

Combatting physical threats posed via digital means: the European Commission's developing approach to the sale of counterfeit goods on the Internet

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The purpose of this paper is to trace the development of the EU's policies regarding the combatting of counterfeiting and in particular the establishment of the European Observatory on Counterfeiting and Piracy (later renamed the European Observatory on Infringements of Intellectual Property Rights). This paper will demonstrate how 'hard' legal regimes for the management of online sales of counterfeit items have been significantly limited by the lack of effective data on the scale of the phenomenon, as well as the reluctance of Internet platforms to tackle online infringements. Through the empowerment of the Observatory and its transferal to the European agency the European Intellectual Property Office (EUIPO) however, the EU has managed to establish its position as a cyber-security actor able to tackle online infringements of intellectual property rights. Through research into and identification of best practices concerning the quantification of counterfeit sales, information collection and sharing, and in facilitating coordination and cooperation between networks of private and public sector actors, the Observatory has taken on a key role in establishing online networks for proactively countering the sale and distribution of counterfeit products online. In this way, the Commission's facilitation of a network governance model has led to the development of a more effective means of combatting the threat posed by physical goods that are distributed via digital means.

Keywords: - counterfeiting, networks, Internet, governance, agencies, EUIPO, European Observatory on Infringements of Intellectual Property Rights

Introduction

One field in which the EU expanded its competence as a cyber-security actor is that of the enforcement of intellectual property rights by tackling trademark infringements taking place online. Originally concerned with efforts to facilitate the completion of the internal market, the EU's trademark policies have increasingly focused upon concerns over the security threats posed by the importation of illegal counterfeit goods into the EU, and in particular, the use of the Internet as the means for this illicit trade. However, the use of 'hard' regulatory approaches to this problem, in the form of legislation seeking to curtail illicit conduct such as the E-Commerce Directive and Enforcement Directive, and expanding EU competences to tackle the online sale of counterfeits by means of international agreements such as the Anti-Counterfeiting Trade Agreement, have had limited success; as a result, the Commission has focused upon alternative means of tackling the online counterfeiting trade. In particular, the Commission has sought to establish itself as a centre of expertise in this field, establishing the European Observatory on Infringements of Intellectual Property Rights (hereafter the Observatory) as a means of identifying and sharing data on enforcement and best practices, as well as facilitating networks of private sector actors in proactively combatting the trade of counterfeit goods online. This article will demonstrate the means by which the EU has sought to supplement its 'hard' legal regime with 'soft' information gathering, cooperation and coordination mechanisms, highlighting the difficulties in establishing legal regimes for combatting the sale of counterfeit goods online, as well as how the Observatory has been established as a key actor in the management of online trademark infringements.

According to the EU's Cyber-Security Strategy, cyber-security refers "to the safeguards and actions that can be used to protect the cyber domain, both in the civilian and military fields, from those threats that are associated with or that may harm its interdependent networks and information infrastructure" (2013, p. 3). Within the field of cyber-security, the combatting of cybercrime constitutes a main area of activity (Fafinski et al., 2010), complementing actions combatting activities categorised as cyber-espionage and cyber-warfare (Grauman, 2012). According to the EU, cybercrime constitutes "a broad range of different criminal activities where computers and information systems are involved either as a primary tool or as a primary target"

(European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 2013, p. 3). For this reason, a more narrow conceptualisation of cyber-security that focuses on attacks against network information systems, which is particularly common amongst computer engineers and technicians (Stevens, 2015, pp. 8–9), misses the broader potential uses of network information systems to crimes. The UK Government, for example, has included the combatting of cybercrime as a key component of its own cyber-security strategy, not only concerned with protecting infrastructure deemed essential to national security, but also to ensure a safe environment for online business transactions, both for commercial actors as well as for consumers (HM Government, 2011, pp. 36–38). Indeed, the perception that cybercrime is ‘rife’ on the Internet has been indicated as a key factor impacting business and consumer trust and confidence in the use of the Internet, particularly for e-commerce (Broadhurst, 2006; Smith, 2004), with the EU perceiving combatting criminal activity as a key means of increasing “confidence and the enhancement of market integrity” (Herlin-Karnell, 2015, p. 54). The EU takes a similar approach to the issue of cybercrime in its Cyber-Security Strategy, noting that “the EU economy is already affected by cybercrime activities against the private sector and individuals” (2013, p. 3), and that cybercrime poses a significant threat as it “knows no borders” (2013, p. 9). In the 2015 Digital Single Market Strategy, the Commission again reiterates the threat to business and consumer confidence presented by illegal activity on the Internet, and considers building trust in Internet security, including the combatting of online content offences, a priority (European Commission, 2015, pp. 12, 14). Counterfeiting can constitute a form of cybercrime, insofar as the Internet is used as the means of advertising the availability of counterfeit goods, and indeed, more easily facilitates their distribution. The EU’s Single Market Act Communication indicated that combatting counterfeiting more effectively was to be considered a key policy (2011a, p. 9), within the context of a policy agenda intended to ensure sustainable growth in light of the financial crisis. For the EU, counterfeiting and other forms of intellectual property infringement deprive “EU creators of appropriate rewards, create barriers to innovation, harm competitiveness, destroy jobs, decrease public finances and possibly threaten the health and safety of EU citizens” (2011b, p. 17), resulting in protection of intellectual property rights being framed as a security issue (see also Farrand and Carrapico, 2012). One of the means the EU has identified to combat this perceived

