



The Consumer Voice in Europe

EU OBSERVATORY ON IPR INFRINGEMENTS

Public consultation
BEUC response

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Ref.: X/2012/048 - 06/07/2012

Summary

BEUC has identified eight priority actions to be undertaken by the Observatory on Infringements of Intellectual Property Rights:

- **Improving the understanding of the value of IPR to provide a balanced approach:** the current approach adopted by the European Commission and rights holders has failed to establish a balanced and fair framework between the rights of creators and those of consumers. Only in addressing the irrationalities within existing copyright laws such as exceptions and limitations, private copying levies, licensing and disproportionate enforcement measures, can the value of IPR for consumers and society increase;
- **Equal representation of all stakeholders:** including consumer associations, civil society and Data Protection Authorities;
- **A sector-specific approach** and distinction between different types of IPR infringement. Health and security concerns should not be used for the purpose of increasing political support for IPR protection;
- **The collection of objective and reliable data** accompanied by a suspension of the European Commission's work on the revision of the Community *acquis* in the field of IPR enforcement until a thorough assessment of the impacts of different types of IPR infringements;
- **An overall economic assessment** of online copyright infringements in accordance with the findings of a number of studies commissioned by governments, international organisations and academics;
- **Monitoring the development of business models for legal offers:** we do not condone copyright infringements, but we see them as symptomatic of the lack of legitimate offers of online content. Consumers are willing to pay for good and attractive legal alternatives. However, when looking at the current legal offers for music and audiovisual content across Europe, one can easily conclude that the offer remains poor in quantity and quality;
- **Developing an inventory of legal offers:** if legal offers are to be endorsed, consumers should become aware of their existence. The Observatory should develop an online guide of legal offers.
- **Consumer awareness:** public campaigns developed by rights holders and treating consumers as criminals have resulted in an erosion of public support for copyright in general. Consumer associations have experience in communicating with their constituencies and have a major role to play.

The European Consumer Organisation (BEUC) welcomes the opportunity to provide its views on the role and the priorities of the European Observatory on infringements of Intellectual Property Rights.

The establishment of the Observatory and its transfer to the Office for the Harmonisation of the Internal Market (OHIM), provides a central platform for the collection of data and the exchange of information on enforcement of Intellectual Property Rights between public authorities, private stakeholders and civil society.

BEUC is confident that the new structure as defined in Regulation 382/2012¹ will allow the Observatory to become an all-inclusive and transparent body which focuses on the real challenges stemming from the enforcement of Intellectual Property Rights.

However, the success of the Observatory will depend on its capacity to adopt a balanced and objective approach to carrying out the tasks entrusted to it.

BEUC has identified eight priority actions to be undertaken by the Observatory on infringements of Intellectual Property Rights.

1. Improving the understanding of the value of Intellectual Property Rights to provide for a balanced approach

BEUC welcomes the intention of the European Commission to entrust the Observatory with the task of improving the understanding of the value of intellectual property.

However, when European consumers are on a daily basis confronted with bottlenecks due to disproportionate and stringent IPR rules, it is difficult to convince them of the value of IPR. The fragmentation of the Single Market along national borders, the indiscriminate application of copyright levies, the criminalisation of consumers illegally downloading, the absence of clear consumer rights as regards the use of material legally purchased content are just a few examples which demonstrate the failure of existing copyright laws.

The approach adopted by the European Commission, national governments and rights holders has created a negative attitude towards copyright among the general public and eroded public support for IPR in general. This has been demonstrated by public opposition to the Anti-Counterfeiting Trade Agreement (ACTA).

Copyrighted works are both an output of intellectual creation and an indispensable input to creativity. Copyright law needs to balance the incentive to create with access to works.

The European Commission must adopt a balanced approach, one based on independent and reliable evidence and which ensures individual users are not treated as criminals nor accused of assumed economic losses of the content industry. As stated above, the economic impact of the failure of the content industry to adapt their business models to consumers' expectations needs to be considered.

2. All-inclusive representative body

BEUC would like to stress that consumer organisations and civil society should be represented on an equal footing with IPR holders on every group to be established, as they are directly affected by IPR enforcement measures either as victims of counterfeit products or as targets of disproportionate copyright enforcement measures. Data protection authorities should also be invited to participate when discussions touch upon the balancing of property rights with consumers' fundamental rights and freedoms. Lastly, representatives of Information Society Service Providers should be added to the list of relevant stakeholders given their involvement in the enforcement of IPRs.

BEUC suggests that all participants be required to meet specific criteria in terms of transparency and representativeness and comply with confidentiality requirements.

