



THE EAST AFRICAN COMMUNITY

POLICY ON ANTI-COUNTERFEITING, ANTI-PIRACY AND OTHER INTELLECTUAL PROPERTY RIGHTS VIOLATIONS

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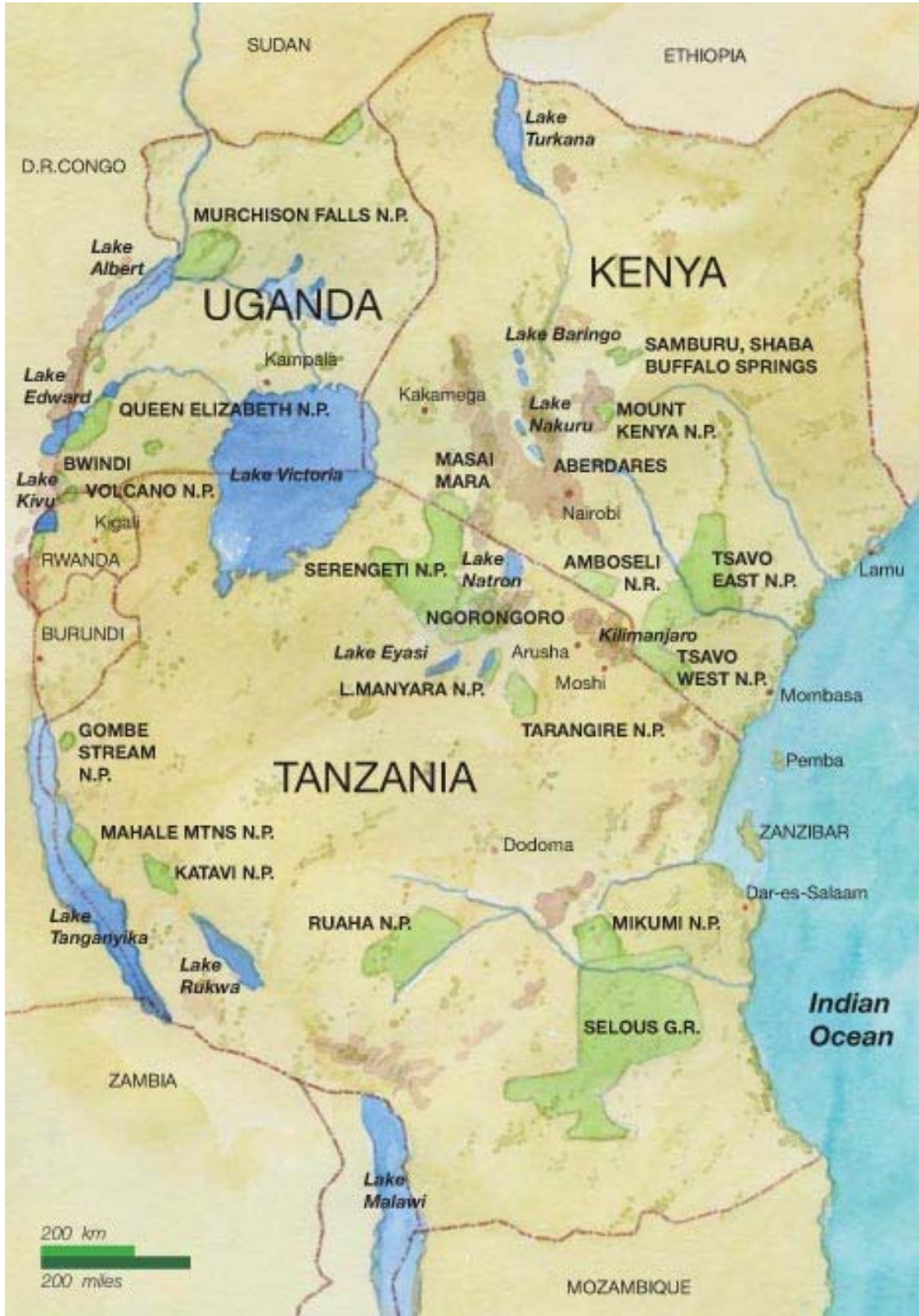
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I. ABBREVIATIONS

ARIPO	-	African Regional Industrial Property Organization
BASCAP	-	Business Action to Stop Counterfeiting and Piracy
BRELA	-	Business Licensing and Registration Agency
CEO	-	Chief Executive Officer
COMMUNITY	-	The East African Community
COSOTA	-	Copyright Society of Tanzania
COSOZA	-	Copyright Society of Zanzibar
CTI	-	Confederation of Tanzania Industries
DVD	-	Digital Versatile Disc
EA	-	East Africa
EAC	-	East Africa Community
EACJ	-	East African Court of Justice
EALA	-	East African Legislative Assembly
ECOWAS	-	Economic Community of West African States
FCC	-	Fair Competition Commission
FDI	-	Foreign Direct Investment
GATT	-	General Agreement on Tariffs and Trade
ICF	-	Investment Climate Facility
IDC	-	International Data Corporation
IP	-	Intellectual Property
IPRs	-	Intellectual Property Rights
IT	-	Information Technology
KAM	-	Kenya Association of Manufacturers
KCB	-	Kenya Copyright Board
KEBS	-	Kenya Bureau of Standards
KEPHIS	-	Kenya Plant Health Inspectorate Services
KIPI	-	Kenya Industrial Property Institute
KRA	-	Kenya Revenue Authority

Kshs	-	Kenya Shillings
NDA	-	National Drug Authority
OECD	-	Organisation for Economic Co-operation & Development
PSFU	-	Private Sector Foundation of Uganda
RBS	-	Rwanda Bureau of Standards
RCRSA	-	Rwanda Commercial Registration Services Agency
SADC	-	Southern African Development Community
SECURE	-	Standards Employed by Customs for Uniform Rights Enforcement
SME	-	Small Micro Enterprise
TBS	-	Tanzania Bureau of Standards
TFDA	-	Tanzania Food and Drugs Authority
TRA	-	Tanzania Revenue Authority
TRIPS	-	Trade Related Aspects of Intellectual Property Rights
Tshs	-	Tanzania Shillings
UAE	-	United Arab Emirates
UNCST	-	Uganda National Council for Science and Technology
UNBS	-	Uganda National Bureau of Standards
UPOV	-	Union for the Protection of New Varieties of Plants
USA	-	United States of America
WCO	-	World Customs Organization
WHO	-	World Health Organisation
WIPO	-	World Intellectual Property Organization
WTO	-	World Trade Organisation

II. EAC MAP



III. EAC QUICK FACTS

Area:	1,850,000 sq. km
Population:	125 million (2007 est.)
GDP:	US\$41 billion
EAC Headquarters:	Arusha, Tanzania
First established:	1967
Dissolved:	1977
Re-established:	July 7, 2000
Main languages:	English, Kiswahili, French
Current Chairman:	H.E. Paul Kagame, President of the Republic of Rwanda
Secretary General:	Amb. Juma Mwapachu

KEY EAC DATES

1967: EAC first established

1977: EAC dissolved

November 30, 1993:

Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation signed.

March 14, 1996:

Secretariat of the Permanent Tripartite Commission launched, full co-operation operations begin.

November 30, 1999:

Treaty for the Establishment of the East African Community signed.

July 7, 2000:

Treaty for the Establishment of the East African Community comes into force.

June 18, 2007:

The Republic of Rwanda and the Republic of Burundi accede to the EAC Treaty.

July 1, 2007:

Rwanda and Burundi become full members of the EAC.

1.0 INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

1.1.1 The East African Community (“EAC”) is a regional economic bloc comprising the five (5) Partner States namely Burundi, Kenya, Rwanda, Tanzania and Uganda. The EAC established a Customs Union in 2005 which encompasses a five (5) year progressive programme to remove internal tariffs, application of a Common External Tariff and elimination of Non-Tariff barriers.

1.1.2 The Treaty for Establishment of the East African Community was signed on 30th November, 1999 and came into force on 7th July, 2000 following its ratification by the original three (3) Partner States of Kenya, Uganda and Tanzania. The Republics of Rwanda and Burundi acceded to the Treaty on 18th June, 2007 and became full Members of the Community with effect from 1st July, 2007.

1.1.3 The EAC aims at widening and deepening co-operation between the Partner States in political, economic and social fields among others for their mutual benefit. In furtherance to this, the EAC Partner States established a Customs Union in 2005 and are currently working towards the establishment of a common market by 2010, a monetary union by 2012 and ultimately a political federation by 2013.

1.1.4 The realization of a fairly large regional economic bloc with a combined population of One Hundred and Twenty Million (120,000,000) people, land area of 1.85 million square kilometres and a combined gross domestic product of US\$ 41 billion, bears great strategic and geopolitical significance and prospects of a renewed and reinvigorated EAC.

1.1.5 The regional integration process is currently at a high pitch. The encouraging progress of the East African Customs Union, the enlargement of the Community with the admission of Rwanda and Burundi, the ongoing negotiations on the East African

Common Market as well as the consultations on fast-tracking the process towards a political federation all underscore the serious determination of the current East African leadership to construct a powerful and sustainable East African economic and political bloc.

1.1.6 To facilitate the implementation of the Common Market, policies and legislation are being developed as regional instruments to be uniformly applied by the Partner States. In furtherance of the above programme and to improve the business and investment climate in the region, the EAC has identified as a priority the need to prohibit and control trade in counterfeit and pirated goods which is rampant in the region and a big disincentive to investors, both local and foreign.

1.2 BACKGROUND TO THE PROBLEM OF COUNTERFEITING, PIRACY AND OTHER INTELLECTUAL PROPERTY RIGHTS (“IPR”) VIOLATIONS

1.2.1 Trade in counterfeit and pirated products is a billion-dollar industry which is widespread and rampant throughout the world but more so among low-income economies. This is due to a number of factors, including but not limited to: lack of effective legislation and enforcement mechanisms, low purchasing power arising from widespread poverty, corruption, under-supply of original products, consumer ignorance, globalization, and liberalisation, among others.

