

Counterfeit Products within China – A New Twist to an Old Problem: Imitation Apple Retailers

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Abstract

This article is a study of the issues surrounding commercial counterfeiting in the context of China's market. The article discusses the interrelationship of counterfeiting with branding, and outlines the scope of the problem in relation to the TRIPS Agreement, China's membership in the WTO, and Section 301 of the *Trade Act of 1974*. The article highlights the "top ten" counterfeited products sold in the United States—many of which have their origins in China—in light of the recent revelations concerning "imitation retailers" such as *Apple* in China. The article concludes by discussing the October 2011 *Anti-Counterfeiting Trade Agreement* (ACTA) and points out that without China's accession, the issue will certainly persist into the future.

Keywords: Counterfeiting; branding; China; Section 301; "Apple"; ACTA

"As much as 80 per cent of the fake products seized in the US are originating from China," US officials have said, adding that such large scale dumpings have been going on for the past five years." (Economic Times, 2011).

"In markets in Shanghai you get good knock offs of Louis Vuitton bags for \$25, North Face jackets for \$26, Cartier wallets for \$15, Callaway and Taylor-Made golf clubs for \$12.50 and Wilson tennis racket for \$10. If a customer doesn't see what he wants he can leaf through a counterfeit goods catalog and order a copy of what he likes. Truck parts, brake pads and pharmaceuticals are also available. Companies are sometimes reluctant to advertise because often all that does is boost sales for the counterfeiters." (Hays, 2008),

Introduction

Commercial counterfeiting is the labeling of any good with a false trademark or infringing on a trademark that is entitled to protection and is legally registered. In legal terms, "Commercial counterfeiting is the practice of placing a fake trademark on a product, often of lesser quality, in order to make the product outwardly indistinguishable from the genuine product and intentionally deceive consumers as to its source." (Matthew Bender, 2008). Counterfeiting may be generally distinguished from two other common practices: piracy in recording and bootlegging. "Pirate recordings are unauthorized duplications of music from legitimate

recordings for commercial gain without the consent of the right's owner." (Indian Music Industry, 2012). Pirated CDs, tapes, or music cassettes are usually compilations such as 'Top Ten', 'Bollywood Hits' (India) or a combination of hit titles of individual songs of different music companies. The packing and presentation of a pirate copy, termed as "*trade dress*,"¹ may not resemble the legitimate commercial product or release of the owner, and thus, pirated recordings are fairly easy to distinguish.² Bootlegging is the recording, duplication and sale of a

¹ "The trade dress of a product is the total image of a product, the overall impression created, not the individual features." (Woodsmith Pub. Co. v. Meredith Corp., 1990). Trade dress is protected by federal trademark law. (Yankee Candle Co. v. Bridgewater Candle Co., 2001).

² Interestingly, the Indian government has provided a template on how to recognize pirated CDs. A "Genuine CD" could contain any one or all of the indicators shown:

- Record label clearly indicated
- Licensing Details
- High –Quality inlay & Graphics
- 4(or more) Color prints
- Good Paper Quality
- SID code
- Plastic 'jewel' case or quality box packaging.

A Pirated CD could contain any one or all of the indicators shown:

- No record company logo
- SID code obliterated
- No SID codes
- poor –quality inlay and graphics, often 2 color print only
- poor paper quality
- promo version
- incomplete, incorrect, or no licensing or trademark details
- discrepancies between disc and packing

performance such as a live concert or broadcast without the permission of the artist or the record company, which is entitled to control the recording rights of the artists' performances. (Indian Music Industry, 2012).

Bamosy and Scammon (1985, p. 334) note that "The false trademark then appears superficially indistinguishable from its legitimate counterpart." The clear reason for commercial counterfeiting is to literally "dupe" the consumer into purchasing the counterfeit item under the mistaken belief that the product is the genuine article. In general terms, for the consumer who unknowingly purchases a counterfeit, "the result is typically dissatisfaction; for the firm whose goods are counterfeited, loss of revenue and goodwill are possible; for the counterfeiter, profits are reaped with little financial or legal risk and with minimal marketing effort." (Bamosy and Scammon, 1985, p. 334). There is also a clear risk or safety factor present in the sale of counterfeit goods. Four have been identified in a report, *Bootleg Billions*, prepared by New York City Comptroller William Thompson (2004):

- Counterfeit electrical products are being sold with fake brands of Underwriter's Laboratory (UL) certificates. UL has seized more than *30 million* counterfeit electrical products such as Christmas lights, electric fans, and extension cords. The Report noted that fake power strips, made with undersized wiring, can cause electrical fires;
- The World Trade Organization reported that 10% of all pharmaceuticals in the world are counterfeit and as much as 60% in some developing countries;

Incorrect Spelling

Artist name or album title is incomplete or cropped off the disc

More than one artists full album on a disc

Low cost

No plastic 'jewel case'

CD's plastic cases and inlay cards packed separately.

Disc is a CD-R/DVD-R

(Indian Music Industry, 2012).

