

OECD COUNTERFEITING AND PIRACY PROJECT

Industry Questionnaire

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COUNTRY: Global

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If you do not wish your company/association to be named in the report as the source for the information contained in this questionnaire, please check here:

Note: The term *counterfeiting and piracy* in this questionnaire covers infringements of trademarks, copyrights (and related rights), patents and design rights. It relates to tangible products only [i.e., intangible digital products which are not embodied in a tangible medium (such as a CD or a DVD) are not covered; these products will be examined in a subsequent phase of the project]. In responding to questions, please address trademark, copyright, patent and design issues separately (to the extent possible).

Q 1 What products made by your industry are most affected by infringements of trademarks, copyrights, patents and design rights (*i.e.*, counterfeiting and piracy)? How have the magnitude and scope of the infringements involving these products changed in recent years (*e.g.*, focussing on the last 5 years)?

A description of the techniques and sources of information you have used to estimate the magnitude and scope would be appreciated.

Points that could be covered:

- Extent to which counterfeiting and piracy of your industry's products is taking place:
 - principal types of products being counterfeited and pirated;
 - indication of how the magnitude and scope of the counterfeiting and piracy of your industry's products have changed in recent years;
 - identification of the principal areas where your industry's products are being counterfeited and pirated (*i.e.*, the economies or regions of the world where the practices are most problematic);
 - how operations for counterfeiting and pirating products are organised (*i.e.*, from

- the acquisition of protected inputs to the manufacture of products) and financed;
- description of how counterfeit and pirated products are being moved from production centres or other locations into domestic and foreign markets and who benefits from the illicit commerce;
- role of organised crime in production and distribution of products;
- International trade in counterfeit and pirated products in your industry sector :
 - identification of the economies that are the major exporters and importers of the counterfeit and pirated products;
 - principal counterfeit and pirated products traded;
- Principal factors that explain the changes in the scope and magnitude of counterfeiting and piracy in your industry sector.

CropLife International is the global federation representing the plant science industry. It supports a network of regional and national associations as well as their member companies in 91 countries. The leading companies of the organization are BASF, Bayer CropScience, Dow Agrosciences, DuPont, FMC, Monsanto, Sumitomo and Syngenta.

The scope of the industry includes both chemical crop protection (commonly referred to as pesticides), and agricultural biotechnology. Both types of products are targets of counterfeiters, but namely high value insecticides, herbicides and fungicides.

The assaults to intellectual property rights not only affect our member companies' trademarks, but also their patent right, design rights and data protection. The bundle of intellectual property rights infringed by counterfeiters is explained by the variety of techniques used in their illegal activities.

Counterfeited products sold under the trademark of a reputable company using fake labels exemplify the typical infringing action. In doing so, several techniques are used. One of them comprises manufacturing the totality of the counterfeited product, including the container and label. In this case, the active ingredient or formulation is not registered and therefore is illegal to package and sell in the same or adjoining countries. Other wrongdoers reuse the container and label of a legitimate product to sell copied contents that resemble legitimate products. Another mechanism use is the purchase or irregular acquisition of a legitimate product to dilute its contents and mix it with unregistered material (that often contain illegitimate by-products). The adulterated product is re-branded under our member company trademarks by reusing original registered containers and labels, as well as fabricated ones.

The irregular business based on the use of legitimate plant science products is usually performed by stealing stocks of ready to sell products, special during the transportation to distribution points. In Honduras the industry has been victimized by carjacks, where wrongdoers seize entire containers of legitimate product for their unlawful businesses.

Techniques also involve cross-boundary movement of products from production centres to selling points. Our industry has identified at least two trends. First, lax customs enforcement and inspections enable cross boundary movement of counterfeited merchandise. For instance, the EU requires a certificate of product registration, issued by the competent Ministry of Agriculture, attached to the import declaration in each of the member countries. In principle, this is a good practice. However, customs focus their control on physical inspection and control of labels on products, and exceptionally on laboratory analysis. Thus, imports of altered products packaged in legitimate containers by third parties are very difficult to detect under current customs procedures in the EU.

