



An Assessment of Intellectual Property Legislative Framework on Violations of Protected Goods

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Abstract

Infringement of intellectual property is a violation of protected rights. Intellectual property is an asset owned by businesses and forms part of a trade. In South Africa, the Constitution and other legislation guarantee ownership of property. The rights to ownership of protected property are affected when criminals misappropriate property. This abuse is evident when the protected property is divested from its lawful owners and sold at a profit to disadvantage the owners. This has the potential of devaluing protected property and contributes to the financial loss of the owners. The abuse ultimately discourages innovation and creativity in businesses. The government is responsible for protecting property rights; the positive spin-off is the taxes that benefit the country. Poor protection encourages free-riding behavior where unscrupulous criminals misuse the intellectual property for their benefit. This study assessed the effectiveness of various legislation that protects property interests. It further highlighted poor enforcement of the law.

Keywords: intellectual property, protected goods, copyright infringement, counterfeiting, terrorism, law enforcement.

1. Introduction

Inventions of the mind date back to the 1300s, so is the crime (Abbott & Sporn, 2002: 9; Harris, Stevens & Morris, 2009: 5). The crime of intellectual property theft was previously punished by severe capital punishment that was proportional to the crime committed (Abbott & Sporn, 2002: 9). There is not a single country in the world that is immune to intellectual property crime (United Nations Office on Drugs and Crime, 2014: 1). Inventions of the mind are just as profitable as physical goods, if not more. This is because mental creativity and innovation outlast the physical product, which can be adapted from time to time as the years progress. The goods that are produced can later be improved to become better in accordance with the needs that exist at the time.

In 2018, there were more than 10.9 million trademarks in the world, with over 15,000,000 classes of trademarks (WIPO, 2019: 74-75). A lack of or poor law enforcement affects businesses, people and government. The tax base will be eroded owing to taxes not being paid by legitimate businesses. This could result in workers being retrenched and governments failing their citizens by not delivering services in communities. The criminals divest the legitimate owners of their businesses and rake in huge profits from selling imitations of genuine goods. South Africa

has promulgated legislation to fight intellectual property violations, such as the Copyright Act 98 of 1978, Trademarks Act 194 of 1993, Merchandise Marks Act 17 of 1941, Customs and Excise Act 91 of 1964, Counterfeit Goods Act 37 of 1997, South African Bank Act 90 of 1989, Tobacco Product Control Act 83 of 1993, Designs Act 195 of 1993 and Patents Act 57 of 1978.

This study assessed the effectiveness of the intellectual property legislation in South Africa by considering its strengths and weaknesses to determine whether it is fit for purpose. This was done in order to assist the country in making improvements in enforcing the law in the country and capacitating law enforcement to uphold intellectual property rights.

2. Key concepts

Intellectual property is an invention of human-made works which comprise symbols, names and images that are registered by authorities and used in commerce (South African Institute of Intellectual Property Law, 2013: 16). It is divided into industrial property such as patents, trademarks, industrial designs and geographical indications, and copyright which covers literary works, films, music, artistic works, architectural designs as well as recordings (WIPO, 2014: 2).

A *trademark* is a distinctive name, symbol, word, picture or combination of these that is used by a business to identify its services or products (International Trademark Association, 2009: 1). It is designed to protect the good reputation of a business's services and/or goods. According to Ward (2011: 49), a sign is capable of being represented graphically and distinguishing goods or services of one business undertaking from those of other businesses. However, it differs from a *patent*, which covers a utility, design, plant or a design of machinery.

Copyright infringement is a violation of the protected rights of another person or institution (Adams, 2010: 201). Copyrights are unregistered rights that allow copyright owners to prevent the unauthorized reproduction of their goods. The fact that the owners of genuine goods do not have to register as legitimate owners does not justify the reproduction of their products without their permission (Lo, 2013: 109).

Counterfeiting denotes the unauthorized production of goods in relation to which the state confers upon legal entities a statutory monopoly to prevent their exploitation by unscrupulous people (WIPO, 2014: 2). Counterfeiting is the unlawful and intentional misrepresentation of goods that leads to actual or potential prejudice to another (Kinnes & Newman, 2012: 33). Moreover, counterfeiting is a routine and mundane form of organized crime that involves the copying of genuine goods to mislead people into thinking they are real. It boils down to the fraudulent manufacturing of goods.

A *brand* is a set of mental attachments and added perceptions held by consumers about the value associated with intellectual property rights (registered product or service) that is provided for at a cost (Kapferer, 2012: 8). A brand is a sign or set of signs certifying the origin of intellectual property rights (registered product or service) and differentiating it from competitors' products (Oosthuizen, 2013: 13).

