

## **Advisory Committee on Enforcement**

### **Fifteenth Session**

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### **NATIONAL AND REGIONAL EXPERIENCES WITH WIPO'S SUPPORT FOR CAPACITY-BUILDING ACTIVITIES IN THE AREA OF BUILDING RESPECT FOR IP**

*Contributions prepared by Albania and Dr. Bassem Awad*

1. At the fourteenth session of the Advisory Committee on Enforcement (ACE), held from September 2 to 4, 2019, the Committee agreed to consider, at its fifteenth session, the “exchange of success stories on capacity building and support from WIPO for training activities at national and regional levels for Agencies and national officials in line with relevant Development Agenda Recommendations and the ACE mandate”. Within this framework, this document introduces the contributions of Albania and Dr. Bassem Awad, Former Judge, Court of Appeals, Egypt, and Professor, Faculty of Law, University of Western Ontario, London, Canada.
2. Both contributions emphasize the benefits of customizing training resources for use in building respect for IP-related capacity-building activities. The contribution by Albania described the process of customizing the WIPO training materials *Investigating and Prosecuting Intellectual Property Crime* for use in Albania. The customized training materials provide an overview of the national legal framework and illustrate the influence of Albanian jurisprudence on the investigation and prosecution of IP infringement cases. The contribution also underscores the benefits of the tool in building up institutional capacities of training institutions, such as the Albanian School of Magistrates, which is responsible for training judges, prosecutors and investigators.
3. In his contribution, Dr. Awad reports on the development of the recently published WIPO Arabic Casebook on the Enforcement of Intellectual Property Rights. This collection of recent court decisions in the area of IP enforcement (with a particular focus on the civil and criminal enforcement of trademarks and copyright) allows judges in the Arab region to enhance their expertise in IP infringement disputes. Dr. Awad also comments on challenges encountered

during, and lessons learned from, the development of the casebook, in which he was involved as a reviewer.

4. The contributions are in the following order:

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## CUSTOMIZING WIPO'S TRAINING MATERIALS *INVESTIGATING AND PROSECUTING INTELLECTUAL PROPERTY CRIME* FOR USE IN ALBANIA

*Contribution prepared by Dr. Mariana Semini-Tutulani, Professor in Law and Head, Initial Training Program, Albanian School of Magistrates, Tirana, Albania\**

### ABSTRACT

This contribution provides information on the impact of the World Intellectual Property Organization's (WIPO) *Investigating and Prosecuting Intellectual Property (IP) Crime* training materials (the Manual), which was customized for use in Albania. The Manual gives a landscape of the national legal framework with a particular focus on the Albanian Criminal Code and Customs Code, as well as the Albanian laws on copyright and industrial property. The Manual has been used across various public institutions in Albania, thereby enhancing their cooperation. Indeed, the stronger the relations among justice institutions and public agencies, the fewer IP infringements occur. The usefulness of the Manual also shows in the way in which Albanian jurisprudence treats the investigation and adjudication of IP infringement cases. The Manual has proven especially useful in building up institutional capacities, which is one of the most important objectives of training institutions such as the Albanian School of Magistrates, which is responsible for training judges, prosecutors and investigators.

### I. INTRODUCTION

1. At the suggestion of the World Intellectual Property Organization (WIPO), and with the support of the General Directorate of Intellectual Property (GDIP), it was possible to prepare and publish *Investigating and Prosecuting IP Crime in Albania* (the Manual) based on the standard WIPO Manual. The Albanian Manual was published in November 2020 under the auspices of the GDIP in Tirana and subsequently distributed to the interested target groups of professionals.
2. The adaptation and publication of the Manual was especially important in Albania as there is reason to believe that intellectual property (IP) infringing activities, such as copyright piracy and trademark counterfeiting have become as lucrative as drug trafficking. This may be attributed to the fact that IP infringers have low overheads, do not pay taxes and evade customs or excise duties, enabling them to make significant profits that should accrue to the owner of the rights concerned.

### II. THE AIM OF THE MANUAL

3. The purpose of preparing this Manual was primarily to build up the capacities of professional groups that are tied to law enforcement within various institutions, such as economic crime structures in the state police, economic crime structures at customs institutions, prosecutors, judges of civil, criminal and administrative courts, GDIP and Copyright Directorate employees, as well as lawyers, bailiffs and others.

