

BUILDING RESPECT FOR INTELLECTUAL PROPERTY IN ZIMBABWE

BY

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
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ABSTRACT

This study looked at building respect for Intellectual Property in Zimbabwe with a focus on the enforcement of Intellectual Property rights, in the face of the rapidly growing problem of counterfeiting and piracy. Although the magnitude of the problem is not known for certain, it is generally accepted that the problem of counterfeiting and piracy is growing fast world over. The ramifications of counterfeiting and piracy include serious threats to safety and health, stifling creativity and a deterioration of local manufacturing industries among others. Zimbabwe has, over the years, witnessed a rise in the availability of counterfeit products and copyright infringing materials in its channels of commerce. Despite sporadic police raids, pirated music and movie products are conveniently available on the streets and the import of cheap counterfeit goods is seriously impeding the growth of the local manufacturing industry. This study sought to analyse the enforcement mechanism in place with a view to establishing the challenges being faced and make recommendations for its improvement. A survey characterised by 40 questionnaires and 10 interviews was conducted. The study showed that while the legislation in place is adequate there is little appreciation of Intellectual Property and poor coordination amongst the relevant stakeholders. The study recommends constant training and a more coordinated approach. It is further recommended that, with the recently launched Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) in mind, building respect for Intellectual Property in Zimbabwe must involve a deliberate alignment of an Intellectual Property strategy to national development goals. Further research is recommended on how Government policies can contribute to building respect for Intellectual Property in Zimbabwe beyond Intellectual Property rights enforcement.

DECLARATION

I Yvonne Wadzanai Chatsama declare that this work is original and is not submitted to any University for the award of any degree:

Student  Date 9/11/14

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DEDICATION

This dissertation is dedicated to my mother Letty Gaza, a woman whose strength and determination I admire.

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ABBREVIATIONS

OECD	Organisation for Economic Cooperation and Development
WHO	World Health Organisation
WTO	World Trade Organisation
TRIPS	Trade Related Aspects of Intellectual Property Rights
ACTA	Anti-Counterfeiting Trade Agreement
WIPO	World Intellectual property Organisation
ACE	Advisory Committee on Enforcement
WCO	World Customs Organisation
SADC	Southern African Development Community
ARIPO	African Regional Intellectual Property Organisation
ZimAsset	Zimbabwe Agenda for Sustainable Socio-Economic Transformation

CHAPTER 1

1.1 Introduction

Advancements in technology have greatly facilitated the proliferation of the infringement of Intellectual Property rights. The ramifications are serious and are a cause for concern world over. Kamil Idris put it aptly when he said,

We find ourselves today facing massive escalation in the theft and abuse of intellectual property (IP). The same technologies which have spawned great commercial opportunities, opened new creative channels and revolutionized the business arena, have also provided unparalleled opportunities for pirates and counterfeiters. Implementing effective enforcement strategies to tackle the new challenges is now of pivotal importance for governments and businesses alike.

Indeed, registering an intellectual property title is meaningless if there are no clear statutory provisions and a functioning system in place to protect and safeguard those interests. Intellectual Property is a vital tool that can be harnessed for economic development and an upsurge in infringement, for example in the context of counterfeiting (which is defined in chapter II), poses a serious threat to the substantial development of any country's economy. The consequences of such infringement are said to include threatening consumer health and safety, loss of tax revenue, depriving legitimate businesses of income and discouraging innovation and creativity. According to the Organisation for Economic Cooperation and Development (OECD) report of 2007, counterfeit and pirated products are being produced and consumed in virtually all economies. The same report states that a quantitative analysis carried out by the OECD indicates that the volume of tangible

counterfeit and pirated products in international trade could have been up to US \$200 billion in 2005.

Zimbabwe has over the years witnessed a rise in the availability of counterfeit products and copyright infringing materials in its channels of commerce. Unfortunately, the problem of counterfeiting and piracy has for a long time been considered as an issue for the big brand owners and creators in industrialised countries whose rights are infringed upon Michael Blakeney (2009). However, with the growth in the trade of counterfeits and pirated products which pose a real danger to health and safety and also affect local manufacturing industries, developing countries should now consider this problem a serious issue. According to the World Health Organisation (WHO), 25% of all medicines in Less Developed Countries are counterfeit and the prevalence is higher in some countries than others, Julian Morris and Philip Stevens (2006). Because of the significance and magnitude of this problem, this research seeks to examine Zimbabwe's Intellectual Property rights enforcement mechanism and contribute to building respect for Intellectual Property.

1.2 Background to the Study

In January 1995 the World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) established global minimum standards of Intellectual Property protection and enforcement. The TRIPS Agreement stipulates that all member states of the WTO must provide for fair, effective and adequate mechanisms against infringement, together with expeditious remedies.

Zimbabwe is party to the main regional and international treaties and agreements on Intellectual Property and has enacted a plethora of legislation on Intellectual Property rights to accommodate changes in the local, regional and international scenes and to bring its intellectual property law into conformity with the TRIPS Agreement.

However, despite the above legislative developments right holders particularly in the music industry continue to cite weak enforcement of Intellectual Property laws as one of the major problems the industry is facing. Further to this an assortment of counterfeit goods ranging from contraceptives, painkillers, hair chemicals, building materials, electrical gadgets, toys and even car spare parts has flooded our flea markets, Elias Mambo (2013). According to Elias Mambo (2013) counterfeit drug syndicates are flooding the Zimbabwe market with consignments of “fake” anti-retroviral drugs (ARVs) and sex enhancers putting the lives of thousands of people at risk. Black Opal Zimbabwe, a local cosmetics distributor, has placed several notices in the newspapers warning the public against purchasing counterfeits from flea markets which are often labelled “black opel” instead of Black Opal. This brings to question the efficacy of the enforcement machinery from the ports of entry right up to the courts of law.

1.3 Statement of the Problem

The past 10 or so years have seen Zimbabwe experience a deteriorating economic and social environment which has resulted in a deep economic and social crisis characterised by a hyperinflationary environment and low industrial capacity

utilization, leading to the overall decline in Gross Domestic Product (GDP) by 50% ZimAsset (2013). This economic recession has led to the near collapse of the health care system and a widespread scarcity of commodities. Unscrupulous business people continue to take advantage of this economic downturn by flooding the market with counterfeits whilst copyright infringement has become an easy way to make money for the unemployed youth.

Copyright infringement is rife and the digital revolution has exacerbated the problem. This is made evident by the ubiquity of infringing materials in the form of movies and music products on the streets. These products cost as little as \$1 for two CDs of which one CD may contain more than 50 songs from different artists. Despite sporadic raids by the police copyright infringement continues to rear its ugly head on our streets. The consumers themselves appear unaffected by the poor quality in these products.

The health care system on the other hand continues to operate below capacity due to the financial challenges the country is facing. The high cost of genuine drugs in hospitals and pharmacies is forcing the ordinary man on the street to resort to cheaper alternatives which more often than not turn out to be counterfeits. These counterfeits pose a real danger to health and sometimes result in death. Retail shops are selling trademark infringing electrical gadgets and clothing items mainly imported from China and Dubai. These goods are cheap but they are also not durable. According to Edinger and Sandrey (2013) the commercial relations between China and Africa are still heavily concentrated on the export of natural resources from Africa, perpetuating the continent's dependence on primary commodities. They

also comment that the past decade has seen a period of strong growth for Africa, driven by the Asian demand for African resources but that same boom in commodities has coincided with a relative decline of African manufacturing. The decline in manufacturing of course is to a certain extent attributable to locally produced goods competing against cheap counterfeits from Asia.

1.4 Purpose of Study

This study sought to contribute further knowledge to the battle against counterfeiting and piracy and explore ways to strengthen the existing enforcement framework and practices in Zimbabwe in order to protect the consumer and the local manufacturing industry. The research analysed the legislative mechanism in place and established whether it is adequate to effectively deal with the problem. An assessment was made as to the competence of enforcement agencies to execute their duties.

1.5 Objectives

The objectives of this study were to:

1. explore the challenges being faced as a result of counterfeiting and piracy,
2. analyse the intellectual property legislative mechanisms in place against the requirements of the TRIPS Agreement,
3. assess the level of awareness on the part of the enforcement agencies,
4. consider the various measures and approaches that can be adopted to improve enforcement and make recommendations.

1.6 Research Questions

1. What is the magnitude of the problem of counterfeiting and piracy in Zimbabwe?
2. Are the laws in place adequate and compliant with the TRIPS agreement?
3. What is the level of awareness of the enforcement agencies?
4. What are the challenges faced by the enforcement agencies in the execution of their duties?
5. What options can be considered in order to improve enforcement?

1.7 Significance of Study

The growth of the trade in counterfeit medicines has raised the importance of the Intellectual Property enforcement issue for developing countries which have hitherto considered it a matter for industrialised countries, Michael Blakeney (2010). The importance of this study is to contribute to reducing the entry of counterfeit and pirated products into channels of commerce within the borders of Zimbabwe and to building respect for Intellectual Property. It is believed, this together with the proper institutional establishments can also assist in promoting innovation and creativity.

1.8 Scope of the Study

This study focused on agents responsible for the enforcement of Intellectual Property laws and the legislative mechanism in place. The research assessed the level of awareness of the various institutions and their competence to execute their mandate. The research also looked at the role of the consumer with a view to demonstrating

the impact of the level of awareness on the fight against infringement of Intellectual Property rights.

1.9 Limitations

The study was carried out in Harare, the capital city of Zimbabwe. The problem which the study sought to address is most prevalent and most pronounced in Harare and the main sources of data which the writer relied upon are found in Harare.

