

**ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS
(PART III OF THE TRIPS AGREEMENT):
EXPERIENCES OF BORDER ENFORCEMENT**

Communication from the United States

The following communication, dated 26 January 2007, is being circulated at the request of the Delegation of the United States.

I. INTRODUCTION

1. The United States offers this submission on border enforcement of intellectual property rights as a contribution to a constructive exchange of information, within the TRIPS Council, on the experiences of Members in implementing Part III of the TRIPS Agreement. The United States reiterates its view that enforcement-related challenges surrounding infringement of intellectual property are of concern to all Members, with negative consequences for both developing and developed economies. In this light, the TRIPS Council can make a positive contribution to addressing these problems through a constructive exchange of views and experiences.

2. This paper briefly discusses recent data on the growing scale of IPR infringement detected in the United States, as measured by seizures of infringing imported goods by US customs authorities. It also introduces basic information regarding:

- Efforts by US customs authorities to employ *risk modelling methods* as a tool to enhance the ability to achieve effective border enforcement against IPR-infringing goods.
- Efforts by US customs authorities to employ *post-entry verification audits* of importers to identify and penalize importations of IPR-infringing goods after the goods have been released into commerce.

3. The United States notes that, consistent with Article 1.1 of the TRIPS Agreement, Members have flexibility to determine the appropriate means of implementing enforcement measures, including border enforcement measures as discussed in Articles 51-60, provided that those means are consistent with the TRIPS Agreement. Accordingly, the US offers this information simply as an example of certain tools that the United States has found helpful in its own efforts to address the growing scale of IPR infringement, with a view to furthering the international cooperation and information exchange called for in Article 69 of the TRIPS Agreement.

II. RECENT DATA ON CUSTOMS SEIZURES OF IPR INFRINGING GOODS

4. In the United States, US Customs and Border Protection (CBP) devotes substantial resources to targeting, intercepting, detaining, and seizing shipments at the border containing IPR infringing goods. As part of these efforts, seizure data is collected and researched, and this data is used as a tool for future interdictions and for guiding efforts to improve international cooperation in the area of border enforcement.

5. The Annex to this document includes a selection of recent statistics and graphs available from CBP. Additional information and statistics can be found on the CBP website at http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ipr/seizure/.

6. As demonstrated in the annexed materials, the United States continues to confront IPR-infringing products at the border, on a massive and increasing scale. The following points, drawn from data for Fiscal Year (FY) 2006 (October 2005-September 2006), are particularly notable:

- The value of infringing goods seized by CBP in FY2006 reached US\$155.4 million, and the number of seizures reached 14,675. The FY2006 value and number of seizures are the highest in the history of CBP.
- This represents an increase of two-thirds by value, and 83 per cent in the number of seizures, compared to the previous fiscal year.
- Footwear accounted for a significant proportion of goods seized in FY2006, at 41 per cent of total value. This was a major increase over the previous year, when footwear accounted for only 10 per cent of total seizures, by value.
- Wearing apparel, handbags, computers, and consumer electronics (including power strips, DVD players, and cell phones) also figured prominently in the seizures made by CBP during the past fiscal year. Consumer electronics seizures represent a particular concern as these fake products may pose health and safety risks.

7. The significant increase in seizures recorded in FY2006 means that the expanding scope of global piracy and counterfeiting activity will remain an important preoccupation for the United States Administration, Congress, business community, and consumer groups.

III. TOOLS FOR ENHANCING BORDER ENFORCEMENT ACTIVITIES

8. The steady increase in overall imports into the United States market, combined with an increasing incidence of IPR-infringing imports, have made it necessary for CBP to develop and implement new methodologies as a means of enhancing border enforcement, and maximizing resources, with respect to identifying and interdicting IPR infringing goods. This paper will briefly introduce two such methods currently being deployed by CBP.

A. RISK MODELLING

9. Given the enormous quantity of goods processed at US ports of entry on a daily basis, and limitations on resources available to inspect shipments for possible IPR infringements, CBP has adopted new risk analysis methods which are intended to:

- sharpen focus on high-risk shipments to increase interdictions;
- reduce unproductive examinations of low-risk shipments; and

- use IPR border enforcement resources more efficiently.

10. As one part of this risk analysis approach, CBP has developed an IPR Risk Model, which expands the agency's current portfolio of IPR targeting methods. The Risk Model represents an innovative, technology-based targeting tool that calculates risk "scores" as a means of indicating relative IPR infringement risk for imports into the US market.

11. CBP's IPR Risk Model is a computer-based program that applies statistical analysis techniques to create a data-driven model of IPR risk. The model is built on the basis of risk factors that are characteristic of IPR infringing imports. These factors are drawn primarily from information provided to CBP when an importer presents goods for entry into the US. The factors, which include data such as country of origin, port of entry, tariff number, and past import history related to these, are statistically weighted based on known risk. For example, each country, port and tariff classification is assigned its own statistically determined weight. The model then applies a mathematical formula to combine these factors and generate risk scores for imports. CBP officers subsequently rely on this output to assist in the identification of inbound shipments which may merit particular attention, or which may represent a low risk and can consequently be processed for entry without physical inspection.

12. The output of the Risk Model is used to enhance current, more traditional tools used by CBP to identify and interdict counterfeit and pirated goods at US borders. These include:

- visual review of packaging;
- manual review of entry and manifest information;
- computerized targeting based on a small number of equally weighted elements such as importer, country, and/or tariff number;
- leads provided by industry and other US agencies.

13. The CBP Risk Model will be implemented nationally in the first quarter of 2007.

14. CBP can share the methodology used to create the IPR Risk Model with other Members, although the model itself cannot be shared because the risk factors are specific to the United States.

B. POST-ENTRY VERIFICATION (IPR AUDITS)

15. Post-entry verification audits are a long-standing feature of CBP's enforcement work, but such audits have only recently (since 2005) been applied with respect to IPR-related enforcement.

16. CBP has trained a group of its regulatory audit employees in IPR subject-matter, enabling them to apply their auditing skills to the enforcement of intellectual property rights. In addition to receiving training from CBP's own IPR specialists, the auditors also attend training offered by trademark and copyright owners in the private sector.

17. IPR-based post-entry audits have been performed or are in progress on 35 importing companies at high-risk for IPR violations based on their importing history.

18. In post-entry verifications, CBP auditors review documentation such as a company's purchase records, product specifications, general and subsidiary ledgers, and payment records. These financial records hold key information that allows auditors to identify potential IPR violations. CBP auditors also review the business practices, or system of controls, that a company uses to prevent it from

importing counterfeit and pirated products. These reviews determine if there are weaknesses in the company's practices or systems that may lead to IPR violations. Based on the findings of these reviews, CBP works with businesses to establish stronger systems of procedures to prevent IPR violations. Findings from these audits have identified violations among importers in several areas, including electronics, toys, textiles, and recreational motor vehicles. CBP is issuing penalties on counterfeit goods uncovered in post-entry IPR audits.

19. CBP is finding that applying post-entry verification audits to IPR subject-matter increases the effectiveness of IPR enforcement by addressing counterfeiting and piracy at the level of individual business organizations. This enables an expansion of enforcement effectiveness beyond examination and seizure at the border, shifting CBP's focus from individual shipments to businesses engaged in trade in IPR-infringing goods.

IV. CONCLUSION

20. The United States has found that the techniques discussed in this paper have been helpful in addressing the growing scale of IPR-infringing trade encountered in the United States. These measures are summarized here for the information of Members of the TRIPS Council, with the understanding that there are a wide variety of approaches that may be applied to border enforcement.

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