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**IPR INFRINGEMENTS AND ENFORCEMENT – ACCOUNTING FOR SOCIO-ECONOMIC,  
TECHNICAL AND DEVELOPMENT VARIABLES**

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\* The views expressed in this Study are those of the author and do not necessarily reflect those of the WIPO Secretariat or any of the organizations' Member States

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## I. INTRODUCTION

1. Intellectual property rights (IPRs) infringement and the need for effective enforcement is probably one of the most important public policy issues in the current discourse on the governance of intellectual property (IP) system. Designing appropriate policies and laws to promote effective and adequate protection of IPRs while ensuring that enforcement measures and procedures do not themselves become barriers to legitimate trade and that such measures do not negatively impact efforts to promote human development is the key challenge.
2. In the on-going debate, passions have been inflamed, arguments over figures and statistics have intensified and motives are being questioned. The emotive nature of the debate on IP infringement and appropriate enforcement measures is to be expected on issues that are not just complex but which also have significant socio-economic implications for countries, companies, communities, and individuals in all countries. In situations like this, the important question is how policy-making and concrete action can move forward where it is needed and resources saved and harm avoided where action is uncalled for or may be detrimental.
3. At the World Intellectual Property Organization (WIPO) progress is being made to separate the hot air from the real issues, to encourage cooperation based on a shared understanding and to provide a basis for informed policy-making. An important part of this process is the work that the Advisory Committee on Enforcement (ACE) is undertaking to analyze and discuss IP rights infringement in all its complexities and, in particular, identifying the different types of infractions and motivations for IPR infringements, taking into account social, economic and technological variables and the different level of development of WIPO Member States, among other issues.<sup>1</sup>
4. The idea that socio-economic, technological and development (levels of development) variables need to inform our understanding of the different types of IP infringements and the motivations behind infringing activity is seen as particularly important for developing countries. The reason, it has been argued, is that:

“[T]he interests of developing countries are best served by tailoring their intellectual property regimes to their particular economic and social circumstances... [I]t is ... more important for developing countries because costly errors of policy will be harder to bear.”<sup>2</sup>
5. This paper seeks to offers some reflections on the issues that need to be considered to take forward the idea of accounting for social, economic and technological variables and levels of development of countries when we discuss the nature of IPR infringements and motivations for infringing activities as well as for designing the appropriate enforcement policies and laws. Three basic arguments are made in the paper.
6. First, the paper argues that the language we use in the enforcement discourse matters more than it has been recognized. In particular, the paper discusses the problems and

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<sup>1</sup> See paragraph 12 of the Summary of the Chair on the Fifth Session of the ACE (document WIPO/ACE/5/11) at [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=17445](http://www.wipo.int/meetings/en/details.jsp?meeting_id=17445)

<sup>2</sup> Commission on Intellectual Property Rights (2002), *Integrating Intellectual Property Rights and Development Policy*, Commission on Intellectual Property Rights, London, p.172

challenges that the increasing use of the term “counterfeiting” to refer to all IP infringing activities has brought about in the way developing countries deal with the questions of enforcement. The challenges arise not just with respect to designing appropriate laws but also with respect to efforts to measure infringing activities.

7. Second, the paper suggests that the idea of taking into account levels of development in IP policies, treaties and laws, if taken to its logical conclusion requires that we move beyond using “developing countries” as a unit of analysis. In effect, we can only deepen our understanding of the types and motivations for IPR infringement if we walk the talk of taking into account levels of development. Walking the talk requires that we start to seriously consider if and how, specific country circumstances can be taken into account in international policy and rule-making in a manner that is fair to all countries and different stakeholders.
8. Finally, the paper makes a case for going beyond the obvious assumptions and stereotypes regarding the relationship between poor socio-economic and low levels of technology and IPR infringement as well as the need for IP enforcement in developing countries. Focusing on the intersection between IP infringement and poverty, the need for imitation as a learning process and the question of foreign rights, the paper points to some additional dimensions that need to be considered in the debate but which are currently glossed over or completely ignored.

