



February 6, 2015

VIA WORLD WIDE WEB

<http://www.regulations.gov>, docket number USTR-2014-0025

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

**Re: 2015 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment. 79 Fed. Reg. 78133 - 35 (December 29, 2014)**

Dear Ms. Wilson:

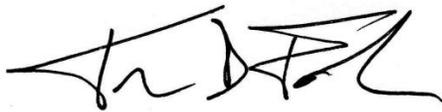
The attached written comments are submitted on behalf of the International AntiCounterfeiting Coalition, Inc. ("IACC"), in response to the request by the United States Trade Representative ("USTR"), published in the Federal Register on December 29, 2015, for written submissions from the public concerning 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 230 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 the protection and enforcement of intellectual property rights by our trading partners. We look forward to assisting in those efforts to promote IP protection globally, and we are available at any time for clarification of any issues raised in the attached submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Travis D. Johnson', written in a cursive style.

Travis D. Johnson  
Vice President - Legislative Affairs & Policy  
The International AntiCounterfeiting Coalition  
1730 M Street NW, #1020  
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**Submission of the**

**International AntiCounterfeiting Coalition**

**to the**

**United States Trade Representative**

**Special 301 Recommendations**

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**February 6, 2015**

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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 230 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.

While quantifying the harms caused by counterfeiting is inherently difficult – due in large part to the illicit nature of the trade – those harms remained severe in 2014. 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, presents a clear threat to the health and well-being of consumers, and to the integrity of our national security

infrastructure.<sup>1</sup>

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, research of publicly-available sources, and data generated by the IACC through its own programs and direct engagement with foreign governments. 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.

The People's Republic of China remained the country of greatest concern for IACC members in 2014, as it has been for many years. Across virtually every product sector, China continues to be the leading source for the manufacture of counterfeit goods entering the U.S. and other consumer markets. Additionally, China has been a hub for the explosion seen in recent years with regard to the online sale and distribution of counterfeit and pirated goods, as well as for the services necessary to support such operations. While members have highlighted some bright spots of progress, IACC members continue to cite a variety of concerns with the overall level of IP protection and enforcement in China.

For over a dozen years, the IACC has recommended Russia's inclusion on the Special 301 Priority Watch List, and we do so again this year. Rights-holders have lamented the overall lack of progress in IP enforcement during the past year, a situation that has likely been exacerbated by political and economic turmoil.

The IACC devoted significant efforts in 2014 to increasing its international engagement, with a particular focus on Latin America. The IACC and its members organized and participated in a number of trainings throughout the region, while also forging new or stronger relationships with government partners. We are pleased to report some very positive developments in the region, particularly with regard to pro-active outreach by the government in Curacao. The IACC will seek to further expand these efforts throughout the coming year.

In the continuation of a trend noted in the IACC's 2014 submission, Africa and the Middle East region have taken on increasing importance as both end-consumer markets for counterfeits and as logistics hubs for the trafficking of illicit products; we are actively seeking to engage with partners in those regions, as detailed herein.

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<sup>1</sup> *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>.

The organization of this year's comments, by region rather than simply by country, was made consciously, and with the intent to underscore the fact that the trafficking of counterfeit goods is, inherently, a cross-border problem requiring collaboration and partnership. The policies, practices, and resources that countries apply to addressing the issues at and within their borders necessarily impact their neighbors in the region and further afield. The IACC welcomes this opportunity to highlight the efforts of those trading partners who have taken steps in advancing the protection and enforcement of legitimate manufacturers' IP rights, and to offer suggestions for where those efforts might be improved for the benefit of all.

**IACC SPECIAL 301 RECOMMENDATIONS, 2005 – 2015\***

	05	06	07	08	09	10	11	12	13	14	15
Belize	PWL	PWL	WL								
Botswana										SM	
Brazil			PWL	WL	WL	WL	WL	WL	WL	WL	WL
Canada	WL	PFC	PWL	WL	WL	PWL	PWL	PWL	PWL	WL/OCR	WL/OCR
Chile	WL										
China	PFC/306	PFC/306	PFC/306	PFC/306	PFC	PWL	PWL	PWL	PWL	PWL	PWL
Colombia										SM	WL
Costa Rica		PWL	PWL								
Czech Republic			WL	WL	WL						
India	WL									SM	PWL
Indonesia										SM	PWL
Italy							WL	WL			SM
Kenya										SM	WL
Korea				OO							
Kuwait	WL										
Malaysia	PWL	PWL	WL							SM	SM
Mexico	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Mozambique										SM	WL
Namibia										SM	
Nigeria										SM	WL
Pakistan										SM	
Panama	WL										
Paraguay			PWL/306	306	306	306	306	306	306	WL/306	SM
Philippines	PWL	PWL	WL	WL	WL	WL	PWL	WL	WL	WL	SM
Russia	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL
Saudi Arabia	WL							WL			
South Africa						WL				SM	
Spain						WL	WL	WL			SM
Taiwan	WL										
Thailand											PWL
Turkey	WL			OO	WL	WL	WL	WL	WL	WL	WL
Ukraine											SM
UAE	WL		SM	OO					WL	WL	WL
Vietnam			PWL	WL	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.

## ASIA-PACIFIC & SOUTH ASIA

### CHINA

#### **Recommendation: Priority Watch List**

Not surprisingly, IACC members identified China as the single greatest priority in 2014, as it has been for many years. The factors contributing to this are myriad, with the most prominent being the country's status as the top producer of counterfeit goods found in markets around the world. According to statistics published by U.S. Customs and Border Protection for Fiscal Year 2013 – the most recent available at the time of writing – the People's Republic of China accounted for 68% of IPR seizures by value, and 49% of the overall number of seized shipments.<sup>2</sup> An additional 25% of seizures (by value), and 34% of seized shipments, are classified as originating from Hong Kong.<sup>3</sup> Together they account for 93% of seizures in terms of value, and 74% of seized shipments. Figures published by the European Commission tell a similar tale – over 66% of goods by volume and 72% by value originate in China (with an additional 13.3% by volume, and 7.7% by value originating in Hong Kong).<sup>4</sup> Similar rates have been noted consistently in the IACC's interactions with officials in other jurisdictions around the world.

The manufacture for export of counterfeit goods, however, remains but one component of rights-holders' concerns with regard to China. Large-scale production to serve the domestic retail market likewise remains a significant problem, and the widespread availability of those counterfeits continues to serve as a barrier to equitable market access for U.S. manufacturers. Another continuing, and growing concern, is the explosion in China-based websites – both stand-alone sites and marketplace platforms – selling to both Chinese consumers and consumers abroad. Rights-holders' comments continue to note a variety of concerns including the need for more deterrent penalties,

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<sup>2</sup> *Intellectual Property Rights: Fiscal Year 2013 Seizure Statistics*, U.S. Customs & Border Protection Office of International Trade (2014), [http://www.cbp.gov/sites/default/files/documents/ipr\\_annual\\_report\\_2013\\_072414%20Final.pdf](http://www.cbp.gov/sites/default/files/documents/ipr_annual_report_2013_072414%20Final.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border 2013*, European Union (2014), [http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/2014\\_ipr\\_statistics\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2014_ipr_statistics_en.pdf).

continued overreliance on administrative enforcement, and the need for greater consistency and transparency with regard to the disposition of seized counterfeit goods and instrumentalities. While China has taken significant steps to improve its IPR regime in recent years, the scope and size of the counterfeiting and piracy problems there remains exceedingly large, as outlined herein.

In the IACC's 2014 comments to the USTR, we noted rights-holders' largely positive opinion of Chinese enforcement agencies – most notably with regard to China Customs, the Ministry of Public Security (“MPS”), and Public Security Bureau (“PSB”). These sentiments were repeated in IACC members' comments again this year, which highlighted those agencies' engagement with rights-holders, their professionalism, and their increasing expertise in dealing with IPR cases. Rights-holders likewise noted their thanks for the support and encouragement provided by the State Administration for Industry and Commerce (“SAIC”). As also noted in past years' submissions though, rights-holders continue to bemoan China's over-reliance on administrative enforcement, the obstacles presented by thresholds for criminal prosecution, and the need for greater collaboration between administrative and criminal enforcement agencies.

Administrative enforcement, though still the most common route of enforcing IP rights, has been characterized as increasingly challenging by some, particularly in Northeast China. Agencies in that region are described as very conservative in their market actions against sellers, and those agencies have at times used the need to maintain social stability as a justification for not taking action against counterfeiters. There remain significant concerns regarding local protectionism, as well as perceived disparate treatment among domestic and international brands, at the provincial level.

Though precise figures are not available at this time, some members have reported an increase in the number of criminal enforcement actions, which is encouraging. Likewise, members have applauded special projects initiated by the MPS in 2013 and 2014, which encouraged police at all levels to place a greater priority on criminal IP cases. IACC members have long encouraged closer collaboration between the administrative and criminal enforcement agencies in China, and more directly, an increase in the number of criminal case referrals. Historically, local AICs have referred only a small percentage of initiated cases for criminal investigation, and this remained the case in 2014. Greater levels of coordination and collaboration would be welcomed.