1.10 Research Outline

The first chapter introduced this research work. It comprised the background of the work, statement of the problem, outlined the objectives, scope, purpose and significance of the study. The second chapter is a literature review of material used for the research work. It identifies key scholars and explains key words. The third chapter presents the methodology. Chapter four gives data analysis, findings and interpretation. Chapter five contains the conclusion and recommendations.

1.11 Conclusion

A sound enforcement mechanism is a crucial aspect of building respect for Intellectual Property. Rampant infringement and public health risk due to counterfeits may be an indication of poor enforcement strategies. The varying scholarly views on this subject have elucidated the problem and assisted in showing the policy considerations necessary for a developing country like Zimbabwe to ensure that enforcement measures are TRIPS compliant, innovation and creativity are promoted and consumers and local industries are protected.

CHAPTER 2

Literature Review

2.0 Introduction

The previous chapter looked at the problem to be addressed by the study. An assertion was made that counterfeiting and piracy negatively impacts development and the health and safety of consumers among other serious consequences. Mention was made of the fact that developing countries should approach this problem not as one that only affects brand owners and creators in the developing world, but one that also affects the health and safety of consumers, stifles creativity and has the potential to destroy the local manufacturing industries. This chapter looked at the literature that has covered the issue of Intellectual Property enforcement with a focus on counterfeiting and piracy.

2.1 What are Counterfeiting and Piracy?

Counterfeiting and piracy are said to have common roots and these roots continue to shape the law and enforcement landscape to the extent that they are often treated as a single phenomenon, Joe Karaganis (2011). However, Karaganis argues that the practices that define them have increasingly diverged and that the conflation of counterfeiting and piracy today has little to do with shared contexts but the effort to equate the harms of copyright infringement to health and safety hazards associated with certain counterfeits.

However several attempts have been made to craft definitions. According to Michael Blakeney (2009), the terms counterfeit and piracy in relation to goods refer to the manufacture, distribution and sale of copies of goods which have been made without the authority of the owner of the Intellectual Property. He further explained that the goods are intended to appear to be so similar to the original as to be passed off as genuine items. LTC Harms (2012) explains that counterfeiting is more than trademark infringement. He proceeds by stating that trademark infringement, in general terms, is committed if the infringer's mark is so close to the registered mark that there is a likelihood of confusion between the marks. He then observes that with counterfeiting the likelihood of confusion is generally not enough, the two marks must either be identical or fairly indistinguishable. Harms (2012) emphasises that the protected goods must be imitated in such manner and to such a degree that the infringing goods are substantially identical copies of the protected goods.

With regard to piracy LTC Harms (2012) explains that whilst copyright infringement is in some instances not criminalized and is not *per se* piracy, there cannot be piracy without copyright infringement. However, Joe Karaganis (2011) argues that piracy is better understood as a product of enforcement debates than as a description of specific behaviour. He explains that the term blurs and is often used intentionally to blur important distinctions between types of uncompensated use which range from clearly illegal, such as commercial scale unauthorised copying for resale to disputes over the boundaries of fair use and first sale as applied to digital goods.

At the level of international Intellectual Property law the TRIPS Agreement defines counterfeiting and piracy.

The TRIPS Agreement in a footnote defines counterfeit trademark goods as follows:

14 (a) “counterfeit trademark goods” shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.

Zimbabwe’s Trade Marks Act [Chapter 26:04] is in tandem with the TRIPS agreement and in Sec 86 defines counterfeit trademark goods as any goods which bear without authorisation a trade mark which—

- (a) is identical to a registered trade mark; or
- (b) cannot be distinguished in its essential aspects from a registered trade mark; and thereby infringes the rights of the proprietor of the registered trade mark;

Under the TRIPS agreement:

14 (b) “pirated copyright goods” shall mean any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

Sec 60 of Zimbabwe’s Copyright and Neighbouring Rights Act [Chapter 26:05] restricts importation or exportation of copyright infringing goods in line with the TRIPS Agreement.

An obligation is created under TRIPS to provide for criminal procedures and penalties for cases of wilful trademark counterfeiting or copyright piracy when this is done on a commercial scale. TRIPS stipulates that the remedies to be made available shall include imprisonment and/or monetary fines. The TRIPS Agreement permits, in appropriate cases, that remedies available also include the seizure, forfeiture and

destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Above that, members may also provide for criminal procedures and penalties to be applied in other cases of infringement of Intellectual Property rights where the infringements are committed wilfully and on a commercial scale. In this regard Zimbabwe is fully compliant and even TRIPS plus as it not only prohibits importation in accordance with the TRIPS Agreement but also goes further to prohibit the exportation of infringing goods.

2.2 The Scale of the Problem

According to the OECD report of 2007 the overall degree to which products are being counterfeited and pirated is unknown, and there do not appear to be any methodologies that could be employed to develop an acceptable overall estimate. Michael Blakeney (2009) comments that the statistics of industry associations are invariably biased upwards since they are intended to highlight the extent of the problem of the trade in infringing products. The Australian Government described the figures supplied by the Business Software Alliance in its effort to document global pirate rates, as a “self-serving hyperbole that is unverified and epistemologically unreliable”, Xuan and Correa (2009). Some of the reasons cited by the OECD report of 2007 for this dearth in information are the clandestine nature of many counterfeiting and piracy activities, general lack of indicative data and the difficulty in detecting counterfeit and pirated products. These, among other factors, contribute to difficulties in establishing the magnitude of the problem.

In Africa and perhaps world over more emphasis is placed on counterfeit medicines and maybe rightly so because of the gravity of their repercussions particularly in light of drugs that treat Malaria, TB and HIV. With regard to counterfeit medicines it is even more difficult to establish the scale of the problem because the terms counterfeit drugs and substandard drugs are often confused and used interchangeably in some studies. The WHO report (2003) defines a counterfeit drug as one that is deliberately and fraudulently mislabeled with respect to identity and/or source. The same report defines substandard drugs as genuine drug products which do not meet the quality specifications set for them. However, the terms continue to be used interchangeably in some studies thereby making the statistics unreliable.

Despite the dearth of information on the real extent of medicines counterfeiting, the little documented evidence shows that the problem of poor quality medicines, particularly medicines counterfeiting is on the increase and that almost half of medicines in some regions of Africa may be counterfeit, Chioma Onwuka (2010). According to a WHO survey of seven African countries in 2003 as cited by Julian Moris et al (2006) it was found that between 20 and 90 percent of all anti-malarials failed quality testing. Malaria is estimated to cost African nations at least US\$12 billion annually in lost economic output and the economic cost of tuberculosis-related deaths, including those resulting from HIV co-infection, in Sub-Saharan Africa is estimated to be about US\$ 50 billion annually, Jeremy Wilson (2011). These losses are believed to be compounded by counterfeit pharmaceuticals. This confirms the findings of Ahmad (2004) as cited by Julian Morris et al, (2006) who stated that the discovery of counterfeit anti-retrovirals (stavudine-lamivudine-

nevaripine and lamivudine-zidovudine) in the Congo raises the prospect that the first line therapies for treatment of HIV/AIDS could soon be rendered useless and this could have grave implications for the people of Sub-Saharan Africa. This is because some counterfeit medicines may contain insufficient amounts of the active ingredient thereby causing resistance over time to the actual treatment. Therefore, even though it clearly is not possible to be certain as to the precise extent of the problem literature reveals that it is generally accepted that there is indeed a problem.

2.3 What are the driving forces?

According to LTC Harms (2012) to copy is human. He justifies this assertion by quoting the Greek philosopher, Aristotle, who held the view that art is imitation, and that imitation is good because it is natural to humans from childhood, and because children and adults too, learn from imitation. Literature also draws a link between culture and the levels of copying. LTC Harms (2012) observes that in much of the West there is an acceptance of individualism which is not found in some other parts of the world, for example, in collectivist cultures such as those in Asia which may explain the prevalence of the problem in that region.

The attitude of consumers is also important when considering what drives counterfeiting and piracy. According to the OECD report of 2007 while some consumers purchase counterfeit and pirated products believing that they have purchased genuine articles, there are consumers who knowingly buy such goods because they believe they are getting a good to bargain.

Other studies reveal that there are several social factors such as illiteracy and unemployment that have a contributory role in all this, particularly in respect of piracy. However, a study carried out in India as cited by Harms (2012) concluded that though such social factors have a significant influence, the phenomenon occurs more because of economic reasons than anything else. Harms observes that for pirates it is an easy way of making quick bucks while at the same time it is a gainful arrangement for the end users in which they can purchase a variety of info-entertainment products which otherwise remain unaffordable at least to a vast majority. The study confirms that it is this 'win-win' situation for pirates and end users which keeps the piracy alive and active in the society. It is noted that other socio-economic variables like poverty and high prices only add to the degree of the problem.

The European Commission has inferred from its various studies that among the reasons for the large increase in trade in counterfeited and pirated goods are the high profits and comparatively low risks involved, the penalties in some countries which are not deterrent, a general global growth in industrialized capacity to produce high quality items; and the growing interest of organized crime in taking a share of these high profits.

Further, when it comes to software there is a school of thought which argues that the concept of intellectual property should not be applied. It is argued that the business software market is unique to an extent that warrants a very different understanding of piracy, Joe Karaganis (2011). Studies have shown that top-tier software vendors have

established and maintained their dominant positions in emerging markets through piracy, often prior to or in the absence of significant local investment, Joe Karaganis (2011). He further argues that any loss they incur at the margins of the consumer and business markets in those countries should be weighed against the value of maintaining their dominant position, which for near-monopolies would arguably be very high. Karaganis proceeds to quote the Romanian President, Traian Basescu, during a press conference with Bill Gates in 2007 in which he said;

Piracy helped the young generation discover computers. It set off the development of the IT industry in Romania. It helped Romanians improve their creative capacity in the IT industry which has become famous around the world.....it was an investment in Romania's friendship with Microsoft and Bill Gates.

