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EUBIP Position Paper

Intellectual Property Rights
Business Council (IPRBC)
of the European Chamber of Commerce
in Hong Kong

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Introduction

Since its inception in 2012, The European Chamber of Commerce Intellectual Property Rights Business Council (IPRBC) has, by nature, primarily focused its action on the enforcement of trademarks rights albeit keeping overall competence for the whole spectrum of Intellectual Property Rights (IPR). This is reflected in this Position Paper, which follows on the former Intellectual Property Position Paper released by the European Chamber of Commerce in Hong Kong (ECC) in 2016.

The IPRBC believes that it is important to highlight in this introduction some of the key features of two recent reports published by the EUIPO-OECD and EU Customs respectively as they put more global perspective on some of the key challenges Hong Kong is facing in its fight against counterfeiting. On a different note, the IPRBC highlights Hong Kong's substantial efforts in becoming the regional champion for IP trading and the challenges it is facing.

Key Recommendations

- **Internet Best Practice:** Enhancing the remarkable e-auctioning with integrity program implemented by the IPRPA, on the example of the EU Charter of Confidence signed in 2011 and renewed in 2016 between brand owners and major e-commerce platforms, to ultimately get key local stakeholders to agree on common principles for IPR protection on the Internet. In this regard, the BASCAP Best Practice paper for Removing Fakes from Online Platforms could also be used as a supporting tool.
- **EU-Hong Kong Cooperation:** Fostering strategic IPR Cooperation between the EU and Hong Kong authorities at an operational level by appointing IP Attaches (i.e. EU IP attaché based in Hong Kong and Hong Kong IP attaché based in Brussels). Operational cooperation between EU-HK-brand owners in relation to transshipment should also be encouraged.
- **Legal Environment:** Promoting and encouraging a streamlined and user friendly legal environment enabling all brand owners, including SME's, to effectively enforce their IPR at a reasonable cost. This notably concerns evidential requirements in relation to secret showrooms, enforcement of imitations, effective enforcement at the trade fairs, etc.
- **Public Awareness:** Designing a novel and ambitious public awareness strategy frankly addressing counterfeiting impact (i.e. funding of terrorist and criminal organizations, catastrophic consequences on sustainability and social responsibility) and focusing more on mainstream communication channels (i.e. social media).
- **The FSBC recommends the Hong Kong government pay particular attention to the demand for FinTech in the fields of payment services, remittances and robo-advisors. In addition, the implementation of FinTech by financial institutions should be encouraged.**

1

Hong Kong's Global Role in Counterfeit Trading

In addition to being illegal in both Hong Kong and most jurisdictions internationally, the trading of counterfeit goods also threatens the health and safety of consumers, reduces the amount of tax collected, disrupts funding to the activities that are essential to the social-economic balance as well as hurts the economy as a whole. On the other hand, a robust development of Intellectual Property (IP) trade would benefit the economy of Hong Kong as a whole. According to a survey commissioned by the Intellectual Property Department (IPD) published in June 2015, 50% of establishments in the legal services industry believes that IP trading could enhance overall development of Hong Kong's economy.¹ It is the IPRBC's view that it is important to provide right-owners with the certainty that the results of their innovations will be protected while protecting consumers by building trust in whatever the market has to offer. The competitiveness of European businesses as well as the reputation of Hong Kong as a place of good law enforcement depends on it.

1.1. The OECD and EUIPO Report: "Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact"

The Organisation for Economic Co-operation and Development (OECD) and the European Union Intellectual Property Office (EUIPO) have published a report in April 2016 concerning the economic effects counterfeit trading cause to economies around the world². The trading of counterfeit and products represented up to 2.5% of world imports, or as much as USD 461 billion.

According to the World Trade Organisation's TRIPS Agreement, "Counterfeit trademark goods shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation."

Counterfeit goods trade took up 5.1% of imports to the European Union, consisting of as much as EUR 85 billion. Taking the cosmetics and personal care sector as an example, losses due to counterfeit goods made up almost 8% of the annual licit turnover of the industry.³ The majority of brands targeted by counterfeiters are from OECD member states: United States, Italy, France, Switzerland, United Kingdom, Japan, Germany and Luxembourg. The report unveiled the negative impacts of the trading of counterfeit goods to the global

economy. Not only does that undermine the importance of Intellectual property as a key value generator for brands, but it also affects the competitiveness of the economy as a whole.

The distribution of imports of counterfeit products to the European Union in the years 2011, 2012 and 2013 were recorded in the report. The record amount of counterfeit goods seizures was at the highest in 2012, with 150,423 cases. Out of the top five provenance economies of counterfeit products to the EU, four of them are Asian economies, namely China, Hong Kong, Singapore and Thailand. Despite the identification of the top provenance economies, trade routes in counterfeit goods are still unpredictable because of its complexity and dynamic changes. Hong Kong, China and Singapore are identified as the main intermediary transit point either out of convenience or because traffickers exploit governance gaps in those regions.

The important role of e-commerce, which provides new possibilities to distribute and get access to counterfeit goods, is regarded as a rising challenge for the international community. The rise of e-commerce also brought the problem of transportation of counterfeit goods through small shipment. Small shipments service is a new way of avoiding detection and mitigating risks of sanctions in the transportation of counterfeit goods. 65% of seizures are mail related and over 20% are air related, while sea and road only made 8% of the seizures respectively. 43% of seized packages included less than 10 items, and over 40% of these packages only contained 1 item. In an infringement case involving small shipments, the senders try to get around customs by splitting large packages of counterfeit goods into smaller units. Mailing from widely scattered postal stations, they repeatedly send small parcels, while changing the names of the senders and addresses to escape law enforcement. The rise of small shipment services is a key issue in dealing with counterfeit trading which is directly linked to the attractiveness of e-commerce.

