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**COMMISSION STAFF WORKING DOCUMENT**

**Report on the protection and enforcement of intellectual property rights in third countries**

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### Report on the protection and enforcement of intellectual property rights in third countries

#### 1. INTRODUCTION

In 2014 the European Commission, with the aid of the EU Observatory on Infringements of Intellectual Property Rights (IPR), undertook a new survey of the protection and enforcement of IPR, outside the EU, continuing the series of surveys carried out since 2006, and as foreseen in the European Union (EU)'s *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*.<sup>1</sup>

The principal objective of the survey is to identify those third countries in which the state of IPR protection and enforcement gives rise to the greatest level of concern, and thereby to enable the Commission to focus its activities and resources aiming at the improvement of IPR protection worldwide by establishing an updated list of so-called "priority countries".

The results of this survey will also enable right holders, in particular small and medium-size enterprises, to improve their business strategies and operations to protect their corporate value in intangibles by better managing risk around their IP, when engaging in business activities in or with certain third countries.

Finally, this report will be useful for authorities in third countries as a window into the perception of EU users of their IPR systems, in particular in regard to potential areas for improvement.

#### 2. BACKGROUND

IPR are one of the principal means through which companies, creators and inventors generate returns on their investment in knowledge, innovation and creativity. A recent study has estimated that IPR-intensive sectors account for around 39% of EU GDP (worth some EUR 4.7 trillion annually) and, taking indirect jobs into account, up to 35% of all jobs<sup>1</sup>. In practical terms, through the granting of temporary exclusive rights, IP creates an incentive to develop, produce and distribute new and authentic goods and services, from which all citizens benefit.

The ability to protect and access to effective remedies internationally is important for right holders to protect their rights – incentives to invest are reduced in jurisdictions where these are uncertain – hence the need for solid and predictable IPR frameworks that create environments conducive to innovation and sustainable growth and offer effective enforcement. In a globalised economy of international supply chains, lack of proper IP protection in some jurisdictions can dramatically affect business and therefore sustainable job creation as well as consumers practically anywhere in the world.

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<sup>1</sup> [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152643.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf)

There have been significant IP regulatory reforms in many third countries, not least as a result of the WTO's *Trade- Related Intellectual Property Rights* (TRIPS) agreement, but their enforcement efforts have not always matched these. Often the possibilities for effective enforcement of IPRs are limited due to serious deficiencies in the IPR framework, e.g. customs authorities lacking ex-officio powers, courts issuing insufficiently deterrent sanctions, officials lacking sufficient knowledge and training on IPR. Enforcement efforts may also be hindered by a lack of political will which is often evidenced by a lack of sufficient resources devoted to enforcement efforts.

IPR infringements have indeed reached unprecedented levels, facilitated in particular by digital technology that allows low-cost, high quality reproduction in bulk. International trade in counterfeit and pirated goods has been estimated to be worth as much as USD 650 billion.<sup>2</sup>

The EU experienced a tripling in the number of IPR infringing goods detained at EU borders between 2005 and 2013. E-commerce has led to increased trade in small consignments, which makes detection of IPR infringements harder. Due to this new pattern, customs cases involving IPR infringements in the EU more than doubled from 2009 to 2013. In 2013, almost 87,000 detention cases were registered by customs, involving almost 36 million detained articles (the value of the equivalent genuine products is estimated to be worth nearly EUR 800 million).

While right-holders are responsible for taking adequate steps to protect and enforce their IPRs both in the EU and in third countries, and for adopting operational measures (e.g. technological protection measures for digital copyrighted works), public authorities also have their role to play, namely by providing a framework that supports innovation and creativity and protects IPRs. The EU is taking action using the tools at its disposal, which range from initiatives such as bilateral trade agreements to non-legislative ones such as IP Dialogues. The IPR Survey forms part of that toolbox.

### **3. METHODOLOGY**

This Report is based on a variety of information and data, including the responses received to a questionnaire that sought specific information about the protection and enforcement of the various IP rights, infringements suffered, measures undertaken against them, and reactions from national authorities to requests for enforcement or assistance. Invitations to take part in the survey were sent to right holders, consumer and industry associations, universities, EU Delegations and embassies of EU Member States.

More than 230 responses were received, covering about 40 countries, with around a fifth on China. The majority of the respondents were businesses (about 30 %) and associations representing right-holders, e.g. industrial federations or royalty collecting societies (39 %).

The questionnaire indicated that information regarding the authors of the replies would remain confidential. Consequently, the respondents to the survey are not publicly identified.

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<sup>2</sup> *Estimating the global economic and social impacts of counterfeiting and piracy*, Frontier Economics - BASCAP, 2011, <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Final.pdf>

It should be highlighted that the results of the survey are only one element upon which the Commission services have based their identification of priority countries. The following additional sources of input have also played a significant role in this assessment and prioritisation exercise:

- information received from EU Delegations and commercial representations,
- data on suspect goods detained by customs at EU borders,
- data on actions against IPR infringement published by various governments,
- reports and assessments made by other relevant bodies and organisations (e.g. the OECD),
- information made public through WTO's *Trade Policy Reviews*,
- assessments carried out by DG Trade's *Market Access* teams,
- assessments of IPR systems by the Commission services,
- judgments made by international bodies such as the WTO Dispute Settlement Body,
- the outcomes of discussions the Commission services have had with third countries in the context of IP Dialogues/Working Groups,
- the efforts undertaken and the political engagement and attitude shown by the countries concerned to make improvements, as well as the stance of that country in multilateral IP *fora*,
- other information regarding bilateral trade relations between the EU and third countries.

This Report is not intended to provide an exhaustive analysis of the IPR situation around the world. "Priority countries" may not be those where the protection and enforcement of IPR is the most problematic in absolute terms, but are rather those where such deficiencies are deemed to cause the largest injury to EU interests, depending on their relevance in terms of importance of the economic relationship between the country and the EU.

#### **4. RESULTS OF THE SURVEY**

Summaries of the replies received in respect of those countries for which sufficient information was provided will be posted under the *Enforcement* section of DG Trade's IPR web site. These summaries – with the obvious exception of the section summarising the Commission's actions – will be based exclusively on the replies received, which have not been subjected to a detailed verification by the Commission, and therefore do not necessarily reflect its views.

The survey included single answer questions as well as those which allowed for free text responses. The single answer questions in relation to level of satisfaction consisted of five options:

- I agree fully*
- I agree to some extent*
- I neither agree nor disagree*
- I disagree*
- I strongly disagree*

##### **4.1. Global results**

Almost 50 % of the respondents either disagreed or strongly disagreed that the effectiveness of the current IPR (protection and enforcement) situation is satisfactory. Whereas just over 40% either agreed fully to some extent that IPR protection and enforcement has improved in

the last two years, 35% either disagreed or strongly disagreed with this statement, reflecting quite a divergence.

## 4.2. Specific issues

The replies varied in regard to the effectiveness of **IP protection mechanisms**. Respondents were the least satisfied with the effective protection of patents and regulatory data protection<sup>3</sup> compared to trade marks, copyright and related rights, designs, trade secrets and geographical indications.

In terms of the effectiveness of **IP enforcement mechanisms**, respondents felt relatively unsatisfied mostly with regard to patents, trade marks, regulatory data protection and copyright and related rights.

Regarding **administrative mechanisms**, respondents showed relatively most satisfaction with their effectiveness in regard to patents and trade marks.

