

## Society of Audiovisual Authors (SAA)

14.04.2016

### RIGHTHOLDERS

#### A. Identification

##### A.1. Rightholder or rightholders' association?

Rightholder	Rightholders' association
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If "rightholder"

##### A.2. Type of rightholder?

Company (other than SME)	SME <sup>1</sup>
Individual	Other: please specify European association of collective management organisations (CMO) managing audiovisual authors' rights

If "rightholder's association"

##### A.3. Type of rightholders' association?

Umbrella/cross-sector association	National
Sector association	European
SME	International

SAA is the umbrella association representing 29 European CMOs for audiovisual authors (screenwriters and directors) from 22 Member States. The Society of Audiovisual Authors (SAA), 87 Rue du Prince Royal, 1050 Brussels, [info@saa-authors.eu](mailto:info@saa-authors.eu)

SAA is not a direct rightholder but, with its contribution, reflects the views and concerns of its members as direct or indirect rightholders of audiovisual works and offers a policy perspective.

##### A.4. What is the core sector of your activity(ies) (if possible specify with four-digit NACE classification)?

A Agriculture, forestry and fishing	B Mining and quarrying
C Manufacturing	D Electricity, gas, steam and air conditioning supply

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<sup>1</sup> According to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC: enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million ([http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index\\_en.htm](http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index_en.htm)).

E Water supply; sewerage, waste management and remediation activities	F Construction
G Wholesale and retail trade; repair of motor vehicles and motorcycles	H Transportation and storage
I Accommodation and food service activities	J Information and communication
K Financial and insurance activities	L Real estate activities
M Professional, scientific and technical activities	N Administrative and support service activities
O Public administration and defence; compulsory social security	P Education
Q Human health and social work activities	<b>R Arts, entertainment and recreation</b>
S Other service activities	T Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use
U Activities of extraterritorial organisations and bodies	Other: please specify

If possible please specify with four-digit NACE classification: [90 \(creative, arts and entertainment activities\)](#)

#### A.5. In which Member States do you trade?

Austria	Italy
Belgium	Latvia
Bulgaria	Lithuania
Cyprus	Luxembourg
Croatia	Malta
Czech Republic	Netherlands
Denmark	Poland
Estonia	Portugal
Finland	Romania
France	Slovakia
Germany	Slovenia
Greece	Spain
Hungary	Sweden
Ireland	United Kingdom
<b>All EU member states</b>	

#### A.6. What type of IPR do you hold/represent?

<b>Copyright</b>	Community trademark rights	Community design rights
Rights related to copyright	National trademark rights	National design rights
Patent rights (including rights derived from supplementary protection certificates)	Geographical indications	Rights of the creator of the topographies of a semiconductor product

Plant variety rights	Sui generis right of a database maker	Trade names (in so far as these are protected as exclusive property rights in the national law concerned)
Utility model rights	Other: please specify	Don't know

## B. Exposure to and impact of infringements

### B.1. Do you experience occurrence of IPR infringements when offering your services or trading your goods?

Yes	No
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If "yes" please provide detail.

SAA is not a direct rightholder but represents CMOs managing rights for audiovisual authors. The views expressed here reflect the concerns of SAA's members as direct or indirect rightholders of audiovisual works. It is important to note that although cultural works are considered an important driver of the digital economy, the revenues of audiovisual authors generated by online exploitation are limited or non-existent.

Rightholders and audiovisual authors in particular face 3 main problems in terms of copyright, **piracy** being one of them. Illegal access to audiovisual works probably generates more money to pirates (through advertising, subscriptions) than the legal online market does for rightholders, in particular audiovisual authors. This discourages new businesses based on the exploitation of protected works – something essential to the development of the European online content market. Efficient action against piracy requires strong political, legislative and judicial messages for pirates and a renewed, multifaceted effort at EU level: 'follow the money' mechanisms to interrupt pirates' revenue streams, efficient 'notice & stay down' mechanisms, as well as a review of the IPRED Directive.

