

# EXAMINING TRADEMARK COUNTERFEITING LEGISLATION, FREE TRADE ZONES, CORRUPTION AND CULTURE IN THE CONTEXT OF ILLICIT TRADE: THE UNITED STATES AND UNITED ARAB EMIRATES

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This Paper seeks to explore the complex dynamics of illicit trade, specifically the trade in counterfeit goods, the legal framework of two countries for comparison—the United States and United Arab Emirates—and other impacting factors such as free trade zones, corruption, and culture.

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## I. INTRODUCTION

This Paper seeks to examine the issue of trademark counterfeiting through the lens of illicit trade, particularly looking at the legal structure in the United States (“U.S.”) and in select countries in the Middle East. It will also explore the addition of legal complexity of Free Trade Zones (“FTZs”) in the Middle East and the movement toward online marketplaces. Illicit trade has been occurring since antiquity, as shown by letters from the Assyrian Empire to efforts in ancient Greece and Rome to authenticate goods through trademarks in the Aztec Empire.<sup>1</sup> Post-antiquity illicit trade has continued to grow, morph, and be mingled with political dimensions, such as the trade in intellectual thought (smuggling of books in Sixteenth century France),<sup>2</sup> state-building (smuggling of goods for war between Venice and the Ottoman Empire),<sup>3</sup> resistance (American colonists smuggling to resist British tax policies and rule),<sup>4</sup> and goods in diaspora communities.<sup>5</sup>

The current state of illicit trade, particularly in the Middle East, can be traced back to remnants of artificial boundaries set up by colonial powers and the Ottoman Empire to rule their conquered lands, which had the effect of cutting off traditional trade paths and creating artificial boundaries for which local populations had no respect.<sup>6</sup> Of illegal drug trade, trade and smuggling in humans, weapons, and others, two of the top two revenue generators are: (1) the production and sale of counterfeit products, and (2) illegal trade in intellectual property that only emerged with the industrial revolution.<sup>7</sup> This Paper will be focusing on one of the top revenue generators in illicit trade: the production and sale of trademark counterfeits.

As noted above, the history of trade, colonization, and conquest of each area has already had an impact on what trade routes exist and often whether they are considered licit or illicit. However, additional layers of

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1. LOUISE I. SHELLEY, *DARK COMMERCE: HOW A NEW ILLICIT ECONOMY IS THREATENING OUR FUTURE* 17–20 (2018).

2. *Id.* at 28.

3. *Id.*

4. *Id.* at 28–29.

5. *Id.* at 31–32.

6. *Id.* at 39.

7. *Id.* at 48.

factors including the economy, the political situation, and society also play a major role in the movement of illegal goods.<sup>8</sup> This Paper seeks to explore the legal culture and legal framework that purports to limit the movement of illegal goods. In some cultures, or from some perspectives, there is an official or unofficial perception of a benefit of counterfeit products,<sup>9</sup> without regard to the detriment, or possibly in spite of it.

This Paper will initially examine (I) the perceived benefits of trademark counterfeiting and the harm caused by trademark counterfeiting to set the stage for the need for a legal framework to enforce trademarks; from there, the Paper will explore (II) two main jurisdictions' legal frameworks for criminal prosecution of trademark counterfeiting, the U.S. and the United Arab Emirates; next, the Paper will discuss (III) Free Trades Zones (FTZs), corruption and culture in the United Arab Emirates to see the impact and interplay they have with counterfeits; and finally, the Paper will conclude by examining (IV) technology and its relationship to the evolution of trademark counterfeiting.

#### A. The Perceived Benefits of Trademark Counterfeiting

In many global cultures, local protectionism<sup>10</sup> provides a space for product counterfeiting and the illegal trade of intellectual property. The

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8. See Louise Shelley, *Illicit Trade and Our Global Response*, FOREIGN SERV. J., Oct. 2018, at 22, 24, [https://www.afsa.org/sites/default/files/flipping\\_book/1018/index.html](https://www.afsa.org/sites/default/files/flipping_book/1018/index.html).

9. See, e.g., Yi Qian, *Counterfeiters: Foes or Friends? How Counterfeits Affect Sales by Product Quality Tier*, 60 MGMT. SCI. 2381, 2381 (2014) (noting the research finding that counterfeiting “could have positive spillover effects on authentic sales”). See also Felix Tang et al., *Understanding Counterfeit Consumption*, 26 ASIA PAC. J. MKT. & LOGISTICS, 4, 4 (2014) (discussing findings amongst consumer motivation study conducted in Hong Kong finding that motivation for counterfeit purchases included “utility (35 percent) received from the good over the genuine article[.] . . . perceived risk involved in the purchase (22 percent),” social norms (10 percent), confusion (10 percent), and ethical concerns (10 percent), and “at less than 4 percent each, were culture, habit, and desire to explore”).

10. See Daniel Chow’s definition of local protectionism, ““Local protectionism” refers to the role of local governments in protecting illegal activity by failing to fully enforce the law. Note that under the definitions set forth above, some forms of local protectionism may also be considered forms of organized crime.” Daniel Chow, *Organized Crime, Local Protectionism, and the Trade in Counterfeit Goods in China*, 14

reason for local protectionism can vary widely. Additionally, the differences between collectivist or individualist societies<sup>11</sup> can impact how the societies may view intellectual property protections.<sup>12</sup> A wide variety of legitimate and illegitimate reasons exist for local protectionism, manifestations of collectivism, and individualism, and often, the reasons involve impact on the manufacturing and sale of counterfeit goods exist. These reasons have included: economic inability to afford a branded product but having access to a counterfeit; counterfeits helping a startup to build up capital before being able to create their own intellectual property; perceived status of a consumer who buys a counterfeit brand that they cannot afford or do not want to invest in; availability of counterfeit product in a market where the authentic brand does not sell; lower prices from neighboring markets; revenue generation and job creation; and many others.<sup>13</sup>

## B. The Harm

Despite the possible positive reasons for an individual, company, or society to engage in counterfeit, the harm caused by trademark

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CHINA ECON. REV. 473, 473 (2003). *See also* *Protectionism*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The protection of domestic businesses and industries against foreign competition by imposing high tariffs and restricting imports."); Robert W. Kerns Jr., *The Counterfeit Food Crisis in China: A Systemic Problem and Possible Solutions*, 41 N.C. J. INT'L L. 573, 587–89 (2016).

11. *See, e.g.*, Pat K. Chew, *A Case of Motivated Cultural Cognition: China's Normative Arbitration of International Business Disputes*, 51 INT'L LAW. 469, 475 (2018) (comparing the perspective of a collectivist vs. individualist society).

12. *See, e.g.*, Farhad Aliyev & Ralf Wagner, *Cultural Influence on Luxury Value Perceptions: Collectivist vs. Individualist Luxury Perceptions*, 30 J. INT'L CONSUMER MKT. 158, 160 (2018). *See also* Jiongen Xiao et al., *Cross-Cultural Effects of Self-Discrepancy on the Consumption of Counterfeit Branded Luxuries*, 30 ASIA PAC. J. MKT. & LOGISTICS 972, 977 (2018).