Terms of reference should establish the conditions for membership to be adopted and signed by all members.

3. Sector-specific approach

BEUC would suggest that the work of the Observatory distinguishes between different IPRs. In particular, we would advise that the issue of counterfeiting of physical products is clearly separated from online copyright infringements.

Health and security concerns must not be used for the purpose of increasing political support for stronger IPR protection. Rules which are justified as a result of certain aggravated forms of violations should not be declared applicable to all kinds of infringements. Serious risks to consumer health and safety must be tackled for their own sake and not when they coincide with an IP infringement.

4. Collection of objective and reliable data

BEUC shares the view that understanding the complex landscape of IPR infringements is a precondition for any action to be taken. Any public policy on IPR enforcement should be based on objective, reliable and evidence-based data.

However, we find hard to understand and justify the intensive efforts of the European Commission over the last three years to strengthen the existing rules, either by voluntary self-regulatory efforts² or legislative action. In the absence of reliable and comparable data, the European Commission should prioritise suspending the on-going work regarding the revision of the IPR Enforcement Directive 2004/48.

The collation and analysis of objective, reliable and comparable data has been included among the tasks of the Observatory. However, we are concerned that the new regulation amounts to a total delegation to the Observatory to develop a methodology for the analysis and reporting of data. For this data to be endorsed by all relevant stakeholders there must be agreement on the basic elements and parameters of the methodology which is to be used.

We are aware that the European Commission has begun a study on the development of a common methodology which would allow for “objective” and comparable data to be collected. However, we hold serious concerns that the methodology to be proposed will be based on the assumptions such as that the number of products infringing IPRs is equal to the number of non-effected legitimate purchases. We are particularly concerned that such a methodology is inappropriate for online copyright infringements, as is further explained below.

5. The need for overall economic assessment

BEUC regrets the decision of the European Commission to pay reference to the studies financed and commissioned by industry to demonstrate the economic impact of “piracy”, without even considering a number of studies which point out the positive, long-term effects of non-commercial file-sharing. From a governance perspective, the Observatory must take into account the findings of the following studies:

- ❖ The study by the **IvIR Institute of the University of Amsterdam on behalf of the Dutch Ministry of Economy**³ concluded “file sharing has, in fact, created a net benefit to the economy and society in both the short and long term and that will likely continue. The direct impact on sales of file sharing is minimal (though it depends on the category). In fact, the only areas actually in trouble right now may be the sale of plastic discs (CDs and DVDs), but much of the damage has nothing to do with file sharing, and there are indications that the “lost” money can be made up in other ways. The report recommends moving away from criminalising user activities and rather to focus instead on encouraging new business model development.
- ❖ The study by the **Canadian Government**⁴ evidenced that those who file share spend the most money on legal content. The same conclusion was reached by the **Norwegian Business School**⁵ according to which “file-sharers in fact purchase 10 times as much content as they download for free”.
- ❖ A study by the **Harvard Business School**⁶ revealed that file-sharing can only be blamed for 20% of the reduction in music sales. The figure has been revised from an earlier result stating it was close to zero, but anyway it cannot be compared to the 100% which the entertainment industry claims peer-to-peer (P2P) technology is responsible for.
- ❖ Similarly, a study by the **London School of Economics and Political Science** has concluded that the decline in sales of physical copies of recorded music cannot be solely attributed to file-sharing, but should be explained by a combination of factors such as changing patterns in music consumption, the effect of decreasing disposable incomes on leisure products and increasing sales of digital content through online platforms⁷.
- ❖ The Advisory Committee on Enforcement of the **World Intellectual Property Organisation** has commissioned a study⁸ focused on whether in the absence of piracy all consumers would switch to legitimate copies at current prices. The study concluded that “This outcome is unrealistic - especially in developing countries where low incomes would likely imply that

many consumers would not demand any legitimate software at all. Accordingly, estimated revenue losses by software producers are bound to be overestimated".

- ❖ According to the report of the **US Congress Government Accountability Office**⁹, the numbers previously circulated regarding the economic impact of counterfeiting and piracy were erroneous.
- ❖ The analysis by the **Social Science Research Council**¹⁰ concluded "even if one admits that some sectors in the industry suffer losses directly because of file sharing, the TERA study overlooks the fact that the money not spent on, say, CDs and DVDs is simply transferred to other activities and sectors, which potentially better contribute to EU economic and social wealth".

Furthermore, an assessment of the impact of European Union IPR enforcement rules on innovation and the development of the information society - as explicitly requested by the Directive 2004/48 on IPR enforcement - is still pending.

