

**THIRD GLOBAL CONGRESS  
ON COMBATING COUNTERFEITING AND PIRACY**

31 January -1 February 2007

***SHARED CHALLENGES – COMMON GOALS***

**FOCUS AREA 3: BUILDING CAPACITY**

Hon LTC Harms SC  
Supreme Court of Appeal, South Africa

In this keynote address I wish to deal with the politics of capacity building. The views expressed herein do not present or represent any official perspective but being of and from Africa my focus will be on the developing world.

It is comforting but delusional to believe that once there is a legal framework in place, which complies with TRIPS, all is well. Available enforcement procedures are only the beginning. They have no value without the recognition of the value of IP at the political, administrative and judicial levels; without the will to enforce; and without the capacity to enforce.

A. Capacity building requires a partnership.

It is generally accepted that rights holders of trademarks and copyright have the prime responsibility for taking measures to protect their rights while the role of government is to assist in the enforcement of IPRs. However, unless government, which is the ultimate enforcement functionary, has the capacity to enforce, rights holders have no motivation to enforce their rights. The partnership between government and industry is a delicate one.

Political leaders regularly commit themselves to capacity building. We find that not only in statements emanating from G8 conferences but also at regional

conferences of ministers of say, Africa, and, more particularly and recent, at the APEC Ministers' Meeting (November 2006).

In spite of this many governments, especially in the developing world, send out mixed signals. On their political agenda is, for instance, the provision of cheaper pharmaceuticals. Drug patents become, consequently, free game. The disrespect for or disregard of one type of IP has a knock-on effect and must by necessity lead to disrespect for and disregard of other types of IP.

Even developed countries tend to lack a coherent policy: depending on the forum, whether WTO, WHO, WIPO, WCO or the UN generally, IP related policies differ and may even conflict.

Apart from the mixed signals, the results of these undertakings are not always apparent; we do not see capacity building on the ground. For instance, developing countries in Africa in general do not produce counterfeit goods. These tend to be imports from countries with the capacity to produce counterfeits on a commercial scale. It is known that about 90% of all fake drugs sold in one particular country in Africa, for instance, come from two particular exterior sources. If statistics are anything to go by this means that "exporting" countries are not using their best endeavours to prevent the export of counterfeits. Because enforcement does not begin and end at a country's borders counterfeiting has to be attacked at the source.

There are two principal reasons for this. First, IP laws are of little political consequence and do not excite the average politician; and, secondly, "the lack of political will to combat the problem often equates to an economic or other policy such as a military one that trumps pharmaceutical and public health policy" (Michele Forzley).

If I may adopt and adapt something said by the WHO: Political will and commitment should be demonstrated by:

- enacting new laws or updating existing laws for dealing with counterfeit and pirated goods;
- establishing the necessary regulatory institutions and clearly setting out in those laws the power, duties and responsibilities of the institution(s);
- training of personnel, including enforcement officers and judicial officers;
- making available necessary financial and other resources;
- ensuring that the laws are enforced; and
- fostering international cooperation and entering into bilateral and multilateral agreements with other governments and with international organizations.

But it is not only political will that is lacking in all these fields. All too often the private sector is not fully committed to enforce their rights in especially developing countries. There are many excuses for this, some valid and others not. However, a leonine partnership, an unbalanced partnership between government and industry is bound to fail.

#### B. Capacity building must be approached holistically

The lack of enforcement capacity is symptomatic of a larger enforcement and capacity problem. That is why it is not only wrong but also counterproductive to consider the issue of capacity building in the context of counterfeiting and piracy only. In other words, the approach to capacity building must be holistic. And not focussed on IP rights only.

To begin: Counterfeiting is not necessarily concerned with the infringement of IPRs. This explains why we have on the one hand the TRIPS definition of counterfeiting and piracy, which defines these concepts with reference to trademarks and copyright, while, on the other hand, we find that the WHO has for its own purpose (which is the protection against fake pharmaceuticals) another definition not based on IPRs. It is in these terms:

“a medicine, which is deliberately and fraudulently mislabelled with respect to identity and/or source. Counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients or with the wrong ingredients, without active ingredients, with insufficient active ingredients or with fake packaging.”

This wider definition of counterfeiting can be applied, *mutatis mutandis*, to all consumer goods including fake cigarettes, spare parts and the like. On the other hand, IPRs are indispensable in the battle against all forms of fakes.