13. *See* Jeremy M. Wilson & Rod Kinghorn, *The Global Risk of Product Counterfeiting: Facilitators of the Criminal Opportunity*, A-CAPP BACKGROUNDER (January 2015), [http://a-capp.msu.edu/wp-content/uploads/2018/05/PC\\_Opportunity\\_Backgrounder\\_FINAL.pdf](http://a-capp.msu.edu/wp-content/uploads/2018/05/PC_Opportunity_Backgrounder_FINAL.pdf). *See also* Kaleel Rahman et al., *Fakes and Fashion: Understanding the Counterfeit Crisis in the Middle East*, 10 EUR. ADVANCES CONSUMER RES. 90, 92 (2013) (explaining how factors such as fashion changes, trialability, superior quality, and household usability can affect attitudes towards counterfeit).

counterfeits is broad and can include harm to the brand owner/victim, the economic development of a country, and the health and safety of the consumer.<sup>14</sup>

Governments worldwide continue to note the harm that is coming to their countries from counterfeit goods, including the U.S. government.<sup>15</sup> Often, counterfeiting is: (1) either not criminalized or not enforced; (2) either unofficially sanctioned by the government or is allowed to occur because of corruption;<sup>16</sup> or (3) some combination of the prior two. In any of these cases, arguably harm is still occurring within that country, either economically or physically to its citizens. Harm to the consumer can be seen in many forms—from dissatisfaction with the quality of a purchase to negative effects on health, up to death.<sup>17</sup>

Additionally, product counterfeiting's connection to other criminal activity is present, but often difficult to prove or even research. Some recent efforts to show linkages or patterns between criminal activity has shown that concurrent charges with counterfeiting includes: conspiracy, trafficking and distribution/sale of counterfeits, possession, and smuggling;<sup>18</sup> while those arrested for counterfeiting were charged prior with trafficking, sale, possession or distribution of illicit drugs, fraud,

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14. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-216, INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEIT MARKETS 8 (2018). *See also* BASCAP & INTA, FRONTIER ECONOMICS, THE ECONOMIC IMPACTS OF COUNTERFEITING AND PIRACY 41–51 (2017) (discussing the econometric analysis of impacts on economic growth); Wilson & Kinghorn, *supra* note 13.

15. *See* Memorandum on Combating Trafficking in Counterfeit and Pirated Goods, 2019 DAILY COMP. PRES. DOC. 203 (Apr. 3, 2019), <https://www.whitehouse.gov/presidential-actions/memorandum-combating-trafficking-counterfeit-pirated-goods/> (discussing the need to expand U.S. anti-counterfeiting efforts because of the harm to the U.S.) [hereinafter 2019 Counterfeit Memorandum]. *See generally* CONG. RESEARCH SERV., RL34292, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE (2015) (emphasizing the importance of enforcing intellectual property rights as a component of US international trade policy).

16. Wilson & Kinghorn, *supra* note 13.

17. BASCAP & INTA, *supra* note 14, at 51; GAO-18-216, *supra* note 14, at 8; Hearing on Counterfeits and Their Impact on Consumer Health and Safety Before the U.S. S.Comm. on the Judiciary, 114th Cong. 3 (2016) (statement of David Hirschmann, President & CEO, Glob. Intellectual Property Ctr. of the U.S. Chamber of Commerce).

18. JAY KENNEDY, A-CAPP CENTER PRODUCT COUNTERFEITING DATABASE: INSIGHTS INTO CONVERGING CRIMES 6 (2019), <http://a-capp.msu.edu/wp-content/uploads/2019/01/Converging-Crimes-FINAL-2.pdf>.

white-collar crime, and occupational offending, intellectual property crimes or counterfeiting, property crimes; crimes against a person;<sup>19</sup> and in a smaller percentage but more serious area, some were linked to terrorist activities.<sup>20</sup>

## II. Global Legal Framework to Prosecute or Remedy Trademark Counterfeiting: U.S. and the Middle East

Globally, legal frameworks to either prosecute in criminal courts or allow for civil suits for trademark counterfeiting exist, but in many cases are (1) not being used for a variety of reasons;<sup>21</sup> (2) being used only occasionally not touching the extent of the actual problem; (3) not strong enough to have any type of punishment or deterrent for offenders; (4) inaccessible or difficult to use for the brand owners; (5) in a corrupt legal systems; or (6) not worth the time and resources to go through the legal process because the brand prosecutors are not incentivized to use it.

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19. *Id.* at 5.

20. *Id.* at 6 (“The category of ‘Other Offenses’ served as a catchall for a litany of illegal behaviors, including crimes of smuggling, selling or purchasing an illegal firearm, prostitution, possession of an illegal assault weapon, selling fraudulent passports, and as mentioned above the identified links to terrorist activities. While these individuals represent less than 1% of all the individuals in our database, their activities have the potential to have far reaching consequences. In addition to counterfeiting, these individuals were concurrently charged with providing material support (weapons) for terrorism, and the financing of terrorism and terrorist organizations.”). *See also Senator Collins Chairs Hearing Detailing Link Between Sale of Counterfeit Goods and Hezbollah*, U.S. SENATE COMMITTEE HOMELAND SECURITY & GOV’T AFF. (May 25, 2005), <https://www.hsgac.senate.gov/media/minority-media/senator-collins-chairs-hearing-detailing-link-between-sale-of-counterfeit-goods-and-hezbollah>; Michael Schidlow, Counterfeit Goods: Money Laundering in Plain Sight (Part I — The Risks), LEGAL EXECUTIVE INSTITUTE (June 28, 2018), <http://www.legalexecutiveinstitute.com/counterfeit-goods-money-laundering-part-1/>; Brandon A. Sullivan et al., *The Nexus Between Terrorism and Product Counterfeiting in the United States*, 15 GLOBAL CRIME 357, 357 (2015), <https://www.tandfonline.com/doi/pdf/10.1080/17440572.2014.919227?needAccess=true>. *See generally*, 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 (2015).

21. *See, e.g.*, Kari Kammel et al., *The Crime of Product Counterfeiting: A Legal Analysis of the Usage of State Level Statutes*, 18 CHI.-KENT J. INTELL. PROP. 125, 152 (2019); Wilson & Kinghorn, *supra* note 13.

Although studies have not yet been done in this area, it is well known that prosecutions are largely non-existent and arguably ineffective.<sup>22</sup> Furthermore, while civil suits can be made against other legitimate companies, civil suits against illicit counterfeiters are problematic for a variety of reasons, including whether they are a registered legitimate company, whether they exist at all as a company, where they are located, and where they keep their resources. An effect of all the above reasons is that from a risk perspective, trademark counterfeiting is low risk and high reward—much less risky and more money than drugs, weapons or other types of illicit trafficking.<sup>23</sup>

While the global impact of anti-counterfeiting efforts is still relatively unknown and tenuous, it is worth reviewing what *de facto* and *de lege* anti-counterfeiting legislation in a comparative look at the global framework, the U.S., and the U.A.E. as a starting point.

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22. See Kammel et al., *supra* note 21, at 137 fig. 4 (noting the declining rate of state level convictions in the U.S. over a ten-year period). At the U.S. Federal level, the U.S. Intellectual Property Enforcement Coordinator reported to Congress that: [A]t the end of FY 2018, the FBI had 195 pending IPR investigations . . . [I]n FY 2018, the FBI initiated 54 new investigations, made 22 arrests, obtained 12 convictions, forfeitures totaling \$3,176,949, and restitutions totaling \$64,549,217; in FY 2017, the number of CBP and HSI IPR seizures increased more than eight percent, to 34,143 (from 31,560 in FY 2016). The total estimated Manufacturer's Suggested Retail Price (MSRP) of the seized goods, had they been genuine, was \$1,206,382,219; in FY 2017, ICE-HSI initiated 713 intellectual property investigations and had 457 arrests, 288 indictments, and 240 convictions.

U.S. INTELLECTUAL PROPERTY ENF'T COORDINATOR, ANNUAL INTELLECTUAL PROPERTY REPORT TO CONGRESS 18 (2019), <https://www.whitehouse.gov/wp-content/uploads/2019/02/IPEC-2018-Annual-Intellectual-Property-Report-to-Congress.pdf>. Despite the convictions obtained at both the U.S. state and federal levels, the numbers do not appear to come close to dealing with the various estimates of the scope and scale of the global counterfeiting problem. See Org. for Econ. Co-operation and Development [OECD], *Trends in Trade in Pirated and Counterfeit Goods*, at 45 (2019), <https://www.oecd-ilibrary.org/docserver/g2g9f533-en.pdf?expires=1570725918&id=id&acname=ocid177642&checksum=F0F69A8331616D89817BE299B7076D52> (estimating that in 2016 counterfeiting made up 3.3% of world trade) [hereinafter OCED, *Trends in Trade*].

23. See Erwin A. Blackstone et al., *The Health and Economic Effects of Counterfeit Drugs*, 7 AM. HEALTH & DRUG BENEFITS 216, 220–21 (2014) (discussing incentives and penalties for trademark counterfeiting).