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\* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

4. The idea of adapting the training manual was immediately embraced by the GDIP, which considered the Manual a document that would increase the knowledge of the Albanian professionals on international obligations for the protection of IP rights and would facilitate the practical implementation of these obligations. The criminalization of infringements and criminal punishment of those who infringe IP rights remain the main purpose of this material. However, the combination of criminal prosecution with the claims of civil parties in the criminal process or in separate civil proceedings is a particularly effective path to protecting IP rights. The administrative route, which makes use of fines provided for infringements of rights, completes the network of instruments for identifying and punishing infringements.

5. The protection of the public interest and the protection of consumer rights are highlighted in all the issues covered by the Manual, and especially in the cases related to the counterfeiting of pharmaceutical and food products.

6. The Manual clearly demonstrates that there is an organized chain in IP crime. Indeed, IP infringements are committed by different persons with different levels of knowledge and with different forms of guilt, some of them being exploited by others. The guilt of the offenders who are part of the supply chain normally depends on their proximity to the source of the illegal goods: the most indisputable would be the first link of the chain, usually the manufacturer of the goods or product, then comes the importer and distributor, the warehouse keeper, the owner of the shop or warehouse and, at the end of the chain, there is the street vendor.

7. Professionals who have made use of the Manual have regarded it as a useful instrument and a practical guide focused on the treatment of judicial and investigative practice in criminal prosecutions in Albania, in particular in relation to the investigation and adjudication of concrete cases related to copyright and trademark infringement, including copyright piracy and trademark counterfeiting. The Manual also provides examples of documents related to the preparation of the indictment and the denouncer's statement, which have been adapted for use in Albania. These templates assist law enforcement officials to compile and prepare, in a unified manner, the documentation on the issues that follow.

### **III. THE ADAPTION OF THE MANUAL FOR USE IN ALBANIA**

8. The Manual was adapted for use in Albania on the basis of three parallel themes:

- The international legal framework that provides protection against IP infringements, based mainly on TRIPS, as well as the national legal framework based on the Albanian Criminal and Customs Codes, special laws for the protection of copyright and industrial property in Albania, and the by-laws that have been adopted in their implementation.
- Ways of protecting IP rights at the national level. In this aspect, the main functions of the national legal framework are to recognize and protect IP rights, to determine applicable instruments and legal remedies, to establish and operate law enforcement structures and to ensure the implementation of law enforcement procedures;
- Practical advice on the steps to be followed in the investigation phase and in the trial phase mainly by investigators, prosecutors and judges.

9. The Albanian language version of the Manual maintained the standard model prepared by WIPO. However, the customized version for Albania drew examples from the Albanian experience for each chapter, especially in relation to dealing with counterfeit products, copyright piracy and the obligation to pursue infringements of a criminal or administrative nature.

#### IV. THE STRUCTURE OF THE MANUAL

10. The Manual contains 15 chapters, in line with the model prepared by WIPO for other countries. An important piece of the Manual deals with the elements of a criminal offense based on the Albanian legislation, including the subjective elements of the offense, such as the expression of the intention, as well as the constructive knowledge of the consequences of a criminal offense. This part of the Manual also provides practical and didactic suggestions for prosecutors and investigators to identify the factors that should be assessed by legal professionals to identify the seriousness of the infringement and to exclude reasonable doubt as to guilt. A list of possible questions that can be asked to the people involved in these activities facilitates the transfer of knowledge to professionals and helps build their capacity.

11. Aspects related to the prosecutor's discretion give practical value to the Manual, which includes material on how to identify the perpetrator, formulate the charge, assess the burden of proof and consider possible alternative criminal charges.

12. Punishment remains an important aspect that aims to vindicate the infringed right, but also to prevent new infringements of the same kind. Reasonable and fair proportionality between the offense and the sentence is an important consideration for courts. The nature and extent of the damage caused, the extent of unfair competition in the market, the circle of persons involved in the offense and any associated criminal activity, or the extent and manner of their organization remain very important factors in determining whether the circumstances aggravate the offense or not.

13. In assessing the seriousness of the breach of the law, prosecutors and judges must take into account the specific actions that constituted the infringement of the right, for example whether the actions were related to human health or public security matters, whether the breach potentially caused casualties. They must consider the number of persons who participated in the criminal activity, as well as the possibility of involvement of organized crime groups and networks, and must evaluate the extent of the losses or the extent of the concrete or potential damage caused to the persons concerned, the type and size of the market where the infringing goods were traded, the impact on the market and whether the victim or injured person took reasonable steps to minimize the consequences of the infringement<sup>1</sup>.

