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CAB/464/DV

2004-05

INTERNATIONAL ELECTROTECHNICAL COMMISSION

CONFORMITY ASSESSMENT BOARD (CAB)

SUBJECT

IEC mark(s) of conformity: CAB decision

BACKGROUND

Below a summary is provided of the CAB/WG 7 work, the CAB's discussions and CAB decisions so far concerning an IEC mark. In Annexes 1 and 2 may be found extracts of two legal opinions, commissioned by the General Secretary, to assess in general terms the potential legal risks of use of an IEC mark. Annex 3 is a copy of the "Blueprint" for an IEC Mark proposed by WG 7. A copy of the WG 7 report CAB/408A/R of June 2003 is included in the CAB agenda for reference.

WG7 is to hold a meeting on the day prior to the CAB meeting and will be reporting on progress with design of a mark and development of regulations for the licencing and application of a mark.

The current document is available only on the IEC Technical Server.

ACTION

Members of the CAB are invited, at their 2004-06 meeting, to decide whether to recommend to the Council Board to proceed with the development of an IEC mark of conformity.

Comments should be provided on the IEC Technical Server by 2004-05-25. They will be collected and redistributed to CAB members before the meeting.

Current CAB Position on an IEC Mark

For some time the CAB has been giving consideration to the development of an IEC mark, which could be used by the schemes. Working Group 7 was established by the CAB at its meeting in October 2001 and tasked with the following objectives:

- To consider the market relevance, legal and administrative issues (such as ownership and protection) relative to the introduction of an IEC mark.
- To provide a co-ordinated CAB input to CASCO WG 12: Marks of conformity assessment.
- To develop a co-ordinated CAB view for IEC management.

CAB/WG 7 provided status reports to subsequent CAB meetings and reported to the CAB at the May 2003 meeting, essentially recommending approval to proceed with an IEC Mark, subject to a number of conditions re use by IECEx and investigation of legal, risk, cost issues etc. Proposals 1 and 3 (of four proposals) from WG 7 listed below are relevant to the current considerations.

WG 7 Report

Proposal 1

- a) That CAB supports work to proceed with the provision of an IEC Mark of Conformity.*
- b) That the IECEx Management Committee be requested to support a generic IEC mark that retains a clear linkage to IEC while also a distinctive Scheme appearance and a reference to the issuing body.*

Proposal 3

That CAB requests IEC Management to investigate the ownership, administrative, legal and cost issues concerning the introduction of an IEC Mark of Conformity.

That work progresses on the development of draft rules for an IEC Mark of Conformity in line with the "Blueprint" attached as annex A, as a base line specification for the development of an IEC Mark.

The WG 7 report recommendations (CAB/408A/R) were subsequently considered and approved by the CAB by correspondence. Both proposals received support from 10 members, with two negative votes in each case.

At the October 2003 Meeting of the CAB the results of the voting and the general question of an IEC Mark were discussed, and the CAB resolved as follows:

CAB Decision 10/2003

The CAB notes the approval by correspondence of the proposals from WG 7, Marks, and the IEC General Secretary's intention of commissioning a legal and financial risk assessment as soon as practicable. It requests WG 7 to continue its work, examine the different elements of a possible mark and their relationships, start drafting potential rules of operation for marks, and provide any necessary briefing for the risk assessment. It is recognized that the initial use of the mark will be by the IECEx Scheme.

The CAB reported to the CB in the following terms:

Report to CB – October 2003

The CAB noted the progress on working towards a decision to provide an IEC mark, and particularly the undertaking of the General Secretary to get advice on the risk, as a result of which

the CB would be asked to make a decision on whether or not to proceed. CAB WG 7 will continue to work on development of possible design elements, and on rules and regulations for the application of a mark.

To give a complete picture of reporting on the issue the following extract from the CAB Chairman's report to the October 2003 Council meeting is relevant:

CAB Report to Council

The desirability of developing an IEC Mark or individual scheme marks has been under discussion for some time. The three Schemes have differing views on their requirements for a mark. IECEx is committed to the exclusive use of IEC standards for its conformity assessment activities and perceives significant user support for availability of a mark. At this stage in its development IECEE has concluded that a mark would not be beneficial to users of the Scheme and IECQ, following its merger with CECC, has resolved to make use of the existing CECC Mark.

