



**UNIVERSITY OF NAIROBI
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MASTER OF LAWS**

EFFECTS OF INTELLECTUAL PROPERTY RIGHTS ON TRADE IN KENYA

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SUPERVISOR

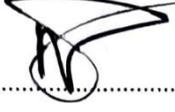
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2022

Declaration

I, Kazungu Brian Nyanje do hereby declare that this LLM Research Project Paper is my original work. It has not been submitted for award of any degree or any other academic credit in any other University or learning institution. I also declare that any reference made to books, texts, articles, journal articles, papers, websites and journals, and any other pertinent materials have been duly acknowledged.

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This LLM Research Project Paper has been submitted for examination with my knowledge and approval as the University supervisor.

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Abbreviations and Acronyms

ACA	Anti-Counterfeit Authority
ADR	Alternative Dispute Resolution
AGOA	African Growth and Opportunity Act
ARIPO	African Regional Intellectual Property Organization
BMDA	Bureau Marocain du Droit d'Auteur (Moroccan Copyright Office)
CISAC	International Confederation of Authors and Composers
COA	Court of Appeal
CMO	Collective Management Organisation
CS	Cabinet Secretary
DRM	Digital Rights Management
EACCMA	East African Community Customs Management Act, 2004
EALA	East Africa Legislative Assembly
EPO	European Patent Office
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement of Trade in Services
GSP	Generalised System of Preferences
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMPRA	Independent Music Performance Rights Association
IP	Intellectual Property
IPOK	Intellectual Property Office of Kenya
IPR	Intellectual Property Rights
KAM	Kenya Association of Manufacturers
KAMP	Kenya Association of Music Producers
KEBS	Kenya Bureau of Standards
KEPHIS	Kenya Plant Health Inspectorate Service
KECOBO	Kenya Copyright Board
KIPI	Kenya Industrial Property Institute
KIPO	Kenya Industrial Property Office
MCSK	Music Copyright Society of Kenya Seeds
MPAKE	Music Publishers Association of Kenya
MSMEs	Micro, Small and Medium Enterprises
NACOSTI	National Commission for Science, Technology, and Innovation
NCRC	National Crime Research Centre
NCAJ	National Council for Administration of Justice
PRISK	Performers Rights Society of Kenya
PS	Principal Secretary
R&D	Research and Development
SCIO	State Council Information Office of China
S&T	Science and Technology
SDT	Special and Differential Treatment
SSA	Sub-Saharan Africa
TRIPS	Agreement Trade Related Aspects of Intellectual Property Law
UDHR	Universal Declaration of Human Rights
USC	United States Code
USMFTA	US-Morocco Free Trade Agreement

USTR	Office of the United States Trade Representative
WC	Watch List
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Institute
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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Constitution of Kenya, 2010
 Constitution of the People's Republic of China
 Constitution of the Republic of South Africa, 1996
 Morocco's Constitution of 2011
 United States Constitution

List of Transnational Legal Instruments

Agadir Declaration adopted in Agadir on 8 May 2001
 Agreement on Trade Related Aspects of Intellectual Property Rights April 15, 1994, entered effect January 1, 1995 (1994) 33 I.L.M. 1197
 Agreement relating to the International Registration of Marks, adopted in Madrid in April, 1891
 Barcelona Declaration adopted at the Euro-Mediterranean Conference on November 27-28, 1995.
 Berne Convention for the Protection of Literary and Artistic Works in the Act of Paris of 24 July 1971.
 Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure (1977, amended in 1980).
 East African Community Customs Management Act, 2004
 East African Community Elimination of Non-Tariff Barriers Act, 2017
 Euro-Mediterranean Agreement between the European Communities and their Member States, and the Kingdom of Morocco, 1996.
 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961).
 International Convention for the Protection of the New Varieties of Plants (Act of Geneva, 1991).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3,
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Patent Cooperation Treaty (1970, amended in 1979 and modified in 1984).
Protocol on the Establishment of the East African Community Common Market
Protocol relating to the Madrid Agreement concerning the International Registration of Marks (1989).
Treaty for the Establishment of the East African Community
United States – Morocco Free Trade Agreement
Universal Declaration of Human Rights, 10 December 1948, 217 A (III),
Vienna Convention on the Law of Treaties of 1969

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Access to Information Act, 2016
Anti-Counterfeit Act, No 13 of 2008
Copyright Act, Chapter 130 of the Laws of Kenya
Copyright (Amendment) Act, 2019
Criminal Procedure Code, Cap 75 of the Laws of Kenya
Finance Act, 2001, No. 6 of 2001
Finance Act, 2003, No. 15 of 2003
Government Proceedings Act, Chapter 40 of the Laws of Kenya
Health Laws (Amendment) Act, 2019
Industrial Properties Act No. 3 of 2001
Kenya Citizenship and Immigration Act, 2011
Kenya Industrial Research and Development Institute Act, 2022
Micro and Small Enterprises Act, 2012
Penal Code, Cap 63 of the Laws of Kenya
Pharmacy and Poisons Act

Science, Technology, and Innovation Act, 2013
Seeds Plants and Varieties Act, Chapter 326
Statute Law (Miscellaneous Amendments) Act, No. 2 of 2002
Statute Law (Miscellaneous Amendments) Act, 2018.
Trade Marks Act, Chapter 506
Trade Descriptions Act, Chapter 505
Treaty Making and Ratification Act, 2012

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Anti-Counterfeit (Recordation) Regulations, 2021
Anti-Counterfeit Regulations, 2010
Copyright (Collective Management) Regulations, 2020.
Copyright (Collective Citation Management) Regulations, 2020
Copyright Regulations, 2020.
Trade Marks (International Registration) Rules, 2003

List of Moroccan Statutes

Law No. 17-97 on the Protection of Industrial Property
Law No. 2-00 on Copyright and Related Rights
Law No. 9-94 on the Protection of Plant Varieties

List of South African Statutes

Merchandise Marks Act 17 of 1941
Counterfeit Goods Act, 1997
Copyright Act No. 98 of 1978
Performers' Protection Act no. 11 of 1967

List of United States Statutes

African Growth and Opportunity Act, Chapter 23, Subchapter I (19 USC, 2020 Edition)
Copyright Act (17 USC, 2020 Edition)
Crimes and Criminal Procedure Act (18 USC, 2020 Edition)
Omnibus Trade and Competitiveness Act of 1988 Chapter 17 (19 USC, 2020 Edition)
Tariff Act, 1930, Chapter 4 (19 USC, 2020 Edition)

Trade Marks Act, Chapter 22 (15 USC, 2020 Edition).

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Brend v. Wood [(1946) 62 TLR 462 at 463

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Dr. Samson Gwer & 5 Others v. Kenya Medical Research Institute (KEMRI) & 3 Others [2014] eKLR

In the Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No. 1 of 2012)

In Lim Chin Aik v. The Queen [1963] AC 160

Karen Njeri Kandie v. Alassane Ba & another, Petition No. 2 of 2015

Mercy Muneo Kingoo & Another v. Safaricom Limited & Another Constitutional Petition No. 5 of 2016

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Reminisce Sports Bar Limited t/a Reminisce Bar & Grill & 3 Others v. Cabinet Secretary Ministry of Transport & 7 Others Civil Appeal No. 219 of 2014

Republic v. Erastus Maina, Criminal Case No. 294 of 2017

S v. Arenstein 1967 (3) SA 366

Samson Gwer & 5 Others v. Kenya Medical Research Institute & 3 Others, Petition No. 12 of 2019

Xpedia Management Limited and Others v. Attorney General and Others NRB Petition No. 317 of 2015 [2016]

Abstract

As the Kenyan Parliament and Government stakeholders in the Trade sector seek to enact new laws, regulations and policies geared to harmonise the current Intellectual Property (IP) regime, importers, retailers, and some consumers have expressed their dissatisfaction with the enforcement of the existing IP laws. This paper examines the roots of the public outcry on the enforcement of IPR on a scale of three complementary hypothesis. First, that the Kenyan IP legal regime is too swingeing and likely to cripple the trade sector. The laws in place are insouciant of the roles importers and retailers play in building the economy. The laws have the potential of shredding business start-ups.

Second, although international IP Agreements, Treaties and Conventions like the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) inspired Kenyan legislations like the Anti-Counterfeit Act, the legislations have introduced measures that a way beyond the scope of these agreements. Further, they have set standards that even developed countries have not adopted because of their likelihood to impair the trade sector. Kenyan IP laws like the East African Community Customs Management Act (EACCMA) can be draconian when they should not be, and others like the Copyright Act, 2001 can be less effective in the protection of Copyright holders and business entities.

Third, to create a proper Kenyan and Afro Centric IP regime, Kenya needs to understand the nature and history of IPR. The Legislature and Policy makers in the trade sector should draw lessons from developed countries. They should also understand the fears and aspirations of developing and least developed countries during the adoption of the Marrakesh Agreement Establishing the World Trade Organization and the Doha Declaration.

This paper has validated the three hypothesis and certified that a good IP regime can be a very instrumental apparatus to achieve Sustainable Development. Kenyan legislative and Policy makers well understand the importance of Intellectual Property Rights (IPR) protection to the economy. However, they have been guilty of transplanting foreign or even locally cooking provisions that are likely to work at the detriment of the trade sector. The results have been grotesque. There have been unending complaints from the trade sector on enforcement of IPR.

Most scholars and Kenyan business persons are convinced that the enforcement procedure tends to benefit either International IPR holders, IPR agents or brokers more than local IPR holders and businesses. They also have a conviction that the system of laws is also

inconsiderate to the Kenyan economic status and penalties tend to impair the economy rather than build it. This owes to the fact that IP rules and norms are not conceptualised to conform to the Kenyan society. The laws impose more obligation on importers, and thus increasing the cost and time of doing business in Kenya.

CHAPTER 1

INTRODUCTION TO THE EFFECTS OF IPR PROTECTION ON TRADE IN KENYA

1.1 Background to Effects of IPR Protection on Trade in Kenya

Intellectual Property Rights (IPR) are instrumental in social, economic and cultural growth.¹ It is for this reason that most IP scholars often style IPR² with magnanimous phrases such as: “catalyst for development;”³ the designer of an informed society and ‘trade liberator.’⁴ The protection of IPR is now recognised as an international norm.⁵ This is attributed to the fact that Intellectual Property (IP) can now be used as an object of trade.⁶ Most forms of IP can be: sold; bought; licenced; or exchanged just like conventional property.⁷ However, what sets apart IP from other forms of property is the political configuration and dynamics around the world.⁸ Even the most notable IP scholars cannot agree on the roles, purpose and effects of IP on trade or development.

Although most Kenyans consider the protection and promotion of Intellectual Property Rights a foreign idea, Kenya has a well-grounded legal framework that protects IPR in the name of “trade facilitation and promotion of innovation and creativity.”⁹ The Constitution of

¹ William M. Landes and Others, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003).

² Intellectual property is the protection of human creativity. See Ben Sihanya (2016, 2020) *Intellectual Property and Innovation in Kenya and Africa: Transferring Technology for Sustainable Development*, Innovative Lawyering (IL) & Sihanya Mentoring (SM), Nairobi. Chapter 1: Nomenclature of IP innovation and Transfer of Technology, at 1-41.

³ Carsten Fink and Keith E Maskus, ‘Intellectual Property and Development: Lessons from Recent Economic Research’ (World Bank 2005) <<https://openknowledge.worldbank.org/handle/10986/7443>> (accessed 12 June 2022).

⁴ Ben Sihanya, ‘Combating Counterfeit Trade in Kenya’ (University of Nairobi, 2009) <<http://erepository.uonbi.ac.ke/handle/11295/52389>> (accessed 5 October 2021).

⁵ Mukumov Bobur Meliboy Ugli, ‘Improvement of Legislation in the Field of Intellectual Property’ (2022) 22 Ta’lim fidoyilari 287.

⁶ Ben Sihanya, ‘Intellectual Property Audit, Valuation, Commercialization, Securitisation and Taxation in Kenya’ (2018) *JKUAT Law Journal* 41.

⁷ Dushyant Sharma, ‘Intellectual Property and the Need to Protect it’ (2014) 9, 2014 Indian J.Sci.Res. 084.

⁸ Gaëlle Krikorian and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010) <<https://library.oapen.org/handle/20.500.12657/26082>> (accessed 30 June 2022).

⁹ Ben Sihanya ‘Intellectual property quality assurance and ISO in Kenyan universities’ (2008) Vol 4 *Law Society of Kenya Journal* 35.

Kenya, 2010,¹⁰ gives legitimacy to Kenyan IP statutes such as: Industrial Property Act 2001,¹¹ Copyright Act 2001,¹² Anti Counterfeit Act 2008,¹³ Trade Marks Act¹⁴ and Seeds and Plant Varieties Act, Cap 326.¹⁵

It further allows the application international IP treaties, agreements and conventions such as the Convention Establishing the World Intellectual Property Organization; the Marrakesh Agreement Establishing the World Trade Organization ;¹⁶ the Banjul Protocol on Marks Within the Framework of the African Regional Intellectual Property Organisation (ARIPO) (1993); and WIPO Copyright Treaty (WCT) among others.¹⁷ Moreover, it gives Kenyan courts the mandate to interpret and apply IP laws to ensure that they are in compliant with the Constitution.¹⁸

Although most Kenyan Policy makers are rightfully convinced that enforcement of IPR can facilitate trade and foster innovation and creativity,¹⁹ very few Kenyan IPR holders understand or even benefit from the IP regime.²⁰ Kenyan IP laws substantially shelter international IPR holders and offer less remedies in cases where agents or brokers benefit more than the IPR owners do.

The other factions of the community: importers and retailers only know the hostile nature of IP laws and policies, which is likely to cripple the trade sector. Therefore, three most

¹⁰ Article 260 of the Constitution of Kenya describes property to include intellectual property. Under articles 11(c) and 40(5), the state is obligated to *support, promote, and protect the intellectual property rights of the people of Kenya* and article 69(c) places the duty of protecting and enhancing IP on the state.

¹¹ The Industrial Properties Act No. 3 of 2001 seeks to promote invention and innovation, help in transfer of technology through the grant and regulation of patents, utility models, technovations and industrial Design.

¹² This Act addresses copyright in literary, musical, and artistic works, audio-visual works, sound recordings, broadcasts, and related purposes

¹³ This Act seeks to prohibit trade in counterfeit goods.

¹⁴ This Act fosters the registration of Trade Marks.

¹⁵ This Act protects the intellectual property in relation to seeds and plants.

¹⁶ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994 constitutes the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets out the parties' obligations in enforcing IPR.

¹⁷ Article 2(5) and (6) of the Constitution of Kenya 2010, formalises general rules of international law and mandates the parliament to ratify treaties and conventions on intellectual property rights.

¹⁸ Article 165(3)(d) of the Constitution of Kenya 2010

¹⁹ KAM, *Intellectual Property Rights Regime within the East African Community* (Kenya Association of Manufacturers 2017)

²⁰ Kenya Association of Manufacturers (KAM), *Intellectual Property Rights Regime within the East African Community* (Kenya Association of Manufacturers 2017).

important questions remain unasked. The first is whether the IP laws are commensurate to Kenya's status; second, whether implementation of the laws is sufficient and justified; and lastly, whether there is a resultant benefit to Kenya as a whole, including economic development through trade, creativity, and innovation.

While creating IP laws and policies, international IPR holders or their agents measure up as key stakeholders and their input is deemed necessary. Therefore, they have a platform to convey their views, which always infer, that the IP legal regime and enforcement systems are not strict enough. Most of them criticize the regime regardless of how modernised and in conformity with all international standards it is.²¹ In fact, Kenya, under the Kenya Citizenship and Immigration Act, 2011, has gone overboard to prohibit the entry of immigrants who are involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber-crimes, and related crimes.²²

In the enforcement of IP laws, Kenyan IPR holders, especially in the copyright world spectate, as agents and brokers reap most of the benefits. Retailers and importers of infringed protected goods, on the other hand, only realise that the law exists when Government agencies enforce them. Therefore, they incur huge loses through penalties and forfeiture of the goods, and as a result, their businesses die at infancy. Consumers on the other hand only get what remains after the battle involving the key players in the trade-IPR sector. The price could be higher than they can afford.

The science of the protection of intellectual property rights emanates from the necessity to prevent unauthorised use of intellectual property.²³ Developing and Least Developed Countries (LDC) readily accepted the notion on the assumption that it would be beneficial to their citizens.²⁴ However, they distanced themselves from the concept of international enforcement of IP and most were intimidated to adopt the foreign-championed IP laws.²⁵

²¹ Festus Mbuimwe, 'Strengthening Kenya's IP Landscape' [2016] *WIPO Magazine*, accessed at <https://www.wipo.int/wipo_magazine/en/2016/04/article_0007.html> (on 5 October 2021).

²² Section 33(1)(n) of the Kenya Citizenship and Immigration Act, 2011

²³ UNCTAD (ed), *Knowledge, Technological Learning and Innovation for Development* (United Nations 2007). 9 1

²⁴ Keith E Maskus and Carsten Fink, *Intellectual Property and Development: Lessons from Recent Economic Research* (World Bank Publications 2005).

²⁵ *Ibid.*

Developed countries like the United States; the European Union (EU) countries and Japan are the titleholders of the international protection of IPR idea. Technology and innovation in these countries is well advanced, and thus the need to safeguard their IP.²⁶ In fact most developing and under developed countries were reluctant to adopt the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the Marrakesh Agreement Establishing the World Trade Organization.²⁷

Ben Sihanya makes a novel observation that IP can either stand on the sides, progress, or hamper sustainable development in Kenya and other African countries.²⁸ This depends on the context in which the rights are applied. Statistics by the World Intellectual Property Organization (WIPO) evidence that Africa's involvement in registration of IP is negligible on the global arena. For instance, in 2019, patents application from Africa only accounted to 0.5% of the global figure while the percentage of registered Trade Marks was 1.7%, industrial designs fell at 1.3%, and plant variety at 2.1%.²⁹ With pressure exerted on the African nations to implement both civil and criminal aspects of IPR,³⁰ Kenya can only benefit if it properly domesticates the international IPR treaties and conventions. Radical transplantation of Western Laws can significantly damage the economy.³¹

Although this paper acknowledges the importance of protection of IPR to Kenya, it furthers the argument that an IP regime can foster, stifle, or have no impact on trade and development.³² It addresses some serious concerns that the National Assembly and other policy makers have neglected. It supplements Ben Sihanya's argument that there is a

²⁶ *Ibid.*

²⁷ Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books 2000). 3

²⁸ Ben Sihanya (forthcoming 2022) "Intellectual Property, Innovation, and Technology Transfer in Health in Kenya and Africa: Case of COVID-19 and Malaria," in Ben Sihanya (forthcoming 2022) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials* (IPILKA 2), Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

²⁹ WIPO, 'World Intellectual Property Indicators 2020' [2020] Intellectual Property 237.

³⁰ Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' [1999] Intellectual property and human rights 13.

³¹ Beatrice M Kavoo, 'The Role of "Parliamentary Diplomacy" in Maintaining Political Stability: A Case of Kenya 2000-2014' (Thesis, University of Nairobi 2015) <<http://erepository.uonbi.ac.ke/handle/11295/92999>> (accessed 5 October 2021).

³² Ben Sihanya (forthcoming 2022) "Intellectual Property, Innovation, and Technology Transfer in Health in Kenya and Africa: Case of COVID-19 and Malaria," in Ben Sihanya (forthcoming 2022) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials* (IPILKA 2), Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

significant need of legal and Policy changes.³³ For instance, strict application of IP law can lead to closure of Small and Medium-Sized Enterprises (SME). It also identifies loopholes within the international IP system like the failure of the TRIPS agreement to prohibit export of counterfeit and pirated goods. This lacuna makes Kenya and other developing countries the battlefield in a war between Western IPR holders and Asian counterfeiter. The loss incurred to Kenyan importers and retailers include loss of capital through forfeiture of the goods and payment of fines. Although their actions may not be intentional, they are vulnerable to both criminal and civil scrutiny of the law.

1.2 Statement of the Problem and Issues Arising on IPR Enforcement in Kenya

While doing its part under international law, Kenya has ratified international legal instruments and enacted legislations to protect IPR and secure investments. However, strict adherence to these laws can easily disregard the primary norms of protection of human rights and cripple the trade sector within the Kenyan society.³⁴ For instance, Kenyan courts, as any in other democratic society, requires the examination of *mens rea* (intent or motive) in criminal offences as enshrined under the Penal Code.³⁵ Notwithstanding this basic requirement, the offences under IPR enforcement laws such as the Anti Counterfeit Act, 2008 adopt the strict liability nature, which overrides the basic threshold to prove a crime. The penalties therefore would from Jeremy Bentham's perspective of utility, be considered unproportionate.

To explain why traders in Kenya complain about the IP regime we should examine Oliver Wendell Holmes' observation that both civil and criminal liability arise from the blameworthiness of a man's conduct. The blameworthiness is measured objectively through the conception of an ordinary man. Further, "a law which punished conduct which would not

³³ Ben Sihanya, 'Integrating Intellectual Property, Innovation, Transfer of Technology and Licensing in Kenya and Africa', *WIPO-WTO Colloquium Papers: 2018 Africa Edition* <https://www.wto.org/english/tratop_e/TRIPS_e/colloquium_papers_e/2018_african/chapter_1_2018_african_edition_e.pdf> (accessed 7 June 2022).

³⁴ Rosemary J. Coombe and Joseph F Turcotte, 'Cultural, Political, and Social Implications of Intellectual Property Law in an Informational Economy' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2463936 https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2463936_code1101364.pdf?abstractid=2463936&mirid=1 (accessed 5 August 2021).

³⁵ See section 9 of the Kenyan Penal Code.

be blameworthy in the average member of the community would be too severe for that community to bear.”³⁶

While Kenya without any social considerations victimises retailers in possession of infringed goods, forcing them to either pay fines and forfeit the goods or be subjected to the humiliating criminal procedure, someone in another part of the world enjoys the proceeds of sale of the same goods. This paper does not sympathize with the acts of selling IPR infringing goods. It however adopts the reasoning that the IPR protection laws should be constitutional, fair, just, and foster trade, innovation, creativity and not the contrary.

In June 2019, the then Kenyan President, Uhuru Muigai Kenyatta, issued a directive, barring the principal agency tasked with protection of IPR, the Anti-Counterfeit Authority (ACA), from carrying out inspections in the major ports of entry like the Mombasa Port and the Inland Container Depot (ICD).³⁷ Reasonably, this transferred the war on counterfeit and pirated goods from the importers to the unsuspecting retailers who operate under the presumption that anything allowed into Kenya is legal. It also made the obligations under the TRIPS agreement harder to discharge.

For instance, Article 26(1) of the TRIPS Agreement which obligates ACA to safeguard the rights of IPR holders through barring of the importation of unauthorised industrial designs, Article 28(1)(a) on the prevention of importation of unauthorised patents; Article 36 on the prevention of importation of unauthorised layout-designs (topographies) of integrated circuits; article 50 to give judicial authorities the right to bar the entry of IPR infringing goods, and article 51 which allows IPR owners to make applications to the authorities for infringing goods to be seized at the points of entry.

The nature of IPR is often a subject of confusion.³⁸ There is a presumption that IP laws protect consumers from substandard goods. However, IPR are private in nature and only

³⁶ Oliver Wendell Holmes, *The Common Law* (Barnes & Noble Publishing 2004).

³⁷ Gitonga Marete, ‘Clearing Firms Now Fault Kicking out of Inspection Agents from Mombasa Port’ *Business Daily* (4 February 2020) <<https://www.businessdailyafrica.com/bd/corporate/shipping-logistics/clearing-firms-now-fault-kicking-out-of-inspection-agents-from-mombasa-port-2279098>> accessed 16 January 2021.

³⁸ Charles Clift, *Combating Counterfeit, Falsified and Substandard Medicines: Defining the Way Forward?* (2010).

protect the interests of the IPR holders.³⁹ That explains why even the Kenyan Anti Counterfeit Act is silent on substandard goods.⁴⁰

Counterfeit goods are often assumed to be substandard. However, the quality of the infringing products is improving.⁴¹ With the rise in the cost of living,⁴² some consumers might prefer counterfeit goods due to the price difference. Counterfeit goods are generally cheaper than the genuine goods making consumers develop a special interest.⁴³ If the quality of counterfeit goods is up to the standard of human consumption, then one of the basic reasons for international IPR protection, that IPR enforcement protects consumers from health and risks hazards is a fallacy.⁴⁴ This creates a new challenge to the Authorities in conducting investigations before the IPR holder lays a complaint (*suo motto*). In *suo motto* protection of IPR, the biggest concern should be counterfeit goods that are substandard in nature.

As the TRIPS Agreement requires, the protection of IPR in Kenya is mainly centred around the Western standard of IPR. The Agreement leaves out sets of IPR that are central and important to Kenya and Africa. These include, traditional knowledge, folklore, utility models and traditional cultural expressions.⁴⁵ This sets a double standard for the recognition, protection, and commercialisation of IPR. It leaves Kenya and other developing countries vulnerable to exploitation by Western countries.

³⁹ Paul David and Bronwyn Hall, 'Property and the Pursuit of Knowledge: IPR Issues Affecting Scientific Research.' (2006) 35 Research Policy <<https://ora.ox.ac.uk/objects/uuid:658ae45f-ccb4-4a8b-94e6-d91e2b849776>> accessed 11 November 2022.

⁴⁰ Johanna Braun and Peter Munyi, 'New Enforcement Mechanisms Challenge the Legality of Generics in the Name of Public Health: The Emergence of Anti-Counterfeiting Legislation in East Africa' (2010) 18 African Journal of International and Comparative Law 238.

⁴¹ Ismail Tamer Toklu and Salih Baran, 'Attitude towards Counterfeit of Luxury Brands: A Research on Consumers in Turkey' (2017) 7 *International Journal of Academic Research in Business and Social Sciences*, at 618.

⁴² Allan Olingi and Irene Mugo, 'Rising Cost of Living: Who Will Save Kenyans?' *Nation* (4 July 2022) <<https://nation.africa/kenya/business/rising-cost-of-living-who-will-save-kenyans--3867978>> (accessed 6 July 2022).

⁴³ Amran Harun and others, 'Understanding Experienced Consumers towards Repeat Purchase of Counterfeit Products: The Mediating Effect of Attitude' [2020] *Management Science Letters* 13. 3

⁴⁴ Erwin A Blackstone, Joseph P Fuhr and Steve Pociask, 'The Health and Economic Effects of Counterfeit Drugs' (2014) 7 *American Health & Drug Benefits* 216.

⁴⁵ Ben Sihanya, 'Integrating Intellectual Property, Innovation, Transfer of Technology and Licensing in Kenya and Africa,' *WIPO-WTO Colloquium Papers: 2018 Africa Edition* <https://www.wto.org/english/tratop_e/TRIPS_e/colloquium_papers_e/2018_african/chapter_1_2018_african_edition_e.pdf> accessed 7 June 2022.

1.3 Research Objectives to Effects of IPR Protection on Trade in Kenya

Kenya has caught the attention of Western IP watchdogs such as the United States and the European Union.⁴⁶ Since the USA's and EU's priority in the protection of IPR is to safeguard the interest of their citizens⁴⁷ Kenya also needs to investigate if the cost of protection of international IPR is proportionate to the benefits.

1.3.1 Specific Objective to Effects of IPR Protection on Trade in Kenya

Trade, being an engine of growth⁴⁸ and a major factor in economic development,⁴⁹ can directly be affected with the enforcement of IPR. Therefore, this study specifically aims to investigate the effects of IPR protection on trade in Kenya.

1.3.2 General Objectives of the Study on Effects of IPR Protection on Trade in Kenya

While focusing on the specific objective, the study first investigates the Kenyan IP legal framework and how it could be reasonably enforced to facilitate trade and safeguard importers, retailers, and consumers. It secondly investigates the concerns that arise from the criminal and civil nature of IPR cases. Thirdly, it analyses the IPR legislation, international instruments, and policies to identify their significance to trade. Ultimately, it draws lessons from two trade giants: the US and China. It further analyses other African countries with higher IP performance index, in the year 2021, such as South Africa and the Kingdom of Morocco. Based on the foregoing analysis, it makes recommendations on Legislative and Policy change.

⁴⁶ International Trade Administration and U.S. Department of Commerce, 'Kenya - Country Commercial Guide' (*International Trade Administration U.S. Department of Commerce*) <<https://www.trade.gov/knowledge-product/kenya-market-overview>> (accessed 5 October 2021).

⁴⁷ See the Executive Summary to, USTR, '2020 Special 301 Report on Intellectual Property Protection' (USTR 2020) <https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf#:~:text=The%20Special%20301%20Report%20%28Report%29%20is%20the%20result,amended%20%28the%20Trade%20Act%2C%2019%20U.S.C.%20%2%A7%202242%29.>> (accessed 3 October 2021).

⁴⁸ James Riedel, 'Trade as an Engine of Growth: Theory and Evidence' in David Greenaway (ed), *Economic Development and International Trade* (Macmillan Education UK 1988) <https://doi.org/10.1007/978-1-349-19174-1_3> accessed 28 June 2022.

⁴⁹ Neddy Soi and Others, 'Effect of International Trade on Economic Growth in Kenya' (2013) 5 *European Journal of Business and Management* 131.

1.4 Research Questions on Effects of IPR Protection on Trade in Kenya

Throughout the research, this paper seeks to answer three questions. First, can the existing IP legislation effectively enforced to facilitate trade and protect the interests of importers, retailers, and consumers? Are there reasonable ways of IP enforcement, in both civil and criminal realm, that Kenya can adopt to prosper economically as well as fostering innovation and creativity? Moreover, what lessons can Kenya draw from the Protection of IP in China, the USA, and African countries with higher IP performance index, in the year 2021, such as South Africa and the Kingdom of Morocco?

1.5 Hypotheses and Assumptions on Effects of IPR Protection on Trade in Kenya

The study is premised on the three assumptions. First, Kenyan IP Law and enforcement mechanism may have a negative effect on local trade. Secondly, the Criminal nature of IP may not foster trade or innovation; and lastly, IP law does not protect importers and retailers who unintentionally deal in infringing goods due to its strict liability nature of crimes and there are lessons to be learnt from countries such as the USA, China, South Africa (SA) and the Kingdom of Morocco.

1.6 Review of the Literature, Law, and Policy on IPR Enforcement in Kenya

This section analyses the literature, law, and policy on the enforcement of intellectual property rights in Kenya.

1.6.1 Introduction to the Literature, Law, and Policy on IPR Enforcement in Kenya

The most accentuated benefits of IPR protection include: incentive for Foreign Direct Investment (FDI);⁵⁰ economic growth;⁵¹ monetization of inventions and creations;⁵² and promotion of innovation and creativity,⁵³ among others. IPR can also be used as a tool to

⁵⁰ Hezron M. Osano and Pauline W Koine, 'Role of Foreign Direct Investment on Technology Transfer and Economic Growth in Kenya: A Case of the Energy Sector' (2016) 5 Journal of Innovation and Entrepreneurship 31.

⁵¹ Laurent Oloukoi and Melain Senou, 'Intellectual Property Rights and Innovation: Implications for Added Value Creation in Africa' (2016) 15 British Journal of Economics, Management & Trade 1.

⁵² Brenda Syengo, 'Securitisation of IP Assets: An Examination of the Legal Regime on the Use of Intellectual Property as Collateral in Kenya' (Thesis, University of Nairobi 2021) <<http://erepository.uonbi.ac.ke/handle/11295/160583>> (accessed 18 July 2022).

