

Selected Notes and Highlights

2007 International Law Enforcement IP Crime Conference

Niagara Falls, Canada

Summary:

In late June, 2007 the largest International Law Enforcement IP Crime Conference ever held in North America took place in Niagara Falls, Canada with approximately 400 delegates from 40 countries in attendance.

The conference was jointly hosted by Interpol and the Royal Canadian Mounted Police in partnership with Underwriters Laboratories Inc. and was structured around 3 themes:

1. “***Understanding*** the Threat of Counterfeit Products”
2. “***Best Practices*** in Combating the Threat of Counterfeit Products”
3. “***Partnerships*** for Combating the Threat of Counterfeit Products”

Enclosed is a summary of selected discussion points and insight shared by the guest speakers at the 2007 International Law Enforcement IP Crime Conference. We hope this will be useful to conference attendees, their organizations, and other interested parties as a reference to the key points shared by some of the top IP professionals in the world today.

Theme 1:

Understanding the Threat of Counterfeit Products

Insight from world leaders in IP crime fighting

Welcome and Opening Remarks from Conference Sponsors:

Conference Hosts:

RCMP:	Raf Souccar
INTERPOL:	John Newton
Underwriters Laboratories:	Keith Williams

Key Messages:

- To combat IP crime we must work *together*
- We need to work together to create better *communication networks and collaborative capability* for rights holders and law enforcement
- Sustained, aggressive action is needed to target IP crime at its *source*.

North American Perspective:

Ken Hansen (RCMP):

- What DOES NOT work is:
 - Working in isolation
 - Seizing products but not prosecuting (either criminally or civilly).
 - Using too many resources for low level investigations
 - Plea bargaining
- What DOES work is:
 - Collaborating with the Interpol IP group
 - Partnerships with private industry and private investigations
 - Partnerships with Health Canada
- Canadian Law insights
 - Counterfeiting can be addressed via Criminal Code and Copyright Act
 - Counterfeiting is NOT illegal under Canada Customs Act
 - Canada Customs Act does not provide for seizure of proceeds of counterfeiting

Christine Hogue (US Customs and Border Protection)

- US customs traditional approach of Customs & Border protection was “officer driven” inspections etc.
- Now, US customs is also using “risk modeling” (historical data driven)

Gilda Gonzalez Carmona (Mexico IP Protection & Enforcement)

- Mexico’s IPR efforts are focused on public awareness.
- Very effective anti-counterfeit media campaigns and contests have been carried out. Themes include: children against piracy, parents teaching children, guardians of music.

European Perspective:

John Taylor (European Commission on Taxation and Customs)

- In Europe, customs seizures up 234% from 2005-2006.
- Largest seizures are: Cigarettes (60%), Clothing (20%), CD & DVD (5%).
- Fake pharmaceutical seizures are up 300% since 2005!
- Country of origin: China (86%), Malaysia (4%), UAE (2%), India (1%)
- Germany has the highest seizure rate in Europe (55%). Germany is very focused on IPR!!
- General observation: Counterfeiting is becoming more sophisticated in all areas.

Benoit Godart (Europol)

- 10% of medicine worldwide is FAKE. 1% in developed countries is fake.
- Medicines are a special case of high demand because it is not an “open market” - supply is tightly controlled but demand is high. This provides an opportunity for counterfeiters.

Franco Papa (Italian Police)

- IP Crime is on the rise in Europe for several reasons including:
 - European Union has opened up national borders
 - Global markets
 - Ease of counterfeit production
- In Italy 30% of knock offs are produced internally; 70% are imported
- In Italy, the main distribution channel is street vendors – they are *everywhere*. A whole segment of society is involved in this. This is a cultural / societal problem.
- Imported counterfeit goods are often “triangulated” to hide country of origin.