The other two main issues for rightholders and audiovisual authors are **abuses of safe harbour provisions of the E-commerce Directive by online platforms** (see the [summary SAA response](#) to the online platforms' consultation) and the **lack of a mechanism to ensure audiovisual authors get a share of the revenue they are owed**. There is no uniform mechanism in the audiovisual sector to ensure authors are remunerated for the use of their works online. Unlike the music sector where CMOs license music platforms, collective management for audiovisual authors' online rights is limited. Audiovisual works are licensed by producers or distributors, as well as by some audiovisual authors' CMOs in a few countries. Very often authors have transferred their exclusive making available right to the producer in a bundle of rights at the production stage and cannot claim anything afterwards, except if the law provides otherwise. SAA's proposed solution (see [SAA white paper](#)) is to clarify at EU level that when an audiovisual author transfers his exclusive making available right to the producer, they shall retain an unwaivable right to remuneration to be exercised collectively towards platforms who make audiovisual works available to the public.

Addressing these three issues simultaneously is essential to develop the online market for European audiovisual works in general and improve the situation of audiovisual authors in particular.

### B.2. How do infringements impact on your business?

Loss of turnover	Reputational damage
Monitoring costs (e.g. technical measures for prevention and detection)	Non-legal enforcement costs (e.g. notice and action procedures)

Litigation costs	Other: please specify Loss of audiovisual authors' remuneration for the use of their works online.
Free promotion of the brand/product	

**B.3. What is the overall financial impact of IPR infringements on your turnover?**

Positive	Negative
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**B.4. Please provide estimation in % of overall turnover.**

[...] % of overall turnover.
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**B.5. From your experience, how did the occurrence of IPR infringements develop over the last 10 years?**

Decreased	Increased
Unchanged	Don't know

Please provide detail

In line with the rapid development of the internet over the past decade, which plays a greater role by the day in the consumption of creative works, copyright infringements online (so-called 'piracy') on a commercial scale have increased and become more complex, so more difficult to trace and stop.

Rapid development of digital and communication technologies has also facilitated the entry of new classes of online platforms into the value chain, as well as a multiplication of ways in which copyrighted works can be commercially exploited legally and illegally.

It is essential that any new or revised EU legislation on IPR infringements, as well as any possible revision to the EU Copyright and E-Commerce Directives, take into account and address the entire online ecosystem, including the fact that many online services which engage in the communication to the public or making available of copyright-protected works should fall under copyright rules, cooperate in reducing piracy (see [BASCAP study](#) on 'The roles and responsibilities of intermediaries: fighting counterfeiting and piracy in the supply chain', March 2015, according to which intermediaries can do more to combat counterfeiting and piracy by taking steps to help eliminate global supply chain vulnerabilities that allow infiltration of counterfeit and pirated products), should not be allowed to invoke 'safe harbour' provisions and thereby ensure that value is fairly shared along the value chain. This would remove a distortion in the digital market, benefit authors, creative sectors, innovative digital services, consumers and stimulate growth in the European digital economy. However, ensuring a fair transfer of value online by removing the effect of safe harbour provisions of the E-Commerce Directive on protected works is not sufficient to ensure that audiovisual authors are fairly remunerated. A tool to fight piracy and eradicate the non-authorized presence of audiovisual works online does not per se increase authors' remuneration. In parallel, SAA's [proposal](#) to improve audiovisual authors' remuneration for the online exploitation of their works is necessary. It aims to introduce in the EU copyright legislation a provision stating that when an audiovisual author has transferred or assigned his making available right to a producer, that author shall retain an unwaivable

right to obtain an equitable remuneration. This remuneration right should be collectively managed and collected from audiovisual media services making works available to the public.

### **C. Functioning of key provisions of Directive 2004/48/EC on the enforcement of intellectual property rights**

This section aims to provide the Commission with stakeholder' views, opinions and information about the functioning of the overall enforcement framework and of key provisions of IPRED.

#### **C.1. Overall functioning of the enforcement framework**

**Have you filed legal action against infringers of your IPR?**

Yes	No
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SAA has not started litigation itself but some SAA members have. Certain SAA members directly hold rights in audiovisual works and they all represent authors of audiovisual works who directly, or through a joint entity of rightholders (authors, producers, distributors), systematically file such legal actions.

