

Border Control Measures and the Interface with Private International Law

Introduction

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Border Control Measures are an essential part of the Municipal Customs Laws of countries in their endeavor to protect Intellectual Property Rights. Countries which are now on the crossroads of International Trading Channels are especially vigilant in regard to the proper enforcement of these laws. With the emergence of the open free market regime and globalized economies, the reach of the grey and the counterfeit market has grown many-fold. International trading channels are particularly concerned about the impact of the grey market and the inflow of counterfeit goods into domestic economies. There is however a thin line of difference between these two markets. Grey market goods are genuine goods which are infiltrated through the porous borders of a country and on which little or no duty is paid. Counterfeit goods on the other hand are goods which infringe the intellectual property right of a right holder causing loss of revenue, reputation and brand equity. The problem of the grey market is strictly a duty structure issue and an enforcement prerogative of the customs authorities.

The scope of this paper does not extend to the grey market and is limited specifically to the issue of the counterfeit market in trading economies. In a typical scenario, a country's market is often clogged by inferior quality goods which, though cheap, play havoc on the established industry. International corporations face major issues of copyright infringement, intellectual property violations and on the ground level, consignments of bad parts or goods that escape lax customs laws and cause a major disaster in the economics of trade.

The solution to this problem lies in a holistic circle of local customs laws, intellectual property obligations, abidance to international treaties and conventions and the actual practice and procedure followed by the enforcement regimes. Border Control Measures plays a pivotal part in the whole enforcement process. The concept has evolved from a symbiosis of international obligations, trade agreements and the local border enforcement laws. Border Control Measures are implemented by most countries in their municipal laws to prevent the infringement of intellectual property rights and to ensure the protection of customs laws and internal security. The roots of border control measures evolved from its origins in various multilateral agreements

and gained its finality in the TRIPS agreement. Countries who are signatories to the TRIPS agreement are now customarily obligated to follow and implement the same in their internal legal regimes. Control Measures is one such provision of TRIPS which has been quite effectively adapted by most signatories to the Agreement. The scope of Border Measures as implemented by countries encompasses several legal systems including international trade laws, intellectual property enforcement laws and laws in the customs framework.

The paper analyses the implementation of Border Control Measures by countries against the background of Private International Law. The paper at the onset lays down the definitions and the basic tenants of Border Control Measures. Thereafter this paper proceeds to analyze the procedure of implementation of Border Control Measures as has been laid down by various International Conventions and Conferences in the backdrop of the TRIPS agreement. An interesting comparison with the Indian Law in practice and the de-facto international procedure in place in the customs laws of various Asian countries will facilitate the understanding of the Indian position in comparison with its Asian neighbors. The paper focuses on the lacunae of the entire legal regime, particularly on the fact that almost no attention is paid to the export market by countries when they implement these measures in the localized system. A range of recommendations will also be explored to tackle the loopholes and to bring about an effective enforcement regime. The paper will conclude with an effective conclusion bringing into a circle the various workings on the national and international regime.

THE EVOLUTION OF BORDER CONTROL MECHANISMS

Definitions

The regime of Intellectual Property Rights in relation to imports/exports was generally ignored in the earlier part of the 20th century. It was only after the constant flooding of domestic markets with counterfeit and inferior quality goods that countries began to take notice of this menace. An appropriate enforcement regime was then envisaged to control the outbreak of the counterfeit market. As a result, the TRIPS Agreement and various other conventions were drafted and ratified by most of the countries. These international agreements provided for a unique concept of Border Control Mechanisms to combat such informalities with trade. The essence behind these measures was that the counterfeit market had to be harnessed before it could paralyze the entire system. This would be achieved by the symbiosis between private international law, localized legal regimes and other multilateral measures. However, the completed process has given rise to a system where the regime is more import centric. Countries have not been forthcoming to regularize their export mechanisms to conform to the same standards of import control laws. This attitude of countries compounds the problem and makes effective enforcement a myth.

