



February 18, 2010

VIA WORLD WIDE WEB

<http://www.regulations.gov>, docket number USTR-2010-0003

Ms. Jennifer Choe Groves
Senior Director for Intellectual Property and Innovation
and Chair of the Special 301 Committee
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Re: 2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 75 Fed. Reg. 2578 - 80 (January 15, 2010)

Dear Ms. Groves:

The International AntiCounterfeiting Coalition, Inc. ("IACC") submits the following in response to the request by the United States Trade Representative ("USTR") for written submissions from the public concerning the acts, policies, and practices of foreign countries that are relevant to its determination under Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 USC § 2242 ("Special 301") of countries which deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

Founded in 1979, the IACC is the world's oldest and largest organization representing exclusively the interests of companies concerned with trademark counterfeiting and

**The International AntiCounterfeiting Coalition • 1730 M Street, N.W. • Suite 1020 •
Washington, D.C. 20036**

Phone: (202) 223-6667 • Fax: (202) 223-6668 • www.iacc.org

Ms. Jennifer Choe Groves
February 18, 2010
Page Two

copyright piracy. Our members consist of over 200 corporations, trade associations, and professional firms and represent total annual revenues of approximately \$750 billion. Our brand and copyright owner members represent a broad cross-section of industries, and include many of the world's best known companies in the apparel, automotive, consumer goods, entertainment, pharmaceutical, and other product sectors. The IACC is committed to working with government and industry partners in the United States and elsewhere, to strengthen IP protection by encouraging improvements in the law and the allocation of greater political priority and resources, as well as by raising awareness regarding the enormous—and growing—harm caused by IP violations.

The IACC applauds the USTR and the inter-agency team for their ongoing work to improve protection and enforcement of intellectual property rights by our trading partners. We look forward to working with the USTR in its efforts to promote IP protection globally. We are available at any time for clarification of any issues raised in the attached submission.

Respectfully submitted,

A handwritten signature in black ink that reads "Bob Barchiesi". The signature is written in a cursive, slightly slanted style.

Robert Barchiesi
President

**The International AntiCounterfeiting Coalition • 1730 M Street, N.W. • Suite 1020 •
Washington, D.C. 20036**

Phone: (202) 223-6667 • Fax: (202) 223-6668 • www.iacc.org



Submission of the

International AntiCounterfeiting Coalition

to the

United States Trade Representative

Special 301 Recommendations

February 18, 2010

TABLE OF CONTENTS

INTRODUCTION

IACC Membership and Mission	1
Nature and Scope of Counterfeiting	1
Recent Developments	3
Common Concerns	4
Conclusion	4

PRIORITY WATCH LIST

China	6
Russia	29
Canada	33

SECTION 306 MONITORING

Paraguay	37
----------	----

WATCH LIST

Brazil	40
Mexico	44
Philippines	46
South Africa	49
Spain	52
Turkey	55

INTRODUCTION

The International AntiCounterfeiting Coalition, Inc. (“IACC”) submits the following recommendations to the Office of the United States Trade Representative (“USTR”) pursuant to a request for written submissions from the public concerning the acts, policies, and practices of foreign countries relevant to the determination by USTR, in cooperation with other participants in the Special 301 review, under Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 USC § 2242 (“Special 301”) of countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

IACC Membership and Mission

Founded in 1979, and based in Washington, D.C., the IACC is the largest and oldest association in the world representing exclusively the interests of intellectual property rights owners concerned with trademark counterfeiting and copyright piracy. Our members consist of over 200 corporations, trade associations, and professional firms, and represent estimated annual revenues of over \$750 billion. Our brand and copyright owner members consist of a broad cross-section of industries, and include many of the world’s best known brands across all product sectors.

Central to the IACC’s mission of combating trademark counterfeiting and copyright piracy is the education of the public and policy makers about the serious, and growing, threats posed by intellectual property crimes. Further, we seek to promote the adoption of legislative and regulatory regimes, and the application of resources necessary to implement and enforce such policy regimes. Critical to this mission is the belief that counterfeiting causes severe economic harm to both rights-holders and the economy as a whole, while also creating hazards to public health and safety.

The IACC seeks to engage governments throughout the world in dialogue on issues related to the protection and enforcement of intellectual property rights, assists in capacity building via the training of law enforcement and border control personnel, and conducts educational programs for policy-makers, rights holders, and the public at-large.

Nature and Scope of Counterfeiting

Though traditionally viewed strictly as an economic crime – and a concern limited primarily to large multinational companies – our understanding of trademark counterfeiting and

copyright piracy has evolved over time. Though it remains a significant economic concern¹, intellectual property crime is now viewed also as a significant threat to consumer health and safety, and to national security. Further, the trafficking in counterfeit and pirated products has been tied repeatedly to organized crime, child labor, and human trafficking.²

In spite of significant efforts by governments and private-sector rights holders, the trafficking of counterfeit and pirated goods continues to grow more severe. Anecdotal and statistical evidence demonstrate increases in the overall volume of this illicit trade, while the diversification of counterfeit manufacturing reported in previous years, remains a concern. Counterfeiting is unquestionably a global problem, requiring a coordinated, cooperative approach with our trading partners.

Among the greatest concerns reported by IACC members were the following:

- China and Russia

For several years, China and Russia have remained the countries of greatest concern to IACC members across all product sectors. While we have seen limited progress in some areas, the level of infringing activity in each country, in addition to severe deficiencies in the countries' enforcement and border enforcement regimes require our recommendation for their maintenance on the Special 301 Priority Watch List. Infringing goods from the People's Republic of China accounted for nearly 80% of all goods seized at the US border; that number rises to nearly 90% when also including seized goods originating from Hong Kong. Reports from IACC members in other regions around the world suggest that the PRC remains the primary source of origin for most infringing goods seized in other countries as well. Russia, likewise, remains a major source of frustration for IACC members due to a variety of issues including insufficient enforcement of existing laws, the need for legislative reform, insufficient training for prosecutors and judges, border control issues, official corruption, and a lack of political priority to address the entire range of problems experienced by rights-holders.

- Canada

In 2009, the USTR placed Canada on its Priority Watch List; based on member reports over the past year, the IACC strongly urges the USTR to maintain the Priority Watch List rating.

¹ See, generally, "The Economic Impact of Counterfeiting and Piracy". The Organisation for Economic Cooperation and Development. Available at: http://www.oepm.es/cs/OEPMSite/contenidos/ponen/InformeOCDE26feb09/2009_03_03_OECD_Study_on_Counterfeitin_g_and_Piracy.pdf

² See, e.g., Padavan, Sen. Frank. "The Counterfeit Connection – the counterfeit goods trade, intellectual property theft and terrorist financing: with a discussion of illegal immigration, alien smuggling and human trafficking." Available at: <http://www.nysl.nysed.gov/scandoclinks/ocm64225740.htm>

In spite of years of encouragement from the US and EU governments, and private-sector rights-holders, the Canadian government has failed to show any meaningful improvement in implementing an effective regime for IP protection. Numerous legislative deficiencies have been highlighted by IP owners in past years, and acknowledged by the Parliament. Regrettably, no concrete action has been taken to address these problems, and they remain a hindrance to rights-holders. This situation has been particularly frustrating for IACC members. Rights-holders are cognizant of the limitations on resources, sometimes severe, faced by many less-developed countries; such reasoning simply does not hold water in the case of a well-developed economy such as Canada's. The shortcomings seen in Canada are widely viewed as resulting from a lack of political will to take action necessary to ensuring an appropriate level of IP protection and enforcement.

- Online Piracy and Counterfeiting

As in previous years, the growth of the internet as a distribution tool for counterfeit and pirated goods is of growing concern for IACC members. The unauthorized digital distribution of copyrighted works, including books, music, motion pictures, and business and entertainment software presents a significant threat to the entire copyright sector. Similarly, web-based facilitation of counterfeit sales and distribution poses a number of challenges which necessitate creative and concerted approaches to enforcement.

Recent Developments

While IACC members have been encouraged by certain developments throughout the past year, including the continuing progress towards adoption of the Anti-Counterfeiting Trade Agreement, members' overall impressions were that little progress was made with respect to the problems identified in last year's submission. The IACC commends the USTR and the inter-agency team for their ongoing work to improve protection and enforcement of intellectual property rights by our trading partners. In particular, we wish to take note of the following:

- Anti-Counterfeiting Trade Agreement

The IACC supports the efforts of USTR in seeking the enactment of a new gold standard for cooperation, and in seeking a plurilateral solution to what is truly a global problem. ACTA recognizes that the fight against counterfeiting cannot stop at national borders, if that effort is to be successful. IACC urges the USTR to call on participating countries to make anti-counterfeiting enforcement a high priority and to provide the necessary resources to deter counterfeiting.

- Engagement of Foreign Governments

The IACC commends the efforts of the executive branch agencies for their continuing efforts to engage and educate foreign governments on the importance of intellectual property rights.

IACC staff and representatives of member companies have participated in a number of programs hosted by the US Patent & Trademark Office's Global Intellectual Property Academy, and had the opportunity to meet with visiting scholars and officials from foreign governments through programs sponsored by the Department of State. We believe that such direct interaction with policy-makers, prosecutors, and law enforcement personnel play a vital role in developing truly cooperative, cross-border solutions to the global problem of counterfeiting.

Common Concerns

The pages following include a table summarizing IACC's Special 301 recommendations for the years 2000 - 2010, and more detailed discussions of the problems experienced by IACC members in each identified country. As noted previously, many of these concerns remain unchanged since our filing in 2009 – they include the following:

- The need for substantially greater political will and resources to combat IP crime;
- The need for increased use of criminal enforcement tools, which create substantially greater deterrence than administrative measures, such as customs seizures, and economic sanctions that generate limited deterrence;
- The need for greater cooperation and coordination among different government enforcement bodies, including police, Customs, and other administrative enforcement bodies – both within countries, and across borders;
- The need for Customs and other enforcement authorities to provide IP owners with earlier access to information needed to pursue investigations and legal actions;
- The need for greater support from governments and the judiciary for creative enforcement tools, including third-party- and landlord- liability strategies; and
- The need for greater transparency regarding the results of government enforcement work.

Conclusion

The explosion of counterfeiting and piracy in recent decades represents one of the most significant threats to stability and growth of the global economy in the Twenty-First Century – stifling capital investment and economic development. Equally concerning is the growing threat to public health and safety as counterfeiters attempt to pass off fakes made with toxic, dangerous components. We appreciate the opportunity to share members' experiences through the Special 301 process, and look forward to continuing to work with the USTR and the rest of the interagency team in the coming year.

IACC SPECIAL 301 RECOMMENDATIONS, 2000 – 2010*

	00	01	02	03	04	05	06	07	08	09	10
Argentina	WL	WL	WL								
Australia											
Belize					WL	PWL	PWL	WL			
Bolivia				WL							
Brazil	WL	WL	WL		WL			PWL	WL	WL	WL
Bulgaria			WL		WL						
Canada	WL	OO	WL	WL		WL	PFC	PWL	WL	WL	PWL
Chile	--	WL	WL	WL		WL					
China	306	306	306	306	306	PFC/306	PFC/306	PFC/306	PFC/306	PFC	PWL
Costa Rica							PWL	PWL			
Columbia			WL								
Czech Republic								WL	WL	WL	
Greece											
Hong Kong		OO									
Hungary				WL							
India				WL	PWL	WL					
Indonesia		WL	PWL								
Italy	WL	WL	WL								
Japan		WL	WL		WL						
Jordan					WL						
Kazakhstan			WL								
Korea	WL								OO		
Kuwait						WL					
Lebanon					PWL						
Libya					WL						
Malaysia	WL	PWL		PWL	PWL	PWL	PWL	WL			
Mauritius					WL						
Mexico	WL	OO	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL
Pakistan					WL						
Panama				WL	WL	WL					
Paraguay		306	306	306	306			PWL/306	306	306	306
Peru								SM			
Philippines			PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL
Poland			PWL	PWL	PWL						
Romania					WL						
Russia	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Saudi Arabia			WL	WL	WL	WL					
Singapore	PWL		WL	WL							
South Africa		WL	WL	WL							WL
Spain											WL
Taiwan	WL	PWL	PWL	PWL	WL	WL					
Thailand	PWL		WL	WL	WL						
Turkey				WL	WL	WL			OO	WL	
Ukraine		WL	PFC		PFC						
UAE			WL	WL	WL	WL		SM	OO		
Venezuela					WL						
Vietnam			WL	WL				PWL	WL	WL	

* Abbreviation PFC: Priority Foreign Country; 306: Section 306 Monitoring; PWL: Priority Watch List; WL: Watch List; OO: Other Observations; SM: Special Mention

CHINA

Recommendation: Priority Watch Country

Introduction

IACC members continue to regard The People's Republic of China ("PRC" or "China") as the country presenting the largest and most critical concerns, both with respect to the local market as well as exports.

