



International Chamber of Commerce

*The world business organization*

An ICC initiative

**BASCAP**

Business Action to Stop  
Counterfeiting and Piracy

# KENYA

Promoting  
and Protecting  
Intellectual  
Property  
in Kenya



**Anti-Counterfeit Agency**  
*Educate, Enforce, Eliminate*

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ICC works to promote a balanced and sustainable system for the protection of intellectual property. It believes that IP protection encourages innovation and the development of knowledge-based industries, stimulates international trade, and creates a favorable climate for foreign direct investment and technology transfer.

#### **About BASCAP**

Counterfeiting and piracy have become a global epidemic, leading to a significant drain on businesses and the global economy, jeopardizing investments in creativity and innovation, undermining recognized brands and creating consumer health and safety risks. In response, the ICC launched BASCAP to connect and mobilize businesses across industries, sectors and national borders in the fight against counterfeiting and piracy; to amplify the voice and views of business to governments, public and media; and to increase both awareness and understanding of counterfeiting and piracy activities and the associated economic and social harm. Visit BASCAP on the web at: [www.iccwbo.org/bascap](http://www.iccwbo.org/bascap)

#### **About ACA**

The Kenya Anti-Counterfeit Agency (ACA) is a State Corporation established under Section 3 of the Anti-Counterfeit Act, 2008, Laws of Kenya. The Agency was established to prohibit trade in counterfeit goods in Kenya. Specifically, the Agency has four major functions: to enlighten and inform the public on matters relating to counterfeiting; to combat counterfeiting, trade and other dealings in counterfeit goods in Kenya; to devise and promote training programs on combating counterfeiting; and to co-ordinate with national, regional or international organizations involved in combating counterfeiting. It is through the latter function that the Agency is collaborating with international institutions such as the BASCAP.

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## Abbreviations

ACA	Anti-Counterfeit Agency
BASCAP	Business Action to Stop Counterfeiting and Piracy
BSA	Business Software Alliance
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ICC	International Chamber of Commerce
ICT	Information and Communications Technology
IP	Intellectual Property
IPM	Interface Public Members
IPR	Intellectual Property Rights
KAM	Kenya Association of Manufacturers
KCB	Kenya Copyright Board
KEBS	Kenya Bureau of Standards
KIPI	Kenya Industrial Property Institute
Kshs.	Kenyan Shillings
MOU	Memorandum of Understanding
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
SMEs	Small and Medium Sized Enterprises
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WCO	World Customs Organization
WIPO	World Intellectual Property Organization

Innovation, invention and creativity. These are among the most important ingredients on which economic growth increasingly depends. To continue to grow, to compete and to deliver products and services to the marketplace, companies are progressively investing in creativity, innovation and other forms of *intellectual assets*. Under the aegis of Intellectual Property or IP, these assets have become key drivers for creating brand value, jobs and overall business growth.

As economies evolve from traditional agricultural, mineral and low-value manufacturing activities, governments have also been investing in their national capabilities to innovate, create and build up intellectual property. They have increased their investment in university research, incubation centers and public-private R&D projects, and developed better services to help companies develop, register and commercialize trademarks, copyrights and patents.

The intangible nature of intellectual property – and its vulnerability to theft – has also driven many governments to upgrade efforts to protect it. Unfortunately, IP theft, as evidenced by the global proliferation of counterfeit and pirate products, drains revenue and jobs and puts downward pressure on innovation, international trade and investment.

As a result, strong IP protection goes hand-in-hand with government policies encouraging investment in IP and exhibiting the significant benefits of IP to a country's growth and development.

### The value of IP

This paper explains the value of intellectual property and why it is important to Kenya's integration into the global economy. Section 1 explores the benefits of IP protection in strengthening national economies, driving innovation and technology, fostering new ideas, and enhancing society and culture:

- IP protection benefits the economy in terms of GDP, employment, tax revenues, development and competitiveness. IP rights (IPR) also promote foreign direct investment (FDI) and technology transfers in developed and developing countries, driving development and economic growth.<sup>1</sup>
- IP protection promotes innovation, increases funding for R&D and helps firms achieve more value from innovations.
- IP helps firms monetize their innovations, secure investment, grow market value, and develop new markets. Companies that use IPR generally succeed better and have a higher market value than those that do not.
- IP protection helps small and medium enterprises. SMEs that rely on IP of all sorts reported 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 health care – and helping protect consumers from inferior and dangerous counterfeits.

Just as adequate IP protection and enforcement mechanisms support the numerous societal, consumer and economic benefits described in this paper, inadequate IP protection and inadequate enforcement against IPR violations have the opposite effect.

### What is at risk?

Section 2 of this paper describes the risks associated with IP theft and the impact on the Kenyan economy. Africa is both a target destination and transit route for counterfeit and pirated goods. In Eastern Africa, Kenya is the biggest market for counterfeit and smuggled goods.<sup>2</sup> Research suggests that the counterfeiting business in Kenya is worth Kshs. 70 billion (approximately US\$835 million); and the Kenyan government loses about US\$84 million in tax revenues to counterfeiting and piracy, funds which could be invested in public health, infrastructure, and education.

## Time is right for action

Recognizing the potential benefits of stronger IP protection, Kenya has made progress in improving its IP protection regime. In 2008, the Kenyan Parliament enacted the Anti-Counterfeit Act which established the Anti-Counterfeiting Agency. Kenya has taken steps on a regional and international level through its commitment to several IP regimes, but challenges in enforcement remain. This paper suggests that the time is right for Kenya to further strengthen its IPR systems through inter-agency and international collaboration, and in cooperation with trading partners ready to assist Kenya with the implementation of the necessary policy and legal reforms.<sup>3</sup>

## A path forward

To reach the target of creating a robust IP protection regime capable of generating and preserving the significant benefits that lie ahead in Kenya's future, this paper suggests a comprehensive set of recommendations for Kenya to better address certain remaining challenges. It includes a wide range of proposals ranging from legal reforms and policy actions, to tools for strengthening enforcement practices. A robust IP Protection regime requires effective and immediate implementation of such concrete suggestions. The assignment of responsibility to a specific IP body or authority with the task of putting the recommendations in place is of the utmost importance in this regard.

## Summary of suggested recommendations

### Legislative Recommendations

- Address deficiencies in criminal IP law and procedures
- Improve border enforcement
- Address deficiencies in the Copyright Act, 2001
- Improve and expedite civil enforcement procedures, and procedures with respect to the Trade Marks Act, 2001.
- Grant powers to the ACA to settle matters out of court under the Anti-Counterfeit Act, 2008

### Policy Recommendations

- Establish an inter-agency approach between the different Kenya Agencies administering and enforcing IP rights
- Establish an inter-agency approach with private sector coordination
- Expand IP-related administrative and technical capacity building
- Increase public and political awareness of counterfeiting and piracy and the associated economic and social harm

In addition to this report, ICC-BASCAP commissioned Frontier Economics to conduct a new and comprehensive study of existing research on FDI and on the importance of IPR protection in Kenya.<sup>4</sup>

## 1. Intellectual property is important to Kenya's economic growth and development

Creativity and innovation are proven drivers for economic growth and competitiveness. Research has shown that growth is closely related with the capacity of the economy to generate innovation and commercialize innovative products. Intellectual property rights (IPR) play an indispensable role in the formation, development and growth of innovative capacity. This is especially important as growing economies, like Kenya's, continue to evolve from traditional agricultural and low-value manufacturing activities. Intellectual assets have become strategic factors for value creation by firms and they are increasingly important in attracting investment, enabling productivity and efficiency gains, and fostering the growth of innovative sectors in the economy.