Rights-holders also commented that the costs associated with undertaking enforcement in China can be excessive, due in part to the expectation that they conduct significant

preliminary investigations in advance of approaching enforcement agencies. Where action is taken, the costs related to evidence storage can likewise be very high.

The regions of greatest concern for manufacturing and large-scale sales within China have remained largely unchanged from previous years, with rights-holders continuing to identify Guangdong province as the major hub for manufacturing counterfeits, and specifically the cities of Guangzhou and Shenzhen.

In last year's comments, the IACC highlighted growing concerns in Xinjiang Province in Northwest China, and we reiterate those concerns here. That region has been cited by numerous rights-holders as being difficult to work in, in part due to perceived protectionism and official corruption. Members have described a significant increase in the volume of counterfeit goods moving in this locale, with known traffic from Urumqi to Kazakhstan and on into Russia. Increased enforcement both at and within the borders are necessary to address this growing problem.

IACC members continue to call for China to address the issue of criminal prosecution thresholds, which serve as a significant obstacle to more effective and deterrent enforcement. For years, it has been known that counterfeiting operations actively exploit the loopholes that exist as a result of criminal thresholds by limiting the volume of counterfeit products held in a single location, falsifying business records, and adopting other simple practices to limit their criminal exposure. The situation is exacerbated by the practices of courts and prosecutors in calculating illegal business volume based upon on-site seizures rather than investigating further into the actual volume of illegal activity over time, or refusing to include semi-finished products or components in those calculations. This frustrates enforcement initiatives, prevents convictions, and minimizes penalties for offenders, reducing overall deterrence. China should take concrete action to eliminate these thresholds, which would provide enforcement personnel and prosecutors with greater flexibility, offer significant leverage to encourage lower-level offenders to cooperate with investigations, and generally increase the efficiency and effectiveness of their efforts.

IACC members commented positively regarding the judicial system in China in 2014, noting improvements in the expertise of both judges and prosecutors, and the successful conclusion of cases with sentencing and fines that follow statutory guidelines. Beijing Haidan court was singled out as a good example of a court that imposes strict penalties, and the establishment of specialized IP judiciary in Beijing and Shenzhen has been welcomed by rights-holders. Regrettably though, some rights-holders point out a lack of consistency within the judicial system, underscoring the need for additional training

and guidance to clarify applicable legal standards. While courts in major cities tend to demonstrate greater knowledge and expertise on issues related to intellectual property, that is not always the case in more far-flung courts. As a result, sentencing disparities between provinces is a common concern.

Widespread retail sales of counterfeit and pirated goods have long been a major concern for rights-holders in China, and are viewed as a major impediment to market access. Retail sales in well-known outlets such as the Silk Market, the Pearl, and countless others have been a focus of complaints – and litigation – for a number of years, yet the distribution remains rampant across every product sector. For their part, retailers (and the landlords who provide vendors with the facilities to sell their illicit wares) remain largely undiscouraged due to sporadic and ineffective enforcement. As discussed herein, the ineffectiveness of administrative measures, the thresholds for criminal prosecution, and the failure to look beyond inventory on-hand when actions are taken all contribute to the retail problem. As noted in last year’s comments, the issues are compounded by bureaucratic hurdles to legitimate manufacturers’ entry into the market.

While the retail distribution concerns of rights-holders in China were traditionally limited to the realm of brick-and-mortar shops, that has changed drastically in recent years, as we’ve seen an explosion in the trafficking of counterfeit and pirated goods online via both stand-alone rogue websites and large-scale trading platforms. This trafficking has been a major focus of the IACC’s enforcement and engagement efforts on behalf of its members in recent years, with the launch of our RogueBlock® program in 2012, and the subsequent launch of our IACC MarketSafe® initiative in 2014. The former program was developed in cooperation with partners in the payment processing sector, and is designed to identify illicit trafficking online, and to cut off the mechanisms used by the operators of those sites to receive payments. The IACC MarketSafe program, meanwhile, was developed in collaboration with the Alibaba Group, and is intended to address the sale of counterfeit goods on the Taobao and Tmall platforms – two of the largest consumer-facing marketplaces in China.

Between its commencement in January 2012, and through October 2014, the RogueBlock program has identified over 11,000 rogue websites, and resulted in the termination of over 4,100 individual merchant accounts. Analysis of the data generated by the program indicates a disproportionate volume of these sites – and equally important, the financial institutes that are providing their merchant capabilities – are based in China. In contrast to the retail trafficking that has traditionally been a concern for rights-holders, the overwhelming majority of the

China-based rogue sites appear to be directed at U.S. (and to a lesser extent European) consumers, rather than at the domestic market.<sup>5</sup>

As noted in last year's submission, operators of these rogue sites are increasingly turning to China-based rogue PSPs - illegitimate payment service providers who aid the sites in avoiding detection by means of aggregation and other tools.<sup>6</sup> This business model presents obvious difficulties for any brand seeking to enforce its rights online, particularly in light of the frequent reluctance of Chinese banks to comply with U.S. court orders to freeze counterfeiters' assets and provide account records in such cases.<sup>7</sup> 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 further engagement with the Chinese regulatory agencies to discuss potential solutions.

In May 2014, the IACC MarketSafe program commenced, following lengthy discussions between our organization and the Alibaba Group, seeking a collaborative approach to addressing long-standing concerns about the trafficking of counterfeit goods on the Taobao and Tmall platforms. As of October 2014, participants in the pilot program had submitted approximately 45,000 listings related to illicit products. We will continue seek to refine the program and improve its effectiveness in 2015, and are hopeful that other major actors in this sector will be open to similar collaboration. Our efforts to date have demonstrated that where there is true cooperation and partnership, we can have a substantial impact on the trafficking of counterfeit and pirated goods; but it is incumbent upon all of the participants in the online ecosystem to work together in order to ensure the safety and legitimacy of the online marketplace.

While there has been some notable progress in this area, unfortunately, much remains to be done in China in this regard. Takedown procedures on many platforms frequently become circular affairs in which listings for illicit products are removed, but immediately re-posted by the sellers. Until platform operators institute and enforce strict punitive measures on such recidivists, including permanent bans from selling on

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<sup>5</sup> The sites, for example, are English-language sites, with pricing in U.S. dollars.

<sup>6</sup> 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>.

<sup>7</sup> 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).

the platform, significant improvements are unlikely. Further, platforms and service providers must be willing to take a more proactive approach, without the need for constant monitoring and intervention by rights-holders, where sellers are trafficking in clearly counterfeit products.

As noted above, China remains far and away the single largest source of counterfeit and pirated goods entering the U.S. market, and others around the world. However, rights-holders generally speak positively regarding their interactions with China Customs. Customs is described as generally responsive to rights-holders' requests for assistance, and proactive in its approach to enforcement. Rights-holders indicated that Customs has engaged in more active dialogue on IP issues in 2014, and noted that recordation of their rights and increased training have both shown positive results. Unfortunately though, the overall outbound volume of counterfeit goods remains exceedingly high. We believe that some of these concerns could be alleviated by greater collaboration and intelligence sharing between Customs and rights-holders, particularly with regard to enforcement against express delivery and international mail shipments which have increasingly become the preferred method of delivery for counterfeiters – especially those operating rogue sites directed at consumers overseas. In addition, a number of members have noted growing concerns regarding cross-border trafficking in Northwest China; we would encourage the government to explore the assignment of additional resources and personnel to this region.

IACC members again highlighted the need for improved efficiency and transparency in regard to the disposition of seized counterfeits and instrumentalities. The need for improvement in this area is a long-standing complaint of rights-holders, noted in the IACC's 301 submissions for a number of years. The current process is described by rights-holders as often exceedingly slow, which significantly increases the costs associated with storage of the goods. In many cases, rights-holders are provided little or no information about the destruction of infringing goods, and generally have not been permitted to witness the goods' destruction. The adoption of clear policies in this area 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. The appropriate seizure and disposition of instrumentalities, the policy is viewed as essential to preventing recidivism, by eliminating counterfeiters' ability to immediately resume their illicit businesses following enforcement actions (or at the very least, making it more difficult and more expensive). The lack of clear policies and procedures, and their inconsistent application, undermines faith in the system, while also feeding concerns with regard to official corruption. We strongly encourage the Chinese government to establish clear guidelines regarding the destruction of counterfeit goods and instrumentalities.

Notwithstanding the progress that China has demonstrated in some respects, it remains the country of greatest concern for IACC members in 2015. The IACC encourages continued reforms to China's IPR regime, and urges China to address significant concerns of rights-holders, including:

- Providing for greater cooperation between administrative and criminal enforcement authorities with the aim of increasing the volume of case transfers and the imposition of deterrent criminal penalties where appropriate;
- Developing a pilot program with China Customs and industry partners to address the exploitation of mail and express delivery services for the exportation of counterfeit goods to consumers abroad;
- Developing best practices for Chinese financial institutions and entities to help cut off the payment facilities and the profits of counterfeit merchants operating online, and to identify bad actors currently in the system;
- Adopting clear policies and practices to ensure the efficient and transparent destruction of seized counterfeit goods and instrumentalities;
- Providing leadership and oversight to ensure the consistent application of IP laws throughout the country; and
- Providing necessary personnel and resources to address the growing concern of cross-border trafficking in Northwest China.