⁵³ Anne Gitonga and Joseph Kieyah, *Overview of Intellectual Property Rights: The Case of Kenya* (Kenya Institute for Public Policy Research and Analysis 2010) <<http://catdir.loc.gov/catdir/toc/fy16pdf01/2012313548.html>> (accessed 18 July 2022).

achieve competitive advantage as Odongo notes in the study of the Safaricom Kenya Limited.⁵⁴

The negative effects of strict protection of IPR in developing countries, is an area that has drawn less attention from the Kenyan academic community. Nonetheless, outstanding scholars like Ben Sihanya prophesied that a bad IP regime can cripple the economy and deny citizens access to essential goods such as medicine.⁵⁵ In one of the WIPO-WTO Colloquium Papers, Sihanya notes that the protection of IP under TRIPS only favours the Western definition of IP and leaves out sets of IPR that are important to Africa and other developing countries. These include: traditional knowledge, folklore, utility models and traditional cultural expressions. He concludes, that the effects of IPR on economic development can be immeasurable. However, he emphasises on the need to contextualise IPR application in Kenya.⁵⁶

To build on the findings and wisdom of other renowned scholars in the field, this paper explores the objectives and reviews related literature from a three-pronged approach: First, the background of property ownership in Kenya. Second, the history of IPR; adoption of IPR in developing countries and finally, the strict enforcement of IPR in Kenya. Since most Kenyan scholars have paid less attention to the rights derogated by the state in enforcing IP law, writings on the topic from different scholars even those who hold contrary opinions, guide, and justify the arguments this paper. The literature explores books, journals, case studies, newspaper articles and credible online sources.

1.6.2 Effect of the International Application of IP Law on Trade in Kenya

While Moraa, Murage and Omenya report that even for Kenyan inventors' awareness of Intellectual Property is negligible,⁵⁷ Sihanya confirms that the IP regime in Kenya is

⁵⁴ Frederick O Odongo, 'Intellectual Property Rights as a Strategic Tool for Achieving Competitive Advantage by Safaricom Kenya Limited' (Thesis, University of Nairobi 2015) <<http://erepository.uonbi.ac.ke/handle/11295/94921>> accessed (18 September 2022).

⁵⁵ Ben Sihanya, 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya' in Peter Gallagher, Patrick Low, and Andrew L. Stoler (eds), *Managing the Challenges of WTO Participation* (Cambridge University Press, London 2005)

⁵⁶ Ben Sihanya, 'Integrating Intellectual Property, Innovation, Transfer of Technology and Licensing in Kenya and Africa,' *WIPO-WTO Colloquium Papers: 2018 Africa Edition* <https://www.wto.org/english/tratop_e/TRIPS_e/colloquium_papers_e/2018_african/chapter_1_2018_african_e_dition_e.pdf> (accessed 7 June 2022).

⁵⁷ Hilda Moraa, Kelvin Murage, and Rhoda Omenya, 'Intellectual Property in Technological Innovations-Perceptions from Tech Startups in Kenyan ICT Hubs' (iHub 2012)

underutilised. The situation is worse for the Kenyan retailers and consumers.⁵⁸ To explain why, Wekesa has well differentiated between the philosophies of property ownership in the Western World and Traditional African set up.⁵⁹ He captures the development of Western Jurisprudence of property rights in which philosophers such as John Locke, in as early as 1690, came up with well-reasoned arguments as to why private ownership of property is warranted.⁶⁰ However, this is contrary to the African concept of property ownership.

Customarily, most African communities communally owned property, including intellectual property.⁶¹ Although scholars differ in the context of traditional ownership of property, the common feature is that the whole community shared the benefits that accrued from the use of the property. In most communities, there was no distinction with regard to who owned what.⁶² Duties could be allocated and land seasonally divided among members who would till for farm produce.

Moreover, when the farming season ended, the whole community could use the land for activities such as grazing.⁶³ Even in communities where people could possess more property than others, the property could be used by the whole community in events such as payment of dowry and ceremonies. The political structure allowed every member within the society to have a voice when it came to the use of property.

Most categories of IP were also owned communally except for performances, which members could pay for. Most inventions were affiliated with the whole tribe. For instance, whenever one member of the community invented a song or a piece of art, they would teach everyone who was interested to learn. The piece of art would therefore be shared and in

<https://files.ihub.co.ke/ihubresearch/uploads/2012/november/1354025437_819_126.pdf> (accessed 16 January 2020).

⁵⁸ Ben Sihanya, 'Intellectual Property for Innovation and Industrialisation in Kenya' (2008) 4 *Convergence* 185.

⁵⁹ Moni Wekesa, 'An Overview of the Intellectual Property Rights (IPRs) Regime in Kenya,' in Moni Wekesa and Ben Shihanya (eds), *Intellectual property rights in Kenya*. (Konrad Adenauer Stiftung, 2009)

⁶⁰ John Locke, 'Second Treatise' (1988) 1690 *Two treatises of Government* (1698).

⁶¹ Darrell A Posey, Graham Dutfield and International Development Research Centre (Canada), *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (IDRC 1996). 60

⁶² Cuthbert K. Omari, 'Traditional African Land Ethics.' [1990] *Traditional African land ethics*. 167.

⁶³ Admos Chimhowu, 'The "New" African Customary Land Tenure. Characteristic, Features and Policy Implications of a New Paradigm' (2019) 81 *Land Use Policy* 897.

common identified with the whole community.⁶⁴ This explains why the concept of IP remains foreign among most importers, retailers and consumers in Kenya.

Most developing countries shared no interest in adopting the TRIPS Agreement. Adronico Adede accounts that, African countries only adopted the Western championed agreement because the developed countries lured them. The countries were convinced that developed countries would facilitate technology transfer and address their issues such as agriculture and trade.⁶⁵ This argument is however be half-true. The Kenyan Government needed less convincing since the Kenyan elites have had a symbiotic relationship with foreign multinational companies dating back to the 1970s.⁶⁶

Sihanya accounts how the African elites readily adopted IP regimes, which could limit their people's chances to access medicine.⁶⁷ Although the Industrial Property Act, 2001, sets out measures such as compulsory licencing of IP rights, which could be beneficial to the Kenyan population, such measures are unexploited. The elites would rather, utilise resources in workshops and spurious awareness campaigns, which offer no solutions.⁶⁸ On the other hand, Kenya's real activities in exercise of IPR mostly involves seizure and destruction of counterfeit and pirated products,⁶⁹ at the expense of Kenyan traders and for the benefits of the multinational companies.⁷⁰

⁶⁴ Government of Kenya, *Sessional Paper No. 10 of 1965 on African Socialism and Its Application to Planning in Kenya* (Government Printers 1965) <<https://repository.kippra.or.ke/handle/123456789/2345>> accessed 2 November 2022.

⁶⁵ Adronico O. Adede, 'Origins and History of the TRIPS Negotiations', in Christophe Bellmann, Graham Dutfield and Ricardo Meléndez-Ortiz (eds), *Trading in Knowledge: Development Perspectives on TRIPS, Trade, and Sustainability* (Earthscan 2003).

⁶⁶ Francis G. Snyder, 'Law and Development in the Light of Dependency Theory' (1980) 14 *Law & Soc'y Rev* 763

⁶⁷ Ben Sihanya, 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya' in Peter Gallagher, Patrick Low, and Andrew L. Stoler (eds), *Managing the Challenges of WTO Participation* (Cambridge University Press, London 2005).

⁶⁸ Ben Sihanya (forthcoming 2022) "Intellectual Property, Innovation, and Technology Transfer in Health in Kenya and Africa: Case of COVID-19 and Malaria," in Ben Sihanya (forthcoming 2022) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials* (IPILKA 2), Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

⁶⁹ ACA, 'KSH 4.9 Million Counterfeit Goods Destroyed in Mombasa, Kenya - Anti-Counterfeit Authority (ACA)' (*Anti-Counterfeit Authority*, 13 September 2019) <<https://www.aca.go.ke/media-center/news-and-events/186-counterfeit-goods-destroyed-in-mombasa-kenya>> (accessed 15 June 2022).

⁷⁰ Kennedy M Mogaka, 'The Influence of Intellectual Property Rights Enforcement on Multinational Companies' Decision to Invest in East Africa' (Thesis, University of Nairobi 2012) <<http://erepository.uonbi.ac.ke/handle/11295/96811>> accessed 15 June 2022.

As Khoury explains the desire of developing and least developed countries to avoid the protection of international IPR, he further acknowledges how Developed countries do not perceive it enough for developing and least developed countries to adopt the TRIPS agreement. They also expect them to adopt additional measures through bilateral agreements.⁷¹ He also expounds on the development – dependency theories debate, explaining how dependency theorist believe that the protection of IPR can only widen the economic gap between the poor south and the rich North.⁷²

He explains how scholars from developing countries have realised the negative implication of the development theory on economic development and campaigns on the dependency theory. In as much as his argument on the negative effects of the development theory is convincing, since, closely imitating the steps taken by developed countries centuries ago can be absurd, he fails to explain that even the application of the dependency theory has also been a disaster in African countries.

The Marrakesh Agreement Establishing the World Trade Organization (WTO) in 1994, introduced substantive trade policies that state parties ought to adopt. Annexure 1 of the agreement presented the most comprehensive rules as Multilateral Trade Agreements.⁷³ They include: the revised General Agreement on Tariffs and Trade (GATT 1994) as Annexure 1A; the General Agreement of Trade in Services (GATS) as annexure 1B; and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as annexure 1C.⁷⁴ After developing countries adopted the Marrakesh Agreement, developed countries closely monitored the implementation of the TRIPS agreement, influencing them to adopt swift and strict measures for IP protection.

Jeremy de Beer and others narrate that the measures included expansion of the legal structures of enforcement of IP. Although he narrates that that local communities repelled

⁷¹ Amir H Khoury, 'The Public Health of the Conventional International Patent Regime & (and) the Ethics of Ethicals: Access to Patented Medicines' (2008) 26 *Cardozo Arts & Ent. LJ* 25.

⁷² Amir H. Khoury, 'Dubai's New Intellectual Property-Based Economy: Prospects for Development without Dependency' (2009) 9 *J Marshall Rev Intell Prop L*.

⁷³ World Trade Organization, *General Agreement on Tariffs and Trade* (World Trade Organization 1998) <https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf> accessed 15 July 2022.

⁷⁴ Ebenezer Durojaye and Mukundi Gladys Mirugi, 'States' Obligations in Relation to Access to Medicines: Revisiting Kenyan High Court Decision in *P.A.O and Others v. Attorney-General and Another*' (2013) 17 *Law, Democracy & Development* 24.

the measures since they only addressed a few people's concerns,⁷⁵ he does not address the fact that most developing countries transplanted IP regimes from foreign countries.⁷⁶ The IP laws favoured foreign manufacturers and imposed strict punitive measures on local retailers.

Even after the adoption of the TRIPS Agreement, IPR championing Developed Countries did not find the measures effective. This is because the Agreement only affiliated counterfeiting with trademarks and piracy with copyright.⁷⁷ Braun and Munyi account that Developing countries were expected to develop TRIPS plus measures in two ways.⁷⁸ One: through the making of the statutory penalties more severe and empowering custom officials to seize and detain IPR infringing goods, even where no official complaint had been registered.⁷⁹ Two: through expanding the definition of "counterfeiting" in statutes such as the Anti Counterfeit Act, to include the infringement other doctrines of protected IPR such as copyright and related rights, Industrial Property and Plant Breeders Rights.⁸⁰

The war arising out of IPR is not one instigated by Kenya or other developing countries. A report by Organisation for Economic Co-operation and Development (OECD) clarifies that companies whose products are mostly vulnerable to counterfeiting are in developed countries such as the United States and most countries within the European Union. On the other hand, the greatest manufacturers of the counterfeit and pirated products are in East Asian Countries, with China on the lead.⁸¹ Even though the report recommends the adoption of stringent measures, it does not consider the Kenyan situation. Forcing a ban on IPR infringing import goods only persecutes unsuspecting legitimate traders who invest much to build up businesses through importation and retailing.

Chinese or Taiwanese IPR infringing syndicates reap much benefits from the manufacturing and selling of IPR infringing goods. In 2020, the Anti Counterfeit Authority (ACA)

⁷⁵ Jeremy de Beer, Chidi Oguamanam and Tobias Schonwetter, 'Innovation, Intellectual Property and Development Narratives in Africa' in Jeremy de Beer and others (eds), *Innovation & Intellectual Property: Collaborative Dynamics in Africa* (UCT Press 2014).

⁷⁶ Sihanya (forthcoming, 2022), *IPILKA 2*.

⁷⁷ Article 51 of the TRIPS Agreement, footnote

⁷⁸ Johanna Braun and Peter Munyi, 'New Enforcement Mechanisms Challenge the Legality of Generics in the Name of Public Health: The Emergence of Anti-Counterfeiting Legislation in East Africa' (2010) 18 *African Journal of International and Comparative Law* 238.

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ Organisation for Economic Co-operation and Development (OECD) /European Union Intellectual Property Office (EUIPO), *Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade*, (OECD Publishing, Paris, 2019)

published a survey on counterfeit goods. The survey complements the OECD report and indicates that most of the counterfeit and pirated goods in Kenya constitutes imports. It also indicated that Kenya has a comprehensive legal structure, build to combat illicit trade. The statistics as to the knowledge Kenyans possess in IPR and those who voluntarily buy illicit goods was however disappointing. Moreover, the report hides the statistics of counterfeit goods behind the general purview of illicit trade.⁸² Deducing the real figures and effects of counterfeiting and piracy is therefore difficult. The report also failed to focus on the negative effects of the ‘comprehensive legal structure’ on the importers, retailers, and consumers. Furthermore, although the National Crime Research Centre (NCRC) lists the smuggling of counterfeit goods as one of the most prevalent border crimes, it fails to break down infringement in the context of specific IPR doctrines.⁸³

To investigate farmers’ knowledge in IPR, Justice A Tambo and others use data from 300 farmers in Kenya, Malawi, and Zambia. In their findings they discover that more than half of the innovators have no prior knowledge of IPR.⁸⁴ While Mbote has appreciated the extent in which Kenya has adopted Intellectual Property Laws, she is indifferent about the roles the laws play in development and invention. Mbote contends that Kenya and other developing countries have not fully contextualised the role of different IP categories.⁸⁵ This in turn makes the whole system work against Kenya’s economic development, since the Government invests much in the IP industries, yet local IPR holders are few.

Whereas Sihanya supports the enforcement of IP laws and believes that IP is instrumental in any country’s development, he observes counterfeiting and piracy affects retailers in Kenya

⁸² Anti-Counterfeit Authority, ‘National Baseline Survey on Counterfeit and Other Forms of Illicit Trade in Kenya’ (Anti Counterfeit Authority 2020) Accessed at https://www.aca.go.ke/images/2020/National_Baseline_Survey_Counterfeit_and_Illicit_Trade_In_Kenya.pdf on 28 January 2021.

⁸³ National Crime Research Centre, ‘Issue Brief on Mapping Chronic Crimes and Offences, 2018’ (National Crime Research Centre 2019) <<https://crimeresearch.go.ke/wp-content/uploads/2019/10/Issue-Brief-on-Mapping-Chronic-Crimes-and-Offences.pdf>> accessed 10 November 2022.

⁸⁴ Justice A Tambo and others, ‘Copyright or Copyleft: An Assessment of Farmer-Innovators’ Attitudes towards Intellectual Property Rights’ (2020) 74 Journal of Rural Studies 133.

⁸⁵ Patricia Kameri-Mbote, ‘Intellectual Property Protection in Africa’ (International Environmental Law Research Center 2005) Accessed at <http://erepository.uonbi.ac.ke/bitstream/handle/11295/41242/full%20text%20.pdf?sequence=1> on 21 January 2020.

in as much as it affects the IPR holders.⁸⁶ He further affirms that Kenya and majority of African countries still pay more attention to the traditional four factors of production such as land, labour, capital, and entrepreneurship.⁸⁷

On the IP question, Cannady explains that developing countries are merely observers as the major benefactors are the developed countries equipped with the right resources to advance their agenda.⁸⁸ The Kenya's 11-year streak of overperformance in innovative achievement in Africa,⁸⁹ which is negligible worldwide,⁹⁰ verifies the explanation. Mandel describes the struggle between developed and Developing Countries. He notes that Developing Countries can only positively realise the effects of IP on the economy at a local level. He poses a convincing challenge to developing countries, asking them to be self-aware of the effects of IP at the international level.⁹¹ Application of international IP could mean transfer of profit from one country to another if not meant for global enrichment.

Keli and Pisuke note that most countries misinterpret the role of IP. They suggest that every nation should have a separate branch they call, 'innovation law.'⁹² This implies that countries should be more concerned of the economic side rather than the legal side of IP. Applying this to the Kenyan situation, the country should focus on ways to use IP to foster trade for everyone's benefit. The economic side of IP will build on industries, support importers and retailers rather than submerge their businesses.

1.6.3 Effects of Strict Enforcement of IP Law on Trade in Kenya

In enforcement of IP rights in Kenya, the Kenyan Government puts less consideration on importers, retailers, and consumers. For instance, the Anti Counterfeit Act, 2008 and the Copyright Act, 2001 designates representatives from the Kenya Association of Manufacturers

⁸⁶ Ben Sihanya, 'Combating Counterfeit Trade in Kenya' in Moni Wekesa and Ben Shihanya (eds), *Intellectual Property Rights in Kenya*. (Konrad Adenauer Stiftung, 2009)

⁸⁷ See Ben Sihanya, 'Intellectual Property for Innovation and Industrialisation in Kenya' (2008) 4 *Convergence* 185

⁸⁸ Cynthia Cannady, 'North-South Trade in Intellectual Property: Can It Be Fair' (2004) 3 *World Trade Rev* 317

⁸⁹ Cornell University, INSEAD, and WIPO, *The Global Innovation Index 2020: Who Will Finance Innovation?* (Ithaca, Fontainebleau, and Geneva, 2020).

⁹⁰ WIPO, *Global Innovation Index, 2021: Tracking Innovation through the COVID-19 Crisis* (Dutta Soumitra and Others eds, 14th edn, WPO 2021) Accessed at <<https://tind.wipo.int/record/44315>> on 18 May 2022.

⁹¹ Gregory N Mandel, 'Leveraging the International Economy of Intellectual Property' (2014) 75 *Ohio St LJ* 733

⁹² Aleksei Kelli and Heiki Pisuke, 'Intellectual Property in an Innovation-Based Economy' (2008) 33 *Rev Cent & E Eur L* 223

(KAM), and stakeholders in music, film, and publishing industries as eligible members of the boards established under the legislations. Therefore, they are key players in the legislative and Policy formulation of matters related to IP. However, the business community, regularly affected by these laws do not form membership of these boards. They thus have limited capacity in national IP laws and policies decision making.

The statutory stakeholders create laws and policies, which may neither favour local retailers nor importers. This explains why Kenya employs very strict measure to battle counterfeiting and piracy and these laws are always under review to vary them to the favour of IPR holders. The reason as to why these laws have not been heavily subjected to scrutiny is because the enforcement mechanism of IPR in Kenya is still weak. Or as the Kenyan Ministry of Information Communication and Technology through the Kenya National ICT Masterplan: Towards a Digital Kenya, describes it, “weak and ineffective.”⁹³

Sihanya acknowledges the importance of intellectual property to trade. He lists all the possible reasons put forward by those supporting counterfeiting (Robin Hood defenders), and argues that the benefit of IP outweighs counterfeiting. With an outstanding appraisal of IPR, he remarkably makes an elaborate conclusion, stating that Kenya needs to strike a balance and consider the rights of manufacturers, traders, and consumer of in enforcing IP.⁹⁴

The repealed Industrial Properties Act was enacted to protect foreign IPR holders in order to safeguard FDI.⁹⁵ Due to the lack of understanding of appreciation for IPR, the Act prohibited parallel importation of goods.⁹⁶ Lettington and Munyi explain how the enactment of IPR laws has previously been marred with irregularities. For instance, the Statute Law (Miscellaneous Amendments) Act, 2002, which amended the Industrial Property Act, 2001 was passed at night with most members of Parliament being absent and neither KIPI, the

⁹³ Government of Kenya (Ministry of Information Communication and Technology), *The Kenya National ICT Masterplan: Towards a Digital Kenya* (Ministry of Information Communication and Technology 2014) <<https://repository.kippra.or.ke/handle/123456789/1724>> accessed 2 November 2022.

⁹⁴ Ben Sihanya, ‘Combating Counterfeit Trade in Kenya’ in Moni Wekesa and Ben Shihanya (eds), *Intellectual Property Rights in Kenya*. (Konrad Adenauer Stiftung, 2009)

⁹⁵ Government of Kenya, *National Development Plan for the Period 1997-2001* (Government Printers, 1997) <<https://repository.kippra.or.ke/bitstream/handle/123456789/1432/Development%20plan%201997-2001.pdf?sequence=1&isAllowed=y>> accessed 5 November 2022.

⁹⁶ Robert Lewis-Lettington and Peter Munyi, ‘Willingness and Ability to Use TRIPs Flexibilities: Kenya Case Study’ [2004] DFID Health Systems Resource Centre

Ministry of Trade nor the Office of the Attorney General would take responsibility of the amendments.⁹⁷

The National Council for Administration of Justice (NCAJ) rightfully groups trade in counterfeit goods and piracy as illicit trade.⁹⁸ It also lists goods that are highly counterfeited and discusses the offences related to IPR infringement, describing them as *strict liability*. Therefore, in such cases, the law does not burden the state to prove the criminal element of *mens rea* (intent or motive).

Proving the *actus reus* (act) is enough to convict the suspect. In clustering IP offences as strict liability, NCAJ's interpretation of the Anti-Counterfeit Act, 2001 is fatal and derogates the constitutional right to fair hearing. This subjects Kenyans who innocently invest in importation and retailing of such goods to huge penalties without any consideration of their state of mind. Even mere display of counterfeit goods in their shops makes them guilty. However, these punishments do not affect the foreign manufacturers/exporters of the counterfeit goods most likely in China or Hong Kong.⁹⁹

In acknowledging the importance of IP protection at the universal level, Chivai explains the importance of IPR enforcement to trade and innovation.¹⁰⁰ Further, he argues that the laws within Kenya are deficient for collective protection of IPR in the country. His paper is convincing to the extent of benefits of IP to the local manufacturers. Applying strict measures will however subject retailers to unfair trade practises and increase the socio-economic gap.

⁹⁷ *ibid*

⁹⁸ National Council for Administration of Justice, *Enforcement Manual to Combat Illicit Trade in Kenya* (2nd edn, National Council for Administration of Justice 2020) <https://kam.co.ke/kam/wp-content/uploads/2020/09/15.04.2020_2nd-Edition-Enforcement-Manual-to-Combat-Illicit-Trade-in-Kenya-1.pdf> accessed 20 January 2020.

⁹⁹ James Nurton, 'OECD/EUIPO Report: China and Hong Kong Account for 75% of Dangerous Counterfeits' (*IPWatchdog.com | Patents & Intellectual Property Law*, 21 March 2022) <<https://ipwatchdog.com/2022/03/21/oecd-euipo-report-china-hong-kong-account-75-dangerous-counterfeits/id=147701/>> accessed 6 November 2022.

¹⁰⁰ John Chivai, 'Counterfeiting in Kenya: Enhancing the Legal and Institutional Regime' (University of Nairobi 2015) http://erepository.uonbi.ac.ke/bitstream/handle/11295/91413/Chivai_Counterfeiting%20in%20Kenya.pdf?sequence=1 accessed 20 January 2020.

Auma writes that the only option to mitigate copyright offences Kenya is criminal prosecution, which attracts hefty fines for the guilty suspect.¹⁰¹ He therefore recommends that there should be an option of mitigation on the part of the prosecutor. Kenya should adopt his ideas with varying application on case-to-case basis. For instance, infringement of local products could carry a bigger punishment.

KAM acknowledges that Kenya has a relatively good IP system. It however notes that the IP regime in East Africa is not harmonised and porous borders make it a haven for counterfeiters and pirates to move their goods across the border.¹⁰² The association recommends a harmonised East Africa Community (EAC) IP regime. The study however fails to consider reasons as to why the other EAC countries do not adopt IP law as Kenya has. Acknowledging porous borders and smuggling should also convince Kenya and the association that retailers who buy counterfeit goods can be victims as well.¹⁰³

Kingola gives the statistics of the retailers' situation in a case study done in Nyamakima, Nairobi County.¹⁰⁴ He clarifies that most of the goods are imports and that there is poor sensitization of IP by the Government. He then proposes more involvement of the Government to enforce IP law. In this, he adopts the legal side of IP rather than the economic side, which can promote trade.

In the case of Kenyan manufactured pharmaceuticals, Mwendwa explains that access to other companies' innovation without restriction fosters innovation and reduces the prices of

¹⁰¹ William Oyange Auma, 'Copyright in the Digital Age: An Assessment of Kenya's Legal and Institutional Framework for the Protection and Enforcement of Copyright' (University of Nairobi 2017) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/101177/Auma_Copyright%20in%20the%20Digital%20Age%20-%20An%20Assessment%20of%20Kenya%27s%20Legal%20%26%20Institutional%20Framework.pdf?sequence=7&isAllowed=y> accessed 20 January 2020.

¹⁰² Kenya Association of Manufacturers (KAM), *Intellectual Property Rights Regime within the East African Community* (Kenya Association of Manufacturers 2017).

¹⁰³ Kenyan retailers buy counterfeited and pirated goods relying on the fact that there is a proper border protection system.

¹⁰⁴ Kingola Paul, 'The Effects of Control Measures on Prevention of Trade in Counterfeit Electrical Goods in Nyamakima Nairobi' (University of Nairobi 2020) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/3986/Kingola_The%20effects%20of%20control%20measures%20on%20prevention%20of%20trade%20in%20counterfeit%20Electrical%20goods%20in%20Nyamakima%20Nairobi.pdf?sequence=1&isAllowed=y> accessed 27 January 2020.

medicine.¹⁰⁵ Mege observes that the Kenyan Government does so little in sensitization of copyright and piracy.¹⁰⁶ He suggests a reduction of taxes on software will reduce piracy. Tulula supports the argument¹⁰⁷ Omondi furthers it¹⁰⁸ as Macharia generally concludes¹⁰⁹ that the demand for counterfeit goods in is a result of low income and illiteracy among other factors.

Most Kenyan writers confirm the existence of the problem but focus more on the positive side of fostering IP enforcement. Blind promotion of IP laws can however create a major rift between the rich and the poor with international companies reaping huge benefits. The literature fails to address that there is need to limit the application of International IP Agreements to the extent that they are beneficial to everyone in the country.

1.6.4 Rights of Retailers and Consumers in Enforcement of IPR in Kenya

Although retailers are major players in the Kenyan trade industry, IP laws neglects their rights. So far, the literature on IP is rich with reasons as to why the country should embrace strict measures, in the name of fostering innovation, investment and building the economy. This paper however addresses the literature gap by focusing on the five (5) key areas:

¹⁰⁵ Maina Catherine Mwendwa, 'Competitive Advantage of Brand Generic Products through Entry Strategies Adopted by Multinational Pharmaceutical Companies in Kenya' (University of Nairobi 2015) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/92996/Maina%20%20Catherine%20M_Compitivive%20advantage%20of%20brand%20generic%20products%20through%20entry%20strategies%20adopted%20by%20multinational%20%20Pharmaceutical%20companies%20in%20Kenya.pdf?sequence=3&isAllowed=y> accessed 26 January 2020.

¹⁰⁶ Fredrick Otieno Mege, "Protection and Regulation of Intellectual Property Rights in Computer Software and Programs in Kenya" (University of Nairobi 2014) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/77302/Mege_Protection%20And%20Regulation%20Of%20Intellectual%20Property%20Rights%20In%20Computer%20Software%20And%20Programs%20In%20Kenya.pdf?sequence=3> accessed 19 January 2020.

¹⁰⁷ Joseph Tulula, 'The Demand for Counterfeit Goods in Kenya: A Case Study of Phones' (University of Nairobi) <<http://erepository.uonbi.ac.ke/bitstream/handle/11295/96285/Tulula%20-The%20Demand%20For%20Counterfeit%20Goods%20In%20Kenya%20A%20Case%20Study%20Of%20Mobile.pdf?sequence=1&isAllowed=y>> accessed 17 January 2020.

¹⁰⁸ Arum G.J. Omondi, 'Factors Contributing To Trade In Counterfeit Products In Nairobi City County: A Case of HP Toner Cartridges' (University of Nairobi) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/105348/Omondi_Factors%20Contributing%20To%20Trade%20In%20Counterfeit%20Products%20In%20Nairobi%20City%20County%20A%20Case%20Of%20Hp%20Toner%20Cartridges.pdf?sequence=1&isAllowed=y> accessed 17 January 2020.

¹⁰⁹ Julius Macharisa, 'The Impact of Counterfeit Consumer Products on Social Life: A Case Study of Nairobi CBD. Diss.' (University of Nairobi) <<http://erepository.uonbi.ac.ke/bitstream/handle/11295/76781/UON%20FINAL%20NOVEMBER%202014.pdf?sequence=4&isAllowed=y>> accessed 17 January 2020.

The first is the nature of IP enforcement in Kenya as set out by applicable legal instruments. The second is the necessity of the criminal nature of IP law and the remedies accrual to civil law including passing off. The third is the prioritization of local manufacturers and adoption of economic based IP enforcement. The fourth is the hierarchy of needs in enforcement of IP with special focus on standards, health, and safety hazards and IPR complaints; and lastly, effective remedies for unsuspecting legitimate importers and retailers;

1.7 Justification, Significance and Scope of the Study on Effects of IPR Protection on Trade in Kenya in Kenya

Kenya and other developing countries readily enact intellectual property laws without a thorough analysis of how they would affect their citizens' social and economic aspects of life. The promotion and protection of IPR for the benefits of the Kenyan people was not a priority until the promulgation of the Constitution of Kenya 2010.

The repealed Constitutions namely: the Constitution of Kenya, 1963; and the Constitution of Kenya, 1969 whether in its original form or the 2008 Revised Edition did not recognise IPR. Although Kenya protected forms of IPR such as trademarks under the Trade Marks Act, it is only until the commencement of the Industrial Property Act, Cap 509 (repealed) on February 2, 1990, that the ad hoc body to promote innovation: the Kenya Industrial Property Office (KIPO), came to exist.

The government's perception of the role of KIPO was however disappointing. Even with the existence of a policy to promote Science, Technology, and Innovation,¹¹⁰ there was no significance placed in the registration of IP. The Kenyan Government did not align the policy with the roles of KIPO but expected KIPO to protect foreign inventions. The Eighth National Development Plan for the Period 1997-2001 rightfully recognised the place of KIPO in registering patents and licences. However, the plan further stated:

¹¹⁰ Government of Kenya, *Sessional Paper No. 05 of 1982 on the Acceptance of the Report of the National Council for Science and Technology Dated May 1980 Entitled Science and Technology for Development* (Government Printers 1982) <<https://repository.kippra.or.ke/bitstream/handle/123456789/1505/SESSIO~3.PDF?sequence=1&isAllowed=y>> accessed 6 November 2022.

“Given the dominant role of foreign patents and licenses; KIPO plays a particularly important part in monitoring the role of foreign- technologies in domestic productive activities.”¹¹¹

With the Constitution of Kenya 2010 and Legislations which protect IPR, the benefits of IP to the Kenyan population are still negligible. In the tussle between foreign IPR holders and infringers, Kenyan importers and retailers stand to suffer. Until now, the existing literature has failed to focus on the rights of consumers and retailers in in the war against IPR infringement. This study will critically analyse the existing laws in Kenya including international instruments. It will also give priority to the rights of retailers and how strict enforcement of the IPR laws could make them close businesses. Further, it will address the need to foster innovation, and mitigation of the criminal nature of intellectual property in Kenya.

The study will also draw a comparative analysis of countries such as the USA, China, the Kingdom of Morocco and South Africa. Considering the criticism and the comparison, the Findings, Conclusion will build on the Recommendations of the study to illustrate how the Government can strengthen intellectual property rights to foster trade, innovation, and creativity in Kenya. They will also encourage the essence to build more on local industries to increase innovation.

1.8 Conceptual and Theoretical Framework on Effects of IPR Protection on Trade in Kenya

In addressing the issues emanating from the strict protection of IP law, this paper uses terminologies that may not have a universal application. It also looks at theories that advance the idea of protecting Kenyan natural and artificial persons from a transplanted IP regime. The first fragment of this section therefore discusses the terminologies that are contextualised to in the text. The second section talks about the theories that are instrumental to realise the objectives of this paper.

¹¹¹ Government of Kenya, *National Development Plan for the Period 1997-2001* (Government Printers, 1997) <<https://repository.kippra.or.ke/bitstream/handle/123456789/1432/Development%20plan%201997-2001.pdf?sequence=1&isAllowed=y>> accessed 5 November 2022.

