

Overview of Intellectual Property Rights: The Case of Kenya

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Abstract

Theory and experiences amongst the Asian Tigers reveal that knowledge has an important role to play in promoting economic growth. Knowledge however, is a non-rival good with partial excludable characteristics. Intellectual Property Rights therefore encourage the development and commercialization of creations of the mind - intellectual property (IP). If such creations were made available to the public without any legal IP protection, this becomes public knowledge, hence standing the risk of being copied or imitated. This diminishes the potential profits and discourages innovators from engaging in innovative activities. This study aims at reviewing the intellectual property regulations and structure, drawing on its role in promoting the generation of new knowledge. The study does this by providing a global picture with regard to the use, economic benefits and origin of intellectual property rights, and by providing statistics on the different intellectual property rights tools in Kenya, such as patents, industrial design, utility models, trademarks, copyrights and plant breeder's rights. The study also provides an overview of the regulatory and institutional framework governing intellectual property rights, including a review of the recent developments, and the challenges faced in Kenya, including cases of infringement and misappropriation of intellectual property rights. The study's recommendations encourage development of knowledge based growth as envisioned in Vision 2030.

Abbreviations and Acronyms

AIDS	Acquired Immune Deficiency Syndrome
ARIPO	African Regional Intellectual Property Organization
BSA	Business Software Alliance
EPZ	Export Processing Zones
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GI	Geographical Indicators
HP	Hewitt Packard
IAVI	International AIDS Vaccine Initiative
ICG	Inter-governmental Committee
ICTSD	International Centre for Trade and Sustainable Development
IEA	Institute of Economic Affairs
IFPI	International Federation of the Phonographic Industry
IIPA	International Intellectual Property Alliance
IP	Intellectual Property
IPR	Intellectual Property Rights
KEMRI	Kenya Medical Research Institute
KIRDI	Kenya Industrial and Research Institute
KIPI	Kenya Industrial Property Institute
KIPO	Kenya Industrial Property Office
KEPHIS	Kenya Plant Health Inspectorate Services
KWS	Kenya Wildlife Services
MRC	Medical Research Council
MCSK	Music Copyright Society of Kenya
NEMA	National Environment Management Authority
NQCL	National Quality Control Laboratories
OECD	Organization for Economic Cooperation and Development
PBR	Plant Breeders Rights
PCT	Patent Cooperation Treaty
PLT	Patent Law Treaty
R&D	Research and Development
RRO	Reproduction Rights Organization
ST&I	Science Technology and Innovation
TK	Traditional Knowledge
UK	United Kingdom

TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UPOV	International Convention for Protection of New Varieties
VDP	Vaccine Development Partnership
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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1. Intellectual Property Rights: An Introduction

1.1 Background

Theory and experiences amongst the Asian Tigers reveal that knowledge has an important role to play in promoting economic growth. This is evidenced by theories such as endogenous or New Growth Theory and countries such as the Asian tigers, which have focused on science, technology and innovation as the main development strategy (United Nations Conference on Trade and Development - UNCTAD, 2007). Knowledge is a non-rival good with partial excludability characteristics. If the knowledge generated is valuable, it stands the risk of being copied or imitated, thereby reducing the potential profits from 'exploiting and/or commercializing the knowledge', which discourages innovators from engaging in innovative activities. With the advent of new information technology and the effects of globalization, knowledge exchange is made easier. Relying on the market to protect the originator of the knowledge from exploitation from third parties is unrealistic.

The uncertainties and risks that exist may lead to knowledge being used inefficiently, wasted, exploited by a third party, counterfeited or pirated. This brings out the importance of having efficient systems that would protect one from certain uncertainties and market inefficiencies, which encourage innovators to invest in knowledge creating activities. These systems prohibit others from illegally using or copying an invention by granting successful inventors temporary monopoly power over their innovations, thereby allowing innovators to commercialize and exploit their innovation.

These systems are intellectual property rights (IPRs), which can be defined simply as the rules and regulations that protect an individual or institution against illegal copying, reproduction or imitation of products formed out of a creative process (UNCTAD, 2007; and Idris, 2003). These rights are conferred to an innovator to protect their intellectual property (IP).¹

¹ According to the World Intellectual Property Organization-WIPO (available at <http://www.wipo.int>), intellectual property refers to creations of the mind, which include inventions, literary and artistic works, and symbols, names, images, and designs used in commerce and are often classified into industrial and artistic products or processes.

Intellectual property rights have been in existence for many years since the 1400s, with the aim of protecting innovators by granting them exclusive limited rights to use the innovations through what was termed as a ‘limited monopolies’ (Idris, 2003). IPRs are awarded by national governments based on the relevant legislation in place and are only valid within the respective jurisdiction. There are, however, some international and regional agreements and conventions concerning IPR that several countries are party to.

Studies reveal that intellectual property rights play an important role in encouraging investment in knowledge creation, where absorptive capabilities exist² (UNCTAD, 2007). Patents, for instance, have proved to be important instruments for encouraging innovation in industries such as pharmaceutical, chemical, computer and mechanical industries. Trademarks are important marketing tools that are used to distinguish one good from another, and have contributed to the establishment and growth of distinctive quality brands. Copyrights have also been instrumental in encouraging creativity and the growth of film, music and software industry. Patents, copyrights, trademarks and other IPR instruments are also important assets and a source of revenue through self-exploitation and royalties, sales, joint ventures and licensing agreements. Unscrupulous people sometimes infringe on these rights.

1.2 Overview of Intellectual Property Rights in Kenya

In Kenya, initial IP laws were based on colonial heritage introduced to Kenya to address imperialist interests (Sikoyo *et al.*, 2006). On gaining independence, Kenya inherited colonial legislature on patent, trademarks and copyrights. All these laws were later repealed and/or amended to be more appropriate and relevant to better reflect the economic situation, technological capability and priorities in Kenya. The intellectual property rights currently recognised are: trade marks and service marks, patents, utility models, industrial designs, rationalization models, copyrights and plant breeders rights. They are governed by four main acts; the industrial property Act 2 of 2001, the Trademark Act CAP 506, the Copyright Act 12 of 2001 and the Seeds and Plant Varieties Act, Cap 326. These are administered by three main institutions: Kenya Industrial Property Institute (KIPI),

² Absorptive capacity is the “ability to recognize the value of new information, assimilate it and apply it to commercial ends” (Cohen and Levinthal, 1990).

Kenya Copyright Board, and Kenya Plant Health Inspectorate Services (KEPHIS), respectively.

Despite the fact that IPR has had a long history in Kenya, with the first statute being traced to the colonial period, awareness of IPR in Kenya is limited (Misati, 2008; and Ogada *et al.*, 2004). If awareness is limited, the laws become ineffective. Lack of awareness has over the years increased the opportunities of infringement and counterfeit. According to the International Intellectual Property Alliance (2003), Kenya has become a dumping ground for pirated and counterfeit goods such as pirated music, movies and counterfeit drugs. Lack of awareness has also contributed to the exploitation of local innovators (Ogada *et al.*, 2004). There have been a number of IP-related disputes that have emerged over the years in Kenya, which would not have been if IPR was understood, protected and enforced.

Kenya has put in place several policies and incentives for the private sector to encourage firms to grow, with the overall aim of achieving economic growth and reducing poverty. These policies often fail to recognize the importance of knowledge infrastructure in encouraging innovation, competitiveness of enterprise and promoting the overall growth of the private sector. Additionally, Kenya does not have a national policy on IPR.³ Consequently, the knowledge infrastructure and innovation in the country remains rather underdeveloped. The government has, however, now started recognizing the importance of technology, innovation and intellectual property protection. According to the Kenya Vision 2030, science, technology and innovation (STI) play an important role in encouraging economic growth.

The strategies for promoting STI proposed in the Kenya Vision 2030 aim at:

- Strengthening technical capabilities: Kenya's overall ST&I capacity and capability is deemed to be weak (Government of Kenya, 2008).
- Improving human resources: Currently, little emphasis is put on science and technology in the education system. Emphasis has been on exams with limited opportunities of practical experience such as industrial attachments.
- Identifying, funding, and coordinating research in priority areas

³An intellectual property right policy has now been drafted.

and improving STI awareness: Research is mainly funded and controlled by the public sector, with the private sector showing little interest in R&D (Government of Kenya, 2006).

- Protecting local technological and indigenous knowledge through IPR: Protection of indigenous technology is especially important because the current IPR system in Kenya does not recognize or protect indigenous knowledge and innovations of local communities (Mbeva, 2004).

1.3 Objectives of the Study

The main objective of the study is to provide a situation analysis of IP and IPR in Kenya. The specific objectives are:

- To provide a global picture of use and origin of intellectual property rights
- To provide an overview of intellectual property rights in Kenya including experiences/cases of intellectual property rights infringement, counterfeiting and piracy in Kenya.

1.4 Justification of the Study

Intellectual property and intellectual property rights have far reaching effects in an economy, especially in encouraging innovation and creation. This has, however, been overlooked as there is not much literature available on the link between knowledge, innovation and economic growth in Kenya, and the importance of protecting knowledge and intellectual property. Intellectual property rights have, over the years, contributed to growth and development of several countries such as Japan, China and the United States of America, and individual companies such as Microsoft, Sony, Pfizer, Xerox and so on. In Kenya, a number of individuals, companies and countries continuously utilize or interact with intellectual property rights. However, the term is still largely misunderstood. Moreover, Kenya has been experiencing an influx of counterfeited and pirated products.

Counterfeits and illegal imitations have become a major concern to a number of industries. Understanding the role IP and IPR plays in an economy is important for the public and the private sector alike, as it will enable them to develop appropriate policies and strategies that would

benefit the economy and encourage technical changes and innovation. Therefore, improving awareness on intellectual property rights and appreciating its role in economic development is key to fostering an understanding of these systems and, consequently, promoting healthy competition in the country, which is necessary for economic growth. This is especially important as Kenya aspires to be a globally competitive newly industrialized middle income economy as articulated in Kenya Vision 2030.

An informed population that rewards creativity, stimulates innovation and protects investments in knowledge generating activities through intellectual property rights, stands a better chance of making a significant contribution to economic development, while safeguarding public interest.

Knowledge and innovation influence a country's economic and social development and are therefore important assets to any country.

From a policy perspective, it is important to identify priorities and modalities that would enhance the knowledge economy. This study provides a situation analysis of IP and IPR in the country. It explores the origin and theories of IPR, while providing an overview of IPR in Kenya, including the laws, policies and institutions. The study also looks at some challenges faced with respect to intellectual property rights, giving examples of cases where these rights have been infringed. The last chapter concludes and makes recommendations for Kenya.

2. Intellectual Property Rights and Economic Growth

2.1 Intellectual Property Rights

Intellectual property rights are the rules and regulations in place that protect an individual or institution against illegal copying, reproduction or imitation of intellectual property-creations of the mind. Table 2.1 summarizes definitions provided in literature.

2.2 Theories of Intellectual Property

Menell (2003) traces the history of the theories of intellectual property and argues that the philosophy of intellectual property emerged with the introduction of limited monopolies that were introduced by different countries with the aim of encouraging innovation. He also provides a summary of scholars who have, over the years, indicated their views of IP. Some of those who championed IP included Bentham (1839) who emphasizes on the need for protecting inventors from the rivals in a position to imitate the invention. Mill (1862) argues that the temporary exclusive privileges granted by patents were rewards to the inventor. Clark (1927) had a similar view asserting that a system that does not

Table 2.1: Definition of intellectual property rights

Definition	Source
“the rights given to persons over the creations of their minds”	World Trade Organization ⁴
“those legal rules, norms and regulations that prevent the unauthorized use of intellectual products”	UNCTAD (2007, pp. 91)
“the commercial application of imaginative thoughts to solving a technical or artistic challenge”	Idris (2003 pp.9)
“legal and institutional devices to protect creations of the mind such as inventions, works of art and literature and designs”	UNCTAD & ICTSD (2003 pp. 27)

Author’s compilation

⁴ Intellectual Property Rights material available at World Trade Organization (WTO) website http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm

give inventors control over their inventions and protection against rivalry would discourage the spirit of innovation. Other scholars such as Robinsion (1933) and Plant (1934a, 1934b) had a differing view, arguing that markets and not IPR encourage innovation. Over the years, several other debates have emerged, some for IPR and others against it. In 1969, Nordhaus revealed that the optimal duration of patent protection should create a balance between incentive for innovation and the effects of a monopoly. This, according to Menell (1999), is considered to be the 'classic treatment'.⁵

Most recent studies indicate that IPR offers incentives for innovations to a number of industrial sectors. "The objective of intellectual property protection is to create incentives that maximise the difference between the value of the intellectual property that is created and used as the social cost of its creation, including the cost of administering the system" (Besen and Raskind, 1991).

The traditional models of intellectual property rights focused on granting protection to individual inventors for a specific duration. This is because the traditional intellectual property rights had two main assumptions; first, individual inventors conducted separate different research projects; and second, innovations were one-shot inventions that cannot be improved upon. History reveals that these assumptions do not hold; as different innovators often undertake research in similar fields, bringing about competition and a race to benefit from the patent protection. Over the years, it has also been established that inventions are not only outputs but also inputs, which innovators often build on to make further improvements and innovations, thus patenting them. Modern models of protection have since transformed to include patent breadth and exclusivity, and also consider the implications of cumulative innovation (Menell, 1999).

2.3 History of Intellectual Property Rights

The concept of intellectual property rights has been in existence for many years. One of the earliest attempts of protecting invention was evidenced in Italy in the 1440s when an individual was granted exclusive rights for his invention. The Venetian Law enacted the first patent statute in 1474, which provided the inventor with an 'exclusive license' for ten years. This Venetian Law is regarded as the first systematic

⁵ See Menell (1999) for analysis of the theories.

attempt at protecting inventions (Menell, 2003; Idris, 2003). Since then other countries have granted similar limited monopolies to inventions of local inventors. Intellectual property rights were also utilized in mercantilist period by states as a means to develop manufactured goods and to establish foreign trade monopolies (Menell, 2003).

By the 19th century, a number of countries had experienced industrialization, and the growth of their cities. This encouraged a number of them to establish appropriate intellectual property laws, to promote innovation and creativity, and to protect their local industries. During this period, international protection of innovations became increasingly necessary. To address this, the Paris Convention for the Protection of Industrial Property was held in 1883 and laid down a few common rules which each member states should follow as regards patents, marks, industrial designs trade names, indications of source and unfair competition (Idris, 2003). In 1886, another major treaty was established; the Berne Convention for the Protection of Literary and Artistic works. It provided authors with an international form of protection for literary works and the recognition of copyrights (Ibid). Both the Paris and the Berne Conventions have been revised several times over the years, since its enactment.

The World Intellectual Property Organization (WIPO), a specialized agency of the United Nations that deals with developing a balanced and accessible international intellectual property system, was established after the Paris Convention and the Berne Convention, both separately provided for the establishment of an international bureau. The two bureaus established by the two conventions were united in 1893 and later replaced by WIPO following the WIPO Convention (1967). Currently, WIPO has 184 members states including Kenya, 183 of which are party to the Paris Convention, and 164 are party to the Berne Convention.⁶ Kenya is a member of all the three conventions.

