

A LEGAL APPROACH TO COMBATING TERRORIST ORGANIZATION FUNDING THROUGH THE COUNTERFEIT MARKET

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I. INTRODUCTION

The rise of terrorism is a significant problem in the world we currently live in. More recently, radical Islamic jihadist terrorist organizations pose the most significant terrorist threats to Western society.¹ The attacks in Paris on November 13, 2015, the attacks in Europe in November and December 2015, the San Bernardino attack on December 2, 2015 and the attack in Jakarta on January 14, 2016, all serve as evidence that terrorist attacks have been occurring too frequently.² There are various strategies countries take to prevent terrorism, terrorist attacks and to protect national security.³ Regardless of the strategy implemented to prevent such terrorism, it is imperative that terrorists are denied funding and other resources necessary to carry out attacks, develop infrastructure and establish safe havens to operate.⁴

One method used by terrorist groups to acquire funding the sale of counterfeit goods. In recent years, there have been numerous reports establishing the link between counterfeiting and terrorist organizations.⁵ Sales from Internet sites and the market for fake goods, ranging from designer clothes to pharmaceutical products, are essentially funding terrorist and criminal organizations.⁶ Terrorist organizations are attracted to counterfeiting as a means of financing attacks, because of its profitability and relative anonymity.⁷ Counterfeiting is weakly punished by legislation, both in the United States and abroad, and it is difficult to prevent the counterfeit expansion in a world where it is dealt with as a minor offence.⁸ In some countries, the criminal aspect is not even

¹ Dennis M. Lornel, *How Terrorist Trends Evolve and How Financial Institutions Should Respond*, ACAMS TODAY, (March 7, 2016), <http://www.acamstoday.org/how-terrorist-trends-evolve/>.

² *Id.*

³ See generally Michael Taxay, *Trends in the Prosecution of Terrorist Financing and Facilitation*, 62, U.S ATT'Y BULL. 2, 2-8 (2014).

⁴ *Id.*

⁵ SHIMA D. KEENE, THREAT FINANCE: DISCONNECTING THE LIFELINE OF ORGANISED CRIME AND TERRORISM 116 (2012)

⁶ *Rise in Counterfeit Market Linked to Terrorist Funding*, FRAUD AID ADVOCACY, available at: <http://www.fraudaid.com/scamspeak/conprods.htm>.

⁷ SHIMA D. KEENE, THREAT FINANCE: DISCONNECTING THE LIFELINE OF ORGANISED CRIME AND TERRORISM 117 (2012). Counterfeit goods used by terrorist are not restricted to products sold by street merchants. According to the International Anti-Counterfeiting Coalition, Inc: "Modern day counterfeiting operations are no longer limited to luxury goods and apparel related products. On a more sophisticated and organized level, counterfeiters and pirates are also trading on names and logos often associated with products like razor blades, shampoos, pharmaceuticals, foods, hand tools, auto parts, airline parts, light bulbs, film, skin lotion, laundry detergents, Band-Aids, insecticides, batteries, cigarettes and practically anything that bears a name that consumers recognize".

⁸ UNIFAB, *Counterfeiting & Terrorism Report 2016*, European Union Intellectual Property Office, 19, (2016) <https://euipo.europa.eu/ohimportal/documents/11370/71142/Counterfeiting+%26%20terrorism/7c>

considered.⁹ This note proposes a solution to enforce greater penalties for these types of crimes, as well as create general awareness and knowledge of the deep connection between terrorist funding and counterfeit goods. Overall, this issue should be prioritized among different States and countries alike.

II. COUNTERFEITING

Product counterfeiting¹⁰ is a form of consumer fraud.¹¹ It is defined as the reproduction of total or partial use of an intellectual property right without authorization from its owner.¹² Counterfeiting currently represents up to 10 percent of world trade.¹³ The counterfeiter's goal is to create confusion between the original product and the counterfeit product in order to benefit, monetarily or otherwise, from another's reputation.¹⁴

Counterfeiting is different than copyright infringement, which involves the violation of the author's right to reproduce her copyrighted material.¹⁵ Product counterfeiting is generally an organized group activity, involving many people in order to maximize profits.¹⁶ Due to "outsourcing," manufacturing of goods takes place in countries with a cheaper and poorer workforce.¹⁷ As a result, there is a minimal capacity for oversight, making unauthorized production possible.¹⁸ Products that are in high demand can be manufactured based on same or similar designs, and can be sold through parallel markets while being priced competitively to maintain profits.¹⁹ While product counterfeiting is widespread, the scale of the global problem is not well documented.²⁰ Despite the serious global challenges counterfeiting poses, the

4a4abf-05ee-4269-87eb-c828a5dbe3c6

⁹ *Id.* at 20.

¹⁰ See BLACK'S LAW DICTIONARY 402-03 (9th ed. 2009) (defining "counterfeiting" as the "unlawful forgery, copying, or imitation of an item . . . or the unauthorized possession of such an item, with the intent to deceive or defraud by claiming or passing the item as genuine").

¹¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, COUNTERFEIT PRODUCTS 173 (2010), available at: https://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit_products.pdf. The word "counterfeit" is defined in the Lanham Act at 15 U.S.C §1124.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* The International Chamber of Commerce continues to cite a frequently used estimate: "Counterfeiting accounts for between 5-7% of world trade, worth an estimated \$600 billion a year".

production and trafficking of counterfeit goods is a matter of intellectual property theft, and garners little sympathy among the public.²¹ While counterfeiting and intellectual property theft might not be a priority for all politicians, Senator Patrick Leahy from Vermont finds it to be an important matter that calls for regulation.²² Senator Leahy, among others, has notably authored bills reflecting increasing penalties for trafficking counterfeit drugs.²³ Senator Leahy has also been connected to legislation strengthening other intellectual property rights, such as privacy protections for consumers.²⁴

Counterfeiting affects all business sectors, and companies are not the only parties affected.²⁵ Consumers should be aware of the threat of counterfeiting due to possible health and safety concerns associated with certain goods.²⁶ One way consumers are protected from these harms is through trademark law.²⁷

Counterfeit goods traded by transnational criminals can be split into two categories: those that merely represent copyright infringement and those that cause real harm to life and society.²⁸ The trade from both forms of counterfeit goods result in profits to criminals, corrupt officials, businesses, and diverse terrorist groups.²⁹ Terrorists and criminals profit from trading consumer-related counterfeits because of the low risk and significant consumer demand, as well as the need for product diversification.³⁰ Additionally, private entrepreneurs, state officials, and online criminals also benefit from their role in facilitating this trade.³¹

There is overwhelming evidence that counterfeiting has taken on a new dimension and is now extremely closely linked to organized crime, and even terrorism.³² Counterfeiting is no longer just an

²¹ *Id.*

²² Press Release, U.S Senator Patrick Leahy of Vermont, *Senate Approves Leahy-Grassley Bill to Increase Penalties for Counterfeit Drugs* (Mar. 7, 2012), <https://www.leahy.senate.gov/press/senate-approves-leahy-grassley-bill-to-increase-penalties-for-counterfeit-drugs>.

²³ *Id.* Senator Leahy also introduced the Combating Online Infringement and Counterfeits Act (COICA).

²⁴ Press Release, U.S Senator Patrick Leahy of Vermont, *Leahy Calls on FCC To Strengthen Privacy Protections for Consumers* (July 7, 2016), <https://www.leahy.senate.gov/press/leahy-calls-on-fcc-to-strengthen-privacy-protections-for-consumers>.

²⁵ European Union Intellectual Property Office *supra* note 8, at 7.

²⁶ *Id.*

²⁷ See *Trademark Legal Basics*, IOWA STATE UNIVERSITY TRADEMARK LICENSING OFFICE (1995-2017), <http://www.trademark.iastate.edu/basics>.

²⁸ Louise I Shelly, *The Diverse Facilitators of Counterfeiting: A Regional Perspective*, 66 *J. OF INT'L AFFAIRS* 19, 19 (2012). In the first category are counterfeits such as clothing, purses. In the secondary category are counterfeit pharmaceuticals, food, and wine. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 20.

