



A STUDY ON DRUG COUNTERFEITING IN THE LIGHT OF COVID-19 PANDEMIC: INDIAN SCENARIO

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ABSTRACT

The world has been facing one of the most challenging times due to the Covid-19 pandemic. The novel coronavirus comes with new variants and strains that are believed to be more contagious and dangerous. The world has witnessed millions of deaths and affected persons due to COVID-19 disease. There are no specific medicines and vaccines available for its cure, much less with firm conviction and certainty. The scientists and researchers have been painstakingly working round the clock to find a concrete preventive and curative solution for it. However, the pandemic has exploded the drug market and as a result, it has attracted many globally to take it as an emerging lucrative business opportunity. The arrival of new medicines and vaccines has increased their demands many folds, and so the temptations of the looters and fraudsters, who want fast cash. The consequence of the ongoing menace is the sharp hike in counter pharmaceutical products globally. However, in the present alarming state, where the racketeers are devising innovative techniques and methods to engulf the pharma market with counterfeit products, it is imperative to realize that drug counterfeit is a serious crime and not limited to IPR Crime. It is an economic or a white-collar crime which affects the social order. Furthermore, using online portals as an interface for advertising and selling fake pharma products has brought the crime of

drug counterfeiting into the ambit of cybercrime. Therefore, in this milieu, a robust mechanism is required to control and prevent the menacing pose by drug counterfeiting. This paper has attempted to study and explore the linkage or intersectional area between the economic or white-collar crime, corporate crime, IPR crime, and cybercrime from the viewpoint of the multidimensional effect and consequences caused by the commission of counterfeit drugs or medicines. An attempt has been made to explore that up to what extent the law provided in the criminal statute book of India is effective in preventing and controlling the crime efficiently.

Keywords: Drug Counterfeit, Counterfeiting, Trademark, IPR, Drug & Cosmetic Act, IPR Crime, White-Collar Crime, Cybercrime, Corporate Crime

INTRODUCTION

The world has been facing one of the most challenging times due to the Covid-19 pandemic. World Health Organization (WHO) had declared it a pandemic on 11 March 2020. More than a year gone, the people have still been struggling to save their lives. The novel coronavirus comes with new variants and strains that are believed to be more contagious and dangerous. The world has witnessed millions of deaths and affected persons due to COVID-19 disease. There are no specific medicines and vaccines available for its cure, much less with firm conviction and certainty. The scientists and researchers have been painstakingly working round the clock to find a concrete preventive and curative solution for it. The medicines, vaccines, and other associated products and services reached to the people so far are the results of their efforts; however, castles are



not built overnight. So, it would be the duty of every person living on this planet to work in coordination, cooperation, and commitment. Humans must not forget their fundamental characteristic of being human, that is, the humanity and kindness towards all especially, in the time of natural mass disasters like the Covid-19 pandemic.

In addition to the severe impact on people's health, this global biological disaster has affected the world's economy, growth, and resources adversely. However, the pandemic has also attracted many globally to take it as an emerging lucrative business opportunity. The study of various business opportunities and making legitimate profits out of the pandemic is beyond the scope of this paper. Instead, this paper has tried to explore the flip side of the opportunists, such as the profiteers and racketeers.

Undoubtedly, the Covid-19 pandemic has exploded in the drug market because of the emerging coronavirus treatments. However, the scaling and speeding up demands for the Covid-19 treatment and prevention has also created a lucrative market for scrupulous fraudsters. The arrival of new medicines and vaccines has increased their demands many folds, and so the temptations of the looters and fraudsters, who want fast cash.