Case Studies: Northern Ireland

Colin Cushley (Police Service of Northern Ireland)

Mr. Cushley shared two case studies: (1) gas cylinder theft and counterfeit refilling operation and (2) counterfeit alcohol (Smirnoff vodka) production in border areas of Northern Ireland. These successful IPR cases in Northern Ireland provided insight to the sheer magnitude of effort involved in major IP crime investigations and the need for comprehensive project planning and execution of the entire operation, including:

- Collaboration with other police agencies and military
- Managing multi national jurisdictions and stakeholders (Northern Ireland and Republic of Ireland)
- Hazardous materials removal, some requiring heavy equipment
- Large scale civilian evacuations
- Confiscation and storage of industrial quantities of hazardous material
- Coordination with organized crime task forces and anti-terrorist forces (both of these operations were run by organized crime)
- Funding and staffing for the hundreds of police, fire, military and civilian personal required for these operations.

Keynote Address:

Commissioner Tam (Head of Intelligence & Investigations: Hong Kong Customs and Excise)

Commissioner Tam provided an overview of Hong Kong Customs and their focus on IP protection. Mr. Tan also outlined the elements required for effective IPR including:

- Vigorous Enforcement
- Close International Cooperation
- Partnerships
- Education
- Legislative framework

Case Study: Project Jupiter – Southeast Asia

Dr. Paul Newton (University of Oxford / Interpol)

Dr. Newton delivered a presentation on “Operation Jupiter” which was an Interpol coordinated anti counterfeiting effort which targeted the masterminds and the supply chain of the counterfeit malaria drug (Artensuate) being produced in Southeast Asia:

- Artensuate was developed by China in 1970’s and it is a highly effective anti-malarial drug.
- Counterfeit Artensuate appeared in 1998 and now 1/3 of all Artensuate sold in SE Asia is fake. It is a health disaster.
- 6 countries were involved in the production and distribution on the fake drug: Vietnam, Laos, Thailand, China, Cambodia, and Myanmar.
- Operation Jupiter was a huge multi-national operation
- Operation Jupiter has been largely successful in dismantling counterfeit Artensuate operations.
- In general, pharmaceutical counterfeiting is largely International, Organized, and Industrialized and the Internet is the emerging distribution channel

Case Study: Child Slavery and IP Crime

Ed Kelley (Attorney - Tilleke & Gibbons Intl. - Thailand)

Mr. Kelley shared powerful, heart wrenching insight into the systematic abuse of children in Southeast Asia who are used and abused as slave laborers for the production of counterfeit products:

- Today’s counterfeit organizations are a kind of ‘evil’ form of legitimate corporations. They operate like legitimate companies and have similar roles equivalent to: CEO, HR, Finance, Manufacturing, Distribution, Sales, etc.
- Societies exist in some parts of the world, including regions in Southeast Asia, where strong values of ‘the rule of law’ and ‘the moral treatment of human beings’ are not present. Without the legal and moral foundation necessary for legitimate business operations, these areas tend to become havens for illegal enterprise – especially counterfeit production and distribution.
- Elements that provide ideal conditions for IP crime include:
 - Loose visa rules, relaxed rule of law, geography located on trade routes with vast wilderness borders, low paid government officials (vulnerable to bribes) and a trade culture based on historical relationships among families & clans.
- To learn more about the tragedy of child slavery:
 - ILLICIT (Moises Naim) and
 - Welcome to the Bangkok Slaughterhouse (Father Joe Maier)

- Closing Message: There is a demand side to the counterfeit problem. As individuals there are lots of things we can't control but we CAN control *ourselves*. We need to think of where these products come from and the human pain caused. DON'T BUY KNOCK-OFFS.

Internet Crime

Inez Miyamoto (FBI)

Detailed example of IP crime on the internet involving the illegal “cracking” of legitimate software protection technology and subsequent distribution as “WareZ” was presented. Key points included:

- Ease of access to information via the internet has been a significant factor in the increase in IP crime in the past 10 years.
- Internet IP investigations are very complex. An FBI IP Internet Crime investigation may take 1-2 years.
- FBI is increasing its resources dedicated to IP crime but current IP investigative need exceeds supply of agents. Part of the challenge is need in other “major” crime areas such as homicide, terrorism, organized crime.

