



Fake Chips: A Prosecutor's Perspective

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Computer Crime and Intellectual Property Section

Domestic IP Crime Enforcement

**NIST Product Authentication
Information Management Workshop**
February 17-18, 2009

“CHIP” Prosecutors

- “Computer Hacking and Intellectual Property”
- At least one CHIP prosecutor in each of 93 U.S. Attorney’s Offices
 - More than 230 CHIP attorneys nationwide
 - CHIP Units in 25 U.S. Attorney’s Offices





CHIP Responsibilities

- **Prosecute Core Offenses**
 - Computer Crime
 - Intellectual Property Offenses
- **District Legal Counsel**
- **Outreach: Law Enforcement**
 - Incident Response
 - Search Warrants
 - Advice and Support
- **Community & Industry Outreach**

Computer Crime and IP Section

- **Criminal Division, U.S. Department of Justice**
 - Around 40 prosecutors
 - 12 dedicated to prosecuting IP crime
 - At least two on-call “Duty” attorneys each day
- **Prosecute multi-jurisdictional cases and coordinate with foreign law enforcement**
- **Publish Prosecuting Intellectual Property Crimes Manual & Field Guide on investigating counterfeit trafficking crimes.**
- **Cybercrime Lab**
 - Forensic and technical consultation



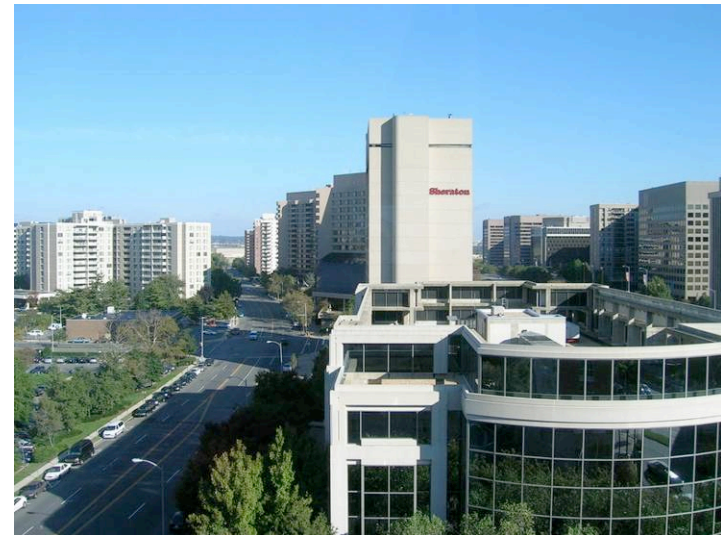
Prosecution / Investigative Team

- **Coordinate investigative and legal strategy**
- **Electronic Evidence**
 - Determine IP address
 - Seize Computers
 - Email Search Warrants
- **Traditional Investigative Steps**
 - Search Warrant / Surveillance
 - Undercover / Confidential informant
 - Banking / Transaction Records
 - Confession



National IPR Coordination Center

- Numerous law enforcement agencies under one roof
 - ICE
 - Postal Inspection
 - FBI
 - CBP
 - FDA-OCI
 - CCIPS
- Clearinghouse for IP crime intelligence
- Centralized point of contact for multi-jurisdictional and transnational IP enforcement operations;
- Undercover capabilities



