

February 7, 2008

Via Electronic Mail

Ms. Jennifer Choe Groves
Director for Intellectual Property and Innovation
and Chair of the Special 301 Committee
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508
Email: FR0606@ustr.eop.gov

RE: Comments for the Identification of Countries Under Section 182 of the
Trade Act of 1974 (Special 301)

Dear Ms. Groves:

I am writing on behalf of Levi Strauss & Co. (LS&CO.) in response to the Federal Register notice of January 16, 2008, requesting comments for the identification of countries under Section 182 of the Trade Act of 1974 (Special 301).

LS&CO. is one of the world's largest brand-name apparel marketers with sales in more than 110 countries. There is no other company with a comparable global presence in the jeans and casual pants markets. Our market-leading apparel products are sold under the Levi's®, Dockers® and Signature by Levi Strauss & Co.™ brands. LS&CO. owns more than 5,000 trademark applications and Registrations worldwide, and we consider our intellectual property to be one of our most important assets, critical to the successful maintenance of our positive brand image. LS&CO. is strongly committed to protecting our trademarks from unfair competition, infringement, and counterfeiting, and we aggressively combat intellectual property rights (IPR) violations in all of the countries where we operate.

While our diligence has paid off in many markets, LS&CO. seeks the U.S. Trade Representative's (USTR) continued assistance in addressing several weaknesses in IPR enforcement, legislation and/or practices in the following countries:

Costa Rica

Costa Rica's efforts to protect and enforce intellectual property rights continue to diminish. Although Costa Rica's IPR enforcement legislation conforms to the World Trade Organization's (WTO) TRIPS agreement and the U.S.-Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), the Costa Rican General Prosecutor's office fails to adequately prosecute

intellectual property related crimes, particularly in the area of trademark counterfeiting and copyright piracy.

LS&CO. has successfully conducted numerous raids and has seized more than 17,000 counterfeit units since the passage of Costa Rica's 1999 and 2000 IPR laws. However, the General Prosecutor's office continues to refuse to prosecute IPR violators unless there is a direct impact on public health or safety. This policy is practiced by prosecutors throughout the country, with law enforcement officials often dismissing IPR complaints without conducting investigations. Because of this lack of support, no enforcement actions were conducted in Costa Rica in 2006 or 2007 despite the fact that we identified approximately 20 illegal factories or shops making counterfeit Levi's® brand products and numerous retail locations selling them in Costa Rica.

Brand owners do have the option of taking legal action on their own against IPR violators by filing private complaints. However, an official investigation is required in order to substantiate the allegations of infringement. IPR-related crimes are assigned to the judicial police who have not pursued these cases, leaving brand owners like LS&CO. with very limited tools to combat counterfeiters in practice.

In 2007, a new police unit was formed (Special Investigations Unit) in Costa Rica which has met with the LS&CO. investigations coordinator and agreed to assist with investigations despite the fact that the recently reelected Attorney General has told the Unit not to assist us. Additionally the Costa Rican customs services recently agreed to receive counterfeit identification training, again, over the objections of the Attorney General. LS&CO. will commence those training sessions in February 2008.

Japan

The Japan Patent Office (JPO) has traditionally been and continues to be a weak link that limits the ability of trademark owners such as LS&CO. to effectively enforce the rights of our famous and well-known trademarks. LS&CO. is concerned with a few problematic developments that have occurred in Japan and we seek USTR's assistance with these issues.

First, LS&CO. is concerned with trademark registration and opposition procedures in Japan. The trademark register of the JPO contains a high volume of marks that bear a striking resemblance to LS&CO. trademarks and cause confusion in the marketplace. LS&CO.'s famous Arcuate pocket stitch trademark has been registered in numerous variations in Japan from as early as 1983 (Reg. No. 1592525), yet the JPO continues to approve registration for marks that are very similar.

Second, LS&CO. believes that the JPO's determination of likelihood of confusion incorrectly focuses on hyper-technical distinctions between marks in question and ignores the conditions under which trademarks are actually used in the marketplace. Marketplace factors should be seriously considered in determining whether there is "likelihood of confusion" among consumers about LS&CO. products versus other companies' products.

Third, Japanese Trademark Law prohibits registration and bad-faith use of a mark that is identical or similar to a mark that is widely recognized throughout the world. However, this provision is not upheld in practice because the term “bad faith” has been interpreted quite narrowly by the JPO. LS&CO. believes that when it is apparent that companies are intentionally attempting to register marks that are similar to a famous or well-known mark such as the Arcuate pocket stitch trademark, that fact, in and of itself, should be sufficient to prove the “bad faith” intent on the part of the applicant. A more reasonable application of this provision would allow LS&CO. to invalidate a majority of the registrations for marks that are similar to the Arcuate pocket stitch trademark.