## INDIA

### **Recommendation: Priority Watch List**

India was retained on the Priority Watch List in the USTR's Special 301 Report in 2014, which highlighted a range of concerns across every area of the IP landscape, while also noting the "critical role that meaningful, constructive, and effective engagement between India and the United States should play in resolving these concerns."<sup>8</sup> While the intervening months since the publication of the 2014 report have seen an apparent increase in the engagement by the Modi administration on issues related to IPR, many of the concerns noted by rights-holders in last year's comments remain unchanged today. We encourage USTR to continue its efforts with regard to India, and likewise, encourage the Indian government to move ahead with concrete actions that support its commitment to both structural and substantive improvements in the protection and

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<sup>8</sup> 2014 Special 301 Report, USTR

<https://ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf>.

enforcement of intellectual property rights in 2015. For now though, the IACC recommends India's continued retention on the Priority Watch List.

Rights-holders from across a variety of sectors, including consumer electronics, apparel and footwear, pharmaceuticals, and petro-chemicals continue to see significant levels of counterfeit products in the market. Likewise, rights-holders report a range of concerns with regard to other forms of intellectual property protection ranging from patent infringement, trade secret theft, and high levels of both online and hard goods copyright piracy.

Last year, the IACC highlighted concerns of trademark owners with regard to India's current statutory regime and its negative impact on enforcement, and we reiterate those issues here. Section 115(4) of the Trade Marks Act of 1999<sup>9</sup> provides for a procedure which requires police personnel to seek a preliminary opinion from the Registrar of Trade Marks in advance of any anti-counterfeiting enforcement. The requirement results in significant delays, with some rights-holders stating that obtaining an opinion from the Registrar often takes in excess of one month, during which time the target of enforcement continues to do business as usual. This unnecessary administrative delay is viewed by some as acting as a complete shield against enforcement for "fly-by-night" vendors who have moved on long before any action can be taken. Some trademark owners have also cited difficulties in obtaining enforcement assistance in cases involving the trafficking of labels and packaging rather than finished goods.

In addition to these trademark sector concerns, IACC members have noted the need for a variety of legislative enactments related to copyright in order to bring India's legal regime in line with the current technological landscape, including legislation to fully address camcording and pre-release piracy and to effectively deal with online trafficking.

IACC members were largely positive in their comments regarding India's law enforcement agencies, noting that they are generally supportive of IP enforcement efforts. However, much as is the case in China, members have highlighted a disparity in the assistance they receive from state to state. Greater efforts are needed to standardize practices and procedures, in addition to providing necessary staffing and resources to meaningfully address what clearly remains a huge problem in India.

While there have been some signs for optimism under the Modi administration, India has yet to demonstrate concrete progress that would justify its removal from the Priority Watch List. The volume of counterfeits in the market remains severe, and the range of issues that continue to challenge rights-holders is expansive. We applaud USTR's

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<sup>9</sup> The Trade Marks Act (1999), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=128107](http://www.wipo.int/wipolex/en/text.jsp?file_id=128107).

continuing efforts to engage the Indian government on these important matters, and encourage India to take the following actions in the coming year:

- Increase engagement with the private sector to develop a roadmap for reforms that will lead to practical improvements in the IP regime;
- Adopt necessary legislation and amendments to remove impediments to enforcement that currently exist;
- Expand efforts in training and in providing clear guidance to law enforcement personnel to increase the uniform application of IP laws and consistency of enforcement throughout the country.

## **INDONESIA**

### **Recommendation: Priority Watch List**

The IACC recommends Indonesia's retention on the Priority Watch List in 2015, due to rights-holders' continued concerns noted in both the IACC's comments from a year ago, and also highlighted in USTR's final report. During consultations with members over the past year, rights-holders from a variety of sectors including consumer electronics, IT, agricultural chemicals, entertainment, and apparel and footwear have reported significant, and in some cases, severe levels of counterfeits in the local market.

Among the most widely-noted problems was the need for improved border control measures. Though local manufacturing is not generally viewed as a major concern, counterfeit products are pervasive in the local retail market; the problem is pronounced in popular resort areas catering to tourists. Some rights-holders also indicated problems with transshipment in addition to those imports for local sales.

Rights-holders also repeatedly voiced concerns regarding a lack of professionalism and potential corruption within some law enforcement agencies, noting instances where targets of enforcement actions received advance notice of the raids tourist, and as a result were able to avoid prosecution.

USTR's acknowledgement in last year's report of the need to address issues of efficiency and transparency in the judicial system, as well as the need for more deterrent sentencing, was likewise echoed by IACC members.

In light of the above, the IACC supports Indonesia's retention this year on the Priority Watch List, and encourages the Indonesian government to:

- Increase the resources available to Customs agencies as a means to decreasing the volume of counterfeit goods imported or transshipped through the country;
- Undertake increased enforcement efforts in retail markets;
- Provide additional training and resources to the judiciary as a means to improving the efficient handling of cases.

## **MALAYSIA**

### **Recommendation: No Recommendation**

For a number of years in the early- to mid- 2000s, Malaysia was a regular presence in the IACC's Special 301 comments, as a result of widespread optical disc piracy, and a number of other rights-holder concerns. The IACC included abbreviated comments concerning Malaysia in its Special 301 submission last year, for the first time since 2007, and we continue to monitor the developments there.

IACC members representing several product sectors have noted an apparent increase in recent years with regard to both local manufacturing and retail sales of both domestically-produced and imported counterfeit products. These complaints were most pronounced among the apparel, electronics, and petro-chemical sectors. End-user piracy likewise remains a concern in Malaysia.

The breadth of rights-holder concerns roughly parallel those identified in neighboring Indonesia, including the lack of deterrent penalties in both criminal and civil contexts, the need for more efficient handling of cases by prosecutors and the judiciary, and the need for more robust border control measures.

Rights-holders offered mixed reviews of enforcement agencies, with some describing a "permissive" attitude among enforcement personnel with regard to counterfeits, concerns about corruption due to targets being tipped off in advance of actions, and a lack of follow-through on the part of prosecutors where enforcement actions had resulted in the seizure of goods or arrests of individuals. One member however singled out the Ministry of Domestic Trade, Cooperative and Consumerism ("MDTCC") positively, commending the Ministry's consistent support for raids.

Courts are reportedly unwilling to take up charges laid under the Trade Description Act of 2011, and offenders generally face little risk of criminal sanctions. As a result, enforcement actions may result in little more than a loss of counterfeiters' inventory. Greater political will, training – especially among the judiciary – and increased

awareness will be essential to increasing the level, and effectiveness, of IP protection and enforcement in Malaysia. In 2015, the IACC encourages the government of Malaysia to take concrete actions to:

- Ensure proper training and guidance is available to the judiciary to adequately deal with IP cases; and
- Take steps to increase awareness both among consumers and within the government about the importance of intellectual property rights.

## **PHILIPPINES**

### **Recommendation: No Recommendation**

The IACC continues to monitor the progress demonstrated by the Philippines since its recent removal from USTR’s Special 301 Watch List, following a number of years at the Watch List and Priority Watch List level. While the IACC acknowledges that progress has been made in recent years, rights-holders continue to experience a number of problems related to IP protection and enforcement, and we encourage USTR to maintain its positive engagement with the Intellectual Property Office of the Philippines (“IPO-PHL”).

IACC members from a number of sectors continue to report significant levels of trafficking in counterfeit goods in the Philippines. Retail sales remain a primary concern, in spite of the government’s efforts to clean up large-scale trafficking that had persisted for many years at well-known markets including Green Hills and the Robinson Wholesale Market. A number of IACC members have registered concerns during the past year related to online marketplace sites based in the Philippines, and greater efforts should be made to ensure that the progress seen in the brick-and-mortar world is not diminished by increasing problems online. Improving Customs enforcement likewise remains a priority concern, as most of the infringing product in the retail market is believed to be sourced from China.

The handling of cases by the court system remains unacceptably slow, and rights-holders would welcome additional progress in that area.

As in past years, IACC members’ comments with regard to enforcement personnel were largely positive; the National Bureau of Investigation (“NBI”) was singled out by one member for praise, describing the agency as “very helpful.” In spite of the progress seen in recent years with regard to enforcement, counterfeit and pirated goods remain widely-available in the retail market. It is important that enforcement actions be

supported by the courts both in terms of prompt adjudications, and in the imposition of truly deterrent sentencing for convicted parties.

The IACC is encouraged by the efforts of the Philippines to undertake systematic improvements to its IP regime, and we welcome the opportunity to assist the government in realizing further progress. In 2015, the IACC encourages the government of the Philippines to:

- Expand upon its recent efforts to reduce the availability of counterfeit goods in the retail market;
- Increase the training and expertise of the judiciary to substantially increase the efficiency with which IPR cases are handled; and
- Continue to publicize its efforts as a means to increasing public awareness regarding the importance of IPR.

