



February 15, 2011

VIA WORLD WIDE WEB

<http://www.regulations.gov>, docket number USTR-2010-0037

Mr. Stanford McCoy
Assistant U.S. Trade Representative for
Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Re: 2011 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 75 Fed. Reg. 82424- 26 (December 30, 2010)

Dear Mr. McCoy:

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 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.

Founded in 1979, the IACC is the world’s oldest and largest organization representing exclusively the interests of companies concerned with trademark counterfeiting and 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 and 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 style with a period at the end.

Robert Barchiesi
President
The International AntiCounterfeiting Coalition



Submission of the

International AntiCounterfeiting Coalition

to the

United States Trade Representative

Special 301 Recommendations

February 15, 2011

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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 the USTR, in cooperation with its interagency partners in the Special 301 review (“Special 301”), under Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 USC § 2242, of countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

The IACC is the world’s oldest and largest organization dedicated exclusively to combating trademark counterfeiting and copyright piracy. Founded in 1979, and based in Washington, D.C., the IACC represents over 200 corporations, trade associations, and professional firms, across a broad cross-section of industries, including many of the world’s best known brands in the apparel, automotive, electronics, entertainment, luxury goods, pharmaceuticals, software, and other consumer product sectors.

Central to the IACC’s mission is the education of both the general public and policy makers about severity of the threats posed by intellectual property crimes, and the scope of the harm that such crimes cause – not only to legitimate manufacturers and retailers, but also to consumers and governments worldwide. The IACC seeks to address these threats by promoting the adoption of legislative and regulatory regimes which effectively protect intellectual property rights, and the application of resources sufficient to implement and enforce those regimes.

In the year that has passed since the IACC’s last Special 301 filing, legitimate businesses and their employees have struggled to recover from the global recession. According to the U.S. Bureau of Labor Statistics, unemployment rates in the United States during 2010 hovered at 9.6% – nearly 15 million individuals.¹ By most indicators, however, it appears that manufacturers and retailers of illicit goods continued to enjoy a thriving business in 2010. Seizures by U.S. Customs & Border Protection (“CBP”) and Immigration & Customs Enforcement (“ICE”) continue at high levels, and across every

¹ United States Department of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/pdq/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNU04000000&years_option=all_years&periods_option=specific_periods&periods=Annual+Data (last visited Feb. 2, 2011).

conceivable product sector.²

During 2010, the IACC observed some new or growing trends in counterfeiting, including an increase in organized crime involved in counterfeit trafficking, a growth in the use of the internet to facilitate trafficking, a greater impact on small- and medium-sized enterprises (SMEs), a wider variety of products being counterfeited, higher quality of counterfeits, and increased impact on consumer health and safety and national security.

For a number of years, the IACC has raised concerns regarding the apparently increasing involvement of organized criminal organizations in the trafficking of counterfeit goods; and a number of cases in 2010 provided further support for this assertion. For example, in early 2010, the Federal Bureau of Investigation (FBI) arrested an alleged member of an international criminal ring involved in money laundering and the trafficking of narcotics, firearms, untaxed cigarettes, and counterfeit goods. Officials believe the group operated in New York and New Jersey, but had ties to criminal enterprises in Canada, Albania, Macedonia, Serbia, and Kosovo.³ Another New Jersey counterfeiter sentenced in July 2010 was charged with providing material support (in the form of 1,200 assault rifles) to Hezbollah.⁴ Also, in November 2010, the New York Times reported a growing body of evidence demonstrating that La Familia Michoacana, the infamous Mexican drug cartel, has expanded its criminal activities to include software counterfeiting, and even marks each counterfeit disk it produces and distributes with its own “brand” using the group’s signature stamp.⁵ And even more

² E.g., *Customs Agents Seize Counterfeit Detergents*, SEATTLE TIMES, Sept. 23, 2010, http://seattletimes.nwsource.com/html/localnews/2012981583_apwacounterfeitdetergent.html?syndication=rss (reporting CBP’s seizure of 1,500 cartons of counterfeit laundry detergent); *Dangerous Counterfeit Toys Seized at LAX*, ABC LOCAL, Dec. 22, 2010, http://abclocal.go.com/kabc/story?section=news/local/los_angeles&id=7859911 (reporting CBP’s seizure of almost 55,000 counterfeit toys); Marty Cox, *\$21 Million: Counterfeit Seized Goods at Airport Included Fake Drugs, iPads*, NAT’L LEDGER, Sept. 30, 2010, <http://www.nationalledger.com/cgi-bin/artman/exec/view.cgi?archive=53&num=35098> (reporting seizure of \$21 million worth of counterfeit items, including pharmaceuticals, DVDs, and electronics, by ICE, CBP, and U.S. Customs); *Shady Sunglasses Seized at ND Border*, VALLEY NEWS LIVE, Dec. 26, 2010, <http://www.valleynewslive.com/Global/story.asp?S=13741071> (reporting CBP’s seizure of over 3,300 pairs of counterfeit sunglasses); *U.S. Customs Seizes Large Quantity of Counterfeit Exercise Products: Popular Ab Coaster Product Among the Fake Items Discovered by Officials*, PRWEB, Jan. 14, 2010, <http://www.prweb.com/releases/2010/01/prweb3442394.htm> (reporting CBP’s seizure of large container quantities of counterfeit exercise equipment).

³ *N.J. Man Accused in International Drug Ring is Captured in Toronto*, N.J. ONLINE, Jan. 26, 2010, http://www.nj.com/news/index.ssf/2010/01/nj_man_accused_in_internationa.html.

⁴ Michael Hinkelman, *Knock-Off Trafficker Jailed; Ring Linked to Hezbollah Aid*, PHILLY NEWS, July 15, 2010, http://articles.philly.com/2010-07-15/news/24968075_1_counterfeit-ring-hezbollah-fake-goods.

⁵ Ashlee Vance, *Chasing Pirates: Inside Microsoft’s War Room*, N.Y. TIMES, Nov. 6, 2010, <http://www.nytimes.com/2010/11/07/technology/07piracy.html>.

recently, Johan Nortje, a South African customs officer responsible for investigating counterfeit goods smuggling, was murdered by hit men outside his home. At the time of his death, Nortje was investigating an international criminal syndicate involved in the trafficking of counterfeit cigarettes, clothing, and other consumer goods. A South African newspaper reported that Nortje's murder, which followed several attacks on other customs officials, confirmed government fears of counterfeiters targeting customs officials in Durban.⁶

Though it has been viewed traditionally as an economic crime, and a concern limited primarily to large multinational companies, intellectual property theft poses a growing threat to SMEs, along with a range of non-economic harms related to consumer health and safety⁷ and national security.⁸ The former issue has been exacerbated by a relatively recent increase in the counterfeiting of a wide range of consumer goods, including food and beverages, alcohol, personal care products, and electronics, while in the past year, there have also been several notable cases involving potential threats to national

⁶ Paul Kirk, *Murder of Customs Official 'Was a Hit'*, CITIZEN, Jan. 18, 2011, <http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=165579&sn=Detail&pid=334&Murder-of-customs-official-%E2%80%98was-a-hit%E2%80%99>.

⁷ *E.g.*, *8 Arrested for Selling Counterfeit Rabies Vaccine*, DESK OF BRIAN, Sept. 27, 2010, http://deskofbrian.com/2010/09/8-arrested-for-selling-counterfeit-rabies-vaccine/?utm_source=rss&utm_medium=rss&utm_campaign=8-arrested-for-selling-counterfeit-rabies-vaccine (reporting death of four-year-old child due to counterfeit rabies vaccine); Martin Cassidy, *Trading Standards Issues Counterfeit Brake Pads Warning*, BBC, Aug. 2, 2010, <http://www.bbc.co.uk/news/uk-northern-ireland-10846035> (reporting seizures of counterfeit brake pads in Northern Ireland that failed friction tests and were held together by glue); *Counterfeit "MAPED" Stationary Seized*, SUNDAY TIMES, Feb. 14, 2010, <http://www.sundaytimes.lk/100214/BusinessTimes/bt31.html> (reporting seizure of counterfeit school supplies with a number of safety flaws, including sharp edges and loose screws); Caroline Dobson, *China: World's 'Single Largest Source' of Counterfeit Goods*, EPOCH TIMES, May 16, 2010, <http://www.theepochtimes.com/n2/content/view/35528/9999999/1/1/> (reporting that more than 1,500 consumers of counterfeit sofas in the U.K. suffered breathing problems, eye issues, and serious burns from toxins found in the sofas); *Former Bellevue Salon Owner Sentenced for Fake Botox Injections*, SEATTLE PI, Jan. 16, 2010, http://www.seattlepi.com/sound/414309_sound81776672.html (reporting inflammation, swelling, and hardening of patients faces after receiving counterfeit Botox and Restylane injections, causing one woman to undergo plastic surgery); David Knowles, *Counterfeit Chinese Condoms Reach U.S.*, AOL NEWS, Jan. 21, 2010, <http://www.aolnews.com/2010/01/21/counterfeit-chinese-condoms-reach-us/> (reporting sales of underperforming, unsterilized counterfeit condoms that were lubricated with vegetable oil); Leslie Meredith, *Counterfeit Phones May Explode*, TECH NEWS DAILY, Sept. 28, 2010, <http://www.technewsdaily.com/counterfeit-phones-may-explode-1339/> (reporting twenty hospitalizations and one death in India due to recent counterfeit cell phone explosions).

⁸ *E.g.*, Grant Gross, *U.S. Agencies Crack Down on Counterfeit Networking Hardware*, PC WORLD, May 6, 2010, http://www.pcworld.com/article/195791/us_agencies_crack_down_on_counterfeit_networking_hardware.html (reporting the sentencing of Ehab Ashoor, a Saudi citizen who purchased counterfeit Cisco Gigabit Interface Converters, intending to sell them to the U.S. Marines for use in transmitting troop movements, relaying intelligence, and maintaining security at a military base in Iraq).

security. In recent years, Congress has addressed the consumer health and safety concerns inherent in the counterfeiting trade,⁹ and has more recently begun examining the national security implications of such trafficking.¹⁰

IACC members across all sectors report a troubling increase in the volume of illicit trafficking via, or facilitated by, a variety of websites, ranging from large-scale business-to-business (B2B) sites connecting manufacturers and high-level distributors of counterfeits, consumer-facing retail sites trafficking in one or more brands or types of goods, auction sites, “online classifieds,” cyberlockers, and sites streaming pirated content. Such illicit online trafficking has created new and significant obstacles to enforcement by IP owners and law enforcement personnel. And while the U.S. government has demonstrated significant leadership in seeking to address the growing problem online,¹¹ regrettably, many of our trading partners have failed to take meaningful steps in this area.

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.

The latest studies on the global scale of counterfeiting and piracy estimate the total global value of counterfeit and pirated products to be US\$455-650 billion each year, with the projected annual global value of counterfeit and pirated products to exceed \$1 trillion by 2015.¹² Job losses due to counterfeiting and piracy have been estimated at 2.5 million lost jobs in G20

⁹ See Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (providing enhanced maximum penalties for counterfeiting offenses that endanger public health and safety).

¹⁰ See Robert Brodsky, *Senators Are Worried About Counterfeit Defense Supplies*, GOV'T EXECUTIVE, Aug. 9, 2010, <http://www.govexec.com/dailyfed/0810/080910rb1.htm> (citing Congressional concerns regarding the vulnerability of the U.S. military's supply chain and a need for action by the Department of Defense).

¹¹ See, e.g., ICE, News Release, ICE Seizes 82 Website Domains Involved in Selling Counterfeit Goods as Part of Cyber Monday Crackdown, Nov. 29, 2010, <http://www.ice.gov/news/releases/1011/101129washington.htm> (reporting seizures of illicit websites pursuant to ICE's "Operation In Our Sites v. 2.0", an extension of "Operation In Our Sites I," which was announced in June 2010).

¹² See FRONTIER ECONOMICS, ESTIMATING THE GLOBAL ECONOMIC AND SOCIAL IMPACTS OF COUNTERFEITING AND PIRACY, at 6, 9 (commissioned by Business Actions to Stop Counterfeiting & Piracy (BASCAP)), available at <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Final.pdf>.

countries, including the United States.¹³ It has been suggested that every year G20 countries lose approximately \$125 billion due to counterfeiting and piracy: including \$77.5 billion in tax revenues and higher welfare spending, \$25 billion in increased costs of crime, \$18.1 billion in the economic cost of deaths resulting from counterfeiting, and \$125 million for the additional cost of health services to treat injuries caused by dangerous fake products.¹⁴

Among the countries reported on by IACC members in 2010, China remained their greatest concern, without regard to the specific types of goods involved. Russia was likewise a major concern, as it has been for over a decade. In each case, progress on IP protection and enforcement has remained limited during the past year, and both countries continue to exhibit severe deficiencies in a number of areas.

Based on customs seizure data¹⁵ and anecdotal reports from brand owners, there is good reason to believe that the single largest source of these infringing items remains China. In spite of sporadic escalations in enforcement, China's over-reliance on administrative enforcement measures, coupled with consistently low penalties in counterfeiting cases, has failed to provide a significant or meaningful deterrent to counterfeiters.

With regard to Russia, IACC members reported little improvement during the last twelve months, and reiterated their concerns regarding inadequate border measures, insufficient enforcement of existing laws, the need for improved training on IP issues for prosecutors and judges, ingrained corruption, and an overall need for greater political priority to address the problems that have been experienced by rights-holders for years.

While the overall problems of IP protection and enforcement remain more severe in China and Russia, there is perhaps no country where these issues continue to frustrate rights-holders more than Canada. For years, the IACC has highlighted a variety of legislative deficiencies and procedural hurdles which severely limit the enforcement of

¹³ *Id.* at 5.

¹⁴ *Id.* at 7.

¹⁵ In recent years, statistics from customs agencies in many countries have indicated China to be the source of 60 to 90% of goods seized. *See, e.g., China Behind Most Fake EU Customs Seizures*, EU BUSINESS, July 23, 2010, <http://www.eubusiness.com/news-eu/customs-counterfeit.5nk> (attributing as much as 90% of counterfeit goods seizures in certain European countries to China); Europa, Press Release, Questions and Answers: EU-China Customs Cooperation and Combating Illicit Trade, Aug. 31, 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/389&format=HTML&aged=0&language=EN&guiLanguage=en> (naming China as the biggest source of allegedly infringing goods entering the European Union, yielding 64% of all goods detained by customs on suspicion of IP violations in 2009); CBP, IPR Seizure Statistics, http://www.cbp.gov/xp/cgov/trade/priority_trade/ipr/pubs/seizure/ (last visited Feb. 10, 2011) (naming China as the number one source of counterfeit and pirated goods for FY 2009, accounting for 79% of the total value of seized goods in the U.S.); Havocscope Black Markets, 2008 Counterfeit Goods Seizures in Japan, <http://www.havocscope.com/2008-counterfeit-goods-seizures-in-japan/> (last visited Feb. 10, 2011) (naming China as the source of 81.5% of the counterfeit goods seized in Japan in 2008).

intellectual property rights in Canada, whether by law enforcement or private rights-holders. Regrettably, the Canadian government has failed to show meaningful improvement in addressing these issues. As described in the IACC's February 2010 submission to the USTR, while rights-holders are cognizant of the sometimes-severe limitations on resources 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. Instead, the short-comings seen in Canada are widely viewed as resulting from a lack of political will to take the actions necessary to ensure an appropriate level of IP protection and enforcement.

The pages following include a table summarizing the IACC's Special 301 recommendations for the years 2001–2011, 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 2010. 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, which 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 regarding creative enforcement tools, including third-party- and landlord-liability strategies; and
- The need for greater transparency regarding the results of government enforcement work.

Counterfeiting and piracy represent perhaps the single greatest threat to America's innovation-based economy – a problem made worse by arbitrary market access restrictions and protectionist policies that serve little purpose other than to foreclose legitimate trade and competition in the marketplace. The resultant stifling of capital investment and the diminishment of economic development is harmful not only to legitimate manufacturers and creators, but to consumers around the world as well. The

IACC appreciates the opportunity to share its members' experiences through the Special 301 process, and looks forward to continuing to work with the USTR and the rest of the interagency team in the coming year.

