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PIRACY AND COUNTERFEITING: PERSPECTIVES AND CHALLENGES FOR AFRICAN COUNTRIES

prepared by Mr. Gift Sibanda, Director General** of the African Regional Intellectual Property Organization (ARIPO)*

This paper was prepared to support discussions of item 2) of the work program agreed for the seventh session of the WIPO Advisory Committee on Enforcement (ACE), that is, "Identification of different types of infractions and motivations for IPR infringements, taking into account social, economic and technological variables and different levels of development".

A. INTRODUCTION

1. The magnitude and the devastating effects of counterfeiting and piracy continue to be a matter of concern for both developed and developing countries. Counterfeiting and piracy largely targets luxury goods and other essential items such as apparel, accessories, industrial products, music, videos, software, medicines, etc., all of which usually have good returns. Counterfeiting and piracy continue to hinder research and economic growth, thereby contributing to unemployment. Counterfeiting preys on known or famous brands and persistently continues to render them valueless through disrepute. At its worst, counterfeiting also poses a health hazard to consumers, in particular in the food, medical and pharmaceutical industries, for example through the unauthorized manufacturing and sale of drugs that lack appropriate ingredients. It is also a threat to public safety where non-genuine or fake spare parts are put to use. As if this is not enough, upon discovery of these fake goods mandatory mass destruction can also lead to environmental devastation. In many African countries, piracy

* 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.

** Mr. G H Sibanda also participated in the Global Congress on Combating Counterfeiting & Piracy as a resource person and has also chaired the African Forum on Piracy and Anti-counterfeiting. He can be contacted on the following e-mail address: gsibanda@aripo.org

and counterfeiting has been linked to organized crime. It is by all means a global scourge liable to prosecution given the appropriate enforcement measures. Unfortunately, lack of political will, high levels of illiteracy, absence of centralized enforcement systems in individual countries and technology disparities render developing countries vulnerable to counterfeiting and piracy.

2. The fight against piracy and counterfeiting is further complicated by the highly concealed nature of operations coupled with its cross-border nature and international character. As such, there is an urgent need for international cooperation and modern technologies to mitigate against the said obstacles. In the case of developing countries, technical assistance and training in areas such as border measures, judicial systems, the police, and other agencies become indispensable.

B. THE TRIPS AGREEMENT ON IP ENFORCEMENT

3. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) was carefully negotiated to ensure that it contained multilateral standards considerably balanced and flexible to ensure that it achieved its purpose. The TRIPS Agreement provides for balanced standards to enforce intellectual property rights (IPRs) such as civil and administrative remedies, border measures, provisional or interim measures and criminal procedures. There have been calls for the revision and enhancement of these measures by some developed countries. In addition, a number of countries have initiated measures to raise the levels of enforcement of IPRs, for instance in the framework of the G8 and the proposed Anti-Counterfeiting Trade Agreement (ACTA). Developed countries have also increased bilateral efforts to enhance the enforcement regime of IPRs as seen in the execution of Free Trade Agreements (FTA) and Economic Partnership Agreements (EPA). The total effect of these efforts would be the imposition of different sets of standard with varying conditions on developing countries.

4. On the other hand, it must be pointed out that there are other voices from within both developed and developing countries that see these efforts as TRIPS-plus efforts which undermine the expectations and aspirations of provisions of the TRIPS Agreement.

5. The enforcement of IPRs has become a very prominent and pressing issue internationally. Whilst the debate in formulating solutions to this issue is diverse, there is consensus that counterfeiting and piracy have reached very alarming levels which continue to rise. At the same time, the main actors, such as governments, right holders, civil societies, international organizations, relevant institutions, scholars, academics and practitioners generally disagree on the actual levels of piracy and counterfeiting. These groups also disagree on their effects and the tools to be employed to combat them. As a result the process of finding suitable solutions has been and continues to be a global challenge.

C. IP INFRINGEMENT AND SOCIETY

6. What are some of the elements fueling IP infringement in the developing African countries? The factors which fuel piracy and counterfeiting in African countries include unemployment, illiteracy, and lack of awareness, lack of mechanisms to combat piracy and counterfeiting and/or very low levels of enforcement actions. Additionally, enforcement measures against piracy and counterfeiting are often ineffective because of factors such as inadequate training and sensitization of law enforcement institutions, inadequate resources, scarcity of IP experts, the inactive and passive attitude of right holders, weak or no collaboration among stakeholders, lack of political will or its weakness thereof, etc.

7. Low incomes in developing economies provide the impetus for consumers to seek low priced goods and services. Those engaged in counterfeiting and piracy globally take advantage of these needs by flooding the market with counterfeit and pirated goods. This is usually done

by targeting low income communities and areas where there is very little knowledge about intellectual property rights issues. Here, access to goods may even be a matter of survival, and become a human rights and societal social issue.

