



European Digital Rights (EDRi) was founded in June 2002. Currently 32 privacy and civil rights organisations have EDRi membership. They are based or have offices in 20 different countries in Europe. EDRi promotes and defends civil rights in the information society.

EDRi welcomes the opportunity to answer to the general consultation of stakeholders on the EU Observatory on infringements of intellectual property.

Broadly our approach to the work of the Observatory would mirror what Commissioner Kroes said in Avignon *“let's take a step back from the [enforcement] tools, and remember what we are trying to achieve.”*

### **1) Supporting policy making by providing research-based knowledge**

Intellectual property is a useful asset for creation, innovation and cultural diversity. However, a good policy making can not be achieved without independent and objective research. Recommendations must be based on open and transparent discussions.

It is important that policy making is based on credible research-based analysis in order to appropriately reflect the needs of society. In order to participate to the achievement of efficient policy, research must be visibly independent. Indeed the independence of research is essential to make it trustworthy and reliable.

EDRi believes that two important questions must be priority and independent research and analysis would be of great help to achieve a successful policy:

- how much actual harm is done by online IPR infringement taking the content market as a whole into account?
- what are the reasons for the illegitimacy of IPR legislation as perceived by citizens and as described by Commissioner Kroes<sup>1</sup>?

The Observatory should conduct an assessment of the implementation of EU legislation on citizens' rights and IP rights. Analysis should focus on the reason of EU legislation failure to fight counterfeiting and piracy effectively. The Observatory should create analysis on the basis of which policy makers should be able to propose a coherent approach that tackles the phenomena at their origins, i.e. the reason why they exist and why consumers don't consider the protection of IP rights

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<sup>1</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/777>

to be legitimate and wilfully and ubiquitously ignore them. The Observatory should not focus its analysis on how to set up more repressive measures, but on how to tackle infringements by getting rid of the reasons why consumers feel justified in infringing intellectual property rights.

One must keep in mind that access to culture and freedom of expression are key goals that need to be taken into account in the research and analysis led by the Observatory. In recent years, the policies have had a tendency to restrict access to culture more than they have allowed the spread of knowledge and education. This is seen most blatantly in the Term Extension Directive<sup>2</sup> and the failure of the EU to provide a coherent exceptions and limitations regime.

To be credible analysis provided by the Observatory must have the vision to look at other approaches rather than simplistically demanding increasingly repressive measures. It must be based on objective, credible and independent researches that will lead to open and transparent debates and discussions within the different entities involved in the Observatory.

## **2) Supporting enforcement bodies by providing intelligence and knowledge, as well as tools and techniques**

The task of an observatory should not be to provide tools and investigatory measures but to provide a credible analysis of the situation using reliable data, allowing policy makers to understand what needs to be improved and how. The Observatory should focus on providing information and data related to intellectual property rights infringements and on offering a productive platform for cooperation.

Article 2.1 e) of the Regulation places an obligation on the Observatory to provide information about tools and **NOT** to provide such tools and techniques. Developing repressive tools will quasi automatically create a dissonance between the intended role of the Observatory and its actual activities.

The Observatory should provide credible EU-wide analysis of the markets, market failures, trends, consumers' views and behaviour in order to inform the policy debate.

If the statistics produced by certain parts of the content industry is to be believed, a very large portion of the population views intellectual property law as so illegitimate that it may be wilfully and repeatedly ignored. Legitimacy can not be created by repression.

The fight against counterfeiting and piracy can not be adequately addressed by increasing repressive measures. Instead it is the very important role of the Observatory to provide an understanding of the origin of the phenomena. In the past decade, the focus on repressive measures has been far from productive and the growing gap between users and the legitimacy of intellectual property laws. It is the rule of the Observatory to redress this balance.

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2 Directive 2011/77/EU

The Observatory should focus on providing a strong and trustworthy analysis that can be used by enforcement bodies.