IACC SPECIAL 301 RECOMMENDATIONS, 2001 – 2011*

	01	02	03	04	05	06	07	08	09	10	11
Argentina	WL	WL									
Belize				WL	PWL	PWL	WL				
Bolivia			WL								
Brazil	WL	WL		WL			PWL	WL	WL	WL	WL
Bulgaria		WL		WL							
Canada	OO	WL	WL		WL	PFC	PWL	WL	WL	PWL	PWL
Chile	WL	WL	WL		WL						
China	306	306	306	306	PFC/306	PFC/306	PFC/306	PFC/306	PFC	PWL	PWL
Costa Rica						PWL	PWL				
Colombia		WL									
Czech Republic							WL	WL	WL		
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								OO			
Kuwait					WL						
Lebanon				PWL							
Libya				WL							
Malaysia	PWL		PWL	PWL	PWL	PWL	WL				
Mauritius				WL							
Mexico	OO	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Pakistan				WL							
Panama			WL	WL	WL						
Paraguay	306	306	306	306			PWL/306	306	306	306	306
Peru							SM				
Philippines		PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	PWL
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		WL	WL								
South Africa	WL	WL	WL							WL	
Spain										WL	WL
Taiwan	PWL	PWL	PWL	WL	WL						
Thailand		WL	WL	WL							
Turkey			WL	WL	WL			OO	WL		WL
Ukraine	WL	PFC		PFC							
UAE		WL	WL	WL	WL		SM	OO			
Venezuela				WL							
Vietnam		WL	WL				PWL	WL	WL		WL

* Abbreviations: 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 List

Introduction

For most IACC members, the People's Republic of China ("PRC" or "China") remains the primary source of counterfeits of their products sold worldwide, and China-based manufacturers and traders appear to be responsible for the majority of these illicit goods offered for sale on the internet. Digital and hard-goods piracy of copyrighted works, likewise, remain similarly widespread. As such, China remains the country of deepest concern for the IACC.

During the past year, the Chinese government has acknowledged the need to address counterfeiting, copyright piracy, and other IP violations in a more effective manner. In November 2010, the central government announced the formation of a new, inter-ministerial Leading Group and the commencement of a six-month enforcement campaign under the leadership of Vice Premier Wang Qishan and the Ministry of Commerce ("MOFCOM").¹⁶ This campaign has differed from previous initiatives, particularly in its emphasis on targeting of online infringements and the significant increase in the level of police attention to new cases. Effective action in both areas is clearly critical and the government's efforts in these areas are accordingly recognized and welcomed by our members.

China has pursued enforcement campaigns in the past, with the level of enforcement subsiding upon their completion. This time, senior Chinese officials have emphasized that the level of enforcement will not be relaxed after the current campaign comes to a close. There have also been indications that the campaign might be formally extended beyond March 2011. Moreover, officials have promised to carefully study the results of the campaign and devise measures to reform existing regulations and policies based on what they learn. Such statements clearly suggest reason for optimism, but industry will nevertheless be monitoring developments closely to ensure follow-through.

To date, the main beneficiaries of the current campaign have been multinational companies that have established brand protection units within their subsidiaries in

¹⁶ For details of the campaign and other IP developments in English, see MOFCOM's website at <http://www.chinaipr.gov.cn/>. For details of the campaign in Chinese, see <http://www.mofcom.gov.cn/aarticle/ae/ai/201012/20101207344331.html>.

China.¹⁷ Many of the IACC's members are, however, small- and medium-sized enterprises ("SMEs") without substantial operations in China. As a result, several IACC members have thus far been unable to benefit from the present campaign. As explained below, the IACC looks forward to working with Chinese authorities to make remedies more widely available to its members.

The IACC is hopeful that Chinese authorities will likewise follow through in adopting structural changes in the manner in which IPR is protected and ensure that the political commitment to enforcement and reforms is sustained.

The current enforcement campaign comes on the heels of industry surveys that suggest a noticeable deterioration in perceptions of the effectiveness of IP enforcement in China, as well as an increase in the importance that companies attach to the issue.¹⁸ Industry perceptions clearly have been fed by disappointments over the Chinese government's failure to fulfill earlier commitments to bring down the levels of infringement under previous action plans. Most recently, IACC members have expressed concern over prosecution guidelines, issued in May 2010 by the Ministry of Public Security ("MPS") and Supreme People's Procuratorate ("SPP") and repeated in a Judicial Opinion issued jointly by the MPS, SPP, and Supreme People's Court ("SPC") on January 10, 2011, that effectively tripled the threshold for investigating and prosecuting traders in counterfeits to RMB150,000 (US\$22,500 at the current exchange rate). These high thresholds represent a significant barrier to effective enforcement, particularly in light of the unpredictability with which case values, in practice, are calculated.

The January 2011 Judicial Opinion does offer a few other positive tools for enforcement, including against online infringements. In particular, the Opinion provides for criminal liability as an "accomplice" for Internet Service Providers ("ISPs") and arguably also for online trading platforms that act with knowledge. This provision will require testing in

¹⁷ To be clear, however, not all of the IACC's larger member companies have reported noticeable benefits as a result of the initiative thus far.

¹⁸ In the 2010 member survey of the US-China Business Council ("USCBC"), members ranked IPR enforcement as their fourth biggest concern — up from eighth in 2009. USCBC, *US Companies' China Outlook: China Operations Profitable and Growing; Protectionism Concerns Real and Rising*, 2010 MEMBER PRIORITIES SURVEY RESULTS, at 10, available at http://www.uschina.org/public/documents/2010/membership_survey.pdf. In this survey, 44% of respondents noted that China's IPR enforcement levels negatively affect their willingness to engage in manufacturing and R&D in China, up from 24% in 2009.

Similarly, in Shanghai AmCham's 2010 membership survey, 71% of respondents claimed that IP enforcement was the same or worse than the year before—up from 61% in AmCham's 2009 survey. *Lack of IPR Enforcement Key Concern*, GLOBAL TIMES, Jan. 21, 2011, <http://business.globaltimes.cn/china-economy/2011-01/615048.html>.

practice, but it may ultimately offer a breakthrough in efforts to coax trade platforms in particular to increase the level of cooperation they provide to rights holders and enforcement authorities alike.¹⁹

The central government's current enforcement campaign suggests that top-level Chinese authorities have reached a clearer understanding of the enormous impact of counterfeiting on Chinese industry, consumers globally, as well as the reputation of the Chinese government itself for IP protection. It is hoped that the goals of the campaign will become self-sustaining once it becomes clear how high the stakes are, particularly for Chinese enterprises.

The IACC will of course continue to monitor enforcement trends in China and work with PRC authorities to ensure that our members, both large and small, benefit from heightened police attention to counterfeiting. The IACC will also continue working with concerned governments to promote reforms in relevant laws, regulations, and policies, including those recommended by our members below and in prior Special 301 reports to USTR.

While reforms are clearly desirable on a number of fronts, the IACC recommends that the U.S. Government engage with China on the following priority issues during its bilateral engagement this year:

- Significantly increasing human and material resources for criminal investigations and enforcement in hot-spot regions, including establishing specialized IP enforcement units by police and prosecutors, preferably nationwide in China.

¹⁹ The "Opinion of the SPC, SPP, and MPS on Several Issues in the Application of the Law to the Handling of Criminal IP Infringement Cases", issued January 10, 2011, appears to have been issued mainly to establish new thresholds for criminalizing copyright violations conducted over the internet. It does not address the core concerns of trademark owners with respect to criminal enforcement against counterfeits, such as the high thresholds for criminal prosecution and conviction and the lack of predictability in the method for calculating case values. See discussion *infra* and in the IACC's previous Special 301 submissions to the USTR. For the IACC's 2009 and 2010 Special 301 reports, see http://4356049642aa3c99a6e91c99180a8219894d6198.gripelements.com/pdf/member-resources/iacc_2009_special_301_recommendations.pdf and http://4356049642aa3c99a6e91c99180a8219894d6198.gripelements.com/pdf/member-resources/iacc_2010_special_301_recommendations.pdf, respectively. However, the new Judicial Opinion does offer helpful clarification of standards and policies in a number of other areas, including determinations of liability in cases where the infringing trademarks or goods are not entirely identical to those covered by the trademark owner's registrations in China. The Opinion also offers reminders to enforcement authorities and IP owners regarding their rights to pursue infringers through private criminal prosecution and to request assistance from Chinese courts in obtaining evidence that is otherwise difficult to gather through private investigators.

- Strengthening the investigative powers of administrative enforcement authorities, or failing that, providing much closer cooperation with Chinese police in the investigation process.
- Updating the IP provisions within China’s Criminal Code to facilitate criminal investigations and prosecutions against smaller-scale infringers, as well as those operating “underground,” such as internet traders and operators of unlicensed factories and trading companies.
- Introducing a range of measures directed towards internet trade platforms and ISPs that host stand-alone sites offering counterfeit branded goods and pirated product, and other infringing sites, to encourage them to police themselves, and to cooperate both with IP owners pursuing take-downs of advertisements for such illicit goods, and with investigations into vendors of infringing goods.
- Devoting resources against online piracy and online “hybrid” businesses that deal in both pirated and counterfeit versions of our members goods, including removal of those sites and any relevant licenses for those businesses.
- Reaching out directly to small- and medium-sized enterprises and other companies who do not have the resources to maintain large anti-counterfeiting operations in China, or contacting the registered trademark agents in China, industry associations, or foreign governments.
- Considering the establishment of a pilot program in Shenzhen to increase the monitoring of shipments by Shenzhen trading companies and clarifying their duty of care to “know their customers,” inspect shipments, and keep reasonable documentation on the supplier of goods, including detailed contact information and contracts.
- Establishing clearer duties of care for landlords of retail and wholesale markets where counterfeiting remains pervasive (consistent with China’s recent JCCT undertakings).
- Strengthening the Trademark Law of China through the ongoing revision process. We outline later in this submission the IACC’s primary concerns, including the need to increase compensation to trademark owners in civil litigation.

- Increasing transparency through publishing a wider array of IP enforcement statistics and undertaking a fresh economic and social impact study to better understand the impact of counterfeiting on Chinese industry and consumers, as well as the role the internet is currently playing in fueling the problem.

Nature and Scope of Counterfeiting and Piracy in China

Counterfeiting in China continued to affect most major sectors in 2010, reflecting a long-term trend, but with a noticeable increase in counterfeiting in electronics and higher-end pharmaceuticals, and continuing growth in the use of the internet to promote, sell, and deliver counterfeits directly to consumers via the post. Thus, it appears that the new trend is that counterfeiting in China is becoming more sophisticated, high-tech, and reliant on the internet.

The types of items counterfeited in 2010 range from fashion, portable phones and smartphones,²⁰ pharmaceuticals and medical equipment,²¹ wine²² and liquor²³, food,

²⁰ The production and export of portable phones and smartphones is largely concentrated in Shenzhen, particularly in the Huaqiangbei District. The region is said to be the source of production for hundreds of millions of phones annually, with the majority produced “underground” and infringing an array of IP rights of both local and foreign brands. Over the last few years, large-scale counterfeiting and design copying of major brands of smartphones in the PRC has given rise to the concept of “Shanzhai”—a Chinese term which is largely viewed positively by Chinese consumers, as it suggests access to designs and features of major brands, but at lower cost. See Shanzhai, <http://en.wikipedia.org/wiki/Shanzhai> (last visited Feb. 15, 2011). Shanzhai phones are said to occupy 10-20% of the global market for phones. *Id.*

A survey of smartphones offered online in mid-2010 found that 33 trade boards, mainly based in China, offered one particular model for sale 10 days before the product’s official launch. See OpSec, Press Release, [OpSec Study Exposes Counterfeiting and Grey Market Diversion in Recent Smartphone Product Launches, Sept. 22, 2010](http://www.opsecsecurity.com/en/news-and-events/press-releases/opsec-smartphone-product-launches-study), <http://www.opsecsecurity.com/en/news-and-events/press-releases/opsec-smartphone-product-launches-study>. This suggests counterfeiting in this sector is increasingly well-organized, even to the point that infringers are increasingly penetrating the rights-holders’ supply chains to get early access to designs and technology.

²¹ Chinese exports of counterfeit drugs to developing nations remain problematic, with continued reports, in particular, of high penetration in Nigeria. See, e.g., Safe Medicines, Nigerian Authorities Seizes Counterfeit Drugs made in China, <http://www.safemedicines.org/2010/07/nigerian-authorities-seizes-counterfeit-drugs-made-in-china.html> (last visited Feb. 15, 2011). Within China itself, over 131 individuals were detained and ten tons of fake medicine seized in one instance in Beijing. See http://www.legaldaily.com.cn/bm/content/201001/22/content_2033194.htm?node=20733. Large-scale cases of counterfeiting of anti-cancer medications were also reported, with revenues in one case confirmed to exceed US\$4 million. Michelle Yu, *Counterfeit Anti-Cancer Drugs Impact Pharmaceutical Firms*, EPOCH TIMES, June 22, 2010, <http://www.theepochtimes.com/n2/content/view/37824>. And in another example in Wuhan City, police arrested 6 individuals found to have dealt in 20 different types of counterfeit drugs over a three-year period, with confirmed sales to over 3,000 individuals and revenues exceeding US\$1.4 million. See <http://news.asiaone.com/News/AsiaOne+News/Crime/Story/A1Story20100713-226729.html>. The U.S. and China agreed during the December 2010 JCCT consultations to upgrade exchanges on counterfeit drug cases, as well as to hold a meeting at the 2011 APEC summit on the topic. See United States

beverages,²⁴ agricultural chemicals, electronic components,²⁵ computer and networking equipment, software and related products, batteries, cigarettes,²⁶ cosmetics, condoms,²⁷ home appliances, ginseng,²⁸ cement,²⁹ and auto parts.³⁰

Department of Commerce, 21st U.S.–China Joint Commission on Commerce and Trade – Fact Sheet, <http://www.commerce.gov/node/12467> (last visited Feb. 15, 2011).

²² See Zhuang Pinghui, *Everyone’s Faking it in China’s Wine Country*, Jan. 8, 2011, SOUTH CHINA MORNING POST, available at <http://archive.scmp.com/search.php>, for a detailed report on widespread counterfeiting of foreign and Chinese brands of wines in one of China’s most renowned wine producing regions, Changli County. This report claims that the pervasiveness of counterfeits has ruined the reputation of the region as a source of quality wines, and that government efforts to effectively enforce trademark rights have been unsuccessful.

²³ The production and export of counterfeit spirits remains a serious problem that tends to attract organized crime elements in a number of countries. But counterfeiting of leading Chinese spirits has increased to critical levels. This was recently illustrated in a *New York Times* report on counterfeit “MOUTAI” spirits. Andrew Jacobs, *Fake Liquors Flow as Demand Soars for China’s Fabled Sorghum Spirit*, N.Y. TIMES, Feb. 13, 2011, <http://www.nytimes.com/2011/02/14/world/asia/14maotai.html> (“Despite a national campaign against fake Moutai, the authorities seem to be losing the battle against counterfeiters, who have perfected the look and taste of the real thing. All across town, stores sell Moutai’s distinctive white bottle, and chemical vendors shamelessly hawk additives that can turn run-of-the-mill homemade spirits into liquid gold.”).

²⁴ In one noteworthy case last year, a Hainan court sentenced an individual to four years for selling approximately US\$5 million (RMB3.3 million) in fake Red Bull and Wang Lao Ji, a local brand. See http://www.gdcourts.gov.cn/spsd/t20100422_30507.html.

²⁵ Last year, fake electronics parts were estimated to cause economic harm in the IT industry to the tune of US\$100 billion per year, according to the National Electronics Distribution Association. Counterfeiting in the industry involves the recycling and rebranding of components intended as scrap. See Rachael King, *Fighting a Flood of Counterfeit Tech Products*, BUSINESSWEEK, Mar. 1, 2010, http://www.businessweek.com/technology/content/feb2010/tc20100228_486251.htm. For an assessment of the impact of counterfeiting on U.S. weapons procurement in the January 2010 Department of Commerce report, see U.S. DEP’T OF COMMERCE, DEFENSE INDUSTRY BASE ASSESSMENT: COUNTERFEIT ELECTRONICS (2010), available at http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/defmarketresearchrpts/final_counterfeit_electronics_report.pdf.

²⁶ Last year, Chinese authorities conducted a number of successful seizures against enormous quantities of counterfeit cigarettes, including many export shipments destined for the U.S. and other countries. One such seizure in Shenzhen yielded 9.75 million units. See Fu Jian Intellectual Property Office, http://www.fjipo.gov.cn/html/12/110/2704_20101213915.html (last visited Feb. 15, 2011).

²⁷ See John M. Glionna, *China’s Latest Scandal is Counterfeit Condoms*, LA TIMES, Jan. 21, 2010, <http://articles.latimes.com/2010/jan/21/world/la-fg-china-condoms21-2010jan21> (estimating that up to a third of contraceptives in some regions of China are counterfeit).

²⁸ See Peh Shing Huai, *No Breakthrough in China’s War on Fakes*, STRAITS TIMES, Oct. 1, 2010, <http://wanderingchina.wordpress.com/2010/10/04/no-breakthrough-in-chinas-war-on-fakes-straits-times/>.

Counterfeiting of fashion and sports brands continues to attract the most attention from IACC members, with concerns focused on all aspects of the trade -- production, wholesaling, retailing within China, and online sales -- both for domestic sale and export.

