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THE ENVIRONMENTALLY SAFE DISPOSAL AND DESTRUCTION OF INTELLECTUAL PROPERTY INFRINGING GOODS – EXECUTIVE SUMMARY*

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ABSTRACT

This study provides an introduction to the main issues surrounding the environmentally safe disposal and destruction of intellectual property (IP) infringing goods. It maps out the applicable legal and practical frameworks, taking into account both IP and environmental perspectives, and summarizes the core environmental concerns related to the destruction and disposal of common types of IP infringing goods. Analyzing challenges and opportunities for improvement, the study discusses the strengths and drawbacks of common and alternative methods of destruction and disposal, as well as recycling and re-use initiatives. Specific attention is given to practical considerations, such as restraints on physical and financial resources, particularly as they pertain to developing countries. Stressing the important role of awareness campaigns and education as well as alternative disposal options and recycling, the study calls for cooperation on building capacity of key actors through the provision of training initiatives and tailored educational materials.

* The full study *The Environmentally Safe Disposal and Destruction of Intellectual Property Infringing Goods* is available (in English) at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=375396. The study was completed with valuable input received from the United Nations Environment Programme Asia and the Pacific Office.

** The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

I. INTRODUCTION

1. Trade in counterfeit and pirated goods¹ is a growing international problem that creates significant economic and ethical consequences for right holders, governments and the economy; in addition, it can harm the environment and endanger public health. The Organisation for Economic Co-operation and Development (OECD) estimates that intellectual property (IP) infringing goods accounted for approximately 2.5 per cent of global trade in 2013, or as much as 461 billion US dollars, which represents an increase in volume from the 1.9 per cent estimated in 2008². While the vast majority of IP infringing goods are sourced from Asia, their trade is widespread, with counterfeit and pirated goods originating from virtually all economies and global regions.

2. Practically all types of IP protected products are infringed; this may include counterfeit high-end luxury goods, electronic products, commercial equipment and machinery, agrochemicals and industrial products, general consumer products, pharmaceuticals, refrigerants, vehicle spare parts, cigarettes, alcohol, foodstuff as well as pirated goods such as CDs/DVDs and computer software. The production of IP infringing goods is profitable because costs associated with research, development and marketing are bypassed and production and employment standards not adhered to. As a result, IP infringing goods are often of sub-standard quality and/or unknown composition. Some, such as counterfeit pesticides, are inherently toxic and, together with health sensitive goods (e.g., counterfeit pharmaceuticals, cosmetics, contaminated refrigerants for air conditioners, electronics and tainted foodstuff), can represent a significant public health and environmental threat.

3. To store and destroy IP infringing goods in an environmentally safe way is a difficult and often complex goal to achieve, especially in developing countries. Appropriate storage and destruction is often constrained by a lack of regulatory frameworks, technical expertise and environmental awareness, suitable disposal or recycling infrastructure or financial resources.

4. Storage is costly and may become limiting, particularly following seizure operations, when enforcement agencies can be overwhelmed by a high volume of seized goods. Hazardous materials must be adequately segregated or sufficiently stored as to avoid fire, leakage, explosion or accident risks, and appropriate emergency response plans or equipment should be available.

5. Open burning is the most inappropriate disposal method for IP infringing goods with the potential of devastating and long-term effects on both the environment and human health. Despite this, it is repeatedly used and is the main method generally employed at showcase events aiming to raise public awareness of the counterfeit problem³. Burning infringing products along with their plastic packaging materials can release a large volume of toxic fumes such as persistent organic pollutants (POPs), organic compounds which are resistant to environmental

¹ The terms “counterfeit goods” and “pirated goods” as used in this study are defined in the TRIPS Agreement, Article 51, Note 14: “For the purposes of this Agreement: (a) ‘counterfeit trademark goods’ shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation; (b) ‘pirated copyright goods’ shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation”.

² OECD and European Union Intellectual Property Office (EUIPO) (2016), *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, available at: <http://dx.doi.org/10.1787/9789264252653-en>.

