



February 8, 2013

VIA WORLD WIDE WEB

<http://www.regulations.gov>, docket number USTR-2012-0022

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: 2013 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 77 Fed. Reg. 77178- 80 (December 31, 2011)

Dear Mr. McCoy:

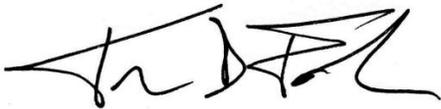
The attached written comments are submitted on behalf of the International AntiCounterfeiting Coalition, Inc. ("IACC"), in response to the request by the United States Trade Representative ("USTR"), published in the Federal Register on December 31, 2012, for written submissions from the public concerning 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', with a stylized, sweeping flourish at the end.

Travis D. Johnson
Vice President, Director of Legislative Affairs & Policy
The International AntiCounterfeiting Coalition
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Submission of the

International AntiCounterfeiting Coalition

to the

United States Trade Representative

Special 301 Recommendations

February 8, 2013

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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 the severity of the threats posed by intellectual property crimes, and the scope of the harms 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. While the countries of concern highlighted by IACC members, and the particular issues emphasized in those countries tend to vary from year to year, many of the recommendations contained herein are long-standing concerns that have been raised in prior years’ submissions. One such trend identified in recent years is the pronounced shift toward the shipment of counterfeit goods into the United States via mail and express delivery services, in small quantities, directly to consumers, and the correlation of that trend to an online sale and distribution model.

In recent years, the IACC has noted the exploitation by counterfeiters of legitimate technologies to facilitate their illicit activities, and called for increasing engagement and collaboration with other players in the online space to address these concerns. The past year has seen substantial progress in this regard – most notably within the payment

processing sector, which has devoted significant effort to working with rights-holders in identifying the bad actors misusing their systems. We are hopeful that other key players within the online marketplace, including search engines, ISPs, online advertising brokers, and delivery services will follow the positive example set by the payment processing sector, in working with rights-holders to stem the illegal trafficking of counterfeit goods.

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 harms caused by counterfeiting remained severe during 2012, whether measured in terms of lost sales to legitimate manufacturers, tax revenues and duties which go unpaid to governments, lost jobs, or 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 well-being of consumers worldwide; and as made clear by a Government Accountability Office ("GAO") investigation, the infiltration of counterfeit products into the critical infrastructure and military supply chains is a significant threat to our national security.¹

In 2012, China remained the country of greatest concern for IACC members across every product sector, as it has been for many years. 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. In spite of some positive developments during the past year, Russia and Canada, likewise, remain major concerns for rights-holders across a number of sectors. Each of these countries is again recommended for placement on USTR's Priority Watch List this year. They are joined by seven additional countries recommended for placement on the Watch List, or for Section 306 monitoring. Most of these countries were identified in last year's submission by the IACC, and remain jurisdictions in which

¹ "DOD Supply Chain: Suspect Counterfeit Electronic Parts Can Be Found On Internet Purchasing Platforms." U.S. Government Accountability Office. GAO-12-375. (Feb. 2012), *available at* <http://www.gao.gov/assets/590/588736.pdf>.

IACC members continue to experience significant problems. A new addition to this year's report is the United Arab Emirates, a result of increasing rights-holder concerns related primarily to customs enforcement and trans-shipment, as well as reported increases in domestic distribution of counterfeit goods.

The pages following include a table summarizing the IACC's Special 301 recommendations for the years 2003–2013, 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 needs for:

- Greater cooperation and coordination among different government enforcement bodies, including police, customs, and other administrative enforcement bodies, both within countries and across borders;
- Customs and other enforcement authorities to provide IP owners with earlier access to information needed to pursue investigations and legal actions;
- Substantially greater political will and resources to combat IP crime;
- 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;
- Greater support from governments and the judiciary regarding creative enforcement tools, including third-party- and landlord-liability strategies; and
- 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, 2003 – 2013*

	03	04	05	06	07	08	09	10	11	12	13
Belize		WL	PWL	PWL	WL						
Bolivia	WL										
Brazil		WL			PWL	WL	WL	WL	WL	WL	WL
Bulgaria		WL									
Canada	WL		WL	PFC	PWL	WL	WL	PWL	PWL	PWL	PWL
Chile	WL		WL								
China	306	306	PFC/306	PFC/306	PFC/306	PFC/306	PFC	PWL	PWL	PWL	PWL
Costa Rica				PWL	PWL						
Czech Republic					WL	WL	WL				
Hungary	WL										
India	WL	PWL	WL								
Italy									WL	WL	
Japan		WL									
Jordan		WL									
Korea						OO					
Kuwait			WL								
Lebanon		PWL									
Libya		WL									
Malaysia	PWL	PWL	PWL	PWL	WL						
Mauritius		WL									
Mexico	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL
Pakistan		WL									
Panama	WL	WL	WL								
Paraguay	306	306			PWL/306	306	306	306	306	306	306
Peru					SM						
Philippines	PWL	PWL	PWL	PWL	WL	WL	WL	WL	PWL	WL	WL
Poland	PWL	PWL									
Romania		WL									
Russia	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Saudi Arabia	WL	WL	WL							WL	
Singapore	WL										
South Africa	WL							WL			
Spain								WL	WL	WL	
Taiwan	PWL	WL	WL								
Thailand	WL	WL									
Turkey	WL	WL	WL			OO	WL	WL	WL	WL	WL
Ukraine		PFC									
UAE	WL	WL	WL		SM	OO					WL
Venezuela		WL									
Vietnam	WL				PWL	WL	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

China remains the top priority for our members due to the high levels of counterfeiting within the country and the growing and largely unfettered expansion in the use of the Internet by counterfeiters based in the country. China also continues to supply the overwhelming majority of fake products imported to the US (at least 84%) as well as many other countries.² Accordingly, the IACC recommends that China remain on the Priority Watch List for 2013. Our members hope this will contribute to continuing close monitoring of China's progress, as well as greater engagement on China's legislative and structural reforms that will lead directly to greater deterrence against violations.

Greater Enforcement

As explained in last year's report by the IACC, the State Council established a new inter-ministerial working group in 2010, the National Leading Group for Combating IPR Violations and Production and Distribution of Counterfeit and Inferior Commodities (the National Leading Group), to coordinate anti-counterfeiting strategy nationwide. The Leading Group has helped to ensure greater resources are brought to bear against counterfeiters in China and is also spearheading efforts to develop a more comprehensive array of changes in both laws and practices with the goal of improving the efficiency and deterrence of enforcement efforts.

Following the creation of the Leading Group, dramatic increases in both administrative and criminal enforcement have been recorded. During 2012, the number of administrative and criminal actions more than doubled. Though most of this enforcement work has been on behalf of local brands, some foreign companies, including IACC members, have also reported noticeable, if somewhat limited, reductions in the level of counterfeiting for their brands, including reduced visibility of fakes in major retail and wholesale markets.

² Intellectual Property Rights: Fiscal Year 2012 Seizure Statistics. U.S. Customs & Border Protection – Office of International Trade, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/ipr_communications/seizure/fy2012_final_stats.ctt/fy2012_final_stats.pdf.

In response to this greater enforcement, counterfeiters are organizing themselves more effectively, and using the Internet in a more sophisticated manner. Furthermore, administrative enforcement—which is the default method of enforcement—remains largely non-deterrent. Consequently, there is a consensus—including among Chinese authorities—that deeper reforms are needed in order to make sustainable progress.

The Chinese view in this regard was most recently expressed by China’s top police official responsible for IP enforcement, who stated:

“After years of effort, the increasing number of such violations has shown they have not yet been effectively addressed. Infringements are still rampant and public in some places³... [Therefore], one cannot be optimistic about the situation with respect to the production and sale of counterfeits. New criminal chains and networks for the production and sale of fakes are breeding which are industry-focused, regional and systematic.⁴

Reforms Still in the Pipeline

As explained in the IACC’s 2012 Special 301 submission, in late 2010, Premier Wen Jiabao, as leader of the Leading Group, announced plans⁵ to strengthen deterrence against counterfeits by focusing on the following five tasks—each of which is of deep interest to IACC members:

- closer monitoring of and enforcement against Internet counterfeiting;
- introduction of punitive damages and higher administrative fines under the next revision of the PRC Trademark Law;
- reduction of numerical thresholds incidental to the next amendment of the

³ See Remarks of Gao Feng, Deputy Director of the Economic Crimes Investigation Division of the Ministry of Public Security, Jan. 23, 2013, available at www.usa.chinadaily.com.cn/epaper/2013-01/23/content_16164460.htm.

⁴ See Remarks of Gao Feng in Chinese at http://www.chinadaily.com.cn/hqgj/jryw/2013-01-22/content_8099147.html

⁵ See 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. See also 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>.

PRC Criminal Code;

- greater cooperation and coordination between Chinese police and administrative enforcement authorities; and
- greater cooperation with foreign enforcement authorities in dealing with cross-border cases.

As explained below, despite progress on each of the above tasks, most remains on paper, rather than in practice, at least for the time being.

Internet Counterfeiting – Foreign and local trademark owners alike have traditionally filed over 98% of their enforcement complaints with administrative authorities—principally the local Administrations for Industry and Commerce (“AICs”). However, to date, the AIC have focused their policing almost exclusively in physical markets, rather than online. Further, while the State Administration for Industry and Commerce (“SAIC”) and local AICs have exhorted local trade platforms, such as Taobao and DHGate, to improve their take-down procedures⁶, these exhortations have not been focused sufficiently on dealing with repeat offenders and other blatant large-scale vendors. Consequently, many of our members are left with the impression that serious infringements are going largely unaddressed by the government.

Chinese police appear to be conducting more coordinated and direct enforcement against larger online copyright pirates under recent enforcement campaigns. The scope of these campaigns has been dwarfed by the size of the problem, but clearly they are a start. The IACC hopes in any case that similar campaigns can be initiated to focus more resources against online counterfeiters, including those targeting both local and international buyers.

Chinese police (the Public Security Bureaux or “PSBs”) and local AICs in most major regions have established special teams to focus on a range of violations, including IP infringements as well as various types of fraud. However, the resources of these new teams appear limited, and their role seems limited to supporting investigative work by local police.

Meanwhile, the SAIC announced plans in 2010 to create an online monitoring and enforcement system which would be piloted first in select cities and launched

⁶ The SAIC has issued periodic notices and basic rules on Internet counterfeiting, including “Order 49” and, most recently a notice issued January 5, 2012, *available at* http://www.saic.gov.cn/ywdt/ztbd/zscq/zcfb/201201/t20120105_122261.html.

nationwide by 2013. There is so far little information on the ongoing pilot projects, the timeline for implementation of a national system or even of the actual contents of the planned enforcement system.

Finally, the Supreme People's Court (SPC) issued a new judicial interpretation in November 2012 on online copyright infringement, which Chinese judges can refer to as "reference" when dealing with trademark disputes against trade platforms and ISPs. It is too early to speculate on the impact this new interpretation will have in encouraging trade platforms to cooperate in joint enforcement work with trademark owners. But the SPC has recently indicated that a further interpretation focused mainly on online infringements of trademark rights will be issued shortly after the Trademark Law is revised, and depending on its contents, the likelihood this interpretation will lead to behavioral change by online trade platforms and ISPs should be greater.

Compensation and Administrative Fines – Under action plans of the National Leading Group and the 2008 National IP Action Plan of the State Council, the Chinese have proposed increasing the costs to infringers and improving recoveries to IP owners by increasing compensation from civil courts and raising administrative fines that may be imposed by local AICs. Following through on these proposals, the National People's Congress (NPC) recently issued a draft revision of the Trademark Law for public comment in December 2012, which explicitly provides for punitive damages, higher fines for cases involving "serious circumstances", a requirement that infringers prove their revenues (failing which the trademark owner's calculation of damages should be accepted), and a doubling of the maximum level of statutory damages. Each of these reforms is laudable. It remains unclear when the law will be enacted, although this will likely happen sometime before the end of 2013.

In the meantime, the IACC has expressed concern to the NPC over the need for detailed definitions of key terms, such as "serious circumstances", and we are hopeful this and other ambiguities left by the draft will be adequately addressed in implementing regulations and judicial interpretations from the SPC.

Amendment of the Criminal Code and Reduction of Thresholds – Although the NPC has not yet fixed amendment of the Criminal Code as part of its legislative work plan, it has entrusted the Ministry of Public Security ("MPS") to lead a research program aimed at generating detailed proposals for amending the law. Consistent with Premier Wen Jiabao's 2011 speech, this research is focused in part on determining whether the current thresholds-based approach to criminal liability for IP crimes remains valid.

