



Asia-Pacific
Economic Cooperation

2005/AMM/002anx4rev1
Agenda Item: IV, VI.4

Three Model Guidelines APEC Anti-Counterfeiting and Piracy Initiative

Purpose: Consideration
Submitted by: SOM Chair



17th APEC Ministerial Meeting
Busan, Korea
15-16 November 2005

APEC MODEL GUIDELINES TO REDUCE TRADE IN COUNTERFEIT AND PIRATED GOODS

Growing trade in counterfeit and pirated goods threatens innovation, the economic livelihoods of pioneering businesses and entrepreneurs, and the health and safety of consumers across the Asia-Pacific region and around the world. Driven by new technologies that make it easier than ever before to rapidly produce counterfeit and pirated goods in commercial quantities and by transnational networks that increasingly use global trading lanes to distribute and sell those goods worldwide, this illicit trade costs legitimate rights holders billions of dollars each year. Indeed, according to the World Customs Organization (WCO), counterfeit goods account for up to seven percent of total global trade in goods, a figure equivalent to \$637 billion in 2004.

APEC economies are committed to reducing trade in counterfeit and pirated goods and to combating transnational networks that produce and distribute such goods through strong and effective border enforcement. To that end, the following model guidelines are provided for economies' competent authorities to deal with the inspection, suspension, seizure and destruction of goods and equipment used in cases of import, export and transshipment of counterfeit and pirated goods, recognizing existing constitutional and other legal requirements of member economies. Further, the model guidelines are indicative references that may be useful to members in improving their IPR enforcement and protection regimes; however, they do not mandate changes to existing law. At a minimum, they apply to counterfeit trademark and pirated copyright goods. Individual economies could choose to apply them to additional kinds of infringing goods.

MODEL GUIDELINES

1. IDENTIFYING AND MANAGING RISKS

To better identify and target for inspection arriving and departing shipments that may contain counterfeit and/or pirated goods, effective enforcement regimes:

(a) Identify Current Perceived Risks.

- Consulting with right holders, industry groups, other relevant stakeholders and competent authorities responsible for all aspects of intellectual property rights enforcement to identify perceived risks and promote actions to mitigate those risks wherever possible.
- Exchanging available data regarding significant customs seizures of counterfeit and pirated goods wherever possible, including via the WCO Customs Enforcement Network and/or other similar international networks.

(b) Direct Resources and Manpower Based on Identified Risks.

- Focusing enforcement resources and assets on the highest risk transactions and activities.
- Maintaining high qualification standards for customs officers and other competent authorities involved in all aspects of intellectual property rights enforcement.

(c) Take Advantage of New Risk Management Techniques.

- Sharing information on innovative mathematical and statistical approaches that may be developed to provide greater analytical targeting of shipments that could contain counterfeit and/or pirated goods.

2. MAINTAINING EFFECTIVE ENFORCEMENT PROCEDURES

In accordance with the domestic law of each member economy, effective enforcement procedures designed to empower right holders and customs and other competent authorities to restrict the import, export and transshipment of counterfeit and pirated goods:

(a) Build Partnerships with Right Holders.

- Offering interested right holders an opportunity to provide contact information that can be stored, easily updated and accessed in key ports, and taking appropriate measures to guarantee the confidentiality of such information.
- Notifying importers or exporters and right holders when a shipment of suspected counterfeit or pirated goods is detained.
- Seeking the assistance of right holders to determine whether such goods are counterfeit or pirated, with appropriate procedures to protect confidential information.
- Enabling right holders to submit applications to competent authorities for the detention of suspected counterfeit and/or pirated goods that are being imported or exported, when they have valid grounds for suspecting that the importation or exportation of such goods may take place.
- Ensuring that applications are not so burdensome or costly that right holders are discouraged from seeking detention of suspected counterfeit and/or pirated goods, while requiring adequate information and evidence to enable competent authorities to identify suspected infringing shipments and determine infringement.
- Allowing adequate time for right holders to comply with these and other procedures before releasing suspected counterfeit and/or pirated goods, taking

into account relevant international guidelines, including the WCO Model Provisions for National Legislation.

