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INTA Response to DG Health & Consumer Protection Consultation
on
Future Challenges: 2009 – 2014
11 January 2008

The International Trademark Association (INTA) welcomes the opportunity to respond to DG SANCO's Future Challenge Paper and to offer insight and comments on the risks and opportunities that European consumers will face between 2009-2014 and beyond. The Consultation Paper's discussion of new influences affecting consumer choice and the expected rise in fraud and counterfeits resulting from the process of globalization in general and the development of the Internet in particular are in line with a number of INTA's concerns and objectives.

Given the basis on which our Association was founded, we would like to focus our comments on whether DG SANCO should become involved in 'intellectual property rights and/or quality standards rather than safety.' We take the view that intellectual property rights (IPRs) help promote and ensure consumer protection, thus, IPRs can be complementary to safety issues. Indeed, IPRs play a major role in combating the concerns discussed in the consultation paper, such as fraud, counterfeit pharmaceutical products, protection for consumers on- and offline, and the globalisation of trade. We are therefore pleased to outline some of our main concerns and offer a number of recommendations.

Coherence of DG SANCO policies and a comprehensive IPR strategy

INTA welcomed last December's Council invitation for the Commission to present a comprehensive intellectual property rights strategy, which will allow for an effective IPR framework to ensure synergy with other European policies in the global fight against counterfeiting. We feel that the protection and enforcement of intellectual property rights should be a key priority for the EU, and it is our view that the effectiveness and success of the EU's forthcoming IPR strategy will partly depend on the European Commission's ability to integrate IPRs into all of the relevant policy areas (from consumer protection to the development of e-commerce) and to take into consideration the range of policy instruments which may be needed to ensure such integration.

To make the best use of the available resources, we support the enhanced cooperation and collaboration between the different Directorate Generals working on these issues. Additionally, this process could be facilitated by leveraging the expertise and willingness of the rights-holders.

We welcome DG SANCO's interest in becoming involved in IPRs, an area which has not been its remit but which contributes to one of its key objectives: "*making Europe's citizens healthier, safer and more confident*". Certainly, synergy exists between DG SANCO's mission and the enforcement of IPRs, as both aim at ensuring:

- Consumer health and safety, e.g., in the fight against the counterfeiting of medicines;
- Consumer education and confidence in products and services, to ensure that consumers are not misled;
- Consumer trust in the online world.

Consumer Confidence and Protection Online

The Internet can be an outstanding resource for consumers in a number of ways. As the Consultation Paper points out, consumers are increasingly taking greater control of their own health care by going online to obtain important health information. As such, citizens must be able to trust the websites they are accessing and be assured that the information they acquire online is indeed reliable.

The public must be made aware of the risks that exist on the Internet, ranging from false, incomplete or misleading information to the online sale of counterfeit drugs or other potentially harmful products. It is also crucial that adequate safeguards are put in place to ensure that consumers are fully protected against fraudulent tactics, such as *phishing* and *cybersquatting* (defined below), which increasingly are becoming a threat for Internet users. Industry, public authorities and consumer associations can work together to bridge this critical knowledge gap by providing citizens with information on how they can protect themselves online.

Phishing & Cybersquatting

The fraudulent tactics of *phishing* and *cybersquatting* can affect everyone who uses the Internet, including children and other vulnerable consumers.

Cybersquatting is a deceptive practice in which Internet users are directed away from their intended online destination by cybersquatters who had registered domain names that are confusingly similar to internationally recognised trademarks or well-known institutions. As a result, less savvy users may be misdirected to adult-only sites or may be bombarded with advertisements, pornographic material, unlawful spyware and even harmful computer viruses.

One particularly pernicious form of cybersquatting, which rises to the level of criminal conduct, is commonly referred to as *phishing*. Phishers create email addresses based on cybersquatted domain name registrations and use these addresses to send out phishing emails that appear to originate from legitimate sources, such as trusted financial institutions. These emails deceive consumers into providing sensitive personal information, such as bank account details and credit card numbers. In one instance¹, phishers sent emails addressed from what appeared to

¹ Computer World "Deutsche Bank Hit Again By Phishing Attack. 25 August 2004. <http://www.computerworld.com/printthis/2004/0,4814,95471,00.html>

be the support desk of a well-known bank that directed recipients to a website where they were prompted to provide personal identification numbers and account information. Clearly, the tactics of phishers can cause great confusion and present significant risk of fraud to consumers.

