Administration Pledges Aggressive Efforts to Combat IPR-Related Trade Barriers

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*Sandler, Travis & Rosenberg Trade Report*

The Trump administration’s first annual report on intellectual property rights-related trade barriers adopts the more enforcement-oriented tone that has marked much of the administration’s trade actions to date. The Office of the U.S. Trade Representative’s annual Special 301 report on the adequacy and effectiveness of U.S. trading partners’ IPR protection and enforcement lists 34 trading partners as meriting particular concern.

IPR theft “has resulted in distorted markets and unfair trade practices that harm American workers, innovators, service providers, and small and large businesses,” a USTR press release said. The report therefore “reflects the administration’s resolve to aggressively defend Americans from harmful IPR-related trade barriers,” including by “using all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services.”

**Positive Developments.** The report highlights the following achievements by U.S. trading partners in 2016 and 2017.

- China expanded a pilot program for specialized IP courts to include four new tribunals. The specialized courts initiated positive steps to address concerns regarding evidentiary burdens, low damages, and other matters.

- China recognized trade secrets as the subject of civil IP protection and published for comment draft amendments to the 1993 Anti-Unfair Competition Law, which is one of several measures important to trade secrets protection.

- Honduras took steps to address the retransmission of unauthorized satellite signals and promote regulatory compliance by cable providers, resulting in active investigations into illegal retransmission and at least one major rogue cable provider entering into content licensing agreements with U.S. right holders.

- India amended draft patent rules to eliminate administrative patent-related incentives in a manner that better aligns with international best practices.
- Brazil took significant steps to reduce its patent and trademark application backlog, including by hiring 210 new patent and trademark examiners.

- The National Assembly of Kuwait passed a significantly improved copyright and related rights law and commenced new enforcement actions that signal a positive shift in attitudes towards respecting IPR.

- The United Arab Emirates adopted legislation that would significantly increase the fines available for criminal cases of IPR infringement from current non-deterrent levels.

Areas of Concern. The report highlights the following issues of concern.

- trade secret theft, rampant online piracy and counterfeiting, and high levels of physical pirated and counterfeit exports in China, along with requirements for U.S. firms to develop their IP in China or transfer their IP to Chinese entities as a condition for accessing the Chinese market

- lack of sufficient measurable improvements by India on longstanding challenges, including difficulties in receiving and maintaining patents, insufficient enforcement actions and policies, and an outdated trade secrets legal framework, along with new and growing concerns, including draft policies that negatively affect the commercialization of biotechnology

- in Indonesia, patent law revisions that have raised serious concerns with respect to the patentability criteria for incremental innovations and computer implemented inventions and local manufacturing and use requirements

- inadequate or ineffective border enforcement against counterfeit and pirated goods, and a lack of authority for customs officials to seize and destroy such goods at the border or in-transit, on the part of countries such as Canada, Egypt, Indonesia, Mexico, Turkey, Turkmenistan, and Uzbekistan

- a lack of effective policies and procedures in Argentina, Greece, Tajikistan, Turkmenistan, Uzbekistan, and Venezuela to ensure their government agencies do not use unauthorized software

- a lack of adequate and effective protection for regulatory test or other data submitted by pharmaceutical and agricultural chemical producers in China, India, Indonesia, Thailand, and Russia

- inadequate protection for trade secrets, notably in China and India

- the European Union’s approach to the protection of geographical indications in the EU and third-country markets

Priority Watch List. Trading partners on the PWL present the most significant concerns regarding insufficient IPR protection or enforcement or actions that otherwise limited market access for persons relying on IPR protection. Eleven countries – Algeria, Argentina, Chile, China, India, Indonesia, Kuwait, Russia, Thailand, Ukraine, and Venezuela (the same as in 2016) – have been placed on the PWL and will be the subject of particularly intense bilateral engagement during the coming year.
Watch List. Twenty-three trading partners are on the WL and merit bilateral attention to address underlying IPR problems: Barbados, Bolivia, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Jamaica, Lebanon, Mexico, Pakistan, Peru, Romania, Switzerland, Turkey, Turkmenistan, Uzbekistan, and Vietnam.

Out-of-Cycle Reviews. OCRs focus on identified challenges in specific markets. Successful resolution of these issues can lead to a positive change in a trading partner’s Special 301 status outside of the typical timeframe for the annual review, while failure to address these concerns or further deterioration within the specified timeframe can lead to an adverse change in status.

In 2016 USTR will conduct OCRs of the following countries.

- Colombia: to assess its commitment to the IPR provisions of the U.S.-Colombia Trade Promotion Agreement and monitor the implementation of its national development plan (continuation of OCR announced in 2016)

- Kuwait: to focus on improving the country’s copyright regime to meet international standards by fall 2017

- Tajikistan: an OCR announced in 2015 will remain open through fall 2017; USTR notes recent engagement with the software industry and reiterates the importance of Tajikistan formalizing a presidential-level decree, law, or regulation mandating government use of licensed software by fall 2017

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