

# ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Report on the application of Directive 2004/48

BEUC Response

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## Summary

The European Consumers' Organisation (BEUC) welcomes the opportunity to submit its views on the implementation of the IPR Enforcement Directive 2004/48 and its ongoing review. BEUC is concerned with the approach followed by the European Commission (DG Markt) vis-à-vis Intellectual Property Rights and the proposals outlined in the report regarding the need to revise the current rules.

BEUC is strongly opposed to a possible revision that would aim at eroding consumers' fundamental rights and at establishing disproportionate enforcement mechanisms for a number of reasons. In particular:

- The Directive has been implemented by Member States only recently and therefore the **feedback on its effectiveness remains limited**;
- The European Commission **has yet to carry out the assessment of the impact of the Directive on innovation and the development of the information society**, as required by Article 18 of the Directive 2004/48;
- The decision to revise the Directive has been based on the feedback received by right holders' representatives within the framework of a stakeholder dialogue established by DG Markt **without the participation of civil society, academics and data protection authorities**;
- The revision of the Directive **has not been included in the Commission's Work Programme for 2011, nor has it been foreseen in the EU Digital Agenda**;
- The adoption of stronger and disproportionate enforcement rules that fail to distinguish between different types of IPR infringements and between commercial entities running for profit and individual consumers entail the risk of **eroding public support for IPRs and jeopardise consumers' fundamental rights**;
- The European Commission **has** ignored the conclusions of a number of independent studies by governments, international organisations and academics that focus on the **assessment of the overall economic impact of file sharing and point to the inaccuracy of the data provided by right holders** regarding the scale of copyright infringements online;
- The implementation report **identifies privacy and data protection legislation as an obstacle to the effective enforcement of IPRs**, contrary to Opinions of Article 29 Data Protection Working Party and the European Data Protection Supervisor;
- The report calls for an **active involvement of Internet Service Providers and the development of voluntary codes of conduct for the enforcement of IPRs** in contradiction with the European Charter of Fundamental Rights, the recently adopted Telecom Package and the e-commerce Directive;
- Further harmonisation of IPR enforcement legislation when **the substantive copyright law is far from being harmonised and adapted to the digital environment** is not only premature, but it also entails the risk of further fragmenting the Internal Market.

## Introduction

The European Consumers' Organisation (BEUC) has always supported the establishment of a fair, proportionate and forward-looking framework for Intellectual Property Rights, where the interests of rights holders will be balanced with the interests of consumers and the public in general. In particular, the main question is whether copyright enforcement should take precedence over the competing objective of preserving freedom of communication and expression on the internet. Intellectual property should serve the dual role of providing incentives and facilitating dissemination. This equilibrium needs to be reflected in related public policy initiatives and legislative proposals.

However, the overall approach followed by the European Commission (DG Markt) vis-à-vis IPR enforcement as outlined in the implementation report and demonstrated by the parallel initiatives in the field of IPR enforcement<sup>1</sup> raise serious concerns as to the balanced integration of the different interests of the stakeholders concerned. BEUC would like to submit its views on the Commission's policy on IPR enforcement in general and on specific points raised in the consultation.

## Incomplete assessment of the impact of the Directive

The European Commission has clearly stated that the feedback received from Member States on the implementation of the Directive on IPR Enforcement has been limited due to its late transposition<sup>2</sup> and the small number of court cases.

Furthermore, the Commission has yet to carry out an assessment on innovation and the development of the information society, as explicitly requested by the Directive. BEUC has repeatedly stressed that the adoption of stronger and more stringent rules for copyright enforcement in the online world would be detrimental to innovation. It is not the first time that copyright owners complain of online copyright infringements by individual users as the reason for loss of revenue. The same happened in the 1980s when copyright owners cried wolf over the invention, production and marketing of home-taping as a serious threat to the profitisation of the model of movies for the motion picture industry.

**Copyright owners have always been reluctant to adapt their business models to new technologies and tend to consider strong and disproportionate enforcement as the antidote to their own fear toward innovation.**

The development of business models which respond to users' expectations and satisfy their interests have been proven successful. For instance, it is not surprising to see that the emergence of new and sophisticated applications to be used on smartphones together with the development of micro-payment methods have been endorsed by consumers, while there has been no attempt to 'pirate' them.