Border Control Mechanisms can broadly be stated as procedures applied by countries that enable the respective municipal Customs and Intellectual Property Law frameworks to place an embargo on the influx of counterfeit or pirated goods in and out of their respective domestic commercial markets. These measures are chiefly based on Articles 51-60 of the TRIPS Agreement 1995 which provide the basic framework of Border Enforcement. Signatories are obliged to implement these measures in their legal frameworks with appropriate modifications as may be deemed necessary for the protection of the trading channels.

In India, customs officials are in charge of bringing into the forefront the procedures of Border Control and their subsequent implementation. The local municipal laws of the country, namely the Customs Act 1962 and the Trademark Act 1999 along with their allied rules provides for an ineffective and illusionary measure of enforcement. As it stands today, the enforcement procedure adopted by the Indian Customs is borrowed heavily from the provisions of Border enforcement as envisaged in the TRIPS Agreement. The above procedure is supplemented by certain provisions in the local laws which give the authorities the prima facie powers of search detention and seizure. In some cases, after an appropriate proceeding, the law confers upon the authority the powers of confiscation.

The Customs Act 1962ⁱ provides for supplementary measures to help the enforcement of the procedure in actuality. Primarily there are three main sections which empower Custom Officials to stop goods at the time of entry into India or at an exit point are:

Section 11 of this Act empowers the Customs to stop such goods from transit or entering the Country, Under this Section if the Central Government is satisfied that for the purposes of Sub Section (2)ⁱⁱ of the Customs Act it is necessary to prevent the import or export of goods of any specifications, either completely or subject to such conditions as it puts forth, it may do so.

Section 111ⁱⁱⁱ of the above Act provides that the Custom Officials may seize imports from being released in the Indian markets and under Section 113^{iv} of the same act; exports may be stopped by Custom officials.

The relevant parts of the sections of the Customs Act dealing with Border Control Mechanisms for protection of intellectual property rights all fall under the broad framework of the definitions of trademarks, patents and copyright law applicable in the country.

The definition of “counterfeit” reads “A counterfeit is an imitation that is made usually with the intent to deceptively represent its content or origins. The word counterfeit most frequently describes forged currency or documents, but can also describe clothing software, pharmaceuticals, watches, or any other manufactured item, especially when this results in patent infringement or trademark infringement. Section 102 of the Trademarks Act 1999 lay down that a person shall be deemed to falsify a trade mark if he performs any of the following actions. These are laid out in the act as follows:

1. A person shall be deemed to falsify a trade mark who, either, –
 - (a) without the assent of the proprietor of the trade mark makes that trade mark or a deceptively similar mark; or
 - (b) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.
2. A person shall be deemed to falsely apply to goods a trade mark who, without the assent of the proprietor of the trade mark, –
 - (a) applies such trade mark or a deceptively similar mark, to goods or any package containing goods;
 - (b) uses any package bearing a mark which is identical with or deceptively similar to the trade mark if such proprietor, for the purpose of packing, filling, or wrapping therein any goods other than the genuine goods of the proprietor of the trade mark.

The above statute also lays down that any trade mark falsified as mentioned in sub-section (1) or falsely applied as mentioned in sub-section (2), is in this Act would be referred to as a false trade mark.^{vi} Further, during any prosecution for falsifying a trade mark or falsely applying a trade

mark to goods, the burden of proving the assent of the proprietor shall lie on the accused.^{vii} The definition of “false trade descriptions” is also defined under Section 2 (1)(i) of the Trademarks Act, 1999. In addition to the above mentioned statutory law, the Central Board of Excise and Customs have issued two notification no. 1/1964-Cus as amended dated 18.01.1964 and 135/1960- Cus dated 31.12.1960 which provides for the conditions restricting import and export respectively.^{viii}

The Procedure under Private International Law:

The TRIPS Agreement of 1995 gives the procedure to govern cross border measures and protect intellectual property rights, the by which the customs authority of a country is empowered to stop the entry and exit of goods which violate Intellectual Property laws. The procedure is laid out in Article 51 to 60 of the TRIPS agreement. Article 51 of the Agreement is the key provision in enforcing cross border measures to protect IPR. This provision empowers the right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.

