

The GLOCEPS

Weekly Influential Brief

Research and Analysis in Transnational Organised Crimes Pillar

Addressing challenges in enforcing the Anti-Counterfeit Act, 2008 in Kenya: lessons from Singapore

Ida Gathoni & Valtino Awuor



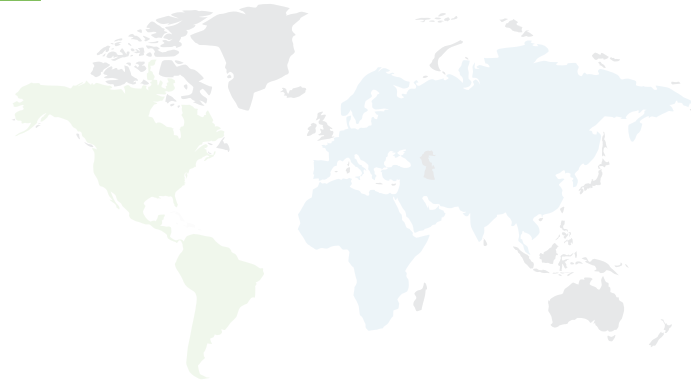
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Introduction

Counterfeit trade in Kenya poses significant challenges to the economy. In 2018, the vice was valued at KES 100 billion, with one in five products being counterfeit. Approximately 4 million consumers use fake goods. Counterfeit products have infiltrated almost all sectors of the economy including pharmaceuticals, electronics, fashion, and consumer goods. This is causing harm to legitimate businesses and trusted brands while posing risks to public health. To address these concerns, Kenya enacted the Anti-Counterfeit Act in 2008, (ACA), aiming to combat counterfeiting and empower law enforcement. However, enforcement faces numerous challenges like rising demand for counterfeit goods, weak border control, increasing online marketplaces, and questions of integrity.

In this regard, Kenya needs to understand strategies used by other countries to address the counterfeit trade. Singapore stands out as a prime example of effective anti-counterfeiting strategies. The country has done this through the implementation of strong enforcement mechanisms such as specialized intellectual property rights enforcement, and collaboration among industries. Analysing Singapore's legislative framework and enforcement approaches can provide valuable insights for policymakers and stakeholders in Kenya. By leveraging these lessons, the country can develop targeted policies and interventions to overcome challenges in enforcing the ACA.





Background

The counterfeit trade in Kenya

Counterfeit trade has long plagued Kenya, affecting various sectors of the economy. Initially, it targeted popular consumer goods like clothing, footwear, accessories, and household items. Entertainment media such as music albums, films, and books were also widely counterfeited. Counterfeit pharmaceuticals emerged as a major concern in the 1990s and early 2000s, posing risks to public health. Later the problem evolved to include electronics, automotive parts, cosmetics, clothing, luxury goods, tobacco, and alcohol products, impacting the economy and legitimate businesses. Consumers seeking cheaper alternatives often fell victim to these fake goods. To tackle this issue, Kenya introduced the Anti-Counterfeit Act (ACA) in 2008, establishing a legal framework and enforcement mechanism. The ACA complemented existing laws like the Pharmacy and Poisons Act of 1957, the Trademarks Act of 1957, the Industrial Properties Act of 2001, the Copyright Act of 2001 and the Customs and Excise Act of 1978. However, challenges have persisted in effectively

implementing and enforcing the new law. This can be explained by several factors, including social pressure that drives demand for counterfeit goods, porous borders and corruption among law enforcement agencies, just to name a few.

Social pressure and the pursuit of material possessions drive the demand for counterfeit products. In the age of social media, there is a strong emphasis on displaying wealth and social status. People feel compelled to conform to societal expectations, even if it means purchasing counterfeit luxury items or branded goods. The desire to fit in and acquire the perceived prestige associated with genuine brands fuels the demand for counterfeits. Affordability also plays a significant role as counterfeit goods are sold at lower prices, making them accessible to consumers with limited finances. Additionally, the misconception that counterfeits can match the quality of genuine products adds to their appeal. However, low levels of consumer awareness and inadequate education about intellectual property



Photo Credit: spot.ph





rights contribute to the proliferation of counterfeit goods.

