

Advisory Committee on Enforcement

Sixth Session

Geneva, December 1 to 2, 2010

SUMMARY BY THE CHAIR

Document prepared by the Secretariat

1. The sixth session of the Advisory Committee on Enforcement (ACE) was opened by Mr. Christian Wichard, Deputy Director General of WIPO.
2. The Committee unanimously elected, for one year, Mr. Makiese Augusto, First Secretary, Economic Affairs, Permanent Mission of Angola, as Chair.
3. The Committee adopted the Draft Agenda (document WIPO/ACE/6/1 Prov.) with an amendment as follows. Agenda item 7 of the Draft Agenda reads: "Work of the ACE".
4. Under agenda item 5, the Committee heard seven speakers making presentations relating to various elements of the work program agreed at the fifth session of the ACE (working documents WIPO/ACE/6/4 to WIPO/ACE/6/10). Among the specific issues that were dealt with in the presentations were, *inter alia*, an analysis of methodologies applied in existing studies to measure the economic impact of counterfeiting and piracy; recommendations for further economic research in that field at the micro-level, including with a view to improving and harmonizing data collection methods. There was further discussion on the interrelation between high prices, low income and cheap technologies as driving factors for copyright piracy; the impact of current pricing policies on the scope of media piracy; a more inclusive business model-based approach by some right holders as a complementary to enforcement and educational models; possible reverse effects of inaccurate or over-dramatizing outreach campaigns; low-price models as viable business models in the media market, and the fact that enforcement should not be used to preserve high-end markets. Recent findings were reviewed concerning consumer attitudes on counterfeiting and piracy, including with a view to the acceptance and non-acceptance of various educational models, the importance of having credible and reliable data, and public-private

cooperation in consumer education. In addition, the importance of a careful use of language relating to counterfeiting and piracy was emphasized, as well as the need to differentiate between individual countries rather than “developing countries” as a unit, and to consider elements such as poverty and imitation as a learning process in the context of developing policies and strategies for building respect for IP. One speaker discussed current challenges related to the storage and disposal of seized counterfeit and pirated goods, especially in light of growing volumes of seized goods in many countries, environmental and humanitarian relief considerations, as well as costs incurred by governments and right holders. In addition, a case study addressed the detriment of piracy on local cultural development, as well as a range of challenges that may be faced by right holders in an attempt to compete with pirated products at the low-end of the market.

5. In the discussions following the presentations, a number of observations were made and questions were raised. Several delegations expressed their interest in the continued work of the ACE as suggested in the recommendations of working document WIPO/ACE/6/7, especially with a view to the effect of counterfeiting and piracy on employment. One delegation formulated a request for WIPO to assist in respective economic research at the national level. Some delegations underscored that adequate pricing structures would be a useful complement to enforcement and educational efforts, while other delegations questioned the efficiency of lower prices as illegal competitors would be ready to compete at any low end of the market. Moreover, the need to effectively relate to consumers for successful educational work was discussed, as well as the importance of close and effective public-private cooperation in that context. Some delegations suggested that the work of the ACE should include an analysis of the language used in the context of counterfeiting and piracy, as well as of the role of imitation as a learning process in developing policies for building respect for IP. There was further discussion on the need to establish a balance between preventive and repressive efforts, including with a view to reaching out to consumers. It was further underscored that there was no obligation on governments to bear costs associated with the storage and destruction of seized counterfeit and pirated goods; that new partnerships could be explored; and that IP infringements should not be conflated with health and safety risks without being mindful of the context.
6. The Chair took note of the information provided by the delegation of the European Union (EU) concerning the work relating to developing methodologies for measuring the effects of counterfeiting and piracy, undertaken by the EU Observatory on Counterfeiting and Piracy. Some delegations invited the EU to share respective information and findings at the next session of the ACE.
7. The Chair further took note of the concerns voiced by the delegation of South Africa concerning working document WIPO/ACE/6/9 and its status. It was agreed that the Secretariat would engage in bilateral discussions with the delegation on that matter.
8. Under agenda item 6, the Secretariat introduced document WIPO/ACE/6/2 on recent activities of WIPO in the field of building respect for IP, including with a view to training, capacity building, legislative and policy advice, awareness-raising, international cooperation and information exchange. The Committee took note of the presentation by the Secretariat.
9. The Committee took note of information provided by the delegation of France on a pedagogic exhibition, aiming at the public at large, which is currently being presented at the *Cité des sciences et de l'industrie*, Paris, in partnership with the French Institute of Industrial Property (INPI), entitled “*Contrefaçon, la vraie expo qui parle du faux*”. The delegation of France invited all WIPO Member States to visit this international exhibition

