

Approach for countering the growing menace of smuggling & counterfeiting

Background:

1. Smuggling:

1.1. Smuggling into and out of India is broadly driven by the following motives: a) to evade customs duty; 2) to corner undue export incentive by over-valuation of exports; 3) to launder ill-gotten fund by means of invoice manipulation; and 4) to evade prohibition under the Customs laws and any other laws for the time being in force, such as the one covering narcotic drugs, explosives, counterfeit goods etc. Nefarious economic crimes like transferring fund to Swiss banks through the modus of excess remittance against over-invoiced goods or direct transfer of fund through hawala route, clandestine import of fake currency notes, movement in and out of narcotic drugs, concealed import of explosives for use by terrorist groups and import of fake drugs and medicines are some of the serious problems Indian Customs is confronted with. Over and above, in-smuggling of non-duty paid goods such as cigarettes, computer parts, electronic goods, music and film DVDs, machinery parts, garments, yarn, CFL lamps etc. push the legitimate and compliant trade to the back foot, and needs to be firmly tackled.

1.2. The consistent up-swing of the smuggling graph as evident from the value of seizures by the Customs over last four years from 2006-7 to 2009-10 portends a serious threat to our economic stability as also security. To be precise, the estimated value of seizures went up from Rs. 689 crore in 2006-7, to Rs. 1021 crore in 2007-8, Rs. 1557 crore in 2008-9 and to Rs. 1752 crore in 2009-10. Narcotic drugs, computer parts, electronic items, machinery parts, and fabrics/yarn figure prominently in the list of seizures that have been

showing a sharp rise, while seizure of goods like fake Indian currency has been consistent all through. In terms of value, seizures account for approximately one third of the total detection made by the Customs.

1.3. Automation of customs clearances at the border and induction of Risk Management System (RMS) at all important points of entry have made customs intervention more focussed. The analysis of various risk parameters to render the RMS dynamic for general targeting as also the provision for specific intelligence and information have made the RMS an effective tool for combating smuggling. Consequently, while dwell time for customs clearances has been substantially reduced, and the green channel has been extended to about 70% of imported consignments, customs interdiction at the border has been on the rise.

1.4. Customs laws in India provide adequate teeth to enforcement and penal provisions in the Act. The laws vest in Customs officers the power to issue search order, make seizure of goods believed to be smuggled, arrest suspects prima facie involved in smuggling, adjudicate in exercise of quasi judicial authority, confiscate smuggled goods, impose penalty on persons found guilty and prosecute offenders in serious cases involving high value or grave offences. The Customs laws provide for a maximum of seven years' imprisonment for smuggling and a penalty that may go up to cent percent of the value of smuggled goods. Those apart, law provides for detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) for up to one year without trial.

1.5. In recent time, several multilateral and bilateral agreements have been entered into by Indian Customs with the Customs administration of other countries under the auspices of World Customs Organization, as a result of which the trans-border customs cooperation has now become a reality.

2. Counterfeiting:

2.1. The term “counterfeiting” has no single agreed definition. Generally, however, the term relates to the infringement of trademarks. The WHO describes a counterfeit medicine as one that is “deliberately and fraudulently mislabelled with respect to identity and/or source”.

2.2. India, so far as IPR enforcement is concerned, figures in the ‘priority watch list’ of the USA for 2010 along with 10 other countries viz. Algeria, Argentina, Canada, Chile, China, Indonesia, Pakistan, Russia, Thailand and Venezuela, as per ‘Special 301 Report of the United States Trade Representative (USTR)’. The USTR report has even named the places where counterfeit (and pirated goods) abound in India, viz. Nehru Place and Palika Bazaar in New Delhi, Richie Street and Burma Bazaar in Chennai, Manish Market, Heera Panna, Lamington Road and Fort District in Mumbai, and Chandni Chowk in Kolkata. These places surely need to be kept under vigil for their high-volume trade. USTR expressed serious concern over **"India's inadequate legal framework and ineffective enforcement"**.