security threat, particularly where it relates to the online facilitation of counterfeit sales, is the empowerment of the Observatory (2011a, p. 9), as this article will discuss.

As well as further exploring the role of the EU as a cyber-security actor in the field of online distribution of intellectual property-infringing goods, an issue relatively unexplored in EU cyber-security literature, this article contributes to the understanding of the Observatory and its functions as a regulator, which has received little attention in comparison to other EU agencies, with academic literature often doing little more than confirming its existence (see for example Acquah, 2015; Falkner, 2013; Geiger, 2012; Godart, 2010; Grant, 2012; O'Neill, 2011; Peukert, 2011). This article therefore contributes both to understanding of the EU as a cyber-security actor in the field of intellectual property generally, as well as the role of agencies in these activities specifically.

Governing through networks: - EU agencies, stakeholder expertise and the establishment of the European Observatory on Infringements of Intellectual Property Rights

The early twenty-first century has seen a proliferation of European agencies. These EU-level agencies, argue Trondal and Jeppesen, “contribute to technical and sectoral know-how [...and] is one way for the Commission to control the implementation of community regulation [...] as well as securing expertise, credibility and visibility” (2008, pp. 417–418). This ‘agencification’ of the EU has been claimed to follow similar trends at the national level, particularly in Western Europe (Christensen and Lægveid, 2007), and in line with dominant beliefs concerning the importance of market liberalisation with stakeholder involvement in regulation (Levi-Faur and Jordana, 2005). As Levi-Faur has stated, the development of these agencies must be placed in context; the new regulatory model is social, political and economic, based in principles of market efficiency that both serve to constitute and moderate the current capitalist system (2005, p. 14). In this ‘regulatory capitalism’ framework, the state “retains responsibility for steering, while business increasingly takes over the functions of service provision and technological innovation [...it entails] a restructuring of the state (through delegation and the creation of regulatory agencies)” (Levi-Faur, 2005, p. 15). According to Cardwell, the principle

advantages of the use of agencies is their ability to fulfil the need for specialised, technical assistance, the implementation of key tasks and their networking role, bringing together different regulatory stakeholders (2013, p. 541). Indeed, the Commission appears to subscribe to such a logic, commenting in the 2001 White Paper on Governance that the “creation of further autonomous EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union” (European Commission, 2001, p. 23). Furthermore, according to a 2008 Commission document, agencies are “part of the institutional landscape of the Union” (2008, p. 2) and “support the decision-making process by pooling the technical or specialist expertise available at European and national level” (2008, p. 2). So common has the use of agencies become in the European regulatory space that one author has commented: -

One could even get the impression that for each and every new threat that the European Union is faced with (fraud; bio-terrorism; unsafe food; planes falling from the sky; chemical attacks; unsafe trains; diseases; illegal fishing; violations of human rights; etc.) the first reaction is to set up another Agency (van Ooik, 2005, p. 126).

Indeed, as of 2015, there are 32 regulatory agencies active in the EU (Egeberg et al., 2015, p. 615); by way of comparison, in 1999, there were eight, and by 2007, 24 (Levi-Faur, 2012, p. 33). Agencies operating within the field of cyber-security are the European Union Agency for Network Information Security (ENISA), the European Defence Agency, and the European Cybercrime Centre (EC3) unit, established under the auspices of Europol. Yet, as this article will demonstrate, while the European Observatory also undertakes activities in the offline environment, it nevertheless serves to extend the scope of the EU’s capacities as a cyber-security actor through the coordination of efforts to counter online infringements of intellectual property rights, and in particular, the online sale of counterfeit goods.

