



February 10, 2012

VIA WORLD WIDE WEB

<http://www.regulations.gov>, docket number USTR-2011-0021

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: 2012 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 76 Fed. Reg. 81555- 56 (December 28, 2011)

Dear Mr. McCoy:

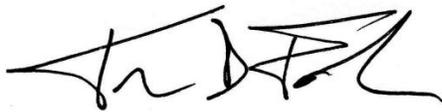
The attached written comments are submitted on behalf of the International AntiCounterfeiting Coalition, Inc. ("IACC"), in response to the request by the United States Trade Representative ("USTR"), published in the Federal Register on December 28, 2011, for written submissions from the public concerning the acts, policies, and practices of foreign countries that are relevant to USTR's 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.

With a membership composed of over 200 corporations, trade associations, and professional firms, and founded over 30 years ago, the IACC is the world's oldest and largest organization representing exclusively the interests of companies concerned with trademark counterfeiting

and the related theft of intellectual property. The members of the IACC 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 abroad 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 assisting in those 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, appearing to read 'Travis D. Johnson', written in a cursive style.

Travis D. Johnson
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Submission of the

International AntiCounterfeiting Coalition

to the

United States Trade Representative

Special 301 Recommendations

February 10, 2012

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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.

The comments submitted by the IACC are drawn from a variety of sources, including surveys of member companies, and interviews with local experts in the identified countries, as well as from publicly-available sources. By all accounts, the trafficking and sale of counterfeit goods remained a significant concern for legitimate manufacturers across nearly every industry during the past year. In last year’s submission, the IACC noted a number of trends including the increasing use of the internet by traffickers of counterfeit goods, as well as a pronounced increase in the trafficking of products with a clear nexus to consumer health and safety and national security. These troubling findings appear to have continued during the past year, as evidenced by the Department of Homeland Security’s recently published FY 2011 IPR Seizure Statistics.¹

Seizures by U.S. Customs & Border Protection (“CBP”) and Immigration & Customs Enforcement (“ICE”) continue at high levels, and across every conceivable product sector. But the number of seizures of those goods classified as “health and safety-related” increased by 44% over the past year, and increased by 41%, in terms of dollar value, since FY 2010. While the overall volume of seizures has decreased in terms of dollar-value, the number of individual

¹ See U.S. CUSTOMS & BORDER PROT., OFFICE OF INT’L TRADE, INTELLECTUAL PROPERTY RIGHTS: FISCAL YEAR 2011 SEIZURE STATISTICS, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/ipr_communications/seizure/ipr_seizures_fy2011.ctt/ipr_seizure_fy2011.pdf.

seizures has increased.² This seeming disconnect is largely a result of a significant increase in “low value” seizures of counterfeit goods shipped via international mail and express delivery services; that increase, in turn, has been correlated to the shifting business and distribution models used by counterfeiters. While large-scale shipments of illicit goods continue to be smuggled into the country using traditional methods such as oversea shipping containers, the same criminals are increasingly leveraging other means to sell and ship their wares directly to consumers.

In years past, the IACC has highlighted concerns regarding the involvement of organized criminal organizations in the trafficking of counterfeit goods; 2011 continued to provide examples of this association.³

As noted above, the past year saw a greater recognition in the US and abroad related to the exploitation of legitimate technologies to facilitate illegal activity, including the theft of intellectual property. In addition to the consumer-facing sites previously discussed, IACC members across many sectors continue to report concerns related to large-scale business-to-business (B2B) sites connecting manufacturers and high-level distributors of counterfeits, online classifieds, cyber-lockers, and sites streaming pirated content. We applaud the Administration’s recognition of the threats posed by IP theft online, and its efforts to encourage creative and collaborative efforts to address these issues in an effective way, while also encouraging the continued growth and vitality of the legitimate online marketplace. We realize that counterfeiting is a truly international problem, requiring the efforts of all of our trading partners; US leadership on these issues remains vitally important if we are to see real and lasting progress in this fight.

The costs associated with counterfeiting are, by any measure, staggering. In terms of lost sales to legitimate manufacturers, lost tax revenue and duties which go unpaid by the criminals involved in the trafficking, lost jobs, and lost investment in capital improvements and research and development; counterfeiting is a significant drain on the U.S. and global economy. The manufacture and distribution of goods produced in an entirely unregulated supply chain, where the makers have every incentive to cut corners by using cheap, substandard components, and no incentive to abide by accepted standards of consumer health and safety, is a significant threat to the health and well-being of citizens here and in other countries. And the infiltration of counterfeit products into the critical infrastructure and military supply chains is a significant threat to our national security.

² See U.S. CUSTOMS & BORDER PROT., *supra* note 1.

³ See, e.g., Jane Byrne, *Mafia Grip on Italian Food Sector Putting Industry at Risk*, FOOD NAVIGATOR.COM, <http://www.foodnavigator.com/Legislation/Mafia-grip-on-Italian-food-sector-putting-industry-at-risk-report> (discussing organized crime involvement in illegal activities ranging from price fixing to passing-off cheap products as respected Italian brands) and Eric Holder, U.S. Attorney Gen., Remarks at White House Release of Strategy to Combat Transnational Organized Crime (July 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/25/remarks-white-house-release-strategy-combat-transnational-organized-crim>.

As it has been for many years, China remained the country of greatest concern for IACC members across every product sector. Both the leading source for the manufacture of counterfeit goods produced for export to the US and other markets, as well as a hub for online trafficking of counterfeit and pirated goods, member companies continue to cite a variety of concerns with the overall level of IP protection and enforcement. Russia, too, remains a major concern this year, though some members have indicated nominal progress in some areas during 2011. Members' frustration with the pace of progress in Canada remained high over the past year as well, as the government has thus far failed to address a number of major concerns that have been raised by rights-holders – and acknowledged in Ottawa – for several years. Each of these countries is recommended for placement on USTR's Priority Watch List this year. They are joined by nine additional countries, for which we recommend inclusion at the Watch List level, or for further monitoring under Section 306.

The pages following include a table summarizing the IACC's Special 301 recommendations for the years 2002–2012, and more detailed discussions of the problems experienced by IACC members in each identified country. Many of the problems identified herein have gone unaddressed for several years, and have been discussed in prior years' submissions to the USTR. Among these are:

- 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 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 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.

The IACC welcomes the opportunity to work with the U.S. government in addressing these issues.

IACC SPECIAL 301 RECOMMENDATIONS, 2002 – 2012*

	02	03	04	05	06	07	08	09	10	11	12
Argentina	WL										
Belize			WL	PWL	PWL	WL					
Bolivia		WL									
Brazil	WL		WL			PWL	WL	WL	WL	WL	WL
Bulgaria	WL		WL								
Canada	WL	WL		WL	PFC	PWL	WL	WL	PWL	PWL	PWL
Chile	WL	WL		WL							
China	306	306	306	PFC/306	PFC/306	PFC/306	PFC/306	PFC	PWL	PWL	PWL
Costa Rica					PWL	PWL					
Colombia	WL										
Czech Republic						WL	WL	WL			
Hungary		WL									
India		WL	PWL	WL							
Indonesia	PWL										
Italy	WL									WL	WL
Japan	WL		WL								
Jordan			WL								
Kazakhstan	WL										
Korea							OO				
Kuwait				WL							
Lebanon			PWL								
Libya			WL								
Malaysia		PWL	PWL	PWL	PWL	WL					
Mauritius			WL								
Mexico	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
Pakistan			WL								
Panama		WL	WL	WL							
Paraguay	306	306	306			PWL/306	306	306	306	306	306
Peru						SM					
Philippines	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	PWL	WL
Poland	PWL	PWL	PWL								
Romania			WL								
Russia	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Saudi Arabia	WL	WL	WL	WL							WL
Singapore	WL	WL									
South Africa	WL	WL							WL		
Spain									WL	WL	WL
Taiwan	PWL	PWL	WL	WL							
Thailand	WL	WL	WL								
Turkey		WL	WL	WL			OO	WL	WL	WL	WL
Ukraine	PFC		PFC								
UAE	WL	WL	WL	WL		SM	OO				
Venezuela			WL								
Vietnam	WL	WL				PWL	WL	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

The People’s Republic of China (“PRC” or “China”) remains the top source of counterfeits distributed worldwide for most of the IACC’s members, across all product sectors. In addition, China-based manufacturers and traders appear extremely active in promoting global sales of fake goods on the Internet. Because of the key roles played by China in both the manufacturing and distribution of counterfeit goods around the world, and for the additional reasons set forth in this chapter, China remains the country of greatest concern for the IACC. As such, we recommend that USTR retain the PRC on the Priority Watch List in 2012.

In addition to the concerns raised by IACC trademark owners, copyright piracy – including both hard goods and internet/mobile device piracy, continues to be a major concern. Those members likewise reiterated last year’s reports of extensive production and distribution of unlicensed (hard goods) merchandise based upon their infringed copyrighted works as well. Both trademark and copyright members noted continuing concerns related to transparency of the disposition of seized goods, and a refusal of enforcement authorities to seize instrumentalities used to produce fakes.

Further, our members report continued difficulties thwarting trademark “squatting” or “hijacking” of their legitimately owned marks by companies in China—often connected with counterfeiting or piracy of our members products—due to gaps in Chinese legislation.

And while, by all accounts, counterfeiting remained severe during 2011, a number of our members commented positively with regard to the Chinese government’s “Bright Sword” enforcement campaign, particularly with respect to criminal prosecutions, which were reported to have increased 38%.⁴ The increased focus on enforcement, and

⁴ For the first ten months of 2011, criminal prosecutions of IP crimes—mostly involving trademark counterfeiting—were reported by the Supreme People’s Procuratorate to have increased 38%. See <http://www.csptal.com/cn/upload/2011%E5%B9%B4%E4%B8%AD%E5%9B%BD%E7%9F%A5%E8%AF%86%E4%BA%A7%E6%9D%83%E5%8F%B8%E6%B3%95%E4%BF%9D%E6%8A%A4%E7%8A%B6%E5%86%B5.pdf>. For an overview in Chinese of the “Top 10” criminal cases concluded during the campaign, see <http://news.qq.com/a/20110905/000879.htm>. The Bright Sword campaign ended for most ministries in June 2011, but was extended for Chinese police until the end of 2011.

demonstration of political will exemplified what rights-holders have been saying for years: the PRC government has the ability to do more to protect IP rights.

Rights-holders now welcome a continuation of the level of effort seen during “Bright Sword”.

Our members are encouraged by the Chinese government’s announcement of a range of policy measures—some already in place and some in the planning stage—to ensure continued improvements in IP enforcement across the board.⁵ Each of these measures is critical to our members, and we are hopeful that the PRC government will move swiftly in implementing them. They include the following, many of which the IACC has advocated for several years:

- The establishment of a permanent “National Leading Group for Combating IPR Violations and Production and Distribution of Counterfeit and Inferior Commodities”, based in the Ministry of Commerce (“MOFCOM”), but involving all major ministries and judicial organs with a role in IP protection;
- A planned reduction of thresholds for criminal liability (already introduced in May 2011 for counterfeiting of pharmaceuticals) under the future amendment to the Criminal Code;
- The proposed introduction of punitive damages and a doubling of statutory damages for trademark infringement under the upcoming amendment of the Trademark Law;
- A range of new measures to address online counterfeiting and further encourage online trading platforms and ISPs to provide more effective protection for IP rights;
- Greater cooperation between Chinese and foreign customs and other law enforcement authorities in the handling of cross-border cases; and
- More sustained public education to promote enforcement of IP rights.

⁵ The Chinese government’s latest plans for anti-counterfeiting enforcement reforms were outlined—in part—in a speech delivered by Premier Wen Jiabao on November 5, 2011, which is summarized in English at http://www.chinaipr.gov.cn/newsarticle/news/headlines/201011/976289_1.html, and in a State Council Opinion and a Notice issued on November 13, 2011 and December 28, 2011, respectively. See Opinion of the State Council on Further Cracking Down on IP Violations and the Production and Distribution of Counterfeit and Inferior Commodities, Jan. 20, 2012, *available in Chinese at* <http://society.huanqiu.com/discovery/2012-01/2376157.html>, and the Notice implementing the Opinion, *available in Chinese at* <http://www.miit.gov.cn/n11293472/n11293832/n13095885/14443601.html>.

Chinese civil courts also issued several important decisions during 2011 that should help to clarify the duty of care of landlords and online trade platforms in addressing counterfeiting, including in cases involving Taobao.com and the Silk Street Market.

The Chinese government's positive statements have provided some members with a measure of optimism for long-term prospects for reform, but we will be closely monitoring to ensure that the PRC government and legislature (the National People's Congress, or "NPC") follows through with effectively implementing concrete structural reforms and enforcement.