Whilst counterfeit and piracy are criminalised there is serious agitation against that from various stakeholders with diverging opinions.

The 2007 OECD report summarises its findings with regards to drivers for counterfeit and pirate activities as follows:

TABLE 1: OECD 2007 Driving Factors

Counterfeit or pirate supply	Knowing demand for counterfeit or pirated products
Driving factors	Driving factors
Market characteristics High unit profitability Large potential market size Genuine brand power	Product characteristics Low prices Acceptable perceived quality Ability to conceal status
Production distribution and technology	Consumer characteristics No health concerns

Moderate need for investments Moderate technology requirements Unproblematic distribution and sales High ability to conceal operation Easy to deceive consumers	No safety concerns Personal budget constraint Low regard for IPR
Institutional characteristics Low risk of discovery Legal and regulatory framework Weak enforcement Non- deterrent penalties	Institutional characteristics Low risk of discovery or prosecution Weak or no penalties Availability and ease of acquisition Socio-economic factors

2.4 The local scenario

It is believed the majority of counterfeit medicines originate in less developed countries and that China is a production center although there is no certainty as to the precise data about the scale and scope of the problem, Julian Morris et al (2006). In Zimbabwe one can confidently say there is very little manufacturing of counterfeit products if there is any at all. Piracy, however, is rampant but the equipment to produce large quantities of pirated copies is not manufactured locally.

The presence of counterfeit goods can be attributed to an influx into Africa of these products from China and this is causing significant injury to local industries with the impact varying from country to country. Trade unions in Zambia have blamed Chinese imports for undermining the clothing and electrical sectors, Vinaye Ancharaz (2013). In Ethiopia, while competition from Chinese shoe imports has

forced the local footwear industry to innovate and upgrade a number of producers have been squeezed out while surviving firms have contracted, Vinaye Ancharaz (2013). Vinaye Ancharaz also cites the example of Mauritius where small and medium-sized enterprises (SMEs) in the clothing, footwear and furniture sectors have borne the brunt of Chinese competition, being unable to match the price-quality ratio offered by cheap counterfeit Chinese products. The same scenario obtains in Zimbabwe and this is why the writer agrees with the assertion that developing countries should no longer view the issue of enforcement as an issue for big brand owners but begin to strategise on how Intellectual Property rights enforcement can protect local industries and consumers. Sub-Saharan Africa 's share of manufacturing value added in GDP is said to be the second lowest among all regions of the world, Vinaye Ancharaz (2013), hence the need to protect the manufacturing industries and building respect for intellectual property should be among the strategies employed to that end.

Julian Morris et al (2006) alleges that the underlying causes for counterfeiting in LDCs are defective Intellectual Property protection, lack of adequate civil liability, price controls and taxes and tariffs. This perception has led developed countries to agitate for higher standards of Intellectual Property enforcement and this is made evident by the Anti-Counterfeiting Trade Agreement (ACTA) whose drafting was spearheaded by countries like USA and Japan. It is strongly contented by Carsten Fink as cited by Dorica Phiri (2010) that there had been no evaluation of the effectiveness of the current enforcement rules under the WTO before it was concluded that the adoption of new rules under another international agreement as

the ACTA is urgent. It is worth mentioning that this contentious Agreement is not going to come into force as it has been rejected by the European Union after extensive civil opposition.

Michael Blakeney (2009) contradicts Julian Morris *etal* (2006) above and cites a World Intellectual Property Organisation (WIPO) survey of 2002 which revealed that barriers to combating counterfeiting and piracy did not subsist in the substantive law but rather in penalties available or otherwise to stop and deter counterfeiting and piracy. Blakeney states that the WIPO survey also attributed the ineffectiveness of enforcement systems mainly to a lack of human resources and funding, practical experience in Intellectual Property enforcement of relevant officials, insufficient knowledge on the side of rights holders and the general public concerning their rights and remedies as well as systemic problems resulting from insufficient national and international coordination.

In Zimbabwe a lack of experience in Intellectual Property enforcement can be noted in the case of *S v Moyo & Anor* HB 21/09. Both accused persons, in this case, were convicted by the same magistrate in different trials. The convictions of the magistrate court were quashed and the sentences were set aside by the High Court. The reason being the prosecutor and magistrate who presided on the two matters lacked knowledge of Intellectual Property and the magistrate misdirected herself in her ruling.

The facts of the cases are as follows. Members of the Zimbabwe Anti-Piracy Organisation conducted a clean up campaign in conjunction with the Zimbabwe Republic Police by raiding businesses that were selling compact discs (CDs) and

digital video discs (DVDs). The accused persons were selling or displaying for sale these items, resulting in their arrest and prosecution for “selling and hiring out” (in respect of Moyo) and possession (in respect of Tshaba) in contravention of sec 59 of the Copyright and Neighbouring Rights Act [*Chapter 26:05*].

In the case of Moyo the charge sheet alleged that the CDs and DVDs were blank. This implies that there was nothing copied on the CDs and DVDs. Copyright infringement entails the copying of works in which copyright subsists. Without copying there is obviously no copyright infringement. Secondly it was not established which copyright was infringed, whether the copyright still subsisted in the originals and who the owner of the copyright was. This reveals that there was no appreciation of the basic tenets of copyright law.

In the case of Tshaba, though there were infringing copies there was no evidence that the copyright still subsisted in order for it to be an infringement indeed. The trial magistrate assumed that the mere possession of non original copies constitutes an offence. Accordingly, the convictions in these two matters were quashed and the sentences set aside. The high court ordered that new trials should take place before a different magistrate. This shows that there is little appreciation of Intellectual Property law on the part of the enforcement agents and this confirms the assertion by Michael Blakeney above.

2.5 Legal Framework for the Enforcement of Intellectual Property Rights

The achievement of a more effective enforcement of Intellectual Property rights was one of the main driving forces behind the conclusion of the WTO TRIPs Agreement,

Dorica Phiri (2010). This agreement has been identified as the first international treaty on Intellectual Property rights that has included specific provisions on enforcement and it sets down the minimum standard which all member states of the WTO are required to comply with.

The TRIPS Agreement outlines rules on the procedures and remedies that must be available under the national law. These rules take into cognisance the basic differences between national legal systems and seek to provide for effective enforcement action whilst safeguarding against abuse of the procedures. Article 1.1 of the Agreement is vital and aids in the interpretation of the enforcement provisions. It provides that members may but shall not be obliged to, implement in their law more extensive protection than is required by the agreement provided such protection does not contravene the provisions of the agreement. Members are therefore, at liberty to determine the most suitable system of implementing the provisions of the Agreement in the context of their own legal systems.

Zimbabwe as a member of the WTO has domesticated the enforcement provisions and has in certain instances gone TRIPS plus.

2.5.1 General Obligations

The general obligations are contained in Art 41 of the TRIPS Agreement which requires members to ensure that enforcement procedures permit effective action against infringement and expeditious remedies which constitute a deterrent to further infringement. Art 41 further stipulates that the enforcement procedure should be fair and equitable and may not be unnecessarily complicated, costly, entail unreasonable

time limits or unwarranted delays. Further, decisions should be on the merit of a case, in writing and reasoned. Those decisions shall be based only on evidence in respect of which parties would have been given a chance to be heard.

Michael Blakeney (2009), comments that in most countries some degree of delay is an inevitable consequence of the generally increasing workload which the court system has to bear. To deal with the situation countries such as Thailand have announced the establishment of entirely new courts to hear Intellectual Property matters, Blakeney (2009). However Art 41.5 declares that members are not under any obligation to put in place a judicial system for the enforcement of Intellectual Property rights distinct from that for the enforcement of law in general.

Zimbabwe in 2001 promulgated the Intellectual Property Tribunal Act Chapter [26:08] which established a tribunal, to be known as the Intellectual Property Tribunal and it came into effect in 2010. The purpose of the Tribunal is to hear and determine references, applications, appeals and other matters on the subject of Intellectual Property. However due to challenges in financial and human resources the Government has not been able to set up that specialized court to deal with Intellectual Property matters. A High court judge can be appointed to sit as the Tribunal when the need arises.

2.5.2 Civil and Administrative Procedures and Remedies

The above are provided for in Art 42 to 49 of the TRIPS Agreement. These provisions cover purely procedural matters. The major thrust is that procedures should be fair and equitable regarding evidence, injunctions to prevent entry of

infringing goods into channels of commerce, damages, right of information, indemnification of defendants and that administrative procedures shall conform to principles equivalent to those set forth in this section of the agreement.

2.5.3 Provisional Measures

Art 50 of the TRIPS Agreement stipulates that judicial authorities shall have the power to order prompt and effective provisional measures to prevent an infringement of any Intellectual Property rights and to preserve relevant evidence in regard to the alleged infringement. Art 50 further stipulates that provisional measures can be adopted *inaudita altera parte* (without hearing the other party) where appropriate. This can be done where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed. It further states that where these measures have been adopted the parties affected shall be given notice without delay. Michael Blakeney (2009) comments that in cases of copyright piracy and trademark infringement the defendant will not usually remain available to answer interrogatories or to discover documents. Therefore on detection relevant evidence will immediately be destroyed. To deal with this situation the English court of appeal in *Anton Piller vs Manufacturing Processes* [1976] RPC 719 approved a procedure whereby on an *ex parte* application in camera, an order would be granted to an applicant to inspect the defendants premises to seize, copy or photograph materials which may be used as evidence of the alleged infringement, Michael Blakeney (2009). The defendant maybe obliged to deliver up infringing goods and may also be obliged to provide information about sources of supply and about the destination of infringing goods, Michael Blakeney (2009). The Anton Piller

order is provided for in Zimbabwe's Trademark and Copyright Act in sec 9D and sec 57 respectively.

