

IN-DEPTH ANALYSIS

Re-communicating the EU's IPR strategy for third countries

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Abstract

The European Commission's most recent initiative in the field of intellectual property rights (IPR), a 2014 communication, returns to an issue that has been largely side-lined since the European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA) in 2014. While not a landmark, 'Trade, growth and intellectual property – Strategy for the protection and enforcement of intellectual property rights in third countries' (COM(2014)0389) serves as a good basis for constructive debate on securing better IPR protection in foreign markets, in cooperation with third countries and without infringing on civil liberties. The new document builds on a 2004 communication with a nearly identical title ('Strategy for the protection and enforcement of intellectual property rights in third countries'), which introduced a broad framework of initiatives aimed at combatting IPR violations outside the EU.

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1 The 'new' EU IPR protection strategy in third countries - some brief comments

The new Commission communication on IPR protection in third countries was published on 1 July 2014

It mainly reproduces the 2004 Strategy, with some nuances.

Published on 1 July 2014, the communication entitled 'Trade, Growth and Intellectual Property, Strategy for the protection and enforcement of intellectual property rights in third countries' (COM(2014)0389) represents the Commission's first official initiative in this area since the controversial Anti-Counterfeiting Trade Agreement (ACTA) was rejected by the European Parliament in July 2012. The objective of ACTA was to improve the enforcement of anti-counterfeiting laws at international level. This is an objective that the EP endorses, but the agreement itself was considered by Parliament (as succinctly put by the rapporteur on the matter, David Martin (S&D, UK), to be 'too vague, open to misinterpretation and potentially jeopardising to the citizens' liberties'.¹

The Commission's new document largely reproduces an earlier Commission communication from 2004, which had an almost identical title, namely: 'Strategy for the protection and enforcement of intellectual property rights in third countries'. By so doing, the Commission appears to underline the continuing relevance of the strategy while nuancing its goals, in light of the weakening support for IPR protection and extensive use of the internet as a trade channel.

The communication also takes inspiration from an older external study which had been tasked to outside experts with a view to assessing the efficacy of the 2004 IPR strategy five years after its entry into force.

The present note will offer an analytic review of the content of the Commission communication, referring where possible to the previously published Commission documents dealing with IPR protection in third countries. At the end, it will put forward a number of conclusions and recommendations.

2 Changes in the external context since 2004

Globalisation, the rise of new trade channels and increased sensitivity to low prices all make IPR protection more difficult to secure.

Over the past decade, the world's economies have become extremely interconnected, and emerging economies are playing an increasing role in the international trading system.

Although IPR legislation has improved worldwide, IPR infringements have reached unprecedented levels. According to a 2009 OECD study on IPR infringements² on a global scale, a total equivalent to USD 250 billion in

¹ 'European Parliament rejects ACTA', press release, European Parliament, 4 July 2012, <http://www.europarl.europa.eu/news/en/news-room/content/20120703IPR48247/html/European-Parliament-rejects-ACTA>

² 'Magnitude of Counterfeiting and Piracy of tangible products: an update', November 2009, <http://www.oecd.org/sti/ind/44088872.pdf>

international trade is estimated to be in counterfeited and pirated goods (corresponding to about 2 % of world trade).³

Over the last years, public support for IPRs has somewhat faded and the lower prices of infringing goods have attracted a growing number of consumers. Technological breakthroughs and extensive use of the internet in world exchanges have certainly had an impact on this developments. However, the perception that counterfeiting and piracy are alternative source of revenues, entailing lower risks than other illegal activities and the absence of awareness on the negative impact of counterfeiting on economies, are also decisive elements of this equation.

Improving IPR enforcement in third countries remains the main challenge. However, this is something the EU cannot achieve on its own. It requires, inter alia, better training of customs and judicial officers, as well as the existence of deterrent sanctions and of actual prosecutions. A firm political will on the part of third countries' authorities to seriously tackle IPR violations and fight related organised crime is crucial in this context.

A successful ACTA agreement would have been a useful tool for further progress on IPR enforcement in third countries. However, the hardline approach followed in the negotiations and the non-inclusion of the development agenda ultimately resulted in a failure in terms of IPR enforcement and contributed to increased public concern about its merits.