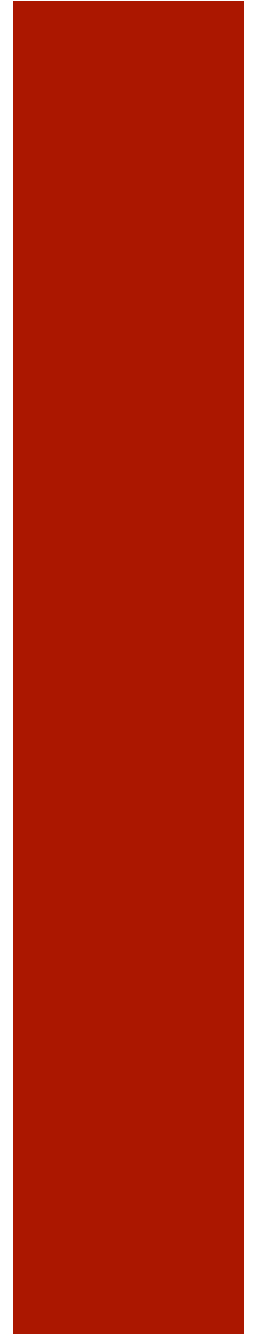
Recent Enhancements

- **PRO-IP ACT of 2008**

- Created Intellectual Property Enforcement Coordinator position in the Executive Office of the President
- Created a new interagency IP enforcement advisory committee, comprised of DOJ, DHS (both ICE & CBP), FBI, PTO, Commerce, USTR, State (INL & USAID), FDA, OMB, Department of Agriculture and the Register of Copyrights
- Enhanced sentencing and forfeiture provisions
- **\$25 million in funding** to enhance enforcement, but only if appropriated by Congress

International Issues

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DOJ International Presence

- Intellectual Property Law Enforcement Coordinator (IPLEC)
- Bangkok, Thailand (Jan. 2006)
- Sofia, Bulgaria
(Nov. 2007)



International Cooperation - China

- **Joint Liaison Group for Law Enforcement Cooperation**
 - U.S. and Chinese IP law enforcement agencies interact directly on transnational criminal IP cases and policy issues
 - IP working group established in 2007
 - Ministry of Public Security's Economic Crime Investigation Department
 - U.S. DOJ / CCIPS
 - ICE and FBI
 - Case referrals have already generated convictions in China
 - Current focus on health and safety and organized crime

International Cooperation

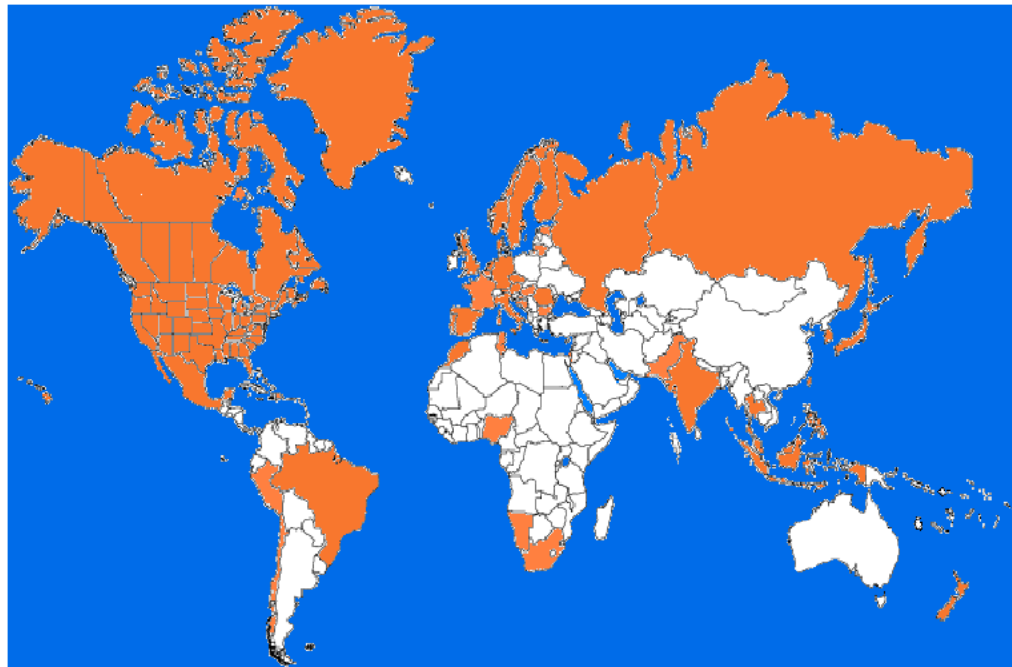
- **Intellectual Property Criminal Enforcement Network**
 - Launched in 2007 by U.S. DOJ with assistance of ASEAN
 - Forum for law enforcement agencies from numerous countries to share intelligence and develop coordinated strategies for combating cross-border IP crime, focusing on:
 - Large scale distribution networks;
 - Criminal organizations



USDOJ - ASEAN - USPTO
CONFERENCE TO DEVELOP AN INTELLECTUAL PROPERTY CRIME
ENFORCEMENT NETWORK (IPCEN)
GRAND HYATT ERAWAN, BANGKOK, THAILAND 23-26 OCTOBER 2007

International Cooperation

- **G8 24/7 Network**
 - 49 countries (map below)
 - DOJ (CCIPS) is the U.S. point of contact
 - Around-the-clock assistance available



Trafficking in Counterfeit Marks

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Why Prosecute Trademark Crimes?

