

**Intellectual property right protection in South Africa  
compared to other developing countries with particular  
reference to the replacement parts market.**

By

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**Confidentiality Clause**

To whom it may concern

Re: Confidentiality Clause

Due to the opinions expressed by some of the participants in the research of this dissertation it would be appreciated if the contents remain confidential and not be circulated for a period of five (5) years.

Yours sincerely

I.A. McCabe

**DECLARATION**

This research has not been previously accepted for any degree and is not being currently submitted in candidature for any degree.

Signed:.....

Date :.....22-3-2005.....116012

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It is far too seldom in life that you have the opportunity to realize how much other people mean to you. One often goes through life taking family, friends and colleagues for granted. Eventually the time comes when one realizes, how much these people have assisted you in your day to day life. No matter how insignificant the assistance may have seemed at the time, there comes a day when you look back and say “I couldn’t have done it without you”.

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## **Abstract**

When one purchases an item, whether it is food, appliance, pharmaceutical, or automotive related, one has certain expectations concerning the item. When these expectations are not met, one seeks certain recourse against the manufacturer concerned. Imagine the consumer's confusion when he is told by the manufacturer that they are not responsible for the expectations not being met as the item was not made by them but instead is a "grey" or counterfeit product.

The average consumer is not aware that South Africa, as well as most other countries around the world has a major problem regarding "grey" or counterfeit product entering the market. This practice is an infringement of the intellectual property rights of the copyright owner. It is illegal, and like all illegal activities there is no control regarding quality, so the consumer is not aware of the risks faced in purchasing from such sources.

This dissertation seeks to answer the key research question which is: How do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market. And how can these levels of protection be improved. This will be done by explaining what intellectual property rights are, what they mean, and why they should be protected. I also discuss some arguments for and against the protection of intellectual property rights. I will discuss some of the organizations that protect intellectual property rights, as well as some of the implications of the lack of protection.

The key research question in this dissertation is how the level of intellectual property right protection in South Africa compares to other developing nations. In order to help answering this key question, I will discuss six basic questions:

1. Is pressure being exerted by developed nations in order to improve levels of intellectual property right protection?
2. What are the general levels of intellectual property law enforcement?
3. What resources are available for enforcement of intellectual property rights?
4. How do the people perceive intellectual property crime?
5. How "user friendly" is the intellectual property rights protection system?
6. What are the levels of involvement of organized crime in intellectual property rights infringements?

In closing I will provide some recommendations as to how South Africa could easily and economically move away from being seen as a developing nation from an intellectual property perspective, to being seen as a first world country.

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## **Chapter One: Introduction**

### **1.1 Introduction**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

“A fundamental shift is occurring in the world economy. We are moving rapidly away from a world where national economies were fairly self contained entities, isolated from each other by barriers to cross border trade and investment. This isolation was caused by distance, time zones, language, differences in government regulation, culture and business systems. We are currently moving to a world where the barriers to cross border trade and investment are tumbling. Perceived distance is shrinking due to advances in transportation and telecommunications technology. Material culture is appearing to look the same the world over, and national economies are merging into an interdependent global economic system. This process is commonly referred to as globalization”.

Source: Hill, Charles W.L (2000) *International Business: Competing in the global marketplace*. Fourth edition United States: McGraw Hill

In order to properly answer the research question for this dissertation it is necessary to begin by explaining exactly what is meant by the terms intellectual property and intellectual property rights.

From ancient times and the earliest tools that man devised, such as the wheel, that harnessing of electricity or the internal combustion engine, it has been the inventiveness of the world's creators that has enabled the world to advance to today's levels of technology. Countries with innovative local industry have always had laws to protect and promote innovation. These laws generally protect four types of intangible property: patents, trademarks, copyrights and trade secrets, which collectively are known as intellectual property.

”Intellectual property is information and original expression that derives its intrinsic value from creative ideas. It is also information that has commercial value”

Source: Unites States Department of State International Information Program (2004)  
[Online] Available from: <http://usinfo.state.gov/products/pubs/intelprp/> [Accessed 11 June 2004]

Intellectual property has many of the same characteristics as real or personal property. Intellectual property is an asset that can be bought, sold, licensed, exchanged or given away in much the same way as any other form of property. This in turn gives the intellectual property right holder the right to prevent unauthorized use of his/her property, in much the same way as this might apply to a piece of personal property like a car or house. The biggest difference between intellectual property and any other kind of property is that intellectual property is intangible. I.e. It cannot be identified by its own physical parameters must therefore be expressed in some discernable way in order to be protectable.

The four main types of intellectual property, patents, trademarks, copyrights and trade secrets are protected on a national basis by each individual country. In years gone by this was considered to be sufficient, but due to internationalization and especially the increases in international trade, there is a need to expand this. Because each individual country is different, the scope of the protection, as well as the requirements for obtaining protection varies. Even though there are many similarities between the laws of different countries, laws only comprise one part of a national system of intellectual property protection. The effectiveness of the protection in any country is determined by the effectiveness of the institutions administering the system and the means available for the enforcement of protection. This is particularly relevant within the South African perspective, and I will in chapter three illustrate some comparisons between South Africa and other developing nations. This relates back to the key research question: How do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

## **1.2 Why protect intellectual property rights?**

Intellectual property rights protection can be simply termed as a contract between society as a whole and the individual or organization responsible for the invention or innovation. Under the terms of this contract the inventor, or organization, is given exclusive rights to prevent others using, making or selling the invention or innovation without prior authorization for a fixed period of time. In return for this exclusivity the inventor or organization must publicly disclose the details of the invention or innovation to the public.

The current international policy aimed at protecting intellectual property rights is based on a desire to promote a diverse and competitive marketplace. This in turn provides inventors and innovators with enforceable property rights to their creations. This makes it possible for them to recoup the investment that they made in the creative process, and provides encouragement to devote their time, effort and money to developing new works, products or services. This is of particular importance in developing countries, as this can increase international trade and therefore improve the economy of the country concerned.

In 1999 alone the United States pharmaceutical industry spent an estimated U.S. \$ 24 Billion on research and development in the drug field. They claim that this was only made possible due to an effective intellectual property protection system. “What is the point of spending millions of dollars researching and developing a new drug if someone else can copy it as soon as it is approved?” Source: Juma C., (date not known). *Intellectual Property Rights and Globalization. Implications for developing countries*. Harvard University press.

The strong and effective enforcement of intellectual property rights in developing countries is crucial. Thieves, pirates and counterfeiters respect neither intellectual property rights nor do they pay the proper taxes or customs duties. The strong and effective enforcement of intellectual property rights is the cornerstone on which an attractive investment climate is built, and will produce long term economic benefits to the country involved whether they are developing or not. The effective enforcement of intellectual property rights can:

- ✚ Stimulate innovation by providing an environment where innovation is rewarded and protected. If this is encouraged in the developing countries there will be less of a need to import innovations from the more developed countries. In fact this will create the opportunity for export to the developed countries.
- ✚ Encourage the development of lower cost methods of production and distribution of existing products. This in turn will improve the economy of the developing country by making them more competitive with the developed countries.
- ✚ Invite the introduction of new, safe and effective products and services.
- ✚ Encourage the transfer of technology. Developed countries will be more eager to share technology with a country that has well developed intellectual property right protection.
- ✚ Create jobs both in the primary as well as supporting industries throughout the economy. This is of particular importance in the developing countries economies.
- ✚ Create a better prepared and trained workforce through on the job training associated with the transfer of technology.
- ✚ Increase the amount of new capital that can be generated for investment in economic development. Developed countries are more likely to invest in developing countries that protect intellectual property as the likelihood of their technology being stolen or copied is reduced.
- ✚ Create advances that can contribute to the level of technology throughout the world.

Source: European Union Dialogue with Business Intellectual Property site (2004) [Online]. Available from: <http://europa.eu.int/business/en/topics/ipr/index.html/> [Accessed 5 June2004]

Intellectual property can be divided into three main categories. These can be defined as follows:

- ✚ Industrial property.
- ✚ Artistic or literary property.
- ✚ Sui Generis property.

### **1.2.1 Industrial property**

Industrial property can be divided into the following categories:

- 📌 Patents.
- 📌 Trademarks.
- 📌 Industrial designs.
- 📌 Geographical indications.
- 📌 Trade secrets.

#### **1.2.1.1 Patents**

“A patent is an exclusive right awarded to an inventor to prevent others from making, selling, distributing, importing or using their invention, without license or authorization, for a fixed period of time. In return, society requires that the patent applicant disclose the invention in a manner that enables others to put it into practice. This increases the body of knowledge available for further research.

Source: Website of Oppedahl & Larson LLP Practitioners of Intellectual property Law (2003) [Online] Available from: <http://www.patents.com/patents.htm#whatis> [Accessed 5 June 2004]

#### **1.2.1.2 Industrial Designs**

Industrial designs protect the aesthetic aspects i.e. shape, texture, pattern or colour of an object, rather than the technical features.

#### **1.2.1.3 Trademarks**

Trademarks provide exclusive rights to use distinctive signs, such as symbols, colours, letters, shapes or names to identify the producer of a product, and protect its associated reputation. In order to be eligible for protection a mark must be distinctive of the proprietor so as to identify the proprietor's goods or services. The main purpose of a trademark is to prevent customers from being misled or deceived.



#### **1.2.1.4 Geographical Indications**

Geographical Indications identify the specific geographical origin of a product, and the associated qualities, reputation or other characteristics. They usually consist of the name of the place of origin. E.g. Sherry, Port, Champagne or Madeira wine

#### **1.2.1.5 Trade Secrets**

Trade secrets consist of commercially valuable information about production methods, business plans, clientele, databases etc. They are protected as long as they remain secret by laws which prevent acquisition by commercially unfair means and unauthorized disclosure.

Source: Website of Oppedahl & Larson LLP Practitioners of Intellectual Property Law (2003) [Online] Available from: <http://www.patents.com/patents.htm#whatis/> [Accessed 5 June 2004]

### **1.2.2 Artistic and Literary Property**

#### **1.2.2.1 Copyright**

Copyright grants exclusive rights to the creators of original literary, scientific and artistic works. Copyright only prevents copying, not independent derivation. Copyright protection begins, without formalities, with the creation of the work, and lasts (as a general rule) for the life of the creator plus 50 years. It prevents unauthorized reproduction, public performance, recording, broadcasting, translation, or adaptation, and allows the collection of royalties for authorized use. Computer programs are protected by copyrights, as software source and code have been defined as a literary expression.

Source: Business Network Services (1998) [Online]. Available from: <http://www.whatiscopyright.org/> [Accessed 14 June 2004]

#### **1.2.2.2 Sui Generis systems**

Integrated Computer Circuits: This is a specific Sui Generis form of protection for the design of integrated computer circuits. As the inventive step is often minimal and originality is the only requirement, the minimum period of protection is 10 years.

#### **1.2.2.3 Plant Breeders' Rights**

Plant breeders' rights are granted to breeders of new, distinct, uniform and stable plant varieties. They normally offer protection for at least fifteen years. Most countries have exceptions for farmers to save and replant seeds, and for the use of protected materials for further breeding.





#### **1.2.2.4 Database Protection**

The EU has adopted legislation to provide Sui Generis protection in respect of databases, preventing unauthorized use of data compilations, even if non-original. Exclusive rights to extract or utilize all or a substantial part of the contents of the protected database are granted.

However, the three most important intellectual property rights in the context of this dissertation are patents, trademarks and designs.

### **1.3 Organizations that protect Intellectual Property Rights**

There are several international organizations that protect intellectual property rights. However for the purposes of this dissertation I am only going to discuss what I consider to be the most important. These are:

-  World Trade Organization (W.T.O.)
-  World Intellectual Property organization (W.I.P.O.)
-  World Customs organization (W.C.O.)
-  The International Anti-counterfeiting Coalition (I.A.C.C)

#### **1.3.1 World Trade Organization**

The World Trade Organization was established on January 1<sup>st</sup> 1995, and since then has tried to oversee the global rules of government policy towards international trade. The World Trade Organization is the only international body that deals with the rules of trade between nations. As of April this year the World Trade Organization had a membership of 147 countries with applications pending for another 29 countries. The World trade Organization has its headquarters in Geneva.






Source: The World Trade Organization (1995) [Online]. Available from: [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm) [Accessed 11 June 2004]

The overriding purpose of the World Trade Organization is to assist in making international trade flow as freely as possible, with the minimum of side effects.

With the establishment of the World Trade Organization came the first efforts to bring in any form of international agreement that would require all countries' to honor other countries' intellectual property rights. The essence of the agreement was to attack the widespread practice of copying (pirating) innovative firms' products without obtaining, and paying for, a license to use their innovations.

Source: Thomas A. Pugel, Peter H. Lindert (2001). *International Economics*, Irwin McGraw-Hill, eleventh edition, pg 139.

As part of the negotiations and convention that established the World Trade Organization, the Agreement on Trade Related Aspects of Intellectual Property Rights (T.R.I.P.S) was concluded later in 1995. The introduction of T.R.I.P.S. was an attempt by the World Trade Organization to narrow the gaps in the way the intellectual property rights were protected around the world. The T.R.I.P.S. agreement covers five basic issues:

-  How basic principles of the trading system and other intellectual property agreements should be applied.
-  How to give adequate protection to intellectual property rights.
-  How countries should enforce those rights in their own territories.
-  How to settle intellectual property disputes between members of the World Trade Organization.
-  To offer special transitional arrangements during the period when the system is being introduced (new members and developing countries).

Source: World Trade Organization site for Intellectual Property Rights Protection and Enforcement. (1995) [Online] Available from: [http://www.wto.org/english/thewtoe/whatis/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewtoe/whatis/tif_e/agrm7_e.htm) [Accessed 1 June 2004]

The main benefits of World Trade Organization membership are as follows:

- ✚ The system helps to promote peace by assisting international trade to flow smoothly.
- ✚ The system allows disputes to be handled constructively.
- ✚ The system is based on rules, not on power. The World Trade Organization does not claim to make all countries equal, but it does reduce some of the inequalities, by giving some of the smaller countries more voice, while freeing the major powers from having to negotiate trade agreements with each individual partner. All decisions are made by consensus.
- ✚ Freer trade cuts the cost of living. Trade policies affect the way we live, the prices we pay for our food and clothing. Protectionism is expensive. The World Trade Organization global system lowers trade barriers through negotiation and applies a strict principle of non-discrimination.
- ✚ It gives consumers more choice, and a broader range of qualities to choose from. International trade, enabled by the actions of the World Trade Organization has enabled the consumer to have access to many items that were previously unavailable at certain times of the year. Fruits and vegetables that are out of season, foods, clothing and other products, cut flowers from all over the world, and so on.
- ✚ Trade raises income. The lowering of trade barriers encourages trade to increase, which in turn leads to increased income. Recent research has shown that the cutting of trade barriers in agriculture, manufacturing and services by one third would boost the world economy by US \$ 613 billion.
- ✚ Trade stimulates economic growth, and that can be good news for employment. Trade clearly has the ability to create jobs. Yes, it is true that the relaxing of trade barriers can cost jobs in the short term, but it is also true that free international trade stimulates the economy and that in itself creates jobs.
- ✚ The basic principles make the system economically more efficient, and therefore cut costs. Free trade allows resources to be used more appropriately and effectively for production.
- ✚ The system shields governments from narrow interest groups. The World Trade Organization trade system helps governments take a more balanced view of trade policy.

- ✚ The system encourages good government. Under the rules of the World Trade Organization, once a commitment has been made to liberalize a sector of trade it is very difficult to reverse. This results in improved certainty and clarity of trading conditions for business.

Source: The W.T.O. site, What is the Organization (1995) [Online]. Available from: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/utw\\_chap7\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap7_e.pdf) [Accessed 15 May 2004]

### **1.3.2 World Intellectual Property Organization**

The need for international intellectual property right protection became evident once foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because they were worried that their inventions would be copied and exploited commercially by other countries. 1873 marked the birth of the Paris convention for the protection of industrial property. This was the first international treaty designed to help people of one country protect their intellectual property rights in other countries. In 1886 the same thing was done to protect the rights of copyright holders with the establishment of the Berne convention. Just like the Paris convention, the Berne convention set up a bureau to handle the administration of the conventions.

The World Intellectual Property Organization began life in 1893 as B.I.R.P.I, which was a French acronym for the United International Bureau for the protection of Industrial Property. This body was established principally to administer and service the Paris and Berne Conventions on industrial property and copyright. It was restructured and reconstituted as a United Nations agency in 1974 and the name was changed to The World Intellectual Property Organization.

The World Intellectual Property Organization main objectives were to promote the protection of intellectual property rights throughout the world and to harmonize legislation in this field. In 1996 the World Intellectual Property Organization expanded its role and further demonstrated the importance of intellectual property rights in the management of international trade by entering into a cooperation agreement with the World Trade



Organization. Today the main functions of the World Intellectual Property Organization are to serve as a forum for the negotiation of intellectual property right treaties. The administration of these treaties and operate the systems of global protection such as the Patent Cooperation Treaty and the Madrid system. The World Intellectual Property Organization is also supposed to provide technical assistance and training to developing countries and countries in transition through the World Intellectual Property Organization Academy.

Source: Medium Term Plan for World Intellectual Property Organization Program Activities, Vision and Strategic Direction. (2004) [Online]. Available from: <http://www.wipo.int/about-wipo/en/dgo/pub487.htm#strategic> [Accessed 11 June 2004]

The World Intellectual Property Organization currently has 180 member states.

Source: World Intellectual Property Organization Membership List. (2004) [Online] Available from: [http://www.wipo.int/about-wipo/en/members/member\\_states.html](http://www.wipo.int/about-wipo/en/members/member_states.html) [Accessed 12 June 2004]

### **1.3.3 World Customs Organization**

The World Customs Organization aids the national economic wealth and social protection of its members by promoting an honest, transparent and predictable customs environment. This permits legitimate trade to flourish and effective action to be taken against any illegal activities.

The World Customs Organization was established in 1952, and is an independent intergovernmental organization whose mission is to enhance the effectiveness and efficiency of customs administrations. With 161 member governments it is the only intergovernmental world wide organization competent in customs matters.

