



February 7, 2014

VIA WORLD WIDE WEB

<http://www.regulations.gov>, docket number USTR-2013-0040

Ms. Susan F. Wilson
Director for
Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Re: 2014 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 79 Fed. Reg. 420- 22 (January 3, 2014)

Dear Ms. Wilson:

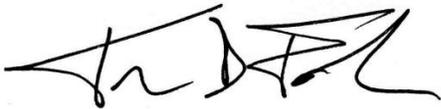
The attached written comments are submitted on behalf of the International AntiCounterfeiting Coalition, Inc. ("IACC"), in response to the request by the United States Trade Representative ("USTR"), published in the Federal Register on January 3, 2014, for written submissions from the public concerning 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 flourish at the end.

Travis D. Johnson
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Submission of the

International AntiCounterfeiting Coalition

to the

United States Trade Representative

Special 301 Recommendations

February 7, 2014

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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, spanning a broad cross-section of industries. IACC rights-holders include many of the world’s best-known brands in the apparel, automotive, electronics, entertainment, luxury goods, pharmaceutical, software, and other consumer product sectors.

Central to the IACC’s mission is the education of both the general public and policy makers regarding the severity and scope of the harms caused by intellectual property crimes – 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 to effectively protect intellectual property rights, and encourages 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, interviews with local experts in the identified countries, and research of publicly-available sources. While the countries of concern highlighted by IACC members, and the particular issues emphasized in those countries, vary from year to year, many of the recommendations contained herein are long-standing concerns that have been raised in previous years’ comments.

This year, the IACC comments also draw from data compiled under the IACC RogueBlock program (previously called the Payment Processor Initiative). This program, launched in January 2012, is a collaborative effort between IACC rights-holders, law enforcement, and the payment industry to diminish the ability of rogue website sellers to profit from their illicit sales. In a nutshell, the program provides a streamlined mechanism for rights-holders to report rogue sites to major credit card network and payment processing partners, facilitating action against the underlying

merchant accounts for those sites. In the past two years since its launch, forty-four rights-holders across various product sectors (including apparel and luxury, electronics, pharmaceuticals, software, personal care, fitness equipment, automotive, security, tobacco, music and entertainment) have utilized the program to report over eight-thousand rogue websites. The data compiled by the IACC in its administration of this program thus serves as a useful cross-industry sample of the overall problem of infringing online sales.

The harms caused by counterfeiting remained severe during 2013, whether measured in terms of lost sales to legitimate manufacturers, lost tax revenues and duties that 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. Further, 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. As enunciated by the Government Accountability Office (“GAO”) in 2012, the infiltration of counterfeit products into the critical infrastructure and military supply chains poses a significant threat to our national security.¹

In 2013, China remained the country of greatest concern for IACC members across every product sector, as it has been for many years. China continues to be the leading source for the manufacture of counterfeit goods produced for export to the U.S. and other markets, as well as a hub for online trafficking of counterfeit and pirated goods. IACC members 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 likewise remains a major concern for rights-holders across a number of sectors. Accordingly, Russia is again recommended for placement on USTR’s Priority Watch List. The IACC recommends seven additional countries for placement on the Watch List; of those, one is recommended for continued Section 306 monitoring, and another is recommended for an Out-of-Cycle Review. In addition, the IACC includes comments on several other countries where rights-holders have noted continuing or increasing concerns, but without recommendation for their 301 status.

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), <http://www.gao.gov/assets/590/588736.pdf>.

Each year, the IACC strives to highlight current trends and broader concerns in the area of anti-counterfeiting that deserve special attention. In past years, the IACC has highlighted trends like the apparent shift in counterfeiters' distribution models, moving away from large-scale, container shipments to individual or small shipments via express delivery and international mail services. This year, the IACC would like to highlight rights-holders' growing concerns with regard to transshipment. More specifically, rights-holders have growing concerns with regard to national policies precluding (or greatly diminishing) enforcement against counterfeit goods in-transit.

While a number of rationales have been offered for refusing to take action against such shipments, in some cases, the decisions seem to be based primarily on provincialism and budget considerations. A number of countries have taken what amounts to a "not my problem" approach to enforcement, where counterfeit goods are only seized if their associated shipping documents indicate that the goods are intended for sale in the local market. The problem is one of diffused responsibility – if the goods are bound for another market, authorities tend to rely on the other market to take appropriate action. In the short-term, such a decision may provide immediate gratification, in that it provides a quick resolution and eliminates the costs associated with investigation, storage, and disposal of the goods. Regardless, this type of "out of sight, out of mind" approach is unacceptable. The trafficking of counterfeit goods remains a truly globalized business, and in order to make meaningful progress in addressing the threats posed to legitimate businesses and consumers throughout the world, countries must be willing to act with an eye toward our mutual interests. These concerns with regard to transshipment are raised in several of the individual country chapters, and the IACC welcomes USTR's assistance in addressing this issue.

The pages following include a table summarizing the IACC's Special 301 recommendations from 2004 to present, 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 previous years' comments 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 like 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 (including the IACC's RogueBlock program); 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, 2004 – 2014*

	04	05	06	07	08	09	10	11	12	13	14
Belize	WL	PWL	PWL	WL							
Botswana											SM
Brazil	WL			PWL	WL	WL	WL	WL	WL	WL	WL
Bulgaria	WL										
Canada		WL	PFC	PWL	WL	WL	PWL	PWL	PWL	PWL	WL/OCR
Chile		WL									
China	306	PFC/306	PFC/306	PFC/306	PFC/306	PFC	PWL	PWL	PWL	PWL	PWL
Colombia											SM
Costa Rica			PWL	PWL							
Czech Republic				WL	WL	WL					
Hungary											
India	PWL	WL									SM
Indonesia											SM
Italy								WL	WL		
Japan	WL										
Jordan	WL										
Kenya											SM
Korea					OO						
Kuwait		WL									
Lebanon	PWL										
Libya	WL										
Malaysia	PWL	PWL	PWL	WL							SM
Mauritius	WL										
Mexico	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL
Mozambique											SM
Namibia											SM
Nigeria											SM
Pakistan	WL										SM
Panama	WL	WL									
Paraguay	306			PWL/306	306	306	306	306	306	306	WL/306
Philippines	PWL	PWL	PWL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland	PWL										
Romania	WL										
Russia	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Rwanda											
Saudi Arabia	WL	WL							WL		
South Africa							WL				SM
Spain							WL	WL	WL		
Taiwan	WL	WL									
Thailand	WL										
Turkey	WL	WL			OO	WL	WL	WL	WL	WL	WL
Ukraine	PFC										
UAE	WL	WL		SM	OO					WL	WL
Vietnam				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; OCR: Out-of-Cycle Review.

CHINA

Recommendation: Priority Watch List

Introduction

As in past years, China remained the top priority for IACC members in 2013, due to the high volume of counterfeit goods produced for domestic and foreign consumption, as well as, the continued growth of China-based online trafficking in such illicit goods (including the supporting infrastructure for online sales). The most recently published statistics from both U.S.² and European Customs³ agencies demonstrate that China continues to be the single largest supplier of counterfeit goods to each of those markets. Accordingly, the IACC recommends that China remain on the Priority Watch List in 2014.

China has made significant progress in the years since its accession to the World Trade Organization (WTO), having enacted numerous changes to its legal and enforcement regimes. However, a number of deficiencies in each continue to contribute to high levels of counterfeit and pirated goods available in the domestic market, and to China's status as the primary supplier of such goods around the world. The U.S. International Trade Commission estimated the total losses to American businesses attributable to the range of IPR infringement in China in 2009, at nearly \$50 billion.⁴ To ensure meaningful progress in 2014, China must take further steps to improve its statutory regime and to remove impediments to the effective enforcement of intellectual property rights.

² *Intellectual Property Rights: Fiscal Year 2012 Seizure Statistics*, U.S. Customs & Border Protection Office of International Trade (2013), http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/seizure/fy2012_final_stats.ctt/fy2012_final_stats.pdf.

³ *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border 2012*, European Union (2013), http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2013_ipr_statistics_en.pdf.

⁴ *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, United States International Trade Commission (2011), <http://www.usitc.gov/publications/332/pub4226.pdf>.

Nature and Scope of Counterfeiting & Piracy

Counterfeiting in China remains a problem for IACC members across all product sectors. Media reports of China-made counterfeit apparel, footwear and fashion accessories (including leather goods, eyewear, watches and jewelry), smartphones, pharmaceuticals, wine and spirits, sporting goods, industrial and agricultural chemicals, consumer electronics, semiconductors, IT products, musical instruments, entertainment and business software, tobacco, cosmetics, auto parts, and others are widely available.

The variety of problems reported by rights-holders during the past year was likewise comprehensive, including: trademark infringement and counterfeiting; end-user and institutional (including both corporate and governmental agencies) copyright piracy; manufacturing for domestic and foreign distribution; retail and wholesale distribution; trafficking in circumvention devices; deficiencies in administrative, civil, and criminal enforcement; ineffective penalties for convicted infringers; uncertainty and inconsistency in judicial decisions; obstacles to market access and rights acquisition; and a lack of clear and consistently applied rules for the disposition of seized counterfeits and instrumentalities. As noted in previous submissions, many of the above concerns apply in both the online and brick-and-mortar context.

Legislative and Regulatory Issues

China Trademark Law Revision

Throughout 2012 and 2013, the National People's Congress remained at work on a revision to the Trademark Law, which rights-holders hoped would address a number of long-standing concerns to China's statutory regime. Though the new law does not take effect until this May, and its practical impact cannot yet be measured, rights-holders were generally pleased with the Chinese government's openness and its invitations for rights-holders' comments during the drafting process.

The new law includes some positive additions with regard to enforcement, including the availability of increased penalties in both administrative and civil actions. For many years, the IACC, and rights-holders generally, have characterized the level of fines available (and actually imposed) under both the administrative and civil enforcement regimes in China as lacking in any real deterrence value. Rights-holders constantly question whether the cost of enforcement outweighs the likelihood of recovery (in civil

actions) and the deterrent impact of fines (in administrative actions). The new law's provision of increased penalties offers some hope for enhanced deterrence and recovery. The real impact of these increased penalties, however, will of course depend on whether and to what extent they are actually imposed in practice.