8. On the other hand, there are also consumers that are very much aware of the counterfeit nature of goods and products that use that very fact to bargain for low prices. For those who gravitate towards counterfeit goods and pirated products with full knowledge of that fact, it is usually simply a matter of affordability.

9. It appears that the systems currently in place facilitate the movement of counterfeit and pirated goods. For instance, there have been reports of instances of customs officers and other government officials participating in cross border transportation of counterfeit and pirated goods. A great number of business owners are also guilty of looking on whilst counterfeited goods are traded in. In an economy where there are few business outlets where *quality* products are sold and prices are very high, it is nearly the norm to see many consumers patronizing goods which are advertised to the effect that they are cheaper because they are produced by a particular country or company, but serve the same purpose. It then becomes clear that there is lack of will on the part of the whole system to confront the situation mostly due to the social implications of such a confrontation.

10. The gravity of the counterfeiting and pirating problem is a reality check in the sense of what is available to the consumers by way of goods and purchasing power. Products typically counterfeited include those that are fast moving with higher value. These are commodities such as frequently consumed goods that attract considerable profit margins, including food and alcoholic beverages, cigarettes, batteries, stationary, electronic equipment, spare parts for motor vehicles, tires and tubes, lubricants, medicine and drugs, seeds and fertilizers, cosmetics, etc.

D. A BALANCED IP ENFORCEMENT

11. There is a need to combine the legalistic and repressive approach of fighting piracy and counterfeiting with a more expansive understanding and appreciation of social and economic dimensions. At a time when TRIPS continues to create a balanced environment for developing countries to improve their IP system, including through utilizing the flexibilities enshrined in the instrument, it may be advisable to ensure that such balances and flexibilities be also reflected in the context of free trade agreements and economic partnership agreements being executed at the bilateral levels.

12. There is the need to factor in WIPO's Development Agenda Recommendation 45 which emphasizes the need *to approach intellectual property enforcement in the context of broader societal interests and especially development oriented concern* all in accordance with Article 7 of the TRIPS Agreement.

13. It is also important to draw attention to the significance and relevance of WIPO's Strategic Goal VI which encourages *informed and empirically well-founded policy discussions at the international level to support the creation of an enabling environment that promotes respect for IP in a sustainable manner and strengthen capacity in Member States for the effective enforcement of IP rights in the interests of social and economic development and consumer protection*.

14. There is also a need to encourage more collaboration and active cooperation between governments, as well as between right holders and governments, including from developing countries. It is such cooperation that is the foundation of significant improvement in IP issues and systems as seen in the implementation of the TRIPS Agreement. More technical

assistance in funding should be targeted at strengthening weak enforcement systems. Also, cooperation at the political level to enhance political will should be initiated and sustained.

15. Anti-counterfeiting policy developments or initiatives should aim at addressing the need for building IP awareness and IP systems which have been put in place in developing countries as a result of the TRIPS Agreement. Such developments should further permit fully utilizing TRIPS flexibilities that will promote matters such as access to medicines, and achieving health-related Millennium Development Goals. In addition, other developmental issues that are of great concern to African countries such as traditional knowledge and biodiversity, food security, climate change and access to the Internet should be reflected in such developments.

16. The initiatives should uphold the purpose of IPRs which is to protect innovation, competition, consumer rights; encourage production and export and overall economic development and growth. The dialogue should take on board issues of human rights principles and should be very transparent and grounded in multilateral institutions, systems and regimes.

E. IP ENFORCEMENT AND SUSTAINABLE DEVELOPMENT

17. The enforcement of IPRs is a subset of the intellectual property system which plays a crucial role in competitive economic growth, development and job creation for the global economy. It is therefore paramount that the crafting of any aspects of intellectual property should take on board wider issues pertaining to intellectual property, its role in national and international economy vis-à-vis the broader issues of societal development. Such an approach will result in crafted solutions which actively address related issues of funding, provisions of technical assistance, training, strengthening of relevant systems, job creation, enforcement of legal regimes, multilateral collaboration which will all dovetail into sustainable development across the globe.

18. In line with Article 7 of the TRIPS Agreement, the enforcement of IPRs should contribute to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. In addition, considerations relating to expectations of developing countries regarding matters such as access to medicines and other health needs, access to transfer of technology to aid development in Africa, as well as the Millennium Development Goals, should also be taken into account.

19. Enforcement initiatives should address the existing conditions and needs in developing countries so as to take on board local competitors, their local creative initiatives, and locally crafted solutions. These are the stakeholders who at first hand know the benefits of enforcement of IP rights for their businesses and will therefore be willing to be part of relevant initiatives.

