

**A CRITICAL ANALYSIS OF THE POLICING OF COUNTERFEIT GOODS
IN SOUTH AFRICA**

by

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DECLARATION

I declare that the thesis “**A CRITICAL ANALYSIS OF THE POLICING OF COUNTERFEIT GOODS IN SOUTH AFRICA**” is my own work, that I have acknowledged all the sources used, and quotations included in this thesis by means of a complete reference list.

I further declare that I submitted the thesis to originality checking software and that it falls within the acceptable requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

The researcher understands and adhered to the standards on research ethics as proposed by the human Sciences Research Council.

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ABBREVIATIONS AND ACRONYMS

ARIPO	:	African Regional Industrial Property Organisation
AU	:	African Union
COPIS	:	Anti-Counterfeit and Piracy Information System
DPCI	:	Directorate for Priority Crime Investigation
DTI	:	Department of Trade and Industry
EU	:	European Union
FATF	:	Financial Action Task Team
GATT	:	General Agreement on Tariffs and Trade
IACP	:	International Association of Chiefs of Police
ILO	:	International Labour Organisation
ILP	:	Intelligence Led-policing
INTERPOL	:	International Criminal Police Organisation
KYC	:	Know Your Customer
NDP	:	National Development Plan
NCCS	:	National Crime Combatting Strategy
NPA	:	National Prosecuting Authority
OAU	:	Organisation of African Unity
OEDC	:	Organisation for Economic Development and Co-operation
SADC	:	Southern African Development Community
SAPS	:	South African Police Service
SARS	:	South African Revenue Services
SARPCO	:	Southern African Regional Police Chiefs Co-operation Organisation

TRIPS : Agreement on the Trade-Related Aspects of International Property Rights

UK : United Kingdom

UNODC : United Nations office on Drugs and Crime

USA : United States of America

WHO : World Health Organisation

WTO : World Trade Organisation

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The glittering earth is unable to encompass man perpetually.

Obedience is better than sacrifice – by mukomana Olga.

SUMMARY

The researcher conducted a critical analysis of the policing of counterfeit crime in South Africa. A pure qualitative research design and approach was adopted. A literature review, interviews and observations were conducted to provide an overview of this problem nationally and internationally.

Interview schedules were designed with pre-determined open-ended questions, which allowed participants to explain their perceptions, opinions and viewpoints on the policing of counterfeit in South Africa. Some of the designed questions were mailed to respondents.

Questions were posed to members of the Specialised Commercial Crime Unit, members of the South African Police Service's Crime Prevention Unit, members of the Department of Trade and Industry who deal with counterfeit, prosecutors who normally prosecute counterfeit cases, brand owners/holders/representatives, and attorneys who assist in the policing of counterfeit crime.

The findings of this study informed the proposed recommendations for preventative and reactive response mechanisms. These proposed recommendations suggest ways of improving efficiency and effectiveness in policing counterfeit in South Africa.

KEY TERMS: Policing of counterfeit and piracy, modus operandi in committing counterfeit, intellectual property crime, organised crime in counterfeit, use of intelligence led policing, private public partnership, misrepresentation to disguise the truth, money laundering to hide proceeds of crime, theories of crime and theories of punishment in counterfeiting and piracy, adjudication of counterfeiting and piracy, counterfeiting investigation process, sanctions in counterfeit and piracy.

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CHAPTER ONE: GENERAL ORIENTATION

1.1 INTRODUCTION

Counterfeit is a crime that has been in existence since time immemorial. This can be noticed back in the Holy Bible at 1 John 4 v 1, 2 Peter 2 v 1 and 2 Corinthians 11 v 14-15, which warns all people about the presence of false prophets who arose among genuine ones.

In the modern epoch, counterfeit manifests in various ways with similar characteristics of deceiving and defrauding people. It also takes a motive of making financial gain. Counterfeit is a financial crime that is growing significantly the world over (Basu & Lee, 2015:39; European Commission, 2014:7; OECD, 1998:4). It can be said where people are located counterfeiters and or counterfeit goods are found. The involvement of underworld-organised criminals in counterfeiting is an indication of the lucrateness of the business (Rojek, 2016:1; Balsamo, 2006:373; Sonmez, 2014:758; Minagawa, Trott & Hoecht, 2007:455). Heinonen and Wilson (2012:273), Lewis (2009:47) and Zibas (2012:22) report that counterfeiting's yearly turnover in the world exceed proceeds of illegal drug trafficking business.

South Africa as a global village is not an exception as counterfeited goods are spotted in many places such as residential areas, busy streets and transportation terminals in cities. This crime continues unabatedly despite the Counterfeit Goods Act 37 of 1997 as the main legislation that criminalises counterfeiting. The study focuses on the policing of counterfeit in South Africa and analyses the capabilities and abilities of the South African Police Service to police in-land counterfeit. This is at the backdrop that the Constitution of the Republic of South Africa, Act 108 of 1996 and the South African Police Service Act 68 of 1995 mandate the South African Police Service to police crime (South Africa, 1996a). The police are required to consciously strive to create an atmosphere of safety and security and protection of property in the country (Large, 2009:4). In addition, Wells (2016:274) asserts that counterfeiting often takes place in communities and will need community involvement in policing. Moreover, Customs & Excise and the Department of

Trade and Industry also enforce the Counterfeit Goods Act 37 of 1997 amid the spread of the problem. It is in this context that this study looks at the policing of counterfeit in South Africa and seeks to find a way of improving the policing of this crime.

1.2 THE BACKGROUND OF THE STUDY

“The elephant in the living room” is a cliché whereby people avoid discussing uncomfortable issues that plague them (Britt & Gottfredson, 2003:21). This holds true to the crime situation in South Africa. In South Africa, the levels of crime, particularly commercial crimes, have increased sharply owing to the sophisticated methods used by criminals and the inability of law enforcement agencies to solve them (Ivkovic & Sauerman, 2012:15). The above assertion was corroborated by the South African Police Service (2010:21), which stated that commercial crime has increased exponentially, from 4.8% in 2007/8 to 16.6% in 2008/9. According to the South African Police Service (SAPS), Crime Statistics for 2013-2014, commercial crime has decreased though not significantly (South African Police Service, 2014). This can also be seen from the fake goods that are displayed in the market places and businesses in different cities in the country. The fake goods are fuelled by trade liberalisation, globalisation and open borders among other factors. This phenomenon led to the formal and informal businesses becoming target for counterfeit syndicates who sell counterfeit products to them so that they can save from the cost of purchasing genuine products.

According to Spilsbury (2009:4) and Lewis (2009:47), counterfeit is a hot subject that stands at around 6%-10% of all trade globally and the industry was estimated to be making about \$600 billion annually. Counterfeit production and trafficking profits are exorbitant relative to illicit drug trafficking and production (Europol, 2015:11). A study by Rojek (2016:5) and Bikoff, Heasley, Sherman and Stipelman (2015:246) argues that counterfeit trade accounted for 10% of the global trade in 2015. Beare (2012:77) claims that counterfeiting of goods is the most common commercial crime that terrorists engage in to finance their activities. Counterfeiting is basically the production of the counterfeit product that resembles the genuine product. To this extent, Staake and Fleisch (2008: xiv) state that copying or imitation of products is an important feature of counterfeiting.

It is often associated with the infringement of intellectual property rights and is characterised by piracy.

Frequently the pirated goods are sold to the public at a discounted price, whereas some of the counterfeited goods are retailed at the same price if not more as genuine goods in order to hide the fact that they are not genuine. The proceeds of counterfeit is huge and criminals often disguise the money by channelling the proceeds to unethical organisations which may use the money to purchase equipment that are used for counterfeiting or even weapons that are used to commit other crimes .

According to the United Nations Office on Drugs and Crime (2014a:13) and United Nations (2011:5), counterfeiting of goods is in the increase in South Africa. It causes South African businesses an annual loss of over R2 billion on imported goods. These include the loss on sales, goodwill and royalties, among others (South African Institute of Intellectual Property Law, 2013:16). This further contributes to job losses, especially in the retail sector where counterfeited goods that are mostly manufactured in China are imported and sold in South Africa at a low price. Consequently, this stifles the sale of products manufactured in South Africa and the imported genuine products (Dlabay & Scott, 2011:200). Consumable counterfeit products are untested and therefore present a serious health hazard to people. Davison (2011:xxi) asserts that they are often of poor and sub-standard quality.

Asongu (2014:527); Van Walbeek (2014:1); Moyane, Jideani and Aiyegoro (2013:2990) are some of the researchers who conducted research on the negative effects of counterfeit goods for businesses and people in South Africa. This has amplified the assertion of some crime researchers that the SAPS is struggling to fight commercial crime, especially counterfeit (Corruption Watch, 2012). It is evident from the 2013/2014 SAPS national crime statistics that little has been done to reduce this crime. The difficulty in reducing this type of crime is compounded by the sophistication of the criminals who are involved in it and the extensive syndicate network that operates both nationally and internationally. However, no research has so far been conducted on how counterfeit and

piracy should be policed efficiently and effectively in South Africa. Reference to empirical data appears to be inadequate. A search of the SABINET database, which hosts prominent South African research journals, using the key words “counterfeiting”; “commercial crime”; “piracy”; “copyright”; “fake product”; “intellectual property”; “immaterial property”; “mimicked products”; “corruption” and “fraud”, singularly and in various combinations resulted in few relevant sources.

1.3 PROBLEM STATEMENT

Welman, Kruger and Mitchell (2005:14) and Creswell (2014:114) assert that a problem statement refers to some difficulty that the researcher experiences in the context of either a theoretical or practical situation and to which the researcher wants to obtain a practical solution. According to Leedy and Ormrod (2010:44), the first requirement in the research process is to see the problem with clarity and to state it in precise and pristine terms.

The main focus of this study was to analyse the policing of counterfeit phenomenon in South Africa. Despite the fact that the counterfeiting of goods constitutes a crime in South Africa and many other countries, counterfeiting also impacts negatively in the running of businesses. A legitimate business in every country is carried out on the undertaking that the laws of the country will protect their rights, and countries use the law enforcement agencies to safeguard these rights. The same can be said with South Africa, which has mandated the law enforcement agencies to enforce intellectual property rights laws. This is done with the hope of encouraging a culture of innovation and fair competition in the country.

However, police omnipresence is a challenge in South Africa as it is all over the world. The presence of counterfeit and pirated products that are sold in many streets and shops in South Africa attest to this challenge. Lack of effective and efficient policing of counterfeit is a challenge that affects the well-being of the country. According to Burger (2014:1), this is indicative of the skills’ shortage in the policing of specialised crimes. This is attested by the fact that many police members are not trained on identifying and

detecting counterfeit goods. As a result, they are unable to easily distinguish counterfeited products from the original ones as it will be indicated later in this study.

Mofokeng (2012:71) also argues that the SAPS has generally lost skilled members in the Specialised Units. These include the researcher who was a member of the SAPS and responsible for policing counterfeit and piracy crimes in the Specialised Commercial Crime Unit in Gauteng province. Owing to loss of members from the SAPS, this left only a negligible number of Specialised Commercial Crime Units, members from the Department of Trade and Industry (DTI), as well as Customs and Excise in the South African Revenue Services (SARS) to police counterfeit and piracy. Furthermore, inadequate use of intelligence is another factor that contributes to the ineffective and inefficient policing of this crime. Ratcliffe (2003:2) encourages the use of intelligence as a tool in preventing and fighting crime. The need for this is accentuated by the fact that the equipment used in counterfeiting produce the exact duplicate of the product being counterfeited, therefore making it difficult to notice the difference.

What compounds this further is the need for experts' testimony for the successful adjudication in counterfeit cases. That should be preceded by the testing and certification of the counterfeit product especially in cases where the accused disputes that the product is a counterfeit. As it will be indicated later, getting the services of experts may be a tedious and an expensive exercise.

According to Vithal and Jansen (1997:30), the researcher's interest in the theme of the research study as well as the significance of the research serves as a vital motivation. In this study, the researcher's interest was sparked by what he experienced as the member of the Specialised Commercial Crime Unit that is responsible for the policing of counterfeit and piracy crimes in Gauteng province. This exposed the researcher to the challenges of policing counterfeit and the profound impact that it has on the economy.

Counterfeit crime needs to be policed properly so that product owners can be protected against unscrupulous criminals in order to encourage business investment in the

country. A register of products of well-known brands owned by multinational companies that do business in South Africa already exists. These products are sold in the market and the multinational businesses ultimately lose business in the country. The consequences of this can lead multinational businesses to disinvest and boycott-doing business in the country, which in turn can cause job losses and reduction in revenue collection.

Police agencies are constitutionally mandated to protect people and property to maintain law and order in the country in terms of Section 205 (3) of the Constitution of South Africa Act 108 of 1996. In South Africa, the SAPS is responsible for maintaining public order, protecting and securing the inhabitants of the Republic and their properties, upholding and enforcing law and preventing crime, combating crime, as well as investigating all crimes in South Africa.

The SAPS is also given a legislative mandate to bring a case docket to court by Section 13 of the South African Police Service Act 68 of 1995. This power is also stated in Sections 19-57 of the Criminal Procedure Act 51 of 1977. It is against this background that the former Minister of Police (Mr Nathi Mthethwa) stated in his Budget Speech of 2014 that the fight against crime should be strengthened and an integrated approach should be used to accomplish the goal of creating safer communities and eradicating crime (South Africa, 2014a). The former Police Minister (Mr Fikile Mbalula) also echoed this sentiment when he argued that the successful fight against crime needs an integrated approach (South Africa, 2017). In 2017, the current Police Commissioner (General Khehla John Sitole) acknowledged that organised crime in Western Cape is rife because the police are not employing modus operandi analysis (EWN, 2018). To make stride towards the fight against commercial crime, the police need to improve public confidence so that the people could report hidden crimes such as counterfeit and piracy. Counterfeit crime is associated with fraud, which is characterised by secrecy and it can be difficult to solve without reliable information from informants and proactive intelligence gathering (Spilsbury, 2009:4).

1.4 THE RESEARCH QUESTION

The critical phase in conducting scientific research is to identify the problem and then delineate it into specific research questions that are relevant to the problem that is being researched (Creswell, 2014:139). Research questions are meant to spell out beforehand what the researcher is probing when conducting research into a specific issue that is the subject of the investigation (Creswell, 2009:111).

According to Silverman (2013:60), a research question is posed when the researcher does not have sufficient knowledge about the topic or the problem that is being researched. Moreover, the research question offers guidelines on the data that must be collected based on the problem of the study. This leads to focused analysis and interpretation of the data received from the participants, literature study and other relevant sources. Therefore, the main question posed by this research is - How is the counterfeiting of goods policed in South Africa?

This will cover the entire spectrum from proactive to re-active policing of counterfeit goods in South Africa. The following sub-question that hinges on the capacity and capability of the SAPS to police counterfeit goods in support of the main research question was asked: To what extent are the SAPS members properly trained and capacitated to police counterfeit goods.

1.5 RESEARCH OBJECTIVES

According to Bryman (2012:5), research is conducted to address gaps in the literature or inconsistencies between a number of studies or unresolved societal issues. The empirical research collects new data and determines if there are interesting trends or patterns in the collected data that will help to establish the facts (Birks, 2014:221). The main objective of this study was to analyse the policing of counterfeit goods in South Africa.

The following sub-objectives were pursued in an attempt to achieve the main objective:

- To establish the rationale for policing counterfeit crime - This dealt with the reasons for policing counterfeit crime by the law enforcement agencies rather than the brand holders or representatives and or owners of the products. The counterfeiting of goods is a crime that should receive attention amidst many heinous crimes that are often being committed in South Africa.
- To establish the extent of counterfeit crime in South Africa - In this regard, the research determined the magnitude of counterfeit crimes as well as the cost associated with counterfeiting to the economy and the well-being of the people.
- To determine how counterfeit goods is policed in South Africa - The manner in which counterfeit is policed by the relevant law enforcement agencies was determined and the researcher made comparisons with other countries.
- To establish factors that hampered effective policing of counterfeit goods in South Africa - This objective is designed to identify factors that hamper effective policing of counterfeit goods in South Africa with the ultimate goal of determining how they could be addressed.
- To make recommendations based on the findings, with regard to policing of counterfeit goods in South Africa and propose policy changes as well as best and prudent tactics that could be implemented to effectively police counterfeit in South Africa.

1.6 THE SIGNIFICANCE OF THE STUDY

The prevalence of counterfeit goods poses a serious threat to entrepreneurship and future innovation as well as creativity. The future of every country lies in the hands of its population who should be encouraged to be innovative and be involved in promoting invention in order to propel entrepreneurship and job creation. To promote inventions and innovations in the country, the violators of intellectual property rights must be sanctioned as counterfeit affects the economy of the country by stealing from the national tax and the proceeds of legitimate businesses.

This research contributes towards the effective and efficient policing of counterfeiting in the country and highlight areas that demand further research. Therefore, the findings of this study would not only benefit academics or academic institutions, but would be of value to the entire business sector, the criminal justice system and the global community as follows.

1.6.1 Value for academia

Literature on the development of counterfeit goods in various countries, international instruments relevant to counterfeit infringements as well as counterfeit legislation in South Africa is dealt with. The study indicates various approaches to policing counterfeit and the role of various stakeholders involved in the fight against counterfeit. It also identifies the existing gaps in the policing of counterfeit.

Various data collection and analysis strategies that were applied in this study would offer value to postgraduate students, researchers and other scholars worldwide. Scholars would understand the value of policing counterfeit crime and know factors that exacerbate this crime in South Africa.

1.6.2 Value for the business sector

The results of this study could be used by business to lobby the government to address factors that impede the effective and efficient policing of counterfeit goods. The business community in general would benefit from the study's exploration of the best approaches in dealing with counterfeit.

1.6.3 Value for role players in the criminal justice system

All criminal justice system role players can benefit from this study in one way or the other. For example, SAPS could benefit from this study by identifying the goods that are prone to be counterfeited and pirated and or that are often counterfeited and pirated by criminals in the country. Members of SAPS will have a better understanding of the concept of protected goods and how goods in general are counterfeited in South Africa.

The research has also identified pertinent challenges that hamper the efficient and effective policing of counterfeit and indicated possibilities of overcoming them. This would enable policy makers (such as bureaucrats and legislature) to have more knowledge on counterfeiting in order to make informed decisions. The research would empower law enforcement officers to understand counterfeit offenders' background and the current social and economic challenges that might affect their daily behaviour, especially towards committing further crimes.

1.6.4 Value for the community

Crimes committed by counterfeit criminals are against social norms and the victims of these crimes are proprietors and community at large. Counterfeiters make use of unregulated, untested, substandard, and often toxic materials in manufacturing the goods. Understanding this phenomenon empowers the community to devise measures that will ensure that they do not become vulnerable victims of this crime.

1.7 DEMARCATION OF THE STUDY

No research can focus on every problem and or attempt to seek solutions to all the problems in a country. In a research project, demarcation is equivalent with delimitation of the study, which involves determining the scope of the study, selecting the area of interest or a combination of criteria. These include availability, accessibility, theoretical interest, and deciding on how research will be pursued as well as what practical constraints are involved (Goddard & Melville, 2007:14). In addition, Silverman (2000:88) asserts that the demarcation of the study involves the reduction of a group of people or phenomenon that is going to be studied to enable the study to be more manageable. This is a national study as the SAPS operates nationally and the legislation that is used in this study is national as opposed to provincial and or local. The study is demarcated as follows.

1.7.1 Population demarcation

According to Sekaran and Bougie (2009:262) and Dantzker and Hunter (2012:52), a population is the entire group of people, events or things of interest to the researcher that need to be probed in the study. Babbie and Benaquisto (2010:108) state that a population comprises a group of people that the researcher regards as forming an object of the study and would determine some characteristics from. Therefore, SAPS members, the DTI officials, brand owners/holders/representatives, attorneys and prosecutors were the population of this study. This population was characterised as follows: members of the Specialised Commercial Crime Units counterfeit Task Teams and members of the Crime Prevention Units in the South African Police Service. The prosecutors who prosecute counterfeit and attorneys who often represent people who are accused for counterfeit and/or those who advise brand owners, brand owners, and the Department of Trade and Industry officials who police counterfeit.

1.7.1.1 Overview of the Specialised Commercial Crime Units

The Specialised Commercial Crime Unit was formed on 1 August 1999 in the democratic dispensation to reduce highly sophisticated and complex commercial crime by investigating and assisting to prosecute the offenders (South Africa, 2004a:1). It was given a mandate to investigate crimes with monetary value of more than R60 000 and also to investigate complex statutory commercial crimes among them counterfeit and piracy. The Specialised Commercial Crime Unit operates nationally with its Head Office situated in the SAPS Head Office in Pretoria. The Unit has nine provincial offices situated in the SAPS Provincial Offices and they are accountable to the Head Office. The Provincial Offices oversee the activities of the actual operational units, which mostly are situated in the buildings that are occupied by the Department of Justice and Constitutional Development's Specialised Commercial Crime courts and prosecutors who are employed by the National Prosecuting Authority (NPA) as well as SAPS offices in various parts of the country. The counterfeit Task Team was established in provinces that have more economic activities and high prevalence of counterfeit and piracy crimes. The provinces include Gauteng, Western Cape, Mpumalanga, and Kwa-Zulu Natal.

These provinces have counterfeit task teams attached to Specialised Commercial Crime Units focused on fighting counterfeit and piracy crimes in provinces. In 2015, when the study commenced, Gauteng Province had 24 members, Kwa-Zulu Natal had 23, Mpumalanga had 8, and the Western Cape had 25 (Kubheka, 2015). However, in 2018, the staff component of the task teams had reduced drastically. For instance, Gauteng Province had six members, Mpumalanga Province had three, Kwa-Zulu Natal had six and Western Cape had five.

In big cities, members of the SAPS Crime Prevention Units do police counterfeit and piracy (Kubheka, 2015). They do by arresting suspicious vendors who are trading in counterfeit and piracy goods and also confiscating suspicious counterfeited and pirated goods. They apply their general knowledge in policing counterfeit and piracy, as they are not trained on this.

1.7.2 Time demarcation

Time delimitation is time needed to plan the empirical study as it can be time consuming and there might be various changes in the population and sample based on the time period. This entails time to do draft research plan, selecting an appropriate method to conduct research and paying attention to details amongst others (Blessing & Chakrabarti, 2009:102). The research focused on the counterfeit and piracy goods within the period of 01 April 1998 to 31 March 2018. The period has historical significance, as it is associated with the democratic era. It is also noteworthy as it is a period when the South African Counterfeit Goods Act 37 of 1997 was implemented and later amended by the Counterfeit Goods Act 25 of 2001. The period is characterised by increased trade with the international community and increased migrant in-take as the country had opened its doors to the world.

1.7.3 Paradigm demarcation

According to Mouton (2013:33), there are three research paradigms, namely qualitative, quantitative and mixed methods. Qualitative study is textual in nature and it assists researcher to have a good understanding of the phenomenon that is being studied.

Conversely, quantitative research is associated with numbers and it is experimental, quasi-experimental and uses non-experimental designs. Mixed method paradigm study combines both qualitative and quantitative paradigms respectively in a single study (Creswell, 2014:110). This study only made use of a qualitative research paradigm, which is described as non-numerical paradigm (Babbie & Banaquisto, 2010:24).

1.7.4 Geographical demarcation

Geographic demarcation involves an initiative of setting geographic parameters to the research study (Goddard & Melville, 2007:14). The study was conducted in South Africa that is composed of nine provinces and only four provinces, that is, Gauteng, Western Cape, Mpumalanga and Kwa-Zulu Natal were sampled for the study. These four provinces were selected based on the high incidents of counterfeit and piracy. In addition, these are provinces that have high business activities in the country.

1.8 DEFINITION OF KEY THEORETICAL CONCEPTS

Key theoretical concepts are the concepts that feature a lot in the entire research study because every discipline has its own specialised language and concepts that are known to those who are in the field. The definition of key concepts make these terms/concepts meaningful within the context of the study (Leedy & Ormrod, 2010:58). The explanation of key concepts is vital as it simplifies the research by making the work understandable to the reader in the context of the discipline being studied. Contextualisation of concepts make the reader to be familiar with the field and have a good comprehension of the phenomenon being studied (Babbie & Mouton, 2012:111; Maree, 2007:15; Kumar, 2011:62). The following key concepts are explained in this study.

1.8.1 Policing

According to Newburn (2008:17), policing is the process of preventing and detecting crime and maintaining law and order. It is an activity that might be engaged in by any law enforcement official or member of the public. In this research, policing activity is operationalised as the prevention and or investigation of counterfeit and piracy.

1.8.2 Counterfeit and piracy

Counterfeiting denotes the unauthorised production of goods in relation to which the state confers upon legal entities a statutory monopoly to prevent their exploitation by unscrupulous people (WIPO, 2014:2; Staake & Fleisch, 2008:33). Moreover, counterfeiting is a routine and mundane form of organised crime that involves the copying of genuine goods to mislead people into thinking they are real.

However, piracy is the infringement of copyright and related intellectual property rights. It is characterised by unauthorised duplication of copyrighted content that is passed off as genuine item. Breaches of trademark and copyright laws overlap and the concepts are used synonymously in certain jurisdiction (Staake & Fleisch, 2008:17). Spilsbury (2009:4) underscores that counterfeit and piracy are forms of fraud, while Treadwell (2011:176) contextualises them further by saying they are forms of consumer fraud whereby products are sold purporting to be what they are not, with the ultimate goal of making exorbitant profit.

1.8.3 Trademark

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

1.8.4 Intellectual property

Intellectual property can be regarded as inventions, literary and artistic works and symbols, names and images used in commerce. It could be divided into industrial property such as patents, trademarks, industrial designs, geographical indications and copyright that covers literary, films, music, artistic, architectural designs as well as recordings (WIPO, 2014:2).

1.8.5 Brand and brand holder/brand representative

A brand is a set of mental attachment and added perception held by consumer about the value associated with intellectual property rights (registered product or service) that is provided for at a cost (Kapferer, 2012:8). Oosthuizen (2013:13) asserts that a brand is a sign or set of signs certifying the origin of intellectual property right (registered product or service) and differentiating it from competition.

The brand owner/holder/representative is the owner of intellectual property rights on the specific goods or services, whereas the brand representative is the person or entity appointed to represent the goods or services that are owned by the brand owner/holder in a particular jurisdiction (Malaval, 2004:203).

1.8.6 Organised crime

Organised crime is a criminally structured association established by more than one person acting in covert with a view of committing criminal act, which is punishable by law. Albanese (2011:4) defines it as a crime for purposes of securing profit and or power by engaging in unlawful activities. Article 2 of the United Nations Convention on Transnational Organised Crime defines organised crime as a gathering of more than three people who take action in a concerted manner for the purpose of committing crimes and obtaining a financial or other none monetary benefits (United Nations, 2011).

1.8.7 Intelligence led-policing

Ratcliffe (2008:1) defines intelligence led-policing as the application of crime intelligence analysis as an objective decision-making tool in order to facilitate crime reduction and or prevention through effective policing strategies and external partnership projects drawn from an evidential base.

1.8.8 Crime intelligence

Crime intelligence is the information that is gathered for the prevention or investigation of crime and that ultimately serves as the basis for the evidence presented in court (Gottschalk, 2010:44). Similarly, Cope (2004:190) emphasises that it is the information

about crime that has been systematically collected and processed into a particular form and that is readily accessible for use in the prevention of crime and the tracing of wanted criminals.

1.8.9 Misrepresentation

Misrepresentation is the distorting of the truth to deceive unsuspecting victims (Joubert 2010:158). Snyman (2008:253) calls it a perversion or distortion of the truth to the detriment of innocent victims causing them to believe a lie.

1.9 OUTLINE OF THE STUDY

The research is organised into the following chapters.

Chapter One: General Orientation – The chapter provides the problem description, background, motivation, objectives, research question, and the significance of the study. Various concepts that are used in the study are also defined.

Literature Research: Chapter 2, 3, 4 and 5 are literature research and covers the entire literature review. **Chapter Two: Historical Background and Theoretical Explanation of Counterfeit Crime** – deals with the historical background and theoretical explanation of counterfeit crime. It covers the history of counterfeit and piracy. **Chapter Three: International Perspective on the Policing of Counterfeit** – deals with the international perspective on the policing of counterfeit goods and its dynamics. **Chapter Four: The Policing of Counterfeit in South Africa** – covers the policing of counterfeit goods in South Africa. It deals with various measures that are currently used for policing counterfeit goods in South Africa as well as determining the effectiveness of such measures. **Chapter Five: Adjudication of Counterfeit in South Africa** – deals with the adjudication of counterfeit goods in South Africa by focusing on the role of the Criminal Justice System and exploring and describing how it deals with counterfeit and piracy cases. It covers the investigation, preservation and presentation of evidence, and the sanction that is imposed on the offenders in counterfeit and piracy cases.

Chapter Six: Research Methodology – The research methodology used in the study is dealt with covering the research approach, research design, population, sampling, data collection methods, integrity of the collected data, and data analysis.

Chapter Seven: Research Findings – This chapter discusses and analyses the interpretation of data from participants and the literature. The practical experiences of participants are also revealed.

Chapter Eight: Recommendations and Conclusion – Finally, the recommendations that are designed to address the short falls are indicated, followed by the general conclusion of the entire study.

1.10 CONCLUSION

The chapter provided a background and context of the entire study on the policing of counterfeit goods in South Africa. The nature and extent of the counterfeit and piracy problem are spelled out in the problem statement. The chapter also put forward the objectives to be achieved in the project. The people or organisation that will benefit (beneficiaries) from the study are described. The chapter also defines and explains key concepts that are used in this study in order to assist the readers to understand this thesis in the context of its discipline.

CHAPTER TWO: HISTORICAL BACKGROUND AND THEORETICAL EXPLANATION OF COUNTERFEIT CRIME

2.1 INTRODUCTION

The former United Nations Secretary General Boutros Boutros Ghali, mentioned that the forces of darkness are at work and no society is spared, referring to illicit trafficking and organised crime in Europe, Asia, Africa, and America (Woodiwiss & Hobbs, 2009:117). This indicates the seriousness of this crime that shows no signs of recession, just like fraud that is a challenge worldwide. WIPO (2009a:2) states that counterfeiting has become the world's fastest growing and most profitable illicit business as its tracks are noticed in most countries.

What was previously seen as a “cottage industry” or “back room business” has now become an industry infiltrated by syndicates and criminal organisations (UNICRI, 2011:16; Large, 2009:3). Contrary to the common believe that counterfeit is a victimless crime, the nature and manifestation of this crime indicates that it is largely a white-collar crime committed against the people and/or organisations' property rights, including intellectual property rights. Intellectual property rights are rights that are protected by international conventions and guaranteed to the holder of that property.

Counterfeit, which is recognised as a crime in many countries spread rapidly owing to the established supply needs that often infiltrate genuine goods supply chain channels. The European Commission (2014:7) states that in some instances, criminals run counterfeit business supply chain parallel to the supply chain of the legitimate business thus posing undesirable consequences. OECD's (2008:82) states that business owners often lament for the police intervention because their businesses are often hi-jacked by criminal organisations. The intervention is neither effective nor efficient as these illicit activities continue to increase. Wilson (2015:12) emphasises the ineffective policing of counterfeit by stating that counterfeit business continue to operate and thrive in the markets, streets and on the internet. This resonates with Lo and Kwok's (2016:5)

assertion that counterfeit is perpetrated by criminals who know that law enforcement agencies are not properly trained to police it.

This chapter explains the manifestation and extent of counterfeit indicating the reasons of its increase within its historical context. It also deals with criminological theories relating to counterfeiting, therefore demystifying the relation between organised crime, counterfeit, money laundering and intellectual property instruments as well as indicating its policing.

2.2 HISTORICAL BACKGROUND OF COUNTERFEIT

According to the United Nations Office on Drugs and Crime (2014b:1), no country is immune from counterfeit criminality. This criminality dates back to the 13th century, where trademark, which is a precursor of counterfeit, was a challenge in the United Kingdom (UK). A compulsory trade mark law in the UK required bread makers to place a mark on every loaf of bread and goldsmiths to engrave marks on their products as well. It is during this period when infringement of trademark became a crime that was punishable by capital punishment (Abbott & Sporn, 2002:9). In 1584, a first trademark case that was commonly known as Stanford case was lodged in the UK. In this case, the court found the accused guilty of producing an inferior material and placing a mark of a genuine product that belonged to a legitimate owner with the intention to deceive potential buyers (Chaudhry & Zimmerman, 2013:8).

Apart from deceiving buyers by selling them fake products, counterfeit crime also affects the economic well-being of genuine product owners by divesting them their valuable product brand (Chaudhry & Zimmerman, 2013:7). It could be equated to the hi-jacking of one's business. Although coins were counterfeited in the 16th century, Harris, Stevens and Morris (2009:5) state that the difficulty of creating counterfeit coins that included some valuable metal and the heavy penalties for counterfeiting minimised it to a certain extent. However, counterfeiting flourished once more in the United States of America (USA) in 1650 after the introduction of paper money (Newman, 1957:174). By the 17th century, counterfeiters had honed their skills and could replicate the currency to

look the same with the genuine one. This led to the USA hiring ex-counterfeiter to confirm before the release of the new money by the bank that criminals could not easily replicate it (Phillips, 2005:102).

The inscription of unique signs in goods became a symbol of authenticity and prestige. Ono (1999:2) asserts that the Babylonians and Egyptians priests placed their unique inscriptions on monuments to increase their proceeds and legitimacy in society. The trademark on goods was then used to identify manufacturers of products and made it possible for people to identify genuine quality products from the inferior and substandard products for which the manufacturer could be held accountable (Ono, 1999:2-3). This made some criminal elements to embark on counterfeiting and trademark infringement worldwide.

A long history of trademark could be seen from the unique identification marks stamped by the Roman builders in bricks and tiles, Chinese on their pottery, Greek vases and Japanese lumbers that used inscription to identify genuine goods worth the value placed on them (Newman, 1957:174). In the 17th century, the Spanish priest called Domingo Navarette noted the ability of the Chinese to copy the products from modern Europe with relative ease and precision and reported the matter to the police (Chaudhry & Zimmerman, 2013:9).

According to Cummings (1997:574) and Penz, Schlegelmilch and Stottinger (2009:68), the equipment and skills used to manufacture money in the 20th century in the USA confined counterfeiting to very skilled and technologically enhanced criminals. As a result, the USA Secret Service, the branch of the USA Treasury Department that is responsible for enforcing counterfeiting laws, discovered many counterfeiters before the money leaked into circulation. With the advent of new technology such as colour printers, quality paper and electronic reprographics, more counterfeit schemes emerged. This indicates that counterfeit has been in existence for centuries and has subsequently grown in magnitude and sophistication to become an international crime that has huge impact to business and economy.

2.3 IMPACT OF COUNTERFEIT

Counterfeiting is almost the same as forgery in that something is copied to defraud buyers by passing it as the original or genuine product. It is legally singled out from other acts of forgery and is treated as a separate crime. In general, counterfeit impacts negatively on the relationship that people have with the authentic branded products (De Chermatony, Mcdonald & Wallace, 2011:397). Owing to the skills and sophistication in which counterfeited products are produced, most of them end up looking like genuine products, therefore making it difficult if not impossible for people to distinguish between them. Eventually, this make counterfeit crime to have a severe negative impact in international trade and global economy (Heike, 2010:159). Its enormity in the global scale negatively affects the growth and operation of most start-ups and established businesses (Phau & Teah, 2009:15; OECD, 2008:134).

Counterfeit crime cause businesses to lose plenty of money owing to lost sales, lower profits, less royalties, and loss of trust in the brand. Businesses end up reducing the financial loss by cutting jobs and reducing investment, therefore in turn leading to lower economic growth. The personal and family trauma for people who lose employment is disastrous as they fail to service mortgages and other personal debts that they might have while others end up having to relocate to cheaper accommodation or become homeless. UNICRI (2011:47) statutes that even those who are fortunate to get another employment, the possibility of finding employment that pays less than the previous employment is huge. A study by Bikoff, et al., (2015:246) reveal that counterfeited drugs and medicine cause more than 100 000 deaths in the African continent on an annual basis.

