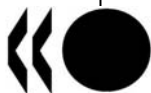


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Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

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**English - Or. English**

**COUNCIL**

**Council**

**REPORT TO COUNCIL ON THE PROJECT ON THE ECONOMIC IMPACTS OF  
COUNTERFEITING AND PIRACY**

**(Note by the Secretary-General)**

**JT03284651**

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## Background

1. The OECD launched a project in 2005 to assess the economic impact of counterfeiting and piracy. The Council mandate for this project is contained in document C(2004)202/REV3, which is attached as Annex I. In addition, in considering this document, Council also received a statement by the Chair of the Executive Committee which provided an authentic interpretation of C(2004)202/REV3. That statement, was annexed to the Summary Record of the Council meeting [C/M(2005)10/PROV, Annex 2], and is reproduced as Annex II.

2. The objective of the project was to “*improve factual understanding and awareness of the harmful effects that infringements of intellectual property rights, as described and defined in the WTO TRIPS Agreement, have on governments, business and consumers in Member countries and non-member economies*”.

3. Due to time and resource constraints the project was to be carried out in three phases:

- Phase I would focus on counterfeited and pirated products (*i.e.*, tangible products that infringe trademarks or copyrights) as well as patent and design infringements;
- Phase II was to examine the impact of piracy on digital content;
- Phase III would study infringements of the other intellectual property rights not examined in Phases I and II.

4. The mandate also envisaged a number of technical meetings of experts to develop parameters and properly scope the work to be done and the creation of an informal advisory group (IAG). The IAG has been attended by representatives from government, other relevant international organisations, trade unions and industry. It met a number of times to provide guidance on the various Phases, and has reported regularly to the Committee on Industry, Innovation and Entrepreneurship (CIIE).<sup>1</sup>

## Progress to date

5. While the original expectation was that all three phases of the project would be completed by 2007, resource constraints (the entire project was funded through voluntary contributions) and technical complexities have meant that the project has not yet been completed. To date, the study has produced the following outputs:

- Phase I was completed with the publication of the report *The Economic Impact of Counterfeiting and Piracy* in 2008. This study developed and applied a new methodology to estimate the incidence of counterfeit and pirated items in world trade, drawing primarily on world trade and custom seizure data. It also provided an analysis of the market for counterfeit and pirated goods and the effects on various affected parties. The study estimated that international trade in counterfeit and pirated goods accounted for up to USD 200 billion in 2005. Some of the work was updated in November 2009, and this indicated that counterfeit and pirated goods in international trade grew steadily over the period 2000 – 2007 and accounted for up to USD 250 billion of international trade in 2007. The study, which received broad political and financial support from members, is one of the most cited sources by policy makers wishing to highlight the economic impact of counterfeiting and piracy.

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<sup>1</sup> The CIBE, mentioned in the original mandate and in the statement by the Chair of the Executive Committee, was replaced by the CIIE in 2007.

- Phase II covered the piracy of content, such as music, films and software that does not involve the use of physical media; in other words it essentially dealt with piracy over the Internet. This phase resulted in the publication of the report “Piracy of Digital Content” in 2009. It explored the market for digital piracy, identified the key factors and mechanisms that drive digital piracy and described the main initiatives taken by industry and governments to combat digital piracy. The analysis and conclusions of this report were generally considered to have advanced international discussions of the drivers and responses to on-line piracy, although the report did not quantify the extent of piracy or its economic impacts, and was therefore only partially completed. This was because of difficulties in scoping the study, specifically due to problems related to quantification due to the lack of reliable data (and especially government data) on the extent of online piracy.
- Phase III has not yet been carried out because agreement could not be reached within either the IAG or the CIIE on its scoping, and this is largely the subject of this report to Council.

### Scoping of Phase III of the Counterfeiting and Piracy Study

6. The objective of Phase III of the project on Economic Impact of Counterfeiting and Piracy was, as noted in C(2004)202/REV3, to study the infringements of the other intellectual property rights not examined in Phases I and II of the project. The imprecise wording of the scope of Phase III in the mandate led the IAG to extensively consider a number of possible components for this Phase, specifically, the other forms of IPR covered directly or incorporated by reference in the TRIPS Agreement (*i.e.*, plant varieties), and not already covered in Phases I and II.

