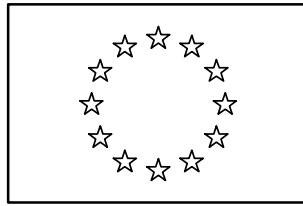


EUROPEAN COMMISSION
DIRECTORATE GENERAL FOR TRADE



**STRATEGY FOR THE ENFORCEMENT
OF
INTELLECTUAL PROPERTY RIGHTS
IN THIRD COUNTRIES**

Brussels, 23 June 2004

**STRATEGY FOR THE ENFORCEMENT OF
INTELLECTUAL PROPERTY RIGHTS IN THIRD COUNTRIES**

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PART I

INTRODUCTION

Violations of intellectual property rights (IPR) continue to increase, having reached, in recent years, industrial proportions. This happens despite the fact that, by now, most of the WTO members have adopted legislation implementing minimum standards of IPR enforcement. It is, therefore, essential for the European Union to increasingly focus on vigorous and effective implementation of the enforcement legislation.

This Strategy intends to be a contribution to the improvement of the situation in third countries. It is a logical sequence of recent initiatives like the Enforcement Directive, that will harmonize enforcement legislation within the European Union, and the revision of the Customs Regulation, that provides action against counterfeit or pirated goods at the Community's border.

The purposes of the Strategy are to:

- Provide a long-term line of action for the Commission services with the goal of achieving a significant reduction of the level of IPR violations in third countries;
- Describe, prioritise and co-ordinate the mechanisms available to the Commission services for achieving their goal;
- Inform right-holders and other entities concerned of the means and actions already available and to be implemented, and raise their awareness for the importance of their participation.

This Strategy does **not** intend to:

- Impose unilateral solutions to the problem - It is clear that, ultimately, any proposed solutions will only be effective if they are prioritised and considered to be important by the recipient country. The Commission services are ready to assist in the creation of such conditions.
- Propose a one-size-fits-all approach to promoting IPR enforcement - It will be necessary to have a flexible approach that takes into account different needs, level of development, membership or not of the World Trade Organisation (WTO), and main problems in terms of IPR (country of production, transit or consumption of fake goods) of the countries in question.
- Copy other models of IPR enforcement or create alliances against certain countries - The Commission services are ready and willing to improve co-operation and to create synergies with countries sharing their concerns and facing similar problems. It is, however, important that this strategy remains primarily focussed on positive and constructive efforts.

EXECUTIVE SUMMARY

In view of the worrying increase in volume and value of violations of IPR, namely in the form of piracy and counterfeiting, and of the growing concerns expressed by Community right-holders about these practices, DG TRADE decided at the end of 2002 to launch a “*Survey on Enforcement of Intellectual Property Rights in Third Countries*” to assess the situation.

The enforcement of IPR, and in particular the fight against piracy and counterfeiting, involves a number of different services within the Commission, in Member States and in third countries. DG TRADE has a well defined area of competence. In legal terms it is framed by the enforcement provisions of the TRIPs Agreement, as well as the IPR clauses in bilateral agreements. More generally speaking, DG TRADE is concerned by the enforcement (or lack thereof) of the intellectual property of Community right-holders in third countries.

This is why, in the wake of the *Enforcement Survey*, it was decided to prepare a strategy paper determining the priorities and optimising the use of resources in order to obtain the most effective results in terms of IPR enforcement in third countries. The present document defines the different methods / instruments available to the Commission for tackling the problem and provides a list of specific actions that are already being implemented and / or will be carried out in the coming years. Furthermore, it gives the relevant background information setting out the full scope of the problem.

To gain momentum and credibility, such a strategy requires considerable high-level political support. IPR enforcement has to do with core areas of the sovereignty of the countries concerned (legislative power, justice, police, administration). To pass the message that there need to be changes in these fields means involving the Commission at the highest level, including the Commissioners responsible for the Directorates-General concerned by the problem.

The proposed actions can be summarised as follows:

- 1) **Identifying the priority countries:** Creating a mechanism based on a questionnaire that will periodically assess the situation and allow the identification of countries where the efforts of the Commission should be concentrated.
- 2) **IPR mechanisms in multilateral (incl. TRIPs), bi-regional and bilateral agreements:** This would include **i)** raising enforcement concerns at Summit meetings with third countries concerned and in the Councils / Committees created in the framework of these agreements more systematically; **ii)** consulting trading partners with the aim of launching an initiative in the TRIPs Council, sounding the alert on the growing dimension of the problem, identifying the causes and proposing solutions; **iii)** revisiting our approach to the IPR chapter of bilateral agreements with a view to, *inter alia*, the strengthening of the enforcement clauses.
- 3) **Political dialogue:** **i)** Making clear to trading partners that an effective protection of IP, at least at the level set in TRIPs, is essential; **ii)** launching joint initiatives focusing on IPR enforcement with countries sharing / affected by similar

concerns; **iii)** providing training and implementing networking mechanisms for officials in EC Delegations facing enforcement problems.

