

Emerging Challenges to Legitimate Business in the Borderless World



Chairman's message



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It gives me great pleasure to present a comprehensive report on the problem of smuggling and counterfeiting (illicit trade) and the challenges in overcoming these threats. This report titled “**Emerging Challenges to Legitimate Business in the Borderless World**” is prepared by Grant Thornton in collaboration with FICCI Committee Against Smuggling and Counterfeiting Destroying the Economy (CASCADE). It is a compilation of facts and figures, best practices, case studies and initiatives taken at the national and international level to fight illicit trade.

The report is broadly divided into four sections:

Understanding of the current scenario: Illicit trade is a growing threat to economies, domestically as well as globally. It damages legal businesses causing huge financial losses to them and to the exchequer. It also converges with criminal activities generating increasing insecurity and instability around the world. This network of illicit trade has entangled not only the legal industry and governments but also the consumers who are exposed to grave risks to life and property. This report is an important step towards empowering the consumers, industry and policy makers with the destructive nature of illicit trade.

Challenges in the e-Commerce market place: The internet is changing the way commerce and businesses are conducted around the world. The advent of technology has helped erode geographical borders, aiding criminal networks operating e-Commerce sites to remain anonymous while reaching global audiences. This report brings to us a better understanding of the e-Commerce eco-system and the loopholes present wherein adequate attention is needed by policymakers to expand the ambit of laws and regulations.

Border protection and international cooperation in enforcement: Smuggling and counterfeiting is a global menace, and are rightly being labeled growing crimes of the 21st century. This report highlights some of the key challenges in enforcement such as lack of sufficient resources, low priority by enforcement officers, lack of training and capacity building along with complex litigation processes and insignificant punitive action. In response to the crime that spans international borders, countries are entering into bilateral and multilateral agreements along with joint operations making transborder cooperation a reality.

Building global competitiveness through ‘Make in India’ initiative: In spite of several awareness generation programmes, there is still a trend among consumers to proactively or passively buy fake and smuggled products mainly because of their low cost. This results in tax and duty evasion. It is therefore imperative to bring about a behavioural and cultural change of respecting legal trade practices. This report touches upon the Indian government’s ambitious ‘Make in India’ campaign. It is heartening to see the focus on intellectual property protection as one of the key features in the programme. I hope that the ‘Make in India’ campaign will be used to aggressively spread consumer awareness on the importance of promoting the manufacture and sale of genuine goods in the country.

I am confident that this report will be useful for all stakeholders and will go a long way in tackling the scourge of illicit trade.



Foreword



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In the recent past, India's economic growth story has attracted world's attention. But the growth has brought new challenges for the domestic economy. One of the challenges currently faced is the growing illicit trade in counterfeits, pass offs and smuggled goods. These activities are threatening brands not only within the country but across the globe. Contraband and counterfeit products hurt the integrity of the brand, further diluting the brand owner's reputation. This results in decline of sales of the legitimate products. The practice might also impact consumers' health creating safety hazards.

The FICCI initiative in the form of Committee Against Smuggling and Counterfeiting Activities (FICCI CASCADE) made an attempt to study the losses incurred by illicit trade in select manufacturing related sectors in India. It was seen that the loss has increased by 44.4 percent in just two years, from INR 72,969 crore in 2011-12 to INR 105,381 crore in 2013-14. On account of the illicit markets, the total loss to the government for manufacturing industries in 2014, was estimated at INR 39,239 crore.

I am happy to share that FICCI CASCADE has taken another step in the direction of deepening its understanding of the extent of the illegal trade in counterfeit and smuggled goods and its impact on the socio-economic fabric of the country. We are pleased to present this report, **"Emerging Challenges to Legitimate Business in the Borderless World."** This report reflects the growing complexities associated with illicit trade, making it a growing threat to the global economy. This report urges us to look at the drivers of illicit trade; understand both the domestic and international perspectives that requires cooperation between regional, national and international entities.

In our country laws have been introduced that are not only compliant with our international obligations but are in many ways progressive. Moreover, given the emphasis on the current 'Make in India' campaign bringing in economic development and the much anticipated growth; an effort therefore needs to be made to examine how illegal trading activities can be curbed. It is hoped that this study would further open up a debate on the extent of this problem, and will help us find ways and means to mitigate the challenges.

Activities associated with illicit trade, counterfeiting and smuggling in particular, are often referred to as fast growing industries and businesses which are thriving globally.

These activities have become persistent in nature and escalate with each passing day in scope and magnitude. Illicit trade of this kind impacts a multitude of stakeholders worldwide including consumers, manufacturers, governments and many more to the extent that it is posing a threat to the national security of countries. With perpetrators becoming well-connected, the problem surpasses global boundaries, with the phenomena no longer restricted to one geography. The report deep dives into factors which instigate these illicit activities and their impact on various stakeholders. While loss of revenues to governments and defamation of manufacturers' brand are some of the well-known adverse impacts, terror funding is a lesser known consequence and one of immense worry as it directly poses a threat to the national security of countries. Globally, losses due to counterfeiting were reported to have reached US\$ 1.7 trillion by 2015 as per the International Chamber of Commerce, while the estimated annual tax loss to the Indian government was estimated at INR 39,239 crore in a FICCI CASCADE study in 2014.

While counterfeiting and smuggling impact every sector in India, the severity is higher in specific industries such as FMCG and Tobacco. The report discusses the trends, statistics and growth with respect to various sectors and also emphasises the measures in the Indian context. The ordeal of enforcement agencies and authorities continues as the modus operandi adopted to produce fake goods build up, with newer means to smuggle goods and produce counterfeit goods coming into spotlight.

It is evident that the problem in India is not limited to a few cities or regions. However, there are specific areas which predominate in illicit activity and these are exploited as a transit point by illegal operators. In terms of the tactics, e-Commerce is the newest channel adopted by counterfeiters to effectively reach a wider audience. With online marketplaces witnessing a phenomenal growth in India, the space has also become an easy prey to fake goods. The report discusses at length growth of this sector in India, its typical characteristics and the challenges that ensue. The report also highlights global trends and challenges.

With respect to India, building global competitiveness through "Make in India" campaign is imperative and so combating the issue of counterfeit in this regard is critical. The campaign has been well received in all spheres and measures have been suggested in the report to manufacture and promote authentic products with high quality and utility standards.

The report seeks to summarise that with realising supply chain synergies, global cooperation and functioning as a cohort, economies worldwide can go a long way to combat these illegal activities.

Executive summary

As perpetrators of illicit trade are becoming increasingly sophisticated, well-connected and adequately funded, the activities of counterfeiting and smuggling are presenting a bigger challenge for enforcement authorities and governments globally. The direct link of these activities with terrorists is a cause of concern. For example, according to the United Nations millions of dollars from the trade of illicit tobacco reach to terror outfits such as the Taliban and the Al-Qaeda.

In addition to this, visible consequences of illicit trade such as adverse impact on innovation, investment and brand reputation are well-known to most stakeholders. However, the bigger concern is the manner in which counterfeiting and smuggling is impacting the social fabric of nations. This in turn is weakening their economic processes -- an impact that seems too severe to tackle.

Euro Monitor International predicts that counterfeiting accounts for around 5-7 percent of world trade estimating to be around US\$ 600 billion annually. India in particular, is victimised as it continues to serve as a transit point to smuggling and counterfeiting. Virtually every industry and sector in the country is plagued by operators. This includes sectors such as FMCG, tobacco, technology, alcohol, automotive etc. While inadequate enforcement and lack of consumer awareness boost counterfeiting in India, high tax differentials between neighbouring areas primarily favours escalation in smuggling activities.

Online marketplaces have become a preferred hub for illicit operators owing to their wider reach and ease of access. e-Commerce in India is growing substantially with increased traction of mobile telephony, rising internet penetration and disposable income levels.

While these factors underline the ongoing growth and huge potential in e-Commerce, at the same time, the challenges during logistics, cash on the delivery (COD) model and poor cyber laws act as a deterrent to the industry. In this regard, global e-retailer Alibaba Group Holding Ltd. that runs the famous e-Commerce site, Alibaba.com is a good example. To mitigate the challenges, the Company by way of investment in to their processes, technology and imposition of heavy penalties for culprits have set up a notable example for other operators -- a model that Indian firms can apply to their businesses.

However, in the absence of a specific e-Commerce legislation in India and other laws including the Information Technology Act, Indian Contract Act, Companies Act, 2013, intellectual property, laws in copyrights and trademark etc. there are certain grey areas. Thus, there is need for a separate e-Commerce law in the country.

The most critical aspect that needs to be addressed in this area is the liability of sellers and the marketplace in case of counterfeit or smuggled products.

As the problem of counterfeiting and smuggling becomes global, there has been, in parallel, sufficient evidence to demonstrate that the global community has woken up to fight this menace. Agreements signed under agencies such as the World Customs Organisation (WCO) and Europol and measures such as custom controls, training and several joint operations being carried out in the direction have been highlighted in the relevant section of the report.

Moreover, the lengthy and complex litigation process along with corruption plagues the enforcement landscape across countries.

The launch of "Make in India" initiative by the Indian government intends to transform the country into a manufacturing hub. The plan has witnessed early success and has attracted foreign investments. The campaign, needless to mention, requires authentication of products to protect it from the perils of counterfeiting and ensure making it a complete success in the times to come.

Based on the ongoing trends and global endeavours undertaken worldwide to address smuggling and counterfeiting, certain key recommendations proposed in this regard include:

- Stringent enforcement and strengthening of the legal system
- Set up a nodal governance agency
- Increase consumer awareness
- Adopt of anti-counterfeit technologies
- Invest in research and development
- Collaboration

The impacts of illicit trade and the associated activities of smuggling, piracy and counterfeiting can be long lasting. Nevertheless, with the measures proposed above and increased collaboration between enforcement agencies, consumers and other associated stakeholders at a broader level, adverse impacts of this menace can undoubtedly be restrained and tackled.

Contents	
Overview	05
1. The current scenario 1.1. Counterfeiting and smuggling - an overview of concepts 1.2. Impact of counterfeiting on stakeholders 1.3. Key drivers of the trade and associated implications 1.4. Industries impacted 1.5. Market size 1.6. Current trends and best practices to combat counterfeiting and smuggling 1.7. Geographies 1.8. Modus Operandi	06
2. e-Commerce marketplace and counterfeiting scenario 2.1. e-Commerce market - an overview of trends 2.2. Challenges and potential solutions in e-Commerce 2.3. Legislative framework in e-Commerce and the required policy interventions	26
3. Border protection: International cooperation in enforcement 3.1. Best practices to aid in seizing counterfeit and smuggled goods 3.2. Current regulatory landscape and issues faced 3.3. Role of enforcement agencies 3.4. Collaborative efforts	38
4. Building global competitiveness through 'Make in India' initiative 4.1. Solutions to manufacture and promote authentic products within the country 4.2. Ongoing initiatives for anti-counterfeiting solutions 4.3. Consumer involvement through greater awareness	50
5. Recommendations	56

Overview

Smuggling and counterfeiting are the most common things that come to mind when there is reference of illicit trade. However, the trade itself is vast and full of complexities. As the word suggests, illicit trade comprise of trade of manufacturing and export of counterfeit goods. The crime poses a latent threat to the progress of global economy.

Since the trade and industry are increasingly getting globalised, perils associated with the phenomena of counterfeit and smuggling are no longer restricted to one geography. There have been incessant efforts by global organisations, governments and corporates to check illicit trade. But there seems to be a long way to go in this direction. World Customs Organisation (WCO) estimated that approximately 3 billion pieces of counterfeit and pirated products were seized in 2013. Of these, more than half of the reported goods were illicit pharmaceutical products (2.3 billion pieces), followed by electronic appliances (470 million pieces), other taxable products (95 million) and foodstuff (50 million), amongst other commodities. For other industries such as tobacco, a significant rise in illicit trade have been reported. It indicated that in 2012 the illicit trade, rose to 40 percent making tobacco trafficking a serious issue for customs organisations.

Each year, an increasing number of brands are affected by illicit trade. These range from consumer goods such as electronics, apparels, and alcoholic beverages to various other industries such as Information Technology (IT), automotive etc. The global menace is now a cause of concern for industries and countries. There have been instances of inter-linkages of such a trade with terrorist activities. For instance, trafficking of cigarettes was next in line to trafficking in drugs. As per WCO, this was also likely to be one of the prime sources of funding terrorist activities in the sub-Saharan region.¹

Over time, the illicit trade and the practices have become more organised and well-resourced. Factors such as improved global logistic networks, real time data sharing systems and online platforms have facilitated an efficient supply of illicit products. This has resulted in an increase in the volume of people and organisations directly involved in illicit trade. The growing magnitude of the problem has created substantial roadblocks for associated stakeholders such as the governments, consumers, manufacturing organisations and many others who are afflicted within the whole chain.

“Counterfeiting accounts for between 5 - 7 percent of world trade, worth an estimated US\$ 600 billion a year.”

Euro monitor
International

1. THE GLOBAL ILLICIT TRADE IN TOBACCO: US Department of State, 2015

The current scenario

1.1. Counterfeiting and smuggling - an overview of concepts

International Trademark Association “Counterfeiting” is a practice of manufacturing, importing/exporting, distributing, selling or otherwise dealing in goods, often of inferior quality, under a trademark that is identical to or substantially indistinguishable from a registered trademark, without the approval or oversight of the registered trademark owner. Counterfeits are most commonly called “fake goods” or “knock-offs.” Many well-known and successful brands, spanning across industries are victims of counterfeiting.

Counterfeiting is different from traditional trademark infringement or passing off, which involves, inter alia, the selling of products under confusingly similar trademarks or service marks.²

International Anti-Counterfeiting Coalition

Counterfeiting is a federal and state crime, involving the manufacturing or distribution of goods under someone else’s name, and without their permission. Counterfeit goods are generally made from lower quality components, in an attempt to sell a cheap imitation of similar goods produced by brands consumers know and trust.³

Smuggling, often synonymous to illicit trade and counterfeiting is a criminal offense of bringing into or removing from a country those items that are prohibited or upon which customs or excise duties have not been paid. Smuggling is the secret movement of goods across national borders to avoid customs duties or import or export restrictions. It typically occurs when either the customs duties are high enough to allow a smuggler to make a large profit on the clandestine goods or when there is a strong demand for prohibited goods, such as narcotics or weapons.⁴

there are huge profits made out of the trade. Worldwide, the periphery of smuggled goods has come to include almost any item that one could think of, ranging from food items to mobiles, DVDs, arms and weapons, medicines, alcohol, cigarettes and tobacco products etc.

1.2. Impact of counterfeiting on stakeholders

The World Economic Forum’s Global Agenda Council on illicit trade is of the view that the practice encompasses a wide variety of illegal activities including smuggling and activities that cause a negative impact on the economic, social, environmental or political landscape.

Owing to the intricacies and mounting issues posed by counterfeiting and smuggling, there has emerged a parallel economy that operates alongside, but at the same time is increasingly overlapping with the legitimate economy. This parallel economy results in:

- Distortion of markets;
- Regulatory burden;
- Funding criminal organisations or international terrorist groups and
- Promotion of global economic disparities.

Beyond doubt, illicit trade poses a threat to various stakeholders including the government, consumers, manufacturers and the national security of the respective country. While some consequences are immediate or can be reasonably well assessed, there are others which are hidden and difficult to comprehend. These, unfortunately, may have a much deeper impact constituting global supply chain vulnerabilities, risk to the social fabric and undermining the economic system of nations.

2. What is counterfeiting, International Trademark Association, April 2015

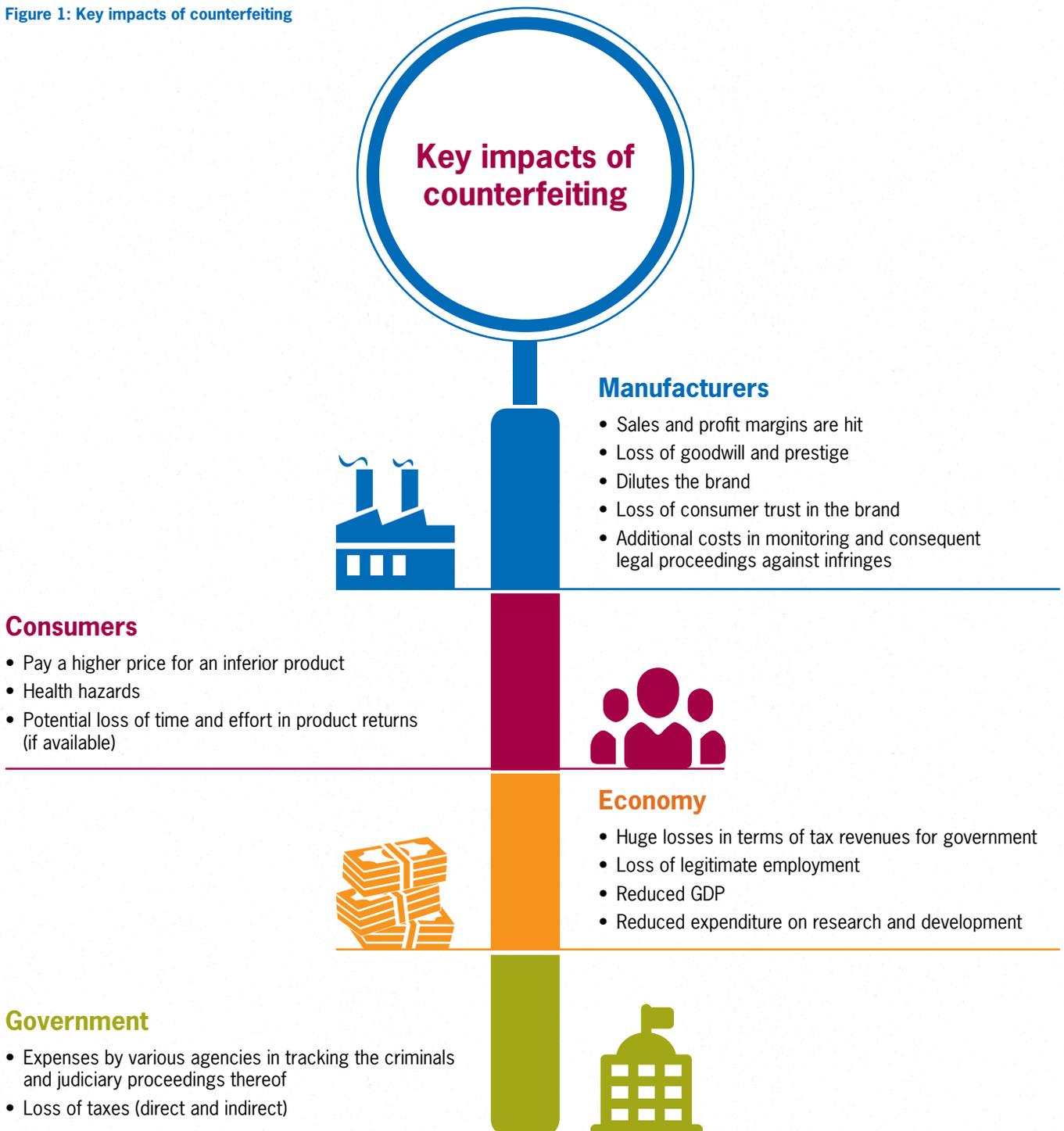
3. What is Counterfeiting, IACC

4. Smuggling, Legal-dictionary



Research suggests losses caused by counterfeit products amounts to **US\$ 700 billion globally.**

Figure 1: Key impacts of counterfeiting



1.2.1. Consumers

Social motivations, desire to buy luxury brands, comparison with the peer group often compels consumers to purchase counterfeit products. Sensitivity to price is another motivator that draws them to purchase smuggled or counterfeited goods. Besides this, there is another group of consumers which is oblivious to the fact that what they are buying may be a counterfeit. The aftermaths of buying a counterfeit product however, inflict upon both the groups of consumers. Buying of such counterfeit products affects the health and safety of consumers adversely as the products are made of inferior material and fail to meet the designated safety standards. Research also substantiates the fact. Indirectly, customers bear the cost of counterfeiting through higher prices demanded by corporate expenditures incurred on intellectual property.

1.2.2. Government

Governments world over, lose billions of dollars in tax revenues owing to counterfeit and smuggled products. Specifically, in terms of sales tax, excise tax, income tax and customs duty, the losses mount year-on-year. These are especially high in certain sectors including tobacco and alcoholic beverages where, excise taxes are high.

Coupled with the costs incurred in judicial proceedings in various associated law enforcement agencies, the effort and cost entailed by the various government bodies to seize these goods is gruelling.

Figure 2: Losses to the government



Source: FICCI CASCADE

5. The Wall Street Journal

1.2.3. Manufacturers

Manufacturers are the hardest hit by the phenomena of illicit trade. In addition to the tangible impact of revenue lost by the trademark owner to the counterfeiter, there are elusive impacts which are far more treacherous. Loss of goodwill, dilution of brand and loss of consumer trust are some disastrous impacts. However, it is difficult to estimate the loss in numbers. Moreover, the process of brand repositioning itself and gaining consumer trust is cumbersome and risky. Such repercussions are prolonged when lost revenues result in loss of jobs and a negative sentiment affecting the economy and imposing a multiplier effect.

1.2.4. National security

Counterfeit products when deployed in certain crucial sectors such as defence pose a severe threat to national security. Another increasing trend is the involvement of terrorist organisations in counterfeiting, piracy and smuggling activities. The funds thus raised are often used in funding terrorist activities. Such cases have been reported from several parts of the world. A 2010 report by the United Nations for instance, highlights that trade in illicit tobacco helped fund the Taliban and Al Qaeda.⁵

1.2.5. Economy

The larger impact of smuggled and counterfeited activities is on the economy as a whole. It weakens the local industry, dampens legal imports and drastically decreases the volume of revenues collected from various duties and levies by the states.

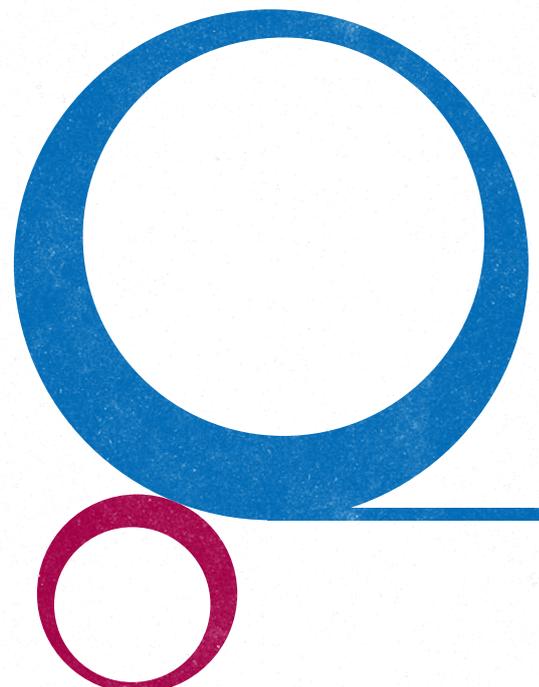


Table 1: Seizures of imported counterfeit and pirated products from the top 20 source economies

Region of top 20 source economies	Number of source economies in region	Seizures (% of total)
Asia	12	69.7
Middle East	2	4.1
Africa	2	1.8
Europe	2	1.7
North America	1	1.1
South America	1	0.8
Total sources	20	79.2

Source: OECD, 2007 (Note: The seizure percentages are based on trade weighted data from 19 reporting economies.)

