



Oral Testimony of

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On

CHINA'S COMPLIANCE WITH WTO OBLIGATIONS

Chairman D'Amato and Members of the Commission, on behalf of the members of the International AntiCounterfeiting Coalition, Inc. (IACC), I thank you for the opportunity to provide you with our comments regarding intellectual property protection and enforcement in China.

The IACC is a Washington, D.C.-based non-profit organization that represents intellectual property owners from diverse industries, including auto, entertainment, consumer goods, apparel, pharmaceuticals and many others. We focus our efforts on the protection and enforcement of intellectual property rights.

Due to time constraints, I will summarize my full written submission and also identify additional steps.

RECOMMENDATIONS

The IP enforcement challenges posed by China are, in fact, global challenges to the IP enforcement system. Our recommendations have both domestic and international components. Moreover, they are not limited to steps that target actions in China. Specifically, we recommend the following:

- Strengthen the federal criminal statute against trafficking in counterfeit goods in the U.S. by making provisions of H.R. 32 the law of the land;
- Strengthen the enforcement provisions of free trade agreements to obligate trading partners to improve protection and enforcement, which would include targeting goods from China;
- Support INTERPOL's effort to combat criminal trafficking in counterfeit goods as this will include goods originating from China;
- Encourage the U.S. Government to be more creative and imaginative in developing IP training programs and tools for technical assistance and capacity building; and

- Instruct relevant U.S. agencies to consider whether the global threat of criminal counterfeiting and piracy can be adequately fought with an IP system that is grounded on principles of territoriality.

WTO COMPLIANCE

To assess WTO compliance, the WTO's TRIPS Agreement is the starting point. TRIPS--Articles 41 through 61--obligate China to implement *effective* enforcement procedures and provide remedies that have a *deterrent* effect. Our members report that:

- Many raids have been conducted;
- Significant quantities of counterfeit goods have been seized;
- Criminal prosecutions have been initiated;
- Shipments have been stopped by Chinese Customs; and
- Prison sentences have been imposed.

Despite a lot of enforcement activity, China continues to pose the greatest threat to IACC members' intellectual property assets as compared to other countries in the world. We believe that China has no equal either as a source of counterfeit and pirated goods to the world or as a market in which fakes are produced and sold locally. Despite significant improvements in China's IP legal regime over the last few years, the enforcement system continues to be fraught with weaknesses and inefficiencies that facilitate massive counterfeiting and piracy. To list a few, these weaknesses include

- porous borders,
- failing to ensure that guilty defendants are, in fact, paying fines or serving time, and

- lack of referral of administrative cases for criminal investigation.

The exports of counterfeit and pirated products continue to flow from China to every corner of the world. For FY 2004, our Bureau of Customs and Border Protection (CBP) seized 2,826 shipments from China containing counterfeit and pirated product, having a domestic value of over \$87 million dollars,¹ accounting for 63% of the total monetary value of intellectual property seizures in FY 2004.

Recent legal developments in China that are relevant are the customs regulations and the December 2004 judicial interpretations regarding criminal cases. Both are recent and it is too soon to predict the overall long term impact of the changes. Regarding the criminal enforcement system, the police, prosecutors and the courts will have to demonstrate a willingness to investigate, prosecute and impose higher level penalties on counterfeiters and pirates.

The system must impose a level of penalty that will deprive the individuals involved of any economic benefit and impose a monetary fine or prison sentence so that the penalty is greater than the rewards of returning to the illegal activity of counterfeiting and piracy.

Thus, greater political will at all levels must be demonstrated to ensure that IP crime is punished.

JCCT: RESULTS?

Turning to the JCCT, IACC members' central concern was the judicial interpretations. The IACC welcomes the lowered criminal thresholds that have been announced by China.

¹ Both of these statistical measures were increases over FY 2003 when CBP seized 2,056 shipments with a domestic value of over \$62 million.

