

DANGEROUS LIAISONS

WHY IP INFRINGEMENTS ARE THE NEW ELDORADO FOR ORGANIZED CRIME



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FOREWORD

This position paper summarizes the evidence emerged during the International Conference organized by the Italian Ministry of Economic Development, EUIPO, UNICRI and INDICAM on October 21st. The goal of the Conference was to focus on how organized crime is today a prominent player when it comes to IP infringements.

The speakers, some of the most valuable and experienced professionals from governments, law enforcement agencies and public institutions, touched many aspects of the relationship between criminality and IP violations.

This work is representing all the points of discussion and it is a contribution to raise awareness about the dangers hidden behind counterfeiting.

I personally thank all the people who made the Conference a successful event; the Italian Ministry of Economic Development for their support and the fruitful cooperation shown every day on these topics, and, together with the Undersecretary of State Alessia Morani, also for having well represented the engagement of the Italian Government in the fight against illicit trade. A special thanks to EUIPO and the Director of the Observatory, Paul Maier, who is representing one of the most reputed leaders in the IP community, striving for a better IP protection and for a stronger IP community.

My personal gratitude goes to UNICRI and its director, Mrs. Antonia De Meo, for the incredible work achieved by the organization she is leading, in the research on the connections between organized crime and IP infringements; for several years the specific knowledge of UNICRI represents a cornerstone for all of us who are working in the IP community.

Last but not least, my special thanks to Marco Musumeci from UNICRI, whose competence and deep knowledge on these topics have made the conference a real success. Likewise, a warm thanks to the INDICAM team that has largely contributed to bring this event to life and to make this position paper a complete and important reading for all the “good actors” in the fight against the “bad actors”.

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PREFACE

By MP Alessia Morani, Undersecretary of State at the Italian Ministry of Economic Development, President of the National Council for the Fight against Counterfeiting and Italian Sounding (CNALCIS)

Counterfeiting today represents an extremely profitable business area for national and transnational organized crime thanks to a market of vast proportions, a widespread distribution network and an evolved illegal business model, which also functions on a technological level.

The globalization of counterfeiting, from production to consumption, is closely related to the role that transnational crime has assumed in the management of the counterfeiting supply chain. Criminal organizations have demonstrated, once again during the current pandemic, an extraordinary ability to respond to the market and adapt to changes in the national and international context, including through the diversification of their activities, the indissoluble circle between the management of illegal activities and the reinvestment of capital into the licit economy, and the consequent expansion of sources of funding and control over geographic territory.

Recent data on the international trade of counterfeit goods attest to the extent of the phenomenon. According to the most recent Organisation for Economic Co-operation and Development (OECD, 2018) estimates, the United States, France and Italy are the countries most impacted by trade in counterfeit products; Italian products are among the most counterfeited in the world.

Responding to the breadth of counterfeiting, and its impact on the justice sector, as well as on society and national economies, requires a holistic and multi-institutional strategic response. However, significant variance remains among countries with respect to the priority assigned to addressing violations of intellectual property rights. Uneven policies and responses – from a regulatory and law enforcement point of view – not only prevent significant impact, but also risk frustrating well-intended national action plans and cross-border strategies.

The exclusion of intellectual property crimes from the European Multidisciplinary Platform Against Criminal Threats (EMPACT) priorities within the Policy Cycle 2018-2021 is evidence that, even in the European Union, a homogeneous level of awareness (and response) has yet to be reached.

It is with this objective, especially considering the current period of health emergency, that the Italian Ministry of Economic Development (DG Protection of Industrial Property – UIBM) and INDICAM organized an International Conference (held on 21 October 2020); this event was held in close collaboration with the European Union Intellectual Property Office (EUIPO) and the United Nations Interregional Crime and

Justice Research Institute (UNICRI). The Conference brought together renowned experts with the common aim of raising collective awareness of the impact of counterfeiting in the criminal justice sphere, including its role in strengthening the financing of organized crime and in the proliferation of money laundering. The results of the Conference included the need to elevate, as a key priority, the issue of counterfeiting to the European level of the next Policy Cycle 2022-2025, to more effectively combat organized crime and other forms of international crime, as well as to more effectively seize and confiscate assets linked to counterfeiting.

In Italy, much has been done in the last decade, in terms of regulation, prevention and enforcement, thanks to strong institutional commitment and public-private collaboration. The national "Anti-Counterfeiting System" is a modernized model of addressing counterfeiting; this system significantly strengthens the regulatory framework and creates a more articulated (and streamlined) institutional structure. The National Council for the Fight against Counterfeiting and Italian Sounding (CNALCIS), with the support of the Secretariat (DG Protection of Industrial Property – Italian IPO/UIBM), plays an essential role, implementing strategic coordination required by law and promoting the necessary operational response cooperation among different governmental agencies, as well as between public and private stakeholders. It will be the responsibility of the newly renewed Council to emphasize the urgency for the policy to address the highlighted issues, making them a priority on the Government's agenda.

COUNTERFEITING AND ORGANIZED CRIME: CRIMINAL INFILTRATION AND OTHER INTERESTS AT STAKE

Counterfeiting is extremely attractive for organized crime given its profit versus risk ratio. This form of criminality, over the past several years, has proven to be increasingly profitable while, at the same time, receiving little interest from law enforcement and policy makers. This inevitably produced more extensive counterfeiting operations and has resulted in extensive income generation for organized crime.

The inclusion of counterfeiting in the work of existing organized crime syndicates and their modus operandi has only accelerated the proliferation of this crime. Having transnational criminal alliances already in place, with established distribution networks, territorial control and strategies (including those related to money laundering), it has been relatively easy to include counterfeiting in their portfolio of criminal activities. The result is that today counterfeiting has clearly become one of the many forms and manifestations of organized crime.