The latest statistics released by the Department of Homeland Security indicate that 79% of IP-infringing goods seized at U.S. ports of entry originated from the PRC. The total figure is 89% if imports from the Hong Kong Special Administrative Region are included—an increase of 3% from the previous year.³

While the level of counterfeiting of IACC member brands in China was serious for most members, the scope of the problem was generally the same as in 2008.⁴ As portended in the IACC's 2009 Special 301 submission, our members report that Chinese police, prosecutors and administrative authorities were reluctant to pursue action in a number of cases for much of the last year, likely in response to orders from above which discouraged taking on cases that might lead to the closure of factories, and subsequent civil unrest, during the height of the global financial crisis. Overall, however, the negative effects of reduced enforcement appeared to be compensated by lower consumer demand for products, and thus the feared explosion in the level of counterfeiting did not materialize.

³ See DHS statistics issued in October 2009 at

http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/seizure/fy09_stats.ctt/fy09_stats.pdf.

⁴ Industry surveys on the impact of counterfeiting in China for 2009 are not yet available. However, the annual survey of the Quality Brands Protection Committee (QBPC)—a China-based industry association in which many IACC members participate—indicated continued worsening of counterfeiting for multinational brand owners in 2008 as compared to 2007.

See, [http://www.qbpc.org.cn/uploads/ppt_files/2008%20MSC%20PPT%20\(Public%20Version\).pdf](http://www.qbpc.org.cn/uploads/ppt_files/2008%20MSC%20PPT%20(Public%20Version).pdf)
http://www.qbpc.org.cn/QBPC_Membership/20_1.html for a summary of the survey, the key findings of which generally suggest a slight worsening in perceptions of the problem:

- 83% of respondents reported that the severity of counterfeiting in China was the same or worse as compared to the prior year, compared to 79% in the prior year, while only 6% indicated the situation had improved for their companies;
- 63% of respondents believe the economic impact of counterfeiting on their business was significant or worse, compared to 56% in the prior year; and
- 81% of respondents believe the problem of exports of counterfeits was the same or worse than the year before, up from 76% in the prior year.

As in other countries, counterfeiters in China are continuing to step-up their use of the Internet as a platform for the promotion and sale of fakes. The recent spike in seizures of postal shipments by Chinese Customs corroborates with this trend. During the first three quarters of 2009, Customs seized 43,000 shipments of infringing goods as compared to 11,000 seized in all of 2008—an increase of almost 500%.⁵

Our members believe the root causes of the continuing unacceptable levels of counterfeiting remain the same as those explained in earlier IACC 301 submissions⁶:

- Over-reliance on administrative enforcement, caused mainly by non-deterrent penalties and a lack of adequate investigatory power of administrative enforcers;
- Inadequate resources for criminal enforcement;
- Loopholes in legislation, including those created by the threshold requirements under China’s current Criminal Code;
- The lack of more effective cooperation among different enforcement authorities, and obstacles to the prompt transfer of administrative cases to the Public Security Bureau (“PSB”) (China’s main police force), particularly Customs cases;
- Inadequate civil compensation and the lack of reliable access to preliminary injunctions; and
- An overly political approach to bilateral and multilateral dialogue, which has inhibited cooperation on the ground between Chinese enforcers and their counterparts in other countries.

Over the last year, progress was made towards cleaning up counterfeiting in retail and wholesale markets, as well as on the Internet, mainly through new rules and case decisions targeting intermediaries—or more specifically, landlords and B2B and B2C trade portals, such as Taobao.com.

In December 2009, the National People’s Congress (“NPC”) enacted a new Law on Tortious Liability, which generally mandates take-downs of advertisements for counterfeit and other infringing goods by ISPs and ICPs. Meanwhile, the State Administration for Industry and Commerce (“SAIC”) announced plans to issue regulations in 2010 that would require ISPs

⁵ See latest Chinese customs statistics at <http://www.chinaipr.gov.cn/news/government/573117.shtml>.

⁶ See http://www.iacc.org/resources/IACC_2009_SPECIAL_301_Recommendations.pdf

and ICPs to not only remove ads for infringing goods, but to also take appropriate measures to prevent them from happening in the first place.

Progress was realized through the issuance of groundbreaking decisions and a judicial “recommendation” from civil and criminal courts in Beijing against the Silk Street Market. These decisions also clarify the obligation of landlords to prevent infringements rather than simply intervening to stop them upon receiving notice. Meanwhile, authorities in Beijing and several other cities issued new administrative guidelines implementing the promised “Trademark Authorization System” in retail and wholesale markets. While the foregoing efforts have so far only resulted in uneven progress in reducing the visibility of fakes in Chinese markets, it is clear that government efforts to deal more comprehensively with counterfeiting in the markets are achieving greater traction.

Criminal investigations also commenced in 2009 against the Silk Market’s alleged evasion of tax, as well as against the ex-general manager, who has been accused by a vendor of instigating and benefiting from counterfeiting. It is hoped these provocative developments will heighten the overall attention given to landlord strategies in China, and hasten the implementation of the Trademark Authorization System in major cities throughout 2010.

Finally, the latest enforcement statistics from Chinese ministries suggest that police actions increased somewhat over the last year, but prosecutions and convictions fell dramatically. The reasons for this are unclear, and the IACC will be reviewing the data again once Chinese authorities issue full 2009 statistics in the coming weeks. Based on anecdotal reports from our members, there is a sense that the fall in prosecutions and convictions may be due to protectionism and fears over social instability.

Our members are however encouraged that the enthusiasm and skills of Chinese police for IP enforcement work are growing, and there is increasing optimism that, with greater resources and improvements in relevant laws and procedures, greater traction can be achieved in the war against counterfeiting in China.

The IACC is hopeful that all branches of the U.S. government with a hand in IP matters in China will intensify their engagement and dialogue with Chinese authorities, both with respect to joint efforts in strengthening cooperation on cross-border cases, as well as structural and legislative reforms needed to bring enforcement practices up to international standards.

Recent Developments

Nature of Problem

The scope and scale of counterfeiting of IACC member companies in China remained broad during 2009.

Counterfeiting was found by our members to be particularly severe with respect to pharmaceuticals, alcoholic beverages⁷, computer networking equipment, mobile phones⁸, computer peripherals, batteries, home appliances, auto parts⁹, apparel, footwear, sportswear, luxury accessories (including handbags, jewelry¹⁰, watches and eyewear), personal care, condoms¹¹, food, agricultural chemicals,¹² and cigarettes¹³.

⁷ For an overview of the latest developments in counterfeiting of spirits, see China Daily, February 1, 2010 at http://www2.chinadaily.com.cn/bizchina/2010-02/01/content_9405181.htm.

⁸ For an overview of some of the problems faced by mobile phone and handheld computer makers, see Reuters report, July 30, 2009, at <http://www.reuters.com/article/idUSTRE56TOBL20090730>. See also, New York Times report of April 28, 2009, at <http://www.nytimes.com/2009/04/28/technology/28cell.html>.

⁹ Auto companies report that wholesaling, export and, increasingly, production of fake auto parts is taking place on a large-scale in the city of Guangzhou, with production also taking place elsewhere in the province of Guangdong, as well as in Zhejiang and Jiangxi.

¹⁰ Counterfeiting of jewelry in 2009 appeared to peak particularly for Tiffany, which in just one case in mid-2009 seized over 26,000 fakes from a Shenzhen producer. See http://press.tiffany.com/Shared/Media/Doc/News_58.PDF.

¹¹ One recent press report quoted Chinese authorities as stating that one-third of the two billion condoms used in China each year may be fake. See http://www.postchronicle.com/news/original/article_212280378.shtml.

¹² In June 2009, over 150 tons of counterfeit fertilizer was seized in Vietnam. See http://www.itpc.gov.vn/importers/news/2009/06/2009-06-25.987536/MISNews_view/?set_language=en.

IACC members also reported continuing problems with exports from China of counterfeit pesticides on a large scale, with several enormous seizures taking place in Europe between April 2009 and January 2010. For example, in April 2009 Hungarian customs at the Budapest airport seized four tons of counterfeit pesticides arriving from Beijing on a Chinese aircraft. In this case, the fake pesticides had a dangerous 'flashpoint' of 24 degrees centigrade. In March 2009 Hungarian customs seized 57 tons of counterfeit pesticides originating from China, transiting Germany via truck. In late-March 2009 Hungarian customs seized another 10 tons of Chinese-made counterfeit pesticides along the Ukrainian border. And in early January 2010, German customs seized 28 tons of counterfeit pesticides arriving by vessel from China.

Rights holders in this sector have reported severe challenges over the past year in dealing with the costs and logistics for storage and destruction of fake agricultural chemicals—the exact contents of which are often hard to determine. They are also pressing for greater support from shippers, suppliers of raw materials and others involved in the supply chain for agricultural chemicals in order to address the problem.

¹³ For an overview in the latest developments with cigarette counterfeiting in China, see <http://www.slate.com/id/2221438>.

Information regarding counterfeiting last year in particular industries is listed below. Unfortunately it seems reasonable to assume that the overall scope of the problem is in the tens of billions of dollars.¹⁴

Pharmaceuticals

The scale of counterfeiting inside China was most dramatically illustrated by a case last year in Beijing involving 10 tons of fake diabetes medicines that were promoted mainly through TV marketing programs. Fortunately, the culprits behind this case were arrested and prosecuted.¹⁵

There were also continuing reports of rampant exports of fake drugs, particularly to Africa, which was recently described by the World Health Organization (“WHO”) as a “dumping ground for counterfeits”. The scope of Chinese exports of fake drugs to Africa was further illustrated by a report in June 2009 of the seizure in China of a shipment of drugs labeled “Made in India” that was intended for Nigeria, and which, if consumed, would have potentially harmed 642,000 people.¹⁶

The WHO also recently estimated that 30% of the medicines sold in developing countries are counterfeits.¹⁷ China also remains a major source of raw materials used in the manufacture of counterfeit pharmaceuticals (APIs) in other markets.

¹⁴ Although there have been no recent published studies to measure the scale of counterfeiting in China, the anecdotal evidence is overwhelming that a significant portion of global trade in fakes—if not the majority—has its roots in factories in China.

A recent global study on the impact of counterfeiting and piracy in G20 countries estimates the total cost to governments and consumers at €100 billion, annually, with 2.5 million jobs displaced. See report issued in May 2009 by Frontier Economics Ltd. at <http://www.iccwbo.org/bascap/index.html?id=30506>.

One eye-popping illustration of the global scale of Chinese-sourced fakes was a seizure in June 2009 at just one market in Russia, where the value of goods seized was \$2 billion. See http://rt.com/Top_News/2009-06-29/Authorities_shut_Europe_s_largest_market.html.

¹⁵ See China Daily, December 31, 2009 at http://www.chinadaily.com.cn/metro/2009-12/31/content_9251740.htm reporting on the criminal trial in the Xuanwu District Court in Beijing. See also Legality Daily (in Chinese), January 22, 2010 at http://www.legaldaily.com.cn/bm/content/2010-01/22/content_2033194.htm?node=20733. In a Wall Street Journal report of May 5, 2009, an experienced Chinese anti-counterfeiting investigator underscored the obstacles to enforcement posed by local protectionism as follows: “Counterfeiting is now so huge in China that radical action would crash the economy overnight [and] even destabilize a government where counterfeit factories and warehouses are often owned by local military and political grandees.” See <http://online.wsj.com/article/SB124146383501884323.html>.

¹⁶ See China Daily, June 13, 2009 at http://www.chinadaily.com.cn/china/2009-06/13/content_8280574.htm.

¹⁷ See BBC report of January 10, 2010, which also notes that counterfeiting in Africa is being fuelled by increasing travel and trade ties, generally, and facilitated by “porous border controls, outdated legislation and

Fashion / Sportswear

Counterfeiting of fashion and sports brands continues to attract the most attention from IACC members, with the main manifestations being online sales (both for domestic sale and export), retail and wholesale markets (see below), and factories.

Fake fashion and sportswear still comprise the bulk of counterfeit goods circulating globally, and trade therein remains perhaps the biggest magnet for IP criminals.¹⁸

IACC members in the fashion and footwear industry mostly consist of small and medium-sized enterprises (“SMEs”) whose fame far exceeds their profits and ability to fund extensive global enforcement programs. Most of these companies have limited or non-existent retail business in China itself, thereby making it all the more difficult to police their rights locally in a cost-effective manner.

Problem Regions

Within China, IACC member companies continue to report that the epicenter of counterfeiting—including production, wholesaling, exporting and retailing—is the province of Guangdong, its capital Guangzhou, and the abutting Special Economic Zone of Shenzhen.

Other regions that remain hot spots for counterfeiting include the wholesale and export center, Yiwu City, and Jinjiang County and Putian District in Fuzhou, both regions in Fujian Province known for the production of fake footwear that is sold globally.

The city of Yiwu in Zhejiang Province remains a continuing problem area for wholesaling and export trade for all types of products, fed by an expanding web of traders from the Middle East and Africa, thousands of which have established permanent offices in Yiwu.

weak enforcement mechanisms”. Fake medicines are also said to be increasingly sold at a similar price to genuine goods and with high-quality packaging, thereby making it harder to distinguish the two for pharmacists and consumers. See also a report at <http://africanliberty.org/pdf/Keepingitreal.pdf> suggesting that counterfeit medicines from China and India are killing over 700,000 people annually, mainly in the developing world. See:

http://www.bbc.co.uk/focusonafricamagazine/news/story/2010/01/100122_counterfeit_goods.shtml.

