

This Tool Kit is prepared by S.S. Rana & Co. and seeks to explain the basic concepts of Counterfeiting and Piracy in India with a view to aid Police Officials in combating widespread counterfeiting and piracy.

Foreword

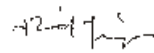


Retaining a nation's competitive edge rests on its ability to innovate as well as create, and maintain an environment which aims to nurture, protect and sustain innovation. Today India strives to achieve a conducive environment where enforcement of Intellectual Property Rights is given paramount importance.

In this regard, enforcement agencies have been actively working towards curbing the menace of counterfeiting and piracy in IP intensive industries. But due to the complexity and multi-faceted nature of these offences, there is a need among the enforcement agencies to have additional assistance in identifying and appropriately dealing with various IP infringement cases.

FICCI's Intellectual Property Rights Division is intensively involved with the issue pertaining to protection and enforcement of IP Rights, and the Federation is pleased to present the Intellectual Property Tool Kit for Police Officials. This Tool Kit will serve as a ready reckoner for the Police Officials while dealing with the menace of counterfeiting and piracy which is posing a serious threat to the nation's economy.

I would like to express my appreciation to the FICCI IPR Committee members for extending their valuable guidance towards the development of the Tool Kit. I also take this opportunity to acknowledge with much appreciation BSA | The Software Alliance for their initiative and guidance, and our knowledge partner, S.S. Rana & Co, who have played a pivotal role in the development of the Intellectual Property Tool Kit for Police Officials.



Dr. A. Didar Singh
Secretary General
FICCI



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GUIDE TO THE TOOLKIT

Who should use the Booklet?

The booklet may be used by any person as it provides a basic understanding to the concepts of counterfeiting and piracy and a useful insight to the challenges faced by the Police officials in enforcing Intellectual Property Rights.

The booklet has been designed to assist the Police officials which may be used as a practical guide when dealing with infringing goods. An attempt has been made to provide a ready reckoner for Police officials compiling all the relevant provisions of law, methodologies to detect counterfeit products and a checklist for the Police officials while enforcing Intellectual Property Rights with relevant statistics and data.

What is the scope of the Booklet?

Counterfeit is used both for forgeries of currency as well as the imitations of clothing, handbags, shoes, pharmaceuticals, aviation and automobile parts, watches, electronics, software, works of art, toys, movies etc. The booklet primarily focuses on Intellectual Property enforcement.

What is in the Booklet?

Chapter 1 provides an understanding to the concept of counterfeiting and piracy by illustrating different modes in which it takes place. It discusses its impact on various stakeholders and the role and specific challenges faced by the Police officials in dealing with the ever growing industry of counterfeiting/piracy.

Chapter 2 intends to cover the various methodologies to aid Police officials in differentiating the original product from its counterfeit.

Chapter 3 deals with the regulatory framework under the various Indian laws to enforce the Intellectual Property Rights of an individual with



special emphasis on the powers of Police officials relating to search and seizures of counterfeit/pirated products. The Chapter also highlights relevant landmark Judgments in this context.

In Chapter 4, an attempt has been made to provide the various steps to be taken by Police officials at the Police station, during the stage of investigation, search and seizure and post search and seizure while dealing with counterfeit/pirated and infringing products.

Chapter 1

Understanding Counterfeiting and Piracy

"My words and my ideas are my property, and I'll keep and protect them as surely as I do my stable of unicorns." - Jarod Kintz, 'This Book is Not for Sale'.

1.1 Introduction

The challenge of counterfeited and pirated goods has emerged as a global problem. With low barriers to the market entry and infiltration, no country is immune from the impact of counterfeiting and piracy and no single sector can be said to be an exception. Counterfeit goods, including medicines, auto and airplane parts, electrical components, toys, food and beverages and many others, can be dangerous and can potentially harm or even kill consumers. The massive infiltration of counterfeit and pirated goods drains \$1 trillion from the global economy and robs over 2.5 million jobs¹. Apart from the significant economic loss to the government in terms of sales tax, excise tax, income tax and customs duty, loss of jobs etc., these products are unsafe and pose risks to millions of individual consumers in terms of health and safety not to mention the evils like child labour, money laundering and even human trafficking which are associated with the counterfeit industry².

There is a demand for counterfeit products in the Fast Moving Consumer Goods (FMCGs) industry, as fake goods are far cheaper than the originals. Further people actively participate in software counterfeiting as well as the illegal piracy of movies and music. Due to the lack of awareness among the general public, less significance is given to intellectual property crimes as compared to other crimes. It is pertinent to note that

¹ International Chamber of Commerce World Business Organization, Counterfeiting and piracy undermine economic development available at <http://www.iccwbo.org/advocacy-codes-and-rules/bascap/>

² FICCI - Business Software Alliance, Intellectual Property Toolkit for Customs Officials, 2014

the Indian intellectual property rights statutes provides for both civil and criminal remedies against intellectual property crimes which is being discussed in various chapters of this booklet.

Intellectual Property (IP) forms a substantial part of the asset value of any business and plays a crucial role in the economy of a country, in the development of industries and of any human endeavor. The significance of IP has necessitated a legal framework to deal with recognition of IP as an economic and moral right and channelizing its proper enforcement. Concrete legislations have been enacted for the protection of various intellectual properties and their associated rights, including the Trademarks Act, 1999, Copyright Act, 1957, Patents Act, 1970 and Designs Act, 2000.

The current intellectual property laws of India have been amended from time to time to align them with the continuous developments in Intellectual Property rights at the International fora. They strongly comply with the international treaties, including TRIPS Agreement, Paris Convention and the Berne Convention. Even though India is not a signatory to the WIPO Copyright Treaty and Rome Convention, the Indian intellectual property legislations were drafted with due consideration to these treaties.

This booklet is a discussion on the problems of Intellectual Property crimes, specifically counterfeiting and piracy and effective measures to combat the same. Due to the advancements of cheaper and easily-accessible technology available to the wrongdoers, the problem of counterfeiting has become significantly rampant. As soon as a new technology is added for protection of the IP or to indicate the authenticity of a product, the counterfeiters learn to copy or circumvent it or otherwise fool the consumers into buying the cheap imitations made available by them in the market.

1.2 The Impact of Counterfeiting and Piracy across Different Stakeholders³

Government

- Loss of taxes (direct and indirect)
- Anti-counterfeiting and anti-smuggling measures such as police raids, customs seizure and mass public awareness campaigns
- Public welfare costs including monetary compensation and health care-related ones
- Legislative costs

Original right holder

- Loss of sale and profitability
- Loss of brand value
- Infringement of copyright
- Special advertising campaigns
- Increased packaging costs
- Reputational risk
- Consumer patronage

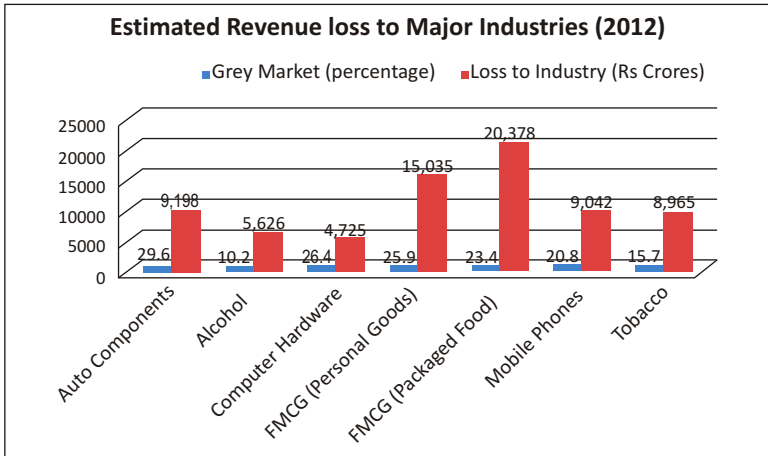
Economy

- Reduced GDP
- Increase in black money
- Increased criminal activity and terrorism
- Reduced employment and deteriorating working conditions
- Degradation of environment
- Reduced expenditure on research and development

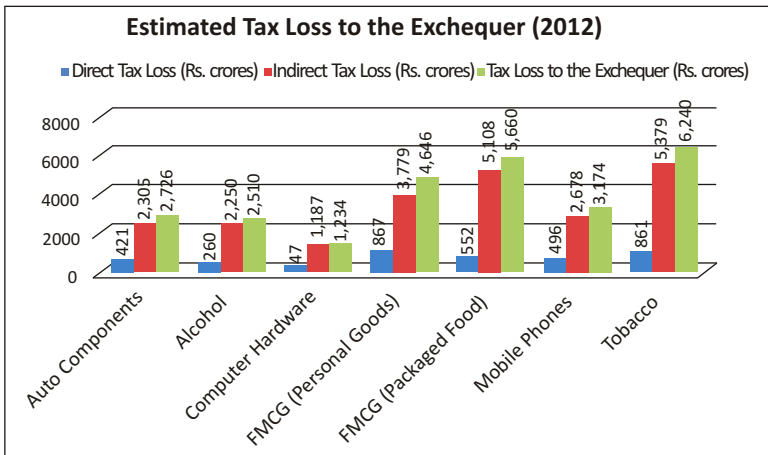
Consumers

- Defrauding of consumers-availability of poor quality goods leads to loss of money
- Health and safety concerns (e.g. medications, baby formula, electronic goods etc.)
- Lowers consumers' confidence in using the affected brand.