2.3. Criticism of the West notwithstanding, India’s pro-active role in the January, 2011 meeting of the WHO against counterfeiting of drugs drew admiration and support from a large number of member countries like Brazil. In this meeting India raised strong concern over the delay in setting up a working group by the WHO to address the problem of counterfeit and substandard medicines and against leaving the task with International Medical Products Anti-Counterfeiting Taskforce (IMPACT).

2.4. According to the Report of the FICCI-National Initiative against **Piracy**

and Counterfeiting (FICCI-NIAPC), the share of fake/counterfeit medicines is estimated at 15 to 20 percent of the total Indian market, of fake music CDs/DVDs at 40%, of fake car parts at 37%, of counterfeit major soft drinks at 10%, of fake cosmetics, toiletries and packaged foods at 10-30%. The loss of revenue for music industry is estimated at Rs. 600 crores and for film industry at Rs. 2000 crores, annually. Interestingly, a random search of registered Indian companies has revealed that 60 companies start with the word 'Nike', 65 companies with 'Rolex', 217 companies with 'Intel', 136 companies with 'Tata', and over 400 companies with 'Reliance'.

2.5. According to reliable industry sources, 74% of the software and 21.5% of cigarettes sold in India are counterfeit. The 'Bollywood-Hollywood Initiative' launched by the US-India Business Council with the FICCI has estimated that the Indian entertainment industry is losing approximately 80% of its revenue to counterfeiting (and piracy).

2.6. Much of the above estimated quantum of counterfeit goods and supply is attributable to smuggling. However, it is not possible to quantify smuggling and/or trading of counterfeit goods as much of it remains un-reported, un-detected, and at times, un-noticed as well. A significant development in regard to border enforcement of IPR has taken place in India with the enactment of Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 (vide notification no. 47/2007-CUSTOMS (N.T.) dated 8th May, 2007) by adopting TRIPS procedures and norms as contained in Articles 51 to 60. The customs single point recordation has been computerized and integrated with its Risk Management System all over the country for the purpose of interdiction and adjudication at the border in a time bound manner. Incidentally, the WCO in 2010 acclaimed the Indian Customs module for recordation of IPR notices of right-holders as the 'Best Regional Practice' for the Asia Pacific Region and circulated it among members for emulation.

2.7. Trade mark registration in India numbers approximately a lakh every year, accounting for over 70% of total IPR registrations that include Patent, Design, Copyright, Geographical Indications etc. From the above, the magnitude of the problem of counterfeiting of Trade Marks can be easily gauged. Total registration of notices from right-holders by the Customs till date number 332 out of which 328 are on account of Trade Marks protection and 4 for Patents.

2.8. So far as enforcement against counterfeiting is concerned, it is the police under various state governments which play a major role. Confronted with law and order problem, particularly in the context of terrorism and insurgency, it is often not possible for the police to accord adequate attention to IPR enforcement to the desired extent. Besides, in the absence of any dedicated IPR court to try IPR offences and disputes, the court proceedings are invariably long-drawn, spanning over a decade ordinarily.

2.9. With a spurt in scientific inventions, technological innovations and IT advancement, counterfeiting is becoming increasingly more sophisticated, complex and organized. In order to create mass awareness about the ill effects of counterfeiting, it is absolutely necessary to reach out to all sections of the society, including students and small children. Japan's example in this regard to reach out to children and young consumers who are susceptible to the danger of counterfeit pharmaceuticals and cosmetics through 'Manga Comics' has been considered as exemplary by the World Intellectual Property Organization (WIPO) which is encouraging other WTO members to adopt the same technique to reach out to children of impressionable age.