A CAB Working Group on the subject has recommended the development of a generic IEC Mark and CAB has given in principle agreement subject to the resolution of a range of ownership, legal and financial issues. Such a mark would find immediate application within IECEx and would be suitable for use in other Schemes when conditions are appropriate.

Position of the Schemes

If a mark is to be used by a scheme it is clear that it must be one which is uniquely identified with the scheme. The combination of a generic IEC mark with the addition of a unique symbol to identify with the scheme (or relevant part of the scheme), thus forming a "family of marks", appears to be the most acceptable approach. IECEx has been consistent in its support for a generic IEC mark which, with the addition of a scheme identifier, will satisfy the marking requirements of the scheme. To date IECQ-CECC has indicated that it proposes to continue to utilise the CECC mark. However, some of that scheme's members have indicated their unwillingness to use the CECC mark because of its lack of a connection to IEC. As a result it is likely that IECQ-CECC will give consideration to the use of a generic IEC mark together with the CECC mark or some other scheme identifier. At this time IECEE is of the view that there is no demonstrated need for a mark within the scheme. This however may change over time and it would be prudent to ensure that a generic mark is developed such that it could be used by IECEE in the future.

Legal Opinions – Risk and Liability Issues

Following on a CAB request, the General Secretary has obtained two legal opinions on the possible risk and associated consequences of development of an IEC mark. The extracts of the legal opinions, included as Annexes 1 and 2, raise some issues which need further consideration prior to an IEC mark being made available for use. These are preliminary opinions only and have been obtained without the benefit of the Rules etc. which are being developed by WG 7 and which will more clearly define the proposed conditions and licencing agreements under which a mark can be applied. However, it is clear that, subject to satisfactory resolution of the various concerns raised and acquisition of appropriate levels of liability insurance, any risks to IEC from the introduction of a mark can be minimized, without detracting from the benefits which can be delivered by availability of a mark.

CAB Working Group 7

WG 7 is continuing with its work on design of a mark and drafting of regulations for licencing and use of the mark. The WG will be meeting on the day prior to the CAB meeting and will provide a verbal report on its progress. When the draft of the "regulations" is finalised it will provide a basis

for more detailed legal advice. While it is clear that IEC should own the mark, other aspects are less well defined, including such issues as the most appropriate licencing arrangements, the role of the schemes, any role for the National Committees and the like.

Recommendation

That the CAB recommend to the Council Board that development of a generic IEC mark for use by the IEC Conformity Assessment Schemes be approved, subject to satisfactory resolution of the risk and liability issues raised in the preliminary legal opinions. The CAB further recommends that WG 7 continue its work on the design of a mark and the regulations for licencing and application.

Annex 1

Extract from legal opinion no. 1

1. General legal responsibility

- a) IEC is legally responsible for standards that it issues and any damage caused directly by any negligence or other defect in their preparation. Normally, IEC would not be responsible for defective application by the manufacturer or other user.
- b) IEC has a duty of care to ultimate users of products to act responsibly and a contractual responsibility to all purchasers or users of standards. Disclaimers do not provide protection against negligence but should be used as I have previously advised.

2. Testing

- a) Use of IEC standards is voluntary and therefore independent conformity testing and certification is voluntary and is often carried out in-house.
- b) IEC website and other sources of information to the public should make clear that testing is voluntary so that IEC cannot be accused of misrepresenting that all standards are subject to compulsory testing and certification.
- c) It may be that labelling should only be authorised where independent conformity testing and certification takes place.

3. Responsibility

- a) Conformity testing should be the prime responsibility of the manufacturer and, if labelling is to be encouraged, specific conditions should be added to the conditions of sale of the standards so that the IEC label can only be used for example:
 - i) After testing and would specify that independent conformity testing was required.
 - ii) An indemnity from the user to IEC in relation to the costs and damages of legal actions where IEC is joined as a defendant but is not at fault.
 - iii) Trademark ownership claims and related matters.
- b) Disclaimers would have to appear in all forms of media and publications issued by IEC so that its position is clear to the general public.