Only 20% of respondents agreed fully or to some extent that they were satisfied with the effectiveness of **civil judicial procedures and remedies** (including cease and desist injunctions), 18% in regard to **criminal judicial procedures**, 19% for **provision of temporary measures** (such as seizures), 23% for the effectiveness of **customs procedures**, and 16% with the effectiveness of **arbitration procedures**, 16% with the availability of legislative measures for combating online infringements (such as laws relating to online liability for intermediaries), 12% with effective practical application of measures for **combating online infringements** by enforcement authorities (such as preliminary injunctions), and 12% with the effectiveness of **cooperation with intermediaries** in combating online infringements (such as blocking of websites). Relatively more respondents were less satisfied than not with their **level of engagement** with authorities.

The **most frequently suffered infringements** related to trade marks (mentioned by 42% of the respondents), followed by patents (28%) and copyrights (24 %). These infringements were mainly linked to local production and local sales (mentioned by 55% and 50 % of the respondents respectively), followed by importation into the country concerned (31 %), while exportation from the country concerned either to the EU or to other third countries were less frequently mentioned (14% and 16% respectively).

28% of the respondents declared that infringement of their IP rights resulted in **risks to the health or safety of customers**, similar to figures from 2010 (30%).

Almost half of the respondents had **suffered previously** in respect of an infringement that they were reporting now. Just over half had suffered severe damages in the country concerned due to local use/marketing, and nearly a third had suffered severe damages in third countries due to **export** from the country concerned. A third had experienced infringements resulting from **online promotion** where the goods/services were sourced inside the country concerned, and almost a quarter had experienced infringements resulting from online promotion where the goods/services were sourced outside the country concerned.

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<sup>3</sup> Submitted to gain marketing approval for pharmaceutical/plant protection products

30% of respondents considered that there are **differences in the treatment of enforcement cases between nationals and foreigners** in the country concerned (up from 25% in 2010), and 21 % considered that certain provisions of national IP law in the country concerned are specifically detrimental to foreign right holders (e.g. maximum damage thresholds). About 26 % of the respondents reported local measures which, while not constituting IPR infringements as such, are nevertheless considered to be particularly detrimental to foreign right-holders (e.g. related to non-voluntary technology transfer, abusive compulsory licensing, etc.). The majority of those that responded (47%) felt obliged to use a **local representative** to initiate/conduct IPR enforcement actions.

## **5. UPDATED LIST OF PRIORITY COUNTRIES**

The updated list of priority countries remains, as in the previous survey, split into three categories, and is as follows (with countries listed alphabetically within each category):

**Priority 1.** China

**Priority 2.** Argentina, India, Russia, Turkey

**Priority 3.** Brazil, Canada, Ecuador, Indonesia, Korea, Malaysia, Mexico, Philippines, Thailand, Ukraine, USA, Vietnam.

A separate category of countries exists for which the Commission will monitor developments, with a view to reassessing the status of these countries on the basis of the continuation of their progress: Chile, Colombia, Israel, Paraguay, Peru, South Africa, UAE, Uruguay.

It should be noted that progress in Israel, in particular in regard to pharmaceutical products, has led to its removal from the Priority Lists. Philippines, it is also worth noting, has improved its protection and enforcement recently and has moved from Priority 2 to 3 (and if it continues its current positive trajectory could in future be removed entirely). Similarly, welcome developments in Indonesia, including new legislation, have meant that the country has also moved from Priority 2 to 3. Although there have been noticeable improvements in Ukraine's bilateral engagement on IPR issues, the situation has not improved neither in regard to legislation nor enforcement. Argentina has moved from Priority 3 to 2, which reflects the lack of efforts to improve the situation and an unwillingness to engage on IPR issues. Russia's move into the Priority 2 category can be explained by the state of uncertainty regarding its direction in IP policy, lack of clarity regarding implementation following amendments to the civil code and the relative size of market and importance to stake holders. Ecuador's inclusion into the Priority 3 category is due to the recent erosion across the board of IP protection and enforcement standards but could be reviewed if Ecuador implements the commitments it has undertaken vis-à-vis the EU in the recently negotiated FTA.

## **6. SUMMARY OF ASSESSMENT OF IPR SITUATION BY COUNTRY**

The reports below summarise the Commission's current assessment of the local situation regarding IPR protection and enforcement in these countries (based on the findings of the 2014 survey and on other sources of input, as specified in chapter 2).

It should be noted that bilateral agreements are being negotiated, and/or "IP dialogues" held, with several of these countries (e.g. Brazil, Canada, China, India, Korea, Malaysia, Russia, Ukraine, Thailand, Turkey, Vietnam).

In addition, many of them have launched national initiatives aimed at strengthening their IPR systems legislatively and operationally. Although their IPR regimes should as a consequence improve, continued concerns about certain aspects of IPR protection and enforcement in the countries concerned justify their presence in this updated list of priority countries.

## **China**

### *Progress*

China has clear objectives and a long term strategy in the field of IPR, with the overall ambition to become an innovation economy by 2020. The *National IP Strategy* (NIPS), adopted in June 2008, remains the main reference point, which has been complemented by the *12th Five Year Plan* (released in March 2011) with the objective of developing China into an innovative country.

The Commission acknowledges various improvements in Chinese IP legislation. China has during recent years made continued efforts to review and update its IP legislation and, in that context, has afforded external stakeholders, such as the EU, an improved possibility to comment on draft legislation during public consultations. The new laws on patents and trade marks (that entered into force in 2009 and 2014 respectively) were major steps forward. The on-going revision of the Copyright Law is expected to lead to further significant improvements in China's legislative IP environment.

During the Third Plenary Session of the 18<sup>th</sup> Chinese Communist Party in 2013 a political declaration was published which supports and reinforces trade and IP in general. This is in line with the growing positive attitude at central level of the Chinese administration towards IP. This attitude has helped progress, such as the decision in 2014 to create three specialised IP Courts in Beijing, Shanghai and Guangzhou, and overall has led to positive developments for European companies operating in China.

The Commission appreciates the opportunity of having regular discussions and exchange of information with the Chinese authorities involved in IP matters under the framework of the *EU-China IP Dialogue Mechanism*.

### *Concerns and areas for improvement and action*

In spite of these positive developments, seven out of ten EU industries present in China continue to consider IP as one of the issues of major concern for the healthy development of their business there and that serious obstacles remain to effective IP protection. In particular much remains to be done at sub-central level.

In this context it is worth noting the 'socialism with Chinese characteristics' policy and the further implications of such a policy on IPR protection and enforcement, the consequence of this policy ultimately being that the respect of the rule of law can be subordinated to political decisions. Though the top priority of the Chinese Communist Party's Fourth Plenary Session

in October 2014 was the strengthening of the "rule of law", the exact purpose and consequences of this reform remain to be seen.

The Chinese patent system (with invention patents, utility models and industrial designs) is growing fast in terms of numbers of applications. However, there are continued concerns around the quality of invention patents, mainly concerning the search of prior art and the treatment of very simple technical solutions. Furthermore, the wide use of utility models leads to "patent-thickets", hindering the patentability of new inventions. One of the key policy issues in this context are the quantity-based incentives set by the Chinese government in its drive to becoming an innovative country.

In the ICT sector, EU companies, in particular telecom equipment vendors, hold a number of important patents for technologies that are essential to the functioning of certain standards (standard essential patents). Chinese ICT companies widely use these technologies without paying adequate royalties, leading to huge losses for the EU companies concerned. Another worrying tendency is the use of competition law by Chinese authorities for imposing heavy fines and setting very low royalty rates for the licensing of patents owned by foreign companies.

Regarding regulatory data protection for chemical entities, the regulatory framework in China provides for different registration categories which define chemical entities only as "new" in the case that they have never been marketed in any country. This practice discriminates against foreign products, and results in a system which may raise concerns as to its compatibility with Article 39.4 TRIPS.