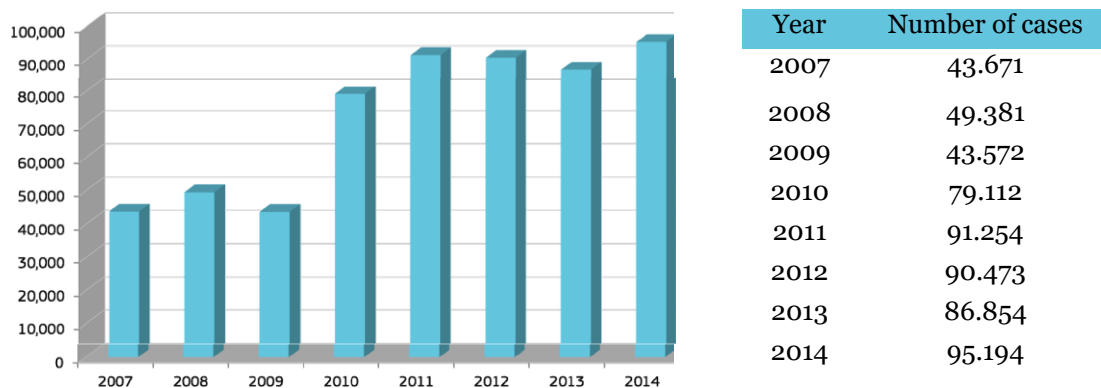
3. International instrument for enforcement of intellectual property rights

The World Trade Organisation (WTO) was set up in 1995 as the custodian of all member states regarding agreements in trade-related aspects. The Trade Related Aspects Agreement is part of the General Agreement on Tariffs and Trade and the DOHA Round Declaration (WTO's DOHA Development Round of 2016 Declaration) of trade negotiation among WTO members. Its objectives are to encourage free trade, reduce tariffs and ensure more equitable

and levelled playing fields achieved within the ambit of the law of various countries (WTO, 2015: 39). The Trade Related Aspects Agreement was created to enforce strong minimum standards of intellectual property protection in each of the areas associated with intellectual property rights, including copyrights, trademarks, patents and trade secrets (Adams, 2010: 201). The establishment of the WTO was seen as an important step towards the protection of intellectual property rights in member states. The main objective was to create international enforcement standards over and above the current intellectual property right protections under the World Intellectual Property Organisation and the Trade Related Aspects Agreement (Lo, 2013: 109). As one of the techniques used by countries to promote accountability, law enforcement agencies have to enforce the principles enshrined in the Trade Related Aspects Agreement, and they do so by making certain that people account for their infringement actions regarding intellectual property violations in the respective jurisdictions.

The Anti-Counterfeiting Trade Agreement is the latest intellectual property treaty that defines intellectual property to include all categories of intellectual property that are subject to the Trade Related Aspects Agreement, such as intellectual property violations. This makes the definition of intellectual property under the Anti-Counterfeiting Trade Agreement to overlap with that of intellectual property under the Trade Related Aspects Agreement. The narrow definition of counterfeiting under the Trade Related Aspects Agreement has made the policing of counterfeit crime problematic in many countries. After the adoption of the Anti-Counterfeiting Trade Agreement, the definition was extended to cover many elements of intellectual property infringements and this contributed to clarifying the uncertainties in identifying intellectual property violations, thereby making it easy for many countries to adapt their laws in line with the spirit of the Anti-Counterfeiting Trade Agreement's stipulations (Adams, 2010: 203). Article 23 of the Anti-Counterfeiting Trade Agreement makes provision for the punishment of intellectual property violators who import and export prohibited and protected goods. Moreover, Articles 25 and 26 of the Agreement also include specific rules of seizure, forfeiture and destruction of confiscated goods as well as the *ex officio* policing and criminal enforcement, which are elements that are in addition to Article 61 of the Trade Related Aspects Agreement. This has resulted in an increase in seizures of offending goods and the arrest of perpetrators.

BASCAP (2015: 1) argues that Internet infringements in country sales or indirect losses to governments and consumers that are included the global impact of these illegal activities could add up to more than US\$1.77 trillion annually. Figure 1 below indicates the trend of intellectual property violations in the European Union (EU) from 2007 to 2014.



Source: European Commission (2015: 11)

Figure 1. Intellectual property violation cases in the EU

The European Commission Taxation and Customs Union revealed that 103 million intellectual property infringement goods were seized in 2004 in the EU. This number increased to 128 million in 2006 and a similar incremental trend is noticed from 2007 up to 2014 (European Commission, 2014:11). Going by the above statistics, it is apparent that there is an increase in the seizure of intellectual property infringements every year in the EU.

4. Measures used in fighting intellectual property violation on the African continent

The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa for the promotion of unity and solidarity of African states. Its main goal was the co-ordination and intensification of co-operation and efforts to achieve a better life for Africans. In addition, the OAU sought to defend sovereignty, territorial integrity and independence. It promoted international co-operation, giving due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. It advocated the co-ordination and harmonization of political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical and defense policies (Sakala, 2010: 28). Baimu (2001: 299) asserts that an extraordinary summit of the OAU held in Sirte, Libya on 9 September 1999 called for the establishment of an African Union in line with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty establishing the African Economic Community. Following this, the Constitutive Act of the African Union was adopted during the Lomé Summit of the OAU on 11 July 2000. The African Union has the following conventions that assist in the policing of counterfeit crime in Africa:

- Convention on the Prevention and Combating of Terrorism, adopted in 1999.
- Protocol to the OAU Convention on the Prevention and Combating of Terrorism of 2003.
- Convention on the Prevention and Combating of Corruption of 2003.
- Bamako Convention on the ban of the import into Africa and the control of transboundary movement and management of hazardous wastes within Africa, adopted in 1991.
- African Regional Industrial Property Organisation (ARIPO), also called the Lusaka Agreement, of 1976 which caters for the regulation of implementing the Banjul Protocol on trademarks.