The effectiveness of a country's IPR protection regime is critical for countries to reach their technological, creative, economic and societal potential. Putting in place an effective IPR regime is one of the most concrete ways to release the potential of inventors and creators, and empower them to transform ideas into high-quality products and services, jobs and economic growth.

### IP benefits the economy

Economic, government and industry studies and statistics have confirmed that sectors that rely on IPR protection are substantial contributors to the economy. African countries are no different; IPR generates economic activity, employment and growth in developing as well as developed countries. IPR attracts foreign direct investment (FDI) and promotes R&D and technology transfer in developing countries, driving development and economic growth. And IPR is an important component of the overall health of an economy. For example, copyright-related industries generate substantial GDP and employment contributions in emerging and developing countries: According to the WIPO, creative industries in Kenya contribute more than 5% to GDP and over 3% to employment.<sup>5</sup>

### IP attracts FDI

FDI is important because it supports economic development through the transfer of technology and managerial skills and through the creation of employment opportunities.<sup>6</sup> For developing countries, particularly for those in the early stages of development, technology transfer from foreign high-income economies and the spillover effects from FDI have been considered the most important sources of innovation, since most such countries lack the capital and the skills to conduct state-of-the-art research.<sup>7</sup>

The strength of a country's IPR regime is one of the factors influencing decision of producers and firms to transfer technology or invest in a country. For example: The OECD has found that the strength of a country's patent rights is positively correlated to inward FDI, holding other factors constant. Economists found that a 1% increase in a country's patent protection correlates to a 2.8% increase in FDI, and a 1% improvement in trademark and copyright protection increases FDI by 3.8% and 6.8%, respectively.<sup>8</sup>

Ten African countries, including Kenya, attracted 70% of new FDI projects between 2003 and 2010.<sup>9</sup> Kenya has several tax treaties and other investment promotion agreements to encourage FDI. The country serves as the East African business hub for many international companies, including General Motors, Procter & Gamble, Microsoft, Ogilvy and Mather, Coca-Cola and Citibank.<sup>10</sup> Kenya's FDI inflows have however been decreasing. Between 1997 and 2011, Kenya's FDI was about 0.6 percent of Gross Domestic Product, which is below the African average of 1.7 percent and relatively low compared to neighboring countries like Rwanda, Uganda and Tanzania.<sup>11</sup> This decline is attributed to, among other things, a poor business environment<sup>12</sup>: High value services, for instance, prefer outsourcing to countries with greater IP protection.<sup>13</sup>

The importance of effective IPR protection laws in attracting FDI has been recognized by the East Africa Community (EAC): *“Granted that IPRs constitute by far the most valuable assets of most modern businesses, the creation of an enabling and secure investment climate necessarily demands an effective legal regime for the protection of IPRs. The absence of such a regime inexorably drives away new investments from the East African region”*.<sup>14</sup> Frontier Economics estimates that improving Kenya’s IPR protection regime could be associated with between US\$460 and US\$630 million of additional FDI (Frontier Economics, 2012, p.13). Such an increase in FDI could be associated with increased employment between 135,000 and 185,000, which would lead to an important reduction of Kenya’s current unemployment rate of 40%.

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## IP promotes innovation

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Innovation is a key ingredient of sustained economic growth, development and better jobs. Studies have estimated that innovation accounts for as much as 80% of economy-wide growth in productivity in high-income countries. Although less is known about innovation and its economic impact in low- and middle-income economies, available evidence suggests that innovating firms in those economies are also more productive than their non-innovating peers.<sup>15</sup> Effective IP protection increases research, development and innovation. It attracts venture-capital investment for R&D and for the commercialization of innovative products and services. IPR promotes cultural expression and diversity, promotes the dissemination of new technologies, and promotes development. For example: The OECD has found that a 1% increase in the strength of patent protection in developing countries correlates to nearly a 1% increase in domestic R&D (0.7% on average). A similar increase of trademark and copyright protection correlates to a 1.4% and a 3.3% increase in domestic R&D, respectively.<sup>16</sup>

Firms can earn substantially more from innovations that are protected by IPR. On average the ‘patent premium’ for patented versus unpatented inventions is between 180% and 240%, depending on the industry. In other words, patents on average double the value of an invention. The more valuable a patent, the more R&D that takes place: A 10% increase in the patent premium leads to a 6% increase in business R&D expenditure.<sup>17</sup> IP ownership has therefore become more central to the strategies of innovating firms: Demand for patents has risen from 800,000 applications worldwide in the early 1980s to nearly 2 million in 2010 (1.98 million).<sup>18</sup>

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## IP helps firms monetize their inventions and grow

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Firms use IPR to help develop, create value, conduct trade and benefit from their works and inventions. A firm’s ownership of IP rights helps to reassure investors that they should inject money into the company. The use of IP in fostering investment is not only important for established firms that are already reliant on patents, trademarks and copyrights—protecting their value, innovation and reputation—but even more so for new firms seeking to establish a secure stream of investment and innovation. Firms also can use their IP to penetrate new and profitable markets, to develop products, services and processes and to collaborate through licensing or establishing strategic alliances.

There are several examples of homegrown Kenyan companies, such as Wananchi, AccessKenya, KDN, Seven Seas and Safaricom, which have successfully used technology and innovation to meet the needs of the local market. By virtue of their strong and recognized brand, these companies have also been able to expand into neighboring countries and entire regions.<sup>19</sup> This type of indigenous innovation, supported by IP, creates jobs, new markets and economic growth.

Firms that rely on IP generally succeed better than those that do not. Trademarks and other intangible IP assets can enhance a firm’s market value substantially. An innovative firm’s value in the market or in an acquisition does not just lie in its physical assets—cash, securities, plant, property, equipment, raw materials or finished goods—but also in the firm’s ‘intangible assets’ (sometimes lumped together with ‘goodwill’). Such non-physical assets include the value of such items as the firm’s ‘going concern’ value, its customer lists and expectation of future economic benefits, and also the value of the firm’s intellectual property, including its brands. ‘Intangible assets’ and goodwill often represent a much bigger part of an innovative firm’s market value than its current and physical assets, and the intellectual property component of intangible assets is growing.



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## IP protection helps small and medium enterprises.

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SMEs are important contributors to innovation and creativity. Traditional economic theory and empirical studies have shown how large companies are a major source of innovation, given that they may have greater funding than small firms to devote to research and development (R&D), greater ability to take the risks associated with innovative activity, better economies of scale, and thereby a lower marginal cost of innovation.<sup>20</sup>

However, a large body of evidence also shows that SMEs, especially young firms, contribute greatly and increasingly to the innovation system by introducing new products and adapting existing products to the needs of customers.<sup>21</sup> In Africa, economic powerhouses such as South Africa, Egypt and Nigeria, the SME sector is estimated to contribute over 70% in employment and 30-40% contribution to GDP.<sup>22</sup> In Kenya, the Micro and Small Enterprise (MSME) sector is estimated to employ about 74.2% of the Kenyan workforce and contribute to about 18.4% to the country's GDP.<sup>23</sup>