In 2008, the Competitiveness Council released Conclusions reiterating that the growth of counterfeiting and piracy were particularly worrying, being “aware of the scale of this phenomenon on the Internet” (Council of the European Union, 2008, para. 10). In order

to effectively determine the scale of this problem, the Council urged the Commission to establish a European counterfeiting and piracy observatory, coordinating with both the public and private sectors to gather evidence (2008, para. 15). Acting on this invitation, the Commission released a Communication on enhancing intellectual property enforcement in 2009, in which it was stated that along with ratifying ACTA, “consolidating public and private sector partnerships is also imperative to [...making...] IPR enforcement work better [...] by complementing legislation with a range of non-legislative measures” (2009, pp. 4–5). With regard to the establishment of the Observatory, the Commission went further than the Council suggested, stating that it would constitute a “platform for representatives from national authorities and stakeholders to exchange ideas and expertise on best practices, to develop joint enforcement strategies and to make recommendations to policy-makers” (2009, p. 6). The Observatory was originally a sub-department of the Commission’s DG Internal Market and Services (EU Observatory on Infringements of Intellectual Property Rights, 2015), but was subsequently moved to the European Union Intellectual Property Office (EUIPO, formerly the Office for the Harmonization of the Internal Market, or OHIM), a pre-existing agency responsible for the registration of European Union Trade Marks. Renamed the Observatory on Infringements of Intellectual Property Rights, the Observatory had its powers expanded under Regulation No 386/2012 (2012) Article 2, to include not only data gathering and coordination with national regulators and interested stakeholders, but also the capacity to make Recommendations to the Commission for legal action upon the basis of its findings. This power was reiterated in Amending Regulation 2015/2424, which established the existence of the EUIPO and that all prior references to OHIM would be taken as references to the EUIPO. The 2012 Regulation is particularly useful in identifying the means by which the EU has expanded its capacity as a cyber-security actor. Through repositioning the Observatory as an information-gathering agency within the structure of EUIPO, the EU has sought to establish both credibility and expertise concerning the scale of counterfeiting in the EU, including on the Internet. By establishing the Observatory within an agency structure, it helps to ensure the resilience of the relationships between public and private actors involved in gathering data concerning infringement, through a process of formalisation of roles that “bridges the gaps between insulated hierarchies to form a network of stable and interdependent relations” (Levi-Faur, 2012, p. 37).

The intention to formalise these roles is made clear by recital 23 of the 2012 Regulation, which states that the Observatory will bring together those private actors “most concerned by or most experienced in the fight against infringements of intellectual property rights, in particular representatives of right holders, including authors and other creators, as well as internet intermediaries”, who are to be responsible for data collection and the sharing of best practice under Article 2. Yet what is counterfeiting, and why is it perceived as a problem requiring EU intervention? In order to better understand the EU’s anti-counterfeiting policies and the establishment of the Observatory, it is necessary to first provide a brief overview of the intellectual property rights affected by counterfeiting, and the underlying rationale for protection. Counterfeiting concerns the infringement of an economic undertaking’s trademark. A trademark, under EU law, is considered as being any sign that distinguishes the goods or services of an undertaking from those of other undertakings, and include logos, phrases, and the shape of goods or their packaging, as indicated by the Trademarks Directive (2008/95/EC). Unlike other forms of intellectual property, such as copyright, the rationale for protection is not entirely based on notions of incentive or reward for acts of creation (see, for example Bently and Sherman, 2014, pp. 35–40; see also Spitzlinger, 2011; Zemer, 2007). Instead, the original impetus for the protection of these signs or identifying marks was based in notions of consumer protection. As Ramirez-Montes argues, the genesis of trademark in the English common law system was intended as a means of ensuring that consumers could be assured as to the origin and quality of goods, while at the same time protecting the interest of traders in honest competition (2010, pp. 92–93). The initial forays into trademark law by the Commission were taken on the basis of achieving internal market harmonisation goals, and a desire to ensure that intellectual property rights would not serve as a barrier to trade (European Commission, 1976, p. 7). The resulting legislation therefore served to establish a common Community Trade Mark (now, as stated above, the European Union Trade Mark as of the 2015 Amending Regulation), to be registered at EUIPO, with the intent that it was to be “confined to fundamental rules, the harmonisation of which was deemed indispensable to the completion of the internal market” (Kur, 1997, p. 3).

Nevertheless, measures to *protect* the market for trademarked goods were being developed alongside measures to *harmonise* the market. As early as 1985, concerns regarding the acts of counterfeiting led to the European Parliament's Committee on Legal Affairs and Citizens Rights drafting a report (European Parliament, 1985) in response to a Commission proposal for a Regulation on counterfeiting (European Commission, 1984). According to this report, counterfeiting was considered to be a 'jargon' term, covering the making and/or selling of products similar to well-known products on the market, with the mark or name of the manufacturer of the original goods (1985, p. 13) – often linked together with 'piracy', the infringement of copyright¹. The reason for wishing to prevent such conduct was clear – in addition to constituting a potential harm to legitimate businesses as well as impacting upon the development of the internal market, they were considered as posing “a threat to the health and safety of consumers everywhere” (1984, p. 19). Furthermore, counterfeiting at this time appears to have been considered as a problem originating outside of the EU; the proposed Regulation intended to provide for a common procedure for preventing the goods entering the internal market by means of using custom services to stop counterfeit goods from countries such as Taiwan, Hong Kong, South Korea and Brazil at the external frontiers of the EEC (1985, pp. 13, 18–19).

