



ALTACIT GLOBAL

INTELLECTUAL PROPERTY CRIME

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ABSTRACT

This article focuses providing an overview of intellectual property crime by addressing the problems and the factors contributing to the growth of intellectual property crime This article has tried to analyse the cost to the right holder and the legal protection relating to intellectual property crime while also providing the Indian perspective to the whole issue.

KEYWORDS: Intellectual Property Crime, Piracy, Counterfeiting, Organised Crime, Intellectual Property, Patents, Trademarks, Copyrights, Geographical Indications, Monopoly, Enforcement, Customs and Border Measures.

INTELLECTUAL PROPERTY CRIME

Increasingly, the global economy is dependent upon the creation and distribution of intellectual property (IP) to drive economic growth.ⁱ However markets are plagued by fakes be it stamps, watches, cigarettes, cosmetics, pharmaceuticals, FMCG products, auto components, software, music, films etc resulting in significant loss to companies, corresponding evasion of tax duties and violation of the rights of the consumer. Studies by industry associations bear this out, the CII Allianceⁱⁱ estimates that the FMCG sector loses approximately 15% of its revenue to counterfeit goods with several top brands losing up to 30% of their business due to IP crime. The nature of the crime, its size, diversity and scope has hindered the task of coordinating a dynamic response. Lack of consumer awareness and advancement of technology are the major factors which encourage counterfeiting which is further fuelled by lax enforcement laws which make things easy for counterfeiter. The continuity of socio-economic growth and industrial competitiveness depends upon high level of IP protection and enforcementⁱⁱⁱ raising profound concerns of the rapidly growing piracy of IP rights and production of counterfeit goods.

IP CRIME

IP crime is more generally known as counterfeiting and piracy. Counterfeiting is, wilful trade mark infringement, while piracy involves, wilful copyright infringement. These are very similar and often overlapping crimes. IP crime is not a new phenomenon but due to globalisation and advances in technology counterfeiting and piracy has become big business.^{iv}

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OVERVIEW OF PROBLEMS

During recent years the scope and scale of the problem has grown at a rate previously unknown. The counterfeit traders with whom most people come into contact are small-scale operators or street vendors. However, such vendors are only the front end of much wider and more sophisticated networks. Although the term “organized crime” should be used with caution in describing the counterfeiting industry, Interpol states that “extensive evidence is now available which demonstrates that organized criminals and terrorists are heavily involved in planning and committing intellectual property related crimes.”^v

Further, online piracy is facilitated by increases in transmission speeds, since faster connections enable users to send and download larger files (such as software programs) more quickly. Without strong online copyright laws and enforcement of those laws, online piracy via spam, auction sites and P2P systems will continue to grow alongside increases in Internet usage.^{vi}

There are 4 main factors contributing to the growth of IP crime^{vii}:

- Widespread availability of technology
- Increased globalization of world trade; it is easier to manufacture in one geographic location and distribute elsewhere. The result of more open borders and more trade is that it is also easier for counterfeits to flow across borders.
- Legal penalties are low; if they exist at all.
- The influence of organized crime.

Counterfeiting and piracy have emerged as clear and serious threats to business, consumers and government. Counterfeiting is obviously a breach of consumer affairs, health, trade, and employment law. It is the negation of all the major legislation protecting individuals.^{viii} Without coordinated action and policy to clamp down on the criminals and to dissuade consumers by bringing about increased awareness, a cycle of economic destabilization occurs with control slipping to the criminals.

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Costs to the right holder

Industries which find themselves in direct competition with counterfeiters suffer a *direct loss in sales*. Indeed, some markets are even dominated by counterfeiters, creating barriers of entry for the producers of the genuine product. Some would argue that the buyers of the fakes would not have bought the genuine item but that is a very narrow argument and can only apply to a small segment of luxury goods. Many counterfeit products today are of higher quality and compete directly with the genuine items. In addition, consumers who are deceived into believing that they bought a genuine article when it was in fact a fake, blame the manufacturer of the genuine product when it fails, creating a loss of goodwill. Even cheaper and obvious copies that are bought in good faith represent a serious threat to the company that wants its brands associated with quality and exclusivity. Beside direct losses of sales and goodwill, one should not forget the expenditure involved in *protecting and enforcing* intellectual property rights. The right owner becomes involved in costly investigations and litigation when combating counterfeiters and may also have to spend further sums on product protection. The budget for anti-counterfeiting is rarely well defined within an organization, but spans across several departments such as marketing, human resources, product development and legal departments.^{ix}

Legal Protection:

A counterfeit product can infringe any, or all, of the main intellectual property rights, namely trade marks, patents, designs and copyrights. Counterfeiting predominately deals with trade marks whereas copyright infringements are referred to as piracy. Generally patents alone are not usually referred to as counterfeits or as piracy.