Still, Kenya's porous borders pose challenges for anti-counterfeit enforcement. Smuggling operations easily evade border control measures, enabling the unchecked entry of counterfeit products. Insufficient inspections, limited personnel, and inadequate technological resources make it difficult to identify and intercept counterfeit goods. The reopening of borders, such as the Kenya-Somalia border, without proper security measures raises concerns about the potential surge in the counterfeit sugar trade. Previous partnerships aimed at enhancing border security have been established, but further action is needed to improve the expertise of border officials and address emerging counterfeit trends in East African borders.

Corruption within Kenya's law enforcement agencies poses significant obstacles in enforcing anti-counterfeit laws, allowing counterfeit operations to thrive. Transparency gaps in organizations like the Kenya Ports

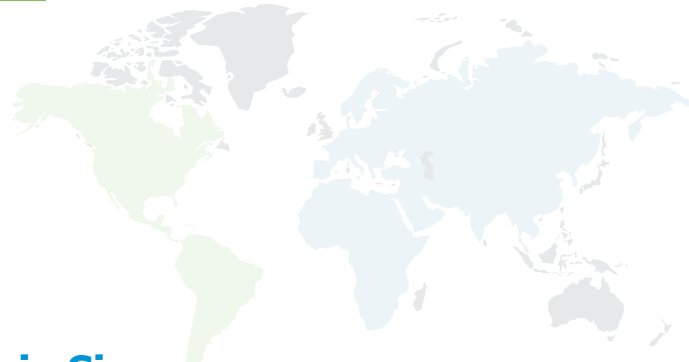
Authority (KPA) and Kenya Revenue Authority (KRA) are exploited by counterfeiters who bribe officials or enjoy protection from influential individuals. This collusion compromises investigations and prosecutions, resulting in insufficient penalties. The rise of e-commerce platforms has further complicated efforts to combat counterfeiting, as monitoring and regulating online marketplaces prove challenging. Lengthy legal procedures, high burdens of proof, and insufficient resources hinder the effectiveness of anti-counterfeit laws. Insufficient funding, technological limitations, and a shortage of skilled personnel impede enforcement efforts. These collective challenges undermine the integrity of enforcement, allowing counterfeiters to evade legal consequences and perpetuate the circulation of counterfeit goods in Kenya.

In this regard, Kenya can learn a lot from Singapore's experiences in fighting this vice and customize its approaches to effectively tackle the unique challenges it encounters in combating counterfeiting.



Photo Credit: Capital News





Counterfeit trade in Singapore

Counterfeit trade in Singapore grew in the 1970s and 1980s as the country emerged as a leading trade hub in Asia. It further increased in the 1990s owing to the increasing availability of goods from among others, China, Hong Kong and Taiwan. The presence of counterfeit goods, including luxury items such as jewellery and designer shoes, electronics, pharmaceuticals, and automotive parts, was prevalent. Being counterfeit, the goods were often poor quality and did not meet safety standards. This led to consumer dissatisfaction and a loss of confidence in Singapore as a reliable source of goods. In addition, the illegitimate trade deprived legal businesses of revenue. In this regard, Singapore took proactive steps to address the issue of counterfeit trade by enacting the Trade Marks Act, of 1998. Amendments have also been made to the Customs Act, of 1960, the Copyright Act, of 1987, the Patents Act, of 1994 and the Registered Designs Act, of 2000. Specialized units, like the Intellectual Property Rights Branch of the Singapore Police Force, were established with the necessary resources to investigate and

prosecute counterfeiters in the year 2000. Collaboration with organizations like Interpol and partnerships with industry stakeholders were prioritized. Public awareness campaigns complemented these efforts, particularly in discouraging demand for fake goods. Furthermore, the country stepped up enforcement of its intellectual property laws. Actions included intelligence-led raids on factories and consignments and prompt prosecution of offenders. This resulted in significant progress in reducing counterfeit goods. To date, Singapore remains vigilant to combat evolving tactics and maintains its strong stance against counterfeiting. These efforts have worked together to bolster intellectual property protection in the country. The progress in combating illicit consumption is evident as the proportion of illicit consumption out of the total cigarette consumption decreased from 25.6% in 2012 to 13.8% in 2017. Furthermore, there has been a notable decline in the number of individuals penalized for cigarette-related offences, reducing from 20,624 in 2018 to 7,508 in 2022.



Photo credit: DB&B





Key Issues

The following section highlights valuable insights that Kenya can learn from Singapore's approach to combating counterfeiting.



