

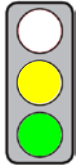
ACTION PLAN ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

cepPolicyBrief No. 2015-04

KEY ISSUES

Objective of the Communication: The enforcement of intellectual property rights is to be improved.

Affected parties: Companies, citizens and authorities.



Pro: (1) Due diligence obligations for monitoring supply chains may reduce the import of products which infringe intellectual property rights.

(2) Agreements between rights holders and advertising and payment service providers aimed at blocking their services to providers of unlawful content, as well as a mandatory chargeback scheme, may reduce the number of IP infringements on the internet.

Contra: Applying due diligence to the supply chain increases the bureaucratic burden on companies and is therefore only advisable in exceptional cases.

CONTENT

Title

Communication COM(2014) 392 of 1 July 2014: Towards a renewed consensus on the **enforcement of Intellectual Property Rights: An EU Action Plan**

Brief Summary

► Context and objectives

- Intellectual property rights ensure that companies, inventors and creators are able to obtain a return on their investment, inventions and work. Intellectual property rights include, in particular, industrial property rights such as patents, trademarks and utility models as well as copyrights.
- 39% of EU GDP is generated in sectors which use a greater than average number of intellectual property rights per employee ("IPR-intensive sectors") (p. 1).
- 35% of employees in the EU work directly or indirectly in IPR-intensive sectors.
- The Commission, together with the "European Observatory on Infringements of Intellectual Property Rights", is planning ten non-legislative measures to prevent commercial scale infringements of intellectual property rights. The Observatory is part of the Office for Harmonization in the Internal Market (OHIM) and develops instruments and procedures to protect intellectual property rights.
- The ten measures will prevent IP-infringing products from getting onto the market and thereby create incentives for investment, growth and employment in IPR-intensive sectors.

► Action 1: Raising public awareness

- Citizens – particularly young people – are not always aware of the damage caused by commercial scale infringements of intellectual property rights.
- The Commission wants to support national publicity campaigns aimed at informing the public about
 - the economic damage caused by commercial scale infringements of intellectual property rights,
 - risks to health and safety as a result of fake products,
 - the advantages of IP-respecting products and
 - access to IP-respecting products.

► Action 2: Due diligence obligations for all stakeholders in the supply chain

- Consumers are becoming increasingly conscious of the ethical performance of companies. IPR-intensive companies can therefore improve their reputation among consumers by carrying out systematic audits of their supply chain thereby reducing the risk of IP infringements.
- The Commission wants to look into special due diligence obligations for IPR-intensive sectors when auditing their supply chains and introduce these obligations – initially on a voluntary basis.
- The Commission wants to publish a report on how technical innovations can help to identify fake products.

► **Action 3: Depriving infringers of revenue**

- To combat unlawful activities, the Commission supports voluntary agreements ("MoU", "Memoranda of Understanding") between rights holders and (p. 6)
 - "advertising service providers",
 - "payment service provider" and
 - shippers.The MoUs will help to keep IP-infringing products off the Internet.
- The MoU signed in 2011 by the operators of internet platforms and brand manufacturers will serve as a model.

► **Actions 4 and 5: Assisting small and medium-sized enterprises to enforce their rights**

- Small and medium-sized enterprises (SMEs) often fail to enforce their intellectual property rights due to the high cost of litigation. Some Member States are seeking to reduce this problem by
 - "improved" conditions and special funds e.g. for litigation insurance or
 - simplified small claims procedures.
- The Commission wants to examine which of these measures could provide a model for EU-wide measures. The result of the examination will be published in a Green Paper. In conjunction with the Green Paper, the Commission will hold a consultation about the need for EU action.
- The Commission wants to examine whether the Directive on the enforcement of intellectual property rights [2004/48/EC] meets the needs of SMEs.

► **Action 6: Reimbursement of payments for fake products**

- Certain credit and debit card providers offer consumers the possibility of cancelling unintentional purchases of fake products and reimburse payments ("chargeback schemes") (p. 8). In some Member States, these schemes are mandatory.
- The Commission will publish a Green Paper in conjunction with a consultation on chargeback and similar schemes. On the basis of the consultation results, the Commission will decide on concrete EU measures.

► **Action 7: Enhanced cooperation between national authorities**

- The EU Customs Action Plan 2013-2017 (2013/C 80/01) will address, in particular, the supply of IP-infringing goods from non-EU countries, bought over the internet. This requires greater cross-authority cooperation between Member States.
- In 2015, the Commission will invite representatives from customs, police and judicial authorities in the Member States to a conference aimed at enhancing cooperation.
- The Commission will set up an Expert Group - made up of representatives from national authorities - in order to improve the sharing of best practice for protecting intellectual property.
- In the context of negotiations on free trade agreements, the EU aims to obtain commitments from non-EU states to achieve better protection of intellectual property rights. This will facilitate trade with IPR-intensive products.

► **Action 8: Training programmes**

- Training of national authorities in relation to IP-infringing activities largely takes place at national level. The Commission will support the Observatory in the development of standard EU sectoral training programmes for authorities.
- The Commission will also support training programmes for judges and legal practitioners.