The main trade mark concern in China remains the registration of bad-faith applications. The recently reviewed trade mark law of China now explicitly refers to this issue for the first time, without however changing the situation significantly for the most frequent cases where trade mark squatters do not have a previous business relationship with the respective brand owner. The EU also continues to engage with China pending concerns on the interpretation given by the Chinese Supreme People's Court of basic trade mark concepts, and possible incompatibilities with TRIPS.

The Chinese legal framework on trade secrets is outdated. EU companies are particularly worried about the various proceedings requiring the disclosure of business information when trying to enter the Chinese market (procurement, standard setting, company registration, joint ventures, etc.), coupled with the difficulties to get effective protection through appropriate remedies before the administration and courts against unfair commercial use and unauthorised disclosure of such data.. Uncertainty further remains as regards the conditions and requirements needed to trigger ex-officio investigations by the Chinese authorities.

These problems at the substantive side are coupled with significant shortcomings in the area of enforcement. All documents submitted in administrative or judicial litigation need to go through a cumbersome notarisation and legalisation process when originating from a foreign country. Another significant problem is the difficulty in obtaining interim injunctions. Damages awarded for IPR infringement by the Courts appear inadequate to compensate for losses or to deter infringement. This situation is aggravated by the problem of insufficient reimbursement of enforcement costs, and by the difficulty to obtain criminal sanctions.



Serious concerns also remain regarding the cooperation between different administrative and police entities concerned with IPR infringements.

To an important extent the weaknesses of IPR enforcement are also due to the very inequality that exists between the provinces and cities. In the most advanced provinces or cities like Beijing or Shanghai the standards of the courts are reasonably good and are expected to further improve, particularly through the new specialised IP Courts, whereas lack of expertise and corruption continue to be serious problems in other provinces. Moreover, the lack of independence of the judicial system in China creates an additional burden to EU companies, in particular in cases involving strategic industries or state-owned enterprises.

China's massive enforcement problems in practice are well reflected both in the concerns raised by European companies in the recent survey and in the official statistics of the European Commission on customs enforcement of 2013, according to which 66.12% of the goods detained in 2013 at EU borders due to suspected IPR-infringement originate from mainland China, and another 13.31% from Hong Kong, China.

The measures taken by the Chinese government, in form of the creation in 2012 of a "national leading group" and various special "sword campaigns" against counterfeiting activities, while commendable have not been able to keep pace with the scale of infringements, especially regarding online piracy and fake goods.

#### *EU action*

The need for improved protection of IPR is a message constantly conveyed by the European Commission to Chinese authorities at all levels of government, including at the highest level during the EU-China Summits.

The EU and China are celebrating in 2015 the 10<sup>th</sup> Anniversary of its *IP Dialogue Mechanism* with special events in Beijing and Brussels. This mechanism allows both sides to exchange regularly information and opinions on a wide range of IPR issues, including legislative, regulatory and enforcement aspects of the protection of patents, trade marks, copyright, trade secrets and other IP rights. It comprises two components: an *EU-China IP Dialogue*, which takes place once a year in Brussels or Beijing, and an *EU-China IP Working Group*, which takes place twice a year in Beijing or other Chinese cities, with the participation of European industry. Unlike the Dialogue, the Working Group focuses on more concrete issues or sectors and is more technical in nature.

This dialogue mechanism was in the past successfully supported by the technical co-operation programmes IPR1 and IPR2. As from 2014, the new cooperation programme *IP Key* has taking over this function, in cooperation with the Office for Harmonization in the Internal Market (OHIM).

The Dialogue is highly valued by the EU and is a cornerstone of EU-China economic and trade cooperation. It has provided a unique opportunity to engage China in a constructive and on-going dialogue on IP issues of concern to the EU. As a result, China has, for example, taken a number of EU comments and concerns into account when revising some of its IPR legislation, relating namely to patents, trade marks, and copyrights (draft state). However,

despite these positive developments, significant progress on priority issues for the EU is still needed, especially insofar as IPR enforcement is concerned.

Another important pillar in this context is the *EU-China Joint Customs Cooperation Committee*, which was established in 2009 and is in charge of the strategic framework for customs cooperation and for the *EU-China Customs IPR Action Plan*. This plan foresees the exchange of general risk information and trends, the creation of networks of sea- and airports to target high risk consignments, strengthening cooperation with other law enforcement agencies, and the development of partnerships between business communities and customs authorities in China and the EU. The third EU-China Customs IPR Action Plan was signed in 2014, extending the existing customs cooperation through exchange of officials, harmonization of exchange of cases, and the inclusion of further air- and seaports.

The creation of this EU-China customs network has led to improvements in the collaboration between customs authorities of both sides at the associated air- and seaports, and resulted in a number of concrete detentions and cases, some of them of high-profile. Overall, the EU is reasonably satisfied with the implementation of the action plans, although there remains much room for improvement.

In response to the high number of detained goods suspected of infringing IPR with provenance Hong Kong, the Commission has recently signed an Action Plan on cooperation in the customs enforcement of IPR in the EU and Hong Kong, China.

The European Commission has been providing further support since 2008 through the *China IPR SME Helpdesk*. The Helpdesk's mission is to support EU's small and medium sized enterprises (SMEs) in both protecting and enforcing their IPR in or relating to China, through the provision of free information and services. These services include a free-of-charge helpline, trainings, and web-based materials. The term of the China IPR SME Helpdesk has been extended for another three years at the beginning of 2015.

The EU and China are also seeking progress through on-going negotiations of an ambitious bilateral agreement on geographical indications (GI), which aims at including a high level of protection from all the agencies, an ex-officio protection in China for a list of names, and a single window to which to apply in the future. In parallel, a letter of intent was signed in 2013, envisaging cooperation and joint actions against counterfeiting in trade in alcoholic beverages.

## **Argentina**

### *Progress*

An apparent lack of political will to protect IPR in Argentina over the past few years has not allowed any progress since the last survey. Despite good IP laws in existence, their enforcement can be difficult. Positively, the uptake of digital legal offer of music has increased and the Pirate Bay website was blocked.

### *Concerns and areas for improvement and action*

Right holders continue to suffer from the local production and sale of counterfeit products, notably at La Salada Market in Buenos Aires which has been in existence for many years and where the sale of infringing goods is carried out openly and on a large scale. Digital piracy is still a problem. Right holders face difficulties in enforcing their rights since judicial and administrative processes are slow and complex and sanctions not sufficiently deterrent. Opaque patentability criteria, very slow granting procedures and inadequate regulatory data protection penalise business (especially foreign companies that feel they are not receiving the same treatment as local ones). Although GI's can theoretically be registered in Argentina, no EU ones have so far succeeded –. Complications exist in particular for EU GI's in view of the local tendency to use familiar EU names for food and wine products.

#### *EU action*

There has been little contact with Argentina on IPR since there have been no meetings of the EU-Mercosur negotiations since October 2012 and it has not been possible to arrange another IPR Dialogue since the first session in 2008. An IPR SME Helpdesk, however, was set up in the Autumn of 2013 to cover the Mercosur countries to provide information and assistance on IPR issues to EU SMEs wishing to do business in Argentina.

## **India**

#### *Progress*

Some improvements can be noted in IPR legislation, for example India joining the international trade mark system's Madrid Protocol in 2013, the creation of comprehensive e-filing services, customs services' enforcement, co-operation between various enforcement departments, and improved IPR awareness amongst officials. The Indian Patent Office has also taken actions in recent years by digitalizing operations and hiring additional patent examiners. However, much remains to be done.