¹⁸ The scale of counterfeiting in fake fashion and sportswear was most recently illustrate by a seizure in early 2010 in Italy which netted an astounding 500,000 tonnes of fakes, including brands of many IACC members. See Reuters, February 13, 2010 at <http://af.reuters.com/article/worldNews/idAFTRE61C22H20100213>. The seized product was thought by police to be intended for distribution by Chinese traders based in Italy to buyers in other cities throughout Europe. The seizure was also said to be one of the biggest hauls of counterfeits ever conducted in Italy.

Finally, counterfeiting of fashion, sport and luxury goods in retail and wholesale markets in major cities, including Beijing, Guangzhou, Shanghai and Shenzhen, continues at critical levels. As explained below, however, there are definite signs of light at the end of the tunnel in this regard.

The Internet

IACC members remain dismayed by the scale of counterfeiting of their brands in stand-alone websites operated by local traders, most of whom operate as untraceable ghosts. Most of these traders offer products as well through the major Chinese B2B and B2C portals, the most common being Taobao.com (an affiliate of Alibaba.com), Eachnet.com (affiliated with eBay), Dhgate.com, Globalsources.com, and Madeinchina.com. Our members have recently begun enjoying much higher levels of cooperation from these portal operators in the form of prompt take-downs of sites offering suspected counterfeits. But members are reporting recidivism rates of 70% to 80% of most cases, thereby resulting in continuing drains of time and resources to follow up individual cases.

Regrettably, most Chinese B2B and B2C portals are still unwilling to adopt enforcement policies and procedures akin to those adopted by similar portals in other countries, or to otherwise adopt obvious technical solutions, such as word filter bans on repeat offenders, software that automatically takes down multiple listings, etc. These portals generally claim to lack the resources to do more, but experience in other countries has proved that portals are only likely to respond positively to pressure—whether it is the threat of litigation or government intervention.

To date, Chinese laws have been silent as to an ISP or trade portal's obligations to take down infringing material. However, as noted above, China's legislature recently enacted the Law of the PRC on Tortious Liability, which enters into effect on July 1, 2010, and will impose on ISPs the obligation to take down any data that infringes civil rights following receipt of notice.¹⁹

¹⁹ Article 36 of the Law of the PRC on Tortious Liability states:

“If an Internet subscriber or service provider uses the Internet to infringe upon the civil rights and interests of another, he/it shall bear tortious liability... If an Internet subscriber uses Internet services to commit a tortious act, the wronged person shall have the right to notify the Internet service provider that it should take such necessary measures as deleting, blocking, delinking, etc. If the Internet service provider fails to promptly take the necessary measures after receipt of the notice, it shall be jointly and severally liable with the subscriber for the additional damage... If an Internet service provider is aware that a subscriber is using its Internet service to infringe upon the civil rights and interests of another but fails to take necessary measures, it shall bear joint and several liability with the subscriber.”

Meanwhile, the SAIC recently announced plans to issue new regulations intended to assert its jurisdiction over a range of commercial activities undertaken over the Internet in China, including trademark violations and unfair competition. A draft of these regulations²⁰ would extend the duty of care of “network operators” to protect trademarks and trade names not only by stopping them upon notification, but by “taking measures to prevent violations from occurring”. If included in the final version of the regulations, local Administrations for Industry and Commerce (“AICs”) may be empowered to leverage B2B and B2C portals to adopt more uniform and effective measures to respond to brand owner complaints. The AICs might also end up playing a role—similar to that played by the EU and France—in mediating the negotiation of voluntary protocols for cooperation on enforcement.

Regrettably, most AICs now remain unwilling to intervene against trademark infringements on the Internet, unless the infringer can be found and infringements in the real world are confirmed to be taking place (i.e., the trademark owner is able to locate infringing goods in a warehouse or in transit). This is very difficult, even where significant investigation resources are made available to track the infringer down.

During 2010, the SAIC and local AICs are likely to limit their actions to the research and drafting of rules, as they believe more time is needed to study the problem and enforcement options.

Meanwhile, some degree of respite may be forthcoming as the Ministry of Industry and Information Technology (“MIIT”) and China’s domain name registration authority, CNNIC, recently issued rules that may help to some degree in investigating and enforcing against counterfeiters on the web. These rules require all ‘.cn’ domain name owners to provide copies of their business licenses and valid identification documents or risk the disconnection of their service. MIIT is also requiring that all ‘.cn’ websites or ‘.com’ sites linked to a China-based server obtain an ICP license. While rules in this regard have existed for several years, MIIT now appears ready to enforce them more aggressively, hopefully providing a new channel for trademark owners to seek the shut-down of websites that blatantly promote the sale of counterfeits.

Finally, at the local and national levels, Chinese police have begun expanding the resources spent in pursuing cyber-crimes of all types, including to some extent counterfeiting. But the number of cases they are able to investigate and the time and resources they are able to dedicate to cases are, however, limited at this stage. As noted above, administrative enforcement authorities still lack the tools to investigate and sanction most Internet traders.

²⁰ The draft regulations are available at <http://dailynews.sina.com/bg/chn/chnpolitics/phoenixtv/20100122/0011135240.html>.

2009 Enforcement Statistics

The IACC has in the past measured the success of the Chinese government and judiciary in making progress in anti-counterfeiting through a review of enforcement statistics focused on criminal action, including transfers of cases from administrative authorities to the police, police interventions, prosecutions by local procuratorates, and, ultimately, convictions. While the data issued by the government is still incomplete, the information available suggests that police were somewhat more active in 2009, but that prosecutors brought far fewer cases than in 2008, thereby resulting in far fewer convictions. These findings are consistent with anecdotal reports from IACC members, who believe their criminal complaints have been stymied by prosecutors, either due to protectionism or under orders from above to drop cases out of fears of social instability.

Criminal

- Local AICs (the most active administrative enforcement authorities for trademarks in China) transferred only 140 cases in the first 11 months of 2009, compared with 137 cases in 2008, thereby suggesting a small increase.²¹ The total number of AIC transfers still pales, however, in comparison to the total number of counterfeiting cases handled by the AIC in the first half of 2009—41,700 cases.²² The need for deeper reforms to promote more transfers to the police is illustrated further by statistics indicating that in 2008, local AICs handled 2100 cases where the value of the infringing goods was confirmed to exceed RMB 50,000—the basic standard for criminal conviction.²³
- There are no published statistics indicating the number of cases successfully transferred by local Customs to the PSBs. But IACC members report few customs transfers, and even fewer convictions arising from such transfers.

²¹ See AIC transfer statistics for the first half of 2009 at <http://www.nmipc.gov.cn/nmzscqshow.asp?id=5151>. Interestingly, 65 of the 140 reported transfers involved foreign rights holders—thereby suggesting foreign companies have been enjoying preferential treatment as compared to local trademark owners—a charge sometimes raised by domestic brand owners in industry roundtables.

²² See AIC seizure statistics for the first half of 2009 at <http://www.chinaipr.gov.cn/news/government/282824.shtml>.

²³ See AIC transfer statistics for 2008 at http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=271552&col_no=925&dir=200903.

Customs authorities have been frank in acknowledging that a customs transfers and investigations into export rings are hampered by a lack of police enthusiasm. And IACC members have been told that this lack of enthusiasm is due to a lack of resources and the presumption (clearly well-founded) that investigations into such cases will involve substantial cost and complexity, and with limited prospects for a successful outcome.

Fortunately, the General Administration of Customs and Ministry of Public Security have recently indicated to IACC members that research is being undertaken that should lead to the issuance of new guidelines in 2010 to address these problems.

And in the meantime, some local Customs officials have indicated a willingness to allow seized shipments to continue to their intended destinations with the understanding that this will facilitate criminal enforcement on the receiving end.

- Local PSBs handled 1468 IP cases in the first three quarters of 2009, thereby suggesting a 25% increase from 2008, during which police handled 1455 cases.²⁴
- Prosecutors handled only 909 IP cases during the first three quarters of 2009, thereby suggesting a 43% drop compared to 2008, during which 2107 cases were prosecuted.²⁵
- Chinese courts decided 1400 criminal cases in the first 10 months of 2009, suggesting a 40% drop in convictions as compared to 2008, during which 3326 were handled during the full year.²⁶

²⁴ See police statistics for January to September 2009 at <http://www.nmipc.gov.cn/nmzscqshow.asp?id=5151>.

²⁵ See prosecution statistics for January to September 2009 at http://www.sipo.gov.cn/sipo2008/mtjj/2009/200911/t20091119_481629.html.

²⁶ See court statistics for January to November 2009 at <http://www.chinaipr.gov.cn/news/government/276322.shtml>.

Administrative

Government departments issued the following statistics regarding administrative enforcement by local Administrations for Industry and Commerce (“AICs”), Technical Supervision Bureau (“TSBs”) and Customs, and although the figures are clearly incomplete, they clearly suggest an enormous increase in activity. Regrettably, this increase in activity does not yet appear to have resulted in noticeable reductions in the level of counterfeiting for most IACC members.

- TSBs throughout China handled 200,000 cases during the first 11 months of 2009, suggesting an increase of over 15% from 2008, during which a total of 180,000 cases were handled.²⁷ (NB: TSB statistics lump together counterfeiting cases together with those only involving product quality violations, including non-compliance with labelling and technical standards. It has, however, been broadly estimated by TSB authorities that at least half of their cases also involve the counterfeiting of trademarks.)
- Customs reported handling 43,000 seizures during the first three quarters of 2009, up from 11,000 for all of 2008.²⁸ This approximate five-fold increase is almost certainly due to an explosion in the number of seizures by Customs of postal shipments—i.e., a very small quantity of fakes sold by web traders.
- AICs were reported to have handled 41,700 cases in first six months of 2009, up from 56,634 for all of 2008, thereby suggesting a nearly 50% increase.²⁹

Civil

Brand owners have been availing themselves more of remedies available against IP violations through the civil courts, as evidenced by the 23% increase in civil actions in the first half of 2009, i.e., 13,700 cases.³⁰ This increase in civil proceedings appears due in part to greater confidence among brand owners in the Chinese courts and the perception that courts are now willing to issue compensation that might exceed litigation costs.

²⁷ See TSB statistics for actions during the first 11 months of 2009 at <http://english.ipr.gov.cn/news/headlines/594830.shtml>.

²⁸ See Customs statistics for the first three quarters of 2009 at <http://www.chinaipr.gov.cn/news/government/573117.shtml>.

²⁹ See AIC seizure statistics for the first half of 2009 at <http://www.chinaipr.gov.cn/news/government/282824.shtml>.

³⁰ See statistics for civil IP cases handled by local People’s Courts at <http://www.ipr.gov.cn/xwdt/xwtt/08/529973.shtml>.

IACC members have only recently begun testing the civil courts more routinely as a means of generating deterrence, as well as compensation for actual losses. They are, however, also more actively going to court to test the law and use it in more innovative ways—including against landlords and retailers. See below.

Transparency

The IACC again encourages the Chinese government to publish a wider array of enforcement statistics, including breakdowns by region and the type of crime. Doing so will help policy makers at the national and regional levels to respond more quickly and appropriately to challenges on the ground, and also provide rights holders—local and foreign—with the information required to provide the government and legislature feedback on how the current system is functioning.

Customs

IACC members continue to be impressed by the cooperative attitude of Customs officials at the national and local levels, transparency and openness to exploring new solutions to nagging problems—the more significant of which are noted below.

Police Transfers

The General Administration of Customs commenced a consultation with industry and the Ministry of Public Security in mid-2009 to explore new ways to increase the transfer of more cases from Customs to the PSB and to identify the infringers responsible for shipments before they have time to react to seizures.

IACC members are encouraged by the willingness of police and customs authorities to devote time and resources to addressing this priority (albeit difficult) issue.

Settlements with Infringers

In March 2009, the General Administration of Customs issued an amendment to its Implementing Measures for Customs Protection of Intellectual Property, introducing an innovation—rights holders are now encouraged to settle disputes with Chinese trading companies following the seizure of goods, and in a manner which effectively gives the rights holder the power to guarantee that a fine will not be imposed by Customs. It has been hoped that this innovation would lead to settlements under which brand owners might be able to

obtain quicker access to information from the exporter regarding the factory that supplied the goods and the intended buyer overseas. Brand owners have not yet begun testing out the new regulations in earnest.

Postal Shipments

During 2009, the General Administration of Customs initiated a campaign intended to intensify monitoring and seizure of postal shipments containing counterfeit goods. As explained below, Customs seizures of postal shipments soared in 2009, and it remains unclear whether this was due to closer monitoring or whether it simply reflected an increase in shipments by Chinese web traders.

The IACC looks forward to receiving details from Customs on the results of its enforcement campaign and the steps it is considering to address this critical area going forward.

