

Advisory Committee on Enforcement

Seventh Session

Geneva, November 30-December 1, 2011

FUTURE WORK OF THE ADVISORY COMMITTEE ON ENFORCEMENT (ACE)

prepared by the Secretariat

1. In its first session, held in 2003, the ACE agreed on the principle of a thematic approach to its work, and the inclusion of expert presentations in the respective sessions.¹ In its subsequent sessions, the Committee analyzed and discussed the following work programs:

- 'The role of the judiciary and quasi-judicial authorities, as well as of the prosecution, in enforcement activities (including related issues such as litigation costs)';²
- 'Education and awareness-raising, including training, concerning all factors relating to enforcement, primarily those that are indicated in requests for assistance by Member States';³
- 'Coordination and cooperation at the international, regional and national levels in the field of enforcement';⁴
- 'Contribution of, and cost to, right holders in enforcement, taking into account Recommendation No. 45 of the WIPO Development Agenda';⁵ and

¹ Paragraph 16 of document WIPO/ACE/1/7 Rev.

² Meeting documents at http://www.wipo.int/meetings/en/details.jsp?meeting_id=5662

³ Meeting documents at http://www.wipo.int/meetings/en/details.jsp?meeting_id=9964

⁴ Meeting documents at http://www.wipo.int/meetings/en/details.jsp?meeting_id=12802

⁵ Meeting documents at http://www.wipo.int/meetings/en/details.jsp?meeting_id=17445

- 'Developing on the substantive study contained in WIPO/ACE/5/6, analyze and discuss IPRs infringements in all its complexities by asking the Secretariat to undertake:
 1. A literature review of methodologies and gaps in the existing studies;
 2. Identification of different types of infractions and motivations for IPR infringements, taking into account social, economic and technological variables and different levels of development;
 3. Targeted studies with an aim to developing analytical methodologies that measure the social, economic and commercial impact of counterfeiting and piracy on societies taking into account the diversity of economic and social realities, as well as different stages of development;
 4. Analysis of various efforts, alternate models and other possible options from a socio-economic welfare perspective to address the counterfeiting and piracy challenges'.⁶
- 2. For its seventh session, the Committee agreed the following work program:

'A continuation of the work program of the sixth session of the ACE (items 2, 3 and 4)'.⁷
- 3. Concerning the future work of the ACE, to be determined at the Committee's seventh session, it was agreed that proposals referred to under paragraph 11 of document WIPO/ACE/6/11, as well as elaborations thereof, newly submitted proposals and proposals referred to in paragraph 9 of document WIPO/ACE/5/11 would serve as a basis for the discussion of the future work at the seventh session of the ACE.⁸
- 4. By Circular C.7975 of May 25, 2011, the Secretariat invited Member States to submit new proposals for the future work of the ACE, for consideration at the seventh session of the Committee. In response, the Secretariat received proposals by the United States of America, the Russian Federation and Peru, respectively. They are reproduced in the Annexes to this document.

5. The Advisory Committee is invited to take note of the information contained in this document and its Annexes, and to consider proposals referred to under paragraphs 3 and 4, above.

[Annex I follows]

⁶ Meeting documents at http://www.wipo.int/meetings/en/details.jsp?meeting_id=20199
⁷ Paragraph 13 of document WIPO/ACE/6/11.
⁸ Paragraph 12 of document WIPO/ACE/6/11.

PROPOSAL FROM THE UNITED STATES OF AMERICA
Submitted to the Secretariat on July 28, 2011

The WIPO Advisory Committee on Enforcement is requested to undertake a comparative analysis of methodologies applicable to the following:

1. Determining jurisdiction in civil and criminal cases;
2. Gathering and storing evidence; and
3. Corporate Social Responsibility (CSR) on building respect for IP.

[Annex II follows]

PROPOSAL FROM THE RUSSIAN FEDERATION
Submitted to the Secretariat on August 9, 2011

The Federal Service for Intellectual Property (ROSPATENT) proposes the following issues for future consideration:

1. Online infringement of copyright and measures to combat it, especially when it comes to cross-border cases of infringement;
2. The impact of enforcement mechanisms adjusted in other countries in order to tackle piracy, especially in the field of P2P technologies;
3. Infringement of exclusive rights on objects of intellectual property in the Internet, in particular, problem of control of "parallel import".