1.2.2 Globalization and the trade liberalization policies adopted by many developing countries in the 1980s at the prescription of the Bretton Woods institutions made it possible for counterfeit/pirated products to reach hitherto unknown markets including East Africa.

1.2.3 Digital technology has contributed immensely to the proliferation of pirated software, audio and visual works which perform almost as well as the original products but retail at a fraction of the cost of the genuine product. Their circulation channels are also more widespread among the low-income populations where the genuine products do not ordinarily reach and if they do, are normally too expensive for the residents of such areas.

1.2.4 The deliberate relaxation, and in many cases, total abolition of import restrictions and controls over the last two (2) decades opened the floodgates for local importers to import counterfeit/ pirated products for a ready market starved of affordable modern goods which were hitherto unavailable in the local market or were too expensive for the ordinary citizen to afford.

1.2.5 In a report published in 2008 by the Organization for Economic Co-operation and Development (OECD)¹, it is estimated that the cost to companies from counterfeiting is as high as *United States Dollars Six Hundred and Thirty Billion (\$630,000,000,000)* annually, while counterfeit and substandard products cost the East African region over *United States Dollars Five Hundred Million (US\$ 500,000,000)* in lost tax revenue annually.²

1.2.6 Trade in counterfeit and pirated products affects the entire spectrum of society. It causes grave concern to **governments** because it (i) retards innovation, (ii) poses a serious threat to the lives and health of consumers and (iii) channels substantial resources to criminal networks, organised crime and other groups that disrupt and corrupt society. Counterfeit/pirated products are of concern to **businesses** because of their debilitating impact on (i) sales, (ii) dilution of brand value and firm reputation, and (iii) firms' ability to benefit from the breakthroughs made in developing new products. They are of concern to **consumers** because of the significant health and safety risks that they pose.³

1.2.7 In recent years, East Africa's business environment has been inundated with an avalanche of counterfeit and pirated products, making the region extremely unattractive to investors and genuine enterprises. Cheap and sub-standard products supplied through foreign and local traders and manufacturers are illegally replicating well-known brand names and designs on their packages and labels. Imitation products are common in a variety of product areas including dry cell batteries, alcoholic beverages and fruit juices, shoe polish, toothpastes/toothbrushes, soaps and detergents, ball point pens, books, electrical and electronic items, perfumes, clothing, footwear, cosmetics, pharmaceuticals,

¹ Report available at

http://www.oecd.org/document/4/0,3343,en_2649_34173_40876868_1_1_1_1,00.html

² KAM Position paper on Counterfeits presented to Finance, Trade and Planning Parliamentary Committee in August 2008. Available at http://www.businessadvocacy.org/downloads/KAM%20Position%20Paper-%20Counterfeit%20_S&R_.pdf

³ The Economic Impact of Counterfeiting and Piracy – OECD. Available at <http://www.oecd.org/dataoecd/13/12/38707619.pdf>

automotive spare parts, computer software and hardware, audio and video tapes and CDs, etc.

1.2.8 In short, any fast-moving product with a reputable brand name is an easy target for counterfeiters.

1.2.9 The profitability and market share of legally registered businesses, especially those involved in the manufacture of fast moving consumer goods have been seriously affected by the proliferation of counterfeit and pirated products in the market. This trade poses an extremely serious threat to the viability of legitimate industries, jobs creation, tax revenues collection and to the health and lives of East Africans.

1.2.10 Within the EAC region, protection of IP rights has traditionally been among the least prioritized agendas of any of the Partner States. Hunger, disease, malnutrition, education, job scarcity and corruption have always led the charge in as far as the prioritization of national resources and policy formulation is concerned.

1.2.11 As an economic crime, counterfeiting and piracy is widespread across the East Africa region. None of the five territories can be said to be adequately meeting the challenges posed by the counterfeit/ piracy trade. A majority of them have, however, established structures (both legislative and institutional) with the potential of safeguarding innovation and creativity within the region. Despite this, serious challenges still exist which will be highlighted and addressed in this Policy.

1.2.12 The unchecked trade in counterfeit and pirated products in the East African region is attributable to several factors including but not limited to the following:

- (a) lack of specific anti-counterfeiting and piracy national legislation;
- (b) lack of a national/regional Policy and Strategy on combating counterfeiting and piracy;

- (c) consumer ignorance on the risks involved in the use and consumption of counterfeit/pirated products;
- (d) widespread poverty resulting in low purchasing power;
- (e) weak or non-existent institutional capacity and capabilities for legal enforcement;
- (f) corruption, particularly at the entry points;
- (g) limited (or lack of) cooperation and coordination between and within the private and public sectors;
- (h) lack of appreciation by the judiciary of the enormity of the problem and its negative impact leading to lackluster and half-hearted enforcement of the existing laws;
- (i) neglect by brand owners to protect their brands by registration; and
- (j) the elimination of import restrictions and controls.

1.2.13 Initiatives undertaken to date to tackle counterfeiting and piracy have been at the national rather than regional level and have been both haphazard and uncoordinated. Without a strong and harmonized regional control mechanism, the risk of escalation of this illicit and harmful trade will remain high and become worse after the collapse of trade barriers upon the establishment of the common market in 2010.

1.2.14 Fortunately, as a starting point at the regional level, the importation of counterfeit goods of all kinds is already prohibited under the East African Customs Management Act of 2004 but this, as will be demonstrated later in this Policy, has not eliminated or in any significant way reduced counterfeit trade in the region.

1.3 EXISTING SAFEGUARDS AGAINST COUNTERFEITING, PIRACY AND OTHER IPR VIOLATIONS IN THE EAC REGION

1.3.1 Currently, there is no EAC regional law on Intellectual Property in general or counterfeiting/piracy in particular. The East African Treaty, however, recognizes the important role played by science and technology in economic development and, accordingly, recommends a harmonisation of policies on commercialisation of technologies and promotion and protection of IPRs as a way of promoting co-operation in the development of science and technology within the Community.

1.3.2 The East African Customs Management Act of 2004 also recognizes the adverse effects of counterfeit goods and prohibits the importation of counterfeit goods of all kinds into the EAC region. These provisions are, however, insufficient and it is therefore up to the individual Partner States to formulate their own laws on IPR, counterfeiting and piracy.

1.3.3 All Partner States are party to the TRIPS Agreement. Part III of this Agreement requires the domestic laws of all WTO members be in compliance with the Treaty. In that regard, Part III of the Agreement establishes the following minimum standards in respect of national measures and procedures for the enforcement of intellectual property rights:

- a) civil proceedings such as injunctions, damages, evidence, right of information and provisional measures, must be available to right holders;
- b) criminal proceedings for commercial scale trade mark and copyright infringement must be available; and
- c) border measures should be taken to prevent the commercialisation of imported products that infringe trade marks and copyright.

1.3.4 It should, however, be noted that the TRIPS Agreement only establishes the minimum standards to be implemented according to the mechanism determined by each

Partner State. The TRIPS Agreement does not attempt to harmonise procedural rules for enforcement of IPRs. Instead, it leaves room for countries to utilise in-built flexibilities to achieve the stated objective. One of the most significant flexibilities is the freedom of Member States to determine for themselves the method of implementing the provisions of the TRIPS Agreement, including procedures for the enforcement of IPRs.

1.3.5 It is fair to say that most of the existing Intellectual Property laws within the EAC Partner States are TRIPS compliant as far as the protection of trade marks, patents, industrial designs and copyright are concerned. However, counterfeiting in particular presents a peculiar challenge that is not adequately (or at all) addressed by the existing laws. There is therefore an urgent need to formulate specific legislation tailored towards combating counterfeiting with stiff penalties capable of making this trade an unattractive business proposition.

1.3.6 It is also evident from the research on which this Policy is based, that the enforcement of the existing laws in the entire EAC region is a major challenge. For instance, despite the copyright laws of each EAC Partner State being TRIPS compliant and having adequate provisions to curb piracy, evidence on the ground confirms that the piracy rate in the affected sectors (music, software, film, etc) is almost at 100%. This suggests that while it is undoubtedly laudable to have good laws, any law is as good as its enforcement mechanism. Accordingly, the formulation of an effective law against counterfeiting must necessarily be accompanied by an effective enforcement mechanism if it is not going to become a dead letter law which most copyright laws in the EAC Partner States currently are. Schedule One sets out the existing national laws on IPR within the EAC Partner States.

2. POLICY GOAL AND OBJECTIVES

2.1 Policy Goal

2.1.1 The EAC Common Market is expected to come into effect in January 2010 resulting in the free circulation of goods and people within the region. The goal of this policy therefore is:

To lay the foundation for the establishment of an effective regional mechanism to combat and if possible, eliminate counterfeiting and piracy trade in the region and thereby create a conducive investment climate as a prerequisite to industrialization and economic growth.

2.2 Policy Objectives

2.2.1 This Policy is aimed at revitalising the EAC countries' economies by promoting the creation, protection and exploitation of IPRs which are the life-line of technological development and wealth creation the world over. The overall objective of this Policy therefore is:

To provide a Policy basis for a robust legal framework for the protection and enforcement of Intellectual Property Rights in the region with specific focus on combating counterfeits and pirated products.

2.2.2 This Policy thus aims to achieve the following specific objectives:-

- i) to define and create a sound EAC legal framework to combat counterfeiting, piracy and other IPRs violations;

- ii) to harmonize the proposed national legal framework on counterfeiting and piracy in the region;
- iii) to establish a harmonized institutional framework through a dedicated lead agency and sub agencies in each Partner State;
- iv) to establish protection mechanisms for IPRs both in the region and in each Partner State;
- v) to facilitate greater institutional and public awareness of the dangers of use/consumption of counterfeit and pirated products;
- vi) to facilitate promotion of private-public sector partnerships to deal with the problem;
- vii) to strengthen border measures to impound and destroy counterfeit/pirated products; and
- viii) create a conducive investment climate in the region free of unfair competition practices embodied in counterfeiting and piracy.

3.0 THE IMPACT OF COUNTERFEITING, PIRACY AND OTHER IPR VIOLATIONS

The impact of counterfeiting and piracy can be assessed in relation to the three key groups that are gravely affected, namely, *consumers*, *producers* and *governments*.