- The Federal Aviation Administration in the United States reported that 520,000 counterfeit airline parts are installed each year in U.S. planes;³ and
- \$12 billion in counterfeit auto parts are installed each year in U.S. automobiles. (Thompson, 2004).

Counterfeiting and Branding

In the United States, "Commercial counterfeiting is the counterfeiting of brand name, trademarked merchandise A counterfeit is a spurious mark which is identical with or is substantially indistinguishable from a registered mark" (The Lanham Act, 15 U.S.C. §§ 1051-1127). *The Lanham Act of 1946* codified prior civil law into a national system of trademark protections. (15 U.S.C. § 1051-1127). The act provides for the registration and enforcement of

³ See, e.g., Federal Bureau of Investigation, "Two Miami-Based Aircraft Parts Suppliers Plead Guilty in Procurement Fraud Scheme Four Others Previously Convicted for Their Roles in Counterfeit Airplane Parts Scheme," at www.udoj.gov/usao/fls (April 12, 2010). The Department of Justice Press Release is quoted below:

The United States announced the April 7, 2010 guilty plea of defendants Mariella Bianchi, 51, and Juan Beltran, 28, both of Davie, for their participation in a massive procurement fraud scheme designed to defraud the U.S. Air Force and Navy, and the commercial aviation sector. The defendants pled guilty to conspiracy to commit airplane parts fraud, in violation of Title 18, United States Code, Section 38(a). Defendants each faced a statutory maximum sentence of 10 years in prison.

These convictions are part of Operation Wingspan, a two-year investigation into the manufacture and sale of counterfeit military and commercial airplane parts. To date, the loss in Operation Wingspan is estimated at more than \$5 million. In addition, this operation has resulted in the seizure of more than \$150,000 and the revocation by the Federal Aviation Authority ("FAA") of at least 2 FAA Repair Station Certificates.

Defendant Mariella Bianchi was the owner of The Airborne Group, a military and commercial aircraft parts supply company in Miami. Juan Beltran was the Director of Military Sales at the Airborne Group. Bianchi and Beltran bid and were awarded contracts to supply the U.S. Air Force with various aircraft parts, including the KC-135 or E-3 military aircraft. Once they were awarded a contract for the aircraft parts, defendants Bianchi and Beltran contacted unauthorized local manufacturers, including Julio Zerene of Zerene Aerospace, to manufacture the parts, in violation of the specific contract specifications that required either new surplus parts or parts that had been manufactured by Boeing or other approved sources. Once the parts had been illegally manufactured, defendants Bianchi and Beltran would complete false Certificates of Conformance, also known as a "Parts or Material Certification Form" or "ATA 106" forms, and other paperwork, including packing slips and invoices, all falsely representing either the condition or manufacturer of the parts. Defendants Bianchi and Beltran then forwarded the completed fraudulent paperwork and the counterfeit parts to the U.S. Air Force for use in military aircraft.

trademarks and prohibits counterfeit merchandise from being imported into the U.S. (19 C.F.R. Part 133 (1995)). *The Trademark Counterfeiting Act of 1984* made trafficking in goods and services using a counterfeit trademark a felony (18 U.S.C. § 2320) and strengthened civil remedies to allow for statutory and treble damages and the award of attorney fees against a culpable party. It also permitted the destruction of articles bearing counterfeit marks. (Pub. L. No. 98-473, II § 1502(a), 98 Stat. 2178 (1984)).

As a matter of business practice, branding itself is the heart of many domestic and international businesses. The Associated Press reports that *Interbrand*, which tracks brand values, of which “the logo is a key part,” values Coca-Cola’s brand at \$71.86 billion; McDonalds (started in 1948 in San Bernardino, California, by brothers Dick and Mac McDonald) at \$35.59 billion; Nike’s at \$14.53 billion; and Ford’s brand at \$7.5 billion. (Associated Press, “Logos Can Say It All,” 2012).

The Scope Of The Problem

Commercial counterfeiting runs rampant not only throughout the United States but throughout international markets as well. Faisal Darem (2009) reports that the World Health Organization has estimated that the trade volume of fake and counterfeit medicines to \$32 billion; this figure will increase to \$75 billion by 2010. By some counts, the volume of commercial imitation and counterfeiting globally represent 7-10 percent of the total volume of world trade, which equal \$780 billion annually. Other experts place the percentage between 5-7 percent. In any event, the problem is real and seems to be getting worst and not better (ICC Counterfeiting Intelligence Bureau, 1997).

China and Commercial Counterfeiting

In terms of size, scope, and magnitude, commercial counterfeiting is considered to be the most serious problem in China in relation to all the economies in the world. Commercial counterfeiting affects China both in terms of its domestic and international markets. Dermody (2011) asserts that a major issue for China is its “*shanzhai culture* where some Chinese delight in making cheap imitations, sometimes a parody, of expensive, famous brands.”

