

LEGAL COMMENTARIES

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The Protection of Trademarks in the Digitization Process upon the Products' Entry into the EU Common Customs Area: The Role of Customs Administration

Abstract: The protection of industrial property rights in the digital economy era is of particular importance because the digital economy increases the risk of trading pirated and counterfeit goods. The aim of this publication is to present the role of customs authorities in trademark protection of a product upon its entry into the EU common customs area. Customs authorities usually work as the first line of defence in the protection of property rights against an illegal entry which could further enable their retail distribution. Actions taken by customs authorities often require cooperation with the police, the border guard, the road traffic inspectorate, and foreign customs authorities. Customs authorities of individual Member States, including Polish customs officers, implement uniform EU customs law, which regulates the general rules and procedures applicable to goods (but not to services)

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lawfully introduced into the EU customs area. Cultural objects are here treated as items not subject to the principle of free movement of goods – they require clearance by cultural authorities and customs services.

Keywords: trademark, follow the money, digitization process, cultural objects

Introduction

Currently, breaches of industrial property law, including within its scope trademarks, in the digitization process take on a new significance, not only in the European Union (EU) but also internationally, increasing the risk of the pirated and counterfeit products being placed on the market. The digital revolution has opened numerous new possibilities, both for creators of innovative products and for consumers, as the internet has made it possible to reach wider groups of consumers and new consumer markets with new products.

The internet environment allows for a wider and quicker spread of goods and contents breaching property laws, while at the same time it has become harder for consumers to distinguish original goods and contents from the products breaching rights. Also, it has become easier for entities breaching trademark-related rights to disguise themselves under false identities, as they choose States with systems with poor capacities in terms of enforcing these rights, often located outside of the EU customs borders.

The progressive development of the e-economy, including electronic commerce, has led to an increased frequency of breaches of not only trademark-related rights, but also of industrial property rights all over the world. Today, forged and pirated products amount to 2.5% of the global commerce. It is estimated that in the EU 5% of all the goods which have entered into the EU common customs area are forged or pirated, coming from illegal commerce, which translates into an amount of €85 billion.¹ This situation is damaging for both the EU budget and for business entities, thereby undermining the fundamental principle of the EU market – the principle of fair competition.

¹ European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. A balanced IP enforcement system responding to today's societal challenges*, 29 November 2017, COM(2017) 707 final.

Under both international² and EU³ law trademark protection is regarded as part and parcel of intellectual property protection, without additionally categorizing the rights as pertaining either to industrial or to intellectual property. In the Polish legal framework however there are two separate legal acts regulating these issues. These are the Copyright and Related Rights Act⁴ and the Industrial Property Law,⁵ thus distinguishing between intellectual and industrial property. This legislative basis is the reason why in the literature on the subject two types of analyses are conducted – one regarding industrial property as a component of intellectual property, and the other distinguishing between industrial and intellectual property.

The former reflects the international and EU regulations. Both the EU regulator and the international one present intellectual property as comprised of:⁶ the trademark, the sign, copyright and all related rights, in compliance with the national and EU laws, the geographical designation, the patent valid under the national and EU laws, the Supplementary Protection Certificate (SPC) for pharmaceutical products, the Supplementary Protection Certificate (SPC) for plants protection products, the EU plant health law, the plants species protection law in compliance with the national or EU regulations, the utility model to the extent to which it is protected under the national or EU law as an intellectual property right, and the trade name to the extent to which it is protected under the national or EU law as an exclusive intellectual property right.

The other, regulatory, type appears in Polish legal regulations, where the legislator presents the scope of industrial property law as encompassing: the innovation, the utility model, the industrial design, the integrated circuit topography, the geographical designation, and the trademark. The exclusive-use right with regard to the protected items for commercial purposes is obtained after the award of the patent for an innovation, protection right of utility models and trademarks, or the registration right for industrial patterns or integrated circuit topography.

² Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299; Paris Convention for the Protection of Industrial Property, 20 March 1883, as amended on 28 September 1979; Madrid Agreement Concerning the International Registration of Marks, 14 April 1891, as amended on 28 September 1979; Hague Agreement Concerning the International Registration of Industrial Designs, 2 July 1999; Locarno Agreement Establishing the International Classification of Industrial Designs, 8 October 1968, as amended on 28 September 1979.

³ Convention on the Grant of European Patents, 5 October 1973, as amended on 17 December 1991; Act revising the Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, last revised on 17 December 1991, 29 November 2000; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.04.2004, p. 45.

⁴ *Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych*, Dz.U. 1994 No. 24 item 83, as amended.

⁵ *Ustawa z dnia 30 czerwca 2000 r. Prawo własności przemysłowej*, Dz.U. 2001 No. 49 item 508, as amended.