#### *Concerns and areas for improvement and action*

Several constraints on patent protection are notably detrimental to EU companies and the situation appears to have become more serious since the last survey. This applies in particular to certain aspects of patent law where restrictive patentability criteria combined with difficulties to enforce patents granted, and with extremely broad criteria being applicable for granting compulsory licences or for the revocation of patents, make the effective patent protection in India very difficult, notably for pharmaceuticals and chemicals but also for other sectors where local innovation is being promoted. The Indian Patent Office also has a worryingly large patent backlog.

Another area of concern is the apparent absence of an effective system for protecting undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products against unfair commercial use, as well as unauthorized disclosure.

Further progress remains necessary regarding IPR enforcement, including through a stronger commitment of relevant authorities to fight IPR infringements, and through sanctions against infringers that act as an effective deterrent. The 2012 amended Copyright Act has positive

features but some aspects remain problematic according to EU stakeholders, such as inadequate protection for technological protection measures and lack of enforcement against circumvention technologies, devices, and services.

EU stakeholders report, for example, a high rate of video game piracy, made possible by the widespread availability of devices used to bypass technological protection measures. Vendors reportedly sell circumvention devices on the Internet, in retail stores and kiosks, as well as modified game consoles. Pirated console games are reportedly sold in factory-pressed CD and DVD format, often copied from pirated games sourced elsewhere in Asia, and are reportedly widely available in smaller retail establishments throughout the country.

Enforcement actions and the imposition of deterrent penalties for IPR infringements are needed to make progress and it is encouraging that EU stakeholders have reported some positive developments in this area. For example, EU copyright holders report they generally have positive relationships with Indian authorities and that police will often take enforcement action on their own initiative. Experience with the enforcement of trade mark rights of EU stakeholders in Courts is generally also positive. EU stakeholders, however, note that patent enforcement is characterised by backlogs in the Civil Courts that hear them as any other commercial case, as there is no specialisation for IP judges.

EU stakeholders with standard essential patents note they face challenges in getting Indian ICT companies, in particular telecom equipment vendors, to pay due royalties. They note this is in least in part due to Court decisions and injunctions being reportedly difficult to obtain.

It still appears that the implementation of IPR enforcement mechanisms needs further strengthening, especially outside of Delhi. Strong engagement from the authorities to enforce IP and to improve the implementation of civil, criminal and customs procedures will remain very important not only for right-holders but also for creating a climate favourable to innovation.

The large number of locally produced infringing goods remains a source of serious concern, especially regarding patents and trademarks. Detentions of suspect goods of Indian provenance by EU customs are worrying notably for medicines and related products, especially when considering the associated potential health risks. The report on EU customs enforcement of intellectual property rights noted India represented 22% of all articles detained in 2013 in that sector. In terms of number of articles detained in postal traffic into the EU, about 19% were medicines in 2013, and about 7% of all postal articles detained by EU customs were shipped from India. As IPR-infringing medicines are often sent in small consignments this makes it more difficult for customs to take action.

The World Customs Organization's Illicit Trade Report 2013 also noted that India represented under 4% of cases, but ranks first when it comes to the number of pieces of goods (2,203,272,337 pieces; 72.57%) as a result of large consignments of medicines intercepted at import by countries in Africa and the Middle East in particular.

Externally, India often opposes plurilateral and multilateral efforts to address piracy and counterfeiting in fora such as WTO, WCO and WIPO. It is important that IPR enforcement discussions take place at these institutions and that India participates in these debates in an open and result-oriented spirit. The same considerations apply to the on-going international

climate change (United Nations Framework Convention on Climate Change (UNFCCC)) negotiations, where India pushes for measures with other countries which would weaken IPR protection in that area such as patentability exclusions, and systematic compulsory licensing.

### *EU action*

The EU is pursuing a number of avenues of action, but so far progress has been very limited. The EU has been negotiating a Free Trade Agreement but India refused to include a substantial IPR chapter. An IP Dialogue was agreed with India in 2005, but has regrettably never been implemented due to reticence on the Indian side. Such a mechanism has demonstrated with other third countries its utility as a mean to informally and rapidly discuss emerging IPR issues, including concrete difficulties faced by right-holders. The EU is aiming to find ways to engage India in a constructive dialogue on IP that among other things will look at how to achieve its legitimate policy goals in ways that does not undermine the innovation climate in the country

In 2013 the Regulation (EU) No 608/2013 was adopted, which also clarifies the handling of medicines transiting the EU territory in order to address concerns regarding the impact on legitimate trade in generic medicines of provisions in the earlier Regulation (EC) No. 1383/2003..

In mid-2014 the EU and India agreed a project to be financed under the Capacity Building Initiative for Trade Development programme on "EU-India Intellectual Property Cooperation." OHIM will implement the project over the period 2015-2017, with a focus in the areas of IP administration (trademarks, industrial designs, geographical indications) and brand development for Indian SMEs. The objectives support India's IPR Policy: to enhance the capacity of India's IP administration institutions in order to adequately meet business needs in line with international standards and; to enhance the capacity of the Indian productive sector to create, protect and manage its own brands by using IP as a tool for development.

In July 2014 the EU provided comments on Indian Patent Office Guidelines for examination of patent applications in the field of pharmaceuticals. In the revised Guidelines the Indian Patent Office took these on board and has now noted that "the test of Section 3(d) of the Act does not bar patent protection for all incremental inventions of chemical and pharmaceutical substances."

The EU also responded to the call for comments on the proposed National Intellectual Property Rights Policy for India by the IPR Think Tank in December 2014. The EU in particular provided information on European experience and "good practices" in the field of IPR, actively participating in the Think Tank's work, including attending a stakeholder meeting in February 2015.

## **Russia**

### *Progress*

Some improvements have taken place in Russia in the last 2-3 years, most notably major amendments of the Civil Code. These amendments represent a step in the direction of

internationally accepted practices. They encompass a wide range of issues, from rules on substantive IPRs and their subject matter to regulation of IPR in the digital environment. Some of these amendments will only come into force in 2015, and it is premature to make full assessment of their impact. Another welcome improvement is the establishment of a specialized IP Court, which acts as both a court of first instance and as a court of appeal since mid-2013. The IP Court's competence does not, however, extend to copyright and related rights cases.

#### *Concerns and areas for improvement and action*

Despite the recent improvements in legislation, application of which is yet to be seen and assessed, IPR enforcement remains an issue in Russia. Massive markets of pirated content and counterfeit goods continue to exist and flourish, both physically and online. The widespread availability of IPR-infringing content hinders entrance of legitimate service providers into the Russian market. For example, Spotify has announced a cancellation of launching its service in Russia for the foreseeable future. Enforcement procedures in general are still slow and inefficient, which is a particularly negative sign in a country where infringing goods are not only imported but also domestically manufactured. The Commission notes that Russia has announced its decision to launch a pilot project to legalize parallel imports, i.e. apply international exhaustion of trademark rights for selected sectors, which might further aggravate the issue of counterfeit goods influx into the country.

Respondents to the IPR Survey report that the procedures for IPR crime investigations are inefficient and cumbersome, and the penalties are non-deterrent. In addition, Russia's current Criminal Code does not allow for corporate entities to be held criminally liable. This, along with high thresholds for applying criminal procedures, apparent reluctance by enforcement authorities to take action against large infringers and poorly staffed IPR economic crime police has led to a significant decrease of initiated IPR crime cases in the last years. In addition, the number of administrative cases has, like the number of criminal cases, fallen significantly in recent years.

Under its WTO commitments, Russia has undertaken to implement a six year term of regulatory data protection. Nevertheless, the amendments to the law "On circulation of pharmaceuticals", which were signed into law on 22 December 2014, leave it open to later implementing acts and practice to ensure effective non-reliance on the original data until the expiry of the 6 years period.