20. There is a need for increased technical assistance and training to developing countries, in areas such as border measures, judicial systems, the police and other law enforcement agencies. Enhanced collaboration with these institutions through their governments should be undertaken to ensure that the training assistance is broadened.

21. In addition to training officers whose duties deal directly with IP issues, discussions and strategies such as incorporating the subject into their training curriculum and seminars held during their annual meetings will be very helpful as a way of sensitizing the whole system and creating awareness. These law enforcement officers could then serve as agents of change. The widespread training of the police officers, the judges, the custom officials coupled with the continuous introduction of the teaching of IP in the universities of the developing countries will accelerate the expected results in relation to intellectual property right issues.

22. International organizations including the World Trade Organization (WTO), WIPO, the World Health Organization (WHO), the Food Agricultural Organization (FAO) etc. should cooperate more and coordinate their training and technical assistance for higher results. This cooperation and coordination should be done at all levels. Their funding packages should include plans to encourage local and national strategies crafted to assist in anti-counterfeiting efforts aimed at ensuring economic growth. In this regard, the collection of information, statistics and data should not be undertaken by international institutions only but should be done locally or in collaboration with the local and national institutions.

23. Armed with such tools as methodology and statistics the governments and people of developing countries can be better sensitized on issues of counterfeiting and piracy and their negative effects on a nation's development. The involvement of national experts and institutions will certainly render this exercise easier to achieve, as cooperation will be more forthcoming. Such data and statistics will be more acceptable and better appreciated as local and national experts are seen spearheading such programmes.

24. Whilst it should not be a national policy to levy or tax right holders, it will be useful for right holders of all sizes, local or international, to contribute to IP enforcement. This can take creative forms such as funding awareness creation exercises and campaigns, assisting in the destruction of seized counterfeit and pirated goods, collectively placing and paying for advertisement in the media and sustaining them. They can also engage relevant government agencies to fund IP retreat programmes for them.

F. CONCLUSION

25. Enforcement is a subset of the overall IP regime, just as IP is a subset of the broader issues of development. In pursuing that development agenda, nations, institutions, multilateral and bilateral groups should adopt an all-inclusive approach. The fight against counterfeiting and piracy should be an all-embracing and transparent one. It should have the active collaboration of all including private right holders and their governments. Greater levels of efficiency will be achieved together with higher volumes of gains if these all-inclusive initiatives and strategies are firmly situated within the concept of multilateralism and institutionalized as we have seen in the TRIPS Agreement.

26. The TRIPS Agreement which was painstakingly negotiated and adopted has ensured that firm foundations are laid in IP in Africa and a lot of technical assistance have aided in modernizing broad range of infrastructure in Africa. The TRIPS Agreement and its provisions are carefully balanced in a very dynamic manner to aid and sustain the fight against counterfeiting and piracy and our call is for the world to continue in that direction.

27. There is no denying that there is counterfeiting and piracy going on in developing countries just as it is in developed countries, but perhaps for different reasons. As there is a market for counterfeit goods and products, there is the need for collaboration among investors, businesses and governments both nationally and internationally to enable effective and balanced IP enforcement. This will reverse the negative trend and habit of counterfeiting and piracy so that investors, businesses and governments will reap significant profit from the growth of their economies and job creation. It is unimaginable to conceive how the battle against piracy and counterfeiting can be won without such wider approach.

References

1. *Amy Kapczynsky, University of California at Berkeley Law School – Intellectual Property and Sustainable Development and Access to Medicines.*
2. *Bridges Weekly Trade News Digest. Vol. 13 No. 29. 11/11/2009 - WIPO Enforcement Committee Gives Development Concerns Centre Stage.*
3. *Carsten Fink, Group d' Economie Mondiale, Sciences Po Paris – Enforcing Intellectual Property Rights: An Economic Perspective.*
4. *International Centre for Trade and Sustainable Development (ICTSD) – Recent Research on Piracy and IP Enforcement in Developing Countries: Issues and Lessons.*
5. *ICTSD- The Global Debate on the Enforcement of Intellectual Property Rights and Developing Countries.*
6. *Carlos M. Correa, Centre for Interdisciplinary Studies on Industrial Property and Economics, University of Buenos Aires – The Push for Stronger Rules: Implications for Developing Countries.*
7. *Bridges Weekly Trade News Digest. Vol 13, No. 31. 16/9/2009 – EU Releases Communication on Enhanced IP Enforcement for its Internal market.*
8. *Bridges Weekly Trade News Digest. Volume 13. No. 38. 4/11/2009 – EU issues New Reports on IPR Enforcement outside Europe.*
9. *WTO Website: www.wto.org , WIPO Website: www.wipo.org .*

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