To enable this provision, Article 52 requires that the applicant has to provide evidence which prima facie makes a case of infringement of Intellectual Property Rights and also provide a description of the goods for speedy recognition of the goods by the Customs Authorities. The applicant has to prescribe the time period for which such goods will be suspended from circulation. The Authority has the power to scrutinize the merits of the Application and subsequently accept or reject it. Article 53 provides that after the scrutiny and acceptance of the application, the applicant may be asked to provide a security for the duration of the suspension of the goods in question. Article 53.2 provides that the suspended goods may be released if the defendant pays a sufficient amount to protect the right holder for any infringement as security. This amount should ideally not be an unreasonable amount and also should not prejudice any other remedy available to the right holder. If the right holder fails to pursue the right of action within a reasonable period of time, the security amount shall be released by the Department. The other articles provide for the issuance of notice to all the affected parties and adjudication by a competent authority.

The TRIPS agreement provides that any proceeding should be initiated within a time period of not more than ten days subsequent to the issuance of the notice by the Customs Authorities. In certain cases, this period may be extendable by another ten days. Where proceedings leading to a decision on the merits of a case have been initiated, the defendant is permitted by Article.55 to

request a 'review, including a right to be heard' with a view to deciding, within a reasonable period, 'whether these measures should be modified, revoked or confirmed'. Article.55 provides that where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, Article.50.6 shall apply to require that the suspension shall be revoked or cease to have effect if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority, or, in the absence of such a determination, within 20 working days or 31 calendar days, whichever is the longer.

Article 56 provides for indemnification in cases of wrongful detention which has to be paid by the Applicant to the defendant once the proceedings have concluded. There is also a provision for inspection and information which is given to the Right Holder to establish his claim. The customs authorities are also empowered to take suo motto action under Article 58 in case it apprehends a wrongful import / export of goods. One of the remedial measures given to the appropriate authorities under Article 59 is an option to destroy the suspended goods. However, re-export of goods in the unaltered state is not permitted under this procedure. The procedure allows for the exclusion of small articles of non-commercial nature.

POINTS TO PONDER

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- Goods imported are searched by Customs officials on information and Detained when there is a prima facie proof that the good imported might be offending some law of the country.
 - The process of Detention is followed by further investigation and enquiry. Goods may be released by Customs authority if they are found to be conforming to the laws of the country. In case of reasonable belief that the goods detained are compromised with the law, the goods are seized.
 - Once goods are seized the matter is referred to a competent judicial authority to adjudicate the matter. Depending upon the outcome of the adjudication, the goods may be released or confiscated and subjected to penal procedure.
 - The implementing agency in the whole process is the Custom authority. However the outcome of the entire process is based solely on the decision of the competent judicial authority. The flaw in the system therefore lies in the fact that the entire implementation mechanism falls flat if the judicial process cannot comprehend the magnitude of the problem and mistrial the issue. What is needed is a stronger stand alone implementation mechanism within the customs system that is sensitized and aware of the problem and is actually able to enforce the procedure without referring it to a judicial tier.
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BORDER CONTROL MEASURES POST TRIPS SCENARIO

Commodities flowing across international markets are heavily based on intellectual property guidelines. Unfortunately a large portion of these goods are products which do not conform to international standards, or are plainly counterfeit goods. There is a wide infiltration in a globalized market of such goods. However, an estimate of piracy and counterfeiting activities are difficult to quantify and can represent between 5% and 7% of world trade.^{ix} This percentage causes alarm bells to ring in commodity reliant markets and is the cause of enforcement departments to go scurrying for appropriate legal measures to stem the leak in the system.

The effectiveness of the border measures is left to the close cooperation and collaboration between the right holders and the customs authorities. The problem often faced is that custom officials are ill informed and do not take action when informed. The problems are further compounded by the lack of knowledge and technical know how by appropriate authorities. Customs need rights holders to provide detailed information on products, routes and normal shipping patterns in order to detect counterfeits. The right holders unfortunately also do not have all these minute details and hence the implementation of Border Control Mechanisms becomes a paper tiger in the jungle of the commodity trade.