³ In a review of news items reporting on the destruction of counterfeit pharmaceutical goods no less than 15 burning events were observed and in most cases photographs indicate the inclusion of all packaging including plastic containers (which will result in the release of toxic fumes and residues).

degradation, affecting both workers and waste pickers with direct exposure to toxic fume or with potential for leachates to pollute surrounding soils and waterways.

6. Disposal to non-sanitary and open landfills can be similarly damaging both for the environment and for the many scavengers that pick over the waste.

7. In addition, if IP infringing goods are not adequately destroyed they may be recovered and re-enter the channels of commerce either in the same or an adapted form.

8. With the high volume of IP infringing goods seized, the costs for these operations represent a substantial liability for enforcement agencies. While every effort is made to indict the infringers for these costs, more often it is the right holders or governments that are left to foot the bill.

II. THE IP PERSPECTIVE – LEGAL AND POLICY FRAMEWORKS RELEVANT TO THE ENVIRONMENTALLY SAFE STORAGE, DESTRUCTION AND DISPOSAL OF IP INFRINGING GOODS

9. While the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)⁴ and national IP regulations provide for the authority to destroy or dispose of seized IP infringing goods, evident among States is a lack of harmonization as to how this is performed in criminal, civil, administrative and custom proceedings.

10. The determination as to who pays for the storage and destruction and the length of available proceedings vary both across remedies and countries.

11. Both the WIPO Development Agenda and the United Nations Sustainable Development Goals (SDGs) rationalize and justify action to improve the environmentally safe destruction of IP infringing goods. Nonetheless, all parties, be they the judiciary, enforcement agencies, environmental agencies or right holders, will have to buy into the concept of sustainable development and recognize their role if these important aspects are to be improved and positive change realized.

III. THE ENVIRONMENTAL PERSPECTIVE – LEGAL FRAMEWORKS RELEVANT TO THE ENVIRONMENTALLY SAFE STORAGE, DESTRUCTION AND DISPOSAL OF IP INFRINGING GOODS

12. There are a number of multilateral environmental agreements that become relevant to the disposal of IP infringing goods depending on the nature of these goods (e.g., hazardous⁵, containing toxins, ozone depleting substances or mercury) and whether they may require transportation across borders for appropriate destruction. Of these, probably the most relevant is the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal⁶, which obliges its parties to ensure that hazardous and other wastes are managed and disposed of through environmentally sound management (ESM).

⁴ Articles 46, 59 and 61.

⁵ For an IP infringing good can be defined as hazardous if it poses a substantial or potential threat to public health or the environment and exhibits one or more of the following five hazardous characteristics: flammable, explosive, reactive, corrosive or toxic.

⁶ Adopted on March 22, 1989, and entered into force on May 5, 1992, 1673 UNTS 57, available at: <https://treaties.un.org/doc/publication/UNTS/Volume%201673/v1673.pdf>.

13. In general, four environmental principles are widely recognized as crucial for effective and controlled management of wastes⁷:

- The “polluter pays principle” implies that all producers of waste are legally and financially responsible for the safe and environmentally safe disposal of the waste they produce. This principle also attempts to assign liability to the party that causes the damage.
- According to the “precautionary principle” where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
- The “duty of care principle” stipulates that any person handling or managing hazardous substances, or wastes or related equipment is ethically responsible for using the utmost care.
- The “proximity principle” recommends that treatment and disposal of hazardous waste take place at the closest possible location to its source to minimize the risks involved in its transport. Similarly, every community should be encouraged to recycle or dispose of the wastes it produces, inside its own territorial limits, unless it is unsafe to do so.

14. Under the Basel Convention, also a series of technical guidelines on hazardous waste management were developed, such as, in collaboration with the Partnership for Action on Computing Equipment (PACE) and the Mobile Phone Partnership Initiative (MPPI), guidelines on ESM and recycling for information and communication technology (ICT) equipment.

