



CONFINDUSTRIA

State of intellectual property in third countries

Public consultation on
the protection and
enforcement of
intellectual property
rights in third countries

May 2019

Confindustria is the main association representing manufacturing and service companies in Italy, with a voluntary membership of more than 150,000 companies of all sizes, employing a total of 5,440,125 people.

The association's activities are aimed at guaranteeing the central importance of companies, the driver's of Italy's economic, social and civil development. By representing companies and their values at institutions of all levels, Confindustria contributes to social well-being and progress, and from this standpoint guarantees increasingly diversified, efficient and modern services.

PRIORITY 1 COUNTRIES

1) China

The Chinese market is a great opportunity for the export, however the great weaknesses in the protection of IPR determine an unfair and non-competitive market. On the enforcement side, the establishment of Chinese specialized courts for the resolution of IPR disputes in 2014 represented an important initiative; however, there is a strong mismatch between the interpretations of the local judges and the Supreme People's Court; this prevents effective and homogeneous protection throughout China.

Trademark

Fashion sector: the main problems for fashion sector is the trademark law, in particular the trademark registration: due to the presence of numerous brands already registered (around 26 million), the registration of new trademarks in China is blocked or slowed down by very complicated procedures. Most of the trademarks already registered are not used; this depends on the "first to file" law in China, for which it is advisable to register trademarks even if they are not used. In fact, the protection granted to the brands that are in use but not registered (de facto trademarks) is very limited. Furthermore, the large number of similar brands deposited by third parties (potential copiers and / or imitators) is not opposed by the trademark office. Foreign companies are obliged to present many actions of opposition and invalidation, with unsustainable costs, considering that the lawyers' fees are not reimbursable even in case of positive sentence. So, the biggest problem is the "trademark grabbing" or "squatting": counterfeiting/usurpation of trademarks, design, copyright to the detriment of the legitimate owners, who are forced to take legal actions, very expensive, to use their intangible assets or to have to buy them back. The reform of the trademark law introduced the protection of the "well-known de facto trademark", which however does not allow combating counterfeiting even with strong evidence relating to the pre-use of the trademark and the mala fide of the counterfeiter

Copyright

Music sector: China was the 7th largest music market in 2018 by revenue to the music industry, however, the Chinese market is still far below its full commercial potential due to the gaps in legal protection of recorded music (absence of broadcast and public performance rights protection, shorter term of protection than the 70-years international standard) and shortcomings in the copyright enforcement system which affect the monetisation of recorded music online (low damages, procedural barriers to civil litigation and the absence of civil third-party website blocking injunctions) all of which force copyright holders to rely on the administrative and criminal enforcement routes instead.

Yet, administrative and criminal enforcement is not always forthcoming or consistent; similarly, civil courts have not been consistent in the treatment of certain types of online content sharing platforms with respect to copyright and the ISP liability limitation regime. More generally, the Chinese market is not yet fully open to Western investment and involvement in all activities relating to the music business.

Publishing sector: China is one of the main problematic countries in Asia regarding digital piracy.

Trade secret

It would be important to work for a specific legislation on trade secret protection and to see a lower burden of proof of trade secret owners requiring, e.g. only preliminary proof of each relevant aspect such as accessibility, security measures, illegal disclosure and value of the secrets. The companies would appreciate the Public Security Bureau at city level to establish a specialised task force or department dedicated to the reporting of trade secret cases from IP owners.

2) India

Music sector: 15th largest music market in 2018 by revenue to the music industry, however, it is still far below its full commercial potential due to the gaps in legal protection of recorded music (e.g. shorter term of protection than 70-years) and, most importantly, extensive and TRIPS-incompatible interference with the exercise of exclusive rights in recorded music which affects both the traditional offline markets for broadcasting (TV and radio) and the online music market (due to the WPPT-incompatible ministerial interpretation of the concept of broadcasting). India's copyright royalty setting board (slashing music royalty rates for radio broadcast licensing) as well as the compounding problem of insufficient copyright enforcement online (given the backlog of cases and the sheer volume of infringing activity) undermine the ability of the music industry to obtain full returns on their investment in content production. India should be elevated to Priority 1 group due to the regulatory action (DIPP memorandum of 2016) introducing a WIPO WPPT-incompatible interpretation of the law allowing digital music services to operate on the basis of a statutory licence for broadcasters in India instead of individually licensed, free-market commercial deals with record companies.

Publishing sector: India as China is the other major problematic country in Asia regarding digital piracy.