- 4) **Incentives / Technical Cooperation** **i)** Ensuring the inclusion in the relevant programmes of technical assistance initiatives in the field of IPR enforcement; **ii)** exchanging ideas and information with other key providers of technical cooperation, like WIPO, the US, Japan and certain EU Member States, with the aim of avoiding duplication of efforts and sharing of best-practices.
- 5) **Dispute settlement / Sanctions:** **i)** Recalling the possibility that right-holders have of making use of the TBR mechanism in cases of evidence of violations of TRIPs or of bilateral agreements; **ii)** making *ex officio* use of the dispute settlement mechanisms included in multilateral and/or bilateral agreements in case of non-compliance with the required standards of IP protection.
- 6) **Creation of public-private partnerships:** **i)** Supporting / participating in local IP networks established in relevant third countries; **ii)** using mechanisms already put in place by Commission services (IPR Help Desk and Innovation Relay Centres) to exchange information with right-holders and associations; **iii)** building on the cooperation with companies and associations that are very active in the fight against piracy/counterfeiting, *inter alia* by ensuring the cross-participation of experts from the Commission and from private entities in events organised by the other party.
- 7) **Awareness raising / Drawing on our own experience:** Promoting the inclusion in technical cooperation programmes and in public-private partnership initiatives of information destined to **i)** raise public awareness about the impact of counterfeiting (loss of foreign investment and technology transfer, risks to health, link with organised crime, etc.) and **ii)** raise the awareness of Community right-holders doing business in “problematic” countries about the risks incurred; **iii)** make available to the public and to the authorities of concerned third countries a “Guidebook on Enforcement of Intellectual Property Rights”.
- 8) **Institutional cooperation:** **i)** Improving the exchange of information and the coordination between the services in charge of the different aspects of IPR enforcement; **ii)** simplifying the identification and the access of external entities (right-holders, third country authorities, etc.) to the service responsible for the specific issue concerning them.

The Strategy for the Enforcement of Intellectual Property Rights in Third Countries will be presented to the public in the framework of the Conference celebrating “The 10th Anniversary of the TRIPs Agreement” organised by DG TRADE in Brussels on 23 and 24 June 2004.

PART II – PROPOSED ACTIONS TO ADDRESS THE PROBLEM

1) *Identifying the priority countries*

It is important to identify a limited number of countries on which the efforts of the Commission in the framework of the present strategy should be concentrated (*cf.* Part III, section 4.). The human and financial resources allocated to the enforcement of IPR¹ being limited, it is unrealistic to pretend that our action can extend equally to all, or even most, of the countries where piracy and counterfeiting occur. Therefore, a mechanism to assess which are the most problematic countries/regions, or those where the action of the Community is most urgently required, will be an essential tool for the successful implementation of this strategy.

At the end of 2002, the Commission services launched a survey to assess the situation in third countries regarding violations and enforcement of IPR². By identifying with more clarity and accuracy the problems, the survey provided a diagnostic that allowed the Commission services to develop the present strategy. At the same time, it gave substantial information to help identify those countries on which the priorities should be focused and to which the bulk of our limited resources should be allocated.

Specific actions:

- Put in place a mechanism that will periodically conduct an exercise similar to the “*Survey on Enforcement of Intellectual Property Rights in Third Countries*”, based on a questionnaire distributed to entities like the Commission Delegations, Embassies of Member States, right-holders and associations, Chambers of Commerce, etc. The replies will then be analysed and the results will be made available to the public. Such results, in conjunction with other reliable sources of information available to the Commission services³, should constitute the basis for the renewal of the list of the priority countries for the subsequent period.

¹ The reference to intellectual property rights (IPR) in the present paper is made in its wider meaning, i.e., including copyright and related rights, but also trademarks, patents, designs, geographical indications, undisclosed information, etc.

² The complete results of the “*Survey on Enforcement of Intellectual Property Rights in Third Countries*”, including a detailed report per country, for all the countries for which we received sufficient information, are available at:
http://europa.eu.int/comm/trade/issues/sectoral/intell_property/survey_en.htm

³ There is already available a source that provides valuable information about the origin, the itinerary and the nature of counterfeit and pirated goods destined to, or in transit via the Community: the annual statistics about the goods originating from third countries seized by Customs at the Community border. The report is released by DG TAXUD. The figures for 2003 can be found at:
http://europa.eu.int/comm/taxation_customs/customs/counterfeit_piracy/index_en.htm

2) *Multilateral / Bilateral agreements*

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)⁴ has a detailed and extensive chapter dedicated to the setting of minimum standards of IPR enforcement and technical cooperation. It also provides for a structure responsible for monitoring the implementation of the provisions of the Agreement and for consultation between Members, i.e. the TRIPs Council. Finally, it puts in place a dispute prevention and settlement mechanism. These characteristics make TRIPs one of the most adequate and effective instruments to address problems related to IPR violations.

The numerous bilateral agreements established by the European Community contain a chapter dedicated to IP. This chapter usually establishes that a very high standard of protection of IP (including the enforcement thereof) must be achieved. Most agreements also include a clause allowing for technical cooperation in this field. These clauses must be carefully monitored and effectively implemented, notably with respect to the more “problematic” countries.

The institutional structures of these multilateral and bilateral agreements (TRIPs Council, Association Councils, the World Intellectual Property Organisation – WIPO, etc.) can be used to monitor and discuss legislation and enforcement problems from a very early stage. They allow for a structured political dialogue and can act as *fora* to submit new initiatives or to act as “early warning” for arising problems, before there is a need to adopt stricter measures.

It is also envisaged to make the enforcement clauses in future bilateral or bi-regional agreements more operational and to clearly define what the EU regards as the highest international standards in this area and what kind of efforts it expects from its trading partners.