**Do you think that the existing rules – as provided by the Directive and implemented at national level – have helped effectively in protecting IP and preventing IPR infringements?**

Yes	No
Partly	No opinion

Please explain.

The IPR Enforcement Directive provides tools to enforce IPRs and fight against piracy. These tools are the last resort when infringements have occurred. SAA and its members consider that facilitating collective licensing and rights' management is an important tool to prevent infringements.

**Do you consider that the measures and remedies provided for in the Directive are applied in a homogeneous manner across the MS?**

Yes	No	No opinion
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Please explain.

The discrepancies in national court decisions and procedures regarding the taking down and blocking of copyright-protected works offered illegally online prove this.

According to Art 3(2) of the IPR Enforcement Directive, Member States have a general obligation to ensure that “measures, procedures and remedies are effective, proportionate and dissuasive”, and according to Art 3(1) national procedures need to be “fair, equitable, not unnecessarily complicated or costly nor within unreasonable time-limits or unwarranted delays”. There is no binding indication given at EU level as to how to set up national procedures (page 40, footnote 149, 2015-3 IRIS publication of the European Audiovisual Observatory ‘Copyright enforcement online: policies and mechanisms’).

Examples of disparate national court decisions include the Dutch Supreme Court decision of 13 November 2015 in a case concerning an action for an injunction to block access to the Pirate Bay which led to a reference to the CJEU on the meaning of communication to the public under Art 3(1) Copyright Directive and the link with Art 11 Enforcement Directive ([C-610/15](#)). In Germany, a Federal court decision on 26 November 2015 obliging internet access providers to block access to websites providing links to predominantly illegal works paved the way to website blocking in that country. Contrarily, the Stockholm District court ruled in November 2015 that a Swedish ISP does not have to block access to the Pirate Bay. In Greece, on the model of AGCOM in Italy and HADOPI in France, a new administrative procedure for taking down and blocking copyright works offered illegally online has been created (Art 69 of the draft law on the implementation of the CRM Directive). In addition, according to the European Audiovisual Observatory, there is 'no coherence among the various models' and tools to fight piracy available in France, Italy, Spain and the UK and 'any attempt to provide a one size fits all model would not be meaningful' (pages 41-47, 2015-3 IRIS publication of the European Audiovisual Observatory 'Copyright enforcement online: policies and mechanisms').

It is noteworthy that it is not an easy task to find the most suitable measures and remedies, even in the context of a single country, as proven by the ongoing consultation in the US on the safe harbour provisions in section 512 DMCA (deadline: 21 March 2016) which includes an assessment of the costs and burdens of the notice and take down process on large and small-scale copyright owners, online service providers and the general public. One of the controversial points being discussed is whether the notice and take down process should become a notice and stay down process.

## **C.2. Measures, procedures and remedies provided for by IPRED**

Responses to this section should be based on the overall experience with the measures, procedures and remedies provided for by IPRED as implemented and applied at national level. If appropriate please specify in your response, to the extent possible, particular national issues or practices and the jurisdiction concerned.

### **C.2.1. Evidence (Articles 6 and 7)**

**Would you consider that the measures provided by IPRED are effective means for presenting, obtaining and preserving evidence?**

<b>Yes</b>	No	No opinion
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If "no": please explain

**Did you face problems using evidence when making use of your right of information/taking legal action/applying for an injunction in a cross-border situation (judicial authority in your country of establishment and (alleged) infringer/intermediary incorporated or resident in another Member State and/or judicial authority of another EU Member State)?**

<b>Yes</b>	No
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If "yes": please explain (Please specify to the extent possible the issues and the jurisdictions concerned)

Thanks to the system of reciprocal representation agreements between SAA members, cross-border situations do not cause additional problems.