Still, important nuances must be explored. Experts have highlighted an increased tendency by organized crime to introduce counterfeit products into the legitimate supply chain, in view of selling them as originals and reaching a wider customer base. This aspect is connected with organized crime's efforts to extend a grasp over the legal economy, controlling enterprises in various sectors directly or indirectly. This criminal strategy started as an alternative way of laundering money, flanking investments into real estate with investments into enterprises. Increasingly, this became a preferred method for money laundering activities, targeting not only big companies but also small shops and services. At the same time, it allowed criminals to control, directly or indirectly, a series of economic activities which could also be used for other purposes. The infiltration of counterfeit products into the legitimate supply chain is one of them.

Intellectual property (IP) crimes are an advantageous opportunity to rapidly turn dirty money into earnings that appear to be legal, with a significant low level of risk. This model, as also highlighted by some of the experts who participated in the International Conference, is based on the flexible use of fake goods' trade both to diversify illegal activities and to infiltrate the legal channels with counterfeit goods. This modus operandi allows for an easy entry into growing markets, with high profit margins and low exposure to law enforcement, in contrast to other forms of criminality, such as drug trafficking, arms smuggling and human trafficking.

Several cases demonstrate the promiscuity between legal and illegal that characterizes this kind of crime, ranging from examples where the criminal organization controls entire supermarket chains, distributors of finished goods or business units to instances where criminals control legitimate shops and sell

counterfeit goods as originals to unaware consumers. It is a system which constantly feeds itself by creating a full resource mobilization and money laundering circle.

Counterfeiting provides enormous funds to organized crime which can be reinvested in various activities, both licit and illicit.

When it comes to infiltration, the use of counterfeiting for criminal purposes has been characterized by at least two models. The first consists in producing, distributing and pushing counterfeit products into the legal market, by imposing the selling of fakes on third party sellers. It is somewhat of a switch from the forced payment of the “pizzo” (e.g.: the typical “protection money” extorted by organized crime from entrepreneurs to allow them to keep running their business without any harmful consequences) to a lower-risk money collection, based on the “gentle invitation” to trade fake goods already produced and/or distributed by the criminal organization.

The second model has been fundamental for establishing new criminal alliances outside the typical territory of influence, while reinforcing control and fully exploiting the network of new delinquent groups. The Italian Directorate for Anti-Mafia and counterterrorism reported, as an example, the results of a recent articulated investigation that uncovered a complex system of connections between legal and illegal trade. The role of organized crime, established in the Italian region of Campania, was the apex of a transnational alliance for the production, importation and distribution strategy to penetrate the legal economy. In that investigation, law enforcement agencies found more than 10 production sites (in Italy alone), and more than 820,000 goods ready to be sold, as well as a financial and operational structure dedicated to this illegal activity. This modality is useful for understanding the evolution of organized crime’s second “business model”. The model used both legally-produced and counterfeit products sold to retailers to flood the market with counterfeited goods which were not easily detectable. In this case, the counterfeit goods were used as a “pizzo-like” money collection, to control the territory more effectively with very little risk. Additionally, law enforcement agencies identified online sites dedicated to the sale of fake goods, exploited by the criminals for even wider distribution.

The described investigation shows the danger of infiltration into the retail market sphere, and a means to further bolster income generation for organized crime syndicates.

Still, infiltration has not been limited to the retail sphere; organized crime has also exploited the public procurement sector with respect to counterfeit products, particularly where the supply chain cannot be adequately verified by governmental agencies.

Given the continued attractiveness of public procurement for organized crime, often due to the high quantities of goods purchased or to the high economic value (e.g.: in the healthcare sector), stronger oversight mechanisms and protocols with respect to public procurement contracts need to be considered.

Organized crime's ability to infiltrate the legal economy is also strengthened by some weaknesses in the enforcement apparatus. As pointed out during the Conference and confirmed by some complex investigations (like the one above mentioned), organized crime is becoming stronger where the system is not adequately considering counterfeiting as a priority. If the system is not built around a more efficient evaluation of risks, organized crime can rapidly gain significant economic results thanks to money laundering.

THE STRUCTURE OF ORGANIZED CRIME, BETWEEN TRANSNATIONALITY AND DELINQUENT ALLIANCES

One additional element which deserves specific attention is linked to the scope and magnitude of criminal operations related to counterfeiting. As aforementioned, one of the immediate difficulties stemming from the involvement of organized crime is their ability to rely on a well-established transnational network of alliances, including well-functioning trafficking methods, trade routes and intermediate nodes and hotspots. All these elements are nowadays serving different illicit operations managed by transnational criminal organizations and are shedding light on the integration of strategies and criminal *modi operandi* which modern criminal groups are fully exploiting to manage several illicit activities at the same time.

The structure of these networks relies on several organizations which all perform their own role in the trade. Some of them may simply facilitate some parts, making sure that products transit through certain hubs or acting as intermediaries between producers and final purchasers of the bulk counterfeit goods. In some cases, certain criminal groups may only be involved in the production phase, while in other instances this element is also coupled with their direct involvement in the distribution of counterfeit goods. Some of the cases investigated by law enforcement agencies show both *modi operandi*. There have been instances where criminal groups based in Europe were simply purchasing counterfeit products from Asian criminal groups, while in others, criminal organizations based in Europe were supplementing this stream of products with locally produced counterfeits. This demonstrates that there is still a noticeable local production of counterfeit goods in Europe and, usually, criminal organizations will differentiate the sourcing on the basis of the quality they want to achieve or on the basis of the established relationships with the various criminal groups.

In addition, especially in the identified transit points for counterfeit products, criminal organizations also created apparently legitimate companies to manage the clearance of goods through customs or for the temporary storage of products. Once again, this demonstrates the attention criminals give to the legal economy and to creating an apparent shield of legitimacy to some of their operations.