In April 2020, WHO and Interpol raised warning singles concerning the surge in counterfeit drugs due to the Covid crises. Interpol's pharmaceutical crime-fighting unit Operation Pangea made 121 arrests

worldwide and seized the potentially dangerous pharmaceuticals worth more than US\$ 14 million. The pharmaceuticals seized by Interpol had counterfeit facemasks, substandard hand sanitizers, and various unauthorized antiviral drugs. In addition, the agency found 2,000 online links concerning Covid-19 related advertisements for the sale of counterfeit items such as surgical masks. It has seized more than 34,000 counterfeit and substandard masks, corona spray, self-testing kits for HIV and glucose, coronavirus medicines, and various surgical instruments. They are also the overall seized of illicit pharmaceuticals worldwide of around 4.4 million units, including hypnotic and sedative agents, analgesics, painkillers, anabolic steroids, anti-cancer medication, and vitamins. In addition, the agency closed down more than 2,500 web links, including social media pages, websites, and online market platforms. As per Interpol's estimation, the whole efforts described above had disrupted the activities of 37 organized crime groups.¹

The Indian pharma markets are no different. They are flooded with counterfeit Masks. It is reported in a news article that there is fake certificates booking cottage industry, and it has become difficult for hospital, much less the common people, to spot the correctly certified masks. The newspaper cited an incident of a government hospital. The hospital tendered for N95 masks and received offers from 122 firms carrying a range of certificates. On investigation, 120 out of 122 certificates were found fake.² The

¹Interpol.int, 2020. Global operation sees a rise in fake medical products related to COVID-19. [Online] Available at: <https://www.interpol.int/en/News-and-Events/News/2020/Global-operation-sees-a-rise-in->

fake-medical-products-related-to-COVID-19 [Accessed 29 May 2021].

²Pulla, P., 2020. COVID-19 Investigation: The Indian Market Is Flooded with Fake N95 Masks. [Online] Available at: <https://science.thewire.in/health/covid->



government agencies have also spread a word of caution. For example, a pharma company owner was recently arrested in Indore, Madhya Pradesh, for allegedly selling counterfeit Remdesivir injections. According to police, around 400 counterfeit Remdesivir vials were recovered from the car of the owner.³ Indore police also bust a similar racket this month. The police claimed that over one lakh such counterfeit vials had been circulated all over the country.⁴

The Food and Drug Department of Haryana claimed to have bust fake Remdesivir racket on 25 March 2021⁵, wherein 11 arrests were made. The alleged accused allegedly sold Meropenem as Remdesivir vials by printing fake stickers of Hetero Labs Limited, a pharma company that deals in producing vital drugs. The agency has claimed to have seized 277 fake drug vials labeled with stickers of "Covifor Lyophilized powder (Remdesivir for injection 100mg/vial)" and 3,326 empty boxes of Meropenem. In the previous month, a similar fake Remdesivir racket was busted

in Mysuru.⁶ The accused used to fill the empty vials of Remdesivir with cheap antibiotics or saline solution for resale. The Mysuru police claimed that the alleged accused has sold over 800 to 900 counterfeit Remdesivir vials. The police also seized Rs. 2.82 lakh, around 41 counterfeit Remdesivir injections labeled with stickers of various companies, around 99 bottles of Ceftriazone IP injections, and other related materials. In a recent raid, the Delhi police bust inter-state fake Remdesivir racket.⁷ The police seized over 188 vials of Remdesivir labeled with the name 'Covipri,' a packing machine, 3000 empty vials, and packing material of Azithromycin. The police stated that the gang used to sell the injection at exorbitant rates of Rs. 25k to Rs. 40K in major cities. In another incident, three persons were arrested for selling fire extinguishers as oxygen cylinders by modifying the same using spray paints.⁸ Over 2,73,000 doses of the counterfeit Remdesivir injections were seized in

19-counterfeit-n95-masks-cdsco-bis-standards/ [Accessed 29 May 2021].

³ANI, 2021. MP: Pharma owner arrested in Indore with 400 'fake' remdesivir vials. [Online] Available at:

<https://timesofindia.indiatimes.com/videos/news/mp-pharma-owner-arrested-in-indore-with-400-fake-remdesivir-vials/videoshow/82102627.cms> [Accessed 29 May 2021].

⁴World, R., 2021. Indore Police Bust Fake Remdesivir Racket: 'Over One lakh Vials Circulated In The Country. [Online] Available at:

<https://www.youtube.com/watch?v=4B-4R3nyjks> [Accessed 29 May 2021].

⁵TNN, T. T. o. I., 2021. Haryana FDA busts fake Remdesivir racket, 11 held. [Online] Available at: <https://timesofindia.indiatimes.com/city/chandigarh/haryana-fda-busts-fake-remdesivir-racket-11-held/articleshowprint/82957259.cms> [Accessed 29 May 2021].