³¹ *Id.*

³² European Union Intellectual Property Office *supra* note 8, at 6.

economic cost to businesses; it is also a problem of organized crime for public authorities and governments.³³ However, criminal organizations and terrorist groups indistinguishable; they operate with different priorities.³⁴ While organized criminals seek financial profit, terrorist networks require funds, which consist of different forms of illegal trafficking.³⁵

III. COUNTERFEITING ENFORCEMENT AND PUNISHMENT

Enforcement is essential to combating all forms of counterfeiting. Generally, enforcement is defined as “the act or process of compelling compliance with a law, mandate, command, decree or agreement.”³⁶ Enforcement is often thought of as only prosecution.³⁷ All formal and informal approaches to enforcement of laws should be considered and are important in the process in order to achieve compliance.³⁸ Legal rules and their enforcement shape the incentives and deterrents that change the behavior of those the rules regulate.³⁹ When applied to intellectual property rights, these methods are essential to prevent the infringement of owners’ rights or to provide remedies for infringement.⁴⁰

Enforcement is not always easy to implement. While it is imperative to prevent individuals from engaging in counterfeiting activities, weakness in the current IP legal system makes it difficult for authorities to properly enforce punishments for this behavior.⁴¹ These weaknesses do not necessarily stem from a lack of existing substantive law, but relate to how the law is enforced.⁴² An effective IP legal system both the enacts IP legislation and effectively enforces rights.⁴³ Otherwise, counterfeiters will take advantage of legal loopholes and the inaction on the part of the authorities to avoid prosecution.⁴⁴

Furthermore, business globalization has aided the development in

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Khadijah Mohamed & Ratnaria Wahid, *Fighting counterfeiting: Importance of Enforcement of Intellectual Property Rights*, 9 J. OF INT’L COMMERCIAL L. AND TECH. 249, 253 (2014).

³⁷ *Id.*

³⁸ *Id.* at 254.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 253.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

counterfeiting trade.⁴⁵ Counterfeiters use free trade zones and free ports as safe locations for “trans-shipment” of counterfeit goods.⁴⁶ Using international borders, counterfeiters can place manufacturers, distributors, and sales all in separate countries in an effort to prevent authorities from tracking their activities.⁴⁷

A. *Anti-Counterfeiting Trade Agreement*

Enforcement of intellectual property rights is a constant struggle due to the access of technology that broadens the ability of authors and creators to reach new audiences, while simultaneously giving piracy access across international borders.⁴⁸ One means of trying to control counterfeiting and enforcing punishment is through the Anti-Counterfeiting Trade Agreement.⁴⁹ As a result of trying to address the need for improved security measures to protect intellectual property rights holders, first-world countries negotiated and developed an international agreement designed to promote cooperation in preventing copyright and trademark infringement.⁵⁰

Eight parties signed the Anti-Counterfeiting Trade Agreement (ACTA), including the United States, Japan, Australia, Canada, Singapore, New Zealand, Morocco, and Republic of Korea on October 1, 2011.⁵¹ The ACTA is an “initiative to strengthen the international legal framework for effectively combating global proliferation of commercial-scale counterfeiting and piracy.”⁵² The agreement also includes innovative provisions to deepen international cooperation and promote strong intellectual property rights and enforcement practices.⁵³ The agreement covers the legal framework for enforcement of intellectual property rights, including civil and criminal enforcement, border measures and enforcement of intellectual property rights in a digital environment.⁵⁴

In regards to civil enforcement, the agreement provides the judicial authorities of its signatories with the power to issue cease and desist orders to any infringers to prevent any of the infringing goods

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Hilary H Lane, Comment, *The Realities of the Anti-Counterfeiting Trade Agreement*. 21 *TUL. J. INT'L & COMP. L* 183, 184 (2012-2013).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Office of the United States Trade Representative, *Anti-Counterfeiting Trade Agreement (ACTA)*, <https://ustr.gov/acta> (2011).

⁵³ *Id.*

⁵⁴ Lane, *supra* note 48, at 187.

from entering the marketplace.⁵⁵ In addition to injunctions, a party to the agreement must provide for monetary damages to be paid by the infringer to the rights holder as a form of injury compensation for losses incurred as a result of the infraction.⁵⁶ More concretely, the ACTA provides judicial authorities broad powers of penalty enforcement against alleged infringers on the behalf of rights holders, but these provisions also provide security against fraudulent claims of infringement.⁵⁷

Conversely, criminal enforcement and penalties are applicable under the ACTA in cases of willful trademark counterfeiting.⁵⁸ In other words, criminal penalties apply when an accuser can prove that a defendant willfully imported or distributed the infringing goods domestically on a commercial level.⁵⁹ Criminal penalties under the ACTA include imprisonment and sufficiently high monetary fines to provide a deterrent to future acts of infringement.⁶⁰ Aside from imprisonment and monetary fines, criminal enforcement of the ACTA provides parties with the authority to seize “suspected counterfeit trademark goods or pirated copyright goods and any related materials and implements used in the commission of the alleged offense.”⁶¹

B. Anti-Counterfeiting Enforcement in Europe

Customs administrations of the European Commission (EC) are active in enforcing Intellectual Property rights at the EU borders.⁶² According to the World Intellectual Property Organization (WIPO), there are different ways authorities can detect counterfeit goods.⁶³ First, IP rights owners may become aware of distributors or retailers trading counterfeit goods and bring the trade to the attention of the police.⁶⁴ Second, law enforcement officers, who are empowered under trademark legislation to take action against traders in counterfeit goods, can also detect counterfeits.⁶⁵ Third, actions can be taken against counterfeit goods at ports of entry of imports.⁶⁶

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 189.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Dagmar Babčanová, *Transport of Counterfeit Goods*, 1 INT’L SCI. J., 2014 at 5, 6.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 6-7.

⁶⁶ *Id.* “If a trade mark owner becomes aware that consignments of counterfeit goods are on their way to the country, he can alert the customs authorities, who will keep watch for the goods

For example, under the French Customs Code, customs authorities have broad investigative and anti-counterfeiting powers, including the right to seize counterfeit products.⁶⁷ Therefore, customs officials have the authority to seize counterfeit items from individuals at ports of entry and even in marketplaces.⁶⁸ Regardless of some of these actions taken towards eliminating counterfeiting, it is still considered the least policed form of transnational crime – remarkable considering the profits from fraudulent sales total billions of dollars annually.⁶⁹

Specifically within Europe, both France and Italy have directly targeted the demand side of counterfeits by establishing strict consumer penalties against those who purchase counterfeit items and by implementing meaningful consumer awareness campaigns to deter the public from making future purchases.⁷⁰

France is regarded as offering the most comprehensive and strongest legal protections to fashion designers over their work product.⁷¹ French intellectual property law, with respect to fashion designs, is far more creator friendly than the United States laws.⁷² In France, intellectual property law reflects the idea that fashion constitutes wearable art as opposed to purely utilitarian objects.⁷³ In contrast, United States law has consistently denied copyright protection to fashion designs on the basis of functionality.⁷⁴ Most notably, the French Intellectual Property Code provides for sanctions and liability for those individuals who purchase and even possess counterfeit items.⁷⁵ The end consumers of counterfeit goods could face a fine of up to 300,000 euros or three years in jail.⁷⁶ In order to cut down on this behavior, in France any individual who transports products into or through France must possess documents evidencing the genuine origin of the products.⁷⁷ French Organizations such as Le Comité National Anti-Contrefaçon (CNAC) focus on warning consumers about the dangers of counterfeit goods, as well as the possible penalties individuals would face if they purchase or possess any counterfeit

and impound them when they arrive.”

⁶⁷ Dianna Michelle Martinez, *Fashionably Late: Why the United States Should Copy France and Italy to Reduce Counterfeiting*, 32 B.U. INT'L L. J. 509, 524 (2014).