- Providing a means to decide cases on their merits and to order appropriate remedial action (*e.g.*, exclusion or seizure of the goods) within a reasonable and specified period of time after the right holder has produced adequate evidence of infringement and customs or another competent authority (where customs cannot determine infringement) has granted an application for suspension of release.
- Empowering right holders to take enforcement action through administrative, civil or criminal processes by providing them with the identity (including name and addresses) of the parties (importer, consignor, manufacturer, etc.) involved in the importation or exportation of such goods once a final determination is made that the goods are counterfeit or pirated.

(b) Allow Competent Authorities to Take *Ex-Officio* Action.

- Permitting competent authorities to act on their own initiative to suspend the release of goods when, consistent with relevant provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and domestic law, there is *prima facie* evidence that the goods are infringing.
- Partnering with right holders and industry to train relevant personnel how to distinguish genuine from illegal products of all types.

(c) Remove Infringing Goods from Commercial Channels.

- With respect to destroying counterfeit and pirated goods, further development of guidelines is needed.
- Prohibiting the exportation of seized counterfeit and pirated goods in an unaltered state. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce.
- Sharing information with other economies regarding shipments of suspected counterfeit and pirated goods (such as information on the goods themselves and the identity of the parties involved in the import and export of those goods), in appropriate cases and to the extent allowed by the domestic law of each member economy, and using information they receive from other economies in their enforcement activities. APEC economies have established IPR Service Centers and identified Anti-Counterfeiting and Piracy Points of Contact, which may be used for this purpose. APEC economies are also cooperating through other international organizations.

(d) Complement Traditional Examinations with Innovative Techniques

- Conduct post-entry examinations of business records, methods of payment, purchasing contracts, and importers' internal controls to track down illicit financial gains and expose counterfeiting and piracy business practices, when such techniques are allowed by law

3. PROMOTING AND UPHOLDING STRONG LAWS AND DETERRENT PENALTIES

To support the procedures outlined above and to better deter trade in counterfeit and pirated goods and punish violators, effective enforcement regimes are:

(a) Based on Strong Laws and Provide for Appropriate Authorities.

- Implementing fully *Section 4: Special Requirements Related to Border Measures* (Articles 51-60) of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.
- Treating the willful importation or exportation of counterfeit or pirated goods and the distribution of counterfeit or pirated goods in domestic commerce as unlawful activities subject to penalties.
- Ensuring that each type of violation is subject to the jurisdiction of an appropriate competent authority, that the relationship between authorities is clear, and that there is adequate communication and cooperation between authorities.
- Bringing any Free Trade Zones (FTZs) and similar areas in each economy under the jurisdiction of the competent intellectual property enforcement authorities within the territory of each economy.

(b) Include Deterrent Penalties

- Imposing criminal and/or administrative penalties sufficient to deter trafficking in counterfeit and pirated goods, and providing for adequate civil remedies (including monetary damages).

4. ENSURING TRANSPARENCY AND FOSTERING PUBLIC AWARENESS

To ensure that members of the public – including right holders and the trading community – are aware of their rights and obligations under applicable laws and procedures, effective enforcement procedures:

(a) Ensure Transparency.

- Publishing border enforcement procedures (for example, procedures for submitting applications for the detention of suspected counterfeit and/or pirated

goods, any charges and deadlines associated with such applications, and any procedures for destroying or making unusable counterfeit and pirated goods and the tools used to produce such goods that are seized by competent authorities), and penalties and any significant administrative and judicial decisions regarding those procedures with the appropriate consent of rights holders, to the maximum extent possible on the Internet.

- Identifying publicly competent authorities for intellectual property enforcement and contact points for assistance.

(b) Foster Public Awareness.

- Sponsoring targeted information campaigns and seminars for right holders and key members of the trading community, including manufacturers, retailers, freight forwarders and shippers.
- Publicizing enforcement actions wherever possible, including relevant statistics that economies may collect, such as the number of cases where goods are seized or destroyed at the border, administrative procedures are requested and taken, criminal charges are brought, alleged infringers are prosecuted, and criminal penalties are actually imposed.