Consumers receive poorer quality products that are unregulated and unsafe for their health. According to Joossens, Chaloupka, Merriman, and Yurekli (2000:394), businesses have also to guard against the risk of being wrongly litigated based on harmful products that consumers mistake to be the genuine brands that are sold by that business. They spend more money in protecting their goods through private policing and protective measures on packaging in order to differentiate them from fake goods mostly

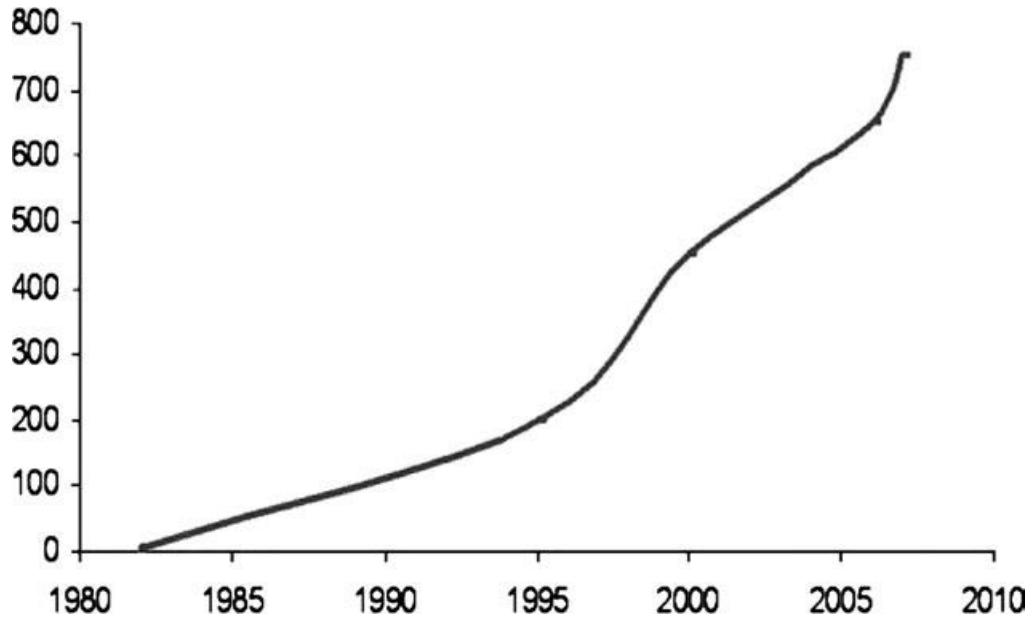
with no success. This expenditure is often passed over to consumers who ultimately pay more for the product.

However, Estacio (2013:397) indicates that the working conditions in the counterfeit industry are poor. Most companies offer low remuneration and more often workers are exposed to health and safety risks when this is contrasted with employment created by legitimate business that offers employment benefits and job security. It is important to note that counterfeit also affects the fiscal well-being of governments in various ways. The fiscal cost of counterfeiting ranges from its policing to tax avoidance (OECD, 2008:134). According to Cohen (2000:272), there might even be a need for the government to increase the policing expenditure budget by employing additional police officers who will be dedicated to deal with this crime. In most cases, the violation of intellectual property rights stimulate organised crime.

2.3.1 The Magnitude and Extend of Counterfeit

In 2009, the UN reported counterfeit as constituting 5%-7% of the world trade or 600 billion USA dollars a year globally. This report further indicates that the pharmaceutical industry is a lucrative market for criminal syndicates who produce illegal drugs (Basu & Lee, 2015:39). OECD (1998:30) indicates that 67% of the world's counterfeit goods originate from China. Asserting that this figure excludes domestic sales and digital products distributed via the Internet because counterfeiting activity has expanded from luxury to common consumer goods affecting products such as automotive replacement parts, electrical appliances, and toys (Stoner & Wang, 2014:205). Figure 1 below illustrates the growth of counterfeit goods and piracy marked from 1980 to 2010.

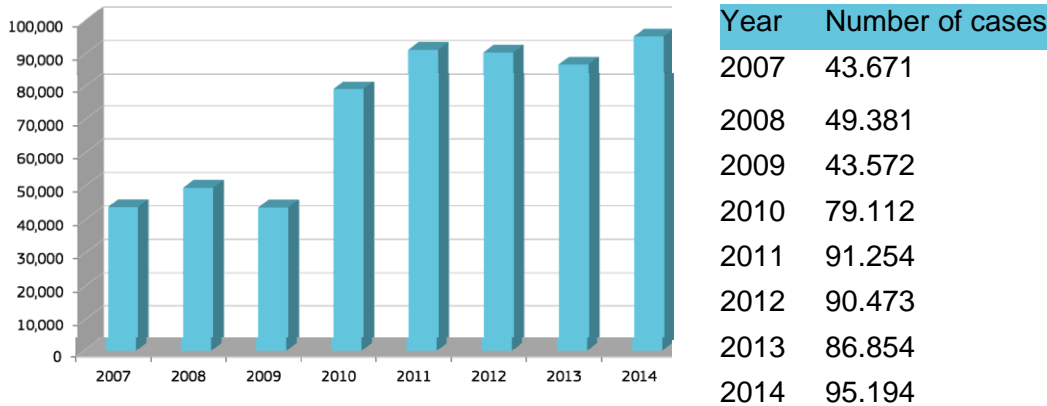
Figure 1: Growth in the counterfeit goods and piracy market



Source: INTERPOL (2014:7).

The estimated volume of internationally traded counterfeit products moved from 200 to 250 billion USA dollars from 2005 to 2007, therefore resulting in the increase of counterfeited products from 1.85% to 1.95% within the global trade (Lewis, 2009:47; INTERPOL, 2014:7). Compared to the volume of international trade that has doubled during the same period, this signifies a drastic increase. Minagawa, Trott and Hoecht (2007:455) and BASCAP (2015:1) underscore that when Internet infringements in country sales or indirect losses to governments and consumers are included the global impact of these illegal activities could add up to more than 1.77 trillion USA dollars annually. Figure 2 below indicates the trend of counterfeit in European Union (EU) from 2007 to 2014.

Figure 2: Counterfeit cases in European Union



Source: European Commission (2015:11).

Figure 2 above also indicates the number of counterfeit cases that were reported in the EU. Furthermore, the European Commission Taxation and Customs Union revealed that 103 million counterfeit goods were seized in 2004 in the EU and this number increased to 128 in 2006 and similar incremental trend is noticed from 2007 up to 2014 (European Commission, 2015:11). Going by the above statistics, it is clear that there is an increase on the seizure of counterfeit goods every year in the EU.

The USA counterfeit industry generates 100 billion USA dollars annually and in 2008 customs registered the seized goods worth 178 million USA dollars (BASCAP, 2011:78). This indicates the determination of counterfeiters to continue with their criminal actions. Despite its negative social and economic effects, it remains an organised scheme perpetrated on business principles.

2.3.2 Economic Benefits of Counterfeit

Pires, Schneider and Herrera (2016:5) state that cost-benefit analysis gives a better explanation on the economic benefit of an activity. This means that criminals will engage in criminal enterprises that are financially rewarding and this principle is true in counterfeiting. According to BASCAP (2009:10), counterfeit is beneficial to criminals and

detrimental to governments as they lose tax revenue that could have been collected from a legitimate business.

Counterfeit as an economic crime has financial benefit to counterfeiters and the host of other people that are involved in it. Soudijn (2012:161) emphasises the benefit of economic crimes to criminals by stating that criminals make the deliberate choice to be involved in them for their own monetary benefit. The large proceeds of counterfeit are at times used to procure arms and ammunitions that are often used in terrorism to overthrow established governments. Some of the proceeds are laundered in various ways such as the buying of real estates, genuine luxury goods, precious metals, as well as investments in various markets. The advantages of real estates are that properties can be used as operational and logistical bases for organised crimes such as counterfeit, as well as a means to re-invest the proceeds of illicit activities and obscure markets by using fraudulent schemes (Dugato, Favarin & Giommoni, 2015:945).

A similar trend is occurring in the USA where paper money counterfeiters re-invest the proceeds of crime in legitimate business. Cummings (1997:540) avers that in 1990, the Secret Service discovered that 100 counterfeited USA dollars was circulating internationally. They believe that the dollars were printed on a press machine that is similar to those used by the USA Treasury that had been sold to Iran in the 1970s. In 2002, the police seized 130 million USA dollars in fraudulent USA notes before they were circulated and detected more than 44 million USA dollars in spurious USA currency after it had passed into the criminals' hands. Companies were losing close to 8.1 billion USA dollars annually in overseas business owing to violations of Intellectual Property. Selling false drugs with cheap ingredients and high profit margins seem to be rife. An investment of just 1000 USA dollars in raw material could net an amount of 200 000 USA dollars and above (INTERPOL, 2014:52).

In 1992, the USA passed Counterfeit Deterrence Act of 1992 with the intention to increase penalties. This legislation also instructed the Department of Treasury to redesign paper money in order to make it more difficult to reproduce. This resulted in the

redesigned currency been released in 1996. The USA Treasury officials believe that the watermark and the use of colour-shifting inks made the currency nearly impossible to reproduce with the current technologies (USA, 2002:1).

The 2008 data of the value of illicit trade shows that the total global economic value of counterfeit and pirated products was 650 billion USA dollars annually. The USA domestic production and consumption alone was accounting for 370 to 570 billion USA dollars annually and international trade on counterfeit and piracy was accounting for 960 million USA dollars annually. On the contrary, digitally pirated music, movies and software were accounting for between 80 to 250 billion USA dollars (OECD, 2016:69). The ICC (2010) predicted by then that in 2015, the impact of counterfeit and pirated goods would exceed 1.77 trillion USA dollars with a possibility of more than 2.5 million jobs being at risk of being lost. The genuine goods producers will be forced to reduce their production levels based on less demands owing to the circulation of counterfeit goods in the market.

However, Soudijn (2012:161) argues that the generation of more laws, regulations and enforcement of the laws by the police in any country cannot solve the problem of counterfeit. According to Sheptycki (2008:30), this is because social exclusion provides motive for criminal entrepreneurship and state-based criminality as these types of crime provide access to the economic means by which some criminals may ensure their inclusion at the top of the social pecking order of global consumer capitalism. Criminals continue to infringe intellectual property rights and hide the proceeds through financial institutions.

According to OECD (2008:6), employment might be lost in the informal sector because of effective intellectual property rights policing. Conversely, employment could not be necessarily higher in the formal sector of this industry. This could be because of the quality of employment in the formal sector that includes pension funds, medical aid and minimum wage. Although counterfeit workers may face hardships, people are likely to venture and stay in this sector in the absence of alternative employment.

Lewis (2009:48) emphasises that in many developing countries, the distribution of counterfeit and pirated goods often offer important source of employment for some workers. Such workers and their dependents have better living income earned from counterfeit crime. This implies that sustained reductions in counterfeiting will require the creation of legitimate employment opportunities for workers who earn their living from selling counterfeit goods.

2.3.3 Intellectual Property Crime and Money Laundering

According to Large (2009:13), counterfeit crime involves intellectual property and it is linked to money laundering as the proceeds are used in recycling the profits from counterfeit to finance other crimes. The mistake made by many governments is to relegate counterfeit crime to be a menial issue that does not receive priority in policing. This is based on the notion that financial crimes are not serious social crimes and this lead to the criminals exploiting this gap. Large (2009:13) argues that the proceeds of counterfeit are used for money laundering activities. According to Le Khac, Markos, O'Neill, Brabazon, and Kechadi (2011:504), money laundering is the third largest business in the world that is estimated to be ranging from 500 billion USA dollars to more than 1 trillion USA dollars annually.

Le Khac, Markos, O'Neill, Brabazon, and Kechadi, (2011:504) describe money laundering as a process of disguising the origin of illicit money to make it appear legitimate. It is basically the conversion of the money that is obtained from criminal activities to a legitimate status by disguising its origin through various means. This disguises the origin of illegal earnings to look as if they come from a genuine source other than counterfeit, therefore making crime a worthwhile endeavour for criminals (Mackrell, 1996:47). Without money laundering, money obtained through criminal acts was going to be worthless because criminals were not going to use it in such large amount anywhere. According to Zelenovic, Vunjak and Mirovic (2015:348), the increase use of technology such as electronic money transfer makes it easy to transfer money from various transactions, therefore making it relatively easy for money laundering.

2.3.3.1 Money laundering

The motive for money laundering is monetary gain (Leff, 2012:1). Criminals would be having the proceeds of crime that they now want to use in a legitimate way. They will now embark in various ways to ensure that they launder the money that they have to be able to realise its financial value, and some of the ways that they use are as follows:

- Financial institutions: Criminals make use of financial institutions to invest their ill-gotten gains without drawing attention to the police (Soudijn, 2012:146). They can successfully do this to a certain extent and with a limited amount because investing large amounts of money regularly will make the banks to question the source of such funds. Soudijn (2012:150) asserts that to avoid detection some criminals use the identities of unsuspecting people to open bank accounts at various banks all over the world. Some hard-core criminals do not want the transactions to be traced back to them. According to Choo and Smith (2008:45) and Financial Action Task Team Guidance (2013a:28), they:
 - use agents and mules to open bank accounts for them where transaction will be made to launder the money; and/or
 - use of their intermediaries, family and close associates to launder the money on their behalf and pay them a service fee or bribe.
- Embedment: Criminals embed illicit transactions and proceeds within a large volume of legitimate money and do business transfers with the financial institutions (United Nations, 2013a:34; United Nations, 2013b:3). This would normally work well for criminals who have some legitimate business even if that business does not generate enough money but it is only used as a front to hide their illicit activities.
- Politically Exposed Persons: The money could also be laundered through the Politically Exposed Persons. Politically Exposed Persons are individuals who are entrusted with prominent public function owing to their positions and influence (Financial Action Task Team Guidance, 2013a:3). Money laundering through these people could also involve the utilisation of their families and close associates. According to the Financial Action Task Team Guidance (2013a:27),

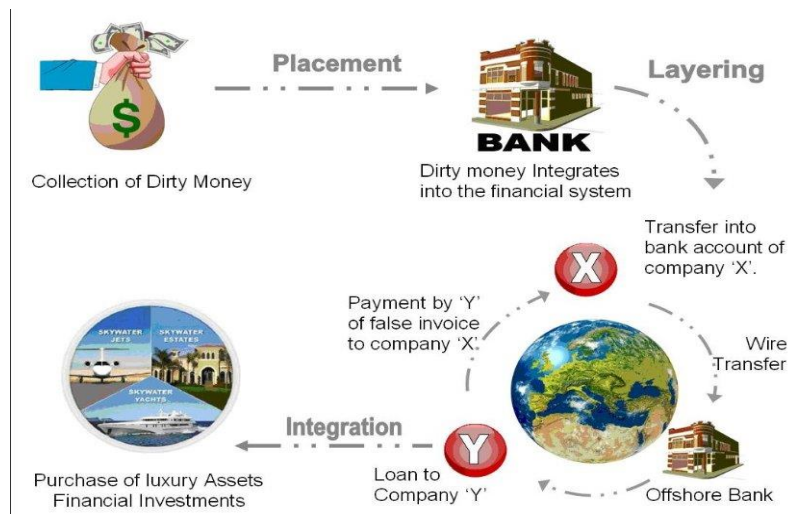
Politically Exposed Persons also tend to shield their identity by using corporate businesses to obscure the illicit monies or assets.

This indicates that there are various ways of laundering money, therefore making it difficult for this practice to be effectively policed and prevented. The laundering circumvents obstacles to procure and utilise money to fund acts such as terrorists' activities (Levi, 2015:283).

2.3.3.2 The process of money laundering

Money laundering is by nature a secret scheme that involves underground operations. Criminals attempt to hide their activities and illegal money from the police in fear of arrest and prosecution. Figure 3 below describes money laundering by indicating the three-stage process and showing the sequential flow of money laundering (Mugarura, 2014:389). This diagram indicates the probable elements that facilitate money laundering by indicating that money laundering is commenced by placing the money with the financial institutions until the money is integrated into the legit financial flow system.

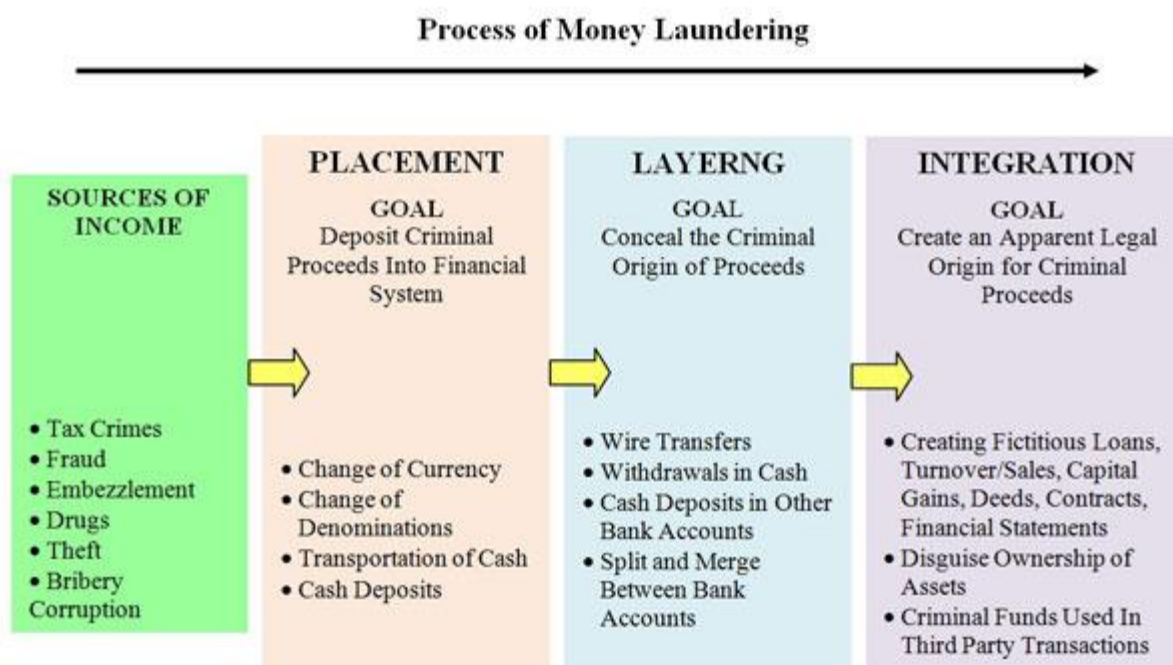
Figure 3: Descriptive money laundering process



Source: Zelenovic, Vunjak and Mirovic (2005:351).

Figure 4 below shows the process by naming the source of funds and detailing the three money laundering process. The diagram further provides possible narration of the process.

Figure 4: Process of money laundering



Source: Choo and Smith (2008:46).

The diagram above shows the possible flow of money laundering in sequence. Money laundering industry is rife and span across nations. The International Monetary Fund (IMF) has hinted that global amount of money laundering is equivalent to between 2-5 percent of the world's gross domestic product market. This money is often used to destabilise countries and corrupt nations (Antoniou & Sinha, 2012:93).

International Anti-Money Laundering and Combating the Financing of Terrorism standards are set by the Financial Action Task Team that demands financial institutions employ Know Your Customer rules. This Know Your Customer rule applies to all accounts and cash transactions that go beyond a designated threshold in order to curtail

money laundering (Soudijn, 2012:150). This initiative by Financial Action Task Team is intended to curb the misuse of trade system as a method by which organised criminal organisations and terrorists financiers move money for the purpose of disguising its origin by commingling it into the formal economy (Financial Action Task Team Guidance, 2013b:52).

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

The findings of a money laundering report by BASCAP (2009:i) indicates that business people should lobby and educate government officials and policy makers about the value of intellectual property and display how counterfeit and piracy affect economic growth, employment and innovation. The engagement with government could produce policy measures that can be used to effectively police counterfeit.

According to Section 18 of the USA code of 1956, the criminal elements that need to be proved for successful conviction of money laundering in the USA is that there should be a proceeds and the accused should know that the financial transaction is intended to conceal such proceeds or to promote specified unlawful activity. These requirements

are easy to prove and the situation assists the police to fight corruption by establishing the source of wealth or funds (Financial Action Task Team Guidance, 2013b:20). Once these requirements are proved, the assets are located and the police seize the proceeds (Leff, 2012:1). This makes people to account for the source of their wealth and it operates on the same principles as the lifestyle audit. Thus policing illicit transactions by establishing the source of funds, so that organised crime can be suffocated by confiscating the money that fuels it (Financial Action Task Team Guidance, 2013b:20).

2.4 THEORETICAL EXPLANATION OF COUNTERFEIT

Economic and policing theories have developed over time in an attempt to explain how crime is committed and how it could be policed. There is a body of evidence about the factors that coerce people to be at risk of committing crime. Only selected social theories related to the commission of crime will be dealt with indicating that crime is motivated by economic supply and demand factors. Organised crime is an enterprise that employs rational cost-benefit analysis to minimise costs and maximise gains based on the principle of supply and demand of the illegal markets (Lo & Kwok, 2016:1). With regard to counterfeit crime, it is apparent that there is no product categories left unscathed by counterfeiters, hence counterfeiting continues to thrive with economic benefits to criminals (Chaudhry & Zimmerman, 2013:7; Bian & Veloutsou, 2007:212).

It is also important to point out that greed is not the only motivation for white-collar crime. However, it is also a reality that some people turn to crime to fulfil overwhelming financial needs while psychological factors also play an important role in decision-making (Stotland, 1977:185). There is always a need to understand a range of crime causation theories in order to get an insight on predisposing and precipitating factors in the causation of crime.

2.4.1 Rational Choice Theory

George Homans pioneered the establishment of the rational choice theory in 1961 by setting out framework of exchange. According to the rational choice theory, individuals are motivated by the goals that express their preferences. They then act according to

the information they have received after having evaluated the opportunities before them. This theory implies a conscious individual who is engaging in deliberate calculative strategies (Browning, Halcli & Frank, 2000:128). This means that counterfeiters consider the benefits and risks of their actions before embarking on them.

Rational choice theory has its roots in the classical school of criminology developed by the Italian social thinker, Cesare Beccaria. Beccaria and other utilitarian philosophers suggest the following: people choose their behaviour, including criminal behaviour; their choices are designed to bring them pleasure and reduce pain; criminal choices can be controlled by fear of punishment; and the more severe the punishment, the greater its ability to control criminal behaviour (BASCAP, 2011:17; Clarke, 1997:9). This is in consonant with economic theory on crime that professes that individuals respond rationally to the costs and benefits of criminal opportunities. In relation to counterfeit for instance, the point of departure in economic analysis is the existence of a market. Individuals who embark in counterfeiting for profit while escaping detection and conviction make up the supply side of this market (Forst, 2009:29).

Beccaria called for fair and certain punishment to deter crime, as he believes that people are self-centred and therefore, they must be motivated by the fear of punishment, which provides a tangible motive for them to obey the law and suppress crime. To deter people from committing more serious offenses, crime and punishment must be proportional (Dugato, Favarin & Giommoni, 2015:949). The main creation of the rational choice theory was to give focus to situational crime prevention. As illustrated in Figure 5 below, for crime to occur, three elements need to converge - suitable target, the desire and the opportunity.

Figure 5: Crime Triangle



Source: Heinonen and Wilson (2012:274).

Figure 5 above shows the elements that must converge before a crime can take place. Von Lampe (2011:150) refers to the convergence of these elements as a “niche for offending”. It describes the opportunities that criminals have at their disposal to enrich themselves by committing crimes and stealing from others.

Situational crime prevention consists of opportunity-reducing measures that are directed at specific forms of crime involving management, design or manipulation of the immediate environment that makes crime more difficult and risky (Schneider & Kitchen, 2007:33). Rather than simply responding to crime after the fact, recent attention to crime prevention has focused on specific ways in which to modify the physical and social environment.

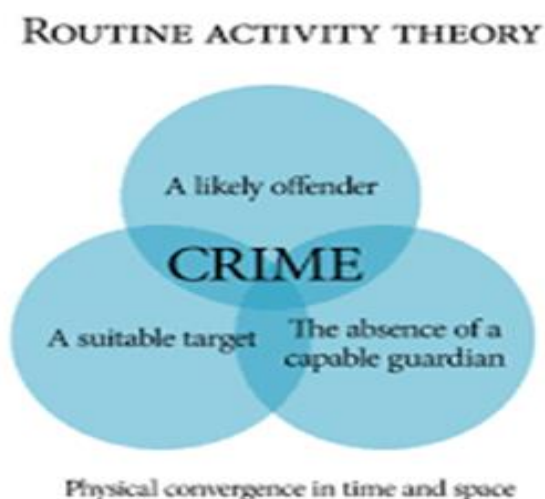
2.4.2 Routine Activity Theory

Routine activity theory profess that crime depends on the opportunities available at a specific place (Cohen & Felson, 1979:588). The logic of this theory is that crime does not need hardened offenders, super predators or convicted criminals but just an opportunity. An underlying theory of situational crime prevention is routine activity theory, which identifies the minimal elements that must converge in space and time in order to

make crime possible (Reynald, 2011:4). These elements that are mentioned in Siegel (2010:78) and depicted in Figure 6 below are:

- The availability of suitable targets;
- The absence of capable guardians, such as police, homeowners, neighbours, friends; and relatives; and
- The presence of motivated offenders.

Figure 6: Routine Activities Theory: The Interaction of Three Factors



Source: Nikitkov, Stone and Miller (2014:315).

2.4.3 Situational Crime Prevention Theory

Situational crime prevention was first popularised in the USA in the early 1970s coined defensible space. This term signifies that crime can be prevented or displaced through the use of protective measures. Situational crime prevention presents crime as a rational choice made by offender after evaluating several opportunities that exist for the crime in a given situation (Clarke, 1997:2). The more the opportunity for offending the more the likelihood that the motivated offender will commit crime. That is why AIC (2003:1) postulates that one principle of preventing crime from happening is target hardening.

Criminologists have suggested using several situational crime prevention efforts that might prevent or reduce crime rates. One approach is not to target a specific crime but to create an environment that can reduce the overall crime rate by limiting the access to tempting targets for a highly motivated offender. According to this, community policing and enforcement of the law at all cost can still reduce criminal opportunity. Graham (2009:104) mentions the following five situational crime prevention strategies:

- Increase the effort needed to commit crime;
- Increase the risks of committing crime;
- Reduce the rewards for committing crime;
- Reduce provocation or induce guilt or shame for committing crime; and
- Reduce excuses for committing crime.

In situational crime prevention, the offender identifies ways of manipulating immediate situations to be able to perpetrate crime. In this context, it could be the high price of genuine goods, the ease in which it could be counterfeited and the need by the market for such products. This theory postulates that in order to reduce criminal activity, planners must be aware of the characteristics of sites that are at risk; the elements that push people toward these sites; what equips potential criminals to take advantage of opportunities offered by these sites; and what constitutes the immediate triggers for criminal actions. Criminal acts could be avoided if potential targets are securely guarded, the means to commit crime is controlled, and potential offenders are carefully monitored (Drawve, Thomas & Walker, 2014:450).

2.4.4 Neutralisation Theory

Neutralisation theory claims that to become a criminal, one has to go through the learning experience in which potential criminals and experienced criminals master the techniques that enable them to neutralise conventional values and drift back and forth between illegitimate and conventional behaviour (Belzen, 1996:183; United Nations, 2003: 192).

This is in unison with Sykes and Matza (1957:664) theoretical model, which posits that:

- Criminals sometimes voice a sense of guilt over their illegal acts - If a stable criminal value system exist in opposition to generally held values, it would be unlikely that criminals would exhibit any remorse for their acts other than regret when being apprehended.
- Criminals frequently respect and admire honest, law-abiding people - Honest people are often revered, and if for some reason such people are accused of misbehaviour, the criminal would defend their integrity. Those admired may include honest apostles, priests, clergy, parents, teachers, and neighbours.
- Criminals draw a line between people they can victimise or not - Often church pastors or neighbourhoods are off limits. This practice implies that criminals are aware of the wrongfulness of their acts.
- Criminals are not immune to the demands of conformity - Most criminals frequently participate in many of the same social functions as law-abiding people - for example, church gatherings and family activities.

According to Sykes and Matza (1957:664), criminality is the result of the neutralisation of accepted social values through the learning of a standard set of techniques that allow people to counteract the moral dilemmas posed by illegal behaviour. Techniques of neutralisation suggest that people develop a distinct set of justifications for their law-violating behaviour. This technique of neutralisation is exhibited by the following patterns of behaviours (Sykes & Matza, 1957:664):

- *Deny responsibility* - Young offenders sometimes claim their unlawful acts were simply not their fault, stating that their acts resulted from forces beyond their control or were accidents.
- *Deny injury* - By denying the wrongfulness of an act, criminals are able to neutralise illegal behaviour. For example, delinquents may claim that the behaviour was merely a prank, helping affirm the offender's perception that crime can be socially acceptable.

- *Deny the victim* - Criminals sometimes neutralise wrongdoing by maintaining that the victim had it coming. This denial may also take the form of ignoring the rights of an unknown victim; for example, stealing from the unseen owner of a shop.
- *Condemn condemners* - A criminal views the world as a corrupt place with a dog-eat-dog code. They shift the blame to others and criminal is able to repress the feeling that their own act is wrong.
- *Appeal to higher loyalties* - Criminals often argue that they are caught in the dilemma of being loyal to their own peer group while at the same time attempting to abide by the rules of the larger society. The needs of the group take precedence over the rules of society because the demands of the former are immediate and localised. These excuses allow people to drift into criminal modes of behaviour.

The basis of neutralisation theory is that criminals continue to go back and forth between legitimate and illegitimate conducts. That is why it is often called the drift theory where criminals subsequently view themselves as the victims rather than the culprits.

2.4.5 Strain: Merton's Theory of Anomie

Strain theory posits that crime is a function of the conflict between the goals people have and the means they can use to obtain them legally. As a group, strain theorists believe that most people share similar values and goals. They want to live a better life. They also want to care for their families and educate and empower their children with knowledge and skill. Unfortunately, the ability to achieve these personal goals is stratified by socio-economic class. While the affluent may live out the good life, the poor are left out from achieving their goals. As they cannot get what they want and wish, they begin to feel frustrated and angry, a condition which is referred to as strain (Agnew, 1992:47).

People who feel economically and socially excluded may humiliate others as they consider themselves to be left out from empowerment and begin to envy those who are successful. They tend to believe that if they do not embark on unconventional methods of making money such as counterfeiting and or committing fraud they are surely going

to lose out in social competition and have little chance of future success. In addition, the effect of inequality may be greatest when the impoverished population believes they are becoming less able to compete in a society where the balance of economic and social power is shifting further towards the affluent. Under these conditions, there is a likelihood that the poor will choose illegitimate life to enhance their economic and social status (Siegel, 2010:190).

2.5 CONCLUSION

Counterfeit crime is a big industry that is valued over a trillion USA dollars annually. The crime poses a serious threat to legitimate business. It is an old crime that started with the copying of old vases, pottery and lumbers that had inscriptions on them. It later developed to coins and currency, both coin and paper money. It is a crime against intellectual property and is considered by most states as a serious risk to nations. The consequences of counterfeit are negative to people, business and governments. People lose jobs and their health deteriorate after using sub-standard goods, business close down as their products are copied and government lose tax revenue. This crime involves organised crime and criminals use the proceeds to facilitate money laundering. Money laundering is also increasing as criminals use it to hide their assets. Some of the organisations even use the proceeds to finance terrorism. It is evident that the policing of counterfeit crime is not given adequate enforcement and harsher sentence. As a result, criminals see this crime as an opportunity worth pursuing for profit and livelihood.

CHAPTER THREE: INTERNATIONAL PERSPECTIVE ON THE POLICING OF COUNTERFEIT

3.1 INTRODUCTION

Countries are globalising their relations and businesses are internationalising their operations to grow and be competitive in the global market. In the same vein, criminals are also maximising their ill-gotten profit. Sonmez (2014:758) asserts that counterfeit crime is attractive business to the free riders. In addition, Kerns (2016:573) equates it with the capturing of one's ideas in developing and imitating products without incurring significant investment thereby eliminating the competitive edge of the original product owner. Counterfeit crime is also regarded as a moving target, which could not be confined to a single country because products that are produced in one country are sold in different countries with different statutes that define what is crime and what is not.

The prevention of crime is the responsibility of the government but when it comes to the prevention of counterfeit goods, many countries seem not to prioritise its policing. Another problematic issue is lack of synergy in criminalising counterfeiting in many countries and this leads to indecisiveness in developing and implementing a focused campaign in eradicating this. This is despite the fact that the United Nations adopted resolution 1373 in 2001 to prevent and suppress the financing of terrorism (United Nations, 2001).

This chapter deals with the policing of counterfeit goods, focusing specifically at the nexus between counterfeit and organised crime, counterfeit and terrorism, *modus operandi*, factors causing the rise of counterfeit and increase of counterfeiters. In addition, the chapter discusses international framework on policing counterfeit, and various international conventions and treaties.

3.2 COUNTERFEIT AND ORGANISED CRIME

The availability of volumes of counterfeit goods reflect an increase in the types of products which are counterfeited and an increase in the number of parties involved in

this activity (Ene & Mihaescu, 2014:54). In venturing into a particular criminal enterprise, organised criminals first weigh in on the level of profit attainable from any given illicit activity as well as the level of risk involved (UNICRI, 2009:83). Blackstone and Hakim (2013:158) and Rojek (2016:6) support this when they assert that counterfeit crime has grown exponentially as a crime of choice for organised criminals.

According to Spink, Meyer, Park, and Heinonen (2013:6), the criminals involved in counterfeit could be categorised as follows:

Individuals or Small Groups: Some counterfeit cases involve individuals or small groups who operate out of their homes, garages, or small storage facilities. This category tends not to be the main focus of the police as compared to larger groups who engage in more significant counterfeit activities as well as committing other serious offenses.

General Criminal Enterprises: This is a category of transnational, national or local groupings of highly centralised enterprise that is run by criminals who engage in illegal activities for money and profit purposes. An Asian criminal enterprise where 30 people were charged with smuggling counterfeit goods worth 40 million USA dollars into USA is a classical example of general criminal enterprises. Similar to this group is the operations of the “JAH” an organisation based in West Africa that specialises in the sale of counterfeit and pirated products over the world. This organisation established bases in many countries and engage in money laundering as well (Heinonen & Wilson, 2012:279).

Organised Crime Members: Organised crime members are a specialised subset of a criminal enterprise that maintains its position through the use of violence. An example of this is the Lim organisation in Asia that commits counterfeit and piracy crime, sabotage businesses, extort money from business owners, and threaten law enforcement officials with retaliation and constantly threaten to kidnap their families (Spink et al., 2013:60).

Terrorist Organisations: Organisations that support terrorism use counterfeit and piracy as one of the methods to raise funds. A distinction exists between organisations that support terrorism by merely providing funding and resources versus terrorist organisations who engage in the actual violent terrorist activities (Choo & Smith, 2008:39).

Warez Groups: Their motivation for committing counterfeit and piracy is for personal fame and notoriety. This sophisticated and hierarchical group specialises in distributing counterfeited goods and piracy software via the internet.

Counterfeit crime can be committed in two ways, namely - deceptive and non-deceptive counterfeit. In deceptive counterfeit crime, consumers do not realise that they are buying a counterfeit product. This type of counterfeit crime can be minimised through proactive policing in order to stop the supply of the infringing products to the markets and consumers. Effective prevention and deterrence of this crime could involve the use of intelligence as well as the imposition of harsher sentences on convicted counterfeiters. However, UNODC (2016:190) indicates the difficulty of locating the culprits owing to the difficulty of locating the area where goods are counterfeited as this can be produced anywhere in the world where the labour is cheap and laws are weak.

Conversely, non-deceptive counterfeit relates to the counterfeit that is bought by consumers wilfully knowing it to be counterfeit (Zibas, 2012:23-25). In this case as well, proactive policing may to a certain extent still be employed to minimise this crime because consumers are technically accomplices to the crime. Large (2009:3) argues that counterfeiting could be committed in an organised manner by members with full knowledge of the organisation. This needs high level of sophistication as organised crime needs significant financial resources to meet periodic financial needs, cover any incidental expenses and to support the vertical or horizontal expansion of their enterprise (Levi, Shentov & Todorov, 2015:342). Once a smuggling operation is developed, it can generate sufficient profit to allow further investments in the scheme in a number of self-financing cycles (Levi, et al., 2015:345).