⁶ *Ibidem*, Art. 2(1).

The EU customs officers apply the Leonardo da VINCI system (short name: the VINCI system) to perform customs checks. This system gathers and processes data, together with the application for an initiation of activities by the customs authorities, which is further forwarded to the industrial property right owners. Thanks to detailed data regarding original and forged goods, the customs authorities are capable of identifying goods suspected of breaching property rights with regard to trademarks. The system is integrated with the central information basis of the European Commission – the COPIS (anti-Counterfeit anti-Piracy Information System), which encompasses all the Member States and their data on decisions regarding the applications and the seized cargo.⁷ It was established in relation to the entry in force of Regulation (EU) No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights (Regulation (EU) No. 608/2013).⁸ In the year 2011 the system was interfaced with the Data Sharing System of the Patent Office of the Republic of Poland.

The EU Digitization Level and the Customs Environment

The EU digitization process is progressing year by year, and in 2020 the average Digital Economy and Society Index (DESI) reached the level of 52.6, marking an increase of 3.2 units from the previous year and of 7 units from the year 2015.⁹ Despite the increase in this index, Poland was and still is behind the EU countries taking the lead in the digitization process, i.e. Finland (72.3), Sweden (69.7), Denmark (69.1), the Netherlands (67.7), or Luxembourg (62.8). Poland, with an index of 32.1 in the year 2017 and 37.7 in 2018, was in 24th place. In 2018 customs authorities processed over 343 million customs declarations. As shown in the Table below, an index lower than Poland's was recorded only in EU countries such as: Bulgaria (36.4), Greece (37.3), Romania (40.0), Italy (43.6), and Cyprus (44.0).

⁷ Ministerstwo Finansów, *Leonardo da VINCI – System ochrony praw własności intelektualnej* [Leonardo da VINCI – Intellectual Property Rights Protection System], https://finanse-arch.mf.gov.pl/systemy-informacyjne/vinci/o-systemie/-/asset_publisher/d3oA/content/leonardo-da-vinci-%E2%80%93-system-ochrony-praw-wlasnosci-intelektualnej [accessed: 01.07.2019].

⁸ OJ L 181, 29.06.2013, p. 15.

⁹ E. Gwardzińska, *Unijne usługi pośrednictwa celnego w działalności e-biznesu* [The European Union Customs Brokerage Services in E-Business Activities], "Przedsiębiorczość i Zarządzanie" 2015, Vol. 16(9), pp. 191-203.

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Table 1. The digitization level in the EU Member States in the years 2018-2020

State	2018		2019		2020	
	DESI index	Place in the ranking	DESI index	Place in the ranking	DESI index	Place in the ranking
Austria	48.5	13	51.1	14	54.3	13
Belgium	50.1	11	53.0	11	58.7	9
Bulgaria	33.5	27	33.8	28	36.4	28
Croatia	40.8	21	44.3	20	47.6	20
Cyprus	39.4	23	41.5	24	44.0	24
Czech Republic	44.7	19	47.3	18	50.8	17
Denmark	62.5	3	66.0	3	69.1	3
Estonia	55.7	5	58.3	5	61.1	7
Finland	62.8	2	68.1	1	72.3	1
France	45.7	17	49.8	16	52.2	15
Germany	47.9	14	51.2	13	56.1	12
Great Britain	53.5	6	56.6	7	60.4	8
Greece	32.3	28	35.1	27	37.3	27
Hungary	40.0	22	42.3	22	47.5	21
Ireland	53.1	8	58.0	6	61.8	6
Italy	36.2	25	41.6	23	43.6	25
Latvia	46.8	15	49.9	15	50.7	18
Lithuania	49.4	12	51.8	12	53.9	14
Luxemburg	52.4	9	54.5	9	57.9	10
Malta	53.3	7	55.3	8	62.7	5
Netherlands	60.8	4	63.6	4	67.7	4
Poland	37.7	24	40.7	25	45.0	23
Portugal	44.8	18	47.0	19	49.6	19
Romania	35.1	26	36.5	26	40.0	26
Slovakia	41.9	20	42.9	21	45.2	22
Slovenia	45.9	16	48.7	17	51.2	16
Spain	50.2	10	53.6	10	57.5	11
Sweden	64.0	1	67.5	2	69.7	2
Average Index	46.5	×	49.4	×	52.6	×

Source: own elaboration based on European Commission, *Digital Economy and Society Index 2018 Report*, 14 May 2018, <https://ec.europa.eu/digital-single-market/en/news/digital-economy-and-society-index-2018-report> [accessed: 15.06.2020].

