ON-LINE SALES OF COUNTERFEIT GOODS AND THE UNIVERSAL POSTAL UNION: THE LITTLE KNOWN AGGRAVATOR

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E-commerce continues to grow, both in absolute terms and as a percentage of the retail marketplace. Total U.S. retail sales through e-commerce channels have increased from $261.2 billion in 2013 to $389.1 billion in 2016, representing a growth rate of 14% year-over-year (U.S. Census, E-Stats 2016: Measuring the Electronic Economy, May 2018; U.S. Census, E-Stats 2014: Measuring the Electronic Economy, June 2016). Amazon reported that in 2017, sales by third-party sellers had, for the first time, accounted for more than half of the global sales volume on its sites (Amazon 2017 SEC Filing). This growth is comprised of many sellers of legitimate products as Amazon and other e-commerce platforms have sought to expand the items available on their sites and permit distribution outside of their warehouses, but it also includes an increasing volume of counterfeit or otherwise infringing goods sold via online marketplaces. Related to this growth is the low rates for shipping goods from China to the United States and the effect this may have on the counterfeiting problem brand owners face.

For decades factories abroad have manufactured unauthorized products cheaply and then shipped containers of the products, often packed with other counterfeit goods from the same or nearby factories, via sea to U.S. distributors. Although relatively inexpensive on a per-unit basis, this model comes with two significant downsides. First, U.S. Customs and Border Protection (CBP) will likely find it suspicious that a shipping container holds a combination of electronics, apparel, and cosmetics, rather than all goods from one brand. Because the import documents list an unknown recipient, this would lead CBP to detain the goods. Second, U.S. distributors and retailers will each take their own cut of the sales price, reducing the profits to the counterfeiter. Wanting to avoid detection, but willing to accept the loss of a percentage of small packages if seized (instead of losing an entire container), foreign, principally Chinese, sellers of counterfeit goods have shifted their strategy and now increasingly post products on e-commerce platforms for sale directly to consumers. In fiscal years 2015 and 2016, CBP seizures of express carriers and international mail constituted approximately 90 percent of all seizures based on intellectual property rights (U.S. Government Accountability Office, Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market, January 2018).

The convenience of on-line marketplaces for both buyers and sellers makes these attractive channels for counterfeit goods, but foreign shipping costs should make it prohibitively expensive for e-commerce sales across borders. What many people may not realize is the ability of foreign counterfeiting operations to fulfill on-line orders cheaply is facilitated by low international postage rates from China and other countries. In December 2015, the United States Postal Service Office of Inspector General detailed concerns about the low postage rates paid for items shipped from China to the United States (United States Postal Service Office of Inspector General, Terminal Dues in the Age of Ecommerce, December 14, 2015). The report noted that it would cost less to send a package from China to the U.S. than it would to send that same package domestically within the U.S. In one example cited in the report charges for shipping packages weighing between 1.4 and 5 ounces from China to the U.S. amounted to about $1.60 per item. First Class mail domestic rates for those same packages would come to between $2.04 and $2.22. An October 2017 report from the U.S. Government Accountability Office concluded that this disparity disadvantaged U.S. businesses as a result of the lower shipping costs available to foreign sellers (U.S. Government Accountability Office, International Mail: Information on Changes and Alternatives to the Terminal Dues System, October 2017).

The USPS Office of Inspector General and GAO reports traced this price difference to a set of fees known as "terminal dues". Every four years the United Nations agency, the Universal Postal Union ("UPU"), sets these terminal dues—the remuneration rates for international mail posted between member countries. Under this system the postal authority that collects postage and sends an item abroad pays a fee to the member country that receives the item. Since the UPU developed the current fee structure in 1969, postal agencies in more developed countries have paid higher terminal fees than posts in developing countries, subsidizing the costs of sending the items. The UPU intended that the subsidies would fund the development of the postal infrastructure in developing countries, thereby fulfilling the Union's goal of building out a single global postal network (United States Postal Service Office of Inspector General, Terminal Dues in the Age of Ecommerce, December 14, 2015). This goal dates back well past 1969 – the international community founded the UPU in the late 1800s when it recognized the need to coordinate national postal authorities in order to facilitate correspondence in an era of increasing worldwide trade and migration (Gough, 2016. While the system did not overtly envision a subsidy to lesser-developed countries (or those classified as such) as part of its development, the British "penny post" system which preceded the UPU had an element of a subsidy to it (*Id.*). It originally applied to mail correspondence, but in 1929 was amended to include "packets" (Herman, 2017).

While the basic contours of the terminal fees framework at the UPU have not changed since the 1960s, the uses of the international postal system have undergone a radical shift. In the intervening years the volume of mail correspondence has declined while use of the postal service for fulfilling retail orders has come to take up a larger portion of deliveries. Accordingly, rather than subsidizing personal correspondence, the terminal dues increasingly subsidize retailers—and often counterfeit operations—in the developing countries. Critics have argued that it does not make sense for BRICS countries (Brazil, Russia, India, China, and South Africa), which play significant roles in the competitive global marketplace, to pay lower terminal dues (United States Postal Service Office of Inspector General, Terminal Dues in the Age of Ecommerce, December 14, 2015).

In October 2018, the White House announced the intention of the United States to leave the Universal Postal Union because the administration believed that the UPU had not made sufficient progress to address the imbalances in terminal dues (White House, Statement from the Press Secretary, October 2018). The White House also announced its intention to negotiate bilateral and multilateral agreements to resolve the terminal dues issues. (Id.). The UPU has scheduled a meeting for September 2019 in Geneva, Switzerland to vote on a U.S. proposal to permit *self-declared* rates by UPU members. If the proposal fails, the United States will likely leave the organization the next month. It remains unclear what will happen if the United States has not yet negotiated rates through other agreements once it departs the UPU.

The preferential postal rates will remain in effect for at least the short term, to the benefit of the foreign e-commerce participants. This means that foreign sellers of counterfeit items will be able to participate in the United States e-commerce marketplace with little added cost as compared to domestic sellers. Given the ease with which a seller can list an item for sale on a platform, escape detection and remain out-of-reach of United States enforcement action, the foreign counterfeit seller problem will continue to persist. Thus, absent such a substantial increase in international postal rates, brand owners need to adjust their enforcement strategies to address the market imbalance exploited by the infringers. Cooperation with Customs officials to seize products en route remains an integral component of brand protection, but the increasing importance of direct on-line sales compels brand owners to take action before the products get shipped. This means that brand owners will need to continue to remove the posts of infringing items. An effective on-line enforcement strategy requires developing and maintaining internal guidelines for identifying authentic products, developing relationships with the platforms, and working with the right vendors to conduct sweeps of electronic marketplaces using appropriately narrowed criteria.

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