14. The burden of proof is addressed in a separate chapter, which begins with the need to identify the right holder, the author and the owner of the IP rights, then continues with precautionary measures to secure and preserve evidence, before analyzing cases where the infringers are located beyond national borders or the infringement and the consequences of the infringement extend to several states. These elements related to the provability of the infringement have been addressed both in relation to trademark counterfeiting and copyright infringements.

15. The Manual also deals with cases of disposing of counterfeit or pirated goods, the manner of their confiscation, the interaction of customs authorities with the judiciary, the coordination of work with the economic crime police, etc. Ordering the destruction or disposal of these goods is in itself a legal remedy that protects the interest of the right holder from unfair competition and aims to prevent the phenomenon of further infringements committed by other infringers.

16. In cross-border cases, not only may infringements be of a greater magnitude, but the involvement organized crime also appears more sophisticated. These phenomena are occasionally associated with the criminal offense of money laundering. Mutual legal assistance and cooperation in these cases is one of the key success factors. The Manual facilitates

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<sup>1</sup> Whether the victim or injured person took reasonable steps to mitigate the consequence of an infringement is only relevant in calculating damages in civil claims within a criminal proceeding.

capacity building of its readers because it provides practical advice on the steps to be taken by the prosecutor and the judge in cases of cross-border organized IP crime.

## **V. TARGET TRAINING GROUPS OF PROFESSIONALS**

17. The Albanian School of Magistrates signed a memorandum of cooperation with the GDIP and included the Manual in training materials for judges and prosecutors while also making the Manual immediately part of its electronic and physical library.

18. Throughout 2021 and 2022, several training sessions were held targeting judges, prosecutors, lawyers and employees of law enforcement agencies. These sessions were developed in tripartite cooperation between WIPO, the School of Magistrates and the GDIP.

19. The Handbook was also distributed to magistrate candidates. It was used for the first time as practical material in the course that formed part of the first ever Initial Program (2021-2022) of the School of Magistrates, complementing the materials on IP crime.

20. The Manual remains a useful material for lawyers and state attorneys who partake in the training conducted jointly by the School of Magistrates and the State Advocacy and the National Chamber of Advocates.

21. An important target group that can benefit from this Manual is also that of professionals working in the customs administration, who can find great relevance to their daily work, especially related to the import and export of allegedly infringing products.

## **VI. CONCLUSION**

22. The preparation of the customized *Investigating and Prosecuting IP Crime* Manual facilitates the capacity building of professionals in the justice system, public administration, state police, customs system, as well as those in the network of freelance professionals, such as lawyers and bailiffs. The training material provides both theoretical and practical elements, legal and jurisprudential analysis, practical advice and models of acts and documents.

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## THE WIPO ARABIC CASEBOOK ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

*Contribution prepared by Dr. Bassem Awad, Former Judge, Court of Appeals, Egypt, and Professor, Faculty of Law, University of Western Ontario, London, Canada\**

### ABSTRACT

In a world increasingly based on knowledge assets, the judicial treatment of intellectual property (IP) rules and regulations is of critical importance to economic growth and policy development. The judiciary in the Arab region has limited experience in adjudicating IP cases owing, among others, to the lack of Arabic-language resources addressing legislation and court decisions from the region.

The WIPO Arabic casebook on the enforcement of IP rights provides a thorough analysis of a number of salient cases and best practices for adjudicating IP cases in the Arab region. This casebook is intended for use primarily by judges, magistrates and law enforcement officers.

During the preparation of this casebook, several challenges arose in relation to the complexity of adjudicating IP disputes in the Arab region and accessing relevant case law from domestic courts.

The casebook has been highly relevant to capacity-building activities and training for members of the judiciary and national law enforcement authorities.

### I. BACKGROUND: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THE ARAB REGION

1. Judicial decisions play an instrumental role in the elaboration and reform of domestic intellectual property (IP) regimes. Courts and judges are the main guardians of a fair and equitable IP system that fosters innovation and promotes the growth of national economies while respecting societal benefits. Given the economic significance and legal complexities associated with IP infringements, special consideration should be given to the adjudication of IP cases and the enforcement of judicial decisions.

