



## **The Danish Government's response to the Commission's Report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights**

### ***Introduction***

As from 11 January 2011 to 31 March 2011 the Commission has launched a consultation on the Commission's report on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights, COM(2010) 779 final, (*Evaluation Report*) including the related *Staff Working Document*, SEC(2010) 1589 final, and the *Issues Paper*, 6141/11 PI8 Droipen 10 JUSTCIV 17 - Presidency questionnaire.

This response comprises feedback from the Danish Government on the Evaluation Report including the Staff Working Document and the Issues Paper. As requested by the Commission the structure of this response is aligned with the structure of the Issues Paper.

The Evaluation Report and The Staff Working Document have also been sent in consultation with external parties. As recommended by the Commission such parties will provide their answers directly to the Commission through the Commission's consultation portal. Nevertheless, in this response from the Danish Government the Danish Government has also taken in to consideration feedback from external parties.

### ***1. Digital environment***

#### **1.1. Do you consider that IPR infringements over the Internet pose a problem that the current toolbox of Directive 2004/48/EC (Enforcement Directive) is not entirely suitable to handle?**

IPR infringements over the Internet pose a unique and specific set of challenges. The Danish Government therefore supports the Commission's endeavour to limit the increasing problem of IPR infringements in the digital environment.

The internet challenges are comprehensively addressed in specific legislation i.e. the E-Commerce Directive (2000/31/EC) and the Information Society Directive (2001/29/EC). Consequently, this existing regulation should be taken in to consideration when amendments to the Enforcement Directive are considered.

#### **1.2. What kind of specific measures are in your view suitable to combat such infringements? Which measures should be taken at EU level?**

The Danish Government supports the Commissions' endeavours to limit IPR infringements in the digital environment.

In doing so it is important to maintain a broad approach – focus should be given to enforcement as well as availability of legal online services, new business models and legal opportunities to download and use copyright protected works in a way easily available for the consumers.

Measures that are effective, balanced and proportionate to combat IPR infringements on the Internet should be developed and harmonized at EU level. Such measures should be implemented in the most suitable way to address these kinds of infringements. The Danish Government urges the Commission to analyse, evaluate and recommend best practice measures, procedures and remedies related specifically to IPR infringements on the internet.

The digital environment has become a major forum for distribution of creative content. This development has resulted in new opportunities for innovation and use of creative content as well as challenges related to IPR-infringements such as illicit file-sharing and other use and distribution of IPR-protected material without the consent of the right holder.

The European Commission has made the creation of a digital single market one of the highest priorities in Europe's 2020 flagship initiative the Digital Agenda. The Danish Government has expressed its support to the promotion of legitimate cross-border online services within the European Union in its contribution to the European Commissions hearing on Creative Content in a European Digital Single Market.

**1.3. Is there a need to lay down rules regarding the *liability of online service providers* (and *limitations* thereto) in the Enforcement Directive beyond those already existing in Directive 2000/31/EC (Directive on electronic commerce)? If yes, is there a need to *define the term* “online service provider” in the legal framework of intellectual property?**

Online service providers play an important role when it comes to distribution in the digital environment.

The Commission should take in to consideration, that limitations to the liability of online service providers are regulated in the E-Commerce Directive (2000/31/EC) when the role of intermediaries is considered in connection with the revision of the Enforcement Directive.

**1.4. Taking into account the types of data mentioned in Article 8(1) and 8(2) of the Enforcement Directive, is there a need to introduce explicit rules that enable authorities to order *online service providers*, regardless of their liability, to *disclose information relating to individual subscribers* who have allegedly committed IP infringement? If yes, what should be the *preconditions* and *limits* for such orders (e.g. infringement has to be on a commercial scale, only judicial authorities may order such measures, infringement proceedings have to be in progress, only certain types of data may be provided, limitations for safeguarding rights to privacy and protection of confidential data)? What should be the *sanction* for non-compliance with such orders? Should these measures be limited to IP infringements? (See also question 5.3.)**

The European Data Retention (2006/24/EC) and Data Protection Directives (95/46/EC and 2002/58/EC as amended by 2009/136/EC) are quite specific in their balancing of principles and exceptions related to data retention for specific purposes and the protection (use and deletion) of data. Any considerations regarding retention of data for the purpose of disclosing information related to IPR infringements should respect these fundamental principles while also securing the proportionality of any new obligations related to data retention placed on intermediaries on the internet.