By the 1980s, international trade was on the increase with increased globalization. This brought about trade distortion and infringement of intellectual property rights, which were being experienced by a number of developed countries (Idris, 2003). Developed countries spearheaded by the United States of America drove the process of introducing IPR in trade in 1982 during the preparations of the World Trade Organization (WTO) Uruguay Round of negotiations, which saw the establishment

⁶ More information available from <http://www.wipo.int/treaties/en/> and http://www.wipo.int/about-wipo/en/what_is_wipo.html

of The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement that was established in 1994, but took effect on 1st January 1995 (Blakeney, 2004). TRIPS provides the minimum level of protection for each WTO member state to give to fellow members with respect to intellectual property.⁷ According to Falvey and Foster (2006), the TRIPS agreement was the first international agreement to provide a comprehensive and global set of rules covering IPR protection. It specifies the minimum standards that should be attained by member countries, depending on their level of development. Developed countries were given one year to ensure their national laws and practices conformed with the Agreement, while developing countries were given five years.

These conventions have been instrumental in providing the principles of national treatment pertaining to the protection of intellectual property rights. There have been several developments over the years since national IPR standards in a number of countries became harmonized and stronger. The regulations include a wider range of issues that extend the initial patent and copyright laws, such as protection over business methods, life firms, cell lines and DNA sequences, trade mark sounds and smells (UNCTAD and ICTSD, 2003).

2.4 Intellectual Property Rights Instruments

Intellectual Property Rights (IPR) is therefore crucial in providing the necessary protection and rights to curb illegal copying of genuine products. IPR provides the necessary incentive for an investor to put effort, resources and ingenuity into developing a product or service. The degree and type of protection varies depending on the product, service, sector, market demand and structure, R&D costs and the nature of the innovative process (Commission on Intellectual Property Rights, 2002).

⁷ TRIPS was negotiated in the 1986-94 Uruguay Round and established a multilateral framework, including minimum levels of protection that members should give to intellectual property of members of the World Trade Organization (WTO). This was not specified by the earlier international conventions. More information of TRIPS agreement available at http://www.wto.org/english/tratop_e/trips_e/t_agmo_e.htm

Intellectual property rights can be categorized into three:

1. Industrial property: These include patents, utility models, industrial design, trademarks and geographical indicators.
2. Copyrights and related rights: These are rights given to literary and artistic works.
3. Plant breeder's rights: These rights are given to plant breeders.

In Kenya, the intellectual property rights recognized are patents, utility models, industrial designs, rationalization models (all of which can all be classified as industrial property), trade marks and service marks, copyrights and plant breeders rights (Mbeva, 2004). These rights are governed by various laws and institutions. Table 2.2 summarizes the different international treaties and agreements for protecting IPR.

2.4.1 Industrial property

According to the Paris Convention (Article 1), industrial property is applied on a broad sense to industry, commerce, agriculture and extractive industries, manufactured or national products.

In Kenya, patents, industrial designs, and utility models are administered by the Kenya Industrial Property Institute (KIPI) and are governed by the Industrial Property Act 2 of 2001. Trade and service marks are also administered by KIPI and are governed under Trade Mark Act, CAP 506.

As mentioned earlier, the first international treaty on industrial property was the 1883 Paris Convention for the Protection of Industrial Property. It applies to the protection of industrial property, including patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition. Kenya accented to the Paris Convention in 1965. The Paris Convention is administered by the World Intellectual Property Organization (WIPO), which Kenya is a member having ratified to the WIPO Convention in July 1971.

Kenya is also a member of African Regional Intellectual Property Organization (ARIPO) which was created in Lusaka-Zambia on 9 December 1979 (also referred to as the Lusaka Agreement) and has 16 member states which include: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan,

Table 2.2: Instruments and agreements for protecting IPRs

Type of intellectual property	Instruments of protection	Protected subject matter	Primary fields of application	International agreements
Industrial property	Patents and utility models	New, non-obvious inventions with industrial utility	Manufacturing, agriculture	Paris Convention; Patent Cooperating Treaty; Budapest Treaty; Stasbourg Agreement
	Industrial designs	Ornamental designs of products	Manufacturing, clothing, automobiles and electronics, etc	Hague Agreement; Locarno Agreement
	Trademarks	Identify signs and symbols	All industries	TRIPS; Madrid Agreement; Nice Agreement; Vienna Agreement
	Geographical indicators	Identify place names	Wines and spirits	Lisbon Agreement
Artistic and literary property	Copyrights and neighbouring rights	Original expressions of authorship	Publishing, electronic entertainment, software and broadcasting	TRIPS, Berne Convention; Rome Convention; Geneva Convention; Brussels Convention; WIPR Copyright Treaty; WIPO Performance and Phonograms Treaty; Universal Copyrights Convention
Sui generis protection	Integrated circuits	Original designs	Computer chip industry	TRIPS
	Database protection	Databases	Information processing	Washington treaty
	Plant breeders' rights	New, stable, distinct varieties	Agriculture and food	TRIPS
Trade secrets	Laws against unfair competition	Business information held in secret	All industries	EC Directive 96/9/EC; UNOV, and TRIPS

Source: Primo Braga, C. A., C. Fink and C. P. Sepúlveda, 2000

Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. The main aim of ARIPO is to pool together resources of member countries on matters of industrial property, with the aim of achieving technological and industrial development.

Patents

“A patent is an exclusive right granted for an invention of a product or a process that provides a new way of doing something, or offers a new technical solution to a problem” (Idris, 2003). The term patent is derived from a Latin term *patere*, which means to be open and refers to the open letters⁸ (Menell, 1999). The first ‘letter of patent’ was a grant of monopoly in 1440 by the English Crown to John of Shiedame, who with his company was invited to the United Kingdom to introduce a method of manufacturing salt (Patterson, 1968). The first modern patent law introduced in the country is however said to be the 1623 Statute of Monopolies of England. Prior to the enactment of this statute, limited monopolies such as that granted to John of Shiedame, were granted by the English Crown, in the exercise of his royal rights under system of common law (Misati, 2008).

A patent is granted for a limited, finite time (typically 20 years), during which the owner enjoys the specified rights. These rights include the right to decide who may use the patented invention through certain agreements or licenses. These rights can also be sold to someone else. Once the patent expires, the protection and rights end (Idris, 2003; UNCTAD, 2007). One important feature of patents is the requirement for disclosure of technological information at the point of making the patent application (in most countries). Not all inventions are patentable. The three common conditions of patentability are:

- Novelty, must have new characteristics
- Industrial applicability (utility), must be practical and/or applicable
- Inventive step (non-obvious), must be original and not obvious

If the invention falls within the patentable matter and meets the above conditions, the patent authority then makes the decision on whether to grant the patent, following the investigation of the patentability. Every

⁸Open letters were the documents used in the middle ages to confer rights and privileges to individuals.

Table 2.3: Patent activity by patent office and country of origin (2006)

No.	Country	No. of patent filings by country of origin	Patent filings made by residents in patent office	
			Number	% of total filings
1	Japan	514,047	346,964	67
2	United States of America	390,815	221,928	57
3	Republic of Korea	172,709	125,473	73
4	Germany	130,806	47,983	37
5	China	128,850	122,301	95
6	France	44,677	14,524	33
7	United Kingdom	41,085	17,481	43
8	Russian Federation	29,059	27,891	96
9	Netherlands	27,389	2,167	8
10	Switzerland	24,861	1,740	7
11	Canada	21,555	5,507	26
12	Sweden	14,915	2,447	16
13	Australia	10,809	2,834	26
14	Finland	9,681	1,816	19
15	India (2005)	8,094	4,509	56

Source: WIPO (2008)

country has its own procedures for grant, exploitation and litigation of patent rights (Misati, 2008; and WIPO, 2005). Additionally, patents are only valid in the country in which the application is made and subsequent grant is obtained. There are, however, ways in which patents can be applied in several countries, for instance through Patent Cooperation Treaty (PCT) or through ARIPO.

Patents are very important for various reasons. They facilitate technology transfers, facilitate investment, stimulate R&D and can be an important asset (Idris, 2003). A glance at the top 10 countries in terms of number of patents filed by resident in their patent office reveals that patent filing is largely undertaken by economically advanced countries (Table 2.3). However, in countries such as Switzerland, Netherlands, Sweden and Finland, a large proportion of the patents are filed by non-residents. In comparison, the number of patents filed by residents in the Kenya patent office in 2006 was 38, while the total number

of patent filings was 71,⁹ a low figure compared to the top countries. However, over half of the patents are filed by residents. According to WIPO statistics, the number of resident patent filings per million in Japan in 2006 was 2,720.65, while in Kenya it is a mere 1.08, a further indicator of the low levels of patent activity in the country.

Relevant laws and conventions

The Patent Cooperation Treaty (PCT) was concluded in 1970, amended in 1979, and modified in 1984 and 2001. It makes it possible for individuals or companies from member states to seek patent protection from a number of countries simultaneously by filing an “international” patent. In 1994, Kenya accented to the PCT. PCT applications can be made at the national patent office, which in Kenya is KIPI, or with the International Bureau of WIPO in Geneva.¹⁰ Majority of the applications made under PCT through KIPI are by non-residents, especially Germany and France.

As mentioned earlier, Kenya is party to ARIPO and under the Harare protocol (the Protocol on Patents and Industrial Designs), which entered into force in 1984, ARIPO is empowered to grant patents and register utility models and industrial designs on behalf of the 16 contracting states. KIPI is a receiving office for ARIPO patents and industrial design applications. Therefore, an inventor wishing to protect their invention under the ARIPO countries can do so by filing in one application and designating any of all 16 countries.¹¹ From when ARIPO came into force to 2010, there have been 2,163 patents granted by ARIPO.

As indicated earlier, in Kenya patents are governed by the Industrial Property Act (Act 3 of 2001) and administered by KIPI. According to the Act, a patent expires at the end of 20 years from the filing date. The Act provides for the registration of patents as well as the protection of the right owner, the scope of the protection and the enforcement of the rights. If the owner’s rights are infringed, the owner can obtain an injunction and seek damages and/or compensation. Infringement,

⁹ Data obtained from WIPO (available from http://www.wipo.int/ipstats/en/statistics/patents/wipo_pub_931.html#a12). See Table 2.3 for additional statistics.

¹⁰ More information on the Patent Cooperation Treaty available at www.wipo.int.

¹¹ More information on ARIPO available at <http://www.aripo.org>, <http://www.kipi.go.ke/patents/regional.htm> and http://www.wipo.int/africa/en/partners_org/partners/aripo_bg.html

which refers to the unauthorized use, production or sale of any patented invention, is a vice experienced around the world, Kenya included.

The initial patent law relevant to Kenya was contained in Kenya Patent Registration Ordinance (1933) CAP 508 and the Kenya United Kingdom Industrial Designs Act CAP 510, which provided for patents to be granted and governed by patent law of the United Kingdom (Odek, 1994). The patents granted under this law were then registered in Kenya at the Department of the Registrar General, in the office of the Attorney General. The Patents Registration Act (CAP 508) was enacted to facilitate for the registration of the patents granted (Kameri-Mbote, 2005; and Sikoyo, *et al.*, 2006). According to data from KIPI, between 1914 and 1989 a total of 3,920 patents were registered under this Act by the Attorney General's office. In 1989, an independent law known as the Industrial Property Act (CAP 509) was enacted, which came into force in 1990 and led to the establishment of Kenya Industrial Property Office (KIPO), which was mandated to receive applications for industrial property. The Act had provisions for patents as well as other intellectual property instruments such as utility models, industrial designs and rationalization models or technovations. This Act was drafted when there was need to have an independent patent system capable of protecting the drug then said to have ability to manage AIDS that was developed by Kenya Medical Research Institute (Odek, 1994). This Act was repealed in 2001 when the Industrial Property Act No. 3 of 2001 was enacted, which then saw the conversion of KIPO into KIPI-Kenya Industrial Property Institute (Kameri-Mbote, 2005). The 2001 Act was acted to ensure that it is harmonised with domestic laws and to ensure they were TRIPS compliant (Wako, 2007). This Act also has provisions for utility models, industrial designs and rationalization models or technovations.

Utility models

Utility models are a simpler form of patents. They are granted to minor or incremental novel inventions for a shorter time. The criteria for granting protection is also generally less stringent (UNCTAD and ICTSD, 2003). In the case of Kenya, utility models are granted for 10 years and are not renewable.

The definition of a utility model provided in the Industrial Property Act 3 of 2001 is “any form, configuration or disposition of element of some appliance, utensil, tool, electrical and electronic circuitry, instrument, handicraft mechanism or other object or any part of the same, allowing a better or different functioning, use, or manufacture of the subject matter or that gives some utility, advantage, environmental benefit, saving or technical effect not available in Kenya before and includes micro-organisms or other self-replicable material, products of genetic resources, herbal as well as nutritional formulations that give new effects”. It is important to note that there is no universal consensus on what constitutes utility models; therefore, different terms may be used depending on the country. In Australia, for instance, utility models are referred to as petty patents, which were introduced in 1979 to encourage local small firms to be innovative (UNCTAD and ICTSD, 2003). In countries such as Hong Kong, Ireland and Slovenia, what is equivalent to a utility model is referred to as a short-term patent (WIPO, 2005). Other terms used include small patents, utility certificates, innovation certificates and utility innovations.

Utility models are also governed by the Industrial Property Act (2001) and are administered by KIPI. Data on applications and grants on utility models reveals that majority are by Kenyans (Table 2.4).

Industrial designs

This generally refers to the protection of the ‘outer appearance’ (design) of a product, which should be new or original. Depending on the legal provisions of the respective country; the novel designs are protected once registered (UNCTAD and ICTSD, 2003). In Kenya, an industrial design refers to “any composition of lines or colours or any three dimensional form, whether or not associated with lines or colours, provided that such composition or form gives a special appearance to a product of industry or handicraft and can serve as a pattern for a product of industry or handicraft” (Industrial Property Act 3 of 2001, Section 84(1)) and are granted for 5 years and can be renewed for two consecutive periods. Section 92 of the Act provides the rights of the owner of an industrial design, which include the right to institute court proceedings against any person who infringes the industrial design.

Table 2.4: Applications made and granted in Kenya (2004-2010)

	2004		2005		2006		2007		2008		2009		2010	
	Applica-tions	Grants												
Industrial Designs	55	5	117	66	72	47	74	35	49	48	90	103	76	50
% by Kenya	80	100	87	89	75	72	56	45	80	69	84	87	91	78
Utility model	13	1	11	8	19	4	16	2	19	3	30	2	28	5
% by Kenya	100	100	100	100	100	100	100	100	95	100	100	100	100	100
Patent	34	8	40	32	43	11	47	5	63	9	54	11	79	7
% by Kenya	91	100	85	25	95	45	87	80	100	56	89	55	97	57
SGP	50	7	53	16	39	18	85	12	89	33	117	76	118	47
% by Kenya	0	0	2	0	0	0	2	0	0	0	0	0	0	0

Other than trademarks, industrial designs represent majority of the IP applications made to KIPI as indicated in Table 2.4.

Trademarks

A ‘mark’ is “a distinctive name, logo or sign identifying the source of goods or services” (Idris, 2003). The identifying mark includes anything ranging from a word, letter, slogan, device, brand-name, heading, label, ticket, name, signature or numeral that is distinctive or any combination and can be either two or three dimensional form (KIPI, 2005b). The period of protection varies and remains for life through continued commercial use or registration and renewal processes, thus making trademarks a powerful IP asset. The origin of trademarks can be traced to the middle ages, where it was used by merchants to distinguish and brand their products (Idris, 2003).

