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WORK ON COUNTERFEITING AND PIRACY CONCERNING THE DEVELOPMENT OF A METHODOLOGY TO MEASURE THE SOCIO-ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY

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THE OBSERVATORY

1. The European Commission established the European Observatory on counterfeiting and piracy (henceforth referred to as "the Observatory") in April 2009. This was in response to a request from the Competitiveness Council in its resolution 25th September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan.
2. The Observatory's objective is to provide information on the problems and risks associated with counterfeiting and piracy. It seeks to foster strong collaboration and regular exchanges of information and best practices between Member States, public authorities and stakeholders engaged in enforcement of intellectual property rights. Presently the secretariat for the Observatory is provided for by the European Commission but the Commission adopted in May 2011, a proposal for a Regulation of the European Parliament and the Council that would entrust these tasks to the Office for Harmonization in the Internal Market at Alicante (OHIM). This proposal is to ensure that we can reinforce the capacity of the Observatory to feed European policy-makers with the information they need to design effective policies as well as to assist enforcement against counterfeiting and piracy across the Union.

* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO

THE STUDY COMMISSIONED BY THE EUROPEAN COMMISSION

3. One of the existing tasks of the Observatory is that of collecting statistics that help assess the extent of the counterfeiting and piracy problem. The Observatory has a sub-group dedicated to develop and apply efficient and common methodologies to measure the scale and socio-economic impacts of counterfeiting and piracy within the European Union. In order to facilitate this task, the European Commission launched a call for tender on this issue in early 2010 and selected RAND Europe to undertake this work. We expect the study to be completed in early 2012.

4. In general terms this study consists of three tasks:

- First, the consultants are required to identify and compare existing studies and methodologies concerning counterfeiting and piracy from different sectors and public authorities.
- Second, on the basis of the results of this critical review, they must propose a methodology to estimate the size of counterfeiting and piracy markets that could be used for future application.
- Third, the methodology should be tested through the quantification of the scope of counterfeiting and piracy for particular sectors.

CHALLENGES

5. Since the study is not yet finalized, it is not possible to present its results. Nevertheless, in steering the study with the consultants and through contacts with the Observatory's members as well as with Member States, a number of key challenges in achieving agreement on a common methodology can be identified. These are as follows:

No current consensus on which methodology to use.

6. To date, it would appear that there is no consensus either at macro or at sectoral levels around one methodology that should be applied for this purpose. On the one hand this confirms the need for a study but, on the other hand, it also indicates the scale of the challenge ahead. It would appear that each study that currently exists applies its own methodology that typically relies on a differing set of assumptions on the underlying markets. Moreover, the assumptions are not always specified.

7. As the OECD stated in the executive summary of its report on this issue in 2007:

"The overall degree to which products are being counterfeited and pirated is unknown, and there do not appear to be any methodologies that could be employed to develop an acceptable overall estimate. The clandestine nature of many counterfeiting and piracy activities, the general lack of indicative data and the difficulty in detecting counterfeit and pirated products contribute to difficulties in this regard. Analysis has therefore focused on international trade, where data, from customs authorities, are more abundant."¹

A chronic lack of data that may persist if stakeholders are unwilling to engage.

8. Obviously counterfeiters or internet pirates do not make a habit of declaring the level of their sales or uploads/downloads. For practical purposes, the OECD (for counterfeiting) relied

¹ *The economic impact of counterfeiting and piracy* OECD 2007.

on trade estimates since the only quantifiable data available are those relating to seizures at customs. Even such customs' seizure data have their limitations. For example, one has to adjust such data according to different levels of investment in enforcement across national borders. However, it is even more difficult to rely on such data to construct estimates of counterfeiting within a borderless, unrestricted trade area such as the European Union given that systematic customs controls are not required for products or services entering into neighboring Member States. Other data, usually from industry are therefore required. As regards on-line piracy, the source data are often industry estimates of the number of illegal downloads or connections to streaming sites offering access to works for which licences have not been granted.

9. Numbers of court actions or out of court actions taken by enforcement bodies and/or intermediaries at the behest of rights-holders against suppliers of counterfeit or pirated products would be very useful indicators of the level of infringement although again they would have to be adjusted. For example, regarding court actions, due account would have to be taken of the relative costs of court procedures and their efficiency in terms of redress.