In addition, IACC members in the various content industries report a growing problem with “hybrid” infringers who sell both counterfeit hard goods in addition to pirated copies of their copyrighted goods. For example, some members have identified sites selling or otherwise distributing unlicensed copies of entertainment software, while also offering for sale a variety of branded merchandise including apparel, action figures, trading cards and the like. These infringers thereby cause significant harm to every aspect of the legitimate producers’/manufacturers’ IP portfolio, and significantly impact the viability of the Chinese market for those rights-holders. In addition, some entertainment software producers cited wholesale copying of their MMO-type games, which are then made available to Chinese users online.

While counterfeiting in fashion products is not normally viewed as posing risks to consumer health and safety, the scale of the trade and profits generated make it a natural magnet for IP criminals, including organized crime.³¹

The growth of counterfeiting in many sectors has clearly been fueled by dramatically increased trade via online trading platforms. This is most clearly illustrated by Japanese government statistics indicating a dramatic increase in seizures of postal shipments of fake products originating from China. In 2009, 33% of fake goods seized in Japan were

²⁹ *Id.*

³⁰ Counterfeiting in auto parts was aptly illustrated by a recent Chinese government report confirming three consecutive seizures in late 2010 by Ningbo City customs of a total of 144,910 units packed in 746 containers. See http://www.ipr.gov.cn/gndtarticle/ttxw/201012/1006181_1.html. Another report estimates that global turnover in counterfeit car parts last year may have been as high as US\$16 billion, with most product coming from China. Jay B. Hilotin, *Counterfeit Car Parts Sold in U.A.E.*, GULF NEWS, Oct. 14, 2010, <http://gulfnews.com/news/gulf/uae/counterfeit-car-parts-sold-in-uae-1.696199>. In the U.A.E., it was also estimated that up to one-third of all spare parts are counterfeit. *Id.*

³¹ The scale of counterfeiting in fake fashion and sportswear was illustrated by a seizure in early 2010 in Italy which netted an astounding 500,000 tons of fakes, including brands of many IACC members. *Italy Police Make Huge Haul of Fake Designer Goods*, REUTERS, Feb. 13, 2010, <http://af.reuters.com/article/worldNews/idAFTRE61C22H20100213>. Police believe the seized product was intended to be distributed by Chinese traders based in Italy to buyers in other cities throughout Europe. The seizure was said to be one of the biggest hauls of counterfeits ever conducted in Italy. *Id.*

delivered by international post, while in the first half of 2010, this figure increased to 79%, with 90% of such deliveries having been posted from China.³²

Our copyright-industry members also report continued problems in China with pirated copies of their products widely-available for sale locally, as well as exported to other markets. In addition, the explosion of China-based websites offering copied versions of our members' copyrighted products worsened in the past year.

The IACC is aware of the International Trade Commission's pending economic impact study on the effects on the U.S. economy of IP violations occurring in China. Many of our members submitted information to the International Trade Commission for this study, which should help to provide a more empirical understanding of the scope of counterfeiting in China.

Notorious Markets

Physical Markets

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 nearby Special Economic Zone of Shenzhen.

Guangzhou and close-by suburban towns such as Foshan and Shunde remain hubs for both the production, wholesaling, and export of a wide range of goods, particularly in the fashion sector, with Guangzhou Baiyun Leather World being particularly egregious.

Counterfeiting of electronics, including computer peripherals, phones and smartphones and electronic components, remains rife in major markets in Shenzhen, including the Saige Electronic Market and Mintong Digital Center.

Other regions that remain hot spots for counterfeiting include the wholesale and export center, Yiwu City in Zhejiang Province, 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 remains a 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.

³² See Ivan Zhai, *Beijing Issues Call for International Fight Against Fakes*, SOUTH CHINA MORNING POST, Jan.13, 2011, available at <http://archive.scmp.com/search.php>.

Finally, counterfeiting of fashion, sport and luxury goods in retail and wholesale markets in major cities, including Beijing (several markets in the Chaoyang District, including Sanlitun Yashow) and Shanghai (Han City Fashion & Accessories Plaza and various markets on Qipu Road, such as Xingwang International Garments City).

But the Silk Market in Beijing clearly remains the most iconic of retail markets for counterfeiting of fashion, sporting goods, and electronics. See below for recent developments in this market.

Internet Markets

IACC member companies continue to experience problems with numerous websites based in China. We recommend that the following internet markets be included in the notorious markets section of the Special 301 Report: Dhgate, Trademe, HC360, Globalsources, Linkchina, Tradetang, Tradekey, Tradett, Diytrade, Alibaba, Aliexpress, and Taobao. These websites will be discussed more fully in a later section of this submission.

IACC requests that the U.S. government urge the Chinese government to take stronger enforcement actions against counterfeiting and piracy in these physical and virtual markets.

2010 Enforcement Data

The Chinese government has yet to publish full-year data on the results of enforcement work in 2010. However, several government bureaus have issued limited half-year figures and set forth below are statistics the IACC has gathered so far, including data illustrating the progress made during the current enforcement campaign.

Criminal

In mid-January 2011, the MPS reported having dealt with 2,049 cases in the first three months of the current enforcement campaign, resulting in the detention of 4,157 suspects, and the shutting down of 916 production facilities. These cases covered both counterfeits and “shoddy goods,” many of which were also counterfeits, and the total value of goods involved was reported to be RMB 2.3 billion or US\$250 million.³³

Meanwhile, the SPP announced that from January to October 2010, prosecutions had been pursued against 2,328 individuals in 2,144 separate cases.³⁴ This compares with

³³ For further details, see http://www.ipr.gov.cn/gndarticle/updates/govupdates/201101/1186130_1.html.

³⁴ See www.ipr.gov.cn/gndarticle/ttxw/201012/979427_1.html.

2,695 cases in the whole of 2009. As the rate of prosecutions and convictions normally increases in the final quarter of each year, it is likely that full-year figures for prosecutions and convictions in 2010 will reflect significant increases over the previous year.

AIC

The State Administration for Industry and Commerce (“SAIC”) reported that local Administrations for Industry and Commerce (“AICs”) handled 16,036 cases during the first three months of the enforcement campaign, including 2,439 involving foreign trademarks.³⁵ This compares with a total of 51,000 cases in all of 2009, thereby suggesting a notable increase in the likely number of cases for all of 2010.

Statistics regarding criminal transfers from local AICs to police during 2010 have not yet been published. But the SAIC recently announced that only 26 cases had been transferred during the current campaign.³⁶ Given that the total number of such transfers in 2009 was apparently only 92 while AICs directly handled 43,596 counterfeiting cases,³⁷ it is hoped that greater progress will be made in promoting transfers going forward. See further comments below in this regard.

Customs

Data provided by the General Administration of Customs (“GAC”) indicates that 2,200 shipments of counterfeits were processed during the first three months of the campaign, with the goods involved valued at RMB150 million or US\$23 million.³⁸

As noted in last year’s Special 301 report, the value of seizures has been decreasing in China, due mainly to the increasing reliance of counterfeiters on postal shipments, which normally contain much smaller quantities of goods. While the seizure statistics for customs in China do not appear (so far) to be growing, IACC members believe

³⁵ See http://www.ipr.gov.cn/gndarticle/updates/govupdates/201101/1185340_1.html.

³⁶ For the SAIC announcement, see http://www.ipr.gov.cn/djqjmxzdarticle/djqjmxzd/bw/201012/1128490_1.html.

³⁷ For data on criminal transfers in 2009, see <http://www.sipo.gov.cn/sipo2008/zwgs/zscqbps/201004/2009zhishichanquanbaohubaipishu.pdf>. For data on the total number of AIC actions, see <http://www.chinaipr.gov.cn/news/government/282824.shtml>.

³⁸ *Id.*

Chinese customs continue to do an admirable job in monitoring and stopping infringing goods.

Civil

The SPC reported that during the first 11 months of 2010, local courts handled 32,748 IP cases, representing an increase of 37% over the prior year.³⁹ The SPC has yet to issue figures breaking down this data between trademark, counterfeiting, copyright, and other types of IP cases.

Internet

IACC members remain dismayed by the scale of counterfeiting and piracy of their goods in stand-alone websites operated by local traders, and operators of larger-scale sites, both of which are increasingly organized and well-resourced.⁴⁰

The scope of the problem is clearly not limited to foreign brands; and the widespread nature of the problem has also clearly caught the attention of Chinese consumers, who in a recent online survey described the problem of internet counterfeiting as “running wild.”⁴¹

Most online traders of fakes advertise products through multiple channels, including the major Chinese B2B and B2C trade portals, as well as through stand-alone websites that are hosted by ISPs both within China and overseas. Increasingly, online counterfeiters are operating through tens, hundreds and in some cases thousands of separate platforms and domain names. The more aggressive offenders will sometimes cooperate with traders located overseas who manage sites locally, handle customer relations, and manage logistics.

Due to the greater difficulties and costs in investigating and taking down listings for fakes offered on stand-alone websites, IACC members have mainly concentrated their policing efforts on B2B and B2C platforms in China.

³⁹ See http://www.ipro.gov.cn/gndarticle/updates/govupdates/201101/1184988_1.html.

⁴⁰ One example of this increasing sophistication among online traffickers is the previously-cited expansion of “product lines” offered by some sites. Rather than simply trafficking in pirated software, music or movies, operators have begun offering all manner of products that music, film, and game producers would license in tandem with their core products, thereby undermining the value of both the underlying copyrighted work and the market for related merchandising.

⁴¹ Wang Xin, *Online Sale of Fake Goods ‘Running Wild,’* CHINA DAILY, Mar. 24, 2010 (reporting on the survey of 19,600 respondents, 90% of whom characterized internet counterfeiting as “wild”).

The main English-language platforms based in China that target customers outside the PRC include Dhgate, Trademe, HC360, Globalsources, Linkchina, Tradetang, Tradekey, Tradett, Diytrade, Alibaba and Aliexpress.

Meanwhile, the most renowned portal targeting Chinese buyers is Taobao.com (“Taobao”), which is also believed to function as a virtual, and 24-hour, “trade exhibition” for counterfeiters and pirates seeking sources for illicit goods that are eventually sold through the export platforms mentioned above.

Members within the copyright sector report that while China has become an important market for their digital products on computers and mobile devices, high volumes of pirated material persist in the market as a result of illicit distribution via websites, linking sites, cyber-lockers, offline servers, and the like.

In addition, our members who have business models built upon “cross-rights” (i.e., both trademark and copyright interests) in PRC, such as computer and online game companies (whose products and services also include a significant volume of associated branded goods), report continued problems in China with both piracy of their software products, including illegal “offline” servers hosting unauthorized copies of their games, as well as counterfeit versions of their associated branded goods such as expensive models, action figures, trading cards, and game-play cards. These infringements continue to damage the rights-holders’ business model, which relies on the integrity of both the copyrights and trademarks of these companies.

Change Afoot

Over the past year, many IACC members reported improvement in the attitude of major trade boards and in concrete actions they took in both conducting take-downs of listings for infringing goods and building up their internal policies and procedures for protecting IP rights. The efforts of most trade platforms are still works in progress, with recidivism by infringing vendors still the norm rather than the exception. Counterfeit and pirated products are still widely sold and hosted online, but the apparent commitment to change is encouraging.

There are also signs that the bigger platforms, including Taobao, are becoming more proactive in cooperating with Chinese police and brand owners in supporting criminal investigations into larger targets. This is best illustrated by a recent Taobao initiative under which it states it will now provide new sightings for further investigation by Chinese police based on an examination of advertising and sales activities of vendors promoting goods on Taobao’s online platform.⁴² As a consequence, over the last few

⁴² See Jim Erickson, *Trading Websites Are Calling the Cops*, ALIZILA, Jan. 27, 2011, <http://alizila.com/details/index.php/blog/2011-01/85/> (reporting Taobao.com’s cooperation program with Hangzhou Public Security Bureau).

months, many of our members in the fashion industry have been approached by Chinese police on multiple occasions seeking verification letters and pricing information to support criminal prosecutions against online traders caught with large quantities of fake product in their warehouses. While this is a positive sign, this same proactive approach needs to be extended to all product sectors and also to small- and medium-sized enterprises.

This progress in the fashion sector is no doubt a result of the government's latest enforcement campaign, which includes online counterfeiting among its priorities.⁴³ The SAIC has been tasked to lead efforts in this regard, focusing on two primary tasks.

The first of these involves implementing the regulations issued in May 2010, the "Interim Measures for the Administration of Online Merchandise Trading and Related Services," which require trade boards and ISPs to verify the identity of online traders and take "necessary measures to protect registered trademarks" as well as other IP rights. While the SAIC appears to be exhorting trade boards to take their obligations seriously, the regulations need to be made clear, and the SAIC's efforts must be sustained.

The second task undertaken by the SAIC is to establish an online monitoring system for local AICs to verify the status of online traders and intervene more quickly with government-mandated take-down orders and other measures. The SAIC has indicated that their new online system is likely to be launched formally in the second half of 2011. In the meantime, our members report that local AICs are now demonstrating greater willingness to intervene directly against online advertisements of fake products—something which was previously quite rare. The IACC will be monitoring the situation closely for progress in this area.

As noted in the IACC's 2010 Special 301 submission, the legal foundation for the take-down of listings of counterfeits by trade boards and ISPs was significantly strengthened in December 2009 when the National People's Congress ("NPC") issued the Law on Tort Liability. Unfortunately, this law does not require ISPs or online trade platforms to take preventive measures against violations (including violations by repeat offenders) or to deal proactively with suspected infringements, such as sites offering multiple brands of fakes at unreasonably low prices. However, as noted above, the government appears to be taking steps to press trade boards to move in this direction under the May 2010 SAIC regulations and the January 2011 joint notice, and by stressing direct engagement with individual trade platforms. Likewise, the IACC will monitor these developments, and report to USTR accordingly.

⁴³ Details of the government's cross-ministerial action plan on online counterfeiting are set out in a joint notice issued in January 2011. For text in English, see Intellectual Property Protection in China, Nine Ministerial Administrations Join Hands in the Crackdown Upon IPR Infringement and Fake & Shoddy Commodities in Online Shopping, http://www.chinaipr.gov.cn/newsarticle/news/government/201101/1185070_1.html (last visited Feb. 15, 2011).

In the meantime, judicial support for the establishment of a higher and clearer duty of care for ISPs and online trade platforms may come soon, through decisions issued by civil and criminal tribunals of the People's Courts. Such support would be welcomed by rights-holders.

The joint Opinion issued by the SPC, SPP and MPS in January 2011 clearly indicates that parties who knowingly provide internet services to IP violators may be held criminally liable as accomplices, as further explained below.⁴⁴

Meanwhile, Chinese courts are expected to issue decisions in the coming months that will clarify the obligation of trade boards to proactively search their own websites to identify infringing listings.⁴⁵ Again, the IACC will closely monitor this situation for concrete results.

Going forward, the IACC encourages continuing close engagement by the Chinese government with trade boards, ISPs, and trademark and copyright owners to establish clearer duties of care on an industry-wide basis, both through mandatory regulations as well as through the promotion of best practices.⁴⁶

Stand-Alone Websites

As noted above, IACC members have in many cases concluded that private action against stand-alone websites is simply not cost-effective, due to:

- the large number of infringers involved;
- the higher cost, and in some cases burdensome requirements, of conducting take-downs with relevant ISPs;

⁴⁴ The utility of this new Judicial Opinion remains untested, and there are fears among IP owners that Chinese prosecutors and courts will be reluctant to pursue criminal liability against an ISP or online trade platforms in cases without particularly egregious circumstances. Still, the explicit inclusion of ISPs in the Opinion is expected to have a positive impact in encouraging ISPs and ICPs to cooperate in enforcement work.

⁴⁵ A November 2010 case against Taobao in the Haidian District Court clearly indicates the trade board's responsibility to use its own search engines to identify pirated software, and rejected its reliance on the copyright owner to provide links to each listing containing pirated works. The court suggested that the plaintiff needs to provide sufficient information to assist the trade board to identify infringing works, but nevertheless emphasized the trade board's obligation to proactively search out infringing items on its service once it is provided with the tools to do so.

⁴⁶ The Chinese government might promote best practices in due course by encouraging industry and online trade platforms to enter into MOUs, as the recent practice has been in Europe.

- the inherent difficulties and high cost of investigating the stand-alone websites through private investigators;
- the lack of adequate investigative powers by local AICs and other administrative enforcement bodies; and
- the lack of police resources to hunt down infringers in more significant numbers.

Most of the above obstacles exist in other countries as well, and IACC members are seeking to work more closely with each other to organize resources to deal with individual cases on a collective basis. In the meantime, our members are hopeful that policing work by Chinese authorities will begin to net a greater number of targets that operate stand-alone websites offering fakes and other infringing goods. In addition, criminal actions against infringing websites need to be increased along with sufficient support by the National Copyright Administration of China (“NCAC”) and other agencies supporting copyright enforcement.