Statistics from OECD suggest that these activities are rampant in virtually all the economies across the globe. Data provided by customs officials suggest that products intercepted were from close to 150 source economies, including 27 of the OECD's 30 member countries. The sources mentioned included those economies where counterfeiting and piracy were proliferating, as well as economies that served as intermediate shipping points. Amongst the top 20 source economies, Asia emerged as the largest source for counterfeit and pirated products, with China as the single largest source economy.⁶

Table 2: An illustrative lists of products subject to IP infringements

Industry	Examples of products subjects to IP infringement
Apparel, footwear and designer clothing	T-Shirts, hats, jerseys, trousers, footwear, caps, socks
Audio-visual, literary and related copyrighted work	Music, motion pictures, TV programmes, (CDs and DVDs), software, books, computer/video games
Automotive	Engine parts, body panels, air bags, tires, bearings, suspension and steering components, clutch plates, oil, filters, oil lumps, water pumps, chassis parts, engine components, lighting products, belts, wiper, interiors trim, brake fluid, sealing products, wheels, bulbs
Consumer electronics	Components components (monitors, casing, hard drives), computer equipment, webcams, remote control devices, mobile phones, TVs, CD and DVD players, loudspeakers, camera, headsets, USB adaptors, shavers, hair dryers, iron, mixers, blenders, pressure cookers, kettles, deep fryers, lighting appliances, smoke, detectors, clocks
Electrical Components	Components used in power distribution and transformers, switchgears, motors and generators, gas, and hydraulic turbines and turbine generator sets, relays, contacts, timers, circuit breakers, fuses, switchgears, distribution boards and wiring accessories, batteries
Personal accessories	Watches, jewellery, glasses, luggage, handbags, leather articles
Tobacco	Cigarettes, cigars
Other household products	Home and personal care products, including shampoos, detergents, fine fragrances, perfumes, feminine protection products, skin care products, deodorants, toothpaste, dental care products, shaving systems, razor blades; shoe; polish; non-prescription medicine

Source: OECD 2007 - Instances of products most widely counterfeited and smuggled in various sectors. The expanse of such products (in terms of various categories within a single product or goods across industries) is especially vast in automotive and consumer electronics.

6. The economic impact of counterfeiting and piracy, OECD

1.3. Key drivers of the trade and associated implications

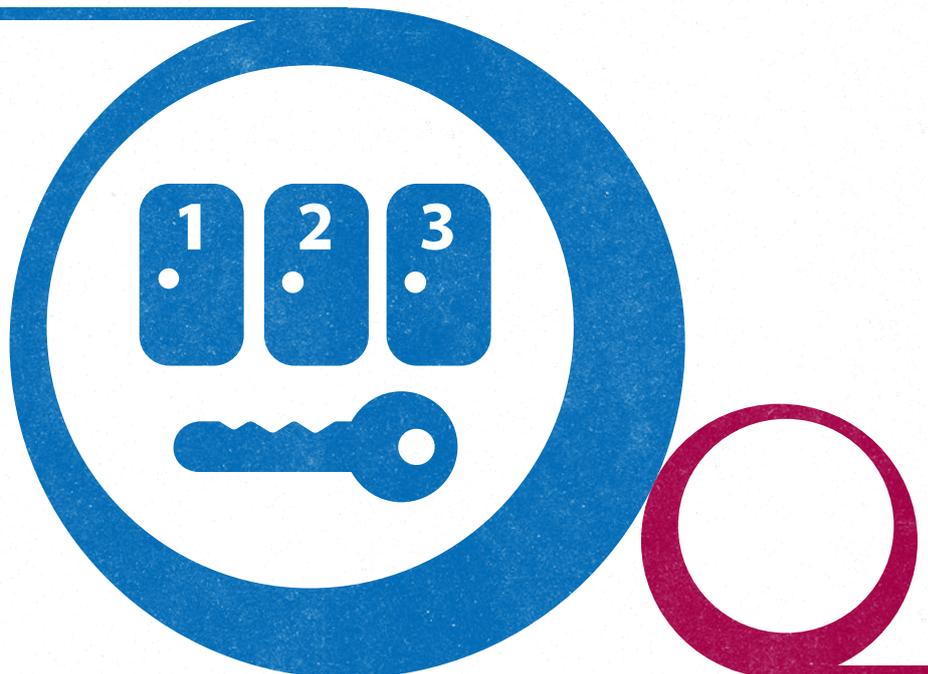
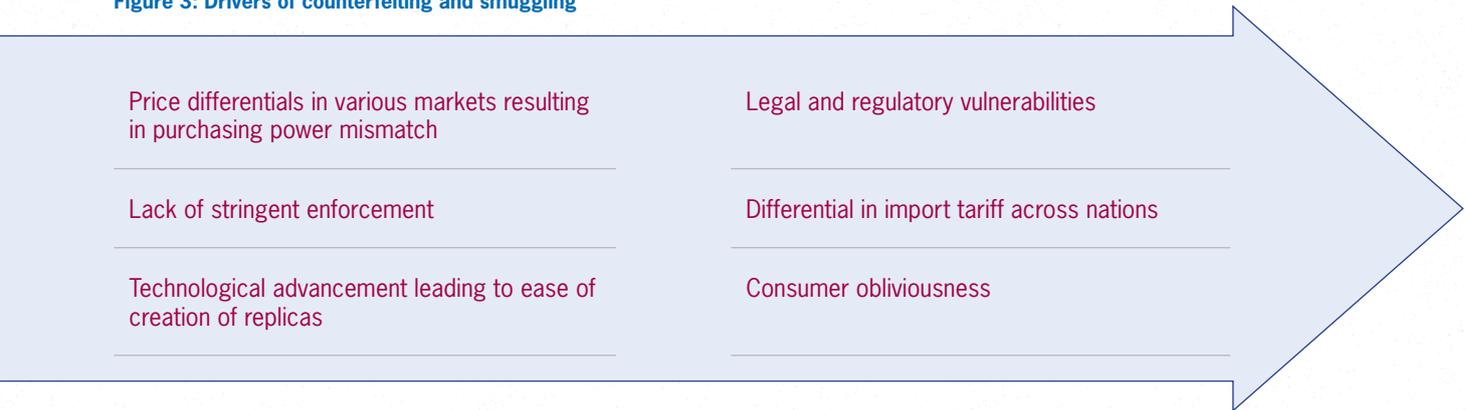
1.3.1. Drivers of counterfeiting and smuggling

Smuggling thrives on high tax differentials that prevail between neighbouring areas; in addition to weak border controls, and import restrictions typically on goods in high consumer demand. These factors result in the thriving of an illegal parallel economy.

One of the critical causes of activities such as smuggling and counterfeiting is the existence of price differences between various markets. These highlight a significant gap in consumer purchasing power in different countries and as a result, act as an instigator to produce and distribute counterfeit goods in their local market.

Further, certain new technologies are supporting such activities as they allow easier reproduction of IPR bearing products and goods, and facilitate reproduction of products in nearly every industry. Additionally, lack of political will and inadequate enforcement at various levels encourages the practice.

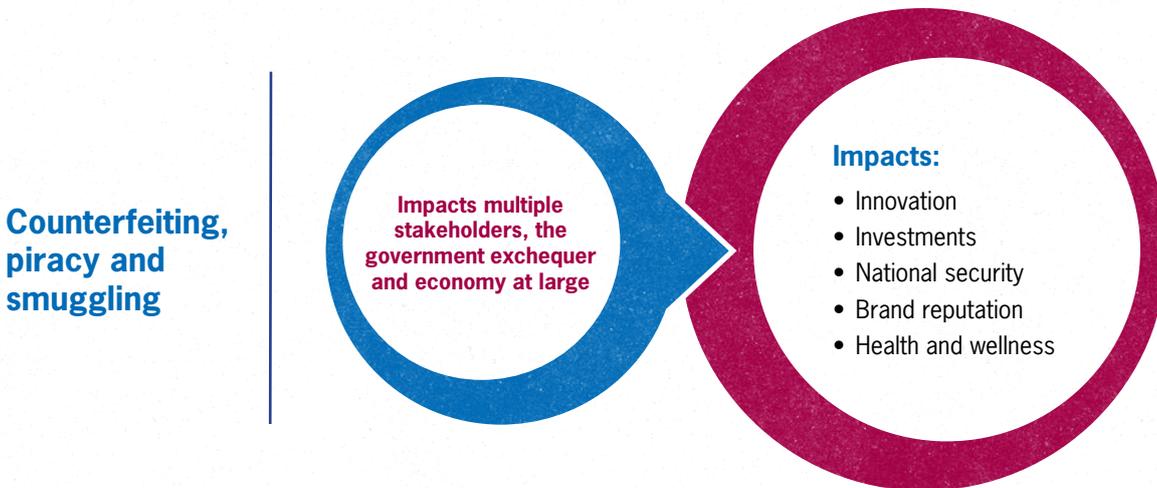
Figure 3: Drivers of counterfeiting and smuggling



1.3.2. Implications of counterfeiting and smuggling

Counterfeiting and smuggling have a far reaching impact on individual stakeholders, which rapidly percolate to the entire economy. Smuggling weakens the local industries, legal imports and impacts government exchequer by way of revenue loss in form of duties and levies. It leads to breeding of a parallel economy which is detrimental to the development and well-being of the citizens. The criminal networks behind smuggling and counterfeiting extend to activities such as the manufacture, export, import and distribution of illicit goods.⁷

Figure 4: Impact of illicit trade



Law enforcement authorities today face a daunting challenge with the magnitude of activities around counterfeiting. Counterfeiters have now started adopting novel methods to prevent their detection. The severe impact of these activities include:

Downfall of local industries

Smuggling drastically cuts prices of locally manufactured goods thereby destroying the market for local products, resulting in local industries to breakdown. The impact of the problem is to the extent that it leads to unemployment. Manufacturing employs a substantial percentage of skilled and unskilled labour in the country and this sector is the most hit. Moreover, the challenge is bigger for local manufacturers for whom the struggle continues in the unfair but highly competitive market.

Loss of revenue

Central and state governments suffer heavy losses by way of loss of sales tax, customs and excise tax etc. These losses run in several crores and there is an additional effort to seize smuggled goods by various agencies further adding to the cost for the exchequer.

Breeding ground for criminal activities

Often financial gains are further deployed for illegal activities such as drug trafficking and other organised crimes. Research also suggests that terrorist activities are supported by these gains, indicted a lot of activity being used to supplement wrongdoing. For instance, The Financial Action Task Force (FATF) conducted a study into money laundering and terror financing associated with the illicit trade in tobacco, wherein the WCO Secretariat and several WCO member administrations participated. It suggested that money laundering and terror funding was consequential to illicit trade in tobacco.⁸

Dilution of brand value and firm reputation

Inferior products tarnish the reputation of the manufacturer and dilute the brand image over time. Manufacturers lose their trust as consumers unknowingly buy fake products. There also lies a significant effort later for manufacturers to take its due in legal proceedings.

Curtails innovation

Increasing magnitude of counterfeited and smuggled goods discourages companies to invest and deploy resources in product innovation. Lack of adequate measures to protect intellectual property rights by way of patents, copyrights, trademarks etc. curbs the willingness to innovate or spend on research and development.

7. UNODC

8. Illicit Trade Report 2012, WCO

1.4. Industries impacted

Smuggling and counterfeiting is now hurdle for growth for almost every sector in India. Authentication Solution Providers Association (ASPA) suggests the presence of counterfeit specifically being highest in FMCG packaged foods, personal goods, mobile phones, alcoholic beverages, bottled water, pharmaceuticals, etc., causing billions of losses to industry and the government.

ASPA estimated the direct and indirect loss to the government from counterfeit goods at INR 392 billion in 2014 compared to INR 130 billion in 2012.⁹ Findings from the report by FICCI CASCADE suggests that illicit market in seven select manufacturing sectors including fast moving consumer goods (FMCG), tobacco, alcohol and mobile phones led to a loss of INR 39,239 crore during 2014.¹⁰

Table 3: Estimated Tax Loss to the government

Industry Sector	Direct Loss (INR Crore)	Indirect Tax Loss (INR Crore)	Tax loss to the Exchequer (INR Crore)
Auto Components	421	2305	2726
Alcohol	260	2250	2510
Computer Hardware	47	1187	1234
FMCG (Personal Goods)	867	3776	4646
FMCG (Packaged Goods)	552	5108	5660
Mobile phones	496	2678	3174
Tobacco	861	5379	6240
Estimated Annual Loss	3504	22686	26190

Source: FICCI CASCADE (loss calculated for the year 2012)

Further, a detailed study of seven sectors in India conducted by FICCI CASCADE has shown some interesting results with respect to the size of illicit market and losses to industries. The estimated loss to these seven sectors increased by 44.4 percent in two years, from INR 72,969 crore in 2011-12 to 1,05,381 crore in 2013-14.

Table 4: Loss of sales to the industry (in INR 2013-14)

Industry Sector	2013-14	2011-12
Alcoholic Beverages	14,140	5,626
Auto Components	10,501	9,198
Computer Hardware	7,344	4,725
FMCG (packaged goods)	21,957	20,378
FMCG (personal goods)	19,243	15,035
Mobile phones	19,066	9,042
Tobacco	13,130	8,965
Total Loss	105,381	72,969

Source: FICCI CASCADE

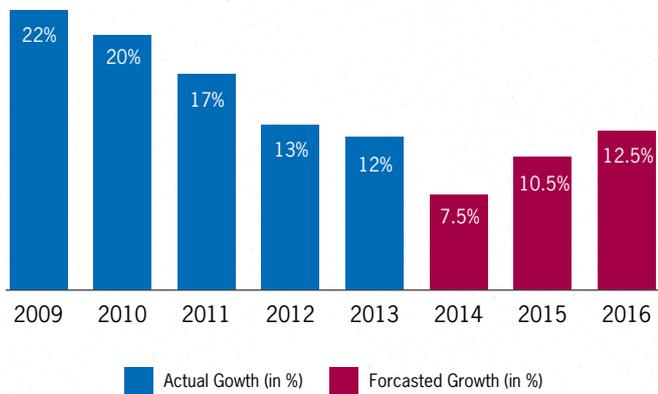
9. Presence of fakes highest in FMCG and liquor: ASPA, NavHind Times, 24 November 2015

10. ILLICIT MARKETS: A threat to our National Interest, FICCI CASCADE

1.4.1. FMCG

Often referred to as the consumer packaged goods or CPG industry, the multi-million dollar sector constitutes famous brands that we use every day. These are essential items we purchase and use in our everyday lives. FMCG goods are referred to as ‘fast moving’ because these are the quickest items to leave the shelves and also tend to be the high volume, low cost items.¹¹

Figure 5: FMCG Value Growth Rate (%)



Source: AC Nielsen

The sector is rapidly growing in India. Research firm, Nielsen predicts the industry to grow to US\$ 49 billion in 2016.¹² Losses in FMCG sector are extremely high from counterfeited and smuggled goods.

A pan-India movement was initiated by FICCI CASCADE against smuggling and counterfeiting amongst youth and consumers with the objective to enhance understanding of grey markets for such illicit goods. It estimated overall loss to the government due to counterfeit brands in 2012 at INR 16,546 crore in the Indian FMCG sector alone. FICCI CASCADE report, **Illicit Markets - A threat to our national interests**, based on grey market estimation, pointed out the losses to the government annually to the tune of INR 4,646 crore in personal care and INR 5,660 crore in the packaged goods.¹³

1.4.2. Fashion and Apparel

Recent developments suggest that several global brands in India have suffered a dip in their sales owing to fake counterparts of accessories and apparel being produced. It also came to light that goods in this category are smuggled from countries including China and Thailand, which then reach seaports in different parts of India. These are then distributed further to various states by other modes of transport.¹⁴

Smuggling of apparel is also rampant in India, in the used wearable clothes category, which are smuggled from special economic zones (SEZs) to enter the Indian retail market.

Data suggests that as much as 30 percent of imports into the SEZs are smuggled into the domestic market. Though the import of wearable clothes in India requires licence from the government, yet, this is another channel which is significantly contributing to thriving illicit trade as it entails a payment of merely INR 50 a kg at custom checkpoints.¹⁵



11. The FMCG Industry, About FMCG, 2015
 12. What’s in store for FMCG Market, Nielsen, November 2014
 13. FMCG sector: Govt. loss at INR 16,546 crore due to counterfeit brands, Indian Express, 2013
 14. Fake brand items flood markets, Times Of India, February 2013
 15. India emerges top importer of used clothes, Business Standard, October 2015

1.4.3. Tobacco

The industry in particular has observed rise in illicit tobacco product trafficking, making it a growing threat to the national interests of not India but several economies worldwide. Excluding China, the illicit market is forecast to grow by 16 percent in the next five years. Within this, the consumption of cigarettes along will reach to 660 billion a year.¹⁶

If one was to deep dive into the concept of illicit tobacco, it simply refers to the trade in tobacco products that are illegally manufactured, distributed or sold. As per the U.S Family Smoking Prevention and Tobacco Control Act, the term “illicit trade” means “any practice or conduct prohibited by law which relates to production, shipment, receipt, possession, distribution, sale, or purchase of tobacco products including any practice or conduct intended to facilitate such activity.” The Financial Action Task Force (FATF) is of the view that “Large-scale organised smuggling likely accounts for the vast majority of cigarettes smuggled globally.” Trafficking in this context flourishes through similar routes as drugs, weapons or other illicit forms of trade.¹⁷

It has grown to become a thriving business globally, and a multi-billion dollar industry which propels organised crime and funds terrorist operations. For instance, in 2013, customs officials in Ireland seized € 4.3 million of counterfeit cigarettes believed to be part of an operation with ties to the Real Irish Republican Army.¹⁸ When one looks at the industry in India, it is significant and makes remarkable contribution to the economic growth, approximately US\$ 900 million of foreign exchange.¹⁹ The nature of tobacco industry is such that despite high taxes, the complex tax structure offers sufficient room for manipulation and at the same time, the rise in taxes in parallel, spurs the smuggling of inferior products. This not only results in losses to the government, but also poses massive health hazards to the consuming population. Tobacco Institute of India suggests that these account for 20 percent of the market and cost the exchequer INR 7,000 crore (or US\$ 70 billion) worth of taxes.²⁰

The Directorate of Revenue Intelligence (DRI) reported cigarette smuggling in the country to have increased fourfold (by value). According to a working paper by the World Health Organisation (WHO), import duty evasion from smuggling into the country for the financial year 2014-15 was estimated to be around INR 2,363 crore. Additionally, it also suspected cigarettes smuggled from Korea, Indonesia, China, Singapore and United Arab Emirates.

16. Wall Street Journal

17. THE GLOBAL ILLICIT TRADE IN TOBACCO: US Department of State, 2015

18. Wall Street Journal

19. Indian Tobacco Industry 2014-15, Mirror

20. How India's tax system helps cigarettes flourish, Rediff, September 2015

21. Times Of India, 2015

After being smuggled from these countries, criminals then take advantage of porous borders in several places in South-East Asia, including Delhi, utilising it as the transit point for smuggling goods out of the country.

Governments, manufacturers and trade bodies have constantly stressed on the need to curb illegal trade of tobacco products. The Directorate of Revenue Intelligence (DRI) has been active in seizing shipments of cigarettes by acting on specific alerts, conducting random checks and adopting an agile attitude to curb illicit trade in this category.

Since March 2015, around 4.96 crore cigarette sticks worth INR 37.29 crore have been seized by the DRI and customs in Gujarat with over 90 percent of the hauls coming from Mundra port.²¹ A similar racket was exposed by the Department in Hyderabad early this year followed by a major seizure of 3.21 crore cigarettes of the high-value brands, valued at INR 23.29 crore from the Adani Hazira port in Gujarat. In both the instances, smuggling was reported to transpire from Dubai.

The modus operandi of criminals has enhanced. The smuggling, as shown by DRI, happens through cargo, baggage and courier mode. The regional units of DRI are becoming increasingly active in their efforts to curb smuggling. However, there have been some progressive efforts in this direction. The DRI has been conducting regular surveillance operations. A robust outlook adopted by the government and other associated stakeholders is also certainly adding up to the fight against the menace in this industry.



Why combating cigarette smuggling is critical?

- A highly profitable revenue stream for illicit networks, it fuels transnational crime, terrorism and corruption.
- Magnifies black marketing and facilitates funding for several other criminal activities including trafficking in humans, drugs, weapons and other pirated goods.
- Associated penalties with cigarette smuggling as opposed to trafficking in humans or narcotics is low. Low risk and high reward thereby make it lucrative for criminals.
- Robs governments of their revenues, annual state and local tax loss was estimated to be US\$ 2.95 to US\$ 6.92 billion for US, while for European Union it was estimated between 7.8 and 10.5 billion annually.

US Department Of State

1.4.4. Technology

Technology sector has flourished in India with estimates suggesting that the sector along with Business Process Management (BPM), including hardware;) having generated US\$ 146 billion in revenue during FY15 compared to US\$ 118 billion in FY14, implying a growth rate of 23.72 percent.²²

Coupled with this unprecedented growth is however, a lack of efficacy in implementing adequate programmes to make consumers aware of the hazards imposed by using counterfeits. These do not meet the suitable compliance standards.

To exemplify: A study by the Indian Centre for Materials for Electronics Technology (C-MET) tested safety standard compliance of 150 parts and components of 15 counterfeit mobile handsets available on the Indian black market. It found all uncertified mobile phones containing very high levels of hazardous substances, especially Lead (Pb), the values being 35-40 times higher than the globally acceptable limits in some instances.²³

A FICCI CASCADE report suggests the mobile phone industry has suffered a total loss of INR 19,066 crore due to the illicit market in 2013-14.²⁴ About US\$ 100 billion worth of counterfeit technology hardware is sold worldwide each year, according to the data from Alliance for Grey Market and Counterfeit Abatement (AGMA).²⁵

“If you want to buy an expensive smart phone, you will have to shell out at least over INR 20,000. But duplicate phones are available at as low as INR 6,000. The duplicate ones run as good as the original ones.”

A mobile shop owner in
Mumbai

Losses in mobile phone industry

- The share of grey market within the mobile phone industry for 2012 estimated that the loss to the industry in 2014 would stand at INR 19,066 crore. This was an increase of 111 percent in comparison with the loss of INR 9,042 crore determined in the year 2012.
- This reflects a significant increase in the losses on account of operation of the illicit markets.
- Loss to the government has also increased significantly from INR 3,174 crore in 2012 to INR 6,705 crore in 2014.

Source: FICCI CASCADE report on Illicit Markets: A Threat to National Interests

22. IT and ITeS Industry in India, IBEF, September 2015

23. Buying a counterfeit mobile phone could be deadly, GSMA, February 2014

24. Counterfeits causing INR 19,000-cr loss to smartphone industry: FICCI report, Business Line, October 2015

25. Fake computer hardware, IACC

1.4.5. Automotive

Automotive industry in India is one of the largest in the world and accounts for 7.1 percent of the country's gross domestic product (GDP). The sector has witnessed unparalleled growth owing to ever growing demand and consequently heavy investment by auto makers. In fact, statistics from IHS suggests that India will become the third largest automotive market in the world by 2016 ahead of Japan, Germany and Brazil, on account of the domestic automotive sales.²⁶

Statistics by the Department of Industrial Policy and Promotion (DIPP) suggest the industry has attracted foreign direct investment (FDI) worth US\$ 13.48 billion during the period from April 2000 to June 2015.