Meanwhile, the IACC recommends that the U.S. Government intensify its dialogue with China on the following priority issues during its bilateral engagement throughout the remainder of 2012:

- Police Resources – Counterfeiting activity in the PRC is increasingly organized and difficult for private investigators to penetrate. IACC members therefore believe that the Ministry of Public Security ("MPS"), China's top police body dealing with IP crimes, and local governments must increase the resources, training and political support for anti-counterfeiting and other IP violations.

China is clearly making progress in this regard through the recent establishment of specialized IP enforcement units of police in many major cities. Our members also report a noticeable increase in cases in which police are taking more proactive measures to track down the source of fakes and the scope of prior production and sales.

However, more clearly needs to be done to ensure IP enforcement work can be pursued on a more sustained and institutional basis, particularly in hot-spot regions.

- Investigation Powers of Administrative Authorities – Administrative enforcement authorities, particularly the Administrations for Industry and Commerce ("AICs"), the Technical Supervision Bureaus ("TSBs") and Chinese customs, will no doubt continue to handle the vast majority of counterfeiting cases for the foreseeable future. Pending an allocation of significantly greater resources to Chinese police, the IACC recommends that the investigative powers of administrative enforcement authorities be strengthened. Absent changes in relevant laws and regulations, we recommend steps be taken to promote closer cooperation with Chinese police in the investigation process.
- Criminal Code Amendment and Reduction of Thresholds – The IP provisions of China's Criminal Code were last amended in 1997, well before the explosion of

counterfeiting in the PRC and the advent of the Internet. Amending the Code would offer an opportunity to modernize the law in light of current realities and lessons generated from the rich experience of local and foreign rights holders and enforcement personnel, both in China and globally.

The NPC has not formally decided whether to amend the IP provisions of the Criminal Code. However, Premier Wan Jiabao has signaled that active research on its amendment will soon be underway (if not already in progress) during his speech on November 5, 2011.⁶ The speech highlighted the aim of reducing the current thresholds for criminal liability, which are currently RMB 50,000 (US\$7,300) for producers and RMB 150,000 (US\$22,000) for traders.⁷

In prior Special 301 reports, the IACC has explained the concerns of its members over the impact of these thresholds, and our members are therefore encouraged by Premier Wen's announcement. We now encourage the US government to offer technical assistance to legislators in China as they consider the options for legislative reform, as well as assistance in developing new guidelines to help local enforcement authorities in allocating responsibility for particular cases.

- Trademark Law Revision – The NPC has announced plans to enact amendments to the PRC Trademark Law in 2012, with the goals of strengthening enforcement and addressing the phenomenon of bad faith trademark piracy, which remains a priority concern for Coalition members.

The IACC recommends deeper engagement with the NPC, Trademark Office and other stakeholders to ensure the revisions are drafted in a manner which achieves these stated goals.

- Internet Counterfeiting – The IACC encourages greater cooperation with China for cases involving the online trade in counterfeits conducted through China-based trade platforms and stand-alone websites. The IACC also encourages greater exchanges of best practices and innovations in dealing with online trafficking, including through sharing databases of repeat offenders and cutting off payment provider services to online traders, whether by government regulation or industry protocols.

⁶ See *supra* note 5.

⁷ The RMB50,000 threshold is applicable to producers as well as to traders whose completed sales have been verified. The threshold of RMB150,000 applies to traders where no evidence of prior sales is available, and the main evidence of counterfeiting is the value of inventory seized by authorities. In practice, with the exception of online traders, infringers in China are rarely caught with evidence of prior sales.

- Physical Markets / Landlord Liability – Counterfeiting of a wide range of consumer goods, as well as hard goods trade in pirated copyrighted products, remains grave in a number of notorious markets in China, including the Silk Street Market in Beijing, the Baiyun World Leather Market in Guangzhou, various wholesale markets in Yiwu and various electronics markets in Shenzhen. The IACC recommends that China’s ministries intensify enforcement work in these and other markets. We also recommend that the State Administration for Industry and Commerce (“SAIC”) and MOFCOM draw upon recent civil court decisions involving the Silk Street Market which clarify the duty of care of landlords and other “market management organizations” in developing more effective administrative measures to promote trademark protection in their markets.

- Support for SME Brands – Many IACC members are small- and medium-sized enterprises (“SMEs”) that do not have the resources to establish anti-counterfeiting and anti-piracy teams within China. The IACC also encourages the Chinese government to explore ways of strengthening protections for SMEs’ brands, e.g., by increasing outreach by enforcement authorities to SMEs and their agents in China and establishing training and awareness programs to promote more effective cooperation with Chinese enforcement authorities.

Scope of Problem

Counterfeiting in China continued to affect most major sectors in 2011, with IACC members reporting particular problems with respect to apparel, footwear and fashion accessories (including leather goods, eyewear, watches and jewelry),⁸ portable phones and smartphones (including the sale of devices “pre-loaded” with pirated copyrighted products),⁹ pharmaceuticals,¹⁰ wine,¹¹ liquor¹², food, beverages, agricultural chemicals,

⁸ For updates on global trends on counterfeit fashion, see the blog of Prof. Susan Scafidi at <http://www.counterfeitchic.com>.

⁹ So-called “Shanzhai” phones—including counterfeits and design infringements—are said to occupy 10% to 20% of the global market for phones. See Shanzhai, <http://en.wikipedia.org/wiki/Shanzhai>.

¹⁰ The continuing large scale problem with fake drugs in China, as well as the more aggressive response of local authorities, is illustrated by a recent case published in September 2011 involving over 1,000 police who conducted actions in four provinces (Henan, Guangdong, Hebei and Anhui) resulting in actions against 117 locations involved in the production and sale of fakes. The acted resulted in the seizure of 65 million units of fake drugs and the arrest of 114 suspects. *Chinese Police Arrest 114 for Producing, Selling Counterfeit Drugs*, INTELLECTUAL PROP. PROT. IN CHINA, Sept. 11, 2011, http://www.chinaipr.gov.cn/newsarticle/news/government/201111/1265554_1.html; see also *Police Detain 39 for Fake Drugs in SW China*, INTELLECTUAL PROP. PROT. IN CHINA, Jan. 4, 2012, http://www.chinaipr.gov.cn/newsarticle/news/local/201201/1274096_1.html (reporting on a major bust against a network in Southwestern China netting 39 suspects of pharmaceutical fakes, raids against 69 locations, including 20 warehouses and production and packaging facilities); S. CHINA MORNING POST,

electronic components,¹³ computers, computer peripherals, computer printer ink cartridges, musical instruments and accessories, networking equipment, entertainment and business software, batteries, cigarettes, cosmetics, condoms, home appliances and auto parts.¹⁴

Nov. 2, 2011 (noting the detention of 114 individuals following a raid action in Kaifeng City, Henan Province and the seizure of RMB 190 million (US\$60 million) in fake local and international brands of pharmaceuticals).

¹¹ For a recent overview of the nature of the counterfeiting problem for the wine industry, see *Fake Wines Find Fertile Ground in China*, CHI. TRIB., Sept. 17, 2012. See also S. CHINA MORNING POST, Jan. 8, 2011, 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. *Id.*

¹² Counterfeit production and export of spirits remains a serious problem that tends to attract organized crime elements in a number of countries. Counterfeiting of leading Chinese spirits, such as MOUTAI, is commonplace, if not more prevalent than that of foreign brands. See *Fake Liquors Flow as Demand Soars for China's Fabled Sorghum Spirit*, N.Y. TIMES, Feb. 14, 2011, <http://www.nytimes.com/2011/02/14/world/asia/14maotai.html?pagewanted=all>. See also *158,400 Bottles of Fake Moatai Wine Destroyed*, INTELLECTUAL PROP. PROT. IN CHINA, Oct. 13, 2011, http://www.chinaipr.gov.cn/newsarticle/news/local/201110/1260085_1.html, and *Police Nab 184 in Raid on Fake Liquor Copycats*, INTELLECTUAL PROP. PROT. IN CHINA, Nov. 9, 2011, http://www.chinaipr.gov.cn/newsarticle/news/government/201111/1265555_1.html for details of recent MOUTAI cases. In total, the Chinese brand was able to work with Chinese officials to facilitate prosecutions against 121 individuals. *Id.*

For an overview of two major cases involving RMB 4 billion (over US\$600 million) in fake wine and liquor undertaken during the Bright Sword campaign, see <http://news.qq.com/a/20110910/000448.htm> and <http://news.qq.com/a/20110910/000468.htm> (in Chinese).

¹³ Fake electronics parts were estimated last year 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. Rachael King, *Fighting a Flood of Counterfeit Tech Products*, BUS. WEEK, Mar. 1, 2010, http://www.businessweek.com/technology/content/feb2010/tc20100228_486251.htm; see also U.S. DEP'T OF COMM., BUREAU OF INDUS. & SEC., DEFENSE INDUSTRY BASE ASSESSMENT: COUNTERFEIT ELECTRONICS (2010), available at http://www.bis.doc.gov/defenseindustrialbaseprograms/osies/defmarketresearchrpts/final_counterfeit_electronics_report.pdf.

¹⁴ Over the last year, police in the provinces of Fujian, Jiangsu and Anhui were said to have seized 1.3 million labels and 2.5 million units of fake foreign parts and executed actions against 100 locations and detentions of 200 individuals. See *Fujian: 2.5m Fake Car Parts Seized*, INTELLECTUAL PROP. PROT. IN CHINA, Oct. 27, 2011, http://www.chinaipr.gov.cn/newsarticle/news/local/201110/1263204_1.html.

Exports of fakes, to both developed and developing countries remained serious, and motivated the commencement, in early 2011, of a special enforcement program by the central government to stem the export of fakes from China to African markets.¹⁵ Such special enforcement programs should be encouraged for exports from China to other territories, not just Africa. It should be noted that every other country listed in IACC's 2012 301 report suffers from imports of fake goods from China; many of these countries are far larger markets than Africa. Thus, initiatives deterring imports to all major markets should occur and be ongoing.

Our members across industry sectors also report a continued trend in which goods are sold by online traders in China and delivered to consumers by mail and express delivery service. This phenomenon is confirmed by the continued reduction in the level of seizures of wholesale quantities by customs in China and abroad.¹⁶ Increased scrutiny of such exports would be welcomed.

Clearly, market opportunities for genuine fashion goods continue to grow for foreign companies, and Chinese consumers are increasingly disinterested in purchasing fakes.¹⁷ Further, certain IACC members in the fashion industry having brand protection teams in China have reported a noticeable reduction in the visibility of fakes in many markets following intensifying criminal enforcement and more proactive intervention by landlords in many markets.

However, for most IACC members in the fashion sector, the scale of counterfeiting remains critical, particularly in the online space. Further, our members in this sector report continued involvement by organized crime in the international trade in China-made fakes—both on a large and small scale.¹⁸

¹⁵ See Ding Qingfen & Zhou Siyu, *Ministry Cracks Down on Counterfeit Exports*, CHINA DAILY, Feb. 19, 2011, http://www.chinadaily.com.cn/business/2011-02/19/content_12043644.htm. The enforcement program appears intended mainly to address deterioration of political ties between China and African trading partners, many of which have reported serious damage to local industry as well as government tax revenues as a result of Chinese imports of fakes.

¹⁶ The trend outside China is easily illustrated by experience in Japan. In 2009, 33% of fake goods seized in that country were 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. See S. CHINA MORNING POST, Jan. 13, 2011.

¹⁷ See *Pro Logo: Chinese Consumers are Falling Out of Love with Fakes*, ECONOMIST, Jan. 14, 2012, <http://www.economist.com/node/21542819> (reporting a recent survey of Chinese consumers indicating their increasing reluctance to buy counterfeit luxury goods and greater interest in buying genuine product).

¹⁸ 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. See *Italy Police Make Huge Haul of Fake Designer Goods*, REUTERS, Feb. 13, 2010,

IACC member companies report that the epicenter of counterfeiting in China remains 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 the production, wholesaling and export of a wide range of goods, particularly apparel (including underwear and jeans). The production of fake leather goods remains deeply entrenched in various villages in the Huadu and Baiyun districts of Guangzhou, while wholesaling and exports of leather goods remained a critical concern in the notorious Guangzhou Baiyun World Leather Market.¹⁹ Production of fake jewelry is said by our members to be concentrated in the city of Yiwu in Zhejiang Province, and increasingly in the city of Yichun in Jiangxi Province.

Meanwhile, counterfeiting of electronics, including computer peripherals, phones and smartphones and electronic components, remains rife in Shenzhen, with wholesale and retail trade continuing largely unabated in a number of markets, including most notably, the Saige Electronic Market and Mintong Digital Center.