### A. Global Legal Efforts to Protect Trademarks and Prevent Counterfeits

A variety of international treaties and conventions exist for the protection of intellectual property and, specifically, trademarks. Trademark treaties administered by the World Intellectual Property Organization (WIPO)<sup>24</sup> include the Paris Convention,<sup>25</sup> the Madrid Agreement (Marks),<sup>26</sup> the Madrid Protocol,<sup>27</sup> the Nice Agreement,<sup>28</sup> the Vienna Agreement,<sup>29</sup> the Singapore Treaty,<sup>30</sup> and the Trademark Law Treaty.<sup>31</sup>

Additionally, the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) addresses trademark counterfeiting and sets up general principles for the protection of intellectual property rights.<sup>32</sup> However, the Agreement still makes it necessary for countries to enact implementing national legislation on the topics of "rules for obtaining evidence, for provisional court orders, for

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24. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/portal/en/> (last visited August 27, 2019).

25. See generally Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305.

26. See generally Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, WIPO Lex, <https://wipolex.wipo.int/en/treaties/textdetails/12599>.

27. See generally Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted on Jun. 27, 1989, S. TREATY DOC. NO. 106-41, <https://wipolex.wipo.int/en/text/283529> (allowing for an international registration of trademark) [hereinafter Madrid Protocol].

28. See generally Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, Jun. 15, 1957, 828 U.N.T.S. 191, <https://wipolex.wipo.int/en/text/287437>.

29. See generally Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, adopted on May 22, 1969, 1155 U.N.T.S. 331, <https://wipolex.wipo.int/en/text/294836>.

30. See generally Singapore Treaty on the Law of Trademarks, Mar. 27, 2006, 2263 U.N.T.S. 3, <https://wipolex.wipo.int/en/text/290013>.

31. See generally Trademark Law Treaty, Oct. 27, 1994, 2037 U.N.T.S. 35, <https://wipolex.wipo.int/en/text/294358>.

32. See Agreement on Trade Related Aspects of Intellectual Property Rights arts. 46, 51, 59, 61, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

injunctions, damages and other remedies, and for measures at the border and criminal sanctions.”<sup>33</sup>

## B. United States Legislation

The U.S. Congress has enacted various trademark legislation over the past 150 years<sup>34</sup> with the current legislation including the Lanham Act,<sup>35</sup> the Trademark Counterfeiting Act,<sup>36</sup> the Federal Trademark Dilution Act,<sup>37</sup> the Anti-Counterfeiting Consumer Protection Act,<sup>38</sup> the Anti-Cybersquatting Consumer Protection Act,<sup>39</sup> the Stop Counterfeiting in Manufactured Goods Act,<sup>40</sup> and the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act.<sup>41</sup> This rich history of protection of intellectual property is more developed than in other countries and stems from the U.S. cultural heritage.<sup>42</sup>

33. *Enforcement of Intellectual Property Rights*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/trips\\_e/ipenforcement\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/ipenforcement_e.htm) (last visited Aug. 27, 2019).

34. For a brief history of these U.S. federal trademark laws, see generally Jeremy M. Wilson et al., *Product Counterfeiting Legislation in the United States: A Review and Assessment of Characteristics, Remedies, and Penalties*, 106 J. CRIM. L. & CRIMINOLOGY 521, 527–34 (2016).

35. See generally Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051–1072, 1091–96, 1051, 1058, 1111–27, 1141 (2018).

36. See generally Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320 (2018).

37. See generally Federal Trademark Dilution Act, 15 U.S.C. § 1125(c) (2018) (implementing the Madrid Protocol).

38. See generally Anti-Counterfeiting Consumer Protection Act of 1996, 18 U.S.C. § 2311 (2018) (allowing for the prosecution of an organization trafficking in counterfeit goods under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1960 (2018)).

39. See generally Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (2018).

40. See generally Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181, 120 Stat. 285 (2006) (codified as amended at 18 U.S.C. § 2320 (2018)).

41. See generally Prioritizing Resources and Organization for Intellectual Property (Pro-IP) Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008) (codified as amended at 15 U.S.C. § 8101 (2018)).

42. See generally Irene Kosturakis, *Intellectual Property 101*, 46 TEX. J. BUS. L. 37, 38–40 (2014) (discussing the early historical development of intellectual property right in the thirteen colonies and U.S. Constitution).

While the U.S. is one of the more active countries in creating legislation for the protection of counterfeiting, prosecution or filing suit remains a limited option for a variety of reasons at the federal level. For example, per the April 2019 Presidential Memorandum,<sup>43</sup> the U.S. Department of Commerce put out a Comment Request on the Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations in the Federal Register, with one of the items requested being to “identify appropriate administrative, statutory, regulatory, or other changes, including enhanced enforcement actions, that could substantially reduce trafficking in counterfeit and pirated goods or promote more effective law enforcement regarding trafficking in such goods.”<sup>44</sup> After *Tiffany (NJ) Inc. v. eBay Inc.*, in which the court held that eBay was not liable to Tiffany for contributory trademark infringement for the sale of counterfeit goods on its platform,<sup>45</sup> companies have held off on filing civil suits at least against e-commerce platforms, while the problem of counterfeiting sales online continues to skyrocket.<sup>46</sup>

The *Prosecuting Intellectual Property Crimes Manual*, published by the Office of Legal Education Executive Office for United States Attorneys, notes that charging decisions should be made if the prosecutor “believes that the person’s conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.”<sup>47</sup> In the U.S., brand owners can also seek exclusion orders

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43. See 2019 Counterfeit Memorandum, *supra* note 15.

44. Comment Request, 84 Fed. Reg. 32861 (proposed Jul. 10, 2019).

45. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 103 (2d Cir. 2010).

46. See Matthew J. Clark, *Leveeing a Flood of Counterfeits on Amazon*, AM. BAR ASS’N,

[https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2018-19/january-february/leveeing-flood-counterfeits-amazon/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/january-february/leveeing-flood-counterfeits-amazon/) (last visited Nov. 22, 2019);

Morgan Forde, *US E-Commerce Platforms Struggle to Rein in Counterfeit Products*, SUPPLY CHAIN DIVE (July 23, 2019), <https://www.supplychaindive.com/news/us-e-commerce-platforms-counterfeit-products/559316/>;

Roomy Khan, *Counterfeits - Amazon, Etsy, eBay, Instagram, and Others Duping Consumers and Damaging Innovation*, FORBES (May 10, 2019, 4:12 PM), <https://www.forbes.com/sites/roomykhann/2019/05/10/counterfeits-amazon-etsy-ebay-instagram-and-others-duping-consumers-and-damaging-innovation/#44f7427a6002>.

47. H. MARSHALL JARRETT ET AL., PROSECUTING INTELLECTUAL PROPERTY CRIMES 377 (4th ed. 2013), (citing U.S. ATTORNEYS’ MANUAL (USAM) ch. 9-27.220).

of trademark counterfeits through the International Trade under Section 337 of the Tariff Act 1930.<sup>48</sup> Federal criminal cases are not always filed for a variety of reasons, and are sometimes referred to the state level or local U.S. courts.<sup>49</sup>

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The USAM was replaced in 2018 by the Justice Manual, which states regarding charging decisions:

Section 2320 is not intended to criminalize every trademark infringement for which remedies may exist under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.* It is intended to deal vigorously with the burgeoning and increasingly lucrative trade in outright copies of well-known trademarked merchandise. The 1996 amendments are intended to focus prosecutive attention on the growing problems associated with the unlawful importation of counterfeit trademarked goods, and violations tied to organized criminal behavior and criminal enterprises.

Justice Manual § 1702 (U.S. Dep't of Justice 2018).

48. *See generally* Tariff Act of 1930 § 1337, 19 U.S.C. § 1337 (2018) (discussing an illegal activity as the “importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946.”).

49. *See* H. MARSHALL JARRETT ET AL, *supra* note 47, at 377 (quoting USAM ch. 9-27.220).

