

22 March 2011

Mr Alvydas Stancikas
Head of Enforcement of IPR Unit
DG Market
European Commission
Rue de la Loi 200
Brussels B-1049

Dear Mr Stancikas

European Commission report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights

Response by Consumer Focus

ID: 55973692370-21

Introduction

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal services) Northern Ireland. Our role is to represent the interests of consumers, particularly those who are disadvantaged. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus has been working on copyright and related issues for a number of years including through our predecessor organisation, the National Consumer Council. We want to see a digital economy characterised by competitive, dynamic and innovative markets to which consumers have meaningful access and in which they are empowered to make informed choices. And we want to see a copyright culture that supports this by striking a fair balance between creators, investors and consumers. We do not believe that a fair balance is currently being achieved due to an over-emphasis on intellectual property (IP) rights and enforcement of those rights and an under-emphasis on the consumer and public interest in access to knowledge, information and culture.

Consumer Focus welcomes the opportunity to respond to the European Commission's report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED). In our response we will concentrate on issues relating to copyright and the digital economy.

Evidence and impact assessment

The Commission clearly states that due to late transposition of the Directive in many Member States and, as a result limited experience of its application, it has not been possible to carry out an economic analysis of the impact of the Directive on innovation and the development of the information society, as required by Article 18. Despite this the Commission concludes that 'clarifications' to the Directive may be needed. We do not believe that such conclusions can be drawn on the basis of the evidence presented.

The report refers to certain studies of IP infringement but the selection is partial and there is no analysis of the many studies that have been undertaken which have often reached quite different conclusions about the impact of infringement. A recent literature review commissioned by Consumer Focus on the economic impact of copyright exceptions (in the context of the review of UK copyright law where exceptions are very limited) concluded that 'the economic evidence that format-shifting, parody and user-generated content cause any kind of economic damage to rights-holders simply does not exist'.¹

The European Observatory on Counterfeiting and Piracy, set up by the Commission to improve understanding on IPR infringements, is currently preparing a study on the development of a common methodology for assessing data on counterfeiting and piracy. It would seem sensible to await the outcome of this study before considering moves to clarify or revise the Directive.

There is also a need to analyse IPR infringement by the type of infringement and the type of entity doing the infringing. Without this it is not possible to identify the best solutions for particular problems. It is particularly important to distinguish between commercial operators and individual consumers. The Commission's report identifies that 'file-sharing of copyright-protected content has become ubiquitous, partly because the development of legal offers of digital content has not been able to keep up with demand, especially on a cross-border basis'.² It follows from this that removing barriers to the development of new business models, and encouraging a competitive and innovative market, have a very important role to play in combating infringements by individual consumers. A recent report by Consumer Focus on competition, copyright and collective rights management found many shortcomings in the way competition policy is applied in IP in the UK including a failure to apply European case law.³ We hope the Commission's forthcoming proposal on collective rights management will contribute to a more competitive market where new business models can flourish.

Finally it has to be recognised that copyright law is not fully harmonised in the EU and there are significant differences in Member States legal systems. It is not surprising, therefore, that the Commission has found differences in interpretation and practice in the Member States. In addition copyright law is very complex which causes difficulty in the national courts and inconsistencies in the case law. An analysis by Consumer Focus of proceedings against consumers in the UK for alleged copyright infringement through peer-to-peer file-sharing

¹ Mark Rogers, Joshua Tomalin and Ray Corrigan *The economic impact of consumer copyright exceptions: a literature review*, Consumer Focus, November 2010

² COM(2010) 779 final, Section 3.1

³ *Competition, copyright and collective rights management: a consultation on growth and innovation in the creative and digital technology industries*, Consumer Focus, January 2011

found instances where consumers had been charged with, and pleaded guilty to, the wrong charge.⁴ Changes to IPRED will not, on their own, bring greater clarity or consistency.

In our response to the European Commission's Creative Content reflection document we called on the Commission to undertake a review of private copying exceptions across Member States with a view to establishing a proposal for a harmonised non-commercial copying exception for consumers.⁵ This would provide greater consistency and could help restore the balance between rights and exceptions which, as the Commission's reflection document states 'is currently skewed by the fact that the harmonisation Directives mandate basic economic rights, but merely permit certain exceptions and limitations'.⁶

The Commission has not made a case for revising the IPR enforcement directive.

We comment below on some of the issues the Commission has raised.

Intermediaries and injunctions

Consumer Focus is very concerned about the Commission's approach to the role of intermediaries in its report. It is our view that the current rules on liability in the e-Commerce Directive and IPRED provide the correct approach and should not be changed. It is essential that the mere conduit principle is safeguarded and the principle that internet service providers can only act upon a specific court order. It is a good thing that 'the evidence required by the courts in Member States is generally rather high'.⁷

We would oppose a wide interpretation of the provision on injunctions which would require ISPs to monitor content and prevent infringements in the future. This conflicts with the prohibition of general monitoring in the e-Commerce Directive. It would increase the operating costs of ISPs. These additional costs would be passed on to consumers and could reduce access to broadband, which is recognised as an essential service, for low income consumers.

Information and data protection

Consumer Focus is also concerned by the Commission's approach to privacy and data protection rules and its apparent view that these essential rights of citizens and consumers are an obstacle to enforcement of intellectual property rights. It is our view that only law enforcement agencies should be given powers under EU and UK law to undertake lawful interception of communication and to obtain communications data retained by communication service providers.

Under no circumstances should communication service providers be allowed or required to retain data and release such data to private agents or companies. The rights of citizens and consumers not to have their communication intercepted by private agents or companies without their consent should be safeguarded. The European Data Protection Supervisor and

⁴ Consumer Focus response to the consultation on setting the value of claims heard in the Patents County Court, December 2010.

⁵ Consumer Focus response to the European Commission's Creative Content reflection document, January 2010

⁶ *Creative content in a European digital Single Market: challenges for the future*, a reflection document of DG INFSO and DG MARKT, October 2009

⁷ COM(2010) 779 final, Section 3.3 second paragraph

the Article 29 Data Protection Working Group have confirmed that IP addresses are personal data which should be protected.⁸

Damages

The principle for damages in the UK is to compensate the claimant for the damage, loss or injury they have suffered as a result of another's acts or omission. In its report the Commission suggests there should be a move away from this principle in the case of the infringement of IP rights and that punitive damages should be considered. We utterly oppose this suggestion which could have far reaching consequences for our legal system and that of other European countries.

Yours sincerely,



Jill Johnstone
Director International Policy Advocacy

⁸ See Consumer Focus response to Ofcom consultation on online infringement of copyright and the digital Economy Act 2010 draft initial obligations code, July 2010 and Consumer Focus response to the Home Office consultation on the Investigatory Powers Act 2000: proposed amendments affecting lawful interception, December 2010.