can be translated in different ways (mandate, request, preliminary measure...) with very different meaning. As a result of that, is not easy to determine the reach of the measure. If there is not a common definition of injunction, that will lead to legal uncertainty. For example in art. 8.3 Directive 2001/29 injunction has been translated as “medida cautelar” (precautionary measure) and in the art. 11 Directive 2004/48 injunction has been translated as “mandamiento judicial”, which is a wider term with different meaning than “medida cautelar”. In sum, it is necessary not to use the term injunction if the Directive does not explain the meaning and measures that are included in it.

C.2.4. Other issues

**Are there any other provisions of the Directive which, in your view, would need to be improved?**

- Yes
- No
- No opinion

**Please explain:**

*3000 character(s) maximum*

Telefonica would like to take the opportunity to bring some comments about the regulation of injunctions related to patents. We know that this Consultation is focused on intermediaries and copyright, but we cannot ignore that for the purposes of the Directive 2004/48, the term “intellectual property rights” includes industrial property rights such as patents. In this sense, we would like to raise the need to incorporate appropriate and balanced rules in relation with the seeking and granting of injunctions in some specific cases. Patent Assertion Entities (PAEs) are responsible for an increasing number of patent lawsuits. The multiple cost of PAEs litigation are a direct threat to the affected mobile network operators’ business, mobile telecommunications innovation, standardization and the future of mobile operator’s networks in general. Information and Communication Technology (ICT) sector is the basis of
the most innovative segment of modern economies and is use IPRs intensively. ICT sector represents the backbone of the DSM. This sector has a particular context due to the ICT products are affected by network effects which make interoperability among different standards crucial for the success of the technology. In the ICT sector, a smartphone, e.g, involves more than 2,000 essential patents and, unfortunately, this list of patents is not well defined.

D. Issues outside the scope of the current legal framework

D.1. Role of intermediaries in IPR enforcement and the prevention of IPR infringements

* Do you believe that intermediary service providers should play an important role in enforcing IPR?

- Yes
- No
- No opinion

Please explain:

1500 character(s) maximum

Telefonica strongly believes that it would be profoundly misguided to impose obligations on Internet Access Service Providers and cloud hosting platforms intermediaries to proactively monitor, evaluate and remove/block access to potentially illegal content which is made available on networks and hosting platforms. IASPs should not be liable for the content that they transmit, store or host, provided that they are acting for the sole purpose of making the transmission more efficient and without having neither knowledge of nor control over the information which is transmitted or stored. Not contributing to such infringements at all.

The ISP’s liability covered under the E-commerce Directive is very well balanced should not be re-opened. However, the case is different when the intermediary becomes active in optimizing the presentation of the uploaded content. There are certain services that have been developed after the adoption of the e-Commerce Directive such as online and e-commerce platforms, search engines, apps stores websites, and others, which are having effective control on how, when and what content is transmitted and accessible to the user and therefore, should be excluded from the liability exemption principle. Moreover, other intermediaries such as advertisers and payment service providers should also be involved in any kind of cooperation process because they have an interest in bringing specific contents to the internet user’s attention.

In your opinion which intermediaries are best placed to prevent infringements of IPR?

- [✓] Advertising service provider
- [ ] Business-to-business data storage provider
- [ ] Business-to-consumer data storage provider
- [✓] Content hosting platform
Services such as online, e-commerce platforms, search engines, apps stores and others, which have effective control on how, when and what content is transmitted and accessible to the user and therefore, should be excluded from the liability exemption principle. Moreover, other intermediaries such as advertisers and payment service providers should also be involved in any kind of cooperation process because they have an interest in bringing specific contents to the internet user’s attention.

Do you cooperate with rightholders or rightholders’ association in the protection and enforcement of IPR?

- Yes
- No

The cooperation covers the following IPR

- Copyright
- Trademark rights
- Design rights
- Geographical indications
- Patent rights
- All IP rights
- Other
- Don’t know

In which form do you cooperate with these rightholders?

- Bilaterally
- Within a multilateral cooperation agreement
- Other

Please provide detail and reference:

Telefonica participate in several rightholders associations related with trademarks and pay content, defending actively the rights that each association represents. Bilaterally Telefonica policy requires its suppliers to respect intellectual property rights of third parties. Telefonica does not take technical measures to seek and identify the user who is infringing the IPR in question. Telefonica require in its agreements with suppliers that they respect the intellectual property rights of third parties. Additionally, Telefonica has removed advertisement from infringing websites.
Do you consider your cooperation with rightholders successful?
- Yes
- No
- No opinion

What are the elements for a successful cooperation between rightholders and intermediaries?
1000 character(s) maximum

The successful cooperation requires to understand the problem, and collaborate with a common objective, working with respect to the legal frame, with a balanced assumption of costs.

On the basis of your experience what are the main challenges in establishing a successful cooperation between rightholders and intermediaries?
- Economic interests (e.g. additional costs)
- Technology
- Specific regulatory requirements
- Other
- No opinion

Please specify
500 character(s) maximum

Telefonica in its role as an ISP, believes that a cooperation regime as regards blocking measures could be acceptable if rightholders are obliged to be granted a court order for blocking specific websites; and/or if rightholders bear all costs and pay the access provider for providing blocking services.