⁶India, T. T. o., 2021. Fake Remdesivir racket busted in Mysuru, nurse from private hospital arrested. [Online] Available at: <https://www.newindianexpress.com/states/karnataka/2021/apr/19/fake-remdesivir-racket-busted-in-mysuru-nurse-from-private-hospital-arrested-2292031.html> [Accessed 29 May 2021].

⁷Desk, D. W., 2021. Delhi Police busts Uttarakhand gang for selling fake Remdesivir injections. [Online] Available at:

<https://www.deccanherald.com/video/national/delhi-police-busts-uttarakhand-gang-for-selling-fake-remdesivir-injections-980790.html> [Accessed 29 May 2021].

⁸Ojha, A., 2021. Delhi: Fire extinguishers painted and sold as oxygen cylinders, 3 arrested. [Online] Available at: <https://www.msn.com/en-in/news/other/delhi-fire-extinguishers-painted-and-sold-as-oxygen-cylinders-3-arrested/ar-BB1gqp4v?li=AAggbRN&c=7349812266460360760&mkt=en-us> [Accessed 29 May 2021].



Gujarat.⁹ It has also been revealed that the darknet has been flooded with fake coronavirus vaccines for \$250.¹⁰

The examples cited above are just the tip of the iceberg. However, they are enough to understand the gravity of the crime. It is an ongoing menace. Coronavirus outbreak has resulted in speeding up of the products in the market without checking on the security and anti-counterfeiting systems as being done in the usual course. In addition, the tremendous increase in demand for vaccines and medicines has further increased the avenues for criminals to exploit the market for fast cash.

Counterfeiting products are a global issue. The counterfeiting of a drug is no exception. According to Indian Pharmaceuticals Industry analysis, India ranks 3rd for pharma production by volume and 14th rank by value globally.¹¹ It is also a huge consumer market. Drugs or pharma products are one of the most vital and necessities of any nation's healthcare system. On the contrary, counterfeit pharma products pose a serious threat to the system because it connects with patients' lives or the needy population.

The drug counterfeit was chiefly considered a crime against Intellectual Property Rights (IPR Crime), such as counterfeiting or infringing a registered trademark. In such cases, the losses or damages suffered by the

trademark owners have mostly been settled through civil or commercial courts or Alternative Dispute Resolution. Thus, the criminal liability hardly fastened upon the culprits because of settlements, the slightest interest of the corporate giants in lodging complaints, or the cumbersome trial process. However, in the present alarming state, where the racketeers are devising innovative techniques and methods to engulf the pharma market with counterfeit products, it is imperative to realize that drug counterfeit is a serious crime and not limited to IPR Crime. It is an economic or a white-collar crime which affects the social order. The examples cited above also show that the crime is being committed by any person, such as individuals, associations, companies, or corporations, for fast cash. Furthermore, using online portals as an interface for advertising and selling fake pharma products has brought the crime of drug counterfeiting into the ambit of cybercrime. Therefore, in this milieu, a robust mechanism is required to control and prevent the menacing pose by drug counterfeiting. This paper has attempted to study and explore the linkage or intersectional area between the economic or white-collar crime, corporate crime, IPR crime, and cybercrime from the viewpoint of the multidimensional effect and consequences caused by the commission of counterfeit drugs or medicines. An attempt has been made to explore that up to what extent the law provided in the criminal statute

⁹Times Now, 2021. 2,73,000 doses of fake Remdesivir injections seized in Gujarat. [Online] Available at: <https://economictimes.indiatimes.com/news/india/273000-doses-of-fake-remdesivir-injections-seized-in-gujarat/videoshow/82369088.cms?from=mdr> [Accessed 29 May 2021].

¹⁰ Kumar, C., 2020. Fake coronavirus vaccines flood darknet, sell for \$250. [Online] Available at: <https://timesofindia.indiatimes.com/india/fake->

[coronavirus-vaccines-flood-darknet-sell-for-250/articleshow/79731580.cms](https://timesofindia.indiatimes.com/india/fake-coronavirus-vaccines-flood-darknet-sell-for-250/articleshow/79731580.cms) [Accessed 29 May 2021].

