

INTELLECTUAL PROPERTY

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Stemming the tide of counterfeits abroad

Some individual nations have recently taken steps to protect IP rights.

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IT DOESN'T TAKE an intellectual property lawyer to know that counterfeit goods have become a major threat to U.S. corporations. As with any problem of such magnitude, the solutions are slow in coming and, in many cases, the sum total of reparations cannot keep pace with the ongoing economic damages suffered by companies selling in overseas markets as well as in high-risk domestic market sectors.

That said, there is cause for optimism among intellectual property holders. This article will provide an update on some of the progress that has been made and continues to be made. Daily reports appear in the business press about nations that have taken salutary measures to help stabilize a global order of IP protection. Again, though, because the problem is of such persistent severity, those initiatives often get ignored when juxtaposed with such reportedly staggering loss numbers.

Consider just a few of these latest numbers. During the first quarter of this year alone, more than \$1.1 billion of counterfeit goods were seized worldwide. A stunning \$500 billion in such goods is estimated to exchange hands annually. Linda Punch, "Bogus Brands and the Internet," Internet Retailer, August 2005. See www.internetretailer.com/article.asp?id=15631. Specific cases in point are equally daunting. According to Tiffany & Co.,

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for example, 73% of the jewelry sold on eBay bearing the Tiffany brand is counterfeit. Id.

To understand the enormity of the situation, consider the current numbers confronting U.S. entertainment companies. These losses take on particular significance in the wake of the high-profile legal victories—*Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 125 S. Ct. 2764 (2005), being the latest—the industry has enjoyed. Such legal victories are palliatives. They affirm that U.S. companies are, legally, in the right.

But the patient may die anyway as the problems challenging this industry persist apace.

Not the least of these problems, there's been a reported 25% decrease in CD sales during the last five years. That time frame is especially significant as the decision in *A&M Records Inc. v. Napster*, 284 F.3d 1091 (9th Cir. 2002), is around five years old. It seems that even front-page legal victories don't necessarily provide much more than loss control in the face of massive public infringement. Additionally, aggressive actions against individual users have likewise not stemmed the hemorrhage (although it has certainly created serious public relations problems for the music business).

Some networks are hard to stop

Grokster may drive the point home. The company has now closed operations, five months after the U.S. Supreme Court decision. Yet even supporters of the music industry's cause acknowledge profound differences between centralized programs, which are easy to find and easy to shut down, and decentralized protocols like BitTorrent. With those, there's nothing to

shut down except individual Web sites where product availabilities are posted. Furthermore, such sites can always reopen abroad—which is just one reason why the kind of global actions described below are vital to any IP protection strategy.

The 25% decrease is not an isolated number. Add to it the fact that 90% of the songs and movies copied on the file-sharing networks are downloaded illegally, according to music industry filings. There has been a fall in overall global CD sales of 20% between 1999 and 2003 and a particularly large drop in CD sales in the United States.

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Global infringement is equally disheartening. For example, studies show that, of the 9.5 million people in Germany who have downloaded music, 89% of them did so illegally. Meanwhile, Latin America's largest economy is a haven for everything from

illegal medicine to illegal music. According to the International Federation of the Phonographic Industry, 54% of the music sold in Brazil is done so illegally.

To be sure, seizures and interdictions need to be aggressively carried out in the same way that we continue arresting heroin dealers even though high-volume arrests and convictions have never apparently lowered addiction rates.

At best, however, it remains difficult, in light of the kind of massive loss numbers cited above, to assess the effectiveness of reported seizures. Recently, U.S. Customs and Border Protection seized and destroyed 3,000 fake Stanley hand tools as well as a cache of Sony electronics worth \$100,000. Compare such recoveries to the volume of theft and infringement in China, where just about every

automobile battery manufactured is a U.S. brand-name product rip-off.

Our myriad examples show just how global the problem really is. These examples further suggest that, short of suing millions of online music listeners in Düsseldorf, Germany, or Sao Paulo, Brazil, or starting a trade war with China that would gut our own economy, the solutions must lie in global treaty-making and enforcement.

Here's the good news on that front. We are seeing not just effective World Trade Organization deliberations, but also salutary efforts by other countries, including Third World as well as developed nations. If nothing else, such efforts confirm a mood in the world today, a growing resolve to achieve cogent IP policy and practice because, after all, the global marketplace is the one in which we all have to live.