Ordinarily, the prosecutor “should commence or recommend Federal prosecution if he/she believes that the person’s conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.” . . . This directive is not absolute. Even a provable case may be declined in three situations: when prosecution would serve no substantial federal interest; when the person is subject to effective prosecution in another jurisdiction; or when there exists an adequate non-criminal alternative to prosecution . . . Broken down further, the relevant considerations include:

- The federal interest in intellectual property crimes.
- Federal law enforcement priorities.
- The nature and seriousness of the offense.
- The deterrent effect of prosecution.
- The individual’s culpability in connection with the offense.
- The individual’s criminal history.
- The individual’s willingness to cooperate in the investigation or
- prosecution of others.
- The probable sentence and other consequences of conviction.
- Whether the person is subject to prosecution in another jurisdiction.
- The adequacy of alternative non-criminal remedies.
- Special considerations for deciding whether to charge corporations. *Id.*

Further, at the U.S. state level, all fifty U.S. states have a statute allowing for civil suits, injunctions, and monetary damages.<sup>50</sup> Forty-nine of the fifty U.S. states have criminal statutes protecting trademarks,<sup>51</sup> mostly anti-counterfeiting,<sup>52</sup> but some forgery,<sup>53</sup> criminal simulation,<sup>54</sup>

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50. See Wilson et al., *supra* note 34, at 536 (describing survey of state civil laws, including policy characteristics and damages). See also ALA. CODE § 8-12-18 (1980); ALASKA STAT. § 45.50.180 (1961); ARIZ. REV. STAT. ANN. § 32-1985 (2005); ARK. CODE ANN. § 4-71-214 (1997); CAL. BUS. & PROF. CODE § 14250 (West 2007); COLO. REV. STAT. § 6-1-109 (1963); CONN. GEN. STAT. ANN. § 35-11i (West 1963); DEL. CODE ANN. tit. 6, § 3314 (1976); FLA. STAT. ANN. § 495.141 (West 1967); GA. CODE ANN. § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-33 (West 2001); IDAHO CODE ANN. § 48-514 (West 1996); 765 ILL. COMP. STAT. 1036/70 (1998); 815 ILL. COMP. STAT. 425/4 (1986); IND. CODE. § 24-2-1-14 (1955); IOWA CODE § 548.114 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); LA. STAT. ANN. § 51:223 (1954); ME. REV. STAT. tit. 10, § 1531 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, §§ 12, 13 (LexisNexis 2006); MICH. COMP. LAWS § 429.43 (1969); MINN. STAT. ANN. § 333.29 (West 1959); MISS. CODE ANN. § 75-25-27 (1997); MO. REV. STAT. § 417.061 (1973); MONT. CODE ANN. § 30-13-335 (1979); MONT. CODE ANN. § 30-13-335 (2009); NEB. REV. STAT. § 87-141 (2000); NEV. REV. STAT. ANN. § 600.430 (1979); N.H. REV. STAT. ANN. § 350-A:13 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-16 (West 1997); N.Y. GEN. BUS. LAW § 360-m (McKinney 1996); N.C. GEN. STAT. § 80-11 (1967); N.D. CENT. CODE § 47-22-12 (1957); OHIO REV. CODE ANN. § 1329.66 (West 1978); OKLA. STAT. tit. 78, § 32 (1959); OR. REV. STAT. ANN. § 647.105 (West 1961); 54 PA. CONS. STAT. § 1125 (1982); 6 R.I. GEN. LAWS § 6-2-13 (1975); S.C. CODE ANN. § 39-15-1170 (1994); S.D. CODIFIED LAWS § 37-6-24 (1939); TENN. CODE ANN. § 47-25-514 (1982); TEX. BUS. & COM. CODE ANN § 16.104 (West 2011); UTAH CODE ANN. § 70-3a-404 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 19.77.150 (West 2003); W. VA. CODE § 47-2-14 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-112 (1965).

51. See Wilson, et al, *supra* note 30, at 543–44 n. 109.

52. See ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. PENAL CODE § 350 (West 1984); COLO. REV. STAT. § 18-5-110.5 (2001); CONN. GEN. STAT. ANN. § 53-347a (West 1963); DEL. CODE ANN. tit. 11, § 926 (2005); GA. CODE ANN. § 10-1-454 (1996); HAW. REV. STAT. ANN. § 708-875 (West 1997); IDAHO CODE ANN. § 18-3614 (West 1972); IDAHO CODE ANN. § 18-3615 (West 1972); 410 ILL. COMP. STAT. 620/3.16 (1985); 765 ILL. COMP. STAT. 1040/4 (1955); 815 ILL. COMP. STAT. 425/2 (1986); 815 ILL. COMP. STAT. 425/3 (1986); IOWA CODE § 714.26 (2004); KAN. STAT. ANN. § 21-5825 (2010); KY. REV. STAT. ANN. §365.241 (West 2000); LA. STAT. ANN. § 14:229 (1984); MD. CODE ANN., CRIM. LAW § 8-611 (LexisNexis 1957); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS § 750.263 (1931); MINN. STAT. ANN. § 333.42 (West 1986); MINN. STAT. ANN. § 609.895 (West 1999); MISS. CODE ANN. § 97-21-53 (West 2009); MISS. CODE ANN. § 97-21-55 (West 2009); MISS. CODE ANN. § 97-21-57

and theft of trademarks,<sup>55</sup> with New Mexico being the only one without a general statute.<sup>56</sup> However, in this case, the use of these statutes is also very low, and the exact reasons why it has yet to be studied.<sup>57</sup>

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(West 2009); MO. REV. STAT. § 570.103 (1998); MONT. CODE ANN. § 30-13-338 (2009); NEV. REV. STAT. ANN. § 205.205 (West 1911); NEV. REV. STAT. ANN. § 205.210 (West 1911); N.H. REV. STAT. ANN. § 638:6-b (2009); N.J. STAT. ANN. § 2C:21-32 (West 1997); N.Y. PENAL LAW § 165.71-74 (LexisNexis 1992); N.Y. ARTS & CULT. AFF. LAW § 33.07 (LexisNexis 1983); N.Y. ARTS & CULT. AFF. LAW § 33.09 (LexisNexis 1983); N.C. GEN. STAT. § 80-11.1 (1995); N.D. CENT. CODE § 51-07-04 (1975); OHIO REV. CODE ANN. § 2913.34 (West 1997); Okla. Stat. tit. 21, § 1990.2 (1999); Or. Rev. Stat. Ann. § 647.140 (West 1999); Or. Rev. Stat. Ann. § 647.145 (West 1999); OR. REV. STAT. ANN. § 647.150 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (West 1996); 11 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (1994); S.D. CODIFIED LAWS § 37-6-2 (1939); S.D. CODIFIED LAWS § 37-6-3 (1939); TENN. CODE ANN. § 39-14-152 (2000); TEX. PENAL CODE ANN. § 32.23 (West 1997); VT. STAT. ANN. tit. 9, § 2530 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 9.16.020 (West 2011); WASH. REV. CODE ANN. § 9.16.030 (West 1999); WASH. REV. CODE ANN. § 9.16.035 (West 1999); W. VA. CODE § 47-2-14a (1996); WIS. STAT. ANN. § 132.02 (West 1985); WYO. STAT. ANN. § 6-3-610 (1982).

53. See FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN. § 10-1-454 (1996); IDAHO CODE ANN. § 18-3614 (West 1972); IDAHO CODE ANN. § 18-3615 (West 1972); IND. CODE § 35-43-5-2(d) (1976).

54. See ALA. CODE § 13A-9-10 (1975); ALASKA STAT. § 11.46.530 (1978); ARK. CODE ANN. § 5-37-213 (1975); COLO. REV. STAT. § 18-5-110 (1963); HAW. REV. STAT. ANN. § 708-855 (West 1972); KY. REV. STAT. ANN. § 516.110 (West 1974); ME. REV. STAT. ANN. tit. 17-A, § 705 (1975); NEB. REV. STAT. § 28-606 (1977); OHIO REV. CODE ANN. § 2913.32 (West 1972); OR. REV. STAT. ANN. § 165.037 (West 1971); 18 PA. STAT. AND CONS. STAT. ANN. § 4102 (West 1972); TENN. CODE ANN. § 39-14-115 (1989); TEX. PENAL CODE ANN. § 32.22 (West 1973); UTAH CODE ANN. § 76-6-518 (LexisNexis 1973).

