Border measures in Peru

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Peru has made important strides on intellectual property protection: raids and seizures of pirated and counterfeit goods are up, IPR legislation is stronger, and special prosecutors are dedicated solely to IPR crimes. Upon entry into force in 2009, the U.S.-Peru Trade Promotion Agreement's (PTPA) improved IPR protection in Peru in numerous ways, including by:

- Establishing new dispute resolution mechanisms;
- Extending terms of protection for copyrighted works;
- Ensuring that governments use only legitimate computer software;
- Restoring patent terms to compensate for delays in granting the original patent;
- Criminalizing end-user piracy;
- Authorizing the seizure, forfeiture, and destruction of counterfeit and pirated goods and the equipment used to produce them;
- Mandating both statutory and actual damages for copyright infringement and trademark piracy.

Referring to these last two points, Border Measures for the protection of copyrights or related rights and trade mark rights were approved.

Legislative Decree 1092 and its Regulation (Supreme Decree No 003-2009-EF) define pirated and counterfeit goods and makes provision for border control measures to be taken by the Peruvian Customs administration. Its protective scope covers exported and imported goods and goods in transit that are suspected of infringing intellectual property rights, but does not cover small quantities of goods, inherently non-commercial goods and the personal belongings of travellers.

A pirated good is defined as any good that is a non-authorized copy of a work protected in the manufacturing country, when the production of said copy constitutes an infringement of a copyright or a related right under the law of the importer country.

A counterfeit good is defined as any good, including packaging, bearing without authorization a trade mark that is identical to a trade mark already registered in respect of such goods, or a trade mark in which the essential aspects cannot be distinguished from the registered trade mark, thereby infringing the rights of the owner of the trade mark in question under the law of the country of importation.

Finding fakes

The border control measures can be initiated by a citizen, a lawyer or the Customs administration. Peruvian Customs can perform spontaneous inspections of goods if they have reasonable grounds that they are counterfeit or pirated and cannot be held liable for any damage to inspected goods.

When requesting protection at the borders, the petitioner will be required by the Customs administration to deposit a bond to cover possible losses or damages caused to the importer, exporter and/or consignee of the goods resulting from any suspension of the release of non-infringing goods. This bond must be a sum equivalent to 20% of free on board (FOB)value of the goods. In the case of perishable goods, the guarantee shall be constituted by 100% of FOB value of it. Merchandise under US$ 200 FOB value will not be affected.

The precautionary measures that can be granted are immobilization, seizure or withholding of the merchandise. Sworn declarations will be accepted only from public entities, as well as foreign entities and institutions of international cooperation, ENIEX, non-governmental organizations for national development, or non-profit private institutions funded by donations for educational purposes that are duly registered before the Peruvian Agency of International Cooperation (APCI).

In order to verify the ownership of the relevant goods and to suspend them at the border, trade mark owners or their legal representatives or agents must be registered in an official database kept by the Customs administration. The Customs board will liaise with the Peruvian Trademark Office (INDECOPI) for the purpose of registering right holders.

Parallel imports

As mentioned above, the border measures are only applied to those goods bearing a counterfeit trade mark or pirated goods. They are not applicable to so-called parallel imports, or goods bearing an authentic trade mark that are traded by third parties without the consent of the trade mark owner.

Based on the principle of exhaustion of trade mark rights, the trade exclusion right of a trade mark owner ends once he has authorized the incorporation in trade of the goods identified with his trade mark. This principle has been included in the Andean Community legislation in Article 158 of the Decision 486 of the Cartage Agreement, which reads: “Trademark registration shall not confer on the owner the rights to prevent third parties from engaging in trade in a product protected by registration once the owner of the registered trademark or another party with the consent of or economic ties to that owner has introduced that product into the trade of any country, in particular where any such products, packaging or packing as may have been in direct contact with the product concerned have not undergone any change, alteration, or deterioration.” The quoted regulation, which is applied to the Andean Community countries (Bolivia, Colombia, Ecuador and Peru), deals with a doctrine known as “supranational exhaustion of trade mark rights”. This doctrine comes into effect when the good is first traded in a supranational market (in this case the Andean Community of Nations). National exhaustion occurs when the first sale of trade marked goods by the owner (or a third party with its authorized consent) takes place in the local market of the subject country.

Finally, the international exhaustion of trade mark rights is invoked when the first trade is conducted in a foreign market, i.e., in the market of an export state that is not integrated within a supranational market. International exhaustion assumes the complete freedom of imports and the attendant parallel sales of the authentic trade marked goods in the import state wherein that trade mark is registered.

Copyright

Regarding copyrights and related rights, the WIPO treaties of 1996 state that no aspect of the treaties will affect the parties' abilities to determine the conditions, if any, whereby the right of exhaustion shall be applied after the first sale or another transfer with authorization of the owner. The Andean Decision 351, Common Regime on Copyrights and Related Matters, includes in its Article 13 d), says that the author enjoys the exclusive patrimonial right to prohibit (or authorize) import into the territory of any Member Country any reproductions made without the authorization of the right holder.

Thus, the right does not exist when the reproductions have been made with the authorization of the owner, in which case it can be asserted that the owner's right has been exhausted and therefore he cannot oppose the parallel import.

Parallel imports are vital to the economy and development of Latin American markets. Whether a country decides to allow parallel imports or not has a direct impact on the development of the free market. The subject has become divided into two irreconcilable camps. One believes in international exhaustion and claims that segmentation of the markets is contrary to free trade. This concept is ironically supported by many industrialized countries who, in other circumstances, proclaim themselves defenders of the free market of goods and services.

Prohibiting parallel imports could propitiate abuses and predatory practices by the holders of IP rights, particularly with respect to underdeveloped countries, where the presence of competitor goods is a basic need. The other school of thought advocates the advantages of territorial exhaustion, claiming that segmentation would allow prices of merchandise to be lowered in poorer countries without the risk of resale in markets of greater economic affluence.

For more information, please contact:

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One of the professionals that have achieved this distinction in the year 2014 is Dr. Oscar Mago, who appears in the category Intellectual Property lawyers. It is worth noting that this is not the first time he receives this recognition, which does nothing but consolidate the good management being done by Peruvian firm OMC Abogados & Consultores and the place it has obtained worldwide.
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