

Seizure of Counterfeit Products in the US and the EU- A Comparative Study

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Introduction

The United States Customs and Border Protection agency recently published its fiscal year 2006 seizure statistics for intellectual property rights.¹ This article will analyze that report and compare it to the previous year's statistics. Comparisons will also be made with European Union statistics.

Recordation of Rights

United States Customs and Border Protection (CBP)

Counterfeit goods imported from other countries can significantly harm profits made by U.S. businesses. To protect their interests, these businesses can record their intellectual property rights at the CBP, a bureau of the department of Homeland Security. In order to be recorded at the CBP, a trademark must first be registered with the U.S. Patent and Trademark Office (USPTO), and a copyright must be registered with the U.S. Copyright Office. After that, the registration can be recorded at the CBP electronically², including all of the information required by the Regulations (19 U.S.C. Part 133). A fee of \$190.00 is required for each copyright or trademark (per class) recorded. Once the intellectual property rights are recorded, U.S. Customs can deny entry to goods that infringe upon the recorded rights. These goods are seized at the point of entry to the United States. Following the seizure, the trademark or copyright owner will be notified, as will the importer. Unless the importer successfully files a formal petition seeking relief from the seizure, the seized goods will be forfeited. The protection afforded by recordation of registered trademarks with the CBP will remain in effect concurrently with the USPTO registration, and must be re-recorded on each anniversary of the expiration of the trademark registration. Copyright recordations will remain in effect for 20 years, and can be renewed at the end of each 20-year term.

¹ Available through:
http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ipr/seizure/trading/fy06_ipr_stat.ctt/fy06_ipr_stat.pdf

² You can start an application at: <https://apps.cbp.gov/e-recordations/>

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EU Customs Authorities

In Europe, intellectual property right holders can record their rights with customs authorities, by filing an 'application for action'. The current legislation for this is Council Regulation (EC) No 1383/2003 on July 22, 2003, effective on July 1, 2004. Right owners register their rights with a national customs agency free of charge, using standardized forms and information throughout the EU. Even though the recordation is done through a national customs agency, recordation of rights having to do with a Community trademark has the same legal status throughout all Member States. The right holder should submit a copy of his application form for every country which he wishes it to cover. For instance, if a right holder of a Community Trade Mark would like his trademark recorded for customs purposes for EU Member States, he would have to submit 27 copies of the relevant documents. The national customs agency will then take care of distributing the application to the customs agencies of the other Member States. A granted 'application for action' will be valid for one year, with the option of a one-year extension.

Right holders must fulfil two conditions to validate a successful application for action. First, they must provide the qualified customs administration a sufficiently accurate description of their goods to make identification possible. Second, they must provide proof that they hold the right in question.

The Regulation has also extended the 'ex officio' procedure, which grants EU customs authorities the right to react without a prior application if there are sufficient grounds for suspecting that goods infringe an intellectual property right.

The procedure in the EU differs from the US procedure in certain ways. For example, the recordation in the EU is valid for a shorter period; one year with an option for a one year extension. After this period the right holder in the EU will have to file an 'application for action' again. By forcing right holders to re-submit their application every two years, the EU customs agencies are assured of up-to-date information.³ In addition, there are no costs involved for right holders in the EU to record rights. In the US, a fee of \$190.00 is charged for each copyright or trademark (per class) recorded.

U.S IPR. Seizure Totals

The U.S. had a total number of 14,765 intellectual property seizures in 2006, which is a considerable rise from 2005, when 8,022 seizures were

³ Authors would like to thank Mr. Sannes of the Intellectual Property Rights Department of the Dutch Tax & Customs Administration in Groningen, the Netherlands for his expert advice on this subject.

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made. This jump from 8,022 seizures to 14,765 seizures constitutes an 83% increase. Which is all the more significant considering that since 2002 there was a consistent (but relatively small) increase of about 750 additional seizures per year. Please refer to Table 1 for the previous years' totals.