Chow (2006) reported on China’s three main methods or strategies prominent in counterfeiting auto parts. These strategies may be considered as more generic representations of China’s overall strategy and philosophy regarding counterfeiting:

“(1) *Reverse engineering*:⁴ Counterfeiters take a product and reverse-engineer it

⁴ See, e.g., Pamela Samuelson & Suzanne Scotchmer. 2002. “The Law and Economics of Reverse Engineering.” *Yale Law Journal*, Vol. 111, pp. 1575-1673.

in order to make an unauthorized copy or counterfeit. The simplest and crudest method is to take the genuine part and make a mold based on the existing part itself. Using the mold, the counterfeiter can then make unauthorized copies (counterfeits) of the original, genuine part. A more sophisticated method is to create a template or blueprint of the part and then use the blueprint to create a new mold. Sophisticated computer programs now allow the use of digital photos as a basis for modeling software. If the counterfeiter starts with a two-dimensional digital photo of the part, the modeling software can create a three dimensional drawing or template for the part that can serve as the basis for a detailed template or blueprint.”

Refurbishing

Counterfeiters also take used or discarded parts and refurbish them and pass them off as new parts. For example, a used or discarded car filter or spark plug can be cleaned and repackaged using genuine original packaging and then sold or passed off as new.”

“(Internal and External Theft of Information Technology (IT): Many companies that manufacture auto parts in China have poor or non-existent IT security. Often company computers will contain design and product drawings with precise manufacturing specifications for the product. Many companies have no IT security measures in place that prevent these drawings from being taken internally from the computers in the design compartment by copying these files directly on a memory stick. No security measures prevent the transmitting of these files electronically to other computers. Many persons have access to computer companies both on site and through remote access via outside computers at the home or elsewhere. This creates a situation in which these proprietary designs are kept in an “open store” that is easily accessible by unauthorized users, thieves, and counterfeiters. In addition, companies will often transmit these files in intra-company e-mail without any encryption devices. The use of third-party subcontractors to manufacture parts creates an additional security risk. Many subcontractors who receive access to templates, blueprints, and drawings are even less careful than IT owners about keeping proprietary information out of the wrong hands” (Chow, 2006).

In terms of China’s domestic market, a study in 2001 by the PRC State Council Research and Development Center reported that the PRC economy was flooded with between \$19-\$24 billion worth of counterfeit goods (Chow, 2006; Pei, 2005). Today, counterfeiting in China accounts for almost 8% of their gross domestic product and is even the main source of support for some local economies. Goodman (2004) provides an insight into why the Chinese market itself has been the object of *domestic* pirating and counterfeiting. He notes: “The authorities may be overmatched. In this still nominally Communist country of 1.3 billion people, the concept of private property is neither fully understood nor valued, let alone the abstract notion of intellectual property. Penalties for violations are weak and enforcement is spotty, experts said. Authorities often shield factories from raids, choosing to protect jobs over trademarks” (Goodman, 2004).

Moreover, and perhaps more disturbing, China has become a major platform for the export of counterfeit products to countries in Asia, Europe, and the United States. *Express Components Information* (2012) reports that “It is no secret that most of the counterfeit and sub-standard product originates from China. Statistics have been quoted as high as 75%.” In 2003, China accounted for over \$62 million of the \$94 million of all counterfeit and infringing goods seized by the US Customs Service at ports of entry into the United States (Chow, 2006).

The question remains what can be done to prevent this problem that is so detrimental to brand name products from escalating and continuing to be a major issue in international trade.

Trips And Counterfeiting

The TRIPS Agreement (TRIPS) was designed to be the major source of intellectual property protection⁵ in the world trading community.

TRIPS covers five broad issues:

- How basic principles of the trading system and other international intellectual property agreements should be applied;
- How to give adequate protection to intellectual property rights;
- How countries should enforce those rights adequately in their own territories;
- How to settle disputes on intellectual property between members of the WTO; and
- Special transitional arrangements during the period when the new system is being introduced (WTO, 2012a; WTO, 2012b).

Before becoming a member of the World Trade Organization in 2001,⁶ China created new legislation designed to align its laws with TRIPS, the Agreement on Trade-Related Aspects of

⁵ Types of intellectual property: The areas covered by the TRIPS Agreement:

- Copyright and related rights
- Trademarks, including service marks
- Geographical indications
- Industrial designs
- Patents
- Layout-designs (topographies) of integrated circuits
- Undisclosed information, including trade secrets

(WTO, 2012b).

⁶ China concluded negotiations with the World Trade Organization (WTO) on September 17, 2001, concerning China's terms of membership. Among the commitments undertaken by China were the following: China will provide non-discriminatory treatment to all WTO Members; all foreign individuals and enterprises, including those not invested or registered in China, will be accorded treatment no less favorable than that accorded to

Intellectual Property Rights, and other WTO requirements (Blodgett, Hunter & Hayden, 2009). Wu (2007) argues that four factors relating to membership in the WTO and accession to the TRIPS Agreement have transformed Chinese administrative law: the domestic constitutional function of the WTO in relation to Chinese domestic law; the adoption of detailed procedural and substantive requirement of the TRIPS agreement (these two factors strengthened by China's Accession Protocol where the right to trade and the obligation to provide independent judicial review in the area of trade disputes are explicitly referred); China's continued intention to widen and deepen its economic reforms, and subsequently legal reforms; and political pressures from other members of the WTO to guaranty openness and transparency in trade policies relating to intellectual property protections involving the establishment of fair and equitable procedures, the requirement of reasoned decisions, participation and right of information, and effective judicial review (Wu, 2007).