The automotive aftermarket continues to be plagued by illicit trade, which primarily comprise of defective auto components and accessories. Auto Component Manufacturers' Association of India (ACMA) estimates Indian automotive components aftermarket to be around INR 250 billion.²⁷ The level of counterfeiting poses enormous risk to the lives and safety of consumers. Moreover, lack of safety standards for the aftermarket leads to the imports being unchecked. Separately, instances of luxury cars being smuggled into India have continued to be brought to the forefront by various enforcement agencies including such as Central Bureau of Investigations (CBI), Enforcement Directorate, Income Tax Department, and the Customs Department.

ACMA suggests about 20 percent of all road accidents in India directly or indirectly can be attributed to the use of counterfeit automotive parts. In 2012, India recorded 490,383 road accidents, with fatalities standing at 138,258. Not only this, the fake parts market results in a huge loss for the government, to the tune of about INR 2,200 crore annually in tax revenue.²⁸

26. India to be world's third largest auto market by 2016: IHS, Rediff, July 2013

27. Strengthening Supply Chain Integrity to Combat Illicit, FICCI CASCADE

28. 40 percent of auto parts sold are fake, Business Standard, June 2014

29. About INR 39,000-crore loss in one year due to illicit markets in manufacturing sectors: FICCI report, Indian Express, 28 July 2015

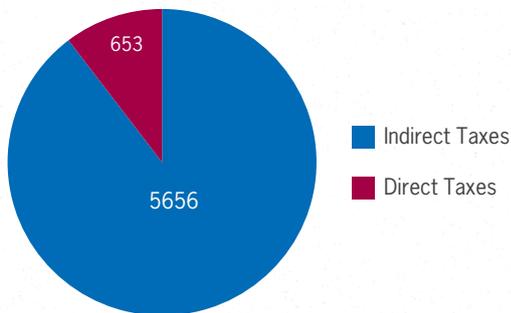
30. DNA India

1.4.6. Alcohol

Liquor industry in India witnesses a high level of risk owing to the associated regulatory environment. Spurious liquor is a grave concern as it endangers lives of consumers. Various state governments have over the years continued to struggle on account of spurious liquor and the accounted losses thereof. However, relevant steps have been taken in this direction. For example, the Excise and Taxation Department in states including Punjab, Himachal Pradesh having deployed tamper proof holograms on liquor bottles. However, the complexity and degree of menace has continued to rise sporadically.

One of the trends in the industry is counterfeit labels of well-known brands. Owing to huge profit margins in premium brands, perpetrators package inferior quality liquor blends which directly impacts the reputation of the brands. FICCI CASCADE estimates a revenue loss to the tune of INR 6309 crore in the alcohol industry in 2014.²⁹

Figure 6: Total Estimated Loss to Government Alcoholic Beverages (INR Crore)



Source: FICCI CASCADE

Further, restrictions on foreign liquor in certain geographies have triggered these states to become the transit point for liquor smuggling. For instance, Maharashtra exercises a policy of discouraging liquor consumption through high prices and low sales and also has one of the highest excise duty regimes in India. However, neighbouring states and union territories such as Goa and Daman with their comparatively liberal policies and lower costs of liquor provide a huge incentive for smugglers and bootleggers to smuggle in the drink to Maharashtra. With neighbouring state Gujarat under ban, Maharashtra has become a transit point for transporting liquor from states such as Haryana and Madhya Pradesh to the dry state.³⁰

1.4.7. Music and Movies

Digital music theft has been a prime factor behind the decrease in the sales over the past 15 years. Additionally, mobile boom in the past few years has also added to the decline.

The movie industry in India, typically featuring Bollywood is expected to grow to US\$ 40.3 billion (at 11.6 percent CAGR) by 2018. The growth will primarily be led by digitally driven revenues. But this growth would be affected by piracy.³¹

The Indian film industry estimated at INR 15,000 crore incurred a loss of 10 to 20 percent annually because of piracy.³² Lack of stringent laws in the segment and minimal fines has led to the failure of keeping piracy in check. One of the popular modus operandi deployed towards piracy is the rough file sharing networks.³³

1.4.8. Software

The growth of software piracy is synonymous with the growth of the information technology (IT) sector. Counterfeit software products often lack key features, documentation and upgrade options. They are mostly unreliable and are more prone to bugs and viruses. This unlawful sale of counterfeit software is costing major IT on account of the losses.

The impact of illicit trade is far reaching across sectors in India. FICCI CASCADE studied the extent of the grey markets in key industries. The overall grey market percentage has grown. The estimated losses are on account of tax revenues inclusive of both direct and indirect taxes (Refer tables). If one were to estimate the incremental costs incurred by government on account of welfare measures, enforcement, legislation and interest costs, the losses would be significantly higher.

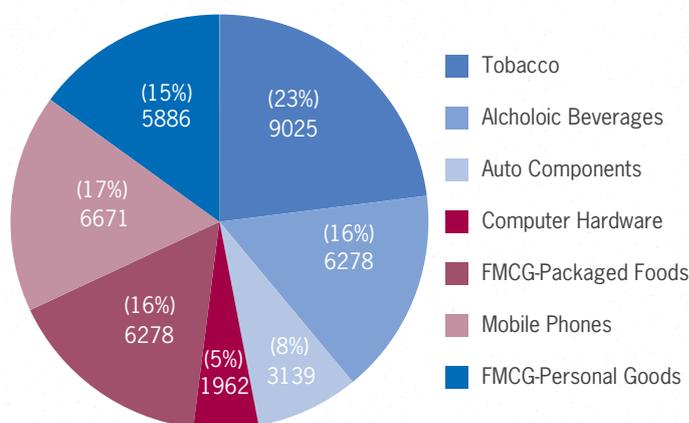
Specific measures to curb illicit markets by enforcement agencies, and adoption of enhanced technology monitoring to identify counterfeit products in various sectors would go a long way in reducing the extent of these activities.

Table 5: Industry-wise grey market share

Industry	Grey Market percentage	
	2012	2010
Alcoholic Beverages	16.7	10.2
Auto Components	33.7	29.6
Computer Hardware	27.9	26.4
FMCG - Packaged Foods	21.7	23.4
FMCG - Personal Goods	31.6	25.9
Mobile	25.4	20.8
Tobacco	20.2	15.7

Source: FICCI CASCADE - The grey market percentages were determined for 2008 and 2010 in the 2012 report for individual sectors. The data provides a comparison of 2012 and 2010.

Figure 7: Total Loss to Government (INR 39,239 Crore attributed to 7 industries)



Total loss to the government estimated in 2014 on account of the illicit markets in specific industries is INR 39,239 crore. This is an increase from the previous figure of INR 26,190 crore in 2012.

31. 2015 Top Markets Report, International Trade Administration

32. Indian film loses about 2250 crore due to piracy, IBN, September 2015

33. Piracy cost Bollywood US\$ 959 million: Report, Times Of India, 2010

1.5. Market size

The problem of counterfeiting, piracy and smuggling in India is spread across industries. Moreover, it has continued to extend within organised and unorganised sectors. These practices are not novel to the Indian landscape and recent developments suggest these being widely carried out, with fake products consumed in virtually all countries and hence the concern becoming increasingly global than ever before.

1.5.1. Growth and magnitude of illicit trade, escalating globally

Information provided by Havocscope suggests global estimate of piracy at around US\$ 657.76 billion in 2012. The total availability of counterfeit products in the US was at US\$ 225 billion.³⁴

Researches suggest that China is the “global capital” of counterfeit products, with 8 percent of its GDP contributed by manufacturing/producing counterfeit goods. With respect to India, the problem is affecting almost every sector drastically including entertainment, apparel, medicines, software, finance, manufacturing, FMCG, automobile parts and electronics.³⁵ Unfortunately, several parts in India are exploited by perpetrators to serve as transit destinations upon smuggling goods from various countries.

As counterfeiting becomes an economic problem and an international concern with dramatic growth globally, there continues to be a constant battle of various stakeholders against the perpetrators, especially governments and manufacturers, who find themselves in a tight spot.

The magnitude of the problem is such that it encompasses not only exclusive goods, but items, that we, as consumers use regularly. This not only causes a serious risk to the health but also has disastrous repercussions on the economic growth. With a multiplier effect, production of fake goods pulls out the inducement to innovate or invest and with violation of intellectual capital across segments, research and development efforts go in vain.

The scope of illicit activities is expanding with each passing year. It encompasses infringement of intellectual property rights (IPR) over trademarks, copyrights, patents etc.

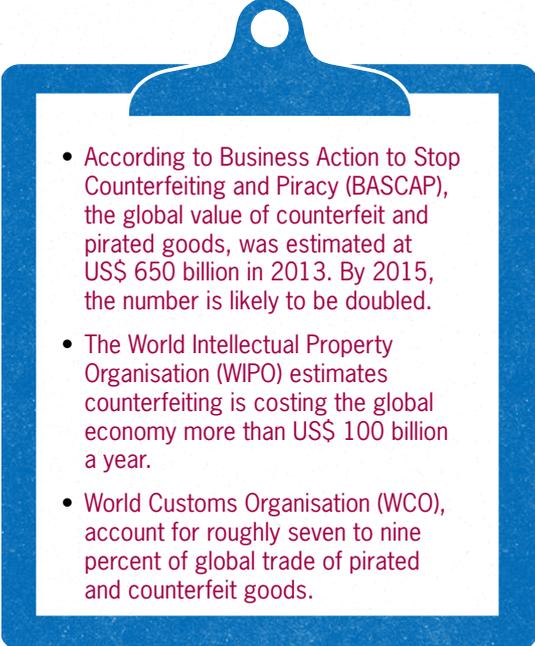
The volume of trade that passes through ports is ever increasing and the advancement in technology has constantly allowed counterfeiters to deploy new tactics and evade the law enforcement agencies.

Further, it is difficult to put across exact numbers for each segment but researchers suggest the growth has grown exponentially and across sectors.

Table 6: Global impact of counterfeit and Piracy

Global round-up - Counterfeit and Piracy

- International Chamber of Commerce (ICC) estimated the global economic and social impacts of counterfeiting and piracy to have reached US\$ 1.7 trillion in 2015. The losses are primarily on account of lost tax revenues and increased spend on enforcement.
- While international trade in fake products accounts for more than half of counterfeiting and piracy, it was estimated to reach US\$ 960 billion in 2015. Domestic production and consumption was estimated between US\$ 370 billion and US\$ 570 billion. Specifically with respect to digitally pirated music, movies and software, the figure was estimated at US\$ 240 billion in 2015.³⁶

- 
- According to Business Action to Stop Counterfeiting and Piracy (BASCAP), the global value of counterfeit and pirated goods, was estimated at US\$ 650 billion in 2013. By 2015, the number is likely to be doubled.
 - The World Intellectual Property Organisation (WIPO) estimates counterfeiting is costing the global economy more than US\$ 100 billion a year.
 - World Customs Organisation (WCO), account for roughly seven to nine percent of global trade of pirated and counterfeit goods.

34. The Global Growth of Counterfeit Trade, Havocscope

35. 'Counterfeiting costs India US\$ 7.8 billion annually', Hindu Business Line

36. Impacts of counterfeiting and piracy to reach US\$ 1.7 trillion by 2015, ICC, 2011

Growth in the counterfeit industry – A closer look at the Indian market

- A leading industry body suggests that counterfeit luxury retail market in India likely to double to INR 5,600 crore by 2015. The current fake luxury products market is estimated around INR 2,500 crore.
- The counterfeit luxury goods market is expanding at a CAGR of as high as 45 percent.
- Online commerce is a significant contributor to this growth accounting to over 25 percent of all fake luxury goods sold. The online luxury market worth INR 17,000 crore is growing at over 20 percent.

Source: A leading industry body

- Counterfeit and smuggled goods in categories such as alcohol, personal care products, tobacco, mobiles and mobile components, automobile components, and computer hardware and software rose from INR 72, 900 crore in 2012 to INR 1.05 trillion in 2014.
- The above increase is approximately a 44 percent growth and the growth rate surpasses the overall market growth of the country.
- The overall counterfeit market is reported to be increasing at 44 percent a year, around four times the speed of the FMCG market; it was estimated to be worth some INR 1.05 lakh crore in 2014.

Source: FICCI CASCADE

1.6. Current trends and best practices to combat counterfeiting and smuggling

1.6.1 Trends

A report by a leading industry body suggests the market for fake goods being driven largely by web shopping portals. This accounts for over 25 percent of the overall market for fake luxury products in India.³⁷ While e-Commerce websites are hailed for the range and discounts they offer, the medium has come under scrutiny for encouraging sales of counterfeit products.

The modus operandi of producing fake goods is also moving ahead with newer means adopted by perpetrators to smuggle goods and produce counterfeit goods. In addition to that, one can find luxury brands even in product categories not manufactured by the original brands. A classic example in this context is Harley Davidson deodorants.³⁸

Trends in counterfeiting and smuggling

- Dynamic industry with rising complexities
- Online marketplace an easy target
- Technology advancement acting as a catalyst to produce near replicas
- Lack of adequate enforcement procedures
- Tactics deployed in illicit trade taking a giant leap
- Reported losses of counterfeit goods on a steady rise
- Rising toll on health and wellness

37. http://www.business-standard.com/article/companies/buyers-love-for-discounted-luxury-products-spawns-fakes-online-114021501176_1.html

38. Counterfeit luxury products and how to recognise the genuineness, Economic Times, 23 July 2015

Dynamic industry with rising complexities

The counterfeiting and smuggling terrain in India has changed noticeably over the years, with cheats posing challenges for rights holders to enforce their rights in India effectively.

On the retail side, counterfeiting is confined to identified marketplaces and locations in specific cities such as Mumbai, Delhi, Chennai, Kolkata and Bangalore. Some industries such as pharmaceuticals, fast-moving consumer goods and electronics continue to face challenges on the wholesale side from infringing activities emerging via various demarcated 'industrial zones' across India. This is coupled with the fact that cheap, high-end products are often imported from China.³⁹ Moreover, the criminals continue to be creative in their ways to evade the law and produce such goods and utilise better technology to produce look alike.

Online marketplace an easy target of counterfeiters

Online marketplace is the up and coming as well as a convenient channel for selling fake products. With online shopping portals accounting for a higher percentage of fake luxury goods market in India, customers may not even realise that they are being duped while they indulge in shopping.

Reported losses of counterfeit goods on a steady rise

Lack of adequate enforcement and low monitoring levels especially, in smaller towns, has led to the activities grow enormously. This leads to corresponding rise in losses suffered by the exchequer. While globally counterfeiting losses were reported to have reached US\$ 1.7 trillion by 2015, the estimated annual tax loss to the Indian government have been estimated at INR 39,239 crore in a FICCI CASCADE study in 2014.

Technology advancements encouraging such activities

Developments in technology allow for better quality in printing and packaging which keeps the look of the product almost at par with the original. This makes the product almost impossible for a consumer to spot the difference. To support their illicit activities, they are agile to adopt new packaging technologies.

Lack of adequate enforcement procedures

Existence of a weak IP protection and law enforcement in India has continued to prompt fake manufacturers to duplicate other products in the market. Further, no strict action has been taken against the convicts. This has failed to establish a fear of law among culprits.

Tactics deployed in illicit trade taking a giant leap

Perpetrators take advantage of any loopholes or vulnerabilities in the framework to carry out illicit trade. For instance, an organised group of smugglers used children in the smuggling of goods and petroleum products from across the border amidst shortage of essentials.

Smugglers have been adopting both human carriers and the consignments (for example, in case of gold) as a means to fulfil their illegal motives. This has been a notable trend observed by the Directorate of Revenue Intelligence. Such instances highlight the appalling ways and means that continue to be deployed in the proliferation of illicit trade.

Rising toll on health and wellness

Repercussions of counterfeiting, piracy and smuggling are significant with multiplier effects on manufactures, businesses, the government, consumers and society at large.

One of the critical risks is on the health and wellbeing of consumers. For instance, a customer who unknowingly buys fake electrical beauty goods, such as a hair dryer may not realise that he is exposed to the risk of electrocution or fire.

Fake medicines, foods and beverages, toys, auto parts and health and beauty products endanger consumers and deny them of the benefits they expect from the legitimate products. The Automotive Component Manufacturers Association of India reported that use of fake parts resulted in 25,400 deaths and more than 93,000 injuries during 2009.



“Lacoste does not sell any of its products online. But its polo T-shirts costing more than INR 3,000 are being sold for as less as INR 1,000 on some e-commerce websites.”

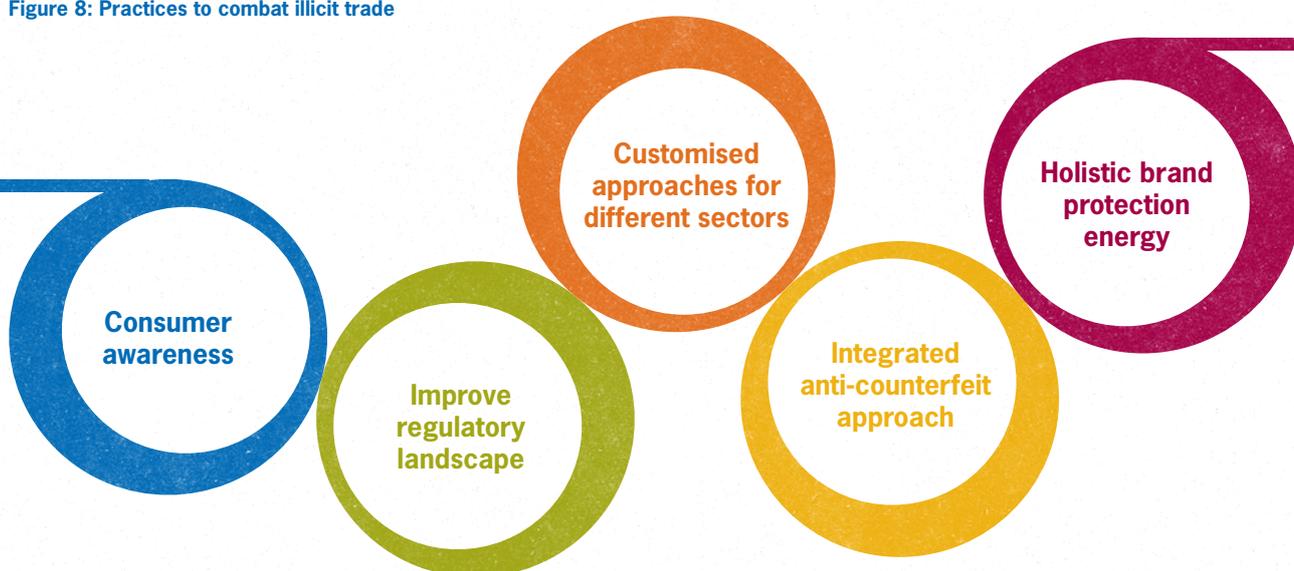
39. Developing an effective anti-counterfeiting strategy for India,

1.6.2. Practices to combat illicit trade

Illicit trade in itself needs to be recognised as a serious barrier to global trade. Globally, organisations such as the World Trade Organisation (WTO), which regulates global trade is continuing efforts in this direction. Agreements such as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and General Agreement on Tariffs and Trade (GATT) 1994 are instances of measures being enacted in this regard.⁴⁰

Losses from illicit trade are not merely estimates affecting multiple stakeholders and the economy at large, but these practices damage the social fabric of the country. Thus, industry involvement is required to tackle these issues. This is also because the reach of industry to deal with illegal activities is extensive and more effective. Implementation of track and trace systems, authentication solutions and collaboration of government agencies along with brand owners would act as an impetus as different stakeholders work towards a common goal.

Figure 8: Practices to combat illicit trade



Customised approaches for different industries

To curb digital piracy for instance, one could adopt technical controls, including digital rights management (DRM), network management, and content identification systems. These alone, may not completely evade, but would certainly impose difficulties for illegal operators. DRM technology for instance, prevents unauthorised use, such as licensing requirements on software and prevents content from being duplicated. Similarly, for other sectors such as automotive and cosmetics, one could follow suit.

Holistic brand protection strategy

Fulfilling the brand promise is critical to the very existence of brands and their legacy. But several years of efforts in building the brand is diminished when regularly challenged by illicit trade. Owing to the gaining popularity of the social networking mediums and new media, it takes few seconds for a consumer to express his dissatisfaction over his favourite brand. This is in comparison to the several months of efforts and huge amount of investments done to position itself in the market. It is prudent for manufacturers to therefore make Brand Risk Management (BRM) an intrinsic part of their long business plan and continually review and monitor the aspects associated with brand protection. Involving channel partners and consumers would allow tackling the issue at the grass root level.

40. PR Newswire

Integrated anti-counterfeit approach

It is vital that enforcement agencies take into account factors such as differences in geographies, diverse methods used by criminals and the ever evolving technological advancements used during these activities.

Geographical differences for example, are important to consider while implementing the anti-counterfeit programme.

For instance, the finished leather trade which is a continuing cause of concern for luxury brands such as Louis Vuitton, operates in the Dharavi slum area in Mumbai. Accessing Dharavi, a region which by and large lacks any formal addresses presents prime challenges in addition to securing adequate police protection when executing an anti-counterfeiting raid.⁴¹

Similarly, smaller towns and cities must be on the radar of the agencies as the level of monitoring in such areas is as it is low, which makes it pragmatic to carry out such activities.

The state of anti-counterfeiting solutions also needs to be modernised. The ASPA is of the view that India is at least 10 years behind in enforcing anti-counterfeiting measures compared to western countries.⁴²

Industry involvement is vital in battling these crimes given its better insight into markets, supply chains and effective control processes would help better the situation.⁴³ Implementation of track and trace systems, authentication solutions and collaboration of government agencies along with brand owners is a must in this direction.

Consumer awareness

A combined effort involving manufacturers, government and various enforcement agencies is critical to generate consciousness amongst consumers. Running targeted campaigns customised for different sectors including FMCG, automotive, electronics, fashion and apparel, tobacco, pharmaceuticals and many others, which bear the brunt of counterfeit and smuggled products would help increase awareness.

Further, highlighting dangers of buying and using these goods, if shared by way of experience would have a greater recall value in the minds of the public at large. These could be shared by consumers who have been using fake products knowingly or unknowingly. Designated member bodies such as leading manufacturers and enforcement agencies could also share their story, which would help others to understand seriousness of the issue.

Improving regulatory landscape

A weak regulatory system is the driving force behind counterfeiting and smuggling. Stringent anti-piracy regulations are a must to enforce IP rights and empower various enforcement agencies in India. As India's picture on the global map continues to improve and the focus of the new government on creating a digital India is increasingly felt beyond borders, so the nation's stance on IP rights and enforcement would also have to be taken a notch up. The effects of such efforts would be experienced by international trading partners and prospective business investors.

For manufacturers, adopting authentication tools such as holograms, watermarks, security inks and substrates, code based digital tracking etc. is imperative. Stringent regulations and heavy penalties in the event of failure to adopt the same would enforce manufacturers to take their anti-authentication efforts seriously. Further, agencies responsible for product quality such as the Bureau of Indian Standards (BIS) must also assume an active role in this regard.