Whois Database

To help consumers determine the reliability of a website and lessen the risks of phishing attacks and other fraudulent practices, all Internet users can utilise the Whois Database, a free online directory. INTA views this as a vital resource for preventing consumer confusion and fraud because the database allows users to easily identify owners of websites selling goods or disseminating information and provides accurate contact information on websites' owners.

INTA is mindful of some stakeholders' concerns regarding the Whois Database because of its provision of website owners' contact details, and respects the need to ensure that the data of individual citizens is adequately protected. Still, as consumers are using the Internet to access information and increasingly to purchase goods including health-sensitive products such as medication, the Whois Database can be of great assistance to EU consumers in certifying the authenticity of websites and in turn, reinforcing consumer confidence in the Internet.

Public awareness

Industry action is necessary to help raise awareness of risks that consumers face. However, in an increasingly globalised environment, public action is also essential. INTA takes the view that DG SANCO should integrate the debate on the relevance of IPRs to consumers' health and protection into its ongoing dialogue with consumers associations, through initiatives including debates, online surveys and the organisation of pan-European information campaigns. Other information campaigns developed by DG SANCO (such as "Help - For a Life without Tobacco") are examples of how European consumers can be reached and can contribute to raising awareness on issues such as counterfeiting and online fraud. DG SANCO may also want to consider establishing a platform or a forum, similar to the "EU Platform for Action on Diet, Physical Activity and Health" for different stakeholders to engage in concrete actions to raise awareness about the benefits of IPRs for consumers.

Globalisation of Supply Chains – the issue of parallel trade

Following the Consultation Paper's reference to regulatory cooperation and global trade, along with the reference to Europe as the world's largest food importer, we would like to bring to DG SANCO's attention some critical issues in relation to parallel trade.

This is not just an issue for brand owners: parallel traders also undermine consumer trust in brands and the quality and service they represent. Because some of the EU's 27 Member States are among the wealthiest in the world and have relatively high price structures for consumer and healthcare goods, the EU is a particularly attractive target for parallel importers.

Parallel imports

Parallel imports (or “grey market goods”) refer to branded items that are imported into a market and sold in that jurisdiction without the consent of the owner of the trademark in that market. While this is often dismissed as a problem only for brand owners, INTA strongly supports the observance of trademark rights within global trade as an important means of also protecting consumers. We advocate the system of *Community exhaustion* of trademark rights used in the EU (similar to national exhaustion), which allows the brand owner to rely on its trademark rights to prevent the further sale of the goods in a second country. This system provides the greatest benefit to consumers, because brand owners often design their products, packaging, sales and distribution networks to meet specific cultural, language, regulatory and environmental conditions in specific countries.

Different products made for different markets

While parallel import products are indeed “genuine” goods (as distinct from counterfeit goods), problems still arise because these products are often formulated or packaged for a different jurisdiction than the one to which they are ultimately exported and therefore, they respond to different consumers’ requirements.

Product formulation can vary significantly between markets that have specific cultural tastes, because brand owners research local flavour preferences and tailor their product accordingly. For example, abrasives in toothpaste (including silica, calcium carbonate or bicarbonate of soda) differ by region: in Indonesia, top selling European toothpaste brands taste of cloves rather than mint. The same risk could be applied to any food products under international brands where the recipes used will always vary according to local culinary norms.

Consumer products are often region-specific: for instance,

- face cream formulated for the humidity of the tropics is inappropriate for the northern European consumer;
- personal care or cleaning products sold for use in some countries are formulated to meet hard water conditions which do not exist in other countries;
- motor lubrication oils are radically different between the Middle East and Scandinavia;
- a leading brand of cigarettes which reaches the EU by parallel routes may deliver a tar yield (15 milligrams) in excess of the limit authorised in the EU (12 milligrams) while misleading consumers by indicating a lower tar yield on a paper label stuck to the packs by the parallel trader.

Furthermore, parallel imports are frequently in breach of packaging legislation and can mislead consumers as to what they can expect from a product that was supposed to be sold in a different jurisdiction because:

- instructions and information that indicate origin, ingredients or other mandated information may be removed or obstructed;
- lot numbers, which allow goods to be traced more easily in case of product recall, may be removed;
- an altered product label that was intended for another jurisdiction could potentially cause consumers confusion – for instance, if a label or instructions are in a foreign language;

- relevant health information such as allergy warnings may be omitted because it may not have been required in the originating country;
- consumers may find that they are unable to access after-sales service and product warranties; and
- the imported product may not comply with European standards or regulations – a risk of particular concern with regards to pharmaceutical and veterinary products. For instance, medicine packaging may have inaccurate or missing emergency telephone numbers, and directions may be inapplicable. Consumers will also be less able to determine if the product is stale or otherwise rendered ineffective, which could lead to potentially serious consequences.