## **THAILAND**

### **Recommendation: Priority Watch List**

The IACC recommends Thailand's retention on the Priority Watch List again in 2015, in light of a variety of significant problems faced by rights-holders outlined herein, and in past Special 301 reports.

IACC members first reported a sharp decline in support for IP enforcement efforts in 2013, coinciding with the widespread political upheaval in the country at that time. With the arrival of the new government in 2014, rights-holders were hopeful that police resources that had been diverted to handle the civil unrest would return to their previous activities, and resume IP enforcement missions. Regrettably, it appears that such hopes were unfounded, as the new government has diverted police and related enforcement resources to anti-corruption efforts that have been implemented. Rights-holders report little or no cooperation from the Royal Thai Police, Royal Thai Customs, and the Thai Department of Intellectual Property. Brand owners remain concerned that the government's lack of priority and attention to economic crimes such as counterfeiting will fundamentally undermine the IP regime – and equally important, consumer attitudes towards counterfeiting and piracy – creating an environment in which production and distribution will flourish.

The range of issues cited by IP owners likewise remains extensive, including: manufacturing (though most goods reportedly enter the country through Cambodia,

sourced from Vietnam and China), inadequate border measures, retail distribution, insufficient and non-deterrent penalties, and the need for greater transparency in the disposition of seized counterfeits and instrumentalities.

Trademark owners also continue to express frustration with regard to the Trademark Registrar and the Trademarks Appeal Board as a result of their overly-formalistic approach to registrations, oppositions, and cancellations.

Based on member feedback, the apparel and footwear sector appears to be the most affected by Thailand's counterfeit trade, both in the traditional brick-and-mortar environment, and online. Rights-holders identified the Rongkluea Market as a perennial concern; one of the largest in the country, Rongkluea serves as both a retail market for tourists and a wholesale market for traders operating throughout Thailand. It is described by some as "untouchable," in part due to perceived protectionism, and in part due to organized criminal involvement which makes enforcement largely impossible.

In light of all of the above considerations, the IACC recommends that Thailand be retained on the Priority Watch List in this year's Special 301 report. In 2015, the IACC encourages the Thai government to:

- Substantially increase the number of IP enforcement actions;
- Explore opportunities for collaboration with partners within the region to address mutual concerns related to cross-border enforcement; and
- Demonstrate considerably greater political will to deal with the problems facing rights-holders, as outlined herein.

## **VIETNAM**

### **Recommendation: Watch List**

Although the IACC did not provide comments on the country during last year's Special 301 process, we concurred with USTR's placement of Vietnam on the 2014 Watch List, and support its retention on the Watch List in 2015 as well.

Rights-holders continue to express a high level of concern over Vietnam's commitment to IP enforcement. Though there has been notable progress with regard to the country's legal regime over the years, as one trademark owner commented, "Legal rights are only as good as the ability of the IP owners to enforce them, and in this regard, Vietnam still

falls short.” Rights-holders have frequently cited Vietnam’s over-reliance on administrative enforcement as a chief concern with the country’s IP regime, and that criticism was repeatedly raised during this year’s consultations. Criminal enforcement – and the increased deterrence associated with criminal penalties – remains a rarity. This factor is perhaps all the more frustrating because when criminal sanctions are brought, rights-holders have been largely pleased with regard to courts’ imposition of sentences.

Retail sales of counterfeit goods remain widespread across a variety of product sectors, with those problems most pronounced in major cities such as Hanoi and Ho Chi Minh. Perhaps more troubling though is that rights-holders report that many retailers’ attitudes towards selling counterfeits indicates few qualms in doing so, few concerns of prosecution, and little understanding of the health and safety implications inherent in their sales.

One especially disconcerting report this year came from the personal care sector, where a rights-holder discovered counterfeit versions of one of their products had infiltrated the legitimate supply chain of a major hospitality provider in Vietnam. Though the incident was quickly discovered, it serves as a reminder of the need for adequate and effective supply chain security, and the willingness of counterfeiters to exploit any lapses thereof.

Inadequate border measures also remain a major concern, as goods continue to flow into Vietnam from China, and as noted above, continue to flow from Vietnam to other countries in the region including Cambodia and Thailand.

Vietnam has made some notable progress with regard to capacity building and awareness over the course of the past year, hosting major events with INTERPOL, as well as with private-sector groups. We commend the Vietnamese government for its efforts in this regard, and believe that direct, one-on-one engagement with law enforcement partners and with rights-holders are an essential part of improving the overall level of IP protection and enforcement in the country. Such collaboration not only provides practical insight regarding what is or is not effective, but also helps to develop trust and a spirit of cooperation which should pay dividends in the future. In light of the substantial challenges that remain to be addressed however, the IACC recommends Vietnam’s retention on the Special 301 Watch List. In the coming year, we encourage the Vietnamese government to:

- Adopt policies to encourage the referral of administrative cases for criminal enforcement; and
- Continue efforts related to capacity building and training with international partners.

## EUROPE, MIDDLE EAST, AFRICA

### ITALY

#### **Recommendation: No Recommendation**

Italy returns to the IACC's Special 301 filing for the first time since 2012. While we make no specific recommendation for placement on the Watch List in 2015, IACC members wish to draw attention to one particular area of concern with regard to the country's current legal regime, related to the destruction of counterfeit goods.

The adoption of Article 23 of EU Regulation No. 608/2013<sup>10</sup>, regarding simplified procedures for the destruction of counterfeit goods, was viewed optimistically by rights-holders, and could be used to great effect to improve the efficiency of European customs agencies' handling of counterfeit goods interdicted at the border. Regrettably, these expedited measures have not been available to rights-holders in Italy due to a conflict between the provisions of the Regulation, and Italian criminal law. On December 30, 2013, Italian Customs published an official statement, Circolare No 24/D, noting the conflict, and precluding the use of the expedited destruction procedures. Rights-holders would support amending the conflicting law, and believe that doing so would significantly reduce the costs associated with the storage of counterfeit goods. We would welcome the opportunity to engage with the Italian authorities regarding the potential benefits of adopting such expedited procedures.

### SPAIN

#### **Recommendation: No Recommendation**

The U.S. Trade Representative continued its Out of Cycle Review ("OCR") of Spain in 2014, with a focus primarily on ensuring concrete progress to address long-standing copyright concerns. While the IACC makes no specific recommendation for Spain's placement in this year's comments, we would like to draw attention to additional ongoing concerns for rights-holders in the trademark sectors.

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<sup>10</sup> Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013, Concerning Customs Enforcement of Intellectual Property Rights and Repealing Council Regulation (EC) No 1383/2003, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0015:0034:en:PDF>.

In this year's consultations, rights-holders note continued concerns in Spain with regard to the overall level of counterfeits in the Spanish market, particularly with regard to the online trafficking of counterfeit goods. The disposition of seized goods likewise remains a focus of rights-holders with special attention being paid to the implementation of EU Regulation No 608/2013, which entered into force in January. Based on responses from member companies, the apparel, footwear, and accessories sectors appear to face the most significant levels of product counterfeiting.

Rights-holders voiced approval for the efforts and support provided by Spanish law enforcement and Customs, but indicate that those efforts have been hampered by a number of factors. Enforcement personnel are described as efficient and responsive, but lacking the necessary resources. Brand owners also point to recent case law regarding the interpretation of Article 274.2 of the Spanish Criminal Code, which proscribes penalties for counterfeiting offenses, as an impediment to effective criminal enforcement. Current law provides nominal penalties for retail level distribution, and provides only a misdemeanor charge for offenses involving profits of less than 400 Euros. In practice however, the low level penalties discourage enforcement against retail sales, while also diminishing the leverage that law enforcement or prosecutors might have in working up the distribution chain (because vendors face little threat that significant penalties will be imposed).

Rights-holders also continue to cite judicial delays; as a result, there is support for additional training for the judiciary, or for specialized IP tribunals to increase the efficiency with which cases are handled.

Members have commented positively with regard to the political will demonstrated by the government in seeking to address the deficiencies in Spain's IPR regime, and we continue to monitor the implementation of legislation that began to take effect last year. In addition to the structural and substantive reforms that have been enacted, rights-holders encourage the government to undertake greater efforts to educate consumers, and to raise public awareness regarding the benefits of IP and the range of harms caused by the trafficking of counterfeit and pirated goods. We look forward to continuing dialogue with the Spanish government in 2015.

## **TURKEY**

### **Recommendation: Watch List**

IACC members have again recommended Turkey's inclusion on the Watch List this year, for the seventh year in a row, due to continuing concerns in a number of product

sectors. Turkey remains one of the leading points of entry for counterfeits into the European Union, ranking 4<sup>th</sup> in the number of items seized, and 3<sup>rd</sup> in terms of the value of infringing goods.<sup>11</sup> Rights-holders noted little or no improvement with regard to issues that have been highlighted in previous years. Domestic retail sales within the Turkish market and the need for substantial improvements in border enforcement to prevent illicit smuggling remain priority concerns, while the judiciary, levels of enforcement, and non-deterrent penalties were also sources of frustration. For these reasons, and those discussed below, we recommend Turkey's retention on the Special 301 Watch List in 2015.