SMEs often use IPR more extensively than large companies. Those SMEs that use IPR report faster growth, and higher income and employment than those that do not. For example: SMEs in the ICT sector in the EU that rely on IPR reported 10% more growth in turnover, market share and employment, respectively, than those that had not used IPR.<sup>24</sup> Although the ICT sector in Africa is not as developed as in the EU – 90% of African businesses do not have online presence and only 2% of Global online content is from Africa – online business models in Kenya are growing rapidly.<sup>25</sup> In just 11 years Kenya has leaped from a 0.4% Internet penetration rate to 25.5% Internet penetration rate, according to Internet World Stats.<sup>26</sup> This rapid expansion is largely due to the embracement of mobile technology, which in turn has supported domestic innovations such as Safaricom's Mobile Money payment system M-Pesa. This growth has opened up new business opportunities; SMEs in Kenya are increasingly adopting e-commerce strategies, with some now earning over 60% of their revenue from the Web.<sup>27</sup> ICT is also an integral part of Kenya's ambitious "Vision 2030", which includes a goal of creating more than 20,000 direct Business Process Outsourcing (BPO) jobs through IT enabled services and increasing the ICT sectors contribution to GDP by Ksh10 billion.<sup>28</sup>

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## IP benefits consumers and society

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IPR supports the development of a continuous stream of innovative, competitive products and services that benefit consumers. IPR promotes consumer trust and more effective protection against counterfeit and pirated goods. IPR is helping to address many of society's most important needs, from clean energy to health care to a truly 'digital economy'. Poor IPR protections or enforcement, resulting in counterfeiting and piracy, simply undermine the economic and societal benefits of IPR. For example:

Copyrights provide the basis for the continuous stream of new music and films, ever-improving business, games, software, books, magazines, newspapers and other published material, photography, and many other related activities. However, high piracy rates, poor enforcement procedures and ineffective management of IP rights inhibit domestic creative industries from realizing their full potential. For example, although the vibrant Kenyan music scene has seen a boom in production, musicians struggle to make a living from their music; Music pirates, who copy CDs the moment they are released and sell them on the streets, make it nearly impossible for them to profit from direct sales of legitimate recordings.<sup>29</sup>

Patents boost many products and services that society relies on for health, energy, communication, transportation and many other human and commercial needs. Trademarks support the development of products and services that consumers want and depend on, from clothing and computers to foods and footwear, educational and entertainment products, services, scientific products and even sporting activities.

Consumers benefit from IP not only through the stream of innovative products and inventions and creativity that would otherwise not be created by firms, but also through the rights that protect the identity of well-known goods and services. Trademarks act as signposts of quality and prevent other firms to pass off one make of good as being the same as another.<sup>30</sup>

Establishing and promoting an adequate IPR system can have a significant impact on consumer health and safety, and on consumer protection. In particular, the prevalence in Kenya of counterfeit goods, including pharmaceutical drugs (such as fake malaria and HIV medicine), electrical components and food and beverages, can be harmful or even lethal to consumers. These products may contain ineffective or dangerous and untested ingredients, and provide no assurance of safety or efficacy. Effective IPR rules and strong enforcement of laws and regulations are therefore crucial to protect the health of consumers while ensuring that the products are genuine and comply with the required safety standards.

## 2. Risks associated with counterfeiting and piracy in Kenya

### The Situation in Africa

Despite persistent levels of poverty, African countries have experienced strong economic growth in the last decade. The gross national income (GNI) across Africa saw an impressive 66% increase between 2005 and 2010 (up US\$1,550,444 from US\$931,264).<sup>31</sup> Africa's economy is expected to grow by 4.5% in 2012<sup>32</sup> and 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 at an average of 5% in the next 10 years.<sup>33</sup> This trend is reflected in a growing 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 has grown, counterfeiters have also recognized these opportunities and Africa has become both a target destination and significant transit route for knock-off goods. Cheap and sub-standard products are flooding the market through foreign and local traders and manufacturers illegally replicating well-known brand names and designs on their packages and labels.<sup>34</sup>

Several factors have contributed to the wide scale proliferation of counterfeit and pirate products throughout Africa. Such factors include the disproportionate size of its informal economy; corruption, particularly at the entry points; outdated legislation and weak enforcement mechanisms, including a lack of and national/regional Policy and Strategy on combating counterfeiting and piracy; unawareness by the consumers on the risks involved in the use and consumption of counterfeit/pirated products; and substantial trade links with China, a known source of counterfeit goods.<sup>35</sup>

The infiltration of substandard counterfeit medicines in African countries is of particular concern. According to estimates by the World Health Organization (WHO), up to 30% of medications on the African market are counterfeit.<sup>36</sup> Of the more than 655 000 malaria deaths globally each year, 90% occur in Africa.<sup>37</sup> The WHO estimates fake anti-malaria drugs alone kill 100,000 in Africa a year, and the black market deprives governments of 2.5% to 5% of their revenue.<sup>38</sup> The U.S. National Institutes of Health found after analyzing data collected from 21 sub-Saharan African nations that 35% of anti-malarial drugs failed chemical testing because they were poorly manufactured, while another 20% were complete fakes.<sup>39</sup> The use of substandard drugs not only prevents treatment, it can also promote the development of drug resistant strains, in turn decreasing the effectiveness of legitimate medicines.

Fake medicines are however not the only counterfeiting problem in Africa. Cheap counterfeit electronics and electrical components are flooding African markets, putting consumers and legitimate manufacturers at risk. In 2007, a major regional distributor with offices in Kenya, Uganda, Tanzania and Ethiopia claimed that up to 80% of computer consumable products on sale in East Africa could be fake, with HP brand of toners and cartridges being one of the most affected.<sup>40</sup> Piracy of music, movies and software is also ubiquitous. According to the 2011 Global Software Piracy Study of the Business Software Alliance (BSA), the global commercial value of unlicensed software is around US\$63.4 Billion, with piracy rates in most African countries exceeding 80% – almost double the global piracy rate (42%). BSA estimates that in 2011 the piracy rate in Eastern and Southern Africa (ESA), which excludes South Africa, was 83% and had a commercial value of US\$108 million.<sup>41</sup>

Fake household goods and cosmetics are similarly widespread in Africa. However, compared to counterfeit luxury products and pirated DVDs and CDs – which are often sold at substantially reduced prices – fake household products in Africa are increasingly sold at prices on a par with the genuine item.<sup>42</sup> This acts as an additional obstacle for consumers who wish to purchase legitimate products, as they can no longer rely on price as a means to distinguish between fake and genuine goods.

For example, in Nairobi a wholesaler can make a 50% mark-up a foreign-made counterfeit Colgate toothpaste compared to 13% on the real product.<sup>43</sup> The consumer, who pays the same price for both items, is often unaware that she is buying a counterfeit product that may be vastly inferior, or in certain cases even harmful. In 2008, fake cosmetics circulating in Dar es Salaam, Tanzania, were found to cause skin cancer, thinning of the skin and severe nerve tissue damage. Counterfeiters were producing home-brewed concoctions and repacking them into original packages in order to resell them at higher prices. Amplifying the problem, salon owners and workers did not know how to differentiate the counterfeit cosmetics from the genuine ones.<sup>44</sup>

Counterfeiting in Africa also impacts governments and society at large; the Investment Climate Facility for Africa (ICF) estimates that in 2008 the East Africa Community (EAC)<sup>45</sup> lost US\$500 million in revenues due to unpaid taxes by counterfeiters.<sup>46</sup> Illicit trafficking routes in many West African countries and struggling, weak governments makes this region particularly 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 (UNODC) estimated that revenues from 45 million counterfeit anti-malarial medicines in West Africa were worth US\$438 million – more than the annual gross domestic product of Guinea-Bissau. Similarly, cigarettes smuggled through the same region were estimated to be worth US\$775 million, exceeding Gambia's entire legal economy.<sup>47</sup>