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<sup>1</sup> Observatory on Counterfeiting and Piracy, Stakeholders' dialogue on online counterfeiting, Stakeholders' dialogue on online copyright infringements.

We also invite the European Commission to assess the **economic impact of the lack of a Digital Single Market for content online** and the damages suffered by consumers and the general public as a result of not having access to such content, knowledge and information.

Furthermore, an **impact analysis of the anachronistic substantive copyright legislation on innovation** is essential. Despite the evidence that the current system of copyright exceptions and limitations is not adapted to the digital environment, the European Commission has ruled out the possibility of revising the Information Society Directive<sup>3</sup>, which was adopted 5 years before the IPR Enforcement Directive, on the grounds that it is well adapted to the digital environment.

It is also interesting to note that the European Commission published an exhaustive analysis of the economic impact of the e-commerce Directive<sup>4</sup>, prior to the launch of the public consultation on its implementation. A similar assessment is needed before the decision on revision of the IPRED Directive is made.

Furthermore, the adoption of copyright enforcement measures may, under certain conditions, **jeopardise the very architecture of peer-to-peer technology**, irrespective of whether the technology is being used to infringe copyright or not<sup>5</sup>. P2P technology enables users to share communications, processing power and data files with other users. Use of P2P technology can enhance efficiency by allowing faster file transfers, conserving bandwidth and reducing or eliminating the need for central storage of files<sup>6</sup>.

Therefore, there is a clear need for a clarification by the relevant services of the European Commission as to the reasons for the incomplete assessment of the impact of the IPRED Directive and the timing of its publication.

### **Governance concerns**

BEUC is concerned about the approach of the European Commission in evaluating the implementation of the Directive. In order to overcome the lack of feedback by EU Member States, DG Markt has established a number of stakeholders' groups with the mission to identify the problematic provisions. However, the vast majority of participants represent the rights holders and/or legal practitioners who have represented plaintiffs in IPR infringement court cases. **The absence of civil society, academics, judges and data protection authorities significantly questions the credibility and the independence of these groups.**

Furthermore, the revision of the IPRED Directive has not been included in the recent Work Programme of the Commission for 2011, nor has it been foreseen in the EU Digital Agenda. On the contrary, the European Commission has simply

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<sup>3</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>4</sup> Study on the economic impact of the Electronic Commerce Directive:  
[http://ec.europa.eu/internal\\_market/e-commerce/docs/study/ecd/%20final%20report\\_070907.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/ecd/%20final%20report_070907.pdf)

<sup>5</sup> EU Digital Copyright Law and the End-User, Giuseppe Mazziotti, p.138.

<sup>6</sup> "Peer-to-Peer file sharing technology: consumer protection and competition issues", Federal Trade Commission 2005.

reserved the right to assess in 2012 whether there is a need for additional measures for enforcement of Intellectual Property Rights.

### **Strengthening of enforcement cannot go on ad infinitum**

BEUC is concerned with the exclusive focus of the European Commission on the adoption of longer protection and stronger enforcement measures. With countless new opportunities arising from the ways content is accessed and distributed, the need to rethink the European legal framework has arisen with the aim of achieving a fair balance between the different stakeholders, promoting innovation and cultural diversity.

From the consumers' point of view, the current copyright framework is far from balanced. A number of permitted uses of copyright-protected material are only allowed as exceptions and limitations to the copyright owners' exclusive rights. However, these exceptions and limitations are not absolute conditions and consumers often face unclear boundaries as to which acts are permitted under the current copyright legislation. Just as copyright holders possess some core rights and interests, consumers also hold some inviolable rights to use and disseminate protected works.

In addition, the current copyright framework which is based on an exhaustive list of optional exceptions and limitations, lacks sufficient flexibility to take account of technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework that allows new and socially valuable uses which do not affect the normal exploitation of copyright works to develop without the copyright owners' permission.

In this respect, BEUC fully agrees with the analysis of the European Commission's Reflection Paper on Creative Content Online:

"There is a need to restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation Directives mandate basic economic rights, but merely permit certain exceptions and limitations"<sup>7</sup>.

