

WIPO/IP/JU/Ryd/04/3

ORIGINAL: English

DATE: May 2004



KINGDOM OF SAUDI ARABIA



WORLD INTELLECTUAL
PROPERTY ORGANIZATION

WIPO NATIONAL WORKSHOP FOR JUDGES

organized by
the World Intellectual Property Organization (WIPO)
in cooperation with
the Government of the Kingdom of Saudi Arabia

Riyadh, December 13 to 15, 2004

POLICY CONSIDERATIONS AND PRACTICAL MEASURES FOR THE EFFECTIVE
ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (COPYRIGHT);
ROLE OF THE PUBLIC AND THE PRIVATE SECTOR

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1. The Problem

An effective enforcement system in a country depends to a large extent on the commitment of the public authorities and also of the private sector. Both sectors are mutually interlinked as regards enforcement measures.

The commitment depends on a number of factors. One important such factor consists of various policy considerations relating directly or indirectly to enforcement. Another important factor consists of various practical measures to make more efficient the enforcement mechanisms.

2. Policy considerations

Realising which is the basic rationale for copyright protection.

One underlying very general policy consideration in connection with enforcement is to realise which are the basic rationale for copyright protection. As we know, copyright operates on the basis of exclusive rights for the author or his successor in title. We also know that the rationale for copyright protection is to stimulate creativity and inventiveness and thus contribute to social, economic and cultural progress and development. It also serves at facilitating and promoting investments in the culture, media and information sectors.

Mitigating negative effects of too far-reaching exclusive rights

Even if the copyright system thus has the overall purpose of promoting progress in society, this comes at a price. The price lies in the costs resulting from the exclusive rights which have to be paid by the users. This cost may be high or it may be low, but it has to be paid. If the rules are not respected, the enforcement system will impose economic sanctions.

From what is said now the conclusion can easily be drawn that a system of comprehensive all-covering rights making every kind of exploitation subject to the consent of the author of the work at issue is simply not workable.

Mechanisms to mitigate negative effects of exclusive rights

There are basically two types of mechanisms which can be used to mitigate negative effects of the exclusive rights.

The first one consists of limitations on the exclusive rights. All copyright laws, and also that of the Kingdom of Saudi Arabia, contain provisions in this respect.

The second one consists of legislation outside copyright law, in particular law on unfair competition.

Relations to enforcement

Enforcement of copyright law is basically the implementation in practice of the existing legislation, and judges and prosecutors have little room for policy considerations when they have to implement the law.

What is important to keep in mind is, however, that intellectual property law is an important element in the legislative fabric of a country and that it has to be properly enforced. Otherwise it is useless and does not serve the purpose for which it is there. There is no need to create a special separate system for enforcement of intellectual property nor is there any obligation to devote more resources to enforcement of intellectual property than to other sectors of enforcement.

But the enforcement authorities have to use some resources and give attention also to the enforcement of intellectual property rights, including copyright.

It should also be noted that membership of the World Trade Organization and being a party to the TRIPS Agreement entails obligations to set up and operate an efficient enforcement system. Breach in this respect may – as our own experience shows – entail dispute settlement procedures within WTO.

3. Practical measures

A number of practical measures can be undertaken to make enforcement more efficient.

Information and training

The most important one is to devote sufficient resources and attention to information and training. The police and the prosecution authorities have to be informed about intellectual property and its enforcement. The same goes for the judiciary. The present workshop is a good example of such an activity, and WIPO has a number of tailor-made activities in this respect which could be used.

Use of interlocutory injunctions

Another element which is of great practical importance in the enforcement context is what is called “provisional measures,” mainly interlocutory injunctions, to prevent infringements from occurring and to preserve evidence. It is important that the judiciary does not hesitate to use such measures, and also to use them, in appropriate situations, without hearing the other party. Quick action is often called for in infringement cases and interlocutory injunctions serve that purpose.

Seizure, destruction etc. of infringing material

In infringement cases it is also important that infringing material is prevented from entering commercial channels. Consequently, such material should be seized, removed from the channels of commerce and, if necessary, destroyed

Damages

It has been for a long time a prevailing trend in courts in most countries to award damages which are generally too low to constitute a real reparation of the damage caused to the right-owner. It is therefore important that judges give consideration to the level of damages so that they award proper compensation to the injured party.

Criminal sanctions

Criminal sanctions have proved to be an efficient deterrent in intellectual property violation cases. This applies, however, under one condition, namely that they are severe enough to serve as a deterrent and are not merely symbolic. At least in cases where organised criminal activities are involved and the activities are on a commercial scale, it would be quite appropriate to adjudicate prison sentences, if the law so admits.

Publication of judgements

In many countries it has proved to have a particularly deterrent effect to publicise judgements in infringement cases. This serves both as a reminder to potential future infringers and it is also useful in that it reminds the public at large about intellectual property and about the consequences of violation of those rights.

The role of the private sector

The private sector, including industry, has a significant role to play in the context of enforcement in at least two respects.

The first one concerns cooperation with enforcement authorities. The right-owners in private sector have everything to gain from a close cooperation with the police and the prosecutors. They can in fact greatly facilitate the work of enforcement authorities by providing information, evidence and technical assistance, for instance in helping to identify infringing material. This is sometimes not so easy; for instance many infringing CD's are hardly possible to distinguish from the real ones. This is one example of a situation where the industry can be of particular assistance.

The other way in which the private sector/the industry can assist in enforcement activities has do to with the identification of infringing material. The music industry has developed a number of identification codes and a wide use of those codes assists in monitoring the manufacture of optical discs and thus helps in the efficiency of the enforcement chain.

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