

**Ref: Proposed Regulation on Customs Enforcement of Intellectual Property Rights
Counterfeit Goods in Transit Must Be Covered Effectively**

The International Chamber of Commerce (ICC) Business Action to Stop Counterfeiting and Piracy (BASCAP) welcome the adoption of the European Parliament's legislative resolution on the proposal for a Regulation concerning customs enforcement of intellectual property rights (IPRs)¹. The European Parliament has rightly recognized the importance of effective legislation on border enforcement of IPRs to empower Customs authorities to prevent the transit of fake goods at the EU's borders. Not only does this protect EU citizens, it helps to reduce the flow of potentially very dangerous goods to people in other countries.

We therefore very much support the EP's Amendments 3 (Recital 4), 27 (Article 1(4a)) and 11(Recital 10a):

Amendments 3 (Recital 4) and 27 (Article 1(4a)) – Scope of Customs Regulation

These Amendments make it explicit that the Customs Regulation shall apply to goods in transit.

Amendment 11 (Recital 10a) – Reversal of burden of proof

Amendment 11 addresses effectively the issue of fake goods in transit likely to be diverted into the Internal Market.

Given the common difficulty of proving the intended destination of goods in transit, in particular because these are often subject to inadequate or false declarations, we believe that Customs authorities should be able to detain suspected counterfeit goods in transit, absent proof by the declarant or owner of the goods that these goods are in fact destined for a non-member country of the Union.

The Customs Regulation thus makes clear that the declarant, holder or owner of the goods ultimately bears the burden of proving the destination of the goods. In the absence of clear and adequate proof, Customs and other law enforcement authorities and jurisdictions may legitimately presume that the fake goods in transit are destined for the Internal Market and are no longer in transit.

Amendment 11 provides additional safeguards to prevent those goods (which often pose health and safety risks to consumers) from entering the Internal Market. Such safeguards consist, first, of reversing the burden of proof to make the declarant, holder or owner of the goods responsible for providing clear and convincing evidence that the goods are not destined for the Internal Market and, second, of issuing guidelines providing criteria for Customs authorities to effectively assess the risk of deviation of goods onto the market of the Union, taking into account the relevant case-law of the Court of Justice of the European Union.²

We thus believe that the Amendment 11 will enable Customs authorities to deal more effectively and conclusively with the issue of suspected counterfeit goods in transit under the proposed Customs Regulation, and thereby to increase its effectiveness.

¹ 3 July 2012, P7_TA-PROV (2012) O272

² Joined Cases C-446/09 & C-495/09, *Philips & Nokia*

We would thus strongly urge that, at a minimum, Amendment 11 (attached) be included in the amended Customs Regulation, as proposed by the European Parliament.

P7_TA-PROV(2012)0272

Customs enforcement of intellectual property rights

European Parliament legislative resolution of 3 July 2012 on the proposal for a regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights (COM(2011)0285 – C7-0139/2011 – 2011/0137(COD))

(Ordinary legislative procedure: first reading)

Amendment 3

Proposal for a regulation

Recital 4

Text proposed by the Commission

(4) The customs authorities should be able to control goods, which are or should have been subject to customs supervision in the customs territory of the Union, with a view to enforcing intellectual property rights. Enforcing intellectual property rights at the border, wherever the goods are, or should have been, under ‘customs supervision’ as defined by Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, makes good use of resources. Where goods are detained by customs at the border, one legal proceeding is required, whereas several separate proceedings would be required for the same level of enforcement for goods found on the market, which have been disaggregated and delivered to retailers. An exception should be made for goods released for free circulation under the end-use regime, as such goods remain under customs supervision, even though they have been released for free circulation. It is also appropriate not to apply the Regulation to goods carried by passengers in their personal luggage as long as these goods are for their own personal use and there are no indications that commercial traffic is involved.

Amendment

(4) The customs authorities should be able to control goods, which are or should have been subject to customs supervision in the customs territory of the Union, ***including goods placed under a suspensive procedure***, with a view to enforcing intellectual property rights. Enforcing intellectual property rights at the border, wherever the goods are, or should have been, under ‘customs supervision’ as defined by Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, makes good use of resources. Where goods are detained by customs at the border, one legal proceeding is required, whereas several separate proceedings would be required for the same level of enforcement for goods found on the market, which have been disaggregated and delivered to retailers. An exception should be made for goods released for free circulation under the end-use regime, as such goods remain under customs supervision, even though they have been released for free circulation. It is also appropriate not to apply the Regulation to goods carried by passengers in their personal luggage as long as these goods are for their own personal use and there are no indications that commercial traffic is involved.

Amendment 11

Proposal for a regulation

Recital 10 a (new)

Text proposed by the Commission

Amendment

(10a) Where goods in transit are suspected to be an imitation or a copy of a product protected in the Union by an intellectual property right, the declarant or holder of the goods should bear the burden of proving the final destination of the goods. The final destination of the goods should be presumed to be the market of the Union in the absence of clear and convincing evidence to the contrary provided by the declarant, holder or owner of the goods. The Commission should adopt guidelines which will provide criteria for customs authorities to effectively assess their risk of deviation onto the market of the Union, taking into account the relevant case-law of the Court of Justice of the European Union.

Amendment 27

Proposal for a regulation

Article 1 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. This Regulation shall apply to goods in transit through the customs territory of the Union which are suspected of infringing an intellectual property right.