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June 23, 2014

Via email: minister.industry@ic.gc.ca

The Honourable James Moore, P.C., M.P.
Minister of Industry
235 Queen Street
Ottawa, Ontario K1A 0H5

RE: Bill C- 8 – Combating Counterfeit Products Act

Dear Minister Moore:

I write on behalf of the Intellectual Property Law Section of the Canadian Bar Association (the CBA Section) about Bill C-8, now before Parliament. The CBA Section believes that Bill C-8 is generally beneficial for Canada. However, we have suggestions to make the statutory regime more effective in strengthening Canada's proposed anti-counterfeiting enforcement regime.

The Canadian Bar Association is a national association representing 37,500 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The CBA Section deals with law and practice relating to all forms of ownership, licensing, transfer and protection of intellectual property and related property rights, including patents, trademarks, copyright, industrial designs, plant breeders' rights, as well as trade secrets.

The CBA Section would welcome the opportunity to work with you and your officials to improve the Bill before it passes into law. I would welcome an opportunity to meet or speak with you to this end.

Yours truly,

(original signed by Rebecca Bromwich for Angela Furlanetto)

Angela Furlanetto, Chair, CBA Intellectual Property Section

Encl.



THE CANADIAN
BAR ASSOCIATION

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BARREAU CANADIEN

Bill C-8, Combating Counterfeit Products Act

**NATIONAL INTELLECTUAL PROPERTY LAW SECTION
CANADIAN BAR ASSOCIATION**

June 2014

PREFACE

The Canadian Bar Association is a national association representing 37,500 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Intellectual Property Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Intellectual Property Law Section of the Canadian Bar Association.

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Bill C-8, *Combating Counterfeit Products Act*

I. INTRODUCTION

This submission was prepared by the National Intellectual Property Section of the Canadian Bar Association (CBA Section). The mandate of the CBA Intellectual Property Section extends to law and practice relating to all forms of ownership, licensing, transfer and protection of intellectual property and related property rights, including patents, trademarks, copyright, industrial designs, plant breeders' rights, as well as trade secrets.

The CBA Intellectual Property Section believes that Bill C-8 is generally beneficial for Canada. However, we have suggestions to make the statutory regime more effective in strengthening Canada's proposed anti-counterfeiting enforcement regime.

II. EXECUTIVE SUMMARY

The CBA Intellectual Property Section recommends the following changes to improve the proposed regime:

1. Integrate a Simplified Procedure into the proposed border enforcement regime.
2. Provide an expedited procedure for IPR owners to obtain an RFA after confirming to Customs that goods are counterfeit, to enable the IPR owner to access additional information about the importer and initiate court proceedings.
3. Modify sections 44.02(2) and 51.04(2) to provide equal protection to IPR owners whether or not they reside in Canada.
4. Provide for blanket RFA filings in advance of importation and expedited RFA filings after contact by Customs.
5. Modify the proposed border enforcement regime to include details of the cost of participation.
6. Relax restrictions imposed on Customs Officers by section 51.05 and on IPR owners by section 51.07 (1) and (2), to allow IPR owners to use information provided by Customs to pursue remedies in a court of competent jurisdiction.
7. Provide for disclosure of information by Customs for goods in customs transit control.

8. Amend section 51.01(1) of the *Trade-marks Act* to clarify the *mens rea* and the *actus reus* of the offence.
9. Expand the offence to be added to the *Trade-marks Act* to include at least use of a trade-mark in association with any goods or services closely related to the registered goods or services, as well as goods or services enumerated in an application to extend a trade-mark registration, that has been filed, based on actual use, but not yet registered.

III. NEW BORDER ENFORCEMENT REGIME [S. 44.02 – 44.11 COPYRIGHT ACT & 51.04 – 51.12 TRADE-MARKS ACT]

One of the stated objectives of the Bill is to enact new border enforcement measures to enable customs officers to detain goods suspected to infringe copyright or trade-mark rights (counterfeits) and allow them to share information with the copyright and trade-mark owners (collectively, intellectual property rights owners or IPR owners) who have filed a Request for Assistance (RFA), to give those IPR owners a reasonable opportunity to pursue a remedy in Court. However, in its present form, the Bill may not effectively achieve its objective of strengthening enforcement of copyright and trade-mark rights and curtailing commercial activity infringing copies and counterfeit trade-marked goods because:

- the only mechanism for seizure, forfeiture or destruction by Customs of imported counterfeits is for an IPR owner who has filed an RFA to initiate court proceedings;
- the *ex officio* detention provisions appear to contemplate importers having the ability to “re-export” confirmed counterfeits if no RFA has been filed in respect of the goods in question;
- the RFA provisions are unclear and appear to disproportionately impose financial and procedural burdens on IPR owners; and
- there are no provisions to address in transit counterfeits.