The above conventions and agreements make trading in intellectual property goods a punishable offence in all the African countries, and mandate law enforcement to combat it (Republic of Ghana, 2008: 10). The other instrumental organization in policing cross-border crimes in the southern part of Africa is the Southern African Regional Police Chief Co-operation (SARPCCO). It works in conjunction with the International Criminal Police Organisation (INTERPOL) to combine resources and expertise to fight transnational crimes such as intellectual property infringements.

5. Intellectual property violations: South African perspective

Article 51 of the WTO Agreement on the Trade Related Aspects of Intellectual Property Rights specifies and distinguishes between the concept of trademark goods and copyright goods. The concept of trademark concerns the protection of identifying product marks such as words, slogans, logos, shapes and colors. It indicates the origin of the product, guarantees quality to consumers and serves as the manufacturer's acceptance of responsibility on product defects (Ramara, 2006: 7). Intellectual property infringement such as trademark counterfeiting comes

into play when a person, without permission or authority, uses a trademark and falsely presents it as genuine. Conversely, copyright infringement refers to usurping goods, which are unauthorised copies of CDs, DVDs, online streaming contents and software products protected by intellectual property rights. Copyrights are unregistered rights that allow the copyright holder to prevent unauthorized reproduction of the products.

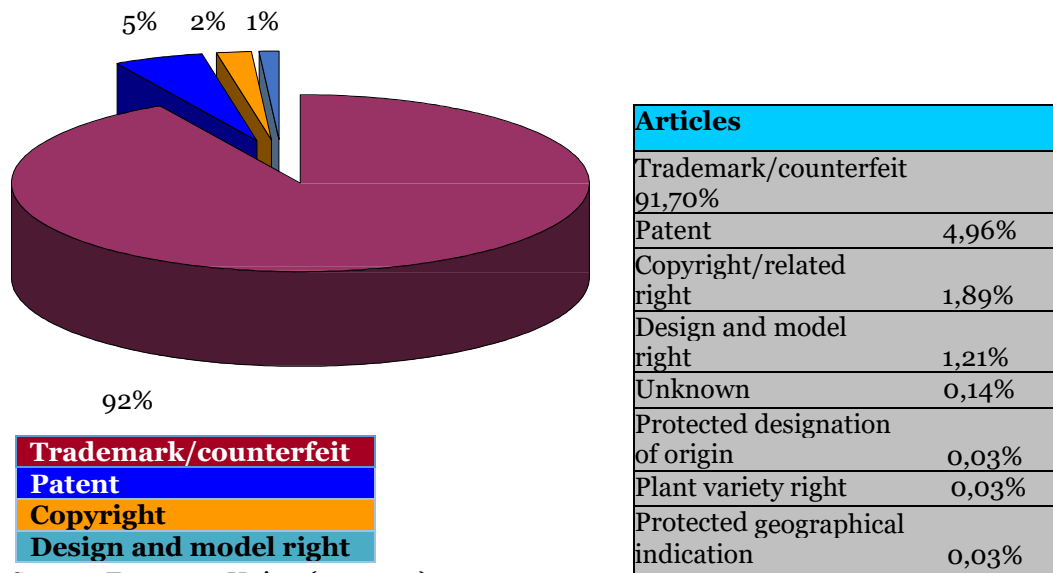
Draper and Scholvin (2012: 1-5) argue that criminals are interested in engaging in crimes that pay better with low levels of arrest, such as counterfeit and other intellectual property crimes. The copying of computer software, DVDs and CDs is one of most common copyright infringements in South Africa. Many of the goods are world-leading products that were created by developed countries such as the USA, Germany, France and the UK (IFPI, 2016: 3). To commit copyright violations, criminals make use of computers and electronic devices to copy the goods bearing famous brands. Some criminals steal not-yet-released information through hacking, as happened in the case of the first South African produced Oscar-award winning film “Tsotsi” directed by world-renowned film director Gavin Hood (Dovey, 2009: 91).