It clearly results from the data presented in the Table that we will have to wait for some time for the establishment of a uniform digital market in the EU. Thirteen EU Member States were ranked below the average DESI index (52.6). These include: Bulgaria, Croatia, Cyprus, the Czech Republic, France, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, and Slovenia.

As regards the actual practice, the rapid implementation of digital solutions is mainly of interest for the industries subject to strong competition. For years these industries have been, for example, in the telecommunication, insurance, or banking sectors. The digitization levels are lowest in sectors where competition is non-existent, i.e. in those traditionally related to the state administration, energy sectors, or public services.¹⁰

In the customs environment the situation is completely different. In the year 2014 at the EU level electronic transactions on average accounted for more than 98% – for exports this figure was 99.7%, and for imports 96%.¹¹ From this year onward it is virtually impossible to perform any customs transactions outside of the electronic system, although customs regulations allow for applications submitted on paper (Article 158 excerpt 3 of the EU Customs Code).¹² This form is only permissible in the case of a failure of the electronic system, either on the side of the business entity or on that of the customs authority, and only with the consent of the customs authority, although in the Polish practice such an option is only possible in case of a failure on the side of the customs authority.

In the year 2014 the EU customs authorities serviced almost 16% of the overall global import – over 2 billion tons of goods – and processed over 270 million customs applications a year. In the year 2015 the value of trade with third countries amounted to 3.5 billion dollars and the number of processed customs applications rose to 293 million, serviced by 2,000 EU customs offices working 24 hours a day, 365 days a year,¹³ with customs authorities in the Member States processing on average 609 customs declarations a minute.¹⁴ The increase in commercial turnover means that performing complete customs checks is practically impossible in the EU.

Customs Control of Goods in the EU Breaching Trademark Protection Laws vs. the “Follow the Money” Rule

Customs checks by customs authorities may be performed not only at borders but also in and out of the country in business entities’ registered offices, as well as on the roads and distribution points, i.e. warehouses, shops, bazaars, and street markets.

Customs authorities (in Poland, currently customs-revenue authorities) independently decide on the carrying out of customs checks, and they make their own

¹⁰ *Polska digitalizacja w ognie Europy* [Poland Behind Europe in Digitization], “Business Journal”, 1 August 2017, <http://businessjournal.pl/polska-digitalizacja-ogonie-europy/> [accessed: 15.09.2019].

¹¹ E. Gwardzińska, op. cit., p. 196.

¹² Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), OJ L 269, 10.10.2013, p. 1.

¹³ European Commission, *EU Customs Union – Unique in the World*, https://ec.europa.eu/taxation_customs/facts-figures/eu-customs-union-unique-world_en [accessed: 23.03.2019].

¹⁴ European Commission, *Customs Risk Management*, https://ec.europa.eu/taxation_customs/general-information-customs/customs-risk-management_en [accessed: 23.03.2019].

decisions about the form of the checks – whether they are going to be document checks or only an examination of the goods, or whether the checks are going to be carried out in some form combining the two.

Within the scope of the customs checks, the customs authorities can perform: a document control before the release of goods, based on either the submitted customs declaration or a random or post-import check (*a posteriori*) after the release of goods – within the period of three years from the submission of the customs declaration (Article 103 of the EU Customs Code), although this type of check basically does not refer to trademark protection.

All the customs checks, apart from random checks, are carried out based on a risk analysis, with the use of electronic data-processing techniques. They are aimed at identification and assessment of risk, as well as at taking indispensable safeguarding measures based on the criteria developed at the national or EU level, or – in appropriate cases – at the international level. The checks are carried out within the scope of a common risk management framework, based on exchanges of information about the risk, and its results, among custom administrations, as well as on the establishment of common risk criteria and standards, plus control measures and selected priority areas (Article 46 of the EU Customs Code). These may relate to all customs procedures, types of goods, transport routes, means of transport, or business entities. They may also provide for a previously-established and limited timeframe, with opening and closing dates, or intensified checks, as well as for the possibility of their periodical review taking into account unidentified risks, thus securing an indispensable protection level for EU citizens and financial interests, as well as SMEs, while at the same time guaranteeing equal treatment for all entrepreneurs within the entire EU.¹⁵

The customs checks performed in the year 2017 registered almost 95,000 cases of seizures of cargo suspected of breaching intellectual property rights, including the seizure of 35 million products of an estimated value of nearly €617 million. Also, more than 19,000 breaches of law were recorded as posing a threat to consumers in terms of sanitary, phytosanitary, and veterinary hazards, or technological standards. Around 7,000 breaches of regulations pertaining to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹⁶ were also identified – a 76% increase. Also detected were nearly 115 breaches of regulations regarding the export of cultural goods, and almost 11,000 cases of unpaid financial obligations or improperly filled-out declarations resulting in unpaid dues, where the dues in arrears exceeded the amount of €415 million.¹⁷

¹⁵ European Commission, *Why is Risk Management Crucial?*, https://ec.europa.eu/taxation_customs/general-information-customs/customs-risk-management/why-is-risk-management-crucial_en [accessed: 13.03.2020].