15. A key driver to achieve ESM and appropriate destruction of IP infringing goods is the strength of the existing national environmental policy and legislative framework. Where this is well developed waste management will be more effectively controlled. However, where the legal system is less robust or other economic demands take precedence over environmental protection, the safe destruction of IP infringing goods will be a more challenging task and may result in less acceptable disposal options being utilized. In respect of hazardous infringing goods, depending on the size of the seized consignment and the type of hazardous substances contained, it may be more suitable to arrange for transboundary export of these goods to the place of origin or to a third country with a facility for environmentally sound disposal. Transboundary movements of hazardous and other waste are regulated through the prior informed consent procedure under the Basel Convention⁸. The high cost of this procedure, however, may preclude this option in the absence of additional financial support.

⁷ See also Guidance Document on the Preparation of Technical Guidelines for the Environmentally Sound Management of Wastes Subject to the Basel Convention, available at: <http://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/sbc/workdoc/framewk.doc>.

⁸ This procedure requires: notification (of the importer to the competent authority of the State of export); consent to the export and issuance of a movement document; transboundary movement; and subsequent receipt of a confirmation that the waste has been disposed of as planned in an environmentally sound manner.

IV. ENVIRONMENTAL AND PUBLIC HEALTH AND SAFETY CONCERNS WITH THE STORAGE, DESTRUCTION AND DISPOSAL OF IP INFRINGING GOODS

16. The disposal method selected for IP infringing goods will depend on the specific nature of the good (e.g., hazardous or not), the available technology or expertise and costs. Hazardous or health sensitive⁹ goods will often require specialized disposal or recycling.

17. Counterfeit organic pesticides should in most cases be incinerated at a high temperature (>1100 degrees Celsius) as they often contain toxic components that greatly differ from the original product. Prior to disposal, counterfeit pesticides will also require chemical and physical analysis in an accredited, well-equipped quality control laboratory with certified personnel. Facilities able to achieve this may be of limited availability. Once the pesticides are destroyed, the containers would need to be effectively rinsed and destroyed and should not be re-used as residual chemicals will remain in the container walls.

18. Counterfeit pharmaceuticals pose a threat as they are outside established regulatory frameworks and often produced in unsanitary conditions. Counterfeit cosmetics may contain dangerously high levels of toxic metals and have even been found to contain paint stripper, nail varnish remover or urine. Such health sensitive products should either be incinerated or at minimum disposed of through encapsulation. This relatively inexpensive process encases the infringing goods into a concrete/cement solid that can be relocated to a landfill site and will prevent scavenging by waste pickers and leaching into the surrounding environment. Counterfeit pharmaceuticals and fake cosmetics should not be destroyed through low temperature open burning as toxic pollutants may be released into the air.

19. Counterfeit electronic goods may also pose a serious hazard to consumers through defects such as faulty batteries or overheating. However, they will contain valuable materials such as gold, silver and copper that may bring significant financial dividends through formal recycling¹⁰. Recycling should first remove the functionality of the goods and be guided by ESM principles. Developed countries commonly have licensed recycling facilities in which salvageable materials can be safely extracted. Yet in less developed countries recycling of "e-waste" is frequently unregulated, usually informal and sometimes illegal and practiced by people with little personal protection or technology and a lack of awareness of the potential health risks¹¹.

20. With regard to counterfeit clothing and footwear, the environmental footprint and costs could be reduced if these goods could be disposed of by way of humanitarian donations or innovative use, which would also be considered socially responsible. Prior to such actions being taken, however, it is important to obtain the right holders' full agreement. Many right holders do not currently support the donation of their goods due to potential problematic consequences in respect of liability and negative impacts on brand image. This is especially the case when materials used in the production of these counterfeit goods are unsafe and may cause harm to the user (e.g., banned toxic dyes and high flammability). In addition, there is a danger that donated goods illicitly return to the marketplace.

⁹ Health sensitive goods are considered harmful as a result of their sub-standard or incorrect active pharmaceutical ingredients, unsafe additional ingredients or lack of therapeutic benefits, which can further endanger the patient's health.

