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**THE ROLE OF THE GOVERNMENT AUTHORITIES IN THE ENFORCEMENT OF
INTELLECTUAL PROPERTY RIGHTS**

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1. Intellectual property rights are essentially private rights, and, as with any other kind of private right, the enforcement of these rights is primarily a matter for the individual owners of these rights. However, this often cannot be done in any meaningful or effective way without the support of the governmental authorities. A number of areas in which such support is requisite are reviewed below.

Legislative and Procedural Reform

2. The most immediate task facing government will be to ensure that national legislation adequately reflects the international standards of protection which the state is committed to provide in consequence of its membership of the World Trade Organization, and its becoming bound by the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

3. From the technical point of view, it will not always be easy to incorporate into the national law the very specific requirements of Part III of the TRIPS Agreement relating to enforcement. Many of the procedural concepts and mechanisms provided for in Part III are of Anglo-American common law origin: they have no natural place in a civil law system, and their terminology has no natural counterpart in the lexicon of modern legal Arabic. The legislative drafting work necessary here will call for skill and care.

4. Moreover, when the drafting work is complete, the country's judiciary will need to be convinced of the importance of actually utilising these new mechanisms. Often this will involve a departure from familiar procedures and attitudes. This will be the case particularly in relation to the making of provisional orders and injunctions, the central procedural feature of any effective intellectual property enforcement regime.

Maintaining Registration and Deposit Facilities

5. Where the scheme of legal protection requires a registration or deposit regime, as will usually be the case with patents and trademarks, and sometimes with copyright as well, the

government will have to make available the resources for such a regime to operate effectively. This is not just a clerical or database function. There will need to be qualified professional staff capable of handling such matters as administrative revocation and third-party opposition proceedings.

Bringing Criminal Prosecutions

6. In countries where there is a significant risk of intellectual property infringement at street level, it will be for the government to take the initiative in bringing criminal cases and thereby committing its authority to the elimination of widespread infringement. Normally these cases would be brought by the public prosecutor. This may require an adjustment of priorities and resources in the public prosecutor's office. Without support of this kind, it would be difficult for private rights holders, using civil remedies alone, to bring the situation under control. In the initial stages, more will be gained for rights holders by well-publicised raids on suspected premises, convictions of individuals and their punishment with meaningful levels of fines or imprisonment, destruction of infringing goods and the equipment used to produce them, and the closure of premises, than would be gained by proceedings with the object of obtaining for the rights holders compensation for the loss and expense suffered by them as result of the infringement. It is only when street-level piracy has been largely eliminated, and intellectual property has become widely recognized as a permanent feature of the state's legal order, that civil litigation, as opposed to criminal prosecutions, will become the norm in intellectual property matters, and right-holders and right-users can move on to explore areas such as collective licensing, arbitration and alternative dispute resolution.

7. In some countries, special units within the government apparatus have been set up to deal with intellectual property infringement matters. Their function is to receive complaints, investigate, and bring matters before the judicial or other competent authorities. Sometimes this function is entrusted to special units already in existence for some other, but related, purpose: for instance, a Ministry of Commerce may have in existence a consumer protection unit, with officers experienced in investigations and court work, and, with appropriate extra

training, these officers can have their mandate enlarged to cover certain forms of intellectual property infringement as well, such as trade-mark counterfeiting cases, or sound and video recording piracy cases.

8. In some countries, such a special unit exercises not only investigatory powers, but also adjudicatory powers as well. While this may have the advantage of convenience and speed, it means that the same authority is in effect combining the role of policeman with that of judge, and this does carry some risk that the process will not be “fair and equitable” as required by article 41(3) of TRIPS.

Customs Authorities

9. Nowadays, intellectual property infringement often takes place on an international basis, and national frontiers can usefully be made to serve as a “front line” of defence. TRIPS Part III envisages an active role for customs authorities. This is dealt with in Section 4 of Part III (articles 51 – 60). Under Section 4 states are obliged to adopt procedures enabling a right-holder who has valid grounds for suspecting that importation of counterfeit trademark or pirated copyright goods may take place, to apply to the competent authorities in the state in question for the suspension of the release of such goods into free circulation: article 51. States are free to make the suspension procedure available in respect of goods involving other forms of infringement as well. States are also free to designate which governmental body is to be the “competent authority” for the purposes of the suspension procedure. Such authority could simply be the ordinary courts; alternatively it could be a purpose-built official body possessing intellectual property expertise, constituted under the aegis of the government ministries responsible for trademarks or copyright; or indeed some special unit within the customs administration itself could be designated as the “competent authority”. States would also be free to give the competent authority the power, or even the duty, to act *ex officio*, so as to suspend release of the goods suspected to be infringing, even in the absence of any request by the right-owner. Clearly the individual officers serving on the competent body would need to be given training not only in the detection of counterfeit or pirated goods, but also in the management of the procedural aspects of the suspension along

