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## Economic Commission for Europe

Committee on Economic Cooperation and Integration

Team of Specialists on Intellectual Property

Sixth session

Geneva, 21–22 June 2012

### Report of the Team of Specialists on Intellectual Property on its sixth session

#### I. Attendance

1. The Team of Specialists on Intellectual Property (TOS-IP) held its annual session on 21-22 June 2012. Some 60 experts representing national government agencies, academic institutions, international organizations and the business community participated in the meeting. The following 19 UNECE member States were represented: Andorra, Azerbaijan, Belarus, Canada, Czech Republic, France, Georgia, Greece, Kyrgyz Republic, Poland, Republic of Moldova, Romania, Russian Federation, Serbia, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States of America. A representative of Afghanistan also participated. The international organizations participating were the European Commission, European Patent Office, International Telecommunications Union, World Intellectual Property Organization (WIPO), World Trade Organization, United Nations Conference on Trade and Development, and the United Nations Interregional Crime and Justice Research Institute.

2. The European Union was also represented.

#### II. Adoption of the agenda and election of officers (agenda item 1)

3. The Team adopted the agenda of its session unchanged as provided in document ECE/CECI/IP/2012/1.

#### III. Substantive segment (agenda item 2)

4. The topic of the substantive segment was Intellectual Property and Competition Policy. It was organized into four sessions, on “Of carrots and sticks: The Role of Intellectual Property and Competition Policy in Promoting Innovation”, “See You in Court

– Unfair Competition Rules and Intellectual Property Rights Enforcement”, “Anti-trust Meets IP – How to Assess the Competitive Effects of Intellectual Property”, and “Balancing Act – How to Ensure that IP Is not Used to Block Innovation-based Competition”.

5. In addition, the substantive segment included a keynote speech by the Chief Economist of the Directorate General Competition of the Commission of the European Union.

6. The substantive segment provided an opportunity for national policymakers from both intellectual property agencies and competition authorities as well as the business community to discuss interdependencies between intellectual property policy and competition policy and to exchange experiences and good practices on how to effectively achieve the goals of promoting vigorous innovation-based competition and promoting the use of intellectual property as a tool for knowledge-based development.

7. The results of the discussions at the substantive segment will form the basis for a policy-oriented document to be submitted to the seventh annual session of the UNECE Committee on Economic Cooperation and Integration on 5 - 7 December 2012.

8. Some of the points made during the four sessions of the substantive segment were:

(a) Patent and other intellectual property rights are important tools to provide incentives for innovation.

(b) Product market competition also provides incentives for innovation in that innovation is a way to stay ahead or keep up with the competition.

(c) In this sense, the goals of competition policy and intellectual property rights are aligned.

(d) However, there is also some inherent tension between the two. This is because intellectual property rights confer a degree of market power, although not necessarily – indeed, usually not – a monopoly.

(e) At the same time, it can be argued that intellectual property, by virtue of enabling businesses to differentiate their products, promotes competition based on product differentiation and product quality, whereas in the absence of intellectual property, the only viable competition would be cost-based competition in uniform products.

(f) There has been a trend at leading intellectual property offices of increasing numbers and complexity of patent applications and grants, particularly in information and communication technologies, but greater uncertainty about patent validity, and more litigation.

(g) These developments have raised concerns about adverse effects of patent thickets and so-called “patent wars” (where major technology companies engage in bidding wars for patent portfolios to be used in strategic litigation against competitors) on both innovation and the effectiveness of innovation-based competition.

(h) It was suggested that, to address these concerns, intellectual property policy should focus on the appropriate width, depth and length of IPR protection, whereas competition policy should focus on abuses of intellectual property rights, i.e. on cases where intellectual property rights are used in such a way as to confer market power that goes above what such rights would normally confer.

(i) The two policy areas overlap most closely, and the appropriate division of labour is still in flux, in the area of inter-operability standards.

(j) From an intellectual property policy point of view, patent offices and regulators should make sure that the quality and hence validity of granted patents is high and that boundaries are clear.

(k) Patents that are narrow in scope but long in duration may provide a good compromise between providing adequate innovation incentives and avoiding excessive product market distortions in some industries. In others, it might be desirable to reduce the maximum patent term. At present however, intellectual property law treats all industrial sectors the same way with regard to patent scope and duration.

(l) From a competition policy point of view, it is today generally agreed that intellectual property rights are not per se anti-competitive. The preferred approach to assess the competitive effects of intellectual property is the so-called rule of reason, under which the actual impact of a particular use of a given intellectual property right on the strength of competition in the relevant market is assessed on a case by case basis.

(m) There was some debate as to whether per se rules might be appropriate for certain types of abuses of intellectual property, such as licensing agreements that fix product prices or restrict production volumes or divide markets among the licensor and licensee.

