

## **Advisory Committee on Enforcement**

### **Ninth Session**

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PREVENTIVE ACTIONS BEING DEVELOPED BY THE EUROPEAN COMMISSION TO COMPLEMENT ONGOING ENFORCEMENT MEASURES WITH A VIEW TO REDUCING THE SIZE OF THE MARKET FOR PIRATED OR COUNTERFEIT GOODS.

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### **I. INTRODUCTION**

1. The European Commission's (the Commission) key objective in the field of intellectual property (IP) policy is to optimise the incentives for innovation and, by so doing, maximize growth and job creation. As far as the IP enforcement policy is concerned it meets this objective by applying the so-called "follow the money approach". The Commission's aim is to focus on and discourage commercial scale IP infringing activity that undermines returns to investment and fiscal revenues, as this relies on grey economy work often associated with social exploitation and stifles growth and job creation.

2. In that respect, since 2011 the Commission's approach to IP enforcement within the Internal Market can be summarized under five pillars:

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\* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

- First, the collation of databases and development of economic models and procedures to better track and evaluate the societal costs of IP infringing activities so that IP enforcement policy can be as targeted and as effective as possible;
- Second, the Commission's services with the Member States seek to make all parties aware of the scale of the problem in order to incite all stakeholders to play their role in reducing the societal costs that result from it;
- Third, the Commission seeks to ensure a smooth functioning, harmonised, effective, proportionate and non-abusive civil redress framework;
- Fourth, the Commission seeks to incentivise the development of pro-active and inclusive voluntary agreements between stakeholders to prevent the development and spread of commercial scale IP infringing activities. These are based on best-practice that the Commission seeks to identify both within its own and other markets;
- Finally, the Commission seeks to assist national enforcement authorities to share best practice across the Internal Market.

3. To meet these tasks we rely on the European Observatory on Infringements of Intellectual Property Rights (the Observatory) that is based in the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM). The Commission established the Observatory formally two years ago<sup>1</sup> to provide it with the objective data and technical support to develop our policies.

4. Today's session at the WIPO Advisory Committee on Enforcement (ACE) provides an opportunity to further explain the Commission's existing and planned initiatives under the fourth pillar mentioned above. However, it must first be underlined that the five pillars are neither substitutes nor complements but that they are mutually dependent. All five have to be developed simultaneously in order to achieve the Commission's IP enforcement objectives. The "voluntary" mechanisms described below would not be feasible were it not for our harmonised civil redress system that imposes due diligence on all intermediaries throughout the relevant IP value-added chains. Likewise, unless we can make all stakeholders aware of the actual societal costs of IP infringing activities, they will not engage in the preventive measures we are beginning to develop. Last and not least we need objective data to establish those societal costs and that is not proving to be an easy task when industry is fearful to provide the relevant data because of the impact they might have on stock market evaluations.

5. It is also important to stress that we do not see this policy in a European vacuum, the internet crosses all borders and the spread of ICT has permitted many if not all IP product supply chains to extend beyond European borders. It follows that, if our IP enforcement policy is to be successful in meeting its objectives, we must convince our trading partners to engage with us in applying and developing it. We would therefore wish to thank the WIPO for inviting us to present our policies in this field.

## **II. UPSTREAM AND DOWNSTREAM "DUE DILIGENCE" INITIATIVES**

6. As regards the fourth pillar which is the focus of this session, we can divide this set of "cooperation agreements" into two further subsets:

7. The first set seeks to prevent IP infringing products from entering the market and requires the participation of all actors in the upstream part of the IP product value-added chain. This can

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<sup>1</sup> [http://ec.europa.eu/internal\\_market/ipenforcement/docs/observatory/20120419-ohim-regulation\\_en.pdf](http://ec.europa.eu/internal_market/ipenforcement/docs/observatory/20120419-ohim-regulation_en.pdf)

range from the supplier to the brand owner, from the artist or songwriter to the record company, from the inventor to the commercialising company or from the freelance journalist to the news publisher.

8. The second set seeks to prevent infringers from making money downstream in the IP product value-added chain by reducing the level of profits that can be made from either selling IP infringing products and/or making revenue from their distribution via advertising.