7. The IAG considered a number of different options for the scoping of the study, and at the end of the deliberations, due to differences amongst Members on the availability of data and resources, and differing levels of political support, only two categories remained for possible examination in Phase III:

- i)* Geographical Indications (GIs); and
- ii)* Plant varieties.<sup>2</sup>

8. Of these categories, Geographical Indications proved the most difficult, with Members at both the IAG and the CIIE unable to reach agreement on the scoping of work on GIs. While some Members gave strong support to the study, and considered that the scoping proposals formed a suitable basis for work on Geographical Indications, other Members considered that the proposals did not adequately address significant issues of concern on GIs, including the potential impact of the study on the ongoing international discussions identified in the study’s original mandate, the source and availability of data and some technical issues related to the different approaches currently in use to protect GIs internationally. These issues are discussed in more detail in the next section.

### Issues surrounding Geographical Indications

9. The most significant area of disagreement among Members was the potential for work on Geographical Indications to prejudice discussions in other international *fora* (in particular discussions at

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<sup>2</sup> While Plant Varieties are not recognised in Part II of the WTO TRIPS Agreement as a distinct Intellectual Property Right, their protection, either through patents or through a *sui generis* system, is specifically mandated by Article 27§3(b) of the TRIPS Agreement, and the category was agreed by both the IAG and the CIIE as a separate item for possible examination under Phase III. However, the CIIE also considered that this was too narrow a category to warrant a study on its own.

the WTO related to the Doha Round and discussion at the World Intellectual Property Organization – WIPO).

10. In fact, this issue had been raised originally at the time of the Council decision on the mandate for the study and thus specifically addressed in C(2004)202/REV3, which included the following provision:

*“Phase III will be conducted in a manner that does not prejudice discussions taking place in other international fora”* (see paragraph 9 of the Council mandate in Annex I).

11. In addition, the statement by the Chair of the Executive Committee annexed to the Council Summary Record [C/M(2005)10/PROV, Annex 2] contained some additional clarification of Council’s intent with respect to Phase III (see Annex II):

*“The consideration of issues is still ongoing within the WTO. In addition, there are also discussions on GIs going on in the World Intellectual Property Organization (WIPO). We all agree that this aspect of the OECD’s project has to be conducted in a manner that will not prejudice discussions taking place in these other international fora. In other words, Phase III would not address issues being negotiated in the WTO (including the Doha Development Round), WIPO or other international fora. In order to meet this objective, the parameters of work on GI infringements will be developed by a group of experts, for final consideration by the CIBE or its successor.”*

12. The IAG was created in part to give effect to these directions and the various Secretariat proposals on GIs attempted to design a study that would not prejudice discussions in other international fora. However, these proposals could not bridge the significant policy differences among Members.<sup>3</sup> Despite considerable discussion over an extended period, due essentially to trade policy differences, participants in the IAG were unable to develop parameters that were acceptable to the CIIE.

13. In addition to the concerns that Phase III work on GIs could prejudice discussions taking place in other international fora, some Members expressed concerns that data sources for GI infringements might be too heavily concentrated in the industries themselves, which could raise concerns about bias in any analysis. Also, some Members considered that there were complex technical issues related to GIs due to the different approaches used to protect GIs in different jurisdictions which could create problems for comparative analysis.

### ***Conclusion and Proposed Action***

14. The inability of Members at either the IAG or the CIIE to agree on the scoping of Phase III (particularly with respect to the GIs) reflects significant policy differences that exist amongst them. At its meeting on 25-26 March 2010, the CIIE agreed that as these issues could not be resolved, and the Council mandate could not be concluded, this should be reported to Council for its further consideration<sup>4</sup>.

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<sup>3</sup> The latest Secretariat proposal covering Geographical Indications and plant varieties is contained in Annex 3 of document DSTI/IND(2010)3.