An European Community study^x has indicated that the phenomenon of counterfeiting has grown tenfold since the early 1980s and has now developed the strains of an outbreak. The reasons for this phenomenon are enormous and include among others developments in reprographic technologies, where digitization has facilitated the rapid and extensive production of copies at a minimal cost, the growth in world demand for branded items, as well as economic and political developments, such as the growth of international trade, the internationalization of the economy, the expansion of means of communication and the opportunism of organized crime. The World Customs Organization viewpoint is that a domestic grey market spreads through devices like parallel grey markets, smuggling and ambush trading.

The World Economic Forum in Davos in January 2003 was informed by the World Customs Organization (WCO) that the trade in counterfeit and pirate products was as high as US\$450 billion per annum and was controlled by organized crime and was being used to fund terrorist activity. This is an immediate cause of concern in civilized communes and any steps taken in relation to border control naturally take into account the aspects of internal security affairs of the country.

WIPO is the principal specialized agency of the United Nations system of organizations which is concerned with the use and protection of intellectual property. It administers 23 international treaties dealing with different aspects of intellectual property protection.

In December 1995 the WIPO and the WTO signed an agreement which establishes a framework for co-operation in providing technical assistance to developing countries in relation to the implementation of the TRIPS Agreement. The Agreement also provides for the mutual exchange of the laws and regulations of both organizations. The TRIPS Council has agreed that both organizations should use a uniform system for notification by Members of their intellectual property laws and that this system should be administered by WIPO. In addition the European Commission, through its Director General of Trade, has the responsibility for devising and monitoring internal or external intellectual property policies in accordance with the trade policies of the EU. A key policy of the EU is to secure the better recognition and enforcement of intellectual property rights. DG Trade's policy in the field of intellectual property consists of promoting the implementation of effective standards for IP protection world-wide; promoting an adequate enforcement of IPR world-wide and participating in the fight against violations; ensuring that IPR s are supportive to public health objectives, to innovation and to technology transfer; and cooperating with developing and least developed countries.

The Director General of Trade has been the main author of the recently approved Strategy for the Enforcement of IPR in Third Countries. The Enforcement Strategy focuses on the implementation and enforcement of existing IPR laws. It proposes to describe, prioritize and coordinate the instruments available to the European Commission for achieving its goal. It announces the identification of priority countries and the implementation of specific measures in fields like technical assistance, dispute settlement and other sanction mechanisms, political dialogue, partnerships with private entities as well as with international organizations and countries sharing similar concerns. Furthermore, it provides information to right-holders and other entities concerned about such means and actions, and raises awareness for the importance of their role in the fight against piracy, counterfeiting and other IPR violations.

The governments and customs administrations in the Asia-Pacific region have increased their attention on IPR protection and their cooperation with business resulting in improvements in combating the trade in counterfeited goods. Maintaining this favorable environment is one of the most important responsibilities of governments, their agencies and departments. With globalization, counterfeiting and piracy have become a major concern. The establishment and optimization of effective IPR legal protection and enforcement systems will play a significant and unique role in promoting social wealth and economic development.

The initiative of the World Customs Organization IPR Strategic Group has been in establishing an Asia Pacific Secretariat to co-ordinate efforts to assist Customs administrations improve their capacity to implement effective border measures against IPR crime; and to further enhance the partnership between rights holders, customs administrations and other competent national agencies throughout the Region. A number of countries and regions have announced anti-counterfeit initiatives. Encouraging progress has been made at the First Global Congress on Combating Counterfeiting in Brussels, the International Conference in Rome, Italy and the Regional Forum in Shanghai in raising awareness of the counterfeit issue but there remains a strong need to engage all governments at the political and policy-maker levels on the issue.

