

PUBLIC CONSULTATION ON THE EVALUATION AND MODERNISATION OF THE LEGAL FRAMEWORK FOR THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

The International Union of Cinemas/ Union Internationale des Cinémas (UNIC) is a European trade body representing cinema associations and key cinema operators across 36 territories.

We welcome the opportunity to submit our position on the European Commission's consultation concerning the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights.

Film theft is the biggest threat to the well-being of the film industry, including cinemas. Given the committed involvement of cinema operators in the fight against film theft, UNIC members welcome concrete actions to improve the enforcement of intellectual property rights and ensure that ongoing copyright infringements are prevented, that all intermediaries contribute to this endeavour and that robust EU rules concerning copyright enforcement are implemented more effectively across all Member States.

Cinema operators enter into exclusive licence agreements with film distributors to acquire a theatrical licence for a film in a specific territory. By committing a certain share of their box office income to the film distributor in return, as well as investing in state-of-the-art cinemas, operators make significant contributions to a dynamic sector. Any illegal film viewing or recording deprives cinema operators, film distributors, producers and creators of important revenues and prevents further investments into the creation and distribution of future works. It endangers the diversity as well as the competitiveness of European cinema, putting at risk much-needed jobs for millions of Europeans working in the creative industries.

In a recent study, Carnegie Mellon University illustrated that if piracy could be eliminated from the theatrical window, box-office revenue would increase by 15 per cent.¹ Considering that in 2015, cinema-going across 36 UNIC territories accounted for € 8.5 billion in box office returns, the estimated extra revenue would have totalled € 1.3 billion. A study by TERA Consultants on the importance of saving jobs in the EU's creative industries estimates that, in 2008 alone, film theft resulted in the loss of 135,000 jobs in the wider audiovisual industry across the then 27 EU Member States. It also estimates that in the same year, EU audiovisual industries lost € 5.34 billion in retail revenue due to piracy.²

Preventing individuals from recording films and soundtracks in the theatres is therefore a key priority for UNIC's members. In this context, cinema operators and their national associations engage in a range of activities – generally a combination of campaigns to raise audience awareness and programmes against camcording in cinemas – to prevent film theft. Within cinema theatres, staff are trained in what to look for and which measures to take if they find someone illegally recording a film. In some UNIC territories, reward programmes have been successfully implemented for cinema employees who identify people illegally recording a film. UNIC members also rely on the respective legal

¹ *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University, 2016

² *Building a Digital Economy :The Importance of Saving Jobs in the EU's Creative Industries*, TERA, 2015

frameworks in their territories in order to successfully tackle illegal recordings, through a combination of civil remedies and criminal sanctions.

In the UK, for example, a firm message has been delivered as to the seriousness of such crimes, thanks to a series of prosecutions under the 2006 Fraud Act. Within this framework, convictions have become more common. In 2014 for example, an individual was sentenced to 33 months imprisonment for recording a blockbuster film in a cinema, uploading it to the internet and producing and selling copies to the public.³ Criminal sanctions are also enforced successfully in other EU countries. In Germany, for example, in 2015 a couple were sentenced to 22 and 10 months imprisonment respectively for camcording and selling films.

UNIC members take part in the fight against the infringement of intellectual property rights through membership of wider anti-piracy coalitions, such as the Federación para la protección de la propiedad intelectual and the Coalición de Creadores in Spain, the Association de lutte contre la piraterie audiovisuelle in France and the Federation Against Copyright Theft or Gesellschaft zur Verfolgung von Urheberrechtsverletzungen in Germany.

In this short complementary response to the consultation, UNIC wishes to address what it believes the European Commission should see as its priorities in this context.

Better co-operation by intermediaries:

Online intermediaries are key gatekeepers of the Internet, indispensable in the prevention of intellectual property rights infringement. Therefore, UNIC believes that stakeholders whose services are used in infringing activities, both directly and indirectly, bear responsibility and have the obligation to prevent such infringements. They should not be able to use the liability regime as an excuse not to cooperate in the fight against piracy. With better cooperation, rightsholders would not be forced to initiate costly, sometimes lengthy, legal proceedings to obtain injunctive relief.

Clarification of the liability regime in relation to the E-commerce directive:

Some intermediaries make unfounded assertions of eligibility for liability privileges and/or also use the liability regime as an excuse not to cooperate in the fight against intellectual property rights infringement. UNIC therefore considers that clarifications are needed regarding the type of activities that would disqualify an intermediary from being able to invoke one of the liability privileges in the E-commerce Directive. Said information would make the provisions of the directive on the enforcement of intellectual property rights (IPRED) more effective and efficient.

No anonymous business online:

Due to the lack of enforcement of the transparency requirements in article 5 of the ECommerce Directive, illegal websites/platforms are able to run their online business in complete anonymity within the EU. The problem is exacerbated by the prevalence of equally anonymous online intermediaries (hosting providers, ad-brokers). This anonymity

³ <http://www.fact-uk.org.uk/cammer-sentenced-to-33-months-imprisonment/>

renders a fair number of IPRED's provisions ineffective, such as the right to information as enshrined in article 8 of IPRED, along with the gathering of evidence (article 6 and 7 IPRED) and collection of damages. The Commission should therefore explore how to make transparency more meaningful by attaching proactive measures and consequences for failure to comply, either at the European level or by asking Member States to create new sanctions.

Clarification of existing provisions of the IPRED in order to achieve better and harmonized implementation across the Member States :

In order to provide rightsholders with efficient tools in order to prevent and stop infringement, the European Commission should clarify that articles 6&7 of IPRED, related to evidence, apply online. It should also clarify that injunctive relief is available against all intermediaries whose services are used to infringe, including payment providers, advertising companies, search engines and domain registrars, as well as the assertion that no specific liability or responsibility is required as a pre-condition to the issuance of an injunction against an intermediary.

Robust takedown and stay down measures:

Even when illegal content is taken down rapidly, it often remains available either because it is instantly re-uploaded or because it is accessible via a variety of other sources. What is needed is a requirement to take down not just an individual link or file but, once the rightsholder identifies a piece of audiovisual content, the site should be obligated to remove that content, all other identical copies of that content, and prevent users from re-uploading the same content. We encourage the European Commission to take action to clarify that takedown procedures include the concept of permanent and complete removal, i.e. "take down and stay down".

Adequate compensation:

Sanctions and remedies as proposed by IPRED are supposed to be "effective, proportionate and dissuasive". So far, rather than being effective or dissuasive, these measures are more a form of compensation that rarely covers up the full loss. National legal proceedings involve substantial legal costs, varying considerably from member state to member state, and awarded damages are not sufficient to compensate for the actual harm suffered. Online infringement involves thousands of titles, whereas damages paid are usually only calculated on the basis of a sample of content. Concerning the level of damages awarded: (i) rightsholders should be adequately compensated for their losses, whilst (ii) infringers (and other potential infringers) have to be deterred by significant penalties and reimbursements. It should also be an obligation (rather than an option, as is presently the case) for Member States to provide for lump-sum damages.

Such civil remedies only make sense if the infringer can be identified readily, they comply with injunctions or interdicts and are able to pay damages and (where applicable) legal costs. UNIC would also encourage Member States to implement criminal sanctions at the national level, in order to efficiently combat commercial scale infringement.