In addition, there have traditionally been other impediments to obtaining the evidence necessary to substantiate damages claims which may need to be further addressed to ensure the effectiveness of the new provisions. More specifically, the investigative powers of administrative enforcement agencies in China are far less expansive than the authority provided to criminal enforcement agencies. Absent a broader mandate to seek and secure evidence in business, financial, and communications records; counterfeiters will remain able to hide the full extent of their operations and avoid more serious penalties.

Another positive addition to the new law is its explicit provision regarding contributory liability. Previously, the theory of contributory liability was recognized under Chinese case law, and IACC members have had a long history pursuing such actions in China. Still, statutory recognition of this theory is a positive step for IP in China; although further clarification regarding the intended scope of this provision would be additionally helpful.

Other amendments, unfortunately, have been less positive. The new law included significant changes to the trademark opposition process, and rights-holders fear these changes will exacerbate long-standing problems related to bad-faith registration of marks and trademark squatting.⁵ In addition, there are a number of ambiguous provisions in the law as enacted that will require clarification via implementing regulations⁶ or the issuance of judicial interpretations. Overall, the impact of the new Trademark Law remains to be seen, and rights-holders will be monitoring its effects closely in 2014.

Enforcement

Rights-holders' comments with regard to the various Chinese agencies involved in IP enforcement have remained fairly consistent in recent years. Administrative

⁵ Explain why changes to opposition proceedings will make bad faith reg. worse.

⁶ Implementing regulations for the new law were issued for comment recently, and the PRC government has requested that comments be provided no later than February 10, 2014.

enforcement remains the most commonly utilized enforcement avenue in China. Rights-holders continue to press for changes, such as the removal of criminal thresholds, to increase the overall, and improve collaboration between administrative and criminal enforcement agencies.

Rights-holders have also identified concerns with regard to the consistency of enforcement actions at all stages. For example, Beijing Haidian District Court has been recognized for imposing strict penalties in counterfeiting cases, but it is in the minority. Ideally, given the same laws and regulations, the ultimate penalties imposed for similar conduct should be comparable, and predictable, whether the case is initiated in a major city or a more outlying region.

Some rights-holders have noted a positive trend with regard to law enforcement engagement, particularly with regard to Customs, the Ministry of Public Security (MPS), and Public Security Bureau (PSB). However, significant challenges remain in improving the overall level of enforcement. Counterfeit goods of all types remain readily available in the domestic market, and China remains the largest supplier of counterfeit goods to other markets around the world. IACC members' priority issues with regard to enforcement are discussed in further detail below.

Key Regions

The regions of greatest concern for manufacturing and large-scale sales within China are the same as those identified in last year's comments. Guangdong Province, including the cities of Guangzhou and Shenzhen, is most frequently mentioned as the most concerning for rights-holders across all product sectors.

Other regions specialize in counterfeiting for distinct product sectors, and rights-holders in the corresponding sectors highlight those as well.

As reported last year, Fujian Province continues to be the center for production of all varieties of counterfeit footwear. Interestingly, the city of Putian, in Fujian Province, has the greatest concentration of counterfeit sellers identified by IACC's RogueBlock program, followed by Fuzhou in the same province.⁷

⁷ The IACC compiles this data during its analysis of reported rogue websites. Other common areas for sellers identified by the RogueBlock program are Guangzhou and Shenzhen (both in Guangdong),

Xinjiang Province in Northwest China is an area of growing concern, due to its emergence as a center of manufacturing for counterfeits in the personal care sector. Given its geography, it appears products manufactured in Xinjiang are likely intended for sale in, or transshipment through, the bordering countries of Russia, Mongolia, Kazakhstan, Kyrgyzstan, Tajikistan, Afghanistan, Pakistan, and India. Strong protectionism has precluded sustained enforcement efforts in this region.

Thresholds

For a number of years, the IACC's Special 301 comments have focused significant attention on China's thresholds for criminal liability and the severe impediment that those thresholds present to effective enforcement of IP rights. Counterfeiters, aware of the criminal thresholds, have adopted a variety of strategies to minimize their likelihood of criminal prosecution. These range from practices as simple as limiting the amount of infringing product kept in-stock at retail outlets and storage facilities, to concealing or falsifying business records and other more complicated schemes. The application of the thresholds is further complicated by inconsistent valuation of goods (including unfinished components), particularly where proof of an offender's historical sales or inventory is difficult to obtain. The end-result is an over-reliance upon administrative enforcement, and in turn, the application of far less deterrent penalties.

As asserted in prior submissions, the IACC believes that China should follow international practice and eliminate thresholds to investigation, prosecution and liability. Doing so would provide enforcement personnel and prosecutors with greater flexibility, offer significant leverage to encourage lower-level offenders to cooperate, and generally increase the deterrence value of counterfeiting laws.

In 2011, Premier Wen Jiabao announced the government's intent to address the thresholds issue when the Criminal Code was next revised. Three years later, we are still awaiting a solution to the problem. As a result, some have raised questions about the government's commitment to dealing with the issue.

Balizhuang Xili (in Beijing), Shanghai, Xiamen (in Fujian), Wuhan (in Hubei), Hangzhou (in Zhejiang), and Hebi (in Henan).

Coordination of Enforcement between Criminal and Administrative Authorities

For many years, IACC members have cited China's over-reliance upon administrative enforcement as a key obstacle to decreasing the volume of counterfeit goods, both sold in the domestic market and produced for export abroad. Historically, this concern of over-reliance emanated from a number of factors, including the lack of deterrence value in available administrative penalties. Another significant factor has been the limited tools and authority available to administrative agencies, including the Administration for Industry and Commerce (AIC), Technical Supervision Bureau (TSB), and Customs, as compared to those available to criminal enforcement agencies like the PSB. The most notable difference among these is the PSB's more robust investigative powers, including the power to detain infringers, and to gain access to banking and communications records which may provide far greater insights into the scope and duration of counterfeiting operations.

Closer collaboration between the administrative and criminal authorities has been viewed as a means to overcoming some of the challenges facing administrative enforcement agencies, and to increasing the number of criminal case referrals. This would serve to increase both the overall level of enforcement and the deterrent effect of enforcement actions. Statistics concerning such case referrals from local AIC offices to local PSB offices are not available, though historically, they have represented a very small percentage of the total number of cases initiated by AICs.

Retail and Online Trade

Retail sales of counterfeit and pirated goods in China remain a significant concern across all product sectors in China; however, the lines between retailers and large-scale distributors continue to be blurred, due in large part to the continued growth of online sales directed at both domestic and foreign consumers. The IACC is aware that the Supreme People's Court (SPC) is drafting an interpretation on online counterfeiting, and it is hoped that that measure, in addition to draft rules issued by the State Administration for Industry and Commerce (SAIC) will help to provide some clarity to the rules governing the online marketplace in China.

In the brick-and-mortar arena, IACC members point to well-known and frequently reported-upon markets such as the Silk Market in Beijing, the Hangqiao Pearl Market in Shanghai, Mingtong Digital in Shenzhen, and the Baiyun World Leather Market in Guangzhou, as well as in countless smaller retail locations. The Huanqiangbei area, in the city of Shenzhen, is well-known for the production and sale of counterfeit

smartphones. Rights-holders identify Mingtong Digital Communication Market as the most notorious market in Shenzhen, citing its fast numbers of stores that serve tens of thousands of retail and wholesale customers on a daily basis. The Market employs a large security staff and enjoys local protectionism, both contributing to difficulties in enforcement for rights-holders. There is perhaps no better example of the extent of China's retail counterfeiting problem though, than the widely reported incidents of China's "counterfeit stores", that go beyond selling counterfeit goods and offer a counterfeit shopping experience – copying the appearance, design, and even employee uniforms of legitimate stores to give consumers the impression of being in an authorized retailer.⁸

Rights-holders report increasing concerns with regard to the volume of domestic counterfeit sales, which are viewed as an obstacle to fair market access. These problems are compounded by bureaucratic hurdles to legitimate manufacturers' entry into the market, whether due to delays in approvals for distribution, restrictions on certain types of goods, disputes over trademark rights with squatters, or other impediments. Counterfeiters continue to exploit these obstacles as a means to servicing consumers' demand for well-known brands from abroad. The copyright sectors face similar problems, as more and more consumers turn to illegal downloads and streaming from unauthorized sources to fill the void created by government restrictions on entertainment content.

While the scale of counterfeiting and piracy in China is difficult to measure with certainty, one needs only to search the names of brands in search engines, or on China-based trade platforms and social media, to get an idea of how pervasive the problem is. While in the past year, the IACC has seen an increase in willingness on the part of some Chinese trade platforms to work with rights-holders,⁹ the true impact of such collaborations remain to be seen.

In addition to trade platforms, the trafficking of counterfeits on stand-alone rogue

⁸ Laurie Burkitt and Loretta Chao, Made in China: Fake Stores, Wall Street Journal (2011), <http://online.wsj.com/news/articles/SB10001424053111904292504576484080863377102>.

⁹ One example of this is the IACC's pending MarketSafe™ Program, in collaboration with Taobao Marketplace (a platform under Alibaba Group). In August 2013, the IACC and Taobao Marketplace signed a Memorandum of Understanding to facilitate rights-holders' reports of infringing product listings on Taobao.com and Tmall.com. This program is currently under development, and is expected to launch in early March 2014.

In a similar vein, IACC members experienced some success in 2014 in obtaining take-downs on AliExpress.com (another Alibaba Group platform), via the RogueBlock program.

websites (whether single- or multi-brand) remains of dire concern to IACC rights-holders. Forty-four of the IACC's 110 rights-holder members have at some point utilized the IACC's RogueBlock program to address this problem, as other available enforcement tools have proved inadequate. After two years since the launch of RogueBlock, and almost 9,000 websites reported, the IACC has compiled extensive data confirming that the vast majority of these websites, and the infrastructure supporting them, are based in China. While most reported sites are .com domains¹⁰ and appear to be directed at U.S. consumers, analysis of the data reveals that all but a handful are Chinese-operated and utilize China-based bank accounts for transactions. In addition to that technical infrastructure, the preferred delivery service for shipping utilized by these sites appears to be EMS; the China-based global deliver company has been cited by rights-holders for failing to follow both U.S. Customs' and EMS' own rules related to international commercial shipments. As a result, counterfeiters are able to maintain their anonymity during the shipping process.

