

1. Definitions and metrics

DEFINITIONS

‘Counterfeit’

There is no consistent legal terminology in law which embraces the diverse manifestations of counterfeiting. The definition of the word counterfeit is said to be ‘in a constant state of evolution to cover both a macro, umbrella term for the entire concept of any type of deception or fraud and a micro, specific term for the IPR-defined infringement’ (Spink and Fejes, 2012, 251). An illustration of the confusion around the meaning of the term ‘counterfeit’ is the extended discussions within the World Health Organization (WHO) of the terminology which it would use in relation to counterfeit medicines (see Chapter 8).

A conventional dichotomy which is suggested by the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is between ‘counterfeit trademark goods’ and ‘pirated copyright goods’. These are defined in Article 51 (fn 14) of TRIPS as follows:

1. ‘counterfeit trademark goods’ shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
2. ‘pirated copyright goods’ shall mean any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

It should be noted that the TRIPS definition of counterfeit only applies to trademark goods. Other industrial property rights such as patents, industrial designs, layout design rights, plant variety rights, geographical indications and confidential information can also be infringed to produce goods which emulate those of a rights holder.

References to counterfeit goods often include pirated products. For example, the Australian Crime Commission (ACC) in its 2011 report on organised crime in Australia declared that

Overall, counterfeit goods can be divided into two main categories: digital (such as software and music) and physical (ranging from clothing to pharmaceuticals). Within both categories, counterfeit goods can be further classified into those goods that consumers know to be counterfeit and that are sold at a discounted price, and goods that are purchased at undiscounted prices in the belief they are genuine. (ACC, 2011, 73).

Piracy is a copyright-related matter and refers to the unauthorised duplication of copyrighted works such as books, artistic works, computer software, electronic books, movies or music. This book focuses on the counterfeiting of products which are protected by industrial property rights.

‘Intellectual Property Crime’

An alternative approach, which avoids confusing counterfeiting with piracy is to refer to ‘intellectual property crime’. For example, in 2004 the UK IP Office established an Intellectual Property Crime Group to bring together stakeholders including government agencies, intellectual property (IP) right holders and enforcement authorities to fight counterfeiting and piracy (UKIPO, 2020). Similarly, the International IP Crime Investigators College, established by Interpol, defines IP crime as ‘a generic term used by Interpol to describe a wide range of counterfeiting and piracy offences’.¹ The Europol website explains that ‘intellectual property crime is committed when someone manufactures, sells or distributes counterfeit or pirated goods, such as such as patents, trademarks, industrial designs or literary and artistic works, for commercial gain’.²

The US Federal Bureau of Investigation (FBI) prefers the term ‘intellectual property theft’. Its criminal investigative programme specifically focuses on the theft of trade secrets and infringing products that can impact the health and safety of consumers, ‘such as counterfeit aircraft, car, and electronic parts’.³

The ACC in its 2011 report on organised crime in Australia, described IP crime as IP crime covering a range of counterfeiting and piracy offences. It divided counterfeit goods into two main categories: digital (such as software

¹ <https://www.iipic.org/aboutIPCrime.php>, accessed 13 October 2020.

² EUROL, ‘Intellectual Property Crime’ available at <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/intellectual-property-crime>, accessed 13 October 2020.

³ See <https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft>, accessed 13 October 2020.

and music) and physical (ranging from clothing to pharmaceuticals) (ACC, 2011, 73). It noted that within both categories, counterfeit goods can be further classified into those goods that consumers know to be counterfeit and that are sold at a discounted price, and goods that are purchased at undiscounted prices in the belief they are genuine, with the second category attracting greater criminal involvement and posing the greater health and safety risk to consumers, as the items – including car parts, pharmaceuticals and alcohol – may be of substandard quality (ACC, 2011, 73).

It should be noted that, colloquially, counterfeiting includes not only the fraudulent imitation of products but also the manufacture of products which are identical to the original but which are made without the right holder's consent, such as products resulting from an exceeding of the production run authorised by the right holder. Also, some acts of unfair competition or parasitism, such as the production of 'look-alikes' are sometimes characterised as counterfeiting although they might not directly affect an IP right.

