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As the Intellectual Property Enforcement Coordinator (IPEC) within the Executive Office of the President of the United States, Danny Marti leads efforts to develop a strategic plan on the enforcement of intellectual property rights and is responsible for coordinating efforts of federal agencies engaged in intellectual property policy and enforcement. Marti is perhaps unusual among brand protection professionals in how he entered the field and the time he has spent in it, from when his undergraduate interests in arts and literature led to federal internships on trade and copyright issues through a distinguished legal career in intellectual property private practice. He became the IPEC in March 2015 following a unanimous confirmation vote by the Senate, a vote he attributes to bipartisan consensus on the need to protect intellectual property. Marti agreed to an interview with Dr. Jeremy Wilson, Director of the Center for Anti-Counterfeiting and Product Protection (A-CAPP) at Michigan State University, at the 2016 A-CAPP Center Brand Protection Summit.
Dear Fellow Brand Protection Practitioners,


Since the launch we have received many positive comments confirming our mission and we continue to hope that The BPP will become your go-to place for the information you require, on the brand protection issues you are most interested and that are essential to your practice. In addition to looking for submissions of articles, we are also looking for poll participants, see Temperature Test, participants in the BP Forum, a question to professionals and their answers, and for submissions of events/new resources and announcements to appear in The Bulletin. Please join the conversation and see more detailed policies and guidelines on submissions on the opposite page.

Issue 2 of The BPP includes not only an interview with the US IP Czar, but also topics such as gray market strategies from an academic scholar, explanation of the new China trademark laws from our very own BP Hero and transportation focused columns in the Legislative Update and Professional Pointers quarterly columns. I hope you enjoy The Brand Protection Professional as much as the team enjoyed putting together BP community relevant information contained in this issue. Please feel free to contact me directly with any questions leahevertburks@gmail.com.

Leah Evert-Burks
Managing Editor & Industry Fellow
Center for Anti-Counterfeiting and Product Protection
Michigan State University

mission statement

The Brand Protection Professional: A Practitioner’s Journal (BPP) is a quarterly resource dedicated to reporting on brand protection issues, research and professional information for in-house brand protection practitioners. The BPP aims to advance brand protection through the establishment of an accessible, comprehensive forum containing essential information for the brand protection community.
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Submissions:
The BPP encourages submissions from a wide range of experts, so long as the subject of the contribution fits the mission of the journal. Contributors are encouraged to draw on experience for their articles and to write articles that reflect what is important to brand protection practitioners. Publication decision is in the absolute discretion of the editorial team. To learn more, including submission guidelines, instructions, and tips, please see our policy and statement guide.

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IN THE HEADLINES

SEPTEMBER
Tiffany v. Costco

Tiffany & Co. won its trademark case against the retail giant Costco. A jury awarded Tiffany $5.5 million in compensatory damages and $8.25 million in punitive damages in connection with Costco’s sale of engagement rings labeled “Tiffany.” In its summary judgment decision preceding the trial, the Court rejected Costco’s claims that “Tiffany” was a generic term for engagement rings. The parties await the Court’s entry of a final judgment. MORE

OCTOBER
Counterfeit Apple products on Amazon

Spotlighting the issues with sellers on Amazon and the platform’s lack of effective controls, Apple filed a lawsuit against one of the sellers of counterfeit chargers, but in doing so lays out a case for Amazon’s culpability. MORE

For more on e-commerce related risks, see Legislative Update

NOVEMBER
Gray Goods in the UK

In an appeal surrounding a trademark infringement case brought by brands Ralph Lauren, Adidas, Under Armour, Jack Wills, and Fred Perry, the Court of Appeals ruled that those selling gray market or parallel goods in the UK, not authorized by the brands, could face criminal charges. The Court’s ruling cited not only consumer confusion, which is at the core of trademark law but also health and safety issues and violations of public policy. The Court did carve out a defense for violators if they “acted honestly and reasonably.” MORE

See also the Appellate Court order in its entirety.

For more on the gray market, see Developing Stratagems to Tackle Gray Market
DECEMBER

The United States Trade Representative is expected to publish the “2016 Special 301 Out-of-Cycle Review of Notorious Markets” before end of this year. This is a supplemental report to The 301 report which is a “Congressionally-mandated annual review of the global state of intellectual property rights (IPR) protection and enforcement. The review reflects the Administration’s resolve to encourage and maintain enabling environments for innovation, including effective IPR protection and enforcement, in markets worldwide, which benefit not only U.S. exporters but the domestic IP-intensive industries in those markets as well.” Comments by industry, brand protection groups and other affected sectors submitted comments for consideration in October which followed public hearing for the Special 301 Report in March of 2016 and the issuance of the Special 301 Report MORE

JANUARY

President-Elect Trump

The inauguration of President-Elect Trump will take place on January 20, 2017; with the 115th Congress returning to Washington D.C. on January 3, 2017. Before that time the Trump administration will have announced key transitional appointments including the US Trade Representative and possibly the Intellectual Property Right Enforcement Coordinator who has indicated he will be leaving the position (see cover story), among other appointments of interest to the brand protection community. Early indicators of new Trump policies are expected to directly affect the IP sector including trade policy. MORE

FEBRUARY

Plain Labeling

For the month of sugar and sweets a tracking of the progress of plain label legislative initiatives worldwide, indicates in addition to tobacco it may also affect sugary products. All eyes are on the World Trade Organisation panel and its review on Australia’s decision to enforce standardised packaging on tobacco products anticipated any time now. The anxiety over plain packaging by brand owners is the undermining of traditional trademark rights and increased ease for counterfeiters to copy product. MORE
FCPA: THE CAREFUL WALK FOR U.S. COMPANIES AND BRAND PROTECTION PROFESSIONALS

Tracy Garner
Manager, Anti-Counterfeiting & Unauthorized Distribution, Finance, Control-Legal Affairs, Schneider Electric

For those of us in brand protection, adhering to the U.S. Foreign Corrupt Practices Act (FCPA) (See FCPA_TEXT) can be like walking a tightrope in our global anti-counterfeiting efforts. It’s important that we understand the relevant prohibitions and exceptions of the FCPA in working with foreign officials. This article will briefly discuss the history and meaning of the FCPA, how it relates to brand-protection efforts, real-life examples of corruption and bribery we face, and precautions we can take to protect ourselves from FCPA violations.

The U.S. FCPA was signed into law in 1977 by President Jimmy Carter after Securities and Exchange Commission investigations found more than 400 U.S. companies making questionable or illegal payments to foreign government officials and political interests. The FCPA has two provisions. The first is an accounting provision not discussed in this article. The second is an anti-bribery provision prohibiting the payment of money or anything of value to a foreign official to influence that official to violate their duty or give an improper advantage. It should be noted that agents or third parties engaged by U.S. entities should also follow the FCPA anti-bribery provision, as U.S. entities are liable for the actions of their third-party representatives.

Obviously, to fight counterfeits in foreign countries, we must engage with foreign officials on key activities such as registering trademarks, conducting raids, and inspecting imports. Even though we (or our agent) may be operating in a foreign country, as U.S. citizens or representatives of U.S. companies we must follow the rules of the FCPA. The challenge that arises is that certain payments or fees are often standard practice for officials in some countries. For example, some agencies may require fees to cover court filings, personnel, transportation, or removal and storage of seized goods associated with a raid. Current trends even include charging companies to train agency staff on identifying counterfeits. The drafters of the FCPA also understood this reality and put a provision for facilitating payments (sometimes called “grease payments”) that may be used to expedite the performance of the official’s routine duties that he is already bound to perform.
There are, however, two issues that arise when evaluating whether a facilitating payment is permissible. First, facilitating payments are generally prohibited in most countries outside of the U.S. Second, U.S. regulators have discouraged the use of facilitation payments, noting that the liberal use of them can create a culture of permissiveness and lead to larger bribes. All companies should therefore carefully monitor the use of facilitation payments to ensure that they are in compliance with local law and are not abused.

U.S. citizens and U.S. companies must not, of course, engage in bribery and corruption activities that violate the FCPA in our dealings with foreign officials. Unfortunately, we are likely, in our fight against counterfeits, to witness others clearly offering bribes to authorities. For example, one brand owner observed a police officer escort a suspect to an ATM to withdraw cash; a short time later, the brand owner was informed that the investigation did not find any counterfeiting activity (Personal Communication, 2018). Engaging multiple agencies rather than a single agency on such a case might prevent such behavior. Another brand owner had arranged a raid with the local authority, only to learn the suspect’s store had been cleared of all counterfeits after the target had been tipped off in exchange for a monetary payment (Personal Communication, 2016a). One way to avoid tipping off a target is to withhold the name and address of the location from the authorities until the “last minute”.

To ensure they adhere to the FCPA, brand-protection professionals should get approval from their Legal team or management before paying fees or making any other payments to foreign officials. If making a payment to a foreign official, brand-protection professionals should obtain documentation, such as a formal receipt from the agency of the official (not the individual official). They should also make sure that any third parties are aware of the restrictions of the FCPA, agree in writing to adhere to its principles, and proceed with a facilitating payment only when granted permission. Best practice is to include an acknowledgement and agreement to comply with FCPA in a contract. Brand-protection professionals should also train

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1 Conversation the author had with a brand owner
2 Conversation the author had with a brand owner
their agents periodically to ensure a full understanding of the breadth and requirements of the law.

