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NOTE

Policy Department C
Citizens' Rights and Constitutional Affairs

THE IMPLEMENTATION OF THE NOTION OF "COMMERCIAL SCALE" VERSUS "PRIVATE USE" IN THE FRAMEWORK OF DIRECTIVE 2004/48/EC: THE CONSUMER PERSPECTIVE

Workshop on the state of implementation of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights in the Member States
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Directorate-General Internal Policies
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The implementation of the notion of "commercial scale" versus "private use" in the framework of Directive 2004/48/EC: the consumer perspective

SPEAKING NOTE

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1. Introduction

BEUC, the European Consumers' Organisation, is the representative organisation of around 40 independent national consumer organisations from countries of the EU, EEA and other European countries and works to promote the interests of consumers in Europe.

The NCC is a long standing member of BEUC. Our role is to make a practical difference to the lives of consumers. We do this through research, policy analysis, and working with others who can make change happen. We have a particular remit to represent the interests of disadvantaged consumers.

Both organisations have worked for a number of years on a wide range of intellectual property issues. These have included: design rights and car spare parts; trade marks and parallel imports; pharmaceutical and software patents; and a wide range of copyright issues.

The role of intellectual property

Our approach to intellectual property law is to achieve balance. On the one hand, protection of intellectual property confers monopoly privileges, restricting competition, including innovation that builds on past creativity, and imposing costs on consumers. On the other hand, consumers have an interest in ensuring that innovation is encouraged and creators receive a fair return. IP law needs to provide a fair balance between these two – too much or too little IP protection will lead to a loss of economic welfare.

In recent years it has become clear that this balance is not being achieved. In all areas of IP there has been an extension of both the scope and term of IP rights and the interests of consumers have been eroded.
This lack of balance is clearly visable in the Intellectual Property Rights Enforcement Directive (2004/48/EC).

2. The Directive on the Enforcement of IP

Our main concern with the Directive is the conflation (or purposeful confusion) of consumers with organised counterfeiting operations and so the risk of disproportionate penalties for individual citizens. This results from the broad scope of the directive and the failure to clarify and define the term "commercial scale".

Broad scope

The Directive states that "the measures, procedures and remedies provided for …….shall apply….to any infringement of intellectual property rights…" (Article 2)

The Directive does not provide clear guidance on the scope of intellectual property rights that enforcement measures are to be directed towards (even though there is some variance across EU member states on this). By not doing so the Directive implies that all claimed infringements are as serious as each other, hence the supply of dangerous counterfeit medicines is as serious as a teenager downloading music files without clearance from the copyright holder.

Commercial scale

The problem is that the definition of 'commercial scale' is not set out, and does not explicitly require financial benefits, profit or a commercial motive for activities to be identified as taking place on a 'commercial scale'.

Although the final Directive pulled back from the criminalisation of private infringement of IP rights (after representations by a number of member governments and advocacy groups), by not firmly excluding non-commercial practices from the scope of the Directive it has raised the prospect of disproportionate and unjust sanctions being levelled against individual consumers in the EU.

Fair use/exceptions and exclusions/chilling effect

In addition, the Directive did not provide a clear statement regarding the protection of consumer interests that exist in IP law (eg. fair dealing/fair use, educational and research uses) to balance the enforcement of private intellectual property rights. There is a brief reference to exceptions in article 2.2 "this Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in community legislation concerning copyright and rights related to copyright…" but then the Directive goes on to deal solely with IP rights enforcement. There is a risk that this imbalance may have a significant negative impact on how exceptions and limitations are exercised. There may be a "chilling" effect on usage with consumers being scared away from legitimate users.

3. The notion of commercial scale, TRIPS and IPRED2

TRIPs

The term “commercial scale” comes from the World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) where it is also undefined. However, the way it appears in the text offers some clues to the intentions of negotiators.

Where it appears it is always linked to the word “wilful”:

“…..wilful trademark counterfeiting or copyright piracy on a commercial scale”
“…committed wilfully and on a commercial scale”
(Article 61)

This clearly implies a deliberate act but leaves unclear whether “scale” relates to motive or volume or both.

However, in the de minimis provisions for import seizures (much of the enforcement chapter of TRIPS is about border measures) the phrase “non-commercial nature” is used which does suggest commercial motive. (Article 60)

Also TRIPs was negotiated in the late 1980s and early 1990s – in the pre-internet era – when opportunities for consumer copyright infringement were limited. It seems highly likely that negotiators were concerned with commercial for profit counterfeiting and piracy operations.

Yet the Directive, which went through the legislative process a decade later, failed to provide a definition of “commercial scale” or even include the qualifications that exist in the TRIPS agreement.

IPRED2

Attempts were made to define “commercial scale” during the legislative process for the Directive on Criminal Measures aimed at ensuring the Enforcement of Intellectual Property Rights (IPRED2) but the outcome was not entirely satisfactory. Although the European Parliament clearly wanted to avoid making criminals out of children and average consumers the amendments passed to achieve this were not well drafted leaving scope for ambiguity. A clearer amendment was tabled:

“…for the purpose of this directive “on a commercial scale” means a large number of repeated infringements committed in ;pursuit of a direct pecuniary gain, excluding in particular any act carried out by a private person not intended to earn a profit”

This would have defined commercial scale in a proportionate way but unfortunately it was not adopted by parliament.