4. Complaints from the Public

Greater visibility of the IEC name could lead to more contact with the public and the necessity to investigate complaints sent to IEC about products made available by standards' users. While IEC might seek to avoid investigation as it has no role in production, it would need to take some action if the complaint was serious both as regards its duty of care as well as to protect the reputation of its "brand".

5. Trademark Management

- a) The global use of the IEC initials which might result could lead to the need and expense of vastly increasing IEC's portfolio of Trademarks. Despite the use of mechanisms to

facilitate international trademark protection (i.e. Madrid Agreement and Protocol and EU Trademarks) fees are still payable on a country by country basis with the possibility of opposition to applications. This is already contemplated up to a point to protect IEC's own use.

- b) Further research on overall trademark strategy will be necessary if IEC decides to promote use of the initials.
- c) IEC can rely on unfair competition laws or passing off actions, as well as trademark infringement, against unauthorised users depending on the terms of the licence in the conditions of sale, i.e. use only after independent conformity testing. It seems unlikely that IEC would know that unauthorised use had taken place before a product liability claim occurs.

6. Conclusion

- a) It is possible that IEC standards are already referred to in sales promotion material and on products and in their labelling as I do not believe that this is prohibited.
- b) IEC has a duty of care to the public which exists and which would be highlighted by labelling, thus theoretically increasing the risk of its being involved in litigation. However, the risk may be small in reality.
- c) IEC must ensure that the statements on its website and in publications are not misleading through use of clear disclaimers and text.
- d) IEC has a long history, its credibility is well recognised and I am advised it has never been the subject of a legal action for product liability in relation to its standards so the increased use of its brand should not seriously increase the risk of such action.
- e) IEC has taken out professional indemnity insurance as a protection.
- f) Subject to appropriate precautions mentioned in this note, the encouragement of the use of the initials IEC for marking may be acceptable.

Annex 2

Extract from legal opinion no. 2

1. The following comments refer to a mere marking of products with an unambiguous declaration, such as e.g. “conform to all applicable IEC standards” or alike [hereinafter IEC Mark]. Our comments would apply, however, all the more, if the idea is that the producers should simply affix the IEC Logo on their products or their packaging.
2. The present comments are again based on Swiss law, as a sort of model of analysis. They are not meant to and cannot give you any certainty with regard to any foreign laws which might be applicable, in particular the laws of all countries where products bearing an IEC Mark would be “on the market” and might cause damage. They are limited to civil law issues and do not treat any aspects of administrative and/or criminal law.
3. It is probable that the promotion of the use of an IEC Mark stating conformity of the marked products to IEC standards would imply an increase of liability risks for IEC, and this on two legal grounds.
4. First, certain legal codifications such as e.g. the Swiss Product Liability Act of 1993 and corresponding EU Legislation include rules, explicitly stating that any person, creating the appearance of being a producer by applying their trade mark or other signs of identification on a product shall be deemed to be a producer in the sense of the Act and accordingly subject to product liability, in principle [art. 2, para. 1, sec. b of the Act].

Although there is no respective Swiss jurisprudence allowing a somewhat precise assessment of whether or not and how this rule would apply to the case of the intended IEC Mark, it is likely, that possible victims of defective products bearing an IEC Mark could try to hold IEC liable on the grounds of this rule.

5. Second, the application of a mark on a product as a fact implicitly suggests a certain quality confirmation of the proprietor of the mark (or the organisation represented by the mark) to the market. Modern tendencies of legislation and jurisprudence tend to assimilate such fact patterns to legally relevant implicit warranties to third parties other than producers (e.g. distributors and end-users, in particular private consumers, forming the legal ground for liability). It seems quite likely that this kind of legal effect could be attributed to the promotion of an IEC Mark.
6. In conclusion, it is imperative to assume that the intended promotion of an IEC Mark could in many countries in principle create or increase liability risks for IEC with regard to products which for any reason would not meet the applicable IEC standards, and this with regard to victims as well as distributors.
7. Moreover, it cannot be excluded, that, on the grounds of an IEC Mark, IEC could be held liable for defective goods bearing the IEC Mark, even if the defects had nothing to do with the IEC Standards.
8. Such risks could possibly be mitigated to a certain – but probably rather small – extent, by quality agreements with the licensed mark users (and respective controls) and/or disclaimers to the addressees of the IEC Marks and in the market in general.