All brand protection professionals, whether U.S. citizens or working for U.S. companies, should have a basic understanding of the FCPA and how it applies to their anti-counterfeiting activities. Diligence in vetting third-party agencies and seeking the proper approvals before allowing a facilitating payment are musts to protect yourself and your company from the severe penalties for violating the FCPA.

DEFINITIONS

A **Foreign Official** can include:

- Employee or agent of a foreign government-owned or controlled entity
- Employee or agent of a public international organization
- Official or candidate for a foreign political party
- Employee or agent of a foreign government

**Anything of Value**: No payment or gift is too small if made with corrupt intent. There is no de minimis exception. Examples include:

- Cash
- Per diems
- Discounts
- Travel expenses
- Meals and Entertainment
- Use of company car or aircraft
- Tickets to sports events
- Gifts, including gift certificates
- Donations to political or charitable organizations
- Sponsorships, scholarships or educational grants

**Facilitating/Grease Payments**: Payments to foreign officials to expedite "routine governmental action." Examples include:

- Obtaining business permits, licenses, or other official documents
- Providing telephone service, power and water supply
- Processing governmental papers
- Scheduling inspections
WHAT YOU NEED TO KNOW ABOUT THE 3RD AMENDMENT TO THE CHINA TRADEMARK LAW

Jack Chang
Vice Chairman, Quality Brands Protection Committee

The two primary objectives of the 3rd Amendment to the China Trademark Law (TML), effective May 1, 2014, were to expedite the examination process and to strengthen trademark protection. After the National People’s Congress (NPC, the People’s Republic of China Parliament) publicized the draft amendment in December 2012, the Quality Brands Protection Committee (QBPC www.cbpc.org.cn) reviewed the draft with the China Association of Enterprises with Foreign Investment (CAEFI) and raised many concerns. CAEFI responded by setting a February 2013 meeting between the QBPC and the NPC Legal Affairs Department. The NPC subsequently invited QBPC to a May 2013 meeting to comment on the 2nd NPC draft amendment, which addressed several important concerns. Below I review in detail some of the specific positive changes that resulted from this process—and some of the remaining challenges.

Positive Changes

Eliminating the gap between the renewal of trademark registration and the Customs recordal
Under the old TML, a trademark renewal application could only be filed within six months of expiration. However, it normally took more than six months to receive the trademark renewal certificate. As a result, by the time the renewal certificate was received, the Customs recordal had expired. Trademark owners, who needed the Chinese Customs’ border protection to help fight against cross-border trade of counterfeit goods, had no protection between the time of the expiration of the trademark registration and the completion of renewal application and Customs rerecordal. NPC addressed this problem by allowing trademark renewal applications twelve months before expiration (Para. 1, Art. 40 of the TML). This should eliminate the border protection gap.

Extending the deadline for filing administrative litigation against unfavorable decisions by the China Trademark Review & Adjudication Board (TRAB)
The NPC agreed to extend this deadline from fifteen to thirty days to allow for ample time to prepare the case. (Art.34, Para. 3 of Art. 35, Para. 3 & 4 of Art. 44, Para. 2 of Art. 45 and Art 54).

Fixing Trade-Related Aspects of Intellectual Property Rights (TRIPs) compliance gap
Under the old TML, the implements of counterfeiting (computers, equipment and machinery, etc.) could only be seized if they were “exclusively” used to manufacture trademark infringing goods or labels. Article 46 of the TRIPs (in which China is a signatory) adopts the term “predominant use” rather than “exclusive use,” which makes a significant difference on law enforcement’s ability to seize the implements. The NPC agreed to adopt the term “predominant use” in the revised TML (Para. 2 of Art. 60).
Remaining Challenges

Unauthorized use of another's registered trademark for export (commonly referred as "OEM for Export") does not constitute trademark infringement

The NPC, following the recommendation of the judiciary, defines use of a trademark as "the conduct of differentiating the source of the goods" (Art. 48). This promotes the view that unauthorized use of another's registered trademark in China on goods for an overseas market does not constitute trademark infringement. This is because the function of the trademark in "differentiating the source of the goods" was not fulfilled within China and the goods not distributed in China, making it unlikely that unauthorized trademark use would confuse Chinese consumers. Several civil courts have adopted this view in their decisions. This also makes it difficult to characterize trademark counterfeit as a crime. As a result, administrative enforcement agencies are discouraged from taking actions against unauthorized use of another's registered trademark as long as the alleged "infringer" claims that the goods are for an overseas market. This problem, if not fixed quickly, may be devastating to brand owners (domestic or foreign). After QBPC raised this issue to the highest authorities and provided constructive solutions, some academic thought leaders and the judiciary have followed suit and are willing to work with industry, including the QBPC, on finding a workable solution.

Bad faith registration

Expediting the trademark examination process was a primary objective of the 3rd Amendment, which abolished the seemingly endless process of opposition, appeal, administrative litigation, and reexamination of the old TML. Under the new TML, a prior rights holder or an interested party has only one chance to oppose a possible bad faith application. Once the opposition action is dismissed by the China Trademark Office (CTMO), the preliminarily approved application will immediately become a registered trademark. The party opposing the registration may still file an invalidation action against the registered trademark but it cannot stop the registrant from using the trademark while the subsequent litigation—which may take two to three years to complete—is pending. This poses a serious threat to trademark owners who face bad faith application and registration issues in China. The change also generates a very large number of trademark-related administrative litigation cases for the Beijing Intellectual Property Court and the High Court. To make things more challenging, the CTMO and TRAB in general do not use Article 7 (Good Faith article) to revoke or invalidate bad faith applications or registrations, as Article 7 is not a legal basis for contesting these. Moreover, many foreign trademark owners, when trying to substantiate their opposition or invalidation actions, include evidence proving the long-term use of their trademarks outside China but CTMO, TRAB and Chinese courts accept such evidence only if owners prove prior use within China. Prior use in China must also have generated "a certain level of influence" before the filing date of the bad faith application/registration. Fortunately, the Beijing IP Court and High Court seem to have adopted a much more practical and reasonable view in their cases involving NUXE Laboratory (a French cosmetic company) and Facebook. In the NUXE case, the Beijing IP Court agreed many Chinese consumers are purchasing cosmetic products from overseas for personal consumption, and visiting the NUXE Laboratory's official website for product information, making it obvious that the NUXE Laboratory's trademark enjoyed good brand awareness among the Chinese consumers. In the Facebook case, both the Beijing IP Court and High Court expressed that a bad faith applicant/registrant violated the good faith article (Art. 7 and Para. 1 of Art. 44) by acquiring
trademark registrations through deceptive or unfair approaches. Neither NUXE nor Facebook had physical operations in China. These rulings may result in more positive administrative litigation decisions from open-minded courts in Beijing against bad faith applications and registrations.

**Innocent seller of infringing goods**

Paragraph 2 of Article 50 in the TML grants only the Administration for Industry of Commerce (AIC), the administrative agency enforcing the TML, the authority to instruct “innocent” sellers of infringing goods (i.e., sellers who claim they have no knowledge that the goods were infringing, can prove that the goods were acquired legitimately, and disclose the source of the goods) to NOT to sell the goods. The AIC has no authority to seize and confiscate such infringing goods. In May 2013, the QBPC asked the NPC to delete wording that “the innocent seller shall be immune from any punishment” and to include wording that “the AIC shall still confiscate and destroy the infringing goods” in the 2nd NPC draft amendment. NPC only deleted the wording did not adopt the suggested wording in the final amendment. This adversely affects both foreign and Chinese trademark owners. Recently, an NPC delegate from Zhejiang Province, who is also the Chairman of the Wahaha Group, a famous Chinese food and beverage company, filed a petition during the NPC Annual National Assembly to urge the NPC to fix this problem. Failure to do so may not only adversely affect Chinese consumers and trademark owners by leaving infringing goods in trade, but also constitute a TRIPs compliance issue.

The 3rd Amendment to the TML has improved the legal framework of China with respect to intellectual property, though such reform cannot satisfy everyone’s concerns. New challenges continue to arise as patterns of infringing activities adapt to changes in the legal framework, which necessitates changes in enforcement activities. Therefore it is critical for all stakeholders to recognize the progress for what it provides and to work together on the new developing challenges to IP in China.

For more on China, see the IPEC Joint Strategic Report: “China In Focus: A Snapshot View of IPR Policies and Practices” (pages 133-134)
Interview with the U.S. Intellectual Property Enforcement Coordinator (IPEC)  
DANNY MARTI

Jeremy Wilson  
Director, Center for Anti-Counterfeiting and Product Protection, and Professor,  
School of Criminal Justice, Michigan State University

As the Intellectual Property Enforcement Coordinator (IPEC) within the Executive Office of the President of the United States, Danny Marti leads efforts to develop a strategic plan on the enforcement of intellectual property rights and is responsible for coordinating efforts of federal agencies engaged in intellectual property policy and enforcement. Marti agreed to an interview with Dr. Jeremy Wilson, Director of the Center for Anti-Counterfeiting and Product Protection (A-CAPP) at Michigan State University, at the 2016 A-CAPP Center Brand Protection Strategy Summit.

