

# GLOBAL BUSINESS

## SEMINARS

### Counterfeiting: Public and Private Responses and Next Steps

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#### *Moderator*

Sherman E. Katz, William M. Scholl Chair in International Business

#### *Featured Speakers*

Eric Smith, President, International Intellectual Property Association (IIPA)

Timothy Trainer, President, International Anti-Counterfeiting Coalition (IACC)

Joseph Papovich, Assistant USTR for Intellectual Property, Services, and Investment

Paul Salmon, Senior Counselor to the World Intellectual Property Organization (WIPO)

John J. Hamre, CSIS president and CEO, has described counterfeiting and piracy as “an ugly wart on the face of globalization.” Increased production and sale of fake goods and pirated copyrighted property has led to the loss of over 750,000 jobs in the United States alone, and billions of dollars in lost revenues. Sherman Katz noted in his opening remarks that the problem is worsening, particularly in countries where laws and enforcement mechanisms are weak and buying power is low.

According to Joseph Papovich, the prescription for curbing this growing threat must develop from an effort that unifies public and private resources, and focuses on the dual weapons of preventative education and enforceable sanctions. All of the speakers agreed that the most effective tool in mobilizing successful anticounterfeiting campaigns is to show problem countries that enforceable mechanisms of intellectual property regulations are in their strong national interest.

Also effective is the Special 301 report published annually by Papovich’s office, which publicly censures countries deficient in anticounterfeiting enforcement and contains

submissions from many private groups, including the IIPA and IACC. Papovich offered a candid and insightful explanation of weaknesses in U.S. trade law and deficiencies in the climate abroad, which render the campaign against counterfeiting a more formidable challenge: limited sanction power; a lack of global understanding and education; and, perhaps most significantly, the reluctance of governments to view the piracy of intellectual property as an offense rivaling the theft of physical goods. This final tendency often prevents victimized corporations from receiving the governmental aid requisite to stop the pirates.

#### **“Trade tools are essential for reducing piracy.”—Eric Smith**

Eric Smith outlined the problem of piracy of intellectual property media, encompassing technology and arts media, such as compact discs and digital video discs (DVDs). The IIPA, created in 1984, unites seven trade coalitions including the Motion Picture Association of America and the Association of American Publishers. The 1988 Omnibus Trade Act, which merged trade policy and the effort to enforce intellectual property rights abroad, was fitting and necessary, according to Smith, given that copyright exports account for 4.94 percent of the U.S. GDP, a larger share than any other product or service.

Thus, it comes as no surprise that the effects of intellectual property (IP) piracy can be devastating to U.S. and other significant owners of copyrighted works. The problem is becoming more elusive and dangerous as digital IP media emerge. With analog piracy, the bootlegged copy suffers qualitatively with each regeneration, but the nature of digital technology now enables IP pirates to generate an infinite number of copies that rival the quality of legitimate products. Indeed, digital piracy now accounts for over 50 percent of the problem.

With this level of fraudulent behavior plaguing a vital and burgeoning export, enforceable antipiracy laws become imperative. Smith evaluated the effectiveness of both TRIPs (World Trade Organization [WTO] agreement on Trade-Related Intellectual Property) and Special 301 sanctions. Pursuit of TRIPs violations through WTO

consultations and dispute settlement, he noted, works well only in the event of a clear *statutory* deficiency in a country's IP laws. For example, U.S. cases against Japan, Greece, Denmark, Sweden, and Ireland were all settled favorably. Indeed, most major U.S. trading partners have good laws; the problem lies in enforcement. To date, no major TRIPs enforcement case has been adjudicated to completion. Special 301 reports, therefore, seem a more effective mechanism of enforcement at present. Though the bite of 301-threatened sanctions works most effectively in dealing with non-WTO countries (since the U.S. cannot level unilateral sanctions against a WTO member without WTO approval), naming and shaming in a Special 301 report acts as an inducement to improve local enforcement in countries that do not maintain and administer sufficient antipiracy standards. The related threat of reduced IPR investment by trading partners also helps produce improvements. Finally, sanctions to deny preferential tariff treatment to goods from countries where IP laws are not enforced under the Generalized System of Preferences (GSP) and other preferential trade acts such as the Caribbean Basin Economic Recovery Act (CBERA) and the Andean Trade Preference Act (ATPA) continue to be effective. Smith noted there must be a credible threat of benefit withdrawals. These sanctions remain legal without WTO approval.