Counterfeiting and Piracy in Retail and Wholesale Markets

Notwithstanding the increase in online sales of fakes, and the significant shift in favor of online distribution of pirated copyrighted works, the trafficking of counterfeit and pirated hard goods remains endemic in retail and wholesale markets in China. Historically speaking, the IACC believes this continuing problem is largely the result of over-emphasizing administrative enforcement, which lacks a sufficient deterrent impact, and imposing numerical thresholds for criminal prosecution, recently increased to RMB150,000 or US\$22,300.

Fortunately, over the last few years, Chinese authorities have begun introducing a range of measures to encourage market management companies (“landlords”) to address counterfeiting by threatening (and sometimes levying) administrative fines, issuing notices listing marks for “emphasized protection”, and offering standard templates for leasing agreements that clarify the landlord’s legal rights to terminate leases with vendors who are repeat offenders.

In addition to the national government’s actions, certain local governments have also gradually introduced a “trademark authorization system” (“TAS”) (explained in the IACC’s prior Special 301 reports) to encourage landlords and tenants to keep records indicating the wholesale source of the goods and confirming that the tenant has obtained authorizations to deal in a particular brand from the trademark owner or its agent. In cities such as Beijing, the roll-out by local AICs of the TAS has reportedly gone smoothly—but only in certain markets, such as those for construction materials. In

fashion, electronics, and other markets, landlords have pushed back, and it remains unclear how committed the SAIC and local AICs are at present to expanding the system and eventually making it mandatory.⁴⁷

In the meantime, IACC members are pleased to note China's willingness, as reflected in the December 2010 JCCT consultations, to clarify the legal duties of landlords to police against counterfeits in their markets, including the "supervision and inspection" of vendors.⁴⁸ Just how the Chinese government is planning to achieve these objectives remains unclear at present,⁴⁹ but our members look forward to working cooperatively with the national and local governments in the implementation process.

Silk Market

The Silk Market in Beijing continues to attract the close attention of IACC members, due to the continued harrowing levels of counterfeiting of their brands, and to the important civil and criminal actions which are pending there. Given the symbolic importance of this market—which is clearly one of the top tourist attractions within Beijing, and ultimately all of China—a positive resolution of this long-standing black-spot would create an extremely helpful example to landlords and vendors in markets throughout the country.

Details on the latest developments with the Silk Market are summarized below.

- Appeals of Civil Actions - As noted in the IACC's last Special 301 submission, in January 2010, the No. 2 Beijing Intermediate People's Court issued five civil judgments against the landlord of the Silk Street Market following complaints

⁴⁷ IACC members appreciate the complexity of the TSA system, but encourage the Chinese government to establish a timeline for its implementation.

Some AIC officials have suggested that the TSA might be expanded with a proposed national database maintained by the SAIC, which can be used to upload trademark authorization records as well as to facilitate monitoring of and enforcement against repeat offenders. As previously noted, a similar database for the management of online traders appears to be under construction. Combining these projects into one seems to be the logical next step.

⁴⁸ See United States Department of Commerce, *supra* note 21 ("In order to protect trademark rights in local markets, China agreed that it will take appropriate legal measures to clarify the responsibilities/liabilities of market managers, including landlords, operators, and managers and to strengthen supervision and inspection activities.").

⁴⁹ IACC members have in the past championed a "two-strike" rule, already adopted in some markets, under which landlords are required to terminate the leases of vendors found selling fakes on two or more occasions. IACC members are hopeful this rule will be made mandatory, if only in problem markets.

filed in 2009 by American and European brand owners,⁵⁰ including various IACC members. The court held in each case that the landlord was subject to a much higher duty of care than that established in prior civil actions. Specifically, the landlord was required (a) not only to stop infringements pointed out by the brand owners but also stop infringements it “should have known” about; and (b) to take preventive measures to avoid infringements in the future. The landlord appealed these five decisions to the Beijing Higher People’s Court and the appellate decisions are expected soon. If the original holdings are maintained, IACC members are hopeful this will provide legal support for the SAIC and local AICs in their efforts to impose mandatory duties of care on landlords and vendors along the lines promised in the December 2010 JCCT. Our members are also hoping positive decisions on appeal will help persuade the Silk Market as well as landlords in other problem markets to cooperate with brand owners in enforcement programs akin to those in place with online trade platforms.

- Criminal Prosecution of Former General Manager – As reported last year, the former General Manager of the Silk Market, Mr. Wang Zili, was arrested in late 2009 for colluding with a wholesaler, Mr. Yang Changjun, selling counterfeit handbags in the market. The prosecution and trial of Mr. Wang is expected to proceed over the next few months. However, our members note that counterfeiting in the market has not subsided significantly following Mr. Wang’s arrest—thereby suggesting his involvement was not a major factor behind the roaring trade in fakes in the market.
- “Restructuring” by Market – The Silk Market landlord announced plans in early 2010 to “restructure” the market, and increase sales of “fake-proof” items, such as silk fabric, traditional handicrafts and authorized local brands. However, market surveys conducted by IACC members after this restructuring suggest that the level of counterfeiting remains largely unchanged. Fakes of certain luxury brands are no longer openly displayed as widely, but they are aggressively touted in the aisles of the market by vendors armed with pictures of samples and entire catalogues of multiple brands.
- Tax Investigation – In 2009, following a report by former General Manager Wang Zili, Chinese tax authorities and police commenced an investigation into the management of the market for tax violations. These allegations and investigations were widely reported at the time in the local press, but there has been no further news of the progress or outcome of the government’s inquiries. An official statement by Chinese authorities regarding the current status of the

⁵⁰ The plaintiffs in these cases were Columbia Sportswear, Hard Rock Cafe, Hermes and Tommy Hilfiger.

investigation, whether it remains open or has been concluded, and, if the latter, a summary of the results of the investigation, would be welcomed by rights-holders, some of whom have expressed concern that the inquiry simply “disappeared” as a result of protectionism.

Obstacles to More Effective Enforcement

The concerns of our members regarding the main legal and practical obstacles to effective enforcement have already been extensively covered in recent Special 301 submissions by the IACC. They are summarized below, together with our members’ concerns over — and positive reactions to — particular recent developments.

Outreach to Foreign Brand Owners

Chinese police and administrative enforcement authorities have admirably reached out to brand owners and associations they work most closely with in order to generate leads on new cases, and IACC members with the resources to fund robust anti-counterfeiting programs in China have been impressed with the relevant authorities’ positive attitudes and support provided.

However, going forward, the IACC recommends Chinese authorities seek out reports of infringements by reaching out directly to a broader range of companies, including SME brands, and other companies who do not have the resources to maintain a large anti-counterfeiting presence in China. Alternatively, the authorities may solicit their complaints by contacting their registered trademark agents in China, industry associations, or foreign governments. The IACC stands ready to provide a bridge to its members in this regard.

Ultimately, many of our members can only cooperate with law enforcement through their designated investigators, trademark agents and lawyers in Asia. If relevant authorities have concerns over working with our members through these service providers, the IACC would appreciate the opportunity to better understand these concerns so they can be properly addressed.

Police Resources / Political Priority

The two pillars for success in anti-counterfeiting and anti-piracy by any government are police resources and sustained political attention. Clearly, the current enforcement campaign in China is benefiting from strong commitments of both resources and political support, and IACC members are hopeful that these commitments will extend beyond the planned completion of the campaign in March 2011. As noted above

however, the scale of counterfeiting and piracy in so many sectors seems so enormous that our members believe the current campaign will require several years before the situation can be rectified.

While there is clearly a need to prioritize large-scale cases and those which involve consumer health and safety, far greater police resources will be needed to address effectively the many smaller-scale infringements, which are largely undeterred at present by traditional administrative enforcement measures.

The IACC has previously recommended that Chinese police establish specialized teams to handle IP enforcement in hot-spot regions, and preferably nationwide. Doing so would generate greater efficiencies across the board. We understand that these teams already exist in certain regions, but we believe it would be beneficial to expand the scope of this innovation to many other cities as well – for example in Guangzhou, Beijing, Yiwu, and Shenzhen.

Criminal v. Administrative

Prior Special 301 submissions of the IACC have provided extensive critiques of the IP provisions in China's Criminal Code, the current thresholds-based approach to criminalizing IP violations, and the limitations in the deterrent impact and cost-effectiveness of current administrative enforcement. These are summarized and updated below.

- The end-result of most administrative complaints is the seizure and confiscation of a limited number of goods and (assuming the infringer has not fled) the imposition of a small fine. In the experience of most IACC members, these sanctions, even when taken together, have had little or no deterrent value, particularly against third parties. Meanwhile, government enforcement against targets operating on the internet has, until recently, been almost non-existent due to the lack of an adequate legal framework.
- The activities of almost all counterfeiters meet the thresholds for criminal prosecution, i.e., RMB50,000 or about US\$7,500, in production or prior sales. Proving that these thresholds have been satisfied requires either good luck or extensive investigations by trademark owners and Chinese enforcement authorities, such that the investigation costs end up being much higher than in other countries.
- As noted above, the SPP and MPS issued Prosecution Guidelines in May 2010 that effectively increase the threshold for criminal investigation and prosecution

of vendors of fakes to RMB150,000 or US\$22,500. The theoretical justification for this threshold is that the goods have not yet been sold and thus the crime is not yet completed and the public not yet harmed. While the legal basis for increasing this threshold arguably warrants debate,⁵¹ the end result is the creation of a much wider safe haven for infringers.

- No government is able to pursue every criminal act to a proper end. It is therefore critical under all laws that the standards for selecting cases for criminal investigation, prosecution and conviction be suitably flexible, in contrast to the existing structure which is dependent upon rigid thresholds. The current thresholds for criminal liability in China provide a relatively bright line which substantially reduces the perceived risks for would-be counterfeiters and ultimately induces the commission of more violations. The risks are clearly much more palatable for traders (including those engaged in export trade and those operating through internet fronts) who can easily organize their business such that investigators have difficulty finding transactional records or sufficient quantities of fakes to support a criminal prosecution.
- The calculation of case values (i.e., “illegal business turnover” or *fei fa jing ying e*) is extremely unpredictable, thereby making it particularly difficult for police to justify commencing investigations or otherwise intervening at an earlier stage. Relevant judicial interpretations of the SPC require application of the infringer’s actual sales prices, and otherwise permit reliance on the retail price of corresponding genuine goods only where there is insufficient evidence of the infringer’s actual prices.
- The investigative powers of administrative authorities are extremely limited, and AICs are often reluctant to seize documents and computer records they encounter. Police involvement in the investigation stage, for example, through checking of emails, phone taps, checking banking records, and interrogation of smaller-scale defendants, remains rare unless the police have agreed to handle the case from the start.
- China’s current administrative and criminal enforcement systems and basic legal provisions were established well before counterfeiting became a social problem. (Indeed, the IP provisions in China’s Criminal Code were last revised in 1997.) Further, the current regime, under which the vast majority of cases are handled

⁵¹ Chinese officials have at times argued that the establishment of a new threshold for uncompleted sales fills an important gap in the law, since in some prior cases, prosecutions were not pursued due to a lack of judicial guidance; IACC members had not previously reported such difficulties.

administratively, was based on a Soviet model that had never effectively been tested.

- The World Trade Organization (WTO) dispute between the U.S. and China that ended in 2009⁵² left legal uncertainties as to whether China's current thresholds for criminal investigation, prosecution and conviction meet the standards under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Further research by Chinese authorities is clearly warranted in this regard.

Given the above, the IACC urges the Chinese government and legislative and judicial authorities to broadly review the options for reform, both in the short term and for the longer term.

The IACC would be pleased to provide suggestions to U.S. and Chinese IP policy makers on possible short-term and longer-term reforms, drawing on the vast experience of our members in enforcing rights throughout the world.

Customs

As in previous years, IACC members generally report continuing high levels of satisfaction with enforcement by Chinese customs. Frustrations continue, however, over on-going difficulties in pursuing criminal investigations and prosecutions against individuals responsible for shipping even very large quantities of fakes. Almost all such shipments are nominally exported by small trading companies—more often than not incorporated in Shenzhen. The management of such companies will normally claim that they were unaware of the shipment or the nature of the goods being shipped, and that they have no information on the supplier of the goods.

The IACC recommends that consideration be given by China to intensifying the monitoring of shipments by Shenzhen trading companies and clarifying their duty of care to "know their customers," inspect shipments, and keep reasonable documentation on the supplier of goods, including detailed contact information, contracts, and the like. If appropriate, a pilot program in this regard should be considered in Shenzhen, which appears to be the main hot-spot for sham exporters.

Further, the IACC recommends much closer scrutiny of repeat offenders—even one-time offenders. To the best of our knowledge, Chinese Customs is currently applying

⁵²WTO Panel, *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009).

heightened supervision only against exporters following three or four confirmed violations.

Longer-term, it is recommended that the NPC revise Article 214 of the Criminal Code to facilitate criminal prosecution against exporters and other vendors based on a deemed knowledge standard, rather than actual knowledge. The number of actual prosecutions under a deemed knowledge standard would probably not increase much, but amending the law in this manner may give police and customs greater leverage over exporters by encouraging them to disclose the supplier of fake goods at an early stage of investigations.

Finally, the IACC recommends that the GAC permit the expansion of use of the current general bond system to all companies, without regard to the level of seizures in the prior year (currently over US\$25,000). The direct and indirect costs to companies of paying bonds immediately after every seizure has proved costly to many IACC members, particularly SMEs – for which those costs can pose a significant financial burden.

Increased International Cooperation

The IACC has been heartened by recent bilateral agreements between China, the U.S., EU, and various other countries and international organizations to strengthen information exchange and cooperation on anti-counterfeiting. This includes a recent agreement by China to participate in a new information-sharing platform established by the World Customs Organization.⁵³

We understand the intent behind these new accords is not only to pursue a small number of major cases, but rather to expand intelligence-sharing more broadly.

The IACC looks forward to working with concerned governments to promote the goals of broader information sharing, and ultimately better enforcement, with China.

Civil and Administrative Enforcement under Trademark Law

The Trademark Law of China, which governs both civil and administrative (but not criminal) enforcement, is scheduled for revision by the NPC in 2012. A draft of the revision was recently circulated for industry comment, although the provisions on

⁵³ See World Customs Organization, Press Release, New IPR Tool Bolsters Customs-Business Partnership, Feb. 2, 2011, <http://www.wcoomd.org/press/?v=1&lid=1&cid=8&id=247>, introducing the World Customs Organization's new Interface Public-Members (IPM) tool. The IPM appears primarily intended to permit IP owners to upload onto a shared database real-time information on new products, as well as guidance to local customs to help distinguish between genuine and fake products.

enforcement do not differ significantly from those examined in the IACC's 2010 Special 301 submission.

The IACC looks forward to commenting on future drafts as they are made available.

In the meantime, we summarize below the issues of priority concern to our members in relation to the proposed revision, as well as other concerns arising in civil and administrative enforcement.

- Legalization Requirements – Our members continue to suffer enormous costs and delays in enforcement due to the imposition of requirements by local AICs for powers of attorney in favor of local agents to be notarized and legalized in their home countries. In some cases, local AICs are willing to conduct raids without a POA, on the basis that the complaint was filed by a simple “member of the public”. But in such cases, the AICs will often refuse to provide access to penalty decisions and other information and evidence gathered during their investigations, and the rights-holders will not have the right of appeal in respect of penalty decisions.
- Three-in-One Courts – The SPC is expanding the introduction of “three-in-one” courts in various cities which are given jurisdiction to deal with criminal, civil and administrative cases involving IP subject matter. The IACC lauds this reform, as it will help ensure that judges handling IP cases are better versed in IP law. However, some of our members report that judges from these tribunals are more likely to impose suspended sentences than judges from the prior criminal tribunals. While this problem has not yet emerged as an overwhelming concern of our members, the IACC will be monitoring trends in this regard closely.
- Contributory / Accomplice Liability - The IACC encourages the State Council and NPC to clarify in the future amendment to the Trademark Law that liability may be extended to landlords, transporters, warehousemen, B2B and B2C platforms, ISPs and other intermediaries in the counterfeit trade based on a deemed knowledge standard, rather than an actual knowledge standard.

Consideration should also be given to importing into the Trademark Law or its Implementing Regulations the provisions on intermediary liability contained in the January 10, 2011 Judicial Opinion issued by the SPC, SPP and MPS.⁵⁴ This

⁵⁴ Article 15 of the “Opinion of the SPC, SPP, and MPS on Several Issues in the Application of the Law to the Handling of Criminal IP Infringement Cases” states:

provision clarifies that criminal liability as an accomplice may be imposed where the offender knowingly provides a range of services, including access to raw materials, packaging, production equipment, or services such as payment collection, internet access, or “online storage space”—a term which would appear to cover the services offered by B2B and B2C trade platforms.