3.1 Consumers

3.1.1 As already noted, the presence of counterfeit/pirated goods in the market poses a grave danger to the health and lives of the general public (consumers). The exact magnitude of this damage can never be established as while some of the effects are immediate (e.g. illness arising from counterfeit pharmaceutical products) others are a long term (e.g. injury from cosmetics). In other cases the use/consumption of a counterfeit product may not be harmful to health or endanger life but nevertheless constitutes a loss of bargain, thereby increasing poverty levels.

3.1.2 Some of the obvious impacts on consumers include:-

- (a) death and ailments arising from direct consumption or use of counterfeit products e.g. food, milk, drugs, sanitary pads, toothpastes, etc;
- (b) increased insecurity i.e. where doors in a whole estate can be opened by one key;
- (c) loss of agricultural produce and livestock following the use of counterfeit fertilizers, pesticides, herbicides, chemicals and seeds;
- (d) lack of after sales service or any effective recourse in the event of damage or injury;
- (e) loss of consumer choice due to investment disincentives caused by counterfeit/pirated goods;
- (f) road accidents caused by use of fake spare parts (especially brake pads/disks, tyres, steering rods, etc).

3.2 Producers

3.2.1 Manufacturers spend colossal sums of money not only manufacturing but advertising their products, paying wages and taxes as well as constructing the manufacturing plant and equipping it, while counterfeiters incur no such costs but instead ride on an already established goodwill and intrude into a ready market at virtually no cost. Few manufacturers (if any) can survive this kind of cut-throat unfair competition.

3.3 Governments

3.3.1 Counterfeit/piracy is an illicit trade and the perpetrators do not pay tax on their imports or produce. If they do, the declared value of the merchandise is lower than the declared value of genuine products resulting in lower taxes payable. KRA reported, during an interview with the consultants, that its own revenue stamps were being counterfeited and applied on counterfeit products, thereby ensuring that the loss of revenue was at 100%.

3.3.2 Counterfeit trade also frustrates long term government policies on matters such as attaining food self sufficiency, providing clean water, creating jobs, increasing revenue collection, etc.

3.3.3 The illicit trade also leads to deterioration of international relations between states stemming from unnecessary trade wars.

3.3.4 The Kenyan Ministry of Trade reports that while Kenyan manufacturers incur an annual net loss of over Kenya Shillings Thirty Billion (Kshs. 30,000,000,000) (approximately United States Dollars Four Hundred and Twenty Million (US\$420,000,000)) due to counterfeit products, the government loses Kenya Shillings

Six Billion (Kshs. 6,000,00000/=) (approximately United States Dollars Eighty Million (\$80,000,000)) in potential tax revenue due to counterfeit products.⁴

3.3.5 In a report issued by Confederation of Tanzanian Industries, the Tanzanian Government estimates loss in revenue to be between 15-25% of current total domestic revenue. If this level is used, it means the Government is losing between Tshs 540–900 Billion per year due to tax evasion related to counterfeit and substandard goods. This is equivalent to 4.6% – 7.5% of the total value of Gross Domestic Product in Tanzania, and 14% – 23% of the National Budget in the country.

3.3.6 According to reports by the International Chamber of Commerce, Business Action to Stop Counterfeiting and Piracy (BASCAP) “...*Counterfeiting and piracy harm society in many ways that are not easily understood. For example, those producing counterfeit and pirated goods never pay tax on their goods when importing or when selling them. This deteriorates the tax revenues of the country where the goods are being sold. The decline in sales of the genuine, taxable product also compounds the problem causing the government to lose out doubly.*” As an economic scourge, counterfeiting costs the East African region close to United States Dollars Two Hundred Million (\$200,000,000) in lost taxes.⁵

3.3.7 The above statistics are only indicative of the general situation across the East African region. The amount of government revenue lost through IPR violations could be reinvested into the economies to the great benefit of the masses.

3.3.8 Counterfeiting and piracy hamper government planning because they result in illegitimate trade. Besides the fact that the trade is illegal, the government cannot predict the trade patterns of counterfeiters and pirates, hence it cannot plan for income from this trade. A lot of government resources are diverted to enforcement.

⁴ Keynote address by Honourable Amos Wako, Attorney General of Kenya, during the Third Global Conference on Combating Counterfeiting & Piracy at the International Conference Centre in Geneva, Switzerland on January 30, 2007. Available at www.ccapcongress.net/archives/Geneva/Files/Wako.pdf

⁵ Estimate by BASCAP as at October 2007. BASCAP case study database, available at <http://www.icc-ccs.co.uk/bascap/article.php?articleid=731>

3.3.9 Counterfeiting and piracy also frustrate government long term plans e.g. on creating employment. Jobs shift from rights holders to infringing parties. The shift has implications on the welfare of employees as working conditions in clandestinely-run illicit businesses are often far much poorer than those prevailing in legitimate firms that value their employees more and adhere to health, safety and other regulatory standards.

3.3.10 Counterfeit trade creates a bottomless pit for Government expenditure on public works projects such as road and dam construction, housing, water treatment works, etc. When the materials used in those projects are counterfeit, the Government not only loses colossal sums of money in paying the contract sums but also incurs double expenditure in undertaking expensive repairs or having the works done afresh. Similarly, when supplies to Government stores and its institutions are fake, e.g. stationery, pens, computer hardware and software, medical equipment and drugs to public hospitals, textbooks to schools, etc the Government not only loses money since such products do not serve the purpose but ends up unjustly enriching the counterfeiters who supply such goods.

3.3.11 Currently, the Governments of Kenya and Uganda are implementing universal free primary education and supplying learning materials to schools at Government expense. It is quite possible that the bulk of that expenditure goes to counterfeiters while the authors and genuine publishers of textbooks are languishing in poverty despite their books being on every desk throughout the Republic.

3.4 Specific Impact Areas

3.4.1 On Economic Growth

Stamping out counterfeit trade/piracy is an absolute pre-requisite to economic growth. There can be no meaningful industrialization and resultant job creation unless this menace is eliminated in the region. There is no incentive for a manufacturer to invest in constructing a factory, obtaining licences, installing expensive equipment and computer

systems and employing staff if his products will end up on a shelf filled with imitations retailing at a fraction of the price of the genuine product, having been imported/ made by persons who did not incur the same costs. Without economic growth poverty levels are bound to increase, with all its attendant consequences – crime, disease and general breakdown of social order.

3.4.2 On Businesses

Businesses whose products are counterfeited or pirated experience the following hardships:⁶

- (a) loss of direct sales not only from consumers who buy the cheaper but counterfeited product but also those who are harmed by a counterfeited product and before realizing that it was counterfeit, discontinue the use of the genuine product altogether, believing that the standards of the genuine manufacturer have fallen;
- (b) unfair competitive advantage to those enterprises that free-ride on the research and development and marketing expenses of legitimate enterprises;
- (c) the possibility of product liability arising from consumption/use of defective counterfeit products;
- (d) dilution of brand value via loss of goodwill and prestige;
- (e) increased cost on self-help initiatives in monitoring the market and instituting legal proceedings against infringers; and
- (f) increased cost of changing packaging to discard the imitated one only for the counterfeiter to catch up or for the consumer to get confused by the frequent changes in packaging and shun the new packaging believing it to be the counterfeit.

⁶ “*Intellectual Property: Source of innovation, creativity, growth and progress*”. Report by the Business Action to Stop Counterfeiting and Piracy (BASCAP), an International Chamber of Commerce (ICC) initiative, page 17.

3.4.3 On Competition

Counterfeiting and piracy are detrimental to the proper functioning of a perfect market in that legitimate industries cannot compete fairly with pirates and counterfeiters on the price of products. Pirates and counterfeiters simply take a free-ride on all the effort, creative work and investment of the legitimate manufacturer.⁷

3.4.4 On Trade

3.4.4.1 In an increasingly interlinked world, the economic well-being of nations is heavily dependent on international trade. There exists a positive two-way relationship between intellectual property and international trade. The intellectual property system spurs economic development by providing the basis for business transactions such as licensing. The patent system facilitates technology transfer and foreign direct investment as it provides reassurance to companies seeking to invest in a country that their IPRs will be protected sufficiently to enable them recoup their investment in research and development. Patent databases also provide a deep pool of technical information that countries can use to build up their technological capacity.

3.4.4.2 Protection of trade marks assures businesses that the trading field will be fair and level without unscrupulous traders riding on the goodwill of established trade marks. Protection of copyright assures creators of copyright works that they will market and sell the product of their intellectual labour within a secure environment devoid of joy-riders who seek to replicate the original works and sell them at a fraction of the price of the genuine product in direct competition with the genuine product which, of necessity, is invariably more expensive by virtue of the effort and cost of production and commercialization.

⁷ Ibid note 14, page 15.

3.4.4.3 Counterfeiting and piracy, therefore, tilt the balance of trade in favour of the illicit trader. As a result, it deprives the owner of the genuine product the opportunity to sell his product, recoup his investment and make a profit. It also discourages the genuine manufacturer/trader from engaging in other innovative activities since there is no reward for such effort and cost.

3.4.5 On Foreign Direct Investment (FDI)

3.4.5.1 There is a strong link between effective IPR protection laws and the level of Foreign Direct Investment (FDI) which plays an important role in technology and knowledge transfer in favour of developing countries. Needless to say, multinationals will not transfer their technology to a region where the IPRs in such technology are not protected or enforceable. Granted that IPRs constitute by far the most valuable assets of most modern businesses, the creation of an enabling and secure investment climate necessarily demands an effective legal regime for the protection of IPRs. The absence of such a regime inexorably drives away new investments from the East African region.

3.4.5.2 The relationship between FDI and protection of IPRs was tested in an econometric analysis carried out by the OECD in which it was found that FDI from Germany, Japan and the United States was relatively higher in economies with lower rates of counterfeiting and piracy.⁸

3.4.5.3 Multinationals are therefore less likely to transfer their advanced technology, invest in production or research and development facilities in countries where they are likely to have their products copied or technology stolen with impunity. This is particularly true of industries where intellectual property plays a key role, such as the IT, biotechnology and pharmaceutical sectors.