³ FICCI-CASCADE, 'Counterfeiting, piracy and smuggling: Growing threat to national security'



Graph 1.1: Estimated Revenue Loss to Industries (2012)



Source: FICCI CASCADE Report on Socio- Economic Impact of Counterfeiting, Smuggling and Tax Evasion in seven Key Indian Industry Sectors

Graph 1.2 Estimated Loss to the Exchequer (2012)

Fast Moving Consumer Goods (FMCGs) are the most counterfeited products in India with the value of counterfeits reaching USD 7.8 billion. The most pirated work is software with USD2.98 billion followed by video games at USD 129.9 million⁴.

⁴<http://www.havocscope.com/tag/india/>

1.3 Counterfeiting and Piracy- Meaning

It is simple yet challenging to define counterfeit/pirated goods. In India, Section 28 of the Indian Penal Code gives a general definition of counterfeit as follows 'A person is said to counterfeit who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.' Intellectual Property Laws in India do not define the Counterfeit Goods or Pirated Goods, though TRIPS agreement to which India is signatory defines *Counterfeit Trademark Goods*⁵ and Pirated Copyright Goods⁶.

In general parlance the term counterfeit is used in reference to trademark infringement and piracy for infringement of copyrights. In simple words counterfeit means to imitate something with the intention to practice deception. Piracy means making an unauthorized exact copy not a simple imitation of an item covered by an intellectual property right generally in the context of music, motion pictures, computer software etc.

A workable definition in the context of Intellectual Property Rights for Counterfeit/Pirated goods can be as follows "Illegal goods infringing upon genuine goods that are legally protected under Industrial Property Law i.e. Trademark, Design, Patent, Geographical Indication and Copyright Law."⁷

⁵ The definition of 'counterfeit Trademark goods' is provided under Article 51 of TRIPS Agreement as follows: "Counterfeit trademark goods shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation."

⁶ The definition of 'Pirated Copyright goods' has been provided in Article 51 of the TRIPS Agreement as follows: "Pirated copyright goods shall mean any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation."

⁷ Countermeasures to Counterfeiting Problems, Japan Patent Office, Asia-Pacific Industrial Property Center, JIII, 2007

1.4 Modes of Counterfeiting and Piracy

Keeping in mind the above facts, the discussion below covers the modes in which such counterfeiting occurs and technological measures available throughout the world to combat the same.

- **Pharmaceuticals**



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A medical product is considered as a counterfeit when a false representation in relation to its identity or source is made. This applies to the product, its container, or other packaging or labeling information. Counterfeiting can apply to both branded and generic products and these counterfeit products may include incorrect or wrong ingredients or without active ingredients or with incorrect amounts of active ingredients or with fake packaging and so on.⁹

⁸ Counterfeit drugs on display in the counterfeit museum in Paris.

⁹ World Health Organization; Counterfeit Medical Products; Report by the Secretariat; 2010 (63rd World Health Assembly).

- **Software**

The widespread practice of piracy has made it difficult for the copyright owners to enforce their IP rights. However, software companies (copyright owners) are now launching more and more lawsuits against major infringers.



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Some common types of software piracy include:

- Counterfeit software¹¹ : Illegal copying and distribution of commercial software on CD or DVD along with any accompanying manuals that the original legitimate software was sold with.
- OEM (*original equipment manufacturer*) unbundling¹² : A type of software piracy that occurs, when OEM-packaged software is separated from the hardware it originally came bundled with at the OEM or retail level of sale.
- Softlifting¹³ : A type of software piracy that occurs when users share their software with other users who are not authorized to have access by the *End-User License Agreement*.

¹⁰ <http://japandailynews.com/magazine-staff-arrested-for-selling-issues-with-dvd-copying-software-176785/>

¹¹ http://www.webopedia.com/TERM/C/counterfeit_software.html

¹² http://www.webopedia.com/TERM/O/OEM_unbundling.html

¹³ <http://www.webopedia.com/TERM/S/softlifting.html>

- d. Hard disk loading¹⁴ : It occurs when hardware dealers; brick-and-mortar or Internet vendors, install an unauthorized copy of commercial software onto a computer system. In many cases consumers will not receive any manuals or original CD of the software but the hardware dealer may charge for the illegal software in the total system purchase price.
- e. Corporate software piracy¹⁵ : It is a type of piracy where corporations under report the number of software installations acquired through volume purchase agreements.
- f. Internet software piracy¹⁶ : includes illegally obtained software through Internet channels, usually through peer-to-peer file sharing systems or downloaded from pirate/illegal web sites that make software available for download for free or in exchange for users who uploaded software.

- **Fast Moving Consumer goods (FMCG)**

Counterfeit goods have permeated the FMCG sectors with apparels, shoes, mobile phones, computers, cigarettes, watches, etc., beings some of the most common pirated goods.. These goods are manufactured without the required



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authorization and are made with inferior quality goods and do not guarantee the same quality as that of the original one.

¹⁴ http://www.webopedia.com/TERM/H/hard_disk_loading.html

¹⁵ http://www.webopedia.com/TERM/C/corporate_software_piracy.html

¹⁶ http://www.webopedia.com/TERM/I/Internet_software_piracy.html

¹⁷ *Fake cigarettes on display by French Customs.*

In India, FMCG sector loses 1.7 Billion INR of revenue annually due to counterfeiting and piracy. Government from FMCG sector is losing about 6 Billion INR by way of unpaid taxes and duties from this sector alone.¹⁸

1.5 The manner in which counterfeiting is affected

Stages	Type
Manufacture/Production	<p>Authorized Packaging for Fake Products</p> <p>Authorized packaging facilities that sell off genuine packaging materials to the counterfeiters who package their fake goods in genuine packaging. In such cases it is even more difficult to identify the fakes on the basis of packaging material alone. Such cases have to be referred to labs for final verifications.</p>
	<p>Recycling and Remarketing</p> <p>Recycling and remarketing is a process by which the used components are removed from package and is repackaged and remarked. These components are then sold as new product in the open market. These parts may be non-functioning or not performing as per manufacturer's specifications and raises major reliability concerns. The reuse rubbished materials may be used by counterfeiters.</p>
Distribution	<p>Out of Specification</p> <p>Defective piece is sold instead of being destroyed. This mode of counterfeiting is very common in apparels, shoes, bags etc. A lot of times due to minute defect in stitching, finishing etc. of the product, the same is rejected by the company. These products instead of being destroyed re-enter the distribution channel.</p>

¹⁸ "Countering Counterfeits", Dr. G. Sridhar, available at <http://dspace.iimk.ac.in/bitstream/2259/313/1/>.

Stages	Type
	<p>Break in Supply Chain</p> <p>Due to the expanding overseas markets, supply chains are becoming more and more fragmented due to which there is an increased risk of break in the chain of distributors.</p>
Other Methods	<p>Misrepresentation or Description of goods</p> <p>Contraband-Concealment of goods for avoidance of customs controls</p> <p>Re-labelling/ Reclassification- Camouflage of high-tariff products as low-tariff ones to reduce tax liability or change the name of the country of origin to take advantage of favourable economic relations with a country</p> <p>Short-landing transit Goods- Grey channel leakage of transit goods or bonded imports not meant for consumption in the domestic market</p> <p>Falsification-Tampering with documents relating to goods</p> <p>Mixing fake products with genuine products</p> <p>Non mention of brand name and adding counterfeit trademark i.e. logos once it crosses the border</p>

The booklet intends to cover the main principles and link between owner's rights, counterfeit products, economic perspectives and intellectual property protection. It aims to provide a ready reference to the Police officials to enable them to effectively tackle piracy and counterfeit products, discusses technological solutions and the need for anti-counterfeiting policy, industry initiatives and consumer awareness.

Chapter 2

Distinguishing between fake and original goods

2.1 Common Methods of Differentiating the fake and original products

The initial measures taken by governments and industries were to create awareness of such counterfeited/pirated goods or services amongst public. Various industries through accreditation marks, water marks, and codes, tracking devices, etc., track the counterfeiters and infringers.

There has been a great deal of debate and discussion regarding the same on a global level between countries, through WIPO and other UN agencies.

To distinguish between the original and fake products with a naked eye is increasingly becoming difficult as counterfeiters are using computerized and digital machines to write prices, manufacturing dates and batch numbers on the packets. In view of the development in technology, it is becoming inevitable for all stakeholders to install and use new technologies to detect counterfeit products.

Moreover, if some general rules¹⁹ regarding spotting of fake products are kept in mind, it can always be handy for the Police officials to distinguish between the original and the fake products.

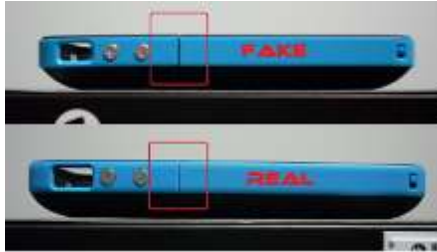
General Tests

- a. **Examine the quality of the product.** The quality of infringing goods is often lower than that of the originals.