TRIPS covers most forms of intellectual property, but the most important aspect is how it is intended to assist trademark owners by requiring a country to provide at least a seven-year initial term of registration of a trade mark and the continual renewal of a registration (Sommers and Virginia, 2004).

Additionally, under TRIPS, the owner of a mark also has the exclusive right to prevent others from using the mark on certain goods and services if there is "likelihood of confusion" with a protected product. Lastly, the Agreement provides for monetary damages in cases of infringement and allows for the confiscation of any machinery used to produce the products and the counterfeit goods destroyed (Sommers and Virginia, 2004). This provision serves as a method of preventing counterfeiters from removing the infringing marks themselves and releasing the altered products back into the market.

Although these provisions may seem like standard protocol, they represent significant changes to the trademark registration process in China. Before 1983, China only allowed "enterprises" to register trademarks, restricting individuals and institutions. In matter of fact, these

enterprises in China with respect to the right to trade; China will eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export; price controls will not be used for purposes of affording protection to domestic industries or services providers; the WTO Agreement will be implemented by China in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO Agreement; within three years of accession, all enterprises will have the right to import and export all types of goods and trade them throughout the customs territory with limited exceptions; and China will not maintain or introduce any export subsidies on agricultural products. (Blodgett, Hunter & Hayden, 2009, pp. 207-208, citing World Trade Organization (Press Reslease). 2001. "WTO Successfully Concludes Negotiations on China's Entry," Sept. 17, at http://www.wto.org.ezproxy.shu.edu/english/news_e/pres01_e/pr243_e.htm (last visited August 2, 2012).

enterprises were largely or exclusively “state-owned” enterprises (SOE’s). It was not until ten years later that service marks could be registered within Chinese markets. This was due to China’s highly fragmented and large bureaucracy, where enforcement of trademark rights was extremely expensive and time consuming (Sommers and Virginia, 2004). This situation may not be all that different today. Bush and Bo (2011) report “Although privatization of state-owned enterprises continues in some sectors, current policy favors the establishment of national champions in strategic sectors through the consolidation of SOEs and, in some cases, acquisition of smaller private firms along the way” (Bush and Bo, 2011, citing Forsythe, 2010). Bush and Bo (2011) continue: “The resurgence of the state sector resonates in a new epithet among China's entrepreneurs: gong jin si tui--"the public progresses, the private retreats." (CNFOL.com, “Why the "Public Economy Progresses, Private Economy Retreats" Revived?” 2010; Wei Sen, 2010). They continue: “Multinational companies likewise worry that formal and informal regulatory hurdles continue to shield China's burgeoning domestic markets from foreign competition while China's industrial policies are nurturing formidable state-backed competitors in global markets” (Bush and Bo, 2011, citing McGregor, 2010,).

When raids of suspected counterfeit operations and seizures were successful, the fines imposed were minimal and were hardly a deterrent, averaging about \$700 a case, with the trademark owner receiving a paltry \$40 in compensatory damages. These counterfeit goods were then often stripped of their infringing marks, resold at public auction, and often rebranded and sold by the same or another counterfeiter, resulting in a cycle where little could be done to actually prevent the practice.

China and Section 301

The “Special 301” Report is an annual review and survey of the global state of protections of intellectual property rights (IPR) and their enforcement. The Report is conducted by the Office of the United States Trade Representative (USTR), pursuant to the mandate *the Trade Act of 1974*. (Section 182, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994)). The Report identifies the range of concerns exhibited by the U.S. government, including what are termed as “indigenous innovation” policies that may unfairly disadvantage U.S. rights holders in China.

Under Section 301, the President, through the Office of United States Trade Representative, is authorized to “investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States' economic interests” (Yu, 2002).

Section 301 gives the USTR authority to take a variety of actions in response to unfair trading practices of a foreign country, including imposing retaliatory import duties or entering into an agreement to eliminate the unfair practice (Trade Act, [19 U.S.C. § 2411](#)(c), 2006).

Each year on the last day of April, the USTR's Office issues the Special 301 Report that places countries on a priority foreign country list. According to Donald Harris (2009), China has been the most “notorious and singled-out country for piracy and counterfeiting practices.” In May of

2011, China was once again listed for the seventh year as a country with one of the worst records for preventing copyright theft (Reuters, 2011).

Douglas McIntyre (2011) has identified the top ten counterfeited products sold in America—many of which have their origins in China:

1. Footwear: Value: \$99.8 million—Percent of Total Seizures: 38% Just under \$100 million worth of counterfeit footwear was seized entering the U.S. in 2009, by far the greatest amount of any product. By value, 98% of counterfeit footwear originated in China. 2009 was the fourth year in a row that footwear was the top commodity seized.