Police corruption is one of the factors that stifle the fight against counterfeit crime and makes it very difficult to successfully deal with this crime. Moreover, Park (2008:54) emphasises this by stating that when state officials are involved in organised crime, it becomes difficult to deal with it. What compound this is the fact that police organisations are unable to hire highly trained cybercrime investigators, lawyers, auditors, accountants and engineers that possess the knowledge to deal with such sophisticated aspects of organised crime owing to budgetary constraints (Blackstone & Hakim, 2013:161). As a result, this allows criminals who have sophisticated measures that cannot be successfully dealt with by ordinary police officers to have an upper hand when producing counterfeit goods. They use sophisticated skills and expertise to perfect counterfeit goods to look like genuine products (Von Lampe, 2011:158).

3.3 COUNTERFEIT AND TERRORISM

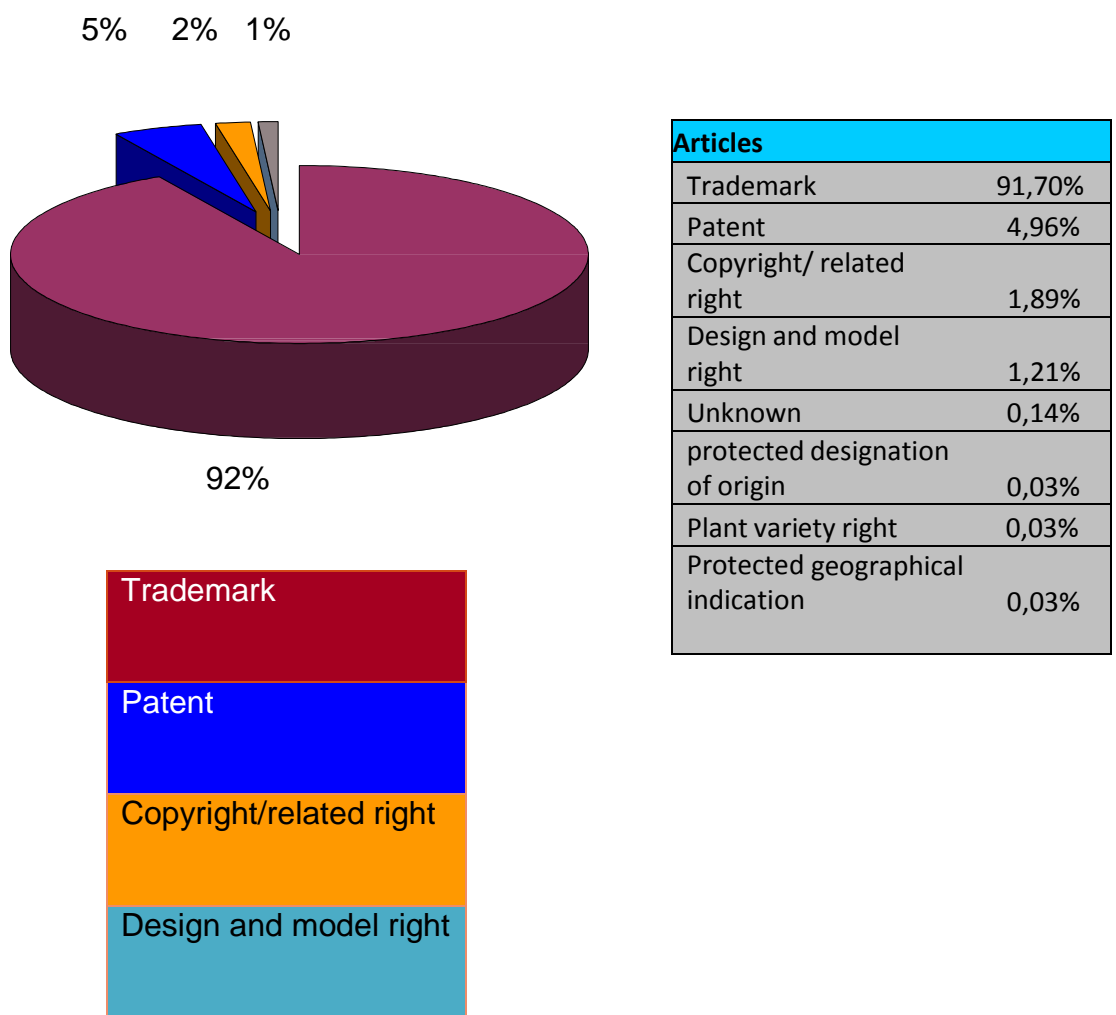
After the confirmation of the involvement of the organised crime in counterfeiting activities in 2010, the United Nations Commission on Crime Prevention and Criminal Justice took a decision to strengthen crime prevention and criminal justice responses in the policing of counterfeit crime, piracy and terrorism. Counterfeit crime focuses on economic profit and the acquisition of wealth through the illegal market while terrorism is motivated by ideological aims and desire for political change as well as focusing on acquiring resources (Sullivan, Chermak, Wilson & Freilich, 2014:359). The nexus between these crimes is that counterfeit is used to generate the money that fund terrorist activities. A small group may focus on counterfeiting whereas other groups may focus on many other activities of terrorism (Spink et al., 2013:7).

The link between counterfeit crime and terrorism has been demonstrated in cases of organisations such as Hezbollah, Hamas, Harakat al-Shabaab al-Mujahideen, Al-Qaeda, Revolutionary Armed Forces of Colombia, and Islamic Jihad. These organisations are known to be trading in counterfeit and conducting illicit businesses such as dealing in piracy to finance their terrorism activities (Choo & Smith, 2008:39). They are classified as terrorist organisations by the USA State Department on the list of

Foreign Terrorist Organisation (US Department of State, 2017). As explained previously, counterfeit crime proceeds are mostly used by criminals to fund other crimes such as terrorism around the world. Meaney (2004:99-100) categorises counterfeit criminals into two groups, namely - marauders criminals, which are criminals who operate close to their residential area and commuters criminals, which are those criminals who commit their criminal acts far away from their residential places.

The 21st century has seen a globalised enormity of the counterfeit industry and market as well as the ease by which consumer ideas and goods can be transported around the world by technologies. This is expedited by the availability of digital and networked technologies that make information on products easily accessible. The International Trademark Association (INTA) states that with the distribution of counterfeit products online, sellers are more accessible to their market, anonymity of the seller is confined and it is easy for the counterfeiter to deceive their customer into believing that the goods are genuine, as merchandise is often received after payment (International Trademark Association, 2009:1). Figure 7 shows EU picture of the categories of goods whose intellectual property is often infringed.

Figure 7: Breakdown by type of infringed right per seized articles in the European Union



Source: European Union (2007:15).

Figure 7 above illustrates that, in 2007, the majority of articles seized by customs were infringing on a trademark and covered a wide variety across all product sectors. With regard to patent infringements, the main products involved concerned electronic equipment. With regard to copyright infringements, CDs and DVDs were the products most affected, as well as a wide variety of products containing protected images such as well-known comic figures. In design rights, most infringements concerned toys and accessories for cell phones.

Counterfeit is a lucrative business for syndicates and international criminal organisations because they are able to decipher and reverse some engineered security measures placed in some of the goods. Although this requires more time, skills and money, the sophistication and financial muscle of syndicates and organised criminal organisations make it possible (Choo & Smith, 2008:43).

3.4 MODUS OPERANDI IN COUNTERFEITING

Modus operandi is useful for the prevention and resolution of crime by the police as it enables them to analyse the trademarks of the perpetrators in order to identify those who committed crime (Berg & Shearing, 2011:25). Without the use of the *modus operandi*, it could not be possible for the police to build the database that makes it easy to match it with the method used in the perpetration of a particular crime. More so, owing to the clandestine nature of counterfeiting, it is difficult to get to how it is carried out and its extent owing to lack of precise figures (Jolly & Philpott, 2004:214; United Nations Office on Drugs and Crime, 2014c:173). This tends to be compounded by the increase of counterfeit crime in informal markets where there are loosely controlled supply chain systems that lack proper monitoring and effective policing in many countries (OECD, 2008:82).

The booming international trade and the concomitant signing of trade agreements have resulted in the weakening of the security in national borders, therefore enabling illicit goods to flood countries. As a result, it is easy for syndicates and organised criminal organisations to create alliances involving different criminal organisations both nationally and internationally. The Sicilian Mafia also known as Cosa Nostra that was established in the 19th century in Sicily, Italy is the classical example of a network of organised crime groups based in Italy and America. The group bonded together in several groups to protect themselves and carry out their extra-judicial activities of torturing people. They also practiced as small armies and extorted money from business people. During the 21st century, they became adept at corrupting government officials and intimidating politicians to vote for their preferred candidates at political congresses (Balsamo, 2006:373-377). They initiated a series of alliances with criminal organisations from other

countries to create a division of labour and to subdivide the counterfeit market. By so doing, counterfeit crime is attaining greater operational efficiency and maximising profits with links between different criminal activities in terms of both their financing and the money laundering of their proceeds. Commercial specialisation has been repudiated in favour of the simultaneous trade and supply of different categories of illegal goods and counterfeiting that has become a fundamental element of this scheme (Choo & Smith, 2008:50).

One of the major factors that increase the demand for counterfeit goods is their low prices. There is also an increasing trend towards the insertion of counterfeit products within the licit supply chain system. Moreover, cargoes are often diverted to pass through different transit points in an attempt to mislead the law enforcement agencies on their country of origin. Countries such as Italy and Portugal, for example, are often associated with the counterfeiting of clothing items while Spain and Italy are mostly associated with the production of fake spare parts for automobile and clothes amongst others. These products are not only intended for domestic markets, but are also exported throughout the world. The transit route is often chosen after due consideration of the severity of local legislation and effectiveness of law enforcement. Counterfeit criminals also mix the legitimate goods with the counterfeited ones to minimise chances of detection of these goods (CEIPI, 2004:27).

WCO (2014:1) highlights that counterfeit products are traditionally distributed through *fly-by-night* networks, street corner vendors and street stalls. Informal markets are highly targeted for counterfeit goods owing to their loosely controlled supply chain system (OECD, 2008:82). Therefore, this serves as a fertile ground for counterfeit goods.

3.5 FACTORS CAUSING THE RISE OF COUNTERFEIT AND INCREASE OF COUNTERFEITERS

According to Von Lampe (2011:158), societies in transition and in developing countries, weak, corrupted, and contested state authority are most likely to have a defining influence on crime opportunities. The prevalence of organised crime activities tends to

be high in such countries and owing to these paralysis conditions, the police tend to be ineffective as well. What drives the interest of counterfeiters is the elevated market demand for products that are easily reproducible with the technologies that they have. This made counterfeiting to develop into being a highly organised industry with international network of productive-distributional and selling structures.

In countries such as Finland, New Zealand, Sweden, Norway, and Luxemburg, counterfeiting laws are strongly enforced and it is a criminal offence and sentence is harsher. The legal definition of counterfeiting and the evidence that is required by courts to successfully prosecute people who are involved in counterfeiting is a challenge. In some developing countries such as Myanmar, Haiti, Moldova, and the Bolivarian Republic of Venezuela where counterfeiting and piracy laws are very weak and not seriously enforced and policed, the police often advise complainants to pursue civil actions against the perpetrators (Levy-Carciente, 2016:16).

Large counterfeiting organisations with manufacturing capabilities and connections distribute counterfeit products at a larger scale throughout the world because they have resources, technologies, and can bribe relevant authorities to aid or turn a blind eye on their products. Closing down such organisations needs intensive intelligence that could help in arresting the kingpins rather than operators and confiscation of small quantities of goods. These industries tend to centre their production in one country and distribute it to other countries and sites (Basu, 2013:318; OECD, 1998:17).

The growth rate of counterfeit is also associated with the significant development of international commerce, the internationalisation of the economy, the large-scale distribution of new technologies, the opening of new markets, and the gradually increasing importance of exploiting intellectual property rights in multiple sectors (Minagawa, Trott & Hoecht, 2007:461). There are no products on the market, which could not be counterfeited and this is attested by the often discovery of production sites, the sophisticated technology that is being used during production, and the entrepreneurial management skill involved in this. The outsourcing of productions by licit

producers provides an additional opportunity for counterfeiters to improve their production. Once the complicity of outsourced producer is ensured, it is possible to produce quantities of goods that exceed the job order amounts received. Thereafter, they use the same production tools made available to the outsourced producer by the party owning the intellectual property rights (Ribbert & Brolmann, 2014:25).

Accurate measurement of the true costs of counterfeit is a key factor in convincing government leaders and ultimately consumers that stronger police action is needed to stop the flow of counterfeit goods (BASCAP, 2009:1). However, it has to be noted that increased counterfeit and copyright policing would not necessarily expand the sales of legitimate products because people who afford some of these products based on the sale value cannot necessarily afford genuine goods that cost more. The study conducted by Owen (2012:599) in the USA suggests that copyright holders respond to stronger copyright policing and enforcement by lowering their prices to capture a larger number of consumers.

Blackstone and Hakim (2013:160) partly apportion blame to the police for failure to curb counterfeit and other intellectual property crime violations. They accuse the police for focusing on their organisation and only choosing to police what they identify as easy to solve to increase performance statistics. OECD (2008:82) argues that the police find it difficult to police counterfeit crime in places such as bars, clubs, car boots sales, markets mobile vendors because of the structural and legal implications in various countries. Based on this, Blackstone and Hakim (2013:160) recommend that counterfeiting could better be policed by private investigators because as the profit seeking industry, their clients define their objectives.

3.5.1 Brand Appeal

As defined by Klijn, Eshuis and Braun (2012:499), brand is any name, term, symbol, design that identifies the product of the seller to differentiate it from other similar products. It basically gives the product a symbolic value and identity, which serves to enhance the organisation's brand equity. In essence, this is the positioning of a product

in the mind of the target population (Jooste, Strydom, Berndt & Du Plessis, 2009:217; Manley, 2013:37). Modern trade allocates increased importance to the trademark as a direct expression of the producer's quality and reputation.

Against this background, manufacturing companies have made significant investments to ensure greater quality for their products to attract a greater number of buyers. Quality controls are a natural consequence of this process, given that the compliance of marketed products with pre-determined standards is an element that is directly linked to the reputation acquired by the producer (Wheeler, 2006:8). The importance of the "brand" and its impact on consumers' choice are of considerable appeal to counterfeiters who take advantage of an entrepreneur's reputation by replicating the relevant trademark or products, and by marketing them under her/his brand without having to sustain the associated costs (Quian, 2014:317).

Branding is important for the policing of intellectual property infringements and it consists of four components, namely, brand identity, brand image, brand position, and brand equity (Laforet, 2010:10). As stated above, the high level of profitability inherent in counterfeiting has attracted the interest of organised crime. Counterfeiters make use of the cheapest materials available without considering the level of toxicity of such materials (Quian, 2014:317).

3.5.2 Trademark and Weak Protective Systems

Trademarks and geographical indications are exclusive rights that reduce inefficiencies that result from a mismatch of information between buyers and sellers on certain attributes of goods. Nobel prize-winner economist, George Akerlof, pointed out that markets may fail when consumers have less information about the quality of goods than producers (Armbruster & Knutson, 2013:351). Trademarks identify a product with its producer and reputation for quality that was generated through repeat purchases and word of mouth. They create an incentive for companies to invest in maintaining and improving the quality of their products. Geographical indication identifies the origin of a product signalling the quality that it possess, which is associated with its region (Quian,

2014:318). Should companies not prevent third parties from counterfeiting their products, then they will have little incentive to invest financial resources into such products because counterfeit crime encourages free-riding behaviour (WIPO, 2009b:4).

According to OECD (2008:47), opportunities such as large potential markets, product profitability, genuine brand power, recognition and profitability appeal to counterfeiters are enticing. They are seen as opportunities to make profit at a lesser risk and the weak laws that are not properly enforced by the police enhance this opportunity.

3.6 INTERNATIONAL LEGAL FRAMEWORK ON POLICING COUNTERFEIT

International Chamber of Commerce (2010:19) states that intellectual property is as important as physical property. In some countries such as United States of America (USA), UK and Japan, business' intangible assets like brands and trademarks are more valuable than the tangible assets (International Chamber of Commerce, 2005:10). In most countries such as UK, USA, Kenya, India, China, and Mexico, counterfeit is a criminal offence and this indicates the seriousness in which these countries tries to stamp out counterfeiting. The United Nations Commission on Crime Prevention and Criminal Justice decision 19/1 of 2010 advocates the response towards the fight against counterfeiting and piracy. Another United Nations instrument intended to fight counterfeit is the Palermo Convention against Transnational Organised Crime, adopted by General Assembly resolution 55/25 on 15 November 2000. The Palermo Convention against Transnational Organised Crime is regarded as the main international instrument in the fight against transnational organised crime. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organised crime. These include the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the Protocols (United Nations, 2004a:iv; United Nations, 2004b: 2-7). The Convention represents a major step forward in the fight against transnational organised crime and signifies the recognition

by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle these problems.

The other multi-national instruments protecting counterfeit currency are the International Convention for the Suppression of Counterfeiting Currency of 1974, Protocol to the International Convention for the Suppression of Counterfeiting Currency of 1964, and finally the Optional Protocol regarding the Suppression of Counterfeiting Currency of 1964 (United Nations, 2004b:2-7).

3.6.1 World Trade Organisation

The World Trade Organisation (WTO) was set up in 1995 as the custodian of all member states on agreements in Trade Related Aspects. Trade Related Aspects agreements are created to enforce strong minimum standards of Intellectual Property protection in each of the areas associated with Intellectual Property Rights including copyrights, trademark, patents, and trade secrets (Adams, 2010:201). The establishment of the WTO was seen as an important step towards the protection of the intellectual property rights in member states. The main objective was to create international enforcement standards over and above the current intellectual property right protections under the World Intellectual Property Organisation and the Trade Related Aspects agreement (Lo, 2013:109). The Anti-Counterfeiting Trade Agreement is the newest intellectual property treaty that defines the intellectual property to include all categories of intellectual property that are the subject to Trade Related Aspects agreement. This makes the definition of the intellectual property under the Anti-Counterfeiting Trade Agreement to overlap with that of intellectual property under the Trade Related Aspects agreement. The narrow definition of counterfeit under Trade Related Aspects agreement made the policing of counterfeit crime problematic in many countries. After the adoption of Anti-Counterfeiting Trade Agreement, the definition was extended to cover many elements of intellectual property infringements and this contributed in clarifying the uncertainties in identifying what is counterfeit and piracy thereby making it easy for many countries to adapt their laws in line with the spirit of Anti-Counterfeiting Trade Agreement's stipulations (Adams, 2010:203).

The Anti-Counterfeiting Trade Agreement and Trade Related Aspects agreement are two separate agreements within different international regimes that make provisions on the policing of counterfeit. Article 23 of Anti-Counterfeiting Trade Agreement makes provision for punishment of counterfeiters who import and export counterfeit goods. Moreover, Article 25 and 26 of Anti-Counterfeiting Trade Agreement also includes specific rules of seizure, forfeiture and destruction of confiscated good as well as the *ex officio* policing and criminal enforcement, which are elements that are in addition to Article 61 of Trade Related Aspects agreement. It significantly expands intellectual property policing rules beyond those contained in Trade Related Aspects. Furthermore, Article 27 of Anti-Counterfeiting Trade Agreement requires that its parties should ensure that civil enforcement and criminal enforcement procedures are available to permit effective action against an infringement of intellectual property rights including remedies to prevent infringement and remedies, which constitute a deterrent to further infringements.

3.7 INTERNATIONAL CRIMINAL POLICE ORGANISATION

International Criminal Police Organisation (INTERPOL) is the largest international police organisation with a vision to police for a safer world. Its mission is to prevent and fight crime through cooperation and innovation on police and security matters. INTERPOL established the INTERPOL Intellectual Property Crime Action Group in 2002 to fight intellectual property crime in the world. It was formed in collaboration with law enforcement agencies of different countries and this facilitated international police actions against intellectual property crime (Council of Europe, 2007:102).

The Global Congress Steering Group comprising of INTERPOL, the World Customs Organisation, the World Intellectual Property Organisation, Global Business Leaders Alliance against Counterfeiting, and other global business sector representative bodies was formed in 2004 to implement a more effective collective response to counterfeiting worldwide (INTERPOL, 2014). Operation Jupiter targeted the Tri-border area, where Argentina, Brazil and Paraguay meet. It is an area where counterfeit goods of all types

including cigarettes, clothing, computers, CDs, DVDs, electrical goods, and pharmaceuticals are either manufactured or distributed on an industrialised scale. Most of these items are consumed in the TRI-border area of South America although increasingly they are found in North America and beyond (Hudson, 2010:4). Often the size of the area and the challenging operating environment makes policing difficult. These difficulties enable organised and transnational criminal organisations to thrive, therefore resulting in organised criminality and a wide range of intellectual property crimes.

3.8 AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Another important instrument in the fight against international counterfeit is the Trade Related Aspects agreement that came into effect in 1995. The Trade Related Aspects agreement as part of the General Agreement on Tariffs and Trade and the DOHA Round Declaration (WTO's DOHA Development Round of 2016 Declaration) of trade negotiation among WTO membership, encourage free trade, reduction of tariffs, ensure more equitable, and levelled playing field are achieved within the ambit of the law (WTO, 2015:39). To enforce the principles enshrined in the Trade Related Aspects agreement, the police need to be instrumental in making certain that people account for their infringement actions.

The Trade Related Aspects agreement is composed of three parts, namely - standards concerning the availability, scope and use of Intellectual Property Rights; enforcement of Intellectual Property Rights; and acquisition and maintenance of Intellectual Property Rights and the related procedures (WTO, 2015:40). The international agreements that fall under World Intellectual Property Organization such as the Paris Convention for the protection of industrial property and the Berne Convention for the Protection of Literary and Artistic Works were insufficient to protect counterfeit and piracy. The above conventions were also considered not sufficient mechanism in improving international cooperation and establishing best practices for the enforcement of broader intellectual property rights by providing a more effective legal framework as required. This led to the

enactment of Agreement on Trade Related Aspects agreement to strengthen the enforcement and policing of intellectual property rights (Lo, 2013:106).

3.8.1 European Union and African Union

According to the Directorate General Taxation and Customs Union of the European Union (EU), counterfeit is growing astronomically in the Internet. Choo and Smith (2008:37) argue that information communication technology (ICT) enhance the criminals' terrestrial activities. The Border Measures Regulation 1383 of 2003 authorises for the policing and seizure of counterfeit goods by the police (INTERPOL, 2014:31). INTERPOL often conduct raids in various states typical of this being Operation Barrel that was conducted to fight counterfeit in EU countries such as Turkey, Croatia, Norway, and Switzerland in 2011. Operation Opson that was a joint policing operation between INTERPOL and EUROPOL was also conducted where counterfeit liquor and spirits were confiscated and destroyed (INTERPOL, 2014:11).

The Anti-counterfeit and Piracy Information System was set up by the European Commission to exchange information for all customs operations. The system is designed to address counterfeit and piracy by facilitating the information exchange between the customs authorities of member states (Ribbert & Brolman, 2014:26).

The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa for the promotion of unity and solidarity of African States. Its main goal was the co-ordination and intensification of co-operation and efforts to achieve a better life for Africans. In addition, the OAU sought to defend their sovereignty, territorial integrity and independence. Moreover, it advanced for the promotion of international co-operation, giving due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. Lastly, it advocated for the co-ordination and harmonisation of political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical, and defence policies (Sakala, 2010:28).

Baimu (2001:299) asserts that an extraordinary summit of the OAU held in Sirte, Libya on 9 September 1999 called for the establishment of an African Union in conformity with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty establishing the African Economic Community. Following this, the Constitutive Act of the African Union was adopted during the Lomé Summit of the OAU on 11 July 2000. The African Union has the following conventions that assist in the policing of counterfeit crime in Africa:

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

The above conventions and agreements make dealing in counterfeit goods a punishable offence in all the African countries, and mandate the police to combat it (Republic of Ghana, 2008:10).

The other instrumental organisation in policing cross-border crimes in the southern part of Africa is the Southern African Regional Police Chief Co-operation (SARPCCO). It works in conjunction with INTERPOL to combine resources and expertise to police transnational crimes such as counterfeit and piracy.

3.9 POLICING OF COUNTERFEIT: AN INTERNATIONAL PERSPECTIVE

A paradoxical argument taunted by some people and nations has been whether the police should in the first place be policing counterfeit or should play a supportive role to brand holders in enforcing the policing of counterfeit. This means allowing private

investigators to police and investigate counterfeiting activities and thereafter allow the police to assist only with the actual arrest of suspects. The approach complements both policing agencies because the private police are contracted by brand holders to investigate counterfeit goods sale and after finding substantial evidence, they submit their findings to the police for arrest and prosecution (White & Gill, 2013:88; Blackstone & Hakim, 2013:162). This argument is based on the fact that the police should be policing priority community crimes that affect common man in the street and not counterfeit as its policing is meant to benefit the elite-business people (Large, 2009:14). The above argument is in line with several countries' position when it comes to policing of counterfeit and piracy. Many countries seem not to prioritise the policing of international property crimes and leaving the crime to spread further in societies.

In the 21st century, one of the strategies of police agencies is to empower societies and particularly the communities to become participants in the fight against crime (Wells, 2016:56). The policy manifests in the promulgation of concepts of partnership approach in policing (Turley, Ranns, Callanan, Blackwell & Newburn, 2012:2). Nevertheless, this is not a situation where the police and community organisations are thrown together haphazardly but is a partnership where the police take a proactive leadership role in bringing disparate groups, and other agencies together to focus on policing and community disorder.

In criticizing the policing of commercial crime such as counterfeit, Mackenzie and Hamilton-Smith (2011:8) argue that many police agencies operate under a system of target-oriented performance and in the specific field of organised crime policing. They further contend that these systems of targets oriented problem do not always yield positive results. Key performance indicators used in policing and law enforcement agencies have been easy to meet and therefore have not been assisting in making the police effective (Blackstone & Hakim, 2013:160).

In the early 18th century (1812), the American Reverend, Lyman Beecher broke the silence on white-collar crime during his sermons concerning unethical behaviours in

business. He highlighted that people who once would have been deterred from wrongdoing by 'shame alone', now flout rules with contempt for the established order (Woodiwiss & Hobbs, 2009:106). This sounds true to the white-collar crime that involves illegal activities of people and institutions whose purpose is to get profit through legitimate business transactions. This also applies to the organised crime that involves illegal activities of people and organisations whose purpose is profit through illegitimate business enterprise (Choo & Smith, 2008:39).

The International Association of Chiefs of Police is of the view that policing initiatives should focus at the policing of transnational crimes by cooperating with other law enforcement agencies across their borders. This encourages police to share information that could assist in policing counterfeit and go a long way in solving crime and effectively policing organised crime. Counterfeit crime is an international phenomenon and therefore equally requires an international response similar to the one used in crimes such as illegal immigrant smuggling, human trafficking, illegal mining, cybercrime and money laundering (Sheptycki, 1998:495).

The acquisition of ICT that expedites information sharing will benefit the fight against international crime (Wilson, 2015:6). It could be used effectively and efficiently through harmonising and utilising data that are already available in the database of other law enforcement agencies that are involved in policing counterfeit and piracy. Most importantly, ICT makes it easy to exchange intelligence and share information routinely by the interfacing of police agencies (Sheptycki, 1998:497). BSA (2010:9) paints a future picture by stating that in the absence of piracy, most consumers of counterfeit would switch to legitimate goods at their current prices. However, in developing countries, many consumers would not necessarily demand legitimate goods at all owing to their financial constraints.

3.10 POLICING OF COUNTERFEIT CRIME IN SELECTED COUNTRIES

OECD (2008:66) states that counterfeit crime is becoming increasingly difficult to detect, which makes effective policing difficult to fight it. This is owing to the sophistication and

skilful nature of counterfeiters and traders who continue to sell the counterfeited goods unabated. Counterfeiters are also producing relatively good quality counterfeit goods where at times is not easy to distinguish between the real and counterfeited product and these goods are saturating the markets. Behavioural similarities evident in counterfeit and fraud involve the misrepresentation of information and fake goods that masquerades as genuine ones. Goldman (2010:146) emphasises that in the commission of fraud, perpetrators make use of bogus elements to influence unsuspecting people.

3.10.1 Policing Counterfeit in Britain

The counterfeit and contraband in the United Kingdom is largely policed by the British police and City of London police Intellectual Property Crime Unit assisted by the Serious Organised Crime Agency and the National Criminal Intelligence Services as well as EU-Anti-Fraud Office (Woodiwiss & Hobbs, 2009:120; INTERPOL, 2014:24). The National Criminal Intelligence Services affirmed that the financial gain from counterfeit is more profitable than the sale of drugs such as heroin and or cocaine. This discovery became a serious concern to the police and they committed resources to curb the scourge of counterfeiting (UNICRI, 2009:84).

Ratcliffe and Guidetti (2007:110-114) argue that British police had to address a significant increase in crime rates and respond to the new challenges in global crime patterns. This compelled them to adapt and change with changing topology of international crimes as the country is at the receiving ends of counterfeit goods with an estimated value of £2.8 billion per year. This figure increased to £10 billion in 2003 and this involves all the brands, not only the luxurious ones, as it was the case before. The UK Government has conceded that counterfeit crime costs the economy about 4 100 job losses annually (Bian & Veloutsou, 2007:12), and in the USA it is estimated to be causing 750 000 job loses annually (Wilson, 2015:12).

Counterfeit is both a criminal and civil offence in the UK (Large, 2009:5). There is the National Intellectual Property Crime Strategy that tackles counterfeit crime from a general consumer based initiative by educating the public about the dangers of

counterfeit goods (Counter Offensive an IP Crime Strategy, 2005:9). According to Large (2009:5), the biggest hurdle is the extent to which the public heed to the plea of not buying counterfeit goods.

According to Stevens and Yach (1995:52), the consultation between the police and local people has been regulated by statute in the UK since 1985. Section 106 of the Police and Criminal Evidence Act of 1984 makes provision for community consultation with the police about matters concerning policing and for obtaining community co-operation with the police in policing. The rationale for this consultation is to prevent crime and maintain law and order in conjunction with respective communities because effective policing can only be achieved when the community have a say on how they should be policed. Stevens and Yach (1995) provide the following aims and objectives of police-community consultation:

- Improved articulation of the citizen's viewpoint;
- Shared identification of and responses to crime problems;
- Improved education of citizens about policing;
- The resolution of conflicts between the police and community groups;
- Encouragement of practical self-help community crime prevention initiatives; and
- Education of the police regarding community concerns and priorities.

Reiner (1995:161) reports that community consultation and sector policing were revived in 1990 in the UK during the operational policing review that was termed "traditional policing". As years passed, it was renamed sector policing, which is also known to be policing by consent of the community (Dixon & Rauch, 2004:5). Furthermore, Reiner (1995:161) maintains that during the 20th century, policing was localised to make it effective and efficient through collaboration with the community. It was realised that policing without the support and cooperation of the community will never succeed in reducing crime and bringing order in the community. Dixon and Stanko (1993:14) mention the following principles of sector policing strategy that the British Metropolitan Police initiated and implemented during 1993 to fight crime:

- Make the most effective use of resources;

- Work in close co-operation with the community (to reduce crime, increase accountability and legitimacy of the police);
- Own and get ahead of local problems by identifying and helping to tackle underlying causes;
- Encourage visible and accessible patrolling by known local officers; and
- Deliver a better quality service provided by officers enjoying the support and approval of local people that is, policing by consent.

According to Cote-Boucher (2016:49), to defeat counterfeit and organised crime, an intelligence-led policing is to be used because intelligence-led policing is a preferred strategy that can solve hidden crimes such as counterfeit (Wilson, 2015:10). The police operate among the community that should supply them with information on criminal activities. Figure 8 below is a diagram that shows how intelligence cycle policing is conducted.

Figure 8: Intelligence cycle in policing



Source: Schaible and Sheffield (2012:762).

Figure 8 above shows that planning and directing is the initial step, which is followed by collection; processing and exploitation; analysis and production; and the dissemination of information to the relevant units to use in solving crime. An example of intelligence-led policing in the UK was a project called “Operation Galland”, where the police worked

on information from communities and managed to reduce car theft to 17% in 2003 (Gottschalk, 2010:44).

3.10.2 Policing Counterfeit in the United States of America

In 1970, the USA introduced team policing that entailed partnership building and problem solving with the community. This created an environment in which intelligence-led policing and information sharing was more viable because of the strong relationships established through community policing (Peed, 2009:1). The USA makes use of various policing agencies to police counterfeit and intellectual property rights crimes such as the Customs and Border Protection, Homeland Security Investigations, Federal Bureau of Investigations (FBI), and the Terrorism Intelligence Unit. There are many statutes that sanction counterfeit such as Lanham Act 15 of 1946; The Trademark Counterfeiting Act 18 of 1984; Intellectual Property Enhanced Criminal Enforcement Act of 2007; Federal Trademark Dilution Act 2006; The Anti-counterfeiting Consumer Protection Act of 1996; Counterfeit Drug Prevention Act of 2007; Anti cybersquatting Consumer Protection Act of 1999; Stop Counterfeiting in Manufactured Goods Act of 2006 and PRO-IP Act of 2008 (Wilson, Sullivan, Johnson, Fenoff & Kammel, 2016:528-533. The above legislation complements each other and strengthens the fight against counterfeiting (Rojek, 2016:6; Sonmez, 2014:789). Counterfeiting is also punishable by various State laws and trafficking in counterfeit goods is a criminal offence. Under federal law, counterfeiting is punishable by up to 12 years in prison and or a fine of up to 250,000 USA dollars (Sonmez, 2014:789).

According to Skogan (1995:5), the resemblance of sector policing, the Chicago Alternative Policing Strategy was started in 1993 as a pilot project in Chicago, USA. The goal of the Chicago Alternative Policing Strategy is to encourage community members and the police to work together to reduce crime. According to Lombardo and Olson (2010:587), the Chicago Alternative Policing Strategy is defined by the following four key elements:

- Expanded police presence on the beat;
- Community involvement;

- Support from other agencies; and
- Proactive problem solving.

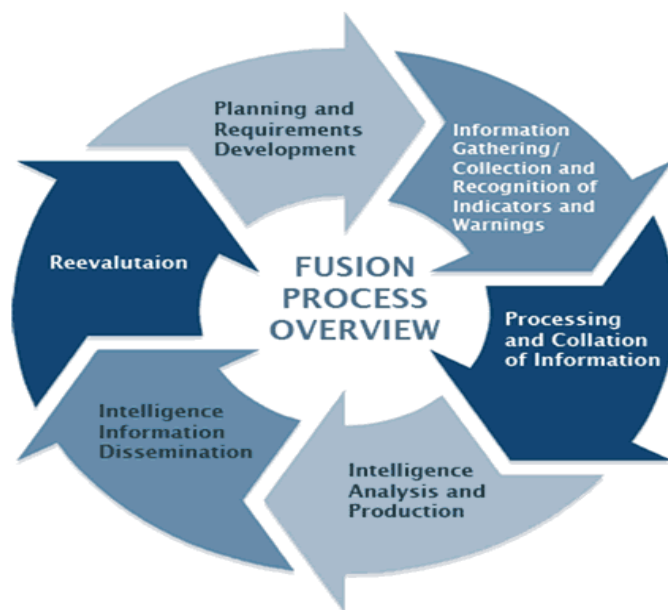
During this period, the relations between the police and the community were strained as there was no trust between them and the crime was high. Community involvement is always vital in policing as they know better about the burning issues that they are facing and they are critical stakeholders in making crime fighting information available to the police to solve crime (Docobo, 2005:1-3). Estacio (2013:410) reports that cooperation between the police and the community led to the shutting down of counterfeit selling stores by the police in the New York City.