¹⁶ 1 July 1975, 993 UNTS 243.

¹⁷ European Commission, *Customs Sees What You Don't... and Protects You*, https://ec.europa.eu/taxation_customs/facts-figures/customs-sees-what-you-dont-protects-you_en [accessed: 23.01.2019].

In the year 2018 EU customs authorities seized 70,000 objects suspected of breaching intellectual property laws and over 27 million objects with an estimated value of nearly €740 million. They also detected 4,553 breaches of the CITES regulations and 117 cases where regulations pertaining to the export of cultural goods were not obeyed.¹⁸

In the case of turnover in cultural goods (export and import), trademark infringements account for a relatively small number of cases. Here we mainly have to deal with customs smuggling. In the year 2018 officers of the Polish National Treasury Administration foiled the smuggling of 611 objects of historical value during customs checks on the Polish-Ukrainian border-crossing points in the Podkarpackie voivodeship. These included, among others, collection objects, dog tags, binoculars, caps, mess kits, medals, bayonets, and clocks. In the year 2019, during inspection of international postal packages in Dębica, the officers foiled the smuggling of eight pieces of an adorned sword – a bronze stiletto from the Bronze Age (2300 BCE – 700 BCE), a truly unique item.¹⁹

Also, icon paintings carried by travellers in personal luggage are quite often smuggled. These are used for personal purposes or as gifts and this type of smuggling is not trade-related; i.e. only very rarely does the smuggling involve a large number of items and is carried out for commercial purposes. Quite often the people involved do not even realize that they are breaching customs regulations. Most commonly the seized objects are handed over to the museum of icon paintings in Supraśl.

Here it is worth noting that a lawful turnover in the import of cultural goods into Poland from an EU non-Member State requires a customs declaration in order to apply an appropriate customs procedure to them (admission to trading or temporary admission). In the case of artworks or collection objects, based on the customs regulations the applicable rates are: customs duty – 0%; VAT – 8% of the declared customs value of the objects.

In the case of the export of cultural objects, a permit issued by the Minister of Culture and National Heritage is required for permanent disposal of cultural objects and their transfer out of Poland, whereas a temporary transfer requires a permit by the Voivodeship Monuments Conservator. In the case of library materials, all types of permits are issued by the Director of the National Library. The lawful export and import of cultural goods requires the performance of specific customs formalities, and a failure to perform them amounts to customs smuggling and may involve seizure of the goods. Yet cultural objects account for only a small portion of goods illegally imported or exported.

¹⁸ Ibidem.

¹⁹ Krajowa Administracja Skarbowa, *Funkcjonariusze KAS udaremnili przemyt unikatowego miecza z epoki brązu* [National Treasury Administration Officers Foiled the Smuggle of a Unique Bronze Age Sword], 18 December 2019, https://www.podkarpackie.kas.gov.pl/izba-administracji-skarbowej-w-rzeszowie/wiadomosci/aktualnosci/-/asset_publisher/3Q3r/content/funkcjonariusze-kas-udaremnili-przemyt-unikatowego-miecz-a-z-epoki-brazu?redirect=https%3A%2F%2F [accessed: 13.06.2020].

Seizures of cargo are currently the most common method applied by customs authorities to prevent fakes from being placed on the market, and they amount to 70% of confiscations in the world.²⁰ Yet the success of the customs authorities amounts to merely a fraction of the global exchanges. The value of the goods seized and declared by the custom authorities amounts to only 1.2% of the estimated value of counterfeit cargo.²¹

The EU data from the year 2017 demonstrates that at least 100,000 counterfeit goods, with an overall value of €2 million, are smuggled across the EU customs borders each day.²² For the sake of comparison, in the year 2013 counterfeit and pirated goods amounted to 5% of EU imports, which translated into €85 billion for the year.²³ In the year 2016 the customs authorities seized over 41 million products, with an overall retail value²⁴ of around €673 million.²⁵ Products with the highest Domestic Retail Value are most commonly luxury goods, such as watches (around 16%), handbags and wallets (around 10%), perfumes and cosmetics (around 8%), as well as sports footwear and clothes of luxury brands (around 7%). The top three also includes counterfeit toys (around 14%).²⁶

As shown by data reflected in Figure 1 below, the goods most commonly seized by customs authorities in 2016 included: cigarettes (24% of all arrested products), toys (17%), food and foodstuffs (13%), as well as counterfeit packages, tags, and labels of original products (15% in total). Other categories of products included clothes (4%), body care products (3%), perfumes and cosmetics (2%), and mobile accessories (2%). The remaining categories, accounting for 1%, include, among others, shoes, watches, accessories, sunglasses, medicines, computer equipment, and alcoholic beverages.²⁷ In the year 2016 an increase was observed with regard to everyday use products, i.e. food and foodstuffs, and toys. In around

²⁰ *The WCO Tool in the Fight Against Counterfeiting*, Interface Public Members (IPM) brochure, <http://www.wcoipm.org/> [accessed: 11.07.2019].