Court Proceedings and *Ex Officio* Detention

As drafted, the Bill prohibits importation of counterfeits, and Customs Officers may detain suspected counterfeits under section 101 of the *Customs Act*. Owners of copyrights or registered trade-marks are to file a RFA as a first step to pursuing border enforcement remedies under the *Copyright Act* or the *Trade-marks Act*. If a RFA has been filed, then a Customs Officer who has reasonable grounds to suspect that the importation or exportation of the goods is prohibited may detain the goods and provide a sample of the goods and certain information to the IPR owner. However, to detain the goods longer than 10 days (20 with an

extension) and to forfeit or destroy the goods, the IPR owner must commence a court action.

At that point the goods are detained by Customs until:

- The proceedings are disposed of, settled or abandoned;
- The Court directs that the goods are to be released; or
- The IPR owner consents to the goods being released.

If an IPR owner has not filed an RFA, Customs may detain goods under section 101 of the *Customs Act* and solicit information from the IPR owner to assist in determining whether the goods are counterfeit (i.e. prohibited under section 51.03). If the IPR owner gives information to Customs confirming the goods are counterfeit then Customs has only three options on how it can deal with the goods:

- It can dispose of the goods if the underlying legislation permits it. (Neither the *Trade-marks Act* nor the *Copyright Act* permit it without a Court order);
- The importer may abandon the goods; or
- The importer may export the goods.

The Bill does not provide for detention of counterfeit goods unless a court action is commenced by an IPR owner. Customs will have no choice but to permit importers to export goods confirmed to be counterfeit by IPR owners. Exporting counterfeit goods is prohibited by and an offence under the *Copyright Act* and the *Trade-marks Act*.

Nor does the Bill prohibit exportation, sale, or distribution of counterfeit goods in an “unaltered state”, unless it does not affect the legitimate interests of the registered trade-mark owner. But this prohibition only arises in a proceeding before the Court. If there is no RFA, there can be no court proceeding, and Customs has no choice but to allow exportation of confirmed counterfeit goods, in an unaltered state, when requested by the importer. The CBA Intellectual Property Section suspects this is an unintended consequence of the Bill.

The Bill should be modified to preclude exportation of confirmed counterfeit in an unaltered state. Alternatively and at a minimum, the Bill should expressly provide an expedited procedure for IPR owners to obtain an RFA, after confirming to Customs that goods are counterfeit, to enable it to access additional information about the importer and bring court proceedings.

The CBA Intellectual Property Section is acutely aware of the investment of time and resources involved in litigation and the scrutiny undertaken by litigants in evaluating the risk before commencing litigation. Even in the most simplified court procedure, minimum obligations must be satisfied. The expense to obtain a final order is never insignificant, and it is rare that a plaintiff recovers all of its costs. Accordingly, it is likely that there will be cases where IPR owners confirm to Customs that goods are counterfeit, but decide against commencing proceedings. In such a case the current provisions of the Bill will result in the release of confirmed counterfeits into the Canadian market.

The Bill places complete responsibility and cost on IPR owners while benefiting and rewarding an importer of counterfeit goods that abstains or stays silent. In addition, the Bill requires recourse to the Courts with resulting costs to taxpayers in every instance. To strike an appropriate balance between the interests and obligations of importers and IPR owners, the CBA Intellectual Property Section recommends an administrative regime, sometimes referred to as a 'Simplified Procedure' be considered. A Simplified Procedure regime will redress some of these concerns.

The World Customs Organization Model Legislation recognizes the merits of a Simplified Procedure (see Part IV – Disposal of Infringing Goods, Article 11(2)) and expresses the shortcomings of a system that mandates judicial intervention to effect seizures and destruction:¹

Part II. APPLICATIONS FOR INTERVENTION BY CUSTOMS

Note on Article 1

1.01 The TRIPs Agreement obliges Contracting Parties to enable right holders to lodge applications for border seizures to competent authorities. Under this model law application for enforcement actions shall be submitted directly to the customs that will process the applications and decide whether to take the requested actions or refuse the applications. Other solutions are naturally also possible. For instance, in some countries applications for border seizures are dealt with by the courts. However, practical experience has shown that authorising customs to deal with this task ensures that the applications are processed in a fair and effective manner without unnecessary burdening the courts. Naturally the decisions by the customs should be subject to a judicial review by administrative or civil courts.