¹⁹ 'How to spot counterfeit products' available at <http://www.wikihow.com>

- b. **Be wary of unusually low prices.** Although not all fakes are sold at a lower price than the originals, a suspiciously low price is still a good indicator. If it looks too good to be true, then it probably is.
- c. **Inspect the packaging carefully.** The packaging of infringing goods is often dodgy and does not indicate the address of the manufacturer and the importer. Furthermore, many companies mark their products with holograms, control numbers and/or other security measures. These help in ascertaining the source of the product and determine if it is original.
- d. **Check if logos and trademarks are displayed correctly.** At first glance, an infringing product may appear identical to the genuine one. On a closer look, however, one may be able to identify certain differences. For example, logos may be badly reproduced and trademarks deliberately or accidentally misspelled, or change in colour combinations, etc.
- e. **When buying goods over the Internet, do not hesitate to ask precise questions to the sellers or auctioneers** in order to get more information about the supply chain and to make sure that the goods come from a legal source.
- f. **Buy medicines from safe, reputable sources.** If the medicines are bought online it is advisable to be wary of websites offering to supply 'prescription-only medicines' without a prescription. One risks being supplied with medicines that are not effective or safe.
- g. **Check the instructions manual.** Normally it should be in your language and should not contain grammar or spelling mistakes.
- h. **When in doubt, contact or check out the website of the manufacturer of the genuine product.** Many right holders have information on their websites to help customers detect fakes, including pictures and descriptions of the originals.

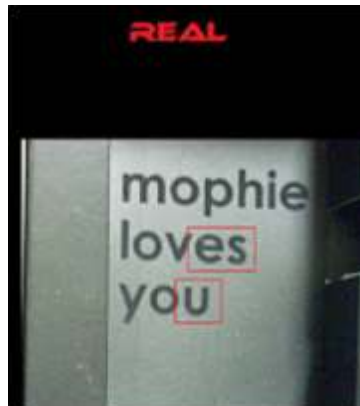
The fake product has huge gap and fitment is not good



The fine printing on fake product could not be read.



The fonts of the fake product is different.



(Source: <http://spot-fake-products.blogspot.sg/2011/11/how-to-spot-fake-mophie-juice-pack-plus.html>)

2.2 Technological Tools for Authorities:

There have been many recent developments that help tracking down the source of counterfeit goods, or find if a good was copied / imitated. Some of the technologies which are used by the authorities and corporations in India and abroad are discussed below:

- **Anti-erasing Ink:** This kind of ink can be used to mark expiration dates on labels of medicinal or other consumable products to stop counterfeiters from selling expired goods with changed dates.
- **Plastic Identifiers:** Non-removable nano-particles can be added to plastic resins providing a unique chemical signature of the manufacturer that can be verified using scanners.
- **Quantum Dot:** This micro-resonant structure allows a band of specific colors to transmit, when quantum dot and spectral structures are used together the bar codes are almost impossible to recreate.
- **Holograms:** This is not limited to personal ID cards; they can be embedded on bar-codes, price labels and logos. Work with the help of 2D and 3D stickers and dot matrix printers.

The above mentioned technologies are inclusive of few of the technologies in terms of anti-counterfeit technologies.²⁰

2.3 Other Technologies

- **RFID (Radio Frequency Identification)**²¹ : These are radio transmitters attached to the packaging of the good or sometimes even to the active ingredients of drugs and emit an electronic product code. With these, the individual packs, the ingredients,

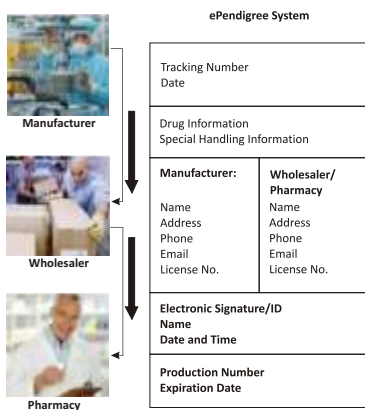
²⁰ <http://www.azom.com/article.aspx?ArticleID=10252>

²¹ <http://www.slideshare.net/smodilinkedin/multiple-strategies-and-technologies-to-combat-counterfeit-drugs-8180213>

expiry, and location of the product can be tracked throughout the custody chain. It is also considered a better option as compared to barcodes. Used by BAJAJ HINDUSTAN LTD., SIEMENS LTD., ICICI, CITIBANK, SONATA, WIPRO INFO. TECH., CIPLA LTD²², Infosys, Samsung, Philips, GE²³ to name a few.



- **ePedigree²⁴**: The pedigree system of the drug industry is a paper trail that shows where a product originated and where it is meant to reach at the end. The ePedigree system is an online way for doing that same which requires electronic signatures and cannot be faked as easy as hand written records.



²² <http://www.essencomputers.com/customers.htm>

²³ <http://www.vitaran.in/clientele.htm>

²⁴ <http://www.slideshare.net/smodilinkedin/multiple-strategies-and-technologies-to-combat-counterfeit-drugs-8180213>

- **Optically Variable devices (OVD)**²⁵ : This point covers more than one type of technology, from inks that respond to light, holograms, optically variable thin films, retro-reflective materials and scrambled images.
- **Kodak's Traceless**²⁶ : It is considered an infallible system that detects if a product is a fake. It also has a fail-safe that doesn't allow for reverse engineering. Used in electronics by Sony and Intel.²⁷

- **SMS**²⁸ : The text message technology has reached a new height, when customers receive a product bought online or delivered to them; they receive a code, which is sent to the manufacturer for authentication of the products' origin. Used in pharmaceuticals by the NAFDAC²⁹ and Airtel.³⁰

²⁵ *Ibid.*

²⁶ http://graphics.kodak.com/KodakGCG/uploadedFiles/Products/Security_and_Authentication/TRACELESS_System/Tab_Contents/KODA_TRACELESS_Interphex_Handout.pdf

²⁷ http://graphics.kodak.com/US/en/About_GCG/News/2013/Kodak_Helps_Brand_Owners_Defend_Supply_Chains_from_Product_Diversion_and_Counterfeiting/default.htm

²⁸ <http://www.supplychainbrain.com/content/industry-verticals/pharmaceuticalbio-tech/single-article-page/article/utilizing-technology-to-combat-counterfeit-and-substandard-drugs-in-the-supply-chain/>

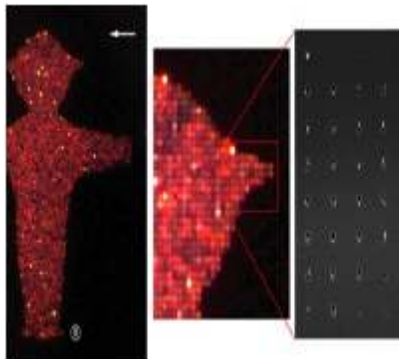
²⁹ *Anti-counterfeit Technologies: A Pharmaceutical Industry Perspective, as published on 9th October, 2012, on www.scipharm.com*

³⁰ <http://www.sproxil.com/blog/?p=753>



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- **Spectroscopy³²** :This technology is used in the supply chain to accurately identify chemicals without direct contact with the substance, through sealed glass, plastic bottles, bags and blister packs at ports of inspection, loading docks, points of sale and manufacturing plants.
- **IBM's nano rods³³** : IBM has created a technology which allows a nano sized pattern which is randomly generated for each product and can't be replicated even by the creator, hence creating an anti-counterfeit pattern on the product to prove authenticity.



³¹ [Ubergizmo.com](http://www.ubergizmo.com)

³² <http://www.supplychainbrain.com/content/industry-verticals/pharmaceuticalbio-tech/single-article-page/article/utilizing-technology-to-combat-counterfeit-and-substandard-drugs-in-the-supply-chain/>

³³ <http://www.research.ibm.com/articles/nano-counterfeit.shtml>

- **Smart cards**³⁴ : This plastic card incorporates a computer chip which provides the means to write into or read information from the card with various degrees of security.



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- **Electronic encryption**³⁶ : This causes a video to become unviewable when recorded as there is disturbance signal encoded into the video to confuse video recorders.
- **Monoclonal antibodies**³⁷ : These chemical markers are added in minute concentrations to pharmaceutical or liquor products that can be detected using a kit with specific antibodies.
- **Photochromic/thermochromic inks**³⁸ : These types of inks are light/heat reactive and can be used on the packaging of products to check authenticity.

³⁴ <http://www.oecd.org/sti/ind/2090589.pdf>

³⁵ *Sourcesecurity.com*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*



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- **Microscopic tags**⁴⁰ : These kinds of tags were originally used to find and trace explosives to their place of origin, however as they are virtually indestructible given their size they are good method to track products.

Conclusion

The above discussed technological measures to combat and prevent counterfeiting/piracy, are being used by many industries, however there remains substantial scope of improvement in India in the level of awareness of these problems and use of measures to prevent them.

IP holders/manufacturers should facilitate the Police officials with requisite support system to effectively tackle the issue of counterfeiting and piracy. Synchronized operation and mutual assistance between the industry and government authorities is the need of the hour.