**In view of your experience with the application of the rules for having access to and preserving evidence do you see a need to adjust the application of that measure, in particular with regard to preserving evidence in the digital environment?**

Yes	No	No opinion
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If “yes”: please explain

### C.2.2. Right of information (Article 8)

**Have you made use of your right of information by applying for an order by a judicial authority?**

[select one or more]

Yes, against an infringer	Yes, against an intermediary	No
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**In view of your experience with the application of the right of information do you see a need to adjust the provisions for the application of that measure?**

Yes	No	No opinion
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*Do you consider that the right balance is struck between the right to property and the right to judicial review on the one hand and the right to respect for private life and/or the right to protection of personal data on the other?*

Yes	No	No opinion
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If “no”: Please explain

When debating the relation between copyright enforcement and the fundamental rights of alleged infringers, it is worth remembering that fundamental and human rights form the classical foundation on which copyright has developed at international level and we must not lose track of authors’ right to property and protection of their intellectual property. Indeed, according to Art 27(2) of the Universal Declaration of Human Rights (1948), everyone has the right to protection of the moral and material interests resulting from any scientific, literary and artistic production of which he is the creator and Art 17 of the EU Charter of Fundamental Rights protects intellectual property.

Certain Member States have implemented EU Directives in a way that gives prominence to the right to respect for private life and to the protection of personal data, which creates additional obstacles for rightholders’ claim to their property. However, helpful CJEU rulings have stressed the need for Member States “to strike a fair balance between the various fundamental rights” and to ensure an “interpretation of directives not in conflict with fundamental rights or with other principles of general Community law” (Promusicae C-275/06, Bonnier Audio C-461/10).

### C.2.3. Procedures and courts, damages and legal costs (Articles 3, 13 and 14)

**Have you filed legal action against infringers of your IPR?**

[select one or more]

Yes	No
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As mentioned above, SAA has not started litigation itself but some SAA members have. Certain SAA members directly hold rights in audiovisual works and they all represent authors of audiovisual works who directly, or through a joint entity of rightholders (authors, producers, distributors), systematically file such legal actions.

**Did you claim reimbursement of legal costs incurred in the proceedings?**

Yes	No
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**Did you apply for damages as a compensation for the prejudice suffered as a result of IPR infringement?**

Yes	No
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**C.2.4. Provisional and precautionary measures and injunctions (Articles 9 and 11)**

**Have you applied for provisional and precautionary measures in case of an infringement of your IPR?**

[select one or more]

Yes, against an infringer	Yes, against an intermediary	No
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**Have you applied for an injunction in case of an infringement of your IPR?**

[select one or more]

Yes, against an infringer	Yes, against an intermediary	No
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**In view of your experience with the application of the rules for provisional and precautionary measures and injunctions do you see a need to adjust the application of these measures?**

Yes	No	No opinion
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As underlined in the French government’s proposals on the modernisation of authors’ rights in the Digital Single Market, the fight against piracy would be more effective if actions were taken to guarantee the efficiency of injunction measures ordered by Member States’ jurisdictions. It implies strong involvement by all interested parties, even if they do not play a role in the making available or distribution of works. This is the case in particular of economic players in the advertising and online payment sectors. In addition, the tools to fight piracy must be complemented by measures encouraging cooperation between rightholders and intermediaries so as to define and apply technical procedures to prevent the circulation of infringing works.

***Should the Directive explicitly establish that all types of intermediaries can be enjoined?***

Yes	No	No opinion
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Please specify why or why not.

Given that in practice, certain intermediaries believe they are immune from being enjoined, it may be helpful to explicitly state this. However, the text of the Enforcement Directive according to which rightholders can “apply for an injunction against intermediaries whose services are used by a third party to infringe IPR, without prejudice to Art 8(3) of Directive 2001/29/EC” (Art 11) is relatively straightforward.

***Should the Directive explicitly establish that no specific liability or responsibility (violation of any duty of care) of the intermediary is required to issue an injunction?***

Yes	No	No opinion
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Please specify why or why not.

Again, given the uncertainties in this field, which conveniently provide excuses for ISPs to adopt a “hands-off” approach, explicitly stating this may be helpful.

***Should the Directive explicitly establish that national courts must be allowed to order intermediaries to take measures aimed not only at bringing to an end infringements already committed against IPR using their services, but also at preventing further infringements?***

Yes	No	No opinion
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Please specify why or why not.

As specified in the next question, establishing a general monitoring obligation is prohibited under the E-Commerce Directive (Recital 47). However, this same Recital states that “this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.” As such, we do not see any reason why national courts would be prevented from ordering intermediaries from preventing further infringements in a particular case.