In addition to China and India, the other problematic countries in Asia are: Iran (which is not even in Berne and where there is also physical piracy), Saudi Arabia, Kazakhstan and Indonesia.

Fashion sector: the most critical issue concerns the corruption of customs offices which prevents an effective and concrete enforcement activity. However the Indian property office has evolved a lot in recent years, but much more needs to be done.

The same problems of corruption at customs level are also recorded in Thailandia, Vietnam, Cambogia.

3) USA

Publishing sector: in this country the enforcement is satisfactory but there are worrying case law trends on educational uses under the Fair Use doctrine and infringement in online marketplaces, many of which are US owned. Another issue is about services providing anonymization (i.e. Cloudflare).

PRIORITY 2 COUNTRIES:

a) Music sector

Argentina: unlicensed music services are widely available in the country due to grossly insufficient copyright enforcement action (hardly any administrative or criminal actions in the past years) and obstacles for rights holders to taking civil actions (especially online, where third-party injunctions to block copyright infringing websites are not easily available and local ISPs have resisted rights holders' applications for such orders). Argentina is the second most important music market in Latin America and should remain a focus country (priority 2) in view of the very poor level of copyright enforcement online.

Switzerland: Switzerland is an important music market in the heart of Europe, yet, it has not only failed to reform its copyright law and enforcement system to keep in line with that of its EU neighbours (e.g. to match the 70-years term of protection; to limit the private copying exception to copying from a legal source only; to enable third-party injunctions such as e.g. website blocking orders to tackle online infringement) but has also actively resisted the much-needed reform of the copyright enforcement system (such as enabling the processing of ISP addresses and personal data for the purpose of civil and criminal copyright litigation and law enforcement). Moreover, Swiss law maintains far reaching limitations on the ability of record companies and performers to monetise their broadcasting and public performance rights and the legislature is considering further roll-back of public performance rights protection which would be incompatible with Switzerland's obligations under the WIPO WPPT treaty.

South Africa: South Africa is the largest and most important music market on the African continent. Yet, it has not yet ratified the WIPO Internet Treaties and instead, it is on the cusp of adopting very concerning and very poorly drafted copyright law amendments which would undermine copyright protection, legal certainty and the freedom of contract in the creative sectors.

Ecuador: Ecuador should be elevated to the Priority 2 group because it has the worst IP (including copyright) legislation (so called "COESCI" code) across all of the Latin American countries and because its state-owned paid TV company, CNT, openly denies their legal obligations in respect of copyright licensing for use of recorded music. The COESCI Code, passed under the previous administration, is hostile to the very notion of private ownership of IP rights and it introduces a vast number of overbroad copyright exceptions, including an open-ended exception which is not legally certain or TRIPS or WPPT three-step test compatible.

Ukraine: Ukraine should remain in the Priority 2 group of countries given its continued defiance of its DCFTA obligations in respect of payment of broadcasting fees by State-owned broadcasters, slow pace of reform of the collective management accreditation system, failure to address a number of problems in the recent amendment of copyright

law (in 2018) and numerous concerning proposals in the parliament for poorly considered and poorly drafted further copyright law amendments.

b) Publishing sector

South America: the main problematic countries regarding digital piracy are: Mexico, Mercosur especially Paraguay and Bolivia, Chile , Perou and Panama, country where several servers of pirate services are hosted.

c) Fashion sector

Turkey: there is still a serious counterfeiting problem, but customs are starting to work better. Once the status of “well-known trade mark” is obtained, enforcement is much faster and more effective.

Kenya, Nigeria, Ethiopia: in these countries that are working as reference points for the manufacturing of the sector, it is important to monitor the protection of IP rights that could become critical; instead customs protection is practically non-existent, so it is necessary to work to create an effective and well-structured customs system.

PRIORITY 3 COUNTRIES:

a) Music Sector

Brazil: largest Latin American music market, yet the country has not ratified the WIPO Internet Treaties due to the long-standing, ideological hostility to copyright under the previous administration which affected also the FTA negotiations with the Mercosur countries; Brazil should remain on the Priority 3 list and should be urged to ratify the WPPT/WCT as part of any negotiations for accession to the OECD and any trade negotiations with the EU. On the positive note, there have been signs of improvement in the enforcement of copyright online with a few notable enforcement cases against unlicensed online music services.

b) Publishing sector

Africa: in particular French speaking countries like Togo and Guinea (physical piracy)