



INTELLECTUAL PROPERTY RIGHTS THEFT IN FAR EAST COUNTRIES

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Abstract

This paper addresses the issue of intellectual property theft including counterfeiting in the bilateral trade between U.S and Far East countries and discusses four areas: socio-cultural and economic aspects, technology disparity, intellectual property enforcement and protections and licensing/technology transfers that might explain why counterfeiting and/or intellectual property rights violation is so proliferate in Far East countries.

Intellectual Property Rights Theft in Far East Countries

I. Introduction

The practice of product counterfeiting or intellectual property rights theft of high-visibility, strong brand name goods is a major problem. According to US Custom Services in 2002 total counterfeit product seizures was \$20 billion. The culprits committing such crimes came from the biggest to the smallest of countries: China, Hong Kong, South Korea, Singapore, Taiwan, Indonesia Thailand and Malaysia. The counterfeited products ranged from wearing apparel, consumer electronics and media (e.g., motion pictures on laser disc, DVD, interactive and computer software on CD-ROM, CD-R, floppy disc, tape, cellular phones, radio, power strip, lights, lamps, electrical tool and appliance etc), cigarettes, watches and parts, handbags, wallets, backpacks, toys, electronic games, sunglasses and headwear.

It is believed internationally that counterfeiting is used as a source of funds by the underworld, particularly in places such as parts of East Asia and Eastern Europe where law enforcement is weak. Global losses from counterfeiting amounted to more than \$350 billion and counterfeit products accounted for 7 percent of the world trade (Nia and Zaichkovsky, 2000). The Far East is particularly notorious for counterfeiting, and for some companies the problem is so rife that it is discouraging further investment there. In China the counterfeiting of products ranging from toothpaste to handbags is now recognized as the most serious problem of its kind in the history of the world (Saywell, 2003).

Intellectual property rights theft includes counterfeiting - the production of copies that are identically packaged, such as trade marks and labeling. Originals are copied so as to seem to a consumer the genuine article (Kay, 1990). This is a serious problem besetting an increasing number of industries. It affects not only products whose brand name is synonymous with its quality, but also products, which require a high level of research and development, and marketing (Nash, 1989). The manufacture and sale of counterfeit products is undermining company and brand reputations, hitting profits, devaluing research and development costs and incurring legal fees. Substandard counterfeit goods not only ruin goodwill and destroy credibility; they can be hazardous to the innocent end-purchaser, especially with regard to pharmaceutical products (Nash, 1989).

The seriousness of this counterfeiting problem has prompted some marketers either to take independent legal actions, or depend on anti-counterfeiting firms which employ international investigators to carry out surveillance and raids against counterfeiters (Ashuri, 1993). Technological advances enable counterfeiters to produce brand name products easily (Cottman, 1992). Inadequate penalties for commerce in counterfeits and weak enforcement of the respective laws and regulations have also been blamed for the growth in counterfeit trade. Better organization of counterfeit activities and the removal of trade barriers also make it likely that counterfeiting will continue to abound (Kay, 1990).

Despite the seriousness of, and the worldwide outcry against, the counterfeiting problem, there is relatively limited research on the subject in the literature. The attention in the literature relates to both supply dimension and demand dimension of the counterfeiting problems. For instance, supply dimension studies have looked into ways of discouraging counterfeiting through legal issues such as intellectual property rights, trademark registration, and their infringements, protection strategies and regulatory actions (Conner and Rumelt, 1991; Onkvisit and Shaw, 1989), and enlisting the assistance of channel members to fight against counterfeiting (Olsen and Granzin, 1993). On the demand dimension studies have looked at the area of understanding consumer behavior (Bloch et al., 1993; Lichtenstein et al., 1993).

The purpose of this study is to identify the practice of intellectual property rights theft in Far East countries.

The remaining sections of this paper are organized as follows: section II reviews concepts concerning counterfeiting, section III presents research findings and the final section presents concluding remarks.

ii. Literature Review

The factors affecting intellectual property rights theft in Far East countries are identified as socio-cultural and economic aspects, technology disparity, intellectual property enforcement and protections, licensing and technology transfers.

