

Ref: Federal Register, Docket Number: 190703544–9544–01: *Input to the Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations.*

The Transnational Alliance to Combat Illicit Trade (TRACIT) (www.tracit.org) is an independent, private sector initiative to mitigate the economic and social damages of illicit trade by strengthening government enforcement mechanisms and mobilizing businesses across industry sectors most impacted by illicit trade.

TRACIT’s comments recognize the work undertaken by the U.S. Office of the Intellectual Property Enforcement Coordinator (IPEC) to prepare the 2016 *Joint Strategic Plan on IP Enforcement (2016 Strategic Plan)*.¹ This work is still relevant and remains largely unimplemented. Consequently, TRACIT recommends that first order activities should be to implement the 2016 Strategic Plan without delay. The following views are offered as guidance on prioritization:

1. *Expand the scope of the “prohibited items” list*

Pursuant to Section (ii) of the Notice, “establishing and enforcing a prohibited items list,” TRACIT recommends expanding the scope of this list to encompass additional, interconnected illicit products.

Section 1. (C) of the *2016 Strategic Plan* highlights the economic, social, and ethical harms associated with the exploitation of IP interests, including threats to fair trade, consumer health and safety, environment, exploitation of labor, and domestic and international security. With respect to the latter, the *2016 Strategic Plan* highlights the particularly acute threats to security when IP based crimes are used to finance and support criminal syndicates around the world and other criminal activities such as drug trafficking, people smuggling, bribery, money laundering and terrorism.

In addition to the presence of counterfeits online, many other illicit products are available through e-commerce platforms. These include adulterated and substandard pharmaceuticals, digital content vulnerable to copyright piracy, such as TV shows, movies, music and software, ivory, animal skins, shark fins and other forms of illicit wildlife trade, conflict diamonds, gold and other illicit gemstones, illicit tobacco, illicit alcoholic beverages, and illicit rare woods harvested from rainforests. In many cases it is the same criminals that manipulate the same transit routes and exploit the same online commercial platforms for the delivery of these illicit products – all of which present risks to fair trade and consumer health, and all of which pose threats to security by feeding violence and breeding corruption, undermining trust in institutions and the rule of law, and generating enormous illicit financial flows. Unless illicit trade is tackled holistically, the threats to consumers and national security delineated in Section C will persist.

¹ <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/2016jointstrategicplan.pdf>

2. Significantly upgrade requirements for sellers participating in e-commerce channels.

An oft-repeated excuse for not effectively controlling illicit trade online is that it's impossible to govern the "billions of transactions" that occur every day. This is a red herring to divert attention away from a manageable solution: The vast majority of transactions involve legal suppliers, leaving a relatively smaller number of illicit transactions originating from an even smaller number of illicit sellers. Thus, e-commerce channels should substantially invest in rigorous systems to better qualify sellers to trade online. This would significantly reduce the presence of illicit products online and therefore significantly reduce burdens on other measures to mitigate the presence of illicit products that have made it onto online markets. For example, in the U.S., sellers of food products undergo rigorous approvals before bringing product to market and it is unfathomable for there to be no recourse to a seller of faulty product.

Similarly, ISPs must more rigorously apply requirements for hosting websites. In every country, a verified license is required to operate a motor vehicle, requiring proof of a confirmed legal name and address. Failure to operate by the rules of the governing jurisdiction are enforced by strict penalties and capped by loss of privilege.

Consequently, TRACIT endorses Action 2.22 of the 2016 Strategic Plan, calling for inter alia, enhanced "know your seller" programs in e-commerce channels and adoption of a multi-factor verification system or other mechanism to support a "trusted" seller program. We do not agree that such programs should be voluntary.

3. *Improve consumer protection measures for online shoppers*

"The UN Guidelines for Consumer Protection (the Guidelines), last revised in 2015, represent international consensus on matters of consumer protection. The revised Guidelines place enhanced emphasis on the role of member states in developing consumer education and awareness programs. In this connection, section (V)(G)(42) of the Guidelines provides that "[m]ember states should develop or encourage the development of general consumer education and information programmes (...)." Such education programs are particularly vital in relation to counterfeit goods and e-commerce, where consumers are increasingly vulnerable.