***In that respect should the Directive establish criteria on how preventing further infringements is to be undertaken (in the on-line context without establishing a general monitoring obligation under the E-Commerce Directive)?***

Yes	No	No opinion
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Please specify why or why not.

Indeed, what the court means by “preventing further infringements” would probably have to be defined in each particular case so as to frame and guarantee the effectiveness of intermediaries’ actions.

***Do you see a need for criteria defining the proportionality of an injunction?***

Yes	No	No opinion
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Please specify why or why not.

***Do you see a need for a definition of the term "intermediary" in the Directive?***

Yes	No	No opinion
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Please specify why or why not.

Defining what is an “intermediary” would not be helpful since a single definition cannot possibly encompass all the different types of intermediaries and would be out-of-date as soon as it is written given that new intermediaries constantly appear. It would be more helpful to draw up criteria looking at the role (active or passive) and activities of such players.

***Do you see a need for a clarification on how to balance the effective implementation of a measure and the right to freedom of information of users in case of a provisional measure or injunction prohibiting an internet service provider from allowing its customers access to allegedly IPR infringing material without specifying the measures which that service provider must take?***

Yes	No	No opinion
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Please specify why or why not.

***Do you see a need for other amendments to the provisions on provisional and precautionary measures and on injunctions?***

Yes	No	No opinion
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If "yes" please specify.

### **C.2.5. Publication of judicial decisions**

**Have you requested in legal proceedings instituted for infringement of an IPR the decision to be published in full or in part?**

Yes	No
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Please explain your motivation.

**Do you see a need for / added value in a more systematic dissemination of the information concerning the decision in legal proceedings instituted for infringement of an IPR?**

Yes	No	No opinion
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Please explain

### C.2.6. Other issues

**Are there any other provisions of the Directive which, in your view, would need to be improved?**

Yes	No	No opinion
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Please specify the relevant provisions and explain.

## D. Issues outside the scope of the current legal framework

### D.1. Role of intermediaries in IPR enforcement and the prevention of IPR infringements

**Do you believe that intermediary service providers should play an important role in enforcing IPR?**

Yes	No	No opinion
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If "yes"

In the 2010 evaluation report of the Enforcement Directive, uncertainties over the concept of “intermediaries” and the broad interpretation which is made in certain Member States and the measures applicable to them when contributing to/facilitating an infringement were raised. The same issues hold true today, particularly given the ever increasing role of so-called “ISPs” in offering works to the public. The Enforcement Directive set the basis for an active role of ISPs towards improving online copyright enforcement, by for example providing that Member States must allow rightholders to apply for an injunction against ISPs whose services are being used by a third party to infringe IPRs (Art 9 and 11) and encouraging the development of self-regulatory codes of conduct (Art 17). However, the very fragmented implementation of the Directive (and other instruments such as the notice and takedown and blocking procedures of the E-Commerce Directive) has created legal uncertainties. This question is also of course linked to the need to ensure that “active” intermediaries should not be able to invoke the safe harbour provisions of the E-Commerce Directive. Indeed, many new business models and services (which are subject to diverging case-law at national level) carry out intermediary activities which cannot be limited to a “mere technical, automatic and passive nature” (Recital 42) and cannot therefore benefit from Art 12-14 liability exemptions.

Moreover, the importance of intermediaries’ role in terms of enforcement has already been widely recognised and is considered as one of the most effective tool to fight online IP infringements, in parallel to the review of the Enforcement Directive. Indeed, voluntary agreements between stakeholders and different types of ISPs are currently being applied at national, EU and international level in certain areas and the EU Commission is seeking an EU-wide approach via its “follow the money” approach to IPR enforcement (seeks to drain illegal websites of their economic sources by ‘capturing in a voluntary enforcement net all relevant intermediaries that play a role in generating economic revenues from illegal activities’, (pages 49-51, 2015-3 IRIS publication of the European Audiovisual

Observatory 'Copyright enforcement online: policies and mechanisms'). Industry notice and action procedures, which also involve ISPs, are also an effective IP enforcement tool, which would be even more effective if included in the future revised Enforcement Directive.