### **3) Supporting businesses and right holders to improve their strategies with knowledge and tools**

The Regulation is clear that the role of the Observatory is to facilitate the development and exchange of information (Article 2.2(j)). Nothing in the Regulation creates a mandate for the development of tools by the Observatory.

In order to support businesses and right holders to improve their strategy the focus should lie in understanding why a large portion of the population estimates that intellectual property rights are illegitimate. It is through providing an understanding of the roots of this illegitimacy that the Observatory will be the most effective.

A thorough assessment of the failure of legitimacy of online intellectual property legislation is necessary before any credible support to business strategies could be proposed.

### **4) Raising awareness of all relevant actors**

Raising awareness should not only be targeted at Union citizens but at all actors that play a role in intellectual property protection and creation. There is little point of seeking to raise awareness of the impact of infringements to consumers if there is no awareness of the facts that the infringements are continuing.

The task should be the support of mutual exchange of information and understanding and not support to preaching to citizens whose concerns and opinions are not being understood nor addressed.

It is therefore important that the information dissemination of the Observatory covers all stakeholders: EU institutions, economic actors, Member States' authorities and citizens.

### **- What are the major issues/challenges that IP will face over the coming years on a global level and in particular for your sector? And how do you think they should be addressed?**

The major issue that IP will face and is already facing is the adaptation to the digital environment

and technological innovations. Currently no element of the EU acquis appears to be adapted to the digital age from the Information Society Directive, to the Intellectual Property Enforcement Directive, the Database Directive... Absurdly even the Commission recognises the failure of the Database Directive but fail to repeal it.

Intellectual property needs a framework that will allow flexibility to adapt quickly to the changes to come in the future.

Global pricing is also a major problem that IP is facing. Firstly, it is really difficult for users to understand that they are paying the same price for digital content that they would pay for a physical CD or DVD... It is even less understandable when one understands that what he/she is paying for is a license and not the property of the content.

It is an even greater problem, when assessed at a global level. Indeed in emerging economies, CDs and DVDs are often sold for the same prices as in the US and Europe. The Media Piracy in emerging economies report shows that the relative to local incomes in Brazil, Russia, or South Africa, the price of a CD, DVD, or copy of Microsoft Office is five to ten times higher than in the United States or Europe. There is no distribution of legal CDs and DVDs outside the capitals. Some 90% of the people in emerging economies can only turn to illegal media copies. That is creating an incentive to the development of piracy in the digital environment.

The costs and subsequent consequences of the global pricing need to be assessed and analysed taking into account the right to access culture, in order to understand and answer properly to the need of the market.

There need to be an assessment the wider costs and benefits of IPR infringements as these are often counter-intuitive and consequently not taken into account in policy making. Even Bill Gate recognises the benefits of piracy<sup>3</sup>.

**- What should the Observatory's main goals be and what objectives need to be set in order to achieve them?**

The Observatory's main goal should be to understand the reasons of intellectual property infringements, creating analysis that will allow the development of strategies. The focus should be to reconcile consumers with creators, and not to reinforce the current gulf that exists.

In its recommendation process, the Observatory has to keep a balance between all rights at stake. It needs to focus on the creative content as a whole and not to artificially protect elements that are not suited to the market as it currently functions.

The Observatory in its assessment needs to take into account important principles such as access to culture and privacy protection in all circumstances. Encouraging creativity and innovation can be

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<sup>3</sup> <http://articles.latimes.com/2006/apr/09/business/fi-micropiracy9>

achieved through positive measures. Effective protection can not and will not come via more repressive measures.

EU policy needs to be credible, consistent and harmonised. Protection of intellectual property should be the same in every EU member states to give creators the opportunity to access a real single market, and put all EU citizens at the same level of accessibility to culture.

Despite its broad remit, the Observatory needs to be conscious of the fact that different types of IP (counterfeit medicines and music for example) cannot be treated the same way while maintaining any semblance of proportionality.