The Global Congress Steering Committee has been established to improve levels of cooperation among international authorities and the private sector, and now must urgently develop the recommendations from Brussels, Rome and Shanghai into priorities and concrete action plans. The World Intellectual Property Organization is enhancing its efforts to convince governments of the need for effective enforcement systems and the benefits of entrusting judges with special experience in dealing with intellectual property cases. The private sector has made progress in identifying mechanisms to quantify the size and extent of the global counterfeit problem and its impacts on consumer health and safety and the growth of organized crime networks. Interpol has formally established an Intellectual Property Crimes Unit and is about to launch its pilot project in South America. WIPO has also assisted in the formulation of the Rome Declaration on combating counterfeit drugs in February 2006.

The problem of the counterfeit goods also has far reaching implications in the era of the fragile internal security of nations. If we take two examples from the recent past, it is well known that the uprising and subsequent build up of terror modules like the D-Company in Dubai started out from funding raised from deals of counterfeit video tapes and music cassettes based out of India. Similarly, the evolution of trans-border terrorism in Central America was funded by the United States through the narcotics trade and illegal cigarette trade across the Atlantic Ocean. If the enforcement procedures are not tightened at the border in the domestic level, these funds generated by organizations from counterfeiting could easily be channeled into activities which may seriously jeopardize the homeland security of nations.

Thus we can see that the global enforcement agencies have to be apprised themselves of the emerging threat to various domestic markets from the outbreak of the counterfeit market trade. They have to slowly and steadily turn around to devise simple, effective implementation mechanisms to combat the spread of intellectual property violations. The above highlighted

proposals are just the initial steps to the buildup of a proper and potent enforcement mechanism which can be adopted and implemented by countries and economies in the near future.

POINTS TO PONDER

- The counterfeit market will always follow the trend set by the actual market movement of goods. If the original goods are outsourced to be manufactured in the Third World Countries the counterfeit market will follow suit. This is because, as in the original market, the development of these goods will also be comparatively cheaper in a third world setup.
 - The ground reality today is that counterfeit goods are mostly manufactured in Third World Countries. These goods are then re-exported to the target country which can often be in a continent like Africa. Goods are usually manufactured in bulk in countries like India and China where production cost and research & development initiative is less and then these are exported to countries in Africa and East Europe. What happens therefore is a vicious cycle where it is not the developed multinational which wrecks the economy of an underdeveloped nation, but slightly up-market third world economies playing havoc with the lesser developed nations. The equilibrium of the economic system is therefore damaged considerably by the fact that the countries enforce a strict import control mechanism but hardly care about the export systems. A concrete solution to the problem therefore is possible if the countries tighten up the export system to complement the import control mechanisms already in force.
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COMPARISON BETWEEN SOUTH EAST ASIAN COUNTRIES AND INDIA ON
THE ENFORCEMENT OF BORDER CONTROL MEASURES