1.8.1 Conceptual Framework to Effects of IPR Protection on Trade in Kenya

This paper focuses on the IP regime in Kenya and the effects it has on the trade sector. Some of the terminologies could create ambiguity if given the dictionary meaning, which warrants this section. Except as it may otherwise be inferred, the word ‘retailer’ in this paper includes, wholesalers and distributors. The words ‘agents or brokers’ include agents whether in Kenya or abroad, whether appointed pursuant to a statute or not, by IPR holders to conduct local affairs on their behalf. These include the Collective Management Organizations (CMOs) established under the Copyright Act, 2001.

The term IPR holder describes a person, whether natural or legal who owns intellectual property recognised in Kenya whether through registration or reputation. The word trade means dealings in goods and services for profit within Kenya. Trade in goods takes the universal definition and includes commercialization of IP. Trade in services includes services delivered by authors and performers of creative works.

1.8.2 Theoretical Framework on Effects of IPR Protection on Trade in Kenya

This section addresses the theories that are significant to the to the topic. They are theories that legislative and Policy makers can adopt in formulation and amendment of IP laws and Policies. They focus on the spirit of universality and law as a tool to engineer social and economic development within Kenya.

1.8.2.1 Public Interest Theories of Regulation on IPR Enforcement and Trade in Kenya

Justice G.V. Odunga explains Rousseau’s social contract theory, to involve pre social persons donating their power to the state in exchange for mutual protection.¹¹² He further accounts that, “the *raison d’etre* (core significance of existence) of the State is to facilitate and enhance the individual’s self-fulfilment and advancement, recognising the individual’s rights and freedoms as inherent in humanity.”

Therefore, it is a common expectation that the state is in possession of the knowledge and power of what amounts to public good.¹¹³ Further, it exercises this knowledge and power for

¹¹² *Christopher Ndarathi Murungaru v. Standard Limited & 2 Others* [2012] eKLR, HCC 513 of 2011 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/98156/>> (accessed 17 January 2021).

¹¹³ Johan Den Hertog,. "Review of economic theories of regulation." *Discussion Paper Series/Tjalling C. Koopmans Research Institute* 10, no. 18 (2010). 2

the benefits of the people. The state plays its roles through balancing of needs. The needs of the public should override those of few foreign companies when it comes to the greater good.¹¹⁴ Essentially, IPR should be an instrument to promote innovation, industrialisation and spur economic development in Kenya,¹¹⁵ rather than suppressing unsuspecting retailers.

This study therefore focuses on the Government's role to achieve what is best to the members of the public. It explains the international obligation as required by the treaties and agreements that the Kenya has ratified and concludes that no further measures ought to be employed. It discusses more advanced economies, such as the USA, China and South Africa and draws lessons on how Kenya can use the IP regime to foster trade, innovation, and creativity.

1.8.2.2 African Renaissance Theory on IPR Enforcement and Trade in Kenya

African leaders who witnessed the impact of colonization and slavery saw the need of a social and economic independent Africa. As Ngugi a Thiong'o advocated for self-representation of Africans,¹¹⁶ Marcus Garvey believed that political independence and solid industrial foundation were key to realise African liberation. Moreover, if Africans would only be a group of slaves if they would not grip the two factors.¹¹⁷ Gaining independence was a requisite to economic development. Kenya should utilize the objective under TRIPS and create eligibility criteria for protection with more focus on transfer of technology. The country should also build up industries that are independent of other countries and encourage local innovation, creativity, and registration of IP.

The Sessional paper no. 10 of 1965 on African Socialism and its Application to Planning in Kenya described the philosophy underpinning the structures of the Government in the pre-colonial era as African Socialism. It acknowledged the fears and aspirations of the people

¹¹⁴ Michael Levine, and Forrence Jennifer, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis," *Journal of Law, Economics, & Organization* 6 (1990): 167-98.. <http://www.jstor.org/stable/764987>. (Accessed January 16, 2021)

¹¹⁵ Ben Sihanya, 'Intellectual Property for Innovation and Industrialisation in Kenya' (2008) 4 *Convergence* 185.

¹¹⁶ Ngugi wa Thiong'o, *Something torn and new: An African renaissance*. (Basic Civitas Books, 2009)

¹¹⁷ Amy Jacques Garvey, *The Philosophy and Opinions of Marcus Garvey: Africa for the Africans* (Routledge 2013).

who were eager to thwart Capitalism of the East and Communism of the west.¹¹⁸ Kenya sought to create a system of Government predominantly based on the traditional values the country had before independence. These included equality and goodwill. The African Renaissance Theory is adopted by this paper to emphasize on the need to protect our manufactures, retailers and consumers from unnecessary and bad laws which are likely to hamper trade.

1.9 Research Methodology: Design, Methods, and Techniques on Effects of IPR

Protection on Trade in Kenya

The primary form of research methodology adopted in this study is doctrinal. The study analyses literature, law, and Policy with bias on Afro-Kenyan materials on the effects of IPR protection on trade and related factors. The paper derives the data or resources building it up from: libraries; bookshops; personal collections; online sources; conferences; workshops; presentations; courses; workplace; and expert consultations. The paper also examines other sources of information such as case law, journal articles, books, book chapters and dissertations.

On matters not well addressed in literature, law and policy, the paper analyses newspapers, magazines, and related online sources to fill in the gaps. Moreover, the paper examines past surveys and reports to address the effects of IPR enforcement on trade.

1.10 Scope and Challenges, Originality, and Contribution on Effects of IPR Protection on Trade in Kenya in Kenya

This paper explores and investigates the reasons behind the complaints from traders and Kenyan IPR holders, especially authors of artistic works. It addresses concerns such as the criminal nature of the Kenyan IP regime and the freedom and monopoly granted to IP agents such the Collective Management Organisations (CMOs). It further analyses local laws, international instruments and relative literature from other fields affecting trade in Kenya to establish the plight of retailers in the enforcement of intellectual property. The greatest challenge faced during research was that some materials that would have been very

¹¹⁸ Government of Kenya, *Sessional Paper No. 10 of 1965 on African Socialism and Its Application to Planning in Kenya* (Government Printers 1965) <<https://repository.kippra.or.ke/handle/123456789/2345>> accessed 2 November 2022.

instrumental to the research, such as Government policies and enforcement manuals were not be readily available in the public domain.

Investigating from where other Law and Development scholars, like Ben Sihanya, have left, this study draws an international analysis of the two most developed economies in the world, and two most outstanding IP regimes in Africa. It compares the legal institutions and their methods of enforcement and how they have leveraged IP to the benefit of their citizens. Other researchers should also see the other side of IP. They should understand that although the laws can influence a system, they are invaluable when not enforced.

1.11 Chapter Outline on Effects of IPR Protection on Trade in Kenya in Kenya

This paper built by five (5) comprehensive chapters. Below is a brief description of the five chapters.

Chapter 1: Introduction to the Effects of IPR Protection on Trade in Kenya

This chapter gives a brief background on the effects of IPR enforcement to trade. It describes the problem statement and justifies the study. The chapter also gives a critical review of the literature, law, and Policy; describes the methodology used; analyses the theories in support of the research; describes the limitation and the basic hypothesis of the paper. It finally gives a chapter outline and the Summary of Findings, Conclusion and Recommendations on the Effects of IPR Protection on Trade in Kenya.

Chapter 2 – Legal Framework of IP Trade Related Laws in Kenya

In this chapter, the paper gives a general overview of the IP law provisions that affect trade. It lists the Kenyan laws and regulations and international instruments including those applicable within the East African Community (EAC). The Chapter also focuses on the implementation of the said laws through the various state agencies. It touches on the criminal aspect of IP laws, the doctrine of strict liability and the effect on unsuspecting importers and retailers and local IP holders.

Chapter 3 - Reasonable Enforcement of IP law to Facilitate Trade

This chapter gives a deep analysis of the IP related laws and how they affect local IP holders, importers, and retailers. These include the balance of enforcement of IP with regard to standards and health implications. It also focuses on the civil and criminal aspects of IP law and passing off as a remedy. It also addressed the challenges an IP regime can create in

pandemics such as the Covid 19 and how the Government can utilise the law to protect its citizens.

Chapter 4 - Comparative Analysis of IP-Trade Regimes to the Kenya's Regime

Chapter 4 focuses on the two most predominant countries in all IPR and trade headlines: the USA and China and the two most outstanding IP regimes in Africa: The Kingdom of Morocco and South Africa. It brings out concerns on how the USA and China have historically enforced IPR under the precinct of, 'we will only enforce IP when we have IP to protect.' It touches on the trade war and threats of sections that have been predominant. It further investigates how bilateral trade agreements have affected the IP regime in the Kingdom of Morocco, and how Kenya transplanted the South African IPR enforcement laws and eliminated the human rights aspects. It concludes with how Kenya can leverage its position to realise development.

Chapter 5 – Findings, Conclusion and Recommendation to the Effects of IP Laws on Trade in Kenya

This chapter details the discoveries and findings made throughout the research process. Further, it gives an overall conclusion of the paper. The paper draws its conclusion from the general arguments and observations made during research. The chapter also discusses the Intellectual Property Bill, 2020 (IPOK Bill) and makes recommendations for Policy and legislative reforms.

1.12 Summary of Findings, Conclusion and Recommendations on Effects of IPR Protection on Trade in Kenya in Kenya

As the world acknowledges human intellect as capital for creation of property, it further gives rise to the IPR. However, there are serious concerns that the legislature and other Policy makers have neglected. For instance, strict application of IP law can lead to closure of Small and Medium-Sized Enterprises (SMEs). Since most infringed products originate from foreign countries, Kenyan traders can therefore easily fall victim of importing and retailing such good. However, Kenya has enacted laws which prohibit the mere possession of infringed products without considering the person's intent. The laws make unsuspecting retailers vulnerable to both criminal and civil scrutiny of the law, increase the burden of doing business in Kenya and in turn hamper trade.

The copyright regime has also created a disaster in the name of monopolised CMOs. Apart from the forceful collection of royalties and vandalizing traders' property, they fail to adhere to the rules set by the Act and withhold the royalties meant for distribution to the artists. Therefore, there is need to review the IP laws in place to favour the local industry and facilitate trade.

The comparative analysis explains why countries such as the USA are keen in protecting IPR while countries like China avoided protecting IPR until they developed their innovation and creativity fields. Countries such as the Kingdom of Morocco have been affected by bilateral agreements they have entered with the USA and the EU. While South Africa maintains a relatively higher position to Kenya in the collection of royalties and innovation, it performs relatively lower in the enforcement of IPR. Its Counterfeit Goods Act reflects our original Anti counterfeit Act, 2008, save as it does not create strict liability offences and is keen in the protection of the rights of the importers and retailers.

With the problems the IPR enforcement agents have been facing during president Uhuru Kenyatta's Government, the recently developed Intellectual Property Office of Kenya (IPOK) Bill 2020 should contain the fears and aspirations of the Kenyans and the business community. On the contrary, the Bill transfers the problems from the separate IP related legislations to one legislation. If the serious concerns raise in this paper re not addressed, enacting the Bill as an Act of parliament will not solve the problems but create more.

CHAPTER 2

IP LEGAL FRAMEWORK THAT AFFECTS TRADE IN KENYA

2.1 Introduction to IP Legal Framework that affects Trade in Kenya

While investigating the effects of IPR protection on trade in Kenya, this chapter focuses on the first two objectives of this paper. First, it gives an overview of the legal framework that gives IPR legitimacy in Kenya. Second, it interrogates the criminal and civil nature of IPR cases. This is inspired by the attribute of the law as a tool for social engineering,¹¹⁹ and is instrumental in the achievement of any form of social change,¹²⁰ including: the recognition; promotion and protection of IPR.

Moreover, any change that is not nurtured in law cannot be enforced.¹²¹ The enforcement of IPR can only be legitimate if it is anchored in the law. Nonetheless, it is noteworthy that the legitimacy of the enforcement does not directly translate to trade facilitation or sustainable development. IPR enforcement can either be neutral, foster or hamper trade and sustainable development.¹²² Although the adoption of IPR was majorly influenced by developed countries, such as the USA and Japan,¹²³ their legitimacy has been granted by the Constitution and Kenyan legislations enacted by the National Assembly.

By virtue of being a member of the international organisations such as WTO, WIPO and ARIPO, ratification of IP international legal instruments has been the least of what is expected of Kenya. IPR protection and promotion is also a subject in most bilateral trade related agreements that Kenya has adopted. For instance, the Agreement between the Governments of the Republic of Kenya and the Government of Japan for the Promotion and Protection of Investment, makes special provisions for the protection of IPR.¹²⁴

¹¹⁹ Harpani Matnuh, 'Law as a Tool of Social Engineering' (2017) 147 *Advances in Social Science, Education and Humanities Research*.

¹²⁰ Scott L Cummings, 'Empirical Studies of Law and Social Change: What Is the Field-What Are the Questions' [2013] *Wis. L. Rev.* 171.

¹²¹ Ben Sihanya, 'Typology of Sovereignty, Constitutions, States and Governments in Kenya and Africa Constitutional Democracy, Rule of Law and Change in Kenya, Nigeria and South Africa' [2018] *E. Afr. LJ* 75.

¹²² Ben Sihanya (forthcoming 2022) "Intellectual Property, Innovation, and Technology Transfer in Health in Kenya and Africa: Case of COVID-19 and Malaria," in Ben Sihanya (forthcoming 2022) *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials* (IPILKA 2), Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

¹²³ Ben Sihanya, 'Technology Transfer and Development in Kenya: Issues in Regulation and Competition Law,' (1995) assessed essay submitted in partial fulfilment of the Master of Laws Degree, University of Warwick Law School, UK, Dr Andy Clark, Regulation of International Technology Transfer and Intellectual Property on file at Innovative Lawyering and Sihanya Mentoring) Nairobi & Siaya.

¹²⁴ Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investments, Legal Notice No. 109 of 2017.

To understand the science of protection of IPR and the impact it has on the Kenyan trade sector, this Chapter focuses on the Kenyan laws that give IPR legitimacy. Further, it gives an overview of how their enforcement affects the trade sector and a general insight into what constitutes IP laws in Kenya, their origin, the rights they create; how they are protected in the country their effects on trade.

2.2 Protection of IPR and Trade under the Constitution of Kenya 2010

Although the drafters of the Constitution acknowledged the Kenya's relations at the global arena, they appeared to be more concerned about Kenyans in matters surrounding the promotion and protection of IPR. As the supreme law of the land, the Constitution of Kenya 2010, safeguards the sanctity of property, including IP.¹²⁵ It defines property to include any vested or contingent right to, or interest in or arising from IP.¹²⁶

It places an obligation on the State to support, promote and protect IPR.¹²⁷ Further to the protection of the Western standards of IPR, it gives the state the responsibility of protecting and enhancing IP in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.¹²⁸ The role of protection of IP is given to the National Government.¹²⁹

2.2.1 Protection of IPR under the Bill of Rights

Article 27(2) of the Universal Declaration of Human Rights (UDHR)¹³⁰ and Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹³¹ establish the right of an author to moral and material interest that is derived from scientific, literary, or artistic production. Although the UDHR and the ICESCR do not define what constitutes IPR, some scholars have interpreted the provisions as to obligate states to protect both industrial property and artistic work.¹³² However, the UN Committee on Economic,

¹²⁵ Ben Sihanya, 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya' in Peter Gallagher, Patrick Low and Andrew L Stoler (eds), *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge University Press 2005).

¹²⁶ Article 260 of the Constitution of Kenya 2010, Article 260

¹²⁷ Article 11(2)(c) and Article 40(5) of the Constitution 2010.

¹²⁸ Article 69(c) of the Constitution 2010.

¹²⁹ Fourth Schedule, paragraph 12 of the Constitution 2010.

¹³⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <<https://www.refworld.org/docid/3ae6b3712c.html>> [accessed 16 July 2022]

¹³¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <<https://www.refworld.org/docid/3ae6b36c0.html>> [accessed 16 July 2022]

¹³² Deepa Kansra, 'Advancing the Human Right to Science Under the International Covenant on Economic, Social and Cultural Rights,' *RMLNLU Law Review* (2020).

Social and Cultural Rights (CESCR), through the *General Comment No. 17*, held a different opinion. It highlighted the distinction between IPR and Human Rights.¹³³

At the introductory level, the committee opined that IPR are state mechanisms meant to encourage people to be innovative and creative and to disseminate the results of the creativity and innovation for the benefits of everyone. Further, IPR can be acquired, transferred, revoked, traded, amended, and even forfeited. They are instruments states use to protect business and corporate interests and investments.

On the other hand, the committee described human rights as “timeless expressions of fundamental entitlements of the human person which are fundamental, inalienable and universal.” The Committee explained that the rights derived under Article 15(1)(c) of the ICESCR, are not necessarily IPR but are meant to encourage people to take part in scientific development for the benefit of everyone. For instance, the wordings of article 15(1)(c) should be interpreted to describe an author as a natural person. Although IP regimes recognise legal persons as holders of IPR, legal persons cannot enjoy human rights due to their nature.

Under the Constitution of Kenya, 2010’s Bill of Rights, the state is required to support, promote and protect IPR of the Kenyan people.¹³⁴ Further, the Constitution bars the parliament from enacting laws that allow the State or any person: to arbitrarily deprive a person of property of any description; or in any way restrict or limit the enjoyment of any right discriminatively.¹³⁵ It also prohibits the state from depriving a person any property unless the deprivation results from the acquisition or conversion of land or is for public purpose and interest and is carried out in accordance with the law.

The law authorizing the deprivation of property must also require prompt payment in full, of just compensation to the person; and allow any person who has an interest in, or right over, that property a right of access to a court of law.¹³⁶ The constitutional provisions might have been inspired by article 32 of the TRIPS Agreement and can be realised under Section 80 of the Industrial Properties Act, 2001.

¹³³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006, E/C.12/GC/17, at <https://www.refworld.org/docid/441543594.html> [accessed 19 July 2022].

¹³⁴ Article 40(5) of the Constitution of Kenya 2010

¹³⁵ *Ibid*, Article 40(2) of the Constitution 2010.

¹³⁶ *Ibid*, Article 40(3) of the Constitution 2010.

To understand the place of IPR in the Kenyan constitutional framework, one needs to analyse how the Bill of Rights is to be applied. As the Constitution of Kenya 2010 confers IP rights, it also confers other bundles of rights. This means that IPR can also be limited under Article 24 of the Constitution 2010. It is a primary constitutional principle that the enjoyment of one person's fundamental rights and freedom should not infringe on another's.¹³⁷

As Oliver Wendell Holmes rightly put it, "The right to swing my fist ends where the other man's nose begins." The Kenyan Supreme Court in, *In the Matter of Kenya National Human Rights Commission*,¹³⁸ adopted the comprehensive approach of constitutional interpretation. This described the rights under the Constitution of Kenya 2010 are interrelated and therefore, the courts must balance the rights.

In *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others* (2019)¹³⁹ the Kenyan Supreme Court upheld the decision of the Court of Appeal (CoA). The Court of Appeal (COA) had considered the balance between IPR and the need to protect public health.

The Supreme Court held that when there exist competing rights, a balance must be drawn. This means that the doctrine of proportionality ought to be utilised to resolve the tension between the fundamental rights and freedoms under the Constitution of Kenya 2010 and IPR. On the question of the protection and enforcement of IPR under the Anti Counterfeit Act, 2008, the court in *PAO & 2 Others v. Attorney General; Aids Law Project* (2012)¹⁴⁰ held thus:

"While such intellectual property rights should be protected, where there is the likelihood, as in this case, that their protection will put in jeopardy fundamental rights such as the right to life of others, I take the view that they must give way to the fundamental rights of citizens in the position of the petitioners."

The decision has the implication that, although IPR are recognised under the Constitution of Kenya 2010, there are other rights and freedoms which are so fundamental that they supersede the protection of IPR. The protection of IPR should therefore uphold the values

¹³⁷ Constitution of Kenya 2010, Article 24(1)(d)

¹³⁸ *In the Matter of Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Ref. No.1 of 2012

¹³⁹ *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others* (2019), Petition No. 5 of 2017

¹⁴⁰ in *PAO & 2 Others v. Attorney General; Aids Law Project (Interested Party)* (2012) Petition 409 of 2009.

and the spirit of the Constitution of Kenya 2010 and if they fall short of the threshold, then they are invalidated by Article 2(4) of the Constitution.

2.3 IP International Legal Instruments that Affect Trade in Kenya

International IP treaties, conventions and agreements guide and influence Kenyan courts by virtue of Article 2(5) and (6) of the Constitution of Kenya 2010. The provision recognises general rules of international law and any treaty or convention ratified by Kenya part of the law of Kenya.¹⁴¹ However, most IP treaties were adopted prior to the Constitution of Kenya 2010 and before the enactment of the Treaty Making and Ratification Act, 2012. This means that the people, through the Parliament, were not involved in the ratification of the treaties. Since the Treaty Making and Ratification Act, 2012 does not have retrospective application,¹⁴² the IP treaties still apply in Kenya.

Kenya still has an obligation under Article 26 of the Vienna Convention on the Law of Treaties of 1969. The Convention establishes the principle of *Pacta sunt servanda* in treaties and conventions. *Pacta sunt servanda* laminates state parties' responsibilities to be bound by treaties they have adopted and apply the provisions in good faith. It states, "every treaty in force is binding upon the parties to it and must be performed by them in good faith." In *Karen Njeri Kandie v. Alassane Ba & Another* the Supreme Court agreed that the treaties adopted prior, the promulgation of the Constitution were still in force. It affirmed the stand taken by the court of appeal that:

"The corpus of international treaties in Kenya cannot be demarcated for jural efficacy into pre-and post-2010 categories. We take the view that as long as Kenya's ratification of any treaty remains in force, unrevoked, unrecalled and unsuspending, the obligations that flow from it and its jussive force as part of the laws of Kenya remains the same irrespective of when the ratification occurred. A differentiation born of judicial interpretation is neither tenable nor practical. Its utility is equally doubtful."

Therefore, all international IP instruments that were ratified by Kenya before the promulgation of the Constitution of Kenya 2010, are still effective and the obligations that emanate from them ought to be performed in good faith.

2.3.1 The TRIPS Agreement

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) applies in Kenya by virtue of Article 2(6) of the Constitution. As an international IP instrument, it sets

¹⁴¹ *Ibid*, Article 2(5) and (6) of the Constitution of Kenya, 2010.

¹⁴² David Kenani Maraga, 'The Legal Implications of Article 2(6) of the Constitution of Kenya 2010' (Thesis, University of Nairobi 2012) <<http://erepository.uonbi.ac.ke/handle/11295/14855>> (accessed 6 September 2021).

the minimal standards for the protection of IPR among members of the WTO. It obligates the members states to implement its provisions but there is no requirement to enforce more than what the agreement requires.¹⁴³

It acknowledges the peculiarity of each state and encourages every state to decide how the agreement will be implemented. TRIPS obligates states to protect the following bundles of IPR: Copyright and Related Rights; Trade Marks; Geographical Indications; Industrial Designs; Patents; Layout-Designs (Topographies) of Integrated Circuits; Protection of Undisclosed Information; and Control of Anti-Competitive Practices in Contractual Licences.

To protect inventions from state exploitation without authorization, the TRIPS agreement lays the foundation upon which such exploitation can be warranted. Even if the laws of the state authorize such exploitation, the exploitation must be considered on individual merit. The state or its agents must also notify the holder of the intention to use the invention and in cases of emergency take reasonable time to inform the holder of the use. The use must be non-commercial and limited for the purpose and the duration it was intended. The right holder is also entitled to adequate remuneration and has a right to bring a suit to review the decision of the state.¹⁴⁴

The fears and aspirations of developing and least developed countries are addressed by the sole objective of the agreement. The countries were fearful that introducing TRIPS into GATT would affect their right to economic self-determination.¹⁴⁵ For this reason, the negotiators agreed to a beneficial stipulation within the agreement that would benefit the DCs and LCDs. This can be seen through Article 7 of the agreement which reads:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

The objective clearly proves that the protection of international forms of IPR under the jurisdiction of DCs and LDCs was meant to be symbiotic.¹⁴⁶ By the use of the world ‘should’ the negotiators of DCs and LDCs realised that there wouldn’t be much to gain out of the

¹⁴³ Agreement on Trade Related Aspects of Intellectual Property Rights April 15, 1994, entered into effect January 1, 1995 (1994) 33 I.L.M. 1197.

¹⁴⁴ Article 32 of the TRIPS Agreement.

¹⁴⁵ Luigi Palombi, *Gene Cartels: Biotech Patents in the Age of Free Trade* (Edward Elgar Publishing 2009).

¹⁴⁶ Mark V Shugurov, ‘TRIPS Agreement, International Technology Transfer and Least Developed Countries’ (2015) 2 *Journal of Advocacy, Research and Education* 74.

agreement if there is no proviso making technology transfer an essential part of IPR protection. The preamble, which outlays the desires of the member states, also recognises that some measures to the protection of IP can easily impede legitimate trade.

TRIPS also accords members the right to adopt measures that safeguard public health and nutrition, and to sponsor the public interest in sectors central to their socio-economic and technological development in their laws as long as they are in line with the agreement.¹⁴⁷ It acknowledges that states may need to adopt the measures to prevent IPR holders from abusing IPR and avoid practises that arbitrarily restrain trade or widely distress the international transfer of technology.¹⁴⁸

From the wordings of the preamble, articles 7 and 8, the creators of the agreement aimed at improving the social and economic concerns of the member states.¹⁴⁹ Under article 31 of the Vienna Convention on the Law of Treaties, TRIPS must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

2.3.2 Treaty for the Establishment of the East African Community

The EAC treaty embodies the vision of the community to transform the region into a modern society.¹⁵⁰ It embraces the fears and aspirations of the member state population to synchronise operations within their borders and ultimately establish a political federation.¹⁵¹ It gives the community a mission to improve the lives of the population within it through factors such as trade and investment.¹⁵² In acknowledging, the vital role science and technology plays in the development of an economy, the members states to the treaty undertake to stimulate collaboration in the progress of science and technology within the

¹⁴⁷ TRIPS, Article 8.

¹⁴⁸ *Ibid.*

¹⁴⁹ Alison Slade, ‘Good Faith and the TRIPS Agreement: Putting Flesh on the Bones of the TRIPS “Objectives”’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2558114 <<https://papers.ssrn.com/abstract=2558114>> (accessed 6 October 2021).

¹⁵⁰ Magaga Alot, ‘Marketing the Cause: Communications Tools and Techniques and Strategies-the Case of the EAC’ (2nd EAC Symposium, Snowsrest Hotel, Arusha, 28 April 2011) Page 9 <http://196.41.38.241/bitstream/handle/11671/244/2ND_EAC_SYMPOSIUM_MAGAGA_PRESENTATION_280411.pdf?sequence=1> (accessed 8 September 2021).

¹⁵¹ Preamble to the Treaty for the Establishment of the East African Community

¹⁵² Beatrice B. Kiraso, ‘EAC Integration Process and Enabling Peace and Security Architecture’ (EAC Peace and Security Conference, Kampala, Uganda, 5 October 2009) <<http://196.41.38.241/bitstream/handle/11671/248/EAC%20Integration%20-%20Enabling%20Peace%20and%20Security%20Architecture.pdf?sequence=1>> (accessed 5 August 2021).

EAC. This is effected through the harmonisation of policies on commercialisation of technologies and protection of IPR.¹⁵³

The EAC comprises of seven countries, namely: Burundi; Democratic Republic of the Congo; Kenya; Rwanda; South Sudan; Uganda; and Tanzania.¹⁵⁴ Six of the seven countries have adopted the Convention Establishing the World Intellectual Property Organization¹⁵⁵ and the Agreement establishing the World Trade Organization¹⁵⁶ with an exception of South Sudan. Even with the states' aspiration to synchronise operations within their borders and ultimately establish a political federation,¹⁵⁷ the countries still have separate parliaments and thus different domestic IPR legal frameworks. Although the EALA enacted the EACCMA to harmonize the customs operations within the EAC, the EACCMA does not affect national legislations.

Critiques believe that the need to consolidate the aspirations of the member states for the universal benefit of the community should be grounded on the sovereignty of the people.¹⁵⁸ The EAC treaty is only concerned with the organisational structures rather than the voice of the individuals who build into it.¹⁵⁹ This implies that even the protection of Intellectual property within the system may not be people oriented

2.3.2.1 Protocol on the Establishment of the East African Community Common Market

To facilitate and promote integration within the East African Community, the member states under the protocol undertake to cooperate in the protection of IP.¹⁶⁰ The protocol acknowledges the importance of IPR in fostering creativity and innovation.¹⁶¹ IPR are also assets in cross boarder investment.¹⁶² To protect IP, the protocol requires states to “put in place measures to prevent infringement, misuse, and abuse of intellectual property rights. Moreover, they are expected to cooperate in fighting piracy and counterfeit activities as well

¹⁵³ *Ibid*, Article 108(1)(i) of the Treaty for the Establishment of the East African Community

¹⁵⁴ East African Community, 'EAC Partner States' (*East African Community*) <<https://www.eac.int/eac-partner-states>> accessed 9 November 2022.

¹⁵⁵ WIPO, 'Member States' (*WIPO (World Intellectual Property Organization)*) <<https://www.wipo.int/members/en/index.html>> accessed 9 November 2022.

¹⁵⁶ World Trade Organization, 'WTO Members and Observers' (*World Trade Organization*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 9 November 2022.

¹⁵⁷ Treaty for the Establishment of the East African Community, Preamble

¹⁵⁸ Korwa Gombe Adar and Mercy Kathambi Kaburu, 'Kenya Citizens' Sovereignty, Popular Participation, and the EAC Intergration and Democratization' in Kasaija Phillip Apuuli and others (eds), *Popular Participation in the Integration of the East African Community: Eastafricaness and Eastafricanization* (Rowman & Littlefield 2020). Page 57.

¹⁵⁹ *Ibid*.

¹⁶⁰ Protocol on the Establishment of the East African Community Common Market, Article 5(3)(k).

¹⁶¹ *Ibid*, Article 43(1).

¹⁶² *Ibid* Article 29(4)(f).

as exchange information on matters relating to intellectual property rights. They are encouraged to promote public awareness on intellectual property rights issue while enhancing capacity in intellectual property. They are further expected to increase dissemination and use of patent documentation as a source of technological information, adopt common positions in regional and international norm setting in the field of intellectual property; and put in place intellectual property policies that promote creativity, innovation, and development of intellectual capital.”¹⁶³

The party states are further required to create mechanisms for “the legal protection of the traditional cultural expressions, traditional knowledge, genetic resources and national heritage and the protection and promotion of cultural industries. they are supposed to safeguard the use of protected works for the benefits of the communities in the Partner States; and encourage the cooperation in public health, food security, research, and technological development.”¹⁶⁴

Although the protocol envisions a better economic set up for the EAC, the provisions on IP appear to be a replication of the Kenyan IP statutes. Of all the objectives, the fight against counterfeiting and piracy is one of the most favoured. This is because the country already has a system in place to curb the vices. Member states should however place special significance on creating awareness before embarking on enforcement of IPR.

2.3.2.2 East African Community Customs Management Act, 2004

With the member states agreeing to have a decentralised structure for revenue collection, the national revenue collecting bodies within the EAC are assigned the responsibility of customs management.¹⁶⁵ To curb the shortfalls for the decentralised system, the East Africa Legislative Assembly (EALA) created the East African Community Customs Management Act, 2004 (EACCMA) to make provisions for the management and administration of customs and any related matters.

¹⁶³ *Ibid*, Article 43(4).

¹⁶⁴ *Ibid*, Article 43(5).

¹⁶⁵ Tabitha Kiriti Nganga, ‘International Trade Processes and Tax Policy’ (2014) Volume 2 *Trade Discourse in Kenya* 299.