Jeremy Wilson: Can you say a few words about the IPEC office and its mission?

Danny Marti: The PRO-IP Act of 2008 created the Office of the Intellectual Property Enforcement Coordinator and placed it in the Executive Office of the President. Congress had realized a number of federal departments, offices, and agencies all had intellectual-property equities. Congress formalized this coordinator position to help the federal government think past the formal lines of one department’s work plans to provide a whole-of-government approach.

Wilson: How have you seen the office change over the past several years?

Marti: Since arriving at IPEC, we now have two career staff, including a professional chief of staff, who will help provide continuity into the next administration. In addition, we have brought on a number of detailees (government employees from other departments or offices) to work in my office for a period of time. The office needs to have a level of institutionality and capacity in order to continue its mandate. So I wanted to focus sufficient time to building up of the institution so that I can work to pass it to the new administration while also taking very seriously one of our statutory deliverables, which is the joint strategic plan.
Wilson: What parts of your mission do you think the office is currently doing very well?

Marti: We have been quite extensively engaged in the international space to heighten awareness of the convergence of threats in illicit trade. I think we need to understand and talk about the issues quite differently than we have in past. Sometimes you hear about IP being spoken in terms of protection, and I think that’s shorthand speak for all of us. We’re protecting X brand. The truth of the matter is it’s about integrity of supply chains around the world and about the diversity of counterfeit products that exists in global markets. So what we’ve been attempting to do over the last year or year and a half is to increase the understanding of our trading partners around the world on the nature of the threat we’re facing in order to obtain the collaboration and partnerships we need to address this truly global threat.

Wilson: What areas do you think need special attention moving forward?

Marti: There’s the macro, big-picture policy issues, and there’s the micro, agency-level issues of what needs to be done with respect to federal government engagement. At the macro level, one thing that I’ve been discussing with our international partners is the need to develop a whole-of-government approach as well as a specialized approach to IP crimes, illicit trade, and pirated goods. Most countries around the world do not have a whole-of-government approach to combat counterfeit goods. Let me dissect that for a moment. In the U.S., we take a whole-of-government approach from a strategy standpoint and from an operational standpoint. From a strategic standpoint, my office does not do actual operations but we provide the policy environment, the strategy setting. We work across two dozen federal partners to develop this strategy, that provides a whole-of-government approach that is greater than [that] of any one particular partner. On the operational side we have the IPR Center—Bruce Foucart is a
liaison to your Center’s board and has been a wonderful leader and partner in the fight against illicit trade. He runs a great shop at the IPR Center. The IPR Center is a perfect example of an operational whole-of-government approach. They bring together 19 domestic and four international partners in a task-force setting to combat this global threat. Very few countries have any models like this. I think we need to do more of that in order to make the world a smaller place where law enforcement, companies, and other stakeholders can work across geographic lines to combat this truly global threat.

Wilson: What do you see as some of the biggest challenges in bringing partners together to create a shared vision?

Marti: Our trading partners understand the threat, and are interested to do more and partner more. I think some of the challenges may be a lack of resources and competing priorities, as we all have. And that’s where our dedicated focus to keep moving forward is important.

Wilson: How does it work practically to involve brand owners in what you’re doing? Obviously you have finite resources and there are many companies out there. How do you go about coordinating among them? What can they do to get involved in your strategy setting?

Marti: A few things. Last fall, I issued a Federal Register notice and we accepted comments from anyone who wanted to submit them regarding development of the next national three-year plan. And we received several comments from the private sector. We’ve also maintained an open-door policy for companies and other stakeholders who want to speak with me or my team. I also engage with the private sector (in conferences, international fora, at the IPR Center, and with other federal partners) to understand the nature of the threats that they’re facing. It is difficult because there’s many of them, so one thing that I have encouraged rights holders to do is to develop a summary of the threats and the limitations that they’re seeing and share with us some ideas, some best practices. When appropriate, partner with similar situated companies and provide a trade association or coalition
approach where we can summarize industry issues in a much more effective way. One example is with the automotive industry. We could have, and have, heard from individual car manufacturers. But sometimes it’s more effective when they all come together. I think where the government can weigh in are on those issues that are more cross-cutting and global in nature, where an individual company or trade association may find it difficult to gain traction.

**Wilson:** So many of our brand-protection partners struggle internally, particularly with their senior leadership, to explain the importance and value of brand protection. If you were in their position, how would you argue the importance of protecting brands and intellectual property?

**Marti:** I think too often we address the nature of counterfeiting as a single-dimension threat that perhaps undermines the company’s bottom line. It could affect brand value, it could represent lost sales, etc. What we often don’t discuss publicly are the additional convergences of threats that illicit trade represents. Illicit trade and pirated goods also pose significant risks to public health and safety. The consuming public does not appreciate how diverse counterfeit trade looks like today. When a consumer and sometimes a policy official closes his or her eyes and thinks about what counterfeit trade looks like, they may conjure up images of counterfeit luxury purses or sunglasses or luxury watches but little do they know that Customs and Border Protections sees counterfeit products in over 600 diverse product categories, from contact lenses to toothpaste to children’s toys to electronics to all sorts of apparel, footwear, accessories. The breadth is amazing. Anything that can be faked is being faked. We are seeing increased counterfeit trade in pesticides and fertilizers that are poisoning farmlands across the world and possibly poisoning the food that ends up on our dinner plates.

“When appropriate, partner with similar situated companies and provide a trade association or coalition approach where we can summarize industry issues in a much more effective way”
Wilson: What do you think is the most important message to get across to consumers about this issue?

Marti: Consumers need to appreciate the multi-dimensional nature of counterfeit goods. Too often a consumer may see a counterfeit bag or other product in the single dimension of an economic transaction and don't appreciate the bag might have been manufactured through child or forced labor or contributed to environmental damage at the source of manufacture or maybe distributed through transactional organized crime networks. The consumer does not see the bigger picture, and that’s one thing that government as well as academia and other stakeholders can help provide a deeper understanding as to the convergence of threats posed by illicit trade.

Wilson: What can academia do to help reduce IP crime?

Marti: This space needs to have more rigor in its analytical assessments. There is very little data and scholarly research on a number of these topics. Academia can help develop the framework to understand these threats. Let me return to the labor conditions. I’m not aware of any definitive report in the U.S. or elsewhere that either seeks to quantify or fully develop our understanding of labor conditions associated with the manufacture of counterfeit goods. There are a number of reports that will talk about child labor and forced labor but the subset of those exploited labor categories in connection with the manufacture of counterfeit goods is an area where we’re missing research. We’re missing understanding. And I think we need to have that type of understanding in order to find effective solutions. If, for example, we realize labor conditions associated with the manufacture of counterfeit trade often implicates either forced labor, child labor, unsafe working conditions, or some other categories, we can direct our efforts in the labor space to also focus a solution on the illicit trade space. But right now we address them in a highly compartmentalized manner.
Wilson: Is there anything else that you’d like to share with our partners about you or your office or brand protection?

Marti: I think we might have touched upon it, but the importance of having data-driven strategies. That’s where we need collaboration between rights holders, who have their own body of information, what they’re seeing in the field, with government partners, who might be exposed to some additional data points both domestically and globally, and academic institutions, to provide the level of research and strategy behind what we’re all doing. We need to pool all these different sources if we’re going to find a more effective response to illicit trade.
LANDMARK LANDLORD LIABILITY CASE in the European Union

Korstaan Groot  
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Ronald Brohm  
Managing Director, REACT, The Netherlands

Brand-protection professionals won an important victory in July (2016) in the Court of Justice of the European Union (Court of Justice) (case # C-494/15). The decision, which concluded a 5-year battle over intermediary liability, originated in the Czech Republic. There, REACT members were being confronted with market-traders who consistently and on a large scale sold counterfeits of their brands.

It had been difficult to hold these sellers of counterfeit goods liable and initiate effective enforcement against them. This was primarily because the sellers were illegal citizens, standing-ins for the real market-traders, or used fake IDs. Furthermore, the law did not clearly establish liability of landlords for these markets. In response to this situation, REACT and some of its members (Tommy Hilfiger, Urban Trends, Lacoste, Burberry, GStar and Rado) decided in 2011 to focus efforts on one particular landlord, the Delta Center in Prague.

The applicable EU Enforcement Directive (2004/48/EC) (“Directive”) found in Article 11 provides for liability of the intermediary “whose services are used by a third party to infringe on intellectual property rights.” This had been confirmed in the previously decided L’Oréal / eBay case (C-324/09) concerning the operator of an online marketplace and the sale of fake goods.

The case against Delta Center fits well into the mission of REACT’s program to hold intermediaries responsible for their role in supporting counterfeiting. REACT previously sought to have shipping agents (transporters) pay for storage and destruction of fake goods and summoned many Internet Service Providers (ISP’s) to court to remove their fake product offerings online.

The guiding principle behind such actions is simple: when an intermediary has been put on notice and is able to stop the infringement with reasonable efforts (mainly through a contract), then it should do so or be held liable for failure to do so. Yet landlords of physical markets had not previously been successfully challenged in court.