¹¹ibef.org, 2021. Indian Pharmaceuticals Industry Analysis. [Online] Available at: <https://www.ibef.org/industry/indian-pharmaceuticals-industry-analysis-presentation> [Accessed 29 May 2021].



book of India is effective in preventing and controlling the crime efficiently.

RELEVANT LEGAL PROVISIONS CONCERNING DRUG COUNTERFEITING IN INDIA

Drug Counterfeit- IPR Crime

A trademark¹² maybe a word, sign, symbol, design, logo, or expression. It is a unique mark that distinguishes it from the product or service of others. It is an identifier of the source of a product or service. The trademark authority may register three kinds of a trademark; namely, Standard Trademark applied by the proprietor or owner, Certification Trademark applied by the certifying authority, and Collective Trademark applied by a group. The trademark could be conventional, like wordmarks or slogans, or non-conventional, like sound marks or color marks. In addition,

¹²Section 2 (zb) – Trade Marks Act, 1999- "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and-- (i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and (ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark.

¹³S. 103. Trade Mark Act, 1999 Penalty for applying false trade-marks, trade descriptions, etc.—Any person who— (a) falsifies any trade mark; or (b) falsely applies to goods or services any trade mark; or (c) makes, disposes of, or has in his possession, any

there can be the registration of a dynamic mark, moving mark, and smell mark.

The criminal liability is provided under Section 103 to 105 of the Act. Any person who falsifies any trademark; or falsely applies to goods or services any trademark; or makes, disposes of, or has in his possession, any die, block, machine, plate or other instruments to falsify or of being used for falsifying, a trademark; or applies any false trade description to goods or services, or applies to any goods in violation of section 139, shall be punished with imprisonment of minimum six months and maximum three years with fine. The fine should not be less than Rs—fifty thousand, which may extend to two lakhs. However, the court may reduce the prescribed minimum sentence and fine in particular situations.¹³

die, block, machine, plate or other instrument for the purpose of falsifying or of being used for falsifying, a trade mark; or (d) applies any false trade description to goods or services; or (e) applies to any goods to which an indication of the country or place in which they were made or produced or the name and address of the manufacturer or person for whom the goods are manufactured is required to be applied under section 139, a false indication of such country, place, name or address; or (f) tampers with, alters or effaces an indication of origin which has been applied to any goods to which it is required to be applied under section 139; or (g) causes any of the things above mentioned in this section to be done, shall, unless he proves that he acted, without intent to defraud, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees. [S. 101. Meaning of applying trademarks and trade descriptions.—(1) A person shall be deemed to apply a trade mark or mark or trade description to



Any person who sells, lets for hire or exposes for sale, or hires or has in his possession for sale, goods or things having a false trademark or false trade description or trademark in violation of section 139 shall be punished

goods or services who— (a) applies it to the goods themselves or uses it in relation to services; or (b) applies it to any package in or with which the goods are sold, or exposed for sale, or had in possession for sale or for any purpose of trade or manufacture; or (c) places, encloses or annexes any goods which are sold, or exposed for sale, or had in possession for sale or for any purpose of trade or manufacture, in or with any package or other thing to which a trade mark or mark or trade description has been applied; or (d) uses a trade mark or mark or trade description in any manner reasonably likely to lead to the belief that the goods or services in connection with which it is used are designated or described by that trade mark or mark or trade description; or (e) in relation to the goods or services uses a trade mark or trade description in any sign, advertisement, invoice, catalogue, business letter, business paper, price list or other commercial document and goods are delivered or services are rendered to a person in pursuance of a request or order made by reference to the trade mark or trade description as so used. (2) A trade mark or mark or trade description shall be deemed to be applied to goods whether it is woven in, impressed on, or otherwise worked into, or annexed or affixed to, the goods or to any package or other thing. & S. 102. Falsifying and falsely applying trademarks. (1) A person shall be deemed to falsify a trade mark who, either,— (a) without the assent of the proprietor of the trade mark makes that trade mark or a deceptively similar mark; or (b) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise. (2) A person shall be deemed to falsely apply to goods or services a trade mark who, without the assent of the proprietor of the trade mark,— (a) applies such trade mark or a deceptively similar mark to goods or services or any package containing goods; (b) uses any package bearing a mark which is identical with or deceptively similar to the trade mark of such proprietor, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the proprietor of the trade mark. (3) Any trade mark falsified as mentioned in sub-section (1) or falsely applied as mentioned in sub-section (2), is in this Act referred to as a false trade mark. (4) In any