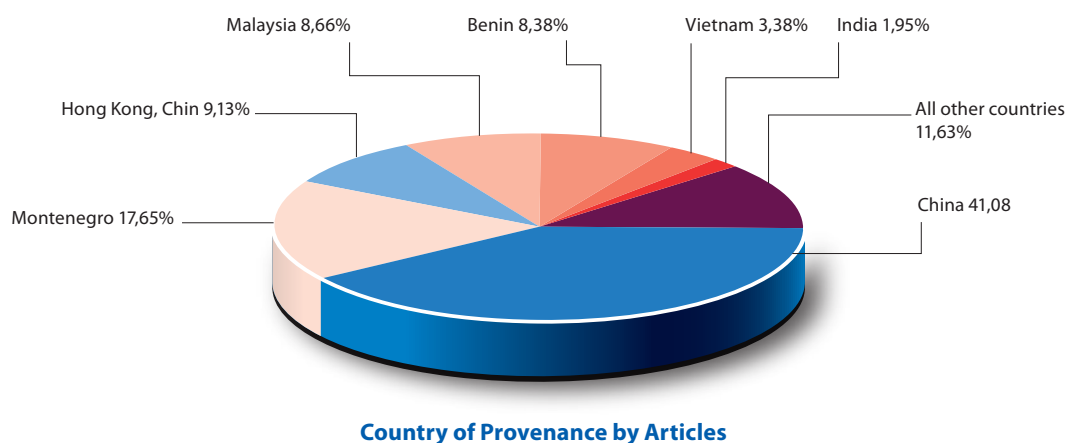
1.2. EU Customs Seizure Statistics – Global Outlook

Each year the European Commission issues a Customs activity, focusing on their enforcement of IPR. It is based on the data transmitted by the Member States administrations, in accordance with the relevant EU customs legislation (Regulation (EU) No 608/20132).⁴

According to the Statistics published on 22 September 2016 by the European Commission, more than 80,000 detention cases were registered by Customs in 2015, for a total of more than 40 million detained counterfeit articles. The value of the equivalent genuine products is estimated to be just over 642 million euro.

1.3. EU Customs Seizure Statistics - Hong Kong Focus

As in 2014, China continues to be by far the main country of provenance from where goods suspected of infringing an IPR were sent to the EU⁵.



Hong Kong, China	Value	% of total
Watches	€ 57.492.452	51%
Parts and technical accessories for mobile phones	€ 11.267.399	10%
Bags, including wallets, purses, other similar goods carried in the pocket/bag	€ 10.313.381	9%
Mobile phones	€ 4.523.581	4%
Clothing (ready to wear)	€ 4.517.627	4%
Other shoes	€ 3.993.548	4%
Jewellery and other accessoires	€ 2.488.020	2%
Packaging materials	€ 1.930.465	2%
Sport shoes	€ 1.875.385	2%
Audio/video apparatus including technical accessories and parts	€ 1.771.422	2%
total € 113.585.452		

In 2015, Hong Kong became the third largest country of origin of counterfeit products seized by EU Customs behind Montenegro, both in terms of total quantities seized (9.3%) and value of quantities seized (20.23%), while China remains the first country of origin on both accounts with 41.08% and 58.37% respectively.

1.4. Overview on Hong Kong IPR Enforcement Authorities

The Customs & Excise Department (C&ED) is the mandated governmental department responsible for taking criminal sanctions against copyright and trademark infringements in Hong Kong.⁶ The C&ED's mission is to protect the interests of IPR owners and legitimate traders through enforcement of the Copyright Ordinance (Cap. 528), the Trade Descriptions

Ordinance (Cap. 362) and the Prevention of Copyright Piracy Ordinance (Cap. 544). The C&ED adopts a two-pronged enforcement strategy against the supply and retail of counterfeit goods. On the supply side, the C&ED focuses its enforcement efforts against illegal activities at the import and export, manufacturing, wholesale and distribution levels. At the retail level, the C&ED takes repeated and sustained enforcement actions to eradicate street level piracy and counterfeiting activities.

The Intellectual Property Department (IPD) serves to maintain the protection of intellectual property rights in Hong Kong to the highest international standards, high-quality and responsive patent, trademark and designs registration services to the public and promote awareness about IPR in the community.⁷ In recent years, the IPD has actively promoted Hong Kong as an IP trading hub in the region by launching the scheme “Hong Kong as IP Trading Hub”.

The Hong Kong Police force are also competent for IPR enforcement matters and may exercise their power of arrest and seizure should they encounter suspected copies of infringing goods in the performance of their duties.⁸

The Department of Justice (DOJ) is responsible for prosecuting all criminal cases, except those via private prosecution, so this includes all criminal cases involving IP enforcement.⁹

Hong Kong courts are equipped to handle both criminal and civil matters. Different level courts will handle cases depending on the type of relief sought and the amount of damages claimed for a civil action, and the fines and penalties that may be imposed in relation to a criminal offence.

The Intellectual Property Rights Protection Alliance (IPRPA), created in 2004 by the C&ED and strong of 94 members, provides a broad-based platform that enables the exchange of information and knowledge, and fosters closer cooperation between the C&ED and the IPR industry.¹⁰ Noting that assistance and support from the industry stakeholders are pivotal in the IPR protection regime, the C&ED maintains an effective strategic partnership with the IPR industry in the publicity and public education for IPR protection.

1.5. Development of “Hong Kong as IP trading Hub”

In recent years, in addition to its efforts in protecting intellectual property in the city, the Hong Kong government has actively promoted Hong Kong as the regional IP trading hub by launching the programme “Hong Kong as IP Trading Hub” under the Intellectual Property Department (IPD). Apart from the IPD, the Hong Kong Trade and Development Council (HKTDC), Department of Justice (DoJ), the Innovation and Technology Commission (ITC) have also been assisting in the development of the project.

An independent working group focusing on the topic was set up in 2013, which identified 4 strategic goals in transforming Hong Kong as the regional IP trading centre: Enhancing the IP protection regime; Supporting IP creation and exploitation; Fostering IP intermediary service and manpower capacity and Promotion, education, and external collaboration. The IPD has earmarked \$2.55 million for the promotion and education efforts under the framework of the 4 strategic goals, focusing on business sectors and targeting SMEs in the city. In addition to developing local support for IP trading, the IPD cooperated with mainland and international authorities aiming to boost Hong Kong's image as an international IP trading hub. The IPD has also organized the 2015 Business of Intellectual Property (BIP) Asia Forum attracting over 2400 IP professionals from 37 countries and regions in hope of promoting Hong Kong to potential IP investors.

The development of Hong Kong as the regional IP trading hub has been met with the challenge from Singapore. Both as international business and trading centres in the region, both cities have committed to provide services for IP trading in recent years. Despite having a strong advantage under its links with Mainland China and the organisation of high profile events such as the Business of Intellectual Property Forum on an annual basis, Singapore is gaining more momentum on some key areas. For instance, with an earlier start in the promotion of IP trading dating back to 2003, Singapore has since managed to secure the regional offices of several key Intellectual Property Protection and Enforcement non-governmental organisations and associations such as WIPO's regional arbitration centre, the first of its kind out of Geneva, INTA's regional office and Interpol's regional office. In recent years, Singapore has also become a leading figure in the ASEAN community with respect to Intellectual Property trading and valuation.

