



ASSIGNMENT MEMORANDUM

SUBJECT : INTERNATIONAL TRADE LAW II (ITL2)

ASSIGNMENT : 1st SEMESTER 2010

[References in square brackets refer to the course notes]

QUESTION 1 [90]

1. A definition of counterfeiting

A **counterfeit** is an imitation that is made usually with the intent to deceptively represent its content or origins. The word *counterfeit* most frequently describes forged currency or documents, but can also describe clothing, software, electronic stock shares or certificates, pharmaceuticals, watches, DVD movies or more recently, cars and motorcycles, especially when this results in patent infringement or trade mark infringement.

This covers a wide range of consumer items, from outright fakes in the sense that they are non-functional look-a-likes (e.g. prescription drugs, computer flash drives), functional but inferior items (memory sticks, blank videotapes) to fully functional items illegally manufactured without paying copyright fees (CDs, DVDs, computer software). In the latter case, there is often little or no attempt at disguising its origin as the end user will be aware that the counterfeit product will work at least as well (and sometimes better than) the original.

2. The extent of counterfeiting in South Africa today (facts, figures and examples relevant to the South African Economy must be provided in this section)

Any relevant facts or figures from a published source such as:

- International Intellectual Property Alliance Report 2007– www.iipa.com
- Department of Trade and Industry (DTI)
- It is believed South Africa is becoming a haven for counterfeiting syndicates because of its growing economy and technological infrastructure. Counterfeiting is on the increase, especially the proliferation of the download-to-burn from the Internet CD and DVD business.
- Business software, movies and music seem to dominate the South African counterfeiting trade.

- South African trade in pirated business software grew from R35m in 2002 to R119m in 2006, pirated DVDs grew from R30m to R75m between 2002 and 2008, and pirate music grew from R3m to R8.5m between 2002 and 2005. Books have also become targets.
- The market for fake copies of popular books has grown from R1.4m in 2002 to R3m in 2006.
- One in five drugs available on the SA market was either counterfeit or stolen in 2004. The global average figure for counterfeit or stolen drugs is between 5 and 10 percent. Sales of drugs in South Africa total about R14.5 billion a year. R2 billion of this is estimated to be counterfeit.
- The DTI reports that South Africa lost more than R2bn between 2003 and 2005, and about R540m in the 12 months to March (2006) due to counterfeiters.
- Photocopy shops in and around university campuses are harming the market for educational and business publishers.

3. South African Law that deals with counterfeiting and the recourse available to right holders who feel their property rights have been violated. (Information is provided in the course pack. However, it would be useful for students to familiarise themselves with the actual legislation by obtaining a copy of the relevant Act.)

- The Counterfeit Goods Act (CGA)
- South African Copyright Act 98 of 1978
- Harmful Business Practices Act
- Films and Publications Act
- Copyright Act and Trade Marks Act.

Remedies in case of counterfeiting: Counterfeit Goods Act provides remedies to holder's copyright and trade mark (not holder's patent and design rights). Also civil remedies with regard to Copyright Act and Trade Marks Act (interdict, claim damages). [pp. 171-174].

Student's own substantiated view on the rights of Twentieth Century Fox in the given scenario.

4. The main debates/concerns surrounding South African counterfeiting law at present.

- SA Police are curtailed in their ability to effectively enforce CGA – 2006 court ruling by Senior Magistrate Wessels.
- Perception amongst the public that piracy is a victimless crime.
- Concern about the connection between counterfeiting and organised crime such as human trafficking, money laundering, tax evasion, and counterfeit bank notes
- Criminal court system in SA is overburdened – even when winning a case and being awarded costs, the chances of collecting from a defendant are slim.
- Judgments remain un-enforced and therefore and this serves as no deterrent at all.
- End-user piracy of business software is not a crime in SA.

5. **International law that deals with the counterfeiting of goods and South Africa's application/recognition of these laws. (Information is provided in the course pack but further reading is recommended.)**
- WIPO 'Internet' Treaties, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
6. **The effect of counterfeiting on companies whose property rights are violated.**
- Counterfeiting has a devastating effect on legitimate right holders, legitimate distributors, and retail businesses.
 - Local copyright owners are mobilising to take a stand against piracy/counterfeiting.
 - Legitimate distributors in SA report having to reduce employment levels, some rental outlets have reported year-on-year decreases in business in the region of 30%, and many rental outlets have actually closed.
 - Detrimental effects of illegal downloading on SA's domestic creative community (musicians, etc.)
7. **Sidewalk DVD vendors often claim that their DVDs are good quality and not fake – 'genuine movies shipped in from China'. This implies that they are parallel imports. Clearly indicate that you understand the difference between counterfeiting and parallel imports and what the South African government's present position is on parallel imports. Is the SA government's position in agreement with international law when it comes to parallel imports?**

Counterfeiting (piracy) is production of goods without the authority of the owner of an intellectual property right (e.g.: trade mark) in respect of goods which the counterfeit goods intimate or closely resemble. Illegally produced fake goods.

Parallel importation is illegal/unofficial importation/trade in genuine/legally produced goods without the permission of the holder of intellectual property right in goods who has full and exclusive rights to US patented/trademarked goods in SA.

Remedies in case of counterfeiting: Counterfeit Goods Act provides remedies to holder's copyright and trade mark (not holders patent and design rights). Also civil remedies with regard to Copyright Act and Trade Marks Act (interdict, claim damages). [pp 171-174].

Any valid example will be accepted for SA:
 Counterfeiting: DVDs, Music CDs, Cigarettes
 Parallel Imports: Nike Clothing

8. **Your own point of view on whether South Africa is winning the battle against counterfeiting. Are we doing enough? Do we need to do more? Explain.**
- CGA should be amended to clarify and simplify police procedures, ease

time limits, reinstate powers of arrest, and include complainant's right to submit evidence of economic damage for consideration in sentencing.

- Pass modern copyright legislation and join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. Try and bring SA law more into compliance with the TRIPS agreement.
- Ensure adequate protection of copyright material on the Internet.
- Increased public awareness concerning the detrimental effect of illegal downloading on SA's domestic creative community.
- Increased vigilance on our porous borders – SACU in particular and preventing the transshipment of pirated goods through SA territory to SACU.
- Training and technical assistance for law enforcement agencies (prosecutors, customs officials, police officers).

This is an exercise in exploring and thinking about counterfeiting in South Africa, what laws apply to it (nationally and internationally), and how successful we are in ensuring that intellectual property rights are protected in the South African economy.

This assignment is not intended to be a 20 page essay. The issues listed above can comfortably be explained and argued in a concise five page report.

Remember to acknowledge all sources of information at the end of your report. A simple listing of sources used can be given at the end on p. 6.

Hint - Sources of relevant information:

1. The International Intellectual Property Alliance's latest report.
2. Department of Trade and Industry statistics with regards to counterfeiters.
3. South African Federation Against Copyright Theft.
4. Various Press Releases – Example:
"South Africa becomes fertile ground for counterfeiters". *The Weekender*.
May 12 -13, 2007, p. 10.
5. National and international counterfeiting legislation.
6. <http://www.screendaily.com/south-africa-cracks-down-on-dvd-piracy/409812.article>
7. <http://www.havocscope.com/tag/movie-piracy/>