INDIA	CHINA	SINGAPORE	MALASIYA
<p>Custom officers are not empowered to enforce the law on Intellectual Property Rights which is not in keeping with the international practice. No specific reasons could be ascertained for this deviation. At present, the IPR violations are to be first determined by the Registrar of Copyrights or Registrar of Trade and Merchandise Marks, and thereafter a notification is required to be issued under Section 11 of the Customs Act, 1962 whereupon the goods become liable to action (under the Customs Act). However, under TRIPS the border enforcement requires a mechanism such that a holder of IPR informs customs of a violation and requests it to suspend clearance in respect of counterfeit or pirated goods. Present law does not provide such an authority to customs. Incidentally, the same goods may also be liable to action under TRIPS as well as Customs provisions and it is desirable that a common authority viz. customs adjudicate the matter. Accordingly, it is recommended that the customs should be authorized to enforce IPR, by a suitable amendment to the Trade and Merchandise</p>	<p>To effectively crack down the illegal trade of infringing goods, the Regulations authorize China customs to investigate the infringement related to importation and exportation with the exceptions of two circumstances: any dispute occurs over the right concerned between the right holders and importers or exporters or the importation or exportation constitutes a criminal offence to which the police is responsible for criminal investigation. Once the infringement is proved by customs, the infringing goods shall be confiscated by customs. The traders of the infringing goods might be imposed of a penalty by customs provided that they knew or should have known the infringement of their goods. Strengthened power of customs in IPR enforcement effectively helps to restrain the illegal trade of infringing goods.</p> <p>Since there are nearly 400 ports in China, maritime or land, by</p>	<p>A copyright owner, licensee or a trademark holder may serve on the Director-General of Customs a written notice stating that he objects to the impending importation of infringing copies of their works. The person would have to provide sufficient information to enable the Director-General of Customs to identify the alleged infringing copies and to ascertain the time and place where the copies are expected to be imported. The person would also have to satisfy the Director-General of Customs that the copies are infringing copies.</p> <p>Detention of Infringing Copies: An authorized officer may (a) detain any copies of copyright material or infringing trademarks (i) that are imported into, or that are to be exported from, Singapore; and (ii) that are not goods in transit, unless the copies are consigned to any person with a commercial or physical presence in Singapore; or (b) examine any copies of copyright material or</p>	<p>Part XIVA of the Trade Marks Act, 1976 provides for Border Measures on issues of trademark particularly counterfeit trademark goods. An application for restriction of on importation of counterfeit trade marks goods may be made to the Registrar of Trade Marks</p> <p>Malaysia has a unique border measures provision where there are a few government agencies namely the Royal Customs Department, Enforcement Division of the Ministry of Domestic Trade & Consumer Affairs, the Royal Malaysia Police Department as well as the local authorities that are involved in enforcing IPR. The Customs officers have jurisdiction to stop the importation of counterfeit trademark or pirated copyright goods at the point of entry, where these parallel powers are being provided for under the three respective legislations mentioned above.</p>

<p>Marks Act and the Copyrights Act.</p>	<p>which infringing goods can be transported, it is impossible for right holders to lodge applications to each port customs offices to seize infringing shipment. A centralized system of IPR recordation has been applied from the beginning of China customs protection of intellectual property rights in 1995. Currently, 2300 rights have been recorded with the Customs General Administration (CGA) and CGA is responsible to distribute the information of CIPRS to port customs. Now, IT technology is used to distribute the information. Now, most of the seizures made in port customs depending on information of CIPRS, rather than the information of right holders^{xi}.</p>	<p>infringing trademarks, including goods in transit, which he reasonably suspects are infringing copies of any copyright material or trademark.</p> <p>Upon detention, the Director-General shall give a written notice to the importer, exporter or consignee (as the case may be) of the detained copies and to the copyright owner or the trademark holder, as the case may be.^{xii}</p>	
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RECOMMENDATIONS

Today counterfeiting and piracy affect a huge spectrum of different goods, from aircraft parts to detergent, from alcohol and perfumes to security holograms. No industry is spared. Whereas previously high-end branded goods were a principal target, the latest trend is also to copy ordinary branded consumer goods – even those as mundane as toothbrushes. The type of goods counterfeited is changing constantly in line with market trends.

Counterfeiters are getting cleverer. They are exploiting technological advances to produce copies hardly distinguishable from the originals, in some cases even outsmarting the proprietors. They are making extensive use of the Internet, resulting in the sale and distribution of fake goods at enormous speed and with no geographical limitations. And they are seeking to circumvent border measures by moving imitation goods across borders in "disassembled" form, i.e. waiting until the consignment has passed through customs before sticking on the trademark labels which would make it obvious that the goods are counterfeit.

A disturbing trend in the current legal regime of Border Enforcement Mechanisms is that the regulations are focused and implemented only on the import procedures and laws. Very little has been done or been implemented in relation to the export of counterfeit goods. Across the board, countries seem to be concerned with the stopping of one way traffic rather than implementing the laws on both sides of the spectrum. A procedure therefore needs to be adopted to ensure that the border enforcement laws are implemented vis-à-vis export mechanisms also.