during the Sixth Global Congress on Combating Counterfeiting and Piracy, to be held on February 2 and 3, 2011. The delegation further invited Member States to consider hosting the exhibition in their respective countries. The exhibition is presented in three languages, namely English, French and Spanish.

10. The Committee further took note of a presentation by the delegation of Mexico on an ongoing successful educational campaign against counterfeiting and piracy that focuses on educating children.
11. Under agenda item 7, the Secretariat introduced document WIPO/ACE/6/3. Proposals by Member States on the future work of the ACE included a continuation of the work program adopted at the fifth session of the ACE; an analysis of the obligations of right holders in the domain of enforcement as a mechanism to facilitate the efforts of Member State in this field; conducting a mapping study of the unilateral, bilateral, plurilateral and multilateral initiatives on IP enforcement/counterfeiting, including IP enforcement provisions in free-trade agreements (FTA) and various task forces and public-private partnerships on IP enforcement/counterfeiting; a study to assess the effectiveness of IP enforcement measures, with a view to formulating a strategy for enhancing IP enforcement policy stimulating development and economic growth; an analysis of the technical assistance provided by WIPO in the field of building respect for IP with a view to further improving this assistance; an examination of public awareness campaigns focused on building respect for IP; a comparative analysis of methodologies applicable to: (i) calculating damages; (ii) determining jurisdiction; and (iii) gathering and storing evidence; an analysis of Corporate Social Responsibility (CSR) on building respect for IP; the relationship between poverty, inequality, the need for imitation and the protection of foreign rights; international cooperation to promote respect for IP, based on Recommendation 45 of the Development Agenda; an analysis of flexibilities relating to IP enforcement available under TRIPS for developing countries and least developed countries and their socio-economic significance, especially in relation to medicines, access to knowledge and food security; a continuation of the work program agreed at the fifth session of the ACE; and a discussion on how to intensify and improve WIPO's enforcement-related technical assistance, including: (i) an evaluation of how WIPO has been promoting the concept of "building respect for IP" in its technical and legislative assistance activities; (ii) an inventory of "success stories" of technical assistance and capacity building in this area; (iii) legislative assistance with a view to preventing the abuse of enforcement procedures such as "sham litigation"; and (iv) legislative assistance in drafting national laws of enforcement that take into account the use of flexibilities as well as the different socio-economic realities and the differences in the legal tradition of each country.
12. The Committee took note of the proposals referred to under paragraph 11, above. It was agreed that those proposals, as well elaborations thereon, newly submitted proposals and the proposals referred to in paragraph 9 of document WIPO/ACE/5/11 will serve as a basis for the discussion of the future work at the seventh session of the ACE.
13. The Committee agreed to consider, at its seventh session, the following topic:

A continuation of the work program of the sixth session of the ACE (items 2, 3, and 4).
14. Under agenda item 7, the Chair further invited views by delegations on the contribution of the ACE to the implementation of the WIPO Development Agenda¹.

¹ This does not constitute a precedent for the future.