Socio-cultural and economic aspects

The practice of counterfeiting obviously violates intellectual property. MNCs' managers are faced with the fact that their company's intellectual property, often a major element of their competitive posture and possibly their primary competitive advantage, is no longer theirs exclusively and can be used against them (Haley, 2000). Today, the government of China does not advocate intellectual property theft and counterfeiting, yet it does have as one of its primary economic policies the acquisition of free technology and encourages both its government controlled companies to acquire free technology at every opportunity (Blackman, 1997). When host countries' governments feel that protecting foreign investors' intellectual property advances their long-term interests, they often cannot easily do so due to inherent situational limitations (Haley et al, 1998). These limitations may be legal, but are more often cultural and or political (Haley et al, 1998).

Carver (1996) argued that sinicized cultures never developed legal systems based on the universal rights that form legitimate demands for the state's enforcement of an individual's claims; rather they are public law systems. Haley (1998) pointed out that in Confucian societies, traditional Confucian economic principles heavily influenced socio-economic perspectives such as Marx's economic principles. Chan and Chiang (1995) in their excellent historical study of Chinese entrepreneurs gave a detailed description of how the Chinese traditionally acquired the necessary technical knowledge to go into their chosen business. In the process, they provided tremendous insight into the difficulties that MNCs are having with regard to intellectual property theft in Asia. No universities existed to provide Chinese entrepreneurs with the required training and knowledge or well-accepted scientific methods to develop independently the needed technology. The Overseas Chinese acquired needed technology by going to work for people who had the necessary knowledge, and learning what they needed on the job as apprentices. The question of who owned that technology never came up because the concept of privately held intellectual property did not exist.

The economic impact of counterfeiting activities is enormous. For instance data from International Chamber of Commerce (2002), The Anti Counterfeiting Group (2002) and Business Software Alliance (2002) can be depicted as follows:

The world trade in counterfeit products including software adds-up to 5 - 10% of total worldwide trade amounting to \$300 - 600 billion. The worldwide trade in counterfeit branded goods is a total of around \$200 billion. Counterfeit music sales are worth \$4 billion in the form of fake CDs and cassettes. Software piracy comprises 40% of all new business software application. Revenue losses are \$23 billion. Of the 3% of all imported in the U.S., there is \$74 million worth of counterfeit goods.

Technology disparity

Technology disparity between developing countries and developed countries triggered the violation of intellectual property rights and counterfeiting activities (Barton, 2002). The shortage of research and development expenditures in Far-East countries caused an inability to develop strong indigenous technological capability, therefore product imitation, IPR (Intellectual Property Rights) violation, and counterfeiting were rampant (Possey, 1990).

Developing countries accepted TRIPS (Trade Related Intellectual Property Rights) not because the adoption of intellectual property was high on their list of priorities, but partly because they thought the overall package offered numerous benefits including the reduction of trade protectionism in developed countries to liberalize agriculture and textiles. As a result, reduced tariffs have not been honored, and these countries are saddled with the burdens of the TRIP agreement (Barton, 2002).

The difficulty for developing countries in this context is that they are second comers in a world that has been shaped by first comers. Because of that, it is a very different world from that in which the first comer developed. A commonly used indicator of technological discrepancy is the extent of patenting activity in the U.S. and through international applications through patent cooperation treaties. In 2001, less than 1% of U.S. patents were granted to applicants from developing countries, 65% of which were from seven advanced developing countries. From 1999 to 2000 less than 95% of these applicants came from just five developing countries such as China, India, South Africa, Brazil and Mexico (Barton, 2002).

Research and Development expenditure is heavily concentrated in developed countries and in a few of the more technologically advanced developing countries. Few developing countries have been able to develop strong indigenous technological capability. This means that it is difficult either for them to develop their own technology or to assimilate technology from developed countries (Barton, 2002).

Intellectual Property Enforcement and Protections

In countries where legal protection is imperfect, imitation and counterfeiting are widespread (Helpman, 1993). Enforcement of IPR in developing countries is likely to become more difficult in the absence of incentives (Richardson, 1996). Lang (2001) argued that there is no meaningful system for encouraging intellectual property compliance. IPR should be global commodities, however, the protection granted is usually limited to the jurisdiction of the country that confers such rights. In the United States when two parties vie for a patent, the patent goes to the party who invented first. In contrast, in Europe or Japan once the invention is made public, it is no longer novel and patent application of such an invention would be rejected (Hicks and Holbein, 1997).

According to Lee, et. al. (1996) a country's system of intellectual property protection influences the volume and composition of U.S. foreign direct investment. Passage of a patent or copyright law has had little effect on the perceived weaknesses of protection. Developing countries are likely to accomplish little if they go through the motions of enacting a patent or copyright law. They must first convince firms that these laws must be enforced in order for system to succeed.