The current thresholds for criminal liability are RMB50,000 (US\$7,300) for producers and RMB 150,000 (US\$22,000) for traders.⁷

The IACC has explained its views on the need to reduce thresholds for investigation and prosecution in each of its Special 301 reports to USTR over the last decade, and thus, our members were greatly heartened by Premier Wen Jiabao's announcement in 2011 that thresholds would be reduced. It remains unclear, however, just how committed the government remains to this objective, and whether the Criminal Code will be amended quickly enough to make a difference in the short to medium term. The last revision of the law occurred in 1997, and at that time, counterfeiting was not a major concern, let alone counterfeiting over the Internet.

The IACC continues to believe that China should follow international practice and eliminate thresholds to investigation, prosecution and liability—leaving them only to help local courts in calculating sentences. Doing so would facilitate investigations by PSBs into online infringements, give local police and prosecutors greater leverage over smaller infringers so as to encourage them to disclose details of principal offenders, and send a broader message of deterrence to the market, generally.

Better Coordination between Police and Administrative Authorities – Given the limited investigative powers of administrative enforcement authorities, such as the AICs, Technical Supervision Bureaux (“TSBs”) and Customs, national authorities have prioritized the need for closer coordination and cooperation with local PSBs, which have greater authority, including the power to detain infringers, and check emails, phone logs and banking records. Recent press reports suggest that a certain level of progress has been achieved in promoting transfers between the PSBs and TSBs under regulations issued in 2011, as well as in cases involving tobacco and pharmaceutical counterfeiting (see below). However, to date, there are no available statistics on the level of transfers from local AICs to PSBs in either 2011 or 2012, and this lack of transparency is troubling to the IACC, given the minute level of transfers in 2010—only 175 out of over 40,000 cases.

While we anticipate that the level of transfers has increased somewhat, our members have not reported dramatic improvements in this regard in the last year (aside from in

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.

the tobacco and pharmaceutical industries).

Greater Cooperation in Cross-Border Cases – Over the last year, there have been reports of moderate increases in the number of cases in which police and customs from the US and China have cooperated in investigations into cross-border cases. While this increase is laudable, there is clearly a need to dramatically increase the number of such cases, thereby creating a substantial and more reliable pipeline for investigations into US and other foreign-based buyers and Chinese suppliers. Achieving this will clearly require greater organization, planning and good will. Hopefully the successful cooperation witnessed in 2012 will provide the necessary platform for even greater cooperation in the coming year.

Other Priority Issues

Landlord Liability - IACC members report moderate progress in the Chinese government's efforts to reduce counterfeiting in retail and wholesale markets, in part through wider implementation of the "Trademark Authorization System" ("TAS"). This system is now supported by the creation of online databases in which vendors are encouraged to keep records of authorizations from trademark owners and suppliers.

Very little information has been published on the results of various pilot programs. Interestingly, in Beijing – the home of the infamous Silk Street Market – the local AIC published a detailed report in 2012⁸ which indicates fairly extensive implementation of the TAS, with over 400 markets participating. The irony is that counterfeiting in the Silk Street Market remains rife, with the only sign of progress being that visibility of samples of certain brands has been reduced, but with transactions now taking place in stairwells, rather than on the market floor. Overall, efforts by enforcement authorities and the landlord in this iconic market have been inadequate, and the IACC recommends continued attention to the problem by USTR and relevant Chinese authorities. We also support efforts to expand the scope of the TAS throughout China⁹, and making it mandatory, rather than voluntary.

⁸ Chinese press reports from April 2012 indicated that 365 markets have implemented the TAS, with 127 having adopted "online authorization platforms" containing over 25,000 records. *See, e.g.*, http://sbj.saic.gov.cn/ztbd/sbzn/jyjl/201204/t20120428_125987.html.

⁹ *See* recent Chinese reports on the adoption of the TAS in cities as far-flung as Weifang and Ordos at <http://cermn.com/art155339.aspx> and http://www.nmgs.gov.cn/zcfg/ztfz/201301/t20130124_45212.html.

Meanwhile, decisions in 2011 and 2012 in Guangzhou and Nanjing (respectively) against landlords of fashion markets have raised deep concerns among IACC members by turning back the clock on the basic theory of landlord liability. In these cases, the landlords were exonerated from secondary liability on the basis that they had attempted to educate vendors after receiving notice of an initial violation and lacked the intent to facilitate counterfeiting. The holdings in these cases clearly run contrary to holdings in decisions over the last few years issued in Beijing and several other cities which clearly confirmed the responsibility of landlords to take measures that are “effective” in “stopping infringements”, not merely discouraging them. The IACC therefore recommends that the Supreme People’s Court attempt to resolve the conflicting holdings by issuing an appropriate notice or judicial interpretation.¹⁰

Taobao MOU – During 2012, the IACC entered into an MOU with Taobao intended to promote more effective and friendly cooperation between the B2B/B2C platform and our members. It is too early to draw conclusions, as cooperation under the MOU commenced only recently. But our members have been encouraged by Taobao’s willingness to engage in more substantive dialogue and to consider new models of cooperation.

Given Taobao’s size and influence in the Chinese market, we would hope that any new model for cooperation can later be applied to cooperation with other trade platforms in the PRC.

Trademark Squatting – As noted in last year’s report, IACC members suffer extensive harm from trademark squatting, i.e., bad faith registration of their trademarks. As discussed below, we are pleased to observe that the latest draft revision of the PRC Trademark Law would impose a requirement of “good faith” on all trademark applicants. However, it remains unclear how “bad faith” can be proved under the future law, and whether Chinese authorities will require evidence of actual sales and advertising in China as a condition to protection. (See below for further comments.)

Handling of Seized Fakes and Production Equipment – As noted earlier, our members remain deeply concerned over the lack of transparency in the handling of seized fakes by

¹⁰ The SPC supported the basic concept of landlord liability by recognizing early cases by IACC members against the Silk Market as “Top 10 Cases” for 2006. These and subsequent decisions of the Beijing courts are covered in depth in the IACC’s last several Special 301 submissions.

administrative authorities, and by provisions in the current Trademark Law which mandate the confiscation and destruction of production equipment only where there is evidence that it has been used “exclusively” to make counterfeits. As explained further below, the latest draft revision of the Trademark Law regrettably retains this language.

Scope of Problem

Sectors Affected

Counterfeiting in China continues to affect virtually all sectors in which our members operate, including apparel, footwear and fashion accessories (including leather goods, eyewear, watches and jewelry),¹¹ portable phones and smartphones, pharmaceuticals,¹²

¹¹ Perhaps the most noteworthy illustration of the scale of counterfeiting of fashion goods involving Chinese suppliers was a case that documented the export of 70 containers of fake Nike, Disney and other brands. The export price of each container was said to be about \$200,000, and each container generated retail sales of an estimated \$1.5 million, thus yielding total sales of \$150 million. *See* <http://www.imperialvalleynews.com/index.php/news/national-news/2294-international-counterfeit-goods-trafficking-scheme-arrest.html> and http://www.chinaipr.gov.cn/newsarticle/news/chinaworld/201211/1712592_1.html. *See also* reports on another large-scale case involving the shipment of 135 containers of various fashion brands, including Coach, Burberry, LV, Nike and others at <http://articles.latimes.com/2012/mar/05/business/la-fi-mo-counterfeit-bust-20120305> and http://7thspace.com/headlines/407229/twenty_nine_charged_in_new_jersey_for_related_international_schemes_to_import_counterfeit_goods_and_drugs_laundry_profits.html.

See also report on raids on 37 locations in Guangdong Province netting evidence suggesting turnover of \$820 million in fake LV, Coach and Hermes bags at <http://fashion.telegraph.co.uk/news-features/TMG9689915/515-million-designer-counterfeiting-ring-unearthed.html>.

See also report on case in China involving 18 counterfeiters of fake CROCs sentenced to a total of 46 years in prison for dealing in over 128,000 pairs valued at over \$9 million, at <http://www.streetinsider.com/Corporate+News/Crocs+%28CROX%29+Updates+on+Chinese+Counterfeit+Crackdown/7931911.html>.

See also reports from July 2012 on the purchase of Chinese-made fake Nike sports uniforms by the Egyptian Olympic team at http://www.huffingtonpost.com/2012/07/26/egypt-olympic-uniforms_n_1706043.html.

¹² The scope of pharmaceutical counterfeiting in China was best illustrated by the results of a recent sweep against a major ring by Chinese authorities, in which 2,000 people were arrested, over \$180 million in fakes were seized and over 1,000 units of production equipment were confiscated. *See* August 6, 2012 report from the New York Times at http://www.nytimes.com/2012/08/06/world/asia/2000-arrested-in-china-in-crackdown-on-counterfeit-drugs.html?_r=0.

For a broader overview of the scope of counterfeiting of medicines in China and globally, see Wall Street Journal report at

wine,¹³ liquor, golf and other sports equipment¹⁴, food, beverages, agricultural chemicals, electronic components (including those used for military equipment¹⁵), computers, printer ink cartridges, musical instruments, networking equipment, entertainment and business software, batteries, cigarettes,¹⁶ cosmetics, condoms, home appliances, ball bearings¹⁷ and auto parts.¹⁸

<http://online.wsj.com/article/SB10001424127887323320404578211492452353034.html#articleTabs%3Darticle> (noting that cancer drugs are a top target).

¹³ For an overview of the state of wine counterfeiting in China, *see* <http://www.reuters.com/article/2012/03/12/us-china-wine-fake-idUSBRE82Bo7E20120312>. *See also* report on market survey of wine drinkers in 2012 indicating that 44% of respondents were discouraged from buying wine due to rampant counterfeiting at <http://www.winecompanion.com.au/news/news-articles/2013/january/fears-of-fake-wines-in-china>. <http://www.thedrinksbusiness.com/2012/11/10000-bottles-of-fake-lafite-uncovered-in-china/>. *See also* report on one seizure of 10,000 bottles of LAFITE wine in Wenzhou City, noting that only 50,000 bottles of genuine product are imported to China each year, at <http://www.observertoday.com/page/content.detail/id/570585/Schumer-visits-area-to-push-ban-on-fake-wine.html?nav=5047>.

¹⁴ *See* report on recent seizure of golf equipment in China at http://www.cybergolf.com/golf_news/task_force_continues_crackdown_on_chinese_golf_club_counte_rfeiters.

¹⁵ For reports on fake components used in military equipment assembled in the US, *see* <http://thehill.com/blogs/defcon-hill/procurement/218219-gao-counterfeit-military-parts-easily-obtainable-from-chinese-companies> (noting that 334 of 396 global vendors of fakes were based in China) and <http://www.cbc.ca/news/politics/story/2013/01/09/f-vp-weston-hercules-counterfeit-chinese-parts.html> (confirming that fake China-made parts used in cockpits of transport plans could disable instrument panels mid-flight); and http://articles.businessinsider.com/2012-03-28/news/31248142_1_counterfeit-parts-vendors-investigators (providing overview of DOD purchases of counterfeits).

¹⁶ For an overview of cigarette counterfeiting in China, *see* https://reportingproject.net/underground/index.php?option=com_content&view=article&id=9. *See also* report on a recent seizure in New York of \$4.5 million in fake cigarettes at http://gothamist.com/2013/01/28/45_million_in_counterfeit_cigarette.php

¹⁷ *See* report on recent survey in Shanghai of vendors of ball bearings, revealing that 29 of 40 stores sold fakes, and estimating that two thirds of all shops offering ball bearings offered fakes, at <http://www.stopfakebearings.com/#/news/2013/01/counterfeit-bearings-in-shanghai-a-growing-problem-tokyo-2013>.

¹⁸ *See* https://reportingproject.net/underground/index.php?option=com_content&view=article&id=9.

Key Regions

Guangdong Province remains the region of greatest concern to most IACC members, with particular problems reported in Guangzhou City (production, retail, wholesale and online distribution of fashion goods), the outlying villages of Huadu and Baiyun (leather goods production), and the infamous Guangzhou Baiyun World Leather Market (wholesaling of leather goods). Counterfeiting of undergarments and jeans remains problematic in the satellite towns of Foshan and Shunde, among others.

Our members in the electronics sector continue to report serious problems in Shenzhen, particularly with respect to smartphones (in the Saige and Mintong malls), computer peripherals and electronic components. Production of these items is increasingly spreading to cities and towns near to Shenzhen, including Dongguan. A significant portion of online traders in electronics appears to be based in Shenzhen.