## II. IP INFRINGEMENTS –DEFINITIONS AND LANGUAGE

9. Effectively tackling the issues around IPR infringement and enforcement will require effective dialogue and the engagement of a range of stakeholders and actors. The terminology, definitions and language used in the discourse have important implications for the analysis and our understanding of the complexities around IPR infringements, including with respect to the question of different types of infractions and motivations for IPR infringements. A particular concern that has been raised or has come up particularly in developing country contexts relates to the use of the term “counterfeiting”.
10. Increasingly, the term “counterfeiting” is being used not just by lay people but by IP experts and policy-makers to refer to all IPR infringements or to broad based IP enforcement initiatives.<sup>3</sup> We now have the draft “Anti-Counterfeiting Trade Agreement – ACTA”<sup>4</sup>, the “Global Congress on Combating Counterfeiting and Piracy”<sup>5</sup>, the “International Medical

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<sup>3</sup> The term infringement, when used with respect to IP rights, essentially means unlawfully interfering with a right or rights granted by patent or industrial design, trademark, copyright or other IP laws in a particular country where those rights are valid. Infringement is therefore a general term which can be used with reference to any acts that constitute a violation of any IP rights. Counterfeiting and piracy, as terms of art, have narrower meanings. Under the TRIPS Agreement (Footnote 14), counterfeiting means -without authorization, using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which a trademark is validly registered, subject to any exceptions limiting the rights of the trademark owner. In other words, it is a term that is primarily related to trademark infringement. Piracy, on the other hand, means –without the consent of the right holder or person duly authorized by the right holder, directly or indirectly making copies of an article protected by copyright where the making of that copy constitutes an infringement. As such, the term relates to matters of copyright infringement

<sup>4</sup> Information about ACTA can be found on the websites of the various negotiating partners such as the website of the United States Trade Representative (USTR) at <http://www.ustr.gov/acta>

Products Anti-Counterfeiting Taskforce – IMPACT”<sup>6</sup>, “Business Action to Stop Counterfeiting and Piracy – BASCAP”<sup>7</sup>, the draft East African Community (EAC) Anti-Counterfeiting Policy and Bill, the “Global Anti-Counterfeiting Network – GACG”<sup>8</sup>, the “International Anticounterfeiting Coalition – IACC”<sup>9</sup> and so on.

11. The allure of using the terms counterfeiting and/or piracy particularly in political debates about IP enforcement, in public awareness and advocacy campaigns and in law enforcement contexts is obvious. Both terms, in ordinary usage, suggest intentional fraud and criminality. This explains why we also see the constant use of the word “theft” and “stealing” to refer to alleged IP infringements.
12. It is well accepted, and indeed an obligation of all WTO Members, to provide for criminal procedures and remedies with respect to certain acts of counterfeiting and piracy. In particular, Article 61 provides that “Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.” However, the increasing broader use of the term counterfeiting with respect to a much broader set of infringing acts appears to be aimed at portraying any suspected act of infringement as criminal. Consider this passage from the Organization of Economic Development and Cooperation (OECD) Observer:

“Crime is one good reason to take counterfeiting seriously as a public policy issue, but there are others. Fake goods pose a threat to public health and safety. They destroy businesses through loss of profits and consumer trust and, ultimately, brand value. They impact on employment when jobs shift from legitimate businesses—the “rights” holders—to infringing parties.”<sup>10</sup>

13. In just a few sentences there is so much that is mixed up. From counterfeiting there is a direct link made to crime, public health, brand value and right holders being the legitimate business and infringers illegitimate or illegal business! It is obvious that the generalized use of the term counterfeiting makes it easier to justify proposed laws and treaties, awareness and advocacy campaigns, criminalization of broader range of IP infringing activity and the allocation of more government resources to IP enforcement activities, which is indeed what the OECD piece calls for.
14. While some may see this as a desired result, the overzealous use of these terms, particularly the terms “counterfeiting – anti-counterfeiting” makes it harder to analyze the different types of infractions and motivations of IPR infringements. It also explains some of the resistance we are seeing in developing countries or by developing country governments towards enforcement initiatives. There are at least three important reasons for this.

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[Footnote continued from previous page]

<sup>5</sup> The latest Congress, the fifth, took place in Mexico in December 2009. See details at <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Congress/Default.asp>

<sup>6</sup> Information on IMPACT is available at <http://www.who.int/impact/en/>

<sup>7</sup> BASCAP’s website is at <http://www.iccwbo.org/bascap/id883/index.html>

<sup>8</sup> See website at <http://www.gacg.org/>

<sup>9</sup> See the coalition’s website at <http://www.iacc.org/>

<sup>10</sup> See OECD “Counterfeiting and Piracy – Fakes, Facts and Figures” *OECD Observer*, available at <http://www.oecdobserver.org/news/fullstory.php/aid/2278/>

15. To start with, the use of a term “counterfeiting” which has a specific technical meaning with respect to trademarks and a word whose usage in ordinary language suggests intentional fraudulent and criminal behavior makes it difficult to distinguish between:
- Permissible and illegal interference with IP rights;
  - civil acts and criminal acts;
  - intentional or unintentional acts; and Commercial or non-commercial activities.