The Facts and the Decision

Delta Center is the tenant of Pražské tržnice’ (Prague market halls). It sublets stalls and pitches in the marketplace to individual market-traders. Counterfeit goods of REACT members’ brands were regularly offered for sale in this marketplace. REACT therefore asked the Czech courts on behalf of some of its members to order Delta Center to stop renting sales areas to those tenants committing trademark infringement.

REACT argued that, like the operators of online marketplaces in the L’Oréal / eBay case, the operator of a physical marketplace may, pursuant to the Directive be forced to take measures to prevent trademark infringements committed by market-traders who rented space from it. Although the Najvyšší soud (Supreme Court, Czech Republic) rejected REACT’s claims, the Court
of Justice, the highest court in the EU, ruled that an operator which provides a service to third parties relating to the letting or subletting of stalls/pitches in a marketplace, and which therefore offers the possibility to those third parties of selling counterfeit products in that marketplace, must be classified as an “intermediary” within the meaning of the Directive. Whether the provision of a sales point is within an online marketplace or a physical marketplace is irrelevant because the scope of the Directive is not limited to electronic commerce. Consequently, the Court of Justice ruled, the operator of a physical marketplace may itself be forced to put an end to the trademark infringements by market-traders and required to take measures to prevent new infringements.

The Court of Justice held that not only must those injunctions be “effective and dissuasive” but also “equitable and proportionate”. They must not therefore be “excessively expensive” and must not create “barriers to legitimate trade”. The Court also ruled the intermediary cannot be required to exercise “general and permanent oversight” over its customers. That stated, the Court of Justice ruled that the intermediary may be forced to “take measures, which contribute to avoiding new infringements of the same nature by the same market-trader.” The Court of Justice concluded that the injunctions must ensure a “fair balance” between the protection of intellectual property and the absence of obstacles to legitimate trade.

Altogether, the Court of Justice ruling is very clear: The landlord of a physical market, once receiving notice of infringing activities by its market-traders, is responsible for stopping such activities, though demands by rights owners must be “reasonable” and “proportionate.” Given the fact that market-traders are supposed to operate under a contract with the landlord, the landlord has the capability to follow up the claims by rights owners and, as long as the claims are justified, the demands are in general fairly easy to fulfill by the landlord.

The landmark decision provides an enforcement tool for rights owners when seeking to “clean” markets of counterfeit goods in EU Member States. Thanks to this ruling, rights owners can demand assistance from the landlords due to their clear liability under the EU Directive. This provides a more effective means for brand owners to pursue their rights than chasing the individual market-traders directly, which can be a cumbersome or even impossible process.

REACT is working to put the decision into action. Specifically, it is inspecting the most notorious EU markets, after which it will immediately notify landlords of any brand infringements. Should the goods not be removed by the time of a second inspection, REACT will take further legal measures in accord with the Delta case. Because many marketplace landlords are local municipalities, there may be additional challenges in the near future.

See text of full judgment at: Delta Center Judgment July 2016
THE SELF-BALANCING SCOOTER CRISIS and the ENFORCEMENT of a CERTIFICATION TRADEMARK

Jason Daniels
Senior Investigations Manager, Global Security and Brand Protection, UL (Underwriters Laboratories)

I vividly remember the first time I saw a “hoverboard”*. I was traveling on business in south Miami when I watched a gentleman in the distance effortlessly gliding along the boardwalk. My immediate thought was how awkward it appeared as there were many other people walking in the same direction, but with little movement. This man appeared to be floating on air. As he came closer I was taken aback by the two-wheeled device he was standing on and wondered how it was operated. What made it go and how was it maneuvered? I have to admit I also did think about how much I would like to give it a try.

As the 2015 holiday season approached, “self-balancing scooters” became the rage. They were everywhere: advertised on billboards and TV commercials, and available to purchase at local mall kiosks and online. Everyone was captivated by the seemingly simple device that allowed you to hover and glide across surfaces. Little did we know just how much attention this product would receive beyond its novelty and the dangers it would ultimately present.

I still joke (half-heartedly) with co-workers that December 14, 2015, was an apocalyptic day at UL. That was the day I received an email containing several images of self-balancing scooters' packaging prominently displaying a counterfeit UL trademark. At the time, UL did not offer a certification program for the product. At this same time the units were receiving substantial media attention for dangerous malfunctions leading to the products catching fire or causing injury. Until that day, UL had not been directly involved with these self-balancing scooters. But, on that day, we were on notice that our trademark had been counterfeited, as the product was not UL Certified. We had to become directly involved, quickly. UL protects its trademarks, which are a trusted symbol of safety.

UL’s primary concern was that counterfeiting of the UL Mark on self-balancing scooters would lead to a false sense of security for consumers. Furthermore, a number of infringing UL trademarks appeared on the outer packaging (which allowed for more rapid identification and seizure), on the product itself, the battery, charger or other components (whose appearance also gave consumers false security but made enforcement efforts more complicated).

What better way to demonstrate the safety of the device than to place the UL Mark on it as the trademark represents UL’s proven 120-year reputation of research, science, engineering and testing standards. Given the dangers to consumer safety, an aggressive effort was initiated to identify infringing manufacturers and distributors globally.

*Hoverboard* is a registered trademark. Accordingly, this term, though commonly used, will not be used generically in this article but will instead be referred to as “self-balancing scooters”
UL’s Global Security & Brand Protection (GSBP) Unit, a worldwide internal force with the mission of protecting the company’s interests and initiatives, was called into action. Primarily comprising former law-enforcement officers, GSBP works directly with global governmental authorities whose missions are also to protect consumers. With the self-balancing scooters craze hitting mainstream commerce during the 2015 holiday season, the GSBP Unit was working day and night to investigate and respond to inquiries regarding the legitimacy of UL-Marked product entering the market. During this time, individual consumers were contacting UL about models for sale at their local retail stores. Though an overwhelming task, we continued to work long hours and take steps to address the crisis.

One enforcement action occurred while researching a popular online site, where we identified a large-volume infringing seller. The GSBP Unit engaged the seller through covert means and eventually revealed the distribution source of the product. We presented the case intelligence to the Los Angeles County Sheriff’s Department Counterfeit and Piracy Enforcement (CAPE) Team, who pursued a criminal investigation. The probable cause threshold was achieved and a search warrant was executed on a warehouse in City of Industry, California where investigators located nearly 4,900 infringing devices. The estimated retail value of these counterfeit self-balancing scooters was close to $1 million.

Due to rapid climb in popularity of the devices, and the need to help ensure the availability of safe devices, UL announced a certification program to properly evaluate self-balancing scooters. In February 2016, a team of UL engineers developed the appropriate methodology, known as UL 2272, to certify the product for safety. This has afforded retailers and manufacturers the opportunity to distribute properly tested and safe products and have their devices bear the UL certification trademark. Such certification also provides consumers who purchase a certified self-balancing scooter with peace of mind. Diligence in helping ensure the self-balancing scooters bearing the UL trademark have truly been manufactured in accordance with UL 2272 will be an on-going task for the GSBP Unit.
As we approach the 2016 holiday season, parents can trust that the self-balancing scooter under the tree will be safe to use. All UL certified self-balancing scooter models can be found in UL’s certification database and searching category code FK1S and “electrical systems for self-balancing scooters.” The list of certified products will continually be updated as more product manufacturers are certified to UL 2272.

For more information on UL2272 and certified self-balancing scooters, visit [www.ul.com](http://www.ul.com). Any specific inquiries or incident reporting should be directed to UL.

The below is a sampling of certifications. Some of these represent certification services for various product groups; while others are product or market specific certifications.

<table>
<thead>
<tr>
<th>Certification Body</th>
<th>Description</th>
<th>Website</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canadian Standards Association (CSA)</td>
<td>Provides not-for-profit standards development, training and research, along with advisory solutions and global testing, inspection and certification services. Key business areas include: home and commercial, industrial, healthcare and specialized markets and technologies. The CSA certification mark appears on billions of products globally, contributing to a safer, more sustainable world.</td>
<td><a href="http://www.csaigroup.org">www.csaigroup.org</a></td>
<td>T: 416-747-4000 or 800-463-6727</td>
</tr>
<tr>
<td>ENERGY STAR®</td>
<td>Is a voluntary U.S. Environmental Protection Agency (EPA) program that certifies environmental benefits and financial value through superior energy efficiency. It includes various certifying energy-efficient products, homes, and buildings.</td>
<td><a href="http://www.energystar.gov/products?s=mega">www.energystar.gov/products?s=mega</a></td>
<td></td>
</tr>
<tr>
<td>FM Approvals (formerly Factory Mutual Research Company)</td>
<td>Provides certification for electrical and electronic equipment, electrical equipment for use in hazardous locations, fire alarm and signaling, fire protection equipment, insulation, pipes and fittings, pumps, roofs, valves for fire protection service, walls, etc.</td>
<td><a href="http://www.fmapprovals.com">www.fmapprovals.com</a></td>
<td>T: 781-255-4972</td>
</tr>
<tr>
<td>The Good Housekeeping Seal</td>
<td>Is used for various consumer products. Evaluation of the products include reviewing product effectiveness, as well as packaging and marketing claims. The Good Housekeeping Seals also provide for a limited two-year warranty.</td>
<td><a href="http://www.goodhousekeeping.com/product-reviews/seal/">www.goodhousekeeping.com/product-reviews/seal/</a></td>
<td></td>
</tr>
<tr>
<td>UL</td>
<td>For over 120 years, UL has promoted safe living and working environments. UL certifies, validates, tests, verifies, inspects, audits, advises and educates. UL has developed more than 1600 standards for safety, and approximately 22 billion UL Marks appear on products around the world.</td>
<td><a href="http://www.ul.com/">http://www.ul.com</a></td>
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</tr>
</tbody>
</table>
Beyond China, what manufacturing countries are of most concern to you for brand protection risks?