In the second modality, illegal trade routes have developed and constantly expand geographies. In this case, the products do not clear customs, but are smuggled from country to country. This modus operandi intertwines lawful and unlawful acts. For an illustration, assume that a given country A_1 has lax regulatory systems where products easily obtain regulatory clearance. Evildoers will legally import the registered products in country A_1 but will smuggle it into country B_1 , where more stringent regulatory requirements would disallow sales of products registered in country A_1 . The technique is often used in the Mercosur region to smuggle products from Paraguay and Uruguay mainly to Brazil, and to some extent to Argentina. Smuggling between Honduras, El Salvador and Nicaragua has also been detected.

Typically there is extensive manufacture of agrochemical active ingredients and formulations in China, but India has proven to be also one of the main exporting centres of counterfeited. Their target markets are usually in Europe, Africa, Middle East, Asia and the Americas. However, Chinese counterfeiters also have significant activity in their domestic market.

The scope of finances and trade routes behind counterfeiting are nearly untraceable. Monitoring the networks and their finances encounters an additional hurdle in the evolution of highly organized crime behind the counterfeiting industry. We believe that organised crime accounts for virtually 100% of the illegal activities in pirating plant science products. The criminal activities are international, cross-country and take the form of bribery and corruption of officials. For instance, literally tonnes of unregistered products enter Russia and Ukraine on that pattern. Once in a given country the material may be formulated, packaged and moved by road within and between neighbouring countries. Although, there may be some very small opportunistic criminals, like in United Kingdom, their overall impact is relatively small.

Violence has also increased in the recent years. Carjacks in Honduras have been highlighted already. The swelling violence has made enforcement substantially dangerous, especially for inspections, raids and confiscation of goods. A recently case includes a member company inspector shot to death in Guatemala while collecting counterfeited samples.

The Principal factors explaining the changes in the scope and magnitude of counterfeiting and piracy of plant science products are:

- Very well known and established brands are in the market places, which are now targeted by criminal gangs. The sophisticated low use rate chemistry (grams of active ingredient per hectare) is very attractive to a counterfeiter that sees an opportunity to obtain large profits from relatively small quantity of product. We have indications that the gangs may have moved from counterfeiting pharmaceutical products to agricultural products after government crackdowns on fake drugs.*
- Lack of awareness of police, government authorities, customs and health officials to the adverse effects of pirated products on crops, environment, operators and consumers.*
- Lack of awareness of people within the agricultural industry, such as distributors/retailers and farmers / purchasers.*
- Lack of effective legislation and poor enforcement of intellectual property in some countries.*

- *Increased manufacture in China as product patents have expired in that country.*

Q 2

What have been the principal effects of the counterfeiting and piracy in your industry sector?

A description of the techniques you have used to measure the effects would be appreciated.

The effects on industry could cover how counterfeiting and piracy have affected:

- overall business strategies;
- investment in domestic and foreign production facilities;
- industry innovation and creation/development of products;
- product development;
- marketing strategies;
- product costs and pricing;
- workers; and
- international trade

The illegal trade has an effect on the companies, farmers and product operators, country economies, human health, wildlife and the environment.

The financial impact due to reduction of sales of company labelled products has been felt. The smuggling activity in Mercosur from Paraguay and Uruguay distribution points is estimated in \$45 million USD and growing.

Estimates for the period comprising 2001 to 2004 indicate that approximately \$20 - \$30 million USD) worth of industry products were pirated in Europe Middle East & Africa (EMA). Figures are forecasted to keep escalating for 2005 as extensive illegal activities are revealed in Russia and Belarus. For the EMA region, Russia, Ukraine, Belarus, Moldova, and Poland are the main epicentres of illegal activity.