Specific actions:

- The EU will consult other trading partners regarding the possibility of launching an initiative in the TRIPs Council highlighting the fact that the implementation of TRIPs requirements in national laws has proven to be insufficient to combat piracy and counterfeiting, and that the TRIPs Agreement itself has several shortcomings.

For example, the TRIPs Council could consider in the future a number of actions to tackle the situation, including the extension of the obligation to make available customs measures to goods in transit and for export⁵.

- Ensure a continued effort in the monitoring of the TRIPs compliance of legislation, in particular in the “priority” countries.
- Revisit the approach to the IPR chapter of bilateral agreements. In the framework of such a review, one of the main elements to consider is the clarification and strengthening of the enforcement clauses. Although in designing the rules for each

⁴ Agreement on Trade-Related Aspects of Intellectual Property, Annex 1C to the Agreement establishing the World Trade Organisation (TRIPs, Marrakesh 1994).

⁵ Article 51 of the TRIPs Agreement only stipulates the obligation for Members to have in place customs measures for imported goods.

specific negotiation it is important to take into account the situation and the capacity of our partners, instruments such as the new EU Directive harmonising the enforcement of IPR within the Community, as well as the new customs' Regulation on counterfeit and pirated goods may constitute an important source of inspiration and a useful benchmark.

- Raise more systematically enforcement concerns at Summit meetings and in the Councils / Committees created in the framework of these bilateral agreements. In order to allow the Commission to be in a position to obtain an effective reaction from its counterparts, it is absolutely essential that it obtains credible and detailed information from the right-holders, either directly or via the EC Delegation or the embassies of the Member States in the countries concerned.

3) *Political dialogue*

The Commission must make clear to its trading partners that it considers an effective protection of IP, at least at the level set in TRIPs, as absolutely essential, and that the first step for fighting piracy and counterfeiting is an adequate level of enforcement at the source, i.e. in the countries where these goods are produced and exported. The Commission will also emphasize that effective enforcement is in many cases of mutual interest, be it for health or consumer reasons etc. In its numerous contacts, at different levels with the authorities of the countries concerned, the Commission must strongly convey the message that it is willing to assist them in raising the level of enforcement, but also that it will not refrain from using the instruments at its disposal in the cases where deficient enforcement is harming its right-holders.

In addition, the Commission is increasing its cooperation with countries heavily affected by this type of practices and that share the Community's concerns like Japan. This will result in an increased exchange of information and even in participation in joint initiatives in third countries. In addition such "joint ventures" should produce a rationalisation of resources between countries sharing identical concerns and pursuing parallel initiatives.

Finally, the EC Delegations in the "problematic" countries can play a very important role, by establishing close links with the local enforcement entities, with the Community right-holders operating in these countries and with the embassies of EU Member States and other countries concerned by deficient IPR enforcement.

Specific actions:

- The message "*improve your enforcement*" should be repeated, as frequently and at as high a level as possible, in the Commission's contacts with authorities of the countries in question and in all appropriate *fora*, notably the WTO and WIPO. It must be perceived as a priority concern.
- This commitment to include IPR enforcement in the political dialogue is illustrated by the following initiatives:
 - At the EU – Japan Summit of 2003, the Commission and Japan agreed to establish an improved dialogue in a number of areas, including IPR. This initiative has led to an EU proposal for an "EU - Japan Joint Initiative for IPR Enforcement in Asia",

that will focus on elements like **(i)** the close follow-up of the progress of Asian countries in the field; **(ii)** coordinating technical assistance programmes and responsibilities; **(iii)** enhancing EU-Japan efforts to raise awareness in the fight against piracy and counterfeiting and to promote the strengthening of IPR enforcement; **(iv)** exploring the possibility to cooperate in other areas of IPR. The initiative could be implemented by an Annual Work Plan containing specific activities.

- The Commission and China agreed in the margins of the 2003 EU-China Summit to hold, at least once a year, a "Structured Dialogue" on all-encompassing IPR issues, multilateral and bilateral. Among other issues, the discussions should focus on efforts to combat piracy and counterfeiting, institutional reforms, enforcement-related areas such as central and sub-central enforcement by customs, police, administrative and judiciary bodies, public awareness of consumers and right-holders. The first meeting is expected to take place in the second half of 2004.
- Basic training will be provided to a number of officials in priority Delegations so that they can offer a minimum of information to entities contacting them with enforcement problems. The idea behind this initiative is to create some networking between Commission officials in Delegations and to establish closer teamwork between Delegations and the Headquarters. Teamwork will facilitate the compilation of information and the definition of targeted actions for the different countries and/or for a regional approach.

4) *Incentives / Technical cooperation*

Most of the countries with deficient enforcement will claim a lack of resources and the existence of more pressing priorities than protecting IP rights. IP enforcement is a complex and multi-disciplinary activity. It involves drafting of legislation, training of judges, police forces, customs officials and other experts, the setting up of agencies or task-forces, public awareness raising, etc. Most of these needs can be, and to some extent already have been, addressed by the Commission via technical cooperation programmes, but it is important to do more and better.

Technical assistance is an activity favoured by the EC for its contribution towards poverty alleviation and development. It is thus important to demonstrate that adequate IPR enforcement can contribute to this goal by making a link with investment opportunities, transfer of technology and know-how, protection of traditional knowledge, improvement of health and safety standards, etc.

