



Policy statement

Recommendations on the implementation of the WIPO Development Agenda proposals

Prepared by the Commission on Intellectual Property

Introduction

WIPO is now at the important stage of deciding how to implement the 45 proposals agreed during the two meetings of the Provisional Committee on the Development Agenda in February and June 2007.

During this process, ICC suggests that WIPO members keep the following in mind:

- The aim of these proposals is to ensure that the IP system helps stimulate development and progress in all WIPO member countries, as development is a concern for every country. Even in countries where the intellectual property system has been in place for some time, it is often not being used to its full potential.
- Implementation should be focused on specific practical measures and based, where possible, on lessons learnt from experiences in different countries. The intergovernmental nature of WIPO and its network of stakeholders would make it an ideal forum for the exchange of information on practical experiences.
- For implementation to be effective and timely, any implementation proposals should be realistic and achievable in relation to WIPO's resources and mandate.
- WIPO should not waste time and resources by reinventing the wheel but should use and build on existing work by other organizations. Work has been or is being done by other organizations, both in the public and the private sector, on several of the issues addressed in the proposals. It would be more efficient for WIPO and its member states to take stock of such work first to see if existing mechanisms are sufficient before deciding to start a separate initiative in the same area.
- While intellectual property protection is a necessary pre-condition of development in today's knowledge based economy, it cannot work in a vacuum. Intellectual property protection has to be supported by sound economic management and other appropriate policies in areas such as education, science and technology, culture, taxes, investment regulations, production and technical incentives, trade, and competition. Governments also have to commit themselves to establishing an effective infrastructure to process and make use of intellectual property rights.



Without positive action by individual governments, the intellectual property system will not fulfill its potential as a tool for development, growth and progress. Below are examples, set out by ICC in an earlier paper¹, of measures governments could take, some of which are reflected in the proposals:

- provide clear and enforceable intellectual property rights ownership, without discrimination as to nationality;
- improve the accessibility of the national and international intellectual property protection systems in terms of costs and ease of use;
- ensure that intellectual property institutions are efficient and sufficiently funded;
- support intellectual property policies with sound economic management, good infrastructure and other appropriate policies;
- establish an active and coherent intellectual property policy coordinated throughout government bodies;
- educate local communities, businesses and the public on the potential benefits of the intellectual property system;
- provide assistance to innovators/producers/creators on how to use intellectual property protection to their commercial advantage and support efforts of stakeholder organizations in this area;
- bridge the gap between academic and research institutions, and businesses and financing sources; and
- make it a priority to strengthen and/or create a legal framework to ensure implementation and effective enforcement measures against intellectual property theft. There is also a need for clearly designated and sufficiently resourced enforcement institutions, supported by training, international cooperation and public education.

More detailed comments on some of the proposals can be found below.

¹ "Making intellectual property work for developing countries" document no 450/1003 of 19 July 2005 at http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/Statements/MakingIPworkfordevelopingcountries19July05.pdf

Cluster A: Technical Assistance and Capacity Building

4. Place particular emphasis on the needs of SMEs and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting-up appropriate national strategies in the field of IP.

WIPO should work closely with chambers of commerce and other local business organizations when organizing programmes for SMEs in different countries as these organizations have direct access to local companies and can help inform the organizers of the needs of businesses in that particular country. ICC is currently preparing a tool-kit for chambers of commerce to help them set up IP programmes for local businesses, and is working with WIPO on a training programme for chambers.

7. Promote measures that will help countries deal with IP-related anti-competitive practices, by providing technical cooperation to developing countries, especially LDCs, at their request, in order to better understand the interface between intellectual property rights and competition policies.

Competition regimes have proliferated over the last fifteen years and over a hundred countries now have competition regimes in developed and developing countries alike. These competition laws are generally implemented by national competition agencies and take into account the impact of IPR on the market in the same way as they take into account other factors. Newer competition agencies receive technical assistance from UNCTAD, more established competition agencies, and other organizations specialized in competition policy. In addition, competition agencies learn from each other's experiences through the International Competition Network (ICN). The ICN was set up by government competition agencies in 2001 with a view to exchanging best practices and promoting convergence, and to help competition authorities in countries where competition regimes are relatively new. The interface between intellectual property and competition has been extensively studied in the OECD and UNCTAD as well as in the US and the EU, the most experienced competition jurisdictions.

