

30 August 2020

Ref: *Public consultation to collect views for the formulation of the Brazilian National Intellectual Property Strategy* (<https://www.gov.br/economia/pt-br/aceso-a-informacao/participacao-social/consultas-publicas/2020/estrategia-nacional-de-propriedade-intelectual>).

Introduction

The Transnational Alliance to Combat Illicit Trade (www.TRACIT.org) expresses its appreciation to the Interministerial Intellectual Property Group (GIPI), chaired by the Ministry of Economy, to establish goals, objectives and guidelines aimed at strengthening the national intellectual property system. We agree with the GIPI's approach that a more effective and balanced national intellectual property system is an important foundation for innovation, competitiveness and development in Brazil.

We respectfully submit our views in this document, and we have endeavoured to submit views via *"Links para acessar os formulários eletrônicos."* In the context of the short consultation period, from 07/31/2020 to 30 August 2020, our views are general in nature. In any case, we would be willing to engage more deeply in the process and to contribute specific views on current or proposed legislations, regulations and programs, as appropriate.

Lessons from COVID-19

As Brazil prepares its national IP strategy, it is worthy to note that there are vital lessons from the COVID-19 pandemic that compel a renewed urgency in the commitment to combat IP theft, counterfeiting and piracy.

- Foremost amongst these learnings is that while lockdowns forced legitimate businesses to slow or shutter operations, public safety policies did little to dampen the determination of organised criminals to exploit supply shortages, consumer fears, and burdened customs and law enforcement officers.¹
- We have always demonstrated that counterfeiting is not a victimless crime, and therefore, the most appalling lesson was witnessed in the early months of the crisis, when fraudulent forms of personal protection equipment (PPE)—surgical masks, hydro-alcoholic gels, testing kits, thermometers, gloves and sanitizers—flooded marketplaces.
- Almost immediately, the EU Anti-Fraud Office (OLAF) identified over 340 companies acting as intermediaries or traders of counterfeit or substandard products linked to the pandemic. Millions of substandard medical products with fake EU conformity

certificates were seized in several Member States.² Law enforcement authorities from the US to the EU, from the UK to Germany, from China to India to Indonesia scrambled together emergency responses to stop this fraud. This is more than enough evidence that illicit trade is a global problem and that reactive, ad hoc measures are insufficient.

- The pandemic also confirmed previously found evidence that online platforms continue to be a major source of consumer fraud. We witnessed an astronomical 2,490% increase in the availability of fake face masks and a 270% increase in non-genuine hand sanitisers available online.³ Clearly, a leading lesson from lockdown must be an urgency to set rules that ensure safe and secure online shopping.
- Beyond the increase in fake and fraudulent PPEs, counterfeit versions of high-demand consumer products—like cleaning solutions, toilet paper, indoor sports equipment, refrigerators and freezers, food products and reading materials⁴—rapidly entered markets, filling gaps where the legitimate supply chain could not keep pace with frenzied, crisis-level demand. According to industry watchdogs, the number of counterfeit detections has generally increased 38% across the board.⁵ The ability of counterfeiters to maintain—and grow—output while the rest of world trade slows to a crawl is a reminder of the massive role China plays as a source of supply and illustrates that its exports are shrouded from conventional trade mechanisms and detection practices. Evidently, counterfeiting through traditional trade routes, such as those along China’s Belt and Road has increased more than 200% through ports moving product into the CIS region (via Russia), and into South East Asia (via Vietnam and Myanmar).⁶
- Not surprisingly, consumption of digital media has also seen a sharp rise during the COVID-19 stay-at-home and social distancing regulations. This has propelled an increase in illegally streaming content online: film piracy increased 41% in the US, 43% in the UK, 50% in Spain, 66% in Italy and 63% in India.⁷ This impacts the interests of writers, composers, photographers, visual artists, musicians, actors, producers of video games, broadcasters, libraries, music and video platforms, and ultimately the consuming public.

Recommendations

For these reasons we present our 5-point plan for a resilient post-crisis regime:

1. Strengthen law enforcement efforts.

Criminalizing counterfeiting with deterrent penalties and laws is only as effective as the actions taken by the law enforcement community. Effective enforcement depends on better coordination and the availability of adequate funding and training sufficient to address new challenges and patterns. Governments also must respond to the magnitude of the problem by not only amending national laws and regulations, but also: (i) introducing legislation that targets various forms of illicit trade issues, such as the recent efforts of the US government to

fight against illicit trade in wildlife⁸ and tobacco;⁹ (ii) setting deterrent penalties; and (iii) enforcing a zero-tolerance enforcement regime.

