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Enforcement and Data Protection

*Common Principles of European
Intellectual Property Law*

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Introduction

- Stronger enforcement has been one of the “megatrends” of intellectual property law for the last 15 years
 - “weak signals” before that, e.g. CAFC which took a pro-patent stance
 - TRIPS: From virtually no provisions on enforcement in international conventions or community law to - in some cases - highly detailed provisions.
 - Enforcement Directive 2004/48/EC
 - Bilateral TRIPS-plus Agreements
 - Draft Directive on Criminal Measures
 - Anti-Counterfeiting Trade Agreement (ACTA)
- The megatrend has however met (justifiable) resistance, e.g.
 - Pirate Party and similar organizations
 - Lengthy discussion in EU Parliament when Enforcement Directive was adopted
 - Directive on Criminal Measures does not seem to move forward due to resistance
 - Discussion on non-practising entities (NPEs aka Patent Trolls) raised concerns about too strict enforcement even among big corporations

Procedure and Substance

- Enforcement has two sides
 - A procedural side
 - A substantive side
- The procedural side of enforcement has to do with questions relating to procedural law
 - fair trial etc.
- The substantive side of enforcement has to do with questions relating to substantive law
 - Criteria for damages, amount of damages etc.
- This division is necessary in order to realize that different principles guide the two sides.

Procedural law principles

- The procedure shall be “fair and equitable”
- The procedure shall be expeditious (aka fast) and cost-effective (aka cheap)
 - TRIPS art. 41(2)
 - “They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”
 - Art 3(1) IPRED
 - “[The] [measures,] procedures [and remedies] shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”
- Adds nothing to the already established principle of effective judicial protection
 - “a general principle of Community law stemming from the constitutional traditions common to the Member States which has been enshrined in Art. 6 and Art 13 of the European Convention on Human Rights and Fundamental Freedoms [...] and which has been reaffirmed by Art. 47 of the Charter of Fundamental Rights of the European Union.” (Case C-432/05 UNIBET, p. 37)

Sanction principles

- Effective, proportional and dissuasive
 - Art. 41(1) TRIPS
 - “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit *effective* action against any act of infringement of intellectual property rights covered by this Agreement, including *expeditious* remedies to prevent infringements and remedies which constitute a *deterrent* to further infringements.”
 - TRIPS does not explicitly provide for proportionality of sanctions
 - Art 3(2) IPRED
 - “Those measures[, procedures] and remedies shall [also] be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”

Role of principles in implementation

- The role of the principles in the national implementation has generally been quite small
 - Generally no explicit provisions
 - Some remarks in preparatory works in some countries (e.g. Finland)
- Role of the principles in the interpretation of the sanction rules more important
 - Problem is how to put meaning into the principles
 - Principles quite vague in themselves

Content of principles

- How to put meaning into the principles?
 - Context sensitivity
 - Not all infringements are equal
 - Counterfeit/piracy: willful infringements
 - Infringements between competitors (B2B)
 - Role of proportionality greater in B2B infringements
 - Role of deterrence greater in cases of piracy/counterfeiting
 - Comparative law
 - What has the balance between the principles traditionally been in the member states and why?
 - Fundamental rights
 - Case C-275/06 Promusicae

Case C-275/06 Promusicae

- ECJ, 29 January 2008, preliminary ruling
- Does the rightholder have a right to request names and addresses of Internet users from an ISP in a case of suspected copyright infringement?
- Promusicae, an association of Spanish music producers
 - had applied for an order against the Spanish ISP Telefonica
 - requiring it to disclose the names and addresses of certain Internet users.
- Promusicae argued
 - had identified a number of IP addresses
 - used for illegal peer-to-peer (P2P) file sharing of music files using the software system Kazaa
 - Only the ISP, however, knows the identities of the persons behind the IP addresses.

Promusicae – Spanish law

- According to Spanish law, obligation only
 - in cases of criminal investigations or
 - to protect public safety or
 - if national security is involved
- The Spanish market court
 - Spanish law not in line with Community law
 - Preliminary ruling
 - whether Community law requires member states to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

Promusicae – Art. 8 IPRED

- On the face of it, Art. 8 IPRED seems to favour the copyright holder.
 - Member States shall ensure that,
 - in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant,
 - the competent judicial authorities may order that
 - information on the origin and distribution networks of the goods or services which infringe an intellectual property right
 - be provided by the infringer and/or any other person who [...] (c) was found to be providing on a commercial scale services used in infringing activities [...]
- However, according to Art. 8(3)(e) this applies without prejudice to, inter alia, provisions on the processing of personal data.

