



## **POSITION OF PRINCIPLES ON INTELLECTUAL PROPERTY RIGHTS**

### **SEPTEMBER 2010**

As the Internet became widespread in society, it brought with it ever increasing opportunities for communication, education and entertainment. However, the existence of unlawful file-sharing of copy-righted content remains a contentious issue. The challenge remains to find an appropriate balance between rights holders' right to enforce their copyright, the promotion of innovation, and the safeguard of the Internet openness.

EuroISPA acknowledges that right-holders should be able to benefit from the exploitation of their work and we remain willing partners in exploring possible solutions with them. Today's media landscape is changing rapidly and challenging traditional ways of licensing content for online distribution. That said, proposed initiatives should take legal, practical and technological aspects into account while maintaining creativity and innovation in the online world.

#### **EXECUTIVE SUMMARY**

- 1. EuroISPA believes there is a need to promote legal and innovative content services by tackling the root of the problem instead of treating the symptoms**
- 2. The rule of law should prevail to ensure each party's rights are protected**
- 3. ISPs cannot be held liable for the unlawful actions of others**
- 4. Technical enforcement: an inadequate answer to unlawful file-sharing and a threat to the open nature of the Internet and innovation**
- 5. "Graduated response" presents major threats for key Fundamental Rights**
- 6. One industry should not subsidise another industry's weaknesses in adapting to the online environment**
- 7. EuroISPA is open to discussion proportionate, reasonable and sustainable solutions**

*EuroISPA is the world's largest association of Internet Service Providers (ISPs), representing the interests of over 1700 ISPs across Europe. With a secretariat based in Brussels, EuroISPA is a major voice of the Internet industry on information society issues such as cybercrime, data protection, e-commerce regulation, EU telecommunications laws and the safe use of the Internet. Further information about the organisation (including its composition, aims and position papers) is available from the website: <http://www.euroispa.org>.*



## **1 NEED TO PROMOTE LEGAL AND INNOVATIVE CONTENT SERVICES: TACKLING THE ROOT OF THE PROBLEM INSTEAD OF TREATING THE SYMPTOMS**

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EuroISPA believes that it is possible to create online services that make customers or sponsors want to pay for music. By informing consumers about intellectual property rights, and adequately meeting their expectations and needs, the culture of unlawful file-sharing amongst consumers could be altered. Major right-holders should be encouraged to develop adequate offers through innovative business models. A number of creative initiatives already strive to go beyond classic distribution channels, embracing the Internet while offering artists the opportunity to reach out freely and quickly to a worldwide audience.

## **2 THE RULE OF LAW SHOULD PREVAIL TO ENSURE EACH PARTY'S RIGHTS ARE PROTECTED**

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Copyright law enforcement should be handled by courts as only a court can assess facts and evidence in order to issue a judgement on the potential infringement of the law. In addition, only a court can rule a fair balance between copyright law and the Fundamental Rights of information, privacy and communication. The rule of law is undermined when intermediaries, such as ISPs, are asked to bypass the court system becoming the judges of the copyright legislation.

## **3 ISPs CANNOT BE HELD LIABLE FOR THE UNLAWFUL ACTIONS OF OTHERS**

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Access ISPs are *mere conduits*, that is to say only *carriers* of huge volumes of content over their networks. Therefore ISPs cannot be held responsible for monitoring the content and use of online services. The mere conduit principle of the E-Commerce Directive is a cornerstone for a reliable legal framework for the Internet industry and all its users, and guarantees the Internet's openness for innovation and creativity. Consequently, infractions are the responsibility of users and content providers and not of those who provide the networks who should not have to bear the cost in time, resources or money defending legal actions regarding infractions for which they are not responsible.

## **4 TECHNICAL ENFORCEMENT: AN INADEQUATE ANSWER TO UNLAWFUL FILE-SHARING AND A THREAT TO THE OPEN NATURE OF THE INTERNET AND INNOVATION**

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One demand of the right-holders is for ISPs to make unlawful content sharing impossible through blocking and filtering techniques. Our concern, however, is that no technical measure has proven or is likely to be efficient as they are not only easy to circumvent but also inaccurate. Furthermore, in practice, these techniques have proven disproportionately costly for ISPs to implement and become quickly obsolete in a fast moving technological world. EuroISPA fears that by implementing strictly controlled systems, the security and innovative potential of the Internet will be damaged and generate unintended consequences outside the scope of the real problem. The resilient nature of the Internet means that technical enforcement will always shift the problem instead of resolving it. Technical measures can grant SPs with no alternative other than to monitor consumers' Internet traffic, so infringing the secrecy of communications.

## **5 "GRADUATED RESPONSE" PRESENTS MAJOR THREATS FOR KEY FUNDAMENTAL RIGHTS**

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Graduated response is a setting whereby right-holders would give ISPs notices of IP addresses alleged to have been involved in copyright infringement. The ISPs would then be requested to directly notify (and eventually



sanction) the registered user. EuroISPA believes that graduated response, as it stands, shows major legal uncertainties and lacks proportionality. Indeed, Fundamental Rights of information, privacy and communication are severely undermined, when right-holders become judges, ISPs become prosecutors and customers are cut off from the Internet. Any restriction of an individual to the access to the Internet, provided that it is proportionate, should only be taken following a prior judicial ruling. EuroISPA believes it is essential to ensure there is a clear and firm legal framework that allows for repeated commercial infringements to be promptly and efficiently prosecuted.

## **6 ONE INDUSTRY SHOULD NOT SUBSIDISE ANOTHER INDUSTRY'S WEAKNESSES IN ADAPTING TO THE ONLINE ENVIRONMENT**

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ISPs should not be expected to shoulder the cost of the protection of Rights holders' copyright. The Internet must not be treated differently than other channels of distribution. If music CDs are physically copied and sold in markets, police and rights holders will investigate and prosecute the culprits. They do not prosecute the municipality who provides the market square. It should be no different when the copyright theft takes place online.

Suggestions that ISPs should bear any costs are driven by the incorrect assumption that ISPs profit from online piracy, when, in reality, unlawful file-sharing activity place significant costs upon ISPs due to the excessive use of bandwidth. Moreover, ISPs are further penalised when forced into implementing costly measures to address alleged unlawful file-sharing. In conclusion, the assumption that one industry should subsidize another industry's weakness constitutes a dangerous precedent.

## **7 EUROISPA IS OPEN TO DISCUSSION PROPORTIONATE, REASONABLE AND SUSTAINABLE SOLUTIONS**

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EuroISPA is open to discussions regarding proportionate, reasonable and sustainable solutions that respect Fundamental Rights of information, privacy and communication and do not delay the development of new business models that meet consumers' expectations. Preference should be given to sustainable solutions. This includes strengthening industry and government efforts to create better awareness on the use of copyrighted works and the public perception of the value of intellectual property as an economic and cultural asset. The availability of legal content at attractive conditions and prices is also of particular relevance. An evaluation of economic necessity and the effects on the consumer is an absolute must before fundamental legal positions are abandoned.