3. Strategy to counter smuggling and counterfeiting:

3.1. The FICCI may play a catalytic role in the enforcement of anti-smuggling as also anti-counterfeiting laws, thereby helping the compliant trade in general, as also the law-abiding right holders. The FICCI may also guide the trade through the appropriate procedure at the border as also in the interior in order to get their grievances duly and lawfully redressed. The organizational support from a Federation like the FICCI will go a long way in mitigating the suffering and hardship of the affected traders, manufacturers and right holders on account of procedural hurdle and legal wrangle. In order to achieve the above objective, **two special cells may be set up** with the personnel well conversant with the Customs laws and procedure and the laws and procedure relating to IPR with special emphasis on Trade Marks. The said two cells may maintain close liaison with the government departments concerned so as to facilitate and trigger prompt remedial action. Keeping in view the above broad objective, the following action plan is recommended:

Action Plan:

- i) The Federation may administer systematic dissemination of enforcement techniques, procedure and strategy through regular workshops for the guidance of its members. For the above purpose, the Federation may get necessary resource persons from the government as also from outside, having necessary work experience in the enforcement of anti-smuggling and anti-counterfeiting laws.

- ii) With assistance from its members and resource persons, the Federation may attempt to identify sensitive products and evaluate threat perception in respect of those products from the point of view of smuggling and counterfeiting. Those qualitative inputs from the Federation will help the Customs in programming targets through its Risk Management System for detection of smuggled and counterfeit goods.
- iii) With a view to create mass awareness, Seminars may be organized at university level also to sensitize students about the ill effects of smuggling and counterfeiting on the economy, health and security.
- iv) The mass awareness campaign may be considered at school level also. Japan's exemplary initiative to alert children about the disastrous effects of counterfeiting through 'Manga Comics' is worth emulation.
- v) The cell should undertake an in-depth study of various legal provisions concerning enforcement of Customs laws to prevent smuggling and the laws relating to Trade Marks to guard against counterfeiting and point out the inadequacy, if any, in any of the existing provisions, and propose suitable amendment to the appropriate authority. As for instance, the provisions of section 140 of the Trade Marks Act, 1999, are not compatible with IPR (Imported Goods) Enforcement Rules, 2007 and the former needs to be suitably amended in the light of elaborate border measures set out under the above said Rules of 2007.
- vi) For want of synergy among various departments of the government, prevention of smuggling and counterfeiting is often seen to be seriously handicapped, particularly in a case of counterfeiting where more than one government department may be involved in the enforcement, and the cause of the right holder suffers in consequence. The Federation may play a stellar co-ordinating role in this regard.

- vii) Conflicting and overlapping enforcement jurisdiction of various government authorities under different Acts tends to cause confusion and doubt in the mind of a right holder as to the right course of action. The Federation may consider taking up the above issue with the government so as to remove the anomalies and to simplify the procedure.
- viii) The cell should study the international best practices as are consolidated by the World Intellectual Property Organisation (WIPO) and advise the concerned government department through the Federation regarding its applicability and/or suitability in Indian context.
- ix) The Federation may maintain close contact and liaison with WIPO and participate in its International Enforcement Conferences by deputing its delegates cum observers. The seminars in India may also be organized in collaboration with WIPO and the foreign Missions like the British Council and the USIS/US embassy so that the experience and experiments in those countries can be shared.
- x) The Federation may undertake the publishing of a periodical bulletin for keeping the members apprised of its pro-active role in countering and containing IPR infringement.
- xi) In the event of a reported abuse of the legal process, the cell should advise the aggrieved member(s) regarding the proper course of action.
- xii) On a general issue affecting a number of members, the Federation may offer a common platform to take up the matter with the competent administrative and/ or judicial authority. With a view to achieve this, the Federation may have to upgrade its catalytic role to hand-holding support.
- xiii) The Federation may work out a strategy to counter organized and large scale counterfeiting at the manufacturing stage itself rather than

focusing on the stage of distribution or trading. In order to achieve the above objective, it may be necessary to involve indirect tax administration of both the Centre and the States.

- xiv) The Federation may enter into a dialogue with the Law Ministry as also the apex judicial authority, so as to ensure that dedicated IPR courts, emulating the best international practices, are set up in all metro cities to begin with.