The city of Yiwu in Zhejiang Province remains the top region of concern for local, and increasingly global, wholesaling of fakes. It also remains a notable source of fake jewelry, together with Yichun City in Jiangxi Province.

Meanwhile, Fujian Province remains a hotbed for counterfeiting of footwear of all types, with particular mention of Putian and Jinjiang County. Jinjiang and Quanzhou City are also noted for production of certain types of athletic equipment.

Fujian, Jiangsu and Anhui provinces are reported to be hot-spots for fake auto parts, with certain cities noted for being “no-go” for enforcement due to strong protectionism.

Pharmaceutical counterfeiting is reported by members to be problematic in parts of Guangdong, but more recently in Henan Province and various cities in northeastern China.

Counterfeiting continues to be rife in various wholesale markets in major cities, including the Silk Market in Beijing and Han City Fashion and Accessories Plaza and Xingwang International Garments City in Shanghai.

Online Counterfeiting

The scale of online counterfeiting in China has not yet been methodically surveyed, but the severity of the problem can perhaps best be illustrated through data offered by Taobao, the largest online trade platform. Recently, Taobao reported having taken

down 87 million postings in 2012, and imposed punishments on over 950,000 vendors.¹⁹

The scope of online counterfeiting can also be realized by conducting searches of brands—large and small—in search engines of major trade platforms in China. For example, literally millions of listings appear when searches are made of certain leading footwear brands, the vast majority of which are offers for counterfeit products. Brands are simultaneously plagued by tens of thousands of standalone “rogue” websites set up to appear to be brands’ authorized sites, but actually selling counterfeit products.

Clearly, the management of Chinese trade platforms are aware of how their services are being used by counterfeiters. Far greater, and more collaborative, efforts will be necessary to result in significant progress in reducing the availability of counterfeits online.

As noted above, the investigation and enforcement of trademark and other IP rights in China has become virtually unmanageable on the Internet. Government resources are not yet systematically focused on reviewing the content of trade platforms or of web traders based in China that openly offer fakes. The scale of the problem is arguably too large to permit such proactive monitoring and enforcement. Consequently, the government has focused much of its efforts to date on pressing the larger trade platforms to respond in a timely manner to take-down notices.

While virtually all online platforms in China are now responding to take-down requests, IACC members have deep concerns over the timeliness of responses, the imposition of unreasonable documentary requirements, unreasonable demands by certain platforms for sample purchases, and a lack of meaningful penalties against sellers whose listings have been reported. In the time that it takes for reported postings to be removed, an equal or greater number of new listings for counterfeit products pop up.

Meanwhile, to our knowledge, the Chinese government has made only minimal efforts to press trade platforms to address repeat offenders and large-scale vendors through proactive reporting to authorities or the brand owner. Our members believe there is no time like the present for the government to increase pressure on trade platforms to do more in this regard, and based on existing laws and regulations.

¹⁹ See Taobao’s latest enforcement report at <http://bbs.taobao.com/catalog/thread/154504-260229715.htm>.

As noted above, the SPC issued a judicial interpretation in November 2012 to assist local courts in dealing with online copyright disputes against online service providers. Pending issuance of a new interpretation from the SPC on trademark violations, local courts are likely to refer to the November document, which imposes an explicit duty on online platforms to stop infringements based on constructive knowledge, and not just actual knowledge. The obligation to stop infringements would, if applied to trademark cases, suggest that merely sending warnings or temporarily suspending the accounts of repeat offenders would not be legally sufficient, and that only termination of the infringer's account would shield the trade platform from liability.

To date, the damages awarded by Chinese courts to plaintiffs that have sued online trade platforms have been insignificant, particularly compared to the enormity of the problem and the legal costs of bringing actions. Consequently, fewer such actions have been filed over the last year and online platforms have consequently been less responsive than desirable.

This may of course change following the planned introduction of punitive damages in the future Trademark Law and the proposed judicial interpretation by the SPC specifically targeting online counterfeiting.

Meanwhile, IACC members have been encouraged by the entrance into force on December 1, 2012 of a revision of the PRC Postal Law, Article 23 of which now states that senders of express mail must provide evidence of their identity and preserve this evidence for at least one year. This provision should help to some degree in tracing back shipments of fakes purchased by individual consumers from Internet traders.

Exports

The latest CBP statistics indicate that 84% of the US\$1.11 billion in infringing products seized during the last fiscal year were from China (including Hong Kong, products from which would normally be transshipments from China).²⁰ Similarly high seizures of China-sourced fakes have previously been reported in Japan, the EU and elsewhere.

Chinese-made counterfeits also continue to pose deep concerns in Africa, particularly with respect to pharmaceuticals, and as reported in the IACC's Special 301 submission

²⁰ See Intellectual Property Rights: Fiscal Year 2012 Seizure Statistics. U.S. Customs & Border Protection – Office of International Trade, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/ipr_communications/seizure/fy2012_final_stats.ctt/fy2012_final_stats.pdf.

last year, the Chinese government has recognized the problem and issued new rules to deal with Africa-bound shipments of fakes.²¹

IACC members that have recorded their rights with Chinese Customs continue to express general satisfaction with the work of Chinese authorities in monitoring shipments, utilizing intelligence and responding professionally to seizures. Chinese Customs also wins top marks for accessibility and transparency.

Meanwhile, IACC members continue to be concerned over the lack of success by Chinese Customs in supporting criminal investigations against counterfeiting rings. However, we understand that during 2012, Chinese Customs and police pursued some test cases in which fakes were allowed to be exported to the US for controlled deliveries, and with the aim of ultimately determining the identity of the supplier in China following arrests at the receiving port. These cases bode well for future cooperation, both between Chinese Customs and police as well as with foreign enforcement authorities. The IACC encourages US and Chinese authorities to intensify cooperation and increase the number of cases where controlled deliveries are conducted and deeper investigations subsequently facilitated on both sides.

2012 Enforcement Data

The Chinese government has yet to publish comprehensive data on the results of its enforcement work in 2012. However, the following partial data confirms a clear up-tick in enforcement.

Criminal

Preliminary reports regarding criminal enforcement in 2012 suggest the following achievements:

- Local PSBs investigated 39,000 cases involving 57,000 infringers;

²¹ Recently, the value of counterfeit exports to Kenya, Uganda, Rwanda, Burundi and Tanzania was estimated to exceed \$600 million (see <http://english.sina.com/china/2013/0106/545398.html>). Meanwhile, the government of Tanzania recently estimated that it loses 15-25 percent of tax revenues as a result of counterfeiting, with much of the goods coming from China. See <http://www.theeastafrican.co.ke/news/Tanzania+takes+on+counterfeits+afresh/-/2558/1363528/-/nq7js7/-/>.

See recent report on MOFCOM reactions to fake exports to Africa at <http://allafrica.com/stories/201208240131.html>.

- The value of these cases exceeded RMB10.7 billion or \$1.6 billion;
- Prosecutors approved the arrest of 14,000 suspects in 12,000 cases;
- Chinese criminal courts resolved 10,000 cases which resulted in sentences against 12,000 individuals.

Full-year statistics on prosecutions in 2011 were issued in mid-2012, and indicated a 21 percent increase in the number of individuals prosecuted, to 6,870. Thus, it would appear that the number of prosecutions in 2012 will have at least doubled compared to 2011.²²

Administrative

The SAIC has only published enforcement data covering the first half of 2012, and this data is incomplete. However, it is encouraging, as it suggests a possible doubling of the level of cases handled to over 60,000, and the value of goods involved in these cases exceeding RMB1.61 billion or \$255 million.²³ The SAIC has not yet reported the number of criminal transfers from local AICs to the police during 2012. This has been a critical measurement of achievement, as prior transfer rates have been extremely disappointing (normally less than 400 out of 40,000 or more cases).

Meanwhile, the Ministry of Commerce (“MOFCOM”) recently announced aggregate figures for all types of administrative enforcement, and these indicate investigations were conducted into 274,000 cases involving product valued at \$128 million. The targets of these actions were said to include online trading, international trading companies and key sectors such as auto parts, etc.²⁴

The TSBs (an administrative enforcement body similar to the AICs which mainly focuses on “fake and shoddy goods”, rather than trademark violations) announced having dealt with 2,347 “major cases” in 2012, with a total value of US\$2 billion. The total number of major cases was also said to have increased nearly 39 percent compared to 2011.

²² See SPC 2012 report to NPC http://www.court.gov.cn/qwfb/gzbg/201204/t20120413_175925.htm See SPC’ 2011 report to NPC http://www.gov.cn/2011lh/content_1827715.htm

²³ For 2012 half-year figures from the SAIC, see http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201208/t20120802_128381.html.

²⁴ See <http://www.ipraction.cn/2013/01/21/ARTI1358735116830853.shtml>

Further, local TSBs were reported to have transferred 1,716 cases to the police, representing a hefty 44% increase from the prior year.²⁵ This increase in transfers is of course heartening. However, it remains unclear what proportion of these cases involved trademark counterfeiting. Further, it should be kept in mind that AICs handled the bulk of trademark counterfeiting cases in China—over 50,000 in 2011.

Government reports suggest that the TSB decision to increase cooperation has been based upon the conclusion that police involvement is necessary to address the two most common obstacles in administrative enforcement work: the lack of proper police powers (including the power to search various records and detain suspects) and local protectionism (to which police are generally less susceptible).²⁶

Civil

In 2011, local civil courts concluded 66,000 cases in the first instance, representing a 37.7 percent increase over 2010.²⁷

Meanwhile, the SPC reported that, between January and September 2012, Chinese civil courts accepted 65,105 IP cases, representing a 42 percent increase from the equivalent period in 2011. The number of cases actually decided by September 2012 likewise increased by 41 percent.²⁸

Meanwhile, a research report by the SPC analyzing IP cases brought before the civil courts between 2008 and mid-2012 indicated that out of 226,753 cases brought, only 20,370 involved trademark rights, and only a quarter of these involved foreign brand owners.²⁹

²⁵ See http://www.chinaipr.gov.cn/newsarticle/news/headlines/201301/1723617_1.html

²⁶ See http://www.chinaipr.gov.cn/newsarticle/news/headlines/201301/1723617_1.html

²⁷ See http://www.court.gov.cn/qwfb/gzbg/201204/t20120413_175925.htm and http://www.gov.cn/2011lh/content_1827715.htm.

²⁸ See <http://www.court.gov.cn/qwfb/sfsj/201212/P020121224548533406277.xls>.

²⁹ See http://www.npc.gov.cn/npc/xinwen/2013-01/06/content_1750233.htm

Customs

In 2011, China Customs detained approximately 10 billion infringing goods valued at approximately RMB 50 billion or \$790 million.

The vast majority of infringing goods seized (94%) involved trademark violations.

The six regions recording the most seizures were Shanghai, Ningbo, Xiamen, Shenzhen, Hangzhou and Huangpu Customs in Guangzhou.³⁰

The General Administration of Customs has not yet published enforcement figures for 2012. However, MOFCOM has reported that in the first four months of 2012, 2,504 seizures were conducted involving goods valued at RMB 5 billion or \$800 million.³¹

Cigarettes

Tobacco was the first product to be dramatically impacted by counterfeiting in China. The problem began in the early 1990's and spiraled shortly thereafter.

Over the years, enforcement work in this area has benefited from significant resources from Chinese tobacco companies and the government, as well as intensive strategic thinking from officials in the State Tobacco Monopoly Administration ("STMA"), MPS and other ministries. Consequently, the successes and challenges of these authorities in dealing with fake cigarettes (mainly in the domestic market) are a bellwether for success in enforcement in other sectors.

Unlike other ministries, the STMA has been fairly transparent in its work, issuing fairly complete statistics and analysis of the nature of the problem as well as the strategies adopted in the field. The most recent such report was issued³² in early 2012, and it sums up the results of enforcement work in 2011. The statistics set out in this report (summarized below) suggest a noticeable increase in enforcement over the prior year. But in accompanying commentary, relevant officials have concluded that, despite the impressive results, counterfeiters of cigarettes are adapting well to the increased enforcement by going deeper underground, thereby requiring the authorities to prepare

³⁰ See <http://finance.jrj.com.cn/2012/04/26152212931034.shtml>

³¹ See <http://www.mofcom.gov.cn/article/ae/slfw/201206/20120608175166.shtml>

³² See http://www.tobacco.gov.cn/html/10/1005/100509/10050903/4114397_n.html.

for the long haul and explore deeper reforms in the law and in enforcement practices. This includes giving Chinese police greater resources and support for deeper criminal investigations—a conclusion which of course applies to other sectors and the general problem of the Internet.³³

The following are the results reported from enforcement in 2011.