**1.5. Taking into account the jurisprudence of the European Court of Justice, is there a need to amend the existing legal framework relating to *the liability or legal obligations of***

***online service providers (including search engines and online market places) whose services are directly used in infringing activities (not necessarily on a commercial scale)? If yes, which legal instrument should be amended (the Directive on electronic commerce, the Enforcement Directive or the Trade Mark Directive)?***

The existing regulation of online service providers' liability in the E-Commerce Directive (2001/31/EC) should be taken in to consideration when the role of intermediaries is considered in connection with the revision of the Enforcement Directive.

**1.6. In the case of online copyright infringements, does your law provide for the possibility of taking measures against *websites facilitating such infringements* or against *advertisers* financing such websites? Does your law provide for specific legal measures against P2P file sharing? Do you see a need for such measures to be included in the Enforcement Directive?**

The Danish copyright act does not contain specific legal measures against P2P file sharing, since this is covered by the general copyright rules regulating the scope of the copyright protection, which states that copyright implies the exclusive right to control the work by reproducing it and by making it available to the public.

The rules of the Danish Administration of Justice Act regarding temporary injunctions can be used by the courts to order an ISP to block subscriber-access to websites facilitating online copyright infringements. This has been upheld by the Danish Supreme Court in a ruling from 2010.

## ***2. Scope of the Directive***

**2.1. Is there a need to apply some (or all) of the measures provided for in the Enforcement Directive also with a view to rights that currently are not covered by the Directive?**

The Danish Government believes that it is not necessary to apply the measures provided for in the Directive also to rights that are currently not covered by the Directive.

**2.2. How do you think issues like the protection of trade secrets and domain names and protection against parasitic copies (look-alike marketing) should be dealt with? Do you see them as being linked to IPR or do you consider them more an issue of unfair competition law? Would you see an added value of EU action in that area?**

Protection of trade secrets and domain names and protection against parasitic copies (look-alike marketing) is not seen as being linked with IPR unless one or more of the intellectual property rights as defined in the "Statement by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and the Council on the enforcement of intellectual property rights (2005/295/EC)" (Statement) are infringed in connection with the infringement of trade secrets, domain names and marketing rules.

**2.3. Is there a need to provide a list of intellectual property rights in the Enforcement Directive? If yes, what should be the relation of this list to the scope of the Directive (exhaustive list, indicative list, minimum list)? Should such a list be included in the Articles or in the recitals? How should rights protected only by certain national laws be treated in such a list?**

A non-exhaustive list of intellectual property rights in line with the above mentioned Statement could be developed.

### **3. Evidence**

#### **3.1. What are the limits of the provisional measures (e.g. search or seizure orders) in respect of confidential (private) information under your law? Have you encountered any difficulties in this respect?**

(a) According to the Danish Administration of Justice Act an order of disclosure etc. cannot be issued if it will produce information about matters about which the individual would be excluded or exempted from testifying as a witness pursuant to Sections 169-172, see Section 298, Section 299, Section 306, Subsection 4, and Section 653, Subsection 5.

According to Sections 169-170, public servants, ministers of religion, defence counsels etc. are as a general rule excluded from testifying about matters to which they are bound to observe professional secrecy.

According to Section 171, the nearest relatives of a party are as a general rule exempted from testifying. Also according to Section 171 a witness is always exempted from testifying if the testify presumably exposes the witness to penalty etc. According to Section 172 editors etc. are as a general rule exempted from testifying about source references etc.

Finally, according to Section 653, Subsection 4, the court entirely or partly rejects a request for a search if the search in consideration of the sanctity of private life, business secrets, or other reasons presumably will harm or cause inconvenience to the alleged infringer in a way that is disproportionate to the interests of the claimant.

Furthermore, the Danish Act on Processing of Personal Data shall apply to processing of personal data in connection with orders of information according to the Danish Administration of Justice Act Section 306 (which corresponds with Article 8 of the Directive). The person who is ordered to provide information according to Section 306 may process personal data, since the processing is necessary for compliance with a legal obligation to which the controller is subject.

(b) The Danish Government has no information of difficulties encountered in this respect.

#### **3.2. What are the conditions, under your law, to *obtain banking, financial or commercial documents*?**

The limits mentioned in section 3.1 above also apply to the obtaining of banking, financial and commercial documents. Obtaining these documents is not limited to cases of commercial scale.

#### **3.3. Is there a need to ensure that**

**a) *personal computers* can be searched/seized in order to establish evidence for an IPR infringement committed via the Internet?**

**b) *screenshots* are accepted by courts as evidence for infringements committed via the Internet?**

Even now the evidence gathering mentioned can be carried out according to the Danish Administration of Justice Act. Therefore, according to Danish law there is no need to ensure the evidence gathering.

