

BEUC-L-2014-259/KRO/cs

17 September, 2014

RE: Enforcement of Intellectual Property Rights

Dear Attaché,

I write on behalf of The European Consumer Organisation (BEUC) to express our views on the enforcement of Intellectual Property Rights in light of the exchange of views taking place at the Working Party on Intellectual Property meeting, 18 September, 2014.

For a number of reasons, BEUC is strongly opposed to a revision of the Directive 2004/48 on enforcement of Intellectual Property Rights which results in an erosion of consumers' fundamental rights and establishing disproportionate enforcement mechanisms.

Evidence lacking that Directive 2004/48 needs revision

Contrary to what is stated in the Italian Presidency Paper, the responses to the public consultation on the review of the Directive 2004/48 demonstrated clear division of viewpoints. The European Commission has clearly stated that the feedback received from Member States on the implementation of the Directive on IPR Enforcement has been limited due to its late transposition and the small number of court cases.

Furthermore, the Commission has yet to carry out an assessment of the impact of the Directive on innovation and the development of the information society, as explicitly requested by Article 18 of the Directive. BEUC strongly believes that the adoption of stronger and more stringent rules for copyright enforcement in the online world would be detrimental to innovation.

Adopting stronger enforcement measures risks eroding public support for IPR in general

BEUC is concerned by the exclusive focus of the Presidency Paper on the adoption of stronger enforcement measures. The failure to distinguish between organised criminal entities infringing IPR for profit and individual users engaging in file-sharing for personal use, creates not only a problem of proportionality, but also an ethical problem.

With countless new opportunities arising from the ways in which content is accessed and distributed, the need to rethink the substantive European legal framework has arisen. This requires achieving a fair balance between the different stakeholders, promoting innovation and cultural diversity. Copyright law must balance the incentive to create with granting access to works.

From consumer point of view, the current copyright framework is far from balanced. A number of permitted uses of copyright-protected material are only allowed as exceptions and limitations to the copyright owners' exclusive rights. However, these exceptions and limitations are not absolute conditions and consumers often face unclear boundaries as to which acts are permitted under the current copyright legislation.

Disclosure of personal information

Article 3 of the Enforcement Directive refers to the principle of proportionality in the enforcement of intellectual property rights. The rights of content owners must be balanced with those of users, the latter includes fundamental rights to protection of personal data, to privacy and to the confidentiality of communications. The European Court of Justice has ruled that EU law does not oblige Member States to publicise personal details in order to guarantee effective protection of the author's rightsⁱ.

Identifying alleged infringers should only be permitted in line with the European Charter and all conditions in the IPR Enforcement Directive. We call on the Commission to identify all Member States failing to respect the safeguards and to launch infringement proceedings.

Personal information of online users must only be disclosed to public law enforcement authorities. Disclosure of users' information to third parties is incompatible with data protection rules. This includes IP addresses, both static and dynamic. These are personal data since a third party can easily discover the natural person using the IP address. This view is shared by both the European Data Protection Supervisor and the Article 29 Data Protection Working Group.

The concept of intermediaries and injunctions

BEUC is seriously concerned by Presidency's focus on the closer involvement of Internet Service Providers (ISPs) in the fight against IPR infringements as the recommended way forward.

BEUC considers the current rules on liability as outlined in the e-Commerce Directive and the Directive 2004/48 on IPR Enforcement to be proven as effective and should therefore be maintained. It is crucial to ensure the 'mere conduit' principle is safeguarded i.e. internet providers can only act upon specific orders by a court. A simple warning by a copyright owner that specific content is allegedly infringing copyright should never be considered conclusive evidence entailing the liability of the internet provider.

BEUC is opposed to a wide interpretation of the provision on injunctions which would require ISPs to monitor content and prevent infringements in the future. Such an extensive interpretation conflicts with the prohibition of general monitoring as outlined in Article 15 of the e-Commerce Directive²³ and should therefore be rejected.

Mandating the enforcement of copyright by private entities runs contrary to the fundamental right to an effective remedy and a fair trial. The Charter of Fundamental Rights of the European Union explicitly grants everyone the right to a fair and public hearing by an independent and impartial tribunalⁱⁱ. The European Court of Justice has explicitly affirmed the principle of effective judicial protection as a general principle of Community lawⁱⁱⁱ. The need to respect this principle becomes even more important in the context of IPR enforcement cases, which often involve complex legal analysis, making it impossible to ascertain *prima facie* the infringing character of copyright protected content.

The use of specific technologies, such as Deep Packet Inspection, whereby ISPs inspect every bit of information passing over their networks, also raises serious privacy concerns and runs contrary to the fundamental right to the confidentiality of communications.

We would welcome the opportunity to provide you with further information as necessary.

Yours faithfully,

Kostas Rossoglou
Senior Legal Officer

ⁱ Case C-275/06

ⁱⁱ Article 47 of the Charter of Fundamental Rights of the European Union.

ⁱⁱⁱ ECJ, 13 March 2007, Case C-432/05, UNIBET.