

Countermeasures to Counterfeiting Problems

[Additional Textbook]

**- What Measures to be Taken Against
Counterfeit Goods -**

Japan Patent Office
Asia-Pacific Industrial Property Center, JIII

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Chapter 1. When any counterfeit goods are found;

1. What measures shall be taken when any counterfeit goods are found?

In general, the remedial measures against any articles infringing intellectual property rights such as counterfeit goods and pirated editions are as follows:

- (A) Remedial System by Administrative Organ (Administrative Route) and
- (B) Remedial System by Judicial Organ (Judicial Route)

For any cases of bigger scales (large amounts of damages), the remedial system for seeking criminal punishments (Criminal Route) is available.

And the Customs Protective System for Intellectual Property Rights as the protection by the Customs (Shoreline Measures) is also available to block the export of counterfeit goods overseas at the Customs (also available to block the import). This paper explains the system in China as an example where more protective organs (regulating administrative organs) have been established than in any other countries and then explains characteristics of the systems in other Asian countries.

It is pointed out by persons concerned that the reason why damages due to counterfeit goods and pirated editions still persist in recent years is that regulating organs are not operated appropriately in addition to many such cases in the remarkably developing Asian economy.

2. Characteristics of Administrative Route and Judicial Route

The following items can be listed as the characteristics of the administrative route:

- a. The procedure is simple (Simplicity)
- b. The speedy resolution can be expected. (Speed)
- c. The expense is little (Inexpensiveness), etc.

However, the compensations for damages cannot be claimed at the administrative organs in some cases.

The following items can be listed as the characteristics of the judicial route:

- a. The compensations for damages can be claimed with judgments.
- b. The compulsory executions of stoppages and seizures under judgments are possible and

enforceable nationwide.

- c. The stoppages and provisional dispositions before filing suits are available.
- d. The preservation of evidences is possible, etc.

However, there are such demerits as complicated procedures, expensiveness and taking a lot of time for dispositions.

3. Administrative Route

The administrative organs for seeking remedies differ among types of intellectual property rights.

And for the protection of intellectual property rights at the exhibitions where counterfeit goods are exhibited in many cases, the Law on Protection of Intellectual Property Rights at Exhibitions was promulgated in January, 2006 and put into effect on March 1, 2006 in China.

The cooperation among two or more administrative organs is also important to eradicate counterfeit goods, and the Chinese government asks each administrative organ to make full use of its job responsibility and exchange information mutually so that the effective activities for exposure become possible.

1) Regulating Administrative Organs (Examples in China)

(1) Infringement of Trademark Right

A claim for remedy (claim for disposition) shall be filed to the administration department for industry and commerce of a local people's government of a prefecture or higher ranking body.

(2) Infringement of Patent Right (Patent of Invention, Utility Model and Design)

A claim for remedy (claim for disposition) shall be filed to the administrative department for patent service (administrative department for proprietary right service) of a local people's government of a province, autonomous region or directly controlled municipality. For example, they are the Guangdong Intellectual Property Administration and the Beijing Intellectual Property Administration.

(3) Infringement of Copyright

A claim for remedy (claim for disposition) shall be filed to the administrative department for copyright (Copyright Administration) of a local people's government of a province, autonomous region or directly controlled municipality. For example, they are the Hebei Copyright Bureau and the Shanghai Copyright Bureau.

(4) Act of Unfair Competition

A claim for remedy shall be filed to the administrative department for industry and commerce of a local people's government of a prefecture or higher ranking body.

In addition to a local people's government of a prefecture, province, autonomous region or directly controlled municipality, it can be filed to the Administration for Industry and Commerce of a local people's government of a "prefecture", an administrative district under a province.

(5) Infringement of Right to Integrated Circuit Layout Design

A claim for remedy (claim for disposition) shall be filed to the State Intellectual Property Office responsible for an administrative department for intellectual property rights in the State Council.

(6) Infringement of Right to New Breed of Plant

A claim for remedy shall be filed to an administrative department for agriculture and forestry of a local people's government of a province or higher ranking body.

(7) Violation of the Product Quality Law

A claim for remedy shall be filed to a supervising department for product quality of a local people's government of a prefecture or higher ranking body.