In Asia Pacific estimated figures for counterfeited products account for \$200-250 million USD worth of sales. The impact is significant in China, Thailand and Vietnam, with some presence also in Malaysia and Indonesia. Some years ago, studies were carried out in China that revealed that in some locations, around 30% of the products being sold were in fact counterfeits. However, the indicative estimate, as well as the magnitude and scope are usually anecdotal. A compilation of figures is hard to obtain due to the obscure nature of this illegal trade practices. The typical data available are compilations of individual cases, with nearly no systematic documentation whatsoever.

In addition, one of the principal effects of counterfeiting and piracy on the agricultural industry has been the raising doubt and fear within the farming community, impacting negatively the trade name and reputation of both the copied product and the company producing it. Again, it is hard to obtain estimates of the damages due to the obscure nature of this wrongful practice.

In relation to customers, the impact is first and foremost amongst farmers, particularly small farmers who suffer economic losses as consequence of use of impoverished products that does not deliver the expected benefits. Illegal products, even if they contain the correct active ingredient also tend to have reduced efficacy compared to their legally registered equivalent. Reduced efficacy on weeds, pests or diseases resulting from the use of an illegal product will reduce the harvested yield of the treated crop and result in poorer profit margins for the affected farmer. Frequently, farmers in developing countries may rely on such products for crop production.

There are cases of damages to crops, but as mentioned, the financial impact is hard to estimate. We can cite a case in Huaiyin, Liangshui and Chuzhou, China, where the use of a fake pesticide totally ruined 200 hectares of wheat, destroying the harvest for over 100 farmer households. In 2005, several hundred hectares of sugar beet in Russia and Ukraine have been severely damaged or destroyed by illegal products. Developed countries are not exempt from threat. In 2004 in Italy, hundreds of hectares of maize, potatoes and tomatoes were severely damaged or entirely wiped out by a product, which contained the wrong ingredient. Clearly, in these cases the losses incurred by farmers were in the order of tens of thousands of Euros per affected crop. Thus, safety to crops and subsequent economic losses to farmers have been a significant issue.

Also operators are exposed to potentially harmful and toxic chemistry as the illegal products have not been tested or gone through the stringent registration process that all legally registered agricultural products follow. In some cases, products are sold without any active ingredients or often containing unsafe materials such as sugar, sand, yeast, brick dust, in the formulation. These cases pose severe risks to human health and environment, while hampering the performance of the products. The health effects of illegal products are unknown and may be long term, both for operators using the product and for consumers who eat produce treated with illegal product. A case in 2005, where an illegal product was obtained from a farm in Slovakia resulted in severe headaches and vomiting for the laboratory assistant who analysed the sample.

In addition, where counterfeit products contain unregistered ingredients or by-products, there are potential consequences for maximum residue levels and the safety and quality of produce. This may become a trade issue, as agriculture commodity exports may not comply with sanitary and phytosanitary international standards.

The loss of security in the integrity and safety of the food chain is also at stake if illegal products are used and the produce enters into the food chain. The quality of the food supply is compromised and the public undergoes significant risks to the public when treated produce is consumed.

In summary, the dangers of counterfeited plant science products relies in the fact that, like many products, wrongful handling and inappropriately use may pose a risk to human, wildlife and the environment. These threats are minimized through suitable precautions, which has been part of the commitment assumed by the Plant Science Industry. However, programs for proper management or stewardship throughout the life cycle of products will hardly be effective for operators and consumers that have direct contact with the illegitimate, often hazardous, chemicals contained in the counterfeited products. Intoxications, accidents and pollution may derive from inadequate management and disposal of containers. Training programs for the safe use of the industry's products will most likely not respond to products that become adulterated. Finally, counterfeiters will hardly overlook safety matters, such as the benefits from container designs used to minimize risk and contamination.

In relation to measurement of the effects of illegal products, some member companies have created databases to monitor each case involving our products. The database is populated with the knowledge gained by talking extensively to distributors and farmers who have been affected by the use of illegal products, usually resulting in a complaint due to crop damage or reduced efficacy. The evidence collected (picture, packages, invoices, etc) is stored in the database and in many cases, because organised crime is involved, the case is handed over to private investigators and occasionally law enforcement. The evidence uncovered by these investigations

helps to estimate the potential losses to their business. Customs officials and import/export statistics also help us to understand the scale of the problem caused by illegal activities.

