

# ASPECTS CONCERNING COUNTERFEITING AND PIRACY IN THE EUROPEAN UNION

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**Abstract:** *The global problem of counterfeiting and piracy has increased in European Union though there are special laws defending Intellectual Properties Rights. The aim of this paper is to point out the aspects on the topic of counterfeiting and piracy inside the European Union Single Market. Analysing the information gathered, we can conclude that there are evident facts of growing and increasingly dangerous phenomena in the European Union, with significant impact on the economic and social sectors. European Commission is the one that identifies strategies and effective practices to help rightful owners protect their Intellectual Property Rights.*

**Key words:** *intellectual property rights, counterfeit, piracy, European Union.*

## 1. Introduction

“The intellectual efforts create new technologies, describe new ways of doing things, develop new products and services, and expand the cultural richness of society. They result in intellectual assets, or pieces of information, that may have economic value if put into use in the marketplace” claims Maskus K. in his study “Intellectual Property Rights in the Global Economy”.

A substantial threat to creators and various industries is considered to be trade in counterfeit goods. The increasing number of counterfeit goods and the counterfeit goods themselves are a real danger to everyone. There are counterfeit articles in every sector, including the fast-moving consumer goods, pharmaceutical, and automotive industries.

Chuchinprakarn S. points in his study “*Consumption of Counterfeit Goods in*

*Thailand: Who Are the Patrons?*” that counterfeiting is a profitable industry. Furthermore, it is the production of copies that have identical packages, trademarks, and labels as the genuine products but use low quality materials in the production process. Even though counterfeit goods are affordable, they may be harmful to the public due to the inferior quality of materials.

Even if governments and management have visibly identified the problem, not very much is known – equally in practice and theory – concerning the mechanisms and structure of the illegal market, the course of action of counterfeit producers, consumer behaviour with respect to replication products and the economic impact on individual companies. The variety of the counterfeit trend underlines the call for further research in this area and

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the development of specific actions for fighting product piracy.

Because of the clandestine nature of the counterfeit market, the accessibility to the phenomenon is limited. As a result, the existing literature does not necessarily cover all aspects regarding counterfeit and piracy. This paper seeks to highlight the effects of counterfeiting and piracy inside the Single Market, using existing research in the domain. The statistics published yearly by European Commission are very relevant for the study. The paper may not be able to identify additional aspects regarding counterfeiting, the phenomenon of counterfeit involving a large amount of problems to be discussed.

The paper reviews the current state of counterfeit inside European Union, highlights the most important data provided by European Commission regarding counterfeit and piracy and suggests some objectives to be met. From an academic perspective it may serve as an opening point for a prospective research agenda that addresses the current knowledge gaps.

The phenomenon of counterfeiting and piracy remain a great concern to policymakers worldwide not only for European Union (EU). While an exact quantification of the scope and economic effects at the aggregate level remains challenging, it is recognized that the trade in fake goods today affects virtually all economic sectors that are driven by creativity and innovation, and is prevalent in all economies. While luxury goods producers have been the traditional targets of counterfeiters, today, industries as diverse as entertainment, cosmetics, foodstuffs, electronics, auto parts, and most alarmingly, medicines, are concerned.

Despite a legal framework developed in the Intellectual Property Rights (IPR) in the whole Union, violations of IPR occur

widely, and represent the cause of considerable damage to the EU economy in terms of jobs, economic growth, health and safety of consumers.

## **2. Defining counterfeiting and piracy**

The terms “counterfeiting” and “piracy” are defined and used in various ways, depending on the country and the context. In general, however, “counterfeiting” typically relates to infringements of trademarks, whereas “piracy” is usually associated with infringements of copyright or related rights. In addition, both terms are normally used in connection with cases of intentional infringements of IP rights, related to commercial purposes of the infringer, or causing significant economic harm to the right holder.

Note 14 of the TRIPS Agreement provides the following definitions:

(a) “counterfeit trademark goods” shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

(b) “pirated copyright goods” shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation. [7]

According with the proposal of European Commission for a “Regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights” No 285/2011,

'goods infringing an intellectual property right' means:

(1) 'Counterfeit goods', means:

(a) goods which are subject of an action infringing a trade mark and bear without authorisation a trade mark identical to the trade mark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such a trade mark;

(b) goods which are subject of an action infringing a geographical indication and bear or are described by a name or term protected in respect of that geographical indication;

(2) 'Pirated goods', means goods which are subject of an action infringing a copyright or related right or a design and which are or contain copies made without the consent of the holder of a copyright or related right or a design, regardless of whether it is registered, or of a person authorised by that holder in the country of production;