55. See ALA. CODE § 13A-8-10.4 (1975); IND. CODE § 35-43-4-1(a) (1976); IND. CODE ANN. § 35-43-4-2(a) (West 1976).

56. Wilson et al., *supra* note 34, at 543. *But cf.* N.M. STAT. ANN. § 26-1-6 (1972) (dealing specifically with pharmaceuticals, medical devices and cosmetics).

57. See Kammel et al., *supra* note 21, at 136 (noting that only twenty-seven states tracked convictions under their trademark counterfeiting statutes, and over a ten-year period of those that tracked three had no convictions, two-thirds had less than 100, and New York have over 3000).

### C. Middle East Legal Perceptions of Intellectual Property & Trademark Counterfeiting

As the U.S. is a complex legal system made up of America's historical roots in England and elsewhere, Middle Eastern Law, a relatively recent scholarly construct, has a complex history that has interacted with and is complimentary of Arabic law, Oriental law, Muslim (or Islamic, *shari'a*, or *fiqh*) law, North African law, Near Eastern law, and occasionally Southwest Asian law.<sup>58</sup> Chibli & Revkin note that, "[l]ike other attempts to reduce a complex, multilayered, deep legacy to a silver-bullet theory explaining progress or stagnation because of Islamic law,<sup>59</sup> the one-size-fits-all thesis is enticing and sometimes brilliant, but is it perforce overbroad."<sup>59</sup> These scholars note that currently, "the more real constraints that the commercial lawyer is likely to face have more to do with persistent family legal structures in most business ventures . . . and with the heavy hand wielded by authoritarian, rentier, nepotistic, and kleptomaniac rulers, combined with Western obsession with Middle East oil."<sup>60</sup> This legal culture creates a very different environment for the protection of trademarks and the prosecution of trademark counterfeits, which many Western brands may have experienced with frustration.

#### *i. United Arab Emirates Fighting Counterfeits—But Are They Successful?*

The United Arab Emirates ("UAE") consists of seven Emirates: Abu Dhabi, Dubai, Sharjah, Ajman, Ras Al Khaimah, Umm al-Quwain and Fujairah and has become the location of choice in the Middle East for sales and marketing of many multi-national brands.<sup>61</sup> Dubai, in particular, is an international trade center, with the Jebal Ali Port in

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58. Chibli Mallat & Mara Revkin, *Middle Eastern Law*, 9 ANN. REV. LAW SOC. SCI. 405, 406 (2013).

59. *Id.* at 423.

60. *Id.*

61. Omar Obeidat et al., *Procedures and Strategies for Anti-Counterfeiting: United Arab Emirates*, WORLD TRADEMARK REV. (May 24, 2018), <https://www.worldtrademarkreview.com/anti-counterfeiting/procedures-and-strategies-anti-counterfeiting-united-arab-emirates>.

Dubai handling most of the UAE's 20 million containers a year in transit.<sup>62</sup> Additionally, Dubai's state-of-the-art transport and free-zone infrastructure make it attractive for business and trade, but also for counterfeit shipment and transit.<sup>63</sup>

UAE is one of the most active countries in the Middle East in combating trademark counterfeiting.<sup>64</sup> The UAE has enacted trademark laws, and its anti-counterfeiting law is found in Articles 37 and 38 of the Federal Trademark Law.<sup>65</sup> Most recently, in December of 2016, the U.A.E. enacted a new federal law on "Combating Commercial Fraud," which increased the maximum penalty for counterfeiting to AED 1 million (~US\$275,000) for pharmaceutical and food products and AED 250,000 (~ US\$68,000) for other products, up from AED 10,000 (approx. US\$2,700).<sup>66</sup>

Additionally, brand owners can file a civil case against a counterfeiter under the UAE Trademark Law.<sup>67</sup> Another option available to brands is administrative actions, which are issued by the Department of Economic Development (DED) in Abu Dhabi, Dubai, and Sharjah and by the Ministry of Economy in the remaining Emirates, which allow brands to register trademarks for monitoring and the ability to file complaints.<sup>68</sup>

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62. *Id.*

63. *Id.*

64. *Id.*

65. See Trademark Law, Federal Law No. 37, art. 37, 38 (1992) (UAE), amended by Federal Law No. 8 (2002) (U.A.E.) (concerning trademarks). See also Bashir Ahmed & Saurbh Kothari, *Doing Business in the United Arab Emirates: Overview*, AFRIDI & ANGELL (2015/2016), [http://afridi-angell.com/knowledge\\_detail.php?ids=199](http://afridi-angell.com/knowledge_detail.php?ids=199).

66. See Paul Allen, *New Law to Combat Counterfeiting: What Does it Mean for Businesses and Brand Owners?*, DLA PIPER (Jan. 18, 2017), <https://www.dlapiper.com/en/oman/insights/publications/2017/01/new-law-to-combat-counterfeiting-uae/>. The AED is the currency code for the Dirhams, the currency of the UAE. See *AED - Emirati Dirham*, XE, <https://www.xe.com/currency/aed-emirati-dirham> (last visited Dec. 3, 2019). See also *Combating Commercial Fraud Law*, Federal Law No. 19 (2016) (UAE); *UAE Issues New Law on Combating Commercial Fraud*, INCE (Jan. 1, 2017), <https://www.incegd.com/en/knowledge-bank/uae-issues-new-law-on-combating-commercial-fraud>.

67. Federal Law No. 37, art. 37, 38 (UAE); Federal Law No. 8, art. 40 (UAE).

68. See Yasser Masood, *United Arab Emirates: Anti-Counterfeiting in The United Arab Emirates*, MONDAQ (Apr. 5, 2019), <http://www.mondaq.com/x/795256/Trademark/AntiCounterfeiting+in+the+United+Arab+Emirates>. See also Ahmad Zaza, *How to Benefit from Trademark Protection Before the Dubai Department of Economic Development (DED)*, TAMIMI.COM (Sept. 2015),



However, the UAE is still a top provenance and transit country for counterfeit goods. The Organisation for Economic Cooperation and Development (“OECD”) Report of 2019 notes that in the years 2014-2016, the UAE was the third top provenance countries for counterfeit goods in terms of share of seized value and share of customs seizures.<sup>69</sup> The 2019 OECD report also notes that key provenance economies of counterfeit trade were locations where “the actual production of infringing goods is taking place and economies that function as a point of transit through which infringing goods pass.”<sup>70</sup> Additionally, the report notes that counterfeiters

[T]end to ship counterfeit products via complex trade routes, using several transit points. This is done for several reasons, including:

- “Cleansing” of all the documents and camouflaging the original point of production and/or departure.
- Establishing distribution centres for counterfeit and pirated goods (e.g. in free trade zones) and for transshipping them in smaller orders to their final destination points.
- Processing of products, usually in free trade areas, often by adding counterfeit
- trademarks and/or repackaging or re-labelling goods.<sup>71</sup>

Additionally, in regard to enforcement of intellectual property from a U.S. perspective, the UAE remains on the U.S. Trade Representatives Annual Section 301 report for failing “to address concerns related to IP protection and enforcement and market access barriers with respect to

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<https://www.tamimi.com/law-update-articles/how-to-benefit-from-trademark-protection-before-the-dubai-department-of-economic-development-ded/>.

69. OECD, *Trends in Trade*, *supra* note 22, at 40 fig. 4.1.

70. *Id.* at 42.

