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NOTE ON ADOPTED RECOMMENDATION 7 – INTELLECTUAL PROPERTY RIGHTS (IPRs) AND COMPETITION POLICIES

prepared by the Secretariat

INTRODUCTION

1. At the first session of the Committee on Development and Intellectual Property (CDIP), held from March 3 to 7, 2008, Member States agreed that the Chair would organize informal consultations between the first and second sessions of the CDIP to continue consideration of the work program for implementation of the adopted recommendations.

2. During the informal consultations, held on April 16 and 17, 2008, Member States discussed adopted recommendation 7 and agreed that the Secretariat would prepare a note for the July session of the Committee with a description of the activities that WIPO has undertaken in the past in this field and suggestions on the kind of initiatives that WIPO could undertake in the future, bearing in mind its mandate. The text of adopted recommendation 7 is as follows:

“Promote measures that will help countries deal with IP-related anti-competitive practices, by providing technical cooperation to developing countries, especially LDCs, at their request, in order to better understand the interface between intellectual property rights and competition policies.”

3. The recommendation addresses the interface between intellectual property rights and competition policies in the context of WIPO’s technical and legal assistance activities. Though the issue is also addressed in different contexts under recommendations 22, 23 and 32, the focus of this note is limited to WIPO’s technical and legal assistance.

DESCRIPTION OF WIPO'S PAST TECHNICAL AND LEGAL ASSISTANCE ACTIVITIES ON IP AND COMPETITION POLICY

Technical Assistance

4. Technical assistance activities are developed upon the request of Member States of WIPO and are generally a part of a broader national plan jointly developed with Member States comprising a range of activities to be conducted over a given period. To date, there have been very few requests from Member States for technical assistance in the field of intellectual property rights and competition policy. However, in some WIPO meetings, the issue has been included as a topic of discussion. Examples of seminars or meetings in which the issue was included in the program include:

(a) International Seminar on Intellectual Property and Development, organized jointly with UNCTAD, UNIDO, WHO and WTO, Geneva, May 2 and 3, 2005;

(b) WIPO Regional Meeting of Directors of Industrial Property Offices and Copyright Offices of Latin America, Buenos Aires, May 30 to June 2, 2006;

(c) WIPO-ECLAC Regional Expert Meeting on Intellectual Property Management in Open Economies: A Strategic Vision for Latin America, Santiago, March 7 to 9, 2007;

(d) WIPO Inter-regional Seminar on the Strategic use of Intellectual Property for Economic and Social Development, Ljubljana, November 12 to 16, 2007; and

(e) WIPO Training for Diplomats, Jakarta, April 14 to 18, 2008.

5. In addition, the issue has been discussed in some detail in programs focusing on public policies and flexibilities in the IP system, including the WIPO Inter-regional Seminars on the Strategic Use of Intellectual Property for Economic and Social Development.

Legal Assistance

6. So far, WIPO has not received any specific requests for assistance on matters of competition policy and its interface with intellectual property rights. Requests have generally focused on specific points of IP law, for example, in the form of advice on a draft IP law prepared by the member country's authorities, as a request for a first draft IP law to serve as a basis for discussion with the country's authorities, or in the context of assistance as regards the flexible implementation of obligations under the TRIPS Agreement.

7. Although all intellectual property rights have an effect on competition, there are a few points of IP law that could be regarded as having an interface with competition law and policy. These points include, in particular, private agreements where IP rights are licensed or assigned, and special remedies or measures such as compulsory licenses of IP rights aimed at preserving competition standards or to end anticompetitive practices involving such rights.

8. In the context of its assistance to Member States on the use of flexibilities, WIPO has addressed the inclusion of competition-related provisions in industrial property laws. Such inclusion has been primarily on two different levels: (1) the establishment of systems to address anti-competitive practices by means of the use of intellectual property mechanisms

(e.g. compulsory licenses); and (2) the establishment of mechanisms for monitoring anti-competitive clauses in licensing agreements.

9. In 2006, WIPO commissioned a study on the interface between intellectual property and competition policy. The objective of the study was not to have a document for public distribution but rather to receive an informed and reliable input on how work in this area should move forward. The study concludes with a number of recommendations, such as the importance of establishing post-grant oppositions in order to challenge abusive titles as well as to include competition-related provisions at least in patent statutes. The process is underway for the publication of this study.

10. In the field of collective management of copyright and related rights, a number of issues concerning competition rules, the *de facto* or *de jure* monopoly situation of collective management organizations, have been addressed in a publication on “Collective Management of Copyright and Related Rights” published by WIPO in 2002.

SUGGESTIONS ON POSSIBLE INITIATIVES FOR IMPLEMENTATION OF ADOPTED RECOMMENDATION 7

11. With respect to legislative assistance, WIPO is prepared to respond to any specific requests for assistance in the field of IP rights and competition policy, in line with its mandate. As with legislative assistance in other areas, requests will be treated confidentially and advice will only be provided upon the specific request of a Member State or group of Member States. In addition, the focus will be on suggesting options or alternatives, rather than on recommending a specific course of action.

12. With respect to technical assistance in the field of intellectual property rights and competition policy, the Secretariat could, upon request, organize national seminars, workshops, advisory missions, internships and study visits specifically focusing on this area, thus enhancing knowledge and awareness on possible policies and measures relating to IP-related anti-competitive practices.

13. Sub-regional, regional or international events could also be organized to discuss differing approaches to the issue in various countries or regions. This could serve to provide a forum for exchange of experiences in this area, in line with the concern expressed under adopted recommendation 32. Similarly, a range of studies could be commissioned that could outline how the issue is being addressed in certain jurisdictions, which could be useful to policy-makers in other jurisdictions. Such studies could be particularly relevant to countries that have recently introduced competition law, in order to carry out appropriate implementation, as well as to countries that plan to adopt competition law in the near future.

14. Finally, IP and competition policy could also continue to be included in meetings organized to discuss public policy issues relating to IP rights and in meetings on flexibilities under existing international agreements in the field of IP.

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