### Which intermediaries are best placed to prevent infringements of IPR?

Advertising service provider <sup>2</sup>	Mobile apps marketplace
Contract manufacturing service provider <sup>3</sup>	Press and media company <sup>4</sup>
Business-to-business data storage provider <sup>5</sup>	Online marketplace
Business-to-consumer data storage provider <sup>6</sup>	Payment service provider
Content hosting platform <sup>7</sup>	Retailer
Domain name registrar	Search engine
Domain name registry	Social media platform
DNS hosting service provider	Transport and logistics company
Internet Access Provider	Wholesaler
	Other: please specify

### Do you cooperate with intermediaries in the protection and enforcement of your IPR?

Yes	No
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If "Yes"

### Which intermediaries?

Advertising service provider <sup>8</sup>	Mobile apps marketplace
Contract manufacturing service provider <sup>9</sup>	Press and media company <sup>10</sup>
Business-to-business data storage provider <sup>11</sup>	Online marketplace
Business-to-consumer data storage provider <sup>12</sup>	Payment service provider
Content hosting platform <sup>13</sup>	Retailer

<sup>2</sup> Advertising agencies, advertising broker.

<sup>3</sup> Contract manufacturing is an outsourcing of certain production activities previously performed by the manufacturer to a third-party. This may concern certain components for the product or the assembly of the whole product.

<sup>4</sup> Newspaper, broadcaster.

<sup>5</sup> Data storage space and related management services for commercial user.

<sup>6</sup> File-storing or file-sharing services for personal media files and data.

<sup>7</sup> Platforms providing to the user access to audio and video files, images or text documents.

<sup>8</sup> Advertising agencies, advertising broker.

<sup>9</sup> Contract manufacturing is an outsourcing of certain production activities previously performed by the manufacturer to a third-party. This may concern certain components for the product or the assembly of the whole product.

<sup>10</sup> Newspaper, broadcaster.

<sup>11</sup> Data storage space and related management services for commercial user.

<sup>12</sup> File-storing or file-sharing services for personal media files and data.

<sup>13</sup> Platforms providing to the user access to audio and video files, images or text documents.

Domain name registrar	Search engine
Domain name registry	Social media platform
DNS hosting service provider	Transport and logistics company
Internet Access Provider	Wholesaler
	Other: please specify SAA members are ready to cooperate with intermediaries willing to cooperate.

**Do you cooperate with these intermediaries**

Bilaterally?	Within a multilateral cooperation agreement?
Other: please explain	

If "multilateral cooperation agreement": Please specify the agreement and its scope.

**Do you consider your cooperation with intermediaries successful?**

Yes	No	No opinion
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If "yes"

**What are the elements for a successful cooperation between rightholders and intermediaries?**

Please explain
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**On the basis of your experience what are the main challenges in establishing a successful cooperation between rightholders and intermediaries?**

Economic interests (e.g. additional costs involved)	Technology
Specific regulatory requirements	Other: please explain

If "no"

**Why do you not cooperate with intermediaries?**

Not aware of the possibility	Investigation and reporting costs
Negative experience	Other: please explain

**In your opinion does the voluntary involvement of intermediary service providers in enforcing IPR have or might have a negative impact on fundamental rights?**

Yes	No	No opinion
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If 'yes'

**How could fundamental rights be negatively affected?**

Limitation of freedom of expression	Limitation of freedom to conduct business
Limitation of the right to due process	Limitation to the dissemination of legal content
Other: please explain	

**D.2. Specialised courts**

**Have you filed legal actions with a court, a court's chamber or a judge specialised in IP matters?**

Yes	No
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**Did the legal action at a court specialised in IPR matters provide an added value compared to legal actions at other courts?**

Yes	No	No opinion
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**D.3. Do you identify any other issue outside the scope of the current legal framework that should be considered in view of the intention to modernise the enforcement of IPR?**

Yes	No	No opinion
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Please specify

SAA strongly encourages the Commission to examine the possibility of integrating a ‘notice and action’ type mechanism (mentioned in Art 21(2) of the E-commerce Directive) in the future revised Enforcement Directive. In addition, the notification procedure (and the information to be provided) as well as the impact of this procedure, i.e. the action to be taken by the hosting provider (immediate take down, as quickly as possible within 24 hours, and stay down of illegal works, not just the links to it) should be harmonised.