(n) Potential problems arise when owners of patents of uncertain validity make payments to potential competitors to induce them not to enter the market. More generally, any clauses in a patent licensing agreement that restrict actual or potential competition can be subject to anti-trust intervention.

(o) Another potential problem arises when the manufacturing of a given product requires access to several or even many patents on complementary technologies, and the owner of such a complementary patent uses it to prevent competitors from entering the market.

(p) In addition to anti-trust law, such cases may also be addressed under unfair competition or “abuse of dominant position” rules.

(q) Where the number of patent owners involved is not too large, such hold-up problems can often be avoided through cross-licensing agreements. Where large numbers of patentees are involved, patent pools may provide solutions.

(r) The potential damage of hold-up problems to competition can be reduced if courts do not grant injunctive relief, i.e. if they do not block competitors from using the contested intellectual property while the case is being argued.

(s) Potential hold-up problems also need to be addressed when inter-operability standards are created for platform technologies. One challenge in this regard is to define and enforce the “fair, reasonable and non-discriminatory (FRAND)” terms on which essential patents are made available to the users of the standard.

(t) There was some debate on whether competition authorities should provide guidance to courts on what can be considered FRAND.

(u) A particular challenge in managing essential intellectual property in standard setting processes is that many standards aspire to global acceptance and validity, whereas intellectual property rights are national, and their validity may vary depending on the jurisdictions for which protection has been sought.

(v) The International Telecommunications Union, in part in cooperation with other bodies, has developed guidelines on the treatment of patents and trademarks in standard setting in order to ensure fair competition among standard users.

(w) Competition authorities may also have to take the potential for patent-related hold-up problems into account when assessing mergers and acquisitions between innovative companies.

(x) Generally, unfair competition legislation on the one hand protects the owners of intellectual property from unfair competition, but on the other hand also restricts the abuse of intellectual property rights.

(y) There are differences across jurisdictions in the scope of unfair competition legislation relating to intellectual property as well as in which government agencies and courts have authority. The Russian Federation, for instance, is in the process of creating a specialized intellectual property court. More work needs to be done on systematically analysing the relationship between competition policy and intellectual property, defining goals and priorities, developing a unified strategy to implement them, and broadening the definition of unfair competition to bring it in line with international standards.

(z) Counterfeiting and other forms of intellectual property rights infringements can be a threat to innovation-based competition. The Russian Federation will be organizing an international conference against counterfeiting in Moscow on 22-24 October 2012 in order to improve anti-counterfeiting legislation.

#### **IV. Review of the work done since the fifth session and since the 2005 UNECE reform (agenda item 3)**

9. The Chairperson thanked the speakers, moderators and participants of the substantive segment for their outstanding presentations and contributions to the debate and gave the floor to the secretariat to introduce the agenda item.

10. The secretariat referred to document ECE/CECI/2012/3 and explained the background of the 5-year review of the programme of work of the UNECE at large, and of the Committee on Economic Cooperation and Integration in particular. It recalled that the Committee on Economic Cooperation and Integration (CECI) had been established as a result of the 2005 UNECE reform, and that the Team of Specialists on Intellectual Property had been established as one of the subsidiary bodies of this Committee. At the 2011 session of the United Nations Economic Commission for Europe, member States had decided to carry out a 5-year review of the reform initiated in 2005. This review covers the whole UNECE and all its subprogrammes, committees and subsidiary bodies. The Executive Committee, which oversees the work of UNECE between sessions, requested the secretariat to provide it with a clear picture of the mandates of its committees and their subsidiary bodies, the extent to which these mandates have been carried out in a resource-efficient way, and their added value relative to other UN bodies and international organizations. In response, CECI prepared a review paper in consultations with members of its Teams of Specialists and networks of experts. The review paper was submitted to Executive Committee in December 2011 for consideration. Once all sectoral committees of UNECE have reported on their activities, the Executive Committee will carry out a cross-sectoral review of the added value of the activities of its committees with a view to identifying the future priorities for the work of the Commission as a whole. There is thus a possibility for a re-orientation of priorities with implications for the future work, including of the Team of Specialists on Intellectual Property. The final decision will be taken by UNECE in the spring of 2013.

11. The Chairperson gave the floor to the secretariat to present a summary of the results achieved since the 2005 UNECE reform and of the main work done since the previous session, including a synopsis of good practices and policies, a policy dispatch, a training tool and capacity-building.

12. On the results achieved since the 2005 reform, the secretariat referred to document ECE/CECI/2012/3 and highlighted the mobilization of extrabudgetary resources, both financial and in-kind, which had made up 88 per cent of the (non-staff) resources used in the implementation of the work of the Team. The secretariat also highlighted that the Team had organized or contributed to some 30 capacity-building events reaching some 2,500 policymakers and practitioners from 20 countries with economies in transition.