2) Actual Regulations

The Administration for Industry and Commerce (AIC) is responsible for the actual regulations against counterfeit goods in distribution and sales markets as infringements of

trademark rights, and the Copyright Bureau is responsible for those of pirated editions as infringements of copyrights.

The Bureau of Quality and Technical Supervision (TSB) supervising the quality of products is in charge of any violation of the Product Quality Law at production sites of factories etc. The Public Security Bureau (PSB) is also responsible for exposures of more vicious counterfeit goods and those involving large amounts of money.

4. Judicial Route

The judicial route is to file a civil suit based on the civil right of claim for an injunction against an infringement or for a compensation for damages. The suit shall be filed to a competent court (people's court), and a claim for preliminary disposition is also admitted. In addition, criminal suits may be filed against certain infringements (infringements of trademark rights).

1) Structure of People's Courts

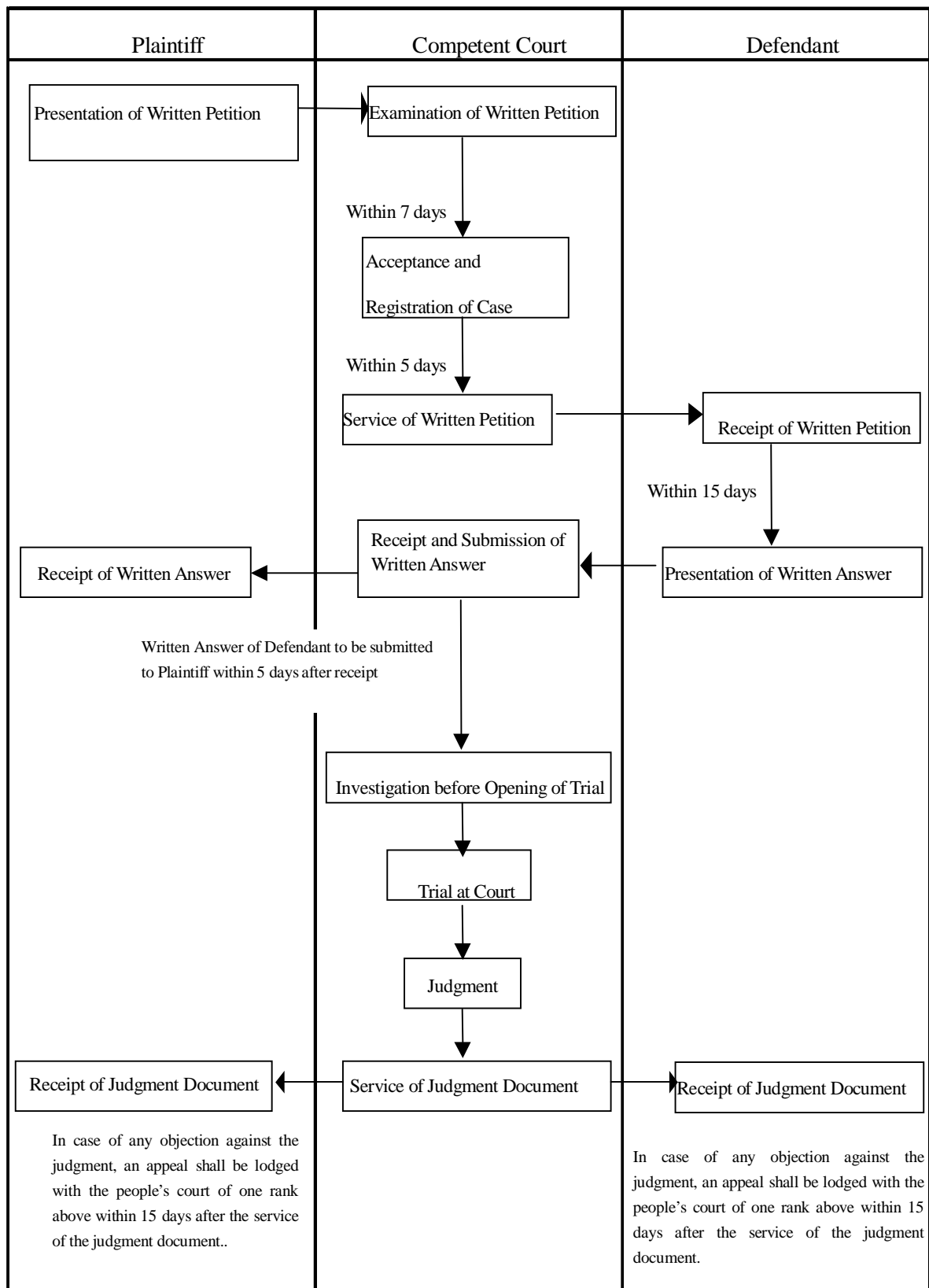
Against infringements of intellectual property rights such as trademark rights and patent rights, owners of such rights may be awarded remedies by filing suits to judicial organs. The Chinese judicial organs are called people's courts and consist of the Higher People's Courts (one each in provinces, autonomous regions and directly controlled municipalities), the Intermediate People's Courts (in provinces, autonomous regions, directly controlled municipalities, municipalities under direct controls of provinces or autonomous regions and autonomous provinces) and the Basic People's Courts (one each in prefectures, municipalities, autonomous prefectures and wards under direct controls of municipalities) as people's courts of each rank of local bodies under the Supreme Court as the supreme judicial organ.