<sup>4</sup> Council should also be aware that the CIIE has undertaken extensive discussions on a proposed Council Recommendation covering (depending on the views of different Members) Intellectual property Rights generally, or counterfeiting and piracy in particular, so as to provide for current and prospective OECD members an “*acquis*” on these important issues. Significant trade policy differences amongst members on the coverage of the Recommendation have also stalled its progress within the CIIE.

15. In light of the preceding, the Secretary-General invites the Council to decide whether Phase III of the study on the Economic Impact of Counterfeiting and Piracy should, or should not be pursued, and if it is to be pursued, to provide guidance on its scope.

## ANNEX I

### COUNCIL DOCUMENT C(2004)202/REV3 THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY, NOTE BY SECRETARY-GENERAL

#### Background

1. Counterfeiting and piracy are longstanding problems which appear to be growing in scope and magnitude. These practices can have negative effects on the sales and profits of affected firms, while raising economic, health, safety and security effects for governments and consumers. The emergence of the Internet has significantly increased the distribution channels for counterfeit and pirated goods, and raised jurisdictional problems in combating such practices.
2. There has recently been an upsurge in private sector mobilisation to raise awareness of this issue. Some OECD member governments are also placing renewed emphasis on combating counterfeiting and piracy.
3. The OECD is being asked to carry out the project described in this document in light of *i*) its previous work on the subject, and *ii*) its research and analytical capabilities.
4. The activity is foreseen in the draft PWB 2005/2006 under output 1.2.1. The work proposal template is provided in the Annex to this document. The project would be funded through voluntary contributions and would be carried out only in so far as such voluntary contributions are received.
5. Given the preliminary nature of the discussion that the Committee on Industry and Business Environment had on the proposal, it is considered appropriate to submit the matter to Council directly.

#### Objective

6. The objective of the proposed project will be to improve factual understanding and awareness of the harmful effects that infringements of intellectual property rights, as described and defined in the WTO TRIPS Agreement, have on governments, business and consumers in Member countries and non-member economies. Given time and resource constraints, it is proposed that the project be carried out in three phases, which would be separately funded. Each of these phases will be reflected in separate reports to be supplemented by an overall final report covering all three phases.
7. The first Phase will focus on counterfeit and pirated products (*i.e.*, tangible products that infringe trademarks or copyrights) as well as patent and design infringements. As indicated below, an analytical report will be prepared that will include a series of sectoral assessments that illustrate the different types of effects that the illicit practices can have on economies. In addition to the report, regional workshops and a Global Forum will be held to provide further opportunities to examine and discuss issues.
8. The second Phase will examine the impact of piracy of digital content. To properly scope the work on piracy of digital content, the Secretariat will organise a technical meeting with experts from

Member governments to develop the parameters of the work for consideration by the Committee on Industry and Business Environment, or its successor, during the third quarter of 2005, while work on Phase I is already progressing. Following this scoping work, Phase II will be undertaken provided that adequate funding is available.

9. The reports on Phases I and II of the study will be submitted to the Council in 2006. Phase III of the study on infringements of the other intellectual property rights not examined so far will be launched in the second half of 2006 and presented to Council in 2007. In order to properly scope the work to be done in Phase III, the Secretariat will organise a technical meeting with experts from Member governments to develop the parameters of the work, for consideration by the Committee on Industry and Business Environment, or its successor. Following this scoping work, Phase III will proceed provided that adequate funding is available. Phase III will be conducted in a manner which does not prejudice discussions taking place in other international *fora*.

10. Upon completion of the whole project, the Council will consider, if justified by the conclusions of the study, whether further work should be undertaken to encourage governments in Member countries and non-member economies to develop more effective policies to combat counterfeiting and piracy. The further work envisaged in this paragraph would be dependent on availability of adequate funding.