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## The Situation in Kenya

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Kenya has the largest market in East Africa, and serves as the major distribution point for surrounding countries like Uganda, Rwanda, and Ethiopia. Like other East African countries, Kenya is facing an alarming increase in the trade in counterfeit products and smuggled goods, an illicit industry estimated worth Kshs. 70 Billion (approximately US\$835 million), even rivaling key foreign exchange earners tourism and tea and coffee.<sup>48</sup> Mombasa port, which handles an average of 1,700 containers a day, acts as a strategic hub and entry point for illicit goods and is notorious for its abuse by organized crime networks for the smuggling of drugs, counterfeits, and other illicit commodities. Despite several high profile seizures by Anti Counterfeit Agency (ACA) of Kenya, including counterfeit ballpoint pens, electronics and sportswear worth millions of Kshs, smugglers continue to use the port as gateway for illicit goods to enter Kenya and the greater EAC area.<sup>49</sup>

The intangible nature of intellectual assets renders them especially vulnerable to theft, particularly through product counterfeiting and digital piracy. This illegal activity drains the economy of legitimate products and facilitates an "underground economy" that deprives the government of revenues for vital public services, dislocates thousands of legitimate jobs, undermines investment, raises costs for law enforcement and exposes consumers to dangerous and ineffective products. Overall, IP theft can have serious negative implications affecting a country's economic growth, citizen's health and safety, and public order and security.<sup>50</sup>

However, 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 any information on their activities to any government agency, and therefore any measures of the size of illegal businesses, such as total illegal sales or the income earned by these businesses, must be estimated by indirect methods.<sup>51</sup>

As a result, government agencies and private sector organizations have had to examine the issue and develop methodologies to estimate economic and social effects. Below is an assessment of the impact of counterfeiting and piracy in Kenya in relation to the three key groups affected; consumers, producers and government. Figures have been obtained from public sources, such as international and governmental reports, academic journals and newspapers. Although only providing anecdotal evidence of the prevalence and frequency of counterfeits and piracy, the review helps illustrate the magnitude and scale of the problem.

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## Consumers

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Although there are short-term gains to consumers and the Kenyan economy from counterfeiting, e.g. cheaper products, the medium and long-term losses are massive. The impacts of the presence of counterfeit and pirated goods include loss of consumer choice due to investment disincentives caused by counterfeit/pirated goods; loss of agricultural produce and livestock following the use of counterfeit fertilizers, pesticides, herbicides, chemicals and seeds; road accidents caused by use of fake spare parts (such as brake pads/disks and tires); and danger to the health and lives through the use of counterfeit products (e.g. food, milk, drugs, toothpastes etc.).<sup>52</sup> In 2010 the Consumer Federation of Kenya carried out a survey of the counterfeit market.<sup>53</sup> The study found that counterfeit consumer goods are often packed in small packages aimed at low-income consumers and that it is very difficult for consumers to differentiate between a genuine and fake product. As a result, consumers are often deceived into buying substandard goods. The survey identified the following product categories as worst hit by counterfeits<sup>54</sup>:

<b>Ballpoint pens</b>	<b>Medicines</b>
<b>Shoe polish</b>	<b>Laundry detergent &amp; bleach</b>
<b>Computer software</b>	<b>Cigarettes</b>
<b>Batteries</b>	<b>Petroleum jelly</b>
<b>Toothpaste</b>	<b>Electronics</b>

While some of the effects of counterfeits are immediate (e.g. illness from ingesting counterfeit foodstuffs), other effects may be long term (e.g. injury from using counterfeit cosmetics or drug resistance from fake medicines). Various reports show that the pharmaceutical sector in Kenya 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 are believed to be spending about Kshs. 4 Billion (US\$47 million) each year on fake medicine.<sup>55</sup> The Kenya Anti-Counterfeit Agency (ACA) believes that as much as 40% of all malaria drugs in the Kenyan market are counterfeit. There are several examples of the commonness of fake drugs: In December 2008 a consignment of drugs branded “Panadol Extra” worth Kshs. 5 Million was impounded and destroyed by the Pharmacy & Poisons Board after it was tested and found not to contain any active ingredient but mere chalk.<sup>56</sup> Medicines tested by the Drug Inspectorate Unit in Nyanza proved to be composed of ordinary chalk and in 2004, tests by Government inspectors in the Nyamira District revealed that veterinary medicine was being sold as anti-malaria drugs.<sup>57</sup> These findings suggest that there are an overwhelming number of fake products on the market, constituting a serious health concern to Kenyan consumers.

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## Producers

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Agriculture is one of the most important sectors of Kenya’s economy: 75% of the Kenyan population is dependent on agriculture for food and income, and it contributes 26% to the Gross Domestic Product (GDP) and 60% to foreign exchange earnings.<sup>58</sup> The importance of this sector is also recognized in Kenya’s “Vision 2030”, which identifies agriculture as one of the main drivers of growth that will catapult Kenya to a middle-income country.<sup>59</sup> Unfortunately, the use of counterfeit fertilizers, chemicals and seeds has resulted in decreased agricultural productivity. For example, the use of a fake grain preservative bearing the famous “Actelic Super” brand sold cheaply to farmers in the repeatedly famine-stricken Ukambani region of Kenya resulted in an entire harvest being lost because the product sold to farmers was mere chalk with no active chemical ingredient for preserving grain against weevils.<sup>60</sup> In 2010, the Agro-Chemical Association of Kenya estimated the trade on counterfeit pesticide at between 15 to 20%, resulting in farmers in Rift Valley and Central Kenya getting lower crop yields due to use of fake chemicals in their farms.<sup>61</sup>

Furthermore, counterfeit and piracy impedes the growth and development of local creative industries in Kenya.<sup>62</sup> The Kenya Publishers Association (KPA) announced in 2011 that roughly Kshs. 2 Billion (US\$24 million) is lost to book piracy annually in Kenya<sup>63</sup> and the Kenyan music industry estimates that over 90% of music is pirated.<sup>64</sup> Between 2002 and 2003, Kenya's Customs & Excise department seized over 100,000 music CDs coming into Nairobi. A further 15,000 music CDs were seized in Mombasa. During the same period of time, industry reported meagre legitimate sales of approximately 15,000 music CDs.<sup>65</sup> Zanzibar, Rwanda and Burundi have no local music and film industries of note, which is blamed on the prevalence of piracy.<sup>66</sup>

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 (KAM) estimates that manufacturers incur an annual net loss of Kshs. 30 Billion (US\$360 million) while the government loses Kshs. 6 Billion (US\$71 million) in potential profits and tax revenue due to counterfeit trade.<sup>67</sup> Manufacturers spend money not only on manufacturing but also advertising, paying wages and taxes as well as constructing the manufacturing plant and equipping it; counterfeiters incur no such costs and instead free ride on legitimate business's investments. The pervasiveness of counterfeit and pirated products in the market have seriously affected market share of legally registered businesses in Kenya, and in particular those involved in the manufacture of fast moving consumer goods:

- Sara Lee has reduced its production capacity in Kenya to less than 40% and threatened to cease commercial operations in Kenya altogether if the Government does not respond more forcefully to the flagrant importation of counterfeit shoe polish bearing the KIWI trade mark.<sup>68</sup>
- GlaxoSmithKline Beecham, the global pharmaceutical giant, closed its production line in Nairobi, retaining only a sales office, as the result of the proliferation of counterfeits.<sup>69</sup>
- HACO Industries, a Nairobi-based manufacturer of BIC ball point pens, loses an estimated Kshs. 100 million annually to counterfeiters.<sup>70</sup>
- In 2008, Hewlett-Packard estimated that the market for toners, cartridges and other consumables in Kenya was losing more than Kshs. 500 million (US\$5.9 million) every month due to counterfeits.<sup>71</sup>
- Most computers in Kenya are sold with software installed for "free" (so-called "hard-disk loading piracy") and pirated copies of business software products are available in stores for no more than the price of the physical medium.<sup>72</sup> BSA estimates that 78% of software in Kenya was pirated in 2011, corresponding to a commercial value of US\$85 million.<sup>73</sup>
- In 2006, the dry cell battery manufacturer Eveready declared annual losses of Kshs. 500 million to illegal dumping of dry cell batteries in the Kenyan market.<sup>74</sup> In an effort to combat the rise in counterfeits, Eveready has spent approximately Kshs. 500,000 for various programs designed to help train government employees on understanding the impact of counterfeit and illegal products.<sup>75</sup>

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## Government

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The impacts of counterfeiting and piracy deprive the economy of legitimate jobs, tax revenue and increases social costs.<sup>76</sup> Estimates put the annual loss of revenue to the Kenyan state as a result of counterfeit trade between Kshs. 6 Billion (US\$84 million)<sup>77</sup> and Kshs. 40 Billion (US\$490 million).<sup>78</sup> Record size inflow of counterfeit tobacco products in Kenya – with an illegal trade valued at between Kshs. 80 and 100 Billion (US\$1.05 billion) annually<sup>79</sup> – denies the government a significant source of tax revenue. In March 2012 the ACA noted that cigarettes are Kenya's number one counterfeited product, with counterfeits estimated to represent between 5%<sup>80</sup> and 12%<sup>81</sup> of total product sales in Kenya. The Kenya Revenue Authority (KRA) has even reported that its own revenue stamps have been counterfeited and applied on various counterfeit products, thereby ensuring a 100% loss of revenue.<sup>82</sup> Exasperating the problem is the pervasiveness of corruption in Kenya. The country is perceived as one of the most corrupt in the world, ranked far down at 154th on a list of 178 countries that feature in the 2011 Transparency International Corruption Perceptions Index.<sup>83</sup>

The issue of fake mobile phones can be particularly illustrative of the challenges that Kenyan government faces with regards to counterfeits. Bypassing traditional heavy infrastructure investments, Kenya is leapfrogging directly to mobile and wireless systems; 3 in 4 Kenyans have a mobile phone, with over 29 million mobile subscriptions and one million new mobile phone subscribers alone in the first quarter of 2012.<sup>84</sup> Mobile phone banking systems are transforming Kenya's financial services industry, with around Kshs. 700 Billion (US\$8.3 Billion) deposits made annually and increasing.<sup>85</sup> Mobile money service M-Pesa has 14.9 million registered accounts, representing 78% of the entire customer base of its parent company Safaricom, the largest mobile operator in Kenya.<sup>86</sup>

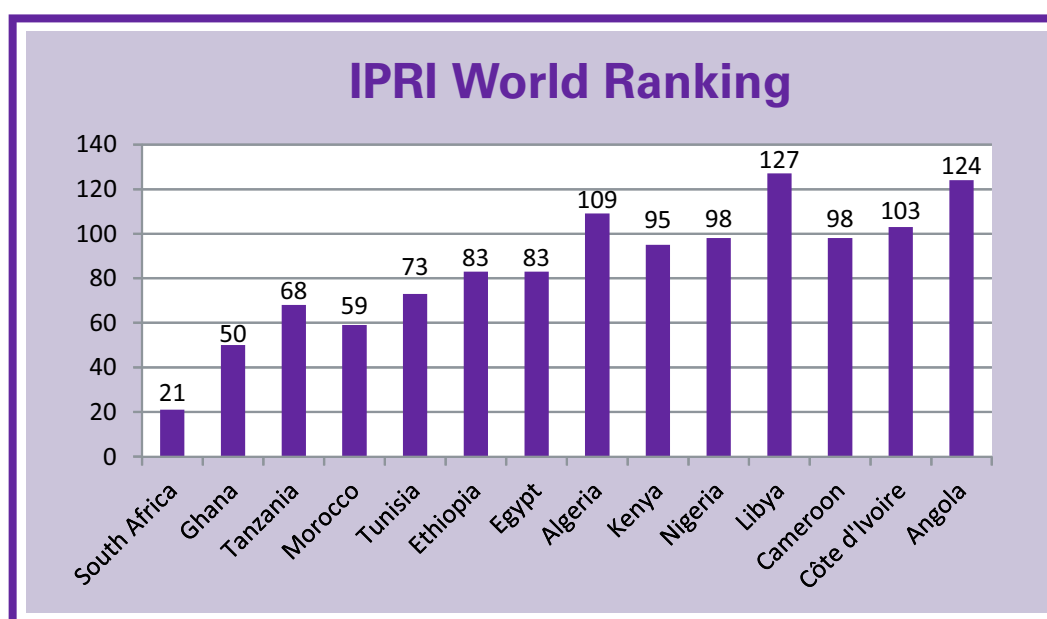
However, according to industry statistics by the Communication Commission of Kenya (CCK), close to 3 million mobile phones in the Kenyan market are counterfeit, translating to about 10% of all the active mobile devices in the country.<sup>87</sup> This not only infringes manufacturer's intellectual property rights and denies the government revenue in form of taxes; counterfeit mobile phones, manufactured without due consideration to the recognized security standards, impair network systems and may expose mobile money systems to fraud. This threat has forced the CCK to take drastic measures. As of 30th September 2012, the CCK will be switching off all counterfeit handsets, effectively requiring those using counterfeit handsets to acquire genuine phones.<sup>88</sup>

## Impact of IPR enforcement on Kenya's FDI, employment and exports

Frontier Economics, working with the International Chamber of Commerce, has recently completed a new and comprehensive assessment of the potential benefits to the Kenyan economy of improving Kenya's intellectual property rights (IPR) protection regime. The study focused on the impact that improving IPR might have on Kenya's FDI attractiveness, employment and exports.

A key finding from the study is that there is clear and significant scope for improving Kenya's IPR protection and the enforcement of these rights. Kenya consistently ranks poorly in international indices of IPR enforcement, and the US Trade Representative has identified Kenya's 'lax enforcement' of IPR as a serious challenge for US businesses (Figure 1 below).

**Figure 1.** IPRI country rankings



Source: IPRI 2012

Kenya also currently under-performs in terms of FDI inflows. FDI inflows in absolute terms were just US\$335 million (1.04% of GDP) in 2011.<sup>89</sup> Kenya is the second worst performer of the largest 15 African economies, and does not compare well against average African FDI inflows of 2.5%.<sup>90</sup>

The table on the following page sets out the key benefits from improving Kenya's IPR protection regime. We estimate that a significant improvement in Kenya's IPR protection regime could be associated with:

- An increase in FDI of between US\$460 and US\$630 million. This in turn would be associated with an increase in employment of between 135,000 and 185,000 workers. It would increase employment in Kenya by between 1.3% and 1.7%.
- A significant improvement in Kenya's IPR protection regime and associated increases in FDI could increase exports by between US\$750 million and US\$1.5 billion. This in turn would be associated with an increase in employment of between 220,000 and 440,000, an increase between 2.0% and 4.1%.