Despite the lower thresholds, a reasonable argument can be made that TRIPS rejects the use of numerical standards. TRIPS Article 61 requires that any counterfeiting or piracy on a commercial scale shall be eligible for criminal penalties. Under the new interpretations, counterfeiters must still be caught with approximately \$6,000 worth of counterfeit goods to be eligible for criminal penalties. For many products, one would have to have a significant number of units, easily a commercial quantity, to reach the sum of \$6,000.

The text of the new interpretations should not be the sole focus of our efforts. Whatever steps the Chinese take – new regulations/interpretations, increased training, more funding, specialized IP units for the police, etc. -- such steps must result in a reduction of the overall counterfeiting levels. Additionally, the administrative enforcement bodies need to cooperate more closely with Chinese police and promptly transfer those cases that meet the standards for criminal investigation and prosecution.

WTO: DISPUTE?

Because of the divergent IACC membership, we have no member consensus supporting a WTO case.

What Next?

There is no expectation that the current onslaught from China will ease in the near future. The IACC members' lack of consensus on the pursuit of a WTO case does not mean that there are no steps to take. In fact, the wave of Chinese counterfeit and pirated product has significant lessons for industry and government.

1. Strengthen U.S. Laws

The U.S. Government should continue to strengthen its domestic laws to protect IP. For example, H.R. 32 (Stop Manufacturing in Counterfeit Goods Act),² which is currently being considered in the House of Representatives, is the type of legislation that should be part of U.S. law in order to close loopholes in our criminal laws.

Once law, the provisions in H.R. 32 can then become a part of the bilateral free trade agreements.

2. Free Trade Agreements

The U.S. should continue to include strong IP enforcement provisions in free trade agreements. The challenge of combating the trade in counterfeit and pirated products can be, in part, met through effective implementation of the provisions of FTAs, which now obligate trading partners to take actions at their borders against goods intended for export and goods in-transit, including activities within free trade zones. Enhanced levels of criminal enforcement will also add to the IP owners' abilities to protect their assets.

3. National Success/Global Problems

Successful single market companies in the U.S. must increase their awareness of the possible threats posed by counterfeiters and pirates. Those that may not be active in multiple global markets may still be victims of IP theft simply due to their success. Because of today's technology and instant communication, a successful national enterprise can easily become a global target of counterfeiters. Along these lines, the U.S. Government should increase its efforts to raise awareness among small and medium enterprises (SME). Many successful SMEs may not be aware of the IP assets they have

² H.R. 32 was introduced in the House of Representatives on January 4, 2005.

or how they might protect those assets. Thus, this requires a proactive education program.

4. IP System Exposed

Technology, communications and increased trade facilitation all contribute to jeopardizing the success of SMEs, but also pose threats to larger enterprises. The challenges posed by the massive quantities of counterfeit and pirated products made in China and elsewhere and exported throughout the world highlight a collision between borderless criminal activity and territorial IP rules. Counterfeiters have flooded global markets with substandard and dangerous products with no regard for national borders and with no respect for the rule of law, placing law abiding companies at an extreme disadvantage in combating IP crimes.

The global IP system has rules. IP owners who are the victims are failing to make much progress, in part, because of the territorial nature of some IP rules,³ which help counterfeiters and pirates exploit an established IP system. In view of the collision between global counterfeiting and piracy and the territoriality of some types of intellectual property, it may be appropriate to consider new rules.

5. IP Capacity Building/Technical Assistance

The IACC encourages the U.S. Government to consider a more systemic approach to IP training that expands the target audiences to include the local business communities who can become our allies. By improving the business community's awareness of the importance of IP to them and local economies, it may accelerate our efforts to engage both the business and law enforcement communities to advocate for

³ The territoriality of some types of intellectual property, e.g., patents and trademarks, hinder the ability of owners to seek protection and enforcement against counterfeiters.

better IP protection overall. We believe that increased efforts should be made to broaden the reach of IP training in order to enlist a wider group to support our efforts and to meet our objectives.

Thank you and I welcome the opportunity to answer any questions you may have.