In view of the extensive work already being carried out in other fora, and so as to avoid duplication, ICC suggests that WIPO should first collect information on what has already been done on the intellectual property/competition interface to better inform its discussions.

WIPO's key strength is its expertise in intellectual property policy, and its technical assistance is targeted towards national intellectual property offices, while competition policy is implemented by specialist competition agencies.

A positive role for WIPO might therefore be to play on its strength by providing intellectual property expertise to competition authorities, and by helping national intellectual property offices provide such expertise to their own national competition agencies.



11. To assist Member States to strengthen national capacity for protection of domestic creations, innovations and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate.

National capacity for protection of all creations, innovations and inventions should be strengthened, regardless of whether they are of domestic or foreign origin. To do otherwise would be contrary to the principle of national treatment which WIPO members are bound to follow under international intellectual property treaties such as the Paris Convention and TRIPS. According to this principle, countries must provide to nationals of other treaty parties the same advantages as those they give to their own nationals. It should not be forgotten that inventions and creations of foreign origin are usually also of benefit to the host country as all countries use inventions, innovations and creations which originate from elsewhere.

Cluster B: Norm-Setting, Flexibilities, Public Policy and Public Domain

15. Norm-setting activities shall:

- **be inclusive and member driven;**
- **take into account different levels of development;**
- **take into consideration a balance between costs and benefits;**
- **be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations and non-governmental organizations; and**
- **be in line with the principle of neutrality of the WIPO Secretariat.**

ICC believes that past norm-setting activities already took into account different levels of development, and that future norm-setting activities could build on the experience drawn from these. Existing multilateral agreements contain built-in flexibilities which enable contracting parties to implement minimum standards in a manner befitting their national environment. Such flexibilities - such as those made possible by the well-known three-step test enshrined in Berne, TRIPS and the 1996 WIPO Internet Treaties - are important tools for developed and developing countries alike, as they allow for the adoption of locally-relevant legislation. The wide-spread adoption of a number of WIPO treaties by countries with diverse interests at varying stages of development attest to the flexibility of such mechanisms, which should not be overlooked. These flexibilities can allow for practical solutions to the issues faced by particular member countries. It is important, however, to recall that the exercise of flexibilities rely for their effectiveness on policies that support a well-functioning IP system.

As a non-governmental organization representing the interests of creators, innovators, distributors and users of intellectual property in small and large businesses worldwide, ICC supports the consideration of views from non-governmental stakeholders in norm-setting activities. It is important that any input from non-governmental groups be provided in a balanced manner that fairly represents a cross-section of stakeholder interests, taking into account the overlap of representation that may exist amongst NGOs or groups of NGOs.



16. Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.

and

19. To initiate discussions on how, within WIPO's mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO.

and

20. To promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.

The "public domain" is a very important but also very difficult and confused concept, as the various discussions during the Development Agenda process have demonstrated. Clarification of this concept –which appears to mean different things to different people - is essential if WIPO wishes to do further work in this area.

It should firstly be made clear that this proposal is about the public domain in an intellectual property context only.

Secondly, the public domain is not an independent self-contained entity but can only be defined in relation to different types of rights. The public domain in the area of patents will therefore be different from the public domain in relation to copyright. ICC suggests that a clear analysis of what the public domain is in relation to different types of intellectual property rights be carried out to help delegates better understand this concept, before deciding any specific action in this area.

The term "public domain" is generally applied to material or knowledge which is not covered by IP rights e.g. because protection has lapsed at the end of its term or renewal fees are not paid in the case of registrable rights. "Public domain" could however be interpreted more widely. For example, in the patent field, prior art can be defined as "anything made publicly available" and includes published information partially protected by patent rights. This latter type of information could arguably also be said to be in the public domain.²

The issue of what should be in the public domain is necessarily considered and debated in every discussion of the scope of rights. Norm-setting activities specifically targeted at maintaining the public domain should therefore not be regarded as an independent goal.