the lines envisaged in Section 4. These border measures will involve a significant departure from the traditional, and relatively passive, revenue-collecting role of the customs administrations in this part of the world. Their new task will be made easier if there is closer co-operation on intellectual property matters between different customs administrations, both regionally and internationally.

Government Officials Generally: Evolution of Attitudes and Training

10. Officials deputed to serve on the competent authority for the purpose of customs procedures, or on any other administrative body exercising decision-taking powers in the intellectual property field, will need to become familiar not only with the nature of intellectual property itself, but also with the nature of adversarial legal process, as envisaged in TRIPS. Any procedure before such a body is required by article 41(3) of TRIPS to be “fair and equitable”. Any such body must respect the rules of procedural fairness followed by the regular courts: articles 49 and 50(8). For instance, if the officials appointed to sit on such a body are requested by a right-holder to order the seizure of goods alleged to be infringing, and if the officials feel this is the only way they can keep control of events, they must also consider the possibility that the goods might turn out not to be infringing after all, and that commercial losses will be incurred by an innocent party: accordingly, against this event, these officials will also need to be able to assess the likely level of such losses, and to decide whether the right-holder should be ordered to deposit security as a condition of the seizure being ordered. Again, if measures are being considered against a suspected infringer, he will be entitled to know of and comment on all the evidence which that body has considered: article 41(3). It will not be possible to withhold from the alleged infringer the evidence against him which the body has before it, simply because that evidence happens to be in a “ministry file”. The decisions of the body would normally need to be in writing, with reasons given: article 41(3).

11. In the past, where specialised administrative bodies have been entrusted with decision-taking powers affecting private rights, the relevant national legislation would often grant only very restricted rights of appeal. Typically, a person aggrieved by a decision of the body in

question would have the right to place the decision before the competent minister for review, but that minister's decision would be final. Plainly, the minister's natural inclination would be to support his own officials. Now, under the regime of TRIPS, it will not be possible to exclude recourse to the regular courts for review of the decisions of such administrative bodies: article 41(4).

12. If officials who have spent their professional career in ministries dealing with information or culture or national heritage are entrusted with responsibilities in the intellectual property field - and this can be the case particularly with copyright - they will have to learn to give due weight to the fact that these rights are in the nature of private property created by law, not in the nature of official licences or permits granted or withdrawn as a matter of mere administrative discretion, and that these rights are capable of having significant commercial and international implications.

13. These officials will also have to learn to co-operate with private sector bodies, often based abroad, which are capable of providing technical expertise and assistance, such as rights holders' federations and associations. They will also need to be aware of the particular interests and objectives of such bodies.

14. Finally, government authorities are themselves often substantial rights users, and they should encourage their own employees to respect the legal rules protecting the forms of intellectual property they come into contact with in the course of their ordinary duties. This will, again, be particularly the case with copyright.

Government Support for Creators of Intellectual Property

15. When an effective protective regime is in place, there is much a government can do to encourage its own nationals to take advantage of it, by providing support for creative activity.

16. In the case of inventions, the government can provide financial and other assistance for the conduct and commercialisation of local research and development. This can be done, typically, by financial grants, soft loans, and beneficial tax treatment of income derived from intellectual property.

17. The educational resources of the state can be directed into areas where intellectual property rights are generated. The prime example is that of India, where the directing of resources into computer software education has led to the country becoming one of the largest software exporters in the world.

18. In the traditional copyright fields, authors, composers and performers should be made aware of their rights, and in particular of the enhanced international scope of these rights as result of TRIPS. The government authorities should encourage, for instance, composers and performers to form local (or regional) collecting societies and affiliate them to the international network of similar societies in order to benefit from the flow of royalties generated by the use of their works abroad.

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