²¹ United States Chamber of Commerce, *Measuring the Magnitude of Global Counterfeiting: Creation of a Contemporary Global Measure of Physical Counterfeiting*, Global Intellectual Property Center, Washington 2016, p. 25.

²² N. Szewczak, *Przywozisz podróbkę z wakacji? Grozi za to nawet więzienie* [You're Bringing Back a Fake from your Holidays? You May Even Go to Jail for It], TVN24.pl, 16 August 2014, <https://tvn24bis.pl/wiadomosci-gospodarcze/71/przywozisz-podrobke-z-wakacji-grozi-za-to-nawet-wiezienie,459116.html> [accessed: 20.06.2020].

²³ Europol/EUIPO, *2017 Situation Report on Counterfeiting and Piracy in the European Union*, 22 June 2017, pp. 12-13, <https://www.europol.europa.eu/publications-documents/2017-situation-report-counterfeiting-and-piracy-in-european-union> [accessed: 17.06.2020].

²⁴ Domestic Retail Value (DRV) - the price at which the goods would be sold in retail sale in a Member State if they were not fakes.

²⁵ European Commission, *Report on the EU Customs Enforcement of Intellectual Property Rights. Results at the EU Border 2016*, Publications Office of the European Union, Luxembourg 2017, pp. 5-11.

²⁶ *Ibidem*, p. 11.

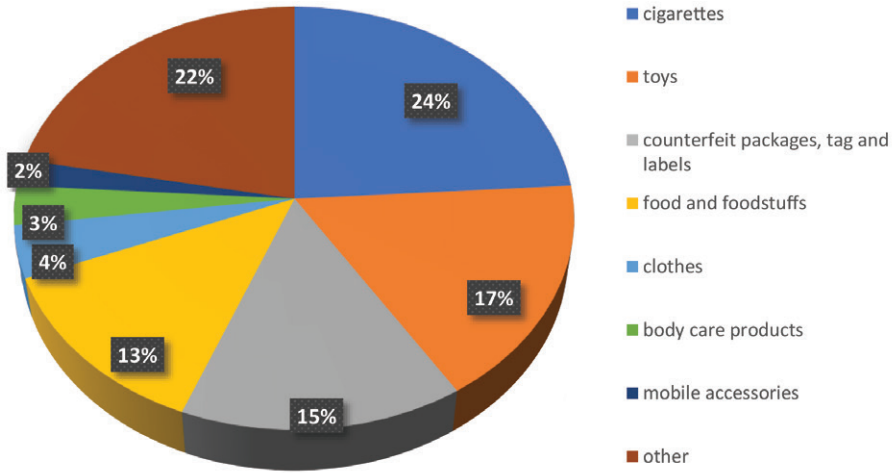
²⁷ *Ibidem*, p. 10.

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90% of the cases the seized goods were destroyed or used as a basis for court proceedings concerning breaches of intellectual property rights, and only 3.7% of the seized goods turned out to be original products not in breach of property rights.²⁸

Figure 1. Categories of products seized by the customs authorities in 2016



Source: European Commission, *Report on the EU Customs Enforcement...*, p. 10.

In the year 2018 the categorization of cargo arrested by the EU customs authorities changed. The most frequently seized items were clothes (12.33%), insecticides, shoe polish, glue, electric bulbs (11.13%), medicines (10.10%), cigarettes (8.90%), materials, packages (8.83%), and toys (7.63%). (See Figure 2 below).