Indeed, the text of the Enforcement Directive could be revised and completed by providing measures at least in the following areas:

- Information society services should provide rightholders with technical means to prevent copyright protected works from being made available online and rightholders should actively cooperate in this sense with information society services.
- Any take-down measures by information society services, if the latter have knowledge of the infringing character of the making available of a work, should be permanent to avoid any further infringing act regarding the same work according to the conditions laid by the Member States.

- The fight against online piracy would be more efficient if information society services were also obliged to guarantee the “stay down” of infringing works under Art 12.3 of the E-Commerce Directive.
- When measures to prevent or stop copyright infringing activities are imposed on intermediaries in the sense of the E-Commerce Directive, the cost of these measures should be borne by the intermediaries in question, as it is already the case in certain Member States (UK and Finland) and as per a ruling of the Paris Court of Appeal on 15 March 2016 (detailed below).
- Member States must ensure that economic actors do not encourage or allow those responsible of IPR infringements, including those situated in another Member State or a third country, to carry out acts due to these infringements or to collect any type of revenue linked to such infringements. Obligations could stem from regulatory measures accompanied by sanctions or from codes of conduct involving all stakeholders effectively monitoring all parties’ commitments (the latter is what the Commission is currently looking at via the “follow the money” initiatives).

**E. Do you have any other comments?**

Yes	No
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Please specify

The scope of the question and clarifications of the civil enforcement system in the EU should not be limited to infringements committed ‘with a commercial purpose’. All infringements should be punished. The only difference being that sanctions will be larger for commercial purpose infringements.

As stated in the SAA’s contribution to the Commission’s public consultation on the Enforcement Directive in March 2011, clarifications of the 2004/48/EC IPRs Enforcement Directive are necessary to avoid ambiguities and adapt the Directive to the challenges posed by today’s digital environment. There are indeed a number of useful improvements and gaps in protection which should be considered.

In this context, we do not support any form of legislation that would decriminalise so-called non-commercial infringements. Given the nature of enforcement online, such decriminalisation would provide a readymade defence for structurally-infringing websites.

In addition, proper implementation of Art 8(3) of the Enforcement Directive is necessary to foster cooperation of intermediaries in fighting piracy. In addition, the SAA supports the “follow the money” initiatives of the European Commission which will ‘upgrade’ the role of intermediaries in the fight against commercial scale infringements via MOUs with online advertisers and payment processors which the Commission is working on alongside stakeholders.

Cooperation between rightholders and intermediaries could also lead to the spreading of effective filtering technologies developed by platforms and implemented at the stage when users upload content onto their servers. Moreover, such filtering technologies or measures should be funded by intermediaries, since they enable access to copyright infringing sites and profit economically from such access. This is already the case in the UK and Finland and was the conclusion of the Paris Court of Appeal in the French *Allostreaming* case. The court confirmed the filtering measures ordered in first instance to stop the illegal streaming of audiovisual works. To reach its decision, the court held (i) that online search engines fell within the scope of “intermediaries” in Art L 336-2 French IP Code (CPI) which transposes Art 8(3) of the 2001/29 Copyright Directive, (ii) that the blocking and de-indexing

measures in question also fell within Art 336-2 French IP Code, since they complied with the obligation to provide measures which are “strictly necessary” to preserve the rights in question pursuant to the case-law of the French constitutional court (decision 10 June 2009 validating Art L 336-2 CPI) and the case-law and principles of EU law (CJEU, UPC Telekabel decision 27 March 2014, C-314/12), (iii) that the blocking and de-indexing measures in question contribute to making access to websites offering infringing content more difficult and are therefore justified and, finally, (iv) that it is legitimate and in line with the principle of proportionality. The court also pointed out that the intermediaries failed to demonstrate that executing the measures in question would subject them to “unbearable sacrifices” in the sense of the UPC Telekabel CJEU decision (para 53) and would affect their economic viability.

This filtering technology would be based on databases of works which have been registered, with a view to identifying and blocking illegal content. In this context, cooperation between rights holders and service providers as well as an obligation for producers to provide footprints of audiovisual works are key to developing such databases of protected works and should therefore be encouraged.