BEUC calls upon the European Commission to revise the Information Society Directive<sup>8</sup> as a matter of urgency, with the aim of establishing a harmonised, consumer-friendly and forward looking copyright framework<sup>9</sup>.

### **Risk of eroding public support for Intellectual Property**

The approach adopted by both the European Commission and national governments vis-à-vis IPR enforcement may result in eroding any public support for IPRs. The failure to distinguish between organised criminal entities infringing

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<sup>7</sup> Creative Content in a European Digital Single Market: Challenges for the Future, A Reflection Document of DG INFSO and DG MARKT, 22 October 2009.

<sup>8</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>9</sup> For further information, please see BEUC's response to the Reflection Paper on Creative Content Online, Reference X/003/2010 - 05/01/10.

IPR for profit and individual users engaging in file-sharing for personal use, creates not only a problem of proportionality, but also raises a problem of ethics.

Copyrighted works are both an output of intellectual creation and an indispensable input to creativity. Copyright law needs to balance the incentive to create with access to works. Strict copyright enforcement in the digital environment has the potential to frustrate the objective of dissemination of creative works and restrict consumers' access. The solution put forward by some EU Member States, such as France and the UK, which targets individual infringers directly is a short-sighted approach.

The approach, supported by copyright owners, has resulted in creating a negative attitude towards copyright among the general public, particularly young people. It becomes synonymous with monopolies and strict enforcement. Moreover, in most cases, consumers and citizens are not even aware of what copyright consists of and they do not know what they can or cannot do with copyright protected content. According to research by Consumer Focus, 73% of British consumers are "never quite sure what is legal and illegal under current copyright law"<sup>10</sup>.

The European Commission must adopt a balanced approach which is based on independent and reliable evidence and will ensure individual users are not treated as criminals, nor accused of the assumed economic losses of the content industry. As noted above, the economic impact of the failure of the content industry to adapt their business models to consumers' expectations needs to be considered.

### **BEUC comments on specific issues**

In addition to our comments on the overall approach of the European Commission on enforcement of Intellectual Property Rights, BEUC would like to submit comments on specific issues.

#### **➤ Incorrect legal presumptions**

BEUC regrets the failure of the European Commission to **distinguish between different forms of IPR infringements**. Counterfeiting of physical goods and online copyright infringements are treated as equally serious, implying that the harm caused by the selling of counterfeit medicines equates to that caused by a teenager downloading a single music file for his private use in order to discover a new artist before buying their CD or going to their concert.

A further clear distinction needs to be made between commercial-scale copyright infringements by entities operating for financial gains and unauthorised use of copyright-protected material by individual consumers for their own private use. The European Commission has been reluctant in clarifying the term 'commercial scale' thus opening the door to disproportionate sanctions against individual consumers, without considering the lack of commercial motive, intention or financial benefits.

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<sup>10</sup> Research undertaken by BMRB for Consumer Focus. Interview conducted among 2026 consumers in the period from 17<sup>th</sup> to 23<sup>rd</sup> September, 2009.

The penalty level for infringements should differ, depending on the scale and motive for the infringement. Applying the same enforcement measures to criminal gangs infringing copyright for profit and individual consumers doing it for personal use is neither fair nor proportionate.

Furthermore, the **current legal uncertainty in relation to the infringing nature of mere downloading acts** and the different interpretations provided by national legislation may entail the risk of a specific act being considered as an IPR infringement in one country, but not in another<sup>11</sup>. The same risks apply to most of the copyright exceptions and limitations, which are far from being harmonised, let alone the fact their scope remains unclear. BEUC is therefore concerned that further harmonisation of IPR enforcement legislation without harmonisation of the substantive copyright law will further fragment the Internal Market.

This existing legal uncertainty has been explicitly identified by the Advocate General in the *Promusicae* case<sup>12</sup>:

“It is not certain that private file sharing when it takes place without any intention to make a profit, threatens the protection of copyright sufficiently seriously to justify recourse to this exception. To what extent private file sharing causes genuine damage is in fact disputed”.