Next, there is, I believe, a direct relationship between the level of counterfeiting in any given country and the perceived level of corruption. Corruption, for instance, at customs level, does not only affect the prevention of counterfeiting; it also affects the collection of customs dues in general. Corrupt law enforcement and judicial officers do not only impinge on IP enforcement, but all law enforcement.

There is also a direct relationship between the strength of the regulatory regime and the prevalence of, for instance, fake pharmaceuticals. The stronger the regime the less likelihood there is of having counterfeits on the market. Many developing countries do not have the capacity, human or financially, to provide an effective regulatory regime. Fake drugs do not only impact on IP rights; they also impact, more widely, on basic human rights. Once again, the need for capacity building in this field requires a wider perspective.

A general complaint about IP enforcement is the lack of law enforcement capacity, which has a number of aspects. Police, for instance, do not only lack IP sensitivity; they lack human resources; they lack financial resources; and they lack technical equipment. These problems are, again, not peculiar to IP enforcement.

A related issue is the fact that a high level of general criminality may provide little motivation for diverting scarce resources specifically to IP protection.

That is why counterfeiting and piracy, as crimes, require redefinition and reclassification. Only then will they be taken seriously and will enforcement capacity building be a reality.

Counterfeiting and piracy are too often perceived in developing countries as lesser economic crimes against wealthy IP right holders from foreign countries committed by poor hawkers or eager students. In the process it is forgotten that it is also a crime against the local artist, against the local entrepreneur.

I wish in this context to take issue with those who argue that the criminal nature of counterfeiting and piracy is determined by the damage caused to the exclusive rights of holders. One could, I think, hardly justify a global conference of this size and with all the role players present for the protection of private rights only.

Misappropriation of intellectual property is often more than the misappropriation of other property. Counterfeiting is not only a fraud against the rights holder but also a fraud against the public, especially against the unsophisticated. The people in the developing world, again generally speaking, are poor and, consequently, not in the market for luxury counterfeit goods. Although there are obviously the metaphorical counterfeit Rolex watches on the market, counterfeit consumer goods (especially pharmaceuticals, body care products and foodstuffs) are the real problem. Counterfeiting is also a crime against public health and safety. And it is a fiscal crime: a crime against the public purse.

Once these crimes are perceived for what they are; once it is realised that the serious criminals are not street hawkers but members of crime syndicates who pull the strings; once the links to other crimes such as terrorism, drug trafficking, immigration law transgressions, theft and weapon crimes are recognised; once the intimate relationship between consumer protection legislation and anti-counterfeiting is seen, redefinition and reclassification of the

crime will occur and prescribed sentences will be more rational; so, too, the approach and reaction of law enforcement officers and courts to them will become realistic and more consistent.

That is why awareness campaigns should not only be directed at the affluent and literate. They must be designed to reach the illiterate. They must not only threaten. They must stress the dangers of counterfeiting to the common good. In this regard the recent campaign by the Japan Patent Office must be lauded. The campaign is directed at Japanese tourists and aims to expose the necessity of eradication of counterfeit products and the importance of IPRs. This it does by emphasising that such products finance criminal syndicates.

Last: the problems concerning court proceedings. They are seen as costly, over-elaborate, long, slow, and with uncertain outcomes. There is also the perception that many developing countries do not have the judicial capacity to enforce IP rights. A respected African academic recently wrote that “most African countries lack capacity to effectively implement and harness [international IPR norms] for national development.” Whether this is true or not is beside the point; the fact is that the perception exists and it impacts on IP enforcement. Once again, the problem is not peculiar to IP enforcement; it affects all litigation.

I have taken part in many educational seminars organised by the Enforcement Division of WIPO and others where the judiciary or enforcement officials and the like was the target audience. We were always well received, as was our message about IP enforcement. We took some trouble to emphasise the local public interest element; the fact that enforcement is not about a fight between the big and the small; that counterfeiting is about diverting legitimate income to crime syndicates; and the balancing of rights. But what remains unanswered is whether the underlying systemic problems will be addressed.

These examples, I submit, show that the issue of capacity building is multidimensional and must be approached from that perspective.

### C. Conclusion

The politics of build capacity requires that we concentrate on foundations. Without a proper foundation one cannot begin building. If the foundation is lacking, it must be built. If it is cracked or weak, it must be propped up and be repaired. Now is the time.