⁶⁸ *Id.*

⁶⁹ Shelly, *supra* note 28, at 19.

⁷⁰ Martinez, *supra* note 67, at 530.

⁷¹ *Id.* at 523.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Nisha Balsara, *Redefining Fashion: From Congress to the Runway*, 11 J. HIGH TECH. L 93, 95 (2010). Currently the United States Supreme Court is deciding whether fashion designs are non-functional in the case *Star Athletica LLC v Varsity Brands*, 137 S. Ct. 1002 (2017).

⁷⁵ Martinez, *supra* note 67, at 524.

⁷⁶ *Id.*

⁷⁷ *Id.* at 525.

goods.⁷⁸ Given the extreme penalties individuals face if they are found purchasing or possessing fake items, the CNAC have created campaigns that raise awareness of the potential consequences of this behavior.⁷⁹ By informing potential consumers of the consequences of participating in the counterfeit business by means of purchasing these items, and also raising awareness of ways to spot counterfeit items, these campaigns make it more likely that an individual who purchases a counterfeit item does so knowingly.⁸⁰

Most notably, France adopted the Law No. 2014-315 in March 2014, which strengthened French anti-counterfeiting laws.⁸¹ The new law contained various changes including: improving of the assessment of damages awarded to IP rights owners in infringement proceedings, extending the statute of limitation period to five years for all IP infringement claims, harmonizing the infringement seizure procedures and reinforcing customs actions to all IP rights in complication with EU Regulation No. 608/2013.⁸² France also has strong borders, and French customs plays an efficient role in protecting the French market from counterfeit goods.⁸³ One effective method is that French Customs are not limited to interventions at the borders; rather it can intervene anywhere in the French territory.⁸⁴ Customs can detain goods that are suspected of infringing IP rights for up to 10 working days and during this time the rights holder must notify Customs that legal proceedings against the infringer have been initiated; otherwise the good will be released.⁸⁵ In order to benefit from customs actions, rights holders can file a formal application for free customs surveillance.⁸⁶

In France, the infringement of IP rights may constitute a criminal offense if there is criminal intent.⁸⁷ Public prosecutors may initiate criminal proceedings against infringers, but it is more typical for the prosecutors to act at the request of Customs or the rights holder.⁸⁸

⁷⁸ *Id.*

⁷⁹ *Id.* at 526. A recent campaign warns “buy a fake Cartier, get a genuine criminal record”.

⁸⁰ *Id.*

⁸¹ Xavier Buffet Delmas & Julie Fabre, *France Strengthens Its Legal Framework for the Fight Against Counterfeiting*, GLOBAL MEDIA AND COMMUNICATIONS WATCH, (Apr. 8, 2014), <http://www.hlmediacomms.com/2014/04/08/france-strengthens-its-legal-framework-for-the-fight-against-counterfeiting/>.

⁸² *France: Law No. 2014-315 of March 11, 2014, Strengthening the Fight against Counterfeiting*, WIPO, (Mar 13, 2014), http://www.wipo.int/wipolex/en/news/2014/article_0009.html.

⁸³ Julien Fréneaux & Vivane Azard, *France*, WORLD TRADEMARK REVIEW, (2014), <http://www.worldtrademarkreview.com/Intelligence/Anti-Counterfeiting/2014/Country-chapters/France>

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Criminal intent must be proven by material evidence, but can also be presumed from the circumstances of the infringement.⁸⁹ In some instances, criminal intent results from mere negligence by the infringer.⁹⁰ If found guilty, the infringer can be sentenced to imprisonment for up to five years and the establishment that sold the counterfeit goods may also be closed.⁹¹ If an individual is a second time offender, the penalties can be doubled.⁹² Additionally, when the offense is committed by an organized crime group, under the Customs Code, the penalties can be increased up to five years of imprisonment and a fine of up to five times the value of the products.⁹³

Similar to France, Italy also has extremely rigorous anti-counterfeiting laws and extends liability to purchasers.⁹⁴ Italian law penalizes both consumers and sellers in order to protect the fashion designs, which are recognized as copyrightable art.⁹⁵ The Italian Criminal Code indirectly addresses the issue of liability for engaging in the purchase or sale of counterfeited items by punishing anyone who introduces counterfeit goods with imprisonment for one to four years, and a fine ranging from 3,500 to 35,000 euros⁹⁶ Moreover, the Italian Criminal Code imposes liability for the crime of “handling”, for anyone who receives or conceals money or objects originating from any crime, with the purpose of procuring a profit for oneself or another.⁹⁷ Italy also took additional steps against counterfeiting by enacting Decree-Law No. 80 in May 2005.⁹⁸ The law sanctions end-consumers of counterfeit goods and “indicates that one who purchases or receives an item without previously ascertaining its legitimate origin, when the price or other circumstances leads the customer to believe that the goods infringe on intellectual property rights, shall be fined up to 10,000 euros.”⁹⁹ One reason why these fines are successful in preventing consumers from purchasing counterfeit goods is because many of the consumer “fines far surpass the retail amount of many of the items bought had they been genuine.”¹⁰⁰

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Martinez, *supra* note 67, at 527.

⁹⁵ *Id.*

⁹⁶ *Id.* at 528; *see also* Codice Penale [C.p.] art. 474 (It.), *available at* <http://www.altalex.com/index.php?idnot=36768>.

⁹⁷ Martinez, *supra* note 67, at 528.

⁹⁸ *Id.*

⁹⁹ *Id.*, *see also* Decreto Legge 14 maggio 2005, n. 80/05, art. 1(7), G.U. 2005, n. 111 (It.), *available at* <http://www.camera.it/parlam/leggi/050801.html>.

¹⁰⁰ Martinez, *supra* note 67, at 529.

1. *Court of Justice of the European Union Counterfeiting Case Law*

i. Background

“The involvement of the European customs authorities with articles suspected of infringing intellectual property rights (IPR)” has rapidly increased throughout Europe.¹⁰¹ Statistics in 2010 indicated that approximately 80,000 cases of shipments were suspected of violating IPR.¹⁰² “Since July 1, 2004, the legal basis for customs’ interceptions has been the Council Regulation (EC) No. 1383/2003 (“Counterfeit Goods Regulation” or “Regulation”).”¹⁰³ This regulation sets out the conditions for an action by customs authorities when goods are suspected of infringing IPR and details the measures that should be taken if the goods in fact infringe.¹⁰⁴

In many cases the European Union (EU) is transit territory and because of their central position, “a major part of the commerce between Europe and the Far East is conducted through the North Sea ports of Antwerp, Rotterdam and Hamburg.”¹⁰⁵ Under the “Counterfeit Goods Regulation, customs authorities of the EU member states are entitled to take action when goods crossing the EU’s external borders are suspected of infringing IPR”¹⁰⁶ It is immaterial whether the consignment is only in transit or in transshipment through the EU Customs territory.¹⁰⁷

In *Polo Lauren*, the Court of Justice of the European Union

¹⁰¹ Dorothee Altenburg, *Transit of Counterfeit Goods in the EU: What’s the Effect of Philips and Nokia?*, INTABULLETIN (Nov. 1, 2012), <http://www.inta.org/INTABulletin/Pages/TransitofCounterfeitGoodsintheEUWhat’stheEffectofPhilipsandNokia.aspx>

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (“Article 3, paragraph 1 explicitly exempts parallel imports and overruns produced by a licensee outside the scope of an existing or past license agreement from application of the Counterfeit Goods Regulation. An exemption (set forth in Article 3, paragraph 2) also applies to small consignments in travelers’ personal baggage”. Furthermore, “Article 11 of the Regulation allows European Union member states to provide, in accordance with their national legislation, for a simplified procedure enabling customs authorities to have detained goods abandoned for destruction under customs’ control without there being any need to determine whether an IPR has been infringed under national law. In this case the rights holder must inform customs authorities within a certain term (10 working days; 3 working days in the case of perishable goods) that the detained goods infringe its IPR and provide them with a written consent of the declarant or the owner of the goods to abandon the goods for destruction. Such consent shall be presumed to be given when the person in charge has not specifically opposed destruction within the prescribed period. Destruction shall usually be carried out then at the expense and under the responsibility of the rights holder.”).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