- 8,801 suspected infringers were detained, and 5,117 were ultimately subject to criminal prosecution;
- Authorities dealt with 4,714 counterfeiting cigarette cases involving product valued over RMB50,000 (the criminal threshold);
- Over 382,000 cases of fake cigarettes were seized (each case containing 50 cartons);
- Over 105 million units of printed cigarette labeling was seized;
- 12,300 tons of fake tobacco leaf were seized;
- 806 sets of cigarette production equipment were confiscated;
- A total of 804 fake cigarette sales networks were shut down, representing an increase of 13% over the prior year;
- The number of cases transferred from administrative authorities to the police increased almost 6% from the prior year.
- The number of infringers criminally convicted increased 29%.
- 145,000 cases of counterfeit cigarettes were seized in the course of transportation, representing 38% of the total seizures.

³³ Online advertising and sales of cigarettes are banned in China, thus making detection and enforcement somewhat easier. But this has not stopped some networks from exploiting the Internet to promote their business. See report on a recent only case in Jiangsu in which online traders were caught dealing in over RMB10 million (\$1.58 million) in fakes at <http://jiangsu.sina.com.cn/news/s/2012-12-28/o80233597.html>

Transparency in Reporting of Enforcement Statistics

Chinese authorities have not typically reported enforcement data in a detailed and transparent manner so as to assist the public to draw valid conclusions over the government's performance. Key problems in this regard include:

- The mixing of enforcement data for cases involving “fake and shoddy goods” (pursued under Art. 140 of the Criminal Code) and trademark counterfeiting (Art. 213-215).
- The inclusion of tobacco counterfeiting cases in the total. As indicated above, perhaps a third or more of criminal prosecutions against counterfeiters in China involve fake cigarettes. However this is unconfirmed due to ambiguities in reporting.
- The lack of reporting on the performance of individual cities and provinces, and in a consistent manner, and in particular on prosecutions and criminal transfers.

Very likely, the central government receives much, if not all, of the required data from local enforcement authorities and the judiciary. The IACC urges authorities to improve their reporting in order to ensure proper credit is given, as well as to help in early detection of back-sliding in particular areas.

Trademark Law Revision

As noted above, the NPC issued a draft revision of the PRC Trademark Law in December 2012 and sought public comment before January 31, 2013. The following is a summary of the key reforms proposed in the draft and the IACC's views thereon.

Relationship between Criminal Code and Trademark Law

Our members believe that, in terms of improving IPR protection, the single biggest challenge for China at present is the need to continue strengthening criminal enforcement against counterfeits. But as resources for criminal investigations and prosecutions will always be limited, it is also critical to strengthen administrative and civil sanctions. As indicated below, the IACC is generally pleased with the proposals set out in the NPC's draft revision of the Trademark Law, as it seems likely to achieve these goals.

However, our members continue to believe that, even if the proposed changes in the Trademark Law are implemented, the level of deterrence will be insufficient to create the required “sea change” in enforcement. Likewise, while greater cooperation between PSBs and administrative enforcement authorities is necessary and helpful, we believe that the substantial reduction of numerical thresholds is essential to maximizing deterrence, reducing the cost, and increasing the efficiency of enforcement work by all concerned. This is especially true with respect to online counterfeiting, where there are inherent difficulties in confirming the scope of prior transactions and seizing significant stocks of infringing goods.

While Premier Wen Jiabao has already announced the intention to reduce thresholds, our members report resistance to this proposal from certain policy makers. We therefore suggest the Chinese government and judiciary more deeply consider the rationale for reducing thresholds and develop a more comprehensive plan for ensuring that the final action plan is workable. To these ends, the IACC stands ready to provide whatever technical assistance the Chinese may require, including expertise in understanding how rights holders select enforcement strategies in particular circumstances, how local authorities make decisions to accept cases for investigation and prosecution, and how civil strategies (including settlements) help to reduce the burden on prosecutors and courts. The IACC recommends that the US government intensify its own technical exchanges with China on these and related topics.

Damages

Article 62 of the draft Trademark Law laudably introduces punitive damages of up to three times the claimed harm in “serious” situations, but without specifying the conditions that qualify as “serious”. We suggest that the future law or its implementing regulations define “serious” to include any case involving intentional counterfeiting. Article 62 also boosts the maximum allowable statutory damages to RMB 1 million (\$160,000), double the maximum in the current law.

Further, in cases where the trademark owner presses for compensation based on actual damages, Article 62 encourages the courts to adopt the trademark owner’s position if the defendant fails to produce accounts and books ordered by the court or if the evidence produced is falsified. We strongly support this language (set out below):

“When determining the amount of compensation, if the owner of the trademark has presented all evidence it can, but the account books and documents related to the infringement are still under the control of the infringing

party, the People’s Court shall order the infringing party to provide such account books and documents; if the infringer does not provide them or those it provides are false, the People’s Court may determine the amount of compensation by reference to the rights holder’s position and the evidence it has filed.”

Article 62 also introduces a new method of calculating damages by way of a deemed royalty. We support this language, as we believe it will help to simplify the work of plaintiffs that would otherwise have difficulty proving lost profits due to disputes over pricing and costs. Local courts will still need to determine the appropriate royalty rate and whether to calculate the royalty against the infringer’s lower price or the higher-priced genuine items, and we encourage the NPC Standing Committee to clarify these and other related issues in future implementing regulations.

Chinese courts have traditionally been conservative in calculating damages awards, in part to avoid creating excessive incentives for further litigation that would clog the courts.³⁴ Clearly, efforts will need to be taken to avoid abuse of judicial resources. However, international practice suggests that setting compensation awards higher will help to promote early settlements of disputes, and without the need for litigation.

Administrative Penalties

Article 59 of the draft revision to the Trademark Law appears to be intended to encourage the imposition of higher fines against infringers, particularly in egregious circumstances, such as those involving repeat offenders. We applaud these changes. But we encourage the NPC to provide additional definitions or other criteria that would increase predictability in the calculation of fines, e.g., by mandating minimum fines in particular cases.

Under the current law, local AICs have the discretion to impose fines of up to five times the “illegal business amount” or total revenues of the infringer; and in cases where this amount is hard to determine, statutory fines of up to RMB 100,000 (\$16,000) may be imposed. But in practice, fines are typically not levied at the higher ranges, and the statutory fines are rarely imposed at all. Without further definitions and more explicit

³⁴ The fears of excessive litigation are best illustrated by a recent report from Chongqing City, where it is claimed that an enormous amount of civil litigation involving counterfeits is pursued by lawyers and agents that operate on a contingency basis. See http://www.chinadaily.com.cn/cndy/2012-03/15/content_14837691.htm (criticizing “professional consumer advocates” and noting that one particular litigant was responsible for over 40% of the 640 counterfeiting cases in the city last year).

language, the proposed changes are not likely to result in significant changes from current practice.

We also laud the following provisions within Article 59, which should have a positive impact:

- The draft provides for fines up to RMB 250,000 (\$40,000) in cases where there is no evidence of prior sales by the infringer or where illegal revenues reach up to RMB 50,000. Clarification that significant fines may be imposed even where there is no evidence of prior sales should provide a useful tool for deterrence, and should also make it easier for local AICs to press vendors holding significant stocks of fakes to disclose the origins of their goods.
- In cases where an infringer has committed its second or subsequent offense within a five-year period or when the circumstances are otherwise deemed “serious”, the draft requires AICs to impose “heavy penalties”. We assume this means fines at the higher end of the scale, i.e., five times the illegal business amount or, in smaller-scale cases, up to RMB 250,000.

As suggested above, without detailed guidelines and definitions, for example what constitutes “serious circumstances”, local AICs are likely to continue their current, generally lax policies with respect to the calculation of fines. The IACC consequently recommends that any case of trademark counterfeiting or a case involving an infringer that lacks the required business license or other required permits be deemed “serious”.

Article 59 of the NPC draft also encourages trademark owners to seek AIC mediation support to settle compensation claims against infringers. We are in principle supportive of this provision, since it may help trademark owners to resolve cases more quickly and to also generate compensation that can be used to fund future anti-counterfeiting investigations.

Intermediary Liability

Article 56(5) of the NPC draft would impose secondary liability for any party that “intentionally . . . provides facilitating conditions, thereby assisting another to infringe.” Similar language already appears in the current Implementing Regulations, and we assume its elevation to the Trademark Law reflects a desire by the NPC to give greater priority to contributory liability across the board, whether it be online trade platforms,

ISPs, customs brokers and freight forwarders, landlords of retail malls (such as the infamous Silk Market) or others.

The IACC has previously expressed concern that the term “intentionally” may not capture constructive knowledge, and it was suggested that the language be amended to the more standard phrasing of “knew or should have known”.

While we understand that the term “intentionally” actually covers constructive knowledge, we question whether this will be understood in practice by infringers, local courts and administrative authorities. We therefore suggest making the applicability of the constructive knowledge standard explicit in the future law or implementing regulations.

Article 56 does not list out the types of behavior that would be deemed to be “assisting another to infringe,” and the IACC has previously opined that online service providers and landlords (among others) should be specifically listed out in the law or implementing regulations so as to eliminate any doubt about their potential liability, thus encouraging proactive cooperation in take-down and other cooperative enforcement efforts.

The NPC drafters are no doubt aware of the November 2012 judicial interpretation issued by the SPC which sets out a range of factors for determining liability for infringement by online service providers. While these new rules were intended mainly to address copyright infringement, the same principles should be applicable to online counterfeiting as well. We encourage the NPC drafters to consider these rules as they further revise the law and prepare a first draft of implementing regulations thereto.

Additionally, we encourage the NPC to take note of the recent string of decisions against the landlord of the Silk Street Market, which despite intensive government action and civil actions by brand owners extending for more than a decade, remains rife with counterfeits. The latest decisions of the Beijing Intermediate People’s Court (now on appeal), suggest that a landlord acting in egregious bad faith may be held liable for infringement notwithstanding the lack of specific knowledge of a particular vendor’s dealings in fakes.

Destruction of Production Equipment

Article 59 of the NPC draft provides for the destruction of equipment “exclusively used” to produce infringing goods. This language appears in the current implementing regulations to the Trademark Law and it has also appeared in prior drafts of the law prepared by the Trademark Office and the State Council’s Legislative Affairs Office.

The IACC believes that inclusion of the phrase, “exclusively used”, unnecessarily limits the scope of cases in which forfeiture and destruction of production equipment may be appropriate. We suggest a broader standard that would allow local AICs and courts the discretion order the forfeiture where the infringer has acted in obvious bad faith and/or where the circumstances are serious.

Actions against Anonymous Parties

Under current law, to pursue civil remedies of any kind a plaintiff must identify the defendant by its identity card number or business license. This requirement severely undermines the ability of IP owners to rely on the civil courts to obtain necessary relief, and it is suggested the requirement be modified to comport with international practice.

Under US law, for example, an IP owner may go to court seeking relief against an anonymous party—referred to as a “John Doe” or “XYZ Corporation”—where efforts to identify the suspected infringer have proven unsuccessful.

So long as the anonymous party has been provided notice of the action, the US courts are empowered to award the same remedies in such cases, as in those against defendants whose identities are known:

- freezing and forfeiture of compensation, including that held by third parties, such as banks;
- the freezing and forfeiture of domain names by domain name registries;
- the disclosure of identifying information, emails and financial records by third parties that hold such material, such as ISPs and banks.

As counterfeiters are now relying extensively on the Internet and the anonymity it provides, our members strongly encourage the NPC to consider adopting a “John Doe” rule in the future Trademark Law, or failing that, under corresponding changes to other laws. To the extent needed, we also encourage the NPC to grant local AICs the power to obtain information and freeze assets and domain names, whether through the administrative tribunals of the People’s Courts or other channels.

Bad Faith Registration

Pre-emptive filing of trademark applications for both foreign and local brands remains a serious problem for brand owners, caused largely by the lack of adequate provisions in the current law.³⁵ The NPC draft attempts to address some of the existing insufficiencies by inserting a general prohibition against bad faith filings in Article 9:

“The application for registration, and use, of a trademark shall comply with the principle of good faith.”