2. Consumer Electronics: Value: \$31.8 million—Percent of Total Seizures: 12% Consumer electronics, such as cell phones, digital music players and cameras, made up 12% of all seizures worth nearly \$32 million. China produces most of these electronics, with approximately \$18.5 million worth of seizures originating from there. Consumer electronics are also the most popular counterfeit product originating from Hong Kong—second only to electronics imported from China. Consumer electronics make up 40% of all counterfeit goods that are intercepted from Hong Kong.

3. Handbags/Wallets/Backpacks: Value: \$21.5 million—Percent of Total Seizures: 8% China exported \$19.5 million of these goods—slightly more than 90% of the total.

4. Apparel: Value: \$21.5 million—Percent of Total Seizures: 8% The amount exported from China is amounts to \$17.9 million—more than 80% of the total.

5. Watches/Parts: Value: \$15.5 million—Percent of Total Seizures: 6% The majority of these items (just over \$7.9 million in value) came from Hong Kong. The American market is literally flooded with replicas of every Rolex model available, as well as Panerai and Omega models.

6. Computers/Hardware: Value: \$12.5 million—Percent of Total Seizures: 5% The \$12.5 million represents nearly double the amount taken the year before. According to the Alliance for Gray Market and Counterfeit Abatement, up to 10% of all high-tech products sold worldwide are counterfeit.

7. Media: Value: \$11.1 million—Percent of Total Seizures: 4% In 2008, just under \$6 million worth of media, including compact disks and DVDs, was seized entering the country. By 2009, that figure rose to slightly over \$11 million. Approximately half of these goods came from China. As noted earlier in the Introduction, counterfeit media such as CDs and DVDs are often referred to as "bootleg" media.

8. Pharmaceuticals: Value: \$11.1 million—Percent of Total Seizures: 4% Slightly more than \$11 million worth of pharmaceuticals were seized in 2009, most of which came from China. Pharmaceutical products also accounted for the majority of all counterfeit goods coming from India, making up 86% of intercepted goods originating from that country.

Pharmaceuticals were the top commodity presenting "*potential safety or security risks*" according to Customs and Border Protection or the CBP. Pharmaceuticals account for 34% of all the items in this security risk category, which also includes electrical articles (power cords, lights) and critical technology components (networking equipment, semiconductor devices).

9. Jewelry: Value: \$10.5 million—Percent of Total Seizures: 4% In 2009, approximately \$10.5 million worth of fake jewelry was seized—often through online auction sites. In an important ruling by the Second Circuit Court of Appeals in 2010, Tiffany & Co. lost a lawsuit against eBay concerning the sale of counterfeit Tiffany jewelry on its site. Tiffany had filed suit based on trademark infringement, trademark dilution, and false advertising. Tiffany eventually lost on all claims against eBay. (*Tiffany Inc. v. eBay Inc.*, 2010).

10. Toys/Electronic Games: Value: \$5.5 million—Percent of Total Seizures: 2%

Not surprisingly, out of the \$5.5 million worth of toys and electronic games that were seized in 2009, just under \$4.9 million came from China—or nearly 90 percent. As American consumers regrettably learned, counterfeit toys have the disastrous potential of being extremely dangerous. The Office of Homeland Security (Homeland Security News Wire, 2011) noted that some of these seemingly innocuous products were made with poisonous materials, such as lead, and others were shown to malfunction and hurt children, such as electronic toys that overheat or explode. (E.g., Lipton and Barboza, 2007).

Thus, while some of the most prevalent examples of counterfeit goods in China exist within the digital media and electronics industry, ranging from movies to software and music which are “pirated” due to their cheap duplication cost relative to their retail street price (Liu, 2010), a current issue has arisen concerning *Apple Inc.*, one of the world’s leading companies of consumer electronics, computer software, and personal computers.

The Conundrum of the “Chinese Apple”

As of 2011, investigations have been underway due to discover retail shops that posing as legitimate Apple stores. Not only customers, but also staff members, were unaware if the products they were selling were genuine or counterfeit Apple products. These “imitation retailers” as they are called, go beyond the simple fakes of consumer goods that have long been abundant in China (Burkitt and Chao, 2011). This circumstance may be considered the modern era of “copying” in China, in which owners of knockoff stores and chains target sophisticated Chinese consumers with store experiences and customer service nearly identical to the real franchise (Burkitt and Chao, 2011). There have been examples of small regional operations such as “11 Furniture” which base their company’s design and customer experience on the furniture store IKEA, as well as larger national franchises such as “Dairy Fairy” who attempt to replicate Dairy Queen down to the exact blue and red colors on their cups (Burkitt and Chao, 2011).

Although these companies are operating (posing) under different names, the underlying concept is the same. In some cases, however, these retailers aren't even selling counterfeit goods, which is the reason why these imitation Apple stores have come under such investigation. The first store was found in the southwestern city of Kunming, selling real iPads and iPhones in a similar setting to that of Apple Inc.'s trademark retail outlets, and identifying itself as a genuine Apple store despite not having the U.S. company's permission (Burkitt and Chao, 2011). The store management claimed that it possessed a valid business license and that it was operating legally through selling legitimate Apple products. Yet, mysteriously, they did not claim to be authorized Apple dealers— although they decorated their stores to appear like genuine Apple stores. While there are unauthorized dealers who sell Apple products within China, the latest string of fake stores has taken counterfeiting to a new level (IB Times, "China Fake Apple...", 2011).