2

IPR Protection – On the Internet

According to a recent report by the Hong Kong Census and Statistics Department¹¹, more than 80% of all persons aged 10 and over in Hong Kong used the internet. Over the past 10 years, the rate of increase for use of the internet has increased from 56.9% to 84.9%. Out of the 80%+ population, more than 97% used their smartphone for internet connection.

To give a broader perspective, the China Internet Network Information Centre estimates that there were over 710 million Internet users in China by June 2016, up from about 450 million back in 2010, bringing the current penetration rate to about 51.7%.¹² About 656 million of these users access the internet via their mobile phones/smartphones. In 2015, China's e-commerce increased 42% compared to 2014 and was estimated to be worth 615 billion EUR. This number is expected to double by 2018.¹³

This accounts to millions of posts each day on social media, blogs, commercial platforms and standalone websites. Over the years, a growing part of this online activity related to advertising, marketing and selling counterfeit goods infringing the intellectual property rights of European brands. Infringers have decided to move their operations from traditional brick and mortar shops to online shops for a number of reasons, including:

- Mitigating their legal risks by making it harder for brand owners and enforcement authorities to identify them.
- Reducing their costs by operating from home with mostly make to order operations.
- Simply following the shopping trends, which have steadily grown toward e-commerce.

Another remarkable indicator is the unparalleled success of the November 11 and December 12 giant retail sales in China. During the recent 11 November 2016 sale, one of China's largest online auction site company reported a USD 17.7 million worth of sales on that one day. This phenomenon triggered a spectacular increase in the volume of private postal courier and represents a huge challenge for enforcement authorities, brand owners and reputable private courier companies to monitor and detect parcels containing counterfeit products.

Chinese officials stated in November 2015 that roughly 40% of all the goods sold online on Chinese websites were counterfeit goods.¹⁴ The fight against the sale of counterfeit goods online has undoubtedly reached an unprecedented scale and needs to be made a key priority.

Hong Kong has no or marginal manufacturing capabilities for counterfeit goods and is essentially a consumption market. The fast-paced development of both e-commerce and postal courier in both Hong Kong and China has made counterfeit products largely and easily available to Hong Kong consumers, while representing an incredibly hard challenge for enforcement authorities and brand owners to monitor and enforce. Recent trends show that online shoppers of counterfeit goods are mostly looking for trendy articles such as clothing and accessories of luxury, fashion, sport and tech brands, which are of direct concern to a large number of European brands.

Consumers' safety, Hong Kong's reputation as a prime shopping location, long term impacts on the environment as well as the business interests of legitimate brands owners are amongst some of the most critical elements at stake.

In view of that, the IPRBC has organised various events in raising awareness of IPR in Hong Kong in the past year. A breakfast seminar on IPR Protection on the Internet was held on 21st June, 2016 in partnership with the C&ED. Three main topics of discussion focusing on preventative measures, enforcement and raising industry standards were discussed. Representatives from various Hong Kong authorities, major auction sites and brand owners shared their practices in combating counterfeit trade in Hong Kong.

2.1. Remarkable Initiatives by C&ED

C&ED has taken the full extent of this critical issue and articulated its online enforcement strategy around the following pillars:

1. The creation of the Electronic Crime Investigation Centre (ECIC) in late 2012, which aims at dealing with online IPR infringements.¹⁵ The ECIC notably formulated new methodologies on cyber investigation and evidence collection. In addition, it also offers in house trainings on computer forensic and online investigation.
2. The creation of a division of about 50 staff dedicated to enforcement of online intellectual property crimes (due to an internal reorganization) in early 2014.
3. The launch of SocNet, a webcrawler, developed jointly with the University of Hong Kong and destined to track and trace the trading of counterfeit goods on the Internet in July 2015.¹⁶ This increased C&ED's monitoring capacity to about 4,000 social media accounts a day, compared to about 200 previously.
4. The regular organization of tailored awareness campaigns and communication events destined to raise awareness and share best practices amongst both the general public and the private sector (i.e. about 60 trainings and events organized in 2014-2015 covering various online IPR enforcement related topics).

2.2. The Continued Problem with Auctions Sites

There are a number of well-known online auction sites, which operate in Hong Kong and are popular amongst the general public. It should be kept in mind that while purchasing counterfeit goods online in Hong Kong is not an offence, importing/exporting or re-selling of such counterfeit goods are.

For instance, one of the more popular online Customer to Customer (C2C) marketplace from China launched its Hong Kong official website in 2013. According to Alexa, this same marketplace is today the 6th most visited website in Hong Kong¹⁷ and 1 out of 4 Internet users in Hong Kong has an account on this online marketplace. According to this marketplace's statistics, the transactions in Hong Kong have grown 50% year on year.

However, as auctions sites have become more popular, the counterfeit problem on these sites has also grown. While some auction sites are more willing to cooperate with other stakeholders, especially brand holders, in taking down counterfeit goods on the website, other sites showed more reluctance in doing so.

In May 2016, the International Anti-Counterfeiting Coalition (IACC) suspended one of its new memberships just weeks after a new member, a prominent online auction site company from China, joined the group.

The founder and executive chairman of this Chinese company, made a comment regarding counterfeit goods sold on his auction sites in June 2016 which stirred up controversies regarding the problem of efforts in protecting intellectual property rights made by large-scale auction sites. His comment that counterfeit products having better quality and price than the original goods stirred up criticism internationally¹⁸, although he later defended his previous statement and proclaimed that counterfeit goods have no place on its auction site.

This same auction site, has just signed the new European Union Memorandum of Understanding (MoU) on the 21st June, 2016¹⁹. The renewed memorandum serves to establish a code of practice in the fight against the sale of counterfeit goods over the Internet and to enhance collaboration between the signatories. The MoU established a cooperation between rights owners and internet platforms in the European Union in dealing with the trading of counterfeit goods online.

Another popular auction site has been cooperating strongly with law enforcement all over the world, including the EU, Interpol and national law enforcement bodies, which suggest that there is room for cooperation between the auction sites and the authorities. The company has signed the EU MoU in 2011²⁰ and has been actively working on developing an efficient system in dealing with counterfeit goods on the site. A lot of resources have been invested in support of big fish targeting on the site, such as the creation the Law Enforcement eRequest System, an online webform for enforcement agencies to request data, inclusive of uploading their supporting documents such as a court order.