2.5.4 Special Requirements Related to Border Measures

Border measures are contained in Art 51 to 61 of the TRIPS Agreement. Ports of entry play a key role in the fight against counterfeiting and piracy as they are the first line of defence for any country. The TRIPS agreement focuses on imports but members are at liberty to apply border measures to exports as well. Zimbabwe prohibits both importation as well as the exportation of infringing goods. Customs authorities are said to be mainly concerned with the collection of trade related revenues and the control of trade in drugs, weapons and noxious substances and so intellectual property protection is not a primary concern, Michael Blakeney (2009).

The TRIPS Agreement in Art 51 requires members to:

Adopt procedures to enable a right holder who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyrights goods may take place to lodge an application with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.

The rights holder is of course required to provide security to protect the defendant and the competent authorities so as to prevent abuse.

Border measures cover other issues such as indemnification of importer, *ex officio* action, *de minimis* exports and criminal procedures. Under *ex officio* action members may require competent authorities to act upon their own initiative and suspend the release of goods in respect of which they have acquired *prima facie* evidence that an

Intellectual Property right is being infringed. The provision on *de minimis* imports stipulates that members may exclude from the application of border measures small quantity of goods of a non commercial nature contained in traveller's personal luggage or sent in small quantities.

2.6 Zimbabwe's Enforcement Legislation

Zimbabwe's legislation, as shown above, is TRIPS compliant and has in other areas gone TRIPS plus. As cited above Zimbabwe prohibits both importation and exportation of infringing goods while TRIPS only requires that members prohibit the importation of infringing goods. Although Zimbabwe has an IP Tribunal Act in place which is a TRIPS plus measure it has not been able to establish a standalone court due to limited resources.

2.7 Impact of Counterfeiting and Piracy

The effects of counterfeiting and piracy are said to be broad and profound. According to the OECD report of 2007, these effects are more pronounced in developing countries which is where the infringing activities tend to be highest, and it is believed that this is due in part to relatively weak enforcement.

Counterfeiting and piracy is said to stifle innovation yet innovation is considered to be one of the main drivers of economic growth. According to the 2007 OECD report it reduces the incentive to develop new ideas particularly in the Pharmaceutical industries where research and development costs associated with the development of new products are high compared to the cost of producing the resulting products. Vladimir Popov (2011) argues by stating that it has been demonstrated that the

creation of most intellectual products was not stimulated by the Intellectual Property rights protection and that these products would have been created anyway without any Intellectual Property rights protection because the creator always has the benefit of the first sale. Vladimir Popov agrees with Boldrin and Levine (2008) who say

Intellectual monopoly apologists like to portray intellectual property as a cure, a powerful and beneficial medicine alleviating the innovative impotence of competitive markets. If intellectual property is the Viagra of innovation, then it has been prescribed on the basis of the wrong diagnosis to a patient who is not impotent. It may occasionally provide an initial spurt of innovational enthusiasm. Unfortunately, this subsides rather rapidly and is replaced by a rapacious desire to obtain economic satisfaction through the exclusion of as many people as possible from fruitful intellectual intercourse.

Vladimir Popov further argues that analogies with “piracy” and “stealing the product” are inappropriate because the owner/creator of the intellectual product, unlike the owner of the physical product, does not stop to possess it after it has been “pirated”. What Intellectual Property rights protection does, according to Vladimir Popov, is not preventing “stealing”, but providing the inventor/creator with the monopoly, which is generally a very primitive, inefficient and full of negative consequences way to stimulate inventions. This new thinking challenges the assertion that counterfeiting and piracy discourage research and development and stifles creativity. A divergent opinion can be noted in the ruling of the Hong Kong Magistrates’ court in the case of *HKSAR v Chan Nai Ming* as quoted by LTC Harms (2012):

What is created by or on behalf of the owners of copyright is theirs to deal with and dispose of as they choose. It is not up to others to dictate how they should do so or at what price. It is not open to others to make moral judgments about the price of a book or a DVD or a music CD, and claim that it is excessive, as some form of justification for infringing the copyright. The law does not accord any validity to such attempts to justify copyright piracy.

The prevailing view is that the monopoly granted by Intellectual Property protection serves as an incentive and flexibilities in the TRIPs agreement are a fair attempt to strike a balance.

The OECD (2007), reports reveals that counterfeit products may have environmentally damaging consequences due to non observance of environmental regulations in their manufacture. It further states that the growing volume of seized counterfeit and pirated goods raises environmental issues since their destruction can be a costly process that creates considerable waste.

With regard to employment the 2007 OECD report asserts that jobs shift from right holders to infringing parties. The working conditions of employees in clandestinely run illicit activities are far poorer than those prevailing in recognised firms who are required to adhere to health, safety and other regulatory norms OECD (2007).

Further an econometric analysis carried out by the OECD (2007) revealed that Foreign Direct Investment (FDI) from Germany, Japan and the United States was relatively higher in economies with lower rates of counterfeiting and piracy. However additional results of the same study by the OECD suggest that counterfeiting and piracy serve only a limited role in explaining FDI behaviour.

Counterfeiting and piracy are detrimental to the proper functioning of competition. Since counterfeit and pirated goods are, by definition, substitutes in the economic sense for lawfully marketed goods which they imitate, the divergences in the cost base for illegal operators will also give rise to differences in the conditions of competition for the lawful operators, Michael Blakeney (2009).

The impact of counterfeiting and piracy ranges from poor economic development, risk in the safety and health of consumers, loss of business to right holders, discouraging research and development and consequently stifling innovation.

2.8 Strategies to Curb Counterfeiting and Piracy

Despite the minimum standards for Intellectual Property enforcement set by the TRIPS agreement counterfeiting and piracy continues to grow. Effort is being made world over by both government and industry to reduce this problem. The OECD report (2007) has identified key areas requiring the attention of policy makers. The areas are improved coordination of ministries and government bodies involved in the administering and enforcing IPRS, a clear policy on Intellectual Property enforcement, a sound legal and regulatory framework that provides the parameters within which enforcement can be set, raising awareness, international cooperation and training of law enforcement agents.

Developed countries feel the need to persuade developing countries to bolster their enforcement regime by tempting them with bilateral and regional free trade agreements. The USA is notorious for such free trade agreements coupled with promises of access to large and lucrative markets. Developing countries must be careful not to enter into an agreement that requires them to go TRIPS plus because these agreements are never as beneficial as they purport to be and only serve to reverse the gains won under the TRIPS Agreement.

WIPO set up an Advisory Committee on Enforcement (ACE) in 2002. WIPO seeks to assist member states to develop effective and balanced Intellectual Property laws in pursuance of socio-economic development and consumer protection. The objectives of the Committee are; coordination of private sector and relevant organizations to combat counterfeiting and piracy, public education, assistance, coordination to undertake national and regional training programs for all relevant stakeholders, LTC Harms (2012). WIPO also offers a platform for the exchange of information on enforcement issues through the establishment of an Electronic Forum Richard Boadi et al (2009). Prior to setting up the ACE, WIPO was criticised for being weak and taking a narrow and traditional Intellectual Property (infringement) view of counterfeit trade and lacking institutional mechanisms for effective enforcement of new forms of infringement or piracy such as those related to e-commerce, Richard Boadi et al (2009). WIPO implemented several reforms including promulgating treaties in the field of copyright to regulate use in the digital era.

Another WIPO initiative is the Global Congress on Combating Counterfeiting and Piracy. The first Global Congress on Combating Counterfeiting and Piracy was organised in 2005 by the World Customs Organisation (WCO) and Interpol with the support of WIPO, Richard Boadi et al (2009). The purpose of the Congress was to develop a collective understanding of the extent of the counterfeit problem, as well as to identify effective anti-counterfeiting measures and to generate ideas for further co-operation, Richard Boadi et al (2009). Boadi et al mentions that the Congress provided an opportunity for leaders from the public and private sectors to analyze the

social and economic impact of counterfeiting and shape future enforcement strategies and actions. Subsequent Global Congresses on Combating Counterfeiting and Piracy have been held annually.

The International Police Agency (Interpol) has made counterfeiting and piracy an enforcement priority. It established a working party on counterfeiting and piracy in 1994.

The WCO has set up an Intellectual Property rights division. The WCO has promulgated model customs legislation designed to assist members in the implementation of the TRIPS provisions, Michael Blackeney (2009). The model is designed to provide Customs Administrations with a guide to best practice. In particular it is intended for those Customs Administrations implementing Intellectual Property rights legislation for the first time and those conducting legislative reviews or reforms, Michael Blakeney (2009). The Model Law is based on the border control provisions of the TRIPS Agreement.

Conclusion

This chapter reviewed literature on counterfeiting and piracy. It looked at the scale of the problem and the key drivers world over *vis a vis* the local scenario. The desk research points to the fact that Zimbabwe's legislation is TRIPs compliant which brings to question the efficacy of the enforcement machinery in place. The ensuing chapter will present the research methodology.

CHAPTER 3

Methodology

3.0 Introduction

The research methodology discusses the various steps that are adopted by a researcher in studying the research problem. This chapter gives an insight into the research techniques or methods used in the study, and the reasons for employing such techniques or methods. It provides information on the research design, research instruments, sampling technique, research population, ethical considerations and data analysis procedure.