The unique aspect of the counterfeit Apple stores is its similarity to the real ones. The store itself is an attempted replica with the same wooden tables as standard Apple stores with traditional branded posters and signs across the walls. Additionally, they have the winding staircase and concrete floors that are common within real Apple stores. Employees are clad with standard Apple T-shirts – bright blue with a white Apple logo across the chest and Apple employee identification cards. It seems suspicious that the store managers and staff do not clarify where they have obtained the goods, and in an article posited in NBC News, Wang Haijun, a lawyer in Beijing, acknowledges that if the shop isn't authorized to sell Apple products, then their origins pose complications and the retailers could still be in breach of Chinese law. This is particularly true if the goods are brought in from overseas, which raises import duty considerations (Mong, 2011).

While some executives say that "fake" stores can help build ultimate brand awareness, it inevitably limits the companies' ability to control the experience that consumers have with their brands. Imitation companies run the risk of tarnishing a consumer's association with an established brand at a time when Chinese consumers are increasingly brand-conscious (Burkitt and Chao, 2011). In the case of Apple, the company still benefits from the sale of its own products at these stores, but it isn't able to oversee the service or hire the employees as it typically does at its outlets, which may pose a problem for the company in the long run.

In 2006, brand owners estimated that 15 to 20% of all well known brands in China were counterfeit and estimated their losses to be in the tens of billions of dollars per year (Chow, 2006). In the past decade, since China became a member of the World Trade Organization in 2001, the country has made subtle legal changes to its IP system. However, as noted by Charles Archie (2011), what is apparent is that China's implementation work is still incomplete. Archie states that many of the shortfalls in China's WTO compliance efforts seem to stem from China's incomplete transition from being a state-planned economy. As a result, China has failed to fully embrace the key WTO principles, namely, market access, non-discrimination, and national treatment. Archie also asserts that China has not yet fully *institutionalized* necessary "market mechanisms" and made its trade regime predictable and transparent. (Archie, 2011, quoting USTR, 2005 Report to Congress on China's WTO Compliance, 2005).

Acta: A Possible Solution... But Without China?

Stephen Jenei (2011) noted recently that the United States, Australia, Canada, the European Union and its member states, Japan, South Korea, Mexico, Morocco, New Zealand, Singapore, and Switzerland reaffirmed their strong commitment to the *Anti-Counterfeiting Trade Agreement* (ACTA) at a signing ceremony in Tokyo in October of 2011. The United States, Australia, Canada, Japan, South Korea, Morocco, New Zealand, and Singapore actually signed the agreement.

The agreement is designed to fight against the infringement of intellectual property rights (IPR), most particularly commercial counterfeiting and piracy of goods on a global scale. The Agreement includes provisions on civil, criminal, border, and digital environment enforcement measures, provides cooperation mechanisms among the ACTA parties to assist in their individual and collective enforcement efforts, and the establishes so-called “best practices” for effective IPR enforcement. ACTA's most significant points of departure from existing international intellectual property law include: (1) expansive coverage of multiple kinds of IP and changes to the international definitions used in the WTO Agreement on Trade Related Aspects of Intellectual Property Law (TRIPS Agreement); (2) the expansion of what constitutes criminal copyright violations; (3) more stringent border measures; (4) mandating closer cooperation between governments and right holders, threatening privacy and co-opting government resources for private-sector benefit; and (5) the creation of a new international institution (an ACTA "Committee") to address IP enforcement. “These changes indicate a push for standardization around a rights regime that may not be appropriate for all countries, endangering existing institutional processes and legitimacy” (Kaminski, 2011, pp. 387-388).

Margot Kaminski (2011) notes that ACTA first arose as a concept in 2005. Japan announced its intention to support a proposal for an anti-counterfeiting agreement in late 2005, and the United States joined Japan in proposing a similar agreement in late 2006. In October 2007, the U.S. and Japan announced a more formal joint treaty, and was joined by Switzerland and the European Community. "Nine additional countries participated in informal discussions in the following months, and official negotiations were held in 2008 over the course of meetings in June, July, and October" (Kaminski, 2009, p. 251). The final list of countries negotiating ACTA included Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, the Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Morocco, the Netherlands, New Zealand, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, the United Mexican States, the United States, and the European Union. It is worthy noting that Argentina, Brazil, India, and China were not invited to participate in negotiations.

ACTA is designed to build on the minimum standards of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, some aspects of ACTA, however, remain controversial since the agreement does not mention “fair use” anywhere in the text.

Of course, critics say the biggest problem is that the eight signatory countries don't include the main offenders in copyright disputes—most notably China. What should be apparent is that unless and until China becomes a signatory (and active supporter) to ACTA, the problems surrounding counterfeiting and piracy will continue to persist. However, until recently, the country was in a probationary period giving them time to comply with the rules and regulations of the WTO. It remains to be seen whether China will adhere to these policies and if the underlying problem with counterfeit goods will cease to exist in the future.