However, even though the general volume of take downs on online auction sites initiated by brand owners has increased steadily over the years, visibility and availability remain high. The burden remains essentially on brand owners to monitor, detect and report auctions of counterfeit of their products to these platforms for them to take them down, often having to adapt and cope with cumbersome, and sometimes questionable, policies and rules imposed by the platforms. This is proving time consuming, expensive and ineffective in the long run, since this merely addresses a visibility issue while serious infringers are not deterred from coming back, very often on the same platform and under the same name.

2.3. The Fast-Growing Role of Social Media

In addition to auction sites, social media and apps have rapidly become a prominent front in the struggle against counterfeiters.

Social networks have become the preferred method for counterfeit trading, accounting for 65% of online cases handled by the C&ED during the first half of 2015.²¹ By contrast, during the first half of 2014, 79% of online cases were conducted through auction sites.²²

Popular social media services are used as virtual showrooms, without any means of payment, to lure potential customers in visiting standalone websites or private accounts on auction sites, where counterfeit products are ultimately sold.

The new challenge of social media represents the move of transactions away from traditional websites to being a haven for counterfeiters under the freedom and anonymity, in order to impersonate fan pages on social media. 'Likes' and 're-tweets' on these networking platforms spread very quickly, making it more difficult to track sources and control impact. Different social media have very different modes and a wide range of operations, which result in some social media being more difficult to monitor than others.

One of the more popular social media services alone has over 1.65 billion monthly users globally, while other social media services have 1 billion and 500 million monthly users respectively.²³ It is natural that law enforcement on social media has to rely on systems instead of human beings in detecting the illegal activities on the site. In 2015, the C&ED and the University of Hong Kong jointly developed a programme targeting on the counterfeit activities on social media. The "SocNet System" is designed to detect and manage crime migration in different internet networks, including various social media platforms. It is capable of handling a huge amount of message thread simultaneously and maximizing the speed of webpage screening and analysis. The system creates a database that extends enforcement scope without extending manpower and improves customs efficiency by 90% in handling online counterfeit cases²⁴.

In November 2015, the European Union's Law Enforcement Agency (EUROPOL) conducted the Operation In-Our-Sites (IOS) VI which successfully tracked down and abolished websites and social media accounts selling counterfeit goods.²⁵ This is first joint cooperation between law enforcement agencies in different European countries as well as Asian countries, including Hong Kong, in dealing with online IPR crimes related to websites and social media. The EUROPOL acknowledged the importance of cooperation between the private industry and the authorities, which is a key to the success in monitoring and reporting IP-infringing websites via the organization.

2.4. The Paradox of Hong Kong as a Haven for Rogue Websites

Counterfeiters are aware that the Internet has no borders and have been smartly exploiting discrepancies between the different countries' legislations, as well as weak international cooperation.

A growing number of websites advertising and selling counterfeit goods are registered in Hong Kong, due to the favourable environment of convenient and anonymous website hosting. Instead of targeting Hong Kong customers, these websites reach out to customers in countries such as Japan, Korea or European countries in their respective local languages. It sometimes happens that the rogue website is blocked from local or regional access to prevent its detection from Hong Kong authorities, while its intended markets are far away.

Although not directly impacting Hong Kong's consumer market, online counterfeiters seriously tarnish Hong Kong's reputation for providing a safe and enjoyable business and shopping environment, by exploiting its reputation of being one of the most free economy to cover and facilitate their illegal activities.

The Hong Kong Internet Registration Corporation Limited (HKIRC) has been trying to track down these rogue websites and combat the malicious use of the .hk domain name²⁶. The HKIRC oversees the administration and assignment of the country code top level Internet domain names ending with .hk and its Chinese equivalent. The HKIRC manages around 440,000 domain names, with 31 registrars all of the the world providing .hk domain name registrations.

A domain allocation policy with a pre-launch priority registration (PLR) has been established, giving trademark holders a priority to secure a domain name that it has registered the trademark with. The HKIRC also helps settle dispute resolution for domains registered through the corporation. Trademark holders can file a complaint towards a registrant whose domain name is identical or confusingly similar to the trademark holder's registered products or services. Under the efforts of the HKIRC, number of phishing cases using .hk in 2014 dropped by 99% compared with 2009.

An Early Detect Service named ".hk WATCH" has also been introduced. Once trademark holders subscribe to the .hk WATCH service, they will be notified instantly if someone else registers a domain with identical or similar to the registered trademark, with the detailed information of the domain registration to facilitate a complaint to be launched by the trademark holders.

2.5. The Lack of Deterrence of Penalties Imposed

The current lack of a deterrent penalty imposed on online infringers encourages more infringers to move their operations online, or for the same infringers to repeat the same. In order to effectively deter online infringers and ultimately decrease the trade of counterfeit goods online, appropriate responses must be brought from both a criminal and civil enforcement standpoint by mainly focusing on repeat offenders and large scale sellers (i.e. large volume of auctions, or registrant of several rogue websites, etc.). A good start would be to increase cross-jurisdictional cooperation.

2.6. The Increasing Trend of Youngsters Selling Counterfeit Products Through Online Platforms

Statistics have also shown an increase in Hong Kong students engaging in counterfeit selling activities in 2015 compared to 2014²⁷. There are altogether 82 cases of secondary or university students allegedly selling counterfeit items online, which is twice the number of 2014. Of the 82 cases, more than half of the arrested students aged under 18 accounted for nearly 40% of all the arrests related to counterfeit infringement made by C&ED in the year.

The situation continued to worsen in 2016. In the first six-months of the year, 29 secondary students have been arrested for selling counterfeit products on the internet which is a threefold rise compared to 2015²⁸. In the first two quarters of 2016, the C&ED have already arrested 112 people in the 99 cases taken, which includes secondary and university students and seized \$1.2million worth of counterfeit products.

According to the C&ED, local youngsters and students have become a common type of individual online counterfeiting seller which usually operates on a relatively small scale. These sellers operate mainly on social media, posting advertisements on different platforms. "To purchase on someone's behalf" is also a common form of operation for these types of seller. Origins of these counterfeit products usually go back to Mainland online retail platforms. The C&ED believe that the sharp increase in cases involving young people can be attributed to the lack of awareness about one's legal responsibilities as well as the misconception that the authorities would not be able to track their crimes online.