Finally, the JPO has allowed its decisions on trademark registrations and opposition procedures to be swayed by faulty determinations made in the past without sufficient analysis to support those decisions. LS&CO. is deeply worried that these unjust decisions are being relied upon by the JPO to continue the trend. For example, a decision issued by the JPO in 2006 rejected LS&CO.’s opposition of a mark registered under No. 4715767 by Yugen Kaisha Toys McCoy Product. The cited mark consisted of a parallel double stitching arc strikingly similar to LS&CO.’s Arcuate pocket stitch trademark. The JPO initially issued a “notification of reason for invalidation,” but changed its determination after reviewing the written opinion submitted by Toys McCoy, which was supported by the submission of numerous previous JPO rulings against LS&CO. based on the Arcuate pocket stitch trademark. This case is a good illustration of the problems LS&CO. is facing as a result of the JPO’s reliance on previous faulty decisions to justify current rulings.

With regard to enforcement, the fact that the trademark register of the JPO is flooded with marks similar to the Arcuate pocket stitch trademark affects LS&CO.’s ability to enforce its trademark rights. A false image of legitimacy has been created by the JPO for such marks, and the fact that the JPO has basically permitted a free-ride for those seeking to infringe on the Arcuate pocket stitch trademark for decades has emboldened the infringers.

Consequently, when LS&CO. sends warning letters to infringers, many of them feel entitled to simply reply that they are not committing infringement and that LS&CO. is free to file a lawsuit against them. Although the courts tend to have a more reasonable approach than the JPO in considering issues of similarity and likelihood of confusion, the infringers understand and rely on the fact that the significant costs involved in pursuing civil action in Japan coupled with the uncertainty of the outcome will ultimately dissuade LS&CO. from taking such action.

LS&CO. respectfully requests that USTR press the Japanese Government to (1) ensure that the JPO take into account the realities of the marketplace and not overly focus on technical distinctions when reviewing trademark registrations; (2) urge the JPO to take a panoptic approach in its interpretation of the term “bad faith” in accordance with Japanese Trademark Law; and (3) press the JPO to discontinue its reliance on past decisions issued prior to the recent enhancement of protection for famous and well-known trademarks.

Mexico:

The integrity of LS&CO.'s trademarks in Mexico is a very high priority given the high volume of business that LS&CO. undertakes with Mexico. In general, Mexico's legal framework for trademark protection is adequate. The Mexican Institute of Industrial Property (IMPI) has the authority required to enforce trademark rights. However, there are significant shortcomings in enforcement.

Piracy, which feeds into the informal Mexican economy, is still widespread in Mexico and extremely lucrative, thus making it difficult to combat. Mexico's primary IPR enforcement agencies, the Procuraduria General de la Republica (PGR) and the IMPI, lack the resources necessary to successfully conduct their missions. This lack of resources continues to make it difficult for law enforcement officials to conduct investigations and to assist in raids.

While the IMPI appears willing to conduct raids, police assistance is negligible, thereby limiting the agency's effectiveness in enforcing Mexico's IPR laws. To add to the problem, Mexico requires brand owners to post a cash bond prior to conducting a raid against an alleged counterfeiter to cover any damages that might be caused by the raid. This bond is expensive and serves as yet another obstacle to successful enforcement action in IPR cases.

Along with enforcement problems on the ground, Mexican trademark registration procedures continue to create problems for brand owners. Mexico's procedure is to allow registrations to be issued without an opportunity for third party IP rights-holders to object beforehand. The registration can only be cancelled post-registration after a three to five year term of circulation. LS&CO. asks USITR to pressure Mexico to adopt a new system to allow third parties to oppose fraudulent trademark applications before they are registered.

Mexico also does not recognize common law trademark rights based on previous use. Formal registration is required to establish a trademark right. This requirement imposes an additional cost for legitimate rights-holders attempting to protect their intellectual property. The Mexican government should be urged to expand the scope of its trademark law to allow common law protection.

Philippines

In 2006, LS&CO. identified three specific priorities with respect to IPR protection in the Philippines: (1) equal enforcement for all industries; (2) improvement in the efficiency of the courts; and (3) prevention of copycat registrations of globally famous trademarks.

Unfortunately, 2007 did not show any marked improvement from 2006 with respect to the Philippines' unequal treatment of IPR violators in different market sectors. The government's anti-piracy program was almost exclusively targeted on unlicensed software and optical media. Enforcement actions against trademark infringement of other consumer goods such as clothing, footwear and pharmaceuticals have not received equal attention from the government.

