

Joining forces in the fight against counterfeiting

High-end cultural and creative industries (CCIs) are key drivers of competitiveness, growth, and jobs in Europe:

- High-end CCIs enjoy an annual output of €547 billion (4% of the EU GDP) and employ 1,7 million people in Europe;
- They export on average 62% of their output, which represents 17% of the EU's total merchandise exports (€308 billion) ^[1];
- Between 2010 and 2013, they grew by 28% and created over 200,000 jobs in Europe.

Creativity and innovation lie at the heart of our businesses, as we compete to attract customers from all over the world with unique and desirable products, many of which rely on unique elements only possible in Europe, such as its raw materials, climate, savoir-faire and heritage. The protection of this creativity through a strong legal framework is essential to the continued success of European CCIs.

I. Counterfeiting is a barrier to the completion of the Single Market

Counterfeiting is in constant geographical expansion and its scope is now comparable to the strongest European industrial sectors. Latest figures published by the OECD only confirm its exponential growth rate: international trade in counterfeit and pirated goods represented up to 2,5% of world trade (compared to 1.9% in 2005), a total value of €411 billion. This is the equivalent of the GDP of Austria. More specifically, counterfeit and pirated products amounted to up to 5% of imports in the European Union, i.e. €116 billion.

The Internet is increasingly a central part of the way people interact, inform themselves, and do business. It has created unprecedented opportunities for individuals and organisations to develop their activities at the national, regional, and worldwide levels, as it has allowed a new plethora of intermediaries to grow. It has also raised a number of challenges both for consumers and companies which, if not addressed, will hinder Europe's ability to fully grasp the opportunities offered by the Internet and the Digital Single Market, as identified by the Commission's 2015 Communication on Online Platforms. Online counterfeiting is one of them.

The consequences are manifold:

- 1) **Decreasing consumer trust online:** consumers are abused and unknowingly buy counterfeited products, with no appropriate remedies to get redress, with purchases increasingly made online using a variety of intermediaries.
- 2) **Concerns over the conformity and safety of products:** counterfeited products are not authentic. Their manufacture escapes any type of certification or safety checks. Hence, these products raise security and even public health concerns for European consumers, for example for counterfeited medicines, car parts, electronic devices, toys, or cosmetic products.
- 3) **Threat to public security:** in today's geopolitical and security context, one should not undermine the fact that counterfeiting has become one of the main facilitators and financiers of terrorism and

organised crime¹. Today, counterfeiting represents a source of profit and of financing for those entities, to the same extent as arms and drug trafficking, money laundering and corruption².

- 4) **Obstacles to digital and e-commerce development:** the proliferation of online counterfeiting creates a significant obstacle to the development of high-end industries' online sales of and more generally to their digital strategies.
- 5) **Loss of revenue for IPR-intensive industries,** which represent 26% of the EU's employment and 39% of its GDP³.
- 6) **Loss of employment in Europe:** as a consequence of the loss in revenue for companies, counterfeiting leads to a loss in employment estimated to 2.5 million jobs for the economies of the G20 countries⁴. In France, it is considered to represent a loss of 40,000 jobs every year.
- 7) **Loss of tax and welfare:** a 15% increase in IP infringement for high-end cultural and creative industries would generate a €24 billion loss through lower tax revenues and higher welfare spending, based on reduced VAT, corporation taxes, export taxes and personal income taxes as well as increased welfare payments for those who lose their jobs⁵.

The proliferation of counterfeiting constitutes a major threat to the achievement of the European Digital Single Market. Consumers are still hesitant to buy certain types of products online, partly because it becomes increasingly difficult to differentiate between legal offers and counterfeited goods. The development of a safe and sustainable digital environment would benefit both companies and consumers and would foster growth and jobs. This is particularly the case for the luxury sector, which cannot offer their customers a unique quality experience, or contribute to the growth and competitiveness of Europe in the global market.

II. All actors in the value chain have a role to play in the fight against counterfeiting

Right holders remain at the front line in the fight against counterfeit, but one of the unintended consequences of the development of internet and intermediaries is that it has enabled counterfeiters to reach consumers more easily than ever before. These intermediaries, which often enjoy a privileged position in the value chain, should therefore take an active part in addressing this issue and should join forces with others against illicit goods. This essential co-operation is currently rejected by a number of intermediaries. That is why right holders have been advocating in favour of the introduction of a specific obligation for all actors along the value chain to *"take appropriate and proportionate proactive measures in order to protect consumers and intellectual property right holders against the promotion, marketing and distribution of counterfeit products"*.

In practice, the introduction of such an obligation would not affect the limited liability regime applying to – under specific conditions – intermediary service providers: it merely requires their cooperation in the fight against counterfeiting through an obligation of means. In other words, they would not be held liable for the presence of counterfeits in their ecosystem, if they can show that they are taking proactive, appropriate and proportionate measures to stop the growth of counterfeit products from being shown, sold and delivered to consumers. It would be left to the decision of the courts (if needed) to determine whether appropriate and proportionate proactive measures have been taken.

¹ In one of its reports, the United Nations' Office on Drugs and Crime emphasised the close links between counterfeiting and terrorism, which have been confirmed by several national, regional and international authorities (Interpol, Europol, or other states such as the UK).

² United Nations Office on Drugs and Crime, *"Focus on the illicit trafficking of counterfeit goods and transnational organized crime"*, 2014, p.2.

³ Joint study between the European Patent Office (EPO) and the Office for Harmonization in the Internal Market (OHIM), *"Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union"*, September 2013.

⁴ Frontier Economics, *"The Impact of Counterfeiting on Governments and Consumers - A report commissioned by BASCAP"*, May 2009, p. 5.

⁵ Frontier Economics, *"The contribution of the high-end cultural and creative industries to the European economy"*, November 2014, p. 14.