The city of Yiwu remains a problem area for wholesaling and export trade for all types of products, fed by demand in particular from traders from the Middle East, Africa and elsewhere in the developing world.

Counterfeit production of fake footwear continues Jinjiang County in Fujian, and the Putian District in Fuzhou City. Both regions are in Fujian Province, known for the production of fake footwear that is sold globally.

Meanwhile, counterfeiting of apparel, footwear, sports, fashion accessories, electronics, and software continues to flourish 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 perhaps the most notorious of physical markets in China continues to be the Silk Street Market in Beijing. Despite almost a decade of attention by our members,

<http://af.reuters.com/article/worldNews/idAFTRE61C22H20100213>. Police believed the seized product was intended to be distributed by Chinese traders based in Italy to buyers in other cities throughout Europe. *Id.*

¹⁹ See *infra* for comments on a recent civil action against the landlord of the Baiyun World Leather Market. IACC members report that recent enforcement initiatives by administrative authorities have in some cases forced retailers and wholesalers of fakes in major markets to exhibit unbranded samples to reduce the risk of raid actions. However, these vendors normally offer to sell the same goods bearing counterfeited brands, while providing access to samples in hidden warehouses located near the markets.

including via multiple civil, criminal and administrative complaints, counterfeiting remains rife in this market, and continues to function as a symbol of China's general failure to provide adequate protection for IP rights of all kinds. (See below for the latest developments in this market.)

Physical Markets / Landlord Liability

The Chinese government issued annual "Action Plans" in 2008 and 2009 (reported in prior IACC Special 301 reports) suggesting a commitment by the national and local AICs to target landlords of physical markets as part of a wider plan to promote enforcement of IP rights. IACC members were pleased to observe measured progress from these initiatives, including:

- the issuance by many local governments of guidelines encouraging landlords to monitor trademark authorizations issued to vendors,
- the issuance of standard leasing clauses to clarify the rights of landlords to terminate leases with vendors of counterfeits; and
- the imposition of administrative fines against landlords who failed to take requested measures to stem trade in fakes in their markets.

While these measures have reduced the level of visibility of fakes in many (but by no means all) markets, and have provided brand owners a new avenue for stopping and deterring counterfeiting, the results of these initiatives have been disappointing in most of the "notorious markets" noted above, particularly those offering fashion and electronics products. Further, even in markets that have adopted the new measures more aggressively, our members report that infringements eventually return after a certain period. This is due in part to the fact that recent guidelines and policies targeting landlords have not been legally binding.

During the JCCT consultations at the end of 2010, a new round of initiatives to address counterfeiting in retail and wholesale markets was supposed to be under preparation, pending clarification of the legal duties of landlords under relevant law.²⁰ Unfortunately, no such clarification was issued by either the SAIC or MOFCOM, and it remains unclear

²⁰ See DEP'T OF COMMERCE, 21ST U.S.-CHINA JOINT COMMISSION ON COMMERCE AND TRADE FACT SHEET (2010), available at <http://www.commerce.gov/node/12467> ("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.").

exactly what measures national and local authorities are planning, if any, to further develop earlier landlord liability initiatives.

As indicated in earlier Special 301 reports of the IACC, some of our members have worked collectively since 2004 to address counterfeiting in the iconic “Silk Street Market” in Beijing, both through legal actions and programs intended to promote cooperation with the landlord. Regrettably, the landlord has not responded positively to these efforts, and more recent requests by our members to Beijing authorities for intervention against landlords have likewise been largely unsuccessful. Consequently, counterfeiting of most members’ brands continues largely unabated.

In July 2011, civil actions by some of our members yielded decisions by the Beijing Higher People’s Court which have helped to clarify the duty of care for the Silk Street Market and other landlords. These groundbreaking decisions,²¹ which largely affirmed rulings of the lower courts issued in 2010,²² clearly specify the landlord’s obligation to take reasonable measures to deal with confirmed infringers, failing which the landlord may be held jointly liable. Specifically, the appeal court held:

“(The landlord) is under a duty to *pay reasonable attention to obvious activities that are suspected of infringing* another person’s (trademarks)... In the circumstances that it *knew or should have known* of the possible existence of such infringing activities at any specified booths, (the landlord is required to) prevent the damage that may be caused to the right holder by the infringing activities by *actively stopping the same in a timely and effective manner* or taking other effective measures.”

These rulings appear to raise the duty of care for landlords by clarifying the landlord’s obligation to proactively monitor counterfeiting by particular vendors based not only on actual knowledge but *deemed knowledge* of violations.

IACC members hope that these 2011 appeal court decisions (which are now final) will be utilized by national and local AICs and other authorities as a basis for new regulations and other enforcement initiatives designed to compel landlords to respond to complaints from trademark owners and AICs themselves in a more effective manner.

Our members report positive civil court decisions against landlords not only in Beijing but also in Shanghai. Regrettably, however, one of our members received negative decisions in civil actions pursued in 2011 against the landlord of the Baiyun World Leather Market in Guangzhou. The facts in this case appeared similar to those faced by the Beijing courts in the Silk Market disputes, and, thus, the Guangzhou courts’ decisions have been difficult to reconcile for our members.

²¹ Civil actions were filed concurrently in the names of Columbia Sportswear, Tommy Hilfiger (a PVH brand), Hard Rock Café, and Hermes.

²² The holding of the lower court was described in detail in the IACC Special 301 submission filed in 2011.

As indicated below, our members are hopeful that efforts by both brand owners and government authorities will be strengthened through appropriate amendments to the current Trademark Law, as well as through amendments to the Criminal Code and relevant judicial interpretations of the SPC that would lead to a substantial reduction in the thresholds for criminal prosecution and conviction. The current threshold for criminalization for vendors of fakes is RMB150,000 (US\$23,000).²³ While the Chinese government's policy of allocating criminal enforcement resources to more serious infringements is understandable, it has proved in practice to be unworkable, arguably facilitating the explosion of counterfeiting of all types of goods over the last decade—both on a small and larger scale.²⁴

Online Markets

Counterfeits of many IACC member brands remain highly visible on China's more popular online trade platforms targeting domestic and foreign consumers, including Alibaba, Taobao (a subsidiary of Alibaba), DhGate, TradeMe, HC360, GlobalSources, LinkChina, TradeTang, TradeKey, and others. Following exhortations by the Chinese government to Chinese trade platforms and ISPs, over the last year, some IACC member companies have reported improved cooperation in procuring timely take-downs following the submission of sightings of advertisements for fakes. However, many members continue to have significant problems with online trade of counterfeit and pirated products.

The IACC is encouraged that the central government appears committed to intensifying efforts to address online counterfeiting, as well as copyright piracy, through a range of initiatives. These include the issuance of new regulations by the SAIC and MOFCOM to regulate online markets, monitor individual vendors and strengthen enforcement of “real name” requirements. The SAIC is also reportedly planning to implement a

²³ The latest judicial opinion of the SPC, SPP and MPS indicates criminal liability may be pursued based on evidence of prior sales of only RMB50,000 or based on seizures of goods valued at three times this level. However, in practice, vendors are rarely caught with contracts or other evidence of completed sales. Thus, the reality is that the threshold for criminalization of violations by vendors in China is normally RMB150,000. Making things more difficult is that case values are normally calculated based upon the infringer's prices, rather than the value of the corresponding genuine product.

²⁴ The implications of China's thresholds-based approach to criminalization of IP crimes are described in greater detail in earlier IACC Special 301 submissions. But in the briefest of terms, counterfeiters routinely avoid criminal liability by keeping transactional records hidden and maintaining stocks of fakes in quantities that fall just short of relevant thresholds. While in principle, it is possible for Chinese authorities and IP owners to confirm the scope of prior transactions through investigations, the thresholds system makes such investigations more difficult and costly than in other countries. And as explained *infra*, the vast majority of counterfeiting cases in China continue to be handled by administrative authorities, including the AICs, which lack the normal range of police investigation powers.

national database (currently being piloted in certain cities) to assist enforcement authorities in directly monitoring and investigating suspected violations. MOFCOM and the SAIC have not disclosed details of their actual plans, but senior officials have indicated they will be rolled out by 2013.²⁵ IACC strongly encourages the agencies to live up to these commitments with prompt, and concrete, action in these areas.

A certain degree of deterrence was also generated during 2011 through the January 2011 judicial interpretation on criminal liability jointly issued by the SPC, SPP and MPS, which threatens action against ISPs that knowingly provide Internet services to IP violators.²⁶ Again, such actions must be sustained in order to provide concrete deterrence to ongoing illegal activities.

In the meantime, the need to address online counterfeiting issues is increasingly acknowledged as a priority within the central government's enforcement work. This is reflected in recent pronouncements by the recently-established Leading Group on anti-counterfeiting,²⁷ and more directly in SAIC guidelines issued in July 2011, to promote and coordinate investigations into online infringements cases by local AICs.²⁸ The IACC encourages such efforts.

The online trade platform in China of greatest concern to our members is Taobao. Advertisements for fakes of IACC member brands are often in the thousands and even millions. As China's largest online trade platform, our members have been particularly eager to establish positive cooperation with Taobao in dealing with routine "take-down" work as well as more complex criminal investigations and focused action against repeat offenders. In 2011, IACC members were encouraged by Taobao's support for criminal investigations commenced during the Bright Sword campaign. These actions resulted in convictions mainly against targets located in Shanghai and Hangzhou. Our members report, however, that few, if any, such cases were pursued in Guangdong Province and

²⁵ See Yang Hongfeng, Deputy Director of the SAIC's Market Regulation Division, Address Issued May 26, 2011, available in Chinese at http://gjss.ndrc.gov.cn/xxh/zcfg/t20110609_417116.htm.

²⁶ This judicial opinion is still relatively new, and there have been no reports to date of its application against trade boards or ISPs in counterfeiting cases. Still, the opinion appears to be at least partially responsible for the improved cooperation from ISPs and online trade boards over the last year.

²⁷ See *supra* note 5.

²⁸ The SAIC notice issued May 2011 is available in Chinese at <http://www.blawdog.com/article/Resource/1119.htm>. It prioritizes the investigation of cases reported from national authorities, those reported in the media and those involving a case value exceeding RMB 1 million (US\$140,000). It also requires AICs requesting support from AICs in other regions to complete their investigations within 30 days. The notice also states that local AICs have the power to shut down trade platforms that fail to cooperate, but the legal basis for this power remains ambiguous.

its capital, Guangzhou, which is where most online traders in fake fashion and other products are located. Further, our members report that Taobao's proactive support dropped noticeably after the enforcement campaign's completion around June 2011.

Many of our members also report Taobao's continued resistance to taking down larger quantities of listings on a timely basis, inconsistent handling of complaints and documentary requirements, reluctance to focus more attention on repeat offenders and other similar concerns.²⁹

Chinese courts issued civil decisions in 2011 which help clarify the duty of care of online trade platforms to deal more effectively with confirmed infringers in a manner consistent with the above decisions involving the Silk Street Market.³⁰ These decisions should continue to encourage online trade boards to increase resources and improve their systems and procedures for dealing with repeat offenders.

Going forward, the IACC encourages continuing close engagement by the Chinese government with online trade boards, ISPs, payment providers and trademark and copyright owners to establish clearer duties of care on an industry-wide basis, both through mandatory regulations as well as through best practices.³¹

2011 Enforcement

The Chinese government has yet to publish full-year data on the results of enforcement work in 2011. Partial data has been published, including that covering the nine-month Bright Sword campaign extending from October 2010 to June 2011.

Criminal

²⁹ Many IACC members participated in special enforcement programs initiated by Taobao in 2011 that required the purchase and verification of samples for each take-down request. While the cost of these purchases was covered by Taobao, IACC members report little impact from the program. The IACC is currently conducting a survey to collect experiences and concerns of its members regarding their experiences with Taobao.

³⁰ The most noteworthy case in this regard was issued April 2011 by the Shanghai No. 1 Intermediate People's Court, which held that Taobao was obligated to do more than take down advertisements for counterfeit products, and, in particular, that its failure to apply penalties permitted under its own IP protection guidelines against a repeat offender of a local brand was sufficient to attract liability. See the original decision in Chinese at http://www.pdiprlaw.org.cn/pdcqw/gweb/xxnr_view.jsp?pa=aaWQ9NDM5NDQmeGg9MQPdcssPdcssz. For related press commentary, see <http://www.dffy.com/fazhixinwen/sifa/201105/22854.html>, <http://www.enet.com.cn/article/2011/0510/A20110510856086.shtml>, and <http://roll.sohu.com/20110512/n307408442.shtml>.

³¹ The Chinese government may want to promote best practices in due course by encouraging industry and online trade platforms to enter into MOUs, as has recently occurred in Europe.