13. Turning to the work done since the previous session, a Synopsis of **Good practices and policy recommendations on raising awareness of the role of intellectual property rights in innovation and the dangers and economic costs of intellectual property rights infringements** was prepared drawing on the results of the substantive segment of the fifth session of TOS-IP in July 2011. This Synopsis was submitted as an official document to the sixth session of the UNECE Committee on Economic Cooperation and Integration on 30 November - 2 December 2011 (ECE/CECI/2011/8).

14. The **Comparative Review on Intellectual Property Rights Commercialization - Policy Options and Practical Instruments** was published.

15. As part of the secretariat's effort to further improve the dissemination of policy recommendations and good practices developed under the Committee on Economic Cooperation and Integration, a draft **Policy Dispatch on Intellectual Property and Open Innovation** was prepared and circulated to the Team.

16. The TOS-IP organized or participated in the following IP-specific capacity-building activities:

(a) **Subregional Conference on Commercialization and Valuation of Intellectual Property and on IPR Enforcement, Bishkek, Kyrgyz Republic, from 11 to 12 October 2011.** The Conference was co-organized by the secretariat, the State Intellectual Property Service of the Kyrgyz Republic, and the United States Patent and Trademark Office and was hosted by the State Customs Service of the Kyrgyz Republic. The Conference was attended by well over 100 national experts working on the accounting, auditing, valuation and commercialization of intellectual property, as well as on IPR enforcement from government agencies, academic institutions and the business community from Azerbaijan, Kazakhstan, the Kyrgyz Republic, the Russian Federation, and Tajikistan, as well as international experts working on these issues.

(b) **Subregional Conference on Economic Aspects of Intellectual Property, Chisinau, Republic of Moldova, from 9 to 11 November 2011.** The Conference was co-organized by the secretariat, the State Intellectual Property Office of the Republic of Moldova, the United States Patent and Trademark Office, and React Moldova (the local chapter of a global business association). It discussed the role of intellectual property in the process of economic development with a particular focus on international technology transfer and cross-border enforcement. The Conference brought together almost 100 international experts and national policymakers from Armenia, Georgia, the Republic of Moldova, Romania, and Ukraine representing intellectual property offices, enforcement agencies, agencies engaged in economic development work, and the business community. The World Intellectual Property Organization also participated and contributed to the programme.

(c) Contribution to the **Fourth Interregional Symposium on Enforcement of Intellectual Property Rights, Belgrade, Serbia, 6 - 7 September 2011.** The Symposium was organized by WIPO in cooperation with the Serbian Intellectual Property Office and the United States Patent and Trademark Office. Representatives of government ministries and law enforcement agencies of 28 countries participated in this event.

(d) Contribution to the **9th Annual WIPO Forum on Intellectual Property and Small and Medium-sized Enterprises for Intellectual Property Offices and Other Relevant Institutions in OECD Countries, Munich, Germany, 19-20 October 2011**. The Forum was organized by the World Intellectual Property Organization and was hosted by European Patent Office.

(e) Contribution to the **International Conference on Intellectual Property and Innovation, Budapest, Hungary, 3-4 April 2012**. The Conference was co-organized by the Hungarian Intellectual Property Office and the United States Patent and Trademark Office (USPTO). It was attended by around 100 representatives of the Hungarian Intellectual Property Office, enterprises, law firms and universities, research institutes and by participants from Poland, Romania, and Slovenia.

(f) Contribution to the **V Astana Economic Forum, Astana, Kazakhstan, 22-24 May 2012**, on the topic Intellectual Property and Competition Policy, as part of a session on Intellectual Property and Economic Growth, which was co-organized by the Kazakh Committee on Intellectual Property Rights and the World Intellectual Property Organization. The session was attended by about 100 participants.

17. Overall, some 200 participants from 10 countries with economies in transition attended the events where UNECE was the main organizer.

18. Responses from evaluation questionnaires distributed to participants at the UNECE events showed that over 80 per cent of respondents gave the events a rating of 4 or 5 on a scale of 1-5.

19. A pilot **Training Tool on the Valuation of Intellectual Property** had been prepared, drawing on the results of discussions held at the fifth session of TOS-IP in July 2011 with the World Intellectual Property Organization's Academy, the European Patent Academy and the United States Patent and Trademark Office's Global Intellectual Property Academy, as well as on inputs from international experts on intellectual property valuation. Elements of the tool were tested at one of the capacity-building events conducted in 2011. Further development and testing will be done at a capacity-building event in September 2012.