In addition, there are the Military People's Court, the Maritime People's Court, etc. as special people's courts.

2) Flow of Civil Proceedings

The Chinese judicial system is the two-instance system. Therefore, the decision of the superior court of the court of the first instance, that is, the court of appeal (the Intermediate

People's Court or Higher People's Court when the Basic People's Court is the court of the first instance) or that of the Supreme Court is final.



Prepared by referring to Volume on China of Manual of Countermeasures against Counterfeit goods of JETRO.

5. Protection at Customs (Shoreline Measures)

In case any articles infringing intellectual property rights are imported, the shoreline measures can be taken by making use of the Customs.

1) Protected Rights

The rights to be protected are trademark rights, copyrights and patent rights (including those to utility models and designs).

2) Basic Procedures at Customs

In order for any owner of an intellectual property right to obtain the protection for such right by the Customs, he or she shall first go through the procedure for a notification at the Customs as a precondition and register his or her own intellectual property right.

(1) Notification to China Customs

An owner of an intellectual property right or his or her attorney (in case the owner does not have any sales office or place of business in China) shall notify the China Customs of his or her intellectual property right.

The documents required for such notification are as follows:

- Application Form (obtainable from Website of China Customs)
- Identification Card of Applicant
- Documentary Evidence for Existence of Intellectual Property Right (Copy of Trademark Registration Certificate, Copy of Patent Certificate and Document, Evidence, etc. proving Copyright)
- Photo or Sample of Article covered by Intellectual Property Right, Information on Lawful Importer (Licensee), Information on Company suspected of Infringement of Right, etc.
- Power of Attorney and Identification Card of Attorney for Registration

(2) Examination of Notification by Customs

The China Customs is to give notice to the applicant on the result of its examination

of the notification within 30 days after the date of receipt of the application documents for notification. When the China Customs approves the notification, it will issue the Certificate for Notification for Customs Protection of Intellectual Property Right, and, if not, it will give written notice to the applicant together with the explanation of the reason for disapproval.

(3) Effective Term of Notification

The effective term of the notification is 10 years from the date of issuance of the Certificate for Notification for Customs Protection of Intellectual Property Right.

(4) Claim to Customs for initiating Shoreline Measures

When the owner of the right or his or her attorney claims the initiation of the protective measures against any articles suspected of infringing the intellectual property right, he or she is required to submit necessary documents etc. to the Customs of the place of importation.

3) Protective Measures at Customs

(1) Seizure

The seizure of the articles suspected of infringement may be made under the application by the owner of the right or under the authority of the Customs. In case the Customs has made the seizure under its authority, it will serve the consignee with the Customs Certificate of Seizure and give written notice to the owner of the right to that effect.