2.7. Recommendations

- Promoting a deterrent enforcement arsenal against online infringers, especially focusing on repeat infringers, infringers operating at a commercial scale, as well as a comprehensive set of tools destined to compel blatantly uncooperative stakeholders (i.e. Internet Service Providers, auction sites, social media, postal courier companies, etc.) to actively and effectively support anti-counterfeiting efforts.

- Targeting IPR awareness campaigns towards youngsters on the Internet or other mediums such as social media to raise awareness of the risks involved in dealing with counterfeit products. Suggest automatically replacing each infringing auction, website and social media post taken down with a Government notice clearly warning consumers about the legal, societal, environmental and health risks linked to buying and/or selling counterfeit products on the Internet.
- Intensifying international Cross-Jurisdictional cooperation to effectively and timely identify and enforce online IPR infringement, which often occurs in several jurisdictions.

3

IPR Protection at the Borders

Hong Kong was ranked as the second largest provider of counterfeit goods in numerical terms to the European Union from 2011-2013 after China and was named the top of the list among the top provenance economies of counterfeit goods entering the EU in terms of GTRIC-e average. However, in terms of “production probabilities” for provenance economies to the EU with GTRIC-e, Hong Kong ranked behind China and other European and Asian countries. This shows that Hong Kong does not have the ability to produce the large amount of counterfeit goods that are shipped to the EU, and mainly only acts as a transit point in international counterfeit trade routes.

Border protection therefore remains as a key focus for the C&ED who handles customs duties relate to goods importing into, exporting out of or transshipping through Hong Kong at ports, airports and land crossing. While Hong Kong ranks no. 1 as the world’s busiest airports by cargo traffic²⁹ and no. 5 as the largest container ports³⁰, the C&ED plays a crucial role in enforcing IPR at Hong Kong borders.

3.1. EU – Hong Kong Customs Cooperation

Hong Kong and the EU have been working closely regarding border control. The Agreement on Cooperation and Mutual Administrative Assistance in Customs Matters (CCMAA) between Hong Kong and EU was entered into force on 1 June 1999³¹ to provide a legal framework to promote supply-chain security and trade facilitation, fight against fraud and improve cooperation on the protection of IPR.

On 27 April 2015, C&ED and the EU signed an Action Plan to improve the targeting of shipments to dismantle illegal IPR infringing activities, and to promote active involvement of Customs authorities. The plan includes sharing of general and case specific information for

joint analysis on risks and trends. In 2016, the Pilot Project under the Action Plan has been extended to cover more major airports and more countries. Both parties will endeavour to further widen its coverage in relation to the scope and geographical locations.

3.2. Assessing the Problem with Transhipments

Although the C&ED is not empowered to seized goods in transit by vessel or aircraft under the Trade Descriptions Ordinance (TDO) in Hong Kong, international cooperation has proven to be a success in tackling the counterfeits in transit overseas. An action plan was put in place between EU and the C&ED, which facilitated the exchange of information on IPR cases and the conduction of joint analysis on general risks and trends with the EU member states. The Pilot Project under the Action Plan had been reviewed and refined by both sides in July 2016³².

Hong Kong remains to be a major intermediary transit point of counterfeit importing into EU in 2015³³. Due to its excellent location as a transshipment hub, Hong Kong is expected to focus on the control of transshipment and to promote supply-chain security. Due to this reason and in order to further enrich the facilitation services provided under the Economic Cooperation Framework Agreement (ECFA), the C&ED has launched the Free Trade Agreement Transshipment Facilitation Scheme (FTA Scheme) on 20 December 2015. This voluntary scheme provides traders with customs supervision service and issues Certificate of Non-manipulation to certify transshipment cargo that have not been undergone any further processing during their stay in Hong Kong.

Having said that, the C&ED will maintain the normal clearance procedure including the IPR inspection on shipments going through the scheme to ensure that the scheme will not be manipulated as a safety net by IPR infringers.

Last year, IPRBC reported on the importance of transshipment in the counterfeit trading situation in Hong Kong and suggested the C&ED to join forces with the EU authority in dealing with illegal transshipment in order to achieve visible results. In fact, throughout the years, the C&ED has exchanged timely intelligence with overseas counterparts, which facilitates the tackling of smuggling activities of infringing goods through mutual cooperation. For instance, in 2015 and 2016 (up to the end of November), seizure data of over 2,400 suspected IPR-related consignments was referred to the EU for further investigation while the C&ED received 20 referrals in total from the EU in return. The IPRBC will organize a roundtable conference between the C&ED and representatives from the European Chamber of Commerce and EU authority on the topic of transshipment.

3.2.1. New EU Regulation on “Goods in Transit”

The new EU Trade Mark reform legislative package consists of the new regulation (EU) 2015/2424³⁴ entered into force on 23 March 2016 and the Trade Mark Directive published in December 2015. The Office for Harmonization in the Internal Market (OHIM) has been changed into the European Union Intellectual Property Office (EUIPO). The amendment brought about changes in three areas: trade mark fees, technical changes and institutional changes for EUIPO.

The new regulation aims to strike a balance between fighting counterfeiting and the need to protect free trade. Under the new regulation and directive, the proprietor of an EU registered trademark now has the right to prevent third parties from bringing goods, without authorization, with trademark identical or essentially identical with the EU trademark in respect of similar goods into the EU, even without being released for free circulation. Such goods would be, at the request of the trademark proprietor, detained by Customs officials broadly in all customs situations, even they are in transit, transshipment, warehousing, free zones, temporary storage, inward processing or temporary admission. The amended directive prevents the EU from becoming a point of transit for international counterfeit trade routes. However, to strike a balance between IPR protection and the free flow of trade in legitimate goods, the EU trademark proprietor has to prove before court and obtain a substantive decision that his/her EU trademark has been infringed. Otherwise, the proprietor is not entitled to prohibit the placing of the goods on the market in the country of final destination.

As mentioned above, the TDO in Hong Kong prohibits the import and export of goods to which a false description or forged mark is applied but it does not cover “goods in transit”. Therefore, Hong Kong law is less comprehensive than the EU regulation. Brand owners may need to resort to civil action against counterfeiting goods in transit. However, for transshipment counterfeit cargo, this will likely be caught and within the enforcement powers conferred on the C&ED under the TDO. Transshipment cargo refers to any “imported article” that is consigned from a place outside Hong Kong to another place outside Hong Kong and is or is to be removed from the vessel, aircraft or vehicle in which it was imported and either returned to the same vessel, aircraft or vehicle or transferred to another vessel, aircraft or vehicle before being exported.³⁵ Having said that, whether goods in transit fall into the scope of importation is arguable, thus there is a need to clarify the same by amending the law and enriching the power for the C&ED to take enforcement action against goods in transit. Pending the amendments on law, the C&ED is coordinating with the EU through the SSTL, which enhances security of the supply chain and facilitates trade. The C&ED will identify potential participants who have exports to the EU by air or sea and inform the EU Member States of suspected consignments through the intelligence exchange system. The Customs Authorities of the EU member States can detain the consignments at the border.