Enforcement must be tightened to make the world safe for IP trade growth. Smith asserted that in addition to the demonstration value of a government winning a TRIPs enforcement case, the TRIPs text itself needs improvement with respect to enforcement. He also urged that enforcement provisions also be added to both regional and bilateral free trade agreements (FTAs). The U.S.-Jordan FTA, which the Senate recently ratified, should serve as a model for developing better standards. It stipulates the following:

*Article 4, Clause 25*

Each party shall ensure that its statutory maximum fines are sufficiently high to deter future acts of infringement with a policy of removing the monetary incentive to the infringer, and shall provide its judicial and other competent authorities the authority to order the seizure of all suspected pirated copyright and counterfeit trademark goods and related implements the predominant use of which has been in the commission of the offense, and documentary evidence.

*Article 4, Clause 28*

Each party shall provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial

gain shall be considered willful piracy on a commercial scale.

The proactive and continued involvement of the U.S. government is absolutely necessary—without it, Smith said, “copyright industry revenue and employment growth would stagnate.”

**“Counterfeiters are competitors.”—Timothy Trainer**

According to Timothy Trainer, the IACC directs most of its effort toward development of enforcement strategies with USTR and the private sector and toward counseling and training the FBI, U.S. Attorney's Offices, state governments, and multinational corporations (MNCs). The challenge of the IACC, which deals exclusively with trademarks and patents, is often more daunting than that of the IIPA: an MNC may own 300–400 trademarks on products being produced in over 50 countries. Companies can find themselves in quandaries about prioritizing the products in terms of which to register—and, more importantly, which will require vigilant anticounterfeiting enforcement measures.

Counterfeiters, Trainer noted, have grown aggressive to the point of forcing the original producers into new and different classes of service. For example, fake Nike watches in Asia left Nike with no choice but to start producing real watches; otherwise, the counterfeiters would begin taking customers away from traditional lines of business. The illicit reproductions are growing more advanced; the counterfeiters can acquire new, high-tech machinery as easily as the MNCs to make knockoffs. When the economy of a nation worsens, counterfeiting rises rapidly, and some governments accept it as another source of employment. Trainer noted that some companies will accept substantial losses before attempting to mobilize against the counterfeiters.

The IACC places rigorous training of foreign government officials at the heart of the enforcement effort. In addition to improving 301 and ensuring that all new FTAs have stronger enforcement provisions than TRIPs, Trainer views U.S. embassies as prime venues to host training seminars. Like Smith, he credits the U.S. government as a singular force in promoting this effort.

**“Enforcement must come through hands-on diligence.”—Joseph Papovich**

Joseph Papovich, who is personally responsible for coordinating the Special 301 report for the USTR, asserted the necessity of joint government–private sector antipiracy and anticounterfeiting initiatives; neither companies nor the government can conduct effective campaigns if either

is absent. He also noted that unilateral sanctions cannot always be imposed from the U.S. governmental perspective: trade, although a significant element of foreign policy, is generally trumped by broader strategic and defense objectives. The threat of damaging relationships in those fields often obviates the possibility of punitive sanctions with a given nation. Moreover, sanctions against imported products mean some U.S. businesses will pay more for products they want, leading to congressional pressures in opposition to the sanction.

Special 301 was created in 1988, at approximately the same time that IP provisions were integrated into the WTO architecture. Papovich offered a candid analysis of 301's effectiveness. Some countries, he said, ignore the "blacklist," whereas others will revise policy and/or strengthen enforcement to win removal from it. He identified seven major roadblocks:

1. Limited sanction power of the U.S. government due to broader foreign policy objectives, which often supersede imposing sanctions;
2. There exists a lack of education and understanding at the global level with respect to antipiracy campaigns (in both statutory and enforcement facets);
3. Governments abroad have difficulty realizing that IP theft is as much a crime as theft of physical property, and are thus reluctant to impose criminal sanctions on counterfeiters and pirates;
4. Governments abroad rarely feel compelled to offer assistance to a wealthy MNC to facilitate IP theft solutions;
5. In addition to governmental reluctance, sensitizing local law enforcement authorities—such as police, prosecutors, and judges—to the necessity of strong antipiracy enforcement is highly challenging and demands constant pressure;
6. Digital and internet piracy are nearly impossible to curtail; moreover, many First Amendment activists withhold support from this effort because of the unclear distinction between intellectual property and free information on the Internet. The Digital Copyright Act remains controversial in the United States, frustrating the effort to market its tenets to our trading partners.

Backlash abroad against TRIPs and 301 can severely injure even the most well-intended U.S. antipiracy effort. Many foreign governments resent the condescension they perceive in the 301 blacklist. There is a powerful sentiment abroad to weaken TRIPs with respect to public health, especially pharmaceuticals, particularly in poorer countries. Many states are calling for an outright global prohibition of unilateral sanctions of which the United States is the largest source.

Papovich agreed with Smith that bilateral agreements, especially the U.S.-Jordan Agreement, provide for IP enforcement more forcefully than TRIPs. The most important mechanism of enforcement, however, is "hands-on diligence" (i.e., U.S. embassies press their host governments towards stricter enforcement).