(2) Objection by Consignee

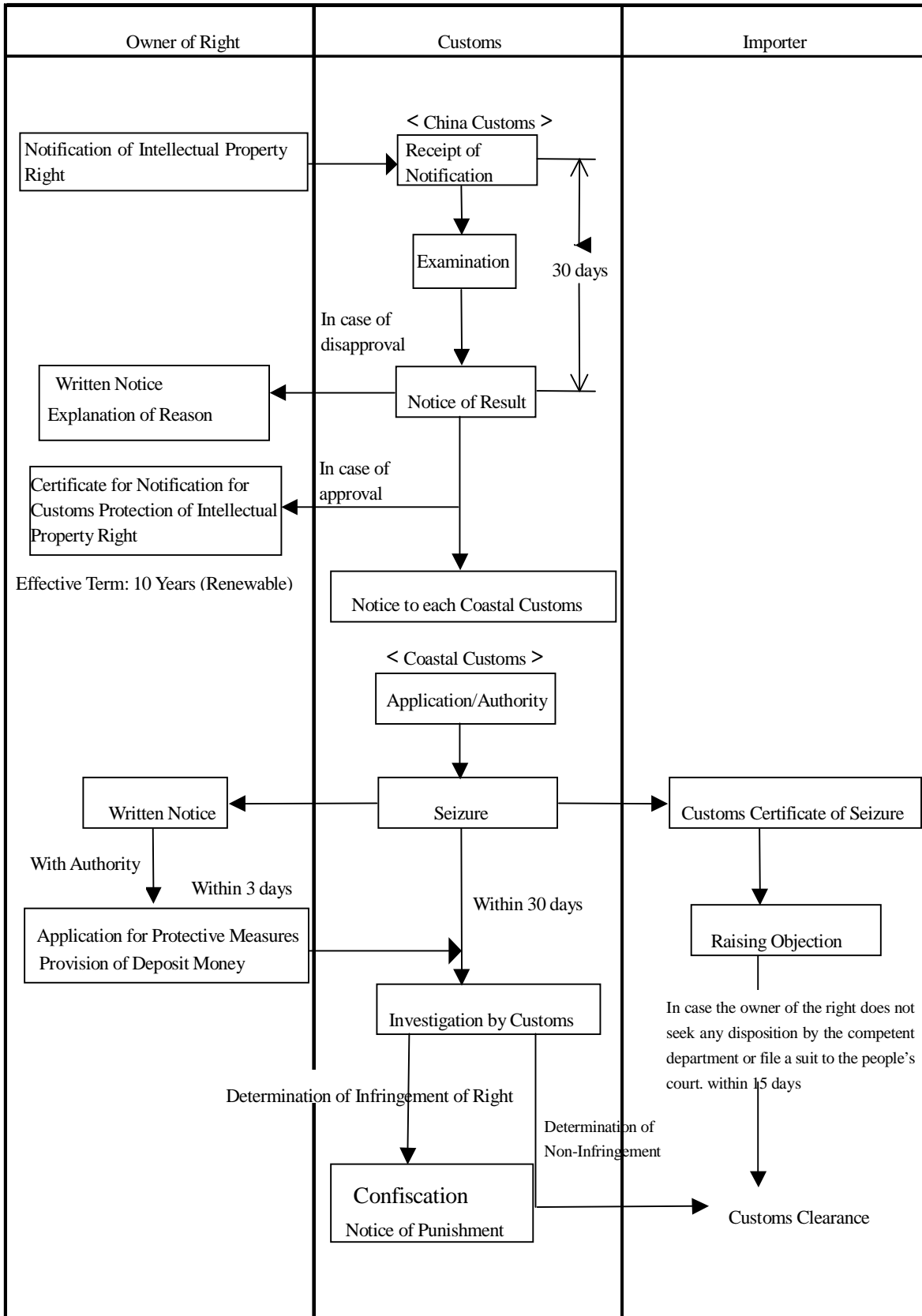
(3) Investigation by Customs

The Customs shall investigate within 30 days after the date of the seizure whether the seized article infringes the right and whether the consignee intentionally tries to import the infringing article and so on.