**Table 2.** IPR improvement in Kenya

<b>Table 1. Magnitude of Improvement of IPR in Kenya</b>	
<b>Type of benefit</b>	<b>Magnitude of benefit</b>
<b>FDI</b>	<b>\$460million - \$630 million</b>
<b>Exports</b>	<b>\$750million - \$1.5billion</b>
<b>Employment</b>	<b>355,000-625,000</b>
<b>from Exports</b>	<b>220,000-440,000</b>
<b>from FDI</b>	<b>135,000-185,000</b>

Source: Frontier Economics, 2012

The report recommends that urgent steps be taken to improve Kenya's IPR protection regime. The study suggests that a useful starting point would be to remedy the significant deficiencies in the regime and IPR resourcing identified in the US Trade Representative's most recent report on Kenya. These include:

- Substantially increase the staffing and resourcing of the Kenya Copyright Board (KCB);
- Increase the funding of the Kenyan Anti-Counterfeit Agency (ACA);
- Provide for the implementing regulations necessary to clarify and expand on the provisions of the Anti-Counterfeit Act.



### 3. Time is right for Kenya to further improve its IP regime

Time is right for Kenya to further improve its IP regime. The business sectors that depend on intellectual property protection represent an important and growing part of every modern economy, particularly as these economies advance from dependence on agricultural, mineral and low value-added manufacturing to higher-value products and services. Intellectual property based sectors in both developed and developing countries are substantial drivers of GDP and employment growth.

Domestic companies in developing countries such as Kenya also rely substantially on the trademark system to protect their brands at home and abroad. As with patents, the use of trademarks is on the rise in developing countries. Domestic companies constitute a substantial part of the users of these trademark systems, and even in comparison to developed countries there is a high rate of use of the trademark system in developing countries relative to GDP.<sup>91</sup>

According to a series of studies, a weak IPR environment reduces investment in the computer software and pharmaceutical sectors and it presents a significant barrier to international technology licensing. At least 25% of American, German, and Japanese high-tech firms refused to invest directly or through joint ventures in developing countries with weak IPRs. (Mansfield, 1995; Lee and Mansfield, 1996). Multinational firms are more likely to export, increase sales from existing foreign operations, increase investment, and transfer technology directly in response to stronger IPRs, as an important complement to market liberalization, technology development and competition policies. (Maskus, 2000). In short, effective IP protections directly correlate with “precisely the kind of technology-intensive, organizational know-how diffusing activities ... which are most desired by the up-and-coming business enterprises in the developing and transitioning countries”.

In light of the increase in consumer demand, the inflow of counterfeit goods, and the associated benefits for FDI, the time is right for improvement of the IP regime in Kenya.

In recent years, Kenya has comprehensively reformed its Intellectual Property (IP) laws to bring them into compliance with internationally accepted standards as per the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement). The main legal instruments arising from this reform and now governing IPRs in Kenya are<sup>92</sup>: a) Industrial Property Act, 2001; b) Copyright Act, 2001; c) Trade Marks Act (Cap 506), d) Trade Description Act, 2009; and e) Anti-Counterfeit Act, 2008. Other IP laws include the Food Drug and Chemical Substances (Cap 254), the Seeds and Plant Varieties Act (Cap 326) and the Weights and Measures Act.

Kenya is also a member of most major international and regional treaties and agreements on IP including the Paris Convention for the Protection of Industrial Property (1883), the Trademark Law Treaty (1981), the TRIPS (1995), the Lusaka Agreement establishing African Regional Industrial Property Organization (ARIPO), the World International Property Organization Convention (1970) and the International Union for the Protection of New Varieties of Plants (UPOV).

In addition, Kenya has established specialized courts, including the Industrial Property Tribunal and the Registrar of Trademarks, to deal with matters related to IP.

In recent years Kenya has worked towards improvement of its IP regime, through legal reforms, the establishment of law enforcement bodies and specialized courts as well as through training initiatives to raise the awareness of IP and counterfeiting. While Kenya provides a quite advanced legal and institutional framework to ensure IP protection, deficient enforcement of the existing IP legislation continues to be a serious challenge.

## 4. Suggested Recommendations

While Kenya provides a quite advanced legal and institutional framework to ensure IP protection, deficient enforcement of the existing IP legislation continues to be a serious challenge. BASCAP members encourage Kenya to take further actions to improve its IPR protection and enforcement regime. This draft paper provides a set of specific legislative and policy recommendations on the protection and enforcement of IPR in Kenya.

### Legislative Recommendations

#### 1. Address deficiencies in criminal IP law and procedures

Kenya's Anti-Counterfeit Act, 2008, provides criminal measures. Section 35 stipulates in the case of a first conviction the offender will be jailed for a term not exceeding five (5) years or a fine of not less than three (3) times the prevailing retail price of the genuine product or both. In the case of a second/subsequent conviction, imprisonment for a term not exceeding fifteen (15) years or a fine not less than five (5) times the prevailing retail price of the genuine goods or both.

A person who obstructs an inspector in the discharge of his duties, fails to comply with the requirements of an inspector, fails to give assistance/information to an inspector or gives false information to an inspector, is liable to imprisonment for a term not exceeding three (3) years or a fine of Kenya Shillings Two Million (Kshs. 2,000,000/=) (approximately US\$24,000) or both.

The Act does not, however, provide for a mandatory custodial sentence<sup>93</sup> irrespective of the flagrancy of the offence. Neither does it provide for minimum penalties within the result that too much discretion is left in the hands of the court. As currently drafted, it is quite possible for a habitual offender to be sentenced to a lesser fine or jail term than a first offender.

##### Recommendations:

- A. Review the fines upwards to achieve deterrent minimum fines.
- B. Amend the law to introduce a mandatory custodial sentence for the third/subsequent offence of a minimum (2) years depending on the flagrancy of the offence.

#### 2. Improve border enforcement

The Kenya Revenue Authority (Customs Department) has set up a specific unit to deal with counterfeits and smuggling, called the Anti-Counterfeits and Smuggling Unit. This unit is charged with the task of ensuring that no counterfeits/smuggled items are imported into the country, seizing suspected products at the ports of entry and prosecuting importers.

The Anti-Counterfeit Act, 2008, does not establish a solid scheme<sup>94</sup> for border enforcement procedures. There is only section 34 of the Act, which states that the owner of an intellectual property right may apply to the Commissioner only when he has valid grounds for suspecting that the importation of counterfeit goods may take place. However, the Act does not provide for the possibility to conduct border enforcement controls to exports and goods in transit.

### **Recommendations:**

- A. Amend the Anti-Counterfeit Act, 2008, to introduce comprehensive border enforcement procedural rules.
- B. Amend the Anti-Counterfeit Act, 2008, to allow the Kenyan customs authorities to intervene in the cases of exportation and goods in transit.

## **3. Address deficiencies in the Copyright Act, 2001.**

In Kenya, piracy is widespread, estimated by the Kenya Copyright Board (KCB) to be upwards of 90% in virtually all kinds of copyright works.<sup>95</sup> The Copyright Act was passed in 2001, and came into force in 2003. It provides<sup>96</sup> specific administrative and enforcement structures and mechanisms for copyright and related rights. It contains provisions for both civil remedies and criminal sanctions for copyright infringement.

The Act provides that any person found guilty of any offence specified in the Act will be liable to a fine not exceeding Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) (approximately US\$4,800) or imprisonment for a term not exceeding six (6) years for a first offender and in any other case to a fine not exceeding Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/=) (approximately US\$9,500) or imprisonment for not exceeding ten (10) years or both. The fines levied are to be shared equally by the Kenya Copyright Board and the Kenya Revenue Authority.

It can be assumed that this provision is meant to provide an incentive to both institutions to prosecute copyright infringers. The reality, however, indicates that this incentive scheme has not worked because, generally, the levels of fines levied on offenders, and the number of prosecutions are too low. The average fine imposed is Kenya Shillings Five Hundred (Kshs. 500/=) (approximately US\$6).

