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October 16, 2014

Via Electronic Mail

Addressee:
Members of the Council Working Party on Intellectual
Property

***Re: CCIA's View on the Council Deliberations regarding the Enforcement of Intellectual
Property Rights***

Dear Sir or Madam,

On behalf of the Computer & Communications Industry Association (CCIA), I write to express our view about the ongoing Council deliberations on intellectual property rights (IPR) enforcement. CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies with more than \$200 billion in annual revenues.

Against the background of the Presidency paper on the enforcement of intellectual property rights¹, circulated on 11 September, and the upcoming deliberations between Member States on the draft Council Conclusions, we would like to bring the following points to your attention:

There is no need to revise the current EU legal framework on IPR enforcement. We would like to point out that under the current legal framework the IPR Enforcement Directive² (IPRED) is a central part of a delicate balance between rightsholders, users and intermediaries. In the context of the digital economy, the interplay between IPRED and the liability limitation provisions of the E-Commerce Directive are of particular importance.

Importantly, any review of IPRED would risk upsetting this delicate balance and as a consequence create legal uncertainty, which would undermine investment in Internet companies and the development of the digital economy as a whole. In addition, there is no evidence for the need to revise IPRED. Due to the late transposition of the Directive in several Member States, there is only limited data and experience on its application. Because of that, the Commission rightly decided to not reopen IPRED.

Core provisions of the E-Commerce Directive provide the backbone to Europe's thriving digital economy. In addition to IPRED, the E-Commerce Directive is an important

¹ Council of the European Union document 13076/14, available at:
<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013076%202014%20INIT>

² Directive 2004/48/EC (OJ L 157, 30.04.2004).

element of the finely balanced legislative framework on IPR enforcement that exists in Europe. The intermediary liability protections enshrined in Articles 12-14 provide a simple principle according to which intermediaries are not primarily liable for the wrongdoings of their users. This is the single most important rule guaranteeing a thriving digital economy and an incentive to invest into online businesses. A study estimates that the activities of online intermediaries in the EU contributed around EUR 310 billion to European GDP based on latest available data from 2009.³

The rule does not mean, however, that intermediaries have no obligations. They *must* act expeditiously and disable access to infringing content once they acquire actual knowledge of it. In a lot of cases online intermediaries go even beyond their legal obligations and put in place sophisticated mechanisms to address infringing content on their sites. To support Europe's digital economy, we urge the Council to recognize and reiterate the importance of the current intermediary liability protections in the E-Commerce Directive.

As regards the scope of injunctions, the problem is *not* the EU legal framework, but its incorrect application at national level. The prohibition to impose monitoring obligations on intermediaries laid down in Article 15 of the E-Commerce Directive is a core provision for online intermediaries.

In the past years the Court of Justice of the EU (CJEU) has explicitly dealt with the possible scope of injunctions against internet intermediaries (e.g. C-324/09 - *L'Oreal/eBay*; C-70/10 - *Scarlet Extended*, C-360/10 - *Sabam/Netlog*) and made clear that such injunctions need to be very specific with regards to the measures to be taken by intermediaries and must not merely be success-oriented in order not to breach the prohibition to impose monitoring obligations on intermediaries. For example, general filtering systems installed for the prevention of copyright infringements would amount to a monitoring obligation and were held disproportionate by the Court.

Despite this clarity brought by the decisions of the CJEU, courts in certain Member States continue to issue injunctions that are contrary to key provisions in IPRED, the E-Commerce Directive and the case law of the CJEU⁴. It is therefore essential for the Commission and the Member States to develop appropriate mechanisms to ensure that injunctions against intermediaries are appropriately framed and do not constitute monitoring obligations on intermediaries, thereby endangering legitimate trade, innovation in the digital economy, and fundamental rights of EU citizens.

The Commission's Action Plan on IPR Enforcement needs to be supported. To enable a better, more consistent and efficient enforcement of IPR, the Commission wishes to pursue a holistic approach. The Action Plan on IPR enforcement proposes new policy tools like the "follow the money" approach to specifically target commercial scale IP-infringing activity. This approach builds on top of the existing legislative framework and aims to gather all relevant stakeholders in the fight against IPR infringement.

³ Thelle, M. H. & Jespersen, S. T. (2012). *Online Intermediaries – Assessing the Economic Impact of the EU's Online Liability Regime*. Available at: <http://www.copenhageneconomics.com/Files/Filer/Intranet/Documents/1253-01%20Edima%20Online%20Intermediaries%20Report%20FINAL%2010JAN2012.pdf>

⁴ For example, BGH – Judgment dated 16 May 2013 - Kinderhochstühle im Internet II – I ZR 216/11; BGH, Judgment dated 17 August 2011 - I ZR 57/09

To this end, the Commission convenes targeted stakeholder dialogues to address specific enforcement issues in order to mobilize all means to effectively dissuade and impede the diffusion of IP-infringing products. To achieve the aim of arriving at a new consensus on the enforcement of IPR, the Commission invited all European institutions to contribute to this work. We believe that EU Member States should actively engage in this process in order to achieve the best possible outcome.

In conclusion, it is our strong conviction that the current EU legal framework on the enforcement of IPR is in no need of a revision. Member States should support the work undertaken by the European Commission in the framework of the EU Action Plan and refrain from legislative measures which would risk to upset the delicate balance between users, rightsholders and intermediaries. In the past, initiatives like the Anti-Counterfeiting Trade Agreement (ACTA) have shown how contentious new legislative measures on IPR enforcement can be, politically as well as publicly. This was also reflected in the position of the European Parliament at that time.

As the new Commission is about to take office, renewed emphasis should be placed on achieving a fully integrated, digital single market in which citizens and consumers have access to the content, commercial offers and information they are looking for. The Internet has brought unprecedented opportunities for people to legally access and find the products they want. Innovative offers that meet the demands of European consumers will always be the best and most effective way to reduce IPR infringements.

I thank you for your attention and remain at your disposal for any questions you might have.

With kind regards,



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