This general principle is not specifically defined in the NPC Draft, and there is concern that the definitions of good faith and bad faith will not be sufficient in the law or in the future implementing regulations thereto, thus limiting the scope of protection that will ultimately be afforded against obvious bad faith pirates. We therefore encourage the NPC to take steps to ensure that the future provisions in the Trademark Law are practical and effective in deterring all bad faith filing, including with respect to foreign brands that have not been the subject of advertising and sales inside Mainland China.

Registrability / Accelerated Appeals

The draft law provides for the registration of single-color marks based upon evidence of secondary meaning, i.e., evidence of use and reputation for the mark inside China. Our members laud this development, but propose that the Trademark Office accept evidence of secondary meaning during prosecution, rather than incidental to rejection and the filing of appeals, and for any case where the filing of relatively straightforward evidence may impact on its determination. Doing so would help accelerate the registration process, particularly for companies that are suffering significant levels of counterfeiting. To help such brand owners deal effectively with fakes much earlier, we also suggest China improve its current rules and procedures on the acceleration of cases which are already under appeal so as to bring delays in registration down from several years to a more reasonable timeframe.

To illustrate: The applications of one IACC member which suffers from substantial levels of counterfeiting have been rejected and the member has appealed to the Trademark Review and Adjudication Board (“TRAB”). Regrettably, the TRAB typically

³⁵ For an overview of the problem in Chinese, see the results of a recent research program by the Beijing No. 1 Intermediate People’s Court in late 2012 and data on recent cases, *available at* <http://www.cipnews.com.cn/showArticle.asp?Articleid=23601>, and <http://bjgy.chinacourt.org/public/detail.php?id=99823> (reporting on six recent decisions issued by the Beijing courts), <http://www.ipraction.cn/2012/08/29/ARTI1346223452159859.shtml> (providing historical data on the growing scope of the problem).

takes two to four years to issue decisions, and registration can be delayed a further two to four years if further judicial appeals are required. As a result of these delays, our member has been restricted in the measures it can take to effectively stem the production and distribution of exports of counterfeits originating in China. This brand owner has been able to obtain court orders in the United States seizing domain names and awarding injunctions and hundreds of millions in compensation, but ultimately the company has been powerless so far to deal effectively with the source of the problem in the PRC.

Thus, to reiterate, the IACC recommends that the TRAB and the courts accelerate the handling of cases where the brand owner can demonstrate high levels of counterfeiting. We further recommend the law and related guidelines be amended to allow the Trademark Office to permit trademark owners to argue secondary meaning and related issues during prosecution, as doing so may help to reduce delays in registration across the board.³⁶

Conclusion

China made further progress in 2012 in boosting criminal enforcement, strengthening cooperation between administrative and criminal enforcers, and in drafting a revision of the PRC Trademark Law that could eventually boost compensation and administrative fines dramatically. We look forward to implementation of these proposed changes and maturing of reforms already put in place. Finally, we are hopeful that the government and the legislature will ultimately implement the reduction of numerical thresholds promised by Premier Wen Jiabao in 2011, take steps to dramatically expand policing of counterfeits on the Internet, and likewise greatly expand the scope of cooperation with US and other foreign police and customs in dealing with cross-border cases.

³⁶ The brand “TRUE RELIGION” and its Chinese equivalent (pronounced “*zhen shi xin yang*”) were rejected by the Trademark Office, necessitating appeals to the Trademark Review and Adjudication Board (TRAB). Decisions from the TRAB are still pending, and in the meantime, the brand owner has been forced to pursue remedies in the US which, while useful to a degree, have not cured the problem. The latest legal actions in the US include a March 2012 decision ordering the seizure of 282 rogue websites and damages of \$863 million (True Religion Apparel, Inc., et al. v. Xiaokang Lei, et. al., S.D.N.Y.) and December 2012 TRO issued against 345 websites (True Religion Apparel, Inc. et al. v. Does 1-100, N.D. Ill.). The company applied for a further TRO in January 2013 seeking orders against 334 further websites (True Religion Apparel, Inc. et al. v. P’ships and Ass’ns Identified in Schedule “A”, N.D. Ill.). In each of the foregoing cases, the domain names in question were hosted by Chinese registrars and/or the registrants were based in China. True Religion intends to work closely with PRC authorities to root out the problem in the PRC once its trademark rights in China are confirmed.

Notwithstanding the substantial progress China made in 2012, the continuing high levels of counterfeiting and uncertain prospects for the above-mentioned reforms requires the IACC to recommend that China remain on the Priority Watch List until more concrete manifestations of progress are realized.

RUSSIA

Recommendation: Priority Watch List

Overview

To say that recent years have been eventful with regard to developments in Russia's trade relationship with the United States, and particularly the role that intellectual property rights have played in those developments, would be an incredible understatement. The U.S.-Russia Bilateral Market Access Agreement (including the Side Letter on IPR³⁷), the adoption of Part IV of the Civil Code, Russia's accession to the World Trade Organization, and the establishment of Permanent Normal Trade Relations between our countries have all represented significant steps toward Russia's full integration into the global marketplace. Rights-holders have been generally supportive of that integration, with the understanding that while full membership in the trade community affords many opportunities to a country, it also demands the assumption of certain responsibilities. Among those is the obligation to provide an effective framework for the protection and enforcement of intellectual property rights. We were therefore pleased with the announcement last December of the agreement between the U.S. and Russian governments on an action plan to improve IPR protection and enforcement.³⁸

While we acknowledge the progress that has been made thus far, and the commitments to make further improvements going forward, the IACC recommends that Russia be retained on the Special 301 Priority Watch List until more concrete results have materialized. In 2012, Coalition members continued to report high levels of counterfeits in the market affecting a variety of sectors, severe levels of copyright piracy – particularly in the online context, insufficient border control measures, and structural concerns related to deterrence, transparency, and public awareness. Many of these same concerns have been cited for a number of years. We applaud the efforts of USTR

³⁷ U.S. Russia Bilateral Market Access Agreement – Side Letter on IPR, *available at* http://www.ustr.gov/archive/assets/World_Regions/Europe_Middle_East/Russia_the_NIS/asset_upload_file148_10011.pdf

³⁸ United States – Russian Federation Intellectual Property Rights Action Plan. *available at* http://www.ustr.gov/webfm_send/3619 .

in working with their Russian counterparts, and are hopeful that the new action plan will provide a roadmap to real progress on these long-standing concerns.

Nature and Scope of Piracy and Counterfeiting in Russia

In 2012, Coalition members' litany of concerns related to intellectual property protection and enforcement in Russia remained largely unchanged from those identified in previous years. Rights-holders from a wide variety of product sectors continued to cite problems ranging from domestic production of counterfeit and pirated goods, to retail and wholesale distribution, as well as large-scale online distribution of copyrighted works, and insufficient border controls. IACC members reported little to no apparent improvement over the prior year, when a Ministry of Internal Affairs study 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."³⁹ Meanwhile, media reports confirm that other industries, including the wine and spirits⁴⁰, tobacco⁴¹, information technology⁴² sectors continue to be similarly at risk. According to Alexei Popovichev, Executive Director of RusBrand, the Russian market for counterfeit goods exceeds 900 billion rubles (\$29 billion).⁴³

Enforcement

Enforcement remains, as it has been for many years, the single greatest problem cited by rights-holders. In a 2011 question and answer session, then-Prime Minister, and current Russian President, Vladimir Putin acknowledged that there obstacles to

³⁹ *Up To 30 Percent of Russia's Key Retail Goods Counterfeit*, PETOŠEVIĆ, Sept. 23, 2011, available at: <http://www.petosevic.com/resources/news/2011/09/000768>.

⁴⁰ *See, e.g., 30,000 Bottles of Fake Vodka Seized in Russia*, NEW YORK DAILY NEWS, June 27, 2012, available at <http://india.nydailynews.com/business/a7a189961235da03b133efe1bf578bfb/30-000-bottles-of-fake-vodka-seized-in-russia>.

⁴¹ *See Estonia: 8.5 Million Counterfeit Cigarettes Seized*, discussing a major seizure valued at over four and a half million dollars, seized in transit from China to Russia. ASSOCIATED PRESS, available at <http://www.wvltv.com/news/world/142339375.html>.

⁴² *See, e.g., Counterfeit Chips Possible In Mission Fail*, discussing the failure of an unmanned mission to Mars by the Russian space agency, and the agency head's statement that the imported chips that failed may have been counterfeit, UNITED PRESS INTERNATIONAL, Jan. 31, 2012, available at http://www.upi.com/Science_News/Technology/2012/01/31/Counterfeit-chips-possible-in-mission-fail/UPI-56361328048672/.

⁴³ Rachel Nielsen, *Medvedev Urges Copyright Enforcement*, THE MOSCOW TIMES, Oct. 23, 2012, available at <http://www.themoscowtimes.com/business/article/medvedev-urges-copyright-enforcement/470256.html>.

addressing the problem of counterfeit goods more effectively⁴⁴; though in a statement at a conference in October of last year, Prime Minister Medvedev refused to support the idea of creating an oversight body to monitor Russia's efforts at enforcing IP rights.⁴⁵ We're pleased however that many of the components of the agreed upon action plan appear to be focused on enforcement, and on those activities that lend to improving the efficiency of enforcement actions, e.g., post-seizure destruction of contraband and instrumentalities, imposing deterrent penalties and sentences, and ensuring adequate coordination with rights-holders and law enforcement agencies tasked with combating counterfeiting and piracy. Many of these have been specifically highlighted by the IACC in prior years' submissions as action items which would be viewed positively by rights-holders.

Customs

Though Russia is not a major exporter of counterfeit goods to the United States, its border enforcement is still cited as a concern by rights-holders, in part a function of its expansive borders and its proximity to major centers of counterfeit production in China. The importation of counterfeit goods for domestic consumption remains a problem, and some rights-holders continue to report concerns about the trans-shipment of goods through the region.

Conclusion

The level of trademark counterfeiting and copyright piracy in Russia remained very troubling to rights-holders across all product sectors in 2012. While Russia's entrance into the WTO, and its ongoing bilateral engagement with the United States pursuant to the Intellectual Property Working Group is encouraging, we recommend that Russia be maintained at the Priority Watch List level until more concrete results have been achieved. We encourage the Russian government to take the following actions in the coming year:

- Continue good-faith efforts toward the goals set forth in the IPR Action Plan;
- Ensure transparency in legislative reform by providing an opportunity for consultation and comment with stakeholders on proposed legislation;

⁴⁴ *Russia to continue to fight counterfeiting – Putin*, VOICE OF RUSSIA, Dec. 15, 2011, available at http://english.ruvr.ru/_print/62275282.html.

⁴⁵ See Nielsen, *supra* note 43.

- 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;
- Publicize 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

While IACC members applauded continuing efforts of law enforcement agencies to address the level of counterfeiting and piracy in Canada, rights-holders remain frustrated by Parliament's failure to provide personnel with much-needed tools and a statutory framework necessary to ensure long-term improvements. The legislative fixes required are widely-acknowledged, and have been highlighted over the course of recent years in the IACC's Special 301 recommendations, policy papers published by domestic rights-holder groups such as the Canadian Intellectual Property Council⁴⁶ and the Canadian Anti-Counterfeiting Network⁴⁷, and by Parliament itself.⁴⁸ Canada however remains seemingly content with efforts to seize its way out of its counterfeiting problem. While seizure numbers continue to rise, thanks to the persistence and hard work of enforcement personnel, the seized goods are quickly replaced as counterfeits continue to flow into the country from abroad. Unfortunately, recent large seizure efforts by the RCMP have been temporary projects that are not expected to continue in 2013 due to restructuring and lack of resources. Though recent reports indicate that prosecutors have requested training materials from the Intellectual Property Institute of Canada ("IPIC"), to improve the handling of IP-related cases, at present prosecutions of such

⁴⁶ *A Time For Change: Toward a New Era for Intellectual Property Rights in Canada*, Canadian Intellectual Property Council, Feb. 3, 2009, available at <http://www.ipcouncil.ca/uploads/ATimeForChange.pdf> .

⁴⁷ *Report on Counterfeiting and Piracy in Canada: A Roadmap for Change*, Canadian Anti-Counterfeiting Network, Nov. 2011, available at <http://www.cacn.ca/publications/CACN%20-%20Report%20on%20counterfeiting%20-%20Executive%20Update%20-%20nov%202011.pdf> .

⁴⁸ *Counterfeit Goods in Canada – A Threat to Public Safety*, STANDING COMM. ON PUBLIC SAFETY & NAT'L SECURITY (2007), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=209854> . See also *Counterfeiting and Piracy are Theft*, STANDING COMM. ON INDUS., SCIENCE & TECH. (2007), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200> .

offenses remain few and far between, and penalties continue to lack the necessary deterrent effect.

