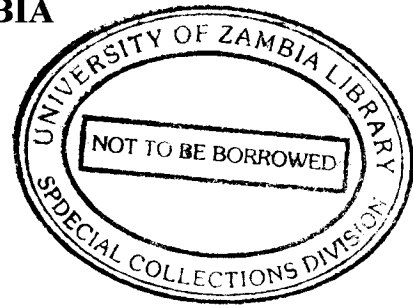


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



I recommend that the directed research paper prepared under my supervision

by

OBBISTAR MUSUKWA

(20003587)

Entitled:

**A CRITICAL ANALYSIS OF THE EFFICACY OF THE LEGAL FRAME WORK
TO DEAL WITH COUNTERFEITS (DRUGS INCLUSIVE) AND PIRATED
GOODS IN ZAMBIA.**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing Directed Research.

.....
Mr. George Mpundu Kanja
Supervisor

22.12.05

.....
Dated

DECLARATION

I, OBBISTAR MUSUKWA, Computer No. 20003587, do declare that i am the author of this Directed Research Paper Entitled:

A CRITICAL ANALYSIS OF THE EFFICACY OF THE LEGAL FRAME WORK TO DEAL WITH COUNTERFEIT (DRUGS INCLUSIVE) AND PIRATED GOODS IN ZAMBIA.

and that it is a product of my ingenuity and that due acknowledgement has been given where other scholars' work has been used or cited. I truly believe that research has not been previously presented in the school for academic work.

Date: 28/12/05

Signed D. MUSUKWA

DEDICATION

I DEDICATE THIS WORK TO MY LATE PARENTS, DICKSON AND ALICE SINGOGO MUSUKWA, FOR IMPARTING IN ME THE VALUE OF A GOOD EDUCATION. I WISH YOU WERE HERE TO SHARE IN THE GLOW OF MY SUCCESS.

ACKNOWLEDGEMENTS

Special thanks, goes to creator, the Almighty and Loving for his abundant grace and guidance through the storms and valleys of life. Without Him, I would not have reached this far. Furthermore, I am greatly indebted to the following people:

- Mr. George Mpundu Kanja, my supervisor for his guidance and assistance and allowing me to work at my own pace.
- The entire academic staff in the school of law and all my classmates (2003-2005)
- Mrs. Mwape Mr.F. Chizu, Mr., Dorcas Chileshe Ilunga, Mr. Muyunda Ililonga, Brenda Muntemba, Mr. Mubanga William, Mr. Bonaventure Chilinde and many other too numerous to mention for their material support.
- Theophister Thope and Hazel Mwenya for rendering typing services and for putting up with dead lines.
- Elliot Simposya (the late) who tragically died in August 2005 for your guidance and believing in me. MYSRIP.
- To my family members especially Kay B. Mayawa Musukwa and Tionge Musukwa and my brothers and Sisters for your support.
- Henry Timeo Musukwa (the late) for all the sacrifices you made to ensure that I finish education.
- Fr. Emmanuel Chikoya for spiritual guidance and for rendering his computer and printer for this directed research.

TABLE OF CONTENT

Submission of Directed Research	(i)
Recommendation	(ii)
Declaration	(iii)
Dedications	(iv)
Acknowledgement	(v)
Table of National Statutes	(vi)
Table of cases	(vii)
Introduction	1
CHAPTER ONE	3
1.1 What are counterfeit	3
1.1.1 (a) What are trademarks	3
(b) Types of trademark	4
1.1.2 Economic Benefits of trademark	4
1.2.0 Global Prevalence of problem of counterfeit	5
1.2.1 Examples of counterfeit product	5
1.2.2 Detection of counterfeits	13
1.2.3 Factors facilitating counterfeit	15
2.0 Piracy	16
2.1 What is a Copyright	17
2.1.2 Factors which Promote Piracy	18
2.1.3 Organized Crime and Piracy	19
2.1.4 Identifying Counterfeit	21
3.0 Counterfeit and Piracy on Zambian Market	22
3.1 Piracy in Zambia	22
3.2.0 Counterfeit Product in Zambia	25
3.2.1 Counterfeit Drugs	29

4.0	Impact of counterfeit and piracy	31
CHAPTER TWO		35
A) TRADEMARKS PROTECTION		35
2.1	Trips Agreement (1994)	35
2.2	Trademark Law Treaty (1994)	37
2.3	Paris Convention (1885)	38
2.4	The Madrid Agreement (1891) and Madrid Protocol (1989)	39
2.5	Nile Agreement (1957)	42
B) COPYRIGHT AND OTHER RELATED RIGHTS		42
2.6	Trips 1994	42
2.7	Rome Convention (1961)	43
2.8	Berne Convention (1886)	44
2.9	WIPO Copyright treaty (1996)	46
3.0	The WIPO Performances and Phonogram treaty (1996)	47

CHAPTER THREE	49
3.1 Copyright and Performance Right Act (1994)	49
3.2 The Trade Mark Act	52
3.3 Penal Code	55
3.4 The Pharmaceutical Act (2004)	56
3.5 Food and Drugs Act	58
3.6 Custom and Excise Act	59
3.7 The Competition and Fair Trading Act	61
CHAPTER FOUR	
4.1 Anti-Piracy Crush Squad	63
4.2 The Copyright taskforce	64
4.3 Zam Cops	64
4.4 Zambia Competition Commission	67
4.5 The Pharmaceutical Regulatory Authority	69
4.6 Zambia Patent office	73
4.7 Registrar Copyright	74
4.8 Zambia Bureau of standards	75
4.9 The ZRA	78
5.0 ZACA	79
CHAPTER FIVE	81
5.1 Adequacies and shortcoming of institution/Legislation	81
5.2 Recommendations	86
5.3 Conclusion	88
Bibliography	90

TABLE OF INTERNATIONAL AGREEMENTS AND NATIONAL LEGISLATIONS

1 INTERNATIONAL AGREEMENTS

Trips Agreement (1994)	35,42
Trademark law Treaty (1994)	37
Paris Convention (1883)	38
Madrid Agreement (1871) and Madrid Protocol (1989)	39
Nile Agreement (1959)	42
Rome Convention (1961)	43
Berne Convention (1886)	44
WIPO Copyright Treaty (1996)	46
WIPO Performance and Phonogram Treaty (1996).	47

2 NATIONAL LEGISLATIONS

Copy right and Performance right Act	49
Competition an Fair trading Act	61
Customs and Excise Act	59
Food and Drugs Act	58
Pharmaceutical Act	56
Penal Code	56
Trademark Act	52

TABLE OF CASES

- Trade Kings V Unilever Limited and Cheseborough Zambia Limited
- Michael Bolton V Isley Brothers (1994)
- Performance Societies Ltd V Hickey T/A Bar B-Que Restaurant Ltd (1979) ZR
- University of London V University Tutorial Press Limited
- R V Johnson (1994)

1.0 INTRODUCTION

Piracy and counterfeiting are chronic problems that have posed serious challenges to intellectual property legal legislation. Piracy and counterfeiting are infringements of intellectual property rights and consequences economically, socially and financially are far reaching. This study therefore, aims at exploring the significance of counterfeit and piracy of goods not only as a trade problem and intellectual property but also as un-noticed health issue with grave repercussions. Piracy and counterfeit goods are a world concern affecting both developing and developed countries. Counterfeit goods have caused serious health problems resulting into death, cancer, chronic illnesses, poisoning, among others. Musicians, governments and trademark and copyright holders have lost out on revenues. However, the author of this text from the onset, acknowledges the fact that providing an accurate or exact overview of counterfeit and piracy at all levels – globally, regionally and nationally – is difficult and next to impossible due to lack or and scanty documented data. The author acknowledges that the problem of counterfeiting and piracy has reached alarming levels that the consumer is hardly sure of the genuinity of the product he or she is buying. The problem has impacted negatively economically, socially and is posing a grave dimension on the health of the world citizenry due to fake products on the market, which include counterfeit drugs. The growing problem of counterfeiting can be evidenced from the statistics carried out in the European Union in 2002 which shows that the European Union has seen a 900% increase in the amount of different counterfeit products coming into the European Union in the last five years.¹ This shows the magnitude of the problem if only one region of the world can experience such an increase. The rationale of this study therefore is to pinpoint hitherto unrecognized risks posed on society at large, and the losses encountered by owners of trademarks and copyrights, its effects on industry at global, regional and national levels. This paper also

¹ EU Institution Press release” Customs: Counterfeiting and Piracy in 2001”. Brussel, 26 July 2002.

discusses the international framework on piracy and counterfeit and will examine the local legal framework and institutional capacity, if any. The paper further offers suggestions on how to deal with the problem

CHAPTER ONE

This chapter will define the terms *Counterfeit Products* and *'Piracy'* and will explore the problem of counterfeiting and piracy at global or international and national levels. The chapter will, further, seek to illuminate the growing seriousness of the problem and provide factors that motivate counterfeiters and pirates of goods.

1.1 WHAT ARE COUNTER FEITS?

Counterfeit products are products (of any kind) bearing an unauthorized presentation of a manufacturer's trademark. Simply stated, counterfeit products refer to those products which are fake, not original copies of a manufacturers' trademark or trade name and which are packaged to appear as though they have been manufactured by the holder or owner of the trademark or with his authorization. Counterfeiting is an infringement of a trademark of a right holder. In order to have a clear understanding of the issue at hand it is imperative to briefly explain what a trademark is.

1.1.1 (a) WHAT IS A TRADEMARK?

Trademarks, generally, speaking, identify goods or product. A trademark is described as a word, name, symbol, device or any combination thereof which distinguishes the goods of one person from goods manufactured or sold by others and indicates the source of goods. Cornish, W.R, writes that "*Trademark and related aspects of trading goodwill (get up, trade names of businesses, etc) are protected and symbols needed by consumers to distinguish between Competing Products and Services on a market economy*".² Furthermore Kamil Idris, Director General (WIPO) and Secretary General of International Union for Protection of New varieties of plants, point out that an established trademark with positive customer recognition may be a single most valuable intellectual

² W.R Cornish, Intellectual Property. 3rd ED. Universal law Press co. PVT.LTD Delhi 2003, P8

property asset or even the most valuable assets of any kind, which business can possess.³

(b) TYPES OF TRADE MARKS

Trademarks are of different types, such as **service marks**, **certification marks**, **dress marks** and **geographical indication**. **Service marks** are names used to identify a service such as *Western Union* for money transfer, *celtel* (for communication)

McDonalds and Nandos for fast food restaurants, and the defunct *UBZ logo* interlia; **Certification marks** are used to indicate that a good or service complies with a standard or specification. On the other hand, **Collective marks** are marks used to identify the goods and services to member of an organisation (e.g. *UNZA* for University of Zambia, *FAZ* for football Association of Zambia).

Trade names are names used to identify a business (e.g. Sony corporation, Toyota, Sanyo, Philips incorporation etc). **Trade dress** indicates the unique overall appearance of a business or a product inform of symbols, slogan or logos. **Geographical indication**, lastly, identify a product as originally from a certain area or region such as “*Champagne*”, “*Chianti*” or *Darjeeling*”⁴

1.1.2 ECONOMIC BENEFITS OF TRADEMARKS

According to Kamil Idris, trademarks serve two primary micro functions: Firstly, they facilitate consumer’s decision making about their choice of product in the market. Since consumers are always faced with the problem of selecting among several goods on shelves offered for sale that resemble each other, whose superficial similarities may hide differences in quality and characteristics, trade marks help customers to reduce their search costs as trade marks are often used in conjunction with advertising that communicates information on product on market.⁵

³ Kamil Idris. Intellectual Property: A power tool for Economic Growth, Switzerland, W,Po 2003, P148

⁴ Ibid, P 149.

⁵ Ibid, P 150 - 151

Secondly, they provide incentives for enterprises to invest in development and delivery of goods and services of quality for consumer's desire. Trademarks that have become popular are often good indications of the rate of quality of the goods to which they relate and the people's general satisfaction with the product. Therefore, a trademark motivates sellers to invest in products quality, maintenance and improvement beneficial to society in general.⁶ A trademark, therefore, must be registered in order to be protected. In Zambia, the protection of a trademark lasts first for seven years, but there after can be renewed every fourteen years, but this will change when Zambia becomes TRIPS compliant.

1.2.0 PREVALENCY OF THE PROBLEM OF COUNTERFEIT AT GLOBAL LEVEL

The problem of counterfeiting of products is wide range and runs across a wide range of products. This infringement of intellectual Property Rights costs Companies billions of Dollars in lost revenue and creates the potential for unqualifiable harm to the company brand and reputation.⁷ There is hardly any sector that is not touched by counterfeiters of fake products. The typical affected sectors in the European single market with regard to rate of counterfeiting/ piracy are: *Data processing (39%) audio visual (16%) textiles (10-16%); music (10%); vehicle spare parts (5-10%); sports and leisure (5-7%).*⁸

1.2.1 Examples of Counterfeit Products

Examples of Counterfeit products include prescription and over - the counter drugs (such as *viagra, Lipitor, Serostim, artesunate malarial drug*, etc); clothing (especially designer shirts such as *Gucci, Loyalty*, etc); wrist watches; sportswear (such as *Nike, umbro*,

⁶ William M Landes and Richard a Posner, "The Economics of Trade mark Law. **The trademark Report 78 (May, June 1988) P. 270 – 271.**

⁷ [http: source: www. ey. Com/global/content/. Nsf/us/ Health science](http://source: www. ey. Com/global/content/. Nsf/us/ Health science). Visited in August 2005

⁸ Source: <http://europa. Eu.int/comm./internal-market/en/inteprop/indprop/country>

Puma); Jersey; financial instruments (a category which include *credit cards as well as currency and treasury bonds*)⁹; fake ID (*passports, drivers license, birth certificates*); Cigarettes; DVDs; CDs; toys, computer software; musical system (such as radios); perfumes; luxury and fashion wear ; designer shoes; aircraft components; automobile components; pharmaceutical products; mineral water; insecticides; teabags; facial creams
pace marker; canon printer and typewriter, inclusive of toners; Louis Vuitton hand bags; condoms etc. The list is endless of counterfeit products. Ruth Orchard, Director general of Anti-counterfeiting Group, a UK based group representing more than 200 manufacturers in 30 different countries sums up the issue by pointing out that:

*"... It used to be that luxury goods were primarily the ones being attacked. It's now every consumer product you can think of: washing powder, condoms teabag, vodka, children's sun cream. It's just unbelievable".*¹⁰

Globally, below is an illustration of the most affected product by product.

(a) **COMPUTER SOFTWARE**

According to Kamil Idris, this product is the most affected of all products by counterfeiting and piracy.¹¹ According to **Global software Piracy report** (May 2000),¹² the computer software industry calculates that it lost US \$ 12 billion, in 1999, a staggering amount in comparison to the United Nations budget which stood at U S \$ 2.54 billion for 2000-2001,¹³ Software losses region by region is

Source: [http/ www. Chanel register. Co.uk/2005/07/28/gieschen counterfeit report](http://www.Chanelregister.Co.uk/2005/07/28/gieschen%20counterfeit%20report) (Jon Leyden. **Internet fuels trade in counterfeit goods**, 28th July 2005

Source: [http// news.bbl.co.uk/uk/1/hi/magazine/383627.stm](http://news.bbl.co.uk/uk/1/hi/magazine/383627.stm). (By Jennifer Quinn, BBC News on line Magazine)

Kamil Idris, **1P: A power tool for Economic Growth**. P302.

Global Software Report (May 2000) P.2.

OPCIT P 302.

illustrated below for the period 1999 courtesy of **Global software Piracy Report** (May 2000:3) and Kamil Idris.

FIGURE 1: Software Piracy Losses by Region (US\$ billions) (Approximate Figures

[Region]	[Amount lost]	
	[1994]	[1999]
Mid East / Africa	\$ 500	\$ 500
Eastern Europe	\$ 1000	\$ 500
Latin America	\$ 1000	\$ 1100
Asia / Pacific	\$ 3000	\$ 2250
Western Europe	\$ 2250	\$ 3750
North America	\$ 4000	\$ 3550

***Source:** Kamil Idris, **IP: A Power Tool for Economic Growth** (2003) at P303

(b) PERFUMES

Counterfeits have not spared the perfume industry either. Criminals in many parts of the world have discovered that the counterfeiting of products is financially lucrative and relatively low risk, they have sunk their tentacles in almost every industry and the perfume industry is no exception. It is estimated that the industry has lost over 5% of its total turnover.¹⁴ Designer perfumes inter alia; *Gucci, Givenchy, Chanel and Christian Dior have been targeted.*¹⁵

(c) LUXURY GOODS AND FASHION WEAR

The counterfeiting of luxury goods and fashionable wear of world renowned designers is prevalent. Counterfeit copies of these goods proliferate especially in the Western World and the Far East where the major manufacturers are established. For example the owner of designer

¹⁴ K. Idris. **Intellectual Property: A power tool for Economic Growth** P305.