⁸ Ibid, note 16.

3.4.5.4 In East Africa, a number of multinational organizations in the region have either closed down or downsized their manufacturing operations due to counterfeiting. For instance Sara Lee reduced its production capacity in Kenya to less than forty per cent (40%) and has threatened to cease commercial operations in Kenya altogether if the Government does not respond more forcefully to the flagrant importation of counterfeit shoe polish bearing the KIWI trade mark. Many more companies are facing imminent closure not only in Kenya but in the whole EAC region since no business can survive sustained competition from counterfeiters for the reasons already advanced.

3.4.6 On Public Health and Safety

3.4.6.1 Being illicit, counterfeit/pirated products are produced without the quality and safety checks normally imposed by public standards authorities and by the brand proprietors. When buying counterfeit and pirated goods, consumers are deliberately misled into believing that they are obtaining the same high and tested quality expected of branded products. This deception only emerges after an injury, damage or malfunction has occurred. Moreover, in the absence of after sales service or any effective recourse in the event of injury, damage or malfunction, unsuspecting consumers bear the burden of having to pay for the resultant loss in terms of medical treatment or replacement of the counterfeit item.

3.4.6.2 The World Health Organization (WHO) estimates that counterfeit drugs account for 10% of all pharmaceutical products sold in the world, and up to sixty per cent (60%) of all drugs sold in the developing countries. According to WHO, sixteen per cent (16%) of counterfeit drugs contain the wrong ingredients, seventeen per cent (17%) contain incorrect amounts of the proper ingredients and sixty per cent (60%) have no active ingredients whatsoever.⁹

⁹ Ibid, note 14 – page 16.

3.4.6.3 The serious risks posed to public health and safety arising from the use of counterfeit toys, electrical/electronic products, foodstuffs, beverages, airplane and automotive spare parts, medicines, etc have often been illustrated in fatal accidents. For instance, in 1990, one hundred and nine (109) children died in Nigeria after taking a lethal pharmaceutical preparation containing paracetamol and an industrial solvent.¹⁰ In China, a fake insecticide totally ruined two hundred (200) hectares of wheat in Huaiyin, Liangshui and Chuzhou counties in Jiangsu province in May 2005, destroying harvests for over one hundred (100) farmer households.¹¹

3.4.6.4 A few years ago, a fake grain preservative bearing the famous “*Actelic Super*” brand was sold cheaply in the perennially famine-stricken Ukambani region of Kenya after the region had just had the biggest bumper harvest in many years. The entire harvest went to waste after a few months because the so called “*Actelic Super*” sold to farmers was mere chalk with no active chemical ingredient for preserving grain against weevils.

3.4.6.5 In a report entitled “*Counteracting Counterfeiting: Strategies for improving the integrity of Medicinal Marketplace in Tanzania*” produced in September 2005, the Director General of the Tanzania Food and Drugs Authority noted that fake medicines were alarmingly on the increase and a number of serious cases had been detected where unscrupulous dealers repackaged and re-labeled expired “drugs” or drugs with no active ingredients.

3.4.6.6 The Pharmacovigilance Department of the Pharmacy and Poisons Board of Kenya, in conjunction with the Division of Malaria Control, carried out a baseline survey on the quality of anti-malarials on the Kenyan market prior to widespread distribution in 2006. The survey confirmed that sixteen per cent (16%) of anti-malarial drugs in the country were fake and that thirty eight (38%) of the drugs were sub-standard. The

¹⁰ ICC Counterfeiting Intelligence Bureau, www.icc-cs.org

¹¹ Ibid, note 19.

Minister for Medical Services stated “.....those who trade in them [fake drugs] are trading people's lives.”¹²

3.4.6.7 A combined force of security operatives on 2nd October 2008 intercepted over three hundred (300) cartons of counterfeit cosmetics imported into Uganda. The Police, Interpol and the National Drug Authority (NDA) seized the products from various stores in Kampala. *"These cosmetics are very popular among ladies who bleach but have fatal side effects,"* said an Interpol official. The impounded cosmetics included; Movate, Neo-vate and diprosone among other body lotions and tubes.¹³

3.4.6.8 In December 2008 a consignment of drugs branded “Panadol Extra” worth Kenya Shillings Five Million (Kshs. 5,000,000/=) was impounded in Kenya and destroyed by the Pharmacy & Poisons Board after it was tested and found not to contain any active ingredient but mere chalk.

3.4.7 On Innovation and Competitiveness

3.4.7.1¹⁴ Innovation has long been recognised as a main driver of economic growth, through the development and exploitation of ideas for new products and processes. Innovators protect these ideas through patents, copyright, industrial designs and trade marks. Without adequate protection of these intellectual property rights, the incentive to develop new ideas and products would be reduced, thereby weakening the innovation process. The risks are seen as particularly high for those industries in which the research and development costs associated with the development of new products are higher compared to the cost of producing the resulting products. Counterfeiting and piracy, to the extent that they undermine the efforts of innovators, have serious adverse effects on research and, consequently, competitiveness.

¹² “Kenya: 16 per cent of Malaria Drugs Fake”, article reported in the Daily Nation on 29th May 2008.

¹³ “Uganda: Fake Cosmetics Impounded”, article published in the New Vision newspaper on 3rd October, 2008.

¹⁴ Ibid, note 16.

3.4.7.2 Populations in every region, including the EAC, are endowed with creativity and innovation which must be harnessed and nurtured via a conducive environment of protection if its benefits are to be realized for the common good. By setting up a strong IPR protection regime, innovators and scientists will be able to invest time, resources and creative thinking to develop innovative products and technologies and expand knowledge and culture within the region.

3.4.7.3 Counterfeiting and piracy rob innovators and creators of their just reward, undermine local culture by reducing the incentive to be creative in music, writing, performing, etc. which, as a result, ultimately limits the diversity and availability of high-quality products.

3.4.8 On International Relations

3.4.8.1 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is one of the three pillars of the World Trade Organisation (WTO), together with the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). Concerns about counterfeiting and piracy in the multilateral trading system predate the TRIPS Agreement.

3.4.8.2 A proposal on trade in counterfeit goods was submitted to WTO as early as 1978, as part of the Tokyo Round of trade negotiations. Subsequent work led to the inclusion of a specific mandate in the Uruguay Round negotiations, which explicitly called for the development of a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.¹⁵

3.4.8.3 It is against this background that the TRIPS Agreement was negotiated as part of the Uruguay Round. When adopted, it was the first multilateral treaty with detailed rules on the enforcement of IPRs, which are subject to multilateral dispute settlement. The

¹⁵ Deputy Director of the WTO - General Rufus Yerxa speaking at the 3rd Global Congress on Combating Counterfeiting & Piracy in Geneva, 30-31 January 2007. Available at www.wipo.int/enforcement/en/global_congress/docs/rufus_yerxa.doc

TRIPS enforcement provisions are of crucial importance to creators and inventors, as they oblige WTO Members to make available procedures permitting effective action against acts of IPR infringement, including expeditious and deterrent remedies. They specify the civil and administrative procedures and remedies, including provisional measures, which must be available in respect of any act of infringement of a covered intellectual property right. In addition, as regards trade mark counterfeiting and copyright piracy, WTO Members are required to make available the necessary border measures to control counterfeit/piracy trade and, when counterfeiting and piracy is wilful and on a commercial scale, apply criminal procedures. At the same time, it is worth noting that the TRIPS Agreement is characterized by a desire to preserve the delicate balance between the different interests involved. This is reflected in the concern under the Agreement that enforcement procedures should not constitute barriers to legitimate trade as demonstrated by the detailed safeguards incorporated to this effect. Developed countries came under a specific obligation to comply with the TRIPS enforcement rules as from 1996 while developing and least-developed countries were to become compliant by the year 2000.¹⁶

3.4.8.4 Since all the EAC Partner States are signatories to the TRIPS Agreement, the adoption of this Policy would be a significant step towards complying with not only the letter but the spirit of the TRIPS Agreement. As already noted elsewhere in this Policy, counterfeiting and piracy can lead to an unnecessary deterioration in the international relations between otherwise friendly countries e.g. Kenya and China have on several occasions traded accusations over the alleged importation of counterfeit products into Kenya from China.

¹⁶ Ibid, note 24 at page 2.

4.0 POLICY STATEMENTS ON THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR COMBATTING COUNTERFEITING, PIRACY AND OTHER IPR VIOLATIONS

4.1 Legal Framework

The EAC Partner States will enact harmonized laws, or where such laws exist, amend them, to specifically and effectively deal with the menace of counterfeiting and piracy by imposing civil and criminal sanctions that make the illicit trade an unattractive business proposition. The laws will also establish new institutions or mandate existing institutions to enforce the laws.

4.1.1 Rationale

4.1.1.1 The advent of a common market envisages the collapse of trade barriers within the region. With the free movement of goods being a key feature of the common market, it makes no sense to have an anti-counterfeits law in four (4) out of five (5) Partner States because the Partner State without such law will become the illicit entry point and conduit of counterfeit goods into the whole region. It therefore means that failure to enact and harmonise anti-counterfeit laws across the region is not an option if plans to establish the common market remain on course. The entire EAC region must have a uniform, effective, consistent and business-friendly legal framework that protects intellectual property and fosters the emergence of an attractive business/investment climate.

4.1.2 The proposed harmonization of national laws envisages:-

- (a) the enactment of equivalent legislation in terms of definition of counterfeits and pirated goods, enforcement structures and penalties in all the Partner States;
- (b) establishment/identification of enforcement institutions;

- (c) setting up a co-ordination mechanism between the enforcement institutions across the region; and
- (d) the EAC playing a coordinating role over the anti-counterfeiting /anti-piracy initiatives.