### **3.4. Is there a need to clarify the term “*under the control*” relating to evidence in Article 6 of the Enforcement Directive?**

According to the Danish Administration of Justice Act the court can order a party to present documents that are under the control of the opposing party, see Section 298. The party shall state the facts that the requested documents shall establish, and state the reasons supporting that the documents are under the control of the opposing party, see Section 300.

## ***4. Intermediaries***

### **4.1. Is there a need to introduce a *common definition of intermediaries* in the Enforcement Directive?**

According to Danish law injunctions against intermediaries have to be requested under the general rules, see section 4.2 below. Therefore, there is no need to introduce a common definition of intermediaries.

### **4.2. Does your law contain *specific provisions on injunctions against intermediaries*, or do such injunctions have to be requested under the general rules? If there are specific provisions, what are these and are they used often?**

Danish law does not contain specific provisions on injunctions against intermediaries. As mentioned at page 15 in the Staff Working Document injunctions against intermediaries have been used according to those general rules.

### **4.3. Is there a need to clarify in the Enforcement Directive that not only permanent injunctions are available against intermediaries but also *interlocutory injunctions*? Should other provisional or precautionary measures be available against intermediaries (see also question 5.1.)?**

See section 4.1 and 4.2 above.

### **4.4. Taking into account that certain measures are available against intermediaries even when they cannot be held liable for the infringing acts, is there a need to *clarify the standing* of an intermediary in IP infringement proceedings? Can an intermediary be deemed an “*unsuccessful party*” when an injunction is issued against it without establishing its liability for the infringement (e.g. relating to cost issues)?**

See section 4.1 and 4.2 above.

The predictability of the intermediaries and market players’ rights and standing is important.

### **4.5. Should intermediaries (transport service providers, Internet platforms, ISPs) be involved to a greater extent in the prevention or termination of IP infringements? If yes, what ways would you deem appropriate?**

Online service providers play an important role when it comes to distribution in the digital environment.

The Commission should take in to consideration that the liability of online service providers is regulated in the E-Commerce Directive (2000/31/EC) when the role of intermediaries is considered in connection with the revision of the Enforcement Directive.

Involvement of intermediaries (e.g. transport service providers, Internet platforms, ISPs) to a greater extent in the prevention or termination of IP infringements should be reasonable and balanced in relation to their possibilities' of carrying out their businesses.

## ***5. Right of information***

### **5.1. Is there a difficulty in applying IP enforcement measures (especially rules on right of information) together with rules on *data protection* or *right to privacy* in your country?**

The Danish Government has no information about difficulties regarding this subject.

### **5.2. What are the limits of the right of information in your country, in view of privacy issues? Is there a need to amend the Enforcement Directive (or other EU legal instruments) in order to accommodate such conflicts?**

As described under section 3.1, the Danish Act on Processing of Personal Data shall apply to processing of personal data in connection with orders of information according to the Danish Administration of Justice Act Section 306 (which corresponds with Article 8 of the Directive). The person who is ordered to provide information according to Section 306 may process personal data, since the processing is necessary for compliance with a legal obligation to which the controller is subject.

### **5.3. Is there a need to clarify that the right of information pursuant to Article 8 of the Enforcement Directive may also be invoked before the infringement (and, where appropriate, the acts having been carried out on a commercial scale) was established by the judicial authorities, i.e. that *providing information* may also be ordered as a *provisional measure*? Is the usefulness of this interpretation in strengthening the IP enforcement framework enough to outweigh that providing information is by definition “irreversible” and that in certain cases the addressees of such orders are third parties (intermediaries) not being party to the litigation?**

According to the Danish Administration of Justice Act Section 306, Subsection 1, the right of information may be invoked in the context of proceedings as foreseen by the directive.

### **5.4. Due to data retention laws, online service providers sometimes do not possess the requested information about the infringements (e.g. it was subject to deletion). At the same time this information might need to be provided when requested by the public authorities. How do online service providers in your country respond to such requests from the public authorities when they are no longer in the possession of the information needed?**

The right holders in Denmark have not reported this as being an issue of concern.

**5.5. Can information that in your country would normally be subject to the banking secrecy, be requested by using the right of information?**

See section 3.1 and 3.2 above.

## **6. Commercial scale**

**6.1. Have you defined "commercial scale" in your country – either in law or by jurisprudence? If so, which is the definition that you have chosen?**

No, see page 5 in the Staff Working Document.

**6.2. Is the definition of “commercial scale” still appropriate in Recital 14 of the Enforcement Directive? Is there a need to have a definition at all, and if yes, should it be moved to the Articles of the Directive? Should the link between the commercial scale requirement and the right of information remain intact?**

See section 6.1.