(CJEU) held that the Counterfeit Goods Regulation was applicable to cases of transit.¹⁰⁸ In *Class International*, the CJEU held that, “under harmonized trademark law, goods in transit do not infringe upon the exclusive rights of a trademark owner unless the owner can demonstrate that the goods are intended to be put on the market in the country in question, and the onus of proving interference lies with the rights holder who alleges it.”¹⁰⁹

Meanwhile, there was debate about whether the “Counterfeit Goods Regulation contained a *manufacturing fiction*.” (emphasis added)¹¹⁰ According to the manufacturing fiction for the determination of infringement, goods stopped by customs at the EU’s external borders must be “considered as having been produced in the member state of the customs action.”¹¹¹ Many argued that cases such as *Polo Lauren* and *Class International*, and other case law of the CJEU, was irrelevant because all goods falling within the scope of the Regulation simply had to be regarded as goods that were produced in the member state where the customs actions took place.¹¹² The CJEU dismissed the “manufacturing fiction” doctrine in the notable joined cases *Philips* and *Nokia*.¹¹³

ii. *Philips and Nokia*

In the joined cases *Koninklijke Philips Electronics NV v. Lucheng Meijing Industrial Company Ltd (“Phillips”)* and *Others* and *Nokia Corporation v. Her Majesty’s Commissioners of Revenue and Customs (“Nokia”)*, the “two national courts each referred for a preliminary ruling on a question concerning the interpretation of the European Union’s legislation governing action by customs authorities against possible infringements of intellectual property rights.”¹¹⁴ “[B]oth cases concern allegedly counterfeit or pirated goods, which were in the customs situation of ‘external transit.’”¹¹⁵

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Case 446/09, *Koninklijke Philips Elec. NV v. Lucheng Meijing Indus. Co. Ltd., Far East Sourcing Ltd., Röhlig Hong Kong Ltd, & Röhlig Belgium NV*, 2011 E.C.R.; Case 495/09, *Nokia Co. v Her Majesty’s Comm’n of Revenue & Customs*, 2011 E.C.R., available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5c3e0e867c1f34b24963e8c09cc03b9fe.e34KaxiLc3qMb40Rch0SaxyKc3r0?text=&docid=84313&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=431616>.

¹¹⁵ *Id.* (External transit is an “aspect of the customs duty suspension arrangements which, in accordance with Article 91(1)(a) of the Community Customs Code, allows ‘the movement from one point to another within the customs territory of the Community of . . . non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures’. According to case-law, ‘external transit’ is based on a legal fiction, since the whole

In *Phillips*, Belgian Customs detained a shipment of shavers coming from China, and the goods had been declared under a temporary importation arrangement without stating a country of destination.¹¹⁶ The applicant who wanted the goods detained claimed that non-community goods in transit should be treated as though they had been manufactured in the member state in which they are situated and are subject to the legislation enforced from that member state.¹¹⁷ “*Phillips* argued that in determining whether goods in transit from one non-Member State to another non-Member state should be detained, Customs should apply a ‘production fiction’”¹¹⁸ test that the goods were produced in that Member state.¹¹⁹ Using this test would avoid the burden of proving that the goods in question were traded in the EU.¹²⁰ “The Antwerp Court of First Instance confirmed copyright and design right infringement in applying the ‘manufacturing fiction’” test.¹²¹

In *Nokia*, United Kingdom Customs had detained a shipment of Chinese cell phones in transit to Colombia, but refused to seize the goods.¹²² *Nokia* could not provide evidence that the goods would be “diverted onto the EU market”, so customs “decided to release the goods”, a decision that was confirmed by the High Court of England and Wales, Chancery Division.¹²³ The referring court asked the Court of Justice whether this was a matter that was essential to establish and classify the goods as ‘counterfeit’ in order for the customs authorities to be able to detain the goods.¹²⁴ The International Trademark Association advocated for the position that the EU Counterfeit Goods Regulation is in fact intended to permit local customs authorities to seize counterfeit goods that are in transit, but not intended for sale in a member state.¹²⁵

“[T]he CJEU confirmed that non-Community goods in transit

procedure unfolds as if the non-Community goods concerned had never entered the territory of a Member State.”

¹¹⁶ *Id.*

¹¹⁷ *Id.* at ¶ 3.

¹¹⁸ *Id.* (Production Fiction means that Customs would not need to show that the goods had been put on the market in the Member state).

¹¹⁹ *CJEU Advocate General Opinion in Nokia referral may help IP owners combat and detain counterfeit goods in transit*, BRABNERS, (Jan. 31, 2011), <http://www.brabners.com/news/cjeu-advocate-general-opinion-nokia-referral-may-help-ip-owners-combat-and-detain-counterfeit>.

¹²⁰ Case 446/09, *Koninklijke Philips Elec. NV v. Lucheng Meijing Indus. Co. Ltd., Far East Sourcing Ltd., Röhlig Hong Kong Ltd, & Röhlig Belgium NV*, 2011 E.C.R.; Case 495/09, *Nokia Co. v Her Majesty’s Comm’n of Revenue & Customs*, 2011 E.C.R., available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5c3e0e867c1f34b24963e8c09cc03b9fe.e34KaxiLc3qMb40Rch0SaxyKc3r0?text=&docid=84313&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=431616>.

¹²¹ Altenburg, *supra* note 101.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

through the EU cannot, merely by the fact of being so placed, infringe IPR applicable in the EU”¹²⁶ Regardless, the court found that IPR may be infringed where, “during their placement under the transit procedure in the EU Customs territory or even before their arrival in the territory, non-Community goods are the subject of a commercial act directed at EU consumers, such as a sale, offer for sale or advertising.”¹²⁷

As a result of this case law, “EU member states may take action with respect to goods in transit that are suspected of infringing IPR, without establishing any requirement for infringement. Once customs has taken action under the Counterfeit Goods Regulation, it is up to the courts of the member states to decide, on the basis of national law, whether the goods actually infringe an IPR.”¹²⁸ After this decision, it is imperative that right holders collect as much evidence as possible when demonstrating that there was a plan to distribute the goods in the country where they were detained.¹²⁹

iii. Counterfeiting: A Logical Choice For Terrorist Funding

“The link between organized crime groups and counterfeit goods is well established.”¹³⁰ Counterfeiting is seducing as a means of financing criminal enterprises, because it is too weakly punished by legislation, both within the United States and abroad, and it is highly profitable and costs relatively little.¹³¹ There are various reasons why organized criminal organizations, such as terrorist groups, are attracted to counterfeiting as one of many forms of funding. Most importantly, the penalties are too weak and rarely enforced.¹³² For example, in France, selling counterfeit products is punishable by a two-year prison sentence.¹³³ Conversely, counterfeiting offenses in Malaysia are punishable with criminal sanctions under the Trade Description Act (TDA) 1972 and the Consumer Protection Act of 1999 (CPA) for a maximum fine of RM250,000¹³⁴ for group offenders and up to

¹²⁶ *Id.*

¹²⁷ *Id.* (“According to the CJEU, an offer for sale or advertising addressed to consumers in the EU, or documents or correspondence concerning the goods in question showing an intention to divert the goods to EU consumers, will be sufficient to establish proof of such a commercial act. The Court stated that the national courts would need to decide the issue on a case-by-case basis with reference to the specific indication that might suggest that the goods were actually bound for the transit member state or the EU market”).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Ronald K. Noble, Sec’y Gen. of Interpol, *The Links Between Intellectual Property Crime and Terrorist Financing*, Address Before the United States House Committee on International Relations (July 16, 2003) available at: <http://www.interpol.int/Public/ICPO/speeches/SG20030716.asp>.

¹³¹ EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, *supra* note 8, at 19.

¹³² *Id.* at 20.

