

Introduction

Promoting and protecting the value of intellectual property in Kenya

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Business Action to Stop Counterfeiting and Piracy

IP rights play an indispensable role in the formation, development and growth of innovative capacity. This is particularly important as growing economies such as Kenya's continue to evolve from traditional agricultural and low-value manufacturing activities. The benefits of IP protection include strengthening national economies, driving innovation and technology, fostering new ideas and enhancing society and culture, as follows:

- IP protection benefits the economy in terms of gross domestic product, employment, tax revenues, development and competitiveness. IP rights also promote foreign direct investment (FDI) and technology transfers in developed and developing countries, driving development and economic growth.
- IP protection promotes innovation, increases funding for research and development and helps firms to achieve more value from innovations.
- Intellectual property helps firms to monetise their innovations, secure investment, grow market value and develop new markets. Companies that use IP rights generally succeed better and have a higher market value than those that do not.
- IP protection helps small and medium-sized enterprises (SMEs). SMEs that rely on intellectual property of all sorts report higher growth, income and employment

than those that do not – in some cases, as much as 20% more.

- IP protection benefits consumers and society, providing consumers with innovative products and services in virtually every area of life, driving solutions to many of society's most important needs – from clean energy and reduced carbon emissions to healthcare – and helping to protect consumers from inferior and dangerous counterfeits.

However, just as adequate IP protection and enforcement mechanisms support the numerous societal, consumer and economic benefits described here, inadequate IP protection and inadequate enforcement against IP rights violations have the opposite effect.

Counterfeiting and piracy in Africa

African countries have experienced strong economic growth in the past decade. Gross national income across Africa saw an impressive 66% increase between 2005 and 2010, and the economy is expected to grow by 4.5% in 2012. A recent consumer market survey conducted by research firm McKinsey shows that consumers have become key drivers of Africa's economy, which is expected to grow annually at an average of 5% in the next 10 years. This trend is reflected in heightened demand for consumer and electronic goods. At the same time, an extraordinary growth in telecommunications has led to an inflow of international advertising and increased brand awareness.

However, while the legitimate market is

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thriving, counterfeiters have also recognised these opportunities and Africa has become both a target destination and a significant transit route for knock-off goods. The widescale proliferation of counterfeit and pirate products throughout Africa results in a significant drain on businesses and government revenue, jeopardises investments in creativity and innovation, undermines recognised brands and creates consumer health and safety risks. Counterfeit and pirated goods have infiltrated every branch of the African economy: from alarmingly high levels of sub-standard medicines – the World Health Organisation estimates that up to 30% of medications on the African market could be counterfeit – to the pervasiveness of cheap counterfeit electronics, fake household goods, cosmetics and music, film and software piracy.

Counterfeiting in Africa also impacts on governments and society at large. The Investment Climate Facility for Africa estimates that in 2008, the East Africa Community lost \$500 million in revenues due to unpaid taxes by counterfeiters. Illicit trafficking routes in many West African countries and struggling, weak governments make this region rife with counterfeits. In some instances, profits from illicit activities are comparable to or even exceed the host country's economy. In 2009 the United Nations Office on Drugs and Crime estimated that revenues from 45 million counterfeit anti-malarial medicines in West Africa were worth \$438 million – more than the annual gross domestic product of Guinea-Bissau.

The situation in Kenya

Kenya has the largest market in East Africa and serves as the major distribution point for

surrounding countries such as Uganda, Rwanda, and Ethiopia. Like other East African countries, Kenya is facing an alarming increase in the trade in counterfeit products and smuggled goods. The illicit industry is estimated to be worth Ksh70 billion (approximately \$835 million), rivalling the key foreign exchange earners of tourism and tea and coffee.

Since counterfeiting operates outside the law, estimating the exact level of counterfeiting and evaluating its harmful consequences is extremely challenging. Illegal businesses do not report information on their activities to government agencies, and therefore any measures of the size of illegal businesses (eg, total illegal sales or the income earned by these businesses) must be estimated by indirect methods. As a result, government agencies and private sector organisations have had to examine the issue and develop methodologies to estimate economic and social effects. Business Action to Stop Counterfeiting and Piracy (BASCAP) recently prepared a report on the impact of counterfeiting and piracy in Kenya in relation to the three key groups affected: consumers, producers and government. To help to illustrate the scale of the problem of counterfeits in Kenya, the report analysed figures obtained from public sources, such as international and governmental reports, academic journals and newspapers. Some of the key findings were as follows:

- Consumers – a 2010 survey by the Consumer Federation of Kenya found that counterfeit consumer goods are often aimed at low-income consumers and that it is difficult for consumers to differentiate between a genuine and fake product. As a result, consumers are often deceived into buying substandard goods. For example, in

Nairobi a wholesaler can make a 50% mark-up on foreign-made counterfeit Colgate toothpaste compared to 13% on the real product. The consumer, who pays the same price for both items, is often unaware that he or she is buying a counterfeit product that may be vastly inferior, or in certain cases even harmful. Various reports have shown that the Kenyan pharmaceutical sector is among the sectors most harmed by counterfeiting and piracy. According to the Kenyan Association of Pharmaceutical Industry, approximately 30% of the drug market is counterfeit and Kenyans spend about Ksh4 billion (\$47 million) each year on fake medicine.