(3) 'Goods suspected of infringing an intellectual property right' means goods with regard to which there is adequate evidence to satisfy customs authorities that, in the Member State where these goods are found, are *prima facie*:

(a) goods which are subject of an action infringing an intellectual property right under the law of the Union or of that Member State;

(b) devices, products or components which circumvent any technology, device or component that, in the normal course of its operation, prevents or restricts acts in respect of works which are not authorised by the right-holder of any copyright or right related to copyright and which infringe an intellectual property right under the law of that Member state;

(c) any mould or matrix which is specifically designed or adapted for the manufacture of goods infringing an intellectual property right, if such moulds

or matrices infringe the right-holder's rights under Union law or the law of that Member State.

### **3. Aspects regarding counterfeiting and piracy inside the single market**

The European Commission (EC) and EU Member States are fighting counterfeit and other IPR infringements on various fronts. At strategic level a Customs Action Plan was adopted by the EU Council in 2009 to effectively combat illicit trade.

The implementation of Council Regulation (EC) No 1383/2003 and the activities contained in the action plan were considered to have provided a successful response to the trade in counterfeit goods. The annual statistics published by the Commission showed an upward trend in customs activity, as well as increased cooperation with right holders.

Nevertheless, it was recognised that the increasing diversity of products seized and new trends, such as the importation of small consignments resulting from Internet sales, indicated that further measures were required and that there was no room for complacency. The need to respond to this growing problem was underlined as the trade in counterfeit goods represented a real threat to each citizen and society as a whole.

The Commission considered that the efforts undertaken by the customs authorities to protect the economic interests and the health and safety of citizens must continue and a further action plan was recommended. Such a plan should cover the main areas contained in the previous plan, namely legislation, operational performance, industry cooperation, international cooperation, and communication. The new plan should take into account relevant developments in the customs area, such as the modernised Community Customs Code, as well as

external factors, such as the increase in sales over the Internet.

On March 16th 2009 the EU Council adopted a Resolution on the EU Customs Action Plan to combat IPR infringements for the years 2009 to 2012.

The Resolution includes about fifty targeted measures to be developed by the Commission and/or the Members States focusing on:

- improving and where necessary modifying, existing IPR legislation;
- strengthening operational cooperation between customs in the EU and with third countries;
- improving cooperation with right holders;
- developing further international cooperation on IPR enforcement;
- improving publicity and awareness.

In line with the Council Resolution, the Plan foresees, among others:

- the review of customs legislation resulting in the Commission Proposal for a new Regulation to reinforce customs actions in fighting trade of IPR infringing goods;
- the annual publication of statistics on customs detentions registered at the external border of the EU.

The new plan should also take into account other new trends and forms employed in the distribution of counterfeit goods dangerous to society, resulting from the globalisation of world trade, and growing involvement of organised crime.

Member States and the Commission collaborated closely on a range of issues related to the examination of the current framework for customs activities related to IPR enforcement. All Member States indicated that IPR protection represented a clear priority for them and many considered that in order to make the activities of customs in IPR more efficient, it would be appropriate to develop and start using a joint information database

containing the approved applications for action.

According with the conclusions of the High Level Seminar organised in Paris on 25-26 November 2008, there are four main challenges presented by counterfeiting.

(1) *Dangerous counterfeit goods*

The consumer should be informed of the consequences, sometimes dramatic, associated with counterfeit goods, by awareness-raising campaigns at the EU level, to which customs could be associated. Legislation and procedures at both the Community and national level should, where necessary, be modified to strengthen the ability of customs to intercept counterfeit goods. Particular attention should be given to the harmonisation of measures relating to simplified procedures and small quantities of infringing goods.

(2) *Organised crime*

A European Observatory, where customs could make a significant contribution and where best practices could be exchanged, would make a regular evaluation and analysis of the growing phenomenon of organised crime in counterfeiting possible. Cooperation between stakeholders should be reinforced through the development of electronic information exchange systems. Risk analysis at the Community level is necessary and should be developed, taking advantage of existing mechanisms. Joint European customs actions will be developed, focussing on themes or particular sectors. The essential partnership between customs and industry will be strengthened.

(3) *Globalisation of counterfeiting*

The customs action plan with China, which has been finalised by the Commission services, would allow the exchange of information, as well as officials with this country to fight against counterfeiting. Member States and the Commission will continue to work towards

the adoption of effective border measures in the current negotiations on the ACTA, the proposed anti-counterfeiting trade agreement. International cooperation in the form of information exchange and joint operations will be strengthened with key partner countries.