There are two main symbols that are used universally to represent a trademark protection: ® represents registered trademarks, while the ™ denotes that the sign is used by the holder as a trademark (whether this sign is registered trademark or not).

Relevant laws and conventions

The 1883 Paris Convention for the Protection of Industrial Property is the first international treaty dealing with trademarks. The main system for facilitating trade and service marked internationally, however, is the Madrid system for the international registration of marks, which was established in 1891 and operates under the Madrid Agreement (1891) and the Madrid Protocol (1989).¹² Both entered into force in December 1995 and into operation in April 1996. The Madrid Agreement and Protocol are open to any states party to the Paris Convention for the Protection of Industrial Property. Under the Madrid system, one can file one application directly within their respective national or regional trademark office, and have the trademark protected in several countries. Kenya became party to the Madrid Agreement and Protocol in June 1998.¹³

¹²The Protocol was introduced to make it more applicable to more countries; for instance, it provided for international registrations for national applications, introduced the possibility of the office of the designated Contracting Party to receive an ‘individual fee’ and so on (more information available from www.wipo.int)

¹³<http://www.wipo.int/madrid/en/>

Table 2.5: Sample of trademarks in Kenya

Trademark	Description	Company
Device	Illustration of a wind mill	Unga Limited
Words	“Jogoo”	Unga Limited
Slogan	“the pride of Africa”	Kenya Airways
Numerals	0722	Safaricom Limited

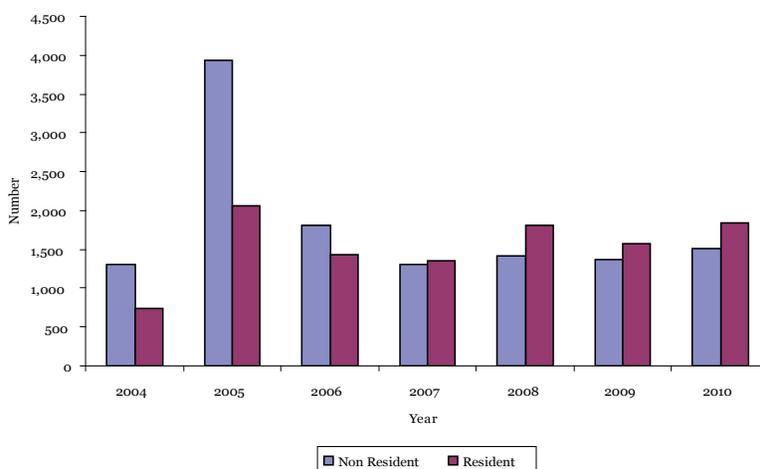
Source: KIPi (2005b)

Trademarks in Kenya are governed by the Trade Marks Act of 1955 (CAP 506), which like the other laws governing intellectual property, was also inherited from the colonial era. This Act has been amended several times over the years with the most recent amendment having taken place in 2002 (Wako, 2007). The 2002 amendments ensured the law conformed to the Madrid Protocol and TRIPS agreement (Economist Intelligence Unit, 2008).

Trademarks and service marks are granted for a duration of 10 years and can be renewed from time to time. A number of companies have used trademarks, some of which are described in Table 2.5.

A service mark is a mark used to specifically identify a service. The difference between service marks and trade marks is that the former is used to identify a service as opposed to a product. An example of a service mark is ‘Uchumi’, which is a registered service mark of Uchumi Supermarkets (KIPi, 2005b). As indicated in Table 2.6, majority of the trademark and service mark applications and grants in Kenya emanate

Figure 2.1: Trademarks registered in Kenya



Source: KIPi

Table 2.6: Application and grants of trade and service marks in Kenya

	2004		2005		2006		2007		2008		2009		2010		
	Apps	Regs	Apps	Regs	Apps	Regs	Apps	Regs	Apps	Regs	Apps	Regs	Apps	Regs	
Madrid marks	Non Resident	3,346	28	3,639	24	4,391	502	3,963	2,855	5,042	7,262	3,560	1,635	3,448	1,601
	Non Resident	907	1,313	1,058	3,928	1,177	1,802	1,278	1,303	1,260	1,415	1,296	1,366	1,466	1,506
Trade marks	Resident	891	732	1,175	2,067	1,460	1,433	1,996	1,349	1,887	1,815	2,220	1,571	2,737	1,843
	Total	1,798	2,045	2,233	5,995	2,637	3,235	3,274	2,652	3,147	3,230	3,516	2,937	7,651	4,950
Service marks	Non Resident	1	371	0	356	0	56	0	27	0	34	0	72	0	9
	Resident	0	116	1	89	1	5	0	6	0	8	0	19	0	2
Total	1	487	1	445	1	61	0	33	0	42	0	91	0	11	

NB: 'Apps' refers to applications, while 'Regs' refers to registrations

Source: KIPi

from non-residents. The data also reveals that the number of trademark applications has been gradually increasing, especially those made by residents, which may be an indication of the increased appreciation of the use of trademarks by local companies.

As illustrated in Figure 2.1, non-residents had the greater share of the trademarks registered annually in 2004 to 2006. This trend, however, shifts in 2007 to 2010. For both residents and non-residents, there was a great increase in the trademarks registered in 2005 which, according to the KIPI, was a result of the automation of the trademarks registry, which occurred in 2004 to 2005 and helped in clearing a backlog (KIPI, 2008b).

Trademarks have over the years been used as important marketing tools, used largely to differentiate products. They are mostly used by companies, but can also benefit countries. Ethiopia, for example, secured intellectual property rights for their coffee brands, that is Yirgacheffe, Harrar, and Sidamo Ethiopian Fine Coffee, which represent the famous and distinctive fine coffees of Ethiopia. Trademark registrations for this coffee have been made in around 30 countries. All distributors of this coffee are required to obtain licenses to sell them and, as of 2008, there were over 80 licensees in eight countries. These have already proven to be an important asset. Since its establishment, producer's income is estimated to improve to around the US\$ 6-8 per kilogram level up from US\$ 1 per kilogram.¹⁴

Trademark protection gives the companies the opportunity to develop the brand. In fact, most, if not all popular brands, are protected by trademarks. Like trademarks, brands are used to differentiate ones products from the competitors, mainly based on their image, quality and exclusivity (OECD, 2008). Successful trademarks are also used strategically with franchising (Idris, 2003). Branding and trademarks have proven to be an important business asset for a number of well known global brands, indicated in Table 2.7.

These are well known strong brands that have been developed by their respective companies over the years, have penetrated the

¹⁴ Information from light years IP, a Washington based non-governmental organization that has been assisting Ethiopia on trademark and licensing issues, which assisted the Ethiopian Intellectual Property Office and the Ethiopian Fine Coffee Stakeholder Committee to initiate this initiative. Information available at <http://www.lightyearsip.net/scopingstudy/coffee.html>

Table 2.7: Global brand values (2010 rankings)

Rank (out of 100)	Brand	Value (million US\$)	Rank (out of 100)	Brand	Value (million US\$)
1	Coca-cola	70,452	11	Toyota	26,192
2	IBM	64,727	12	Mercedes-Benz	25,179
3	Microsoft	60,895	13	Gillette	23,298
4	Google	43,557	14	Cisco	23,219
5	General Electric	42,808	15	BMW	22,322
6	McDonalds	33,578	16	Louis Vuitton	21,860
7	Intel	32,015	17	Apple	21,143
8	Nokia	29,495	18	Malboro	19,961
9	Disney	28,731	19	Samsung	19,491
10	HP	26,867	20	Honda	18,506

Note: The estimates of the best 100 global brands are produced annually by Interbrand and assess the brand value based on a variety of issues; i.e. strategic brand management, marketing budget allocation, portfolio management, brand extension mergers and acquisitions, licensing, investor relations, etc.

Source: Interbrand (2010)

global markets, and have built strong consumer brand recognition. Unscrupulous rival companies have however over the years been infringing on the established trademarks by using well known brand names and/or logos illegally, which are affixed to their products and passing them off as genuine products. The automotive sector is one of the many sectors that have been hard hit by trademark infringements. Well known trademarks have had their brands affixed to non-genuine car parts such as disc brake pads, clutch plates, oil filters, suspensions, steering components and spark plugs and sold to the often ignorant public. These products are often sub-standard and dangerous to the user. Such an undertaking can also diminish the reputation of the genuine company (OECD, 2008).

Geographical indicators

According to the TRIPS Agreement, Article 22, geographical indicators (GI) 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.” The main difference of GI and other intellectual property rights is that it identifies certain products with attributes of quality and reputation, with a certain geographical location. As is the case with trademarks, geographical indications can be used to promote economic development, and is a powerful marketing tool (Idris, 2003). At the moment, Kenya does not have a specific law in force for the protection of geographical indicators. There is, however, a draft Geographical Indication Bill (2009),¹⁵ which if enacted will see GI’s being administered by KIPI. The statute will have provisions for the registration, procedure and requirements, duration and use of geographical indicators, as well as cancellation and rectification of GI (Ramba, 2007). The Trade Mark Act (CAP 506), the Paris Convention, and TRIPS have some provisions for geographical indicators that are applicable. According to the Trademark Act (CAP 506), ‘geographical names or other indications of geographical origin may be registered as collective trade marks or service marks’ (Section 40A (5)). The Paris Convention and the TRIPS agreement, both of which Kenya is party to, have certain limited provisions addressing GI. Article 10 of the Paris Convention deals with ‘false indications: seizure, on importation, etc., of goods bearing false indications as to their source or the identity of the producer’. TRIPS agreement addresses ‘the protection of geographical indicators’ in Section 3, Article 22.

Some examples of GI used globally are Australia’s wine, French wine, California wines and Tequila, which have been protected in Mexico as a geographical indication since 1977 (Idris, 2003).

2.4.2 Copyrights and rights related to copyright

This consists of rights given to literary and artistic works which, according to the WIPO, apply to various forms such as art work, books, other writings, musical compositions, paintings, sculpture, computer programmes, plays, architecture, choreography, dance, instruction manuals, technical document and software. Copyrights protect the expression of an original idea as opposed to the idea itself, ‘original works of authorship’ (UNCTAD, 2007; Idris, 2003). The period of protection of a copyright is the life of the author and another 50 years or 70 years

¹⁵ The Geographical Indicators Bill has been lodged with the Attorney General (AG), which will then be forwarded to the Kenyan National Assembly.

(depending on the country), after the author's death. Copyrights are unique as they are granted automatically upon 'creation or fixation of the expression' and do not require registration. Copyrights provide the author with exclusive rights that prevent any third party from illegally using or reproducing the work (OECD, 2008). Copyrights can, however, be sold or transferred from the owner to someone else.

The invention of the movable type and printing press by Johannes Gutenberg in the 1440s contributed to the emergence of copyright, where publishers were awarded control over printing. One of the earliest copyright recorded was granted to John of Speyer in 1469. He was granted the exclusive right to 'print the letters', which refer to 'the production of multiple copies of a document by using the printing press method' (Idris, 2003).

Relevant laws and treaties

The first international treaty on copyrights was the 1886 Berne Convention for the Protection of Literacy and Artistic Works, which provided a basis of recognition of copyrights in different countries with the aim of protecting authors who in the early 1880s were finding their works being illegally reproduced and sold in other countries (Ibid). Under the Berne Convention, as articulated in Article 5(2), member countries enjoy these copyrights without any formalities; therefore, registration of a copyright is not a requirement. However, in many countries, Kenya included, registration (voluntary) may be undertaken by the respective copyright office. Kenya accented to the Berne Convention in 1993. Other international laws that address copyrights include the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, the WIPO Copyright Treat (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).¹⁶ Like the Berne Convention, under the TRIPS agreement, legal protection of copyrights is mandatory to members. TRIPS also provided guidelines for the enforcement of copyrights and related rights. Kenya, as well as other developing countries who were members of WTO, was given a deadline within which to update its IP laws (Ouma, 2004). In 2001, a TRIPS complaints Copyrights Act (and Industrial Property Act) was enacted (Ouma and Sihanya, 2009).

¹⁶ Kenya's status on the WCT and the WPPT is signatory (20 December, 1996) and according to WIPO the effect of a signature is not legally binding unless ratified. Despite this, however, Kenya has already incorporated some relevant provisions in the Copyright Act (2001).

As is the case with the Industrial Property and Trademark statutes, copyright laws in Kenya also had a colonial heritage. The 1842 English Copyright Act; the 1844 International Copyright Act; the 1862 Fine Arts Copyright Act; and the 1888 Copyright (Musical Compositions) Act were extended to Kenya by the 1897 East Africa Order in Council to make it applicable in Kenya. The 1842 English Copyright Act was, however, the main statute. This Act was revised by the 1911 Copyright Act, which was also applied to Kenya. This Act was later amended and the Copyright Act was passed in 1956 in the United Kingdom, which was extended to Kenya in 1963 through an Order in Council. These copyright laws were aimed at protecting the rights of British publishers who were a monopoly in the country, while also restricting the growth of the local publishing industry (Kameri-Mbote, 2005; Sikoyo *et al.*, 2006; and Ouma and Sihanya, 2009). The Act was superseded in 1965 by an independent Copyright Act (CAP 130), whose provisions were largely adopted from the earlier Acts. This Act was amended several times but later repealed in 2001 when the Copyright Act 12 of 2001¹⁷ was enacted (Kameri-Mbote, 2005; and Ouma, 2004).

The Copyright Act (2001) is implemented by the Copyright Board, which the Act established. The Act provides for the period of protection of different forms of literary and artistic works, which include:

- (i) literary works,
- (ii) musical works,
- (iii) artistic works,
- (iv) audio-visual works,
- (v) sound recordings, and
- (vi) broadcasts.

Authors of these forms of works are granted the exclusive right to reproduce, distribute (sell, rent, lease, hire, loan, import etc), communicate and broadcast whole or part of the work. The scope of protection is detailed in Table 2.8.

There are some expectations and limitations provided in the Copyright Act (2001) depending on the use or user, which are listed

¹⁷ The Copyright Act (2001) came into force in February 2003. Four amendments were made to in sections C 15, 30, 36 and 42 through the Statute Law (Miscellaneous Amendments Bill) 2012.

Table 2.8: Protection of copyrights in Kenya

Type of work	Date of expiration of copyright
Literary, musical or artistic	Fifty years after the end of the work other than photographs year in which the author dies.
Audio-visual works and photographs	Fifty years from the end of the year in which the work was either made, first made available to the public, or first published, whichever date is the latest.
Sound recordings	Fifty years after the end of the year in which the recording was made.
Broadcasts	Fifty years after the end of the year in which the broadcast took place.

Source: Copyright Act 2001, Section 23 (2).