Source: The World Customs Organization. About the World Customs Organization. (2003) [Online] Available from: <http://www.wcoomd.org/ie/En/AboutUs/aboutus.html> [Accessed 15 June 2004]

The main roles of the World Customs Organization are:

- ✚ “To establish, maintain, support and promote international instruments for the harmonization and uniform application of simplified and effective customs systems and procedures governing the movement of commodities, people and conveyances across customs frontiers.”
- ✚ “To reinforce member’s efforts to secure compliance with their legislation, by endeavoring to maximize the level of effectiveness of members’ cooperation with each other and with international organizations in order to combat customs and other transnational offences.”
- ✚ “To assist members in their efforts to meet the challenges of the modern business environment and adapt to changing circumstances, by promoting communication and cooperation among members and with other international organizations, and by fostering integrity, human resource development, transparency, improvements in the management and working methods of customs administrations and the sharing of best practices”.

Source: The W.T.O. About the World Customs Organization. (2003) [Online] Available from: <http://www.wcoomd.org/ie/En/AboutUs/aboutus.html> [Accessed 21 May 2004]

The collection of import revenue at borders has for many years been viewed as customs most important responsibility. Due to the increase in international trade import duties are being progressively reduced, the role of the customs organization is changing. Customs’ role in protecting society, enforcing trade rules and contributing to a fair and equitable international marketplace is becoming more important. Customs, situated as they are at land, sea and air frontiers, are the obvious choice as the main government agency to protect the external frontiers. A broad range of contraventions confront the customs officials of today. Such offences include the trafficking of, illicit drugs, endangered species, nuclear and hazardous goods and also goods which are being imported, transited, or exported, whilst contravening intellectual property rights legislation.

Source: World Customs Organization site Information covering the main issues currently being followed at the World Customs Organization (2003) [Online] Available from: [http://www.wcoomd.org/ie/En/Topics\\_Issues/topics\\_issues.html](http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html) [Accessed 1 June 2004]

The public perception of an intellectual property rights offence is generally that of copied T-shirts, watches or perfume, and while these contraventions can be extremely damaging to individual companies and in turn national economies, the actual range of products being counterfeited is more extensive and in many instances they pose a serious health and safety risk to the public. Some past cases in which the World Customs Organization has been involved include counterfeit pharmaceutical products and prescription drugs, which have been manufactured with sub-standard constituents, unsafe car parts, reverse engineered aircraft parts, and computer processors where the operating speed has been artificially increased making the product more likely to break down under pressure. This last example is a graphic reminder of just how dangerous counterfeiting can be, especially if the fake computer part is installed, as a key component for example in an air-traffic control system.

Source: World Customs Organization site Information covering the main issues currently being followed at the World Customs Organization (2003) [Online] Available from: [http://www.wcoomd.org/ie/En/Topics\\_Issues/topics\\_issues.html](http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html) [Accessed 1 June 2004]

For national economies, in the long term, counterfeiting causes serious economic damage, especially in terms of attracting inward investment. Large manufacturers, distributors and other traders are looking for a fair trading situation, where their products and brands are adequately protected from unfair competition. The trend for international business is to reduce the number of manufacturing and distribution sites and this means that they are becoming extremely selective in choosing their final investment locations. The degree to which Governments act to create a fair trading environment for these markets is therefore crucial. This is again particularly relevant to South Africa as a developing nation that is trying to encourage foreign direct investment.

Customs administrations therefore play an important and legitimate role in providing a valid control against intellectual property rights violations. By supporting the viability of legitimate trade their respective economies will prosper and their public will be protected against sub standard and often hazardous goods.



Source: World Customs Organization site Information covering the main issues currently being followed at the World Customs Organization (2003) [Online] Available from: [http://www.wcoomd.org/ie/En/Topics\\_Issues/topics\\_issues.html](http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html) [Accessed 1 June 2004]

In order to meet this challenge, the World Customs Organization has been developing a joint Customs/Business intellectual property rights training program. This is a highly synergistic and innovative partnership, as vital commercial information and the business dimension is combined with customs information and key enforcement techniques. The basic World Customs Organization philosophy is to help member administrations to improve their efficiency and effectiveness in all aspects of their work. Member administrations are therefore facilitated and assisted at their own pace, so that they can develop their own improvement plans.

Many training events have been carried out throughout the world and a number of training projects and training styles are being developed. As an example, a full scale regional training session is currently being planned in South Africa and a four stage practical exercise in Eastern Europe which will be followed by a road show is shortly to be commenced.

The main future priority for the World Customs Organization is to build upon their understanding and co-operation with their business partners and facilitate sustainable improvement in customs' efficiency and effectiveness in intellectual property right enforcement among their members.

Source: World Customs Organization site Information covering the main issues currently being followed at the World Customs Organization (2003) [Online] Available from: [http://www.wcoomd.org/ie/En/Topics\\_Issues/topics\\_issues.html](http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html) [Accessed 1 June 2004]

#### **1.3.4 The International Anti-counterfeiting Coalition**

The International Anti-counterfeiting Coalition is somewhat different in structure from the other organizations discussed here. The International Anti-counterfeiting Coalition is the largest multinational organization exclusively representing the interests of companies

concerned with intellectual property right enforcement. I.e. product piracy, counterfeiting. Their members consist of 150 large corporations, trade associations, and professional firms, and represents total revenues of over U.S. \$ 650 billion. The International Anti-counterfeiting Coalition is based in Washington in the United States.

Source: Home page of the International Anti-counterfeiting Coalition (2004) [Online]  
Available from: <http://www.iacc.org> [Accessed 13 June 2004]

The International Anti-counterfeiting Coalition's mission consists of the beliefs of its members that:

- ✚ “Acts of counterfeiting and piracy pose a clear and present danger to consumer health and safety, cause to economic harm, defraud consumers and constitute unfair competition to legitimate businesses.”
- ✚ “The sale of pirated or counterfeit goods is a significant problem for intellectual property owners. The sale of such pirate and counterfeit merchandise erodes the market for genuine goods and services. This market erosion affects every individual and company that works hard to produce legitimate high quality genuine products. Pirates and counterfeiters illegally profit at the expense of legitimate manufacturers, their employees, owners, and wholesale distributors.”
- ✚ “The lucrative trade in counterfeit and pirate products attracts organized crime and provides organized crime with revenues for other nefarious activities.”
- ✚ “Pirate and counterfeit products are typically of inferior quality and can sometimes be dangerous. Unfortunately, purchasers of fakes often mistakenly attribute this poor quality to the legitimate brand owner, hurting the brand owner's reputation with the consumer.”

Source: Publications of the International Anti-counterfeiting Coalition (2003) [Online]  
Available from: [http://www.iacc.org/teampublish/109\\_471\\_1651.cfm](http://www.iacc.org/teampublish/109_471_1651.cfm) [Accessed 5 June 2004]

International Anti-counterfeiting Coalition members are concerned that many trading partner nations are slow to take the necessary steps to establish strong intellectual property enforcement systems. They believe that an effective enforcement system must integrate

civil, provisional, and criminal and border enforcement elements. Developments since the implementation of T.R.I.P.S have changed the needs of intellectual property rights owners. The growing evidence of organized crime, increasing exports of counterfeit and pirated products and advancing technological developments have far outpaced the international standards as well as most national legislation. Therefore it is no longer enough that governments aspire to meet only the minimum standards as laid down in T.R.I.P.S. far more is required.

Countries that choose to implement only the minimum T.R.I.P.S. standards are facilitating trade in pirate and counterfeit goods. South Africa as well as several other developing countries have been cited for this (Chapter 3). It is no longer enough just to have border systems that are applicable to imports only. The border system has to apply to exports as well as in-transit goods.

In addition to this, governments have acknowledged the involvement of organized crime in illegal trade, so therefore they must also realize that criminals do not let national borders interfere with their activities.

The International Anti-counterfeiting Coalition produces a report annually which is released to its members as well as the office of the United States Trade Representative which recommends actions that should be implemented against countries that the International Anti-counterfeiting Coalition feels have insufficient intellectual property rights enforcement capabilities.

Source: Publications of the International Anti-counterfeiting Coalition (2003) [Online] Available from: [http://www.iacc.org/teampublish/109\\_471\\_1653.cfm](http://www.iacc.org/teampublish/109_471_1653.cfm) [Accessed 5 June 2004]

From the 2003 report the International Anti-counterfeiting Coalition reports as follows. "The International Anti-counterfeiting Coalition recommends that the United States Trade Representative continue to monitor the Peoples Republic of China and Paraguay. We recommend that Malaysia, Philippines, Poland, Russia and Taiwan be put on the Priority

Watch List; and that Bolivia, Canada, Chile, Hungary, India, Mexico, Panama, Saudi Arabia, Singapore, South Africa, Thailand, Turkey United Arab Emirates, and Vietnam be placed on the watch list”.

Source: Publications of the International Anti-counterfeiting Coalition (2003) [Online]

Available from: [http://www.iacc.org/teampublish/109\\_471\\_1692.cfm](http://www.iacc.org/teampublish/109_471_1692.cfm) [Accessed 5 June 2004]

Based on the 2003 report the International Anti-counterfeiting Coalition identifies the following needs from these countries (this will be discussed in chapter 3);

- ✚ The need for increased political will to combat intellectual property crime.
- ✚ The requirement that legislation permits ex officio enforcement at the border and within the domestic market.
- ✚ The requirements for effective legislation to detain, seize, forfeit and destroy pirate and counterfeit goods being exported, imported and moving in-transit.
- ✚ The requirement for sentencing guidelines that require more stringent penalties (fines/imprisonment).
- ✚ The requirement that intellectual property crime is linked to organized crime with regard to penalties.
- ✚ The requirement that prosecutions are initiated.
- ✚ The requirement for laws and regulations relating to optical media production (inspections/closures)

Source: Publications of the International Anti-counterfeiting Coalition (2003) [Online]

Available from: [http://www.iacc.org/teampublish/109\\_471\\_1653.cfm](http://www.iacc.org/teampublish/109_471_1653.cfm) [Accessed 5 June 2004]

#### **1.4 Literature Review**

This dissertation seeks to answer the key research question: How do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved? And in doing so identify the different aspects relating to intellectual property rights. I.e. what is intellectual property and what are intellectual

property rights. What are the positive and negative aspects of intellectual property right protection? To illustrate briefly the South African replacement parts market and to answer the six identified research questions to the identified countries China, Taiwan, Malaysia, India and South Africa.

1. Is pressure being exerted by developed nations in order to improve levels of intellectual property right protection?
2. What are the general levels of intellectual property law enforcement?
3. What resources are available for enforcement of intellectual property rights?
4. How do the people perceive intellectual property crime?
5. How “user friendly” is the intellectual property rights protection system?
6. What are the levels of involvement of organized crime?

To then have some of the major players in the South African parts market answer the six research questions. The players that I have spoken to are as follows.

Matt Gennrich, General Manager Parts and Accessories Division Volkswagen of South Africa.

Andreas Walker, Consultant MB–Service Solutions, International Automotive Parts and Service Consultants.

Piet van Wyk de Vries, Director Parts Operations Toyota South Africa.

Ian McDonald, Branch Manager Volvo Truck and Bus Cape Town.

Martin Kavanagh, Aftersales Manager Volvo Southern Africa.

Allan Young, General Manager Parts Operations General Motors South Africa.

Paul Flavin, Brand Protection Manager Ford Motor Company of Southern Africa.




Finally to wrap up with a conclusion and recommendations on how to improve the levels of intellectual property right protection in South Africa compared to other developing countries with particular reference to the replacement parts market.



### **1.5 Problem Statement**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

South African Customs are focused on the optimal collection of revenue and the facilitation of **legitimate** trade through the South African borders. To this end customs engages in a variety of activities and employs different skills across numerous branch offices and ports of entry within South Africa. The South African Revenue Services Act, No 34 of 1997 provided the mandate for the performance of the following tasks (SARS annual report, 2003):

-  Collection of all revenue that is due.
-  Ensure the maximum levels of compliance with current legislation.
-  Provide a customs service that will maximize the collection of revenues, protect our borders and facilitate trade.

Customs administration plays a strategic role in the growth of international trade and the development of the global market place. The efficiency and effectiveness of a customs administration can significantly influence the economic competitiveness of a country.

South Africa is 1,221,040 square kilometers in area with a population of 43,2 million people (World Bank and Banque Mondiale, 2001). The country's Gross domestic product in 2002 was \$104,2 billion, the import share of the gross domestic product was 26,6% in 2002. The growth rate of goods and services on the import side was an average of 8,1% while exports grew by 4,1% (World Bank, IMF 2002). This effectively means that South Africa is becoming one of the worlds most sophisticated and promising emerging markets. A unique combination of highly developed first world economy infrastructure and a huge emerging market economy has given rise to a strong entrepreneurial and dynamic investment environment, with many global competitive advantages and opportunities. In order to improve the competitiveness of the importers, exporters and its stakeholders customs aims

to establish a barrier free clearance environment and protection of vital health, safety and security interests.

While South Africa's economy is growing stronger, it has developed a large number of legitimate traders as well as those who indulge in the activities of money laundering, narcotics trafficking and fraud. Regionally South Africa has access to 14 Sub-Saharan countries with a market access of one hundred and forty million people, which is expected to grow at an annual rate of 3 percent.

While customs overriding objective is the collection of revenue it also plays a vital part in the protection of the South African economy. Various seizures were made at different ports of entry during 2003 which included counterfeit goods that had a total value of R 11,673,550. This is only what was actually seized; the suspected total is in the region of R 583,677,500. South Africa has been identified by counterfeiters around the world as the main gateway to the vast market of Africa. There have been significant increases in the numbers of counterfeit and illegal goods being seized by customs authorities at South African ports of entry. Many of these products are unsafe and many more are plain dangerous. The practice is also costing South African business as well as the South African government a lot of money in lost revenues.

South Africa needs to improve its levels of intellectual property right protection, at least to be seen as equal to some of the other developing countries discussed in this dissertation.

### **1.6 The importance and Objectives of this research**

Recent years has seen an overwhelming growth in all aspects of business within South Africa. Our economy is literally booming. With the increase in levels of business has come a tremendous increase in the levels of entrepreneurship at all levels.

One can hardly move through a city or town in South Africa without being offered obviously counterfeit goods at flea markets and now even at traffic intersections. When we are looking at a T-Shirt or pair of sunglasses this does not appear to be a problem, but when

we are looking at automotive or aircraft replacement parts or medicines the problem becomes a bit more apparent.

The objective of this research is to shine a little bit more light on the issues of counterfeit goods, and the costs involved. The costs in money through lost revenues as well as the cost in human life through possible failures in automotive components or ineffective medicines.

### **1.7 Ethical Considerations**

Information has been obtained with the permission of my principals at Volvo operation's throughout the world, as well as some of the major players in the South African motor industry, and is of a confidential nature. I have been given permission to use such information for purposes of this research only. There is therefore a requirement that the information contained in this document is not made public.

### **1.8 Limitations**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

### **1.9 Research Design**

The strategy that is chosen for the research design is aimed at attaining greater depth into the research problem and thus enables the researcher to analyze the problem and provide a comprehensive solution.

#### **1.9.1 A Case Study**

As this study is qualitative rather than quantitative in nature the approach to the dissertation is one of a case study. Chapter 3 analyses the levels of intellectual property right protection in South Africa versus other developing countries in the form of a case study. Chapter 5 then answers the key research question: How do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?



### **1.9.2 Data Collection and Analysis**

The study will be qualitative in nature. The research will draw on the writings of several social scientists. As well as the opinions and feelings of the “key” players named earlier.

## **Chapter Two: The positive and negative aspects of intellectual property right protection.**

### **2.1 The implications of intellectual property right protection.**

The international protection of intellectual property rights provides an essential incentive for investment in research and development. This is particularly true in the fields of agriculture and medicine, where research can be extremely costly and long term with results being uncertain.

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved? Developing countries like South Africa have an important interest in providing effective intellectual property right protection as a way of encouraging more foreign investment. But as in all theories there is more than one school of thought.

“The public will learn that patents are artificial stimuli to improvident exertions; that they cheat people by promising what they cannot perform; that they rarely give security to really good inventions, and elevate into importance a number of trifles. No possible good can ever come of a Patent Law, however admirably it may be framed.”

Source: Article on the future of patent law. (Anon.) The Economist Sept 12 2002

“The patent system...secured to the inventor, for a limited period of time, the exclusive use of his invention and therefore added **the fuel of interest to the fire of genius**, in the discovery and production of new and useful things”

Source: Abraham Lincoln

Most of the world's people lived in countries which did not enforce intellectual property rights. This is no longer the case; T.R.I.P.S. requires even the least developed countries to have some minimum form of intellectual property protection in place by 2006. Whether this

is a good or bad thing for poorer developing countries and their people is a hotly debated subject.

The feeling from the governments of many developing countries is that western style intellectual property protection brings many costs and few benefits. Patent systems are expensive to implement, and drain scarce money and trained manpower from other more pressing concerns. Patents hurt, rather than help, domestic industries, which are often based more on copying than on innovating. And in the process, western patent rules prevent poor people from getting life-saving drugs, interfere with age old farming practices and allow foreign "pirates" to raid local biodiversity or traditional handicrafts, without getting permission or paying compensation.

Source: Brian Martin. 1998. Information Liberation: Challenging the corruptions of information power. London Free Press

"Into this fray now steps a study by an international commission set up by the British government to examine how intellectual property rights can help or hinder developing countries. It questions the doctrine that patents are good for the poor. There is little evidence to show that truly downtrodden places which introduce robust intellectual property protection reap any of the much touted benefits. Certainly, patents matter greatly to some industries, such as pharmaceuticals. But putting in a rigorous patent system will not make Angola a hotspot of biotechnology innovation any time soon; a license to drive is little use without a car."

Source: Brian Martin. 1998. Information Liberation: Challenging the corruptions of information power. London Free Press

These feelings should not lead to rejection of intellectual property rights in the poor world altogether. Applied in the right way and at the right moment in development, they offer opportunities and not threats to poorer people. Some developing countries, such as India and China, whose industrial scale copying of other people's products alarms western businesses, are sufficiently advanced to support the sort of innovation that would benefit from patents. They should bring their systems up to scratch, for the sake of their own

industry. Even the poorest countries can profit from well designed intellectual property protection. Senegal, for example, has thousands of musicians who would benefit from copyright enforcement.

“Carefully worked-out policies for protecting intellectual property will not solve developing countries' bigger problems, such as inadequate health care, lousy schools and sheer poverty. But if they are adapted to fit individual countries' circumstances, they can play a helpful role in nurturing the domestic industries that lasting growth requires”.