71. *Id.* See also Org. for Econ. Co-operation and Development [OECD], *Mapping the Real Routes of Trade in Fake Goods*, at 13 (2017), <https://www.oecd.org/gov/risk/mapping-the-real-routes-of-trade-in-fake-goods-9789264278349-en.htm> [hereinafter OECD, *Mapping the Real Routes*].

pharmaceuticals and medical devices” because it did “not provide adequate or effective border enforcement against counterfeit and pirated goods . . . [as] the customs officials lack authority to take action to seize and destroy goods at the border.”<sup>72</sup> The UAE is still reported as one of the most active locations for counterfeit goods, including as a provenance economy.<sup>73</sup>

### III. FREE TRADE ZONES, COUNTERFEITS, CORRUPTION AND CULTURE: EXAMINATION OF THE UNITED ARAB EMIRATES

There are many overlaying features and elements to examine that can give an insight into how and why a legal culture exists—in this section, this Paper will explore some of the features and elements present in the United Arab Emirates. This section will explore FTZs, corruption, and the element of *hawala*.

#### A. Free Trade Zones

The impact that Free Trade Zones, or FTZs, play in illicit trade is still largely unmeasured. But, the reduction in regulation and anecdotal stories notes by brand and law enforcement shows that while it facilitates trade, it also facilitates the movement of counterfeit goods as well.<sup>74</sup> The principal features of the different types of FTZs are that they: (1) “are geographically delimited, usually physically secured areas;” (2) “offer benefits based upon physical location within the zone,” and (3) “represent separate, duty-free customs areas.”<sup>75</sup> According to the International Labour Organization (ILO), there are “over 3,500 zones in

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72. U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT, at p. 7 (2019). *See also* Fouad Egbaria, *USTR Special Section 301 Report Identifies 36 Countries for IP Infringement Watch Lists*, METALMINER (May 1, 2019), <https://agmetalminer.com/2019/05/01/ustr-special-section-301-report-identifies-36-countries-for-ip-infringement-watch-lists/>

73. OCED, *Mapping the Real Routes*, *supra* note 71, at 30, 36, 43, 50, 73.

74. *See* OCED, *Trends in Trade*, *supra* note 22, at 42.

75. Org. for Econ. Co-operation and Development [OECD], *Trade in Counterfeit Goods and Free Trade Zones: Evidence from Recent Trends*, at 16 (2018), <https://dx.doi.org/10.1787/9789264289550-en> [hereinafter OECD, *Evidence from Recent Trends*].

130 economies today.”<sup>76</sup> A study by the OECD and EUIPO confirms that “lightly regulated FTZs are also attractive to parties engaged in illegal and criminal activities, such as trade in counterfeit and pirated products or smuggling and money laundering, as these zones offer a relatively safe environment with both good infrastructure and limited oversight.”<sup>77</sup> While there are many benefits for host economies and businesses,<sup>78</sup> there are also unique challenges that exist, such as the increase of trademark counterfeits.<sup>79</sup> A 2019 OECD study noted that counterfeiters use FTZs for establishing distribution centers for their counterfeit product.<sup>80</sup> Additionally, the Anti-Counterfeiting Committee of the International Trademark Association (INTA), made up of trademark practitioners globally, noted results of a survey of practitioners that “in countries where FTZs are present, specific regulations usually exist to allow for IP enforcement within those zones and with regards to goods in transit. However, in practice, the activities of enforcing those IP rights appear to be relatively low.”<sup>81</sup> Additionally, with the increase of FTZs both in quantity and size, customs seizure are also increasing.<sup>82</sup> In summary, like the development of technology, FTZs serve a beneficial purpose in increasing the flow of trade and ease of business transactions, but on the flip side this convenience and expediency also creates a ripe environment of which counterfeiters can take advantage.

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76. *Id.*

77. *Id.* at 13 (confirming the links between FTZs and trade in counterfeit products. The existence, number and size of FTZs in a country correlate with increases in the value of counterfeit and pirated products exported by that country’s economy). The report later provides more data on FTZs and counterfeit goods. *See id.* at 41-54.

78. *Id.* at 21.

79. OECD, *Mapping the Real Routes*, *supra* note 71, at 19. *See also Anticounterfeiting Committee Survey Points to Need for Enforcement in Free Trade Zones*, INT’L TRADEMARK ASS’N BULLETIN (Sept. 1, 2019), [https://www.inta.org/INTABulletin/Pages/ACC\\_-committee\\_update\\_01\\_7415.aspx](https://www.inta.org/INTABulletin/Pages/ACC_-committee_update_01_7415.aspx). X [hereinafter *Anticounterfeiting Committee Survey*].

80. OECD, *Trends in Trade*, *supra* note 22, at 42.

81. *Anticounterfeiting Committee Survey*, *supra* note 79.

82. *See* OECD, *Evidence from Recent Trends*, *supra* note 75, at 51 (noting each additional FTZ within an economy is associated with a 5.9 percent increase in the value of fake exports).

## B. Corruption's Impact Seen in the UAE

Understanding corruption and how it plays into Middle Eastern legal systems can have an impact on how multinational corporations approach their legal cases regarding trademark counterfeiting. Additionally, it is of vital importance to have a local on-the-ground network in the Middle East, consisting of lawyers, investigators, and others who might aid in intelligence gathering or preparing other information.<sup>83</sup> Despite all of these necessary preparations, it is also important to be aware of the impact of corruption, in any jurisdiction. Here, corruption in the UAE will be examined. While, “[c]onventional approaches to fighting corruption, such as legal and administrative reforms that promote democratization, transparency, and the rule of law risk missing some key factors that contribute to popular perceptions of corruption.”<sup>84</sup>

In Transparency International's Corruptions Perceptions Index of 2018, the Middle East and North Africa continue to have systemic corruption, which weakens its institutions.<sup>85</sup> The UAE leads the region (meaning it has less corruption than other Middle Eastern countries) with scores of seventy, while others such as Syria, Yemen, and Libya are in the bottom five of the index.<sup>86</sup> Additionally, investigations by the Organized Crime and Corruption Reporting Project (OCCRP) and the Center for Advanced Defense Studies (C4ADS) show that Dubai is an active global hub for money laundering<sup>87</sup> and continues to use a largely unregulated system called *hawala*, which is often cited as a mechanism

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83. *Customs, Consumers, and Cooperation: How to Fight Fakes in the Middle East's Free Trade Zones*, INTA BULLETIN (Feb. 15, 2018), [https://www.inta.org/INTABulletin/Pages/Anticounterfeiting\\_in\\_the\\_Middle\\_East\\_Interview\\_7303.aspx](https://www.inta.org/INTABulletin/Pages/Anticounterfeiting_in_the_Middle_East_Interview_7303.aspx).

84. Yazan Doughan, *Corruption in the Middle East and the Limits of Conventional Approaches*, GIGA FOCUS MIDDLE EAST (Sept. 2017), <https://www.giga-hamburg.de/en/publication/corruption-in-the-middle-east-and-the-limits-of-conventional-approaches>.

85. *Middle East & North Africa: Corruption Continues as Institutions and Political Rights Weaken*, TRANSPARENCY INT'L (Jan. 29, 2019), <https://www.transparency.org/news/feature/regional-analysis-MENA>.

86. *Id.*

87. Karina Shedrofsky, *Dubai's Golden Sands*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (June 12, 2018), <https://www.occrp.org/en/goldensands/dubais-golden-sands>.

for the flow of criminal financing but can be much more complex if understood in its cultural context.<sup>88</sup>

Because corruption and illicit trafficking of counterfeit goods are inherently linked,<sup>89</sup> those looking to prevent trademark counterfeits in the UAE either as a transit, destination or provenance economy must understand this impact, since it will have an effect on their enforcement activities. Despite this, or perhaps because of it, the UAE government has taken recent steps to increase its anti-corruption legislation and penalties. Corruption and bribery are prohibited by Federal Law No. 3 of 1987 of the UAE Criminal Code, which covers all seven Emirates and applies to the FTZs, which have jurisdiction to enact civil and commercial laws, but not criminal laws.<sup>90</sup> While the impact of these changes have yet to be seen, at least the *lex lata* of the UAE is now aligned with international best practices at the UN Convention Against Corruption.<sup>91</sup>

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88. *Hawala* is an ancient banking practice, which comes from Islamic traditions and is essentially based on a trust system that allows a party to transfer or remit money quickly and cheaply without a bank. Dulve M. Redín et al., *Exploring the Ethical Dimension of Hawala*, 124 J. BUS. ETHICS 327, 327-37 (2014). “[H]awaladars’ perception of what is ‘illicit’ or ‘criminal’ may differ from that of global regulators, especially in contexts where many activities deemed criminal by the Western world, from what Goodhand (2005) has identified as the ‘coping’ or ‘survival’ economy.” *Id.* at 330–31. *Hawala* is not in its essence a part of organized crime, corruption or bribery, but like any other traditional financial mechanism is used for criminal transactions. *See id.* at 334.