Strategic intelligence that indicates patterns of activity useful in planning and decision making for future operations is used in the fight against crime. Crime pattern analysis is used to forecast, reveal similarities and prevent future crimes (Harfield & Harfield, 2008:xxix; Schaible & Sheffield, 2011:764-766; UNODC, 2010:5). This serves as a useful source for effective planning, crime prevention and crime detection. Vellani and Nahoun (2001:2) assert that crime analysis is conducted by gathering similar and related facts to feed the police with reliable information. It is undertaken to assist the police to understand the immediate crime problem in order to proactively fight it (Ratcliffe & Guidetti, 2007:110). Owing to the plurality of policing in the USA, effective and efficient sharing of the information becomes a critical success factor. Federal police agencies are also used to provide local police with the means to understand the structure and movement of organised crime elements within their jurisdictions and disseminate information to various states for effective policing (Cordner & Scarborough, 2010:439). In 2010, operation Pangea III that was targeted at counterfeiting on the Internet managed to close down counterfeit drug manufacturers in many countries (Rojek, 2016:8).

According to Lambert (2010:1), the intelligence process is not a mechanical series of independent steps that are mechanically processed in sequence order. It represents a recipe for intelligence and information sharing that frequently changes according to the

needs directed by the following processes: planning and direction; collection; processing and collection; analysis; dissemination; and re-evaluation. Figure 9 below reflects data fusion and the associated philosophy of intelligence-led policing.

Figure 9: Model of intelligence process



Source: Lambert (2010:1).

From Figure 9 above, each phase may be broken down into sub-processes that collectively contribute to an effective information management and analysis system. The intelligence process acts like a radar that sweep across a community. It uses the scanning, analysis, response, and assessment model (Lambert, 2010:2). The process identifies potential threats, determine the status of suspicious activity and provide indicators of criminality so that operational units can develop responses. According to Schaible and Sheffield (2011:763) and Heinonen and Wilson (2012:274), police should play an active role in identifying particular community problems such as counterfeiters and develop strategies to counteract that.

3.10.3 Policing Counterfeit in China and India

Asia is the most populated continent in the world and China, which is found in Asia, is the world's main source of counterfeited merchandise. The overall figure shows that almost 60% of the total amount of articles seized in the world originates from China (OECD, 1998:26). In addition, Bian and Veloutsou (2007:213) assert that the increase in counterfeit in China can be attributed to its economic growth where there is increase in production of goods and criminals taking this opportunity by producing parallel goods that are counterfeited. Most of the goods so produced in China are exported to the rest of the world for commercialisation (Chaudhry & Zimmerman, 2013:12). That is the reason why so many goods that are seized are traced back to China and this indicates how huge organised crime is in China despite the laws that prohibit counterfeit and violation of intellectual property crimes.

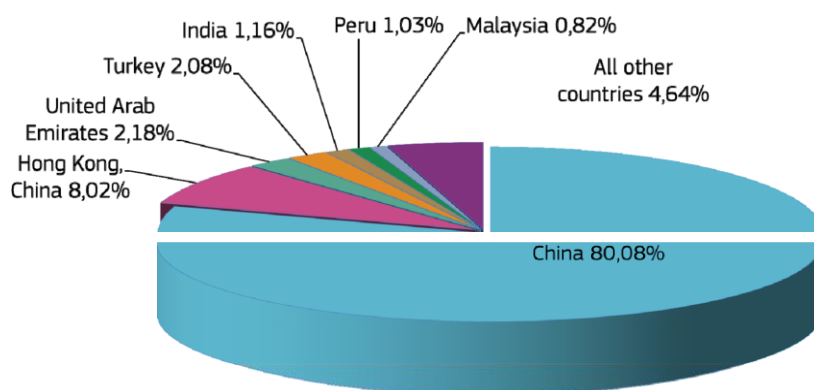
According to Beauchamp (1998:278), disputes over counterfeit CDs and computer software have been at the centre of USA trade conflicts with China. Business Software Alliance claims that 98% of the software used in China, including that used by the government, were illegal copies (Beauchamp, 1998:278). Other goods are distributed under false trademarks include cereal, razor blades and soap. Lax policing and enforcement resulted in a new trade agreement in 1995, which was designed to give USA manufacturers greater access to the Chinese markets (Harris, 2008:99).

Despite these efforts, the policing of counterfeit crime in China is not yielding positive results as seen by the increase in counterfeit growth in that country (EUROPOL, 2017:1; EUROPOL, 2015:15). WIPO (2009b:4) argues that exclusive rights that are granted to brand holders are detrimental to the consumers as they increase economic deficiencies owing to higher prices.

India is leading in medicine counterfeiting followed by United Arab Emirates (Harris, Stevens & Morris, 2009:4; UNICRI, 2011:23). India regards the policing of this crime in a serious light as it affects the welfare of its citizens. The Indian Police Service and the Central Bureau of Investigation are responsible for policing this crime in terms of the

Police Act of 1861 and the Interpol often gets involved by frequently conducting raids where counterfeit materials are seized and destroyed (Nair, 2010:381). The first international meeting to counterfeit medicine took place in 1992 to agree on the definition of counterfeit. Subsequent to that, an international instrument to fight counterfeit medicine was UN guidelines for development of measures to fight counterfeit medicines which was adopted in 1998 (United Nations, 2011:1). It was later followed by Anti-counterfeit Resolution 20/6 that was adopted in 2011 (New, 2014:1). Figure 10 below shows leading countries on counterfeit production and it is clear that China is a leading country followed by other countries with small percentages.

Figure 10: Countries of provenance of counterfeit goods



(Source: European Commission, 2015:19).

The above figure 10 provides a picture of the extent of the counterfeit problem by country of provenance. This knowledge will enable the planning, allocation and deploying of policing resources.

3.10.4 Policing Counterfeit Crime in Nigeria, Botswana and Namibia

The Federation Republic of Nigeria is a constitutional democratic country governed by the Nigerian Constitution Act 24 of 1999. There are few counterfeit law enforcement agencies in Nigeria with the highest population numbers in the African continent. The

Standards Organisations of Nigeria, Nigerian Customs and the Nigerian Police are responsible to police counterfeit as the police have a mandate to enforce law and order in terms of Section 4 of the Police Act (Sheptycki, 1998:400). The other regulatory bodies that assist in policing counterfeit include the National Agency for Food and Drugs Administration Council (NAFDAC), Economic and Financial Commission (EFCC) and Consumer Protection Council (CPC). The level of organised crime is high and the poor are desperate to improve their standard of living and this pushes many people in a population of more than 180 million to join organised crime. This is coupled with the prevalence of counterfeit crime, which overwhelms law enforcement and renders them unable to deal with these crimes effectively and efficiently.

Botswana police is classified under discipline forces in terms of Section 19(1)(b) of the Constitution of Botswana, Act 83 of 1966 and by implication, they are responsible for policing counterfeit crimes. The Crime Prevention Unit assists in policing counterfeit in the country in alliance with the community. In fighting counterfeit, the Botswana police together with INTERPOL often conduct operations to seize and destroy counterfeit goods. In 2014, Operation Wipeout was conducted and counterfeit goods worth millions of Pulas were discovered and destroyed in Botswana (INTERPOL, 2014).

Similar approach is applied in Namibia as a Constitutional democracy under the Namibian Constitution Act 7 of 2010 and Police Act 19 of 1990. The Namibian Police is composed of many units dedicated to the policing of various crimes. The Specialised Investigation Units such as the Commercial Crime Investigation Division is charged with the policing of counterfeit (Booyesen, 2009:87). Counterfeit crime that is conducted mostly in hidden places need community to become the eyes and ears of the police by reporting the perpetrators of this crime to the police. Active community participation in policing helps solve crime where suspicious counterfeited goods is imported from various continents. Collaboration with other stakeholders in policing, assist a lot in fighting organised crime. This was evident when the Namibian Police together with INTERPOL confiscated counterfeit goods worth millions of Namibian Dollars (INTERPOL, 2014).

3.11 CONCLUSION

Counterfeiting is an old crime that has been in existence since time immemorial. It infringes and violates intellectual property rights of legitimate rights holders. The crime has been growing since and in the 21st century, it has leapfrogged to become the crime of choice to different people in different continents and countries. Counterfeit, as a form of organised crime, has become a multi-billion USA dollar industry in the world with bad consequences to business, people and the environment.

In various countries, law enforcement agencies police counterfeit and piracy differently and are guided by international legal framework, which most countries are signatories to and that mandates law enforcement agencies to deal with this crime. Globalisation and internationalisation have also compounded the policing of this crime and warrant effective and efficient collaboration between law enforcement agencies across the countries to effectively deal with this challenge. This extends to external cooperation and collaboration with multi-national companies, which own intellectual property rights as they conduct business in various countries. The financial imperative of effectively policing this crime is to promote investment and job creation in the formal markets of different countries.

The African continent, like other continents, has become the lucrative market for counterfeiters who route the faked goods to be sold for profit. This indicates the need for international cooperation in dealing with this crime. This also poses a health hazard to most countries because most counterfeit goods are made of material that cannot be recycled or exposed properly such as tablets and medicines, chemicals, among others. It is clear that the policing of counterfeit crime in South Africa needs more than what the SAPS alone can do because it also relates to porous borders that make the containment of this crime a challenge. The general trend that is observed and revealed by the study indicates that this crime continues to increase, therefore making it clear that its policing is not that effective. This makes the continuous search for effective modalities of policing this crime unavoidable until such time that this crime can be efficiently and effectively

policed. The economic impact this crime has in the financial systems and economic growth of countries is enormous.

CHAPTER FOUR: THE POLICING OF COUNTERFEIT IN SOUTH AFRICA

4.1 INTRODUCTION

The principle of the Freedom Charter indicate that “the police force and the army shall be open to all on an equal basis and shall be the helpers and protectors of the people” (Freedom Charter, 1955:1). The latter dovetail with Section 205 (3) of the Constitution of the Republic of South Africa, Act 108 of 1996, that says the SAPS shall police the country (South Africa, 1996a). On the contrary, the dispute always arises from the police on what to police or not. Moreover, South African cities and towns are abound with counterfeit products that are flowing across the streets, flea markets and shops and this goes on to show that policing of counterfeit is in competition with other priority crimes that are prevalent in the country (WIPO, 2009a:4). The distributors of counterfeit goods are found everywhere in South Africa and this makes this crime very difficult for the police to eradicate it completely. Of common knowledge is that the police cannot be on patrol in every street as they are limited in number and capacity. Despite this, the trade in counterfeit and pirated products is a billion-rand industry that is widespread and is more prevalent in under-developed and developing countries. This confirms the sentiment that illicit trade cannot exist without licit trade (IFPI, 2016:3). The illicit organised crime businesses are deeply intertwined with licit trade and this makes incentives to combine their illicit operations with legitimate business ventures.

Contrary to the views of some people, South Africa was infested with 278 organised crime groups dealing in contraband even before 1994. Even during apartheid era, organised crime groups from various countries such as Nigeria, China, Russia, Italy, and Morocco, among others, had been in existence and networking with international mafias. The International Mafias are known to be a subculture that is often outpacing the capability of the police to control and manage crime (Mohamed & Wahid, 2014:257; Shaw, 1998: 1). This is confirmed by the SAPS organised crime threat analysis audits that were conducted in 1995 and 1997, which revealed an increase of organised crime groups from 278 in 1994 to 500 organisations operating within South Africa with links to international criminal organisations (Gastrow, 1999:59). The Thailand Police’s arrest of

Italian Mafia boss based in South Africa, Cape Town in 2010 when he visited Thailand bears witness to this fact. He was known in South Africa as Robert Von Palace Kolbats-Chenko under false name whereas his real name is Vito Roberto Palazzolo.

This chapter discusses counterfeit crime problem from the South African perspective. This includes corruption, legal framework on policing counterfeit, factors encouraging counterfeit, rationale for policing counterfeit, the current state of affairs in policing counterfeit, the role of criminal justice system in making counterfeit policing effective, and evidence based practices for policing counterfeit.

4.2 THE PROBLEM OF COUNTERFEIT IN SOUTH AFRICA

Counterfeit crime, piracy and other related intellectual property crimes are rampant in South Africa (South Africa, 2014b:9). Inevitably, counterfeit crime and piracy are financially rewarding crimes that modern organised crime will not fail to exploit. Crime also slowed South Africa's socio-economic development (Ampratwum, 2009:74; South Africa, 2011:386). In South Africa, by the 1980s, criminal enterprises had grown dramatically and encompassed a diverse array of illegal activities, from trafficking to counterfeiting commodities. During that period, the police investigators and intelligence units had neither the skills set nor the personnel to contain the problem. This was aggravated by the failure of the police and other law enforcement officials to generally understand the nature of organised crime, largely influenced by poor information sharing among law enforcement agencies at all strata of government.

Park (2010:39) argues that disease does not respect borders and neither do counterfeiters who form unholy alliances with illegal organisations. This principle holds true to the South African situation where counterfeit has experienced involvement of organised criminals who tend to be the beneficiaries of the illicit trade. Counterfeiting can be committed on physical product itself or trademark attached to the goods or both. It is both trademark and copyright piracy as held in a case of *University of London Press Ltd v University Tutorial Press Ltd* (1916) 2 Ch 601.

Exponential growth of intellectual property, counterfeit and piracy violation was recorded in 1994 when South Africa opened its borders to the world of branded protected goods. This is motivated by fashion displayed by Americans in the media and other platforms. Many challenges and opportunities arose for unscrupulous organised criminals (Du Plessis & Rousseau, 2003:166). In the country, the strategic provinces where counterfeit goods were discovered and distributed to various provinces are Gauteng, KwaZulu-Natal and Western Cape (Naidu, 2005). This is owing to their lucrative economic activities such as the likes of busy ports of entry as well as high population numbers. For instance, in 2008, OR Tambo International Airport was identified as a major destination of inbound Counterfeit Goods (SAFACT, 2009:2). To further highlight the magnitude and extent of the problem, in 2008, South Africa was rated 16th out of 20 countries in terms of intellectual property violations with losses up to R21 million annually (Spoor & Fisher, 2008). This amount of counterfeited products and the figure has since increased astronomically. In 2011, counterfeit seizures globally increased by 46% annually, further showing the magnitude of the problem (Moneyweb, 2011:1).

Moreover, the involvement of organised crime in counterfeiting activities makes the crime very dangerous to police. Organised criminals are more resourceful than traditional criminals. Through collaboration, organised criminals can deploy resources that are more diverse and recruit specialists and experts in their field of work (Von Lampe, 2011:152). Organised crime has the character of making the world look small. Kruger (2008:3) argues that counterfeit crime is a global phenomenon as it is noticed by criminals having easy access to countries, speedy communication worldwide, fast and easy transfer of money worldwide despite the presence of the police in every country. This often brings in new profile of criminals into the realm of entrepreneurial crime (Carter, 2009:4). As it is noticed in South Africa where traditional and social media such as Facebook, Instagram, twitter, Pinterest, LinkedIn, Snapchat, WhatsApp, YouTube and newspapers as well as the Internet are used for advertising counterfeit goods. In collaboration with the SAPS, INTERPOL in 2012 had operation code named “Meerkat”, which confiscated counterfeit goods and operation “Pangea” in 2013 where counterfeit medicines were seized (INTERPOL, 2014:11).

As a way to compound counterfeit problem further, criminals have even established networks in legal manufacturing sites. They make use of spies who steal information from legitimate manufacturers of the products to be used in their own production. As is the case in the leading producers of counterfeit, even in South Africa, human trafficking and the use of child labour in producing the offending products is widespread (Basu & Lee, 2015:39; Large, 2009:14). Criminals also use reverse engineering whereby they purchase and strip genuine items to study how they could be replicated (Naude, 2015:252). Once it is known how they were made, they replicate them in large quantities and sell them at a cheaper rate to the distributors and consumers. Their products are characterised by the high level of adulterated toxic substances and unregulated substandard ingredients in food, beverages and medicines (Wang & Song, 2013:175). For instance, wine and spirits are diluted with unknown chemicals. As a result, these products become a health hazard to people. Their counterfeited car parts have the propensity to tear into two parts and their cell phone batteries often explode in the hands of users. The widely reported cases of motor vehicle and machinery counterfeited spare parts that are sold even in licit shops makes the crime difficult to police (Whitelaw, Smith & Hansen, 2012:417). In general, counterfeited products poses health hazard to the people and adverse economic results to countries.

For South Africa, there are incalculable financial costs to the reputation of legitimate businesses that are importing the goods, such as dampened brand value and overburdened public health systems because of people getting sick from the use of counterfeited products (Basu, 2013:316). Businesses lose revenue and profits, with negative consequences for their shareholders as benefits from the breakthroughs they make in developing new products are squeezed. Eventually, this leads to disinvestment and or capital flight (Ampratwum, 2009:74). Countries lose tax revenue as counterfeit goods move through informal markets where taxes and duties are not paid. This pushes everybody to be in action and results in public and private policing ultimately bearing the costs of preventing, detecting and prosecuting this crime.

South Africa promulgated the Counterfeit Goods Act 37 of 1997 on 1 January 1998 to protect brand holders against trading in counterfeit. Despite this significant step in the war against proliferation of counterfeit goods, evidence indicates that this crime still continues unabatedly.

4.2.1 Copyright and Trademark Violations: South African Perspectives

Article 51 of the WTO Agreement on the Trade Related Aspects of Intellectual Property Rights specifies and distinguishes between the concept of trademark goods and the one of copyright goods. The concept of trademark concerns the protection of identifying products mark such as words, slogans, logos, shapes, and colours. It indicates the origin of the product, guarantees quality to consumers and also serves as manufacturer's acceptance of responsibility on product defect (Ramara, 2006:7). Counterfeit crime comes to play when one without permission or authority use a trademark and falsely presents it as genuine. Conversely, copyright goods, as indicated previously, refers to usurping goods, which are unauthorised copies of CDs, DVDs, software products protected by intellectual property rights. Copyrights are unregistered rights that allow the copyright holder to prevent unauthorised reproduction of the products.

Draper and Scholvin (2012:1-5) argue that criminals are interested in engaging in crimes that pay better with low levels of arrest such as counterfeit and other intellectual property crimes. The copying of computer softwares, DVDs' and CDs' is one of most copyright infringements in South Africa. Many of the goods are world-leading products that were created by developed countries such as the USA, Germany, France, and UK, among others (IFPI, 2016:3). To carry out copyright violations, criminals make use of computers and electronic devices to copy the goods bearing famous brands. Some criminals steal not yet released information through hacking, as happened in the case of the first South African produced Oscar award winning film "Tsotsi" directed by world-renowned film Director Gavin Hood (Dovey, 2009:91). The version of the film was copied and distributed by criminals to the general public worldwide before the official launch. Computer system hacking involves the act of defrauding people by using their stolen personal information to commit crime through the use of computers on the network

(Payne, 2013:158). In the same vein, Snail (2009:7) argues that the practice is a criminal act and that perpetrators are not easily apprehended given the complexity of computer hacking. In terms of Section 86(1)(2) of the Electronic Communication and Transaction Act 25 of 2002, computer hacking involves the act of a person who intentionally accesses or intercepts or modifies any data without permission or authority (South Africa, 2002b). Access to data may be gained at various levels, where the hacker's ultimate goal is to gain full access, in terms of Section 86(1) of the Interception and Monitoring Prohibition Act 127 of 1992 (South Africa, 1992).

For instance, the employee may copy movies and music CDs, DVDs, and computer software from database and sell them to criminals, which is a case of collusion (Ivkovic & Sauerman, 2012:6). In terms of Section 86(2) of the Electronic Communication and Transaction Act 25 of 2002 and the Regulation of Interception of Communication and Provision of Communication Related Information Act 70 of 2002 accessing unauthorised data is a punishable offence (South Africa, 2002a).

4.2.2 Counterfeit as a Form of Fraud

According to Snyman (2010:158), fraud is an unlawful and intentional making of a misrepresentation, which causes actual or potential prejudice to another person. Cases of *S v Campbell* 1991 (1) SACR 503 (NM) and *S v Swarts and Another* 1961 (4) SA 589 (GW) support the above assertion that fraud causes prejudices on others and also that it can only be committed intentionally. On the contrary, counterfeiting as indicated above, involves the copying or imitation of the product without the authority with a view to deceive or defraud others (Basu & Lee, 2015:39). In the case of *R v Dyonta and Another* 1935 AD, the court held that it was immaterial whether the victim is actually deceived or whether his prejudice is only potential. The common denominator between counterfeiting and fraud is the intent to defraud.

In counterfeiting, documents are often forged to disguise the products that are in transit and intended for particular destinations and markets. Often documents are forged to represent what it is actually not whereas some are used to serve as transportation

documents (Benson & Simpson, 2009:19-20; EUROPOL, 2015:25). This is done with the purpose of misleading the police so that they can regard the goods as genuine (Newham & Faull, 2011:5). If the documents belong to people, most often the real owners of the documents may not know because the crime is carried out in secret (Levi, 2009:55). The problem of counterfeit is exacerbated by the fact that many consumers cannot by themselves distinguish fakes from originals. The presence of counterfeit goods undermines the signalling function of trademarks and brands (Penz & Strottinger, 2005:568). Purchasers of counterfeit products will not derive value from the product that they paid for, at worst they could be exposed to physical harm if counterfeit products create health or safety risks.

Finckenauer (2007:79) argues that in executing counterfeit crime, the perpetrators converge to exploit the criminal opportunities of the existing markets for illegal goods. If the laws, law enforcement and legal systems are also corrupt and ineffective, this further perpetuates the crime. To enable crime to happen, criminals make use of social engineering. Social engineering methods are best applied against individuals who can be convinced against their better judgement to do or believe things that they should not. Counterfeit dealers are able to convince the public about the benefits of purchasing counterfeit goods. Such as better quality than the genuine goods and or good value for money for instance. Some of the counterfeiters use fake Internet domain names (cybersquatting) resembling genuine established companies domain names with reputable brands to capitalise on their brands by selling to customers fake products as there is insufficient policing on the internet (Rojek, 2016:3). This is tantamount to hijacking legitimate business' website and business.

4.2.3 Counterfeit and Corruption

Corruption undermines good governance and effective operation of government (South Africa, 2011:446; Ampratwum, 2009:68). In counterfeit crime and piracy, corruption is a factor that is associated with smuggling and it is carried out when the citizens knowingly purchase counterfeit products and the public officials facilitate or tolerate the black market and illicit economy and by so doing, they further expand the illegal market (Basu,

2013:317; Kinnes & Newham, 2012:33). Faull (2011:6) avers that corruption is noticed when police officials steal or extort money from criminals and or steal confiscated goods or contraband from the accused or after the raids on counterfeit.

The above conforms to the opportunity theory of crime. For instance, Melzer (2010:46) argues that price was the primary incentive for increase in trafficking of illegal goods. If prices and duties on goods at ports of entry are increased or are higher, this will have an effect on police corruption as prices affect the price elasticity, which will in turn encourage police corruption. Mugarura (2014:382) argues that globalisation has aggravated transnational crimes as high number of people frequently cross the borders with illicit goods than was the case many years back. The more entry into the country is difficult the more incidences of corruption from the police and boarder officials take place due to bribes offered to these officials by the illegal goods dealers (Cote-Boucher, 2016:49-51; Lo & Kwok, 2016:5). On the down side of it, people who regard the police as corrupt, inept, or are afraid of the police are likely not to report crimes as compared to citizens who have a good rapport and respect for their police. However, Newham (2015:46) argues that even if honest and well-behaved members were recruited in the police that would not reduce crime and eradicate police misconduct but can improve organisational culture. The problem of corruption is worsened when corrupt police officials use their powers to demand bribes in exchange of sharing state privileged information (Albanese, 2007:230).

Adejumo (2010:2) emphasises that this conduct by the police is unethical as privilege information is given out to the public in exchange of payment. In terms of Section 1 of the Prevention of Organised Crime Act 121 of 1998, police officials who have legitimate access and control to sensitive information can even commit corruption if they illegally exchange it with counterfeiters and other perpetrators of other crimes. This can also be a case of sharing confidential and protected information with criminals (Payne, 2013:66; Copes & Vieraitis, 2012:566). The conduct is displayed when unscrupulous employees compromise the employer's information, thereby breaking the trust relationship with the employer. In the case of the police, trust and legitimacy are broken with the public as

well (Payne, 2013:65). Yusuf and Babalola (2009:419) provide the other angle on how craft manifests, which is seen when the police form unholy alliances with perpetrators to facilitate loss to property of the employer or any person or institution. Corruption encompasses conflict of interest because it is an act of dishonesty (Goldman, 2010:97). This unethical conduct is punishable by law. Worse is that in the SAPS as argued by Newham (2015:44) corruption is allowed to exist and the members are not held accountable and punished speedily to deter those intending to commit crime.

4.3 RATIONALE FOR POLICING COUNTERFEIT IN SOUTH AFRICA

Counterfeit crime is regarded as a serious economic crime that is committed by falsifying facts or by concealment of the truth (CEHRUD, 2010:1; United Nations Office on Drugs and Crime, 2014c: 2). It subordinates the public interest to an illegal individual private gain (Greef, Roos, Vorster & Van Romburgh, 2011:94). Indicating how serious misrepresentation of facts is, in the case of *S v Shaban* 1965 4 SA 646 (W), the minutes of business directors' meetings were improperly captured and certain words were deliberately omitted. This was held to be a crime. In line with the above, the Hong Kong case of *Sin kam-wah & another v HKSAR* (2005) 8 HKCFAR 192 indicates misrepresentation of information as amounting to a crime. In this case, government employees were convicted of fraud after they had misrepresented facts on documents in order to obtain personal financial gains from a government department illegally (Mcwalters & Carver, 2009:105). The courts in these cases ruled that the omission constituted a misrepresentation, which prejudiced third parties and the acts were regarded as fraudulent conducts. Similarly, offenders who commit counterfeit crime further carry it out by misrepresenting facts of the products through substandard and inferior ingredients used and written words on documents such as sworn statements. This behaviour is also a criminal act just like the behavioural tendencies evident in counterfeit that involve the use of misrepresentation of information and fraudulent documents in introducing counterfeit products in the markets.

Brand holders of products see counterfeit as decreasing status of genuine products, which negatively affect purchase intention of the original products (Basu, 2015:40).

Counterfeit crime affects consumers' confidence in legitimate brands, destroys brand quality, company reputation, impose negative impact of the consumers' evaluation of genuine products, cause loss of revenues, increase costs associated with trying to contain infringement, impact on jobs and threaten consumers health and safety (Bian & Veloutsou, 2007:212; Whitelaw, Smith & Hansen, 2012:418). In addition to the above, Lewis (2009:48) states that counterfeit crime causes loss of goodwill, profit and jobs.

In South Africa, most efforts to mitigate counterfeit are mostly directed towards arresting the sellers of counterfeit and not counterfeit producers. Therefore, the enforcement is not targeted at the suppliers to deter counterfeiters (WIPO, 2009b:19). There is a huge problem in policing as it seems members do not carry out their active policing function effectively and do not show pride and motivation anymore (Burger, 2015a:1). The problem of criminals in the police could be contributing to the lapse of policing ethics (Deveymaeker, 2015:35; Burger, 2015a:49).

Companies resort to technology and devices such as special inks, dyes or ultraviolet and electronic signatures. However, each new measure only appears to be pawn in the battle against time (Naude, 2015:257). Over the last few decades, sales of counterfeit products have increased dramatically in the world including South Africa (Penz et al., 2009:89). Despite innovative protective measures to fight this scourge in South Africa, the police mostly rely on tip-offs from the public (Smith & Cornish, 2003:26). This is a case of reactive policing, which is old-fashioned and has detrimental consequences to violated people (Steinberg, 2015:7).

Counterfeit crime in South Africa has also been confirmed by the police to be perpetrated by mostly organised criminal gangs with links to the Chinese Triad from Hong Kong and Taiwan such as the '14K' and the 'Wo Shing Wo' (Gastrow, 1999:62). As was the case in countries such as Russia and Italy, criminal organisations penetrates the police and other government officials through payment of bribe so that they can operate freely in furthering their criminal enterprise. The community mistrusts the police and do not report crime, which in turn causes crime to spiral out of control. The South African government

has acknowledged that efficient organised criminal groupings are a threat (Steinberg, 2015:2). Consequently, crime breaks social trust and inhibits interaction between the police and the community (Roberts & Gordon, 2016:49).

The involvement of society in policing crime is crucial as the police cannot spot every crime happening in communities and can foster social cohesion. As argued by Newham and Faull (2011:47), the police cannot be at every street in an allocated precinct. The challenges of establishing and implementing partnerships in policing such as active citizenry in policing seem to be far-fetched. The roles of Community Policing Forums and Community Safety Forums and how partners can collaborate to ensure successful partnerships in closing down the illegal outlets are certainly having an effect on the availability of counterfeit goods in the market (Park, 2010:35).

4.4 THE USE OF DETECTION TOOLS AND PROACTIVE POLICING IN THE POLICING OF COUNTERFEIT

According to Mackenzie and Smith (2011:20) and Heinonen and Wilson (2012:274), the proactive policing of counterfeit rely more on the identification of the counterfeited items. This leads to the reliance on small hand-held equipment such as detection pens, ultra violet portable lights to detect counterfeit money etc. It has to be noted that these devices on their own will not be necessarily effective and that is why CEPOL (2015:14) emphasises the need and importance of a multi-agency approach. According to Newham and Faull (2011:47), this could include shared policing responsibilities by public and private law enforcers in the identification and detection of counterfeit goods. Public-private partnership in policing counterfeit and piracy is noticed when brand owners or holders employ private investigators to locate counterfeiters and counterfeit goods (White & Gill, 2013:88). This reaffirms the importance of collective responsibility for the successful crime prevention.

Intelligence-led policing has a significant role to play in this by collecting and developing information related to threats of counterfeit and using it to apprehend perpetrators and or use strategies that will eliminate or mitigate the threat. The strength of Intelligence-

led policing is its ability to combine problem-solving policing, information sharing and police accountability, with enhanced intelligence operations (Joyce, 2011:76). It basically uses tactical intelligence about imminent threats to develop and implement preventive measures and operational intelligence to respond to long-term threats.

They clandestinely collect and evaluate information on counterfeiters and other criminals that would normally not be available to investigators through overt sources (Lushbaugh & Weston, 2009:141). This information is then channelled to police and other law enforcement officials for further investigation that could either lead to crime prevention or crime detection. According to Ratcliffe (2009:7), intelligence involves synthesising and evaluating the data that is systematically gathered on people or organisations suspected of being involved in crime. It becomes the basis for the structured problem-solving framework to an identified problem.

4.5 SOUTH AFRICAN LEGAL FRAMEWORK ON POLICING COUNTERFEIT

South Africa has several legislation that criminalise counterfeit and intellectual property crimes. They are grounded on the Constitution of South Africa Act 108 of 1996, which also protects private property, and they include the following:

- Counterfeit Goods Act 37 of 1997
- Copyright Act 98 of 1978
- Trademarks Act 194 of 1993
- Merchandise Marks Act 17 of 1941
- Customs and Excise Act 91 of 1964
- South African Bank Act 90 of 1989
- Tobacco Product Control Act 83 of 1993
- Patents Act 57 of 1978.

Nonetheless, the Constitution remains the supreme law of the country upon which all other statutes must comply. Everyone has the right to the freedom and security of the person and property in terms of the Constitution of the Republic of South Africa Act 108 of 1996. Section 35 of the Constitution guarantees human rights to accused, arrested

and detained persons. An arrest may not be carried out if a suspect can be brought to court by means of a summons. Every police official is obliged to render a direct service to the public, including reaction to requests of the public, handling of complaints and the taking of statements and reports. The law allows the SAPS to make an arrest without a warrant (Section 40 and 41 of the Criminal Procedure Act 51 of 1977), in serious cases, or if there are reasonable grounds to suspect that a suspect will flee or dispose of evidence, or will attempt to evade or obstruct justice in some way. According to the Constitution, the police have a duty to the community it serves, to safeguard them and their property from harm through enforcing the law. Every nation's police are responsible for the prevention, detection and investigation of crime and the apprehension of alleged offenders (United Nations, 2010:1).

Some of the objectives of the SAPS are to prevent and investigate crime (Pepper, 2010:5). Crime prevention is described as all activities that reduce, deter or prevent the occurrence of specific crimes by altering the environment in which they occur and providing a strong deterrent in the form of an effective policing (South Africa, 1998:14). To achieve this, they need a collaborative effort. That is why Section 201 of the Interim Constitution Act 200 of 1993 mandates the SAPS to adopt community policing approach, which include establishing and maintaining partnership with the community to fight crime such as counterfeit and piracy. The Policy Framework and Guidelines for Community Policing (South Africa 1997b:1), indicates that counterfeit and piracy can be effectively policed through partnership between the police and the community.

Partnership in this regard can be established with brand holders as they employ private in-house investigators to assist the police in identifying and reporting counterfeit traders (OECD, 1998:12). This will provide the required resources and build a strong base for the fight against counterfeit. Internationalisation of counterfeit crime, its magnitude and the sophistication render it impossible for any company to address the problem on its own (Blackstone & Hakim, 2013:157). This is also a challenge to the SAPS that has insufficiently trained members who are poorly resourced and overwhelmed by workload (Nalla & Newman, 2013:63). Moreover, the police and customs officers lack sufficient

expertise to identify goods that infringe intellectual property rights. This necessitates multi-agency approach that could use collective resources and wisdom to fight this crime. Kruger (2008:1) argues that fighting counterfeit and piracy requires clandestine methods to match the capabilities of the criminals because counterfeiters employ various modus operandi and are very innovative.

The Counterfeit Goods Act 37 of 1997 is the sole Act that criminalises counterfeit crime in South Africa by empowering the police to arrest and facilitate the prosecution of counterfeiters. This means counterfeit crime is a statutory crime punishable by law (South Africa, 1997a). It protects and enforces intellectual property rights by providing civil and criminal remedies against counterfeiters who are caught by the police. Criminal proceedings are preferred in cases of deliberate infringements or infringements for commercial purposes, which have resulted in a particular infringement or harm to the brand holder.

Section 5(1) of the Counterfeit Goods Act 37 of 1997 empowers the police to collect evidence relating to suspected counterfeit; conduct searches where necessary; and take steps to terminate dealing in counterfeit goods. Among others, the Counterfeit Goods Act also makes diversion an illegal act. Diversion involves the distribution of a genuine product outside of their intended market, thereby violating the first sale doctrine, where for example goods that are to be sold in South Africa are diverted and sold in Botswana without following proper legal channels, therefore avoiding tax payment in South Africa.

Many of the goods that are counterfeited are bearing famous and known brand names, which violate trademarks and Counterfeit Goods Acts simultaneously. The Trademarks Act 194 of 1993 criminalises trademark infringement and grants the police powers to police trademark. Trademark is any word, name, symbol, or device used by a person to identify and distinguish his or her goods from those manufactured or sold by others and to indicate the source and geographic indication of the goods (Bienabe, Bramley & Kirsten, 2009:74-75; South Africa, 1993b; South Africa, 1993c). Through geographic indication, the police can track where the goods originate from and be able to locate the

owner. Additional advantage of trademark is the fact that brand holders and producers can distinguish their goods from other competing goods (Welchy, 2010:361), and the police rely on these identifying characteristics to investigate and police the infringement. The counterfeiters make policing difficult by targeting young people because they are gullible to purchase branded and fashionable clothes (Spoor & Fisher, 2013:3).

Tobacco Product Control Act 83 of 1993 makes any deceptive or misleading packaging and the physical goods that do not meet certain specifications as contained in the Tobacco Product Control Act an offence and empowers the police to act on such violations. Owing to sophistication and the syndicate manner in which these crimes are committed, the police use traps and undercover operations to deal with this.

4.6 FACTORS ENCOURAGING COUNTERFEIT

South Africa has a gap between progressive policies and implementation of these policies to address social ills (Mogstad, Dryding & Fiorotto, 2016:5). This is influenced by often-heard complaints of lack of efficient implementation of policy resulting in poor service delivery. As argued by Burger (2015a:1), the inability by the SAPS to carry out its mandate effectively contributes to increase in crime and other social disorders in the country. Policing weakness is one of the factors pushing-up counterfeit crime and piracy. The majority of the police members are not trained on the policing of counterfeit except few who are attached to the Specialised Commercial Crime Unit [also referred to as the Directorate for Priority Crime Investigation (DPCI)] of the SAPS, Customs & Excise officials and the Department of Trade and Industry (DTI) officials. This is further compounded by loss of dedicated members to undertake proactive policing function and again this leads to staff apathy among the remaining members (Burger, 2015a:1).