- To protect trademark owners from “corporate identity theft”
- To protect consumers from fraud
- To protect the safety of non-purchasing users
- To protect modern commercial systems and the economy



Trafficking in Counterfeit Marks / Labels

- 18 U.S.C. § 2320: Must show the defendant
 - Trafficked, or attempted to traffic, in goods or services (or labeling components for goods or services)
 - Trafficked “intentionally”
 - Used a “counterfeit mark” on or in connection with (or applied to labels for) such goods or services
 - Used counterfeit mark “knowingly”



Counterfeit Mark Element

- Defined at 18 U.S.C. 2320(e)(1)(A): A “counterfeit mark” is a “**spurious mark**”
 - that is used in connection with trafficking in any goods, services, or labeling components;
 - identical to or substantially indistinguishable from a mark in use and registered for those goods or services;
 - that is applied to or used in connection with goods or services for which it is registered OR is applied to or consisted of labeling components “designed, marketed, or otherwise intended to be used” on or in connection with such goods or services; and
 - use of which is likely to cause confusion, to cause mistake, or to deceive.

Knowledge Element

- Must prove beyond a reasonable doubt that Defendant **knew** marks were counterfeit
 - “An awareness or a firm belief”
 - May also prove knowledge by showing “willful blindness”
- Evidence:
 - Defendant was put on notice
 - Prior civil or criminal actions
 - Prior customs seizures
 - Extremely low price
 - Questionable supply chain

Trafficking Element

- Trafficking must be “for purposes of **commercial advantage or financial gain.**”
 - “Financial gain” includes the receipt, or expected receipt, of anything of value.
- Trafficking includes **possessing** counterfeit goods with the intent to traffic in them.
- Trafficking now expressly prohibits importing and exporting infringing goods.

Common Defenses

- **Overrun Goods – “Third Shift”**

- Licensed fab is authorized to manufacture 10,000 widgets bearing ACME trademark but makes an additional 1,000 without permission;
 - But...
- Defendant purchases irregular (but legitimate) goods, without the trademark, from licensee, and then has a different company apply the trademark – **defense does not apply**

- **Gray Market Goods**

- Legitimate ICs are licensed to distributor for sale in Brazil; Distributor breaches contract and sells chips at higher price in U.S.

Common Defenses

- **Intermediary Who Lacks Knowledge**
 - Gray marketer distributor purchases and resells ICs bearing counterfeit marks and claims he thought he was reselling authentic gray market goods
 - Not uncommon defense in gray market;
 - Importance of developing circumstantial evidence of knowledge

Operation Cisco Raider



- **Multi-jurisdictional U.S. and multinational investigation**
 - FBI: 15 cases in 9 different field offices
 - ICE: 28 investigations in 17 field offices
 - Royal Canadian Mounted Police
 - 400 seizures of 74,000 pieces of counterfeit Cisco Systems networking hardware, labels, valued at \$76 million (USD)
- **E.g.: U.S. v. Todd Richard (N.D. Ga. 2008)**
 - Richard imported unlabeled counterfeit Cisco hardware from China
 - Attached counterfeit Cisco labels, which were shipped separately, and resold the hardware as legitimate on eBay
 - Sentenced to 36 months in prison and ordered to pay \$208,440 in restitution

Prosecutorial Considerations

- **Law enforcement priorities**
- **Nature and seriousness of the offense**
 - More appropriate for civil enforcement?
- **Person's culpability in the offense**
 - History of offenses (civil and criminal)
 - Willingness to cooperate against others
- **Potential Jury Reaction**
- **Deterrent effect of prosecution**

Working with the Victim

- **Referral to law enforcement**
 - Establish ownership of registered TM
 - Identify counterfeits through industry or brand expert
- **Knowledge element**
 - Prior cease and desist letters sent to target?
 - Prior administrative seizures?
 - Prior civil litigation?
- **Assistance during investigation**
 - Identify items to be seized from search
 - Expert may attend search to identify counterfeits
 - ***Storage of seized goods****
 - Provide estimates of infringement amount
- **Trial/Sentencing/Restitution/Forfeiture**

Contact Information

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