**6.3. The criterion of “commercial scale” (as for its definition, see Recital 14 of the Enforcement Directive) applies to a limited number of specific cases: communication of banking or commercial documents [Article 6(2)], right of information towards intermediaries [Article 8(1)], and seizure of movable and immovable property and blocking of bank accounts as a precautionary measure [Article 9(2)]. For which of the above mentioned three situations do you consider the *commercial scale criterion as necessary or useful*? What risks do you see if this criterion were to be abolished?**

See section 6.1.

**6.4. If you have made the right of information subject to the commercial scale requirement, how do you deal with the problem that sometimes the *rightholder needs additional information* from an intermediary in order to be able to determine whether the infringement has been committed at a commercial scale?**

See section 6.1.

**6.5. If under your law commercial scale is not a precondition for ordering the measures concerned, *has its absence lead to abuses*, in certain areas, by right holders? If yes, which areas are affected?**

The Danish Government has no information about abuse.

## **7. Damages**

**7.1. Do you see a deficiency in the practice of awarding damages, i.e. in compensating the rightholder for damages suffered (including moral prejudice and lost profits)? If yes, is this deficiency due to the current wording of the Enforcement Directive? Would it help this deficiency if recovery of unjust enrichment was to be ordered as an objective sanction (i.e. not depending on the culpability of the infringer), or should unjust enrich-**

**ment of the infringer and other economical consequences play a greater role in calculating damages?**

Case law is still rather limited. In existing Danish judgments damages are often awarded at the courts' discretion without being very explicit or detailed on how awarded damages have been motivated and calculated.

It is important to continue to be entitled to take unjust enrichment of the infringer and other economical consequences in to consideration when calculating damages. However, recovery of unjust enrichment should not be ordered as an objective sanction.

Finally, according to information given by the Danish right holders, they often prefer to settle disputes out of court as the damages awarded are rarely deemed proportionate to the costs of a trial.

**7.2. In your judicial practice, what is the relationship between unjust enrichment and lost profits (i.e. royalties or license fees that would have been due in a contractual relationship)?**

See 7.1.

**7.3. What is the legal situation under your law relating to the *liability of legal persons* (and the managers thereof for the acts carried out by the legal person)? Is there any *IP-specific problem* in this respect that could be tackled in the Enforcement Directive?**

In limited liability companies the management is only liable if it has violated the principle of fault.

The Danish Government can not support any idea as regarding to extending the liability rule for the management when it comes to IP-specific matters.

**8. *Corrective measure***

**8.1. In your judicial practice, what is the *difference between “recall” and “definitive removal”* from the channels of commerce? Is the fact that the infringer is *no longer in possession* of the infringing goods a factor in deciding which measure to apply?**

When products by judgment are “*recalled*” in Denmark the possibility of using the infringing products at a later stage still exist. This could be the situation, if the infringing products are recalled until the parties for example have negotiated a solution subject to contract, e.g. a license agreement. Further, if a patent for example is just about to expire the products could be recalled until the patent expires.

“*Definitive removal*” is a permanent solution in contrary to recall of products. Definitive removal is used if it is not possible only to recall products from the trade.

**8.2. Is there a need to clarify in the Directive *the relationship between corrective and provisional measures*?**



If the difference between recall and definitive removal is not interpreted uniformly in all member states, it could be reasonable to clarify the difference in the Directive as it is explained above.

On page 19 in the Staff Working Document the Commission states that among other countries Denmark uses the discussed recall instrument as a preliminary measure before proceedings. The Danish Government would like to rectify that the discussed recall instrument is only used by judgment after proceedings in Denmark. However, in connection with the use of the interlocutory injunction instrument, products can be recalled if the recall can be characterized as a subsidiary (“accessorisk” in Danish) obligation to act compared to the omission obligation (“undladelsespligt” in Danish) that is the main purpose of the interlocutory instrument.

**8.3. Does it happen frequently that the infringer is not able to pay the costs of the destruction and that those therefore have to be borne by the State? Would you consider it justified to impose the costs for the destruction of counterfeit goods on the State where the destruction is in the public interest (in particular because these goods pose a risk to consumers' health and safety)?**

The Danish Government has no comments.

**8.4. Would it improve the situation if the Directive clarified that courts are entitled to impose the costs of destruction of the infringing goods *directly* on the infringer once the infringement is established?**

The Danish Government has no comments.

**8.5. Do you see a need to harmonise aspects of *secondary use* (e.g. for charity purposes) of infringing goods in the Enforcement Directive?**

In relation to trademark infringements any harmonisation of secondary use should ensure that secondary use of goods can not in any way be linked to the infringed trademark.

## **9. Other issues**

The Danish Government has no comments.