However, it should be acknowledged that there are a number of associated criminal offences that go beyond the bounds of IP statutes. These include money laundering, corrupting public officials and the use of the profits from piracy and counterfeiting to fund other criminal activities. Beresford et al (2005, 66) regard IP crime as a subset of 'white collar crime', which is an illegal activity that usually involves deceptive practices for the purpose of financial gain. Given the broad application of IP elements in criminal activities Speck and Urbas (2013, 191) propose a tripartite definition of IP crime which goes beyond copyright piracy and trademark counterfeiting to encompass the full range of associated criminal activities. Thus they define 'intellectual property crime' as including: (a) crimes against IP where the primary target of the proscribed conduct is the IP right of another; (b) crimes using IP, where the aim of the proscribed conduct is to exploit the IP of another in order to obtain a benefit or cause harm; and (c) crimes incidentally involving IP including planning, organising, conspiring in, dealing in the proceeds of, money laundering with respect to, and concealing or destroying evidence of IP infringements.

This book will focus upon the trade in counterfeit goods which are those which infringe IP rights.

Organised Crime

Organised crime is also a concept whose definition has always been problematic (Levi, 1998) and this is reflected in the voluminous literature which addresses that concept. Lampe (2020) identifies 200 definitions of organised crime and in his comprehensive review of the literature (Lampe, 2016, ch. 2) identifies three different notions of the core nature of organised crime: one focused on criminal activity, one focused on criminal organisation, and one

focused on illegal governance. Although a number of definitions combine elements from each of these foci. A conduct-focused approach is that of Adamoli et al (1998, 9), who observe that the term denotes a method of conducting criminal operations which is distinct from other forms of criminal behaviour, having as its salient features: violence, corruption, ongoing criminal activity and the precedence of the group over any single member. Ponsaers et al (2008, 647) require two or more people systematically offering services or manufacturing goods which is prohibited by the criminal law of the nation state including the sale of drugs and counterfeit goods, running a brothel or paying bribes to politicians. More concisely, Lasswell and McKenna (1972, 26) define organised crime as non-ideological, concerted criminality of sufficient weight and scope of power to inhibit public control.

Beare (1996, 14–15), adopting an organisational approach, defines organised crime as a process or method of committing crimes, not a distinct type of crime in itself. It is an activity, involving a continuing criminal conspiracy, with a structure greater than any single member, with the potential for corruption and/or violence to facilitate the criminal process. An example of the organisational approach is Abadinsky (1990, 6), who defines organised crime as a non-ideological enterprise involving a number of persons in close social interaction, organised on a hierarchical basis, with at least three levels or ranks, for the purpose of securing profit and power by engaging in illegal and legal activities. Similarly, Reuter and Rubinstein (1978) view organised crime as a set of stable, hierarchically organised gangs, which, through violence or its credible threat, have acquired monopoly control of certain major illegal markets.

Block (1983, vii) sees organised crime as a system composed of relationships binding professional criminals, politicians, law enforcers and entrepreneurs. Lampe (2016) stresses the extra-legal governance of organised crime groups.

The principal international instrument concerned with organised crime is the United Nations Convention against Transnational Organized Crime (UNTOC), which was adopted by the United Nations (UN) General Assembly by Resolution 55/25 on 15 November 2000 and which entered into force on 29 September 2003 and with 190 parties (as of 26 July 2018).⁴ UNTOC does not define organised crime, but addresses organised criminal groups. Article 2(a) of UNTOC defines an ‘organised criminal group’ as a ‘structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly,

⁴ 40 ILM 335 (2001).

a financial or other material benefit'. 'Structured group' is defined in paragraph (c) to mean 'a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'. Serious crime is defined in paragraph (b) as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.

A key provision of UNTOC, with great significance for the fight against the involvement of organised crime groups in IP crime is Article 12(1)(a), which requires parties to adopt such measures as may be necessary to enable the confiscation of the proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds. Article 2(e) defines the 'Proceeds of crime' as 'any property derived from or obtained, directly or indirectly, through the commission of an offence'. The details of the implementation of confiscation provisions are explored in Chapter 8.

The national implementation of UNTOC does not necessarily single out organised crime groups. For example, in the USA there is no statute specifically criminalising organised crime by name; however, the prohibition of racketeering under Title 18 of the United States Code § § 1961–8⁵ prohibits most activities of organised crime groups. The US Code defines 'racketeering activity' as any act which is indictable under any of the following provisions of title 18, United States Code:

section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works),

section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances),

section 2320 (relating to trafficking in goods or services bearing counterfeit marks).

Title 18 US Code § 1962(a) prohibits any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest any part of such income in the establishment or operation of, any enterprise whose activities affect interstate or foreign commerce, and paragraph (c) prohibits any person associated with any enterprise mentioned in paragraph (a) 'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.' Title 18 US Code § 1963 provides that persons who violate

⁵ Racketeer Influenced and Corrupt Organisations Act 1970 (RICO).

the preceding section ‘shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States’ any property or interest in property or any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of Section 1962.