In your opinion does the voluntary involvement of intermediary service providers in enforcing IPR have or might have a negative impact on fundamental rights?
- Yes
- No
- No opinion

How could fundamental rights be negatively affected?
- Limitation of freedom of expression
- Limitation of freedom to conduct business
- Limitation of the right to due process
- Limitation to the dissemination of legal content
- Other

Please specify
500 character(s) maximum
The “right of information” contemplated under the IPRED provides for this right only in the context of judicial proceedings. We insist that a prior judicial order is necessary when providing personal data since other fundamental rights such as data protection could be threatened. Telefónica cannot assume the role of a Judge, when Fundamental Rights are at stake (i.e. Freedom of Speech between others). It must be a Judge’s decision which determines if illegal content or activities exist.

Other comments on the role of intermediaries in IPR enforcement and the prevention of IPR infringements:

3000 character(s) maximum

See next section for these comments.

D.2 Other issues

Do you identify any other issue outside the scope of the current legal framework that should be considered in view of the intention to modernise the enforcement of IPR?

- Yes
- No

Please explain:

3000 character(s) maximum

1) Liability. We consider the liability regime under the e-Commerce Directive still fit for purpose in particular for those intermediaries whose primary role is limited to merely transmitting third party data or providing user access to the Internet, and therefore, they are exempted from liability for copyright infringement. This is the case of Telefónica in its “mere conduit passive role” as a network access service provider and in its role as hosting cloud service provider. By the contrary, Telefónica ask for clarification and guidance over other agents (“false intermediaries”) who have an active role on piracy activities and for this particular category of illegal content (IPR’s). This is the case of “false intermediaries” which are hosting illegal contents under a “mere technical, automatic, passive and neutral hosting” appearance. We consider that these agents promote via different actions the hosting of a particular nature of contents and launch campaigns through blogs, social networks, etc. to promote the access to these illegal contents creating a lucrative business via advertisement. In those cases quick actions are required from hosting providers.

2) Arbitration System. The Commission should promote an alternative process in those states where intermediaries are party in litigation cases between rightholders and infringers, there is an alternative process in the WIPO Arbitration and Mediation Center.

3) Costs. The identification, blocking measures, and investigation expenses,
are expenses of an objective nature, that is, if deeming them proportional, the execution of processes to service providers of the information society required in order to the identification and research, that are not part of its core business of providing Internet access, and they suppose providing resources not planned to fulfill the court order requested by third parties. Shall be without prejudice to its impact on the judicial process by those. It is estimated according to the above criteria and, in particular, the principle of proportionality, that the service providers should not bear the cost involving the obligation to provide information for an individual, to initiate legal action and therefore, it should be the rightholder the one to pay the expenses involving the action to perform”.

E. Other comments

E. Do you have any other comments?

- Yes
- No

Please explain:

**3000 character(s) maximum**

Telefónica is in favour a legal framework in which the right of information and the right to privacy are balanced, but always provided that the achievement of these provisional measures do not introduce obligations or undue burdens on certain kind of intermediaries. We are referring to those intermediaries which its activity is of a mere technical, automatic and passive nature. This implies that the service provider has neither knowledge of nor control over the information which is transmitted or stored.” This Statement directly falls on network operators, internet access service providers and pure cloud storage providers.

For injunctions, corrective measures, Provisional and precautionary measures the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties and public interest, shall be taken into account. In addition, all these measures regulated in Directive 2004/48 must, in particular, respect Article 15(1) of Directive 2000/31, which prohibits national authorities from adopting measures which would require an ISP to carry out general monitoring of the information that it transmit or to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights (see Scarlet Extended).

On the other hand and in line with our previous explanations there are new online platforms which may have control over the illegal content and therefore, those platforms should act expeditiously to remove or to disable access to the information (such as live broadcast of live contents sports events). Thus, if an on line intermediary does not qualify for an exemption under the e-Commerce Directive (which remains fit for purpose); its liability will be determined by the national laws of the respective Member State according to some “European Guidelines”. When these new agents, use business models that could allow accessing illegal content; it may be scope for some
kind of voluntary agreements between all the agents involved in the value chain. It is essential that any action taken under these voluntary agreements is proportionate and necessary to achieve the objectives pursued and maintain a balance between all the fundamental rights involved fully respecting open internet provisions under TSM Regulation.

Useful links
Enforcement of intellectual property rights (http://ec.europa.eu/growth/industry/intellectual-property/enforcement/index_en.htm)

Background Documents
[DE] Datenschutzerklärung (/eusurvey/files/dd8b2d68-19ef-46c1-94c2-5dd4895a22e6)
[EN] Background information (/eusurvey/files/a5da5dca-4fed-4d7d-a452-a326303ac265)
[EN] Privacy statement (/eusurvey/files/76e773ff-7057-476a-8440-0cdac45a21df)
[ES] Antecedentes (/eusurvey/files/a2ffeaea-5b75-454e-a65f-741d784e4cf5)
[ES] Declaracion de confidencialidad (/eusurvey/files/567d7bec-dabe-40a6-9598-98de4eeace82)
[FR] Contexte (/eusurvey/files/81aa2212-332b-4808-9059-fde91b1043a9)
[FR] Declaration relative la protection de la vie prive (/eusurvey/files/af24e5d2-8a6d-4867-bb8a-8af697c057b5)
[IT] Contesto (/eusurvey/files/c5544db2-47c3-459b-bc63-d750ace25279)
[IT] Dclaration relative la protection de la vie prive (/eusurvey/files/af24e5d2-8a6d-4867-bb8a-8af697c057b5)
[PL] Kontekst (/eusurvey/files/4c3e015f-c229-46a6-9330-0aa8b594df45)
[PL] Oświadczenie o ochronie prywatności (/eusurvey/files/3d746855-55a0-41ff-9ed0-f66f43c30c22)

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