This subdivision of roles can also be seen within a given country. Taking Italy as an example, the Camorra groups are probably the most active (both in Italy and internationally, as mentioned above). While they frequently establish alliances with Chinese criminal groups to obtain part of the counterfeit bulk supplies they want to sell, they also establish connections with low profile criminal groups of African origins who will be responsible for ensuring the final delivery of products. This is especially true when the target is formed by consumers who are “looking for the counterfeit”. In this case, these lower profile criminal groups will be in charge of the distribution in local markets or touristic places, in those cities in which, unfortunately, the presence of sellers of counterfeit goods in the streets is still a reality, with a level of “social” acceptance higher than the expected.

The criminal supply chain is the exact replica of a legal supply chain, where all the key roles are covered, thanks to delinquent alliances that organized crime is capable of building and enhancing. The consequence is a higher capacity of infiltration in the legal supply of products, with a wide organization dedicated to illicit conducts.

Mirroring a legal supply chain gives an idea of how structured the approach of organized crime towards the trade of fakes is. This demonstrates how strong organized crime’s commitment and interest in this business is, where the entrepreneurial strategy of criminal organizations is the same, whatever the traded wares. The supply chain management is the same, regardless of the product.

THE CRIMINAL CARPE – DIEM

Monitoring organized crime activities as a whole is an immensely difficult task but law enforcement agencies, following the example of what Europol and Interpol are doing, will need to progressively move towards this direction. This is also needed in view of the extreme velocity with which organized crime is capable of mutating, adapting and grasping all profit possibilities which are opened by new economic or social situations, as well as by the mutated technological environment.

The impact of the current crisis represents an unprecedented case of high demand for health-related products. Therefore, it comes as no surprise that organized crime has swiftly taken a large market segment to cover the widespread demand for personal protection equipment – PPE (such as masks, gloves and sanitizers) of which there was a rapid shortage in the traditional legal channels at the start of the pandemic.

Criminal organizations have focused their energies on goods related to COVID-19 and all Member States in the EU, as well as the US, have been quickly overrun by a flow of allegedly valid products for reducing risks of contagion. Regardless of whether these products were actually effective or not, their characteristics misled the public, bearing fake certifications, with no active ingredients nor the basic features to be

classified as fit for purpose. During the Conference, some speakers reported the terrible effects of this criminal activity, with millions of dollars stolen from buyers who never received the goods or, in some other cases, received goods not corresponding to the certification.

The COVID-19 emergency highlighted the adaptability and rapid capacity for new investments by organized crime, as well as the ability to cover areas with a huge demand in real-time.

Shortly after the COVID-19 pandemic emerged, fake PPE products flooded the market and of course the online channel was heavily exploited by organized crime. While it is undeniable that the reaction of online big players was decisive to effectively tackle illegal offers, criminal organizations resorting to online circuits has shed a light on the opportunities and challenges the digital world embodies.

ORGANIZED CRIME AND IP CRIMES IN THE ONLINE ENVIRONMENT

E-commerce is one of the greatest and most challenging opportunity for the industry. Day after day, this form of commerce is growing by double digits, connecting millions of people around the world, creating new growth opportunities for the biggest brands as well as for the small and medium ones. However, the positive effects of digital progress are tarnished by some negative consequences caused by the inadequate governance of the web environment.

In Europe, the legislative framework is particularly dated and less adapted to the development of e-commerce, and generally to the rapid growth of the digital channels as a vehicle of communication, content creation and information diffusion. The Directive 31/2000 of the European Parliament, drafted for the governance of e-commerce, is the heritage of the dawn of the digital age. This is one of the most relevant reasons for which the structure of online commerce is now showing some weaknesses: facilitating the bad actors, and not just the legal ones.

Several speakers underlined the growing threats due to the expansion of the online environment. Two of them are particularly dangerous when it comes to tackling illicit conducts: the impact on the method of transportation of goods and the relative ease of the dissimulation of identities and supply chains.

With regard to the first point, the growing use of e-commerce has impacted logistics, re-balancing the delivery routes from maritime to postal or express couriers. The negative consequence of this is that it has been increasingly difficult to apply the risk analysis criteria developed for and adapted to “traditional” logistics, which were based on large shipments occurring in the traditional “brick and mortar” trade. The side effect of this has been a dramatic increase in the number of small parcels

shipped in an unprecedentedly short time. Such a change is seriously affecting the capacity of law enforcement to analyze and to oppose the illicit trade of goods, harming the effectiveness of counteractions. Of course, the system's weaknesses have been exploited by criminal networks, who rapidly switched the organization of their shipments from large maritime containers to small parcels. The malicious actors adopted a business model which fully exploited the digital channels, using them for B2B (maintaining relationship with counterfeiters and trading the bulk), and for B2C (reaching more potential customers while lowering the risks of the illicit business). Finally, an indirect consequence of this new online model was the collapse of the customs procedures for risk analysis and inspection of traded goods.

Once again, organized crime demonstrated a quicker adaptation to change than the legal framework; the Conference discussed this point, highlighting the need, today more than ever, to reshape the EU Directive as part of a better and more effective way to tackle the illicit trade of fake goods.

A revised legislation would be one of the pillars for a stronger cooperation among Law enforcement agencies (LEAs), also providing a powerful resource for a stronger judicial counteraction. Several speakers raised the urgent necessity to reinforce the fight against counterfeit trade with a synergic convergence of actions, composed of different cornerstones, among which cooperation, more adapted regulations and more advanced methods of analysis are some of the most relevant. The EU has the tremendous opportunity to show true leadership in this area, with the current open window for the draft of the renewed e-commerce Directive. As many times stated by the EU president, Mrs. von der Leyen, Europe has the unique opportunity to provide a more sustainable digital space, with a more effective legal framework which fully empowers continental companies to pursue social and economic development. The final goal is to change the paradigm: creating a fairer playing field where rights and duties are more balanced for companies, online players and consumers.