5.1 South African intellectual property legislative landscape

Counterfeit crime, piracy and other related intellectual property crimes are rampant in South Africa (South Africa, 2014b: 9). Inevitably, counterfeit crime and piracy are financially rewarding crimes that modern organized crime will not fail to exploit. Crime has also slowed South Africa’s socio-economic development (Ampratwum, 2009: 74; South Africa, 2011: 386). Despite all of the above, South Africa has several pieces of legislation that criminalize intellectual property crime. These are grounded in the Constitution of the Republic of South Africa, which protects private property (South Africa, 1996). Legislation was promulgated to fight intellectual property violations such as the Copyright Act 98 of 1978, Trademarks Act 194 of 1993, Merchandise Marks Act 17 of 1941, Customs and Excise Act 91 of 1964, Counterfeit Goods Act 37 of 1997, South African Bank Act 90 of 1989, Tobacco Product Control Act 83 of 1993, Designs Act 195 of 1993 and Patents Act 57 of 1978. Piracy, as the infringement of copyright and related intellectual property rights, is characterized by unauthorized duplication of copyrighted content that is passed off as the genuine item. Breaches of trademark and copyright laws overlap and the concepts are used synonymously in certain jurisdictions (Staaake & Fleisch, 2008: 17). Spilsbury (2009: 4) emphasizes that counterfeiting and piracy are forms of fraud, while Treadwell (2011: 176) contextualizes them further by saying that they are forms of consumer fraud in which products are sold purporting to be what they are not, with the ultimate goal of making an exorbitant profit. The Counterfeit Goods Act 37 of 1997 criminalizes counterfeit crime in South Africa by empowering the police to arrest and facilitate the prosecution of counterfeiters. This means that counterfeit crime is a statutory crime punishable by law (South Africa, 1997). The Act protects and enforces intellectual property rights by providing civil and criminal remedies against counterfeiters who are caught by law enforcement agencies. Criminal proceedings are preferred in cases of deliberate infringements or infringements for commercial purposes which have resulted in a particular infringement or harm to the brand holder. Section 5(1) of the Counterfeit Goods Act 37 of 1997 empowers the police to collect evidence relating to suspected counterfeiting, conduct searches where necessary and take steps to terminate dealing in counterfeit goods. Among others, the Counterfeit Goods Act also makes diversion an illegal act. Diversion involves the distribution of a genuine product outside of its intended market, thereby violating the first sale doctrine. For example, goods that are to be sold in South Africa are diverted and sold in Kenya without following proper legal channels, thus avoiding tax payment in South Africa. Many of the goods that are counterfeited bear famous and known brand names, which violate the Trademarks, Merchandise Marks and Counterfeit Goods Acts simultaneously. The Trademarks Act 194 of 1993 criminalizes trademark infringement and grants the police powers to police trademarks. In general, counterfeit crimes impact negatively on the relationship that people have with the authentic branded products (De Chermatony, McDonald

& Wallace, 2011: 397). The OECD (1998:30) indicates that 67% of the world’s counterfeit goods originate from China. Digitally pirated music, movies and software account for US\$200 to 250 billion (OECD, 2016:69). A research study conducted by ICC (2010) indicates that in 2015, the impact of counterfeit and pirated protected goods exceeded US\$1.77 trillion, with a possibility of more than 2.5 million jobs being at risk of being lost. The genuine goods producers will be forced to reduce their production levels based on less demand owing to the circulation in the market of goods that violate intellectual property laws.

Trademarks and geographical indications are exclusive rights that reduce inefficiencies resulting from a mismatch of information between buyers and sellers on certain attributes of goods. Nobel prize-winner economist, George Akerlof, points out that markets may fail when consumers have less information about the quality of goods than producers (Armbruster & Knutson, 2013: 351). Trademarks identify a product with its producer and reputation for quality that was generated through repeat purchases and word of mouth. They create an incentive for companies to invest in maintaining and improving the quality of their products. Geographical indication identifies the origin of a product, signaling its quality, which is associated with its region (Quian, 2014: 318). Should companies not prevent third parties from counterfeiting their products, then they will have little incentive to invest financial resources into such products because counterfeit crime encourages free-riding behavior (WIPO, 2009: 4).



Source: European Union (2007: 15)

Figure 2. Breakdown by type of infringed right per seized article in the EU

Figure 2 above illustrates that in 2007, the majority of articles seized by customs infringed a trademark and covered a wide variety across all product sectors. With regard to patent infringements, the main products involved concerned electronic equipment. With regard to copyright infringements, CDs, DVDs, software and online streaming of contents were the products most affected, as well as a wide variety of products containing protected images such as well-known comic figures. In design rights, most infringements concerned toys and accessories for cellphones (Stoner & Wang, 2014: 205).

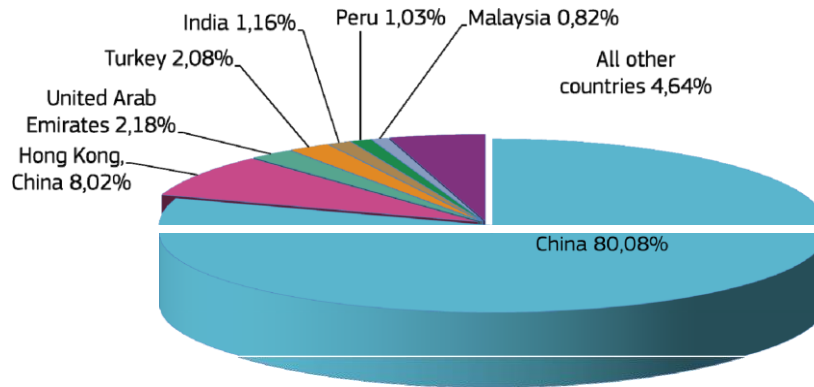
Through geographical indication, law enforcement agencies can track where the goods originate from and locate the owner. An additional advantage of trademarks is the fact that brand holders and producers can distinguish their goods from other competing goods (Welchy, 2010: 361), and the police rely on these identifying characteristics to investigate and police the infringement.