¹³³ Noble, *supra* note 130.

¹³⁴ RM250,000 is about 56,460.00 USD

RM100,000¹³⁵ for each individual, or imprisonment not exceeding three years.¹³⁶ In contrast, in some drug-related offenses, offenders can be punished either with life imprisonment or the death penalty.¹³⁷ The obvious gap between huge profits with low risks of penalty would attract those involved in illegal activities to engage in this business.¹³⁸ If authorities take no deterrent measures, counterfeiting will no doubt continue to be on the rise.¹³⁹

In general, law enforcement does not treat intellectual property crimes, like counterfeiting, as high priority crimes, and thus do not always investigate these cases.¹⁴⁰ Unfortunately, in some countries, the criminal aspect of counterfeiting is not even taken into consideration.¹⁴¹ Sentences imposed on those convicted of intellectual property infringement are much lower than those imposed in drug-related cases, which makes counterfeiting an attractive trade for criminals.¹⁴² Furthermore, there is a general lack of harmonization among countries in implementing punishment for counterfeiting.¹⁴³ Specifically, within the European Union, all countries do not protect intellectual property rights in the same manner, which can lead to the phenomenon of “forum shopping”¹⁴⁴ within the European Union.¹⁴⁵ Counterfeiters can essentially choose to conduct their activities in certain member states, which have more permissive legislation.¹⁴⁶

Additionally, counterfeiting is attractive to terrorists as a means of funding because investigations into these crimes, when initiated, often tend to be seizure-based and do not follow the flow of money.¹⁴⁷ However, even if law enforcement were to follow the flow of money, given the high level cash-based transactions involved, it is difficult to establish with precision the end destination of the financial flow.¹⁴⁸

135 RM100,000 is about 22,584.00 USD

136 Mohamed & Wahid, *supra* note 36, at 252.

137 *Id.*

138 *Id.*

139 *Id.* at 253.

140 Noble, *supra* note 131.

141 EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, *supra* note 8, at 20 (“Justice does not consider counterfeiting as dangerous as it seems necessary to raise awareness to the judges towards the dangers and various consequences of counterfeit in order to warrant more severe sentences.”).

142 *Id.*

143 *Id.*

144 Forum shopping is a practice adopted by litigants to get their cases heard in a particular court that is likely to provide a favorable judgment.

145 EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, *supra* note 8, at 21

146 *Id.*

147 Noble, *supra* note 130.

148 *Id.*

IV. TERRORIST FINANCING

A. *Methods of Terrorist Financing*

The terrorist threat is not static, and terrorists adapt and evolve, mainly in response to the countermeasures that have been enacted.¹⁴⁹ As the terrorist threat has evolved, the means by which terrorist groups “raise, store, and move funds have also changed and have hindered government efforts to prevent terrorist activities.”¹⁵⁰ Studies have “show[en] that terrorist groups learn from one another, exchange information, and share innovations.”¹⁵¹ Prior to the September 11, 2001 terrorist attacks, “al-Qaeda funded and controlled operations from its base in Afghanistan.”¹⁵² However today, “the terrorist threat is more decentralized” and groups like al-Qaeda “no longer fund other terrorist groups, cells, or operations.”¹⁵³ Most terrorist groups are small, while others operate as part of a large political organization.¹⁵⁴ The small groups typically are not involved in extensive criminal activity solely to raise funds because terrorist operations are generally inexpensive.¹⁵⁵ Regardless, some funding is necessary.¹⁵⁶ The groups that are not big enough to have assets or investments may resort to purely criminal acts to acquire the funds and equipment.¹⁵⁷ In regards to larger terrorist organizations, they rely on criminal activity to supply some of their operating capital.¹⁵⁸ As these groups grow larger, they begin to invest their money and become more independent of both state sponsorship and criminal fundraising.¹⁵⁹ While many fundraising techniques remain popular, including abusing charities and other businesses, terrorists continue to engage in criminal activity to fund their action.¹⁶⁰

The terrorist organization ISIS is unlike any other terrorist organization in that it has accumulated wealth at an unprecedented rate and has various sources of revenue.¹⁶¹ ISIS does not necessarily depend

¹⁴⁹ Michael Jacobson & Matthew Levitt, *Tracking Narco-Terrorist Networks: The Money Trial*, 53 THE FLETCHER FORUM OF WORLD AFFAIRS, 117, 118 (2010).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Stephen C. Warneck, *A Preemptive Strike: Using Rico and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV 177, 184 (1998).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 185.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 187.

¹⁶¹ Janine Di Giovanni, Leah McGrath Goodman, & Damien Sharkov, *How Does Isis Fund Its Reign of Terror?*, NEWSWEEK, (Nov. 6, 2014, 7:30 AM),

on moving money across international borders but does maintain a majority of its revenue from local criminal and terrorist activities.¹⁶² ISIS is fairly decentralized, yet it supports about eight million people, reflecting the size of the population living in territories under ISIS control.¹⁶³ ISIS supports tens of thousands of militants currently at war and also recruits new members daily.¹⁶⁴

The methods by which terrorist groups move money, and how that money can be distributed are usually overlooked.¹⁶⁵ Terrorist organizations often raise money in places different from where they are located and different from where attacks might take place.¹⁶⁶ For terrorists to be effective, they must be able to move money from its origins to the area where it is needed.¹⁶⁷ Based on research and evidence, it appears that terrorists use the following factors when choosing a method to move funds: volume, risk, convenience, simplicity, costs, and speed.¹⁶⁸ Terrorist groups have to maintain a balance of all of these factors in order to successfully maintain their criminal enterprise and avoid detection from law enforcement.

There are few forms of “moving money” that the terrorist organizations can employ.¹⁶⁹ A classic Islamic Law, dating back to the eighth century, commands a form of transferring money known as Hawala.¹⁷⁰ “Hawala is an alternative or parallel remittance system.”¹⁷¹ This system operates outside or parallel to traditional western banking systems.¹⁷² Hawala is difficult to track and prevent because of the complicated manner of its transactions.¹⁷³ There are no receipts and the bookkeeping is in the aggregate rather than in terms of individual payment.¹⁷⁴ Additionally, while money changes hands domestically, the passing of funds internationally is not as obvious.¹⁷⁵ In some cases,

<http://www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Michael Freeman & Moyara Ruehsen, *Terrorism Financing Methods: An Overview*, 7 PERSPECTIVES ON TERRORISM 5 (2013).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 6.

¹⁶⁹ Douglas T Cannon, *War Through Pharmaceuticals: How Terrorist Organizations are Turning to Counterfeit Medicine to Fund their Illicit Activity*, 47 CASE W. RES. J. INT’L L. 343, 353 (2015).

¹⁷⁰ *Id.* at 354.

¹⁷¹ Patrick M. Jost, *The Hawala Alternative Remittance System and its Role in Money Laundering*, FIN. CRIME ENF’T NETWORK, <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/FinCEN-Hawala-rpt.pdf>

¹⁷² Cannon, *supra* note 170, at 354.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

the money does not need to be transferred from broker to fulfiller.¹⁷⁶ Due to frequent “off the books” dealings, tracking the money is nearly impossible unless wiretaps are used or tracking systems are in place to monitor couriers.¹⁷⁷ The key attractiveness of Hawala is anonymity.¹⁷⁸ Since 9/11, the United States, as well as other governments, have been on high alert for illicit trading through Hawala networks.¹⁷⁹ However, while many Western countries are increasingly suspicious of Hawala transactions, a large portion of the Western world still allow for these types of transactions.¹⁸⁰

The highest, and most obvious, risk terrorist groups face is being detected by authorities.¹⁸¹ However, there is also risk associated with relying on various methods of funding.¹⁸² While there is a high degree of certainty that transfers made between banks will be accurate and successful, cash transfers are less reliable because of the opportunities for theft along the way, in addition to possible seizures by law enforcement.¹⁸³

The convenience of a particular method will depend on the geographic and topographic features as well as demographic factors.¹⁸⁴ Moreover, terrorists prefer funding methods that require the fewest steps and least amount of skill.¹⁸⁵ Therefore, terrorists are less likely to engage in elaborate money laundering schemes involving numerous actors.¹⁸⁶ Additionally, terrorists try to avoid payment of fees, when possible, as a way to reduce the inevitable cost and fees of moving money.¹⁸⁷ The most important factor terrorists consider is moving money as quickly as possible.¹⁸⁸

The growing nexus between international terrorism and organized crime is a positive development.¹⁸⁹ Tracking terrorists for their illicit activities, rather than their terrorism-based endeavors, is less complicated.¹⁹⁰ While countries adhere to dissimilar definitions of terrorism or acknowledge different lists of designated terrorist organizations, there still exists a consensus between them on the need to

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Jost, *supra* note 171, at 9.

