

## **Counterfeit Goods: A menace we could do without.**

*By Caroline W. Mwaura*

Last week, I bought a packet of my favourite brand of biscuits. I was disappointed at the taste and aroma of the biscuits, which I found to be different from what I had come to expect of that particular brand. It was only upon closer examination of the packaging paper that I realised I might have been taken for a ride. The name of the company that owns the trade name was indicated on the packaging paper. The dominant colour of the packaging paper was also similar to that of the genuine product and so was the design on the paper. The packaging paper however seemed crudely designed. I wondered whether I had bought a counterfeit product, in which case this would be an instance of passing off. This brought to mind an article in a local daily in the recent past where tins of a well known food flavouring additive had been found to contain a similar product, although the product had not been manufactured by the company that owns the trade mark.

“Passing off” refers to the practice of using another’s registered trade name or mark on a person’s product for purposes of misleading consumers into buying the product in the belief that they are buying a product made by the owner of the registered mark or name. The phenomenon of passing off has been with us for as long as those who endeavour to live off the goodwill and trust developed by a manufacturer in his brand realised that they could succeed in doing so while escaping any form of sanction from the law.

On paper, there are laws which prescribe punishment as a deterrent to such practices. The Trade Marks (Amendment) Act, 1994, under section 58C defines forgery of a registered mark as the making of a trade mark without the consent of the proprietor of a registered trademark or the authority of the Act or the making of a mark so nearly resembling a trade mark as to be likely to deceive or cause confusion. Section 58D (1) (d) of this Act previously prescribed a fine of ten thousand shillings or five years imprisonment or both before the fine was increased to two hundred thousand shillings by the Trade Marks (Amendment) Act of 2002. More needs to be done with regard to enforcement of such laws.

Consumers who buy fake products stand to lose from two angles: monetarily and health wise. Aside from the immediate consequence of lost value for money to me after I discarded the biscuits, there would also have been implications on my health had they not been fit for consumption. In the case of a product that is not ingested, say a dry cell battery, the negative effect, most likely a leak, would be on the equipment in which it is used. And these consequences are only to the consumer.

The manufacturer who registers a trademark only to have it imitated is forced to share his earnings with the person who infringes the mark. A person who, by all possible interpretations, is a thief. Registering a trademark is an investment. Under the current system of registration in Kenya, the registration process takes a considerable amount of time and money. Further, significant amounts of money are required to advertise the trademark or name before it can attain the status of a well-known brand for a particular product. Failure to control the vice of trademark infringement does not bode well for this country at a time when investment is an oft-quoted ingredient in the development process. There are already many factors that have sent investors packing. Incentives are needed to restore confidence in this country as an attractive investment location. Local investors should especially be encouraged as they potentially count for a contribution to the country's wealth. They are, for instance, unlike foreign investors, more likely to re-invest their earnings locally. The growth potential of the economy, viewed from this angle, is promising. Trademark protection counts as an incentive in promoting investment.

It also cannot be lost on the observer that manufactures are also consumers. Meaning the manufacturer stands to suffer both as a producer of the genuine product not bought by the misled consumer, and as an end-recipient of a fake product.

Admittedly, consumers themselves encourage trademark infringement. If there were no market for the fakes, no manufacturer would invest in making them. Consumers value a bargain, and it is easy to see why one would buy an imitation at a fraction of the price of the genuine commodity. After all, they reason, the counterfeit serves the purpose, doesn't

it? It is an arguable point whether low incomes are to blame for the proliferation of fakes. Income levels are a major (if not the main) factor in many consumers' choice of the commodities to buy. It therefore becomes necessary for the legal machinery to intervene in order to ensure that these products do not reach the market.

Those found manufacturing fake products should be made to pay for such wrongdoing. This would stem the problem at its source and it would probably produce better results than educating and informing the public about why they should not buy fake products. Financial realities may curtail a public information measure. That is not to however say that it should not be attempted. The public should also be encouraged to report instances of trademark infringement that they encounter. A system should be devised to encourage such feedback from consumers.