- OEM Suppliers – In November 2009, the Shanghai Higher People’s Court issued a decision in a civil infringement case referred to as the “Shenda” dispute, which seemed to suggest that the use of a trademark by an OEM producer in China solely for export would not be regarded as infringing the rights of the owner of the PRC trademark registration for that mark.⁵⁵ This decision, which was based on the simple conclusion that Chinese consumers would not be harmed by such exports, attracted deep concern among brand owners who feared counterfeiters would exploit the loophole apparently created by the decision. It was also feared that Chinese customs, AICs and police would begin refusing to act in cases involving production of counterfeit goods intended solely for export. These fears have thus far not come to pass, perhaps due to the unusual facts in the Shenda dispute, including the fact the plaintiff and the defendant had a prior business relationship. But the IACC remains deeply concerned over the issue and will be monitoring developments closely.

While the latest draft of the Trademark Law revision does not specifically address OEM liability, prior drafts issued by the Trademark Office attempted to carve out a safe haven for OEM suppliers. These provisions were removed from subsequent drafts, and the IACC strongly urges that they not be introduced in future versions.

- Administrative Sanctions – In the vast majority of cases, IACC members believe the penalties imposed by AICs and other administrative authorities do not create

Anyone that is well aware of another person’s criminal infringement of IP but nonetheless provides such person with assistance in the form of the main raw materials, auxiliary materials, semi-finished products, packaging materials, machinery, equipment, labels, marks, production technology or formulas, etc. for the production or manufacture of infringing products, or with services such as internet access, server hosting, online storage space, communication and transmission channels, payment collection or fee settlement, etc., should be punished as an accomplice in the criminal infringement of IP.

⁵⁵ See Joseph Simone, *PRC Trademark Enforcement: Shanghai Appeal Court Ruling Sparks Controversy Over OEM Infringement Liability*, COPYRIGHT & TRADEMARK LAW BLOG, June 24, 2010, <http://www.lexisnexis.com/Community/copyright-trademarklaw/blogs/copyrightandtrademarklawblog/archive/2010/06/24/prc-trademark-enforcement-shanghai-appeal-court-ruling-sparks-controversy-over-oem-infringement-liability-issue-4-june-2010.aspx> .

a meaningful deterrent and are absorbed by counterfeiters as a mere cost of doing business. As explained above, without the fear of criminal prosecution—however limited—infringers are likely to refuse to cooperate with government investigations about the source of goods, prior sales and the like. The IACC therefore repeats its earlier recommendations to increase maximum fines, including statutory fines (currently limited to RMB100,000 or US\$15,000), and establish minimum fines, particularly in cases involving repeat offenders, counterfeits (as opposed to other types of trademark violations) and parties operating without a business license.

- Case Transfers – Incidental to the current enforcement campaign, the MPS, SAIC and other ministries have reiterated the importance of boosting the transfer of administrative cases to the police.⁵⁶ History has demonstrated the difficulties of achieving this goal, however, and the IACC is hopeful that new measures will be introduced soon which can be used by our members in day-to-day enforcement work. In the meantime, we reiterate an earlier suggestion that Chinese police retain primary jurisdiction over all cases involving an “underground” operator, i.e., a party operating without a business license.
- Civil Compensation - IACC members continue to report only modest successes in obtaining meaningful compensation from counterfeiters, with damages normally being insufficient to cover actual legal and investigation costs. Compensation awards in key cities—including Beijing—continue to discourage trademark owners from filing civil actions. The SPC has previously indicated plans to encourage local courts to be more generous in calculating compensation, but little evidence of this has been witnessed to date. It is hoped in the meantime that local courts will be encouraged to increase awards of statutory damages once the NPC amends the current Trademark Law, likely in early 2012. Under the latest draft of the law circulated for industry comment, the maximum for statutory damages would be doubled from the current level of RMB500,000 to RMB 1 million (US\$75,000 to US\$150,000).

Copyright Law

The most pressing issue for our copyright members in the entertainment and business software, film and music industries is online piracy, which, despite the current enforcement campaign, remains at critical levels.

⁵⁶ See, in particular, the latest list of enforcement priorities announced by the SPP in December 2010 at <http://www.spp.gov.cn/site2006/2010-12-02/0002130129.html>.

The recently-issued Judicial Opinion on criminal enforcement of IP rights helps fill an important gap in the law by offering new thresholds for criminalization of online copyright violations. But as the Judicial Opinion remains untested, and further time is needed to test the impact of these new provisions, the IACC will be monitoring this area closely to ensure that the necessary statutory and regulatory tools are in place to ensure our members' ability to enforce their rights online, and to determine whether further amendments to China's copyright law are needed to do so.

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 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.

The IACC also encourages the Chinese government to pursue a fresh economic and social impact study along the lines undertaken in 1999 and 2002 by the State Council's Development Research Center. Such a study would help better understand the impact of counterfeiting on Chinese industry and consumers, as well as the role the internet is currently playing in fueling the problem.

Conclusion

Counterfeiting and piracy in China remain epidemic, and its impact on consumers both within China and globally deserves closer attention and enforcement. Nonetheless, the IACC is encouraged by recent efforts by MOFCOM, the MPS, the GAC and other Chinese ministries to create meaningful change through the current enforcement campaign. The government itself has recognized the need for the current campaign to be "institutionalized" over the long term. More importantly, the government has recognized that the scope and complexity of the problem warrant deeper research into possible reforms to current enforcement regulations, policies and practices. As noted above, the IACC hopes that this effort will also be taken up by China's legislature, which may be better equipped to consider and implement a broader range of reform options.

RUSSIA

Recommendation: Priority Watch List

Overview

A quick review of the chart included at the beginning of this year's IACC submission is illustrative of the long-standing problems faced by intellectual property owners in the Russian Federation. Of the nearly fifty countries on which the IACC has filed comments with USTR since 2001, Russia and China are the only two countries to be included in every submission. Furthermore, at no point during this period has the IACC recommended Russia for status below the Priority Watch List level. This dubious distinction is the result of a host of concerns, including widespread trafficking in counterfeits, high levels of (non-counterfeiting) trademark infringement, hard goods and internet-based copyright piracy, insufficient border controls, non-deterrent penalties, official corruption, and others. More troubling perhaps is the fact that the above-identified concerns have been cited by rights-holders in a variety of industries. Unfortunately, rights-holders' concerns remained significant in 2010, and accordingly, the IACC recommends Russia's continued maintenance at the Priority Watch List level.

Scope and Nature of Piracy and Counterfeiting in Russia

During 2010, manufacturers in nearly every product sector represented by the IACC, including the chemical, apparel, automotive, tobacco, business and entertainment software, and consumer goods industries, continued to report problems with either local manufacturing or importation of counterfeits from abroad, intended for sale in the Russian market.⁵⁷ According to Moscow's Higher School of Economics, sales of counterfeit goods accounted for as much as 24% of all retail sales in key product sectors

⁵⁷ A selection of 2010 news stories involving the counterfeit trade in Russia is illustrative. Joby Warrick. Officials fear toxic ingredient in Botox could become terrorist tool," *The Washington Post*. January 25, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/01/24/AR2010012403013_2.html?hpid=topnews&sid=ST2010012403382 (discussing counterfeit Botox); Alex Anishyuk. "Blind eye turned to counterfeit cell phones," *The St. Petersburg Times*. February 24, 2010. http://www.sptimes.ru/index.php?action_id=2&story_id=30860 (involving counterfeit mobile phones); "Footie star web scam," *The Mirror*. April 11, 2010. <http://www.mirror.co.uk/news/top-stories/2010/04/11/footie-star-web-scam-115875-22177410/> (apparel); "Online pharmacy caught faking logos," EurActiv.com. May 21, 2010. <http://www.euractiv.com/en/health/online-pharmacy-caught-faking-logos-news-494428> (pharmaceuticals).

during 2009.⁵⁸ Border enforcement remains a priority concern – though not surprisingly so, in light of Russia’s expansive borders. Such border control problems exacerbate the domestic availability of counterfeit goods manufactured in neighboring countries⁵⁹, while also offering numerous routes for trans-shipment. Russia remains both a market for the consumption of counterfeit goods, as well as a producer and facilitator of trafficking.

Additional trademark-related issues, particularly those of trademark “squatting,” remain a concern for brand owners.

Enforcement

Intellectual property owners have long cited enforcement of their rights as the single-greatest area where improvements were needed; that issue was at the heart of much of American rights-holders’ comments surrounding the U.S.-Russia bilateral WTO accession negotiations, and underlies much of the substance set forth in the Side Letter on IPR signed between our countries in 2006, which has not yet been fully implemented by Russia five years later. Regrettably, Russia’s efforts to overhaul its previous IPR legislative regime with the introduction and implementation of Part IV of the Civil Code, appear to have shifted much-needed attention away from this issue – a concern that was raised by several when Part IV was first proposed. But while the modernization of the Russian statutory framework has taken shape, the need for improved IPR enforcement has not abated.

The enforcement problems referred to by IACC members are holistic in nature; they do not refer simply to the need for more raids by police – though that would certainly be welcome. Rather, rights-holders are troubled by comprehensive short-comings of the enforcement regime. In addition to the need for more raids and more arrests, they cite slow moving prosecutions following the initial enforcement actions. Where convictions are obtained, they note that sentences are too low and provide minimal deterrence, opening the door for recidivism and emboldening offenders.⁶⁰

⁵⁸ See, “24% of Russia's key retail goods fake.” *Sydney Morning Herald*.

“<http://www.smh.com.au/business/world-business/24-of-russias-key-retail-goods-fake-20100925-15f4x.html> .

⁵⁹ Russia shares a border with China – widely reported as the highest volume manufacturer of counterfeit goods in the world.

⁶⁰ See, e.g., Tim Greene, “Kaspersky vows anti-virus products are safe despite source-code theft.”

Network World, describing the theft, and posting online of anti-virus source code – the perpetrator received a three and a half year sentence, but it was suspended. Available at: <http://www.networkworld.com/news/2011/013111-kaspersky-antivirus.html> .

In addition, some members continue to report problems with transparency, including significant trouble obtaining the verifiable (or timely) destruction of counterfeit goods and components, or the seizure of implements and instrumentalities of the crime. The lack of transparency further feeds perceptions of official corruption, which in turn reduces trust and diminishes effective cooperation between the public and private sector.

While some rights-holders have noted an improving relationship with law enforcement personnel, and an increasing interest in working IPR cases, particularly with the Russian Federal Security Service (FSB)⁶¹, there remains a significant need for better cooperation. At the root of all of these problems, rights-holders see an overall lack of political will to address their concerns, as year after year the situation seems to show little – if any – improvement.

Customs

For several years, the IACC's members have expressed concerns regarding the effectiveness of Russia's border enforcement regime – particularly in light of its shared borders with China, which remains the world's largest manufacturing source for counterfeit goods.

2010 was, inarguably, an eventful year for issues related to border control measures in Russia – most notably, the entry into force of the new Customs Union between Russia, Belarus, and Kazakhstan. The effect that the Customs Union will have on the level of border enforcement against the entry of counterfeit goods into the region, and the movement of illicit goods inside the zone remains unclear, which has been cause for concern among some rights-holders. IACC members will, however, be monitoring the operation of the entity and the implementation of the Customs Union's customs code throughout 2011. IACC members encourage the swift establishment of a unified trademark registry for the Customs Union; though one is planned, it is not expected until 2012.⁶²

In recent years, the IACC has urged more close cooperation between Russia's Customs service and their Chinese counterparts. We were therefore pleased to learn that the two countries undertook joint Customs training on IPR during 2010, and also heartened by recent news that additional such cooperative programs are expected in 2011. This is a

⁶¹ Similar reports were received, and noted in the IACC's 2010 submission. We are hopeful that this is indicative of a trend, and perhaps due to improving familiarity and expertise with IP-related issues and cases.

⁶² See, The IPReport – Summer 2010. Coalition for Intellectual Property Rights. http://www.cipr.org/files/IPReports/CIPR_The_IPReport_Summer_2010.pdf

positive step, and builds upon reports noted in last year's submission that Russian enforcement personnel (both Customs and police) were expressing greater interest in IPR training initiatives.

The Russian government's commitment under the auspices of the ongoing WTO bilateral negotiations to include *ex officio* authority in the Customs Code was likewise welcomed by rights-holders, who had urged the government to do so for a number of years.

Legislation

Part IV of the Civil Code, when it was proposed initially several years ago, was cause for significant debate among interested parties in both countries. That debate was centered primarily around the proposed legislation's compliance with TRIPS standards, but was viewed by some as diverting energy and attention from the related issue of IP enforcement. The TRIPS-compliance of Russian law was a point raised specifically in the IPR Side Letter, and in the period since the enactment of Part IV, the Russian government has made substantial progress in addressing the concerns of IP owners.

The Russian government's commitment to the enactment and implementation of a WTO-compliant statutory regime is worthy of praise. The IACC encourages the Russian government to continue examining its legal structure for deficiencies or other opportunities for improvement. Such a process should be entered into openly, and in cooperation with its international partners, and those in the private sector. However, we would also remind the Russian government that merely adopting laws and regulations that comply with international norms and best practices is insufficient, in the absence of effective IPR enforcement.

The Russian government must undertake significant efforts to increase the overall level of enforcement under its new statutory framework.

Conclusion

While IACC members have reported modest improvements in Russia's IPR regime in recent years, and the commitments undertaken by the Russian government in bilateral negotiations with the United States are reason for optimism at further improvements, the level of trafficking in counterfeit and pirated goods in, and through, Russia remains unacceptably high. Accordingly, the IACC recommends that Russia be maintained on USTR's Priority Watch List in 2011, and encourages the Russian government to take the following actions in the coming year:

- Increase the level of strategic and practical coordination and cooperation between the Russian Customs service and its counterparts in key trading partners, including China and the United States;
- Provide greater opportunities for training related to intellectual property crimes at all levels of law enforcement;
- Improve the timeliness and transparency with which seized counterfeit goods are destroyed;
- Undertake sustained anti-counterfeiting enforcement campaigns in well-known markets, and publicize both the enforcement actions and prosecutions, as a means to increasing public awareness and demonstrating political priority for protecting intellectual property rights.

CANADA

Recommendation: Priority Watch List

Introduction

IACC member companies continued to be frustrated with the overall level of protection and enforcement of intellectual property rights in Canada in 2010. For a number of years, the IACC has commented on a variety of issues ranging from the need for substantive amendments to existing law, the structural impediments to enforcement faced not only by rights-holders, but also by Canadian law enforcement and customs personnel, the largely reactive approach taken by Canadian authorities in dealing with trademark counterfeiting and copyright piracy, and the need for a more urgent attitude on the part of the government in its efforts to address these and other obstacles to effective and deterrent enforcement of IP rights. The Canadian government has spoken often of the importance of strong IP protections, yet those words have failed to be matched with concrete action. As in previous years, such positive reforms failed to materialize in 2010.

In its 2009 Special 301 Report, the USTR elevated Canada to its Priority Watch List and maintained that designation in 2010, citing inadequate levels of IPR protection and enforcement. Though there have been some developments which give rights-holders cause for optimism, we have seen little in the way of substantive, systematic improvement that would justify a change in that status. Based on IACC members' assessments, and in light of the continuing existence of serious obstacles to effective protection and enforcement identified in prior years, the IACC recommends that Canada be maintained on the Priority Watch List in 2011.

Nature and Scope of Piracy and Counterfeiting in Canada

As one of the largest economies in the world, with significant consumer purchasing power, and as one of the U.S.' closest allies, Canada represents a significant export market for US-manufactured goods and a significant market for domestic production of core-copyright and branded goods. Unfortunately, legitimate manufacturers and retailers reported that they continue to face competition for consumer spending due to the widespread availability of counterfeit and pirated goods in the marketplace. In

2010, IACC members again reported problems involving product counterfeiting in the apparel, automotive, electronics, food and beverage, IT, luxury goods, medical equipment, personal care, pharmaceutical, software, tobacco, and wine & spirits sectors. In addition to the trafficking in counterfeit hard goods, business and entertainment software producers reported problems with end-user and institutional copyright piracy, including unique concerns in their sectors involving “pre-release” piracy.

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. As reported in prior years, and noted in the introduction to this submission, online piracy remains a huge problem in Canada.

Government enforcement efforts remain largely ineffective as a result of the lack of deterrent penalties and relatively infrequent prosecutions. IACC members continue to assert the need for significant improvements in Canada’s border enforcement regime, a concern that has been noted for many years.

Several IACC members noted that Canadian law enforcement made significant numbers of seizures of counterfeit merchandise in the period leading up to and during the 2010 Winter Olympics in Vancouver.⁶³ A similar phenomenon was seen around the time of the 2008 Summer Olympic Games in Beijing; in both cases, rights-holders were left with the impression that law enforcement is fully capable of addressing the trafficking problem – but only when the necessary political will is applied.