¹⁷⁹ Cannon, *supra* note 169, at 354.

¹⁸⁰ Freeman & Ruehsen, *supra* note 166, at 6.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Jacobson & Levitt, *supra* note 150, at 119.

¹⁹⁰ *Id.*

fight crime.¹⁹¹

B. Punishment for Terrorist Financing

There needs to be a more serious and severe additional element of punishment imposed upon counterfeiters who fund terrorist organizations, given the harshness of the crime, which is more than simply selling counterfeited goods. Some countries are more willing to coordinate with the United States on criminal law enforcement than on counterterrorism efforts.¹⁹² This is because many countries do not want to acknowledge that they have a terrorism problem, while others are reluctant to be seen cooperating with the United States on the “War on Terror”.¹⁹³

One approach to prosecute individuals for terrorist funding is to punish them for their criminal activity rather than for crimes of terrorism.¹⁹⁴ Prosecuting a suspect for crimes of terror is difficult because in these cases, evidence often comes from intelligence sources. For example, the evidence could be inadmissible and its use may compromise valuable information or methods employed by the agencies.¹⁹⁵ Beyond the legal benefits, disclosing terrorists’ criminal activities conveys a positive public relations externality to other countries, as well as to potential terrorists.¹⁹⁶ Redefining terrorists as criminals sullies the upright reputation they seek to portray among their followers as “freedom fighters” or principled religious activists.¹⁹⁷ Publically pursuing terrorists through the criminal activity track taints the political, religious or practical legitimacy that is so critical to building the financial support and recruiting operatives to these terrorist organizations.¹⁹⁸

C. Prosecuting for Financing Terrorist Organizations

1. 18. U.S.C §2339A and §2339B

It becomes an interesting problem deciding the effective means in which to punish individuals associated with terrorist funding. It is an

¹⁹¹ *Id.*

¹⁹² *Id.* at 120.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 121.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

easier question to determine how to punish those who are directly involved and intentionally or knowingly contribute to the enterprise. However, it is rather difficult to determine the means to punish those that might lack the knowledge or intent mens rea requirement. In regards to counterfeiting, should a country punish an immigrant selling counterfeited designer bags on the street for terrorist financing when he may not have the appropriate intent or knowing mens rea? These types of questions relate to other forms of terrorist financing, such as drug trafficking¹⁹⁹ or even human trafficking²⁰⁰ associated with the adult film industry, and the ways in which these forms of crimes are punished as well.

Prosecutors investigating terrorist financing and facilitation have a range of charging options available.²⁰¹ The primary statutes used to charge terrorist financing and facilitation are codified at 18 U.S.C §§2339A–2339D, 50 U.S.C. §§1701–05 and 18 U.S.C. §1956(a)(2)(A).²⁰² However, the most frequently used charge of the terrorist financing statutes is section 2339B, concerning the provision of material support or resources to a designated foreign terrorist organization (FTO)²⁰³. The original terrorist financing statute, section 2339A,²⁰⁴ was enacted in 1993 in response to the World Trade Center bombing that same year, while section 2339B²⁰⁵ was enacted in 1996 following the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.²⁰⁶ The material support statutes, codified at 18 U.S.C. §§2339A and 2339B, have been used hundreds of times in the Department of Justice's (DOJ) efforts to prevent the flow of assistance to terrorists and terrorist organizations. Following the 9/11 attacks, these tools were strengthened by Congress through amendments permitting the prosecution of defendants whose support for terrorist activities occurs entirely outside the United States.²⁰⁷ Although these amendments have rarely been the subject of litigation, in appropriate cases, prosecutors should give

¹⁹⁹ See *Drug Trafficking and the Financing of Terrorism*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/frontpage/drug-trafficking-and-the-financing-of-terrorism.html>.

²⁰⁰ See *Terrorist use Human Trafficking to Generate Revenue, Demoralize Adversaries, Fill the ranks*, HOMELAND SECURITY NEWS WIRE (Dec. 31, 2014), <http://www.homelandsecuritynewswire.com/dr20141231-terrorists-use-human-trafficking-to-generate-revenue-demoralize-adversaries-fill-the-ranks>.

²⁰¹ Michael Taxay, Larry Schneider, & Katherine Didow, *What to Charge in a Terrorist Financing or Facilitation Case*, 62, U.S ATT'Y BULL 9, 9-15 (2014).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ 18 U.S.C. §2339A (a)(b)(2017).

²⁰⁵ 18 U.S.C. §2339A (a)(g)(2017).

²⁰⁶ Taxay, Schneider, & Didow, *supra* note 202, at 10.

²⁰⁷ John De Pue, *Extraterritorial Jurisdiction and the Federal Material Support Statutes*, 62, U.S ATT'Y BULL 16, 16-23 (2014).

serious thought to the worldwide reach of these powerful statutes.²⁰⁸

Material support is a key element of the offenses described in both section 2339A and section 2339B.²⁰⁹ Congress has defined the phrase “material support or resources” broadly, and courts have declined to limit the statute’s scope to the physical transfer of assets.²¹⁰ Expressly, section 2339A makes it a federal crime to provide one or more of the types of aid set forth in the definition, knowing or intending that the support will be used in the preparation for, or carrying out of, and federal offenses listed in the section.²¹¹ More specifically, material support applies to any individual or organization when the donor *knew or intended* that the material support to be used in preparation for, or in carrying out one of the criminal violations within the statute.²¹² Section 2339A solely criminalizes support with intent.²¹³ However, this does not completely ban supporting criminal activity, because individuals could still indirectly support terrorist organizations as long as they do not explicitly have the intent for the aid or support to do so.²¹⁴ Therefore, the specific intent element is not necessarily useful for federal prosecutors in efforts to eliminate economic support for terrorism.²¹⁵

In order to try and eliminate the financing of terrorist organizations, Congress enacted a more relaxed material support statute in order to reach a broader range of individuals than section 2339A.²¹⁶ As a result, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which created a second material support statute. The AEDPA was codified as 18 U.S.C section 2339B.²¹⁷ Section 2339B criminalizes knowingly providing any of these categories of aid to a foreign terrorist organization designated by the Secretary of State.²¹⁸ Most importantly, section 2339B eliminated the specific intent requirement, as long as the recipient of the aid is one of the designated Foreign Terrorist Organizations.²¹⁹ Therefore, it becomes easier to prosecute individuals using this statute because it is enough to just knowingly provide material support or resources to a terrorist

²⁰⁸ *Id.* at 16.

²⁰⁹ Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. OF NAT’L SEC. POLICY L. 5, 6 (2005).

²¹⁰ Taxay, Schneider, & Didow, *supra* note 201, at 10.

²¹¹ *Id.*; see 18 U.S.C §2339A (2017).

²¹² Bradley A. Parker, *Material Support and the First Amendment: Eliminating Terrorist Support by Punishing Those with No Intention to Support Terror?*, 13 N.Y. City L. Rev 201, 213 (2011).

²¹³ Taxay, Schneider, & Didow, *supra* note 201 at 10; see also 18 U.S.C. §2339A and §2339B.

²¹⁴ See Parker, *supra* note 212, at 205.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Taxay, Schneider, & Didow, *supra* note 201, at 10; see also 18 U.S.C §2339B.