Overall business strategies have changed due to the damage caused to the image of our brands and the company when counterfeit products destroy crops or result in reduced efficacy. Unfortunately, it is inevitable that purchasers associate legitimate brands to the damage or poor efficacy resulting from the use of an illegal copy. The negative perception within some areas of the market place translate into significant additional resources on anti-counterfeit measures such as:

- *Security marks to enable purchasers to easily distinguish authentic product from illegal offerings*
- *Marketing communication expenses to raise the profile of the risks posed by illegal products and how to distinguish between valid and illegal product*
- *Legal network within companies and in each country affected by counterfeit activities*
- *Investing and modifying production lines to permit application of the container security standards while minimising reductions in productivity*

Although product development has not been significantly affected, the activities of counterfeiters are a factor for decision-making. If the increase in counterfeiting activities continues, the market opportunities will be reconsidered.

Marketing strategies have changed significantly due to additional costs for market communications around the safe use and the need to communicate the scale of counterfeit issues to officials, distributors, purchasers/farmers, and government.

For example, in the EU, product costs associated with the portfolio of a single company have increased by well over \$1,000,000 USD due to the need for:

- *extensive market communications*
- *application of the security standards including investment in manufacturing plants permit their application*
- *reduced capacity of manufacturing plants due to slower production to permit application of the security standards in products*
- *shipping and analysis of suspicious samples at laboratories within Europe, Middle East, Africa and Asia*
- *establishment of local laboratories qualified to perform analysis on products*
- *private investigator fees to investigate often complex cases or those involving organised crime*
- *legal costs incurred in the prosecution of cases*
- *PYE (person year effort) costs for coordinators within countries and a regional defence managers*
- *PYE needed for representation on industry associations*
- *the workers within the industry are exposed to greater stress due to the presence of illegal product and the fact that organised crime is at the root of it. This has been highlighted in*

Europe due to the well-established activities of organised crime.

Q 3

What measures has your industry taken to combat the counterfeiting and piracy of its products? How effective have these measures been? What are the principal remaining challenges?

Points that could be covered:

- discussion of technologies that have been most effective in helping to defend trademarks and copyrights and, to the extent applicable, patent and design rights;
- industry and firm-level initiatives that have been taken to protect trademarks, copyrights, patents and design rights;
- costs associated with these measures

To tackle counterfeiting, the industry crafted several actions plans through local and regional trade associations within the network. The CropLife Spanish, MERCOSUR, and Asian sister organizations will launch actions plans in October 2005, while work in other regions like Europe was started earlier in 2005.

The measures primarily focus in liaising with the authorities to draft regulations to define the scope illegal activities and to develop auditing programs in the points of sales. For instance, the plant science industry has a partial engagement with authorities in China that have begun to yield some positive results. Efforts related to enforcement enjoy of certain degree of success in Vietnam. In Thailand there has been modest success engaging in effective enforcement as well. The industry highlights the EU funded BISTRO project in Ukraine as a good example of an essential project to begin the elimination of illegal practices and environmental/health risks associated with the use of counterfeit plant protection products.

In addition, educational campaigns have been launched in Latin America to alert the farmers and the agricultural chemicals dealers of the negative effects and risks of purchasing or offering for sale-counterfeited products. For example, the industry has joint efforts with the Nicaraguan agriculture, health and environment authorities as well as the police and local governments to conduct a pilot program including training and auditing of retail sellers in rural areas.

Good practices and regulatory models are in of utmost interest of the industry. Guidelines for quality of packaging and labels, empty containers programs and product stewardship are examples of actions that the industry has undertaken to combat counterfeiting. In Europe, companies have launched their own pilot campaigns to use authentication security devices together with a significant market communication programmes. They are in the process of measuring its impact with farmers and distributors.

Also, our industry has worked with customs officials to register our trademarks and provide information,

which may allow them to intercept illegal imports at border crossings but with significant costs associated with these measures.