Legislative Concerns

As noted in both the IACC’s 2009 and 2010 Special 301 filings, the Canadian Parliament has failed to take concrete action following its undertaking of two studies into the extent and effects of counterfeiting and piracy on the Canadian market and Canadian consumers. Four years ago, the Standing Committees on Industry Science and Technology, and Public Safety and National Security made inquiries into these issues, resulting in the tabling of two reports: *Counterfeit Goods in Canada – A Threat to Public Safety*⁶⁴, and *Counterfeiting and Piracy are Theft*⁶⁵. The findings included in

⁶³ See Don Butler, *Counterfeit Jerseys No. 1 Business-Killer for Legit Merchants*, MONTREAL GAZETTE, Nov. 29, 2010, <http://www.montrealgazette.com/news/Counterfeit+jerseys+business+killer+legit+merchants/3902217/story.html> (reporting seizures of counterfeit hockey jerseys by the RCMP and a specialized anti-counterfeiting team formed by Winter Olympics organizers).

⁶⁴ STANDING COMM. ON PUBLIC SAFETY & NAT’L SECURITY, COUNTERFEIT GOODS IN CANADA – A THREAT TO PUBLIC SAFETY (2007), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=209854> .

those reports, for example, 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; both painted a damning indictment of the state of IP protection and enforcement in Canada.

Among the Committees' recommendations at that time were the enactment of new criminal provisions related to the manufacture, reproduction, importation, distribution and sale of counterfeit goods; strengthening of civil remedies for counterfeiting and piracy infringements; the provision of statutory authority for the Canada Border Services Agency (CSBA) to target, detain, seize, and destroy counterfeit and pirated goods *ex officio*; the allocation of sufficient material resources and personnel to government agencies tasked with IP enforcement; and the establishment of 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. Regrettably, four years have gone by without the enactment of new legislation to achieve any of these aims. It is time for Canada to make all necessary changes to its laws to ensure counterfeit and pirated products may be seized at its borders and to ensure supportive legislation that will stop Canada from being a haven for internet piracy.

Bills C-32 and S-9

In June 2010 and in December 2010, two bills were introduced (C-32 and S-9) that could have a positive impact on enforcement for the content industries in Canada. The first, C-32 (the Copyright Modernization Act), includes measures that would assist in enforcement against circumvention devices, which are a massive problem in Canada. The bill would finally make it illegal in Canada to circumvent technological protection measures on devices, disks, and other relevant media, and to import such devices.

While the Canadian government should be lauded for acknowledging the need to update its outdated copyright laws for the digital age, rights-holders continue to have concerns with portions of the legislation that is currently pending. Perhaps chief among these concerns are the bill's ISP safe harbor provisions in which they would adopt a "notice and notice" system, which is viewed as unlikely to effectively deal with the trafficking of pirated content online.

⁶⁵ STANDING COMM. ON INDUS., SCIENCE & TECH., COUNTERFEITING AND PIRACY ARE THEFT (2007), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200> .

However, some rights-holder groups have raised concerns about provisions of the bill, including exceptions to infringement and limitation of statutory damages for “non-commercial” and “private” use of copyrighted works, as well as loopholes in the provisions related to trafficking in circumvention devices that could create significant obstacles to ensuring IP protections. The Bill is currently being reviewed by a legislative committee, and with the possibility of an upcoming federal election, its passage is not certain. The delay would mean yet another year passing without urgently-needed improvement to Canada’s legal infrastructure which would help put a stop to this uncontrolled problem.

Bill S-9, would create two new offenses to Canada’s Criminal Code: trafficking of property obtained by crime, and possession of property obtained by crime for the purpose of trafficking.⁶⁶ These new prohibitions would provide law enforcement, including Canada Border Services Agency (CBSA), with the authority to take action against “intermediaries involved in the movement of property obtained by crime,” including those involved in the importation, export, and delivery of illicit goods. Such tools could be particularly helpful in addressing the trade in counterfeit and pirated goods.

WIPO Internet Treaties

In December 1997, Canada signed on as a contracting party to the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty (collectively, “the WIPO Internet treaties”),⁶⁷ yet over 13 years subsequent, has failed to ratify either the WIPO Copyright Treaty or the Performances and Phonograms Treaty. Of the 88 Contracting Parties to the Copyright Treaty, Canada is one of only nine⁶⁸ that have failed to ratify the agreement. Of the 87 Contracting Parties to the Performances and Phonograms Treaty, Canada is one of ten that have failed to ratify.⁶⁹ This failure to adopt what is generally considered the accepted norm among developed economies is particularly surprising in light of Canada’s well-developed high-tech sector, and world-renowned creative industries.

⁶⁶ For a summary of the legislation, see Parliament of Canada, Legislative Summary of Bill S-9: An Act to Amend the Criminal Code (Auto Theft and Trafficking in Property Obtained by Crime), http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=s9&source=library_prb&Parl=40&Ses=3#a10 (last visited Feb. 10, 2011).

⁶⁷ THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 467 (1998).

⁶⁸ The others include: Bolivia, Israel, Kenya, Monaco, Namibia, Nigeria, South Africa, and Venezuela.

⁶⁹ The non-ratifying parties to the Performances and Phonograms Treaty include those referenced in footnote 68, *supra*, along with Ghana.

Bill C-36: The Canada Consumer Product Safety Act (CCPSA)

Canada took a positive step in dealing with the trafficking of goods bearing counterfeit certification marks and other health and safety-related goods with this law which prohibits labeling consumer goods to misrepresent the safety of those goods. With increasing reports of toxic or otherwise dangerous counterfeit goods in sectors not traditionally viewed as posing safety risks, however, the Canada Consumer Product Safety Act (CCPSA) represents only one part of the solution to a much larger problem. If it is the intent of the Canadian government to protect its consumers from potentially dangerous products, then it must take a broader view of the counterfeiting problem, beginning with full implementation of the recommendations cited in the Committee reports from 2007.

Cooperation, Resources and Coordination

Border enforcement in Canada remained a major concern for IACC members in 2010, as it has been for numerous years. The Canada Border Services Agency has been handicapped by previously identified legislative deficiencies, which include the lack of *ex officio* authority to seize counterfeit goods. The influx of counterfeit goods into Canada for retail distribution or transshipment to the U.S. or other markets remains largely unimpeded.

CBSA's reliance on the Royal Canadian Mounted Police (RCMP) or local police to take enforcement action after the goods have entered the Canadian market continues to be hampered by limitations on resources devoted to investigating IP offenses. Where enforcement is undertaken, prosecutions have been limited; and where prosecutions have taken place, the lenient penalties meted out by the judiciary serve little deterrent value. As such, there is a systematic disincentive for Canadian law enforcement to devote significant efforts to IP enforcement, leading to the conclusion that the trafficking of counterfeit goods and pirated goods in (and through) Canada will continue to become more prevalent. A more coordinated, cooperative approach is called for, but even such improvement is unlikely to have a significant impact on the problem, absent the adoption of the necessary legislative changes outlined previously.

IACC representatives have met with law enforcement personnel at all levels in Canada, and they have clearly expressed a desire to do more, but they must be empowered to do so.

The IP Enforcement Working Group, a new initiative consisting of several rights-holder organizations, law enforcement agencies and government officials, hopes to develop further plans to share information and resources to assist in promoting better enforcement in Canada. In order to succeed, however, efforts such as these need

stronger government initiatives, supportive legislation, and additional resources to combat the significant problems in Canada.

Canada's participation in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations and promises to sign onto the Agreement in 2010 signaled some progress in border enforcement. Other legislative initiatives are being considered; however, each year of delay means another year of huge financial loss to the trademark and copyright industries in Canada. The IACC requests that the urgency of the problem in Canada continue to be emphasized by the USTR.

Conclusion

Regrettably, little has changed in Canada since the IACC's 2010 Special 301 filing, and the frustration of IACC members continues to grow. This is only compounded by the knowledge that enforcement personnel are willing to take action against counterfeiters, but have been hindered from doing so by out-dated laws and the government's continued inaction. The IACC recommends that the Canadian government:

- Swiftly implement 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;
- Swiftly enact and fully implement legislation such as C-32, C-36 and S-9, which will help support enforcement efforts in Canada;
- 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.

PHILIPPINES

Recommendation: Priority Watch List

Introduction

This year marks the tenth consecutive year in which the Philippines has been included as a country of concern in the IACC's Special 301 submission to the U.S. Trade Representative. From 2002 to 2006, the country was recommended for inclusion on the Priority Watch List, and in every year since, at the Watch List level. In its 2010 Special 301 report, the USTR announced its intent to conduct an Out-of-Cycle Review of the Philippines, the results of which are pending as of this writing. IACC members continue to report little or no progress on long-standing concerns related to a variety of IPR protection and enforcement issues, and as a result, the IACC recommends that USTR elevate the Philippines from the Watch List to the Priority Watch List.

Nature and Scope of Counterfeiting in the Philippines

Over the past decade, IACC members from a variety of product sectors have commented negatively on the environment for intellectual property owners in the Philippines. Among these perennial concerns is the widespread retail-level distribution of counterfeit goods, particularly in the apparel and fast-moving consumer goods sectors, as well as the need for greater transparency and substantially greater enforcement efforts. Perhaps the most frequent complaints heard, however, relate to the adjudication of IPR cases. Coalition members in the apparel, industrial chemical, automotive, and food and beverage sectors remain the most frequent victims of counterfeiting – and of the Philippine government's approach to dealing with such offenses. Similarly, online distribution and hard goods piracy remains a problem for those in the content industries.

Enforcement

IACC members reported no significant improvement with regard to intellectual property enforcement in 2010, in spite of the increased pressure to take substantive action that accompanied the Out-of-Cycle Review and engagement of the Aquino government by

the USTR, both directly and in multi-lateral fora⁷⁰. Retail-level distribution remains widespread, leaving rights-holders with the impression that law enforcement is simply not interested in seriously addressing their concerns. Such disinterest has likewise been attributed to the government, which has demonstrated little in the way of political priority in dealing with the problem over the past year. Regrettably, IACC members also continue to report that efforts to enforce their rights are further hampered by the judicial system's handling of such cases.

Judicial System

2001 was the last year that the Philippines was not recommended by the IACC for inclusion in the USTR's Special 301 report. Remarkably, IACC members report cases dating back to that period which remain ongoing. In both civil and criminal actions, rights-holders report substantial and unwarranted delays in obtaining justice, even for relatively straight-forward cases with clear and substantial evidence of wrong-doing. The courts simply process cases far too inefficiently. Although some rights-holders report positive outcomes following the lengthy process, the delays substantially increase the costs to plaintiffs and significantly decrease the deterrent value of the penalties levied. Moreover, the entire value of a company's trademark and the goodwill that it represents are at a much greater risk of erosion and degradation when counterfeiters and infringers are permitted to continue operating for such an extended period.

These deficiencies in the judicial system must be remedied to ensure that intellectual property rights remain meaningful in the Philippines.

Border Control

IACC members continued to report concerns related to customs enforcement and border control in the Philippines during 2010. While some commented positively on the

⁷⁰ See, e.g., Jessica Anne D. Hermosa, *Philippines Warned on Scope of TPP Commitments*, TRANS-PACIFIC PARTNERSHIP DIGEST, Oct. 1, 2010, http://p4tpp.dyndns.org/index.php?option=com_content&view=article&id=235%3Aphilippines-warned-on-scope-of-tpp-commitments&catid=1%3Alatest-news&Itemid=1 (reporting that USTR welcomed the Philippines to join the TPP, but warned that significant IP reforms would be required); USTR, Press Release, Weekly Trade Spotlight: The Philippines, June 29, 2010, <http://www.ustr.gov/about-us/press-office/blog/2010/june/weekly-trade-spotlight-philippines> (reporting the USTR's presence at the inauguration of President Aquino and plans for advancement under the Trade and Investment Framework Agreement (TIFA)); USTR, Philippines, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/philippines> (last visited Feb. 12, 2010) (describing the USTR's Sept. 2010 visit to the Philippines to meet with key officials of the Aquino administration and increase collaboration under the TIFA).

efforts of those enforcement personnel, Customs simply lacks the resources to secure the country's borders. Though there have been some reported successes with regard to interdictions and seizures, the trafficking of counterfeits remains an issue, particularly with regard to goods in-transit and the trafficking of labels and components. IACC members would welcome improved cooperation and information sharing, which are essential to our rights-holders' ability to pursue investigations and prosecutions after seizures.

Conclusion

In light of the continued concerns of rights-holders from a variety of sectors, the IACC recommends the Philippines' elevation to the Special 301 Priority Watch List.

In 2011, the IACC encourages the Philippines to:

- Take necessary action to improve the efficiency of courts in adjudicating intellectual property cases;
- Provide necessary training in IP law to improve the expertise of prosecutors and the judiciary in handling IP cases;
- Increase the resources available to customs authorities, and likewise provide more detailed information to rights-holders when border enforcement activities result in the detection and seizure of goods; and Significantly increase the level of enforcement actions, with the aim of reducing the volume of counterfeit goods in the retail market.

BRAZIL

Recommendation: Watch List

Introduction

In its 2010 Special 301 report, the Office of the U.S. Trade Representative maintained Brazil's status at the Watch List level. While the USTR commented positively on the Brazilian government's "commitment to fighting counterfeiting and piracy and to strengthening its enforcement efforts," it noted continuing problems with the overall level of counterfeit and pirated goods in the market, in addition to concerns related to border controls and the need for improvements in the area of expeditious and deterrent sentencing.⁷¹ Regrettably, IACC members report that those issues previously identified by USTR remained a concern in 2010, and additionally cited the need for adoption of legislation to close gaps in the country's existing laws. Accordingly, the IACC recommends that Brazil be retained on the Watch List in 2011.

Ineffective border control measures remained perhaps the greatest concern for trademark owners in 2010, along with the overall volume of counterfeit and pirated goods in the Brazilian market. While Brazil remains the largest potential market in Latin America, both for traditional retail and internet-based businesses – including those supporting and integral to the copyright and trademark industries, websites trafficking pirated copyright content and those dealing in counterfeit goods are rampant. The widespread availability of counterfeit and pirated goods poses a significant obstacle to IP owners' entrance into the Brazilian market and their ability to compete for consumers. To date, the Brazilian government has not taken adequate steps to deal with these key issues.

For several years, IACC member companies have encouraged both a more efficient application of resources for the detection and enforcement of counterfeits, as well as an increase in the overall amount of resources allocated for such purposes. The IACC reiterates those suggestions in 2011.

⁷¹ 2010 Special 301 Report, at 29.

Nature and Scope of Counterfeiting and Piracy in Brazil

With a population approaching 200 million⁷² – the largest in South America – and a growing economy⁷³, Brazil's significance as a consumer market continues to grow. Unfortunately, the country has also increasingly become a major end-market for counterfeit goods in nearly every product sector. While there remains some level of manufacturing of counterfeits domestically, the majority of counterfeits in the retail market are imported from abroad. The interdiction of those imports has proven difficult, partly due to the variety of routes available for smuggling across the country's extensive borders.

Enforcement efforts have been largely insufficient to reduce the level of counterfeits in the market. Although raids continue, the deterrent result has been minimal, due to slow prosecutions and failure of the courts to impose substantial penalties for convictions. IACC members continue to report the 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.

Online enforcement has become a greater concern for many rights-holders, and is likely to continue to grow in significance as internet usage becomes more widespread. Brazil currently has an estimated 84 million internet users, and that number is expected to grow to 92 million in 2011 – an increase of over 50% since 2007.⁷⁴ In spite of the cooperation of some ISPs in terms of taking down sites containing infringing material or offering infringing goods, little progress has been made in tackling the severe problem of online infringement in Brazil.

Brazil has the opportunity to be a leader by developing a healthy marketplace for the legitimate online sales and distribution of both copyright products and branded goods, as well as a healthy internet auction arena. Greater and immediate steps must be taken in order to ensure the health of this market and to preserve consumer confidence therein. Many IACC members are seeking to establish and build internet-based products and services in Brazil, ranging from online games to the digital distribution of books, software, music, and filmed entertainment and educational materials. These offerings are at risk of being pushed aside entirely by the overwhelming number of sites

⁷² The World Bank, Data: Brazil, <http://data.worldbank.org/country/brazil> (last visited Feb. 10, 2011).

⁷³ In 2010, real GDP growth was estimated at over 7.5%. Euromonitor International, Brazil, <http://www.euromonitor.com/factfile.aspx?country=BR> (last visited Feb. 10, 2011).

⁷⁴ *Id.*

operating in Brazil that offer pirated and counterfeit products.

Despite cooperation from some ISPs in taking down infringing sites, our members report significant ongoing problems with P2P piracy, cyberlockers, and off-line (illegal) servers hosting pirated content, which decimate sales of legitimate products. In addition, members also report widespread counterfeit branded goods sold online and counterfeit cards, some of which circumvent a variety of proprietary security protections and in some cases are merely fraudulent (empty). Brazil must take steps to stop this type of illegal activity in 2011.