#### ➤ **Incorrect economic presumptions**

The European Commission reiterates the arguments of rights holders that IPR infringements cause significant economic losses. Although this statement might be true for some IPRs, it deliberately ignores the findings of a number of studies which clearly demonstrate the long-term positive economic impact of file sharing for both the content industries and the public's access to knowledge. From a governance point of view, DG Markt should at least take these studies into consideration:

- The study by the IvIR Institute of the University of Amsterdam on behalf of the Dutch Ministry of Economy<sup>13</sup> concluded **"File sharing has, in fact, created a net benefit to the economy and society in both the short and long term and that will likely continue.** The direct impact on sales of file sharing is minimal (though it depends on the category). In fact, the only areas actually in trouble right now may be the sale of plastic discs (CDs and DVDs), but much of the damage has nothing to do with file sharing, and there are indications that the "lost" money can be made up in other ways. **The report recommends moving away from criminalising user**

<sup>11</sup> For instance, both French and Italian statutes explicitly make lawful private copying subject to a strict condition of non-public destination of the copy Article 122-5 of the French Intellectual Property Code and Article 71-sexies of the Italian Copyright. Similarly, in the Netherlands the Court of Harlem held in 2004 that the mere download of an unauthorised MP3 file could be excused under the private copying exception if the user of the download did not reproduce or make it available to others. In France, The Court of Montpellier held that the user's movie reproductions on CD-Rom format met the requirements of the private copying exception, provided by Article L.122-5 of the French Intellectual Property Code, because there was evidence that these reproductions were used exclusively for personal purposes, such as home viewing

<sup>12</sup> [http://curia.europa.eu/jurisp/cgi-](http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79919870C19060275&doc=T&ouvert=T&seance=ARRET)

[bin/gettext.pl?where=&lang=en&num=79919870C19060275&doc=T&ouvert=T&seance=ARRET](http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79919870C19060275&doc=T&ouvert=T&seance=ARRET)

<sup>13</sup> [http://www.ivir.nl/publications/vaneijk/Communications&Strategies\\_2010.pdf](http://www.ivir.nl/publications/vaneijk/Communications&Strategies_2010.pdf)

**activities, and focusing instead on encouraging new business model development.**

- The study by the Canadian Government<sup>14</sup> demonstrated that those who file share spend most money on legal content. The same conclusion was reached by the Norwegian Business School<sup>15</sup>, according to which **"file-sharers in fact purchase 10 times as much content as they download for free"**.
- A study by the Harvard Business School<sup>16</sup> revealed that **file-sharing can only be blamed for 20% of the reduction in music sales**. The figure has been revised from an earlier result stating it was close to zero, but anyway it cannot be compared to the 100% which the entertainment industry claims P2P technology is responsible for.
- Similarly, a recent study by the London School of Economics and Political Science has concluded that **the decline in the sales of physical copies of recorded music cannot be attributed solely to file-sharing**, but should be explained by a combination of factors such as changing patterns in music consumption, decreasing disposable household incomes for leisure products and increasing sales of digital content through online platforms<sup>17</sup>.
- The Advisory Committee on Enforcement of the World Intellectual Property Organisation has commissioned a study<sup>18</sup> focused on whether in the absence of piracy all consumers would switch to legitimate copies at current prices. The study concluded that **"This outcome is unrealistic -especially in developing countries where low incomes would likely imply that many consumers would not demand any legitimate software at all. Accordingly, estimated revenue losses by software producers are bound to be overestimated"**.
- According to the report of the US Congress Government Accountability Office<sup>19</sup>, **the numbers previously circulated regarding the economic impact of counterfeiting and piracy were erroneous**.
- The analysis by the Social Science Research Council<sup>20</sup> concluded "even if one admits that some sectors in the industry suffer losses directly because of file sharing, the TERA study overlooks the fact that the money not spent on, say, CDs and DVDs is simply transferred to other activities and sectors, which potentially better contribute to EU economic and social wealth".

Furthermore, it is unfortunate that DG Markt precludes the findings of the study still to be prepared within the framework of the Observatory of Counterfeiting and Piracy, regarding the development of a common methodology for the comparison of data on counterfeiting and "piracy".