The resulting Regulation (1986), however, was considered as having certain deficiencies. In particular, the definition provided for counterfeit goods was considered insufficient, including only those “goods bearing without authorization a trade mark” in Article 1(2)(a). The result of this was that goods were being imported without any marks, the identifying marks shipped separately, and then affixed subsequent to their importation into the EEC (European Commission, 1991, p. 6). The Commission proposed the repeal and replacement of the Regulation with one with a more comprehensive definition of counterfeit goods, as well as proposing additional improvements to the customs identification and seizure procedures (European Commission, 1993). The resulting Regulation (1994) expands the definition of

¹ While it is not the main focus of this paper, it is nevertheless important to distinguish between the different forms of intellectual property infringement, despite 'counterfeiting' and 'piracy' often being discussed and classified together – in particular, whereas copyright infringement may cause economic harm to a right-holder, the significant risks to public health and safety that arise from certain forms of counterfeit good are not necessarily existent when considering acts of piracy (see Farrand and Carrapico, 2012, pp. 395–398)

counterfeit goods under Article 1(2)(a) to cover packaging and any trademark symbols, including labels, stickers or instructions for use, and which bears “without authorization a trade mark which is identical to the trade mark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such trade mark”. It is in 1998, however, that the discourse concerning counterfeiting becomes one dominated by questions of security (see generally Farrand and Carrapico, 2012). In the 1998 Green Paper on counterfeiting and piracy, the Commission states that “counterfeiting is also rife in sectors involving products which are highly sensitive from the point of view of public health and safety, such as medicinal products, medical equipment, toys, and spare parts for cars and aeroplanes” (1998, p. 8). Subsequently, in the 2000 Follow-up document, the Commission announced that “apart from the economic and social consequences, the phenomenon [of counterfeiting and piracy] appears to be increasingly linked to organised crime and is developing in new ways with the Internet” (2000, p. 3). For this reason, as well as measures taken to improve customs enforcement of intellectual property rights, the Commission concluded that “given that counterfeiting and piracy on the Internet are a growing cause for concern, the Commission intends to keep a close eye on developments and will, if necessary, take appropriate initiatives” (2000, p. 5). As the next two sections of the article will demonstrate, however, the EU has faced significant hurdles regarding the management of online counterfeit sales, based in a lack of useable data on the phenomenon, and in coordinating the action of interested actors in the online environment, two problems that the establishment of the Observatory is intended to remedy.

The Observatory as a source of information: - better regulation through better evidence provision

The Commission has found that assessing the impact of the online sale of counterfeits upon the internal market is a difficult and indeed unenviable task. Referring back to the 1998 Green Paper that launched the EU’s anti-online counterfeiting policies, the Commission admitted that the scale was difficult to estimate, and the impact difficult to quantify (1998, p. 10). In the Follow-up, the Commission reiterated that the exact economic impact of the activity was unknown, but noted that “interested parties” estimated the combined impact of counterfeiting and piracy to be “€200 to €300 billion

a year and with global losses of 200,000 jobs a year” (2000, p. 4). However, this figure has been subject to substantial criticism due to its inaccuracy (see for example Sanchez, 2008 on the origins of these, and similar figures), as well as its unquestioned use by policy-makers as a basis for legislative action (Farrand, 2014) and the blurring of the boundaries of copyright infringement and trademark infringement, masking both the different economic values of each activity and the potential consumer harm (Farrand and Carrapico, 2012; see also Heinonen et al., 2014; Sullivan et al., 2014). In its 2008 Conclusions (mentioned above) the Competitiveness Council, perhaps aware of the concerns regarding the validity and reliability of data on online infringements, commented that the Observatory could serve to ensure “a more precise analysis of these phenomena” (2008, para. 15), and in 2009 the Commission subsequently noted that one of the biggest challenges in this field was the collection of valid data, and that due to data being held by a myriad of national enforcement bodies, intellectual property offices and private sector corporations, any held data on the economic impact of online counterfeit sales was often “difficult to assimilate” (2009, p. 5).