It appears that an increasing number of rogue sites are relying on the services of a select few illegitimate payment service providers (so-called "rogue PSPs") to process credit card transactions, likely in an effort to avoid detection by rights-holder and credit card network investigators.¹¹ Such PSPs operate much like legitimate third-party payment service providers (one example of which would be PayPal); however, rogue PSPs do so without authorization from the credit card companies, in order to conceal a network of fraudulent sellers utilizing their services. The most common rogue PSPs tend to change names every few months (once they are detected and terminated),¹² but the underlying entities appear to stay the same and be very much connected to one another. There has been no evidence to suggest that these entities process anything other than illegal

¹⁰ Out of 8,759 reported websites (as of February 7, 2014), there have been a total of 5,820 .com domains. Other popular domains are .net (with 846 sites), .co.uk (with 514 sites), .us (with 210 sites), and .ca (with 163 sites). There have been only twenty-three .cn sites reported through the program.

¹¹ For additional discussion regarding the strategies that rogue PSPs use to evade detection by investigators, see International AntiCounterfeiting Coalition, IACC Payment Processor Portal Program: First Year Statistical Review (October 2012), *available at* <http://www.gacg.org/Content/Upload/MemberNewsDocs/October%202012%20Report%20to%20IPEC%20-%20FINAL.pdf>.

¹² The most common rogue PSPs from the month of January 2014 are SSLBillPay.com, Icpayment.com, VirtuousBill.com (which appears to be the same entity as SSLBillPay.com), ePayment-Gateway.com, and 95gateway.com (which appears to be the same entity as 95epay.com, a rogue PSP commonly seen in previous months).

transactions.¹³ All of these entities are based in China.

Additionally, these rogue merchants and PSPs appear to be concentrated in a select few Chinese acquiring (merchant) banks. Many rogue website sellers represent a relationship with an acquiring bank on the websites themselves. Of the 399 total websites submitted through the RogueBlock program where the IACC noted such a representation, 384 (97%) of were tied to a Chinese bank.¹⁴ The reluctance of Chinese banks to comply with U.S. court orders to freeze counterfeiters' assets and provide account records in such cases further reinforces the concern that the Chinese banking system is quickly becoming a safe haven for counterfeiters' ill-gotten proceeds.¹⁵

Clearly, some regulation or oversight by the Chinese government is needed to address the problem of China-based rogue PSPs, and the banks that cater to them. The IACC would welcome engagement with the Chinese regulatory agencies to discuss potential solutions.

Exports & Border Controls

Though U.S. Customs & Border Protection (CBP) has not yet published detailed IP seizure statistics from Fiscal Year 2013, based upon input from rights-holders and others, there is a strong expectation that the totals will remain in-line with those seen in recent years. In fact, by some reports, the volume of counterfeit exports may have increased during 2013. In FY 2012, 84% of the \$1.11 billion in seized infringing products originated from China (including Hong Kong, products from which would normally be transshipments from China). Similar figures have been reported in other markets.

In last year's comments, the IACC also noted that Chinese-sourced counterfeits were increasingly visible in a number of markets within Africa. That trend also appears to

¹³ In fact, the IACC has seen evidence that these entities actually advertise themselves in black-market forums for counterfeit sellers and tout their abilities to process for rogue websites (one entity, for example, claiming "no limitation on counterfeit products").

¹⁴ 190 (48%) of the website sellers self-identified Bank of China, or one of its regional branches, as the relevant acquiring bank.

¹⁵ See Brief for International AntiCounterfeiting Coalition as Amicus Curiae in Support of Appellees and Affirmance, *Tiffany (NJ) LLC v. Forbse*, 12-2317-cv(L) (2013).

have continued during the past year.¹⁶

Rights-holders generally speak positively with regard to their interactions with Chinese Customs. Rights-holders note that Customs is generally responsive to rights-holders' requests for assistance, and has taken a proactive approach to enforcement. IACC members have expressed an interest in greater intelligence sharing and collaboration, in hopes that this would lead to more cases against those operations manufacturing for export. Unfortunately, despite the largely positive regard for Customs, and the robust export seizures undertaken, the volume of counterfeit goods exiting the country for markets abroad remains incredibly high.

IACC members were pleased by last year's month-long collaboration between Chinese Customs and U.S. Customs and Border Protection, which resulted in the seizure of nearly 250,000 counterfeit consumer electronics items. Further collaboration would be welcomed by rights-holders in other sectors.

Disposition of Seized Goods & Instrumentalities

The efficient and transparent disposition of both infringing goods and related instrumentalities remained a priority issue for IACC members in 2013, as in previous years. The adoption of clear policies in favor of destruction would serve the overarching interests of government, rights-holders, and consumers in ensuring that counterfeit product, once seized, does not re-enter the stream of commerce. With regard to instrumentalities, the policy is essential to preventing recidivism, by eliminating the opportunity to immediately re-start their illicit businesses (or at the very least, making it more difficult and more expensive).

In recent years, the general policy for determining the appropriate disposition for instrumentalities was to assess whether they were (or could be) used for general purposes, or if they were used exclusively to facilitate the illegal conduct at issue. That policy was problematic for two reasons: it was necessarily based on some degree of speculation, and it arbitrarily set the bar for destruction at such a high level as to preclude the possibility of destruction in most cases. Furthermore, because it was applied inconsistently, there was little clarity with regard to whether or why such determination was made.

Rights-holders have reported that the policy is slightly improved by the new Trademark Act, and that seizure and destruction of instrumentalities will no longer require that the

¹⁶ See discussion below at pages x – x.

implements be used exclusively for illicit activities, but that their primary or main use be the facilitation of the counterfeiting offense. Unfortunately, this minor shift suffers from the same flaws as existing policy. There will likely always be a subjective element to the determination of whether an instrumentality has been used for other purposes, and it remains unclear as to what evidence is necessary to establish additional uses. As a result, rights-holders are not optimistic about the consistency with which the policy will be applied. A far preferable approach would be to provide clear rules for the destruction of counterfeits and instrumentalities as the default policy.

Official Corruption & Local Protectionism

While many rights-holders have noted positive and improving relationships with law enforcement in the past year, concerns related to corruption and protectionism have been noted regularly in the IACC's previous submissions; and unfortunately, those concerns remained pronounced in this year's process. A general rule of thumb cited by rights-holders was that this is less of a concern in larger metropolitan areas, and more so at the provincial and local government levels in the more rural or remote regions. This must be addressed in order to ensure the fair application of China's IPR regime. While rights-holders have cited a wide range of concerns regarding the enforcement environment in China, this problem is more insidious. Even if rights-holders' other concerns about statutory deficiencies, limitations on resources, over-reliance on administrative measures, and the like were to be resolved, protectionism and corruption (whether within the enforcement agencies or local authorities overseeing them) would undermine the rule of law.

As enunciated above, there remain areas in China where rights-holders are aware of large-scale sales, distribution, and production of counterfeit goods, but enforcement in those areas has simply not been available from a practical standpoint. Some have noted increasing difficulties in Northeast China, where administrative authorities have expressed reluctance in pursuing enforcement actions against counterfeiters, citing concerns about upsetting social stability.

It is essential that the central government take a leadership role in addressing these concerns. There must be sufficient oversight of provincial and local authorities to ensure that laws are applied in a consistent and transparent manner. In addition, it should be a priority that all enforcement personnel receive the training necessary to ensure a level of professionalism on par with the many others recognized for their cooperation. Finally, where instances of corruption are uncovered, the penalties applied should reflect the severity of the crime; the disincentive must exceed the expected

benefit that one received from aiding counterfeiters in the first place.

Acquisition of Rights

Both international and local brands have cited preemptive trademark filings as a significant concern in China. For years, individuals have taken advantage of loopholes in the current PRC Trademark Law to obtain registrations for famous marks known to be associated with others – in many cases, a well-known global brand not previously sold in China, but nonetheless recognized by Chinese consumers. While the NPC’s new Trademark Law, which takes effect in May, does include a requirement that applicants seeking to register a trademark must do so in good faith, it appears to have led to more questions from rights-holders than it has answered. Rights-holders are unclear whether the requirement can be raised for purposes of opposition or invalidation.

Likewise, while the amended law will provide some clarification on the procedure for recognition of a well-known mark, the law retains the present standard of protection. Rights-holders describe the current system for determining well-known status as subjective and lacking in transparency, noting far greater numbers of Chinese companies being granted such status than foreign companies. Accordingly, many remain concerned about disparate treatment under the law, and a lack of genuine interest in addressing the bad faith registration of marks whose fame preceded their owners’ arrival in China.

2013 Enforcement Statistics

The IACC has been unable to obtain comprehensive statistics on the Chinese government’s IPR enforcement efforts in 2013; however, a recent summary published in late January 2014¹⁷ included the following data points from the Ministry of Public Security:

- Nearly 60,000 individuals suspected of IPR infringements were arrested in 2013;
- Those individuals were tied to 55,180 cases, involving goods with an estimated value of approximately \$28 billion;
- Over 90 million metric tons of counterfeit and substandard goods were seized, (including 300 million pills valued at over RMB 2.2 billion, seized as part of an operation targeting the online sale of counterfeit pharmaceuticals).

¹⁷ China Nabs 60,000 Copyright Pirates in 2013, Xinhua (2014), http://news.xinhuanet.com/english/china/2014-01/21/c_133063171.htm.

The same summary estimates administrative cases to be in the range of 200,000 each year, though no specific figures are available at this time. Rights-holders have long urged Chinese officials to publish more comprehensive statistics, and Chinese officials have given some indications that greater transparency will be forthcoming in 2014. IACC members would welcome such a step, as well as similar action from provincial and local authorities.

