The statement of Centrum Cyfrowe Projekt: Polska on civil enforcement of intellectual property rights (the Intellectual Property Rights Enforcement Directive or IPRED)

Centrum Cyfrowe Projekt:Polska would like to express position in relation to the current, second phase of the public debate on the efficiency of proceedings and accessibility of measures in civil enforcement of **Intellectual Property Rights** (**the Intellectual Property Rights Enforcement Directive or IPRED).** The first stage was consulting the Commission's report about implementing the Directive and it ended in March 2011. During this stage NGOs did raise the issue of the lack of prerequisites for the revision of IPRED and pointed out the need to gather evidence before "opening" the Directive.

Our understanding is that the current, second phase is heading in that exact direction. We want to note that since the closing of the consultations in March 2011, especially in 2012, evidence has been gathered that stronger enforcement of copyright is not the right way to face the issue of the circulations of works in the Internet. We therefore oppose the enhancement of intellectual property rights enforcement at European level in the direction that determines the directive. In our opinion, changes should rather focus on the intellectual property law reform than strict IPR enforcement.

Centrum Cyfrowe is a non-government organization which has no experience in executing intellectual property rights. Our line of work consists of applying the Creative Commons licences to share works. We also promote using those licences by other entities. We actively promote access to public data and sharing of works in Poland. We are also an institutional partner of the Creative Commons organization and an active supporter of free licences. We see that using free licences is the best way to promote innovation and creativity, along with broadening the scope of fair use and loosening the copyright regime instead of maximizing its enforcement measures. However we do understand that protection of rights is important. We have been calling for copyright reform for over a year. This is why we will address the copyright issue in this statement and not intellectual property as a whole.

When it comes to copyright the Commission seems to focus on the Internet in which a majority of infringement seems to happen due to citizens' actions. Usually those are unintentional and they are non-commercial in almost every instance. Along with other organizations that promote a free and open web we claim that one cannot compare file-sharing with smuggling of trademarked clothing or even medicine, which is exactly what the Directive does by implementing only a single set of enforcement measures for every type of intellectual property. One cannot omit the fact that the social noxiousness of downloading a file and introducing a counterfeit drug is very different.

We have a keen interest in making sure that an overly strict law and severe sanctions won't block creativity and public innovation. Centrum Cyfrowe shares the concerns that were raised by European NGOs in the IPRED debate which has been taking place since 2010, especially the argument that the Commission started the debate under pressure from the entertainment industry which is known for trying to find a way to stop file-sharing by the means of introducing harsher enforcement. However there is no evidence that unauthorised access and copying of content in the Internet negatively impacts authors or the industry's revenue, there is especially no way to back the claims that file-sharing causes losses and assess those claimed losses. Empirical data and studies (to be found on the Centrum Cyfrowe sites, including the http://conasuwiera.pl blog and the 'Circulations of Culture. On Social Distribution of Content.' research report conducted by the Centrum Cyfrowe) show that unauthorized circulation of content does not harm the circulation of authorized content.

The Commission continues to treat culture and authors' works as commodities and wares. This is not a surprise since copyright falls under the prerogatives of the Directorate General of Internal Market and Services. The situation might be different if the copyright issue would fall under the DG CONNECT or DG for Education and Culture. Throughout the last year DG CONNECT's Commissioner Neelie Kroes has called for copyright reform many times, ie. during her speech at the Intellectual Property and Innovation: a Framework for 21st Century Jobs and Growth conference in September 2012. She stressed the fact that in the face of technological changes copyright law must be reformed in order to maintain proper balance. Results similar to those of the Lisbon Council's report were observed in an IViR report ""Legal and Economic and Cultural Aspects of File Sharing".

Meanwhile copyright remains under the influence of the industry and organizations associated with it. This might be the reason why the Commission has refused to acknowledge a different approach than putting more effort info copyright enforcement. We believe that searching for new alternatives to the "analog" copyright regime is the only way to end the peculiar war between the entertainment industry preserving revenue based on exploiting copyright and citizens accessing works in the Internet. 2012 saw many propositions to regulate non-commercial file-sharing and copyright as a whole and the governments of the Netherlands and the United Kingdom decided to start their own copyright reform without waiting for solutions on the European level.