#### *EU action*

Due to the state of overall bilateral relations, the *IP Dialogue* between the EU and Russia has been put on hold since December 2013. Nevertheless, OHIM together with Rospatent is implementing a project aimed at the alignment of Russian and EU trademark and designs regulations, drafting guidelines for the examination thereof in order to streamline Russian application, registration and processing procedures and approximate them to the EU approach, modernization of quality and automation processes for prosecution of the trademark and design applications, and improvement of accessibility to information on Russian trademarks and industrial designs..

In the course of the last few years, the Commission has addressed a number of letters to Russian government officials on several IPR issues. Even now, in the absence of regular face to face contacts with the Russian authorities, the Commission continues to deliver IPR-related messages via the EU Delegation in Moscow. The Commission remains committed to maintaining a constructive way of communicating with the Russian authorities on IPR.

## **Turkey**

### *Progress*

A number of positive developments have been welcomed, with respondents to the IPR Survey in particular welcoming the establishment of civic and criminal IPR courts, and special branches of police for IPR crimes. In the area of copyright and neighbouring rights, Turkey has improved its administrative capacity, online services, awareness-raising, stakeholder dialogue and training activities. The Turkish Patent Institute (TPI) has improved further its administrative capacity by recruiting new junior examiners. TPI organized a number of events in different fields of industrial property rights together with various national and international counterparts and stakeholders. Turkey has taken some action to address the trade in counterfeit goods relating to health and safety, including the enactment of enhanced penalties for manufacturing and selling fake pharmaceuticals.

In the area of IPR enforcement at customs, the online application system has resulted in an increased number of seizure applications but the level of coordination and cooperation with the right holders remains fairly satisfactory. Through the central IPR management unit, in-house trainings have been organised to improve the enforcement capacity and further increase the awareness among the customs officers.

### *Concerns and areas for improvement and action*

There are a wide range of concerns in Turkey, with the general situation felt to have worsened. This is seen in the slow pace of legal proceedings (with inconsistent judgments between courts), a lack of judicial training on IPR (particularly patent) matters, an overreliance by the judiciary on "technical experts" (with concerns in regard to their partiality), a lack of legislative support for collective management and licensing of reproduction rights, a lack or vagueness of measures in relation to digital copyright infringement, a lack of regulatory data protection for pharmaceutical combination products, insufficient justifications for TPI's decisions, and registration of bad faith trade marks. The draft copyright law is still pending, as is draft law on industrial property rights. Concerning Geographical Indications, further efforts with all stakeholders are needed to improve a common legal understanding with regard to GIs' effective protection. There is also a need for more effective campaigns to raise awareness of the risks of IPR infringements and the benefits of strengthened IPR protection in the country.

Serious issues remain in regard to enforcement. The consequences of the Constitutional Court decision on seized counterfeits are still being dealt with, where right holders incur costs for their storage. There are significant difficulties in obtaining preliminary injunctions, with burdensome requirements for the issue of search warrants. Counterfeiting and piracy in Turkey often have an organised crime character and pose serious risks for public health and consumer protection. In some areas, IPR owners' attorneys have been threatened by the

offenders. Turkish police still do not take ex-officio action for counterfeit and pirated goods, and a number of large fake markets continue to operate with impunity.

#### *EU action*

The EU and Turkey continue to hold annual meetings of the Working Group on Intellectual Property Rights, the last of which was held on 25 March in Ankara, with the participation of IPR holders from different industries. It is concerning that several issues have remained on the agenda with no resolutions as of yet. OHIM also organised a number of seminars in Turkey on the area of trade marks in 2014.

### **Brazil**

#### *Progress*

The National Council to Combat Piracy (CNCP) has continued its efforts to tackle widespread counterfeiting and piracy and an effective collaboration with the Brazilian Customs, the World Customs Organisation, the sporting goods industry and the EU Delegation in the months prior to the FIFA World Cup resulted in impressive seizures of clothing and merchandising. There are 11 EU GI's pending registration and it is hoped that the draft law to rectify the definition of a GI to align it with TRIPS will proceed through the decision process rapidly. The Brazilian IP office, INPI, has continued to recruit patent and trade mark examiners to try to address the huge registration backlog but since there has been an increase in the number of applications also via PCT no concrete reduction has been witnessed so far.

#### *Concerns and areas for improvement and action*

Local production and importation of counterfeit products sold in various known fake markets (and notably the 'Galeria Page' in Sao Paolo) is still considerable and digital piracy (including illegal downloading, illegal streaming and peer to peer file sharing) is a problem nationally and from online promotion outside of Brazil. The new copyright law has not yet been adopted. Of continued serious concern is the involvement of the Brazilian health authorities (ANVISA) in pharmaceutical patent examination and slow, complex and unpredictable judicial procedures. Brazil seems interested in developing the protection of GI's, albeit to champion local products, but this also allows some EU GIs to benefit.

#### *EU action*

The EU and Brazil discuss IPR issues of mutual interest in annual IPR Dialogues of which there have been 7 so far. It is envisaged that these will continue, especially as there have been no meetings of the EU-Mercosur negotiations since October 2012. IPR is also discussed in the context of the EU-Brazil Joint Committee meetings. As mentioned above (see Argentina) an IPR SME Helpdesk, was set up in the Autumn of 2013 to cover the Mercosur countries to help EU SMEs wishing to do business in Brazil.

### **Canada**

#### *Progress*



Positive developments have been noted recently. Canada addressed certain issues under the Comprehensive Economic Trade Agreement (see below). On May 13, 2014 Canada ratified the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. Improvements were also made regarding IPR enforcement.

The Combating Counterfeit Products Act, adopted in December 2014, amended the Copyright Act and the Trade-marks Act to add new civil and criminal remedies and new border measures in both Acts, in order to strengthen the enforcement of copyright and trade mark rights and to curtail commercial activity involving infringing copies and counterfeit trade-marked goods. For example, it introduced new border enforcement measures enabling customs officers to detain goods that they suspect infringe copyright or trade mark rights and allowing them to share information relating to the detained goods with rights holders who have filed a request for assistance, in order to give the rights holders a reasonable opportunity to pursue a remedy in court.

Canada's new "notice and notice" regime for Internet copyright infringement came into effect in January 2015. The regime provides a mechanism for copyright holders to give notice of Internet-related copyright infringement claims to Internet intermediaries, who are required to respond to a notice in a specified manner or face liability.

#### *Concerns and areas for improvement and action*

The Canadian IPR system still features shortcomings. Despite recent positive developments, a number of issues remain to be addressed, in particular weaknesses in enforcement mechanisms, and in the sharing of information between Canadian IPR enforcement authorities and right holders. There still appears to be a low prioritization of tackling IPR infringements by law enforcement, prosecutors and courts and a lack of resources given. Moreover, the way broad exceptions in copyright law are applied may be detrimental to right holders.

EU stakeholders report Canada remains a host to sites that facilitate and enable massive unauthorised downloading of pirated versions of copyrighted works, including video games. These Canadian-hosted sites attract millions of unique visitors every month. Despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, many sites continue to offer circumvention devices; and computer software that effects a "soft modification" of the security technology of games consoles, and thereby facilitates the play of pirated games, remains available on sites hosted in Canada.

The "notice and notice" regime for Internet copyright infringement only came into effect in January 2015, so it is too early to assess its effects. The regime would also still need to be supplemented by "notice and takedown", as well as by other measures to encourage all players to address online infringement in an effective way. There is no requirement for the ISP or the user to take down infringing material and the only way to enforce a takedown is through the courts.