Nevertheless, despite concerns expressed regarding the reliability and validity of economic data, the potential risks of counterfeit goods and the fact that they are being advertised and distributed through the Internet, are considered readily apparent by stakeholders and EU agencies such as Europol. In their provocatively titled report ‘The Counterfeiting Superhighway’, the European Alliance for Access to Safe Medicines (EAASM) argued that in a test performed, 36 medicines were bought from online, non-verified ‘pharmacies’, with laboratory analysis finding that over 62% of medicines tested were either counterfeit, substandard or unapproved generic medicines (2008, p. 27). The EAASM also estimated that 1% of medicines sold in the EU were counterfeit, representing 7 million prescriptions in the UK alone, and that “the Internet, now fairly ubiquitous in Europe though poorly regulated with regard to buying medicines, represents a major loophole through which counterfeit medicines can reach consumers” (2008, p. 11). Similarly, Johnson and Johnson raised concerns regarding the sale over an ineffectively regulated Internet of both counterfeit medicines and counterfeit contact lenses implicated in a number of serious eye infections and damage to vision (2011, p. 3). According to Europol’s ‘Serious Organised Crime Threat Assessment’ (SOCTA) report from 2013, 28.6% of all goods seized at EU borders constituted counterfeit goods

posing a direct risk to health and safety, covering “foods and beverages, body care articles, medicines, electrical household items and toys” (2013, p. 22). In the Proposal for the above-mentioned Enforcement Directive, the Commission commented “counterfeiting and piracy, which were once craft activities, have become almost industrial-scale activities. They offer criminals the prospect of large economic profit without excessive risk” (2003, p. 12), particularly on the Internet, where identification of infringers was considered highly difficult, further reducing the risks for alleged counterfeiters (2003, p. 12). Counterfeiting, as discussed above, was not deemed new in the early 21st Century, and indeed European states and the US had raised concerns about mass-scale counterfeiting in industrialising nations in the 1970s and 1980s, with the US linking the issue of intellectual property protection to that of global trade (see for example Drahos and Braithwaite, 2002), mandating the ‘Special 301 Report’ system, in which states deemed to not give proper effect to intellectual property rights may be subject to trade sanctions (Farrand and Carrapico, 2012). What was perceived as new was the use of the Internet as the means of facilitating the distribution of counterfeit goods – the trade of physical goods posing potential health risks as well as, a significant threat to the economy by the use of digital network communications technologies. There is evidence to suggest that online marketing of counterfeit goods is not solely limited to sophisticated and highly technical activities such as the establishment of online pharmacy-imitating websites, but also includes a more ‘mundane’ transition of offline activities to the online environment (Treadwell, 2012, p. 176). At the local level, Treadwell argues, the Internet auction (such as that facilitated by eBay) has to an extent supplanted the ‘car boot sale’ as the means for selling ‘knock-off’ goods, with low level criminal activity not directly linked to the sale of safety critical or organised crime-related counterfeits (2012, pp. 180–181). According to the sellers of counterfeit merchandise online interviewed by Treadwell, “the Internet is the perfect vehicle for such transactions and all [interviewed participants] commented on how easily the Internet facilitates low risk forms of crime” (2012, p. 185). The combination of relative anonymity and the sheer volume of transactions taking place on websites such as eBay led the interviewed participants to consider the activities as largely risk free, appearing to confirm the concerns of the Commission regarding the implications of the Internet for the distribution of counterfeit goods. Of particular concern is that online transactions facilitate the transfer of ‘small consignments’ – packages sent directly to individual

buyers in the EU containing the counterfeit items rather than large shipping containers full of thousands of goods for subsequent marketing and distribution within the EU. For customs officials, online purchases of counterfeit goods creates a considerable problem – “the massive flow of packages containing infringing goods poses a serious challenge, because of their sheer quantity, as well as their ability to blend into the mass of postal packages” (Schneider and Maillefer, 2015, p. 263). Given the difficulties in identifying these goods in transit and upon arrival at the EU’s external borders, the quantities of such goods reaching the internal market has been difficult to ascertain. This substantial lack of information in turn has led to difficulties in the combatting of such infringements. In this way, the online sale of counterfeit goods can be considered a cyber-security in two key ways. The first is that the sale of counterfeits online, a form of cybercrime, impacts upon network security insofar as it leads to a decrease in consumer and business confidence in the use of the Internet for online transactions, deemed to be of high importance in ensuring the competitiveness of the EU as an economic area (European Commission, 2015, pp. 13–14). The second is that through the sale *online* of goods posing a significant health threat to EU consumers, the Internet is used as the *means* of engaging in illegal activity presenting a threat to the physical security of individuals (Leontiadis and Hutchings, 2015; Mackey and Liang, 2013).