It will be necessary to have a flexible approach that takes into account the recipient country's different needs, level of development, membership or not of the World Trade Organisation (WTO), and main problems in terms of IPR (country of production, transit or consumption of fake goods). Any cooperation programmes will only be effective if they are prioritised and indeed felt as important in the recipient country.

In this field it is also relevant to share information and to ensure a minimum level of synergy between the main providers of technical assistance, such as WIPO, the World Customs Organisation (WCO), the Member States and third countries like Japan, the US and others.

Finally, the following difficulties must be stressed:

- (i) In most cases, technical cooperation is “demand driven”, i.e. it requires a request by the beneficiary of the action. It is important to turn it into a “dialogue driven” request, by discussing its importance and benefits for the recipient.
- (ii) It is a relatively long-term solution, with few immediate results. However, the present strategy is a long term one, and adequate enforcement is a goal that will not be achieved only by immediate actions, in particular in the case of least-developed countries, not yet bound by TRIPs requirements.
- (iii) Implementing the programmes implies a complex and bureaucratic process. This is why further strengthening coordination between the Commission services responsible for the different aspects of IPR enforcement and between the Commission and third parties is an essential component of the present strategy.

Specific actions:

- Ensure that, at least, the countries identified as priorities are given the option to include intellectual property in the trade-related technical assistance programmes or to obtain specific IP programmes.

In particular, the Commission would like to extend technical assistance to Latin America, since it is a region where enforcement can certainly be improved and where no programme is in place.

- There are a number of programmes that cover IPR. Some, like ECAP⁶ I and II, for the ASEAN countries, or even the recently concluded EU-China IPR programme are specifically destined to provide assistance on IPR. Others are generally designed to cover trade related issues, but may include IPR among their objectives – WTO II⁷ and Small Project Facility⁸, for China; technical cooperation programmes under the framework of the Cotonou Agreement for the African, Caribbean and Pacific (ACP) countries; or the CARDS⁹ programme, for the countries of the Balkans. The Commission will ensure that the component of IPR enforcement is adequately covered by these programmes.

⁶ EC-ASEAN Intellectual Property Rights Programme comprises a regional and a national component and covers all areas of IPR. It has a value of €5 million. An additional €2 million is planned, to take account of the inclusion of Laos, Cambodia and Vietnam. The project started in 2000 and has a duration of 5 years

⁷ WTO II is the largest WTO related support programme in China, with a value of €15 million over 5 years - to which China has indicated willingness to contribute with an additional 30%. DG Trade is proposing a chapter on IPR. The programme should be launched before the end of 2004.

⁸ Project designed to support small initiatives in China. With a total value of €9.6 million, and a duration of 5 years, the initiatives are demand-driven, but DG TRADE will actively encourage the inclusion of IPR related projects.

⁹ In the framework of the Community Assistance for Reconstruction, Development and Stabilisation (CARDS) programme for the Western Balkans, a project called “Industrial and Intellectual Property Rights” was launched in July 2003. The project will have a duration of 36 months and a value of €2.25 million.

- In the case of “production” countries, the focus in any cooperation programmes must shift from assistance in drafting legislation to a more enforcement-oriented strategy, including training programmes for judges, police, and customs.

It must be pointed out that this practice is already being successfully implemented in the specific field of customs (DG TAXUD). There are a number of customs cooperation agreements that, *inter alia*, cover an essential tool of IPR enforcement (customs controls of fake goods). These agreements with countries like India and China (a new one is soon to be concluded) produce very positive results in terms of training and of passing on our experience and methods to these countries. Furthermore, they are illustrative of how one can build on the existing TRIPs requirements (*cf.* the control of exports and goods in transit, in addition to the control of imports). It is likely that a similar agreement may be established with Japan in 2004.

- Exchange ideas and information with other key providers of technical cooperation, like WIPO, the US, Japan and certain EU Member States, with the aim of avoiding duplication of efforts and sharing of best-practices.
- Improve the dialogue mechanisms with: (i) the WCO to assess the compatibility of their technical assistance with our positions and the complementarity with our programmes; (ii) WIPO and other providers of assistance (the European Patent Office, the Office of the EU Trademarks and Designs, etc.) to share information and to better coordinate strategies.
- Technical cooperation is also an important element of the TRIPs Agreement (Article 67) and it “fits” into the objectives of the Doha Development Agenda. It can be considered to take an enforcement-oriented initiative in this framework.

5) *Dispute Settlement / Sanctions*

No rule can be really effective without the threat of a sanction. Countries where IP violations are systematic could be publicly identified. As a last resort, consideration should be given to resorting to dispute settlement mechanisms provided for in multilateral and bilateral agreements.

The existing Trade Barriers Regulation (TBR) mechanism¹⁰ could be a starting-point. TBR is a legal instrument that gives the right to Community enterprises and industries to lodge a complaint, which obliges the Commission to investigate and evaluate whether there is evidence of violation of international trade rules resulting in adverse trade effects. The result is that the procedure will lead to either a mutually agreed solution to the problem or recourse to dispute settlement.

¹⁰ Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the WTO. Available at: <http://europa.eu.int/comm/trade/issues/respectrules/tbr/legis/adgreg06a.htm>

The TBR has a broad scope of application, covering not only goods but also, to some extent, intellectual property rights and services, when the violation of rules concerning these rights has an impact on trade between the EC and a third country.