Criminal enforcement of IP rights appears to have increased dramatically during 2011, likely due to the increased efforts seen during the Bright Sword campaign.

A total of 4,544 IP cases were accepted by local criminal courts for prosecution during the first 10 months of 2011, representing a 38% increase as compared to the same period in 2010.³²

In 2011, the MPS announced having investigated over 28,000 cases involving both IP violations and “fake and shoddy goods” (i.e., goods that violate product quality regulations or pose threats to consumer safety). This compares with a total of 9,284 cases pursued in the four preceding years (2006 to 2010).³³

Civil

Between January and October 2011, Chinese civil courts accepted 52,708 IP cases in the first instance, representing a 42% increase from the same period in 2010. The total number of cases concluded during this period was 38,682, representing a nearly 40% increase on the prior year.

It is said that over 60% of civil cases involving disputes over IP rights involve copyright, with most of the remainder involving trademark.

Administrative Actions - AICs

In the first 11 months of 2011, local AICs increased the number of cases handled by 20%, up to 67,000.³⁴ Meanwhile, the value of goods confiscated by local AICs doubled (to RMB 933 million or US\$140 million), and fines imposed amounted to RMB 460 million (US\$72 million), representing an increase of 14% on the prior year.³⁵

The number of transfers of AIC cases to the PSBs in 2011 has not yet been reported. Meanwhile, the SAIC disclosed that 175 cases were transferred during all of 2010, compared to only 95 in 2009.³⁶ While this reflects a significant percentage increase, the

³² See

<http://www.csptal.com/cn/upload/2011%E5%B9%B4%E4%B8%AD%E5%9B%BD%E7%9F%A5%E8%AF%86%E4%BA%A7%E6%9D%83%E5%8F%B8%E6%B3%95%E4%BF%9D%E6%8A%A4%E7%8A%B6%E5%86%B5.pdf>.

³³ See *China Solves 28,000 IPR Violation Cases*, CNTV, Nov. 7, 2011,

<http://english.cntv.cn/2011107/102262.shtml>;

<http://www.mps.gov.cn/n16/n1252/n1642/n1987/2716508.html>.

³⁴ See http://www.ipr.gov.cn/gndtarticle/updates/govupdates/201112/1273366_1.html.

³⁵ See ANNUAL DEVELOPMENT REPORT ON CHINA’S TRADEMARK STRATEGY (2010), available in Chinese at <http://www.saic.gov.cn/zwgk/zyfb/qt/sbj/201104/PO20110425607919983842.pdf>.

³⁶ *Id.*

total number of transfers remains minute when compared to the total number of AIC cases handled each year.

Administrative Actions - TSBs

The value of fake and shoddy goods seized by local TSBs decreased, from RMB 574 million (US\$91 million) in 2010 to RMB 533 million (US\$84 million) in 2011.³⁷

Customs

Reflecting the continuing trend of postal shipments of fake goods, rather than larger wholesale shipments by container, customs seizures dropped from 110 million units in 2010 to 95 million in 2011. The total number of seizures also dropped from 20,300 to 17,000.³⁸

Meanwhile, Customs and Border Patrol seizure data in the year ending September 2011 indicate that China remains the single largest source of fake goods imported to the US. In 2011, the value of seizures remained the same at US\$124 million, representing 62% of seizures from all countries.³⁹

Blueprint of State Council Leading Group

As noted above, the new “National Leading Group for Combating IPR Violations and Production and Distribution of Counterfeit and Inferior Commodities” issued an opinion and notice which set out a number of priorities for enforcement work and a framework for implementation.⁴⁰ While not covering every major issue of concern to IACC members, the documents do address critical areas of concern, including the following.

³⁷ See http://www.gov.cn/jrzq/2012-01/05/content_2037744.htm.

³⁸ See <http://www.cipnews.com.cn/showArticle.asp?Articleid=22694>;
http://www.sipo.gov.cn/wqyz/gndt/201111/t20111130_633871.html.

³⁹ Almost all fakes imported to the U.S. from Hong Kong are trans-shipments from China, and thus the total percentage of China-sourced fakes seized in the U.S. last year was arguably 70%. See U.S. Customs and Border Prot. & Immigrations and Customs Enforcement, CBP, ICE Release Report on 2011 Counterfeit Seizures (Jan. 9, 2012), http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/01092012.xml; U.S. Customs & Border Prot., Fiscal Year 2011 IPR Seizure Statistics, http://205.130.201.42/ImageCache/cgov/content/newsroom/press_5freleases/2012/jan/hires/01092012_5fhires_2ejpg/v2/01092012_5fhires.jpg (last visited Feb. 10, 2012).

⁴⁰ See *supra* note 5.

- Intensification of administrative enforcement, including by customs.
- Strengthened measures to address online infringements.
- Creation of new means for monitoring and supervising the source of goods, e.g., by checking receipts and certificates. (Whether this is intended in part to refer to the “trademark authorization system” adopted by various AICs is unclear.)
- Further intensification of criminal enforcement by Chinese police, particularly for food, drugs and agricultural chemicals.
- Increased transfer of cases initiated by administrative enforcers to the police. The documents sets out a range of measures to achieve this, including through supervision and possible sanctions by the Ministry of Supervision and Supreme People’s Procuratorate.⁴¹
- The creation of a centralized database on infringement cases to promote the exchange of enforcement data between administrative authorities and the police by 2013.
- Improved coordination and cooperation in the investigation of cases across regions and across authorities. Notably, the documents specifically state that local police must provide assistance to administrative authorities that seek “joint enforcement”.
- Inclusion of IP protection as a factor in conducting work evaluations of local officials.
- Imposition of orders to local governments to address particular problems in IP protection within specified deadlines. The documents indicate that such orders will be issued by the Leading Group itself, with performance also supervised by the Ministry of Supervision.⁴² The SPP (the national prosecutors office) will also be responsible for investigating allegations of dereliction of duty by local officials.

⁴¹ Elaborate procedures were adopted in 2006, setting out in great detail the process and deadlines for the evaluation and transfer of cases by various administrative authorities to the PSBs. However, these rules have largely been ignored for a number of practical reasons.

⁴² IACC members are now exploring the viability of filing reports directly to the Leading Group to explain long-standing enforcement problems involving particular regions and markets.

- Measures to “create a social credibility environment of honesty, self-discipline, credibility and mutual trust”. The specific measures under consideration remain unclear, but appear to include the creation of blacklists of infringers, greater efforts to ensure the identity of online traders, and possible denial of credit to confirmed infringers. Interestingly, the People’s Bank of China is indicated as one of the main leaders in implementing these reforms.⁴³
- Expanded use of hotlines and new funding for rewards offered to whistleblowers.
- Publication of infringer data and information on significant cases to the media.
- New public awareness and training initiatives.
- Greater funding for law enforcement.
- Establishing and strengthening cooperation with overseas enforcement authorities in dealing with cross-border cases.

Most of the above plans merely repeat the contents of earlier initiatives and prior commitments by China, some of which have had a noticeable impact on counterfeiting, but some of which have not. The IACC is hopeful that the Leading Group will operate transparently in reporting progress and continuing challenges and will remain open to suggestions from industry in developing and implementing future initiatives.

Continuing Member Concerns

Criminal Thresholds

As noted above, IACC members believe that a reduction or elimination of criminal liability thresholds will be extremely useful in the Chinese government’s future efforts to address counterfeiting. We are therefore encouraged by Premier Wen Jiabao’s November 5, 2011, speech indicating plans to amend the Criminal Code to these ends.

In the meantime, the IACC encourages the SPC to issue new interpretations or opinions that will both lower existing thresholds and offer additional criteria to capture a range of other factors, including recidivism, the number of infringing items produced or sold, evidence that might suggest the infringement has taken place over a longer period of time, etc.

⁴³ It remains unclear whether the People’s Bank of China might have a role in addressing online counterfeiting by requiring payment providers to cease providing payment services to confirmed infringers.

The IACC also encourages the government and NPC to carefully monitor the implementation of recent changes to Article 141 of the Criminal Code, which effectively removed thresholds for pharmaceutical counterfeiting.⁴⁴ No doubt, Chinese police and administrative authorities have had to respond to this change in the law by adopting new policies for the allocation of responsibility for investigation of cases. The experience generated in this regard may accordingly prove useful in the course of research over the amendment of the IP provisions of the Criminal Code.

Administrative Enforcement

Administrative enforcement by the AICs, TSBs and Customs in China has offered a quick and inexpensive alternative to civil and criminal enforcement. However, as noted above, these administrative authorities generally lack the investigation powers needed to effectively deal with criminal-scale counterfeiting cases and, in particular, to generate evidence of the full scale of violations, as well as the source of fakes. These authorities lack the investigation powers to access banking details and emails, the power to open locked premises (including warehouses), the authority to enter private residences and the power to detain suspected infringers. While administrative authorities are able to request assistance from local police and other authorities, they do not routinely do so.

IACC members express the hope that the Leading Group and relevant ministries will more deeply explore the options for addressing the above problems. Solutions could involve granting additional police powers to administrative authorities, encouraging greater cooperation with Chinese police or a combination of measures.

Customs

Chinese Customs remained accessible and cooperative on a range of fronts during 2011, attracting continuing praise from many IACC members.

However, our members continue to report the following concerns which limit the cost-effectiveness of their customs enforcement programs:

- Only a very small number of cases initiated by Chinese customs are transferred to Chinese police for criminal investigation, thereby leading to prosecutions and

⁴⁴ Article 140 through 149 of the PRC Criminal Code addresses the production and sale of “fake and shoddy goods”, mainly targeting goods that pose a risk to consumer health and safety, due to their failure to meet labelling or mandatory product quality standards. Article 141 of the Code previously permitted criminal enforcement against parties dealing in fake pharmaceuticals only where they caused actual harm to consumers, and under the revised provision (enacted February 1, 2011, and effective May 1, 2011), this requirement was eliminated, thereby freeing local police and prosecutors to pursue criminal actions against any producer or vendor of fake or sub-standard drugs.

convictions. While we understand suppliers of fakes are using multiple layers to protect themselves from detection, and that this makes the investigation of cases more difficult, IACC members are hopeful that better results can be realized through more intensive cooperation between Chinese customs, police, brand owners, and, where appropriate, foreign customs and police.

- The cost and hassles of paying bonds following each individual seizure remain of great concern to IACC members. While some of our members have avoided these requirements by qualifying for the General Bond program, most do not qualify. It is therefore recommended that the General Administration of Customs (“GAC”) lower the thresholds for access to the General Bond program. Our members also suggest the GAC extend the approval period for General Bonds to two years and accelerate the approval process, and adopt procedures for ensuring more timely review of bonds actually paid for individual cases.
- Many of our members have difficulty in keeping the GAC’s online database of authorized Chinese factory suppliers updated, thereby leading to false seizures. Our members acknowledge that trademark owners bear primary responsibility for these seizures, so the burden of updating the GAC’s database—which is quite significant—rests solely with the IP owner. Thus, IACC members hope that the GAC will develop new alternative procedures to reduce the risks of false seizures, while simultaneously reducing the burdens on IP owners to update the GAC’s database.
- Some of our members report inadequate inspection of air cargo and courier shipments, which often contain higher-value fakes. It is suggested additional customs manpower be allocated to this channel of exports.

Transparency

The IACC has consistently recommend Chinese authorities increase the level of transparency in their handling of counterfeiting, piracy and other IP violations. Given the renewed commitment to strengthened enforcement and structural changes in the works, this year we emphasize the need to establish clearer benchmarks for progress by individual ministries, with statistics for enforcement published more regularly, broken down by region, and broken down by reference to the exact law under which penalties are imposed.

TM Law Revision

The State Council's Legislative Affairs Office ("SCLAO") issued a new draft revision to the PRC Trademark Law in September 2011 for industry comment, and it is now expected that the NPC will review and perhaps enact a revised law in mid-to-late 2012.

The IACC expressed concerns over the following provisions in the SCLAO draft.

- Maximum and Minimum Civil Compensation – The SCLAO draft would increase the maximum statutory damages to RMB 1 million (US\$ 158,000), double the current level. While this is laudable, many infringers are now generating substantially more in profits, and it is therefore recommended the maximum be increased further, perhaps to RMB 5 million.

Our members report though that their main concern is not the maximum compensation offered by law, but rather the minimum. Courts in many cities still calculate damages very conservatively, even in cases involving obvious bad faith counterfeiters, such that compensation obtained fails to cover litigation costs, let alone to compensate for actual harm. The IACC therefore recommends that the NPC consider amending the Trademark Law or its Implementing Regulations in a manner that will encourage courts to be more generous in calculating compensation in such cases.