3.3. Small Express Courier of Counterfeits Remains Continuous Challenge for Brand Owners

Trading of counterfeit via postal courier of small parcels remains a huge challenge for brand owners and most private courier companies.

To tackle this problem, the C&ED has made much effort to cooperate with the private express couriers and has signed Memorandums of Understanding (MoUs) with some of the larger private express couriers in 2015. Besides, the C&ED also enhanced its close cooperation with the Mainland and international enforcement authorities on intelligence exchange (details in section 2.4). It is noted that postal and courier traffic still accounted for 77% of all detentions by EU customs and Hong Kong is the second large country/region of provenance in terms of number of cases and seizure quantity³⁶. The battle to fight against trade of counterfeits via postal courier is hard, especially since not all private express couriers have signed the MoUs and enormous manpower is needed to inspect the mass volume of parcels going through Hong Kong every day.

EU has introduced the so-called “simplified procedure for the destruction of small consignments” by Regulation 608/2013 taking effect in January 2014. Under the new regulation, the IPR holder has to either submit a national application requesting the customs authorities of an EU Member State to take action in that Member State or a single EU application, designating one or more Member States. In the application, certain information has to be provided to the customs authority, including specific and technical data on the authentic goods, such as images and information relevant to the customs authorities’ analysis and assessment of the risk of infringement of the relevant IPR. The IPR holder can then opt in for the procedure to destroy the counterfeit goods in small consignment by customs. A small consignment is defined as one containing three units or less or having a gross weight of less than 2kg, generally under the form of parcels arriving by post or courier³⁷. Customs is then able to destroy the small consignment if the importer consents or if the importer does not respond within ten working days. The new procedure does not require the IPR holder to be involved once the application has been made and opt-in is chosen. In the event the importer does not respond, customs officials can take the silence as implied consent.

If the importer objects, customs will inform the IPR holder, that can then seek a determination from the court that the goods infringe its rights and should be seized and destroyed³⁸. This simplified procedure effectively reduces the workload of the customs as once the IPR holder has opted in, the customs does not need to notify the IPR holder for verifying the intercepted goods in small consignment and can make a decision to destroy the goods in the absence of an objection from the importer. The IPR holder can also be released from the obligation to inspect the goods within a short time frame. The time saved in the simplified procedure allows the customs to do more inspection and seizure of counterfeits in small consignment which largely improves the efficiency of the seizure.

Currently, when the C&ED intercepts postal/courier parcels containing suspicious counterfeit goods, the C&ED will inform the IPR holder to conduct inspection before proceeding to destruction of the seized goods. The C&ED is invited to consider introducing a small consignment destruction procedure similar to the one in EU, which does not require the IPR holder to inspect the seized goods on a case by case basis, to improve the efficiency on tackling the increasing trend of trading counterfeits in small parcels.

3.4. Further Cooperation with International Enforcement Authorities on Intelligence Exchange

The C&ED has made substantial efforts to combat cross-border IPR anti-counterfeiting activities and has been working closely with Mainland Customs and overseas Customs offices through intelligence exchange and/or joint enforcement actions.

With the launch of a new co-operation mode by focusing on key districts, key areas and key merchandise in 2016, the Customs administrations have achieved prolific results. Between January and November 2016, through intelligence exchange and risk indicator analysis, the Customs administrations conducted a series of joint operations to accelerate inspections on express parcels and transshipment cargoes, effectively fighting against IPR infringing crimes going through the borders.

In only 8 months' time, the C&ED seized over 194,000 suspected counterfeit goods from express parcels and transshipment cargoes destined for the United States, Africa, Europe and Latin America with a total seizure value of about HKD26 million. Amongst them were some 3,000 suspected counterfeit sportswear and footwear items seized during the period of the UEFA Euro 2016.

Meanwhile, to enhance the effectiveness of fighting cross-border IPR infringing activities, the C&ED and the US and European law enforcement agencies conducted timely exchange of intelligence and close monitoring of suspicious shipments of IPR infringing goods for interception³⁹.

3.5. Recommendations

- Expand current legislation to reflect similar provisions as the new EU Trade Mark package to allow detainment and seizure of infringing goods in transit in Hong Kong.
- Consider introducing a small consignment destruction procedure similar to one in EU to improve the efficiency on tackling the increasing trend of trading counterfeits in small parcels.
- Strengthen the international cooperation, especially on the EU- and US- relations, in order to fight the cross-border IPR Infringing activities and tackle the continuous transshipment problem.

4

IPR Protection on Inland

As far as IPR protection in Hong Kong is concerned, due to the recent development, copyright piracy activities are largely taking place on the Internet. The crime of counterfeit goods in physical shops has largely decreased. Only sporadic, small-scale sales are observed in the physical market. C&ED is fully aware of the overwhelming impact Internet has on all aspects of lives and business, and has rearranged a wide array of C&ED functions accordingly, as explained earlier in the document.

Despite the great efforts of C&ED, the problem of IPR infringement on inland Hong Kong still exists due to the new forms of infringement. These are phenomena such as IPR infringement at Hong Kong trade fairs, growing presence of imitation products and the rise in the number of secret showrooms. As a result, the Hong Kong Government, Hong Kong retailers as well as European brand owners suffer from losses and extra costs, when products are not bought via authorised stores and sellers. To battle all of this, better cooperation is needed between different parties - from brand owners to C&ED. New measurements, penalties and procedures need to be put in place both in Hong Kong and the European Economic Area.

The IPD provides high-quality and responsive patent, trademark and designs registration services to the public in Hong Kong. This helps promote the sale of genuine goods in Hong Kong. To help these enterprises to grasp fully the intellectual property regimes in Guangdong Province, Hong Kong and Macao, a number of government departments from the three places, including, Guangdong Intellectual Property Office, Guangdong Provincial Administration for Industry and Commerce, Administration of Press and Publication (Copyright Bureau) of Guangdong Province, IPD and Intellectual Property Department of the Macao Economic Services have jointly developed the "Intellectual Property Database for Guangdong Province, Hong Kong and Macao".⁴⁰ This Database enables the Pearl River Delta's (PRD) existing and potential investors to search in a one-stop-shop manner for information on intellectual property systems throughout the region.