In addition to the WTO dispute settlement mechanism, the EU also includes similar mechanisms in an increasing number of bilateral agreements. These mechanisms can be triggered in cases of non-compliance with the required high(est) standards of IP protection.

Deficient enforcement derives more frequently from the way the rules are (not) *de facto* implemented by the competent authorities than from an absence of legislation or a blatant contradiction of legislation with TRIPs requirements. However, when such deficiencies become systemic, they can substantiate a dispute settlement case.

Specific actions:

- Remind right-holders of the possibility to make use of the TBR mechanism in cases of evidence of violation of TRIPs or of the high(est) standards as agreed in bilateral agreements between the EC and third countries. This mechanism is launched by the lodging of a complaint.
- The Commission is ready, in clearly justified cases, to make *ex officio* use of the WTO dispute settlement mechanism and of the similar dispute settlement tools included in our bilateral agreements in case of non-compliance with the mutually accepted standards of IP protection.

6) Creation of public-private partnerships

There are numerous companies and associations which have been very active in the fight against piracy/counterfeiting for many years, and which constitute not only an invaluable source of information, but also a key partner for any initiatives in terms of awareness raising. Some of these entities are already present, and very active, in most problematic countries.

Other than the specific actions now proposed, there are within the Commission other examples of initiatives to create public-private partnerships that are directly or indirectly linked with IPR enforcement.

One of these projects involved the creation of Innovation Relay Centres, to support companies dealing with transfers of technology¹¹. This project includes people with extensive experience in the IPR area (licensing, transfer of IP rights, etc) and could be used to collect information about enforcement problems in third countries. So far the network only covers the EU, but consideration is being given to extending it to third countries. There is a pilot project with an office in Chile.

¹¹ This project is managed by DG ENTR. For more information see: <http://europa.eu.int/comm/enterprise/innovation/networks.htm#irc>

There is also already in place the “IPR Help-Desk”¹², a project sponsored by the European Commission to support creativity and innovation. The purpose of the Help-Desk is not to handle complaints but to provide information to the EU industry. It may therefore give guidance to companies facing violations of their rights in third countries.

Finally, the Commission services have a long experience of involving private operators in their seminars and training programmes covering, in particular, border enforcement of IPR.

Specific actions:

- Support the creation of local IP networks involving companies, associations and chambers of commerce. This practice is already being implemented in certain key countries and will be actively supported by DG TRADE.
- Improve cooperation with companies and associations that are already active in the fight against piracy/counterfeiting, *inter alia* by exchanging information about future initiatives and ensuring the cross-participation of experts from the Commission and from private entities in events organised by the other party.

7) *Awareness raising / Drawing on our own experience*

Providing better information to the public is another very relevant dimension of the Strategy. This can be divided into the following components:

- (i) Raising the awareness of users / consumers in third countries. This must be done from two perspectives: **(a)** to promote the benefits of IPR in terms of promotion of creativity, investment, transfer of technology, protection of traditions and quality; **(b)** to inform about the dangers of IPR violations to public health, consumer protection, public security, etc.
- (ii) Raising the awareness of right-holders. Again from two different perspectives: **(a)** the risks incurred by trading in certain countries where IPR enforcement is ineffective and the minimum precautions that must be adopted, like registering the IP right in those countries (frequently, small and medium sized companies do not even apply for the protection of their intellectual property in third countries where they are producing or selling their goods); **(b)** the need to use the means available in these third countries to enforce their rights. Countries which are members of the WTO (with the exception of least-developed countries) must have implemented minimum standards of IP protection and enforcement since 2000. It is clear that the first steps to protect and enforce IPRs must be taken by the right-holders themselves, and that they must use, to the maximum extent, the available mechanisms before being entitled to legitimately complain about the effectiveness of such protection and enforcement.

¹² <http://www.ipr-helpdesk.org>

Specific actions:

- The Commission services do not have the resources to pursue extensive awareness raising campaigns on this issue in third countries purely on their own. However, this type of activity could be implemented by some of the above-mentioned means, i.e. by inclusion in existing technical cooperation programmes and by public-private partnerships.
- The Commission services sponsored the drafting of a “Guidebook on Enforcement of Intellectual Property Rights”. This Guidebook is mainly intended to assist the public authorities of developing and least developed countries in their efforts to put in place systems and procedures for the effective enforcement of IPR. In particular, the guidebook considers the most common difficulties confronting those countries in the enforcement of intellectual property rights and provides guidance on how to achieve effective and long-lasting protection for such rights. The guidebook identifies a number of useful resources which may be of assistance to authorities and right-holders confronted with difficulties.

The Guidebook will be publicly available through the Commission website.

8) ***Institutional cooperation***

The Commission services responsible for the different aspects of IPR enforcement should step up their coordination and cooperation with a view to enhancing the role of the Commission in the fight against piracy and counterfeiting. Without creating an additional layer of bureaucracy, it is necessary to:

- i) further improve information exchange and coordination between the services in charge of the different aspects of IPR enforcement;
- ii) simplify the identification and the access of external entities (right-holders, third country authorities, etc.) to the service responsible for the specific issue concerning them.