The following recommendations have also been suggested across the board to ensure proper enforcement of Border Measures:

- Improving understanding at the political and policy-making level of the serious consequences of the counterfeiting trade and the vital role that enforcement authorities in the region can play in fighting IP crime.
- Encouraging countries to modernize their Customs legislation on border measures for IP protection, taking into account the WCO Model Law to further enhance anti-counterfeit capabilities, specifically by: Reducing or eliminating the requirement for IP owners to pay bonds for counterfeiting cases;
- Facilitating further simplification of procedures for obtaining court orders; Empowering customs officials to conduct in-depth investigations into counterfeiting and piracy cases;

- Encouraging Customs-with the assistance of right owners where appropriate- to transfer more cases to the police and other competent authorities for investigation and criminal prosecutions.
 - Implementing protection for industrial products design and patents for inventions similar to the protection currently offered for trademarks.
 - Establishing channels for strengthening exchange of information between the customs administrations of the Asia-Pacific region and other foreign customs administrations to effectively share information concerning the infringing trade in counterfeit goods.
 - Expanding and promoting understanding, information-sharing and cooperation between customs, other enforcement agencies and the private sector to effectively facilitate combating of trade in counterfeit goods.
 - Another important facet of implementation can be the build up of an international knowledge management programme that shares through cooperation between countries that names of convicted or impounded shippers that are actively involved in the trade. The main link in the chain of events is the shipper who ultimately transports the goods across foreign borders. If a list of shippers are identified and blacklisted by a tracking mechanism, the system of implementation will become much effective and a comprehensive detailing of the chief link will be established. The blacklist should specifically include the names of the Board of Directors of a particular shipping line so that even one individual out of several can be pinpointed. The guiding principals of this system can be taken of from the CRISIL system of blacklisting adopted by credit card companies in India and approved by the Reserve Bank of India. This is a system where the defaulters in one card or finance organization are blacklisted and circulated across the board to prevent repeated offences in different companies.
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CONCLUSION

The concept of Border Control Mechanisms as it has evolved throughout the years is an effective way forward in combating various intellectual property violations. The customs agencies throughout the world, ably guided by the TRIPS Agreement, are up in arms to combat this menace that has a strict influence on the domestic economy. The open market era which is prevalent today has actually facilitated a number of channels by which individuals can shield themselves under the garb of established multinationals and infiltrate the system with inferior quality goods. The fact of the matter is that due to this process, the brand equity of the corporation is the only principle which is dented and a company loses millions of dollars in fighting against this problem.

The customs laws in developing countries like India still need to be adequately sensitized to the practice and procedure of the international law of enforcement. The legal regime today is hopelessly blunted by the lack of knowledge, proper infrastructure, and a many tier process of adjudication which more than often throws up a decision that is beneficial to neither party. The customs organizations need to be made more adaptive and needs to be given judicial powers to effectively adjudicate the cases themselves without relying on a third tier of decision. This would help in the faster and speedier identification of culprits and expedite a process where more of these goods are trapped and filtered out of the system.

The problem of counterfeiting today also has implications on a country's homeland security. As illustrated by the Indian, United States and Italian examples, where counterfeit goods were the main financial pillars to set up terrorist networks, the money today gained by individuals in this trade can be channeled into activities which can have gross implications to the internal security of the country. The Border Control in countries need to be strengthened effectively keeping in mind this angle and adequate measures have to be taken to stem the flow of the revenue into illegal activities.

The recommendations to strengthen the system can be centered on an international knowledge management system which catalogues the shippers and their Board of Directors through a rating system and blacklists repeated offenders. This information can be then circulated around to signatory countries to keep an adequate lookout for possible suspects. Another enforcement mechanism could be the adoption of holographic codes into patent numbers embedded into products. This would provide a built in system in the original product which would identify the genuine from the fake. Measures out of the box need to be

implemented instantly to immediately stem this problem and to protect the domestic economy.

In conclusion, one can only hope that the systems becomes more competitive and adaptive so as to enable the Border Control Organizations to become a proper pillar of enforcement of the law and shining examples of protectors of the municipal legal regimes.

ENDNOTES

ⁱ Hereinafter referred to as “the act”

ⁱⁱ 11. POWER TO PROHIBIT IMPORTATION OR EXPORTATION OF GOODS. SUB SECTION - (1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.