The public domain should not be viewed as the antithesis of intellectual property protection; it is an integral part of its ecosystem. In the area of copyright, the public domain is enriched by the injection of creative and innovative works. Copyright protection stimulates the creation and dissemination of such works by allowing authors and creators to reap the fruits of their labors.

² "Uncontested "public domain" status may only apply to material that enjoyed IP protection, which subsequently lapsed. However, knowledge is also put into the public domain in one sense when disclosed to the public in exchange for limited patent rights over how it may be used." - *"Saving the village: Conserving jurisprudential diversity in the international protection of traditional knowledge"*, paper by Antony Taubman, from *"International Public Goods and Transfer of Technology"*, edited by Keith Maskus and Jerome H. Reichman, Cambridge University Press 2005, p. 544 .



Similarly, encouraging patenting will enrich the public domain as patent applicants are obliged to disclose technical information which will allow a third party to use the invention as a basis for further research. As the vast majority of patents are not maintained for the maximum duration possible (renewal fees are usually required every year), a very large proportion of the information in patent databases is off patent. The EPO database for example had, in May 2006, 56 million of published patent documents (from 70 countries) of which only 4 million were patents in force, leaving a technical library of 52 million of technical documents which can be freely used³.

The patent system also naturally functions in a way that tends to place more technology in the public domain in developing countries: the less developed the country, the fewer patent applications are filed. For example, it can be roughly estimated (based on a comparative number of patents granted) that about 95% of the technology patented in the US is in the public domain in Brazil⁴. Technology patented in developed countries is becoming more and more accessible with already existing online search engines and patent offices websites.

Patent databases contain a wealth of knowledge and technological information and WIPO is creating tools to improve possibilities for searching these worldwide. There is however no point obtaining access to such information if the person accessing does not know how to use it. Training on the use of patent information and databases could therefore greatly help local researchers and scientists to use the information as a basis for their own research and to identify technological information that can be freely used. Examples of use of the EPO databases to find technological solutions for specific problems in Africa can be found in a presentation given at the ICC panel discussion of May 2006.⁵

Collating information on existing procedures and initiatives which identify freely usable information would help WIPO members better use already existing mechanisms. Examples of existing initiatives to help developing countries and LDCs access scientific and other information are the HINARI, AGORA and OARE programs which scientific, technical and medical publishers have established to provide LDCs and developing country research, educational and medical institutions with free or affordable access to publications in the medical, agricultural and environmental fields⁶. With respect to digital works, initiatives such as the Automated Content

³ See presentation given by Pascal Phlix (EPO) at the ICC panel discussion on 30-31 May 2006: <http://www.iccwbo.org/policy/ip/id2479/index.html>

⁴ This is a reasonable approximation based on statistics available in the USPTO's and INPI's websites. Between 2001 and 2005, 894,382 patents were granted in the US, while 81,232 were granted in Brazil (this represents roughly 9% of the number of patents granted in the US, but includes a certain percentage of patents granted to Brazilian residents). On average, 1/3 of applications in Brazil are by Brazilian residents and 2/3 by non-residents. A similar proportion is assumed for grants of patents in Brazil (for which there are no separate statistics). It is also assumed that a small proportion of patents are granted in Brazil to non-residents who do not seek protection in the US. For statistics see: (http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (filings and grants) http://www.inpi.gov.br/menu-esquerdo/patente/pasta_estatisticas/depositos_html (filings) http://www.inpi.gov.br/menu-esquerdo/patente/pasta_estatisticas/decisoas_html (grants)

⁵ See presentation given by Pascal Phlix (EPO) at the ICC panel discussion on 30-31 May 2006: <http://www.iccwbo.org/policy/ip/id2479/index.html>

⁶ See presentation given by Maurice Long (publisher/coordinator HINARE/OARE/ AGORA) at the ICC panel discussion on 30-31 May 2006: <http://www.iccwbo.org/policy/ip/id2479/index.html>



Access Protocol (ACAP)⁷ will help make it easier for users of the Internet to know what rights are asserted over different works, or whether they are freely accessible.

