

Copenhagen, February 10th, 2023

Submission by the Danish Rights Alliance

Commission Recommendation on 'Combating online piracy of live content'

The Danish Rights Alliance is a non-profit organization representing most of the Danish rights holders in all creative sectors including right holders to audiovisual works, TV distribution and music¹.

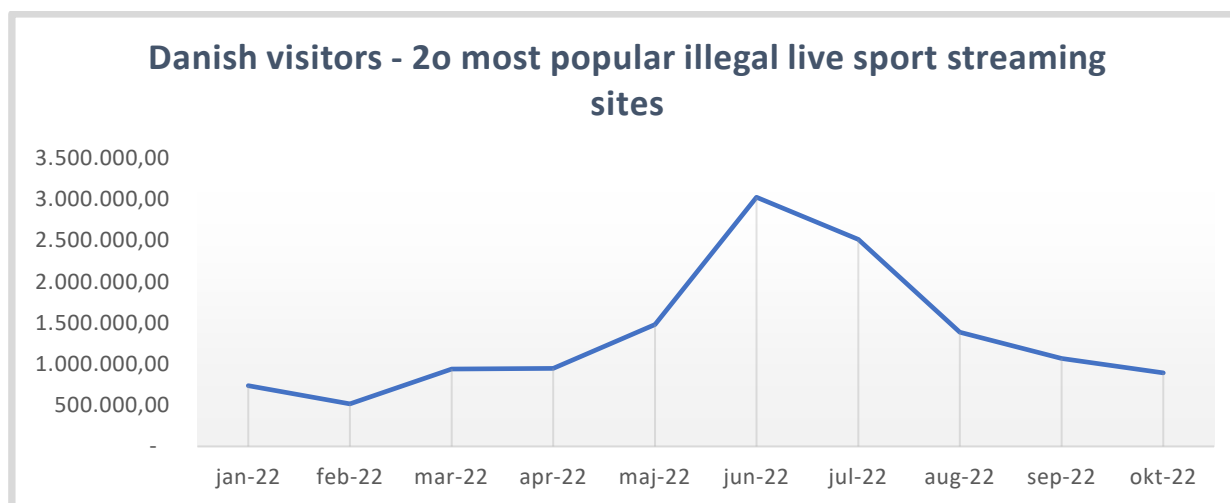
The Danish Rights Alliance welcomes this consultation to prepare a Commission Recommendation as very timely. The increasing consumption of illegal IPTV and streaming of live content is worrying and the negative financial impact for all legal stakeholders is notable. The Danish Rights Alliance has observed increased use of illegal IPTV and streaming in the national Danish market by national and /Nordic surveys and these observations concurs with the findings of EUIPO and others². Although the sport sector is without doubt highly affected by illegal distribution of live events, we encourage the Commission to also consider that rightsholders engaged in other sectors such as music and audiovisual content are also very much affected by illegal distribution of live content online.

The Danish Rights Alliance has over some time collected data related to sports piracy. This data shows that illegal streaming of live sport is very popular, and it seems to be an increasing problem.³ The 20 most popular live sport streaming sites have accumulated more than 13.500.000 visits from January 2022 to October 2022 from Danish IP addresses. The following graph shows, that there is a consistent high number of visitors on the illegal sites, but also that it is highly influenced by big sporting events that usually take place during the summer such as NBA finals (June), Wimbledon finals (June) and Tour de France (July).

¹ www.rettighedsalliancen.dk

² E.g., AAPA report: Illicit IPTV in Europe, 14 December 2022

³ Data is collected by Similarweb, see <https://www.similarweb.com/>



Most of the sites focuses on football, as it is one of the most popular sports amongst Danes. But the sites cover a broad spectrum of sports from cycling to motor sport and golf. The platforms offering illegal streams have a professional look, where many offer scores and results of previous events as well as a schedule of upcoming matches. Some sites have the streams integrated on the platform and others link to third parties' web addresses where the content can be found (unauthorised). Either way the sites provide a manageable overview of the illegal content and easy access with very few clicks.