²¹⁹ Parker, *supra* note 212, at 206.

organization.²²⁰

Section 2339B reflects recognition by Congress that terrorist organizations can have multiple wings, including military, political, social, and that any material support to any of these wings ultimately supports the terrorist organization's violent activities.²²¹ Section 2339B contains a specific mens rea requirement, providing that the defendant must know the FTO is a designated terrorist organization or that it has engaged in "terrorism."²²² Although section 2339A and section 2339B are independent substantive offenses, each has certain characteristics of complicit liability.²²³ However, these offenses also differ from traditional complicity liability in several ways, including: they create an independent substantive offense, they provide for a knowledge mens rea; and they take a different approach to the definition of the actus reus of the offense.²²⁴

Unlike conspiracy, these crimes are framed with a mens rea of knowledge rather than of purpose.²²⁵ These offenses are prosecutorial weapons because material support may take many different forms and can be tied to so many different underlying offenses.²²⁶ The government uses section 2339A and section 2339B as catch-all offenses that can be invoked in widely varying situations, where individuals engage in conduct that may contribute in some way to the commission of terrorist offenses.²²⁷

2. *USA PATRIOT ACT*

The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), sought to "deter and punish terrorist acts in the United States and around the world" and to "enhance law enforcement investigatory tools."²²⁸ Section 805(a)(2)(B) of the act added "expert advice or assistance" to the definition of material support in section

²²⁰ *Id.*

²²¹ Taxay, Schneider, & Didow, *supra* note 201, at 10.

²²² *Id.* at 11; *see also* 18 U.S.C §2339B (2017).

²²³ Abrams, *supra* note 209, at 8.

²²⁴ *Id.* at 11.

²²⁵ *Id.* at 6 ("These provisions can be used to impose punishment for conduct remote from the commission of criminal harms, often conduct involving minimal and outwardly non-criminal acts.").

²²⁶ *Id.* at 7 ("Most important to note is that the request mens rea for these offenses is merely knowledge.").

²²⁷ *Id.*

²²⁸ Parker, *supra* note 212, at 297; *see also* 18 U.S.C.A §1 (Westlaw through Pub. L. No. 107-56).

2339A.²²⁹ This addition targeted the tangible support in the form of money, weapons and other goods and services.²³⁰

Addressing concerns that section 805(a)(2)(B) was impermissibly vague, Congress sought to define “expert advice or assistance.”²³¹ Therefore, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA), which amended the definition section of the first material support statute, section 2339A(b)(1).²³² As a result, “expert advice or assistance” is defined as “advice or assistance derived from scientific technical or other specialized knowledge.”²³³

D. Courts Interpretation and Application of “Material Support”

In *Holder v. Humanitarian Law Project*, the Supreme Court upheld section 2339B’s broad prohibition on support terrorist organizations.²³⁴ Plaintiffs wished to provide support to two groups that were designated as foreign terrorist organizations, and claimed they sought to facilitate only the groups’ lawful, nonviolent purposes.²³⁵ Plaintiffs allege that section 2339B violated the Fifth Amendment due to vagueness and infringed their First Amendment right to free speech and association.²³⁶ The court ultimately held that the statute was not constitutionally vague and does not penalize mere association with a foreign terrorist organization, but it expressly prohibits the act of giving material support.²³⁷ Congress took care to add narrowing definitions to the material-support statute over time, which increased the clarity of the statute’s terms.²³⁸

²²⁹ *Id.* at 297, at 8; *see also* 18 U.S.C.A §1 (Westlaw through Pub. L. No. 107-56 §805(a)(2)).

²³⁰ Parker, *supra* note 212, at 298.

²³¹ *Id.* at 208.; *see also Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D Cal. 2004) (Plaintiffs argued that §805(a)(2)(B) violated First Amendment guarantees because it invites viewpoint discrimination targeting groups and their supporters based on political views. They also argued that §805(2)(B) was impermissibly vague and overbroad and failed to afford adequate notice to individuals of what is prohibited, which gives government officials the discretion of enforcement ultimately causing individuals to refrain from partaking in activities protected by the First Amendment. The court held that the term “expert advice or assistance” was impermissibly vague but not overbroad).

²³² Parker, *supra* note 212, at 298-99; *see also* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

²³³ Parker, *supra* note 212, at 299.

²³⁴ Taxay, Schneider, & Didow, *supra* note 201, at 10.

²³⁵ *Holder v. Humanitarian Law Project*, 561 U.S 1 (2010).

²³⁶ *Id.*

²³⁷ *Id.* at 39.

²³⁸ *Id.* at 21 (See §2339A(b)(2) “‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge”; §2339A(b)(3) (“‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge”; §2339B(h) (clarifying the scope of “personnel”). And the knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes

Additionally, the *Holder* court noted that section 2339B, when applied to speech, did not require proof of intent to further a terrorist organization's illegal activities.²³⁹ Importantly, the court highlighted the mental state required and acknowledged that Congress plainly spoke to the necessary mental state, and chose knowledge about the organizations' connection to terrorism, not specific intent to further the organization's terrorist activities.²⁴⁰

The court in *United States v. Sattar* worked to define the actus reus of the material support offenses.²⁴¹ The court indicated that providing material support, means to furnish, supply, to make ready, to make available."²⁴² In *Sattar*, an inmate, incarcerated for conspiracy and soliciting crimes of violence, was a leader in a designated foreign terrorist organization.²⁴³ While incarcerated, the Bureau of Prisons severely limited his contact with the outside world.²⁴⁴ However, when his attorney visited him in prison, she helped conceal the discussions they had regarding a FTO by making extraneous English comments to mask the Arabic conversation.²⁴⁵

The indictment alleged that the defendants had provided "material support and resources" to the FTO in the form of "communications equipment" and "personnel."²⁴⁶ The government's theory regarding communications equipment was that the defendants provided such equipment by their use of telephones in the course of transmitting and disseminating messages and information to and among the FTO's leaders in the United States and around the world.²⁴⁷ In response, defendants argued that they were "merely talking" and that the acts constituted nothing more than "using" communications equipment, rather than "providing such equipment" to the FTO.²⁴⁸ Furthermore, the indictment charged that the "personnel" provided by the defendants to the FTO included the defendants themselves, through their assistance to the FTO's leaders and members in communicating with each other.²⁴⁹

containing a similar requirement. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 523 (1994).

²³⁹ *Id.*

²⁴⁰ *Id.* at 16-17.

²⁴¹ *U.S. v. Sattar*, 272 F. Supp. 2d. 248 (S.D.N.Y 2003).

²⁴² Taxay, Schneider, & Didow, *supra* note 199, at 10; *see also U.S. v. Sattar*, 272 F. Supp. 2d. 248 (S.D.N.Y 2003).

²⁴³ *U.S. v. Sattar*, 272 F. Supp. 2d. 248 (S.D.N.Y 2003).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 370.

²⁴⁶ Abrams, *supra* note 209, at 12.

²⁴⁷ *Id.* at 12-13.

²⁴⁸ *Id.* at 13.

