

Roundtable: the enforcement of IP rights in Europe

In the context of the EC's new action plan and strategy

The EC's action plan on the enforcement of IP rights

On 1 July 2014 the European Commission launched a 10 point action plan to improve the enforcement of intellectual property rights in the EU (http://ec.europa.eu/internal_market/ipr/enforcement/action-plan/index_en.htm). This is a clear recognition by the EC of the fundamental importance of improving enforcement, which should not be overshadowed by current proposals to amend underlying IP rights.

The EC's press release describes the plan as taking a 'follow the money' approach, with the aim of 'depriving commercial-scale infringers of their revenue flows' rather than penalising individuals. Of course targeting the larger scale infringements may be expected to provide more 'bang for buck' and be less contentious. The plan focuses on: i. increased cooperation/communication at all levels of the distribution chain, including the sharing of best practices between Member States; ii. encouraging rightsholders and distributors to improve their due diligence procedures to better catch infringements throughout the distribution chain; and iii. education of consumers around the negative impact of infringements/counterfeits.

The first two points will undoubtedly help to tackle those commercial-scale infringements. The third aim, of consumer education, is likely to have a broader impact on all infringements of IP. A better informed public should be less likely to invest in counterfeit goods which can damage not only the economy and legitimate businesses, but also consumers themselves through defective or unsafe products. In this way if the EC's action points are effective then they may help to address enforcement at the small and large/commercial scale. However, the immediate and longer term results will no doubt depend on how these points are implemented.

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IP strategy and the Italian perspective

The EC is calling for new initiatives at international level to face the new challenges posed by the globalisation of markets and the development of the web economy, with the aim of harmonising and better protecting and enforcing IP rights.

There is nothing new in terms of the possible action to be taken, mainly represented by new rules in international trade agreements and support in emerging economies, but IP rights are being increasingly and widely breached all over the world and something needs to be done. From an Italian perspective, this situation undermines the sustainable development of the 'Made in Italy' industry. This is particularly the case when considering the following factors: 1. Italy's high labour costs; 2. Entrepreneurship is mainly carried out by small and medium sized companies excelling in a number of highly specialised

sectors; 3. Many Italian companies have undergone a process of internationalisation by delocalising production and creating local joint ventures in many emerging economies and subsequently selling their products in these countries; 4. SMEs are less equipped than multinational companies to protect IP rights outside Europe. That is why, amongst the measures identified by the EC, I have the view that establishing a stronger relationship between the EC, Member States and EU business to directly support economic operators in overcoming concrete difficulties on IP issues and creating local IP rights helpdesks represent the most immediate suggestions to be taken into consideration.

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The notion of 'commercial scale'

In the EU IP rights are a highly contentious issue. Since the late 1980s almost all EC proposals to regulate various aspects of IP rights have been met with resistance from NGOs and other interest groups. One issue that continuously comes up is the question of whether or not and/or where the regulation of IP claims should differentiate between individual and commercial potentially infringing activities.

IP maximalists see the term as an unnecessary limitation in fighting against counterfeiting and piracy. Groups critical of the current scope of IP rights on the other hand demand a more precise definition of commercial scale that explicitly excludes individual acts of unauthorised use of IP protected works without the intent of financial profit. Both sides interpret the definition provided in the EU Directive on the enforcement of intellectual property rights (2004/48/EC, IPRED1) - acts carried out for direct or indirect economic or commercial advantage - as a half-baked compromise. Delegated to the Directive's recitals outside the core legal text and using an equally vague terminology, it adds little to legal clarity and leaves much to the interpretation of courts and national lawmakers.

Thus, the conflict that started with debates about the implementation of TRIPS Article 61, and gained prominence in the conflict about IPRED1, continues to be a divisive issue in the current debate about the future of copyright in Europe. A solution for the conflict will have to account for the widespread practices of sharing digital content, not by criminalising user behaviour but more likely through some form of blanket compensation. IP enforcement could then focus on areas where a social consensus exists: That profits from the distribution of digital goods should benefit the creators of those goods.

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