3.1 Research Design

A research design can be defined as the conceptual structure within which a particular research will be conducted. Its main purpose is to provide for the collection of relevant information with minimal expenditure of effort, time and money, Dawson (2002). This research adopted the quantitative and qualitative approach to address the objectives of the study. The data was collected by means of interviews and questionnaires. The research used qualitative and quantitative research methods to collect and extract data from existing literature and in gathering data from respondents. Multiple research methods were employed to enhance the validity and reliability of the data collected.

3.1.1 Quantitative Approach

Burns and Grove (1993) define quantitative research as a formal, objective, systematic process to describe and test relationships and examine cause and effect interactions among variables. This approach deals with numerical measurement. This research used detailed questionnaires. Some questions were the Yes/No type and participants were required choose the most appropriate responses from those listed for each question. This type of research method collects a huge amount of data, which can often be generalized to a larger population and allows comparisons between two or more groups. It also provides statisticians with a great deal of flexibility in analysing the results.

3.1.2 Qualitative Approach

Qualitative approach deals with how people understand their experiences. The strengths of qualitative research methods are derived primarily from its focus on specific situations or people and its emphasis on words rather than numbers, Patton (2002). Therefore the researcher conducted interviews. The questions asked not only for information and opinions but also allowed the interviewer to probe the emotions and motivations related to the topic. Qualitative data helps to clarify research questions and permits a thorough examination of the phenomena under study. However it is worth noting that the data collected can be altered to some degree by the presence of the researcher.

3.2 Research Instruments

This research employed the use of questionnaires and interviews. These tools helped the researcher to collect necessary information to draw informed conclusions with regards to the research questions that had been formulated.

3.2.1 Questionnaires

Data was collected with the aid of questionnaires to examine the level of Intellectual Property rights awareness and to evaluate the effectiveness of the current legislation. The information obtained through a questionnaire is similar to that obtained by an interview, but the questions in questionnaires tend to have less depth, Burns & Grove (1993). Questionnaires were decided upon because they ensure a high response rate. They require less time and energy to administer and they offer the possibility of anonymity as subjects' names are not required when completing the questionnaires. Questionnaires have their weaknesses and these include the question of validity and accuracy Burns & Grove, (1993). The subjects might not reflect their true opinions but might answer what they think will please the researcher. Consequently valuable information may be lost as answers are usually brief. But it is good that large amounts of data can be collected with relative ease. Questionnaires are standardized therefore it is not possible to explain any points in the questions that participants might misinterpret. This can be partially solved by piloting the questions on a small group of people.

3.2.2 Face to face Interviews

Interviews were conducted to compliment data collection through questionnaires. Face to face interviewing is a qualitative research technique that involves conducting intensive individual interviews with a small number of respondents to explore their perspectives on a particular topic. According to Gray (2004) there are various reasons to use interviews one of which is the need to attain highly personalized data as there are opportunities to probe and explain where clarification is required. This method of interviewing does not bore a respondent and ensures full and accurate data collection. The main advantage of using interviews is that the researcher is able to adapt the questions as necessary. The researcher is also able to pick up nonverbal cues from the respondent during the interview which may not be detected in a telephone interview. By reading the facial expressions of the respondent the interviewer can easily understand what the respondent wants to say. Interviews may be a disadvantage in that respondents may be uncomfortable about the anonymity of their responses when they interact face to face. One advantage is that during interviews participants may be amenable to talk about their personal views and beliefs, when given an opportunity to add to the conversation and in the process the researcher discovers unexpected and unforeseen data, W. Tellis (1997)

3.3 Sampling Technique

Sampling is the process whereby information is obtained from selected parts of an entity, with the aim of making general statements to the entity as a whole or an identifiable part of it Boyd and Waterfel (2000). The two also say that the goal of any sampling method is to obtain a sample that is representative of the target population.

Purposive sampling was used to select the units for study. Purposive sampling is a criterion based selection in which particular settings, persons or events and area are selected deliberately in order to provide important information for the researcher, Patton (2002). This technique was selected to draw up the sample size since the units were considered to be the most important sources of data. This method helped to produce a more precise sample at considerably less cost and time.

3.4 Research population

A sample of 50 respondents was targeted for purposes of this research. The target population for questionnaires was 40 while the targeted respondents for in-depth interviews were 10. The number for in-depth interviews was much smaller than for the questionnaire since interviews were dealing with specific individuals in positions of authority. The following stakeholders were identified for interviewing and responding to questionnaires:

- a) Zimbabwe Revenue Authority (ZIMRA)
- b) Judicial Service Commission (JSC)
- c) Zimbabwe Republic Police (ZRP)
- d) Zimbabwe Music Rights Association (ZIMURA)
- e) Medicines Control Authority of Zimbabwe (MCAZ)
- f) Zimbabwe Intellectual Property Office (ZIPO)
- g) Ministry of Industry and Commerce
- h) Consumer Council of Zimbabwe

These provided sufficient in depth data that was pertinent to the study. It is less costly to obtain data for a selected subset of a population, rather than the entire population. Data collected through a carefully selected sample is a highly accurate measure of the larger population.

3.5 Area of Study

The study was conducted in Harare. Harare was selected because it is the centre of the country's commercial activities. There is a concentration of both industries and government institutions. The music industry is also bigger in Harare than other cities in the country.

3.6 Ethical considerations

Consent of the respondents was sought to ensure voluntary participation. Burns and Grove (1993) define informed consent as the prospective subject's agreement to participate voluntarily in a study, which is reached after assimilation of essential information about the study. The subjects were informed of their rights to voluntarily consent or decline to participate, and to withdraw participation at any time. Participants were assured of the confidentiality of the information. Assurance of confidentiality and anonymity enables the participants to freely express their views without being prejudiced by fear of exposure. Burns and Grove (1993) define anonymity as when a subject cannot be linked, even by the researcher, with his or her individual responses. In this study anonymity was ensured by not disclosing the participant's name on the questionnaire.

3.7 Data analysis procedure

Data was collated, categorised and then analysed.

3.8 Conclusion

The chapter has described the research methodology that was used to generate data for this study. The ensuing chapter focuses on data presentation, analysis, interpretation and discussion of the results obtained through the questionnaires and interviews. Appropriate tables, figures and graphs are used to explain the data collected and the results of the study.

CHAPTER 4

Data Presentation, Analysis and Interpretation

4.0 Introduction

The preceding chapters discussed the problem of counterfeiting and piracy, reviewed relevant literature and outlined the methodology for the research. This chapter discusses the data collected during the survey and the results of the research. The data is presented using graphs, tables, and figures to help summarise all data collected.

4.1. Study population

The research questions targeted different categories of samples and the following were involved: Zimbabwe Revenue Authority (ZIMRA), Judicial Service Commission (JSC), Zimbabwe Republic Police, Zimbabwe Music Rights Association (ZIMURA) and Local Musicians, Medicines Control Authority of Zimbabwe (MCAZ) and the Zimbabwe Intellectual Property Office (ZIPO) among others. Questionnaires were distributed and the interviews conducted as planned. The research questions endeavoured to establish and assess the views of the study population with each categorised sample specifically giving its own responses. This is because the population samples have different roles and so are affected differently. As mentioned above forty (40) questionnaires were distributed and ten (10) interviews were conducted. Out of the forty questionnaires that were distributed thirty-four (34) were returned therefore 85% was answered. This is a good response

rate as it is above half of the study population. This number was reached because the vendors of CDs and DVDs were reluctant to participate in the survey even after it had been explained to them that the questionnaire was for study purposes and that the data collected would be confidential. Some of the study population were simply not interested in the survey.

TABLE 2: Study Sample

Targeted Sample population	Targeted number of respondents	Total respondents	Response rate (%)
Right holders	10	10	100
Vendors	5	3	60
Zimbabwe Republic Police	5	4	80
Magistrates	5	3	60
Prosecutors	5	4	80
Consumers	10	10	100

4.2 The Magnitude of counterfeiting and piracy

Although there are no statics to show the exact magnitude of the problem, the survey on the consumers revealed the trends of goods which are counterfeited.

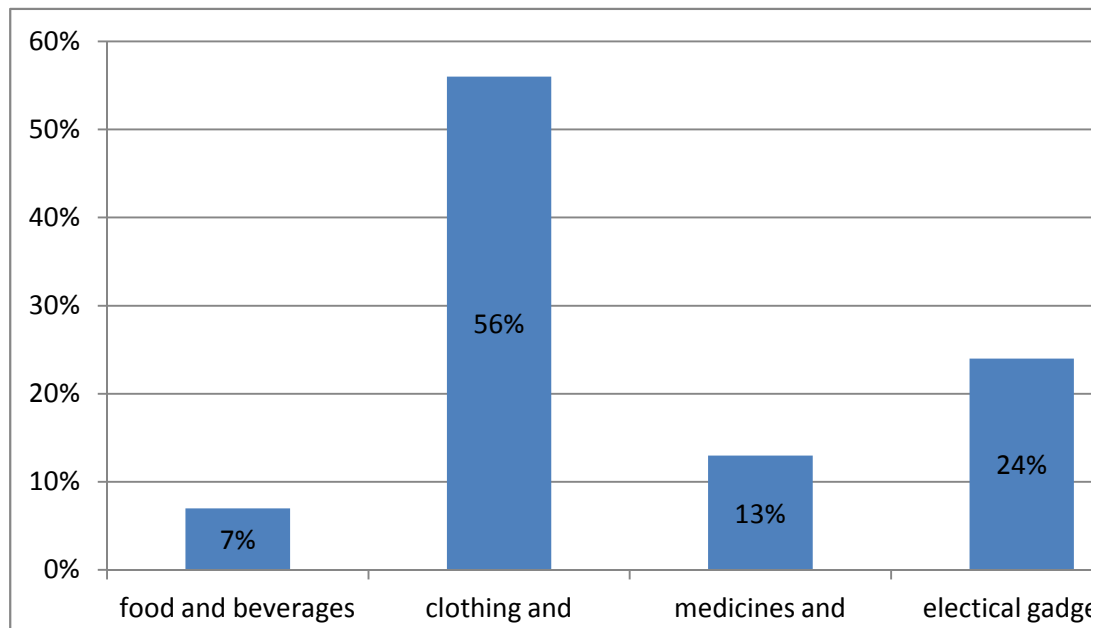


Figure 1: Trends In Counterfeiting

4.3 Consumers

Gender

Out of the 10 respondents 6 were women and 4 were men as illustrated on fig 1below.