Table 2.9: Contribution of copyright industries to economic development in selected countries

Country	Employment		
	GDP contribution	Figure	Contribution to total workforce (%)
Chile (1997)	2% (US\$ 1.2 billion)	149,000	2.7
Uruguay (1997)	6% (US\$ 705 million)	46,000	4.9
Brazil (1998)	6.7% (US\$ 53 billion)	1.3 million	5.0
Mexico (1998)	6.7% (Figure not indicated)	1.5 million	3.6
Australia (1999)	3.3% (US\$ 10.2 billion)	345,000	3.8
Singapore (2000)	3.2% (US\$ 5 billion)	81,000	3.9
Taiwan (2000)	5.9% (US\$ 16.8 billion)	377,456	2.6
United States of America (2002)	6% (US\$ 626 billion)	5.5 million	4.0
Kenya (2007)	5.3% of GDP (Ksh 85,208.7)	61,131	3.3

Source: International Intellectual Property Alliance, 2005; and, Nyariki et al. (2009)

Table 2.10: Contributions made by creative industries

Country	Creative industries contribution to GDP (%)	Creative industries % of employment
United States	11.12	8.49
Singapore	5.70	5.80
Canada	4.50	5.55
Latvia	4.00	4.50
Hungary	6.67	7.10
Philippines	4.92	11.10
Russian Federation	6.06	7.30
Mexico	4.77	11.01
Croatia	4.42	4.23
Lebanon	4.75	4.49
Jamaica	5.10	3.03
Bulgaria	3.42	4.31

UNCTAD (2008)

in Section 26 (1). For example, the law permits the use of copyrighted material for academic purposes, scientific research, private use, criticism, review or reporting of current events or for the inclusion in a collection of literary or musical works as long as not more than two short passages are lifted from the copyright work, which should be well referenced/acknowledged. The broadcasting of work intended for 'systematic instructional activities, or use in a school or university' is also permissible. According to Ouma and Sihanya (2009), however, these exceptions and limitations are vague and narrowly construed and are likely to contribute to interpretation and implementation problems amongst users.

Copyrights are important IPR instruments contributing to growth and development of a range of products and services, while also promoting creativity and innovation. Table 2.9 provides statistics of the size and contribution made by the copyrights industry in selected countries including Kenya.

The film industry is making significant gains in the country. The value added contribution from motion picture production, distribution and projection industry in 2007 was estimated at Ksh 567 million (0.035 of GDP). To promote the industry, the Minister of Finance announced in the 2009-2010 budget speech the removal of VAT and import duty on television, camera, digital cameras and video cameras to

film producers. The local music industry is also making a big impact as the value added contribution from authors, music composers and other artists in 2007 is estimated at Ksh 177 million (0.011% of GDP) (Nyariki *et al.*, 2009).

Collective management organizations/collecting societies

The owner(s) of copyrighted works has the right to allow or deny the use of the works through negotiations and agreements. Section 33 of the Copyright Act (2001) provides for such licensing agreements. Licensing agreements are often done by collective management organizations (CMOs) or collecting societies that do this on behalf of the copyright owner. According to Idris (2003), a collective management organization acts on behalf of the owner(s) of the rights, and negotiates with users to allow them to use the owner's works on certain fees and conditions. The collective management organization then distributes the copyright royalties to the respective owners after deducting their fee to cover the administrative costs. They act as the link between the copyright owner and the users of the copyrighted work. Collective management organizations often operate with respect to the field of operation of the copyrighted work, such as publication, performance and production. Under the Copyright Act (2001), CMOs (which are referred to as copyright collection societies) are mandated to obtain a certificate of registration from the Copyright Board. The following are some of the CMOs in Kenya:

- (i) Reproduction Rights Society of Kenya - Kopiken - is a Reproduction Rights Organization (RRO) dealing largely with the publication industry;
- (ii) Music Copyright Society of Kenya (MCSK) is the collective management society dealing with the music industry;
- (iii) Kenya Association of Music Producers (KAMP) deals with collection of royalties for music producers; and,
- (iv) Society of Performing Artists of Kenya (SPAK) deals with performing artists in the music industry.

Membership of CMOs is open to copyright owners. One has to first register, obtain a license or become a member with the respective CMO. Kopiken, for instance, was licensed as a CMO in 2006 by the Copyright Board. Kopiken licenses the reproduction of copyright protected materials. This is done through the licensing of photocopying bureaus

and universities. According to Ouma and Sihanya (2009), libraries and learning institutions are expected to obtain licenses (referred to as licenses for reprography) to facilitate them to reproduce copyright-protected material if the use is not covered by the exceptions and limitations spelled out in the Copyrights Act (2001). Membership to Kopiken is granted to relevant associations such as Kenya Publishers Associations, Kenya Oral Literature Associations, Music Copyright Society, Kenya Non-Fiction Authors Association, Writers Associations of Kenya, and Kenya Association of Photographers, Illustrators and Designers. Kenya Publishers Association is an association for publishers, while the rest are authors' associations. Currently, 40 per cent of royalties received is distributed to Kenya Publishers Association, while 60 per cent is distributed to author associations.¹⁸

The main function of the Music Copyright Society of Kenya (MCSK)¹⁹ is to collect royalties on behalf of its members, who are largely musical composers, authors, translators, arrangers, music publishers and affiliated societies. The royalties are obtained from the license fees collected from music users such as hotels, discos operators, broadcasters, etc who play the music of the members. MCSK therefore controls the right of performances of music for the members either in public, through broadcasts and transmissions. For example, according to the MCSK audited report (ended 30th June 2009), provision for royalties for 2008/2009 was Ksh 24.7 million, up from Ksh 5.8 million in 2007/8.

Copyright infringement and piracy

A number of industries including music, film and software have been heavily affected by copyright infringement and piracy. This has been exacerbated by the technological advancements that have made it easier to do so.

The Copyright Act 2001 legislates against copyright infringement. According to section 26 (1) of the Copyright Act, copyright in a literary, musical or artistic work or audio-visual work shall is the exclusive right to control the following acts: reproduction; translation; adaptation; the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement; and the communication to the public and the broadcasting of the whole work or a substantial part

¹⁸ Information obtained from Kopiken.

¹⁹ See <http://www.mcsk.or.ke/>

thereof, either in its original form or in any form recognisably derived from the original.

In this respect, copyright infringement refers to the reproduction, translation, adaptation, distribution, communication or broadcast of the whole or part of original work without authorization from the copyright owner. The sanctions for infringement of copyrights are indicated in Section 38 of the Act, which imposes stiffer penalties for repeat offenders. Once infringement of a copyright occurs, the owner can sue and is entitled to damages and can seek an injunction. If a copyright is infringed or breached on a commercial scale, then it is referred to as piracy (OECD, 2008). One anti-piracy measure provided in the Act is requirement for all sound recording and audio-visual work imported into Kenya for sale or offered for sale, rental, hire, lending or distribution as well as those produced in Kenya should have a tamper proof, serially numbered authentication device affixed to it.

According to the International Federation of the Phonographic Industry (2006), the term piracy in the music industry can be in four forms.²⁰

- Physical music piracy which involves making or distributing copies of sound recordings on physical carriers without the permission of the owner.
- Counterfeits within the context of copyrights, or recordings made without the necessary authorizations.
- Bootlegs, which is the recording of live or broadcast performances without authorization.
- Internet piracy, which is the “unauthorized use of music or other creative content available on the internet.”

In 2006, approximately 1.2 billion accounting for 37 per cent of all CDs purchased globally (legally or otherwise) were pirated CD copies (IFPI, 2006). In 2008, the total loss attributed to pirated software was estimated at US\$ 53.0 billion globally. In Kenya, software piracy in 2008 was estimated at US\$ 31 million from US\$ 28 million in 2007, and the estimated software piracy rate for the year 2008 was 80 per cent down from 81 per cent in 2007 (Business Software Alliance, 2010).

²⁰ Information obtained from http://www.ifpi.org/content/section_views/what_is_piracy.html

2.4.3 Plant breeders rights/Plant variety protection

Breeding of new plant varieties has been an important practice aimed at improving overall productivity through the development of new plant varieties with higher yields and better resistance to pests and disease. Developing new plant varieties, however, takes a substantial amount of time and resources. The breeder therefore requires effective protection in order to benefit from the investment.

Relevant laws and conventions

As is the case with other intellectual property rights, plant breeders' rights grant the rights holder the right to commercially exploit the new plant variety. In Kenya, plant breeders rights (PBR) are administered by Kenya Plant Health Inspectorate Services (KEPHIS)²¹ and are governed by the Seeds and Plant Varieties Act, CAP 326. The Seed and Plant Varieties Act, CAP 326 of 1972, came into force in 1975 and has been amended over the years (1977, 1991 and 2002). Regulations for Plant Breeders Rights were introduced in 1994, with the gazettelement of the Seeds and Plant Varieties (Plant Breeder's Rights) Regulations in November 1994.

In 1997, the Plant Breeders Rights Office was established to administer plant variety protection in Kenya; prior to that plant varieties protection was largely dormant (Kameri-Mbote, 2005; and Sikinyi, 2003). Internationally, the protection of new plant varieties is provided by the International Convention for Protection of New Varieties (UPOV Convention) (Idris, 2003). UPOV provides a framework for the protection of plant varieties.²² Kenya accented to UPOV in 1999.

According to the Act, the period for which plant breeder's rights are to be exercised should not exceed 25 years. The Act, however, also provides a minimum protection period depending on the type of plant. For fruit trees and their root-stocks, forest and ornamental trees and grape vines, for example, the period should not be less than 18 years, while that for other plant varieties should not be less than 15 years. Table 2.11 summarizes the number of PBR granted by KEPHIS since its inception up to 2010. According to KEPHIS (2010), there are a total of 293 PBR that have been granted (Table 2.11).

²¹ KEPHIS was established in 1996 through Legal Notice No. 305 of October 1996.

²² More information on the UPOV Convention available at www.upov.int

Table 2.11: Total plant breeder rights applications in Kenya as of June 2010

Status	No. of applications
PBR grants issued	293
DUS ²³ test report requested	218
Withdrawn applications ²⁴	153
Awaiting government amnesty	109
DUS-undergoing testing and awaiting testing	277
Incomplete applications	84
Contested applications	30
Processed but awaiting payment of grant certificate	167
Processed but waiting government amnesty	35
Awaiting gazettelement	30
To be forwarded to gazettelement	16

Source: KEPHIS

Table 2.12 provides information on the total number of PBR new applications and grants over the past seven years. As illustrated in Figure 2.2, majority of these applications were made by non-residents.²⁵ According to statistics provided by the International Union for the Protection of New Varieties of Plants (2009), between 2004 and 2008, 68 per cent of the applications filed were by non-residents, and mostly for horticultural products. During the same period, all the grant titles issued were to non-residents. The sector where Kenyans make the most number of PBR applications is agricultural crops.²⁶ Horticultural crops represented majority of the applications, with the Rose species dominating. In this sub-sector, majority of the PBR applications are by foreigners.²⁷ The Netherlands, Germany and France are the countries with the most number of breeders rights applications (most of which

²³ DUS (Distinctness, Uniform and Stability) refers to the tests for granting Plant Breeders Rights.

²⁴ A PBR application can be withdrawn at any time (Table 2.12).

²⁵ See <http://www.upov.int/en/publications/statistics.htm>

²⁶ According to KEPHIS, as at December 2009, a total of 350 applications in agricultural crop were made, of which 95% (333) were by Kenyans.

²⁷ According to KEPHIS, as at December 2009, a total of 657 applications in horticulture were made, of which 97% (637) were by non-residents.

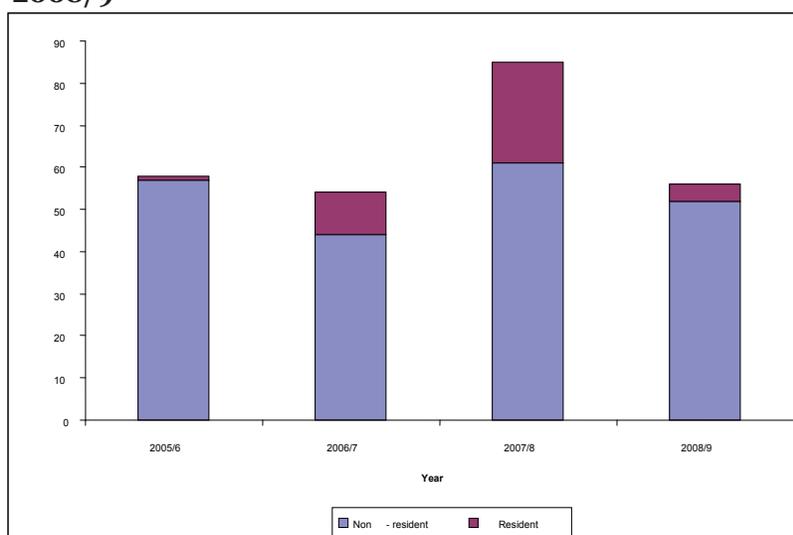
²⁸ According to the Horticultural Crops Development Authority.

Table 2.12: Plant breeders rights applications 2004/5 to 2009/10

Year	New applications	PBR grants
2003/4	43	43
2004/5	100 (85 withdrawn)	7
2005/6	58 (12 withdrawn)	44
2006/7	56 (8 withdrawn)	38 (10 withdrawn)
2007/8	85 (9 withdrawn)	16 (22 withdrawn)
2008/9	56 (6 withdrawn)	7 (10 withdrawn)
2009/10	56	74 (23 withdrawn)

Source: KEPHIS

Figure 2.2: Plant breeders rights applications 2004/5 to 2008/9



Source: KEPHIS, various annual reports

are for Rose species). These countries are also the main importers of Kenyan flowers.²⁸

2.4.4 Traditional knowledge

There are no international standards for the legal protection of traditional knowledge (TK) and, therefore, there is also no universal definition of traditional knowledge or folklore. The term can however be described as “knowledge associated with the environment” (Dutfield, 2003) and it relates to artworks, handicrafts, folklore and other cultural works

Box 1: Categories and embodiments of TK and folklore

1. Knowledge of current use, previous use, or potential use of plant and animal species, as well as soils and minerals;
2. Knowledge of preparation, processing, or storage of useful species;
3. Knowledge of formulations involving more than one ingredient;
4. Knowledge of individual species;
5. Knowledge of ecosystem conservation;
6. Classification systems of knowledge, such as traditional plant taxonomies;
7. Renewable biological resources that originate (or originated) in indigenous lands and territories;
8. Cultural landscapes, including sacred sites;
9. Non-renewable resources;
10. Handicrafts, works of art, and performances;
11. Traces of past cultures;
12. Images perceived as 'exotic', such as the appearance of indigenous people, their homes and villages, and the landscape; and
13. Cultural property and cultural artifacts.

Source: Dutfield (2003) and Posey and Dutfield (1996)

and expressions such as dances and music. Traditional knowledge can make valuable commercial contributions to several industries including pharmaceuticals, cosmetics, agriculture, food, beverages, industrial enzymes, bio-pesticides, publishing, architecture and fashion (Idris, 2003). TK is commonly transmitted either orally or by observation as summarized in Box 1.

Traditional knowledge is often difficult to protect using the IP instruments, and are therefore often open to commercial exploitation. For instance, protecting TK as a copyright would be inappropriate for a number of reasons. First, copyrights require an identifiable author; second, copyrights are provided for a finite period, and lastly, for copyrights to be applicable, works should be fixed. The problem therefore comes about because TK tends not to have one identifiable author. It is often communal knowledge passed on from generation to generation orally and forms a community's identity, therefore rendering it ineligible for copyright protection (UNCTAD and ICTSD, 2003).

In Kenya, there is some protection of folklore²⁹ when it is used for commercial purposes. This is provided under the Copyright Act (2001) and the Copyright Regulations (2004), which states that the Minister may ‘authorise and prescribe the terms and conditions governing any specified use of folklore, except by a national public entity for non-commercial purposes, or the importation of any work made abroad, which embodies folklore’ (Copyright Act (2001) Section 49 (d)) and that ‘any person who uses folklore for commercial purposes in Kenya without the permission of the Board (Kenya Copyright Board) commits an offence’ (Copyright Regulations (2004), Section 20 (3)).

