

Summary of the Danish Government's report on counterfeiting and piracy March 2008

In January 2007 the Danish Minister of Economic and Business Affairs decided to set up an interdepartmental committee to analyze the problem of counterfeiting and piracy. The results of this analysis are comprised in a governmental report. This paper contains a summary of the governmental report.

The Danish Government has made the fight against counterfeiting and piracy a major priority, and the topic is included in the Government Platform from November 2007.

In the report the committee confirms that counterfeiting and piracy have damaging effects on consumers, companies and society as a whole. Counterfeit products, such as medicines or children's toys often constitutes an actual health and security risk for consumers, who are not necessarily aware of the fact that they are buying and handling counterfeit products.

Furthermore, Denmark is a knowledge-based economy. When this knowledge is copied and thereby stolen, it is a problem for both companies and for society as a whole. **The extent of counterfeiting and piracy is quite significant, and rapidly expanding. This development is not only taking place in Denmark, but also within the European Union as well as worldwide.**

The committee concludes that the effort to combat counterfeiting and piracy can be strengthened in several different areas, and recommends a variety of policy initiatives.

These initiatives fall within the following four categories:

- efficient rules and regulations
- strengthening of cooperation between authorities, both national and international
- increased awareness on the part of industry
- increased awareness on the part of consumers

1. Extent of the problem

Counterfeiting and piracy is an international problem. Since the problem concerns illegal activities, there are no exact numbers on the extent of the problem.

OECD¹ has made a thorough inquiry of the international development of counterfeiting, and estimates that the value of internationally traded counterfeited goods may have amounted to as much as 200 billion US dollars in 2005.

On a regional level, EU statistics on seized counterfeit and pirated goods at the European borders strongly indicates that counterfeiting and piracy is on the rise within the EU. These statistics show that in the period between 2002 and 2006 there has been an increase of as much as 400% in the number of cases concerning seized goods.

On a national level, the statistics of seized goods by the Danish customs authorities also indicates a rise in the amount of goods being copied. National statistics show that between

¹ The Organisation for Economic Co-operation and Development

2003 and 2007 there has been a continuous increase in the amount of seized counterfeit goods.

2. Production and distribution of counterfeited goods

The overall tendency with respect to counterfeiting and piracy is that the activities of the producers of counterfeit goods have become increasingly professional. Counterfeiting and piracy are linked to organised crime. This is most likely due to the combination of **the low risk of being discovered**, mild sanctions and the possibility of very high profit.

Because of technological advances, counterfeited goods nowadays are of high quality, which makes it difficult for both the rights owner, consumers and even experts to identify whether the goods are counterfeit. The professionalism of the producers of counterfeit goods has led to the use of efficient and modern equipment suitable for mass production, not only of luxury products with well-known trade marks, but also of quite ordinary convenience goods such as toothpaste and ball pens.

Counterfeit goods are produced all over the world. The greatest production of counterfeited products takes place in Asia, particularly in China, but it is becoming increasingly common for production to take place also within the EU.

The producers of counterfeit goods are also becoming increasingly professional in their approach to the task of distribution. They constantly change their strategy to avoid exposure. To blur the origin of the products and to make it more difficult for the customs officers to identify the consignments containing counterfeit goods, the producers use certain destinations as transit. The destinations used as transit are often free ports or countries that are traditionally considered to be “low-risk countries,” meaning countries that are not hot spots for production of counterfeit goods, for instance the United States and Japan, but also certain EU-countries. There is also a growing tendency to divide the consignments into numerous smaller and therefore less conspicuous parcels. Thus, the risk of having consignments seized by customs is reduced significantly.

The intensified professionalism of counterfeiters has also resulted in a change of sales outlets. Today counterfeited goods are no longer only sold at markets and at other temporary sales outlets. They are also distributed through the Internet and through well-reputed special shops and retail stores.

Counterfeit goods are also often bought when consumers travel abroad. The results of a Danish consumer survey indicate that the majority of counterfeited goods purchased by Danish consumers have been purchased abroad.

3. Consequences of counterfeiting and piracy

Counterfeiting and piracy have a very negative impact on competitiveness and economic growth, innovation, the employment rate, public health and safety, and the environment. This is the case both on a national level as well as on a global level.

The many health and safety risks which are associated with counterfeit products constitute a serious problem for the consumers.

It is obvious that counterfeit medicinal products are often dangerous. In some cases the counterfeit medicine may not even contain the active ingredients of the genuine medicine. In other cases, the counterfeit medicinal products may contain the correct ingredients, but in an incorrect dose. In addition, there is a risk that the medicinal products are not manufactured or stored under the proper sanitary conditions.