²⁴⁹ *Id.*

E. Criticism over Material Support Laws

The material support laws have engendered various debates and criticisms throughout its evolution.²⁵⁰ The political debates over the laws are centered on the notion of balancing national security with civil liberties.²⁵¹ Those concerned with national security question the material support laws and worry that they do not address the ever-evolving nature of the terrorist threats, and solely focus on prosecuting terrorists acts that have already occurred, rather than concentrating on prevention.²⁵² Civil libertarians criticize the material support laws because they are an example of increased executive actions used in the name of national security and prevention in a “perpetual war.”²⁵³

In addition to political debates, there is also constitutional criticism, specifically regarding the First and Fifth Amendments.²⁵⁴ The First Amendment does not provide absolute protection to all types of speech.²⁵⁵ Speech, related to the material support statutes that is considered fighting words,²⁵⁶ incitement to illegal activity or imminent violence²⁵⁷ and true threats, is not protected.²⁵⁸ Therefore, it is uncontested that violent conduct and speech that fosters that behavior is unconstitutional and can be prosecuted.²⁵⁹ As a result, individuals who intend to support violent terrorists groups and their activities by providing material support can be prosecuted and punished if they have the requisite intent required by the statute, which comports with the First Amendment.²⁶⁰

However, it becomes problematic when an individual lacks no specific intent to further the violent goals of the terrorist organization.²⁶¹ Section 2339B has resulted in punishing individuals whose conduct cannot be linked to any specific terrorist attack or violent conduct, which troubles critics of the statute.²⁶² Arguably, section 2339B infringes on the protected First Amendment Right of Association by criminalizing material support only when offered to a politically

²⁵⁰ Michael G. Freedman, *Prosecuting Terrorism: The Material Support Statute and Muslim Charities*, 38 HASTINGS CONST. L.Q. 1113, 1118 (2011).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Parker, *supra* note 212, at 299.

²⁵⁶ *Id.*; see *Chaplinsky v. New Hampshire*, 314 U.S. 568 (1942).

²⁵⁷ Parker, *supra* note 212, at 299; see *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁵⁸ Parker, *supra* note 212, at 299; see *Virginia v. Black*, 538 U.S. 343 (2003).

²⁵⁹ Parker, *supra* note 212, at 299.

²⁶⁰ *Id.* at 300

²⁶¹ *Id.*

²⁶² *Id.*

disfavored group.²⁶³ Under section 2339B, intent is no longer required and punishment hinges on the identity of the organization that has received the material support.²⁶⁴ Therefore, individuals are prosecuted and punished because of their connections to certain groups who have committed the illegal acts even if there is no proof of intent to further the terrorist activity.²⁶⁵

F. *Other Forms of Punishment for Terrorist Financing*

Another crime that is sometimes charged in terrorist financing cases is international money laundering under 18 U.S.C section 1956(a)(2)(A).²⁶⁶ This statute is sometimes called “reverse” money laundering due to the fact that this offense involves the movement of “clean” money overseas for an improper purpose.²⁶⁷ The statute proscribes the transportation, transmission, or transfer of funds from a place inside the United States to a place outside the United States “with the intent to promote the carrying on of specified unlawful activity” (SUA). 18 U.S.C.§1956 (2014). The list of SUA’s is extensive and includes the material support offenses, IEEPA violations, and many of the crimes commonly associated with terrorism.²⁶⁸ Although the statute appears to have a broader proscription than section 2339A, courts have read into the requirement that the defendant also intend to further the progress of a SUA, which goes beyond intent to promote the activity.²⁶⁹

In order to combat this type of terrorist funding, the United States, in concert with 36 other countries, organized the Financial Action Task Force on Money Laundering (FATF).²⁷⁰ The prime initiative of the FATF is to adopt a uniform set of standards regarding money

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Taxay, Schneider, & Didow, *supra* note 201, at 9; *see also* 18 U.S.C. §1956(a)(2)(A) (whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States - with the intent to promote the carrying on of specified unlawful activity).

²⁶⁷ Taxay, Schneider, & Didow, *supra* note 201, at 13.

²⁶⁸ *Id.*

²⁶⁹ *Id.*; *see e.g., United States v. Trejo*, 610 F.3d 308, 314 (5th Cir. 2010).

²⁷⁰ Cannon, *supra* note 170, at 374. (The FATF members are Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, People’s Republic of China, Portugal, Russian Federation, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States; the two international organizations are the European Commission, and the Gulf Cooperation Council.); *see also FATF Members and Observers*, FIN. ACTION TASK FORCE (2014), <http://www.fatf-gafi.org/about/membersandobservers/>.

laundering and terrorist financing which encourage an effective implementation of legal, regulatory and operational measures for the action that pose a threat to the financial systems.²⁷¹

V. PROPOSED SOLUTIONS FOR THE UNITED STATES

A common theme in both punishing counterfeiting in general and punishing terrorist financing is the mens rea requirement of “knowingly” participating in both actions. In order to properly deal with the ongoing issue of terrorist groups funding their activities through counterfeiting, there needs to be a form of punishment for all parties involved, as long as there is some level of knowledge and awareness that the funds procured are being used to further the terrorist agenda and support a designated FTO.

Organizations like CNAC, are essential as a means to educate the consuming public about the harms of purchasing counterfeit goods and the ways in which the money funds terrorists groups. If the consuming public is aware of these crimes, then it becomes easier to prosecute them if they violate the law. For example, US Code section 2339B criminalizes knowingly providing aid to a foreign terrorist organization. Therefore, if the United States were to create organizations, like CNAC, more people could be punished for engaging in this activity, both on the consumer and producer sides. The ability to punish more individuals is one way to begin decreasing the illegal behavior altogether.

Various surveys examining counterfeit consumers’ motives in making purchases noted that most consumers partake in the counterfeit industry because they consider counterfeiting to be a “victimless crime.”²⁷² Therefore, there needs to be substantial monetary fines within the United States on those purchasers of counterfeit goods who know or should know that the product is counterfeit. Similar to Italy and France, the U.S should shift their focus toward the demand side of counterfeiting, by creating these harsher penalties for consumers engaging in this behavior. This can apply to vendors as well. Although many counterfeit vendors might be in the business to solely make a profit, they too should be held responsible according to the same “knowing” standard.

Implementing these laws would inevitably cut down on the counterfeiting epidemic because consumers would be less likely to purchase products knowing the crime associated with it. Therefore, this method would serve as an ultimate deterrent and decrease the demand

²⁷¹ Cannon, *supra* note 170, at 349; see also *Who We Are*, FIN. ACTION TASK FORCE (2014), <http://www.fatf-gafi.org/pages/aboutus/whoweare/>.

²⁷² Martinez, *supra* note 67, at 123.

for the counterfeit market. While this would solve the initial problem, there would still likely be individuals interested in purchasing counterfeit goods. Due to this type of ignorance and disrespect for the law, it becomes increasingly important to impose even harsher penalties for those individuals who then continue to engage in this behavior. These individuals should be punished as providing material support to terrorist organizations.

While many countries adhere to dissimilar definitions of terrorism and acknowledge different terrorist organizations as potential threats, the United States should work to unite with other countries to fight crime more generally. Countries are more attracted to fighting crime than specifically “the war on terror.” By reinforcing the existing criminal laws, and perhaps creating greater consumer punishments as described above, this will inevitably have a positive impact on reducing terrorist funding through counterfeiting. The United States should also continue to pursue punishing terrorists for their other criminal activities because this taints the political and religious legitimacy they desperately rely on to garner financial support and recruit operatives. Any manner in which the United States can cut off resources to terrorists is beneficial in the fight to eliminate their existence.

VI. CONCLUSION

The connection between selling counterfeit goods as a means of funding terrorist organizations is both well established and serious concern. Terrorists, as well as other criminals, are attracted to counterfeiting because of its generally low enforcement and high demand. While countries around the world, including the United States, have tried to implement legislation in order to regulate and punish counterfeiting, there clearly needs to be a more unified worldwide approach in order to deal with this issue logically. Countries need to accept that counterfeiting is a real problem and should be treated more seriously than just merely intellectual property theft.

Countries, such as France and Italy, have been successful in enforcing counterfeiting regulations by focusing on the end-consumers. Citizens in France and Italy are generally more aware of the harms of counterfeiting through campaigns that are prevalent throughout these countries. Overall, creating awareness of the connection between counterfeiting and terrorist funding through the use of campaigns is effective both for general public knowledge and education, but also to establish the appropriate mens rea for prosecution purposes. The more knowledgeable the consumer, the easier it can be to punish individuals who knowingly continue to engage in this behavior and support terrorist

organizations. Although extinguishing the counterfeit market as a means of support for terrorists appears to be an unattainable task, there are definite approaches the United States can take in order to begin to minimize the market and decrease the attractiveness of counterfeiting to criminals all together.