References

Archie, Charles V. 2011. "China Cannot Have Its Cake and Eat It Too: Coercing the PRC to Reform its Currency Exchange Policy to Conform to its WTO Obligations." *North Carolina Journal of International Law and Commercial Regulation*, Vol. 37, pp. 247-305.

Associated Press, 2012. "Logos Can Say It All." *Asbury Park Press*, July 28, pp. A8-9.

Bamossey, Gary & Debra L. Scammon. 1985. "Product Counterfeiting: Consumers and Manufacturers Beware" in *Advances in Consumer Research* Volume 12, eds. Elizabeth C. Hirschman & Moris B. Holbrook, Provo, UT : Association for Consumer Research., pp. 334-339.

Blodgett, Mark, Richard J. Hunter, Jr. & Robert Hayden. 2009. "Foreign Direct Investment, Trade, and China's Competition Laws," *Denver Journal of International Law and Policy*, Vol. 37, pp. 201-231.

Burkitt, Laurie & Loretta Chao. 2011. "Made in China: Fake Stores," *The Wall Street Journal*, Nov. 10, at <http://online.wsj.com/article/SB1000142405311190429250457648408086337702.html> (last accessed July 30, 2012).

Bush, Nate & Yue Bo. 2011. "Disentangling Industrial Policy and Competition Policy in China," Vol. 10, No. 3, *ABA Antitrust Source*, at www.americanbar.org/.../feb.11_bush2_23authorcheckdam.pdf (last accessed July 31, 2012).

Chow, Daniel C.K. 2006. "Counterfeiting and China's Economic Development," *United States China Economic and Security Review Commission*, June 8, at http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_06_08wrts/06_06_7_8_chow_daniel.pdf (last accessed July 29, 2012).

CNFOL.com. 2010. "Guo Jin Min Tui"Weihe Juantu Chonglai? [Why the "Public Economy Progresses, Private Economy Retreats" Revived?], Feb. 3, at <http://news.cnfol.com/100203/101,1277,7218345,00.shtml> (last accessed July 28, 2012).

Code of Federal Regulations. 1995. 19 C.F.R. Part 133.

Darem, Faisal. 2009. "Commercial fraud and counterfeiting of trademarks leads to abuse of intellectual property rights," *Business and Economy*, September 5, at www.yobserver.com/business-and-economy/10017206.html (last accessed July 30, 2012).

Dermody, Bill. 2011. "China takes knock-offs to a new level, copying entire stores." *USA Today* (on line), at http://www.usatoday.com/money/industries/technology/2011-07-31-China-counterfeiting-fake-Western-goods-stores_n.htm (last accessed August 1, 2012).

Economic Times. 2011. "80% fake products seized in US comes from China," Jan. 14, at <http://economictimes.indiatimes.com/80-fake-products-seized-in-us-comes-from-china/articleshow/7283304.cms> (last accessed July 29, 2012).

Express Components Information. 2011. "Counterfeiting in Electronic Components," at cdn.attracta.com/sitemap/10755.html (last accessed July 28, 2012).

Federal Bureau of Investigation. 2010. "Two Miami-Based Aircraft Parts Suppliers Plead Guilty in Procurement Fraud Scheme Four Others Previously Convicted for Their Roles in Counterfeit Airplane Parts Scheme," April 12, at www.udoj.gov/usao/fls (last accessed August 1, 2012).

Forsythe, M. 2010. "Chairman Mao Never Left Board as Communists Dominate China Inc.," *Bloomberg*, Oct. 13, at <http://www.bloomberg.com/news/2010-10-12/chairman-mao-never-left-board-as-communists-assert-control-over-china-inc-.html> (last accessed July 30, 2012).

Goodman, Peter. 2004, "Pirated Goods Swamp China: Official Crackdown Has Little Effect," *Washington Post Foreign Service*, Sept. 7, Page E01.

Harris, Donald P. 2009. "The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint," *Fordham International Law Journal*, Vol. 32, pp. 96-187.

Hays, Jeffrey. 2008. "Pirating and Counterfeiting in China,: *Facts and Details*, at <http://factsanddetails.com/china.php?itemid=356=9=61> (last accessed August 1, 2012).

IB Times. 2011. "China Fake Apple Store Managers Claim Products Are Real," *International Business*, July 25, at <http://sanfrancisco.ibtimes.com/articles/186163/20110725/china-fake-applestore-products-real-inspection-investigate.htm> (last accessed July 30, 2012).

Indian Music Industry (IMI). 2012. "What is Piracy," at <http://www.indianmi.org/index.htm> (last accessed August 1, 2012.)

International Chamber of Commerce (ICC) Counterfeiting Intelligence Bureau. 1997. "Countering Counterfeiting: A Guide to Protecting and Enforcing Intellectual Property Rights, United Kingdom, at www.icc-ccs.org/icc/cib (last accessed July 31, 2012).