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 2013.

Nature and Scope of Piracy and Counterfeiting in Canada

IACC members from nearly every product sector continued to report problems with counterfeit retail sales, both in traditional brick and mortar shops, and increasingly in the online market. The sectors most heavily affected include apparel⁴⁹, pharmaceuticals⁵⁰, consumer electronics⁵¹, and the core copyright industries⁵². The overwhelming majority of counterfeit product is reportedly manufactured abroad for import, exploiting the Canadian Border Services Agency's limited statutory authority to act against intellectual property violations. As in past years, there remain some reports of domestic manufacture or finishing (assembly, labeling, or packaging of goods imported without infringing labels), but such activities involve a small percentage of the overall volume. Based on information obtained from interdictions at the border, or where seizures in the market have been traced back to their source, China is the primary origin of counterfeit goods entering Canada.

⁴⁹ See "Police Make Half-Million Dollar Counterfeit Clothing Bust in Winnipeg." GLOBAL WINNIPEG, Sept. 15, 2011, *available at* <http://www.globalwinnipeg.com/police+make+half-million+dollar+counterfeit+clothing+bust+in+winnipeg/6442482788/story.html> .

⁵⁰ See, e.g., Yue Pang and Patrick Li, *Counterfeit Growing Dangerous*, EPOCH TIMES, Aug. 15, 2012, noting that counterfeit pharmaceuticals now constitute up to 7 % of Canadian seizures, *available at*: <http://www.theepochtimes.com/n2/canada/counterfeit-growing-dangerous-280139.html>. See also, "FDA Warns Doctors of Counterfeit Botox", describing FDA warnings sent to 350 medical practices regarding shipments of Botox shipped by an unapproved Canadian supplier previously tied to shipments of counterfeit drugs. Fox News Latino. Dec. 24, 2012, *available at*: <http://latino.foxnews.com/latino/health/2012/12/24/fda-warns-doctors-counterfeit-botox/> . Last visited: Feb. 7, 2013.

⁵¹ See, e.g., Russell Piffer, *Police Seize Millions in Counterfeit Goods*, TORONTO STAR, Dec. 3, 2012, *available at* http://www.thestar.com/news/crime/2012/12/03/police_seize_millions_in_counterfeit_goods.html.

⁵² See, e.g., Alex Consiglio, *Multi-million dollar counterfeit DVD ring cracked, RCMP Says*, TORONTO SUN, Jul. 25, 2012, *available at* <http://www.torontosun.com/2012/07/25/multi-million-dollar-counterfeit-dvd-ring-cracked-rcmp-says>.

Legislative Concerns

In 2007, two committees within the Canadian Parliament published reports which outlined in detail a number of deficiencies in Canada's statutory regime for effectively addressing counterfeiting and piracy. *Counterfeit Goods in Canada – A Threat to Public Safety*, and *Counterfeiting and Piracy are Theft*, provided a roadmap which has been endorsed by both the IACC and by Canadian interest groups, to remedy some of the most long-standing and fundamental obstacles to effective protection and enforcement of IP rights in Canada.⁵³ Regrettably, in the six years that have passed since publication of these reports, there has been little progress made by Parliament in this regard.

While Parliament took a positive step last year with its enactment of C-11, the Copyright Modernization Act, many of the IACC's members in the core copyright sectors raised concerns with a number of the bills' provisions. We therefore continue to monitor the implementation of that new law to ensure that Canada abides by its existing obligations.

Cooperation, Resources and Coordination

In last year's submission, the IACC highlighted Project O-Scorpion, an initiative led by the Toronto Royal Canadian Mounted Police, which was ultimately responsible for over \$78.5 million worth of seizures during a six month period, more than doubling the value of seizures by the RCMP across Canada the entire year prior. The emphasis on enforcement continued during 2012 with the Toronto Police Service conducting Project Consumer Safety, alongside other municipal law enforcement and the Toronto RCMP, which accounted for over \$4 million worth of goods seized in one day in the Toronto area. Over 500,000 units were seized and the cases are proceeding through the court system. That latter operation also illustrated that the trafficking of counterfeit goods often overlaps with other illicit criminal activity, as officers not only seized a variety of counterfeit goods, but also contraband liquor and forged U.S. driver's licenses. Canada must take positive steps however to ensure that the efforts of their enforcement personnel are not ultimately wasted due to lack of prosecution and minimal sentences. Though Project O-Scorpion resulted in 19 individuals being charged with 71 total counts, we are not aware of any resulting convictions to date. The Mounties, meanwhile, have

⁵³ See note 48, *supra*.

stated that their current resources allow them to investigate “a mere fraction” of counterfeiting cases.⁵⁴

Despite the significant seizure numbers cited above, rights-holders remain concerned that such successes appear to have been limited to the Toronto metropolitan area. No comparable actions were reported in other major cities such as Montreal or Vancouver. Rights-holders have also reported that restructuring of the RCMP will result in a reduced priority for anti-counterfeiting and anti-piracy operations in 2013. While CBSA and RCMP personnel continue to show interest in such work, they remain under-resourced and hampered by insufficient statutory authority to take action. Customs’ lack of ex officio authority leaves them largely reliant upon the RCMP or provincial authorities to seize counterfeit and pirated goods entering the country.

Conclusion

Regrettably, Coalition members report little progress in the overall level of IP protection in the past year. Canada must take concrete steps toward addressing long-standing deficiencies in its legislative regime, to empower its enforcement personnel, and to ensure that enforcement actions are accompanied by meaningful judicial action. The IACC recommends that the Canadian government:

- Provide CBSA with the ex officio authority to act against counterfeit and pirated goods at the border;
- Make meaningful progress towards enacting the legislative recommendations included in the 2007 reports of the two Standing Committees;
- Increase the resources available to Customs, police, and prosecutors, particularly at key points of entry and large metropolitan areas such as Vancouver, Toronto, and Montreal;
- Provide additional training to customs, police, prosecutors, and the judiciary regarding counterfeiting and piracy; and
- Work more closely with private-sector rights-holder groups to build public awareness about the impact of counterfeiting and piracy on the economy and on Canadian consumers.

⁵⁴ See *Mounties Say They Lack Resources to Probe Most Pirated Product Cases*, THE CANADIAN PRESS, May 4, 2011, available at: <http://www.tbnewswatch.com/news/144808/Mounties-say-they-lack-resources-to-probe-vast-most-pirated-product-cases>.

BRAZIL

Recommendation: Watch List

Introduction

In each of the past five years, the IACC has recommended Brazil's inclusion at the Watch List-level on USTR's Special 301 report, citing a range of issues including, among other things, widespread retail sales of counterfeit and pirated goods, a growing online and mobile trade in illicit products, and the need for improved border enforcement measures. Reports from IACC members indicate that each of these remained concerns for rights-holders during 2012. Perhaps more troubling though are reports of increasing problems related to domestic production of counterfeit goods – both for consumption and export – along with a perceived decrease in the level of enforcement and of political will to address the lack of effective IPR protection in the country.

The widespread availability of counterfeit and pirated goods continues to be viewed as a market access concern, and the Brazilian government must take positive steps to address this problem. They are left to do so however in an environment where public awareness of the benefits and contributions of a strong IP protection regime remains low, where academics present a false choice between development, access to goods and information versus protection of IP – particularly in the online context, and where the negative impact of counterfeiting is not widely acknowledged.⁵⁵

In light of the reports received from IACC member companies during our Special 301 process, and their growing concerns about the level of protection and enforcement of IP

⁵⁵ See, e.g., *Comprehensive analysis of Brazil's luxury market – challenges, real potential, future perspectives (part 1)*, Oct 2, 2012, noting that a recent survey by IBOPE indicates that 70% of Brazilians purchasing fake products within the previous 12 months were aware of their origin, *available at*: <http://www.cpp-luxury.com/comprehensive-analysis-of-brazils-luxury-market-challenges-real-potential-future-perspectives-part-1/>.

rights there, we recommend Brazil's continuing on the Watch List.

Nature and Scope of Counterfeiting and Piracy in Brazil

With the largest population in South America, and a rapidly developing economy, Brazil has long been viewed as a growth market with significant potential. However, trademark owners – both foreign and domestic – face significant competition in the Brazilian market from counterfeiters and pirates. In past years, Coalition members reported that the overwhelming majority of counterfeit and pirated goods in the market were sourced from abroad. Finished and unfinished counterfeit products were imported to Brazil directly from China, or through trans-shipment hubs such as Paraguay. Though some level of domestic production of counterfeits was known to take place, that local manufacturing was viewed as less serious than the import problem. In the past year however, IACC members have reported a significant increase in the domestic production of counterfeit goods in a variety of product sectors.

Ineffective border controls, which have long been cited by rights-holders remain, a significant concern. That concern now extends not only to the importation of goods into the Brazilian market though, but also to Brazilian exports of counterfeit product throughout the rest of South America.

Counterfeit goods from a variety of product sectors including apparel and footwear, luxury goods, and pharmaceuticals⁵⁶, remain readily available. While recent years have seen reports of increased levels of enforcement – e.g., seizures of counterfeit pharmaceuticals are said to have tripled between 2007 and 2009 - those actions do not appear to have reduced the overall volume of counterfeit products in the market. Though we have not yet seen updated enforcement statistics, anecdotal reports indicate that there has been a decrease in the level of enforcement over the past year.

Enforcement Actions

Brazil's enforcement regime continues to be hampered by the failure of the legislature to

⁵⁶ See S. Imber, *Brazil's Counterfeit Medicine Problem Triples in 4 Years*, citing Federal Criminal Police reports of seizures of a variety of drugs including erectile dysfunction medication, cancer treatments, and obesity drugs, and noting a relative decrease in the trafficking of "lifestyle drugs" in comparison to other, more profitable medications. Apr.17, 2012, available at: <http://www.safemedicines.org/2012/04/brazils-counterfeit-medicine-problem-triples-in-4-years-422.html> .

adopt truly deterrent penalties. As noted in prior years' submissions, even where prosecutors pursue cases involving crimes against industrial property, the penalties available under existing statutes are exceedingly low. Imprisonment is generally limited to between three months to a year for trademark offenses, though in practice, custodial sentences are rare, with most offenders facing only a fine. While the Criminal Code provides for somewhat higher penalties for crimes against copyrights, they likewise do not pose a significant deterrent. Sustained enforcement actions are necessary to diminish the availability of counterfeit and pirated goods in the marketplace; but long-term progress will require greater disincentives than are currently provided under the law.

While rights-holders have commented positively in the past with regard to the National Council Against Piracy and Intellectual Property Crimes ("CNCP"), Coalition members report a marked decrease in activity by the council during the past year.

Border enforcement also remains a key concern, and we continue to encourage Brazil to increase its engagement and collaboration with its neighbors, particularly with regard to Paraguay.

Public Education

Both the USTR and the IACC have commented positively in previous years regarding the efforts of the Brazilian government to increase public awareness on the benefits of a strong IPR regime, and on the harms associated with counterfeiting and piracy. Such efforts deserve greater investment, and we encourage the Brazilian government to work collaboratively with rights-holders in disseminating that message.

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, the need for improved border control measures, the need to enact truly deterrent penalties for IPR offenses, and growing concerns related to increased domestic production of counterfeit goods.

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

- Enact legislation to increase the minimum term of imprisonment, along with other penalties for criminal trademark counterfeiting;
- Devote significantly greater resources to customs authorities and law enforcement, and increase specialized IP enforcement units throughout the country;
- Focus resources and enforcement measures on Internet piracy and online brand infringement, and enact the legislation necessary to support such enforcement efforts;
- Increase the number and consistency of prosecutions of IP crimes, and ensure deterrent penalties are imposed;
- Continue efforts to raise consumer awareness regarding the threats posed by counterfeiting and piracy.

MEXICO

Recommendation: **Watch List**

Introduction

IACC members remain concerned with the levels of counterfeiting and piracy in Mexico, noting little progress in the country during 2012. Widespread retail sales of counterfeit goods continue to trouble rights-holders from a variety of sectors – perhaps most pronounced in the apparel and footwear, luxury goods – and in the core copyright industries. Both large, well-established markets (including three cited in last December’s Out of Cycle Review of Notorious Markets), and smaller, less formal markets can be found selling counterfeit goods throughout the country.