³⁹ www.schreiner-medipharma.com

⁴⁰ *Ibid.*

Chapter 3

Current Laws applicable on Counterfeiting and Piracy, Penalties and Remedies thereof alongwith Landmark Judgments

Current Laws applicable on Counterfeiting and Piracy, Penalties and Remedies along with Landmark Judgments

For the sake of convenience, an attempt has been made to provide brief overview of all the laws for the time being in force, which are relevant for the Police officials to tackle the issue of counterfeiting/ piracy. This part also provides an insight into the powers of Police officers under various statutes to combat piracy and counterfeiting.

Legal measures are provided under various statutes in India to deal with counterfeit/ pirated products.

1. The Trade Marks Act, 1999
2. The Copyright Act, 1957
3. The Patents Act, 1970
4. The Designs Act, 2000
5. The Geographical Indications of Goods (Registration and Protection) Act, 1999
6. The Information Technology Act, 2000
7. The Indian Penal Code, 1860

3.1 Trade Marks Act, 1999

A trademark can be a word, logo, name, pattern of colours, slogans, three-dimensional shapes etc. which distinguishes the goods and services of one trader from its competitors.⁴¹ The main objective of a trademark is to indicate the source of origin of the goods or services. The Trade Marks Act, 1999 (hereinafter referred as the TM Act) along with the Trade Mark Rules, 2002 are the primary legislation in India which deals with law relating to trademarks. When a person has registered a trademark he has the exclusive right to use the trademark in relation to the goods or services in respect of which the trademark is registered.⁴²

Registration of a trademark under the TM Act grants a bundle of rights to the registered proprietor and if anyone violates such rights it is called infringement of trademark. The TM Act further provides that a trademark is infringed, when a mark is used in trade by an unauthorised person which is:

- a) identical or deceptively similar to the registered trademark; and
- b) used in respect of goods or services, which are identical or similar to the goods or services for which the trademark is registered.⁴³

⁴¹ Section 2(1)(zb) of the Trade Marks Act, 1999 defined 'trademark' as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours

⁴² Section 28 of the Trade Marks Act, 1999

⁴³ Section 29 of the Trade Marks Act, 1999

Provisions relating to Counterfeit Goods

The TM Act in India provides for civil and criminal remedies against misrepresentation, false representation, infringement and passing off by the way of fine or imprisonment or both under Sections 102 to 107.

The TM Act does not expressly define the term 'counterfeiting'. However, the TM Act has defined the offences of 'falsifying a trademark' and 'falsely applying a trademark' which can be said to be overlapping with counterfeiting of trademarks.

S.No.	Offences	Meaning
1.	Falsify a Trademark	<p>A person shall be deemed to falsify a trademark, who:</p> <ul style="list-style-type: none"> (a) Makes the trademark or a deceptively similar mark, without the permission or authorisation of owner of the trademark; or (b) Falsifies any genuine trademark, whether by <i>alteration, addition, effacement or otherwise</i>.⁴⁴
2.	Falsely applying a Trademark	<p>A person shall be deemed to be falsely applying a trademark who, without the consent of the proprietor of the trademark:</p> <ul style="list-style-type: none"> (a) <i>Applies</i> such trademark or a deceptively similar mark to goods or services or any package containing goods; or (b) <i>Uses any package</i> bearing a mark which is identical with or deceptively similar to the trademark of such proprietor, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the proprietor of the trademark.⁴⁵

⁴⁴ Section 102 of the Trade Marks Act, 1999

⁴⁵ *Ibid*

Penalty for Offences relating to Counterfeit Products

S.No.	Offence	Penalty
1.	Falsify a Trademark, Falsely applying a Trademark or applying False trade description	Imprisonment for a term which shall not be less than six months but which may extend to <i>three years</i> and with fine which shall not be less than Rs. 50,000 (<i>Fifty thousand</i>) but which may extend to Rs. 2,00,000 (<i>Two lakh</i>) ⁴⁶
2.	Intentionally selling goods or providing services to which false trademark or false trade description is applied	Same as above ⁴⁷
3.	Subsequent conviction for the above offences	Imprisonment for a term which shall not be less than one year but which may extend to <i>three years</i> and with fine which shall not be less than Rs. 1,00,000/- (<i>Rupees One Lakh</i>) but which may extend to Rs. 2,00,000/- (<i>Rupees Two Lakh</i>) ⁴⁸

Cognizance of certain offences and powers of Police officer for search and seizure

It is pertinent to note that the offence of falsifying a trademark, falsely applying a trademarks and selling such goods and services are cognizable in nature⁴⁹

Under the TM Act, Section 115(4) provides that any police officer not below the rank of **Deputy Superintendent of Police** or equivalent, may, if he is satisfied that falsification of a trademark has been, is being, or is

⁴⁶ Section 103 of the Trade Marks Act, 1999

⁴⁷ Section 104 of the Trade Marks Act, 1999

⁴⁸ Section 105 of the Trade Marks Act, 1999

⁴⁹ Section 115(3) of the Trade Marks Act, 1999

*likely to be, committed, search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence, wherever found, and all the articles so seized shall, as soon as practicable, be produced before a Judicial Magistrate of the first class or Metropolitan Magistrate, as the case may be: Provided that the Police officer, before making any search and seizure, **shall obtain the opinion of the Registrar** on facts involved in the offence relating to trademark and shall abide by the opinion so obtained.*

Sanyo Electric Company through its Constituted Attorney Pankaj Gupta v. State

(Decided on August 30, 2010)

Order under challenge: The Additional Chief Metropolitan Magistrate (ACMM) directed that the warrant of search issued by the Court under Section 93 of the Code of Criminal Procedure, 1973 shall not be executed till the Police officer obtains opinion and shall abide by the opinion of the Registrar of Trade Marks under the proviso to Section 115(4) of the Trade Marks Act, 1999. ACMM has held that compliance with the proviso to Section 115(4) is mandatory before any search warrant is executed for offences under the TM Act.

Contentions: The contention of the Petitioner is that the proviso to Section 115(4) of the TM Act is not applicable to search warrants which are issued by the Courts under Section 93 of the Code. Section 115(4) of the TM Act authorizes a Police officer to conduct searches without a warrant and the proviso to Section 115(4) of the TM Act applies only to the said Sub-section and not a search warrant which is issued by a Court under Section 93 of the Code.

Decision: The Court held that Section 115(4) of the TM Act does not override and obliterate the power of the court to issue a search

warrant under Section 93 of the Code. The two provisions operate independently as one relates to searches pursuant to warrants issued by the courts and the other relates to searches by Police officers without a Court warrant. The pre-requisite or pre-conditions for a search by a Police officer without warrant under the proviso to Section 115(4) of the TM Act cannot be read into and made a pre-condition before a search warrant issued by a court under Section 93 of the Code is executed. Otherwise, a judicial order of the court issuing warrant of search will be a paper order and unexecutable unless the Registrar gives a positive opinion. The legislative intent behind empowering a Police officer to conduct a search only pursuant to an opinion of the Registrar under Section 115(4) is clearly to protect the right to privacy and to ensure that the power of search and seizure under Section 115(4) is not misused/abused. A judicial order serves the same purpose and protects against misuse of the power of search.

The said proviso will apply to searches made by Police officers without warrant issued by the court i.e., all searches under Section 115(4) of the TM Act including Sections 102, 165 and 166 of the Code, except searches on a warrant issued by a court under Section 93 of the Code.

The above interpretation does not mean that the court, before issuing a warrant under Section 93 of the Code, cannot seek opinion of the Registrar. In a given case, the court may seek opinion of the Registrar of Trade Marks before it decides whether or not to issue a warrant under Section 93 of the Code. There may be best right forward cases of counterfeiting, where opinion is not necessary; but there may be other cases where the Court may feel the necessity to have an opinion or clarification of the Registrar before a search warrant is issued. Opinion of the Registrar of Trade Marks has to be given due weight age and consideration but will not be binding on the court.

Hindustan Lever Ltd. & Anr v. Satish Kumar

(Decided on March 5, 2012)

The present suit was filed for permanent injunction restraining the infringement of trademarks, copyright, passing off, mesne profits, damages and delivery up, etc. against the Defendant alleging that he was engaged in counterfeiting of fast moving consumer goods such as shampoos and creams bearing the marks of the Plaintiff.

The Plaintiff Hindustan Unilever Limited's brands were used in India for a variety of goods including Sunsilk, Clinic Plus for shampoos; Fair & Lovely, Ponds/Ponds Dream Flower, Lakme, Elle 18, Vaseline, Rexona, Aviance and Denim for cosmetics and toiletries.

The Plaintiff alleged that the Defendant was a counterfeiter of various FMCG brands and was engaged in manufacturing and selling spurious personal care products. The Plaintiff had conducted criminal raids with the assistance of the Police at the premises of the Defendant, on several dates. The Plaintiff alleged that:

- a) When Police raids were conducted at the premises of the Defendant pursuant to FIR it led to seizure of large quantities of counterfeited goods bearing the trademarks such as- Fair & Lovely, Sunsilk and Clinic/Clinic Plus/Clinic etc.
- b) It was also stated that the product packaging in which the counterfeit goods were recovered from the Defendant is a complete reproduction of the artwork in the Plaintiffs packaging. In some instances, the Defendant had used the discarded bottles/containers of the products of the Plaintiffs.
- c) Despite the Police raids, the Defendant refused to give up the unlawful activities. Therefore, the Plaintiffs sought an order of

temporary injunction by this Court and the same was allowed ex parte.