Action at the EU level was therefore justified on the grounds that acts of counterfeiting and piracy, which by their nature take place on a global scale and disregard national borders, cannot be effectively tackled at a local or national level due to insufficient information and expertise, necessitating coordinated EU responses (Council Regulation, 2012, recital 25). Upon its establishment, the Observatory quickly solidified its position as an information repository for the combatting of intellectual property infringements, facilitating information exchange between the national and European levels. The Observatory describes itself as being “a network of experts and specialist stakeholders” (European Observatory on Counterfeiting and Piracy, 2017), comprising representatives from both the public and private sector. Of particular relevance to this article, the Observatory has also established specific working groups on IP in the Digital World, and the use of economics and statistics as a means of ensuring more robust methodologies for the identification of the harms of counterfeiting (2015). One of the first actions of the Observatory upon its establishment was to gather legal experts from

the private sector in order to better understand the different approaches to both countering and quantifying counterfeiting in the EU. A report compiled in 2010 provided an overview of identified best practices and provided recommendations to national enforcement agencies and private stakeholders, including means of identifying alleged counterfeiters operating on the Internet for the purposes of injunctions, and initiation of legal action (European Observatory on Counterfeiting and Piracy, 2010, pp. 3–5). In its 2013 Work Programme, the Observatory stated that it would act as an information coordinating body, working with the Commission’s DG TAXUD to compile effective data on intellectual property infringements, as well as establishing a methodology and online reporting tool for SMEs to log infringements of trademarks and an “information exchange system to make information, including that from rights holders, available to enforcement related authorities” (2013, pp. 21–23). The Observatory has continued to cement its position as an expert body through the compiling of reports on other dimensions of intellectual property infringement, including its 2015 situation report co-written with Europol, in which it stated that there was a need for concerted action by public sector and private industry actors online, due to the fact that “the internet is the most significant enabler for the distribution of counterfeit goods, because of [...] its ability to operate across various jurisdictions, and its potential for presenting sophisticated replicas of official web shops” (2015, p. 5). By acting as a data gatherer, a point of contact for national bodies and private sector actors to share information on infringement practices, and then publishing reports on counterfeiting, the Observatory seeks to provide the EU with a repository for technical know-how and expertise that can then serve to reinforce the position of the EU as an actor in this field. As the subsequent section will demonstrate, however, the effectiveness of the Observatory equally applies to improving online enforcement as well as data gathering.

The Observatory as a network regulator: - mitigating problems of coordination and cooperation online

Responding to the new means of committing traditional content-related crimes facilitated by computer technologies, the EU moved quickly to set up a legal framework for the removal of illegal content online, including information pertaining to counterfeit

items on the Internet. The E-Commerce Directive (2000) provides for the limitation of liability for ISPs and online intermediaries under Articles 12-14, so long as they do not initiate, modify or select the recipient of a data transmission in the case of an ISP, or fail to act to remove illegal content or limit illegal activity when it is brought to their attention in the case of online intermediaries. As Julia-Barcelo and Koelman wrote at the time of the passing of the directive, as well as covering the distribution of illegal materials such as child abuse media and defamatory statements, it was intended that this Directive also be used to combat copyright and trademark infringements (2000, p. 231). According to Swartout (2011), the role of the service provider became understood as a 'passive' one; Article 15 of the E-Commerce Directive clearly provides that Member States shall not impose a general obligation upon internet intermediaries "to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity". Similarly, the Intellectual Property Rights Enforcement Directive (2004) provides for injunctions under Article 11, preventing an alleged perpetrator from continuing in an act of infringement. However, this legal regulation has not been considered as particularly effective at countering infringements of trademarks online. This was addressed by the European Court of Justice (ECJ) in the case of *L'Oreal v eBay* (2011). In this case, L'Oreal was concerned by the number of infringing goods available from sellers on the eBay service, including goods that were considered as counterfeits bearing L'Oreal's trademarks (2011, paras. 32–35). L'Oreal argued that while eBay did take some measures in order to combat the selling on infringing and counterfeit goods, more could be done, and that even if the trademark infringements were not being committed by eBay itself but by its users, an injunction to prevent *future* infringements should nevertheless be placed against eBay under Article 11 of the Enforcement Directive (2011, paras. 43–48). The ECJ disagreed, concluding first that eBay could rely upon Article 14 of the E-Commerce Directive to ensure its immunity from liability, but only where it acts judiciously to remove infringing content upon becoming aware of its existence – if actively searching for infringements, the service provider would then be obliged to remove such content once discovered, but would not be required to do so if taking a passive role and only removing content when asked to do so (C-324/09, 2011, para. 124). Secondly, it concluded that an injunction to prevent future infringements

under Article 11 may not in itself be unreasonable, but when read in line with Article 15 of the E-Commerce Directive, the measure

cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider's website [...and that] furthermore, a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly. (2011, para. 139)