The SCLAO draft does not include provisions offering punitive damages, which were indicated as a goal for legislative change in Premier Wen Jiabao's November 5, 2011, speech. The IACC is therefore hopeful that the NPC's future draft of the Trademark Law will address industry concerns over inadequate compensation through provisions on punitive damages.

- OEM Liability – The IACC's 2011 Special 301 report mentions our members' concerns over recent case decisions in China under which OEM suppliers of goods have been exempted from liability for infringement on the basis that the goods they make would be exported, thereby avoiding consumer confusion within China. During 2011, Chinese courts have issued further decisions confirming earlier holdings, thereby indicating a clear view on the issue from judicial authorities in the PRC. The IACC is pleased to note that the SCLAO draft does not explicitly exempt OEM suppliers of exported goods from liability, as doing so would codify a potentially dangerous loophole in the law that would likely be exploited by counterfeiters.
- Intermediary Liability – IACC members have concerns over the provisions in the SCLAO draft relating to intermediary liability (aka secondary liability).

Specifically, the IACC recommends that the draft include explicit references to landlords and “market management organizations”, as well as providers of Internet services, including online trade platforms and ISPs. Further, the IACC recommends that intermediary liability be explicitly allowed not only in cases where knowledge is proven, but also on the basis of deemed knowledge. Fortunately, Chinese courts have consistently applied secondary liability to landlords, ISPs, and online trade platforms, and recent decisions have confirmed that a deemed knowledge standard is applicable. Our members therefore believe that the failure of the future Trademark Law to incorporate these provisions may be misconstrued as an effort by the legislature to reverse the protections currently offered by the courts.

- Bad Faith Trademark Registration – The problem of trademark squatting and bad faith imitations of reputable foreign trademarks remains serious in China, causing severe damage to trademark owners and consuming enormous resources of the Trademark Office and courts. These problems are caused mainly by restrictive provisions in the current Trademark Law, conservative guidelines on its application issued in recent years by the SPC, and a traditional reticence among Chinese authorities in recognizing the evidence “bad faith” that is presented in trademark oppositions and cancellations. While the SCLAO draft broadens the criteria for addressing bad faith registrations, the IACC believes the proposed changes will be insufficient to remedy the situation in most of the typical situations currently encountered by foreign trademark owners. The IACC therefore urges the NPC to consider adopting broader criteria in the future law for addressing bad faith registrations, as well as the definition of “bad faith” itself.

Conclusion

China made progress in 2011 in boosting criminal enforcement, expanding the scope of protection offered in new and important areas—such as online counterfeiting and landlord liability—and in developing an action plan for future reforms in the law and enforcement systems that are consistent with prior recommendations of the IACC. Our members are hopeful that the Chinese government will work steadily to implement reforms and new legislation in a considered manner, and to expand cooperation with rights holders and overseas enforcement authorities to address growing international trade in fakes. However, the IACC recommends China remain on the Priority Watch List until more concrete manifestations of progress have been realized.

RUSSIA

Recommendation: Priority Watch List

Overview

While Russia took an important step during the past year, with its accession to the World Trade Organization⁴⁵, a number of severe, and long-standing, problems continue to be experienced by rights-holders in the country. Members continue to report high levels of counterfeits in the market, hard goods and online piracy concerns, insufficient border control measures, official corruption, and need for more deterrent penalties. These same concerns have been cited by IACC member companies for many years, and much improvement continues to be necessary. As such, the IACC recommends that Russia be placed again on USTR's Priority Watch List.

Nature and Scope of Piracy and Counterfeiting in Russia

During 2011, manufacturers in nearly every product sector represented by the IACC, continued to experience a variety of problems ranging from domestic production, retail and wholesale distribution, and exports of counterfeit and pirated goods.⁴⁶ A study released in September of last year, by the Russian Ministry of Internal Affairs' Department of Economic Security estimated that "up to 30% of the goods sold in Russia's major retail sectors such as apparel, household chemicals, food, cosmetics and perfumes are counterfeit."⁴⁷ As noted in previous submissions, border enforcement remains a significant concern in terms of importation, export, and transshipment of counterfeit goods. Russia remains a market for the consumption of counterfeit goods, as well as a source of counterfeit production, and distribution of both counterfeit and pirated goods.

The above-referenced report from the Russian Ministry of Internal Affairs likewise confirms reports of the IACC's members in the copyright sector, regarding the decreased

⁴⁵ See World Trade Org., *Ministerial Conference Approves Russia's WTO Membership*, Dec. 16, 2011, http://www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm.

⁴⁶ See, e.g., Vladimir Kozlov, *\$1.2 Billion Anti-Piracy Suit Filed in Russia*, HOLLYWOOD REPORTER, Oct. 26, 2011, <http://www.hollywoodreporter.com/news/12-billion-anti-piracy-suit-253667>; *Up To 30 Percent of Russia's Key Retail Goods Counterfeit*, PETOŠEVIĆ, Sept. 23, 2011, <http://www.petosevic.com/resources/news/2011/09/000768>.

⁴⁷ See *Up To 30 Percent Of Russia's Key Retail Goods Counterfeit*, *supra* note 46.

availability of pirated hard goods, noting that the apparent reduction in the brick-and-mortar space is due to the ready availability of those pirated goods online.⁴⁸ Online piracy, and online sales of counterfeit hard goods, remain a priority; rogue servers, cyber-lockers and P2P pirate sites are said to operate with impunity.

Enforcement

For many years, IP owners have urged the Russian government to increase the level of enforcement against counterfeiters and pirates. While the modernization of its statutory regime has presented opportunities for improved protections for rights-holders, it was widely-acknowledged that the legal regime was a secondary matter for most rights-holders – insufficient enforcement was the single-greatest concern. And while Russia has implemented the Part IV revisions to its Civil Code over recent years, and after many years acceded to the WTO, the overall level of enforcement remains problematic for owners of intellectual property.

As noted in the IACC’s 2011 submission, the problems of enforcement “are holistic in nature.”⁴⁹ They require not only greater enforcement actions by police, but more efficient prosecution and adjudication, the provision of deterrent-level sentencing, and improved transparency.

In recent submissions, some Coalition members have reported improving relationships with law enforcement personnel, as well as an apparent greater interest in taking on IP-related cases. However, such improvements have been described as inconsistent, as members have also continued to express concerns related to official corruption.

Customs

Russia’s expansive borders, and its proximity to major centers of counterfeit production in China, present obvious challenges for enforcement personnel. These challenges are further complicated by the entry into force of Russia’s Customs Union with Belarus and Kazakhstan in 2010. IACC members are continuing to monitor the implementation of the Customs Union, particularly with regard to the development of those practices related to intellectual property enforcement.

⁴⁸ See *Up To 30 Percent Of Russia’s Key Retail Goods Counterfeit*, *supra* note 46.

⁴⁹ See IACC 2011 SPECIAL 301 RECOMMENDATIONS, at 36, available at http://4356049642aa3c99a6e91c99180a8219894d6198.gripelements.com/pdf/member-resources/2011_special_301_iacc_final.pdf.

We are pleased by reports of closer cooperation between border enforcement authorities in Russia and China, and by the recent enactment of *ex officio* authority in the Customs Code, which the IACC had long supported.

Legislation

Though Russia has acceded to the World Trade Organization, it is worth noting that membership alone should not be an end in itself. While we applaud the Russian government's commitment to the enactment and implementation of a WTO-compliant statutory regime, we also encourage Russia to continue examining its laws for areas of potential improvement in all aspects of IP protection and enforcement. Furthermore, and as has frequently been stated, absent effective and deterrent enforcement, even the best of statutes is no benefit to rights-holders. Improvements to the statutory framework itself, must be accompanied by improvements in the enforcement of the laws.

Conclusion

The level of trademark counterfeiting and copyright piracy in Russia remain unacceptably high. Accordingly, the International AntiCounterfeiting Coalition recommends that Russia be maintained on USTR's Priority Watch List in 2012, 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, the EU, 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; and
- Cooperate with rights-holders and increase focus on the severe Internet piracy problem, with emphasis on takedown of notorious sites and deterrent actions to prevent further expansion of piracy on the Internet hosted within Russia.

CANADA

Recommendation: Priority Watch List

Introduction

In spite of some positive developments in Canada during the past year, IACC members remain frustrated by the overall level of protection and enforcement of intellectual property rights in Canada during the past year. While the introduction of legislation to modernize Canada's copyright laws was welcome news, and rights-holders are more optimistic that legislation will be enacted by the majority government, significant concerns have been raised about the sufficiency of that legislation, and the lack of similar progress with regard to the country's trademark laws or border control regime. These latter concerns have been voiced by the IACC's members for a number of years, to little avail.

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 again recommends that Canada be placed on the USTR's Priority Watch List in 2012.

Nature and Scope of Piracy and Counterfeiting in Canada

Counterfeit goods remain widely available in the Canadian market, in a wide variety of product sectors including apparel⁵⁰, tobacco⁵¹, pharmaceuticals⁵², electronics, and the core copyright industries. While some trademark companies have reported the local manufacture or finishing of infringing goods, by most accounts, the illicit counterfeits found in the Canadian market is sourced primarily from China. The importation of counterfeit and pirated goods is a problem exacerbated by the insufficiency of the tools and material resources made available to Customs. Members also report local

⁵⁰ See *Media Advisory: Counterfeit Clothing and Accessories Seized*, CAN. NEWSWIRE, Dec. 2, 2011, <http://www.newswire.ca/en/story/889315/media-advisory-counterfeit-clothing-and-accessories-seized>

⁵¹ See Chris Doucette, *Cops Bust Major Chinese Smuggling Ring*, LONDON FREE PRESS, Nov. 1, 2011, <http://www.lfpress.com/news/canada/2011/11/01/18912221.html>.

⁵² See *Counterfeit Cialis Seized in the Greater Toronto Area*, HEALTH CAN., June 21, 2011, http://www.hc-sc.gc.ca/ahc-asc/media/advisories-avis/2011/2011_83-eng.php.

manufacture and sales through online sites of pirated and counterfeit goods. Burned discs, online pirate sites, and “mod shops” for circumvention of TPMs are prevalent.

While enforcement personnel have shown the ability to produce positive results when working cooperatively, such collaboration has not been the norm. Prosecutions likewise remain infrequent, and have provided minimal deterrence to infringers.

Legislative Concerns

For several years, the IACC has encouraged the Canadian Parliament to follow-through on legislative proposals which have been offered to bring Canada’s intellectual property regime in line with the regimes of similarly-situated countries. The Parliament acknowledged the deficiencies in its efforts to address counterfeiting and piracy in 2007, publishing two reports on the issue: *Counterfeit Goods in Canada – A Threat to Public Safety*⁵³, and *Counterfeiting and Piracy are Theft*⁵⁴. Regrettably, in the five years since, the Canadian government has failed to address the concerns raised in those reports.

Among the recommendations made by the Standing Committee on Industry Science and Technology, and the Committee on Public Safety and National Security were the enactment of criminal provisions dealing with the manufacture, importation, and distribution of counterfeit goods; *ex officio* authority for the Canada Border Services Agency (CBSA) to enforce IP rights at the border; strengthening of civil remedies for counterfeiting and piracy infringements; the provision of much-needed resources for enforcement personnel. In addition to the government’s own reports, the Canadian Anti-Counterfeiting Network (“CACN”) recently updated its own “Roadmap for Change”, outlining a wide-range of needed improvements to the country’s IP enforcement regime.⁵⁵ These recommendations are in line with those of the Canadian Intellectual Property Council (CIPC), another well respected Canadian organization lobbying the government for better laws and resources in this area. The IACC strongly endorses the comprehensive evaluation put forth by the CACN.

⁵³ 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>.

⁵⁴ 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>.

⁵⁵ See CAN. ANTI-COUNTERFEITING NETWORK, REPORT ON COUNTERFEITING AND PIRACY IN CANADA: A ROADMAP FOR CHANGE – EXECUTIVE UPDATE (2011), available at <http://www.cacn.ca/publications/CACN%20-%20Report%20on%20counterfeiting%20-%20Executive%20Update%20-%20nov%202011.pdf>.

Copyright Modernization

While the government failed to enact the Copyright Modernization Act (C-32) last year, a new bill, C-11, would represent an improvement over existing law – particularly with regard to the enforcement against circumvention devices.

As noted in last year's recommendations, Canada remains one of only a handful of contracting parties to the WIPO Internet treaties,⁵⁶ which has yet to ratify either the WIPO Copyright Treaty or the Performances and Phonograms Treaty.⁵⁷ 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.

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

In 2011, the IACC commented positively on the enactment of the Canada Consumer Product Safety Act, which prohibited the trafficking of goods bearing counterfeit certification marks and other health and safety-related goods. To date however, we are not aware of any instances in which the new authority provided by the CCPSA has been exercised by Canadian law enforcement.