Without making these distinctions it is difficult to imagine an analysis of the different types of infringements and motivations behind infringing activity.

16. The current counterfeiting discourse seems to suggest, a priori, that we are dealing with criminal activity and the motives are criminal. Indeed, one of the reasons that have been given for difficulties in providing a clear statistical picture of IP infringement is that “due to their illegal nature, there are no reliable figures on sales of intellectual property infringing products.”<sup>11</sup> But if this statement is true it begs a larger question; at what point can we declare that an illegal activity has occurred?
17. Determining that an infringement of any IP right has occurred requires a legal test. First we need to determine the existence and validity of the right. We then need to determine whether the act complained of is a proscribed interference with the right. This requires not just a *prima facie* analysis but also an analysis of exceptions and limitations to the specific IP rights and in some cases an analysis of other laws. As Loughlan has pointed out:

“The use of terminology like “theft” or “stealing” in contemporary intellectual property discourse is not meant to reflect legal fact. When the background authoritative voice in the MPAA film quoted intones that “downloading a pirated film is stealing”, no statement of law is being made. The statement is meant, rather, to draw upon and mobilize the ordinary, almost instinctive response of ordinary people to dislike, disdain and despise the unauthorized user of copyright works as they would dislike, disdain and despise the ordinary thief who takes away from another “with intent to permanently deprive.”<sup>12</sup>

By using language that deliberately exaggerates or mischaracterizes the legal situation we create significant room for resistance and questioning of motives.

18. The second reason why the generalized use of the term counterfeiting makes sober analysis difficult is its use with respect to patent infringement. In this particular case, the usage of the term has permitted or led to serious skepticism about the real motives and intention of those advocating for IP enforcement in developing countries. In this regard, Correa has observed that the debates about counterfeiting, especially when relating to medicines, “are often obscured by inappropriate use of the concept of ‘counterfeiting’ or

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<sup>11</sup> Fink, Carsten (2009) “Enforcing Intellectual Property Rights: An Economic Perspective”, a paper presented to Fifth Session of the ACE. Available at [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_5/wipo\\_ace\\_5\\_6.pdf](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_6.pdf).

<sup>12</sup> Loughlan, Patricia (2007) ““You wouldn’t steal a car...”: Intellectual Property and the Language of Theft”, *European Intellectual Property Review*, 29(10), 401-405, at 403.

piracy to describe situations in which legitimate generic versions of medicines are introduced without the consent of the originator of the drug.”<sup>13</sup>

19. Mara, writing on the coverage of anti-counterfeit policy debate in the global media in Intellectual Property Watch in early August 2010 starts her piece by asking:

“Are counterfeit products first and foremost a threat to human health and safety or is provoking anxiety just a clever way for wealthy nations to create sympathy for increased protection of their intellectual property rights?”

Haman has also observed in the particular case of Africa that:

“Various stakeholders, including African governments, are often suspicious about whether big pharmaceutical companies conveniently use anti-counterfeiting laws to curb the flow of generic medicines, rather than ensuring public safety”<sup>14</sup>

Others like Consumers International have complained of “industry campaigns that treat consumers like criminals”<sup>15</sup> even when in fact, legally speaking, no proof of unlawful activity has been provided.

20. The third reason why attempts to stretch the meaning of the term counterfeiting is problematic is that we may end up delegitimizing laws and policies. For example, in April 2010, the Kenya Constitutional Court granted an interim injunction stopping the application of the Kenya Anti-Counterfeiting Act, 2008 to medicines on the account that the petitioners had proved a *prima facie* case that the definition of counterfeiting in the Act could lead to generic medicines being taken as counterfeits.<sup>16</sup> The Judge was satisfied that the petitioners had demonstrated that the implementation of the Act with a broad definition of counterfeiting could adversely affect their human rights, including the right to life.
21. Overall therefore, as we work to deepen our understanding of the types and motivations for different IPR infringements in developing countries and more broadly, we need to be clearer on definitions. Language will be important to move towards shared understanding of issues and ensure that country specific circumstances are taken into account.

