

THE ROLE OF TRADEMARK IN ADDRESSING COUNTERFEITS CRISIS IN AFRICA

Experience of Kenya

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SYNOPSIS

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, and creating consumer health and safety risks. Trademarks and strong intellectual property systems play an important role in addressing the counterfeiting practices. This paper presents Kenya experience outlining efforts, challenges, and lessons in overcoming counterfeit goods through protection of trademarks and other Intellectual Property (IP) assets.

Key findings: This case study demonstrates the extent and impacts of counterfeits and counterfeiting to consumers, economy, local producers, investments, and overall economic development of Kenya and African countries at large. It also outlined the efforts undertaken by Kenya government in combating the problem.

Main lessons: Trademarks and IP systems can reduce counterfeiting practices if they are appropriately established and supported. The study also revealed that fighting counterfeiting in African countries requires strong technical and institutional capacities at different levels (government agencies, judiciary, private sector, research, consumers, etc.).

Main recommendations: The paper recommends to African states to strengthen their IP laws and frameworks, promote capacity building of all pertinent stakeholders and establish coordinated, coherent and holistic approaches to address all factors fueling counterfeit products in African markets. The paper also calls for establishing and supporting national and regional Anti-Counterfeit Agency to ensure, among other, strengthening of co-ordination between all agencies involved in combating counterfeiting and piracy in Africa.

Introduction

In recent years, there has been huge increase of poor quality and counterfeited goods in African markets ranging from software, textile, electronics, spare parts, medicine/drugs, cosmetics, household items, food items, etc. Product counterfeiting and trade in counterfeit products, labels, and packaging involve imitation of genuine products that are marketed under brand names. Counterfeit products are becoming a major problem to consumers, innovators, and traders in African states. Such imitations are usually clones or falsified products, labels and

packaging designed to look like those of genuine products. The aim is to confuse or deceive consumers as to their quality, source, origin, or legitimacy. Counterfeits are manufactured, processed, or supplied by unscrupulous traders who infringe and unlawfully apply other corporations' or individuals' innovations and intellectual property (IP).

Creativity and innovation are proven drivers for economic growth and competitiveness. Research has shown that growth in a country is closely related with the capacity of the economy to generate innovation and commercialize

innovative products. Intellectual property rights (IPR) play an important role in the formation, development, and growth of innovative capacity. This is especially important as growing economies, like those of many African countries, continue to evolve from traditional agricultural and low-value manufacturing activities towards diversified and high-value economies.

The World Intellectual Property Organisation (WIPO) indicates that Intellectual Property (IP) in the form of patents, trademarks, copyrighted works, industrial designs, trade secrets, geographical indications, like other types of property, can be developed, owned, managed, and commercialized to generate economic returns. Moreover, increasingly, private enterprises and academic institutions see patents, trademarks, copyrighted works, and other forms of IP as economic assets, the value of which can be optimized by proactive policies and strategies.

WIPO defines a trademark as “any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors.” Trademarks are also described as “Distinctive design, graphics, logo, or combination thereof that uniquely identifies a firm and/or its goods or services, guarantees the item’s genuineness, and gives its owner the legal rights to prevent the trademark’s unauthorized use.” They are part of the intellectual property tools used in business.

Purposes and benefits of trademarks as one of IP systems are many. They are central to business branding and marketing strategies, and help define the image and reputation of the business’ products in the eyes of consumers. They also create trust for a business, which is the basis for establishing a loyal clientele and enhancing goodwill. They can also lift business growth, as consumers often develop an emotional attachment to certain trademarks, based on a set

of desired qualities or features embodied in the products bearing them. They also provide an incentive for businesses to invest in maintaining or improving the quality of their products to ensure that products bearing their trademark have a positive reputation.

The risks associated with IP theft, counterfeit and counterfeiting and the impact on the African economy is huge. As an example, the counterfeiting business in Kenya is approximately US\$835 million and the Kenyan government loses about US\$84 million in tax revenues to counterfeiting and piracy (UNECA 2013, EAC 2009); funds which could be invested in public health, infrastructure, and education.