- Russia: 6.8%
- Philippines: 2.7%
- Vietnam: 16.2%
- Mexico: 16.2%
- Brazil: 16.2%
- Indonesia: 6.8%
- Other: 14.9%

Other countries include: Turkey, Sri Lanka, Korea, Poland, Ukraine, Venezuela, Pakistan, Thailand and various countries in Africa

Our next poll to be included in the third issue of The BPP will shed light on where brand protection professionals come from.

COMPLETE POLL
CRISIS MITIGATION
THROUGH COMMUNICATION IN BRAND PROTECTION

Andy Grayson, Graduate Intern, Anti-Counterfeiting and Product Protection, Michigan State University

Leah Evert-Burks, Managing Editor and Industry Fellow Center, Anti-Counterfeiting and Product Protection, Michigan State University

All organizations are susceptible to widely publicized crises. Brand crises—such as those resulting from the Samsung Note 7 recall, the BP Gulf of Mexico disaster, financial losses and internal corruption at Enron, or Tylenol tampering—can remain embedded in public memory for decades (Coombs, 2014).

Few brands are aware of all the resources (e.g., in-house employees, academic research, practitioner experience) they have to develop their own plans for responding to a crisis. This article seeks to provide brands with, 1) basic guidelines and resources that are essential to developing a crisis-mitigation plan ultimately reflected in crisis communication, specifically in relation to brand protection and counterfeit products, and 2) examples of varying communication approaches some industries have taken to recent product-counterfeiting crises that may have mitigated damage—including some that have actually helped improve sales and communication on companion threats.

Myriad researchers and practitioners study crisis mitigation. As a result, there are many definitions of crises in this area. We use that of Katherine Fearn-Banks, 2007: a crisis is, “a major occurrence with a potentially negative outcome affecting the organization, company, or industry, as well as its publics, products, services, or good name.” This definition encompasses all possible entities a crisis could negatively affect.

Crises may take various forms: natural, technological, confrontation, malevolence, organizational misdeeds, workplace violence, and rumors (Lebinger, 1997). Counterfeiting threats can fit into many of these crisis categories. The Enron crisis was a crisis of organizational misdeed and internal corruption, a rumor crisis with actions permanently tarnishing the firm’s reputation, and a crisis of malevolence given the harm caused to the greater economy (CNN, 2013).

Similarly, Samsung has suffered a loss of trust, one of the most detrimental outcomes a brand can face. Product-defect crisis mitigation and communication plans have many analogous elements to brand protection. As one crisis-management executive observed, “Unfortunately for Samsung, when one product is defective, it implicates the entire brand in the court of public opinion.” Furthermore, Samsung “committed the cardinal sin of crisis management by claiming the problem was fixed when in fact it wasn’t” (Linco, 2016).
Most crises are multifaceted and threaten multiple components of a firm. Therefore, it is vital to investigate every aspect of a foreseen or active crisis to ensure that all possible risks are alleviated.

Prior to developing a complete crisis mitigation plan, W. Timothy Coombs (2014) advises that an organization conduct a strengths, weaknesses, opportunities, and threats (SWOT) analysis. The SWOT helps identify what an organization already does well (strengths), what the organization lacks (weaknesses), the capital an organization has to prevent and ameliorate crises (opportunities), and the potential hazards to an organization’s success (threats). Coombs asserts that conducting a SWOT analysis allows for ample foresight into and appropriate preparedness for creating a complete crisis communication plan to mitigate damage to the organization.

In addition to a preliminary SWOT analysis, Coombs posits the three-stage approach to developing a crisis mitigation plan: 1) precrisis, 2) crisis, and 3) post-crisis.

The precrisis stage comprises all things that could help an organization plan for a crisis. Its three factors are, “prodromal signs, signal detection, and probing” (Coombs, 2014, p. 9).

These can aid an organization in detecting any event that may lead to crisis. Internal and external partners to an organization are key to identifying these signs. Researching (probing) all possible avenues by which your organization could be adversely affected by a counterfeit product expedites the identification of warning signs that could occur (signal detection), or symptoms of a crisis that is in its preliminary stages (prodromal signs).

The crisis stage is made up of the measures taken to slow the catalyst event (crisis). Its three main facets are “damage containment, crisis breakout, and recovery.” An organization’s use of in-house PR or communication professionals is critical for navigating these stages; as such personnel will know how to best relay unfavorable information to the public.
Finally, the **post-crisis stage** includes the learning and resolution sub-stages. The organization must revisit each stage of the crisis and identify what it did well and what it could have learned from the crisis (learning), as well as what it plans to do to prevent further crises (resolution). It may also be beneficial for an organization to conduct another SWOT analysis during the post-crisis stage to adequately assess its current organizational standing.

While the above **three-stage plan** has much value for developing a crisis-mitigation plan, the value of a quick or readily available prepared response in the age of the internet is crucial. Rapid communication is key given the vast speed at which news travels and the many social media outlets by which it can be shared. It is essential for an organization not to waste any time determining the content of the messages or who should receive them.

**Looking in from the outside**

Several crises surrounding counterfeit products, and subsequent corporate responses, provide insight on how to effectively respond. Below we review corporate communication regarding counterfeit pharmaceuticals, cosmetics, and auto parts.

Due to the immediate health and safety concerns they pose, some high-profile pharmaceutical counterfeit cases have dominated reports in the media. In the past year, there has been an unprecedented increase in the number of incidents involving counterfeit opioid-based medications (*Kamp & Campo-Flores*, 2016). In fact, counterfeit opioids may have led to the April death of the musician Prince (*Brodwin*, 2016). In particular, criminal opportunists are adding deadly doses of the synthetic narcotic fentanyl. Fentanyl was first added to illegal heroin. However, it is now being added to counterfeit prescription drugs to mimic narcotic effects at lower costs to capture illicit profits related to the painkiller epidemic.

In one recent case, a San Francisco couple set up a profitable lab in their apartment to produce counterfeit pills (*Kamp & Campo-Flores*, 2016). Mallinckrodt, the manufacturer whose products were counterfeited, only responded after news of the lab was published, and then did not issue a press release or information other than statements of cooperation with the authorities. In addition, the organization did not provide information on the counterfeit pills or how to identify them. Rather, this information came from health authorities such as the Drug Enforcement Administration and state authorities such as the California Poison Control. Similar after-the-fact limited communication plans appear to be the choice of other manufacturers in the opioid industry. Such crisis-stage reaction may be grounded in the hope that the crisis and residual brand-association diminish with time—but only time will tell if this response serves well as damage containment, crisis breakout, and recovery.

Similar to counterfeit pharmaceuticals, counterfeit cosmetic products can also pose health and safety concerns given their application to the skin. In a recent case, counterfeit MAC and Chanel products were found to contain harmful levels of lead, beryllium, aluminum, and bacteria (*Somosot*, 2014). MAC had a pre-crisis and crisis plan approach. Its pre-crisis approach included providing information to consumers on its website (MAC Cosmetics Counterfeit Ed) and acknowledging the prodromal signs, signal detection, and probing factors. These sought to prevent counterfeit purchases by providing essential information and redirecting sales from counterfeiters to authorized retailers. Its crisis approach included a press release following a 2014 report by ABC’s Inside Edition on counterfeit
products. Its planning and quick response allowed MAC to direct consumers and press to information immediately after an event occurred. This may boost sales of its valid products, especially as consumers come to appreciate MAC's transparency and readily retrievable information.

The automotive industry provides a third example of responses to counterfeit products. This industry often must communicate on genuine-part quality recalls and non-genuine-part counterfeit alerts. Hyundai, which has been subject to recent recalls for products such as defective Takata airbags, sunroofs, and instrument-panel features, has taken an on-stage approach to communication on counterfeit airbags and unauthorized parts in combined messaging (Huetter, 2016). This messaging both warns consumers of counterfeit parts and urges them to request genuine Hyundai replacement parts, thereby combating the lucrative practice of using imitation aftermarket parts in collision repair and fixes. The company also publishes a web page (ConsumerAwarenessHyundai) for consumers on crucial brand issues. This information is readily available to the press and the public should a crisis arise.

When a mass-media story breaks out about a high-profile raid or companion crises such as product defects or recalls that a brand has been counterfeited, brand owners must be ready with a crisis plan. Understanding guidelines for crisis communication will help in developing a plan and in framing an appropriate response. How a brand responds to a crisis, both through the content of its communication and its transparency, can influence public opinion on it.
E-COMMERCE AND DE MINIMIS ENTRIES: 
CHALLENGES IN MONITORING COUNTERFEITS

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Of Counsel

Abigail Struxness
Manager, Regulatory and Legislative Affairs, FBB Federal Relations/Lindsay Hart LLP

In the last issue, we noted changes made to the *de minimis* rule by the Trade Facilitation and Trade Enforcement Act might facilitate the entry of counterfeit products into the United States. Under the new rule, which took effect on August 26, 2016, when Customs and Border Protection issued an interim final rule, the *de minimis* value of shipments entering the U.S. without declaring at Customs was increased from $200 to $800 (with one person being able to import one shipment per day). Now, several months later, we can analyze some of the changes to the supply chain that this rule has created, its potential impact on counterfeit enforcement, and actions that Congress and related agencies are taking in response.