Specific actions:

- Inter-service meetings will be regularly organised to follow up the initiatives being implemented in the framework of the present strategy and to discuss the results obtained, as well as the inclusion of new initiatives. Furthermore, increased cooperation between the services involved with technical assistance issues will be introduced in order to promote IPR enforcement-related assistance to relevant third countries.
- In order to help third parties understand the distribution of tasks among the different Commission services:
 - A new Commission webpage will be created, presenting: **(i)** the existing legislation to enforce IPR; **(ii)** a *vademecum* on enforcement, including the Commission contact points for the various types of IP rights and aspects of their enforcement, as well as links to the various web-pages of the different services dealing with it.

- Cross-links will be inserted in the existing web-pages of each service dealing with certain aspects of IPR or certain sectors.
- Ensure coordination with other Commission initiatives linked with IPR, such as the Innovation Relay Centres and the IPR Help-Desk, and their effective contribution to the objective of the present Strategy by collecting and distributing information *vis-à-vis* the private sector.

PART III – BACKGROUND

1) What is the problem?

The TRIPS Agreement establishes for the first time a single, comprehensive, multilateral set of rules covering all kinds of IPR. It contains also a detailed chapter setting minimum standards of IPR enforcement to be adopted by all members of the WTO.

However, despite the fact that, by now, most of the WTO members have adopted legislation implementing such minimum standards¹³, the levels of piracy and counterfeiting continue to increase every year. These activities have, in recent years, assumed industrial proportions, because they offer considerable profit prospects with often a limited risk for the perpetrators.

It has thus become clearly insufficient to limit the efforts of the EC to merely monitoring the creation of general legislative frameworks in WTO member countries. It is essential that the EC increasingly focuses on vigorous and effective implementation of the enforcement legislation.

Within the Community and at its external borders there have been a number of important initiatives in recent years. As long ago as 1994 the EC adopted the so-called Customs Regulation (Regulation (EC) No 3295/94), allowing border control of imports of fake goods. Later, in 1998, the Commission issued its Green Paper on Combating Counterfeiting and Piracy in the Single Market. As a result of responses to the Green Paper, the Commission presented an Action Plan, on 30 November 2000. This Action Plan is materialising, namely in the form of a Directive harmonising the enforcement of intellectual property rights within the Community¹⁴, of a Regulation improving the mechanisms for customs action against counterfeit or pirated goods¹⁵ set by the previous Customs Regulation, *the extending of Europol's powers to cover piracy and counterfeiting and a study on a methodology for the collecting, analysing and comparing of data on counterfeiting and piracy*¹⁶. In addition, the Presidency Conclusions of the Spring European Council 2003¹⁷ made a strong call for the increase in the fight against

¹³ Least Developed Countries have until 2006, at least, to adapt their legislation to the TRIPS requirements.

¹⁴ The Enforcement Directive was formally adopted in April 2004. The text is available at: http://www.europa.eu.int/comm/internal_market/en/intprop/piracy/index.htm

¹⁵ COM (2003) 20 final, of 20/01/2003, available at http://europa.eu.int/comm/taxation_customs/customs/counterfeit_piracy/files/counterfeit_en.pdf

¹⁶ Copy available upon request sent to MARKT-E4@cec.eu.int

¹⁷ Spring European Council 2003: Presidency Conclusions:

“37. *The European Council calls upon the Commission and Member States to improve exploitation of intellectual property rights by taking forward measures against counterfeiting and piracy, which discourages the development of a market for digital goods and services; to protect patents on computer implemented inventions...*”

piracy and counterfeiting. As a consequence, the Commission (DG JAI) intends to launch a legislative initiative in 2004 in the form of a proposal for a Council Framework Decision on approximation of national legislation and sanctions on counterfeiting and piracy.

The situation is, however, different outside the borders of the Community. The internal instruments available to Community right-holders in the case of violations of their rights within the Community or in the case of imports of fake goods into the EU are not usable when these violations occur in third countries and the resulting goods are either consumed domestically or exported to other third countries. Although such violations occur outside, they directly affect Community right-holders.

2) Why and how much does it matter? To whom?

a) European Community

Violation of IPR, which is reflected in the presence on the market of increasing volumes of pirated and counterfeit goods, has a very negative impact in a number of different areas. The Community, being a market that traditionally invests heavily in IP-protected goods and services and receives considerable added-value for this effort, is particularly affected by poor enforcement of IP, even when it takes place in third countries, and even if the pirated / counterfeit goods or services are not destined for the Community market. These are some of the adverse effects of IP violations:

Economic and social: Deprives right-holders of the revenue from their investment in R&D, marketing, creative effort, quality control, etc. Negatively affects market-share, sales volume, reputation, employment and ultimately the viability of certain IP-based activities/companies. High levels of IPR violations also discourage foreign investment and transfer of technology.

Health and consumer protection: Pirated and counterfeit goods are usually produced by anonymous entities that pay no heed to health, safety and quality requirements and provide no after-sales assistance, guarantees, operating instructions, etc... Illustrating this problem are growing seizures of fake medications, food (and even bottled water), car and plane parts, electrical appliances and toys.

Public order and security: A growing concern in recent years is the increased involvement of criminal organisations and sometimes even of terrorist groups in major international trafficking of counterfeit and pirated goods. This is explained by the particularly lucrative nature of these activities and by the lower risk¹⁸ compared with other lucrative criminal activities. The scale of the problem and the sums of money involved render the situation regarding piracy as complex to tackle as drug trafficking or money laundering. Europol, Interpol and a number of police forces in the Community have created departments dealing specifically with it.

