

7 July 2015

UNION DES FABRICANTS (UNIFAB) comments on the Initial Report of the GNSO Policy Development Process Working Group on Privacy & Proxy Services Accreditation Issues

UNIFAB welcomes the Initial Report of the GNSO Policy Development Process Working Group on Privacy & Proxy Services Accreditation Issues. UNIFAB also supports the efforts of the GNSO in setting up the Working Group.

1. About the Anti-Counterfeiting Group (UNIFAB)

The UNION DES FABRICANTS (UNIFAB) is a French, not for profit trade association, representing more than 200 members, from a wide spectrum of sectors (see our website <http://www.unifab.com/fr> for more information). UNIFAB offers a forum for all stakeholders involved in anti-counterfeiting activities to collaborate and support each other.

2. Counterfeiting, the Internet and Enforcement Strategies

Counterfeiting has become a significant issue for brands on the Internet. The sheer volume of infringements means that UNIFAB members have had to develop a multi-mechanism enforcement strategy to deal effectively with the threat and damage to its business caused by online counterfeit goods.

There are a number of barriers to implementing an effective domain name enforcement strategy. Each website identified will present a different threat to our members' brands and businesses. The type and extent of the threat posed will turn on factors such as the scale of the operation; whether the website is part of a 'cluster' (that is to say a group of inter-related infringing websites); whether the website is deliberately deceptive and particularly misleading to consumers; and whether the relevant member has any desire to own the relevant domain itself. Each infringing website will also present distinct challenges when it comes to enforcement action, due to the complicated web of intermediaries whose services are used by the infringers to display the infringing content. This calls for a considered and bespoke approach to enforcement. There is, quite simply, no 'one size fits all' solution.

3. Privacy & Proxy Issues

Members have found that the use of Privacy & Proxy Services by counterfeiters severely impedes the implementation of an efficient enforcement strategy to remove counterfeit websites, and that there is an extremely inconsistent approach to releasing accurate WHOIS information by Privacy & Proxy service providers and/or registrars. This significantly slows down any enforcement action.

UNIFAB is therefore of the view that where websites are clearly offering counterfeit goods for sale, they should not be able to benefit from Privacy & Proxy Services, on the basis of long-standing European and other international laws.

4. The Legality of Privacy & Proxy Services Under European Law

The European E-Commerce Directive¹ requires that any provider of “information society services” must render easily, directly and permanently accessible to the recipients of the service and competent authorities²:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established; and
- (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner.

The definition of “information society services” spans a wide range of economic activities which take place on-line, and include, in particular, the selling goods on-line³. It also encompasses advertising-funded services and furthermore Article 6 of that directive requires similar information disclosure for those advertising goods and services.

Therefore, on the basis of the above clearly established law, the use of Privacy & Proxy services is in direct conflict with the requirement to provide contact information in an easy, direct and permanently accessible manner. UNIFAB is therefore of the view that Privacy & Proxy services are being used to facilitate breaches of European law.

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

² Article 5 of Directive 2000/31/EC

³ See further Recital 18 of Directive 2000/31/EC

5. The Right to Privacy Under European Law

There has been much debate about the right to privacy under European law as a justification for using Privacy & Proxy services.

Under European Union data protection laws⁴, personal data can only be processed lawfully and for legitimate purposes. Persons or organisations that process personal data must protect it from misuse and must respect certain rights of the data subjects. This is often quoted as a reason for allowing Privacy & Proxy services.

However, in the context of service providers pursuing an economic activity, the obligation to provide relevant information relating to name, geographic address and contact details can be fairly balanced against the right to the protection of personal data. The European Court of Justice has in the past addressed this balancing of rights, stating that: ***“although it is certainly necessary to respect the protection of personal data, the fact remains that when the infringer is operating in the course of trade and not in a private matter, that person must be clearly identifiable”***.

6. Freedom of Expression in Europe

There has been much debate about the potential impact on Freedom of Expression as a justification for using Privacy & Proxy services.

In Europe, the European Convention on Human Rights provides protection for Freedom of Expression under Article 10, including the right to impart and receive information freely. As in the US, the courts distinguish between political speech, which is given a high level of protection, and commercial forms of speech where there is a much wider “margin of appreciation” in balancing this protection with other rights and limitations.

A case that provides a helpful sense of this relates to the upholding of the criminal convictions of the operators of the piratebay website⁵, where the European Court of Human Rights found that: ***“the safeguards afforded to the distributed material in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate”*** and that ***“there were that there were weighty reasons for the restriction of the applicants’ freedom of expression”*** the commercially run website.

7. Conclusion

UNIFAB respectfully argues that Privacy & Proxy services should not be available to registrants where the domain name is to be used in the pursuit of an economic activity, in particular for the sale of counterfeit goods. This use of Privacy & Proxy services conflicts with fundamental principles established under European law that require service providers to display their contact details to allow rapid communication in a direct and effective manner.

⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

⁵ NEIJ AND SUNDE KOLMISOPPI v. SWEDEN 40397/12