*De minimis* was raised, in part, because of rapidly increasing consumer demand for e-commerce. Individual consumers buy products online from an overseas vendor, who ships these individual packages into the U.S. under *de minimis* and as a “gift” via express courier shipment. Such shipments quickly clear Customs for direct delivery to the customer. Companies such as UPS, FedEx, and DHL all supported the increase in *de minimis* because such shipments represent a significant business segment for them.

The problem presented by the increase in *de minimis* value is that individual packages with limited Customs documentation are more difficult to track and less likely to be inspected for counterfeits than containers of goods with manifest documentation. CBP Commissioner Kerlikowske acknowledged this conflict between free flow of commerce and brand protection at a Senate Finance Committee hearing, stating that the “absolute explosion” of e-commerce is “one of the most difficult challenges we face right now.”

Members of Congress are watching the *de minimis* implementation closely, and so should brand owners. Senator Menendez (D-NJ) expressed concern to CBP Commissioner Kerlikowske at a Senate Finance Committee hearing, on
CBP Oversight, holding up express mail packages where constituents received counterfeit bridal and prom dresses CBP Oversight, holding up express mail packages where constituents received counterfeit bridal and prom dresses from China. CBP has a duty to prevent fake products from entering our market...I’m pleased that the Customs bill we passed includes...language to raise the enforcement priorities for counterfeit products, especially those marked as ‘gifts,'” he said. Senate Finance Committee Hearing

Businesses, particularly those that sell direct-to-consumer, navigate the tradeoff between expedited de minimis shipments and counterfeit risk in a variety of manners. To benefit from de minimis, some companies have moved their warehouse facilities to Canada, sending individual shipments into the U.S. via courier companies and saving the company millions of dollars in duty payments, notes Richard Wortman of Grunfeld, Desiderio, Lebowitz, Silverman, Klestadt a leading U.S. customs attorney. Adding to this phenomenon is the shift of discretionary cargo into Canadian ports, which accelerated industry-wide during labor disputes in U.S. West Coast ports in 2014-2015.

There is also increased interest in e-commerce brand protection. Amazon recently launched a new program, brand-gating, for its 3rd-party sellers who sell brand-name goods. The sellers provide Amazon receipts of their branded purchases from manufacturers or written permission to sell the products. They must also pay Amazon up to a $1,500 non-refundable fee to sell leading brands such as Nike, Adidas, and Hasbro. This authorization and fee scheme for individual third-party vendors may be intended, in part, to reduce the risk to consumers of counterfeit shipments entering the U.S. via Amazon under de minimis rules.

The de minimis increase can expedite delivery of goods to customers, but also threatens to enable counterfeiters as well. Increased awareness of this issue and advocacy for greater CBP enforcement on eCommerce and de minimis entries can help quell any surge in counterfeit shipments.
TRANSPORTATION INTERMEDIARIES
Part of the Problem Should be Part of the Solution

Michael Holihan
Board Certified Intellectual Property Lawyer, Holihan Law

Brand-protection professionals recognize that the production of counterfeit goods has moved largely to offshore jurisdictions outside the U.S., many locations having little to no intellectual property protection or enforcement regimes. As a result, the transportation of counterfeit goods to the U.S. by sea cargo or courier or postal service packages is now the essential component introducing counterfeit goods into the U.S. marketplace.

The Law
The Lanham Act is a strict liability statute imposing responsibility on anyone using an infringing trademark in commerce. This would arguably include those entities involved in the transportation and importation of counterfeit merchandise from other countries into the U.S. if such activities constituted “use in commerce.” The Lanham Act defines “use in commerce” to include instances when “goods are sold or transported in commerce.” Courts have concluded that this interpretation applies to infringement actions as well.

The Cast
Two categories of entities involved in the transportation of counterfeit goods warrant attention and resources from brand professionals.
First are the entities physically taking possession and transporting goods from a foreign country to the U.S. These include foreign or domestic trucking companies, vessel operating common carriers (VOCC) carrying goods from foreign ports to the U.S.; courier services (FedEx, UPS, DHL etc.) which accept and subsequently transport goods by air from foreign port to the U.S.; and U.S.-located transshipping companies physically receiving and transshipping goods from the U.S. to foreign ports.

Second are entities that arrange the transportation and importation of counterfeit goods. This group includes non-vessel operating common carriers (NVOCC), freight forwarders, licensed customs brokers, and couriers operating through third party transportation companies.

Often overlapping, these categories of services provided by these groups are interchangeable and typically advertised to the public as “seamless logistics” services. In truth, such entities are the sole means by which counterfeit products manufactured in foreign countries get purchased and delivered to U.S. customers.

**The Steps**

1) To identify these entities, brand professionals should first review their Customs Border Patrol (CBP) seizure notices, which should include the name and address of the importer of record (IOR).

2) Brand professionals should follow all CBP notices with a letter to the listed IOR, demanding that it cease further importation of the infringing merchandise. These letters often result in the IOR discovering its identity was stolen, at which point brand professionals should demand a copy of the CBP notice the IOR received.

3) CBP notices to the IOR should include an entry number for the seized shipment, which enables identification of the customs broker who filed the entry. Brand professionals should then demand the customs broker either refute the IOR’s claim of identity theft, or, if the customs broker was acting on a forged power of attorney, provide information on the upstream transportation companies (i.e.: VOCC, NVOCC, freight forwarders, and in some cases, trucking companies used on prior related entries) which brought the infringing goods into the U.S.

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Courier Context

1) Brand professionals’ investigation of couriers also starts with the seizure notice. Each seizure notice includes a CBP case number at the top of the document. This case number starts with a four-digit port code. All CBP seizures at FedEx, DHL, or UPS courier hubs should have a port code that identifies the specific courier hub involved in transporting or importing the seized package.

2) Brand professionals should then issue a demand letter to the listed IOR and the courier, requesting full information on the source of the shipment, including tracking information (i.e., where and from whom the courier physically received the package).

3) As the sale of merchandise has increasingly become a business of logistics, brand-protection professionals must increasingly understand how infringing product is transported to the consumer and what entities are in the responsibility chain. By using these tools, practitioners can better identify transportation and importation intermediaries who are part of the problem—and require them to be part of the solution.

In the JIPPI’s U.S. Joint Strategic Plan on Intellectual Property Enforcement for 2017-2019, the importance of Private-Public Partnerships is discussed in everything from IP innovation to collaborating on information collection.

A key to developing successful partnerships is the setting of a Contract of Expectations. Elements include:

- **Trust**: Commit to building trust
- **Vision**: Identify and agree to the vision
- **Risk & Rewards**: Understand the risks and rewards for each partner
- **Key Players**: Understand commitments of the key players
- **Communication**: Communicate expectations
Leveraging Consumer Feedback to Identify and Combat Counterfeiting

Jason Calhoun
Intelligence Team Lead, National Cyber-Forensics & Training Alliance (NCFTA)

Laurie Iacono
Program Manager, National Cyber-Forensics & Training Alliance (NCFTA)

Consumer feedback may be among the most helpful sources for obtaining leads about counterfeit products. The increasing volume of such feedback, particularly that gathered online in consumer reviews and other reporting mechanisms, however, can be challenging for any one brand to consistently monitor. With knowledge of some of the main sources for consumer reporting as well as the types of information collected for each, brands can better leverage such information.

The Internet Crime Complaint Center (IC3) is one such source. IC3 provides the public with a mechanism to report internet-facilitated criminal activity such as phishing campaigns, online auction scams, and intellectual-property theft directly to the Federal Bureau of Investigation.

“IC3 is often the first piece of the investigative puzzle,” says Donna Gregory, IC3 Unit Chief. “We receive victim complaints, and then analyze, aggregate, and exploit those complaints to provide law enforcement with comprehensive reports that can be used to open new investigations or enhance existing ones. Information remains IC3’s most valuable commodity.”

Many of the most prolific cyber schemes were first identified by IC3. One example is business e-mail compromise (BEC), a sophisticated scheme that compromises legitimate business e-mail accounts through social engineering or computer intrusion techniques. BEC is responsible for stealing more than $3 billion from more than 22,000 victim companies IC3 categorizes and describes the most current Internet schemes on its website and publishes public service announcements to warn consumers and industry about new cyber schemes as they develop and become more prominent and threatening.

Another source for consumers to submit complaints is via the National Intellectual Property Rights Coordination Center (commonly referred to as the IPR Center) and its “Report IP Theft” button. (See Volume 1/Number 1 of The BPP pages 18-19). The button makes it easier for consumers to report trade fraud and intellectual property theft by linking users to an online form that goes directly to the IPR Center’s Intelligence Section, where
leads are processed and shared with IPR Center’s 23 partner agencies. The IPR Center also utilizes the expertise of government personnel as well as of leaders in the financial, retail, and business communities at the National Cyber-Forensics & Training Alliance (NCFTA) to further develop and vet leads.