2. According to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), enforcement procedures must be such as to permit effective action against any act of infringement of intellectual property rights (IPRs). In addition, the remedies available must be expeditious in order to prevent infringements and must constitute a deterrent to further infringements<sup>2</sup>.

3. The experience of IP adjudication varies from one country to another. The judiciary in the Arab region has limited experience of adjudicating complex IP-related cases. Most of the judicial systems in the region do not have specialized courts to manage IP disputes. Judges in courts of first instance and appellate courts are usually called to deal with IP disputes without

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<sup>2</sup> Article 41 of the TRIPS Agreement.

having received specialized training on IP. The lack of Arabic-language resources addressing or analyzing legislation and court decisions from the Arab region is another challenge in providing IP training to judges and law enforcement authorities.

4. In recent years, the need for a casebook compiling jurisprudence in the field of IP in the Arab region has become a priority for WIPO's Building Respect for IP Division (BRIP Division) in order to enhance expertise in IP disputes in the region. The development of this casebook also complements the activities to achieve Strategic Pillar 4 of WIPO's Medium-Term Strategic Plan 2022-2026 ("support governments, enterprises, communities and individuals to use intellectual property as a tool for growth and sustainable development") for the benefit of the Arab region<sup>3</sup>.

5. This casebook complements and adds to the WIPO publications on the enforcement of IPRs: the fourth edition of the casebook in English, the first edition of the casebook in Spanish *Jurisprudencia – La observancia de los derechos de propiedad intelectual*, and the second edition of the French casebook *Recueil de jurisprudence – L'application des droits de propriété intellectuelle*.

6. Preparation of the casebook followed the methodology adopted in previous publications by the BRIP Division on enforcement of IPRs. Each chapter explains basic IP principles in practical terms and examines selected cases to discuss how these principles could be applied in various contexts. In the casebook, similarities between judgments in Arab countries are carefully identified and, where appropriate, differences within the jurisprudence are highlighted.

7. An external IP expert from the region, the Honorable Judge Nehad Al Hussban, Chief of Al Salt Court and a Member of the Jordanian Judicial Council, was selected to develop the casebook on enforcement in the Arab region. Judge Al Hussban is the author of the adaptation of WIPO's training manual "Investigating and Prosecuting IP Crime – Training Materials for Law Enforcement Authorities and Prosecutors" for Jordan. This casebook was reviewed in accordance with the WIPO Publications Policy by an external expert, the Honorable Judge Bassem Awad, Judge (on leave) at the Court of Appeals of Egypt and Professor at the Faculty of Law of the University of Western Ontario in Canada.

8. The casebook is intended for use primarily by judges, magistrates and law enforcement officers.

## II. SCOPE AND STRUCTURE OF THE CASEBOOK

9. The main focus of this casebook is the civil and criminal enforcement of trademarks and copyright. There is limited discussion of patents and industrial designs owing to the small number of criminal and civil disputes in the target jurisdictions. The casebook does not include a review of administrative decisions of national IP offices.

10. Most Arab countries follow the civil law tradition, which is founded on a uniform application of an agreed set of laws. There is little scope for judge-made law in civil, criminal and commercial courts, although in practice judges tend to follow previous judicial decisions. Courts interpret and apply the provisions of the applicable law to the facts, and judicial precedents are given less persuasive weight.

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<sup>3</sup> See also Expected Result 4.3 ("Increased IP knowledge and skills in all Member States").



11. The casebook is composed of four chapters. The first chapter provides a general introduction of the various forms of IPRs and the common types of IP disputes. The second chapter contains an exploration of the infringement of copyright and related rights. The infringement of trademarks including the protection of well-known trademarks and unfair competition is examined in the third chapter. The fourth chapter provides a summary of the main disputes in the field of patents and industrial designs. Each of the last three chapters includes a brief explanation of basic principles and procedural rules, followed by the criminal measures (sanctions) and civil remedies (calculation of damages). Each chapter ends with an examination of the structure of provisional or interim measures as well the identification of the number of court orders from the Arab region.

12. The casebook provides a thorough analysis of a number of salient cases with references to other relevant cases in the Arab region. The casebook compiles over 329 cases from eight countries.



Countries	Number of cases
Egypt	60
Jordan	160
Kuwait	4
Lebanon	5
Morocco	37
Palestine	13
Qatar	2
United Arab Emirates	48
Total	329

### III. COMMON CHALLENGES AND LESSONS LEARNED

13. During the preparation of this casebook, several challenges arose in relation to the complexity of adjudicating IP disputes in the Arab region and the lack of sufficient mechanisms for collecting and disseminating court decisions.