Source: Brian Martin. 1998. Information Liberation: Challenging the corruptions of information power. London Free Press

## **2.2 The positive aspects of protecting intellectual property rights.**

While intellectual property right protection seeks to ensure that the owner of the right maintains all the privileges due to him as a reward for the work done in implementing the idea. Some concepts are spontaneous and involve little effort, and the creator is then rewarded for the very act of creativity. In other cases, it may take a long time to bring the transition from intangible concept to tangible creative work; this time usually comes at a cost. The present cultural system maintains that whatever effort is laid out should be recovered later on and that time and effort should be rewarded proportionately in whatever measure the creator had in mind, although it is usually financially.

When copyrighted articles are illegally counterfeited there is a loss in revenue for the copyright owner. In many cases companies can go out of business due to such losses. This is particularly prevalent in the business of computer software, where many unscrupulous users will copy or buy pirated software rather than buy the genuine product. The continued loss of revenue to the publisher results in higher prices to cover costs and this to the detriment of the honest user.

In China Microsoft launched its authentic version of Microsoft XP on the 9<sup>th</sup> November 2001 with a price tag of approximately US \$ 180. However on the streets of Shanghai XP had already been on the market for about three weeks selling at approximately U.S. \$2.50.

Source: Article on Microsoft XP. (Anon) The Economist Hong Kong 8th November 2001

Surely the aim should be that an incentive for innovation or creating a new product can at least remain for the most part, in order to pave the way for further creativity and innovation? The possible recovery of initial outlays for research and development can make way for significant personal gain but is this not the reason why people work towards new creations or innovations?

### **2.3 The negative aspects of protecting intellectual property rights.**

The question is whether intellectual property right protection serves the common good of society, regardless of the benefit for the owner of the right needs to be asked. A good example of this is where patents are being granted to drugs that limit the spread of the AIDS virus. While one can appreciate the tremendous amounts of expenditure undertaken by the researchers of the drugs, one also has to acknowledge that the market of patients who desperately need access to these drugs cannot afford the prices being charged. These costs may well reduce if other companies were able to produce the same products at a lower price using the same design as the original drug. In the broad picture what is of greater importance: the profitability of the drug research company or the global need for a drug that may substantially extend the lifetime of its users?

Source: Brian Martin. 1998. Information *Liberation: Challenging the corruptions of information power.* London Free Press

#### **2.3.1 Problem identification.**

There are several other examples to consider in the same light. Schools and the parents of school children are often not able to pay the prices being charged for school text books. Yet, education is critical to the advancement of society, especially in the poorer developing economies.

Fortunately, this problem has been identified and some partially successful alternatives have been developed. Those few who are resistant to the possibility of someone capitalizing on an idea can pronounce a work part of the public domain and prevent anyone from making

financial gains on it. The concept of “fair use” also entitles consumers to a certain amount of freedom in making personal copies of copyrighted works. The “fair use” law refers that copying is generally allowed for personal use or for education, research or scholarship. Typically however only a portion of the work may be copied.

Source: Brian Martin. 1998. Information *Liberation: Challenging the corruptions of information power*. London Free Press

Technological developments have made it cheaper and easier to make copies of information. Printing was a great advance; it eliminated the need for hand copying of documents. Photocopying and computers have made it even easier to make copies of written documents. Photography and sound recordings have done the same for visual and audio material. The ability to protect intellectual property is being undermined by technology. Yet there is a strong push internationally to expand the scope of ownership of information.

Governments generate large quantities of information. They produce statistics on population, figures on economic production and health, texts of laws and regulations, and vast numbers of reports. The generation of this information is paid for through taxation and, therefore, it might seem that it should be available to any member of the public. But in some countries, such as Britain and Australia, governments claim copyright in their own legislation and sometimes court decisions. Technically, citizens would need permission to copy their own laws. On the other hand, some government generated information, especially in the US, is turned over to corporations that then sell it to whoever can pay. Publicly funded information is "privatized" and thus not freely available.

Source: Dorothy Nelkin. 1984. *Science as Intellectual Property: Who Controls Research?* New York: Macmillan.

The idea behind patents is that the fundamentals of an invention are made public while the inventor for a limited time has the exclusive right to make, use or sell the invention. But there are quite a few cases in which patents have been used to suppress innovation.

Source: Richard Dunford, *The suppression of technology as a strategy for controlling resource dependence*, Administrative Science Quarterly, Vol. 32, 1987, pp. 512-525.

Companies may take out a patent, or buy someone else's patent, in order to inhibit others from applying the ideas. From its beginning in 1875, the US company AT&T collected patents in order to ensure its monopoly on telephones. It slowed down the introduction of radio for some 20 years. In a similar fashion, General Electric used control of patents to retard the introduction of fluorescent lights, which were a threat to its sales of incandescent lights. Trade secrets are another way to suppress technological development. Trade secrets are protected by law but, unlike patents; do not have to be published openly. They can be overcome legitimately by independent development or reverse engineering.

More generally, intellectual property is one more way for rich countries to extract wealth from poor countries. Given the enormous exploitation of poor countries built into the world trade system, it would only seem fair for ideas produced in rich countries to be provided at no cost to poor countries. Yet in the G.A.T.T. negotiations, representatives of rich countries, especially the U.S., have insisted on strengthening intellectual property rights.

Source: Peter Drahos, June 1995, *Global property rights in information: the story of T.R.I.P.S. at the GATT*, Prometheus, Vol. 13, No. 1, pp. 6-19.

### **2.3.2 Financial returns.**

The potential financial returns from intellectual property are said to provide an incentive for individuals to create. In practice, though, most creators do not actually gain much benefit from intellectual property. Independent inventors are frequently ignored or exploited. When employees of corporations and governments have an idea worth protecting, it is usually copyrighted or patented by the organization, not the employee. Since intellectual property can be sold, it is usually the rich and powerful that benefit. The rich and powerful, it should be noted, seldom contribute much intellectual labor to the creation of new ideas.

Many people feel that intellectual property protection is an attempt to create an artificial scarcity in order to give rewards to a few at the expense of the many. Intellectual property

promotes inequality. It fosters competitiveness over information and ideas, whereas cooperation makes much more sense. In the words of Peter Drahos, researcher on intellectual property, "Intellectual property is a form of private sovereignty over a primary good - information."

Source: Peter Drahos, 1994, *Decentering communication: the dark side of intellectual property*, in Tom Campbell and Wojciech Sadurski (eds.), *Freedom of Communication* (Aldershot: Dartmouth, 1994), pp. 249-279, at p. 274.

Of the various types of intellectual property, copyright is especially open for exploitation. Unlike patents, copyright is granted without an application and lasts far longer. Originally designed to encourage literary and artistic work, it now applies to every memo and doodle and is more relevant to business than art. There is no need to encourage production of business correspondence, so why is copyright applied to it?

Source: David Vaver, March 1996. *Rejuvenating copyright*, Canadian Bar Review, Vol. 75, pp. 69-80.

Much of the recent debate over the impact of intellectual property rights on the poor has centered on the issue of access to expensive medicines. On paper, many of the world's least developed countries have laws which provide patent protection for pharmaceuticals. In practice, few enforce them. Spurred on by a victory in April 2001 against drug companies fighting patent reform in South Africa, developing countries issued a declaration at the World Trade Organization meeting in Doha last year. This asserted the primacy of public health over intellectual property rights. They resolved that the world's least-developed countries should be given at least until 2016 to introduce patent protection for pharmaceuticals.



### **Chapter 3: The research questions as they involve the chosen developing countries.**

#### **3.1 Analyzing the chosen developing countries.**

In this chapter In order to answer the key research question: How do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved? I will apply the six basic research questions to each of the developing countries chosen for this dissertation.

1. Is pressure being exerted by developed nations in order to improve levels of intellectual property right protection?
2. What are the general levels of intellectual property law enforcement?
3. What resources are available for enforcement of intellectual property rights?
4. How do the people perceive intellectual property crime?
5. How “user friendly” is the intellectual property rights protection system?
6. What are the levels of involvement of organized crime in intellectual property rights infringements?

The main reason for choosing the five particular developing countries discussed in this dissertation was that one could not open a publication or website on intellectual property rights protection without at least one or more of these five countries being cited for some or other form intellectual property rights violation. On top of this each and every one of the countries chosen has a similar problem in that there are insufficient resources available to effectively enforce crime in general not to mention intellectual property crime.

#### **3.2 The Peoples Republic of China.**

“United States - Chinese relations have had a few problems over recent years. There has been the recent dispute of the U.S. surveillance plane on Chinese soil, the accidental N.A.T.O. bombing of the Chinese embassy in Belgrade, and continuing controversy over human rights issues. The most repeated problem however has centered on repeated intellectual property rights violations in China.”

Source: Cecilia Bhattacharya. Intellectual Property Rights: Violations in China. (April 2001) [Online] Available from: <http://www.internationala.com/currentissues/china/bhattacharya.pdf> [Accessed 2nd July 2004]

Since the end of the cold war China has become an exciting new market option for the worlds most developed countries. However some of the bad experiences that China's new trading partners have had have shown that businesses need to take some basic precautionary steps before proceeding into the Chinese market.

One of the biggest intellectual property related problems stemming from the Peoples republic of China is the fact that they traditionally have never subscribed to the western style intellectual property tradition. Western intellectual property tradition recognizes the intellectual property rights of the creator, inventor, or author through the mechanisms of copyright, trademarks and patents. In China as well as other previously communist states, the idea of an individual owning their own ideas is a new one. In communist tradition the moral rights of the creator were recognized and limited economic rights were acknowledged through a once off payment, but all subsequent rights and revenues belonged to the state.

Source: Richard Miller. Princeton Business Journal. Guard your intellectual property in Russia and China. (Feb 1st 2001) [Online] Available from: <http://www.Pacpubserver.com/new/business/2-1-01/protection.html> [Accessed 6 July 2004]

### **3.2.1 Is pressure being applied to China by developed countries?**

International pressure from the more developed countries and the desire to increase international trade have prompted the leaders of the Peoples Republic of China to begin a series of improvements regarding the legal protection related to private intellectual property rights.

In November 2003 the United States Trade Representative led a high level delegation, which included the U.S. State Department to China to discuss the Chinese implementation of its World Trade Organization commitments including the vital intellectual property component.

President Bush raised the issue of intellectual property rights with Premier Wen during Premier Wen's visit to the United States in December 2003. Such is the urgency from the point of the United States that China comply with at least the minimum levels of intellectual property right protection as laid out in T.R.I.P.'s that the United States Government has spent significant amounts of money providing technical training to Chinese judges, prosecutors, law enforcement and customs officials.

Source: E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs.

Testimony before the senate judiciary committee Washington D.C. (March 23<sup>rd</sup> 2004)

[Online] available from: <http://www.state.gov/e/eb/ris/rm/30717.htm> [Accessed 7 July 2004]

"During a joint China-EU symposium on copyright theft senior European Union trade official Paul Vandoren told the gathering that illegal copyright theft was costing European companies millions of Euros every year. He said that his office could prove that over 400 Chinese companies involved in blatant copyright theft".

Source: Intellectual property. EU asks China to curb Copyright infringement. (25<sup>th</sup> July 2000) [Online] Available from: [http://www.bizasia.com/intellectualproperty/drasw/euaskschina\\_curb\\_copyright.htm](http://www.bizasia.com/intellectualproperty/drasw/euaskschina_curb_copyright.htm) [Accessed 7 July 2004]

### **3.2.2 What are the general levels of intellectual property law enforcement in China?**

The general level of law enforcement in China is much like most other developing countries. There is a concentration of law enforcement personnel in metropolitan areas and not much at all in rural areas.

There is an ancient Chinese proverb that states "The mountains are high and the emperor is far away". This was never truer than it is today. Given China's vast geography and population, it would be an awesome task for the central government to police any activity, never mind piracy or counterfeiting throughout the entire country. In China, as it is in the United States, intellectual property laws are mainly enforced at local level. The leadership in Beijing is not very intimidating when locals have to answer to local powers. Across northern China for example, local officials are ignoring a more lenient tax code issued by

Beijing and instead are forcing locals to pay exorbitant taxes on unfertile land. In other areas, local government bosses have taken central government money meant for combating drugs and piracy and used it to build palatial homes.

Source: Speaking Freely. China: Rule of law, sometimes. Ram Gorni (date unknown) [Online] Available from: <http://www.atimes.com/atimes/china/cg03ad03.html> [Accessed 2 July 2004]

China's Criminal Code provides for prison terms for up to seven years for counterfeiters and copyright pirates. In response to international pressure as well as U.S. backed assistance and training, Chinese police and prosecutors have become noticeably more interested as well as active in enforcing intellectual property rights.

However, investigation of cases is still considered difficult. Details of suspect companies are difficult to trace. Other shortcomings such as poor telecommunications, inadequate infrastructure and the sheer size of the country further compound investigators problems.

The main problem with border enforcement in China however is not so much counterfeit products entering into China through China's borders, but counterfeit products being shipped out through China's borders. A substantial proportion of all China's exports pass through Hong Kong. It would be essential to coordinate any border enforcement actions to ensure that effective action is taken against both the Chinese factories as well as the Hong Kong trading companies that typically arrange for local sales and export of infringing goods.

Source: China: Protecting the Knowledge Based Economy and Intellectual Property Rights. Harvard Asia Business Conference. (2<sup>nd</sup> February 2001) [Online] Available from: <http://www/fas.harvard.edu/~asiactr/haq/199903/9903a010.htm> [Accessed 7 July 2004]

In the area of border enforcement, China has scored several remarkable blows to intellectual property criminals. For example, Chinese Customs officials have confiscated some 80,000 pirate DVDs during the first half of 2004. Most of these seizures took place at the Guangdong/Hong Kong border and at the Beijing Airport. Additionally, Chinese Customs

have begun to support multilateral cooperation with Hong Kong Customs as well as U.S. Customs in joint seizing efforts. According to the U.S. State Department's fact sheet of June 17<sup>th</sup> 1996 on the intellectual property rights agreements, "As part of a continuing border enforcement effort, Chinese Customs will be cooperating with its regional and international counterparts, including Hong Kong Customs and U.S. Customs".

Source: U.S. – China Relations on the protection of Intellectual Property. (Date unknown)  
[Online] Available from: <http://gurukul.ucc.american.edu/ted/hpages/ipr/lloyd.htm>  
[Accessed 13 July 2004]

### **3.2.3 What resources are available for the protection of intellectual property rights in China?**

In 1993, in response to pressure being exerted on China by the U.S. government, the Chinese government established special courts in the major cities of China specifically to handle intellectual property cases. Divisions have been set up in provincial and municipal courts throughout the country to adjudicate in intellectual property disputes. Since then, some twenty other specialized courts have been set up throughout China. Although this is a step towards the provision of a proper system of protection for copyrighted material, implementation of such measures is still inconsistent and inefficient. However, due to lack of resources, the lack of judicial expertise, and the unpredictability of trial outcomes, litigation in Chinese courts remains a risky and expensive response to Chinese copyright violations.

Such is the urgency from the point of the United States that China comply with at least the minimum levels of intellectual property right protection as laid out in T.R.I.P.'s that the United States Government has spent significant amounts of money providing technical training to Chinese judges, prosecutors, law enforcement and customs officials.

Source: E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs.

Testimony before the senate judiciary committee Washington D.C. (March 23<sup>rd</sup> 2004)

[Online] available from: <http://www.state.gov/e/eb/ris/rm/30717.htm> [Accessed 7 July 2004]



The National Copyright Administration in China, the body responsible for national copyright enforcement, is severely under funded and understaffed. It reportedly employs as few as five people. It has also been reported, that in order to pursue enforcement actions, some rights holders are compelled to help subsidize transportation and other enforcement expenses.

Source: China: Protecting the Knowledge Based Economy and Intellectual Property Rights. Harvard Asia Business Conference. (2<sup>nd</sup> February 2001) [Online] Available from: <http://www.fas.harvard.edu/~asiactr/haq/199903/9903a010.htm> [Accessed 7 July 2004]

#### **3.2.4 How do the Chinese people perceive intellectual property crime?**

As discussed in section 3.2, in China the idea of individuals actually owning their ideas is a new one. In typical communist tradition the moral rights of the creator were recognized and limited economic rights were acknowledged through a once off payment, but all subsequent rights and revenues belonged to the state.

Source: Richard Miller. Princeton Business Journal. Guard your intellectual property in Russia and China. (Feb 1st 2001) [Online] Available from: <http://www.pacpubserver.com/new/business/2-1-01/protection.html> [Accessed 6 July 2004]

The absence of the protection of intellectual property rights in China has spawned employment for millions. The most serious problem in China is where local officials are reluctant to take action against an intellectual property rights infringer because of the infringer's good connections, or the fact that the infringer's production facility provides income and jobs for the region. These practices have been going on for generations, so the Chinese people do not see intellectual property rights violations as a crime, but as a way of earning an income.

#### **3.2.5 How “user-friendly” is the Chinese intellectual property rights protection system?**

In preparation to China's entry to the World Trade Organization on the 11<sup>th</sup> December 2001, Beijing upgraded China's intellectual property laws to the minimum levels required by T.R.I.P.'s. Authorities also amended a fifteen year old patent law in January of the same

year. Previously applicants had to wait anywhere from a few month to a few years to find out if their application had been approved. The new amendment would substantially speed up the process.

Source: Cecilia Bhattacharya. Intellectual Property Rights: Violations in China. (April 2001) [Online] Available from: <http://www.internationala.com/currentissues/china/bhattacharya.pdf> [Accessed 2nd July 2004]

There is however a lot of ambiguity in the Chinese Criminal Code as to the types of activities that warrant criminal enforcement, as opposed to mere administrative penalties. China adopted a system of levels of severity for offence linked to intellectual property crime. For example "huge amounts" of illegal income, "especially serious" circumstances or "relatively large amounts" of illegal income are factors that distinguish between small violations and large illicit operations. Naturally, this vague language has discouraged foreign firms from pursuing criminal proceedings. There is a lack of effective cooperation and coordination between administrative and criminal enforcement authorities, particularly in relation to the transfer of serious cases from the former to the latter. The administrative penalties are not effective. The fines are very low, with standard fines for counterfeiting, even if the offender is a repeat offender.