The US Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act)⁶ in Section 402(b) required the Attorney General, through the US Attorneys’ Offices, the Computer Crime and Intellectual Property section, and the Organized Crime and Racketeering section of the Department of Justice (DoJ), and in consultation with the FBI and other federal law enforcement agencies, to ‘create and implement a comprehensive, long range plan to investigate and prosecute international organized crime syndicates engaging in or supporting crimes relating to the theft of intellectual property’.

This legislation has been supplemented by Presidential Executive Orders, such as Executive Order 13581 of 24 July 2011, Blocking Property of Transnational Criminal Organizations, issued by President Obama, which identified the Camorra, involved in product counterfeiting as an international crime group. On 9 February 2017, President Trump issued an Executive Order 13773 on Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking, announcing that it would be the policy of the executive branch to strengthen enforcement of federal law in order to thwart transnational criminal organisations and subsidiary organisations, including criminal gangs, cartels, racketeering organisations, and other groups engaged in illicit activities that present a threat to public safety and national security and that are related to, for example: corruption, cybercrime, fraud, financial crimes and IP theft; or the illegal concealment or transfer of proceeds derived from such illicit activities.

METRICS

The conventional estimate of the size of the annual losses to US industry from the global trade in counterfeit goods at the time of the launch of the Uruguay Round in 1994 was US\$ 60 billion (see Abbott and Sporn, 2002, § 1.02[A]). This figure is apparently derived from the 1988 estimates by the US International Trade Commission of losses from counterfeiting (USITC, 1988, App. D). This had apparently risen from an estimated at US\$ 5.5

⁶ 42 USC 3713b.

billion in 1982.⁷ A report by the Organisation for Economic Co-operation and Development (OECD) in 1998, while conceding the impossibility of finding accurate statistics to substantiate perceptions of the increase in the scale of the trade because of its clandestine nature, stated that the ‘overall costs of counterfeiting in the world today are normally estimated to be 5–7 per cent of world trade’. There is no substantial aggregated data to support the high percentages, but the figures are now accepted and used to illustrate the extent of the counterfeiting problem’ (OECD, 1998, 25). In purported justification of this estimate the OECD report referred to a 1997 report by the Counterfeiting Intelligence Bureau (CIB) of the International Chamber of Commerce, which looked at the WTO’s estimate of the size of world trade of nearly US\$ 5,000 billion in 1995 and which ‘took the general assumption that counterfeiting has increased from 3 per cent in 1990 to more than 5 per cent in 1995, giving a value of approximately US\$ 250 billion for that year’ (OECD, 1998, 24).

This OECD estimate, based on the CIB estimate, has been taken as an authoritative figure by subsequent studies. Thus a 2004 report by Union des Fabricants (UDEF) on *Counterfeiting and Organised Crime* stated:

Globally, an OECD report published in 1998 estimated that counterfeiting was generating €250 billion in illegal earnings annually and represented 5 to 7% of world trade (UDEF, 2004, 4).

In May 2005, the Secretary General of the International Chamber of Commerce reported that the global trade in counterfeits had reached US\$ 600 billion (Cattai, 2005). In the same month the Gieschen Consultancy reported the size of counterfeiting to exceed US\$ 3 trillion (Gieschen, 2005). A study commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP) and published in February 2011, projected that by 2015 the global value of counterfeit and pirated products could be up to US\$ 1.77 trillion (Frontier Economics, 2011, 8–9). This report amplified the findings of the OECD by including digital distribution, which it estimated as accounting for between 6.5 per cent and 12 per cent of the total value of counterfeit and pirated products consumed, and which was projected to account for US\$ 210 billion in sales by 2015 (Frontier Economics, 2011, 9).

The OECD and European Intellectual Property Office (EUIPO) estimated that in 2016, counterfeit and pirated goods accounted for up to 3.3 per cent of world trade and up to €121 billion or 6.8 per cent of EU imports from third countries (OECD/EUIPO, 2016). When compared to the figures for 2013 under the previous EUIPO/OECD study, they indicate that the share

⁷ See S. Rep. No. 104-177, 104th Cong., 1st Sess. 1-2 (1995).

of counterfeit goods in world trade increased by up to 10.4 per cent and the share of fakes in EU imports by up to 42.3 per cent between 2013 and 2016. A 2016 study by Frontier Economics for BASCAP estimated the value of the international and domestic trade in counterfeit and pirated goods in 2013 to be US\$ 710–917 billion and with a forecast of US\$ 991 billion for 2022 (Frontier Economics, 2016, 8). The Frontier Economics study estimated the displacement of legitimate economic activity to amount to US\$ 470–597 billion in 2013, with a forecast of US\$ 980–1,244 billion in 2022. Fiscal losses were put at US\$ 96–131 billion for 2013 and US\$ 199–270 billion for 2022, and it estimated the costs of crime to be US\$ 60 billion in 2013 and 125 billion for 2022 (Frontier Economics, 2016, 8).