10. Member States for technical reasons often do not gather statistical data on court cases at central level. The problem to date is therefore that the commercial stakeholders (for apparent fear of revealing the scale of the problem to investors and or competitors) that dispose of such data as parties to such cases are not very willing to release them. The Commission hopes that within the Observatory sufficient trust will be developed in order for this reluctance to be lifted on the part of both groups of parties. If it is not it is difficult to see how any estimations of the scale of the problem will result even if agreement can be found on a methodology to make those estimates.

The methodology will only be as credible as the assumptions on which it is based.

11. Even with such data, any methodology to estimate the total size of counterfeit or piracy markets and the economic and social costs that they represent for the EU economy has to be based on a series of transparent assumptions. These will take the form of agreed and credible values to variables regarding the demand-side and the supply-side of the relevant markets.

12. On the demand-side users (including businesses buying inputs) will either unintentionally or knowingly buy a counterfeit good or pirate service. The degree to which they do so will be dependent on a number of variables, including the accessibility and price/quality difference of the relevant "genuine" product and the perceived social acceptability of the "illicit" products. The economic loss from the counterfeit or pirated products for the relevant sector will subsequently be derived by relying on an agreed and credible assumed substitution ratio between pirated/counterfeit products and the potential sales of the genuine products that have been foregone.

13. On the supply-side the pricing decision for the "genuine" product will impact on the level of counterfeiting or piracy as will the costs of making and distributing illegal copies. However, it is also evident that the global nature of a brand, the level of enforcement against IPR infringements and the speed and relatively low costs with which, thanks to new ICT technology, one can market illicit product over the global market all increase the probability of an increased supply of such products.

14. It is probable therefore that the methodology would consist, for different sub-groups of markets and sectors, of setting values to a common set of variables that are assumed to affect the demand and supply-side of markets that are suffering from piracy and/or counterfeiting. The values for those variables will be sector or market specific. It follows that final estimations will have to be undertaken sector by sector.

The methodology has to be pragmatic and not give rise to additional administrative burden.

15. Neither Member States nor stakeholders will be willing to undertake large scale surveys on a yearly basis in order for the Observatory to use an agreed methodology and estimate yearly statistics on counterfeiting and piracy for all sectors. In the current dire economic climate facing the EU, no Member State will agree to launching such expensive surveys that will add to the administrative burden of companies.

16. It follows that any methodology to be agreed upon should be credible but not overtly costly to implement. This is a major challenge that will need to be fully accounted for in the Observatory's final choice of a "best practice/credible/most costs effective" methodology.

The key challenge of achieving widespread agreement around a credible compromise.

17. Once the consultants will have made their proposal in the study early next year, the Commission will make them publicly available. Then, through the representative forum of the Observatory that covers all the relevant stakeholders, an agreement will be sought on the proposed methodology or an adjusted version of it that would then become the basis for all estimates of the socio-economic impact of counterfeiting and piracy within the European Union. The Observatory will subsequently be tasked with producing the relevant estimates on a regular basis.

18. The key is to arrive at a reasonable level of consensus across all the stakeholder representatives on a methodology. If this can be achieved then the data resulting from its application will become the agreed trackers for prioritizing, designing and monitoring the European Commission's and the Member State's policies on enforcement against IPR infringements.

19. Given that the sectors represented within the Observatory often have members who are working at global level we believe that such an agreed methodology could be adopted internationally. We have a common interest with all our trading partners to achieve such a consensus. We would therefore be happy to report back to WIPO next year on our progress in order to extend any results that we achieve to beyond the EU's borders.

CONCLUSION

20. There are many challenges to meet before a reasonable level of consensus on a common agreed methodology for measuring the socio-economic impact of counterfeiting and piracy can be achieved. However, we believe that the RAND study and subsequent discussion within the European Observatory between all the stakeholders including the Member States offer a very important first step on this path. We are happy to share our progress with all our trading partners since all our societies suffer from the same ills arising from counterfeiting and piracy and the counterfeiters do not respect any of our borders.

21. We very much hope to be able to report back to this enforcement committee of WIPO of a positive result early in 2012.

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