The Tobacco Product Control Act 83 of 1993 makes any deceptive or misleading packaging and the physical goods that do not meet certain specifications as contained in the Tobacco Product Control Act an offence and empowers the police to act on such violations. Owing to the sophistication of and the syndicate manner in which these crimes are committed, the police use traps and undercover operations to deal with this. This Act criminalizes dealing in unregistered and prohibited tobacco in the country. Similarly, the South African Bank Act 90 of 1989 criminalizes the copying and abuse of South African currency. In the USA paper money counterfeiters re-invest the proceeds of crime in legitimate business. Cummings (1997: 540) reveals that in 1990, the Secret Service discovered that 100 counterfeited US dollars were circulating internationally. They believed that the dollars were printed on a press machine that was similar to those used by the US Treasury that had been sold to Iran in the 1970s. In 2002, the police seized US\$130 million in fraudulent US notes before they were circulated and detected more than US\$44 million in spurious US currency after it had passed into criminals' hands. Companies were losing close to US\$8.1 billion annually in overseas business owing to violations of intellectual property. Selling false drugs with cheap ingredients and high profit margins seems to be rife. An investment of just US\$1,000 in raw material could net an amount of US\$200,000 and above (INTERPOL, 2014: 52). In 1992, the USA passed the Counterfeit Deterrence Act of 1992 with the intention to increase penalties. This legislation also instructed the Treasury Department to redesign paper money in order to make it more difficult to reproduce. This resulted in the redesigned currency released in 1996. The US Treasury officials believed that the watermark and the use of color-shifting inks made the currency nearly impossible to reproduce with the current technologies (USA, 2002: 1). The Customs and Excise Act 91 of 1964 of South Africa authorizes customs officials to arrest criminals and confiscate contraband within the borders of the country. In an attempt to protect and enforce intellectual property rights, the legislation provides both civil and criminal remedies against counterfeiters.

6. International enforcement of anti-intellectual property violations

INTERPOL is the largest international police organization, with the vision to police for a safer world. Its mission is to prevent and fight crime through co-operation and innovation on police and security matters. INTERPOL established the INTERPOL Intellectual Property Crime Action Group in 2002 to fight intellectual property crime in the world. It was formed in collaboration with law enforcement agencies of different countries and this has facilitated international police actions against intellectual property crime (Council of Europe, 2007: 11250).

The Global Congress Steering Group comprising INTERPOL, the World Customs Organisation, the World Intellectual Property Organisation, Global Business Leaders Alliance against Counterfeiting and other global business sector representative bodies was formed in 2004 to implement a more effective collective response to counterfeiting worldwide (INTERPOL, 2014). Operation Jupiter targeted the Tri-border area, where Argentina, Brazil and Paraguay meet. It is an area where counterfeit goods of all types, including cigarettes, clothing, computers, CDs, DVDs, electrical goods and pharmaceuticals, are either manufactured or distributed on an industrialized scale. Most of these items are consumed in the Tri-border area of South America, although increasingly they are found in North America and beyond (Hudson, 2010:4). Often the size of the area and the challenging operating environment makes policing difficult. These difficulties enable organized and transnational criminal organizations to thrive, resulting in organized criminality and a wide range of intellectual property crimes. Figure 3 below shows the origins of intellectual property violations and it is clear that China is a leading country.



(Source: European Commission, 2015: 19)

Figure 3. Countries of origin of intellectual property violations

The above figure provides a picture of the extent of the intellectual property violation problem by country of origin. This knowledge will enable the planning, allocation and deployment of resources to enforce anti-intellectual property violations.

7. Organized crime and money-laundering activities

The motive for money laundering is monetary gain (Leff, 2012: 1). The laundering circumvents obstacles to procure and utilize money to fund acts such as terrorists' activities (Levi, 2015: 283). The International Monetary Fund (IMF) has hinted that the global amount of money laundering is equivalent to 2-5% of the world's GDP market. This money is often used to destabilise countries and corrupt nations (Antoniou & Sinha, 2012: 93).

International Anti-Money Laundering and Combating the Financing of Terrorism standards are set by the Financial Action Task Team that demands financial institutions to employ Know Your Customer rules. These rules apply to all accounts and cash transactions that go beyond a designated threshold in order to curtail money laundering (Soudijn, 2012: 150). This initiative by the Financial Action Task Team is intended to curb the misuse of the trade system as a method by which organized criminal organizations and terrorist financiers move money for the purpose of disguising its origin by introducing it into the formal economy (Financial Action Task Team Guidance, 2013: 52).

The Know Your Customer rules are a key element in fighting money laundering and terrorism financing as they require customers to present valid identification and financial institutions to verify the documents and store copies (Financial Action Task Team Guidance, 2013: 3). However, with all the measures in place, criminals still continue to launder their money through other dubious ways such as through the purchase of precious metals, as they earn high interest and can be stored and moved easily. Precious metals are liquid, transferrable and can be uniquely concealed. They can be described as having physical and commercial properties, which carry value in small quantities. They are valuable for money laundering and terrorism financing as ownership can be transferred quickly, often with a minimal audit trail (Financial Action Task Team Guidance, 2013: 48). Mitsilegas (2003: 117-119) points out the difficulty in tracing the audit trail to prove that the proceeds are from criminal conduct, as well as the need for circumstantial evidence which the police ordinarily would not possess for the successful conviction of the offenders in these cases.

The findings of a money-laundering report by BASCAP (2009: i) indicate that business people should lobby and educate government officials and policy makers about the value of intellectual property and emphasize how counterfeit and piracy affect economic growth,

employment and innovation. The engagement with government could produce policy measures that can be used to police counterfeiting effectively.