Denmark is well known for its highly developed blocking system and the cooperation about blocking of websites between rightholders and Internet Service Providers (ISP). This includes a court approved system of dynamic blockings. The Danish ISPs and the Danish Rights Alliance has already back in 2013 agreed on a voluntary Code of Conduct for blocking in a cooperation also with the Danish Government playing a key role. The Code of Conduct has been revised to meet the development of illegal services and of the legal system, notably dynamic blockings, pirate brand blockings etc. Blockings of illegal sites and take downs of infringing content from social media and other platforms are the main tools and the most effective remedies of enforcement of copyrights.

The current code of conduct describing the procedures of dynamic blockings in Denmark is available [here](#).

Since the legal framework as such is in place after approval of the EU Copyright Directive and the Digital Services Act Regulation together with the formal call for action by the EP Resolution, there is no need to embark on new legislation neither to update existing legislation. ⁴

The Danish Rights Alliance encourage the Commission to consider the following when drafting its Commission Recommendation

1. Make the Recommendation cover all types of live and time sensitive content

⁴ European Parliament resolution of 19 May 2021 with recommendations to the Commission on challenges of sports events organizers in the digital environment EP P9_TA (2021)0236

2. Require ISPs to use automatized, technically updated, and dynamic approaches to blockings rather than imposing predetermined strict deadlines etc.
3. Introduce the role of 'trusted flaggers' in the process of blockings

These will be elaborated in the following.

Make the Recommendation cover all types of live and time sensitive content

Sports content is very exposed to illegal distribution and use as shown by various data and reports, including the sources mentioned by the Commission in the 'Call for evidence' regarding this hearing.

The Danish Rights Alliance is also aware of illegal distribution of films which are relevant in theatres being live streamed on social medias, as well as illegal streaming of live concerts on social medias. Use of live content might well increase and we therefore encourage the Commission to make sure that the Recommendation will cover content broadly, and not solely sports events and IPTV.

Also, the Commission Recommendation should take into consideration the various platforms on which content is distributed illegally. Blockings might be effective for some platforms, however different remedies must be used on social medias, legal platforms etc. Also the emergence of new platforms such as metaverse platforms should be incorporated when defining enforcement and content protection remedies.

Require ISPs to use automatized, technically updated, and dynamic approaches to blockings rather than imposing predetermined strict deadlines etc.

The Danish blocking Code of Conduct sets out the timeframe of 7 days for the ISPs' implementation of blockings upon notice from the Danish Rights Alliance. This timeframe may be acceptable (although it is far from perfect) for implementation of blocking notices concerning illegal use of services offering not time sensitive content but it is a time frame that makes little sense when it comes to illegal transmission of live content.

An intervention to stop the illegal streaming of live events is by nature urgent if it should be meaningful. Therefore, the forthcoming Commission Recommendation should reflect this by clarifying what is an appropriate and proportionate injunction⁵. To reflect the development of illegal live streaming the forthcoming Commission Recommendation should provide an updated interpretation of the current explanation of 'appropriate and necessary' which is found in in the Guidelines on the IPR Directive⁶:

*It follows that the competent judicial authority should not issue injunctions which require the taking of measures that go beyond what is **appropriate and necessary** considering the facts and circumstances of the case at hand to prevent **an imminent infringement** (our emphasis), p.18.*

⁵ Cf. Article 9.1 Directive 2004/48

⁶ Com (2017) 708

The Guidelines acknowledge that the starting point for assessment of what is 'appropriate' to prevent an 'imminent' threat. Therefore, the 30 minutes called for by the EP should be referenced as the appropriate and proportionate *minimum standard* for the application of blocking injunctions or take downs.

However, the timeframe and remedies which the ISPs should implement cannot be static or predefined. It need to be of dynamic nature to follow the digital and technological developments. Therefore, it should be underlined by the Commission that a 30 minute deadline is not a fixed standard, but a dynamic standard and minimum requirement which should always be interpreted by nature of the technological advances as well as the development of the illegal services.

Evenly important is to emphasize that blocking measures will have to be technology neutral. Currently court decisions in many cases restrict blocking to DNS blockings but this may not be sufficient. The Recommendation should therefore give guidelines to legal authorities as well as for voluntary blocking agreements, that other blocking techniques will have to be introduced to ensure an efficient outcome.

Intermediaries such as the ISPs and also hosting services should be obliged to follow the directions set out in the Copyright Directive on online platforms to always apply updated and dynamic measures.⁷ This parallel to the requirements in the Copyright Directive regarding online sharing platforms will mean that intermediaries such as ISPs shall be obliged: 'in accordance with high industry standards of professional diligence' to 'expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from their websites, the notified works or other subject matter'⁸ (our emphasis).