Protecting TK as a patent is similarly difficult as the innovator is often not identifiable. It is, however, important to note that an innovator can utilize traditional knowledge to come-up with a unique innovation which is patentable. Given these challenges, the most appropriate was to protect TK through its own statute.

The National Policy on Culture and Heritage (2009) affirms the Government’s commitment to protect intellectual property rights of artists, creators and performers and proposes to enact appropriate legislation to protect intellectual property rights related to Kenyan traditional music and dance. Currently, however, there is no regulatory framework for the protection of TK, folklore or genetic resources. A task force on the Development of Laws for the Protection of Traditional Knowledge, Genetic Resources and Folklore comprising of multi-institutional stakeholders with the mandate of identifying policy and legal framework to protect TK, folklore and genetic resources in the country was appointed by the Attorney General in 2006.³⁰ One of the outputs of the task force was a draft National Policy for the Protection of traditional knowledge, genetic resources and expressions of culture. As indicated in the task force report, the policy has already gone through

²⁹ The definition of folklore according to the Copyright Act is *a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author, which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya and includes: (a) folktales, folk poetry and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; and, (d) the production of folk art, in particular drawings, paintings, sculptures, pottery, wood work, metal ware, jewellery, handicrafts, costumes and indigenous textiles.*

³⁰ The establishment of the task force on the Development of Laws for the Protection of Traditional Knowledge, Genetic Resources and Folklore is contained in the Gazette Notice No. 1,415 of 2006. In Gazette Notice No. 1178, dated February 2009, the task force was extended to 31 July 2009.

stakeholder review and thorough scrutiny, and is ready to be submitted for distribution and application.

In the international scene, there have been several attempts to address the protection of TK. For instance, there have been proposals under TRIPS, which is silent on TK, to include provisions for the protection of TK. It started in 1999 when a number of developing countries emphasized the importance of traditional knowledge in their negotiations on TRIPS. During a WIPO Standing Committee on Law of Plants session devoted to discuss the draft Patent Law Treaty (PLT), the delegation of Colombia submitted a document which proposed that protection of biological and genetic heritage should be included in the PLT. It was this that led to the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the ICG) by the WIPO General Assembly (Dutfield, 2003; UNCTAD and ICTSD, 2003). The main purpose of the ICG is: (a) access genetic resources and benefit sharing; (b) address the protection of traditional knowledge, whether or not associated with those resources; and (c) protection of expressions of folklore (WIPO, 2000).

There have been several meetings organized in Geneva, Switzerland since the inception of ICG, which have deliberated on different modalities of protection of traditional knowledge. The first session was held in 2001, since then, there have been one or two sessions convened every year. The sessions have been having extensive participation by representatives of indigenous and local communities. Kenya has been an active participant of ICG³¹.

2.5 The Regulatory Environment for Intellectual Property

2.5.1 The relevant laws

As indicated in Section 2.4, Intellectual Property in Kenya is governed by the following statutes:

- Industrial Property Act 2 of 2001
- Trade Mark Act CAP 506

³¹ Details of the sessions available at http://www.wipo.int/meetings/en/topic.jsp?group_id=110

- The Copyright Act 12 of 2001
- Seeds and Plant Varieties Act CAP 326

These statutes together with three additional statutes, namely: the Weights and Measures Act CAP 513, the Trade Descriptions Act CAP 505, and the Anti-Counterfeit Act (2008), also address the issue of infringement of IP and unfair competition that protect the rights of right owners as well as licensees.

The Trade Descriptions Act CAP 505 has been one of the most relevant statute used to fight trademark infringement and counterfeiting in Kenya (especially prior to the enactment of the Anti-Counterfeit Act). An intellectual property right holder could rely on this law if their trademark, copyright or patent were infringed upon, whereby 'misleading or false description' is provided with respect to the existing patent, trademark or copyright license. According to the Act, misleading or false description also covers the following:

- identity, quantity (length, width, height, area, volume, capacity, weight and number), size or gauge;
- method of manufacture, production, processing or reconditioning;
- composition;
- fitness for purpose, strength, performance, behaviour or accuracy;
- any physical characteristics not included in the preceding paragraphs;
- testing by any person and results thereof;
- approval by any person or conformity with a type approved by any person;
- place or date of manufacture, production, processing or reconditioning;
- person by whom manufactured, produced, processed or reconditioned; and,
- their being subject to an existing patent, trademark licence or copyright licence.

It is important to note that the terms 'patent', 'trademark', 'copyright' or 'country of origin' were introduced in 2002, and the penalty was only increased in 2003 following amendments introduced during those

years.³² In 2003, the Trade Descriptions Act was amended to provide for a more severe penalty of Ksh 2,000,000 from Ksh 500,000.

The Weights and Measures Act, Cap 513, has also been beneficial in combating counterfeits with respect to incorrect description in relation to the quantity and packaging.

These laws have, however, been ineffective in addressing counterfeit and pirated goods, which infringe on the rights of Intellectual Property Right owners. In December 2008, however, the Parliament of Kenya passed the Anti-Counterfeit Act and was assented to law by the President.³³ The commencement date of the Act was published on 24 July 2009, and was given as 7 July 2009. The Act establishes an Anti Counterfeit Agency which is managed by a Board. The Board was officially inaugurated and inducted in January 2010. The members of the Board include the Permanent Secretaries of the Ministries of Industrialization, Trade and Finance; the Attorney General; the Commissioner of Customs Services; the Executive Director of the Kenya Copyright Board and the Executive Director of the Anti-Counterfeit Agency; the Managing Directors of Kenya Industrial Property Institute, Kenya Plant Health Inspectorate and Kenya Bureau of Standards, the Pharmacy and Poisons Board Registrar; the Chief Executive of Kenya Association of Manufactures; and two people (from the private sector) appointed by the Minister.³⁴

The Act comes in the wake of increased levels of counterfeited and pirated goods and aims at creating public awareness on, and combating counterfeiting (through the Anti-Counterfeit Agency). One key achievement of this Act is that all enforcement agencies operate in a coordinated manner (given they are represented in the board) and from a centralized institution. Additionally, the inspectors designated from these enforcement agencies are to work together to conduct raids, seize and detain suspect goods and even arrest suspects.

³² The Statute Law (Miscellaneous Amendments) Act (No. 2 of 2002) and the Finance Act No. 15 of 2003.

³³ It was earlier introduced by the Ministry of Industrialization in June 2007 but did not go beyond the first reading, which was in July. Parliament was later dissolved in October of the same year in preparation for the December elections.

³⁴ The two members from the private sector were appointed on 9 November 2009 in Gazette Notice No. 12354 dated 9 November 2009.

IPR is now embedded in the Constitution of Kenya (2010) and recognized as a right. Chapter Two of the Constitution of the Republic of Kenya Section 11(2c) for instance states that ‘The State shall promote the intellectual property rights of the people of Kenya’. The Constitution further recognizes IPR as property that needs to be protected as indicated in Section 40(4). ‘The State shall support, promote and protect the intellectual property rights of the people of Kenya’. According to the Constitution, Intellectual Property Rights is one of the responsibilities of the National Government.

There are a number of additional laws that have been drafted or are in the process of being drafted that would address certain IP relevant issues. They include:

- The Science, Technology and Innovation Bill,
- The Technical, Industrial, Vocational and Entrepreneurship Training (TIVET) Bill,
- The Traditional Medicine Bill (2009),
- The Geographical Indicators Bill (2009), and
- The Wildlife (Conservation and Management) Amendment Bill 2010.

These bills are yet to be published and introduced to the legislature. The draft Science and Technology Bill is intended to fill the gaps identified in the Science and Technology Act, CAP 250, which is now considered to be outdated. The draft TIVET Bill provides for the establishment of technical, industrial, vocational and entrepreneurship training system, management of respective institutions, and curriculum development. This draft bill advocates for training within TIVET institutions geared at facilitating innovation and creativity.

According to the draft Traditional Medicines Bill (2009), traditional medicine practitioners are permitted to protect their intellectual property. Matters relating to benefit sharing are also articulated in the Bill.

The draft Geographical Indicators Bill (2009) provides for the protection of geographical indicators in relation to goods or services with a description or presentation used to indicate the geographical origin, in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics are exclusively or attributable to that geographical environment.

Table 2.13: Offences and penalties

Act	Offence	Penalty
Industrial Property Act 2 of 2001	Intentional act of infringement of a patent or the registered utility model or industrial design	Fine of not less than ten thousand shillings, and not exceeding fifty thousand shillings, and not exceeding three years, and not more than five years or both
Copyright Act 12 of 2001	A person who sells, lets, hires or trades, or is in possession of any infringing copy for purposes other than domestic or private use	Fine not exceeding one hundred thousand shillings, or imprisonment for a term not exceeding two years or both
	A person who makes for sale or hire, distributes or imports other than for private use, any infringing copy; or makes or has in possession any contrivance used or intended to make infringing copies	Fine not exceeding four hundred thousand shillings, or imprisonment for a term not exceeding ten years or both
	A person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in where such performance is an infringement of that copyright	fine not exceeding five hundred thousand, or imprisonment for a term not exceeding four years or both
	Other copyright case	Fine not exceeding eight hundred thousand shillings, or imprisonment for a term not exceeding ten years or both.
Trade Mark Act CAP 506	Forgeries, replicas or representation of a registered trademark (for sell/trade) that is likely to deceive or cause confusion	Fine not exceeding two hundred thousand shillings, or imprisonment for a term not exceeding five years or both
Anti-Counterfeit Act (2008)	Possession, control, manufacture, produce, sell, hire out, barter or exchange, or offer or expose for sale, hiring out, exchange, exhibit, distribute, import, transit, transship or export counterfeit goods for purposes of trade or any other purpose or dispose of any counterfeit goods in course of trade	Fine, in respect of each article, or item involved in the particular act of dealing in counterfeit goods to which the offence relates, not less than three times the value of the prevailing retail price of the goods, or imprisonment for a term not exceeding five years or both
		For a second or any subsequent conviction; fine, not less than five times, the value of the prevailing retail price of the goods or imprisonment for a term not exceeding fifteen years or to both
Weights and Measures Act CAP 513	Misrepresentation, whether oral or otherwise, to the quantity of the goods; incorrect statements etc	Fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding three years or to both. Court can also order to prevent the person from continuing to deal with or in the same goods or articles in respect of which the offence was committed.
Trade Descriptions Act CAP 505	False or misleading trade description	Fine not exceeding two million shillings or to imprisonment for a term not exceeding two years or to both.

Source: Industrial Property Act (2001), Trademark Act (CAP 506), Copyright Act (2001), Anti-Counterfeit Act (2008), Weights and Measures Act (CAP 513), and The Trade Descriptions Act (CAP 505).

The draft Wildlife (Conservation and Management) Amendment Bill 2010 provides for the establishment of the Kenya Wildlife Regulatory Authority whose role amongst other things is to regulate and monitor bioprospecting. According to the Act, one would have to obtain a permit from the Authority before undertaking any bioprospect activities involving any wildlife resources.

2.5.2 The offences and penalties provided in law

These laws are all aimed at encouraging IPR, whilst prohibiting infringement of these rights. According to the Industrial Property Act, infringement is an offence; however, the penalties are not punitive and are not likely to be a deterrent to counterfeiters. The maximum fine for instance is Ksh 50,000. The maximum fine provided for offences under the Copyright Act and the Trade Mark Act are more stringent but still not that punitive. For instance, the maximum fine under Copyright Act is Ksh 800,000 and Ksh 200,000 under the Trademark Act. The Anti-Counterfeit Act however, provides much stiffer penalties as indicated in Table 2.13.

2.5.3 The IP relevant policies

Despite the legal provisions in place and the fact that Kenya is party to a number of international conventions on IPR (see section 2.5.4), there has not been much policy focus to intellectual property. In fact, Kenya has not had a specific policy on intellectual property.³⁵ However, some policy papers have made a few policy prescriptions with respect to intellectual property. For instance, the need to develop a comprehensive policy framework for the industrial technology development was emphasized in Sessional Paper No. 2 of 1996 on “Industrial Transformation to the year 2020”, which also postulated other relevant policies, which included improving the acquisition of technology through indigenous research and development, foreign direct investment, purchasing or leasing ‘off-the-shelf’, overseas training, and by accessing patent documents available in the public domain from patent offices. Other policies in Sessional Paper No. 2 of 1996 include the need of identifying, patenting and branding of natural resources and products.

³⁵ There is now a draft policy on Intellectual Property Rights.

In the 2002-2008 Development Plan, the government proposed to strengthen the Kenya Industrial and Research Development Institute (KIRDI) to support technology diffusion and strengthen the then Kenya Industrial Property Office (KIPO)³⁶ to enhance patenting of new technology. The 2002-2008 Development Plan also noted the importance of KIPO in protecting foreign patents and encouraging domestic patents. It noted the importance of converting KIPO into an autonomous entity.

These policies have not been very comprehensive in addressing IPR issues. Additionally, there has been poor implementation of some of these policies, which has resulted to repetition of policy prescriptions. For instance, identifying and protecting indigenous knowledge and technology appears in Sessional Paper No. 2 of 1996 and the Kenya Vision 2030 and is yet to be implemented. Both policy documents call for the strengthening of linkages and collaboration of stakeholders, including those in the private sector. However, the modalities, incentives and mechanisms to encourage this have not yet been established as contributing to the limited partnerships between research institutions and the private sector currently experienced in Kenya, as articulated in government documents such as the Private Sector Development Strategy 2006-2010.

Literature reveals that public policy is an important instrument to correct market and government failures and improve efficiency in the production and allocation of resources (Weimer and Vining, 1992). Lack of a national policy on IPR has left a large policy gap over the years, contributing to the limited resource allocation to knowledge related activities and information asymmetries, uncertainty, and lack of innovation currently experienced in the country.

The most recent Government strategy, Kenya Vision 2030, however recognizes the importance of science, technology and innovation (ST&I), and envisions Kenya as a knowledge-led economy where knowledge plays a critical role in boosting wealth creation, social welfare and international competitiveness. The Kenya Vision 2030 brings out the need to introduce a ST&I dissemination strategy, which will be

³⁶ Kenya Industrial Property Office (KIPO) was established in 1990 following the enactment of the Industrial Property Act (CAP 509) of the Laws of Kenya and was later converted to Kenya Industrial Property Institute (KIPI) following the enactment of the Industrial Property Act No.3 of 2001

instrumental in determining the priority areas for ST&I investment with the aim of encouraging economic growth and adding value to the respective goods and services. Kenya Vision 2030 proposes to strengthen technical capabilities through advanced training of personnel, improved infrastructure and equipment, and by strengthening linkages with other stakeholder so as to protect technical knowledge produced from tertiary institutions, including universities using intellectual property rights to identify and protect indigenous technology and to establish a national recognition system to honour innovators. The Kenya Vision 2030 recognizes some of the problems and challenges that the country is faced with as regards the knowledge ecology and proposes strategies aimed at addressing them. According to Kenya Vision 2030, the measures proposed for strengthening technological capability include increased funding for research, advanced training of personnel, improved infrastructure and equipment, coordination of research activities, and strengthening linkages with other stakeholders.

The Government's aim under Kenya Vision 2030 is to streamline science technology and innovation into all sectors of the economy, through carefully targeted investments, with the overall aim of providing value added goods and services that will contribute to the growth of Kenya.