¹ WCO model legislation, World Customs Organization Model Provisions For National Legislation To Implement Fair And Effective Border Measures Consistent With The Agreement On Trade-Related Aspects Of Intellectual Property Rights. Available at: www.tafar.org.tw/forum/20110816/20110816WCOModelLawfinal.pdf

Several jurisdictions, including the European Union, United Kingdom and Australia have adopted Simplified Procedure regimes.² Broadly speaking, these regimes provide that, in cases of uncontroverted counterfeit goods or pirated works (*i.e.* assertion by the IPR owner and either acquiescence, admission or silence by the importer), Customs may seize and destroy the counterfeit goods without judicial intervention. In these regimes, silence or abstinence by the importer results in forfeiture and destruction by Customs, but objection or disputation by the importer necessitates a judicial determination prior to any forfeiture and destruction.

On June 12, 2013, the European Union adopted a new regulation addressing border enforcement of IPR and specifically the mechanics of their Simplified Procedure.³

Enforcing IPR at the border by customs authorities is an efficient way to quickly and effectively provide legal protection to rights-holders as well as users and groups of producers, but the regulation should not apply to goods carried by passengers in their personal luggage for their own personal, non-commercial use.

These regimes recognize in part the practical difficulties and economic and procedural inequities associated with a border enforcement regime that places responsibility for seizure and destruction on IPR owners' recourse to the courts and imposes no obligations, economic, procedural or otherwise on the importer to take a position.

A Simplified Procedure integrated with the proposed border regime should be adopted. This would allow for the seizure and destruction of confirmed counterfeit goods without judicial intervention in cases of admission or silence by the importer.

Omissions in the Bill

The Bill does not articulate the extent of disclosure, the costs associated with participating in the RFA program, or the limitations on the ability to participate. As a result, IPR owners may

² See *The Intellectual Property Laws Amendment Act 2012 (the Raising the Bar) Act* (Australia), available at: www.comlaw.gov.au/Details/C2012A00035/ddc2ffe4-4567-448d-8c27-8bba74a39169; *The Goods Infringing IP Rights (Customs Regulations)* (United Kingdom), available at: www.customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_CL_000244; *EU No. 608/2013 of the European Parliament and of the Council of 12 June 2013 Concerning Customs Enforcement of Intellectual Property Rights and Repealing Council Regulation EC No. 1383/2003*. Available at: www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0015:0034:en:PDF. [**"EU No. 608/2013"**].

³ *EU No. 608/2013*, *supra* note 2. See Schedule A for a detailed extract from EU Regulation No. 608/2013.

be reluctant to participate or may not qualify. Some of the issues identified by the CBA Intellectual Property Section are discussed below.

(a) Information

Information required for a RFA is not specified: it will be in the, “form and manner prescribed by the Minister”. In addition, the Bill does not express whether the content of a RFA will be publically available. Third party access to the RFA may impact the IPR owner’s willingness to participate in this program.

The Bill or the Regulations should specifically enumerate the information required for a RFA. The CBA Intellectual Property Section recommends that, before the Regulations are finalized, a robust consultation process take place to allow input on whether a RFA should require details such as the place(s) of manufacture of the IPR owner’s goods, the address(es) for delivery of the IPR owner’s goods in Canada, and the list of authorized importers.

(b) Residency Requirement

The Bill requires that the “...owner’s name and address in Canada ...” be provided. This could be construed as a Canadian residency requirement for IPR owners filing a RFA. The CBA Intellectual Property Section recommends that the legislation be clarified to protect all IPR owners whether or not they reside in Canada.

Sections 44.02(2) and 51.04(2) should be amended to clarify that the address may be for a representative or agent for service in Canada if the IPR owner is not resident in Canada.

(c) Time-line

The Bill does not specify whether the RFA is intended to be a blanket filing in advance of any importation – as is the case, for example, with a U.S. recordation - or whether it is to be done on a case by case basis, following a specific importation.

Both blanket RFA filings in advance of importation and expedited RFA filings after contact by Customs should be expressly provided for.

(d) Evaluating the Regime

The decision of companies with extensive portfolios of IPR's to file a RFA may be influenced by the information they are required to provide and the cost structure.