The reality in many developing countries is that institution capacity is generally weak and in particular there is a lack of experienced and well qualified officials. In the majority of developing countries there is considerable dependence on technical assistance in the form of draft laws, expert advice and commentary on new draft legislation provided by WIPO and other bodies (Drahos, 2002). Developing countries face particular difficulties in developing a comprehensive and coordinated policy on intellectual property to eradicate counterfeiting. For many countries, it is a relatively new area in public policy (Petit, 2001).

Licensing and Technology Transfers

The crucial issue with respect to intellectual property is not whether it promotes trade or foreign investments, but how it helps or hinders developing countries to gain access to technologies that are required for their development. The transfer of technology may not be sustainable. Rather, as we have seen, some countries may use weak intellectual regimes as a means of gaining access to foreign technologies and developing them using reverse engineering (Maskus, 2000).

Radosevic (1999) and Saggi (2000) suggested that technology transfer could deter developing countries from committing reverse engineering (imitating without permission) by giving appropriate incentive policies in developed countries to promote technology transfer. Such incentive policies might involve giving tax breaks to companies that license technology to developing countries; establishing effective competition policies in developing countries; making more public funds available to promote indigenous scientific and technological cooperation (for instance, supporting a global research alliance between developing countries and developed country research institutions); and ensuring commitments that benefit publicly funded research available to all participants to ensure open access to scientific databases.

A license is a contract which authorizes the use or exploitation of the subject matter of the license for a specified purpose and period of time, with all other rights maintained by the owner of the technology. Licensing could be used as means for market penetration strategy. However, it presents risks in the form of loss of control over exploitation of intellectual property rights (Apke, 1998).

Iii. Methodology

Data for this study were collected from U.S. companies engaged in active combat against international intellectual property rights theft and counterfeiting. According to the U.S. Anti-Counterfeiting Group (ACG), there were five U.S. companies actively engaged in fighting intellectual property rights theft and counterfeiting in Far-East countries. These organizations represented home products, food, perfume and toiletries, three software companies and one classy fashioned garment company. However, after being contacted only three companies were willing to participate as respondents in this study. The companies were (1) manufacturers of home products, food perfume and toiletries in Chicago, (2) a manufacturer of software and operating systems in Utah and (3) a manufacturer of software and computer game software in Phoenixville Philadelphia.

Direct interview between researcher and anti-counterfeiting managers was conducted by frequent and intensive phone calls and e-mail.

Iv. Discussion

Socio-cultural and economic aspects

All respondents agreed that the concept of privately held intellectual property rights did not exist in Far-East countries. Their points of view were based upon the fact that Far-East countries have covertly promoted the so called reversed-engineering, a euphemism of illegally pirated goods (e.g., software, CD, music, DVD, computer hardware, etc.). They commented that most of the

consumers in the Far East were attracted to consume or buy counterfeit products, for instance software whose functionality or performance was not affected by the fact that the product was a counterfeit. Pirated software including music could function in the same way as the legitimate version.

All respondents disagreed with the notion that no educational systems exist to provide Far East countries' entrepreneurs with the required training and knowledge to develop their own technology. In this regard respondents stated that educational systems must be the basis for promoting intellectual property rights. They agreed that the education system plays an important role for disseminating and instilling what was an obligation and right for every individual. They expected the new generation would be aware of intellectual property rights.

The respondents disagreed upon the statement that Far East countries felt compulsory to protect foreign investors' rights. However, they cannot easily enforce the protection due to inherent situational limitations. These limitations may be legal but more often are cultural. This was due to the public perception that piracy and counterfeiting were low-grade harmless crimes. Theft of intellectual property was not yet considered to be equivalent to other property crimes.

All respondents agreed that Far East cultures never develop legal systems based upon universal rights that form legitimate demands for the intellectual property rights enforcement of individual claims. Rather, they develop public law systems that consist of duties owed by the individual to their government.

The market condition in the Far East countries that spurred counterfeiting activities was consumer demand. Some consumers wanted to own certain goods which conferred a certain social and economic status but were unable or unwilling to pay the price for the genuine items. Therefore, counterfeiting proliferated. This situation involved three types of consumers: those who knew the goods were counterfeit but did not care, those who knew the goods were counterfeit but they bought them because of economic reasons, and those who were unable to distinguish between the counterfeit and the genuine item.