The Hon'ble Delhi High Court granted a decree of permanent injunction and held the Defendant liable inter alia to pay punitive damages to the tune of 10 lakhs. The court held that one of the reasons for granting punitive damages is that as despite of raids by the Police from time to time at the premises of the Defendant, whereby, huge amounts of counterfeiting products were recovered, the Defendant still continued to counterfeit the products of the Plaintiffs. It showed that the Defendant has no respect for any law or any fear and his only motive is to sell sub-standard products to public at large which are used by them in day to day life.

3.2 Copyright Act, 1957

In India, the laws relating to copyrights are mainly governed by the Copyright Act, 1957 (hereinafter referred as the Copyright Act) and the Copyright Rules, 2013. Copyright generally exists in following kind of works;

- a) original literary, dramatic, musical and artistic works;
- b) cinematograph films; and
- c) sound recordings.⁵⁰

Copyright Infringement

Copyright in a work is infringed when any person without licence from the owner of the copyright or the Registrar of Copyright, does anything,

⁵⁰ Section 13 of the Copyright Act, 1957

the exclusive right to do is conferred upon the owner of the copyright.⁵¹ Anyone who allows, uses, sells, shares, or otherwise exploits items protected under the Act without necessary authorization is liable under the Sections 63 to 69 of the Act.

⁵¹ Section 51 of the Copyright Act, 1957 provides that copyright in a work shall be deemed to be infringed:

- a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under the Copyright Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under the Act-
 - (i) does anything, the exclusive right to do which is by the Copyright Act conferred upon the owner of the copyright, or
 - (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or
- b) when any person-
 - (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
 - (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright,
 - (iii) or by way of trade exhibits in public, or
 - (iv) imports into India, any infringing copies of the work.

However, this provision shall not to the import of one copy of any work for the private and domestic use of the importer.

Offences under the Copyright Act

S.No.	Offence	Penalty
1.	Knowingly infringes or abets infringement of copyright work	Imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than Rs. 50,000/- (Rupees Fifty Thousand only) but which may extend to Rs. 2,00,000 (Rupees Two Lakhs only) ⁵²
2.	Subsequent Conviction for the above offence	Imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than Rs. 1,00,000 (Rupees One Lakh only) but which may extend to Rs 2,00,000 (Rupees Two Lakhs only) ⁵³
3.	Knowing use of infringing copy of computer programme ⁵⁴	Imprisonment for a term which shall not be less than seven days but which may extend to three years and with fine which shall not be less than Rs. 1,00,000 (Rupees One Lakh only) but which may extend to Rs. 2,00,000 (Rupees Two Lakhs only)
4.	Possession of plates for purpose of making infringing copies ⁵⁵	Imprisonment which may extend to two years and shall also be liable to fine
5.	Circumventing effective technological measure applied for the purpose of protecting any of the rights conferred under this Act, with the intention of infringing such rights ⁵⁶	Imprisonment which may extend to two years and shall also be liable to fine

⁵² Section 63 of the Copyright Act, 1957

⁵³ Section 63A of the Copyright Act, 1957

⁵⁴ Section 63B of the Copyright Act, 1957

⁵⁵ Section 65 of the Copyright Act, 1957

⁵⁶ Section 65A of the Copyright Act, 1957

S.No.	Offence	Penalty
6.	Removal, alteration etc. of Rights Management Information ⁵⁷	Imprisonment which may extend to two years and shall also be liable to fine

Microsoft Corporation & Anr v. Mr. Dhiren Gopal & Ors

(Decided on December 15, 2009)

In the present case Plaintiff had prayed for an ex-parte injunction to be issued to restrain Defendant, their agents, servants and all other persons acting on their behalf from using pirated/unlicensed software programmes of the Plaintiff in any manner to protect the copyright of the Plaintiff. This was accompanied with the application for interim injunction and an application for the appointment of a Local Commissioner to visit the offices of Defendants and to seize the hard discs of the computers, compact discs and other storage/replicating media installed at Defendants offices with the help of technical expert of the Plaintiff and to prepare an audit report/license summaries and to determine if they contained pirated, counterfeit unlicensed version and to seize and seal the computers.

The Hon'ble Delhi High Court held as follows:

"The technology has advanced to an extent and a mirror image of the hard disc can be obtained and preserved. The mirror images so obtained would contain all the data being used on computer systems. The appropriate method, therefore, in all such cases where the Court considers appointment of Local Commissioner necessary and seizing of infringing material necessary is a direction for preparation of mirror images of the hard disc and get such mirror images sealed on the spot so that the Plaintiff are not able to use the

⁵⁷ Section 65B of the Copyright Act, 1957

database of the Defendant either for blackmailing the Defendant or for any other purpose and the sealed mirror images are produced in the Court and inspected in the Court by experts of the Plaintiff to find out if there was an infringement or not and if the Plaintiff finds an infringement, he should file an affidavit after viewing the mirror images to that extent and the suit should be continued further, otherwise the suit should be dismissed and the Defendant should be suitably compensated by the Plaintiff for making false allegations, by way of awarding cost to the Defendant."

The Court ordered the investigation to take place and allowed the appointment of the local commissioner. It further ordered that the Defendant in case were found using pirated software, would cease and desist from using pirated software forthwith.

Power of Police to seize infringing copies: Under the Copyright Act, power of seizure has been given to a **Police officer not below the rank of Sub-Inspector**. The grounds of belief and reasons for doing so are to be recorded in writing by the concerned Police officer.

The relevant provision under the Copyright Act is Section 64 which provides that any Police officer of the rank of a sub-inspector or above, may, if he is satisfied that an offence under section 63 in respect of the infringement of copyright in any work has been, is being, or is likely to be, committed, seize without warrant, all copies of the work, and all plates used for the purpose of making infringing copies of the work, wherever found, and all copies and plates so seized shall, as soon as practicable, be produced before a Magistrate.⁵⁸

⁵⁸ Section 64(1) of the Copyright Act, 1957

Girish Gandhi v. Union of India

(Decided on September 27, 1996)

The petitioner was carrying on the business of keeping library of video cassettes, TVs and VCRs, and lending them to customers for viewing at their homes.

The petitioner had filed a writ petition to declare Section 64 of the Copyright Act as ultra-vires on the ground that it gives arbitrary powers to the Police to conduct search and seize any material from the shop without a warrant (even though, no overt act has been taken or initiated against the petitioner).

The Court held that powers given to the Police officers under Section 64 of the Act are not arbitrary. The Police cannot act unless it has some type of information on which he is satisfied, and the satisfaction must be objective. The Police officer has to report to the Magistrate and if the aggrieved person makes an application to the Magistrate, must return the material, if it is proved that no copyright infringement is involved.

The aggrieved person is free to resort to the remedies available in the appropriate courts. Section 64 must be read with Sections 51, 52, 52 (a) and 64 (2), which also contain the guidelines and safeguards which prescribe the procedure for seizing of the copies by the Police officer.

Section 64 is not invalid and does not hit the Article 14 or any other Articles of the Constitution of India. It is also not arbitrary for the reason that guidelines and safeguards are provided under Sections 51, 52 and 52A and Section 64(2) of the Copyright Act, coupled with the fact that it is expected of the Police officer that he would not act arbitrarily and his satisfaction shall always be based on some material or knowledge and he shall only proceed for action under Section 64 in a bonafide manner and not for making a roving inquiry.

Event and Entertainment Management Association v. Union of India

(Decided on March 2, 2011)

In this case the constitutionality of a Circular dated March 4, 2008 issued by the Commissioner of Police, Delhi was challenged. The Circular emphasized upon all concerned that whenever any complaint is received from M/s. Super Cassettes Industries Ltd., (SCIL) in respect of violation of the provisions of Copyright Act, 1957, the same may be attended to and Police assistance may be provided as we are doing in cases of Phonographic Performance Ltd., and Indian Performance Right Society Ltd.

The Hon'ble Delhi High Court struck the Circular down, as unconstitutional. It was held that:-

"To the extent the impugned circular/notification privileges the complaints from SCIL over other complaints from owners of copyright it is unsustainable in law for the simple reason that there has to be equal protection of the law in terms of Article 14 of the Constitution. The Police are not expected to act differently depending on who the complainant is. All complaints under the Act require the same seriousness of response and the promptitude with which the Police will take action, Likewise, the caution that the Police is required to exercise by making a preliminary inquiry and satisfying itself that prima facie there is an infringement of copyright will be no different as regards the complaints or information received under the Act."

The Hon'ble Court had also made remarks on the manner in which complaints under Section 64 of the Copyright Act are dealt with. The same is discussed herein below:

- That Police, merely on the receipt of the information or a complaint from the owner of a copyright about the infringement

of the copyrighted work, is not expected to straightway affect seizure.