MONEY MAKES THE (CRIMINAL) WORLD GO ROUND: A GLIMPSE AT MONEY LAUNDERING AND THE IMPORTANCE OF FINANCIAL INVESTIGATIONS

Organized crime is driven by money. Just like legitimate entrepreneurs, criminal organizations balance pros and cons to achieve the highest earnings to maintain and strengthen their professional activities. However, in order to do so organized crime is aware to avoid authorities' controls; no trace can be left behind. That is where money laundering comes in: complex processes to conceal illegal money through transfers both within and outside the banking circuit and through commercial transactions.

From a recent estimate of the United Nations (UN), the amount of money laundered by organized crime is huge, between 1.6 trillion USD and 4 trillion USD. This amount corresponds to 1.5% and 5% of the global GDP (EUROPOL/EUIPO, 2020).

The evaluation emerged after some of the biggest operations against the illegal trade of counterfeit goods and pirated contents were carried out, showing how organized crime is significantly raising the level of its expertise while corroborating its eclectic range of economic interests.

Some investigations (EUROPOL/EUIPO, 2020), for instance, have highlighted that criminal organizations are entering the crypto-currency mining business for laundering money raised through illegal pirated contents, such as Internet Protocol Television (IPTV) illegal streaming, a low-perceived crime by consumers that often goes unnoticed although is widely exploited. Likewise, in some other cases the mechanism used by organized crime is once again proving how fine the line between the legal and illegal economy is. Organized crime is using legal companies to shield illegal transfer of money or exploiting complex procedures (such as loans and false invoices) to launder the money, dealing with sophisticated financial structures adapted to the scope.

Being capable of transferring funds is a necessary element of the criminal strategy and money transfer operators can aid in the fulfilment of this task. Registered cases and investigations have unveiled that criminal organizations have already been capable of controlling money transfer operators, directly or indirectly, especially when the criminal scheme relied on a transnational criminal group with criminals operating in different regions. These operators were frequently used to transfer funds to the Asian members of the transnational criminal organization. In instances where the national authorities of a particular country established thresholds to the amount of money that can be transferred in a single operation, criminal groups were able to overcome this by fractioning the total amount to be transferred into a myriad of small transactions. Of course, this modality is easier to implement when the criminal organization directly controls the money transfer operator and the territory. Once again, results from several law enforcement operations confirmed this *modus operandi*.

It is clear, now more than ever, that every “grey” area (e.g.: cryptocurrency, money transfer agencies, false invoices, etc.) poses a potential risk of breach for the legal system. These weak spots are fully exploited by criminals to cover their actions and rapidly launder the huge amount of money collected through illegal activities. Therefore, investigations need to take into account this entire complexity, including the network of financial transactions that are necessarily generated by the criminal cooperation schemes. In particular, money has to be transferred to the criminal groups responsible for the production of the counterfeit products, usually located in Asia. Money transfer operators, often controlled by organized crime, are used for this purpose. However, these transactions may leave a money trail that could be followed.

Furthermore, and similarly, each group involved at any stage of the distribution chain will have to obtain profit in some way. Money trails could also be identified in these cases, while attention should also be given to other activities which are very probably performed by these groups in the instances where their role is to facilitate the transit of products. Practices related to corruption, intimidation and also to the creation of shell companies through which products or even part of the profits are moved, should be investigated.

Finally, following the money should also be a priority in relation to investigating criminal organizations involved in the overall management of the trade. It is probably at this stage that the majority of money laundering activities will take place and that the criminal organization will also reinvest in economic enterprises capable of further supporting the criminal scheme. Research, as well as several cases investigated by law enforcers, demonstrate how criminals are capable of gaining control of economic activities, through loansharking, intimidation or making connections with unscrupulous politicians. All these elements and the related financial flows could be used to create an integrated investigative approach to monitor the economic side of organized crime operations, including in relation to counterfeiting. In addition, it is entirely possible that by monitoring all these financial flows and financial interests of organized crime, law enforcers could discover alliances and connections between criminal activities which were apparently not connected.

TAKE-HOME MESSAGE: ALL TOGETHER WE CAN DO BETTER

The International Conference has represented an important opportunity to focus attention on the consolidated interest of organized crime in counterfeiting. The various experiences reported by the speakers, with a wide view on the phenomenon, confirmed the dangers linked to a simplistic view of what fake goods trade actually entails.

Through counterfeiting, organized crime makes delinquent alliances strengthening the overall criminal network. Different criminal organizations are often involved in different rings of the supply chain, from production until the ultimate sale to consumers.

As emerged during the Conference and by looking at this peculiar *modus operandi*, infiltrations in the legal economy are the greatest threats posed by criminal organizations. While financing other illegal activities organized crime is engaged in, the same proceeds from counterfeiting enter the regular economy through well-structured money laundering techniques, tainting the legal market and hindering the identification of the criminal chain. Therefore, a “follow-the-money” approach seems like the most adequate to adopt in order to effectively tackle the issue: it means

applying to counterfeiting the same tools already used in other financial investigations linked to serious crimes, such as drug trafficking.

Counterfeiting, as clearly demonstrated, is a complex criminal phenomenon: it knows no borders and is capable of building diversified entrepreneurial structures, which tread the thin line between legal and illegal.

Given the transnational nature of IP crimes, whose perpetrators make use of sophisticated tools to elude controls – by branching out their own organizational structure and deploying resources all over the globe –, joining forces becomes the only suitable approach to these issues. Cooperation is the key for tackling the worldwide business of counterfeiting: every stakeholder represents a fundamental piece of the mosaic, from national governments to international organizations, from brand owners to law enforcement and consumers; everyone needs to play their part in order to guarantee a consistent response to this issue.