Health and Safety

Nimo Ahmed (UK Medicines and Healthcare products Regulatory Agency – “MHRA”)

- MHRA focus is on counterfeit medicines, drug trial fraud, internet investigations, unlicensed medications, and unlawful medications in the UK.
- Counterfeit medicines are no longer only a “developing nation” problem.
- MHRA is seeing more and more counterfeit drugs in UK since 2000.
 - Transition from “lifestyle drugs” to “lifesaving drugs”.
 - Main supply channel is direct to end customer via internet “pharmacies”.
- Drug counterfeiter methods:
 - Obtain stolen licenses
 - Try to penetrate the supply chain
 - In Developed countries: Lifestyle drugs. High value, lower volume.
 - In Undeveloped countries: Lifesaving drugs. Lower value, high volume
- Emerging global trends in counterfeit medicines:
 - Sheer volume is staggering
 - Vast types of products affected
 - Co-mingling with authentic drugs to avoid detection will lead to drug resistant strains of pathogens.
 - Full extent of problem is unknown.
 - Problem will get worse before it gets better
 - There is risk of mass poisoning by terrorists

Brian Monks (Underwriters Laboratories Inc.)

- Underwriters Laboratories tests products to protect the public safety.
- 12 years ago UL discovered the first occurrence of counterfeit products bearing a fake UL brand mark: Electrical extension cords being sold in New York City.
- Today the UL mark is attached to 12 billion labels per year. Some are being counterfeited and are putting the public safety at risk.
- UL has an aggressive “Zero Tolerance” anti-counterfeiting policy
- Advice to other firms: Adopt a zero tolerance policy to knock-offs.
- Give counterfeiters no quarter! Don’t make deals with them and don’t license them!

Theme 2:

Best Practices in Combating the Threat of Counterfeit Products

Insight from world leaders in IP crime fighting

Chris Israel (Coordinator for International IP Enforcement - US Chamber of Commerce)

- Intellectual Property is essential for wealth creation. In the USA, IP accounts for 40% of economic growth, 1/3 of value of publicly traded stock, ½ of GDP and 18 million direct, high paid American jobs!
- The IP Enforcement Office focus is to “TARGET ORGANIZED PIRACY”
- IP Enforcement is a complex challenge because:
 - The diversity of industries and business models involved covers the whole business spectrum.
 - IP protection legislation has not kept up with the problem
 - DEMAND is increasing (consumers still want counterfeit products)
 - Global and national coordination is needed

Globally, US efforts include work with APEC, EU, SPP, G8, and specific nations.

Nationally, multiple USA agencies are involved including Department of Homeland Security, USTR, State, FDA, PTO, plus State and Local authorities.

Best Practices:

Kevin McGowan (Asst. Chief of Police –Waterfront Commission of New York Harbor)

- NYC has an illegal immigrant problem and selling counterfeit goods is how many eek out a living.
- Demand side is a huge issue. Counterfeit alley and the Canal Street areas of Chinatown are tourist attractions!
- Chinese Fujin province is known ass “Marlborough Country”.
 - \$8k in cigarettes in China = \$1M in NYC!
- Most police view IP as a “low level crime”.
- NYC has 50k police officers – more than some national armies, yet fewer than 100 officers are dedicated full time to IP crime.
- Private investigators are an essential element in the fight against IP crime
- NYC has 12 different police agencies but no common database.
- Latest IP crime trends in NYC:
 - Violence, police corruption, Trans shipping (to hide point of origin), gangs involvement, turf disputes.
- Tougher laws are needed.

View from the Bench:

Judge Ronald Lew (Sr. US District Court Judge – Central California)

- Some judges some see IP as a higher priority and than others
- There is progress. For example, Google “Lucky and Flo” on the internet to see the success of using dogs in Malaysia to detect counterfeit DVD’s.
- Regarding China:
 - They are improving. China is starting to get the will to prosecute IP infractions but there is still a long way to go.
 - There are failures too. Corruption exists at every level. Judiciary and law enforcement are very vulnerable due to low pay.
- In most countries IP legislation is still weak and hasn’t caught up to the exploding technology.
- IP cases should be easy to convict in court if investigated / prepared properly. Very few go to trial when evidence is presented. Defendants just roll over and plea. It is a slam dunk. Liability and harm are easy to show also because the case is so well prepared.
- The key long term is DETERRENCE
 - Criminal conviction...needs long sentence
 - Civil conviction...needs high dollar judgments
- IP cases can also be pursued as “spin-off” cases that don’t need IP law to convict. Examples include: Conspiracy, tax evasion, etc.
- Criminal conviction in US is a tough road for IP due to high burden of proof
- Judge Lew agrees with B. Monks: “give counterfeiters no quarter”
- Follow the law. The tools are there (and getting better)
- We need to improve coordination and cooperation