The link between intellectual property violations and terrorism has been demonstrated in cases of organizations such as Hezbollah, Hamas, Harakat al-Shabaab al-Mujahideen, Al-Qaeda, Revolutionary Armed Forces of Colombia and Islamic Jihad. These organizations are known to trade in goods that infringe intellectual property and to conduct illicit businesses such as dealing in piracy and counterfeiting to finance their terrorism activities (Choo & Smith, 2008: 39). They are classified as terrorist organizations by the US State Department on the list of Foreign Terrorist Organisations (US Department of State, 2017).

8. Research methodology

This study drew on experiences in South Africa, Africa, the USA and the EU and in other jurisdictions beyond. An array of secondary data sources was used, such as journal articles, textbooks, online sources and government and business publications. Primary sources were also used by drawing on the author's earlier scholarly work but adapted to suit the purpose. A qualitative approach and empirical design were followed in this study. Miles, Huberman and Saldana (2014: 11) describe this design as covering an array of interpretive techniques and seeking to describe, decode and translate information to find the meaning of a naturally occurring phenomenon in the social world. The design was appropriate for this study as there was little information in literature that could achieve the objective of this study. The following three research methods were used to collect data:

Purposive sampling was used to identify and interview Specialised Commercial Crime Unit participants who enforce the law against intellectual property violators. In total, 20 participants were interviewed. These respondents were selected for interviews based on their intimate knowledge of and experience in anti-intellectual property infringements. Purposive sampling was also used to identify and interview 14 prosecutors who prosecute intellectual property crimes.

Crime Prevention Unit members working at police stations next to Specialised Commercial Crime Units who enforce laws against intellectual property crimes by arresting vendors trading in protected goods and confiscating them were selected through snowball sampling. A total of 332 were interviewed.

Ten brand owners were identified through snowball sampling. Nine members of the Department of Trade and Industry (DTI) who enforce anti-intellectual property crimes were interviewed. A total of 21 legal representatives who, in most cases, legally represent their clients in intellectual property violations and others who are employed by brand owners or represent them in court cases were interviewed.

The researcher used this design to obtain credible data from respondents through the observation of raids. Permission was granted by the employers concerned to conduct observation without those being observed knowing that they were being observed. This would ensure that they did not modify their practice due to being observed, as this could have led to inaccurate findings. A video recorder was used in seven raids that were conducted in various places to record the conduct of police and suspects during searches and the seizure of counterfeit goods. Recordings were made in such a way that people were unaware that they were being observed.

The study was conducted from 1 April 1998 to 31 March 2018. This period is significant as a result of its association with the start of the democratic dispensation in South Africa. It was characterized by increased trade with the international community and increased migrant intake, as the country had opened its doors to the world.

8.1 *Data analysis*

The data collected from interviews and the observation data were transcribed to facilitate the process. It was analyzed methodically according to the thematic method by classification into themes, subthemes and categories. Data was analyzed using Tesch's eight-step data analysis method, which involved getting a sense of the whole, picking one of the transcribed interviews and reading it carefully, making a list of topics and clustering them, coding and classifying information, making a final decision and alphabetizing the codes, assembling same categories, doing a preliminary analysis and, finally, recording the data (Creswell, 2014: 198).

8.2 *Ethical considerations*

Ethical clearance was obtained from the College of Law at the University of South Africa before the commencement of this study. In this study, the researcher ensured confidentiality by not disclosing the personal details of the participants. Informed consent was obtained from all participants. The participants consented to be interviewed and were not coerced to participate in the study; hence participation was voluntary. All participants were informed that they were permitted to withdraw from the interviews. Participants were not allowed to discuss their individual responses among themselves. The information they provided was kept in a safe place. Participants were not remunerated for participating in the interviews. Video recordings of the raids were made with the consent of participants and their employers.

9. Findings and discussion

The interviews and observation results produced the themes and subthemes. Statements by participants were confirmed by the observations. The responses of 406 interviews were obtained by asking participants about their own understanding of an assessment of an intellectual property legislative framework on violations of protected goods in South Africa. This resulted in the following themes and subthemes:

10. Intellectual property crime resting on protected goods

The findings indicate that intellectual property is highly valued. Its theft is a crime that is growing in a great magnitude worldwide and there are no signs of it subsiding any time soon. This is indicated by shocking statistics on the number of seized articles that have infringed intellectual property rights worldwide, i.e., 60% of the total number of articles seized in the world in 2018. These articles included CDs, DVDs, software, online material and clothes and were confirmed to have originated in China (Chaudhry & Zimmerman, 2013: 12)., Some legitimate businesses in South Africa are also guilty of intellectual property violations as they mix their merchandise with goods that violate intellectual property. Many famous branded goods are in demand and are protected by intellectual property laws. Copyright and trademark infringements and counterfeiting are crimes against personal property. In South Africa, section 25 of the 1996 Constitution protects private property against appropriation. Some legitimate goods owners conceded that the war against intellectual property infringement was being undermined by the lack of collaborative effort among production houses since legitimate producers operate in secrecy in an attempt to protect their products against free-riding behavior by criminals. Legitimate goods owners are loathed to spend money on protecting their goods against copying as the cost of protecting the goods is prohibitive and further causes the selling price to increase. This has the potential of discouraging consumers from consuming the goods.