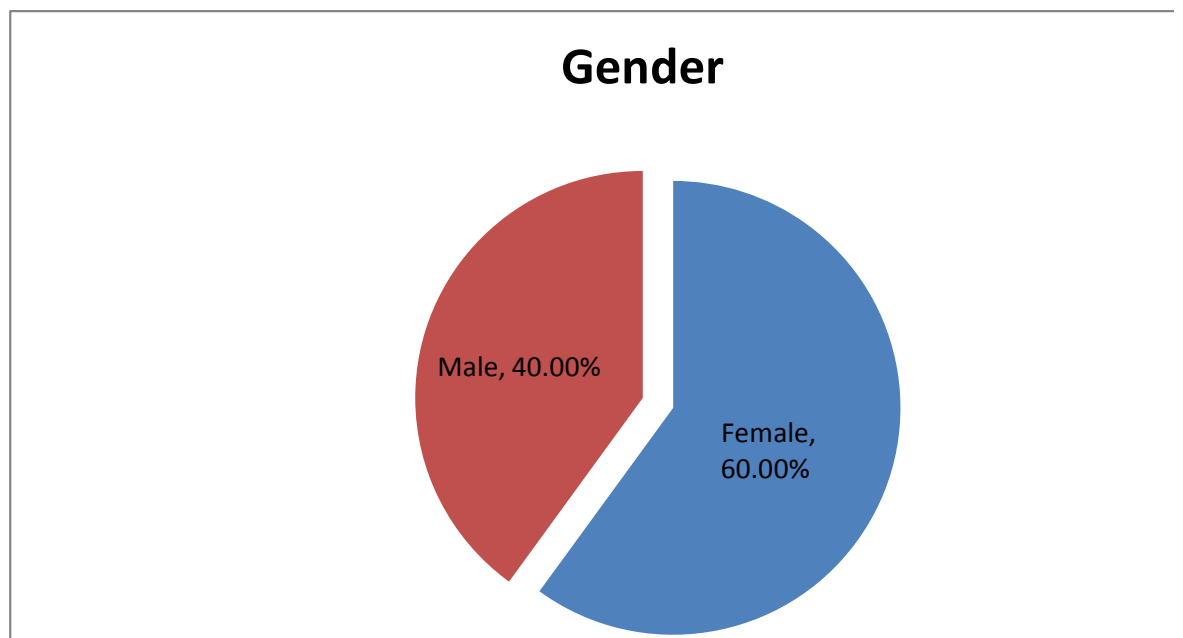


Figure 2: Gender

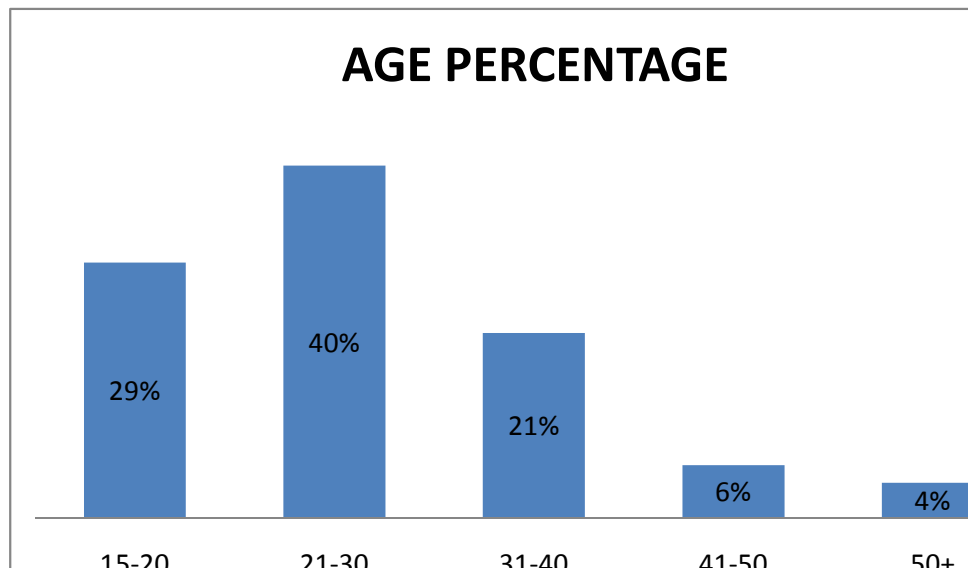


Figure 3: Age

The study revealed that 80% of consumers purchase counterfeit and pirated products knowingly. The study showed that they prefer to do so because these goods are much cheaper than originals and that there is not much difference from the originals in terms of appearance. 80% of the consumers were of the view that the consequences of using counterfeited and pirated products were not serious but the mere fact that they may be not durable especially in the case of electrical gadgets. The study also revealed that consumers would never buy counterfeit medicines, chemicals, food and beverages knowingly, with the exception of 10% who would buy counterfeit cosmetics, as they consider these not to pose a serious risk to health. It was also revealed that there have been isolated incidents of counterfeit hair chemicals but the police were quick to alert consumers. 90% of the consumers revealed that they were aware that counterfeiting and pirating is illicit but confessed that they did not quite understand to what extent these activities are detrimental. 70% dismissed piracy as insignificant to warrant raids by the police and prosecution of offenders. They also emphasised that some original works are just not available on the local market and

this justifies piracy. The researcher discovered that the sense of illegality is subtle mainly because Intellectual Property is intangible so most consumers have no qualms about purchasing counterfeited or pirated products.

4.4 Level of awareness of enforcement agents

In this section questionnaires were handed out to Police Officers, Magistrates and Prosecutors. A total of 15 questionnaires were distributed and 11 were returned.

TABLE 3: Enforcement Agents

	Agree / yes	Disagree / no	Not sure / maybe
General knowledge of counterfeit and pirated goods	11	0	0
Is there a special unit in your institution dedicated to handle IP matters?	0	7	4
Have you ever handled an IP case?	3	0	0
Is the current enforcement system adequate?	6	1	4

The study revealed that though 100% of the enforcement agents know about counterfeit and pirated goods, their appreciation of the legal issues related to the concepts of Intellectual Property is not sound. 70% of the study subjects

recommended raising awareness on the part of the enforcement agencies and members of the public. It was a widely held view that the Government should capacitate the enforcement agencies through training workshops to enable them to understand and implement the legislation in place.

4.5 Vendors

A total of 5 vendors were targeted. Several vendors were approached but were reluctant. Only 3 agreed to participate. The study revealed that vendors are generally not aware of intellectual property. However the vendors admitted that they are aware that the selling of pirated copies is illegal. The subjects also revealed that they had never been arrested and in the event that they are arrested they are prepared to pay a fine which normally ranges between \$10 and \$20. Although the subjects declined to reveal how much money they generate from sales in a day, it is assumed it is above the fine which explains the rate of recidivism. The subjects also expressed the opinion that to them this business is an honest way of making money rather than stealing. They mentioned that this business has kept many unemployed youths from living a life of crime. This is the perception of the vendors. Piracy is obviously not viewed as theft as there is no dispossession of property and an immediate feeling of loss on the part of the right holders. Piracy is not viewed as a crime at all.

4.6 Medicines Control Authority of Zimbabwe (MCAZ)

The Medicines Control Authority of Zimbabwe is responsible for regulating the pharmaceuticals manufacturing industry. It approves and registers medicines. The study revealed that registration approval process and subsequent market authorisation is currently taking at least two years. The study also revealed that registration and

retention fees which are the main source of revenues for MCAZ are among the highest in the region. These factors have been identified to be among those which delay the approval and registration of medicines and unscrupulous business people take advantage of this gap and import counterfeit medicines. The other driving factor which was identified is the high cost of conventional medicines and profiteering. The MCAZ which works hand in glove with the Ministry of Health and Child Welfare mentioned that their approach to Intellectual Property focuses much on improving access to medicines under the TRIPS Flexibilities than the enforcement of Intellectual Property rights. The MCAZ stated that the sale of counterfeit medicine is rampant on the black market but in comparison to other countries in the region such as Zambia, the problem of circulation of counterfeit medicines in Zimbabwe's channels of commerce was much lower. A comment was made that the situation could be greatly improved if the legislation on counterfeits is gazetted. The MCAZ revealed that the Bill pertaining to counterfeits is currently before the Public Health Advisory Board. The study further revealed that strategies to combat the problem have been first of all advocating for the now pending bill mentioned above and the promulgation of the Import and Export regulations of 2008 which designated ports of entry for medicines as a way to control what comes through the borders. The MCAZ commented that the Import and Export Regulations have been of great help as they have significantly reduced the number of counterfeit medicines being imported into the country. Challenges cited include the fact that the MCAZ does not have officers to man the designated ports. Another challenge noted was that whilst there is coordination with Criminal Investigations Department (CID) drugs unit, ZIMRA and Port Health it is not very effective as information is not freely shared.