Prosecution Best Practices:

Sherri Schornstein (Asst. US Prosecuting Attorney)

- Tools in successful prosecutions:
 - Undercover buys of counterfeit product
 - Search warrants (with private investigators as needed and with rights holder present to confirm counterfeit products)
 - Monitoring of consensual conversations
 - Subpoenas for 3rd party records (banks, paypal, ebay, etc)
 - Target interviews
- Investigation and prosecution recommendations:
 - Search first, then interview
 - Multi-jurisdictional: Find out the rules & engage others as needed
 - Assess needs for interviews in other jurisdictions
 - Need to brief any “non-case” agents carefully & provide full background & explain clearly why IPR case is important.
- Logistics & Housekeeping:
 - If you search a warehouse, you need a warehouse for the evidence!
 - Need a plan and funding for storage and disposal of confiscated material.
- Deterrence notes:
 - SPECIFIC deterrence deters THIS TARGET. Includes prison, fines, forfeiture of goods, seizing of websites, etc.
 - GENERAL deterrence deters OTHERS. Includes press releases, public service announcements.
- General Suggestions:
 - Have frequent, regularly scheduled meetings with the investigative team
 - Momentum is important. Celebrate success, keep moving.
 - Communicate continuously with your investigative team.
 - Work cooperatively with private industry and rights holders.
 - Don't sue CIVILY in advance of a pending CRIMINAL case.
 - Don't serve weak, half-hearted cease and desist letters. Strong and clear notices are needed to remove any “lack of knowledge” defense at later proceedings.
 - Plan carefully for disposal of counterfeit junk after trial is over:
 - Court orders for destruction
 - Charge with harmful abandonment
 - Put in plea agreement

Erling Vesterguard (Denmark Major Crime Prosecutor)

- How to investigate and prosecute IP crime as effectively as possible:
 - 3 goals for Investigations:
 1. Terminate the illegal activity
 2. Prevent further criminal activity
 3. Prosecute the offender
 - 5 challenges for IP Investigations:
 1. Complex legal framework
 2. Extensive crimes. Different products
 3. Crime with no borders
 4. Difficult presentation of evidence (compared to other crimes)
 5. Involvement of the rights holder (who is also the victim)
- To achieve these 3 goals, given the 5 challenges involved, Denmark developed a **Total Project Approach** to IP Investigations called “Investigation Model 2005” with the following structure:
 - Project Steering Committee
 - Project Team:
 - Project Leader, Investigation Team, Prosecuting Team, Technicians, Auditors, Customers, Rights Holder (as needed)
 - ...project lead role may transition from Investigator to Prosecutor when case goes to trial.
 - Typical IP Investigation Project:
 - *Customs detect suspected counterfeit product shipment.*
 - *Prosecutor gets a wiretap order (this is quite easy in Denmark)*
 - *Steering committee establishes project team under a project leader*
 - *Police monitor the importer*
 - *Prosecution obtains a search warrant*
 - *Police execute warrant and make arrests*
 - *Prosecutor makes indictment*
 - *Target is prosecuted*

Interpol Database:

John Newton (Interpol)

- Interpol 3 core functions are to provide:
 1. Secure global police communication services
 2. Operational data services and databases for police
 3. Operational police support services
- Interpol’s IP group is the Intellectual Property Crime Action Group (IIPCAG)
- IP crime functions at Interpol come under the “Financial and High Tech Crime” area
- Interpol has developed a Database on International Intellectual Property (DIIP) Crime to facilitate collaboration and information sharing among transnational investigators.
- Interpol has tripled their IP crime resources in the last year