with imprisonment for a minimum of one year and maximum three years with fine. The fine must be at least one lakh rupees and may extend to two lakh rupees.¹⁴ Section 105¹⁵

prosecution for falsifying a trade mark or falsely applying a trade mark to goods or services, the burden of proving the assent of the proprietor shall lie on the accused.

¹⁴ S. 104. Penalty for selling goods or providing services to which false trade mark or false trade description is applied.—Any person who sells, lets for hire or exposes for sale, or hires or has in his possession for sale, goods or things, or provides or hires services, to which any false trade mark or false trade description is applied or which, being required under section 139 to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer, or person for whom the goods are manufactured or services provided, as the case may be, are without the indications so required, shall, unless he proves,— (a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of commission of the alleged offence no reason to suspect the genuineness of the trade mark or trade description or that any offence had been committed in respect of the goods or services; or (b) that, on demand by or on behalf of the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods or things or services; or (c) that otherwise he had acted innocently, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees. [Id. Note 13 supra]

¹⁵ S. 105. Enhanced penalty on second or subsequent conviction.—Whoever having already been convicted of an offence under section 103 or section 104 is again convicted of any such offence shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but



deals with enhanced Penalty on second or subsequent conviction Imprisonment.

The offenses under Trademark Act are cognizable, non-bailable, and non-compoundable. However, the same may be quashed under Section 482 of the Criminal Procedure Code. The Trademark Act was enacted and amended to provide registration, better protection of trademark of any goods or services, and to prevent fraudulent marks. In other words, the Act is to protect the intellectual assets or intangible assets of its creator or owner. Further, it allows the consumers to make informed decisions before purchasing any product or hiring any services. There could be a severe threat to the economy if the counterfeiting and infringement issues concerning trademark do not adequately address. The Indian National IPR Policy 2016 has emphasized strengthening the IP enforcement mechanism. Here the police or the law enforcement agency has a crucial responsibility of effective enforcement of the rights of IP owners.

If a counterfeit or fake trademark product belongs to the pharma or drug industry, it comes under the ambit of drug or medicine

which may extend to two lakh rupees: Provided that the court may, for adequate and special reason to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than one year or a fine of less than one lakh rupees: Provided further that for the purposes of this section, no cognizance shall be taken of any conviction made before the commencement of this Act.

¹⁶S. 3 (b) "drug" includes— 9 [(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;] (ii) such

counterfeiting. The Act does not deal with the quality of material or substance contained in the product per se; it deals with its branding through its outer cover. For instance, if a Remdesivir injection produced by a company says 'A' and labeled it with an imitated trademark of company 'B,' whether company A has committed an offense under Trade Mark Act? Company A has infringed the rights of company B, and it may be tried for the offense under Section 103 read with Section 114 of the Act for falsely using another's trademark. However, if the injection ingredient is also altered or degraded, can it be liable for changing the internal contents of the product under this Act? Indeed, replacing ingredients with some other lower-quality material to deceive consumers is an imitation of the original product. However, in the illustration mentioned above, the punishment is provided under the Drug and Cosmetic Act, 1940.

Drug Counterfeit- A crime under Drug & Cosmetic Act (Drug Act)

The Act provides an inclusive definition of drugs. Drugs¹⁶ Includes all medicines, substances, components of the drug, or devices that use or intended to be used for treatment, diagnosis, mitigation, or

substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of 10[vermin] or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;] 11[(iii) all substances intended for use as components of a drug including empty gelatin capsules; and (iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board.



prevention of any disease or disorder in human beings or animals. It also includes such substances intended to affect the structure or function of the human body or destruct diseasing, causing vermin or insects in human beings or animals. A similar definition is also provided for Ayurvedic, Siddha, or Unani drugs.