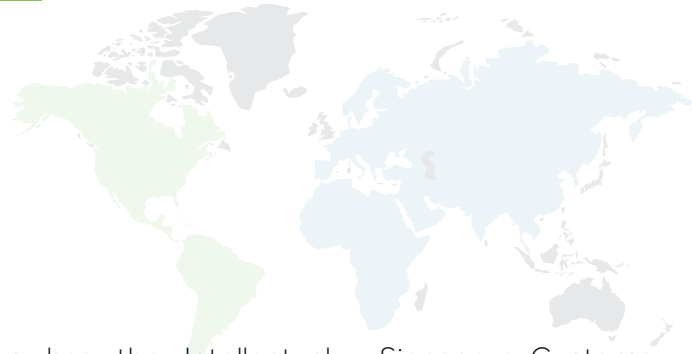
a) Enforcement mechanisms

Singapore's law enforcement agencies have dedicated units specialized in intellectual property rights enforcement, equipped with the necessary resources and expertise. These include The Intellectual Property Office of Singapore (IPOS) and the Commercial Affairs Department (CAD) of the Singapore Police Force. Moreover, Singapore has created a dedicated agency called the Intellectual Property Rights Branch (IPRB) under Singapore Customs. This agency has a specific focus on implementing border control measures to prevent the import and export of counterfeit goods. In contrast, Kenya has established various specialised agencies including Anti-Counterfeit Authority (ACA), the Kenya Copyright Board (KECOBO), and the Kenya Industrial Property Institute (KIPI). These organizations work together to combat counterfeiting and enforce intellectual property rights in the country in a multiagency concept. However, they continue to face

challenges in effective enforcement mainly due to limited financial and human resources, capacity constraints, and corruption. Similarly, the enforcement of customs laws is primarily conducted by the Kenya Revenue Authority (KRA), which faces different constraints in terms of resource allocation and capacity compared to the IPRB.

Singapore has specialized Intellectual Property (IP) Courts to handle disputes and cases related to intellectual property rights, including counterfeit trade. These courts have jurisdiction over a wide range of IP-related cases, such as trademark and copyright infringement, and patent disputes. They handle both civil and criminal cases and are staffed with judges who possess expertise in IP law. Singapore's IP Courts demonstrate the country's commitment to specialized adjudication and effective enforcement of IP





rights. Conversely, Kenya has the Intellectual Property and Anti-Counterfeit Court (IP & ACC Court). It handles intellectual property-related offences and counterfeit trade cases, albeit with a broader scope compared to the specialized IP Courts in Singapore. The IP & ACC Court faces significant challenges that affect its effectiveness. One of the main issues is the backlog of cases and delays in court proceedings. This leads to prolonged litigation, which can be frustrating and discouraging for rights holders who seek timely resolution of their intellectual property disputes. In addition, the court's efficiency is hampered by insufficient resources, such as limited funding, personnel, and infrastructure. Kenya's Judiciary has been receiving 0.6 per cent of the national budget which falls far short of the international standard of 2.5 per cent. The lack of specialized judges and trained personnel in intellectual property law further hinders the court's ability to effectively handle complex cases in this field.

Singapore Customs, under the authority of the Customs Act, of 1960, has the power to seize and detain suspected counterfeit goods at entry ports. They work closely with rights holders, using targeted inspections and risk assessment methods to identify and intercept counterfeit products. The Customs unit has the authority to seize and detain suspected counterfeit goods, either at the request of the rights holder or on its initiative. This proactive border control approach effectively reduces the influx of counterfeit goods into Singapore. In contrast, Kenya's border control measures vary in effectiveness and sophistication, often hindered by corruption. Given Kenya's location and vulnerability to cross-border counterfeit trade, addressing porous borders is crucial. The potential reopening of the Kenya-Somalia border raises concerns about an upsurge in counterfeit trade.



Photo Credit: The Guardian





b) Internal and external cooperation and collaboration efforts

Singapore prioritizes international cooperation and partnerships with stakeholders, including Interpol, to combat counterfeiting. This collaborative approach fosters information sharing and close cooperation among government agencies such as IPOS, Singapore Customs, and law enforcement bodies, as well as rights holders, industry associations, and international organizations. This enhances enforcement measures and raises public awareness. In Kenya, the Anti-Counterfeit Agency (ACA), Kenya Revenue Authority (KRA), Directorate of Criminal Investigations (DCI), and Kenya Bureau of Standards (KEBS) are government agencies that collaborate. They enforce anti-counterfeit laws, conduct investigations, seize counterfeit goods, and prosecute offenders. While this collaboration exists, it is important to reinforce coordination, information sharing, and joint operations to improve the effectiveness of

anti-counterfeit measures in Kenya.