2.3.2.2.1 Counterfeit Goods

EACCMA lists counterfeit goods as prohibited goods¹⁶⁶ thereby prohibiting the importation of counterfeit goods of all kind.¹⁶⁷ Such goods including the packaging¹⁶⁸ are strictly liable for forfeiture once seized.¹⁶⁹ The object of carriage of the prohibited goods can also be forfeited under Act. Objects of carriage of less than 250 tons, vehicles, animals, or other objects together with their tackle, apparel, furniture, and all other gear used for transportation are liable to be forfeited. If the object weighs above 250 tons, then it is not subject to forfeiture but the owner is liable to a fine not exceeding \$10,000/= and the vessel is to be detained until the fine is paid.¹⁷⁰

EACCMA however makes exceptions in case the shipper is not aware that the goods transported are prohibited. In this situation, the commissioner of customs will have the goods under his or her control, before having them re-exported or disposed in a manner he or she deems fit.¹⁷¹

2.4 Kenyan National Legislation on IPR

Although Kenyan national legislations make provisions for the registration of IP, the effects of IPR on trade are usually witnessed during enforcement of the rights. This is because the IP regime in the country is underutilised. Even though Kenyan statutes borrow a lot from other countries like South Africa, and international agreements such as the TRIPS, some statutes create provisions that go overboard to and hamper legitimate trade.

In Kenya, all the parties in the supply chain except the consumers and the IPR holder of the specific product can infringe on IPR. To understand the reason behind the protection of IP, this section focuses on two categories of legislations. The first is IP legislations meant to foster trade and innovation in Kenya, and the second category discusses purely enforcement IP legislations and provisions.

¹⁶⁶ Second Schedule, Part A, Paragraph 12 of the East African Community Customs Management Act, 2004, (EACCMA)

¹⁶⁷ Section 18(1) of the EACCMA.

¹⁶⁸ Section 212(1) of the EACCMA.

¹⁶⁹ Section 210(a) of the EACCMA.

¹⁷⁰ Section 211 of the EACCMA

¹⁷¹ Section 212(2) of the EACCMA.

2.4.1 IP Legislations Meant to Foster Trade and Innovation in Kenya

This section assesses the legislation on intellectual property in Kenya and their place or role in fostering trade and innovation in Kenya.

2.4.1.1 Copyright Act, 2001

The Copyright Act, 2001 serves to protect owners of copyright in literary, musical, and artistic works, audio-visual works, sound recordings, broadcasts. Its application affects both goods and services aspects of trade.¹⁷² The Act establishes the Kenya Copyright Board (KECOBO)¹⁷³ whose functions are inclusive of: licencing and supervision of Collective Management Organizations (CMOs) and enforcement of all matters relating to copyright.¹⁷⁴ The Act has been amended several times to introduce stringent measures to fight piracy.

To understand the recent developments in the Kenyan Copyright world, it is imperative to investigate the legal framework around three key issues in the copyright world. Firstly, the public's confusion of the roles of KECOBO and CMOs and how it affects trade. This is inspired by the fact that traders and copyright holders are more conversant with the operations of the CMOs rather than KECOBO. Secondly, the constant development of the online and digital worlds which make the traditional enforcement mechanisms almost inoperable; and thirdly, the effects of employment contracts within the copyright world.

2.4.1.1.1 Roles of KECOBO and CMOs in Trade Facilitation in Kenya

Since one cannot monitor most copyright works in isolation, and management of copyright work as an individual is practically impossible.¹⁷⁵ The Copyright Act, 2001 makes provisions for collective administration of copyright. The Act creates the biggest player in Kenyan copyright world by giving the Kenya Copyright Board (KECOBO) the mandate to register Collective Management Organisations (CMO). It describes a CMO as ‘an organisation approved and authorized by the Board which has as its main object, or one of its main objects, as the negotiating for the collection and distribution of royalties and the granting of licenses in respect of the use of copyright works or related rights.’¹⁷⁶

¹⁷² Ben Sihanya, “Reflections of open scholarship modalities and the copyright environment in Kenya,” in Jeremy De Beer, Chris Armstrong, Chidi Oguamanam & Tobias Schonwett, *et al* (eds) (2013) *Innovation & Intellectual Property Collaborative Dynamics in Africa*. (UCT Press, Cape Town 2013).

¹⁷³ Section 3 of the Copyright Act, 2001.

¹⁷⁴ Section 5 of the Copyright Act, 2001.

¹⁷⁵ *Xpedia Management Limited and Others v. Attorney General and Others* NRB Petition No. 317 of 2015 [2016] eKLR, Paragraph 123

¹⁷⁶ Section 2 of the Copyright Act, 2001.

The CMOs are supposed to be companies limited by guarantees and non-profit entities. Although their main objective is collection and distribution of royalties to artists, they must operate under the confines of Copyright Act and the Copyright (Collective Citation Management) Regulations, 2020. The regulations ensure that the organisations operate in the best interests of the copyright holders. An external auditor should regularly audit the accounts of the organisation.¹⁷⁷ The Act gives the first registered CMO monopoly to operate in the Kenyan market by limiting the authority of KECOBO to register another CMO in the same class of works and category of rights.¹⁷⁸ The CMOs can however be deregistered by KECOBO if they fail to act in the best interest of the copyright holders.

Authors, producers, performers, visual artists, and publishers can create CMOs to collect royalties based on tariffs set and gazetted by the cabinet secretary on matters relating to copyright.¹⁷⁹ The Act mandates the CMOs to manage and distribute the royalties and other remuneration accruing to their members.¹⁸⁰ They are also required to submit information on the management and distribution of the royalties to KECOBO annually.¹⁸¹ Therefore, they facilitate the symbiotic relationship between the business entities they collect royalties from and the copyright holders. The business entities benefit from the IPR through attracting customers, while the copyright holders get remunerated for their creativity.

2.4.2.1 Effects of Online Piracy and Copyright Employment Contracts on Trade in Kenya

It is estimated that the loss incurred from online piracy amounts to Kshs. 92 billion annually and 50,000 jobs.¹⁸² Before 2019, the only civil recourse to bar online piracy was to obtain Anton Piller orders which could be granted *ex-parte* if the holder convinced the court or tribunal of the existence of prima facie case of copyright infringement. The orders are meant to secure the preservation of the documents, copies, or things as evidence.

The Copyright (Amendment) Act, 2019¹⁸³ amended the Copyright Act by introducing among other provisions, the right to apply for interim relief in situations where a person believes their copyright is being pirated by a person, whether they are in Kenya or not. The provision

¹⁷⁷ *Ibid*, Section 46 of the Copyright Act, 2001.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*, Section 46A of the Copyright Act, 2001.

¹⁸⁰ *Ibid*, Section 46C of the Copyright Act, 2001.

¹⁸¹ *Ibid*, Section 46D of the Copyright Act, 2001.

¹⁸² Jacktone Lawi, 'Kenya's Creative Sector Loses Sh252 Million Daily to Piracy' (3 May 2022) <<https://www.pd.co.ke/commerce/kenyas-creative-sector-loses-sh252-million-daily-to-piracy-125577/>> (accessed 25 July 2022).

¹⁸³ Copyright (Amendment) Act, No. 20 of 2019.

allows the High Court to give orders against: persons facilitating piracy; persons making available of online location or internet service providers, whether in or out of Kenya.¹⁸⁴

Although private copyright in Kenya vests in the author, the author has the discretion to transfer the rights to the person who commissioned the work or the person who had the author in their employ during the making of the work.¹⁸⁵ This implies that unless there is a direct contract to limit the rights of the employer, the employer can enjoy is the copyright holder to the literacy and artistic work.

2.4.1.2 Trade Marks Act

This Act makes provisions for registration of Trade Marks. It also acknowledges international Trade Marks, which are entitled protection in Kenya under the Agreement relating to the International Registration of Marks, adopted in Madrid in April 1891 and the Protocol relating to the Madrid Agreement adopted in Madrid on 27th June 1989.¹⁸⁶ These agreements are operationalised in Kenya through the Trade Marks (International Registration) Rules, 2003. Members of the Banjul Protocol on Marks need not register again in Kenya, unless the Registrar communicates to African Regional Intellectual Property Organization (ARIPO), in respect of the application.¹⁸⁷

Although the Act deters owners of unregistered trademark from seeking injunctions and damages for infringement, it acknowledges the unutilised system of trademark registration. The Act gives the owners the option of instituting legal proceedings on passing off.¹⁸⁸ The issue is however the balance of rights. The Act gives additional rights to the holder of registered IP not just in the civil but also in the criminal realm.

2.4.1.2.1 Criminal liability

Offences are found in part 11 of the Trade Marks Act. The offences likely to affect trade in Kenya include: forgery, selling or importation of goods or performance of services with a registered trademark. Forgery is defined in two ways. One, the creation of a trademark or mark that resembles a registered trademark, likely to deceive or confuse the public and two,

¹⁸⁴ Section 35 of the Copyright Act 2001.

¹⁸⁵ *Ibid*, Section 31

¹⁸⁶ The Trade Marks Act, Section 40C.

¹⁸⁷ *Ibid*, Section 40D of the Industrial Properties Act, 2011.

¹⁸⁸ *Ibid*, Section 5

falsification of a registered trade mark, whether by alteration, addition, effacement or otherwise.¹⁸⁹

Forgery of a registered trademark is prohibited through the creation or importation of machines that can illegally replicate the trademark or the creation or importation of the trademark or packaging materials with the trademark on it.¹⁹⁰ On sale, importation and provision of services, the trademark has to be forged or falsely applied. In all the cases, the accused must have the intention and all offences carry the same sentence of a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding five years or to both. The goods are thereafter to be forfeited to the state.¹⁹¹

2.4.1.3 Industrial Properties Act, 2011

The primary objective of the Act is to promote innovation and make provisions for technology transfers. It grants and regulates intellectual property in the form of patents, utility models, technovations and industrial designs. In granting exclusive rights to the IPR holders, some provisions of this Act have been cited as an impediment to the progress of the health care system. Just like the Copyright Act, 2001, the Industrial Property Act also accords the ownership of an invention to the employee if the invention is made during the course of employment.¹⁹² The Act assumes that during employment, the employee has access to the employer's resources. In applying this principle, the Supreme Court in *Samson Gwer & 5 Others v. Kenya Medical Research Institute & 3 Others*¹⁹³ validated a clause within the employment contract that allowed the employer to own any forms of IP invented or authored by the employee. The court held that when the employee argues that the invention was not made during employment, then they should prove it.

The Act gives the state the option of exploiting a person's invention if the exploitation is in the public interest, in particular, national security, nutrition, health, environmental conservation, or the development of other vital sector of the national economy; or the Government determines that the manner of exploitation of the invention by the IPR holder is not competitive. If such is the case, the Managing Director of KIPi can apply to the CS and

¹⁸⁹ *Ibid*, Section 58C of the Industrial Properties Act, 2011.

¹⁹⁰ *Ibid*, Section 58D of the Industrial Properties Act, 2011.

¹⁹¹ *Ibid*, Section 58H of the Industrial Properties Act, 2011.

¹⁹² Industrial Property Act, Section 32.

¹⁹³ *Samson Gwer & 5 Others v. Kenya Medical Research Institute & 3 Others*, Petition No. 12 of 2019.

consult the IPR holder. Upon approval of the application the Cabinet Secretary (CS) can give an order of compensation.¹⁹⁴

2.4.1.3 Other IP Legislations Meant to Foster Trade and Innovation in Kenya

Among other reasons for enactment, the Seeds and Plant Varieties Act Cap 326 makes provisions for creation of proprietary rights to persons breeding or discovering and developing new seeds and plant varieties. The Act obligates the Cabinet Secretary to prepare an index of names of plant varieties for use in connexion with the sale of seeds of varieties. The index groups the seeds in classes and names. Once the index is gazetted, the Act makes it an offence for anyone to use names other than those gazetted in the index.¹⁹⁵

Kenya Industrial Research and Development Institute Act, 2022¹⁹⁶ defines IP as ‘any intangible property that is the result of creativity such as patents, copyrights, industrial designs, utility models and Trade Marks.’ Although it is the only Kenyan statute that defines IP, scholars like Ben Sihanya believe that such definition is inconclusive for two reasons. First, the Act defines IP using the IP doctrines and two, it does not recognise other forms of IP such as GIs. The Act expounds the meaning of “innovation” under the Industrial Property Act.

Whereas the Industrial Property Act 2011 describes innovation as ‘utility models, technovation models, and industrial designs and any other non-patentable creations or improvements that may be deemed as deserving specified intellectual property rights,’ the Kenya Industrial Research and Development Institute Act, 2022 adopts a more Afro- Kenyan definition under the Science, Technology and Innovation Act, 2013,¹⁹⁷ by adding: a product, process, service or idea which is novel; an improved use of a new product, service or method in industry, business or society; or indigenous or traditional knowledge by community of beneficial properties of land, natural resources, including plant and animal resources and the environment.

The Science, Technology, and Innovation Act, 2013 is designed to promote, co-ordinate and regulate of the progress of science, technology, and innovation. The Act establishes the National Commission for Science, Technology, and Innovation (NACOSTI) and gives it powers, inclusive of “application for the grant or revocation of patents; institution of such

¹⁹⁴ Section 80(1) of the Industrial Property Act 2011.

¹⁹⁵ Seeds and Plant Varieties Act, Section 7.

¹⁹⁶ Section 2 of the Kenya Industrial Research and Development Institute Act, 2022.

¹⁹⁷ Ibid, Section 2

action in respect of the patent as it may deem appropriate for the security of the country; and acquire from any person the right in, or to, any scientific innovation, invention or patent of strategic importance to the country.’¹⁹⁸

Although the Science, Technology, and Innovation Act, 2013 does not describe how NACOSTI can exercise such mandates, the exercise ought to be constitutional. If not, the Government Proceedings Act¹⁹⁹ gives IPR holders of patents, copyright, and Trade Marks the right to institute proceedings against the Government if any agent²⁰⁰ of the Government infringes on the IP. However, the agent should be working under the authority of the Government. The problem that could emanate from this provision is the lack of the definition of the phrase, ‘authority of the Government.’ However, it could be interpreted to mean servants and agents of the Government acting within their contract of employment.

The Access to Information Act, 2016 expounds Article 24 of the Constitution to limit the right to access of information. The provision bars the disclosure of information that is likely affect commercial interests, including IPR, of an entity or person with the information.²⁰¹ The Micro and Small Enterprises Act, 2012, establishes the Micro and Small Enterprises Authority²⁰² and mandates it to: generate funds to create technology that is significant to Micro and Small Enterprises (MSE); boost innovation and Transfer of Technology (ToT) to foster production in MSE; simplify registration and protection of IPR for MSE; and provide incentives to encourage invention and innovation by MSE.²⁰³ Further, the Sessional Paper No. 02 of 2005 on Development of Micro and Small Enterprises for Wealth and Employment Creation for Poverty Reduction, requires the government through KIPI to increase the access of MSE to the IPR regime²⁰⁴

2.4.2 IP Enforcement Legislations

This section analyses the legislation focused on IP enforcement in Kenya, as discussed below:

¹⁹⁸ Section 6(2) of the Science, Technology and Innovation Act, 2013.

¹⁹⁹ Government Proceedings Act, Chapter 40 of the Laws of Kenya.

²⁰⁰ The word ‘agent’ also includes independent contractors under the Government’s employ. See Section 2 of the Government Proceedings Act, Cap 40.

²⁰¹ Section 6(1)(e) Access to Information Act, 2016

²⁰² Section 29 of the Micro and Small Enterprises Act, 2012

²⁰³ *Ibid*, section 50

²⁰⁴ Government of Kenya, *Sessional Paper No. 02 of 2005 on Development of Micro and Small Enterprises for Wealth and Employment Creation for Poverty Reduction* (Government Printers) <<https://repository.kippra.or.ke/bitstream/handle/123456789/1360/Sessional%20Paper%20no%20of%202005%20Development%20of%20Micro%20and%20Small%20Enterprises%20for%20Wealth%20and%20Employment%20Creation%20for%20Poverty%20reduction%281%29.pdf?sequence=3&isAllowed=y>> accessed 2 November 2022.

2.4.2.1 Anti-Counterfeit Act, 2008

The Anti-Counterfeit Act, 2008 is purposed to prohibit trade in counterfeit goods. The Act makes Kenya peculiar as it is one of the few countries to have a specific legislation addressing the issue of counterfeiting.²⁰⁵ The Act describes counterfeit goods as goods derived from the counterfeiting of any item that bears an intellectual property right, and includes any means used for purposes of counterfeiting.²⁰⁶ It describes counterfeiting in relation specified actions done without the authority IPR owner. It protects both local and foreign IPR whether the IPR subsists in Kenya or in a foreign country.²⁰⁷

The enforcement of this Act has created public outcry both on imports²⁰⁸ and locally sold goods.²⁰⁹ Unlike other Acts of Parliament governing intellectual property, the Anti Counterfeit Act was strictly an enforcement Act before the gazetting of the Anti-Counterfeit (Recordation) Regulations, 2021. The Act is exclusive or rather draconian in nature since it establishes offences perceived as strict liability offences. Unlike regular offences, which require the three elements of a crime to be proven, strict liability offences only, require proof of the act.²¹⁰

The offences are found under Section 32. Prior to 2019, section 32 of the Act only established seven offences. These offences impose liability on a person without measuring their intent. They can all be committed during the course of trade. They include manufacturing, possessing or controlling, selling, exhibition, distributing, importing or disposing counterfeit goods in any manner. The Statute Law (Miscellaneous Amendments) Act, 2018, introduced the more contentious offences. These offences are beyond the requirements the TRIPS agreement create in enforcement of IPR. Although they appear

²⁰⁵ Chris Walters, 'Africa: Analysing Kenyan Judgments Concerning Counterfeiting and Common Law Rights' (*Managing Intellectual Property*, 17 March 2020) <<https://www.managingip.com/article/b1kqlmgwg1mh63/africa-analysing-kenyan-judgments-concerning-counterfeiting-and-common-law-rights>> (accessed 6 September 2021).

²⁰⁶ Anti-Counterfeit Act, Section 2.

²⁰⁷ Look at the Definition of 'Counterfeiting under Section 2 of the Anti-Counterfeit Act, 2008.

²⁰⁸ Anyango Otieno, 'City Traders Demand Release of Goods Held in Mombasa' *The Standard* (5 July 2018) <<https://www.standardmedia.co.ke/business/news/article/2001286811/traders-protest-holding-of-goods-at-the-port-of-mombasa>> (accessed 6 September 2021).

²⁰⁹ Business Daily Africa, *Small Traders Accuse ICCD, Anti-Counterfeit Authority of Harassment* (2019) <<https://www.youtube.com/watch?v=qk45hL4VHAU>> (accessed 6 September 2021).

²¹⁰ National Council for Administration of Justice, *Enforcement Manual to Combat Illicit Trade in Kenya* (2nd edn, National Council for Administration of Justice 2020) <https://kam.co.ke/kam/wp-content/uploads/2020/09/15.04.2020_2nd-Edition-Enforcement-Manual-to-Combat-Illicit-Trade-in-Kenya-1.pdf> (accessed 20 January 2020). Page 30.

unreasonable, they have not been challenged since enforcement activities have been reasonable. The reasonableness of the offences is discussed in the next chapter.

The Act also gives the Minister the power to appoint persons as inspectors under the Act. Further it gives the minister the authority to designate, through a gazette notice, any specified class of persons to be inspectors and this can be amended or withdrawn through another gazette notice. Although the Kenyan Anti Counterfeit Act borrowed this provision, the drafters went further and specified some of the offices whose members are also designated as inspectors.

These include: any member of the ACA Board, police officer, authorized customs officer, trade development officer, industrial development officer, trade mark and patent examiner, seed and plant inspector, public health inspector, and inspectors appointed under the Standards Act (Cap 496), the Weights and Measures Act (Cap 513), the Copyright Act (No 12 of 2001), the Food, Drugs and Chemical Substances Act (Cap. 254), the Pharmacy and Poisons Act (Cap. 244) and the Pest Control Products Act (Cap 346).

The modification of this provision under the Kenyan Anti Counterfeit Act might create absurdity since the Act does not specify how the designated inspectors can exercise their mandate under the Act. The Kenyan provision could simply imply that all the mentioned offices are ad hoc inspectors and can therefore discharge the objectives of ACA, without being part of the Authority. This means that they could use different procedures than those set out by ACA and thus create confusion.

2.4.2.2 Trade Descriptions Act

This Act was enacted in 1977 and designed to forbid false descriptions of goods, services, accommodation, and facilities provided in the course of trade. The original Act recognised GIs, through forbidding the importation of goods which bore a false indication as to the place of manufacture, production, or reconditioning.²¹¹ The Act recognised the place of manufacture as trade description and made it an offence to falsify such descriptions.²¹²

The principal offence under the Act involved: the application of false description; and supplying or offering to supply falsely described goods.²¹³ The original offence under the Act attracted a sentence of twenty thousand shillings or imprisonment a term not exceeding two

²¹¹ Section 7 of the Trade Descriptions Act, 1977.

²¹² *Ibid*, Section 8 (h) of the Trade Descriptions Act, 1977.

²¹³ *Ibid*, Section 3 of the Trade Descriptions Act, 1977.

years, or both.²¹⁴ Through the Finance Act, 2001,²¹⁵ the liability for the offences under the Act was increased to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or both.²¹⁶

The Act was further amended by the Statute Law (Miscellaneous Amendments) Act, No. 2 of 2002, which added the possession of falsely described goods to the offences under Section 3. Further the Act prohibited the importation of goods which bore the name of any manufacturer in Kenya, unless, there was a direct indication as to where the goods originate from. It also broadened the definition of trade description to incorporate descriptions involving existing patents, trade mark licences or copyright licences.

The Act recognised counterfeiting as a crime through expanding the definition of false trade description to include, ‘any mark made to so nearly resemble a registered trade mark or monogram as to be likely to deceive.’²¹⁷ The protection encompassed: figures, words, marks, colours, arrangement or combination, whether including a trade mark or not, or any name or initials which can lead a person to have confidence that the goods are manufactured or belong to a person when they do not.²¹⁸ The liability for falsifying trade description was increased to a fine not exceeding two million shillings, through the Finance Act, 2003.²¹⁹

Although the Act does not define geographical indications, the description of the offence under section 7 of the Act matches the definition of GIs. To define GIs, Ben Sihanya harmonises the definitions from WIPO²²⁰ and the TRIPS agreement.²²¹ He basically describes them as signs or names that are attributed to a certain origin or geographical location.²²² Further, he gives examples of Kenyan products that can be protected as GIs. For instance,

²¹⁴ *Ibid*, Section 15 of the Trade Descriptions Act, 1977.

²¹⁵ Finance Act, No. 6 of 2001.

²¹⁶ See Section 64 of the Finance Act, 2001

²¹⁷ Section 9(1)(e) of the Trade Description Act 1977.

²¹⁸ *Ibid*, section 9(2).

²¹⁹ Finance Act No. 15 of 2003

²²⁰ WIPO describes GIs as, “A geographical indication (GI) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. To function as a GI, a sign must identify a product as originating in a given place.” See WIPO Website, ‘Geographical Indications’ (*WIPO (World Intellectual Property Organization)*) <https://www.wipo.int/geo_indications/en/index.html> (accessed 21 July 2022).

²²¹ Under Article 22(1) of TRIPS, GIs are defined as: ‘indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.’

²²² Ben Sihanya (2016, 2020) *Intellectual Property and Innovation in Kenya and Africa: Transferring Technology for Sustainable Development*, Innovative Lawyering (IL) & Sihanya Mentoring (SM), Nairobi. Chapter 1: Nomenclature of IP innovation and Transfer of Technology, at 1-41.

mnazi (coconut palm wine, from Coastal Kenya).²²³ However, he acknowledges that there are no enabling laws to protect Kenyan GIs.

The Trade Descriptions Act defines a country of origin of goods as the country in which the goods last underwent a treatment or process resulting in a substantial change.²²⁴ The Act further prohibits dealing, handling or importation of the following two (2) categories: First, any goods to which there is applied a trade description which contains a direct or indirect reference to any country, town, or place other than the country, town, or place in which the goods were manufactured or produced. Second, any goods which bear the name of any manufacturer, dealer, or trader in Kenya, unless there is added to that name in a conspicuous manner, the name of the country in which such goods were made or produced and the name of the manufacturer of the goods in that country.²²⁵

So far, there has been no changes as to the offence meted from such crimes. The liability remains a fine of not more than two million shillings or to imprisonment for a term not more than five years, or to both such fine and imprisonment.²²⁶

2.4.2.3 Penal Code

The Penal Code²²⁷ defines a trade mark as a mark other than trademark registered under the Trade Marks Act (Cap 506), lawfully used by any person to denote any chattel to be an article or thing of the manufacture, workmanship, production, merchandise or of any peculiar or particular description made or sold by such person; or any mark or sign which in pursuance of any law in force for the time being relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provision of such law.²²⁸

²²³ Ben Sihanya, 'Integrating Intellectual Property, Innovation, Transfer of Technology and Licensing in Kenya and Africa,' *WIPO-WTO Colloquium Papers: 2018 Africa Edition* <https://www.wto.org/english/tratop_e/TRIPS_e/colloquium_papers_e/2018_african/chapter_1_2018_african_edition_e.pdf> (accessed 7 June 2022).

²²⁴ Section 27 of the Trade Descriptions Act 1977.

²²⁵ *Ibid*, Section 7 of the Trade Descriptions Act 1977.

²²⁶ *Ibid*, section 15 of the Trade Descriptions Act 1977.

²²⁷ Penal Code, Chapter 63 of the Laws of Kenya.

²²⁸ Section 380 of the Penal Code.

The Code makes forging and unauthorised application of the forged or counterfeited trade mark, a misdemeanour. Any person convicted of the crime is also required to forfeit the goods and the instruments of forgery to the state.²²⁹

2.4.3 Computer Misuse and Cybercrimes Act, 2018

This Act²³⁰ establishes the offences associated to computer systems. In relation to the protection of IP, the Act defines and criminalises cybersquatting through prohibiting the intentional use registered Trade Marks without prior consent of the owner.²³¹ Under the Act, cybersquatting includes acquiring of an internet domain name that counterfeits a registered trademark or name without the IPR holders' authorization. The acquisition has to be in bad faith purposing to profit, misinform, defame, or deter other persons from registering the same.²³²

2.5 Summary of Findings, Conclusion and Recommendations on IP Legal

Framework that affects Trade in Kenya

Kenya has an elaborate legal framework for the protection and promotion of IPR. First, the Constitution of Kenya 2010 requires the state to promote and protect IPR of the Kenyan people. The question as to whether IPR can be regarded as human rights has elicited different views from scholars. Two, Kenya it has ratified international IP instruments such as the TRIPS agreement to facilitate trade.

Further, Kenya has statutes which acknowledge and a geared towards the protection of IPR. These include: Industrial Property Act 2001 which protects industrial property; Copyright Act 2001 which protects copyright and related works; the Anti Counterfeit Act 2008 which is the principal enforcement act for trademarks; and the Trade Descriptions Act which protects Geographical Indications; among others. Statutes such as the Copyright Act, 2001 have been subjected to amendments to make them conform to emerging issues such as digital piracy. Legislations from the East Africa Legislative Assembly (EALA) such as the East African Community Customs Management Act, 2004 (EACCMA) are also applicable.

²²⁹ *Ibid*, Section 381

²³⁰ Computer Misuse and Cybercrimes Act, No. 5 of 2018

²³¹ Section 28 of the Computer Misuse and Cybercrimes Act, 2018 makes cybersquatting a crime and any cyber squatter is liable on conviction to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or both.

²³² *Ibid*, Section 2.

CHAPTER 3

REASONABLE ENFORCEMENT OF IP LAW TO FACILITATE TRADE IN KENYA

3.1 Introduction to Reasonable Enforcement of IP Law to Facilitate Trade in Kenya

The spirit behind the promotion and protection of IPR is to facilitate trade in goods and services. However, enforcement of IPR should be done in the spirit of justice and within the confines of the law. Failure of the IPR Government agencies to identify players in the trade sector as stakeholders has in the past created an uproar from the business communities who are backed by local politicians and even state officials.

The motion against IPR has mainly been themed around the Government’s seizure and destruction of IPR infringing goods. The table below represents the value of goods the Government of Kenya through the Anti Counterfeit Authority seized and destroyed from the year 2016-2020.

Table 1: Value of goods the Anti Counterfeit Authority seized and destroyed

Year	Value of Goods Seized	Value of Goods Destroyed
2016	KSh. 240 million	KSh. 100 million ²³³
2018	KSh. 819.2 million.	KSh. 63.8 million ²³⁴
2019	KSh. 707.6 million ²³⁵	-
2020	KSh. 144 million	KSh. 114.4 million ²³⁶

²³³ Government of Kenya (Executive Office of the President), ‘4th Annual Report 2016 on Measures Taken and Progress Achieved in the Realization of National Values and Principles of Governance’ (Government Printer 2017) Presidential Reports 4

<<https://repository.kippra.or.ke/bitstream/handle/123456789/3485/4th%20Annual%20President%27s%20Report%20%202016.pdf?sequence=1&isAllowed=y>> accessed 2 November 2022.

²³⁴ Government of Kenya (Executive Office of the President), ‘6th Annual Report 2018 on The Measures Taken and Progress Achieved in The Realisation of National Values and Principles of Governance’ (Government Printer 2019) Presidential Reports 6

<<https://repository.kippra.or.ke/bitstream/handle/123456789/2877/L%20694%20%20ANNUAL%206TH%20PRESIDENT%27S%20REPORT%20BOARDROOM%20MONDAY%2025%20MARCH%202019%20%281%29.pdf?sequence=1&isAllowed=y>> accessed 2 November 2022.

²³⁵ Government of Kenya (Executive Office of the President), ‘7th Annual Report 2019 on Measures Taken and Progress Achieved in The Realization of National Values and Principles of Governance’ (Government Printer 2020) Presidential Reports 7

<<https://repository.kippra.or.ke/bitstream/handle/123456789/2878/L%20702%207TH%20REPORT%20OF%20NATIONAL%20VALUES%20AND%20PRINCIPLES%20OF%20GOVERNANCE%20-%20Final%20%281%29.pdf?sequence=1&isAllowed=y>> accessed 2 November 2022.

²³⁶ Government of Kenya (Executive Office of the President), ‘8th Annual Report 2020 on Measures Taken and Progress Achieved in The Realization of National Values and Principles of Governance’ (Government Printer 2021) Presidential Reports 8

<<https://repository.kippra.or.ke/bitstream/handle/123456789/3499/8TH%20ANNUAL%20PRESIDENT%27S%20REPORT%20ON%20NATIONAL%20VALUES%20AND%20PRINCIPLES%20OF%20GOVERNANCE%202020%20%286%29.pdf?sequence=1&isAllowed=y>> accessed 2 November 2022.

Vide a letter dated January 28, 2021, forty-one members of the legislative arm of the Government accused the Kenyan sitting President, Uhuru Kenyatta of failure to competently manage his government. Of major concern were the fourth and fifth paragraphs under the title, ‘Economic Ruin.’ The paragraphs read as follows:

“Today, economically speaking, Mt. Kenya is limping and groaning. People are crying bitter tears. In Nyamakima, Gikomba, Kamukunji and on Taveta, Kirinyaga and River roads, businesses have closed as besieged traders relocate to the rural areas to dress their wounds.”

Further, that:

“This personal and communal suffering is a direct result of the policies of Your Excellency’s administration. Import and export trade, which employed millions of traders from our region, was viciously disrupted when merchandise that formed the mainstay of countless enterprises was branded counterfeit. It was impounded, seized, destroyed, and set on fire. Our people literally saw their lives’ savings and lifetime investments go up in smoke.”²³⁷

Nearly eight months later, the Ministry of Interior’s Principal Secretary, Mr. Karanja Kibicho, whether on his own capacity or representing the Government, ordered ACA to cease seizing counterfeit goods from retailers.²³⁸ In his opinion, trade in counterfeit goods could only be fought if the importing consolidators were held accountable or teams were deployed to where the goods originated to deter counterfeit and substandard goods from being exported from those countries into Kenya.²³⁹ In his considered view, the Ministry of Interior PS, he believed that the fight against counterfeiting was detrimental to the Kenyan business environment and should thus be fought at the source.

Considering that the Principal Secretary (PS) was addressing the concerns of the Micro, Small and Medium Enterprises (MSMEs) the contrary is supported by the country’s legislation. Furthermore, the government believes that the Kenyan IP regime is, “weak and ineffective.” It identifies the need for improvement to facilitate enforcement.²⁴⁰

²³⁷ Benjamin Muriuki, ‘41 Mt. Kenya Leaders Accuse President Kenyatta of Mismanaging his Administration, Insist BBI Unpopular’ (*Citizen tv.co.ke*) <<https://citizentv.co.ke/news/41-mt-kenya-leaders-accuse-president-kenyatta-of-mismanaging-his-administration-insist-bbi-unpopular-5099833/>> (accessed 16 August 2021).