41. Developing an effective anti-counterfeiting strategy for India, the IP Media group

42. Navhindtimes

43. PR Newswire

1.7. Geographies

A report by the United States Trade Representative has named Nehru Place and Palika Bazaar in New Delhi; Richie Street and Burma Bazaar in Chennai; Manish Market, Heera Panna, Lamington Road and Fort District in Mumbai and Chandni Chowk in Kolkata as markets that need to be watched out for high-volume illicit trade.

Needless to say, the Indian landscape is now more afflicted by counterfeiting, making it evident that the problem is not limited to a few cities or regions. However, there exist specific areas which are predominant in such trade and owing to their proximity to ports utilised as a transit point for the sale of black market goods etc. The spread of illicit trade is not restricted to a specific region in India. However, there are areas which are popular for certain category of goods.⁴⁴

Further, statistics suggest the spread of smuggled goods across India. Many regions have also come into light on account of increased number of seizures by adequate authorities in the recent past.

- Central Board of Excise and Customs (CBEC) revealed 35,500 cases of smuggling and commercial fraud recorded in 2012-13 as compared to 33,251 cases in the previous year.
- Less than 5 percent cases of the above were reported from Mumbai whereas Kolkata and Shillong accounted for over 64 percent of all the cases.
- In recent seizures across Maharashtra, the state excise department seized smuggled liquor meant for Christmas and New Year celebrations worth over INR 1.5 crore constituting premium brands and illegal imports from other states.⁴⁵
- Steep rise in seizures of smuggled cigarettes have been reported by the Directorate of Revenue Intelligence (DRI) and customs authorities. The airport customs at Delhi's Indira Gandhi International Airport seized over two crore sticks worth about INR 20 crore in 2014.⁴⁶
- Similarly, the regional unit of DRI and customs in Gujarat seized around 4.96 crore cigarette sticks worth INR 37.29 crore since March 2015.⁴⁷
- The Directorate of Revenue Intelligence (DRI) officials in Chennai recently busted international smuggling racket which targeted electronic equipment by operating an illegal network between Singapore and Chennai.

"India shares a 2,216 km open and porous border with Myanmar, Nepal, China and Bangladesh, serving as a haven for smuggling of drugs and narcotics."

DNA India

44. Industry report reveals Delhi contributes 75 percent to India's booming market in counterfeit goods, Mail Online India, 2013

45. DNA India

46. Steep rise in seizure of smuggled cigarettes, The Hindu

47. Smuggling of foreign cigarettes rampant in state, ET Retail, November 2015

As captured above, while the notorious markets continue to flourish, there are certain other areas which predominate in inferior goods of specific categories. Liquor in Maharashtra, electronic equipment in Chennai and fashion goods in Mumbai to name a few.

Table 8: Snapshot of illicit trade across India

City/ Region in India	Sector/Product most hit
Delhi Gaffar Market, Sadar Bazar, Khari Baoli, Bhagirath Place, Nehru Place and Kashmere Gate	Virtually all products spanning the sectors most hit by counterfeit and smuggled goods. <ul style="list-style-type: none"> • Gaffar Market: Mobile phones and accessories, cosmetics, electronic appliances • Sadar Bazaar: FMCG and cosmetic items • Nehru Place: A hub for fake electronics including hardware, pirated software, and computer accessories like pen drives, hard disks etc. • Kashmere Gate: Fake auto parts • Palika Bazaar: Fake smartphones and accessories, cosmetics and electronics • Sarojini Nagar: Fashion and Apparel, Watches and Cosmetics • Janpath: Fashion and Apparel
Northeast Manipur, Mizoram, Nagaland, Meghalaya and Tripura	The targeted sector in this region is Banking and Finance, with connectivity to neighbouring countries such as Bangladesh and large areas being unmonitored acting as a stimulus to produce fake currency notes. ⁴⁸ Another afflicted sector includes electronics and cosmetics
Mumbai Manish Market, Linking Road and Lamington Road	Electronics and Fashion and Apparel <ul style="list-style-type: none"> • Fake CDS and DVDs sold alongside unauthorised versions • Replicas of luxury fashion brands through the Linking Road
Hyderabad Cheney Trade Centre and Hong Kong Bazar	Electronics including computer hardware and software
Maharashtra	Serving as a haven for fake liquor. One of the drivers for this trend has been the prohibited liquor in Gujarat under prohibition, making Maharashtra a transit point for transporting liquor from Haryana, Punjab and Madhya Pradesh among other states The Mumbai- Ahmedabad national highway which restricts checking of vehicles at border posts for instance has been favoured by smugglers to transport liquor to Gujarat
Chennai Kasimedu Street and Burma Bazaar	Electronic equipment including mobile phones, pirated movie CDs, imported cameras, fax machines, LCD TVs, music players and iPod

48. 6 Reason's why Northeast is the Gate way to Illegal currency, Northeast Today day

1.8. Modus Operandi

As governments, manufacturers and the affected stakeholders are getting ready to put up a fight against counterfeiters and smugglers, illegal operators continue to change and reformat their modus operandi. This makes it a constant and never ending chase.

Advancement in technology, low levels of monitoring and the crime becoming organised more than ever before, allows the perpetrators to continually escape from the law enforcement authorities. By not resorting to specific means of engaging in such trade and changing means to suit their needs, they manage to turn the situation to their advantage. Moreover, slow pace of judiciary, long pending cases makes it easier for criminals to abuse the system and get away without being convicted for infringement of trademark or other related crimes in India.

In technology sector for instance, fake phones are increasingly flooding the metros. Traders in this business import imitation parts of phones and other smartphones, primarily from China and afterwards assemble them locally, only to sell those at throwaway prices.

Similarly, counterfeit cosmetics are sold widely by way of low-quality packaging, a poor replica of a genuine logo, and misspellings of brand names. Similar packaging, logo and branding with a minor change in the brand name is one of the most commonly adopted method. Interestingly, the criminals also sell products in categories which are not manufactured by the original brand.

As the police raid and seize such goods, criminals adopt an alternative method the very next day to meet their objective. Selling fake cosmetics through mobile accessories vendors (which are also fake) in popular markets like New Delhi is a classic case. In case of liquor, empty bottles are used by bootleggers to sell duplicates. Labels are removed and defaced from empty branded bottles that are not smashed by consumers.

Furthermore, e-Commerce is the newest channel adopted by counterfeiters to effectively reach a wider audience. As pictures of original products are posted by counterfeiters, consumers get misled and end up receiving the fake product. In this case, policing is even more difficult because of the absence of any stringent laws in online commerce. Moreover, websites in a lot of cases are registered outside the jurisdiction area and operate from another country.

Global online sales are projected to reach US\$ 1.09 trillion dollars by 2017, at a compound annual growth rate of 16.2 percent¹, outpacing growth in traditional retail. By the same time, it is projected that 46 percent of online transactions will be made outside the currently developed markets in North America and Western Europe.



e-Commerce marketplace and counterfeiting scenario

2.1. e-Commerce market - an overview of trends

The journey of e-Commerce in India has been phenomenal. What started as a buzzword has now become a household reality and quintessence of the business world. The country has witnessed tremendous growth in the e-Commerce world, changing the way people transact. The online market space is progressing in terms of diverse offerings; ranging from travel, movies, hotel reservations and books to matrimonial services, electronic gadgets, cosmetics, apparel, footwear, fashion accessories and even groceries. e-Commerce has influenced the way consumers make purchasing decisions. The barriers with regard to reach and convenience have been eliminated by the ease and comfort online marketing provides to its end users.

Increased use of smart phones, tablets and internet has propelled accessibility to both urban and rural users. Foreign companies are pumping large amounts of capital into Indian companies, as they foresee the potential they have in generating profits at a later stage.

A look at the numbers stands a testimony to the fact that the picture is rosy when one talks about the current and projected growth with respect to e-Commerce in the country.

A global management consulting expects the overall e-Commerce market in India to quadruple to US\$ 60-70 billion by 2019.⁴⁹ Industry players also expect fund inflows to continue and perhaps get stronger in the coming years. Retail e-Commerce in India is also growing leaps and bounds. Consulting firm Technopak points the US\$ 2.3 billion Indian e-tailing market in 2014 to reach US\$ 32 billion by 2020⁵⁰

Table 9 below reflects the huge growth in retail e-Commerce sales in India, the sector being an important contributor to e-Commerce sales. As shown, with a high year-on-year growth, retail e-Commerce sales are predicted to reach US\$ 47.49 billion in 2019 from an estimated figure of US\$ 11.10 billion at the end of 2015.

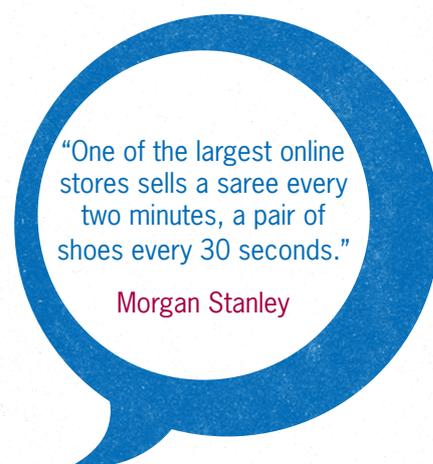


Table 9: Total Retail and retail e-Commerce sales in India (billions, % change and % of total sales)

	2014	2015	2016	2017	2018	2019
Total retail sales (US\$)	717.83	818.33	941.08	1082.24	1244.58	1418.82
% change (year-on-year)	13	14	15	15	15	14
Retail e-Commerce sales (US\$)	6.10	11.00	17.65	27.36	38.33	47.49
% change (year-on-year)	133.8	80.3	60.5	55.0	40.1	23.9
% of total retail sales	0.8	1.3	1.9	2.5	3.1	3.3

Source: eMarketer, July 2015

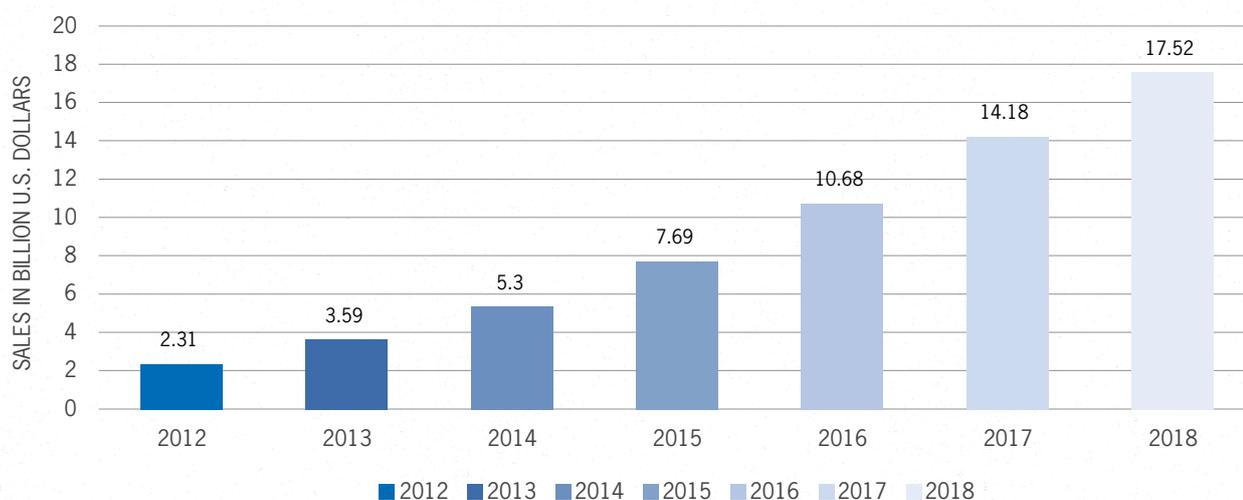
49. <http://www.bcgindia.com/documents/file181823.pdf>

50. DNA India

The overall growth of e-Commerce in India has been phenomenal over the years. Current numbers and projections by analysts indicate a huge potential for growth, as depicted below:

- The Internet and Mobile Association of India (IAMAI) estimates the Indian e-Commerce market currently at US\$ 16 billion.
- A leading industry body expects e-Commerce market to reach US\$ 250 billion in next ten years, as internet penetration would rise and digital network spread in the rural areas.⁵¹
- Internet market in India, valued at only US\$ 11 billion in 2013, could rise to US\$ 137 billion by 2020, according to a Morgan Stanley Research report, “The Next India: Internet - Opening up new opportunities”. This growth exhibits an enormous potential to drive economic growth, thus facilitating creation of new markets and industries.

Figure 9: Retail e-Commerce sale in India from 2012-2018



Source: Statista 2015 (Note: converted at the exchange rate of US\$ 1=INR 60.96;

*includes products or services ordered using the internet via any device, regardless of the method of payment or fulfilment)

The spur has been driven by rising disposable incomes and greater internet penetration.

51. e-Commerce market in India may touch US\$ 100 billion by 2020: Study, Money Control

2.1.1 The Indian online marketplace – characteristics and trends

India’s three largest online marketplaces, Amazon, Flipkart and Snapdeal sell diverse products ranging from books to electronics. Indian consumers today have made e-Commerce an inevitable part of their daily lives, making B2C e-Commerce leading the market in India, while B2B is limited to organisations which focus on online channels to integrate with their partners and distributors.

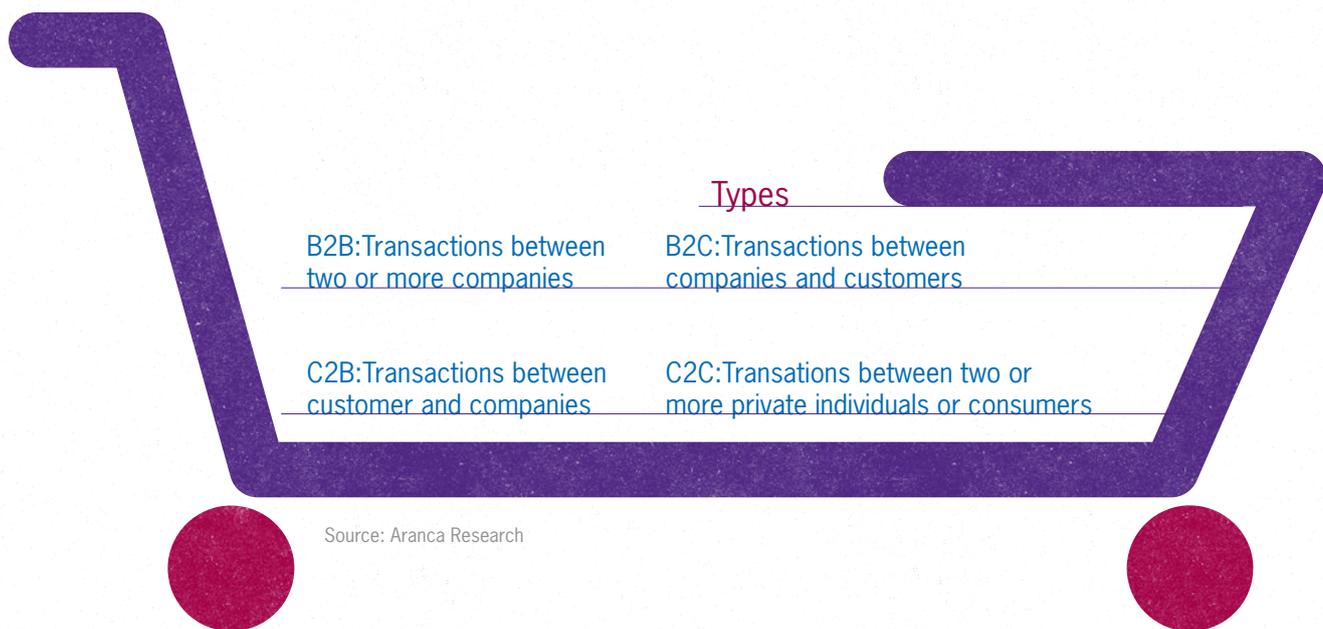
Typical characteristics peculiar to the Indian market and spurring trends in the space include:

1. Increased traction of mobile commerce

Increased usage of smartphones, tablets and ipads has made mobile commerce occupy a prominent position in the e-Commerce space. The smartphone market which is expected to double and touch US\$ 80 million by the end of the current fiscal⁵², has propelled consumer product goods, food and beverages companies and several others to invest in mobile commerce.

A Gartner study points at the rapid increase of mobile commerce in India; estimating over 40 percent of digital commerce transactions from a mobile device in 2014, anticipated to surpass 50 percent in the last year.⁵³

Figure 10: e-Commerce: segments



One of the challenges faced by the online retailers is that 80 percent of the Indian population lacks the mode/way to pay electronically for purchases. Cash still predominates the landscape, accounting for US\$ 1.4 trillion in transactions annually. Cash-on-delivery as a payment being widely adopted, is also creating an opportunity for mobile wallets to serve the large, unbanked population.⁵⁴

52. Indian smartphone market to double to 80 million by fiscal end: Samsung, Economic Times

53. e-Commerce players must focus on customer experience, product delivery: Gartner, The Hindu, November 4 2015

54. Morgan Stanley

2. Tier-2 and Tier 3 cities contribute largely to the growth

Rising disposable incomes, access to the internet and the demand for entertainment has created needs in Tier-II cities, which are progressively a key target audience for online marketplaces. However, this would also entail investment efforts from businesses in distribution centres, investment in logistics etc.

Owing to these trends, it is certain that Tier 1 and 2 cities present a large untapped market for companies to cash on.



“The e-Commerce opportunity in our target segment, the tier 2 and tier 3 cities, is growing even faster than the rest of the market.”

Shop clues CEO and founder,
Sanjay Sethi



Amazon has registered remarkable growth in Tier II cities, reaching 50 percent, from the 36 percent in the previous year.

3. Sector attracting huge investments

e-Commerce continues to be a preferred investment for venture capitalists and has ensued remarkable interest of investors and foreign firms alike. The overall business and investor sentiment has soared due to 2014 election of Prime Minister Narendra Modi. To exemplify, deals in private equity investment in particular, was recorded at more than US\$ 9.5 billion (In the first six months of 2015.)⁵⁵

e-Commerce start-ups have collectively raised more than US\$ 8 billion from private equity and venture capital investors since the start of 2014, including nearly US\$ 4 billion in 2015, pushing their valuations to high levels.⁵⁶ With the ongoing momentum, it is certain that e-Commerce companies will continue to attract both angel and venture capitalists. Moreover, as the e-Commerce industry continues to witness a magnanimous growth, more and more local companies will look up to venture capitalists making the space yield increase number of dollars year on year.

55. e-Commerce overdrive: Private equity investors infuse US\$ 9.5 billion in first half of 2015, Economic Times, July 2015

56. Twenty five people who matter in Indian e-Commerce, Mint, September 24, 2015

Table 10: e-Commerce activity in India

E-Commerce Activity In India (INR Crore)						
Category	2012 (Jan-Dec)		2013 (Jan-Dec)		2014 (Jan-Oct)	
	No. of Deals	Value (INR Cr)	No. of Deals	Value (INR Cr)	No. of Deals	Value (INR Cr)
M&A	23	1998	17	1098	23	3444
Private equity	56	3632	81	5028	80	16356
Total	79	5630	98	6126	103	19800

E-Commerce Activity In India (US\$ Million)						
Category	No. of Deals	Value (US\$ mn)	No. of Deals	Value (US\$ mn)	No. of Deals	Value (US\$ mn)
M&A	23	333	17	183	23	574
Private equity	56	605.3	81	838	80	2726
Total	79	938.3	98	1021	103	3300

Source: Grant Thornton, Deal tracker, US\$ 1=INR 60

4. Cash is king in the Indian setup

When compared to the developed markets, credit card penetration still has a long way to go in India. e-Commerce has thrived in the country, basis cash on delivery, which has served as a boost to the sector's growth, but at the same time is an evil for the marketplaces. Product returns add to the cost of the sellers by way of associated logistics commission and taxes etc. in addition to the credit cycles being hit with the cash on delivery model.

Cash on delivery is said to have popularised by Flipkart in India.⁵⁷ If one was to gauge the way forward with respect to this aspect, it is quite indicative that while the urban population might prefer use of credit cards owing to a working couple in the family or higher penetration of plastic money, Tier-2 and 3 cities might prefer cash on delivery. Times ahead in this regard would largely depend on the target audience of the business.

5. Innovation is fundamental to growth

The sector in India is estimated to have multiple players and consequently, severe competition. In their endeavour to capture a larger pie of the market, most e-tailers are adopting a strategy of constant innovation and diversification of their product portfolio.

Most of the players which start with a single product, eventually diversify their product portfolio with multiple offerings; Flipkart being a notable example of the trend. The marketplace broadened its offerings with various products such as mobile phones, computers, movies, music, baby products and stationery from its initial set-up of selling books online.⁵⁸

Similarly, Snapdeal, the second largest e-Commerce company which began operations as an online group discounting site in 2010, got converted into a marketplace with thousands of products.⁵⁹

57. Fresh trouble for e-Commerce: Vendors losing money as buyers turn back cash-on-delivery orders, Economic Times, 23 Jul 2015

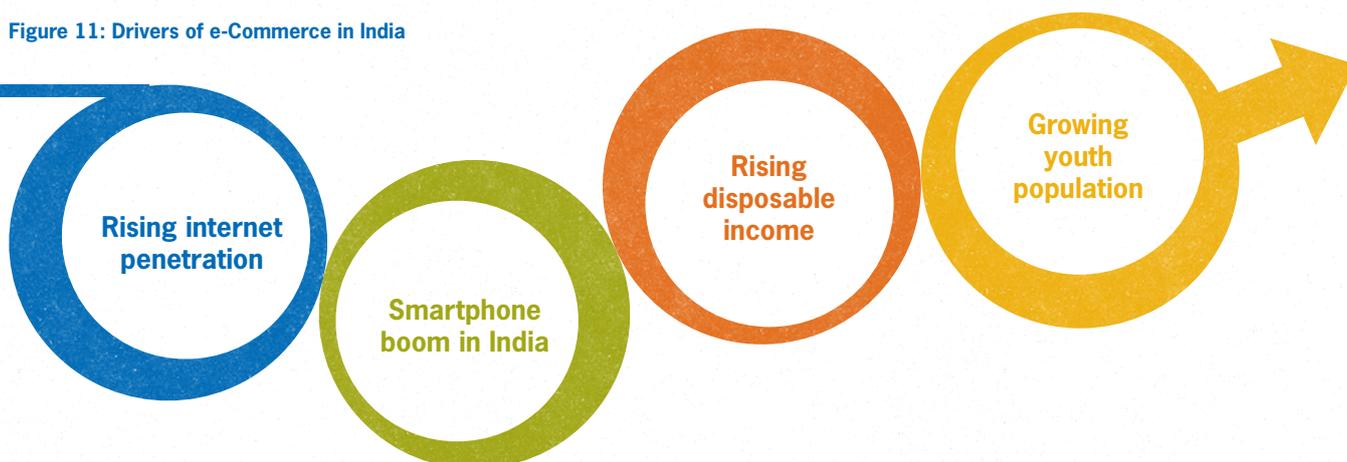
58. The rise and rise of e-Commerce in India, IBEF, 2013

59. The rise and rise of e-Commerce in India, IBEF, 2013

2.1.2 Indian online marketplace – drivers

India's e-Commerce segment is buzzing with activity. Booming smartphone usage and growing mobile internet access in a young country with 1.27 billion people contributing to this rapid growth, factors responsible for accelerating this growth include:

Figure 11: Drivers of e-Commerce in India



1. Rising internet penetration

Internet users in India have gone up from 50 million in 2007 to 300 million in 2014. Morgan Stanley expects the size of the Indian internet market to rise from US\$ 11 billion in 2013 to US\$ 137 billion by 2020 and market capitalisation of these internet businesses is estimated to reach US\$ 160-200 billion from the US\$ 4 billion in early 2015. With the maturing of this market year on year, more companies would get listed leading to an expansion in the market cap of internet companies making e-Commerce the largest part of the internet market at US\$ 102 billion.