KCB, established under the Copyright Act, was a positive step towards countering piracy but research confirms that it is completely overwhelmed by the magnitude of the problem and there is no sense of achievement on its part. For instance, while the Board is mandated by the statute to prosecute infringers of copyright, it has to-date successfully prosecuted only very few cases over the last eight (8) years since it has been established.<sup>97</sup> The Board is overwhelmed by the challenge ahead of it due to human resource incapacity.

The biggest challenge facing copyright rights owners seeking to enforce their rights in Kenya is the absence of deterrent minimum fines and civil remedies. Usually damages are based on the quantity seized by the KCB or the complainant during a raid, which usually bears no consonance with the quantity already sold by the infringer (based on sales records or in the warehouses).

Duplicity and a generally unclear delineation of roles between the newly established Anti Counterfeit Agency and the Kenya Copyright Board have been reported, as both these bodies have powers to raid, cease and prosecute for copyright infringement. In practice, however, issues solely pertaining to copyright counterfeit issues are handled by the Kenya Copyright Board, while cases of infringement of both copyright and trademarks are handled by the Anti-Counterfeit Agency. Yet, this distinction is not very clear from a legal standpoint, and it has been reported that even in cases of pure copyright infringement, pursuing the matter through the Anti-Counterfeit Agency is faster and penalties more punitive (value-based) than under the Copyright Act.

### **Recommendations:**

- A. Amend the copyright law to prescribe maximum penalties, which can act as a real deterrent for infringers and potential infringers and also introduce deterrent minimum fines.
- B. Amend the copyright law to clearly delineate the respective roles of the Anti-Counterfeit Agency and the Kenya Copyright Board regarding raid, cease and prosecute powers for copyright infringement.

## **4. Improve and expedite civil enforcement procedures, and procedures with respect to the Trade Marks Act, 2001.**

One of the deficiencies in the civil enforcement area is the duration of judicial procedures, which is considered to be lengthy. In addition, Section 34, subsection (6), (b), (ii) of the Anti-Counterfeit Bill, 2008, requires brand owners to sign an indemnity, which effectively indemnifies the Anti-Counterfeit Agency's officers from just about everything, and places a heavy obligation on brand owners for actions of ACA officers which are completely beyond their control. This indemnity has caused many brand owners to simply walk away from enforcement in Kenya, due to breadth of scope. Moreover, the civil enforcement provisions of the Anti-Counterfeit Act, 2008, should be further strengthened and a judicial reform should be proposed to establish special courts to determine IPR disputes.

With respect to the Trade Marks Act, 2001, in trademark prosecution, some inconsistencies in examination have been reported, which often result in delays and sometimes in additional expense to overcome refusals or disclaimers that are not consistent with the law. In trademark enforcement, the law provides that infringement actions must be pursued in the High Court (different from industrial design and patent infringement disputes) as court of first instance. This is problematic because there is general lack of capacity in handling and appreciating IP matters, in addition to the backlog of other types of cases before these courts.

In addition, the official fees payable at the trademarks and patent office are also considerably high, and among the highest on the continent, particularly for foreign applicants, which has been prohibitive for some clients when thinking of seeing IP protection in Kenya.

### **Recommendations:**

- A. Speed trial process and ensure courts issue preliminary court injunctions in a timely and effective manner.
- B. Enhance the capacity to handle IP issues by the High Court, which has jurisdiction to hear and determine all IP infringement issues.
- C. Remove from the Anti-Counterfeit Act, 2008, the requirement for the private companies to sign an indemnity.
- D. Amend the Anti-Counterfeit Act, 2008, to allow the seizure of documentary evidence relating to the suspected infringement.
- E. Issue clear procedural guidelines regarding the trademark examination proceedings to be consistent with the law.
- F. Introduce clear legislative rules to regulate the issues of parallel importation and exhaustion of rights.
- G. Amend the amount of fees payable to the trademarks and patent office to make IP protection and registration of rights more attractive.

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## 5. Grant powers to the ACA to settle matters out of court under the Anti-Counterfeit Act, 2008.

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Under the East Africa Community Management Act the Commissioner of customs is given powers to compound cases where an importer of prohibited goods admits offence in writing. In this case the goods are forfeited and the Commissioner imposes a fine on the importer which is half the value of Goods or USD 10,000.

In Tanzania, The Fair Competition Commission is also given powers to settle matters out of court, impose fines and destroy goods. Indeed most of the counterfeit cases in Tanzania are resolved under this out of court mechanism.

Given the length it takes to try cases through the court, if ACA is given powers to settle cases out of court with a proper mechanisms- i.e. the consent of both the complainant and the person found with the counterfeit goods, and to destroy such goods and impose fines, this will not only fasten resolution of such cases but also generate the much needed revenue for ACA as ACA will get to retain the fines which will go towards financing its budget.

### **Recommendations:**

- A. Amend the Anti-Counterfeit Act, 2008 to grant powers to the ACA to settle cases out of court in addition the power to destroy counterfeit goods and impose fines

## Policy Recommendations

The remaining recommendations are aimed at the need to take some broader measures, actions and initiatives to support the more specific implementation and enforcement of IP legislation as recommended above.

- As a starting point, Kenya needs a national IP action plan covering the full range of legal and policy reforms, technical assistance and capacity building measures, channels for international cooperation and tools for strengthening enforcement practices.
- The effective and immediate implementation of the legislative and policy recommendations could benefit considerably from the assignment of responsibility to the Kenyan Anti-Counterfeit Agency with the task of implementing the recommendations. The Agency would have a broad responsibility to oversee the coordination of relevant agencies, develop and implement joint strategic enforcement plans and report to the Kenyan government.

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### 1. Establish an inter-agency approach between the different Kenya Agencies administering and enforcing IP rights.

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The administration and enforcement of IPRs in Kenya is the shared responsibility of the office of the Registrar General in the Attorney General's Chambers – under which the Kenya Copyright Board falls – the Kenya Industrial Property Institute (KIPI), Customs Department of the Kenya Revenue Authority and the Kenya Bureau of Standards (KEBS). As evidenced, Kenya has no shortage of institutions. What is largely lacking is coordination and information sharing among the various institutions. Therefore, an inter-agency approach to IP enforcement on both policy and operational levels is key to achieving comprehensive IP regimes.

### Recommendations:

- A. Establish inter-agency working groups at the national level under the guidance of the Anti-Counterfeit Agency to enhance collaboration, and communication in the enforcement and protection of intellectual property rights. A single liaison or point of contact in each institution/agency should be designated.
- B. Draft a Memorandum of Understanding (MOU) providing the rules of engagement to govern the inter-agency collaboration. Joint procedural manuals could also be helpful in facilitating the establishment of an inter-agency approach.
- C. Establish IPR Enforcement Committee to organize all inspectors under the Anti-Counterfeit Act for future training, communication, cooperation and coordination. Such Committee will be composed of persons who head the enforcement departments in the respective agencies.
- D. Foster administrative cooperation and coordination amongst domestic enforcement authorities through seminars, workshops and conferences.
- E. Improve cross-border cooperation between Kenya enforcement authorities and international agencies or IP offices of foreign governments.
- F. Encourage customs and policy authorities to participate more fully in developing and using existing technical tools to collect and share information. Share information with the competent customs authorities including relevant information to better identify and target for inspection shipments suspected of containing infringing goods.
- G. Improve customs' risk assessment tools. For example, given the great differences in prices between authentic and counterfeit products, a system should be set up to flag up any imports of certain products that fall below a certain declared value.
- H. Promote internal coordination among, and facilitate joint actions by competent authorities responsible for the enforcement of IPR.
- I. Upgrade technical infrastructure and develop on-line network to allow competent authorities involved in the enforcement of IPR to rapidly exchange information on enforcement issues, including real time alerts information on suspect products, manufacturing sites, distribution routes and key sale points.
- J. Research and make information available on technical tools and systems for prevention and investigation purposes (including tracking and tracing systems which help to distinguish genuine from counterfeit products).
- K. Develop databases to collect, store and analyze data on the scope and impact of IPR infringements and national case law on such infringements and systems to enhance access of public authorities and private stakeholders to information.
- L. Issue documents for the implementation of IP rights such as handbooks and manuals and make them available to the law enforcement authorities.