To ensure and control the quality and standard of the drugs, the Act has provided what would construe as substandard drugs, misbranded drugs, adulterated drugs, and spurious drugs. It applies to import, manufacturing, and selling.

Misbranded¹⁷ drugs are those drugs that are coloured, coated, powdered, or polished to conceal any damage, or they are showcased as high therapeutic value than they are. They also include drugs that are not labeled as prescribed or labeled with any false or misleading claim.

¹⁷S. 9. Misbranded drugs.—For the purposes of this Chapter, a drug shall be deemed to be misbranded— (a) if it is so coloured, coated, powdered or polished that damage is concealed or if it is made to appear of better or greater therapeutic value than it really is; or (b) if it is not labelled in the prescribed manner; or (c) if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular. [Also, S. 17 of Drug and Cosmetic Act, 1940]

¹⁸9A. Adulterated drugs.—For the purposes of this Chapter, a drug shall be deemed to be adulterated,— (a) if it consists, in whole or in part, of any filthy, putrid or decomposed substance; or (b) if it has been prepared, packed or stored under insanitary conditions whereby it may have been contaminated with filth or whereby it may have been rendered injurious to health; or (c) if its container is composed in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or (d) if it bears or contains, for purposes of colouring only, a colour

A drug is an adulterated¹⁸ Drug if it consists of decomposed, decayed, or filthy substance; or it has been stored, prepared, or packed in unhygienic or contaminated conditions detrimental to health. If a drug contains or its container is composed of any toxic substance injurious to health or any unprescribed colour is being used, or any substance has been mixed therewith to reduce its quality or strength are covered under the definition of adulterated drug.

Spurious¹⁹ is a kind of drug which either imported, manufactured, or sold under the name of a different drug; or imitated, substituted, or resembled another drug; or the name of another drug is labeled upon it in a manner that is likely to deceive the consumers, or it is labeled with the name of a fictitious or an unrelated manufacturer or is substituted by another drug or substance wholly or partially. In addition, the Act prohibits the import of any drugs of sub-

other than one which is prescribed; or (e) if it contains any harmful or toxic substance which may render it injurious to health; or (f) if any substance has been mixed therewith so as to reduce its quality or strength. [Also, S. 17A of Drug and Cosmetic Act, 1940]

¹⁹9B. Spurious drugs.—For the purposes of this Chapter, a drug shall be deemed to be spurious— (a) if it is imported under a name which belongs to another drug; or (b) if it is an imitation of, or is a substitute for, another drug or resembles another drug in a manner likely to deceive or bears upon it or upon its label or container the name of another drug unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug; or (c) if the label or container bears the name of an individual or company purporting to be the manufacturer of the drug, which individual or company is fictitious or does not exist; or (d) if it has been substituted wholly or in part by another drug or substance; or (e) if it purports to be the product of a manufacturer of whom it is not truly a product, [Also, S. 17B of Drug and Cosmetic Act, 1940]



standard quality, misbranded drug, adulterated, or spurious drug.

It is relevant to mention that according to the Act, the manufacture in relation to any drug includes any process or part of a process for making, altering, ornamenting, finishing, packing, labeling, breaking up, but does not include the compounding or dispensing of any drug, or the packing of any drug in the ordinary course of retail business.

Whoever imports manufacture for sale or distribution or sells, or stocks or exhibits or offers for sale, adulterated or spurious drug shall be punished with imprisonment for a term which may extend to three years and a fine which may extend to five thousand rupees.²⁰ The Act further enhances the punishment for those who commit the same offense again.²¹ If the offense is proved, then the consignment of the drugs has to be confiscated.²²

²⁰13. Offences. (1) Whoever himself or by any other person on his behalf imports,— (a) any drug deemed to be adulterated under section 9A or deemed to be a spurious drug under section 9B or any spurious cosmetic referred to in section 9D or any cosmetic of the nature referred to in clause (ee) of section 10 shall be punishable with imprisonment for a term which may extend to three years and a fine which may extend to five thousand rupees; (b) any drug or cosmetic other than a drug or cosmetic referred to in clause (a), the import of which is prohibited under section 10, or any rule made under this Chapter, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both; (c) any drug or cosmetic in contravention of the provisions of any notification issued under section 10A, shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees, or with both. [Also, S. 27 of Drug and Cosmetic Act, 1940]

²¹Id. Note 20 supra

It continues with the earlier illustration, company 'A' shall be punished for manufacturing an adulterated drug form of Remdesivir injection of company 'B' under this Act. Also, it has labeled with other company's name in a deceiving manner, the provision of spurious drugs would attract.