In other words, the tough line adopted by the EU and other advanced economies to counter counterfeiting and piracy does not seem to have produced the expected results, and has even alienated public support.

Public and political support for IPR enforcement is weakening.

Contrary to its first aim, ACTA's outcome contributes to undermining support for IPR enforcement.

2.1 Assessment of the 2004 strategy

The Commission restates the relevance of the 2004 strategy.

The Commission argues that the 2010 mid-term review confirmed the relevance of its 2004 strategy. Reference is made to the study entitled 'Evaluation of the Intellectual property rights enforcement strategy in third countries'⁴ (final report), which was independently produced by a consortium of academic experts.

The communication itself does not provide much further reference to the 2010 study, the main conclusions of whose assessment can be found in the Commission's staff working document accompanying the 2014 communication⁵. It simply conclude that an evaluation of the 2004 strategy took place in 2010 and 'confirmed its relevance' while including several recommendations and remarks.

³ These figures are, however, outdated, and it would be useful if the Commission could provide more recent estimates of the scale of IPR violations at global level.

⁴ http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_147053.pdf

⁵ SWD(2014)0204 - Commission staff working document: Trade, growth and intellectual property - http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152644.pdf

2.2 The main conclusions of the 2010 study

The 2004 strategy is globally relevant, but can be improved.

The study is not entirely supportive of the Commission's IPR strategy. It in fact concludes that 'the Strategy and the set of actions it consists of can globally be considered as relevant, despite some limitations'. It is seen as responding primarily to the needs of industry; the interests of other stakeholders (e.g. consumer organisations, and even of SMEs) are not sufficiently considered in the 2004 Strategy.

Broader stakeholder interests and development concerns are not sufficiently taken into account.

According to the authors, 'overall, and despite EC efforts, a very substantial gap remains in data and information on the scope of the problem and on the challenges of IPR enforcement, which makes it difficult to influence policies, back them up with statistics, or optimise the prioritisation of measures'.

Technical cooperation with appropriate funding proved to be the most effective tool.

While the Commission has traditionally been an active contributor to IP enforcement at multilateral level, in particular in the framework of the WTO's TRIPS Council, it has managed to secure only limited progress, mainly owing to third-country opposition and the subsequent stalemate in negotiations. This is the reason why the ACTA agreement (under negotiation in 2010) was seen as a potential catalyser for further progress of IPR enforcement in third countries. The study noted that the EC strategy and the ACTA negotiation process were largely based on a hardline approach and did not take much account of the emerging development agenda, and that this ultimately resulted in failure to apply stricter IPR standards in third countries.

The importance of awareness-raising was underestimated ...

According to the study, it is unclear (debatable) whether the Commission and other EU institutions can be specifically considered to have contributed directly and significantly to improvements in the enforcement of IPRs in third countries. Nevertheless, it argues that the Commission has been partially effective: 'it was in reality most successful when providing technical cooperation projects on IP enforcement with appropriate funding as part of bilateral arrangements involving third country input'. However, it concludes that 'the Strategy has underestimated the importance of raising the awareness of key target audiences of the need for IPR enforcement, and has hence made, with a few exceptions, only a limited contribution in this important field'.

... and the lack of consistency within the EU undermined the position towards third countries.

The evaluation finally concludes that there was a persistent lack of cohesion in all aspects of IP promotion and IPR protection within the EU institutions and Member States, and that this clearly undermined the credibility of the message conveyed to third countries.

3 The goals set by the Commission

IPR enforcement in third countries remains the priority.

The Commission confirms that IPR enforcement remains the priority in third countries. However, it considers that a policy response is needed in order to cope with new challenges and to put in place clear and suitable rules and procedures for effective IPR enforcement. This also raises some important

internal market issues, such as the need to identify and punish abuses, to prevent the proliferation of spurious rights (such as bad faith registrations) and to preserve the innovative role of IPRs while ensuring that they do not become an end in themselves.

Support for stronger IPR measures needs to be recovered.

With a view to improving enforcement, the Commission is eager to recapture public support for IPR action and to make consumers more aware of the negative consequences of IPR infringement.

The right balance between IPR protection and public freedoms on the internet has to be found.