¹⁰ A typical mobile telephone will contain approximately 15 g of copper, 0.034 g of silver, 0.034 g of gold, and 0.015 g of palladium, amounting to a total of 15 tonnes of copper, 34 kg of silver, 34 kg of gold and 15 kg of palladium for every million telephones recycled; see <http://www.bbc.com/future/story/20161017-your-old-phone-is-full-of-precious-metals>.

¹¹ Devin N. Perkins and others (2014), *E-Waste: A Global Hazard*, 80 Annals of Global Health, pp. 286-295.

V. MAIN CHALLENGES IMPACTING THE ENVIRONMENTALLY SAFE STORAGE, DESTRUCTION AND DISPOSAL OF IP INFRINGING GOODS

21. Challenges for the environmentally safe storage and destruction or disposal of IP infringing goods are numerous. Inappropriate destruction and disposal of IP infringing goods frequently results from poor technical capacity or environmental awareness, lack of disposal or recycling infrastructure, weak legislation or a lack of financial resources.

22. The storage and the destruction or disposal of IP infringing goods are processes authorized, overseen and conducted by many parties (e.g., IP enforcement agencies, environmental agencies, right holders, and private contractors). This increases the difficulty of coordination and cooperation, resulting in a process that may be disorganized and fail to function correctly.

23. Furthermore, the appropriate technical knowledge and environmental awareness of the parties involved may be inadequate. Organizations such as the International Criminal Police Organization (INTERPOL), World Customs Organization (WCO) and WIPO use tailored training materials specifically aimed at IP enforcement agencies. However, so far there is only limited adequate guidance on the topic of environmentally safe storage and destruction / disposal of hazardous or potentially hazardous IP infringing goods. While some specific initiatives and workshops have been organized with enforcement authorities and other relevant actors to address these problems (e.g., WIPO/United Nations Environment Programme Asia Pacific Workshops, Green Customs Initiative of the United Nations Environment Programme), more effort is required to improve knowledge and awareness.

24. Another limiting factor is the lack of specific monitoring and statistics on destruction / disposal practices for IP infringing goods such that methods, levels of success and social and environmental impacts cannot be compared and any lessons learned compiled and shared.

25. One of the main concerns of right holders and governments is the high costs involved with both the storage and destruction of IP infringing goods, especially when specialized methods or transboundary export are required for hazardous material disposal. Furthermore, protracted litigation procedures that can take many years until a final decision is reached can result in a marked increase in storage costs, with the onus for payment generally bearing on the right holders. These situations have ultimately led some right holders to request customs not to seize their products or at least not until a certain threshold of volume has been encountered. This is an area that needs to be improved.

VI. OPPORTUNITIES TO IMPROVE THE ENVIRONMENTALLY SAFE STORAGE, DESTRUCTION AND DISPOSAL OF IP INFRINGING GOODS

26. Several opportunities can be identified to address the existing challenges and improve the environmentally safe storage, destruction and disposal of IP infringing goods.

A. TRAINING AND CAPACITY BUILDING

27. Improved technical capacity and environmental awareness of the responsible parties involved with the storage, recycling or destruction/disposal of IP infringing goods is urgently needed. This can be achieved through collaborative efforts between international organizations involved with IP enforcement training (e.g., WIPO, INTERPOL, WCO), environmental matters and waste management (e.g., United Nations Environment Programme) and relevant thematic areas (e.g., Food and Agriculture Organization; World Health Organization (WHO) for agro-

chemicals and health). In addition, stakeholders of the private sector with particular knowledge and experience in waste disposal could contribute their expertise.

28. Depending on the targeted audience and their pre-existing knowledge of the topic, training materials could cover:

- definition and types of hazardous IP infringing goods;
- definition and types of health sensitive IP infringing goods;
- appropriate storage and segregation of hazardous IP infringing goods;
- laboratory analysis of hazardous IP infringing goods;
- description of available options for recycling, destruction / disposal of IP infringing goods;
- destruction / disposal hierarchy of IP infringing goods;
- disposal methods for showcase events;
- alternative disposal options and recycling methods for IP infringing goods;
- standard operating procedures for destruction / disposal of IP infringing goods;
- monitoring and reporting on the storage and destruction / disposal of IP infringing goods; and
- national and local coordination for environmentally sound storage and disposal of IP infringing goods.