There are fragmented law enforcement agencies such as the SAPS border police and Specialised Commercial Crime Unit, Customs & Excise (SARS), and the Department of Trade and Industry. The Specialised Commercial Crime Unit and the DTI officials are known to police counterfeit that has already entered the country through borders and sold in the open market. The Specialised Commercial Crime Unit is responsible for

policing complicated and sophisticated commercial crime. The Unit makes use of prosecution-guided investigation as opposed to prosecution-led investigation to police crime (South Africa, 2006:112). It does so because of its specialisation function and the capacity and skills built over many years (South Africa, 2014b:7; Burger, 2015b:3). Another issue that seem to contribute to the surge in counterfeit crime is the good quality of some counterfeited products, which makes it difficult to distinguish counterfeit from genuine products without the assistance of a laboratory/forensic tests (Bian & Veloutsou, 2007:212).

The police also find it difficult to detect and prove counterfeit (Bumatay, 2015:342). Other institutional characteristics are low risk of discovery, complacent legal and regulatory framework in various countries, weak police enforcement and non-deterrent penalties (Mohamed & Wahid, 2014:249). In addition, the significant potential for intimidation and corruption by organised crime has facilitated the expansion of counterfeit as well as the opportunity to offer them within normal sales channels. Eventually, this reach unsuspecting and unaware consumers (WIPO, 2011:6). Increasing evidence of the presence in the market of counterfeit goods potentially harmful to the health and safety of consumers does not make counterfeit a 'victimless crime' (Penz, Schlegelmilch & Stottinger, 2009:68). People who consume fake medicine for example might get sick or even die from such intake. Factors encouraging the spread of counterfeit goods also include profitability, large markets and brand power, among others (Bumatay, 2015:342). Illegal trading, which is both highly profitable and presents low levels of risk, is certainly appealing to organised crime syndicates. This appeal is enhanced by the relative logistical simplicity of commerce and widespread distribution of technologies, which allow for the reproduction of the product and the possibility of exploiting existing trade routes (Basu, 2013:326).

Widespread availability of good technology and communication make it easier to manufacture in one geographic location and distribute elsewhere (The Patent Office, 2006:2). Technology characteristics include easy distribution and sales, concealment of operations, easy to deceive or dupe customers and the use of internet and social media

that speed up business all over the world. However, because the police are slow in catching up with technology, this gives criminals opportunity to benefit financially (Whitelaw, Smith & Hansen, 2012:417).

Consumers who believe that counterfeits are similar with genuine goods and worth the money they pay for them further aggravate the problem (Bian & Veloutsou, 2007:214). Past research on counterfeit has stressed that price-quality inference is a key driver of the demand for fake goods. The findings of a South African study on counterfeit purchasing attitude by Chuchu, Chinomona and Pamacheche (2016:328) confirmed that price-quality inference is the determining factor in the consumer-buying attitude. In South Africa, the buying of counterfeit goods for personal use is not a crime. This makes the policing work even more challenging as there is no law that punishes purchasing of counterfeit goods. This also will not encourage the consumers of counterfeit goods who bought counterfeit to be recruited by the police to witness in courts except for them to risk being victimised or attacked by counterfeit dealers at a later stage. The higher the price discount and therefore the more favourable the perceived price/value relationship, the more consumers are lured into buying fakes (Penz, Schlegelmilch & Stottinger, 2009:75).

Another issue is the weakness in policing strategy employed by the SAPS towards policing counterfeit crime. SAPS makes use of reactive policing approach to police counterfeit crime as they wait for the brand holders to report counterfeit before they take action. The Specialised Commercial Crime Unit investigators rely heavily on tip-offs and complaints from brand holders. Although the police have powers to search and seize goods with or without a warrant, they do hesitate to operate without a warrant as they would have the onus to prove the existence of a reasonable suspicion before the magistrate or the judge can confirm or condone their actions within a period of ten days after having conducted their raid. If the raid is not confirmed by the local magistrate or judge in whose jurisdiction a raid was conducted, the police would have to return the goods to the person they were seized from and also make good any damage caused in terms of Section 4A of the Counterfeit Goods Act 37 of 1997. This is because search

and seizure has negative effects on the person whose goods are subject to search and seizure such as reputational damage, personal image assassination, halting the businesses, and distrust in the eyes of their customers. Naude (2015:257) mentions that the police do not conduct spontaneous raids or sting operations mindful of the litigation that might follow as they have to be certain that a search and seizure warrant would have been issued for the raid they have conducted. Deveymaeker (2015:29) has revealed that for the financial year 2014/2015, the pending civil claims against the SAPS stood at over R26 billion. This figure is often caused by lack of police professionalism and lack of compliance with the laws and relevant policies. Police officers who did not receive training on the identification of counterfeit crime exacerbate this problem because only few of the Specialised Commercial Crime Unit members of the Counterfeit group are the ones trained on the policing of counterfeit and Intellectual Property crimes. Johnson (2010a:18) also argues that poor policing is aggravated by the failure of the police to use intelligence that could be proactive in dealing with counterfeit crimes. Some of the SAPS members often book in counterfeit goods in the SAPS 13 at police stations for safekeeping instead of the declared counterfeit depot for storage of counterfeit goods in terms of Section 23 of the Counterfeit Goods Act 37 of 1997. The brand holders are often not called out to test and analyse the goods so that proof of counterfeit can be produced in court. By the same stroke, brand holders are forced to make use of private investigators to police counterfeit (South Africa, 2014:18).

There are allegations that some legitimate businesses in South Africa deal in counterfeit products and customers would be asked if they want to buy original product or counterfeit product in various standard and degree such as ordinary or good quality goods. Many branded goods are produced by the developed countries and priced in USA dollar. The performance of the rand as compared to the USA dollar exchange rate and the economic conditions in South Africa also contributes to the propensity of counterfeit crime (Mohamed & Wahid, 2014:256). The situation is equivalent to running an illegitimate business behind the cover of legitimate business thus using the legitimate business as a front for counterfeit (Gastrow, 1999:62). According to Steinberg (2005:2), the involvement of organised criminal groups in these activities has multiplied the number

of goods subject to unauthorised replication, thereby leading to the “evolution” of counterfeiting. It is obvious that counterfeiting is in constant massive growth with evolving “targets” (UNICRI, 2011:12).

Moreover, there is a weakness of existing corruption and enforcement strategies that do not bring together different parts of government, industry, policy makers, and police to create a coordinated approach to counterfeit (The Patent Office, 2006:4). Most of these law enforcement agencies operate in isolation. Attesting to Burger’s (2015a:1) assertion that the SAPS does not carry out its mandate effectively and Berg and Shearing (2011:19) attribute this failure to execute their mandate effectively to the total collapse of the command and control in the SAPS. This is further compounded by the trust deficit between the police and the community where the trust levels have seriously deteriorated, which leads to community apathy towards the police (Burger, 2011:13). Lack of experienced and capable police officers to deal with this crime is another major issue. According to Nalla and Newham (2013:63), the training provided to the SAPS members is insufficient and many experienced members have left the service thereby causing a policing vacuum. The relatively low level of apprehension generated by this illegal activity is owing to the initial perception that counterfeiting was associated only with luxury or textile goods, and it did not generate sufficient concern to warrant incisive police action. The National Development Plan identified good leadership as being at the heart of addressing numerous challenges facing the SAPS to eradicate crime (South Africa, 2011:392-393).

For criminals, the risk involved in counterfeiting is significantly low, given that the police tend not to consider counterfeiting as a top priority crime. Legal actions against counterfeiters are also costly. Moreover, the outcomes are uncertain and enforcement is difficult (Deveymaeker, 2015:34). The policing of counterfeit is also made worse by poor education of the consumers, modest resources the country has and porous borders between different African countries, which makes easy transit point among others (Spoor & Fisher, 2013:3). Steinberg (2015:4) reveals that contraband goods are smuggled on land borders and also by use of light aircraft across neighbouring countries. This

makes the police with scant resources and lack of dedication in the policing of this crime highly ineffective. Penalties in the majority of countries, as mentioned earlier, are also less severe if compared with those applicable to contact crimes; but the consequences of counterfeit are far reaching for the country (Mohamed & Wahid, 2014:252).

4.7 CONCLUSION

In many instances, the consumers purchase the products unknowingly that they are not genuine products so it is a crime of product fraud as prescribed by South Africa's Counterfeit Goods Act 37 of 1997 and Consumer Protection Act 68 of 2008. The scale of counterfeit problem in South Africa is big and like in many parts of the world, counterfeit poses financial, social and legal costs to the government, brand holders and owners as well as the population at large. Among others lead to disinvestment in the country, loss of goodwill for business, shedding of jobs in the retail sector, lower bottom line experienced in the sectors affected, low tax paid to government and health hazards to consumers, which further over burdens the health system owing to consumption of dangerous products that push people to frequently visit medical centres to obtain medicine for various sicknesses.

For the goods to end up being sold in the shops and markets across the country, most of the time counterfeiters pay bribes to the police and other law enforcement officials to allow the goods to enter the country and for those that are produced in the country to be transported around various destinations for trade. There are many factors that encourage counterfeit crime such as the efficient economic system, open borders partly owing to poor policing and globalisation, reactive policing, over-reliance on tip offs, uncoordinated approach to police counterfeit and intellectual property crimes owing to shortage of critical skills set and manpower in the SAPS. Moreover, there are few private investigators in the employ of brand holders, and price impact on goods as most genuine goods are produced in the developed countries and tend to be priced in USA dollars.

CHAPTER FIVE: ADJUDICATION OF COUNTERFEIT CRIME IN SOUTH AFRICA

5.1 INTRODUCTION

The rot in a social system manifests in the upsurge in social disorder, crime and absence of social cohesion (Roberts & Gordon, 2016:49). Stabilising these challenges requires synchronised, effective and efficient law enforcement system. The levels and nature of intellectual property and organised crime as cited by the WIPO (2012:4) present threat to both stability and good governance in the country. The magnitude and sophistication of organised crime is in the main complicated by South Africa's unique political and socio-economic issues.

Illicit and counterfeit goods erode legitimate business and cause threat to society. In addition, Carpenter and Edwards (2013:2) lament that they thwart financial sustainability of businesses. This can be fought by creating strong deterrence to eradicate this scourge. For deterrence measures to be effective, they should be implemented on product packaging, law enforcement, and on the integrated supply chain. However, Melzer (2010:31) argues that lack of punishment seems to aggravate the problem because punishment is lenient for counterfeit and intellectual property violations. This fuels crime opportunities, which often lead to additional opportunities particularly given weak punishments associated with commercial crimes and low risk detection. This turns to be more tempting to criminals than it is the case with contact crimes.

This is proven by crime incidence in the country and by statistics that confirm that South Africa has one of the highest recidivism rates in the world (Thinane, 2010:1). This implies that criminals who are incarcerated revert to crime upon their release and end up returning to prison.

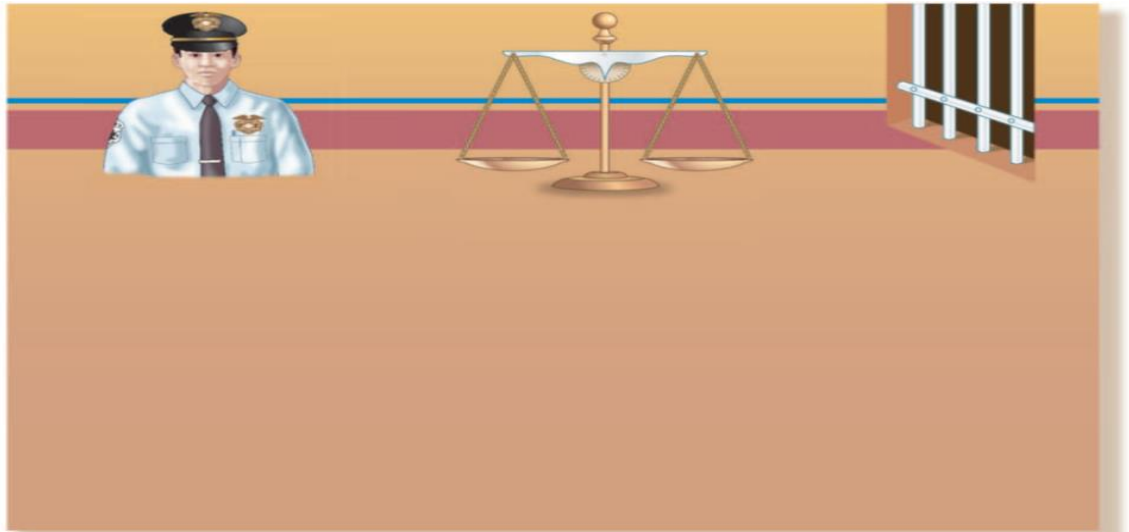
The chapter discusses concepts such as theories of punishment; adjudication of counterfeit; counterfeit investigation process; and sanctions from the South African perspective. Attention is also given to the investigation and the sanctions meted at the offenders as a deterrence measure to potential counterfeiters.

5.2 THE ROLE OF CRIMINAL JUSTICE SYSTEM IN COUNTERFEIT POLICING

The criminal justice system refers to government departments that are responsible for policing, adjudicating and correcting criminal conduct (South Africa, 1996b:5). It is essentially an instrument that is designed to instil social control in societies. Society considers some behaviours too dangerous and destructive that it either strictly controls their occurrence or outlaws them (Kriegler & Shaw, 2016:69). It is the job of the agencies of the criminal justice to prevent social harm by apprehending and punishing those who violate the law and in so doing deter those who may be contemplating future wrongdoing.

Criminal justice is a complex web of practices requiring inputs and cooperation from many stakeholders (South Africa, 2010:5). In addition to viewing the criminal justice system as a collection of agencies, it is possible to see it as a series of decision points through which offenders flow. It begins with initial contact with police and ends with the offender's re-entry into society. The initial contact an offender has with the criminal justice system occurs when police officers observe a criminal act and take the necessary action to either prevent it from occurring or investigate the crime. They may also find out about a crime through a citizen or victim complaint. Similarly, an informer may alert the police about criminal activity in return for financial or other considerations. For all practical purposes, a person who is under arrest is deprived of his or her liberty. Arrests can be made at the scene of a crime or after a warrant of arrest has been issued by presiding officer of the court. After an arrest, the suspect remains in police custody for further processing within the processes of the other criminal justice system departments, i.e. prosecution and correctional system. Figure 11 shows schematic representation of criminal justice system in South Africa.

Figure 11: Criminal Justice System



Source: NPA (2008:6).

The components of this system are police, courts, and correctional service department. The main actors in the court process are the judges or magistrates whose responsibilities include overseeing the legality of the trial process. The prosecutor and the defence are the opponents in what is known as the adversary system. The criminal justice system starts with the involvement of the police, prosecution and judiciary for sentencing and the corrections management who administer rehabilitation of the inmates (NPA, 2008:5).

In counterfeit crime cases, the police collect and gather raw information based on the requirements of evidence collection. In the process, they are required to engage in activities such as interviews, technical and physical surveillance searches and liaison relationships intended to collect intelligence. Thereafter, the processing and exploitation of information take effect (Joyce, 2011:31). Processing and exploitation involves converting the vast amount of collected information into usable intelligence by analysts. The intelligence process also seeks to collect information about crime trends, methods

of criminal operations, and other non-identifying information that helps describe and understand the criminal. In counterfeiting, smugglers often deal with contrabands (Gilmore, Rowell, Gallus, Lugo, Joossens & Sims, 2014:2).

Genuine goods become contraband when distributors and smugglers escape to pay taxes to the countries that produced the goods. The laws of the country become more attractive to offenders when they perceive them to have low likelihood of detecting, prosecuting, and punishing criminality.

5.3 THEORIES OF PUNISHMENT

As the theories of crime elaborate on the causes of crimes, the theories of punishment explain the purpose punishment will serve on a convicted person. Rich (2016:97) avers that theories of punishment are intended on how we justify using coercive power of government to punish people.

The likelihood for the occurrence of crime involves the interaction between three key elements such as the criminal, opportunity and a reduction in the rule of law (Von Lampe, 2011:151). The same hold true to counterfeit crime. In counterfeit crime, the following characteristics and demands of the consumers drive the illegal market (Finckenauer, 2007:79):

- opportunity to commit crimes;
- crime opportunities are concentrated in space and time;
- specific crime opportunity depends on movements;
- one crime produces opportunity for another;
- some products offer more tempting crime opportunities;
- social and technological changes produce new crime opportunities; and
- opportunity for crime can be reduced.

Siegel (2010:17) states that an opportunity for crime can be reduced. Every opportunity to commit crime and prey on others can be eradicated by the imposition of a harsher punishment. Taking into account that the social benefits associated with crime reduction

equal or exceed the social and financial costs of incarceration. However, reducing an opportunity does not always displace crime but focused opportunity reduction can produce wider declines in crime (Melzer, 2010:14).

Samaha (2011:21) refers to punishment as intentionally inflicting of pain or other unpleasant consequences on a criminal. Punishment can take many forms be it physical or non- physical. The main objective of punishment is to humiliate the perpetrator of crime by infliction of punishment equivalent to the harm caused so that he or she is deterred from committing further crimes and in this manner, cause the offender to undergo rehabilitation (Materni, 2013:287). For punishment to work, it has to be carried out by the government and be prescribed in the same law that defines the crime (NPA, 2008:15).

For instance, in countries such as USA and UK, there is a move towards punitive populism (Craipo, 2012:9). Punitive populism advocates for harsher sentences on criminals with the intention to deter them from committing future crimes. In China and Japan, crime control principle seems to be working well as these countries have recently experienced low crime rates. Both jurisdictions have settled into a new paradigm for positioning crime in society to exhibit the cultural expectations by imposing harsh punishment and increasingly normalising the fear of crime (Sheptycki, 2008:23). In the main, the essence of having theories of punishment is to explain retribution, deterrence, rehabilitation, and crime prevention (Materni, 2013:289; Craipo, 2012:19).

5.3.1 Retribution Theory

Retribution theory is also referred to as desert theory and it is the oldest theory of punishment (Rich, 2016:97). It is based on the premise that crime disturbs the balance of the legal order, which will only be restored once the offender is punished for his or her actions. A balance has to be struck between various aspects as far as sentencing is concerned, i.e. objective aspects of a crime, which is the damage caused, the consequence and the severity of a criminal act. The theory is based on the principle that perpetrators must be punished in some way in order to comply with statutes

(Hargovan, 2015:55). This is in conformity with the expressivist theory that says punishment is the best way the community will express condemnation of the wrong deeds by the perpetrator (Glasgow, 2015:602). The essence of the theory is to seek revenge and it complies with the Biblical principle of an “eye for an eye” (Seiter, 2011:28).

Sentences are designed to exact retribution for crimes committed. The focus is on seeking revenge despite the fact that it is difficult to ascertain what punishment will equal the harm caused or the rule violated (Rich, 2016:97). The basis of this theory is that punishment must automatically follow upon the commission of a crime and this will reflect as the community’s condemnation of crime. This will satisfy the principle that an offender merely gets what he or she deserves. Fair punishment must be proportionate to the harm done and or the violation committed.

However, retribution in its unadulterated form will not be applied in the democratic South Africa as it subscribe to a Biblical principle of ‘an eye for an eye’. The reason is that the principle will be in violation of the Constitution (Cross & Ashworth, 1981:128). In this theory, punishment includes serving a prison term. Proportionality is sought so that the greater the offence, the greater the punishment. There should be an adequate proportion between the punishment and the seriousness or gravity of the crime (Meltzer, 2010:31). This system also attempts to appease the victim by giving him or her choice in certain instances, either to have punishment imposed on the offender or to demand a financial settlement. This objective contains the element of expiation in terms of which the offender is purged of his or her guilt because of the imposition of punishment, being proportionate to the degree of moral blameworthiness with which the crime was committed. The moral sense of the theory is that the objective application of the law can have a deterrent effect.

5.3.2 Deterrence and Prevention Theory

Deterrence theory favours higher sentences that will serve a purpose of the theory (Rich, 2016:118). The theory postulates that the offenders made calculated rational decisions about the dangers and benefits of crime even before committing it (Yusuf & Babolola,

2009:421). Administering punishment that will be seen, known and feared by the public is the critical success factor of this theory. In primitive times, punishments such as death sentence, weeping, crucifixion, and fracturing of limbs were meted out at criminals in full view or hearing of the public (Hargovan, 2015:58). The purpose of imposing punishment in public was to create a disincentive to people who are contemplating to commit crime and also to instil a sense of fear into those witnessing it so that they will become law-abiding citizens (Rich, 2016:100). Currently, the vast majority of penalties that are imposed on people are not publicised on public platforms except of those people who are regarded as famous or making headline news. This theory is also invoked to justify imposing corporate criminal liability as corporate entity have the ability to make moral choices through the agency of people who represent the entities (Rich, 2016:99).

The essence of this theory is that the public should observe offenders being punished for their crimes and given harsh sentences. As an element of deterrence was introduced, whereby potential criminals were deterred from committing crimes because of the penalties they might suffer if caught. Punishment is also imposed to ensure that the criminal does not repeat the crime he or she has committed before (Thinane, 2010:21). This served as a deterrent to society, criminals and would-be criminals.

In general, the deterrence theories of punishment are related to an experience, threat or example of punishment, which discourages future crime. The theory presupposes that people are rational thinkers and free moral agents (Von Lampe, 2011:149). They can freely choose between alternative courses of actions to maximise their pleasure and minimise pain.

Therefore, by humiliating the criminal, it is intended to deter him or her and the general public from committing similar offences in fear that they would be punished. In the event of the above social restraints failing, severe penalties await the perpetrator unless there is some excuse or justification for the criminal behaviour. Punishment is not only aimed at preventing other potential transgressors from acting in a like manner, but also at improving the behaviour of the offender in question (Sheptycki, 2008:23).

As mentioned above, for this form of punishment to be effective, it must be imposed in public and or in full view of others so that humiliation can be seen. Often deterrence may be overlapping with rehabilitation and crime prevention.

5.3.3 Rehabilitation and Crime Prevention Theory

The problem posed by recidivism in South Africa makes a mockery of rehabilitation (Rakis, 2005:10). It clearly indicates that offenders are released from prison without being rehabilitated. According to Champion (2001:17), rehabilitation is a philosophy of corrections that promotes educational, vocational training and skills for criminals to bring about reform of criminals and assist to integrate them into society to lead a productive and conforming life. However, Tang (2015:42) describes rehabilitation as offender assistance programme whereby offenders are provided life empowerment training opportunities and spiritual care in order to reduce the criminals' propensity to commit crime when they are released back to communities. The extent or success of the rehabilitation in this regard is largely dependent on the programmes offered to offenders. Zehr (2014:1) regards rehabilitation as an individual salvation that gives greater satisfaction to society than to the offender. It affords the offender the second chance in life to live a sensible life with others. The main objective of rehabilitation is to break the cycle of crime (Muntingh, 2005:4).

Rehabilitation is a career assistance intended to empower offenders so that they can once again be economically active. It is designed to change criminals into law-abiding citizens.

The White Paper on Corrections in South Africa (South Africa, 2005:36) states that rehabilitation refers to some of the following:

- Acceptance of responsibility and accountability for the crime;
- Separating the offender from the offending behaviour;
- Changing criminal behaviour and social circumstance that promote criminality;
- Instilling positive social values and responsibility;

- Addressing offenders and the causes of criminal behaviour;
- Empowering offenders through life and other critical training and skills;
- Conducting needs analysis and risk assessment of offenders; and
- Introducing the offender to the communities (social integration) by providing additional support structures to avoid recidivism.

In the process of rehabilitation, the criminal is exposed to a variety of interventions upon whereby a criminal is empowered and restored to the normal law abiding citizens' status (Chin & Dandurand, 2012:149). Integration is a philosophy that promotes programmes that lead criminals back into their community. There are numerous integrative programmes available to criminals of all types, including individual and group counselling and provision of social services. After rehabilitation, an offender is regarded as being totally transformed to a person prepared for reintegration into the community (Chapman & Murray, 2015:50).

The advantage of rehabilitation is that it can promote reintegration into society and restorative justice (Muntingh, 2005:5). Successful reintegration is largely dependent on repentance and the ability to restore the violated order. Restorative justice in sentencing aims to re-address customary laws, victim neglect and alienation (Von Hirsch, Roberts, Bottoms, Roach & Schiff, 2003:2). It focuses on holding offenders responsible and supports the compensation of victims for their losses through restitution. This process is noted in the South African Law Commission (1997:5) as central to the notion of restorative justice. The way of addressing crime in society places emphasis upon the reparation rather than retribution. Chapman and Murray (2015:47) aver that more weight should be placed on restorative justice as it attempts to extend a helping hand on the victims especially in South African criminal justice system. This will make it more credible in the eyes of the communities.

However, Dissel (2008:27) argues that the available data on recidivism is an indication that the ex-offenders that are released back into society are not fully rehabilitated. This is evidenced by the fact that once many are back into the communities, they re-offend.

5.4 COUNTERFEIT INVESTIGATION PROCESS

Steinberg (2015:12) argues that the battle against crime was a lost cause from the beginning as crime got a head start over enforcement. Enforcement is steps behind because it entered an environment in which the odds are against it. Crime is an act or omission forbidden by law and punishable by a fine, suspension or imprisonment or both. To solve crime, a criminal investigation is conducted to establish the truth. In majority of counterfeit cases, tip-off information is received from sources via either phones, emails or even walk-ins. According to Sammons (2012:7), counterfeit investigation is informed by a Locard exchange principle that says physical contact with the scene will leave traces. This makes it possible for an investigation process to discover such traces.

A criminal investigation is the process of discovering, collecting, preparing, identifying, and presenting evidence to determine what happened and who is responsible for the committed crime (Bennet & Hess, 2004:4). It involves the practice of instituting judicial proceedings that are associated with courts of law (criminal or civil) and other quasi-judicial processes. During the process, the application of science in investigation is embarked upon in order to answer questions emanating from unresolved issues (Bertino, 2012:9). Even the most cautious criminal will leave or deposit up traces and identifying material that will assist to connect them to the scene (Barrow & Rufo, 2014:146). This emphasises the need to properly preserve a crime scene. In the process of conducting criminal investigation, activities such as observation surveillance and or inquiry are conducted during different phases in order to collect information concerning an alleged crime or incident (Dutelle, 2011:4).

During the investigation process, the investigator engages in pursuit of information based on leads and evidence associated with a particularly defined criminal act to identify and apprehend offenders for prosecution (Monckton-Smith, Hart & Webb, 2013:45). This demands a systematic approach that will ensure that the counterfeited product is identified and correct people are arrested. Devery (2010:393) asserts that investigation is conducted with the belief that the trademarks of perpetrators can be learned by carefully examining their characteristics. In conducting investigation, all the

available information about a crime and a crime scene are analysed to discover facts (Stelfox, 2009:126).

Investigation is conducted with the objective to identify the crime, gather evidence, individualise the crime, arrest the criminal, recover the stolen property and involvement in the prosecution process. Van Rooyen (2013:13) states that the objectives of investigation are to:

- Determine whether a crime has been committed;
- Legally obtain information and evidence to identify the responsible person;
- Arrest the suspect;
- Present the best possible case to the prosecutor; and
- Recover stolen property - This serves partly as restoration to the victim (Gilbert, 2007:192).

In the process of investigation, physical surveillance may be deployed to gather evidence of the crime. O'Hara and O'Hara (2003:228) are of the opinion that physical surveillance may best be defined as the surreptitious visual observation of people, their vehicles and premises. A surveillance action can be described as the purposeful, planned and systematic process used by investigators in order to obtain reliable information about a person, organisation and place to satisfy a particular investigation. Gilbert (2007:382) argues that surveillance is a secretive, close watch kept over persons, objects and locations. It should be conducted as soon as the identity of the suspect has become known but where there is still lack of evidence in effecting the arrest (Gilbert, 2007:182). Therefore, physical surveillance can form part of the investigation before the suspect is arrested. Lee (2004:98) suggests the following three basic types of surveillance:

- Mobile: Conducted either on foot or using a vehicle;
- Stationary: Conducted from a fixed place; and
- Electronic: Conducted using technical listening equipment and cameras to keep subjects under surveillance.

In counterfeit investigation process, the public or private investigators have to present the offending goods for examination by experts who represent the brand holders. This will mean that chain of custody of everyone who had an item of evidence in his or her possession must be maintained (Newton, 2008:2). Chain of custody as put by Barrow and Rufo (2014:145) ensures continuity of possession as evidence will need to be marked and tagged properly so that cases are not lost in court. Once the case is disposed off, stolen property should be restored to the lawful owners (Barrow & Rufo, 2014:145). Van der Westhuizen (1996:7) indicates that the recovery of stolen property is twofold in nature:

- To restrict the victim's losses to a minimum; and
- To present the recovered property as evidence with evidential value at the trial.

The brand holders or their representatives and or private investigators conduct test purchases masquerading as buyers. They purchase the alleged counterfeit goods in order to prove that what they have bought is actually counterfeit and not originals. The vendor would have issued a receipt as proof that the goods come from the shop after they were analysed and confirmed to be trademark counterfeit goods. The receipt, test result report and the offending goods would serve as evidence in court proceedings to prove counterfeit. Often they make use of surveillance that span for a period before engaging on the operations. Van Rooyen (2001:89) states that physical surveillance operation is conducted secretly on the target and must blend with the environment and should be abandoned immediately the target becomes aware. This will be in compliance with the due process doctrine that says police conduct in obtaining evidence and securing a conviction should be within the parameters of the law and if not they should be discontinued (Sharpe, 1996:180). Test purchase and evidence analysis provide the court with sufficient evidence to prosecute the suspects.

5.4.1 Test Purchases: An Analysis and Interpretation of Evidence

During test purchases, investigator and brand owners or holders perform a fact-finding work of analysis and verification of information on offending goods. Flick (2009:9) asserts that during analysis, the suspicious goods is classified into one category and a

name is allocated to the category. Identification is an analytical classification process by which objects with similar properties are placed into a category or group because they share a common source. Identification is carried out with the intention to establish the fact that an item belongs to a class, group or design features of an item with a focus on aiding the investigation (Jackson & Jackson, 2004:339).

The next step of identification is individualisation process. During the individualisation process, the evidence with individual characteristics can be positively individualised with a high degree of probability as originating from the specific source only (Swanson, Chamelin & Territo, 2003:68). In addition, Lee, Palmbach and Miller (2007:183) confirm that the individualisation process relies on a comparison testing of a minimum of two items. It demonstrates that a questioned piece of physical evidence and a known sample have a common origin by revealing the individuality and uniqueness of an item through examination to show that no other item is exactly like the one in question (Newburn, Williamson & Wright, 2009:665). The purpose is to confirm whether or not the goods are counterfeit. If counterfeit is confirmed, the complainant must file a complaint with the police. In a case of counterfeit trademark, the brand owner or holder must file a certificate confirming that intellectual property rights subsist, provide and attach proof of the subsistence of copyright. The next step that an inspector (From a rank of a sergeant and higher in the SAPS) should do is to apply for a search and seizure warrant and conduct a raid. During the raid, an inventory of the goods must be prepared, hand deliver seizure notices to the suspect and the brand owners or holders and the police and brand owners or holders should cause the seized goods to be moved to a warehouse/depot that is declared by the government (Dean, 1998:41-42). The brand owner or holder must institute civil and or criminal action within a statutorily stipulated period (3 days) in terms of Section 9 of the Counterfeit Goods Act 37 of 1997. Once the case is lodged, the state has ten days to inform the suspect and a further ten days to institute criminal proceedings against the suspect.

By conducting test purchases, this shows that the information that goes against the traditional reactive approach to policing into action-oriented policing is pursued (Osborne

& Wernicke, 2003:71). The main aim of conducting test purchases is to obtain admissible scientific evidence of counterfeiting. Admissibility of evidence or information” refers to evidence or information that meets specific criteria and standards for it to be admissible in court. The court prescribes that evidence or information must be both relevant and material to the case and must be subject to certain legal prescriptions. In line with the above, Lushbaugh and Weston (2009:5) and Van Harten (2009:1) mention the fundamental requirements that will be considered by the court in deciding on the admissibility of evidence as being reliability, originality, authenticity, legality of evidence, and the best evidence rule.

Test purchases are evidence based proof to protect against any litigation that can be brought in later by the suspect or accused for unlawful search and seizure, destruction and or even arrests.

5.4.2 Proof and Standard of Evidence

Gilbert (2010:52) defines evidence as a personal account of witnesses and information or facts that are used to arrive at a reasonable conclusion. In support of the above, Monaghan (2015:1) says the concept of evidence is a means of establishing and providing the truth or, for that matter, the untruth of any fact that is alleged. This means that evidence is what will be adduced to prove the authenticity or otherwise of the product in question.

Schwikkard, Van Der Merwe, Colliers, De Vos and Van Der Berg (2009:17) classified the concept evidence into the following types:

- direct evidence (eye witnesses, victims); and
- indirect (circumstantial) evidence (a witness placing the accused on the scene with no other possible suspect present and proving or disproving a fact directly).

Evidence is any relevant exhibit, verbal or written testimony, which is produced during quasi-judicial or court proceedings. For instance, evidence with limited behaviour dissimilarities was considered essential for convicting a perpetrator on a charge of

armed robbery in the case of *Nduna v S 076/10 [2010] ZASCA 120*. In addition, the case of *S v Legote 2001 (2) SACR 179 (SCA)* shows the usefulness of probative value of evidence as an ideal probative link in forensic investigations based on fact and not opinion (Siegel, Saukko & Houck, 2013:157).

In order to conduct investigations, the police may want to search people, their cars, and their homes. In order to do so, they must under normal circumstances obtain a search warrant, a judicial order, based on probable cause, allowing police officers to search for evidence in a particular place, seize that evidence, and carry it away for analysis in terms of Section 6 of the Counterfeit Goods Act 37 of 1997. Again, a valid search may be conducted without a search warrant in terms of Section 5(2) of the Counterfeit Goods Act 37 of 1997.

The following are examples of when police may conduct a legal search without a warrant being issued:

- Stop and search - When an officer does not have probable cause to arrest but his or her suspicions are legitimate and it is expected that a search warrant may be granted if applied for at a later stage.
- Contraband can be seized without a warrant if it is plain view. Sady (2012:25) highlights that plain view doctrine is an American legal concept derived from the landmark cases decisions, namely, *Coolidge v New Hampshire 1971*, *Arizona v Hicks 1987* and *Horton v California 1990*. It means goods may be seized in plain view of the police who have a right of search. This is unpredictably locating evidence without possessing prior knowledge that such evidence existed in that location and without executing any physical search to find it. It occurs during the normal search when evidence not mentioned in the search warrant surfaces and is seized. This applies to visual observation without a search warrant (Jarrett & Bailie, 2009:34).

Turvey (2012:349) concludes by confirming the importance of evidence and state that the outcome of any case can ultimately depend on evidence before a magistrate or judge who will sort out the merits of the claims and defences and render judgment.

5.5 ADJUDICATION OF COUNTERFEIT

To fight Intellectual Property violations, South Africa also makes use of a National Crime Prevention Strategy (NCPS) of 1996 (South Africa, 1996b). The NCPS acknowledges a high rate of crime and attempts to prevent crime through a strategy that uses a four-pillar approach.

To attend to the above, adjudication process should conjure up with the National Development Plan's ten critical actions among others (South Africa, 2011:34):

- Strengthening of the Criminal Justice System and improving community involvement;
- Professionalization of the Police Service;
- Demilitarisation of the Police Service;
- Building safety using an integrated approach; and
- Prosecute corruption.

During adjudication of counterfeit, the police and other law enforcement officials make use of investigative information contained in the investigation report to determine whether a case has been made or not. The complainant has to support the report by demonstrating to the courts that their goods mark had been made distinctive through its use and that there is reputational damage attached to its use (Bian & Veloutsou, 2007:212).

In South Africa, the Counterfeit Goods Act 37 of 1997 makes the following violations offenses:

- The possession of infringing goods in the course of business;

- The manufacture, making or production of infringing goods for use which is not of a private or domestic nature;
- The selling, hiring or exchanging of infringing goods;
- The exhibition of infringing goods for the purposes of trade;
- The distribution of infringing goods for the purposes of trade, or any other activity or action which could cause prejudice to the rights of an intellectual property owner; and
- The importation of infringing goods into or through the Republic of South Africa, with the exception of doing so for private or domestic use.