More recently, the government has embarked on introducing policies that will touch on the knowledge economy in the country. They include:

- (a) The National Intellectual Property Policy: This was spearheaded by the Kenya Industrial Property Institute (KIPI) and is currently in draft form.
- (b) The Science, Technology and Innovation Policy: This was drafted by the Ministry of Higher Education, Science and Technology and as of the end of 2010, the final draft ST&I policy and strategy had been approved by stakeholders.
- (c) The National Policy for the Protection of Traditional Knowledge, Genetic Resources and Expressions of Culture: This was one of the outputs of the Task Force on the Development of Laws for the Protection of Traditional Knowledge, Genetic Resources and Folklore, which was appointed by the Attorney General in 2006.
- (d) National Policy on Culture and Heritage (2009): This is the first policy on culture, which defines culture as "that whole complex

Table 2.14: Relevant treaties and conventions Kenya is party to

Convention/Agreement/Treaty	Kenya's status
World Trade Organization (WTO)-Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement	Ratified in January 1995 ³⁷
Patent Cooperation Treaty (PCT)	Ratified in June 1994
World Intellectual Property Organization (WIPO) Convention	Ratified in October 1971
Paris Convention for the Protection of Industrial Property	Ratified in June 1965
Berne Convention for the Protection of Literary and Artistic Works	Ratified in June 1993
Madrid Agreement and Protocol (International Registration of marks)	Ratified in June 1998
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms	Ratified in January 1976
Brussels Convention (Convention relating to the distribution of programme-carrying signals transmitted by satellite)	Ratified in August 1979
Nairobi Treaty (Olympic Symbol)	Ratified in September 1982
African Regional Intellectual Property Organization (ARIPO)	Member since 1978
Uniform Commercial Code (UCC)	Member since 1966
International Union for the Protection of New Varieties of Plants (UPOV)	Ratified in May 1999
WIPO Copyright Treaty (WCT)	Signature December 1996*
WIPO Performances and Phonograms Treaty (WPPT)	Signature December 1996*

*According to WIPO, the effect of a signature is not legally binding

Source: Author's compilations using information from WIPO and ARIPO³⁸

³⁷Kenya, together with other developing countries, was given up to 1 January 2000 to adhere to the provision of the TRIPs agreement, which came into force in 1994. This led to the enactment of the TRIPs compliant Copyright Act No. 12 of 2001 and Industrial Property Act No. 2 of 2001 in Kenya.

³⁸See <http://www.aripo.org> and <http://www.wipo.int> (specifically http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=88C&start_year=ANY&end_year=ANY&search_what=C&treaty_all=ALL)

of distinctive, spiritual, material, intellectual and emotional features characterising a society of social group. This definition encompasses, in addition to art and literature, lifestyle, ways of living together, value of accepted systems, traditions and beliefs”. The policy aims at protecting the intellectual property of artists, communities, creators, as well as performers, while also ensuring the public has access to culture. The policy proposes to facilitate the enactment of appropriate legislation to protect copyright and other intellectual property rights of Kenyan music and dance (including traditional).

- (e) The Traditional Medicine and Medicinal Plants Policy: The policy acknowledges the importance of traditional medicine as well as that of intellectual property for communities and persons dealing with traditional medicine and medicinal plants, and proposes the introduction of a legal framework to facilitate this and deal with sharing of benefits gained from the sale or use of herbal resources. The government also aims to document into databases, certain categories of traditional knowledge to prevent third parties from claiming patents on existing knowledge. The government also proposed to document the biodiversity. The policy also proposes a system to allow indigenous people to benefit from their knowledge, through licensing or commercialization.

2.5.4 Institutional framework

Currently, there are three main institutions that govern intellectual property rights in Kenya: Kenya Industrial Property Institute (KIPI), Copyright Office, and Kenya Plant Health Inspectorate Services (KEPHIS).

Kenya Industrial Property Institute (KIPI)

The Kenya Industrial Property Institute was established in 2002 with the conversion of KIPO following the enactment of the Industrial Property Act 3 of 2001. According to the Industrial Property Act, the main functions of KIPI are to:

- (i) Consider applications for and grant industrial property rights;
- (ii) Screen technology transfer agreements and licenses;

- (iii) Provide to the public, industrial property information for technological and economic development; and,
- (iv) Promote inventiveness and innovativeness in Kenya.

KIPI, whose headquarters are located in Nairobi, is mandated with the task of considering application for granting and regulating patents, utility models, technovations, industrial designs trade and service marks.

The main challenges faced by KIPI (Box 2) are well summarized by the Report on the National Intellectual Property Audit (2004).

Kenya Copyright Board

The Kenya Copyright Board was established by the Copyright Act (2001), which came into effect in 1 February 2003. It is a body corporate which was inaugurated in July 2003. The functions of the Board, as provided in Section 5 of the Act, are as follows:

- (i) Direct, coordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party, and which relate to copyright and other rights recognized by the Act and ensure the observance thereof;

Box 2: Challenges in administering IP

- (i) The activities of KIPI are not adequately known.
- (ii) That KIPI needs to intensify its outreach programme on IP awareness creation.
- (iii) That the process of registration and protection of IPR is tedious and very slow and that the charges are very high. KIPI needs to provide assistance in drafting and presenting patent registrations.
- (iv) That the centralization of KIPI's operations in Nairobi is a major shortcoming.
- (v) That inventors expect KIPI to enforce IP rights, provide finance for commercialization, identify potential investors for commercialization, draft patent application, waive patent processing fees and reward individuals for inventing.

Source: Ogada *et al.* (2004)

Table 2.15: Institutional and legal framework for protecting IPR in Kenya

IP instrument	Statute	Regulatory institution
<ul style="list-style-type: none"> • Patents • Utility models • Industrial designs • Trade marks • Service marks 	1. Industrial Property Act 2 of 2001 2. Trademark (Amendment) Act of 2002, CAP 506	Kenya Industrial Property Institute (KIPI)
Copyrights	3. Copyright Act 12 of 2001	Kenya Copyright Board
Plant breeder's rights	4. Seeds and Plant Varieties Act, CAP 326	Kenya Plant Health Inspectorate Services (KEPHIS)
Laws against unfair competition and IP infringement	5. Competition Act (2010)	Competition Authority
	6. Weights and Measures Act, CAP 513 7. Trade Descriptions Act, CAP 505	Department of Weights and Measures, Ministry of Trade
	Anti-Counterfeit Act (2008)	Anti-Counterfeit Agency

Source: Author's compilation

- (ii) License and supervise the activities of collective management societies;
- (iii) Devise promotion, introduction and training programmes on copyright and related rights, to which end it may coordinate its work with national or international organizations concerned with the same subject matter;
- (iv) Organize the legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness;
- (v) Enlighten and inform the public on matters relating to copyright and related rights;
- (vi) Maintain an effective databank on authors and their works; and,
- (vii) Administer all matters of copyright and related rights in Kenya and deal with connected ancillary matters.

Other functions of the Board as indicated in Section 36 of the Act is to grant manufacturers or producers of sound recordings or audio-visual works with authentication of copyright works and issue an approval

certificate to allow them to purchase an authentication device from Kenya Revenue Authority.³⁹ Like KIPI, however, one major challenge of the Copyright Board is that it is located centrally in Nairobi which also brings in the issue of limited access.

Kenya Plant Health Inspectorate Services (KEPHIS)

KEPHIS is a state cooperation which provides quality assurance on agricultural inputs and produce. KEPHIS also administers Plant Breeders Rights in Kenya and act as the liaison office for the International Union for the Protection of New Varieties of Plants (UPOV), and be the custodian of the Plant Breeders Rights Register.⁴⁰ The Office to administer plant variety protection in Kenya was founded in 1997,⁴¹ and has been operating under KEPHIS since 1998. In May 1998, Kenya assented to the International Union for the Protection of New Varieties of Plants (UPOV) (Sikinyi, 2003). The laws that govern plant breeders contained in the Seeds and Plan Variety Act (CAP 235) came into force in 1972, became operational in 1 January 1985, and were revised in 1991 and 1997 to take into account developments in the international seed industry (Ogada *et al.*, 2004). The Act was again amended in 2002.

Department of Weights and Measures

The Department of Weights and Measures in the Ministry of Trade was established in 1912 with the enactment of the first Weights and Measures Act. Currently, the department is under the Ministry of Trade and is governed by the amended Act (CAP 513), which consolidates the law relating to the use of weights and measures with regard to the manufacture and sale of certain goods and products. Under the act, any misrepresentation with regards to quantity and packaging is unlawful and has helped in apprehending importers of counterfeit goods (Wako, 2007). The department also administers the Trade Description Act (CAP 505). The main function of the Department is to ensure fair trade

³⁹ All sound recording and audio-visual work imported into Kenya for sale, rental, hiring, lending or distribution to the public for commercial purposes in Kenya as well as those produced locally, are expected to have an authentication device affixed to it.

⁴⁰ Information from KEPHIS website available at <http://www.kephis.org>

⁴¹ By Legal Notice No. 305 of 18 October 1996.

practices, ensure use of accurate weighing and measuring equipment in trade, and protect consumers.⁴²

Anti-Counterfeit Agency

The Anti-Counterfeit Agency is a corporate body with perpetual succession, established by the Anti-Counterfeit Act (2008)⁴³ with headquarters in Nairobi. The functions of the Agency include:

- (i) Enlightening and informing the public on matters relating to counterfeiting;
- (ii) Combating counterfeiting, trade and other dealings in counterfeit goods in Kenya;
- (iii) Devising and promoting training programmes on combating counterfeiting;
- (iv) Coordinating with national, regional or international organizations involved in combating counterfeiting; and,
- (v) Carryout any other functions prescribed for it under any of the provisions of this Act or under any other written law.

The Act introduces inspectors who are to be appointed by the Board. The Act also provides that a 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, the Weights and Measures Act, the Copyright Act, the Food, Drugs and Chemical Substances Act, the Pharmacy and Poisons Act and the Pest Control Products Act can be designated as inspectors. These inspectors have the right to enter a place or vehicle suspected of having or producing counterfeit goods; to seize and detain the goods and the tools used to produce the counterfeit goods and depending on circumstance to arrest, with a warrant, any person suspected to have been committing any offence as provided in the Act. The Act spells out in detail the procedure that should be followed upon seizure of goods as well as the storage of

⁴² More information on the Department of Weights and Measures available from http://www.trade.go.ke/index.php?option=com_content&task=view&id=24&Itemid=45

⁴³ The new board appointments commenced in November 2009, and operations of the agency started following the recruitment of staff, which was undertaken between March and May, 2010.

the goods. These goods are used as evidence at the courts. According to the Act, goods seized and detained must be returned to the owner within three months, unless the owner is charged with an offence. If charged, prosecution should commence within three months, and if the person is convicted, then they are expected to bear the costs of destroying the goods.

Other stakeholders

There are two tribunals that relate to IPR in Kenya: The Industrial Property Tribunal, which deals with the enforcement of industrial property established under the Industrial Property Act 2001; and, the Seeds and Plants Tribunal, which deals with grievances relating to plant breeders rights established by the Seeds and Plant Varieties Act. Other enforcement agencies include: the Courts (only the Resident Magistrate's Court or the High Court have jurisdiction over copyright matters), the Kenya Revenue Authority (Customs Department as mandated by the Customs and Excise Act), the Competition Authority (as provided by the Competition Act 2010), and the Kenya Bureau of Standards (as provided by the Standards Act and Trade Descriptions Act). However, the powers given to most of these agencies by the respective laws are largely limited to seizing, inspecting and detaining goods deemed to have contravened the respective Acts.

Other stakeholders include research institutions (such as KIRDI, KEMRI, KEMFRI, KARI and other international research institutions), including universities that undertake research. The National Council for Science and Technology (NCST) provides advice, coordinates issuance of research permits, among other functions.

3. Challenges of Intellectual Property Rights in Kenya

Several studies (Misati, 2008; Government of Kenya, 2006 and Ogada *et al.*, 2004) have indicated that the level of awareness of intellectual property rights in Kenya is low. To further compound the problem, there are enforcement failures experienced in Kenya. For instance, a report by the International Intellectual Property Alliance (2003) states that the magistrates in Kenya have little knowledge of copyright law, and the cases take several years to reach judgment. Another challenge is that Kenya does not have an IPR policy in place.

The Global Competitiveness Index 2009-2010⁴⁴ ranked Kenya 87 out of 133 countries, with respect to intellectual property protection with a score of 3.1 out of 7, where 7 is widely available and 1 non-existent (World Economic Forum, 2009). Some of the reasons for this low level of awareness and intellectual property protection as indicated in the Report on the National Intellectual Property Audit (Ogada *et al.*, 2004) included the following:

- (i) Difficulties in differentiating between the various IPs
- (ii) Difficulties in recognizing inventions and innovations
- (iii) Not knowing how and where to protect IPR
- (iv) No intellectual property management office in the industry
- (v) Too much secrecy covering IP

The audit indicated that a number of Kenyan inventors and innovators are unaware of the different options that they have to protect and commercialize their products, which include licensing, joint ventures and outright selling. Additionally, the level of awareness of IP in universities and R&D institutions and, consequently, the level of commercialization of research findings is low. Majority of the

⁴⁴ Kenya's overall Global Competitiveness Index ranking in 2009-2010 was 98, out of 133 countries. The score given was 3.7 out of a maximum score of 7. The country with the highest score is Switzerland at 5.6, while Burundi had the lowest with 2.58. The Global Competitiveness Index (GCI) is made up of over 113 variables from the Executive Opinion Survey and from publicly available sources. The variables are organized into 12 pillars, with each pillar representing an area considered as an important determinant of competitiveness. More details available at <http://gcr.weforum.org/gcr/>

universities and R&D institutions in Kenya do not have an IP policy and those that have introduced it recently. In fact, according to Sikoyo *et al.* (2006), IPR is taught only in law schools, thereby leaving out other disciplines that may require IP knowledge such as engineering and life sciences.

The audit further reveals that Kenyan inventors often misunderstand how to commercialize and protect their inventions. A large number have a high expectation for rewards from their inventions. Some expect KIPi and the Government to provide them with financial assistance to commercialize their products. Sadly, most Kenyan inventors think that self exploitation is the only way to enable them commercialize their products.

Another key challenge for Kenya is that indigenous knowledge and innovations of local communities are not recognized or protected. This has led to exploitation of knowledge/innovation by other external interest groups who protect and commercialize indigenous or traditional common knowledge at the exclusion of the actual community (Mbeva, 2004).

These challenges have contributed to low commercialization of local protected products, the loss of IP rights to third parties, IPR misappropriations, and influx of counterfeits.

3.1 Gaps in the Regulatory Framework

A major challenge in Kenya is lack of a policy framework to implement intellectual property rights. Furthermore, there have been some institutional and enforcement weaknesses where entities have experienced infringement of their rights, some of whom have failed to obtain the necessary legal attention.

Some of the IPR-related legal statutes lack sufficient provisions for enforcement. The Trade Descriptions Act and Weights and Measures Act were used to fight against counterfeiting and piracy. However, these laws are often limiting and sometimes inadequate (Wako, 2007). Lack of an adequate legal structure to fight counterfeits has been apparent and is a contributory factor to the upsurge of counterfeits in the country. Furthermore, the penalties in the IP-related laws addressing right infringements (prior to the Anti-Counterfeit Act), may have been too lenient and insufficient in deterring intellectual property rights infringements (Table 2.13).