4.7 Zimbabwe Revenue Authority (ZIMRA)

ZIMRA mentioned that when the organisation deals with aspects of counterfeit medicines they will be looking at public health issues and it is not necessarily about the Intellectual Property aspect of it. Therefore even though the organisation has intercepted counterfeit medicines the operations are carried out perhaps under an instruction from the Ministry of Health and without regard to the Intellectual Property aspects. This can be explained by the fact that Intellectual Property rights are private rights and the onus rests on the right holder to enforce his or her rights. Moreover the customs officials manning the borders do not have a sound appreciation of the subject of Intellectual Property. The study revealed that most Customs Officials are not aware that the Copyright and Trademark Acts prohibit the importation and exportation of infringing goods. They normally restrict themselves to the Customs Act [Chapter 23:02] which is the primary legislation for Customs. Further to this the Customs Act is not clear on the prohibition of counterfeit goods but is only specific on the prohibition of importation of counterfeit notes or coins. Counterfeits are perhaps covered under section 47(1) (f) of the Customs Act which prohibits any goods the importation of which is prohibited by or under the authority of any enactment.

However the study revealed that Revenue Authorities are mostly concerned with the collection of revenue and the regulation of arms and harmful substances while Intellectual Property is to a large extent trivialised.

4.8 Zimbabwe Music Rights Association (ZIMURA) and Right holders

ZIMURA collects royalties on public performances for composers of music. It was incorporated in 1980 as a company limited by guarantee and it has been collecting royalties on behalf of its members since its inception. ZIMURA lamented the lack of support from the police. ZIMURA is of the view that the police either do not understand the issues or simply trivialise piracy. Several workshops have been held with the police in a bid to educate them on their important role in the fight against piracy. ZIMURA mentioned that lack of support from the police was contributing to the failure of their efforts to combat piracy.

One of the strategies employed by ZIMURA has been to encourage artists to move with technology and employ technological copy protection mechanisms to protect their works. ZIMURA mentioned that hitherto artists have resorted to composing songs that discourage piracy and these same songs fell victim to piracy which shows the inadequacy of that method. One artist has resorted to the method of encryption and this was a success. Another popular Gospel artist, Fungisai Zvakavapano, is now selling her own music at the same price as that of street vendors. Fungisai no longer uses the standard CD case but now sells her CDs in sleeves similar to those used by pirates hence she is able to cut on costs. ZIMURA is encouraging artist to be creative and not to rely mainly on CD sales.

The right holders strongly believe that the Government is not doing enough to protect their rights because the police conduct sporadic raids and when they do arrest offenders, the fines are not deterrent. The Copyright Act provides that copyright

infringement is punishable by imprisonment for a period not exceeding 2 years or a fine not exceeding level ten. This means that the fine should not exceed US\$700 and normally pirates are fined between US\$10 and US\$20. It is the view of right holders that the courts continue to impose lax sentences because the magistrates lack understanding of the fundamental legal issues. The study also revealed that while right holders are aware of anti-piracy devices most of them have not bothered to find out what they really are and whether they can afford them.

4.9 Zimbabwe intellectual property office (ZIPO)

The Zimbabwe Intellectual Property Office is a section in a Department in the Ministry of Justice, Legal and Parliamentary Affairs. ZIPO is mainly responsible for the registration of Intellectual Property titles. ZIPO revealed that the sale of counterfeited and pirated goods is on the increase. One of the strategies to combat piracy employed by the office is through workshops with ZIMURA to educate the right holders. The office has also held workshops with the Police and Prosecutors as part of the strategies to curb piracy. The office has however indicated that workshops have proven inadequate and suggests tailor made training for the relevant stakeholders. The study revealed that ZIPO has not done anything toward controlling the sale of counterfeits which is rampant in flea markets and retail shops. The explanation being that the onus really rests with the right holder to enforce his/her rights and also because ZIPO has limited resources and manpower.

The office also revealed that the Government in 2009 established an Inter-Ministerial Committee to coordinate Intellectual Property matters. ZIPO explained that although the Inter-Ministerial Committee (IMC) has been established the members of the IMC

need to be capacitated in order to carry out their mandate efficiently and effectively. It was mentioned that most of the members of the IMC have very limited knowledge of Intellectual Property. ZIPO also revealed that the IMC is currently spearheading the crafting of the National Intellectual Property Policy which is expected to bring about better coordination of Intellectual Property issues.

ZIPO also mentioned that the Government is in the process of deliberating on the proposal to create a semi-autonomous Intellectual Property office. A comment was made that this will enable the office to operate better as opposed to the current set up in which it is a section of a Department in the Ministry of Justice, Legal and Parliamentary Affairs. This current set up comes along with budgetary constraints and the office has not had the opportunity to carry out as wide an awareness campaign as it would have wanted to. It was revealed that ZIPO takes advantage of the Zimbabwe International Trade Fair held annually in Bulawayo and Agricultural shows held in other cities of the country to raise awareness owing to the limited budget.

ZIPO also observed that the legislation in place is adequate and TRIPS compliant and what is required is the capacitating of the relevant stakeholders in order to achieve effective enforcement.

There was a general consensus among stakeholders that there is a fragmented approach to the management as well as enforcement of Intellectual Property.

4.10 Limitations Of The Research

The research was limited by various factors. Because of time constraints some of the stakeholders identified to take part in the research had to be omitted. Some of the interviews which were supposed to be face to face were carried out over the telephone due to unavailability of subjects for a face to face interview.

4.11 Conclusion

In this chapter the researcher presented the findings of the research. The objective of this chapter was to establish perceptions and trends. The findings will be further discussed in chapter V and they will form the basis of the recommendations. In summary the chapter managed to reveal that Zimbabwe has an adequate legislative mechanism in place but there is widespread ignorance of Intellectual Property issues and the enforcement agencies require capacitating to fully implement their mandate.

CHAPTER 5

Conclusion and Recommendations

5.0 Introduction

This chapter sums up the previous chapters on introduction, literature review, research methodology, and data presentation. It contains the conclusions and recommendations based on the literature reviewed and data collected for this study.

5.1 Summary

Chapter I introduced the research being carried out. The study focused on an assessment of Zimbabwe's enforcement machinery to establish whether it is adequate to effectively deal with the problem of counterfeiting and piracy. The research also sought to identify the key drivers of the problem and suggest reforms.

The introduction of the study provided a foundation for understanding the importance of Intellectual Property as a tool for development and how the problem of counterfeiting and piracy can impact negatively on a country's socio-economic development as Intellectual Property cuts across a wide spectrum of human endeavours. The background revealed Zimbabwe's position vis a vis its international legislative obligations under the WTO and the challenges the country is facing regarding the problem of counterfeiting and piracy.

Chapter II can be equated to a foundation on which all the ideas in the other chapters rest. This chapter endeavoured to examine literature from different authors and theorists concerning the research topic.

Chapter III gave an in-depth description of the research methodology, research design, research population and sample. It also elucidated on different data collection

methods. The researcher used questionnaires and interviews to gather the required data. The research was carried out as planned and interesting findings and observations were made.

Chapter IV examined the major research findings.

5.2 The major findings

1. Counterfeiting is curtailing the growth of the domestic industry and piracy is stifling creativity in Zimbabwe.
2. Although the Intellectual Property legislation in place is robust and in tandem with Zimbabwe's obligations under the relevant international treaties its implementation is weak.
3. There is widespread ignorance as to the impact of the problem of counterfeiting and piracy on the part of right holders, consumers and the enforcements agents.
4. There is limited appreciation of the legal concepts of Intellectual Property and weak coordination amongst the relevant stakeholders.

5.3 Suggested reforms

5.3.1 Awareness

Awareness is crucial to effective enforcement. It is recommended to convene tailor made stakeholder's workshops to sensitise the different stakeholders. The print and electronic media should be employed in raising awareness as it is among the most efficient mediums in the dissemination of information. Artist may also engage in edutainment in which they educate members of the public whilst entertaining them at the same time. Consumer awareness is a key component of building respect for Intellectual Property.

5.3.2 Rights holders' Cooperation

Artists may also consider selling their products at the same price as those of pirates. The study showed that the consumer does not really care about quality simply because the consumer's perception of quality is different from that of the sound engineer who can immediately tell a fake from an original copy. Therefore, to drive pirates out of business, artists should slash their prices.

Artists should also consider working with mobile phone networks like Telecel which has introduced teletunes. This is a platform where the consumer can get a legal download for a reasonable fee. This would be most ideal for the urban grooves artists who release singles as opposed to albums.

Artist can also engage events management companies to organise their performances, touring, merchandising, sponsorship, royalties and other commercial activities rather than relying mainly on CD sales.

5.3.3 Capacity Building

The Government can engage organisations like WIPO to facilitate capacity building for the Police, Customs Officials and the Judicial Service Commission. This will result in robust border enforcement and effective judicial and administrative enforcement.

5.3.4 National Cooperation

Government can also establish an enforcement taskforce to ensure a harmonised approach as opposed to the current fragmented approach. An anti-counterfeiting

agency can also be established to deal specifically with the problem of counterfeiting.