TRACIT recommends the role of consumer protection agencies be expanded to include anti-counterfeiting as an integral part of their mandate, including (i) education programs on the prevalence of counterfeits on third party e-commerce sites, social media and apps (ii) elucidation on the related risks to the health and safety of consumers from counterfeit goods; and (iii) promotion of consumer redressal mechanisms to sellers.

TRACIT also notes that the Guidelines, recognize increasing consumer risks associated with counterfeits and other illicit products that are increasingly available online and inter alia urge Member States to revise existing consumer protection policies and regulations to ensure that consumers are afforded the same level of protection in the online world as in the physical world.

This is reflected in section 64 of the Guidelines: "Member States should, where appropriate, review existing consumer protection policies to accommodate the special features of

electronic commerce and ensure that consumers and businesses are informed and aware of their rights and obligations in the digital marketplace.” There are also generally enhanced obligations concerning providing education and information on risks.

Consequently, TRACIT recommends that the US government amplify its engagement with the United Nations Conference on Trade and Development (UNCTAD), the UN agency which oversees matters pertaining to consumer protection, in order to help devise of common set of principles that will aid Member States in enhancing their national consumer protection legislation, as well as in setting standards within their national jurisdiction in relation to consumer protections against counterfeiting.

TRACIT also endorses measures detailed in the 2016 Strategic Plan, *Section 2 (5), Putting the Consumer First*, which delineates examples of and calls for development of new, enhanced and targeted educational campaigns for consumer protection.

4. Amplify measures to mitigate the exploitation of express and mail carriers for delivery of illicit products

Section 3 A (3) of the *2016 Strategic Plan* notes that the rapidly growing e-commerce sector is driving the exploitation of international mail and express shipments, collectively referred to as “small parcels,” for fraud and illicit activity.

Increasingly, criminals are using diversification of consignments through smaller and multiple parcels via online sales to reduce the chances of detection and to minimize losses from interdiction. The anonymous nature of online transactions make data collection for risk analyses challenging. E-commerce platforms do not typically relay information on shipments directly to Customs and there is little sharing of information with parcel delivery services.

TRACIT endorses the corrective measures put forward in the 2016 Strategic Plan, specifically: Action 3.4 to identify operational best practices in IP enforcement for express shipping operations; Action 3.5 to assess the voluntary abandonment pilot program; Action 3.6 to support access to data on patterns and trends; Action 3.7 to review the suitability of current CBP user fee allocations; Action 3.8 to evaluate the effectiveness of the CBP-USPS advance data pilot program; Action 3.9 to study exploitation of the international mail environment by perpetrators of illicit trade.

5. Disincentivize movement of counterfeits into the US market by properly attributing (storage and destruction) costs to infringers and/or other complicit parties.

The increase in cross border movement of goods, in part owing to e-commerce, has created new challenges for Customs interception and subsequently the treatment of seized counterfeits. In recognition, *Section 3 (B) (4) of the 2106 Strategic Plan* underscores the urgency to solve the growing financial burden on governments and rights holders who often bear the costs of storage and destruction of seized counterfeits. TRACIT echoes IPEC’s recommendation to explore opportunities to pass costs directly to infringers, and where that is not possible or practical, to assess the role of online and offline intermediaries that profit (knowingly or unknowingly) from the trade in counterfeit and pirated goods, and partner with these entities to pass costs onto the infringers.

The proper attribution of costs to infringers and/or other complicit parties is an integral part of any policy measure aimed at dis-incentivizing practices that may support illicit trade and to simultaneously encourage better accountability in the global supply chain.

Finally, with respect to strengthening control over the maritime supply chain, we encourage the USG to continue promoting and supporting, regulatory, and/or legislative initiatives that can help to fight against criminal organizations involved in illicit trade; reduce the abuse of Free Trade Zones and preserve the integrity of supply chains.