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Enforcing Intellectual Property Rights in Europe and in Third Countries - The Quest for Balance

Prof. Annette Kur, MPI Munich

Some “Self-Evident Truths“

- **Efficient enforcement is an essential element of IP protection – law is meaningless if it only remains in the books**
- **However, even good things turn bad when they are deployed in a one-sided manner**
- **Hence, the general postulate that IP protection must be balanced should also govern enforcement**



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How Balance is created – and may be distorted

- Substantive IP law reflects the balance aspired by the legislature between exclusive protection and the public domain
- That balance is distorted whenever a right is infringed – but it is equally distorted when the rightholder overstates her claims against third parties
- Q: Why must only one side be “deterred“ from such conduct?



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How to separate the (black) sheep from the wolves?

- While “normal“ infringement seems to be “part of the game“ which does not call for particularly strong action, there is wide agreement that hard core counterfeiting and piracy pose a more serious threat
- However, there is no clear and generally accepted formula according to which the two could be separated for the purpose of legislation
 - TRIPS definition of counterfeit goods – too narrow?
 - „commercial scale“ – too unclear (or too broad)?



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The “one size for all“ dilemma

- Due to lack of clear dividing lines, enforcement legislation regularly proceeds from a comprehensive approach (“one size for all“)
- While this means that typically, legal measures will also apply to “normal“ infringement, the political rhetoric accompanying urges for (new) enforcement legislation in Europe and abroad is nearly exclusively focused on hard core cases



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Dangers

- Using the public concern about serious crimes like fabrication of fake and noxious medicaments as an argument pushing for stronger legislation on IP infringement in general is inappropriate and dangerous
- It is dangerous because it obscures the fact that to combat risks for public health is not primarily an IP issue
- It is inappropriate because it will typically tend to encourage imbalanced legislation



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Take European legislation on enforcement as an example...

- The enforcement directive 2004/48 only imposes minimum sanctions and enforcement measures, while protection of confidentiality and remedies against misuse of rights are left to the discretion of MS – only of secondary concern?
- Even more critical: the proposed directive on criminal sanctions
 - lacks hard and fast safeguards addressing the rights of defendants
 - lags behind other EU legislation (compare with Council Framework Decision 2005/212/JHA on confiscation)
 - “Joint investigation teams” – too much influence from private parties?



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Words of warning from the EESC...

- *The EESC welcomes the fact that victims are to be involved in investigations but recommends limiting their role purely to providing information to the public authorities. It would be inappropriate for a company, following an accusation of commercial counterfeiting, to be involved in monitoring activities or confiscating the property of a competitor, who is presumed innocent until proved otherwise in Court. The Committee feels strongly that it is important to resist tendencies towards private justice or interference or intrusion in criminal proceedings by persons holding no public authority*



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Enforcement à la Europe – an export article?

- Exporting EU-style enforcement legislation to foreign trading partners is an (in)official goal of EU policy
- But: If and where legislation is (partly) flawed, export is no recommendable option
- The principle in Art. 41.5 that TRIPS MS are not obliged to create specific enforcement standards privileging IP rights is easily forgotten...



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Lastly, some rather “incorrect“ thoughts...

- **The modern plagues of counterfeiting and piracy did not come out of nowhere – to some extent, they are rooted in the development of IP protection itself**
- **The wider the gap becomes between production costs and the gains achieved by protected items, the more illegal copying it will attract...**
- **If rightholders are compensated for their losses by granting ever stronger rights, also the attraction will increase, and so on**
- **It is doubtful whether imposing (ever more) drastic sanctions is able to break the vicious circle – experiences in other areas tell a different, sad story**



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What to do?

- It is unlikely that the battle against infringement in general, and counterfeiting in particular, will be won by deploying more, and harsher sanctions
- It is at least equally important that the IP system as such re-gains general acceptance and approval
- Contrary to what is often held, this is not just a matter of “education“ – it might mean that the system has to change
- Apart from that, serious crimes such as making and selling fake, inefficient or hazardous medicaments should be targeted for what they are – not (primarily) as IP infringements, but as criminal acts jeopardizing public health and safety



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THANK YOU FOR YOUR ATTENTION!

annette.kur@ip.mpg.de

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