4.1. Mutual Cooperation

In 2014, C&ED detected 1076 cases involving counterfeit goods or goods bearing false trade description with 752 persons arrested and 93 million HKD goods seized. Compared with 2013, C&ED detected 752 cases involving counterfeit goods with 663 persons arrested and 146 million HKD goods seized. These figures reflect a progress in C&ED enforcement measures, instead of a real sign of counterfeiting activities increasing. C&ED also actively cooperates with Organized and Serious Crime Ordinance (OSCO) to crack down on organized

counterfeiting activities. Since 2004, 11 IPR cases (8 copyright cases and 3 counterfeit cases) were detected leading to 130 million HKD worth of goods seized.⁴¹

As in December 2015, there are 121 actionable European trademarks and 52 unactionable European brands (i.e. have not completed recordation clearance) in Hong Kong.⁴² The C&ED has endeavoured to contact respective trademark owners for recordation clearance but some of them did not provide any feedback. In order to enable enforcement actions to be taken on suspected infringing activities on those non-actionable trademarks, the Hong Kong Customs has sought assistance from respective Consulate General in Hong Kong and the EU in soliciting the cooperation of the right holders since May 2015, and is pending the feedback from the relevant right holders.

Normally, recordation clearance with the C&ED takes roughly one to three months, provided that IPR holders are able to provide the recordation documents required and appoint competent examiners timely. If the trademark owner does not complete the recordation clearance, the C&ED is unable to take any action against the infringing activities found on their brands. When there is no feedback from the IPR holders, C&ED will try to seek assistance from the respective General Consulate in Hong Kong in a bid to liaise the trademark owners in their own countries. This has resulted in the outreach program with some of the consulates.

4.2. Monitoring of Trade Fairs

Every year, a great variety of international trade fairs are organized in Hong Kong, ranging from printing and packaging fairs, optical fairs, to jewellery fairs. These fairs attract a high volume of buyers and visitors from all over the world. However, European brands have repeatedly found infringing products displayed in these international fairs, which damages Hong Kong's role as an international trade hub. European brands have tried to work with the organizers of the trade fairs to issue administrative actions against the infringers but the situation has not improved. European brands believe that appropriate criminal actions would be able to effectively deter exhibitors from dealing in infringing products in the future. In June 2016, the C&ED successfully cracked down a booth selling counterfeit jewellery in a jewellery fair held at the Hong Kong Convention and Exhibition Centre.

C&ED launched a "Fast Action Scheme" with IPRPA in July 2006. Under the scheme, C&ED will take prompt enforcement action.⁴³ The scheme enables the Hong Kong Customs to take swift enforcement action in response to complaints against any infringement activity that takes place in local trade exhibitions and fairs. The scheme is activated in 84 major trade exhibitions and has so far resulted into 175 infringement cases detected and 208 persons arrested. However, the scheme requires heavy and lengthy bureaucracy from brand owners to register the infringement, sometimes even three months prior to the fair.

4.3. Secret Showrooms and Street Hawkers

Thanks to the persistent enforcement efforts of C&ED, visibility of counterfeit goods in Hong Kong on-street level has been reduced to a low level. However, a significant number of counterfeiters have moved from on-street shops to secret showrooms to deal in counterfeit products. The customers are usually invited from the street by the storeowner for closer inspection of the product and payment. The situation has been worsening and expanding from popular tourist locations in Western Kowloon to Eastern Kowloon and the New Territories.

In January 2016, the C&ED conducted a large-scale action against an organised counterfeiting syndicate concerning secret showrooms in Mong Kok. About 10,000 items of suspected counterfeit goods with a total value of about \$5 million, which is the largest among similar cases in the past three years, were seized in the operation "Torpedo". Six fixed hawker pitches, six storage areas and an upstairs showroom and three flats have been used to store and sell the products including watches, handbags, leather goods and sunglasses. Tablets computers have also been used to display the products to customers.

There is also an increasing trend of selling counterfeit goods in a mobile nature, either as itinerant hawkers or moving from one temporary on-street shop to another in order to lower the risk of being caught by C&ED or being identified by IPR owners. It is always difficult for European brands owners to identify the identities of these infringers for possible civil enforcement actions. European brands believe that prompt raid actions conducted by C&ED would be effective in addressing this phenomenon.

4.4. Recommendations

- C&ED is recommended to set up a booth in the key trade fairs to take complaints from IPR owners or the public, and to take prompt raid actions against the exhibitors dealing in infringing products on the spot.
- Removing the indemnification burden on brand owners, including the Hong Kong Trade Development Council (HKTDC) requires brand owners to indemnify the HKTDC when a complaint against an exhibitor of HKTDC for trademark infringement is made.
- Seeking action to remove the excessive evidential requirement for taking down the secret showrooms and street hawkers.
- The IPR industry should be encouraged to provide active support to C&ED, such as informing and educating C&ED officers to improve inspection skills in imitation trademarks, with special focus on helping SME's.

5

Co-operation & Awareness

5.1. Increasing Public Awareness and the Environmental Impacts

In the heart of brand protection is the consumer awareness. The better the consumers are informed about the dangers and spill over effects of buying counterfeit goods, the more likely they are to refuse to buy them or to search information about the genuineness of the product. If there is no demand for counterfeit products, the sellers will equally lack an incentive to proceed with the efforts to trade such products. In order to spread these practices as wide as possible, participation to these initiatives to as wide scale is possible. IPRBC also strongly encourages all the relevant parties from both public and private sector to participate in developing and executing such initiatives.

Producing and selling counterfeit goods is also used to fund other illegal operations with extremely high humane cost. These operations include human trafficking, drug trade and terrorism. According to the Europol the counterfeit business is a global operation and is organized by cross-border criminal networks. These networks have links with other forms of crime such as fraud, document forgery, tax evasion and trafficking in human beings (mainly for labour exploitation), as well as with organized criminal groups, such as mafia-type organizations. In return, the profits generated by counterfeiting are also used to fund other criminal activities. Many people buying counterfeit goods are not aware of the larger scale impact of their purchase. If this angle was emphasized more in the campaigns, it could help consumers to see the true cost of their seemingly discounted product.⁴⁴

The trade of counterfeit goods also has an impact to the environment and the society as a whole. According to the statistics by EU, in 2014, 27% of all cases of confiscated goods were destroyed under the new small consignment procedure.⁴⁵ In order to save natural resources and to truly promote sustainability, bigger proportion of materials from confiscated goods should be recycled.