Source: China: Protecting the Knowledge Based Economy and Intellectual Property Rights. Harvard Asia Business Conference. (2<sup>nd</sup> February 2001) [Online] Available from: <http://www/fas.harvard.edu/~asiactr/haq/199903/9903a010.htm> [Accessed 7 July 2004]

### **3.2.6 What are the levels of involvement of organized crime in intellectual property rights infringements in China?**

When China embarked on its process of economic reform almost two decades ago, this heralded the re-emergence of Chinese organized crime, or triads, and drew attention to the rapid growth of crime and corruption. Moreover, the triad phenomenon has become a global concern, as Chinese gangs were active in Paris, Rome and New York.

Chinese officials and organized crime syndicates collaborate in a number of different ways. Many gangs use bribery and other methods to control officials or even offer to protect the

official's own illicit business dealings. In some cases, officials were the heads of local gangs and in many cases officials used relatives to make contact with crime gangs. E.g. in June 2002, police who raided a birthday party thrown by a Chinese gangster got a surprise gift, there were 45 government officials found among the guests.

Source: Speaking Freely. China: Rule of law, sometimes. Ram Gorni (date unknown) [Online] Available from: <http://www.atimes.com/atimes/china/eg03ad03.html> [Accessed 2 July 2004]

### **3.3 Taiwan**

Major trade mark owners cite Taiwan as second only to mainland China as the source of counterfeited products. The auto industry view Taiwan as one of the worlds leading producers of counterfeit spare parts. A recent two day long sweep in Taiwan netted some \$ 1.7 million worth of counterfeit automotive parts. Government officials expressed satisfaction with the two day operation saying that it had made major inroads into stopping trademark counterfeiting and piracy. This might have been correct for the time but unless such operations are conducted regularly, as a matter of normal law enforcement they will have little or no effect.

Source: *Anti Piracy crackdown uncovers 20 criminal groups*, Central News Agency 4<sup>th</sup> January 2003 (Anon).

#### **3.3.1 Is pressure being applied on Taiwan by developed countries?**

For the first time in over ten years, Taiwan is not one of the U.S. government's top targets for trade sanctions. Taiwan aspires to obtain international recognition and legitimacy by joining the World Trade Organization so at present; U.S. industry and government are temporarily satisfied by a flurry of legislative activity towards this goal.

Source: Intellectual Property Regime on Taiwan. Laura W. Young. (Date unknown) [Online] Available from: <http://www.wangandwang.com/nlj-roc.htm> [Accessed 28 June 2004]

Taiwan has recently concluded several amendments to its intellectual property laws. And the Taiwanese government was more than willing to consider U.S. Government as well as



U.S. industry comments when they prepared the drafts of these new laws. The United States is continuing to monitor developments in this area.

Source: United States Trade Representative: Foreign Trade Barriers: Taiwan. (2003) [Online] Available from: <http://www.ustr.gov/reports/nte/2003/taiwan.pdf> [Accessed 12 June 2004]

As Taiwan prepared for accession to the World Trade Organization (January 1st 2002), they amended all their intellectual property laws to comply with T.R.I.P.'s. However continuing piracy of optical media and automotive parts, and the failure to shut down intellectual property right infringing facilities has prompted the United States to ask Taiwan to further improve its enforcement and legal framework for intellectual property rights. In April 2003 Taiwan was placed on the U.S. Special 301 Priority watch list for the second year in a row.

Source: United States Trade Representative: Foreign Trade Barriers: Taiwan. (2003) [Online] Available from: <http://www.ustr.gov/reports/nte/2003/taiwan.pdf> [Accessed 12 June 2004]

### **3.3.2 What are the general levels of intellectual property law enforcement in Taiwan?**

Although the intellectual property laws in Taiwan are up to international standards, companies still encounter difficulties in protecting their intellectual property rights. In 1994 for example a Japanese game's manufacturer's claims against a copyright infringer were dismissed by the courts after the evidence mysteriously disappeared from the Public Prosecutors storage facility.

Source: Intellectual Property Regime on Taiwan. Laura W. Young. (Date unknown) [Online] Available from: <http://www.wangandwang.com/nlj-roc.htm> [Accessed 28 June 2004]

Even though Taiwan has been exporting infringing goods for many years, their government has not taken the issue seriously, and therefore, does not have an effective border enforcement system. The U.S. government has stated that should Taiwan fail to take proper enforcement actions at its borders against counterfeit exports or even counterfeit goods in transit, U.S. customs will be forced to inspect even greater amounts of goods imported from

Taiwan. And this of course would result in further duties being imposed in order to cover the costs.

Source: Publications of the International Anti-counterfeiting Coalition (2003) [Online] Available from: [http://www.iacc.org/teampublish/109\\_471\\_1692.cfm](http://www.iacc.org/teampublish/109_471_1692.cfm) [Accessed 5 June 2004]

From 1992 to date, Taiwan made impressive legislative strides and developed a solid apparatus for the protection of intellectual property. Proposed amendments to its 1992 Copyright Law, 1993 Trademark Law and 1994 Patent Law, in concert with the forthcoming Integrated Circuit Layout Protection Act and Business Secrets Law could bring Taiwan into conformity with international standards and result in a successful bid to join the World Trade Organization. However, unless there is a fundamental change in behavior by enforcement authorities on Taiwan, familiar complaints regarding lax enforcement will inevitably arise within the next two years, despite fresh ink on the law books. It is almost certain that local officials will interpret the new statutes in ways unforeseen by the American officials promoting those protections.

Source: Intellectual Property Regime on Taiwan. Laura W. Young. (Date unknown) [Online] Available from: <http://www.wangandwang.com/nlj-roc.htm> [Accessed 28 June 2004]

### **3.3.3 What resources are available for the protection of intellectual property rights in Taiwan?**

Taiwan does not seem to have a problem relating to resources to protect intellectual property rights. The Taiwanese government had tried to incentivise the police force to take on intellectual property cases. In fact during 2002 when Taiwan was accepted into the World Trade Organization a serious problem relating intellectual property rights enforcement arose. The National Police Administration inadvertently dropped a key incentive for police to work on intellectual property cases. In writing up a new schedule of merit points given to officers for participation in cases (points are used for annual performance appraisals) the National Police Administration forgot to specify points for participation in intellectual property related cases. This resulted in intellectual property

cases being dropped into a point's category that only earned the officer one point instead of the three point they were previously earning.

Source: I.P. Profiles 2003. John Eastwood & Sylvia Sheiu. Winkler Partners. (2003)  
[Online] Available from: [http://www.winklerpartners.com/htmlfiles-english/Publications/articles/IP\\_Profiles\\_2003.pdf](http://www.winklerpartners.com/htmlfiles-english/Publications/articles/IP_Profiles_2003.pdf) [Accessed 28 May 2004]

#### **3.3.4 How do the Taiwanese people perceive intellectual property crime?**

Intellectual property crime in Taiwan, much the same as China, is not perceived as a crime. Everyone loves a bargain, and the general levels of awareness of intellectual property crime and its effects with the general public are extremely low. These levels however were raised significantly in the run up to Taiwan joining the World Trade Organization in 2002.

Source: United States Trade Representative: Foreign Trade Barriers: Taiwan. (2003)  
[Online] Available from: <http://www.ustr.gov/reports/nte/2003/taiwan.pdf> [Accessed 12 June 2004]

#### **3.3.5 How “user-friendly” is the Taiwanese intellectual property rights protection system?**

Due to its lost membership to the United Nations in 1972 Taiwan also lost its membership to the sub-organizations of the UN, e.g. World intellectual property organization. Besides this, Taiwan was unable to be part of various international agreements such as the Paris Convention, the Patent Co-operation Treaty, Bern Convention, etc. Consequently, a claim of priority for the first application by a foreigner can not be approved in principle unless a reciprocal agreement on the claim of priority has been concluded between the two countries concerned. Intellectual property rights owners from the auto and consumer goods industries are complaining of the obstacles in pursuing infringement cases because of this. The laws in Taiwan require that in the event of an intellectual property rights infringement case, a power of attorney (P.O.A.) is required from the C.E.O.'s of all companies concerned. This P.O.A. requires that the signatures are original, and copies or faxes will not be accepted. There are also very strict time limits imposed for the acceptance of a case and due to the fact that it can take a few days for other countries to get their C.E.O.'s original signature on the relevant forms, most of the cases never see the inside of a court.

Source: Publications of the International Anti-counterfeiting Coalition (2003) [Online]  
Available from: [http://www.iacc.org/teampublish/109\\_471\\_1692.cfm](http://www.iacc.org/teampublish/109_471_1692.cfm) [Accessed 5 June 2004]

### **3.3.6 What are the levels of involvement of organized crime in intellectual property rights infringements in Taiwan?**

Vowing to doggedly stamp out piracy across the nation, Premier Yu Shyi-kun on Wednesday ordered the laws against forgery to be revised to protect intellectual property rights and to ensure Taiwan's name is removed from the United States' Special 301 Priority Watch List. "Much evidence shows that organized crime has penetrated the piracy of intellectual property. That crime has not only made it difficult for legal businesses to expand but also added other social problems, such as encouraging youths to join gangs," Yu added.

Source: Taiwan News. Taiwan Headlines (Author unknown) ( April 4<sup>th</sup> 2002) [Online]  
Available from: <http://www.taiwanheadlines.gov.tw/20020404/20020404p1.html> [Accessed 30June2004]

### **3.4 Malaysia**

The volume of counterfeit products being exported from Malaysia is difficult to determine due the broad scope of products involved. Malaysia's counterfeiting and piracy problem is networked by organized crime elements, and this is openly acknowledged by Malaysian government officials. Domestic Trade Minister Muhyiddin Yassin was quoted as saying: "The syndicates are becoming more aggressive", and that "Our officers on the ground are outnumbered by thugs employed by the piracy syndicates".

Source: *Malaysian software pirates face gun toting law men*, Agence France Press 16<sup>th</sup> January, 2003 (Anon)

#### **3.4.1 Is pressure being applied on Malaysia by developed countries?**

The International Anti-counterfeiting coalition reported on 16 countries, singling out the People's Republic of China and Paraguay for continued monitoring of their practices because of past decisions by the U.S. Trade Representative that these countries' practices



were egregious, subjecting them to potential trade sanctions. Additionally, the International Anti-counterfeiting coalition recommended Malaysia, Russia, Taiwan and Ukraine for Priority Watch List.

The basis of the Priority Watch List recommendations are due to a number of problems in these countries that serve as barriers to legitimate trade, including the prevalence of organized crime involvement in pirating and counterfeiting of International Anti-counterfeiting coalition members' products and the potential dangers associated with trying to enforce intellectual property rights in these countries against such nefarious opponents.

Source: International Anti-counterfeiting Coalition. IACC Sites countries for failing to protect intellectual property rights. (February 15<sup>th</sup> 2001) [Online] Available From:

[http://www.iacc.org/teampublish/109\\_471\\_1692.cfm](http://www.iacc.org/teampublish/109_471_1692.cfm) [Accessed 1 June 2004]

### **3.4.2 What are the general levels of intellectual property law enforcement in Malaysia?**

The easy access and trading of pirated goods culminated in various legislative changes that imposed stiffer penalties upon copyright infringers and repeat offenders.

In the past, the penalties imposed by courts quite simply did not fit the crime. This resulted in an escalation of the number of repeat offenders. The new legislative amendments now increased the minimum and maximum penalties to be imposed for each corresponding infringing copy and/or contrivance used in connection with an infringement. In addition, the powers of the Enforcement Division of the MDTCA were broadened. The enforcement officers are now able to arrest without a warrant any person reasonably believed to have committed or is attempting to commit a copyright offence.

Source: Legal Media Group. Managing Intellectual Property. Karin Abraham (July 2004)

[Online] Available from: <http://www.legalmediagroup.com/mip/default.asp?Page=1&SID=2475&ImgName=malaysiaspecial04.gif&=F=F>

### **3.4.3 What resources are available for the protection of intellectual property rights in Malaysia?**

The Ministry of Domestic Trade and Consumer Affairs created the Special Copyright Task Force to combat copyright piracy in April 1999 and it has achieved great success. Following this, Ministry of Domestic Trade and Consumer Affairs formed the Special Anti-Counterfeit Task Force in March 2002 to focus its efforts on eradicating counterfeit trade mark goods.

Members of both these task forces consist of government agencies including Ministry of Domestic Trade and Consumer Affairs, Police, Customs, local councils, Film Censorship Board officers, Ministry of International Trade and Industry and other intellectual property rights associations including the Bureau Software Alliance, Public Performance Malaysia, Recording Industry Association of Malaysia, Motion Picture Association, International Federation of the Phonographic Industry, Music Author's Copyright Protection.

As part of its activities, the Task Force holds open dialogues with intellectual property owners and intellectual property practitioners to gather feedback on enforcement, coordinate activities, and conduct blitz raids to seize counterfeit and pirated goods. The Task Force works closely with other governmental agencies such as the police, National Film Development Corporation, the Customs and the Ministry of Health to further enhance its enforcement programs.

Pirates in Malaysia, however, have also kept pace and have devised methods to avoid detection. Becoming increasingly agile and mobile, the pirate syndicates are able to cross borders, camouflage and transform their trade. The most effective way of fighting piracy is therefore through inter-governmental and cross-border cooperation. To this end, intellectual property owners can expect more cooperation between the Ministry of Domestic Trade and Consumer Affairs enforcement division and Customs in commencing a border measure program to ensure enforcement at Malaysia's borders. The Malaysian Customs and the Ministry of Domestic Trade and Consumer Affairs are already cooperating with the industries (including freight forwarders and carriers) to monitor exports and seize optical

discs and other counterfeit items bound for export through the installation of X-ray machines to scan and detect these pirated products.

Source: Legal Media Group. Managing Intellectual Property. Karin Abraham (July 2004)

[Online] Available from: [http://www.legalmediagroup.com/mip/default.asp?](http://www.legalmediagroup.com/mip/default.asp?Page=1&SID=2475&ImgName=malaysiaspecial04.gif&=F=F)

[Page=1&SID=2475&ImgName=malaysiaspecial04.gif&=F=F](http://www.legalmediagroup.com/mip/default.asp?Page=1&SID=2475&ImgName=malaysiaspecial04.gif&=F=F)

#### **3.4.4. How do the Malaysian people perceive intellectual property crime?**

As per China and Taiwan the general public does not have much idea about intellectual property or intellectual property crimes but continue to support intellectual property infringers because the prices are too good to refuse.

The Malaysian has taken action in this regard. The government has been actively displaying advertisements in the media to educate the public on piracy as part of the Special Copyright Task Force's activities.

The government has also organized road shows, including seminars and concerts, together with local music artists to help educate people on intellectual property rights and the crimes associated with piracy. The Ministry has also issued 30,787 awareness letters to businesses during inspections and during an Awareness Campaign. The Awareness Campaign is one of the many programs carried out from time to time to further educate the public. Through this campaign, the Ministry has worked jointly with copyright owners to send reminder letters and feedback to companies that have been identified as either selling, distributing or using intellectual property infringing items.

Source: Legal Media Group. Managing Intellectual Property. Karin Abraham (July 2004)

[Online] Available from: <http://www.legalmediagroup.com/mip/default.asp?Page=1&SID=2475&ImgName=malaysiaspecial04.gif&=F=F>

#### **3.4.5 How “user-friendly” is the Malaysian intellectual property rights protection system?**

Copyright protection in Malaysia is governed by the Copyright Act 1987 which provides comprehensive protection for copyrightable works. The Act outlines the nature of works

eligible for copyright (which includes computer software), the scope of protection, and the manner in which the protection is accorded. A unique feature of the Act is the inclusion of provisions for enforcing the Act, which include such powers to enter premises suspected of having infringing copies and to search and seize infringing copies and contrivances. A special team of officers is appointed to enforce the act.

The Copyright Act (1987) provides for the enforcement of the law by the Ministry of Domestic Trade and Consumer Affairs, specifically the Enforcement Division, apart from the Police. The Act also provides the necessary clout to the enforcement agencies to effectively carry out anti-piracy measures.

The Malaysian Copyright Act provides for a Copyright Tribunal whose function is to grant Licenses to produce and publish in the National Language a translation of a literary work written in any other language. The Act is currently amended to expand the power of the tribunal to include arbitration of disputes relating to use of copyright works.

Source: Lawyerment.com.my. Intellectual property – Copyright law. (July 23<sup>rd</sup> 2001)

[Online] Available from: <http://www.lawyerment.com.my/intellectual/copyright.shtml>

[Accessed 13 May 2004]

#### **3.4.6 What are the levels of involvement of organized crime in intellectual property rights infringements in Malaysia?**

In response to a request from the United States Trade Representative on the 30<sup>th</sup> December 2002 for industry comments, the International Anti-counterfeiting Coalition's specific recommendations are for the continued monitoring of China and Paraguay. Priority watch list for Malaysia, Philippines, Poland, Russia and Taiwan. And watch list for Bolivia, Canada, Chile, Hungary, India, Mexico, Panama, Saudi Arabia, South Africa, Thailand, Turkey, United Arab Emirates and Vietnam. The recommendations are part of the annual "Special 301" review of countries that deny adequate and effective protection of intellectual property rights. Tim Trainer of the International Anti-counterfeiting Coalition went on to say that "We must also press more governments to take a closer look at who is involved in the global trade in pirate and counterfeit goods. Government officials in Asia have finally



acknowledged that organized crime syndicates and groups are involved in intellectual property crime. We need to press our trading partners to get the police more involved in investigations and prosecute those behind these illegal activities”.

Source: International Anti-counterfeiting Coalition. IACC Cites Countries for failing to protect intellectual property rights. Trading partners must aspire to more than minimums. (Feb. 12<sup>th</sup> 2003) [Online] Available from:<http://www.iacc.org/teampublish/uploads/PressRelease2-13-03.pdf> [Accessed 1 June 2004]

### **3.5 India**

The Indian market is rife with pirate and counterfeit products. According to the International Anti-counterfeiting Coalition the types and volumes are as broad as that found in China. The auto, pharmaceutical, consumer goods, and clothing industries have to deal with high levels of counterfeiting in India. For example the Indian auto-components sector has to put up with a counterfeit rate of between 30% and 40% of all components. These high rates of counterfeit auto parts and accessories lead to exports to the Middle East, Southern Africa and Europe.