The Bill provides that the Minister may, as a condition of accepting an RFA, require the IPR owner to furnish security (in a yet undetermined amount) for liability for, storage, handling and destruction of the goods, as applicable. Further, by filing a RFA, IPR owners accept liability for those costs. Without a clear enumeration of the cost of each category of expenses, and a better explanation of what the category of expenses relate to (*i.e.* what is a "handling" charge, when does it arise, and what considerations affect how it is charged and apportioned?) IPR owners cannot evaluate the cost to participate in the border enforcement program. In practice, counterfeit goods of different IPR owners are often imported together. The Bill fails to outline a mechanism to apportion costs where some IPR owners have filed an RFA and others have not, and each have products of varying weight, size and quantity in the shipment. The Bill has too many unknown variables to permit a meaningful cost-benefit analysis. As a result, industry may be reluctant to participate. While these questions will no doubt be clarified through regulations, it is impossible to comment on the efficacy of the regime without these details.

Further details of the proposed regime should be included in the Bill. At a minimum, a robust consultation on details to be included in regulations should take place.

(e) Limited use of Information

The Bill limits the information that can be provided by Customs to IPR owners if an RFA has not been filed. In such cases, Customs may not disclose any information that "directly or indirectly identifies any person". This information is often necessary for the IPR owner to determine the counterfeit nature of the goods.

The Bill imposes express limitations on the right of IPR owners to use information provided by Customs. The Bill prohibits use of information provided to IPR owners who have filed RFAs for any purpose other than to "pursue remedies under this Act". Further, IPR owners may "not use the information, or information that is derived from the sample, for any purpose other than to give information to the customs officer about whether the importation or exportation of the goods is prohibited under section 51.03". This precludes even access to the courts when a RFA has not been filed.

Most IPR owners market and sell their products internationally, as do counterfeiters. To be effective in controlling trade in counterfeit goods, IPR owners must be able to use the information provided to protect their IPR and prevent sales of counterfeits to consumers in any market in which they have a problem.

The limit on use of information provided by Customs should be relaxed to allow for its use by IPR owners in pursuing remedies in a court of competent jurisdiction.

Pursuant to the limitations in section 51.05, the CBA Intellectual Property Section recommends that:

- a. Customs be permitted to provide additional information to the IPR owner that directly or indirectly identifies the importer in situations where the IPR owner is unable to conclusively determine the authenticity of the goods in question without such information;
- b. IPR owners be at liberty to file a retroactive and expedited RFA.

Goods in Transit

Proposed section 51.03 of the *Trade-marks Act* and proposed section 44.01 of the *Copyright Act* exempt in-transit shipments from the prohibitions. However, to the extent that Customs identifies suspected counterfeit goods, they should be able to communicate concerns and information to customs authorities at the next destination of the goods and to IPR owners, subject to appropriate limitations.

The Bill should allow disclosure of information by Customs for goods in-transit in Customs control.

IV. NEW CRIMINAL OFFENCES

Mens Rea

Section 51.01 of the new offence provision in the *Trade-marks Act* requires the Crown to establish **knowledge by the accused that:**

- the trade-mark is identical to, or cannot be distinguished in its essential aspects from, a registered Canadian trade-mark for the same wares (or services);

- the trade-mark owner has not consented to use of the trade-mark by the accused; and
- the advertisement, sale or distribution of the goods or services would be contrary to section 19 or 20 of the *Trade-marks Act*.

The *mens rea* threshold, as drafted, will render the new trade-mark offence ineffective except in very particular circumstances. If the accused has not been put on notice of each element, prior to laying a charge, it may be practically impossible for the Crown to prove the requisite *mens rea* on the criminal standard of beyond reasonable doubt. For example, to rely on service of a prior cease and desist letter to establish the *mens rea*, the cease and desist letter must not only communicate each of the three elements of the *mens rea*, but it must have been delivered to the accused, **and** either read by the accused or read and explained to the accused, in a manner that can be substantiated by a third party (*i.e.* testimony) such as a process server or private investigator.

In addition, plausible deniability of knowledge could be easily asserted and satisfied, with any one of the following:

- “I’ve never looked at the *Trade-marks Act*”;
- “I don’t know what sections 19 and 20 are”;
- “I didn’t know this trade-mark was registered”;
- “I didn’t know it was registered for these wares”
- “I didn’t know it wasn’t real”;
- “I don’t know what you mean by registration”;
- “I was told it was real”; and/or;
- “I was told it was an overrun, a second, a grey market product.”