Other issues remain, in particular the lack of ratification by Canada of major IPR treaties relating to trade marks. Canada is not a member of either the Madrid Agreement Concerning the International Registration of Marks or the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks. Should Canada decide to join the Madrid Protocol, this could considerably facilitate the access of European industry to extended trade

mark protection. Canada is not a member of the Geneva Act of the Nice Agreement or the Nice international classification of goods and services applied for the registration of marks system. If Canada would be in line it would ease “translation” of European marks to Canada. Neither is Canada a member of the Trade mark Law Treaty, or the Singapore Treaty on the Law of Trade marks.

### *EU action*

The bilateral "CETA" trade agreement resulted in important enhanced IPR protection in Canada. It addressed the key element of IPR protection for pharmaceuticals by providing compensation for delays in the marketing authorisation procedure, a right of appeal for patent holders in marketing authorisation procedure, and regulatory data protection.

The agreement foresees compensation for delays in the marketing authorisation process by providing an additional period of patent protection. It corrected an asymmetry between generics and patent holders by granting a “right of appeal” in the marketing authorisation procedure also to the patent holder. CETA also guarantees that clinical test data submitted during marketing authorisation will be protected for 8 years.

The agreement also included protection of geographical indications, with enhanced protection in the Canadian market at a comparable level to that offered by EU for 145 terms referring to EU agricultural products and foodstuff from a specific geographical origin law, and that additional GIs can be added in the future. The list includes some prominent EU GIs which will be finally authorised to use their names when commercialised in Canada (which has not the case for more than 20 years).

## **Ecuador**

### *Progress*

Although it is not possible to highlight any recent progress on IPR protection, the negotiations for Ecuador's accession to the EU-Colombia/Peru Trade Agreement, which has a comprehensive IPR chapter, fosters hope for an improved environment for IPR protection in the future.

### *Concerns and areas for improvement and action*

Over the past two years Ecuador has been eroding what was a fairly reasonable level of IPR protection by introducing rules that, inter alia, increase costs, reduce the length and scope of protection and undermine pharmaceutical patents. There are serious concerns that these measures are not in line with international law and discriminatory towards foreign companies.

Although tariffs for agro-chemicals were adapted downwards after the initial excessive increases in 2012, the same has not been done for pharmaceuticals. Ecuador has proposed legislation to reinstate criminal sanctions for IPR infringements and has repeatedly awarded compulsory licences on pharmaceuticals. Moreover, a recently adopted Decree obliges pharmaceuticals to become generic upon patent expiry, potentially interfering with trade mark rights. Although Ecuador took steps to revise their law to provide protection for undisclosed test data or other information submitted to obtain marketing approval of pharmaceutical

products, the actual protection provided remains inadequate in practice. There is wide availability of counterfeit and pirated goods and noteworthy is La Bahia market in Guayaquil.

### *EU action*

The EU has been in regular contact with Ecuador, including at high political levels, to transmit messages of concern and encouragement to rectify the situation as regards the protection and enforcement of IPR. The EU will be able to monitor and act in the context of the Trade Agreement once Ecuador and the other Parties have completed the accession procedures. The MERCOSUR IPR SME Helpdesk mentioned above (see Argentina) will be extended to other Latin American countries, including Ecuador, in July 2015.

## **Indonesia**

### *Progress*

There have been several recent improvements in the protection of IPR. The Indonesian government has expressed more political will to improve the environment for IP creation and protection, including through promotion of the country's creative economy, a commitment to growing the share of IPR-intensive industries in its GDP, and continuing the fight against corruption. A positive legislative development in 2014 has been the adoption of the new Copyright Law (No. 28/2014), which includes provisions for dealing with online infringement and a higher penalty for piracy. Furthermore, the amended trade mark law is expected to be adopted in 2015. Its draft includes provisions for faster registration procedures, for the recognition of non-traditional marks, and for the accession of Indonesia to the Madrid Protocol (in keeping with the ASEAN IPR Action Plan 2011-2015). Respondents to the IPR Survey perceived the assignment of IPRs to the Minister of Law and Human Rights in the new government as a positive signal.

### *Concerns and areas for improvement and action*

However, a number of serious deficiencies remain. In spite of government policy statements and actions to the contrary, weak governance and corruption continue to weigh down on all parts of Indonesia's IPR infrastructure. Its markets still have high levels of pirated and counterfeit products, and public awareness of IPRs and of the need to enforce them is low. Indonesia's IP system does not provide for regulatory data protection. Some stakeholders feel that government processes for legislative and regulatory drafting have been insufficiently transparent and consultative. Right holders also note that IPR registration is still marred by substantial delays and sometimes dubious decisions.

Enforcement actions undertaken by the DG IP's Directorate of Investigation are reported to have decreased in recent years. Police and Customs authorities remain generally reluctant to act on IPR infringements *ex officio*, while right holders report that it is often difficult to seek the cooperation of these enforcement agencies due to a lack of understanding of IPRs - but also due to corruption. Court rulings are seen as unpredictable and sometimes even contradictory to legal commitments that Indonesia has through its membership in international agreements. In some cases the absence of implementing regulations leaves substantial legal uncertainty. Bad faith trade mark registrations continue to be a problem in Indonesia, and on a number of occasions in the past years the Indonesian court system has

proven unable to provide undisputable well-known European marks with protection from these. Court rulings are not publicly available at any level but that of the Supreme Court, and even there the legal reasoning provided in rulings is very brief, hindering the development of Indonesian legal professionals' understanding of IP law and its application in their country.

### *EU action*

The *EU-ASEAN Project on the Protection of Intellectual Property Rights (ECAP III)* intends to address some of these deficiencies through technical cooperation activities<sup>4</sup>.

The *EU-Indonesia Trade Cooperation Facility (TCF) Program* strengthens the capacity of government institutions to improve the trade and investment climate in Indonesia and to contribute to the country's long-term sustainable economic development. The TCF program has 6 components including one on IPRs. This component aims at improving the legal framework governing IPRs in Indonesia and supporting the creation of a local IPR culture through nation-wide information dissemination and awareness building.

The EU has also set up an *ASEAN IPR SME helpdesk* in 2013 which provides SMEs with a free-of-charge helpline, trainings, and web-based self-help materials.

Finally, the EU would welcome the opportunity to engage with the Indonesian authorities on intellectual property rights in the near future.

## **Korea**

### *Progress*

There have been a number of recent improvements in Korea. The trade mark system has seen changes preventing the registration of marks that can cause dilution of a famous mark, and the filing of applications in bad faith.

### *Concerns and areas for improvement and action*

Concerns were raised in respect of the patent filing system and certain problems posed by the patent linkage system. The level of sentencing was considered insufficient to ensure adequate deterrence against IPR infringements. Concerns have been expressed about alleged differential treatment between Korean companies and foreign companies both in administrative and judicial procedures.

The fight against the sale of counterfeit goods on street markets has improved but a more systematic action is needed.

The Korean legislative process aimed at putting the copyright and related rights system in compliance with the FTA provisions on the public performance rights of music producers, performers, and authors has not progressed over the last year.

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<sup>4</sup> More information is available at <http://www.ecap3.org>.

### *EU action*

The EU and Korea have been working together to ensure the implementation of the EU-Korea Free Trade Agreement which entered into effect in 2011. The IP Dialogue, established by the FTA, has met twice. In this context, the EU has already raised the abovementioned problem related to the restrictions on licensing the public performance of sound recordings as a significant implementation issue of the IPR provisions of the FTA in Korea.

The second meeting of the IP Dialogue took place in September 2014 in Seoul. It allowed the Parties to exchange information on a variety of developments in their respective IPR systems, and to stress the importance of constructive cooperation at international level.