The only way in which enforcement has been possible for these “less favored” goods is for right-holders like LS&CO. to take direct enforcement action at their own expense. Fortunately, local law enforcement authorities, particularly the National Bureau of Investigation (NBI), have been responsive whenever complaints involving counterfeiting activities are brought to their attention. LS&CO. continues to expect good and consistent cooperation from the NBI in running raids and assisting in the prosecution of suspected violators.

Enforcement cooperation aside, IP right holders continue to suffer from the slow pace with which cases are handled by the Philippines judicial system. This is complicated by inconsistent rulings by the Prosecution Service resulting in the dismissal of otherwise meritorious cases which should have naturally evolved into court indictments. Legal procedural delays and court inconsistencies have allowed most violators to evade punishment and continue their counterfeiting activities. The combination of the obstacles cited above creates a reasonable impression that corruption continues to hamper the criminal justice system. Court cases involving intellectual property will result in more appropriate outcomes if local judicial authorities strictly interpret the provisions of the Intellectual Property Code.

The slow speed of judicial action and the lack of meaningful criminal penalties also make it difficult for IPR protection laws in the Philippines to serve as a significant deterrent to criminal activity. To strengthen the deterrence factor, it is imperative to increase the mandatory jail term for IPR violations to more than six years.

Finally, 2006 saw a disturbing increase in the piracy of international trademarks in the local market, and this trend continued through 2007. Protection of internationally famous marks continues to be eroded by the reluctance of Intellectual Property Office (IPO) trademark examiners to reject copycat applications for registrations instead of having them published for opposition. The Philippine IP Code is explicit in its prohibitions related to the registration of internationally famous marks by third parties. However, the official attitude of the IPO appears to be that its trademark examiners do not have the requisite competence to make such determinations, leaving registration decisions to be decided in expensive Inter Partes proceedings.

Russia

As noted in our 2007 Special 301 submission and in our submission for the Out-of-Cycle Review last August, we are still facing large volumes of counterfeit products in the Russian market. We believe that the bulk of these products are sourced from the Far East via Vladivostok and Ukraine, from Turkey via Azerbaijan or directly through Azerbaijan itself.

These counterfeit products have a direct impact on our first-quality business and compete in the same distribution channels. Although Russia has made some progress through cooperation with Customs and police authorities, there is still room for improvement and much more to accomplish.

Additionally, as part of its WTO accession agreement with the United States, Russia agreed to a binding blueprint on actions that it would take to address piracy and counterfeiting and to improve protection and enforcement of intellectual property rights. LS&CO. is encouraged by this blueprint, which includes specific actions to strengthen border enforcement, bring Russia's laws into compliance with international standards and improve overall enforcement.

As noted in our previous submissions, we are concerned that a new IPR law proposed by the Russian government in 2006 might undermine current IPR laws, including the Law on Trademarks. In light of these concerns, we have worked closely with other IP holders under the auspices of a Russia-based advocacy group, RusBrand, to lobby the Russian government to modify the proposed IPR legislation. Unfortunately, because the changes to the law that went into effect on January 1, 2008 are unclear, and the proposed amendments RusBrand recommended were not adopted, LS&CO. is concerned that enforcement and jurisdictional issues will arise.

We continue to have strong concerns about how effectively the new law will be implemented and enforced in practice. Consequently, we urge USTR not only to continue to apply pressure on Russia to enact a newly amended IPR law, but to also press Russian officials to take steps to ensure that it is adequately enforced.

Thailand

Throughout 2007, LS&CO. continued to encounter challenges in carrying out an aggressive enforcement campaign against counterfeit LS&CO. products in Thailand. We continue to face issues including lack of adequate penalties to deter counterfeiters and lack of recognition and enforcement for our "famous" and well-known trademarks (described further below). Notwithstanding these challenges, LS&CO. has been encouraged by assistance we have received from both police and Customs officials during the past year.

Officers from the Metropolitan Police Bureau and the Economic Technological Crime Suppression Division (ECOTECH) have been actively engaged in monitoring and combating the sale of counterfeit LS&CO. goods. ECOTECH appears to have rededicated itself to major raid actions against large manufacturers of counterfeit LS&CO. products.

For example, one significant action resulted in the seizure of 48,365 infringing items, including counterfeit Levi's® jeans, flasher labels, warranty labels, buttons, leather patches, and the equipment for producing these counterfeit products. Although only 2,200 pairs of completed counterfeit Levi's® jeans were found at the scene, the raid represents an important achievement because it disrupted a major source of counterfeit jean production.

Royal Thai Customs also contributed greatly to the suppression of counterfeit LS&CO. goods in 2007. The number of seizures by Customs increased from merely four in 2006 to 26 in 2007. Customs seizures are frequently a very cost-effective means for capturing a large number of counterfeit goods in a single enforcement action. For instance, on June 12, 2007, two separate Customs seizures led to the detainment of 6,300 pairs of counterfeit Levi's® jeans.