Singapore actively engages in international cooperation by partnering with organizations such as INTERPOL, World Intellectual Property Organization (WIPO), and World Customs Organization (WCO). It shares information and participates in initiatives to strengthen intellectual property protection globally. In contrast, Kenya's involvement with these organizations is more focused on capacity-building and receiving technical assistance, rather than active participation. Kenya primarily collaborates regionally, engaging with organizations such as African Regional Intellectual Property Organization (ARIPO) and African Intellectual Property Organization (OAPI), to promote intellectual property rights protection within Africa. Regional cooperation allows for more targeted and region-specific strategies.





However, having better alignment with international organisations offers global cooperation, information sharing and capacity building. It aligns national efforts with global standards and sends a strong message to counterfeiters.

Singapore has established bilateral agreements and Memoranda of Understanding (MOUs) with various countries, including the United States and the European Union, to enhance trade and cooperation. Kenya has recently inked an MOU with Uganda to combat illicit trade in the East Africa region and has engaged in discussions with the

United Kingdom on anti-counterfeiting and intellectual property protection. However, Kenya faces challenges in effectively implementing and enforcing the provisions outlined in these agreements due to limited capacity and financial resources. Singapore's bilateral agreements differ as they primarily focus on specific partner countries, allowing for a more targeted approach to intellectual property collaboration. In contrast, Kenya's agreements tend to be influenced by regional frameworks like the East African Community (EAC), which have broader implications for intellectual property cooperation within the region.



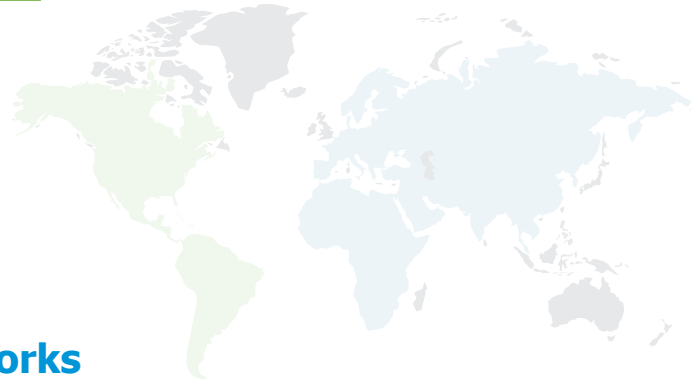
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c) Public awareness and education campaigns

Singapore and Kenya have different approaches to public awareness and education campaigns against counterfeiting and in promoting intellectual property rights. Singapore's strategy is wide-ranging, engaging the public directly through exhibitions, seminars, and workshops. They collaborate with industry associations, use mainstream and social media, and integrate

intellectual property education into the curriculum. In contrast, Kenya faces resource constraints and relies on collaborations with international organizations, industry associations, and government agencies. They utilize the media to disseminate awareness messages but often have limitations in the scale and scope of their initiatives.





d) Legal Frameworks

Singapore's Customs Act outlines the process and requirements for the forfeiture of counterfeit goods. It allows authorities to seize and confiscate the proceeds of counterfeiting activities, including the profits derived from the sale of counterfeit goods. This initiative aims to disrupt the financial gains of counterfeiters and serves as an additional deterrent. Kenya's ACA, although providing some of these measures, could benefit from strengthening provisions related to asset forfeiture. Cognisance is taken that these provisions and procedures may exist under other laws or regulations in Kenya that apply to counterfeiting cases such as the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) of 2009.

Singapore and Kenya have significant differences in the civil remedies available to intellectual property rights holders. In Singapore, the legal

framework offers robust civil remedies, including injunctive relief, damages, an account of profits, delivery up or destruction of infringing goods, and legal costs. These remedies empower rights holders to take legal action, deter infringement, and seek compensation for damages. In contrast, Kenya's civil remedies for intellectual property rights holders may be limited and less accessible. The process of enforcing rights through civil litigation in Kenya can be complex, time-consuming, and expensive. Consequently, rights holders in Kenya face challenges in protecting their intellectual property and obtaining adequate compensation for infringements. This disparity underscores the need for Kenya to strengthen its legal framework, streamline civil remedies, and provide an effective avenue for intellectual property rights enforcement, which would encourage innovation and creativity.