- Section 52 of the Copyright Act deals with 'exceptions to infringement' and enables the person against whom such complaint is made to show that one or more of the circumstances outlined in that provision exists and that therefore there is no infringement. During the preliminary inquiry by the Police, if such a defence is taken by the person against whom the complaint is made it will be incumbent on the Police to prima facie be satisfied that such defence is untenable before proceeding further with the seizure.
- The Court further observed that the Police Officers must now both:
 - ❖ Prima facie be satisfied that there is an infringement of copyright in the complaint is made, and
 - ❖ Conduct a preliminary inquiry during which, if the defence of fair dealing is raised, the Police officer must be satisfied that such defence is untenable.

3.3 The Patents Act, 1970

A Patent is an exclusive right to use, make sell, import an invention granted to the inventor for a limited period by the Government. The Patent System in India is governed by the Patents Act, 1970 and the Patents Rules, 2003.

Tenure and rights granted by patent

Patent is granted for twenty years from the date of filing of the application for the patent.⁵⁹ When a patent granted under the Patents Act, patentee have an exclusive right to prevent third parties from making, using, offering for sale, selling or importing patented products or product obtained directly from the patented process.⁶⁰

The Patent Act protects the patentee's invention from false representation and infringement by way of civil remedies under Section 120 of the Act which provides that *if any person falsely represents that any article sold by him is patented in India or is subject of an application for a patent in India, he shall be punishable with fine which may extend to one lakh rupees*. There are no penal provisions available to the rights holders in patent infringement cases.

3.4. The Designs Act, 2000

The Industrial designs refer to that part of a commercial product, which is concerned with the ornamental or aesthetic features of the product and not with its utility. The Designs Act, 2000 and the Designs Rules, 2001 were enacted to protect new or original design applied on products manufactured by industrial process and to ensure that the artisan, creator, originator of a new or novel design are not deprived of their bona fide reward.

An industrial design is registered for a period of fifteen years (a design is initially registered for a period of ten years which can further be

⁵⁹ Section 53 of the Patents Act, 1970

⁶⁰ Section 48 of the Patents Act, 1970

extended for five years)⁶¹ and after the registration of an industrial design it shall not be lawful for any person to apply or cause to be applied the design or obvious or fraudulent imitation thereof, to any article in any class of articles in which the design is registered.⁶² *Section 22 of the Designs Act deals with piracy of registered design and provides that any person who acts in contravention shall be liable for every contravention to pay to the registered proprietor of the design a sum not exceeding twenty-five thousand rupees recoverable as a contract debt.* There are no penal provisions available to the rights holders in design infringement cases.

3.5 The Geographical Indications of Goods (Registration and Protection) Act, 1999

Geographical indication is a name or sign used on certain products, which is used to identify a good as originating in the territory or a region or locality in a territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. At present 192 geographical indications⁶³ are registered in India and most prominent among them are Darjeeling Tea, Tequila, Kancheepuram, Silk, Scotch Whisky, Tirupathi Laddu, Bikaneri Bhujia Champagne etc. Geographical Indications of Goods (Registration and Protection) Act, 1999 governs the laws relating to Geographical Indication. The Act defines the offences and provides penalties for falsifying and falsely applying geographical indications (under Section 38, 39 of the Geographical Indications of Goods Act) which are similar in nature to the corresponding offences of Trademark.

Powers of Police officer for search and seizure

⁶¹ See Section 11 of the Designs Act, 2002

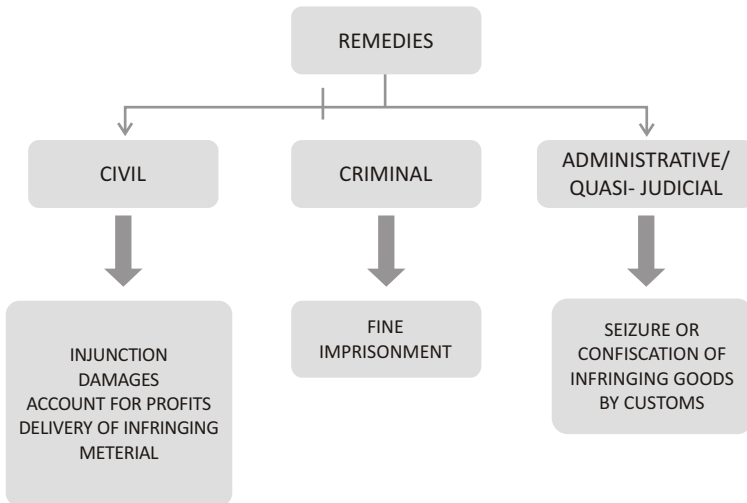
⁶² See Section 22 of the Designs Act, 2002

⁶³ As per the records of the Office of CGPDTM available at <http://ipindiaseservices.gov.in/GirPublic/DetailsGIR.aspx>

Under the Geographical Indications Act, section 50 of the Act provides powers to Police officer not below the rank of the **Deputy Superintendent of Police** if he is satisfied that falsification of geographical indication has been, is being or is likely to be committed to conduct search and seizure without warrant. Provided Police officer before making any search and seizure shall obtain the opinion of the Registrar and shall abide by the opinion of the so obtained.

Remedies in case of infringement of Intellectual Property Rights

The following diagram illustrates the various remedies available with a person in a suit for infringement of an intellectual property right.



Civil Remedies

In general, the civil remedies granted in a suit for infringement of Intellectual Property Right are as follows:

a) Injunction

Injunction is a Court order by which a person is required to perform or is restrained from performing, a particular act. In relation to suits for infringement or for passing off the Court may pass injunction directing other party to refrain from using the trademark in question.

b) Damages or Accounts for profits

Damages means the compensation for the injury suffered. In relation to suits for infringement or for passing off Courts grant damages to the Plaintiff to compensate for the injury suffered on account of unauthorised use of the trademark. Account of profit means the actual amount of profit made by the opposite party due to unauthorised use of the trademark in question.

c) Delivery-Up

In relation to suits for infringement or for passing off Courts can order for the delivery- up of infringing labels and marks for destruction or erasure.

d) Anton Pillar Orders

On the lines of Anton Pillar Orders of English and English derived legal systems, in appropriate cases, the Court has inherent jurisdiction on an application by the plaintiff to require the defendant to permit the plaintiff to enter his premises and take inspection of relevant documents and articles and take copies thereof or remove them for safe custody. The necessity for such an order arises when there is grave danger of relevant documents and infringing articles being removed or destroyed, so that the ends of justice will be defeated.

e) John Doe Orders

John Doe orders are ex parte remedy sought in anticipation of an infringing act against unknown/nameless defendants whose identity is not known to the plaintiff at the time when it is issued. These orders are issued by the Court to search and seize against unknown defendants.

3.6 The Information Technology Act, 2000

The main objective of the Information Technology Act, 2000 (hereinafter referred as IT Act) along with allied rules is to provide legal recognition for transactions carried out by means of electronic data inter-change and other means of electronic communications. The IT Act defines electronic record to mean data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

Penalty for damage to computer, computer system, etc.

If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network commits any one of the following acts then he shall be liable to pay damages by way of compensation not exceeding INR 1,00,00,000/- (Rupees One Crore only) to the person so affected by such act, namely;

- a) accesses or secures access to such computer, computer system or computer network;
- b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium; introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
- c) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other

- programmes residing in such computer, computer system or computer network;
- d) disrupts or causes disruption of any computer, computer system or computer network;
 - e) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;
 - f) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of the IT Act, rules or regulations made thereunder;
 - g) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network.⁶⁶

Tampering with computer source documents and penalty thereof

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to Rs. 2,00,000/- (Rupees Two Lakhs), or with both.⁶⁷

Hacking with computer system and penalty thereof

Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking with computer system and shall be punished with imprisonment up to

⁶⁶ Section 43 of the Information Technology Act, 2000

⁶⁷ Section 65 of the Information Technology Act, 2000

⁶⁸ Section 66 of the Information Technology Act, 2000

three years, or with fine which may extend up to Rs. 2,00,000/- (Rupees Two Lakhs), or with both.⁶⁸

Publishing of information which is obscene in electronic form and penalty thereof

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to Rs. 1,00,000/- (Rupees One Lakh only) and in the event of a second or subsequent conviction with imprisonment for a term which may extend to ten years and also with fine which may extend to Rs. 2,00,000/- (Rupees Two Lakhs only).⁶⁹

Powers of the Police

Sections 76 and 80 of the Information Technology Act provides for significant provisions dealing with the powers of the Police.

Section 76 deals with Confiscation and provides as follows:

"Any computer, computer system, floppies, compact disks, tape drives or any other accessories related thereto, which is in contravention to any of the provision of this Act, rules, orders or regulations made there under, shall be liable to confiscation".

Section 80 deals with the power of Police officer and other officers to enter, search, etc. and provides as follows:

*Any Police officer, **not below the rank of a Deputy Superintendent of Police**, or any authorized officer of the Central Government or a State Government may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected or having committed or of committing or of being about to commit any offence under this Act.*

⁶⁹ Section 53 of the Patents Act, 1970

3.7 Indian Penal Code, 1860

Various provisions of the Indian Penal Code, 1860 relating to the offences of counterfeiting/piracy includes the following:

- **Section 28** of the Indian Penal Code gives a general definition of **counterfeit** -*'A person is said to counterfeit who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.'*
- **Cheating under Section 415** of the Indian Penal Code- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

E.g.: 'A', by putting a **counterfeit mark** on an article, intentionally deceives 'Z' into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces 'Z' to buy and pay for the article, 'A' cheats.