89. *Counterfeit Products Trafficking*, UNITED NATIONS OFF. ON DRUGS & CRIME (Apr. 2018), <https://www.unodc.org/e4j/en/organized-crime/module-3/key-issues/counterfeit-products-trafficking.html> (“Corruption and bribery are inherently linked to the illicit trafficking of counterfeit goods, especially when these are shipped internationally. Trafficking in counterfeit goods also offers criminals a complementary source of income and a tool to launder proceeds derived from various crimes. In a similar fashion, proceeds from other crimes have been used by organized criminal groups to finance their counterfeiting businesses.”).

90. Adam Vause & Zara Merali, *The UAE’s Fight Against Bribery and Corruption*, DLA PIPER (July 16, 2019), <https://www.dlapiper.com/en/dubai/insights/publications/2019/07/the-uaes-fight-against-bribery-and-corruption/>.

91. Richard J. Gibbon, *United Arab Emirates Modernizes Bribery and Corruption Legislation*, NATIONAL LAW REVIEW (June 21, 2019), <https://www.natlawreview.com/article/united-arab-emirates-modernizes-bribery-and-corruption-legislation>. *See generally* GA Res. 58/4, U.N. Doc. A/58/422 (2003), United

With all of the above, understanding the legal structure, corruption, and cultural impacts on the legal system, such as *hawala*, are important to understand the environment in which counterfeiting is occurring in the UAE.

#### IV. CONCLUSION AND ADDITIONAL ELEMENTS FOR CONSIDERATION REGARDING THE EVOLUTION OF TRADEMARK COUNTERFEITING IN RELATION TO TECHNOLOGY

The prior sections of this Paper discussed and explored the harm caused by trademark counterfeiting and the need in various countries to be able to enforce trademark rights through a legal system of both civil and criminal laws and regulations. Next, the trademark counterfeiting legal framework of the U.S. and UAE, two countries having some of the stronger intellectual property regimes in the world, were examined to see not only some of their strengths, but some major challenges they face, whether it be lack of use of existing statutes, corruption, culture, or FTZs. However, despite these challenges, both the U.S. and the U.A.E. continue to push forward new legislation and new areas in which to be able to protect their citizens and brands from trademark counterfeiting. It is yet to be seen what type of impact the legal changes will have on trademark counterfeiting, and one important consideration which this Paper has not yet explored—the role that law will play with technological innovation. This leads to the final section of this Paper—examining technological advances and their relationship to the evolution of the trade in counterfeit goods.

The law has not caught up with technology in the majority of jurisdictions and may never do so with the rapid rate of technological innovation.<sup>92</sup> As one author notes, some technologies can be considered

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Nations Convention Against Corruption (Oct. 31, 2003). The UAE ratified the Convention on February 22, 2006. See *UN Convention Against Corruption Signature and Ratification Status*, UNITED NATIONS OFF. ON DRUGS AND CORRUPTION, <https://www.unodc.org/unodc/en/corruption/ratification-status.html> (last visited Dec. 21, 2019).

92. Daniel Malan, *The Law Can't Keep Up With New Tech. Here's How to Close the Gap*, WORLD ECONOMIC FORUM (June 21, 2018), <https://www.weforum.org/agenda/2018/06/law-too-slow-for-new-tech-how-keep-up/>. See generally William Sowers, *How do you Solve a Problem like Law-Disruptive Technology?*, 82 L. & CONTEMP. PROBS. 193 (2019).

“law disruptive technologies,” and gives examples such as the gig economy, 3D printing and driverless cars.<sup>93</sup> The concept of law-disruptive technology has 3 components: (1) it must involve a new or improved technology; (2) it must have the potential to make a significant economic or societal impact; and (3) it does not fit into the current legal framework.<sup>94</sup> This Paper argues that e-commerce platforms, the sale of product via social media apps, and the dark web could all be law disruptive technologies.

First, e-commerce platforms are growing rapidly in the U.S., China, and even now to other areas, such as the Middle East.<sup>95</sup> In looking at the three-prong test, e-commerce is (1) new technology that allows consumers and retailers to meet anywhere in the world with no barriers to access;<sup>96</sup> (2) e-commerce has had major economic and societal impacts;<sup>97</sup> and (3) the laws that apply to trademark counterfeiting in brick and mortar situations do not fit into the e-commerce scenario in most of the current legal framework globally.<sup>98</sup> However, some countries are starting to enact laws specifically for the complex e-commerce

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93. Sowers, *supra* note 92, at 199–200.

94. *Id.* at 196.

95. J. Clement, *Online Shopping Behavior in the United States - Statistics & Facts*, STATISTA (Aug. 30, 2019), <https://www.statista.com/topics/2477/online-shopping-behavior/>; *Online Retail is Booming in China*, ECONOMIST (Oct. 26, 2017), <https://www.economist.com/special-report/2017/10/26/online-retail-is-booming-in-china>; Gabriela Barkho, *Amazon Launches Its First Middle East E-Commerce Website*, OBSERVER (May 1, 2019, 5:30 PM), <https://observer.com/2019/05/amazon-middle-east-commerce-website/>.

96. See Alexandro Pando, *How Technology Is Redefining E-Commerce*, FORBES (Mar. 6, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/03/06/how-technology-is-redefining-e-commerce/#750d5b3862e3>.

97. See, e.g., Abdul Gaffar Khan, *Electronic Commerce: A Study on Benefits and Challenges in an Emerging Economy*, 16 GLOBAL JOURNAL OF MANAGEMENT AND BUSINESS RESEARCH, 2016, at 19; Jamsheer K, *Impact of e-Commerce On Society: Advantages and Disadvantages*, ACOWEBS (Feb. 19, 2019), <https://acoweb.com/impact-commerce-society/>.

98. See *E-transactions Legislation Worldwide*, U.N. CONF. ON TRADE & DEV., [https://unctad.org/en/Pages/DTL/STI\\_and ICTs/ICT4D-Legislation/eCom-Transactions-Laws.aspx](https://unctad.org/en/Pages/DTL/STI_and ICTs/ICT4D-Legislation/eCom-Transactions-Laws.aspx), (giving an overview of e-commerce legislation of any kind globally and noting that 70% of countries have adopted some type of e-commerce laws) (last visited Dec. 6, 2019). See also Clark, *supra* note 46.

environment, such as China.<sup>99</sup> However, in other countries, such as the U.S., courts have continued to decide that e-commerce platforms do not have liability for the sale of counterfeit goods on their platforms,<sup>100</sup> but the U.S. Department of Commerce, as mentioned in its call for comments above, is actively seeking input on suggestions for new legislation.<sup>101</sup> In the U.S., despite flea market or discount market owners being liable for the sale of counterfeit goods in the brick and mortar environment,<sup>102</sup> that argument of contributory trademark infringement liability has not crossed over into e-commerce, thus limiting civil claims that the brand owner victim can bring against the e-commerce provider. However, a recent case out of Pennsylvania extended theories of strict liability to Amazon for a case brought by a consumer injured by a faulty product, although it has currently been vacated and is pending a rehearing *en banc*.<sup>103</sup> Needless to say, the law is underdeveloped and it is logical to assume that counterfeiters will take advantage.