As noted above, Turkey again appears near the top of the European Commission's most-recently reported statistics, ranking behind only China and Hong Kong in terms of seizures by value.<sup>12</sup> Turkey appears as one of the three most prominent sources of counterfeit goods in a number of categories, including cosmetics and fragrances, a category in which Turkey was the country of provenance for a full majority (51.25%) of the goods seized at EU borders. The IACC has noted Turkey's prominence in the EU seizure statistics for several years, underscoring the need for fundamental improvements in the country's IPR and border enforcement regimes. More concrete steps must be taken to enhance Turkey's border control measures.

While some rights-holders indicate support for legislative reform in the country, the majority of concerns cited by IACC members in this year's consultations were focused on the need for greater and more consistent enforcement of the laws currently in place. Rights-holders have identified significant problems with retail distribution in both large cities and smaller seaside towns including Bodrum, Marmaris, Kemer, Fethiye, Kusadasi, and Kundu, with the latter category catering primarily to tourists (both from within Turkey, and from abroad). Protectionism is a frequent concern with regard to the smaller towns, as stores dealing in counterfeit goods often generate significant tax revenue. Enforcement is likewise frustrated by structural impediments, such as a lack of ex officio power for police actions in IP cases. The judicial process for obtaining a warrant or court order for seizure is described as both slow and difficult. Judges frequently lack expertise in IP issues, and are often unwilling to accept evidence of product samples, test purchase receipts, and the like.

While a number of rights-holders have commented positively regarding their

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<sup>11</sup> *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border 2013*, European Union (2014), [http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/2014\\_ipr\\_statistics\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2014_ipr_statistics_en.pdf).

<sup>12</sup> *Id.*

interactions with law enforcement, they lack the resources and empowerment necessary to have a significant impact on the overall volume of counterfeiting. In 2014, we received reports of significant declines with regard to law enforcement support, attributed by some to a restructuring of the national police. Support for raids and the level of Customs seizures improved somewhat in late-2014, and it is hoped that that progress will carry over into 2015. Where enforcement opportunities are available though, it is essential that deterrent penalties be imposed. Last year, our comments noted the enactment of amendments to the Pharmaceutical Preparations Law (Law No. 1262), to provide for enhanced penalties – including up to 5 years imprisonment. While we are unaware at this time of any individuals sentenced under those provisions, we encourage the Turkish government to consider increasing the authorized penalties for trafficking in other types of counterfeit goods as well.

In light of the continued concerns related to the enforcement of IP rights both within and at Turkey’s borders, the IACC recommends its retention on the Watch List in 2015. In the coming year, we encourage the Turkish government to take the following steps towards combating the trafficking of counterfeit goods:

- Increase direct engagement and collaboration with IP owners to improve customs targeting of illicit shipments;
- Work with rights-holder organizations to develop and offer necessary IPR training at all levels, from the police to the judiciary;
- Review the existing statutory and regulatory regimes to identify structural impediments to IP enforcement efforts; and
- Leverage high-profile enforcement actions as a means of educating the public about the importance of IP protection.

## **UNITED ARAB EMIRATES**

### **Recommendation: Watch List**

The IACC has highlighted growing concerns of rights-holders regarding the level of IP protection and enforcement in the United Arab Emirates (“UAE”) in each of the past two years, and again recommends the UAE’s inclusion at the Watch List level. While we have seen positive engagement from government authorities during 2014 and are actively seeking to increase the level of cooperation between rights-holders and the Emirates’ enforcement agencies, we encourage close monitoring of the situation there by USTR. The UAE remains an important hub for regional and global trade, and has been identified as a key transit point for the trafficking of counterfeit goods.

The scope of industries affected by the trafficking of counterfeit goods in the UAE was nearly universal in 2014, with IACC members from a variety of sectors noting areas of concern ranging from border measures, transshipment and exploitation of free trade zones, to the need for more deterrent penalties, and retail and wholesale trade, along with long-standing issues related to the disposition of seized goods and instrumentalities. While the past year's EU statistics appear to demonstrate an overall decrease in the volume of seizures of counterfeit goods originating from the UAE, the country remains a major source in several categories including ink cartridges and toner, mobile phones, cigarettes, and fashion accessories such as handbags.<sup>13</sup>

A number of members provided positive reports with respect to their interactions with enforcement agencies in the UAE, singling out the police in Ajman, Dubai, and Umm Al Quwain, and economic development departments in Dubai and Sharjah for special praise. The Ministry of Economic Development was praised for its "genuine enthusiasm" in dealing with matters related to IPR. Police are similarly lauded for their willingness to conduct raids and seize goods. Prosecutors and the judiciary received compliments for their engagement and responsiveness, but members noted that the efforts and enthusiasm demonstrated in the UAE are undermined by non-deterrent penalties. One rights-holder cited a case that they were aware of involving a seizure of counterfeit goods valued into the tens of millions of dollars, but for which the punishment imposed was approximately AED 10,000 (roughly \$2,700). Clearly, the assessment of penalties at such a modest level will have no impact on a multi-million dollar trafficking operation.

Rights-holders' experiences with Customs in the UAE has, unfortunately, been less positive than the interactions detailed above with police and economic development agencies. Customs authorities are described as being concerned primarily with trade facilitation, while IPR enforcement remains a lower priority. Brands have also been frustrated by Customs officials' apparent reluctance to operate inside of free trade zones ("FTZs") which are frequently exploited for the finishing and assembly of components imported from abroad.

In addition, rights-holders continue to express concerns related to the transparent disposition of goods. In past years' submissions, the IACC has outlined opposition to proposals that would result in the re-exportation of seized goods to their country of origin. We remain concerned with the implementation of those proposals which would largely preclude any meaningful opportunity for rights-holders to trace goods back to their source and take action at the point of origin.

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<sup>13</sup> *Report on EU Customs Enforcement, supra*

Improved communication and coordination between enforcement agencies in the Emirates would likely pay significant dividends in addressing the issues raised herein. The IACC looks forward to working with partners in the UAE to address these concerns in 2015, and encourages further engagement from the U.S. government to enhance collaboration between enforcement agencies and the private sector throughout the UAE. In the coming year, the IACC requests that the government of the UAE:

- Continue its work 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.

## **KENYA**

### **Recommendation: Watch List**

Kenya appeared for the first time in the IACC's 2014 Special 301 submission to the U.S. Trade Representative, with members citing concerns over the increased infiltration of counterfeit goods into African markets. This year, IACC members again recommended Kenya's inclusion in our comments, due to the continuation of those trends. A growing retail trade among counterfeits in several product sectors – believed to be sourced primarily from China – and local assembly and finishing of components, were the primary complaints raised.

IACC members commented positively with regard to Kenya's Anti-Counterfeit Act (2008), which provides for criminal measures and significant penalties. A first time offender under the act can receive a prison term of up to five years, or a fine of not less than three times the prevailing retail price of comparable genuine goods (or both). Recidivism is also addressed in the statute, which authorizes an increased 15 year maximum term and/or fine of not less than five times the retail value of comparable authentic goods. One perceived deficiency of the current law however is its lack of minimum penalties, which in practice have led to disparate sentencing. Under current law, for example, a habitual receiver could receive a significantly lower penalty than a first-time offender. This practical concern could be addressed in a number of ways,

including a legislative amendment, the establishment of clear sentencing guidelines, or perhaps simply by providing additional training to the judiciary regarding the range of harms caused by counterfeiting. Training might also have a positive effect on the pace of the judicial process, which some rights-holders have stated moves very slowly.

Rights-holders spoke positively about their dealings with Kenya's Anti-Counterfeit Agency ("ACA"), which remains engaged and cooperative with rights-holders. IACC members likewise applaud the Kenya Revenue Authority's ("KRA") creation of a special unit to deal with counterfeiting and smuggling. However, rights-holders note that KRA lacks authority to pursue enforcement against exports or goods in-transit. The IACC would be supportive of legislation that empowered Kenyan authorities in that regard. That authority could, in addition, play an important role in cross-border, regional efforts with other key countries in Southwestern Africa, such as Tanzania and Mozambique, which in turn could allow for the more efficient application of resources by each country. In the coming year, the IACC encourages the government of Kenya to take concrete steps to:

- Ensure the imposition of deterrent penalties;
- Provide opportunities for judicial training in IPR; and
- Ensure that Customs officials are provided with the necessary authority to address cross-border trafficking of counterfeit goods.

## **MOZAMBIQUE**

### **Recommendation: Watch List**

Mozambique, like Kenya, appears for the second consecutive year in the IACC's Special 301 comments due to members' continuing concerns related primarily to border control measures. In last year's submission, Mozambique was described as "a gateway for the distribution of counterfeit goods into southern Africa," and rights-holders echoed those sentiments again during this year's process. Significant improvements with regard to resourcing, inter-agency cooperation, and political priority are essential to improving the level of protection for intellectual property rights in Mozambique.