¹⁵ Tabitha Mvula, "Perfumes" in **Weekend Post**, Friday June 17, 2005 Edition No. 3165. Page V.

boutique was arrested by Federal agents and more than 150 counterfeit handbags, luggage, watches, jewellery, sunglasses and scarves bearing the brand names of Louis Vuitton, Christian Dior, Gucci, Chanel and others valued at \$76,000, according to **San Diego News** (July 13, 2004). According to Kamil Idris, a common technique adopted by counterfeiters is to import the fake clothing from one country and to manufacture or import the labels from another country, which are attached in the country of intended sale, making it difficult to identify fake products while in transit.¹⁶ A major source of such products are the legitimate sub contractor manufacturers who are authorized to make original items far much in excess and sell the remainder through the backdoor which impact negatively on the economy.¹⁷ In Italy, 20% of clothes purchased are counterfeits.¹⁸

(d) TOYS (TRADITIONAL AND ELECTRONIC)

Traditional and electronic toy games are copied frequently and marketed under different trademarks or names making it rather difficult to enforce infringement redress. Worst hit are video games such as these which were created under *the Gameboy™* Nintendo Best Seller, whose estimated losses in USA alone for 1996 stood in excess of \$800 million.¹⁹

(e) AIRCRAFT AND CAR COMPONENTS

The car industries have, equally, been invaded by counterfeiters just like the aircraft industry. Standard part of cars which can be easily sold on the shelf or fitted to different mo of cars are the targets. The car industry records a USA \$12 billion staggering losses per year. On the other hand, though the aircraft industry is highly regulated, counterfeit aircraft parts tend to slip into the chain

¹⁶ Opcit p. 304

¹⁷ Organisation for Economic Cooperation and Development, Economic import of counterfeiting (paris, 1998) P 12

¹⁸ Global congress an combating counterfeiting.

¹⁹ Economic Import of Counterfeiting (Paris 1998) P. 15

medicinal products with correct ingredients but not in the amounts as provided there under, wrong ingredients, without active ingredients, with insufficient quality of active ingredients, which result in the reduction of the drug's safety, efficiency, quality strength or purity. *A counterfeit drug is a drug, which is deliberately and fraudulently mislabeled with respect to identity and/or source or with fake packaging and can apply to both branded and generic products.*²⁵

According to WHO definition,²⁶ the following are examples of counterfeit pharmaceutical products.

- Fake packaging + correct quantity of correct ingredient = counterfeit
- Fake packaging + wrong ingredient = counterfeit
- Fake packaging + no active ingredient = counterfeit
- Fake packaging + incorrect quantity of correct ingredient = counterfeit
- Genuine packaging + wrong ingredient (deliberate) = counterfeit
- Genuine packaging + no ingredients (deliberate) = counterfeit
- Genuine packaging + incorrect quantity of ingredients (deliberate) = counterfeit
- Genuine packaging + incorrect quantity of quantity ingredients (not deliberate) = substandard
- Genuine packaging + correct of ingredient = genuine

According to WHO, between 6 to 10 percent of all medicine on the global market is reported to be counterfeit with estimated sales of more than \$35 billion a year²⁷ and the problem is serious in developing countries, including South East Asia. The Federal Drugs Administration of the USA report reveals that in Africa, more than 20 percent of Anti-malarial drugs are thought to be counterfeit and it is also believed that up to 30 percent of drugs in South East Asia and China may

²⁵ Ibid, p 3

²⁶ Ibid, p 4

²⁷ Source: <http://www/zmh.com.an/new/who>

be counterfeit.²⁸ On the other hand, the WHO database for the period between 1982 and April 1999,²⁹ obtained from confidential and public reports relating to counterfeit drugs showing the geographical origins of these reports indicate the magnitude of the problem of counterfeit drugs. The countries are classified according to WHO regional office.

Figure 2: Geographical Origin of Cases (1982 – April 1999: total 77

Regional office for America	(Developing)	5.8%
Regional office for Eastern Mediterranean	(Developing)	2.1%
Regional office for Africa	(Developing)	19.7%
Regional office for Europe	(Eastern and Developing)	0.8%
Regional office for Western Pacific	(Developing)	46.7%
Regional office for Western Pacific	(Developing)	1.7%
Regional office for South East Asia	(Developing)	3.8%
Regional office for South East Asia	(Developing)	13.6%
Regional office for America	(Industrialized)	5.9%

From the same report the pharma co -therapeutic classes of cases report indicates that the majority of detected counterfeit products in the database are life-saving drugs, such as, anti-biotic. The following are the counterfeit drugs, which among others, are counterfeited by pharmaceutical industry according to a WHO report carried out in Myanmar and Vietnam in 1999.³⁰

²⁸ Source: [www. Astrazeneca – us. com](http://www.Astrazeneca-us.com)

²⁹ WHO (1999). **Counterfeit and substandard drugs in Myanmar and Vietnam**, Switzerland. P 5

³⁰ Ibid, p 6

FIGURE 3: pharmaco-therapeutic classes of cases report (1982 – April 1999 of 71 drugs

Anti-biotic	45.3%	Androgens	4.2%
Tranquilizers	4.0%	Analgensis	7.0%
Anti-diabetic	7.1%	Anabolic steroid	2.5%
Anti fungals	1.7%	Vitamins	2.6%
Anti malarial	2.7%	Respiratory agents	5.8%
Anti tuberculosis agent	1.7%	Hormones	1.9%
Corticosteoids	7.5%	Herbulis	3.0%

Furthermore, a study undertaken in 2001 in Mekong Countries such as Laos, Mynamar, Thailand and Vietnam indicate that a third of Anti Malarial drug, artesunate, were counterfeit.³¹ Other drugs which are seriously counterfeited according to the Food and Drug Administration (F.D.A) report of May 18, 2005,³² in the past year include counterfeit *lipitor*, counterfeit *viagra* [in which thousands of imported fake viagra are manufactured in China to resell in the USA and according to Pfizer, in one case that came to light, one man in china dealing in counterfeit viagra supplied over a quarter of a million pills a month and he infiltrated about nine European and Middle Eastern Countries and around 10 United states America states,³³ etc. However, the problem of counterfeit drug is worst in developing countries due to lack of proper legislation in the health sector coupled with poor regulatory network. According to Dr. Niyi Oyundiran of WHO, up to

³¹ Source: [www. Astra Zeneca – us.com](http://www.astrazeneca-us.com)

³² Source: [http://www.fda.gov/oc/inintives/counterfeit/update 2005.intml](http://www.fda.gov/oc/inintives/counterfeit/update%202005.intml).

³³ Source: <http://news.bbc.co.uk/1/hi/magazine/383679.stm>

40% of all drugs in Nigeria are either smuggled in illegally or are counterfeit.³⁴ Dr Dora Akunyile, director of National Agency for Food and Drug Administration and Control observes:

“They (Counterfeiters...addition mine) have found Africa, a ready and lucrative market due to ineffective regulation in many countries. The discriminatory regulations of pharmaceuticals by exporting countries in which they produce standard products for local consumption and product of questionable quality labeled “for export only”. We have used every opportunity to impress on the international community that products labelled “for export only” are unacceptable ... Products that can't be used in the country of manufacture ate unacceptable...”³⁵

In Africa in general, among other countries, South Africa and Nigeria, have really taken a serious stance with regard to counterfeit. For instance in Nigeria, over 242 million Naira, Nigerian currency, worth of the fake and substandard products such as unwholesome pharmaceutical tablets, syrups, capsules and injectables as well as cosmetics food items, adulterated vegetable oil, *cenvoy*, an imitation of *envoy* vegetable oil and medical devices were destroyed by the National Agency for food and Drug Administration and control (NAFDAC)³⁶

1.2.2 DETECTION OF COUNTERFEITS

By its nature, counterfeits are difficult to detect and investigate. The difficult in identifying counterfeit products in the market is due to the packaging for the counterfeit products, which often look the same as the packaging for the genuine products therefore, consumers are often unable to distinguish between genuine and counterfeit products. However, the following may be indicators of counterfeit products:

³⁴ Panos institute. **Patents, Pills and Public health. Can trip deliver?** London. Panos institute 2002, p 14.

³⁵ Dr Dora Akunyile. Director of NAFDAC in her acceptance speech at Africa Achievement Award. California. UA. May 21, 2004 . Source: Africa times. Com/African watch. Html.

³⁶ **The Post (Business Post) July 26, 2005 P. IX.**

- (i) Unusually low prices for the products.
- (ii) The materials used in the manufacture of products are of a poor quality.
- (iii) The manner in which the products are sold can differ from the manner of normal business and consumer transaction.
- (iv) In the case of *Canon* products, the colour and material used in packaging differ from the genuine *Canon* packaging. For example the counterfeit *Canon* consumable and battery products that *Canon* has seized in market in Europe, Middle East and Africa include: Toners (NPG-1, NPG-11), inkjet and cartridges (BC-05, BC1-21, BC1-3e, BC-20, BC-24, FX-3, BX-3 and EP-22) and Batteries (BP511, BP-522, NB-1L).³⁷
- (v) Forged labels are a frequent counterfeiting strategy.
- (vi) Counterfeit goods may not be manufactured in accordance with established methods that ensure proper functioning of the item.
- (vii) Michele Forzley writes that a counterfeit product may not comply with safety standard, such as electric code standards. He further points out that household fans have been made with counterfeit GF1 plugs, which would not shut off the fan if it were exposed to water, exposing a consumer to electrocution.³⁸
- (viii) The product may not have the manufacturer's name on it and its physical address.
- (ix) No guaranty available or warranty
- (x) The products may not have the source of origin.
- (xi) Incorrect, smeared or blurred producers on packaging.
- (xii) Some drugs may not even have the expiry period as well as date of manufacture.

³⁷ Source: <http://www.Canon.Co.uk/counterfeit>. P 3 and 4.

³⁸ Michele Forzley, J.D. MPH; counterfeit goods and the Public Health and Safety (2003) Source: [http:](http://)

www.Iipi.Org/reports/counterfeit.

(xiii) The drug may have fake packaging, and wrong ingredients.

(xiv) Incorrect spelling of brand names e.g. *Phillips*, "*panasonaenics*", *sharpy*, *philipps*.

1.2.3 FACTORS FACILITATING COUNTERFEIT

A Variety of factors contribute to the proliferation of counterfeit products. Below is a general overview of factors that enhance counterfeiting.

(a) Counterfeiters are motivated by the high (huge) profits which they obtain from the sale of counterfeit products. In the words of Dr. Dora Akunyile, Director NAFDAC ,
*"counterfeiters have discovered that counterfeiting is financially lucrative and of relatively low risk."*³⁹ The high value of certain products which makes it profitable to counterfeit they entice counterfeiters.

(b) Globalisation has made distribution channels easy targets for introduction of counterfeit products. The Zambia Consumer Association Chief, Mr Muyunda Ililonga, asserted in an interview that *"counterfeiting of products is due to the challenging era which has come up with the opening up of the national markets to international trade which has brought with it challenge of counterfeits."*⁴⁰

(c) The other factor is the sophisticated tools counterfeiters use to replicate manufacturer's of genuine products packaging. The technology to produce everything is now widely available in the world due to technological advancement which the world has undergone.

(d) The internet has also fuelled trade in counterfeit goods. John Leyden writes that the *"venues such as internet chat rooms and private forums are also being used by criminals and terrorists to provide information regarding manufacturing techniques...With an*

³⁹ Dr Dora Akunyile Director, NAFDAC, on her acceptance speech at Africa Achievement Award, California USA, may 21, 2004

⁴⁰ Mr Muyunda ililonga, ZACA chief in an interview on 25th August 2005, Afcom House.

increase in internet users in both developed and developing regions in particular the middle East and Asia the potential market for these items is expanding.”⁴¹

- (e) Organised crime has become increasingly involved in counterfeiting as it has become more profitable.⁴² Criminals in many parts of the world have discovered that counterfeiting is financially lucrative and relatively low risk.⁴³ Kamil Idris concurs with this view and further writes... *“the active involvement of fact. counterfeit and pirated goods for several reasons: it is lucrative; it is often a low risk activity; and it funds other activities where the risks as well as the rewards are much greater.....organised crime is almost always involved in commercial-scale counterfeiting and piracy operation”*⁴⁴
- International terrorism has been funded, among others, by profits from counterfeiting and piracy activities.
- (f) Lack of legislation in some countries to help in the eradication of counterfeiting.

However, before analyzing the impact of counterfeit goods and pirated goods, it is imperative that a thorough discussion of piracy is done.

2.0 PIRACY

Piracy, in simple terms, is the unauthorized copying or duplication of an original recording for commercial gain without the consent of the owner. Justice Anderson Zikonda writes that *“TRIPS Agreement defines ‘pirated copyright goods’ to mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that*

⁴¹ John Leyden “internet fuels trade in counterfeit good .” source:<http://www.channelregister.co.uk/2005/07/28/gieschen-counterfiet-report>.

⁴² Source:<http://www.Pfizer.com/Pfizer/subsites/counterfeit>.

⁴³ Dr Dora Akunyile, Director of NAFDAC, on her acceptance of African achievement Award, USA ,May 21, 2004.

⁴⁴ Kamil Idris, Intellectual Property; A power tool for Economic growth P 309.

copy would have constituted an infringement of copyright or a related right under the law of the country of importation”⁴⁵

Piracy acts involve, inter alia, illegal reproduction (dubbing), of audio-visual work, illegal recording of live sound performances; exhibiting such pirated audio – visual work for the sale, importing or distributing piracy audio-visual works, illegal rebroadcast of a television broadcast or cable program and the renting out pirated video tapes.⁴⁶

The problem of piracy, like that of counterfeiting is quite serious at global, regional and national levels depriving not only the owner of the copyright of the profits from their sweat but also results in the loss of revenue on the part of government due to the fact that pirates usually smuggle their contraband into the mainstream economy. In a nutshell, piracy is an infringement of copyrights law of intellectual property rights. There is need to briefly describe what copyrights are.

2.1 WHAT IS A COPYRIGHT?

According to the Intellectual Property Organisation (WIPO) Copyright is a legal term describing rights given to creators for their literary and artistic work.⁴⁷ “*Copyright laws,*” writes Kenneth Mwenda, “*are a part of intellectual property laws. Copyright laws, like any other aspects of intellectual property law, are concerned primarily with the protection of works produced by human intellect*”.⁴⁸ With regard to copyrights Donald Gregory, et al, observes:

⁴⁵ Justine Anderson Zkonda “**parallel importation and counterfeit goods**”, A paper presentation on Intellectual Property at LAZ seminar, Intercontinental Hotel, Lusaka, March 4, 2005. p 4

⁴⁶ Ministry of Information and broad casting services, and Zamcorp Poster on Piracy.

⁴⁷ **WIPO Brochure: what is copyright?**

⁴⁸ K.K Mwenda and D.A Ailola, **frontiers of Legal knowledge** Durham, Carolina Academic Press, 2003, p 62.

“... Copyright arises automatically upon the fixation of the author's work in any tangible medium of expression. Copyright protects only the expression of the work, not the underlying idea, process, procedure, concept, system or discovery”⁴⁹

The kind of work covered by copyright include literary work such as novels, poems, plays, reference works, newspaper, and computer programmes; databases, films, music, compositions, and choreographs; artistic work such as paintings; drawings, photographs, and sculpture; architecture; and advertisements, maps and technical drawing.⁵⁰ The creators of the original works protected by copyrights, and their heirs have certain basic rights. They hold the exclusive right to use or authorize others to use the work on agreed terms.

2.1.2 FACTORS WHICH PROMOTE PIRACY

Factors which promote piracy are the same as those of counterfeits, illustrated above (1.2.2) ... Pirates, like counterfeiters, are driven by profits and organized criminals, The E.F.P.I (International federation for phonographic Industry) reports that:

“It should come as no surprise to governments and law enforcement agencies that the prospect of huge profits for small potential penalties in poorly regulated environment is attractive to criminals and is exploited in an organized and determined fashion. Hence the manufacture and traffic of illegal music products, both domestically and internationally, is often an organized crime activity ... the whole area of intellectual property crime has become much more significant in the current digital and electronic commerce environment”⁵¹

⁴⁹ D.A Gregory, C.W.Saber and J.D Grossman, introductions to Intellectual Property law, Washington DC, BNABooks{1994}p168

⁵⁰ WIPO Brochure: **what is copyright?**

⁵¹ WIPO Brochure: **what is copyright?**

⁵¹ K.K Mwenda and D.A Ailola, frontiers of Legal knowledge Durham, Carolina Academic Press, 2003, p 62.

2.1.3 ORGANISED CRIME AND PIRACY

Throughout the world organized criminals have been involved in piracy. For instance:

- (a) In September 1999 the Dutch Police announced the biggest ever crack down against the illegal CD trade in Holland with the arrest of suspects and raiding of houses resulting into huge quantities of cash and some firearms being recovered. The police estimated that criminal organisation had generated over 4.3 million CDs over 4 years estimated at US \$50 million. The criminals pressed 80,000 CDs per month.⁵²
- (b) In Italy, the Italian Police in Naple reported that the Camorra gang led by Enrico Frattasio had been active in music piracy.⁵³ It is estimated that the group produced and distributed over 50,000 music cassettes and 10,000 CDs each week raising 80 million Liras on each occasion.
- (c) In April 1998, the Hong Kong Independent Commission Against Corruption (ICAC) raid 5 CD plants in Fanling seizing more than US\$83 million worth of equipment including 41 CD manufacturing lines, a CD manufacturing line and two laser beam recording disk mastering machines. In addition 22.4 million illegal CDs were seized. This was the biggest seizure of illegal CDs and manufacturing equipment which indicated massive investment in criminal activity.⁵⁴

⁵¹ D.A Gregory, C.W.Saber and J.D Grossman, introductions to Intellectual Property law, washington DC,BNABooks{1994}p168

⁵¹ WIPO Brochure: what is copyright?

