

WIPO Advisory Committee on Enforcement

Future Work proposal by Brazil

A – General Context

The resumption of work at the ACE provides an opportunity for a qualitative change in the approaches to dealing with the subject of “enforcement” of intellectual property rights within WIPO. A broader scope is required. So are analytical tools that have to be more sophisticated and better equipped to confront effectively the multi-faceted challenge posed by the infringement of intellectual property rights.

This submission concentrates on the issues of enforcement of the multilateral system of IP related to infringements of rights, not encompassing the full scope of the concept, as conceived in Article 7 of the TRIPS Agreement.

Effective results in combating violation of rights are only those which are palpable, sustainable over time and ultimately conducive to the fulfillment of the objectives of the intellectual property system, namely “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”.

B – The role of WIPO

Infringements of IP rights is a global question that affects all countries, both developed and developing ones, in different ways and yet always intensively. All of us are responsible for dealing with it.

As a UN specialized body, WIPO has not only the necessary legitimacy to play a leading role in such a comprehensive debate, but also the much-needed expertise to deal with the complexity of the vast array of infractions against intellectual property rights. For instance, we need to build reliable methodologies to evaluate the economic impact of piracy and

counterfeiting based on empirical evidence and which takes into account different socio-economic realities. Methodologies that are more than an educated guess.

It takes much more than loose coalitions of unilateral efforts to reach the effective results that are needed to benefit all countries and stakeholders.

C – Shortcomings of the “one size fits all” approach

Violations of intellectual property rights do not take place in the void. They are not disconnected from concrete political and social variables. For WIPO to be placed again at the core of the debate and to be able to develop new insight and creative thinking on the subject of infractions of intellectual property rights, it will have to take advantage of the enormously rich debate taking place within and among our civil societies. It is thus a matter of concern to us the multiplication of simplistic treatments of that issue that adopt “one size fits all” models. These models, usually based only on actions taken by Governments and on operational law enforcement, are clearly insufficient to ensure effective “enforcement”.

There is a need for programs that deal with a plurality of instruments to combat intellectual property infringement, for strategies that are able to blend, in proportions tailored to the specific social and technological realities of each of our countries, job creation to avoid the re-incidence of infractions and innovative business models, in addition to operational law enforcement, education and other incentives. In both the design and the execution of such strategies, partnerships between the State and the civil society are called for.

The “one size fits all” repressive approach has been taking a high toll on all societies to the extent that:

- it puts at risk the systemic balance between rights and obligations of holders and users - a balance that is at the centre of the regime of intellectual property - by giving free rein to systematic abuses in the protection of rights, as evidenced by the proliferation of “sham litigations”;

- it may build barriers to legal trade that, in several instances, had a serious and adverse impact on public health, such as the recent cases of seizure, by customs authorities, of legitimate drugs in transit to developing countries;

- it may lead countries, especially LDCs, to waste valuable resources that might be allocated elsewhere, to health, education and employment programs;

- it may trample upon principles that are pillars of fundamental civil rights, such as the right to privacy, presumption of innocence, due process of law, proportionality between offenses and sentences, protection of third party interests, participation in the information society. These are rights that can only be ensured in a context of transparency and "accountability".

In a nutshell, there is an opportunity available for WIPO to make a quality change in the treatment of intellectual property rights violations, the opportunity to make the transition from an approach of purely "enforcement of" to that of "respect for" intellectual property.

Promotion of respect for intellectual property will pave the way for the consideration, within WIPO, of "enforcement" associated with palpable and sustainable results, based on dialogue between Governments and all "stakeholders" and firmly grounded on socio-economic realities.

A debate driven by members must be encouraged at WIPO. That debate will necessarily integrate multiple dimensions: operational law enforcement, education, the social and economic background of different countries. That debate will also involve non-governmental players. A rich exchange of experiences is one of best avenues for developing and improving our national models of "enforcement". There are successful strategies and practices that can be adapted to the different realities of member countries, in light of their own juridical frameworks and their respective capacity to mobilize resources.

The subject selected for debate at the Committee is a good starting point: "Contribution of, and costs to, right holders in enforcement, taking into consideration Recommendation n° 45 of the WIPO Development Agenda". Recommendation n° 45 was drafted taking into account the overall objectives of protection and enforcement of intellectual property rights enshrined in the

TRIPS agreement. An effective enforcement has, therefore, to contribute to the fulfillment of those objectives and to the protection of rights of all stakeholders rather than those of right holders alone.

II

Elements for a work program

The forthcoming session of the ACE will be a fresh start to the work of the Committee in so far as the debate on enforcement will for the first time be guided by the conceptual perspective of respect for intellectual property rights. The development of a work program is therefore needed that will make it possible for the Advisory Committee to structure its debate and thereby to make progress in developing innovative ways for treating the matter. Effective policies are always based upon precise diagnosis. The following work program is thereby based on two basic pillars: diagnosis and action.

A) Diagnosis

- Preparation of studies and promotion of discussions aimed at developing methodologies of measurement of the economic and commercial impact of counterfeiting and piracy on societies, taking into account the diversity of economic and social realities as well as stages of development;
- Preparation of studies and promotion of discussions that examine infringement of intellectual property rights in all its complexity, identifying different types of infractions and the motivations for them, taking into account social, economic, and technological variables;

- Development of methodologies for monitoring and assessing progress in combating intellectual property rights infringement, including cost-benefit analysis of mobilized resources:

B) Action

- Analysis of national experiences, especially those deemed to be successful ones, with a view to both improving systems that integrate the multiple dimensions of intellectual property rights infringement and examining business models in line with the members' specific economic and technological realities:
- Establish partnerships with organizations associated with "enforcement" from an integrated approach that involves all dimensions of the issue:
- Design of capacity building and technical assistance projects that go beyond the mere setting up and training of teams for operational law enforcement in developing countries to include, for example, campaigns to raise awareness in the citizenry as well as programs to reincorporate into the economy those who were "lesser" violators dependent on trade in or on the manufacture of counterfeit products to survive:
- Given resource constraints, develop strategies which prioritize enforcement efforts on the basis of a diagnosis of welfare impact. Welfare effects of different types of IP infringement impact differently on consumers, producers, and the economy at large. For instance, a case can be made for pursuing producers rather than small scale distributors of illicit goods, especially where the former are linked to organized crime syndicates.