- *Amend national laws and regulations (where necessary), to strengthen enforcement efforts and ensure prosecution.*
- *Enact legislation to ensure that criminal penalties reflect the magnitude of the crime, including jail time and the imposition of higher penalties for illegal activities especially for those crimes that have health and safety repercussions. Penalties should be sufficiently high to remove the monetary incentive of counterfeiting and piracy.*
- *Improve capacity building efforts for law enforcement to be able to effectively target and incept counterfeit and pirated goods.*
- *Strengthen enforcement specifically in the Tri-Border Area including better resource allocation and use of proper technology.*
- *Ensure that law enforcement teams are well-funded, fully staffed and properly supplied with equipment necessary to detect illicit trade, including illicit online trade.*
- *Ensure that law enforcement and judicial procedures sufficiently address cases involving electronic evidence and online activities.*
- *Impose greater liability including strict penalties against third-party intermediaries that have demonstrably directed, assisted financially, or aided and abetted the importation of illicit goods.*
- *Collaborate with private sector to exchange information on supply chain routes, red flag alerts and other data that may facilitate effective enforcement and allow end to end investigations.*

2. Strengthen the customs environment

A strong, clean, customs environment contributes strongly to combating counterfeiting and piracy. Conversely, corruption at the border is a significant non-tariff barrier to trade that hampers economic growth and trade performance. Recent figures from the OECD show that improving integrity policies in customs alone has the potential to reduce trade costs by 0.5% and 1.1%.¹⁰ If customs' role is compromised, the system fails and enables opportunities for illegal trade, criminal activity, illegal financial flows and trafficking in products and persons.

Promoting a better customs environment through enhanced public-private dialogue in cross-border processes can create significant benefits for society, as well as the public and private sectors.

- *Empower customs authorities to take enforcement action—acting ex officio or at the request of legal cargo owners—to seize or suspend the release of those goods suspected of infringing laws when they are imported, exported, in-transit and in all situations where the goods are under customs supervision including in free zones as well as bonded warehouses.*

- *Implement a digitized Customs Recordal System for IPRs so that key information can be easily accessed by enforcement officers.*
- *Require that illegal traders be primarily held liable for storage and destruction costs.*
- *Recognize the role played by intermediaries and incentivize cooperation of all parties involved.*
- *Strengthen and expedite adjudication of counterfeiting and piracy cases presented to authorities.*
- *Promote the adoption of sound, intelligence-based risk-management approaches for the detection of counterfeit and pirated goods by customs agencies taking into account, in particular, the organizational framework and processes outlined in the World Customs Organization's (WCO) Customs Risk Management Compendium.*
- *Move towards a comprehensive digital environment for border clearance, as automated systems reduce human touch points and thus lessen the opportunities for improprieties (i.e., bribes). Furthermore, implement the "Ten Principles" of the WCO Revised Arusha Declaration on Integrity in Customs and the G20 High Level Principles on Countering Corruption in Customs.*
- *Ensure balance in implementation of the World Trade Organization (WTO) Trade Facilitation Agreement to ensure that "quick and easy processing" does not obviate long-standing customs and tariff systems necessary to control illegal trading.*
- *Provide for criminal penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale, including imprisonment and/or monetary fines sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity. Measures should include the seizure, forfeiture, and destruction of the infringing goods and of any materials used in the commission of the offence.¹*
- *Utilize the full spectrum of investigative techniques available to disrupt such groups.*

3. Promote a clean digital environment

As noted, online platforms are increasingly vulnerable to exploitation and misuse by illicit traders or otherwise illegitimate operators. Moreover, the spectrum of illicit trade comprises illicit digital trade, including cybercrimes (like hacking, denial of service attacks, spam, copyright piracy and child pornography) and money-laundering in the financial system. Copyright piracy and live events are significant forms of cybercrime that require increased attention and action by governments to deter these illegal activities more effectively.

- *Examine the corporate responsibility and supply chain compliance role for online marketplaces and social media platforms in preventing counterfeiting and piracy.*
- *Increase transparency requirements for digital supply chains to improve know-your-customer and know-your-seller programs.*

- *Increase expectations on online platforms to intensify the implementation of good practices for preventing and removing access to illegal content.*
- *Treat domestic warehouses and fulfillment centers as the ultimate consignee for goods that have not been sold to a specific consumer at the time of its importation.*
- *Encourage the development and adoption of advanced prevention technologies, such as automated tools for rapid notice, takedown and stay down, filtering and redress for online platforms; and the use of risk scoring services and preventive measures to be implemented by online payment solutions offering services on unsafe online platforms. This should also include website blocking. The use of such expeditious actions should match the speed and volume of transactions on a platform.*
- *Ensure that online platforms and participating intermediaries may face liability for operations that promote access to infringing content and that Internet Service Provider (ISP) safe harbor laws are not misused by businesses that depend on the unlicensed use of protected content.*
- *Promote policies requiring ongoing access to contact information for registrants of domain names used in online commerce to ensure law enforcement, cyber security professionals, brand protection representatives and others have continued access to this data in order to protect consumers and to protect against illegal activity online.*

4. Address illicit trade in the express and postal mail sector

The knock-on impact of the sharp growth in the digital commerce sector and rise of social media platforms is the delivery of illicit products through postal and courier streams. For traffickers, small shipments also are a way to avoid detection and minimize the risk of sanctions.

