



CreativeMediaBusinessAlliance

POSITION ON DATA RETENTION

17 November, 2005

We understand that the EP Civil Liberties Committee will adopt its opinion on 24 November on the proposed Directive on data retention. This Directive is of major importance for our sector and we would appreciate your support in ensuring that this becomes an effective instrument in the fight against piracy.

The importance of the Internet as a communications medium is ever increasing and it offers many opportunities. However, with it also comes an increase in illegal activities online. This is particularly true for online piracy, which greatly affects our sectors. The EU has put in place instruments aimed at improving the protection of intellectual property rights, such as the Copyright Directive (adopted in 2001) and the Enforcement Directive (adopted in 2004). The latter expressly recognizes the need to ensure that information concerning the origin of infringing activity, distribution channels and the identity of suspected infringers can be obtained from service providers (Article 8). For this legislation to be meaningful, it is essential that service providers retain the relevant data for a reasonable period and that the data can be disclosed for appropriate purposes. The proposed Directive on data retention should serve to facilitate this. However, the conditions set out in the proposal are too restrictive and would create obstacles to law enforcement in a number of situations. Moreover, many amendments submitted to the EP Civil Liberties Committee seek to further reduce the scope of the Commission proposal.

1. The scope of the proposal must include piracy

The Directive, as proposed, is limited to “the prevention, investigation, detection and prosecution of *serious* criminal offences *such as terrorism and organized crime*”.

Limiting the proposal to “serious” offences would hamper the effectiveness of the Directive and the enforcement activities for other forms of criminal offences. Once an illegal activity is considered as a crime in a Member State, the enforcement authorities should have adequate means to prosecute it. In this respect, it is worth noting that Article 15 of the Directive on data protection in the electronic



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communications sector (2002/58), to which the Commission proposal refers to, applies to all forms of criminal offences. The scope of this proposal should be consistent with Article 15. The limitation would not be consistent with other Community/national measures, in particular Article 8 of the EU Enforcement Directive adopted in 2004, which gives a right to obtain information from service providers concerning the origin of infringing activity, distribution channels and the identity of suspected infringers.

It has been suggested, as a compromise solution, to link the notion of “serious offences” to Article 2.2 of the Council Framework Decision on the European Arrest Warrant which provides a list of offences giving rise to a European arrest warrant. This list includes counterfeiting and piracy. We strongly believe that the best approach is to extend the scope of the Directive to all forms of criminal offences, but if recourse is made to this list, then we would urge you to use **it in its entirety, without alteration or deletion.**

We therefore urge the Members of the European Parliament:

- to **support Amendments 102 and 137**, which extend the scope of the Directive to cover all criminal offences, and reject any amendments that limit further the scope of the Directive;
- if despite our request, the Parliament must support the compromise amendment that would define the notion of “serious crimes” by reference to the Council Framework Decision on the European arrest warrant, **then the list should be used in its entirety without alterations or deletions.**

2. Access to data for law enforcement purposes must not be precluded

We are also greatly concerned by the current wording of Article 3.2, regarding the access to the data retained. The use of the word ‘only’ in this article seems to prevent access by the law enforcement agencies in any other cases than “serious crimes”. This would differ considerably from the rules currently applied in Member States and would be inconsistent with other EU legislation, for instance the Enforcement Directive. It must be clear that this proposal does not preclude other possibilities to obtain data for the enforcement of rights under EU or national legislation, and in compliance with Data Protection rules.



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We therefore urge the Members of the European Parliament:

- to support the first part of Amendment 137, which deletes the term "only" from Article 3.2, and
- to reject Amendments 38, 223 and any other amendments which seek to eliminate the possibility to retain data in other cases than serious crimes, or limit the access and use of the data.

3. Internet data must be retained for a sufficient period of time

Content industry representatives have always stressed that data retention is of major importance and that data should be kept long enough to fight piracy. Our sectors rely on a small number of data categories in our enforcement work. The most crucial is the connection data (i.e. information to identify the user of the internet protocol (IP) address at a given time). Indeed, connection data is the fundamental piece of evidence that police and private party claimant need in any kind of legal proceedings against online violations of law.

The Commission draft proposes a mandatory period of retention of six months. We submit that the period of retention of this type of connection must be sufficiently long to enable law enforcement officials and intellectual property rights owners to find evidence and prosecute law breakers. While it takes some time to conduct investigations into possible online infringements, a further set of delays can occur in the judicial procedures that need to be followed to oblige the service provider to identify the IP address owner. This six months period of retention is therefore a minimum.

We therefore urge the Members of the European Parliament to **reject any amendment seeking to reduce the period of retention.**

Finally, in addition to the mandatory period of retention, Member States shall also ensure that once a legitimate request has been made, under applicable law, the specified data will be stored and preserved. In other words, the Directive should clarify that in addition to the obligation to retain data, ISPs must also implement "preservation schemes".

We remain at your disposal if you need any further information on this subject.