- **Section 486** deals with **Selling goods marked with a counterfeit property mark** *which provides that who ever sells, or exposes, or has in possession for sale, any goods or things with a counterfeit property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both, unless he proves-*
 - (a) *that, having taken all reasonable precautions against committing an offence against this section, he had at the time*

- of the commission of the alleged offence no reason to suspect the genuineness of the mark, and*
- (b) *that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or*
- (c) *that otherwise he had acted innocently.*

3.8 Criminal Measures under International Treaties

1. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

TRIPS is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property regulation as applied to nationals of other WTO Members.

Article 61 of the TRIPS Agreement provides that parties signatory to the Agreement must mandatorily provide for criminal remedies and penalties to be applied in case of wilful trademark counterfeiting or copyright piracy on a commercial scale.

Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent consistently with the level of penalties applied for crimes of a corresponding gravity. Remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.

Signatory members may provide for criminal procedures and penalties to be applied on other cases of infringement of intellectual property rights, in particular when committed wilfully and on a commercial scale.

⁷⁰ http://europa.eu/documents/comm/green_papers/pdf/com98_569_en.pdf

2. Berne Convention

Berne Convention for the Protection of Literary and Artistic Works was entered into force in 1886. The Berne Convention requires its signatories to recognize the copyright of works of authors from other signatory countries (known as members of the Berne Union) in the same way as it recognizes the copyright of its own nationals. India made declaration of continued application in 1928.

Article 16 of the Berne Convention provides that infringing copies are liable for seizure in any country of the Union where the work enjoys legal protection. This provision also applies to reproductions coming from a country where the work is not protected or has ceased to be protected. Such seizures shall take place in accordance with the legislation of each country.

3. Anti-Counterfeiting Trade Agreement

The **Anti-Counterfeiting Trade Agreement (ACTA)** is a multinational treaty for the purpose of establishing international standards for intellectual property rights enforcement. The agreement aims to establish an international legal framework for targeting counterfeit goods, generic medicines and copyright infringement on the Internet, and would create a new governing body outside existing forums, such as the World Trade Organization, the World Intellectual Property Organization, or the United Nations.

The agreement was signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States. In 2012, Mexico, the European Union and 22 countries which are member states of the European Union signed as well. One signatory (Japan) has ratified (formally approved) the agreement, which would come into force in countries that ratified it after ratification by six countries.

It is to be noted that the Agreement has generated a lot of controversy as several interest groups argue that the Agreement

- d) The French Health Products Safety Agency mandates the use of 2D Data Matrix Marking instead of a 13 character Classification of Institutional Program (CIP) with batch number and expiry date and Simplexlinear barcode.
- e) The Nigerian Government has worked towards the grant of International Organization of Standardization ("ISO") accreditation for two National Agency for Food and Drug Administration and Control ("NAFDAC") labs in Lagos, and has entered into a Memorandum of Understanding with Sierra Leonean to boost information sharing and drug regulations throughout the West African region.⁷¹
- f) AIVP (Automated Identification of Vaccines Projects Advisory Task Group) of Canada recommends 2D barcode on primary packaging, 2D or linear barcode on secondary packaging.⁷²
- g) The National Defense Authorization Act (USA), 2012 amendment deals with counterfeited products being sold to the military supply chain. The Defense Logistics Agency has funded the development of the anti-counterfeit technology by Applied DNA Sciences Inc. (APDN) using DNA signatures. The Signature DNA products are used to track and verify microchips and other products in the military supply chain.⁷³

To conclude, it may be said that strict enforcement laws and stringent action by the appropriate authorities is necessary to eliminate counterfeit products. In addition to the regulatory framework, the cooperation from the right holders or owners of such products is equally

⁷¹ [Shttp://www.nrguardiannews.com/index.php/features/science/138974-international-accreditation-of-nafdac-s-labs-boosts-who-pre-qualification-drive](http://www.nrguardiannews.com/index.php/features/science/138974-international-accreditation-of-nafdac-s-labs-boosts-who-pre-qualification-drive)

⁷² Anti-counterfeit Technologies: A Pharmaceutical Industry Perspective, as published on 9th October, 2012, on www.scipharm.at

⁷³ <http://www.crystalra.com/blog/bid/87957/APDN-s-Anti-Counterfeiting-Technology-Addresses-New-Federal-Legislation>



important. Resistance on the supply side alone is inadequate to control or even curb the counterfeit trade. The demand side of the market, that comprises customers, also needs to be addressed to effectively deal with the problem of counterfeiting.

Chapter 4

Checklist for Police Officials

Check List for Police officials

4.1 Dealing with Counterfeiting/ Piracy, Infringement of Intellectual Property Rights

I. At the Police Station

- a. Offences under various Intellectual Property statutes (Copyright, Trademarks, Patents, Designs, Geographical Indication etc.) are both cognizable as well as non-cognizable (as mentioned above).

The offence of infringement of copyright or other rights conferred under section 63 of the Act is cognizable; similarly the offence of falsifying a trademark and falsely applying a trademark are also cognizable. Thus in such cases (cognizable offences) it is incumbent for the Police functionaries to entertain the complaint received, collected, found or ascertained and register it as FIR.

- b. The complaint can be filed by the intellectual property right holder himself or its representative. In case the complaint is filed by intellectual property right holder's representative, a duly stamped letter of authorization by the intellectual property right owner or by his duly authorized agent can be entertained for registration of FIR.
- c. The registration certificate and other evidences regarding the intellectual property rights can be obtained during the investigation stage once the FIR is registered.

II. During the course of Investigation

- a. It is important to appreciate that Copyright Registration is not mandatory; it is only optional and does not confer any additional right, nor is any work protected less merely because it has not been registered. Further, under Section 55(2), where in the case of a literary, dramatic or musical work or artistic work, a cinematograph film or sound recording, a name purporting to be that of the author or publisher appears on copies of the published work, there is a presumption that such person is the author or publisher, as the case may be, unless the contrary is proved. In the case of trademarks, however, registration grants additional rights to the trademark holder. If Investigating officer wishes, he can ascertain the status and veracity of Copyright registration from the online database made available on www.copyright.gov.in⁷⁴ or for Trademarks from the Trade Mark Registry www.ipindia.nic.in. If required this can further be verified by contacting the Registrar of Copyrights and/or Trade Mark Registry.⁷⁵
- b. **Notarized / Certified Copy:** Notarized or certified copies of intellectual property License/Authorization letter/ Assignment deed can be also obtained from the complainant during the course of investigation before submission of the charge in the Court (if required).
- c. The Copyright Act provides a special requirement under Section 52A, **in case of Video film/ Sound Recording** where in the Publisher of a video film or sound recording has been mandated to display on the video film/sound recording, copy of the Certificate granted by the Board of Film Certification, the name and address of the person who made the film/sound

⁷⁴ Status of a Copyright Application can be checked online through Diary no./ Application no.

⁷⁵ In case of International Copyright , registration certificates from any Berne Convention Country should be accepted by the police authorities as a valid certificate for Copyright ownership.

recording, the name and address of the owner of the copyright in such work etc. Further, contravention of the said provision has been made punishable under Section 68A of the Act.

Hence in such cases the Police officers should prima facie verify if the owner of the Copyright has complied with the requirements under Section 52 A of the Copyright Act. Certified copies of certificates issued by Central Board of Film Certification be accepted as declaration/ proof of ownership of Films/motion pictures.

- d. The rules related to **search and seizures as provided under Code of Criminal Procedure**⁷⁶ be followed and the below mentioned points additionally be taken into consideration while dealing with copyright and trademark cases:

⁷⁶ *General Provisions relating to searches under Code of Civil Procedure, 1973:*

Section 100 : Persons in charge of closed place to allow search

- (1) *Whenever any place liable to search or inspection under this Chapter (i.e Chapter 7 of CrPC) is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.*
- (2) *If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of section 47.*
- (3) *Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.*
- (4) *Before making a search under this Chapter (i.e Chapter 7 of CrPC), the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.*
- (5) *The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.*

❖ Powers of Police officer to seize infringing copies:

Under the Copyright Act, power of seizure has been given to a Police officer not below the rank of Sub-Inspector. The grounds of belief and reasons for doing so be recorded in writing by the concerned Police officer. (Section 64 of the Copyright Act)

Under the Trade Marks Act, Police officers those with the rank of Deputy Superintendent of Police and above have the power to carry out search and seizure operations for infringing goods if they are satisfied that a falsification of a trademark has been, is being, or is likely to be committed. The Police officer, before making any search and seizure, shall obtain the opinion of the Registrar of Trade Marks on facts involved in the offence relating to trademark and shall abide by the opinion. (Section 115 of the Trade Marks Act)

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- (6) *The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search. and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.*
 - (7) *When any person is searched under sub- section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.*
 - (8) *Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860).*

Section 102 :Power of police officer to seize certain property.