In addition to medicines, counterfeit hygienic commodities and toys can be dangerous for consumers, as they can contain substances which can provoke an allergic reaction, or result in poisoning. Finally, there is a risk that counterfeit electronic or technical products such as engines, spare parts, telephones etc. do not adhere to mandated technical specifications. This can cause explosions, fire, electric shocks, etc.

For companies that are affected by counterfeiting and piracy there economic consequence is severe. The companies may lose market shares to the companies copying their products, because consumers may to a certain extent prefer to buy counterfeit products since they are much cheaper. Furthermore, companies are forced to spend their economic resources to prevent and avert counterfeiting and piracy.

It is not only the manufacturer of the original products that suffers an economic loss. Companies that are involved from supply and distribution, to the point where the final product reaches the consumer, will also suffer. For example, the designer of a piece of furniture will lose royalties if the furniture is counterfeited.

Counterfeiting and piracy undermine intellectual property rights, and may damage the reputation of the original products. This is the case when the consumers believe that they have purchased an original product, and then discover that the product does not meet their expectations. Also, the original distributors may obtain a poor reputation among consumers, when they reject complaints and services for counterfeited products which consumers in good faith have purchased as if they were originals, for example, over the internet.

In cases where an exclusive product is massively counterfeited, this act may result in dilution of the exclusive status of the original product.

4. Reasons for counterfeiting and piracy

It is first and foremost the high profit rate on selling counterfeit products, combined with a low risk of being caught and a relatively low level of sanctions, which are the causes of the increased extent of counterfeiting and piracy.

Increased globalisation and technological development are additional causes. Many companies relocate their production units to foreign countries, as frontiers have become more open to decrease production costs. At the same time it exposes them to the risk of having their products copied in the countries where they have set up new production plants especially where enforcement of intellectual property rights is poor.

5. Initiatives to strengthen the fight against counterfeiting and piracy

The committee recommends a set of initiatives on the basis of the completed analysis. These recommendations are:

5.1. Efficient rules and regulations

The analysis which the committee has carried through indicates that one of the most important reasons for the rise in counterfeiting and piracy is the low levels of sanctions, which are not proportional to the prospect of rather high profits.

In order to strengthen enforcement efforts, the committee recommends a revision and increase of the sanctions concerning counterfeiting and piracy.

Therefore, the committee recommends that:

- The maximum penalties for serious offences of counterfeiting in Danish legislation concerning trademarks, designs, patents and utility models should be increased to 1 year and 6 months of imprisonment.
- The maximum penalty for particularly serious offences of counterfeiting in Danish criminal legislation should be increased to 6 years of imprisonment.
- Not only intentional, but also gross negligent violations should be punishable by fines.

As a natural consequence of the increased penalties, the committee furthermore recommends that:

- The fine level should be increased for companies which engage in serious counterfeiting.
- The fine level should be increased to an even higher level for companies which engage in particularly serious counterfeiting.

The present Danish regulations concerning prosecution of cases state that it is not possible for the police to prosecute *ex officio* in cases of serious offences of counterfeiting and piracy. The prosecution in these cases is reserved to the right owner, even though public interest might warrant a prosecution.

Therefore, the committee recommends:

- The option of public prosecution should be available in **all** cases of counterfeit and piracy, if public interests are at stake.

Implementation of the recommendation to increase the maximum penalties will also give the police access to more effective remedies in connection with violation of intellectual property rights.

The internet is an essential source for the buying and selling of goods, but online shopping also raises particular issues in relation to counterfeiting and piracy. It is difficult to sanction counterfeiting on the internet, just as it is rather simple for a supplier of counterfeited goods to make the goods appear on the web page as if they were originals.

It is the estimation of the committee that the current regulations pertaining to retailing on the internet are sufficient to prevent counterfeiting and piracy. There is, however, a need to draw the consumers' attention to the risk of purchasing counterfeited products online, as well as a need to inform the consumers of what they can do if they unintentionally have purchased counterfeit products.

Therefore, the committee recommends to:

- Make special guides concerning these topics available to the consumers

The committee has prepared a draft version of such a consumer guide, which will be made available to the consumers on the following webpage www.stoppiraterne.dk.

The committee has further considered whether the current rules regarding illegal downloads of music and movies, etc., are sufficient. Downloading pirated works from the internet is a rapidly expanding phenomenon, and several countries have taken steps to fight this type of counterfeiting.

The committee recommends that:

- An analysis of current and future technical solutions to block web pages and peer-to-peer systems should be carried out within an interdepartmental counterfeiting network suggested by the committee to be set up.² At the same time the possible legal consequences of such technical solutions should be considered.
- The Danish Ministry of Culture continues to carry out ongoing campaigns to inform the public about counterfeiting and piracy on the internet with special focus on illegal downloading.