4) Disposition by Customs

When the infringement of the right by such seized article is finally verified, the Customs will confiscate the infringing article and give written notice of the punishment to the consignee. The seized article infringing the trademark right will be used for public service or sold at auction to any other person than the consignee after removal of the infringing trademark. If such infringing trademark is irremovable, it will be destroyed. All of the articles infringing the copyright will be destroyed.

Notification Procedure & Protection Procedure at Customs



Prepared by referring to Volume on China of Manual of Countermeasures against Counterfeit goods of JETRO.

Chapter 2. Procedures and Processes from Finding to Exposure of Counterfeit Goods

1. Procedures and Processes from Finding to Exposure of Counterfeit Goods

1) Finding of Infringing Articles (Counterfeit Goods, Pirated Editions, etc.)

Counterfeit goods etc. are mostly found by own representatives of companies and sometimes come to their knowledge through reports of investigation companies, information from local distributors, complaints from users, etc.

It is important for future exposures to obtain particulars of the information of finding in writing without fail such as names of finders, times and places (cities, markets, stores. etc.) of finding and articles (goods) found.

2) Confirmation of Damages

One shall confirm damages suffered by one's company by investigating the obtained information of finding of counterfeit goods in respect of the following points:

- a. Do the sales of the company suffer any damage?
- b. Is the brand of the company affected?
- c. Does the distributor of the area in question suffer any damage?
- d. Are they injurious or dangerous to consumers?

One shall judge whether any countermeasures shall be taken against the counterfeit goods as a result of examination of the above points.

In addition, one shall confirm whether such counterfeit goods infringe the right of the company and, if yes, study what remedies can be obtained.

Confirmation of Infringement of Right (Examples)

Imitation of Brand	Is it the infringement of the trademark right?
Imitation of Design	Is it the infringement of the design right?
Technical Imitation	Is it the infringement of the right to the patent or utility model?
Pirated Edition & Copy	Is it the infringement of the copyright?

3) Investigation for Exposure

When it is decided to take any countermeasures (remedies) against the counterfeit goods through the above confirmation work, it is necessary to obtain “evidences” required for taking legal measures against a producer and a seller of the counterfeit goods.

Furthermore, when one buys the imitation, it is important to get a receipt without fail to identify the seller.

Since the investigation into the producer of the counterfeit goods is dangerous for non-professional persons, it is necessary to entrust such investigation to a professional investigation company. It is also important for the measures for the future exposure, suit, etc. to investigate backgrounds etc. of the entities engaged in the imitation business at the same time.

4) Selection of Legal Measures

One shall study which legal measure shall be selected to obtain the best effect for the company.

In case one intends to block the infringement first, administrative dispositions by administrative organs as remedial measures such as arrests and seizures of evidences etc. by the police can be considered (Administrative Route).

When one intends to claim damages etc. additionally, one shall bring the case before the court (Judicial Route).

One shall judge which route is to be selected, taking the purpose of countermeasures against counterfeit goods, sales strategy, etc. of the company into consideration. It is also important to consult with professionals such as lawyers in the country in question since such routes operate differently among countries.

5) Selection of Attorney

The selection of an attorney is important in taking countermeasures against counterfeit goods. In such selection, it is necessary to specify the purpose of the countermeasures against counterfeit goods and the roles of the attorney such as what to be done by such attorney.

Roles of Attorney (Examples)

- a. Submission of Application to and Procedure at Administrative Organ
- b. Investigation of Counterfeit Goods etc.
- c. Negotiations with Administrative Organ
- d. Negotiations with Dealers of Counterfeit Goods
- e. Representation in Suit at Court

6) Exposure

In general, an administrative exposure is made by the competent administrative organ or police. Responsible officers of the administrative organ go to a site and seize or confiscate counterfeit goods, evidences, etc. They also seize account books, slips, etc. at the same time that may be evidences for an administrative punishment.

The attorney accompanies such officers in such exposure, takes photos of things in such exposure and attaches such photos to his or her report. An investigation company accompanies them sometimes.

A responsible person of a company sometimes goes to a site of an exposure of a store in a market etc. However, he or she shall be sufficiently careful since he or she is exposed to physical danger.

Since an exposure at a production site such as a factory may be dangerous sometimes, he or she should not accompany such exposure unless any special situation exists.