2. Smartphone boom spurring m-commerce

A young professional surfing retail shopping sites while on his or her way to work is a common sight in India. Mobile internet is said to be one of the biggest contributors to e-Commerce success in India. The Internet and Mobile Association of India estimates in June 2015 suggest 354 million internet users in India, of which 213 million will be mobile users.

e-marketer estimates that by next year, over 200 million people in India will have smartphones, replacing the United States as the second largest smartphone market in the world. Zinnov predicts that India's mobile commerce market could reach US\$ 19 billion by 2019, up 850 percent from its current size of US\$ 2 billion.

These numbers reflect the scale of mobile revolution and the potential for its growth. Both Snapdeal and Flipkart have taken a mobile-first approach to their business. As a result, Snapdeal sees 75 percent of its orders come in via mobile devices, and 70 percent of Flipkart's orders are placed via mobile.⁶⁰

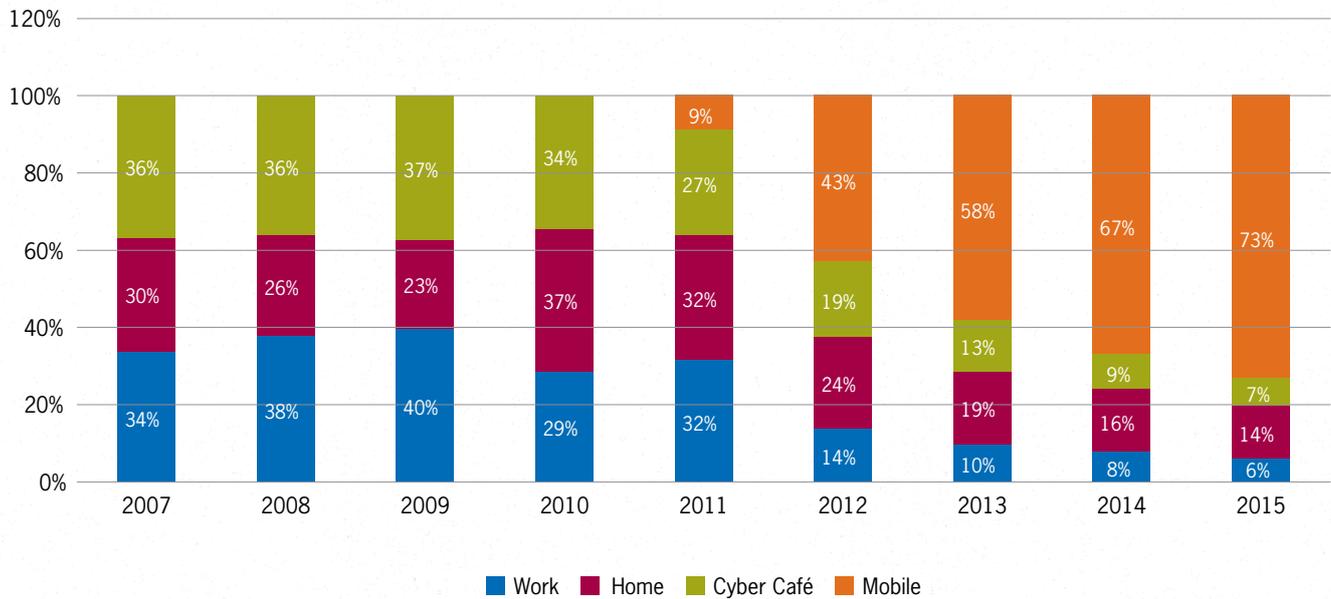
Given the huge prospects of smartphone boom, it is not surprising when e-Commerce companies in India are speedily embracing mobile, with some foregoing web platforms altogether and taking on a mobile only model, like Myntra.

"In July 2014, we had about 15 percent of transactions coming from mobile. In a year, we have gone from 15 percent to 70 percent. This kind of revolution is almost unforeseen and we have to come up with a whole new set of products to deal with that."

Punit Soni, Chief Product Officer, Flipkart

60. http://articles.economictimes.indiatimes.com/2015-08-31/news/66070788_1_snapdeal-ceo-kunal-bahl-pc-platform

Figure 12: Users by modes to access Internet (%) - Internet usage through mobile phones to grow



Source: World Bank, IAMAI, Aranca Research

3. Surging disposable income and a corresponding rise of the upper-middle class

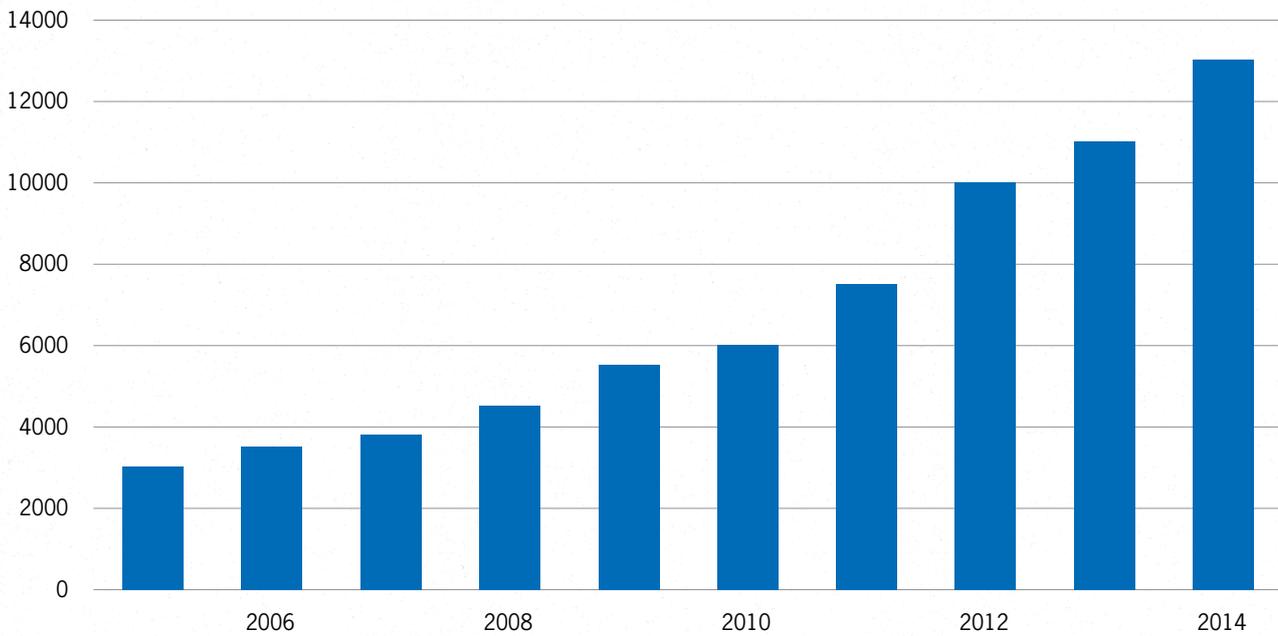
The purchasing power of Indian household has risen significantly and a unique “upper middle class” has emerged, which is spread across the country, especially in the metros. This strata is tech-savvy, seeks access to modern amenities at the click of a button and has revolutionised the country’s e-Commerce landscape.

Many global and domestic brands are available only in the major metropolitan regions, such as Delhi, Mumbai, and Bangalore making this growing middle class a key user of sophisticated consumer products and services. This audience is the modern workforce who have less time to shop at the usual brick and mortar store which creates further potential for online shopping in India.

Further, India’s GDP has seen growth between 6.5 percent and 8 percent as compared to 2.4 percent in the US.⁶¹ This growth has stimulated more job growth and a general improvement in living standards. In addition to that, Modi led new government’s emphasis on creation of a Digital India and increasing foreign direct investment, both factors, have been influencing the e-Commerce industry positively.

61. <http://www.clickz.com/clickz/column/2428178/the-future-of-india-is-e-Commerce>

Figure 13: India total disposable personal income



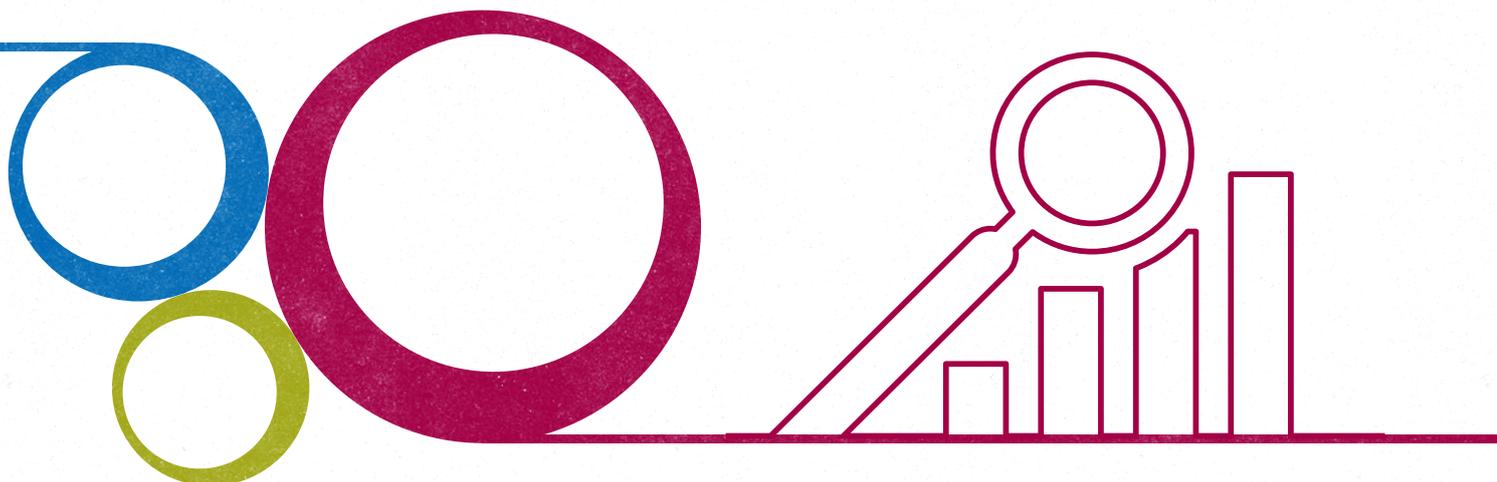
Source: Ministry of Statistics and Programme Implementation (MOSPI)

The Disposable Personal Income in India increased to 127880 INR billion in 2014 from 116010 INR billion in 2013.

4. Growing youth population

India is a developing country with rapidly soaring youth population. A UN report suggests that with 356 million 10-24 year-olds, India has the world's largest youth population despite having a smaller population than China.

This bracket of population contributes significantly to retail commerce who is tech savvy, likes to remain in touch with the latest fads, and has growing aspirations with an affinity to the internet culture.



2.2 Challenges and potential solutions in e-Commerce

2.2.1 Challenges in e-Commerce

Limited internet penetration (which is unfortunately, miserably low at 0.5 percent of the population against 50 percent in Singapore), coupled with logistics and fulfilment challenges, higher return rates, low average order value, insufficient cyber laws and the challenge of dealing with inferior products reflect the appalling state of the industry.

Current IT infrastructure is incapable of fulfilling basic requirements of the highly technology dependent industry. When an e-Commerce portal announces flash sale, infrastructure comes in the way of making it a complete success. It is unable to handle the influx of visitors to the website and to make matters worse, the portal crashes, making the marketplace apologetic to its consumers and the latter blaming the portals for such debacles.

The B2B model which is gaining high traction, is essentially designed to drive efficiency in the supply chain. However, high product returns coupled with cash on delivery model as highly adopted poses considerable challenges for businesses. Credit card penetration being relatively low, makes majority prefer payment on delivery which adds to the working capital of the business. Moreover, this mechanism creates a delay in payment, making the operator restock inventory before cash from the previous sale arrives. High product return further intensifies this issue. Flipkart's decision to stop cash on delivery (COD) for orders over US\$ 185 in the state of Uttar Pradesh may be the first sign that online retailers are pushing back against the popular payment method.⁶²

However, adopting an ideal digital commerce strategy in wake of such circumstances seems like a long way to go for Indian enterprises.

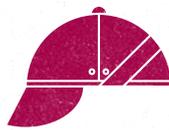
Logistics is another hiccup for the Indian e-Commerce landscape. While major multi-nationals like DHL and FedEx operate in India, goods are normally shipped through smaller and much cheaper third party carriers and these represent their own challenges, most importantly, carriers being unreliable. e-Commerce players are developing their own logistics arms, like Flipkart, but the ones which are still not a big fish in the market continue to struggle.

Issues like website crashes, delay in product delivery from promised timelines and inferior products defacing brands are other issues that need to be tackled.

Counterfeit products thronging online marketplaces is another ongoing battle for brands. While sellers sell inferior quality goods and the blame game between sellers and online marketplace continues, the result is a loss of trust and badmouthing for the latter and a subsequent loss of market share. Moreover, owing to the scale at which online marketplaces operate, it is considerably difficult for these players to track unscrupulous sellers, unless a consumer raises a concern.

Though the degree remains much lower when compared to the developed markets, however, increasing Indian population, especially in urban areas is opting for making payments online. This has led to proliferation of payment gateways and mobile wallets, which are subject to the risk of being misused by unscrupulous merchants.

Challenges



1. Inadequate technology infrastructure
2. Logistic and distribution hiccups
3. Poor cyber laws
4. Enormous scale of marketplaces with sellers running in thousands
5. Perils of the cash on delivery model affecting businesses



Studies from early 2014 noted that 51 percent complaints were registered against leading brands like Amazon, Flipkart, Snapdeal and eBay out of total e-Commerce complaints.

62. Zdnet

2.2.2. Potential solutions against counterfeit in e-Commerce

The challenges that e-Commerce in India has to fight against are not limited and these have been discussed in the section above. Any of these issues cannot be resolved in isolation by businesses, governments or the guards of legal framework. All of these bodies need to work collaboratively to address them. Specifically in the issue of counterfeit, smuggled and inferior goods, the potential solutions trending in the space and the strategies adopted by some of the leading players and many others being suggested by experts include:

a. Adopt an integrated approach with a combination of measures

Prominent players including Alibaba, Amazon, SnapDeal etc. have been at the receiving end of imitation products offered by third parties not connected to the brand owner. Online marketplaces, in their endeavour to protect consumer interests and maintaining the trust of their customers continually make efforts in this direction.

It is evident that one particular approach or measure is not fool proof in this regard and therefore the anti-counterfeit policy should be holistic and marketplaces must constantly go back and check for scopes of improvement as counterfeits are continually escalating their efforts in this space. Leading online marketplaces must resort to a combination of measures including random checks, analysis of transaction data, de-listing notorious sellers etc. Modern technology like data mining, data analysis to continually track transactions and flag those which infringe IPR is worthwhile.

Snapdeal, for instance, recognises sellers with good sales track record and takes actions against those who engage in selling fake products. Further, in case of any violations and upon being adequately notified, the company takes down such listings in accordance with the rules and policies provided on the company's website.⁶³

Alibaba's moves in this direction have been stellar. In 2014, only 3.5 transactions in every 10,000 transactions received customer complaints, which was a 22 percent decline from 2013. This reflects the effectiveness of the marketplace in protecting consumer rights and combating counterfeits.⁶⁴

b. Conduct due diligence

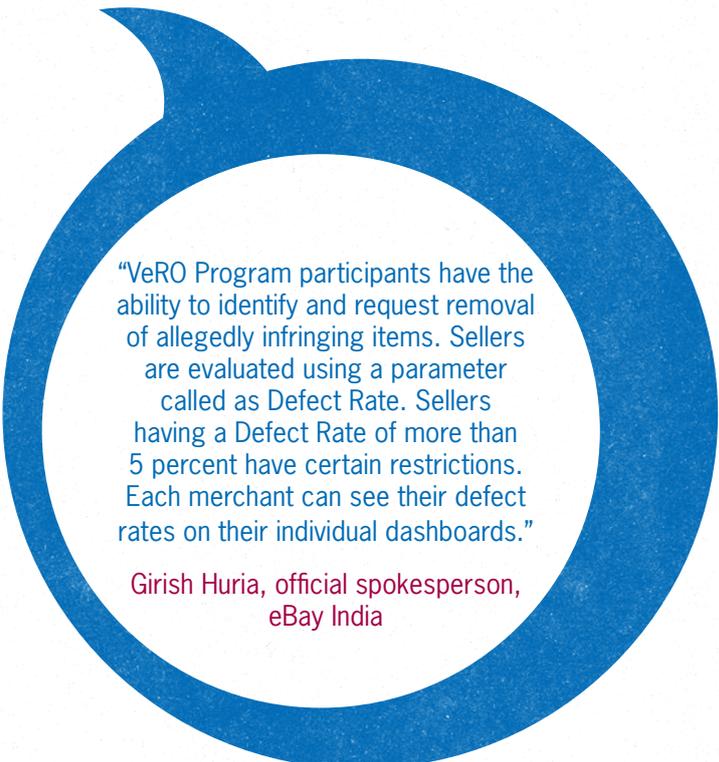
Due diligence of sellers in an ongoing basis is critical. It is pertinent for marketplaces to conduct due diligence of the merchant ahead of signing them up and this practise is followed rigorously by Amazon India. Some other aspects in this category include background checks of entities which helps firms to keep their reputation intact. Amazon India follows a policy of sellers signing an undertaking to sell only genuine and original products. At Amazon, a product is taken down if there is an instance of offence, while for repeat offenders, the sellers are delisted.⁶⁵

c. Monitor on an ongoing basis

Conducting effective checks before appointing the seller does not end the responsibility on part of the business. Monitoring on a continuous basis is imperative to ensure that company policies are effectively practised. In this context, spending on analytics to monitor marketplaces is observing on a rise.

In the case of Amazon India, random sampling by mystery shoppers keeps a check on quality of items shipped by sellers who directly pack and ship items. Where sellers use the company's packing and shipping service, mandatory checks at fulfilment centres are carried out to prevent shipping of counterfeits and damaged products.

E-Bay's Verified Rights Owner Program (VeRO), launched in 1998, allows brand owners to quickly and easily report possible counterfeits or copyright infringements. EBay promptly investigates each notification, and then takes appropriate action on reported listings.⁶⁶



"VeRO Program participants have the ability to identify and request removal of allegedly infringing items. Sellers are evaluated using a parameter called as Defect Rate. Sellers having a Defect Rate of more than 5 percent have certain restrictions. Each merchant can see their defect rates on their individual dashboards."

Girish Huria, official spokesperson,
eBay India

63. Shopping online? Beware of fakes Times Of India

64. Alibaba

65. Fake products bug online buyers, The Hindu, August 2015

66. The poochtimes

Other measures include close cooperation with law enforcement, brands and industry associations to police counterfeits. EBay partnered with the fashion industry on the “You Can’t Fake Fashion” campaign. The company has policies against counterfeiting and is said to take strong action against merchants when the brand owner reports counterfeits.

d. Collaborate to ensure brand enforcement

e-Commerce businesses must work in collaboration with brand owners and governments as well as associate themselves with international bodies that enforce IPR. Further, on its own account, online marketplaces must strengthen their IP portfolio and conduct regular audits to ensure that brand trademarks are not illicitly used online.

e. Need for stringent regulations

The standard of regulation in e-Commerce industry undoubtedly needs to be raised. Electronic commerce dispute resolution in India is also required to be strengthened. The present litigation system in India is not conducive to the industry in realising its complete potential. The proposition of establishing an executive agency ‘Central Consumer Protection Authority’ (CCPA) to protect and enforce the rights of consumer in the new Consumer Protection Bill signals a progressive development in this direction.⁶⁷

Lessons for the Indian marketplaces

Though, there exists a stringent anti-counterfeit policy in place, still how effectively is the policy being addressed, especially given the scale at which these businesses operate is a question that remains unanswered. Moreover, Indian online marketplaces can certainly incorporate lessons from the comprehensive measures taken by global players like Alibaba.

Online marketplace being the first point of reference for the customer to the product, it is not undermining to say that the marketplace must take complete accountability for its customer. Ensuring authenticity of goods, a check on the seller’s credentials cannot be transferred to the seller or the consumer.

Lessons learnt – Alibaba’s battle against counterfeiting

Investment in people and processes

- Invested over RMB1 billion (US\$ 160.7 million) focusing on tackling counterfeit and enhancing consumer protection from 2013 till November 2014.
- A task force of over 2,000 spearheads the counterfeit effort. There were plans to increase this number by another 200 in the past year.
- Enlisted around 5,400 volunteers to assist with daily online surveillance and selective inspection.

Working closely with brand owners

- Cooperated with 1,137 brand owners and to identify and remove IP-infringing goods from our marketplaces (as of September 2014).

Use of sophisticated technology

Data mining to analytics, group uses advanced tools to track transactions infringing IPR. By using transaction data and mapping technology, it found that more than 60 percent of counterfeit watches and jewellery originate from Southern China, while 60 percent of counterfeit outdoor sporting goods are from Southeast China region and 50 percent of counterfeit apparel originates from Eastern China.

Expanded coalition of international associations dedicated to IPR protection

- Signed MOUs with major international associations to protect IP rights.



Penalties for culprits

Redressal of complaints and strict penalties gives sellers a time of upto three days to refute the imposed allegations and before taking any serious action. In case of failure to do so, the group then penalises through various means including

- de-listing products immediately,
- adopting a name and shame policy,
- arranging for the seller to reimburse the buyer and
- ban the seller from another storefront on Alibaba’s marketplaces.

Source: Alibaba.com

67. Your story

2.3 Legislative framework in e-Commerce and the required policy interventions

Growth of electronic commerce has created the need for robust and effective regulatory mechanisms which provide an impetus to the legal infrastructure in the country. The state of legislative framework in the space of e-Commerce is lax in India and need for a separate e-Commerce law has been felt by and large in order to protect consumer rights.

One of the steps in this direction, 'The Consumer Protection Bill, 2015' which was approved by the Union Cabinet is delayed, with the Parliamentary panel examining it and has been given an extension till the Budget session next year. This proposition if progresses timely, would serve as a respite to protect consumer interests to the rapidly growing e-Commerce industry. The Bill seeks to create a 'consumer protection authority' which will have the power to initiate class suit against defaulting companies to fast-track the redress of consumer grievances. It provides for a comprehensive framework for protection of consumer interest and the legislation will replace the age old Consumer Protection Act, 1986.⁶⁸

A look at the existing framework

Current mechanisms come within the purview of cyber law in India and due to the growing complexities posed by e-Commerce, the need for this framework to evolve is now crucial than ever before. India's close counterpart China, has specific laws to protect consumers in e-Commerce by way of the seller providing information on product origin, quality, performance, price etc.