The rights of the accused must be upheld and respected at all times during the policing of counterfeit crime. Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996 makes provision for the Bill of Rights explained at Section 7 below:

- Section 7(1) asserts the Bill of Rights as the cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.
- Section 7(2) asserts that the State must respect, protect, promote and fulfil the rights contained in the Bill of Rights.
- Section 7(3) asserts that the rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill.

The right to equality in South Africa is protected by Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996, as outlined below in terms of Section 37 (5) of the Constitution (South Africa, 1996a). The latter stipulates that everyone has inherent dignity and the right to have their dignity respected and protected. Human dignity is the source of a person's innate rights to freedom and to physical integrity from which a number of other rights flow, such as Section 12(1), which states that everyone has the right to freedom and security of the person, which includes the right:

- not to be deprived of freedom arbitrarily or without just cause;

- not to be detained without trial;
- to be free from all forms of violence from either public or private sources;
- not to be tortured in any way; and
- not to be treated or punished in a cruel, inhuman or degrading way.

During adjudication process, the constitutional rights of the accused must be respected and upheld to prevent violation that may have catastrophic effect to the case and prosecution.

5.6 THE PROSECUTION OF COUNTERFEIT CRIME

Counterfeit crime is a fraudulent manufacturing of products. Kinnes and Newman (2012:33) define counterfeit crime as an unlawful and intentional misrepresentation that results in actual or potential prejudice to another. Such crime would need investigation that is aimed at instituting court proceedings (criminal and or civil) to be conducted where some or other scientific knowledge is applied to a legal problem. This happens in the sense that goods experts would need to conduct tests on the alleged offending goods to confirm that the goods are indeed counterfeited.

Practically, when the right holder finds out that their rights have been violated upon in a manner that is unlawful. According to the Counterfeit Goods Act 37 of 1997, he or she may contact the police or other competent law enforcement agencies such as the DTI inspectors, or Customs and Excise officials from SARS for investigation. The right holder should be prepared to provide the police with all the available information on the infringement so that a warrant of search may be sought and prosecution proceedings initiated. If the brand owner or representative believes that the goods may be hidden or destroyed by the suspect, he or she may apply for a preservation order to obtain and preserve evidence of counterfeit so that they do not get destroyed and or hidden away by the counterfeiters. This order will enable the police to conduct search and seizure without a warrant pending application of a warrant of search and seizure at a later stage (Mogase, 2011:65).

Article 61 of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement requires countries to provide for criminal procedures and penalties in cases of wilful trademark counterfeiting and copyrights piracy on a commercial scale (WTO, 2016; TRIPS, 1995). It recommends that the sanctions should include imprisonment or monetary fines, which are sufficient to deter perpetrators from infringement. In appropriate cases, seizure, confiscation, forfeiture, and destruction of the infringing goods should be done to prevent perpetuation of this crime.

5.6.1 Civil Procedure

In South Africa, civil proceedings are regulated by Civil Procedure Evidence Act 25 of 1965 (South Africa, 1965), and this will operate in conjunction with the Counterfeit Goods Act 37 of 1997. In terms of the Counterfeit Goods Act 37 of 1997, the brand owner or holder has a choice to follow civil and or criminal proceedings. In civil proceedings, summons are used and the advantages are that the respondent will compensate for the damages that the applicant may have suffered as a result of selling counterfeited goods that infringed on the applicant products. The remedies could range from interdicts either interim or final, or delivery up as and an order for destruction of infringing goods, *Anton Pillar order* which is a mandatory injunction coupled with inspection and delivery orders to seize all tools used in the infringement, payment of royalty in lieu of costs and damages suffered because of trading in counterfeited goods. The advantage of this process for the brand owner or holder is that the level of proof is on the balance of probability, which is far lesser as compared with a level of proof in a criminal case.

For the case to hold, the applicant brand holder must have suffered actual or potential prejudice owing to the infringement. The victim must have responded to the untruth and, as a result, must have suffered actual or potential prejudice (Hamilton, 2016:57). The advantage of pursuing civil matter is that the compensation tends to be more. However, due diligence and caution should be exercised by brand owners or holders and the police as improper use of the procedure in search and seizure of suspected counterfeit goods can lead to further litigation on the parties involved in civil suits by the suspects in terms of Section 7 (4) (a) (b) and Section 17 of the Counterfeit Goods Act 37 of 1997.

5.6.2 Criminal Procedure

A crime is an act in violation of the law and it is punishable by the State. The broader use of the term includes infractions and misdemeanours. Crimes are committed against either people or businesses (Johnson, Guerette & Bowers, 2014:551). Therefore, any act for which punishment has been prescribed is a crime. This applies to the Counterfeit Goods Act 37 of 1997, which makes counterfeit a property crime (South Africa, 1997a). The case must be proved beyond reasonable doubt to convict the accused in a criminal case in court.

According to Joubert (2013:46), criminal act consists of the following four elements:

- Legality - implies that conduct is regarded as being of a criminal nature and defined either by common law or by statutory law;
- The act must take the form of either a commission or an omission - conduct or an act;
- The statute provision which forbids the criminal act - unlawfulness; and
- Culpability (including capacity) is blameworthiness - It implies that the accused must have been criminally accountable while performing the unlawful act. Culpability requirements are either intentional or negligent.

In South Africa, counterfeit is a punishable crime under the Counterfeit Goods Act 37 of 1997 and brand owners or holders have a choice to follow the criminal and or civil procedure in litigating the matter. In a criminal case, the victim must lodge a criminal case within statutory framework of three days upon receipt of seizure notice from the police. The prosecutor must prosecute within ten days of receipt of seizure notice.

5.7 SANCTION

The inability of local communities to realise the commonly experienced problems leads to crime (Roberts & Gordon, 2016:49). This means that community awareness is critical in the fight against crime. Prevention is the chief and punishment should be appropriate and must inflict suffering upon an offender as an expression of the community's condemnation and disapproval of the offender and his or her conduct (Zastrow,

2000:21). Sanction must be applied to those who betray public trust and or break the law (South Africa, 2011:454). Punishment must make offenders to suffer other than cause them to enjoy; then the government would have succeeded in punishing the offenders (Rich, 2016:111). This is because the fear of crime will deter people from committing criminal acts. Terblanche (2011:225) underscores that deprivation must be linked with suffering to serve its purpose. According to Tang (2015:51), this will assist to curb the problem of repeat offending by sending a strong message to society that crime does not pay.

In South Africa, there are three kinds of sentences available to the court such as incarceration, fine and suspended sentence (probation). In countries like Italy, Cambodia and Syria, counterfeit crime was not regarded as a criminal offence until recently (Park, 2010:39). Syria only enacted the Law in 2009, which made counterfeit crime both civil and criminal offence that carry penalties of as much as ten years imprisonment and fines with equivalent of millions of rands (Park, 2010:39).

Again, wilful blindness is applied in the USA, which applies when it can be proven that a person must suspect wrongdoing and deliberately fail to investigate. This is a type of foreseeable hazard for businesses, which is included in the reporting requirements of the Sarbanes-Oxley Act of 2002. The Act needs business to report risk that can extend to counterfeiting and product diversion. For instance, in the USA, adaptability of laws are more efficient in closing gaps to move appropriately to address the overall counterfeit threat (i.e. 21 US 331). This USA Act makes it illegal to possess the tools and mechanism to make counterfeit. That being said Act 18 USC 2320 is used more often since it has a bigger stick of increased penalties. This is in similar footing with South African Counterfeit Goods Act 37 of 1997.

Apart from a Court Order declaring the counterfeit goods in question to be forfeited to the State or the goods packaging and tools used in their manufacture to be destroyed, the Counterfeit Goods Act 37 of 1997 also introduces strict penalties, which may be imposed upon counterfeiters in the event of their conviction. Any person convicted of an

offence in terms of the Act will, in the case of a first conviction, be punishable by a fine in respect of each article or item, which fine may not exceed R5000.00 per article or item or imprisonment for a period that may not exceed three years, or both. In the case of a second or subsequent conviction, the fine in respect of each article or item may not exceed R10 000.00 per article or item, while the imprisonment-term may not exceed five years in terms of Section 19 (1) (a) (b) of the Counterfeit Goods Act 37 of 1997.

5.7.1 Incarceration

It is only the courts that can impose imprisonment in terms of Section 276 (1) (b) (h) (i) of the Criminal Procedure Act 51 of 1977. Section 35 (2) of the Constitution of the Republic of South Africa Act 108 of 1996 stipulates that inmates have the right to conditions of imprisonment that are in line with human dignity. If laws do not serve the public interest, they ought to be changed rather than disregarded (WIPO, 2009b:3). WIPO (2012:533) asserts that the multiplicity of purpose lies behind the imposition of sentencing dilemma. The principle is that any violation that is harmless to society deserves probation or fine and any threat to the moral fabric of society deserves imprisonment. In terms of Section 276 (1) of the Criminal Procedure Act 51 of 1977, sentences that can be passed upon a person convicted of an offence among others can be imprisonment or correctional supervision. However, Coetzee (2003:4) argues that the problem with imprisonment is that it makes prisons overpopulated by increasing prison overcrowding, which in turn increases government expenditure.

Thinane (2010:43) defines the concept of imprisonment as much more than merely a period of isolation from the community during which a prisoner is deprived freedom. According to Durose, Cooper and Snyder (2014:15), the concept of incarceration classifies the person as recidivist when an arrest results in imprisonment.

However, in South Africa, the situation of overcrowding is severe as prisons are filled beyond their capacity. Overcrowding generates tension and competition of prison resources (Agboola, 2016:20). Despite tough criminal penalties, counterfeit scheme continues to grow fast.

Agboola (2016:21) highlights that the consequences of overcrowding have forced the Department of Correctional Services to explore alternatives to imprisonment such as the following:

- Reduction of length of detention of remand detainees;
- Conversion of custodial sentence to community correctional supervision;
- Introduction of electronic monitoring;
- Effective parole system;
- Creation of additional bed space by upgrading the facilities and considering option of private prisons, among others.

The government should also explore other methods of punishment that fall short of incarceration to alleviate prison overcrowding problems methods such as probation, naming and shaming, fines or restoration to the victims. However, Levi (2010:130) warns that if offenders perceive sentences to be lenient, then there must be a cause for reflection on sentencing practices. Incarceration is intended to teach a criminal a lesson so that he or she must not commit crime once sentence was served (Muntingh, 2005:2).

5.7.2 Civil Action by Property Rights Owners

Civil action is based on the notion that perpetrators are extremely sensitive to the threat of a criminal sanction with its impact. Therefore, they rather settle the disputes without having to face incarceration (Siegel, 2010:413). Although most counterfeiting allegations are brought through the criminal courts, counterfeiting that violates patent, trademark, or copyright laws has resulted in civil lawsuits.

Each of these goals is in operation when a person is sentenced. Sometimes one policy or goal becomes popular and for a while dominates sentencing considerations. Currently, the supposed failure of rehabilitation and a generally conservative outlook make deterrence and incapacitation the primary sentencing goals (Muntingh, 2005:4). Deterrence strategies involve detecting criminal violations, determining who is responsible, and penalising the offenders to deter future violations. Deterrence systems

are oriented toward apprehending violators and punishing them rather than creating conditions that induce conformity to the law.

Brand owners can sue counterfeiters in civil court for damages and injunctions, and the government can sue counterfeiters in criminal court, where the penalties include fines and imprisonment or both. The advantages of making use of civil proceedings are that actual damages, lost profits and costs can be recovered (Bumatay, 2015:343). Moreover, the offending goods can be destroyed and this is likely to put counterfeiters out of business (WIPO, 2012:565).

5.7.3 Imposition of a Fine

Section 276 (1) (f) of the Criminal Procedure Act 51 of 1977 as amended is succinct about imposition of a fine as a form of punishment. Fines are prevailing and most favourable sentences when it comes to economic crimes (Levi, 2010:127). A fine is described as an individualised punishment often utilised by the courts as an option to incarceration and is usually handed down by the court and should be in proportion to the offence committed. The fine appears, more often than not, to be applied to offences which are perceived to be less serious. In determining a figure, a fine must be compared to the offence committed and how money will affect the offender's ability to pay. As a norm, the perpetrator of crime who pays a fine is exempted from serving a prison term as a fine is regarded as a restoration after a prejudice was caused (Terblanche, 2011:232).

On the contrary, Hargovan (2015:55) argues that although many people believe that imprisonment will reduce crime, which could not be true as there are no visible impact on crime reduction and what is experienced in South Africa is high rate of recidivism instead. A fine could be an option in promoting restorative justice.

Restorative justice aims to orientate criminals towards restorative justice values such as victim empathy, making amends, and taking responsibility for the harm caused. Restorative justice is described as a restorative process in which the victim and the

offender and where appropriate any other individual or community member affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator (Sliva & Lambert, 2015:78). Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behaviour (Bartley, 2010:26). According to UNODC (2006:5), the objectives of restorative justice are:

- Supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance;
- Repairing the relationships damaged by the crime, in part by arriving at a consensus on how best to respond to it;
- Denouncing criminal behaviour as unacceptable and reaffirming community values;
- Encouraging responsibility taking by all concerned parties particularly by offenders;
- Identifying restorative, forward looking outcomes;
- Reducing recidivism by encouraging change in individual offenders and facilitating their integration into the community; and
- Identifying factors that lead to crime and informing authority responsible for crime reduction strategy.

However, Sliva and Lambert (2015:78) counter-argues that this has a tendency of promoting repeat offending as it does not contribute to the process of desistance from offending. On the contrary, a fine serves as individual deterrence and does not have any incapacitative effect (Van Der Merwe, 1991:4).

Chapman and Murray (2015:47) argue that Restorative Justice Interventions on the family of the victim is more important than punishing the offenders. It aims to rebuild the relationships that were damaged by crime in order to establish justice for everyone involved and also plays a role in healing the victim and community. Levi (2010:129) provides another option, which is naming and shaming and says people who care about it are those whose social lives are embedded in communities and those who fear that they may be excluded economically from markets.

5.8 CONCLUSION

As is the case with South Africa, punishment is used as a form of deterrent to crime even in all other countries. The theories of punishment explain the purpose punishment will serve on criminals. South Africa has legislations that punish criminals who engage in counterfeit such as the Constitution of the Republic of South Africa, Act 108 of 1996, Counterfeit Goods Act 37 of 1997, Trademarks Act 194 of 1993, among others. Counterfeit can be prosecuted through civil or criminal procedures as prescribed by the Constitution of the Republic of South Africa, Act 108 of 1996 and the Counterfeit Goods Act 37 of 1997. The Counterfeit Goods Act 37 of 1997 further prescribes admissible investigation processes, which further prescribes how the goods are to be handled after search and seizure had been conducted (continuity of possession) to avoid contamination of evidence. As is the case with many cases evidence has to be sought. In counterfeit crime, a sample of the alleged offending goods have to be tested scientifically by experts to proof that they are counterfeit so that evidence can be brought before the courts. However, in many instances, the SAPS members do not abide by the Counterfeit Goods Act 37 of 1997.

In South Africa, the acceptable sanctions for crime range from imprisonment, probation, civil action and payment of a fine. Once the criminal or defendant has been found guilty, the offending goods, tools, and instruments used in the production of counterfeit goods will be ordered to be destroyed by the brand holders. This is an attempt on the brand holders' side to discourage counterfeit from progressing further.

CHAPTER SIX: RESEARCH METHODOLOGY

6.1 INTRODUCTION

In this chapter, the methodological road map of this study project is outlined. A detailed explanation and justification of design, population, sampling, data collection and data analysis techniques used are given. The chapter concludes by providing assurance on compliance related to ethical issues and highlighted the challenges experienced during the course of the study.

6.2 RESEARCH DESIGN

A research design is a mapping strategy on how the researcher intends to conduct the research of the entire study. According to Flick (2011:65), it assists in clearly stipulating what the researcher wishes to investigate by choosing the best way to reach a reliable conclusion. Similarly, Franklin (2012:54-57) concurs that a research design provides an overarching structure for the research procedures, meaning the whole process of collection and analysis of data. A research design is an in-depth and detailed plan that guides the researcher on how data should be collected and analysed to achieve the objectives of the study.

The researcher conducted the research based on an empirical design. Mouton (2001:133) asserts that empirical design reveals factual discoveries or confirms the existing phenomena. Empirical design was appropriate for this research as there was little information in literature that could answer the research questions and achieve the stated research objectives. The researcher used this design to obtain credible data from respondents through observation, survey and one-on-one interview strategy. The researcher found new knowledge by making use of the operational people who assist in the policing of counterfeit such as SAPS members, prosecutors from NPA, the DTI officials, brand owners/holders/representatives and attorneys.

6.3 RESEARCH APPROACH

According to Miles, Huberman and Saldana (2014:11) and Welman et al. (2005:188), qualitative study approach covers an array of interpretive techniques, which seek to describe, decode, and translate information to get a meaning of naturally occurring phenomenon in the social world. Similarly, Mouton (2013:148) points out that the focus is to synthesise the opinions and to enhance understanding of the phenomenon under study. Qualitative researchers are interested in describing events, persons, phenomenon scientifically without using numerical data (Mc Millan & Schumacher, 2001:135).

In this study, the researcher complied with the above by conducting fieldwork such as interviews, observations and undertaking extensive literature study.

6.4 RESEARCH METHOD

According to Kumar (2011:45), a research method connotes either epistemological research foundation, which includes the activities that lead to acquisition and interpretation of the data received from sources. Research methodology is a method the researcher employs in guiding the research by directing the acquisition of data, arranging the data in logical relationships, setting up means of refining raw data and continuing the approach so that the meaning can be manifested. In understandable terms, research methodology is the appropriate method that was used for the study to answer the research questions and accomplish the stated research objectives.

The entire study made use of qualitative research method, which is a research that follows inductive style as argued by Creswell (2014:4). According to Matthews and Ross (2010:142), qualitative data consists of detailed description of situations, events, participants or people, interactions, and observed behaviours from people to gain holistic picture of the phenomenon being studied. This method further uses direct quotations from participants about their experiences, values, thoughts, attitudes, and convictions. The research was naturalist in nature and the research was conducted in a normal life situation that was a mirror of daily living of the people.

A qualitative approach appeared to be the best choice for this study as it prompted the participants to explain their practical experiences by offering their opinions and viewpoints about the problem of policing counterfeit and piracy. The primary nature of the relationship between the observer and the subject allowed an in-depth study of the whole situation. Gray (2014:181) argues that qualitative research lacks reproducibility as it is confined to one context and it does not intend to generalise the findings as opposed to quantitative studies. However, the findings of this study could be transferable to other studies on the policing of counterfeit.

6.4.1 Descriptive Research

According to De Vos (2003:110), descriptive research commences with a well-defined objective and is conducted in order to describe the phenomenon accurately. Silverman (2000:78) argues that descriptive research is based on the current situational issues and is intended to answer questions about the phenomenon being studied. The aim of descriptive research is probing the plotting of situations that are describing what happens in terms of behaviour (Rosnow & Rosental,1999:15).

In this study, the researcher gained an understanding of and formulated extensive descriptions and explanations of the problems on the policing of counterfeit goods. This is the type of the research that is frequently used in criminal justice studies (Champion, 1993:59). It focuses primarily on specific details of a situation by asking questions such as how in relation to the topic and the objectives under study.

Babbie and Benaquisto (2010:81) argue that descriptive design serves the following purpose in research:

- provides a comprehensive and accurate sketch of the phenomenon under study;
- exposes new data;
- creates set of categories or type of classification;
- clarifies a sequence of steps or stages;
- documents a causal process or mechanism; and
- reports on the background or context of a situation.

According to Gray (2014:36), the other uses of descriptive research are that it can be used to prove accurate profile of a group; describe a situation, process, event, mechanism or show how things are related to each other, provide verbal or show a picture, and generate information that will stimulate new possible explanations. It can assist to provide background information or context and explain specific sequences, and phases or steps. Based on these explanations, descriptive research managed to answer the research questions of the study. In addition to descriptive research, the researcher supplemented the design by using explanatory research in order to reach reliable findings.

6.4.2 Explanatory Research

The focus of explanatory research is to explore a new topic or theme or concept which little is known about or it has not been researched before. Explanatory research is characterised by providing answers to questions related to “what” and “how” in the research. This research design is often used when the researcher seeks to determine the motivation and rationale behind a particular behaviour (Gray, 2014:30). This means the researcher find out how people get along in the setting under issues that concern them and what meaning they provide to their actions (Bachman & Schutt, 2007:11). Furthermore, explanatory research is characterised by the fact that significant factors may be discovered, assessed and described in detail to make sense to the reader (Champion,1993:57).

In the South African context for instance, little is known about the dangers posed by counterfeit goods in the economy and in people’s health as well as lives. Explanatory research answered the aim of this study by explaining how counterfeit crime is policed in South Africa. In addition, the study explored how effective and efficient policing of counterfeit crime would contribute to eradication and or drastically decrease incidence of counterfeit crime and thereby influence business confidence and contribute to job creation in the country.

6.5 PILOT STUDY

According to Grinnell and Unrau (2008:336), and Mason and Bramble (1997:35), a pilot study is a small-scale version of the proposed study, which uses a small sample that is similar to the final sample. In order to undertake scientific research on a specific problem, it is prudent that the researcher understands the background and proper knowledge about the scientific research. In general terms, a pilot study serves a purpose towards addressing the said issue. Mouton (2001:34) warns against taking the main study before conducting a pilot study. The author advocates for a pilot study that does a pre-test on the research instruments. In addition, Welman and Kruger (2001:141) argue that a pilot study is intended to detect possible flaws in the measurement standard and procedure and time limits to identify unclear items and to allow the researcher to notice the participants' behaviours that may impact on the study. It is also meant to test the interview schedules and or mailed questions and discover the soundness of the methodology used and make modifications where needed.

It is against this background that in this study the researcher conducted a pilot study. This study was conducted by means of pre-testing the interview schedules at the Pretoria and Germiston specialised commercial crime Units. The participants chosen to pre-test the interview schedule were not included in the main study. Three participants were selected to participate in the pilot study instead of the initially five participants that were planned to be on the study. The number of the participants had to be reduced as the Specialised Commercial Crime Units have experienced loss of members in the Counterfeit Task Teams within the Specialised Commercial Crime Units. Ultimately, the participants comprised as follows; one participant from SAPS Pretoria Specialised Commercial Crime and two participants from SAPS Germiston Specialised Commercial Crime Unit. Finally, after the assessment and changes in terms of the responses from the pilot study, the main study was undertaken.

Mailed questions were pre-tested on the crime prevention members in four (4) provinces. The questions were emailed to the members and they had them fully completed. The members who were selected to complete the mailed questions were not made to form

part in the main study. The members who partook in the testing were as follows; Gauteng four (4), Mpumalanga two (2), Kwa-Zulu Natal three (3), and Western Cape were two (2) members.

After receiving feedback from the interview schedules and mailed questions, the researcher effected changes to the questions on both interview schedules and mailed questions as an attempt to remove errors and or misunderstandings.

6.6 POPULATION AND SAMPLING

According to Babbie and Mouton (2010:174), target population is a group of people who share a common denominator that is of interest to the researcher. Population can also be described as the theoretical, specified group of study elements (Maxfield & Babbie, 2005:208). In any empirical research study, the participants should be people who are experienced and or who can relate to the phenomenon that the researcher wishes to explore. However, for the fact that population is a large entity and it is not every person who can be a participant in the study, Welman and Kruger (2001:41) suggest that population should be limited to a reasonable size to make studies feasible. Therefore, in this study, all the participants mentioned in the sampling section represented the population of interest. However, the reader must note that time and cost often only permit researchers to collect data from a limited number of participants which in this case is referred to as sampling.

A sample is defined as a model of the population or a subset of the population that is used to generate information about the entire population (Bickman & Rog, 1998:101). In summary, Polit and Beck (2006:278) assert that sampling involves a process of selecting manageable participants from a population that will represent the entire population. Therefore, in this study, purposive sampling was used to select SAPS Specialised Commercial Branch members, SAPS crime prevention members, the DTI members, prosecutors from NPA, attorneys and brand owners/holders/representatives. According to David and Sutton (2011:232), purposive sampling is a type of non-probability sampling in which the units to be interviewed and or observed are selected on the basis of the

researcher's judgment concerning their most usefulness. In purposive sampling, the researcher uses his/her skill, knowledge, experience, and opinion regarding which group of the population will be relevant to the research study.

Therefore, several issues were considered before the selection of the participants from the SAPS Crime Prevention members, the DTI members, prosecutors from NPA and the SAPS Specialised Commercial Branch. The researcher considered issues like duties performed such as whether the target participants work in the law enforcement component responsible for policing counterfeiting and piracy.

The researcher also used the snowball sampling method to choose attorneys and brand owners/holders/representatives (which will from now on be cumulatively referred to as brand owners) representing the various products and services in South Africa. According to Rubin and Babbie (2010:149), with snowball sampling as a non-probability sampling, the researcher does not know the exact location of the participants such as all brand owners that are representing various goods and services in the country. Similarly, Lichtman (2010:142) accentuates that with snowball technique, the researcher must identify participants with similar characteristics for the interviews. According to Snell (1991:35), snowballing entails asking each respondent who was interviewed to suggest another person who agrees to be interviewed. It is referred to as chain referral method of obtaining information from informants (Leedy & Ormrod, 2005:206; Waldorf & Murphy, 1990:113). The researcher managed to identify participants who met the requisite characteristics of being brand owners in the country for inclusion in the sample, and as soon as they were interviewed (those who were within a reasonable distance to the researcher), they then referred the researcher to others with similar qualification criteria. This was possible as they operate the similar business, have same interests of protecting intellectual property and counterfeit in the country as well as worldwide.

6.6.1 Demographic data of the participants

The first category of the participants was the SAPS Specialised Commercial Crime Unit's investigators who investigate counterfeit in the country. For the SAPS Specialised

Commercial Crime Unit in Gauteng, Kwa-Zulu Natal, Mpumalanga, and Western Cape provinces. The researcher conducted one-on-one (face-to-face) interviews with the designated investigators who police counterfeit crime in their respective provinces. The Gauteng Province has three Specialised Commercial Crime Units located in Johannesburg, Germiston, and Pretoria. In Johannesburg, it was discovered that the investigators who police counterfeit crime are only two (2) and the same situation was similar in Germiston and Pretoria Specialised Commercial Crime Units. Altogether, Gauteng Province has six (6) investigators who investigate counterfeit crime and all the investigators were interviewed. All of the participants were males and comprised of four (4) African males and two (2) white males. The participants had 11-15 years' work experience as counterfeit crime investigators and belonged to age group of 41-50 years.

In Mpumalanga Province, there were two (2) Specialised Commercial Crime Units based in Nelspruit and Middleburg. There was one (1) investigator in Nelspruit and two (2) investigators in Middleburg. All the three (3) investigators were interviewed. All the participants were males, comprising of two (2) Africans and one (1) white male. The two (2) Africans were of age group 31-40 years old and of 6-10 years' work experience. The one (1) white male is of age group 51-60 years old and of 26-30 years' work experience.

The Kwa-Zulu Natal Province has two (2) Specialised Commercial Crime Units situated in Pietermaritzburg and Durban. The Durban unit has five (5) investigators whereas the Pietermaritzburg unit has one (1) investigator. All six (6) investigators were interviewed. The participants were five (5) males and one (1) female. They were three (3) African males, one (1) Indian male, one (1) African female and two (2) white males. One (1) white male was of an age group of 51-60 years old and had 6-10 years' work experience. The other five (5) members belonged to the age group of 41-50 years old and had work experience of 6-10 years.

The Western Cape Province has two (2) units one in Bellville and the other one in George. The Bellville Unit has five (5) investigators who police counterfeit crime in the rest of the Western Cape Province and the George Unit has no investigators dedicated

to police counterfeit. All the investigators were interviewed. The participants comprised of one (1) white male, one (1) African female, one (1) Indian male, and two (2) African males. The age group range from 41-50 years and only two (2) of the males had 11-15 years' work experience. The other three (3) participants had 6-10 years' work experience.

The second category of participants were the SAPS crime prevention members working at cluster police stations close to the Specialised Commercial Crime Unit located in Gauteng, Kwa-Zulu Natal, Western Cape, and Mpumalanga provinces. A combination of one-on-one (face-to-face) interviews and mailed questions were used for this category using a snowball sampling method. The researcher distributed 400 questions to members in the four provinces. The questions were distributed per province as follows; in Gauteng was 200, Mpumalanga was 100, Kwa-Zulu Natal was 50 and Western Cape was 50 questions. The completed distributed questions were received as follows; Gauteng was one 113, Mpumalanga was 31, Kwa-Zulu Natal was 23 and Western Cape was 25. The overview of the distributed questions and and the received responses is depicted on the table below.

Distributed questions and responses

Province	Number of Distributed Questions	Responses Received
Gauteng	200	113
Mpumalanga	100	31
Kwazulu-Natal	50	23
Western Cape	50	25
Total	400	192

In addition, the researcher went to the provinces and conducted one-on-one (face-to-face) interviews with additional members in their respective provinces using a snowball sampling method. In Gauteng Province, 125 participants were interviewed from July 2017 to October 2017. In Mpumalanga Province, 84 participants were interviewed from

August 2017 to November 2017, In Kwa-Zulu Natal Province, 68 participants were interviewed from September 2017 to October 2017 and in the Western Cape Province there were 55 participants who were interviewed from October 2017 to November 2017. In this group, 332 police members were interviewed. They were comprised as follows; 229 males and 103 females. In terms of ethnicity, 148 African males and 80 were African females, 17 were Coloured males, 15 were Coloured females, 35 participants were Indian males and seven were Indian females, 21 were white males and nine (9) were white females.

The third category of participants comprised prosecutors who prosecute counterfeit and piracy crimes. Purposeful sampling was used to identify these prosecutors and altogether 14 prosecutors were interviewed as follows: Two prosecutors in Western Cape Province, three in Mpumalanga, three in Kwa-Zulu–Natal, and six in Gauteng Province. The demographic data was as follows; eight were females and six males. In terms of ethnicity, five were white females, and one white male, one Indian female, two Coloured males, one African female and four African males.

Another fourth category of participants who were interviewed was brand owners. A cumulative number of ten brand owners were identified through snowball sampling and interviewed. In Gauteng Province, seven brand owners were interviewed. In Kwa-Zulu Natal, it was one and in the Western Cape, there were two brand owners/holders/representatives interviewed. The researcher was informed by the brand owners that were interviewed in these provinces that they also service other provinces in South Africa. The brand owners in Gauteng also serve Mpumalanga Province, the two provinces are close to each other, and the majority of the brand owners are based in the Gauteng Province. Gauteng Province is a major economic hub of the country, and the majority of the brand owners have main offices in the province.

The fifth category of participants comprised members of the DTI who enforce counterfeit crime. The DTI is the custodian of the Counterfeit and Copyright Acts. Snowball sampling was used to identify the respondents and a total number of nine participants

were interviewed that is comprised of one Indian female, two Indian males, three African males, two white females and one white male. In Gauteng, there were four members interviewed and Mpumalanga had one member interviewed. Whereas in Kwa-Zulu-Natal and Western Cape provinces there were two members each who were interviewed.

Finally, the sixth category and last group of participants that were interviewed were the attorneys who in most cases legally represent the suspects or accused on counterfeit and piracy cases. Snowball sampling was used to identify the respondents and the number of participants who were interviewed was 21. They comprised of 12 African males, two African females, six White males, and one white female. They were interviewed in the provinces as follows; in Gauteng, there were ten and in Mpumalanga, only two members were interviewed. In Kwa-Zulu Natal, there were five and in Western Cape, there were four members interviewed.

6.7 DATA COLLECTION METHODS

Using the correct data collection methods ensured that the researcher was able to reach reliable findings. Creswell (2014:185) asserts that it is accepted that utilising more than one data collection method will ensure that problems associated with one strategy may be compensated for by the strengths of another strategy. In order to enhance validity, the researcher coupled literature with other data collection methods to make triangulation. According to Leedy and Ormrod (2001:105), triangulation involves the use of various methods and techniques for data collection in a single study. These multiple sources of data were used to collect data and to enable comparison of information with the view that they would congregate to answer the specific research question.

The choice of data collection for this study was categorised into literature, interviews and observations as explained below.

6.7.1 Literature

According to Jesson, Matheson and Lacey (2011:16), literature provides background context and assist in making decisions about what to study and what is the current state of affairs about the topic. It will reveal answers to the questions of what has been researched before, by whom and from what perspectives. The study of relevant literature is important in social science research as it provides adequate background information on the research question (Jesson, Matheson & Lacey, 2011:9-10). As supported by Rubin and Babbie (2011:143), the collection of information from literature sources is a valuable technique for defining the variables and concepts used in research and allows for content analysis to be conducted. It is through the literature review that the researcher understands contemporary views of different experts and or specialists on the selected subject matter. Furthermore, conducting a literature review enables the researcher to identify gaps in comparable research studies. To ensure that theories related to the study and literature are extensively covered in the study, the researcher consulted national and international literature such as peer-reviewed articles, academic articles, scholarly books, research reports, business publications, legislation and policies. They all converged and assisted in answering the research questions and achieving the stated objectives on the policing of counterfeiting.

6.7.2 Interviews and Distributed Questions

The researcher conducted in-depth interviews as they were best suited for this study and ascertained that interviews were short, concise and had clear questions to elicit participants' views (Flick, 2011:107). The researcher used one-on-one interviews and ensured that every question in the interview schedules was pertinent to the variable being researched. The interview schedules questions were open-ended to ensure that deeper comprehension of the problem that was being studied was understood. During the interviews, audio recording and note taking was used with the prior consent of the individual participants. Care will be taken to ensure that these recordings are kept confidential for five years after they have been used for analysis and will be destroyed thereafter as mentioned by (Creswell, 2014:192).

For those respondents whom the researcher found difficult to conduct personal interviews with them owing to distance, self-completion questions were used. According to Dawson (2002:30), questions are data gathering tool where participants are asked to respond to the same set of questions in a predetermined manner is used in research. In this regards, Delpont and Roestenburg (2011:188) argue that the respondents must personally complete self-administered questions. In this study, open-ended questions were asked as they allowed elaborate responses to be provided as stated by Miller and Breder (2003:33). However, Welman and Kruger (1999:151) warn that although distributed questions have the advantages of reaching a large pool of respondents who are sent at a relatively low cost, they also have the down side of having low returns depending of the subject matter, length of questions and easy of completion, among others. The researcher e-mailed questions to the respondents for completion. Some of the fully completed mailed questions were returned back to the researcher via email.

6.7.3 Observations

The researcher used field notes on observations during visit to various cities in South Africa, where trading of counterfeit goods is taking place. As pointed out by De Vos et al., (2005:281), through observation technique, the researcher can obtain the non-verbal language and or activities of the research participants and or the environment pertaining to issues that concern the research problem.

In this study, the researcher was a non-participant observer in compliance with the guidelines laid down by Creswell (2014:19). The researcher observed how participants (police officers, DTI officials, attorneys, brandowners - suspects call in their attorneys to observe as the raid is being conducted & brand owners) acting during the raids and took notes. Observing participants needed the researcher to obtain consent from their employers, namely - SAPS management, DTI management, attorney firms, and brand owners as stated by Denzin and Lincoln (2011:65). Permission was sought from the responsible employers that observation be conducted without those being observed not knowing that they were being observed at that point in time to ensure that they did not modify their practice-based on the fact that they were being observed as this could have

led to inaccurate findings. Most importantly, the researcher ascertained that those being observed did not suspect that they were being observed during the actual observation. The advantage of using observation technique was that it provided accurate picture of the study and supplemented the findings from other data collection methods. In addition, observation provided information about human behaviour and physical environment. Information obtained through direct observation can be relied on as opposed to anecdotal evidence as the researcher could see things that others could not describe or might have over looked. This had assisted to corroborate other data collection methods as mentioned above by Leedy and Ormrod (2005:99) that utilising more than one data collection strategy can ensure that flaws associated with another method can be compensated for by the strengths of other data collection methods.

