

Rights owners must get the counterfeit message right

Trademark and copyright owners will not be successful in fighting counterfeiting and piracy merely by talking to governments and enforcement authorities. They also need to engage with the public. But, when they do, they have to be careful

The numbers are startling: in 1982, the US's International Trade Commission estimated that counterfeiting and copyright piracy cost industry approximately US\$5.5 billion on an annual basis. By 2000 that figure had risen to US\$450 billion.

But, despite the astronomical sums involved, it has often proved difficult to get politicians and enforcement authorities to take piracy and counterfeiting seriously. In many parts of the world, developed and developing, both have been viewed as victimless offences that cause difficulties for nobody except rights owners themselves. As a result, those convicted of the crimes rarely go to prison or, if they do, it is for a relatively short time. Any fines imposed are easily covered by the profits IP crime generates. And that's if you get caught in the first place – resources dedicated to fighting counterfeiting and piracy are scarce. Even in the US, they have been scaled back as a result of the increased focus on anti-terrorist initiatives.

That said, it is possible the tide is turning. After years of intensive lobbying from IP owners, governments are beginning to understand the social and general economic damage counterfeiting and piracy cause. IP thieves do not pay taxes; they eat into company profits and so have an impact on levels of investment and employment; rogue traders dealing in dodgy goods often turn out to be part of organised crime

networks that are also involved in activities such as people trafficking, drugs running and arms dealing; then there are those counterfeits that can cause serious illness, injury and death, as was tragically the case earlier this year in China when fake milk formula killed a number of babies. It is things such as these that tend to concentrate politicians' minds.

As a result, we have begun to see concerted action designed to address IP crime. The recent EU Enforcement Directive, while far from perfect and seriously watered down from the original proposal, does at least provide for minimum remedies against criminal IP infringers in the 25 states of the European Union. Likewise, Article 51 of TRIPS states that all member countries of the WTO must adopt measures that allow rights owners to obtain suspension of release of imported counterfeit trademark or pirated copyright goods by the customs authorities. There have also been a series of high-level meetings over the last year between representatives from government, enforcement authorities and industry - most recently in Brussels in May – that have been designed to put in place mechanisms to facilitate information sharing that will improve detection and conviction rates, and to introduce greater penalties for those caught infringing.

And yet, despite all this, the amount of IP crime continues to

rise and now accounts for around 10% of all world trade. This is because politicians and enforcement authorities can only do so much. Of course, counterfeiting and piracy are attractive because they are relatively easy to do and the penalties if caught remain negligible. But even more important, they are attractive because the demand for counterfeits and pirate products is so high. Across the world, in rich and poor countries alike, there is a huge market for stolen intellectual property, and it is this more than anything else that is driving the criminals forward.

The challenge for rights owners, therefore, is how to address the demand. Some will find it easier than others. Any member of the public who heard Ford Motor Company's Timothy Quinlan or Bob Pocica of Pfizer speak at the September annual meeting of the Intellectual Property Owners Association (IPO) in Boston would have been left in very little doubt as to the dangers of fake products in the automobile spare parts and pharmaceuticals industries. Both men provided compelling evidence – statistical and photographic – of the dangers presented by counterfeits in their markets. People die as a result of having brake pads fitted that superficially look like the real thing but in reality do not work; likewise just because a pill seems to be the genuine article does not mean it is. The message is clear and unambiguous: counterfeits are a very real threat to human safety. It is a message that, if told often enough, is likely to get through.

But not everyone can engage with the public at such a level. As one speaker at the IPO

meeting pointed out: "No-one ever died from buying a fake pair of Levi's." So what kind of message can the likes of clothing companies, film makers and computer software manufacturers send out to people who currently have no qualms about buying illegal copies of their products? Basic education, which points out that products brought from market stalls for very low prices are not likely to be genuine, has been tried and it has failed. Most people know when they are buying a rip-off. It does not seem to bother them. Likewise, dry arguments based around lost tax revenues and jobs are unlikely to have much of an impact. So, if persuasion is to be the tactic rights owners choose, the one thing left is to point out links between IP thieves and organised crime; or, to make even more of an impact, between IP theft and terrorism.

But, if they do this, rights owners need to be very careful. They have to be certain that what they say can stand up to scrutiny. Terrorism especially is an emotive subject: make the link and people will listen carefully to what you have to say. But if there is a gap between what you claim and what you can prove, be prepared for accusations that you are playing on public fears with no justification – with all the damage that can do to the brands and products you were setting out to protect.

In July, for example, journalist Duncan Campbell, writing for the UK's 400,000 circulation *Guardian* newspaper, picked up on a claim made in a £1.5 million (US\$2.5 million) public awareness campaign launched by the Industry Trust for Intellectual

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Property Awareness (Itipa), which is funded by a number of film companies including Twentieth Century Fox, Columbia Tristar and Universal Pictures. Central to the campaign was the statement: "Terrorist groups sell DVDs to raise funds." It cited Ronald Noble, secretary general of Interpol, as being the source for this claim. The problem was that Campbell was able to demonstrate that Noble said no such thing. What he in fact stated was that it is possible that terrorists may use IP crime as a means of generating income – a long way from saying that they do.

It allowed Campbell to conclude: "By telling us that we are fighting terrorism by boycotting pirated DVDs, the industry is patronising us and misleading us. Our message should be: don't buy counterfeit and alarmist propaganda from these people." (The full article can be found online at <http://www.guardian.co.uk/comment/story/0,3604,1263360,00.html>).

Whether intellectual property owners like it or not, they are now fighting their battles in the face of growing public scepticism. For all the undoubted positives intellectual property brings to national economies and international trade, the way it is

covered in the mainstream media – and therefore the way most people perceive it – tends to the negative. Campaigns based on unsubstantiated statements, such as the one launched by Itipa, are not likely to change this state of affairs and so, you could say, film companies in the UK have just flushed £1.5 million down the drain.

Pragmatically, the cash would have been better spent on research that could lead to the uncovering of real links between terrorism and IP crime. Alternatively, Itipa and other organisations know exactly where they can find counterfeit and pirate products being sold in

the United Kingdom. They are openly available in markets and car boot sales across the country. And everyone buying them knows exactly what they are. So maybe the most effective use of campaign money is to forget all about positive engagement and instead to focus on catching people breaking the law and then prosecuting them to the full extent possible. Rights owners may find that newspaper stories about bewildered purchasers of fake DVDs in front of a court will do more to dampen the desire for stolen IP rights than any amount of flawed press releases could ever achieve.