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Grey Market Issues

Introduction

It has come to the attention of the directors of Square 1 Products Ltd ("**Square 1**") that some manufacturers of computer equipment are devising their own definitions of "grey market" in an attempt to raise concerns within their distribution channels, in particular with resellers. In doing so they have made certain sweeping comments about "grey" products.

This has created an element of ambiguity regarding the legal position for the "grey market" and the directors of Square 1 therefore consider it appropriate to seek clarification of the position in respect to the law on parallel imports, warranty and product support issues.

Square 1 has instructed Berg Legal to consider this matter and provide advice on the issues referred to above.

Statement

The directors of Square 1 have confirmed that:

"Square 1 has, since the 1995 Silhouette case, taken advice on how the "grey market" has been interpreted by the European Court of Justice (the "**ECJ**") and in particular its rulings on the infringement of trade marks.

The company is mindful that to comply with the rulings, its purchases should be from suppliers within the European Economic Area (the "**EEA**" comprising the member states of the European Community, Norway, Iceland and Liechtenstein), and that regardless of the supplier, it ensures that **ALL** suppliers warrant that the products supplied to Square 1 are authorised by the manufacturer for resale within the EEA or part of it and indemnify Square1 against any loss suffered as a result of a breach of this warranty."

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The Grey Market

There is some confusion about what this term means and it has different meanings in different parts of the world. What may be considered “grey” in the USA is not the same as what is considered “grey” in the European Community.

Manufacturers also apply their own definitions to suit their specific purposes and agendas, for example AGMA (the Anti-Grey Market Alliance), an industry body comprising of technology manufacturers and re-sellers including Cisco Systems and Hewlett-Packard, has defined the grey market as “the unauthorised sale or improper diversion of new products obtained under deceptive circumstances”.

Although there is no legal definition of “grey market” the term is generally used in relation to parallel imports or the movement of goods authorised for sale or distribution in one territory that are then imported for sale in another. A wider definition can mean any goods sourced through an unauthorised channel. However, this does not mean that all “grey” products are illegal or illegitimate.

Used in its widest sense “grey” can mean counterfeit goods, goods sold in breach of distribution terms, but there are also legitimate “grey” products which are not inferior in any way to products bought from authorised distributors. These are sometimes also referred to as “second source” or “direct import” which do not have the same negative connotations as “grey”.

Manufacturers looking to employ restrictive distribution policies and different pricing strategies in different countries often try to guard against “grey market” products. However, within the UK and the European Community the concept of free movement of goods means that whilst products may not come from an authorised source and can be termed “grey” by the manufacturer they are not “illegal” if they have previously been authorised for sale elsewhere within the EEA.

This means that it is perfectly legitimate for companies like Square 1 to buy and sell “grey” products, so long as those products are authorised for use or sale in the EEA.

The Law

A trade mark, in accordance with UK and European Community legislation confers upon its proprietor an exclusive right to use the trade mark and to prohibit or control the use of such trade mark by any unauthorised parties. However, in the interests of free movement of goods and European Community competition law such monopolist rights are not without limits.

The ECJ has developed the principle of “exhaustion of rights” which prevents a supplier from reasserting its rights once its goods have first been distributed in the relevant market with its consent. The underlying idea behind this is to prevent trade mark owners from artificially partitioning markets, maintaining unfair price differentials and exploiting consumers and to ensure there is free movement of goods within the EEA.

This principle, broadly speaking, prevents a supplier from reasserting its rights once its goods have first been distributed in the relevant market with its consent. As a result the trade mark owner is no longer allowed further to control the distribution of those goods as its distribution rights have been “exhausted” by the first sale of the goods.



This means that a product designated for sale in France, Germany or elsewhere in the EEA can be re-sold in the UK without any recourse to the manufacturer or original distributor and the manufacturer cannot rely on its intellectual property rights to prohibit the resale of authorised goods by a reseller that it has not authorised.

Although a trade mark owner cannot prevent anyone from buying its authorised goods in the UK or any other country with the EEA and reselling them in the UK or anywhere else in the EEA, it can still prevent parallel imports of goods from outside the EEA through non-approved channels without its consent.

Product Support & Warranties

Even though so-called “grey” products may be perfectly legal some manufacturers try to avoid honouring the warranties on such items. However, in these instances the warranty should still be good in the designated country and if the product has the benefit of European wide warranty then there would not appear to be any reason why it should not apply wherever the product is sold within the EEA.

Manufacturers may adopt a more restrictive practice, by including express provisions in their initial distribution or import agreements that prevent the benefit of any warranties being passed on to subsequent purchasers. This is acceptable as long as these contracts or provisions do not interfere with competition in the single market. Unfortunately, there is little authority on whether a manufacturer can avoid the statutory consumer warranties relating to its products. However, a purchaser’s statutory rights will be the same, whether it buys products from Square 1 or one of the manufacturers’ authorised UK dealers or distributors.

At present it appears that manufacturers can refuse to support products or offer extended warranties or service contracts for products bought from “unofficial sources” within the EEA, even where the products in question are authorised for sale within the EEA. However, it cannot insist that customers *must* buy its products from its authorised distributors and there are plenty of third party options and solutions available in the market place.

The extent to which a manufacturer will honour its warranties and/or provide support services is largely dictated by its policies and the wording of its contract. However, in many sectors where warranties and service were refused for “grey” products the manufacturers revised their policies in light of adverse publicity.

Conclusions

By purchasing products from suppliers within the EEA, with the benefit of appropriate warranties, Square 1 will ensure that these products are legitimate and legal.

Square 1 has confirmed that whilst it strives, at all times, to offer competitive pricing, it is aware that there are counterfeit products imported into the European Community by less than reputable brokers. These products are often marketed at extremely low prices, and the directors of Square 1 would recommend that extreme caution be exercised by any party considering the purchase of such products.

Square 1 has also confirmed that, through its 15 years business experience (initially through European Micro plc) it is ideally placed to ensure that the products it supplies conform to all current legislation and that they are legitimate and legal. In doing so Square 1 is able to supply brand new manufacturers’ sealed box products direct from EEA approved sources with the benefit of appropriate warranties, and is able to deal with manufacturers’ warranty claims, returning products to source where necessary.



We understand that where manufacturers currently refuse to cover “grey” products for after sales support, Square 1 are able to offer an alternative package called “Square Care”, which specialises in providing competitively priced maintenance packages, for most leading manufacturers’ products. With 120 Cisco and Microsoft accredited engineers supporting its service level agreements ranging from 8hrs x 5 days a week next business day fix to 24hrs x 7 days a week 4 hour fix, the directors of Square 1 are confident that Square Care will often beat the manufacturers’ own support offerings when considered on a like for like basis.

Disclaimer

We have been made aware that Square 1 may reproduce this letter and provide copies of it to certain customers and prospective customers.

However, the information and opinions provided by Berg Legal and expressed in this letter have been prepared solely for the benefit of Square 1 and are intended to provide general information only. They are not necessarily comprehensive and do not purport to give legal or other professional advice in any way. Specific advice concerning individual situations and issues can be obtained from Berg Legal and all readers of this letter (or any copy of it) are advised not to take (or refrain from taking) any action based upon the information or opinions in this letter without first receiving legal or professional advice from a lawyer or other adviser familiar with the reader’s particular circumstances.

Yours faithfully

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