## **Malaysia**

### *Progress*

Respondents to the IPR Survey made a positive assessment of the Malaysian legislators' commitment regarding IPR protection and note more IPR awareness in general by the official enforcement authorities.

### *Concerns and areas for improvement and action*

Simultaneously, however, the respondents note that customs officers are not using their *ex-officio* powers and there is lack of effective coordination between authorities, which results, for example, in granting authorisations for generic pharmaceuticals while the originator's patent is still in force. Respondents expressed concern about Malaysia's regulatory data protection system, where protection starts running from the first marketing authorisation anywhere in the world, and expires if a marketing authorisation is not applied for in Malaysia within eighteen months from the granting of the first authorisation. The Commission notes that there have been no changes since the last Survey regarding the patent term restoration regime and it is still not available in Malaysia.

The widespread availability of IPR-infringing goods, both in physical markets and online, is a concern. Moreover, as indicated in the latest report<sup>5</sup> of DG TAXUD, Malaysia is also the source of 3 % of suspected IPR infringing goods detained on EU borders in relation to value.

### *EU action*

The EU and Malaysia are in the process of negotiating a Free Trade Agreement. The negotiations, although on hold at the moment, are likely to be resumed in 2015-2016. The Agreement will include an extensive chapter dedicated to IPR. The EU funded *ASEAN IPR SME helpdesk* supports SMEs also in relation to Malaysia.

## **Mexico**

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<sup>5</sup>[http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/2014\\_ipr\\_statistics\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2014_ipr_statistics_en.pdf)

### *Progress*

Mexico became a contracting party to the Madrid Protocol which is a positive step for the registration of trade marks in multiple countries. An amendment to its copyright law allows right holders to seek civil damages even before an administrative decision on the infringement has been taken and efforts have continued on the enforcement of IPR.

### *Concerns and areas for improvement and action*

Improvement to the interception of counterfeit goods would be stepped up considerably if Mexico were to provide ex-officio powers to its customs authorities. Counterfeiting and piracy are of huge concern in view of the worrying numbers of counterfeit and pirated products for sale in fake markets around the country and notably in Tepito (Mexico City) and San Juan de Dios (Guadalajara). Online piracy is also very prevalent. Patent registration procedures are slow, as is the judicial process. There is still no possibility to register foreign GI's in Mexico although it appears local interest in GI protection is increasing. The process for applying for marketing authorisations for pharmaceutical and agrochemical products is complicated. Visual artworks used by public institutions have been reported to not receive royalty payments.

### *EU action*

The EU and Mexico have been in regular contact on IPR issues through specialised video conferences usually on an annual basis. It is envisaged that this will continue in the future. The MERCOSUR IPR SME Helpdesk mentioned above (see Argentina) will be extended to other Latin American countries, including Mexico, in July 2015.

## **The Philippines**

### *Progress*

Recently the Philippines has taken significant steps to improve the IPR environment. Most importantly, these steps include a new law with major amendments to the Intellectual Property Code, such as the introduction of landlords' liability for the sale of IPR-infringing goods in their premises, and the granting of IPR enforcement functions to the Philippines IP Office (IPOPHL). Another positive achievement is the inclusion of violation of the Intellectual Property Code as an 'unlawful activity' in the 2013 revision of the anti-money laundering act.

### *Concerns and areas for improvement and action*

Respondents to the IPR Survey indicated, however, that one aspect of the IPR environment remains particularly unsatisfactory, i.e. that court procedures can be extremely long and unnecessarily protracted even if the outcome is positive. Moreover, the penalties/fines prescribed by the IP Code might not be sufficiently deterrent.

Despite the legislative progress, counterfeiting and piracy remain a problem, notably in the digital environment. Part of the solution for the Philippines would require rules on Internet

Service Provider (ISP) liability and closer cooperation with ISPs. In addition, due to lengthy court procedures there is a strong lack of right holders' interest in pursuing judicial procedures and a strong inclination to settle (including through IPOPHL-assisted mediation and arbitration), which makes it difficult to use convictions as deterrence.

### *EU action*

The EU is providing technical assistance to the Philippines under the ECAP III, the EU-ASEAN Project on the Protection of Intellectual Property Rights. The project is aimed at regional harmonization and has a particular focus on trade marks, designs, geographical indications and enforcement. The EU funded ASEAN IPR SME helpdesk supports SMEs also in relation to the Philippines.

## **Thailand**

### *Progress*

The Thai Government has made efforts over recent years to reinforce IPR protection. This was reflected in the creation in 2013 of the National Intellectual Property Centre of Enforcement to ensure coordinated efforts among various agencies involved in the IPR protection and enforcement. On 27 November 2014, Thailand's National Legislative Assembly amended the Copyright Act in relation to the liability of digital service providers, the criminalisation of unauthorised cam-cording in cinemas, and to rights management information protection and technological protection measures. Thailand is in the process of amending its trade mark law to recognise unconventional trade marks such as scent and sound but also importantly to better protect against illegal refilling practices and selling and distributing products bearing well-known marks.

### *Concerns and areas for improvement and action*

In spite of those efforts serious problems still exist.

The amendments to the copyright law have made a big improvement but have also left some issues unaddressed. IPR stakeholders continue to suffer from widespread counterfeiting and piracy while the lack of sustained, coordinated enforcement and prosecution remain a significant issue. The Copyright Act now provides protection against the circumvention of technological protection measures but also has a list of exceptions to this protection. These exceptions appear to be overly broad and undermining technological protection measures.

Actions against digital piracy have not been sufficient. An Internet Service Provider only becomes liable for copyright infringement after a court order, which the court system in Thailand is unlikely to quickly deliver and would cause significant and repeated legal fees. A more cost effective system to enforce copyright online would be opportune. Unauthorized use of software by business, so-called end-user piracy, and retail piracy continue to cause serious harm to business software and IT industries. Rapid advances in the digital economy have shifted how consumers interact with copyrighted content. To meet these demands, the copyright system in Thailand needs to be further modernised and adapted to more accurately reflect the international standards (such as the WIPO Internet Treaties). Stakeholders report lack of cooperation between regulators of pesticides, police and customs to find counterfeit

pesticides in the market and that officials lack sufficient awareness of IPR. This is a serious threat as counterfeit pesticides are a risk to farmers, food, and the environment. Illegal refilling is not considered as an IPR infringement despite the serious threat to consumers' health and significant loss of revenue and reputation for legitimate business in various industries. Swift adoption of the amendments of the Trade mark Act to provide protection against illegal refilling practices would be of great help to right holders.

Thailand's patent office lacks resources to keep up with the volume of applications, resulting in a worrying patent backlog. Moreover, companies have raised concerns about the granting of compulsory licenses for medicines, including whether such licences have been granted in accordance with Thailand's TRIPS commitments.

Enforcement efforts remain uneven and serious violations of IPRs continue. The lack of sustained, coordinated enforcement and prosecution remains a significant issue. More particularly, problematic areas include civil procedures (which are lengthy and expensive), provisional measures (injunctions are rarely granted), criminal procedures (criminal sanctions are not deterrent enough; search warrants can be difficult to obtain) and customs procedures (available only against trade marks and copyright infringement; lack of transparency and burdensome nature of evidence to be submitted). For example, no landlords have yet been prosecuted for IPR violations of their tenants. Inclusion of landlord liability in Thailand's copyright and trade mark legislation would supplement existing procedures under the Criminal Code which have proven ineffective for this purpose, and contribute much to effective IPR enforcement.