⁵¹ IFPI: Piracy in the music Industry and Organized crime (Date of Publication not known)

⁵² Ibid, P5.

⁵³ Ibid, P6

⁵⁴ Ibid P8

- (d) In February 1997, the South Africa Police anti-vehicle theft unit arrested members of a Bulgarian Multi-million Rand car theft syndicate, seizing 14 luxury cars and recovered a substantial quantity of counterfeit CDs and it was involved in arms smuggling.⁵⁵
- (e) In Suffolk County, USA, which was the scene of the biggest CD-R replication plant discovery in August 1999, capable of creating as much as US \$100 million in illegal business? The anti-piracy unit seized 104 individual CD burners, 26,000 completed pirate CDs, 27,500 pirate cassettes, 300,000 jewel boxes, 120,000 blank CD-Rs and 1,000,000 pre-printed inserts and tray cords. The daily production capacity was put at 15,000 CD-Rs per day.⁵⁶
- (f) In July 1999, the Paraguayan Anti Piracy Organisation (APDIF) raided a fully operational CD plant with an estimated daily capacity of 50,000 illegal CDs. The Seizure included 400,000 illegal CDs, CD processing machines, 80 boxes comprising computer towers and 340 infringing stampers. Thirteen people were detained among whom were Chinese, Brazilian and Paraguayan nations.⁵⁷
- (g) In Scotland (December, 2004), the Scottish Anti-Piracy Unit conducted what is believed to have been the biggest CD Counterfeiting operation ever found in Scotland ,when they raided a house and detained a man and woman. The unit seized thousands of illegally copied CDs, DVDs and a video believed to be destined for Barras, Glasgow. The unit also seized 19 CD writers, 11 DVD writers, and 15 video recorders from the premise.⁵⁸
- (h) For example, a raid in Los Angeles, California, netted US \$10.5 million in counterfeit software and holograms, including guns, TNT and other plastic explosives. A member of

⁵⁵ Ibid P9

⁵⁶ Ibid P10

⁵⁷ Ibid, P.9

⁵⁸ Source. www.northlan.gov.Uk or www.Scottish.Counterfeiters.Website visited in August 2005.

the BTK gang convicted of murder in New York testified that extortion and murder were sales tools used to sell the gang's counterfeit Rolex and Cartier Watches and the gang earned up to US \$13 million for its counterfeiting activities which is used to fund its other operation.⁵⁹ Counterfeits money is used in subservient activities (e.g. prostitution, gun running, drugs, etc)... The above clearly illustrate the problem out global level. Most of these pirated material easily find their way into many developing countries, Zambia inclusive, due to weak enforcement of regulation or lack of legislation on piracy altogether.

2.1.4 IDENTIFYING COUNTERFEIT OR PIRATED MUSIC /MOVIES

Identifying pirated or counterfeits music or movies on the CDs or DVDs are not easy. But according to Mr. William Mubanga, USA Embassy security chief at American Embassy in Lusaka stated in an interview⁶⁰ that, it is a quite easy to tell or distinguish a pirated CD from a genuine CD. He explained that due to technology when a product (e.g. CD) is made, such a CD must contain a technological feature which will easily enable a buyer or client to tell the genuineness of such a CD. CDs which do not contain these technological security features are counterfeits. He further explained that, for instance, Philips has a consumer electronic code compliance department which has teamed up with the International Federation for Phonographic Industry (I.F.P.I) whose code is printed electronically on the CD. *"This security code identifies the plant that has made the CD. Further the other code, the source identification code or S.I.D. Code labels the movie or the CD or DVD. Counterfeits don't have any codes on CDs or DVDs,"* Mr. Mubanga said. The CDs or DVDs must contain the plant where it was made in compliance with I.F.P.I. regulation.

Mr. Mubanga, further, observed that counterfeiters have come up with certain identification names. For example, **the Orion** is a counterfeit company, which identifies its counterfeit

⁵⁹ See: www.fbi.gov/cyber/crime.gov.

⁶⁰ Monday, 7th May 2005 at 12:00 hrs (American Embassy)

production. The other is **Dolby**. He also illustrated that all western movies on VCDs are counterfeits because they have a short or limited memory and normally one would find two VCD for it to complete the story. He also emphasized that all VCDs or DVDs music or movies labelled “**Original VCD, or DVDs**” are counterfeits. A genuine DVD should not bear such words as “**Original**”.

3.0 COUNTERFEIT AND PIRACY ON ZAMBIAN MARKET

The Liberalisation and opening up of the Zambian market to International trade and the globalization of the world economy have brought with it serious challenges to Zambia. Among such challenges has been the problem of piracy and counterfeit goods. The majority of people interviewed ranging from shop owners, vendors, consumers to the police, among others, have bemoaned the high rise of counterfeit goods and pirated products ,most of, which are not produced in Zambia, yet enter the local market. This does not entail lack of counterfeit local products.

Mr. Muyunda Ililonga contend that counterfeit goods made locally is a basis of technology which has caught up with Zambia through opening of the market to global trade and unemployment resulting from retrenchments and redundancy which came with privatization of the industry. *“The rise of formal unemployment has made people more innovative. Young entrepreneurs have taken advantage of technological environment to engage in making pirated or counterfeit products,”* he said.

3.1 PIRACY IN ZAMBIA

Piracy has been, and still is, a serious problem in Zambia. This problem has been acknowledged by the main stakeholders in the music industry, from musicians to producers. Dorcas Chileshe, Registrar of Copyrights under the Ministry of Information, observed, in an interview, that the government is losing a colossal amount of revenue through piracy as pirates don't pay tax.

Musicians are getting a raw deal and get demoralised because they are not getting any rewards for their effort.⁶¹ This is illustrated by the newspaper report in which a Kitwe-based musician, Wesley Chibambo, is demanding K2 billion from a South African Jukebox company, Afrovent, for allegedly pirating his to be released song “,Chimutunta”, which has been playing from jukeboxes in Ndola. This followed the Anti-piracy police removal of an MP3 CD from the jukebox containing his song at Buteko Bar, Ndola.⁶²

However, a survey conducted in Lusaka in 2002 revealed that close to 50,000 pirated cassette tapes are sold at Lusaka City Market each week, which translates in the loss of government revenue amounting to about K15 billion per year.⁶³ According to former Deputy Minister for Information and Broadcasting, Hon. George Chilumanda the following are the figures of seizure of pirated tapes by Anti- Piracy Crack squad between 2003 and 2004.⁶⁴

⁶¹ Tuesday, 12th July 2005 at 9:20 – 11 hrs in her office, M.O.I.

⁶² Sunday Mail, June 5, 2005 P7

⁶³ Source: Ministry Of Information and Broadcasting Report 2004.

⁶⁴ Source: Ministry of Information and Broadcasting (Write up for Hon. G. Chilumanda’s Radio Phoenix Let The People talk Programme).

ANTI PIRACY CRACK SQUAD SEIZURE OF PIRATED TAPES CDs AND MOVIES**(2003-2004)**

DATE OF OPERATION	PLACE OF OPERATION	VALUE OF GOODS SEIZED IN KWACHA	VALUE OF GOODS SEIZED IN US DOLLARS
10 th October, 2003	Lusaka	48, 000,000	9,600
16 th October, 2003	Lusaka	3, 000,000	600
18 th October, 2003	Kapiri and Ndola	82, 000,000	16,400
7 th November, 2003	Monze and Livingstone	44, 000,000	8,800
3 rd February, 2004	Nakonde	200, 000,000	40,000
	Solwezi		
9 th February, 2004	Lusaka	104, 000,000	28,000
2 nd March, 2004	Lusaka	9, 000,000	1,800
20 th May, 2004	Kitwe	8, 000,000	1,900
31 st May, 2004	Luanshya	82, 000,000	16,400
28 th June, 2004		49, 000,000	9,700
TOTAL		K629,000,000	US \$ 132,840

Source: Ministry of Information and Broadcasting (2004)

Furthermore, early this year the Police Anti-Piracy Crack Squad seized tapes and CDs from a Matero man worth a colossal K400 million in a single seizure. These tapes were alleged to have been made at the suspect's home. However, although seizures have been conducted by the Anti Piracy Crack Squad, in conjunction with the Zambia Revenue Authority, piracy has continued to

be an issue, unabated. The solution lies in hitting the source of the production. I concur with view of Nick Kumnoupias of Scottish Anti-Piracy Unit who observed on the 19th December 2004 that

*“Getting to the source of significant counterfeit operations ... are the real key to stopping the proliferation of counterfeit product. You can strip a market of illegal goods but within a few days the illegal product is back.”*⁶⁵

Pirated tapes, CDs, VCDs and DVDs are easily smuggled into Zambia by cross-border traders due to her large frontiers which are largely porous and corrupt custom officials who are friendly to these traders. Large quantities of such pirated goods are also made in garages around the major towns in Zambia by unscrupulous people, who want to make a fast “buck” by underwriting CDs. Even at UNZA, pirated musical CDs are a big business. Students easily download music into CDs from computer Room which are connected to the internet for sell to fellow students at K5,000 per CD, if has his own CD. This shows how difficult enforcement can be. The proliferation of pirated tapes and CDs is not due lack of legislation. There is the copyright and performance Act⁶⁶ which provides protection to copyright holders. In spite of this Act, there has been very little convictions. The only reported case on Copyright is the one involving **Performing Rights Society Ltd V Hickey**⁶⁷.

3.2.0 COUNTERFEIT PRODUCTS, DRUGS INCLUSIVE IN ZAMBIA.

Like piracy, counterfeiting is another serious concern in the country. As Tesuji Okui, President of Sanyo Gulf FZE (Free Zone) observed, when launching Sanyo brand of products, “... one of the problems that the region (Africa) has faced, Zambia inclusive, (addition mine)] was duplicate and fake products.”⁶⁸

⁶⁵ Source: <http://www.scotland.nhs.uk/press/041219a.htm> (Nick spoke after a raid of an assortment of pirated CDs, DVDs, CD writers, 11 DVD writers etc at Airdrie home of two suspects).

⁶⁶ CAP 406 of the Laws of Zambia.

⁶⁷ (1979) ZLR 66

⁶⁸ **Business Post Issue No. 3239-17**, Tuesday August 30, 2005 PII

The proliferation of counterfeiting has been fuelled by weak enforcement of the law and lack of legislation specifically dealing with counterfeiting, save for the **Trade Mark Act CAP 401** which only empowers the owner of a registered trade mark to institute redress when the trademark is infringed. Unlike in South Africa, which enacted the **Anti-Counterfeit Goods Act No. 37** which inter alia, aims at achieving the prohibition of certain acts in relation to counterfeit goods as well as the possession thereof, unfortunately this is not the case in Zambia, save for the Penal Code which does not impose severe penalty for counterfeiting (Section 377 (1)) The people of Zambia have seen over the years an influx of counterfeits hitting the market like locusts. In came the following counterfeit goods:

(I) **Electrical goods:** there is an influx of fake '*Phillips*' or '*Phillipps*' pressing irons, Television sets and DVD recorders; counterfeit '*sharp*' TV sets, Radio Cassette players; take *Sony* DVD VCD players, Television sets, Radio Cassette Players; Counterfeit *Panasonic* TV sets, VCD DVD players; *Panasoaenic*-a counterfeit version of or passing off Panasonic brand; fake fans; Counterfeit *G.E.C.* (General Electric Corporation) TV sets, radio; Counterfeit stoves and fridges of reputable brands. Counterfeit adaptors, three – pin plugs and fake wall sockets; fake *pine ware* kettles and other brands of Kettles, etc.

(ii) **Shoe Polish:** There is a serious problem on the market with regard to both *Nugget* and *Kiwi* brands. The worst hit is the *Kiwi* brand by Sara lee. Main features of Counterfeiting are: the original does not smell as strongly as the Counterfeit; the original pin [opener] is sunken while the counterfeit protrudes; the original tin is slightly higher than the counterfeit one. Other forms of *Kiwi* brand are forms of *Kiwi* brand are in form of passing off brands such as "*Kiki*" polish.

(iii) **Mineral Water and Drinks:** Mineral water has been affected as well. For instance Lusaka City Council health department on 16th August 2005 seized counterfeit *polar ice* mineral water to

the tune of 126 bottles in 500 ml from **Big Bear Take Away** at City Market in violation of section 4 of the Food and Drug Act, CAP 303. *Manzi* mineral water has also been a target by counterfeiters as these only pick *Manzi* bottles with labels on and then refill it with water and have them sealed with sealers and put in the fridge ready for sell to unsuspecting consumers. It is due to this problem, which resulted in Simpson Stewart, managing Director of Natural Valley, manufacturers of *manzi* appealing to consumers to “*destroy the label so that it cannot be resold. Help us by destroying the label. Destroy your label after drinking*”.⁶⁹ Almost all mineral water is easily counterfeited. All a counterfeiter needs is a sealer to seal the tops. Containers, on the other hand, are easily picked from the streets and dustbins.

The era of disposable drinks has brought with it challenges of counterfeits. Carbonated drinks are also victims of counterfeiters. Fake *Thirsty*, *Mazoe*, *Orange Juice*, *Disposable Coca-Cola drinks*, *Shake-Shake “Chibuku” brew* and other various bottled drinks are prey to counterfeiters.

(iv) **Perfumes**: All the perfumes sold on the streets by vendors are counterfeits. Belita De La Court of Lamozy Boutique in Lusaka pointed out that “*Cheap imitation ‘designer’ perfumes has found its way on the streets of Zambia with expensive designer scents going for as cheap as K20,000, negotiable.*”⁷⁰ She added that it is impossible to get original designer perfumes so cheaply. Among the counterfeit perfumes peddled on the streets of Zambia are *Pure Poison* by Christian Dior, *Eternity Moments* by Calvin Klein, *Love in Paris* by Ninna Ricci, *Summer* by Kenzo; *Chance* by Chanel while others are counterfeit *cigar*, *El Paso*, *Blue for Men*, *Blue Lady*, *Passion*, *Lomani*, *Manes*, among a host of perfumes. Some of these perfumes are made in backyards by mixing concoctions and as De La Court observes “*one never knows what sort of concoction is added to create the imitation designer perfumes.*” She adds that, “*those perfumes are*

⁶⁹ Simpson Stewart in an Interview on **Manzi Radio Programme** June 9, 2005 at 09:15 hrs

⁷⁰ **The Post Issue No. 3165 (Weekend Post)** Friday, June 17, 2004, PV

a no go for women [and men (addition mine)] it's so hard to find original perfume in Zambia
...⁷¹

(v) **Seeds:** Seeds have not been spared. ZAMSEED, Managing Director lamented that the seed companies are losing between 60 to 70 percent of their revenue because of the influx of fake seeds and appealed to the government to enact a law prohibiting dealing in uncertified seeds and ensure that people stop selling counterfeit seeds⁷²

(VI) **Paint Products:** Counterfeit paint products are also made by adding various concoctions by counterfeiters. Others combine lime and other substances. *Plascone* tins are picked and imitation products are made passing off as *Plascone* paint. A renowned paint shop in Cha cha cha Road also practices this illegal trade by mixing various colours which are packaged in *Plascone* tins, giving false misrepresentation that it is *plascone* paint imported from South Africa. Others affected are *Buffalo* paint and *premier* paint

(vii) **Facial and Body Creams:** A number of facial, hair pomade and body creams of counterfeit nature are available on the market. Counterfeit *Confidence Hair Pomade* made by adding Vaseline and Sulphur substance to make it look like the genuine Confidence hair pomade are on the market. The genuine pomade used for treating dandruff has a soothing effect when applied. Fake hair creams are there, for instance, sometimes last year (2004) Radio UNZA reported that a Chelston lady lost her hair after applying a product she thought was genuine but which was not.⁷³ Among fake body lotion are *Top society*, *Glycerine*, *fair and lovely*, *ultra sheen* and other *facial cream* which originate from Tanzania and Far East.

⁷¹ Ibid, P.V

⁷² The Post Issue No. 3165 (Weekend Post) Friday, June 17, 2004, PV

⁷² Ibid, P.V

⁷² The Post Issue No. 3248, Tuesday, September 6, 2005 (Business News, PII)

⁷³ Source: UNZA Radio

(viii) **Colgate:** There are Colgate tooth pastes which are counterfeit. Most of these come from China and do not bear the manufacture date or the Batch number and claim to be tea tree herbal toothpaste. 50g net weight.

(ix) **Washing Paste:** This is equally counterfeited. Counterfeit *Boom, Rocket, Bullet, Dynamo* and other washing brands are made by unscrupulous traders by mixing concoction which are thick in nature and hardly give lather.

(x) **Cooking Oil:** This is one area which is also affected. Counterfeit Cooking Oil which is a concoction of ZESCO oil transformers and other substances are sold to unsuspecting customers especially at big markets, in major cities, such as Chisokone and City Markets. There are other fake vegetable oils such as *cenvoy*, an imitation of *envoy* vegetable oil [from Nigeria]. Others are difficult to tell.

(XI) **Shoes:** A variety of designer shoes on the market are counterfeits. All Far East produced designer shoes in Kamwala shopping area and COMESA-market along Lumumba road are fake goods, mostly made out of lexine.