¹⁸ In many countries other very lucrative criminal activities like drug trafficking carry considerable risks (even the death penalty) and are combated with considerable resources, while the trafficking of fake goods is seen as a relatively harmless practice.

Fiscal: Being an illegal and clandestine practice by nature, and having lower prices it frequently deprives the state from tax revenue (VAT, revenue taxes, customs duties). This issue is particularly sensitive in countries where there are economic sectors under strict state control, like tobacco, alcoholic drinks, fuel, etc.

b) Third countries

Why should third countries with little tradition in the IPR field, a restricted number of right-holders, and sometimes with a significant share of its industry and commerce benefiting from the violations, care?

The reply to this question is not entirely different from the one given for the Community (see above). The consequences of IPR violations in terms of consumer and health protection, organised crime and loss of fiscal revenue are relatively obvious and directly felt both in the Community and in the third countries where such violations predominantly occur. Consequently, these countries (should) have an immediate interest in combating piracy and counterfeiting.

Regarding the first point however (economic and social consequences), some will say that by enforcing the protection of IP rights held by Community companies, third countries will not obtain any direct benefit. It would appear, on the contrary, that they are using their resources to protect the investment of foreign entities (an argument frequently raised by certain countries). To counter this reasoning, the EC must get across the message that effective enforcement of IP rights (even if these belong to third parties) is an essential tool to attract foreign investment and the transfer of technology and know-how, as well as to protect local right-holders in developing and least-developed countries who are already suffering the misappropriation of their intellectual property¹⁹. It is a matter of good governance and international credibility, not to mention the need to comply with WTO and other international and bilateral commitments. In the mid-to-long term, it will also encourage domestic authors, inventors and investors and contribute to the development of these countries.

Under-estimating the value of intellectual property rights contributes to ineffective enforcement. To enhance this aspect of the intellectual property rights system, it would be useful for some (fast) developing countries to assess the value of the industries based primarily on intellectual property rights²⁰. This could lead to an appreciation of the value of intellectual property rights in terms of a country's economic environment, as well as in respect to economic, social and cultural growth and development.

There are, however, recent examples of countries where the emergence of a competitive and increasingly sophisticated economy is making evident the need to efficiently protect IP against domestic and external violations.

¹⁹ Cf. the cases of counterfeits of certain brands of rice wine in China or of a well-known local fish sauce brand in Vietnam.

²⁰ The Commission services published a study in 2003 entitled "The economic importance of copyright" (available at http://www.europa.eu.int/comm/internal_market/en/intprop/index.htm). Some countries, such as the USA and Finland produce such documents, namely for the copyright industries ("Copyright industries in the US Economy – Stephen E. Siwek & Gale Mosteller, prepared for the International Intellectual Property Alliance and *The Economic Importance of Copyright Industries in Finland*, the Finnish Copyright Society").

In some of the most “problematic” countries the authorities appear to be fully aware of the importance of IPR for the development of the country and domestic right-holders demand enforcement of IPR as rigorously as foreign right-holders. The problem is that the piracy/counterfeiting industry is an important element of their economy. It is therefore clear that there is a broader picture which cannot be tackled merely under the IP angle. Only a comprehensive policy involving authorities at national, regional and local level can provide a solution.

3) Which IP rights are violated and which sectors are most affected?

Most of them. One frequent misconception is that piracy and counterfeiting mainly affect some luxury, sports and clothing brands, music and software CDs/DVDs, and little else. The reality is that virtually every IP is being violated on a considerable scale and that the variety of fake products ranges from cereal boxes to plants and seeds, from aeroplane spare parts to sunglasses, from cigarettes to medications, from AA batteries to entire petrol stations. Big software producers are as likely to be harmed as small makers of a certain type of tea. The annual statistics published by the Commission’s customs services regarding the number and the nature of seized pirated and counterfeit goods originating from third countries provide detailed and reliable information about the dimension and the growth of the problem²¹.

The Commission considers that the vast majority of the problems affecting holders of the different types of intellectual property rights are common and consequently, are most effectively addressed by an integrated strategy. The strategy now proposed aims at improving enforcement against violations of all kinds of IP (copyright, trademarks, geographical indications, patents, designs, etc.).

4) Which are the “priority” countries?

There are several different criteria to define the most problematic countries in terms of enforcement of IPR²². These can be split into: **a)** source countries; **b)** transit countries, and **c)** target countries. For each of these groups of countries, the type of measures most adequate to address the situation will differ.

²¹ http://europa.eu.int/comm/taxation_customs/customs/counterfeit_piracy/index_en.htm

²² The countries indicated for each of the above categories are mentioned on the basis of the following criteria:

- Information received from Community right-holders and other sources (Delegations, etc.) regarding IPR violations.
- Data regarding customs seizures of fake goods at the Community’s borders.
- Relevance of the countries in terms of actual or potential volume of trade with the Community. The inclusion of a country in one or more of the categories below reflects the level of relevance of the situation in that particular country from the Community perspective. Countries with reduced importance in terms of trade were not considered a priority.

In any event, the situation in this area is constantly changing, therefore it will require continuous monitoring and updating.

a) Source countries

These are the countries where production of pirated and counterfeit goods, both for domestic consumption and for export, reaches worrying dimensions. In cases of digital piracy via the internet, the origin of the IPR violation can be particularly difficult to detect.