For this reason, while an injunction could not be imposed to prevent *all* future infringements by *all* users, it could nevertheless require eBay to suspend or terminate the accounts of specific, identified infringers (2011, para. 141). While providing internet intermediaries with clear guidance on what is required of them in order to avoid liability for infringements of intellectual property rights by the users of their services (Rizzuto, 2012, p. 15; Savola, 2014, p. 120), Clark and Schubert have argued that the decision has made the position of trademark holders unclear. This ambiguity may result in platforms such as eBay taking a passive role to infringements using their services, only acting to remove such content when it was brought to their attention, as a means of ensuring they can rely upon immunity from liability (2011, p. 887). As a result, trademark holders are strongly of the opinion that the legal framework currently in place does little to tackle infringement on the Internet generally, or counterfeiting specifically (Farrand, 2014, p. 47). By way of example, the Commission ran a public consultation on the effectiveness of the E-Commerce Directive from August to November 2011, which received over 420 responses, including from firms with significant trademarked assets. Luxury brand company Louis Vuitton stated that the intermediary immunity from liability provisions were allowing services such as online auction websites to abdicate from any responsibility to regulate their websites, providing "an opportunity for illicit practices online to grow, harming consumers and businesses in the process", allowing counterfeiters and organised crime to flourish on the Internet (2011, p. 25).

It became readily apparent that the Commission's legal actions in this field were not sufficient to manage the threat posed by the online sale of counterfeit items. Indeed, this perception was shared by the Commission, as indicated in its Proposal for a Directive on the Enforcement of Intellectual Property Rights, in which it was stated that up until the early 2000s, "action taken by the Community in the field of intellectual property has focused mainly on the harmonisation of national substantive law or the creation of a unitary right at Community level" (2003, p. 4). The Enforcement Directive, albeit intended to effectively counter infringements of intellectual property rights including (but not limited) to those actions taken on the Internet, was ultimately deemed ineffective. This issue was recognised by the Commission in a 2009 Communication on enhancing the protection of intellectual property rights. In particular, the Commission noted that despite the implementation of the Directive, the Internet was still being used to "drive a worldwide market in infringing products, which is stifling innovation and threatening jobs" (2009, p. 3). In its subsequent 2010 Review of the Directive's application, the Commission stated that new business sectors such as online auction sites and pharmacies was leading to an "unprecedented increase in opportunities to infringe intellectual property rights offered by the Internet. The Directive was not designed with this challenge in mind" (2010, p. 2). The Enforcement Directive, while providing for injunctions against intermediaries to prevent infringement subject to a court order under Article 11, did not otherwise place additional or proactive blocking requirements upon online intermediaries. In this report, the Commission stressed the importance of both Internet Service Providers (who provide Internet access to subscribers) and online intermediaries, such as search engines and auction sites, as essential actors in the identification and removal of content pertaining to the sale of counterfeit goods (2010, pp. 6-7). In the view of the Commission, given their "favourable position to contribute to the prevention and termination of online infringements, [we] could explore how to involve them more closely" (2010, p. 7).

However, efforts to achieve this result through formal and legally binding rules have proven to be unsuccessful. In the Single Market Act Communication, the Commission stated that the provision of online services for digital media "must be accompanied by European legislation to combat piracy and counterfeiting more effectively" (2011a, p.

9), to be achieved through the ratification of the Anti-Counterfeiting Trade Agreement (ACTA), a plurilateral trade treaty between nations such as the US, Japan and Canada. ACTA was intended to ensure a reduction in infringements committed in third nations, as well as ensuring the cooperation of intermediaries in managing online infringements (2011b, p. 20). Under ACTA Article 27(3), states party to the Agreement would “endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement”. However, highly-mediatised protests by European citizens both over the content of ACTA, and their belief that the Agreement would lead to both censorship and state surveillance of the Internet as a result of Article 27, in addition to the threat of mass criminalisation of end users (Farrand, 2015, pp. 508–510), led to the European Parliament’s position shifting from one of support for ACTA to one of opposition. Ultimately, ACTA was rejected in a vote by the European Parliament, and as of 2015, the Agreement is considered to be moribund, with only Japan having ratified it. As of the time of writing, there have been no further legal attempts to impose liability or an obligation on Internet intermediaries to proactively manage the sale of counterfeits on their platforms.