A member of the Specialised Commercial Crime Unit confirmed this: “The country that is leading in this trade of imitating original goods is China. The practice is hazardous as untested raw material are used and causes original goods dilution which ultimately has the potential of destroying original goods’ sustainability.”

Goods that are imitations of the original goods are produced en masse as cheap material is used. Most respondents stated that pirated and counterfeited goods that violated trademarks and merchandise marks are often produced in large quantities and sold at a lower price than that of the genuine goods. This explains why consumers are enticed to purchase them rather than the original goods that are seen as unaffordable. The profits of intellectual property goods are laundered and some are used to finance terrorism activities, as indicated by Soudijn (2012: 150).

11. International co-operation in fighting intellectual property violations

South Africa is a signatory to several international treaties and agreements intended to fight intellectual property crimes. It is a member of the United Nations and African Union. It is also a signatory of the World Intellectual Property Organisation and SARPCCO and co-operates in working relationships with INTERPOL, the EU, US law enforcement, the IMF, the WTO, the Anti-Counterfeiting Trade Agreement and Financial Action Task Force, among others.

12. Legislative measures to counter intellectual property violations

South Africa is a signatory to many international agreements on the protection of intellectual property such as WTO and TRIPS, and also works with INTERPOL. Its legislation is in compliance with international instruments. This legislation includes the Copyright Act 98 of 1978, Trademarks Act 194 of 1993, Merchandise Marks Act 17 of 1941, Customs and Excise Act 91 of 1964, Counterfeit Goods Act 37 of 1997, South African Bank Act 90 of 1989, Tobacco Product Control Act 83 of 1993, Designs Act 195 of 1993, Patents Act 57 of 1978 and the Customs and Excise Act 91 of 1964.

12.1 Counterfeit Goods Act, Copyright Act, Merchandise Marks Act, Trademarks Act and South African Bank Act

The law enforcement agencies in South Africa make use of the above legislation to fight intellectual property crimes. All the legislation was passed some time ago and has loopholes. The Counterfeit Goods Act does not allow law enforcement members of the rank of constable to police counterfeiting in South Africa because they are regarded as inexperienced and in a position to commit errors while investigating intellectual property violations. It is important to note that this Act was promulgated in 1997 when members who had held the rank of constable for a long period were promoted. This left the rank of constable being occupied by a large number of newly recruited members who did not have much experience in policing. This situation has since changed and law enforcement members who now occupy this rank are very experienced and they constitute a large number of operational officers deployed to various units within the SAPS. They tend to be confronted with goods that infringe intellectual property rights more frequently. In other words, a rank structure should not be linked with experience, especially within the SAPS, because there are now many experienced members at lower rank structures such as constable.

The Counterfeit Goods Act is prescriptive on the processes that must be followed before premises and/or a suspect can be searched and goods confiscated to obtain evidence. Moreover, the police do not have the equipment to test if goods are counterfeit, as many products

are produced in many parts of the world with different materials that change over time. The situation is similar in other countries and this makes collaboration between the police and goods owners an essential element in the policing of counterfeiting. When law enforcement seizes goods that infringe intellectual property rights, they must store the goods in private storage as declared by government. The storage fees are paid by the brand owners and the cost can be very high, depending on how long the court trial against the accused takes. There is a need for the business and state to share responsibility for the storage costs for a successful and viable approach in dealing with this crime. The business should pay for the storage until the testing of the goods is done because the testing is actually within their realm. Once the testing has been done and there is still a need for the product to continue to be kept for court purposes, then the storage cost should be paid by the state as this is now within the government's realm. This will enhance the collaborative approach in the fight against this crime. A large number of law enforcement officials are not trained on the Counterfeit Goods Act and the Copyright Act.

The Copyright Act is old and fails on many occasions to deal with new crime trends. It does not cater for online policing of intellectual property violators. It also does not make provision for online selling of goods that infringe intellectual property rights. This means that websites and online applications that infringe intellectual property rights cannot be taken down and perpetrators arrested. Online advertising of products that infringe intellectual property rights cannot be policed effectively as this Act does not cater for this. A new Act needs to be written or the current Act needs to be amended considerably.

12.2 South African Bank Act

The police investigate counterfeit currency and any other violations in relation to the contravention of the South African Bank Act. This could involve fraudulent activities with regard to exchange controls.

12.3 Customs and Excise Act and Tobacco Product Control Act

The Customs and Excise Act authorizes customs officials to police intellectual property violations such as counterfeiting, piracy and trademark infringement. The members also enforce the law against any contravention of tobacco product controls.

12.4 Patents Act and Designs Act

The Patents Act and the Designs Act encourage innovation and creativity of products. Products are designed and registered under the Designs Act so that the product and its design can be registered under the name of the person or entity that owns the design. Once products are created, they are registered and given their identity number of ownerships with the authorities.

13. Corruption perpetrated by intellectual property law enforcers

Members of the Specialised Commercial Crime Units, Crime Prevention Units and the DTI indicated that traders of goods tainted by intellectual property infringement do not fear the police since some police members take bribes and abdicate their responsibility to confiscate these goods and/or arrest the traders. However, in areas where the working relationship between law enforcement and the community is cordial, there is sharing of critical information about criminal activities from community members. Here the fight against this crime tends to be more successful.