[Annex III follows]

PROPOSAL FROM PERU

Submitted to the Secretariat on September 1, 2011

“Intellectual property (IP) is an important instrument in terms of the economic development of countries. However, governments and, to an even greater extent, the populations of countries (in particular, less-developed and developing nations) have yet fully to grasp this fact.

States that are aware of the contribution made by IP, not only to their economy, but also to the improvement of the quality of life of their citizens, have a responsibility to set up mechanisms promoting the development of IP and protecting creations from unauthorized use.

Studies assessing the losses suffered by countries as a result of piracy and counterfeiting constitute one of the mechanisms that have been used to analyze the impact of IP on national economies. However, the results of such studies have been called into question because the way in which they were carried out was not entirely objective. It should be pointed out that the public does not generally have access to said studies, which are only made available to a small group of individuals. Finally, such results (should they be reliable) remain a dead letter unless they give rise to appropriate government policies.

Various mechanisms have also been developed with the aim of strengthening IP between countries, the most effective being those designed to bolster the protection of intellectual property rights. Among these instruments, the following stand out: the development of legislation covering a wide range of infringements; increased penalties; and the creation or strengthening of administrative and legal mechanisms used to combat infringements.

Despite all the work that has been carried out to date, levels of piracy and counterfeiting have not been reduced, indeed, in many cases, the number of instances of such activities has increased.

It is important to remember that, first and foremost, we need to promote the creation of IP and that one, although not the only, mechanism for achieving that aim is appropriate protection of the rights of creators.

Against this background, it is vital that the future work of the Committee should focus on re-assessing the mechanisms which have, until now, been used to combat infringements of IP rights, while contributing to the development of new strategies which take into account the situation in each country.

We therefore propose:

- that studies developed using objective and impartial parameters be carried out on the economic impact of piracy and counterfeiting in countries.

These studies should not only focus on the losses suffered by a country as a result of such infringements⁹, but should also evaluate or compare the results taking into account the benefits enjoyed by society thanks to illegal industries (the cost of lesser goods, source of employment, greater range of goods on offer, etc). Whether we like it or not, society does gain from illicit activities.

⁹ The criteria used to establish such losses should be analyzed appropriately, in order to ensure that reliable results are obtained.

One of the reasons why it is difficult to eliminate infringements of IP rights is the fact that such behavior is considered to be socially acceptable. There is a generally-held belief that there is more to be gained from piracy or counterfeiting than from the respect for and protection of IP rights.

Studies that fail to look at the situation as a whole lead to policies which only address part of the problem, making it even more difficult for society to internalize the results.

– that studies be carried out to measure the real impact of development on legislation concerning enforcement measures (increased sanctions or sentences, the establishment of regular procedures, etc), as well as their implementation by the authorities as a part of their efforts to reduce piracy and counterfeiting.

Such studies allow us to see whether, in strengthening enforcement measures, we are on the right track, or whether we should begin to consider alternative courses of action.

As previously stated, most of the efforts to combat these types of illegal activities have been directed towards the creation of evermore severe enforcement systems, designed to protect owners of rights.

However, these attempts to tackle the problem have not had the desired effect. Countries have produced tougher laws against infringers, specialized IP units have been set up and procedures have been developed to defend rights, but infringements continue.

The implementation of post-infringement measures (enforcement measures) might possibly dissuade infringers from re-offending; however, society will remain unaffected and people will continue to clamor for pirated or counterfeit goods.

As long as there is a market for these kinds of goods, there will always be someone willing to meet such demand. At best, an individual punished for infringing rights might change his ways, but he will simply be replaced by another similar person willing to satisfy such demand.

– With regard to the previous point, rather than implementing post-infringement measures, the focus should be on preventive actions or measures.

As pointed out above, there is a market for pirated or counterfeit goods and consequently there is a need to adopt measures to reduce the size of that market. However, experience (the war on drugs, smuggling, terrorism, etc) teaches us that punitive measures on their own are not enough to solve the problem and must be accompanied by preventive measures.

We need to develop studies designed to identify types of preventive measures that could be used in this regard. This would require an exhaustive multi-disciplinary study, involving not only lawyers and economists, but also sociologists, psychologists, educators, etc.”

[End of Annex III and of document]