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Counterfeiting is increasing – how can you defend yourself?

Is your business affected by counterfeiting? If so, you are not alone. A newly released study shows that almost all intellectual property dependent companies listed on the NASDAQ OMX Stockholm 30 Index have been affected. Moreover, most expect that the problem will continue to grow. Better political support is required to stem this development, but companies already have several weapons available to use against the counterfeiters.

For a long time, counterfeiting has comprised more than just luxury goods such as watches, handbags and clothing. Ordinary consumer products and food products are also copied to a large and growing extent. The profit margins can be great even for everyday products if the costs for consumer safety, environmental considerations and working environment can be avoided. This applies to an even greater extent to products such as pharmaceuticals and spare parts for aircrafts and automobiles for which the profit margins are very high, but at the expense of not only the original producers' loss of profits but also the risk to life and health of the public.

In 2009, the OECD estimated that the value of counterfeit goods in international trade was USD 250 billion per year. In 2012 the Swedish Trade Federation anticipated that the value of trade in counterfeited consumer products in Sweden was SEK 20 billion, of which SEK 15 billion was in consumer sales. Thus, the original manufacturers and retailers are being deprived of significant amounts, as is the government in the form of foregone tax revenues.

These and similar calculations indicate that trade in counterfeit goods has a turnover exceeding the illicit drug trade on a worldwide basis. There are strong suspicions that counterfeiting contributes to the financing of terrorism and organised crime in several areas. This means that product counterfeiting is a threat to health, life and security in a variety of ways in addition of being a major commercial problem.

Stock exchange listed companies are severely affected

In the recently published study "How leading companies are affected by counterfeiting and IP infringement" by the Confederation of Swedish Enterprise and Black Market Watch, 15 of the 17 companies listed on NASDAQ OMX Stockholm 30 Index and whose business activities could be exposed to counterfeiting and intellectual property infringement participated.

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The study shows that all companies participating have been affected by the infringements of intellectual property rights, and that all but one had been affected by counterfeiting directly or indirectly. A clear majority of those surveyed reported that the counterfeiting of their products could pose a risk to health and safety. Several of the companies mentioned that the intellectual property rights infringements that they are victims of are linked to international organised crime. 80 percent of the surveyed companies estimated that counterfeiting will increase over the next five years.

More concretely, 12 of the 15 the companies stated that they were directly affected by counterfeiting of their products, while another two had been affected by losses of patent licensing revenues due to counterfeiting. Twelve companies had been affected by patent infringements and eight companies had been affected by infringement of design rights. Hence, counterfeiting hits several types of intellectual property rights.

The report from the Confederation of Swedish Enterprise and Black Market Watch can be found [here](#).

Infringements are stopped in court

Surprisingly, the study shows that only 9 of the 15 participating companies have measures and procedures in place to tackle intellectual property infringement. Preparedness and resources allocated to combat counterfeiting also varies widely between the companies.

The companies' main objective with the fight against infringers is, according to the report, to discourage others from engaging in infringement. The most important measure to achieve this goal is to take legal action against infringers and to get them convicted in court. In addition hereto, a series of measures are applied by the companies in order to obstruct counterfeiting in practice by expanded secrecy and security.

How can one defend oneself?

In order to stop an infringement of patent, trademark or design rights in court, one must first become aware of it. This is often done by the company's own personnel or by customers reporting about the marketing or sale of such goods that appear to constitute an infringement. It is also possible to use the customs which, after they have been informed of existing patents, trademarks and designs, reviews incoming goods and compares them with the respective rights. When a suspected infringement item arrives, customs notifies the rights holder and provides information on the alleged infringement.

In the case of suspected infringement of intellectual property rights, the infringement needs to be established and documented. The documentation may consist of marketing or informational material, one's own photographs or actual products purchased by utilising the channels with which the counterfeit products are distributed. One must also try to determine who is behind the infringement with such certainty that one has a particular individual or

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legal entity to bring before the courts. One can often make such investigations by oneself, if aware of what to look for, but sometimes it may be necessary to hire a private investigator who can make a decoy purchase or study the relevant individuals closer.

When the information is secured, one can turn to the courts in the country where the infringement has been established. In Sweden, as in many other countries, there are judicial procedures for rapid relief, so called interlocutory injunctions, which involves an intervention against intellectual property rights infringement alongside the usual procedures that may take a long time, several months or more. In any case, for infringements found by customs intervention or ongoing sales at trade fairs or markets, rapid intervention can be the best option.

When the court has determined that an infringement exists, it may impose a prohibition punishable by a fine or an equivalent order against further marketing or sales. Furthermore, the judge can award damages as compensation to the rights holder for the sales already made. In addition, the court may, at least in European countries, compel the infringer to provide information on the origin of the counterfeit products and to order that the products be destroyed, as well as making the judgment of the court publically known by, for example, advertisements in newspapers.

Counterfeiting can affect anyone. Rights holders who are not already actively working with the various steps in the intervention against counterfeiting - from the drafting of company policies and customs notifications to court litigation and enforcement of judgments - should carefully consider the need hereof and appropriate actions. Delphi's intellectual property rights lawyers have extensive experience in such work and are able to help both in a proactive and reparative way.



Kristian Fredrikson,
Senior Associate / Advokat



Angelica Lundqvist,
Associate