European right holders have further identified shortcomings in the Thai Geographical Indications Act B.E. 2546 (2003), specifically with regard to the implementation of TRIPS articles 22(2) and 23. Concerns relate to the protection of GIs against any misleading suggestion of geographic origin and (for wines and spirits) the absence of a provision banning the use of GIs in translation.

#### *EU action*

A number of initiatives have been taken to address these deficiencies. In March 2013, the EU launched negotiations for a Free Trade Agreement with Thailand. An Agreement could provide provisions to address deficiencies in the registration, protection and enforcement of IPRs. But in view of the military coup the EU Foreign Affairs Council in June 2014 decided that official visits to and from Thailand are suspended and the EU and its Member States will not sign a Partnership and Cooperation Agreement until a democratically elected government is in place. Three IP Dialogues were held since the launch in February 2011 between the EU and Thailand. Discussions on topics including geographical indications, backlogs in patent registration, pharmaceutical issues and enforcement issues took place. In addition, the EU Delegation has participated in the bi-annual consultations with the Department of Intellectual Property. The EU also carries out the technical assistance program ECAP III with Thailand and other ASEAN countries which aim at enhancing IP integration within the ASEAN region and strengthening IP collaboration among the ASEAN member countries. An ASEAN IPR SME Helpdesk was also set up.

#### **Ukraine**



## *Progress*

Respondents to the IPR Survey were positive towards the recently granted customs' *ex-officio* powers and some also noted improved plant variety protection available.

## *Concerns and areas for improvement and action*

The level of both IPR protection and enforcement in Ukraine is unsatisfactory and has not improved in recent years. In particular, weak institutions, corruption, poor capacity and lack of resources of enforcement authorities have contributed to a generally weak IPR protection and enforcement environment. This has allowed for IPR infringements (both online and in physical markets) to occur on a massive scale and generally without serious consequences. Many of the IPR problems are long-standing, such as repeated infringements, non-payment of royalties by state broadcasters and general lack of clear rules in the area of collective management organisations (CMOs).

The respondents to the IPR Survey note that the Ukrainian IPR laws are particularly unfit for enforcement in the digital environment. Criminal sanctions are not sufficiently deterrent, legal proceedings are reported as lengthy, and there is a shortage of IPR-trained judges. In addition, concerns have been expressed as to whether the Ukrainian government has sufficient political will to improve the situation. There are several new IPR laws currently under development, yet it is unclear when they could be adopted. While this process takes time, some issues could and should be resolved without a new law (for example: non-payment of royalties by state broadcasters, authorization process of CMOs). The Commission notes that the overall political situation in Ukraine makes focusing on IPR issues a challenge. In the same time, predictable IPR environment is one of the necessary preconditions for building a strong economy and attracting investment. Therefore along with reforms in other areas Ukraine needs continued commitment to rebuild its IPR environment.

## *EU action*

The EU and Ukraine have agreed on an extensive and very ambitious IPR Chapter in the recently signed Association Agreement. While the application of Trade part of the Agreement is delayed until January 2016, Ukraine will need to make substantial and timely changes in order to implement the commitments undertaken in the Agreement. The EU and Ukraine are also engaged in a regular IP Dialogue. In addition, a EUR 1.4 m Twinning project started in early 2014 with the aim of strengthening the administrative capacity and competencies of the State Intellectual Property Service of Ukraine (SIPSU) as well as other stakeholders (judges, customs, state inspectors). The Twinning experts are working together with SIPSU on several draft laws to ensure effective legal measures against counterfeiting and piracy, and to provide for the effective implementation of the enforcement legislation and sanctions for IPR infringements, as envisioned in Chapter 9 "Intellectual Property" in Trade Title of the EU-Ukraine Association Agreement.

## **USA**

## *Progress*

The overall situation of IPR protection and enforcement has not notably changed during recent years but is characterised by a generally strong IP system with several positive features, i.e. that there is no corruption, the judiciary is effective and the system for obtaining of a patent is cheap and straightforward. In addition, the EU and the USA continue to enjoy good cooperation on IP issues, which allows for discussion of common IPR enforcement challenges in third countries.

#### *Concerns and areas for improvement and action*

The Commission notes in particular, that there has been no change since the last Survey regarding two major concerns:

- the lack of progress in implementing the WTO panel decision on *Irish Music* (Section 110(5)(B) of the USA Copyright Act<sup>19</sup> was found to be incompatible with the WTO/TRIPS Agreement, and constitutes a blatant violation of copyright); disrespecting WTO dispute settlement decisions on IPR establishes a negative precedent and undermines the credibility of countries such as the EU and USA which share an interest in promoting effective IPR enforcement practices, notably in emerging economies;
- the USA administration's decision to refuse the renewal of the *Havana Club* trade mark on the basis of the embargo against Cuba, which, again, is in breach of a WTO dispute settlement decision that found Section 211 of the US Omnibus Appropriations Act of 1998 to infringe the TRIPS Agreement; the persistent refusal to implement the latter decision by a leading member of the WTO sets a regrettable precedent.

A significant number of respondents to the IPR Survey raise the problem of non-recognition of geographical indications as an independent IP right. Aside from this notable exception, the respondents note that the standard of IPR protection is generally high. Nevertheless, some respondents point out that patent granting has become an unsure process and IPR enforcement is very expensive, which is of particular concern due to patent trolls. Some negative aspects are highlighted regarding copyright issues: no clear rules about public domain and obligatory deposit of literary works at the Library of Congress.

#### *EU action*

The EU and US are engaged in negotiations of Transatlantic Trade and Investment partnership agreement which will address a limited amount of issues of interest to either side. Both countries are also continuing the long-established tradition of Transatlantic IPR Working group where the sides exchange updates and discuss cooperation.

#### **Vietnam**

##### *Progress*

Vietnam has continued to make progress legislatively, including adopting (in 2012) a Circular on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection on Copyright and Related Rights on the Internet and Telecommunications Networks, and

declared its intention to accede to WIPO's Copyright Treaty and Performances and Phonograms Treaty. The government has continued to encourage training for its officials, and Vietnam has received significant technical assistance in the field of IP from the EU.

#### *Concerns and areas for improvement and action*

The trade in counterfeit products is still a concern in Vietnam, especially in the area of medicines and plant protection products which can pose risks for public health, as well as in spirits. Respondents to the IPR Survey reported systematic rejections for claims for second-use inventions of pharmaceutical products, and that the regulatory data protection system lacked a significant degree of certainty, with approvals being discretionary despite criteria being met, and burdensome procedural requirements for data to be kept secret. Trade marks of pharmaceutical companies were reported as being heavily infringed (with a high percentage of branded goods as counterfeit), and the domestic enforcement system being inefficient, with a lack of a clear enforcement structure. Concerns still exist regarding the registration of bad faith trade marks, lack of protection for well-known trade marks, software piracy, and insufficient and inefficient criminal/administrative sanctions. Zing.vn, a Vietnam-based social media site, reportedly continues to enable illegal downloading of music, which highlights the need for better enforcement mechanisms to deal with online copyright infringement.

#### *EU action*

Negotiations for a FTA between the EU and Vietnam were launched in June 2012, and were continuing into 2015. This FTA includes a substantial IPR chapter and should help to improve the IPR framework in Vietnam. The European Trade Policy and Investment Support Project (MUTRAP) is ongoing until 2017, involving the Vietnamese IP Office (NOIP), other authorities, judges, business community, and legal practitioners. Its key objectives are to assist the NOIP to organise and facilitate registration of Vietnamese geographical indications in the EU, improve the capacities of enforcement authorities on IPR, and to increase the awareness and use of IP as a tool for economic integration. The EU funded ASEAN IPR SME helpdesk supports SMEs also in relation to Vietnam.