Legislation

Since 2008, the IACC has encouraged the adoption of legislation that would increase the minimum prison terms available in counterfeiting cases. Under the current law, sentences range between one and twelve months for product counterfeiting, while another law – 9,099/95, provides that first-time offenders who can satisfy other requirements will not face prosecution for crimes with a minimum imprisonment of two years or less. As a result, allegations of criminal counterfeiting are rarely prosecuted. The decreased likelihood of prosecution in turn significantly decreases the deterrent value of the law prohibiting counterfeiting. Bill No. 333/1999, introduced over a decade ago, would increase prison terms for counterfeiting to a minimum of two years and a maximum of four years, but the Brazilian government again failed to act on the bill in 2010.

Brand owners also reiterate earlier calls for the enactment of legislation to provide authority for public prosecution of trademark counterfeiting which, unlike copyright piracy, remains a private criminal offense to be prosecuted by the right holder alone.

In addition, IACC members support the establishment of specialized IP courts in Brazil as a means to improving the courts' efficiency and effectiveness in dealing with IP offenses.

Finally, we note that Brazil, like Canada, has not yet acceded to the WIPO Internet Treaties – a discouraging fact in light of the previously-discussed concerns related to online trafficking of counterfeit and pirated materials.

Enforcement Actions

Improving IP enforcement, both within and at Brazil's borders, remains a priority for U.S. rights-holders seeking to do business in Brazil. For a number of years, IACC members have encouraged the government to increase the overall level of enforcement and also to expand upon its establishment of specialized enforcement teams, which have

shown positive results in a number of cities. Increasing the amount of training made available to enforcement personnel, as well as prosecutors and judges is likewise desirable. The IACC Foundation will continue to offer training programs in Latin America in 2011 to improve law enforcement expertise, and welcomes the assistance of the U.S. government in expanding the reach of such programs.

The smuggling of counterfeit goods into Brazil, and the government's largely ineffective efforts to stem the flow such activity, remain significant concerns for rights-holders in Brazil. Member companies encourage the government to take a more coordinated approach to securing its borders and to work more closely with its regional partners – specifically Paraguay, Chile, and Argentina – all of which face a number of similar issues. In addition, the adoption of a centralized customs recordation system could significantly improve cooperation and information sharing between customs officials and rights-holders.

Public Education

Both the 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. 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 2011, due to continuing concerns regarding the volume of counterfeit and pirated goods in the Brazilian marketplace, ineffective border control measures, and the government's continuing inaction on necessary amendments to the country's legislative regime.

The IACC encourages the Brazilian Government to take the following actions 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 ensure deterrent penalties are imposed;

- Enact Bill 333/1999 to increase imprisonment, along with other penalties for criminal trademark counterfeiting;
- Focus resources and enforcement measures on internet piracy and online brand infringement, and enact the legislation necessary to support such enforcement efforts;
- Develop and implement a centralized customs recordation system to enhance cooperation and coordination between ports of entry;
- Continue efforts to raise consumer awareness regarding the threats posed by counterfeiting and piracy;
- Use the upcoming 2016 Olympic Games as an opportunity to increase awareness and make significant improvements on IP legislation, protection, and enforcement.

ITALY

Recommendation: Watch List

IACC members from both the trademark and copyright sectors have reported a number of counterfeiting and piracy concerns during the past year in Italy; accordingly, we recommend maintaining Italy on the Watch List in 2011.

Introduction

Although by some reports, 2010 brought an increased number of enforcement activities performed by local police on hard goods for IACC members, counterfeiting remained widespread in a variety of sectors, including entertainment and other software, consumer electronics, apparel and luxury goods, pharmaceuticals, and tobacco. In addition, digital piracy in Italy continues as a top concern for most IACC members, as Italy remains one of the worst markets in the world with regard to non-enforcement of internet piracy. While many law enforcement authorities are willing to pursue digital piracy enforcement, prosecutors are not as cooperative, resulting in continued rampant problems with such piracy in Italy. In addition, a particular lack of support by courts focused on IP contributes to the problem.

In 2010, the Italian Communications Authority (AGCOM) proposed a number of measures aiming to reduce online piracy following a 60-day public commentary. The IACC requests that the USTR not only strongly pursue the Italian government's approval of the appropriate legislative and regulatory measures needed to pursue internet-based piracy, but also ensure that enforcement measures actually resulting in substantive progress be taken on this front. Accordingly, enforcement actions must be followed by truly deterrent penalties.

A number of raids were conducted by the local police in the past year, resulting in positive seizures in significant volumes of hard goods, and the local authorities are to be commended for these efforts. The National Anti-Counterfeiting Day efforts in 2010, likewise, were a positive development in Italy.

Trademark Counterfeiting and Copyright Piracy

As noted, the actions of local police have resulted in a decrease of counterfeit hard goods and pirated products. In addition, our copyright members, most notably those in the entertainment software sector, report improved actions related to circumvention devices in Italy. The trafficking of circumvention devices has been a chronic problem in recent years. And while the courts in Italy generally have issued supportive decisions with regard to this issue, the IACC has received reports of a troubling 2010 case in Florence, in which the court issued a controversial decision in favor of circumvention despite a

ruling by the Italian Supreme Court deeming such devices illegal under Italian copyright law. This ruling essentially makes it legal to circumvent computer security measures, facilitating the rampant use of pirated software.

The overall internet piracy problem in Italy is growing, particularly with regard to illegal P2P file-sharing and linking sites, as reported by IACC members in the copyright industries. Similarly, trademark owners report growing concerns regarding the increased use of websites to facilitate the trafficking in counterfeit goods. Mobile device piracy is likewise considered a growing problem. Efforts to address each of these concerns are hampered by a lack of cooperation by Italian ISPs and an often slow and overly-burdensome takedown process.

IACC members do report, however, improved assistance by Italian police and customs with regard to hard-goods counterfeiting and piracy; and these efforts should be commended and continued. Private-sector rights-holders report that they have cooperated with enforcement authorities and intend to continue such cooperative efforts, which include the administration of ongoing training sessions with police and prosecutors. With regard to counterfeit goods, the legal infrastructure is improving for criminal enforcement, for example, with advances in the ability of law enforcement to confiscate goods and enforce criminal penalties.

Needed Improvements

Although AGCOM recently approved measures that may assist in improving the enforcement of online piracy and counterfeiting, these measures still need to be implemented, and translated into a legally-binding regulation in Italy; and these actions must be followed by strong enforcement. The work of the Anti-Piracy Committee stalled in 2010, and those efforts need to be renewed.

Raids on hard goods (both counterfeit and pirated) need to continue, together with court-imposed deterrent sentences. IACC members support current efforts in this regard (after all, Italy itself is home to many of the industries that benefit from such enforcement efforts), and will continue cooperation, training and other support needed to ensure that enforcement efforts and deterrent sentencing continue to improve.

In the coming year, the IACC strongly encourages the Italian government to:

- Continue current enforcement efforts against counterfeit and pirated hard goods;
- Pursue cases in the courts, and ensure that deterrent penalties result;
- Resolve any needed court decisions or legislative issues making clear that circumvention devices are designated illegal under Italian law, and
- Undertake significant efforts to ensure adequate enforcement of intellectual property rights online, with regard to both the distribution of copyrighted digital goods, and the trafficking of counterfeit merchandise.

MEXICO

Recommendation: Watch List

Introduction

In each of the past ten years, the IACC has recommended Mexico's inclusion at either the Watch List or Priority Watch List level, citing a variety of issues, including: border control, widespread retail sales, insufficient levels of enforcement, as well as a number of structural obstacles to effectively enforcing IP rights within Mexico. While some IACC members have commented positively on their experiences in Mexico in 2010 – most notably with regard to the efforts and interest in enforcing IPR shown by Mexico's customs personnel – the overwhelming consensus among rights-holders is that little has changed during the past year. As such, the IACC recommends that the USTR retain Mexico at the Watch List again in 2011.

Nature and Scope of Counterfeiting in Mexico

Throughout 2010, trademark counterfeiting remained a serious concern across most product sectors;⁷⁵ copyright piracy, likewise, remains a significant obstacle to legitimate producers of music,⁷⁶ movies,⁷⁷ entertainment software,⁷⁸ and business software⁷⁹. The

⁷⁵ See, e.g., Jayne O'Donnell, *Raids Crack Down on Counterfeit Goods*, AZ CENTRAL, Dec. 18, 2009, <http://www.azcentral.com/business/articles/2009/12/18/20091218counterfeit.html> (reporting seizures by ICE officials of counterfeit goods in Mexico ranging from pharmaceuticals to apparel); Karen Kucher, *Nearly 6,000 Counterfeit Tetris Games Headed to Mexico Seized*, San Diego Union Trib., July 2, 2010, <http://www.signonsandiego.com/news/2010/jul/02/nearly-6000-counterfeit-tetris-games-headed-mexico/> (reporting seizures of video games headed to Mexico); *More than 13,000 Counterfeit Toys Seized at the Border*, KTLA, Dec. 2010, <http://www.ktla.com/news/landing/ktla-counterfeit-toys-seized.0.6811647.story> (reporting seizures of a wide variety of children's toys destined for Mexico); Vance, *supra* note 5 (describing the counterfeit software trade in Mexico).

⁷⁶ See *IFPI Publishes Digital Music Report 2011*, TOP 40 CHARTS, Jan. 21, 2011, <http://top40-charts.com/news/Music-Industry/IFPI-Publishes-Digital-Music-Report-2011/62897.html> (reporting that domestic releases in Mexico have fallen 45% since 2005).

⁷⁷ See *Piracy: The Real Economic End Game?*, SALEM NEWS, Dec. 11, 2010, <http://www.salem-news.com/articles/december112010/mexico-piracy.php> (describing the thriving market for pirated DVDs in Mexico).

⁷⁸ See Kucher, *supra* note 75.

⁷⁹ Vance, *supra* note 5.

sheer volume of counterfeit and pirated articles available in Mexico poses a significant hurdle to legitimate manufacturers and retailers seeking to enter, or to compete in, the domestic market. As noted in prior years' submissions, the retail sale of counterfeit and pirated products continues to thrive in a variety of traditional brick-and-mortar shops and large (and well-known) flea markets. Equally troubling, however, are reports of greater seizures of counterfeit product sent via mail and express delivery services – likely pointing to a growth in online trafficking with sites (whether domestic or abroad) delivering illicit goods directly to consumers. Enforcement authorities remain under-resourced, and in need of more effective tools and a more coordinated approach to dealing with the well-ingrained counterfeiting and piracy problems.

Customs

The efforts of Mexican Customs were generally viewed by IACC members as a bright spot in 2010. Though customs enforcement continues to be hampered by structural impediments, personnel remain responsive to rights-holders and made substantial seizures during the past year. The Customs Service also continued its development of the strategic plan put forth in recent years.

Customs' effectiveness is constrained, however, by its limited statutory authority. Like their counterpart in Canada, Mexican Customs has no authority to detain goods on the basis of an intellectual property infringement. If a customs official suspects a shipment of infringing IPR, rights-holders must act very quickly to seek an order for confiscation of the goods, which must be issued by the Attorney General's Office (PGR) or the Mexican Institute of Industrial Property (IMPI). In practice, this process can be cumbersome and time-consuming, and in many instances, Customs has no choice but to release the infringing merchandise before a seizure order can be obtained.

The adoption of two legislative proposals could significantly enhance Customs' efforts to enforce IP rights at the borders. First, customs officials should be granted the authority to act, on their own initiative, to temporarily detain goods on the basis of a reasonable suspicion that those goods infringe intellectual property rights. The adoption of procedures which would allow for a prompt investigation and determination of the goods' legitimacy comports with Customs' mission of trade facilitation and its duty to prevent contraband from entering the market. The efficiency of such a process could, in turn, be improved by the creation of a centralized customs recordation system for intellectual property rights, similar to that which has been established in the United States. A centralized database could improve coordination and communication between customs personnel throughout Mexico and participating rights-holders throughout the world. A voluntary, opt-in system could be self-sustained with nominal fees paid by IP owners to register their rights with customs authorities. A proposal for a recordation

system has been languishing in Mexico's Congress for nearly two years; the IACC strongly urges the Congress to adopt both of the proposals described herein.

Enforcement

Whereas IACC members generally spoke positively about Mexican Customs, the frustrations voiced in regard to criminal and administrative enforcement in past years continued in 2010, without regard to product sector. The penalties are insufficient to create deterrence. Enforcement actions are often significantly delayed, with even greater delays before reaching their final resolution, all of which increases the injuries to rights-holders while increasing the profits of offenders.

Administrative action remains a discouraging avenue of enforcement for rights-holders, who note:

- 1) the expense involved, including what are widely-viewed as overly burdensome bond requirements and costs related to serving complaints;
- 2) the length of proceedings – in some cases more than two years before a final decision is issued;
- 3) IMPI's inefficiency in destroying seized goods – in some cases, also a time-frame measured in years, and which in turn results in greater expenses for rights-holders in connection with the storage of seized merchandise;
- 4) IMPI's lack of authority to require defendants to submit to an inspection or seizure of goods; and
- 5) the insufficiency of the penalties that result from administrative enforcement in creating any true deterrence to recidivism.

Such critiques have likewise been voiced with regard to the PGR, but have been far less pronounced, and rights-holders noted with optimism that the Attorney General's Office significantly increased the number of IP-related complaints filed in 2010. The IACC encourages the PGR to carry these cases through to conclusion. The Attorney General's Office has reported an increasing number of convictions, but IACC members also point out that the number of open cases remains very high. It is hoped that the Specialized IP Unit will continue to improve as it gains experience in its direct handling of IPR cases. The Specialized IP Unit can also serve as a resource and authority for prosecutors throughout Mexico, who may be less experienced with IP-related offenses.

Conclusion

While the Mexican government continued its efforts to improve IP protection, the IACC recommends the country's continued placement on the Watch List in 2011. Significant improvements must be made to address rights-holders' concerns in a number of areas, and the IACC encourages the Mexican government to take the following steps in the coming year:

- Improve the resources and tools available to border enforcement authorities by enacting legislation that grants customs officials the authority to detain, on their own initiative, goods that infringe intellectual property rights, and by establishing a centralized customs recordation system;
- Provide increased training for both prosecutors and the judiciary to improve expertise and efficiency of the courts in dealing with matters involving IPR;
- Substantially increase the level of penalties in counterfeiting cases to ensure the deterrent effect of existing laws;
- In the case of administrative enforcement, set measurable goals for improving the efficiency with which cases are handled, minimizing delays in reaching a final determination of the case and of disposition of seized goods; and
- Increase efforts to raise public awareness of the harms caused by piracy and counterfeiting.

SPAIN

Recommendation: Watch List

Background

In its 2010 Special 301 Report, the U.S. 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 IP owners to enforce their rights. Throughout 2010, IACC members reported continuing problems in copyright piracy (particularly in the area of internet piracy), as well as ongoing concerns involving trademark counterfeiting in a wide variety of product sectors.

Copyright Piracy and Trademark Counterfeiting

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 in the world. Our members note that Spain consistently ranks in the top three countries for offending internet sites and downloads. Broadband access in Spain is nearly as ubiquitous as in the United States,⁸⁰ and the Spanish government has done little to rein-in use of the internet as a means of illicit distribution of copyrighted material.

IACC members in the copyright sectors continue to report rampant pirating of music, software, and filmed-entertainment in 2010. One report stated that as many as three billion illegal downloads were made in Spain in 2009,⁸¹ and 2010 was no different. 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. This public perception has been reinforced both by the government's action and inaction. It has been reported that some members of the public freely admit to

⁸⁰ 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. Strategy Analytics, Strategy Analytics: U.S. Ranks 20th in Global Broadband Household Penetration, <http://www.strategyanalytics.com/default.aspx?mod=PressReleaseViewer&a0=4748> (last visited Feb. 12, 2010).

⁸¹ Raphael Minder, *Pressure Grows on Spain to Curb Digital Piracy*, N.Y. TIMES, May 16, 2010, http://www.nytimes.com/2010/05/17/business/global/17piracy.html?_r=2&pagewanted=1.

downloading thousands of movies per year, as well as games and other creative content. In addition, much of the uploading has been linked to a handful of individuals who profit greatly by using pirated materials to lure traffic – and in turn, advertising revenue – to their sites.⁸² Historically, Spain has been a cultivator of the arts, home to internationally acclaimed film directors such as Buñuel and Almodóvar, musicians and singers such as Julio Iglesias, Montserrat Caballé, and Plácido Domingo, and artists such as Picasso and Miró. One would expect, therefore, that Spain would respect the creative arts and want to protect the IP rights of creators. Regrettably, the Spanish government's inaction with regard to widespread online infringement poses a growing threat to the vitality of the creative industries that have flourished there in the past.