6.8 DATA ANALYSIS

According to Mills and Birks (2014:43), data analysis is defined as a process of resolving a problem by means of fragmenting data into smaller manageable segments for analysis to reveal patterns that will be interpreted to make sense. Mouton (2013:108) argues that the main purpose of data analysis is to understand the various elements of data collected to see whether there are patterns or trends that can be identified, or to establish themes in the data.

As the study utilised qualitative method of data analysis, the characteristics of qualitative data analysis are to collect, interpret, criticise, and provide balanced argument on critical issues underpinning the study. Therefore, to achieve the above, the researcher made use of Tesch's eight step data analysis method as follows (Creswell, 2014:198; Tesch, 1990:142):

- Step 1: Get sense of the whole.
- Step 2: Pick one document from the transcribed interviews and read through it carefully.
- Step 3: Make a list of topics and cluster them together.
- Step 4: Code the information.

- Step 5: Classify information by grouping them together.
- Step 6: Make final decision and alphabetise the codes.
- Step 7: Assemble same categories and do preliminary analysis.
- Step 8: If needed then record the existing data.

Where the recording of data is unnecessary, the critical examination ensures that information is aligned to the topics and objectives. Only relevant objective data was categorised according to the wording of the topics to ascertain relevancy. In this study, data was recorded by using the tape recorder and notes during interviews. The collected data was qualitatively categorised into manageable themes.

When analysing the data, it became apparent that the researcher opted for the correct approach and the responses of the participants were direct to the questions that were asked having been guided by the pilot study that was undertaken earlier before the main interviews were conducted.

6.9 DATA INTEGRITY (RELIABILITY AND VALIDITY ISSUES)

The main aim of data integrity (reliability and validity) is to ensure that the research project is clear, meaningful and logical. Reliability involves stability and replicability of the findings (Rule & John, 2011:104; Gray, 2014:184). Ellis, Hartley and Walsh (2010:117) further describe reliability as the tendency from a variable to yield stable and consistent scores when it is being measured. On the same token, Dantzker and Hunter (2012:52) and Babbie and Mouton (2010:119) define reliability as the repeatability of the quality of measurement methods. Of note is that reliability differs from validity, as its main purpose is to ensure that the measuring instruments are able to produce consistent measurements every time. Reliability simply means that when a phenomenon is measured under different conditions, it should yield the same scores. This process has addressed transferability and dependability requirements in this research.

The researcher ensured that the questions on both the interview schedules and mailed questions were tested before actual work activity to check whether they were competent

to yield the same results. The researcher made certain that more data were collected through interviews. The interviews were conducted by use of interview schedule in a consistent manner without any bias. The researcher personally administered the interview schedules and also reporting accurately of the information that emanated from mailed questions that were sent to the respondents.

According to Babbie and Mouton (2012:122), the purpose of validity in the research project is to ensure that the selected research instruments measure what they are supposed to measure. Bryman (2012:47) asserts that validity refers to the extent to which an empirical measure adequately reflects the real meaning of the concept under consideration.

The researcher made sure that data collection methods were administered in a systematic and consistent manner. The data collection methods were only the ones highlighted in this study and the researcher ascertained that they are fit for purpose. The questions were pre-tested to check that they reflect on critical analysis of the policing of counterfeit goods in the South African context.

After the interviews, the conclusions were shared with the interviewees to confirm whether what was recorded and captured was the true reflection of what was said or not. Where there were discrepancies, the researcher rectified immediately. To maintain integrity of the study, the researcher maintained objectivity throughout the study.

6.10 ETHICAL CONSIDERATIONS

Ethics is often associated with integrity and guides the researcher in dealing with what is right and what is wrong in the process of conducting research. It is defined by Dantzker and Hunter (2012:26) as a set of moral principles that are suggested by individuals or group of people. Pasztor (2015:30-32) and Snellman (2015:336) encapsulate as making a morality deliberation of accepting accountability and choice of good acts by the researcher. The researcher forwarded written request to the SAPS Strategic Management Division, SAPS Directorate of Priority Investigations (Hawks), DTI

management, NPA management, law firms, brand owners and the Unisa for permission to conduct research. In addition to the above, other ethical issues that were observed were informed consent, freedom of choice, protection from harm, privacy, anonymity, and confidentiality.

The researcher also adhered to Unisa Policy of Research Ethics when conducting the research. According to the Unisa Policy of Research Ethics (University of South Africa, 2007:3), the researcher must show consideration for the autonomy, rights and dignity of all participants. The other ethical issues such as privacy, confidentiality and anonymity have to do with the protection of participants against any harm that might ensue during or after the study (Leedy & Ormrod, 2010:101). Therefore, in this study, individual participants' responses are kept confidential and secret from other participants and employers (SAPS management, DTI management, NPA management, brand owners, law firms and attorneys). As indicated above, when the researcher has used the data the information will be kept for five years before it is permanently destroyed. Similar to privacy and confidentiality, anonymity protects participants since researchers cannot associate a given piece of information with a specific person (Babbie & Benaquisto, 2010:67).

According to Denzin and Lincoln (2011:65), voluntary participation and informed consent implies that adequate information on the aim, procedures, and dangers associated with the investigation are explained to participants. All participants must have a complete comprehension of what the research is about and the implications of their participation in the study (Noak & Wincup, 2004:37). To ensure compliance with this principle, the researcher informed the participants beforehand that their participation was completely voluntary and gave them the consent form that they signed to confirm their voluntary participation in this study without being unduly influenced. The participants were requested to sign an indemnity form that exonerated the researcher and or Unisa from any claim or damage that could be associated with this study. Moreover, the participants were not compensated for taking part in this research and no gifts and or services were offered to them for participating in this study.

6.11 CHALLENGES ENCOUNTERED IN THE STUDY

A challenge that was experienced was the refusal by SARS management in 2016, 2017 and 2018 to grant permission to the researcher to interview members of SARS who were responsible for policing counterfeit crime. The reason provided by management of SARS was that counterfeit was a sensitive crime and the information would not be provided to individuals as it would expose the government to investment risks and organised criminals who would exploit vulnerabilities in policing and use the information to commit further crimes. However, this did not impede the researcher to achieve the objective of the study as other law enforcement agencies granted approval to interview their members. The study focused more on the SAPS as the crucial stakeholder in policing counterfeit crime in the country.

6.12 CONCLUSION

As is the case with empirical research studies, methodological soundness determined the credibility and integrity of the outcomes of the study. The chapter detailed methodological aspects of the study such as population and sampling procedures, data collection methods, data analysis and data integrity. It also enunciated on the challenges that were encountered by the researcher during the course of the study.

CHAPTER SEVEN: PRESENTATION OF THE RESEARCH FINDINGS

7.1 INTRODUCTION

This chapter is composed of the findings of the study that will be presented and discussed. To establish whether the research questions were sufficiently answered and the stated research objectives are achieved, the findings of both the empirical and literature study on policing counterfeit in South Africa will be indicated, analysed and presented in the identified themes of the study.

Although many studies have been conducted on the increase of counterfeit and intellectual property infringements worldwide, none has been conducted on the policing of counterfeit by the SAPS in South Africa. The one-on-one interview sessions with the relevant research participants were used to analyse the experiences of policing counterfeit in South Africa. In order to increase the validity and trustworthiness of the data received from the research participants, field notes made from the observations were also used.

The findings are analysed by following Tesch's data-analysis method whereby the researcher interpret data and pick up some similarities and differences in the data collected. The codes that fell within the category of the rationale for policing counterfeit in South Africa, as well as the case with the extent and nature of the problem at hand, were clustered together under their own themes. Furthermore, other codes that were grouped together fell under policing of counterfeit as well as factors that hamper effective policing of counterfeit, which were clustered under their own themes.

7.2 FINDINGS

The findings will be categorised into two parts, namely - specific findings and general finding. Specific finding are related to the research questions and research objectives and general findings are based on issues that are at the periphery of this research study but assist to enhance the value of the study. All the findings are derived from data obtained from the literature study and empirical research. The information from diverse

participants and stakeholders were used to answer specific research questions and objectives.

7.3 SPECIFIC FINDINGS

Specific findings of the research is based on the core of the study to answer the research questions and achieve the research objectives of the study.

7.3.1 The rationale for policing counterfeit

Literature has pointed out on section 3.7, 3.10.2, 4.2 and 4.6 that criminal organisations are responsible for manufacturing and distributing counterfeit goods. Some of the goods are produced in countries where organised criminals have purchased farms in remote rural areas and use machinery to produce the goods. Majority of participants from Specialised Commercial Crime Units, Crime Prevention Units, prosecutors, and DTI officials mentioned that counterfeit offers an easy way of making more money for organised criminals. Some of the goods are transported to the neighbouring countries and cities with private jets, which law enforcement would not suspect. Other goods are brought in from various countries in batches and transported separately without identifiable marks on. Once they are in the country, the marks are attached to them and they are then sold as genuine products. This presents a unique challenge to these Departments that are involved in the policing of counterfeit.

According to section 2.3.3, 3.2 and 3.4, there are more money laundering activities in counterfeiting. Organised criminals have many resources and pose a serious threat to the security of a country. Moreover, manufacturers of goods cannot match the strength of organised criminals and would need the protection of states in the form of provision of security and protection of private property. In the absence of sufficient protection as is the case in many countries including South Africa, socio-economic consequences are devastating. This can be seen with the consumption of substandard goods that cause people to be sick and leading to job losses as stated in section 1.2, 2.3, 3.10.1, 4.2, 4.3 and 4.6. Moreover, it causes a burden on the fiscal, as the government has to increase

the budget spend on health. Other negative consequences involve divesting the lawful owners of their innovation and investment.

Counterfeit is a crime against personal property and Section 25 of the 1996 Constitution protects private property in South Africa. Counterfeit and copyright crimes are recognised by the state. Therefore, the police, with the assistance of brand owners as active partners/stakeholders in assisting with the identification, examination and presentation of evidence in court are better placed to police counterfeit crime and piracy. This view is propagated by literature and all categories of participants. It is grounded on the statutes such as the Counterfeit Goods Act 37 of 1997 and the Copyright Act 98 of 1978 that make counterfeiting a criminal conduct.

According to the South African Police Service Act 68 of 1995, the police are the sole agency that is empowered to police crime in the country. The participants from SAPS Crime Prevention Units, Specialised Commercial Crime Units supported by the researcher intimated that majority of police officials are not trained on the Counterfeit Goods Act 37 of 1997 and the Copyright Act 98 of 1978. They further stated that these police officers do not know how to efficiently and effectively enforce the laws on counterfeiting. Neither did the DTI members receive the specialised training on dealing with counterfeit, except the on-the-job training.

The Counterfeit Goods Act 37 of 1997 is prescriptive on the processes that must be followed before a premise and or suspect can be searched and goods confiscated to obtain evidence. Moreover, the police do not have the equipment to test if goods are counterfeited as many products are produced in many parts of the world with different materials that are changed over time. The situation is similar in other countries and this makes the collaboration between the police and goods owners an essential element in the policing of counterfeit and copyright crime.

According to the participants from Specialised Commercial Crime Units, it is very few investigators from the Specialised Commercial Crime Units who are trained to police

counterfeit crime. Trained investigators are located at Specialised Commercial Crime Units, which happen to be situated in big cities and metropolitan areas as indicated in the previous chapter and none is found close to the township, informal settlements,, villages or rural areas. This indicates that there is no effective and efficient policing of counterfeit in most areas. Three participants from the SAPS Crime Prevention Units emphasise the lack of skills in policing counterfeit by stating that *"counterfeit is a specialised crime that can effectively be policed by the Specialised Commercial Crime Units and no one else"*.

In South Africa, police members are spread in all the provinces and police stations are located even in the townships, informal settlements, villages and rural areas. This makes the police to have a local footprint in every area of the country. However, section 1.3, 4.5 and 4.6 of the literature, as well as the majority of SAPS Specialised Commercial Crime Units and Crime Prevention Units members, indicated that there are skills shortage and limited workforce at the police station level to deal with this crime. On top of that, brand owners who could assist in identifying and testing the product in question are also located in big and economically thriving cities such as Johannesburg, Durban and Cape Town. They use private investigators and legal representatives that are not readily available in most areas to assist in the fight against counterfeit. The participants from Specialised Commercial Crime Units and brand owners explained this by indicating that there are few legal representatives and private investigators owing to the prohibitive cost of hiring these people by brand owners.

7.3.2 The nature and extent of counterfeit in the world and in South Africa

The findings in section 1.1, 2.2, 2.3.1, 3.2, 3.5, 3.8.1, 4.2, 4.6 and 5.7.1 indicate that counterfeit is a growing industry in the world and there are no signs of this phenomenon subsiding in the near future. Section 3.10.3 indicates that 60% of the total amount of articles seized in the world in 1998 originated from China. On the other hand, section 4.6 states that there are allegations that some legitimate businesses in South Africa deal in counterfeit products. Some brand owners further stated that the fight against counterfeit is undermined by the lack of collaborative effort by production houses as

legitimate producers and production houses are not unified and operate in high secrecy in an attempt to protect the copying of their products. This is also exacerbated by the fact that the use of protective items on goods adds more costs to the producers.

Most respondents stated that counterfeit goods are often produced in large quantities and are sold at a cheaper price compared to genuine goods that is why most consumers tend to buy them. It has a huge market as section 4.5 indicates that the major target for a counterfeit product is youth. The majority of these youth sells these products at train stations, taxi ranks, bus terminals, shopping complexes, and flea markets in South Africa and most of them are foreign nationals and/or undocumented immigrants. Section 3.2, 3.8.1, 4.2 and 4.6 further indicate that some of the sophisticated sellers advertise and sell their goods online.

Section 1.2, 3.2, 3.4, 4.2.3 and 4.6 supported by members of the Specialised Commercial Crime Units, Crime Prevention Units and DTI mentioned that the porous borders make it easy to bring counterfeited goods to South Africa. Further mentioning that corruption and bribery of law enforcement officials is another factor that enables counterfeit products to be taken from one country to another, thus posing a challenge to the effective and efficient policing of counterfeit. It is important to note that some illicit goods are transported through air and sea. Section 2.2 indicates that the relative ease in committing counterfeit and the amount of money that it generates make it an attractive enterprise for terrorists.

7.3.3 Policing of counterfeit in South Africa

Members of the Specialised Commercial Crime Units and Crime Prevention Units indicated that counterfeiters do not fear the police as some of the police demand bribes and abdicate their responsibility to confiscate counterfeit goods and or arrest them. However, they stated that in areas where a good relationship exists between the police and community, the police are able to receive information on criminal activities. This support section 4.3 and 4.5, which state that in areas where there is a partnership between the local community and the police, the fight against this crime tends to be more

successful.

Many countries do not regard this crime as a top priority that needs concerted and intensive policing and most of them including South Africa as highlighted on section 5.5 do not punish the buying of counterfeit products for private use. This means that only sellers are penalised by the laws. The possession of few counterfeited and pirated goods for a household is not punishable in many countries. Members of the Specialised Commercial Crime Units reiterated that lack of prosecution for criminals in possession of few counterfeited and pirated goods for household use is common in Africa.

According to section 2.4.1, 3.2, 3.5.2, 4.6 and 5.1, organised criminals are active in counterfeit business as they consider this crime less risky. Section 3.2, 5.3, 5.7.1 and 5.7.3, members of the Specialised Commercial Crime Units, Crime Prevention Units, brand owners, and the DTI stated that people who are arrested for this crime tend to be represented by reputable legal representatives and if convicted, most of them get the option of paying fines so they do not serve jail terms. A member of the Crime Prevention Unit emphasised this by stating that *“even the presiding officers do not impose sentences that are proportional to crimes committed”*.

Section 3.5 indicates that some countries such as Finland, New Zealand, Sweden, Norway, Italy, France, and the USA have stronger laws on counterfeit and harsher sentences on counterfeiters. Members of the Specialised Commercial Crime Units, prosecutors and attorneys for brand owners mentioned the difficulty of identifying and arresting leaders of organised counterfeit crimes as they live all over the world and the difficulty of producing sufficient evidence to arrest and convict them. The challenge of finalising extradition arrangements between countries is also an impeding factor as not all countries are willing to enter such agreements. These leaders make use of other people to sell their consignments in various countries.

Members of the Specialised Commercial Crime Units, prosecutors, some members of the Crime Prevention Units and brand owners indicates that in South Africa the owners

of premises where counterfeit and pirated goods are sold as well as where criminals lease stalls and business premises where they sell these products are never arrested and charged for this criminal activities. Most of the selling areas are unmarked stalls and spaces. Consequently, this makes it difficult for the police to obtain a warrant of search and seizure as the fixed physical address is a pre-condition for granting such a warrant. Members of the Specialised Commercial Crime Units, Crime Prevention Units, attorneys of brand holders and brand owners mentioned that selling stalls that are not properly marked could lead to the search and seizure at the wrong place and exposes the police to litigation.

According to section 1.7.1.1 and 3.4 as well as some members of the Crime Prevention Units, Specialised Commercial Crime Units, DTI, attorneys for brand owners and prosecutors, the other complication in South Africa is that most counterfeit sellers are economic migrants who are desperate and end-up becoming street vendors by selling illegal goods in order to make a living. What compound this matter further is that many street vendors do not pay for a space rentals and some economic migrants see this as an opportunity to make income from counterfeit goods. They target places such as taxi ranks, bus ranks, open streets, streets opposite shops, trains and train stations, cinemas, major events and other entertainment sites.

According to section 4.6 and members of the Specialised Commercial Crime Units, Crime Prevention Units, the DTI and brand owners, South Africa lacks a coordinated system to keep statistics on counterfeit and piracy crimes and counterfeiters across the three major Departments that are involved in this, which are the DTI, Customs & Excise and the police. Lack or poor use of coordinated ICT among these Departments impede progress in winning the war against counterfeiters as some counterfeiters use sophisticated technology to communicate and transact. Proper use of integrated technology by these affected departments is essential for the effective and efficient policing of this crime by law enforcement agencies.

Members of the Specialised Commercial Crime Units, some members of the Crime Prevention Units and members of DTI indicate that criminals are able to bring plain attire, labels and machines in the country in separate consignments. Assemble these machines in the country and start reproducing clothes that mimic the original that are then sold in large scales in the country. Section 1.3 and 4.6, supported by members of the Specialised Commercial Crime Units and some members of Crime Prevention Units indicate that in South Africa unlike in other countries such as the USA and Britain, the police do not make use of intelligence-led policing in policing counterfeit and there are no sporadic raids that are targeted at the dealers.

7.3.4 Factors that hamper effective policing of counterfeit in South Africa

Various factors impede the effective and efficient policing of counterfeit in South Africa. This indicates the complex nature of dealing with this challenge, as it require multi-pronged and integrated strategy from all involved.

7.3.4.1 Training

Specialised Commercial Crime Unit: Section 4.6 and all members of the Specialised Commercial Crime Unit indicate that there are few Specialised Commercial Crime Unit investigators who were trained in policing counterfeit crime. The Specialised Commercial Crime Unit offers a training course for policing counterfeit crime that is pitched at level III, which is an advanced level of training offered to Specialised Commercial Crime investigators. This means there is no training on counterfeit and piracy at basic levels that is pitched at level I and II. Only a negligible number of members completed this training, therefore giving them the responsibility of continuously training and guiding their untrained fellow members. Again, some of the trained members were assigned to investigate other commercial crimes other than counterfeit and piracy. Members of the Specialised Commercial Crime Units stated that some cases get withdrawn in courts owing to the failure to comply with the laws such as Counterfeit Goods Act 37 of 1997 and the Copyright Act 98 of 1978 in confiscating the goods and investigating cases.

Crime Prevention members: According to the members of the Crime Prevention Units and Specialised Crime Commercial Units, there is no training on counterfeit policing that is provided to the SAPS members at the police station level. The training that the SAPS offers to members who are joining the police at Basic Training level does not cover the policing of counterfeit crime. Furthermore, police members at station level do not know how to police counterfeit and a large number of them do not know how to properly process the reported cases of this nature. Some Crime Prevention members indicated that when confronted with this challenge, they opt not to vigorously pursue perpetrators of these crimes in order to avoid unnecessary litigations should their actions be incorrect.

Members of the Specialised Commercial Crime Units and Crime Prevention Units underscore that in some instances, the police confiscate the goods from vendors and keep them at the police stations and if they are not claimed back after a certain period, they are destroyed. Some prosecutors and attorneys that normally represent counterfeiters stated that in most cases, sellers of counterfeit goods do not claim counterfeited goods owing to the fear of being arrested. Police do not open cases for dealing in counterfeit goods owing to the shortage of testers and experts who could provide evidence in court, so they often charge sellers for dealing with contraband.

The observation by the researcher that was supported by members of the Crime Prevention Units and some members of Specialised Commercial Crime Units discovered that there are no guidelines on how to process counterfeit crime cases at the police station level. This is further compounded by the absence of the support structure at the police station level such as the contact details of the Specialised Commercial Crime Unit members should the police station receive counterfeit and piracy cases. Some members of the Specialised Commercial Crime Units and Crime Prevention Units attribute these challenges to the centralisation and compartmentalisation of policing counterfeit in South Africa.

7.3.4.2 Prosecution of counterfeit

Interviewed prosecutors and members of the Specialised Commercial Crime Units mentioned that only few prosecutors who are based at the Specialised Commercial Crime Courts in the nine provinces are trained on the prosecution of counterfeit crimes. Prosecutors working in other courts are not trained. Therefore, they do not have specialised skills in prosecuting counterfeit and piracy cases. Prosecutors in KwaZulu-Natal and Mpumalanga mentioned that if there is a counterfeit case in rural areas, senior court officials request prosecutors from the cities to assist the police with the case and its prosecution.

7.3.4.3 Corruption within the police and other law enforcement agencies

According to members of the Specialised Commercial Crime Units, Crime Prevention Units, the DTI officials, brand owners, prosecutors and attorneys, corruption fuels criminality even in the ports of entry where Customs & Excise officials and the police let in illicit substances and goods into the country. These offending goods find their way into the country's streets and shops. Counterfeited goods that have already entered the borders of the country are sold on the streets, flea markets and transport terminals. Police members do not confiscate them but let criminals sell to the public in return for a bribe. Member of the Crime Prevention Units indicated that dedicated police members receive consistent threats from organised criminals who work with corrupt police members and this place the honest police members' lives and families in constant threat. One of them emphasised this by stating that *"many police members are organised criminals themselves."*

Members of the Specialised Commercial Crime Units, Crime Prevention Units, the DTI officials, brand owners and attorneys concur that other groups of organised criminals have links with the SAPS top management, who disclose or tip them of impending raids. Stating that sometimes police members at ports of entry are instructed by senior officers of the police and Customs and Excise not to search specific individuals' goods and consignments. The suspicion is that some organised crime leaders have links to senior officers and pay them bribes in exchange for protection.

7.3.4.4 Characteristics of Counterfeit Goods

Members of the Specialised Commercial Crime Units, Crime Prevention Units, DTI officials, attorneys and brand owners state that some counterfeited goods have a high resemblance to the genuine product, thus making identification by the police difficult if not impossible. Counterfeiters re-invest most of their profits in their businesses by purchasing good manufacturing equipment. This high-tech equipment used to produce the goods make spotting counterfeited items almost impracticable as the goods so produced look to be genuine in most cases. Therefore, confiscated products need to be tested and many legitimate producers live in foreign countries and spend plenty of money to bring their testers (equipment) into the country to conduct analysis and tests. One Crime Prevention Unit member emphasised this by stating that *“a naked eye cannot see what is counterfeit and what is not.”*

According to members of the Specialised Commercial Crime Units, Crime Prevention Units and some brand owners, some of the goods owners outsource production of their goods to external producers who in most cases produce excessive goods into the market in order to make extra income for themselves. This behaviour is unethical as the producers in most cases are not the owners of the goods.

7.3.4.5 Storage of Counterfeit Goods

DTI officials, members of the Specialised Commercial Crime Units and brand owners stated that immediately after counterfeit goods are confiscated by the police, it must be booked in a government declared counterfeit goods depot for safekeeping. The depots are declared by the Minister of Trade and Industry and are privately owned. The owners of depots are provided with training on storage of counterfeit goods. Brand owners, and not the police, pay the storage fees. Members of the Specialised Commercialised Crime Units and DTI officials stated that in some cases, when a cost-benefit analysis is done, it is found that the storage costs turn to be more than the confiscated goods' value. Frequently, the brand owners prefer to settle out of court to avoid the long court process and save on the cost that will be incurred in storage fees.

7.3.4.6 Testing of Counterfeit

Counterfeit goods need to be tested before they can be confirmed to be offending goods. Members of the Specialised Commercial Crime units and DTI officials mentioned that to have a justiciable case, the court needs scientific report confirming that the goods are counterfeit. A case cannot be successfully prosecuted without a scientific report testifying on counterfeit and not all the counterfeited goods that are sold in the country have laboratory experts in the country to assist the police with scientific reports that proof counterfeit. Owing to the shortage of experts in the country, other goods have to be exported to foreign countries for testing so that the case can be prosecuted in courts. However, every goods produced has its own testers who cannot always be in every country when needed.

Members of the Specialised Commercial Crime Units and some attorneys argue that the testing of goods is conducted by the brand representatives at their own expense and could be regarded as impartial because a neutral institution does not conduct the testing. One member captured this by stating that *“the Counterfeit Goods Act 37 of 1997 grants the brand holders a position of the player and a referee in a game and this is unfair to the suspects.”*

7.3.4.7 Police powers

According to members of the Specialised Commercial Crime Units, Crime Prevention Units, the DTI officials, prosecutors and brand owners, there is no proactive policing of counterfeit as the police often wait for complaints from brand owners to report counterfeit. Brand owners employ legal representatives who task private investigators to test and evaluate the purchased goods to have proof such as purchase receipts and copies and or images of offending goods before reporting the case to the police. However, the Specialised Commercial Crime Unit and few Crime Prevention Unit members indicated that the brand holders tend to contract attorneys who do not know much of investigation work to do test purchases at suspicious shops and stalls and not forensic investigators who are experienced in forensic investigation work.

The Counterfeit Goods Act 37 of 1997 does not allow police constables to police counterfeit in South Africa because they were regarded as inexperienced in policing thus likely to make mistakes. It is important to note that this Act was promulgated in 1997 when the SAPS promoted members who have been in the constables' rank for a long period. This left the rank of a constable with a large number of newly recruited members who were indeed not having much experience in policing.

This situation has since changed and police officers who are now occupying this rank are well experienced and they constitute a large number of operational officers deployed to various units within the SAPS. They tend to be confronted with counterfeit and pirated goods on a daily basis. The researcher is of the view that the exclusion of constables in policing counterfeit goods is now without a basis. As currently, a rank structure cannot be linked with experience especially within the SAPS because there are now many experienced members at lower rank structures such as a constable rank.

7.4 GENERAL FINDINGS

Over and above the research findings that emanate from the research questions and research objectives, there are also findings that emanate from the general theme of this research. These findings are grouped as general findings and dealt with in this section of the study, as they are important for the effective policing of counterfeit.

7.4.1 Shortage of Manpower in the Specialised Commercial Crime Units

Members of the Specialised Commercial Crime Units and some Crime Prevention Units indicate the shortage of the work force and critical skills in the Specialised Commercial Crime Units owing to natural attrition and members who leave this unit in droves for greener pastures in the private sector. This affects the capacity of this Unit to deal with counterfeit crime. This was confirmed by the then Acting Head of the Directorate for Priority Crime Investigation, Major-General Yolisa Matakata, during her briefing of the Portfolio Committee on Police on 16 February 2018 and the record analysis of the staff complement of this unit by the researcher from 2014 to 2018. The head of the Directorate

for Priority Crime Investigations General Godfrey Lebeya also indicated the shortage of skills and lack of competence of members as impediment to winning commercial crime war. One Specialised Commercial Crime Unit member summarised this by stating that *“what remains in the Specialised Commercial Crime Unit is a skeleton without flesh because once one leaves the service there is no replacement.”*

7.4.2 The strategy used to police counterfeit

Members of the Specialised Commercial Crime Units and Crime Prevention Units indicate that the SAPS does not have a specific counterfeit policing strategy. Members of the DTI also stated that DTI does not have a focused strategy of dealing with counterfeit crime. Both the South African Police Service and the Department of Trade and Industry make use of the generic strategy referred to as the National Crime Prevention Strategy to fight all crimes in the country including counterfeit. Even the Specialised Commercial Crime Unit does not have designated strategy to police counterfeit and it makes use of the generic National Crime Prevention Strategy as well. There is not even an in-house crafted policy on how counterfeit crime should be policed.

7.5 CONCLUSION

Counterfeit is a transnational crime that is fast-growing both nationally and internationally and needs a focused policing strategy for it to be effectively prevented and successfully prosecuted. There is currently no specific strategy in the policing of counterfeit in South Africa and both SAPS and the Specialised Commercial Crime Unit make use of the generic National Crime Prevention Strategy to police counterfeit.

Lack of coordination in the policing of counterfeit in the country by the responsible law enforcement agencies, namely – the Department of Trade and Industry, the SAPS, and the Excise and Customs make these agencies to lose valuable information that could be used in the prevention, detection, investigation, and prosecution of this crime. This is further negatively affected by the shortage of work force and critical skills in the

Specialised Commercial Crime Units and the few members who are trained in this crime within that limited human capacity.

Exclusion of Constables in the policing of this crime in terms of the Counterfeit Goods Act 37 of 1997 and the reluctance by the brand owners to send experts to test the product if it involves small quantities are also inhibiting factors in successfully dealing with this crime. Although from the financial perspective, one could understand the financial cost that is incurred by the brand owners in terms of the storage and testing of the disputed goods.

CHAPTER EIGHT: RECOMMENDATIONS AND CONCLUSION

8.1 INTRODUCTION

The policing of counterfeit crime is a challenge in many countries, including South Africa. The literature and empirical study indicate how counterfeit syndicates operate in an organised crime modalities. They find this crime as an easy way to find money and enhance their livelihood, while to some is to make as much money as possible. What compounds the successful policing of counterfeit is the fact that consumers who purchase counterfeit goods are not punished and there seems to be a gap that allows counterfeit crime to be perpetuated unabatedly.

Counterfeit is a crime that the police should police through effective and efficient crime prevention, crime detection and crime investigation. The understanding and appreciation of these critical measures could encourage the police to inculcate a crime prevention culture within the service. Of course, there should be resources pumped into the preventive programmes in order to effectively police these crimes. In the absence of prevention, the police should police crime after it has been committed by arresting and causing the suspects to be prosecuted so that this can serve as deterrence.

8.2 RECOMMENDATIONS

The recommendations are designed to address the findings that are indicated in the previous chapter. Some recommendations propose policy changes as well as best and prudent tactics that could be implemented to effectively and efficiently police counterfeit crime in South Africa. They collectively address the findings indicated in specific findings that relate to the research questions and the objectives of the study as well as general findings that relate to the general themes of the study as indicated in the previous chapter.

8.2.1 The Corruption and Bribery of the Law Enforcement Officials

Section 7.3.2 indicates the corruption and bribery of the law enforcement officials as one of the factors that contributed to the ineffective policing of counterfeit crime in South

Africa. As this is done by the same people who are mandated to prevent these actions, it serves as a breeding ground for this crime and will continue to compromise whatever strategy that could be developed to deal with this crime if it is not dealt with efficiently and effectively. The effective and efficient policing of counterfeit crime will demand that anti-corruption strategies among the law enforcement agencies be made an integral part of such strategy.

The Independent Police Investigative Directorate (IPID) is responsible for dealing with police misconduct and criminality. However, there is a need for a dedicated Anti-Corruption Unit that could specifically focus on police officials, DTI officials as well as officials from Customs & Excise at the ports of entry and also in-land as they deal with counterfeit on a daily basis on the street. This Unit could be able to conduct observations, surveillance monitoring and entrapments in these points of entry to increase the potential offender's perceptions of being caught and severely punished.

Alternatively, the capacity of IPID could be enhanced in terms of its human and material resources and its mandate extended to include the investigation of corruption against officials of the DTI as well as officials of the Customs & Excise deployed at the ports of entry. However, under normal circumstances, police officials should be dealing with the corrupt practices perpetrated by members of these departments even in the ports of entry. The process becomes highly compromised if members of all these three entities (SAPS; DTI; and Customs & Excise) working together in a demarcated areas are probably colluding to allow counterfeited goods in the country.

These measures could enhance security at the ports of entry and ultimately minimise the inflow of counterfeited goods in the country. The Counterfeit Unit that is proposed below could then deal largely with counterfeit goods that are produced in the country.

It is important to note that the suggested introduction of the dedicated Anti-Corruption Unit or the capacitating and the extension of the mandate of IPID that are dealt with above are largely reactive in nature although they have a deterrence element.

Proactively, there should be the compulsory vetting of the officials of these three departments who work at the ports of entry and regular lifestyle audit conducted on them. This will ensure that officials deployed at the ports of entry are not contaminated and secondly their lifestyle is continuously audited to ensure that they could not easily be susceptible to corruption and bribery while they are there.

8.2.2 The Rationale for Policing Counterfeit

Section 7.3.1 mentions that there is no way that the manufacturers of goods can or will match the strength of organised criminals in counterfeit, if there is no meaningful intervention of the criminal justice system. Counterfeit crime is a criminal act that should not be treated like civil acts only where the affected parties have to incur the legal costs of their remedial actions. This should also be understood in the context of big, medium and small businesses that will have different financial capabilities and most of them will not be able carry these costs.

Businesses pay corporate tax to the government. Therefore, the government should be able to bear the cost of the criminal actions committed against them. The State has the responsibility to protect the businesses from collapsing because of criminal activities perpetrated against them as this ultimately result in job losses and the loss in tax revenues. Protection of business against this crime will encourage investment in the sector and stimulate economy and the employment in the country. The country needs to spend more in the fight against counterfeit and this should also be understood in the context of the health hazard that people who could consume poisonous and substandard medicine could be exposed to. As such, consumption has ripple effects such as sickness and death that could also have huge financial cost on health facilities and the social welfare of the nation.

8.2.3 The Policing of Counterfeit in South Africa

Section 7.3.3 indicates that South Africa lacks a coordinated system to keep statistics on counterfeit and counterfeiters across the three major departments that are involved in this, which are the DTI, Customs & Excise and the SAPS. This fragmented and

uncoordinated approach does not bode well for the effective and efficient policing of this crime. There should be an effective and efficient collaboration among these law enforcement agencies that extend to the interface of their ICTs to capture and share the captured information on the activities of the offenders and potential offenders.

There should also be joint operations conducted by the SAPS and Metropolitan Police Departments with the technical support from brand holders to get rid of the counterfeited products that are sold in almost every street corner. This will benefit all these three entities as the SAPS will be reducing this crime, the Metropolitan Police departments will be enforcing the Municipal by-law, and the brand holders will be testing the products that are sold on the streets to protect their business and brand reputation and integrity.

The proposed Counterfeit Unit should have members who specialise on online intelligence to monitor online advertisements and sales. This will enable this Unit to detect and shutdown such websites and arrest the alleged dealers. This is essential, as counterfeit business modality is moving online where sellers order and purchase the goods. Brand owners could also have their own people who will monitor the online advertisements and sales and inform the Counterfeit Unit on such activities (the recommendation to establish such a unit is dealt with below). The Counterfeit Unit should follow the prosecution-led investigation to ensure the high successful prosecution that will deter people to embark on this crime.

The joint collaboration of different departments and stakeholders above will enable them to analyse their and each other's strengths and weaknesses to be able to come up with strategies, policies and guidelines that will address the identified weaknesses while capitalising on the identified strengths. Premised on the fact that no matter how strong and efficient other departments might be, if there are loopholes in other departments counterfeit crime will still flourish.

Section 7.3.1 indicates that most police officials are not trained on the Counterfeit Goods Act 37 of 1997 and the Copyright Act 98 of 1978 and do not know how to efficiently and

effectively enforce the laws on counterfeiting. Counterfeit is a specialised crime that need a specialised unit to deal with because it is impossible to train all police officials on specialised crimes. There should be a dedicated Counterfeit Unit that should deal with this crime in major cities in the country. The literature and empirical research indicate that counterfeit is rife and have huge financial impact in big cities that serves as a distributor of these products in other small towns and rural areas.