**"Show countries that IP negotiation is in their best interest."—Paul Salmon**

Paul Salmon outlined WIPO's five major areas of activity:

1. Treaty making (e.g., the Paris and Berne conventions);
2. Global protection services (i.e., single applications for protection in all treaty countries);
3. Patents on trademarks and copyrights;
4. Technical assistance and cooperation for development; and
5. Domain name dispute resolution.

Although global protection services—for which governments pay from \$1,000 to \$1 million per year—have been extremely effective, the new efforts in treaty making and technical assistance have not been as successful. The lack of possibility for cross-sectoral concessions in negotiations of specific treaties, coupled with a lack of enforcement mechanism in the WIPO treaties (trade retaliation is not possible, and most nations do not recognize the jurisdiction of the International Court of Justice to which treaty disputes can be taken) have injured the treaty-making effort. In fact, Salmon cited the first significant potential to conclude substantive treaties in the last 20 years due to the advent of the Internet. At the moment, treaties on patent law harmonization and industrial design registration are in developmental stages.

With respect to technical assistance, the dual problems of limited audience and limited resources are constraining factors. WIPO has sought to expand its audience by reaching out to diplomats to enhance national government interest in the WIPO system of treaties. Also, the WIPO Academy offers distance-learning courses that attempt to guide young entrepreneurs in developing countries and highlight their vested interest in preventing piracy. However, limited resources challenge this effort as only \$20 million of the WIPO budget is allocated to technical assistance. WIPO is part of the UN group. Despite overall UN budget pressures to realize 0 percent budget growth, WIPO has been given more financial flexibility due to the increasing relevance and scope of its mission. Also, WIPO is trying to conclude Memoranda of Understanding (MOU) with the major development banks to aid in technical assistance.

The central tactic in curbing piracy and counterfeiting, according to Salmon, is to convince countries and corporations that their own interests will be injured by piracy and that combating these thefts is vital to the parties' interests.

## Discussion

Sherman Katz asked Joseph Papovich whether the United States was too hesitant in "unsheathing the sword of sanctions because of strategic implications." Papovich noted the United States is "less reluctant than any other country" in imposing sanctions, and if USTR strongly desires to impose a sanction, it generally prevails.

Eric Smith added that the threat of sanctions is of greater importance than the sanctions themselves. He mentioned the specific examples of Turkey and Russia, where piracy is rampant but the U.S. government has done little to curb it. If these nations perceived U.S. willingness to "pull the trigger" as serious, the United States would see better results. Papovich believes that progress has, in fact, been made in Turkey. But many of the piracy operations—particularly IP piracy—are mobile enough to move to new locations (e.g., from China to Hong Kong or Taiwan; or from Bulgaria to Ukraine to Russia). Such mobility can often render sanctions against the previous host state worthless.

Katz then asked what industry should do to mobilize critical political mass to influence host governments. In response, Papovich stressed the importance of corporate involvement. As an example: Procter & Gamble's (P&G) chairman offered a paper outlining potential Chinese governmental involvement regarding counterfeiting to national authorities. The paper bore a strong resemblance to the anticounterfeiting legislation subsequently passed by Beijing. Jane Fawcett-Hoover, head of the Washington office of P&G, who traveled to China with Papovich, identified the following steps toward developing the "critical mass" to which Mr. Katz referred: (a) define the problem; (b) work with the government to increase enforcement; and (c) expand the circle of responsibility to include suppliers as well as nongovernmental organizations (NGOs) and governments.

Timothy Trainer added two effective ways for the private sector to mobilize against piracy: either the corporation itself can work with the host government to improve regulation and enforcement in all its product areas, or an industry-wide coalition of manufacturers of a group of products (e.g., automobiles) can be forged. Trainer and the other panelists believe industry sector task force groups would be particularly effective voices in waging this battle.

J. Michael Finger, a recently retired World Bank economist, said many developing countries are not familiar with the means of enforcement. For example, in Senegal, radio stations do not pay royalties to the artists because the music industry does not seek to collect such royalties.

Regarding China's imminent accession to the WTO, Smith noted many in China believe accession will automatically render counterfeiting and piracy impossible, and they will be forced to pursue more legitimate means of production. Maintaining this convenient (if errant) perception could boost antipiracy campaigns in China.

The discussion concluded with a question to Papovich on how the upcoming WTO ministerial meeting will affect antipiracy campaigns. He focused his response on the two main demands by OECD countries for greater implementation efforts on TRIPs in the areas of public health (e.g., pharmaceuticals) and geographical indications (e.g., champagne in France or basmati rice in India).

*Summary prepared by Alan Isenberg, Program Coordinator, CSIS Scholl Chair.*

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