Conclusion

Notwithstanding the progress that China has demonstrated in some respects, it remains the country of greatest concern for IACC members in 2014. The IACC encourages continued reforms to China's IPR regime, and urges China to address significant concerns of rights-holders, including:

- The need to remove thresholds that preclude criminal investigation, prosecution, and the imposition of truly deterrent penalties;
- The need for a more effective framework for cooperation between criminal and administrative authorities;
- The need for enhanced oversight of Chinese financial institutions and entities that cater to counterfeit merchants;
- The need for greater consistency and transparency throughout the IPR regime;
- The need for greater leadership and oversight, particularly at the provincial and local levels, to root out corruption and protectionism, thereby ensuring a level playing field for all businesses and consumers; and
- The need for greater cross-border collaboration with Customs and law enforcement personnel abroad.

RUSSIA

Recommendation: Priority Watch List

Overview

Russia's IPR regime has long been a major concern for members of the IACC, and intellectual property owners more broadly. While issues related to enforcement have been most frequently cited over the years, and by many accounts remain the most pressing concerns, rights-holders also point to a number of structural problems and statutory deficiencies which impede the protection of intellectual property. Given the continuing breadth and severity of problems reported by rights-holders during the past year, including high levels of counterfeits in the market across multiple product sectors, severe levels of copyright piracy (particularly in the online context), insufficient border control measures, and additional concerns related to deterrence, transparency, and public awareness, the IACC recommends Russia for continued inclusion at the Priority Watch List level.

Nature and Scope of Counterfeiting and Piracy

IACC members' reports concerning the nature and severity of their problems in Russia remained largely unchanged from previous years, as did the range of affected industries. Border enforcement issues remain a primary concern, particularly in light of the country's proximity to large scale manufacturing in China, though also due to significant uncertainty over the effectiveness of the implementation of border controls within the Customs Union created with Belarus and Kazakhstan. The overall level of enforcement within the Russian market remains the most frequently cited concern, as members highlight continued problems with regard to online and brick-and-mortar distribution. Rights-holders also note a need for greater resources and training for investigators and prosecutors, as well as an overall need for improved efficiency.

As in past years, the range of industries affected by counterfeiting and piracy in Russia remains fairly comprehensive, including everything from apparel¹⁸ to spirits¹⁹,

¹⁸ *Police Bust Counterfeit Clothing Factory Near Moscow*, The Moscow Times (2013), <http://www.themoscowtimes.com/news/article/police-bust-counterfeit-clothing-factory-in-moscow-region/490971.html>.

information technology, consumer electronics, pharmaceuticals, all manner of copyrighted works, industrial chemicals, tobacco, and others.

Legislative and Regulatory Issues

Russia has made a number of amendments to its legal regime in recent years, beginning with its adoption of Part IV of the Civil Code, and subsequent amendments, as well as its implementation of obligations pursuant to its WTO accession and other agreements. Rights-holders have welcomed progress made thus far, including Russia's 2010 provision for ex officio authority for Customs personnel, but continue to cite a range of improvements needed to ensure that intellectual property rights are accorded the range and level of protections provided by international norms.

Rights-holders have often cited the lack of deterrence provided under Russian law for willful trademark infringement, and the high thresholds for applying criminal procedures. In August of last year, new procedures were adopted for such fines based upon the value of the goods involved in a given case. Unfortunately, to date, we do not have significant information to report concerning the effect, if any, those new procedures are having. We will continue to monitor the issue throughout 2014.

For several years, copyright owners have reported severe problems with regard to the unauthorized online distribution of copyrighted works, via a number of well-known social media sites like vKontakte²⁰, as well as through stand-alone sites, which often use sponsored ads on popular search engines like Yandex²¹ to drive traffic. In June 2013, Russia approved a new law with the stated objective of addressing such illegal distribution.²² This was a positive step by the Duma, however, the law enacted addressed audiovisual content only, while excluding other affected sectors. While we understand that additional amendments to the law are under consideration, we would strongly encourage the Duma to provide a comparable level of protection and similar enforcement tools to rights-holders without regard to the type of content involved.

¹⁹ *Russian Police Bust \$1mln Moonshine Stash*, RIANovosti (2013), <http://en.ria.ru/crime/20130510/181065711/Russian-Police-Bust-1-mln-Moonshine-Stash.html>.

²⁰ Now, VK.com, the social media network has an estimated 200+ million users; it is the second most-visited site in Russia, according to Alexa.com.

²¹ Yandex is ranked by Alexa as the most visited website in Russia, and twenty-second most-visited in the world.

²² Daria Kim, *Russia Adopts Measures Against Online Video Piracy*, Intellectual Property Watch (2013), <http://www.ip-watch.org/2013/07/24/russia-adopts-measures-against-online-video-piracy/>.

In addition, rights-holders would benefit from a more streamlined approach to dealing with rogue websites registered with .ru domains (and thus not subject to ICANN rules or dispute resolution processes). Registrars have been found to be unresponsive to requests for assistance, leaving rights-holders with few options aside from civil litigation which can be both expensive and time-consuming.

At the most basic level, some rights-holders note that well-established legal principles related to corporate liability in other jurisdictions should be solidified within Russia's statutory framework. This step is necessary to prevent recidivism and the filing of duplicative actions against related legal entities engaged in similar (or identical) offenses. One IACC member noted that under the current regime, infringers are able to game the system by running operations through multiple shell entities, as a judgment against one entity cannot be applied to a separate entity run by the same infringer. The ability to "pierce the corporate veil" in such cases would promote more efficient application of resources by rights-holders seeking to enforce their rights, as well as by law enforcement and the judiciary.

Late in 2013, the IACC was contacted by representatives of the State Duma seeking private sector input on initiatives, legislative and otherwise, that might improve the environment for IP protection and enforcement in Russia. We hope to expand upon this dialogue in the coming year.

Enforcement & Customs Concerns

As noted above, rights-holders concerns with regard to enforcement in Russia, both at and within its borders, are extensive. Members report a variety of issues, including: inefficient and cumbersome procedures for investigations and evidence gathering; non-deterrent penalties; official corruption; a lack of transparency with regard to the disposition of seized goods and instrumentalities; a failure to take action against trafficking in labels and packaging; and the continuing, widespread availability of counterfeits at a retail level from all product sectors.

During the past year, members have continued to closely watch the implementation of the Customs Union. Some have reported that their enforcement efforts at the border have been hindered by what is viewed as an onerous process for obtaining Customs surveillance, although one member reported some successful interactions with Russian Customs, which have led to significant numbers of seized goods. In addition, additional cooperation with Customs authorities in neighboring China would be helpful in

addressing both imports intended for distribution in the domestic market and transshipments bound for third countries.

With regard to retail and wholesale distribution within the Russian market, members continue to cite the Sadova (14 km Moscow Ring) and Moskva markets as significant concerns for the sale of a variety of counterfeit goods in Moscow, particularly with regard to apparel and footwear. Other markets of concern include Apraskin Dvor and Yunona in St. Petersburg, Avangard in Sochi, and Vyborgsky in Khabarovsk.

The IACC has also received reports that enforcement in some regions remains exceedingly difficult. For example, Dagestan, bordering Chechnya in Southeast Russia, is cited by one member as an area where IP enforcement activities have become improbable.

As discussed above, we are continuing to monitor those issues related to the calculation of penalties and thresholds. We will likewise continue to monitor the effectiveness of the specialized IP court created last year, with an eye towards its consistency and transparency, as well as its imposition of appropriate penalties.

Increased transparency throughout the IP enforcement regime and a greater commitment to the rule of law remains a priority in light of continued reports of official corruption in Russia, and the involvement of organized criminal gangs in the trafficking of counterfeit and pirated goods. One report by an independent watch-dog organization in Russia alleges that the overall cost of corruption to the economy may be as high as \$300 billion each year.²³

In spite of the generally disheartening state of the enforcement environment in Russia, several members have pointed to generally positive interactions with law enforcement and Customs officials over the past year, with regard to their receptiveness to working with rights-holders and general interest in IP-related issues. Enforcement agencies, however, remain critically understaffed and lack the necessary resources and statutory tools to have a substantial impact.

²³ Delphine d'Amora, *Report on EU Corruption May Spur Russian Recrimination*, The Moscow Times (2014), <http://www.themoscowtimes.com/business/article/report-on-eu-corruption-could-spur-russian-recrimination/493896.html>.

Conclusion

While Russia has made some progress in addressing long-standing concerns related to IP protection and enforcement, the overall level of trademark counterfeiting and copyright piracy remain troublingly high. We encourage the Russian government to take the following actions in the coming year:

- Demonstrate additional progress towards the goals outlined in earlier intergovernmental discussions – particularly with regard to the enforcement of intellectual property rights online – and towards the obligations undertaken pursuant to Russia’s WTO accession;
- Ensure an opportunity for consultation with and comment from stakeholders on proposed legislation;
- Address serious concerns related to official corruption within the legal system;
- Provide law enforcement and Customs personnel with the resources necessary to more actively protect intellectual property rights; and
- Publicize enforcement actions and prosecutions, as a means to increase public awareness and demonstrate political priority for protecting intellectual property rights.

BRAZIL

Recommendation: Watch List

Introduction

Rights-holders from a wide range of product sectors – apparel, electronics, IT, pharmaceutical, petrochemical, and luxury goods, to name a few – continued to cite significant concerns related to intellectual property protection and enforcement in Brazil over the past year. Many of these concerns remain largely unchanged from previous years' comments, including: widespread retail sales of counterfeit goods, both online and via traditional brick-and-mortar shops; end-user and institutional piracy; inadequate border controls and transshipment; a lack of deterrent penalties for IP offenses; and structural impediments such as high tariffs which negatively impact manufacturers' competitiveness in the market. Accordingly, the IACC recommends Brazil's continued inclusion on USTR's Special 301 Watch List in 2014.

