

Transfer of Counterfeit Goods Through Turkey

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As the easternmost neighbor of the European Union and a country many goods pass through before entering Europe, Turkish customs are very important.

Turkey was historically an important artery of the Silk Road and the Spice Route and it continues to be a strategic crossroads between the EU and the Middle East and an important hub for international land, sea and air transportation.

Even though goods have been transported to their final destination through Turkish customs for many years, the Turkish Custom Authority's responsibility over goods in transit was much debated until the amendment made in Decree Law Regarding the Protection of Trademarks (No. 556).

As the Decree Law No. 556 did not contain any regulation on this topic it was up to a judge's own discretion to determine whether counterfeit goods in transit constituted trademark infringement in Turkey.

While some courts required trademark owners to prove that goods in transit were at risk of being illicitly diverted into the Turkish market (or that there were serious and effective efforts by counterfeiters toward this end) before taking action, other courts accepted the idea that any suspected goods in transit could be detained and considered as trademark infringement if the requirements of Decree Law No. 556 were met.

In short, based on a legal loophole, the legal status of goods in transit was open to interpretation and, before 2009, this led the courts to render many inconsistent decisions.

After the amendment to Decree Law No. 556, the legal status of goods in transit seems much clearer in Turkey than in the EU, considering the Court of Justice of the EU's decision in the Philips v Nokia case. After the amendment, the text identifying "import and export" as infringement was changed to "entrance of the infringing goods to the custom zone and being subject to a use or process that is confirmed by the Customs Authority".

It is obvious that the expression, "being subject to a process which is confirmed by the Customs Authority", includes any action taking place in the customs zone, including the transit of goods through Turkey.

The expression also means that as long as the goods in transit are subject to a customs process, storing the goods in an official storage facility or private storage in a free zone does not change the nature of the trademark infringement.

In other words, the Decree Law No. 556 does not require any proof that the goods in transit will be illicitly diverted into the Turkish market before a legal right owner may take action. Based on recent decisions it is also obvious that the courts do not even need to consider any unclear information (eg, address, name, destination, etc.) of the importer before they may rule in favor of the rightful trademark owner.

Therefore, after the 2009 amendment, goods in transit through Turkish customs can be detained upon the right owner's request. It should be mentioned that in order to detain goods in transit, the goods in question must comply with the definition of trademark infringement under Turkish Law.

In order to constitute an infringement, the trademark should be registered in Turkey and, as a general rule, only the trademark owner can prevent a third party from using its trademark. If the trademark in question is registered in its country of origin and the country of destination, but not in Turkey, the goods in transit cannot be detained.

This is why it is vital for trademark owners to register their marks in Turkey regardless of whether they plan to conduct business in the country. In order to have suspect goods in transit detained, the trademark owner has to file a request to the Customs Authority.

Even if it is obvious that the goods are counterfeit, the Customs Authority will not ex officio detain the products. However, in practice, the Customs Authority tends to inform the trademark owners of suspect products to give them a chance to take the necessary measures. When goods in transit are detained the trademark owner has to file a civil or criminal action against the alleged infringer.

After an action has been initiated, the case turns into a regular trademark infringement case where the trademark owner can also request an injunction or financial compensation for its losses.

Since detaining counterfeit goods before they enter their final destination is one of the more effective techniques in the fight against counterfeiting, registering a trademark in the Turkish Custom Authority's records is the best way for the trademark owner to be aware of suspect goods.

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