### III. TAKING INTO ACCOUNT LEVELS OF DEVELOPMENT: IF WE MEANT WHAT WE SAY

22. Developing countries have, at least in formal terms, been largely integrated into the international IP system. Their large membership in WIPO and participation in the treaties

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<sup>13</sup> Correa in “Fink, Carsten and Carlos Correa (2008) “The Global Debate on the Enforcement of Intellectual Property Rights and Developing Countries”, Issue Paper 22, ICTSD, Geneva

<sup>14</sup> Haman, Marius (2010) “Africa Rising to the Anti-Counterfeiting Challenge”, Journal of Intellectual Property Law and Practice, Vol. 5, No. 5, 344-349 at 347

<sup>15</sup> See Malcom, Jeremy the Coordinator of the Consumer International's IP project quoted in Saez, Catherine (2010), “Global IP Enforcement Push Impacting Consumer Access, 2010 IP Watchlist Finds”, Intellectual Property Watch, 29 April, Geneva. Available at <http://www.ip-watch.org/weblog/2010/04/29/global-ip-enforcement-push-impacting-consumer-access-2010-ip-watchlist-finds/>

<sup>16</sup> See Mbatiah, Suleiman (2010) “Court Victory against ‘Anti-Counterfeit’ Agenda”, The Story Underneath, IPS, April available at <http://www.ipsnews.net/news.asp?idnews=51168>

administered by the organization<sup>17</sup> as well as their membership of the World Trade Organization (WTO) and its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) testifies to this fact<sup>18</sup>. Beyond the formal integration into the international IP system, the importance of IP rights in these countries has also discernibly grown as their economies have expanded and diversified. Equally, awareness of the economic, social and cultural issues around IP rights has also increased among different economic, social and political actors.

23. The rapid integration of developing countries into the international IP system and the efforts of different national and international players to leverage IP rights in these countries have spurred a sometimes dizzying pace of legislative, judicial and administrative activity. Whether it is implementing their international legal obligations or responding to domestic demands and the interests of trading partners, many of these countries have seen a continuous stream of legislative, judicial and administrative initiatives since the mid 1990s. As more laws have been put in place, and as the demand to use or navigate these laws has grown, the emphasis in policy-making and IP administration has inevitably shifted to the question of effective enforcement.
24. In the ensuing international discussions and debate, developing country governments and a range of other actors, including academics, have argued that IP enforcement rules must be crafted and implemented in a manner that takes into account the particular circumstances and context of each country. The WIPO Development Agenda therefore calls for IP enforcement to be approached “in the context of broader societal interests and especially development-oriented concerns”<sup>19</sup>. On its part, the UK Commission on IPRs had argued in 2002 that:

“WIPO should give more explicit recognition to the fact that IP protection has both benefits and costs, and give greater emphasis to the need for IP regimes to be appropriately tailored to the individual circumstances of developing countries.”

25. But even before the UK Commission, it was generally acknowledged, albeit implicitly, that there are differences between how IP rights work in advanced economies as opposed to developing economies. The TRIPS Agreement dealt with the question by conditioning the application of its minimum mandatory rules on transitional periods (special and differential treatment – S&DT). The reason for an S&DT structure built around transitional arrangements was justified on the basis that the ultimate aim was to ensure “the fullest participation [of all WTO Members] in the results of the negotiations”.<sup>20</sup> In other words, TRIPS Agreement has S&DT in a one-size-fits-all system.
26. Over the last decade or so, the one-size-fits-all (full participation) governance model for IP has been successfully challenged. The result is the acceptance of the idea that IP norms and rules, should be structured in a way that “takes into account the levels of development” of countries. But if the S&DT idea in the TRIPS Agreement is the wrong governance model

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<sup>17</sup> Information on WIPO members and ratifications/accessions to WIPO treaties is available on the WIPO website at <http://www.wipo.int/members/en/> and <http://www.wipo.int/treaties/en/> respectively

<sup>18</sup> A list of WTO Members can be found on the organization’s website at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>19</sup> See Recommendation 45 of the WIPO Development Agenda. Available on the WIPO website at <http://www.wipo.int/ip-development/en/agenda/recommendations.html#f>

<sup>20</sup> See the Preamble to the TRIPS Agreement



for “developing countries” what does “taking into account levels of development” mean as a basis for differentiation?