Technology disparity

All respondents disagreed that the technology discrepancy between the U.S. and the Far East countries was causing unbridled incidences of counterfeiting and violation of property rights. Technology discrepancy was not the reason for violating intellectual property rights. However, they agreed that Far East countries accepted TRIPS (Trade Related Intellectual Property Rights) on WITO ratification, not because of Far East countries' priorities but because they thought TRIPS would reduce trade protectionism in the U.S. All respondents agreed that the shortage of research and development expenditures in Far East countries created a major obstacle in developing strong indigenous technological capability.

Intellectual property enforcement and protection

All respondents agreed that in the absence of incentives, the enforcement of intellectual property rights law in the Far East countries was not effective. Since Far East countries did not feel that enforcing the intellectual property laws benefited them, they suggested that incentives could take the form of capacity building such as in judiciary and legislation systems, intellectual property laws and regulations, and educational systems.

Respondents reported that corrupt judiciary systems, particularly in Indonesia, were the major problem when the inflicted industries sued the counterfeiters to the law enforcement authorities. The process of judicial system was uncertain, laborious, complicated and very often did not end with arrest. Therefore, a clean and impersonal judicial system that would have deterred counterfeiters did not exist.

Respondents commented that in order to be effective, intellectual property rights should be a global issue. At present, the protection being granted is in the form of patents, trademarks, industrial design, geographical indications, trade secrets, sui generis, and artistic and literary property. In addition, there should be an absolute partnership among law enforcement, judicial systems and industries to eradicate counterfeiters internationally.

Licensing and technology transfers

Respondents disagreed that licensing and technology transfer with Far East countries may reduce the possibility of counterfeiting. However, they agreed that acceleration of technology transfer would foster competition and raise productivity in Far East countries. They also agreed that licensing increases the risk of piracy because it reduced licensor's control over the manner in which intellectual property rights are exploited. The reasoning behind this is that some countries might use weak intellectual regimes as a means of gaining access to foreign technologies and develop them using reverse engineering thereby enhancing indigenous technological capacity. However, the implementation of TRIPs, or Trade Related Intellectual Property Rights, now restricts the ability of developing countries to follow this path. Article 8 of TRIPs states that measures might need to be taken to prevent the abuse of intellectual property rights abuse including the practices that adversely affect the international transfer of technology.

All respondents agreed that licensing and technology transfer provide low risk and highly profitable alternatives to direct export and establishing a foreign branch, as well as subsidiaries and joint ventures. The determinants of effective technology transfer were many and various. The ability of Far East countries to absorb knowledge from elsewhere and then make use of it and adapt it for their own purposes was also of crucial importance. This is a characteristic that depends on the development of local capacity through education, research and development and the development of appropriate institutions, without which even technology transfer on the most advantageous terms would be unlikely to succeed.

Even the best designed programs (funded by donors) created to foster a national capacity for research have not always been successful. Since many technologies of interest to Far East countries were produced by organizations from the developed countries, the acquisition of technologies requires a determined approach on the part of the recipients of technology to acquire the necessary human capital and appropriate institutions. For example, South Korea and Far East countries started at a very low level of technological expertise forty years ago, comparable to low income countries today, but have now become innovators in their own right.

The aspect of the process of technology transfer would be largely in the hand of developing countries (Far East countries) themselves. But this would not mean the developed countries (including the U.S.) and international policies could not facilitate or hinder the process. The TRIPs document recognized in article 7 that intellectual property rights should contribute to the transfer and dissemination of technology. Article 40 included provisions to prevent anti-competitive practices in contractual licenses and article 66.2 obliged developed countries to provide incentives to their enterprises and institutions to promote technology transfer to least developed countries in order for them to create a sound and viable economic base.

V. Conclusion

The study found that doing business in Far East countries would likely involve intellectual property rights theft, including counterfeiting.

Socio-cultural and economic aspects affected Far East countries' viewpoints that privately held intellectual property rights do not exist and the proliferation of counterfeiting is mainly spurred by the consumers demand for counterfeit goods.

The shortage of research and development caused a major impediment to developing strong, indigenous technological capability. This phenomenon widened the gap between U.S. and Far East countries in the technology disparity. However, the ratification of TRIPs hindered developing countries from acquiring technology transfer through reverse engineering, a "soft" word for copying without permission from the owners of intellectual property.

The enforcement of intellectual property laws was basically lenient due to lack of capacity and problems of corruption. There should be an incentive to promote intellectual property rights in the form of education, technology transfer and licensing in order to create a sound and viable economic base that may reduce counterfeiting activities.

Notes

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