Jenei, Stephen. 2011. "[ACTA NOW, 8 Countries Sign Anti-Counterfeiting Trade Agreement](#)," Oct. 3, at www.patentbaristas.com/archives/2011/10 (last accessed July 29, 2012).

Kaminski, Margot. 2009. "Recent Development: The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)," *Yale Journal of International Law*, Vol. 34, pp. 247-256.

Kaminski, Margot. 2011. "An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement," *Albany Law Journal of Science and Technology*, Vol. 21, pp. 385-444.

Lanham Act, Section. 1946. Sections 1051-1127.

Lipton, Eric & David Barboza. 2007. "As More Toys Are Recalled, Trail Ends in China," July 19, *New York Times* (on line), at <http://www.nytimes.com/2007/06/19/business/worldbusiness/19toys.html> (last accessed July 30, 2012).

Liu, Shen. 2010. "China's Piracy & Counterfeiting Problems." *Trade*, Nov. 23, at <http://blogs.miis.edu/trade/2010/11/23/us-lost-profit-on-chinas-counterfeits/> (last accessed July 28, 2012).

Matthew Bender. (2008). *Trademark and Unfair Competition Deskbook*, 2-5 *Gilson on Trademarks* § 5.19 (2).

McGregor, James. 2010. China's Drive for 'Indigenous Innovation': A Web of Industrial Policies, *International Chamber of Commerce*.

Mong, Adrienne. 2011. "Fake Apple Store Sells Real Products," *Behind The Wall from NBC News*, Nov. 10, at <http://behindthewall.msnbc.msn.com/news/2011/07/26/762475-fake-applestore-sells-real-products> (last accessed July 28, 2012).

Pei, Minxin. 2005. Intellectual Property Rights: A Survey of the Major Issues Sept., *Asia Business Council*.

Reuters. 2011. "22 More Fake Apple Stores Discovered in China," at <http://www.foxnews.com/tech/2011/08/15/22-more-fake-apple-stores-discovered-in-china/#ixzz22O1aGR37> (last accessed August 2, 2012).

Samuelson, Pamela & Suzanne Scotchmer. 2002. "The Law and Economics of Reverse Engineering," *Yale Law Journal*, Vol. 111, pp. 1575-1663.

Sen, Wei. 2010. "Shenme Shi Zhenzheng de Guo Jin Min Tui? [What Is the Exact "Guo Jin Min Tui"?], CAIJING.COM.CN, Feb. 9, at <http://www.caijing.com.cn/2010-02-09/110375152.html> (last accessed July 29, 2012).

Sommers, Mark & Carron Virginia. 2004. "Managing Counterfeiting in China." *Finnegan*, Mar.-Apr., at <http://www.finnegan.com/resources/articles/articlesdetail> (last accessed July 29, 2012).

Thompson, William C. 2004. "Bootleg Billions: The Impact of the Counterfeiting of Goods on New York City," at www.comptrollernyc.gov/bureaus/...bootleg-billions.pdf (last accessed July 30, 2012).

Tiffany Inc. v. eBay Inc. 2010. 600 F.3d 93 (2d Cir. 2010).

Trade Act of 1974. 1974. Section 182, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994).

Trademark Counterfeiting Act of 1984. 1984. 18 U.S.C. § 2320.

United States Trade Representative [USTR]. 2005. 2005 Report to Congress on China's WTO Compliance.

[*Woodsmith Pub. Co. v. Meredith Corp.* \(1990\). 904 F.2d 1244, 1247 \(8th Cir. 1990\).](#)

World Trade Organization (WTO) (Press Release). 2001. "WTO Successfully Concludes Negotiations on China's Entry," Sept. 17, at http://www.wto.org.ezproxy.shu.edu/english/news_e/pres01_e/pr243_e.htm (last visited August 2, 2012).

World Trade Organization (WTO). 2012a. "Understanding The WTO: The Agreements," at www.wto.org (last accessed August 2, 2012).

World Trade Organization (WTO). 2012b. "The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)," at www.wto.org/english/tratop_e/trips_e/trips_e.htm (last accessed July 30, 2012).

Wu, Chuien-huei. 2008. "How Does TRIPS Transform Chinese Administrative Law?" at www.iilj.org/GAL/documents/WuTRIPSC hina.pdf (last accessed July 30, 2012).

[*Yankee Candle Co. v. Bridgewater Candle Co.* \(2001\). 259 F.3d 25, 38 \(1st Cir. 2001\).](#)

Yu, Peter K. 2002. "Second Coming of Intellectual Property Regulation in China," *Benjamin Cardozo School of Law, Occasional Papers*, No. 11, available at www.peteryu.com/2dcoming.pdf (last accessed July 30, 2012).

Representations

Published July 21, 2011. Associated Press



July 21, 2011: A man walks past windows of a shop masquerading as a bona fide Apple store in downtown Kunming, in southwest China's Yunnan province. (AP Photo)

Read more: <http://www.foxnews.com/tech/2011/07/21/entire-apple-stores-being-faked-in-china/#ixzz228voh3K4> (last accessed August 1, 2012).

A blogger took a photo of a fake Apple Store in Kunming, China.