(4) *Sale of counterfeits over the Internet*

All Member States should examine carefully the phenomenon of sales over the Internet and share 'best practices'. Seminars and working groups will be organised in order to conclude memoranda of understanding with Internet platforms and the financial institutions involved in on-line payments, to exchange information, and to share practices on monitoring and identifying professional sellers of counterfeits. [5]

European Commission publishes yearly statistics of customs interceptions of articles suspected of infringing IPR, such as trademarks, copyrights or patents.

The statistics include only goods intercepted using certain procedures defined in Council Regulation (CE) 1383/2003. EU Member States provide the data for these statistics forwarding results relating to IPR infringements to the Commission on a quarterly basis, in accordance with Commission Regulation (EC) 1891/2004.

According with the European Commission's "Report on EU customs enforcement of intellectual property rights", statistics published on 14 July 2011 show an amazing upward trend in the number of shipments suspected of violating IPR. Customs in 2010 registered around 80,000 cases, a figure that has *almost doubled* since 2009. It refers to

more than 103 million products detained at the EU external border.

The report includes the following main ideas:

- It presents that "online sales caused a spectacular increase of detentions in postal traffic;
- Among the top categories, cigarettes are on the first place;
- Items which are used daily by citizens also "accounted for a significant part and this could potentially have health and safety implications";
- The main source of counterfeit and pirated products continues to be China;
- In 90% of the cases of detentions by customs, the goods were either destroyed or the right-holder initiated a court case to establish an IPR infringement;
- The estimated value of the equivalent genuine products was over €1 billion.

The statistical report also provide a summary of customs activities in 2010, related to IPR enforcement, which focuses on the implementation of the EU Customs Action Plan to combat IPR infringements for the years 2009 - 2012.

In 2010 the overall amount of cases of detentions by customs has increased in, to 79,112 cases. In terms of individual articles, the total amount decreased slightly to 103 million articles in 2010. Comparing with the last 10 years, this is the highest number of registered cases all-time and there certainly seems to be a link to increased sales via the internet. The evolution of number of registered cases of IPR infringements and number of registered articles supposed to infringe IPR are presented in Figure 1.

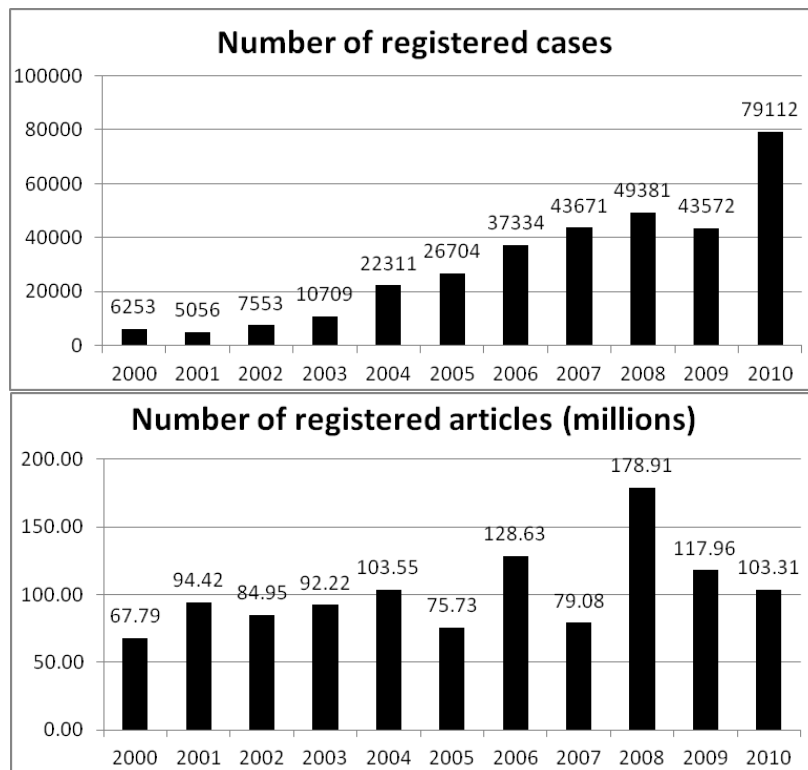


Fig. 1. Number of registered cases and articles

Source: "Report on EU customs enforcement of intellectual property rights, Results at the EU border – 2010")

The report points out that there were different results of detentions, but the majority of goods were destroyed under the simplified procedure after confirmation of the right-holder concerning the infringement and agreement of the holder of the goods.

Concerning the main categories of products carried by passengers, 51.43% of the products were cigarettes. Other important products carried by passengers were: labels or tags 20.70%, games 6.98%, clothing 5.20%, medicines 2.90%, sport shoes 1.86%.