The difference between these rights should be understood. Both patents and copyrights are monopolies, granted by law. A trade mark is not a monopoly. The proprietors of patents and copyrights can grant a license to others without conveying any real interest. A license in these situations is defined as a purchased right to act without the threat of suit by the Right's owner. The registration of all IP

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rights is a complex issue and companies that try to save money by not registering their rights run a great risk, even though they may feel that their products are not worthy of this protection. No matter how small the company, or the product, if it is successful then someone will imitate it. It is not a legal requirement to register trade marks but, to gain full benefit of the various courses of action available, it is strongly recommended.

While the necessary legal protection may exist, it can be said that consumer demand drives counterfeiting, which in turn harms numerous industries. Rising global overcapacity for the manufacture of discs is also key factor behind the spread of disc piracy, affecting music, film and computer software.^x There can be no doubt that product counterfeiting is a serious and damaging economic crime^{xi}.

There are definitely no “major” or “minor” counterfeits. Counterfeiting is a serious offence on a level with trafficking in weapons or drugs.^{xii} It is vital that the public understands that fake- products carry with them a real safety hazard not just the prospect of disappointing performance.^{xiii} Because no industry sector is immune from attack by counterfeiters and no country is exempt from this type of criminal activity.^{xiv} Finding ways to successfully combat it is an international challenge, and demands the participation not only of companies, but also members of the world’s law enforcement agencies, and governments around the world. Each of these groups has a critical role to play if this challenge is to be met.^{xv}

Indian Perspective

India continues to remain on the priority watch list of the US Trade Representative, meaning that India is perceived as not providing adequate intellectual property rights protection or enforcement of laws protecting IPR. However the admitted experience of IP crime in India is lower than in Asia-Pacific region and globally and is contrary to general perception of the relative incidence of IP crime in India.^{xvi} While India does not have a separate legislation to address counterfeiting as in the US, it offers statutory

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remedies, both civil and criminal^{xvii} which are embodied in the new Trademarks Act of 1999, The Copyright Act, 1957, The Patents Act 1970, The Designs Act 2000, The Geographical Indications of Goods (Registration and Protection) Act 1999, Custom & Border measures are provided in The Customs Act, 1962 which one can access through various IP statutes.

India has made important changes to its IP laws and more are in the pipeline, including changes in IP and Customs laws to implement border control measures as required by the TRIPs Agreement. India has signed Customs Mutual Assistance Agreement with most of its major trade partners including EU & USA. These treaties establish formal guidelines and allow officials to share intelligence and investigative data relating to IP violations. In addition, in the last five years the Indian courts have taken a more pragmatic approach to counterfeiting. Lobbying by various brand owners' associations, and more education programmes have resulted in increased awareness and a greater understanding of IP issues among law enforcement authorities.^{xviii}

While crimes such as drug dealing and trafficking are viewed with great concern, the general perception in India of IP crime is that it is a "victimless crime". Consumers in India still appear to be relatively unconcerned because of a divergence of public perception and the lack of understanding about the effects of IP crime. Recently there have been stronger signals with lengthier sentencing and higher penalties for those convicted of counterfeiting and piracy. However, mixed messages are still conveyed and lower penalties are more common than those imposed for more high profile criminal activities.

CONCLUSIONS

The curbing of widespread IP crime including the reduction of influence of organised IP crime, requires a multi pronged and collaborative approach on the part of the various stake holders in bringing about increased awareness amongst the public, legislature and enforcement authorities of the perilous nature and devastating impact of IP crime.

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- ⁱ The fight against piracy and counterfeiting of intellectual property: Prepared by the Commission on Intellectual Property of ICC, Paris and submitted to the 35th ICC World Congress, Marrakesh, 7 June 2004.
- ⁱⁱ In order to strengthen further the enforcement of IPR in a focused manner, an Alliance in the name of CII Alliance for Anti-Counterfeiting/Piracy was formed with the leadership and initiatives of Indian industry and right holders who are affected by the counterfeiting/piracy menace in 2004.
- ⁱⁱⁱ The CII Alliance for Anti Counterfeiting/Piracy, Confederation of Indian Industry. www.ciionline.org
- ^{iv} COUNTER OFFENSIVE: An IP Crime Strategy, a DTI service of the United Kingdom Patent Office DDU/93/IPID/7-04.
- ^v Counterfeiting and Organized Crime: INTA Counterfeiting Special Report September 2004, www.inta.org.
- ^{vi} PIRACY STUDY: First Annual BSA and IDC Global Software Piracy Study, July 04. Business Software Alliance, www.bsa.org.
- ^{vii} *Surpa iv*
- ^{viii} COUNTERFEITING & ORGANISED CRIME, Union des Fabricants Pour La Protection International De La Propriete Industrielle Et Artistique 2003.
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- ^{xviii} *Surpa xvii*