The Commission is also willing to address the growing role of the internet in international trade and the world economy, which by its own nature is borderless and makes IPR infringements more difficult to tackle. This applies not only to digital goods such as music, audiovisual products and software, but also to physical goods that are increasingly traded through e-commerce.

It should be recalled that most of the objections to ACTA concentrated on the internet and virtual economy side, while criticism of the measures against 'material' counterfeiting remained rather limited.

Cooperation with third-country governments, taking account of development and highlighting the benefits of IPRs is important.

In addition, the Commission accepts the need to include a development chapter in its IPR protection strategy. In this contexts, it intends to explore the fact that 'effective IPR regimes, complemented by an enabling environment and sufficient capacity to absorb technology, can help emerging and developing countries to put in place a sound, viable technological base locally'. In other words, the Commission wants third countries to understand that an enhanced IPR regime may well attract further technology transfer and foreign direct investment, acting as a tool to reinforce the economy and promoting research and innovation.

4 A revised IPR strategy vis-à-vis third countries

The revised strategy builds upon the previous one and past experience.

As already mentioned, the idea behind the communication is not to come forward with a new strategy, but to update that of 2004, on the basis of recent experience and recommendations and taking into account the main goals spelt out above. In view of this, the Commission has come forward with concrete proposals, as described below.

4.1 Improving protection and enforcement of IPRs in third countries

Since developments at multilateral and plurilateral levels are unlikely...

The Commission has been a great supporter of the multilateral and plurilateral avenues, since this allows for wider harmonisation as well as a more effective and predictable IPR environment. However, resistance by third countries has been increasing and further developments at this level are unlikely. As a result, while efforts at multilateral level should continue, the Commission intends to concentrate action and resources on bilateral work, notably as regards priority countries. The main bilateral tools in this context are:

... efforts should be concentrated on bilateral

mechanisms (FTAs, political dialogues, technical cooperation).

- Last-generation of EU trade agreements (DCFTAs, CETA, Japan, Morocco, TTIP, etc.), and specific agreements on the protection of geographic indications (with Moldova and Morocco; currently under negotiation with China).
- Political dialogues and working groups on IP.
- Technical assistance, an instrument aiming at improving IPR systems in developing countries through training, capacity-building, legislative assistance and awareness-raising.
- WTO dispute settlement and other remedies foreseen in bilateral agreements, normally used as a last resort in case of clear breaches, but serving as an important deterrent to infringements.

Bilateral action is best fitted to address each partner's specific problems and, therefore, might contribute to restoring third countries' willingness to improve IPR protection.

The 2010 study is quite supportive of the added value of bilateral action. It makes it possible to address issues on a tailor-made basis, fine-tune the EU's ambition to its partners' level of development, and improve coherence between IPRs and other relevant policy strategies towards third countries (e.g. research and innovation and the need for reciprocal protection of IPRs).

In addition, bilateral activities might contribute to overcoming opposition at multilateral level and to restoring third countries' willingness to improve IPR protection.

Although the Commission has achieved positive results in bilateral trade negotiations (on both legislative and cooperation provisions), it is now facing increasing difficulties, for instance in the negotiation of IPR chapters in FTAs. As a response, the Commission is considering the possibility of restricting third countries' participation in EU programmes or funding, e.g. in cases of continuous breach of IPR commitments.

Such a punitive approach, however, seems to conflict with the need to more closely involve third countries, in order to dissipate the perception that the EU's IPR strategy does not take due account of third-country needs. Participation in EU programmes and funding contributes to increasing coherence with other policy areas or chapters in an FTA (e.g. sustainable development goals, research and innovation, etc.), and could prove important as an additional incentive for countries to comply with international commitments and standards (thus operating as an additional tool for building respect for IPRs and improving enforcement systems in third countries).

4.2 Improving stakeholder engagement

Improving stakeholder engagement is a precondition for more effective IPR enforcement.

The Commission takes up one of the main recommendations of the 2010 study, i.e. strengthening consultation with all stakeholders. Although consultations had already taken place in the context of the 2004 Strategy, they were mainly designed for Brussels-based interlocutors and 'those who are actively engaged in trade protection issues', to the detriment of the concerns of other stakeholders (consumers, SMEs, developing countries,

etc.).

