

Navigating the grey market is not a black-and-white issue

By [Kay Rickelman](#)

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Many people believe that grey goods are always counterfeit and illegal to purchase. But they're not necessarily fakes. Sometimes referred to as parallel imports, grey-market goods are the genuine, non-counterfeit goods of a trade mark owner, imported into an economic area and sold without the trade mark owner's consent.



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As a result consumers may get, for example, an iPad Pro for R15,000 instead of R18,000. Why the discount? Because it's not being sold through official channels.

How does this happen? If a brand owner misjudges the size of a market in one country and an official distributor has surplus stock, parallel traders sell the surplus to buyers in countries where the goods are not authorised to be sold.

So this particular iPad Pro is unauthorised for sale in a specific jurisdiction. But the consumer pays less and the article is genuine. Win-win for the buyer, right?

No.

Because considerable down-sides remain, the greatest of which is that no after-sales guarantees or warranties are provided. Caveat emptor: 'Let the buyer beware.'

No guarantee or warranty

The law says that, if the grey goods bear a trade mark, a special notice must be used to clearly state that the goods have been imported without the approval of the registered owner of the trade mark and that no guarantee or warranty will be honoured.

But what if the correct notices about warranties do not accompany the grey goods? The consumer may not be getting what they think they're getting.

Let's say a consumer approaches the authorised distributor, manufacturer or brand owner to claim their warranty, and are turned away. The manufacturer can't stand by the product, because it doesn't know if the product has been modified, stored inappropriately, or sold past its shelf life.

Things can and do transpire after the product leaves the control of the original brand owner, or its authorised distributor, that affect the quality of the goods – particularly in the case of foods, cosmetics and pharmaceutical products, but also electronics like batteries or even software.

If there is a problem with the quality of the goods, the consumer may not realise until it is too late that there is no one to report the problem to, and no redress at all.



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Compliance issues

A lot of work goes into making sure that the products imported into South Africa are safe to use and that they adhere to our country's regulations. This means that local regulators need to be made aware of these products and approve/disapprove them based on safety tests performed by accredited test labs.

If an uncertified product is imported or bought from a parallel importer and causes damage to property, or even worse, injury or death, there can be serious legal action against all relevant parties.



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Inconsistent labelling

Consumer legislation in South Africa requires the unauthorised importer to notify the public that it is not an authorised distributor of the goods. But in reality, not all unauthorised importers are equally scrupulous about this.

If the importer is reselling to reputable outlets, like national franchise stores, they tend to go to the trouble to get the labelling right, or face being cut off from making sales to a large reseller in future. But if they are selling in informal markets where the middlemen are not as reputable or the end buyer is not as mindful, there is a higher probability that they won't apply the correct labels or packaging.

For this reason, consumers must be sharp-eyed. If a consumer is used to purchasing a certain product and is familiar with the label, but sees a different label (perhaps incorporating printed matter in a foreign language), let the buyer beware. The product is unlikely to come from the same source they're used to purchasing from.

Trade mark owners can report mis-labelling to The National Consumer Commission (NCC). The NCC can receive complaints regarding alleged prohibited conduct or offences, and refer matters in turn to the National Consumer Tribunal.

Harm to the brand itself

Many [commentators](#) consider parallel importation to be “a parasitism of the reputation and goodwill that a proprietor and his licensees build up over many years”.

This is because a trade mark is a badge of quality, which assists consumers in making decisions to repeat a purchase or to avoid purchasing an item in future. Beyond attesting to the quality of the good when manufactured, the trade mark also assists in maintaining that quality through point of sale to after-sale service.

On a strict price comparison, the grey goods may appeal to the consumer. But once they encounter a problem with the product they will be disappointed by the absent warranty or service, and may not want to support the brand again.

Harm to the licensed distributor

Because the authorised distributor is familiar with the product and product lines, they can add value when selling the product.

They can advise whether what the consumer is purchasing is the best 'model' of the product for their purposes. They can ensure that quality control is implemented; namely, that the product is not sold past its shelf life, that it is stored in appropriate conditions prior to sale; and that if there are any known defects to a particular batch of the product, they can recall it effectively.

Unfortunately, when authorised distributors pay top price for a product from the original manufacturer, they're unlikely to be able to compete with grey-market pricing. What's more, they are the ones paying for marketing to the public and educating consumers as to the desirability of the product.

If they can't compete, they may stop importing and selling, and the consumer may end up with no access to the product at all.

In the end, while there are obvious benefits to the consumer in being able to purchase goods at a lower cost, grey-market goods remain problematic – so much so that the benefits of reduced prices are arguably outweighed by the implications for guarantees, compliance, safety, brand equity and distribution.

ABOUT THE AUTHOR

Kay Rickelman, Trade Mark Attorney, Spoor & Fisher, South Africa. Kay Rickelman is Spoor & Fisher's foreign trade marks counsel. She has BSc cum laude and Juris Doctor degrees from the University of Illinois. She is an Attorney of the State of Illinois, as well as Attorney of the Seventh Circuit, US Federal Court. Kay has over three decades of experience in domestic and international trade mark registration, searches and clearance, and international trade mark litigation. She specialises in portfolio management and oversees trade mark matters in Africa and abroad, on behalf of international companies. Kay is an expert in obtaining and enforcing trade mark protection in foreign countries.

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