9. Both strands of voluntary approaches depend on all the stakeholders in the relevant part of the value-added chain applying due diligence in their contracts and commercial agreements. That includes the rights-holders themselves. The scheme's successes in reducing the supply of and promotion of IP infringing products also crucially relies on the extent to which consumers/citizens "buy in" to the process. If the latter are not convinced of the added societal value of an IP based product compared to its IP infringing counterpart, then such voluntary approaches, which have costs associated with their implementation, are unlikely to diffuse and succeed.

### **III. DOWNSTREAM: THE DIFFUSION OF SUPPLY-CHAIN AUDITING WITH TRACK AND TRACING SYSTEMS TO STIFLE THE SUPPLY OF IP INFRINGING PRODUCTS**

10. The Commission's services intend to hold two workshops later this year on track and trace systems and supply chain auditing to determine best practice in the application of these systems to reduce IP infringing products from entering markets. The intention is not to oblige rights-holders and their suppliers, employees or contractors to integrate such systems into their business models but rather to incite them to do so by showing them the economic benefits that can result. From the outset we shall invite civil society groups and NGOs to participate in the process.

11. The aim is to ensure that rights-holders apply "Know your supplier/ensure fair contractual terms" principles when relying on a supplier, artist, journalist *etc.* to develop their IP dependent products. Moreover, we would wish to encourage such due diligence to be applied throughout the relevant chain so that it stretches to what are often termed as, second, third or fourth tier suppliers.

12. It seems logical for the policy-maker to assume that any rights-holder promoting a "quality" image in the European Union should, through joint co-operation with his or her suppliers and employees, be able to demonstrate that "quality" throughout its business operations. This makes good business sense. Strategies of brand protection by any business that invests in promoting its quality image depends on such practices.

13. Furthermore, we believe (and will verify with the help of the European Observatory's work on IP perception<sup>2</sup>) that European citizens respond positively to such supply chain auditing. The continuing and growing success of audited "fair trade" labelled consumer products within our Internal Market provides for this optimistic outlook. The positive consumer response to these fair trade audited fast moving consumer products suggests that consumers would warm to such auditing being generalised to all "value" branded products and therefore all IP dependent products.

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<sup>2</sup> The Observatory has recently published a study setting out the results of a pan-European survey on this issue: [https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/25-11-2013/european\\_public\\_opinion\\_study\\_web.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf)

14. Obviously, there are costs involved and these are not minimal, but by (i) seeking out best practice on how such costs can be attributed in a proportionate manner across the actors in the supply chain; (ii) involving social and ethical auditors from the outset to ensure best practice and (iii) informing rights-holders and investors of the opportunities, it should be possible to develop the market for such services in such a manner that all rights-holders, large or small, could adopt such practices. Furthermore, by ensuring that consumers, citizens and civil society representatives are clearly informed of the source, quality and societal value of the products that they can access or purchase, we believe that demand for IP infringing products found in the opaque, grey or black markets will be reduced.

15. It is important to stress that the aim is not so much “protection” but “inclusion”. For example, we believe that social exploitation in illicit grey or black economy businesses in the EU as well as in third countries (at below statutory or recognized living wages) should not be associated with IP based products sold in the EU market. Likewise, abusive contractual terms imposed on a supplier in Europe or in a third country are an invitation to the development of a market for IP infringing products. Or again, rights-holders and the IP community will have little credence if their rights-holding employees or contracted artists complain of abuse of their IPR and unfair terms of remuneration.

16. It is clear that such a move to systematic supply chain auditing and track and tracing to avoid infringing products from entering supply chains is a major challenge that can only be achieved through cooperation at international level. The European Commission’s services therefore wish to reach out to third countries interested in such a project and invite them to contact us so that we can consider how to develop such programmes jointly.

#### **IV. UPSTREAM: MEMORANDA OF UNDERSTANDING BETWEEN RIGHTS-HOLDERS AND DISTRIBUTION AND PAYMENT SERVICE PROVIDERS TO CHOKER THE MONETARY RETURNS OF COMMERCIAL-SCALE IP INFRINGERS**

17. Once IP infringing products are made available and can be promoted or sold to compete against genuine qualitative and innovative IP dependent goods and services, licit businesses need to work together to ensure that the promotion and sales of such IP infringing goods are limited.