This case study focuses on knowledge sharing and awareness creation among African policy makers and practitioners on the experience of Kenya governments in promoting trademarks for economic development as well as a way of overcoming the challenges of counterfeit products and counterfeiting. Given the economic significance of the trademarks, it is believed that African states and institutions will pick and adopt or mirror lessons from this case study for the benefits of individual institutions, country, and Africa economic transformation at large.

Different types of counterfeiting

Counterfeit medicine

The infiltration of substandard counterfeit medicines in African countries is of concern. According to estimates by the World Health Organization (WHO), up to 30% of medications on the African market are counterfeit. Of the more than 655,000 malaria deaths globally each year, 90% occur in Africa. 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 revenue¹. The U.S. National Institute of Health found after analyzing data

¹ Fake Medicine Common in Many Sub-Saharan African Countries”, Gallup World, October 5 2011.

<http://www.gallup.com/poll/149942/fake-medicine-common-sub-saharan-african-countries>

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.²The 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 electronics

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 affected³. Piracy of music, movies, and software is also pervasive. 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.⁴

Fake household goods and cosmetics

These 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.⁵ 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.⁶ The consumer, who pays the same price for both items, is often unaware that he/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.

Extent and impact of counterfeiting on African economies

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) lost US\$500 million in revenues due to unpaid taxes by counterfeiters⁷. Illicit trafficking routes in many West African countries and struggling, weak governments make this region particularly endemic 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.

Nevertheless, the exact extent of counterfeit goods sales in Africa is unknown (Yates, 2014). Measurement is stymied by the dominance of

² East Africa: 80 Per cent of Computer Products Fake", All Africa, 12 November 2007

³ ibid

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[http://portal.bsa.org/globalpiracy2011/downloads/study.pdf/2011 BSA Piracy Study Standard.pdf](http://portal.bsa.org/globalpiracy2011/downloads/study.pdf/2011%20BSA%20Piracy%20Study%20Standard.pdf)

⁵ Africa dumping ground' for counterfeit goods, Pamela Whitby, BBC News, 13 January 2010

⁶ ibid

⁷ 46Onyango, J., 'Eastern Africa region loses \$500 million to counterfeit goods', Business Daily, 15 July 2010, <http://www.businessdailyafrica.com>

traditional small and informal traders who, beyond South Africa, account for upwards of 90% of Africa's retail trade. Among the countries the most hit by counterfeit goods is Nigeria, Africa's largest consumer market and home to 745,000 small and informal traders (Nielsen, 2014). Genuine brands are being sold side by side with their imitations (Ibid). A study by the Standards Organisation of Nigeria in 2011 found that some 85% of goods sold in Nigeria were counterfeit and substandard. According to Yates, the biggest source of fake goods is China – 85%. Other major sources of fake goods are Pakistan, Vietnam, and Thailand, (ibid).

According to the International chamber of commerce (2013) 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.

Experience of Kenya in addressing counterfeiting and strengthening IP

The problem

Kenya has the largest market in East Africa, and serves as the major distribution point for Uganda, Rwanda, and Ethiopia. Like other East African countries, Kenya has been facing a disturbing increase in the trade in counterfeit products and smuggled goods, an illicit industry estimated worth approximately US\$835 million, even rivaling key foreign exchange earners like tourism, tea and

coffee.⁸ Mombasa port has been reported to act as a strategic hub and entry point for illicit goods, smuggling of drugs, counterfeits, and other illicit commodities (see EAC 2009, WHO 2015). Despite several high profile seizures by Anti Counterfeit Agency (ACA) of Kenya, including counterfeit ballpoint pens, electronics, and sportswear worth millions of Kenya shillings, smugglers continue to use the port as gateway for illicit goods to enter Kenya and the greater EAC area (ibid).

The impact of counterfeit products on Kenya

The negative impact of counterfeit goods to Kenya and other African states are many. 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, are estimated by indirect methods. 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 most 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 illustrates the magnitude and scale of the problem.

Counterfeiting and piracy deprive the economy of legitimate jobs, tax revenue and increase social costs. Estimates put the annual loss of revenue to the Kenyan state as a result of counterfeit trade

⁸ Ken Opala, "Merchants of Fakes Reap Sh70bn and Put Lives and Jobs at Great Risk," Daily Nation, November 21, 2009,

between US\$84 million and US\$490 million. 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. The impacts of the presence of counterfeit and pirated goods also 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.) (EAC 2009). In 2010, the Consumer Federation of Kenya carried out a survey of the counterfeit market (TNS 2010). 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 (Keshi 2008).