<sup>14</sup> The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada [http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/h\\_ip01456.html](http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/h_ip01456.html)

<sup>15</sup> [http://www.aftenposten.no/kul\\_und/musikk/article3034488.ece](http://www.aftenposten.no/kul_und/musikk/article3034488.ece)

<sup>16</sup> <http://www.hbs.edu/research/pdf/09-132.pdf>

<sup>17</sup> Creative Destruction and Copyright Protection, Regulatory Responses to File-sharing:

<http://www.scribd.com/doc/51217629/LSE-MPPbrief1-creative-destruction-and-copyright-protection>

<sup>18</sup> <http://keionline.org/node/681>

<sup>19</sup> <http://www.gao.gov/new.items/d10423.pdf>

<sup>20</sup> <http://blogs.ssrc.org/datadrip/wp-content/uploads/2010/03/Piracy-and-Jobs-in-Europe-An-SSRC-Note-on-Methods.pdf>



### ➤ **Right of information**

The report of the European Commission identifies privacy and data protection laws as obstacles to the effective enforcement of Intellectual Property Rights. By doing so, the European Commission **arbitrarily sets aside the principle of proportionality**, which is clearly stated in Article 3 of the IPRED and fails to take into account the case law of the European Court of Justice in the *Promusicae* case<sup>21</sup>, according to which EU law does not oblige Member States to publicise personal details in order to guarantee effective protection of the author's rights.

**Personal information of online users must only be disclosed to public law enforcement authorities.** Disclosure of information about users to third parties is incompatible with data protection rules. This includes the IP address, both static and dynamic, which are personal data since a third party can easily discover the natural person using the IP address. This view is shared by both the European Data Protection Supervisor and the Article 29 Data Protection Working Group.

According to a study carried out by the European Commission regarding the relationship between IPR Enforcement and Data Protection legislation in a number of Member States<sup>22</sup>.

- IP addresses are generally considered by Data Protection Authorities and national courts to be personal;
- IP addresses are considered to be traffic data, which means they **may only be processed in a limited number of circumstances, for specific purposes and that consent is required to process them for other purposes such as online copyright enforcement**;
- ISPs cannot store IP addresses for the specific purpose of online copyright enforcement, with the exception of France wherein retention for the purpose of making information available to the judicial authorities or HADOPI is possible;
- The processing of IP addresses by ISPs to pass on infringement warning notices is generally prohibited or subject to strict restrictions;
- The general monitoring of P2P networks by right holders resulting in the creation of a database of potential copyright infringers is usually prohibited.

BEUC also calls upon the European Commission to clarify whether it considers the limited scope of Article 8 of the IPRED Directive to commercial scale infringements as problematic.

### ➤ **The concept of intermediaries and injunctions**

BEUC is seriously concerned with the European Commission's assessment that the closer involvement of ISPs in the fight against IPR infringements is the recommended way forward.

BEUC considers the current rules on liability as outlined in the e-Commerce Directive and the IPRED to be proven as effective and should therefore be

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<sup>21</sup> Case C275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*.

<sup>22</sup> [http://ec.europa.eu/internal\\_market/iprenforcement/docs/study-online-enforcement\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/study-online-enforcement_en.pdf)

maintained. It is crucial to ensure that the 'mere conduit' principle is safeguarded according to which internet providers can only act upon specific order by a court. A simple warning by a copyright owner that specific content is allegedly infringing copyright should never be considered conclusive evidence entailing the liability of the internet provider.

BEUC is opposed to a wide interpretation of the provision on injunctions which would require ISPs to monitor content and prevent infringements in the future. Such an extensive interpretation conflicts with the prohibition of general monitoring as outlined in Article 15 of the e-commerce Directive<sup>23</sup> and should therefore be rejected.

Mandating the enforcement of copyright by private entities runs contrary to the fundamental right to an effective remedy and to a fair trial. The Charter of Fundamental Rights of the European Union explicitly grants everyone the **right to a fair and public hearing by an independent and impartial tribunal**<sup>24</sup>. The European Court of Justice has explicitly affirmed the principle of effective judicial protection as a general principle of Community law<sup>25</sup>. The need to respect this principle becomes even more important in the context of IPR enforcement cases, which often involve complex legal analysis, making it impossible to ascertain *prima facie* the infringing character of copyright protected content.