- (1) *Any police officer, may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. *
- (2) *Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.*
- (3) *Every police officer acting under sub- section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.*

- Illustrative List of articles which may be seized, confiscated in Trademark / Copyright infringement
- Police Personnel to seize all the counterfeiting or infringing products available in the premises such as products with infringing trademark, false trade description, being imitations of clothing, handbags, shoes, watches, electronics, movies etc.
- In cases pertaining to software piracy, the Police officer to demand the End User License Agreement, License Key, Software serial numbers etc., from the user at the time of search and seizure.
- The Police Personnel to obtain/seize all the bills/receipts/ membership card (Video Libraries Association Membership Card) /register/book maintained at the video-audio shop.
- The Police officer may seize the stock/purchase register or records maintained at the shop/entity and record the number of infringing copies available at the said premises. All the properties or infringing products to be seized including the infringing copies, plates, broadcasting equipments and other accessories involved in manufacturing/producing the infringing copies such as laptop or hard disk of machine on which Video/Audio was found to be installed or duplicated.
- The Police officer to collect the landline telephone bill, electricity bill, Municipal or Panchayat door number and other documents which show the ownership/ possession of the premises as that of the accused. A copy of the driving license, Election identity card, Ration Card, Pan Card, Passport or any other photo identity proof of the accused issued by the Central Government or State Government authority may also be obtained.

- The Police officer may obtain copies of the licenses issued by the Municipality/Corporation to operate the shop/entity. Any rent deed/leave and license agreement may also be obtained from the premises.
- ❖ All necessary precautions should be taken by the Police officer at the time of raid so that the raid/search does not fail, due to interference in the Police work by unethical and anti-social elements of the area or others having nexus with the infringer. The Police raid should be well planned, and the need of reinforcement of Police during the raid should be given due consideration before Police party move out to organize raid.⁷⁷
- ❖ It is advisable that trained experts accompany the complainant at the time of raid/search to identify and differentiate the original and the fake products thereby facilitating Police action. The training certificate from the intellectual property right holder should be available with these experts.
- ❖ The Investigating officer should also try to ascertain other premises where the accused may have stored infringing goods and if necessary such premises should also be raided and searched.
- ❖ All proofs which connect the raided premises to the accused also should be collected as evidence.⁷⁸

⁷⁷ Whenever searches are being organized in a company or a large entity, monitoring of the progress by officers in the company should be done and a stand-by reserve team along with a vehicle should also be kept to move immediately to any other premises if a necessity of searching of other premise instantly arises.

⁷⁸ The police officer should also collect the landline telephone bill, electricity bill, Municipal or Panchayat door number and other documents which shows the ownership/possession of the premises as that of the accused at the time of investigation and before filing of Charge Sheet.

The Concerned police officer should also obtain copies of the licenses issued by the Municipality/Corporation to operate the shop/entity. Any rent deed/lease and license agreement should also be obtained from the premises before filing of the Charge Sheet. The statements of the owner of the premises shall also be recorded under section 161 of Code of Criminal Procedure 1973.

- ❖ It should be also ensured that intellectual property right holder has not given any rights/license or any other rights incidental or connected thereto to the alleged infringer/accused.
- ❖ The concerned officer should take all possible efforts to ascertain and obtain the evidences/physical clues/proofs available at the premises during the time of raids/investigation which would support the prosecution at the stage of trial.⁷⁹
- ❖ As provided under the Code of Criminal Procedure, the list of seized articles along with a copy of the panchnama duly signed by the search witnesses together with all other annexures shall be given to the accused/owner of the premises where such search or seizure has been conducted. A list of seized articles should also be furnished to the accused under Section 165 of Code of Criminal Procedure, 1973.

III. Post Search/seizure of premises

- a. **Source of Infringement:** During the investigation the Police officers should try to identify and trace out the source of infringement and others if any involved in the nexus so as to take legal action against all the infringers involved in the chain. Police officer concerned should try to link up the case through interrogation so as to reach the manufacturer and other associates infringers in this nexus
- b. **Preparing Charge Sheet:** The Investigation officer may consult the Public Prosecutor or Additional Public Prosecutor while preparing the charge sheet for his approval. Inputs of rights owner as to the rights asserted, titled documents. License agreements etc., shall also be secured.

⁷⁹ *In cases pertaining to software piracy, the police officer should collect the End User License Agreement, License Key, Software serial numbers etc., from the user at the time of search and seizure.*

c. Other Related Statutes for Copyright Infringement/Piracy:

The investigating officer shall also pay due attention to the following special statutes in addition to Code of Criminal Procedure 1973 while framing the charge sheet:

- i. Various Provisions of the Indian Penal Code, 1860 relating to the offences under Trade Mark Act which includes Section 420 (Cheating), Section 486 (Selling goods marked with a counterfeit property mark) etc.,
- ii. Provisions of Information Technology Act, 2000
- iii. Provisions of the Cable Television Networks (Regulation) Act, 1995
- iv. Shop and Establishment act of the respective State Government like the Delhi Shop and Establishment act, 1954.
- v. Regulations dealing with exhibition of films on Televisions like the Punjab Exhibition of Films on Television Screen through Video Cassette Players (regulation) rules, 1989 and Tamil Nadu Exhibition of Films on Television Screen through Video Cassette Recorders (Regulation) Act, 1984.

For instance, Section 10 of the Tamil Nadu Exhibition of Films on Television Screen through Video Cassette Recorders (Regulation) Act, 1984 which reads as:

"No person licensed under this Act to give an exhibition on television screen through video cassette recorder or through multi-system operation or through the cable television network as the case may be, shall exhibit or permit to be exhibited any film without a letter of consent from the person who is the first owner of the copyright of the cinematography film under Section 17 of the Copyright Act, 1957 and in case such Copyright has been assigned under Section 18 of the said Act , from the assignee of such Copyright.

- vi. Any other Act/New Statute/Amendments/ Rules/Delegated Legislation/ Guidelines which shall come into force in this regard from time to time should also be considered.

4.2 Conclusion

The above discussed chapters disclose the impact of counterfeiting and piracy as major IP Crimes on our Economy. The irony remains that these crimes are not treated at par with other crimes enshrined under Indian Penal Code. The owner of the IPR suffers from loss of livelihood, reputation and goodwill when an IP is infringed and counterfeit products enter the market. An IP crime is as grave a crime as a theft or robbery etc. Companies that have incurred the R&D costs, production, marketing and transit charges are losing out on their well-deserved income due to counterfeited or pirated goods being available in the market.

As discussed in the previous chapters, these crimes are not merely associated with economic rights alone, but also with respect to basic human rights to have access to efficient and original products, particularly pharmaceuticals which otherwise would cost the lives of the citizens. Creating awareness about the rights of people on their intellectual properties and the need to enforce their individual rights would indeed collectively contribute to the growth of the industry leading to the advancement of the economy.

It is believed that this toolkit could aid and assist appropriate authorities established under law, including the Police officials to deal with these crimes so that the implementation of the law pertaining to this subject matter is carried out in true spirit. It is also suggested that existing policies should be reviewed and new administrative and legislative framework be introduced from time to time so as to ensure fair returns to the right holders, to safeguard the interests of customers. Further for robust enforcement regime, it is imperative that appropriate IP infrastructure be developed so as to curtail counterfeiting and transaction of pirated goods.



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About S.S. Rana & Co.

S. S Rana & Co., established in 1989 is one of India's leading Intellectual Property firm with specialization in Trademarks, Patents, Copyright, Designs, Domain Names, IP Licensing, IP Audit, Searches, Annuities, Customs, Geographical Indications, Enforcement and Litigation. It is one of the very few IPR firms that is registered as “Advocate on Record” with the Hon'ble Supreme Court of India that enables it to represent right from the lower Courts to the Supreme Court of India.

The firm has a dynamic team comprising of qualified and experienced lawyers, associates, patent agents, patent engineers and patent experts from disparate fields like Information Technology, Biotechnology, Chemistry, Business Administration, Pharmaceuticals and Applied Science.

The firm has been assisting both national and multinational companies in strategizing, protecting, enforcing and monetizing their IP Rights in India as well as internationally. With associates in over 100 countries, the firm is able to promptly handle IP filings not just in India, but worldwide.

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About FICCI

Established in 1927, FICCI is one of the largest and oldest apex business organizations in India. FICCI's history is closely interwoven with India's struggle for independence, industrialization and emergence as one of the most rapidly growing global economies. FICCI has contributed to this historical process by encouraging debate, articulating the private sector's views and influencing policy.

A not-for-profit organization, FICCI is the voice of India's business and industry.

FICCI draws its membership from the corporate sector, both private and public, including MNCs; FICCI enjoys direct and indirect membership of over 2,50,000 companies from various regional chambers of commerce and through its 70 industry association.

FICCI provides a platform for sector specific consensus building and networking and is the first port of call for Indian industry and the international business community.

Our Vision

To be the thought leader for industry, its voice for policy change and its guardian for effective implementation.

Our Mission

To carry forward our initiatives in support of rapid, inclusive and sustainable growth that encompasses health, education, livelihood, governance and skill development.

To enhance the efficiency and global competitiveness of the Indian industry and to expand business opportunities both in domestic and foreign markets through a range of specialized services and global linkages.