5.3.5 International Cooperation

International cooperation is also crucial. Since almost all members of the Southern African Development Community (SADC) are members of WIPO, African Regional Intellectual Property Organisation (ARIPO) and signatories to the Paris Convention, Banjul Protocol, Trips Agreement, Hague Agreement and also available on the Information Communication and Technology Platform, they could easily use an Automated System for Customs Data (ASYCUDA), WIPO (2014). This is a goods electronic tracking system to track pirated goods and counterfeits through the WCO. It is an automated Customs data management system that can handle all Customs clearance related processes by implementing simplified and harmonized procedures and standardized trade documents such as electronic processing of declarations, risk management, transit operations and expedited clearance of goods and collecting timely and accurate statistical data for fiscal and trade policy objectives, Michael Blakeney (2009). This system will go a long way to reduce the problem of counterfeiting and piracy in the region.

6. Conclusion

In light of the above, the problem of counterfeiting and piracy is a reality in Zimbabwe and it calls for concerted effort to harness it, particularly to protect the local manufacturing industry and promote creativity by ensuring artists get rewarded

for their hard work. An Intellectual Property policy and strategy is imperative. This policy must align with national development goals. Therefore the guiding premise should be to ensure that the approach to enforcement contributes to sustainable development and promoting creativity. A deliberate effort must be made to inculcate a culture of respect for Intellectual Property. A strategic plan for effective enforcement must be drawn with clear priorities in order to make the best use of the limited financial and human resources the Government has at its disposal. This must also take cognisance of the broader societal interests and strike a balance.

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APPENDIX 1

Questionnaire 1

1. CD and DVD Vendors

A QUESTIONNAIRE ON BUILDING RESPECT FOR INTELLECTUAL PROPERTY IN ZIMBABWE WITH A FOCUS ON COUNTERFEITING AND PIRACY

The following is a survey for a research project which the researcher is doing in partial fulfilment of a Masters in Intellectual Property Programme with Africa University. The main aim of this research is to assess the effectiveness of the enforcement mechanism in place. All the information gathered will be treated with utmost confidentiality and will be used for academic purposes only.

Contact details: 0774819069

Instructions

- a) Please put an X on the appropriate box.
- b) Tick/select more than one answer where appropriate.

1. Please tick the age bracket that you belong to

- ☐ 15-20 years
- ☐ 21-30 years
- ☐ 31-40 years
- ☐ 41-50 years
- ☐ 50 and above

2. Gender

- ☐ Male
- ☐ Female

3 . Do you know about Intellectual Property Rights?

- ☐ Yes
- ☐ No

4. Where do you get these CDs and DVDs you are selling?

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5. How much do you make per day?

- ☐ Less than US\$5
- ☐ Between US\$5 and US\$10
- ☐ Between US\$10 and US\$15
- ☐ More than US\$15

6. Do you know that these copies you are selling are not original?

- ☐ Yes
- ☐ No

5. Are you aware that right holders lose money because of your business

- ☐ Yes
- ☐ No

6. Are you aware that selling pirated copies is a criminal offence?

- ☐ Yes
- ☐ No

7. If yes why do you continue?

- ☐ it is your only source of income
- ☐ it is big business
- ☐ other (please specify).....

8. Does the Zimbabwe Republic Police conduct raids?

- ☐ Often
- ☐ Not very often
- ☐ Not anymore
- ☐ Never

9. Have you ever been arrested by the police for selling pirated copies?

- ☐ Yes

☐ No

10. If yes, what happened to you?

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The End, Thank you

Questionnaire 2

Consumers

Instructions

1. Please tick the age bracket that you belong to

- ☐ 15-20 years
- ☐ 21-30 years
- ☐ 31-40 years
- ☐ 41-50 years
- ☐ 50 and above

2. Gender

- ☐ Male
- ☐ Female

3. What do you understand by the term counterfeits or pirated goods?

- ☐ poor quality
- ☐ imitation
- ☐ substandard
- ☐ all of the above
- ☐ other (please specify)

.....

4. What goods are counterfeited the most? (Please put percentages to make a hundred)...

- | | |
|--|-------|
| <input type="checkbox"/> electrical gadgets | |
| <input type="checkbox"/> clothing and footwear | |
| <input type="checkbox"/> medicines and chemicals | |
| <input type="checkbox"/> food and beverages | |

5. Have you ever purchased counterfeit or pirated goods?

- ☐ yes
- ☐ no

6. Did you know it was counterfeit or pirated?

- ☐ yes
- ☐ no

7. What was the reason?

- ☐ it was the only one available
- ☐ it was cheaper
- ☐ there was not much difference with the original
- ☐ other (please specify).....

8. In your experience what is the effect in terms of quality of counterfeit and pirated goods in comparison to originals?

- ☐ no difference
- ☐ bad
- ☐ terrible
- ☐ other (please specify)

9. Is the problem of counterfeited and pirated products improving?

- ☐ yes
- ☐ no

10. Do you enjoy African movies?

- ☐ yes
- ☐ no

11. Where do you buy your CDs or DVDs

- ☐ retail shops
- ☐ streets
- ☐ other (please specify)
.....

8. Can you differentiate between an original Music CD and a counterfeit one?

- ☐ Yes
- ☐ No

11. Do you know about Intellectual Property Rights?

- ☐ Yes
- ☐ No

16. It is an offence to buy counterfeit or pirated goods?

- ☐ Yes
- ☐ No
- ☐ I don't know
- ☐ other (please specify)

10. Do you think the Government is doing enough to protect and promote intellectual property rights?

- ☐ yes
- ☐ no

10. Do you think the Government is doing enough to protect consumers?

- ☐ yes
- ☐ no

12. Any general comments?

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The End, Thank You

Questionnaire 3

Right Holders

1. Please tick the age bracket that you belong to

- ☐ 15-20 years
- ☐ 21-30 years
- ☐ 31-40 years
- ☐ 41-50 years
- ☐ 50 and above

2. Gender

- ☐ Male
- ☐ Female

3. How long have you been in the music industry?

- ☐ 1-5 years
- ☐ 6-10
- ☐ 11-20
- ☐ 21 and above

3. Do you know about Intellectual Property Rights?

- ☐ Yes
- ☐ No

4. What, in your opinion, is the cause of piracy?

- ☐ weak law enforcement
- ☐ original copies are not available
- ☐ huge demand for CDs and DVDs
- ☐ economic hardship
- ☐ No pirated copies are much cheaper than originals

Others (Please specify).....

5. Have you ever heard of anti-piracy devices?

- ☐ yes
- ☐ no

6. If yes have ever used any anti-piracy devices?

- ☐ yes

☐no

7. Are there any artists who are using anti-piracy devices in Zimbabwe?

☐yes

☐no

8. Are there any other methods that artists in Zimbabwe are using to reduce piracy?

☐yes

☐no

If yes please specify.....

9. Who, in your opinion, should inform the police, of the selling of pirated copies?

☐Right holders

☐Dealers and Marketers

☐Members of the Public

☐Other (Please specify)

10. Has your music ever been pirated?

☐yes

☐no

What action did you take if any at all and what was the outcome?

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11. How would you rate the effectiveness of law enforcers?

☐good

☐bad

☐poor

☐improving

12. Do you think piracy will soon come to an end?

☐yes

☐no

☐other (Please specify).....

11. What would you suggest as measures to control piracy?

- ☐ Awareness Campaigns
- ☐ Stiff penalties for those found infringing
- ☐ Frequent raids by the Police on suspected dealers of pirated CDs
- ☐ Others (Please Specify).....

12. Any general comments

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The End, Thank You

Questionnaire 4

Interviews

1. Name of organization
2. Nature of organisation (e.g. Government department/ regulatory authority)
3. Position of Respondent
4. Gender
5. Period in position
6. What could be the main drivers of counterfeiting and piracy world over?
7. What would you say is the extent of the sale of counterfeit and pirated goods in the country?
8. Do you have any idea what the situation is like in other countries in the region?
9. How is Zimbabwe fairing by comparison?
10. Has your office put any strategies in place to deal with this problem?
11. If yes what are the strategies?
12. Have these strategies been effective?
13. What are some of the challenges being faced in implementing the strategies?
14. To what extent is the law compliant with the TRIPS Agreement?
15. Is there liaison between your office and the enforcement agencies, regulatory authorities and officer at ports of entry?
16. Any general comments.

Questionnaire 5

Enforcement Agencies (ZRP, JSC and Prosecutors)

1. Please tick the age bracket that you belong to

- ☐ 15-20 years
- ☐ 21-30 years
- ☐ 31-40 years
- ☐ 41-50 years
- ☐ 50 and above

2. Gender

- ☐ Male
- ☐ Female

4. How long have you been in that office?

- ☐ 1-5 years
- ☐ 6-10
- ☐ 11-20
- ☐ 21 and above

5. Do you know about Intellectual Property Rights?

- ☐ Yes
- ☐ No

6. Do you know about counterfeit and pirated goods?

- ☐ Yes
- ☐ No

7. How easy is it to differentiate counterfeited and pirated goods from originals?

- ☐ Very easy
- ☐ Not easy
- ☐ Difficult

8. Is there a special unit dedicated to handle such matters?

- ☐ Yes
- ☐ No

9. What is your take on the current enforcement system?

- ☐ there is good enforcement
- ☐ enforcement is bad
- ☐ there is effective copyright protection

10. What action is taken against counterfeit and pirated products?

- ☐ sold at reduced price
- ☐ destroyed
- ☐ given out for free
- ☐ Other (please specify)

11. Do you know about the Zimbabwe Intellectual Property Office?

- ☐ Yes
- ☐ No

12. What is the trend of the sale counterfeits and pirated goods in Zimbabwe, increasing?

- ☐ Yes
- ☐ No

13. If yes what do you think is fuelling the problem of counterfeiting and piracy?

- ☐ Economic reasons
- ☐ High demand
- ☐ High cost of original products
- ☒ Unavailability of the original products in stores
- ☐ Other (specify)

14. Any comments

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The End, Thank You