7) Shoreline Measures at Customs

In case the application for registration is filed to the Customs for the shoreline measures, one will be notified by the Customs occasionally that the clearance of a suspected cargo is suspended. In such case, the genuineness of such suspected cargo is checked within a time period stipulated by a law of each country, and, if such cargo is verified to contain any counterfeit goods, it will be seized by the Customs. In some countries, the Customs may demand the deposit of security money at the same time in some cases.

Since it is difficult for a person in charge of countermeasures against counterfeit goods to come to a site for the judgment of genuineness and the deposit of security money in a short period of time, companies entrust their local attorneys with contacts with the Customs or ask their local subsidiary corporations to establish systems for such measures in general.

In addition, some companies hold training seminars for officers of the Customs on the judgment of the genuineness through same-trade associations, industrial societies and groups for countermeasures against counterfeit goods and cooperate with the Customs in finding counterfeit goods.

8) Disposition by Destruction of Counterfeit Goods

The counterfeit goods so confiscated are to be destroyed by the administrative organ that has confiscated them. However, in some countries, articles infringing trademark rights are distributed among the poor as contributions after such trademarks only have been removed.

In order to assure the disposition by destruction after the confiscation, an owner of a right destroys counterfeit goods under his or her witness at his or her expense in some cases.

In addition, some companies in the same trade jointly destroy counterfeit goods and publicize the “eradication of counterfeit goods” to the general public by providing mass media with such scenes as news.

9) Gratitude to Administrative Organ

After the administrative organ has succeeded in the exposure, it is important to express one’s gratitude to cooperators in such exposure for their efforts for future effective countermeasures against counterfeit goods.

In many cases, companies visit administrative organs that have exposed them, express their gratitude and present letters of thanks, pennants of thanks and shields of thanks to them. Such presentation ceremonies are welcomed by administrative organs and held by many companies.

Chapter 3. Remedial Systems in Asian Countries

1. Remedial System against Counterfeit Goods in each Country

In general, rights under the trademark law, patent law, etc. are granted and effective only in the country where their applications and registrations are made.

The remedies against infringements of rights such as counterfeit goods are applicable only in the country where such rights exist and are not applicable in any countries where such rights do not exist (Principle of Territorial Jurisdiction).

Therefore, when one intends to seek any remedy against infringement of his or her right, it is necessary for him or her to obtain a trademark right, a patent right, etc. in the country concerned.

In addition, since the remedial system and the administrative organ differ among the countries, this chapter briefly explains the remedial system and the administrative organs in each of the Asian countries as follows:

(**Note:** The following explanations are based on present information on each country.

Therefore, when any change is made, one shall take measures in accordance with information after such change.)

2. Major Countries in Asia

The explanations are for the following countries:

- 1) China
- 2) Korea
- 3) Chinese Taipei
- 4) Malaysia
- 5) Singapore
- 6) Philippines
- 7) Thailand
- 8) Vietnam
- 9) Indonesia
- 10) Hong Kong

11) India

3. Characteristics of Remedial System and Regulating Organs in Each Country

1) China

China is tightening up its regulation against counterfeit goods year by year. However, its current situation is that the number of counterfeit goods is increasing for the remarkable development of its economy. Its characteristic is that the administrative organs specially and actively regulate articles infringing trademark rights, poor quality articles, etc.

The regulating organs and the matters regulated thereby are as shown below:

Administration for Commerce and Industry:

Articles Infringing Trademark Rights and Acts of Unfair Competition (Copies, Imitations, etc.)

Bureau of Quality and Technical Supervision:

Poor Quality Articles and Fakes (Articles with False Descriptions)

Copyright Bureau:

Articles Infringing Copyrights (Pirated Editions etc.)

Intellectual Property Administration (Local):

Articles Infringing Patent Rights, Utility Model Rights and Design Rights

Customs:

Articles Infringing Intellectual Property Rights (Articles Infringing Trademark Rights, Pirated Editions, etc.)

Police (Public Security):

Vicious and Large-Scale Articles Infringing Trademark Rights, Poor Quality Articles, Pirated Editions, etc.

