

The Global IP Enforcement Debate: New Economic Perspectives and Policy Challenges

Thursday 17th July 2008

15:00-17:00

Palais des Nations, Geneva

Room XXVII, E Building

The purpose of this informal dialogue, organized jointly by ICTSD and UNCTAD, was to contribute to the current debate on IP enforcement. The enforcement of intellectual property rights (IPRs) has gained prominence in recent years. Just a few weeks ago, the G-8 Summit called for the conclusion of talks on a new Anti-Counterfeiting Treaty (ACTA) by the end of this year. At the same time, one of the recommendations of the WIPO Development Agenda, adopted last September by WIPO General Assembly, underlines the need "to approach intellectual property enforcement in the context of broader societal interests and especially development oriented concerns," in accordance with Article 7 of the TRIPS Agreement.

The dialogue offered an opportunity for providing new perspectives on the economic aspects of IP enforcement as well as insights into the legal and policy challenges, particularly for developing countries, raised by recent initiatives in this area.

Welcoming remarks were made by Kiyoshi Adachi, Legal Officer, IP Team, (UNCTAD), Ahmed Abdel Latif, Programme Manager-Intellectual Property & Technology (ICTSD) and Pedro Roffe, Senior fellow, IP Programme, (ICTSD) who served as moderator.

The discussion was animated by presentations made by Carsten Fink (Visiting Professor, Sciences Po, Paris, on leave from the World Bank Institute) and Carlos Correa (Professor at the University of Buenos Aires). Following the main presentations, Carolyn Deere (Director, Global Trade Governance Project, University of Oxford) and Yusong Cheng (Permanent Mission to the WTO) provided preliminary comments.

Carsten Fink presented the main findings of his recent work commissioned by ICTSD on enforcement issues. He highlighted the importance of the economic perspective to better inform the current debate and initiatives in this area although he did underline the lack of adequate data and statistics as a major challenge to the process. He also raised the question of whether IP enforcement should be a matter of public policy given the responsibility of governments to carefully expend scarce resources. Fink also raised the issue of funding for enforcement either through foreign financing as part of official development aid which can be considered as consistent with the poverty reduction strategies, or an alternative of private financing which would be contingent upon the registration and renewal of IP titles. He concluded by remarking that if weak IPRs enforcement in developing countries reflects fundamental institutional deficiencies, it is not clear how far reaching obligations in trade agreements or technical assistance activities can at all remedy such deficiencies. The record of aid agencies in changing institutions in developing countries is, at best, mixed. Historical evidence and contemporary research suggests that institutional change occurs only gradually and is

more frequently brought about by bottom-up evolution rather than top-down planning. Outside incentives—whether positive or negative—may well make a difference in containing counterfeiting and piracy activities and their international proliferation. However, in many cases, sustained reductions in IPRs violations may invariably have to wait for broader institutional development.

Carlos Correa presented the main findings of his work, also commissioned by ICTSD, on the current drive for new enforcement standards and its implications. Correa offered this perspective with a focus on the balance between innovators/creators and users as reflected in the TRIPS Agreement. He highlighted the various enforcement strategies used by the major players and subsequently advised that any enforcement measures should contain elements to balance the public interest and the producer rights. According to him a major issue in the enforcement offensive relates to the fight against counterfeit medicines and other products that may create risks to health or the environment. The arguments and proposals made in relation to this subject often confuse IP and public health considerations. The application of an IP approach to what is essentially a public health issue may lead to the adoption of an inadequate set of measures. In the case of counterfeit medicines, the appropriate design and implementation of drug regulations is the most critical element in combating counterfeiting in medicines.

In his concluding remarks, Correa advanced a number of recommendations regarding the way forward in this area, among others: that enforcement rules should be adapted to the conditions and needs of countries; that they should not constitute a threat to local competitors nor deter local innovative initiatives; criminal sanctions should be provided, as required by the TRIPS Agreement, against trademark counterfeiting and copyright piracy, but excluded for other types of infringement that may be addressed through civil remedies; courts and administrative bodies should not substitute right holders in the exercise and defence of their IPRs; actions should be taken, when appropriate, upon request of the right holder; provisional measures should be applied with caution, particularly in cases of alleged patent infringement, only when a likelihood of infringement and an irreparable harm are shown; border measures should be limited to the importation of goods in cases of trademark counterfeiting and copyright piracy; enforcement needs not be given priority over other law enforcement functions; enforcement costs should be borne by their direct beneficiaries; in particular, the level of registration fees should take into account enforcement-related costs; custom and competition authorities, the private sector and the judiciary should be made aware of the implications of abuses of enforcement rules and of TRIPS-plus standards.

These stimulating presentations were followed by insightful comments by Carolyn Deere and Yusong Cheng. Deere made the observation that there was more discourse for stronger IPR enforcements than actual facts. She also underlined the distortion in the way data and statistics are used but stressed the need for more dialogues which focus on the actual capacity of countries to provide stronger enforcement. These observations were expanded by Cheng who stressed the need to address the challenges facing developing countries in meeting IPR enforcement requirements referring in particular to the case of China. He commented on the far reaching implications of the case brought by the US

against China at the WTO on enforcement. In this context, he indicated that several of the flexibilities available to countries in implementing their TRIPS enforcement obligations were at stake in this important case. He pointed that IPRs issues and the new offensive agenda on enforcement could have an impact in international relations among countries.

Following the presentations and comments, there was a lively discussion as the participants asked several questions to the panelists. The Panel discussion was timely and reflected how the debate on enforcement has gained prominence in recent years in the trade and intellectual property agenda. A number of these developments at the global, regional and bilateral level carry far-reaching implications for the regulation of the knowledge economy. The papers presented by Carsten Fink and Carlos Correa to be published by ICTSD in the course of this year, make important contributions to this debate.