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## Guide to IPR protection at the border in Kenya



## 1. Introduction

Kenya is a key economic hub in East Africa, and is the largest and most advanced economy in East and Central Africa. The country is home to the port of Mombasa, the largest port in East Africa and the gateway, not only to Kenya, but to the neighbouring countries such as Burundi, Rwanda, South Sudan and Uganda. Entrepreneurs wishing to sell their goods in the region must therefore pay close attention to what is happening in Kenya.

Protecting intellectual property rights (IPRs) from counterfeiters and copycats is key to ensuring continued success and trust amongst customers in the Eastern Africa region. In Kenya, numerous organisations are involved in the fight against counterfeiting. This guide focuses on two major organisations that act at the border against counterfeit products: the Kenya Revenue Authority, which is responsible for customs, and the Anti-Counterfeit Authority (ACA). The ACA is a state organisation mandated to act against counterfeit goods and goods bearing counterfeit marks, and against any means used to create a counterfeited product.

## 2. Preventing counterfeit goods from entering Kenya

### A. Application for customs enforcement

Customs and the ACA have concurrent power to receive applications for enforcement against infringing goods being imported into Kenya. The owner of an IPR who has valid grounds for suspecting that the importation of counterfeit goods may take place can apply to the Commissioner of Customs or the Executive Director of the ACA to seize and detain all suspected counterfeit goods that feature, bear, embody, or incorporate the subject matter of an IPR.

Small quantities of goods used for domestic and personal use are excluded from seizure. Small consignments destined for trade are not excluded from seizure. Imports of regular but small consignments of infringing goods for purposes of trade may therefore be targeted.

#### What types of IPR?

- Copyright
- Plant breeders' rights
- Trade marks
- Industrial designs
- Patents
- Utility models.

#### Requirements

The IPR owner may provide:

- a) sample or photographs of the relevant product;
- b) proof of ownership and continued validity of the IPR - usually the registration certificate.

### Acceptance of application

The Commissioner of Customs or the Executive Director of the ACA must respond to the application within 3 working days. The applicant is informed in writing as to whether or not the application has been granted.

If satisfied that all requirements are met (the goods claimed to be protected are prima facie protected goods; the IPR prima facie subsists; and the applicant prima facie is the owner of that IPR), the Commissioner or the Executive Director is required to grant the application. The Commissioner of Customs or the Executive Director of the ACA must state the period of validity of the application for customs enforcement. The validity period may be shorter than the period applied for. The validity period may not exceed the validity of the IPR. If denied, the Commissioner of Customs or the Executive Director of the ACA must state the reasons for refusal.

### Follow up action

Once the application for customs enforcement has been granted, an authorised customs officer or ACA inspector may seize and detain the suspected counterfeit goods.

In order to avoid the release of the goods back to the suspect, a criminal charge must be made against the person from whom the goods were seized within 3 months.

Any goods seized are stored and kept in safe custody at a counterfeit goods depot until the person in charge of the depot is ordered to release, return, or destroy the goods.

Convicted offenders are fined at least three times the value of seized goods, imprisoned for at most 5 years, or both. Upon conviction, the court may order that the goods be forfeited to the government for destruction. Counterfeit goods are destroyed at the expense of the manufacturer or importer. The court may further order that any tools used in making the counterfeit goods be destroyed or otherwise dealt with. If the accused absconds and goods are not claimed, an ACA inspector may apply to have the goods forfeited to the state for destruction.

### B. Ex-officio action

Customs may act ex officio against the international trade of illegal substances and material, including counterfeit and substandard goods. This includes goods in transit. Customs can search for, seize, and destroy counterfeit goods. The offender may be subject to a fine and/or imprisonment, and the goods may be disposed of.

ACA inspectors may, of their own initiative, seize and detain suspected counterfeit goods which are being imported into, transiting through, transshipping within or being exported from Kenya. Counterfeit goods for the private and domestic use of the importer or exporter are excluded. Rights holders or their representatives in Kenya are promptly notified of the seized goods. Rights holders must provide the ACA with a signed complaint form; an affidavit explaining how the goods are counterfeit; the registration certificate; and the signed indemnity form indemnifying the Agency from any claim for wrongful seizure, removal or detention of alleged counterfeit goods. A fee must also be paid. The rights owner may attempt to reach a settlement with the infringer within 3 months of the seizure. If unsuccessful, the ACA will proceed with a criminal complaint against the suspect.



### C. Mandatory recordal for imported goods

In addition to the above, entrepreneurs intending to sell goods into Kenya must consider the compulsory recordal of IPRs for goods imported into Kenya with the ACA as of 1 January 2023. IPR recordation involves the creation of a database of IPR information relating to any protected IPR for all goods to be imported into Kenya. This information is made available on a database visible to ACA inspectors and other law enforcement officers such as customs officials. The aim is to facilitate access to information, enabling both customs and border officials to identify and seize counterfeits at the border before entry into the country. It is an offense to import into Kenya goods whose IPRs have not been recorded with ACA.

What type of IPR?

- Copyright
- Trade names
- Registered plant breeders' rights
- Registered trade marks
- Registered industrial designs
- Registered patents
- Registered Utility models

#### Requirements

The requirements for recordation are:

1. details of the IPR owner, including full name, postal and physical addresses, and telephone number;
2. name and address of each foreign person or business entity authorised or licensed to use the IPR in Kenya;
3. the identity of any parent or subsidiary company or other foreign company under common ownership or control, which uses the IPR abroad - optional;
4. original simply signed power of attorney form;
5. samples or photographs of the protected goods;
6. description of the IP;
7. description of the goods;
8. details of the place of manufacture of the goods;
9. certified copies of the IP rights;
10. a copy of the certificate of incorporation of the applicant;
11. the applicant's tax registration number;
12. details of the manufacturer of the goods including full name, postal and physical addresses, email addresses and telephone number.

A fee must be paid.

#### Acceptance of application

The ACA will process all applications within 30 days and all recorded IP will be published in the ACA's monthly newsletter.

A recordation will remain in force for a period of 1 year from the date of approval of the application for recordation or the current registration period of the IPR, whichever is shorter. Where an IPR is revoked or cancelled, the IPR recordal will be cancelled or revoked.

An application for the renewal of a recordal should be filed at least 30 days before its expiry.

### 3. Takeaway message

Mandatory customs recordal of all IPRs of imported goods is uncommon. Few countries have implemented a similar procedure to protect the population from counterfeit products. It is however an indication of the seriousness of the fight against counterfeit goods in Kenya. Entrepreneurs wishing to trade in Kenya must therefore find competent agencies, an independent judiciary, and a well-developed legal basis for ensuring their rights are protected.

Although compulsory recordal may be seen as an additional cost to importers, the benefits to an IPR owner should not be underestimated. As the prevalence of counterfeit goods reduces, consumer goodwill and confidence in the brand increase.

### 4. Links

Anti-Counterfeit Authority - <https://www.aca.go.ke/>

Kenya Industrial Property Institute (KIPI) - <https://www.kipi.go.ke/>