The primary aim is to regulate the import, manufacture, distribution, and sale of drugs. Therefore, it is clear that the Act is pro-public. The agenda is to provide drugs of prescribed quality free from any adulteration or misbranding to the public at large. The robust health sector results from effective control and regulation of drugs to reach everyone without discrimination in quality, price, or any other biases.

Drug Counterfeit- A crime under the Indian Penal Code (IPC)

The IPC deals with an offense related to adulteration of drugs,²³ its sale,²⁴ and sale of

²²S. 14. Confiscation. Where any offence punishable under section 13 has been committed, the consignment of the drugs 1 [or cosmetics] in respect of which the offence has been committed shall be liable to confiscation. [Also, S. 31 & 33K of Drug and Cosmetic Act, 1940]

²³274. Adulteration of drugs. Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

²⁴ S. 275. Sale of adulterated drugs.—Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as



the drug as a different drug or preparation²⁵. In all three scenarios, the punishment prescribed is imprisonment for a term that may extend to six months or with a fine, extending to one thousand rupees, or with both.

For counterfeiting, the IPC punish with imprisonment for life or up to seven years along with a fine for offenses under Sections

472 and 475; and up to seven years under Sections 473 and 476. The provision would be applicable in drug counterfeiting cases also. The actus reus is counterfeiting, and the men's rea is to commit forgery. Using false property marks is also punishable under IPC.²⁶ The maker, possessor, seller of any goods, or any other acts concerning counterfeiting a property mark are also punishable.²⁷

unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

²⁵ S. 276. Sale of drug as a different drug or preparation. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

²⁶ S. 481. Using a false property mark. Whoever marks any movable property or goods or any case, package or other receptacle containing movable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark. & 482. Punishment for using a false property mark. Whoever uses any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. & 483. Counterfeiting a property mark used by another. Whoever counterfeits any property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

²⁷ S. 485. Making or possession of any instrument for counterfeiting a property mark. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a property mark, or has

in his possession a property mark for the purpose of denoting that any goods belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.] 486. Selling goods marked with a counterfeit property mark. 2 [Whoever sells, or exposes, or has in possession for sale, any goods or things with a counterfeit property mark] affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves (a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and (b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or (c) that otherwise he had acted innocently, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. 487. Making a false mark upon any receptacle containing goods. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. 488. Punishment for making use of any such false mark. -Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to



In addition, the crime of drug counterfeiting may attract other provisions of the IPC such as cheating, homicides, attempt to murder, abetment, conspiracy. In a nutshell, the Code provides severe punishment in counterfeiting, which applies to fake drugs. The severity of punishment is to deter the accused from committing a crime. Therefore, the counterfeit is an economic loss that further leads to social harm. Besides that, it, unfortunately, opens avenues for further crime such as money laundering, cybercrime.

Drug counterfeit- A Cyber Crime

The nature of IP crimes today spans the physical and digital domains. The selling and distribution of counterfeit drugs on illegal websites is the fastest growing area of expanding counterfeiting by criminals. Cyberspace beyond physical boundaries creates a significant hurdle to the enforcement agencies in cracking the case. Another difficulty is the identification of the drug and cybercriminals. In a nutshell, counterfeiting is carried out by sophisticated criminal networks. Technology advancement has open new ways and avenues for making fast cash.

Drug Counterfeit- A Corporate Crime

Corporate crime is a species of white-collar crime. A crime committed collectively by a group of people or associations in any business for making profits, such as making

and selling fake drugs by a pharma company, is a corporate crime. In short, corporate crime is also an economic crime where the individual's greed for self-enrichment shifts to corporates' enrichment. Corporate crimes harm the commerce and economy of our country for myriad reasons, including the investors lost their interest due to distrust and mistrust. The criminal liability of corporates has been clearly defined under the Trademark Act, The Drug and Cosmetic Act, Information Technology Act, and the Indian Penal Code.