Nature and Scope of Counterfeiting and Piracy

As the largest retail market in South America, and with a rapidly growing middle class, Brazil's consumers have an ever-increasing array of goods and services at their disposal. Regrettably though, for both homegrown and foreign manufacturers of legitimate products, there is steep competition from counterfeiters and pirates for that purchasing power. As reported in previous years, most of these counterfeit goods are sourced from abroad, primarily from Asia, though there is also a significant level of domestic manufacturing and finishing of such goods. Counterfeits are pervasive throughout the retail market; nearly every industry sector from which the IACC draws its membership has reported a significant level of concern in Brazil.

Legislative Issues

IACC members continue to encourage the enactment of Bill number 333/1999, discussed in previous years' comments, to increase the authorized terms of imprisonment (to a minimum of two years) for crimes related to counterfeiting. In

practice, the current sentences for counterfeiting offenses carry little possibility of jail time, minimizing the deterrent effect of the law. Bill 333, first introduced fifteen years ago, still awaits enactment by the Brazilian Congress.

In December 2013, the Ministry of Justice issued guidelines with recommendations to government agencies to adopt measures to prevent the purchase of counterfeit products through the public bidding process. The guidelines are tied to Law 8,666/93 (“the Bidding Law”) and also reference Law 12,846/13, Brazil’s “Anti-Corruption Act,” which provides, among other things, for civil and administrative liability to private companies that engage in illegal activities when selling products to public entities. While it remains to be seen whether, or to what extent, these new regulations will have an impact on government sourcing of legitimate goods, rights-holders are hopeful that this action will increase awareness of the issue among the public sector. Rights-holders also note, however, that questions remain as to the means of enforcement of the new regulations. The IACC will continue to monitor the implementation of these regulations.

Rights-holders also commented positively on Law 12,683 of July 9, 2012 regarding money laundering, which is viewed as a useful tool for going after the ill-gotten proceeds of IP crimes.

In addition, IACC members point to bill 8,052/11 as another piece of long-pending legislation that could have significant practical benefits for IP enforcement if enacted by the Congress. Currently, the costs associated with storing confiscated goods prior to a final judgment can present a significant burden. Bill 8,052 would provide for expedited analysis of seized goods by sampling, as well as more efficient disposition of illicit goods.

Finally, trademark owners urge the passage of legislation necessary to fully implement Brazil’s famous mark renewal procedures.

Enforcement and Border Measures

IACC members have reported mixed views with regard to the enforcement of IPR in the past year. Though some indicate positive collaboration and interest among law enforcement personnel, others have noted a significant downturn during the past year, particularly in the major metropolitan areas of Sao Paulo and Rio de Janeiro. While Sao Paulo has been singled out in recent years for the city’s commitment to fighting counterfeiting and piracy, there has been a drastic deterioration since the election of the current mayor who assumed office at the beginning of 2013. Sao Paulo’s Special Group to Combat Piracy has been disbanded, which has resulted in a steep drop-off in enforcement actions and a re-emergence of open sales of counterfeiting. Well-known

marketplaces such as Rua 25 de Marco and Paulista Center were highlighted by rights-holders as some of the most problematic with recent surveys reporting more than 1,000 stores selling counterfeit goods.

In Rio de Janeiro, recent reports indicate that the local police have expressed an unwillingness to investigate street vendors and other small targets. Camelodromo de Uruguaiana remains a popular market for illicit sales.

Border enforcement, particularly at the Tri-Border region remained a concern in 2013. Increased resources and greater collaboration with Brazil's neighboring countries are essential to decreasing the widespread availability of counterfeit goods in the Brazilian market. And given the continued reports of transshipment through Brazil to other countries in the region, as well as that of assembly and finishing of goods for export, the benefits of such efforts would likely be seen well beyond Brazil's own borders.

Public Education

Rights-holders cited The National Council Against Piracy and Intellectual Property Crimes (CNCP) and The National Association for the Guarantee of Intellectual Property (ANGARDI) for their efforts to increase public awareness regarding issues of counterfeiting and piracy, and the IACC encourages their continuance of those efforts.

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 and fully implement necessary legislation to achieve the objectives identified herein, including increasing the minimum term of imprisonment for trademark offenses and minimizing financial and procedural burdens on both rights-holders and enforcement personnel;

- Devote significantly greater resources to Customs authorities and law enforcement, and increase specialized IP enforcement units throughout the country;
- Take focused and consistent action to clean up well-known retail markets with large numbers of vendors trafficking in counterfeit goods; and
- Continue efforts to raise consumer awareness regarding the threats posed by counterfeiting and piracy.

CANADA

Recommendation: Watch List; Out-of-Cycle Review

Introduction

Rights-holders reports with regard to Canada were greatly mixed during 2013, with some expressing optimism for the adoption of reforms to address a number of long-standing concerns, while others noted increasing frustrations over the level of enforcement, the cooperativeness of the authorities, and pointing to concerns that will remain even after the long-hoped-for enactment of legislation takes effect. This year marks the tenth consecutive year that the IACC has recommended Canada's inclusion in USTR's 301 report, a dubious honor shared with only a handful of other countries, and one that underscores rights-holders' strong desire for progress in the country's IPR regime. Perhaps more importantly, Canada's inclusion throughout the past decade underscores rights-holders' understanding of the importance of the trade relationship between our two countries, and their belief that an improved IPR regime in Canada would create significant economic benefits for the IP-intensive sectors in North America.

Nature and Scope of Piracy and Counterfeiting

IACC members from across all product sectors continued to report problems related to counterfeiting and piracy throughout 2013, ranging from retail sales and distribution in the online and brick and mortar markets, importation and transshipment of both finished goods and labels, and to a lesser extent, domestic manufacturing of counterfeits. Trafficking in counterfeit goods appears to be most pronounced in major metropolitan areas and surrounding suburbs, and reports from the apparel and accessories sectors, as well as electronics and pharmaceuticals remain common. The overwhelming majority of counterfeit product is imported from abroad, exploiting the limited statutory authority to interdict such shipments under existing law. As in past years, there remain some reports of domestic finishing (assembly, labeling, or packaging of goods imported without infringing labels), but such activities involve a small percentage of the overall volume. China continues to be identified as the primary source of counterfeit goods, whether imported for domestic distribution, re-export, or transshipment to the United States or elsewhere.

Legislative Concerns

Rights-holders were hopeful that long-awaited and much-needed legislation to address a variety of concerns would be enacted last year, following the introduction in Parliament of Bill C-56, An Act to amend the Copyright Act and the Trade-marks Act²⁴ and to make consequential amendments to other Acts, in early March, 2013. Progress on the bill was delayed as a result of the decision to prorogue Parliament in September. The bill was reintroduced as Bill C-8²⁵ in late-October in identical form after Parliament reconvened.

While this legislation, if passed, would result in some significant improvements over existing Canadian law, such as the provision of ex officio authority to the Canada Border Services Agency in cases involving the trafficking of counterfeit goods, as well as designating trademark counterfeiting as a criminal offense, rights-holders have raised concerns with regard to a number of the bill's features which are likely to result in a significant burden to those who might seek to enforce their rights. In an apparent effort to draft the legislation in a revenue-neutral manner, the bill's provisions create a great deal of uncertainty as to the costs associated with enforcement – both in terms of petitioning the courts and with regard to storage and disposition of seized goods. Rights-holders have likewise expressed concerns about the lack of a statutory damages provision in the pending legislation.

Another key concern with the legislation is its failure to provide authority to the Canadian Border Services Agency (CBSA) to seize counterfeit goods in-transit through Canada. As is noted with regard to a number of other countries in these comments, trans-shipment of goods is a common practice given the increasing complexity of counterfeit distribution chains. As drafted however, Bill C-8 specifically precludes Customs personnel from taking action against shipment of counterfeit goods, so long as the shipping documents indicate that the goods are intended for a market outside of Canada.²⁶ Based on the plain language of the bill, it appears that even given an instance where CBSA had actual knowledge that the goods contained in a shipment:

²⁴ C-56, 41st Parliament, 1st Session (2013), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6013262&File=24#1>.

²⁵ C-8, 41st Parliament, 2nd Session (2013), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6370314&File=24#1>.

²⁶ *Id.* at Section 51.03(2)(d).

- 1) Were manufactured in violation of the trademark law of the country of production;
- 2) Were shipped in violation of the trademark laws of the country of export;
- 3) Would violate Canadian law if distributed domestically; and
- 4) Would be illegal to import or distribute, as counterfeits, in the country identified as the final destination on the relevant shipping documents;

CBSA would have no authority to seize those goods.

Given the cross-border nature of the global distribution chain used by counterfeiters, the issue of transshipment must be addressed in a meaningful way. As such, the IACC sincerely hopes that Parliament will re-visit this issue, and others that have been raised by rights-holders throughout the legislative process.

Enforcement, Coordination, and Resources

In recent years' comments, the IACC has reported its members' generally positive comments with regard to law enforcement in Canada. In spite of perennial concerns related to lack of sufficient human and materiel resources, as well as statutory deficiencies which constrained the authority and effectiveness of efforts, Canadian law enforcement has in the past been broadly viewed as concerned about counterfeiting and piracy, and open to working with rights-holders to address their concerns. Regrettably, throughout the past year, rights-holders have reported a noticeable decrease in law enforcement engagement.

Where the Royal Canadian Mounted Police (RCMP) has, in the past, taken on a leadership role in IP enforcement, rights-holders noted that most of their collaboration now takes place at the local level with city police in major metropolitan areas. This may be attributable to an internal reorganization within the RCMP, which is believed to have resulted in the re-assignment of some personnel who had developed an expertise in IP-related investigations and a general familiarity with the issues. That diversion of experienced officers to other assignments was disheartening to some rights-holders, given the time and effort that will be necessary to train new officers up to the same level of experience. Rights-holders have also noted continued frustration with the lack of available criminal penalties for trademark counterfeiting, the reluctance of prosecutors to take on counterfeiting cases which may itself discourage law enforcement personnel from pursuing counterfeiters. Likewise, Customs enforcement continues to be hindered by a number of statutory deficiencies previously discussed, as well as the lack of a recordation program (which could facilitate communication and cooperation among rights-holders and CBSA personnel).

