

Creating an Enabling Environment to Build Respect for IP

Concept Paper by Pakistan

WIPO's initiative to build respect for IP, as outlined in its Program and Budget for the 2010/11 Biennium is timely, and a step in the right direction. This paper attempts to identify key elements for creating an enabling environment to build respect for IP. It is expected that by creating such an enabling environment IP will not only be respected but also be effectively enforced.

2. Over the past several years, particularly after the TRIPS agreement, there has been increasing demands on the developing countries to do more on IP enforcement. They are expected to enforce higher levels of IPRs, regardless of their socio-economic conditions and challenges. Periodically, different lists are published to categorize and penalize countries according to their supposed IP infringement levels. Moreover, trade and investment decisions are usually linked to stronger input of the TRIPS 'Plus' enforcement criteria. This is accompanied by a very limited approach to combating infringement of IP rights, in which, in essence, stricter laws and capacity building of enforcement agencies is seen as the primary means to ensure enforcement. Such an approach can temporarily reduce IPR infringements levels, but cannot address the challenge in a sustainable manner. A broader strategy is urgently needed to allow the establishment of conditions in which all countries would have shared understanding of the socio-economic implications of enforcement measures, and direct economic interest in taking such measures. In such an environment, countries' choice to enforce IPRs will be derived from their internal rather than external factors.

3. To create such an enabling environment to build respect for IP in a sustainable manner, we first need to identify the key reasons behind IPR infringement. These include:

- i. To build respect for IP in a sustainable manner, all countries must have a direct economic stake in the IP system. The emphasis on protection of IPRs in different countries has a direct co-relation with the size of IP assets generated and owned by them i.e. countries with high level of IP assets accept the need for higher IP protection, both at national and international levels, while countries with fewer IP assets tend to have little interest in the IP system.
- ii. The statistics usually quoted to highlight the extent of counterfeiting and piracy are viewed with skepticism. These statistics are generally with little transparency regarding the raw data and the methodology used to derive those figures. Consequently, these are viewed as being unduly exaggerated and merely serving the interests of strong economic lobbies¹. Without impartial assessments of the extent of counterfeiting and piracy, it is not possible to build a credible case for higher standards of enforcement.

• ¹ Some examples such statistics include the OECD 2007 Report estimates of USD 200 billion or 2% of Global merchandise trade in 2005; Business Software Alliance estimates of 45% of pirated software in France, 28% in Germany, 25% in Japan, 21% in the US; Business Coalition to Stop Counterfeiting and Piracy estimates of USD 600 bln per year etc.

- iii. Huge margins between the prices of original and pirated items offer significant profit incentives to individual and organized IP infringers. Quite clearly, business models are not adequately addressing the pricing-cost issues involved in selling products (especially pharmaceuticals, books, music, movies). Unreasonably, higher costs along with barriers to access, do provide some justification to the consumers to use counterfeit and pirated goods.
- iv. Inadequate protection of the assets in which developing countries have comparative advantage undermines confidence in the IP system. The continued misappropriation and lack of progress towards an international legal framework on protection of the genetic resources, traditional knowledge and folklore has especially led to the perception that the current IP system is neither fair nor effective in protecting the interests of the developing countries.
- v. Invariably, in bilateral trade agreements, higher standards of IPR protection are demanded in return for trade and market access. This reinforces the view that IPRs are an external imposition, rather than a domestic need.
- vi. The IP enforcement agenda is pursued at different international fora such as WCO, UPU, WHO. Developing countries are increasingly concerned that the limitations of their diplomatic and technical resources to adequately follow complete negotiations processes are being exploited by the developed countries through 'forum shopping'.
- vii. For developing countries with limited financial resources and infrastructure, diverting resources from developmental and even other law enforcement requirements to the protection of IPRs is often difficult to justify.
- viii. Lower levels of public awareness along with capacity constraints of judicial and administrative agencies also lead to weaker compliance to international IP standards.
- ix. Technological breakthroughs have facilitated IPR infringements. It is now comparatively easier to copy, share, reproduce and reverse engineer the protected materials/works. For instance, despite all encoding efforts, infringement is still a very real issue in the digital environment.

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5. In view of the above, a number of measures need to be taken if we are to create an enabling environment to build respect for IP. These include the following:
- i. Undertake independent, objective and empirical assessments of the nature and extent of IPR infringements.
 - ii. Address socio-economic welfare needs of countries particularly for access to medicines and educational materials at affordable prices through use of TRIPS flexibilities and alternate business models for price reductions (such as differential pricing schemes, advance market commitment mechanisms, licensing arrangements for domestic production, etc.).
 - iii. Promote effective protection of the GRTKF owned by the developing countries through a normative framework and to mainstream it in the IP system.

- iv. Promote and facilitate domestic research and innovation through transfer of technology, joint research, innovative commons, open source, exceptions to IPRs for research purposes and by utilizing the concept of utility models, etc. Developing countries should also be supported in commercialization of their domestic innovations.
- v. Develop international guidelines for levels of IPR protection in the bilateral and regional FTAs, in accordance with TRIPs agreement. Such guidelines should be followed in the negotiations on FTAs.
- vi. Undertake independent socio-economic impact assessments of the existing and future IP norms.
- vii. Avoid duplication of work and discourage the 'forum shopping' trend, WIPO, being the lead UN agency on IP, should prepare a compilation of actions/initiatives taken in all UN agencies and international for a with regard to enforcement.
- viii. Promote international cooperation through financial burden sharing by the developed countries for putting in place administrative IPR enforcement mechanisms in the developing countries.
- ix. Promote enforcement of IPRs through capacity building of judiciary and enforcement agencies, making domestic legislation (and its periodic review) in accordance with level of development of different countries, raising public awareness on IP issues, and international cooperation and cost-sharing in putting in place IP enforcement mechanisms.

Road Ahead

- i. The WIPO Advisory Committee on Enforcement (ACE) should identify the elements for creating an Enabling Environment for promoting respect for IP. After identification of the elements, ACE should discuss each of the identified elements in its future sessions.
- ii. WIPO, being the lead UN agency on IP, should promote the concept of creating an enabling environment to promote respect for IP at the forthcoming meetings of the Global Congress on Counterfeiting and Piracy.
- iii. WIPO may organize an International Conference on "Creating an Enabling Environment to build respect for IP".
- iv. WIPO's Programme and Budget Committee (PBC) should adequately incorporate ideas contained in this document and those resulting from the discussions of the ACE and the outcome of the Global Conference in its future programme of work.