Partnership Best Practices:

Discussion Panel: Mark Mutterperl (Fulbright & Jaworski L.L.P.) & Brian Isaac (Smart & Biggar)

Mr. Mutterperl on the leadership role of law firms in IP investigations and prosecutions:

- Lawyers partner and collaborate with others. Here is a typical sequence of events in an IP case:

Counterfeit product is detected at customs, brand owner is notified, lawyer is engaged, PI's are hired to investigate, court orders sought, subpoenas issued, investigation pursued,, work with PI's, follow the trail to the bad guys, file application to seize computers and business records from the importer, identify the "king pin", follow trail to country outside US, apply to seize "king pin" records, pursue legal action in US and in Other Countries.

- Some states are considering laws to restrict investigators ability to use "pretext" as a means of gathering intelligence.

Mr. Isaac on effective government-industry partnerships:

Businesses are ROI (return-on-investment) focused. It is important that legal and law enforcement professionals keep this in mind.

A recent example of a successful investigation in Canada was the ESA (Entertainment Software Association) which targeted counterfeit retail and production operations. ESA partnered with RCMP Milton in an RCMP investigation that involved a successful sweep of counterfeit software operations the Greater Toronto Area. This was a successful example of collaboration with criminal charges laid, civil action taken, and some important precedents were set though the sentences were disappointing.

Matthew Bassiur (United States)

- The return on investment for counterfeiters is in the order of 900%!
- Enforcing IP rights involves 3 groups:
 - Rights Holders, Investigators, and Prosecutors
- IP Crime is unique in that the rights holder is the "victim" and is also the "expert". No other crime is like this and this can present challenges including potential conflict of interest.
- In the US, 10% of IP cases are prosecuted criminally, 90% civilly.
- Key considerations when deciding how to prosecute:
 - Scale of infraction?
 - Degree of harm?
 - Safety & Health at risk?
- Industry / rights holder assistance in these cases is critical.
 - Example: Rockwell Automation industrial machine control software worth 15,000 per machine being sold on eBay for \$200! Rockwell assistance was essential to take this case forward.

Theme 3:

Public and Private Partnerships for Combating the Threat of Counterfeit Products

Insight from world leaders in IP crime fighting

- Brad Huther (US Chamber of Commerce)
 - US Chamber of Commerce created “CACCP” – Coalition against Counterfeiting and Piracy
 - CACP has 6 task forces: Detection and Enforcement, International, Internet, Education, Research, and Technology.
 - www.theCACCP.com
 - www.thetruecosts.org

Partnering with Associations:

- Ian Grant (IFPI “International Federation of the Phonographic Industry”)
 - IFPI represents 1500 members accounting for 90% of the recorded music industry.
 - Cases of interest:
 1. Russian criminals with counterfeit CD’s, credit cards, passports. Also selling firearms
 2. South Africa. Pirate discs
 - Must: Act now. Act resolutely. Work together – it is a global problem. Use private sector resources.

- John Anderson (Global AC Group – “GACG”)

GACG is a group of *other* AC organizations

- National Groups (IACC, Union des Fabriques, APM, etc)
- Regional Groups (CIPR, ECTA, Marques, etc)
- Small Groups (Finnish AC, Danish ACG, UAACP, etc)
- Overall characterization of IP problem:
 - Counterfeiting problem is bad and getting worse
 - It is a supply AND demand problem
 - Free trade zones facilitate shipment
 - “Aspirational Marketing” has fueled this problem
 - International in nature
 - IP Crime is now pan industry, organized crime controlled, flexible and adaptable.
 - Enforcement agencies have other priorities
 - Judicial indifference
 - Officer awareness
- Action needed:
 - Lobby for law change and for resources
 - Collect and analyze statistics on IP problem
 - Raise awareness of the problem
 - Deterrence: Supply, Demand, Trans Shipments.
 - Accept responsibility (aspirational marketing)
 - Work globally and locally
 - Work on “sound-bites” that will resonate with public. Raise awareness and change perception!
 - Cooperate across industry
 - Recognize organized crime as our “competitor”

Tom Kubic (PSI – “Pharmaceutical Security Institute”)

Elements that rights holders can provide to help with their investigations:

1. Information regarding:
 - Product info
 - Complaints received
 - Suspects / targets
2. Funding for:
 - Police / investigative efforts (where allowed by law).
 - Chemical
 - Data analysis
3. Special Projects
 - Provide actual products to support the investigation

Florence Legeay (UNIFAB “Union des Fabricants”)

UNIFAB has 400 members. All industries affected by counterfeiting.