## 2. Establish an inter-agency approach with private sector coordination.

Effective cooperation between private and public authorities is a key element in combating counterfeiting and piracy. While industry has the primary responsibility for protecting its intellectual property, government play a critical role in ensuring there is an effective IPR protection regime in place and enforcing the relevant laws and regulations. Right holders have the technical expertise to distinguish counterfeits from original products and know the supply chain involved in manufacturing, distributing and selling their products, and can assist government in investigations and enforcements actions. Partnerships between manufactures and government agencies will provide the technical expertise to enable authorities to intervene.

### **Recommendations:**

- A. Promote the establishment and maintenance of formal or informal mechanisms such as advisory groups that would facilitate engagement between the Kenyan agencies and right holders and other relevant stakeholders including organizers of trade fairs, transport and logistics companies, retailers and payment service providers.
- B. Undertake cooperative actions together with private sector to build strategies and to promote and spread successful private sector strategies.
- C. Cooperate with private stakeholders to build an electronic information exchange, an early warning system on counterfeit and pirated products and a well-functioning company registration system.<sup>98</sup>
- D. Enhance pre-seizure information sharing with right holders about samples of products and packaging to aid customs in determining whether goods are infringing. Consider participation in the Interface Public Members (IPM) database program of the World Customs Organization (WCO) to facilitate communication and information exchange between right holders and Kenyan customs authorities and to receive access to training and product information on the 'genuine/fake' database.
- E. Consider the creation of a Kenyan Observatory on Counterfeiting and Piracy, with membership constituted of representatives from relevant governments, industries and other stakeholders. Such an Observatory could serve as platform to join forces and build coalitions between representatives from national authorities and other stakeholders for mutual assistance. The tasks and activities of such an Observatory could include responsibility for helping to put effective policy recommendations in place and assisting the Kenyan public authorities in their policy, legal and enforcement work.

## **3. Expand IP-related administrative and technical capacity building**

A country's effectiveness in protecting IP rights is in significant measure dependent upon its capacity to enforce them. Therefore, in addition to prescriptions for better legislation and stronger enforcement, methods for improving knowledge, enhancing training, and developing skill capacities and competences, should be put in place.

### **Recommendations:**

- A. Enhance the knowledge on best public and private sector practices to protect IPR.
- B. Enhance the expertise of persons involved in the enforcement of IPR by providing an on-line inventory of available, relevant training programs and initiatives offered and organized at international level.
- C. Expand cooperation with international organizations with a view to enforcement authorities such as police, prosecutors and customs participating in seminars organized by specialist IP enforcement representatives from the World Customs Organization, Interpol, Europol and UNICRI (United Nations Inter-regional Crime and Justice Institute). These enforcement seminars will secure a more sustainable flow of knowledge and learning throughout Kenyan enforcement agencies.

#### 4. Increase public and political awareness of counterfeiting and piracy and the associated economic and social harm.

There is a need to increase public and political awareness and understanding of counterfeiting and piracy activities and the associated economic and social harm. It is important for consumers, right-holders and government officials to be aware of the counterfeiting problem, to understand the economic and social effects, and to know what concerned parties can do to combat counterfeiting and piracy activities.

##### **Recommendations:**

- A. Design joint campaign against counterfeiting between the private sector and the Kenyan Anti-Counterfeit Agency and other IPR enforcement agencies by continuing to participate actively in the “Fakes Cost More: I Buy Real” campaign.
- B. Promote the adoption of measures to create and strengthen public awareness of the importance of respecting IP and the detrimental effects of IPR infringements.
- C. Develop an overall communication strategy on enforcement-related activities including the use of new communication channels such as social networks and the design and development of an exclusive enforcement related website.
- D. Design nation-wide awareness campaigns, which will educate the public and decision makers on the harms and costs of counterfeiting and piracy and raise awareness especially among young people to enable them understand what is at stake in IP.



Combating counterfeiting and piracy is an important but challenging task that cannot be accomplished in isolation. Protection of IPR should not solely be a priority of state authorities, but needs to be considered as a goal shared broadly by all sectors of society. As a result, public officials, international governmental organizations, industry and even consumers need to work together more closely to develop more creative and effective methods to fight this economic and societal problem.

The Kenyan government has shown increased awareness of the consequences of a lack of IP protection and of the importance of collectively fighting counterfeiting and piracy. Over the past years, the country has initiated legal and institutional reforms, as well as programs to educate the people about the risks of counterfeit products.

The growth in consumer demand in Kenya increases opportunities for counterfeiters and the massive 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 is needed to attract foreign companies to bring their products to Kenya and to encourage local enterprises to generate innovative and create jobs.

This report presents legislative and policy recommendations to support Kenyan stakeholders in their efforts to promote and protect the value of IP. Assigning responsibility to an existing IP body such as the Anti-Counterfeit Agency<sup>99</sup> to oversee and implement these recommendations in Kenya could be extremely effective. The Anti-Counterfeit Agency was created under section 3 of the Anti-Counterfeit Act<sup>100</sup>, 2008, to ensure, among other, strengthening of co-ordination between all agencies involved in combating counterfeiting and piracy in Kenya. Assigning to such a body the task of putting these recommendations in place would establish the needed coordination among relevant agencies to map out joint strategies backed by all such agencies.

The benefits that a more advanced intellectual property regime could generate for country's economy are undeniable. It is an established fact that there is a close correlation between the effectiveness of IPR protection and a country's economic performance. IPR systems significantly affect every country's growth, FDI, employment capacities, innovation and overall competitiveness, and enable productivity and efficiency gains. Putting in place a solid IPR protection and enforcement regime is thus critically important for a country to reach its prosperity potential. The ICC-BASCAP stands ready to do its part to help the Government of Kenya achieve these important goals.

<sup>1</sup>The following sections and many of the included examples of the benefits that intellectual property provides for innovation and the economy are summarized from ICC, Intellectual Property: Powerhouse for Innovation and Economic Growth (2011) <http://iccwbo.org/data/documents/bascap/ip-and-economic-growth/ip-powerhouse-for-innovation-and-economic-growth/> and ICC-BASCAP, Promoting and Protecting Intellectual Property in Kenya (2011) <http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=2147490263>.

<sup>2</sup>Gastrow, P., International Peace Institute, Termites at Work: A Report on Transnational Organized Crime and State Erosion in Kenya—Comprehensive Research Findings (2011), p.45.

<sup>3</sup>See supra note 1.

<sup>4</sup>Frontier Economics, 2012, Long term impacts of counterfeiting and piracy on Foreign Direct Investment in Kenya. (not yet published)

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[en/intproperty/944/wipo\\_pub\\_944\\_2011.pdf](en/intproperty/944/wipo_pub_944_2011.pdf)

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## **The International Chamber of Commerce**

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

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Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

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