²³⁸ Hudson Gumbihi, ‘State Trains its Guns on Agents who Import Fake Merchandise’ *Standard* <<https://www.standardmedia.co.ke/business/news/article/2001420651/state-trains-its-guns-on-agents-who-import-fake-merchandise>> accessed 22 August 2021.

²³⁹ Hudson Gumbihi (2021) “State Trains its Guns on Agents who Import Fake Merchandise,” *Standard*, at <<https://www.standardmedia.co.ke/business/news/article/2001420651/state-trains-its-guns-on-agents-who-import-fake-merchandise>> (accessed 22 August 2021).

²⁴⁰ Government of Kenya (Ministry of Information Communication and Technology), *The Kenya National ICT Masterplan: Towards a Digital Kenya* (Ministry of Information Communication and Technology 2014) <<https://repository.kippra.or.ke/handle/123456789/1724>> accessed 2 November 2022.

Significantly, the MSMEs through trade play a vital role in the economic growth and in developing countries. However, the sector is suffering from factors such as corruption, poor infrastructure, and lack of funds.²⁴¹ Moreover, most MSMEs in Kenya suffer due to lack of timely access to finance or lack of financing in general.²⁴²

In light of the foregoing, this chapter discusses whether the enforcement of IPR fosters or cripples business establishments in Kenya. It addresses the political paradox of enforcement of IP laws vis a vis protection of the MSMEs. It examines the TRIPS agreement as the standard of IP enforcement and analyses Kenyan legislations in line with it.

3.2 Principles of IPR Enforcement Under TRIPS and their Effects on Kenyan Trade

Under the TRIPS agreement, Kenya is under no obligation to set up more extensive measures than those set up by the agreement.²⁴³ It has a leeway to only protect IP if it is motivated by the benefits accrual to the protection of IPR. The benefits may include the promotion of technological innovation and the transfer, and dissemination of technology. The protection of IPR ought to be symbiotic between the producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.²⁴⁴

The TRIPS agreement also requires countries to adopt measures that are effective to prevent infringement of IP under the Agreement. The measures are to be enforced in a manner that does not hamper legitimate trade and to safeguard against IPR abuse.²⁴⁵ The measures are to be guided by the principles of fairness and equity. They ought not be unnecessarily expensive or complex or have unreasonable time limits or unjustified delays. The Agreement also requires that IPR court decisions should only be made if the parties are accorded the right to fair hearing. Further, they are supposed to be timely; based on evidence, well-reasoned and in writing

²⁴¹ Hinh T Dinh, Dimitris Mavridis and Hoa Nguyen, 'The Binding Constraint on Firms' Growth in Developing Countries' (World Bank 2010) Policy Research Working Paper 5485
<<https://documents1.worldbank.org/curated/en/966571468137388733/pdf/WPS5485.pdf>> accessed 16 September 2021.

²⁴² Fredrick K Kidali, 'Access to Credit and Growth of Micro, Small and Medium-Scale Enterprises in Kenya' (PhD Thesis, University of Nairobi 2020)
<http://erepository.uonbi.ac.ke/bitstream/handle/11295/153898/Kidali%20F_Access%20to%20Credit%20and%20Growth%20of%20Micro%2C%20Small%20and%20Medium-scale%20Enterprises%20in%20Kenya.pdf?sequence=1&isAllowed=y> accessed 22 August 2021.

²⁴³ Article 1 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

²⁴⁴ Article 7 of the TRIPS Agreement

²⁴⁵ Article 41(1) of the TRIPS Agreement

3.2.1 Effects of the Criminal Liability Arising out of Kenyan IP legislation to Trade

TRIPS guides members to incorporate criminal procedures and penalties in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. To deter IPR infringement, the agreement suggests remedies such as imprisonment and/or monetary fines. The magnitude of the penalties should correlate with the gravity of the crimes committed. The agreement further recommends measures such as seizure, forfeiture, and destruction of the infringing goods and of any materials and implements predominantly used to commit the offence.²⁴⁶

Without any proper incentive such as elaborate transfer of technology, Kenya has adopted IP Statutes that make provisions that are beyond the basic standards required of Kenya by the TRIPS agreement. Statutes such as the EACCMA, and the Anti Counterfeit Act, 2008, do not provide a requirement or *mens rea*, which opens an interpretation that the offences are of strict liability. This interpretation has been adopted by the NCAJ,²⁴⁷ and its application could victimise traders.

In *Republic v. Erastus Maina*, Criminal Case No. 294 of 2017 (unreported),²⁴⁸ the Magistrates Court at Mumias adopted the same interpretation. At page 10, third paragraph of the judgement, the Court opined that Section 35(3)(b) of the Anti-Counterfeit Act “introduced strict liability on a person who is found in possession of goods regardless of knowledge that the goods are counterfeit.” The Statutes also confer too much and unmonitored power on the Government officials that could easily be misused and hamper trade. Further, some acts are considered offences even where they are not committed on a commercial scale.

3.2.2 Effects of East African Community IP Legislation on Trade

The EACCMA places criminal liability on the infringement of Intellectual Property. It lists counterfeit goods as prohibited goods and subjects them to the same penalties as other prohibited goods. First, it prohibits the acts of importation; exportation; putting on board for

²⁴⁶ Article 61 of the TRIPS Agreement

²⁴⁷ National Council for Administration of Justice, *Enforcement Manual to Combat Illicit Trade in Kenya* (2nd edn) National Council for Administration of Justice 2020 <https://kam.co.ke/kam/wp-content/uploads/2020/09/15.04.2020_2nd-Edition-Enforcement-Manual-to-Combat-Illicit-Trade-in-Kenya-1.pdf> accessed 20 January 2020

²⁴⁸ Anti-Counterfeit Authority, ‘Judgements’ (*Anti-Counterfeit Authority*) <<https://www.aca.go.ke/judgements/204-criminal-case-no-294-of-2017-magistrates-court-at-mumias-republic-vs-erastus-maina>> accessed 12 September 2022.

exportation; or carriage coastwise of prohibited goods. It describes ‘Carriage Coastwise’ as the transportation of goods from one partner state to another.²⁴⁹

Secondly it prohibits the unloading of prohibited goods after importation from foreign or partner states. Thirdly it criminalises acts of acquiring; possessing; keeping; concealing; or procuring for keeping prohibited goods. The Act makes the commission of any of such acts an offence. Any person who commits these offences, if found guilty, is strictly liable to imprisonment for a term not exceeding five years or to a fine equal to fifty per cent of the dutiable value of the goods involved, or both.²⁵⁰

In addition to the sentence and fine imposed, counterfeit, and other prohibited goods including their packaging are supposed to be forfeited.²⁵¹ There is no ground or room for mitigation. The acts amounting to offences need not be done wilfully or in the course of trade. The only person whose rights can be protected is the owner of the object of carriage who may not be aware that the goods were prohibited. Nevertheless, even being unaware places him at the mercy of the Commissioner of customs.²⁵² The Commissioner of Customs can either send the goods back or disposes them in a manner that he deems fit.

The Act is also discriminatory in nature. It makes owners of vessels, which weigh less than 250 tons to strictly forfeit their goods once they have been seized without an option of a fine. The option to pay fine is granted to the owners of vessels, which weigh more than 250 tons.²⁵³ This implies that this provision is only beneficial to the rich business persons or rich multinationals. It exposes citizens of the EAC to financial loss without any form of mitigation. Although meant to prohibit trade in counterfeit and other prohibited goods, the EACCMA can have the effect of killing business start-ups for low income earning importers.

3.2.3 Effects of the Anti-Counterfeit Act, 2008 on Trade in Kenya

This is by far the most contentious IP legislation within the Kenyan jurisprudence. It establishes the Anti-Counterfeit Authority,²⁵⁴ the primary body to prohibit trade in counterfeit goods. Section 32 of the Act establishes the offences while Section 35 provides for penalties. Although the first seven offences under Section 32 of the Act are draconian if they are to be construed as strict liability offences, some of the offences introduced by the Statute Law

²⁴⁹ Section 97 of EACCMA

²⁵⁰ Section 200 of EACCMA

²⁵¹ Section 210 of EACCMA

²⁵² Section 211 of the EACCMA

²⁵³ *Ibid.*

²⁵⁴ Section 3 of the Anti-Counterfeit Act, 2008.

(Miscellaneous Amendments) Act, 2018 to the Act seem more unreasonable, as discussed below.

3.2.3.1 Recordation of Imported Goods in Kenya

The Act makes it compulsory for Trade Marks, copyrights, trade names or any other form of IPR relating to goods subject to importation into Kenya to be recorded with ACA.²⁵⁵ It makes the importation of goods whose subsisting IP has not been recorded with ACA an offence.²⁵⁶ The subsidiary legislations pursuant to this provision, the Anti-Counterfeit (Recordation) Regulations, 2021, give the importers the responsibility of ensuring that IPR related to goods imported for commercial purposes are recorded.²⁵⁷ Moreover, if the importer is not a registrant, he or she has to notify the Authority of their intention to import the goods.²⁵⁸

The Recordation process affects trade in three (3) ways. First, making recordation compulsory to international IPR holders implies double registration with both the ACA and other registration bodies such as KIPI and KECOBO. Second, the registrants (IPR holders or their agents) must pay another fee to ACA, which fundamentally goes against the nature of reducing tariffs in international trade. The recordation process therefore increases a burden both to the IPR holder and the importer. Third, since the Act or Regulations makes no provisions as to unregistered IPR, importation of goods that are unprotected would be a crime.

This reduces the variety of goods that can be available to the Kenyan population because only recorded goods can be imported without being seized and destroyed. Four, it confers advantage to Western multinationals as opposed business entities from other regions which export goods whose IPR is not recognised in Kenya. This goes against the most favoured nation principles of the WTO agreements.

In 2020, Kenya was ranked 56 in the World Bank's ranks for ease of doing business.²⁵⁹ Recordation is likely to affect the country's performance index since it increases the fees payable and the amount of time needed for importation of good. Importers might also be distressed and lose the market for commodities, which are not recorded with the Authority.

²⁵⁵ Section 34B (1) and (12) of the Anti-Counterfeit Act, 2008.

²⁵⁶ Section 32(j) of the Anti-Counterfeit Act, 2008.

²⁵⁷ Regulation 3(3) of the Anti-Counterfeit (Recordation) Regulations, 2021.

²⁵⁸ Regulation 4 of the Anti-Counterfeit (Recordation) Regulations, 2021.

²⁵⁹ World Bank Group, 'Economy Profile of Kenya, Doing Business 2020 Indicators' (World Bank) 2020 <<https://www.doingbusiness.org/content/dam/doingBusiness/country/k/kenya/KEN.pdf>> accessed 16 September 2021.

This could also have the implication of driving business to other less bureaucratic East African Countries.

The Act further established a certification mark in the form of an Anti-Counterfeit Security Device to be applied on the goods, at a fee if, the importer meets the recordation requirements.²⁶⁰ The designed certification mark is to be found in the Second Schedule of the Act, which does not exist. Any goods imported into the country, which do not bear the Anti-Counterfeit Security Device, are subject to seizure and destruction.

3.2.3.2 Importation of Unbranded Goods in Kenya

The Act prohibits the importation of unbranded goods, which do not constitute raw materials.²⁶¹ The best intention derived from this provision could be that unbranded goods could be branded with counterfeit marks or colouration within our borders and become counterfeit goods. Nevertheless, why limit the Kenyan importers from dealing in unbranded goods? The Act has gone to the extent of predicting what could be counterfeited even before counterfeiting occurs. This in turn limits the scope of legitimate trade. It places a burden on every foreign manufacturer to register their brands with the relevant IPR registration entities, lest their goods would be barred from sold traded in Kenya.

3.2.3.3 Declaration of Quantity of IPR in Imported Goods in Kenya

Under the Anti-Counterfeit Act, 2008, importers ought to rightfully declare the quantity or the IPR subsisting in any goods being imported into the Kenya. Failure to declare or false declaration is an offence.²⁶² This essentially makes the whole process of importation and clearance of goods tedious. The declaration of IPR subsisting in imported goods would require Kenyan importers to procure certificates of IPR registration of every product to be imported. Most manufacturers would be adamant to share such information with Kenyan importers. Considering that the world is embracing digital markets, the importers may not easily be in contact with the manufacturers. Therefore, requiring the declaration of every product would reduce the bargaining power and increase the time and cost of importation.

3.2.3.4 Transit through and export of Counterfeit Goods in Kenya

The Act prohibits among other acts, the export and shipment of counterfeit goods through Kenya.²⁶³ Although this is enshrined under the TRIPS agreement, TRIPS also explains the

²⁶⁰ Section 34B (13) of the Anti-Counterfeit Act, 2008.

²⁶¹ Section 32(k) of the Anti-Counterfeit Act, 2008.

²⁶² Section 32(l) and (m) of the Anti-Counterfeit Act, 2008.

²⁶³ Section 32(f) of the Anti-Counterfeit Act, 2008.

provision to be understood that parties are under no obligation to apply such provisions to goods to be used in another nation, with the consent of the IPR holder or to goods in transit or meant for export.²⁶⁴

Being well designated in East Africa, Kenya links countries such as Uganda, Democratic Republic of Congo (DRC), Rwanda, Burundi,²⁶⁵ Ethiopia and South Sudan to the Indian Ocean.²⁶⁶ Such countries expect smooth movement of cargo from the Kenyan port to their country. Setting up measures that could impede the movement of cargo in the name of counterfeit or pirated goods may create a barrier in trade. These countries might prefer to use an alternative route such as the Central Corridor.

3.2.3.5 Effects of Penalties under the Anti Counterfeit Act, 2008 on Trade

Under the Anti Counterfeit Act, 2008, a first offender is liable, to imprisonment for a term not exceeding five years, or to a fine, of not less than three times the value of the prevailing retail price of the goods, or both. For a second or subsequent offender, the penalty increases to imprisonment for a term not exceeding fifteen years, or to a fine, not less than five times the value of the prevailing retail price of the goods, or both.²⁶⁷

The Act also commands the court to order the forfeiture of any benefit or monetary advantage gained by the accused whether convicted or acquitted, upon the application of the Director of Public Prosecution. The benefit or monetary advantage is to be forfeited to ACA within three months, failure to which ACA is mandated to recover the said benefit from the suspect.²⁶⁸ If we walk with the presumption that the NCAJ's *Enforcement Manual to Combat Illicit Trade in Kenya* is the conclusive guide in the enforcement of IPR in Kenya, then these penalties are not proportionate to the offences. Considering that most Kenyans MSMES start up on loans, subjecting the owners to fines and forfeiture of goods takes away the capacity of the institutions to grow and thus hampering trade.

3.2.3.6 Detention and Disposal of Seized Goods

The Anti Counterfeit Act, 2008, mandates the Government to deal with seized goods in three ways. First, the Act authorizes ACA to detain seized goods for a period of three months.

²⁶⁴ See footnote 13 under Article 51 of the TRIPS Agreement.

²⁶⁵ These countries are linked through the Northern Corridor see Aidan Buys, 'China, Japan, India and the East Africa Blue Economy' (2018) Policy Insights South African Institute of International Affairs <<https://www.africaportal.org/publications/china-japan-india-and-east-africa-blue-economy/>> accessed 10 May 2022.

²⁶⁶ *Ibid.*

²⁶⁷ Section 32(1) of the Anti-Counterfeit Act, 2008.

²⁶⁸ Section 32(5) of the Anti-Counterfeit Act, 2008.

During the said period, ACA might decide whether to prefer charges against the accused person or release the goods (less any portion utilised for testing and analysis) to the owner.²⁶⁹

Second, if the person is charged in a court of law, the goods will remain in the custody of the Government until the case is decided. Third, if the accused person is convicted, then the court may order the goods to be forfeited to the state to be destroyed at the suspect's expense. However, if the accused person is acquitted but the court is convinced that the goods are counterfeit, then the goods have to be forfeited to the state to either be destroyed or disposed of in a manner that the court deems fit.

The three-month detention period, before charges are preferred, implies the stagnation of a business, even when the goods are genuine. Despite the three-month period being unreasonable on a scale of trade facilitation, there is no time limit as to the prosecution of the offences under the Act. This means that the goods can be detained for unspecified time and even upon the conclusion of the case, the fate of the goods is not bound to the fate of the accused business person. The goods can to be forfeited even when the case against accused person has not been proven beyond reasonable doubt.

3.2.4 Effects of the Copyright Act, 2001 on Trade in Kenya

There are several impacts of copyright regulation and enforcement in Kenya on trade. Some of these effects are discussed below:

3.2.4.1 Intellectual Property Agents and Brokers

The enforcement of the Copyright Act, 2001, affects trade in two ways. One, is the trade in services and goods embodying the copyrighted products that holders of copyright ought to benefit due to their creativity. Two, is the use of such creativity by business entities to foster their businesses. Therefore, there should exist a symbiotic relationship between the holders and users of copyright. The business entities should use the copyrighted goods and services to attract more clients and in turn, pay the copyright holders in form of royalties. The relationship is however not ideal because the Copyright Act, 2001, as in many other jurisdictions such as Brazil and South Africa, has embraced CMOs.

Being owners of IPR, it would only make sense that holders would benefit more from the IP they create. This is however far from the truth since the CMOs, agents and brokers may not be fully accountable to the IPR holders. They have been accused of extorting traders and

²⁶⁹ Section 28(1) of the Anti-Counterfeit Act, 2008.

failing to act in the best interest of the IPR holders. Most of them benefit more from the enforcement of the IPR than the holders.²⁷⁰

This is partly because they have a proper access to the local agencies than local or international IP holders and are more conversant with IP enforcement than the local IPR holders. With a closer relationship with the Authorities and IPR infringing suspects, the agents and brokers can easily negotiate with the suspects without engaging the IPR owner and remit minimal or no benefits.

3.2.1.1 CMOs under the Copyright Act, 2001

The Copyright Act establishes CMOs to collect and distribute royalties among its members. The CMOs are expected to have the necessary expertise to collect royalties on behalf of the IPR holders.²⁷¹ In Kenya, the CMOs licenced by KECOBO to exercise the statutory mandate that have been subject to public scrutiny include: the Kenya Association of Music Producers (KAMP), Performers Rights Society of Kenya (PRISK) and the Music Copyright Society of Kenya (MCSK). With the power to register and deregister the CMOs vesting in KECOBO, the relationship between the Government agency and the CMOs has been thorny due to IPR holders' and business owners' complaints.

3.2.1.2 IPR Holders Complaints

The media has been marred with artistes,' performers' and music producers' complaints on the royalties the three (3) CMOs have been distributing to them.²⁷² In 2016, the High Court declared Section 30A of the Copyright Act, 2001 unconstitutional because it only allowed royalties to be channelled through CMOs.²⁷³

The ugliness within the copyright world was broadly brought to light during the Covid 19 era.²⁷⁴ One of the most recent attempts to cure this was witnessed through KECOBO's press release dated February 6, 2020. In the release, KECOBO acknowledged concerns from the president of the Republic of Kenya, the public and artistes on mismanagement of Royalties

²⁷⁰ Ismaël Benslimane and Others, 'Intellectual Property Reform in the Laboratory' (2020) <<https://hal.archives-ouvertes.fr/hal-02794343/document>> accessed 20 September 2021.

²⁷¹ *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* ML HCCC No. 154 of 2009 [2009] eKLR

²⁷² Grace Kerongo, 'MCSK Returns to Collect Music Royalties after Dramatic Ejection' *The Star* (21 January 2019) <<https://www.the-star.co.ke/news/2019-01-21-mcsk-returns-to-collect-music-royalties-after-dramatic-ejection/>> accessed 18 September 2021.

²⁷³ *Mercy Munee Kingoo & Another v. Safaricom Limited & Another* [2016] eKLR, *Constitutional Petition 5 of 2016 - Kenya Law* [2016] National Council for Law Reporting (Kenya Law) (High Court of Kenya at Malindi).

²⁷⁴ Christine Nyaguthii, 'KECOBO move to Deregister CMOs "a win" for Artists – Uzalendo News' (*Uzalendo News*, 26 August 2021) <<https://uzalendonews.co.ke/kecobo-move-to-deregister-cmos-a-win-for-artists/>> accessed 18 September 2021.

by the CMOs.²⁷⁵ It further explained how these concerns had been addressed to create a fair and fraud free royalty collection management that ensured that those mismanaging royalties could be penalised.

The Board therefore directed the CMOs to undertake measures like conducting a forensic audit, use of a government approved ICT system for collection, distribution and management of royalties, joint collection of royalties and deposit of the income into a KECOBO-controlled account. 70% of the total collections was to be distributed as royalties to the members while 30% used as CMOs costs. The Directorate of Criminal Investigations (DCI) was mandated to vet the managers of the CMOs' boards and the CMOs were expected to share with KECOBO their respective databases for the creation of a repository of creative works. The Board also recommended that the directors of the CMO's salaries be harmonised with standards established by the Salaries and Remuneration Commission.²⁷⁶

While addressing the Standing Committee on Labour and Social Welfare, KECOBO through its executive director informed the public that the forensic audit had revealed that the CMO directors had received more than KES 1,000,000/= as sitting allowances while dispatched nothing to the members.²⁷⁷ Further, it was revealed that broadcast royalties owed musicians and other creators amounted to US\$9.3 million.²⁷⁸

Vide a press release dated August 24, 2021, KECOBO opted to deregister the three CMOs for failure to meet the requirements set out in the April 2021 license.²⁷⁹ Some of the areas of noncompliance included diversion of the royalties collected to accounts that were not monitored by KECOBO, only distributing 35.9% instead of 70% of the royalties collected and failure to engage the public and creating awareness of the KPM system.²⁸⁰

²⁷⁵ Edward Sigei (2020) "Licensing of Collective Management Organisations (CMOs) for 2020," 6 February 2020, at <https://copyright.go.ke/sites/default/files/downloads/Press%20release%20CMO%20licenses%202020.pdf> accessed 18 September 2021.

²⁷⁶ *Ibid.*

²⁷⁷ Stevens Muendo (2021) "Rot in Artiste's Bodies Exposed as Stakeholders Face Senate," July 2021, *Standard Entertainment and Lifestyle*, <<https://www.standardmedia.co.ke/entertainment/the-standard/2001417585/rot-in-artistes-bodies-exposed-as-stakeholders-face-senate>> accessed 19 September 2021.

²⁷⁸ Yonela BMA, 'Kenya: Enforcement Of Copyright Laws Is Still Very Much Contentious' (*Broadcast Media Africa (BMA)*, 16 July 2021) <<https://broadcastmediaafrica.com/kenya-enforcement-of-copyright-laws-is-still-very-much-contentious>> accessed 19 September 2021.

²⁷⁹ Edward Sigei, 'Kenya Copyright Board (KECOBO) Deregisters KAMP, PRISK AND MCSK' (24 August 2020) <<https://copyright.go.ke/sites/default/files/downloads/Press%20release%20CMOs%20deregistered.pdf>> accessed 18 September 2021.

²⁸⁰ *Ibid.*

The wrangles between the CMOs and KECOBO affects the Kenyan aspects of trade in services. Kenyan Copyright holders have not gained much from the royalties collected by the CMOs. The industry was expected to be self-sustaining especially during the coronavirus 2019 (COVID 19) pandemic, since gatherings were prohibited. Failure to remit royalties to the artistes discourages creativity.

3.2.1.3 CMOs Complaints in Kenya

Interestingly, CMOs have also blamed KECOBO for their failure to properly serve their clients. Some of these complaints involved the authorization of Digital Rights Management Limited (DRM), Expedia Management Limited and Music Publishers Association of Kenya (MPAKE) to collect royalties on caller ring back tones (SKIZA tunes) and copyright and related works without being accountable to MCSK's members.²⁸¹ Further, KECOBO coerced the Board of Directors of MCSK, KAMP and PRISK to have Liberty Afrika Technologies Limited in their employ, yet the organisation was prominent in mismanaging and misrepresenting their royalties from Safaricom Ltd.²⁸²

Opposing a free self-registration system to be created by the World Intellectual Property Institute (WIPO), KECOBO insisted in engaging the services of Liberty Afrika Technologies Limited, which must be paid a 2% monthly commission on royalties collected through the "self-licensing system."²⁸³ Moreover, the CMOs must procure the services of licencing agents to train their members on how to access the system.

3.2.1.4 Business Community Complaints on CMOs in Kenya

The CMOs and KECOBO have been subjected to public scrutiny because of the CMOs' mode of operation. There was an outcry by business persons that the CMOs have constantly collected royalties from them and in extreme situation use goons and police officers to make unwarranted arrests and destroy property.²⁸⁴ Other persons also masqueraded as members of the CMOs and extorted traders.²⁸⁵

²⁸¹ MCSK, 'Music Copyright Society of Kenya's Statement on Kenya Copyright Board's Long Standing Unfair and Ill Intended Regulation of Collective Management Organizations.' (2 August 2021) <http://mcsk.or.ke/wp-content/uploads/2021/08/MCSK-KECOBO_Statement_Press-Release_03Aug21.pdf> accessed 19 September 2021.

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ Chemutai Goin, 'War on MCSK Royalties Escalates as Hoteliers Cry Foul' *Citizen tv.co.ke* (Kenya, 30 August 2019) <<https://citizentv.co.ke/news/war-on-mcsk-royalties-escalates-as-hoteliars-cry-foul-274725/>> accessed 19 September 2021.

²⁸⁵ Boniface Gikandi, 'Uproar over Group Masquerading as MCSK Officials Terrorizing Murang'a' *Standard Entertainment and Lifestyle* (Kenya, 2020)

The enforcement procedures adopted by the CMOs create a hostile environment of trade within the country. The CMOs' agents have been accused of vandalising property and using unreasonable force in certain circumstances. This infers abuse of IPR and based on the headlines, investors might refrain from opening businesses in Kenya.

3.2.1.5 Copyright (Collective Citation Management) Regulations, 2020

The CMOs operated with minimal supervision until the enactment of Copyright (Collective Citation Management) Regulations, 2020. The regulations lay out a proper legal framework for the registration, deregistration, and management of the CMOs. They also incorporate the constitutional principle of public participation in the management and registration of the CMOs. The regulations also approve the appointment of inspectors to investigate the operations of the CMOs within three months.

3.3 Effects of IPR Abuse on Trade

Although nothing precludes the IPR holder from pursuing civil claims against persons who infringe on their IP, most IPR holders would prefer the criminal system because of its strict liability nature. They stand to benefit more because the burden of proof is lower and there is an avenue of Alternative Dispute Resolution (ADR) or plea bargain that they can use to be compensated. Traders also tend to be vulnerable when criminal charges are preferred and thus opt to have the matters settled out of court, thus paying hefty penalties.

The Anti Counterfeit Act, 2008 gives the ACA's Executive Director the power to approve ADR requests by the suspect who is thereafter to pay a fine not exceeding the statutory requirement under the Act.²⁸⁶ To prevent out of court settlement without the involvement of the Authority, the regulation only confers validity to any agreement reached between the suspect and the IPR holder if the agreement is in concurrence with the Authority.²⁸⁷

For the suspects who might be adamant in having the matter settled through ADR, there is still another avenue in plea bargaining that IPR holders can abuse. Therefore, the criminal nature of IP can be a tool to threaten, harass and extort traders who deal with pirated or counterfeit goods. Most of them would prefer settling through a dignified process rather than being branded a criminal even in a case whose likelihood of winning is minimal.

<<https://www.standardmedia.co.ke/entertainment/news/2001380715/uproar-over-group-masquerading-as-mcsk-officials-terrorizing-muranga>> accessed 19 September 2021.

²⁸⁶ Anti-Counterfeit Act, 2008, Section 34A.

²⁸⁷ Anti-Counterfeit Regulations, 2010, Regulation 20A (3)

3.4 Effects of IPR on Trade in and Access to Medicine

Protection of IPR has created a dilemma in public health. By virtue of being private rights,²⁸⁸ WTO countries have adopted IPR to promote international trade and investment. To private citizens, they encourage innovation, on the part of patents and creativity on the part of copyright. Although WTO member states have adopted the TRIPS agreement, the protection of intellectual property rights during the Covid 19 exposed the assortment of problems in trade and access to medicine.

The inability to conduct R&D and come up with vaccines and medicines extensively crippled the trade sector since the available measure was lockdowns. In compliance with the TRIPS agreement, member states fulfil their obligations to protect patented pharmaceutical products.²⁸⁹ The local registration of IP in the member states give the companies including multinationals the monopoly to enjoy the patent of the product with the exclusion of all others.²⁹⁰ The companies gain the locus to institute legal actions against persons who may infringe on their patent rights.

Although the Covid 19 pandemic exposed the fact that development of vaccines could be costly for Developing and Least Developed Countries under a strict IP regime,²⁹¹ Sihanya attests that these countries were fearful even before.²⁹² This is why the WTO acknowledged the importance of implementing and interpreting the TRIPS agreement in a way that supports the public health and supports both access to existing medicine and R&D.²⁹³ There was emphasis that the TRIPS agreement should not be used in a manner that prevents the protection of public health and access to medicine.²⁹⁴ The agreement also ought to be read in light of the objective and purpose.

In questioning the effects of the Anti-Counterfeit Act, the court in *PAO & 2 Others v. Attorney General; Aids Law Project (2012)*²⁹⁵ held that the right to access life, dignity and

²⁸⁸ See the Preamble of the TRIPS Agreement.

²⁸⁹ Nusaraporn Kessomboon and others, 'Impact on Access to Medicines from TRIPS-Plus: A Case Study of Thai-US FTA' (2010) 41 Southeast Asian Journal of Tropical Medicine and Public Health 667.

²⁹⁰ Cédric Durand and William Milberg, 'Intellectual Monopoly in Global Value Chains' (2020) 27 *Review of International Political Economy* 404.

²⁹¹ Ronald Labonte and Mira Johri, 'COVID-19 Drug and Vaccine Patents Are Putting Profit before People' (2020) 5 *The Conversation*.

²⁹² Ben Sihanya, 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya' in Peter Gallagher, Patrick Low and Andrew L Stoler (eds), *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge University Press 2005).

²⁹³ Paragraph 17 of the Doha WTO Ministerial 2001: Ministerial Declaration 2001 (WT/MIN (01)/DEC/1)

²⁹⁴ Paragraph 4 of the Doha Declaration on the TRIPS agreement and public health 2001 (WT/MIN(01)/DEC/2).

²⁹⁵ *PAO & 2 Others v. Attorney General; Aids Law Project (Interested Party)* [2012] Eklr, Petition 409 of 2009.

health must take precedence over the intellectual property rights of patent holders. Further although IPR must be protected, the protection must give way to the fundamental rights of the citizens. This fear materialized on the onset of the COVID-19 pandemic.

On two instances, the countries raised this concern to the Council for TRIPS. The first outcry was from India and South Africa with the subject line, “Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19.”²⁹⁶ About seven months later, 60 more countries expressed the same concern to the council.

There have however been different schools of thought as to whether a pandemic such as the Covid 19 can be an excuse to forego the application of the TRIPS agreement. One cadre believes that enforcement of intellectual property rights can be set aside in the interest of the public.²⁹⁷ Another sect believes that intellectual property rights are private in nature and should thus be protected at all cost. This category believes that if the Governments want to excise dominion over patents, then they should do so as through lease and license agreements. The issue of concern is that a pandemic of the Covid 19 magnitude does not only derogate the environment of trade but can put a whole economy on a stand still.

3.4.1 Argument in Against IP protection during Pandemics

There are several theoretical and conceptual debates by critics against the nature and extent of IP protection during the global pandemic. They focus under this section was the emergence and spread of the coronavirus 2019 (COVID-19) pandemic.

3.4.1.1 Historical perspective of IP in Developing and Least Developed Countries

Most Sub Saharan African (SSA) countries still find the concept of private ownership of property foreign. As earlier observed, the Traditional African Community regime of ownership allowed property, including Intellectual Property to be owned communally.²⁹⁸ Creative arts and inventions were affiliated with the whole tribe except where services were

²⁹⁶ Gerhard Erasmus, ‘The Proposed TRIPS Waiver to Respond to the COVID-19 Pandemic - Tralac Trade Law Centre’ (7 June 2021) <<https://www.tralac.org/blog/article/15235-the-proposed-TRIPS-waiver-to-respond-to-the-covid-19-pandemic.html>> accessed 26 August 2021.