B. PUBLIC AWARENESS AND EDUCATION

29. Improved public awareness and education is also needed. Where States organize showcase events to this end, appropriate destruction / disposal methods should be used. This may include open burning with limitations, such as only the cardboard packaging of seized goods being burnt. More ideally, however, showcase events should demonstrate methods such as crushing and shredding, followed by encapsulation so that no negative environmental or public health impacts are incurred. Furthermore, if the overall message communicates well that the method for destruction was selected to minimize negative environmental harm, the beneficial impact may be greater. Alongside well-prepared media materials, the message can be far reaching and integral for shaping public opinion on the potential dangers and negative impacts of IP infringing goods.

C. IDENTIFICATION OF SUBSTANCE SPECIFIC STORAGE, RECYCLING, AND DISPOSAL OPTIONS

30. The potential for alternative disposal options for IP infringing goods also needs to be identified for each location and disseminated. Several studies have shown that cement kilns, which are often available also in developing countries, may provide an adequate alternative for high temperature incineration¹² of specific hazardous goods such as organic counterfeit pesticides or ozone depleting substances such as counterfeit refrigerants which require this type of specialized high temperature treatment for environmentally safe disposal. To use existent cement kilns for the destruction of these IP infringing goods, the only major cost is the development of a delivery mechanism to send the goods into the kiln furnace, and these costs

¹² Yeging Li and others (2012), *Disposal of Obsolete Pesticides Including DDT in a Chinese Cement Plant as Blueprint for Future Environmentally Sound Co-processing of Hazardous Waste Including POPS in the Cement Industry*, 16 *Procedia Environmental Sciences*, pp. 624-627; Kåre Helge Karstensen and others (2006), *Environmentally Sound Destruction of Obsolete Pesticides in Developing Countries Using Cement Kilns*, 9 *Environmental Science & Policy*, pp. 577-586; Food and Agriculture Organization (1997), *Prevention and Disposal of Obsolete and Unwanted Pesticides Stocks in Africa and the Near East*, FAO Pesticide Disposal Series 5.

will be lower than any transboundary export of infringing waste materials. For health sensitive counterfeit products, encapsulation offers an ideal and inexpensive solution yet is under-utilized and should be better promoted. In respect of other IP infringing goods a review of locally available storage and disposal options should be conducted for each type of good to ensure the most acceptable option is selected.

31. Similarly, right holders need to better support the concept of recycling of IP infringing goods and this practice should be guided by ESM principles based on acceptable risk thresholds using official regulated mechanisms with adequate worker protection. In countries not yet able to instantly respond to these requirements, incremental improvements can nonetheless be made with the right effort, commitment and support from international organizations, governments and right holders. In this respect, the recycling guidelines emerging from the Basel Convention and waste management guidelines from the United Nations Environment Programme should be used to educate and improve recycling practices. Moreover, right holders should pass on to relevant parties knowledge they gained from their own extended producer responsibility schemes on effective and innovative techniques for improved recycling.

D. HUMANITARIAN DONATION

32. For many right holders questioned for this study, the humanitarian donation of goods was a sensitive issue with most indicating they currently did not support such initiatives. While their concerns are clearly valid, the social benefits of such actions are also relevant. Therefore, efforts should be made to bridge perceived interest gaps so that it becomes more acceptable for right holders to agree to donations. Appropriate mechanisms should be found that guarantee that the donated goods do not cause harm to those to whom they are donated. In addition, such mechanisms should decrease the risks for right holders.

33. Perhaps an improved standard for relabeling or rebranding could be investigated in combination with assured testing of counterfeit materials to ensure they cannot harm those that receive them. The development of specific agreements indicating the various responsibilities and expectations of the parties involved may be a further potential step. Such initiatives should clearly define the mechanisms and accountability involved in ensuring any donated products will not be able to return to channels of commerce.