As a way forward, the Commission suggests making use of 'existing mechanisms such as the Commission's Civil Society Dialogue and Market Access Strategy tools'.

4.3 Providing better data

Better data need be available.

The Commission intends to improve data collection and reporting, in order to 'more precisely quantify the role of IP and the impact of IPR infringements', which 'will be important to policymakers for informed policy debate and any awareness raising efforts'.

It suggests fostering the activity of the European Observatory on Infringements of Intellectual Property Rights as regards third-country data, (so far it has mainly focused on infringements in the EU). In particular, the Commission proposes that the Observatory should produce 'country guides on key countries', thus contributing to keeping the list of priority countries up-to-date, and should concentrate its efforts on key issues that are easily perceived by stakeholders.

4.4 Building on EU legislation

EU IPR legislation is still in need of harmonisation and this has a negative impact on negotiations with third countries.

The Commission highlights the benefits of harmonised IP rules for economic operators and their contribution to growth and jobs. It is also argued that such EU harmonisation constitutes a benchmark, facilitating negotiations with third countries. On the other hand, the fact that the EU has not aligned its rules in all IPR areas (e.g. trade secrets, non-agricultural geographical indications, sanctions) is seen as limiting the Commission's margin of manoeuvre in addressing IP issues with third countries.

In this context, the Commission is proposing stronger coordination within the EU, notably as regards enforcement measures. It also endeavours to encourage Member States to ratify international agreements (e.g. the Trademark Law Treaty and the Geneva Act of the Hague Agreement on industrial designs). As far as enforcement is concerned, on 1 July 2014 the Commission adopted a communication on an Action Plan addressing infringements in the EU⁶. The aim is to renew the consensus and reorientate the debate on enforcement within the EU. To this end, it is suggested to change the target of penalties from infringing citizens to commercial-scale infringers, in order to deprive the latter of the revenue motivating such activities.

⁶ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: 'Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan', COM(2014)0392 - <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0392&from=EN>

4.5 Enhancing cooperation within the EU

The Commission acknowledges that cooperation with Member States is often good but can still be improved

In order to improve coordination within the EU, the communication suggests improvements on the existing cooperation in third countries between the Commission and Member States, in particular as regards exchange of information and coordination. To this end, it endorses the idea put forward in the study of making use of existing set-ups (e.g. in the context of the market access strategy).

4.6 Geographic focus

The list of priority countries needs to be continuously updated.

Concerning priority countries, the Commission intends to prolong the practice of updating the list every two years, on the basis of information provided by stakeholders. In defining priority countries, account should be taken of the differences between countries (manufacturing versus transit countries; level of development), in order to better balance the types of IPR infringements addressed (protection and promotion of IPRs, sustainable development, industrial policy and innovation, health and safety concerns) and to avoid any kind of circumvention.

5 Conclusions and recommendations

IPR protection is crucial to the EU's innovation-driven economic performance.

IPR protection and enforcement in third countries is certainly a difficult goal to achieve. The EU has a limited capacity to convince third countries to improve their standards and secure better protection of EU, intellectual property. This objective is, however, one fundamental pillar of the Europe 2020 strategy with its aim of making the EU more competitive both at home and abroad.

The EU cannot compete with emerging economies in medium to low quality products, but it has a comparative advantage in up-market, innovation-driven and brand products, which are increasingly popular in third countries and represent the real future of EU industry.

The performance of the EU economy depends heavily on innovation. As a result, the existence of a level playing field for a knowledge- and innovation-driven economy is crucial for competitiveness and jobs. In other words, the fight against counterfeiting is an important tool for ensuring the EU's competitiveness on global markets.⁷

However, the once existing momentum of support for advancing on IPRs is fading away, and no significant progress is likely to take place at multilateral and plurilateral levels in the near future.

Although the Commission cannot be held responsible for the rejection of

⁷ See, for example, the March 2014 European Council conclusions:
https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141749.pdf

ACTA, the failure to secure a proper agreement guaranteeing a better enforcement of IPRs in third countries has been a real setback for the EU economy as a whole, as well as for those companies in the EU that have sought a more efficient defence of their IPRs in often difficult third-country markets.