COUNTERFEITING DRUGS, CAUSES, AND IMPACT

The Trademark Act does not define the word "counterfeit." However, according to the TRIPS Agreement - "*Counterfeit trademark goods shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.*"²⁸

IPC defines counterfeit as "*a person is said to "counterfeit" who causes one thing to resemble another thing, intending employing that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.*"²⁹

defraud, be punished as if he had committed an offence against that section. 489. Tampering with property mark with intent to cause injury- Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

²⁸Anon., n.d. Wto.org. [Online] Available at: https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art51_jur.pdf [Accessed 29 May 2021].

²⁹ S. "Counterfeit". A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised. 1 [Explanation 1.- It is not essential to counterfeiting that the imitation should be



In simple words, a counterfeit product is an illegal or unauthorized imitation of or resemblance with another product whose trademark rights are protected under the Trademark Act. To attract counterfeiting, the imitation should be deceptive; exact imitation is not necessary.

There is a fundamental difference between counterfeiting and infringement. Counterfeiting can be defined as a fraudulent imitation whereas, infringement is the breach or violation of rules and regulations. In other words, to counterfeit is an act intended to defraud or forge, whereas that is not a necessary element of infringement. All counterfeit marks are infringing, but the reverse is not valid. All infringements are not counterfeit. Wilful infringement may come under counterfeiting. For infringement, the remedy is compensation for damages, John Doe (Ashok Kumar) orders, or injunctions. Counterfeiting is criminal wrong against the state or the public at large. Therefore, the Act of counterfeiting is penalized.

A counterfeit drug or medicine is one that-

1. either contains the wrong active ingredient, or
2. none of the specified active ingredient, or
3. the correct active ingredient at the wrong dose.
4. Contains lower than required levels of active ingredients.
5. Deliberately and fraudulently produced, or mislabelled in a manner it appears a genuine product to the consumers.

The leading causes for counterfeit drugs in India include limited access to healthcare

exact. Explanation 2.-When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person

facilities, consumer's unawareness, expensive cost of genuine medicines, online pharmacy, advancement in technology with weak control and regulation, ill-equipped law enforcement, corruption, fragmented supply chain, difficulty in detecting the counterfeit medicines.

Counterfeiting posed a considerable threat is for the health care and life science industries. Such as, it may lead to loss of the market share, business opportunities for manufacturing genuine pharma products, rising of competitive disadvantage, possibility of product liability, loss of goodwill and increasing expenses for security and monitoring the market, and institution of legal proceedings against the wrongdoers. It also affects the productivity of generic drugs adversely and increases the socio-economic burden. A jobless market will be one of the consequences of losing market share, which would further affect the social order and public revenue. Furthermore, it would further discourage foreign investment. On the flip side, the counterfeiters subsidize further criminal acts.

The issues related to counterfeiting can be minimized as follows:

1. Creating public awareness
2. Implementing anti-counterfeiting measures such as the Falsified Medicines Directive (FMD), Digital watermarks, advanced tracking systems, and Holograms, and
3. Developing stricter laws.

CONCLUSION

so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.]



Drug counterfeiting is a crime of profound gravity. It is explored that there exists an intersectional area between white-collar crime, corporate crime, IPR crime, and cybercrime, and it is widening. It is a warning signal. It is further explored that the law regarding drug counterfeiting is not explicitly provided and that weakness is the strength of criminals. Therefore, there is a vital need for comprehensive rules and regulations to combat drug counterfeiting, significantly when it is expanding beyond the geographical boundary. There is no specific enactment related to drug counterfeiting; one must look into special laws, namely, the Drug and Cosmetic Act, Trade Mark Act, and Information Technology Act; and the general law, namely, the Indian Penal Code. The definition of counterfeit in general is defined in IPC. There is no explicit penal provision of counterfeiting trademark or substance in the special Act. Therefore, to understand the applicability and the offenses prescribed therein in the special laws, one needs to do combine reading. It makes the situation complex and further creates enforcement difficulties. The law needs to be complied with or enacted as one related to counterfeiting of all kinds instead of connecting dots from various special and general laws.

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