While some of the effects of counterfeits are immediate (e.g. illness from ingesting counterfeit food products), other effects may be long term (e.g. injury from using counterfeit cosmetics or drug resistance from fake medicines). 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 (EAC 2009). 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 antimalarial drugs (Kimani 2004 & 2011). These findings suggest that there is an overwhelming number of fake products on the market, constituting a serious health concern to Kenyan consumers.

Impact on local producers: 75% of the Kenyan population depend on agriculture for food and income. The agricultural sector contributes 26% to the Gross Domestic Product (GDP) and 60% to foreign exchange earnings (FAO 2015). 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 (EAC 2009). 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.

Impact on innovation: Furthermore, counterfeit and piracy impedes the growth and development of local creative industries in Kenya (ibid). The Kenya Publishers Association (KPA) announced in 2011 that roughly US\$24 million were being lost to book piracy annually in Kenya and the Kenyan music industry estimates that over 90% of music were been pirated.

Impact on local manufacturers: The impact of counterfeits on traditional manufacturers has been 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 US\$360 million while the government loses US\$71 million

in potential profits and tax revenue due to counterfeit trade. 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 take profit 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 (ICC 2013).

Kenya response to the counterfeit challenges and weak IP system

In the past years Kenya government undertook various reforms in order to deal with emerging national and global challenges that include the problems of counterfeits and weak Intellectual property frameworks.

The IP protection in Kenya

The Industrial Property Act of 1989 established the first independent patent system in Kenya. The 1989 Act was superseded by the Industrial Property Act of 2001, which set up the Kenya Industrial Property Institute (KIPI) as autonomous office to administer patents, utility models, trademarks and service marks (Graff, 2007). Furthermore, Kenya joined the World Trade Organization (WTO) and became signatory to TRIPS in 1995 (ibid). Domestic companies in developing countries such as Kenya 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 (UNCTAD 2012).

Instituting Anti-Counterfeit Agency (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 is the engine in the fight against counterfeits. Specifically, it 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.

ACA deals with counterfeiting from two perspectives i.e. the demand and supply of counterfeits in the market. To curtail the demand for counterfeit goods, the Agency continually creates awareness to the public on the value for genuine and the effects of counterfeiting. The awareness programs are either in open forums for the general public such as the "ASK shows" while others target specific audience such as government agencies and the business fraternity. Curtailing the supply of counterfeit goods as addressed at the ACA is through enforcement of the relevant provisions of legislations and regulations.

Collaboration with relevant enforcement agencies is crucial in driving the mandate of the Agency and these include the local and international bodies. These agencies partner with ACA in intelligence sharing, investigations and prosecutions. Partnership with private sector is also important since counterfeiting involves infringement of IPR which is 'private property'. Collaborations with the private sector are mainly on the intelligence and information sharing platforms, capacity building and in prosecutions where their personnel provide expert witnesses in courts of law.

Achievements: According to ACA, goods were seized from different suspects involved in

counterfeiting. The goods that ACA had handled by Dec 2015 were estimated to be worth Ksh 1 billion. Counterfeit goods that ACA has dealt with include; toners and cartridges, liquid petroleum gas, oils and lubricants, clothing, shoes, detergents, sanitary pads, mobile phone handsets, paints, electrical products, instant showers, electric cables, mobile phones and their accessories among others. Over the years, cases on seized goods have been concluded leading to their destruction on court order.