14. Firstly, the author faced significant difficulties in collecting the court decisions in the area of IP as the jurisprudence is still emerging in the Arab region. Additionally, most of the judicial systems in the region do not have specialized IP courts from which to collect or access the

decisions issued in this area of law. The author had to review annual publications of Supreme Courts to find relevant IP-related decisions and sometime navigate appellate and lower courts to collect relevant decisions.

15. Secondly, another challenge concerns the judicial administration of cases involving counterfeiting and piracy. Most criminal IP enforcement cases in the Arab region do not reach the Supreme Court as they are not subject to appeal. Counterfeiting and piracy offenses in the areas of copyright and trademarks are considered as misdemeanors and end with the appeal phase<sup>4</sup>.

16. Challenges also arose in relation to provisional measures as the decisions of the appellate courts are definitive and cannot be reviewed by the Supreme Court. Moreover, disparity was found in the application of provisional measure decisions among lower courts and, when called to review these measures, the appellate courts usually focus on procedural elements rather than on substantive issues. Furthermore, the decisions of appellate courts are not usually published in most Arab countries due to lack of resources and diversity of decisions.

17. Thirdly, limited cooperation among the relevant authorities in the Arab region in providing court decisions presented some challenges.

18. To mitigate the above-mentioned challenges, the author used decisions and publications available online and relied on personal connections with judges and lawyers in other jurisdictions to acquire available IP-related judicial decisions.

19. In addition, the WIPO BRIP Division contacted the Member States in the Arab region to provide notable cases in the area of IPRs. However, the response rate was not as high as expected. Most courts in the Arab region do not classify decisions related to IPRs or distinguish them from other civil and criminal decisions, and therefore national authorities faced challenges to share the relevant cases with the BRIP Division.

#### IV. FUTURE ACTIONS

20. The casebook on the enforcement of IPRs in the Arab region was published in February 2020<sup>5</sup>, and has been highly relevant in the context of capacity-building activities targeting members of the judiciary and national law enforcement authorities. The casebook has also been used by the BRIP Division as well as by external WIPO experts to train judges and law enforcement authorities in various countries in the region. The casebook provides a collection of recent court decisions in the area of IP and best practices in adjudicating IP cases in the region. It would be advisable to update the casebook within five years to include new

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<sup>4</sup> Misdemeanors are defined as crimes punishable by up to three years of detention. The court in misdemeanor offenses is composed of a single judge at the court of first instance and appeals are held by a court consisting of three judges. According to Article 39 of the Federal Decree-Law No. 38 of 2021 on Copyright and Neighboring Rights of the United Arab Emirates “a penalty of imprisonment for a period of no less than two months and a fine of no less than ten thousand dirhams and not more than one hundred thousand dirhams, or by either of these two penalties, shall be imposed on whomever, without the written permission of the author or the holder of the neighboring right, or their successors, commits any of the following acts: (a) infringing one of the moral or economic rights of the author or the holder of the neighboring right (...) etc.” Available at: <https://wipolex.wipo.int/en/text/584938> (in Arabic). Another example is Article 113 of the Egyptian Law No. 82 of 2002 on the Protection of Intellectual Property Rights indicating that “without prejudice to any more severe punishment under any other law, shall be punishable by imprisonment for a period of not less than two months and by a fine of not less than 5,000 pounds and not more than 20,000 pounds, or by either punishment, any person who: (1) counterfeits a trademark registered in accordance with the law or imitates it in a manner which is likely to mislead the public; (2) fraudulently uses counterfeit or imitated trademarks (...)”. Available at: <https://wipolex.wipo.int/en/text/126540> (in English).

<sup>5</sup> It is available at: <https://www.wipo.int/publications/en/details.jsp?id=4536&plang=AR>.

cases related to emerging technologies and online IP-related crime, as well as to cover more jurisdictions in the region.

21. A copy of the first edition of the casebook was circulated to the relevant Permanent Missions to the United Nations Office at Geneva and two copies have been sent to the IP offices of the Arab countries. The BRIP Division recommended that the casebook be used in training for judges, magistrates and law enforcement authorities. It is strongly recommended that the casebook be added to the reference material of the judicial institutes in the Arab region; the Secretariat has been informed that some institutes have already done so.

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