3.2.1 COUNTERFEIT DRUGS AND OTHER RELATED PHARMACEUTICAL PRODUCTS IN ZAMBIA.

“Counterfeit drugs can not be ruled in Zambia because we are quite porous,” admitted Mrs. Mwape, Director of Pharmaceutical Regulatory Authority in an interview.⁷⁴ However, it is the magnitude of the problem that still remains unknown due to lack of documented data available. From what is available, there are instances when complaints have been lodged by manufacturers or their agents regarding counterfeiting of their products. Notable is the case surrounding drugs known as.

⁷⁴ Interview on the 9th September 2005 at 14:00 hours in her office.

Dawaquin and Dawanol which were anti-malarial and paracetamol drugs respectively manufactured by Dawa pharmaceuticals Ltd of Kenya, distributed in Zambia by Melcome Pharmaceuticals Ltd. These drugs were counterfeited by a Dubai based unknown company which brought its version of anti-malarial and paracetamol drugs known as *Dalaquin and Dalamol*. This Dubai-based company took advantage of the popularity of the registered *Dawaquin* and *Dawanol* drugs and brought a counterfeit version of their own to get a share of the profitability and huge success of *Dawaquin*.⁷⁵ Another drug that is counterfeited, according to Mr Chizu, is the *Vibrant*, a vitamin enriching drug for women, made and distributed by Society for Family Health (SFH) which lodged a complaint with the Authority that their product was being imitated. *Vibrant* is registered.

Furthermore, according to Mrs Mwape, some time in 2001, the Authority seized counterfeit *Chloroquin* and *Medix Rub-on* clear imitations of chloroquin, cough mixture and *Medix Rub-on* made by Interchem Ltd. The counterfeiter made these drugs from a garage at his home which was used as a laboratory, yet it was purported that these drugs were from Dubai. There had been other cases of counterfeit *Panado* and *Anti-biotic* on the market, putting the lives of unsuspecting consumers at risk as these products either do not contain the necessary active ingredients or lack potency. The sad part of the whole episode is that the Pharmacy and Poisons Regulatory Board (now known as the Pharmaceutical Regulatory Authority) is “*all rules but no facilities*”. What this means is that there are nice rules which are well elaborated in the statutes (such as the Pharmaceutical Act) but due to lack of a central laboratory or mini-laboratory at border area or point of entry, counterfeit drugs are easily smuggled in. Furthermore, there are no chemical analyses which are undertaken. Enforcement which is weak, further promotes the proliferation of

⁷⁵ Source: Pharmaceutical Regulatory Authority (an interview with Mr Felix Chizu, pharmacist, 9th June 2005).

counterfeits. As if this is not enough, currently in an interview with Mr. Bonaventure Chilinde, quality assurance manager, confirmed that Pharco Ltd is manufacturing ARVs locally. This is a contravention of a requirement that a drug must have a WHO certification (i.e. pre-certification and pre-qualification process). WHO has not yet sanctioned the certification process.⁷⁷ In 2004, September 21, the government issued Pharco Ltd **compulsory licence number CL01\2004** to start producing generic ARVs for Zambia after government declared HIV/AIDS a national emergency. The other product highly counterfeited is the **condom**. Apart from those which Medical stores Ltd, a government storage company for drugs, tests at Pharco Ltd, the condoms entering the private market are not tested. This has had an impact on the transmission of HIV and other sexually transmitted infections (STI) in the sub-Saharan region.

4.0 IMPACT OF COUNTERFEIT AND PIRACY

The consequences of counterfeiting and Piracy in any given society are far reaching. Firstly counterfeiting and piracy have a negative dimension on the economic affairs of the society. Because counterfeiting and piracy are illegal activities, writes Kamil Idris, many of the normal elements associated with genuine business are removed and therefore society is denied of benefits at various levels, ⁷⁸legitimate manufacturers experience reduction in direct sales. Furthermore since counterfeit products are of substandard and once the consumers discover they tend to lose confidence in the products. For instance, in 1999, the music and pharmaceutical industries lost in direct sales US \$4.1 billion and US \$12 billion respectively.⁷⁹ In Zambia the loss in government revenue amounted to K15 billion in 2002.⁸⁰

⁷⁶ Interview, 25th August, 2005 (09:00hrs)

⁷⁷ The Post issue No. 3241 [“Masebo urges WHO to certify the local production of ARVs”] September 1, 2005 p 2.

⁷⁸ Kamil Idris, Intellectual Property: A power tool for Economic growth (2003) p 309.

⁷⁹ Source: <http://www.ifpi.org>, int; IFPI Piracy Report: 2.

⁸⁰ Ministry of Information and Broadcasting survey 2002.

Secondly, economically, Counterfeiting and Piracy tend to discourage manufacturers of genuine products from establishing industries where they know that their products will be easily imitated due to lack of intellectual protection rights legislation or weak enforcement mechanism. Such moves results in the loss for the host country of Foreign Direct Investment or loss of foreign income to inject in the local industries of the host country.

Thirdly, Kamil Idris writes that socially counterfeiting and piracy consequences are greatly felt by the artists, creators and small -scale entrepreneurs who compete directly with illegal merchandise.⁸¹ For example, the local musicians or local producers are pushed out of the market by pirated copies which are sold at very low prices, initially with lack of lyrics or printed material which appear on the original product. Another example is the fate that befell a Kitwe-based musician, Chirambo, whose song was counterfeited by a South African juke -Box Company before he even released his album. *“Piracy Spoils local creativity and the musicians efforts are being outwit by counterfeiters, such acts does not motivate the record producers and the owner, of the in ventures or creators of music”*, Mr Mubanga, Security officer at American Embassy, pointed out. Piracy was behind of Real Records downfall in Zambia and demoralized the musicians, some of whom even stopped producing music.

Fourth, in the USA, Congressional testimony and academic scholars have established that counterfeit parts for cars, plane, and military hardware have endangered lives and caused fatalities.⁸²

Fifth, the impact of counterfeit is higher and the customer cannot benefit from the product because it is a bogus product, which is not performing an intended use. It is a known fact that counterfeit

⁸¹ Kamil Idris. *Intellectual Property: A power tool for Economic Growth*, 2003 P.311

⁸² Justice Anderson Likonda *“parallel importation and Counterfeit Goods”* A paper presentation at LAZ seminar on Intellectual Property, march 4th, 2005, Hotel, Inter continental, Lusaka. P6

products are manufactured in substandard environments without appropriate controls that ensure their safety and efficiency and they could contain dangerous contaminants.

Sixth, counterfeit drugs have rarely been efficacious and are positively dangerous and detrimental to public health in terms of human suffering and burden on the health service. In extreme cases, these may cause service harm to health. For example, the incorporation of diethylene glycol in pharmaceutical preparations fraudulently has caused the death of more than 500 people, mostly children and when ingested diethylene glycol affects the central nervous system, liver, and kidneys, leading to death through kidney failure.⁸³ Another example, with regard to fatality of drugs relates to *vioxx*, the scandal-hit arthritis pain killer. Recently, the USA pharmaceutical giant Merck was ordered to pay out US\$ 253 million (\$141 million) after the jury in Texas found the drug has contributed to a man's death by heart attack and that the firm has been negligent. Another claimant, a Mrs Peckham, 53, also claims that she suffered two strokes which left her partially paralysed, visually impaired and epileptic after using *vioxx*, a pain killer.⁸⁴ In Nigeria, approximately 2,500 Nigerians died in 1995 from receiving counterfeit meningitis Vaccines.⁸⁵ Furthermore, Michele Forzley points out that apart from injuries caused by taking harmful counterfeits products, it may result into death, blindness, headaches, cancer, prolonged illness, rash, swellings, burns, poisoning, allergic reactions among others.⁸⁶ On the other hand, counterfeit cigarette are related to tobacco linked diseases.

Seventh, counterfeit baby formula has made infants sick⁸⁷. In Zambia, recently, a baby formula, Vitaso, bought by a Lusaka man was found to contain foreign substances after his baby had even

⁸³ WHO (1999) Counterfeit Drugs: Guide lines for Development of measures to combat counterfeit Drugs.

⁸⁴ The Business Post Tuesday August 30, 2005 p VII.

⁸⁵ Michele forzley, I.D. Counterfeit Goods and Public Health and Safety (2003) o
http://www.iipi.org/reports/counterfeit_goods.pdf.

⁸⁶ *ibid*

⁸⁷ Zikonda, A. "Parallel importation and counterfeit goods". A paper presentation-May, 2005, Hotel Intercontinental. P6

eaten a portion of the formula and when he complained to the company, it offered him another packet⁸⁸. Eighth, Counterfeit mineral water most of which are made in questionable environment, may cause diarrhoeal diseases. On the other hand counterfeit perfumes, which contain unknown concoctions, may lead to skin cancers. In conclusion, counterfeit products though cheap and may meet the purchasing power of the majority of the average Zambian work force, does pose a host of problems as illustrated above.

⁸⁸ Source: Kitwe City Council health dept.

CHAPTER TWO

The problem of counterfeiting and piracy is a global concern. There is hardly any country in the world that has not felt the effects of counterfeiting and piracy. However because of such concerns, there has been efforts at international level to put in place legal mechanisms to protect right of inventions (Patents), trade mark or trade names holders, copyright and other related rights, Industrial design, Lay-out designs of integrated circuits. This chapter therefore endeavours to discuss the international legal framework works which offer protection of right holders against counterfeiting and piracy. These international legal frame work is contained in various International Treaties, Agreements and Conventions. This chapter will restrict itself to trademarks, copyrights and other elated rights.

The following are the various international treaties, Agreements and Convention which address the issue of protection of trademarks, copyrights and other related rights and industrial designs.

A. TRADE MARKS PROTECTION

2.1. The Agreement on Trade Related Aspects of Intellectual Property Rights –

(TRIPS Agreement) 1994

The Uruguay Round of international trade negotiations held under the auspices of GATT (General Agreement on Trade and Tariff) were included with the establishment of the World Trade Organization through a series of meeting with the notable one being the **Marrakesh negotiations** held in Morocco. These negotiation resulted into agreements among the negotiators on aspects of Intellectual Property Rights to be recognized and protected with regard to international trade. The TRIPS Agreement has embraced and given recognition to the principles enshrined in the Paris Convention and Berne Convention as seen in Article 2(2) of the TRIPS Agreement which provides:

*“Nothing in Parts I to IV of the Agreement shall derogate from the existing obligations that members may have to each other under the Paris Convention, the Berne Convention,”*⁸⁹

(i) Main Provision (Trade Marks)

Generally the TRIPS Agreement provides for intellectual property Convention, as referred to above, national treatment (according nationals of member states favourable treatment as accorded its own nationals with regard to, inter alia, protection of intellectual property) (Article. 3), Most Favoured Nation Treatment, among others.

However with regards to trademarks, this is contained in section 2 of the TRIPS Agreement. Article 15 (1) of the Agreement provides for the protectable subject matter. Article 16(1) provides:

“The owner of a registered trademark shall have the exclusive right to prevent all third parties not having his consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trade mark is registered where such would result in the livelihood of confusion.”

Article 18 provides for the term of protection and states that the “initial registration and each renewal of registration, of a trademark shall be for a term of not less than **seven years**. The registration of a trademark shall be renewed indefinitely”.

On the other hand, **Article 19** provides for requirement of use and states that registration may be cancelled if there is a three year uninterrupted non-use of a trademark. **Article 20** provides that the use of a trademark shall not be unjustifiably encumbered by special requirements such as inter alia, use in a manner detrimental to its capacity to distinguish the goods or services of the undertaking from those of another. Furthermore the TRIPS Agreement provides that compulsory

⁸⁹ TRIPS Agreement Art 2(2)

licensing of a trademark is not permitted and the owner of a registered trademark has the right to assign his trademark⁹⁰

2.2. TRADEMARK LAW TREATY (TLT) (1994)

This treaty was adopted in 1994 in Geneva, Switzerland, at a Diplomatic Conference. Its objective was, by and large, to harmonize the administrative mechanism with regard to national application and regional application of trademark registration and make it more user-friendly. The greater majority of the provisions of TLT concern the procedure before the trademark office which can be divided into three main phases: (i) application for registration; (ii) changes after registration; and, (iii) renewal in which the TLT standardizes the duration of the initial period of the registration and the duration of each renewal to 10 years each.⁹¹ This provision is contained in Article 13 of the Treaty.

Article 2 of TLT provides that it shall apply to marks for goods and services. Once a country accedes to TLT it is obliged to register service marks as not all countries register service marks. The Trademark Law Treaty provides that a registrable trademark shall consist of visible signs. On the other hand **Article 3** provides for a list of information which the trade mark office may require in the application which must indicate the following; a request, the name and address and other indications concerning the application and his representatives; various indications concerning the mark including a certain number of representations of the mark; the goods and services together with relevant classifications; and a declaration of intention to use the mark.

⁹⁰ Article 21

⁹¹ WIPO (2001) *Summaries of Convention, Treaties and Agreements* P.31

2.3. PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

1883

The Convention was concluded in 1883, revised at Brussels Conference in 1900, at Washington DC Conference in 1911, at The Hague Conference in 1925, at London Conference in 1934, at Lisbon Conference in 1958, and at Stockholm Conference in 1967, and it was amended in 1979. With the exception of the Acts concluded at the revision of the Conferences of Brussels (1897 and 1900) and Washington DC (1911) which are no longer in force, all those earlier Acts are still of significant⁹² The Convention applies to industrial property in the widest sense, including patents, Marks, Industrial designs, utility models (a kind of “small patent” provided for in some countries), trade marks, geographical indication and repression of unfair competition.

Substantive Provisions

The substantive provisions of the Convention fall into three categories: national treatment, right of priority and common rules.

Under the provisions of **national treatment (Articles 2 and 3)**, the Convention provides that as regard the protection of industrial property each contracting state party must grant the **same** protection to nationals of other contracting states as it grants to its own nationals. The convention also provides for **right of priority** in the case of patents, marks and industrial designs. Furthermore the Convention also lays down a few common rules with regard to Patents, marks, industrial designs, trade names, unfair competition and indication of source. **The Paris Convention** provides for protection of trade marks though it does not regulate the condition for filing and registration of marks which are determined in each contracting state by the domestic law. Consequently, no application for registration of a mark filed by a national of a contracting

⁹² WIPO Handbook P 247

stage may be refused as the ground that filing, registration or renewal has not been effected in the country of origin.

Article 5C (1) relates to compulsory use of registered trademark. Under **Article 5C(2)** of the Convention provides that use of the trademark by its proprietor, in a form differing in elements which do not alter the distinctive character of the mark as it was formerly registered in one of the countries of the Union, shall not invalidate the registration or diminish the protection granted to a mark. **Article 6 bis** protects, the trade marks that is “**well known**” as determined in the contracting member state by its competent administrative and judicial authorities. Thus under this Article, each contracting state must refuse registration and prohibit the use of marks which constitutes a reproduction, imitation or translation, liable to create confusion, of a mark considered by the competent authority of that state to be **well known in that state**.

2.4. THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS (1891) AND PROTOCOL RELATING TO THAT AGREEMENT (1989)

The system of international registration of marks is governed by two treaties, namely:

(i) the **Madrid Agreement**, which was concluded in 1891 and revised at Brussels (1900), Washington DC (1911), The Hague (1925), London (1934), Nile (1957), and Stockholm (1967), and amended in 1979.

(ii) The **Protocol** which relates to that Agreement concluded in 1989 aimed at rendering the Madrid system more flexible and compatible with domestic legislations.

The Madrid Agreement and the Protocol are open to any state which is party to the Paris Convention for protection of Industrial Property.

Main Provisions of the Madrid Agreement

Article 1 (2) provides that nationals of any contracting country may secure protection for their marks applicable to goods and services registered in the country of origin by filing the said works at the International Bureau of WIPO through the intermediary of the office of the country of origin. An application for international registration (International Application) may be filed by a natural person or legal entity having a connection, through established, domicile or nationality with a contracting party to the Agreement or the Protocol. Under **Article 31(1)** every application for international registration must be in the form prescribed by the regulation contained in **Article 3 (2)** and the applicant must indicate the goods and services with regard to claims of the protection of the mark. However, once the International Bureau receives the international application, it carries requirements of the agreement and their common regulation. The examination is restricted to formalities, including classifications and comprehensibility of the list of goods and services, among others. If there are no irregularities the International Bureau records the mark in the International Register and publishes the International registration in the **WIPO Gazzete of International Marks**. The registration of the mark at the International Bureau is effected for 20 years with possibility of renewal under conditions specified in **Article 7**. Any country which is partly to the Paris Convention, though outside the special union, may accede to the **Madrid Treaty** and thereby become a member of special union.

Advantage of Madrid System

The system of international registration of marks has a number of advantages for trade mark owners. Instead of filing many national applications in all countries of interest, in several different languages, in accordance with different national procedures and regulations may be obtained by filing one application with the International Bureau (though the office of the home

country), in one language (either French or English) and paying one set of fees only.⁹³ Similar advantages exist when filing an application for renewal, every 10 years, to the International Bureau.