The enforcement environment remained extremely challenging throughout 2014, with members citing a variety of contributing factors. Serious and entrenched organized crime interests are said to be active in the smuggling of counterfeit goods and other illicit trade, using well-established and sophisticated distribution networks to evade detection and prosecution. Rights-holders have also raised concerns regarding the corruption within enforcement agencies which may be tied to those organized criminal

operations. Enforcement agencies also remain under-resourced to deal with the growing problems, and to monitor Mozambique's border crossings. As a result, responsiveness to rights-holders' requests for assistance remained inconsistent in 2014.

Inadequate border measures contribute to widespread importation for sale in the domestic retail market, as well as transshipment to other countries within the sub-region. These issues are exacerbated by a lack of information sharing and collaboration both within the country and with neighbors in the region. Enforcement is likewise hampered by insufficient technological infrastructure and expertise.

Rights-holders have reported lax government procurement policies and procedures that have resulted in significant losses from large purchases of counterfeit goods. The IACC views such incidents as teachable moments that could be used to underscore both the harms associated with the trafficking of counterfeits, and the potential benefits of providing for stronger safeguards and deterrent penalties. The former would help to preserve resources, while the latter could prove a source for self-funding of infrastructure and resource expansion. In addition, some rights-holders have proposed the adoption of robust "proceeds of crime" legislation as a means to shifting the burden of costs associated with enforcement away from the government and brand holders and on to the offenders themselves.

In the coming year, the IACC encourages increased engagement with the government of Mozambique as a means to:

- Increasing political will to address these growing problems;
- Fostering greater collaboration with neighboring countries to address mutual concerns related to cross-border smuggling; and
- Developing greater awareness both within the government and the public about the harms presented by the illicit trade.

## **NIGERIA**

### **Recommendation: Watch List**

Rights-holders from a number of product sectors, most notably in the apparel, consumer electronics, and IT sectors, continued to report extensive problems with regard to the protection and enforcement of intellectual property rights during 2014. The most frequently cited concerns included rampant retail distribution, insufficient border controls, official corruption, lax penalties, and inefficient judicial proceedings.

Joseph Odumodu, Director General of the Standards Organisation of Nigeria (“SON”) has described the current penalties for counterfeiting offenses as more of an incentive to engage in activity than a disincentive. While speaking at an anti-counterfeiting conference, Mr. Odumodu referenced the maximum fine of N50,000 under the current law, and stated, “Knowing the value of what he is likely to make from the business, he would prefer to break the law by bringing the fake and counterfeit goods into the country and keeping the fine ready to pay in case he is caught in the process.”<sup>14</sup> That fine, roughly equivalent to \$250, is grossly inadequate to serve as a deterrent; even those nominal fines are rarely imposed however. As one member characterized the situation, the “practical reality is that IP enforcement actions in Nigeria seldom occur.” And where enforcement actions do take place, delays in the judicial system have been commonplace. As a result, many rights-holders have become discouraged from pursuing their rights in Nigeria. Seeking enforcement at the borders also remains difficult due to legislative gaps, porous borders, and insufficient resources and training.

Rights-holders do express some optimism with regard to legislative improvements that are reportedly in the pipeline, including provisions that should soon permit the expedited destruction of counterfeit goods. That provision could at least alleviate some of the costs associated with the storage of goods during lengthy judicial proceedings, while also ensuring that seized goods do not re-enter the stream of commerce.

Significant steps are necessary in order to provide substantive improvement for rights-holders in the country. In 2015, the IACC encourages the government of Nigeria to:

- Explore opportunities for addressing long-standing concerns of official corruption and increasing accountability by auditing enforcement agencies;
- Adopting policies to increase the availability of deterrent-level penalties; and
- Provide greater opportunities for judicial training to improve the efficiency with which IP cases are handled.

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<sup>14</sup> Bassey Udo, *Nigeria’s Standard Organisation Seeks Review of Laws Against Counterfeit Products*, Premium Times (2014), <http://www.premiumtimesng.com/business/166216-nigerias-standard-organisation-seeks-review-of-laws-against-counterfeit-products.html>.

## RUSSIA, UKRAINE, CAUCASUS

### RUSSIA

#### **Recommendation:      Priority Watch List**

The IACC has recommended Russia's inclusion at the Priority Watch List level in its annual Special 301 submissions for more than a decade. While the country has made sporadic progress over the years in protecting and enforcing intellectual property rights, the challenges faced by rights-holders remain exceedingly large. Regrettably, IACC members have reported little change in the situation on the ground during the past year, likely due to the economic and political in Russia and the Crimea which have drawn critical attention away from improving its IPR regime. As such, the problems highlighted in last year's comments by the IACC are largely unchanged. Accordingly, we recommend that USTR continue to include Russia on the Priority Watch List in 2015.

Rights-holders across several product sectors highlighted a number of long-standing problems during this year's consultations, and the severity of those problems remained largely unchanged from prior years' submissions. Enforcement issues in Russia have been arguably the greatest concern of rights-holders for years. Russia's border enforcement regime, in particular, is cited as a concern, particularly in light of the country's proximity to large-scale manufacturing of counterfeit goods in China. The insufficient level of enforcement – in addition to a failure to impose deterrent penalties – is viewed as a contributing factor to the widespread availability of counterfeits in the retail market, and likewise to a diminished public perception of the importance of IP protections and of the harms caused by counterfeiting. Traditional brick-and-mortar distribution remains a problem, but Russia has seen explosive growth in online trafficking in recent years, and to date, rights-holders have reported great difficulty in addressing those problems online.

As in past years, the range of industries affected by counterfeiting and piracy in Russia remains fairly comprehensive, including everything from apparel to spirits, information technology and consumer electronics, to pharmaceuticals, all manner of copyrighted works, industrial chemicals, tobacco, and others.

Rights-holders have welcomed progress made in recent years with regard to the implementation of its obligations concurrent with its WTO accession and of other relatively recent legislation. As the IACC noted several years ago, in response to Russia's announced intent to reform its IP laws with the adoption of Part IV of the Civil Code,

laws are only as effective as their enforcement. More must be done to ensure that the rights afforded under the law are meaningful in practice. Rights-holders continue to cite as impediments to enforcement Russia's lack of deterrent penalties, and its high thresholds for applying criminal procedures.

For their part, copyright owners continue to face huge challenges in Russia related to the unauthorized online distribution of works, sales of circumvention devices, and a host of other long-standing concerns that have been discussed in detail in prior submissions.

With regard to Russia's border control regime, rights-holders continue to monitor the implementation of the Customs Union, however previously identified concerns with regard to the consistency of enforcement, and the resourcing of the members of the Customs Union remain at the forefront. Members have also described problems related to official corruption, and a lack of transparency with regard to the disposition of seized goods. Members continue to report growing concerns involving the trafficking of counterfeit goods from Northwest China into Russia, through Kazakhstan.

Despite the numerous issues facing rights-holders in relation to enforcement in Russia, several members commented positively on their interactions with law enforcement and Customs officials noting their receptiveness to working with rights-holders and general interest in IP-related issues. However, enforcement agencies remain critically understaffed and lack the necessary resources and statutory tools to have a substantial impact.

As noted in last year's comments, we would welcome increased transparency throughout the IP enforcement regime, in light of continued reports of official corruption in Russia, and the reported 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.<sup>15</sup>

Given the largely unchanged status of the issues raised by rights-holders in last year's submission to the USTR, we recommend Russia's retention on the Priority Watch List. We encourage the Russian government to take the following actions in the coming year:

- Take necessary steps to improve the level of border enforcement to decrease the volume of counterfeit goods entering the market from China;

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<sup>15</sup> 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>.

- Increase engagement with private-sector stakeholders to develop focused, effective action plans to address long-standing concerns related to online trafficking of counterfeit and pirated goods;
- 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.

## **UKRAINE**

### **Recommendation: No Recommendation**

Ukraine was designated a Priority Foreign Country in the U.S. Trade Representative's 2013 Special 301 Report, largely the result of acts, policies, and processes related to copyright and related rights. In the 2014 report, the USTR provided an update on the status of its investigation noting that although it had determined Ukraine's practices to be unreasonable, no action would be taken in light of the political situation in the country.

The IACC acknowledges the many considerations that must be taken into account in USTR's decision process, and while we make no specific recommendation for the classification of Ukraine in this submission, we do wish to highlight some of the difficulties that rights-holders in the hard goods sectors continue to face in that country.

Like those in the copyright sectors, online trafficking is a major concern for trademark owners. In addition, rights-holders describe a broad range of structural and substantive issues in Ukraine, including the overall level of enforcement, insufficient border measures, non-deterrent penalties, and official corruption. We applaud the USTR for its continued efforts to engage with the government of Ukraine to bring about much needed progress in these and other areas.