The CBA Intellectual Property Section recommends that section 51.01(1) of the *Trade-marks Act* be amended as follows:

51.01 (1) Every person commits an offence who **knowingly or recklessly** sells, offers for sale or distributes, **for a commercial purpose**, any goods in association with a trade-mark, **in the following circumstances:**

- (a) the trade-mark is identical to, or cannot be distinguished in its essential aspects from, a trade-mark registered for such goods;
- (b) the owner of that registered trade-mark has not consented to the sale, offering for sale, or distribution of the goods in association with the trade-mark; and
- (c) the sale or distribution of the goods in association with the trade-mark would be contrary to section 19 and/or 20 of the *Trade-marks Act*.

The proposed amendment shifts the knowledge element of the proposed offence to the commercial activity of selling and/or distributing counterfeit goods or services, and away from elements (a), (b), and (c). It is submitted that those three elements of the offence more properly fall within the *actus reus* of the offence.

Knowledge and Recklessness

Proving knowledge beyond a reasonable doubt has been unduly onerous in the context of counterfeiting cases. In a particularly egregious case involving the sale of counterfeit pharmaceuticals by a pharmacist in Hamilton, Ontario,⁴ the court acknowledged this challenge. Notwithstanding the pharmacist's admission that he purchased pharmaceuticals from a travelling salesman, he was acquitted of all fraud related charges. Jennis, J. said he was not satisfied beyond a reasonable doubt that the pharmacist knowingly sold counterfeit pills to the public. As reported in the Hamilton Spectator:

“Given the suspicious circumstances in which...[the pharmacist] purchased the drugs, said the judge, “the accused (was) probably guilty and ought not to be practicing.” But “probably guilty” does not meet the standard of a criminal courtroom and Jennis [the Judge] said the issues of whether...[the pharmacist] ought to remain a pharmacist was for another tribunal to decide.”

In consequence, including recklessness in the *mens rea* requirement of the new trade-mark offence will enhance the public protection.

Actus Reus - Commercial Scale v. Commercial Purpose

Designed to exclude liability from personal use conduct, the phrase, ‘commercial scale’ in the new trade-mark offence imposes a quantitative element to the impugned conduct. Scale implies size or volume, leaving open the possibility that importation or manufacture of small quantities of counterfeit commodities may not be prohibited by the *Act*. This fails to recognize that multiple smaller shipments, a practice commonly used by counterfeiters, can result in “death by a thousand cuts”.

A better approach would be to look at the nature of the impugned conduct and ascertain whether it is for a commercial ‘purpose’ rather than on a commercial scale. This focuses less on the size of the production run or shipment and more on the use to be made of the goods. If

⁴ “Restrictions put on pharmacist in fake drugs case”, *The Hamilton Spectator*, September 7, 2007. Available: www.thespec.com/news-story/2141945-restrictions-put-on-pharmacist-in-fake-drugs-case. See also Brian P. Isaac, “Combating counterfeiting crime in Canada”, (21 November 2007) online: Smart & Biggar www.smart-biggar.ca/en/articles_detail.cfm?news_id=224 For the College of Pharmacists’ discipline decision in relation to Mr. Nasr, see members.ocpinfo.com/search/Pharmacist_Detail.aspx

the *actus reus* of the new trade-mark offence requires the establishment of a commercial ‘purpose’ the Crown may ask the court to infer the purpose from a number of factors including: the nature or type of the commodity; paper work associated with the commodity; typical channels of distribution of and for that commodity; and the scale of the operation, or number of units of the commodity. This would give the Court the necessary flexibility to address counterfeits effectively.

***Actus Reus* – Limitation to Registered Wares**

An issue not addressed through the proposed amendment of s.51.01 is that the proposed trade-mark offence is limited to addressing dealings in counterfeit goods bearing a registered trade-mark that is, “registered for such goods ...”.

Under the *Trade-marks Act*, trade-mark owners are required to specify the goods for which registration is sought in fine detail (much finer than most countries in the world). No classification system is used in Canada and the addition of wares or services to an existing registration requires, in essence, a new application with the incumbent expense and delay. In practice, trade-mark owners may not register for all wares for which their trade-mark may be used in Canada. For instance, many trade-mark owners will not include promotional wares such as baseball caps or cell phone cases in their application for registration. Similarly, they may not add every different ware in a general field in which they use the trade-mark since the registration may be sufficient to protect against infringement in that field even if it does not include each and every type of good for which the trade-mark is used.