It cannot be denied that a lot has been done by the community of stakeholders over the years: in the EU, for example, the establishment of the Observatory on Infringements of Intellectual Property within EUIPO helped to bring together different realities from the public and private sectors (Member States, trade associations, civil society, EU institutions and agencies, and international organizations) to study these criminal phenomena, assist policymakers, support IP rights enforcement and raise awareness on the danger of counterfeiting and related violations.

While, in the past, confrontation was bilateral, today we witness a multilateral approach to the matter. The coexistence and involvement of numerous different actors has inevitably led to a series of challenges that need to be addressed.

First, overlapping expertise among enforcement entities must be avoided, with regard to both substantial competence and geographical scope: the risk is having too many resources deployed in the same areas while leaving loopholes criminals can take advantage of.

Second, working across different databases that are not able to communicate with one another seriously limits the possibility of conducting effective investigations as well as efficient risk analysis that can ensure a wider view of the significant amount of infringing goods that keep flooding into both the illegal and legal markets.

Data harmonization is essential for tackling IP violations and delinquent groups resorting to counterfeiting to also fuel other types of criminal activities; otherwise, we will always have to settle for small wins, rather than seeing the bigger picture.

This issue might seem purely “technical”, but instead it is undoubtedly linked to how governments and institutions actually look at IP crimes, how much weight these infringements have on political agendas, and how little value is placed upon them by public opinion. Different priorities lead to different governance decisions and today States have very separate approaches on how to handle counterfeiting.

Coordination, on the other hand, would mean every single stakeholder finding their own space of action and integrating each other's work, without leaving any gap, and instead covering all the relevant areas: from enforcement to data sharing, from decision-making to awareness.

The EU has surely invested in long-term relationships with important stakeholders: with the U.S., for instance, the transatlantic partnership has allowed the collaboration goals both actors had in mind to be fully expressed, through cooperative customs actions, mutual investigations, data sharing, joint training programmes, concerted advocacy activities, and the constitution of specialized representatives – the Attachés – whose main function is to improve IP policies in the countries they are located in, in order to support fellow citizen businesses and individual right holders.

In the EU-US case there is a peculiarity with regard to IP Attachés: often these kinds of advocates are placed in countries where violations of intellectual property rights are bad and laws do not work like they should to protect right holders; instead, the U.S. IP Attaché for the first time was located in the EU to enhance an already existing and well-functioning relationship. This choice is meaningful because it shows a forward-looking vision concerning the importance of alliances when it comes to tackling counterfeiting and other IP-related crimes.

Building a shared forum to address these crimes results in the multiplication of resources, functions and outcomes. Having a shared group of advocacy representatives moves everyone closer to the desired goal by strengthening intelligence gathering and the exchange of best practices and strategies.

Organized crime and delinquent groups resorting to IP crimes connect different countries and realities in the world, covering their traces with money laundering activities, infiltrating the legal channel and fragmenting their supply chain to avoid controls. Given the highly complex nature of these crimes, acting alone in this fight is fruitless: only a coordinated and holistic approach will suffice to stop them.

This modus operandi calls for a joint counteraction to be undertaken by governments, international organizations and law enforcement agencies: we must aim to integrate virtuous initiatives coming from different stakeholders. But first, we must recognize IP crimes for what they actually are: despicable acts that severely harm people. They harm managers and employees in businesses – not only large businesses, but also many small and medium enterprises that struggle to make their goods stand out in a very competitive global market. They harm citizens that pay taxes to access public services; counterfeiters are not contributing to improve these services, they are instead depriving States' economies of important resources. Lastly, they harm consumers, whose health and safety are at constant risk, especially during the current pandemic, which counterfeiters are exploiting unsparingly by pouring fake PPE and medicines into the market.

The information gap needs to be filled because, today, the impact of IP crimes is still unclear to many, including among institutional decision-makers, and this can lead to a dangerous underestimation of the problem. Once again, cooperation is the key: different parts of our societies should be involved in the conversation, from government representatives to consumers. Bringing the former in means fostering a precautionary, smart and thorough legislation and setting a fair playing field for all stakeholders, while engaging with the latter is essential to raise awareness that can actually affect purchase and consumption behaviors.

And what about enforcement? Criminal operations are complex and fragmented: concurrence with further felonies, difficulties in following the money flow as well as tracking of raw materials are all elements that inevitably hinder investigations. This is where cooperation is best placed to step in, as documented by several case studies from different law enforcement agencies. Starting from apparently circumscribed seizures, the story of the counterfeit goods takes shape, leading to other actors in other countries whose enforcement entities become essential to intercept the illicit trade.

As mentioned before, data sharing is crucial to properly address the issue. Data collection and analysis are one of the best tools for optimizing the efforts to build a global intelligence on IP crimes. All players now have the possibility to feed the transnational system which is dedicated to better defining the network organized crime is building day by day. The industry has the opportunity, thanks to data systems (e.g.: the IP Enforcement Portal run by EUIPO) to collect information and to accurately work on it, allowing next-generation big data analysis to support enforcers.

Data can help us to track the very swift movement of wares, the actors involved throughout the supply chain, where and when transactions occur.

Moreover, new technologies have an important role to play to support law enforcement agencies in better monitoring crime trends and better responding to their evolution. As demonstrated by a recent UNICRI-CERN pilot, for instance, big data visualization and analytical tools are capable of creating a series of relations between different events, including results from law enforcement investigations and registered trends in relation to the activities of criminal organizations. In instances where the amount of data is relevant, these systems permit the visual reconstruction of interrelations between various criminal activities, connecting them to members of criminal families, and therefore potentially showing connections between crimes or criminal families which were initially considered independent from one another. This could also be applied to the use of the same strawmen by several criminal groups or of the same means to ensure the transit of goods or the movements of funds through different financial transactions.