Promusicae – Directives

- ECJ considered many different provisions
 - on one hand provisions on the enforcement of IP rights (TRIPS, InfoSoc Directive 2001/29/EC, Directive on electronic commerce 2000/31/EC, Enforcement Directive 2004/48/EC and the Charter on Fundamental Rights)
 - on the other hand provisions on the protection of personal data (Directive on the protection of personal data 95/46/EC and Directive on privacy and electronic communications 2002/58/EC).

- ECJ
 - Does protection of personal data preclude the communication of names and addresses of Internet users in the context of civil proceedings?
 - No
 - Main principle
 - Art 5 Directive on privacy and electronic communications 2002/58/EC
 - “Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network...”

Promusicae – ECJ (2)

- Exceptions
 - Art 15(1)
 - “Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5 [...] when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC.”
 - Art. 13(1)(g) of the Directive on the protection of personal data 95/96/EC
 - “Member states may adopt legislative measures to restrict the scope of obligations [...] when such a restriction constitutes a necessary measure to safeguard: [...] g() the protection of the [...] rights and freedoms of others.”

Promusicae – ECJ (3)

- If it is ok to give information, is there an *obligation* to do so?
 - No obligation
 - Directive on electronic commerce 2000/31/EC
 - Article 18(1): Member States shall ensure that court actions [...] allow for the rapid adoption of measures [...] designed to terminate any alleged infringement [...].
 - Article 1(5)(b): This Directive shall not apply to questions relating to information society services covered by Directives 95/46/EC [...]
 - Infosoc Directive 2001/29/EC
 - Art. 8(1)
 - Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. [...]
 - Art 9
 - This Directive shall be without prejudice to provisions concerning [...] data protection and privacy [...]
 - Art 8 IPRED

Promusicae – ECJ conclusions

- Conclusion
 - It is up to the member states to
 - strike a fair balance between
 - the fundamental rights and other general principles of Community law.
- National legislatures and courts to interpret IPRED
 - in the light of the
 - fundamental right of respect for private life (i.e. protection of personal data) on one hand and
 - the rights to the protection of property (including intellectual property) and to an effective remedy on the other.

- Strong vs weak enforcement ideology
 - IPRED can accommodate both
 - The Promusicae case reveals the paradox of European IP enforcement
 - The more detailed the regulation the more we need to rely on the general principles
- ECJ gives the tools, not the final answer
 - The question basically referred back to the national court
- Why does ECJ not give a straight answer?
 - Enforcement too political a question?
 - Procedural autonomy
 - Remedies (incl. procedural law) traditionally a very national issue?
 - Fundamental rights at stake: too delicate issues at stake?
 - "One size does not fit all"? Maybe there should be variation between member states?
 - Subsidiarity? Maybe national court better situated?

Possible problems

- What now?
 - If this is going to be ECJ's policy in the interpretation of IPRED, the national courts should seize the opportunity and “take the power back”
 - Argumentation model is however noteworthy
 - Weak/strong enforcement ideology
 - national courts should proactively interpret enforcement rules in light of the principles
- National solutions might lead to disharmonisation
 - Rules of national procedure and remedies “resilient to legal correction”
 - Legislatures/courts continue to rely on the old ways of doing things
 - Courts do not know what is happening in other countries and do not understand why there are differences
 - Implementation of IPRED in most countries autonomous; no regard to developments in other countries

Solution – Harmonisation through communication

- Instead of
 - Harmonisation through legislation
 - TRIPS/IPRED failed
 - Harmonisation through ECJ case law
 - ECJ gave the tools, not the answer
- Harmonisation through communication
 - The reasons for disparate application is sought in the different balancing of the underlying principles in the member states
 - National courts
 - Increased communication between courts increase understanding of alternative views which could increase harmonization or at least give a rational basis for differences
 - cf. English and German courts discussions in interpretation of Art 69 EPC
 - Legal scholarship
 - A truly comparative and ambitious academic endeavor looking into why different countries emphasize the principles differently
 - This could increase understanding of the reasons for different emphasis, which in the long run could increase harmonization or at least willingness to harmonize.