Establishment and strengthening of the Kenya Industrial Research Development Institute (KIRDI)

The unsatisfactory outcome from adoption of the Bayh-dole Act as well as the appreciation of the role of science and technology and innovation as a steering wheel of economic growth by the Kenya government lead to the establishment of Kenya Industrial Research Development Institute (KIRDI) as another effort to attainment of national goals on innovation promotion and addressing the counterfeit goods. KIRDI was therefore empowered to play a critical role in facilitating technology transfer to micro, small and medium industries, improving designs, and promoting product innovation. This was in order to promote rapid growth in the manufacturing sector and give an impetus to Kenya Vision 2030 for manufacturing sector goal of attaining a 10% annual growth. KIRDI's mandate was set to undertake research and development in all industrial and allied technologies including: Mechanical, civil and chemical engineering, food, textile, leather, ceramics and clay technologies; industrial chemistry, power resources, environment among other things. KIRDI is also mandated to co-operate with responsible ministry of industrialization and relevant research committees in matters pertaining to research policies and priorities, co-operate with other organizations and institutions of higher learning in training programs on matters of relevant research; disseminate research findings that will

have a positive impact on national development; liaise with other research bodies within and outside Kenya carrying out similar research, providing patent information, consultancy, reverse engineering, advice on patentability of the invention, patent drafting and advice of how to file a patent application (KIRDI 2011). According to KIRDI 2016 reports, significant milestones and results have been achieved under this initiative.

Reform of the intellectual property laws

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: 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 the African Regional Industrial Property Organization (ARIPO), the World International Property Organization Convention (1970), the International Union for the Protection of New Varieties of Plants (UPOV), the Trade Descriptions Act, The Weights and Measures Act and the Counterfeit of Goods Bill. In addition, Kenya has established specialized courts, including the Industrial Property Tribunal and the Registrar of Trademarks, to deal with matters related to IP.

As part of its ambitious law reform programme, Kenya has focused on reforming its laws on intellectual property to ensure that the

intellectual property laws not only conform to the international laws but also incorporate the needs of the local intellectual property industries. The law reform process was also aimed at: involving the stakeholders in policy formulation and implementation, developing capacity by training investigators and prosecutors who are specialised in intellectual property issues, providing for penalties which are deterrent and punitive, raising awareness of the public on intellectual property issues, creating independent institutions to be the driving force on issues related to intellectual property and harmonising implementation strategy. Other laws that are used to tackle counterfeit and piracy where applicable are the Penal Code, The Criminal Procedure Code, The Evidence Act, the Civil Procedure Act and to a certain extent the Customs and Excise Act (later known as the East African Customs Union Act).

Overall challenges to the Kenya efforts on counterfeit control

While Kenya provides a quite advanced legal and institutional framework to ensure IP protection the following challenges are still persistent:

- Deficient enforcement of the existing IP legislation.
- Since counterfeiting operates outside the law, estimating the exact level of counterfeiting and evaluating its harmful consequences has been extremely challenging.
- Inadequate individual and institutional capacities to approach the challenges as a whole. Coverage of the counterfeit services is for example not spread to all key town and borders.
- Inadequate coordination mechanism and systems between the supply side and the receiving sides, e.g. the sources of counterfeit goods and the affected African countries.

Conclusion and policy recommendations

This case study attempted to highlight the challenges of counterfeits and counterfeiting in Africa and focused on Kenya experience. It has looked at the extent of the problem and the efforts of Kenya government to reform its IP systems, laws and institutional arrangements and practices. The study has revealed a number of issues that African policy makers and development partners may choose to address to ensure that counterfeits products are completely out of Africa markets.

African SMEs and trademark owners are strongly advised to regularly conduct market audits to know how their products are doing on the market. This will help in improving the quality of their products, if there is anyone counterfeiting their product, and enable them to take steps at an early stage before they lose business. They should also register their trademarks, use them, advertise them and sustain them.

African states should strengthen their national and regional laws on counterfeits. Regionals institutions should support and coordinate such efforts. It's equally important that African government, regional institutions and capacity building organizations reinforce the different actors to address deficiencies in criminal IP law and procedures, improve border enforcements, as well as address deficiencies in the Copyright Act, along with establishing strong systems to expedite civil enforcement procedures, and procedures with respect to the Trade Marks.

There is 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 know what concerned parties can do to combat counterfeiting and piracy activities. Combating

counterfeiting and piracy is an important but challenging task that cannot be accomplished in isolation. Protection of IPR should be a goal shared broadly by all sectors of society through coherent and holistic approach. Finally, African governments and regional institutions should also engage and collaborate with countries where counterfeits products originate from in order to increase the fight against this illegal industry.

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