# European Commission: Report on the Application of Directive 2004/48/EC

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On 22 December 2010 the Commission published its report on the first assessment of the Directive on the enforcement of intellectual property rights.

The Directive was designed with the necessity of finding effective means for enforcing intellectual property rights in mind. The Report serves as a first evaluation on the implementation and impact of the Directive. It addresses certain issues on which further clarification is needed.

Effective possibilities for enforcement are essential for the functioning of the internal market. Otherwise barriers to cross-border activities will occur. Also confidence in the internal market and investment in innovation and creation will decrease. The Directive contains minimum yet flexible harmonisation. Its provisions were drawn up through the “best practices approach”. This means that national practices that were most effective before the Directive was adopted served as an inspiration. Member States may apply stricter rules, hence the flexibility.

The first issue the Report addresses is the fact that the Internet creates circumstances that make it easy to infringe intellectual property rights. In this connection the Report notices that the existing legal framework has certain limitations that need to be assessed explicitly.

Next, the Report states that the Directive applies to all infringements of intellectual property rights. Due to uncertainty about this flexible approach, the Commission has published a minimum list of rights that are covered by the Directive. However, not all uncertainties are solved, especially regarding domain names and acts of unfair competition. The Report remarks that the latter seem to be increasing and damage rightsholders. This is why the Report finds it necessary to assess this problem and include in the Directive a minimum list of covered intellectual property rights.

The Report also mentions the broad interpretation of the concept of “intermediaries” in the Directive. Even intermediaries with no direct contractual relationship or connection are subject to the measures of the Directive, including the right of information, provisional and precautionary measures or permanent injunctions. According to the Staff Working Paper that accompanies the Report,

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the existing instruments are not powerful enough to fight online infringements effectively. Therefore, it states, the Commission could research the possibility of involving intermediaries more closely. In particular their position is suitable for contribution to the prevention and termination of online infringements.

Another issue the Report puts forward is the need for Member States to strike a fair balance between the right to information and privacy laws. The Report notes that in some Member States the right to information mentioned in the Directive is granted very restrictively. It accordingly concludes that this issue requires special attention. Both data protection and privacy and the protection of intellectual property are established as fundamental rights in the Charter of Fundamental Rights of the European Union. Since the European legal framework on these fundamental rights is neutral, national laws must also be construed in a balanced way. The Report calls for further evaluation of national laws in light of these requirements.

According to the Directive, applied measures, procedures and remedies must be effective, proportionate and dissuasive. However, the damages that are currently awarded are still rather low. Rightsholders state that current damages fall short of effectively deterring infringers from performing illegal activities. This is mainly because the profits from these activities are considerably higher than the damages. The Report formulates possible solutions for this disparity. One possibility is to consider whether courts should have the power to grant damages corresponding to the infringer's unjust enrichment. The other regards the possibility of awarding damages for other economic consequences and moral damages.

Issues that also need clarification according to the Report are the definition of "corrective measures", including how to apply such measures if the infringing goods are no longer in the infringer's ownership and how to ensure that the court can inflict costs for the destruction of infringing goods directly on the infringer.

Lastly, the Report mentions "other issues", amongst which the fact that Member States hardly make use of the optional provisions of the Directive. Even fewer Member States apply stricter rules, for which Article 2 (1) of the Directive forms the base.

The Report concludes emphasising again that widespread economic harm is caused by infringements of intellectual property rights. Not only the functioning of the internal market, but also consumer health and safety are threatened by infringing products. Therefore proper protection is required. The Commission states that it will continue to engage with all stakeholders to balance the interests involved. The main conclusion of the Report is that the Directive has had a substantial and positive effect on the protection of intellectual property rights. However, since the Directive was not designed with the challenges of the modern

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day Internet society in mind, the Report states that a number of issues need to be clarified.

*Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 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, SEC(2010) 1589 final, 22 December 2010*

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