A 2016 EUIPO/OECD study on *Trends in Trade in Counterfeit and Pirated Goods* estimated that in that year counterfeit and pirated goods accounted for up to 3.3 per cent of world trade and up to €121 billion or 6.8 per cent of EU imports, indicating that the share of counterfeit and pirated goods in world trade increased by up to 10.4 per cent and the share of fakes in EU imports by up to 42.3 per cent between 2013 and 2016 (EUIPO/OECD, 2019). The 2020 report by DG Taxud on customs enforcement of IP rights at the EU border in 2019, indicated a growth in the retail value of seized counterfeit goods from €738,125,867 in 2018 to €759,198,194 in 2019 (DG Taxud, 2020).

As will be indicated in this book, a substantial proportion of the trade in counterfeit goods is undertaken by organised crime groups. The specific size of their share is difficult to quantify, given the clandestine nature of this trade. In relation to the Italian Mafia, a 2012 study undertaken by the Transcrime Centre of the Catholic University of Milan estimated that the imaginary balance sheet of Mafia S.p.A. would show a total turnover of €140 billion, with profits of €105 billion (UNICRI, 2014, 8). A 2012 study by the Directorate General for the Fight Against Counterfeiting – Italian Patent and Trademark Office (DGLC-UIBM) estimated the global turnover from counterfeiting in Italy to be approximately €6.9 billion in 2010 (UNICRI, 2014, 8).

QUANTIFICATION METHODOLOGY

The very substantial growth of the trade in counterfeit products has had a major impact upon international IP enforcement policy. However, there is a good deal of imprecision in the metrics of counterfeiting and piracy. One reason for this is that because this is a clandestine and criminal trade the true extent of counterfeiting and piracy is impossible to calculate with accuracy. The statistics of industry associations, since they are intended to highlight the extent of the problem of the trade in infringing products to attract the attention of enforcement agencies, are invariably biased upwards (Bosworth, 2006, 14). For example, if collected through questionnaires addressed to traders, there

is a natural tendency for those traders to overestimate the sales which they might have made but for the presence of counterfeiting and piracy. Similarly, the statistics of enforcement authorities, such as police and customs are also likely to be exaggerated with a view to securing favourable budget allocations. For example, the valuation of seized counterfeit products at the level of the genuine products which they imitate is likely to produce very high values. Another factor is the valuation of the seized products. Sometimes, seized products are valued as if they are genuine or are treated as lost sales by licit producers. Enforcement statistics are also criticised as being heavily dependent upon the investigation process. For example, they may be a function of changing enforcement priorities (Olsen, 2005, 10). An increase for example in the number of cigarettes seized may be a result of the targeting of counterfeit cigarettes, rather than an increase in the incidence of cigarette counterfeiting.

In 2007, the OECD published the first part of a detailed study on *The Economic Impact of Counterfeiting and Piracy*.⁸ It concluded that ‘international trade in counterfeit and pirated products could have been up to USD 200 billion in 2005’⁹ and that ‘counterfeiting and piracy are taking place in virtually all economies’¹⁰ and that the magnitude of this trade ‘is larger than the national GDPs of about 150 economies around the world’.¹¹

This report was compiled through questionnaires sent to customs officials and to government officials in OECD and a number of non-OECD economies, and through questionnaires that were circulated to industry.¹² The OECD also explained that ‘meetings were organised with the music, movie, pharmaceutical and automotive industries to review drafts and/or develop additional information’.¹³ This methodology would seem to be vitiated by the institutional biases indicated above. In any event, as customs statistics seem to have been the main source of the OECD’s data, its totals did not include domestically produced and consumed counterfeit and pirated products and the significant volume of pirated digital products being distributed via the Internet. For example, a 2008 survey conducted in the UK estimated that around £800 million worth of counterfeit goods pass through online shopping and auction sites in the UK annually.¹⁴

⁸ OECD Doc, DSTI/IND(2007)9/PART4/REV1, 4 June 2007.

⁹ Ibid, 2.