PROVISIONS OF MADRID PROTOCOL

Article 1 provides that state party to the protocol even if they are not part to the Madrid Agreement with regard to international registration of marks referred to in **Article 14 (1)** but are partly to the Protocol in question shall be members of the same Union which countries to the agreement are members. **Article 2 (1)** provides that where an application for registration of a mark has been filed with the office of a contracting party or where a mark has been registered, may secure protection for his mark in the territory of contracting party by obtaining the registration of that mark through the International Bureau through the intermediary of the home office. **Article 3** provides that every international application shall be presented on the form prescribed by regulation and the application shall indicate the goods and services with regard to protection of a claim of a mark. As alluded to above, registration of a mark at the International Bureau is 10 years. However, it must be noted that under Madrid Agreement contracting parities have the right to refuse protection of a mark it their territories if the international registration and if some substantive provisions are not complied with. Any such refusal must be communicated to the International Bureau with **12 months of notification**. However, a contracting party to the Protocol may declare that when it is designated **Under the Protocol**, this time limit is extended to **18 months**⁹⁴

⁹³ Op cit P 19

⁹⁴ Ibid P.18

2.5. NICE AGREEMENT (1957)

The Nice Agreement establishes a classification of goods and services for the purpose of registered trade marks and service marks. The trade mark offices of contracting state must indicate, in connection with each registration, the symbols of the classes. The Agreement is open to state party to the Paris Convention for the Protection of industrial property (1883). The Nice Agreement

B. COPYRIGHT AND OTHER RELATED RIGHTS

The Convention, and treaties which offer protection and enforce copyright at international level are:

2.6. TRIPS AGREEMENT (1994)

The TRIPS Agreement has embraced much of the principles continued in the earlier conventions and in **Article 2(2)** it provides that nothing in Parts I and IV of this Agreement shall derogate from existing obligations that members may have to each other under the **Paris Convention Berne Convention**.

However, **Article 9 (1)** of the TRIPS Agreement provides that members shall comply with a **Articles 1-21** and the Appendix of the **Berne Convention (1971)**. **Article 9 (2)** of the Agreement provides that copyright protection shall extend to experiences and not to ideas, procedures, methods of operation or Mathematical Concepts as such. Article 14 provides for protection of performers, producers of phonograms (sound recordings) and Broadcasting organizations. It states that performers shall have the possibility of preventing acts such as the fixation of their unfixed performances and the production of such fixation of their when under taken without authorisation. The performers shall also prevent broadcasting by wireless mean and communication to the public of their live performance without authorization. **Article 14 (2)** states

that producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. **Article 14 (3)** provides for acts which Broadcasting organization shall prohibit and where members do not grant such rights to broadcasting organizations they shall provide owners of copyrights in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971). **Article 14 (5)** provides the terms of the protection available under this Agreement to performer and producers of phonograms shall last at least until the end of fifty years and the terms of protection granted pursuant to **Article 14 (3)** shall last for at least twenty years from the end of calendar year in which the broadcast took place. **Article 14 (6)** provide that any member may provide for conditions limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the Provision of Article 18 of the Berne Convention (1971) shall also apply, Mutatis Mutandis, to the rights of performers and producers of phonograms in phonograms. **Article 13**, on the other hand, provides for limitations and exception to exclusive rights to certain special cases which do not conflict with a normal exploration of the work and do not unreasonably prejudice the legitimate interest of the right-holder. Furthermore **Article 10** provides for computer programmes protections as literary works under Berne Convention (1971) while Article 11 provides for authorisation or prohibition of rental right of anchors and their successors.

2.7 THE ROME CONVENTION (1961)

The Rome Convention is a Convention which provides reproduction of their phonograms. The Convention also provides for payment of equitable remuneration for broadcasting and communication to the public phonograms (**Article 13**).

Article 14, on the other hand, provides for the minimum term of protection under the Rome Convention which is 20 years. Like the Berne Convention, the Rome Convention permits member states to establish certain limitations in rights such as allowing private use, of short excerpts in reporting current events, use entirely for teaching or scientific research purpose, etc (**Article 15 (1)**). Under **Article 15 (2)** of the Convention, the member states may establish the same kind of limitations with regard to protection of performers, producers of phonograms and broadcasting organizations. The most significant limitation with regard to performers is contained in Article 19 which provides:

“Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio visual fixation, Article 7 shall have no further application.”

2.8. BERNE CONVENTION 1886

The Berne Convention rests on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries which want the protection of performers, producers of phonograms and Broadcasting organizations. Like the Berne Convention protection accorded by the Rome Convention consists basically to the national treatment that a state grants under its domestic law to domestic performances, phonograms and broadcasts (**Article 2 (1)**). Under **Article 2 (2)**, national treatment is subject to the minimum levels of protection specifically guaranteed by the Convention, and also to the limitations provided for in the Convention. **Article 4** deals with eligibility for protection under national treatment. Thus performers are entitled to national treatment if the performance takes place in another contracting state or if it is incorporated in a

phonogram protected under the Convention or if it is transmitted “live” in a broadcast protected under the Convention. In short **Article 4 to 6** deals with national treatment.

Article 7 deals with the minimum protection guaranteed by the Convention to performers is provided by “**the possibility of preventing**” certain acts done without their consent performers are too be granted “the possibility of preventing” broadcasting or communication to the public of “live” performance; recording an unfixed performance; reproducing a fixation of the performance without the consent of the performer. **Article 10** provides that producers of phonograms have the right to authorize or prohibit the direct or indirect to make use of them. These three basic principles of The Berne Convention are: works originating in one of the contracting states must be given the same protection in each of the other contracting states as the latter grants to the works of its own nationals (**principle of national treatment – Article 3**); such protection must not be conditional upon compliance with any formality (**principle of ‘automatic’ protection**); and that such protection is independent of the protection in the country of origin of the work (**principle of the ‘independence’ of protection**). **Article 2(6)** provides that protection under the Convention is to operate for the benefit of the author and his successors in title. **Article 3** provides for protection of authors who are non nationals or residents of such a country are protected if they first publish their work in a member country. Articles 8, 9, 11, 12 and 14 provides for exclusive economic rights which are granted to the authors under the Convention. Article 7 lays down the minimum term of protection which is the life of the author and 50 years after his death. **Article 9(2)** provides for limitations commonly known as ‘free uses’ of protected rights which the Berne Convention allows.

2.9. WIPO COPYRIGHT TREATY 1996

This treaty, by and large, covers two subject matters to be protected by copyright namely; the computer programs, whatever may be the mode of their expression; and compilations of data or other material ('databases') in any form, which by reason of the selection or arrangements of their contents constitute intellectual creation. **Article 1(1)** of the Treaty provides that *"this treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic works, as regards contracting parties that are countries of the Union established by the Convention"* **Article 1 (4)** of the Treaty establishes a further guarantee to the fullest possible respect of the Berne Convention, since it includes all substantive provisions of Berne Convention. **Article 3** of the Treaty provides for **mutantis mutandis** application of **Articles 3 to 6** of the Berne Convention. Under **Article 11** of the treaty, contracting parties must provide' adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty or Berne Convention and that restrictions acts, in respect of their work, which are not authorizes concerned or permitted by law.

Article 12 provides for remedies which can be granted where there instances of infringements. Furthermore creators of computer programmes have the right to authorize commercial rentals as determined by national laws. In addition the author has the right to communication to the public and the right of distribution. This treaty is open to state members of WIPO and the European Union.

3.0 THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (1996)

This treaty was concluded on December 20, 1996. This Treaty deals with intellectual property rights of two kinds of beneficiaries namely performer (actors, singers, musicians, etc), and producers of phonograms (the persons or legal entities who or which take the initiative and have responsibility for fixation of sounds). This treaty has relationship to Rome Convention with regard to articles relating to eligibility of protection. **Article 1** establishes the national treatment principle granted under the treaty. **Article 10** and **14** provide for the protection of exclusive rights which performers and producers of phonograms (with regard to digital network transmission to the public performers by wireless means).

The right holder has the right under the treaty which extends to live aural performances and performers fixed in phonograms except for the right of broadcasting and communication to the public of live performance. Protection is for 50 years from the time the work was fixed. Protection is dependent on whether the performance is fixed in phonograms and the nationality of the performance, fixation and publication of work to be protected. Zambia is a state party to a number of Convention and treaties among which are the following with the regard to protection of trademarks and copyrights:

- a. The Berne Convention (January 1992)
- b. The Paris Convention (April 1965)
- c. The Universal copyright Convention (1965)
- d. The Madrid Agreement
- e. The TRIPS Agreement (January 1995)
- f. WIPO Convention (May 1997)

It must be noted that like most Commonwealth systems in Zambia the international instruments ratified or acceded to by the state, are not self-executed at domestic level and they require ratification by Parliament and them domesticated through an Act of Parliament.

CHAPTER THREE

The value of intellectual property protection in any country cannot be over emphasized. Owners of intellectual property rights need to be protected through legal frame-work which must be put in place in a country. Such intellectual property legal framework will encourage creativity among the people. Intellectual property rights, which help to sustain the lead of those with technical know-how, with successful marketing scheme, have come to foster immense commercial returns. The increasing number of patents granted and trademarks registered, especially in industrial countries and the upsurge of publishing, record-producing, film-making and broadcasting clearly calls for greater protection. This chapter will examine the local legislation which deal with counterfeits and piracy in Zambia.

3.1 COPYRIGHT AND PERFORMING RIGHTS ACT, 1994

This piece of legislation was enacted in 1994 whose preamble states that it is

“An Act to provide for copyright in literacy, musical and artistic works, computer programs, audio visual works, sound recordings, broadcasts and table programs; to provide for rights in performance.....”

The Act provides protection of Copyright. The classic pronouncements of this principle were in **University of London Press v London Tutorial Press. (1916)** where the court stated “... *what is worth copying is worth protecting.*”

3.1.1 Salient provisions of the Act

The following are the salient provisions: **Section 7 of the Act provides for nature of copyright. It provides that a “copyright is a property right which shall subsist in accordance with this Act in the products of creativity, specified in section eight”.**

Section 8 (1) provides for the categories of creativity of works in which copyright subsists and these include: original literary works, original musical works, original artistic works or original computer programs; computations, audio visual works, sound recordings; broadcasts; cable programs and typographical arrangements of published editions of literary works. Furthermore **section 8 (3)** provides that copyright shall not subsist in a literary or musical work or in a computer program unless and until it is recorded in writing or in some other form. **Section 9 (1)** provides for qualifying conditions under which copyright must subsist. For example it shall subsist in a sound recording which is made or first published in Zambia in convention country or in work of any category specified in **section 8 (1)** where the author of the work was a citizen of or habitually resident in, Zambia or a convention country or a body corporate incorporated in Zambia or in convention country. **Section 10** provides for first ownership of copyright while section 11 deals with transfer of copyright term in literary, musical or artistic work etc for a period of 50 years. The same term is applicable to computer programs, broadcasts and table programs and audio visual works and sound recordings. On the other hand typographical arrangements are for a period of twenty five years. The provisions in the Act which deals with infringement of a copyright are **sections 17, 18, 19 and 20**.

Section 17 provides that the owner of the copyright in a work shall have the exclusive rights to do or to authorize others to do in Zambia or any ship or aircraft registered in Zambia the “*controlled Acts*” which are specified under this section to each category of works. However **section 18** provides, “*subject to section twenty-one, copyright in a work is infringed by a person who, without the consent of the owner of the copyright, does, or authorizes another person to do, a controlled act in relation to the work.*” Furthermore, copyright in a work is also infringed by a person who, without the consent of the copyright owner imports into Zambia other than for his private and

domestic use; possesses in the course of trade or business, sells or lets for hire or offers or exposes for sale or hire; exhibits in public or distributes, in the course of trade or business; or distributes, to such extent as to effect prejudicially the owner of the copyright (**Section 19 (a) – (e)**). **Section 20 (i)** provides that copyright in work is also infringed by persons who, without the consent of the owner of the copyright, makes or causes to be made or import into Zambia or sells or lets for hire, or offers or exposes for sale or hire an article specifically designed for making copies of a particular work. It is also infringed by a person who transmits the work by electronic means having reason to believe that infringing copies will be made by means of reception or transmission in Zambia or elsewhere, without the consent of the owner.

Section 21 provides a number of acts which do not constitute infringement such as the reproduction of a work for the purpose of judicial proceedings or education system in Zambia, etc.

Section 24 provides for moral rights of owner of a work. **Section 25 (i)** provides for enforcement of copyright. It provides for infringements which are actionable by a copyright owner. This **section 25 (1)** provides that an infringement of copyright shall be actionable in the court at the suit of the owner of the copyright. In an action for infringement of copyright, all such relief by way of damages, injunctions, accounts, shall be available to the plaintiff in respect of the infringement of any other property right (**Section 25 (2)**). This is shown in the case involving **Micheal Bolton V Isley Brothers (1994)**⁹⁵ which was the largest verdict ever delivered in the USA, concerning a single musical composition in a musical infringement case. Michael Bolton was sued an account of his hugely popular musical compilation, “love is a wonderful thing” for allegedly infringing a musical composition written in 1960s by the Isley Brothers’ musical group. Both songs had the same title. While Bolton’s song was popular in 1991, the Isley Brothers song was a hit in 1966.

⁹⁵ K. Idris. Intellectual property: A power tool for economic growth, Geneva, WIPO, 2003. P 23 or <http://www.law.com>

The jury at the district court level, in 1994, decided that there had been an infringement. The US Supreme Court affirmed the award of the lower court, inspite of the absence of proven direct access, which was implied due to widespread playing on the radio of the Isley Brothers' hit song. US\$5.4 million in damages was awarded including 66% of all future royalties from the single, and 28% of royalties from the album.

In Zambia, the only case that illustrates the provision of section 25 of the Act is the **Performing Right Society Ltd V Francis A. Hickey T/A Bar-B-Que Drive in Restaurant**.⁹⁶ In that case the applicant applied for an injunction and claimed damages for infringement of copyright by the defendant. The court found that the defendant had infringed the copyright and granted the relief of injunction sought and ordered that the plaintiff was entitled to profits and not damages as the defendant was not aware that a copyright subsisted.

Section 28 (1) provides for offences for infringement of copyright. On first conviction, to a fine not exceeding fifty thousand penalty units or ten penalty units for each infringing copy which ever is greater, or to imprisonment for a term not exceeding five years or both. On subsequent convictions, the penalty units are doubled and so is the imprisonment term or both. **Section 40 (1)** provides for registration of copyright with the registrar who shall issue a certificates. **Section 49 (1)** provides for infringements of recording rights while **Section 48 (1)** provides for infringement of performers' rights. All actions for infringement of intellectual property rights are handled by the High Court. The copyright Performances Rights Act provides a legal protection against piracy.

3.2 THE TRADE MARK ACT

The preamble of this Act states that is "*an Act to make provision relating to the registration of trademarks and for our purposes incidental there to*". This piece of legislation provides for

⁹⁶ (1979) ZR 66

protection of registered trademarks against acts of counterfeiting or any other form of infringement. No action can be involved for infringement of unregistered trademarks pursuant to **section 7** of Trademark Act. The holder of the trademark has exclusive rights to use the trademark with regard to goods.

3.2.1 Salient provisions of the Act (infringements)

Section 7 provides that no person shall be entitled to institute any legal proceeding to prevent or recover damages for infringement of an unregistered trademark. **Section 8** provides that a trade must be registered in respect of particular goods.

Section 9 (1) provides that:

*“Subject to the provision of this section and of sections **twelve** and **thirteen**, the registration of a person in Part A of the register as proprietor of a trademark in respect of any goods shall, if valid, give or be deemed to have given that person the exclusive right to the use of the trademark in relation to those goods ...that right shall be deemed to be infringed by any person who, not being the proprietor of the trademark or a registered user there of using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade in relation to any goods in respect of which it is registered and in such manner as to render the use of the mark likely to be taken either:- (a) as being used as a trade mark; or (b) in a case in which the use upon the goods... or in an advertisement circular ... issued to the public, as referring- (i) to some person having the right as proprietor, or registered use of trade mark, or (ii) to goods with which such person is connected in the course of trade.”*

Section 11 provides for infringement by breach of certain restrictions such being restrained to do an act in which an obligation is imposed to the effect that he will not do it. Breach of such action is tantamount to infringement. **Section 10 (1)** provides for rights by registration, of trademark in

respect of goods, in Part B and the infringement there of furthermore under **section 12** provides for saving of vested rights which shall not be interfered with or be restrained by any person being the proprietor of a trademark identical with or in relation to goods to which that person or predecessor in title has continuously used that trademark from a date anterior to the use of the first mentioned trade mark in relation to those goods by the proprietor or to the registration of the first mentioned trademark in respect of these goods in the name of the proprietor, which ever is earlier or to object to that person put on the register for that identical trademark in respect of goods. Section 13 provides that no registration of a trade mark shall interfere with any bonafide use by a person of his own name or of the name of his business; or the use by any person of any bonafide description of the character or quality of his goods, not being a description that would be likely to be taken as importing any such reference mentioned in **section 9 (1) (b)** or **section 42 (3) (b)**. Part XI of the Trademarks Act provides for appeals and legal proceedings. **Section 51 (1)** provides that High Court shall hear appeals of registrar's decisions. **Section 57** provides that registration to be prima-facie evidence of validity of original registration of trademark and assignment and transmission thereof.