Based upon the domestic retail value (DRV), which is the price at which the goods would have been sold at retail in the internal market of the Member State had they been genuine, the top 3 categories

counterfeited are clothing, cigarettes and sport shoes.

According with the same report, China is the main country of provenance of the counterfeited goods (85.92% by articles and 72.91% by value). The country of provenance is the country known where the goods were coming from when the detention was made whereas the country of origin is in principle the country where the goods are produced. Other countries of provenance by articles are: India 3.48%, Hong Kong 2.95%, Moldova 2.06%, Turkey 1.44%, Greece 0.91%, and United Arab Emirates 0.66%.

Following the report, is established that regarding the numbers of detained articles, the top 3 categories are cigarettes, office stationery and other tobacco product and in

terms of cases, the top 3 categories are clothing, shoes and other electrical equipment.

Furthermore, the report mentions that “in 2010 the majority of articles detained by customs were suspected of infringing a Community or national trademark and covered a wide variety of goods across all product sectors”. In terms of suspicion of patent infringements, the main categories of product detained were electronic devices and medicines and in terms of copyright infringements, CD/DVD were the products most affected, though a wide variety of other products were also detained. With regards to design and model infringements, the report aims that “there was a single detention involving a large amount of tobacco products other than cigarettes, though a wide variety of other products were also concerned, such as shoes, medicines and toys.”

The phenomenon of counterfeiting and piracy is a major problem for EU. This is the reason why, according with the same report, “Member States administrations were developing awareness-raising activities, often linked to the publication of statistics or the result of a specific case. Health and safety aspects are particularly highlighted. Communication was done through different media outlets, including TV, radio, the Internet and leaflets at airport, train stations, trade fairs and department stores”. In addition, the report says that “Member States organised a variety of campaigns, several of which concerned medicines, including one about counterfeit medicines sold over the Internet”.

#### **4. Conclusions**

Intellectual property rights, which comprise patents, trademarks, designs and geographical indications, as well as copyright (authors’ rights) and rights related to copyright (for performers,

producers and broadcasters), have been around for centuries. Often, without our even realizing, they affect our daily lives. Moreover, they protect the technology we use (cars, mobile phones, trains), the food we eat and the music we listen to or the films we watch.

The main conclusions we can draw regarding counterfeiting and piracy inside the European Union are:

(1) Counterfeiting is a growing and increasingly dangerous phenomenon inside EU, this fact being revealed by the statistics of seizures for 2010 comprised in “Report on EU customs enforcement of intellectual property rights”. Comparing with the last 10 years, 2010 represents the year with the highest number of registered cases of counterfeiting all-time inside the single market;

(2) The role of IPR is becoming increasingly important. The single market economy and, in the same time, the global economy increasingly depend on the international recognition and dissemination of IPR. IPR protection is considered to be a clear priority for all Member States. Furthermore, developing and start using a joint information database containing the approved applications for action is considered to be useful;

(3) The aspect of a concrete risk for security and health of consumers is becoming an ever greater threat. The market in fake products puts the health, and even the lives, of consumers at risk. Such goods should, as far as possible, be kept off the market. In 2010, 14.5% of the total amount of detained articles were products for daily use and products that would be potentially dangerous to the health and safety of the consumers like suspected trademark infringements concerning food and beverages, body care articles, medicines, electrical household goods and toys. An important objective for authorities from all Member States is to

inform the consumers of the consequences, sometimes dramatic, associated with counterfeit goods;

(4) Counterfeiting and piracy affects the individuals and companies who innovate and develop original products. An essential objective for EU economy is to ensure the right level of protection of IPR inside the single market. There cannot be progress without new ideas and new knowledge;

(5) China remains the main country of provenance of the counterfeited goods in EU, with more than 85% of the total amount of articles suspected of infringing IPR;

(6) The top categories of articles detained in EU were cigarettes which accounted for 34% of the overall amount, followed by office stationary, tobacco products, labels, clothing and toys;

(7) In social terms, the illegal business of counterfeiting and piracy brings with it all the negative side effects of clandestine labour. In addition, counterfeit and piracy activities are in many cases related to organized crime. This provides increased profits and a lot of international criminal organisations are now involved in counterfeiting;

(8) European Commission must make further studies on these interrelations in order to fully assess the impact of counterfeiting and piracy on today's society and economy, and to identify strategies and effective practices to help rightful owners protect their rights;

(9) The increasing use of the internet to sell fakes and the fact that the high quality of fakes often makes identification

impossible without technical expertise increases the challenge customs face.

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