

Advisory Committee on Enforcement

Third Session

May, 15 to 17 2006

(Brazil)

The advisory nature of the mandate of the Committee is adequate and should be maintained.

The Committee's *modus operandi* through presentations of national experiences and exchange of information is helpful in building a culture of respect for intellectual property, both the rights of holders and the public interest elements of the IP system.

Obligations of Members regarding enforcement issues are clearly set out in the WIPO treaties and in the TRIPS Agreement of the WTO. Together, these treaties provide a legal framework at the international level that is sufficiently challenging for both developed and developing countries. These countries face equally stringent issues of piracy at levels that are usually commensurate with the size and dynamism of the respective national economies.

The greater the market, the greater will the reward for pirated goods and services be. The greater the market distortions in terms of inadequate levels of competition, monopolies that lead to unfair pricing systems or abuse of market positions by dominant players, the higher the incentives for piracy and disrespect for IP rights. Antitrust legislations, effective provisions against abusive practices by right-holders, as well as enforceable competition policies should also become essential elements in the fight against piracy, especially in developing countries, which have weaker institutional framework in these areas if compared to those of developed countries.

On the other hand, the poorer the country, the less educated it is, all the more difficult it will be to instill a culture of respect for Intellectual Property. This is why Brazil has supported different approaches to IP protection and ^{the} consideration of new collaborative models of innovation that may reduce the costs to the disadvantaged and

underprivileged of access to products and services of social relevance, such as medicines, food, cultural goods, and education.

The views of Brazil and other like-minded developing countries on these and other IP related issues are set out in their proposal for a WIPO Development Agenda on Intellectual Property Rights. The documents circulated by the Group of Friends of Development include two specific ideas relating to enforcement which will be circulated during this session of the ACE for due consideration of Members.

Piracy, it must be said, is not a phenomenon that is exclusive to developing countries. In fact, both in qualitative and quantitative terms, piracy will prove to be economically more significant in developed countries. Additionally, most of the piracy enabling technologies originate, are developed and used by, and disseminated from the technologically advanced countries, not developing countries.

The IP system must also provide mechanisms that are effective in combating a form of piracy of great concern to biodiverse developing countries. With this in mind, Brazil and other developing countries whose indigenous and local communities are being the victim of biopiracy are supportive of introducing an amendment in the TRIPS Agreement for a mandatory patentability requirement of disclosure of origin of biological resources and associated traditional knowledge and evidence of compliance with the PIC and ABS objectives set out in the Convention on Biological Diversity. Only through such a requirement can the IP system actually prevent misappropriation through patenting of inventions derived from GR and TK that was accessed without due respect for PIC and ABS in the providing country.

Combating piracy, however stringent, should not lose sight of the public interest objectives of national policies. The rights of holders and the public interest must be equally promoted and supported. Flexibilities inherent in IP law should not be encroached upon unduly in the name of enforcement.

To be effective, enforcement issues must be dealt with at the national level in cooperation between the public and private stakeholders. The private sector is usually keen to place additional demands on the public sector regarding IP enforcement, but often do not measure up themselves to the enormous challenges at hand, by sharing the

additional financial costs and burden to taxpayers which stem from enhanced Government anti-piracy initiatives and campaigns.

Brazil strongly favors maintaining the "advisory" nature of this Committee, and believes that the current legal framework of WIPO and the WTO are ~~clear~~ ^{being} clear and flexible enough to provide the necessary ~~mechanisms~~ for enforcement measures at the national level. In particular, the TRIPS Agreement underscores in its Article 41 the fact Members are not obliged "to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general". Article 1.1 of the TRIPS Agreement also states that "Members shall be free to determine the appropriate method of implementing the provisions of that Agreement within their own legal system and practice."

The idea of developing a common set of "best practices" on enforcement within WIPO would represent an undesirable encroachment on the policy space provided by Article 1.1 of TRIPS to signatory countries. For this reason, Brazil would not support any such initiative. Additionally, if there ever was an internationally agreed set of best practices regarding IP enforcement issues, countries would run the risk of being judged against it, be it under multilateral dispute settlement types of mechanisms be it by those Members who attribute themselves the right to judge other countries' level of commitment to the fight against piracy through unilaterally established mechanisms and criteria outside the realm of agreed international law. Moreover, these mechanisms usually rely on unverified, non-transparent data provided by the industry which has the most to gain from the matter under consideration, and not ~~by the countries themselves~~ ^{by the countries themselves}.

Not only repressive measures, but also economic measures and constructive actions such as education, awareness raising, and information exchange can be instrumental in building a culture of respect for intellectual property. The delicate public-private balance that is essential to the credibility of the IP system must be maintained at all costs.

Brazil's experience in combating piracy will be presented during this session by the Executive-Secretary of the National Council for Combating Piracy, Mr. Márcio Gonçalves. This is a multi-stakeholder body, composed of representatives from the

relevant government ^{agencies} ~~agencies~~ and from the private sector, engaged in permanent interaction on an equal footing.

The presentation by Mr. Márcio Gonçalves will be illustrative of the seriousness with which the fight against piracy is dealt with in the country, producing results that are quite impressive considering, in particular, the limited level of resources available (in financial, institutional and human terms) and the enormous dimensions of the challenges such a large developing country as Brazil faces in the field of IP enforcement.