Destruction of Fakes

Presently, Chinese Customs regulations mandate that if trademark markings can be deleted from seized goods, those goods may be auctioned off by Customs, such that the goods may end up back in the hands of counterfeiters for recycling once again as counterfeits.³¹ By contrast, Article 46 of the TRIPS Agreement explicitly requires WTO member countries to provide for destruction of fakes as the main option for disposing of seized goods, with removal of trademarks being allowed only in “exceptional cases”. The WTO panel decision issued January 26, 2009, sided with the U.S. claims in this regard, and the State Council recently issued draft regulations to implement the panel’s findings. Unfortunately, the draft limits the scope of change in this regard to seizures of imported counterfeits and excludes exports. IACC members naturally hope that the State Council will change its mind and extend the proposed changes to exports as well.

³¹ Art. 27 of the Customs Regulations of the PRC gives main priority to the recycling of seized goods: “Where confiscated goods that infringe on intellectual property rights can be used for the public good, Customs shall forward such goods to relevant public welfare organizations for the use of the public good. If the holder of the intellectual property rights wishes to buy them, Customs can transfer them to the holder with compensation. If the confiscated goods infringing on intellectual property rights cannot be used for public welfare and the holder of the intellectual property rights has no wish to buy them, Customs can, after eradicating the marks of infringement, auction them off according to law. If the marks of infringement are impossible to eradicate, Customs shall destroy the goods.”

Counterfeiting in Retail / Wholesale Markets

Counterfeiting of a wide range of consumer and industrial products remains endemic in many retail and wholesale markets throughout the country, including in markets offering fashion, electronics, sports and other types of products that were listed by USTR in its Special 301 report of May 2009. There are, however, indications that the efforts promised by China during earlier JCCT consultations and in prior “Action Plans” of the State Council are finally being realized.

Trademark Authorization System

The latest Action Plan, issued in April 2009³², expressed the intention to implement a “Trademark Authorization System” before the end of the year. And while national rules have not yet been issued in this regard, AICs and Intellectual Property Offices (“IPOs”) in a number of major cities have issued their own local rules, largely based on a model originally developed in Beijing. Under this model, landlords are required to monitor the brands offered by their tenants, and vendors are required to report to the landlords and (eventually) register in an online database all of the brands they offer, and maintain evidence they are authorized to deal in the brands or otherwise make available evidence of the source of the goods. AICs in certain cities have already established databases for these purposes.³³

AICs in other cities, including Shenzhen, Shanghai and Guangzhou, have reportedly followed the lead of authorities in Beijing by imposing fines or threatening to impose fines on landlords that fail to take reasonable steps to control counterfeiting by their tenants. Perhaps seeing an opportunity, some landlords have reportedly begun proactively

³² The 2009 Action Plan, available at <http://www.chinaipr.gov.cn/policy/documents/270651.shtml>, was issued by the State Intellectual Property Office (“SIPO”) which has taken over responsibility for IPR coordination from the Ministry of Commerce.

³³ Press reports confirm the implementation of the Trademark Authorization System in the cities of Beijing, Fuzhou, Datong, Lanzhou, Changzhou, Changji, Langzhong and Wuxi. See <http://www.dt.gov.cn/nr.asp?action=list&newsclass=20&id=421>; http://www.fjsen.com/a/2009-07/21/content_181546.htm; http://www.sipo.gov.cn/sipo2008/mtjj/2008/200804/t20080424_391613.html; <http://www.czgsj.gov.cn/baweb/show/shiju/bawebFile/61266.html>; <http://www.25logo.com/Html/20095-52.html>; http://www.cncw.cn/pdf/ncrbnew/html/2009-12/26/content_137038.htm.

monitoring their markets and intervening directly against infringers, presumably to improve the reputation of their markets among consumers.³⁴

Silk Market

But the bulk of public attention vis-à-vis counterfeiting in retail and wholesale markets over the last year has again been centered on the Silk Street Market in Beijing. And justifiably so, as developments there in recent months have spiraled in ways that have illustrated how counterfeiting can corrupt landlords and their management, and how intervention from Chinese courts, relying on innovative landlord liability principles, can effectively promote progress in such markets. In brief:

- In June 2009, the Beijing IP Office issued guidelines that introduced a more stringent Trademark Authorization System and also set out procedures for promoting cooperation between landlords and rights holders in cleaning up markets. The Silk Market predictably refused to implement the guidelines, claiming they lacked a clear legal basis.
- In July 2009, the General Manager of the market, Mr. Wang Zili, resigned, and a month later, he turned on the ultimate owner of the market, Mr. Zhang Yongping, alleging tax evasion and other offences. A criminal investigation into these violations is currently pending.
- In August 2009, a wholesaler who operated a warehouse in the Silk Market, Mr. Yang Changjun, was arrested following a raid which netted over US\$100,000 in counterfeits of IACC member brands. Mr. Yang was convicted of counterfeiting in early February and sentenced to three and a half years imprisonment. During his confinement and trial, he claimed Wang Zili instigated and funded his counterfeiting activities over a two year period.
- Chinese police arrested the ex-General Manager of the market, Mr. Wang, in December 2009, and an investigation by police is currently pending. It remains unclear if Mr. Wang's alleged scheme will eventually attract criminal liability for the Silk Street Market itself (as a corporate infringer).

³⁴ Landlords managing various computer malls in the Haidian District of Beijing have reportedly implemented a range of measures to prevent sales of pirated software. See <http://tech.sina.com.cn/it/2010-02-12/03213855749.shtml>.

- In early January 2010, the Silk Street Market announced plans to shut down 350 outlets that offer counterfeits, and restructure the market so that 70% of the space is dedicated to “counterfeit-free” products. The market did not commit to eliminating counterfeiting in the remaining 30% of the outlets, however.
- In late January 2010, the No. 2 Beijing Intermediate People’s Court issued five civil decisions against the Silk Street Market based on complaints filed in 2009 by American and European brand owners working in concert with IACC members. In these cases, the court held that the landlord had broadly acted in negligence, and that it should be held responsible for counterfeiting based on its failure both to stop infringements it was notified about by the brand owners, as well as its failure to prevent infringements from occurring in the future. The Silk Street Market has not yet appealed the decisions to the Beijing Higher People’s Court, but it is expected to do so.
- Last but not least, the Chaoyang Basic Court, which sentenced Mr. Yang Changjun issued a separate Judicial Recommendation—akin to a deposition—demanding that the Silk Market establish an action plan for preventing infringements such as those committed by Mr. Yang.³⁵

The above developments provide grounds for optimism that government and judicial authorities in Beijing will continue following through on efforts to leverage the Silk Market to change its ways, as well as to extend the duty of care owed by landlords in notorious markets to both rights holders and administrative enforcement authorities.

The IACC will be closely monitoring further developments in Beijing and offering its technical assistance to Beijing authorities in the coming months.

Obstacles to More Effective Enforcement

The concerns of IACC members regarding the main legal and practical obstacles to effective enforcement have already been extensively documented in prior Special 301 submissions. We

³⁵ The Chinese press has covered recent developments in the Silk Street Market in detail. For reports in English on related the developments, see: http://www.chinadaily.com.cn/bizchina/2009-08/06/content_8531176.htm; www.chinadaily.com.cn/cndy/2010-01/15/content_9324066.htm;

<http://www.globaltimes.cn/www/english/metro-beijing/update/business/2010-01/499701.html>;
http://www.chinadaily.com.cn/china/2010-02/09/content_9452397.htm.

summarize them below, and provide brief updates on the issues of particular concern to our members over the past year.

*Over-reliance on Administrative Enforcement*³⁶

IACC members believe that counterfeiting is criminal activity, no matter what the scale. But in China, due to historical and other factors, 98% of government enforcement resources for IP protection still lie with administrative enforcement authorities. These authorities lack adequate powers and resources to effectively investigate counterfeiting cases and generate more complete evidence of the actual scale of a particular violation. The lack of more complete evidence of the scale of a violation consequently results in fewer criminal actions, given China's system of thresholds for determining criminal liability and sentencing. The end result of most administrative actions is confiscation of the infringing goods (normally excluding raw materials and machinery used to make fakes), and the imposition of a fine that is normally non-deterrent, and quite often negotiated ahead-of-time so as to maximize the chances that the fine will be paid voluntarily by the infringer.

Inadequate Police Resources

Chinese policy makers who defend the current system argue that the PSBs have the discretion to investigate any counterfeiting case based on mere *suspicion* that the case value will exceed the minimum threshold of RMB50,000 (US\$7,100), and without the need for hard evidence that the threshold has already been satisfied. As in other countries, however, the PSBs generally lack sufficient manpower and material resources to conduct such investigations "from scratch", and thus, with the exception of cases that appear enormous in scope (*da an*), they will normally rely on evidence gathered during raids against factories and warehouses. Consequently, the more clever infringers (and almost all fall under the category of "clever")

³⁶ The main problems with AIC and TSB enforcement explained in earlier Special 301 submissions of the IACC include the following:

- (a) Seized product is frequently returned to infringers under improper circumstances;
- (b) AICs often demand case handling fees, without issuing receipts or providing regulations that confirm their legality;
- (c) AICs in some regions continue to deny rights holders access to penalty decisions and are reluctant to publish infringements on the Internet or otherwise;
- (d) AICs in most parts of China continue to refuse to process cases based on notarized purchases, insisting instead that all penalties must be based on a physical raid by their staff - who must at the time of the raid be wearing their official uniforms;
- (e) Regulations issued by the SAIC in 2007 require agents to present notarized and legalized powers of attorney authorizing the issuance of verification letters. Many regions—including Beijing, Guangzhou and Shenzhen--also require legalization of Powers of Attorney before they are willing to take action against infringers. These requirements do not apply to local trademark holders, thereby presenting questions over whether they comply with WTO rules on national treatment.

will take pains to keep the amount of finished products present in one location at any given time under the relevant threshold for criminal enforcement. They will likewise go to great lengths to avoid the seizure of contracts and other documents that explicitly indicate the level of prior transactions.

IACC members have been increasingly impressed by the professionalism and effectiveness of police and prosecutors in some of the more important hotspots in China—including various districts of Shenzhen, Guangzhou, Panyu, Beijing and Shanghai. However, the problems in these regions are clearly severe, and without more resources, the police will be unable to achieve the critical mass of people and data required to effect more rapid and fundamental change in the quantum of deterrence in these critical regions.

Absent a dramatic increase in manpower and materials resources, the IACC (again) recommends Chinese police accelerate plans to introduce specialized squads in hotspot regions to deal exclusively with IP crimes.

Weaknesses in Legislation

It is sometimes said that Chinese laws are fine, and that severe counterfeiting is simply caused by weak enforcement. While most provisions in Chinese law are clearly consistent with international standards, the IACC believes the law is critically deficient in certain ways, and that reforms are clearly desirable so as to maximize results at lower costs for both IP owners as well as government enforcers.

There are a number of areas where the IACC believes Chinese laws could be improved, and indeed modernized to help address new developments, such as the Internet and the latest best practices from other countries. But IACC members believe priority should be given in legislative reform efforts to two main areas: revision of the Criminal Code and reforms in evidence law.

Criminal Code Revision

As explained in the IACC's 2009 Special 301 submission, the use of numerical thresholds under China's 1997 Criminal Code contains loopholes that are too easily exploited by counterfeiters. As a result of these loopholes and the historic over-reliance on administrative enforcement, 99% of all enforcement against counterfeiters is left to administrative enforcement authorities, whose powers are limited and whose deterrent impact is normally inadequate. Consequently, counterfeiters quickly learn that the risks of infringement are far outweighed by the benefits.

China's 1997 Criminal Code and related judicial interpretations of the Supreme People's Court ("SPC") and Supreme People's Procuratorate ("SPP") established a basic threshold of RMB50,000 (US\$7,100) for determining whether a case warrants prosecution. IACC members have learned recently of proposals by the SPP and other judicial authorities to triple this threshold in cases involving vendors of fakes, but not producers. Further our members report that police in some cities have established their own local guidelines already adopting this increased threshold. And in some cities, a threshold five times higher—or RMB250,000 (US\$35,500) is being imposed for criminalization of customs cases. These reports are obviously very troubling.

The obvious intention behind these thresholds is to conserve judicial resources for truly more significant cases. As is well-known, however, even the tiniest of insects can make a house unlivable when the infestation reaches a certain level.

The problem with the current thresholds does not only rest with the basic amount (RMB50,000). Rather, they focus just as much on the method for calculating the value of infringing products involved, i.e., the "illegal business amount". Paradoxically, the SPC and SPP interpretations require calculation of products be based on the infringer's declared prices where there is evidence to prove transactions occurred or offers were made at such prices. In the absence of such evidence, the authorities are permitted to value products based on the victim's own retail price—which is normally a great deal higher than the infringer's intended sales price. This difference in prices routinely creates uncertainty as to how big the illegal business amount will ultimately be, thereby increasing unpredictability over outcomes and discouraging brand owners and police from investing greater resources into particular cases. The existence of different pricing methods also creates a window for legal argument, as well as protectionism and corruption, as local Pricing Bureaux are normally tasked with the job of valuing infringing goods.

China's reliance on thresholds under its 1997 Criminal Code was unsuccessfully challenged in a WTO dispute which ended in January 2009. But the WTO panel's decision clearly suggested that China's current level of thresholds and the method by which cases are calculated may not be TRIPS compatible. Putting aside the question of WTO compliance, however, our members believe the extreme levels of counterfeiting in China and the impact locally-made fakes are having on other countries present sufficient justification for the PRC government and legislature to begin the process of amending and updating its Criminal Code and related enforcement policies and procedures, not just to bring the law into compliance with WTO standards, but also to meet an objective societal need—both inside the country and outside.