We would also suggest that the Observatory assesses the impact of copyright policies on the public domain. Thriving creativity, knowledge and innovation do not depend solely on high-level IP protection. Just as important is to provide for a robust public domain, where competitors are not subject to limitations of their activities.

The adoption of stronger and more stringent rules for internet copyright enforcement would be detrimental to innovation. It is not the first time that copyright owners have complained of online copyright infringements by individual users as the reason for their loss of revenue. The same happened in the 1980s when copyright owners cried wolf over the invention, production and marketing of home-taping as a serious threat to the profit model of movies for the motion picture industry.

6. Monitoring the development of business models for legal offers

BEUC welcomes the inclusion of monitoring the development of legitimate business models for creative content as among the tasks of the Observatory.

We do not condone copyright infringement, but rather see it as a symptom of the lack of legitimate online offers for content. It is not only for consumers to respect the rights of creators, but also for creators to respect the expectations and demands of a new generation of consumers. Digitisation creates a great distribution channel for most artistic or cultural products. The transition from a physical, retail-based market to one that is fully digital and truly global might hurt conventional business models. But repeating the same, conventional arguments such as 'no legal solution can compete with a free one' or 'digital will never replace the physical market' does not necessarily strengthen the arguments put forward by specific associations of right holders that more enforcement is the solution.

We are confident that consumers are willing to pay for good legal alternatives. But the offerings have to be attractive enough for those who are paying.

The development of business models which respond to users' expectations and satisfy their interests have proven successful. For instance, it is not surprising to see that the emergence of new and sophisticated applications for use on smartphones, together with the development of micro-payment methods, have been endorsed by consumers, while there has been no attempt to 'pirate' them.

However, when looking at the current state of legal offers for music and audio-visual content across Europe, one can easily conclude that those available to consumers remain poor both in terms of quantity and quality.

According to the survey by the Open Rights Group (ORG), the main problems relate to a lack of availability, poor pricing and quality¹¹. The ORG looked at how many recent best-selling and critically acclaimed films (including the top 50 British films) consumers can legally buy or rent online. The findings are self-explanatory: only 43% of the top 50 British films can be bought or rented online; only 58% of the British Academy of Film and Television Arts (BAFTA) Best Film Award winners since 1960 have been made available; The average price on iTunes for online films stands at £6.72, while the average DVD price for BAFTA winning films is £5.843.

Therefore, we would suggest that the Observatory not only monitors development in the number of new business models, but also assesses their effectiveness from the consumers' point of view. In this regard, a number of factors need to be taken into account, including the availability of content, affordability, availability of a range of payment schemes, compliance with consumer protection legislation, the possibility for consumers to transfer the content to multiple devices and use it in accordance with their legitimate rights.

Such an assessment will provide very useful feedback to the development of the Digital Single Market - a main priority for the European Commission. It will also enable an assessment of the impact on consumers of the absence of a well-developed market for online content. This can also feed into the overall assessment of policies related to IPR infringements.

The contribution of consumer organisations would be crucial, as they are in daily contact with consumers and receive their complaints regarding digital content.

7. The inventory of legal offers

The majority of consumers cannot always know with certainty whether a website providing content is legal or not, let alone that they are unaware of the multiple legal offers which exist on the market. This holds true for all types of creative content and is particularly apposite to audio-visual content. If legal offers are to be endorsed by consumers, raising awareness of their existence should be the starting point.

BEUC would therefore invite the Observatory to look at the possibility of developing an online guide for consumers to discover legal offers, including the possibility for exchange of consumer feedback as to their experiences. A similar initiative was undertaken in Denmark with the Danish Consumer Council developing a website providing information about where to buy music and the permitted uses: <http://download.taenk.dk/>.

8. Consumer awareness

BEUC welcomes the fact that raising consumer awareness of the risks related to IPR infringements has been included among the tasks of the EU Observatory. BEUC considers the EU Observatory to have a crucial role to play in coordinating campaigns between public authorities across Europe and facilitating the exchange of views on best practices among the stakeholders involved.

However, we are concerned when consumer awareness raising is done under the exclusive responsibility of industry and private stakeholders. Campaigns treating consumers as criminals and threatening them with prison sentences have not only proven ineffective, but have also resulted in the erosion of public support for copyright in general.

Consumer associations have extensive experience in raising consumer awareness and are generally considered to be among the most trusted voices, as demonstrated by the Consumer Market Scoreboard¹². We would therefore welcome reflection on the involvement of consumer associations in the work of the Observatory, either in terms of experience sharing or in developing public campaigns.

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