²⁹⁷ Christopher Stothers and Alexandra Morgan, ‘IP and the Supply of COVID-19-Related Drugs’ (2020) 15 *Journal of Intellectual Property Law & Practice* 590.

²⁹⁸ Darrell A Posey, Graham Dutfield and International Development Research Centre (Canada), *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (IDRC 1996). 60

delivered., most developing countries were reluctant to adopt the TRIPS agreement and thus had to be convinced.²⁹⁹

To convince the developing countries, the IPR champions had to promise that there would be stipulation on technology transfer to create a symbiotic environment in the enforcement of IPR.³⁰⁰ In adopting the TRIPS agreement, Developing Countries did not foresee a pandemic with the magnitude of the Covid 19. The pandemic has made economies of most countries in the world bleed. Based on the history of IP protection in Kenya, this division argues that it is high time to revise the protection of IP to protect lives and boost trade.

3.4.1.2 Access to Medicine during Pandemics

In as much as protection of intellectual property rights could encourage innovation, research, and development, the cost incurred by the pharmaceutical companies is always projected on to the consumers. Patent holders are entitled to payment of royalties under the TRIPS agreement, which significantly increases the cost of medicines.³⁰¹ If we take an example of the East African Region, where 60% of the people in SSA live, nearly two thirds of the people live below the poverty line.³⁰² This means that commercialization of Covid 19 medicines and medical equipment could render it impossible to contain the virus.

It has been observed that IP has the capability to suppress invention, innovation, access, and development especially in the COVID-19 pandemic season.³⁰³ This is because the enforcement of intellectual property rights has made it difficult for developing and least developed countries to access diagnostics, cures, and vaccines, or relevant technologies, and equipment or facilities.³⁰⁴ This implies that people from poor countries will not have prompt

²⁹⁹ Adronico O Adede, 'Origins and History of the TRIPS Negotiations,' in Christophe Bellmann, Graham Dutfield and Ricardo Meléndez-Ortiz (eds), *Trading in Knowledge: Development Perspectives on TRIPS, Trade, and Sustainability* (Earthscan 2003).

³⁰⁰ *ibid*

³⁰¹ Ben Sihanya, 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya' in Peter Gallagher, Patrick Low, and Andrew L. Stoler (eds), *Managing the Challenges of WTO Participation* (Cambridge University Press, London 2005).

³⁰² R. Andres Castaneda Aguilar and others, 'March 2021 Global Poverty Update from the World Bank' (16 March 2021) <<https://blogs.worldbank.org/opendata/march-2021-global-poverty-update-world-bank>> accessed 26 August 2021.

³⁰³ Parsa Erfani and others, 'Intellectual Property Waiver for Covid-19 Vaccines Will Advance Global Health Equity' (2021) 374 *BMJ* n1837.

³⁰⁴ Ben Sihanya (forthcoming 2022) "'Intellectual Property, Innovation, and Technology Transfer in Health in Kenya and Africa: Case of COVID-19 and Malaria' in Ben Sihanya (forthcoming 2022), *Intellectual Property and Innovation Law in Kenya and Africa: Cases and Materials (IPILKA 2)*, (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya) <<https://www.innovativelawyering.com/attachments/12282.pdf>> accessed 26 September 2021.

access to medical care and services due to the expense they can incur to fight the Corona Virus.

3.4.1.3 The TRIPS Agreement and Access to Medicine

Although TRIPS addressed the issue of compulsory licensing of IP in situations of emergencies, the makers did not anticipate a pandemic of the Covid 19 magnitude that could cripple the states' economies.³⁰⁵ Article 31 of the agreement allows member states to use IP without the consent of the IPR holder in situations of emergency and if the IPR holder is hesitant to consent. In such a situation, the property will only be used in the period of the emergency and cannot be used to generate profit.

States can however only exercise their rights to use the intellectual property without the consent of the right holder if the holder is to be paid enough remuneration based on the circumstances and the remuneration is to be calculated on the economic value of the authorization. This means that the IPR holders will still stand to benefit even when the states decide to use the property without authorization. The question is however if the benefits will come at the cost of the health of the people within the state.

3.4.2 Arguments for Protection of IP in Kenya

There are also arguments in support of the need for IP protection during pandemic in the Kenyan context as discussed substantively below.

3.4.2.1 Intellectual Property Rights are Private

The persons in this section believe that there is no reason to lift the protection of IPR since IP are just property like physical property. They argue in the context of land, that it can never be compulsorily acquired without just compensation, whether in crisis or not. They also hide behind the fact that there has been no substantial proof that COVID-19 hampered the access to materials essential to fight the COVID-19 pandemic.³⁰⁶

One of the core issues behind the protection of intellectual property is to foster innovation and creativity. Most companies invest millions towards the inventions and if they believe that where there would be no return for the investment, then they would be hesitant to invest.

³⁰⁵ Hilary Wong, 'The Case for Compulsory Licensing during COVID-19' (2020) 10 *Journal of Global Health* 010358.

³⁰⁶ Francis Gurry, 'Some Considerations on Intellectual Property, Innovation, Access and COVID-19' (24 April 2020) <https://www.wipo.int/about-wipo/en/dg_gurry/news/2020/news_0025.html> accessed 26 August 2021.

3.4.2.2 Priorities of Developing and Least Developed Countries

In developing and least developed countries, especially in sub-Saharan Africa countries, Protection of IP during the Covid 19 period should be the least of concerns. This is because poor political economy and governance already suppresses the countries.³⁰⁷ The Governments ought to invest in the manufacturing sector especially in areas of public health. The reliance on the West and investors has proven detrimental during the Covid 19 era.

Issues such as corruption play a significant role and have been dominant even during the times of Covid 19.³⁰⁸ If this is the case for a disaster-stricken region, there is a possibility even the compulsory licensing of IP may not be used for the benefit of the people. African states should therefore work on their internal mechanisms to build good governance before they can cry foul on IP protection.

In conclusions, the Covid 19 brought out the worst in almost every sector.³⁰⁹ It also exposed the systematic failure in many states since most of the countries were not prepared for such a crisis.³¹⁰ With forced drastic measures, most world economies suffered as business closed due to safety concerns or regulations set by the Governments.³¹¹ Therefore, there is need to ensure that IP does not facilitate the same problems it was meant to cure.³¹²

3.5 Kenyan IP Legislation on Trade in Medicine

The Pharmacy and Poisons Act initially criminalised the trade in goods that are labelled, packaged, or promoted in a manner that erroneous impression regarding its source.³¹³ Although not clear, this could mean the protection of GIs. In 2012, the Government of Kenya through the Ministry of Medical Services, Ministry of Public Health, and Sanitation,

³⁰⁷ Bernard Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring & Innovative Lawyering 2016).

³⁰⁸ Michael Oduor, 'Africa's Covid-19 Corruption that Outweighs Pandemic' *Africanews* (25 May 2021) at <<https://www.africanews.com/2021/05/25/africa-s-covid-19-corruption-that-outweighs-pandemic/>> (accessed 26 August 2021).

³⁰⁹ Debakshi Bora and Daisy Basistha, 'The Outbreak of COVID-19 Pandemic and Its Impact on Stock Market Volatility: Evidence from a Worst-Affected Economy,' *Journal of Public Affairs* 2623.

³¹⁰ Federico Cocolini and others, 'COVID-19 the Showdown for Mass Casualty Preparedness and Management: The Cassandra Syndrome' (2020) 15 *World Journal of Emergency Surgery* 1.

³¹¹ Dylan Balla-Elliott and others, 'Business Re-Opening During the COVID-19 Pandemic' (National Bureau of Economic Research 2020) Working Paper 27362 <<https://www.nber.org/papers/w27362>> (accessed 21 August 2021).

³¹² Daryl Lim, 'AI & IP: Innovation & Creativity in an Age of Accelerated Change' (2018) 52 *Akron Law Review* 813.

³¹³ Section 50A(e) of the Pharmacy and Poisons Act

adopted the Sessional Paper No. 04 of 2012 on National Pharmaceutical Policy.³¹⁴ The Policy proposed stringent measures to be adopted in the fight against substandard and counterfeit medicine.³¹⁵ This is due to the risks of, “prolonged ill-health, drug resistance and sometimes death,” the drugs pose to patients.

In 2019, the Health Laws (Amendment) Act, 2019,³¹⁶ amended the Pharmacy and Poisons Act by giving the Pharmacy and Poisons Board (PPB) additional roles. One of these roles is to monitor the market for the presence of illegal or counterfeit medicinal substances.³¹⁷ Apart from prohibiting trade in Counterfeit starting materials, the Pharmacy and Poisons Act also gives the PPB the power to retain or confiscate a medicinal substance that it has reasons to believe is a counterfeit or is illegally imported. In case the substance, is found to be counterfeit or illegally imported, the PPB is empowered to dispose it at the expense of the owner or importer.

The Anti Counterfeit Act broadens the scope of IPR it protects to include other doctrines of IPR such as patents and plant breeders right. Further, it expands the definition of Counterfeiting to include medicine. It describes counterfeiting in relation to medicine as, “the deliberate and fraudulent mislabelling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging.” This definition was the theme in the case of *PAO & 2 Others v. Attorney General; Aids Law Project (Interested Party)* [2012] eKLR and the United Nations Conference on Trade and Development has described it as unnecessary.³¹⁸

Further, the Sessional Paper No. 04 of 2012 on National Pharmaceutical Policy recognises the need to strike a balance between the protection of IPR and Trade with the Public Health considerations. The Policy notes that the broad interpretation of, “counterfeit Medicine” under the Anti Counterfeit Act can interfere with the importation and sale of generic medicines.

³¹⁴ Government of Kenya (Ministry of Medical Services, Ministry of Public Health and Sanitation, *Sessional Paper No. 04 of 2012 on National Pharmaceutical Policy* (Ministry of Medical Services, Ministry of Public Health and Sanitation 2012) <<https://repository.kippra.or.ke/bitstream/handle/123456789/1165/MPHS-and-MMS-Sessional-Paper-No-4-of-2012-on-National-Pharmaceutical-Policy.pdf?sequence=1&isAllowed=y>> accessed 2 November 2022.

³¹⁵ *ibid*

³¹⁶ No. 5 of 2019

³¹⁷ Section 3B(m) of the Pharmacy and Poisons Act

³¹⁸ United Nations Conference on Trade and Development (UNCTD), ‘TRIPS Flexibilities and Anti-Counterfeit Legislation in Kenya and the East African Community: Implications for Generic Producers’ (United Nations) <https://www.google.com/search?q=united+nations+Kenya+anti+counterfeit+act+medicine&rlz=1C1GCEB_enKE999KE999&oq=united+nations+Kenya+anti+counterfeit+act+medicine&aqs=chrome..69i57.15195j0j4&sourceid=chrome&ie=UTF-8> (accessed 29 September 2022).

3.6 Summary of Findings, Conclusion and Recommendations on Reasonable Enforcement of IP Law to Facilitate Trade in Kenya

Being a WTO developing Country, Kenya is eligible to Special and Differential Treatment (SDT) in adopting measures such as the enforcement of IPR. These measures are aimed at encouraging development of developing countries. SDT allocate more time to developing countries to implement agreements and commitments, encourage developing countries to undertake measures favourable to increase trade opportunities. They further obligate all WTO members to protect trade in developing countries and aid developing countries in infrastructural development.

However, Kenya fails to make use of the international privileges coffered to the country. It instead places itself within the ranks of developed countries and self-sustaining economies such as the United States of America and Japan. There was lack of public participation in the enactment of the legislations and complaints from the business community is a clear indication.

Most of the trade requirements imposed by the provisions of the Anti-Counterfeit Act can be described as non-tariff barriers under the East African Community Elimination of Non-Tariff Barriers Act, 2017. The Act which takes precedence in over national laws in which matters relate to elimination of non-tariff barriers describes non-tariff barriers” as “laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State, whose effect is to impede trade.”³¹⁹

It prohibits partner states from engaging in trade practises, custom procedures or creation of measures that amount to discrimination and non-tariff barriers.³²⁰ This could include the recordation process and the prohibition of importation of unbranded goods. Although the Act deters public officers or Government agencies from engaging in practises that: increase the cost of business; increases the time needed for clearance of cargo or certification; create a ban on market entry; restricts business with partner states or impedes trade, such practises can still be validated by the laws of the state.³²¹ The Act also recognises some of the non-tariff barriers recognised by the WTO.³²²

³¹⁹ Section 2 of the East African Community Elimination of Non-Tariff Barriers Act, 2017

³²⁰ *Ibid*, Section 5(1).

³²¹ *Ibid*, Section 6.

³²² Schedule of the Anti-Counterfeit Act, 2008,

Kenya should also make use of the Territoriality of IPR principal. The Territoriality of IPR principal mandates countries to decide the types of IP that can exist and be protected within their territory. Further, it can demand that the registration of IPR in a country be prerequisite to the promotion and protection of IPR within the territory of that country.³²³ Simply put, “IPR are territorial in nature.”³²⁴ However, the Anti Counterfeit Act protects both local and foreign IPR whether the IPR subsists in Kenya or in a foreign country.³²⁵ This implies that Kenyans ought to observe foreign IP laws³²⁶. This can be rectified to have eligibility for protection criterions as other countries such as the United States, have adopted.

Without downplaying the devastating effect IP infringement can have to the Kenyan economy, innocent manufactures also stand to lose in our legal regime. IP registration is not mandatory in Kenya. A person whose business is affected because his or her unregistered trademark is used by another person still has a recourse in common law. The issue is however the balance of rights. Registered intellectual property gives additional rights to the holder not just in the civil but also in the criminal realm. Kenyans who manufacture infringed products can be affected by the use of a trademark, which is subsequently protected by another person. Policy makers ought to take into consideration the IP level of information within the country.

On access to medicine, Kenya should acknowledge that the right to health should supersede the right to protection of intellectual property rights. The mechanisms present in the protection of consumers are enough. Kenya should not expound the definition of the protection at the peril of the Kenyan citizens. the protection of IP should be balanced with the need to protect Kenyans basic rights.

³²³ Lydia Lundstedt, *Territoriality in Intellectual Property Law: A Comparative Study of the Interpretation and Operation of the Territoriality Principle in the Resolution of Transborder Intellectual Property Infringement Disputes with Respect to International Civil Jurisdiction, Applicable Law and the Territorial Scope of Application of Substantive Intellectual Property Law in the European Union and United States* (Stockholm University 2016).

³²⁴ Patricia Mbote, ‘Monsanto vs. Schmeiser: Implications for Land Rights of Kenyan Farmers’ in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Foundation 2009).

³²⁵ Look at the Definition of ‘Counterfeiting under Section 2 of the Anti-Counterfeit Act, 2008.

³²⁶ Johanna Braun and Peter Munyi, ‘New Enforcement Mechanisms Challenge the Legality of Generics in the Name of Public Health: The Emergence of Anti-Counterfeiting Legislation in East Africa’ (2010) 18 *African Journal of International and Comparative Law* 238.

CHAPTER 4

COMPARATIVE ANALYSIS OF IP-TRADE REGIMES TO KENYA'S REGIME

4.1 Introduction Comparative Analysis of IP-Trade Regimes to the Kenya's Regime

An analysis of the IP regime in other jurisdictions demonstrates that not all countries surmise that a strong IP regime is imperative to economic development. At least not through their actions. Essentially, some of the most advanced economies, have no loyalty to the international obligations on protection of IPR within their borders.

Although they have strong regimes, the regimes are instrumental for protection of their local manufacturers. They pay less attention to foreign IPR and implementation of the international IP instruments. Having risen from the same ashes, the United States of America (the world's greatest IPR watchdog) has ironically not refrained from reprimanding such countries and putting them in an IPR protection watch list and imposing sanctions.³²⁷ However, historically, the USA itself only protected IPR where there was tangible benefit on the country and its citizens.

It is noteworthy that countries with advanced technology at some point deliberately refrained from implementing international IP instruments to gain market advantage. For instance, some scholars describe the USA as the leading IPR violator of the nineteenth century.³²⁸ In adopting maxims such as "we cannot protect IP until we have IP of our own," they learnt from their predecessors and did better.³²⁹ Countries like China, India and Brazil are accused of retaining the 'developing country' status to enjoy the Special and Differential Treatment (SDT) within the WTO.³³⁰

This gives them the leeway not to adopt immediate and stringent measures to protect IPR. They have been in the United States' IPR protection Watch List (WC) and reported to make insignificant progress in the implementation of IP laws especially through enforcement. For Africa, the adoption of stringent IP regime has been a necessity. Not wilfully, but

³²⁷ Ben Sihanya, 'Combating Counterfeit Trade in Kenya' in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung 2009).

³²⁸ Ben Sihanya (2016, 2020) *Intellectual Property and Innovation in Kenya and Africa: Transferring Technology for Sustainable Development*, Innovative Lawyering (IL) & Sihanya Mentoring (SM), Nairobi.

³²⁹ Mike W Peng and others, 'History and the Debate Over Intellectual Property' (2017) 13 *Management and Organization Review* 15.

³³⁰ Clara Weinhardt and Till Schöfer, 'Differential Treatment for Developing Countries in the WTO: The Unmaking of the North-South Distinction in a Multipolar World' (2022) 43 *Third World Quarterly* 74.

stipulations as to the protection of IPR has been conditions to most bilateral trade agreements with the developed countries.

Countries which champion for the protection of international IPR have a lot to lose to IPR infringement. For instance, the European Patent Office (EPO) and the European Union Intellectual Property Office (EUIPO) estimate that industries that have protected and use their IPR are responsible for 45% of annual GDP (EUR 6.6 trillion), 63 million direct jobs (29% of all jobs) and 21 million indirect jobs in the EU.³³¹

As Kenyan legislature and Policy makers strive to fulfil their international obligations under the World Trade Organization (WTO), World Intellectual Property Organization (WIPO), African Regional Intellectual Property Organization, (ARIPO) and other agreements, conventions and treaties, other developing countries are looking for ways to navigate through the treaties for the benefits of their citizens.³³²

Although they do not openly protest the enforcement of IP, they create measures that are likely to frustrate multinational companies who seek to operate within the country and enforce their IPR. This includes creating a very high cost of entry into the country, such as compulsory joint ventures to realise the benefits under the purview of Article 7 of the TRIPS agreement. Using countries with developed technology as the starting point, there is a lot that Kenyan Policy makers can learn to use the country's IP regime for technological advancements.

To understand the effects of enforcement of IPR on trade, this chapter analyses the two most predominant countries in all IPR and trade: the USA and China. The IP history of the USA is not any different from that of China. It is however imperative to understand why the USA now places a huge significance on the protection of IPR across the world. This Chapter brings out concerns on how the USA and China have historically enforced IPR under the precinct of, 'we will only enforce IP when we have IP to protect.' It touches on the trade war and threats of sanctions that have been predominant.

Further it investigates two of the most outstanding IP regimes in Africa: The Kingdom of Morocco and South Africa. It investigates how bilateral trade agreements have affected the IP regime in the Kingdom of Morocco, and how Kenya transplanted the South African IPR

³³¹ EPO, 'Intellectual Property Rights Strongly Benefit the European Economy, EPO-EUIPO Study Finds' <https://www.epo.org/news-events/news/2019/20190925.html> accessed 29 August 2022.

³³² Mike W Peng and others, 'An Institution-Based View of Global IPR History' (2017) 48 *Journal of International Business Studies* 893.

enforcement laws and eliminated the human rights aspects. It concludes with how Kenya can leverage its position to realise development.

4.2 IPR Enforcement and Trade in the United States of America

Kenya can also adopt best practices on IP protection from the United States of America (USA). Therefore, this section focuses on the practice of IP protection and enforcement in the USA.

4.2.1 Brief History of Enforcement of IPR in the United States of America

The United States of America's founding fathers recognised the importance of IPR and devised laws for their protection as early as the year, 1790.³³³ Learning from the European experience, they opted to create an IP regime that was more democratic. The protection of IP was nothing less grounded on virtues such as public welfare and their significance to technology and knowledge.³³⁴ They promulgated a constitution that gives the Congress the mandate to, "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."³³⁵

The country did not just blindly adopt the IP regime, it created different statutes for patents and copyright, which it developed separately based on the cost and benefits accrual.³³⁶ What is key to the development is that the US did not succumb to international pressure in protection of IP. In fact, it deliberately refused to acknowledge international copyright.³³⁷ Despite the hesitation to enforce international copyright for at least a century, the USA allowed the protection of patents in their regime.³³⁸

³³³ Joseph M Gabriel, 'Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909' (2018) 105 *Journal of American History* 129.

³³⁴ B Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (Cambridge University Press 2005).

³³⁵ US Constitution, Article I, Section 8, Clause 8.

³³⁶ *ibid*

³³⁷ B Zorina Khan, 'Does Copyright Piracy Pay? The Effects of U.S. International Copyright Laws on the Market for Books, 1790-1920' (National Bureau of Economic Research, February 2004) <<https://www.nber.org/papers/w10271>> accessed 6 November 2022.

³³⁸ B Zorina Khan and Kenneth L Sokoloff, 'The Early Development of Intellectual Property Institutions in the United States' (2001) 15 *Journal of Economic Perspectives* 233.

A good patent regime had the reputation of being instrumental in the creation of jobs and technology transfer.³³⁹ The benefits derived from the protection of patents included, incentives for innovation and investments within the country.³⁴⁰ Although patent protection is still considered as the cornerstone of the second industrial revolution from 1860 to 1914, the US Policy makers such as Thomas Jefferson were afraid that a strong patent regime would create monopolies and restrict competition.³⁴¹ This led to the creation of anti-trust laws.

Since the benefit was minimal in the protection of international copyright, the country disregarded concerns from scholars, both locally and across the Atlantic and locals were not penalised for copyright piracy. Non-protection of copyright was valuable to the US in two (2) ways. First, since copyright and related works were not monopolised, the sale of such work was competitive and thus the price was significantly low, and second, the citizens benefited from the knowledge.³⁴²

Being new, USA did not have much artistic work to protect as compared to European Countries such as Britain and France, which had enjoyed stability for centuries. They therefore allowed piracy of copyrighted works until the country itself had something to protect nearly a century later.

The United States voiced the need for international protection of IPR before the Marrakesh agreement. Through Congress, the country acknowledged that its citizens who relied on IPR were among the most advanced and competitive in the world.³⁴³ The country therefore identified the importance attached to an adequate and effective international IP regime to its country, absence of which would seriously harm the USA's IPR owners who operate overseas.³⁴⁴ To address the concern, the US Congress opted to devise a proper strategy to

³³⁹ Ha-Joon Chang, 'Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues' [2010] *Journal of Human Development* at <<https://www.twn.my/title2/IPR/pdf/ipr03.pdf>> accessed 3 October 2021.

³⁴⁰ *Ibid.*

³⁴¹ Peter Scott and Anna Spadavecchia, 'Fundamental Patents, National Intellectual Property Regimes, and the Development of New Industries in Britain and America during the Second Industrial Revolution' (2019) 60 *Jahrbuch für Wirtschaftsgeschichte / Economic History Yearbook* 181.

³⁴² B Zorina Khan, 'Does Copyright Piracy Pay? The Effects of U.S. International Copyright Laws on the Market for Books, 1790-1920' (National Bureau of Economic Research 2004) Working Paper 10271 <<https://www.nber.org/papers/w10271>> accessed 3 October 2021.

³⁴³ Omnibus Trade and Competitiveness Act of 1988, Section 1341(1)

³⁴⁴ *Ibid.*, Section 1303(a)

ensure international protection of IPR. The US Congress achieved this through the amendment of the Trade Act of 1974.³⁴⁵

The amendments within the Trade Act of 1974 warranted the United States Trade Representative to identify foreign countries that deny United States persons adequate and effective protection of IPR, or equitable market access.³⁴⁶ Further, the Trade Representative should then to list these countries as priority foreign countries in the Special 301 Report on Intellectual Property. The report would enlighten Policy makers on how to deal with countries which did not rightfully protect IPR. ³⁴⁷For instance, stringent measures such as sanctions would then be employed against such countries. ³⁴⁸ This has made the United States to earn the title, “foreign wolf” in the fight against IPR infringement.

In advising other countries, Harms Loice points out that:

“.....you will be spared if you accept our view of intellectual property law as the rule of law, enter into a Trade Related Aspects of Intellectual Property Rights Plus Agreement and abide by the Anti-Counterfeiting Trade Agreement (ACTA). Otherwise, we will battle you down with section 301 of the Trade Act, 1974.”³⁴⁹

This is further analysed below with specific reference to the practice in the United States of America (USA).

4.2.2 Protection of IPR and Trade Facilitation in the USA

The US Department of State estimates that IP incentive industries in the USA annually account for 38% of the GDP, 52% of the merchandise export, 27.9 million jobs and 46% of wage premiums. Further, the annual cost incurred from the IP crimes on the USA include: \$180 billion from theft of trade secrets; \$18 billion from pirated US software and \$29 billion

³⁴⁵ Ben Sihanya, ‘Combating Counterfeit Trade in Kenya’ in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung 2009).

³⁴⁶ Ben Sihanya (2016, 2020) *Intellectual Property and Innovation in Kenya and Africa: Transferring Technology for Sustainable Development*, Innovative Lawyering (IL) & Sihanya Mentoring (SM), Nairobi.

³⁴⁷ Sean M Flynn, ‘Special 301 and Access to Medicine in the Obama Administration’ (2010) 2 Intellectual Property Brief 5.

³⁴⁸ Y Kurt Chang, ‘Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries’ (1994) 15 *Northwestern Journal of International Law & Business* 206.

³⁴⁹ Louis TC Harms, ‘The Politics of Intellectual Property Laws’ <<https://repository.up.ac.za/handle/2263/19677>> accessed 30 April 2022.

from pirated and counterfeited goods.³⁵⁰ The statistics give the USA a legitimate reason to protect IPR both locally and internationally.

4.2.2.1 Eligibility for Protection IPR in the USA

The United States Code protects local manufacturers against the importation of merchandise bearing the name or trademark protected under the USA laws. The laws extend protection to nationals of foreign country only on two conditions. One, they must be bound by treaties or agreements which require national treatment and the most favoured nations. Two, they must protect the IPR of the US citizens.³⁵¹

Importation of IPR infringing goods is a crime under the Tariff Act of 1930. The protection canvases patents, copyrights, Trade Marks, mask works, or designs concerned and can only be accorded to an industry existing or in the process of being established within the USA.³⁵² The existence of the industry is measured through noteworthy investment in plant and equipment; momentous hiring of labour or capital; or extensive investment in its exploitation, including engineering, Research and Development (R&D), or licensing.³⁵³

4.2.2.2 Offences Relating to IP

Offences on IPR revolve around importation into the USA, sale for importation, or the sale within the USA. The persons eligible to commit these offences include the owner of the infringing goods, importer, or consignee. The offences include the intentional importation of articles that infringe on a valid and enforceable patent, trademark, semiconductor chip product or copyright registered in the USA. The process of intentional making, producing, mining, or processing the goods ought not to infringe a method patented in the USA.³⁵⁴

The purpose of the provision is to prevent unfair methods of competition and unfair acts of importation. The Act further makes it an offence to act in a manner that would destroy, significantly harm, deter an industry from being established or restrain or monopolize trade and commerce in the United States. Offences relating to copyright include intentional infringement geared to achieve commercial advantage or private financial gain, reproduction,

³⁵⁰ US Department of State, 'Intellectual Property Enforcement' (*United States Department of State*) <<https://www.state.gov/intellectual-property-enforcement/>> accessed 14 September 2022.

³⁵¹ Trade Marks Act, Chapter 22 (15 U.S.C, 2011 Edition), §1124

³⁵² Tariff Act, 1930, Chapter 4 (19 USC, 2011 Edition). §1337

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

or redistribution whether before or after the owner does so and whether on the internet or offline.³⁵⁵ The Code further criminalises intentional trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging of copyright or related works.³⁵⁶

4.2.3 IPR Civil Liability in the USA

Even for civil claims, the United States Code categorises violations as either intentional or unintentional. It refers to unintentional violation as innocent infringement and the while pursuing a civil claim, the registrant is not entitled to the profit made through the reproduction and application of counterfeit marks.³⁵⁷ The readily available remedy for the registrant in case of innocent infringement is the equitable. The registrant is entitled to seek injunctive relief to deter any further violations³⁵⁸ through the seizure of the infringing products.³⁵⁹ The court also has the discretion of assessing damages and issue where it deems fit. The Code gives a proper guide for the courts to adopt while issuing injunctive relief and damages.

The registrant is entitled to the defendant's profits, any damages sustained, and the costs of the suit, in case of wilful violation of the IPR.³⁶⁰ The damages can either be statutory or at the discretion of the court. A party can also apply for the destruction of the infringing goods, to the court by giving the office of the United States Attorney a ten-day notice.³⁶¹

4.2.4 Effects of the African Growth and Opportunity Act on Trade

The African Growth and Opportunity Act (AGOA) is a US trade Policy for Sub-Saharan Africa (SSA).³⁶² Whether SSA countries stands to benefit depends on the political environment of the country. Of importance is the description the Act gives to SSA countries. It acknowledges that the SSA countries form a region richly endowed with both natural and

³⁵⁵ Copyright Act (17 U.S.C, 2011 Edition). §506.

³⁵⁶ Crimes and Criminal Procedure Act (18 USC, 2011 Edition). Sec. 2318.

³⁵⁷ *Ibid*, Note 336 §1114.

³⁵⁸ *Ibid*.

³⁵⁹ *Ibid*, §1116.

³⁶⁰ *Ibid*, §1117.

³⁶¹ *Ibid*, §1118.

³⁶² Arthur Gerstenfeld and Raphael Njoroge, 'African Growth and Opportunity Act (AGOA)' (2003) 14 *The International Journal of Business Disciplines* 1.

human resources.³⁶³ It further implores that the region is of enormous economic potential and of enduring political significance to the US.³⁶⁴ The Act is unilateral and non-reciprocal. This implies that it is only mandatory for the United States to lower tariffs for eligible countries. This requirement is however not binding on the Sub-Saharan Africa Countries.³⁶⁵

The Act shows the US commitment to the development of African, including finance, infrastructure, eradication of poverty and diseases such as HIV.³⁶⁶ Although the Policy statement can easily infer the US as the SSA messiah, the USA stands to gain from the relationship.

The European Union and other countries as China sought friendship with SSA countries in form of trade, which evidently awakened the United States desire to secure a good partnership relationship with the sub-Saharan Africa.³⁶⁷ This relationship is also meant to help with the regional integration efforts to build up a free trade area for SSA countries. The Act also allows the United States to negotiate symbiotic trade agreements that would be beneficial to both the United States and the SSA countries. These agreements can include the establishment of a free trade area.

Before AGOA, SSA countries, which are mostly developing or least developed, could export their goods to the US at low or no tariff under *Generalised System of Preferences (GSP)* scheme. The GSP legislation however did not give African Countries any preferential treatment and since the SSA countries had to compete with other developing and least developing countries.³⁶⁸ The GSP is also subject to periodic renewal and from time to time expires, creating uncertainty for importers and exporters. AGOA however was the game changer. It made SSA countries ‘the chosen ones’ in bilateral trade with the United States since there is no obligation to reciprocate the elimination of tariffs in their home countries. However, amidst the benefits that Africans could enjoy, there is a basic requirement that international forms of IPR must be protected.

³⁶³ The African Growth and Opportunity Act, Chapter 23, Subchapter I (19 USC, 2011 Edition).African Section 3701

³⁶⁴ *Ibid.*

³⁶⁵ Williams, Brock R. *African growth, and opportunity act (AGOA): Background and reauthorization*. Washington, DC: Congressional Research Service, 2015.

³⁶⁶ *Ibid.*, Note 194, Section 3.

³⁶⁷ Obuah, Emmanuel E. "AGOA and FOCAC: Competing for African Markets through Multilateral Trade Agreements." *Journal of Management Policy and Practice* 11.5 (2010): 69-78.

³⁶⁸ Didia, Dal, Mihai Nica, and Geungu Yu. "The gravity model, African Growth and Opportunity Act (AGOA) and US trade relations with sub-Saharan Africa." *The Journal of International Trade & Economic Development* 24.8 (2015): 1130-1151.