Section 11(2)(n): The protection of Patents, Trademarks and Copyright

ⁱⁱⁱ 111. CONFISCATION OF IMPROPERLY IMPORTED GOODS, ETC. - The following goods brought from a place outside India shall be liable to confiscation :- (a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;

(c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54.

(n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened

^{iv} 113. CONFISCATION OF GOODS ATTEMPTED TO BE IMPROPERLY EXPORTED, ETC. - The following export goods shall be liable to confiscation :- (a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

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- (b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;
 - (c) any dutiable or prohibited goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;
 - (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
 - (e) any dutiable or prohibited goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;
 - (f) any dutiable or prohibited goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;
 - (g) any dutiable or prohibited goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;
 - (h) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;
 - (i) any dutiable or prohibited goods or goods entered for exportation under claim for drawback which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof;
 - (ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;
 - (j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;
 - (k) any goods cleared for exportation under a claim for drawback which are not loaded for exportation on account of any willful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;
 - (l) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

^v See Generally Wikipedia- <http://en.wikipedia.org/counterfeit.html>

^{vi} Section 2(1)(i) of the Trade Marks Act, 1999

False Trade Description. – means

- (I) a trade description which is untrue or misleading in a material respect as regards the goods or services to which it is applied; or
- (II) any alteration of a trade description as regards the goods or services to which it is applied, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue or misleading in a material respect; or
- (III) any trade description which denotes or implies that there are contained, as regards the goods to which it is applied, more yards or meters than there are contained therein standard yards or standard meters; or
- (IV) any marks or arrangement or combination thereof when applied –
 - (a) to goods in such a manner as to be likely to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose merchandise or manufacture they really are;
 - (b) in relation to services in such a manner as to be likely to lead persons to believe that the services are provided or rendered by some person other than the person, whose services they really are;
- (v) any false name or initials of a person applied to goods or services in such manner as if such name or initials were a trade description in any case where the name or initials –
 - (a) is or are not a trade mark or part of a trade mark; and
 - (b) is or are identical with or deceptively similar to the name or initials of a person carrying on business in connection with goods or services or the same description or both and who has not authorized the use of such name or initials; and
 - (c) is or are either the name or initials of a fictitious person or some person not bona fide carrying on business in connection with such goods or services, and the fact that a trade description is a

trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act;

vii Section 102(4) of the Trade Marks Act, 1999

viii Notification No. 1 / 64 – Customs dated 18.01.1964

- (iii) Goods having applied thereto a false trade mark within the meaning of Section 77 of the Trade and Merchandise Marks Act, 1958.
- (iv) Goods having applied thereto a false description within the meaning of clause (f) of sub-section (1) of Section 2 of the Trade and Merchandise Marks Act, 1958, otherwise than in relation to any of the matter specified in sub-clauses (ii) and (iii) of clause (u) of that sub-section.
- (viii) Goods which are required by a notification under Section 117 of the Trade and Merchandise Marks Act, 1958, to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer or the person for whom the goods were manufactured, unless such goods show such indication applied in the manner specified in the notification.
Notification No. 135 / 60 – Customs dated 31.12.1960
 - (a) Any goods which are required by a notification under Section 117 of the Trade and Merchandise Marks Act, 1958, to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer or the person for whom the goods were manufactured, unless such goods show such indication applied in the manner specified in the notification.
 - (b) Any goods which are required to be stamped under Section 74 of the Trade and Merchandise Marks Act, 1958, but which have not been stamped in the manner specified in the Trade and Merchandise Marks Rules, 1959

ix Professor Michael Blakeney, “Guidebook of Enforcement of Intellectual Property Rights”, Queen Mary Intellectual Property Research Institute, University of London

x Ibid

xi Mr. Li Qunying, “China Customs Protection of Intellectual Property Rights”, sited at <http://www.sccp.org/sccplibary/meetings/February2001/intlprop.doc>

xii For Singapore and Malaysia See generally home page 1: <http://www.ecap-project.org/Malaysia>;
Home page 2: <http://www.ecap-project.org/Singapore>