18. As in the case of supply chain auditing, there should be a joint interest in doing this. The rights-holders will benefit from lower levels of unfair competition if such cooperation works and the service providers’ reputations for safeguarding their customers’ interests will be enhanced. Online or off-line retailers associated with forwarding IP infringing products will eventually lose their customer base and the same is true for a payment service provider who allows for a payment to be executed without any check on the authenticity of the trader.

19. The Commission’s services are seeking to encourage the drawing up of Memoranda of Understanding with clear principles on the basis of which signatories can put in place anti-IP infringing strategies. The first such agreement was brokered by the Commission in May 2011. A substantial number of internet platforms, brand owners and trade associations signed a Memorandum of Understanding on the sale of counterfeit goods via the Internet (MoU). This MoU established a code of practice in the fight against the sale of counterfeit goods over the internet and enhanced collaboration between its signatories. It covers leading e-commerce platforms as well as major brands in the field of fast moving consumer goods, consumer electronics, fashion, luxury goods, sports goods, film, software, games and toys, all operating at both a global and regional level.

20. The MoU promotes trust in the online market place by providing for detailed measures against online offers of counterfeit goods as well as enhanced protection of consumers who

unintentionally buy a fake. Unfortunately, consumer associations have still to become signatories; this demonstrates how consumer groups and certain civil society organizations remain sceptical on the value of IP dependent products as compared to IP infringing counterparts<sup>3</sup>.

21. The MoU covers: (i) Notice and Take Down procedures for online offers which are likely to be infringing; (ii) Preventive and Pro-Active measures by the platforms to remove prior to publication offers of obvious infringing goods; (iii) and Commitments to exchange information so as to act against repeat infringers.

22. On 18 April 2013, the Commission adopted a Report (COM (2013) 209 final) on the functioning of the Memorandum of Understanding on the sale of counterfeit goods via the internet, which showed that it has been effective. Work is currently progressing to encourage consumer bodies to join the MoU and to set out clear key performance indicators to be able to monitor more accurately the impact of the MoU on trends in online counterfeit provision.

23. The Commission wishes to build on this first pilot and has launched discussions with stakeholders involved in the online advertising services industry to determine whether a similar MoU could not be developed between these advertising intermediaries, rights-holders and online media service suppliers. The aim would be to reduce the quantity of advertising on on-line sites that are recognized as being involved in the distribution of commercial scale IP infringing services. Given that online advertising is increasingly bought on a “blind” basis i.e. seeking consumer rather than media profiles, this will be a major challenge.

24. However, rights-holders can be the main drivers of the success or failure of this project given that they are the main advertisers themselves. It is in the interest of any brand owner to know where his advertising money is being spent and it would seem logical that major brands would not be interested in finding themselves promoting and financing sites whose primary purpose is to derive profit by distributing IP infringing products. Not to put too fine a point on this, evidence that is currently available showing such advertising placement errors suggests that brand owners are currently shooting themselves in the foot on this issue.

25. The Commission’s services will also start discussing with payment service providers how they could assist in preventing the fulfilment of payments to IP infringers operating such sites.

26. For the present, the Commission has focussed its work on the issue of online markets but in future we will seek to extend these discussions so as to fully encompass all market players whether on or off-line.

27. For the online MoUs, since websites are accessible across all borders and commercial scale infringers are very footloose, the effectiveness of such MoUs requires their international extension. With that in mind the Commission is interested in discussing these initiatives with our trading partners to consider how they could be extended to cover third countries.

## **V. CONCLUSION**

28. The European Commission is seeking to develop a balanced and effective IP enforcement policy that maximizes the societal value that can be generated from the IP value-added chain. The aim is to develop an “inclusive” approach to IP enforcement that involves all stakeholders voluntarily applying “due diligence” against the development of commercial scale infringing activities.

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<sup>3</sup> The recent report on the significance of IP intensive sectors in the EU economy represents a first step in providing the objective data that these representative bodies are asking for.

29. This inclusive approach will, in principle, ensure that the resulting IP enforcement policy is balanced and fully accounts for the societal values shared by all stakeholders. It is also an approach that can be extended at the international level and, in the increasingly interconnected world that we live in, probably has to be international in order to be successful.

30. The Commission is keen to discuss these issues with our trading partners both within the forum of ACE and bi-laterally.

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