Source: Article on counterfeit automotive parts. Tribune News Service, New Delhi, February 8, 2002

#### **3.5.1 Is pressure being applied on India by developed countries?**

As was the case with China, India also showed signs of resistance to quick enforcement of international intellectual property right protection laws as demanded by the developed countries, particularly the United States. China could get away with it on grounds that it is not a member of the World Trade Organization, but India was required to comply because they are members. Under the terms of the World Trade Organization, India is required to implement World Trade Organization standard intellectual property right protection laws by 2005. It must be acknowledged that there has been remarkable progress in intellectual property right protection particularly in the fields of software and cinema products.

India's general argument towards intellectual property rights was that it does acknowledge in principle the case for strict intellectual property right protection, but this can be done

only in phases suited by its own ground reality. The reality is that absence of international intellectual property rights protection for some decades has spawned employment for millions due to extensive counterfeit operations, so an overnight clampdown on intellectual property rights violators would cause some serious social unrest.

However, under pressure from its own domestic industry and the United States, India strengthened its copyright law in May 1994, placing it on par with international practice.

Source: Insight: Intellectual Property Rights in India. (Date unknown) [Online] Available from: <http://www.indiaonestop.com/markets-intellectual-prop-rights.htm> [Accessed 1 June 2004]

### **3.5.2 What are the general levels of intellectual property law enforcement in India?**

The new intellectual property right protection laws, which entered into force in May, 1995, fully reflect the provisions of the Berne Convention on copyrights, to which India is a party. Based on its improved copyright protection, India's designation as a "priority foreign country" under the United States' "Special301" list was revoked and India was downscaled to the "priority watch list." Copyright enforcement is also rapidly improving.

Classification of copyright infringements as "cognizable offenses" expands police search and seizure authority. While the formation of appellate boards under the new legislation should speed prosecution, local attorneys indicate that some technical flaws in the laws, which require administrative approval prior to police action, need to be corrected.

Trademark protection is considered good by the US authorities, and was recently raised to meet international standards. Enforcement of trademark owner rights had been weak in the past, but is steadily improving as the courts and police respond to domestic concerns about the high cost of piracy to Indian intellectual property rights' holders.

Estimated annual losses to the U.S. pharmaceutical industry due to piracy are \$450 million, but Indian authorities have a different point of view. India's patent act prohibits product patents for any invention intended for use or capable of being used as a food, medicine, or

drug or relating to substances prepared or produced by chemical processes. Consequently, many drugs invented by foreign companies are widely reproduced.

Source: Insight: Intellectual Property Rights in India. (Date unknown) [Online] Available from: <http://www.indiaonestop.com/markets-intellectual-prop-rights.htm> [Accessed 1 June 2004]

India's patent protection is weak and has especially adverse effects on international pharmaceutical and chemical firms. While India has improved its intellectual property rights regime, protection of intellectual property in some areas remains weak due to inadequate laws and ineffective enforcement. India's 2002 patent law amendments exempt subject matter such as biotechnological inventions, methods for agriculture and horticulture, processes for the treatment of humans, animals, or plants, and substances prepared by chemical processes from patent protection.

Source: United States Trade Representative. Sectors. Intellectual Property. (Date unknown) [Online] Available from: <http://www.ustr.gov/reports/2004-301/special301-pw1.htm> [Accessed 12 June 2004]

### **3.5.3 What resources are available for the protection of intellectual property rights in India?**

As regards the aspect enforcement, Indian enforcement agencies are now working very effectively and there has been a notable decline in the levels of piracy in India. In addition to intensifying raids against copyright infringers, the Government has taken a number of measures to strengthen the enforcement of copyright law. Special cells for copyright enforcement have been set up in 23 States and Union Territories. In addition, for collective administration of copyright, copyright societies have been set up for different classes of works.

Concern has been expressed about the allegedly slow judicial system in India and the procedural issues involved in trial and conviction. The Indian judiciary is handling cases as expeditiously as possible. The year that has gone by has again witnessed the versatility of the impartial and independent Indian judiciary when it comes to the issue of protection of

intellectual property rights, amplified by the encouraging trends with Indian courts plugging in gaps in the statute with the common sense of the common law.

Source: Embassy of India, Policy Statements. Intellectual Property Rights in India. (Date unknown) [Online] Available from: [http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm) [Accessed 1 June 2004]

#### **3.5.4 How do the Indian people perceive intellectual property crime?**

Counterfeiting is generally perceived by society as a victimless crime, with 'fakes' simply constituting a cheap alternative product. Criminals on the other hand see counterfeit products as having a large profit but with a far lower risk of prosecution and lighter penalties that drug smuggling for example.

Source: Interpol Website: The impact and scale of counterfeiting. (Date unknown) [Online] Available from: <http://www.interpol.int/Public/News/Factsheet51pr21.asp> [Accessed 31 May 2004]

The Government also brought out A Handbook of Copyright Law to create awareness about copyright amongst the stakeholders, enforcement agencies, professional users like the scientific and academic communities and members of the public. Copies of the Handbook were circulated free of cost to the state and central government officials and police personnel and also provided to participants in various seminars and workshops on IPR matters held during the year.

Source: Embassy of India, Policy Statements. Intellectual Property Rights in India. (Date unknown) [Online] Available from: [http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm) [Accessed 1 June 2004]

The reality of the issue is that the absence of international intellectual property rights protection in India for some decades has spawned employment for millions due to the development of extensive counterfeit operations. So an overnight clampdown on intellectual property rights violators would cause some serious social unrest as well as a serious boost to India's already huge unemployment problem.

### **3.5.5 How “user-friendly” is the Indian intellectual property rights protection system?**

India's criminal IPR enforcement regime remains weak, and India needs sustained, centralized, coordinated enforcement of intellectual property rights, especially trademarks and copyrights. Its court system is extremely slow, and there are only a few reported convictions for copyright infringements resulting from raids. Industry reports significant weaknesses in India's border protection against counterfeit and pirated goods. India also needs to address the high volume of exports of domestically produced counterfeit goods.

Source: United States Trade Representative. Sectors. Intellectual Property. (Date unknown)

[Online] Available from: <http://www.ustr.gov/reports/2004-301/special301-pwl.htm>

[Accessed 12 June 2004]

In addition to the above legislative changes, the Government of India has taken several measures to streamline and strengthen the intellectual property administration system in the country. Projects relating to the modernization of patent information services and trademarks registry have been implemented with help from the World Intellectual Property Organization and the United Nations Development Program. The Government of India is implementing a project for modernization of patent offices at a cost of Rs.756 million incorporating several components such as human resource development, recruiting additional examiners, infrastructure support and strengthening by way of computerization and re-engineering of work practices, and elimination of backlog of patent applications. An amendment to the Patent Rules was notified on June 2, 1999 to simplify the procedural aspects and to make it more user-friendly.

Source: Embassy of India, Policy Statements. Intellectual Property Rights in India. (Date unknown)

[Online] Available from: [http://www.indianembassy.org/policy](http://www.indianembassy.org/policy/ipr/ipr_2000.htm)

[/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm) [Accessed 1 June 2004]

### **3.5.6 What are the levels of involvement of organized crime in intellectual property rights infringements in India?**

Criminal gangs have been operating in India since ancient times. There is no firm data to indicate the number of organized criminal gangs operating in the country, their modus operandi or their areas of operation.

116012



Source: Transnational Organized Crime. The Indian Perspective. Shankar Pratap Singh. (Date unknown) [Online] Available from: <http://www.Unafei.or.jp/pdf/no59/ch29.pdf> [Accessed 3 June 2004]

Criminals see counterfeit products as having a large profit but with a far lower risk of prosecution and lighter penalties than drug smuggling for example.

Source: Interpol Website: The impact and scale of counterfeiting. (Date unknown) [Online] Available from: <http://www.interpol.int/Public/News/Factsheet51pr21.asp> [Accessed 31 May 2004]

### **3.6 South Africa**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

In South Africa intellectual property rights are protected under a variety of laws and regulations. The South African government passed two intellectual property right related laws in parliament at the end of 1997; the Counterfeit Goods Act and the Intellectual Property Laws amendment act to enhance intellectual property right protection. The Department of Trade and Industry administers these acts. Although South Africa's intellectual property laws are generally in line with those of the industrialized nations, there still remain some serious deficiencies in the enforcement of these laws. The enforcement of individual copyright claims is overly complicated due to the lack of evidentiary presumptions in the law which requires the use of an extensive and expensive copyright registration system.

#### **3.6.1 Is pressure being applied on South Africa by developed countries?**

For the past three years, the White House has been pressuring the South African government to drop its plans to seek cheaper alternatives to AIDS medications. Officials were upset when the South African government in 1997 passed a law that would permit it parallel imports of AIDS drugs or the ability to compulsorily license AIDS medications,



such as AZT, which studies have shown can reduce the rate of transmission between pregnant women and their babies.

Between 1997 and the end of 1999, almost every department of the U.S. government attempted to pressure South Africa into compliance. Leading the charge was none other than Vice President Al Gore, who headed the United States - South Africa Binational Commission. The State Department reports that during a 1998 meeting with South African President Thabo Mbeki, Gore made an issue of intellectual property rights protection, and that South African officials attempted to persuade Gore to intervene with the U.S. pharmaceutical industry to terminate its lawsuit. But according to the report, the White House "decided that such an action might undermine the leverage that U.S. companies were exerting through their legal challenge."

Source: Wired News. U.S. to South Africa: Just say no. Lakshmi Chaudhry (25<sup>th</sup> April 2000) [Online] Available from: [http://www.wired.com/news/print/0,1294\\_35874,00.html](http://www.wired.com/news/print/0,1294_35874,00.html) [Accessed 1<sup>st</sup> June 2004]

### **3.6.2 What are the general levels of intellectual property law enforcement in South Africa?**

The 1997 Counterfeit Goods Act was designed to provide broader powers to enforcement authorities in the areas of anti-counterfeiting and anti-piracy, and to simplify the enforcement process so that right owners could be more active. The Counterfeit Goods Act gives police the power to seize counterfeit goods swiftly and easily, and provides for increased monetary penalties and prison terms in criminal cases. The requirements of the Counterfeit goods Act are however extremely burdensome. The Counterfeit Goods Act requires prosecution within two weeks of seizure, and requirement hampers enforcement. The result of this tight time limit places unfair pressure on the rights holder and allows counterfeiters to walk away unpunished. The act is however still in its infancy and it remains to be seen how effective enforcement tool it turns out to be.

South Africa has several specialized departments to deal with the enforcement of intellectual property rights. There is the National Inspectorate Unit of the Department of Trade and Industry, as well as a group under the Department of Health that deals with

pharmaceuticals, and even a “Cyber-cop” unit under the Department of Communications. According to a document prepared by Mr. Macdonald Netshitenzhe (Registrar of the South African Patents and Trademark Office), for a May, 2001 W.I.P.O. conference in Bulgaria, “the South African Government is investing heavily in this type of enforcement.”

Source: The Edge Institute: Intellectual Property Rights in South Africa: An economic Review of Policy and Impact: Teljeur E. Available from: <http://www.the-edge.org.za/projects.html> [Accessed 15 June 2004]

Despite the formation of these specialized departments to combat the problem, law enforcement officials trying to battle commercial crime in South Africa remain understaffed, under funded and overworked. There is very little criminal enforcement in South Africa and it is most often left up to the right owner to take action on their own. Border enforcement in South Africa is at best minimal. South African customs officials lack the support, resources and training necessary to stem the tide of counterfeit goods.

There has however been a marked improvement in seizures of counterfeit or pirated goods at South Africa’s borders due to a concerted effort on the part of the Department of Trade Compliance which forms part of the Department of Trade and Industry.

Based on the above analysis the international anti-counterfeiting coalition has recommended to the United States Trade Representative that South Africa remain on the watch list till next year. Not because South Africa is a major source of counterfeit goods, but because of the lack of border control to stop in the import and in-transit progress of counterfeit and pirate goods.

When South Africa continued to defend its law, asserting it was in full compliance with TRIPS requirements, the United States Trade Representative placed South Africa on the Special 301 Watch List, which lists countries under scrutiny for possible intellectual property violations.



Source: Wired News. U.S. to South Africa: Just say no. Lakshmi Chaudhry (25<sup>th</sup> April 2000) [Online] Available from: [http://www.wired.com/news/print/0,1294\\_35874,00.html](http://www.wired.com/news/print/0,1294_35874,00.html) [Accessed 1<sup>st</sup> June 2004]

### **3.6.3 What resources are available for the protection of intellectual property rights in South Africa?**

In addition, United States Trade Representative recognized that "enforcement remains a problem in part because of a lack of availability of enforcement resources."

Source: International Intellectual Property Alliance website: [Online] Available from: <http://www.iipa.com/rbc/1999/rbcsouthafrica30199.html> [Accessed 30 May 2004]

Disturbingly, the South African Government has responded to an increased smuggling problem with plans to reduce the number of its border posts from 52 to 19, with the 'aim' of improving management of resources. It remains to be seen, however, whether this move can possibly impact positively on the flow of pirate product into the country, or whether smuggling will increase further.

Source: International Intellectual Property Alliance website: [Online] Available from: [http://www.iipa.com/rbc/1999/rbc\\_south\\_africa\\_301\\_99.html](http://www.iipa.com/rbc/1999/rbc_south_africa_301_99.html) [Accessed 30 May 2004]

South Africa still does not devote sufficient resources to the enforcement of its Copyright Law. Overwhelmed by high crime levels, South African officials have committed only limited resources to intellectual property protection. As a result, the local anti-piracy organization has been given special powers to pursue copyright cases and must do most of the preparatory work for official investigations and police actions.

Source: International Intellectual Property Alliance website: [Online] Available from: [http://www.iipa.com/rbc/1999/rbc\\_south\\_africa\\_301\\_99.html](http://www.iipa.com/rbc/1999/rbc_south_africa_301_99.html) [Accessed 30 May 2004]

While the police are faced with severe personnel shortages, liaison with the Police Services remains generally satisfactory. A significant problem is that many police members are newly assigned to the detective branches and lack experience and training in copyright protection. They have nonetheless been receptive to regular training sessions given to

individual police units throughout the country. The motion picture industry is heartened to learn that the South African Government would like to see more of this kind of training for the police and customs officials, as well as judges and prosecutors on enforcing against copyright piracy. The South African Government should create a special enforcement unit in the Department of Trade and Industry to govern copyright regulations and infringements.

Unfortunately, South African prosecutors, judges and courts continue to give low priority to copyright infringement cases. The local anti-piracy organization has initiated 63 criminal prosecutions, and the public prosecutor has accepted admissions of guilt and imposed a police fine in several more cases. The motion picture industry is optimistic that its cooperation with the Cape Town Attorney General concerning prosecutions under the Counterfeit Goods Act will improve the situation.

Source: International Intellectual Property Alliance website: [Online] Available from: [http://www.iipa.com/rbc/1999/rbc\\_south\\_africa\\_301\\_99.html](http://www.iipa.com/rbc/1999/rbc_south_africa_301_99.html) [Accessed 30 May 2004]

The state of the criminal justice system – understaffed, under funded, under – resourced, lack of skills, loss of skills to the private sector, blockages and delays in the courts – means that prosecutions are often unsuccessful. In intellectual property related matters that right holder is often dissuaded from prosecuting a infringer due to the system.

Source: A Symbiotic Relationship? Organized Crime and Corruption in South Africa. Dr. Anthony Minaar. Technicon S. A. (15 October 1999) [Online] Available from: [http://www.transparency.org/iacc/9th\\_iacc/papers/day4/wss/dnld/d4ws5\\_aminar.pdf](http://www.transparency.org/iacc/9th_iacc/papers/day4/wss/dnld/d4ws5_aminar.pdf) [Accessed 15 March 2004]

#### **3.6.4 How do the South African people perceive intellectual property crime?**

The South African government themselves had been identified as major culprits. As of July 1, 1999 the South African Government was given six months to improve the local protection of intellectual property rights or face further unpleasantness from the Clinton administration's fair trade enforcers. The United States Trade Representative was also seeking assurances that the governments own computers had been purged of unlicensed software and that South Africa would be in full compliance with the World Trade Organization's T.R.I.P.'S agreement by January 1<sup>st</sup> 2000.

Source: The Sunday Times Business times, *Industry Toughens on Piracy*, 17<sup>th</sup> March 2002.

Members of the Business Software Alliance and the local software industry estimate the piracy level in the public sector to be as high as 40-50%, extending to various agencies and departments of the South African Government. The government is currently moving toward a consolidation of its purchase patterns and service providers, which hopefully will include allocations for legal software commensurate with the hardware allocations. During the later part of the Apartheid era, Government contractors were not allowed to purchase U.S. technology and, as a consequence; many Business Software Alliance member products were widely pirated by the contractors.

Source: International Intellectual Property Alliance website: [Online] Available from: [http://www.iipa.com/rbc/1999/rbc\\_south\\_africa\\_301\\_99.html](http://www.iipa.com/rbc/1999/rbc_south_africa_301_99.html) [Accessed 30 May 2004]

Pirate photocopying of college texts and school texts has increased drastically over the past few years. It is estimated that at least 50% of texts used country wide are pirate photocopies. The Association of American Publishers hopes to work more closely with Publishers' Association of South Africa, which is deeply involved in trying to improve the situation.

Source: International Intellectual Property Alliance website: [Online] Available from: [http://www.iipa.com/rbc/1999/rbc\\_south\\_africa\\_301\\_99.html](http://www.iipa.com/rbc/1999/rbc_south_africa_301_99.html) [Accessed 30 May 2004]

### **3.6.5 How “user-friendly” is the South African intellectual property rights protection system?**

South Africa's copyright system continues to work against the copyright owner in that the registration process is too slow. Trademark owners are hampered by a slow registration process, as it normally takes three years from filing the application until registration. This system is totally inadequate, particularly for products with short marketing cycles. A producer in South Africa cannot get the copyright for a new product registered early enough in the marketing cycle, and this is when piracy is at its highest.

Source: The Edge Institute: Intellectual Property Rights in South Africa: An economic Review of Policy and Impact: Teljeur E. Available from: <http://www.the-edge.org.za/projects.html> [Accessed 15 June 2004]

South Africa has now become a destination point for pirated optical media products from Asia, including, for example, high-quality counterfeit software produced in the United States and the Far East, and pirate masters of movies not yet released in South Africa. Procedural problems, including the lack of evidentiary presumptions of ownership in copyright infringement cases, continue to subject right owners to overly costly and burdensome procedural hurdles.