## **SOUTH AMERICA**

### **BRAZIL**

#### **Recommendation: Watch List**

The IACC has recommended Brazil's inclusion on the Special 301 Watch List each year since 2008. During this year's consultations, rights-holders from nearly every industry sector continued to report significant and wide ranging problems in the country, most of which have remained largely unchanged from those described in previous years' submissions. Retail sales of counterfeit goods in the Brazilian market are rampant, with noticeable growth in online trafficking. Border measures and non-deterrent penalties, likewise, remain a major concern, along with market access barriers that limit many rights-holders' ability to do business in the country. Accordingly, the IACC recommends Brazil's retention on the Watch List in 2014.

As the largest in South America, Brazil retail market represents a significant growth opportunity for legitimate American manufacturers who depend on IP. That market is significantly diminished by the widespread availability of counterfeit goods in the country. Counterfeits in Brazil continue to be sourced from abroad primarily, though we are receiving increasingly reports of local manufacturing.

Brazil's failure to impose truly deterrent penalties for IP violations remains a primary concern of IACC members. For several years, the IACC's comments have encouraged the enactment of legal provisions that would provide the necessary deterrence; current law provides sentences for importing, exporting or selling counterfeits that generally range from one to three months, or require only the payment of a nominal fine. In practice, sentences are often more lenient, requiring the convicted individual to perform community service. Bill number 333/1999, discussed in previous years' comments, would increase the authorized terms of imprisonment (to a minimum of two years) for crimes related to counterfeiting, bringing them in line with copyright-related offenses. That legislation would also provide for seizures of instrumentalities, which would greatly increase the level of deterrence. Regrettably, the legislation continues to sit dormant, as it has for years.

Sao Paulo, home to the notorious Shopping 25 de Marco mall, along with Mundo Oriental, and Galeria Korai, has been identified as the major center of distribution. Rights-holders noted that the number of malls where large-scale and open sales of counterfeit goods are increasing, mainly around 25 de Marco street and the Bras region, with more than 20 smaller malls operating in the area. The level of enforcement in Sao

Paulo has steadily deteriorated since the election of Mayor Fernando Haddad in 2012; Mayor Haddad deprioritized IP enforcement, and the effect of that decision has been severe. IACC members speak positively however regarding enforcement efforts in Recife, Rio de Janeiro, and Brasilia. Each of those cities maintains specialized IP units, which by all reports are doing good work, and positively engaging with rights-holders. Rights-holders also pointed to exemplary work performed by task forces that have been established through local Prosecutor's Offices, focusing on identifying and dismantling large counterfeiting groups.

Customs enforcement has been a key concern for rights-holders over the years, and that concern has grown more pronounced recently. Customs seizures were reportedly down in 2013 and 2014, and officials are said to lack the resources necessary to make significant improvements. Some rights-holders have also noted a lack of responsiveness on the part of the Customs Service, though it is unclear if this is due to the lack of resources issue, or due to some other reason.

Last year, the IACC raised concerns with regard to corruption and the lack of oversight within Brazil's public bidding process. Rights-holders again sought to draw attention to the issue in this year's consultations. Counterfeiters continue to exploit this lack of oversight and the government's failure to hold contracting entities accountable when counterfeits are sold to the government. Manufacturers and authorized distributors are consistently underbid by counterfeiters, and as a practical matter frequently excluded from any real opportunity to sell to the government.

Complaints regarding the inefficiency of the judicial system remain common; it's described as overly-bureaucratic. This factor, in combination with the previously referenced non-deterrent penalties, results in rights-holders having little recourse for IP violations. Civil proceedings remain an option, but the lack of punitive or statutory damages makes it exceedingly difficult to recover sufficient damages to justify the expense of litigation. Bill 8,052/11, highlighted in past years, could help decrease the costs associated with storage prior to a court judgment, but has yet to be enacted. That bill would allow for expedited analysis of seized goods by sampling, as well as more efficient disposition of illicit goods.

Despite notable efforts in recent years on the part of The National Council Against Piracy and Intellectual Property Crimes ("CNCP") and The National Association for the Guarantee of Intellectual Property ("ANGARDI"), public awareness of the harms of counterfeiting and piracy remains low; there is a widespread public perception that the only difference between authentic and counterfeit goods is the price.

As a result of the foregoing, the IACC recommends Brazil's retention at the Watch List

level in 2015. 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 and in previous years' submissions, 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.

## **COLOMBIA**

### **Recommendation: Watch List**

IACC members' comments with regard to Colombia during this year's consultations largely mirrored those heard last year. A variety of structural impediments to enforcement hinder IPR protection and enforcement in the country, though perhaps the greatest impediment is the lack of priority that the government has placed on intellectual property violations. Accordingly, we recommend that the USTR retain Colombia on the Special 301 Watch List in 2015.

As mentioned in our previous comments, although Colombia has established a number of specialized IP units which could greatly enhance its enforcement regime, too often, these units are utilized to provide support to other police functions when higher priority issues arise. For example, in 2013, IP law enforcement units were directed to cover for other police units that had gone on strike, detracting from their intended operations. The end result of such diversions is the disruption of ongoing case-work, and the postponement or outright loss of opportunities to take action against counterfeiters. A prosecutors' strike, and a number of other strikes involving aspects of the judiciary system in 2014 have likewise disrupted enforcement efforts.

When the system is operating normally, the process remains slow and cumbersome at times. However, rights-holders commented positively with regard to Colombia's prosecutors, and the willingness of the government to provide sufficient resources for investigations, test purchases, and related enforcement actions. Prosecutions are hampered to some degree though by the adoption and application of arbitrary thresholds. Sentences are also reported to lack sufficient deterrence, minimizing the effectiveness of enforcement actions. In 2015, the IACC encourages the government of Colombia to:

- Ensure necessary resources and funding are available to police agencies to allow specialized units to focus on their intended areas of expertise;
- Increase the efficiency of the judiciary to minimize delays; and
- Eliminate thresholds to prosecution.

## **PARAGUAY**

### **Recommendation: No Recommendation**

Paraguay has been under Section 306 monitoring by USTR since the signing of a Memorandum of Understanding in 1998; and last year appeared on the Special 301 Watch List. While rights-holders continue to face a number of problems in Paraguay, including its status as a hub for transshipment into other countries in the region, IACC members acknowledge that the country has made significant strides towards improving its IPR regime. As such, we provide the comments herein, but make no specific recommendation for its placement.

For many years, rights-holders have cited 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. These problems were voiced by companies from a broad cross-section of industries. In discussions with members this year however, we were pleased by the number of positive comments that were received.

Rights-holders report significant increases in seizures by the police in the domestic market, as well as by customs officials at Puerto Fenix, Aeropuerto Silvio Petirossi, and Caacuepemi in particular. Unfortunately, Ciudad del Este continues to operate as a distribution center for counterfeit and pirated products throughout the region, supplying illicit products to both the Brazilian and Argentine markets. Counterfeits

continue to be sold freely in many retail shops, and according to some reports, within the secure areas of Asuncion Petirossi International Airport. Paraguay must continue to increase efforts to reduce these activities.

Rights-holders expressed some optimism with regard to apparent improvements in the expertise of prosecutors handling of IP cases, and overall increased activity. Members report positive experiences with specialized prosecutors and judges, but note however, that there are not enough of them to handle the volume of cases at present. Asuncion, for example, reportedly has only 3, leading to delays and backlogs in cases. Penalties, also, remain too low to provide significant deterrence to the trafficking of counterfeits. Reports of corruption within the judiciary were also received this year, and some rights-holders have suggested that Paraguay consider the use of specially-vetted prosecutors, similar to those used for narcotics investigations.

As discussed in last year's submission, the President of Paraguay recently established the National Directorate for Intellectual Property ("Direccion Nacional de Propiedad Intelectual," or "DINAPI"), within the Paraguayan Ministry of Commerce, which was welcomed by rights-holders as a sign of increasing commitment to IP protection. The purpose of DINAPI is to address political issues concerning the protection of IP, and to serve as a liaison between the government and the private sector. While the Directorate enjoys a good deal of political backing, they have no direct authority over the bodies responsible for enforcing IP laws (prosecutors, judges, law enforcement). However, the Directorate can play a role as a watchdog, and ensure that issues related to IPR remain a part of the political discussion.

Paraguay remains a key entry and distribution point for counterfeit goods in Latin America, and the government must continue to build upon the progress that it has made in recent years to address rights-holders' concerns. In 2015, the IACC encourages Paraguay to take the following steps towards improving its IPR regime:

- Improve coordination among law enforcement and customs officials in Paraguay, and among regional trading partners such as Brazil and Argentina;
- Adopt necessary reforms to root out corruption within the system; and
- Take steps, whether through improved training for judges and prosecutors or the adoption of legislation, to ensure that truly deterrent penalties are authorized and imposed in the case of IPR offenses.