The IACC has previously commented on the 2006 Circular issued by the Spanish Office of the Prosecutor General, which was viewed as legitimizing illicit downloading. The Spanish government must undertake a comprehensive review of its current legal framework and enact the legislation necessary to bring its laws into conformity with international norms and best practices. While IACC members have reported sporadic enforcement actions throughout 2010, the police have generally remained reluctant to undertake actions that might impose a meaningful level of deterrence. In addition, ISPs remain largely uncooperative, and have little incentive to do so.

IACC members from both the trademark and copyright sectors report a significant increase in illegal goods traded online via auction sites, linking sites, and others.

In 2010, IACC members were encouraged by Spain's decision to move forward with legislation contained within the Sustainable Economy Bill that would have provided a process for blocking infringing online sites. Unfortunately, the critical provisions of this legislation were eliminated, once again preventing IACC members from being able to take steps to stop the continuing infringement of their rights. In recent weeks, the Sinde Law, which would allow sites offering infringing content to be taken down, was approved; however, the provisions have been greatly weakened in comparison to earlier versions of the legislation, and it fails to offer an expeditious remedy.

In addition to the copyright concerns noted above, brand owners within the IACC reported continuing problems with regard to trademark counterfeiting, particularly in the apparel and luxury goods, pharmaceuticals, agricultural chemicals, tobacco products, and food and beverage sectors. These reports raise significant concerns, in light of the health and safety implications normally associated with counterfeits in those product sectors. Members also continue to report problems noted in the IACC's 2010

⁸² See *Spain Moves To Reign-In Internet Piracy*, EUROWEEKLY NEWS, Feb. 2, 2011, <http://www.euroweeklynews.com/2011020285773/news/spain/spain-moves-to-reign-in-internet-piracy.html> .

submission related to transshipment and “finishing” of counterfeits manufactured abroad.

Conclusion

In light of the significant problems that copyright and trademark owners continue to experience in Spain, the IACC requests that the USTR maintain Spain on the Watch List in 2011. 2010 saw little progress with regard to the issues identified by IACC members in previous years. In the coming year, the IACC hopes to see Spain undertake the following:

- Take all necessary steps to provide for the effective enforcement of IP rights online;
- Significantly reduce the volume of pirated works and counterfeit goods available in the Spanish market, both in brick and mortar locations and online;
- 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; and
- Undertake much-needed public awareness campaigns to increase consumers’ understanding of the negative implications of counterfeiting and piracy and the positive contributions of intellectual property owners and creators to Spanish culture.

TURKEY

Recommendation: Watch List

Introduction

Turkey was removed from the Special 301 Priority Watch List in 2008, and though the USTR has noted progress with regard to levels of enforcement and efforts to improve public awareness, the country has been maintained at the Watch List level in each of the two most recent Special 301 reports.

Rights-holders continue to report significant problems in the Turkish market across multiple product sectors. While we are currently awaiting updated seizure statistics for 2010, it is worth noting that in the most recent report from the European Union, Turkey was cited as one of the top five countries of provenance for infringing goods in each of the three largest categories of seizures (i.e., “Foodstuffs, alcoholic and other beverages,” “Body care items,” and “Clothing and accessories”)⁸³. Updated statistics are expected in July; however, based on member input, Turkey is expected to remain a significant source of counterfeit goods entering Europe. And while Turkey is rarely cited by U.S. Customs as a major source of seizures bound for our domestic market, this in no way diminishes the resultant harm experienced by American manufacturers in foreign markets.

In light of the significant and continuing concerns regarding the effectiveness of protection and enforcement of IPR in the country, the IACC supports Turkey’s retention at the Watch List level in the 2011 report.

Nature and Scope of Counterfeiting in Turkey

Coalition members from a variety of product sectors reported significant counterfeiting problems in Turkey during the past year, ranging from manufacturing to large-scale wholesale distribution and retail sales, in addition to insufficient border enforcement, particularly with regard to exports and trans-shipment to third countries.

⁸³ EUROPEAN COMMISSION, TAXATION & CUSTOMS UNION, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE EU BORDER – 2009, Annex 4, *available at* http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/statistics_2009.pdf . In fact, Turkey was the number one source of goods in the “Foodstuffs, alcoholic and other beverages” category. *Id.*

Enforcement

Members continued to face difficulty in enforcing their IP rights in Turkey during 2010, and generally pointed to inefficiencies in the system, which resulted in increased costs to rights-holders, slow-moving resolutions, and uncertainty in both results and effects. With regard to retail distribution, IACC members noted that counterfeiters frequently operate in the open, and seemingly with impunity. Current levels of cooperation between law enforcement and rights-holders are insufficient, some describing the police as uninterested and unhelpful.

Adjudication of cases remains unreasonably prolonged – an issue that has been raised repeatedly in recent years’ submissions by the IACC.

Border Control

As noted in last year’s submission, IACC members remain troubled by an insufficient level of enforcement at Turkey’s borders. This concern extends to all aspects of the border control regime, including imports, exports, and trans-shipment. Turkey remains a major source of counterfeit goods bound for the European Union, both in terms of goods manufactured or finished locally for export, as well as goods originating in China or countries of the former Soviet Bloc that transit Turkey bound for other markets. The IACC reiterates its calls for an increase in IPR training for Turkish customs officials and the application of substantially greater resources for the detection and interdiction of infringing shipments entering and leaving the country.

Conclusion

The obstacles faced by intellectual property owners seeking to do business in Turkey are significant and require a measurable increase in the application of political will by the Turkish government if the situation is to improve.

Despite steps taken in previous years, counterfeits remain widely available to Turkish and foreign consumers, and due to insufficient enforcement both within and at the country’s borders, counterfeit products produced in or trans-shipped through Turkey remain widely available in other markets. Drastic improvements are required.

In 2011, the IACC encourages the Turkish government to take the following steps towards combating the trafficking of counterfeit goods:

- Increase cooperation with European Customs to decrease the flow of illicit goods into the European Union, and work with their counterparts to trace European

seizures originating in Turkey back to their sources, so that appropriate high-level enforcement can be undertaken;

- Increase IP expertise at all levels, from the police to the judiciary, to improve both the volume and efficacy of rights-holders' enforcement efforts;
- Devote significant resources to raising public awareness among consumers with the intent of decreasing retail-level sales in the domestic market; and
- Provide for greater transparency with regard to the handling of cases by police, and encouraging the judiciary to provide clear legal opinions for the court's actions and rulings in IPR-related cases.

VIETNAM

Recommendation: Watch List

Introduction

IACC members noted some progress in Vietnam in 2010, reporting that enforcement authorities have made strides in consolidating the legal framework with regard to IPR protections, and also citing an overall increase in the number of administrative raids conducted during the past year. The promulgation of Decree No. 97/2010/ND-CP⁸⁴, which provides for “Administrative Sanctions Against Infringers in the Field of Industrial Property,” was also generally met with approval. The Decree establishes new administrative remedies, including the forcible change of company name, revocation of infringing domain names, and confiscation and forfeiture of illegal monetary gains from infringing acts, and further provides *ex officio* authority for law enforcement officials to act on their own initiative to investigate counterfeiting activities, even absent a formal complaint by the legitimate rights-holder.

In spite of this progress, however, the IACC must recommend Vietnam’s retention on the Watch List in 2011 for several reasons, including the continued widespread availability of counterfeit goods in a number of product sectors, widespread optical disc piracy, growing concerns regarding online infringement, as well as significant practical obstacles to IACC members’ ability to protect and enforce their intellectual property rights in Vietnam. The high volume of infringing goods available in the marketplace is viewed by many as a significant impediment to market access for manufacturers and producers of legitimate goods and content.

Criminal Enforcement

Members commented positively on the apparent increase in the number of raids undertaken by the Economic Police, Market Management Bureau, and Science and Technology Inspectorate in 2010, yet also noted that counterfeit goods remain widely available in the Vietnamese market, particularly in the cosmetics, apparel, pharmaceutical, and spirits sectors, and suggest that still greater numbers of raids are needed. Further, the actions taken by law enforcement are too frequently followed by

⁸⁴ Decree No. 97/2010/ND-CP replaced Decree No. 106/2006/ND-CP, dated September 22, 2006.

delays in prosecutions and the imposition of fairly nominal penalties against offenders, undermining the deterrent value of the enforcement actions.⁸⁵

Rights-holders were pleased by the 2009 enactment of the Criminal Code with regard to criminal liability for copyright piracy and trademark counterfeiting, but the implementation of those amendments has not been without its obstacles. The IACC encourages the Vietnamese government to provide clear, unambiguous guidance on the application of technical terms, such as “commercial scale” and “willful,” to law enforcement, prosecutors, and the judiciary to ensure that criminal prosecution remains a viable option and that criminal liability can be properly applied for the enforcement of intellectual property rights in Vietnam.

There must be an appropriate allocation within the state budget for IP enforcement, including logistics, expenses, and manpower. The issue of insufficient resources has been cited by a number of members as a reason for limited actions, and likewise continues to be a contributing factor in corruption.

Significant structural impediments also hinder effective enforcement of IP rights in Vietnam. For example, under current Vietnamese criminal law, only individuals who commit IPR infringements can be criminally prosecuted. In practice, however, most criminal violations are committed by organizations that remain immune to prosecution. In addition, enforcement authorities are frequently unwilling to prosecute IPR infringers – these offenses are often viewed as insignificant. Due to these and other factors, criminal prosecutions of IPR infringements remain rare.

Administrative Action

Under the new IP law, enforcement authorities will take raid actions against general infringements (i.e., infringement that is not trademark counterfeiting or copyright piracy) only when damage has been caused to the consumer, IP owners, authors, or society. This new provision requires the IP owner to justify damages when submitting a request for a raid action to the enforcement authorities. And while the actual damage may seem obvious, the evidentiary requirements for establishing that proof can be burdensome. An interpretation of the new provision whereby the harm is presumed, and the burden shifted to the infringer, would perhaps remedy this.

⁸⁵ These complaints are not unique to American manufacturers. See, *Fighting counterfeit goods remains a struggle for domestic businesses*, <http://www.lookatvietnam.com/2010/01/fighting-counterfeit-goods-remains-a-struggle-for-domestic-businesses.html> (discussing Vietnamese manufacturers’ dissatisfaction with current levels of enforcement and penalties).

Civil Action

Civil court proceedings remain costly and time consuming. Preliminary injunctions are available under the Law on Civil Procedure, but in practice are rarely applied by courts. Outcomes are often uncertain, as court officials generally have very limited IP knowledge and lack expertise in determining appropriate compensation for damages caused by infringement. There has been some training and education, but thus far, such programs have shown little positive effect. Additional training and education are vitally important.

Customs

Smuggling remains a concern, with significant traffic continuing across Vietnam's northern border with China. Vietnam's General Department of Customs ("GDC") has found that most counterfeit products are unofficially brought into Vietnam (e.g., hand-carried across the borders), and customs authorities are insufficiently resourced to fully address this activity. Accordingly, while the monitoring system adopted by the General Department to aid in detecting and interdicting contraband entering the country through official trade channels has shown some success, the overall effectiveness of that system in decreasing the flow of counterfeit products into Vietnam has been diminished.

Courts

As mentioned above, the courts in Vietnam have been hindered by a lack of experience with IPR-related issues and cases. In addition, the IACC has received reports that court officials have, on occasion, chosen not to handle IPR cases due to the fact that judges may be liable under Vietnam's law for incorrectly deciding IP infringement cases (pursuant to the Law on State Compensation).

Evidentiary problems also remain a concern, with IACC members noting that audio recordings obtained from undercover purchases are inadmissible in prosecutions for IP infringement. Such prohibitions significantly increase the difficulty of establishing elements of intent. Some members have suggested that the government establish specialized IP courts in Hanoi and Ho Chi Minh City to improve expertise among prosecutors and judges.

A final concern raised by IACC members relates to the amended IP law's prohibition against the provision of industrial property representation services by foreign lawyer organizations established in Vietnam, which appears to run contrary to Vietnamese commitments regarding market access and national treatment in the area of legal services.

In the coming year, the IACC urges the Vietnamese government to demonstrate its commitment to the protection and enforcement of intellectual property rights by undertaking the following:

- Substantially increase the resources available for IP enforcement, both within and at Vietnam's borders;
- Continue to increase the number of raids conducted by law enforcement personnel;
- Increase opportunities for the training of prosecutors and the judiciary in the area of IPR to ensure that cases are properly adjudicated; and
- Significantly increase penalties levied against infringers to improve the deterrence of existing enforcement efforts.

PARAGUAY

Recommendation: Section 306 Monitoring

Introduction

While Paraguay's economy is much smaller than others in the region,⁸⁶ and its consumer market similarly modest, many rights-holders view the country as one of the keys to addressing the growth of counterfeiting and piracy throughout South America. Its proximity to South America's largest markets, i.e., Brazil, Argentina, and Chile, and its numerous free trade ports, have made Paraguay a major point of entry for counterfeit goods manufactured abroad and a hub for their distribution throughout the region.

IACC members from virtually every product sector continue to cite Paraguay as one of their greatest countries of concern in Latin America; and while the government has made efforts in recent years to address these concerns, progress on IP protection and enforcement in the country has been slow to materialize. Improving border enforcement remains the issue of greatest priority to IP owners, in addition to continuing problems with trademark infringement and counterfeiting as well as end-user and institutional copyright piracy.

Accordingly, the IACC recommends that Paraguay continue to be subject to Section 306 monitoring in 2011.

Nature and Scope of Counterfeiting in Paraguay

As in 2010, Coalition members cited continuing problems primarily tied to border control issues, including the transshipment and smuggling of finished goods to other markets within South America, the exportation of components (including unfinished goods, labels, and packaging), and the finishing of goods manufactured abroad for subsequent distribution. Free trade zones likewise continue to be exploited for the trafficking of counterfeit goods, as well as a variety of other contraband and illicit goods. Retail-level distribution was also cited by members, primarily in the apparel, copyright, and consumer goods sectors, but is generally not viewed as significant a concern as in other markets in the region.

⁸⁶ See Central Intelligence Agency, World Factbook, Country Comparison:: GDP – Per Capita (PPP), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> (last visited Feb. 12, 2010).

Border Controls and Criminal Enforcement

Paraguay's geography – it is situated at the Tri-Border Region, sharing borders with Brazil and Argentina – is viewed as a major contributor to the problems seen by rights-holders. The porousness of the borders, the availability of free trade ports, and the corruption of officials continue to thwart efforts to crack down on the trafficking of counterfeit and pirated goods.

In recent years' submissions, the IACC has commented optimistically on Paraguay's efforts to implement a trademark recordation system. In late 2007, the General Customs Administration (GCA) issued an advisory on the issue, which was subsequently followed by the issuance of Resolution No. 101, in 2008. The latter formally established the manner in which rights-holders could register their marks with the GCA. While IACC members report no major advances on the implementation of the system in 2010, it is described as a work in progress. Rights-holders have observed, however, that the GCA has begun granting recordal certificates, which is a positive step. IACC members look forward to the continued implementation of the system by authorities, which could greatly improve both customs officials' abilities to identify illicit shipments of counterfeits and their cooperation with rights-holders.

The IACC has also commented in prior submissions – albeit less positively – on another provision of Resolution No. 101. That provision grants rights-holders only twelve hours, upon notification of a violation, to request a suspension of clearance proceedings. This limited timeframe can be exceedingly burdensome on IP owners, particularly for smaller companies without local representation. While the GCA continues, in practice, to provide some leeway in its enforcement of the 12-hour limit, and has generally been willing to ensure that rights-holders have a reasonable opportunity to act, the IACC reiterates its previous requests that the resolution should be modified to comport with practice and fairness.

As noted in previous years' submissions, Coalition members are cognizant of the difficulties inherent in addressing smuggling in the Tri-Border region, and the IACC urges Paraguay to continue working to improve the coordination of border enforcement efforts with its neighbors. The provision of additional resources to customs personnel would likewise be helpful in addressing the continuing problems.

In 2008, Paraguay enacted Law No. 3440/08, which included a number of amendments to the existing laws governing the "Violation of the Intellectual Property Right," under Article 184. Though these amendments have taken force, IACC members are not aware of any major relevant cases in which the new maximum penalties have been applied. As such, it is unclear whether the amendments have had any significant effect with regard

to deterring violations or decreasing the volume of counterfeits in the marketplace. We urge Paraguay to encourage its prosecutors to seek maximum penalties and judges to impose deterrent-level sentences in IP cases.

Conclusion

IP enforcement efforts in Paraguay remain a key factor in addressing wider issues faced by rights-holders in the South American market. And while the Paraguayan government has shown some progress in recent years, significant work remains to be done in order to deter trafficking through the country. In 2011, the IACC encourages the government of Paraguay to take the following steps towards improving its IPR regime:

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

CONCLUSION

The IACC appreciates the opportunity to provide the preceding information about the effects of global counterfeiting and piracy on our members. We look forward to continuing our work on IP issues with USTR and the interagency team, as well as our on-going cooperative IP efforts with our trading partners around the world.