Cooperation, Resources and Coordination

In years past, the IACC has frequently noted a need for increased levels of enforcement, and better coordination among Canada's enforcement personnel, both within and at the borders. We were therefore pleased with the undertaking of Project O-Scorpion in 2011, an initiative led by the Royal Canadian Mounted Police. The most recent statistics we've received from the RCMP noted \$50 Million of seizures of counterfeit and pirated product during a 50-day period. By comparison, the value of seizures for the entire year before totaled approximately \$24 Million. While IACC members were pleased by this initiative, it also underscores some long-standing complaints about enforcement in Canada. Clearly, law enforcement personnel are capable of doing more to address the problems of counterfeiting and piracy than has been done in the past. Likewise, in spite of significant seizures, absent substantial follow-through with criminal prosecutions and the imposition of deterrent penalties, any lasting effects on the greater problem are unlikely to materialize.

⁵⁶ THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 467 (1998).

⁵⁷ See World Intellectual Property Organization, http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=16&treaty_id=20 (last visited Feb. 10, 2012).

While CBSA and RCMP personnel continue to show interest in doing more IP-related enforcement, their efforts remain hampered by insufficient statutory authority to take action, and by a lack of resources to do the job. By some reports, Customs officials in Vancouver have asserted that they do not have the manpower to deal with large-scale container-load shipments of counterfeit goods. Due to CBSA's lack of *ex officio* authority, they continue to rely upon the Royal Canadian Mounted Police (RCMP) or local police to take enforcement action after the goods have entered the Canadian market; in many cases, such after-the-fact enforcement is impractical and often does not occur.

Where enforcement is undertaken, prosecutions remain very limited; and members continue to report an apparent disinterest by Crown Prosecutors in bringing cases for counterfeiting and piracy under the existing statutes. They continue to withdraw charges already laid by the police in some jurisdictions and fail to allow them to be made in the first place, in other jurisdictions. Enacting the legislation proposed by the Parliamentary Committees and by private-sector rights-holders would likely go far in encouraging such cases.

Canada's participation in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations was welcomed by rights-holders. Subsequent to signing ACTA on September 30, 2011⁵⁸ Canada has not yet enacted any new legislation to move towards implementation of the agreement's provisions, although the previously mentioned Bill C-11 was introduced, on September 29, 2011.

Conclusion

Regrettably, the overall level of protection and enforcement of intellectual property rights has seen little progress in the past year. Canada must take concrete steps toward modernizing its legislative regime, and providing its law enforcement and Customs personnel with the resources necessary to do their job. The IACC recommends that the Canadian government:

- Swiftly implement the recommendations of the two Standing Committees, and those identified in the CACN's Roadmap;
- 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;

⁵⁸ Foreign Affairs & Int'l Trade Can., Canada Signs Historic Anti-Counterfeiting Trade Agreement (Sept. 30, 2011), http://www.international.gc.ca/media_commerce/comm/news-communiqués/2011/280.aspx?lang=eng&view=d.

- Swiftly enact and fully implement legislation such as C-11 in order to bring Canada's copyright laws into line with international norms;
- Implement the Anti-Counterfeiting Trade Agreement;
- 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.

BRAZIL

Recommendation: Watch List

Introduction

IACC recommends that the Office of the U.S. Trade Representative maintain Brazil's status at the Watch List level in 2012. The continued, widespread availability of counterfeit and pirated goods in the market, the growth of online and mobile piracy and online trade in counterfeit products, in addition to concerns related to border controls and the need for improvements in the area of expeditious and deterrent sentencing have remained troubling to rights-holders.

Buying counterfeit goods, and downloading pirated product, have become commonplace in Brazil, with little or no social stigma attached. Camelos (retail locations selling pirated and counterfeit goods) abound. While Brazil remains the largest potential market for our members' legitimate products in Latin America, the widespread availability of counterfeit and pirated goods poses a significant obstacle to IP owners' ability to compete for consumers, and serves as a barrier to market entry. To date, the Brazilian government has not taken adequate steps to deal with these key issues.

IACC member companies have, for several years, cited the need for both greater resources for IP enforcement in Brazil, and the more efficient use of those made available. We reiterate those requests in 2012.

Nature and Scope of Counterfeiting and Piracy in Brazil

With a population approaching 200 Million, the largest in South America⁵⁹, and a developed economy, Brazil's significance as a consumer market continues to grow. Regrettably, the consumer demand in Brazil is too often filled by counterfeiters and pirates. IACC members continue to report local production of counterfeits, although the majority of the illicit goods found in the retail market are imported from abroad. The importation of components and labels for finishing and distribution similarly remains a concern.

⁵⁹ See The World Bank, Brazil Country Brief, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/BRAZILEXTN/o..contentMDK:20189430~pagePK:141137~piPK:141127~theSitePK:322341.00.html> (last visited, Feb. 10, 2012).

As in previous submissions, rights-holders cited ineffective border controls as one of the greatest obstacles to progress in addressing the prevalence of counterfeits in the market place. While we have seen reports of increased enforcement actions, the robust supply of counterfeit product entering the country has resulted in little impact on the overall availability of infringing goods.

Likewise, because the judicial process remains slow, and penalties remain low, the long-term deterrent value of the enforcement actions is minimal. We continue to see reports noting 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 has grown in significance as internet usage has become more widespread. Distribution via cyber-locker sites and rogue servers are a growing priority. Brazil currently has an estimated 81 million internet users⁶⁰, including approximately 55.4 million broadband users.⁶¹ Though some ISPs have been cooperative in addressing rights-holder complaints regarding infringing material or offering infringing goods online, the problem of online infringement in Brazil remains severe. Greater and immediate steps must be taken in order to ensure that the online market remains viable for legitimate manufacturers and producers whose offerings may otherwise be displaced by pirated and counterfeit goods.

Legislation

The IACC has, for several years, encouraged the Brazilian government to enact legislation that would provide more substantial penalties for counterfeiting offenses – current sentences range between one and twelve months. In practice, jail time is rarely imposed, and criminal prosecution remains altogether infrequent. Bill 9,099/95, referenced in prior years' submissions has still not been enacted.

In addition, Brazil should be encouraged to enact any legislation necessary to address Internet piracy and trading of counterfeits on the Internet and auction sites.

⁶⁰ See Andrea Novais, *Internet Usage in Brazil*, BRAZIL BUS., June 22, 2011, <http://thebrazilbusiness.com/article/internet-use-in-brazil>.

⁶¹ See *Brazil Sees Substantial Increase in Broadband Users*, XINHUA, Dec. 19, 2011, http://news.xinhuanet.com/english/sci/2011-12/20/c_131316669.htm.

Enforcement Actions

In spite of some efforts on behalf of the Brazilian government to step-up the enforcement of IP rights, both within and at the country's borders, rights-holders continue to report little substantive improvement. While we encourage Brazil to sustain its enforcement efforts, those actions must be accompanied by a disruption of the supply chain that feeds the market, and deterrent penalties to discourage recidivism.

We would continue to encourage Brazil to coordinate closely with other countries in the region on issues related to border controls and smuggling. As noted in prior years, 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 IACC encourages Brazil to continue efforts in this regard.

Conclusion

The IACC recommends retaining Brazil at the Watch List level 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 legislation to increase the minimum term of 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; and
- Continue efforts to raise consumer awareness regarding the threats posed by counterfeiting and piracy.

ITALY

Recommendation: Watch List

Introduction

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 2012. A variety of right-holder and media reports confirm the continued widespread availability of counterfeit goods across many product sectors, though most notably in the areas of apparel and footwear, leather goods⁶², and food and beverage⁶³. Reports of the continued influence of organized crime⁶⁴, linkages to other crimes including illegal immigration, and ongoing concerns related to the counterfeiting of food products and other consumables exemplify the range of problems faced in Italy. While raids continue to be conducted, members reported little noticeable impact on the availability of counterfeits in the local market.

In addition to the concerns faced in the hard goods sectors, digital piracy in Italy continues as a top concern for most IACC members surveyed; Italy is viewed as one of the worst markets in the world, in terms of the non-enforcement of internet piracy. In 2010 and again in 2011, the Italian Communications Authority (AGCOM) proposed a number of measures aiming to reduce online piracy. Draft regulations published in 2011 were insufficient to have a concrete impact on the significant online piracy problems present in Italy. The inability of rights-holders to swiftly stop the proliferation of pirated materials over the Internet is problematic. The IACC requests that the USTR continue to seek the Italian government's movement on appropriate legislative and regulatory measures needed to pursue internet-based piracy, and also ensure that enforcement measures actually resulting in substantive progress be taken on this front.

Nature and Scope of Counterfeiting and Piracy in Italy

As discussed above, the actions taken by the Italian law enforcement seem to have only a minor impact on the availability of counterfeits in the market, with large volumes of counterfeits continuing to be imported from China, as well as from regional shipping hubs. As reported in prior years, counterfeit components are increasingly seen being imported for finishing before distribution within Italy or elsewhere in the European Union.

⁶² See, e.g., *Italian Police Bust Chinese-Senegalese Counterfeiting Ring*, Feb. 7, 2012, <http://www.plushasia.com/article/5847>.

⁶³ See Byrne, *supra* note 3.

⁶⁴ *Id.*

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; mobile device piracy is likewise considered a growing problem.

IACC members continue to report positive engagement with enforcement authorities and intend to seek cooperative efforts, including the continuation of ongoing training initiatives with police and prosecutors. With regard to counterfeit goods, the legal infrastructure is improving for criminal enforcement, with advances in the ability of law enforcement to confiscate goods and enforce criminal penalties.

Needed Improvements

Although AGCOM is moving forward with regard to measures that may assist in improving the enforcement of online piracy and counterfeiting, these measures still need to be fully and robustly implemented, and followed by strong enforcement.

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, 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; 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

While IACC members reported some positive developments in Mexico over the past year, including the continued interest in IP enforcement on the part of Mexican Customs and the development of a Customs registration / recordation system; significant concerns remain with regard to the effective level of intellectual property protection and enforcement. Though Customs remains engaged on IP-related issues, structural obstacles to effective action need to be addressed; and the availability of counterfeit product in a variety of sectors continues at severe levels. This latter point is perhaps best illustrated by the inclusion again of Tepito in the U.S. Trade Representative's December 2011 Out-of-Cycle Review of Notorious Markets. For all of these reasons, the IACC recommends that the USTR retain Mexico on the Special 301 Watch List again in 2012.

Nature and Scope of Counterfeiting and Piracy in Mexico

The trafficking of counterfeit and pirated goods remained prevalent during the past year, across nearly every product sector.⁶⁵ The widespread availability of illicit products poses a substantial threat to the ability of legitimate manufacturers to compete in the Mexican market; the further erosion of the legitimate market, in turn, discourages the further investment in the Mexican economy by rights-holders. And while the high volume of counterfeit and pirated goods makes it more difficult for legitimate manufacturers to enter, and compete in, the local market; it likewise undermines the Mexican economy in terms of taxes, jobs, and capital development.

Notorious black markets remain for hard goods trafficking in both trademarked goods as well as copyrighted products. Local manufacture in Mexico of such illicit goods continues, and our members report these distribution chains and black markets are pervasive. In addition, the use of the Internet to facilitate trade in counterfeit goods, as

⁶⁵ See, e.g., U.S. Immigration & Customs Enforcement, US, Mexico Seize More Than \$80 Million During Operation Holiday Hoax (Dec. 22, 2011), <http://www.iace.gov/news/releases/1112/111222washingtondc.htm> (discussing the seizure of 23.8 million counterfeit items including cigarettes, tools, DVDs, toys, electronics, and clothing, during a six week period).

well as P2P file sharing, downloading, cyber-lockers, and pirate servers is increasing.

It was reported in December 2011 that U.S. and Mexican agents seized over 300,000 counterfeit products with a value estimated at nearly \$80 million, including fake toys, DVDs, electronics, clothing and other products.⁶⁶ As part of that operation, the Tax Administration Service of Mexico (“SAT”) executed more than 150 search warrants, and conducted more than 800 port inspections, seizing nearly 24 million pieces of counterfeit product. No arrests were made however.⁶⁷

As noted in prior years’ submissions, Mexico’s enforcement agencies remain under-resourced in light of the scope and magnitude of the counterfeiting trade in the country. While new tools such as the aforementioned customs recordation system are a welcome development, there remains much work to be done. Prosecution, destruction of seized goods, and deterrent sentencing need improvement in order to stem the tide and open a more legitimate marketplace for our members’ products.