Further information can be found in our [position paper](#) on parallel imports.

Pricing

It is a common misconception that parallel imports are always cheaper for consumers than the goods marketed directly by the brand owner, but research shows this to be an oversimplification. Parallel traders will sell the goods at the highest market prices they can command, as was indicated in the NERA Report for the EU Commission: “The Economic Consequences of the Choice of a Regime of Exhaustion in the Area of Trademarks”, February 1999. Parallel importers aim to maximise their profit, not altruistically benefit consumers. Additionally, studies as well as anecdotal evidence show that increasingly parallel imported goods are often mixed or entwined with counterfeit goods. The counterfeits are “hidden” among the genuine products, and these cases are not often reported.

INTA calls on DG SANCO to support the current status of Community exhaustion. Modifying this status (i.e., moving to a system of “international exhaustion”) would require cumbersome and time-consuming changes of EU trademark legislation. We also believe that in view of the above, price change would in the end be minimal while consumers would be exposed to additional risks.

Health Claims – the value of trademarks

The Consultation Paper acknowledges that consumers are taking into account additional influences when making choices, and observes that they may increasingly wish to have products that offer more than their primary function, i.e. food as pharmaceutical products. Throughout the ongoing debate on food labelling within the Commission and other EU institutions, INTA has supported the EU’s strategic goal to provide consumers with necessary information to enable them to make educated, safe, and healthy choices while reiterating our hope that any legislation regarding food labelling will not have a negative impact on trademark rights in the EU.

Trademarks are not intended to make claims, nutritional or otherwise: their main purpose is to distinguish the goods or services of a brand. Indeed, trademark law (and the long, multistage process of obtaining a trademark) protects consumers against “deceptive” trademarks - it is not possible under EU and national laws to register any mark that is contrary to public policy or that might deceive the public. Examples of trademark applications that were rejected when filed as possible EU Community Trade Marks include ‘Life Energy Food’, ‘Fatigueaid’, ‘Slim Mints’, ‘Lose

Weight and Keep it Off for Life', and 'Energy Plus'. At the Member State level, Denmark has rejected deceptive and/or overly descriptive trademark applications including "Citron Kur" (Lemon Diet), "Friskere End Frisk" (Fresher Than Fresh), and "Det Ren Aeg" (The Clean Egg), while France had rejected "Les Soupes de la Forme" (Soup of Energy) and "Pharmashop" for dietary products.

In the spirit of the Commission's Better Regulation Strategy, we believe that it is important to fully understand and recognise the role of trademarks in building consumer confidence in products. Therefore, we urge the Commission and other regulatory authorities not to unduly burden trademark rights in the context of future legislative schemes on labelling and consumer protection.

Conclusion

These are just a few examples of how trademarks and related IPRs play an important role in helping ensure the health and protection of consumers across Europe in the "real world" and, increasingly, online. The protection of intellectual property rights and efforts to assure "quality standards" and "safety" can be complementary goals rather than conflicting objectives. Trademarks, in particular, can certainly help promote and ensure consumer protection.

In addition to the recommendations made in the body of our submission, we would like to invite DG SANCO to use its dialogue with consumer associations to assess the relevance of IPRs in terms of consumer trust and protection, on- and offline.

We hope this response will be taken into consideration as DG SANCO and the Commission as a whole work to anticipate and act upon the upcoming challenges for European citizens. We look forward to continuing to work with you, and welcome you to contact us for any further information you may require.

About INTA

INTA is a 130-year-old not-for-profit organisation of trademark owners and practitioners from more than 190 countries throughout the world, including all 27 European Union Member States. INTA has offices in Brussels and Shanghai, and is headquartered in New York. Our current membership of over 5500 companies and firms crosses all industry lines, including consumer goods, service providers, manufactures and retailers.

INTA is dedicated to the support and advancement of trademarks and related intellectual property rights to protect the interests of consumers and the public at large. Trademarks serve as a primary means for consumers to make informed choices regarding the products and services they purchase. At a moment where the Internal Market is increasingly successful with European consumers, we take the view that the protection and enforcement of IPRs should be one of the EU's priorities.

Contact

INTA Europe Representation Office
11, rue des Colonies
B-1000 Brussels – Belgium
t. 32 2 517 6103 - f. 32 2 517 6500
csleszynska@inta.org