9. By quality controls we understand in first line permanent efforts of IEC to monitor the productions of licensed producers applying the IEC Mark so as to verify that (a) the applicable IEC standards are applied and (b) that the single products brought into the market are not defective in any manner. This would include, but should not necessarily be limited to the kind of conformity tests mentioned in your letter. Since the production of a certain product may change from time to time (different components, different quality controls, etc.), it will be necessary to carry out such conformity tests on a repeated basis and to request the respective producers to advise you of any changes in the process of production, quality control, etc.

Besides, IEC would possibly also have to perform adequate efforts to prevent the use of the IEC Mark by non-licensed producers, a problem which commonly affects holders of luxury trade marks but which could also have certain implications with regard to liability risks of IEC.

10. By disclaimers we understand (a) general disclaimers on the IEC Homepage, the IEC standard documentation, and alike which, however, could only have very little effect with regard to the use of an IEC Mark in the market and (b) certain reservations directly linked to the IEC Marks which would have to be communicated simultaneously to the addressees of the marks, by phrases integrated in the marks or at least by texts attached to the products carrying the marks (on packaging, directions for use, user manuals, etc.).

Having said this, we realise of course that, apart from practical problems which this would probably pose, such disclaimers would might also impair the objectives and the effectiveness of the promotion of the IEC Mark.

11. The use of an IEC Mark would have to be licensed on certain conditions safeguarding best possible control by and protection for IEC.

Conclusion:

It is our strong opinion, that the promotion of an IEC Mark should not be started without having previously conducted a thorough and professional risk and cost analysis and the procuring of an adequate and sufficient insurance coverage, which requirements do not seem to be given at present.

Annex 3

IEC Mark of Conformity – “Blueprint”

Introduction

This document provides a base-line specification or “Blueprint” for an IEC Mark or Marks of Conformity. The specification items below are in line with WG 7 proposals contained in CAB/347/MTG (previously approved by CAB), have been finalised during the CAB WG 7 2003-05-19 Geneva meeting, and are presented to CAB for consideration.

1. Any IEC Mark of Conformity is to mean the same in all countries.

2. An IEC Mark of Conformity is only issued where the product is found to comply with the IEC Standard(s) or, where an IEC Standard is not available, then an IEC recognised normative document.

3. An IEC Mark of Conformity is not to be used to cover national differences nor IEC Standards that include essential different requirements.

This relates to the need to ensure the common meaning of a Mark.

4. Provision of an IEC Mark of Conformity must be via an IEC third-party Conformity Assessment Scheme or Schemes under the management of the IEC CAB.

To ensure compliance with ISO/IEC Guides and Standards and an overall control over the IEC Mark of Conformity, access of a Mark shall be via one of the IEC CA Schemes.

5. Any IEC Mark of Conformity must be issued under an ISO Type 5 Certification System.

Where IEC CA Schemes provide for an IEC Mark of Conformity, the rules and procedures shall be based on an ISO Type 5 System, which includes such elements as type testing, evaluation of manufacturer's quality system and associated product quality plans and on-going surveillance.

6. Basic Rules governing the ownership, registration and licensing shall be developed by CAB and must satisfy ISO/IEC 17030. Rules governing the meaning, issue and use of an IEC Mark of Conformity in a specific sector may be developed by an IEC Scheme's Management Committee and endorsed by CAB.

This ensures a consistent approach and addresses issues such as product marking, mark ownership, responsibilities and others.

7. IEC Mark of Conformity must be a generic Mark referencing IEC and indicating the scheme that is being used and the issuing body.

CAB WG 7 feels that IEC Mark of Conformity design may cater for individual IEC CA Schemes and areas, but in such a manner that IEC is associated with the Mark. IEC CAB shall approve a final design based on recommendation and request from an IEC CAS Management Committee.