It is an area which needs further exploring and testing but that has all the potential to

allow those who are at the forefront of the fight against organized crime to improve the effectiveness of their investigation and see criminal trends as they are emerging, greatly reducing the reaction time of law enforcers vis a vis new criminal phenomena. We need to remember that behind the illegal trade of fakes there are often well-structured organizations that balance costs and benefits in order to achieve their goals, exactly like legal companies that make their own plans and evaluations to obtain the best possible outcome out from their activities. This entrepreneurial approach translates to a careful analysis of pros and cons that allow criminals to exploit any shortcomings or deficiencies in the enforcement system. Every gap in the net of our police infrastructure is an opportunity that delinquent groups are waiting to seize: therefore, IP stakeholders need to join forces to monitor the worldwide – both online and offline – market, transit territories and free trade zones that often host unlawful activities.

The legislation must be suitable to create new chances of success in the fight against IP crimes: it is now clear that both within and outside the EU, there is an urgent need for stronger laws empowering transnational enforcement, as well as the engagement of all stakeholders. If the COVID-19 crisis has taught us anything, it is that rapid activities are pivotal for an effective counteraction, and cooperation among different actors is key. In the online environment, for instance, it is now time to level the playing field, engaging with web giants to fight counterfeiting and weaken criminal organizations.

In the context of enforcement, prosecution represents another important piece of the mosaic, given that not enough cases related to IP crimes actually go to court or face serious consequences. Tenuous verdicts make criminals' decisions worth the risk and reflect the current status of counterfeiting and intellectual property violations in the public debate.

Investigating and prosecuting more criminal cases is a major challenge that is not always easy to address when other felonies which are deemed to be of greater importance are the focus. This has a knock-on effect with regard to sentencing. We need more severe rulings against counterfeiters that contaminate the legal market and jeopardize people's health and security. Punishing these crimes according to the actual damages they cause is necessary to heighten their risk, something criminals will take into account before committing illegal acts.

We have seen that IP crimes have a larger impact than expected. They are not just activities fueling the power of organized crime, they are organized crime. They infiltrate into the legal environment both in the public and private sphere, they squeeze into every crack we leave open and take all the opportunities given by external circumstances, as we have witnessed during the COVID-19 pandemic.

And what is the role of the European Union in all of this? The intention of the current Commission is to build, in the near future, a European action plan based on the primary goal of filling the gaps between the European continent and the US and China. Therefore, von der Leyen's Commission has set aside investments to enhance what can make the EU a true leader: an environment based on knowledge and innovation to reshape and rebuild a common and effective approach to this issue. In this frame, IP needs to be a priority, also bearing in mind the huge financial contribution to the whole EU.

EMPACT is the best opportunity we have for turning words into actions. It would not only benefit each Member State, but it would also enhance cooperation between countries within, as well as outside, the EU, where similar initiatives can be replicated to give a wider, synergistic response to the problem. Citizens and businesses deserve a stronger protection, and the growing power of organized crime must be stopped with a shared effort.

The role Italy can play is, at the same level, crucially important. Being the third most affected country in the world when it comes to IP infringements, Italy must be at the forefront of raising awareness about the threats represented by organized crime and its connections with counterfeiting. A lot of investments, resources and lives are at stake and the time to act, all together, is now.

THE INTERVIEW

With Susan Wilson, Counselor for Intellectual Property, United States of America Attaché to the European Union

How is the current state of cooperation between the EU and the U.S. and what role does the IP Attaché play to guarantee an effective fight against illicit trade?

The current state of cooperation between the EU and the U.S. in the fight against counterfeiting and illicit trade is generally good. Particularly strong working relationships exist between specific agencies of the respective governments. For example, the U.S. Patent and Trademark Office (USPTO) and the EU Intellectual Property Office (EUIPO) have been very active together in the context of the OECD Task Force on Countering Illicit Trade (TF-CIT). U.S. Customs and Border Protection (CBP) and the EU Anti-Fraud Office (OLAF) have also maintained close contacts in investigations and operations to counter trade in counterfeit pharmaceutical products and medical equipment, especially in the context of the COVID-19 pandemic. In addition, U.S. Government law enforcement officials working through the U.S. National Intellectual Property Rights Coordination Center (NIPRCC) have consistently worked in recent years with their counterparts in Europol and Interpol in a variety of cross-border actions against counterfeiting and illicit trade.

Within this context, the USPTO IP Attaché based in Brussels plays an important role guaranteeing an effective fight against illicit trade.

The Attaché has an important coordinating role within the U.S. Mission to the EU and with colleagues throughout the bilateral U.S. embassies in national capitals throughout Europe, as well as interacting with industry stakeholders. The Attaché analyzes and disseminates relevant information, leads capacity-building programs, and collaborates with U.S. and European colleagues in enforcement actions. More broadly, the USPTO IP Attaché based in Brussels is one of thirteen Attachés throughout the world in Central and South America, China, Southeast Asia, India, Central Eurasia, the Middle East and North Africa, and Europe. The program serves to assist U.S. and like-minded stakeholders internationally in IP-related matters and to advocate for improvement of IP policies, laws, and regulations outside the U.S.

Despite all these efforts, there remains scope for even more extensive and sustained EU-U.S. cooperation in the years ahead. The Attaché will continue to play an important role promoting this closer cooperation.

What more can be done to halt the massive flow of fake products from the critical countries that are often part of international organizations whose aim is to stop counterfeiting?

Notwithstanding the efforts mentioned above, the U.S. and the EU must remain highly vigilant, collaborating even more closely and aligning their positions as much as possible throughout the relevant international organizations (especially OECD, WTO and WIPO) to combat more effectively counterfeit and illicit trade from the critical countries at the source of the problem. High-level political commitments and messaging are absolutely key to signalling that this will be taken seriously and appropriate resources dedicated to combating the scourge.