A member of the Specialised Commercial Crime Unit substantiated this by stating: “A significant number of law enforcers are participatory in crime and many take bribes from traders of goods that infringe on intellectual property and this causes law enforcement to lose respect from both the community and traders. As a consequence, community members hesitate to report crime.”

Many countries do not regard this crime as a top priority that needs concerted policing. Most of them, including South Africa, do not punish the buying of property that infringes intellectual property rights for private use. This means that only the sellers are prosecuted. In many African countries it is common that criminals in possession of some goods that infringe intellectual property rights for household use are not prosecuted.

A member of the Specialised Commercial Crime Unit vindicated this by stating: “It is not a crime to carry some goods that violate intellectual property for household use as long as they are not for selling to the public, and this makes enforcement difficult as people would use household use as a defense when they are arrested.”

13.1 Ports of entry as hubs of corruption

Corruption in the ports of entry is a national threat that fuels large-scale criminality. Customs and excise officials and the police allow goods that infringe intellectual property rights and violate the Trademarks and Counterfeit Goods Acts into the country (Meltzer, 2010: 46). This is tantamount to harboring criminals in their backyard. These goods are sold on the streets, in flea markets and at transport terminals. Often, law enforcement members do not confiscate them, but allow criminals to sell them to the public in return for a bribe. Law enforcement members with integrity are threatened by organized criminal gangs for refusing to comply and work with them. As a result, the lives of honest police members and their families are in constant danger.

One of the police members confirmed this: “Many police members are complicit and partake in criminal activities. Some law enforcement members are corrupt, and many communities do not trust the police.”

14. Testing of goods that violate intellectual property regime

Every good that is the subject of intellectual property infringement must be tested for law enforcement to have a valid case as the court needs scientific reports confirming that the goods infringe the intellectual property rights of registered genuine products. Owing to the shortage of experts in the country, goods have to be sent to foreign countries for testing so that cases can be brought before the courts. Every producer of protected goods has their own testers and they are not permanently in the country.

Goods are tested by representatives of the legitimate goods owner at that owner’s expense. Because testing is not conducted by a neutral institution, the results could be biased. During an interview, one respondent stated: “The Copyright Act and Counterfeit goods Act grants the legitimate owner of goods the position of both player and referee of the game. This seems suspect. The complainants are the ones who test the alleged pirated goods and issue reports that confirm or dispute goods piracy.”

15. Law enforcement as enforcers of intellectual property regime

There is no sign of the proactive policing of intellectual property crimes. Often, law enforcement waits for complaints from genuine goods owners to report violators of intellectual

property. Legitimate owners of goods employ legal representatives who test and evaluate the purchased alleged offending goods. Proof of offending goods such as purchase receipts, copies or images are needed before a case can be reported to the law enforcers. One Specialised Commercial Crime Unit member declared: “The owners of goods hire legal practitioners who have no knowledge of investigation work to do test purchases at suspicious businesses, instead of forensic investigators who are experienced in investigation work.”

There are three law enforcement agencies that are responsible for enforcing intellectual property rights. Customs and excise officials work at the port of entry to confiscate goods that contravene the law, DTI members work together with the customs and excise officials and inland to pursue suspicious cases, and the SAPS work inland to confiscate goods that have already entered through the ports of entry (sea, land and air ports of entry). There is no close collaboration in the fight against intellectual property violations. The computer systems of law enforcement are not linked. This may result in all three law enforcement agencies working on a single case but without any forewarning. This may result in a miscarriage of justice and help the suspect to evade justice. It is imperative that law enforcement’s systems be integrated and system interfaces be implemented to speed up the investigation. A member of the DTI described the working relationship between different law enforcement as follows: “Every different law enforcement in the country works in isolation and what matters is achievement of yearly performance of each to impress the authorities.”

16. Conclusion

This study assessed an intellectual property legislative framework regarding the violation of protected goods in South Africa. The country is a constitutional democracy and protects owners’ private property rights in terms of the South African Constitution. Intellectual property rights are protected rights as influenced by international developments and various countries on different continents. South African intellectual property law is to a certain extent in line with international law and the country is a signatory to various conventions and agreements both internationally and on the continent.

Various loopholes in the Counterfeit Goods Act and the Copyright Act were highlighted that make enforcement of intellectual property rights in the country difficult for law enforcement agencies. The problem of uncoordinated law enforcement systems is exacerbated as the dealers are not easily identified and arrested in time. The failure of proactive enforcement of the law is evident from the presence of offending goods on the market. The issue of corruption is ongoing, and this causes lack of police legitimacy in the law enforcement in the country and could result in communities not providing tip-offs to law enforcement.

Intellectual property crimes have serious undesirable consequences for people, business and government. The failure of legitimate businesses results in job losses and reduces taxes, which ultimately results in no service delivery for the poor as the government will not have money to pay service providers. The profits made by unscrupulous infringers are enormous as they produce and sell goods in large quantities. The profits they make in the process are laundered and often used to fund terrorist organizations.

This paper has presented the empirical and literature findings on the assessment of intellectual property laws in South Africa and highlighted their strengths and weaknesses in enabling the fight against this crime. The study could assist law enforcement in the country to improve enforcement of these rights. The laws must be fit for purpose to enable law enforcement to execute their duties unhindered.

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