One bright spot worth noting, however, was Project PACE, a multi-agency and cross-border collaboration initiated and coordinated by the Toronto Police Service, Financial Crimes Unit, and involving other Canadian law enforcement agencies, the CBSA, as well as the U.S. Department of Homeland Security.²⁷ Following months of investigation and continued enforcement, that operation resulted in the arrest of nearly two dozen individuals, related to the manufacturing and distribution of a wide variety of counterfeit goods, including pharmaceuticals, contact lenses, apparel and accessories, and even transit tokens. The IACC has long encouraged greater levels of such cross-agency and cross-border collaboration as a means to more efficient enforcement, and it is encouraging to see such efforts bearing fruit.

Conclusion

The IACC is hopeful that the enactment of legislation to address some of the long-standing concerns outlined herein will lead to improvements in the level of enforcement, and encourage greater and more consistent engagement between law enforcement and rights-holders. In addition, we encourage the Canadian government to continue working with the private sector to identify and address statutory gaps in its IPR regime. Given the uncertainty with regard to whether and in what form Bill C-8 will be enacted, and related questions as to its implementation, the IACC would encourage USTR to consider an Out-of-Cycle Review later in 2014 to gauge the level of progress that has been made. In the meantime, the IACC would request that the Canadian government:

- Provide CBSA with the ex officio authority to act against counterfeit and pirated goods at the border, and to act against such goods in-transit;
- 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
- Encourage meaningful collaboration between law enforcement agencies within Canada and in the U.S. on anti-counterfeiting operations.

²⁷ Chris Doucette, *Project Pace Bust Nets \$6.5M in Counterfeit Goods*, Toronto Sun (2013), <http://www.torontosun.com/2013/11/29/project-pace-bust-nets-65m-in-counterfeit-goods>.

MEXICO

Recommendation: Watch List

Introduction

The overall situation for IP protection and enforcement in Mexico remained a significant concern for IACC members during 2013, with some members reporting worsening conditions on the ground during the past year. While law enforcement and Customs officials are generally commended for their interest and willingness to work with rights-holders and to receive training to increase their efficiency, there remain significant structural obstacles to their efforts. Further, the government must place a greater priority on IP enforcement, and take greater steps to empower enforcement personnel to take action against infringing goods. This latter concern has been repeatedly voiced with regard to enforcement against goods in-transit, as Mexico's ports remain a key gateway for counterfeit goods destined for other markets within Latin America. Mexico's participation in the ongoing TransPacific Partnership (TPP) negotiations offers a major opportunity to assess the structural and practical hurdles to more effective protection and enforcement of IP rights.

Nature and Scope of Counterfeiting and Piracy

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. Retail-level distribution remains problematic for rights-holders from a variety of sectors. This is perhaps most pronounced in the apparel and footwear, luxury goods, and core copyright industries; however, those in the information technology, consumer electronics, and other industries are also affected. Large, well-established markets such as Tepito, in Mexico City, and San Juan del Dios, in Guadalajara, have been singled out as significant concerns; but smaller, less formal markets pose similar problems throughout the country. Clothing, software, tobacco, and personal care items are sold openly, and with little apparent concern that action will be taken against the vendors.

As in past years, IACC members have reported concerns related to both domestic manufacturing and finishing of goods, in addition to the importation of finished goods for sale in the local market and elsewhere. Transshipment continues to be cited as a

growing concern in multiple product sectors.

Customs & Enforcement

An overly formalistic approach to enforcement is viewed by rights-holders as diminishing the efforts of law enforcement personnel who are in many cases eager to assist intellectual property owners. This approach is perhaps most pronounced with regard to Mexico's Customs enforcement regime. Until relatively recently, Customs officials were not directly empowered to detain imported or exported goods, but would have to obtain outside assistance in order to make such a detention or seizure. Though Customs may now take such action, it remains necessary to obtain an order from a Federal Court, the Mexican Institute of Industrial Property (IMPI), or the Attorney General's Office (PGR). Empowering Customs officers to take action on their own authority against counterfeits could significantly enhance the efficiency of enforcement, and serve as a more effective first line of defense to illicit goods intended for the local market.

Another example of this formalistic approach – one noted in the IACC's comments last year as well – involves the treatment of goods documented for transit through Mexico to a third country. Until relatively recently, Customs officials in Mexico were active in their enforcement against such shipments, however, due to a troubling interpretation of Mexican law²⁸, interdiction against goods in-transit has, for all intents and purposes, ceased. Based on reports from rights-holders active in the country, the rationale offered for this policy change is that where the goods have not entered commerce in Mexico, no harm has been suffered by the rights-holder in Mexico, and accordingly, no remedial action is available. Whether the illicit goods are intended for sale in a local retail store, or in another country entirely, the law should not be interpreted to preclude enforcement against clearly illicit trade.

Where enforcement actions are undertaken, rights-holders further note that progress in the courts is sometimes slow – in some cases taking several years' time – and regrettably, that deterrent sentences are rare. The provision of greater training and resources among the judiciary and prosecutors could be helpful in addressing these concerns.

Despite the efforts of law enforcement and rights-holder personnel, counterfeit goods

²⁸ In 2011, the PGR issued an opinion stating that Customs' mandate under the criminal statutes was limited to those goods being imported, and that because transshipments were not intended for sale in Mexico, no legal basis for their seizure existed.

remain widely available in the Mexican marketplace. And while rights-holders are generally complimentary of enforcement personnel – the local agencies of the PGR, for example, have been specifically commended for their work – that level of cooperation has at times varied significantly among the different agencies. In addition, as in past years, some have reported continuing concerns related to corruption and the involvement of organized criminal gangs.

Conclusion

The IACC recommends that Mexico be retained on the Special 301 Watch List in 2014, in light of the continuing concerns highlighted herein. The IACC encourages the government to take the following actions during the coming year:

- Empower Customs personnel to take ex officio action against shipments of counterfeit goods at the border;
- Provide enforcement personnel with the necessary authority to seize counterfeit goods being transshipped through Mexico;
- Provide additional 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; and
- Increase the level of penalties in counterfeiting cases to ensure the deterrent effect of existing laws.

PARAGUAY

Recommendation: Watch List; Section 306 Monitoring

Introduction

Paraguay has been under Section 306 monitoring by USTR since the signing of a Memorandum of Understanding in 1998. Last year, Paraguay was returned to the Special 301 Watch List. The country has long been cited by rights-holders as being of key importance to addressing counterfeiting and piracy more broadly throughout South America, given its position as a major hub for illicit imports. Regrettably, rights-holders continued to report a range of problems in Paraguay throughout the past year –most notably with regard to border controls, transparency, and corruption – all of which have diminished the outlook for rights-holders in the country and the region more widely. Accordingly, we recommend continued inclusion of Paraguay on the Watch List in 2014.

Nature and Scope of Counterfeiting and Piracy

Rights-holders continue to cite a range of concerns with regard to IP protection and enforcement in Paraguay, including: trademark infringement and counterfeiting, manufacturing and finishing of counterfeit goods, all manner of border control issues, non-deterrent penalties for infringers, retail sales of counterfeits, an overall lack of transparency and a need for better engagement with IP owners, as well as official corruption. Affected industry sectors are likewise broad in scope, ranging from consumer electronics, information technology, and software and entertainment, to apparel, footwear, cosmetics, and chemicals.

Legislative and Enforcement Issues

Near the end of 2012, Paraguay enacted Law No. 4798, creating the National Department of Intellectual Property (DINAPI). IACC members have reported, however, that a lack of effective collaboration between the prosecutor's office and enforcement agencies continues to make enforcement very difficult. In a similar vein, while DINAPI signed a Memorandum of Understanding (MOU) in 2013 with Paraguayan Customs to

conduct joint actions, there has nonetheless been insufficient coordination between Customs and the prosecutors and rights-holders, which has limited the impact of this MOU significantly.

Additionally, the Criminal Code and Criminal Procedures Code currently provide insufficient penalties to create any real deterrent to IP offenses. These minimum penalties, combined with an overall lack of expediency and uncertainty of outcomes in the judicial system, have led some rights-holders to question the effectiveness (and cost-effectiveness) of pursuing cases within Paraguay at all.

As reported frequently in the past, Ciudad del Este and the Tri-Border region remain of key concern with regard to the distribution of counterfeit and pirated products to both Brazil and Argentina. Lack of sufficient resources to address these long-standing border control issues remains a significant hurdle to effective progress.

Conclusion

Paraguay remains a key entry and distribution point for counterfeit goods in Latin America, and the government must place a greater level of priority on addressing these issues. In 2014, the IACC encourages Paraguay to take the following steps towards improving its IPR regime:

- Significantly increase the level of enforcement at the border;
- Provide necessary leadership to improve cooperation between prosecutors and enforcement personnel; and
- Regularly publish statistics related to criminal and administrative enforcement activities involving intellectual property rights, including the volume and value of seizures, fines assessed, fines collected, investigations initiated, cases initiated, convictions, and penalties imposed.

PHILIPPINES

Recommendation: Watch List

Introduction

The IACC has submitted comments on the Philippines during the Special 301 process every year since 2002, citing a wide range of concerns from rights-holders in a variety of product sectors. While acknowledging the progress that has been made in the Philippines in recent years, rights-holders continue to report a significant level of concern in the country during 2013. IACC members remain hopeful that the government of the Philippines will further build on the progress that has been made thus far, and will continue to monitor the implementation of recently adopted changes to the legislative and policy regimes. In 2014, we again recommend inclusion of the Philippines on the Watch List, to ensure that further progress materializes and that reforms undertaken thus far fully take root.

Nature and Scope of Counterfeiting and Piracy

IACC members from a number of product sectors continued to report significant levels of trafficking in counterfeit goods in the Philippines during the past year. Among the affected industry sectors were apparel, footwear, fashion accessories and eyewear, industrial chemicals, consumer electronics, and personal care products. Retail sales remain a major concern, and rights-holders continue to report large-scale trafficking in well-known markets, including Green Hills and the Robinson Wholesale Market. In the copyright sectors, Quiapo has been cited as a major outlet for pirated product. Online trafficking of both counterfeit and pirated goods is also identified as an increasing concern for rights-holders. Improving Customs enforcement remains a priority concern, as rights-holders note that much of the illicit product available for sale in the retail market originates from China.

