

IPR protection, market surveillance and history of the UNECE Recommendation M

The UNECE [*Recommendation M on Use of Market Surveillance Infrastructure as a Complementary Means to Protect Consumers and Users against Counterfeit Goods*](#) suggests adding controls on identifying intellectual property rights (IPR) to traditional market surveillance inspections. This is in addition to mandatory regulatory compliance controls (such as for the safety of products), to entrust a market surveillance inspector (at the conclusion of a traditional market surveillance inspection) also to verify if a particular product is manufactured and/or placed on the market with a required authorization from an IPR owner.

When the UNECE Recommendation M was being developed (in the beginning of 2000's), the IPR protection task was primarily entrusted to customs and to police while the surveillance of specific sectors (like medications, music, film, etc.) was assigned to various other governmental bodies. The combat against counterfeiting was often considered an abuse of consumer confidence and thus the main fight against counterfeiting was assigned to consumer protection agencies. IPR issues were not, at that time, in the mandate of market surveillance bodies. From a market surveillance point of view, the safety of a product was tested against relevant requirements to allow it to be put on the market, irrespective of whether it is a genuine product or a fake.

The discussions at the UNECE Working Party on Technical Harmonization and Standardization Policies (WP.6)¹ on products safety controls at the national market level showed that IPR protection was a priority neither for customs nor police (due to insufficient financing). Regulatory assessment of products usually required specific technical competences and testing laboratories' support which these agencies generally lacked. At the same time discussions at WP.6 provided examples of counterfeit goods being uncovered during routine market surveillance checks, thus showing that market surveillance bodies could constitute an additional complimentary net against counterfeits.

For example, Ukrainian authorities informed WP.6 about a successful campaign in cooperation with an IPR rights holders. The company Procter & Gamble at that time had serious problems with counterfeits in Ukraine and they decided to stop their supplies to the local market. When they checked the situation six months later, they were shocked to still find counterfeited goods of their products in many shops. They decided to fight back by providing market surveillance bodies with a truck-mounted express test laboratory. The state inspector entered a shop and took or purchased a sample of the company's products (toothpaste, shampoo, etc.). This sample was immediately tested (by the express laboratory) and, if it was a counterfeit product, the whole consignment of goods was seized. According to Ukrainian delegates this procedure allowed to almost totally eliminate counterfeits of Procter & Gamble products.

Besides Ukraine similar experiences were presented by experts from Belarus, the Czech Republic, Moldova, the Russian Federation, and Slovakia. In all cases, counterfeit goods were exposed during

¹ WP.6 changed its name to "Working Party on Regulatory Cooperation and Standardization Policies" in 2004. This debate was initiated prior to that date.

routine market surveillance inspections and in some rare cases, counterfeits even met regulatory safety requirements (and, thus, they should have satisfied the tasks of market surveillance inspectors). But at the initiative of market surveillance bodies, they went beyond their formal terms of reference and raised an issue of the IPR infringement. The result of this debate within WP.6 was a general agreement among delegates and experts that any contribution to IPR controls by market surveillance bodies would be beneficial to both IPR holders and consumers.

An important factor in these discussions was that an additional IPR check by market surveillance bodies should not require additional financial resources. It was noted that usually counterfeits had anomalies (for example, in the quality of materials and in the workmanship) and an inspector could just convey his concerns to the IPR owner or to the relevant IPR body which would make a final decision on whether a product was genuine or not.

Based on the above discussions and practical experiences a suggestion on adding (where relevant) an additional IPR control layer to market surveillance procedures was tabled. Certain governmental experts expressed concern that involving market surveillance in the IPR protection process, might lead to a confusion about current institutional framework, regarding terms of reference and areas of responsibilities of traditional IPR bodies. At the same time, there was an overwhelming support for this suggestion from businesses / companies which called for any possible and reasonable assistance from all governmental bodies.

As there seemed to be a reluctance from some delegates on the revision of the mandates of existing IPR protection authorities, experts agreed that at that moment there was no urgent need on the formal inclusion of IPR into mandates of national market surveillance agencies and at the same time it was recommended to market surveillance agencies to add IPR controls to existing inspection procedures, wherever feasible, at their discretion and within their current activities (and budgets).

[Recommendation M](#) was tabled and approved by WP.6 in 2007.

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Questions to MARS experts:

1. What agency (agencies) are entrusted with IPR protection in your country?
2. Does your national market surveillance body have a mandate to execute IPR controls? (How is this task formulated?)
3. What is the experience of your national market surveillance body in spotting counterfeits during routine controls? (What is the approximate share of counterfeits in all products inspected?)