Photo Credit: Federation of Kenya Employers



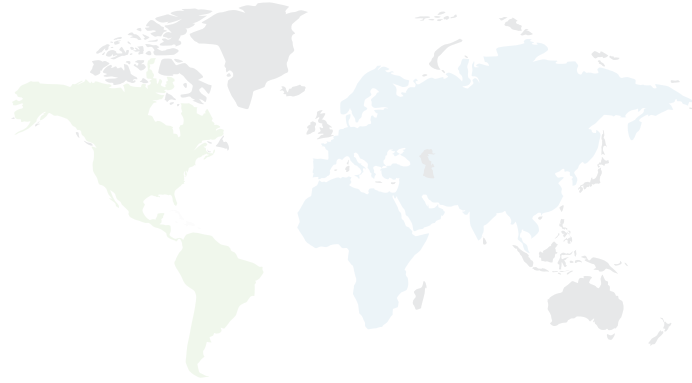


- c) enhance existing collaboration and coordination among relevant government agencies, such as customs, police, intellectual property offices, and consumer protection agencies.
 - d) invest in public awareness campaigns to educate consumers, businesses, and the general public about the risks and consequences of purchasing and selling counterfeit goods.
 - e) strengthen its cooperation with other countries, international organizations, and stakeholders in the fight against counterfeiting.
 - f) promote a culture of innovation and provide support to local inventors, entrepreneurs, and creators, to stimulate economic growth and reduce the appeal of counterfeit goods.
 - g) establish robust mechanisms to detect and remove counterfeit listings, improve digital forensics capabilities, and raise awareness among online shoppers.
3. The Judiciary should:
- a) establish specialized intellectual property courts similar to Singapore's IP Courts.
 - b) allocate additional resources, including funding and personnel, to increase the IP & ACC Court capacity.

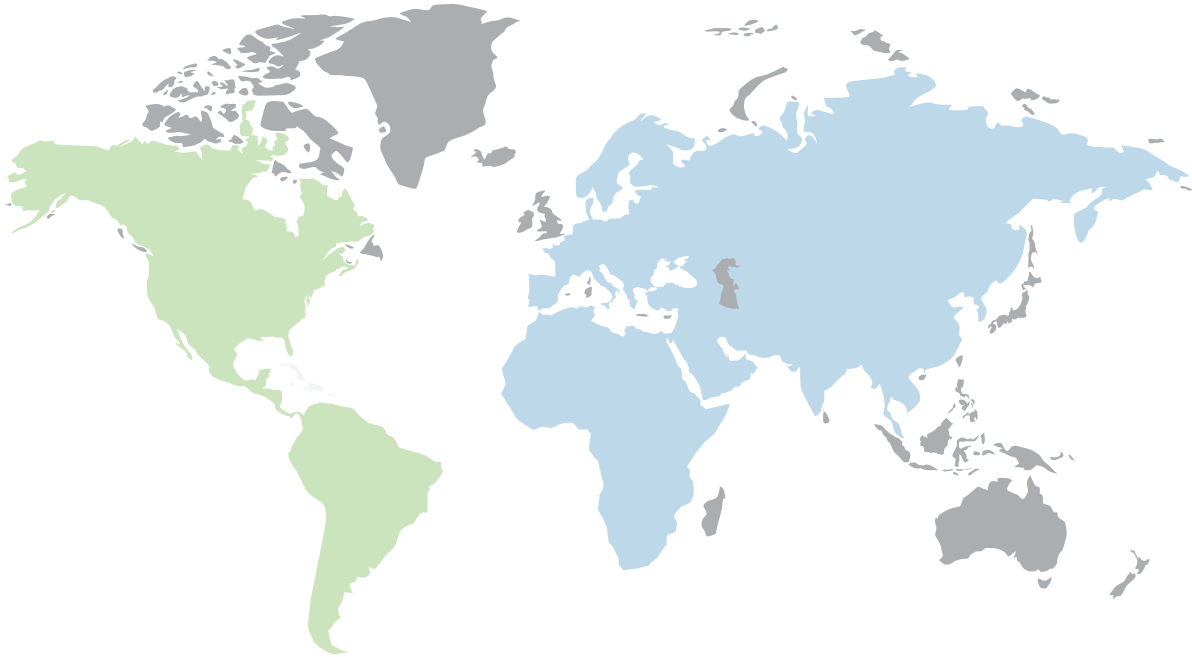


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Off Kiambu Road, Nairobi Kenya
P.O. Box 27023-00100, Nairobi.
Telephone: 0112401331
Email: info@gloceps.org
Web: www.gloceps.org