China's legislature, the National People's Congress ("NPC"), is planning to amend the Trademark Law of the PRC ("Trademark Law") in late 2010 or early 2011, and a draft of the law should arrive at the NPC's Legal Affairs Commission shortly. The Trademark Law only governs civil and administrative enforcement, and not criminal enforcement. It is hoped, however, that the NPC will take the review of the Trademark Law as an opportunity to review the adequacy of all IP remedies being brought to bear on counterfeiting in a holistic manner, and to map out plans in the short-, medium-, and longer-term to bring about needed reforms.

Circumstantial Evidence

IACC members believe criminal as well as civil enforcement could be rendered more cost-efficient if Chinese authorities were more willing to take into consideration circumstantial evidence of the scale of counterfeiting.

In general, courts will focus mainly on the value of finished products that have been seized or contracts that explicitly reference the infringed brand. But they will generally give little or no weight in most cases to other circumstantial evidence, such as the presence of components, raw materials and coded documentation. Consequently, AICs, TSBs and police will routinely decide not to pursue cases in China that in the same circumstances would be deemed more than adequate in other countries.

Chinese law already permits courts to consider circumstantial evidence, and therefore the IACC does not take a position as to whether the existing Criminal Procedure Code should be amended. We do, however, recommend Chinese authorities be encouraged to focus on this apparent loophole in practice incidental to the proposed review of the Criminal Code.

Cooperation among Enforcement Authorities

As noted above, statistics demonstrate that the transfer of administrative cases to the police is still relatively rare.

To encourage more transfers, the IACC recommends greater cooperation among enforcement authorities during the stage of pre-raid investigations, rather than delaying cooperation until raids have been completed.

Civil Compensation

China's 2008 National Strategy on IPR and related policy papers from national ministries and the courts sent a clear message to local courts to increase damages awards in civil proceedings so as to ensure rights holders are able to cover litigation costs and also realize more reasonable compensation of harm caused by infringers. During 2009, a few IACC members reported obtaining damages awards which achieved these goals. Notwithstanding these awards, our members remain cautious about pursuing civil claims due to disappointing awards in various cases—the most recent being the five civil actions by fashion brands against the Silk Street Market, which netted between RMB20,000 and RMB35,000 per case (only US\$3,000 and US\$5,000).

Politicization of International Cooperation

The Chinese government has understandably sought to defend its reputation, sovereignty and system of laws in the course of negotiations with the U.S. and other countries over a range of IP issues. After the filing of the WTO dispute on thresholds in 2006, China took the regrettable step of suspending a wide range of cooperation projects with foreign governments and industry associations, thereby leaving IACC members with the impression that the Chinese government was unwilling and unable to consider differing viewpoints on matters of mutual concern in a business-like fashion.

IACC members believe that many of the issues which the Chinese government has regarded as “sensitive” are issues of equal concern to Chinese IP owners, scholars and enforcement authorities. The IACC therefore expresses the hope that the Chinese government will respond in a more open manner to dialogue over difficult issues, and that mutual exchanges and cooperation in bilateral and multilateral enforcement programs that are of great importance to consumers and rights holders will not be affected by temporary disputes over technical issues.

Trademark Law Revision

As noted above, the NPC is expected to review a proposed revision to the PRC Trademark Law in 2010, and a draft prepared by the Trademark Office is now under review by the State Council's Legislative Affairs Office.

The latest draft made available for public comment was circulated in June 2009, and the following are comments on the provisions relevant to anti-counterfeiting that are of greatest concern to IACC members.

As noted above, the IACC hopes that the NPC can be encouraged to exploit the amendment of the Trademark Law as an opportunity to generate current, accurate and objective data concerning the current scope of counterfeiting in China, the harm it inflicts on local and foreign rights holders and consumers, and the options for reform—including those that go beyond the scope of the Trademark Law itself.

Administrative Investigation Powers

The IACC lauds provisions in the draft Trademark Law that would grant the AICs the power to impose administrative fines against parties that refuse to cooperate with AIC investigations or that otherwise hinder their work. This provision is consistent with the Criminal Code, which prohibits parties from refusing to cooperate with criminal investigations.

Administrative Fines

The draft law would increase the maximum fines local AIC may impose for trademark infringements, up to 500% of the illegal business amount (the current maximum being 300%).

There is, however, reason to doubt whether the increase in maximum fines will have a significant deterrent impact. IACC members report that maximum fines are only imposed very rarely at present.

We therefore recommend consideration be given to adding provisions in the draft law that are more likely to result in heavier fines in a greater number of counterfeiting cases. This may be achieved by establishing minimum fines and by requiring higher fines in cases involving specific circumstances, including counterfeiting (as compared to other types of trademark violations), the production or sale of infringing items without the required business license (a provision that may assist in dealing more effectively with counterfeiters operating on the Internet), etc.

Statutory Damages

The latest draft of the law would increase the maximum statutory damages to RMB1 million from the current RMB500,000.

While laudable, IACC members believe that the maximum statutory damages should be increased further, perhaps to RMB 5 million, given the fact that there are infringers who are now generating profits far above this level and who are expert in keeping hidden admissible evidence of the scale of their profits.

Further, our members have generally found local courts to still be somewhat conservative in calculating damages in counterfeiting cases, and we are therefore skeptical that an increase in the maximum statutory damages will have the desired impacts of compensating rights holders and deterring other parties. Achieving this may instead require intervention from the SPC through the issuance of a new judicial interpretation that assists courts in setting damages awards.

Contributory Liability

The draft law appears to expand the scope of contributory liability to landlords, which is laudable and consistent with the Beijing Higher People's Court's decisions in favor of IACC members Chanel, Louis Vuitton, Burberry and other brands against the Silk Market in Beijing.

We recommend, however, that the draft law's provision on contributory liability impose responsibility not only in cases where the party had actual knowledge, but also deemed knowledge, i.e., where he "should have known" (ying zhi).

As discussed above, consideration could also be given in future drafts to explicitly require landlords and trading platforms on the Internet to take reasonable measures to prevent infringements, and not just stop them upon receiving notice.

Conclusion

The IACC recognizes that Chinese authorities have invested and continue to invest enormous resources in anti-counterfeiting—reflecting the needs of both consumers as well as trademark owners. It is hoped however that Chinese authorities will be willing to invest greater resources in criminal enforcement and commence efforts to update criminal and other legislations to address the challenges currently being confronted in both the real and virtual worlds.

RUSSIA

Recommendation: **Priority Watch List**

Introduction

For over a decade, IACC members have cited Russia as one of their countries of greatest concern for the protection and enforcement of their intellectual property rights. The issues cited by rights-holders are as varied as the types of counterfeit and pirated products which remain pervasive in the Russian market. As noted in prior comments filed by the IACC, significant concerns remain with regard to the overall level of enforcement, inadequate border controls, slow and sporadic prosecution of offenses, insufficiently deterrent penalties, official corruption, and poor coordination between government authorities. While there have been some bright spots in the past year which would indicate that the government is taking the issue more seriously, the overall volume of counterfeit and pirated goods in the market remains unacceptably high. For these reasons, the IACC recommends Russia's continued maintenance at the Priority Watch List level.

Scope and Nature of Piracy and Counterfeiting in Russia

As in recent years, intellectual property rights violations have remained a significant problem for Coalition members in Russia during 2009. Manufacturers in nearly every product sector represented by the IACC, including the chemical³⁷, apparel³⁸, automotive, tobacco³⁹, business and entertainment software⁴⁰, and consumer goods⁴¹ industries continue to report widespread importation for domestic consumption, as well as significant volumes of product

³⁷ See, e.g., Fabrotta, David. "Russia Market Update". <http://www.farmchemicalsinternational.com/magazine/index.php?storyid=1343>, discussing a seizure of approximately 100 tons of counterfeit pesticides valued at over \$1.3 million.

³⁸ See, "Russia's Textile Industry Grows After Shutdown of Counterfeit Goods Market". December 22, 2009. Available at: <http://www.petosevic.com/resources/news/2009/12/000265>.

³⁹ See, "Cigarettes being smuggled into Finland from Russia". Helsingin Sanomat, International Edition, citing estimates that factories in Kaliningrad and elsewhere produce upwards of \$1 Billion for export.

⁴⁰ See, Nowak, David. "Microsoft: Pirated software still in Russian shops". Associated Press. February 8, 2010. Available at: http://www.siliconvalley.com/latest-headlines/ci_14358373?nclick_check=1

⁴¹ See, Harding, Luke. "Russia fears embrace of giant eastern neighbor". The Observer. August 2, 2009. Available at: <http://www.guardian.co.uk/world/2009/aug/02/china-russia-relationship>.

being transshipped through Russia to other markets. Retail distribution, at well-known markets as well as brick and mortar locations, remains common. Similarly, online distribution of copyrighted materials remains problematic, and Russia's extensive borders allow for the smuggling of all nature of goods into and out of the country.

Legislation

In each of the last three years, the IACC has expressed its concerns regarding Russia's legislative regime, focusing primarily on deficiencies within the provisions of Part IV of the Civil Code. Those concerns raised by US- and EU-based rights-holders were largely ignored prior to the enactment of the legislation by the Duma, and their entrance into force in early 2008. However, the Russian government made numerous commitments during the course of negotiations of its WTO bilateral agreement with the US government, set forth in the IPR Side Letter⁴² signed by the two governments. These included efforts to bring Russian law into compliance with TRIPS standards and other pertinent international law.⁴³ Regrettably, these commitments remain largely unfulfilled. Delays have likely been tied to the uncertainty and confusion which seemed to characterize the Russian government's WTO accession efforts during 2009.⁴⁴ We urge USTR to continue pressing their Russian counterparts to undertake the reforms necessary to bring Russia's legislative regime into full compliance with international norms.

Enforcement

Perhaps of greater concern to IACC members than the legislative deficiencies noted above and in previous filings, is the continued need for better enforcement in Russia. Even if Russian statutes were remedied overnight, counterfeiting and piracy would likely continue unabated due to the need for significantly greater enforcement and deterrence against offenders.

⁴² See, U.S. Russia Bilateral Market Access Agreement – Side Letter on IPR, dated November 19, 2006. Available at:

http://ustraderep.gov/assets/World_Regions/Europe_Middle_East/Russia_the_NIS/asset_upload_file148_10011.pdf.

⁴³ See Id. at page 4.

⁴⁴ The Coalition for Intellectual Property Rights' 2009 IP Report newsletters provide a cogent timeline of developments related to Russia's WTO accession progress, including the announced withdrawal of its application, plans to reapply as part of a Customs Union with Kazakhstan and Belarus, and subsequent reversals. Available at: <http://www.cipr.org>.

Members describe Russian law enforcement as, “generally, not very active,” and cite insufficient resources, official corruption, and a lack of transparency as their greatest concerns. Corruption is viewed as having worsened in the past year; and some have stated their belief that this corruption is exacerbated by the large bureaucracy involved in some aspect of IP enforcement. One member reported some success in working cases with the FSB, but also reiterated that that agency’s lack of transparency and insufficient communication with the rights-holder, and with other enforcement agencies, hindered the progress of actions.

Where enforcement actions have been taken, rights-holders have decried delays in prosecutions, an overly formalistic approach by the courts, and the need for more and better training of prosecutors. Finally, Coalition members continue to report difficulties related to the disposition of seized counterfeits following successful prosecutions. Transparent procedures to provide for verification of the destruction of seized goods is essential to ensuring both that the products do not re-enter the stream of commerce, and in improving the confidence of rights-holders in the Russian enforcement regime.

One bright spot in the past year, and a source of some optimism for members, has been an apparent greater interest in IP training on the part of law enforcement, the judiciary, and customs personnel. More than 100 Russian officials participated in an internet piracy program held in Helsinki, Finland; comparable numbers of judges took part in an IP training event in Moscow, and the IACC is aware of programs tentatively planned in St. Petersburg for the Spring of 2010, and in Vladivostok later in the year. It is hoped that these programs are an acknowledgement of the need for, and indicative of a desire for, significant improvement in the area of IPR enforcement.

Customs

The IACC’s concerns with regards to Customs enforcement at Russia’s borders remain largely unchanged since our submission to USTR in February of 2009. Russia remains a significant end-market for counterfeit goods manufactured in China and Turkey. In addition, one member reported that its investigations have uncovered a large increase in the volume of counterfeit product being imported from the EU (via Hungary). In addition, members reiterated previous years’ concerns regarding transshipment of illicit product from China bound for Eastern European markets, along with large-scale warehousing and finishing of counterfeit goods. The latter issue has been made more problematic by the overly-formalistic interpretation of Russian trademark law.

One member offered, as an example, its effort to take action against an individual importing bulk, unbranded product that the infringer intended to package (in unauthorized packaging materials, bearing the rights-holder’s registered trademark) for subsequent export. While the individual was found to have large quantities of packaging materials bearing the rights-

holder's registered trademark, the rights-holder was informed that no action would be taken, because their trademark registration did not include the Class which covered "printed materials".

