

A European directive on criminal measures aimed at ensuring the enforcement of IPrs: necessary or superfluous?

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Background

- » Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (“IPRED” or “IPRED1” or “Enforcement Directive”)
 - » Covers only civil “measures, procedures and remedies”
- » Commission made a proposal for a directive on criminal measures (COM 2005/276) and an amended proposal (COM 2006/168).
- » Proposal as such put on ice.
- » Commission has continued work on a criminal directive
 - » Study on a possible modified proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights CM 4399/09



Stronger enforcement – a megatrend

- » Stronger IP enforcement is a ”megatrend” in IP Law
 - » Floodgates opened after TRIPS (1994)
 - » IPRED (2004)
 - » ACTA (not ratified)
 - » IPRED2(?)
- » Is this megatrend justified?
 - » Evaluation of current system first, before new measures?
 - » Legal solutions are not the only solutions
 - » Is there really enough focus on better business models (especially as regards the Internet)?
 - » Spotify, Voddler etc.

Fundamental problem

- » Main problem: how to define counterfeiting and piracy?
 - » There is no agreement on how to define the concepts (and there never will?)
 - » All "intentional" infringements on a "commercial scale"?
 - » But doesn't all infringements of industrial property require already commercial scale (or similar)?
 - » Intention + commercial scale covers a very broad spectrum of infringements (e.g. B2B)
 - » Only infringements that endanger health or raise safety concerns?
 - » What about P2P networks (Pirate Bay etc.)?
- » If we could define counterfeiting and piracy in a way that covers *only* what *really* is counterfeiting and piracy we might not have this problem
- » But we do have a problem: all criminal directive proposals will (most likely) cover *too much*; also things that we intuitively never would characterize as criminal matters

IP infringements

- » Business-to-business infringements (B2B)
 - » Commonplace litigation between competitors in all fields of intellectual property
 - » Is always on a commercial scale
 - » Can be intentional
 - » Criminal directive would cover these... is this really the idea?
 - » Counterargument: Companies would not invoke criminal law.
 - » Legislation should not leave it to the parties to decide...
 - » Can in some cases be a case of piracy/counterfeiting (fake mobile phones, medicines etc.), but how to distinguish?
- » Business-to-consumer infringements (B2C)
 - » Private person infringes; when commercial scale? If strong lobby for criminal liability in cases of internet infringements, this requirement might not mean so much

Critique – Commission's role

- » Commission argues its case in a strange manner
 - » e.g. "minimum harmonisation" due to "differences" in criminal sanctions between member states. Criminals go to those countries where milder sanctions. Also increasing links to organized crime.
 - » The work by the commission should be much more analytical; what are the different types of infringements and what are the real needs
 - » Internet infringements vs fake medicines vs fake bags vs fake spare parts etc. etc.
 - » Is there really a need to include patent infringements?
 - » Is the purpose to criminally enforce patents against legitimate competitors?
 - » The Commission argues its case in a way that it will most likely not attract support from unbiased observers

Criminal law ultima ratio

- » Criminal law is a measure of last resort
 - » It should not be inflated to cover all kinds of infringements
 - » Not the purpose of criminal law
 - » Shouldn't it be the parties who pay the costs of litigation and pre-trial investigation and not the society?
 - » Should the police (who do not in general know IP law) get more resources? Are there not more important crimes to investigate? Is it fair that IP law is in focus (instead of something more serious)
- » Is the point of expanding criminal law, not the sanctions in themselves, but the competence of the police force to investigate crimes?
 - » At least in Finland there are still marked differences between civil investigations (although we have implemented IPRED) and criminal investigations.

- » The Commission proposals have thus far been
 - » Over-inclusive
 - » ”Member States shall ensure that all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences.”
 - » Possibly unproportional (in light of national law)
 - » ”maximum of at least 100 000 euro” for other than the most serious offenses.
 - » Unclear
 - » ”shall be available in appropriate cases”?
 - » cf. the requirement of clarity and exactness in national criminal law...

Conclusion

- » Much more analytical work needs to be done in order to know whether there really is a need for a criminal directive
- » Criminal law ultima ratio
 - » Only the most serious offences should be covered by a EU directive, if at all
 - » Health/safety
 - » Clear link to organized crime (“busting criminal organisations”)
- » If we could define piracy/counterfeiting, we might not have these problems
 - » Perhaps we should try to work on a definition?
- » Necessary or superfluous?
 - » Necessary: in some cases yes, possibly
 - » Superfluous: in most cases yes, possibly
 - » Problematic in most cases