4.1.3 The various EAC Partner States are at different stages in terms of developing their respective legal frameworks for combating counterfeiting and piracy. Kenya has already enacted its Anti Counterfeit Act (Act No. 13 of 2008) which came into force on 7th July, 2009 whereas Uganda is still considering its Counterfeit Goods Bill, 2007 at the Cabinet level. On the other hand, Tanzania already has an operational statute and a dedicated institution to deal with counterfeiting and piracy¹⁷ while Rwanda and Burundi are currently in the early stages of reforming their Intellectual Property Laws but have not yet drafted anti-counterfeiting and piracy legislation.

4.1.4 While the initiatives so far undertaken by the Governments of Kenya, Uganda and Tanzania are most commendable, more needs to be done to not only to strengthen the existing/proposed legislation but also to harmonise them across the region and to make them effective.

4.1.5 It is recommended that the following definition which is borrowed from the South African *Counterfeit Goods Act* which is brief, concise and inclusive should be contained in the regional law:

“Counterfeiting means without the authority of the owner of any intellectual property right in respect of protected goods, the manufacturing, producing or making, whether within the East African Community Partner States, or elsewhere, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are substantially identical copies of the protected goods....”

¹⁷ Established under the Regulations to the Merchandise Marks Act in Gazette Notice No. 89 published on 20th June 2008.

4.1.6 The term “*Piracy*” should also be defined and it is recommended that the following definition be contained in the regional law:-

“the illicit, unauthorized and illegal reproduction of works/materials protected by copyright, patent or trade mark law or any other intellectual property law and applying to the unlawful reproduction or distribution of copyright works for purposes of trade”

The above definition is drawn but modified from ***The Merchandise Marks Act Cap 85 of Tanzania which defines piracy as ‘the illicit, prohibited or unauthorized copying of any intellectual property right on or over goods for the purpose of trade.’***

4.1.7 Notwithstanding the broad scope of the definitions proposed above, the new EAC law will contain specific exceptions to ensure that there is no interference with the existing laws which permit the manufacture/importation of certain generic products such as medicines. The proposed law will also not interfere with the legitimate parallel importation of essential goods particularly drugs. Partner states are required to maintain these safeguards in their national law and in the regional law.

4.2 Institutional Framework

4.2.1 Partner States shall establish (and strengthen existing institutions) operational enforcement institutions to combat counterfeiting and piracy within their national territories. The National institutions shall have full legal mandate to attend to the challenges posed by counterfeits, piracy and other IPR Violations. For purposes of this Policy, such institutions will be referred to as the **National Enforcement Agency**.

4.2.2 The National Enforcement Agency will be primarily responsible for fighting counterfeiting, receiving complaints and coordinating the relevant departments across government and the private sector. The National Enforcement Agency would be a specialized autonomous body corporate mandated by law to:

- i) monitor the implementation of Anti-Counterfeiting measures in Partner States;
- ii) receive and record complaints from the public on all issues relating to counterfeits and piracy;
- iii) undertake investigations into the importation, distribution, manufacture and supply of counterfeit/pirated goods;
- iv) seize and detain counterfeit goods pending investigations/prosecution by offenders;
- v) arrest, detain and prosecute counterfeiters and all persons in their networks;
- vi) co-ordinate and harmonize the activities of the various organizations involved in the war against counterfeiting and piracy;
- vii) make recommendations for the improvement of Anti-Counterfeiting legislation to bring it into line with international best practices from time to time;
- viii) devise and promote training programmes on combating counterfeiting/piracy; and
- ix) prepare and publish annual Reports on progress towards eradicating counterfeiting/piracy.

4.2.3 The following basic requirements shall be requisite for the National Enforcement Agency:-

- (i) an ideal office with the necessary furniture and equipment;
- (ii) adequate Staff with the requisite qualifications as well as professional training on IP issues and counterfeiting/piracy;
- (iii) adequate annual budget and funding from the exchequer; and
- (iv) headed by a person with experience in IP matters.

4.2.4 Co-Ordination of National Enforcement Agencies

4.2.4.1 Each Partner State is currently at different stages of development in efforts to address the problem of counterfeiting and piracy. These efforts have been made only at the national level and have been taken without any consideration for harmonized controls across the region yet the problem is regional in character. A coherent regional response is therefore critical before the establishment of the proposed common market.

4.2.4.2 One key area where a coherent regional response is required is the coordination of the National Enforcement Agencies. It is necessary for there to be an overarching EAC Anti-Counterfeiting Unit representing all the Partner States with mechanisms to coordinate the operations of the National Enforcement Agencies to ensure the full implementation of the law in the spirit of this Policy.

4.2.4.3 To avoid duplication of effort and resources, it is recommended that the East African Competition Authority (which is already in existence) be conferred with an additional mandate to oversee the operation of the national anti-counterfeiting institutions.

4.3 Private Sector Participation in Enforcement

4.3.1 Collaboration initiatives between the private sector and government are crucial if the fight against counterfeiting/piracy is to be won.

4.3.2 One of the ways of encouraging robust private sector participation in the enforcement of the proposed new laws is to provide dedicated desks at the national enforcement institutions where information on counterfeiting can be confidentially provided by the private sector.

4.3.3 National Enforcement Agencies shall be required to put in place adequate measures to encourage individuals and firms to lodge complaints, provide information and take corrective measures against counterfeits and pirated products.

4.4 Technical and Personnel Capacity Requirements

4.4.1 Specialized and well trained personnel are required to handle the different aspects of fighting counterfeiting/piracy. The staff complement should be specialized at the very minimum in the following areas:-

- (a) technical (scientists, technologists, e.t.c. in relevant fields for purposes of detecting counterfeits);
- (b) legal (with basic knowledge of IP); and
- (c) logistics (to facilitate co-ordination of activities such as investigation, seizures, preservation of evidence, transport, prosecution, etc.

4.4.2 The Board of the National Enforcement Agency should have representation from central Government, relevant Government institutions and regulatory bodies as well as key private sector participants. The Board should have a Chairman who is a respected individual with proven track record on matters of IP and trade, and preferably with a legal background.

4.4.3 The Chief Executive Officer of the National Enforcement Agency should be a dynamic personality with impeccable academic and professional credentials in economics/trade/law and a proven track record in delivering results in a challenging environment. He/she should be a person of high integrity beyond the risk of compromise. It is recommended that the CEO be a person with at least seven (7) years experience, preferably in matters relating to economics, trade or manufacturing but flexibility should be exercised in this regard to ensure that the most suitable candidate is hired. The ideal candidate should possess a University degree in law, science, information technology or

business administration from a recognized University, with at least Seven (7) years experience in the relevant field. A Masters degree in any of the fields above should be an added advantage.

4.4.4 It is recommended that the CEO be placed on a fixed three (3) year term which is renewable subject to achievement of a pre-agreed performance criterion based on the number of cases successfully prosecuted within agreed time-frames and the level of other initiatives undertaken during the period e.g. awareness creation, involvement of private sector in the war against counterfeits/piracy as well as aspects of exemplary performance beyond the agreed benchmarks e.g. fundraising for specific projects aimed at reducing counterfeiting and piracy, etc.

4.4.5 A bonus scheme is also recommended for the CEO and staff of the National Enforcement Agency to ensure consistent over-achievement. The private sector can be requested to finance the cost of this scheme.

4.7.6 The institution should also have specially trained inspectors and prosecutors on matters of intellectual property in general and anti-counterfeiting/piracy in particular. It is recommended that initially specialized officers be seconded from the existing departments of government, such as the Bureau of Standards, Weights and Measures, Customs and the Police force.

4.5 Investigatory Provisions/ Powers of Inspectors for Enforcement

4.5.1 The EAC law shall provide for the establishment of enforcement authorities/institutions in each Partner State to implement the provisions of the proposed law. The enforcement authority, through its inspectors, would be conferred with the necessary powers to investigate a complaint once the same has been filed by an IPR owner. The inspector would also be empowered to initiate investigations if in his

reasonable suspicion counterfeit goods are stored in certain premises or being transported.

4.5.2 The inspectors would have specific training on intellectual property rights protection and law.¹⁸

4.5.3 The new EAC law will require each country to have a minimum number of inspectors depending on the magnitude of the problem in each country. This staff complement should at a minimum be revised every two (2) years and the necessary adjustments made. This will curb the kind of situation now prevalent in Tanzania where the anti-counterfeiting department has only five (5) officers serving the whole country.

4.5.4 There should be co-ordination between the IPR registration offices and the anti-counterfeit agencies to ensure that the latter have a periodically updated list of all registered trade marks in the country for ease of seizing suspected counterfeit goods.

4.5.5 Each Partner State should decentralize the national enforcement agency to ensure that each geographical region has sufficient surveillance personnel to detect and seize counterfeit/pirated products. Research shows that the existing institutions concentrate their attention on border points and major urban centres (especially the capital cities) ignoring the fact that most counterfeit/pirated products are sold in the interior and that there is also substantial local manufacturing and packaging taking place within the territorial borders of the Partner States.

4.5.6 The new law should give the inspector powers to generally:

- (a) enter any place with a view to search, confiscate, detain and remove the counterfeit goods for detention pending further investigation;

¹⁸ See section 22 of the Kenyan Act, which provides for the qualifications of an inspector.

- (b) enter any place with a view to search, confiscate, detain and obtain evidence in regard to the counterfeited goods;
- (c) carry out random inspection of vehicles, aircraft, ships, commercial and business premises; and
- (d) refer to court and prosecute cases of counterfeiting and piracy.

4.5.7 Both the Kenyan Act and Ugandan Bill already give inspectors powers of inspection¹⁹ and powers to take the necessary steps to terminate the manufacture and production of counterfeit goods, seize, detain and remove for detention all the goods in question. On the other hand, the provision in the Tanzanian statute is very general in that it only provides that the Chief Inspector may detain or seize any goods which he reasonably suspects to be counterfeit goods²⁰.

4.5.8 The power to inspect premises should be extended to vehicles, aircraft, ships and all other means of transport.

4.5.9 In order to balance the interests of the rights holder and the common freedoms of the citizenry and thereby avoid arbitrary searches and harassment by the enforcement authority, the exercise of the foregoing powers should be conditional upon a warrant being obtained from a court of competent jurisdiction *ex parte* on the basis of credible affidavit evidence of an apparent existence of counterfeit/pirated goods in the suspected place.