At the highest levels and across the spectrum of government agencies, the U.S. is focused on combatting illicit trade, including addressing the increased threat created by China's Belt and Road strategy. Within Europe specifically, inter-agency teams are (1) following closely developments at the EU level and in the Member States, and (2) reaching out to European counterparts to encourage stronger coordinated action whenever possible (e.g., greater information sharing in border enforcement actions and investment screening efforts).

The U.S. and, more gradually, the EU are specifically placing a steadily greater emphasis on the broad scope and scale of counterfeit products originating mostly from China. Among this very wide range of products, a particular emphasis has understandably been placed on counterfeit pharmaceuticals, which present the most pressing danger in the context of the pandemic. Counterfeiters and the organized crime syndicates that distribute and market their goods have been extremely adaptable and successful during the pandemic in preying upon the needs and fears of governments and their citizens for all manner of personal protective equipment, testing materials and remedies for COVID-19. This is in addition to the severe and sizable environmental, health and safety threats fake and illicit pharmaceutical products have presented globally for years preceding the pandemic.

The World Health Organization estimates that one million people die every year around the world because of counterfeit medicines produced primarily in China and India. Nevertheless, given similarly severe and sizable environmental, health and safety dangers posed by fake and illicit products across a broad range of other key industries (e.g., toys, cosmetics, chemicals, fertilizers and pesticides, as well as spare parts for automotive, aviation and defense applications), a similar emphasis will be placed besides pharmaceuticals on the wider scope and scale of these other counterfeit products originating mostly from China.

A positive development is the new EU-U.S. agenda the European Commission has drafted to revitalize the transatlantic relationship and forge a new global alliance to meet the “strategic challenge” China presents, including through its Belt and Road strategy. It proposes more extensive collaboration and, where possible, the adoption of common approaches on a broad range of critical issues. The aim is to counter comprehensively the threats presented by closed economies like China’s that exploit the openness on which our democratic societies are based.

Given your experience, what are the medium–long term perspectives for the EU when it comes to IP crimes?

The medium-long term perspectives for the EU with respect to IP crimes will largely depend upon whether anti-counterfeiting efforts are reprioritized among the main EU law enforcement priorities through the European Multidisciplinary Platform Against Criminal Threats (EMPACT) policy cycle. The policy is the primary instrument calling for robust action to target the most pressing criminal threats facing the EU through effective cooperation among law enforcement agencies and relevant services of the Member States, EU institutions and agencies, third countries and international organizations, as well as the private sector where relevant.

It is highly unfortunate in this context that IP crimes did not carry over among the identified priorities in the fight against serious international and organized crime for the current period through 2021. The “production and distribution of counterfeit goods violating health, safety and food regulations and sub-standard goods” was an EMPACT priority from 2014 to 2017 but was dropped in the cycle from 2018 to 2021 despite the significant health and safety risks presented to EU citizens. Because the designation of EMPACT priorities has a major influence on European law enforcement efforts against organized crime, the removal of IP crime from the EMPACT priorities has been a major concern in IP rights enforcement circles.

The EUIPO sent a brief to European Commissioner Breton in January 2020 entitled “Importance of Coordination of Enforcement of Intellectual Property Rights Crime in Europe and Beyond.” The EUIPO strongly advocates for the inclusion of IP crimes once again in the EMPACT priorities for the 2022 to 2025 cycle. It specifically notes that: “The identification of certain or all areas of organized IPR crime as EMPACT priorities in the next policy cycle, in combination with a stronger harmonized IP crime legislative framework and further capacity building, would provide for more effective cooperation against IPR crime which has become a global plague.” USPTO Brussels has identified this matter as a key priority to support throughout 2021. Together, with the proper focus and commitment, we can confront this illicit trade challenge and defeat it, strengthening our economies and keeping our citizens safe.

CONCLUSIONS

By Paul Maier, Director of the EUIPO Observatory on IP infringement

The importance of Intellectual Property Rights (IPR) to the EU economy and society has been growing steadily. A series of joint studies by the European Union Intellectual Property Office (EUIPO) and the European Patent Office (EPO) have quantified the contribution made to the EU economy by IPR-intensive industries since 2008 (EPO-EUIPO, 2013 & 2016). The share of these industries has now reached 45% of the EU gross domestic product (GDP). Those sectors represent 29% of EU employment (with another 10% generated in their supply sectors). The types of jobs offered are also of high quality and the pay of the workers and employees is 47% higher than average. Last but not least, IPR-intensive industries generate 96% of goods exports from the EU (EPO-EUIPO, 2019). All these figures show just how essential IPR-intensive industries have become for our economy.

Given the value of IPR, it is no surprise that criminals will want to take advantage of, and seek to illegally benefit from, these economic assets through the production and distribution of counterfeit and pirated products. All types of IPR are subject to infringements. Almost any type of product can be counterfeited. The only criterion criminals take into account is the money they can make by faking products. It is often the most innovative, best quality and most successful products that will be counterfeited. It is therefore the leading products that are attacked, thus rendering the counterfeiting phenomenon particularly harmful for our industry.

The scale of the threat posed by IPR infringements is a major and growing concern. The EUIPO and the OECD in 2019 jointly estimated imports of counterfeits into the EU from the rest of the world at EUR 121 billion, or 6.8% of total EU imports (OECD-EUIPO, 2019). This represents a sharp increase compared to EUR 85 billion, or 5%, calculated in a previous study in 2016, indicating that the problem has become even more acute in recent years. Moreover, the EUIPO has estimated the damage to the legitimate industries in 11 sectors, in terms of lost sales, as a result of counterfeiting. These losses totalled more than EUR 83 billion per year during the period 2013-2017. In addition, more than 671 000 jobs in legitimate businesses were lost, and the Member States were deprived of at least EUR 15 billion per year in tax revenue (EUIPO, 2020). As for the impact of online copyright infringements, a study on illegal Internet Protocol Television (IPTV) found that this generates almost EUR 942 million in unlawful revenue annually in the EU (EUIPO, 2019).