There is absence of a specific e-Commerce legislation in India and thus in the current scenario, other laws including the IT Act, Indian Contract Act, Companies Act, 2013, intellectual property etc. govern the landscape.

Laws in India need to take a fresh look which take into consideration the unique conditions prevailing in the dynamic marketplace to stand steady against the trials and tribulations thrown up by e-Commerce.

- One of the key cyber laws which regulates e-Commerce activities in India is the Information Technology Act, 2000. The scope of this cyber law which was passed in 2000; encompasses, norms of online contract formation, legal recognition of electronic records and communication, cyber contraventions and regulation of certification authorities.⁶⁹

The Act however has some grey areas; it deals with the concept of violation of privacy in a very limited sense (from a handling of data perspective) and this creates the need for a specific data protection legislation in India which is currently not present. While e-Commerce websites operating in India are 'intermediaries' as per the provisions of the IT Act, the Act itself exempts intermediaries from any liability in respect of third-party information, data or communication link hosted by it.

- At present, most complaints with respect to e-Commerce are referred to the Department of Consumer Affairs. However, the sector's operations are increasingly complex to be under the purview of any single ministry. Therefore, the need for 'a clear demarcation of the activities of e-Commerce to be handled by different departments' has been felt and thus the need to demarcate the jurisdiction of various departments.⁷⁰
- Consumer Protection issues are undoubtedly significant in context of e-Commerce as it is a platform to connect buyers and sellers and hence laws governing their relationship is critical. Unfortunately, there is no separate consumer protection law which regulates online transactions.⁷¹
- As the Indian marketplaces merely provide a platform to connect buyers and sellers; legally, their liability is not subject to quality of the product offered as these are sourced from a third-party. A grieved consumer may however, resort to returning defective goods and that is when the marketplace's product return or refund policy come into picture. Within this gamut also, what seems to be lacking is the right of a consumer to claim any damages within the Consumer Disputes Act, 1986.⁷²

e-Commerce regulations have a long way to go in India and inching closely towards this journey is the recent proposal of the Department of Consumer Affairs to bring e-Commerce businesses under the purview of multiple government agencies. The proposal for final consideration of a Committee of Secretaries (CoS) could bring e-Commerce under the purview of up to nine government agencies and regulatory bodies; including RBI, Home ministry, Department of Revenue in the Finance ministry, and Ministry of Corporate Affairs. The proposal, if becomes a reality, would provide much needed spirit to the legal framework and a surge of optimism for many such prompt and effective actions in the future.

68. New consumer protection bill to get delayed, Live mint, 30 November 2015

69. http://www.smsvaranasi.com/insight/e-Commerce_laws_in_the_indian_perspective.pdf

70. http://articles.economictimes.indiatimes.com/2015-01-30/news/58625464_1_e-commerce-industry-finance-ministry-traditional-retailers

71. Nishithdesai

72. Mondaq

Border protection: International cooperation in enforcement

3.1 Best practices to aid in seizing counterfeit and smuggled goods

3.1.1 Current global trends in illicit trade

It is clear that counterfeiting and smuggling is a global menace, and is rightly being labelled as the Crime of the 21st Century. As with progress, this illicit trade has also been continually evolving, with some key trends now becoming discernible. An understanding of these trends is essential to formulating prohibitive, combative and curative measures.

- **Global integration:** A 2015 Situation Report on Counterfeiting in the European Union, authored by Europol⁷³, comments that various case studies provide conclusive proof that organisations involved in such illicit trade are increasingly working together across the globe to take advantage of supply chain, infrastructure and demand-supply synergies, having realised that distribution is often the key to success. Further, such collaborations seem to be purely opportunistic, rather than based on loyalties, and thereby subject to much dynamism.

The World Customs Organisation's ("WCO") Illicit Trade Report 2013⁷⁴ puts down China and Hong Kong as the largest departure countries for counterfeit goods in 2013; however, the top destination countries for that year were the United States, Saudi Arabia and Italy. Such increasing cross-continental movement implies that various other agents are working together to bring about global illicit trade movements. Further, the advent of technology has only helped largely erode geographical borders.

- **Involvement of Organised Crime Groups ("OCGs"):** Case studies also underline that counterfeiting is now regarded by criminals as having lower risks and providing higher returns than drug trafficking. Further, the emergence of large scale production of counterfeits and transnational businesses dealing in illicit trade implies well-organised networks with considerable resources. These networks have links with other forms of crime such as fraud, document forgery, tax evasion and trafficking in human beings (mainly for labour exploitation) as well as with criminal groups, such as mafia-type organisations. In return, the profits generated by counterfeiting are also used to fund other criminal activities.
- **Technology as an enabler:** Technology is being used as an effective enabler across the supply chain to bring together various activities such as manufacturing, distribution, ordering and purchasing across the globe. The internet is the most significant enabler for illicit trade, due to its obvious benefits in this regard, such as an apparent anonymous character, the ability to operate across various jurisdictions, and the potential for presenting sophisticated replicas of official web shops. OCGs are increasingly taking to this 'enabler' since such online 'shops' are hard to track due to the use of false identities to register domain names and the use of proxy servers across multiple jurisdictions. The rise of e-shopping and e-Commerce has therefore only served to aid illicit trade in some respects, with online sales of pirated and counterfeit goods having the potential to surpass the volume of sales through traditional channels such as street vendors and other physical markets. One only has to look to the ubiquitous online advertisements for the sale of illicit physical goods for evidence of this rapidly increasing trend.

73. World Customs Organisation

74. World Customs Organisation

75. Money Laundering vulnerabilities of free trade zone, FATF, 2010

- Abuse of Free Trade Zones ('FTZs')**: Europol suspects Free Trade Zones playing a key role in illicit trade. As per the 2015 Situation Report, “evidence suggests that organised crime groups frequently use FTZs to tranship, label and obscure the port of origin of illegal goods”. FTZs are ‘designated areas within jurisdictions in which incentives are offered to support the development of exports, foreign direct investment, and local employment. These incentives include exemptions from duty and taxes, simplified administrative procedures, and the duty free importation of raw materials, machinery, parts and equipment.⁷⁵ The lower levels of oversight and inspection at such FTZs are being exploited by OCGs to tranship, label and obscure the port of origin of illegal goods. Europol suspects that counterfeiters use FTZs in the UAE, particularly the Jebel Alí Free Zone (JAFZ) in Dubai, to disguise the origin of the illegal goods by changing and re-documenting container loads. The upcoming Port of Tanger Med in Morocco, 15 kilometres from the European Union, is raising similar concerns about entry of illicit goods into the EU.
- Other trends**: Other practices noted by the 2015 Special 301 report by the Office of the United States Trade Representative⁷⁶ include the continued increase in the use of legitimate express mail, international courier, and postal services to deliver counterfeit and pirated goods in small consignments, making it more challenging for enforcement officials to interdict these goods, and the practice of shipping products separately from counterfeit labels and packaging to evade enforcement efforts that target the completed counterfeit item.

Figure 14: The big picture on illicit trade trends



75. Money Laundering vulnerabilities of free trade zone, FATF, 2010

76. 2015 Special 301 Report, United States Trade Representative

3.1.2 Best practices in the fight against illicit trade

The labelling of counterfeiting and smuggling as the Crime of the 21st century, the plethora of agencies and laws instituted by various nations and various measures taken by industries themselves clearly show that the world has woken up to this menace and is attempting to tackle it firmly and effectively. Various ‘good practices’ have emerged across the globe in this regard.

Global cooperation

In response to a crime that is spanning international borders, nations around the world are also entering into several multilateral and bilateral agreements under the auspices of agencies such as the World Customs Organisation (WCO), and entering into joint operations under the supervision of agencies such as Europol, making trans-border cooperation a reality.

A classic example of cross-border cooperation in this regard is Operation Real.

Illicit goods worth nearly US\$ 50 million were seized during an International Criminal Police Organisation (“INTERPOL”) operation targeting the organised criminal networks trading fake and illicit products in Asia. Operation Real was conducted by police and customs agencies across 10 countries – Cambodia, China, Fiji, Hong Kong (China), India, Indonesia, Philippines, South Korea, Thailand and Vietnam. The operation was preceded by a three-day planning, meeting and training course which brought together more than 70 participants from 10 countries and private sector partners to learn the techniques used in different countries to combat counterfeiting and illicit trade.⁷⁷

The WCO also organises simultaneous enforcement activities with multiple Customs Administrations as a best practice against smuggling. The operations intend to gauge the scale of global counterfeiting whilst providing participating Customs officers with hands-on experience. In 2013, the WCO organised two such large-scale operations - Operation Biyela in Africa and Operation Tigre 3 in Latin America. The impact of the substantial level of intervention in a short span of time also served to send a strong message both to offenders and the general public.

Several countries, including the United States, have introduced IPR enforcement coordination mechanisms or agreements to enhance inter-agency cooperation as a best practice. In another interesting development, the United Nations Office on Drugs and Crime (“UNODC”) has proposed regional cooperation networks for prosecutors, working with INTERPOL and others, which could potentially provide the ideal platform to trace back such seizures through the supply chain and track down and investigate criminal networks involved in this illicit trade. This type of ‘backtracking’ investigation could help in dismantling criminal networks engaged both in the illicit trafficking of drugs and other illicit products.

Public and private partnerships

Counterfeiting and smuggling affects private industry immensely; it is therefore essential that private industry be also included in the fight against illicit trade. The Europol and Interpol led Operation OPSON is a good example. It is a multi-agency, multidisciplinary approach that brings together a number of public and private sector agencies to work in partnership to address the threat from food and beverage counterfeiting and fraud. As per Europol’s website, the joint operation saw an impressively long list of countries working together - Austria, Belgium, Benin, Belarus, Botswana, Bulgaria, Burundi, Colombia, Côte d’Ivoire, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Eritrea, Estonia, Finland, France, Hungary, Iceland, Ireland, Italy, Kenya, Latvia, Lithuania, Luxemburg, The Netherlands, Norway, Paraguay, Peru, Philippines, Portugal, Romania, Rwanda, South Korea, South Sudan, Spain, Sudan, Sweden, Tanzania, Thailand, Turkey, Uganda, Uruguay, United Kingdom, USA and Vietnam – to cooperate on news sharing, raids and seizures. The operation involved police, customs, national food regulatory bodies and partners from the private sector, with checks being carried out at shops, markets, airports, seaports and industrial estates.⁷⁸

In India, FICCI’s ‘Committee Against Smuggling and Counterfeiting Activities Destroying the Economy’ (“CASCADE”) is a dedicated forum working towards addressing the challenge of growing illicit trade in counterfeits, pass offs and smuggled goods in the domestic economy. This committee consists of members from leading industries such as FMCG, IT, Mobile Phones, Tobacco, Alcohol, Automotive, etc. Since its inception, FICCI CASCADE has been actively working with the Ministry of Consumer Affairs at the National and State levels in reaching out to the consumers and spread awareness about the menace of counterfeiting and smuggling.

77. INTERPOL operation nets fakes worth US\$ 50 million across Asia, Interpol

78. Record seizures of fake food and drink in INTERPOL-Europol operation, Interpol

Customs controls

Since customs is the first line of defense against smuggling, good customs control is an essential best practice in the fight against illicit trade. This can be achieved through use of technology and providing customs laws adequate teeth for enforcement.

The WCO, through its Interface Public Members ('IPM') programme launched in 2010, has supported the operational activities of frontline customs officers in detecting counterfeit products, and launched the IPM mobile application in 2014 to further aid in this regard. In similar vein, the US Food and Drug Administration has developed one such handheld device that can be used to screen products to identify counterfeit goods across a range of areas. India uses automated customs clearances at the border, coupled with Risk Management System ("RMS") at all important points of entry. Such RMSs allow data to be analysed to unearth trends and improve general targeting and detection in the fight against smuggling.

Regarding enforceable customs laws, India's implementation of the Intellectual Property Rights (Imported Goods) Enforcement Rules, which lay down detailed procedures for recording IP rights with customs, allows Customs to suspend clearance of imported goods, if it has reasonable grounds to believe goods are counterfeit. In such cases of suspension, Customs shall inform the IP rights holder or its authorised representative within 10 days, asking it to confirm whether the consignment is genuine or counterfeit. This remedy is helping gather intelligence and control the flow of counterfeit goods.

Other good practices in the areas of customs laws include; vesting in Customs officers the power to issue search orders, make seizures of goods believed to be smuggled, arrest suspects prima facie involved in smuggling, adjudicate in exercise of quasi-judicial authority, confiscate smuggled goods, impose penalty on persons found guilty and prosecute offenders in serious cases involving high value or grave offences.

Targeted e-Commerce focus

As discussed, criminal networks operating e-Commerce sites are able to remain anonymous while reaching global audiences. However, the internet/ e-Commerce channel, while providing profits from the sale of counterfeit goods, also generates money from advertising revenue based on the number of visitors such sites can attract. Best practices combating e-Commerce counterfeiting therefore aims to tackle advertising revenues and payment processors facilitating e-Commerce sites trading in counterfeit goods. A good example of one such successful operation is Operation CREATIVE, spearheaded by the City of London's Police Intellectual Property Crime Unit. Another example is of Operation in Our Sites, coordinated by the US National IPR Coordination Centre, wherein websites and domain names that enable the sale of counterfeit goods were targeted.

Engaging third parties

Since all businesses involve third parties such as distributors, original equipment manufacturers, licensees, etc. along the supply chain, best practice would dictate that these parties also be involved in the fight against illicit trade. Examples include making them parties to strict non-disclosure and confidentiality agreements clearly spelling out the scope of use of the rights holder's IP, and conducting periodic internal checks and surveillance (including online searches).

Strengthening anti money laundering legislation

Given the intrinsic linkages between illicit trafficking of counterfeit goods and money laundering, another essential good practice is putting in place laws to counter all forms of money laundering. Since funds from such illicit trade are often reinvested by OCGs into terrorism and organised crime, tracking and confiscating illicit funds is critical, automatically proving an effective deterrent to smuggling and counterfeiting by breaking the vicious cycle between illicit trade and money laundering. The United Nations Interregional Crime and Justice Research Institute (UNICRI) and the International Chamber of Commerce's (ICC) Business Action to Stop Counterfeiting and Piracy (BASCAP) recently presented a comprehensive argument on this issue.

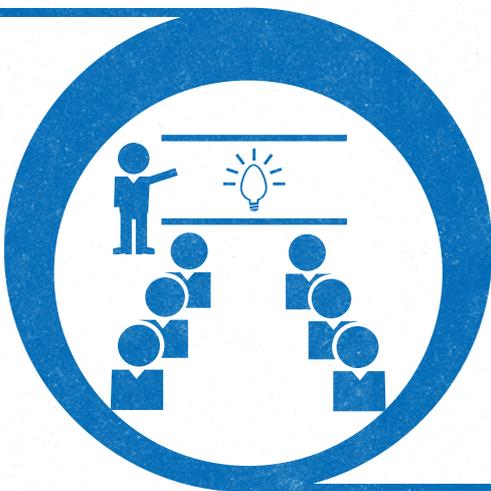
Training

Organisations such as Europol, INTERPOL and WCO hold routine trainings and seminars for capacity building. Such training should be extended to various stakeholders, including enforcement agencies such as customs and police officers, as well as private industry and industry bodies.

The WCO provides e-learning to customs officers on practical aspects of IPR border enforcement, IP-related agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) and practical risk based document targeting. INTERPOL, in association with the Underwriters Laboratories’ UL University, offers training that takes into consideration the different techniques and competencies involved in tracking and combating current and emerging counterfeit threats in various countries, through online courses on law enforcement, regulatory authorities and private sector IP crime.

Packaging

Packaging designed to combat successful counterfeiting is another good practice. Key evidence of this can be found in the FMCG - packaged foods industry, an industry that saw a falling grey market, attributable to innovation in the packaging of its products, which counterfeiters have failed to successfully replicate. As per a FICCI CASCADE report, the grey market in the FMCG-packaged foods industry declined from 23.4 percent in 2010 to 21.7 percent in 2012.⁷⁹ Other packaging innovations include usage of holograms, unique and random/ non-sequential identifier codes and 2D barcodes.



Public awareness

It is essential to also include the public in the fight against illicit trade, since consumer demand represents the demand side of the illicit trade equation. Awareness of health and safety concerns of counterfeit lifestyle items, medicines, etc. and the linkages between profits from such activities and terrorism can help mobilise powerful public sentiment and action against smuggling and counterfeiting.

An example of such a campaign is INTERPOL’s Turn Back Crime global awareness campaign, which aims to educate society about the ways in which organised crime infiltrates our daily lives. Through developing awareness, the campaign can assist the public in protecting themselves from potentially life-threatening products such as fake or sub-standard food and drink. INTERPOL has even taken this theory a step further and developed a consumer focused product called INTERPOL-Checkit (I-Checkit’) which provides the general public with a product verification tool to check if products are real or counterfeit. The UNODC campaign ‘Counterfeit: Don’t Buy into Organised Crime’ is another example of a public awareness initiative that has seen some effect.

Other innovations

Other best practices are industry and/ or geography specific. For example, counterfeiting is rife in the pharmaceutical industry, often due to a mismatch between economic purchasing power and availability in certain regions of the world where certain drugs are needed. Several trading partners have therefore participated, or supported participation, in innovative mechanisms that enable government and private sector rights holders to donate or license pharmaceutical patents voluntarily and on mutually-agreed terms and conditions. The Medicines Patent Pool, an independent foundation hosted by the World Health Organisation (“WHO”), works towards this end, by allowing public and private patent holders to explore voluntary licenses to help improve the availability of medicines in developing countries and thereby proving a deterrent to smuggling and counterfeiting in medicines. Similarly, the United States, Brazil, and South Africa participate as providers, and other countries act as supporters, in the WIPO Re:Search Consortium, a voluntary mechanism for making IPR and know-how available on mutually-agreed terms and conditions to the global health research community to find cures or treatments for neglected tropical diseases, malaria, and tuberculosis. Such enhanced access to medicines can prove a powerful deterrent to counterfeiting and smuggling of medicines.

79. Illicit markets: A threat to our National Interests- Executive Summary, FICCI CASCADE

3.2 Current regulatory landscape and issues faced

International awakening to IP rights is indisputable, as is action towards effectively combating IP right infringement in the forms of counterfeiting and smuggling. However, while there is no lack of governmental bodies and legislation dedicated to this cause, regulatory issues faced by companies and right holders across geographies and varieties of IP rights mainly revolve around a) granting of right in territory under question b) enforcement of right in the face of infringement. Further, of the two, while (a.) appears to have been dealt with more effectively in at-least some of the developed economies, (b.) continues to remain a challenge across the world. A 2014 survey conducted by the European Commission on the protection and enforcement of intellectual property⁸⁰, covering respondents from businesses, associations representing right-holders (such as industrial federations or royalty collecting societies), universities and embassies, from about 40 countries, reports that respondents were relatively unsatisfied with IP enforcement mechanisms' effectiveness. The following chart summarises certain findings from the survey in this specific regard (sourced from Commission Staff Working Document, Report on the protection and enforcement of intellectual property rights in third countries, European Commission, 2015)

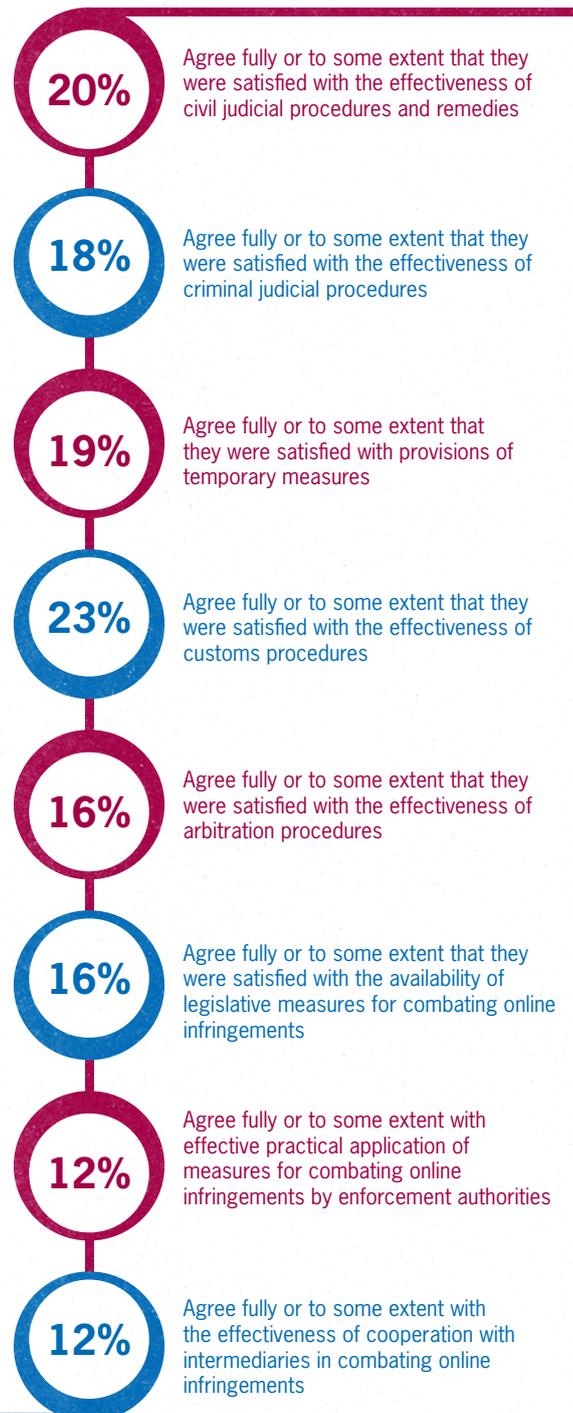
A significant problem, especially in developing countries, lies in the first stage itself, viz., successfully becoming the right holder. Opaque patentability criteria, very slow granting procedures and inadequate regulatory data protection are common issues faced by companies.

China, for instance, is growing in terms of number of patent applications, concerns around the quality of invention patents notwithstanding, thereby leading to formation of 'patent-thickets', which hinder the patentability of new inventions/technologies being brought in by foreign companies.

India, on the other hand, with extremely broad criteria being applicable for granting compulsory licenses or for the revocation of patents, make effective patent protection in India very difficult, not only for pharmaceuticals and chemicals, but also for other sectors where local innovation is being promoted. The Indian Patent Office also has a worryingly large patent backlog.

Authorities have also been known to use competition law for imposing heavy fines and setting very low royalty rates for the licensing of patents owned by foreign companies.

Figure 15: Survey on IPR enforcement effectiveness: results summary



80. Available at <https://oami.europa.eu/ohimportal/documents/11370/0/Report+on+the+protection+and+enforcement+of+intellectual+property+rights+in+third+countries>

Companies are worried about the various proceedings requiring the disclosure of business information when trying to enter markets of developing economies like China and India. Detailed disclosures, coupled with the difficulties in getting effective protection through appropriate remedies before the administration and courts against unfair commercial use and unauthorised disclosure of such data, acts as a deterrent to foreign companies, especially for those operating in industries such as pharmaceuticals.

Enforcement challenges in the current regulatory landscape

Apart from the above substantive challenges, enforcement remains a huge challenge across countries. Major issues face companies opting for both civil and criminal recourses.