Source: International Intellectual Property Alliance website: [Online] Available from: [http://www.iipa.com/rbc/1999/rbc\\_south\\_africa\\_301\\_99.html](http://www.iipa.com/rbc/1999/rbc_south_africa_301_99.html) [Accessed 30 May 2004]

### **3.6.6 What are the levels of involvement of organized crime in intellectual property rights infringements in South Africa?**

Organized crime and corruption are often treated as separate entities but in fact they feed off each other in what is called a symbiotic relationship. While not being unique in its experience of organized crime and corruption, South Africa is a relatively new entrant to this field of experience. The main reason for this is the political and economic isolation under which South Africa suffered as a result of the many years of apartheid rule. This is not to say that South Africa did not experience forms of home-grown organized crime but rather that the levels of organizational sophistication, international networking with other crime syndicates and transnational crime tendencies were not all that prevalent.

Source: A Symbiotic Relationship? Organized Crime and Corruption in South Africa. Dr. Anthony Minaar. Technicon S. A. (15 October 1999) [Online] Available from: [http://www.transparency.org/iacc/9th\\_iacc/papers/day4/wss/dnld/d4ws5\\_aminaar.pdf](http://www.transparency.org/iacc/9th_iacc/papers/day4/wss/dnld/d4ws5_aminaar.pdf) [Accessed 15 March 2004]

The increase in organized crime in South Africa can be attributed to the following factors:

-  Renewed international investor interest in South Africa.
-  South Africa's favorable geographic position on the major trafficking routes between the Far and Middle East, the Americas and Europe.
-  South Africa's accessibility via land, sea and air routes.
-  A criminogenic market structure. I.e. unsaturated demand for illegal goods e.g. drugs, counterfeit products, illegal fire arms.



- ✚ The large scale presence of illegal aliens/undocumented migrants which has, apart from their role in crime (including organized crime) led to an increase in the already intense competition for scarce resources, service and job opportunities.

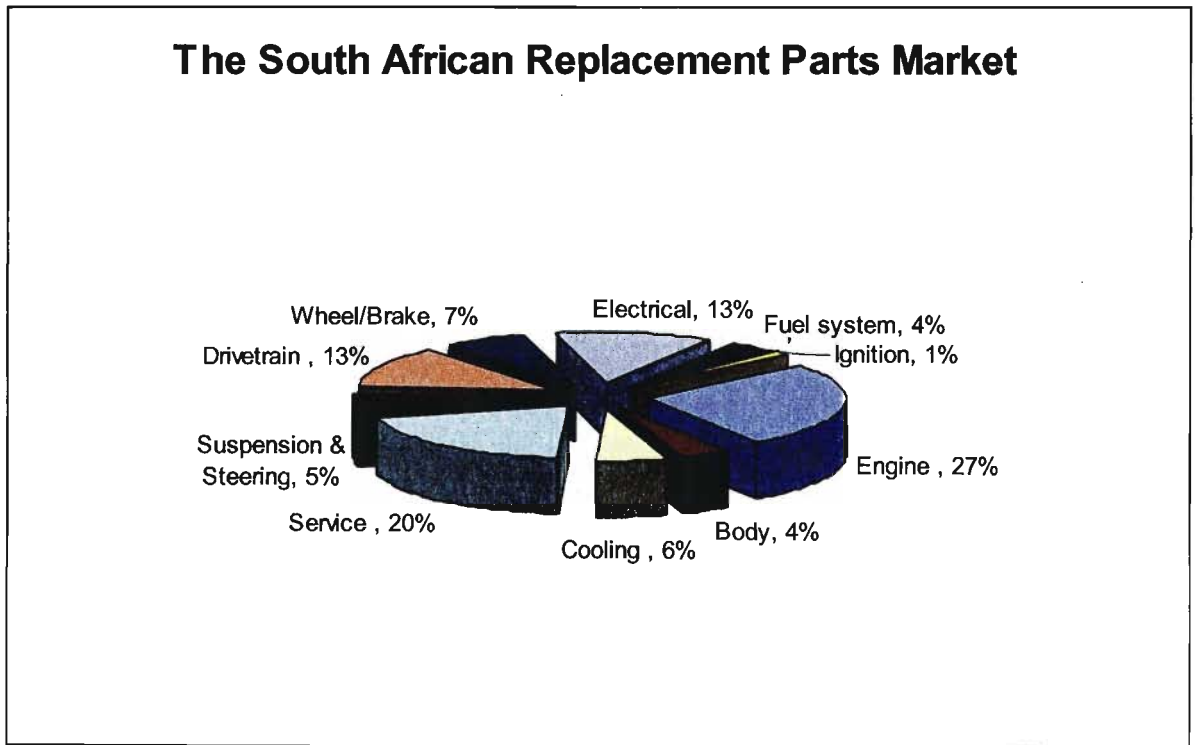
The extent of South Africa's cross border criminal activities would not have been at such a level if there were no corrupt officials at grass roots level. This corruption extends to border officials (border police and immigration officers as well as customs and excise officers all over the country). The extent of the abuse of the system i.e. non-declaration, fraudulent goods manifests, bribery, corruption etc would appear to indicate extensive organized activities and control by specific syndicates. Goods involved typically involve, cigarettes, second hand vehicles, counterfeit automotive parts and optical media. A further problem is the under inspection of containers by customs officials, only about 2% of containers coming into South Africa are inspected, with customs officials taking at face value the manifests of the balance. This is due to a severe lack of resources.

Source: A Symbiotic Relationship? Organized Crime and Corruption in South Africa. Dr. Anthony Minaar. Technicon S. A. (15 October 1999) [Online] Available from: [http://www.transparency.org/iacc/9th\\_iacc/papers/day4/wss/dnld/d4ws5\\_aminar.pdf](http://www.transparency.org/iacc/9th_iacc/papers/day4/wss/dnld/d4ws5_aminar.pdf) [Accessed 15 March 2004]

## **Chapter 4: A brief synopsis of the South African vehicle replacement parts market.**

### **4.1 The South African Replacement Parts Market.**

The size of the South African replacement parts market is estimated at R 12.3 billion per annum (measured at dealer net), this excluding tires, and is segmented as follows:



(Figure 4.1)

The players in this market can be again be broken up into three very distinct segments.

- 🔧 O.E.M.'s (original equipment manufacturers). Genuine parts sold in OEM's packaging, with OEM's warranty. E.g. Volvo Genuine Parts or Toyota Genuine Parts.
- 🔧 The Alternative market. OEM quality parts sold in proprietary brand packaging. E.g. Fram Filters, Ferodo Brake Pads etc.
- 🔧 "White" box and second hand market. Unknown quality parts sold generally in white or brown packaging, with very little details about where they come from..

Source: Automobile magazine February 2003.

#### **4.2 O.E.M.'s market.**

By O.E.M. this refers to the company who manufactured the vehicle in the first place. So when one refers to O.E.M. parts one is referring to the genuine part, or the part specified and supplied by the original manufacturer. E.g. Volvo genuine parts refer to the parts supplied by AB (Aktiebolaget or (Pty) Limited) Volvo to the Volvo dealer. These parts will be supplied in Volvo packaging, and will be clearly marked as Genuine Volvo replacement parts or as Volvo Originaldelar (Swedish translation).

#### **4.3 Alternate market**

The alternate replacement parts market can be split into two distinct segments. The first segment is based on O.E.M. suppliers who are selling genuine parts. And the second segment is based on suppliers who are selling non-genuine parts claiming that they are genuine parts.

##### **4.3.1 O.E.M. suppliers who are selling genuine parts**

AB Volvo (for example) is not in the business of parts or component manufacturing, but in the business of manufacturing Trucks and busses. AB Volvo will design and copyright all of the parts required to manufacture a truck or bus, but in order to concentrate on the core business of manufacturing trucks and busses, many of the parts used during manufacture are sourced from approved O.E.M. suppliers. These approved O.E.M. suppliers are given the specifications for the parts required for the manufacture of Volvo trucks and busses, which they then manufacture using AB Volvo's tooling and supply to AB Volvo's production line. The Volvo aftermarket department would then also purchase these same parts from the same suppliers in order to supply the dealer network with spare parts or replacement parts. The less scrupulous of these suppliers produce additional runs of these parts and sell them on to the open market as Genuine Volvo replacement parts. This is a clear cut infringement of the intellectual property rights of AB Volvo, who have designed and copyrighted the part and even paid for the tooling required to manufacture the parts. This form on copyright infringement is often very difficult to detect and even more difficult to prove.

#### **4.3.2 Suppliers who are selling non-genuine parts.**

The second side of the alternate market is where a supplier counterfeits the genuine part and sells it on the open market claiming that it is the genuine part. There are many instances where this has been picked up due to the product not having the levels of performance that it should have. This is particularly prevalent in the area of service parts, as they are very fast moving. Volvo has had more than one occasion where oil filters manufactured in China have found their way into the South African market. To the untrained eye the filter looks identical to the genuine article and the differences can only be detected when the product fails causing significant damage or if the filter is actually cut open.

In this instance the counterfeit filter has the following differences to the genuine part.

- ✚ Less paper. The counterfeit filter has half the filter paper than the genuine Volvo filter. The paper is shorter and substantially thinner. The paper is also dirty and of a far lower quality than the genuine part. After testing it was determined that the counterfeit filter offered less than 35% of the filtration properties of the genuine part.
- ✚ Poor seals. The sealing of the paper to the top and bottom plate of the filter was found to be sub standard and would lead to unfiltered oil getting back into the engine.
- ✚ Staples used to join paper. The pleated paper was stapled together around the filter and this would also lead to unfiltered oil leaking through the staple holes and getting back into the engine.
- ✚ The spring on the counterfeit filter provided insufficient force to hold the filter in position leading to leakages.

This particular filter was only detected because a customer lost an engine due to the ineffectiveness of the filtration. The customer then tried to put a claim in against Volvo Southern Africa to the amount of R198 974.00 for the replacement of his engine, which was subsequently rejected. This is a clear case of a small saving resulting in a large amount of damage. The customer eventually admitted that he had purchased the filter from a small parts shop in Johannesburg for R 20.00 less than the Volvo agent would have charged. After



an extensive and expensive investigation, Volvo Southern Africa, through out attorneys managed to trace the shop, the importer and through our international dealer network the manufacturer of the filter and have the operation shut down.

**4.4 “White” box or second hand.**

This is the third segment and probably the most straight forward case of copyright infringement. These “white” box parts are copies of the genuine parts but the marketers do not try to pass them off as genuine. They are quite openly marketed as copies. The marketers of these parts normally (although not always) use a plain white box (Hence the name) and the only reference to the parts contained therein is normally the manufacturer’s part number and their name, as in the example below.



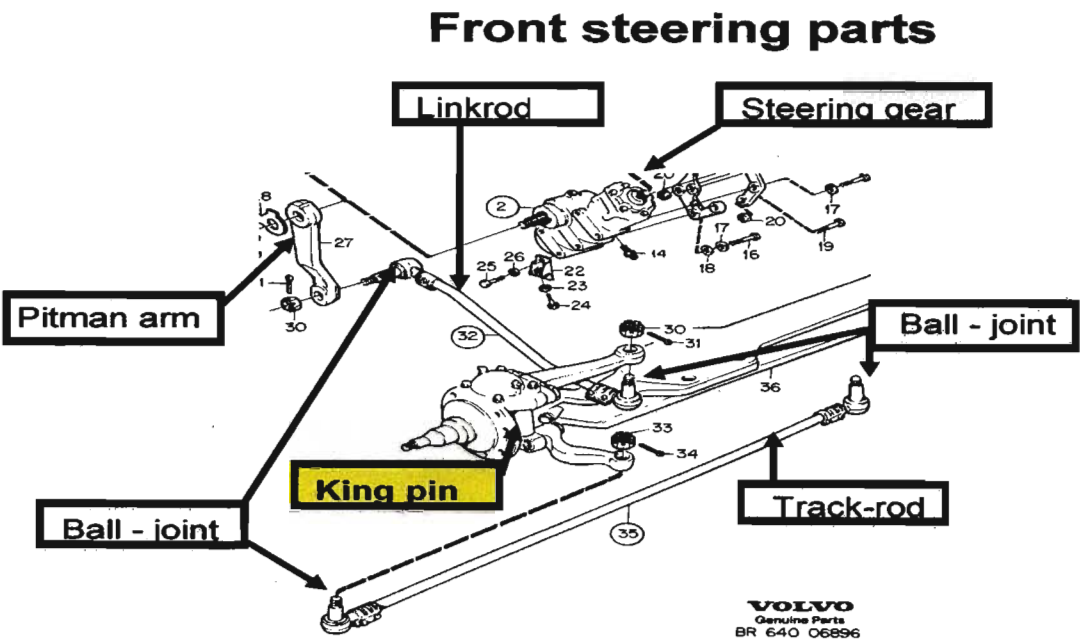
(Figure 4.2)

This is an example of parts that Volvo found on the market in Johannesburg and successfully had the parts removed from the market as part of an out of court settlement with the importer. Volvo threatened to lay a charge of copyright infringement against the importer for the illegal use of the Volvo name as well as the Volvo Part number. The

importer backed down once he realized that Volvo had a strong case against him, and the parts were removed from his premises and destroyed.

The above example is of seemingly innocuous parts, engine valves. The worst that can happen is that the engine breaks, or even blows up. This would cost the customer a few hundred thousand rand in repairs and “down” time.

There is however a far more sinister side to the “White” box side of the business. People look at engine parts or the odd service part like a filter, and again the phrase “victimless crime” comes to mind. The following is an example of a safety critical part that was recently found on the South African market.



(Figure 4.3)

Source: Volvo international website, section on pirate parts. (2004) [Online] Available from: <http://violin.vtc.volvo.se/dept/22300/prod/comp.htm> [Accessed 1 June 2004]

On a heavy duty vehicle whether it be a truck or a bus, the front wheels are connected to steering knuckles which are connected to the front axle by a large pin called a King pin.

This pin is called the King pin because of its importance to both the steering as well as keeping the wheels on the vehicle.

Volvo Southern Africa was informed by the local Customs and Excise department at the City Deep container depot that they had reason to believe that they had intercepted a shipment of non-genuine king pins, and invited Volvo Southern Africa to inspect the shipment. Please bear in mind that a king pin costs about R1 500.00 and can literally kill people.

To the naked eye there appeared to be no difference. Other than the packaging the parts appeared to be identical. But this is one of the critical aspects of counterfeit parts. The king pin is a safety critical part. A failure of the king pin endangers not only the lives of the driver and passengers in the truck or bus concerned but anyone who happens to be unfortunate enough to be in the immediate area. If the king pin on a loaded truck or bus traveling at speed fails, the front wheel can detach itself from the vehicle and become an unguided missile. But regardless whether the front wheel detaches from the vehicle or not, the driver will have no control over the vehicle.

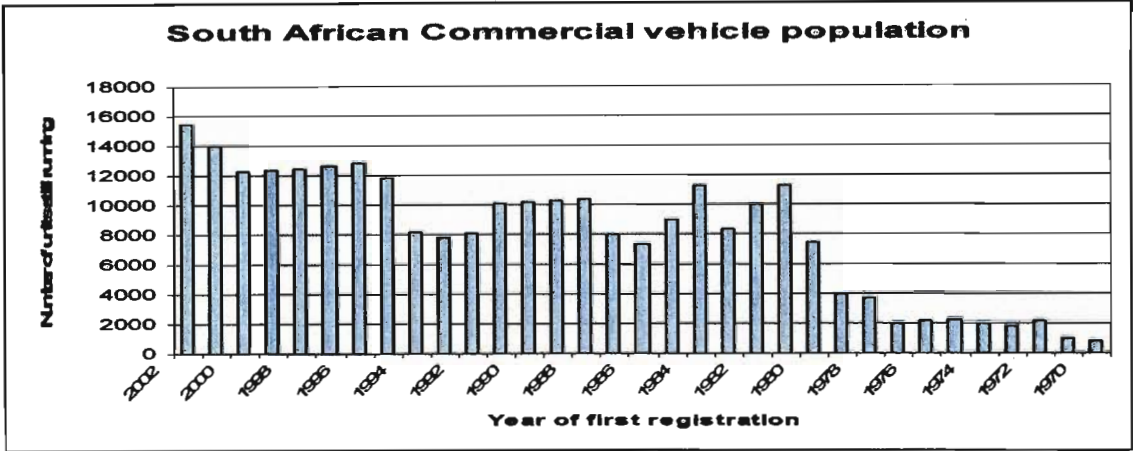
Source: Volvo international website, section on pirate parts. (2004) [Online] Available from: <http://violin.vtc.volvo.se/dept/22300/prod/comp.htm> [Accessed 1 June 2004]

After further metallurgical testing it was discovered that the induction hardening, which is critical to the strength of the king pin, had been conducted incorrectly, further weakening the counterfeit part. If a customer were to unwittingly fit his part, there would most certainly have been at least a failure if not a catastrophe. Volvo Southern Africa requested Customs to impound the parts pending further testing. The parts were eventually destroyed by Customs.

#### **4.4.1 Second Hand parts**

The final segment of the South African parts market is the second hand parts market. The profile of the vehicle parc (an industry term used to describe the total amount of vehicles on the road) in South Africa is far older than in most developed countries. In the United States

for example, commercial vehicles older than 10 years must be removed from the road and scrapped. Due to the developing nature of the South African market there are still a number of commercial vehicles on our roads as old as 30 years.