Section 54 provides that any action relating to infringement or passing off a trademark shall be brought in the High Court. (**Trade Kings V Unilever Plc and Others**). In the UK in the case of **R V Johnston (1999)**⁹⁷ in a landmark judgment the House of Lords held that the burden of providing the statutory defence under the Trademark Act, UK, 1994, (section 92) rests on the accused and the prosecutor does not have to disprove that defence. Their Lordship said "given the importance and difficulty of combating counterfeiting, and given the comparative ease with which the accused can raise an issue about his honesty, it is fair and equitable to require the trader to prove in the balance of probability that his honesty believed the goods were genuine"

⁹⁷ Source: <http://www.aacp.org.uk/news/archivearticle>.

By and large the above are the main provisions that border on infringements. Trademarks rights like any other intellectual property rights granted are essentially negative, i.e. they are rights to stop others doing certain things. They are rights' other words, to stop pirates, counterfeiters, imitators and even in some cases third parties who have independently reached the same ideas from exploiting them without licence form the right own.

3.3 PENAL CODE (CAP 87)

The preamble of the Penal Code states that it is “an Act to establish a code of Criminal Law.”

3.3.1 Salient Provision relating to Counterfeiting Trademark

The main provision in the Penal Code which deals with counterfeiting of trade marks is section 377. The said provision criminalizes the act. Section 377 (1) provides:

“Any person who does any of the following things with intent to defraud or to enable another to defraud any person, that is to say:

- (a) forges or counterfeits any trademark;
- (b) applies any trademark or any forged or counterfeited trademark to any chattel or article not being the merchandise of any person whose trademark is so forged or counterfeited;
- (c) applies any trademark or any forged or counterfeited trademark to any chattel or article not being the particular or peculiar description of merchandise denoted by such trademark or by such forged or counterfeited trademark;
- (d) applies any trade mark or any forged or counterfeited trademark to anything intended for any purpose or manufacture, or in, on, or with which any chattel or article is intended to be sold, or is sold or offered or exposed for sale,

- (e) encloses or places any chattel or article in, upon, under or with anything to which any trademark has been falsely applied, or to which any forged or counterfeit trademark applied;
- (f) applies or attaches any chattel or article to any case, cover, reel, ticket, label, or other thing to which any trademark has falsely applied;
- (g) encloses, places, or attaches any chattel or article in upon, under or to any having there on any trademark of any other person is guilty of a misdemeanour.”

Section 377 (2) further provides that any person who commits any such misdemeanour mentioned in subsection (1) shall forfeit all chattels to which such trademarks or counterfeit trademark is applied or caused or procured to be applied.

3.4 THE PHARMACEUTICAL ACT, (No. 14 of 2004)

This Act repealed the Pharmacy and Poisons Act (1940) and the Therapeutic substances Act, (1968). This Act provides for the registration and regulation of pharmacies; provide for registration and regulation of medicine intended for human use and animal use. The Act also provides for the regulation and control of manufacture, importation, exportation, possession, storage, distribution, supply, promotion, sale and use of medicines, herbal medicines and allied substances.

3.4.1 Salient Provision Relating to Counterfeit Drug

The Act under **section 4 (1)** provides for the establishment of the Pharmaceutical Regulatory Authority to administer the Act, and whose functions are provided under **section 5 (1)**. The provision which deal with counterfeit drugs is contained **section 33**. **Section 33 (1)** provides:

“A person shall not manufacture, import, export distribute or sell substandard, counterfeit or adulterated medicines or allied substandard. Section 33 (2) provides,” A person who contravenes subsection (i) commits an offence and shall be liable, upon conviction to a fine of not less than three hundred thousand penalty units but not exceeding five hundred thousand penalty units or to imprisonment for a term of not less than five years but not exceeding ten years or both.”

Subsection (3) provides that the court may order that such medicines be forfeiting to the state to be destroyed. **Section 34** provides for prohibition of supply of expired medicine, breach of this provision attracts the same penalty and sentences as in **section 33 (2)**. Furthermore, **section 35** provides for prohibition of deception in labelling of medicines. Thus **section 35 (1)** provides that *“a person shall not label, package, that, process, sell or advertise any medicine in a manner that is false, misleading or deceptive in respect of its character, constitution, value, potency, quality, composition, merit or safety or in contravention of any regulation made under this Act.”*

Contravention of the above provision results in commission of an offence and upon conviction shall be liable to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding ten years or both. On the other hand, the Act under **section 62** prohibits the sale of harmful cosmetics which may cause injury to the health of the user and a person who is in breach of this provision can be sentenced to a term ranging from eighteen months to 5 years.

The pharmaceutical Act is comprehensive and very elaborate and it provides for the establishment of the National Drug Quality control Laboratory (**Section 57**) to facilitate the regulation of medicines and allied substances under the Act.

3.5 FOOD AND DRUGS ACT CAP 303

Its preamble provides that it is “*an Act to protect the public against health hazards and fraud in the sale and use of food, drugs, cosmetics and medical devices; and to provide for matters incidental there to or in connection there with*”. This Act is administered by local councils.

3.5.1 Salient Provision relating to Counterfeits

Section 4 of the Act provides that “*Any person who labels, packages, treats, processes, sells, or advertises any food in a manner that is false, misleading or deceptive as regard to its character, nature, value, substance, quality composition, merit or safety, or in contravention of any regulations made under this Act shall be guilty of an offence.*” It is under this provision that Lusaka City Council Health Department seized counterfeit “Polar mineral Water” from Big Bear Restaurant in August, 2005.

It is also an offence where standards have been presented for any food, for any person to label, package, sell or advertise which does not comply with the standard. **Section 6** makes it an offence for any person who sells, to the prejudice of a purchaser, any food which is not of the nature or is not of the substance, or is not of the quality, of the article demanded by the purchaser. With regard to drugs, **section 8** of the food and Drugs Act provides that “*any person who sells any drug that –*

(a) is adulterated; (b) consists in whole or in part of any filthy, putrid, rotten, decomposed or diseased substance shall be guilty of an offence.” Furthermore **section 9** of the Act provides that “*any person who labels, packages, treats, processes, sells or advertises any drug in a manner that is false, misleading or deceptive as regard its character, constitutions, value, potency, quality, composition, merit or safety, or in contravention of any regulations made under this Act, shall be guilty of an offence*”. On the other hand, **section 10 (1)** states that where a standard has been

prescribed for drug, any person who labels, packages, sells or advertises any substance in such a manner that is likely to be mistaken for that drug shall be guilty of an offence, unless the substance is the drug in question and complies with the prescribed standard.

Section 11 deals with prohibition against sale of drug not of the nature, substance or quality demand, while **section 12** deals with sale and preparation of drugs under in sanitary conditions. With regard to **cosmetics**, **section 13-15** deals with prohibited sale of cosmetics'. The Act prohibits the cosmetics which may contain substances detrimental or is prepared and stored under in sanitary conditions. With respect to the sale of devices, the Act, under **sections 17-21** prohibits the sale, labelling, packaging in a manner that is false and no manufacturer shall sell to the vendor without a warranty in writing. **Section 22** deals with the constitution of Food and Drug Board to carry out functions prescribed under the Act pursuant to **section 27**, the Act imposes a duty on the local authority to enforce the Act. **Section 31** provides for penalties in breach of the Act it provides for fines or a sentence of less than 3 months imprisonment of both for first offender for second offenders the sentence is less than 6 months.

3.6 CUSTOMS AND EXCISE ACT (CAP 322)

The preamble of this Act states:

“An Act is provided for the imposition, collection and management of customs, excise and other duties, the licensing and control of warehouses and of premises for the manufacture of certain goods, the exports, the conclusion of customs and trade agreements with other countries, for forfeiture, and for other matters connected therewith or incidental thereto.”

The Act, as its preamble clearly points out, deals with collection and management of custom and other duties and also deals with importation and exportation regulation of goods, among other matters incidental thereto. For instance, **section 34** deals with entry of imported goods and

requires the importer to deliver the bill of entry and pay all duties due there on to the proper officer of Custom and Excise department.

3.6.1 Salient Provision Dealing with Prohibited Goods

It must be emphasized, from the outset, that this Act does not per-se deal with counterfeit goods or piracy. It does not clearly spell out whether counterfeits are allowed into the country or not.

Having said this, **section 40 (1)** provides:

“Subject to the provisions of subsection (3), the importation into Zambia of the goods in this subsection is totally prohibited-

- (a) base or counterfeit coins
- (b) any goods which are indecent, obscene or objectionable
- (c) any goods which might tend to deprive the morals of the inhabitants or any class of the inhabitants of Zambia.
- (d) Prison-made and penitentiary-made goods
- (e) Qilika
- (f) Spirituous beverages which contain preparations, extracts, essences or chemical product which are noxious or injurious.
- (g) Any goods the importation is prohibited by or under the authority of any law.”

However **section 149** deals with smuggling of goods into Zambia. This is one form through which counterfeit and pirated goods enter the country. Thus the said section provides “*any person who- (a) smuggles or attempts to smuggle any goods; (b) aids, assists, or connives at smuggling or attempted smuggling of any goods, shall be guilty of an offence.*” Furthermore **section 150** states that if any goods are imported into Zambia in contravention of **section 40 and 41**, the importer or his cohorts shall be guilty of an offence. **Section 157** provides for forfeiture of goods

either imported or exported contrary to this Act. This Act, as pointed out above, does not address clearly issues of piracy and counterfeits. To invoke **section 40 (1) (g)** of this Act, it must be read together with another law which prohibits either counterfeits or piracy.

3.7 THE COMPETITION AND FAIR TRADING ACT (CAP 417)

This Act is, according to its preamble,

“An Act to encourage competition in the economy by prohibiting Anti-Competitive trade practices, to regulate monopolies and concentration of economic power; to protect consumer welfare; to strengthen the efficiency of possible conditions for freedom of trade, to expand the base of entrepreneurship; and to provide matters connected with incidental to the foregoing.”

3.7.1 Salient Provision relating to counterfeit and public health

This is found under **section 12** which protects consumer welfare against unfair trading.

Section 12 provides:

A person shall not –

- (a) exclude liability for defective goods;
- (c) in connection with the supply of goods or services, make any warranty –
 - (i) limited to a particular geographic area or sales point;
 - (ii) **Falsely represent that products are of a particular style, model or origin;**
- (iv) represent that the products or services have any sponsorship, approval performance and quality characteristics, components, materials, accessories, uses or benefits which they do not have;
- (d) *Engage in conduct that is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quality or quantity of any products or services, or*

(e) Supply any products which are likely to cause injury to health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any law. From the entire Act the above provision is the only provision which comes closer to addressing issues of counterfeit.

CHAPTER FOUR

This Chapter will examine the institutional frame-work which are supposed to deal with counterfeit and piracy. It must be emphasized, on the outset, that these institutions except a few, are not specifically created to deal with counterfeits and piracy. However the following are the institutions:

4.1 ANTI-PIRACY CRACK SQUAD

The Anti-piracy Crack Squad was established in October 2003.⁹⁸ This was born out of an Adhoc team of police officers, prosecutors, immigration officers and some officers from Ministry of Information's and Broadcasting and Zambia Revenue Authority. The Anti –Piracy Crack Squad consists of forty officers. It must be emphasized that the squad is not operated as a unit under the police service. There is no funding allocated for its operation. The coordinator of Anti Piracy Crack Squad is Mr. Kingsley Nkonde from Force Head Quarters.

4.1.1 FUNCTION

Since inception the functions of the squad has been to conduct raids and seizure of pirated tapes, CDs. The seized pirated products are then destroyed. Furthermore, the Squad also conducts sensitization programmes through workshops, targeted at law enforcement agencies from Zambia Police, ZRA, immigration department together with musicians, music dealers and promoters of music or music houses.⁹⁹ The activities of the Anti-Piracy Crack Squad are funded by the copyright office in the Ministry of Information and Broadcasting services and some raids have been funded by music publishing houses. However, the squad experiences funding problems as there is no government budget

⁹⁸ Ministry of information and broadcasting (write up for Hon. Chulumanda Radio Phoenix let the people talk prog.) 2004 p1

⁹⁹ Ibid, P3

earmarked for its operation. Furthermore, the Crack Squad has no transport making it impossible to operate effectively and efficiently. For this squad to operate effectively it is imperative that it is incorporated in the police establishment and operate in the lines of the victim support unit.

4.2 THE COPYRIGHT TASK FORCE (2002)

This taskforce was established by the Ministry of Information and Broadcasting. The taskforce is composed of officers from the following: Zambia Police, Zambia Revenue Authority, Ministry of Legal Affairs, Patent office, ZAMCOPS, National Arts Council, Ministry of Community Development, Zambia Association of Musicians, Mondo Music Corporation, Sounds Investments and Ministry of Information.¹⁰⁰ The mandate of the taskforce is to monitor the implementation of the copyright laws in the country and also served as an advisory body to the government on all copyright issues. The taskforce is chaired by the permanent secretary in the Ministry of Information and Broadcasting services. This taskforce was instrumental in the facilitation of the formation of the Anti-Piracy Crack Squad. The Copyright Office in the ministry of information also spearheads anti-piracy sensitization programmes throughout the country. Like the Anti-Piracy Crack Squad, the copyright taskforce is not establish as institutions under statutes.

4.3 ZAMBIA MUSIC COPYRIGHT PROTECTION SOCIETY (ZAMCOPS) (1996)

This organisation was established in 1996 as a result of the enactment of the copyright and performance Act (1994). The ZAMCOPS, as it is referred to in short, is the collecting society established in Zambia. Prior to its establishment, there was the Performing Right Society that represented the composers, publisher, lyrists and musicians of copyright music. The chairperson of ZAMCOPS is Mr. Folotiya Chisha, proprietor of Mondo Music Corporation. This organisation is non profit organisation and its 300-strong membership of composers and publishers assign to ZAMCOPS their public performance, broadcast and cable transmission rights.

¹⁰⁰ Ibid

Mukuka writes that ZAMCOPS directly represents the rights of its member in the negotiation of terms and conditions with television broadcasters, radio stations, hotels, restaurants and cinema owners.¹⁰¹ From inception in 1996, ZAMCOPS had single handedly fought the fierce fight against piracy in collaboration with Customs officers and the police, supported by the Ministry of Information and Broadcasting and multi-choice. However, although ZAMCOPS had been, in the fore front in fighting piracy, since 1996 spending K15 million in the past 6 years, its main objective is to collect royalties for public performance and broadcasting of music and distributing them to copyright holders (composers and publishers)¹⁰².

4.3.1 FUNCTION

The following are the functions of ZAMCOPS:

- (i) to license copyrightable work in music. This organisation as alluded to already represents composers, musician and publishers (both local foreign) in licensing agreements negotiation with potential users. Under the international Confederation of Societies, Authors and composer (CISAC) foreign on composers whose music is played in Zambia and Zambian musicians whose music is played outside the country, collecting societies have a network of reciprocal representation agreement by which each licences the other to represent its repertoire in the territory in which it is established under the said agreement. Both local and foreign musicians or composers are able to get royalties for their music as long as such composers are members of ZAMCOPS
- (ii) It administers the performing rights of its members
- (iii) It distributes the moncy collected to its members though ZAMCOPS collecting 25%

¹⁰¹ M.A. Mukuka (2002) The Licensing and collection of royalties in the music industry in Zambia: A critical Appraisal. P,34

¹⁰² Copyright News Vol.1 issue No.1, P.1 and 3

from the composers royalties (administrative cost for ZAMCOPS) and the composers get the rest.

4.3.2 STRUCTURE

The ZAMCOPS structure is as follows:

- (a) The **Board**: it consists of ten members inclusive of the Chairman, Board secretary and the Board. The major function of this Board is to formulate policies which are carried out by the secretariat.
- (b) The **Secretariat**: this is headed by the manager, appointed by the Board and serves as secretary during Board meetings. The secretary is in charge of the general administration of the society and carries out the policies laid out by the Board. He/she reports to the Board. The secretariat is subdivided into:
 - (a) Licensing (deals with licensing procedure)
 - (b) accounts (handles the financial issues of the society);
- (c) **Documentation** (in charge of registration and recruitment of members); and
- (d) **Distribution** (processes the log sheet from licensees and calculates how much each composer would receive.