The fight against IP crime can only be a multi-faceted one. Four areas need to be covered: adequate modern civil and criminal laws, awareness-raising among decision makers, enforcers, judges and citizens, a determined fight against the biggest infringers (it is more and more accepted that final consumers should not be

sued under criminal law) and availability of legal offer to make sure the market responds to the needs of the consumers. To efficiently counter criminals, governments will therefore need to make sure that their laws are modern and respond effectively to the challenge. Once such provisions are in place, awareness-raising of enforcers, prosecutors, judges and citizens is another required measure. Policy makers and enforcers must know just how harmful counterfeiting and piracy are, to make sure the laws are applied in a way corresponding to the challenge. IP crime must be fought with determination.

Industry and right holders in general must help authorities. The fight against counterfeiting and piracy can only be won if both the right holders and the authorities work hand in hand. The right holders are the ones that know best what rights they have and they also know what the market for their products and services looks like. Without their knowledge the authorities cannot be efficient and effective in their action.

The authorities are the only ones that can fight criminality. Whereas right holders may use civil or commercial law remedies in some cases, such avenues cannot be the response to the phenomena described above. As clearly appears from the figures mentioned, the cost of IPR infringement, and thus the amounts of money diverted from the legitimate economy, and going into crime thanks to IPR infringements, is colossal. With a high return on investment and a relatively lower risk of punishment (shorter prison sentences and lower fines) compared to other illicit activities, the incentives are favourable to counterfeiting and piracy, which can also finance other illicit activities. There is ample evidence of the involvement of organised crime groups in IPR infringement and of the link between IP crime and other crimes such as drug and human trafficking, fraud, labour exploitation, money laundering and even terrorism. The revenue generated by IPR infringement gives organised crime groups considerable wealth and power.

The EU must fight these phenomena to make sure these financial flows and poly-criminal activities are stopped. This is not only about counterfeit luxury items or a teenager illegally streaming the latest blockbuster, but also about dismantling criminal organisations which thrive on IP theft. IP crime is not a victimless crime, as illustrated by the fact that medicines to treat serious diseases are subject to counterfeiting (OECD/EUIPO, 2020), with potentially deadly consequences for patients, or by how quick criminals were to exploit the opportunities provided by the COVID-19 crisis to sell fake treatments and protective equipment. Fighting IP crime will not only protect EU citizens from substandard goods potentially threatening their health and safety, as well as the environment, it will also disrupt the activities of organised crime groups involved in IPR infringement, supporting the fight against other criminal phenomena, in the interest of the rule of law in our democratic societies.

To best face the threat of IP crime, coordination of IPR enforcement efforts is of the essence. Close cooperation between EU enforcement authorities and data exchanges, with all appropriate safeguards concerning data protection, is the only way to avoid gaps which criminals will be quick to take advantage of. The first step is to establish shared priorities to ensure that enforcement authorities' efforts all go into the same direction. It is therefore of crucial importance to recognise this EU-wide threat, by including the fight against IP crime as an enforcement priority for the forthcoming cycle (2022-2025) of the European multidisciplinary platform against criminal threats (EMPACT). Including IP crime among the EU's top criminal enforcement priorities would allow to mobilize European enforcement authorities and equip them with resources to fight this plague with the right weapons.

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APPENDIX

COUNTERFEITING BETWEEN ORGANIZED CRIME, MONEY LAUNDERING AND LABOUR EXPLOITATION

International online conference promoted by INDICAM in partnership with DGTPI UIBM Italian Ministry of Economic Development UNICRI and EUIPO

21 October 2020 - Anticounterfeiting Week 2020 (5° edition)

Opening of works

- Mario PESERICO - President INDICAM
- Andrea DI CARLO - Deputy Executive Director EUIPO
- Antonia DE MEO - Director UNICRI
- Alessia MORANI - Undersecretary of State MISE

Counterfeiting, organized crime and interconnected crime

- Stefano DELFINI - Director of Criminal Analysis Service MINISTRY OF THE INTERIOR
- Ernesto CAGGIANO - Magistrate, Office MINISTRY OF JUSTICE
- Maria Vittoria DE SIMONE - National Anti Mafia and Anti terrorism Prosecutor Added
- Paolo BORRELLI - GUARDIA DI FINANZA
- Alessandro Canali - Director, General Directorate CUSTOMS AGENCY
- Marco MARTINO - First Executive, Director of the Second Division of the Central Operational Service STATE POLICE
- Marco AQUILIO - Colonel, Head of Organized crime, Subversion and Terrorism Office - GENERAL HQ ARMA DEI CARABINIERI
- Eric M PROUDFOOT - SSA Intellectual property Rights Unit FBI HQ CRIMINAL INVESTIGATIVE DIVISION

MODERATOR: Marco MUSUMECI Programme Management Officer UNICRI

International cooperation, counter actions scenarios and new perspectives

- Susan WILSON - US IP Attaché in EU
- Piotr STRYSZOWSKI - Senior Economist Directorate for Public Governance OECD
- Sergio TIRRO' - Head of Anti Counterfeiting Unit EUROPOL
- Steve FRANCIS - Director US NATIONAL IPR COORDINATION CENTER
- Luigi Iginio GARRUTO - Investigator Illicit Trade, Health and Environment Unit OLAF
- Francesco DE ANGELIS - Criminal Intelligence Officer Illicit Goods and Global Health Programme INTERPOL
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- John ZACHARIA - Former Assistant Deputy Chief US DEPARTMENT OF JUSTICE COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION
- Paul MAIER - Director EU OBSERVATORY ON INFRINGEMENTS OF IP RIGHTS

MODERATOR: Marco MUSUMECI Programme Management Officer UNICRI

Conclusions

- Claudio BERGONZI - Director General INDICAM