During a recent Department of Homeland Security (“DHS”) Secretary’s Awards Ceremony, the IPR Center was recognized “for demonstrating outstanding innovation and collaboration to improve the functionality of the Report IP Theft form.”

Interested rights holders may add the “Report IP Theft” button directly to their website. In 2016, the IPR Center received more than 31,000 investigative leads.

A third platform, the Better Business Bureau Institute for Marketplace Trust’s BBB Scam Tracker, a free tool which also enables the public to report scam activity, also enables the public to report scam activity. The tool allows brand-protection professionals to use keyword searches related to their brand or product. They may also view an on-line heat map showing the most frequent scam activity in certain geographical regions. “BBB Scam Tracker has greatly enhanced our ability to capture information on marketplace fraud, and we are very excited about the potential we have to apply this data toward education and enforcement,” notes Emma Fletcher, Project Director. More than 40,000 reports have been collected since its launch in late 2015.

While knowing where consumer complaints are being submitted is important, the essential next step is aggregating the data from these independent sources and compiling it for industry or law enforcement action. The NCFTA—a non-profit information-sharing organization whose collocated industry and law enforcement partners seek to identify, mitigate, and neutralize cyber crime—is aggregating these reports in coordination with IC3, the IPR Center, and the BBB.

“By merging a wide range of cyber expertise in one location, the NCFTA provides a conduit for information sharing between private industry and law enforcement,” said IPR Center Director Bruce M. Foucart.

NCFTA analysts continually review and cross-reference data from IC3, BBB Scam Tracker, and the IPR Center to identify overlapping submissions. They then share these submissions with interested rights holders and law enforcement partners for further action.

“Prevention is critical, but it is equally important to get the information provided to us into the hands of law enforcement for use in criminal investigations,” notes Fletcher. “Through sharing with NCFTA, the data is analyzed for connections and overlap with other databases, and is made accessible to a range of law enforcement agencies.”

For more information about the entities mentioned in this article, please visit:

BBB Scam Tracker: www.bbb.org/scamtracker/us  NCFTA: www.ncfta.net

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DEVELOPING STRATAGEMS TO TACKLE GRAY MARKET

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A gray market involves the distribution of legitimate product through a channel that is unauthorized by a brand. Though not counterfeit, gray market, “parallel,” or “diverted” goods can still damage a brand. A brand can use reactive strategies to extinguish a gray market that currently exists or proactive strategies to avert a gray market from arising in the first place (Chaudhry 2014). This article summarizes anti-gray market schemes for brand protection professionals.

Reactive: Strategic Confrontation

Most high-technology brands use “stacked incentives” on sales of their products. In the Deloitte report, the analysts recount that the majority of the respondents in the high-technology sector use greater than 5,000 channel members to distribute their products and at least 50% of their sales use some type of incentive scheme. These were as high as 55% off the list price; 25% contractual discount; 12% channel partner accreditation; 8% programmatic; and 10% end user (Deloitte 2011).

Stacked incentives, however, create an opportunity for gray marketers to purchase at a reduced price and resell the product in another market closer to the list price. The brand needs to re-evaluate this negative outcome of stacked incentives and establish contractual agreements that will legally limit the ability to resell its products. This creates the necessity for sales teams to effectively work with the company’s legal counsel to resolve this gray market issue. My research with legal expert Robert Bird on gray markets in the pharmaceutical sector of the European Union found a quagmire of legal challenges presented before the European Court of Justice—and the need for synergy between marketers and legal professionals (Bird and Chaudhry 2011).

Reactive: Supply Interference

A brand’s adeptness at legally restricting access to its products by controlling the volume of goods available or establishing random wholesale or retail delivery dates can deter gray marketers. This tactic does present a conflict with the sales team for the brand: disrupting the supply chain to diffuse a gray market may not be worth the possible alienation to the brand’s legitimate customers. Nevertheless, some brands have taken extreme measures here, such as when Apple temporarily closed its retail stories in Beijing and created an online booking system that allowed only one purchase per phone per day. This may not work in other industries, but is an example of tactics used to control a gray market.
Reactive: Promotional Bursts

Warning consumers about gray market products may require brands to make a decision about honoring warranties. Nikon, the Japanese camera manufacturer, used its “Peace of Mind” campaign to stress the value of buying through a legitimate supply chain and reward consumers with an extended warranty for such purchases. Because gray marketers rarely want to be identified, brands may use ‘track-and-trace’ technology to identify gray market distribution (Transportistics 2016). At the point of purchase, however, gray marketers can circumvent such tracking by removing the manufacturer’s warranty card, the authorized dealer stamp, or the product serial number.

Proactive: Product Differentiation

A homogeneous product presentation allows a gray marketer to resell from one market to the next without the buyer questioning the authenticity of the product. If the brand sells its product designed for a higher-priced domestic market ‘as is’ to a lower-priced market, then the brand should be prepared to observe its product diverted back to the original marketplace. The main drawback of creating a non-homogeneous product presentation is the cost and practicality. The brand must question whether producing distinct products for differing domestic markets to deter a gray market outweighs the economies of scale associated with a standardized product presentation.

Proactive: Strategic Pricing

The volatility in currency movement between the U.S. dollar and U.K. pound is testimony to how rapid a political situation like “Brexit” can change prices and create a gray market. About one year ago, (October 2015), the spot pound was trading at $1.51685/E—today it closed at $1.27861/E (October 5, 2016). The difficult enigma for the brand is to manage its price, such as establishing price bands with an upper and lower limit, in order to set maximum and minimum price thresholds. Some do so through programs such as MAP (manufacturer’s advertised price) but this may also “encourage” diversion with the need to get rid of slow selling products that are part of these programs. However, a gray market can still occur with a minimal price differential between markets if a large quantity of goods can be sold.
Proactive: Dealer Development

The brand must enhance its relationship with its sales function to affect its authorized channel members to impede a gray market. But, as alluded to legitimate channel members can also be the gray marketers—they do not have to be separate entities. Feasible options are to: 1) develop better metrics of the brand’s stacked offerings of incentives and assign functional teams to oversee these offerings; 2) create a uniform policy that governs incentives offered throughout the lifecycle of the product and to provide consistent communication to channel members about policy direction and compliance as well as measures for non-compliance; 3) foster a culture of compliance and respect for distribution plans; 4) educate stakeholders, such as sales teams, and solicit input from channel members about improving the incentive structure for long-term health of the brand and not just short-term profit; and 5) establish ‘touch points’ to screen the channel partners, such as arranging a self-assessment of their activity, scrutinizing their selling behavior online, and performing on-site inspections and internal audits (Deloitte 2011).

Proactive: Marketing Information System

The implementation of a marketing information system should monitor these red flags: 1) pricing that is too low; 2) unreasonable spikes in orders; 3) unusual orders such as size runs and certain styles; 4) special discount requests; 5) warranty exchange requests; and 6) unusual delivery requests. Sugden (2009) suggests key methods of detection may include:

**Audits**—the brand holder’s contracts with its distributors and re-sellers should include language on the right to conduct audits, such as random spot checks, to use point-of-sale reports to gauge illogical sales activity.

**Internet monitoring**—to monitor the abundance of information, including that on auction sites and selling platforms, that must be scrutinized on the internet, a brand may retain an outside service, although this will obviously require budget and some measure of oversight.

**Trap Purchases**—the brand may hire mystery shoppers or investigators to covertly assess the gray market behavior of the authorized channel members.

**Informants**—a gray marketer can work with an elusive identity, but the operation can be uncovered by informants. Paul Mitchell, a manufacturer of salon products, allows all levels of informants to report diverted products to its company website and a toll-free hotline.
Proactive: Long-term Image Reinforcement

This maneuver targets consumers through advertisement that reinforces the brand’s image and thus cultivates a buyer’s desire to obtain goods from authorized channel members. This is an interesting tactic since the gray market product is genuine, so a brand must leverage intangibles, such as customer-loyalty programs, to make the lower-priced gray market alternatives unattractive for consumers.

Proactive: Strategic Alliances

Associations such as the Alliance for Gray Market and Counterfeit Abatement (AGMA) for the high-tech industry, whose members include Cisco, HP, and Microsoft, are an invaluable resource for brands seeking advice and accessing relevant research on the issue. They also help educate government stakeholders and thereby shape public policies regarding gray markets.

Gray Markets Expected to Persist

The continued growth of global business, reduction of barriers to trade through free-trade agreements, and increased volatility in exchange rates are just a few trends that will continue to foster gray markets. However, employing some of the above stratagems will help brands effectively respond to this trade diversion—especially by reinforcing the strength of authorized channels and implementing information systems to monitor the extent of the problem.
The mobile app space is something that WWE is keeping an eye on very closely. Elimination of rogue, malware-infected, and infringing mobile apps is something that we are monitoring and enforcing on more and more. With the WWE Network, our direct-to-consumer video streaming service that consists of both a 24-hour linear streaming channel and on-demand programming available on set-top boxes and mobile devices, it’s imperative to keep this app space free of unauthorized apps to preserve the user experience.
In your work at WWE you engage with both physical goods counterfeiting and video piracy; most of us in brand protection are one or the other. How do your balance your efforts? Do you utilize vendors to assist you?