It is now apparent that to capture the attention of any developing or least developed country in any bilateral trade agreement, the issues of investments and technology transfer must be addressed. Although this is a concern addressed by the AGOA, for the SSA countries, to benefit, they must be worthy. They must be designated as eligible by the US president. Some of the factors that can convince the president to designate a country as eligible include elimination of US barriers to trade and investment through giving the US national treatment in SSA countries, protection of IP and resolution of investment disputes.³⁶⁹ The USA gives a preferential market access to countries, which fulfil their obligations under the WTO including the application of the TRIPS agreement.

4.3 IPR Enforcement and Trade in the China

4.3.1 Brief History of China's Economic Regime

In December 1978, the Chinese rural economy was based on agriculture with paramount sale of products to Government agencies.³⁷⁰ The Government owned most urban commerce and industry. The country had a per capita GDP of around \$200/=-, and was one of the poorest countries in Asia, and made the 10% poorest countries in the world.³⁷¹ The country's GDP on export was less than 10% and foreign investment was insignificant.³⁷² This called for reforms, which steadily increased the GDP per capita at 8%, reducing the poverty rate from 60% to 7%.³⁷³ This part examines whether IPR played a role in the economic growth of the country.

4.3.2 Chinese IP infringement in the Special 301 Report on Intellectual Property

When the Office of the United States Trade Representative (USTR) first released the Special 301 Report on Intellectual Property, in 1989, China made the priority list.³⁷⁴ More than 30 years later after the country has had significant growth and is one of the most industrialised

³⁶⁹ AGOA, Sec 3703

³⁷⁰ Jacques DeLisle and Avery Goldstein, 'China's Economic Reform and Opening at Forty: Past Accomplishments and Emerging Challenges' [2019] Faculty Scholarship at Penn Law <https://www.brookings.edu/wp-content/uploads/2019/04/9780815737254_ch1.pdf> (accessed 23 September 2021).

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ Ross Garnaut, Ligang Song and Cai Fang, *China's 40 Years of Reform and Development: 1978–2018* (ANU Press 2018) at <<https://library.oapen.org/handle/20.500.12657/29458>> (accessed 4 October 2021).

³⁷⁴ USTR, '1989 Special 301 Report on Intellectual Property' (USTR 1989) <<https://ustr.gov/sites/default/files/1989%20Special%20301%20Report.pdf>> (accessed 3 October 2021).

countries in the world and the world's largest manufacturer,³⁷⁵ it still made it to the 2021 Special 301 Report on Intellectual Property's priority list.³⁷⁶ According to the OECD, China and Hong Kong (China) well dominated the counterfeit and piracy market accounting to more than 70% of the goods seized.³⁷⁷

In 1994, the State Council Information Office of China (SCIO) bragged of a legal system that was sufficient to protect IPR. The system exposed persons who infringed IPR to both criminal and civil liability.³⁷⁸ On February 1995, the USA opted to rescind \$1.08 billion of trade sanctions against China after reaching a bilateral IPR Enforcement agreement to improve enforcement and enhance market access for IPR related industries. Apparently, China did not make it to the 1995 Priority Watch List since the USTR opted to closely monitor the implementation of the agreement.³⁷⁹

In 1996, the USTR listed China as the only country in the Priority Watch List for failure to comply with the provisions of the bilateral agreement.³⁸⁰ Although it acknowledged the progress made by China to prevent the retail of infringing products, it noted that the country had failed in some aspects of enforcement, including prevention of exportation of infringing products.³⁸¹

³⁷⁵ UNIDO, 'World Manufacturing Production Statistics for Quarter II 2020' (UNIDO 2020)

<https://www.unido.org/sites/default/files/files/2020-09/World_manufacturing_production_2020_Q2%20%281%29.pdf> (accessed 3 October 2021).

³⁷⁶ USTR, '2021 Special 301 Report on Intellectual Property Protection' (USTR 2021)

<[https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf)> (accessed 3 October 2021).

³⁷⁷ Organisation for Economic Co-operation and Development (OECD) /European Union Intellectual Property Office (EUIPO), *Global Trade in Fakes: A Worrying Threat | En | OECD* (OECD Publishing, Paris, 2021)

<<https://www.oecd-ilibrary.org/docserver/74c81154-en.pdf?expires=1633292366&id=id&accname=guest&checksum=E982540A6F893C7C2F00DDCCE9E4A50F>> (accessed 3 October 2021).

³⁷⁸ SCIO, 'Intellectual Property Protection in China' (*Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and other International Organizations in Switzerland*, June 1994)

<<http://www.china-un.ch/eng/bjzl/t176937.htm>> (accessed 4 October 2021).

³⁷⁹ USTR, '1995 Special 301 Report on Intellectual Property' (USTR 1995)

<<https://ustr.gov/sites/default/files/1995%20Special%20301%20Report.pdf>> (accessed 3 October 2021).

³⁸⁰ USTR, '1996 Special 301 Report on Intellectual Property' (USTR 1996)

<<https://ustr.gov/sites/default/files/1996%20Special%20301%20Report.pdf>> (accessed 3 October 2021).

³⁸¹ *Ibid.*

4.3.3 China in Global Innovation Index

China has seen a significant growth in the Global Innovation Index. In 2011, it was ranked 29th on the index³⁸² and rose through to the 12th position in 2021.³⁸³ As at 2021, it is the only middle-income economy in the top 30 most innovative economies globally. In Science and Technology (S&T) clusters China follows the United States, which hosts the highest number of clusters.³⁸⁴

The Chinese clusters however recorded the largest increases in S&T output. On R&D spending economies in 2019, China came second after the United States and its levels of patents by origin, scaled by GDP, are higher than those of Japan, Germany, and the United States.³⁸⁵ It ranked fifth in world-topping performances in indicators such as new businesses, High-tech imports, and Global brand value, the first being the United States followed by Hong Kong, China.³⁸⁶

Reports create two (2) faces of China. First, the West indicating that China has no interest in protecting intellectual property, creates the first face.³⁸⁷ The face is painted of China's activities of intellectual property theft, which is perceived as the greatest enforcement threat to the USA.³⁸⁸ The second face, still created by Western Scholars, indicates that China's problems with protection of IPR could have nothing to do with the Government.³⁸⁹ This is because employees undertake most trade secrets theft and the Government has done much to ensure there is an outstanding IPR regime. This includes reducing the time and cost for IP registration, reducing the cost of litigation. Apparently, it is easier to for foreign companies

³⁸² INSEAD, *The Global Innovation Index 2011 Accelerating Growth and Development* (Soumitra Dutta ed, INSEAD 2011) <https://www.wipo.int/edocs/pubdocs/en/economics/gii/gii_2011.pdf> (accessed 4 October 2021).

³⁸³ WIPO, *Global Innovation Index 2021 Tracking Innovation through the COVID-19 Crisis* (Soumitra Dutta and others eds, 14th Edition, WIPO 2021) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2021.pdf> (accessed 4 October 2021).

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

³⁸⁷ Eric Rosenbaum, '1 in 5 Corporations Say China has Stolen their IP within the Last Year: CNBC CFO Survey' *CNBC* (1 March 2019) <<https://www.cnbc.com/2019/02/28/1-in-5-companies-say-china-stole-their-ip-within-the-last-year-cnbc.html>> (accessed 4 October 2021).

³⁸⁸ Reuters, 'China Theft of Technology is Biggest Law Enforcement Threat to US, FBI Says' *The Guardian* (6 February 2020) <<https://www.theguardian.com/world/2020/feb/06/china-technology-theft-fbi-biggest-threat>> accessed 4 October 2021.

³⁸⁹ Dan Prud'homme, '3 Myths About China's IP Regime' [2019] *Harvard Business Review* <<https://hbr.org/2019/10/3-myths-about-chinas-ip-regime>> (accessed 4 October 2021).

to win IP related cases in China than it is in the West.³⁹⁰ China also recently created a specialised court to hear IP cases which is the first of its kind.³⁹¹

The challenge comes with combining the two faces. The paintings from the warring opinions are a paradox to China's statistics from WIPO and the UN. There are lessons that developing countries can draw from China. However, to learn anything from the country, the real face must be unravelled.

4.3.4 Effects of China's IP Regime on Trade

To conform to international standards, China had to evolve. Since the protection of IPR is globally recognised as an incentive to innovation and creativity. The aspiration to protect the IPR is enshrined in the Constitution of the People's Republic of China. The Constitution of the People's Republic of China obligates the state to foster “the development of the natural and social sciences, disseminates scientific and technical knowledge, and commends and rewards achievements in scientific research as well as technological discoveries and inventions.”³⁹²

China understood that increased use of IP on a local level enhances capacity building and the development of local industries.³⁹³ By the 1990, the Chinese Government had well adopted the IPR system, for two reasons. The first reason was to promote innovations, investments, and technology transfer³⁹⁴ and the second reason was the unending external pressure from the US and the international community with constant threats of sanctions.³⁹⁵ Either through sheer will or through fulfilling their obligations under international agreements, China updated its system of laws encompassing on Trade Marks, patents, copyright, trade secrets and seed and plant varieties.³⁹⁶

³⁹⁰ *Ibid.*

³⁹¹ Wu Peicheng, ‘Key Breakthroughs in China’s Intellectual Property Judicial Protection over the Last Year’ <<https://news.cgtn.com/news/2020-04-26/Key-breakthroughs-in-China-s-IP-judicial-protection-over-the-last-year-PZOaupfbtS/index.html>> (accessed 4 October 2021).

³⁹² Constitution of the People's Republic of China, Article 20.

³⁹³ Ben Sihanya, ‘Copyright Law, Teaching and Research in Kenya’ (2005) 2005 *East African Law Journal* 28.

³⁹⁴ Mike W Peng and Others, ‘History and the Debate Over Intellectual Property’ (2017) 13 *Management and Organization Review* 15.

³⁹⁵ Ka Zeng, *Trade Threats, Trade Wars: Bargaining, Retaliation, and American Coercive Diplomacy* (University of Michigan Press 2004).

³⁹⁶ Keith E Maskus, ‘Intellectual Property Rights in the WTO Accession Package: Assessing China’s Reforms’ [2004] *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies* 49.

Even after its decision to be part of the WTO, China found itself in a dilemma. The country had adopted the USA inspired IP regime without proper political goodwill to enforce IPR within the country.³⁹⁷ In 2001, the USTR acknowledged the deficiency in the Chinese legal system in the enforcement of IPR, particularly Trade Marks and copyright.³⁹⁸ Although the country had taken huge milestones in campaigning against IPR infringement, the practice was still rampant within the country.³⁹⁹ It even amended its patent, trademark, and copyright laws to fit the international standards. The US therefore took an understanding approach in this year and offered to monitor China due to its undying commitment to fulfil its obligations under the TRIPS agreement.

The USTR notes that, in 2002 the laws existed but had no regulations to make them effective. China had just become a member of the WTO after signing the agreement on December 11, 2001, and pledged to undertake all its obligations under the WTO.⁴⁰⁰ It was however still a haven for counterfeiting and piracy. The country was accused of piracy of optical media (CDs, VCDs and DVDs), entertainment software, cartridge-based video game products and journals and books.⁴⁰¹

From 2003 through 2005, the China's enforcement problem remained. The USTR moved it to the priority watch list in 2006. In 2021 and 2022, China was still said to be a problem in matters counterfeiting and piracy. The United States has engaged China for more than three decades to construct a strong IPR enforcement regime. Although the United States has monitored China for more than three decades, there has been no tangible results on the counterfeit goods flooding the world market.

On the face of it, China has all the requisite laws needed to fight counterfeiting and piracy. Enforcement of the said laws has however not been a success. In fact, the country might have developed due to lack of proper enforcement mechanism on export of counterfeit and pirated goods. The TRIPS agreement is also silent in prohibiting export of counterfeit or pirated goods, which makes Kenyan importers vulnerable.

³⁹⁷ Scott J Palmer, 'An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China' (2000) 8 *Ind. J. Global Legal Stud.* 449.

³⁹⁸ USTR, '2001 Special 301 Report on Intellectual Property' (USTR 2001) <<https://ustr.gov/sites/default/files/2001%20Special%20301%20Report.pdf>> (accessed 3 October 2021).

³⁹⁹ *Ibid.*

⁴⁰⁰ USTR, '2002 Special 301 Report on Intellectual Property' (USTR 2002) <<https://ustr.gov/sites/default/files/2002%20Special%20301%20Report.pdf>> (accessed 3 October 2021).

⁴⁰¹ *ibid*

4.3.4.1 Made in China 2025

The Made in China 2025 is a Policy launched in 2015 which aims at reducing the country's reliance on the Western world. The Policy received significant attention from the Western countries, being described as a document championing to use the Government resources and acquire IP to make the country to compete globally in matters technology.⁴⁰² The Policy however lists the aspirations that the country aims to achieve by the year 2025. The country sets to adopt a China Centric approach in the development of the country's technology sector. The country aims at prioritizing local industries to give them a market advantage and to compete at a global level.

4.4 Effects of IP Enforcement on Trade in African Countries`

In measuring African countries on the WIPO's Global Innovation Index against their protection of IP through the US Chamber of Commerce International IP index, statistics indicate that African countries viciously protect intellectual property while their performance in innovation is less impressive. For instance, the US Chamber of Commerce International IP index ranked the Kingdom of Morocco (the country where the TRIPS agreement was signed in 15th April 1994)⁴⁰³ at 22nd in the years 2020,⁴⁰⁴ 2021,⁴⁰⁵ and 2022.⁴⁰⁶ Although this is one position lower than the 2019 ranking,⁴⁰⁷ Morocco remains the highest performing middle-income economy and African country in IPR protection Index.

⁴⁰² James McBride and Andrew Chatzky, 'Is "Made in China 2025" a Threat to Global Trade?' *Council on Foreign Relations* (13 May 2019) <<https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade>> (accessed 1 June 2022).

⁴⁰³ Ayşegül Özdemir, 'TRIPS Agreement and Access to Essential Medicines' (2008) 1 Ankara Bar Review 90.

⁴⁰⁴ Meir Pugatch and David Torstensson, '2020 International IP Index' (US Chamber of Commerce) 8 <<https://www.uschamber.com/intellectual-property/2022-international-ip-index>> (accessed 12 May 2022).

⁴⁰⁵ Meir Pugatch and David Torstensson, '2021 International IP Index' (US Chamber of Commerce) 9 <https://www.theglobalipcenter.com/wp-content/uploads/2021/03/GIPC_IPIndex2021_FullReport_v3.pdf> (accessed 12 May 2022).

⁴⁰⁶ Meir Pugatch and David Torstensson, '2022 International IP Index' (US Chamber of Commerce 2022) 10 <<https://www.uschamber.com/intellectual-property/2022-international-ip-index>> (accessed 12 May 2022).

⁴⁰⁷ Meir Pugatch and David Torstensson, '2019 International IP Index' (US Chamber of Commerce 2019) 10 <https://www.theglobalipcenter.com/wp-content/uploads/2020/02/GIPC_IP_Index_2020_FullReport.pdf> (accessed 12 May 2022).

However, in the WIPO’s global innovation index, the Kingdom of Morocco was ranked No. 74 in 2019,⁴⁰⁸ 75 in 2020,⁴⁰⁹ 77 in 2021,⁴¹⁰ and 67 in 2022.⁴¹¹ This trend is replicated in most top African countries as shown in the table below:

Table 2: African Leading Countries in International IP index vs. Innovation Index

2019 Ranking				
Country	U.S Chamber of Commerce International IP index	WIPO’s Index.	Global	Innovation
Kingdom of Morocco	21		74	
Kenya	41		77	
South Africa	38		63	
Nigeria	44		114	
Ghana	-		106	
2020 Ranking				
Country	U.S Chamber of Commerce International IP index	WIPO’s Index.	Global	Innovation
Morocco	22		75	
Kenya	41		86	
South Africa	42		60	
Nigeria	50		117	
Ghana	-		100	
2021 Ranking				
Country	U.S Chamber of Commerce International IP index	WIPO’s Index.	Global	Innovation

⁴⁰⁸ World Intellectual Property Organization, Cornell University, and INSEAD, *The Global Innovation Index 2019: Creating Healthy Lives - The Future of Medical Innovation*. (12th edn, WIPO 2019).

⁴⁰⁹ Cornell University, INSEAD and WIPO, *Global Innovation Index 2020: Who Will Finance Innovation?* (13th edn, World Intellectual Property Organization 2020).

⁴¹⁰ World Intellectual Property Organization, *Global Innovation Index*. (Dutta Soumitra and Others (eds), 14th edn, WPO 2021) <<https://tind.wipo.int/record/44315>> (accessed 18 May 2022).

⁴¹¹ World Intellectual Property Organization, *Global Innovation Index 2022: What Is the Future of Innovationdriven Growth?* (Soumitra Dutta and others eds, 15th edn, World Intellectual Property Organization 2022) <<https://tind.wipo.int/record/46596>> accessed 2 November 2022.

Morocco	22	77
Kenya	42	85
South Africa	44	61
Nigeria	50	118
Ghana	-	112
2022 Ranking		
Country	U.S Chamber of Commerce International IP index	WIPO's Global Innovation Index.
Morocco	22	67
Kenya	44	88
South Africa	45	61
Nigeria	49	114
Ghana	40	95

This part investigates the IP regime in the other two most performing countries in Africa and elaborates on what other African countries could borrow from them.

4.4.1 Effects of IP Enforcement on Trade in the Kingdom of Morocco

The 2022 U.S Chamber of Commerce International IP index recognized Morocco as the highest performing middle-income economy and African country.⁴¹² In 2021, the world bank also classified the country as the sixth African country with the highest Foreign Direct Investment.⁴¹³ The story behind the successful economy of the country is not only owed to the human capital, but also the strategic positioning of the country.⁴¹⁴ Because of its geographical positioning,⁴¹⁵ the country is positioning itself as an economic hub between

⁴¹² Meir Pugatch and David Torstensson, '2022 International IP Index' (US Chamber of Commerce 2022) 10 <<https://www.uschamber.com/intellectual-property/2022-international-ip-index>> (accessed 12 May 2022).

⁴¹³ Magdalene Teiko Larnyoh, 'Here Are the Top 10 African Countries with Highest FDI' *Business Insider Africa* (4 June 2021) <<https://africa.businessinsider.com/local/markets/here-are-the-top-10-african-countries-with-highest-fdi/7264vz>> (accessed 20 May 2022).

⁴¹⁴ Walid Ali and Ali Mna, 'The Effect of FDI on Domestic Investment and Economic Growth Case of Three Maghreb Countries: Tunisia, Algeria and Morocco' (2019) 61 *International Journal of Law and Management* 91.

⁴¹⁵ Apart from Spain and France, Morocco is one of the countries which have both Atlantic and Mediterranean coastlines. See Portal of Chamber of Messina, 'MOROCCO - Chamber of Messina - Company Presentation' <<http://www.messinianchamber.gr/mesinia/showroom/jsp90/article.jsp;jsessionid=3230F90F85661F71BADAC>>

Europe and Africa.⁴¹⁶ This is also supported by the system of laws and a Constitution which embeds good governance.⁴¹⁷ Its positioning in the Maghreb region has made Morocco a target to the Western countries. The EU and the USA found a trading partner in Morocco and in the partnership, came a requirement to establish and elaborate IP regime.

4.4.1.1 Protection of IP in Morocco

The Morocco's Constitution of 2011 supports the development of cultural and artistic creation and scientific and technical research. These sectors are to be developed and organized independently based on democracy and professionalism.⁴¹⁸ The integration of these provisions in the Morocco's Constitution of 2011 was influenced by the treaties and conventions that the country had adopted prior the adoption of the Constitution. Scholars account that although the country had adopted the TRIPS agreement, the IP regime within the country remained weak until the US-Morocco Free Trade Agreement (USMFTA),⁴¹⁹ which was signed on June 15, 2004 and entered into force on January 1, 2006.

However, prior to the adoption of USMFTA, Morocco had signed in the Euro-Mediterranean Agreement between the European Communities and their Member States, and the Kingdom of Morocco on 26 February 1996 which was later operationalized on 24 January 2000.⁴²⁰ Although the agreements conformed with the TRIPS agreement, they also introduced measures that were beyond the scope of TRIPS⁴²¹ and strangled Morocco's rights to plead the STD. This section investigates how international actors have influenced the intellectual property regime within the Kingdom of Morocco.

[037956BB1DA?context=403&globalid=30177&categoryid=10&orgid=9407&css=css902](https://openknowledge.worldbank.org/handle/10986/28442)> (accessed 20 May 2022).

⁴¹⁶ Jean-Pierre Chauffour, *Morocco 2040: Emerging by Investing in Intangible Capital* (World Bank 2018) <<https://openknowledge.worldbank.org/handle/10986/28442>> (accessed 20 May 2022).

⁴¹⁷ Maria Th Semmelrock-Picej and Aleš Novak, *ECMLG2013-Proceedings For the 9th European Conference on Management Leadership and Governance: ECMLG 2013* (Academic Conferences Limited 2013).

⁴¹⁸ Article 26 of Morocco's Constitution of 2011.

⁴¹⁹ Omar Aloui, 'Intellectual Property Rights' in Gary Hufbauer and Claire Brunel (eds), *Capitalizing on the Morocco-US Free Trade Agreement: A Road Map for Success* (Peterson Institute for International Economics 2009).

⁴²⁰ 2000/204/EC, ECSC: Council and Commission Decision of 24 January 2000 on the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part 2000 (OJ L).

⁴²¹ *Ibid.*

4.4.1.2 IP Rights under the Morocco Euro-Mediterranean Agreement

This agreement was adopted to give effect to the Barcelona Declaration adopted at the Euro-Mediterranean Conference on November 27-28, 1995. The intention behind the declaration was to strengthen the relationship between the EU and the Magreb and Mashriq Arab countries.⁴²² The declaration required the parties to observe the WTO standards gradually from 2010. Further, they were to adopt appropriate measures concerning rules of origin, certification, protection of intellectual and industrial property rights and competition.

The objects of the Euro-Mediterranean Agreement between the European Communities and their Member States, and the Kingdom of Morocco, were to avail a platform for political dialogue, create the environment for steady trade liberalization in goods, services and capital and sponsor trade increase economic and social relations. Further the agreement aimed to encourage integration between Morocco and other Magreb countries. This was realized through the signing of the Agadir Declaration, signed in Agadir, Morocco on 8 May 2001 between Morocco and Jordan, Tunisia, and Egypt. The Agadir Declaration encourages parties to protect IP under Article 22.

The agreement puts and emphasis on the adoption of the highest international standards in the protection of intellectual, industrial, and commercial property rights. This includes effective means of enforcement of such rights.⁴²³ To realize this agenda the parties to the agreement agreed to cooperate to develop the agencies tasked with the protection of intellectual, industrial, and commercial property and for standardization and quality in Morocco.⁴²⁴

Further, the Morocco was required to accede the following four (4) international agreements within four years: First, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961). Second, the Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure (1977, amended in 1980). Third, the Patent Cooperation Treaty (1970, amended in 1979 and modified in 1984). Fourth, the International Convention for the Protection of the New Varieties of Plants (Act of Geneva, 1991). The Association Council

⁴²² Fadi S Hakura, 'The Euro-Mediterranean Policy: The Implications of The Barcelona Declaration' (1997) 34 *Common Market Law Review* <<https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/34.2/133555>> (accessed 30 May 2022).

⁴²³ Article 39 of the Morocco Euro-Mediterranean Agreement.

⁴²⁴ *Ibid*, Article 51.

can also review the list to include other treaties the council finds to fall under the same category.

The Agreement also requires the Kingdom of Morocco to protect the following five (5) international agreements: First, the Paris Convention for the Protection of Industrial Property in the 1967 Act of Stockholm (Paris Union). Second, the Madrid Agreement concerning the International Registration of Marks in the 1969 Act of Stockholm (Madrid Union). Third, the Berne Convention for the Protection of Literary and Artistic Works in the Act of Paris of 24 July 1971. Fourth, the Protocol relating to the Madrid Agreement concerning the International Registration of Marks (1989). Fifth, the Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks (Geneva, 1977).

4.4.1.3 United States – Morocco Free Trade Agreement

Intellectual property rights are integral to the United States – Morocco Free Trade Agreement which was Signed on June 15, 2004 and entered into force on January 1, 2006.⁴²⁵ This can be seen from the preamble of the agreement which expresses the countries' interest to “foster creativity and innovation and to promote trade in goods and services that are the subject of intellectual property rights.” Although IP is instrumental in fostering creativity and innovation for both countries, the promotion of trade in goods and services that are IP protected was of minimal benefit Morocco at the point of adoption of the agreement.

The agreement also required the parties, as a minimum requirement, to give effect to the provisions on IPR and ratify IP related agreements such as the following seven (7): First, the Patent Cooperation Treaty (1970), as amended in 1979. Second, the Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite (1974). Third, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989).

Fourth, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended in 1980. Fifth, the International Convention for the Protection of New Varieties of Plants (1991) (UPOV

⁴²⁵ Office of the United States Trade Representative, ‘Morocco Free Trade Agreement’ (*United States Trade Representative*) <<http://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>> accessed 7 November 2022.

Convention). Sixth, the Trademark Law Treaty (1994). Seventh, the WIPO Copyright Treaty (1996). Eighth, the WIPO Performances and Phonograms Treaty (1996).⁴²⁶

Further, they were to take reasonable measures to ratify or accede the Patent Law Treaty (2000) and the Hague Agreement Concerning the International Registration of Industrial Designs (1999). In as much as it can be seen from the wording of the agreement that the parties were required to adopt, the United States had adopted most of the agreements. For instance, the US had accepted the UPOV Convention on November 12, 1980 and ratified the Patent Cooperation treaty on November 26, 1975.

Before the countries adopted the United States – Morocco Free Trade Agreement, Moroccan goods exported to the United States faced an average of 4% tariffs while goods from the United States faced an average of 20% tariffs in Morocco.⁴²⁷ For the United States, the agreement was meant to expand the market access of the United States firms to Morocco, while Morocco expected an increase in trade and investment from the United States.⁴²⁸

4.4.1.4 IP enforcement under Moroccan National Laws

4.4.1.4.1 Law No. 17-97 on the Protection of Industrial Property

This is the principal act in the protection of industrial property in Morocco.⁴²⁹ The Act describes industrial property to include: patents for invention, layout-designs (topographies) of integrated circuits, industrial designs and models, Trade Marks and service marks, trade names, geographical indications and appellations of origin and the repression of unfair competition.⁴³⁰

The law recognizes the violation of industrial properties as infringement. What sets apart this law to the Kenyan IPR enforcement law is the elaborate description of the *mens rea*. Although the law criminalizes the acts of offering for sale, putting on the market, reproduction, use, holding with a view to use or putting on the market of an infringing

⁴²⁶ Article 15.1.2 of the United States – Morocco Free Trade Agreement.

⁴²⁷ Raymond J. Ahearn, 'Morocco-U.S. Free Trade Agreement' (Congressional Research Service, the Library of Congress, 2005) RS61424

https://www.everycrsreport.com/files/20040723_RS21464_7e3dd78c87167a036f2320d1f6233bb6bb1b5753.pdf (accessed 23 May 2022).

⁴²⁸ Bessma Momani, 'A Middle East Free Trade Area: Economic Interdependence and Peace Considered' (2007) 30 *The World Economy* 1682.

⁴²⁹ Issam Benhssine, 'Resolution of Conflicts between Country Code Top Level Domains and Trade Marks in Morocco: Analysis and Perspectives' (Social Science Research Network 2016) SSRN Scholarly Paper 2955609 <https://papers.ssrn.com/abstract=2955609> (accessed 30 May 2022).

⁴³⁰ Article 1 of the Law No. 17-97 on the Protection of Industrial Property.

product, if committed by persons who are not manufacturers of the infringing product, shall only make the person liable if they committed in full knowledge of the facts.⁴³¹

On one hand, the law favours the business community by protecting them for the unintentional display and selling of IP infringing goods. However, it also criminalizes intentional usage or holding with a view to use, of the infringing goods.⁴³² This connotes that even a consumer of infringing goods can also be liable unlike in the Kenyan statutes which only puts liability in acts done during trade.

On seizure of counterfeit and other IP infringing goods, the law only requires the products to be seized on import only when the prosecutor or any concerned person requests such seizure.⁴³³ It also limits the powers of the office of the public prosecutor to institute proceedings on its own motion (*suo motto*) except in marks,⁴³⁴ inventions,⁴³⁵ industrial designs or models⁴³⁶ whose publication or implementation of which would be contrary to public Policy, morality or contravene state symbols. Institution of proceedings is therefore only valid if it results from a complaint by the party injured and if the subsisting IP has been registered with the Moroccan authorities.⁴³⁷

Although the law allows for prosecution of IPR infringement cases, the progress of criminal proceedings is subject to the existence of civil proceedings. This can be seen through the law only permitting the criminal court to try matters when another court has established the reality of the damages and passed a final sentence. The law also clearly requires the suspension of criminal proceedings once civil proceedings have been instituted, and above all, the prosecution of both criminal and civil proceedings is limited to three years after the alleged violation.⁴³⁸ The law also creates a standard sentencing guide. For the infringement of each industrial property.

4.4.1.4.2 Law No. 2-00 on Copyright and Related Rights

This is the principal law which protects literary or artistic works in the Kingdom of Morocco. The law requires the copyright work to be protected once created, whether fixed in a physical

⁴³¹ *Ibid*, Article 201

⁴³² *Ibid*, Article 225(3).

⁴³³ *Ibid*, Article 206.

⁴³⁴ *Ibid*, Article 135.

⁴³⁵ *Ibid*, Article 24.

⁴³⁶ *Ibid*, Article 113.

⁴³⁷ *Ibid*, article 207

⁴³⁸ *Ibid*, article 205

media or not.⁴³⁹ It entrusts the duties of protecting and use of copyright and related rights to the Bureau Marocain du Droit d'Auteur (BMDA) (Moroccan Copyright Office)⁴⁴⁰ The office is mandated to have sworn officials who are authorised to impound any form of pirated media and stop unlawful production.

With the powers to collect royalties on behalf of authors of copyright work resting on a government entity, there has been great improvements in royalty collection. In 2012, interviews of some artistes revealed that they had only gained \$220 for five albums released over 10 years. Currently, the BMDA is applauded for perfectly exercising its mandate.⁴⁴¹ For instance, in 2021, the Ministry of Culture, Youth and Communication reported that the BMDA collected more than 18 billion centimes (around Kshs 2.1 billion), in royalties and bonuses and distributed 17 billion (around Kshs 1.8 billion).⁴⁴² The office is also recognized for availing its society's Statement of Income and Expenditures-the society's financial report of collections and distributions,⁴⁴³ thus creating openness and trust. In 2020, Morocco registered +16.9% growth in royalties collection despite of the Covid 19 Pandemic.⁴⁴⁴

4.4.2 Effects of IP Enforcement on Trade in South Africa

For the years 2019,⁴⁴⁵ 2020⁴⁴⁶ and 2021,⁴⁴⁷ South Africa was the best performing African country in the WIPO's Global Innovation Index. According to the International Confederation of Societies of Authors and Composers (CISAC) reports, South Africa also collects the highest amount of copyright royalties in Africa. For instance, CISAC reports that

⁴³⁹ Article 2 of the Law No. 2-00 on Copyright and Related Rights

⁴⁴⁰ Ibid, article 60

⁴⁴¹ Aida Alami, 'Moroccan Artists Earn Applause but Little in Royalties' *The New York Times* (6 June 2012) <<https://www.nytimes.com/2012/06/07/world/middleeast/moroccan-artists-earn-applause-but-little-in-royalties.html>> (accessed 31 May 2022).

⁴⁴² Yassine Elalami, 'BMDA : Plus de 18 Milliards de Centimes de Recettes En 2021' *L'Opinion Maroc - Actualité et Infos au Maroc et dans le monde*. <https://www.lopinion.ma/BMDA-Plus-de-18-milliards-de-centimes-de-recettes-en-2021_a27485.html> (accessed 31 May 2022).

⁴⁴³ CISAC, 'Fine Tuning Royalty Collections for Artists: Morocco Case Study | CISAC' (15 October 2018) <<https://www.cisac.org/Newsroom/articles/fine-tuning-royalty-collections-artists-morocco-case-study>> (accessed 31 May 2022).