- *Streamline Custom's lengthy and time-consuming seizure process, including regulatory changes to reflect the shift in international shipping from ocean shipping containers to small parcels.*
- *Require formal entry for shipments deemed high-risk, notwithstanding that such shipments might otherwise qualify for duty-free or informal entry treatment.*
- *Promote technologies and practices to improve targeting, prediction, and decisional processes.*
- *Collect data on patterns and trends at each point-of-entry, by product category, sector, and brand—including analysis of the corresponding country of origin, transshipment routes, evasive tactics employed, repeat offenders, and other illicit characteristics.*
- *Increase engagement with online intermediaries and deepen cooperation between government and the private sector to prevent the unfettered flow of counterfeits.*
- *Provide platforms and other third-party intermediaries that own or operate warehouses or fulfillment centers with the power to pursue, in coordination with rights*

holders, destruction of counterfeits and other illicit goods that were not interdicted by Customs but are in their possession.

- *Integrate Customs screening and examination process into postal processing chains for proper physical inspection upon arrival to facilitate diverting packages for automated scanning of parcels. Further, implement strategies with the support of Customs to target illicit goods and leverage advance data already available to identify such goods.*

5. Raise awareness about counterfeiting and piracy

As a prerequisite for responsible action, consumers, politicians, enforcement agencies, IGOs and the business community all need to fully understand the harmful consequences of illicit trade on the economy, consumer health and safety, and the environment. It will be essential to continue researching and reporting on the size of the problem to elucidate policy makers on the urgency of solutions. Many intermediaries, when better informed about potential exploitation of their infrastructure and the related damage, demonstrate a willingness to secure supply chains from abuse. Also, in the face of the escalating global growth in demand, it has become clear that consumer education must be undertaken to control the demand-side of these nebulous markets.

- *Launch public awareness campaigns on the threat and harms of counterfeiting and piracy in tangibles and intangibles, both online and offline.*
- *Encourage organizations such as the WCO, OECD, UNCTAD and UNODC to continue their concerted efforts to quantify and communicate the extent of counterfeiting and piracy.*
- *Promote alternatives to counterfeits and pirated goods, including through economic incentives and by endorsing credible certification programs and licensing schemes that guarantee that goods are legitimate and produced in an environmentally and socially responsible manner.*
- *Educate intermediaries on how their infrastructures are vulnerable to and exploited by counterfeiting and piracy; and promote voluntary measures to encourage and/or require intermediaries to restrict use and abuse of their infrastructures.*
- *Educate governments on how privacy laws and cryptocurrencies can be exploited by illicit traders and promote pragmatic, fact-specific application of relevant legislation.*
- *Explore integration of multiple existing governmental awareness campaigns by aggregating the key messages and sharing “campaign” resources and outreach networks. A useful model to build upon is UNODC's campaign “Counterfeit- Don't buy into organized crime,” which is unique in its cross-cutting story.*

¹ <https://www.rouse.com/magazine/news/covid-19-and-the-rise-of-the-counterfeiters/>

² https://ec.europa.eu/anti-fraud/media-corner/news/13-05-2020/inquiry-fake-covid-19-products-progresses_en

³ <https://www.incoproip.com/covid-19-counterfeiters-using-the-pandemic-to-exploit-consumers/>

⁴ <https://www.rouse.com/magazine/news/covid-19-and-the-rise-of-the-counterfeiters/>

⁵ <https://www.fastcompany.com/90500123/counterfeiting-is-a-billion-dollar-problem-covid-19-has-made-it-far-worse>

⁶ <https://www.rouse.com/magazine/news/covid-19-and-the-rise-of-the-counterfeiters/>

⁷ <https://www.muso.com/magazine/film-tv-piracy-surge-during-covid-19-lockdown>

⁸ <https://obamawhitehouse.archives.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking>

⁹ Senate's 2018 National Defense Authorization Act, <https://www.congress.gov/115/crpt/srpt125/CRPT-115srpt125.pdf>

¹⁰ OECD. (2017). Integrity in customs: taking stock of good practices. Paris: OECD Publishing. Retrieved from <http://www.oecd.org/gov/ethics/G20-integrity-in-customs-taking-stock-of-good-practices.pdf>