11. The first phase of the project will seek to:

*Enhance factual understanding of the problem*

The last rigorous analysis of counterfeiting and piracy from a global perspective dates back to 1998 (OECD, *Economic Impact of Counterfeiting*). This work will be updated and expanded through a new analysis that will develop factual information on the scope, volume, trends and impacts of piracy and counterfeiting that is comparable across industries and countries. The study will be fact-finding in nature, and include:

- *An analysis of trends and developments.* The changing volume and scope of counterfeiting and piracy will be examined, as will its role in international trade. Changes in the types of products being counterfeited, and the regions where counterfeiting and piracy are taking place will be highlighted.
- The factors driving counterfeiting and piracy will be identified and discussed, as will the role of new technologies in facilitating counterfeiting and piracy activities.
- *An assessment of the effects on firms, consumers and governments.* A methodological framework for assessing the effects of counterfeiting and piracy on stakeholders will be elaborated. In addition to economic factors, health, safety and security factors will be highlighted. The assessment will include special attention to the adverse effects that the practices can have on those countries where counterfeiting and piracy are most pronounced.
- *A series of sectoral assessments.* A number of sectoral case studies will be conducted, illustrating the various forms of counterfeiting and piracy, and the different types of effects on producers, consumers and governments. The products to be studied will include those with significant safety, health and/or social implications (in addition to economic ones), such as pharmaceuticals, food, drink and consumer products, spare parts and car accessories, aircraft components, toys and electronic equipment (*e.g.*, mobile phones, batteries). Other consumer products with important economic, employment and innovation implications will also be covered, such as software (some with security/safety implications), electrical and optical equipment, chemicals, music recordings, motion pictures, books (especially school text

books), sportswear, luxury goods and fashion clothes and perfumes. Selection will also take into account the availability of information.

- *A description and assessment of policies and measures used to combat counterfeiting and piracy.* National and multilateral policies and measures taken by governments, business and other stakeholders to combat counterfeiting and piracy will be described and assessed, with particular attention to those policies and measures which have been found to be particularly effective. To the extent possible, the policies and measures taken in key non-OECD economies will be included.

#### *Raise awareness of the problem*

The study will be a key part of a broader initiative that will, as indicated above, include a series of regional workshops. The workshops will be aimed at developing factual information on counterfeiting and piracy trends in different regions as well as understanding trends in related policy-making. They should provide a platform for increased familiarity among key public as well as private sector players in OECD and non-OECD economies participating in this activity. Regional workshops in Brazil, China, India and Russia, as well as a Global Forum on Phase I, are envisaged to be held in 2006. A second Global Forum will be organised in 2007.

#### **Methodology and timetable**

12. The project will be overseen by the Committee on Industry and Business Environment, or its successor. Other OECD bodies will, however, be kept apprised of the work. TUAC and BIAC will be involved with the project as will be Consumers International, and co-ordination will be pursued with other international bodies which are active in the counterfeiting/piracy area (such as WTO, WCO, WIPO and Interpol).

13. In order to adhere to the tight timeframes envisioned, an informal advisory group will be created, with the participation of representatives from all Member countries and organisations which have an interest in the project. The project will be carried out and completed in accordance with the usual OECD rules and procedures regarding the proper evaluation and monitoring of projects.

14. With respect to timeframes, the report on the first phase will be completed in mid-2006 and that on the second phase by the end of 2006. The report on the third Phase is expected to be ready as soon as possible in 2007, followed soon after by the completion of the overall final report. The reports will be made publicly available. The regional workshops will be organised during 2006. A Global Forum on Phase I will be targeted for the second half of 2006. A second Global Forum will be organised in 2007 to mark the conclusion of the whole project.

#### **Funding**

15. The total costs for Phase I of the report to be undertaken in 2005 will amount to approximately €490 000. Phase I will not proceed until and unless the required funding is secured. The costs for Phase II and Phase III are estimated at €150 000 and €100 000 respectively. Phase II and Phase III will also not proceed until separate funding is secured. A total of €520 000 would be necessary to cover the costs of the workshops and the Global Fora.

16. The business community has indicated its intention to finance up to 50% of the project; this will be used largely for purposes other than the analytical report, which will be financed primarily by member governments. A number of member governments have expressed interest in the project, and are exploring to what extent they will be able to contribute.



**Proposed Action**

17. In light of the preceding, the Secretary-General invites the Council to adopt the following draft conclusions:

THE COUNCIL

- a) noted document C(2004)202/REV3;
- b) noted the comments by Delegations;
- c) noted that the activity on the economic impacts of counterfeiting and piracy is foreseen in the Organisation's Programme of Work and Budget for 2005/2006 and agreed with the outline of the project as set out in document C(2004)202/REV3.