Table 1⁴

<u>Fiscal Year</u>	<u>Total Number of U.S. IPR Seizures</u>
2006	14,675
2005	8,022
2004	7,255
2003	6,500
2002	5,793

Yearly Domestic Value of U.S. IPR Seizures

The 'domestic value' is generally calculated by the U.S. government by taking the cost of the seized goods, and then adding the cost of shipping and importing the goods to the U.S., with the amount of profit added as well. The domestic value of the seized commodities for FY 2006 amounted to \$155,369,236. This is an impressive increase (67%) from the total amount in 2005, which was \$93,234,510, and surpasses the previous record year of 2004. Please refer to Table 2 for the Total Domestic Value statistics from previous years.

Table 2

<u>Fiscal Year</u>	<u>Total Domestic Value of U.S. IPR Seizures</u>
2006	\$155,369,236
2005	\$93,234,510
2004	\$138,767,885
2003	\$94,019,227
2002	\$98,990,341

All in all, 2006 was a record year for the U.S., both in the total number of yearly seizures and in the total domestic value of those seizures. This is probably a result of both increased enforcement by U.S. agents and a rise in counterfeit materials being produced overseas.

⁴ Numbers acquired from:

http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ipr/seizure/seizure_stats.xml

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Top IPR Commodities Seized (calculated by Domestic Value)

The largest part of the total value of the seized goods is 'footwear', which comprises 41% of the total. Second on the list is other 'wearing apparel' with 16% of the total, third is 'handbags/wallets/backpacks' with 9% of the total, fourth is 'computers/hardware' (9%), and fifth is 'Consumer Electronics' (5%)⁵. Compared to the figures from FY 2005, a couple of things stand out. First, is the spectacular rise of the 'footwear' category, which jumped from 10% in 2005 (domestic value \$8,941,185) to 41% in 2006 (domestic value \$63,445,619). Second, cigarettes made up 10% of the total domestic value of seized goods in 2005, but have disappeared from the list in 2006. If one can conclude from these numbers that trafficking of counterfeit cigarettes in the U.S. has severely slowed or has even come to a halt, this may be seen as a great success.

Top Trading Partners for IPR Seizures (calculated by Domestic Value)

Unsurprisingly, China once again is the largest source of counterfeit goods, and its share is growing. In FY 2005, China was responsible for 69% of the total domestic value of seized goods. This share has grown to 81% in FY 2006. This growth becomes even more significant if we compare the domestic value these percentages represent. In FY 2005, China's 69% represented a domestic value of \$63,968,416; in FY 2006 however, the domestic value of IPR seizures of goods coming from China grew to \$125,595,844, nearly double the amount of 2005. The increase in Total Domestic Value of goods seized (a \$62 million increase) can thus solely be attributed to the increase of seized goods from China.

Second place in FY 2006 is (again) Hong Kong, with a percentage of only 6%, which was the same in 2005. Other countries are responsible for only 1 percent of the total domestic value of seized goods or less. This shows that China is the main source of goods involved in IPR seizures in the U.S.

If we focus on the top intellectual property commodities seized from China (calculated by looking at the domestic value), 'Footwear' has the largest increase from 12% in FY 2005 to 49% in FY 2006. Cigarettes however dropped from 15% in 2005 to 1% in 2006. This can be explained by the increasingly tough stance on counterfeit cigarettes taken by the Chinese government. Considering that China's State Tobacco Monopoly

⁵ To complete the list: Sixth is 'media' (4%), seventh is 'headwear' (2%), eighth is 'health care' (2%), ninth is 'watches/parts' (2%), and tenth is 'pharmaceuticals' (1%). The category 'all other commodities' comprises 8%, complete list and chart can be found at:
http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ipr/seizure/trading/fy06_ipr_stat.ctt/fy06_ipr_stat.pdf.

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Administration contributes an estimated 12 percent to Beijing's national income (more than any other industry)⁶, this tougher stance is hardly surprising, since counterfeit cigarettes pose a serious threat to its steady income of tax revenues. An announcement made last January by China confirms that efforts are underway in China to stop the counterfeiting of cigarettes. According to the announcement, Chinese officials seized 9.07 billion counterfeit brand cigarettes in 2006, with 6,334 people arrested.⁷

The explosive increase in counterfeit footwear can, in fact, be traced almost solely to the seizure of a shipment of 77 forty-foot shipping containers carrying Nike Air Jordan Sneakers, which (combined with one container of Abercrombie & Fitch clothing) was valued at \$69.5 million (one of the largest seizures of counterfeit goods in U.S. history). Without that shipment, the FY 2006 numbers for counterfeit footwear from China would be considerably reduced.