A legally recognized institution to deal with counterfeits in Kenya has also been largely missing. In order to deal with the issue of counterfeits and piracy in Kenya, an Anti-Counterfeit and Sub-Standard Products Secretariat was set up with members from Weights and Measures, Bureau of Standards, the Kenya Industrial Property Institute, the Kenya Copyright Board, the Department of Trade, and Kenya Association of Manufacturers. The Secretariat was successful in undertaking raids on various premises, seizing goods and had the cases brought to court. However, after the Secretariat was taken to court in 2004 by Doshi Iron Mongers Limited, the court ruled (in 2006) that the raids were outside their respective mandate and that the Secretariat lacked the proper legal structure (Wako, 2007; Spence, 2007; and Kareithi, 2009). The Anti-Counterfeit Agency, established by the Anti-Counterfeit Act, has the legal mandate to undertake raids through their inspectors, some of whom, will be designated from the relevant institutions, and who will also be members of the Anti-Counterfeit Agency.

Kenya has experienced increased cases of bio piracy (section 4.5.5) which is as a result of lack of legal structures such as the relevant legal statute and/or appropriate Material Transfer Agreements (MTAs) for bio-prospecting.⁴⁵

Kenya is party to the Convention on Biological Diversity (CBD) and the National Environment and Management Authority (NEMA), which was established by the Environment Coordination and Management Act (1999) and charged with coordination and regulation for the management and conservation of biological diversity. The regulations governing the conservation of biological diversity and resources, access to genetic resources and benefit sharing were gazetted in December 2006 (Legal Notice No. 160).

According to these regulations, any person or institution intending to undertake activities to access genetic resources such as bio-prospecting, are to apply to NEMA for 'access permit', which should be accompanied by evidence of 'Prior Informed Consent' and research clearance certificate, obtained from the National Council for Science and Technology (NCST). A holder of the permit is expected to inform NEMA of the intangible components of plant genetic material collected, all discoveries made and make certain reports as specified in the

⁴⁵ Bio-prospecting refers to the search for biological material, which can be exploited for value and/or commercial purposes such as medicine, food, chemicals and enzymes.

regulations. The regulations also restrict anyone from transferring genetic resources outside Kenya without a Material Transfer Agreement (MTA). NEMA has since received 28 access permit applications and issued 19 access permits.

Other regulatory gaps include the lack of a mechanism to protect traditional knowledge and folklore, which has contributed to infringement and misappropriation as detailed below.

3.2 Infringement and Misappropriation

There have been a number of documented cases of IP infringement, counterfeit and piracy, including court cases⁴⁶ where intellectual property rights have been breached, misappropriated or misused by third parties.

3.2.1 Traditional knowledge

There is vast traditional knowledge and indigenous products that are unique to the country and have not been sufficiently protected as the IPR system in Kenya does not effectively recognize knowledge or innovations from indigenous people of local communities. This has led to commercialization of indigenous or traditional common knowledge by third parties at the exclusion of the actual community, for example the case of the *Kikoy*. *Kikoi* is a colourful cotton fabric worn initially by men and now also by women. It originated from the East African coast. The word *Kikoi* alone cannot be registered as it is generic to these products under Kiswahili language, and such terms cannot be registered as trademarks (Sange, 2010). However, in 2006, there were media reports of a company in the United Kingdom attempting to register the term *kikoy* as their trademark. This is different from *Kikoi*, but can cause confusion amongst consumers. The company in question was the Kikoy Company UK, an international private company with workshops in Kenya and branches in the United Kingdom as indicated in their website (www.kikoy.com).

⁴⁶ Obtained from Kenya Law Reports available from <http://kenyalaw.org/>

According to United Kingdom Intellectual Property Office,⁴⁷ the Kikoy Company registered a trademark that has the following text ‘THE KIKOY CO. WWW.KIKOY.COM’ (trademark E2829992) on 22 October 2003. The trademark covers certain classes of goods, which are largely clothing and accessories. In August 2006, the same company filed for another trademark with the UK Intellectual Property Office. This time the mark text was ‘kikoy’. This second trademark application led to a development charity and law firm to lodge an objection (Mugony, 2008).⁴⁸ The Kikoy Company UK, however, did not respond to the objection, which resulted to the withdrawal of the trademark in April, 2008.⁴⁹ According to Sange (2010), if the trademark was granted, it would have likely caused confusion in differentiating the two, but would not disadvantage the consumers too much as both refer to the same products.

3.2.2 Conflicts arising from patents in medicinal research

Patents are probably the oldest form of IPR in place, having been in existence since the 1400s. There have been a number of ‘patent races’ or ‘wars’ in Kenya in the 1980s and 1990s related to the development of an AIDS drug. The first is the case of KEMRON,⁵⁰ which was the name given to drugs developed by Kenya Medical Research Institute (KEMRI) in late 1980s (Sihanya, 2005). According to literature (Odek, 1994 and Kwena, 2004), the 1989 Industrial Property Act was drafted and enacted hastily after the Kenya Medical Research Institute (KEMRI) initiated research on an anti-AIDS drug leading to the development of KEMRON. The development of this drug resulted to the realization that the patent law that was in place then was not independent and therefore not effective. The enactment of the 1989 Industrial Property Act allowed KEMRI to file the patent application, which was done in July 1990 (application No. 3 titled ‘Primed low dose interferon alpha for management of acquired immunodeficiency syndrome AIDS and pre-AIDS).

⁴⁷Available from www.ipo.gov.uk

⁴⁸ The development agency was Traidcraft Exchange (UK) and the law firm Watson Burton. More information available from www.traidcraft.co.uk

⁴⁹ Case details for this trademark (2431257) from the UK Intellectual Property Office website www.ipo.gov.uk

⁵⁰ A drug that was initially promising results in managing AIDS but ended up failing as it did not meet the efficiency tests.

Another case that raised concern in Kenya about patents related to HIV/AIDS research under a Vaccine Development Partnership (VDP). This partnership was between the University of Nairobi in Kenya, University of Oxford in the UK, and the International AIDS Vaccine Initiative (IAVI). In 2000, it was revealed that the UK's Medical Research Council (MRC) had filed a patent covering the HIV sequences used in a HIV vaccine that was developed by that Vaccine Development Partnership (VDP). The filed patent application listed the Oxford researchers, but excluded the Kenyan researchers. In a press conference conducted jointly by the institutions involved, it was indicated that the patent was filed in good faith, with the aim of protecting it from exploitation (Levings and Kahn, 2001). As much as no legal battle ensued, it was clear that there was no proper legal agreement for joint ownership drawn-up. In the absence of such an agreement, the researchers would not have any legal entitlement to any monetary returns that would have accrued from its exploitation if it were a success.

3.2.3 Copyright infringements and piracy

In Kenya, retail piracy in business software, film and music industry is rampant. This could be as a result of limited awareness of copyrights by the user or inadequate protection and/or enforcement. According to the BSA/IDC Global Software Piracy Study (2009), software piracy losses in the country have been increasing over the years since 2004, with the losses doubling from US\$ 16 million in 2004 to US\$ 31 million in 2008. In 2007, the software losses were estimated at US\$ 28 million up from US\$ 22 million in the previous year. According to International Intellectual Property Alliance Special Report (2003), the Customs and Excise Department has seized over 100,000 pirated music CDs going into Nairobi and 15,000 pirated CDs going to Mombasa in a span of about one year between 2002 and 2003.

Another situation where copyrights have been infringed is the unauthorized sale of ring tones. There is a case in the High Court of Kenya (Nairobi) where a local gospel singer (the plaintiff) took a local company to court for selling ringtones derived from a Kikuyu gospel song where the plaintiff was the copyright owner.⁵¹

⁵¹ Case available from Kenya Law Report at www.kenyalaw.org (Case: Misc. Appli 974 of 2006).

Copyright infringement also often occurs in publishing; for example a case filed by Macmillan Kenya Publishers against Mount Kenya Sundries (Case 2503 of 1995). Macmillan Kenya Publishers accused the latter of illegally reproducing and selling traveler's maps. The case was finally ruled on October 2008 in favour of the Macmillan Kenya Publishers.

Plagiarism is yet another form of copyright infringement. In a ruling dated November 2010 in the High Court of Bungoma (Civil Suit No. 94 pf 2010), the plaintiff was awarded an injunction against a masters student of a local university (the respondent) restraining her from graduating and being awarded her Masters degree based on a copyright infringement claim by the plaintiff. The plaintiff's claim was that the respondent had copied her copyrighted work, which she had submitted to her university (which was different to that of the respondent), a year prior.

3.2.4 Trademarks and service marks infringement

There are cases where the packaging used by the illegitimate product is identical to the legitimate product. This causes a trademark infringement; however, it can constitute a form of counterfeiting based on the definition of counterfeiting provided in the Anti-Counterfeit Act (2008). Counterfeiting refers to the manufacture, production, re-packing, labeling or making of any goods that are identical, colourable imitation or substantially similar to 'genuine' protected goods, without the authority of the owner of intellectual property right subsisting in Kenya or elsewhere in respect of protected goods. There have been a number of cases in the Kenyan courts where trademarks are said to have been infringed:⁵²

Mumias Sugar Company Limited and Njewaka Supermarket (Civil Case 49 of 2006): In this case, the plaintiff, Mumias Sugar, sought an injunction to restrain the defendant, Njewaka Supermarket, from packaging, selling, supplying or contributing sugar under packets similar and/or confusingly similar with the plaintiff's Mumias Sugar Company packaging. This was based on the argument made by the plaintiff that the packaging of the sugar supplied by Njewaka Supermarket was similar to that of

⁵² Cases available from Kenya Law Reports at www.kenyalaw.org

the Mumias Sugar Company and could confuse customers. In May 2006, the judge ruled that a temporary injunction be issued to restrain Njewaka Supermarket from using the packaging that is similar and/or confusingly similar to that of the plaintiff.

Unilever Plc and Bidco Oil Industries (Civil Case 1447 of 1999): This was a case that had been in court for five years. The plaintiff was Unilever PLC who filed a suit against Bidco Oil Industry, claiming that Bidco Oil Industry had infringed on the 'Blue Band' (margarine) trademark by using the device 'band' on their packaging of their margarine 'Gold Band'. The ruling made in February 2004 stated that 'there was no proof that the words 'Gold Band' or 'Bidco Gold Band' resembled the plaintiff's registered trademark 'Blue Band', and was therefore not likely to deceive the public or cause confusion. Bidco Oil Industry was therefore legally permitted to continue using their 'Gold Band' trademark on its margarine.

Beiersdorf Ag and Emirchem Products Ltd (Civil Case 559 of 2002): Another trademark related case involved an international company, Beiersdorf Ag, and local company, Emirchem Products Ltd. Beiersdorf AG is a limited liability company incorporated in Germany and the manufacturer of NIVEA skin care products and holder of the NIVEA trademark. Emirchem Products Ltd were manufacturing and selling pure petroleum jelly known as 'NIVELIN' locally, which according to the plaintiff (Beiersdorf), was packaged to pass-off the product as NIVEA as the jar, labeling and colours were very similar. The plaintiff went to court to file for injunction to stop Emirchem Products Ltd from manufacturing, selling, supplying or distributing skin care products under the name NIVELINE or anything with similar colours or name to that manufactured by the plaintiff. In September, 2002, the court granted the injunction application thereby stopping the manufacturers of NIVELINE from further infringing on the NIVEA trademark.

The infringements are not only limited to products but services as well. For instance, the Kenya Bus Service Management Limited, which deals with bus franchising, leasing and fleet management in Kenya, have issued public warnings to other bus companies against using the company's trademark colours. A number of rival bus companies have

infringed on their registered Trade/Service Mark Numbers (device) in colours 'Sky Blue', 'Blue' and 'NavyBlue'.⁵³

3.2.5 Counterfeiting in medicine

The problem of counterfeit goods is compounded by the fact that counterfeited goods can also be found in 'legitimate stores' as opposed to informal markets (black market). Additionally, it is difficult to differentiate a counterfeit good from a genuine good. A further concern is that these goods are often substandard and pose significant health and safety risks (OECD, 2008). This is especially dangerous when it comes to the pharmaceutical sector.

Counterfeit drugs have not only affected Kenya but also a number of other countries, causing several deaths as indicated in Table 3.1. In Kenya, a random survey by the National Quality Control Laboratories (NQCL) and the Pharmacy and Poisons Board in 2005 estimated that 30 per cent of drugs are counterfeit. According to figures from the Kenyan Association of Pharmaceutical Industry, counterfeit pharmaceutical products account for approximately US\$ 130 million annually in sales in the country (WHO, 2006).

According to the Anti-Counterfeit Act (2008), in relation to medicine, counterfeiting refers to the deliberate and fraudulent mislabeling of medicine with respect to identity or source whether or not such products have correct ingredients, wrong ingredients, sufficient active ingredients or fake packaging. As indicated by the definition, counterfeit drugs are those that look like genuine but contain little or no active ingredient and possibly contain ingredients that can pose health risks. Such drugs can cause severe health complications leading to death as indicated in Table 3.1.

3.2.6 Bio-piracy

"Biopiracy" is a term used to describe the misappropriation of traditional knowledge, technologies, biological, scientific and cultural assets from the developing countries by the developed countries who commercialize the knowledge, often make products such as drugs, cosmetics and so on at the exclusion of the developing country that

⁵³Information of the public notice available at <http://kenyabus.net/> (viewed 22 June 2009). Also available from Gazette Notice No. 6055 (September, 2000).

Table 3.1: A short history of drug counterfeiting (1990 to 2008)

Nigeria 1990	A cough mixture 'diluted' with poisonous solvent. Over 100 children die.
Mexico 1991	Thousands of samples of an ointment for burns contain saw dust.
Bangladesh 1992	The quality of 37 out of 137 allegedly branded products is doubtful.
Turkey 1993	A pharmacist is arrested after attempting to export drugs to Africa. The active ingredient in his 'drugs' is baking powder.
Cameroon 1994	20% of the drug samples analyzed were substandard drugs.
Niger 1995	According to information provided by 'Physicians without Frontiers', a meningitis drug contains water only. More than 50,000 people were inoculated with fake vaccines resulting to 2500 deaths. The vaccines were received as a gift from a country which thought they were safe.
Haiti 1996	At least 59 children die after taking counterfeit syrup used to treat fever.
China 1997	Test series show that 10% of the drugs tested are sub-standard or counterfeits.
India 1998	30 infants die in India due to the consumption of paracetamol cough syrup prepared with diethylene glycol (a toxic chemical used in antifreeze).
Kenya 1998	So-called malaria drugs turn out to be completely ineffective. The number of persons adversely affected can only be roughly estimated.
Malawi 1999	The renowned Africa Health journal reports a genuine flood of counterfeited drugs all over the country.
Cambodia 2000	At least 30 deaths result from counterfeited malaria drugs.
China 2001	The Shenzhen Evening News reports more than 100,000 people died of fake drugs in China.
South-East Asia 2001	A Wellcome Trust study revealed that 38% of 104 anti-malarial drugs on sale in pharmacies did not contain any active ingredients.
Nigeria 2002	60% of our drugs are either counterfeit, sub-standard or expired, says the head of the country's drug control agency.
Switzerland 2003	WHO declares, on average, 10-20% of medicines in developing countries markets are sub-standard.
United Kingdom 2006	Officials seized 5,000 packets of counterfeit Tamiflu estimated to be worth GB£ 500 000.
Kenya 2008	16% anti-malarial drugs in the country were fake

Source: Global Pharma Health Fund (2004); WHO (2006); and Ngirachu (2008)

is the originator of the traditional biodiversity (Dutfield, 2003). The report *Out of Africa: Mysteries of Access and Benefit Sharing* (2004), provides a list of several organisms, plants and genetic materials that have been bio-pirated from Africa (Appendix Table 1). One such case is the Industrial Enzymes from Microbes where a British researcher from Leicester University discovered and collected microbes from soda lakes of Kenya, namely Lake Nakuru and Lake Bogoria in 1992, which were later patented by Genencor, a biotech company based in California, USA, without approval from Kenya. These microbes and the enzymes they produce are used to give jeans the trendy faded look.