On global fora, the Plant Science Industry has supported the launch of the International Chamber of Commerce BASCAP initiative to stop counterfeiting and will most likely be engaged in its ongoing programs fostered by synergies with that enhanced industry group.

The industry is also grateful for the OECD's support through initiatives like the Experts Meeting co-sponsored by WIPO in October 2005. Certainly, the experiences on measurement will be quite useful to compile the figures systematically. In that way, we expect to have a better understanding of the magnitude of this daunting issue, while compiling with the figures usually requested by government authorities.

As free trade progress in several geographies, vanishing customs controls forecast the need to shift controls to other scenarios within the supply distribution chains. Good practices, but also controls are required in that regard. However, EU's customs controls for imports of organic chemicals still deserve recognition. For these products, no specific registration documentation is required, but customs regularly ask for analysis certificates from supplier. In addition, customs often perform their own analysis.

The principal remaining challenges are to get governments and their authorities to take the issue of counterfeit agrochemicals seriously, to legislate appropriately, investigate cases thoroughly and prosecute and punish those found to be responsible.

Q 4 How effective have government policies and programmes (including public/private partnerships) been in combating counterfeiting and piracy in your domestic economy and foreign economies? This would include enforcement activities, legal frameworks, public awareness initiatives and international co-operation and co-ordination.

Points that could be covered:

- identification of the policies and programmes that have, in your view, been the most effective in reducing counterfeiting and piracy in your industry;
- industry experience in combating infringements worldwide (success rates, challenges faced by your industry in using existing policies, programmes and laws, etc.) ;
- legal and related costs associated with defending rights;
- obstacles in defending rights;
- ways in which policies and programmes need to be strengthened worldwide

From a legal standpoint, the main complaint is the lack of uniformity in systems of sanctions, which has implication for trade between the member states and direct impact on single market. There is also strong need for better coordination between databases and to increase the cross border information flow involving national authorities. In addition, sanctions and other ways of enforcing intellectual property rights should be equally effective in all member States.

The main points to be implemented to render more effective the intellectual property laws and to remove the hurdles for infringement cases is to address the lack of:

- *uniform seizure procedures and more effective cross border injunctions (quickness is the main point in this proceedings);*
- *punitive damages in all Member States;*

	<ul style="list-style-type: none"> • <i>right to publish judgements in all Member States;</i> • <i>confiscation of equipment used for illicit purposes.</i> <p><i>Training of customs officials, local authorities and the police on counterfeiting products and intellectual property rights (trademarks and patents), while familiarizing with the products and applicable measures is advisable.</i></p> <p><i>We urge all member States since to prevent the loss of confidence in the single markets by the economic operators and a consistent reduction of investments plus a decrease of employees in EU.</i></p> <p><i>Again, the EU funded BISTRO project in Ukraine as a successful example of an initiative to halt counterfeiting. We also highlight the EU Customs Security Program, which introduced security controls to audit the international supply chains. The goal is to control all physical flows of goods from the shipping point until destination. The European Customs Code has been amended to include the new concept of "Approved Economic Operators". The program has also been put in place to avoid potentially disastrous economic consequences of counterfeiting and could be used as a model in other geographies.</i></p>
<p>Q5</p>	<p>What additional points would you like to make concerning counterfeiting and piracy in your industry?</p> <p><i>The Plant Science Industry considers that counterfeiting is an issue of major concern. The need for immediate, effective actions and engagement by industry and governments is required. The industry is aware that governments often require hard data to assess the impact of this illegal form of trade, but highlights the hardships in compiling such information to quantify and document the scope and magnitude of losses at this time. This is an addition burden assumed by the industry that has become a hurdle to effective actions.</i></p> <p><i>Furthermore, initiatives should cover a broader band of products and not focus on traditional targeted industry sectors.</i></p> <p><i>Finally, the plant science industry reemphasizes counterfeiting as an overarching issue that encompasses intellectual property rights, trade, customs, health, environmental and regulatory issues.</i></p>