Conflicts of interest: The government in many countries might have interests in certain industry sectors, which often collide with those of the foreign investors; unsurprisingly IP right owners have little protection of their intellectual property in such scenarios.

Local protectionism: In many developing economies, including China and India, while central governments are increasingly showing commitment to IP protection, the same is not being reflected at the far more critical, local, ground level, where many laws, regulations and judgments are not enforced because the authorities are reluctant to take action. This is due to the feared impact on the local economy, political pressure and corruption. Such excessive and ineffective decentralisation is considered a major challenge.

Lack of resources: Lack of sufficient resources to ensure enforcement is a common challenge faced by many countries, from Canada to China. Thomas Pattloch, an authority on IP rights with a focus on China, stated in a 2010 interview that "...far less than 1,000 officials throughout all of China, a country with 1.3 billion people, who actually deal with all the copyright issues, not only those involving enforcement. This shows clearly that if you want administrative authorities to act on your behalf and to enforce the law they might quickly reach the end of their capacity".⁸¹ Further, in the event the rights holder wishes to conduct a raid to seize illicit goods at an opportune time (such as when the goods are in stock at a particular location) police authorities may be unable to provide the necessary manpower to carry out a swift or timely raid based on information gathered by the rights holder.

Many other countries do not have courts specialising in IP protection (China has newly instituted the same, although their efficacy is yet to be proven.) On the other hand, in India, it is essential to choose the right court –the Delhi High Court has emerged as the preferred court for IP litigation.

Issues with civil procedures: Civil litigation is the most common action taken against counterfeiting. Judicial procedures for some form of litigation are in place in most countries and Article 42 of the TRIPs Agreement includes it as a basic protection for right holders – ‘Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement’. However, this route poses many challenges in reality.

- Many countries give low priority to tackling IPR infringements in an already overburdened legal system. The image of these activities being ‘victimless crimes’ continues to persist. Thus, even if a rights holder reports and files a complaint against the manufacture/sale of counterfeit goods, the police may not act quickly enough to nab the offenders
- Information often leaks to offending parties even before a raid, due to rampant corruption
- When a civil suit is finally brought before courts, proceedings are often very lengthy, with complex procedures and thereby, ultimately expensive. Heavy backlog of cases before judges further make prosecutions very slow
- Finally, even when convicted, the damages awarded are not significant enough to be a major deterrent
- A related problem for rights owners is the unauthorised production by their own legitimate suppliers (such ‘fake goods’ markets are rampant in countries like Thailand and China). As a practice, suppliers produce “over-runs”, viz., extra quantities of products which they do not account for, and sell them on the black market. As a result, while the rights owner considers these goods to be counterfeits, it is difficult to take action, since courts and enforcement agencies can treat over-runs as a breach of contract rather than as a serious IP infringement

81. Enforcement The Main Problem of Intellectual Property Protection in China, IP Channel

- Another such loophole exploitation can be found in the practice of “parallel trading”; which, refers to situations where products are legitimately bought in one territory and diverted for sale to another territory without the consent of the right holder in the receiving territory. Parallel trading, also called grey market activity or arbitrage, uses two principles limiting the rights of an IPR owner as a loophole:

- i. Territoriality, implying that the IPR protection is valid only for specific countries or regions; and
- ii. Exhaustion, implying that the right owner has very limited rights to prevent further distribution of a product that is put on the market with his consent. Since the goods are essentially authentic, enforcement agencies are reluctant to take action against parallel traders, with civil litigation hard to win. While there are sympathetic and humanitarian arguments to be made in favour of parallel trading, critics also contend that it facilitates counterfeiting.⁸²

Issues with criminal procedures: During the last two decades, many countries have taken steps towards introducing legislation that makes product counterfeiting a criminal offence. The liability can either be based on general matters of criminal law such as an attempt to defraud, or result from provisions in trademark legislation. In fact, as per the TRIPs Agreement, Article 61, contracting parties are obliged to - “...provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale...” However, despite these legislative developments, rights owners may still face difficulties in persuading enforcement authorities to take action against counterfeiters due to counterfeiting being considered a low priority compared to other criminal offences, difficulty in uncovering the full scale of a counterfeiter’s activities; and complex procedural rules with a skewed risk – reward ratio.

In some instances, illicit trade cases cannot even be easily brought before court as a criminal case. An example of the same is, in the case of Russia, as per the 2014 European Commission survey, “Russia’s current Criminal Code does not allow for corporate entities to be held criminally liable. This, along with high thresholds for applying criminal procedures, apparent reluctance by enforcement authorities to take action against large infringers and poorly staffed IPR economic crime police has led to a significant decrease of initiated IPR crime cases in the previous years. In addition, the number of administrative cases has, like the number of criminal cases, fallen significantly in recent years”.

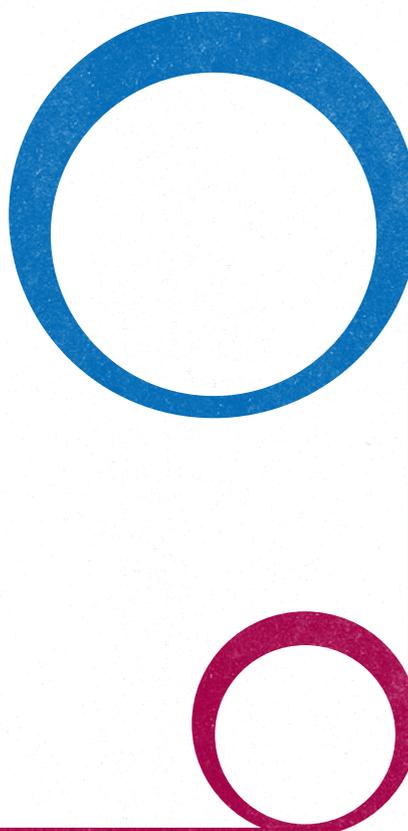
Given the lengthy, complex routes offered by current legislations, it is important that rights holders are at-least aided by effective administrative action that prevents further distribution of illicit goods, while judicial recourse is being sought. However, this in itself is problematic in many countries, due to detailed information requirements that might not be available to the rights holder, and high costs involved.

Fig 16: Global key IPR enforcement challenges

Key Enforcement challenges:



- Lack of adequate manpower, in the form of police to hold raids, specialised IP courts, etc.
- Corruption which affects local enforcement despite best intentions at central levels
- Lack of seriousness: Not considered as serious a crime as killings, etc.
- Lengthy and complex litigation process, with insufficient damages



3.3 Role of enforcement agencies

There are various groups of stakeholders involved in the fight against illicit trade. Three key groups are discussed below in brief:

National legal apparatus: This consists principally of the laws of the land protecting IPR, enforcement personnel including police and customs officers; who often act as the first line of defense in the fight against counterfeiting and smuggling, and judicial authorities and systems of recourse, including courts and benches, who hear cases and award damages.

India, for instance, offers civil, criminal and administrative remedies to tackle counterfeiting and smuggling, found under various statutes – examples include the Trademarks Act 1999, the Copyright Act 1957, the Patents Act 1970, the Designs Act, the Geographical Indications Act 1999, the Drugs and Cosmetics Act 1940, the Food Safety and Standards Act 2006, the Consumers Protection Act 1986, the Penal Code, the Information Technology Act 2000 and the Customs Act, 1962. Customs officers are empowered to inspect any premises, conveyance, x-ray any person and effect search and seize in cases where they have reasons to believe that the goods are of contraband nature. In order to further enforce the same, certain Indian state governments have also formed Special Intellectual Property Cells, which deal with offences relating to infringement of IPR, over and above the ability to file a suit in any court of original jurisdiction.

International bodies: There are also various relevant international bodies operating in this space. Primary ones include those established under the auspices of the United Nations (UNODC, World Intellectual Property Organisation [“WIPO”]), INTERPOL, World Customs Organisation (WCO) and World Trade Organisation (WTO). These bodies serve the important functions of coordinating international action, helping in capacity building, conducting research and sharing best practices and information sourced globally⁸³; they have increasingly come to represent a powerful frontier in the fight against illicit trade.

The WCO is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administration. As per the WCO website, “As a forum for dialogue and exchange of experiences between national Customs delegates, the WCO offers its members a range of conventions and other international instruments, as well as technical assistance and training services provided either directly by the Secretariat, or with its participation. The Secretariat also actively supports its members in their endeavours to modernise and build capacity within their national Customs administrations”.⁸⁴

INTERPOL is “the world’s largest international police organisation, with 190 member countries. Its role is to enable police around the world to work together to make the world a safer place. Our high-tech infrastructure of technical and operational support helps meet the growing challenges of fighting crime in the 21st century”.⁸⁵ As part of its policing activities, INTERPOL is also actively engaged in assisting countries in fighting against the crimes of counterfeiting and smuggling.

WIPO is an agency of the United Nations WIPO that serves as a “global forum for intellectual property services, policy, information and cooperation”.⁸⁶ UNODC, established in 1997 through a merger between the United Nations Drug Control Programme and the Centre for International Crime Prevention, has a mandate to “assist its member states in their struggle against illicit drugs, crime and terrorism”.⁸⁷

The WTO “is an organisation for trade opening. It is a forum for governments to negotiate trade agreements. It is a place for them to settle trade disputes. It operates a system of trade rules. Essentially, the WTO is a place where member governments try to sort out the trade problems they face with each other”.⁸⁸ TRIPS is an international agreement administered by the WTO that sets down minimum standards for many forms of IP regulation as applied to nationals of other WTO members. TRIPS introduced intellectual property law into the international trading system for the first time and remains the most comprehensive international agreement on intellectual property to date. TRIPS specifically requires WTO members to provide IPR protection for copyright rights, geographical indications, industrial designs, integrated circuit layout-designs, patents, new plant varieties, trademarks, trade dress and undisclosed or confidential information. TRIPS also specifies enforcement procedures, remedies, and dispute resolution procedures.

83. Interpol

84. World Customs Organisation

85. Interpol

86. World Intellectual Property Organisation

87. United Nations Office on Drugs and Crime (UNODC)

88. World Trade Organisation

Other associations: These are bodies formed by representatives of right holders/industry. Examples include FICCI's CASCADE and the ICC's BASCAP. An initiative of the International Chamber of Commerce ("ICC"), BASCAP is an organisation of companies from around the world who have come together to address the global concerns of counterfeiting and piracy.

Figure 17: Enforcement: Key stakeholders



3.4 Collaborative efforts

While various stakeholder groups are attempting to enforce IP protection within their respective ambits, it is clear from the increasing illicit trade volumes, that a collaborative effort on the part of such key stakeholder groups will lead to improved results. Various forms of collaboration are already taking place in this regard. One form is that between enforcement officials and rights holders.

Collaboration between right holders and enforcement officials

State apparatus across the world is currently overwhelmed by the counterfeiting and smuggling problem and needs the support of private enterprise. More importantly, fighting counterfeit products at ports of entry is perhaps targeting this problem too late in the supply chain; with too few resources to have any deep and lasting impact. As a result, simple and sole reliance by rights holders on law enforcement is increasingly been seen as a poor strategy. Instead, rights holders and enforcement agencies need to come together and proactively develop strategies to fight counterfeiting and smuggling. Some key areas of collaboration are discussed below.

Training: Training is a crucial step in the fight against counterfeiting and smuggling. One area of collaborative training is for the ground level enforcement authorities, such as police and customs officers. It is essential that they are trained in the latest legal enforcement aspects as well as in the identification of counterfeit goods. Industry, both private players and industry bodies, would be ideal in supplying facts relating to the latter. Examples of such collaboration include training sessions held by FICCI CASCADE nationally for customs officials, police officers and the judiciary.

Online training is also being increasingly used by agencies such as the UN and INTERPOL to facilitate ease of access to various rights holders and enforcement authorities.⁸⁹

89. Interpol

Joint operations: With the increasing sophistication of counterfeiting and smuggling activities involving various “nodes” along a supply chain, joint operations between private industry and enforcement authorities are proving very effective.

This is particularly being resorted to in the tackling of the online sale of counterfeit goods, through collaboration between payment gateway companies, rights holders of goods and enforcement agents.

A large scale project under joint operations is the Taobao Marketplace Agreement⁹⁰, signed between China’s Alibaba Group’s Taobao Marketplace and the International Anti-Counterfeiting Coalition (“IACC”) in August 2015, bringing together the world’s largest anti-counterfeiting organisation and China’s largest consumer-to-consumer marketplace. Under the agreement, the IACC and its participating members will assist Taobao with the identification of listings for infringing products offered for sale on the platform, and of repeat or high-volume infringers, which will be subject to expedited removal procedures. The parties will also collaborate to assist law enforcement with follow-up investigations and offline enforcement.

INTERPOL has also conducted many successful joint operations in this regard.⁹¹

In India, Hindustan Unilever Limited, one of the country’s largest FMCG companies, engages on a continual basis with enforcement agencies to conduct raids and seizures⁹², as do many other FMCG companies.

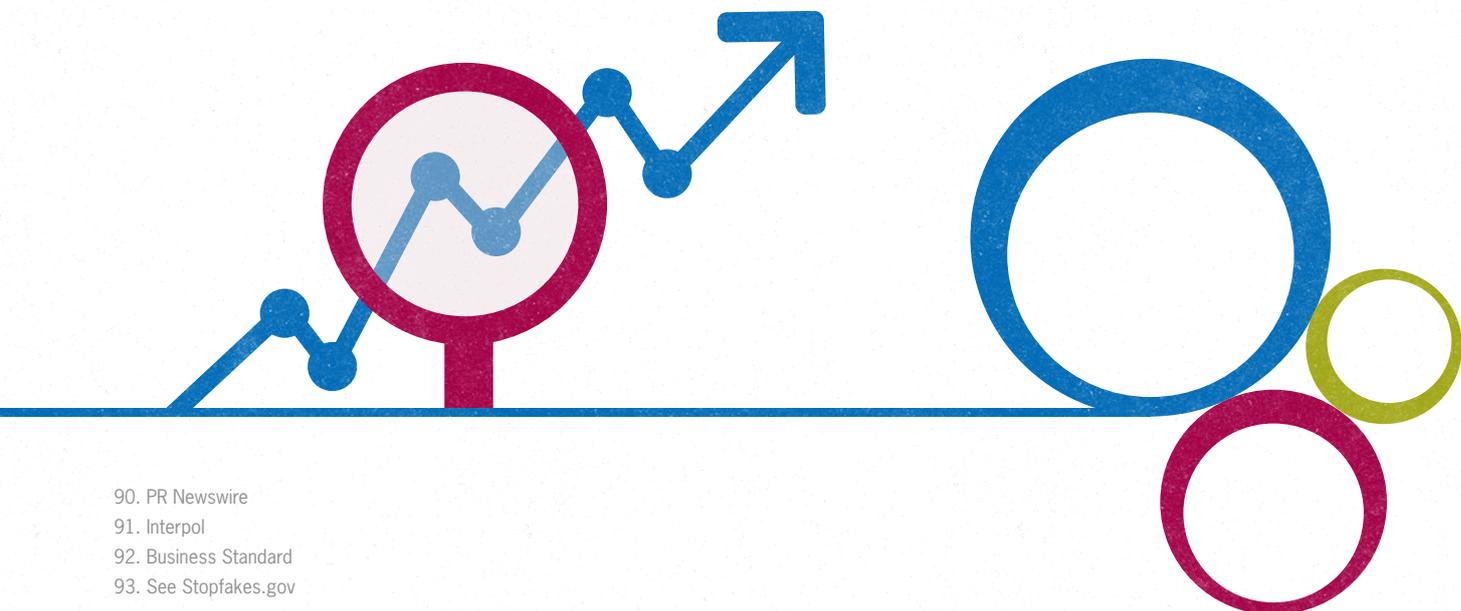
Information databases, research and best practices:

Industry bodies as well as enforcement agencies develop large repositories of information based on their operations. Collaboration would bring together these databases to identify trends, targets, high risk industry sectors and channels, as well as help in identifying further research areas; conducting gap analysis in supply chains of industries and setting best practice standards and procedures.

One area of best practice setting that is increasingly drawing attention is the dealing of seized counterfeit and smuggled goods, given that these goods are sometimes found to have made their way back into the market/supply chain. The apt way to dispose such goods can be set industry-wise, along with procedures, through consultations between rights holders and enforcement agencies.

Another benefit of developing a central repository containing statistics is that it helps to document such overall issues and the lessons learnt from them, without getting isolated companies to share information, at the risk of damaging their reputations. In fact, safe harbor sites can be developed and maintained where companies can share generic information on counterfeiting efforts, such as case studies stripped of identifying information, which can serve as lessons learned for others.

Joint publicity programmes: Right holders and enforcement agencies can also collaborate in mobilising public sentiment. A successful effort in this regard is the stopfakes initiative of the US government, which, in its fight against counterfeiting and smuggling, looks at raising awareness amongst public as well as industry.⁹³



90. PR Newswire
91. Interpol
92. Business Standard
93. See Stopfakes.gov

The Rougeblock Initiative (reproduced from The World Trademark Review's Anti-Counterfeiting 2014)

The operation: A good example of a successful collaborative effort between enforcement agencies and rights holders is the RogueBlock initiative by the IACC, carried out in collaboration with a number of the world's largest payment processing and money transfer companies. The objective is to provide a streamlined, simplified procedure by which rights holders could report online sellers of counterfeit or pirated goods to participating credit card, payment processing and money transfer networks. The programme was designed to identify merchants using payment services to conduct their illegal transactions, in violation of the networks' existing policies. Remedial action may be taken if, on submission and investigation of a verified complaint, the participating networks determined that a merchant had breached its contractual obligations.

Why it worked: Merchants selling counterfeit goods must be able to receive payments for their illicit wares in order to stay in business; by directly attacking their capability, rights holders can cut off the revenue stream that makes such illegal businesses possible (and profitable). Further, because merchants are bound by their service providers' usage policies regardless of jurisdiction, the programme has global reach, allowing action even against operators of websites which would normally be insulated from domestic civil or criminal actions. By focusing on the essential payment gateways, far more effective targeting becomes possible.

Benefits:

- To date, participants in the programme have referred more than 8,000 websites for investigation by the partners in the programme, resulting in the identification of more than 28,000 payment channels and the termination of more than 2,600 individual counterfeiters' merchant accounts.
- Beyond its immediate impact on addressing the proliferation of websites trafficking in counterfeit goods; rights holders have begun to cooperate more closely on training others in the financial sector in IP-related areas, such as due diligence in the onboarding process of new merchants and proactively monitoring the compliance of existing merchants.
- In addition, the ongoing efforts have generated useful data and investigative leads for use by law enforcement agencies in the United States and abroad.

Local and international collaboration amongst enforcement agencies

Given the global nature of counterfeiting and smuggling, enforcement agencies also require collaboration across geographies in order to implement effective enforcement. The areas of collaboration remain largely the same, as discussed in the previous section, viz., training, joint operations, information databases, research and best practices and joint publicity programmes. Examples of some successful collaborations are presented below.

Training: A three day training event was held in October 2013 by INTERPOL's Medical Product Counterfeiting and Pharmaceutical Crime ("MPCPC") Sub directorate and the Indian Central Bureau of Investigation ("CBI"), for about 35 participants from police and drug control agencies across India to increase collaboration and enhance the abilities of the region to more effectively combat all forms of pharmaceutical crime including fake and illicit medicines. Topics covered during the training session included the challenges of fake or counterfeit medicines; detecting, identifying and tracing fake medicines; existing legal frameworks; intelligence gathering and undercover investigations; proper evidence handling; and partnerships with the public and private sectors.

Joint Operations: Coordinated by INTERPOL, police and customs officers across South America took part in an operation aimed at disrupting the organised crime networks behind illicit trade and the production and distribution of counterfeit goods in the region and beyond. The operation involved almost 2,000 raids in 11 countries which sought to dismantle illicit factories and supply chain, and led to the seizure of some 8,00,000 fake goods worth approximately US\$ 130 million, with 805 people either arrested or placed under investigation. Further, during the operation, police in Colombia notably also arrested the subject of an INTERPOL Red Notice wanted in the United States on charges of money laundering in connection with trafficking in illicit goods and counterfeiting.

Other areas: WIPO, WCO, INTERPOL, amongst other international agencies, all maintain vast databases on counterfeiting and smuggling and also undertake targeted public awareness campaigns across the globe. Another key area of collaboration is the sharing of technology, for example, in the pharmaceutical industry, technology is helping in the fight against fake medications. International agencies can help disseminate such technology and spread awareness.

Building global competitiveness through ‘Make in India’ initiative

Launched in September 2014 by Prime Minister Modi, the “Make in India” programme intends to “transform India into a global design and manufacturing hub”.⁹⁴ As a part of the programme, the government has relaxed caps and controls, increased FDI limits in sectors such as Railways, Defence, Insurance and Medical Devices, announced smart cities and industrial clusters, launched workforce development programmes and aggressively marketed the initiative on global stages – to wit, the Prime Minister famously said “sell anywhere but manufacture here” at his inaugural address to the nation on Independence Day.⁹⁵

There are indications that the “Make in India” programme has seen some early success. India has emerged, after initiation of the programme in 2015, as the top destination globally for foreign direct investment, surpassing China and the US.⁹⁶ Several companies have signed MoUs and agreements to set up manufacturing facilities in India, including Foxconn⁹⁷, Samsung⁹⁸ and Boeing⁹⁹, to name a few.

However, due to key consumer sectors impacted by counterfeits in India; including auto parts, alcohol, computer hardware, foods, mobile phone and tobacco industries; a very real danger to the “Make in India” initiative arises from counterfeiting. U.K. Gupta, President of the Authentication Solution Providers Association (“ASPA”) succinctly summed up this danger: “The Make in India campaign needs authentication of products to make it complete. A scenario where goods manufactured in India are counterfeited will only harm the campaign. There is a constant need to ensure that the Made in India label products are of highest quality, genuine and secured till delivered to the end consumer”.¹⁰⁰



The people behind Make in India themselves seem to have recognised the importance of IPR to longer term innovation and sustainable growth, as evidenced by “Make in India” proclamation on its website:

“A MAJOR NEW NATIONAL PROGRAMME. DESIGNED TO FACILITATE INVESTMENT. FOSTER INNOVATION. ENHANCE SKILL DEVELOPMENT. PROTECT INTELLECTUAL PROPERTY. AND BUILD BEST-IN-CLASS MANUFACTURING INFRASTRUCTURE. THERE’S NEVER BEEN A BETTER TIME TO MAKE IN INDIA.”

Further, there already exist reports of sub-standard counterfeit goods, such as medicines, manufactured in other nations, such as China, carrying the Made in India label to avoid detection and tracing back to true origins.¹⁰¹ This, coupled with several locations in India being victimised to serve transit points in smuggling and counterfeiting; makes it imperative that the menace be curbed for the “Make in India” campaign to succeed.

94. Make in India

95. Business Standard

96. Times Of India

97. Forbes Asia

98. Business Standard

99. Times of India

100. Money life

101. The Epoch Times

4.1 Solutions to manufacture and promote authentic products within the country

Various measures can be implemented expeditiously to ensure that authentic products, living up to their stated and perceived quality and utility standards, are manufactured and promoted within India. Time, of course, is of the essence since the “Make in India” campaign has already kicked off.

Change in culture: Perhaps one of the most under-appreciated departments requiring change is the overall mind-set of the Indian manufacturing and consumer populace when it comes to respecting intellectual property.