In these countries it is particularly important to improve the effectiveness and the coordination of the police, the courts, the customs and the administration in general. It is also essential to ensure that the legal framework provides for deterrent sanctions.

The most frequently mentioned country when violations of IP are discussed is undoubtedly China. Other countries are, *inter alia*: Thailand, Ukraine, Taiwan, Russia, Philippines, Indonesia, Hong-Kong, Brazil and South Korea.

b) Transit countries

For the full picture, one should, however, not focus exclusively on countries violating IPR due to the massive production of counterfeited products occurring in their territories, but also on those often acting as a hub. This category includes countries appearing as major places of origin of fake goods seized in the Community, the problem occurring mainly because of the flow of fake products in transit and not because of domestic production of such goods. The large volume of goods originating in these countries is nevertheless indicative of deficient enforcement, at least at the level of border controls. Organised crime networks will take advantage of such weaknesses to establish different traffic routes, hiding the real origin of the goods.

Improving the availability of border measures and the effectiveness of customs authorities in particular regarding the transit of goods should help to substantially reduce the volume of traffic.

Examples of countries in this situation: the USA and the Gulf countries.

c) Target countries

It is also important to consider, in any strategy to reduce the violations of IPR, the countries identified as the main final destinations of exports of fake goods or serving primarily as a market for such products.

Substantial volumes of sales of fake goods occur in almost all countries. The difficulty of defining countries that are main markets for pirated goods is that it is a very widespread problem, albeit for a variety of (sometimes contradictory) reasons: because they are too poor to buy IP-protected products, because such practice is accepted or at least not condemned, because they produce them in large quantities, because there is sometimes no way to distinguish between real and fake, or because fakes are cheaper. This is why it is necessary to concentrate resources on the main markets of the legitimate Community right-holders most affected by IPR violations.

Dealing with the consumption of pirated and counterfeit goods requires an effort in terms of building up public awareness about the negative impact and the risks of such practice. It also requires more effective customs controls of imported goods and a more effective reaction by the police and courts against those networks and individuals involved in large scale trading in such goods.

The most important target market is obviously the European Community, but the EU is not covered by the scope of the present paper. Other very important targets are countries such as the US, Japan, China.

5) What is the situation in the Community?

Generally speaking, the Community and its Member States are acknowledged for protecting and enforcing IPR to very high standards, as the *acquis*, and in particular the recent efforts described in point 1) above, can demonstrate. Also in practical terms, reports like the one published annually by DG TAXUD²³ give a clear idea of the results achieved by the authorities of each Member State in terms of seizures of fake goods at the borders.

However, within the Community the level of enforcement is different among Member States. Some Member States still need to do more towards improving the current situation and cutting down remaining production and sale of pirated or counterfeit goods. The new Directive harmonising the enforcement of intellectual property rights within the Community will help to improve the situation.

6) Who are the key actors in the Commission?

Different Directorates-General (DGs) of the Commission are competent as regards the distinct aspects of IPR enforcement. In simple terms:

- DG Trade handles the external dimension (multilateral and bilateral) of the issue, i.e. enforcement in third countries. It also represents the European Community at the WTO and notably at the TRIPs Council.
- DG Internal Market (MARKT) is responsible for EU intellectual and industrial property policy and legislation and represents and leads negotiations on behalf of the European Community in various committees in WIPO. DG MARKT was the author of the above mentioned Enforcement Directive.
- DG Taxation and Customs Union (TAXUD) regulates the enforcement of IPR at the Community's external borders. DG TAXUD drafted the above mentioned Customs Regulation.
- DG Justice and Home Affairs (JAI) has shared regulatory responsibilities when IPR enforcement is linked with law enforcement both within and outside the Community. Specific "field" operations in the same area will be handled by the European Anti-Fraud Office (OLAF).
- DG Development (DEV) and DG External Relations (RELEX) coordinate, both centrally and via the EU Delegations in third countries, Community assistance to developing countries and least-developed countries, including in the area of

²³ http://europa.eu.int/comm/taxation_customs/customs/counterfeit_piracy/index_en.htm

Trade, while the Europe Aid Cooperation Office (AIDCO) manages any technical assistance programmes.

- Finally, DG Enterprise (ENTR), as manager of the IPR Help Desk²⁴, and with its close contacts with the industry (i.e. with a very important number of IP right-holders), is a key partner.

This is a very crucial point for the efficacy of any strategy. It is clear that DG TRADE has an important and well defined role in terms of improving the enforcement of IPR in third countries. However, the most “operational” responsibilities of the fight against piracy and counterfeiting lie with Member States or with other DGs. The most visible and/or immediate results in this fight will always be achieved by the customs authorities, the police, national courts, the harmonisation of laws and procedures and the creation of information exchange mechanisms at Community level. In these (mainly domestic) areas DG TRADE can only provide a limited contribution. The situation is, however, different with regard to enforcement in third countries. In this case, DG TRADE, with the cooperation of the above mentioned Commission services and of the EC Delegations in third countries, can certainly play a key role in achieving the implementation of the tasks proposed in the present Strategy.

²⁴ [IPR Help Desk](http://www.ipr-helpdesk.org/index.htm), available at <http://www.ipr-helpdesk.org/index.htm>