In light of their shared border, and the apparent influx of counterfeit product manufactured in China, the IACC has advocated for many years for greater coordination between Chinese and Russian customs personnel. We are pleased to have heard reports of improvements in this area in 2009, and of the signature of a cooperation agreement signed between the two governments. This is a positive step, though there remains, undoubtedly, much room for improvement.

The enactment and implementation of *ex officio* authority for Customs remains a priority for rights-holders, as does the need for greater transparency regarding the disposition of goods seized by Customs (as noted in the above enforcement section).

Conclusion

While IACC members have reported some modest improvements in Russia's IPR regime during the past year, the situation there has remained largely stagnant. The volume of counterfeit and pirated goods in the Russian market remains unacceptably high, while enforcement and border control issues continue to be a source of significant concerns to Coalition members. Accordingly, the International AntiCounterfeiting Coalition recommends that Russia be maintained on USTR's Priority Watch List in 2010.

CANADA

Recommendation: Priority Watch List

Introduction

For several years, the IACC's Special 301 submissions regarding Canada have focused on the need for substantive amendments to existing law, the reactive approach taken by Canadian authorities in response to trademark counterfeiting, and the need for the application of greater political will in dealing with a variety of impediments to effective protection and enforcement of intellectual property rights at, and within, the country's borders. During this same period, the Canadian government has appeared to be on the verge of taking a number of steps necessary to remedying these problems, yet on each occasion, such positive reforms have failed to materialize.

In spite of significant outreach and efforts from IACC members, both individually and in cooperation with rights-holder groups such as the Canadian Anti-Counterfeiting Network⁴⁵ and the Canadian Intellectual Property Council⁴⁶, we have seen no appreciable improvement in the area of IP enforcement over the past year. In its 2009 Special 301 Report, the USTR elevated Canada to its Priority Watch List. Based on IACC members' assessments, and in light of the continuing existence of serious obstacles to effective protection and enforcement identified in prior years, we recommend that Canada be maintained at the Priority Watch List level in 2010.

Nature and Scope of Piracy and Counterfeiting in Canada

Canada is an end market for imported counterfeit and pirated products and a trans-shipment route for such products to enter the United States. IACC members report that counterfeit and pirated products in Canada include aftermarket automobile parts, chemicals, fast moving consumer goods, apparel, leather goods, and jewelry, as well as software and entertainment products. As in the United States, counterfeit goods in Canada are sourced primarily from China, while pirated product is produced both domestically and imported from Asia. Internet piracy also remains a huge problem in Canada as well.

⁴⁵ <http://www.cacn.ca>

⁴⁶ <http://www.ipcouncil.ca>

Legislative Concerns

Three years ago, the Canadian Parliament undertook studies into the extent and effects of counterfeiting and piracy on the Canadian market and Canadian consumers. In early 2007, the Parliament's Standing Committee on Industry Science and Technology, and the Standing Committee on Public Safety and National Security held hearings and received testimony from a number of experts, including academics, industry representatives, and government personnel tasked with IP enforcement and consumer protection. These inquiries resulted in the tabling of two reports: "Counterfeit Goods in Canada – A Threat to Public Safety"⁴⁷, and "Counterfeiting and Piracy are Theft" in the House of Commons.⁴⁸ The reports concluded, *inter alia*, that counterfeiting was increasing throughout Canada, that the trade in counterfeit goods posed significant risks to the health and safety of Canadian consumers, that counterfeiting and piracy created a drain on the Canadian economy, and that these problems necessitated a strengthening of the country's legal regime and the application of greater resources for enforcement and deterrence.

The Committees presented a number of specific recommendations, including the following:

- The enactment of new criminal provisions related to the manufacture, reproduction, importation, distribution and sale of counterfeit goods;
- Strengthening civil remedies for counterfeiting and piracy infringements;
- Providing the Canada Border Services Agency the statutory authority to target, detain, seize, and destroy counterfeit and pirated goods on their own initiative;
- Allocating sufficient resources – both with regard to material and personnel – to government agencies including the RCMP and Department of Justice to effectively address counterfeiting and piracy; and
- Establishing a task force composed of prosecutors, law enforcement and Customs personnel to improve coordination among government agencies in dealing with IP crimes, and to enhance cooperation with private-sector rights-holders.

While the federal government publicly stated its support for the Committees' proposals, IACC members report that no significant, substantive steps towards implementing them have been undertaken to date. Canada's existing legislative regime, and the dearth of resources devoted

⁴⁷ The full report can be found at:

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=209854>

⁴⁸ The full report can be found at:

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>

to addressing what the government itself acknowledges as a growing problem, remain a major obstacle to the effective protection of intellectual property rights, and likewise, a major frustration to rights-holders.

Cooperation, Resources and Coordination

For a number of years, IACC members have identified border enforcement issues as a major concern in Canada – they remained so in 2009. The Canada Border Services Agency has been handicapped by previously identified legislative deficiencies, including a lack of *ex officio* authority to seize counterfeit goods. As a result, counterfeit goods flow largely unimpeded into Canada for retail distribution; and Canada continues to serve as a transshipment point for goods manufactured elsewhere, and intended for other end-markets including the United States.

Even where Customs officials have been able to identify counterfeit goods being imported into the country, they are unable to seize those goods on the basis of the infringement. In some instances, CBSA personnel have notified RCMP officers to undertake enforcement after the goods have entered the Canadian market. However, the RCMP continues to be drastically under-resourced, a fact which has hampered even limited enforcement initiatives. These issues have also been compounded by a continuing lack of interest in pursuing counterfeiting cases by Crown Prosecutors -- RCMP officers have been reluctant to pursue the cases because they have no expectation that their enforcement actions will result in prosecution. Finally, the Judiciary tends to view counterfeiting as a relatively minor offense; criminal prosecutions generally result in minimal fines, and convictions rarely result in jail time. This simply reinforces prosecutors' reluctance to pursue criminal charges in counterfeiting cases.

The trafficking of counterfeit goods in (and through) Canada is likely to continue to grow, absent the adoption of a more coordinated, cooperative approach. Regrettably, such a change is unlikely to be seen absent the application of significantly greater levels of political priority to address the long-standing issues. Crown Prosecutors' reluctance to bring counterfeiting cases is largely tied to the country's legislative regime, which CP's state, makes successful prosecutions difficult. The Canadian government must enact the legislative reforms necessary to empower border protection, law enforcement officers, and prosecutors.

Conclusion

Regrettably, little has changed in Canada since the IACC's 2009 Special 301 filing. IACC members have grown increasingly frustrated with the government's continued failure to act upon proposals that have been under consideration for several years. That frustration is compounded by the knowledge that enforcement personnel are willing to take action against

counterfeiters, but have been hindered from doing so by the government's inaction. The IACC recommends:

- That the Canadian Government implement swiftly the recommendations of the two (2) Standing Committees, and take action to remedy other such legislative gaps as identified in prior filings by the IACC;
- Increase the resources available to Customs, Police, and Prosecutors, particularly at key points of entry and large metropolitan areas such as Vancouver, Toronto, and Montreal;
- Provide additional training to Customs, Police, Prosecutors, and the Judiciary, regarding counterfeiting and piracy; and
- Work more closely with private-sector rights-holder groups to build public awareness about the impact of counterfeiting and piracy on the economy, and on Canadian consumers.

PARAGUAY

Recommendation: Section 306 Monitoring

Introduction

In spite of continued efforts in recent years to address a variety of problems related to IPR enforcement, IACC members believe that progress has been insufficient, and that continued monitoring under Section 306 is warranted. Members from a variety of product sectors including manufacturers of chemicals, fast-moving consumer goods, the apparel industry, and others have described moderate to severe problems in the country. Issues identified by member companies have included trademark infringement and counterfeiting, as well as end-user and institutional copyright piracy. Border control issues remain the single-greatest concern for rights-holders – Paraguay is still viewed by many as the single most important gateway into South America for fake products manufactured abroad.

While Paraguay has made great progress in recent years, further monitoring – particularly with regard to determining the effectiveness of the new penal code – is both necessary and desirable to ensure the country’s continued commitment to improving its IPR regime.

Nature and Scope of Counterfeiting in Paraguay

The problems identified by Coalition members in Paraguay are tied primarily to border control issues – for example, the manufacture and finishing of goods for export, export of components (including labels and packaging) to other end-markets in South America, and transshipment of goods manufactured abroad (primarily from China) to third countries. As in previous years, the exploitation of free trade zones by smugglers of counterfeits and other illicit goods remains a significant problem for Paraguayan Customs officials. Though some members report concerns related to retail distribution within Paraguay, these concerns are largely secondary to the cross-border issues identified.

Border Controls and Criminal Enforcement

Counterfeiters in Paraguay are widely reported to have adopted the sophisticated methods seen in other transshipment centers, including the large-scale trafficking of counterfeit labels and packaging separate from the physical goods with which they’ll be used in connection.

These issues have been exacerbated by two factors – Paraguay’s porous borders, and the continuing problem of official corruption.

Last year, the IACC reported on an advisory issued by the General Customs Administration (“GCA”) in late-2007, concerning the implementation of a trademark recordation system. That internal communication was followed by Resolution No. 101, dated February 22, 2008, which formally established the manner in which rights-holders could register their marks with the GCA. Such a system should be helpful in allowing Customs officials to work with rights-holders in identifying and detaining counterfeit shipments. Recent reports from IACC members indicate that the implementation of the system is still in progress, and delays in notification remain an issue at this time.

Resolution No. 101, included a requirement that upon notification by Customs of a possible IP violation, rights-holders must request a suspension of clearance proceedings within 12 hours, in order to inspect the goods. This short timeframe caused the concern of some rights-holders; in practice however, Customs personnel have generally been willing to provide a reasonable period of time during which rights-holders may request a suspension of clearance during which an inspection of the goods may be made. Notwithstanding the application of the requirement in practice, IACC members believe the resolution should be modified to comport with practice and reasonableness.

Further, Paraguay continues to lack adequate resources and technologies needed to facilitate the needed improvements in securing its borders. As noted in the IACC’s recommendations concerning Brazil, better coordination among the nations in the region – particularly those end-markets for the illicit products passing through Paraguay, is essential. In addition, the IACC reiterates its past calls for the adoption of tighter controls within Paraguay’s free trade zones and more strict regulation of import licenses.

Paraguay adopted new criminal provisions in 2008, with the passage of Law No. 3440/08; these included several amendments to Article 184, regarding the “Violation of the Intellectual Property Right”. It remains to be seen whether these amendments will have the effects intended. At present though, members report no significant decrease in the volume of counterfeit goods available in the market, or any other indicator that the increased penalties included under the new statute are having had their intended deterrent effect.

Conclusion

The Paraguayan government has taken important steps to fight product counterfeiting, but much more remains to be done to address the high volume export and transshipment of counterfeits. In the coming year, the IACC encourages the government of Paraguay to take the following steps towards improving its IPR regime:

- Make general reforms of its border control measures, including stricter regulation of import licenses, and requiring customs declarations to identify trademarks on shipped products;
- Continue and increase cooperation with customs and law enforcement authorities in neighboring countries of the Tri-Border region, in particular Brazil and Argentina;
- Provide a detailed breakdown of statistics regarding criminal enforcement actions taken by law enforcement personnel, volume and value of goods seized, total number of trademark counterfeiting prosecutions undertaken, fines assessed, and prison sentences imposed since the enactment of the new criminal provisions.
- Provide more resources to border control and law enforcement authorities; and
- Take steps to address transshipping of counterfeit products through Paraguay and its free trade zones, including controls on suspected counterfeit exports.

BRAZIL

Recommendation: Watch List

Introduction

USTR maintained Brazil on the Special 301 Watch List in 2009, noting improvement in the government's apparent commitment to fighting counterfeiting and piracy, while citing a continuing need for improved legislation, and outstanding issues of concern related to data protection, and patent rights, and the need for sustained enforcement actions. The IACC's recommendations to USTR included additional concerns, including the desire for Brazil to accede to, and implement, the WIPO Internet Treaties.

IACC members report, regrettably, that little progress has been seen in Brazil with regard to these concerns during the past year. As such, we recommend that Brazil be retained on the Watch List in 2010. As noted in prior years' reports, effective border control measures are a perennial concern, as is the overall volume of counterfeit and pirated goods in the domestic market. Furthermore, Brazil should take a leading role in working with its neighbors to more effectively stem the flow of counterfeit goods into the rest of South America.

Members with a presence in Brazil were unaware of any significant increase in the amount of resources allocated to the detection and enforcement of counterfeits during 2009. For several years, the IACC has urged the adoption of a centralized customs recordation system as a means of improving border protection and enhancing cooperation between Customs and rights-holders. To date, no such system has been implemented. Similarly, the Coalition's members have been disappointed by the government's failure to take action on a number of legislative initiatives introduced in recent years, and intended to improve IP enforcement in Brazil.

Nature and Scope of Counterfeiting and Piracy in Brazil

Brazil, the largest consumer market in South America with a population approaching 200 Million⁴⁹, remains a major end-market for counterfeit goods in nearly every product sector.

