

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SPECIAL MENTION

GERMANY

Special 301 Recommendation: IIPA urges USTR to give special attention to Germany in 2008 and heighten its bilateral engagement to ensure that it adopts amendments to its law which provide for effective enforcement, particularly in the Internet environment.

EXECUTIVE SUMMARY

Internet and physical piracy have become grave problems in Germany over the last few years. The German recording and film industries, for example, are being undermined by widespread copying and burning of CDs/DVDs (486 million burned CD-equivalents, compared to 150 million sold CDs) as well as illegal downloading of their copyrighted content.

Germany's ability to combat such piracy depends on its having an effective legal infrastructure, both with respect to substantive standards of protection and with respect to enforcement. Germany has been engaged in the process of implementing the EU's 2004 Enforcement Directive which contains critical tools for fighting Internet as well as physical piracy. Unfortunately, Germany is about to approve amendments to its law which not only do not fully implement this Directive but would make it extraordinarily difficult for right holders and the government to fight, in particular, growing Internet piracy.

IIPA urges USTR to engage with the German government to ensure that the German Federal Parliament's Legal Committee and the German Federal Parliament as a whole revisit certain key elements of the legislation to improve it significantly. Such improvements would include: (a) introducing the right to obtain from third party ISPs IP addresses of infringers in the context of civil cases; (b) removing the double commercial scale requirement in the existing proposal for implementation of the Enforcement Directive, which would prevent this "right of information" from applying to infringers that are not acting on a commercial scale; and (c) specifically implementing the right to injunctive relief required by Article 8(3) of the EU Copyright Directive and Article 11 of the Enforcement Directive. Without these critical remedies against Internet (including P2P) piracy, the major and growing Internet piracy problem in Germany is likely to escalate and further undermine the copyright industries.

ENFORCEMENT ISSUES IN GERMANY

The Growth of Internet Piracy: An estimated 374 million music titles were illegally downloaded in Germany from file-sharing systems in 2006. In contrast, only 27 million tracks were sold through legal online platforms. The damage to record companies was estimated at 440 million euros (US\$ 642 million) from Internet piracy alone. The film industry is also affected by massive illegal downloading and streaming of films. According to the findings of the Brenner Study commissioned by the Filmförderungsanstalt (Film Development Agency) and conducted from January to June 2005, 11.9 million German-language or German-dubbed films were illegally downloaded. In 2006, the film industry was able to measure up to 2 million downloads of pirate copies of these films off the Internet within just 30 days of their availability. For other film titles, the download figures are higher than the number of those going to the cinema during the same period. This early availability of films off the Internet poses a threat to the industry's necessary tiered exploitation (cinema, DVD/video/online, Pay TV, etc.) required for the financing of films. Other industries are impacted as well—book and journal publishers, for instance, are finding that the number of infringing ebook

and audiobook files on P2P networks in Germany is increasing every year. It is imperative that right holders and the German government have the right tools available to them.

The Right to Obtain IP Addresses and the Identity of Infringers from ISPs: Under the EU Enforcement Directive, right holders are entitled to obtain the IP addresses and the identity of infringers under its “right of information” provision (Article 8(1)). Germany has not yet implemented that Directive. Furthermore, under Germany’s recent adoption of the law implementing the Data Retention Directive, it no longer appears possible to obtain from ISPs in civil cases, even under court order, the identity of P2P filesharers hiding behind dynamic IP addresses provided by ISPs. Without such a right, copyright owners are left only with a criminal remedy where such information can be obtained upon court order. In practice, however, many law enforcement officials authorities in Germany refuse to prosecute online copyright infringements on grounds of proportionality despite the cumulative damage. Relegating right holders only to a criminal remedy, already rarely used in Germany against illegal filesharing, effectively deprives right holders of any remedy at all.

Commercial Scale Requirement: Even if the law implementing the Data Retention Directive allowed for the communication of IP addresses and the identity of infringers for civil enforcement purposes, the legislation pending to implement the Enforcement Directive’s “right of information” would still be problematic. Section 101(1) and (2) of the Government proposal imposes a double commercial scale condition, both with regards to the act of the intermediary and the infringement. According to the Enforcement Directive, (cf. Recital 14), the “commercial scale” condition relates to acts carried out by the intermediary, not by the infringer. As a result, Section 101 of the Government proposal would impede the establishment of the identity of the infringer by making it impossible to say whether the user is acting on a commercial scale unless information can first be obtained from the ISP. Moreover, many users engaged in activities that are gravely harmful to right holders (e.g., release groups, massive uploaders, etc.), do not act on a “commercial scale.”

The combination of these two deficiencies effectively means that there will be no right of information in civil Internet copyright cases in Germany. This must be remedied.

Lack of Clarity on the Availability of Injunctive Relief Against ISPs: The draft now being considered by the German Federal Parliament does not contain a provision entitling right holders to apply for injunctive relief against ISPs whose services are used by third parties to infringe a copyright or related right. The Government considers German case law to be adequate to permit such actions. However, this case law requires establishing a violation of a duty of care by the ISP. Accordingly, given the importance of this remedy, it would be highly preferable if Article 8(3) of the European Copyright Directive (2001/29/EC) and Article 11 of the Enforcement Directive were specifically implemented in the law, since these provisions grant injunctive relief irrespective of an ISP’s liability.