► **Action 9: Screening public procurement contracts for IP-infringing products**

- The Commission will assess the scale of the problem of IP-infringing products in relation to public contracts in the medical sector.
- The Commission will publish a guide recommending how contracting authorities can avoid purchasing IP-infringing products.

► **Action 10: Better monitoring and targeting of the protection of intellectual property rights**

- The Commission wants to identify the sectors where investment, economic growth, creativity and consumer protection suffer most from IP-infringements.
- The Observatory will develop a case-law database for IP infringements.
- The Commission wants to publish a report every two years on the economic impact of EU policy in the field of intellectual property.

Policy Context

In parallel to the Action Plan, the Commission has submitted a strategy for the protection and enforcement of intellectual property rights in third countries [COM(2014) 389]. In addition, between December 2013 and March 2014, it held a consultation on a revision of EU copyright law, the results of which were published in July 2014.

Options for Influencing the Political Process

Directorates General:	DG Internal Market and Services
Committees of the European Parliament:	Legal Affairs (leading), Rapporteur: Pavel Svoboda (EPP Group, CZ); Industry, Research and Energy; Internal Market and Consumer Protection; Culture and Education; Civil Liberties, Justice and Home Affairs
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Legal Affairs and Consumer Protection (leading); Economy and Energy; Culture and Media; Digital Agenda

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The infringement of intellectual property rights decreases the revenue which rights holders can gain from their intellectual property. The incentive to create new intellectual property is thereby reduced. This results in less innovation giving rise to a smaller range of products and hindering job creation. Greater efforts to combat IP-infringing products – including non-legislative measures – are therefore appropriate for promoting growth and employment in the EU.

By comparison with legislative measures, non-legislative measures have the advantage of being quick to implement. However, their effectiveness depends on the willingness of those involved to cooperate.

The most important measures can be evaluated as follows:

Action 1: Publicity campaigns informing young people in particular of the economic consequences and health risks of IP-infringing products may help to reduce the demand for such products. The extent to which the success exceeds the costs of such a campaign depends on the individual case.

Action 2: Special **due diligence obligations for monitoring the supply chain may reduce the import of illegal products but also increase – possibly significantly – the bureaucratic burden** on companies. As the Commission also points out, this is borne out by experience such as that gained from the due diligence obligations on EU timber importers. It includes, in particular, traceability along the entire supply chain. In addition, timber importers have to use a risk assessment procedure so they can identify illegally harvested timber and, where necessary, remedy the situation. **On this basis, such strict due diligence obligations are only appropriate in exceptional cases.**

Where such due diligence obligations are introduced for individual IPR-intensive sectors, working towards voluntary commitments by affected companies will not be sufficient because it is unlikely that the ethical awareness which the Commission believes consumers now have, will be enough to make companies enter into voluntary commitments. **Legislation will therefore be unavoidable.**

Action 3: **Agreements between rights holders and advertising and payment service providers aimed at blocking their services to providers of unlawful content** – such as on illegal download and streaming portals – impede the activities of such providers and thus **reduce the number of IP infringements on the internet**. In this regard, the MoU signed in 2011 by brand manufacturers and operators of internet platforms will – as the Commission suggests – provide a model which could significantly reduce IP infringements on the internet. Thus numerous sellers had their accounts blocked as a result of the MoU because they were offering fake products.

Actions 4 and 5: Litigation insurance for patent disputes is unattractive to SMEs in particular due to the high premiums and low insurance sums. A recommendation by the Commission or a legislative measure making it mandatory to attempt to reach an out-of-court settlement prior to court proceedings would promote out-of-court settlements in patent disputes. This would reduce the cost of litigation insurance for patent disputes. Since many patent disputes have a cross-border element, the cost of litigation insurance would only fall noticeably if such a requirement were imposed EU-wide.

Action 6: As a result of the chargeback scheme, traders who sell fake products lose their income. In addition, in the event of an excessive chargeback quota, they will be at risk of cancellation by the bank responsible for their credit card transactions. **A mandatory chargeback** in the case of an unintentional purchase of fake products **may therefore reduce the number of fake products on the internet.**

Legal Assessment

Legislative Competency

Unproblematic. The Commission can propose non-binding measures (Art. 17 TEU). Some of the measures clarify the responsibilities which have been assigned to the Office for Harmonization in the Internal Market (OHIM) in the OHIM Regulation [Regulation (EU) No. 386/2012].

With regard to possible legislative follow-up measures, the competency to adopt measures for the approximation of laws in the internal market (Art. 114 TFEU) and the competency to protect intellectual property rights (Art. 118 TFEU) would be particularly suitable.

Subsidiarity

Unproblematic. The infringement of intellectual property rights often occurs across borders, particularly in the case of fake products sold over the internet.

Proportionality with Respect to Member States

Unproblematic. In particular it is proportionate for the EU initially to propagate voluntary regulations, e.g. as in the case of due diligence obligations for monitoring the supply chain.

Conclusion

Due diligence obligations for monitoring the supply chain may reduce the import of illegal products but also increase – possibly significantly – the bureaucratic burden; on this basis, they are only appropriate in exceptional cases. Where due diligence obligations are introduced, legislation will be unavoidable. Agreements between rights holders and advertising and payment service providers aimed at blocking their services to providers of unlawful content, as well as a mandatory chargeback scheme, may reduce the number of IP infringements on the internet.