Due to these continuing problems with retail distribution, others cited in last year’s IACC submission and growing concerns related to the country’s treatment of goods in-transit, we recommend that Mexico be retained on the Special 301 Watch List in 2013.

Nature and Scope of Counterfeiting and Piracy in Mexico

As in past years, rights-holders report widespread availability of counterfeit and pirated goods in the domestic market of Mexico across a number of sectors. At Tepito, and others, counterfeit clothing, software and entertainment products, in addition to tobacco, razors, and other items are sold openly.

Coalition members likewise continue to report both domestic manufacturing and finishing of goods – particularly in the apparel sector; importation of finished goods remains the norm however, with most goods reportedly sourced from China. Exports to U.S. border states and bordering countries in Central America are not uncommon, and trans-shipment has been cited as a growing concern by a number of rights-holders.

There have been strong indications in recent years that Mexican drug cartels are

becoming more heavily involved in the trafficking of counterfeit and pirated goods.⁵⁷

Customs & Enforcement

While IACC members noted positive interactions with Mexican Customs officials in 2012, Customs' efforts continue to be hampered by a number of factors. Perhaps most troubling have been reports of a continuation, and deterioration, of Customs' treatment of goods declared to be in-transit through Mexico.

Historically, Customs officials in Mexico have been active in their enforcement against such shipments. Last year, however, the IACC members reported that such activity had largely ceased. Regrettably, this trend appears to have continued in 2012.

Early in 2012, we were informed of the planned signing of a public protocol between the Attorney General's Office and Customs outlining the authorities and responsibilities of each with regard to border control measures. That agreement was expected to establish a clear deference in favor of seizing counterfeit and pirated goods. In June however, we were informed of the release of certain detained shipments of counterfeit products at the direction of the Attorney General's Office. The rationale offered for the release of the goods was that, because they were declared to be in-transit to a foreign jurisdiction, the trademark owner had suffered no harm. Whether or not the trademark owner was injured was a question to be resolved by the authorities in whatever jurisdiction or market for which the goods were bound. Given the trans-national distribution generally seen in the trafficking of counterfeit goods, the Mexican policy is extremely troubling to intellectual property owners.

Despite the efforts of law enforcement personnel, the market remains inundated with counterfeit goods, with some surveys reporting the availability of fake products on par with their legitimate counterparts. Administrative enforcement continues to be viewed as ineffective, and rights-holders encourage Mexico to prioritize criminal prosecutions.

Rights-holders appreciate the openness of Mexican authorities to collaboration, both

⁵⁷ See Michael Kunzelman, *Feds: \$13.6M in Counterfeit Sports Goods Confiscated*, ASSOCIATED PRESS, Jan. 31, 2013, available at <http://www.officer.com/news/10862030/feds-136m-in-counterfeit-sports-goods-confiscated>.

with the private sector and with their counterparts in the United States.⁵⁸

Conclusion

Given the significant problems rights-holders continue to experience in Mexico, the IACC recommends that Mexico be retained on the Special 301 Watch List in 2013. Significant improvements are needed to address the volume of counterfeit and pirated goods in the retail market, and to remedy concerns related to Mexico's handling of in-transit goods. The IACC recommends the following actions be taken by the Mexican government during 2013:

- Continue engagement with international partners, including the United States, to undertake joint enforcement actions;
- Ensure that Customs and enforcement personnel have both the resources and authority necessary to act against counterfeit and pirated goods in Mexico;
- 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; and
- Work with rights-holders, both local and foreign, to develop consumer awareness campaigns to educate the public about the benefits of IPR and the harms caused by counterfeiting and piracy.

⁵⁸ See, e.g., *US, Mexico participating in Operation Holiday Hoax*, Dec. 7, 2012 (discussing Mexican participation in the annual HSI / CBP joint operation), available at <http://www.ice.gov/news/releases/1212/121207washington.htm> .

PHILIPPINES

Recommendation: Watch List

Introduction

The Philippines have long been cited by IACC members for inclusion on the Special 301 Watch List or Priority Watch List, owing to a wide variety of concerns raised by companies in multiple product sectors. While the U.S. Trade Representative noted progress in some areas, including retail-level enforcement and a decline in the level of camcording, the country was maintained on the 301 Watch List in 2012 – consistent with the IACC’s own recommendation. Some IACC members reported continued improvement with regard to enforcement in 2012, a fact acknowledged by the removal of Manila’s Quiapo marketplace from the Notorious Market List near the end of 2012; but progress in other areas of concern has been less rapid, and less pronounced.

While the overall value of seizures spiked in 2011, to a reported P8.38 billion⁵⁹, an increase of nearly 60% over 2010 seizures, the value of seizures may have been inflated by the number of seizures involving counterfeit luxury goods in the market. Enforcement figures published by Intellectual Property Office of the Philippines (“IPOP”) indicated that “the highest estimated value of seized items” was attributable to a number of well-known luxury brands.⁶⁰ Seizures in 2012 are expected to be significantly lower however, at approximately P5.5 billion.⁶¹

Ricardo Blancaflor, Director-General of the IPOP has himself acknowledged however that seizures are only one part of the puzzle.⁶² While we are encouraged by the progress seen in this area, similar improvements are needed on other fronts, including border

⁵⁹ See Riza T. Olchondra, *Value of Seized Counterfeit Goods Down in May*, PHILIPPINE DAILY INQUIRER, Jul. 6, 2012, available at <http://business.inquirer.net/69343/value-of-seized-counterfeit-goods-down-in-may>.

⁶⁰ *Id.*

⁶¹ *IPOP Expects Windfall Busts in Counterfeit Items in Dec.*, Jan. 4, 2013. GMA NEWS ONLINE, available at: <http://www.gmanetwork.com/news/story/288828/economy/business/ipop-expects-windfall-busts-in-counterfeit-items-in-dec>.

⁶² See Olchondra, *supra*.

enforcement and criminal prosecutions. Accordingly, the IACC recommends that the Philippines be retained on the 301 Watch List again in 2013.

Nature and Scope of Counterfeiting and Piracy in the Philippines

Responses from IACC members largely mirrored those seen last year, with regard to the types of products involved. Concerns among manufacturers of luxury goods⁶³, apparel, footwear, and accessories remain high, while those in the industrial and agricultural chemicals, pharmaceuticals⁶⁴, consumer electronics, and software and other copyrighted content sectors noted moderate-to-high-level problems in the country. Though retail sales of counterfeit goods were by many reports less pronounced, counterfeit product remains readily available in the market, and rights-holders continue to stress the need for greater efforts in regard to border control measures. In addition, brand owners note continuing concerns related to post-enforcement action including prosecutions, level of penalties assessed by the courts, and the judiciary's efficiency in dealing with such cases – which has long been cited as a major deficiency in the Philippines.

Enforcement

While the overall level of IPR enforcement in the Philippines has improved in recent years, the IACC has noted in recent years that enforcement actions and seizures represent only one part of the equation. Absent the initiation, and prompt adjudication, of criminal cases, as well as the imposition of deterrent penalties against offenders; the prospects for long-term progress will be minimal. 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.

⁶³ See Olchondra, *supra*.

⁶⁴ See *US, Canadian Men Held in Philippines for Fake Viagra*, AGENCE FRANCE-PRESSE, Jul. 12, 2012, describing an illicit online pharmacy operating a call-center in the city of Mandaue; an American and a Canadian, along with four Filipino citizens were arrested on charges of selling counterfeit drugs and fraud, *available at* <http://www.manilatimes.net/index.php/news/breaking-news/27374-us-canadian-men-held-in-ph-for-fake-viagra> .

Border Control

Border control issues were, by far, the problem cited most widely by IACC members during this year's Special 301 process. These concerns have been raised for a number of years, together the need for greater resources, and problems related to exports and trans-shipment of finished goods, components, and labels. In addition, some members continue to cite problems with official corruption, which is believed to contribute to the relative ease with which counterfeit goods enter or transit the Philippines.

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.

While we are heartened by the progress that has been made during the past two years, and by the government's acknowledgement that more must be done to increase the public's awareness of, and respect for intellectual property rights, more must also be done to disrupt the supply chains that feed the market, and to address the inefficiencies of the judicial system.

In 2013, the IACC encourages the Philippines to:

- Establish and publicize 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 additional 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 at the border.

TURKEY

Recommendation: Watch List

Introduction

Turkey remained a country of major concern for IACC members across a number of product sectors in 2012. Despite some significant seizures and steps taken to improve enforcement in the domestic retail market, Turkey continues to be cited by Coalition members for a variety of problems ranging from border control issues and non-deterrent penalties, to inefficient judicial proceedings and a need for greater transparency. Accordingly, we recommend Turkey's inclusion on the Special 301 Watch List.

Nature and Scope of Counterfeiting in Turkey

Rights-holders from a variety of product sectors report continuing problems in Turkey, with a number of sectors reporting an apparent worsening of conditions in 2012. For several years, Turkey has been cited as one of the top countries of provenance for counterfeit goods seized entering the European Union; this was again the case according to the EU's most recent statistics, published in July of last year. Turkey was ranked seventh overall in terms of the number of goods seized, and third, behind only China and Hong Kong in terms of the value of goods seized.⁶⁵ As in the prior year's statistics, Turkey was the largest source of seizures in the "foodstuffs" category, accounting for nearly 70% of seizures in that category. The country also accounted for over 34% of perfume and cosmetics seizures, and was surpassed only by China in the number of apparel seizures. These rankings are largely unchanged from the prior year's report from the EU⁶⁶, and we expect similar results when the 2012 statistics are published later this year.

Turkey's status as a major source of counterfeits to the European Union is perhaps

⁶⁵ EUROPEAN COMMISSION, TAXATION & CUSTOMS UNION, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE EU BORDER – 2011, p. 15, *available at* http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2012_ipr_statistics_en.pdf .

⁶⁶ *See id.* at Annex 3. *Cf.* EUROPEAN COMMISSION, TAXATION & CUSTOMS UNION, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE EU BORDER – 2010, p. 17, *available at* http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/statistics_2010.pdf .

unsurprising in light of both its geography and its trading relationship with the EU and its member states. More surprising perhaps is that Turkey is also a major source of counterfeit goods to the United States, where in FY 2012, the country ranked third – behind China and Hong Kong – in terms of the number of IP-related seizures of goods.⁶⁷ Turkey accounted for nearly 700 seizures by U.S. Customs & Border Protection – primarily from the apparel sector, though watches and jewelry, bed linens and leather goods were also impacted.⁶⁸ Additional sectors including consumer electronics, pharmaceuticals, and personal care products likewise cite concerns related to counterfeit imports from Turkey.

Enforcement

IACC members' reported concerns relating to enforcement in Turkey have remained largely unchanged in recent years. Both manufacturing of counterfeits and finishing of components for domestic consumption and for export remain problematic. Cooperation by law enforcement personnel is described as inconsistent, and the judicial system remains a source of frustration.

While there have been some positive reports of enforcement efforts, particularly among the police in Istanbul⁶⁹, such actions are generally followed by minimal penalties, and then only after long delays in the processing of cases through the court system. As a result, rights-holders have come to view Turkey as a resource-intensive and time-consuming jurisdiction in which to enforce their rights.

Border Control

As one might expect given Turkey's prominent appearance in both U.S. and EU Customs

⁶⁷ Intellectual Property Rights: Fiscal Year 2012 Seizure Statistics. U.S. Customs & Border Protection – Office of International Trade, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/ipr_communications/seizure/fy2012_final_stats.ctt/fy2012_final_stats.pdf.

⁶⁸ *See id.* at 24.

⁶⁹ One such positive report involved an operation last December, in which Istanbul police conducted simultaneous raids on 45 different locations, seizing approximately 300,000 boxes of counterfeit drugs, arresting over 30 individuals, and seizing manufacturing equipment. *See, Operation Launched Against Counterfeit Drug Gang*, DOGAN NEWS AGENCY, Dec. 11, 2012, *available at* <http://www.hurriyetdailynews.com/operation-launched-against-counterfeit-drug-gang-.aspx?pageID=238&nID=36592&NewsCatID=341>.

seizure statistics, the lack of effective border controls remains one of the primary concerns related to that country for rights-holders. Significant improvements are necessary to address the volume of counterfeit exports, as well as the transshipment of illicit goods through the country. The IACC reiterates its calls for greater training of customs officials, and for the allocation of greater resources to decrease such traffic.

Conclusion

IACC members remain frustrated by the lack of progress in Turkey. We are encouraged by reports of increased levels of enforcement; but such activity must take place within the context of a broader approach to combating intellectual property crimes. Prosecutors and courts must be empowered to seek, and to impose, meaningful, deterrent punishments when offenses have taken place.