21. WIPO shall conduct informal, open and balanced consultations, as appropriate, prior to any new norm-setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and LDCs.

Local businesses should be included in such consultations, together with other stakeholders.

22. WIPO's norm-setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.

The WIPO Secretariat, without prejudice to the outcome of Member States considerations, should address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues such as: a) safeguarding national implementation of intellectual property rules b) links between IP and competition c) IP-related transfer of technology d) potential flexibilities, exceptions and limitations for Member States and e) the possibility of additional special provisions for developing countries and LDCs.

On the issue of intellectual property and competition, ICC suggests that a study of existing mechanisms be carried out to have a better understanding of what is already being done, before including this issue in any norm-making activities (see comments on proposal 7 above).

Please see comments on proposals 25, 30 and 31 below for suggestions concerning technology transfer.

23. To consider how to better promote pro-competitive IP licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs.

Training in licensing practices - as already offered by WIPO - would be a good way of promoting licensing, which is generally pro-competitive. The use of innovative commercial licensing models which promote competition between providers through increasing the availability of content on different platforms, or to different providers on the same platform, are important examples that should be explored and discussed.

Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access To Knowledge

24. To request WIPO, within its mandate, to expand the scope of its activities aimed at bridging the digital divide, in accordance with the outcomes of the World Summit on the Information Society (WSIS) also taking into account the significance of the Digital Solidarity Fund (DSF).

IPR protection fosters the creativity necessary for the development of the Internet, as well as the creation and dissemination of further works to the benefit of the public. WIPO should help to create digital opportunities by increasing transparency and bringing needed information about

⁷ <http://www.the-acap.org/>



IPR regimes and how they strengthen the business environment, attract investment, foster entrepreneurship and stimulate innovation.

25. To explore IP-related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries and to take appropriate measures to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate.

and

30. WIPO should cooperate with other intergovernmental organizations to provide to developing countries, including LDCs, upon request, advice on how to gain access to and make use of IP-related information on technology, particularly in areas of special interest to the requesting parties.

and

31. To undertake initiatives agreed by Member States, which contribute to transfer of technology to developing countries, such as requesting WIPO to facilitate better access to publicly available patent information.

To help determine the policies necessary to encourage technology transfer, WIPO could assist member countries to better understand what technology involves, why technology is transferred in practice, and the practical mechanisms of technology transfer. WIPO members could also find it useful to share their national experiences of technology transfer policies and their impact. It should be borne in mind that technology transfer usually takes place in the context of consensual commercial transactions between private or public bodies. WIPO members have to be aware of this commercial context when trying to determine their policies.

Technology is however of no use in a vacuum. Necessary human and physical resources must be available to exploit the technology for this to be of use to a country. Other policies mentioned in the introduction in areas such as education, science and technology, taxes, investment regulations, production and technical incentives, have also to be put into place. A Swedish National Board of Trade study⁸, concludes the following:

“In the longer term, however, the analysis indicates that an effective intellectual property rights system can have positive economic consequences in the developing countries, particularly in the form of transfer of technology, whether this is done via direct foreign investments or via licensing. However, one important factor in this context is the capacity of each country to absorb new technology. In consideration of this, most analyses propose that developing countries should focus their resources on measures that aim at better governance, educational initiatives, targeted technical incentives and an improved competition policy. (...)”

When member countries investigate possible mechanisms, which should be consistent with TRIPS, to foster the transfer of technology, they should not resort to overly simplistic solutions that might inadvertently jeopardize the goal of the intellectual property system to promote innovation and creativity by creating additional burdens on intellectual property owners.