Another microbe also extracted from Kenya owned by Genencor is one that helps remove biological stains from cotton products, which is used in Proctor & Gamble's global detergent brands. In September 2004, Kenya filed a suit against the company claiming that they were illegally acquired (McGown, 2006). According to the Observer (Barnnett, 2004), Genencor had made more than US\$ 1 million in sales to detergent manufacturers and textile firms. The suit was launched by Kenya Wildlife Service with the purpose of establishing mechanisms to share the profits of Genencor from the microbes extracted from Kenya because no benefit sharing agreement was established. According to the Economist Intelligence Unit (2009), this case has not yet been resolved.

Another case is one involving the Diabetes drug called Acaobose, which was developed by a German Company called Bayer from a strain of bacteria obtained from Ruiru dam in Kenya. The strain was identified as Kenyan in a patent application in 1995 and was issued in Europe, the US and Australia. However, Kenya has not yet received any benefits (McGown, 2006).

3.3 Current Reforms and Lessons Learnt

Several lessons have been learnt following these unfortunate experiences. As indicated earlier, the Government has realized the need to improve the regulatory framework and has developed a number of new legal statutes and policies:

Introduction of IP policies and offices in local universities: As of 2004, when the Report on National Intellectual Property Audit was undertaken, only one university and two international R&D institutions had IP policies. However, local universities including University of Nairobi, Moi University, Kenyatta University and Jomo Kenyatta

University of Agriculture and Technology (JKUAT) have realized the importance of IPR and have established their own IP policies with the help of Kenya Industrial Property Institute (Odek, 2009). According to Sikoyo *et al.* (2006), the absence of IP policies in universities creates a risk whereby university researchers transfer knowledge and biological material without adequate consideration of IP and ownership implications.

Introduction of regulations controlling bio-prospecting wildlife resources: According to Institute of Economic Affairs (2008), bio-piracy is as a result of absence of a bio-prospecting legal and/or institutional framework. This notwithstanding, there have been some developments to address the problem. One is the introduction of the regulations governing the conservation of biological diversity and resources, access to genetic resources and benefit sharing, gazetted in December 2006, which requires one to apply for an access permit from NEMA to access genetic resources or to undertake bio-prospecting. The characterization of microscopic organisms in Kenya is another initiative that should improve in controlling bio-piracy. In 2007, Kenya Wildlife Service (KWS) entered into a formal agreement with Denmark's Novozymes, which is the world leader in enzymes and micro-organisms biodiversity, to characterize Kenyan microbial diversity from specific biological niches. The agreement is in accordance with the United Nations' Convention on Biological Diversity (CBD) (Odek, 2009). Under this agreement, Kenya would benefit from any future products developed by Novozymes by running royalties from sales and a milestone payment unlike previous cases where industrial enzymes are extracted from Kenya's soda lakes. As part of the agreement, Kenya will also benefit from training and technology transfer.⁵⁴

To further address issues of bio-piracy with respect to wildlife resources, KWS has drafted a Wildlife (Conservation and Management) Amendment Bill 2010, which when enacted, will make it mandatory for anyone engaging in bio-prospecting or exporting any wildlife resources for the purpose of research or bio-prospecting to disclose all material information and obtain a permit from the Wildlife Regulatory Authority (which is established by the Bill). Disclosure of genetic resources as well as the traditional knowledge could also assist in encouraging benefit sharing opportunities. Disclosure requirement is a proposal that has

⁵⁴ Details available at <http://www.kws.org/kws-novozymes.html>

been suggested in international forums where patent applications, which concerns living organisms or biological material, are required to identify the source of their genetic resources and Traditional Knowledge - TK (Institute of Economic Affairs, 2008). The draft Wildlife (Conservation and Management) Amendment Bill (2010), for instance, has a whole section addressing bio-prospecting. The draft Wildlife Amendment Bill provides that the disclosure requirement is a prerequisite when applying for a bio-prospecting permit. Kenya's biodiversity should be well protected by national legal instruments, especially as Kenya is endowed with a wealth of biological resources that are important to the society and play an important role in economic development.

Protection of traditional knowledge and cultural expressions: Traditional/indigenous knowledge cannot be protected through the conventional intellectual property rights. However, protection is necessary. The National Policy for the Protection of Traditional Knowledge, Genetic Resources and Expressions of Culture should be approved and implemented hastily to introduce appropriate mechanism to protect traditional knowledge, folklore and cultural expressions. The government recently introduced the National Policy on Culture and Heritage, the first policy to address culture. It recognizes the importance of protecting the intellectual property of artists, communities, creators and performers and proposes to facilitate the enactment of appropriate legislation to protect copyright and other intellectual property rights of Kenyan music and dance.

IPR legislation, regulation, enforcement and awareness needs to be improved to address the cases of patent, trademark and copyright infringements that have plagued Kenya. This is especially important since court cases take very long to resolve. For instance, the case of Macmillan Kenya Publishers and Mount Kenya Sundries took 13 years, while that of Unilever Plc and Bidco Oil Industries took 5 years.

4. Conclusion and Policy Recommendations

4.1 Conclusion

There has been some increased attention to STI and knowledge in Kenya. This is an important move given that STI and knowledge is an important foundation to achieving industrial development. Creativity and innovation also play a significant role in an economy, as evidenced by the copyright industry which, as indicated earlier, contributes 5.3 per cent of the total value added and 3.8 per cent of national gross output.

Such knowledge based growth should be encouraged through appropriate policies and regulations, which should be responsive to Vision 2030, the National Policy on Intellectual Property Rights and the ST&I policy.

4.2 Policy Recommendations

Emphasizing the importance of knowledge

Kenya needs to continue placing the intellectual property issues in the fore. Certain measures have been introduced over the years, which will definitely make a positive impact for Kenya. Key among them is improving awareness by KIPi and formal education of IPR. Awareness at the grass root level should, however, be intensified. There are a number of innovators in rural areas who may not know about IPR or know how to access the information given that the relevant institutions are not decentralized. The following can be done:

- (i) Intensify IPR awareness: The KIPi and Copyright Board should consider developing a handbook for IPR for different organizations, for example education institutions, photocopying bureaus, cyber cafes, retail stores, supermarkets and DVD/CD selling points, among others, where the rights, limitations, exceptions and infringement are well identified. The Copyright Act, for instance, is not strictly enforced therefore photocopying bureaus and even universities sometimes infringe on copyrights through photocopying. Awareness campaigns can also be introduced in forums where take-up is expected to be high, such as in the annual National Students Science Congress.

There is need to intensify copyright awareness in learning institutions. This is especially important given that most learning institutions do not teach IPR.

- (ii) Intensify copyright awareness and enforcement: Copyright owners, producers and businesses that deal with selling and hiring out copyright related items should ensure that they follow the law requiring them to have a tamper proof, serially numbered authentication device affixed to it.⁵⁵ In fact, according to the Act, any person who sells or offers for sale any copyright work that requires an authentication device without an authentication device affixed thereto is guilty of an offence and is liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding four years, or to both. The limited use of the authentication device (banderole) may be as a result of low levels of awareness of its existence and use, and weak enforcement. Awareness of CMOs and the role they play should also be intensified to copyright holders.
- (iii) The government should hasten decentralizing of IPR-related institutions: The government should provide offices throughout the country where individuals or companies interested in applying for a trademark, patent, industrial design, utility model or registering their copyright can access the relevant information and application forms, which would also act as a drop-off point initially, before being transformed into a fully pledged branch office, capable of doing everything done at the headquarters.
- (iv) Introduce proper mechanism and regulatory framework for handling technology transfer effectively: This implies that research institutions, for instance, should put in place research agreements to be signed by all parties which clearly states all issues regarding intellectual property rights, knowledge and technology transfer. Universities and R&D institutions in Kenya should be supported to develop appropriate IP policies. The absence of IP policies in such institutions is risky and can lead to loss of knowledge and biological material, as

⁵⁵ Section 36 (11) of the Copyright Act now states that the anti-piracy device will be prescribed by the Kenya Copyright Board. Prior to this amendment, the device was to be prescribed by the Kenya Revenue Authority.

was evidenced in the HIV/AIDS research between scientists in Kenya and the United Kingdom and the bio-piracy cases. Regulation on naming and sharing through mechanisms such as the Mutual Benefit Agreements must be institutionalized in research institutes. This is especially important now that the Environmental Management and Coordination Act, Regulations on Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing was gazetted in 2006. Universities and other research institutes should also endeavor to have well formulated research partnership and technology or knowledge transfer policies, which will enable them to effectively interact with other institutions especially on research.

- (v) To avoid confusion and conflict with respect to trademarks, there should be some collaboration and information sharing mechanisms between the company registry database for business names at the State Laws Office, and the trademark database at KIPI.
- (vi) Promoting an IP culture: This can be done by entrenching IP in the school curriculum.

Review of the legal and regulatory framework

The overall legal and regulatory framework that would encourage knowledge-led economic growth should be institutionalized.

There are a number of policies, including the National Intellectual Property Policy; Science, Technology and Innovation Policy; Traditional Medicine and Medicinal Plants Policy; and National Policy for the Protection of Traditional Knowledge, Genetic Resources and Expressions of Culture which, when implemented, will positively impact the economy. The following bills should also be hastened so as to address the existing regulatory gaps: Wildlife (Conservation and Management) Amendment Bill 2010; Geographical Indicators Bill 2009; Traditional Medicine and Medicinal Plants Bill 2008; Science, Technology and Innovation Bill 2009; and Technical, Industrial, Vocational and Entrepreneurship Training (TIVET) Bill.

These regulatory provisions will go a long way in filling the regulatory gaps that have been in existent. However, given that these regulatory provisions will be administered by different institutions, harmonization

and proper coordination is crucial. Additionally, the government should look at the knowledge ecology in Kenya and determine the needs for the country and the policy gaps. The country needs an effective national innovation system in place. An efficient regulatory environment is important for the promotion, protection and proper implementation of intellectual property rights.

Dispute resolution mechanisms and capacity building to judiciary

A key problem as regards counterfeits and piracy in Kenya is the enforcement of property rights, especially when some cases such as Unilever Plc versus Bidco Oil Industries (Civil Case 1447 of 1999) have been in court for five years, and Macmillan Kenya Publishers and Mount Kenya Sundries case for 13 years. This discourages entrepreneurs from seeking legal redress. Dispute resolution mechanisms should also be reviewed because currently, IPR issues take a long time to be resolved in the courts.

It was noted earlier that magistrates in Kenya have little knowledge of copyright law in Kenya. The judiciary should therefore receive additional training on IPR to ensure that they have adequate skills and knowledge to address legal cases in an effective and timely manner.

Protect the country's traditional, indigenous and biological items

To avoid further cases of indigenous items being patented by third parties, as was the case for enzymes from Lake Bogoria and Lake Nakuru, it is increasingly important for Kenya to conduct a survey of the traditional knowledge and indigenous items available and document them in a comprehensive database. The development of legislation addressing bio-prospecting is an important move for Kenya. The bill should adequately address the issue of bio-prospecting and consequently address the bio-piracy problem with respect to wildlife resources. The enactment of this Act should therefore be hastened. Furthermore, the government should ensure proper implementation of the regulations introduced under the Environmental Management Control Act aimed at controlling bio-prospecting in wildlife resources.

The draft, Traditional Medicine and Medicinal Plants (TMMP) policy, addresses the regulation of traditional and herbal medicine. To be effective, the policy should appropriately address issues of protection of traditional knowledge related to medicine. Kenya, however, urgently needs to undertake an audit of the traditional and indigenous knowledge available, as the country determines ways through which it can be adequately protected. Mechanisms for protecting indigenous Kenyan items should be quickly established to mitigate against the rights of being granted to foreign third party patent holders. Geographical identification method is one way Kikuyu grass⁵⁶ and *Kikoi* can be protected. The government should therefore ensure that the Geographical Indicators Bill is well drafted so that it protects indigenous products. This can be applicable for products such as honey from Ukambani, Kisii soapstone, Maasai shuka, Akamba carvings, Kenyan tea and coffee, and other goods with a given quality, reputation or characteristic attributable to its geographical origin.

The government should also consider developing, mapping out and documenting databases with traditional knowledge, indigenous items and biodiversity.

⁵⁶Which is planted in different countries and according to Institute of Economic Affairs (2009) is patented in Austria.

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Appendix

Table 1: Cases of acquisitions of genetic and/or traditional knowledge by developed countries from Africa

No.	Acquisition	Out of
Medicine from biodiversity		
1	Diabetes drug produced by a microbe	Kenya
2	A treatment for diabetes	Libya, Egypt
3	Antibiotics from a termite hill	Gambia
4	An antifungal from a giraffe	Namibia
5	Infection-fighting amoeba	Mauritius
6	A treatment for impotence	Congo (Brazzaville)
7	Vaccines from microbes	Egypt
8	Four multipurpose medicinal plants	Ethiopia and neighbouring countries
9	Hoodia, the appetite suppressant	Namibia, South Africa, Angola, Botswana
10	Antibiotics from giant land snails	Sierra Leone to Nigeria
11	Drug addiction treatment from iboga	Central and West Africa
12	Multipurpose kombo butter	Central and West Africa
Cosmetics from biodiversity		
13	Skin whitener from an Aloe	South Africa and Lesotho
14	Beauty and healing from okoumé resin	Gabon and Western Central Africa
15	Skin and hair care from the argan tree	Morocco
16	Skin care plus from "pharaoh's wheat"	Egypt
17	Skin care, etc. from bambara groundnut	Sub-Saharan African
18	Skin care from "the resurrection plant"	Southern and Eastern Africa
Agricultural and horticultural products from biodiversity		
19	Endophytes and improved fescues	Algeria and Morocco
20	More Endophytes for improving fescues	Morocco and Tunisia
21	Nematocidal fungi	Burkina Faso
22	Groundnuts	Malawi, Senegal, Mozambique, Sudan, Nigeria
23	Impatiens with a trailing growth habit	Tanzania
24	Molluscicides	Somalia, Ethiopia, Egypt
Biodiversity acquisitions for further investigation		
25	Ocean riches Cape Verde	Comoros, Egypt, Eritrea, Kenya, Mauritius, Mozambique, Seychelles, and South Africa
26	Cosmetics from "kokori fruit"	Nigeria
27	A skin treatment from tamarind	Africa
28	The cancer fighter from bitter leaf	Most of Sub-Saharan Africa
29	Infection-fighting mycobacteria	Uganda
Biodiversity acquisitions under investigation		
30	Industrial enzymes from microbes	Kenya
31	Teff	Ethiopia
32	The infection fighter	Zimbabwe
33	Medicinal Plants	Gabon, Nigeria
34	Skin cream from coco-de-mer	Seychelles
35	Cosmetics from the baobob tree	Africa

Source: *Out of Africa: Mysteries of Access and Benefit Sharing* (Barnett, 2004)