## ANNEX II

### THE ECONOMIC IMPACTS OF COUNTERFEITING AND PIRACY

#### Statement by the Chair of the Executive Committee to Council [extract from C/M(2005)10/PROV]

“At its meeting on 23<sup>rd</sup> March 2005, the Council took note of document C(2004)202/REV3 and agreed without discussion to revert to this document at today’s meeting of the Council with a view to launching the project on “The Economic Impacts of Counterfeiting”. Over the last three weeks, a number of informal consultations have taken place and have concentrated on four basic issues contained in this document:

- The financing of and reporting on the various Phases of the study;
- The scoping of Phase II and Phase III;
- The contents of the work to be undertaken in Phase III; and
- The organisation of two Global Fora.

To speed up the procedure, to clarify some elements of the above issues and to avoid any lengthy consideration of drafting alternatives the following procedure is suggested:

1. Council adopts document C(2004)202/REV3 as it is; and
2. Council takes note of the following understanding which is to be considered as an authentic interpretation of document C(2004)202/REV3 and is to be annexed to the Summary Record of this Council meeting.

Our intention in making this statement part of the official record is to help to clearly define how the project is to be conducted, and to establish the limits within which the OECD Secretariat will have to work.

#### **Financing of and reporting on the various Phases of the study**

The whole project will be financed via voluntary contributions. Each contributor should specify whether the money could be used for the entire project or whether it should only be used for the financing of a specific phase of the project. It is understood that each phase, once sufficient money has been made available, will be carried out independently of the other phase(s).

As stated in document C(2004)202/REV3, each of the Phases will be reflected in separate reports by the Secretariat to be supplemented by an overall final report covering all three Phases. In preparing these reports the Secretariat will follow standard OECD practices; i.e. interested parties, through direct contacts with the Secretariat and/or via the envisaged workshops, will be provided with an opportunity to comment on draft reports. A revised version of such reports will then be submitted to the Committee on Industry and Business Environment (CIBE) or its successor for adoption and onward transmission to Council. Like all other OECD Committees CIBE works of course on the basis of consensus. The reports will be made publicly available in accordance with OECD rules and procedures.

### **Scoping of Phase II and III**

To scope properly Phases II and III, the Secretariat will organise two technical meetings: one during the second half of 2005 for Phase II and one during the second half of 2006 for Phase III with experts from member governments. The composition of national delegations to such expert meetings is of course left to member governments.

### **Contents of the work to be undertaken in Phase III**

There is consensus that the project should improve the factual understanding and awareness of the harmful effects that infringements of intellectual property rights, as described and defined in the WTO Trips Agreement, have on business and consumers, both in member countries and non-member economies. Geographical Indications (GIs) are one of the intellectual property rights covered by the TRIPS Agreement, but there is very little international agreement on the appropriate framework for the protection of GIs.

The consideration of issues is still ongoing within the WTO. In addition, there are also discussions on GIs going on in the World Intellectual Property Organization (WIPO). We all agree that this aspect of the OECD's project has to be conducted in a manner that will not prejudice discussions taking place in these other international fora. In other words, Phase III would not address issues being negotiated in the WTO (including the Doha Development Round), WIPO or other international fora. In order to meet this objective, the parameters of work on GI infringements will be developed by a group of experts, for final consideration by the CIBE or its successor.

### **Organisation of two Global Fora**

Given the time required to undertake the whole counterfeiting and piracy project, and the wish of participants to produce tangible results as soon as possible, it is envisaged to hold two Global Fora.

The purpose of the first Global Forum to be held in 2006 is to convene all interested parties to obtain a global view on the first phase of the study on tangible products that infringe trademarks and copyrights as well as patent and design infringements. The second global forum, to be held in 2007, will draw upon the results of the first Global Forum and will consider the economic impact of infringements of all intellectual property rights.

If justified by the conclusions of the whole project, the Council will consider whether further work should be undertaken.”