⁴⁹ See, Instituto Brasileiro de Geografia e Estatística website. Available at: <http://www.ibge.gov.br/english/> .

Counterfeits supplying the retail market in Brazil are primarily imported from abroad, easily evading detection at the country's long and porous borders; though there is also some domestic manufacture and finishing of infringing goods reported as well. Customs officials have had some success in recent years, intercepting illicit goods at well-known border crossings, but the volume of goods flowing into the country remains high.

IACC members continue to report that availability of counterfeit and pirated products across a broad range of industry sectors, including: apparel and footwear, luxury goods, automotive parts, personal care and health/beauty products, entertainment software, motion pictures, and music.

Legislation

IACC members continue to lament the failure of the Brazilian Congress to act on legislation intended to increase minimum prison terms for counterfeiting offenses. Bill No. 333/1999, introduced over a decade ago, has been viewed as a positive step towards removing a substantial impediment to the enforcement of IP rights in Brazil; but the Congress again took no action on the bill last year.⁵⁰ Brand owners are not optimistic about the prospects for action on this legislation in the coming year.

Brand owners have also noted their support in recent years for the introduction of legislation that would establish specialized IP courts in Brazil – both to alleviate the significant delays that rights-holders frequently experience in pursuing remedies, and to improve the expertise of the members of the judiciary handling such cases. No such legislation was introduced in the past year, and we have received no reports of any high-level or serious discussion regarding the adoption of such a plan.

Border Control and Enforcement Actions

IACC members continue to express concerns regarding are greatly concerned with the current level of enforcement in Brazil. While the number of raids appeared to be trending upwards in from 2006 – 2007, enforcement actions reportedly decreased in 2008. We are still awaiting final statistics for 2009.

⁵⁰ See IACC 2008 recommendations for discussion of how current penalty levels hinder prosecution of counterfeiting offenses. Available at: <http://www.iacc.org>

The issue of border enforcement in Brazil is a complicated one, with no easy solutions. It is clear however that the government must take a more coordinated approach to securing its borders – including better cooperation with regional partners (specifically, Paraguay, Chile, and Argentina), and with private-sector rights-holders.

Criminal Enforcement

In recent years, the IACC has encouraged the intensification of criminal enforcement actions, and the expansion of specialized anti-counterfeiting enforcement teams which have demonstrated some successes in Rio, Pernambuco, Sao Paulo, and Parana, and we reiterate those recommendations with this filing. Further, we would support making additional training in the area of intellectual property available to prosecutors and the judiciary. Throughout the past year, the IACC Foundation has been working with law firms and government officials throughout Latin America to conduct training and capacity building exercises. We would welcome the assistance of the US government in expanding the reach of such programs.

Public Education

Both USTR and the IACC have commented positively on the increased efforts in Brazil in recent years to raise public awareness of the problems associated with counterfeiting and piracy. Those efforts have included public- and private-sector initiatives, and they've been bolstered by extensive media coverage of enforcement actions by Brazilian media. Regrettably, throughout 2008, and continuing into 2009, media interest has waned; and while there have been some continued public awareness initiatives, they have been less widespread than in the past. The International Olympic Committee's announcement of Brazil as the host country for the 2016 Olympic Games provides a golden opportunity for rights-holders and the government to work cooperatively to address a number of the long-standing concerns of intellectual property owners, and to increase the public's understanding of how intellectual property benefits their economy.

Conclusion

The IACC recommends retaining Brazil at the Watch List level in 2010, due to the lack of necessary progress in a number of areas. Counterfeit and pirated goods remain at unacceptably high levels in the Brazilian marketplace, and a number of legislative and enforcement concerns raised in previous years continue – particularly with regard to border enforcement, the prosecution of offenses, and the imposition of deterrent sentences.

The IACC encourages the Brazilian Government to take the following action in the coming year:

- Devote significantly greater resources to customs authorities and law enforcement and increase specialized IP enforcement units throughout the country;
- Increase the number and consistency of prosecutions of IP crimes and ensuring deterrent penalties are imposed;
- Enact Bill 333/1999 to increase imprisonment and other penalties for criminal trademark counterfeiting;
- Develop and implement a centralized customs recordation systems to enhance cooperation and coordination between ports of entry; and
- Work more closely with the private sector in developing effective campaigns to increase consumer awareness of the threats posed by counterfeiting and piracy.

MEXICO

Recommendation: Watch List

Introduction

Mexico has been included as a country of concern for IACC members in their annual Special 301 recommendations for more than a decade, the result of a wide range of problems including manufacturing, large-scale retail distribution, and insufficient enforcement, among other rights-holder concerns. Members report that these problems continued, largely unabated, in 2009; and for that reason, we again recommend Mexico's inclusion on the Watch List in 2010.

Nature and Scope of Counterfeiting in Mexico

Members companies from a variety of product sectors continued to report problems during the past year – the most serious issues identified by IACC members in the apparel and luxury goods sectors, along with digital media, pharmaceuticals, food and beverage, and consumer electronics sectors. Retail distribution – both in traditional brick-and-mortar locations, as well as large flea markets – is widespread, serving both the domestic and tourist market. The overall level of crime appears to be contributing to problems experienced by brand-holders, as law enforcement resources have necessarily been forced to prioritize their allocation of resources to deal with violent crimes, kidnappings, and the growing influence of drug cartels.

Customs

As in 2008, IACC members generally spoke positively about their interactions with Mexican Customs in 2009. Customs personnel have been responsive to members' inquiries and willing to undertake enforcement; their effectiveness is hindered however, by limited resources, and statutory limits on their authority to detain shipment on the basis of IP violations. While Customs has undoubtedly demonstrated a commitment to enforcing intellectual property rights, these structural impediments have resulted in a large volume of counterfeit products reaching the consumer market; the government must take steps to allow more efficient action by enforcement personnel. The IACC strongly encourages the adoption

of a centralized customs recordation system, as well as the adoption of legislation to extend liability to customs brokers who knowingly facilitate the trafficking of counterfeit goods into and through Mexico.

Enforcement

As in previous years, IACC members report significant difficulties in their efforts to enforce their IP rights in Mexico. Rights-holders continue to be frustrated by the lack of deterrent penalties available via administrative enforcement actions – generally limited to nominal fines, or temporary closure of an infringing retailer’s shop. Absent an increase in the penalties available, administrative enforcement is likely to remain minimally effective.

Administrative actions have also been delayed, on occasion, by the bond requirements which many members feel are unduly burdensome and result in unnecessary delays. Additionally, members have stressed the need for improved coordination by enforcement authorities; as well as for more efficient adjudication of cases when they are pursued. Criminal prosecution has likewise been inconsistent, and the expertise of prosecutors remains a concern. As in administrative proceedings, members report delays in the adjudication of cases and a lack of transparency; other common concerns include the insufficient training of law enforcement officers and corruption.

Conclusion

The Mexican government has made significant strides in addressing the problems of counterfeiting and piracy, but much work remains to be done. The IACC supports the inclusion of Mexico on USTR’s 301 Watch List in 2010, and encourages the Mexican government to take the following steps in the coming year:

- Improve the resources and tools available to border enforcement authorities;
- Improve the efficiency of judicial and administrative proceedings to reduce significant delays in adjudication;
- Work more closely with rights-holders in the private sector to obtain IPR training for law enforcement and prosecutors;
- Undertake public awareness campaigns to increase consumer understanding of the harms caused by piracy and counterfeiting.

PHILIPPINES

Recommendation: Watch List

Introduction

Each year since 2002, the IACC has recommended the inclusion of the Philippines at either the Watch List or Priority Watch List level; in 2009, the Coalition's recommendation was the former. USTR's retained the country on the 301 Watch List, and announced an Out-of-Cycle Review, the results of which are currently pending. While we acknowledge that the Philippines has made progress with regard to some issues that have been raised by the IACC and others within the Special 301 context, rights-holders continue to report a significant number of outstanding issues. For this reason, the IACC supports USTR's retention of the Philippines at the Watch List level.

Nature and Scope of Counterfeiting in the Philippines

For several years, IACC members have lamented the need for increased resources for enforcement, as well as substantial delays in the judicial system, the need for greater transparency, and widespread retail distribution. Coalition members from a variety of product sectors – most notably fast-moving consumer goods, food and beverage, apparel and automotive manufacturers – are affected by trademark counterfeiting; while online distribution and hard goods piracy remains a severe problem for software publishers, and film and music producers.

Enforcement

While the government has reportedly taken steps to substantially increase enforcement actions taken throughout the past year⁵¹, reports from member companies do not indicate any significant decrease in the availability of counterfeits available in the market. Further, members report that retail-level sales have continued largely unabated in notorious markets such as Greenhills; and that law enforcement has frequently been reluctant to take action against vendors. In addition, some members have noted concerns regarding corruption,

⁵¹ See, "Business As Usual Despite Out of Cycle Review – IP Philippines". May 4, 2009. Available at: http://www.ipophil.gov.ph/htm_doc/pressrelease05072009.html

which is viewed as a contributing factor to law enforcement's reluctance to take action in some cases.

Judicial System

Undoubtedly, the most frequently cited concerns by IACC members in the Philippines are tied to the judicial system – most notably, the significant delays experienced by rights-holders pursuing civil or criminal actions against counterfeiters. To give an example of the drastic nature of these delays, it is worth noting that currently, multiple Coalition members have IPR cases pending in the Philippines which pre-date the IACC's first inclusion of the country in its Special 301 recommendations to USTR, in 2002. Chief Justice Burger once stated that, "A sense of confidence in the courts is essential ..." and that one of the things that could destroy that confidence is "... that people come to believe that inefficiency and delay will drain even a just judgment of its value [.]"⁵² The delays experienced by rights-holders in the Philippines continue to undermine the faith of rights-holders in the Filipino market and in the government's commitment to addressing IP offenses. These deficiencies in the judicial system must be remedied to ensure that the intellectual property rights held – whether by Americans, Filipinos or others – are to remain meaningful rights.

Members were also single-minded in their belief that many judges and prosecutors lack sufficient training to deal with IP-related cases, and that this deficiency has been a contributing factor in the delays.

For several years, the IACC has advocated for the re-establishment of specialized IP courts in the Philippines; we were pleased to see that the government has taken steps in this direction during 2009. As noted above, in regard to the reported increases in enforcement, the re-establishment of the courts alone will be insufficient to make a significant dent in the level of counterfeiting and piracy in the Philippines. It must be accompanied by a commitment to ensuring that judges and prosecutors are properly trained. Further, those officials must demonstrate an ability to, in fact, move cases more promptly through the system. Absent such an improvement, IACC members will be reluctant to support the country's removal from the Watch List.

Border Control

IACC members' opinions have been divided with regard to customs enforcement and border control initiatives in Philippines during the past year. Some members have commented

⁵² Burger, Warren. "What's Wrong With the Courts: The Chief Justice Speaks Out, U.S. News & World Report (vol. 69, No. 8, Aug. 24, 1970) 68, 71.

positively about improvements in the level of cooperation and support received from Customs personnel throughout 2009. Though they have noted concerns regarding manpower and other resources dedicated to securing the country's borders, some indicate a belief that those personnel currently tasked with customs enforcement have performed adequately, and have had some success in seizing infringing goods.

Conversely, some IACC members reported continuing problems with Customs efforts in the Philippines, particularly with regard to trafficking of components and packaging, and in seeking enforcement against goods in-transit. Others report that corruption remains a concern. Finally, some members have noted that although Customs appears to have improved its enforcement efforts, any such improvement has been largely offset by the fact that the judicial system's inefficiency, and Customs' difficulties in obtaining verified identification of importers, makes follow-up criminal investigations and prosecutions a rarity. As such, the confiscation of goods by Customs becomes little more than a cost of doing business for counterfeiters, and in turn, has little effect on the overall flow of counterfeit goods into and out of the Philippines.

Conclusion

The IACC acknowledges the progress that has been made by the government of the Philippines in recent years, but believes that that progress remains insufficient to justify the country's removal from the Special 301 Watch List. In 2010, the IACC encourages the Philippines to take further action to improve the efficiency of the adjudication of intellectual property cases, and to undertake targeted enforcement action against trademark counterfeiters and copyright pirates operating in large retail markets throughout the country.

SOUTH AFRICA

Recommendation: Watch List

Background

Though South Africa has not appeared on USTR's Special 301 list since its removal from the Watch List in 1999, IACC members are growing increasingly concerned with the protection and enforcement of intellectual property rights in the country. Historically, South Africa has been a large importer and distributor of pirated software and entertainment products as well as a hotbed of trademark infringement affecting a wide variety of products. The judicial system is slow and remains a difficult avenue for IP owners seeking to enforce their rights. Member investigations indicate that much of the pirated and counterfeit product in the country originates in Asia, with product most frequently sourced from China.

Nature and Scope of Counterfeiting and Piracy

Coalition members report the continued presence of pirated optical disc products, most notably in the entertainment software and other entertainment sectors.

These include imports of industrially-produced discs and locally-burned discs, many of which are sourced from downloaded copies on the Internet. Members report ongoing and significant problems in this area, in particular burning by retail stores and "to-order" Internet sites.