According to the data of the World Customs Organization (WCO) from the year 2014, the value of the counterfeit goods on the market exceeded US\$650 billion, which amounted to around 7% of the global trade.²⁹ The data of the Organization for Economic Co-operation and Development (OECD) and the European Police Bureau (Europol) from the year 2016 estimate the global value of crimes against intellectual property at US\$461 billion annually.³⁰ The value of the counterfeit medicines sector alone was estimated by the World Health Organization

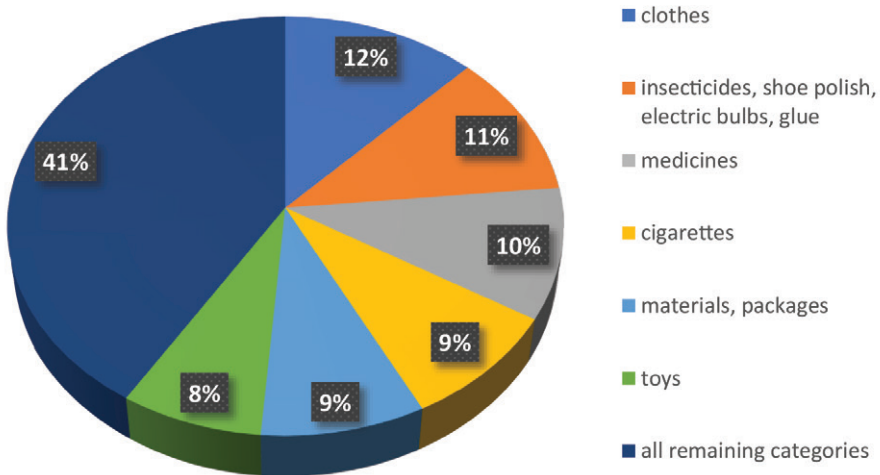
²⁸ Ibidem, p. 9.

²⁹ World Customs Organization, *Collaboration against Global Counterfeiting is Basis for New Memorandum of Understanding between WCO and INTA*, 15 July 2014, <http://www.wcoomd.org/en/media/newsroom/2014/july/collaboration-against-global-counterfeiting.aspx> [accessed: 16.06.2019].

³⁰ OECD/EUIPO, *Trade in Counterfeit and Pirated Goods. Mapping the Economic Impact*, 2016, p. 11, <http://www.oecd.org/gov/risk/trade-in-counterfeit-and-pirated-goods-9789264252653-en.htm> [accessed: 16.06.2020].

(WHO) at US\$75 billion annually.³¹ Profits from the sale of counterfeit medicines may have amounted to €150-200 billion, which means that currently this is the most lucrative business in the counterfeit goods trade.³²

Figure 2. Categories of goods most commonly seized by the EU customs authorities in 2018



Source: own elaboration based on European Union, *The EU Customs Union in Action*, https://europa.eu/european-union/topics/customs_en [accessed: 30.08.2018].

In the fight against breaches of intellectual rights, the EU has developed an Action Plan³³ and Strategy for the Enforcement of Intellectual Property Rights in Third Countries.³⁴

Within the scope of the action plan, the Follow the Money Principle was adopted in the year 2014. As explained by Michel Barnier, the EU Commissioner for Internal Market and Services, rather than punish the – often inadvertent –

³¹ B. Moran, *Cracking Down on Counterfeit Drugs*, 20 August 2013, <http://www.pbs.org/wgbh/nova/next/body/uncovering-counterfeit-medicines/> [accessed: 01.06.2020].

³² *Milion osób umiera rocznie przez zażywanie podrobionych leków. Ile jest ich w Polsce?* [A Million People Die Each Year from Counterfeit Drugs. How Many Are There in Poland?], "Gazeta Prawna", 5 March 2018, <http://serwisy.gazetaprawna.pl/zdrowie/artykuly/1108763,podrobione-leki-w-polsce-i-na-swiecie.html> [accessed: 11.06.2020].

³³ European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan*, 1 July 2014, COM(2014) 392 final; European Commission, *Communication... A balanced IP enforcement system...*, COM(2017) 707 final.

³⁴ Strategy for the enforcement of intellectual property rights in third countries, OJ C 129, 26.05.2005, p. 3.

breach of intellectual property rights by private persons, the proposed actions are supposed to enable enforcement of the Follow the Money Principle, with the aim of denying profits to the entities breaching intellectual property rights in a manner destructive to commerce.³⁵ These include:³⁶ (i) conducting a dialogue with interested parties (such as internet advertising agencies and paid services providers) with the aim of decreasing profits resulting from a breach of intellectual property rights; (ii) promoting due diligence on the part of all entities involved in the production of intellectual property goods, because responsible control of the supply chain and due diligence lower the risk of breaches of intellectual rights; (iii) support for small enterprises with regard to a more efficient enforcement of intellectual property rights by improving court procedures; (iv) enhancing co-operation among the Member States and facilitating the exchange of best practices; and (v) providing a complex training program for state administration bodies of the Member States with the aim of achieving the ability to take quicker actions to prevent intellectual property infringements throughout the EU.

It is worth emphasizing that the Follow the Money Principle does not consist of directly combating instances of piracy, but of limiting the possibilities of making money on pirated contents, based on a cooperation between the advertising market and payment intermediaries, i.e. Visa, MasterCard, or PayPal. In the report entitled *Copyright Enforcement Online: Policies and Mechanisms*, published on 14 January 2016 by the European Audiovisual Observatory (EAO) at the Council of Europe, this principle was declared to be the most effective method of dealing with illegal commercial online distribution of contents.