4.6 Enhanced Border Control

4.6.1 The proposed EAC law would allow an IPR holder to apply to the established enforcement authority to seize and detain counterfeit goods which are leaving or entering the borders of another Partner State so long as the IPR holder furnishes sufficient evidence to warrant the exercise of such powers by the enforcement authority.

¹⁹ Section 23 of the Kenyan Act

²⁰ Regulation 4 (2) of the Merchandise Marks Regulations

4.6.2 The EAC would be expected to institute measures to work with other regional blocs such as the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS) etc, to curtail the importation or exportation of counterfeit goods. This will entail a four (4) tier form of exchange of information between the IPR holder, the local enforcement authority, the regional enforcement authority and the relevant arm of the said economic bloc to control counterfeiting within the EAC.

4.6.3 The inspectors should be stationed at all borders/entry points (both formal and informal) to work hand in hand with the local Customs authorities to inspect imports, exports, or in-transit merchandise suspected of being counterfeit/pirated or in any other way constituting a violation of IPRs without the need of a formal complaint from an IPR holder.²¹

4.7 Seizure and Warehousing/Storage of Counterfeit/Pirated Goods & Monitoring Activities

4.7.1 The Legal framework at the National and Regional levels shall provide for the following measures regarding the seizure and warehousing of counterfeit/pirated products:

- (i) the seizure and detention (and where applicable removal for detention) of all suspected counterfeit/pirated goods found at, on or in such place, premises or means of carriage; or
- (ii) sealing off any place, premises, vehicle or other means of carriage at or in which the counterfeit/pirated goods have been found, or where the packaging of the goods is being conducted, prepared or undertaken;

²¹ Mirrored in the Ugandan Bill at Part VI

- (iii) the seizure, detention, confiscation of tools and equipment which are capable of being used in the manufacture, production, packaging or distribution of counterfeit/pirated goods; and
- (iv) destruction of all the above at the owner's expense (or the State if the counterfeiter cannot be traced) upon a judicial finding that the goods are counterfeited/pirated.

4.7.2 The proposed EAC law should provide for the grant of *ex parte* orders to freeze the offender's bank accounts in order to afford the territory's authorities and rights holders an opportunity to ensure that any profits made from the illicit trade are confiscated and that monetary damages (if awarded) are recoverable.

4.7.3 Partner States should maintain a database of goods that are frequently counterfeited/pirated which should be accessible to members of the public and relevant institutions. The information in the database should be used as the basis for random inspections to be conducted at the ports of entry along the borders of the Partner States.

4.11.4 The established enforcement authorities should collaborate closely with stakeholders in the IP industry to ensure compliance and monitoring of the movement of counterfeit/pirated goods by requiring the stakeholders to file with them quarterly lists of goods that according to stakeholders may have been counterfeited.

4.7.5 There should be a continuous and consistent monitoring of the handling of counterfeit/piracy cases in court and in particular, the level of fines imposed and where necessary to review the same and re- issue sentencing guidelines to ensure that fines imposed by the judicial authorities remove all gains from the infringer and deter future offences.

4.7.6 Brand owners should be required to deposit the particulars of their trade mark registrations with the relevant authorities at the ports of entry for purposes of tracing counterfeit imports.

4.7.7 Partner States should put in place a laws that criminalize import/ export, manufacture, sale or distribution of a device or system or a component of a device or system knowing that the device or system is primarily used to circumvent technological protection measures used in conjunction with materials protected by IPRs. Their laws should also have provisions that the equipment used for the manufacture of counterfeit/pirated goods be seized in order to ensure that infringing parties do not repeat their illegal activities.

4.8 Destruction of Materials

4.8.1 Counterfeit/pirated goods should be destroyed at the owner's expense within thirty (30) days after the conclusion of the investigation or judicial proceedings. No counterfeit goods should be re-exported once they have been certified as being counterfeits.

4.8.2 The proposed EAC law and national laws should provide for a fourteen (14) days notice of intent to destroy the goods to both the IPR holder, and the counterfeiter and if no objection is received from either of them within the said period, the goods should be destroyed in the manner that the authority deems fit at the expense of the offender.

4.8.3 Any equipment used to produce counterfeit/pirated goods also ought to be destroyed at the owner's expense.

4.9 Policy Statement on Rules of Evidence

4.9.1 The Legal framework at the National and Regional levels shall provide for efficient and cost effective means of presenting, obtaining and preserving evidence in counterfeit/piracy cases. The procedures would have due regard to the rights of the

suspected counterfeiter and provide the necessary guarantees, including the protection of confidential and privileged information. The courts should be empowered and encouraged to order access, where appropriate, to banking, financial or commercial documents under the control of the counterfeiter or any third party such as a bank/financial institution.

4.9.2 Where an IPR holder has filed a complaint, he should be required to furnish sufficient information and particulars to the reasonable satisfaction of the inspector that the goods alleged to be counterfeited/pirated are *prima facie* counterfeit/pirated and that he has a *bona fide* IPR right on the basis of which a successful prosecution can be mounted.

4.9.3 In particular, a complainant should furnish the inspector with a specimen of the alleged counterfeit goods, or if not available, sufficient information, and particulars from which the essential and any other distinctive features, elements and characteristics of the alleged counterfeit goods may be ascertained.

4.13.4 Any statement taken down or documentary evidence procured by an inspector in the course of exercising any power in regards to search, seizure and detention may be made available to the complainant at his request and the complainant may make copies of or extracts from any such statement or documentary evidence and must return the original statement or document to the inspector.²²

4.9.5 The proposed EAC law should provide that the inspector investigating the case may be called as a witness by either party to civil or criminal proceedings concerning the counterfeit goods in question, or by the court of its own motion, regarding the outcome of the investigations.

²² This provision has been captured in the Kenyan Act.

4.9.6 Evidence of previous relevant offences and convictions by the counterfeiter should be taken into account for sentencing purposes but should not be treated as conclusive evidence of the commission of the offence.

4.9.7 With regard to presumptions, the proposed EAC law should provide that where a person is proved to have been in possession of suspected counterfeit goods, unless the contrary is proved, he will automatically be presumed to have been in possession of the counterfeit goods for the purpose of dealing with them as such.

4.10 Policy Statement on Judicial Proceedings

4.10.1. In order to ensure that the new law is implemented with the necessary gusto as envisaged in this Policy, certain minimum judicial reforms will be required in each Partner State. Such minimum reforms will include (without limitation):-

- i) all cases involving counterfeiting, piracy or other violations of intellectual property rights should be determined by specially trained judges/magistrates on IP issues;
- ii) there should be a sufficient number of the specially trained judges/magistrates to ensure simultaneous determination of cases in different parts of the country and also expeditious disposal of such cases; and
- iii) comprehensive and continuous training for the relevant judicial officers on IP laws, modern trends in IP law on the global scene as well as the impact of counterfeiting not only on the economy but society at large.

4.10.2 The Legal framework at the national and regional levels shall provide for special judges/magistrates to determine disputes specifically germane to intellectual property rights and their violations with both criminal and civil jurisdiction. This will remove the

current situation where many are lost due to the obvious lack of appreciation of IP issues by the presiding judicial authority. The special judicial officers will also ensure an expeditious disposal of IP cases. Each Partner State should have an adequate number of specially trained judicial officers to ensure concurrent hearing of cases in different parts of the State.

4.10.3 The special judges/magistrates should, at a minimum, have power to:-

- (a) issue *ex – parte* warrants for inspection, seizure and detention of counterfeit goods, to preserve evidence relevant to infringement of intellectual property rights, i.e. anton pillar orders;
- (b) issue orders for destruction of counterfeit/pirated goods;
- (c) direct the offending party to disclose the source of counterfeit/pirated goods;
- (d) grant injunctive relief where appropriate, and in particular restrain the offender from further selling, distributing, or manufacturing the counterfeit/pirated goods;
- (e) require payment of damages by the offending party to the complainant;
- (f) require payment of damages by the complainant to the defendant together with costs of the suit if the complaint was baselessly instituted;
- (g) order the complainant to furnish security for costs pending the outcome of investigations and/or disputes;
- (h) order the release of seized goods and ancillary materials in appropriate circumstances;
- (i) in addition to a conviction, to also direct the offender to pay damages to the complainant without the necessity of separate civil proceedings; and
- (j) fix a hearing date within three (3) months of the filing of a complaint and deliver judgment not later than sixty (60) days after conclusion of the hearing.

4.11 Provisions on Penalties

4.11.1 The crimes of counterfeiting and piracy are serious criminal offences that often leads to significant health and safety risks which may result in loss of life, loss of revenue to companies and governments leading to economic decline and channeling of proceeds to criminal networks, organised crime and other groups that disrupt and corrupt society, and ought to be treated as such. Very stiff penalties therefore must be prescribed and handed down to offenders. If counterfeit goods kill young children and cause house fires in which property and lives are lost; if fake spare parts cause fatal road accidents in which whole families perish; if people die after consuming contaminated/untreated water and unwholesome food; then there is sufficient justification for counterfeiting to be treated as seriously a crime as murder or drug trafficking.

4.11.2 Accordingly, the legal framework at the national and regional levels shall prescribe very stiff penalties with assured deterrent effect on offenders. The penalties prescribed in the current and proposed laws in Tanzania, Kenya and Uganda national laws unfortunately are incapable of having a deterrent effect and stopping counterfeit trade principally because:-

- (a) the fines are easily affordable considering that they are based on the consignment before the court, and little or no regard is given to the value of past business by the offender in counterfeit goods or the merchandise warehoused elsewhere by the same offender;
- (b) since there is no mandatory custodial sentence irrespective of the flagrancy of the offence, counterfeiters will always pay the fines even if it means fund-raising from family and friends;
- (c) there is no permanent disability suffered by the counterfeiter to deter him from repeating the offence e.g. being barred from participation in public procurement under relevant national procurement regulations; and

- (d) the way the penalties are prescribed, the maximum penalties may never be applied since no minimum penalty is prescribed and it is all left to the discretion of the court which discretion is often abused.