Comparison with EU statistics

Since the 2006 EU statistics have not been published yet, the US FY 2005 statistics will be compared with the 2005 EU statistics. The European Commission presented an Action Plan to combat counterfeiting in November 2005, and this plan was implemented in 2006. Although no statistics are yet available, European Commissioner for Taxation and Customs Union László Kovács did, however, mention in a speech delivered in November 2006 that the first results of the implementation of the Action Plan were 'encouraging'.⁸

While the US statistics show both the amount and the value of its seizures, the EU statistics concentrate on the amount of seizures and the number of articles seized. For this reason, it will only be possible to compare statistics based on the amount of seizures.

The 2005 EU statistics show a total of 26,704 seizures made by EU member states' customs officials. This is a 20% increase from 2004, when 22,241 seizures were made.

The amount of seizures conducted by the US in 2005 was significantly lower at 8,022 seizures (see table 1). Table 3 gives a breakdown of the number of seizures expressed as percentages per trading partner.⁹

⁶ See <http://lists.essential.org/intl-tobacco/msg00263.html>.

⁷ <http://english.cri.cn/3130/2007/01/11/262@183979.htm>

⁸ Accessible through:

http://ec.europa.eu/taxation_customs/resources/documents/common/about/speeches/counterfeit_statistics2005_2006_11_10.pdf

⁹ For the US, only the top five countries can be identified from the available statistics.

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US- 2005		EU- 2005	
1. China	46 %	1. China	38 %
2. Hong Kong	11 %	2. Thailand	10 %
3. Pakistan	1 %	3. Hong Kong	8 %
4. Korea	1 %	4. Turkey	7 %
5. India	< 1 %	5. USA	4 %
6. Others	40 %	6. Malaysia	4 %
		7. Algeria	3 %
		8. Afghanistan	1 %
		9. Others	25 %

Both in the U.S. and in the E.U., China is number 1 on the list. In the E.U., the gap between China and the other countries is somewhat smaller than in the U.S., but not shockingly so. Furthermore, the only named 'source' countries that both have in common are China and Hong Kong.

A global survey on counterfeiting and piracy conducted by the International Chamber of Commerce (ICC) confirms China's image as the number 1 supplier of counterfeit goods. This global survey asked respondents to list the top five countries perceived to have the most favorable and least favorable IP environments. The group of respondents comprised 48 companies who (for the most part) trade globally. The respondents named China, Russia and India (in that order) as the countries with the least favorable intellectual property environment, while the most favorable were the USA, the UK and Germany.¹⁰ Interestingly, Hong Kong was not listed in the published top ten least favorable countries, even though this country has a prominent place in both the US and in the EU as to the amount of seizures.

Conclusion

First, the U.S. 2006 statistics show a significant rise compared to previous years, both in the number of seizures and in the total domestic value of those seizures. Even though the 2006 EU statistics have not been published yet, a steady rise is expected there as well, following the implementation of the European Commission Action Plan in 2006.

Both sides of the Atlantic list China as the number one trading partner for counterfeit goods, a dubious distinction indeed.

¹⁰ For the full report please see: www.iccwbo.org/bascap

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Second, the fact that both the US and the EU publish their statistics so publicly is beneficial. This way intellectual property owners are able to track the progress being made in the interdiction of counterfeit goods. Also, the publication of seizure statistics leads to more public awareness of the growth of international traffic in counterfeit goods and the performance by national customs agencies in stopping shipments of counterfeit products, prior to entry into their countries.

Hopefully, at some point the US and the EU will harmonize their approach in presenting the statistics. Only then will a full comparison be possible. Ultimately, if the US and the EU harmonize their efforts in investigating and prosecuting international traffickers of counterfeit goods, this would hopefully result in a decrease of counterfeit products entering commerce in the US and the EU.

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