In addition to these seizures, we have received strong cooperation from the Department of Intellectual Property (DIP), especially the Suppression on IPR Department. In cooperation with the DIP, we have held training sessions for the police in four different locations around Thailand with the goal of educating police officers on how to handle intellectual property infringement. As a result of these sessions, there has been an increase in the number of cases initiated by police authorities outside of Bangkok and the immediate vicinity.

Clearly, these are positive developments, but despite this cooperation from frontline government enforcement authorities, we still must highlight the lingering problems that continue to plague Thailand's system of intellectual property protection. At the forefront of these problems is the failure of the Thai Courts to apply the IP law in several cases in the past year. In three separate cases the Court rendered judgments in which the accused infringer was found not guilty on the grounds that they were not strictly responsible for the premises in which the offenses took place.

These decisions are problematic when considering the facts of the case. The Court has allowed defendants to claim that they were making the goods based on external orders and that they therefore cannot be considered the true owners of the products. In these circumstances, the Court has failed to hold the accused parties responsible for the important roles that they played in carrying out the act of infringement, including the actual sewing of the counterfeit jeans.

The judgments in these cases reflect a growing and disturbing trend in the Thai Court to decriminalize the actions of those persons who are involved in counterfeiting activities at a lower level but who do not finance or control the actual production and distribution of counterfeit goods. LS&CO. believes that substantive enforcement of intellectual property rights cannot occur until infringers at all levels of the supply chain are held strictly responsible for their criminal actions. While the punishment may differ, the liability of the act should not be absolved.

Infringers have also continued to exploit inadequacies in the Thai trademark registration system and have succeeded in registering confusingly similar marks. As part of LS&CO.'s standard practice to defend against infringement of our famous mark, we actively challenge the validity of copycat trademark applications and registrations for marks which are similar to LS&CO. marks. To this end, LS&CO. has repeatedly tried to draw attention to the bad faith intent of applicants in pursuing cancellation of imitative marks.

Unfortunately, the Court has been reluctant to interpret the broad scope of protection which should be afforded to LS&CO.'s famous marks. In a recent Court decision, the Court failed to justify the Defendant's usage of the mark, which was sufficient to demonstrate bad faith in the registration of the trademarks. The bad faith intent of trademark applicants is a critical issue in this type of case. As long as the Court remains unwilling to consider the underlying reasons for the creation of a mark, rather than superficial factors like the trade channel or low price of the goods, it will be extremely difficult to deter these copycat applications. This will again serve to embolden infringers and increase the number of bad faith applications successfully navigating their way through the system.

LS&CO. respectfully requests that USTR engage in discussions with the Thai government regarding the Thai Court's interpretation of the IP law. We would like to encourage the judiciary to consider all procedures and to hold all persons relevant to the infringing activities accountable for their actions. Otherwise, infringers will be likely to refuse to submit to police questioning and, when the case is tried, deny ownership of the counterfeit goods causing the case to be dismissed. The only recourse for an IP owner in that case would be to file a costly and time-consuming private criminal complaint. Unless addressed, LS&CO. is concerned that this loophole in the law will be exploited by infringers, thereby further increasing the counterfeit problem in Thailand.

Venezuela

LS&CO. continues to face a high level of piracy in Venezuela, as indicated by our seizure of more than 61,000 counterfeit garments in that country in 2007. We continue to be encouraged by the new regulations that provide Customs officials with the authority to inspect, retain and seize merchandise that violates intellectual property rights. A trademark owner may now complain to the Servicio Nacional Integrado de Administracion Aduanera y Tributaria (SENIAT), the agency that administers customs and tax activities, and seizure orders may be issued within five days. These regulations continues to show some effectiveness in 2007 as there were a significant number of counterfeit seizures at Venezuela's ports.

Despite some improvements, the Venezuelan Patent & Trademark Office (PTO) does not have adequate staffing and expertise and staff turnover within the agency continues to be a problem. LS&CO. alone has more than 150 oppositions currently pending in the Venezuela Trademark Office. In fact, Venezuela accounts for approximately 65 percent of LS&CO.'s total opposition matters pending in North and South America. Although the PTO may issue a favorable judgment against the applicant, we would like to see the Registrar be more discriminating in what is allowed to be published for opposition and more timely in resolving disputes.

LS&CO. appreciates the opportunity to raise these country-specific problems, and looks forward to working with USTR and other U.S. government officials in addressing them in an effort to protect our intellectual property rights worldwide. Please let me know if you have any questions. I can be reached at (415) 501-3974.

Sincerely,



Helga Ying
Director, Worldwide Government Affairs and Public Policy