In 2013, 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;
- Review the existing statutory and regulatory regimes to identify structural impediments to IP 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.

THE UNITED ARAB EMIRATES

Recommendation: Watch List

Introduction

The United Arab Emirates (UAE) has appeared sporadically in the IACC's Special 301 recommendations over the course of the last decade, and returns again this year due to growing concerns cited by rights-holders in multiple product sectors. With an economy that has developed rapidly over the past thirty years, and a relatively high per capita income and standard of living, the UAE has grown increasingly important as a consumer market, while also becoming a major hub for regional and global trade.

Nature and Scope of Counterfeiting and Piracy

IACC members have observed the UAE closely in recent years, and have expressed concerns over an apparent increase both in the volume and types of counterfeit products trafficked in and through the country. While enforcement authorities have made significant efforts to address this trafficking, the overall volume remains high. According to the most recent EU statistics for IP-related customs seizures, the UAE was ranked in the top five countries in terms of the overall number of seizures, and in the top ten in terms of the value of seizures.⁷⁰ Equally problematic is the breadth of the problem displayed by those statistics; the UAE ranks in the top three of offenders in eight separate categories⁷¹: foodstuffs, perfumes and cosmetics, other body care items⁷², mobile phone parts and accessories, miscellaneous electronic equipment⁷³, cigarettes, other tobacco products, and vehicles (including accessories and parts). In addition to these statistics concerning goods exported from or trans-shipped through the country, numerous media reports from the past year demonstrate the breadth of concerns involving counterfeit goods available in the domestic market, including in the

⁷⁰ EUROPEAN COMMISSION, TAXATION & CUSTOMS UNION, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE EU BORDER – 2011, p. 15, *available at* http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2012_ipr_statistics_en.pdf .

⁷¹ *See id.* at Annex 3, p. 25-7.

⁷² A category which includes razor blades, shampoos, soap, deodorant, and toothbrushes, among others.

⁷³ Including household machines, shavers, hair straighteners, and the like.

cosmetics⁷⁴, IT and printing sector⁷⁵, pharmaceuticals⁷⁶, electronics⁷⁷, automotive, luxury goods, and even the industrial chemical⁷⁸ sectors.

Enforcement and Customs

IACC members have generally commented positively on the efforts of law enforcement and customs officials in the UAE, while noting that more can and should be done to address the ready availability of counterfeit and pirated goods in the country. The UAE is not generally viewed as a major concern in terms of manufacturing counterfeit goods; rights-holders' greatest concerns tend to focus primarily on retail sales in the market, and the need for improved border control measures. Improvement on that latter point is undoubtedly a steep task, given the volume of trade moving through the country's ports and free trade zones, but additional focus must be placed on border interdiction if sustained progress is to materialize. Likewise, domestic law enforcement actions should place a priority on moving up the distribution chain to stop the counterfeit product at its source. Large-scale seizures are, of course, welcome news; but absent appropriate follow-up, such seizures will be viewed by counterfeiters as a cost of doing business. We would also encourage additional collaboration with European Customs personnel with the aim of significantly decreasing the volume of counterfeit exports from the UAE to the European Union.

⁷⁴ See *Dubai Authorities Cracking Down on Counterfeit Cosmetics*, May 29, 2012, available at <http://www.7daysindubai.com/Dubai-authorities-cracking-counterfeit-cosmetics/story-16209811-detail/story.html> .

⁷⁵ See Alvin R. Cabral, *UAE Clampdown on Counterfeits*, KHALEEJ TIMES, October 18, 2012, noting the UAE's seizure of over 2 million counterfeit items from the printing industry alone, available at http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/nationgeneral/2012/October/nationgeneral_October319.xml§ion=nationgeneral .

⁷⁶ See *'Big Catch' for Dubai Police as Duo Accused of Running Backstreet Clinic*, Oct. 2, 2012, available at <http://www.7daysindubai.com/Big-catch-Dubai-Police-duo-accused-running/story-17015722-detail/story.html> .

⁷⁷ See *Fake electronics worth Dhs4 million Seized*, Aug. 5, 2012, available at <http://www.7daysindubai.com/Fake-electronics-worth-Dhs4-million-seized/story-16651622-detail/story.html> .

⁷⁸ See Rory Jones, *Cool Crackdown Ends Counterfeit Air-Con Trading in UAE*, THE NATIONAL, Oct. 8, 2012, available at <http://www.thenational.ae/thenationalconversation/industry-insights/retail/cool-crackdown-ends-counterfeit-air-con-trading-in-uae> .

Conclusion

The IACC recommends that the government of the UAE:

- Provide additional resources and training to facilitate border enforcement, including against goods in transit, and especially in free trade zones such as Jebel Ali and Fujirah;
- Continue enforcement actions against the sale of counterfeit products in the domestic market, and expand upon existing private sector engagement to improve efficiency and effectiveness of those actions; and
- Increase publicity of the government's anti-counterfeiting efforts and policies to improve public awareness regarding the harms caused by counterfeit goods.

VIETNAM

Recommendation: Watch List

Introduction

In 2012, USTR included Vietnam on the Special 301 Watch List citing, among other issues, the fact that “widespread piracy and counterfeiting remain a serious concern ... and counterfeit goods continue to be widely available in physical markets as well.”⁷⁹ Regrettably, IACC members report that little in that regard has changed during the past year; by some reports the situation has grown worse.

Counterfeit goods remain readily available across product sectors, causing significant harm to legitimate manufacturers. Though past submissions have focused primarily on illicit trafficking of counterfeit goods from China into, and through, Vietnam, 2012 witnessed increased reports of domestic production, a source of increasing concern to rights-holders.

Though statistics published by the Ministry of Industry and Trade’s Market Management Department showed a significant increase – approximately 15% – in IPR-related cases during the first nine months of 2012, the situation in Vietnam requires both greater levels of enforcement and action on the part of the government to address fundamental weaknesses in the country’s IPR regime.⁸⁰ Accordingly, the IACC recommends Vietnam’s continued inclusion on the Special 301 Watch List.

Nature and Scope of Counterfeiting and Piracy in Vietnam

According to the above-referenced report from the Ministry of Industry and Trade, administrative actions taken by the government primarily involved products in the food

⁷⁹ *2012 Special 301 Report*, Office of the U.S. Trade Representative, p. 50-1. April 30, 2012, available at http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf .

⁸⁰ *Crackdown on Counterfeit Goods Urged*, VIETNAM NEWS, Nov. 30, 2012, available at <http://vietnamnews.vn/in-bai/233467/crackdown-on-counterfeit-goods-urged.htm> .

and beverage, cosmetics, apparel, electronics, and pharmaceutical sectors.⁸¹ Reports from both IACC members and Vietnamese media confirm that numerous other industries, including personal care products⁸², tobacco and alcohol⁸³, and automotive parts, are similarly affected. And while some reports indicate that the majority of counterfeit products are sold in “rural and upland areas”⁸⁴, such goods are easily found in major cities such as Hanoi and Ho Chi Minh City. Further, they’re being sold, “not only in markets and retail shops but also in large department stores and supermarkets.”⁸⁵

Though the primary source of counterfeits remains, as in prior years, China; domestic production has become more pronounced. In addition, the importation of components, labels, packaging and the like, separately, for assembly and finishing prior to distribution has been more widely reported in Vietnam during the past year.

Enforcement

For many years, the IACC and other rights-holder groups have stressed the need for greater enforcement – and particularly for criminal enforcement – against IPR violations. Though rights-holders generally report positively regarding relationships with the various enforcement agencies, and acknowledge an overall increase in the level of enforcement, the effect in the marketplace has been minimal. Administrative actions remain the government’s preferred approach to dealing with counterfeiters and pirates, but the penalties imposed as a result of these administrative actions remains far too low to provide any real or lasting deterrence. As a result, recidivism remains a perennial problem, and the under-resourced enforcement personnel are left with little to show for their efforts. These problems are widely acknowledged within Vietnam⁸⁶, and the government is therefore encouraged to take concrete steps toward addressing these fundamental defects in their present approach to IP offenses. Criminal enforcement

⁸¹ *Id.*

⁸² *Markets: A Paradise for Counterfeit Goods*, TALK VIETNAM, Apr. 1, 2012, available at <http://talkvietnam.com/2012/04/markets-a-paradise-for-counterfeit-goods/#.URRxiWccqtk>

⁸³ *See, Dealing With Year-End Smuggling*, VIETNAM BUSINESS FORUM, Dec. 12, 2012, available at http://vccinews.com/news_detail.asp?news_id=27646 .

⁸⁴ *See, Crackdown on Counterfeit Goods Urged*, VIET NAM NEWS, Nov. 30, 2012, available at <http://vietnamnews.vn/in-bai/233467/crackdown-on-counterfeit-goods-urged.htm> .

⁸⁵ *See, Consumers Need to be Wary of Counterfeit Goods*, VIETNAM BUSINESS NEWS, Dec. 4, 2010, available at <http://businesstimes.com.vn/consumers-need-to-be-wary-of-counterfeit-goods/> .

⁸⁶ *Id.*

should be made a priority, and convictions should be accompanied by deterrent sentences. Doing so will communicate that the government takes seriously the theft of intellectual property.

Conclusion

The IACC encourages the Vietnamese government to focus on the following issues in 2013:

- Increase the priority and resources available for criminal enforcement against counterfeiters;
- Work with Chinese Customs to develop an action plan to address the trafficking of finished and unfinished counterfeit goods into Vietnam;
- Provide for improved training of judges and prosecutors in the area of IPR;
- Conduct a comprehensive review of existing laws and regulations related to IPR in order to identify structural impediments to enforcement which should be amended; and
- Significantly increase penalties levied against infringers to improve the deterrence of existing enforcement efforts.

PARAGUAY

Recommendation: Section 306 Monitoring

Introduction

While Paraguay remains a relatively minor concern to rights-holders in terms of the production and consumption of counterfeit goods; the country is, by some accounts, the most important jurisdiction in South America in terms of addressing the wider trafficking of counterfeits throughout the rest of the continent. Paraguay's strategic importance as a hub for distribution of counterfeit product – as well as other illicit goods – continues to require vigilance and improved collaboration with its neighbors and with the United States. As noted in prior years' submissions, Paraguay's free ports continue to be exploited for purposes of trans-shipment to markets such as Brazil, Argentina, and Chile. Ciudad del Este, a perennial concern for both copyright and trademark owners, continues to see high volumes of illicit traffic.

While the Paraguayan authorities should be commended for some improvements in enforcement over the past year, including some large-scale seizures that were made in collaboration with their counterparts in U.S. Immigration and Customs Enforcement's Homeland Security Investigations, continued monitoring under Section 306 is desirable in 2013, as is further collaboration and capacity building efforts with HSI, and other international partners.

Nature and Scope of Counterfeiting and Piracy in Paraguay

The concerns of rights-holders with regard to IPR protection and enforcement in Paraguay have been well-documented in previous years, and remained unchanged during 2012. As in past years, border enforcement remains most problematic, with brand-owners citing issues related to imports, exports, and trans-shipment. Rights-holders also noted a range of other problems including finishing of goods for export to

other markets, as well as institutional piracy, law enforcement corruption, and some domestic manufacture and retail level sales of counterfeits.

Paraguay's geography presents significant challenges to customs enforcement efforts, and has long been exploited by transnational organized criminal organizations to facilitate illicit trafficking. The IACC has accordingly urged Paraguay to improve collaboration with partners in the region to address this issue, and we're greatly pleased by their engagement with ICE during 2012. In two widely reported cases last Fall, Paraguayan Customs, working with HSI, seized approximately \$35 million worth of counterfeit luxury goods and electronics.⁸⁷ Such successes must also be followed by prosecutions and the imposition of deterrent penalties; seizures alone are insufficient to make real progress. As in prior years, we encourage similar increased coordination with between Paraguay's enforcement personnel and their counterparts in their Tri-Border neighbors of Brazil and Argentina.

Conclusion

In spite of some notable progress in Paraguay during 2012, the country remains a key entry and distribution point for counterfeit goods entering South American markets. In 2013, 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.

⁸⁷ See, *Paraguay, Homeland Security Seize Counterfeit Goods Worth Over \$34 Million*, October 21, 2012, available at <http://www.hispanicallyspeakingnews.com/latino-daily-news/details/paraguay-homeland-security-seize-counterfeit-goods-worth-over-34-million/19323/>.