The recent initiatives to raise public awareness by the IPD, the International Trademark Association and the IPRBC have been very valuable.⁴⁶ The IPD aims to raise public awareness through the promoting the awareness, respect, management of IP and encouraging creativity. These initiatives include:

- C&ED jointly with the IPD produced a TV and radio application programming interface (API) reminding youngsters not to engage in selling counterfeits on social networking platforms (2015) with "School Visit Programme".

- C&ED co-organizes IPR-related seminars with the industry and law enforcement agencies from time to time. These seminars helped strengthen the mutual cooperation and intelligence exchange of the law enforcement agencies and IPR industry in interdicting and investigating IPR crimes through concerted efforts.
- The IPD organized a cocktail reception for stakeholders in the IP industry and published newspaper supplements to celebrate the 2016 World Intellectual Property Day in April.
- IPD and the C&ED co-organized the “Respect Copyright” Campaign for primary, secondary and tertiary students with the Hong Kong Reprographic Rights Licensing Society. A kick-start ceremony was held in April 2016.
- In 2016, the IPD continued to host school visits and the Interactive Drama Programme, which targets primary and secondary students.
- The IPD also organizes public lectures to educate the public on the protection of intellectual property rights. Two public lectures have been held in 2015, one on “Recent Developments in European Trade Mark Law” and the other on Recent Trends in the UK Intellectual Property Enterprise Court.
- Pledge Schemes: The “I Pledge Campaign” targeted on the general public encouraged members to buy or use genuine goods only, including online behaviours. “No Fakes” Pledge Scheme is up for retailers to pledge to deal in only genuine goods which increases consumer confidence.

On a regional and international level, IPD actively collaborated with mainland authorities by setting up intellectual property office, organising the annual IP symposium and setting up an IP expert group to exchange ideas. Furthermore, the IPD cooperated with organisations such as APEC, WIPO, WTO and INTA in projects and campaigns related to IP.

The IPRBC itself has also done awareness initiatives - together and without the relevant Hong Kong authorities. For example, the council organized an IPR breakfast seminar together with C&ED on “IPR Protection on the Internet” which was held on 21st June, 2016 as part of the EUBIP programme. Another initiative by the council was an “IP rights and protection for European SMEs – Sharing Best Practices” held on the 17 October 2016 as part of the EUBIP programme co-organised together with the EU SME Helpdesk in Beijing.

5.2. International Collaboration and Increased Private Public Collaboration

The recent collaboration with neighbouring countries has also been very successful. However, since the trade of counterfeit goods is constantly evolving, the means to combat it also have to evolve. Given its strategic location and its strong rule of law, Hong Kong has the chance to be a leading market to tackle this crime that knows no borders. To develop the cooperation even further, the key is to increase collaboration with neighbouring countries as well as internationally and to notably increase the involvement of the private sector in the process.

An increase in collaboration between the public and private sector could be arranged through quarterly meetings involving brand owners and the public sector and be a forum to address general issues and trends, share best practices and discuss concrete cases.

5.3. Encourage Action Against Imitation Trade marks

Under the Trade Marks Description Ordinance (Cap. 362), it is an offence to falsely apply to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive. Therefore, the C&ED are empowered to take action to remove imitation products from the market as long as it meets the evidentiary requirement. However, due to the uncertainty regarding what constitutes “calculated to deceive”, there have not been many enforcement cases in this area. Perhaps more co-operation between brand owners and the C&ED will help increase enforcement against such imitation trade marks.

Although not directly impacting Hong Kong’s consumer market, these illegal activities seriously tarnish Hong Kong’s remarkable reputation for providing a safe business and shopping environment. Consumer safety, Hong Kong’s reputation as a prime shopping location and legitimate brands owner’s images are amongst the few critical elements at stake. Since transportation connections are getting better and better, the actual distance to a certain shopping location becomes less and less significant to a visiting tourist, whereas the ability to trust every aspect of the destination becomes more important.

5.4. Recommendations

- The IPRBC encourages the European Commission to develop new initiatives in collaboration with the C&ED to increase cross-jurisdictional cooperation and information sharing on an international level. The Action Plan concerning EU-China customs cooperation on IPR 2014 – 2017, which was signed in the 7th JCCC meeting by Commissioner Šemeta and Minister Yu, building on and further developing the previous version of the Action Plan adopted in 2009 should be used as an inspiration of a mutual closer framework on the protection of the intellectual property rights.
- Increase cooperation between public and private stakeholders to address general issues and trends, share best practices and discuss concrete cases.
- Designing a novel and ambitious public awareness strategy, frankly addressing counterfeiting impact (i.e. funding of terrorist and criminal organizations, catastrophic consequences on sustainability and social responsibility) and focusing more on mainstream communication channels (i.e. social media).

Abbreviations

AEOP	Authorized Economic Operator Programmes
API	Application Programming Interface
C&ED	Customs and Excise Department
C2C	Customer to Customer
CCMAA	Agreement on Cooperation and Mutual Administrative Assistance in Customs Matters
China	People's Republic of China
Courts	Criminal and Civil Courts
DOJ	Department of Justice
ECC	European Chamber of Commerce in Hong Kong
ECIC	Electronic Crime Investigation Centre
EU	European Union
EUBIP	European Union Business Information Programme
EUIPO	European Union Intellectual Property Office
HKTDC	Hong Kong Trade Development Council
Hong Kong	Hong Kong Special Administrative Region
IP	Intellectual Property
IPD	Intellectual Property Department
IPR	Intellectual Property Rights
IPRBC	ECC Intellectual Property Rights Business Council (IPRBC)
IPRPA	Intellectual Property Rights Protection Alliance
JCCC	Joint Customs Cooperation Committee
Macao	Macao Special Administrative Region
MoU	Memorandums of Understanding
OHIM	Office for Harmonization in the Internal Market
OSCO	Organized and Serious Crime Ordinance
PRD	Pearl River Delta
SAIC	Chinese State Authority for Industry
SME	Small and medium-sized enterprise
TDO	Trade Descriptions Ordinance of Hong Kong
TEU	Twenty-foot Equivalent Unit
US	United States
USTR	United States Trade Representative office
WCO	World Customs Organization
YAS	Youth Ambassadors against Internet Piracy Scheme
YUG	Youth uniformed group

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