- Producers – the impact of counterfeits is also felt by traditional manufacturers through brand erosion, loss of sales and market share, the closure of factories and unfair competition. The Kenya Association of Manufacturers estimates that manufacturers incur an annual net loss of Ksh30 billion (\$360 million), while the government loses Ksh6 billion (\$71 million) in potential profits and tax revenue due to counterfeit trade. Furthermore, counterfeiting and piracy impede the growth and development of local creative industries in Kenya.
- Government – the impact of counterfeiting and piracy deprives the economy of legitimate jobs and tax revenue, and increases social costs. Estimates put the annual loss of revenue to the Kenyan state as a result of counterfeit trade at \$84 million – funds which could be invested in public health, infrastructure and education.

The report also looked at the potential benefits that improving Kenya's IP rights protection regime could have on FDI. At present, Kenya underperforms in terms of FDI inflow and is the second-worst performer of the largest 15 African economies. In absolute terms, FDI inflow was just \$335 million (1.04% of gross domestic product) in 2011. Frontier Economics, working with the International Chamber of Commerce, found that a significant improvement in Kenya's IP rights protection regime would improve Kenya's FDI attractiveness and could be associated with an

increase in FDI of between \$460 million and \$630 million.

Policy, law and practice in Kenya

Recognising the potential benefits of stronger IP protection, Kenya has made progress in improving its IP protection regime. In 2008 Parliament enacted the Anti-counterfeit Act, which established the Anti-counterfeiting Agency.

This has helped Kenya to begin reforming its IP laws with the aim of bringing them into compliance with internationally accepted standards under the Agreement on Trade-Related Aspects of Intellectual Property Rights. The main legal instruments arising from this reform and now governing IP rights in Kenya are:

- the Industrial Property Act 2001;
- the Copyright Act 2001;
- the Trademarks Act (Cap 506);
- the Trade Description Act 2009; and
- the Anti-counterfeit Act 2008.

Other IP laws include the Food Drug and Chemical Substances Act (Cap 254), the Seeds and Plant Varieties Act (Cap 326) and the Weights and Measures Act (Cap 513).

While these are certainly valuable legislative measures, it will be imperative for Kenya to commit the proper authority and resources to the implementation and enforcement of IP rights. However, a recent ruling of the High Court of Kenya overturning the Anti-counterfeit Act represents a step backwards in Kenya's fight against counterfeit goods. Clearly, the government needs to clarify its aims and champion the protection of IP rights, the value of intellectual property and the significant losses being suffered by business and consumers alike.

A path forward

While Kenya has taken some positive steps at regional and international levels through its commitment to various IP regimes, deficient enforcement of the existing IP legislation continues to be a serious challenge. To help Kenya to reach its target of creating a robust IP protection regime that is capable of generating and preserving the significant benefits that lie ahead, BASCAP has provided a comprehensive set of legislative and policy recommendations to address certain challenges better. These include the following:

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- Legislative recommendations –
- Address deficiencies in the Copyright Act 2001; and
- Improve and expedite civil enforcement procedures and procedures with respect to the Trademarks Act 2001.
- Policy recommendations –
- Establish an inter-agency approach between the different national agencies administering and enforcing IP rights;
- Establish an inter-agency approach with private sector coordination;
- Expand IP-related administrative and technical capacity building; and
- Increase public and political awareness of counterfeiting and piracy and the associated economic and social harm.

Combating counterfeiting and piracy is an important, but challenging task that cannot be accomplished in isolation. The protection of IP rights should not solely be the priority of state authorities, but rather should be considered as a goal shared broadly by all sectors of society. As a result, public officials, international governmental organisations, industry and even consumers must work together more closely to develop creative and effective methods to fight this economic and social problem.


The Kenyan government has shown increased awareness of the consequences of a lack of IP protection and of the importance of fighting counterfeiting and piracy collectively. In recent years, the country has initiated legal and institutional reforms, as well as programmes to educate the public of the risks of counterfeit products.

The growth in consumer demand in Kenya increases opportunities for counterfeiters, and the mass infiltration of illicit products affects

the health and safety of African consumers.

This leads to a massive drain on the economy by crowding out legitimate economic activity and employment and depriving governments of revenues for vital public services. Regulation and enforcement are needed to attract foreign companies to bring their products to Kenya and to encourage local enterprises to innovate and to create jobs.

IP rights systems significantly affect every country’s growth, FDI, employment levels, innovation and overall competitiveness, and enable productivity and efficiency gains. A solid IP rights protection and enforcement regime is thus critically important for a country to achieve its prosperity potential. The International Chamber of Commerce-BASCAP stands ready to do its part to help the Kenyan government to achieve these important goals.

For more information about the BASCAP report on Kenya, please visit www.bascap.com. 

Biographies

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Jeff Hardy has been the director of the International Chamber of Commerce (ICC) initiative Business Action to Stop Counterfeiting and Piracy (BASCAP) since its creation in mid-2005. BASCAP unites the global business community across all product sectors in an effort to stop the counterfeiting of goods and piracy of intellectual property. It focuses on setting standards for global performance by governments and companies; framing decisions for policy makers; advocating for the allocation of resources at the highest levels in national governments; and building global awareness.

Mr Hardy joined the ICC in 1999 as a policy adviser. Previously he held various positions with the US government.