The active involvement of ISPs in the detection and enforcement of IPRs will require the application of **filtering technologies**. BEUC believes that this should not be the recommended solution. Firstly, filtering technologies are, by design, unable to distinguish between authorised and unauthorised copyright protected content, public domain works or content freely distributed by the author. Similarly, technical measures may result in bandwidth reduction and the slowing down of traffic, thus causing problems to the use of time-sensitive applications and interfering with the neutrality of the network.

From an economic point of view, obliging ISPs to deploy such measures would require a complete reconfiguration of their networks and an increase of their operational costs, which will be passed on to consumers. As a result, ISPs and consumers would have to bear the cost of protecting the private rights and business models of the content industry.

The use of specific technologies, such as Deep Packet Inspection, whereby ISPs inspect every bit of information passing over their networks, raises serious privacy concerns and runs contrary to the fundamental right to the confidentiality of communications.

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<sup>23</sup> Article 15.1 of the e-Commerce Directive "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, (c) the provider complies with rules regarding the updating of 13 and 14, to monitor the information which they transmit or the information, specified in a manner widely recognised store, nor a general obligation actively to seek facts or and used by industry; circumstances indicating illegal activity

<sup>24</sup> Article 47 of the Charter of Fundamental Rights of the European Union.

<sup>25</sup> ECJ, 13 March 2007, Case C-432/05, UNIBET.

Lastly, the impact on innovation and freedom of expression will be significant. The internet is an important means for citizens to access knowledge, information and services, whilst enabling their participation in public debates. Blocking and filtering every piece of information will seriously undermine the character of the internet as a common good.

➤ **Voluntary codes of conduct**

In spite of the fact that voluntary agreements between the content industry and Internet Service Providers have been promoted by some national governments in the EU as the most efficient tool to address the issue of copyright infringements online. They are not the appropriate instrument to address the challenges of digital distribution of copyrighted content

BEUC is concerned about the shift of enforcement from courts to the hands of intermediaries and right holders. Whereas a court proceeding provides safeguards of due process and careful analysis of legal questions, enforcement by ISPs deprives the user of a number of fundamental rights, including the right to a presumption of innocence, the right to be heard, the right to due process, the right to privacy and confidentiality of communications. Besides, these safeguards are part of the revised European legislation on telecoms<sup>26</sup> and therefore cannot be circumvented by voluntary codes of conduct.

It is surprising to see that the promotion of voluntary codes of conduct for IPR enforcement by DG Markt contradicts the overall policy objectives of the European Commission. In its White Paper on European Governance, **the European Commission, although it recognises the merits of self and co-regulation in specific areas, concludes that such an approach is not suited to cases where fundamental rights are called into question<sup>27</sup>.**

➤ **Search orders**

The possibility for the plaintiff to get a search order by the court without the defendant having the possibility to be heard bears the risk of resulting in abuses at the hands of rights holders. The experience from the use of the Anton Piller orders in the UK and the US confirm that such orders have been too readily granted and with insufficient safeguards for respondents<sup>28</sup>.

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<sup>26</sup> Directive 2009/140/EC amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to and interconnection of electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337/37, 18 December, 2009.

<sup>27</sup> European Commission, European Governance, COM(2001)428, 21.

<sup>28</sup> In *Systematica Ltd v London Computer Centre Ltd* case (1983) FSR313, 316, Whitford J observed that a situation is developing where "I think rather too free a use is being made by plaintiffs of the Anton Piller Provision". In *Columbia Picture Industries v Robinson* (1986) FSR 367,439, Scott J commented that the practice of the court has allowed the balance to swing too far in favour of plaintiffs.

➤ **Damages**

The European Commission has highlighted the need for damages awarded to be dissuasive. However, BEUC is strongly opposed to the introduction of punitive damages, which are in conflict with the European legal traditions. Contrary to the US system, exemplary damages are not allowed in Europe.

The concerns linked to the risk of introduction of punitive damages are being raised intensely in the context of the debates devoted to collective redress, mainly by the industry that believes that there is a major risk of blackmailing or of bankruptcy in case of litigation. It is surprising to note that DG Markt has ignored those concerns when reflecting on damages in IPR enforcement. BEUC is concerned about the application of different standards when it comes to defending the interests of rights holders.

Damages should always be of compensatory nature. In order to overcome the current divergences in national legislation, BEUC would invite the European Commission to provide national courts with guidance as to the calculation of damages.

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