Counterfeit products are often sold at fairs and seasonal market places. It is often quite hard to identify the owners of the individual market stalls at the fairs. Therefore the committee recommends that:

- The organizers of fairs and seasonal market places become obligated to have a complete list of names, addresses, etc., of the owners of the market stalls. This list is to be disclosed on demand, to help with easy identification of the sellers of counterfeited products.

² See page 7 of this document for further information on the interdepartmental network.

Furthermore, when receiving a license to arrange a fair or seasonal market, the organizer should also receive guidance on how to prevent the sale of counterfeit products at the market.

It is a precondition for decreasing the extent of counterfeiting that national authorities have the necessary powers to investigate and regulate possible cases of counterfeiting and piracy.

Therefore the committee recommends that:

- When the national customs authorities perform spot controls at the domestic borders of the EU, and when the national taxation authorities perform routine inspections of companies on the basis of tax and levy regulations, these authorities should also look for counterfeit products.
- If they discover such products, they should contact the rights owner and also the police if the counterfeited goods are of a certain quantity, quality or nature, for example counterfeit medicines.

In order to effectively enforce intellectual property rights, police or the rights holders must be alerted when specific violations have occurred. Various Danish authorities perform routine inspections with different purposes in companies, but it is not customary for these authorities to pass information on to the police on suspected counterfeiting or piracy activities.

The committee therefore recommends that:

- The national authorities that perform routine inspections in companies are encouraged to be observant of counterfeited products. In case of suspicious findings of a certain quantity, quality or nature the authorities should contact the police.
- Guidance to the authorities should be made in order to encourage them to notify the police concerning such products.

When dangerous and unsafe counterfeited products are sold, the relevant authorities cannot take the necessary precautions if they are not aware of the existence of the dangerous products.

Therefore the committee recommends that:

- Rights owners should be encouraged to report knowledge of counterfeit products that can involve health and safety risks to the relevant authority.

5.2. Increased cooperation among authorities, both national and international

Typically, counterfeiting and piracy involve activities across borders and police jurisdictions. This type of crime is characterised by increased professionalism. Therefore the committee has made recommendations to enhance the current cooperation between authorities.

Increased cooperation between Danish authorities

The committee finds that to achieve the necessary impact joint coordination of the various efforts taken by national authorities to fight counterfeiting and piracy is very important.

Furthermore, the committee indicates that there is a need for strengthening the knowledge of Danish authorities concerning counterfeiting and intellectual property rights. By strengthening such knowledge, the authorities will be better equipped to fight counterfeiting and piracy.

Therefore the committee recommends that:

- A permanent interdepartmental counterfeiting network should be established, consisting of authorities with close contact to industry and industrial organizations. This network should also examine the need for structured education of authorities in the field of intellectual property rights.

Strengthening international cooperation

Counterfeiting is an international problem. If counterfeiting and piracy are to be defeated, a coordinated international effort is as well necessary.

Already several initiatives have been launched, both regionally and internationally. However, more can be done. For instance, the report indicates that even though many countries have implemented intellectual property legislation a number of countries struggle with the enforcement of these regulations.

Seen in the global perspective of negotiation, the establishment of the Anti-Counterfeiting Trade Agreement (ACTA) seems to be the right practical solution.

Therefore the committee recommends that:

- The participation of Denmark and EU via the Commission in the ACTA negotiations on a set of “golden standards” on enforcement should maintain a high priority. The “golden standards” should be based on the European standards for enforcement.
- In the short term, Denmark, together with the EU and other allies on the question of enforcement, should work for WTO members to accept that WTO is the most appropriate central forum to discuss standards on multilateral enforcement rules. In the long term, there should be an effort to implement joint multilateral standards on enforcement that are based on the “golden standards” in ACTA.

- The dispute settlement system at WTO should be, in the short term, utilized in cases where the applicable law is unequivocal and diplomatic options are exhausted. In the long term, an increase in the use of the dispute settlement system should be considered, especially if the negotiations on a multilateral agreement do not result in the desired outcome.
- Trade Policy Review mechanisms should be used as an offensive forum whenever it is possible to point out the problems that Danish companies encounter with enforcement.
- The negotiations in the Advisory Committee on Enforcement within the organisation of WIPO should continue to be pursued for further coordination, cooperation and exchange of “best practices” among the member countries.
- The Danish Government is urged to support the recommendations in the OECD report.

All the initiatives from the EU in the fight against counterfeiting and piracy, including the initiatives on the basis of the Green Paper from 1998 concerning the fight against counterfeiting in the Internal Market, are very important elements in the fight against counterfeiting and piracy. It is the assessment of the committee that the EU-Commission should examine and put forward additional initiatives on how to strengthen the enforcement of intellectual property rights.