The literature and empirical study indicate that the magnitude of counterfeit crime is widespread and the police will not be able to drastically reduce it within a short space of time. Having a specialised unit in major cities could be a start in dealing with the source and feeder of counterfeit. Owing to the intensity of the population and industries in big cities, it is relatively easy to establish a legitimate business that could only be used as a front to disguise the production of counterfeit goods in the background of such a business. This will be something that will be highly difficult to do in small towns with few industrial areas and strong societal bond. That is why focusing on big cities could go a long way in stabilising this rampant crime and gradually reducing it until it is ultimately eradicated at the end.

This will not negatively affect the prevention, detection, investigation and prosecution of this crime in small towns, villages, informal settlements and rural areas because the SAPS operate nationally. The police should develop Standard Operating Procedures and Guidelines on how the Counterfeit Unit will work with police stations in their provinces or allocated areas to deal with this crime. Having a specialised unit in big cities will also enable it to work with brand owners and other agencies such as the DTI and Customs & Excise, who are largely in big cities as the capacity and speciality of the brand owners is critical for the effective policing of this crime.

The police do not have the equipment to test if goods are counterfeited and this is understandable taking into account the magnitude and variety of the counterfeited goods. Brand owners have the equipment to test the genuineness of the product. However, they will not necessarily have the capacity to test the goods all over the

country, but they could be able to do so in big cities. Faced with the reality of the variety and quantity of counterfeited goods in circulation, it cannot be realistic to expect the brand owners to have all the equipment and experts to test disputed goods at all times in all instances. What would be manageable could be for the Counterfeit Unit and the major brand owners to agree on the number and types of goods that they will focus on over a period of five or ten years. Taking into consideration that the Counterfeit Goods Act 37 of 1997 is prescriptive and has tight timeframe to serve processes (documents) for a court case to be prosecutable and placed on the court roll.

The following criteria could be used to prioritise the goods that should be focused on:

- the magnitude of the counterfeited goods;
- the financial value of the counterfeited goods; and
- the health hazard that such products pose in society.

There should then be an agreement on procuring all the required testing equipment and expertise for the prioritised products and locate them at identified storage places. This should not be interpreted as placing less value on other types of counterfeited goods but should be understood as acknowledging the magnitude and complexity of what has to be done and the capacity to do it thoroughly, procedurally and systematically to outwit the intelligence and sophistication used by criminals in counterfeiting.

Section 7.3.3 indicates that in South Africa, the owners of premises where counterfeit goods are sold and those who lease stalls to people who are counterfeiting goods are neither arrested nor charged for doing so. Counterfeit cannot flourish without being operated from a particular base and in most instances, people who are involved in counterfeit hire or lease premises and stalls where they produce or sell these products. It is highly improbable that all the owners of these leased premises and stalls do not know of the illegal activities that are happening in these premises. Against this background, property owners who lease and continue to lease their property knowing that they lease it to people who deal with counterfeit goods should be arrested and prosecuted for aiding counterfeiting.

Counterfeit goods is mostly sold from unmarked stalls and this makes it difficult for the police to obtain a warrant of search and seizure as the fixed physical address is a pre-condition for granting such a warrant. This emphasises the need for collaborative approach in this crime, particularly between the Counterfeit Unit, brand owners and the municipalities. These entities should deal with the challenges of unmarked stalls so that the municipalities ensure that stalls are marked and understand the implication of the unmarked stalls. Owners of these stalls (people who are allocated these stalls and sells from them) should also be made to understand the risk of selling from different stalls particularly the fact that they might be arrested and their goods seized if a search and seizure warrant is granted for that stall. Adherence to this will minimise the litigation against the police for searching, seizing and arresting wrong people.

Municipalities operate on the Integrated Development Plan, which is a five-year plan that is compiled to determine the development needs of the municipality. The development and the monitoring of this plan involve various role players and this is where the Counterfeit Unit as well as the brand owners could have representation. Therefore, there is no need for the establishment of a new forum for this engagement. This will also make the policing of counterfeit to be an integral part of the by-laws that are enforced by the various policing agencies of the municipality. It will also force property owners who lease properties to demarcate it properly and mark it so that it can be identifiable. It will eradicate the problem of having counterfeiters denying the fact that they have leased or sub-leased property where crime was committed.

South Africa does not punish the buying of counterfeit products. This means that only sellers are penalised by law. The growth of counterfeit is largely influenced by the available market for such products and it cannot be successfully policed by focusing on the producers without dealing with or closing available markets. Closing the available market will minimise the need to produce large quantities of counterfeited goods as the producers and sellers will have no market for their products.

Criminalising the purchase and the possession of counterfeited goods knowing it to be counterfeited could go a long way in minimising this crime. Most people might not want to attract negative attention by being investigated or their goods being seized as counterfeit. This would save lives, particularly in the purchase of fake medicine and probably save money for health care centres as well as serving as deterrence to would be buyers. This will bring about a consolidated approach in the fight against counterfeit in that it will span from the producers, people who facilitate the storage of counterfeited goods, sellers of such goods, as well as the buyers and consumers of such products.

Section 7.3.4.5 indicates that the storage fee of the suspected counterfeit goods is paid by brand owners and not by the state. This does not provide a sound basis on fighting this crime because it makes brand owners to carry the cost of the process that leads to the prosecution of people who produce or sell counterfeited goods. Brand owners are primarily business people who intend to make money and maximise profit in their respective enterprises. They tend to be faced with the choice of paying the money to test and store property to enhance the chances of successful prosecution particularly in the situation where this crime is increasing without the police showing any signs of winning this fight. Consequently, they prefer to settle the matter out of court to save money.

Continuous out of court settlements after the police have worked hard to detect and confiscate counterfeited goods will in the end have a negative impact on the fight against counterfeit. Most police officers might see this as a fruitless exercise that is not worth pursuing with much dedication and vigour because at the end, they are unable to prosecute affected people owing to this out of court settlements. Moreover taking into account that police performance is largely measured by successful prosecution.

Understanding the complexities of dealing with this crime and the reality that businesses pay corporate tax that should actually be used to protect their businesses. There is a need for the business and state to share the storage cost for the successful and viable approach in dealing with this crime. The business should pay for the storage until such

time that the testing of the goods is done because the testing is actually within their realm. Once the testing has been done and there is still a need for the product to continue to be kept for court purposes then the storage cost should be paid by the state as this is now within the government's realm. This will enhance the collaborative approach in the fight against this crime.

Section 7.3.4.7 indicates that the Counterfeit Goods Act 37 of 1997 does not allow police constables to police counterfeit. As indicated in the previous chapter, the reason of excluding them has faded as the SAPS is now having experienced Constables most of which have been in this rank for more than five years. Promotion in the police is no more solely based on the number of years that a person has served in a particular rank. Therefore, it is no longer logical to link the experience in the SAPS with the rank that the person occupies. This warrant that the Counterfeit Goods Act 37 of 1997 be amended so that the Constables who are in majority in operational duties in the SAPS can also be involved in the policing of this crime.

Like in any crime, to minimise victimisation and protect the integrity of circulated brands in society, there should be strong emphasis in proactive policing in the policing of counterfeit. There should be strong reliance on intelligent-led policing where the police can get information and arrest offenders before counterfeited goods is circulated to the public. This could successfully be done by the recruitment and utilisation of informants.

8.3 CONCLUSION

The study analysed the policing of counterfeit crime in South Africa. It also presented the empirical findings and literature findings that could be looked at in enhancing the policing of counterfeit and uplifting the cooperation between the SAPS and the community in the fight against this crime. The researcher also conducted an observation on the hotspots where counterfeit goods were sold out in various parts of the country. The researcher applied various research methods to look at the same aspects from different angles to enable the shortfall of one method to be overcome by the strengths of other methods in order to come to the objective determination. The research questions were

answered and the research objectives were successfully achieved in this study.

The identified shortcomings that were revealed by this study were also analysed and solid recommendations that could address them are made. The findings and the recommendations made add to the value of the study as they could contribute to the effectiveness and efficiency in policing counterfeit in South Africa. The emphasis in terms of this study is on proactive activities because they guarantee the protection of the brand owner in terms of the South African Constitution. Victimisation can be eradicated by adopting proactive approaches to policing which would have to involve intelligence, informers, use of surveillance in policing, and active society that work in conjunction with the police and other stakeholders.

It is apparent in this study that in reality, the policing of counterfeit is an enormous task that cannot be successfully accomplished by the SAPS alone without the critical involvement of other stakeholders. The failure of proactive policing is evident from the presence of counterfeit goods in the markets, therefore requiring another strong element of reactive policing to arrest so that the potential criminals could also be deterred from committing this crime. The successful prosecution of perpetrators also serves as proactive and reactive crime prevention activities that also lead to deterrence.

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CASES

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APPENDICES

APPENDIX A: QUESTIONS FOR THE SPECIALISED COMMERCIAL CRIME UNITS

Dear _____(participant name), **my name is Godfrey Thenga (student number: 32040423)**, I intend to gather data for my Doctoral degree in Police Science that I am studying at the University of South Africa. The purpose of this study is to analyse the policing of counterfeit in South Africa. I request your permission to interview you on the policing of counterfeit goods in South Africa. If you agree to participate in this research, you may sign this form below. The information obtained from this interview will be useful in contributing towards the improvement of the policing of counterfeit in South Africa.

BIOGRAPHIC INFORMATION

Please tick the relevant block below

Age	20-30 years			31-40 years			41-50 years		51-60 years	
Gender	Male						Female			
Rank	Const	Sgt	WO	Lt	Capt	Maj	Lt Col	Col	Brig	Lt Gen
Years of Service	1-5		6-10	11-15	16-20	21-25	26-30	31-35	36-40	

1. THE EXTEND OF COUNTERFEIT IN SOUTH AFRICA

a. What challenges do you have in policing counterfeit?

b. What strategies does the Specialised Commercial Crime Unit use in policing counterfeit and how effective are they?

c. What strategies does the Specialised Commercial Crime Unit use in policing piracy and how effective are they?

2. RATIONALE FOR POLICING COUNTERFEIT AND PIRACY

a. In your opinion who should police counterfeit and piracy and why it should be policed by them?

b. What hampers the effective policing of counterfeit and piracy?

3. THE TRAINING OFFERED BY THE SPECIALISED COMMERCIAL CRIME UNITS IN POLICING COUNTERFEIT AND PIRACY

a. What training on counterfeit and piracy did you receive?

b. Is the training that you received sufficient to enable you to deal with the policing of counterfeit and piracy?

c. How often do you receive refresher training on the policing of counterfeit and piracy?

i. How useful is the refresher training that you receive?

4. THE POLICING OF COUNTERFEIT AND PIRACY

a. What are the best practice in policing counterfeit and piracy?

b. What other information would you like to give on the policing of counterfeit and piracy?

Disclaimer: The information provided in these questions will be confidential and used solely for this research. Your participation is voluntary and at any time during the interview session, you can terminate your participation if you feel uncomfortable to proceed. You can also opt to remain anonymous and the responses will not be traced back to you.

Signature: _____

Date: _____

APPENDIX B: QUESTIONS FOR CRIME PREVENTION OFFICERS

Dear _____ (participant name), **my name is Godfrey Thenga (student number: 32040423)**, I intend to gather data for my Doctoral degree in Police Science that I am studying at the University of South Africa. The purpose of this study is to analyse the policing of counterfeit in South Africa. I request your permission to interview you on the policing of counterfeit goods in South Africa. If you agree to participate in this research, you may sign this form below. The information obtained from this interview will be useful in contributing towards the improvement of the policing of counterfeit in South Africa.

BIOGRAPHIC INFORMATION

Please tick the relevant block below

Age	20-30 years			31-40 years			41-50 years			51-60 years	
Gender	Male						Female				
Rank	Const	Sgt	WO	Lt	Capt	Maj	Lt Col	Col	Brig	Lt Gen	
Years of Service	1-5		6-10	11-15	16-20	21-25	26-30	31-35	36-40		

1. THE EXTEND OF COUNTERFEIT IN SOUTH AFRICA

- a. What strategies do the police use in policing counterfeit and how effective are they?

b. What strategies do the police use in policing piracy and how effective are they?

c. What challenges do the police encounter in policing counterfeit?

2. RATIONALE FOR POLICING COUNTERFEIT AND PIRACY

a. In your opinion who should police counterfeit and piracy and why it should be policed by them?

b. What hampers the effective policing of counterfeit and piracy?

3. THE TRAINING OFFERED BY THE POLICE IN POLICING COUNTERFEIT AND PIRACY

a. What training on counterfeit and piracy did you receive?

b. Is the training that you received sufficient to enable you to deal with the policing of counterfeit and piracy?

c. How often do you receive refresher training on the policing of counterfeit and piracy?

i. How useful is the refresher training that you receive?

4. THE POLICING OF COUNTERFEIT AND PIRACY

a. What are the best practice in policing counterfeit and piracy?

i. What other information would you like to give on the policing of counterfeit and piracy?

Disclaimer: The information provided in these questions will be confidential and used solely for this research. Your participation is voluntary and at any time during the interview session, you can terminate your participation if you feel uncomfortable to proceed. You can also opt to remain anonymous and the responses will not be traced back to you.

Signature: _____

Date: _____

APPENDIX C: QUESTIONS FOR THE DTI OFFICIALS

Dear _____(participant name), **my name is Godfrey Thenga (student number: 32040423)**, I intend to gather data for my Doctoral degree in Police Science that I am studying at the University of South Africa. The purpose of this study is to analyse the policing of counterfeit in South Africa. I request your permission to interview you on the policing of counterfeit goods in South Africa. If you agree to participate in this research, you may sign this form below. The information obtained from this interview will be useful in contributing towards the improvement of the policing of counterfeit in South Africa.

BIOGRAPHIC INFORMATION

Please tick the relevant block below

Age	20-30 years	31-40 years	41-50 years	51-60 years				
Gender	Male			Female				
Position								
Years of Service	1-5	6-10	11-15	16-20	21-25	26-30	31-35	36-40

1. THE EXTEND OF COUNTERFEIT IN SOUTH AFRICA

a. What challenges do you have in policing counterfeit?

b. What strategies does the DTI/Unit use in policing counterfeit and how effective are they?

c. What strategies does the DTI/Unit use in policing piracy and how effective are they?

2. RATIONALE FOR POLICING COUNTERFEIT AND PIRACY

a. In your opinion who should police counterfeit and piracy and why it should be policed by them?

b. What hampers the effective policing of counterfeit and piracy?

3. THE TRAINING OFFERED BY THE DTI IN POLICING COUNTERFEIT AND PIRACY

a. What training on counterfeit and piracy did you receive?

b. Is the training that you received sufficient to enable you to deal with the policing of counterfeit and piracy?

c. How often do you receive refresher training on the policing of counterfeit and piracy?

d. How useful is the refresher training that you receive?

4. THE POLICING OF COUNTERFEIT AND PIRACY

a. What are the best practice in policing counterfeit and piracy?

b. What other information would you like to give on the policing of counterfeit and piracy?

Disclaimer: The information provided in these questions will be confidential and used solely for this research. Your participation is voluntary and at any time during the interview session, you can terminate your participation if you feel uncomfortable to proceed. You can also opt to remain anonymous and the responses will not be traced back to you.

Signature: _____

Date: _____

APPENDIX D: QUESTIONS FOR THE NATIONAL PROSECUTION AUTHORITY

Dear _____(participant name), **my name is Godfrey Thenga (student number: 32040423)**, I intend to gather data for my Doctoral degree in Police Science that I am studying at the University of South Africa. The purpose of this study is to analyse the policing of counterfeit in South Africa. I request your permission to interview you on the policing of counterfeit goods in South Africa. If you agree to participate in this research, you may sign this form below. The information obtained from this interview will be useful in contributing towards the improvement of the policing of counterfeit in South Africa.

BIOGRAPHIC INFORMATION

Please tick the relevant block below

Age	20-30 years	31-40 years			41-50 years		51-60 years	
Gender	Male				Female			
Position/ title	Prosecutor			Senior prosecutor		Control prosecutor		
Years of Service	1-5	6-10	11-15	16-20	21-25	26-30	31-35	36-40

1. PROSECUTION OF COUNTERFEIT AND PIRACY

a. What challenges do you encounter in the prosecution of counterfeit and piracy?

i. How can they be obviated?

b. How effective is the prosecution of counterfeit and piracy in South Africa?

c. What could be attributed to that success or its lack thereof?

d. What knowledge and skills set is required from a prosecutor to successfully prosecute a person who is accused of counterfeit or piracy?

e. How do they acquire that requisite skills/knowledge set?

f. Is there any other information that you want to give on the prosecution of counterfeit and piracy?

Disclaimer: The information provided in these questions will be confidential and used solely for this research. Your participation is voluntary and at any time during the interview session, you can terminate your participation if you feel uncomfortable to proceed. You can also opt to remain anonymous and the responses will not be traced back to you.

Signature: _____

Date: _____

APPENDIX E: QUESTIONS: BRANDHOLDERS/ BRAND REPRESENTATIVES

Dear _____(participant name), **my name is Godfrey Thenga (student number: 32040423)**, I intend to gather data for my Doctoral degree in Police Science that I am studying at the University of South Africa. The purpose of this study is to analyse the policing of counterfeit in South Africa. I request your permission to interview you on the policing of counterfeit goods in South Africa. If you agree to participate in this research, you may sign this form below. The information obtained from this interview will be useful in contributing towards the improvement of the policing of counterfeit in South Africa.

BIOGRAPHIC INFORMATION

Please tick the relevant block below

Age	20-30 years	31-40 years	41-50 years	51-60 years				
Gender	Male			Female				
Position	Brand holder		Brand representative (Power of Attorney)					
Years of Service	1-5	6-10	11-15	16-20	21-25	26-30	31-35	36-40

1. APPROACHES IN PREVENTING COUNTERFEIT AND PIRACY

a. How is your company preventing and or prosecuting counterfeit and piracy?

b. How effective are these measures?

2. What challenges do you have in the policing and prosecution of counterfeit and piracy?

a. How do you overcome these challenges?

3. How do you assist the police to eradicate the scourge of counterfeit and piracy?

4. What could be the best practice to prevent counterfeit and piracy?

5. Is there any other information that you want to give in the prevention of counterfeit and piracy?

Disclaimer: The information provided in these questions will be confidential and used solely for this research. Your participation is voluntary and at any time during the interview session, you can terminate your participation if you feel uncomfortable to proceed. You can also opt to remain anonymous and the responses will not be traced back to you.

Signature: _____

Date: _____

APPENDIX F: QUESTIONS FOR ATTORNEYS

Dear _____(participant name), **my name is Godfrey Thenga (student number: 32040423)**, I intend to gather data for my Doctoral degree in Police Science that I am studying at the University of South Africa. The purpose of this study is to analyse the policing of counterfeit in South Africa. I request your permission to interview you on the policing of counterfeit goods in South Africa. If you agree to participate in this research, you may sign this form below. The information obtained from this interview will be useful in contributing towards the improvement of the policing of counterfeit in South Africa.

BIOGRAPHIC INFORMATION

Please tick the relevant block below

Age	20-30 years	31-40 years	41-50 years	51-60 years				
Gender	Male			Female				
Position/Title	Attorney	Advocate	Associate	Partner				
Years of Service	1-5	6-10	11-15	16-20	21-25	26-30	31-35	36-40

1. DEFENCE OF COUNTERFEIT AND PIRACY ACCUSED IN SOUTH AFRICA

a. What challenges do you encounter in defending the person who is accused of counterfeit or piracy?

b. How do you deal with these challenges to mount a successful defence?

2. What challenges do prosecutors encounter in the successful prosecution of the person who is accused of counterfeit or piracy?

a. What do you think they should do to overcome these challenges?

3. What knowledge and skills set is required from an attorney to successfully defend a person who is accused of counterfeit or piracy?

a. How do they acquire that requisite skills/knowledge set?

4. Is there any other information that you want to give on defending people accused of counterfeit and piracy?

Disclaimer: The information provided in these questions will be confidential and used solely for this research. Your participation is voluntary and at any time during the interview session, you can terminate your participation if you feel uncomfortable to proceed. You can also opt to remain anonymous and the responses will not be traced back to you.

Signature: _____

Date: _____

APPENDIX G: SAPS NATIONAL PERMISSION TO CONDUCT RESEARCH LETTER

SUID-AFRIKAANSE POLISIEDIENS  SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag X 94

Verwysing/Reference:	3/34/2
Navrae/Enquiries:	Lt Col Joubert Intern Thenga
Telefoon/Telephone:	(012) 393 3118

**DIVISION: RESEARCH
SOUTH AFRICAN POLICE SERVICE
PRETORIA
0001**

- A. The National Head
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
- B. The Provincial Commissioner
GAUTENG
- C. The Provincial Commissioner
WESTERN CAPE
- D. The Provincial Commissioner
KWAZULU-NATAL
- E. The Provincial Commissioner
MPUMALANGA

**PERMISSION TO CONDUCT RESEARCH IN SAPS: A CRITICAL ANALYSIS OF THE
POLICING OF COUNTERFEIT GOODS IN SOUTH AFRICA: DOCTORATE DEGREE:
UNIVERSITY OF SOUTH AFRICA: RESEARCHER: G THENGA**

- A
 - 1. The above subject matter refers.
 - 2. The researcher, Mr G Thenga, is conducting a study with the aim is **to analyses the policing of counterfeit goods in South Africa.**
 - 3. The researcher is requesting permission to interview 55 Investigators in Specialized Commercial Crime Units in Gauteng, KwaZulu-Natal, Mpumalanga and Western Cape.
 - 4. The proposal was perused according to National Instruction 1 of 2006. This office recommends that permission be granted for the research study, subject to the final approval and further arrangements by the offices of the National Head: Directorate for Priority Crime Investigation.

**PERMISSION TO CONDUCT RESEARCH IN SAPS: A CRITICAL ANALYSIS OF THE
POLICING OF COUNTERFEIT GOODS IN SOUTH AFRICA: DOCTORATE DEGREE:
UNIVERSITY OF SOUTH AFRICA: RESEARCHER: G THENGA**

5. We hereby request the final approval by your office if you concur with our recommendation. Your office is also at liberty to set terms and conditions to the researcher to ensure that compliance standards are adhered to during the research process and that research has impact to the organisation.
6. If approval granted by your office, this office will obtain a signed undertaking from researcher prior to the commencement of the research which will include your terms and conditions if there are any and the following:
 - 6.1. The research will be conducted at his/her exclusive cost.
 - 6.2. The researcher will conduct the research without the disruption of the duties of members of the Service and where it is necessary for the research goals, research procedures or research instruments to disrupt the duties of a member, prior arrangements must be made with the commander of such member.
 - 6.3. The researcher should bear in mind that participation in the interviews must be on a voluntary basis.
 - 6.4. The information will at all times be treated as strictly confidential.
 - 6.5. The researcher will provide an annotated copy of the research work to the Service.
7. If approval granted by your office, for smooth coordination of research process between your office and the researcher, the following information is kindly requested to be forwarded to our office:
 - **Contact person:** Rank, Initials and Surname.
 - **Contact details:** Office telephone number and email address.
8. A copy of the approval (if granted) and signed undertaking as per paragraph 6 supra to be provided to this office within 21 days after receipt of this letter.
9. Your cooperation will be highly appreciated.

B-E For your information.


**LIEUTENANT GENERAL
DIVISIONAL COMMISSIONER: RESEARCH
DR BM ZULU**

DATE: 20/07/25

**APPENDIX H: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION (HAWKS)
PERMISSION TO CONDUCT RESEARCH LETTER**

South African Police Service



Suid-Afrikaanse Polisie

Privaatsak Private Bag X94	Pretoria 0001	Faks No. Fax No.	(012) 393 2128
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Your reference/U verwysing:

My reference/My verwysing: 3/34/2

THE DIVISIONAL COMMISSIONER: RESEARCH
SOUTH AFRICAN POLICE SERVICE
PRETORIA
0001

Enquiries/Navrae: Lt Col Joubert
AC Thenga
Tel: (012) 393 3118
Email: JoubertG@saps.gov.za

Mr G Thenga
UNIVERSITY OF SOUTH AFRICA

**RE: PERMISSION TO CONDUCT RESEARCH IN SAPS: A CRITICAL ANALYSIS OF THE
POLICING OF COUNTERFEIT GOODS IN SOUTH AFRICA: DOCTORATE DEGREE:
UNIVERSITY OF SOUTH AFRICA: RESEARCHER: G THENGA**

The above subject matter refers.


You are hereby granted approval for your research study on the above mentioned topic in terms of National Instruction 1 of 2006.

Further arrangements regarding the research study may be made with the following office:

The National Head: Directorate for Priority Crime Investigation:

- Contact Person: Maj Gen Mokotedi
- Contact Details: (011) 274 7855

Kindly adhere to paragraph 6 of our Attached letter signed on the 2017-07-25 with the same above reference number.


LIEUTENANT GENERAL
DIVISIONAL COMMISSIONER: RESEARCH
DR BM ZULU

DATE: 2018/04/11



1 CRESSWELL ROAD, SILVERTON, 0127
PRIVATE BAG X1500, SILVERTON, 0127
TEL: (012) 846-4315/4356
FAX: (012) 846-4442
E-MAIL: matthewsr@saps.gov.za
SehumeB@saps.gov.za

Dear Mr Godfrey Thenga

RE: TO CONDUCT RESEARCH WITHIN: A CRITICAL ANALYSIS OF POLICING OF COUNTERFEIT GOODS IN SOUTH AFRICA: DIRECTORATE FOR PRIORITY CRIME INVESTIGATIONS: UNISA RESEARCHER: MR GODFREY THENGA

1. Your application dated 26 August 2015 refers
2. Approval has been granted for you to conduct research in the Directorate for Priority Crime Investigation with the following conditions:
 - a. The research will be limited to the information provided by yourself unless otherwise agreed with the following Senior Officers.
 - Email address: Mokoenanh@saps.gov.za
 - Telephone Number: 013 759 1369
 - Email address: MokotediPN@saps.gov.za
 - Telephone number: 011 373 3341
 - Email address: ZikhalilJ@saps.gov.za
 - Telephone number: 031 325 6069
 - Email address: KhozaNP@saps.gov.za
 - Telephone number: 021 918 3762
 - b. The final draft will be tested with the Acting National Head: DPCI Lt General Matakata to confirm that the research conditions have been adhered to.
3. A copy of your final research document should be submitted to this office for record purposes.


**SECTION HEAD: QUALITY ASSURANCE AND STRATEGIC MANAGEMENT:
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
RM MATTHEWS**
Date: 2018-03-26

BRIGADIER

APPENDIX I: THE DEPARTMENT OF TRADE AND INDUSTRY (THE DTI) PERMISSION TO CONDUCT RESEARCH LETTER



Private Bag X84, PRETORIA, 0001, the dti Campus, 77 Meintjies Street, Sunnyside, 0002, Tel: (012) 394 0000
the dti Customer Contact Centre local: 0861 843 384 International: +27 12 394 9500, www.thedti.gov.za

Enquiries: Mr. DL Mathavha
Telephone: (012) 394 3864
E-mail : DLMathavha@thedti.gov.za

Mr Godfrey Thenga
Deapartment of Police Practice
Unisa Brooklyn House
337 Veale Street
0003

Dear Mr Thenga

RE: REQUEST FOR APPROVAL TO CONDUCT RESEARCH AT the dti

Your submission requesting approval to conduct research at the Department of Trade and Industry (**the dti**) refers.


the dti is in support of your research towards Doctorate in Literature and Philosophy in Police Practice and is willing to provide you with the necessary support to make your studies a success. We trust that the recommendation you provide will assist the Public Service of the Republic of South Africa at the National Government level.

Kindly note that approval has been granted on the following conditions:

- a) That you complete a Confidentiality Declaration form to ensure compliance with Departmental policies;
- b) That you participate in a briefing discussion with the Vetting Unit before commencement of the research;
- c) That you provide **the dti** with a detailed research plan and draft questionnaires, surveys and/or interview questionnaires (where applicable); and
- d) That you submit a copy of your research report once you have published the final document.

Should you have any further enquiries regarding the content herein, please contact the Director: Learning Centre, Ms Angie Ontong on 012 394 5980 or email AOntong@thedti.gov.za.

Yours sincerely,



LIONEL OCTOBER
DIRECTOR-GENERAL

DATE: 28/09/17

Lefapha la Dikgwabisano le Dilintaseteri • Lefapha la Kgwebo le Indasteri • uMnyango wezoHwebo neZimboni • Muhasho wa zwa Mbambadzo na Indasteri • Department van Handel en Nywerheid • Kgoro ya Kgwebo le Indasteri • Ndzawulo ya to Mabindzu na Tilindasteri • LiTiko leTekuhweba neliMboni • ISebo lezoRhwebo noShishino • UmNyango wezokuRhwebetana namaBubulo

Batho Pele - putting people first



APPENDIX J: NATIONAL PROSECUTING AUTHORITY (NPA) PERMISSION TO CONDUCT RESEARCH LETTER

Administration



Tel: +27 12 845 6000

Victoria & Griffiths
Mxenge Building
123 Westlake Avenue
Weavind Park
Pretoria

P/Bag X752
Pretoria
0001

Enquiry: Ms Z de Bruyn
Email: zdebruy@npa.gov.za
Phone: 012 845 6267
Date: 27/02/2017

Mr Godfrey Thenga
Per email: tshabg@unisa.ac.za

**RE: APPROVAL OF REQUEST TO CONDUCT RESEARCH IN THE
NATIONAL PROSECUTING AUTHORITY (NPA)**

Dear Mr Thenga

Thank you for showing interest in conducting research in the NPA. The purpose of this memorandum is to inform you that your request to conduct research within the NPA Specialised Commercial Crimes Unit (SCCU) has been approved.

Corporate Service Centres:

- Finance & Procurement
- Human Resources
- Development & Management
- Information Management
- Research & Policy Information
- Risk & Security

The NPA appreciates that the topic has been approved by the UNISA College of Law, Research Ethics Review Committee. Please consider and/or adhere to (whichever is applicable) to the below-mentioned in support of your research:

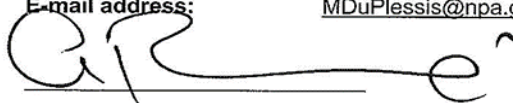
1. The request is supported by the National Prosecuting Services (NPS) of the National Prosecuting Authority and it should be noted and understood that information about the work can only be utilised with the NPA's explicit written approval and permission.
2. The research request focuses on "A Critical Analysis of the Policing of Counterfeit Goods in South Africa" and therefore the policies and acts that govern the SCCU.
3. Permission to conduct research is only limited to interviewing prosecutors from a random list of selected prosecutors.
4. This research intends to address the research problems of:

- 4.1. The policing of counterfeit goods in South Africa, and
 - 4.2. Adjudication of counterfeit in South Africa; the theories of punishments, investigation process and sentencing of counterfeit and piracy in South Africa.
5. Upon completion of the research project, it is suggested that a copy of the report be sent to the NPA for perusal and approval. This is specifically to prevent the inappropriate interpretation and publication of the latter mentioned information.
 6. It is also suggested that in the event of the author publishing an article on research which contains NPA information, it be approved by the NPA.
 7. Please inform the Head of the NPS in the province of your intent to conduct research with the prosecutors before approaching them.

In your case, there will be no need to complete FORM A, which is the request for access to records of a Public Body, Section 18(1) of the Promotion of Access to Information Act, 2000, since your research study only involves interviews with participants.

Kindly keep the NPA informed about further developments on this research and please send your response to the NPA Researcher on the following details:

Name: Ms Marthi Du Plessis
Telephone number: 012 845 6275
E-mail address: MDuPlessis@npa.gov.za



Dr. Silas Ramaite SC
Deputy National Director of Public Prosecutions: Administration and
Office of Witness Protection

Date: 15/03/2017

RE: APPROVAL OF A REQUEST TO CONDUCT RESEARCH STUDY: MR G. THENGA

Page 2 of 2

APPENDIX K: SOUTH AFRICAN REVENUE SERVICES (SARS) LETTER OF REFUSAL FOR CONDUCTING INTERVIEWS

From: Sandile Memela <SMemela2@sars.gov.za>

Sent: Monday, 22 May 2017 11:26 AM

To: Thenga, Godfrey

Cc: SARSMedia

Subject: RE: REQUEST FOR PERMISSION TO CONDUCT INTERVIEWS WITH SARS/CUSTOMS MEMBERS WHO ENFORCE ANTI-COUNTERFEIT MEASURES IN SOUTH AFRICA

Dear Godfrey,

We have noted your request.

Please note that unfortunately SARS would not be able to accede to your request. This is due to the nature and sensitivity of the work undertaken by SARS investigators as well as the Tax Administration Act prescribing the need for confidentiality with respect to tax matters of taxpayers.

We wish you the well in your studies.

SARS MEDIA



APPENDIX L: ETHICAL CLEARANCE



COLLEGE OF LAW RESEARCH ETHICS REVIEW COMMITTEE

Date: 23-09-15

Reference: P29

Applicant: G Thenga

Dear G Thenga

DECISION: ETHICS APPROVAL

Name	G Thenga
Proposal	A critical analysis of the policing of counterfeit goods in SA
Qualification	DLitt et Phil-Police Science

Thank you for the application for research ethics clearance by the College of Law Research Ethics Review Committee for the above mentioned research. **Final approval is granted.**

The application was reviewed in compliance with the Unisa Policy on Research Ethics.

The proposed research may now commence with the proviso that:

1. *The researcher will ensure that the research project adheres to the values and principles expressed in the Unisa Policy on Research Ethics which can be found at the following website:*

http://www.unisa.ac.za/cmsys/staff/contents/departments/res_policies/docs/Policy_Research%20Ethics_rev%20app%20Council_22.06.2012.pdf

2. *Any adverse circumstances arising in the undertaking of the research project that is relevant to the ethicality of the study, as well as changes in the methodology, should be communicated in writing to the College of Law Ethical Review Committee.*



Open Rubric

University of South Africa
Preller Street, Muckleneuk Ridge, City of Tshwane
PO Box 392, Unisa, 0003, South Africa
www.unisa.ac.za/law

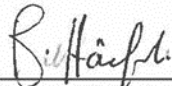
An amended application could be requested if there are substantial changes from the existing proposal, especially if those changes affect any of the study-related risks for the research participants

- 3. The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study.*

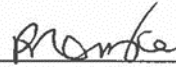
Note:

The reference number (top right corner of this communique) should be clearly indicated on all forms of communication (e.g. Webmail, E-mail messages, letters) with the intended research participants, as well as with the URERC.

Kind regards



DR B HAEFELE
CHAIR PERSON: RESEARCH ETHICS
REVIEW COMMITTEE
COLLEGE OF LAW



PROF R SONGCA
EXECUTIVE DEAN:
COLLEGE OF LAW

APPENDIX M: LANGUAGE EDITING CERTIFICATE

EDITING AND PROOFREADING CERTIFICATE

7542 Galangal Street

Lotus Gardens

Pretoria

0008

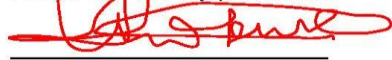
10 September 2018

TO WHOM IT MAY CONCERN

This letter serves to confirm that I have edited and proofread Mr G Thenga's dissertation entitled, **"A CRITICAL ANALYSIS OF THE POLICING OF COUNTERFEIT GOODS IN SOUTH AFRICA"**.

I found the work easy and enjoyable to read. Much of my editing basically dealt with obstructionist technical aspects of language which could have otherwise compromised smooth reading as well as the sense of the information being conveyed. I hope that the work will be found to be of an acceptable standard. I am a member of Professional Editors' Guild.

Hereunder are my particulars:



Jack Chokwe (Mr)

Contact numbers: 072 214 5489

jackchokwe@gmail.com

Professional
EDITORS 
Guild

APPENDIX N: TURN-IT-IN CERTIFICATE



Digital Receipt

This receipt acknowledges that Turnitin received your paper. Below you will find the receipt information regarding your submission.

The first page of your submissions is displayed below.

Submission author: Godfrey Thenga
Assignment title: Complete dissertation/thesis for e...
Submission title: Thesis for Godfrey Thenga
File name: Thesis_G_Thenga.docx
File size: 7.05M
Page count: 242
Word count: 62,337
Character count: 389,451
Submission date: 20-Sep-2018 12:26PM (UTC+0200)
Submission ID: 1005240350