⁸ “Consequences of the WTO-agreements for Developing Countries”, March 2004 (p. 242) at www.kommers.se



According to a joint World Bank and Oxford University Press study ⁹:

“ Many DngCs and LDCs aspire to promote the local manufacture of inventions patented in their respective territories. Although a decision to concentrate production in a few plants around the world generally derives from commercial strategies, poor protection and enforcement of intellectual property rights constitute an additional barrier to the transfer of technology to local companies where this would otherwise be considered.”

“The results (...) suggest that weak IPRs have a negative effect on the likelihood of investments being made. In addition, the enforcement of IPRs affects the type of investments made: companies tend to avoid investing in local production if IPRs are weak and concentrate instead on distribution facilities. (...) These results are consistent with the notion that intellectual property protection stimulates formal technology transfer.”

One important source of technological information is patent databases where much of the information is already off patent and can be used freely. WIPO is already developing tools to facilitate database searches (see comments on proposals 16,19 and 20 above). This type of technology transfer through patent databases can be facilitated through training on the use of patent information and databases.

Initiatives by WIPO and other organizations, such as the European Patent Office, to facilitate access to and use of patent databases should be encouraged.

27. Facilitating IP-related aspects of ICT for growth and development: Provide for, in an appropriate WIPO body, discussions focused on the importance of IP-related aspects of ICT, and its role in economic and cultural development, with specific attention focused on assisting Member States to identify practical IP-related strategies to use ICT for economic, social and cultural development.

Please see the presentation on the development of the ICT industry in India made at the ICC panel discussion on 26 April 2007.¹⁰

28. To explore supportive IP-related policies and measures Member States, especially developed countries, could adopt for promoting transfer and dissemination of technology to developing countries.

An exchange of information between member states on existing national initiatives and their impact could be beneficial. It would also be helpful for WIPO to obtain any information collected by WTO on the initiatives of its member states in this area.

29. To include discussions on IP-related technology transfer issues within the mandate of an appropriate WIPO body.

Other intergovernmental organizations such as UNCTAD have already discussed this subject for many years. Instead of theoretical discussions, exchanges of information on practical experiences and discussions based on case studies and the perspectives of those actually engaged in technology transfer could be more productive.

⁹ “Intellectual Property and Development, Lessons from Recent Economic Research”, 2005 (p. 13 and 8)

¹⁰ <http://www.iccwbo.org/policy/ip/id2479/index.html>



32. To have within WIPO opportunity for exchange of national and regional experiences and information on the links between IP rights and competition policies.

An exchange of national and regional experiences would be a concrete way of increasing understanding and building up a solid base of knowledge on which to build further discussions. Exchanges with other intergovernmental organizations dealing with competition and intellectual property issues, such as the ICN and the OECD, as well as with private sector experts would also be helpful.

Cluster E: Institutional Matters Including Mandate and Governance

39. To request WIPO, within its core competence and mission, to assist developing countries, especially African countries, in cooperation with relevant international organizations, by conducting studies on brain drain and make recommendations accordingly.

Brain drain is due to many factors, of which intellectual property protection is only one, albeit an important one in many cases¹¹. ICC suggests that WIPO liaise with other organizations already examining this subject such as the International Labour Organization and International Migration Office to ensure a more holistic approach to the problem.

40. To request WIPO to intensify its cooperation on IP related issues with UN agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations, especially WTO in order to strengthen the coordination for maximum efficiency in undertaking development programs.

ICC agrees that it is essential for WIPO to coordinate with and lend its expertise to other UN agencies and international organizations working on intellectual property related issues such as those cited above, as well as the Convention on Biological Diversity and UNCITRAL. WIPO's expertise in relation to intellectual property should help ensure that policies developed in these other institutions are based on the realities of how IP works in practice.

Cluster F: Other Issues

45. To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations", in accordance with Article 7 of the TRIPS Agreement.

WIPO members should keep in mind that the theft and illegal use of intellectual property result in economic, social and developmental costs that are broader than profit losses to a single company or sector. Local creators and innovators are particularly affected by counterfeiting and

¹¹ For example, there is at least anecdotal evidence of artists having left their home countries because the latter did not provide sufficient intellectual property protection to allow them to commercialise and make a living from their works.

