

Counterfeit Goods Act 37 of 1997 (CGA)

Topic: Marketing, Advertising and Merchandise

IN A CALABASH

Introduction

Often a business or trading entity develops a brand or property which through the efforts of that business, becomes a well-known, reputable, good quality and premium product.

As a result of the good name, reputation and goodwill, which the owner has in the product, such product becomes desirable to all, sells well and becomes profitable.

Unfortunately, other companies then decide to take advantage of the goodwill and reputation which the owner has built up in the product and they copy this product. This copycat product may be of a much lower quality, less durable and unreliable.

This is called counterfeiting, and it impinges on the intellectual property rights of the business or trading entity which created the product. Although they are intangible, intellectual property rights are valuable assets on the balance sheet of any business.

The activity of copying another's product, such as famous brands, and selling it as if it is that product when it is not is unlawful and is known as counterfeiting.

This action is an attempt to hijack or take advantage of another's intellectual property rights. It also misleads and commits a fraud against the consumer.

In order to control this type of behaviour in South Africa, the Counterfeit Goods Act of 37 of 1997 (CGA) was brought into operation. The Act allows the owner of an 'intellectual property right' and anyone with an interest in goods bearing or representing such rights to take civil or criminal action against a person or company that is involved in counterfeiting, imitating, copying or pirating those protected goods and assets.

Objectives of the Act

The objectives of the CGA are–

- to introduce measures to stop trade in counterfeit goods;

- to stop and/or lessen the unlawful application to goods of another's trademarks or intellectual property rights; and
 - to prevent or stop the release of such counterfeit goods into the channels of commerce.
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Application of the Act and its implication to Tourism

All entities who manufacture and/or sell or who purchase branded goods and products in South Africa must comply with the Act.

Summary of the provisions of the Act

Counterfeiting

Counterfeiting means the manufacturing and/or producing of goods for which an intellectual property right subsists in respect of the protected goods or a colourable imitation thereof in such a manner that they can be calculated to be confused with or be taken as being the protected goods. The relevant act of counterfeiting must have also infringed the intellectual property right in question, either being copyrighted or trademarked matter.

Counterfeited goods

Goods are counterfeit goods when they are manufactured without the authority of the trademark or copyright owner and imitate authentic goods legitimately bearing the trademark or copyright work to such an extent that they are substantially identical copies.

Acts of counterfeit



Acts of counterfeit include—

- possession or control by any person of counterfeit goods in the course of doing business;
- manufacturing, producing or making counterfeit goods other than for private or domestic use;
- selling, hiring out, bartering or exchanging counterfeit goods or the offering or exposing for sale thereof;
- exhibiting counterfeit goods in public for the purpose of trading therein;
- distributing counterfeit goods for the purpose of trading or for any other purpose to the detriment of the owner of an intellectual property right;

- importing or exporting counterfeit goods into or through the borders of South Africa other than for private and domestic use; and
- disposing counterfeit goods in any manner in the course of trade.

Complaints and charges for counterfeiting

Any person with an interest in the protected goods who reasonably suspects that a counterfeiting offence is being committed or has been or is likely to be committed may lay a complaint with an inspector. The interested person can be the owner or licensee of an intellectual property right in respect of the protected goods or an importer, exporter or distributor, duly authorised agent or representative or the attorney of such a person.

An inspector is an official appointed by the Minister of Trade and Industry, a police official holding the rank of sergeant or higher or the Commissioner for Customs and Excise.



Upon receipt of a complaint, the inspector may–

- investigate the matter;
- obtain a warrant of search and seizure;
- enter any place or vehicle to seize and remove any counterfeit goods or collect any evidence relating to counterfeit items;
- place seized goods in a warehouse until the matter has been disposed of; or
- destroy the goods if ordered to do so.



WHAT HAPPENS IF YOU DO NOT COMPLY?

Contravention of the Act amounts to a criminal offence. Any person convicted of an offence will, in the case of a first conviction, be liable a fine which may not exceed R5 000 per article or item, imprisonment for a period that may not exceed three years, or both. In the case of a second or subsequent conviction, such person will be liable to a fine which may not exceed R10 000 per item or article or to imprisonment that may not exceed five years.

The Act has further introduced an interesting provision that operates as an incentive to combat the trade in counterfeit goods: any person who submits any counterfeit goods purchased by him or her to an inspector with the proof of the price that was paid for these goods will be entitled to receive payment of the sum of money equal to three times the amount of the price, under certain circumstances.



RECOMMENDED ACTIONS OR CONTROLS WHICH SHOULD BE IMPLEMENTED BY THE TARGET AUDIENCE TO ENSURE COMPLIANCE WITH THE ACT

- Awareness of and respecting other parties' intellectual property rights;
- Not copying or using another parties' intellectual property rights without first obtaining their permission;
- Taking action when a third party infringes one's intellectual property rights; and
- Register one's copyright and trademarks with the customs authorities.

FURTHER INFORMATION

Regulators

South African Police Service
Customs and Excise