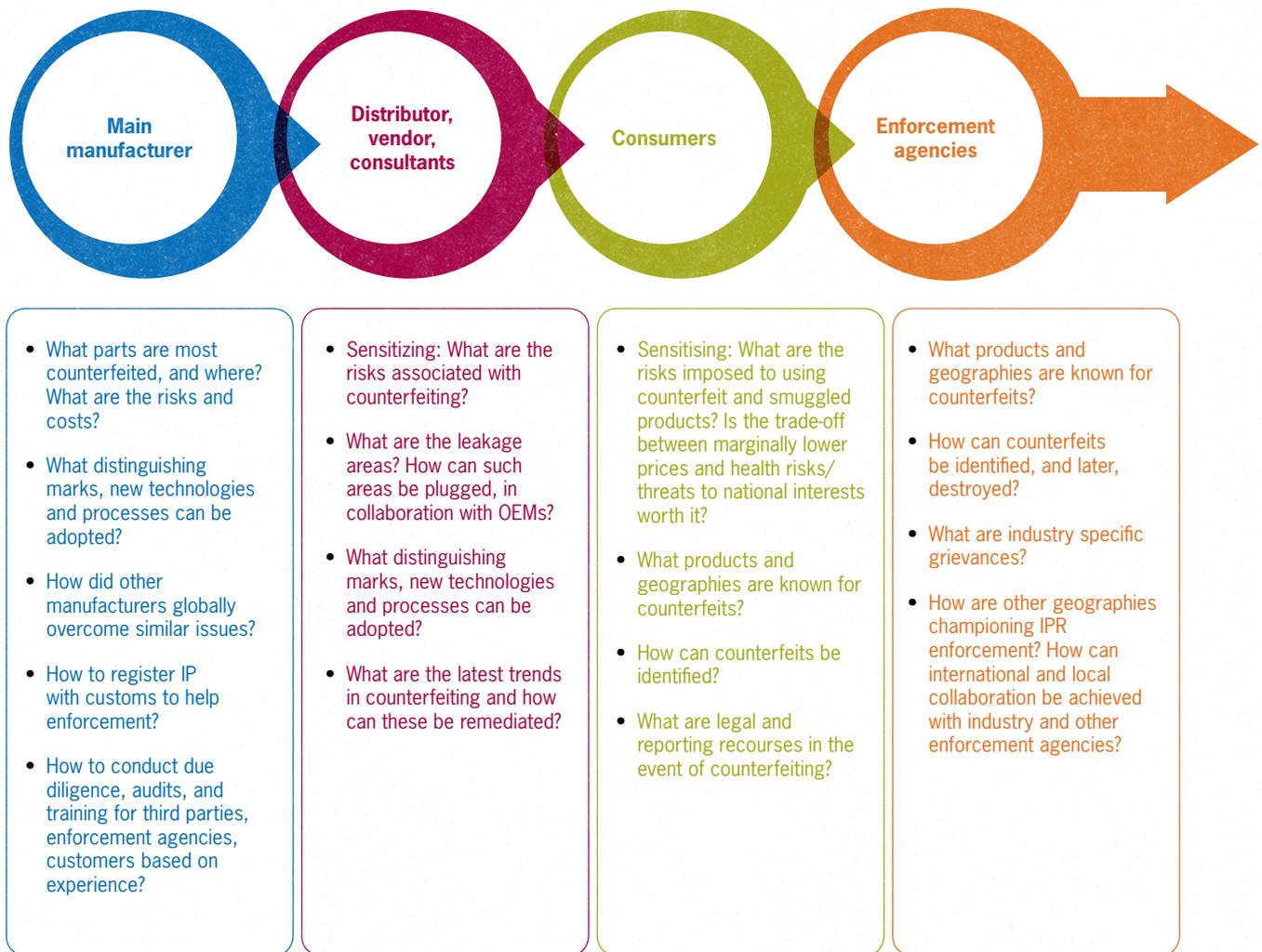
While innovation is clearly not scarce in the country, the fact that India has always been a welfare state with socialist leanings, as against a purely capitalistic state, implies that creators can earn returns on their creations, subject to the greater good. While such a philosophy clearly has its merits, there is also a risk that the larger populace, including manufacturers, enforcement agencies and consumers has diminished respect for intellectual property. These sentiments are further complicated by two factors: “entrepreneurs” eager to cash in on the growing economic story of India by catering to the growing domestic and international demand; and a vast and rising aspirational middle class who do not mind a compromise in order to purchase perceived luxury goods.

Promoting a culture where authentic goods are respected and sought after, as are innovators and rights holders, is an essential first step. By its very nature, such a task will require communication with various stakeholders along the supply chain, from manufacturers to consumers, and will also have to be ingrained into the psyche of the country through educational institutions.

Involve and educate all players: The fight to promote authentic goods within the country will involve a massive effort involving all players: manufacturers, consumers, enforcement agencies and third party enablers. Third parties particularly, including vendors, distributors and stockists, independent consultants such as quality reviewers, payment processors and the like, are often over-looked despite being a key component contributing to the supply chain. India should target educating and involving all parties involved in the manufacturing value chain in the fight against counterfeiting. Based on their respective positions, each party should be made aware of circumstances that allow counterfeiting to take place, dangers that arise due to such counterfeiting, and methods to mitigate and remediate the same. As a part of the “Make in India” programme, Prime Minister Modi has announced measures for enhancing the quality of workforce in the country.¹⁰² This can be the ideal platform to also develop mandatory courses on IPR, counterfeiting and enforcement. It is only by training and galvanizing the micro-level of the manufacturing industry, viz., and individual workers, that the fight against illegal operators can be won.

Further, regular audits and checks should be conducted in order to determine if skilling activities are effective and identify and bridge gaps, if any.

Figure 18: Educational areas for various stakeholders in the manufacturing industry supply chain



Feedback loop to continually audit and identify new educational areas:

- Commission studies, surprise raids, monitor websites to check for counterfeiting.
- Engage with industry associations (eg: SIAM for automotive parts) and enforcement agencies (customs, police) to maintain central databases, identify trends and improve targeting of counterfeiters.

Strengthen enforcement: While manufacturers and consumers can be involved in the fight against counterfeiting, undeniably, the other important side of the equation is enforcement. Given that counterfeiting presents a perceived (and this far, validated by reality) avenue to earn high returns with lower risks as compared to many other illicit activities, enforcement has to improve to ensure higher seizures, stricter penalties, delivered faster. Some potential measures to help in strengthening enforcement in India, partly also sourced from enforcement measures currently being implemented in some leading nations such as the UK and US¹⁰³, are:

103. The Canadian Anti-Counterfeiting Network

- Formulate and implement a National IP Policy, laying out IPR enforcement as a national priority, and earmarking financial resources towards the same.
- Sensitise police to IPR issues and its importance to the economy; set up specialised IPR cells at police stations.
- Impart regular and focused trainings on the counterfeiting problem, involving rights holders and global agencies, to officials of police, customs and other enforcement agencies such as the Health Department (“HD”) and Food and Drugs Administrations (“FDA”) of states.
- Invest in additional court infrastructure relating to IPR to speed up hearing of cases and awarding of penalties.
- Set prohibitive minimum ‘damages’ for counterfeiting cases.
- Apart from financial penalties, extend penalties to confiscation of assets of counterfeiters and permanent blacklisting from industry.
- Develop process manuals for front-line enforcement officials, such as those from customs, HDs and FDAs, updated frequently, detailing both identification and successful destruction techniques.
- Where seizures take place, provide samples to rights holders for testing and strengthening in-house processes against counterfeiting.
- Maintain a central repository of all cases with key data points for further analysis and policy formulations.
- Develop a new/update existing Whistle blower Act¹⁰⁴ that covers corporate whistleblowing pertaining to counterfeiting. The Act could also provide incentives for disclosures, and should have enhanced protection of whistle-blowers.

Invite and adopt global best practices: The “Make in India” initiative invites global manufacturers to manufacture in India. This has the inherent advantage of inviting such global manufacturers to also bring along and implement their best practices to combat counterfeiting, thereby drawing from their experience and expertise in fighting counterfeiting. These practices can then be replicated across industries.

4.2 Ongoing initiatives for anti-counterfeiting solutions

India has woken up to the need for IPR enforcement, consumer protection and public awareness; with evidence of various measures being taken in this direction. While more effort would be required, it must be acknowledged that a beginning has been made.

Enforcement

The Government of India has been initiating several legislative and administrative changes in order to strengthen India’s IP laws and their enforcement. Some of these initiatives include amendments to India’s IP laws (such as more protection to rights holders under the Copyright Law, amendments to the Trademark Act to facilitate implementation of the international registration of trademarks as required under the Madrid Protocol, disposal of the commercial disputes valued at INR 50,000,000 or higher within one year of filing the suit), modernisation of the IP registries with online access systems, establishment of the Intellectual Property Appellate Board (“IPAB”) and border control measures to control parallel imports and counterfeiting.¹⁰⁵

Further, since a key issue with enforcement in India has to do with delayed judicial relief, section 135 introduced in the Trademark Act, 1999, is significant. It gives statutory powers to the courts to grant ex-parte (that is without notice to the defendant) relief in appropriate case. The courts are empowered to grant ex-parte injunctions against infringers restraining them from selling counterfeit goods, and ex-parte order for discovery of documents, preserving of infringing goods, documents or other related evidence and restraining the defendant from disposing of his assets in a manner which may affect plaintiff’s ability to recover damages.

Government initiatives

Most notably in the recent past, the government has, under the aegis of the Consumer Protection Act, 1986, launched a consumer education and awareness campaign called “Jago Grahak Jago” and set up consumer protection councils at different levels of district, state and central, for promoting and protecting the rights of the consumers.¹⁰⁶

104. Times of India

105. Consumer Education

106. Consumer Rights

Rights holders' initiatives

Rights holders have also been at the forefront of the fight against counterfeiting, perhaps on account of being the party standing to gain (or lose) the most by a successful “Make in India” revolution free of counterfeiting. Their initiatives have taken many forms.

Many rights holders' associations have launched consumer awareness campaigns in order to educate and mobilise public sentiment.

One example is the awareness campaign “Be Genuine, Buy Genuine”, launched by the Society of Indian Automobile Manufacturers (“SIAM”) as a way of fighting against unauthorised and unauthentic manufacturers and sellers. SIAM promoted this campaign extensively amidst the general audience during the 2014 Indian Auto Expo, and has also taken the social media route to create awareness among people and maximise the impact of this campaigning. As part of the overall campaign, SIAM also formed the Anti-Counterfeiting Group (“ACG”) consisting of major auto players in the industry. The ACG microsite and campaign emphasises customer awareness, validation methods, packaging updates and other best practices to detect fake products.¹⁰⁷

Industry bodies such as FICCI are also holding seminars under the CASCADE initiative in order to “engage all stakeholders and sensitise them to fight against counterfeiting and smuggling”.

Collaborative initiatives are being seen. One such example of a collaborative effort between private industry and the government is the FICCI CASCADE, with the Ministry of Consumer Affairs. It unveiled a consumer awareness campaign against counterfeiting and smuggling on the occasion of World Anti-Counterfeiting Day on 5 June 2013. The creative campaign stressed on the negative socio-economic impact of counterfeiting and smuggling and the ill effects of this illicit trade on the consumers.

Other rights holders' initiatives: Rights holders are also taking up industry specific initiatives to combat counterfeiting.

For example, HUL conducts about 400 raids every year on counterfeiters¹⁰⁸, while Emami reports a separate cell headed by an ex-assistant commissioner of police whose job is to investigate leads provided by the in-house sales force on places where counterfeit products of its popular brands are made. Once these are identified, the team and local authorities raid these factories.¹⁰⁹

107. Business Standard

108. Consumer Education, Centre for consumer studies, Indian Institute of Public Administration

109. Rediff

110. Moneylife

111. <http://www.iccwbo.org/data/documents/bascap/international-engagement-and-advocacy/country-initiatives/india/fighting-counterfeits-and-improving-the-trademark-environment-in-india/>

In another collaborative initiative, nearly 70 manufacturers of authentication solution providers in India are members of ASPA which is also affiliated with global associations such as the International Hologram Manufacturers Association (“IHMA”), Counterfeit Intelligence Bureau (“CIB”) and INTERPOL. ASPA members protect over 10,000 brands worldwide through the identification of genuine products and documents.

ASPA contends that the use of authentication solutions is vindicated by the experience of various state excise departments – specifically, the usage of authentication solutions in the form of security holograms on liquor bottles has minimised spurious liquor tragedies in states using such solutions, while also increasing excise revenue collections, vis-à-vis states not using such solutions.¹¹⁰ Such authentication solutions therefore become very useful in curbing inter-state smuggling of liquor and cigarettes in the country, a practice that is rampant on account of difference in excise duty rates amongst states.

4.3 Consumer involvement through greater awareness

As discussed in the preceding section, consumers must be involved as a key stakeholder in the fight against counterfeiting and smuggling, and merits special attention. A study by BASCAP focused on Indian consumers has shown that:¹¹¹

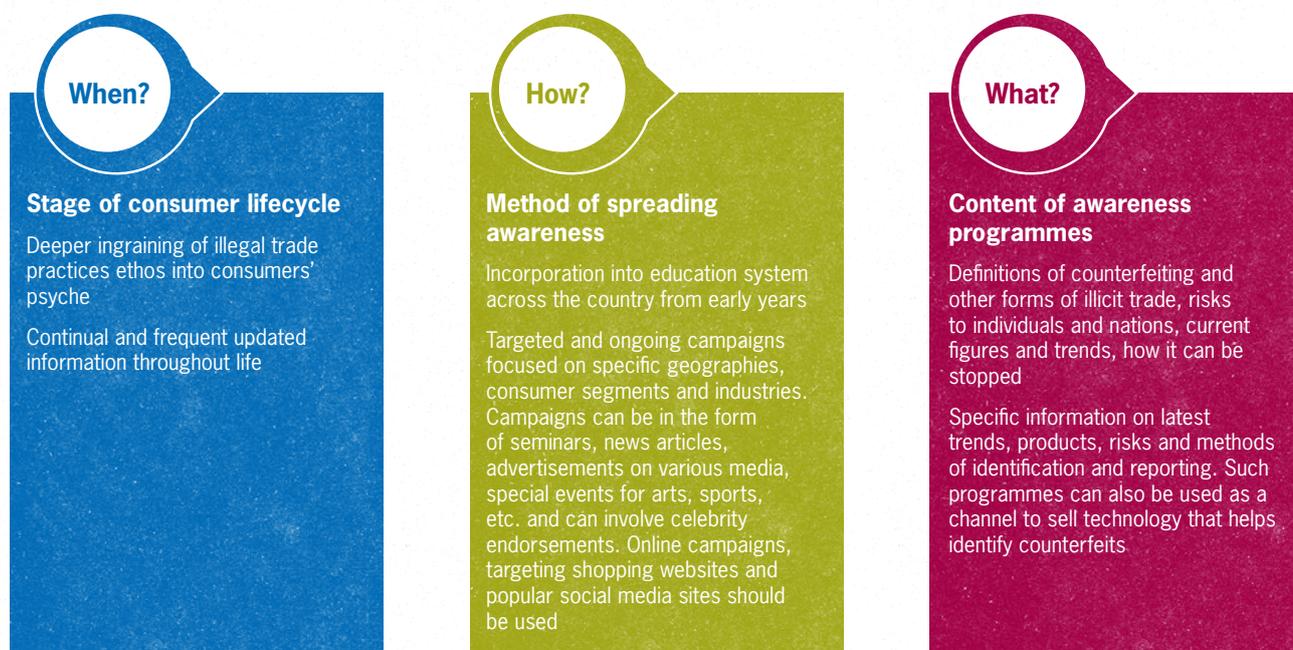
- In cases where packaging is very similar, there is understandable confusion among honest consumers attempting to buy genuine.
- Consumers are willing to take action when given the full picture of the enormous impacts that counterfeits have on society.

Greater consumer involvement can be brought about by spreading awareness of illegal trade practices; the “Make in India” campaign already has a dedicated marketing setup and enjoys a high degree of awareness and recognition amongst the public. This channel could be simultaneously used to also aggressively spread consumer awareness on the importance of promoting the manufacture and sale of authentic goods in the country.

A consumer awareness programme should focus on three key areas that are:

- Stage of consumer's life it is targeted at
- Channels used
- Content of awareness programmes

Figure 19: Spreading greater consumer awareness



The American National Standards Institute (“ANSI”) issued a guide titled “Best Practices in the Fight against Global Counterfeiting” in 2011 based on its interactions through conferences, workshops and interviews.¹¹² One of the issues explored in these interactions and elaborated in the guide is the use of interactions with consumers, manufacturers, and other players in the fight against counterfeiting. ANSI has identified two tenets of spreading awareness, based on consensus and best practices that emerged during its interactions. These can be adapted to the Indian scenario and incorporated as part of the overall consumer awareness campaign in a staged manner.

‘Educate with a simple message’ – ANSI argues that given small businesses and consumers are also part of the counterfeiting fight, small, simple and clear messages, outlining universal basic steps should be used. Such messages can be used effectively alongside the brief but powerful “Make in India” catch phrase to spread general consumer awareness as a first step.

‘We need case studies, from horror stories to near misses’ – ANSI further argues that in order to get attention and drive home the point, case studies on actual incidences, including ones with more terrible consequences, should be compiled and disseminated. Such case studies can be used at specific forums to spread more targeted consumer awareness. Such forums include consumer association meets, university lectures and programmes, trade fairs, etc.

Using technology effectively – It is pertinent to also dwell on how the internet can be used to spread consumer awareness. As discussed in preceding sections, online shopping websites are now a key channel used by counterfeits. While measures to deal with this have already been discussed, the emergence of this trend also implies that a robust consumer awareness programme should necessarily include an “online” element. Online forums that can be used to this end include:

- Online courses offering specific and short modules, along with certifications, on various counterfeiting elements.
- Online campaigns using popular social media such as Twitter and Facebook to spread awareness about counterfeiting and how it can be stopped.
- Industry and geography specific websites that allow consumers to remain updated on latest trends in counterfeiting, shares case studies and provides information on identification and reporting.

Further, many countries and international agencies already offer the above¹¹³, allowing India to also borrow templates and best practices from the same.

112. American National Standards Institute

113. United States Interregional Crime and Justice Research Institute

Recommendations

While the impacts of illicit trade and the associated activities of smuggling, piracy and counterfeiting are far reaching, with increasingly serious consequences, tackling this menace is not impossible. This report concludes with a list of recommendations in this regard, based on the current trends plaguing the landscape, global endeavours and local success and failure stories.

Manufacturers must assume a greater responsibility in the process

Manufacturers can play a critical role in the war against illicit trade. Measures including conducting periodic workshops where custom authorities are trained to help the manufacturer community in identifying counterfeit products, creating repositories, including on websites, that alert consumers about illicit goods, conducting periodic “surprise” checks on all vendors and other supply chain parties for possible leaks, and other similar measures would provide the much needed head-start in this direction.

Strengthen law and ensure stringent enforcement

Besides imposition of fines, there should be strict measures which create a fear of law amongst those indulging in illicit trade, and causes the society at large to realise the seriousness of the crime. In India, the Trademarks Act of 1999 provides for a penalty of 6 months to 3 years of imprisonment in addition to a fine of minimum INR 50,000 for selling or applying false trademarks or descriptions¹¹⁴. A fine of such a paltry amount does not serve as a deterrent for criminals indulging in illicit trade. Laws should be enacted to impose prohibitive minimum “floor” penalties as well as more stringent action in deserving cases; further, seizures of suspected goods should be implemented as an interim measure without waiting for cases to be decided in court. Finally, capacity building of judiciary and other enforcement agencies would increase sensitivity towards such crimes and help in expediting such cases that come to light.

Set up of a nodal governance agency

A single, dedicated, national governance agency that acts as the go-to authority for illicit trade must be set up. This agency can help coordinate national efforts and intelligence against illicit trade, including smuggling and counterfeiting, maintain an updated central database on all registered IP and seizures pertaining to smuggling and counterfeiting, and be manned by personnel specially trained in anti-counterfeiting, smuggling and piracy measures and laws.

Increase consumer awareness

Educating consumers is one of the most effective tools that can be used to help curb counterfeiters by tackling the demand side of the equation. Raising awareness about the adverse effects of purchasing counterfeit, pirated and smuggled goods is of paramount importance in this regard. This would specially be critical for the category of consumers who knowingly buy such products due to

a perceived skewed risk-reward ratio, creating a demand for them. If consumers at large are, however, made to understand that buying goods in such categories could result in serious health hazards, cause environmental damage and contribute to serious national and international problems through the terrorist organisations that such activities often fund, the demand for such illicit goods could be reduced drastically. However, in order to turn universal consumer opinion against such illicit trade, all parties, from manufacturers and their associations, to international agencies, to local and national law enforcement agencies must act in concert.

Adopt anti-counterfeit technologies

Plenty of anti-counterfeit technologies are available in the industry which allow authentication of products. These are available for various industries including consumer goods, alcohol, tobacco, etc. While manufacturers themselves could adopt these, strict regulations mandating that manufacturers implement such technologies would go a long way making progress in the direction. At the same time, industry associations and government agencies must organise awareness campaigns and create a sense of urgency for the manufacturer community to adopt high end technologies, while also educating manufacturers about the most viable technology available (for example, anti-counterfeiting technology currently prevalent in the pharmaceutical industry includes RFID, barcode and track and trace technologies).

Invest in R&D

Criminals engaged in illicit trade are often one step ahead of the game. Therefore, apart from responsive measures, manufacturer associations and governments must also invest in R&D to devise new technology to differentiate original products and enable the tracking of the same globally. Such technology can be in the form of differentiating marks inbuilt into the product, smart packaging, and devices that help consumers ascertain the product they are purchasing is not fake, among others.

Collaboration

At the risk of repetition, the final frontier against smuggling, counterfeiting and other illicit trade has to be in the form of a united front. Different geographies and industries face different challenges from illicit trade – enabling other players to learn from experiences of others. For example, a country with border control issues in the form of illegal immigration, terrorist threats, etc., can help other nations adopt their strategies to prevent smuggling across borders. Similarly industries such as perishable FMCG, which require sophisticated packaging due to the inherent nature of their goods, can share packaging technology with other industries who can then adapt the same to prevent counterfeiting of their products.

114. Asian Patent Attorneys Association

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Federation of Indian Chambers of Commerce and Industry

www.ficci.com

FICCI CASCADE

In the recent past India's economic growth story has attracted world's attention bringing new challenges for the domestic economy. One of the challenges currently faced is the growing illicit trade in counterfeits, pass offs and smuggled goods. These activities are also threatening brands not only in every region of the country but across the globe.

Contraband and counterfeit products hurt the integrity of the brand, further diluting the brand owner's reputation. This not only results in erosion of sales of the legitimate product but further [CASCADE]s onto affect the consumers in the form of health and safety hazards. With the above insight the Federation of Indian Chambers of Commerce and Industry (FICCI) took the initiative to dedicate a forum by establishing the Committee Against Smuggling and Counterfeiting Activities Destroying the Economy - CASCADE on 18th January, 2011.

FICCI Committee Against Smuggling and Counterfeiting Activities Destroying Economy (CASCADE)

www.ficcicascade.com

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