Social media is definitely a growing concern, especially with the major platforms rolling out live streaming and User Generated Content video capabilities. WWE is a fully integrated media and entertainment company and programming that reaches more than 650 million homes worldwide. Facebook, Instagram and Twitter/Periscope/Vine are becoming huge players in the video space without robust fingerprinting and enforcement mechanisms to eliminate pirated content like YouTube’s more mature Content ID system. It’s something they are working on, but their fast rollouts have been a bit “cart before the horse” as their enforcement protocols seemingly have taken a backseat.

We are watching the app space closely as well, but social media is currently the center of my worries. I just changed one of my search terms on Facebook, and whap! A whole new pile of fakes. How worried are you about social media?
Yes, my boss and I are the entire in-house IP team managing 9,000 copyright registrations and 8,000 trademarks worldwide. WWE video programming can be seen in more than 180 countries in 20 languages. Needless to say we have a lot of content to protect and it is really important to align with vendors with strong technology to assist in enforcement. If your company is heavily invested in video content, then you need to choose a strong vendor with top technology in the fingerprinting and watermarking space, as well as a strong vendor in the post-event User Generated Content (UGC) and Peer-to-Peer enforcement space. One cannot ignore social media and mobile apps, and there are vendors in those spaces that specialize there too. On the marketplace front, one almost needs to work with a vendor to assist in the removal of listings online selling counterfeits – it’s a volume game. But even then, one needs to strategically pick certain battles. Let your data work for you. Concentrate on high-volume sellers importing counterfeit goods into high-value jurisdictions and those selling in bulk online. Run select investigations on these high-priority targets and work backwards to shut them down at the source of creation.

One more important tip: do not underestimate the importance of your copyright rights. In some first-to-file countries, you might have problems registering your trademarks, so copyright registrations and the ability to use them to enforce based on international treaties come in very handy where your IP portfolio may have holes. Also, I can’t overstate establishing relationships with other brands and customs/law enforcement to discuss problems and solutions – a fix for your particular problem might already be solved.
I see a direct link between the performances of the Specialized professional athletes and how hard the counterfeiters come after us. Peter Sagan just won his 2nd consecutive world road championships. Whooo!! Everything he rides in, his bike, his helmet, his jersey, his wheels, is target #1. You have many athletes in your company, how do you predict what the next target will be?

You hit the nail on the head – what’s currently popular is always targeted by infringers. Every WWE Superstar and Legend is a separate brand for us (and we have over 200), and we push those that get “hot” with audiences. The problem is that the infringers notice and do the same. So, the need to work closely with your other business units and leverage data via analytics is imperative. While you can never truly predict consumer behavior, different data sources are powerful tools in helping you to identify targets and spend your legal/enforcement budget wisely. On the flip-side, you can always “pirate” the counterfeiters! There might be product you notice being sold illegitimately using your branded IP that appears to be popular in the marketplace. This information, in turn, can be used to create new legitimate channels or product lines for your brand!

Can we finish this discussion with your personal mantra?

I like that better than my "worrying". Good luck!

Andrew, as you know, I always like to say, just as The Rock laid the “smackdown” to his opponents, I like to do the same to brand infringers all over the globe!
Educating law enforcement around the world to effectively combat IP crime.

The IIPCIC curriculum is free to all law enforcement. For more information please visit: www.iipcic.org

INTERPOL works in cooperation with UL to deliver this virtual, global college.
The A-CAPP Center is a multi-dimensional Center from a world-renowned research university that aims to help navigate the strategic, technological, legislative, business and legal challenges of anti-counterfeiting and product protection.

RESEARCH

OUTREACH

EDUCATION

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A global hub for product anti-counterfeit strategy

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EVENTS

INTA 2017 ANTI-COUNTERFEITING CONFERENCE
Staying Ahead of the Curve
February 6-7, 2017
Hong Kong

Registrants will have the opportunity to hear from leading experts about strategies to combat ongoing challenges of counterfeits. Brand owners, government officials, and legal experts will discuss best practices for developing a brand protection program in an environment of changing technologies and sophisticated counterfeiting networks. Learn more and register today!

React

REACT ANNUAL ASSEMBLY MEETING
March 30-31, 2017
Amsterdam
MORE

INTERNATIONAL TRADEMARK ASSOCIATION (INTA) SERIES OF WORKSHOPS
Free-Trade Zones: Commerce vs. Counterfeits
February 8, 2017 - Hong Kong SAR, China
March 21, 2017 - New York, New York, USA
April 19, 2017 - Dubai, UAE
October 4, 2017 - Cartagena, Colombia
November 29, 2017 - Berlin, Germany

Free-trade zones (FTZs) promote employment and attract investment. Countering the proliferation of illicit and counterfeit products in FTZs is an ongoing struggle. INTA has created a series of one-day workshops to provide a forum for key stakeholders, including brand owners, FTZ authorities, and governmental authorities, to share their concerns and best practices—to work together toward solutions to combat the ongoing threat of counterfeiting in FTZs. Registration launches in December 2016.
RESOURCES

RECENT PUBLICATIONS

Center for Anti-Counterfeiting and Product Protection Backgrounder: Virtual Communities as Guardians Against Product Counterfeiting in the Athletic Footwear Industry
This brief summarizes recent research by the A-CAPP Center in exploring the potential of an independent virtual brand community (IVBC) in guarding consumers against counterfeits. READ

International Trademark Association (INTA) Enforcement: An International Litigation Guide
INTA’s latest member resource is newly launched and available online as part of the INTA membership package. This searchable guide includes valuable information on the many facets of trademark litigation, including: prefiling requirements; claims for infringement of registered and unregistered marks; emergency measures; early resolution of litigation; evidence; trials and oral hearings; judgment and final orders; post-judgment issues; costs of litigation; and remedies. More than 40 countries are included, with more to come!

This plan was developed by the Office of the Intellectual Property Enforcement Coordinator along with the leadership and career staff of offices and agencies across the Federal Government with IP-related responsibilities. It is a blueprint for the work to be carried out over the next three years by the Federal Government in support of a healthy and robust IP enforcement policy environment.

The Association for Packaging and Processing Technologies Review of Global Counterfeiting 2016: Protecting Your Brand Amid Counterfeiting
This report examines the counterfeiting trend through interviews with 75 brands, industry experts and technology suppliers.
RESOURCES (continued)

RECENT PUBLICATIONS

This report, which builds on the previous 2012 report, was produced in collaboration with several U.S. government offices. Using quantitative and qualitative methodology it examines intellectual property intensive industry and the direct effects on the global economy.

This is the 1st Edition of the Crime Report, which provides an assessment of the level of IP crime in the UK, highlighting the actions taken by businesses, law enforcement and government to respond to IP crime.

The Madrid System makes it possible for a trademark holder to apply for trademark registration in multiple countries by filing a single international application via a national or regional intellectual property (IP) office. It simplifies the process of multinational trademark registration by eliminating the need to file a separate application in each jurisdiction in which protection is sought. The System also simplifies managing the mark after registration, as it is possible to centrally request and record further changes or to renew the registration through a single procedural step.

EDUCATION

Anti-Counterfeit and Product Protection Criminology
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Courses offered each spring, fall, summer
The certificate is an interdisciplinary program to assist working professionals and graduate students who are seeking a well-rounded foundation in anti-counterfeit strategy and product protection. MORE

Introduction to Product Counterfeiting
SUMMER 2017–ONLINE
This undergraduate course is an introductory examination of product counterfeiting, a global crime that affects people of every socio-economic class, race, gender and culture. The problem is explored through a review of popular literature (e.g., newspaper and magazine articles,
EDUCATION (continued)

blogs, social media), empirical studies, case histories, and criminological theory. Attention is given to understanding the following themes and concepts: the social and economic impacts of product counterfeiting, the transnational nature of counterfeiting organizations, offender motivation, consumer behavior, and the application of crime prevention techniques and theory. The materials presented in this course provide a global understanding of product counterfeiting including the role of brand owners, law enforcement, governments, legitimate businesses, criminal enterprises, and individual consumers. MORE

Understanding Product Counterfeiting
SUMMER 2017-ONLINE
This graduate course explores the crime of product counterfeiting through a mix of theoretical perspectives from criminology, victimology, and organizational behavior. Product counterfeiting is a global crime that impacts almost every aspect of society. The nature of product counterfeiting reflects a toxic mix of mercenary motivations and cognitive dissonance as individuals within organizations, both legal and illegal, capitalize upon criminal opportunities that are solely focused upon the maximization of illicit gains. Through an analysis of theory, empirical studies, and case histories this course helps students gain a comprehensive understanding of product counterfeiting, and promotes the scientific application of theory and research as a means of developing effective crime prevention solutions. MORE

The International Intellectual Property (IP) Crime Investigators College
The International Intellectual Property (IP) Crime Investigators College (IIPCIC) is a multilingual, online training platform that delivers IP training to 12,000+ law enforcement officers and private sector brand protection professionals from over 156 countries. IIPCIC works with private sector brand protection teams to design custom eLearning courses that will educate global law enforcement about their specific IP challenges. For more information, or if you are interested in commissioning a module specific to your industry or company, please send an email to info@iipcic.org or visit our website http://iipcic.org/

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