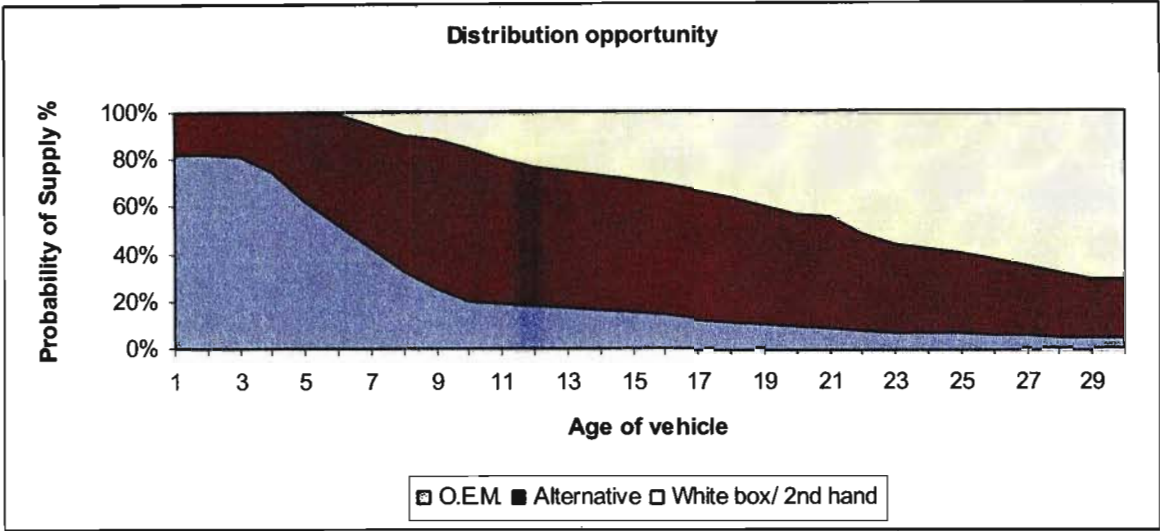
(Figure 4.4)  
 Source: *The South African commercial vehicle population (>3500kg GVM) as per 31 December 2002*, Automobile magazine February 2003.

There comes a time in any vehicles life where it is economically just not viable to purchase parts that may end up costing as much as the vehicle is worth. This is where used parts become a viable option. Due to the number of vehicles stolen in South Africa on a daily basis these parts are normally readily available. This is a segment of the market that is growing steadily and it is up to the government to implement controls so that the number of stolen vehicles does not go on the increase in order to feed the demand for second hand parts.

This segment is generally not of much interest to the vehicle manufacturers as the person who will purchase second hand parts will generally not be prepared to pay the prices for the quality of the genuine part.

The distribution opportunity graph below shows by vehicle age where the consumer is most likely to purchase his parts. The second hand market in South Africa really only starts growing from the 6<sup>th</sup> year of the vehicles life and continues to grow in leaps and bounds through the rest of its life.

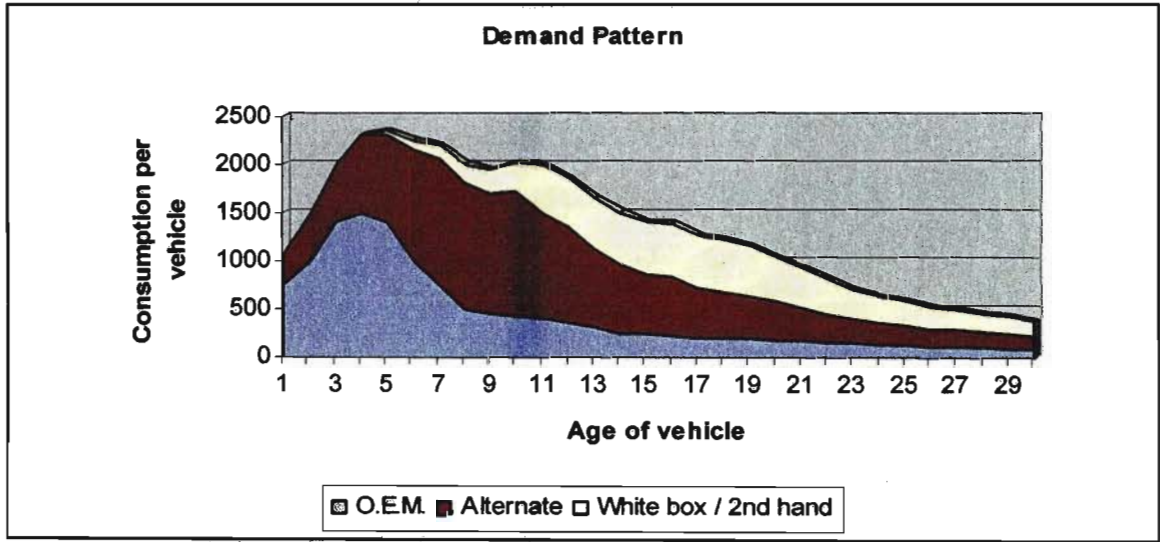




(Figure 4.5)

Source: *Analyzing the parts opportunity*, Automobile magazine, February 2002

**4.5 The demand pattern for parts in South Africa.**



(Figure 4.6)

Source: Automobile magazine, February 2002

As can be seen from the above graph, the consumption of parts in the South African market really reaches its peak after about four and a half years, and gradually decreases with time. Remember that this is an average consumption figure per vehicle. It must also be

remembered that later in the vehicles life there is less focus on what the vehicle looks like, and more focus on merely keeping it running. Minor accidents will not be repaired, and even major accidents will probably end up being repaired by a “back yard” operator using minimal new parts.

This leaves the first four and a half to five years for the O.E.M.’s to make the most of the vehicle, and to limit as far as possible the amount of parts that are available as alternate parts. In general the alternate parts suppliers will only stock the parts that are considered fast moving, and this generally incorporates the following:

- ✚ Certain brake components (safety critical)
- ✚ Certain steering and suspension components (safety critical)
- ✚ Filters
- ✚ Bulbs
- ✚ Clutch
- ✚ Accessories
- ✚ Consumables (oil, grease, fuses etc.)
- ✚ Selected body parts (safety critical)

The O.E.M.’s are under a legal obligation to supply parts all parts for the vehicle and not just the ‘cherries as the alternate suppliers do. There is also a high level of competition among O.E.M.’s as to the average supply rate. Customers often ask O.E.M.’s what their rate of parts supply is before purchasing vehicles. It obviously costs money to stock the entire range of parts for a model line. The alternate suppliers “cherry” pick and only stock the prime lines as mentioned above. O.E.M.’s also have a legal obligation to stock replacement parts for a model line for up to fifteen years after production of the vehicle is stopped (with passenger cars this is only 10 years). This also costs money, and the cost of this must be carried through to the retail price of the replacement parts.

#### **4.6 Saving a few pennies can cost a fortune**

The worldwide replacement parts market offers alternatives to roughly 75% of Volvo’s genuine product range (in South Africa this is much lower at about 20% but will grow as

more Volvo's are on the road). A bus or truck owner who consistently chooses alternate parts can reduce his running costs by approximately 0.5%. However, this marginal saving should always be offset against the likely results if the alternate part is not of sufficiently high quality. The consequences of just one unscheduled stop, reloading, towing, repair, standstill and dissatisfied customers, can transform a cheap purchase price into a very expensive experience indeed.

“Volvo's competitors sell parts for one single purpose: to make money. For Volvo however, selling parts is simply their way of looking after Volvo's renowned name, ensuring that their customers are satisfied and in this way persuading them to choose Volvo the next time round as well. Which explains why there are no traces of compromise in Volvo's choice of material, the parts they use or their design? The high quality of the parts Volvo sells ensures that our vehicles function perfectly for a long time to come, bringing benefits in terms of improved economy, safety and high availability”.

“Your Volvo dealer however can supply every single part which goes to make up your truck or bus. And this undertaking applies for at least 15 years after Volvo have stopped making the model. That is why the operator who chooses Volvo can relax in the knowledge that his wheels will never stop turning”.

“Maintaining such an extensive parts stock obviously costs a lot of money. However Volvo regards it as a natural part of their total commitment to our customers”.

“The fact that Volvo genuine parts meet Volvo's engineering standards in every single respect is of particular importance when we turn our attention to safety-related products. One example is the genuine Volvo windscreen, which is integrated into the cab's overall safety structure and helps give the cab its immense sturdiness. Brakes are another example, where the right combination of brake linings and brake drums is an absolute precondition for obtaining sufficient braking power. Here for instance, a misguided sense of economy may in a worst-case scenario place both the driver and other road users at serious risk”.



Source: *The truth about Volvo Genuine Parts*. Volvo Truck Corporation, International Division Sweden October 2003.







## **Chapter 5: Conclusion and recommendations.**

### **5.1 Conclusions to the six basic research questions.**

The key research question was, how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?



The developed countries seem to have decided that for the less developed countries, compliance with the bare minimum requirements of T.R.I.P.'s is no longer good enough. They want more protection implemented, and better levels of enforcement applied.

The same basic questions were asked of all the developing nations that we looked at:

-  Is pressure being applied by the developed countries?
-  What are the general levels of intellectual property law enforcement?
-  What resources are available for the protection of intellectual property rights?
-  How do the people perceive intellectual property crime?
-  How “user” friendly is the intellectual property rights protection system?
-  What are the levels of involvement of organized crime involvement in intellectual property infringement?

#### **5.1.1 Is pressure being applied by developed countries?**

The more developed nations in the world are hitting out hard at the developing nations such as South Africa, as they feel not enough is being done to enforce their intellectual property rights. In developing countries there appears to be two basic problems concerning intellectual property rights.

-  General apathy regarding intellectual property rights, and a feeling that they have bigger problems to worry about. In any case the wealthy nations can afford the loss of income and we need the income.
-  General lack of resources. I.e. personnel, budget, training etc.

South Africa has perhaps experienced the most pressure from the developed countries in recent years due to the announcements that the South Africa Government would commence the parallel importation of AIDS drugs from India and other countries.

The nation applying the most pressure on all developing countries is the United States. The instrument for applying pressure is the threat of trade sanctions or embargoes. The leading authority seems to be the United States Trade Representative, and his recommendations for “Priority Watch List” or “Special 301” List.

### **5.1.2 Research results:**

“The Counterfeit Goods Act –1997 came into being as a result of South Africa being a signatory to the international T.R.I.P.S. agreement. The Counterfeit Goods Act was a vast improvement over the Trade Marks Act that dated from the early 1940’s which was previously applied to combat counterfeit products. The Counterfeit Goods Act is applicable to all kinds of “illegal” products”.

Source: Matt Gennrich, General Manager Parts and Accessories Division Volkswagen of South Africa.

“The Developed World’s governments should place more pressure on ensuring that intellectual property rights are better protected in the developing world. This can only happen on a macro level as governments in the developed world do not have the resources to “police” activities and adherence to intellectual property rights in the Developing World. Developed world governments can only leverage donor funds, access to markets, informal and formal trade barriers to encourage respect of intellectual property rights. It is business themselves who need to ensure that their intellectual property rights are also protected on a micro level by leveraging foreign direct investment and trade practices. The world bodies like the International Monetary Fund, World Bank and International Court’s decisions are generally not respected by truant developing world governments and hence these decisions have little impact in controlling breaches of intellectual property rights. In essence a carrot and stick approach is needed, we will invest and render aid if you respect intellectual

property or we will create trade barriers, sanctions and the like if you breach intellectual property rights”.

Source: Andreas Walker, WMB – Service Solutions, International Motor Industry Consultants

“I don’t think the “developed nations” bring the pressure but rather the multi-national private enterprises. These also lobby within their governments for the appropriate legislation to be put in place. In the case of “Replacement or Service Parts (as well as Accessories) the largest motor manufacturers have agreed between each other to “tackle” the problem of pirating and particularly the “cloning” of product with the use of original logos and branding around 2001. In broad terms they are still in the process of creating effective infrastructure and researching the size of the problem this is currently the status in South Africa as well.

Globally speaking and in South Africa as well the leading “protectors” are in the electronic sector, fashion brand sector, particularly sports goods, and chemical (medicines) industry”.

Source: Piet van Wyk de Vries, Director Parts Operations Toyota South Africa.

“The first world concept and understanding of Intellectual Property and capital has not yet filtered down to the developing nations. The reasons for this are numerous but the underlying cause is that there is such a vast difference between the ‘haves’ and the ‘have nots’. Until this gap is narrowed the developing economies will struggle to contain the infringement of all aspects of intellectual property in spite of pressure from the developed nations. Many transgress against intellectual property knowingly while others will do it from ignorance.

In the South African context there is a much greater awareness, over the past 5 years or so, of transgressions against intellectual property which has mostly been driven by the software and music industries. In the replacement parts industry there is still a long way to go to counter the effect of pirate and grey imported parts. I think that the problem lies not in the legislation but in the enforcement of the rules.

Source: Ian McDonald, Branch Manager Volvo Truck and Bus Cape Town.

## **5.2 What are the general levels of intellectual property law enforcement?**

As seen in the previous chapters most developing countries have a general law enforcement problem due to the lack of resources. We have explored the lack of resources available to the enforcement officers, whether they are police, customs or immigration officials. The developed countries and in particular the E.U. and U.S stated that the bare minimum as prescribed by T.R.I.P.'s is no longer enough. The developed countries want the lesser developed countries to step up their compliance and enforcement of intellectual property rights.

### **5.2.1 Research results:**

“Compared to other developing nations South Africa is quite advanced. Although intellectual property right protection exists in most of these (other developing) countries they normally lack the resources to enforce it. It is known that certain industries in South Africa like the IT and film industries have achieved considerable success in addressing illegal products”.

Source: Matt Gennrich, General Manager Parts and Accessories Division Volkswagen of South Africa.

“It would appear that it is up to the owner of the brand to secure their own intellectual property rights and whilst there is some legislation in place, say through customs and excise it is very hit and miss. For example just stop at any traffic lights and there is an array of potentially counterfeit goods on sale.”

Source: Martin Kavanagh Aftersales Manager Volvo Southern Africa

“South Africa has developed world levels of intellectual property protection, as well as a sophisticated and enforceable legal system. The only area that needs to be improved is how to “police” breaches of the intellectual property right protection system better through inspections at ports and breaches by local manufactures”.

Source: Andreas Walker, WMB – Service Solutions, International Motor Industry Consultants

“I believe that the level of protection is industry specific based upon how much noise the industries lobby is prepared to make. As I indicated the music and software industries are driving the cause of intellectual property very hard but customers in the transport industry have little regard for whether the replacement part is protected by trademark, copy right or patent. They look at the cost to their operation and base their decision on weighing up the usage factor of a genuine part over the cost and usage of a pirate part. Ethics almost don’t count. All that counts is that they will get away with it”.

Source: Ian McDonald, Branch Manager Volvo Truck and Bus Cape Town.

“Legislation is adequate, but enforcement at port of entry is a problem in every country as not all containers are inspected. The training of Customs officers is helping and the position is improving”.

Source: Allan Young, General Manager Parts Operations General Motors South Africa.

### **5.3 What resources are available for the protection of intellectual property rights?**

As seen in the previous chapters there are varying levels of resources available for the protection of intellectual property rights. Some developing countries have seen the damage that the lack of intellectual property right protection has caused them. Others are still paying “lip service” to the effects of a lack of intellectual property protection. It is clear however that unless the resources are made available to the authorities in developing countries, along with effective training, intellectual property will not be properly protected. Here the developed countries should offer assistance with training.

#### **5.3.1 Research results:**

“Whether these resources are sufficient depends on the actions of the trade mark owner. If a trade mark owner pro-actively protects its market by identifying perpetrators and infringements, action can be taken with the assistance of the relevant role players. i.e. South African Police Services, South African Revenue Services, Department of Trade and

Industry, South African Bureau of Standards, Trade mark owners, Trade mark attorneys and the Dept. of Justice”.

Source: Matt Gennrich, General Manager Parts and Accessories Division Volkswagen of South Africa.

“Very limited resources are available through the use of customs and excise upon entry into the country. Once the product has entered the country the only resource left is the limited resources of the South African Police Services”.

Source: Martin Kavanagh Aftersales Manager Volvo Southern Africa

“Due to the strain placed on resources due to conflicting priorities to police a variety of additional socio-economic ills unique to the developing world, insufficient resources are available for intellectual property rights protection despite a robust structure to protect intellectual property rights being in place. Resources mainly exist in the Customs and Excise departments, South African Police Services, and Big Business who often have dedicated employees to monitor and take corrective action when intellectual property rights are breached”.

Source: Andreas Walker, WMB – Service Solutions, International Motor Industry Consultants

“Only the structures within each Original Equipment Manufacturer (rather ineffective) as well as NAAMSA who are still building the infrastructure. From a government point of view there is a specialist anti-counterfeit group which specializes mainly in the electronic, including DVD, CD, electronic games product segments”.

Source: Piet van Wyk de Vries, Director Parts Operations Toyota South Africa

“I am aware of the standard protections afforded to patents, copy right and trademarks as well as the legislation relating to the import of parts as given by the DTI 93.01-93.05. However as this is not my area of focus this is not something I keep up to date with”.

Source: Ian McDonald, Branch Manager Volvo Truck and Bus Cape Town.



Over and above civil remedies, assistance can be garnered from the SAPS, Commercial Branch, DTI Commercial Investigations as well as SARS, anti-smuggling. Where previously enforcement was not a high priority for the state, larger budgets and more manpower is now being allocated to relevant departments. The NPA, Scorpions are also becoming involved, especially in syndicated infringement operations.

Source: Paul Flavin, Brand Protection Manager Ford Motor Company of Southern Africa.

#### **5.4 How do the people perceive intellectual property crime?**

We have seen in the preceding chapters that there is a general level of ignorance towards intellectual property rights in most developing countries. The people of some developing countries have been involved in counterfeiting products for so long that they feel it is their right to continue to do so. In some instances entire towns depend on the income derived from counterfeiting.

##### **5.4.1 Research results:**

“South African people do not consider intellectual property crime regarding illegal replacement parts as serious, in any case not in the same light as theft or fraud. The impression is gained that they are unaware that there is a difference between legal and illegal replacement parts. It is about affordability and illegal replacement parts are a lot less expensive than genuine parts. The following factors must be taken into consideration:

- 🔧 Lack of knowledge. People are normally not aware whether it is a genuine, counterfeit or copyright infringement part because of the technical nature pertaining to vehicle parts. Many spare parts outlets are aware of this.
- 🔧 Affordability: Legal/illegal replacement parts are a lot less expensive than genuine parts”.

Source: Matt Gennrich, General Manager Parts and Accessories Division Volkswagen of South Africa.

“In the main it would appear that the general “man in the street” has little or no concern for intellectual property rights and would like to purchase predominantly on price”.