4.3.3 Importance of ZAMCOPS:¹⁰³ The importance of this organisation can not be over emphasized. *“The Zambia music Copyright Protection Society (ZAMCOPS) makes it easy for you (musicians-addition mine) to meet your legal and moral obligation towards copyright owners.”*¹⁰⁴ ZAMCOPS renders an invaluable service to users of music. It is a known fact that one cannot use work that is under copyright protection without prior consent of the owner since such work is protected under the intellectual property which a copyright holder enjoys. ZAMCOPS, therefore reduces the hurdles which the musician

¹⁰³ Ibid, P3

¹⁰⁴ Zambia Music Copyright Protection Society Brochure.

has to face if such a musician was not a member of the organisation in negotiating with radio stations, restaurants and other music business houses over royalties. Furthermore, the organisation, in conjunction with Ministry of Information and Broadcasting services and World Intellectual Property Organisation (WIPO) help to sensitize stakeholders of copyright, law enforcement agent, and the general public through seminars and exhibitions¹⁰⁵

4.4 ZAMBIA COMPETITION COMMISSION (1997)

The Zambia competition commission was established on 14th April 1997.¹⁰⁶ the establishment of a new national Competition Authority was one of the several important steps taken towards the economic and political liberalization in Zambia. The commission is primarily “*concerned with the establishment of conditions that enhance free and effective competition in the economy, to ensure that the anti-competitive practices do not create new barriers to trade or other forms of protectionism.*”¹⁰⁷ The Zambia competition commission is established pursuant **section 4 (1) of the Competition and Fair Trading Act.**¹⁰⁸

4.4.1 Functions

The functions of the commission are contained in **section 6 (2)** of the said Act and these are:

- (a) to carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of business, so as to determine whether any enterprise is carrying on anti-competitive trade practices and the extent of such practices, if any;
- (b) carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;

¹⁰⁵ Copyright News vol. 1 Issue No.1 P3

¹⁰⁶ The Zambia Competition Commission (ZCC) Brochure, P1

¹⁰⁷ Ibid, P.1

¹⁰⁸ CAP 417 of Laws of Zambia

- (c) to take such measures necessary to prevent or redress the creation of a merger or the abuse of a dominant position by any enterprise;
- (d) to provide persons engaged in business with information regarding their rights and duties under this Act;
- (e) to provide information for the guidance of consumers regarding their rights under this Act;
- (f) to undertake studies and make available to the public reports regarding the operation of the Act;
- (g) To cooperate with and assist any association or body of person to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provision of this Act; and
- (h) To do such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

From the functions, it is clear that this institution **was not created specifically to deal with counterfeits**. However, it must be emphasized that the Act, which the Zambia Competition Commission enforces, does have a provision for consumer welfare and protection which falls under unfair trading pursuant to **section 12** of the Act. This will be referred to shortly. Generally the commission deals with anti-competition trade practice which include enumeration of anti-competitive trade practices; control of mergers, anti-competition trade policies, unfair trading. The Zambia Competition Commission tries to restrict certain business practices. Basically, the provision within the Act, administered by the Zambia Competition Commission, which deals with counterfeit or passing off or forms of unfair trading are contained in **section 12** of the Act. This provision is aimed at protecting the consumer welfare. **Section 12 (C)** provides:

A person shall not be in connection with the supply of goods or services make any warranty-

(ii) falsely represent that provides are of a particular style, model or origin;

(iv) represent that products or services have any sponsorship, approval, performance and quality characteristics, components materials, accessories uses or benefits which they do not have;

Furthermore **section 12 (d)** provides that “*a person shall not engage in conduct likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quality or quantity of any products or services*”. **Section 16 (1) (C)** provides for offences and penalties. Breach of provision of the Act attracts ten million kwacha (K10 million) fine or a five (5) year sentence or both. As stated above the Zambia Competition Commission, the implementers of the Competition and Fair Trading Act, does not clearly address the issue of counterfeits and piracy though both issues are unfair trading practices. The Act deals more with passing off than counterfeits of trademark. By and large, the Act, through the Zambia Competition Commission, ensures in its bid to protect the user of a product, that any person or business or association shall not exclude liability for defective goods. There is a tendency in Zambia for refusing buyers to return or refund money for cheap counterfeit goods most of which are defective. The Act, therefore, does offer protection.

4.5 THE PHARMACEUTICAL REGULATORY AUTHORITY

This Authority provides regulation and control of medicines in Zambia. The Pharmaceutical Regulatory Authority (PRA) was until early this year (2005) formerly known as the Pharmacy and Poisons Regulatory Board. The Pharmaceutical Regulatory Authority is created pursuant to the **section 4 (1)** of Pharmaceutical Act. Which provides that, “*there is hereby established the Pharmaceutical Regulatory Authority which shall be a body corporate with perpetual succession and a common seal...*”

4.5.1 Structure

The following is the structure of the Authority:

- (a) **The Pharmaceutical Regulatory Authority Board:** This is created pursuant to **section 8 (1)** of the Act. The Board shall consist of part-time members appointed by the minister as follows: (a) five representatives of the Pharmaceutical Societies of Zambia, (b) a representative of Medical Association of Zambia; (c) a representative of the Medical Council of Zambia; (d) a representative of the Department of Pharmacy for the University of Zambia; (e) a representative of the pharmaceutical manufacturers, among others. The Chairperson and his/her Vice-Chairperson are elected by the members of the Board. However **section 8 (5)** provides for the conditions for appointment of the members of the Board. The Board is the decision-making body. The Board is mandated pursuant to **section 9 (1)** to constitute a **medicine committees** whose functions includes interalia, licensing of medicines or medicinal products, monitoring the advertisements and promotion of medicines, herbal medicines and allied substances, monitoring standards relating to medicines, herbal medicines and allied substances; monitoring the conduct of clinical trials and animals clinical tests; and nay other matter referred to by the Board.
- (b) **Secretariat:** This is created pursuant to section 10 of the Act. The secretariat's function is to implement the day to day decisions of the Board.
- (c) **Director General:** The Director General is appointed by the Board, with the approval of the minister. The Director General is the chief executive officer of the Authority. The current Director General is Mrs. Mwape. The Director General is the secretary to the Authority and his/her terms and conditions are determined by the Authority in consultation with the minister.
- (d) **Staff:** These are the employees of the Authority who perform various tasks for the Authority.

4.5.2 Function of the Pharmaceutical Regulatory Authority

The function of the PRA (Pharmaceutical Regulatory Authority) are contained in section 5 (1) of the Act. The following are, interalia, functions of PRA:

- (a) to register medicines, herbal medicine and licence allied substances;
- (b) register pharmacies and licence any premises used for the purpose of manufacturing, importing, exporting, distribution and sale of medicines, herbal medicines and allied substance;
- (c) to serve and perfect the public interest in all matters relating to the sale of medicines, herbal medicines and allied substances;
- (d) establish, maintain and enforce standards relating to the manufacture, importation, exportation, distribution and sale of medicines, herbal medicines and allied substances.
- (e) Manage the National Drug Quality Control Laboratory
- (f) Establish, maintain and enforce standards for privately owned drug quality control laboratories;
- (g) Conduct post market surveillance and monitor adverse drug reaction
- (h) Coordinate and manage national drug formulary activities
- (i) Advise the government on policies relating to the regulation and control of medicines, herbal medicines and allied medicines
- (j) Establish and maintain a relationship with corresponding pharmaceutical authorities in other countries
- (k) Administer this Act and perform duties and exercise powers which are imposed on the Authority by this Act.

4.5.3 Powers of the Authority: The power of the Authority are contained in **Section 6 (1)** of the Act and these are, inter alia, direct any person or pharmacy providing services relating to manufacture, importation, distribution and sale of medicines, herbal medicines and allied substances to deliver its services in such a manner as to ensure compliance with this Act; any institution or person dealing in drugs is required to submit information and records as may be necessary to enable the Authority monitor the performance of such institution or person. Any registered pharmacy is required to inform the Authority of its intention to relocate. Furthermore, the Authority has power to recall or withdraw any medicine from circulation if such medicine is not in the public interest (**Section 7 (1)** of the Act.

Under the Act, the Pharmaceutical Regulatory Authority is mandated to deal with issues of counterfeit or substandard drugs and it is an offence to deal in such drugs in Zambia. This is provided for in **section 33 (1)** which states “**A person shall not manufacture, import, export, distribute or sell substandard, counterfeit or adulterated medicines or allied substances.**” (2) Any person who contravenes subsection (1) commits an offence and shall be liable, upon conviction, to a fine of not less than three hundred thousand penalty units but not exceeding five hundred thousand penalty units or to an imprisonment for a term of not less than five years but not exceeding ten years or both.

Furthermore the sell or supply of an expired medicine or substance attracts the same penalty as in **section 33 (2)**. This is contained in **section 34 (1) and (2)**. In spite of the excellent provisions in the Act, the PRA seems to be overburdened by the counterfeit drugs. In an interview¹⁰⁹ the Director, Mrs. Mwape admitted that the country is quite porous and “*it is difficult to talk in terms of quality of drug in the absence of a national quality control laboratory. We are unable to do*

¹⁰⁹ Interview, September 2005, 14 hours, in her office at PRA

active analysis of drugs.” She acknowledged the availability of counterfeit drugs on the market in Zambia. The short comings of this institution will be addressed in the next chapter.

4.6 ZAMBIA PATENT OFFICE (TRADEMARK OFFICE)

The Zambia Patent Office administers three Acts, namely, the Patents Act¹¹⁰ The Trademarks Act¹¹¹ and the Industrial Designs Act.¹¹² Emphasize in this paper will centre on the first two Act as administered by the Zambia Patent office.

4.6.1 Trademarks Office: Section 3 of the trade marks Act provides for the establishment of the trade marks office and section 4 of the Act further states that the seal of the Patent office, kept in terms of the patents Act shall also be the seal of the trademarks office.

4.6.2 Structure

- (i) **The Registrar:** Pursuant to **section 5 (a)** the Registrar of Trademarks shall exercise the powers and perform the duties assigned to him/her by the Act and shall be responsible for administration of the act. The registrar shall be responsible for registration of trade marks.
- (ii) **Deputy Registrar:** Pursuant to **section 5 (b)**, he/they shall be subject to the control of the Registrar and have all power conferred by the Act on the Registrar
- (iii) **Examiners:** Pursuant to **section 5 (c)**, the examiners and other officers, may be necessary for carrying out provision of the Act. Examiners, as the name suggest, are responsible for examining trade marks, trade names which are supposed to be registered.

It is important to emphasize the point that the Trademark office **does not enforce trademark infringements**. Its role is purely to examine trademarks and register such trademarks if they do

¹¹⁰ CAP 400

¹¹¹ CAP. 401

¹¹² CAP 402

not conflict with other marks already registered. A registered trademark gives the holder exclusive right to exclude others from using his trademark without prior authority. The trademark office grants protection for a trademark for 7 years with indefinite renewal periods (Section 25 of the trade mark Act). Therefore any counterfeiting of a trademark is an infringement of the exclusive rights of a trademark holder which would result into seeking court redress through an injunction to restrain the person /enterprise producing counterfeit from further breaches of the rights enjoyed. In the case involving **Trade Kings Ltd V Unilever Plc, Cheesebrough Ponds and Lever Brothers**¹¹³. In that case the respondent had commenced an action seeking an injunction to restrain the appellants for allegedly infringing their trademark 83/93 in respect of GEISHA and from passing of the soap GEZA. The supreme court ruled that registration of a mark is prima facie evidence of validity of the original registration and restored the appellants trade mark GEZA and quashed the order of expunction granted by the high court.

However, under **section 7** of the Act, if a trade mark is unregistered, the holder of such trademark has no recourse in the law as there is no action for infringement of unregistered marks. As alluded to above, the Zambia Patent Office or the Trade marks Office does not enforce infringement of trademarks. That responsibility is solely in the hands of the owner of the trademark who can sue for infringement or for acts of counterfeiting by a third party.

4.7 REGISTRAR OF COPYRIGHT

This office is found at the Ministry of Information and Broadcasting. The Registrar of Copyright position is created pursuant to **section 54 (1)** of Copyright and Performance Rights Act. The Registrar of Copyrights is Mrs. Dorcas Chileshe. The function of this office, according to Dorcas Chileshe during an interview,¹¹⁴ pursuant to **section 54 (2)** of the Act cited above, are

¹¹³ (1999) Supreme Court Appeal no. 71

¹¹⁴ Interview, 12th July 2005 at 09.20 in her office (MIBS)

- (i) To monitor the activities of the collecting Societies.
- (ii) To encourage and facilitate the development of collecting Societies.
- (iii) To help resolve or facilitate the resolution of disputes between copyright holders and business houses being in music, or at the request of the copyright owner or collecting Societies, to examine cases of alleged copyright infringements and where appropriate, to advise the Director of Public Prosecution.
- (iv) To provide information and advice on copyright matters to the minister.
- (v) To perform such other duties or functions as are provided for under the Act.
- (vi) To keep records of Copyrights deposited with it.
- (vii) The Registrar may grant licences for persons to translate or reproduce certain works, subject to Articles II, III and IV of the Appendix to the convention.

This office in the ministry of information has been instrumental in conducting sensitization in the music industry with major stakeholders in trying to combat piracy. It has from time to time, funded the Anti-piracy Crack Squad's activities, such as seminars, workshops as well as raiding of premises which are involved in pirate activities. It has been behind formation of copyright taskforce in 2002.

4.8 THE ZAMBIA BUREAU OF STANDARDS (ZABS)

This is a specialized organisation of National importance serving the country in the field of standardization, standards formulation, quality control /assurance, import and export quality in sections, certification and removal of technical barriers to trade.¹¹⁵ The ZABS was created in 1982 pursuant to the repealed Zambia Bureau of standards Act No. 22, 1982. This has since been repealed by the 1994 standards Act CAP 416 of the Laws of Zambia.

¹¹⁵ Zambia Bureau of Standards Brochure

4.8.1 FUNCTIONS

The functions¹¹⁶ of ZABS are, pursuant to section 5 (1) of the Act:

- (i) to prepare Zambia standards and promote their use
- (ii) to make arrangements for the examination and testing of commodities, materials and substances from which commodities may be is being sold in the country manufactured, processed or treated .For example, ZABS has established that substandard fertiliser is being sold in the country, following samples tested within and outside the country (POST ,December 5,2005)
- (iii) provide schemes for pre-export inspection of goods
- (iv) to provide training and consultancy in standardization, quality management and quality assurance.
- (v) To coordinate the efforts of producers and consumers in the improvement of the appliances, process, new materials and products.

4.8.2 STRUCTURE

- (a) **Standards Council of Zambia:** This is the governing body of the Bureau. It is made up of a body of 15 persons drawn from Permanent Secretaries (Finance, Industry, Planning, and Health), UNZA, Trade Unions and the private sector. The Council shall elect its own chairperson and vice chairperson, and may establish technical advisory or other committees for the purpose of performing its function.
- (b) **Director:** He/she is appointed by the council and is the Chief Executive of the Bureau. He/she is responsible for the administration and implementation of decisions of the council. He/she may establish organisational structure of the Bureau.

¹¹⁶ Ibid

(c) **Deputy Director:** He/she is appointed by the council and assists the Director in the performance of his function.

(d) **Inspectors and Staff:** These are appointed by the Bureau and are issued with certificates of appointment which is a prima-facie evidence of appointment.

4.8.3 Salient Provision

Section 6 provides for the publication of any specifications or code of practice by the Bureau in relation to a commodity and declares the same to be voluntary standard for the commodity. On the other hand, Compulsory standards may be published for promotion of public interest in relation to a commodity by the minister. **Section 10** provides that a person shall not supply to another any commodity to which compulsory standards applies or export any commodity to which exports standards applies unless such complies with the standards. Section 11 prohibits the supply of a commodity in breach of **section 10** and shall be liable to a fine or less than a year sentence. **Section 13** imposed the minister by statutory order to declare a mark to be depicted as a mark of conformity with respect to standards. A person shall not apply a mark of conformity without Authorization from the Bureau (**Section 14**). **Section 16** empowers the minister to order the prohibition or imposes conditions on the supply of defective commodities in the intense of the public safety. Any person who breaches **section 16** is liable to a fine or a three year imprisonment term (**Section 18**). Under **section 20-21** the minister may order the recall of defective commodities which does not comply the standards or a supplier may, on his own volition withdraw defective commodities and shall inform the Director of his intentions (section 21). This institution therefore deals with standards of various items and emphasizes of compliance.

4.9 THE ZAMBIA REVENUE AUTHORITY

The Zambia Revenue Authority (ZRA) was created pursuant to **section 9** of the Zambia Revenue Act¹¹⁷. The said section provides that there shall be established. The Zambia Revenue Authority which shall be a body corporate with perpetual succession and a common seal.

4.9.1 STRUCTURE

(a) **Governing Board:** This was created pursuant to **section 10 (1)** whose composition includes the secretary to the treasury (Ministry of Finance), the permanent secretary legal affairs), the Governor of Bank of Zambia, LAZ representative, three persons each representing Zambia confederation of chambers of commerce, Zambia institute of certified Accountants and Bankers association of Zambia, and two other members appointed by the minister.

The function of the Governing Board, pursuant to **section 11 (1)** is to assess, charge, levy and collect all revenue due to the government and to ensure that all revenue collected is credited to the treasury. The Governing Board may appoints the commissioner general as member of any of the committees which it establishes and delegates functions pursuant to **section 16 (1)**.

(b) **Commissioner General:** He/she is appointed by the President. The Commissioner – General is the chief executive officer of the Authority and is responsible for execution of the function of governing board and implements its decisions. The Commissioner General may establish organisational structure.

(c) **Secretary:** The secretary is appointed by the governing board in such terms and conditions as may be determine by the Board. He/she shall be responsible for the administration of the day to day affairs of the Board, under the supervision of the commissioner general.

(d) **Staff:** It is appointed by the Governing Board which determines terms and conditions.

¹¹⁷ CAP 321

However with regard to counterfeit and piracy, the legislation administered by the Authority such as the **Zambia Revenue Act** and the **Customs and Exercise Act** does not clearly address these two issues. The provisions in the latter Act which comes closer is **section 40 (1) (g)** which provides “*that subject to the provision of subsection (3), the importation into Zambia of goods in this subsection is totally prohibited any goods the importation of which is prohibited by or under the authority of any law*”. To involve this section, it must be ready with another Act which prohibits counterfeit and piracy.