E. PHYSICAL AND FINANCIAL RESOURCES

34. Various options are available for addressing both the costs and length of time of litigation for IP infringing goods. In the United States of America, all storage and destruction costs for IP infringing goods are paid for by the Treasury Forfeiture Fund with funds derived from the forfeited assets of criminal enterprises¹³. This mechanism relieves right holders of the burden of storage and destruction costs and further ensures criminal assets are recovered at every opportunity for such purposes. There is scope for a similar legislative mechanism to be developed whereby proceeds of crime associated with counterfeiting could be used to provide funding support for national enforcement activities for IP infringing goods. Such a mechanism would not only reduce the burden on governments and right holders in respect of costs of

¹³ Peter Fowler (2013), *Storage and Disposal of Forfeited Infringing Goods: The U.S. Experience*, WIPO-UN ESCAP-United Nations Environment Programme Regional Workshop on the Environmentally Safe Disposal of Intellectual Property Infringing Goods, Bangkok, Thailand, November 21 and 22, 2013, available at: http://www.unescap.org/sites/default/files/infringing-goods-peter_0.pdf.

storage and destruction but would also send a strong message to criminal enterprises that their total assets will be taken if criminal activity is proven.

35. It may also be useful to revisit the proposal to oblige the alleged infringer, at the earliest stage of proceedings, to pay a financial warranty based on *prima facie* evidence of infringement to cover storage and destruction costs¹⁴.

36. Certain measures to reduce protracted timeframes of litigation, and thus the costs for storage, have been proposed in an earlier study¹⁵.

F. MONITORING AND DATA GATHERING

37. Additionally, the practices relating to the environmentally safe destruction and disposal of IP infringing goods could be improved through the development of a monitoring and information platform, either as a standalone mechanism or, more ideally, integrated with current data gathering initiatives operated by WCO, the European Union Intellectual Property Office (EUIPO) and national governments and addressing the volumes and types of IP infringing goods seized worldwide. Specifically, the system should gather information on the nature of the IP infringing goods (e.g., whether hazardous, health sensitive or not), how the goods will be stored, the method used for either destruction, disposal or recycling, what entities are responsible for this task (e.g., enforcement authorities, right holders), what level of costs were incurred for both storage and the destruction process and what, if any, administrative, social or environmental issues were encountered. This platform should also further provide information exchange, support and feedback with respect to appropriate destruction or disposal options available for IP infringing products, any significant technological or innovative advances that are relevant, and any lessons learned or training that would help improve technical expertise and environmental awareness while minimizing both environmental and public health impacts and risks.

VII. CONCLUSION

There is a need to recognize that IP infringing goods seized and authorized for destruction or disposal not only represent a major waste item that must be dealt with in its own right but also pose additional problems over conventional waste due to their often sub-standard quality and/or dubious/unknown composition. This is notwithstanding the direct need that such goods must be definitively removed from the channels of commerce. Furthermore, as IP infringing goods are illicitly produced and trafficked by criminal enterprises, there is often an understandable reluctance with regard to the responsibility or accountability for these goods considering the significant financial burden such goods present for both enforcement agencies (e.g., funded by taxpayers) and right holders, where both parties may actually be considered the victims of this illicit trade. Nonetheless, if the environmentally safe storage, destruction and disposal of such goods is to be accomplished, more attention is urgently required on building capacity, both

¹⁴ European Observatory on Counterfeiting and Piracy Legal Issues Working Group (2010), *Corrective Measures in Intellectual Property Rights*, p. 3, available at: http://ec.europa.eu/internal_market/iprenforcement/docs/corrective_measures_en.pdf.

¹⁵ David Blakemore (2010), *Study Relating to Existing Methods of Disposal and Destruction of Counterfeit Goods Within the Asia Pacific Region* (WIPO/ACE/6/8), para 98, available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=143352.

administrative and technical, and improving the procedures, monitoring and support of these activities, especially for developing countries. This is only likely to occur with more collaborative and committed engagement amongst all affected parties.

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