It is important to note that the last decade of growth for the entertainment industry in general is not based on a stricter law but rather on the development of new technologies and new business models that follow. Last year was the first one that saw a global rise in music sales since 1999. The rise is mostly due to a rise of digital music sales which in turn was caused by a larger number of authorized digital music retailers. Sanctions for copyright infringement should focus on commercial use. We do understand that pursuing such commercial infringers is a problem for copyright holders which may be why collective societies choose to target individual users instead.

Those who participate in culture by collecting rare and unavailable works and making them available are a common target for enforcement agencies as they do partake in actions that may be illegal under current copyright regime. We have described such persons in our "Tajni Kulturalni" (Culture's Secret Workers) study. Sometimes copyright is being abused and settlements are being extorted on a mass scale by sending legal threats to random internet users.

From the consumers' point of view there is no need to revise the Directive in order to introduce stricter enforcement measures. We need the opposite - changes that scale down copyright repressiveness, to which we have pointed in our previous statements.

First of all civil sanctions should be cut down for copyright infringement. Sanctions provided in the article 79 of Polish copyright law allow the plaintiff to demand three or two times the payment due. This acts as a civil punishment and should be replaced with the right to demand damages equal to the loss. This solution in the Polish copyright act raise suspicion in the light of the Directives article 13 which states that the damages should be awarded in accordance with actual loss.

Secondly we should abstain from civil and criminal persecution of citizens that participate in non-commercial file-sharing including remix authors of derivative works made for non-commercial purposes. Criminal sanctions for intellectual property infringement should be minimized. France is a example of criticism from organizations such as the European Digital Rights as file-sharers face the same penalties as people who commit fraud or steal. In Poland fair use allows private file downloading but the criminal punishment (imprisonment up to 2 years) remains for making copyrighted works available without the rightsholder's permission. The same penalty applies for DUI.

Thirdly mechanisms should be introduced to allow citizens to benefit from fair use including a ban on excluding fair use in agreements and introducing DRM-mechanisms which render citizens' rights useless. At this point we would like to point out that the InfoSoc (WE/29/2001) Directive's article 6 has not been fully introduced into Polish law. The article states that Member States should make sure that works will be available for fair use despite DRM and that DRM may not be introduced into works available publicly on-line. In our perspective such provisions should be present in the copyright act itself. We would also like to stress that provisions disallowing restricting fair use have been implemented into the discussed WIPO's document about copyright exceptions for education, scientific and research purposes and disabled persons.

Fourthly a situation in which internet providers and hosting services should be forced to filter users' content based on civil law courts decisions against the WE/21/2000 e-Commerce Directive should not be made possible. The e-Commerce Directive does provide a "notice and takedown" (NAT) procedure which states that a provider should delete content when he receives a trustworthy notice that the content is illegal. In Poland this mechanism is implemented by article 14 of the electronic services act. During the last two years the Court of Justice of the European Union has spoken many times claiming that monitoring users' content by internet providers as well as hosting services violates EU law. The French Court of Appeals has held the same ruling and therefore has put in question the "notice and stay down" mechanism upheld by lower instances of the French court system. Poland has saw similar rulings, the court of appeals in Warsaw has dismissed Roman Giertych's complaint against the administrators of the fakt.pl portal. In the court's view Internet sites' administrators are not required to monitor users' posts. We do note however that the procedure isn't perfect from the user's point of view to which we point in our statement in the Commissions Clean and Open Internet consultations.

In summation we would like to stress the fact that we see no reason to broaden the scope of IPRED. If any changes should be advised, they should only be considered to improve the right balance between the best interests of the public and authors of works.

The Polish Prime Minister Donald Tusk's statement should be the keynote for the consultation. On the 7th of March in an audition in the TOKfm radio he said: "This isn't the question of pressure of the young Tusk family member on the old Tusk. ACTA or the recent debate about the European Patent are classic examples of contemporary politics. I understood, although not without a delay, that it's time to think of Polish interests egoisticaly and think of what's best for the Poles. When it comes to patents and internet users we have to face the fact that Poles will benefit more than they give for quite some time. Maximum freedom in the Internet along with maximum access to content are bigger values for Poles than strict copyright enforcement".