5.0 ZAMBIA CONSUMERS ASSOCIATION (ZACA)

This is a Non-Governmental organisation which is involved in advocacy of consumer rights. The ZACA was established in October 1998. The ZACA is headed by Mr. Muyunda Ililunga. The following are the objectives of the ZACA.¹¹⁸

- (i) To monitor and raise vital issues
- (ii) Focus on the consumption of goods and services, their motives and consequence and consumer’s potential to positively influence them.
- (iii) Inform, generate opinion and coordinate campaigns
- (iv) Work to increase consumer’s influence in market place
- (v) Defend consumer interests by ensuring that applying competition rules results in better quality and choice and lower prices of goods and services.

ZACA’s activities involve policy research and publication, advocacy and dialogue, training and net-working with other non-governmental organisation, information dissemination and outreach, and human resource development. However, by and large, the Zambia Consumers Association (ZACA) the mouth piece of the consumers with regard to a host of issues which affect them

¹¹⁸ Zambia Consumer Association Brochure

especially with regard to prices of goods and services, the quality and quantity of good, among other.

CHAPTER FIVE

This chapter will critically analyse the adequacies of the legislation and institutional framework in respect of combating piracy and counterfeiting. Furthermore, possible recommendations will be provided in order to effectively combat piracy and counterfeit of goods (drugs inclusive).

5.1 THE ADEQUACY AND SHORTCOMINGS OF THE LEGISLATION AND INSTITUTIONAL FRAMEWORK

It is well known fact that the impact of counterfeit goods and drugs on the health of the citizens is quiet grave, as pointed out in **chapter one** above. Economically the government has lost colossal sums of money in taxes from piracy and so have the composers of music and producers. It is from this background that an analysis of legislation and institutional framework is to be examined.

With regard to piracy the **Copyright and Performance Right Act** deals with this issue. Piracy in Zambia is on the upswing. There is nothing wrong with the Act per se with regard to penalties in respect to infringements of copyright. The problem has been the implementation of the Act, itself. In spite of the Copyright task force (2002) and the Anti-Piracy Crack Squad (2003), there has been very little impact. This is seen from the lack of conviction. Since 1979 when the only case (**Performance Rights Society V Hickey**) was decided, there have been no further convictions to date. A country can have good laws but still have bad managers. Raids which are conducted on vendors do not in any way address the problem of piracy. *“Getting to the source of counterfeiting (and piracy – addition mine) operators... is the real key to stopping the proliferation... you can strip a market of illegal goods but within a few days the illegal product is back”*¹¹⁹. This Act has adequate teeth to bite (5 years for first offenders and 10 years for subsequent offenders) but its biggest draw back has the implementation. Furthermore, there also seems to be lack of understanding of the Copyright law by some implementers and musicians themselves. The issues

¹¹⁹ Nick Kounoupas (UK. Anti-Piracy Unit)

of intellectual property rights are not understood by the majority of the people. In respect to counterfeits of registered trade mark goods, the Trade mark law, just like the Patent Act, gives protection to the owner of the trade mark who has exclusive rights against any other persons. Infringements of the trademark can be pursued in the court of law by the owner of the trade mark or by the licensee. The Trade mark Office has **no mandate to enforce a breach of the trade mark**. Furthermore, others have used their trade marks on products without having such trade marks registered with the Trade mark office. Such people have no recourse in the law in case an infringement arises (Section 7 of the Trade mark Act). The major shortcoming of the Act is that it does not give recourse to the consumer who buys the counterfeit products which bears the trade mark which is either a registered or unregistered. The Act is silent. It only offers protection to owners of a registered trade mark against infringement of his trade mark without authorization. Recourse for counterfeit trademark can be found in the Penal Code which criminalizes this illegal activity but sadly, the penalty is less severe.

With regard to counterfeit drugs, the Pharmaceutical Authority has the mandate to administer the Pharmaceutical Act. The Act which is bearing least than a year in force has excellent provisions such as the establishment of the National Quality Control Laboratory, granting of licenses for importers or exporters, manufacturers and wholesale dealers as well as the registration of pharmacies, in addition to mandating inspectors to enter and inspect premises. It also adequately addresses the issue of counterfeit and substandard drugs, sell of which, is criminalized and imposes a sentence of between 5 to 10 years imprisonment in addition to the fine or both, for breach of the provision. The Act, as already pointed out in the previous Chapters, also addresses the issue of expired drugs and sale of cosmetics which are harmful. In spite of these brilliant provisions there are serious problems with regard to countering counterfeits and substandard or

adulterated drugs. There are serious problems which the Authority faces. Firstly, the Authority does not have adequate trained man power to implement the provisions of the Act or to monitor counterfeit of drugs. The Pharmaceutical Authority, in the words of Mr. Bonaventure Chilinde,¹²⁰ has no capacity at present to test the potency of the drugs. This is true in respect to a complaint which was lodged by Dawa Pharmaceutical Company (Kenya) through its agency in Zambia, Melcome Pharmaceutical, over counterfeiting of their drugs, *Dawaquin* and *Dawanol* by a Dubai based company which brought into the country its counterfeit version *Dalaquin* and *Dalanol*. To date, the Authority has not carried out a chemical analysis of the two drugs to verify counterfeiting.

Secondly, the Authority does not have a National Laboratory Centre, a fact which the Director of the Authority pointed out to be a major hindrance in carrying out chemical analysis of sampled drugs entering into the country to determine their potency. The only Laboratory has been the University Teaching Hospital Laboratory which provides more qualitative than quantitative analysis and which also faces the problem of lack of technical know how.¹²¹ Thirdly, there is also the problem of poor governmental funding. The Authority faces chronic funding droughts which hampers its operations and fails to attract high qualified personnel to the Authority. Fourth, there is also lack of basic equipments which are necessary for carrying out their tasks. Fifth, poor conditions of service have demoralized the work force and this is a major catalyst in the officers not doing a better job regarding to inspection of Pharmacies and other drug outlets, to carry out a snap inspection. It is for this reason that inspectors rarely go in the field to carry out inspection coupled with, the issue of lack of transport. Sixth, there are no mini-laboratory at the Border Check points to check the importation of drugs and their potency. The Authority, and this

¹²⁰ Pharco ltd. Quality Assurance Manager, said in an interview

¹²¹ Chilinde Bonaventure, Pharco Ltd.

predecessor – the Pharmacy and Poisons Board, have failed to stop the smuggling of drugs into the country due to the porous borders.

The Zambia Revenue Authority and the legislations it administers also require analysis. The major shortcomings of the Customs and Excise Act is that the Act does not clearly address the issue of counterfeits and piracy, save for **section 40 (1)** of the Act which talks of prohibition of base or counterfeit coins and **section 40 (1) (g)** which must be read together with another Act. The Act is silent. This can be seen from complaint lodged for the ZRA over counterfeit Philips pressing iron by Radian stores limited, the agents of Philips, to restrict the importation of counterfeit Philips pressing irons into the country. In an interview with Ms. Jubilee Hamwala¹²², Customs and Excise International Policy Department, she stated that ZRA can not enforce such measures of Radian Stores because it does not have the mandate to do so. ZRA can only impound smuggled goods which can either be destroyed or auctioned. In this regard, ZRA in conjunction with other agencies has destroyed a number of CDs, tapes and other items smuggled into the country.

The Food and Drug Act administered by the Local Council Public Health Department is quite elaborate with excellent provisions in respect to drugs, food and devices. In spite of these provisions, implementation has been a problem and so has been the comprehension of the issue of counterfeiting. In an interview the Kitwe City Council Chief Health Inspector, it became obvious that the man did not understand the issue of counterfeit drugs and its characteristics and, as such one wonders what type of inspection is done by the Local Authority with regard to Pharmacies and drug outlets. At least the Lusaka City Council Health Department seems to be working in view of the seizure, inter alia, polar mineral water. The Councils also face a host of problems ranging from ill trained personnel, poor funding, lack of transport, poor conditions of service.

¹²² 13th June, 2005, Monday, 14:20 hours, ZRA offices.

The Zambia Bureau of Standards whose mandate is to promote and require the adoption of standards in industry and commerce in order to improve the quality of commodities as well as after sale support services and all aspects of quality assurance for commodities, inter alia, much needs to done. Though the Act does not have adequate provisions which deal with counterfeits but it lays down standards which must be met by the manufacturers. The Bureau also faces a number of problems which range from lack of qualified manpower, lack of a laboratory facility to do the testing to poor funding. Furthermore, the Bureau has failed to seize over the years any commodities which are of substandard. According to Mr. Nteema Muzandu, in an interview, he attributed this problem to lack of testing facilities due to absence of a laboratory and testing facilities. In spite of the Bureau having inspectors at border entry points, the problem of counterfeiting and substandard goods have continued and unabated. Recently the Bureau had an Open Day (October) and among the goods displayed were the *Starex electrical hair clippers* which did not meet the standards due to poor wiring system which failed the standard test. Furthermore Mama Margarine which does not have products specification and is not certified. Bottled mineral water does have specifications for testing, treatment, packaging and labelling, in spite of the high rate of its counterfeiting and enforcement is laid at the door of Ministry of Health. On whether condoms are tested and meet the standards, it was revealed that the testing is quite expensive and others do not meet the standards and the Ministry of Health were called upon to strictly monitor the importation of condoms.

The Zambia Competition Commission, on the other hand, does provide for the protection of the welfare of the citizens (consumers) against unfair trading. Section 12 of the Act does not only hold the seller or manufacturer liable for the product but also criminalizes the false representation that the product is of a particular quality model or origin. This is the only provision which offers

protection and it is a relief for many a consumer. Other provision deal with anti-competition practices.

5.2 RECOMMENDATIONS

In order to deal effectively and decisively with the problems of counterfeiting and piracy in the country, the following possible suggestions are made:

5.2.1 Enactment of Anti-Counterfeit Goods Act: Since counterfeiting is a major problem for the manufacturers and distributors of well know merchandize and has created real danger for the individual customers and even to the economy of the country, there is need to enact an Anti Counterfeit Goods Act similar to the one established in South Africa. The Act should be aimed at – (i) prohibiting certain Acts in respect of counterfeit goods and as well as possession there of; (ii) create offences for the breach of the act and prescribe server penalties in relation there to; (iii) confer upon inspectors and members of Zambia Police Service, ZRA, Councils' Public Health Department with power to enter and search premises and seize suspected counterfeits goods.

5.2.2 Revisit or amend the Customs and Excise Act: The Act must be revisited or amended to address counterfeits and piracy. Under the Act the Commissioner of Customs and Excise and his staff be empowered to seize and detain counterfeits imported goods entering the country.

5.2.3 Training of Officers in Intellectual property: There is need to train officers from the Copyright Office, Police and ZRA attached to the Copyright tasks force and Anti-Piracy Crack Squad with basic knowledge in intellectual property rights and this should be extended to local council officers and musicians.

- 5.2.4 Creation of Economic police unit:** It is suggested that a specialized unit be put in place to handle issues of counterfeit and piracy. Such an economic police unit should be mandated to enforce infringements (Counterfeits and Piracy) in conjunction with the owners of the rights (intellectual property rights) who should be the complainants or an aggrieved consumer. The Economic Police Unit should be established similar to SITET, an organisation that established during the second republic.
- 5.2.5 Enactment of Consumer Protection Act:** It is suggested that a consumer or customer protection Act to offer legal protection to the consumer and hold the seller, trader, manufacturers liable for defective products or counterfeits products which they are selling.
- 5.2.6 Creation of Consumer Complaints Tribunal:** It is proposed that the consumer complaints tribunal be created to handle consumer complaints, in a fast track manner so as not to clog the courts and dispense justice quickly.
- 5.2.7 Creation of Mini Laboratories at border entry points:** In order to combat the issue of counterfeit drugs there must be deployment of officers from the Pharmaceutical Authority at major entry points and such entry points should have mini laboratories where drug analysis can be quickly done to check their potency. In addition a central laboratory should be established for drug quality control.
- 5.2.8 Political will:** There must be political will if the issue of counterfeits is to be won in Zambia. Although the Minister of Sport, (then Deputy Minister Youth and Child Affairs) Hon. George Chilumanda in an interview stated that “...*there have been any political will than now...*”. This has not been seen, save for piracy but not counterfeit, the political will is as dead and silent as a grave yard. The government must throw its weight in the fight against counterfeit and come up with policies that address the problem.

- 5.2.9 Strengthening Institutional Capacity:** Institutional Capacity must be strengthened to deal with piracy and counterfeit and duly qualified personnel appointed to run them.
- 5.2.10 Stringent Procurement Procedure:** This must be put in place with regard to importation of drugs so that it is not easy for any person to bring in drugs such as 'ngoka', 'ngetwa' and other herbal drugs whose potency is not known without authorization from the Authority. In addition proper tender procedures especially for public health institutions with regard to drugs should be tightened to avoid irregular procedures similar to what is obtaining in the **Bulaya** case.
- 5.2.11 Stiffen the Sentence for Breach of standards:** The Standards Act should be amended in order to stiffen the sentence for breach of Standards for commodities in a bid to combat counterfeiting. The sentence imposed by the Act is too soft.
- 5.2.12 Strict enforcement of the law:** there must be strict enforcement of the law with regards to counterfeits products in the country.

5.3 CONCLUSION

The problem of piracy and counterfeiting can not be down played. Piracy for instance has been a serious problem not only to musicians and producers but also to the government through the loss of revenue. Counterfeit goods have been known to lower standards of a well known trade mark as most people involved in cut corners in order to maximize profits. Counterfeit drugs have left a trail of problems in its work such as blindness, death, tumours swellings, rashes and other adverse conditions on the users of these drugs. There is need for the entire world to come together to fight the scourge. As highlighted in this paper, there have been international agreements which member states have signed in order to offer protection at international level to trade marks and copyright holders. But there is no international legislation put in place to combat counterfeiting. At national

level legislations have been put in place to offer protection to holders of intellectual property rights and institutional framework has been created. These institutional framework do not per se deal with counterfeit, although some deal with piracy, and as such there is need to strengthen institutional capacity in order to combat piracy and counterfeits.

BIBLIOGRAPHY

Cornish, *W.R, Intellectual Property*. 3rd ED. Universal law Press co. PVT.LTD Delhi, 2003.

Copyright Bulletin, vol. 2, no.4, March/April2005

Customs: Counterfeiting and Piracy in 2001". Brussels, 26 July 2002 (EU Report)

D.A Gregory, C.W. Saber and J.D Grossman, *introductions to Intellectual Property law*, Washington DC, BNA Books{1994}

Global Software Report (May 2000)

IFPI: **Piracy in the music Industry and Organized crime** (Date of Publication not known)

John Leyden, "*internet fuels trade in counterfeit good.*" gieschen-counterfiet-report

K.K. Mwenda and D.A Ailola, *frontiers of Legal knowledge*, Durham, Carolina Academic Press 2003.

Kamil, I. *Intellectual Property: A power Tool For Economic Growth*.WIPO, 2003

Michele Forzley, I.D. *Counterfeit Goods and Public Health and Safety* (2003) or http://www.iipi.org/reports/counterfeit_goods.

Ministry of Information and Broadcasting survey 2002.

Panos institute. *Patents, Pills and Public health. Can trip deliver?* London. Panos institute 2002

Justice Anderson Zikonda "*parallel importation and Counterfeit Goods*" A paper presentation LAZ seminar on Intellectual Property, March 4th, 2005, Hotel, Inter continental, Lusaka.

William M. Lands and Richard a Posner, "The Economics of Trade mark Law". *The trademark Report 78 (May, June 1988)*

WIPO Brochure: what is a copyright?

WHO (1999) *Counterfeit Drugs: Guide lines for Development of measures to combat counterfeit Drugs*, Geneva.

WHO (1999) *Counterfeit and substandard drugs in Myanmar and Vietnam*, Geneva.

The Business Post Tuesday August 30, 2005

THE POST, Issue No. 3241 September1, 2005

THE POST, Issue No. 3165 (Weekend Post) Friday, June 17, 2004

THE POST, Issue No. 3248, Tuesday, September 6, 2005

BUSINESS THE POST, July 26, 2005

BUSINESS POST, Issue No. 3239-17, Tuesday August 30, 2005

BUSINESS POST, Tuesday November 15, 2005

WEBSITES VISITED

: [http://www. Cyber crime.gov.](http://www.Cybercrime.gov)

: [http://www. Pfizer.com/Pfizer/subsites/counterfeit.](http://www.Pfizer.com/Pfizer/subsites/counterfeit)

[http:// www. Canon http://the Africa times. Com/African watch. Html. Co.uk / counterfeit.](http://www.Canon.com/Africanwatch/counterfeit)

[http://www.fda.gov/oc/inintives/counterfeit/update 2005.intml.](http://www.fda.gov/oc/inintives/counterfeit/update2005.intml)

<http://news.bbc.co.uk/1/hi/magazine/383679.stm>

[http// www.interpol.](http://www.interpol)

[http://www.channel register. co.uk/2005/07/28/](http://www.channelregister.co.uk/2005/07/28/)

[http: //europa. Eu.int/comm./internal-market/en/inteprop/indprop/country](http://europa.eu.int/comm./internal-market/en/inteprop/indprop/country)

[www. Astra Zeneca – us.com](http://www.AstraZeneca-us.com)

[www. ey. Com/global/content/. Nsf/us/ Health science. Visited in August 2005](http://www.ey.com/global/content/.Nsf/us/Healthscience)

[www.northlan.gov.Uk.Scottish. Counterfeiters.](http://www.northlan.gov.Uk.Scottish.Counterfeiters)

www.northlan.govt.Uk