Introduce the role of 'trusted flaggers' in the process of blockings

A prerequisite for efficient interventions by intermediaries is that notices of blockings and take downs are at hand. Notices should be as easy and streamlined as possible, for quickly expedition by the ISPs, platforms etc.

The Digital Services Act Regulation has already established a framework for notification of trusted flaggers, which are nominated by public authorities.⁹ The forthcoming Recommendation should within the framework of the DSA Regulation call for fast application of the 'trusted flagger' concept by the national authorities i.e. nomination by the national Digital Service Coordinator. Thereby the trustworthy, copyright competent and non-commercial qualities of the trusted flagger is safeguarded by national authorities.

This will be in line with the European Parliament Resolution:

⁷ Cf Com (2017) 708 note 102: 102 Cf. C-367/15, OTK, para. 23: "Directive 2004/48 lays down a minimum standard concerning the enforcement of intellectual property rights and does not prevent the Member States from laying down measures that are more protective".

⁸ Article 17,4 b and c, Directive (EU) 2019/790

⁹ Article 22, 2. REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)

12.... to clarify the existing legislation and adopt concrete measures to ensure the immediate removal of, or disabling of access to, online illegal live sports event content, **including online illegal live sports event content notified by a certified trusted flagger to tackle efficiently illegal broadcasts of live sports events**; to understand “immediate” as meaning immediately or as fast as possible and in any event no later than within 30 minutes of the receipt of notification from rightsholders or from **certified trusted flaggers** (our emphasis)¹⁰

Additionally, we observe that these two proposals appear to be in line with the Commission’s reply to the Copyright Contact Committee:

*On prompt removal of online illegal live sport content Commission will assess need for additional measures (e.g., **specific timeframe to remove illegal live sport content and specific certification scheme for trusted flaggers**) (our emphasis)¹¹*

In conclusion, the forthcoming Commission Recommendation should urge Member States to activate the tool of authority proven ‘trusted flaggers’ which can submit blocking and take down notices to ISPs.

A concern often raised with blockings without legal process is a risk of overblocking. However, the introduction of a certified, non-commercial and competent trusted flagger makes it less likely that this procedure should lead to a risk of overblocking. Additionally, a recourse possibility for website and platform operators always being able to require a court decision will be possible, cf. below.

Finally, we will draw the Commission’s attention to a recent Danish court decision about blocking live content:

6.7.4.1. Communication to the public

In the case reported in ‘Ugeskrift for Retsvæsen (2020.3122 Ø),637’ the Danish Rights Alliance requested that the Eastern Court of Appeal, on behalf of the sports organizer La Liga – as owner of the exclusive rights to the productions of the football matches and as holder of the rights attached to the recordings thereof – issue a preliminary injunction against a telecommunications company for blocking access to a website that streamed La Liga soccer matches without authorization. The court carried out an overall assessment of the broadcast of the football matches to

¹⁰ Paragraph 12. Challenges of sports events organisers in the digital environment European Parliament resolution of 19 May 2021 with recommendations to the Commission on challenges of sports events organisers in the digital environment EP P9_TA (2021)0236

¹¹ Slide 16, Copyright Contact Committee 17 December 2021 <https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=da&meetingId=39377&fromExpertGroups=true>

assess whether it could be granted copyright protection based on the case law of the Court of Justice of the European Union (CJEU) (C-403/08 and C-429/08 – Football Association Premier League e.g.). The court considered that La Liga has drawn up guidelines concerning the expression and particular characteristics of the broadcasts of the football matches in question, and that various elements are used (including the logo and the continuous reproduction of the highlights of the match in a carefully edited version, as well as the broadcast being accompanied by graphics in the form, for example, of a clock displayed on the screen), to such an extent that the matches as a whole must be regarded as works that are protected by copyright. The court found the transmissions infringed the right of communication to the public (Article 3(1) InfoSoc Directive) and the related right attached to the audiovisual recordings (section 67 Copyright Act) and granted a blocking injunction¹².

Should the above give rise to questions or comments from the Commission, we remain at the Commission's disposal.

Yours sincerely,

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¹² Mapping report on national remedies against online piracy of sports content, p. 260, EUIPO 2021