## NORTH AMERICA, CENTRAL AMERICA, CARIBBEAN

### CANADA

#### **Recommendation: Watch List; Out-of-Cycle Review**

The IACC welcomed Canada's enactment of legislation in 2014 to address long-standing concerns with the country's intellectual property regime, particularly the adoption of criminal penalties for trademark counterfeiting offenses and the empowerment of the Canada Border Services Agency ("CBSA") with ex officio authority to deal with counterfeits at the border. Bill C-8<sup>16</sup> represents a significant step forward in the country's efforts to provide rights-holders and law enforcement agencies with the tools necessary to protect IP rights. However, a number of concerns remain to be addressed with regard to the implementation and practical application of the new law, as well as with regard to Canada's position on enforcement against goods in-transit. Accordingly, the IACC recommends Canada's retention on the Watch List, and that the USTR commence an Out-of-Cycle Review later in 2015 to determine whether the progress made justifies Canada's removal from the Watch List.

Canada, as one of our largest and most important trading partners, has long been considered a vital market for IACC members across every sector. This factor has also played a role in the seriousness of concerns expressed by the scope and volume of IP protection and enforcement problems detailed by rights-holders over the years. Retail sales and distribution of counterfeit and pirated goods in both the online and brick and mortar markets, and the importation and transshipment of counterfeits have been raised as perennial concerns in the IACC's Special 301 submissions. Illicit trafficking appears to remain most pronounced in major metropolitan areas including Toronto, Montreal, and Vancouver; most of the product in the Canadian market is imported from China, and Customs has traditionally had limited abilities to address those illegal imports. Rights-holders are hopeful that CBSA's new authority provided by Bill C-8 will aid in curbing some of these imports.

As discussed in last year's comments however, the IACC has several concerns with provisions of the bill which may have a negative impact on its practical effect. C-8 was drafted with the apparent intention that the legislation be revenue-neutral, and as a result, there is a great deal of concern that the costs associated with enforcement,

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<sup>16</sup> *Combating Counterfeit Products Act*, Bill C-8, 41<sup>st</sup> Parliament, 2<sup>nd</sup> Session (2013), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6370314&File=24#1>.

including those associated with the storage and destruction of seized product, will fall upon the rights-holder, rather than the counterfeiter. Rights-holders have also expressed reservations with regard to the “request for assistance” procedures which were viewed as unclear, and with the lack of availability of administrative procedures to expeditiously resolve incidents of counterfeit importations. The law appears to require rights-holders to seek a court order for seizure of the goods within ten days, each time CBSA intercepts a package. Given the increased shift in distribution methods toward small consignments via mail and express delivery services, in many cases, it seems almost a certainty that court filings and attorneys’ fees are likely to greatly exceed the value of the goods in question. But, absent that action by rights-holders, the CBSA may have no option but to release the counterfeit goods to the importer. In such cases, the new authority provided by C-8 may have little practical value for enforcement.

Rights-holders likewise remain dismayed that the legislation failed to include any provisions to address the long-standing concerns related to the transshipment of goods through Canada. In fact, 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.<sup>17</sup> When the issue was raised by U.S. Ambassador Bruce Heyman, the response of Canadian Industry Minister James Moore was quite disappointing, and quite telling. “The idea Canada would act as a customs agent for the United States is, frankly, not something that’s on the table ... The scope of this is protecting Canadians and the Canadian domestic market.”<sup>18</sup> It should be noted, that U.S. law provides specific statutory authority for the interdiction of goods in-transit<sup>19</sup>, in effect, serving as a deterrent and safeguard against the entry of counterfeit products into the Canadian market. The IACC strongly encourages the Canadian government to reconsider its position with regard to enforcement against goods in-transit, and in the meantime, to coordinate closely with U.S. Customs and Border Protection to share intelligence on such shipments so that U.S. authorities may take action. In last year’s submission, the IACC highlighted Project PACE, a cross-border collaboration between U.S. and Canadian enforcement agencies that led to the arrest of nearly two dozen individuals for crimes related to the manufacturing and distribution of a wide assortment of counterfeit goods, including pharmaceuticals, contact lenses, apparel and accessories, and even transit tokens.<sup>20</sup> The

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<sup>17</sup> C-8, *supra*, at Section 51.03(2)(d).

<sup>18</sup> Stephanie Levitz, *It Isn’t Canada’s Job to Stop Fake Goods From Going to the U.S.*, *Industry Minister Says*, Canadian Press (2014), <http://news.nationalpost.com/2014/11/27/it-isnt-canadas-job-to-stop-fake-goods-from-going-to-the-u-s-industry-minister-says/>.

<sup>19</sup> 18 U.S.C. 2320(i).

<sup>20</sup> 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>.

collaborative efforts of that sort of operation should be the norm, as opposed to the adoption of an approach that ceases at the country's border.

On the broader issue of enforcement within the Canadian market, rights-holders again expressed frustrations concerning the overall level of enforcement following restructuring of the Royal Canadian Mounted Police in recent years, and a lack of engagement by city and provincial authorities. The IACC continues to encourage greater levels of cross-agency collaboration to provide more efficient use of resources, and we're hopeful that the new criminal provisions in Bill C-8 will lead to a greater priority on enforcement at all levels.

Moving forward, the IACC encourages the Canadian government to continue working with the private sector to identify and address statutory and policy gaps in its protection and enforcement regimes. We look forward to providing feedback on the implementation of C-8. In 2015, the IACC requests that the Canadian government:

- Provide CBSA with the authority to act against counterfeit and pirated 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;
- Work closely with rights-holders and their representatives to ensure the efficient implementation of the provisions of C-8; and
- Encourage meaningful collaboration between law enforcement agencies within Canada and in the U.S. on anti-counterfeiting operations.

## **MEXICO**

### **Recommendation: Watch List**

Mexico remains a significant concern for IP owners in 2015, as rights-holders continue to cite significant problems with the country's regime and minimal progress since the filing of last year's comments. The concerns discussed herein are, for the most part, long-standing issues that the IACC has reported on for several years. The IACC has

recommended Mexico's inclusion on the Special 301 Watch List or Priority Watch List for over a decade. Given the lack of progress reported during this year's consultations, we again support Mexico's inclusion at the Watch List level.

As in years past, IACC members from across a number of industries report the widespread availability of counterfeit and pirated goods in the domestic market; retail-level distribution remains common, particularly in the apparel and footwear and core copyright industries. Trafficking in counterfeit and pirated software, electronics, personal care products, tobacco, and other sectors is also prevalent. Large, well-known markets cited in previous years, such as Tepito and San Juan del Dios, and smaller informal markets remain a key concern.

The scope of issues seen in Mexico also remains largely unchanged from previous years, with domestic manufacturing and finishing of counterfeit goods, large volumes of imports, as well as transshipment through Mexico to other markets in North and Central America, remaining problematic.

Enforcement in Mexico is hindered by several factors, including an overly formalistic approach and segmented approach to enforcing rights that fails to empower enforcement personnel. By way of example, Customs officials remain unable to detain counterfeit goods at the point of import, unless an order is issued by a federal court, the Mexican Institute of Industrial Property ("IMPI"), or the Attorney General's Office. However, the process for obtaining such an order is in many cases too slow in practice to allow for seizures at the border. Rights-holders also reported a lack of communication and coordination between Customs offices and other agencies with anti-counterfeiting responsibilities, further exacerbating the problems. 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.

Concerns related to transshipment also continue to be a frequent source of distress for rights-holders. As discussed in last year's comments, until relatively recently, Mexico was active in its enforcement efforts against goods in-transit. A 2011 opinion from the Attorney General's Office however largely ended those efforts.<sup>21</sup> The IACC has been consistent in its comments to USTR and other venues, with regard to Mexico and other countries, regarding the topic of transshipment. Put simply, trademark counterfeiting is by its very nature a cross-border concern requiring coordination and cooperation across borders. Trading partners who are truly committed to dealing with the problem must be

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<sup>21</sup> 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.

willing to take action against trafficking when they become aware of it. To say that such illicit trafficking is another country's problem diminishes the seriousness of the problem, encourages counterfeiters to exploit the "safe passage" offered by that jurisdiction, and discourages other partners from applying resources in a cooperative and mutually beneficial manner. We strongly encourage Mexico to revisit its position on transshipment, and to resume its interdiction of illicit shipments even where those goods are said to be bound for another market.

In addition to the above concerns, rights-holders continue to report a number of other deficiencies in the enforcement regime. Enforcement actions appear to be focused on, and more frequently taken against, low-level street vendors. And while such individuals may be viewed as easy targets, too often, enforcement personnel and prosecutors fail to follow-up to pursue investigations further up the supply chain where a greater impact could be made. Court cases are also said to proceed very slowly, and penalties – particularly for the typical, low-level offenders that are pursued – remain low. Rights-holders also noted a significant decrease in the overall number of raids during the past year, and we have received reports that the Attorney General's Office notified representatives of IP owners that there would be an informal limit on the number of complaints that they would accept from rights-holders regarding infringing imports. It's unclear whether this is a result of an effort to reallocate resources, or due to a general deprioritization of IP offenses.

In light of these continuing concerns and the reported lack of progress during the past year, the IACC recommends that Mexico be retained on the Special 301 Watch List in 2015. 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;
- Revisit the 2011 Attorney General's Office opinion which reversed the country's policy with regard to enforcement against goods in-transit; and
- Increase the level of penalties in counterfeiting cases to ensure the deterrent effect of existing laws.