27. The idea that analyses on questions such as the types of infractions and motivations behind IPR infringing activities should take in account the levels of development is premised on the argument that (a) certain enforcement obligations or approaches may be too onerous for less developing countries; (b) the interest of countries at different levels of development with respect to IP policies and laws differ; and (c) developing countries need policy space in implementing IP policies and laws.
28. It should follow that the notion of taking into account levels of development in international IP policies and norms means at least three things, namely:
  - International legal obligations and burden of enforcement should be dependent on the factual economic, technological and social circumstances in a country (Evidence-based/empirical approach).
  - Sectoral differences and differences in the fields of technology should count in designing norms and rules.
  - No two countries should be treated the same except where their factual situations are the same.

Effectively, this means our analysis regarding the types of infractions and motivations for IPR infringement can no longer take “developing countries” as a unit of analysis.

29. It is only by moving beyond the broad “developing country” category that we can have a real chance to address the question of “disproportionate burden” for countries. As Basheer and Primi have argued:

“In order to make the Development Agenda more effective in its implementation, one ought to recognize the fact that there is considerable heterogeneity in the technological capability among developing countries. Some are more technologically proficient than others, and this distinction may warrant separate norms in areas of technology that they are strong in. Otherwise the Development Agenda runs the risk of falling into the trap of endorsing a one-size-fits-all scheme –a trap that has characterized the upward harmonization of IP norms for many years and one that the Development Agenda seeks to challenge and change”.<sup>21</sup>

As long as the debate is focused on developed and developing countries as the objects of analysis, the governance model and rules will be based on the lowest common denominator between advanced economies and emerging economies. These are the countries which generally have the economic interest and the political and economic power to shape international rules.

30. It also has to be recognized that many developing countries aspire to more fully integrate into the international trading system. This means that at the national level, a careful balance has to be struck between the idea of policy space and the need to integrate into the international trading system, including the international IP system. That balance will

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<sup>21</sup> Basheer, Shamnad and Annalisa Primi (2009) “The WIPO Development Agenda: Factoring in the “Technologically Proficient” Developing Countries” in De Beer, Jeremy (ed.) *Implementing the World Intellectual Property Organization’s Development Agenda*, Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press, Ottawa, p.110

inevitably be different for different developing countries and for different sectors of their economy.

#### **IV. IPR INFRINGEMENT AND SOCIO-ECONOMIC AND TECHNOLOGICAL VARIABLES: POVERTY, IMITATION AND FOREIGN RIGHTS**

31. The governance model which advocates that norm-setting and IP policies and laws need to take into account a country's levels of development requires that the socio-economic and technological conditions of a country or region be factored into analyzing the benefits and costs of different actions. In the context of this paper, the socio-economic and technological variables in countries should have an important role in shaping how we think and act on the different types and motivations for IPR infringing activities.
32. Socio-economic and technological variables have implications for consumers as well as the ability of countries to enforce IP rights. Our analysis of the implications in the context of IPR infringement and enforcement action, however, remains superficial. While some of the assumptions make sense, certain other assumptions may prove wrong when examined more closely. As way of example, this section looks at some of the dimensions that should be considered when we look at IP infringements in the context of: poverty and inequality; the role of imitation in learning and diffusion of knowledge; and foreign and local rights. These three areas have been chosen because they underpin the main arguments that are frequently used to justify a different approach to IP enforcement in developing countries.

##### **4.1. Poverty and inequality**

33. Poverty and inequality are two important socio-economic conditions generally associated with developing countries. They both have implications for the types of IP infringement and motivations. Indeed, the relationship between poverty and IPR infringement and enforcement has different dimensions that are yet to be fully examined in the literature.
34. The World Bank, which is a global leader in the push for poverty reduction, defines poverty, among other things, as:

“[P]ronounced deprivation in well-being, and comprises many dimensions. It includes low incomes and the inability to acquire the basic goods and services necessary for survival with dignity.”<sup>22</sup>

Another important factor that is attributable to poverty is lack of voice in public affairs. Inequality, on the other hand, refers to the disparities in the distribution of economic resources and access to social services within a society.