4.11.3 The sanctions applicable to offenders must be uniform across the region to avoid some states appearing to be more tolerant of infringers than others. As it is, Kenya, Uganda and Tanzania have set different levels of fines and terms of imprisonment. Such inconsistency should be eliminated.

4.11.4 The proposed EAC law should prescribe both minimum and maximum penalties for offenders depending on the circumstances, quantity and flagrancy. This Policy therefore recommends the following **minimum** fines and jail terms:-

4.11.4.1 First Conviction – Minimum two (2) and maximum of five (5) years imprisonment or a fine based on ten (10) times the prevailing retail value of the genuine goods.

4.11.4.2 Second Conviction – Minimum of five (5) years and maximum ten (10) years imprisonment or a fine based on twenty (20) times the retail value of the genuine goods;

4.11.4.3 Third Conviction – ten (10) years imprisonment with no option of a fine.

4.11.5 The high fines proposed above are meant to make it difficult for the offender to pay them and walk free instead of going to jail, which is the only real deterrent punishment for a serious crime. However, there is need to balance the stiffness of the penalties against the prevailing culture of endemic corruption in the region to ensure that the stiff penalties do not create a fertile ground for corruption.

4.11.6 The EAC law should provide that in passing sentence the judicial officer must take into account the following factors which must be recorded:-

- (i) the risk posed to human or animal life, health, safety or danger to property by the counterfeit/pirated goods in question;
- (ii) the flagrancy of the offence; and
- (iii) the perceived profit earned by the offender from the illicit trade even if not tendered in evidence.

4.11.7 The fines paid by counterfeiters should be passed on to the national enforcement institution to supplement its budget.

4.12 Policy Recommendation on Landlords of Commercial Properties

4.12.1 It is recommended that the EAC law should require landlords of commercial properties in which counterfeit/piracy trade is carried on to, upon receipt of a formal complaint from a legitimate brand owner, serve notice to the tenant for termination of tenancy unless the counterfeiting/piracy trade is stopped, failing which the landlord must, by law, terminate the tenancy. This is the current practice in Australia although it is not a requirement of the law. It is recommended, however, that there should be a public debate on this proposal before it is incorporated into the proposed law to ensure that it does not constitute a disincentive to investors in real estate.

4.13 Policy Recommendation on Control of E-Commerce

4.13.1 The Legal framework at the National and Regional levels shall provide for mandatory removal of websites which advertise counterfeit/pirated material upon receipt of a formal complaint from the brand owner. This is already the law in the USA.

4.14 Enhancing the Ability of Rights Holders to Protect their IPRs

4.14.1 This Policy recommends the initiation of a concerted campaign to encourage rights holders to protect their IPRs in the region especially by trade marks registration which is

a prerequisite to the enforcement of anti-counterfeit laws. As already mentioned, Partner States such as Burundi and Zanzibar appear to have been neglected by rights holders in this regard yet if the new law is enacted and an enforcement institution is set up, such rights owners will receive no assistance from such measures in the absence of legal protection of their IPRs. Each Partner State is required to streamline its registration systems to ensure fast, affordable and reliable registration of IPRs. The waiting period for the registration of trade marks should not exceed eight (8) months from the date of filing the application and trade mark oppositions must be concluded within a year from the date of filing of the notice of opposition.

4.14.2 Other measures should include:-

(a) Handling Consumer Complaints

A mechanism should be established for the expression of complaints by the rights holders. This will be achieved by establishing channels of communication between the National Enforcement Agency, rights holders and consumers.

(b) Information on Imports and Shipment

This can be achieved through the use of a website for instance which displays information on shipments and their cargo. This can act as an early alert for rights holders on incoming cargo of goods bearing a protected brand.

(c) Co-operation Mechanisms

There should be greater cooperation between private sector organizations, enforcement agencies and the relevant branches of Government. This can be achieved by creating platforms for information sharing, carrying out shared operations. Partner States will also have to create avenues for the sharing of information and enhance the framework for cooperation.

5.0 POLICY STATEMENTS ON INSTITUTIONAL AND PUBLIC AWARENESS INITIATIVES

5.1 Research reveals that counterfeiting/piracy is endemic in the region and only rivals corruption in scale and magnitude. The general attitude among the population, despite being clearly aware of the danger of using/consuming counterfeit products, is one of resigned acceptance. There is therefore a critical need to create awareness both amongst the populace and the relevant enforcement institutions in order to enjoin them in the fight against this harmful trade.

5.2 In order to increase the efficacy of other anti-counterfeit activities, it is necessary to effectively increase public awareness of the presence of counterfeit products as well as their effects on the society and the economy. On the other hand, there is need to create awareness on the *benefits* of safeguarding IPRs against infringers and counterfeiters.

5.3 Similarly, there is need to raise institutional awareness to ensure that their anti-counterfeiting activities may have the necessary public support. In East Africa, a large segment of society remains unaware of the benefit of protecting intellectual property as confirmed by the research which revealed that even certain policy makers and general public do not truly believe that controlling/eradicating counterfeits is in the best interest of society, the common attitude being that the current wave to combat the vice is driven by the big businesses to protect their profit margins while the poverty stricken consumer is deprived of affordable essential products.

5.4 Innovators and inventors must be made aware of the value of protecting intellectual property as a critical component for enhancing their innovation capabilities and procuring a competitive advantage in the market place. The EAC's collective mandate of creating IP awareness across the region should be continued and focused on matching the needs of industry and training institutions.

5.5 The institutional and public awareness campaign should be focus on:-

- (a) creating a negative public opinion against the use/consumption of counterfeits;
- (b) increasing awareness and knowledge within the population on dangers of using/consuming counterfeit products;
- (c) complaints against counterfeit/pirated goods;
- (d) reducing the quality of counterfeit/pirated products in the market;
- (e) increasing registration rates of IPRs;
- (f) encouraging closer co-operation with enforcement agencies;

5.6 This Policy recommends the following methods of raising institutional and public awareness:-

- (a) training workshops on IPR, including “how-to” sessions;
- (b) seminars and conferences;
- (c) media campaigns;
- (d) sector specific campaigns targeting particular segments of the economy e.g. pharmaceuticals, automotive spare parts, construction, etc;
- (e) retailer and consumer-specific interventions

6. POLICY STATEMENTS ON BORDER MEASURES TO COMBAT CROSS-BORDER COUNTERFEIT AND PIRACY TRADE

6.1 Customs authorities play an important role in combating counterfeiting and piracy. The role of customs administrations in fighting counterfeiting and piracy in international trade is provided for at the international level, notably the WTO, the WIPO and the World Customs Organization (WCO).²³

6.2 The WCO Model Provisions include the following measures:

- (a) a definition of infringing goods to be subject to border measures that exceeds the definitions of “counterfeiting” and “piracy” contained in Article 51 of the TRIPS Agreement and in particular would place significant burdens on customs in relation to patent infringements;
- (b) customs to have the ability to suspend counterfeit and pirated goods destined for export and goods which are in transit;
- (c) specific time limit of 30 days for handling applications to customs for suspension of import, export, or transit of infringing goods and a shorter time limit of 3 days with respect to applications concerning specific shipments, in contrast to Article 52 of the TRIPS Agreement which requires only that authorities reply to the applicant within a reasonable period, while Article 41 of the TRIPS Agreement sets a general obligation that enforcement procedures shall not entail unreasonable time limits or unwarranted delays.

6.3 All five (5) Partner States of the EAC are members of the WCO. The Model Provisions on Border Measures are therefore a good starting point as far as border control in the region is concerned. However, these provisions need to be domesticated into the relevant customs in each Partner State in order to promote ease of implementation.

²³ “The fight against Counterfeiting and Piracy in the Bilateral Trade Agreements of the EU”, Dr. Duncan Mathews. Available at <http://www.europarl.europa.eu/activities/committees/studies/download.do?file=21459>

6.4 The TRIPS Agreement does not oblige WTO Members to make available border measures concerning exports or goods in transit. In order to enable customs to fight counterfeiting and piracy effectively, it is recommended that they should be empowered to suspend goods destined for export and goods in transit, as well as imported goods.

6.5 The TRIPS Agreement obliges WTO Members to enable right holders to make applications for border seizures to competent authorities but does not specify what those competent authorities must be, for instance in some countries applications for border seizures are dealt with by courts rather than directly by customs.²⁴

6.6 The Customs administration in the region is the East African Customs Union. The main function of the Customs Union is to aid co-operation in trade liberalisation and development in the region. The EAC Customs Management Act provides for the management and administration of customs within the region. The Act prohibits importation of counterfeit goods into the region, thus providing an enabling environment for further reforms on the trade in counterfeit and pirated goods. The Act should, however, be amended to incorporate the key WCO Model Provisions outlined above.

6.7 The EAC Customs Management Act appoints the Directorate of customs, which is established by the Council under the EAC treaty, as the body responsible for the initiation of policies on Customs and related trade matters in the Community and the coordination of such policies in the Partner States. One of the main functions of the directorate is to enforce the customs laws of the Community. This Policy proposes that there be an anti-counterfeiting department under the directorate to ensure coordination between the Directorate and the proposed EAC Anti-Counterfeit Unit.

6.8 The model provisions of the WCO should be incorporated not only into the Partner States' proposed anti-counterfeiting laws but their Customs laws as well.

²⁴ Ibid, note 19.

7. POLICY STATEMENTS ON THE EAC LAW AGAINST COUNTERFEITING AND PIRACY

This Policy contemplates that an EAC Law to combat counterfeiting, piracy and other intellectual property rights violations shall be enacted. The legislative basis for the proposed new law is to be found in both the East African Treaty and the Customs Management Act.

7.1 EAC Treaty Provisions

7.1.1 The EAC Treaty recognizes the importance of intellectual property under Article 103 (1) which provides:

“Recognising the fundamental importance of science and technology in economic development, the Partner States undertake to promote co-operation in the development of science and technology within the Community through:

- (i) the harmonization of policies on commercialization of technologies and promotion and protection of intellectual property rights.”*

7.1.2 The Treaty establishes a Customs Union under Article 75. The role of the Customs Union is to promote co-operation in trade liberalisation and development in the region. The Treaty also establishes a Common Market under Article 76 under which there shall be free movement of labour, goods, services, capital, and the right of establishment.

