

The EU Counterfeit & Piracy Watch List: political aims and legal challenges

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Introduction



This post briefly discusses the new [Counterfeit & Piracy Watch List](#) published by the European Commission on 7 December 2018 (Watch List). The Watch List represents the EU Commission's most recent effort to protect the intellectual property rights (IPRs) of European rights holders. Through a "follow the money" enforcement strategy, the Watch List targets foreign business entities that – on a commercial scale – illegally exploit IPRs of EU citizens to generate revenues.

Watch lists of foreign "hostile" actors are not a novelty in international relations between sovereign states. Such instruments are sometimes used in international negotiations with the aim of obtaining targeted and substantial support for a foreign agenda. For instance, in the context of IPRs, Section 182 of the United States Trade Act of 1974 introduced a conditionality between respect for IPRs (of US companies) and preferential access to the US market. Hence, the [Office of the US Trade Representative](#) annually provides such lists to "identify those countries that deny adequate and effective protection for IPRs or deny fair and equitable market access for persons that rely on intellectual property protection." On the other side, foreign entities (e.g. countries or economic entities) included in such watch lists do not have a proper "right to appeal" the decision, which makes their treatment problematic from a due process perspective. Furthermore, the criteria adopted to form such watch lists are unilaterally determined by their drafters and influenced by stakeholders, often with the aim of setting IP standards on third countries for strategic purposes.

The value of IP for the European Digital Single Market

The stated economic justification for the EU Watch List is to ensure fair competition. European companies are leading providers of IP-protected goods and services in third-country markets; IPR-intensive sectors are said to account for 93% of all EU exports and represent a major source of employment and economic growth. Furthermore, the consumption of IP-related products, in particular audiovisual content, has significantly changed, with increased availability and lowering of costs. Physical records have been digitized, online dissemination has grown, and intermediary platforms have acquired a prominent position in said dissemination, causing business models to shift from ownership of to access to content. But digitization has also posed challenges to the industry and consumers. For instance, distinguishing between legal and illegal providers is not always easy for consumers. Illegal providers can hide behind mutable identities and base their activities in states with weak IPR enforcement. Therefore, considering the high mobility of IP content and providers, a strong cooperation with foreign countries to curtail infringement is presented as a strategic interest of the EU.

The categories under analysis

The EU Watch List is organised into four main sectors of analysis: 1) the online marketplaces offering copyright-protected content; 2) e-commerce platforms offering counterfeit goods; 3) online pharmacies and service providers facilitating the sales of medicines; and 4) physical marketplaces.

According to the Watch List, physical and online marketplaces for counterfeit goods represent a danger to public health and consumer safety, as well as a source of revenue for criminal organisations. Specifically, the sale of counterfeit drugs is not only an IPR infringement issue but also a concrete risk for consumer health. More generally, the trading of counterfeit products is often managed by transnational criminal organisations, which generate substantial revenues from these sales.

Furthermore, commercial-scale activities infringing copyright are manifold and sophisticated. The Watch List identifies eight categories of services through which users can access copyright-protected content in an unlawful manner: cyberlockers; stream-ripping websites; linking or referring websites; peer-to-peer and BitTorrent indexing websites; unlicensed pay-per-download sites; websites for piracy apps; hosting providers (e.g. *CloudFlare*); and Ad-Networks (e.g. *WWWPromoter*).

Among these, due to the nature of their activity, and the European legal debate around the legal status of hyperlinking, *linking or referring websites* represent a challenging case. These websites aggregate, categorise, organise and index links to media content that is stored on hosting websites, cyberlockers or other kinds of sites allegedly containing pirated content. They often categorise links by content type and offer search tools. However, linking or referrer sites do not host the content themselves.

The protected content in linking or referrer sites is organised by title, album, genre and season. The users are provided with detailed information on the content and can choose to download or stream a film or music file by clicking on the respective button. They are then redirected to another site, from where the download or streaming starts automatically. The websites that the Watch List identifies are: [Fullhdflmizlesene.org](#), [Seasonvar.ru](#), [Dwatchseries.to](#), [1channel.ch](#), and [Rnbexclusive.review](#).

In simple terms, under EU law, Article 14 of the E-commerce Directive exempts hosting websites (via a "safe-harbour") that in a predominantly neutral way intermediate access to copyright-protected content (e.g. via hyperlinks), subject to the conditions that they have no actual knowledge of the infringing nature of the content and act promptly to remove the copyright-infringing content if they acquire such knowledge (commonly through a notice). Furthermore, the case law of the CJEU has specifically affirmed that, in order for an online platform to be liable, its intervention must be of crucial importance in a work reaching the public. Namely, "in the absence of that intervention, those customers would not be able to enjoy the broadcast work, or would be able to do so only with difficulty" (See *Ziggo*, para 36; *Filmsteier*, para 41, and [here](#), for an in depth analysis). Unfortunately, the EU Watch List does not discuss the applicability of the safe-harbour provision in light of the relevant case law. It further infers the illegal nature of the activity performed by the hosting website from the profit-making scope of these websites, which might lead to an inaccurate assessment. Finally, these problems are compounded by the fact that the evidence used to declare the illegal status of such providers is based on statements and representations from interested stakeholders that took part in the consultation process.

Conclusion

While protecting IPRs of EU right holders might be a laudable goal and strategic necessity for economic growth, the current EU Watch List raises at least two concerns. First, it does not adequately consider the legal status of the targeted hosting websites, opening the door for erroneous legal qualifications (e.g. the application of article 14 E-commerce Directive is not discussed). Second, the EU is targeting certain businesses' activities without offering them the possibility of objecting to or appealing against the decision to list them. This is particularly problematic in those cases where websites are wrongfully listed as infringing, as is apparently the case for certain websites (see reports [here](#) and [here](#)).