While Canada gives rights in unregistered trade-marks, the Bill does not make it an offence to counterfeit an unregistered trade-mark (a common law trade-mark) and apply it to an associated commodity or service. Further, the Bill does not make it an offence to use a registered trade-mark by placing it on a good or associating it with a service not listed in the IPR owner’s trade-mark registration. Nor does the offence cover commodities where a trade-mark registration has been applied for, but not yet granted.⁵ As a consequence, an accused importing a wide array of counterfeit goods may be committing an offence only with some of them.

⁵ The experience of the Working Group suggests that it takes approximately two (2) years to register an unopposed trade-mark in Canada.

Sanctionable conduct should extend beyond wares for which a trade-mark, particularly a famous trade-mark, is registered. It should apply to all fraudulent use of trade-marks given their use by consumers as a shortcut in making purchasing decisions.

The offence added to the *Trade-marks Act* should be expanded to include at least use of a trade-mark in association with any goods or services closely-related to the registered goods or services, as well as to goods or services enumerated in an application to extend a registration that has been filed based on use, but not yet registered.

V. CONCLUSION

Protecting Canadians from counterfeit products and assuring a strong border enforcement regime are important legislative objectives. To ensure these objectives are met effectively, the CBA Intellectual Property Section urges Parliament to implement the recommendations in this submission to strengthen Canada's anti-counterfeit enforcement regime.

SCHEDULE A

Excerpt from Regulation EU No. 608/2013 of the European Parliament and of the
Council of 12 June 2013

Concerning Customs Enforcement of Intellectual Property Rights and Repealing
Council Regulation EC No. 1383/2003

WHEREAS

...

(2) The marketing of goods infringing intellectual property rights does considerable damage to right-holders, users or groups of producers, and to law-abiding manufacturers and traders. Such marketing could also be deceiving consumers, and could in some cases be endangering their health and safety. Such goods should, in so far as is possible, be kept off the Union market and measures should be adopted to deal with such unlawful marketing without impeding legitimate trade.

....

(4) The customs authorities should be competent to enforce intellectual property rights with regard to goods, which, in accordance with Union customs legislation, are liable to customs supervision or customs control, and to carry out adequate controls on such goods with a view to preventing operations in breach of intellectual property rights laws. Enforcing intellectual property rights at the border, wherever the goods are, or should have been, under customs supervision or customs control is an efficient way to quickly and effectively provide legal protection to the right-holder as well as the users and groups of producers.....This Regulation should not apply to goods carried by passengers in their personal luggage provided that those goods are for their own personal use and there are no indications that commercial traffic is involved.

....

(6) Infringements resulting from so-called illegal parallel trade and overruns are excluded from the scope of Regulation (EC) No 1383/2003. Goods subject to illegal parallel trade, namely goods that have been manufactured with the consent of the right-holder but placed on the market for the first time in the European Economic Area without his consent, and overruns, namely goods that are manufactured by a person

duly authorised by a right-holder to manufacture a certain quantity of goods, in excess of the quantities agreed between that person and the right-holder, are manufactured as genuine goods and it is therefore not appropriate that customs authorities focus their efforts on such goods. Illegal parallel trade and overruns should therefore also be excluded from the scope of this Regulation.

....

(8) This Regulation, when fully implemented, will further contribute to an internal market which ensures right- holders a more effective protection, fuels creativity and innovation and provides consumers with reliable and high-quality products, which should in turn strengthen cross-border transactions between consumers, businesses and traders.

(9) Member States face increasingly limited resources in the field of customs. Therefore, the promotion of risk management technologies and strategies to maximize resources available to customs authorities should be supported.

(10) This Regulation solely contains procedural rules for customs authorities. Accordingly, this Regulation does not set out any criteria for ascertaining the existence of an infringement of an intellectual property right.

....

(16) Regulation (EC) No 1383/2003 allowed Member States to provide for a procedure allowing the destruction of certain goods without there being any obligation to initiate proceedings to establish whether an intellectual property right has been infringed. As recognized in the European Parliament Resolution of 18 December 2008 on the impact of counterfeiting on international trade such procedure has proved very successful in the Member States where it has been available. Therefore, the procedure should be made compulsory with regard to all infringements of intellectual property rights and should be applied, where the declarant or the holder of the goods agrees to destruction. Furthermore, the procedure should provide that customs authorities may deem that the declarant or the holder of the goods has agreed to the destruction of the goods where he has not explicitly opposed destruction within the prescribed period.