15. The delegation of Brazil on behalf of the Development Agenda Group (DAG) stressed that Development Agenda Recommendation No. 45 was directly related to the mandate of competences of the ACE. The principles contained in this recommendation should orient WIPO activities regarding enforcement. The DAG believed that WIPO had indeed been making progress in the implementation of Recommendation 45 since the adoption of the Development Agenda. The work program approved in the last session of this Committee was a milestone in this process. It provided various pertinent elements for discussion in future meetings that corresponded to the different views and objectives of Member States on issues of enforcement. The results of this work program could already be perceived in the documents before us at this session. The studies reflected WIPO's efforts to develop an "inclusive approach" in its activities to building respect for IP. They took into account diversified views and opinions on enforcement issues and were a good basis to promote a balanced discussion on building respect for intellectual property (IP). The DAG hoped that future sessions would continue promoting this kind of debate based on balanced documents, as the Group had seen in this meeting. Despite such achievements, the Group believed that there still was a long way to fully implement Recommendation 45. For example, the contribution of the protection and enforcement of IP rights to the transfer and dissemination of technology remained to be addressed. As document WIPO/ACE/6/7 had stressed, the ACE was also at the beginning of a long process to improve how to measure the economic consequences of all types of IP violations, especially those related to counterfeiting and piracy. Empirical evidence was key. This information was of utmost importance to designing effective measures against those violations. The delegations of Egypt and South Africa supported the statement by the DAG.
16. The delegation of the Philippines aligned itself with the statement by the DAG. The delegation further underlined the need for the WIPO Development Agenda Recommendations to be implemented with full vigor in all the activities of the organization to ensure fuller participation of all Member States, particularly developing countries such as the Philippines. The delegation was greatly encouraged by the approach taken by WIPO towards the creation of an enabling environment to promote respect for IP. In this context, technological innovation and the promise of transfer and dissemination of technological knowledge were areas that required the Committee's intensified consideration.
17. The delegation of Iran aligned itself with the statement by the DAG. The delegation further stated that the work of the ACE should be guided by a balanced approach to IP enforcement, and could not approach the issue of enforcement exclusively from the perspective of right holders. The ACE should give consideration to the social, economic and technological variables and different levels of development, particularly the access to medicines and educational materials at affordable prices, and should try to introduce practical solutions through its technical assistance programs. Member States should discuss in the ACE how to intensify and improve WIPO's technical assistance in this area. Particular attention should be paid to ensure that enforcement procedures were fair and equitable. The ACE could mainstream the Development Agenda through implementing Recommendation 45. In order to create an enabling environment to build respect for IP, there was a need to identify the key reasons behind IP infringements.
18. The delegation of Brazil referred to the thematic approach of the ACE, and to the practice of inviting presentations by experts in its sessions. This systematic working method had proven to be very useful. It offered predictability and consistency to the discussions of the ACE on the various aspects of ensuring respect for IP rights. It was emerging from all the excellent papers submitted by the Secretariat under agenda item 5 that there should be no place in the discussions of the ACE for wasting time on a fruitless search for

one-size-fits-all approaches to dealing with enforcement of IP rights. Each document individually, and all of them taken together, could only confirm that the reality of a complex landscape prevailed. It was against that background that Brazil believed that the ACE had indeed been making progress in the implementation of Recommendation 45 on the basis of the concept of building respect for IP. This was a much broader and inclusive concept than sheer IP enforcement. It rejected the assumption that repression only was the key to compliance, and incorporated societal interests and development concerns into discussions on IP enforcement. Policies and activities developed on the basis of this concept not only benefited from a greater degree of legitimacy, but also were more likely to be effective, as they were based on a deeper understanding of the underlying causes of trademark counterfeiting and copyright piracy, which might vary according to the different socio-economic realities at stake. The delegation also recognized the efforts put by the Secretariat into implementing technical assistance activities and seminars in line with a comprehensive, balanced and development-oriented approach that was favored by Recommendation 45 of the Development Agenda. At the same time, the delegation stressed the need for transparency in all enforcement-related technical assistance and capacity building programs undertaken by WIPO.

19. The delegation of Bangladesh supported the current directions of the work of the ACE, in particular with a view to the implementation of Recommendation 45 of the WIPO Development Agenda. The delegation expressed its wish that the Committee in its future work would pay particular attention to a customized approach to addressing the needs and concerns of least developed countries, as well as socio-economic welfare issues relating to building respect for IP, including issues such as the implications of IPR infringements on poverty and inequality, and of counterfeiting and piracy on, for instance, employment.
20. In line with the decision taken by the 2010 WIPO General Assemblies relating to the coordination mechanism and monitoring, assessing and reporting modalities as agreed in the fifth session of the Committee on Development and Intellectual Property (CDIP), the Chair will forward the views referred to under paragraphs 14–19, above, to the 2011 WIPO General Assemblies.

21. *The Committee adopted the Summary by the Chair, set out in paragraphs 1-20, above.*

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