The other document promoted by the EU, the Strategy for the Enforcement of Intellectual Property Rights in Third Countries, includes: identification of prioritized countries where goods are counterfeited and pirated; strengthening of clauses enabling the enforcement of intellectual property rights in bilateral agreements which stem from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization; as well as the establishment of public-private partnerships which are directly or indirectly involved in the enforcement of intellectual property rights and raising the awareness of intellectual property rights protection both among owners and users (consumers).

Intellectual property infringements not only have a negative economic and social impact, as they deprive the rights' owners of considerable profits, thus affecting, among others, their market share, sales volume, reputation, and employment, but they also negatively impact health requirements, as they do not secure a proper quality or adequate use conditions. This also contributes to the development of

³⁵ European Commission, *Commission Presents Actions to Better Protect and Enforce Intellectual Property Rights*, 1 July 2014, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_760 [accessed: 15.09.2018].

³⁶ *Ibidem*.

criminal or terrorist groups and results in losses to the national budgets due to unpaid public taxes.

In view of the negative effects of breaches of property rights, the EU has developed action plans for the customs authorities. The first action plan, of the year 2009,³⁷ made it possible for the customs authorities to use a common approach to the enforcement of intellectual property rights and provided for focusing on the highest risk areas.

The other plan, from the year 2012,³⁸ created appropriate tools for dealing with the new trends in international trade in goods breaching intellectual property rights. It encompassed four strategic goals, to wit: (i) efficient implementation and monitoring of the EU legislation concerning the scope of intellectual rights enforcement by the customs authorities; (ii) dealing with the new trends in international trade in goods breaching intellectual property rights; (iii) combating trade in goods breaching intellectual property rights in the international supply chain; and (iv) strengthening cooperation between the European Observatory on Infringements of Intellectual Property Rights, which is a part of the European Union Intellectual Property Office (EUIPO), and enforcement agencies.

Implementation of these goals is supposed to contribute to the establishment of an integrated, uniform intellectual property market which properly addresses the needs of the e-economy, with the customs authorities having a leading role in combating the illegal business of goods breaching property rights entering into the EU common customs area. It is the customs authorities who perform the customs control of goods, preventing their entry and their participation in an unlimited turnover. They apply not only IT systems, but also cutting edge equipment, such as smuggling detectors, endoscopes, video-endoscopes, and mobile scanning devices. They are also authorized to perform preliminary investigation activities with regard to detected counterfeit and pirated goods, i.e. those breaching trademark protection law.

The Conduct of Preliminary Investigation Activities

Preliminary investigation activities have not yet been given a legal definition, although they feature in various legal regulations either directly or in the form of separate activities falling within this scope, in spite of the fact that in the year 2018 in the draft parliamentary bill³⁹ the Polish lawmaker formulated such a definition, but the legislation was shelved.

³⁷ Council Resolution of 16 March 2009 on the EU Customs Action Plan to combat IPR infringements for the years 2009 to 2012, OJ C 71, 25.03.2009, p. 1.

³⁸ Council Resolution on the EU Customs Action Plan to combat IPR infringements for the years 2013 to 2017, OJ C 80, 19.03.2013, p. 1.

³⁹ Sejm Rzeczypospolitej Polskiej, *Projekt ustawy o czynnościach operacyjno-rozpoznawczych* [Draft Bill on Preliminary Investigation Activities], 7 February 2008, [http://orka.sejm.gov.pl/Drukio6ka.nsf/0/OEE2EFB34B2B8750C125741A003B1486/\\$file/353.pdf](http://orka.sejm.gov.pl/Drukio6ka.nsf/0/OEE2EFB34B2B8750C125741A003B1486/$file/353.pdf) [accessed: 23.07.2019].

According to Article 2 of the above-mentioned draft, preliminary investigation activities consist of a set of overt and covert operations aimed at: (i) identification, prevention, and detection of criminal activities; (ii) finding individuals hiding from enforcement agencies or justice, as well as missing persons if there is a substantiated suspicion that their disappearance was the result of criminal activities, as well as finding items lost as a result of criminal activities or related to such activities; (iii) determining the identity of individuals, and human remains in case of a substantiated suspicion of criminal activities.

Adam Taracha⁴⁰ defines preliminary investigation activities as those taken by state administration bodies – based on state statutory premises – as overt or covert operations fulfilling informative, investigatory, and preventive and evidence-gathering functions.