People's Court: Suits against Articles Infringing Intellectual Properties

2) Korea

Korea is tightening up its regulation against domestic production of counterfeit goods and inflow of counterfeit goods from foreign countries. The domestic regulation is led by the police, and exposures through the criminal route are effective. The characteristic of the regulation against import and export is that remedial measures can be taken by the Trade Commission.

The regulating organs and the matters regulated thereby are as shown below:

Public Prosecutor's Office & Police Station:

Exposures of Counterfeit Goods with Accusation to Police and Public Prosecutor's Office

Customs Agency:

Articles Infringing Trademark Rights and Articles Infringing Copyrights

Trade Commission:

Remedies by blocking Import and Export of Articles Infringing Intellectual Property Rights

Patent Office:

Regulation against Counterfeit goods in cooperation with Police and Public Prosecutor's Office

Court: Suits against Articles Infringing Intellectual Property Rights

3) Chinese Taipei

In Chinese Taipei, the executions of rights against infringements of patents were made under the leadership of the Code of Criminal Procedure on the basis of criminal punishments until around 2002. However, since the abolishment of criminal punishments, they have been changed to be led by the civil suits claiming compensations for damages and injunctions. Since the amendment of the Code of Civil Procedure in 2003, the system of provisional seizure has come to be used frequently.

The regulating organs and the matters regulated thereby are as shown below:

Investigation Bureau of Legal Affairs Department:

Exposures of Cases of Infringements of Intellectual Property Rights

Police Station of Interior Department:

Exposures of Criminals of Cases of Infringements of Trademark Rights and Copyrights

General Customs Bureau:

Blockage and Shoreline Regulations against Cargos Infringing Intellectual Property Rights

Coat Guard Station: Regulations against Contraband

International Trade Bureau: Surveillance System of Export of Trademarks

Court for Intellectual Property:

Civil, Criminal and Administrative Suits on Intellectual Property Rights
(Scheduled to start in 2007)

4) Malaysia

In Malaysia, the police can effectively investigate infringements of trademark rights and copyrights and bring criminal suits before courts under the Trade Descriptions Act (TDA).

For the regulation against articles infringing design rights etc., the route of civil suits is available but expensive and time-consuming and contains a lot of problems.

The regulating organs and the matters regulated thereby are as shown below:

Regulation Executive Department of MDTCA:

Articles Infringing Trademark Rights and Articles Infringing Copyrights

Police: Articles Infringing Trademark Rights and Articles Infringing Copyrights

Customs: Blockage of Import of Cargos Infringing Trademark Rights and Cargos Infringing Copyrights

Court: Civil Suits against Infringements of Intellectual Property Rights

*MDTCA: Ministry of Domestic Trade and Consumer Affairs

5) Singapore

In Singapore, the main means for remedial measures against infringements of intellectual property rights are civil suits. Criminal suits may be filed against infringements of copyrights and trademark rights.

While remedies with seizures at the Customs are obtainable for articles infringing trademark rights and articles infringing copyrights, owners of intellectual property rights shall take civil proceedings after such seizures. They can additionally take criminal proceedings.

The regulating organs and the matters regulated thereby are as shown below:

Police: Seizures of Articles Infringing Intellectual Property Rights

Customs: Blockage of Import of Articles Infringing Trademark Rights and Articles Infringing Copyrights

Court: Civil Suits against Infringements of Intellectual Property Rights

Criminal Suits against Articles Infringing Trademark Rights and Articles Infringing Copyrights

6) Philippines

In Philippines, different legal measures can be taken against the same infringement. However, a criminal suit, a civil suit and an administrative disposition cannot be filed for the same infringement at the same time.