Source: Martin Kavanagh Aftersales Manager Volvo Southern Africa

“Each socio-economic class has different levels of respect for intellectual property rights. In principle most support, but due to the perceived price advantage received by the individual, for the perceived equivalent value, when a purchasing decision is made, most individuals ignore intellectual property rights covertly (sub-consciously) if they can get a “bargain”. On an overt (conscious) level most will support intellectual property rights. The less developed sections of South African society may not have intellectual property rights as top of mind, but would mainly agree to its necessity if the implications of ignoring intellectual property rights are explained. i.e. awareness of the implications and the education of the population also need to be accelerated to induce greater buy-in to the reason why intellectual property rights exist in the first place, need to be enforced and respected”.

Source: Andreas Walker, WMB – Service Solutions, International Motor Industry Consultants

“The South African population generally has a low awareness of the value of “brands” and the dangers created for them by the counterfeiters. Often the counterfeiter is seen as offering better value. However, this perception is changing as the consumer gains experience (sometimes painfully so) and the media increases their awareness”.

Source: Piet van Wyk de Vries, Director Parts Operations Toyota South Africa

“As a “catch me if you can” syndrome. I believe that as a legacy of sanctions South Africans perceive the protectionism of intellectual property as something which tries to inhibit their ability to make a living and therefore either ignore it or deliberately find methods around it. Further complicating the issue of intellectual property has been the perceptions created as a result of the pharmaceutical dilemma of anti-aids drugs. The consumers won a victory against patented medicine which was morally good and important etcetera, however this also perpetuated the perception that large organizations are ripping the man in the street off, therefore whenever one can get the grey import, which is touted as being as good as the original, the consumer is tempted”.

Source: Ian McDonald, Branch Manager Volvo Truck and Bus Cape Town.

“The public vote with their cheque books- if not legislated many would use the cheapest inferior parts available. SABS has a crucial role to play”.

Source: Allan Young, General Manager Parts Operations General Motors South Africa.

Awareness is only now being created as to the implications of infringement, this is a necessity for the protection of IP rights etc. Unfortunately most brand holders do not consider advertising the fact that IP rights do subsist, are protected and are required to be protected for industry and economic reasons. Most of the public do not understand the implications of, for instance, purchasing counterfeit product. Brand Holders should adopt a more aggressive advertising campaign, together with the state, creating knowledge in the public as to the above.

Source: Paul Flavin, Brand Protection Manager Ford Motor Company of Southern Africa.

## **5.5 How user friendly is the intellectual property rights protection system?**

We have seen several versions of intellectual property protection systems while looking at the five developing countries. The essence of any successful intellectual property protection system is that it must be easy to use and easy to enforce.

### **5.5.1 Research results:**

“Intellectual property protection is a specialized field and it depends how a trade mark holder utilizes its “options”. Although the Counterfeit Goods Act is highly advanced and considered to be world class, it is difficult to put into practice without the assistance of trade mark attorneys. This is specifically applicable because of the “technical prerequisites” prescribed by the Act. If civil action is instituted the attorneys representing the different parties will normally reach a settlement as soon as possible into the Counterfeit Goods Act or common law. The provisions of the Counterfeit Goods Act are more “user friendly” in this regard”.

Source: Matt Gennrich, General Manager Parts and Accessories Division Volkswagen of South Africa.

“Not very friendly or supportive – the view is rather “what is in it for me” (government fines and penalties) than the core problem of copyright transgression”.

Source: Piet van Wyk de Vries, Director Parts Operations Toyota South Africa

“Never used the system so I cant comment.

Source: Ian McDonald, Branch Manager Volvo Truck and Bus Cape Town.

RSA has one of the, in my opinion, most effective Counterfeit Goods Acts. In as far as straight forward infringement is concerned our Trade Marks Act, Patents Act and Copyright Act is in line with TRIPS, and does allow for effective enforcement. Unfortunately the courts are overburdened and outcome to actions usually only forthcoming a year to two years after institution thereof.

Source: Paul Flavin, Brand Protection Manager Ford Motor Company of Southern Africa.

## **5.6 What are the levels of involvement of organized crime?**

Intellectual property crime is a lucrative criminal activity with the possibility of high financial returns. It is also a relatively low risk activity as prison sentences tend to be non existent or at best very light when compared to other criminal activities such as drug trafficking.

The link between organized crime and counterfeit goods is well established, but Interpol is now sounding the alarm that Intellectual property crime is becoming the preferred method of funding for several terrorist groups.

While looking at the developing countries in the previous chapters, there was not one country where organized crime was not somehow involved with intellectual property rights related crime.

### **5.6.1 Research results:**

“Apparently Al-Qaeda has funded certain of its terrorist activities by using the proceeds of counterfeit products. Apparently supporters of certain “causes” will manufacture counterfeit

products and donate the proceeds to certain organizations. (This is not substantiated) It is well known that the proceeds of counterfeit CD's are exceeding that of drugs".

"With specific reference to VWSA and the SA market: In a few instances during the last few years it was established that crime syndicates specializing in stolen or hijacked Volkswagen vehicles have used "illegal" Volkswagen replacement parts to replace certain genuine parts on these vehicles, i.e. ignition locks and door handles. In other instances identification markings on Volkswagen vehicles have been changed by making use of sophisticated counterfeiting techniques. In this regard VIN (vehicle identification numbers) and other markings were changed and altered".

"From time to time certain entities will import "legal" replacement parts. It will then be branded in South Africa with a trade mark making the product illegal".

Source: Matt Gennrich, General Manager Parts and Accessories Division Volkswagen of South Africa.

"Whilst I have no proof it would not surprise me if this were true. Terrorists generally over the years have supported their activities through both legitimate and criminal activities".

Source: Martin Kavanagh Aftersales Manager Volvo Southern Africa

"I am sure there are links, but the flavour of the month is that most of the World's ills are caused by some or other International Terrorist Organisation. The bulk of counterfeiting is being done by unscrupulous entrepreneurial types with the profit motive as the driving force and not political gain as the motivator".

Source: Andreas Walker, WMB – Service Solutions, International Motor Industry Consultants

"There can be no doubt that there is a large involvement by organized crime syndicates in intellectual property crime – there may also be some small fish in the pond, but the real global players are well organized and protected".

Source: Piet van Wyk de Vries, Director Parts Operations Toyota South Africa

“I have no doubt that there are well organized syndicates who are involved in making money from the counterfeiting of intellectual property. Irrespective of the destination of the profits, various groups will use whatever methods necessary to turn a profit. Ethics don't come into the equation; if one is making money illegally its easy to accept that it will be just as illegally. Volvo and other reputable manufactures operate in accordance with the generally accepted business practices and abide by the rules while unscrupulous operators profit from the research and development of the manufactures by sourcing copied components. In order to counter this one cannot rely on legislation alone and consumer education is ultimately the key to winning this war. The arguments in favor of genuine parts need to be intensified with emphasis on; Performance and reliability, Support for the manufacturer and future development, Ethical obligations, Legal implications.

If one could develop the concept of a virtuous circle in regard to supporting the purchase and use of genuine parts this would go a long way to countering the illegal trade. I.e. Buy genuine, volumes increase, better leverage from supplier, prices reduce, buy genuine etc.

Source: Ian McDonald, Branch Manager Volvo Truck and Bus Cape Town.

In my opinion, the levels of organized crime involvement are high. Chinese Syndicates for instance play a large role in counterfeiting operations in RSA, hence the Scorpions recent involvement. There is of course also a large element of individuals, and sometimes large corporations, simply wanting to make a "quick buck".

Source: Paul Flavin, Brand Protection Manager Ford Motor Company of Southern Africa.

## **5.7 Recommendations**

### **5.7.1. Is pressure being applied by developed countries?**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

As can be seen from the comparison in Chapter three South Africa has some good points and some bad points. The general level of apathy towards intellectual property right protection is evident in the research results where most of the “key” players in the South Africa replacement parts market either don’t agree or don’t know of any pressure being exerted by more developed countries.

South Africa can no longer be classed as being in the same boat as many other developing countries. In the last ten years South Africa has become something of a “superpower” amongst the developing nations. With this improved status comes an increased responsibility. China, Taiwan, Malaysia and India as well as South Africa, as seen in the previous chapters, are being pressured by the developed nations to improve intellectual property protection.

South Africa as a nation took the plunge on the 1<sup>st</sup> January 1995 and joined the World Trade Organization as one of its founder members. When the World Trade Organization agreements took effect in 1995, developed countries were given one year to ensure that their laws and practices conform to the T.R.I.P.S. agreement. Developing countries and transition economies were given five years, until 2000. Least-developed countries have 11 years, until 2006. (Now extended to 2016 for pharmaceutical patents) At this point South Africa was considered somewhere between a transition economy and a least developed country due to the 1994 elections being still fresh in everyone’s minds as well as a lot of speculation as to what might become of the country.

South Africa has now had long enough to comply with T.R.I.P.S. requirements. Perhaps it is now time for the more developed nations to start to put a bit more pressure on South Africa to comply faster and to put more focus on compliance. Let the government stop hiding behind the developing nation screen and strive to provide more than the minimum T.R.I.P.’s requirements for intellectual property rights protection.



### **5.7.2. What are the general levels of intellectual property law enforcement?**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

I have examined five developing countries in this dissertation and each one of them has a problem with regards the general levels of intellectual property protection in the eyes of the developed countries. Every developing country that I have looked at is either in trouble with the International Anti-counterfeiting Coalition or the United States Trade Representative. South Africa in comparison with the other developing countries examined is seen to be improving.

The major problem with both the International Anti-counterfeiting Coalition and the United States Trade Representative is not so much that intellectual property crime is being committed in South Africa from the perspective of the manufacturing of counterfeit goods, like in countries such as China, Taiwan, Malaysia and India. The problem is from the perspective that South Africa is deemed to be guilty of not having the correct levels of intellectual property rights protection in order to stop these goods entering and being sold in the country or passing through the country.

The biggest problem relating to intellectual property rights protection in South Africa is that counterfeit goods that infringe on international intellectual property rights are being manufactured in other developing countries such as China, Taiwan, Malaysia and India, and then they are shipped to South Africa to be sold. The lack of general intellectual property right enforcement in South Africa makes us an easy “target”.

### **5.7.3 What resources are available for the protection of intellectual property crime?**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

Here again South Africa is in much the same situation as the other developing countries examined in chapter three. South Africa lacks the resources necessary to curb most forms of crime. As in most developing countries intellectual property crime is not seen in a serious light. There are far more serious crimes on which to focus the limited resources.

South Africa can however look to some of the other developing countries for assistance in making the best use of the limited resources available. The United States has spent a significant amount of money providing training to Chinese judges, prosecutors, police, customs and other law enforcement officials in an effort to improve China's enforcement of intellectual property rights. Taiwan for example has provided an incentive scheme to law enforcement officials to encourage them to take on intellectual property crime. Malaysia created a special copyright taskforce to combat intellectual property crimes.

This is perhaps one area where the government has taken action. This is probably due only to the revamp of the S.A.R.S. under which customs and excise falls. The government seems to have woken up and realized that amounts of money that they were losing in undeclared or falsely declared duties. This area has been strengthened, with more personnel being hired and facilities improved. For someone who deals with customs and excise on a daily basis I can see the changes, and every month they seem to get more efficient. Efficiency is good.

#### **5.7.4 How do the people perceive intellectual property crime?**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

South Africa developed a unique culture during the apartheid era. Due to the sanctions imposed by the rest of the world, South Africans were forced by circumstance to make do with what we had. If we needed something new, we designed, developed and manufactured it ourselves. Most South Africans became proud of products bearing the words "Made in South Africa". Never before had the expression "'n boer maak 'n plan" been more appropriate.

South Africa made tremendous headway in several directions with uniquely developed South African Technology. South Africa has made jet fighters, helicopters, air to air missiles, and it is even rumored an atomic bomb. The levels of innovation experienced in South Africa were unsurpassed compared to any other developing nations. This culture has remained entrenched in a lot of people's minds, and they don't see the problem with copying the designs of others.

There is a strong link to the Chinese situation where there is little respect for intellectual property. The South African government needs to embark on a national education program, in order to educate the people of South Africa in intellectual property rights. What are intellectual property rights and what do they mean. A good comparison here would be to adopt the Malaysian model. The Malaysian government, through the special task force went on a nation wide road show in order to educate the general public about intellectual property rights protection, piracy and counterfeiting. The South African government cannot rely on the private sector to educate the general public. This would be an enormous task and would be far beyond the means of most South African companies affected by intellectual property right infringement. Perhaps the education of the public against A.I.D.S. has overshadowed the need for the government to educate the public in other areas as well.

What are the implications of using counterfeit items, and where does there money go to. Interpol has reported that there has been one successfully prosecuted counterfeiting case where there are alleged connections to Al – Qaeda. Interpol has proved links with counterfeiting operations and more than one terrorist group. What would the average South African think about buying a DVD on the street after hearing that?

The answer here for South Africa regarding the protection of intellectual property rights, is for the government and local industry to work together to improve the protection of intellectual property rights as well as the enforcement of these rights. But this alone will not stop the flow of intellectual property crime but it is a step in the right direction.

These efforts combined will assist the South African Government making South Africa's enforcement efforts exceed the minimum requirements of T.R.I.P.S.

#### **5.7.5 How “user friendly” is the intellectual property rights protection system?**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

South Africa, like the other developing countries examined is in a situation where the intellectual property rights protection system is not user friendly at all. While South African's who feel that their intellectual property rights have been infringed don't have to resort to paying for the transportation of the investigating officials as in China, the system is still extremely slow. In many cases South Africa is not far behind.

The South African intellectual property protection system is comparable to India's and urgently needs to be modernized. The system currently subjects the intellectual property rights owner to overly costly and burdensome processes in order to get any kind of enforcement of his rights.

Malaysia has probably the most user friendly intellectual property system amongst the developing countries examined. If an intellectual property right holder makes a complaint the legal system takes over in totality. There is a team of specially trained enforcement officials who have the powers of search and seizure.

In a developing country where the resources for enforcement of laws and the protection against crime are scarce, what chance do intellectual property rights have? In a developing country where there is a rampant crime problem, where with the existing resources, rape, murder and other serious crimes cannot be contained, what chance does intellectual property crime have of getting any attention.

The intellectual property rights protection system in South Africa needs to be made user friendly for rights holders, in order to have any chance of being upheld.

#### **5.7.6 What are the levels of involvement of organized crime?**

The key research question is how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

According to the developing countries studied in this dissertation South Africa has the least amount of evidence indicating the involvement of organized crime in intellectual property rights violations. It is however only a matter of time before the organized crime gangs currently active in the country realize that there are fantastic returns to be made with a minimum of risk.

South Africa has made progress in one area of law enforcement and this is the launch of the Scorpions unit. The Scorpions were formed in order to combat serious crime, which will obviously include organized crime.

In a previous chapter we looked at the involvement of organized crime in the other developing countries. India has a history of organized crime going back centuries. The same is true for the rest of the countries examined. China, Malaysia and Taiwan also have a history of organized crime through the triads that dates back hundreds of years. South Africa has fortunately been somewhat protected from transnational organized crime due to the apartheid isolation, but this is changing rapidly.

#### **5.8 Conclusion.**

The key research question was how do the levels of Intellectual property right protection in South Africa compare to other developing nations with particular reference to the replacement parts market? And how can these levels of protection be improved?

In response it seems that South Africa compares favorable to most developing nations in most aspects, but unfortunately not in all. South Africa falls short in the enforcement of

intellectual property rights and this is mainly due to the lack of resources in the South African Revenue Services, The South African Police Services, and the general level of ignorance of the brand owners. As discussed, the IT and music businesses are actually actively marketing against intellectual property crime. I don't see any other industry taking such steps. Not unless the Department of Trade and Industry decide to get involved and do it for them.

The replacement parts industry in South Africa has been trying through NAAMSA to have a contributory fund established in order to fund education towards intellectual property crime. This fund would pay for marketing campaigns to enlighten the South African public, and to train some of the enforcement officials in order to improve efficiencies. This has not happened because Ford will not be seen to support a General Motors initiative, Toyota want to do it their way, and some of the smaller manufacturers and importers cannot afford to participate. The question here is can South African industry in general afford not to participate?

South Africa's government as well as the people needs to wake up and smell the roses. As was seen amongst the major players in the South African replacement parts industry none of them could actually agree to any of the basic research questions. The majority of the South African public does not even know what intellectual property rights are. And when explained feel it is not their problem.

Perhaps a bit more pressure from the developed nations as well as the World Trade Organization is required in order to speed up the process.

The best way to answer the key research question is to answer the six basic questions:

1. Is pressure being exerted on South Africa by developed nations in order to improve levels of intellectual property right protection? Yes there is pressure, particularly from a pharmaceutical point of view. South Africa's decision regarding anti aids drugs strengthens a major argument against intellectual property rights. But it is time that the

more developed countries exercise more pressure on South Africa and South African companies to provide more brand protection. The government is trying their best at the moment to provide an infrastructure to enforce intellectual property rights, but further efforts are needed and the only sector who has the power and the resources major industry. Perhaps the home office companies in Europe and the United States should offer some assistance to subsidiaries in South Africa and other developing countries in order to assist.

2. What are the general levels of intellectual property law enforcement in South Africa? According to the research, opinion varies but in general the laws etc. are deemed to be sufficient and up to the standards of other developing countries.
3. What resources are available for enforcement of intellectual property rights in South Africa? This is one area where South Africa falls short compared to other developing nations. More resources need to be allocated to the fight for intellectual property rights protection. Recently the Scorpions have become involved but this is only against the largest organized crime syndicates. Some of the large companies in South Africa who are suffering intellectual property crimes should band together to assist the authorities.
4. How do the people perceive intellectual property crime in South Africa? Your average South African does not know what intellectual property rights are. And even when explained do not see the need to protect them. This needs to change. We have seen the efforts of the music and IT industries in South Africa, it is time that other major industries such as the automotive industry join in as well. This will improve the levels of intellectual property right protection and assist in bringing South Africa ahead of the other developing nations studied in the case study.
5. How “user friendly” is the intellectual property rights protection system? By all accounts the system is not particularly user friendly, as it is not used sufficiently, but as south African companies and the public band together the system has to become easier. This will assist in improving the levels of intellectual property right protection in South Africa.
6. What are the levels of involvement of organized crime in intellectual property rights infringements in South Africa? By all accounts this is low in South Africa but rapidly on the increase. This will need to be addressed urgently or South Africa will become a



dumping ground for counterfeit goods for every organized crime unit in the world. The involvement of the Scorpions should assist in this.

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