⁴⁴⁴ CISAC, 'Global Collections Report for 2020 Data' (CISAC 2021) 7 <https://www.cisac.org/sites/main/files/files/2021-10/GCR2021%20CISAC%20EN_1.pdf> (accessed 31 May 2022).

⁴⁴⁵ World Intellectual Property Organization, Cornell University, and INSEAD, *The Global Innovation Index 2019: Creating Healthy Lives - The Future of Medical Innovation*. (12th edn, WIPO 2019).

⁴⁴⁶ Cornell University. INSEAD. WIPO, INSEAD and WIPO, *Global Innovation Index 2020: Who Will Finance Innovation?* (13th edn, World Intellectual Property Organization 2020).

⁴⁴⁷ WIPO, *Global Innovation Index, 2021: Tracking Innovation through the COVID-19 Crisis* (Dutta Soumitra and others eds, 14th edn, WPO 2021) <<https://tind.wipo.int/record/44315>> accessed 18 May 2022.

the royalties collected by South Africa in 2018⁴⁴⁸ amounted to 49.6% of the amount collected in Africa.

Although the figure remained nearly the same in 2019,⁴⁴⁹ it significantly improved to 57.0% in 2020⁴⁵⁰ despite the effects of the Covid 19 pandemic. Despite the country shining in Africa, CISAC reports that its collection of royalties only amounted to 0.4% of the total royalties collected globally both for the years 2020 and 2021. With the tremendous performance within the region, South Africa is not ranked the best African Country in the protection of the intellectual property. This section investigates the laws concerned and how the country applies them.

4.4.2.1 Constitution of the Republic of South Africa, 1996

Although the Constitution of the Republic of South Africa, 1996, does not make express provisions or define IP, it creates provisions for protection of property.⁴⁵¹ It also requires courts to consider international law and gives them a lee way to find foreign laws persuasive.⁴⁵² It is described as the supreme law of the of the republic and overrides all laws or acts that are inconsistent to it.⁴⁵³

4.4.2.2 Merchandise Marks Act, 1941

This Act primarily governs the marking of goods and their covers in which the goods are sold and the use of words and symbols in connection with businesses. Just like most the Kenyan enforcement IP laws, this Act makes provisions for the appointment of officers to realize the aspirations of the Act.⁴⁵⁴ Although the inspectors appointed under the Act can exercise the same powers as Kenyan ACA inspectors under the Anti Counterfeit Act, their operations can only be legitimized by a court warrant unless the owner of the premises agrees.

⁴⁴⁸ CISAC, 'CISAC Global Collections Report 2019 for 2018 Data' (CISAC 2019) 5 <https://www.cisac.org/sites/main/files/files/2021-10/GCR2021%20CISAC%20EN_1.pdf> (accessed 31 May 2022).

⁴⁴⁹ CISAC, 'Covid-19: Crisis, Resilience, Recovery CISAC Global Collections Report 2020' (CISAC 2020) 6 <<https://www.cisac.org/Media/Studies-and-Reports/Publications/Royalty-Reports/2020-CISAC-Global-Collections-Report-EN>> (accessed 31 May 2022).

⁴⁵⁰ CISAC, 'Global Collections Report for 2020 Data' (CISAC 2021) 7 <https://www.cisac.org/sites/main/files/files/2021-10/GCR2021%20CISAC%20EN_1.pdf> (accessed 31 May 2022).

⁴⁵¹ Article 25 of the Constitution of the Republic of South Africa, 1996.

⁴⁵² *Ibid*, article 39.

⁴⁵³ *Ibid*, article 2.

⁴⁵⁴ Section 3 of the Merchandise Marks Act, 1941.

Further the Act requires inspectors seeking information from a suspect to inform the suspect of their right to remain silent, and the consequences of not remaining silent. The Act also requires the inspectors to carry out their operations during the day and act with utmost decency and order without violating suspect's right to dignity, freedom, and security, and right to privacy.

4.4.2.3 Effects of the Counterfeit Goods Act on Trade in South Africa

The purpose of the Counterfeit Goods Act is to make provisions to prevent trade in counterfeit goods and to further the protection of the holders of copyright, trademark, and certain marks under the Merchandise Marks Act, 1941 against counterfeiting and the sale of the infringed goods. Although the offences under the Act⁴⁵⁵ were replicated under the section 32 of the Kenyan Anti-Counterfeit Act, prior to the additional offences made by the 2018 amendments, the offences under the South African Counterfeit Goods Act are not of strict liability nature. Under the South African Counterfeit Goods Act, a person can only be held guilty of the crimes if at the time of the act, the person knew that the goods were counterfeit or they were not diligent enough to establish that the goods were counterfeit.⁴⁵⁶

The definition of “counterfeiting” is only limited to IPR recognised in South Africa, unlike the Kenyan Anti Counterfeit Act which recognises IPR registered in other countries. The authority to inspect and seize under this Act can only be derived from a warrant given by a judge in chambers after the inspector affirms that there exists an infringement.⁴⁵⁷ However, the inspector may inspect without a warrant if he or she gets consent of entry from a competent person. Further, he can only inspect premises which are not private in nature if he believes that his application for a warrant would be approved and if obtaining the warrant would beat the purpose it is obtained for. Inspection without a warrant can only be valid if the inspector or the complainant applies to the court and the court affirms the activity.⁴⁵⁸ Information from the suspect that is obtained during the inspection cannot be used if it self incriminates the suspect.⁴⁵⁹

Whereas the Kenyan Anti Counterfeit Act gives ACA the authority to detain seized goods for a period of three months to determine whether a suit would be instituted, the South African Counterfeit Goods Act only limits the period to a maximum of 23 court days. First, the Act

⁴⁵⁵ Section 2(1) of the Counterfeit Goods Act.

⁴⁵⁶ Section 2(2) of the Counterfeit Goods Act.

⁴⁵⁷ Section 6 of the Counterfeit Goods Act

⁴⁵⁸ *ibid*

⁴⁵⁹ Section 5(4)(b) of the Counterfeit Goods Act

requires that the seizing inspector to notify the suspect and the IPR holder of the seizure.⁴⁶⁰ The IPR holder should then inform the South African Police service of their intention to lay criminal charges within 3 days. Failure to relay such intention obligates the Police Department to release the goods.⁴⁶¹ Further, the seized goods can also be released if the Police Department fails to give the suspect a notice of intention to prosecute within 10 days of notice, or the IPR holder fails to give the suspect a notice of intention to institute civil proceedings within 10 days of being notified of the seizure

4.4.2.4 Effects of the Copyright Act No. 98 of 1978 on creativity and Trade

This is the principal Act which regulates copyright and related rights. The Act requires any person who broadcasts copyrighted material to pay royalties to the owner. In addition to the Performers' Protection Act No. 11 of 1967, this Act also accords protection to performers. It further establishes collective societies as a link between the broadcasters of the copyrighted materials and the performers or owners. The user of the copyright can either pay the royalties to the owner or performer of the copyrighted material or to the collective society. The Act also gives the parties a leeway to enter into an agreement and in absence of which file the matter in the Copyright Tribunal or refer it to arbitration.

4.4.2.4.1 CMOS in South Africa

Although the South African CMOs are popular even for offering grants to artistes,⁴⁶² they have also been accused of misappropriating the artists funds. For instance according to the 2021 financial statements of South African Music Performance Rights Association (SAMPRO), it was established that the CMO holds around R460 million (around USD 30 million) yet to be distributed to the artistes, while the Recording Industry South Africa (RISA) has around R60 million (around USD 3,9 million) which is supposed to be distributed to the artistes.⁴⁶³ On another incident, the Independent Music Performance Rights Association

⁴⁶⁰ Section 7(1)(1) of the Counterfeit Goods Act

⁴⁶¹ Section 9(b) of the Counterfeit Goods Act

⁴⁶² Anga Hackula, 'Funding Opportunities for South African Musicians' [2022] *Music In Africa* <<https://www.musicinafrica.net/magazine/funding-opportunities-south-african-musicians>> (accessed 1 June 2022).

⁴⁶³ Niki Moore, 'South Africa: SA Music Industry Exposed - the Money Is Not Going to the Artists' *GroundUp* (Cape Town, 26 November 2021) <<https://allafrica.com/stories/202111260247.html>> accessed 1 June 2022.

(IMPRA) has also been accused of swindling artists royalties in the name of donating funds to social relief funds.⁴⁶⁴

4.5 Summary of Findings, Conclusion and Recommendations on Comparative Analysis of IP-Trade Regimes to the Kenya's Regime

This section has elaborated the best practises that can be adopted from the four countries analysed. One, it has shown how the United States once did not protect IPR but later found it necessary when they had built industries and the economy is dependent on IPR incentive companies. Two it has proven that China benefited from deliberate neglect of external pressure to protect IP. Three, it has shown that the Kingdom of Morocco has adopted an elaborate IP regime due to Western countries influence and finally, it has evidenced that Kenya borrowed much from South African IP regime but omitted significant provisions could foster trade.

From the United States of America, Kenya can borrow on the eligibility for protection of IPR criteria. From China, Kenya can learn need to give priority to local industries and better management of IPR from the Kingdom of Morocco. Since Kenya borrowed significantly from South Africa, the provisions that facilitate trade should be reintroduced. These include: one, the definition of "counterfeiting" should be limited to IPR registered in Kenya. Two, searches and seizures should be monitored by the courts in forms of warranties and explanations before the court if no warrant was issued. Three, the time of detention of goods in Kenya should also be significantly reduced from three months and most importantly, the offences should make provisions of intention.

⁴⁶⁴ Patience Bambalele, 'Music Association Impira Accused of "swindling" Artists' Funds' *SowetanLIVE* (15 July 2020) <<https://www.sowetanlive.co.za/entertainment/2020-07-15-music-association-impra-accused-of-swindling-artists-funds/>> (accessed 1 June 2022).

CHAPTER 5
FINDINGS, CONCLUSION AND RECOMMENDATION TO IP LAWS ON TRADE
IN KENYA

5.1 Introduction to Findings, Conclusion and Recommendation to the Effects of IP Laws on Trade in Kenya

The overarching objective of this research project paper was to investigate the effects of intellectual property rights (IPR) protection on trade in Kenya. This is achieved through a four-pronged approach:

First, an analysis of the Kenyan IP legal frameworks and how they could be effectively enforced to facilitate trade while safeguarding importers, retailers, and consumers. Second, examination of the concerns that arise from the criminal and civil nature of IPR cases. Third, thorough scrutiny of the IPR legislation, international instruments, and policies to identify their significance to trade. Fourth, this study draws lessons from two trade giants: the US and China. It further analyses other African countries with higher IP performance index, in the year 2021, such as South Africa and the Kingdom of Morocco.

Based on the foregoing analysis, this section outlays the key findings, concludes, and makes recommendations for legislative and Policy change.

5.2 Findings on Effects of IP laws on Trade in Kenya

This paper investigated the effects of IPR protection to trade in Kenya. The objectives have been achieved in three ways. First, the paper described the Kenyan Intellectual Property Legal Framework as it is, and assesses the reasonability of the legislations in relation to trade. Second, it investigates the concerns that arise out of the criminal nature of IPR cases and the effect it could have on trade. Third, it analyses the IPR legislation, international instruments, and policies to identify their significance to trade. Ultimately, it draws lessons from two trade giants: the USA and China and other African countries with higher IP performance index, in the year 2021, such as South Africa and the Kingdom of Morocco.

The key finding of the paper is that the IP regime in Kenya is not contextualised to support the trade industries for the following reasons. First, the knowledge of Intellectual Property in Kenya and Africa is negligible. Most Kenyan manufacturers have not protected their brands, thus do not benefit from international protection of IPR. Further, importers and retailers are not aware of the brands that have been protected, thereby falling victims of counterfeiting.

While the original counterfeiters benefit from proceeds of sale of counterfeit goods to Kenyans, Kenyan importers and retailers lose their investment and pay fines to the Kenyan Government once the counterfeit goods are impounded. This leads to significant losses and puts Kenyan business entities at the risk of closure. Two, IPR brokers and agents in the Copyright world benefit more than IPR holders. This can be seen from the complaints artists have raised with the Kenya Copyright Board and failure of the Collective Management Organizations (CMOs) to properly account for the revenue collected. Misappropriation of the revenue collected takes away the incentive create artistic works.

The CMOs have also been accused of using goons to intimidate traders and vandalise property. This invariably leads to losses and closure of businesses. Third, Kenyan IP legislation go beyond the scope of protection international IP legal instruments such as the TRIPS agreement create. For instance, whereas TRIPS requires criminal liability to be imposed on intentional infringement of IPR on a commercial scale, some provisions of the Anti-Counterfeit Act and the EACCMA negate such requirements. The legislations create offences that can be interpreted as strict liability. This lowers the burden of proof in the criminal trial.

Since the accused persons can be judged guilty without examining their intent, the risk of conviction and forfeiture of goods to the state is high. Fourth, Kenya has transplanted an IP regime which hampers trade. The parliament ought to have done a cost–benefit analysis prior to the enactment of IP statutes. However, the legislations are designed in a manner that shows that parliament neither understood the nature and purpose of IPR nor investigated the history of IPR in developed countries. Therefore, Kenya adopted a framework that can be unfriendly to the business environment and does not entirely uphold the spirit of the Constitution of Kenya 2010.

5.3 Conclusion to IP laws on Trade in Kenya

A close analysis of the Kenyan IP regime points towards evidence that it has the capacity to cripple trade, innovation, and creativity in Kenya. This paper proves that enforcement of the existing IP legislations can to a large extent impede trade while neglecting the interests of importers, retailers, and consumers. Although the legal framework can protect local manufacturers, registration of IP is still insignificant.

Further, the legislations such as the Anti-Counterfeit Act increase the cost and time of doing business through processes such as recordation. The offences fashioned under the legislations, like prohibition of importation of unbranded goods and failing to declare the IP subsisting in imported goods impose unreasonable burdens on trade. Western developed countries such as the USA and the EU have also greatly influenced the adoption of IP laws in African countries. The protection of IP is a condition in most bilateral treaties and agreements. However, it is noteworthy that most of the countries which require international protection of IP stand to lose if IP is not protected.

5.3.1 Knowledge of Importance of Protection of IPR to Trade in Kenya

The Kenyan population has not fully realised the importance of IP to the country. This is attributed by minimal engagements between the Government and the public, especially the business community and the local IPR holders. The only forum of interaction between Government agencies like the Kenya Industrial Property Organization (KIPI) and the business community is through enforcement of IPR rights.

There is also lack of sensitization of Local IPR holders in the copyright sector. This has made them vulnerable to extortion by CMOs and most of them do not enjoy the royalties they are entitled to. This in a strict sense affects trade in the entertainment sector since the creators of artistic works are discouraged with the meagre royalties, they get out of the millions of monies the directors of the CMOs award themselves.

5.3.2 Importers and Retailers rights to Trade under the Kenyan IP Regime

Three of the most instrumental IP legislations in Kenya include: First, the Trade Marks Act. Second, the Industrial Properties Act, 2001. Third, the Anti Counterfeit Act, 2008. These statutes operate under the Ministry of Industrialization, Trade and Enterprise Development. To fully realise the Kenyan Sessional Paper No. 10 of 2012 on Kenya Vision 2030,⁴⁶⁵ which aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030, the Ministry needs to devise policies that would protect the Kenyan retailers and importers.

⁴⁶⁵ Government of Kenya (Office of the Prime Minister, Ministry of State for Planning, National Development and Vision 2030), *Sessional Paper No. 10 of 2012 on Kenya Vision 2030* (Office of the Prime Minister, Ministry of State for Planning, National Development and Vision 2030 2012) <<https://repository.kippra.or.ke/handle/123456789/3006>> accessed 2 November 2022.

The IP law as it stands introduces barriers to trade. Procedures such as the recordation cannot well serve Kenya. Even if we are to compare the benefits that recordation would have due to revenue collection, the benefit does not outweigh a proper trading environment. IP procedures such as recordation as discussed under Chapters 2, 3 and 4 of this study, increases the time and cost of doing business in Kenya.

5.3.3 Offences under Kenya’s Anti-Counterfeit Act, 2008 and the EACCMA

To prohibit trade in counterfeit and pirated goods, the Kenyan Parliament, and the East African Legislative Assembly (EALA) have adopted stringent measures. The measures apply to Kenyans and with the East African Community Customs Management Act (EACCMA), the East African Community (EAC) states. The criminal offences under the two legislations are strict liability in nature. They do not require the examination of *mens rea* to constitute the crime and therefore vilify importers even by the mere virtue of possession of the goods. The statutes also impose hefty fines and require the owners of the goods to forfeit them to the state. The statutes have not been contextualised to address the concerns that Kenya is still a developing middle income and most people take up loans to set up businesses.

5.3.4 Effects of the TRIPS Agreement to Trade in Kenya

The study finds that although the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) offers incentives to the protection of IP, the level of technology transfer realised in Kenya has been minimal.

However, policy makers create laws that would help Kenya fulfil its obligation under the Agreement. One of the weaknesses of the TRIPS agreement is its failure to prohibit exportation of counterfeit goods. In prohibiting importation, it allows the manufacturers of pirated and counterfeit goods to benefit from the proceeds of sale while importers and retailers of the same goods are penalised in their home countries.

In criminalising importation of counterfeit and pirated goods, the TRIPS agreement does not solve the problem. It only penalises lower income countries while the manufacturers in developed and high-income developing countries remain untouched.

5.3.5 Lessons from the US, China, and other African Countries

As discussed in the previous chapters, there are best practices that can be drawn from the protection and practice of intellectual property rights in the US, China, and African countries like Morocco. These are discussed below:

5.3.5.1 Conclusion on the Effects of IP on Trade in the USA

The study finds that although the USA has had an IP regime from 1970, it only protects international IP when necessary and of benefit to its citizens. For more than a century, the USA did not enforce copyright. It allowed its citizens to gather knowledge at a cheaper price until the country was ready to compete at a global arena. The USA protected patents to encourage innovation and investments. Democratising IP and choosing what was best for its population in IP development made USA a champion in the industrial revolution.

When the USA was industrialised enough and fearful that their IP would be used without any benefit on their part or citizens, it opted to advocate for an international IP regime. The IP laws adopted also advocate for civil ways of court settlement. It only created offences where the *mens rea* (intention) is a critical factor, thereby increasing the burden of proof as opposed to Kenya. The USA also protect IP based on particular factors such as if there is an existing and reciprocated treaty with the other country, or if the IPR holder has an industry that is beneficial to the country or its citizens.

5.3.5.2 Conclusion on the Effects of IP on Trade in China

Some key lessons and debates can also be drawn from IP protection in China. Although China's civilisation dates back thousands of years, modern industrialisation can be traced back to 1978. China has made tremendous progress in innovation and is one of the leading countries in telecommunication, artificial intelligence, biotechnology, and robotics. In adopting IP laws, China has run the show since the first 301 special report by the United States Trade Representative (USTR). It has ratified multiple bilateral and multilateral trade agreements including the TRIPS agreement under the WTO. The development in China is clear evidence of how the country has leveraged the IP regime for the benefit of its citizens.

In public, China has adopted a system of laws that if utilised could end trade in counterfeit and pirated goods. It has further set up a specialised court to hear IP matters. However, the problem remains with enforcement of the laws. Either deliberately or through lack of resources, there has been no significant results when it comes to the fight on international IPR in China. It is still the biggest exporter of counterfeit goods in the world. Kenya is one of the main importers of Chinese products. Although China ratifies treaties and create laws in support of IP, it only implements policies, such as the "Made in China 2025," that are beneficial to its people. It increases the requirements for entry into its market and once there, the firms should ensure technology spill over to China.

5.3.5.3 Conclusion to the Effects of IP on Trade in Morocco and South Africa

The adoption of IP laws in the African countries has majorly been influenced by Western Countries. Countries such as Morocco have implemented international IP agreements due to the bilateral agreements the country has adopted with the United States and the European Union (EU). Although the US and the EU might seem to have had an upper hand in the negotiation of the agreements, the adoption of strong Intellectual Property Laws has also benefitted the country in FDI. Morocco has also adopted laws that are beneficial to the people and given a government entity the mandate of collection of copyright royalties.

South African performance in innovation and collection of royalties is a testimony that protection of IP can be for the benefit of the people. Although the problems that come with Collective Management Organizations (CMOs) have also spilled to South Africa, its legislation on industrial property well protect the people of South Africa. Thus, South Africa and Kenya can also borrow good practises from Morocco in the management of royalties.

5.4 Recommendation to IP laws on Trade in Kenya

The recommendations are meant to answer the second research question which focused on whether there are reasonable ways of IP enforcement that Kenya can adopt to prosper economically as well as fostering innovation and creativity. From the objectives and findings, this study recommends a general makeover of IP laws in Kenya. There is a significant threat to trade within Kenya laws.

For instance, the Anti-Counterfeit Act 2008 which borrowed heavily from the South African Counterfeit Goods Act, significantly left out provisions that protected business persons and fostered human rights. This section offers recommendations on how the Government can restructure the IP system in Kenya to facilitate trade. Since Kenya is in the process of enacting the Intellectual Property Office Bill 2020, this section offers recommendations on the current IP regime and how the bill can be made trade friendly.

It is high time that Kenyan Legislative and Policy makers asked the real questions like what benefits that can accrue to the Kenyan people with the adoption of the *suo motto* enforcement of international IP. Further, although the Kenyan IP regime set out strict measures that are likely to persecute Kenyan traders, it is up to the courts to find a proper interpretation of the statutes, before the parliament amends them.

5.4.1 Analysis of the IP Incentive Industries

Before Kenya employs stringent measures to fight IPR infringement, there should be a cost benefit analysis of how the protection would benefit the country. Unlike the EU and the USA, there is no research on how much Kenya stands to gain if international IP is protected. The National Baseline Survey created by ACA in 2020 gives a general overview on what the world loses to illicit trade. For better decision making, Kenya needs to device a report that is specific to the need for IPR protection in Kenya. ACA should work with NCRC to generate data on the IPR doctrines that are prevalently infringed in Kenya to inform legislative and policy changes.

5.4.2 Eligibility for Protection

Just as developed countries like the USA, only protect IPR from other countries in specific instances, Kenya should do the same. Enforcement activities should be guided by the objective under Article 7 of the TRIPS Agreement. This means that foreign forms of IPR should only be protected if Kenya stands to benefit from through investment in plant and equipment; momentous hiring of labour or capital; or extensive investment in its exploitation, including engineering, Research and Development (R&D), or licensing.

5.4.3 Creating awareness before enforcement of IP Laws

In drafting the IP laws, the Kenyan Parliament in its wisdom created objectives to guide Government agencies. Under the Anti Counterfeit Act, Parliament designated the first function of the Authority as to “enlighten and inform the public on matters relating to counterfeiting.” Since ACA’s duty to “combat counterfeiting, trade and other dealings in counterfeit goods in Kenya,” comes second,⁴⁶⁶ it implies that ACA should invest much in creating awareness before enforcing crimes that the public is not aware of.

Under the Copyright Act, KECOBO’s primary duty is to “enlighten and inform the public on matters relating to copyright and related rights comes before the duty to administer and enforce all matters of copyright and related rights in Kenya as provided for under the Act.”⁴⁶⁷ The Industrial Property Act 2011 also requires KIPI to “provide to the public, industrial property information for technological and economic development.” These and other provisions show how the parliament was invested in public knowledge of the IP regime.

⁴⁶⁶ Anti-Counterfeit Act, 2008, Section 5

⁴⁶⁷ Copyright Act, 2001, Section 5.

Adverse complaints and demonstrations against IP enforcement agencies are a clear indication that there is no proper engagement with public. Without proper knowledge, traders may refrain from dealing with particular brands completely, whether the goods are genuine or not, which is likely to sabotage even legitimate trade. To remedy this, the Anti Counterfeit Authority should invest in creating awareness about IPR with the public. The Kenyan importers and retailers should also be educated on how to identify counterfeit goods and how to avoid buying or importing such goods. KECOBO should also engage with retailers and educate them about their duty to pay royalties under the Copyright Act 2001.

This will reduce the tension between business entities and the CMOs. The authors of artistic works should also be educated on the benefits that can accrue by virtue of being IPR holders. Further, they should be informed on how to register their IP and how to get benefits from the relevant CMOs. KIPi should work with the National Commission for Science, Technology, and Innovation. (NACOSTI) to educate Kenyans on innovation and how to protect and benefit from inventions.

5.4.4 Acknowledging the Business Community as Stakeholders in Protecting IP

Since KAM sits at the Board of ACA as authorised by the Anti-Counterfeit Act, 2008 and stakeholders in music, film and publishing industries sit on the Board of KECOBO, the business community should also be integrated into these statutory agencies. Considering the war on IPR infringement equally affects them, they should be considered as key players in the legislative and policy formulation of matters related to IP. Since no seat is reserved for the business community, the laws and policies created may neither favour local retailers nor importers. To facilitate trade, the business community should be in a position to influence trade related decisions.

5.4.5 Interpreting Provisions Establishing Strict Liability Offences

The offences under the Anti Counterfeit Act and the EACCMA have been described as strict liability since they do not make any consideration to the intention to commit the crime. Although the NCAJ supports the fact that the statutes make offenders strictly liable, Kenyan Courts are under no obligation to adopt this interpretation. The Court of Appeal and courts in other jurisdictions have emphasised the importance of *mens rea*. Although strict liability offences such as selling expired food might be applicable in cases that might cause utmost harm to human beings, such scenarios may not apply in the case of IP in Kenya.

In concurrence that *mens rea* can be inferred, the Kenyan Court of Appeal in *Reminisce Sports Bar Limited t/a Reminisce Bar & Grill & 3 Others v. Cabinet Secretary Ministry of*

*Transport & 7 Others*⁴⁶⁸ explained the importance of *mens rea*. It described it as cardinal maxim in criminal but also stated that it could be dispensed with by a statute. However, in cases where *mens rea* is dispensed with, the court has the discretion to strike a balance between the presumption of *mens rea* and the public interest. The COA further relied on the case of *In Lim Chin Aik v. The Queen* (1963) where the court held that the presumption of *mens rea* had not been ousted because the statute was silent.⁴⁶⁹

The court in *In S v. Arenstein* (1967)⁴⁷⁰ held that in view of legal maxims like *nulla poena sine culpa* (one cannot be punished for something that they are not guilty of) and *actus non facit reum nisi mens sit rea* (an act does not render a man guilty of a crime unless his mind is equally guilty), exclusion of the *mens rea* (intention) provision does not mean that the parliament intended to exclude *mens rea*. In addition, if such was the intention, then the legislature ought to have stated indicated within the statute. Further, the court in *Brend v. Wood* (1946)⁴⁷¹ stipulated that the protection of right to liberty was of utmost importance. Therefore, unless the legislature expressly or by implication rules out *mens rea*, then a court should not convict a person as guilty unless their mind is guilty.

As earlier observed, some counterfeit goods are of better quality than the genuine products. In applying the criminal provisions, courts should employ a balancing act. The courts should use their discretion to measure the harm that the goods can cause. Nevertheless, they should infer *mens rea* not to derogate the suspects' fundamental rights and freedom.

5.4.6 Good Approach to enhance innovation, creativity and facilitate trade

Kenyan policy makers should study other countries to make better decisions while creating laws and policies. David Trubek advises on a North-South system of learning like one adopted by the Brazil, Russia, India, China, and South Africa (BRICS) countries. Further to the learning, Ben Sihanya observes, there is need to conceptualise, problematize and contextualise the system of laws. He reiterates that transplanting laws and ideas is likely to be hazardous to Kenya. It is therefore imperative to amend the laws putting into consideration the social and economic factors in Kenya as discussed under Chapter 4 of this thesis.

⁴⁶⁸ *Reminisce Sports Bar Limited t/a Reminisce Bar & Grill & 3 Others v. Cabinet Secretary Ministry of Transport & 7 Others*, Civil Appeal No.219 of 2014

⁴⁶⁹ *In Lim Chin Aik v. The Queen* [1963] AC 160.

⁴⁷⁰ *S v. Arenstein* (1967) (3) SA 366.

⁴⁷¹ *Brend v. Wood* (1946) 62 TLR 462 at 463

5.4.7 Amendment of the Existing Legislations

Provisions of offences under the Anti-Counterfeit Act, 2008 ought to be revised. The legislature should be aware that there is no requirement to adopt more stringent measures than those required by the TRIPS Agreement. The amendments should include at least seven reforms:

First, all the offences under the Anti-Counterfeit Act, 2008 should have the element of *mens rea*. An accused person should only be guilty if the offences is committed intentionally and on a commercial scale. Second, Section 32(f) and (n) of the Anti-Counterfeit Act should be amended not to criminalise transshipment of counterfeit goods to other countries. This could create a rift with the other countries which import goods through the Kenyan ports. The countries may opt to use ports in other countries like Tanzania.

Third, the Anti-Counterfeit Act, 2008 should also make recordation under Section 34B optional. Recordation should only be an additional measure to the protection of IP and not compulsory. Fourth, the Act should not criminalise the importation of unbranded goods. Unbranded good are not counterfeit in nature and prohibiting such decreases the goods Kenyans can trade in. Fifth, the compulsory declaration of the quantity or the intellectual property right subsisting in any goods being imported into the Kenya should be abolished since it increases the burden on importation. Sixth, the penalties under section 35 of the Act should be revised not to cripple the trade sector. They should be specific and courts should be given the discretion to vary them. Finally, the scope of IPR to be protected under the Act should be limited to Trademarks as TRIPS intended. Although there is no data on cases involving other IP doctrines such as plant breeders' rights and counterfeit medicine ACA has enforced, enforcement of such will create absurdity and an overlap of roles with the PPB, KECOBO and Kenya Plant Health Inspectorate Service (KEPHIS).

The EACCMA should be amended to provide for penalties that will not hamper trade. The offences should not be of strict liability nature and the objects of transportation should not be strictly forfeited. The Copyright Act, 2001 should mitigate the complaints raised by artists. CMOs should be strictly accountable to KECOBO and the Act should introduce crimes for failure of CMOS to effectively collect and remit royalties to the artists. Invariably, KECOBO should be expanded to be a royalty collecting body.

5.4.8 The Intellectual Property Office of Kenya Bill 2020 (IPOK Bill, 2020)

The Intellectual Property Office of Kenya Bill 2020 (IPOK Bill, 2020) seeks to consolidate the, Anti-Counterfeit Act, 2008, Copyright Act, 2001, Industrial Properties Act, 2001 and the

Trade Marks Act and amalgamate the agencies established under the Acts to one office. The most important aspect of this merger is that it creates one body, build to specifically register, and enforce IPR.

The merger will make it easier for the IP agencies to share technology and enforce IP as one department. Proving the existence of IPR will not be a challenge and integration of human resources from different backgrounds could foster the IP department in Kenya. However, the Bill also consolidates the problems the three agencies had. It is a parent document implanted with the four Acts of Parliament with slight modification. The drafters also avoided to engage the business community and key IP scholars who are key stakeholders to the enforcement of IP.

The IPOK Act should either repeal provisions of IPR enforcement in other Legislations or make IPOK the principal organ tasked with the enforcement of IPR. The legislation should clearly be designed to foster innovation and creativity in Kenya. For this to be actualised, the legislature ought to understand that IPR are private in nature and are designed to protected IPR holders unlike consumer protection laws. The legislation should therefore adopt all the IPR enforcement provisions in Acts of Parliament such as the Seeds and Plant Varieties Act, Cap 326 the Government Proceedings Act, the Access to Information Act, 2016 the Micro and Small Enterprises Act, 2012, Trade Descriptions Act, Penal Code, Pharmacy and Poisons Act and Computer Misuse and Cybercrimes Act, 2018 among others.

Further, the IPOK legislation could also adopt the Science, Technology, and Innovation Act, 2013. Which lays at the centre of the promotion, co-ordination, and regulation of the progress of science, technology, and innovation. This will create an ecosystem of all IPR registration and enforcement units working as one with the same vision and mission which should be to anchored under Article 40(5) of the Constitution of Kenya 2010, which requires the state to support, promote and protect IPR of the Kenyan people.

5.5 Other Researchers Contribution on Effects of IPR Protection on Trade in Kenya in Kenya

This research was purely doctrinal. To better influence legislative and policy formulation other researchers can opt for a socio-legal approach.

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