Therefore, the committee recommends that:

- The initiatives from the Green Paper should be realised. At the same time, counterfeiting and piracy should have a central position in new initiatives, such as the Commission’s expected initiative on small and medium-sized enterprises. Finally, intensified enforcement of existing legislation should take place.
- The introduction of efficient enforcement measures must be a central element in the negotiations in connection with bilateral free trade agreements.
- The option to legally manufacture copies of Danish designed furniture, which in Denmark are protected by copyright, should first and foremost be addressed to the responsible authority in the United Kingdom. If deemed necessary, the issue should be raised at the EU-level.
- Denmark's participation in the IPR2 China Project should continue to be of high priority.
- Denmark will encourage the EU-Commission and the Member States to take an active stand on which model for processing trade mark applications should be recommended to the Chinese authorities in connection with the IPR2 Project.
- National databases concerning registered rights should be established in each EU

country in order for the EU countries to exchange these data in the long term.

The Nordic co-operation is another relevant element. The differences between the regulations in the fight against counterfeiting in the Scandinavian countries as well as the open borders contribute to the fact that some Scandinavian countries are being used as transit countries for counterfeit products.

Therefore, the committee recommends that:

- The Nordic Council of Ministers should put forward a joint initiative to combat counterfeiting and piracy. Among other things, this initiative will reduce the possibility of using certain Nordic countries as transit countries when transporting counterfeit products to the EU.

In order to improve conditions for Danish export companies, an effort should be made to reduce barriers to trade bilaterally, when these matters cannot be addressed directly within the scope of the WTO and EU agreements. Lack of enforcement should have particular focus.

The Danish Government has therefore initiated a number of initiatives that will contribute to a better foothold for companies in the global market. Among these are the initiatives mentioned in the Danish trade policy strategy.³ To optimise the impact of each initiative, it is important that all the initiatives interact and support each other to ensure the total effect.

The committee therefore recommends that:

- Enforcement should be included in both present and in future national initiatives concerning trade policies.
- It is important that various initiatives are well coordinated, especially in relation to the initiatives in the Danish trade policy strategy and the recommendations presented in this summary. The coordination should be done in the suggested permanent interdepartmental counterfeiting network.

The committee estimates that continued coordination of the Danish authorities' efforts in various international forums and networks will increase the impact of the Danish points of view.

The committee recommends that:

- There should continuously be coordination of the national authorities' international work for protecting and enforcing intellectual property rights. This coordi-

³ The Trade policy strategy can be found in Danish at: <http://www.um.dk>

nation should take place in the suggested permanent interdepartmental counterfeiting network as well as in the existing associated networks.

The national authorities in Europe have placed great focus on the fight against counterfeiting and piracy and are working on various initiatives. The Danish authorities are already participating in some of these initiatives. The committee estimates that Denmark can benefit by increasing cooperation with authorities in other countries.

Therefore, the committee recommends that:

- The Danish Government aims at increased cooperation among the authorities in selected European countries in the fight against counterfeiting and piracy.

Experience shows that import and transit through the EU is often aimed at destinations where import inspection efforts are presumed to be less strict than in the European destination country. The divergence in inspection efforts can be due to factors such as lack of education and experience or lack of resources. However, since inspection efforts are based upon joint EU legislation, there should be uniform customs efforts regarding counterfeiting throughout the EU.

Therefore the committee recommends that:

- It is important to work towards uniform customs efforts at the borders of the EU.

5.4. Increased awareness on the part of industry

The committee finds that it is important that the Danish companies become aware of what they themselves can do to reduce the problem.

In connection with the work of this committee, two specific guides for enterprises have been drafted, which can help educate companies on how to prevent counterfeiting and enforce rights.

The committee therefore recommends that:

- The Danish trade associations and trade organizations should continue working on strengthening the companies' knowledge of intellectual property rights and enforcement of these rights.
- The national authorities should support these initiatives through dialogue and exchange of information with the companies.
- A special website is to be created containing all relevant information including the draft guides prepared by the committee (www.stoppiraterne.dk)

5.4. Increased awareness on the part of consumers

A consumer survey carried out in July 2007 shows that 44% of Danish consumers dissociate themselves from purchasing illegal copies, while 48% said that they may purchase counterfeit products in the future.

If counterfeiting and piracy are to be significantly reduced, it is of decisive importance to change the consumer attitude towards counterfeiting and piracy.

Therefore, the working group recommends that:

- The suggested permanent interdepartmental counterfeiting network should, in cooperation with the danish companies and the Danish Consumer Council, discuss how future information campaigns can be developed to influence consumer attitude, especially among young people and travellers.
- The suggested website will also contain information and guides targeting consumers.
- The Danish Ministry of Foreign Affairs should supplement its official travel guides on its website with information on counterfeiting and piracy.