



SPOTLIGHT: PRODUCT DIVERSION

The May 30, 2017 United States Supreme Court decision in the case of *Impression Products v. Lexmark International US* says patent owners may not prosecute infringement actions for products first sold outside the United States under patent-owner authority.

Due to the decision of the Supreme Court, diverted and gray-market products are flooding the United States marketplace, and it will continue to be this way for virtually any high-demand and highly-recognized product that is distributed beyond its primary market without a unified, global pricing structure.

Product diversion not only impacts profitability in primary markets based on pricing, but it also erodes brand identity and value. When luxury goods turn up at unauthorized discounters or flea markets, and pharmaceuticals are offered through the Internet, the perception of the value of the product is diminished in the consumers' eyes.

Global organizations in particular industries specialize in diverting products from emerging markets to primary markets. These "brokers" employ various means to obtain product including front companies, corruption or deception of internal sales staff and legitimate customers, and even theft.

Since criminal remedies do not typically apply to diversion cases, it is critical to identify the "alpha source" of products and shut them down. Identifying the "alpha source" usually involves sophisticated investigative techniques designed to determine the wrongdoers by working both internally and externally in the client's operations, examining potential sources such as manufacturers, licensees, sales staff, and accounts.