The question for the EU is, therefore, not so much how to improve the current regulatory system, but, rather, how to raise overall awareness of the benefits of IPR enforcement in a world where economies are increasingly interconnected and competitiveness and jobs very much depend on the capacity to attract knowledge- and innovation-driven investments.

Despite the intention to respond to these challenges, the communication remains vague and can scarcely be called action-oriented. Objectives, priorities, and ways to increase the effectiveness of IPR enforcement are not clearly defined. The following recommendations could, therefore, be considered in the upcoming debate:

- The Commission should strive to ensure that dialogues and cooperation programmes focus more on raising awareness of the social and economic impact of IPR infringements, taking account of the specific needs of each category of interlocutors (rightsholders, users and consumers, national authorities, etc.).

- As the 2010 study suggested, one may also recommend extending cooperation programmes to countries showing interest, building on past experience and introducing improvements as far as allocation of resources and funding are concerned.

- In view of scarcity of resources, consideration should be given to setting priorities and differentiating the approach according to each third country in terms of its importance to the EU (socio-economic or cultural links, etc.) and its specific needs (type of economy, level of development, etc.).

- As regards action to improve stakeholders' engagement, the aim should be to involve the widest range of non-Brussels-based stakeholders: SMEs, consumer associations, users of intermediate products and of internet commerce, third countries' public authorities, etc.). Dialogues might prove effective to promote the development of broader exchanges on the benefits or risks of IPRs in socio-economic terms (job creation, innovation, technology transfers, the fight against organised crime, etc.) and health and safety terms.

Nevertheless, existing mechanisms (e.g. civil society dialogue) do not seem to be sufficient for achieving these goals. New tools, as suggested by the study (IT-based tools, enlarged lists of consulted parties, allowing time for associations to consult their members), might therefore, be considered.

- Although the ideas put forward for providing better data on counterfeiting and piracy are a step in the right direction, other ideas could also be considered. The first relates to information spreading and sharing of best practices, which are important to allow stakeholders to assess results and contribute to policymaking. A second idea concerns the 'development

Raising awareness of the overall benefits of IPRs is important for improving the situation worldwide.

Dialogues and cooperation programmes appear to best suit current needs.

Prioritisation is important in view of scarce resources.

New topics and tools have to be considered to stimulate broader stakeholder engagement.

The availability of data on counterfeiting and piracy is important for assessing the situation.

of a generally accepted methodology for improving statistics on counterfeiting and piracy', as being crucial for the reliability of the data. Such a method would permit a clearer picture of the situation regarding counterfeiting and piracy, facilitate coordination between the various entities managing information (industry associations, law firms, international organisations, etc.), while ensuring complementarity and avoiding overlaps, and contribute to increasing confidence among stakeholders.

Internal harmonisation of enforcement would boost the EU's credibility with third countries.

- Eventually, information on counterfeiting and piracy (type of goods, manufacturing and transit countries, trading platforms, etc.) could be analysed in conjunction with elements of demand in the EU (both consumers and users of intermediate products). The aim of such comparison would be to better synchronise action on both EU demand and third-country supply of counterfeited and pirated goods.

A constructive debate should now start on the basis of the communication.

- Another important element deserving further attention relates to internal harmonisation of enforcement, since this would increase the EU's leverage in terms of pushing for improvements in third countries. Claims that the EU should be 'putting its own house in order first, before preaching to third countries' have not helped build respect for IPRs and the need to counter infringements. On the contrary, increased consistency between the EU's internal and external action on enforcement is likely to facilitate the EU's efforts to improve enforcement of IPRs in the context of bilateral arrangements (FTA negotiations, dialogues, capacity-building and technical cooperation).

All in all, although the Commission communication is not a stepping-stone for better addressing IPR issues and securing more efficient enforcement at global scale, it has the merit of shedding some light on a very sensitive issue that was somewhat sidelined after the rejection of ACTA. It represents a good basis for a constructive debate (in the EP as well as in other forums) on how to secure better IPR protection in foreign markets in cooperation and not in opposition with third countries, and without harming civil liberties in the EU. This point of view offers a starting-point that may need to be closely monitored and properly addressed by the European Parliament.