In the practice of both Polish and EU customs authorities, preliminary investigation activities are firmly positioned as part and parcel of their operations. Yet neither in the EU legislation nor in the Polish National Revenue Administration Act⁴¹ – which regulates the functioning of the customs and revenue authorities – is there any definition of the term. The lawmaker limits him/herself to stating the remit of the authorities, which includes:⁴² identification, detection, and combating offences and misdemeanours with regard to goods the turnover of which is subject to prohibitions or limitations based on the Polish regulations, the EU legislation, or international agreements, and preventing these offences and misdemeanours and prosecuting the wrongdoers if the illegal acts have been detected by the National Revenue Administration, which also pertains to the trademark protections.⁴³

The remit of the customs and revenue authorities indicated by the Polish lawmaker complies with a catalogue of preliminary investigation operations, which may be described as a set of activities undertaken by the customs authorities based on the national customs legislation, of an overt or covert nature, in relation to the entry of goods into the EU customs area or their export out of the area if the goods entirely or partially breach customs and revenue obligations or the principle of fair competition on the market.

Within the the scope of the preliminary investigation operations the Polish customs and revenue authorities are entitled to arrest and search individuals, seize items or search premises, cargo or means of transport and ships in compliance with procedures specified in provisions of the Polish Code of Criminal Proceedings;

⁴⁰ A. Taracha, *Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawnodowodowe* [Preliminary Investigation Activities. Forensic and Legal Aspects], Lublin 2006, p. 25.

⁴¹ *Ustawa z dnia 16 listopada 2016 r. o rachunkowości*, Dz.U. 2016 item 1047.

⁴² *Ibidem*, Article 2(1) point 14.

⁴³ Article 31(1) of the Code of Penal Proceeding (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*, Dz.U. 1964 No. 43 item 296, as amended), in conjunction with Article 305 of the Industrial Property Law.

arrest people and seize items whose data have been entered into the systems referred to in the Act on the participation of the Republic of Poland in the Schengen Information System and the Visa Information System.

As regards any disclosed infringements of the trademark protection law, the customs authorities may take action "on request" or "ex officio". In the former case⁴⁴ the request may be made at the national level (an application is filed with the customs authorities of a Member State requesting action to be taken in this Member State) or the EU level (in this case the application for action to be taken is addressed to the customs authorities of the Member State where the application is filed, as well as to administrations of one or more additional Member States). The owner of the right, or its/his/her plenipotentiary, as well as the person entitled to use the intellectual property right are authorized to submit the application for action.

In the case of an action being taken ex officio, before an application is submitted by the right's owner or its/his/her plenipotentiary, and if the customs authorities have a reasonable suspicion that the goods are in breach of intellectual property law, the authorities may suspend the goods' placement on the market or they may seize the cargo for a period of four working days – until the right's owner is notified by the director of the Revenue Administration Chamber in Warsaw. If the application is not submitted – the customs authority is obliged to release the goods.

The lack of a more comprehensive authority in the area of customs is the most serious issue as regards monuments protection. Customs authorities, either ex officio or upon request, take actions aimed at the seizure, attachment, or destruction of counterfeited and pirated goods on the border. There is an urgent need to increase their powers (a request de lege ferenda).

Final Remarks

Customs authorities play the role of guardians of the international goods turnover, securing it against the entry of illegal goods into the EU common customs area – also with reference to goods breaching property rights within the scope of trademark protection. Despite the fact that the value of goods in breach of intellectual property rights pertaining to their trademark which are found and seized by customs officers is estimated at €650 billion, they amount to merely 1.2% of the estimated value of all counterfeit goods (according to the data of the Global Intellectual Property Centre). The size of the market of goods breaching trademarks seems enormous and is difficult to properly estimate.

The market's thriving development is, to a large extent, boosted by the hefty profits of those involved in such dealings, as well as by the relatively lax penalties for the infringement of regulations and the growing demand for counterfeit prod-

⁴⁴ Article 3 Regulation (EU) No. 608/2013.

ucts on the part of those consumers who would go to great lengths to impress others with brand goods, the purchase of which they cannot afford, so that they would resort to using fakes. This feedback loop drives the development of the counterfeit goods market. Its size and scope can only be reduced by the education of society on its negative economic, social, and health aspects, as well as by the establishment of a system of higher penalties for the infringement of trademark rights.

The research conducted by the author shows that currently the overall number of cultural objects illegally imported into or exported out of the EU customs area (of which Poland is a part) is currently not all that large. This may indicate a significant public awareness in the area of the national heritage protection, or suggest the legal effectiveness of customs checks in this area. Nowadays customs authorities inspect only 10% of goods declared for customs clearance. Undoubtedly though, the issues related to illegal trade in cultural objects and of their admission into the commercial turnover requires more extensive research and analysis.

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