35. Based on these definitions, a number of basic conclusions can be drawn. First, to the extent exclusive rights confer market power to their owners allowing them to charge a higher price than they would otherwise charge in an ideal competitive market, IP rights may have the effect of pricing poor consumers out of the market. Because these consumers also lack voice, they also have the least impact on IP laws and policies. In this situation, IP infringing activities could be assumed to be largely motivated by the need for access to

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The definition is available on the Bank's website at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:22569747~pagePK:148956~piPK:216618~theSitePK:336992,00.html>

basic goods and services.<sup>23</sup> The majority of activities at the individual or household level could also be assumed to be largely non-commercial and non-criminal in terms of motivations.

36. Depending on the levels of inequality it can also be assumed that two countries with roughly the same Gross Domestic Product (GDP) could have very different numbers with respect to those who are priced out of the market. Countries with higher inequalities are likely to have a relatively higher number of people being priced out of IP goods and services markets.
37. Deeper reflection, however, suggests that there can be more to the story of poverty, inequality and IP infringements. This is particularly the case when you place IP rights into the two categories that Fink discusses in his paper presented at the Fifth Session of the ACE.<sup>24</sup> The arguments regarding pricing consumers out of the market and the need to calibrate IP rights and approach enforcement in a different manner work pretty well when dealing with IPRs that are aimed at stimulating inventive and creative activities or investment, namely patents, utility models, industrial designs, copyright and so on.
38. The argument does not work so well when applied to IP rights that protect reputations or indicate the origin of the goods or services (trademarks and geographical indications) which have a critical informational function for consumers. It is much more difficult and, in the most part, inaccurate to argue that poor consumers do not benefit from the information function of trademarks and GIs or do not care about status value of products.

#### 4.2. Imitation and catching up strategies

39. Imitation is an important process through which societies can develop their technological capabilities and move up the development ladder. In this regard, Dutfield and Suthersanen have argued that:

“There is ample historical evidence to indicate that freedom to imitate was an essential step towards learning how to innovate. In addition, numerous examples show that relatively unfettered access to goods, technologies and information from more advanced countries stimulated development in the less advanced ones. Support for both findings comes, as we saw, from the cases of Holland, Sweden, Japan, the United States and the Asian Tigers. It is difficult to see why they would not also be true for today’s developing countries.”<sup>25</sup>

40. It has also been argued that increased levels of IP protection stifle innovation and drastically undercut the opportunities for learning. Maskus and Reichman argue that:

“The natural competitive disadvantages of follower countries may become reinforced by a proliferation of legal monopolies and related entry barriers that result from global

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<sup>23</sup> BASCAP, for example, calls these “struggling consumers”. See counterfeit and/or pirated product purchaser profiles in BASCAP (2009) “Research Report on Consumer Attitudes and Perceptions on Counterfeiting and Piracy”, BASCAP. Available at [http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/BASCAP-Consumer%20Research%20Report\\_Final.pdf](http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/BASCAP-Consumer%20Research%20Report_Final.pdf)

<sup>24</sup> See the discussion in Fink (2009); *supra* note 11, pp. 4 – 5.

<sup>25</sup> See Dutfield, Graham and Uma Suthersanen (2005) “Harmonization or Differentiation in Intellectual Property Protection? Lessons from History”, *Occasional Paper 15*, QUNO, Geneva, p.15. The paper is available electronically at <http://www.quno.org/geneva/pdf/economic/Occasional/Harmonisation-or-Differentiation.pdf>

minimum intellectual property (IP) standards. Such external constraints on competition could consign the poorest countries to a quasi-permanent status at the bottom of the technology and growth ladder.”<sup>26</sup>

41. These lines of argument suggest that countries or societies with poor socio-economic and technological conditions may need less legal monopolies or exclusive rights and/or different enforcement strategies. In the context of analyzing the types of infringement and motivations it can be argued that certain types of infringing activity is a necessary pre-requisite to technological development or, at the very least, that certain types of infringing activity should be treated as a natural process of learning by individuals and firms. In such situations, for example, the use of criminal law may be seen as counterproductive. It has therefore been observed that applying criminal penalties in cases of patent infringement:

“[M]ay constitute an important deterrent for companies, especially small and medium enterprises, willing to operate around patented inventions. A criminal accusation carries many negative effects (in terms of prestige, defense costs, restrictions on travel abroad etc.). Even if the defendants can prove to be innocent, the risk of facing criminal actions may often be strong enough to dissuade a firm from activities that the title holder may argue are infringing.”<sup>27</sup>

42. This argument, as with the case of poverty and inequality discussions above, also works well with respect to Fink’s category two rights but not necessarily the first category. The argument may also make sense only if it is applied sector by sector. A significant part of the historical evidence that Dutfield and Suthersanen and others cite suggests imitation and catch-up strategies were applied by countries to specific sectors.