Customs

IACC members remained largely complimentary of the efforts of Mexican Customs during the past year. Though Customs personnel continue to lack important enforcement tools such as the authority to seize counterfeit and pirated goods *ex officio*, Customs officers are generally responsive to rights-holders’ concerns, and have sought to cooperate with law enforcement agencies whose mandate is more broad. We have, however, also heard some troubling reports with a relative disinterest in taking action against goods that have been declared to be in-transit to a third country. The implication being that some Customs personnel are taking a “not in my back yard” approach to enforcement of intellectual property rights, where clearly-infringing goods passing through Mexico, but bound for a final market elsewhere in Central or South America, are allowed to continue on, unimpeded.

Customs’ effectiveness is constrained, however, by its limited statutory authority. Like their counterparts in Canada, Mexico’s Customs Authority (“AGA”) has no authority to detain goods on the basis of an intellectual property infringement, absent an order from the Attorney General’s Office (“PGR”) or the Mexican Institute of Industrial Property (“IMPI”). In many cases however, obtaining such an order is impractical due to the time constraints and competing priorities of trade facilitation; as such Customs often has no choice but to release the counterfeit goods before an order to detain them can be

⁶⁶ See Ian Simpson, *U.S., Mexico Seize \$84 Million in Counterfeit Goods*, REUTERS, Dec. 22, 2011, <http://www.reuters.com/assets/print?aid=USTRE7BL17V20111222>

⁶⁷ See US, Mexico Seize More Than \$80 Million During Operation Holiday Hoax, *supra* note 63.

acquired. The IACC has long advocated for the extension of *ex officio* authority to Customs officials, and continues to support such a measure.

For several years, the IACC has likewise encouraged the adoption of a centralized customs recordation system for intellectual property rights. We were extremely pleased to learn of the new system developed by Mexican Customs in cooperation with IMPI, and to be administered by the AGA. Though the system, first opened to the public in January 2012, is in its early stages of use, IACC members are optimistic about the potential benefits. We have not yet received substantive feedback from rights-holders regarding the system's effectiveness, or any necessary improvements. We believe however that this initiative represents a step towards improving communication and cooperation between rights-holders and Customs officials.

Enforcement

IACC members remained frustrated in 2011 by the level of both criminal and administrative enforcement. While some members have noted modest improvements in recent years, enforcement actions against intellectual property offenses remain insufficient to generate any substantial reduction in the availability of counterfeit and pirated product in the marketplace, prosecutions often remain a slow and uncertain process, and the sentences imposed on offenders, insufficiently deterrent. These criticisms, as was the case last year, were more pronounced with regard to administrative actions by IMPI than in the case of prosecutions undertaken by the PGR. Increased resources and a focus on notorious black markets will help. In addition, joint actions such as the December 2011 Operation Holiday Hoax, with the U.S. government should be encouraged.

Conclusion

The IACC recommends that Mexico be retained on the Special 301 Watch List in 2012. While progress clearly has been made in some areas, much improvement is needed in order to significantly decrease the availability of counterfeits in the retail market, and to ensure the fairness of the marketplace for legitimate manufacturers and retailers. In the coming year, we would encourage the Mexican government to focus its efforts in the following areas:

- Improve the resources and tools available to border enforcement authorities, including by enacting legislation granting customs officials *ex officio* authority to detain and seize goods on the basis of intellectual property rights violations;
- Work with rights-holders, both local and foreign, to develop consumer

awareness campaigns to educate the public about the harms caused by counterfeiting and piracy;

- Increase training for both prosecutors and the judiciary to improve expertise and efficiency of the courts in dealing with matters involving IPR, as a means to more quickly and consistently resolving cases;
- Substantially increase the level of penalties in counterfeiting cases to ensure the deterrent effect of existing laws;
- Expand efforts to engage with law enforcement and customs officials abroad to more effectively address concerns related to trans-shipment through Mexico to third countries; and
- Continue engagement with international partners, including the United States, to undertake joint enforcement actions.

PHILIPPINES

Recommendation: Watch List

Introduction

For over a decade, the IACC has recommended the Philippines for inclusion by the U.S. Trade Representative at either the Watch List- or Priority Watch List- level of the Special 301 report. In our February 2011 filing, the IACC encouraged the USTR to classify the country as a Priority Watch List country, for the first time since 2006 – a recommendation based largely on the long-standing lack of progress seen in that market with regard to enforcement, judiciary, and border control concerns. In its final report however, USTR determined that a Watch List classification was appropriate, citing the government’s enactment of cam-cording legislation, and an increase in enforcement efforts. In the year that has since passed, IACC members have continued to report many of the same concerns that were raised in last year’s recommendations.

Despite the increased level of enforcement undertaken by the Aquino government, most rights-holders have reported little or no progress in the overall availability of counterfeit product in the marketplace – a fact underscored by USTR’s recent inclusion of Manila’s Quiapo Shopping District in the December 2011 Out-of-Cycle Review of Notorious Markets. Likewise, concerns related to the efficiency of the judiciary and the effectiveness of border control measures remain omnipresent; for each of these reasons, the IACC recommends the continued inclusion of the Philippines on the Special 301 Watch List.

Nature and Scope of Counterfeiting and Piracy in the Philippines

Based on the range of reports from IACC members across multiple product sectors, the overall scope of industries affected by counterfeiting in the Philippines remains largely unchanged from recent years. While apparel, footwear, and accessories remain the sectors from which we’ve heard the greatest volume of concerns, IACC members from a number of other sectors ranging from fast-moving consumer goods, to chemicals, to software and other copyrighted content are similarly affected. As noted above, the widespread retail-level distribution of counterfeit products has been cited as the greatest concern of rights-holders, along with the need for more robust border control measures and more efficient handling of cases. This final concern has been raised by IACC members for a number of years, as the failure to adjudicate offenses in a reasonable

timeframe is seen to decrease the overall effectiveness of the enforcement efforts that are undertaken. When counterfeiters have little concern of imminent punishment for their crimes, they are less likely to be deterred from continuing their illicit businesses.

Enforcement

IACC members remained frustrated with the overall level of enforcement during the previous year. While the Aquino government noted in its own comments to USTR in 2011 that it had increased the number of enforcement actions and the volume of counterfeit and pirated goods seized⁶⁸ in recent years, these actions represent only one part of the equation. Absent the necessary follow-on to the initial enforcement action, including the prompt adjudication of cases, and the imposition of deterrent penalties; the seizure of goods by law enforcement is likely to be viewed as nothing more than a cost of doing business in the country. Likewise, absent significant improvements in the interdiction of counterfeit goods at the border, the seized goods will quickly be replaced in the market by newly imported product.

These three concerns feed into each other, simply reinforcing the problems faced in the Philippines by intellectual property owners. While the government of the Philippines encourages rights-holders to “exercise vigilance and determination” in pursuing legal remedies, it cites the number of cases settled as an indicator that rights-holders should be doing more.⁶⁹ A more likely explanation for the volume of cases settled by rights-holders however is the inefficiency and expense of the process – it often takes many years to reach a final resolution of a case – as well as the uncertainty of outcomes even in clear-cut cases of counterfeiting.

Border Control

IACC members reiterated the concerns noted in last year’s submission with regard to customs enforcement, pointing to a need for greater resources, and continued concerns related to trans-shipment and the trafficking of counterfeit labels and components. While there is some optimism that the customs administration and trade facilitation agreement signed between the U.S. and the Philippines in December of 2010 will offer opportunities for improved cooperation and transparency, members have not yet reported significant progress in Customs’ effectiveness with regard to the detection and interdiction of counterfeit products flowing into and out of the country.

⁶⁸ See Comments of the Government of the Republic of the Philippines Re: USTR Docket Number USTR-2010-0037 (2011 Special 301 Review) (Feb. 22, 2011), at 4.

⁶⁹ See *id.*

Conclusion

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

The government of the Philippines has discussed its “holistic” approach to eliminating the theft of intellectual property – an approach that we endorse fully. Increasing the level of enforcement in the marketplace is a clear necessity, but it must be accompanied by the disruption of the supply chains that feed the market, by addressing the inefficiencies of the judicial system, and by increasing public awareness of the harms caused by counterfeiting and piracy.

In 2011, the IACC encourages the Philippines to:

- Establish clear metrics for the processing of IP cases, to identify the cause of delays, so that necessary action to improve the courts' efficiency in adjudicating intellectual property cases can be implemented;
- Provide necessary training in IP law to improve the expertise of prosecutors and the judiciary in handling IP cases;
- Increase and improve dialogue with rights-holders to seek a more cooperative approach to addressing mutual concerns related to IP protection and enforcement; and
- 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.

SAUDI ARABIA

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 Saudi Arabia, most notably a complete lack of deterrent sentencing. Accordingly, the IACC requests that Saudi Arabia be placed on the Watch List in 2012.

Background

Members report high copyright piracy and trademark counterfeiting in Saudi Arabia, largely attributed to the lack of deterrent penalties. Affected product sectors include entertainment software, automotive parts, pharmaceuticals, consumer electronics and branded luxury items. Despite thousands of raids and large seizures of pirated and counterfeit goods, at considerable cost and efforts by our members, there have been no deterrent sentences and only nominal penalties.

Nature and Scope of Counterfeiting and Piracy in Saudi Arabia

Members have historically reported high piracy and counterfeiting rates. Imports of counterfeit branded goods from Asia have increased in recent years. Reports of imports of fake components with local assembly into finished goods have recently increased.

However, the recent past has seen improved enforcement in terms of raids and actions that have been conducted. For the copyright industries this has been aided by the Ministry of Information which has included large sweeps of street piracy. These helpful actions, however, have been relatively wasted given the lack of follow-through with prosecutions and deterrent penalties after the sweeps and raids occur.

As a result, while Saudi Arabia remains a key market for our members in the region and has significant potential; piracy and counterfeiting rates remain high. While other Gulf States are making strides in imposition of prison sentences for fake products, Saudi Arabia is lacking in punishment for this theft of our members' intellectual property.

As an example, our members report the Ministry of Information has successfully raided the same major pirate seven times beginning in 2006, seizing duplication machines and thousands of pirated DVDs. Each of these offenses resulted in fines by the Violation Review Committee, yet the pirate continued. The most recent offense resulted in the Ministry of Information recommending to the Board of Grievance a judgment of imprisonment. Unfortunately no such deterrent sentence has yet been imposed.

Private-sector rights-holders report that they have, and will continue, efforts to cooperate with enforcement authorities including continuing their ongoing training sessions with appropriate enforcement authorities and supporting all enforcement efforts; however, without deterrent sentences, these efforts are not likely to result in any tangible improvement in the legitimate marketplace in Saudi Arabia.

Finally, our members would also like to note that despite these positive efforts by the Ministry of Information, online piracy, and the trade in counterfeit products via the internet, is increasing in Saudi Arabia, and is of major concern. Copyright owners have reported growing concerns related to illegal P2P file-sharing and linking sites, while trademark owners report the increased use of websites to facilitate the trafficking in counterfeit goods. Mobile device piracy, likewise, is seen as a growing problem.

Needed Improvements

Raids on hard goods for both our trademark members and copyright members need to continue, but the most important factor at this stage is the imposition of deterrent sentences. Our members support current efforts in this regard and will continue cooperation, training and other needed support to ensure enforcement efforts, and deterrent sentencing, improve.

In the coming year, we strongly encourage the Saudi government to:

- Continue existing enforcement efforts against counterfeit and pirated hard goods;
- Pursue cases in the courts resulting in deterrent penalties;
- 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 branded merchandise

SPAIN

Recommendation: Watch List

Background

Spain remains a country of significant concern for rights-holders in both the trademark and copyright sectors, with some estimates of the total market for infringing goods at nearly \$2 Billion.⁷⁰ While the Spanish government has taken steps in recent years to provide new tools to deal with the trafficking of pirated copyrighted works online; the level of online infringement, the widespread availability of counterfeit goods in the marketplace, and the need to more efficiently adjudicate complaints necessitates Spain's retention on the Watch List in 2012.

Nature and Scope of Counterfeiting and Piracy in Spain

Reports of both IACC members, and in the media, indicate that counterfeiting and piracy persisted at high levels in 2011; in spite of efforts made by the Spanish government. With regard to hard goods, the smuggling of tobacco products from Gibraltar has been widely noted, with nearly 3,000 individuals being stopped attempting to illegally import cigarettes into the country during the first nine months of 2011⁷¹; approximately 225 million cigarettes, as well as thousands of pounds of loose tobacco were seized by police and customs throughout the year.⁷² Likewise, the retail-level sales of counterfeit goods, including handbags, sunglasses, apparel and accessories remain prevalent – particularly in popular tourist areas.⁷³

IACC members indicate that digital piracy on the internet in Spain still remains extremely high, with some members citing the country as one of the worst offenders

⁷⁰ See HavocScope Black Markets, Spain Black Market, <http://www.havocscope.com/regions-main/europe/spain/> (last visited Feb. 10, 2012).