4. The state of implementation

The transposition deadline was 29 April 2006. Many member states were late in implementing the Directive and some member states have still not implemented it. This means that there has been a lack of time to develop case law.
The Commission is required to report on implementation in 2009 (3 yrs after 29.4.06).
It is too early to assess its impact on consumers – but it is clear that some problems and inconsistencies have arisen.

Germany

There have been real problems with implementing the term "commercial scale" as it did not previously exist in German case law and there has been considerable debate about how to integrate it.

France

The directive was implemented in October 2007 without the phrase "commercial scale" on the grounds that it was ambiguous and was likely to lead to a lot of litigation. The Courts have been left to access scope. IPRED1 has meant little change for French consumers who can face heavy penalties.

UK

The Directive led to very little change to UK law, indeed it introduces the so called "Anton Pillar" measures which were already available to rights holders in the UK. The term "commercial scale" has been included in the implementation legislation but it is too early to say what impact, if any, IPRED1 has had. Consumers have very limited fair use rights under UK copyright law and can face stiff financial penalties. The British Phonographic Industry (BPI) launched around 140 cases against consumers sharing music online in 2004 and 2005. Most of these were settled out of court so we do not know the sums of money involved. For those that went to Court penalties of between £1,500 and £5,000 were imposed.

Spain

A recent case (November 07) in Cantebria suggests that the notion of "commercial scale" implies commercial motive. There has been a judgement in favour of a consumer charged in connection with downloading music. The two main points of the judgement were:

- Downloading music through P2P systems is not a crime if there is no lucrative intention
- Penalising this kind of practice would involve the criminalisation of a behaviour which is socially accepted and very common, whose aim is not obtaining illegal profits but to make copies for private use.

An appeal has been lodged. If the appeal is successful the consumer will face heavy penalties including a 2 year prison sentence plus a large (Euro 7,200) fine and even larger civil compensation payments.

5. Some lessons

It is too early to fully assess the impact of the directive but some lessons are already apparent.

Adopting terminology from a trade agreement without clarifying the definition or assessing its fit with the legal systems of the member states is problematic.

The way trade agreements are negotiated and agreed always runs the risk of imprecise drafting. Agreements are often reached after long hours of negotiations when negotiators are tired. They generally involve complex trade offs, not only between the terms of a particular agreement (in this case TRIPS), but also between agreements which are also very sensitive such as agriculture or trade in services. Imprecision can result from error or as a way of achieving agreement. Contrast this with the way legal texts are agreed in the European Parliament (and national parliaments) where texts are subject to detailed scrutiny and amendments proposed and voted on. Whilst the latter may not lead to perfect results (as both IPRED1 and IPRED show) it is likely to lead to better results than trade negotiations.

Attempting to harmonise IP enforcement law when IP law is not harmonised and member state legal systems differ is problematic.

It is clear from the member state examples above that consistent interpretation and implementation when the underlining rights of IP rights holders and consumers differ is unlikely to be achieved.

Applying the same enforcement approach to organised criminal counterfeiting organisations operating for profit and to consumers infringing activities is disproportionate and an inappropriate response to P2P file sharing. New business models are needed.

The digital revolution poses huge opportunities and challenges for consumers and providers. While consumers have been actively engaging with the technology and what they can do with it, it is disappointing that many producers and owners of content in the creative industry sector have seen the technology as a threat rather than a business opportunity. Too much attention has been placed on stopping consumers – on enforcing copyright law through taking individual consumers to court, digital rights management, or proposals for broadband disconnection – the so called “graduated response” or “3 strikes and you are out”. Too little attention has been paid to developing new business models to respond to a very clearly expressed consumer demand.

Recent research into the music consumption of young people in the UK (*Music Experience and Behaviour in Young People, British Music Rights and University of Hertfordshire, Spring 2008,* www.bmr.org) provides important insights into the way young people today engage with music. The study found that music plays a very important role in consumer's lives but there is a hierarchy of value to their music consumption. Live music is top of this hierarchy – accounting for 60 percent of their music budget. CDs of their favourite artists come next, followed by ownership of digital files and finally access to a large range of music for experimentation, copying, sharing and recommending to others.

Whilst wide access for experimenting and sharing is at the bottom of the hierarchy it still has value for consumers. The survey found that 80 per cent of those who admit to illicit file-sharing are prepared to engage with a legal file-sharing service, and place a considerable monetary value to it. This suggests that new business models offering consumers the ability to try-out, swap and recommend music legitimately, at the right price, would be attractive to consumers.

So called "education" and enforcement action on their own, or pursued before legitimate "sharing" offerings are available, won't be effective. It will merely drive illicit file-sharing further underground with greater use of encryption and IP masking etc.

The creative community, consumers and indeed Internet Service Providers all need new business models.