¹⁰ Ibid, 11.

¹¹ Ibid, 13.

¹² Ibid, 7.

¹³ Ibid.

¹⁴ Study by DLA Piper, www.vnnet.com/vnnet/news/2220773/online-counterfeit-goods-market-800m.

It should be acknowledged that the OECD report recognises that their estimates are only 'a crude indicator' of the value of counterfeit and pirated products in international trade. This qualification is certainly justified when customs statistics are the basis for the estimate. For example, EU customs are physically able to inspect no more than 3–5 per cent of all cargo passing Community borders (Council of Europe, 2004, para. 17). Seizure rates are influenced by the risk-profiling schemes employed by customs authorities to detect illicit goods and thus reflect their priorities in relation to searches of particular product categories, or source countries.

The apparently exponential growth of the global trade in counterfeit and pirate products has obviously been influential in placing IP enforcement on the agenda of international and intergovernmental organisations. Those who oppose this agenda have begun to question the veracity of the statistics.

At one end of the spectrum of commentators on the metrics of counterfeiting is the American financial journalist, Felix Salmon, who argues that most counterfeiting statistics are fabricated. He sought to track down the estimate that 5–7 per cent of world trade was taken up with counterfeit and pirate products and reported the assessment of Peter Lowe, the assistant director of the International Chamber of Commerce's CIB, that the source of the statistics is 'lost in the mists of time' (Salmon, 2005). As was pointed out above, this estimate was contained in the OECD's 1998 report, which conceded that there was 'no substantial aggregated data to support the high percentages, but the figures are now accepted and used to illustrate the extent of the counterfeiting problem' (OECD, 1998, 23). One factor which he identified in contributing to the high estimates of the value of this trade, is the fact that counterfeit products are often given the same value as genuine items. He refers to the UK Patent Office's Annual Enforcement Report 2004, which refers to seizures by the Police Service of Northern Ireland (PSNI). Seizure of 40,000 videos and DVDs worth £2,000,000, 80,500 music CDs and cassettes worth £1,800,000, and 5,000 pieces of computer software worth £450,000 are listed. This means that the PSNI priced counterfeit CDs at an average of £22.36; counterfeit DVDs and videos at an average of £50 and counterfeit software at an average of £90. These estimates are clearly unrealistic, as in most cases they even exceed the cost of the genuine item (see also, Salmon, 2008). Salmon reasons that these inflated figures are used by the enforcement authorities to secure larger budgets. However, the success of business lobbyists in securing the TRIPS Agreement by reference to alleged losses of US\$ 60 billion per annum has been taken as an encouragement to the business lobby 'in ensuring that no costs of counterfeiting are overlooked' as 'the greater the costs, the greater the problem and the more seriously the argument is to be taken' (Macdonald and Turpin, 2008, 17). Commensurately, the greater the problem, the more likely

will it be that the government will assume the obligation for correcting the situation.

Opponents of the strengthening of the international enforcement regime have insisted that an accurate picture of the metrics of counterfeiting and piracy be established before action is taken. At the fifth session of World Intellectual Property Organization's (WIPO) Advisory Committee on Enforcement (ACE) 2–4 November 2009, the delegations of Brazil and Pakistan called for objective empirical assessments of the nature and extent of IP rights infringements, and an evaluation of the availability and reliability of the available data (WIPO, 2009). For the November 2010 meeting of the ACE a literature review of methodologies and gaps in the existing studies was undertaken by Fink et al (2010). This review found that most of the 'large number of studies exist that seek to quantify the extent of counterfeiting or piracy at the aggregate – sectoral or economy-wide – level ... have serious shortcomings, both concerning the data employed and the adopted methodologies' (Fink et al, 2010, para. 108). As a consequence, the reviewers concluded that 'aggregate estimates of the incidence of piracy and counterfeiting by themselves offer policymakers little guidance about appropriate IP enforcement policies' (Fink et al, 2010, para. 108). Similar conclusions were reached in a study by the US Government Accountability Office (GAO) of efforts to quantify the economic effects of counterfeit and pirated goods (Yager, 2010).

Frontier Economics, in its 2016 report, based its quantification of the size of the trade in counterfeit products on customs seizures data from: the World Customs Organization (WCO), the European Commission's Directorate General for Taxation and Customs Union (DG Taxud), and the United States Department of Homeland Security (DHS), as well as world trade data from the UN Comtrade database and interviews with customs officials, but has responded to questions about the reliability of estimates by moderating estimates in the value of seized products (Frontier Economics, 2016, 16).

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