Additionally, the sales of counterfeit goods on social media and on the dark web might also meet the three components of the test, as alternative venues. Social media counterfeit sales continue to grow with little to no

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99. China's E-Commerce Law went into effect on January 1, 2019. Zhonghua Renming Dianzishangwu Fa (中华人民共和国电子商务法) [E-Commerce Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective Jan. 1, 2019), arts. 1, 2 (English text available at [https://ipkey.eu/sites/default/files/documents/resources/PRC\\_E-Commerce\\_Law.pdf](https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf)).

100. *See, e.g.,* Tiffany v. eBay, 600 F.3d 93 (2d Cir. 2010) (holding that eBay's use of Tiffany's mark on its website and in sponsored links did not constitute direct trademark infringement, nor was there an affirmative duty to remedy the problem, and therefore eBay was not liable for contributory trademark infringement for facilitating the infringing conduct of counterfeiting vendors).

101. Comment Request, 84 Fed. Reg. 32861 (July 10, 2019).

102. *See* Luxottica Grp. v. Airport Mini Mall, LLC., 287 F.Supp.3d 1338, 1347 (N.D. Ga. 2018) (upholding contributory trademark infringement claim against discount mall).

103. Circuit Judge, Roth on the Third Circuit Court of Appeals, held in part that Amazon was the "only member of marketing chain available to customer for redress, as factor weighing in favor of finding that operator was a seller", "imposition of strict liability upon [Amazon] would serve as an incentive to safety," "[Amazon] was in better position than customer to prevent circulation of defective products," and "[Amazon]'s ability to distribute the cost of compensating for injuries resulting from product defects was factor weighing in favor of finding that [Amazon] was a seller." *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 137-38 (3d. Cir.), *vacated, reh'g en banc granted*, 936 F.3d 182 (3d. Cir. 2019).



research done in this area, except by practitioners seeking to enforce their marks.<sup>104</sup> The Dark Web<sup>105</sup> continue to increase with seemingly little ability of brands to stop it, although takedowns do occur by the government and other agencies.<sup>106</sup> Additionally, many anti-counterfeiting providers or solutions companies do monitoring and takedowns of postings on behalf of the brand owners.<sup>107</sup> But these responses are limited

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104. See, e.g., INT'L TRADEMARK ASS'N, ADDRESSING THE SALE OF COUNTERFEITS ON THE INTERNET 8 (2017), [https://www.inta.org/Advocacy/Documents/2018/Addressing\\_the\\_Sale\\_of\\_Counterfeits\\_on\\_the\\_Internet\\_021518.pdf](https://www.inta.org/Advocacy/Documents/2018/Addressing_the_Sale_of_Counterfeits_on_the_Internet_021518.pdf). See generally Maria C. Morra et al., *Original or Counterfeit Luxury Fashion Brands? The Effect of Social Media on Purchase Intention*, 9 J. GLOBAL FASHION MARKETING 24 (2018); Chase Scheinbaum, *Technology Aims to Take On Social Media's Illicit Side: TECH: Pharmaceutical Sales, Counterfeit Goods Could Be Targeted*, 38 SAN DIEGO BUS. J. 7 (2017).

105. See *A Brief Exploration of the Dark Web*, AVG, <https://www.avg.com/en/signal/what-is-the-dark-web> (last visited Dec. 6, 2019). See also Brian Thompson, *Monster Dark Web Takedown Seizes Up to 620,000 Fake Anxiety Meds, Yields NJ's Largest-Ever Pill Haul: Officials*, NBCNEWYORK, <https://www.nbcnewyork.com/news/local/Dark-Web-Investigation-Arrests-New-Jersey-Counterfeit-Drug-Ring-Manhattan-Source-508644231.html> (last updated Apr. 16, 2019, 7:36 PM); *Man Who Made And Sold Nearly One Million Counterfeit Xanax Pills Sentenced*, PARTNERSHIP FOR SAFE MEDICINES (Dec. 10, 2018), <https://www.safemedicines.org/2018/12/man-who-made-and-sold-nearly-one-million-counterfeit-xanax-pills-sentenced.html>.

106. SHELLEY, *supra* note 1, at 241. See also *Over a Million Websites Seized in Global Operation*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Nov. 26, 2018), <https://www.ice.gov/news/releases/over-million-websites-seized-global-operation>; TIMOTHY P. TRAINER & VICKI ELAINE ALLUMS, CUSTOMS ENFORCEMENTS OF INTELLECTUAL PROPERTY RIGHTS at § 4.10 (Proptibord ed., 2019) (“In November of 2018, over 1 million copyright-infringing website domain names selling counterfeit automotive parts, electrical components, personal care items and other fake goods were criminally and civilly seized by the combined efforts of law enforcement agents (ICE’s HSI, Europol, Interpol, police agencies from 26 countries), industry representatives and anti-counterfeiting associations worldwide. The operation, dubbed Operation in Our Sites, was facilitated by the IPR Center, which is led by U.S. Immigration and Customs Enforcement. 33,600 website domain names were criminally seized. In addition, industry partners civilly seized 1.21 million domain names and shut down 2.2 million erroneous ecommerce links featured on social media platforms and third-party marketplaces.”).

107. *Alternative Strategies for Fighting Counterfeits Online*, WORLD TRADEMARK REVIEW (Feb. 7, 2017), <https://www.worldtrademarkreview.com/anti-counterfeiting/alternative-strategies-fighting-counterfeits-online>.

and seem to only be reactive responses and not proactive opportunities to shut down the illicit trade in goods.

However, the *lex lata legal framework* was not created to combat counterfeiting in this online environment. Yet, this hodgepodge of laws in the U.S. and in the U.A.E. designed for brick and mortar counterfeits in legitimate businesses, is often not used at all, enough, or is totally ineffective or inapplicable when it comes to the online space.<sup>108</sup> In the meantime, the global community continues to grow in its reliance and use of e-commerce, social media, and other online tools, pages, and apps for purchases of both legitimate and illicit products.<sup>109</sup> Despite the expectation that each country should catch up to the current state of affairs with their legal frameworks, how can they do so in a way that is forward-thinking regarding technology to predict where the technologies will be in two, five, or even ten years? How can they do so with these current ‘law-disruptive’ technologies, but also be prepared for similar ones to come and at a more rapid pace?

This daunting task for legislatures worldwide is not just relevant for e-commerce and social media, but also for some of the technologies that overlap with it. For example, artificial intelligence, or AI, is known to be used as a technology that help brands with online counterfeit takedowns or social media takedowns,<sup>110</sup> and is most likely already, or soon to be in the near future, used by counterfeiters as well to facilitate sales.<sup>111</sup> E-commerce, social media, artificial intelligence and a host of other

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108. See generally *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93, 113 (2d Cir. 2010); *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151–53 (2019).

109. See Clement, *supra* note 95 (noting retail e-commerce sales worldwide are forecast to more than double between 2018 and 2023, surpassing 6.5 trillion U.S. dollars in 2023.) Yes Marketing, *Over Half of Consumers Use Mobile Apps When Shopping In-store*, CISION PR NEWSWIRE (Jan. 07, 2019), <https://www.prnewswire.com/news-releases/data-over-half-of-consumers-use-mobile-apps-when-shopping-in-store-300773532.html>.

110. *Artificial Intelligence (AI) will Revolutionize Trademark Prosecution and Enforcement by 2023, Reveals New Research*, HOGAN LOVELLS (May 28, 2018), <https://www.hoganlovells.com/en/news/artificial-intelligence-will-revolutionize-trademark-prosecution-and-enforcement-by-2023-reveals-new-research>; *Protect Your Trademark with Artificial Intelligence*, NVIDIA DEVELOPER (Jan. 10, 2018), <https://news.developer.nvidia.com/protect-your-trademark-with-artificial-intelligence/>.

111. Mike Elgan, *Fake Products? Only AI Can Save Us Now*, COMPUTER WORLD (July 21, 2018, 3:00 AM), <https://www.computerworld.com/article/3290370/artificial-intelligence/fake-products-only-ai-can-save-us-now.html>.

technological advances will continue to change the way trade is done—both licit and illicit. What and how the governments, brands, and the legal community can do to prevent or stem the damage caused by trademark counterfeiting in the Middle East, the U.S., and globally remains to be seen.