#### 4.3. Foreign versus local rights

43. Countries with poor socio-economic conditions and low levels of technology are generally taken to be peripheral players in the international IP system. It has therefore been argued that the legislative and other changes made by these countries to comply with the TRIPS Agreement and other treaties have nothing to do with their interests. Thus, the IP system in these countries continues to be “viewed mainly as vehicle for protecting foreign interests. This often colors the response to the system.”<sup>28</sup> One of the results of these beliefs is the questions that have arisen regarding the role of governments in IP enforcement. It is argued that because IPRs are private rights it is the responsibility of right holders to enforce their rights. The government only has to provide the legal mechanisms.
44. These are important arguments that need to be taken seriously. However, we need to go further in our analysis. Determining the role of governments in developing countries beyond ensuring the availability of procedures for enforcement should take into account further considerations. First, taking into account the question of imitation above, a distinction has to be made between *prima facie* infringing activities that result in alternative products (say generic medicines) and infringing activities that may cause harm to consumers. As

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<sup>26</sup> Maskus, Keith and Jerome Reichman (2004) “The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods”, *Journal of International Economic Law* Vol. 7, no 2, pp279-320 at 282

<sup>27</sup> UNCTAD and ICTSD (2005) *Resource Book on TRIPS and Development*, Cambridge University Press, New York, p.621

<sup>28</sup> Sodipo, Bankole (1997), *Piracy and Counterfeiting – GATT TRIPS and Developing Countries*, Kluwer Law International, London, p.276

Fink points out regarding the issue of developing countries allocating more resources to IP enforcement:

“Governments in such countries typically face other priorities for public spending. In addition, most IPRs-holders tend to be of foreign origin, suggesting that short-run benefits of stepped-up IPRs enforcement are likely to be limited – except where domestic consumers are harmed.”<sup>29</sup>

45. Second, the issue of pre-dominant foreign ownership of rights is probably true for patents but may not necessarily be true for trademarks, utility models and copyright in all developing countries. The situation may also vary per sector meaning that national level generalizations give a false picture. This suggests that the assumption that infringing activity mainly affects foreigners may not always be true. The argument of foreign rights and resource allocation also implicitly suggests that in developing countries it is pre-dominantly nationals who infringe foreigners' rights. In some cases, however, the opposite might also be true. This is an issue that needs to be empirically investigated.
46. The argument that because developing country governments have other public priorities to address and hence should spend less on IP enforcement also needs further unpacking. In general, in resource poor-settings it is the case that government plays a much larger role in the provision of not just social services but also economic services. If this is the case, why can governments, for example, not provide support services to local IP owners with respect to IP enforcement? The question should therefore not be simply about whether governments should be or not be involved in enforcement. The appropriateness of government involvement and resource allocation needs to be examined at a more disaggregated level.

## 5. FINAL REMARKS

47. The importance of accounting for socio-economic and technological variables and different levels of development in our efforts to deepen our understanding of the different types of IPR infringement and motivations cannot be gainsaid. To achieve the ultimate goal will however require a reconsideration of some of the assumptions that are made particularly with regard to developing countries.
48. Language is critical in bettering our understanding of the different complexities around IPR infringement. In this regard, while it is a TRIPS obligation to criminalize willful trademark counterfeiting and copyright piracy on a commercial scale, the use of the language of counterfeiting and thieves to suggest criminality in a broader range of infringing acts may have negative consequences for efforts to build a shared understanding of the issues and cooperation. Generalizations may also lead to genuine efforts resulting into bad or questionable policies and laws.
49. There is also a case for moving beyond the rhetoric on the question of taking into account the levels of development. As we demand and move into evidence-based discussions honest questions need to be asked regarding the use “developing countries” as a unit of analysis. In particular, we need to consider the disproportionate burden and policy implications for international standards set on the basis of a broad developed versus developing countries dichotomy on low income countries.

50. Accounting for socio-economic and technological variables in analyses on subjects such as the types and motivations for IP infringements will also require questioning common assumptions and stereotypes. The relationship between poverty, inequality, the need for imitation and the protection of foreign rights needs to be analyzed in a more nuanced manner than has so far been done.

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