20. The representative of the Republic of Moldova expressed their appreciation to the secretariat and the international experts for the capacity-building event organized in Chisinau. He also expressed his appreciation for the substantive segment of the Team's sixth annual session, stating that questions of appropriately balancing intellectual property and pro-competition policies were an important issue in his country.

21. The representative of the European Union stated that they were not prepared to accept document ECE/CECI/IP/2012/3 in its present form.

## **V. Implementation plan for the remainder of 2012 and for 2013 (agenda item 4)**

22. The Chairperson gave the floor to the secretariat to introduce this agenda item. The secretariat explained the status of the UNECE-wide 5-year review of the program of work, the time line for its completion, and its possible implications for the work of the Team in the coming months and its future. The secretariat will maintain an ongoing dialogue with the Team on the progress with the review and resultant possible needs to adapt the implementation plan.

23. The secretariat presented the implementation plan for the remainder of 2012 and for 2013, including:

(a) a **Synopsis of Good Practices on Intellectual Property and Competition Policy** which will be submitted for consideration at the seventh session of CECI. This document will draw on the main conclusions of the above substantive segment of the sixth session of TOS-IP;

(b) associated outputs to better disseminate policy messages, such as short **policy dispatches**, and a regular **newsletter** on innovation-related issues, presenting the activities of the subprogramme, which will draw on contributions by members of all CECI Teams of Specialists and networks of experts. The secretariat invited Team members to provide feedback on the existing draft Policy Dispatch on Intellectual Property and Open Innovation with a view to finalizing it. A Policy Dispatch on the subject of the substantive segment of the sixth session, i.e. Intellectual Property and Competition Policy, will be prepared in the second half of 2012;

(c) contributing to the **Innovation Performance Review of Ukraine**, which will be conducted in the second half of 2012, as well as to reviews that may be undertaken in other countries in this period. Consultations are ongoing with the World Intellectual Property Organization's Section on Technology Transfer and Innovation on the specific nature of their contribution to the Innovation Performance Review of Ukraine;

(d) contributing to field-based **policy advisory workshops** to facilitate the implementation of findings and conclusions from the Innovation Performance Reviews;

(e) contributing to **integrated/cross-cutting or thematic subregional capacity-building and knowledge-sharing conferences and workshops** on policies for promoting innovative, knowledge-based development, subject to demand from member States and the availability of extrabudgetary funding;

(f) an **International Capacity-building Conference on Economic Aspects of Intellectual Property, including Intellectual Property and Competition Policy**, to be organized jointly with the World Intellectual Property Organization in early September 2012 in a UNECE member State yet to be determined;

(g) a **Subregional Training Seminar on Intellectual Property for Judges**, to be organized jointly with the United States Patent and Trademark Office and the Macedonian Academy for Judges and Prosecutors in The former Yugoslav Republic of Macedonia on 24-25 September 2012. The topics will be anti-trust and unfair competition cases involving intellectual property, and the valuation of intellectual property in infringement litigation; and

(h) responding to further invitations for capacity-building activities from the UNECE member States, subject to the availability of extrabudgetary funding.

24. The representative of the Russian Federation expressed their appreciation for the work of the Team since its inception. Referring also to the involvement of the Russian Federation with the work of other international organizations dealing with intellectual property issues, such as the World Intellectual Property Organization and the Organization for Economic Cooperation and Development, she stated that the Team had found its niche, and that the approach taken by TOS-IP corresponded most closely with the goals of her Government. She argued that a particular strength of the Team was its ability to look at intellectual property issues in a systemic, comprehensive way, taking into account a variety of issues, such as unfair competition, innovative development, and customs policy. This ability to take a comprehensive approach to intellectual property and knowledge-based development was due in part to the fact that the Team was working not only with patent offices, but also allowed the business community to participate, make its views heard and contribute its expertise, both at the Team's annual sessions and at the capacity-building activities organized in between sessions. The representative of the Russian Federation

thanked the secretariat for the outstanding quality of its work and expressed strong support for the work of the Team to be continued and expanded. She renewed the invitation for the Team to participate in the Global Forum Against Counterfeiting to be organized in Moscow in October 2012.

25. The Chairperson thanked participants for their comments under agenda items 3 and 4 and reminded them that the secretariat would keep the Team informed of the progress of the review of the work of UNECE since the 2005 reform and its possible implications for the implementation of its work plan.

## **VI. Other business (agenda item 5)**

26. Participants agreed that the secretariat prepare the meeting's report no later than ten days following the session and that it be reviewed and adopted by the Bureau on behalf of the Team.

27. Participants agreed that, without prejudice to the results of the 5-year review, the next annual session of the Team would be scheduled for 4-5 July 2013.

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