ANTI-COUNTERFEITING IN LATIN AMERICA

Luis M. Alcalde surveys the landscape of enforcement policy and actions from Tijuana to Bogotá.

Anti-counterfeiting enforcement actions in Latin America present issues that are unique to the region. Apart from Brazil with its Portuguese background, Latin America's common language and Spanish colonial heritage can easily be seen as monolithic by those unfamiliar with the region. However, effective anti-counterfeiting enforcement in the region requires both an understanding of the similarities and an even deeper understanding of the diversity and realities of Latin America.

In terms of size, Latin America is vast. From Tijuana, Mexico to Tierra del Fuego, the area covers over 6,500 miles. Encompassing South America, Central America, and parts of North America and the Caribbean, what is commonly thought of as Latin America is composed of more than 30 countries and territories. Each country has its specific national politics, demographics, culture, history and legal system. Venezuela and Mexico share a common language and Spanish colonial history, yet their present political systems could not be more different. Chile and Bolivia share a common language, border and Spanish colonial history, but their demographics and cultural temperament are also different. Moreover, both countries have fought wars with each other and continue to be involved in political conflict over disputed territory to this day.

As in other parts of the world, anti-counterfeiting operations in Latin America rely on many of the basics: the development of information from confidential sources or intelligence activities; the purchase of product and the expert verification of its infringement; the planning and implementation of a larger operation to maximise the impact of a takedown of a source of illicit product; and the motivation of local law enforcement and prosecutors to participate in the face of limited governmental resources available to fight the problem.

An overriding concern for any anti-counterfeiting operation in Latin America is the application of the Foreign Corrupt Practices Act (FCPA) to any trademark owner that is subject to United States jurisdiction by virtue of it being a US company or having issued a US-registered security. The FCPA prohibits the payment or authorisation of compensation, directly or indirectly, to a foreign official for the purpose of influencing any act or decision by the foreign official. It also prohibits attempts to induce a foreign official to use their influence to assist the company in obtaining or retaining business for or with any person. Moreover, mere non-participation directly in illegal payments will not suffice. Illegal payments may not be made indirectly by any agent acting for the company. This prohibition applies to investigators and attorneys acting for the trademark owner in anti-counterfeiting operations.

In addition to the FCPA, most Latin American countries are signatories to the 1996 Inter-American Convention Against Corruption. In Article VI, the Convention defines corruption as "giving, soliciting or offering, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions".

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In a region of great poverty, limited governmental resources and high temptation for corruption, trademark owners and their agents must be ever vigilant to not fall foul of the FCPA or local laws and treaties, when performing anti-counterfeiting operations and motivating police and prosecutors with admittedly limited resources to engage in operations. Seemingly simple requests from law enforcement to pay for the additional transportation costs incurred in sending officers on an anti-counterfeiting operation require a determination of whether the payment is a legal "facilitating payment" under the FCPA and is otherwise also proper under local national laws. Moreover, knowing the answer in one country does not guarantee any degree of uniformity. In some Latin American countries, it is legal to hire off-duty police officers to work on various aspects of a private operation. However, in other countries, police officers are prohibited from doing any "special duty" work on their days off. In some countries, legal facilitating payments, even those made under the FCPA, violate local national laws.

A peculiarity of anti-counterfeiting operations in Latin America, and one that is not uniform throughout the region, is the extent to which agents of the trademark owner can participate in investigations and the judicial process without possessing formal powers of attorneys (POA). For example, in Panama, as in other countries, anyone can provide information to law enforcement about illegal activity. However, Panamanian law draws a distinction between persons who make denunciations and persons who make accusations. *Denunciantes* are persons who inform the Public Ministry of the occurrence of a crime. Conversely, the *querellante* is the legitimate victim of a crime. Panamanian law further introduces a concept foreign to US criminal law and procedure—that of the *querellante coadyuvante*. In Spanish forensic terminology, the *coadyuvante* is a person who assists or aids in the conclusion of something. With reference to a litigated criminal process, the *coadyuvante* is the private person whose rights have been violated and who, therefore, is part of the process and aids the prosecutor in proving the charges.

Only someone in possession of a POA from the trademark owner can be a *querellante* or *coadyuvante*. The investigator without a POA would not have a legal right to be part of the criminal process, to officially aid the prosecutor to prove the case, to initiate a prosecution, or to otherwise intervene in a process begun by the prosecutor. This distinction has significant practical consequences, not just in Panama, but also in other Latin American countries with similar laws.

In Peru, for example, investigators, like any other citizens, do not need POAs to obtain and process information, and provide that information to the police. In essence, these investigators have the status of witnesses. By contrast, investigators armed with POAs are authorised to represent the brand owner and actively participate in the process with police and prosecutors. This includes helping to sort and count illicit product, and examine and identify product as being illicit, and continuing to monitor and work with police and prosecutors during the development of the case. The reality is that, in Peru, as in much of Latin America, intellectual property crimes have low priority. Police and prosecutors count on investigators with POAs to do the bulk of the work of finding and processing the evidence, and bringing it to their attention.

Finally, as more Latin American countries move to an accusatorial legal system, which places greater burdens on the police and prosecutors to prove the case against accused counterfeiters, trademark owners and their agents involved in the fight against counterfeiters will need to be even more vigilant and careful in order to conduct technically proper investigations in compliance with all applicable laws. Challenges to affidavits, sources of information, the independence of experts testifying about the illicit nature of products, and all other aspects of anti-counterfeiting investigations and prosecutions, will increase. More importantly, these challenges will result in greater scrutiny from the judiciary and, most likely, less success for trademark owners and their agents that do not pay attention to the peculiarities of the Latin American country in which an anti-counterfeiting operation occurs. To succeed in Latin America, trademark owners need to understand that the region is made up of individual countries that have many commonalities, but nevertheless require their own individual analysis and comprehension.

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