The regulating organs and the matters regulated thereby are as shown below:

Legal Affairs Department of DTI:

Cases of Infringements of Intellectual Property Rights (for compensation for

damages of less than 200,000 pesos)

Legal Affairs Bureau of IPO:

Cases of Infringements of Intellectual Property Rights (for compensation for damages of 200,000 pesos or over)

Customs Bureau:

Blockage of Import and Export of Cargos Infringing Intellectual Property Rights

National Investigation Bureau:

Confiscation of Articles Infringing Intellectual Properties

National Police: Confiscation of Articles Infringing Intellectual Properties

Court: Civil and Criminal Suits against Articles Infringing Intellectual Properties

* DTI: Department of Trade and Industry

IPO: Intellectual Property Office

7) Thailand

Although Thailand is tightening up the regulations against counterfeit goods, it is criticized for its penal regulations being light. And counterfeit goods of famous trademarks of Europe, those of computer software of the United States and those of character goods of Japan appear considerably on the markets. The regulations by the Economic Technological Crime Suppression Division (ETCSD) of the Police work effectively.

The regulating organs and the matters regulated thereby are as shown below:

ETCSD: Cases of Infringements of Intellectual Property Rights (Exposures of Sale and Production of Counterfeit Goods)

Customs: Blockage of Import and Export of Cargos Infringing Trademark Rights and Copyrights

IP Court: Civil and Criminal Cases on Intellectual Property Rights.

* ETCSD: Economic Technological Crime Suppression Division of Police

* IP Court: International Trade & Intellectual Property Court (Central IP Court and

District IP Courts)

8) Vietnam

Vietnam enacted the New Law on Intellectual Properties corresponding to international standards such as the TRIPS Agreement and put it into effect in July, 2006. On the other hand, a sense of the nation on intellectual properties is still low, and the number of counterfeit goods is increasing rapidly together with the economic development. The situation there is that, while sale of counterfeit goods by retailers etc. can be regulated administratively, exposures of production factories are not easy.

The regulating organs and the matters regulated thereby are as shown below:

Market Control Bureau: Seizures of Counterfeit goods sold on Markets

Economic Police:

Exposures of Production Factories and Large-Scale Distributors of Counterfeit Goods

Customs:

Seizures of Import and Export of Articles Infringing Intellectual Property Rights

Court: Civil and Criminal Cases of Infringements of Intellectual Property Rights

Intellectual Property Agency:

Administrative Guidance against Persons Infringing Intellectual Property Rights

9) Indonesia

In Indonesia, intellectual property rights are mostly exercised through criminal prosecutions. Although civil remedial measures have recently become possible legally, only very few cases have been tried to be resolved through civil suits actually. Practical remedial measures against counterfeit goods etc. at this moment are to report them to the police to stop acts of infringements and make them destroyed.

The regulating organs and the matters regulated thereby are as shown below:

Police: Criminal Accusations against Infringing Persons and Confiscation of Infringing Articles

Customs: Blockage of Import and Export of Articles Infringing Intellectual Property Rights (Enforcement regulations are still incomplete.)

Court: Criminal Suits and Civil Suits against Infringements of Intellectual Property Rights

10) Hong Kong

Hong Kong has enacted and put into effect its own laws in the fields of the patent law, copyright law and design law on the basis of the principle of “One Country, Two Systems” since the restoration of Hong Kong to China on January 1, 1997. In addition, it enacted and put into effect the New Trademark Law thereafter.

However, according to the Basic Law of Hong Kong Special Administrative Region that became effective on the date of the restoration, all laws that had been already put into effect in Hong Kong are to be maintained as they are for 50 years except some of them.

The regulating organs and the matters regulated thereby are as shown below:

Customs: Seizures of Infringing Articles and Counterfeit Goods, Criminal Prosecutions and Enforcement of TDO

Court: Civil Suits against Infringing Articles and Criminal Suits against Infringements of Trademark Rights and Infringements of Copyrights

* TDO: Trade Descriptions Ordinance (Forgeries of Trademarks etc.)

11) India

In India, the number of acts of pirates and that of fakes of software, music, movies, etc. are increasing together with its rapid economic development led by creative industries. At the same time, since the intellectual property system has been amended frequently in recent years, it is necessary to first obtain the latest information on the legal

system and then take remedial measures.

The regulating organs and the matters regulated thereby are as shown below:

Court: Civil Suits for Cases of Infringements of Intellectual Property Rights

Criminal Suits for Cases of Infringements of Trademark Rights and Copyrights

Customs: Blockage of Import of Articles Infringing Trademark Rights and Articles
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Collaborator : Kiyofumi Usui
President
USUI I.P. Consultant Corp.