An E.U.-wide music license?

For example, the European Union is encouraging the European music industry to create an E.U.-wide copyright license for online music. The downside is cost. Apple Computer Inc., for example, would have to obtain separate licenses for each song in every E.U. country to offer it to all Europeans, which could cost Apple up to 475,000 euros (\$569,000) per song. The upside is that we are moving ever closer to an enforceable law harmonized with U.S. law and favorable to long-term U.S. business interests. (The first-to-file provision of the Patent Act now pending in Congress would further support ongoing harmonization.)

Brazil, China and Russia are now being pressured by the U.S. government and the WTO to uphold U.S. patents and copyrights. The International Intellectual Property Alliance, which represents movie, music and software companies, has petitioned the United States to end Brazil's favorable trade advantages, which had let that country export some goods to the United States free of duties. The benefits at risk for Brazil total \$3 billion per year.

The alliance petition is an example of global companies and U.S. companies confronting a common problem. In response,

Brazil's government is at least making a token affirmation of American intellectual property rights. Earlier this year, for example, Brazilian police seized \$833 million in counterfeit goods.

President Bush is now personally engaged. He is having trade agreement talks with several Asian countries and discussing how to leverage those agreements to fight intellectual property piracy.

Initiative in Uzbekistan

The Eurasia Foundation is collaborating with Microsoft Corp. and the U.S. Agency for International Development to strengthen IP protection in Uzbekistan. In tandem with this effort, the Uzbek Association of International Law will provide copyright law training programs for authors, copyright holders, public officials and consumers. The association will likewise recommend legislative initiatives and improvements to regulatory procedures.

The importance of this example is that it shows the attractions of WTO membership, which the Uzbek government wants and which it is taking responsible steps to attain.

Israel has embarked on a shrewd negotiation to balance the interests of pharmaceutical companies and the growing demand for generic drugs. Big Pharma representatives are working with Israeli generic drug manufacturers to prepare a list of countries that have extended pharmaceutical patents, which the Israel Patent Office will then use to extend drug patents in Israel.

The purpose is to maximize generic drug distribution but not affect imports of ethical drugs. Israel's Constitution, Law and Justice Committee is considering including major pharmaceutical manufacturing countries such as the United States, the United Kingdom, Germany, Switzerland, France and Italy on the list.

A more responsive China

China has responded to criticism of its IP protection policies and practices by enforcing copyrights with disclaimers on file-sharing Web sites. We also see China more willing than in the past to sign international conventions on IP protection, while a series of laws and regulations on patent rights has also been enacted. Chinese police are said to have recently solved around

7,000 criminal cases involving counterfeiting and commercial intelligence theft. The total IP equity of these cases involves approximately \$321 million.

Historically, China has a recidivist tradition in that it tends to relax controls once the outside pressure subsides. Yet such is the accelerating nature of global trade, especially with Chinese imports and export playing a dominant role in that trade, that those outside pressures are not likely to subside. It's a different market now, and the Chinese likely realize that the rest of the world, including the United States, can no longer tolerate recurrent outbreaks of counterfeiting.

A recent enforcement action in Nigeria typifies an increasingly widespread global interest in IP protection. In just one year, Nigeria proved that its Strategic Action Against Piracy (STRAP), an operation set up by the Nigerian Copyright Commission, has real teeth. The government cites greater cooperation between the commission and police as one reason for seizures worth around \$1 billion in Nigerian currency. In their public statements, officials seem totally enlightened that copyright protection is vital to the nation's economic development.

Interestingly, the aggressive new role mapped out for STRAP is an important component in the hoped-for development of the nation's movie industry. A public forum cited copyright-protected products like movies as a more important long-term revenue generator than oil. Right now, 90% of Nigeria's indigenous CDs, VCDs and DVDs are pirated. The stunning percentage is due to the involvement of organized crime.

Not one of these initiatives, taken alone, is necessarily dispositive. They do not provide new directions or promise solutions different from those ventured in the past by governments around the world. Taken together, however, they provide evidence of a growing global awareness that piracy and counterfeiting, by undermining the stability of global markets, threatens the interests of everyone in those markets. **NLJ**

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