In addition to those retail and border control issues, rights-holders have indicated concerns related to the trafficking of packaging and labels, to be used in local production and finishing of counterfeit goods.

Rights-holders have long cited the inefficiency of the judiciary as a top concern and a

contributing factor to the high cost of pursuing enforcement in the Philippines. We are aware of the implementation of special rules for IP proceedings, which are intended to improve the courts' efficiency, and will be continuing to monitor whether those rules are having their intended effect.

Enforcement

IACC members' comments with regard to enforcement personnel were largely positive, noting their general receptiveness to working with rights-holders. One member specifically reported a successful collaboration facilitated by U.S. law enforcement. Another reported positive interactions with (Filipino) federal law enforcement officers in pursuing a criminal investigation against individuals producing and trafficking in counterfeit coupons. The suspects in that case were arrested during the execution of search warrants, though subsequent proceedings in the case were delayed significantly in the aftermath of last year's typhoon. While the overall level of intellectual property enforcement has improved in recent years²⁹, counterfeit and pirated goods remain widely-available in the retail market, indicating the need for still greater progress.

Customs enforcement remains the first line of defense, both against goods intended for distribution within the Philippines, and against illicit shipments in-transit. While Customs personnel have expressed a desire to improve enforcement efforts, they remain under-resourced, and would benefit from additional IP-related training. Rights-holders also encourage the adoption of a centralized recordation system to improve the efficiency of operations and also foster greater collaboration with rights-holders.

As noted in prior years' comments, the long-standing concerns of rights-holders with regard to corruption, the uncertainty of outcomes, the slow pace at which cases proceeded, and the significant costs incurred in paying for storage while awaiting a final judicial outcome have contributed to the present enforcement environment. Significant delays and nominal penalties provide little disincentive to counterfeiters, while providing rights-holders, law enforcement, and prosecutors little in return for their efforts. The IACC is, however, encouraged by the ongoing efforts to improve the efficiency of the court system in dealing with IP cases, and is hopeful that the reforms will allow for greater numbers of cases to be opened and concluded in a reasonable timeframe. Such an improvement should in turn increase the level of expertise among

²⁹ The Intellectual Property Office of the Philippines (IPOPPL) reported seizures in excess of P6 billion in 2013, and estimates that seizures this year will surpass P7 billion. See, Amy R. Remo, Officials Expect to Haul in P7B in Pirated Goods, *Inquirer.net* (2013), <http://business.inquirer.net/156481/officials-expect-to-haul-in-p7b-in-pirated-goods>.

investigators, prosecutors, and judges. In addition, the government's recent adoption of procedures to permit expedited destruction of counterfeit goods (prior to a final judicial decision), and the provision of free warehousing (where available) should help to lower the costs to rights-holders in pursuing enforcement.

Conclusion

Given the breadth of industries affected, and the widespread availability of counterfeit goods in the retail market, the IACC recommends the Philippines' continued inclusion on the Special 301 Watch List in 2014.

The IACC is encouraged by the commitments made by the government thus far toward improving the protection of intellectual property, but continued monitoring and engagement is necessary to ensure that progress continues to be realized.

In 2014, the IACC encourages the Philippines to:

- Increase direct engagement with rights-holders and their representatives to ensure stakeholder input in the development and implementation of remedial efforts;
- Improve oversight to address concerns of corruption within enforcement agencies and the judiciary;
- Continue to develop and publicize clear metrics for gauging the efficiency and effectiveness of enforcement agencies and the judiciary in dealing with IP cases; and
- Establish a capacity building strategy to improve the effectiveness of border control efforts, with the aim of reducing the volume of counterfeit goods available in the retail market.

TURKEY

Recommendation: Watch List

Introduction

In each of the past five years, IACC members have recommended Turkey's inclusion on the Watch List, citing concerns in a variety of product sectors, though perhaps most notably in the apparel and footwear sectors. Those past concerns remained pronounced in 2013, with rights-holders noting continuing issues related to domestic retail sales within the Turkish market, in addition to the need for significant improvements with regard to Customs' detection and enforcement against shipments of counterfeits entering, and transiting, the country. Likewise, longstanding concerns related to the efficiency of judicial proceedings and efficacy of penalties continued in the past year. As a result, we recommend Turkey's repeated inclusion on the Special 301 Watch List.

Nature and Scope of Counterfeiting in Turkey

The trafficking of counterfeit goods in and through Turkey remained problematic for a number of sectors during the past year. Turkey again appears near the top of the European Commission's most-recently reported statistics as the country of provenance for infringing goods seized (in terms of value), ranking behind only the People's Republic of China and Hong Kong.³⁰ That report cites Turkey as a major source for apparel and footwear, other fashion accessories such as leather goods, handbags, and watches, as well as perfumes and cosmetics, foodstuffs, and electrical equipment, and other types of goods. Those findings also correlate with reports from IACC members. Other industries including consumer electronics and pharmaceuticals are also similarly affected.

Turkey's prominence in the EU seizure statistics is largely unchanged from the previous years' reports, contributing to rights-holders' perceptions that systematic improvements in the country's IPR regime are crucial in order for necessary improvements to be realized. IACC members also noted an increased concern in 2013 with regard to online

³⁰ See *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border 2012*, supra n. 3.

sales of counterfeit goods, which IACC will continue to monitor in 2014. Turkey's intellectual property enforcement efforts are of strategic importance to the region, given both its geography and its trading relationship with the member states of the European Union.

Enforcement

Enforcement-related issues have remained at or near the top of IACC members' reported concerns in Turkey for several years, and this remained the case in 2013. Though some rights-holders report a positive relationship with law enforcement and their responsiveness to complaints, others continue to report significant problems. Investigations and enforcement in retail markets, particularly large well-known markets, has been described as exceedingly difficult, and at times, dangerous. This lack of consistency in law enforcement's willingness to work with rights-holders was noted in the IACC's comments last year as well, and remains a source of frustration.

There have been some positive reports of enforcement efforts involving goods in the health and safety sector. For example, last May in four Turkish citizens involved in the distribution of counterfeit alcoholic beverages were sentenced to 99 years imprisonment following their trial in the deaths of five Russian tourists.³¹ Such penalties must be more consistently applied, and dealt with by the courts in an efficient and deterrent manner. The IACC is also aware of the recent enactment of amendments to the Pharmaceutical Preparations Law (Law No. 1262), to provide for enhanced penalties – including up to 5 years imprisonment – for manufacturing or selling counterfeit pharmaceuticals. The IACC will continue monitoring the implementation and application of these provisions in 2014, and encourages the Turkish government to consider increasing the authorized penalties for trafficking in other types of counterfeit goods as well.

Border Control

The lack of effective border controls and Customs enforcement were the most frequently cited concerns of IACC members with regard to Turkey in 2013. As noted above, Turkey remains a hub for the trafficking of a variety of counterfeit goods, and significant

³¹ *4 Turks Jailed 90 Yrs Each for Poisonings*, Herald Sun (2013), <http://www.heraldsun.com.au/news/breaking-news/turks-jailed-90-yrs-each-for-poisonings/story-fnioxqll-1226647995510>.

improvements are necessary to address the flow of illicit trade through the country. During 2013, the Turkish government began providing for online registration of intellectual property rights with Customs, which is itself a positive step; however, there have been some reports of difficulties in the implementation of the system. In addition, there remains a need for more training of Customs officials and a clarification regarding the application of the Trademark Decree law to importation, exportation, and transshipment of counterfeit goods. It is encouraging that the Customs Directorate appears to be taking a more information-driven approach to enforcement that will be more inclusive of rights-holders input. An intelligence-based approach to targeting and interdicting illicit shipments offers an opportunity for significant improvement over the status quo.

Conclusion

IACC members remained concerned about the scope of counterfeiting in Turkey, and the consistency of cooperation by law enforcement in 2013. While there are some signs of encouragement, significantly greater progress must be made prior to the country's removal from the Watch List.

In 2014, the IACC encourages the Turkish government to take the following steps towards combating the trafficking of counterfeit goods:

- Fully implement the Customs recordation system, and leverage it to increase direct engagement and collaboration with IP owners;
- Improve Customs' intelligence-gathering efforts to improve targeting and interdiction of illicit shipments; work with international partners to carry-out high-level enforcement against transshipments;
- 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;
- Leverage high-profile enforcement actions as a means of educating the public about the importance of IP protection; and
- Provide for greater transparency with regard to the handling of cases by police, and encourage the judiciary to provide clear legal opinions for the court's actions and rulings in IPR-related cases.

UNITED ARAB EMIRATES

Recommendation: Watch List

Introduction

The United Arab Emirates (UAE) has been cited this year as a country of growing concern for rights-holders across a broad range of product sectors. These concerns are tied largely to the UAE's growing importance as a hub for international trade, and as a transit point for counterfeit goods produced elsewhere. As noted in comments submitted last year, UAE's relatively high per capita income, standard of living, and growing importance as a consumer market generally, have also contributed to a local retail market for counterfeit products.

Nature and Scope of Counterfeiting and Piracy

The scope of industries expressing concerns over the trafficking of counterfeit goods in the UAE was nearly universal in 2013. IACC members from sectors as varied as apparel and accessories, petro and industrial chemicals, entertainment, personal care and consumer goods, pharmaceuticals, and electronics have identified the country's IPR regime as being of significant concern. Specific problems cited have included border controls and transshipments, institutional piracy, non-deterrent penalties, and domestic retail trade, as well as concerns related to the disposition of seized goods and instrumentalities. According to the most recent customs statistics published by the European Commission, the UAE was ranked behind only China with regard to the number of items seized for IP violations, and fourth in terms of the value of goods seized. The UAE was cited as one of the top three countries of provenance for goods in six separate categories: perfumes and cosmetics, other body care items³², mobile phone parts and accessories, memory cards and memory sticks, ink cartridges and toners, and cigarettes.³³

³² A category that includes razor blades, shampoos, soap, deodorant, and toothbrushes, among others.

