Using U.S. Unfair Competition Laws to Address Foreign Copyright Infringements

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During the past year, a seafood company based in Thailand, a pair of apparel manufacturers based in China and India, and Embraer, a Brazilian aircraft manufacturer, were all penalized in the U.S. for using pirated enterprise software. The copyright infringement that led to the sanctions did not occur in the U.S., however, and indeed the sanctions did not arise under copyright law at all. Instead, copyright owners and state Attorneys General are turning to U.S. state unfair competition laws to address copyright infringements in foreign markets where local copyright enforcement is ineffective. To that end, states have begun adopting new unfair competition laws or interpreting exiting unfair competition laws to make it an act of unfair competition to sell goods in the U.S. that were produced with the aid of “stolen information technology,” as the use of unlicensed software allegedly confers an unfair cost advantage over competitors that license legitimate software. A new unfair competition law in Washington State even extends liability to certain third parties, such as in-state retailers, that sell goods produced using unlicensed software. This presentation considers some of the implications of this emerging unfair competition theory: While such unfair competition actions have been limited to state law, could or should the FTC recognize such claims under the FTC Act? Is this unfair competition approach compatible with traditional notions of territoriality in intellectual property law? Could this approach be used to address infringement of other intellectual property rights? Is it normatively desirable to use U.S. unfair competition law to discourage foreign infringements?