In addition, the proliferation of Internet sites offering downloads of pirated copyright material has increased significantly over the past few years. One member reports several hundred downloads of illegal copies of its entertainment software each month. Overall, software piracy in South Africa results in billions of lost Rand per year in legitimate sales.

One particular pirate has eluded all enforcement efforts by software and entertainment rights-holders in the past several years. Even in those rare cases where the rights-holder was able to obtain a judgment against this pirate, the individuals behind the operation were able to elude justice by taking themselves and their assets underground—and yet somehow continue to operate via the Internet. Attempts to obtain reliable information as to the identity of the operator of this website and where the operations are based has led to dead ends, and the costs to track them down are financially prohibitive, requiring large investments in forensic investigators and the like. Searches of the sources behind the site have resulted in

false information such as use of an actor's name as the owner of the site. Further, this group has been linked to a network of piracy dating back years—this same website has been owned by various known pirates in South Africa for many years and has continued to operate despite judgments, investigations, and the like. Attempts to get the website blocked have also proved burdensome and difficult under the judicial system and it remains active despite repeated measures against them from rights-holders. Delays in current investigations continue. Not surprisingly, rights-holders are frustrated—even when investigations take place and judgments are obtained, the legal system within South Africa still makes the enforcement of those judgments nearly impossible and allows these pirates to elude responsibility for their infringing activities and makes deterrence of their actions meaningless.

Members report that South Africa continues to be a haven for counterfeit goods in a variety of product sectors, including clothing, sporting goods, sunglasses and the like. These goods, like piracy of copyrighted material, flood the market with illegitimate products and destroy the chance of any development of a healthy marketplace for legitimate goods. This is of particular concern with the FIFA World Cup scheduled to take place in South Africa later this year. Legitimate manufacturers harbor concerns about the potential loss of sales during such a high-profile and widely-attended event.

Enforcement, Judiciary, and Customs

While enforcement has improved in recent years, the procedure of cases through both the criminal and civil courts remain slow. Rights-holders would encourage a review of judicial procedures to improve the courts' efficiency, decrease delays, and minimize the burden placed on IP owners seeking to enforce their rights. Costs associated with court proceedings and proof requirements remain burdensome; and even in cases in which the rights-holder prevails, the penalties imposed remain too low to serve as a significant deterrence to recidivism (or as a warning to other similar offenders).

In one example provided by a member, an individual trafficked in illicit goods – both hard goods, and online distribution – for a number of years, in spite of criminal and civil actions being brought.

The Counterfeit Goods Act has helped; and while the police/inspectors operating under the commercial crimes unit/DTI are generally helpful, intellectual property infringement remains high. Our members also report that the costs of enforcement, coupled with the amount of saturation of pirate and counterfeit goods in the market, render their attempts to provide a clean, healthy marketplace extremely difficult. Ironically, this results in a never-ending cycle of activity: owners, frustrated by lack of improvement in the market, withdraw

from their attempts to clean the market and provide legitimate goods, thereby providing a larger market share to the pirates and counterfeiters.

While IACC members have in the past frequently noted problems with Customs enforcement – a problem likely exacerbated by South Africa’s expansive borders – members have more recently noted greater cooperation from Customs. This may be attributable to a desire to clean-up problems prior to the World Cup (similar to efforts seen in China prior to the Beijing Olympics), but it is seen as a positive sign, regardless of the motivation.

Conclusion

The IACC is including South Africa in its Special 301 recommendations for the first time since 2003, largely due to concerns related to the significant penetration into the market of counterfeit and pirated goods, along with an enforcement regime viewed as slow-moving and minimally-deterrent. In the coming year, IACC members hope to see the following:

- Continued pressure by law enforcement and Customs to decrease the volume of counterfeit and pirated goods in the market;
- A review of current judicial procedures to identify methods for improving the efficiency of courts in handling both criminal and civil actions;
- Judicial training programs focused on familiarizing judges and prosecutors with the negative effects posed by counterfeiting and piracy, and the need for deterring penalties;
- Increased engagement between the government and rights-holders, with an aim towards increasing public awareness about the importance of intellectual property.

SPAIN

Recommendation: Watch List

Background

In its 2009 Special 301 Report, the US Trade Representative placed Spain on the Watch List citing a number of ongoing problems in the country's IPR regime, including severe Internet piracy in the country, insufficient enforcement (including a lack of criminal cases), poor deterrence and poor legal tools for intellectual property owners to enforce their rights. Regrettably, IACC members reported continuing problems in these previously-noted areas, in addition to significant concerns involving trademark counterfeiting in a wide variety of product sectors.

Copyright Piracy

IACC members indicate that digital piracy on the internet in Spain remains extremely high, with some members citing the country as one of the worst offenders globally. Broadband access in Spain is nearly as ubiquitous as in the United States⁵³, and the Spanish government has done little to rein-in use of the internet as a means of illicit distribution of copyrighted material.

One IACC member reports in 2009 almost 1 million downloads of only two titles of its software products. Illegal online distribution appears to be causing a significant displacement of legitimate sales; fueling this is a current lack of legal avenues from which to enforce against such piracy and a sense by the public that such downloading is acceptable, and even legal. That public perception has been reinforced both by the government's action (and inaction).

While much of the problem stems from illegal downloads on P2P sites, a Circular released in 2006 by the Spanish Office of the Prosecutor General seems to legitimize such activity, and certainly seems to remove it from criminal liability. No remedy such as "Notice & Takedown" – which is commonly available elsewhere – exists in Spain. Other legal burdens in Spain create an environment in which legitimate creators have almost no practical ability to stop

⁵³ According to a study released by Strategy Analytics in June of 2009, 57% of Spanish households had broadband internet access, compared to 60% broadband penetration in the United States. See, <http://www.strategyanalytics.com/default.aspx?mod=PressReleaseViewer&a0=4748>

this large-scale infringement; police, for example, have been very reluctant to take actions on Internet piracy. Further, ISPs are generally uncooperative – and not surprisingly – as the widespread availability of pirated works for free logically drives consumers to their services. Service providers are an essential partner in the effort to stem the flow of pirated works online, but at present, there is no real mechanism in place to encourage their cooperation.

While our members are encouraged by Spain's recent decision to move forward with legislation contained within the Sustainable Economy Bill which would provide a process for blocking these infringing sites, they anxiously await its implementation so that they can take steps to stop the continuing infringement of their rights. Our members stand ready to avail themselves of this new procedure and request that USTR encourage Spain to move forward as quickly as possible on its implementation. We understand that the measure, while approved by the Spanish Cabinet, still needs approval by Parliament. IACC encourages the Spanish Parliament to act swiftly on this measure.

Trademark Counterfeiting

In addition to the copyright concerns noted above, brand owners within the IACC reported significant problems with regard to trademark counterfeiting, particularly in the areas of apparel and luxury goods, pharmaceuticals, agricultural chemicals, tobacco products, and the food and beverage sector. The reports raise serious concerns, in light of the health and safety implications involved. In one instance reported in the media, counterfeit pharmaceuticals were tainted with a chemical of which the known side-effects may include psychosis and seizures.⁵⁴ Spain also increasingly appears to be used as a trans-shipment point⁵⁵, as well as a site for “finishing” counterfeits manufactured abroad, prior to their retail distribution.⁵⁶ Members' investigations point to growing involvement of organized crime syndicates, human trafficking, and forced labor.

Rights-holders have been pleased with the results of two recent Appeals court cases – the first in Madrid in July of 2008, the second in July of 2009 in Barcelona – in which Spanish courts have upheld criminal convictions related to the marketing and sale of counterfeit products online. In each instance, the courts held that consumer confusion (i.e., the consumer's belief that the products being sold or advertised were, in fact, legitimate), was not necessary in

⁵⁴ See, http://www.ukmedix.com/viagra/thousands_of_counterfeit_viagra_tablets_seized_in_spain5021.cfm

⁵⁵ For example, shipments of counterfeit glycerin, responsible for numerous deaths in Panama in 2006 passed through Spain on their way to their final destination in Central America. http://counterfeiting.unicri.it/trends.php?sec_ =N

⁵⁶ In May of 2008, Spanish police arrested five suspects on suspicion of trafficking in counterfeit goods, and of forcing people to work in illegal conditions, after discovering an illegal factory. See, <http://www.manufacturing.net/News-Counterfeit-Luxury-Goods-Ring-Busted-In-Spain.aspx?menuid=282> .

order to sustain a criminal charge. It is hoped that these cases signal a better understanding on behalf of the judiciary of the harm caused both to rights-holders and consumers that is caused by the trafficking of counterfeit products.

Conclusion

In light of the significant problems that continue to be experienced by both copyright and trademark owners in Spain, the IACC requests that USTR maintain Spain on the Watch List in 2010. While limited progress has been seen in some areas, the need for significant improvements remains. In the coming year, the IACC hopes to see Spain undertake the following:

- Promptly enact legislation necessary to reduce the volume of pirated material available online, both criminally and civilly – including the distribution of copyrighted materials online via P2P services;
- Take more sustained enforcement action against retail-level sales of counterfeit goods, followed by prosecution, and implementation of deterrent sentences in the case of conviction;
- Take concrete steps to encourage internet service providers to work with rights-holders in developing and implementing best practices and blocking to reduce and deter the distribution and marketing of counterfeit and pirated goods online.

TURKEY

Recommendation: Watch List

Introduction

Turkey was removed from the Special 301 Priority Watch List in 2008, and maintained by USTR at the Watch List level in 2009. IACC members continue to report significant problems related to counterfeiting within the domestic Turkish market, as well as ongoing problems with the export of illicit product from Turkey, primarily to the European Union. Those products include goods manufactured in Turkey, as well as goods manufactured abroad, and transhipped through Turkey to their final destination. In the most recent statistics published by the European Union, Turkey remained one of the top 5 sources of counterfeit and pirated goods, as identified by country of origin and country of provenance.⁵⁷ Turkey was likewise included in the 2008 report by EU Customs as one of the top sources for counterfeit seizures; accounting for the greatest volume of goods seized in the food and beverage sector, and the second largest seizures in the cosmetics and personal care products sector, and the sportswear and apparel sectors.⁵⁸

IACC members from these and other sectors continue to experience significant obstacles to protecting and enforcing their rights in Turkey. While a relatively small portion of Turkish counterfeits reach the US market, American companies point to the displacement of their legitimate goods in the Turkish market and throughout Europe as reasons to maintain Turkey's place on the Watch List in 2009.

Nature and Scope of Counterfeiting in Turkey

Coalition members from a variety of product sectors reported significant counterfeiting

⁵⁷ See, "Report on EU Customs Enforcement of Intellectual Property Rights – Results at the European Border – 2008. Published July 9, 2009. Available at: http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2009_statistics_for_2008_full_report_en.pdf

⁵⁸ See, "Report on Community Customs Activities On Counterfeit and Piracy." European Commission. Available at: http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics2007.pdf , last accessed Feb. 17, 2009.

problems during the past year; these were most pronounced in the food and beverage, apparel, personal care products, and agricultural and chemical sectors. Specific problems cited by member companies have included large-scale manufacturing of counterfeit goods, insufficient border controls on exports and in-transit goods, and widespread retail-level distribution.

Laws and Regulations

In 2009, IACC members again reported concerns related to a lack of legal certainty and coherence in Turkey's legal regime – a problem compounded by insufficient numbers of detailed, published court opinions. As a result, trial courts, prosecutors, and law enforcement have been unwilling to institute, or proceed with, actions against infringers. Coalition members also assert that Turkish authorities often take an overly-formalistic approach to dealing with IP cases, in some instances resulting in what have been viewed as irrational decisions.

Border Control

Customs enforcement – with respect to imports, exports, and in-transit goods – remains a major concern for Coalition members. Infringing product manufactured abroad is said to originate primarily from China, Russia and the former-Soviet republics, as well as the UAE. Intensive IPR training for Customs officials would be welcomed by rights-holders, as would significantly increased efforts aimed at the detection of infringing shipments entering and leaving the country.

Enforcement

Members cited a variety of impediments to effective enforcement of their rights in our 2009 submission to USTR, including slowly-progressing cases, apparent protectionism, and a general perception of corruption within Turkish law enforcement and the judicial system. Regrettably, each of these issues remained a concern for rights-holders throughout 2009. Members report that Turkish police are uncooperative, are frequently reluctant to assist in investigative or enforcement actions, and appear disinterested in taking action of their own accord.

Where actions against infringers have been initiated, members remain frustrated by

significant delays in their adjudication. Further, members continue to report an apparent bias against foreign-based rights-holders.

Conclusion

The IACC acknowledges the strides that the Turkish government has made in recent years, with regard to copyright enforcement, but remains concerned about the pace of progress in the area of trademarks. In 2010, we encourage the Turkish government to place a greater priority on border enforcement to stem the flow of counterfeit products entering the domestic market from abroad, as well as those intended for other end-markets. Increased cooperation with European Customs is viewed as an essential component of reducing the volume of counterfeit goods exported from, and transshipped through, Turkey. In addition, we would support an increase in IPR training at all levels of the criminal justice system – for police, prosecutors, and judges. Finally, the IACC recommends that the Turkish government undertake a public awareness campaign with the intent of decreasing retail-level sales in the domestic market.