³³ See *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border 2012*, supra n. 3.

Legislative & Regulatory Regime

IACC members have expressed a desire for greater modernization in the UAE's current statutory framework for intellectual property. A draft anti-commercial fraud law intended to replace the existing law governing Suppression of Fraud and Deception in Commercial Transactions (Federal Law No. 4 of 1979) has been circulated; and while that legislation includes a number of positive provisions – particularly with regard to much needed increases to the UAE's present penalties for counterfeiting offenses, rights-holders have also been greatly troubled by some of the draft's proposals, such as the re-exportation of counterfeit goods to their country of origin. One member company has indicated that it is awaiting a final determination on whether a previously identified shipment including over 15,000 units of counterfeit products would be re-exported.

The new penalties proposed under the draft law include fines of up to AED 250,000, possible imprisonment, and the destruction of the counterfeit goods at issue. Higher fines, up to AED 1,000,000, would be authorized for offenses involving counterfeit pharmaceuticals or food. In addition, the draft contemplates enhanced penalties for recidivism, including the possibility of the offenders' business licenses being canceled. Rights-holders remain generally supportive of these amendments.

Conversely, the re-exportation provisions noted are purportedly motivated by environmental concerns, and were proposed as an alternative to traditional destruction and disposal of the products seized at the border. Rights-holders have raised concerns, however, that such a policy of re-exporting the goods will likely contribute to their subsequent re-entrance into the distribution chain – essentially giving the manufacturer/exporter in the source country a second opportunity to traffic the same goods, potentially succeeding in evading detection by Customs officials where the first attempt failed.

Enforcement and Customs

IACC members indicated mixed results with enforcement agencies in 2013. While some noted a positive and collaborative experience, and cited initiatives by the Departments of Economic Development, Customs, and others, rights-holders generally pointed to the continued high volumes of counterfeit traffic as evidence that there remains significant room for improvement. Additional training, and a greater focus on long-term investigations to increase the gathering of intelligence, would perhaps result in a greater impact when enforcement actions are taken. As in comments submitted in 2013, the IACC would encourage greater collaboration with European Customs personnel with the

aim of significantly decreasing the volume of counterfeit exports from the UAE to the European Union.

The deterrent effect of enforcement actions would also benefit greatly from the imposition of more substantial penalties – both in criminal and civil cases. Some rights-holders have commented on the high costs associated with enforcing their rights in the UAE. Transparency and consistency among judicial decisions, coupled with meaningful penalties would likely encourage and enable more enforcement activity.

Conclusion

The IACC encourages the government of the UAE to:

- Continue working on legislative reforms related to intellectual property in a transparent manner, allowing for input from relevant stakeholders;
- Undertake capacity-building efforts to ensure the increasing sophistication of investigative and enforcement efforts at and within UAE borders; and
- Make efforts to increase the deterrence of penalties imposed for intellectual property offenses.

SPECIAL MENTION

In addition to the nine countries previously discussed, for which the IACC has chosen to provide specific recommendations on the Watch List or Priority Watch List in 2014, the IACC offers the following brief comments concerning a number of other countries where members have expressed varying levels of concern. It is worth drawing attention to the fact that IACC members provided comments this year on a number of countries throughout the African continent that have not been included in previous years' reports. The concerns underscore the growing importance of a number of these developing markets. The IACC would welcome an opportunity to engage with USTR on IPR issues for the countries listed below, including those on the African continent, in the coming year.

Botswana

IACC members highlighted positive collaboration with police in Botswana. While the IPR regime continues to develop and improve, the interest and engagement shown by prosecutors and other government officials in capacity-building programs gives rights-holders reason for optimism. Sentences for counterfeiters imposed under the Industrial Property Act are generally limited to small fines with no jail terms, and offer little deterrent value. Rights-holders also note that storage and destruction costs are high, and must be borne by the rights-holder. Shifting that burden to offenders would make enforcement more cost-effective and encourage more concerted efforts in the country.

Colombia

In 2013, USTR noted Colombia's efforts to strengthen IP enforcement through increased coordination among its law enforcement agencies, while also noting the need for greater resources and training for personnel tasked with IPR enforcement. Regrettably, the IACC has received reports that IPR units within Colombian law enforcement were regularly utilized as support units to deal with other, higher priority crimes in 2013, and that doing so negatively impacted the progress of those specialized units.

Improvements remain necessary with regard to the efficiency of the judiciary, and the imposition of deterrent sentences. On the other hand, rights-holders noted that prosecutors appear to have adequate funding to carry out investigative and enforcement efforts. Consumer awareness of the harms associated with counterfeiting and piracy also appears to be a relatively high in Colombia.

India

India remained on the Priority Watch List last year, due in large part to continuing concerns in the copyright- and patent-intensive sectors. Trademark owners reported concerns with the manufacturing and retail distribution of counterfeit goods in 2013, and noted inconsistent cooperation from law enforcement. Procedures for seeking enforcement in counterfeiting cases were described as onerous, due to a provision of the Trade Marks Act of 1999³⁴ that requires a preliminary opinion from the Registrar of Trade Marks. This requirement reportedly causes significant delay in police action.

Indonesia

Indonesia was retained on USTR's Priority Watch List in 2013, due to a variety of issues spanning copyright-, trademark-, and patent-intensive sectors. IACC members concurred with USTR's findings from last year regarding the need for more efficient and transparent enforcement of IP offenses to address the high levels of counterfeit and pirated goods in the domestic market. Rights-holders continue to echo that sentiment in this year's comments as well. Rights-holders have additionally indicated that official corruption within enforcement agencies and the judiciary is a significant problem that must be addressed to improve the overall environment for intellectual property rights.

Kenya

Rights-holders speak positively about their dealings with Kenya's Anti-Counterfeit Agency (ACA) and prosecutors, describing both as cooperative and eager to pursue actions against individuals trafficking in counterfeit goods. These efforts are hindered, however, by the low level of penalties imposed against violators. More deterrent sentences are needed.

Rights-holders note that the country's geography presents challenges with regard to border enforcement, given the numerous, remote border crossings, and these challenges are compounded by resource limitations. However, one rights-holder commended Kenyan Customs for its seizure of a large shipment (in excess of 100,000 units) of counterfeit goods from China that was intended for import into Kenya.

³⁴ The Trade Marks Act, No. 47 of 1999, at Section 115(4).

Malaysia

While the IACC has omitted Malaysia from its Special 301 comments since 2007, there were a troubling number of rights-holders' reports mentioning Malaysia this year. IACC members note the need for better collaboration between law enforcement agencies, as well as the need for more efficient judicial processes in both criminal and civil cases. Penalties in criminal and civil cases are reported to be very low, offering little deterrence. The IACC will be monitoring the situation in Malaysia closely in the coming year.

Mozambique

Mozambique has been cited as a growing concern, and is viewed as a gateway for the distribution of counterfeit goods into southern Africa. Responses to rights-holders' requests for assistance by enforcement personnel, both at and within the borders, have been inconsistent. Importation for sale in the domestic retail market and transshipment to other countries within the sub-region are both viewed as problems. The provision of increased resources to enforcement personnel and a demonstration of greater political will to address the trafficking of counterfeits would be welcomed.

Namibia

Namibia has been identified as a country of strategic importance with regard to transshipments from China to other countries throughout Africa. One reported case involved the seizure of over 20,000 units of counterfeit products. While local police were helpful in this case, the IACC member noted that it was extremely difficult to find the necessary legal authority for the seizure, given the absence of local legislation. Compounding that problem was Namibian Customs' reluctance to take action against the shipment. Improved training, and amendments to relevant legislation to independent seizure authority without the need for a rights-holder's complaint, would be helpful in resolving cases more efficiently. Lastly, rights-holders note that destruction of seized goods can be very difficult to obtain in this country.

Nigeria

Rights-holders commented on a number of concerns with respect to intellectual property enforcement in Nigeria, including corruption, the need for increased legal authority for law enforcement officers, and better application of those tools already available. Although Anton Piller orders are available to rights-holders to allow for ex

parte search and seizure, judges are often reluctant to grant them in practice, making investigations and evidence gathering more difficult.

The enforcement of intellectual property rights in Nigeria is also hindered by ineffective cooperation between enforcement personnel, both within the country and with corresponding agencies in neighboring countries. Such collaboration is viewed by rights-holders as a key component to improving IP enforcement in the region.

More deterrent penalties are also crucial to improving the enforcement environment in Nigeria. One IACC member suggested the adoption of a “proceeds of crime” regime as a means to shifting the cost-burden to offenders, and to minimize the financial incentive to traffic in counterfeit goods.

Pakistan

In 2013, USTR retained Pakistan on the Priority Watch List, citing, among other issues, widespread counterfeiting and piracy, and the need to improve the deterrence value of penalties. While rights-holders commend law enforcement for conducting raids, they note that penalties remain low, and that court proceedings are often prolonged unnecessarily. Corruption likewise remains a concern for rights-holders.

Rwanda

Rights-holders identified border enforcement as a challenge in Rwanda, citing a need for better cooperation between Customs and rights-holders. One rights-holder noted very poor relations with Rwandan Customs on anti-counterfeiting matters, and pointed to instances of retaliation by Customs officials, including a case of officials holding up legitimate shipments of the rights-holders’ goods to an authorized distributor in the country. The goods were only released upon involvement by international law enforcement. In a later case, Customs officials released a shipment of confirmed counterfeit products to the counterfeit importer (whom Customs officials considered to be the victim in this case), despite a pending court action by the rights-holder to prevent their release.

South Africa

South Africa last appeared in the IACC’s Special 301 comments in 2010. While rights-holders speak positively about some interactions with the South African Police Service, Customs detentions and seizures have decreased significantly since 2011. Non-deterrent and inconsistent sentences are common. This is particularly problematic, given the slow

progress of most criminal cases. Rights-holders report that IP crime is not a high priority for the government, and that greater political will is needed to decrease the trafficking of counterfeit goods in the country.