The rejection of ACTA by the European Parliament indicates the limited success that the EU has had in combatting the sale of counterfeit goods by way of the Internet through ‘purely’ legal means. In particular, it has resulted in a re-evaluation of law-making practices at the level of Commission, as evidenced by the clear statement with regard to the Trans-Atlantic Trade and Investment Partnership (TTIP), where the Commission reiterated that “TTIP will not foresee any harmonisation of rules on enforcement and it will not bring back any controversial provisions of ACTA” (Cirilig, 2014, p. 27). Furthermore, penal reform and the role of online intermediaries in combatting counterfeiting is explicitly outside of the remit of negotiations (Cirilig, 2014, p. 28). An interesting development that has occurred at the level of the EU is the promotion of an alternative means of regulation to combat Internet-based counterfeit sales. As opposed to the establishment of legally binding enforcement mechanisms, the Commission has instead sought to use agency and network relationships as a means of ensuring online compliance with intellectual property protection requirements. The EU has further established its position as an intellectual property-related cyber-security actor through the creation and coordination of specialised networks for the ‘informal’ enforcement of

intellectual property rights online. Informal, in this context, refers to informal rules and procedures that are not enshrined in law and do not have legal force, with the result that 'enforcement' is also informal and operates outside of official channels (Helmke and Levitsky, 2004, p. 727; Stacey, 2013, p. 396). This approach may be adopted for two key reasons – the first, that there may be some fields where formal competences do not exist or the formalisation of such rules through legislation is difficult to achieve (Heisenberg, 2013, p. 379; Kleine, 2013, pp. 3–7), or alternatively, where the informal inclusion of interested stakeholders may lead to the infusion of a process with increased legitimacy or effectiveness (Borrás and Jacobsson, 2004). The tackling of counterfeiting online through legal means has not been particularly successful, as discussed in the previous section, in part as a result of the inability to implement legislation due to concerns regarding both the competence and scope of Commission action. Instead, under the auspices of the Observatory, acting in a supporting and coordinating role (European Observatory on Infringements of Intellectual Property Rights, 2014, p. 25), the Commission has facilitated a network of actors engaging in voluntary regulation by means of coordinated action, comprising Internet intermediaries working together with affected industries. Of particular importance to this strategy was the Memorandum of Understanding signed in May 2011, signed with the intent that it would constitute a code of best practices for online platforms such as eBay, on the basis that these intermediaries are perceived as best placed to manage such infringements and that “the sale of counterfeit goods online presents a threat to all stakeholders” (2011c, p. 1). Under this Memorandum, signed by parties including eBay, Lacoste, Adidas and Nike, rather than relying upon court actions and the E-Commerce Directive in order to remove infringing content, intermediaries are expected to proactively identify and remove (for example) auction items, where those goods are deemed to be counterfeit (2011c, p. 5), act to temporarily or permanently suspend the accounts of repeat infringers (2011c, p. 6) and cooperate with customs and enforcement-related bodies in the investigation of alleged sales of counterfeit goods (2011c, p. 7). In particular, these methods are intended as a 'supply side' measure, impeding the transfer of goods that arrive in the EU by way of small consignments by preventing the sale of the counterfeit goods, rather than a 'demand side' measure typified by seizing purchased goods at the point of customs. In exchange, the Memorandum provides for a moratorium on litigation relating to alleged infringements being brought against online intermediaries

(2011c, p. 2). A Report on the functioning of the Memorandum by the Commission published in 2013 commented that it considered it to be highly effective, with increased communication between interested stakeholders (2013, p. 8), and that the rate of proactive removal of infringing content on one platform had almost doubled and that more than 8,600 accounts linked to the sale of counterfeit items were blocked or severely restricted (2013, p. 15). Due to its success, the Commission proposed extending the Memorandum until 2017, as well as extending its membership (2013, pp. 16–17). The Observatory, the Commission noted, would play a useful role in the further spreading of the best practices established under the Memorandum, as well as assisting “non-signatory Internet Platforms and Rights Owners to adapt their business processes” (2013, p. 17). By establishing the Observatory as a point of contact, as well as facilitating soft mechanisms for voluntary regulation by networked actors operating on the Internet, the Commission has been further able to increase the effectiveness of online management of counterfeit sales, as well as expand its competences as a cyber-security actor.

Conclusions

The sale of counterfeit items in the EU has been further facilitated by the ability of alleged infringers to sell their wares directly to end users on the Internet through platforms such as web auction sites, making the identification and seizure of such goods more difficult. Indeed, as this paper has discussed, the ability of national authorities to individually counter such actions is significantly limited, and hard legal responses to the phenomenon have been equally ineffective. The agencification of cyber-security through the empowerment of the European Observatory, however, has allowed for the EU to establish itself as an actor in this field, by instituting it as a centre for information concerning the quantity and impact of online counterfeit sales, as well as sharing best practices and technical expertise in combatting such infringements with private and public sector actors throughout the EU. Furthermore, by establishing soft mechanisms of governance such as the Memorandum of Understanding, the EU has successfully managed to bring somewhat reluctant Internet platforms into a proactive enforcement regime, facilitating coordination, cooperation and information exchange in such a way as to counteract the limitations of the E-Commerce Directive.

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