Offices in Tokyo, Paris, Beijing

- counterfeiting prevents sustainable development

Partnering with Law Firms:

Lorne Lipkus (Kestenberg Siegal Lipkus LLP)

Summary of “workflow” of an IP client project:

- Someone complains about knock-offs (competitor, customer, etc)
- Collect intelligence as a “package” to later be given to law enforcement
 - Do buys of counterfeit goods
 - Check product: bar code, etc
 - Prepare written report
 - Preserve evidence (must have a “system”)
 - Take statements precisely
- Obtain a search warrant (hopefully)
 - Sometimes, police will do a “fresh buy” the day before or day of a search to obtain direct/recent evidence.
- Do on-site product identification with support from rights holder
- Seize counterfeit goods & do computer data entry onsite.
- Remove and store counterfeit products
 - Law enforcement controls the chain of custody
- Prosecute (or if no prosecution, seek order for destruction of goods)
- Convictions (or at least destruction of seized goods)

Partnering with Solution Providers:

Phil Viggiani (ID Global) and Simon McCullough: (IACS)

Mr. Viggiani: Topic - “Partnering with solution providers”

- Challenges facing Private Sector:
 - Cost and time pressure. Need to act NOW. Usually “behind the curve”
- Challenges facing Public Sector:
 - Bureaucracy, lack of ownership
- Most clients want to go from NOTHING to EVERYTHING when there is an IP violation
 - Advice is to help clients focus on the most *critical* areas!
 - Just slapping on a technology label WILL NOT WORK.

Mr. McCullough: Topic - “Investigative approach to combat counterfeiters”

- For IACS, the important investigation elements are:
 - Continuity of evidence
 - Detailed reports of searches etc.
 - Corporate background
- It is important to understand the supply chain from Manufacturer to Distributor to Reseller to End User.
 - Reseller investigation starts with Test Purchases
 - Distributor investigations are more complex and require the investigation firm to act in a “pretext” of a distributor. This may include setting up fake companies, websites, etc.

Panel Discussion: Judiciary and Prosecution

Michael Manson (Smart & Biggar)

- In Canada:
 - Quebec is civil law, while the rest of the country is common law.
 - Provincial courts have very little IPR experience, especially on the criminal side.
 - The problem is often that the perpetrators have no assets so civil action is not effective. Therefore in Canada, it is usually better to go the criminal prosecution route if possible.

David Faulkner (ICE coordinator - “US Immigration & Custom Enforcement”)

- David explained the difference between the 2 US government agencies
 - ICE (which “faces” the borders) and
 - CBP (Customs Border Protection)
- 3 levels of IP protection:
 1. Trademark and Copyright REGISTRATON
 - ... Violation of a registered TM or Copyright is *counterfeiting*
 2. Trademark and Copyright
 3. Patent
 - ... Violation here is patent infringement but it is not a *crime*. Only civil action can be taken.

Conclusions:

Since the early 1990's, counterfeiting has grown exponentially from a perceived "low level" crime that mainly affected a few specific product segments to what is now a truly global scourge. Today no product is too insignificant to counterfeit and, more disturbingly, the enemy has become highly sophisticated to the point where many counterfeit operations are a sort of "illegal/evil" model of legitimate, multinational organizations - complete with management structures, manufacturing and distribution facilities, sale teams, and recruiters!

As Rights Holders and IP Protection Professionals, we know that today's fight to protect intellectual property and the public safety is a daunting task and we need to reach outside our respective organizations to share information and work together.

The Niagara Falls IP Conference was the largest of its kind ever held in North America and the knowledge shared by the world class guest speakers in attendance is worth sharing.