⁷¹ See *Smuggling on the Rise Between Gibraltar and Spain*, OLIVE PRESS, Jan. 16, 2012, <http://www.theolivepress.es/spain-news/2012/01/16/smuggling-on-the-rise-between-gibraltar-and-spain/>.

⁷² See *Cigarette Smuggling Crackdown in Spain*, OLIVE PRESS, Dec. 18, 2011, <http://www.theolivepress.es/spain-news/2011/12/18/cigarettes-smuggling-crackdown-in-spain/>.

⁷³ See, e.g., *Counterfeit Goods Warehouse Shut Down*, LEADER, July 10, 2011, <http://www.theleader.info/article/29412/counterfeit-goods-warehouse-shut-down/#>.

globally. While IACC members were pleased with the passage of the Sinde law, full implementation of that law, and concrete action must be taken to stem the tide of online infringements in Spain and to open the market to legitimate copyrighted materials.

Piracy of music, films, and software remained at unacceptably high levels, IACC members in the copyright sectors continue to report rampant pirating of music, software, and filmed-entertainment in 2011. According to a study released by the Coalition of Creators and Industries of Content, over 77% of digital content consumed in Spain during the first half of 2011 was pirated; costing the core copyright industries an estimated \$7.2 Billion.⁷⁴

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

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 2012. 2011 saw little progress with regard to the issues identified by IACC members in previous years. In the coming year, the IACC reiterates its recommendations from 2011, and 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 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.

⁷⁴ See *Over 77% of Digital Content Consumed in Spain is Pirated*, HOLLYWOOD REPORTER, Nov. 8, 2011, <http://www.hollywoodreporter.com/news/77-digital-content-consumed-spain-258726>.

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.

Nature and Scope of Counterfeiting in Turkey

Rights-holders continue to report significant problems in the Turkish market across multiple product sectors. While we are currently awaiting updated seizure statistics for 2011, Turkey was cited as one of the top five countries of provenance infringing goods seized in the European Union, both in terms of articles and value of the goods involved in 2010.⁷⁵ In the category of “Foodstuffs”, nearly 95% of seizures arrived at the EU borders from Turkey; the same is true in almost 10% of perfume and cosmetics seizures, over 2% of other body care products, and over 4% of ready to wear apparel seizures.⁷⁶ These rankings are largely unchanged from the prior year’s report from the EU.⁷⁷ We expect similar results when the 2011 statistics are published later this year. Though Turkey was the source of only 2% of total seizures at the US border, US companies are affected by the trafficking of counterfeits throughout the world.⁷⁸

Coalition members from a variety of product sectors reported significant counterfeiting

⁷⁵ See EUR. COMM’N, TAXATION & CUSTOMS UNION, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE EU BORDER (2010), at 17, available at http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/statistics_2010.pdf.

⁷⁶ See *id.* Annex 3.

⁷⁷ 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.

⁷⁸ U.S. CUSTOMS & BORDER PROT., IMMIGRATIONS & CUSTOMS ENFORCEMENT, FISCAL YEAR 2011 SEIZURE STATISTICS, available at <http://4356049642aa3c99a6e91c99180a8219894d6198.gripelements.com/pdf/news/ipr-fy-2011-seizure-report.pdf>.

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.

Enforcement

The concerns reported by Coalition members in 2011 remained largely unchanged since our February 2011 submission. Members continue to report inconsistent cooperation on the part of law enforcement, inefficient and unnecessarily prolonged judicial proceedings, and remedies insufficient to deter recidivism. Each of these factors is believed to increase the cost to trademark owners in enforcing their rights.

Border Control

For several years, the IACC has commented on the need for improved border measures in Turkey. Members continue to express concerns regarding all aspects of Customs enforcement – imports, exports, and trans-shipment. Those concerns seem to be borne out by the statistics already noted herein, on the basis of seizures by U.S. and E.U. Customs agencies. The IACC reiterates the need for more training and the allocation of greater resources to decrease the volume of counterfeit products moving into and out of Turkey.

Conclusion

IACC members remain frustrated by the lack of progress seen in Turkey in spite of widely-reported deficiencies in the country's IP regime. Counterfeits remain prevalent in a number of product sectors, and in many cases are sold openly without consequences.

In 2012, 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

The IACC has recommended Vietnam's inclusion on the Special 301 Watch List or Priority Watch List in four of the past five years, citing a number of reasons, including the widespread availability of counterfeit goods in a number of product sectors, widespread piracy of copyrighted goods, growing concerns regarding online infringement, and infringement on and of mobile devices, as well as what rights-holders have described as significant practical obstacles to protecting and enforcing their intellectual property rights in the country. 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. Many of these concerns continue to be raised by Coalition members, and as such, the IACC once again recommends Vietnam's retention at the Watch List level.

IACC members have expressed optimism regarding Vietnam's ongoing negotiations to accede to the Trans-Pacific Partnership ("TPP"), as that process will likely encourage Vietnam to further assess the sufficiency of its current IP protection and enforcement regimes. Coalition members continue to state concerns regarding a perceived over-reliance upon administrative enforcement; an increase in criminal prosecutions, and the imposition of more robust penalties against offenders would be welcomed.

Rights-holders are continuing to monitor the application of Decree No. 97/2010/ND-CP⁷⁹, which provides for "Administrative Sanctions Against Infringers in the Field of Industrial Property," and upon which the IACC commented on positively last year as well as Circular No. 37/2011/TT-BKHCN, which was recently issued on 27 December 2011 to guide the implementation of Decree No. 97/2010/ND-CP.

Nature and Scope of Counterfeiting and Piracy in Vietnam

As noted above, counterfeits of our members branded goods pervade the market in Vietnam. Increased imports of such counterfeits from neighboring countries such as China are becoming problematic in attempts to establish a market for legitimate products. Likewise, both hard goods counterfeiting and piracy of copyrighted goods as

⁷⁹ Decree No. 97/2010/ND-CP replaced Decree No. 106/2006/ND-CP, dated September 22, 2006.

well as beginnings of Internet piracy, and certainly pirated product on mobile devices has increased in 2011.

Criminal Enforcement

While rights-holders acknowledge the efforts made by law enforcement agencies in Vietnam, and generally speak favorably in regard to the Economic Police, Market Management Bureau, and the Inspectorate under the Ministry of Culture, Sports and Tourism, the volume of counterfeit and pirated goods available in the Vietnamese consumer market remains unacceptably high. Rights-holders in a variety of sectors, though particularly those in apparel, software, pharmaceutical, and cosmetics, continue to report significant concerns. Greater numbers of enforcement actions are needed, and must be accompanied by prompt adjudications, and deterrent level penalties to discourage recidivism and to signal that the government takes seriously the theft of intellectual property.

Some members report positive relationships with Vietnamese enforcement personnel, but note that in many cases law enforcement is simply overwhelmed, and lack sufficient resources to take on the number of cases that they would like. The government must increase the availability of resources for criminal enforcement and prosecutions.

Administrative Action

Although the Economic Police, Market Management Bureau, and Science and Technology Inspectorate continue to take raid actions against manufacturers and traders of counterfeit goods, counterfeiting remains a significant problem, particularly for alcohol, pharmaceutical, cosmetic and fashion products. In order to deter counterfeiters from repeating their infringement activities, it is important that subsequent to raid action the authorities must conduct follow up investigations to ensure counterfeiters have not reengaged in counterfeit activities. Those counterfeiters that continue to flaunt the law must be prosecuted and criminal penalties strictly imposed. Unfortunately, Vietnamese law enforcement authorities have not done so in practice.

Enforcement of patent rights in the pharmaceutical sector is also a problematic issue. Currently, the Science and Technology Inspectorate at the central and provincial level is the sole authority empowered to take action against patent infringers under administrative procedure. However, the Science and Technology Inspectorate seems to be reluctant to accept and handle patent infringement cases in the pharmaceutical sector (possibly due to social concerns). Therefore, the procedure for handling patent infringement cases in the pharmaceutical sector is unnecessarily prolonged.

The Drug Administration of Vietnam (“**DAV**”) under the Ministry of Health and Plant Protection Department (“**PPD**”) and the Ministry of Agriculture and Rural Development routinely ignore patent owners’ complaints/notices regarding patent infringement by local generic manufacturers/distributors that apply for marketing authorization before DAV and PPD. DAV and PPD recently issued marketing authorizations for generic products even after receipt of the patent owners’ complaint/notice on patent infringement. In the future, DAV and PPD should not continue to do so.

Civil Action

IACC members have continued to express the concerns reported in last year’s filing with regard to civil court proceedings, which are described as unnecessarily prolonged and often not cost effective. Increased training for the judiciary would improve the certainty of outcomes, as would improved guidelines for determining the appropriate level of damages.

Customs

Vietnam’s proximity to major counterfeit goods manufacturing centers in China, and the abundance of routes available to smugglers to bring illicit goods across the border presents a significant challenge to Vietnam’s General Department of Customs (“GDC”). Members report that a number of shopping areas selling counterfeit and pirated goods have sprung up along Vietnam’s northern border, selling China-sourced fakes. It is recommended that the GDC coordinate more closely with other (Vietnamese) law enforcement agencies to crack down on these markets to both discourage the further importation and sale of counterfeit and pirated goods in the border region, and to trace back the source of the goods being offered. Likewise, they should further engage Chinese enforcement agencies to seek assistance in preventing the export of goods from China, and to take necessary action at the source of manufacture.

Conclusion

The IACC encourages the Vietnamese government to continue building upon recent efforts to demonstrate its commitment to the protection and enforcement of intellectual property rights by:

- Substantially increasing the resources available for IP enforcement, both within and at Vietnam’s borders;

- Continuing to increase the number of raids conducted by law enforcement personnel;
- Increasing opportunities for the training of prosecutors and the judiciary in the area of IPR, to ensure that cases are properly adjudicated in an efficient manner; and
- Significantly increase penalties levied against infringers to improve the deterrence of existing enforcement efforts.

PARAGUAY

Recommendation: Section 306 Monitoring

Introduction

Paraguay remains a significant concern for rights-holders, due to its strategic importance to the supply chain for counterfeit and pirated goods sold throughout South America. Though retail sales and distribution pose less of a concern in Paraguay than some of its larger neighbors, the exploitation of its free ports for trans-shipment to markets such as Brazil, Argentina, and Chile; and the high volume of illicit traffic centered in Ciudad del Este have made Paraguay a perennial concern for trademark and copyright owners in the United States. Paraguay remains a hub for large-scale distribution of finished and unfinished counterfeit goods to the rest of Latin America.

Despite efforts to address rights-holders' concerns, pursuant to a Memorandum of Understanding with the United States, progress in the protection and enforcement of intellectual property rights has remained slow. Improving border controls remains the single greatest priority in Paraguay for Coalition members.

The IACC recommends the continued monitoring of progress in Paraguay subject to Section 306, in 2012.

Nature and Scope of Counterfeiting and Piracy in Paraguay

Rights-holder concerns with regard to Paraguay have been well-documented in prior years' submissions by the IACC and others, and remain largely tied to border enforcement. These include trans-shipment through Paraguay to other end-markets in South America, the export of finished product manufactured in Paraguay, and of counterfeit components and labels to be finished elsewhere. In addition, manufacturers in some product sectors, most notably the apparel and copyright sectors, continue to report retail sales of counterfeits within the domestic market.

Border Controls and Criminal Enforcement

The difficulties faced in Paraguay with regard to customs enforcement are partly a function of the country's geography, which offers numerous routes for smuggling goods into neighboring countries such as Brazil and Argentina. More can be done though to

prevent this activity. The IACC has, in recent years, urged the Paraguayan government to increase coordination and cooperation with its Tri-Border neighbors to address these trafficking concerns. We reiterate those recommendations again this year.

In previous submissions, the IACC commented on the enactment of 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. Among these amendments was the authorization of greater maximum penalties for IP violations, however, in practice, Coalition members have yet to report any evidence of increased deterrence, or diminishment of the availability of counterfeits in the marketplace. We continue to encourage Paraguay to encourage its prosecutors to seek maximum penalties and judges to impose deterrent-level sentences in IP cases.

Conclusion

Although the Paraguayan government has shown some progress in recent years, and has committed to improving the environment for legitimate manufacturers and retailers, that progress has been slow to materialize. In 2012, the IACC encourages Paraguay to take the following steps towards improving its IPR regime:

- Make general reforms of border control measures, including stricter regulation of import licenses;
- Continue and increase cooperation with customs and law enforcement authorities in neighboring countries of the Tri-Border region, i.e., Brazil and Argentina;
- Provide additional training to prosecutors and the judiciary to improve the handling and efficiency of IP-related cases;
- 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.