7.2 The EAC Customs Management Act

7.2.1 The Customs authorities constitute the first line of defence by securing external frontiers and seizing the bulk of the counterfeit products being imported.

7.2.2 The EAC Customs Management Act under the Second Schedule prohibits the importation of counterfeit goods of all kinds. Section 200 of the Act, imposes a penalty of imprisonment for a maximum of five (5) years or a fine equal to fifty per cent (50%) of

the dutiable value of the goods or both, on any person who imports prohibited or restricted goods.

7.2.3 It is essential to have strong customs legislation and increased export controls which help to disrupt the production and trafficking of counterfeit goods. The WCO model provisions are suitable for adoption by the EAC towards this end.

7.2.4 This Policy proposes that the penalties prescribed under the above provision should be harmonized with those to be contained in the proposed EAC law on anti-counterfeiting/piracy.

7.3 The Role of the East African Legislative Assembly (EALA)

7.3.1 The role of the EALA in the implementation of this Policy cannot be over emphasized. The EALA will play a key role in achieving the full implementation of this Policy and the proposed new law.

7.3.2 The EALA will be tasked with:-

- a) enacting a new EAC law against counterfeiting and piracy based on the draft to be formulated as a follow up to this Policy; and
- c) strongly and consistently encouraging the Partner States to address the relevant issues pertaining to the implementation of the new law.

8.0 OVERALL POLICY RECOMMENDATIONS AND IMPLEMENTATION STRATEGY

The Policy recommends the following measures to deal with the counterfeit and piracy trade:-

- 8.1 A harmonized legal regime is critical, coupled with the establishment of effective enforcement institutions replicated in all the Partner States.
- 8.2 National laws to provide for uniform and stiff deterrent penalties with mandatory custodial sentences for repeat offenders.
- 8.3 Offences committed in one Partner State should be punishable in any other Partner State where the offender happens to be.
- 8.4 Make stockists liable unless they provide contact details leading to the apprehension of their suppliers.
- 8.5 Governments to enhance poverty alleviation programmes to improve the purchasing power of their citizens.
- 8.6 Develop systematic, co-ordinated and effective consumer awareness programmes to create a strong public opinion against the use/consumption of counterfeit/pirated products.
- 8.7 Elevate the crime of counterfeiting/piracy to same level as drug trafficking, money laundering or similar serious crimes.
- 88 Sensitize brand owners to register their trade marks locally and co-operate with the enforcement institutions to procure the conviction of offenders.

- 8.9 Governments to deliberately engage with countries which manufacture and export counterfeit/pirated products into the region.
- 8.10 Empower institutions at points of entry with necessary technology to detect counterfeits/pirated products.
- 8.11 Educate and sensitize the judiciary to become part of the solution rather than part of the problem.
- 8.12 Build adequate capacity for enforcement of new laws in terms of training, library materials, equipment, transport, etc.
- 8.13 Establish an EAC supervisory unit to co-ordinate the operations of national enforcement institutions.
- 8.14 Enjoin landlords of commercial premises in which counterfeit/piracy is conducted in the fight against the menace.
- 8.15 Require web-hosting companies to disable websites advertising counterfeit/pirated goods upon receipt of a formal complaint from the brand owner without the necessity of a court order.

8.16 Implementation Strategy and Stakeholder Roles

The EAC will develop an Implementation Plan for this Policy, involving a range of both Government and private sector stakeholders in order to define the various roles and responsibilities. Developing this plan will provide an important step towards ensuring that the actions outlined in the Policy are addressed systematically and effectively.

The Implementation Plan will also emphasize the performance measures for the actions and initiatives outlined in the Policy, which can then be used to gauge the overall progress towards a counterfeit and piracy free East African Community.

9.0 SCHEDULES

9.1 SUMMARY OF LAWS OF MEMBER STATES ON PIRACY

Country	Kenya	Tanzania	Uganda	Rwanda	Burundi
Law and Definition Of Piracy	<p><i>Copyright Act, 2001</i> Piracy not defined in the Act but it would fall within the acts that constitute infringement under Section 26-29 including reproduction in any material form, translation, adaptation distribution to the public, importation, communication to the public, fixation and re-broadcasting, broadcasting performances or communicating them to the public.</p>	<p><i>Copyright and Neighboring Rights Act, 1999</i> Specifies what qualifies to be protected under the Act. Infringement includes, <i>inter alia</i> the manufacture or importation for sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a work, a sound recording or a broadcast, or to impair the quality of copies made or the manufacture or importation for sale or rental of any device or means that is susceptible to enable or assist the reception of an encrypted program.</p> <p>Under the Merchandise</p>	<p><i>Copyright Act 1964</i>, Section 13 specifies that a copyright is infringed by any person who does, or causes any other person to do, an act falling without the license of the person in whom is vested either the whole of the copyright or, where there has been partial assignment or partial testamentary disposition, the relevant portion of the copyright.</p>	<p><i>The Draft Law on IP</i> does not define “piracy” as such but Article 194, 195 provides for works subject to protection under copyright.</p>	<p>The Draft new IP-law contains a definition on pirated goods.</p>

		Marks Regulations, 2005, “Piracy” is defined to mean the illicit, prohibited or unauthorized copying of any intellectual property right on or over goods for the purpose of trade.			
Institutions to Administer the Law	Kenya Copyright Board Section 3 of the Act.	Copyright Society of Tanzania (COSOTA)	Uganda Registration Services Bureau, Registrar of Copyrights, Section 41	Ministry of Youth, Sports and Culture, Article 10, 11 and 12 of the Draft Law on IP.	NONE
Enforcement Mandates	Section 5 provides that the Kenya Copyright Board shall have the task of administering all matters of copyright and related rights provided for in the Act and to deal with ancillary matters connected with its functions under the Act. Section 37 makes provision for Anton Piller orders.	Under section 47 (c) there is a provision for COSOTA to ensure the rights of the right holder are safeguarded.	Section 42 provides that the registrar of copyrights shall do all acts pursuant to ensuring the interests of the right holders are safeguarded	Article 38, 39, 102, 116 provide for enforcement of rights of right holders when different Intellectual Property rights are violated.	NONE
Remedies and Penalties	Section 38 (4) provides that any person found guilty of any offence specified in the	Section 36 provides that a right holder whose rights are in danger of being	Under section 47 and 48 where an individual is guilty of in violations	Article 262 provides that any	Articles 422 and 423 of the draft new IP-

	<p>Act will be liable to a fine not exceeding Kshs. 400,000 or for a term not exceeding six years for a first offender and in any other case to a fine not exceeding Kshs. 800,000 or imprisonment for not exceeding 10 yrs or both.</p>	<p>infringed may apply to the courts for injunctive relief against the infringer. Further he or she may ask for payment of damages occasioned by such infringement including any profits accrued through such infringement. The injured right holder may require the copies destroyed according to section 38. Further to this under section the offender/pirate as a first offence may be liable to a fine not exceeding Tshs. 500,000 or imprisonment not exceeding 3 years or both. For subsequent offences the punishment is a fine not exceeding Tshs. 10,000,000 or imprisonment not exceeding 5 years.</p>	<p>against rights in the act he is subject to a fine not exceeding one hundred currency points and or imprisonment not exceeding four years.</p>	<p>person who knowingly performs an act constituting an infringement of any of the rights in the Act shall commit an offence and shall be liable to fines ranging from twenty thousand Rwandan Francs to ten million Rwandan Francs or a maximum imprisonment term ranging between six months and ten years or both.</p>	<p>law states that the penalties for counterfeit good are given by the Court. Article 460 makes reference counterfeiting and piracy acts: penalties are according to the Criminal Code and the Criminal Procedure Code.</p>
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9.2 SUMMARY OF LAWS OF MEMBER STATES ON COUNTERFEITS

Country	Kenya	Tanzania	Uganda	Rwanda	Burundi
Law and Definition Of Counterfeits/ Piracy	<p><i>Anti Counterfeit Act, 2008</i>, Section 2: Defines the term Counterfeit to mean: the following actions in respect of protected goods:</p> <p>a) The manufacture, production, packaging, labeling or making whether in Kenya or elsewhere of any goods whereby those protected goods are imitated in such a manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods;</p> <p>b)The manufacture, production, packaging, labeling or making whether in Kenya or elsewhere the subject matter of that intellectual property, or a colorable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his licence;</p>	<p><i>Merchandise Marks Regulations, 2008</i>, Regulation 2 Defines the terms counterfeit and piracy. Counterfeiting is defined to mean the following actions in respect of protected goods:</p> <p>a)The manufacturing, producing, packaging, labeling or making whether in Tanzania or elsewhere of any goods whereby those protected goods are imitated in such a manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods;</p> <p>b) The manufacture, producing, or making whether in Tanzania or elsewhere the</p>	<p><i>Counterfeit Goods Bill 2007</i>, Section 2 defines term Counterfeiting to mean any of the following acts without the authority of the owner of any intellectual property right:</p> <p>a) The manufacturing, producing, packaging, labeling or making whether in Uganda or elsewhere of any goods whereby those protected goods are imitated in such a manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods;</p> <p>b) The manufacture,</p>	<p><i>The Draft Law on IP</i> does not provide a definition</p>	<p>No law defines the term</p>

	<p>c) The manufacturing, producing or making of copies, in Kenya or elsewhere, in violation of an authors rights or related rights.</p>	<p>subject matter of that intellectual property, or a colorable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his licence;</p> <p>c) The manufacturing, producing or making of copies, in Tanzania or elsewhere, in violation of an authors rights or related rights.</p> <p>Piracy is defined to mean the illicit, prohibited or unauthorized copying of any intellectual property right on or over goods for the purpose of trade.</p>	<p>producing, or making whether in Uganda or elsewhere the subject matter of that intellectual property, or a colorable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his licence;</p> <p>c) The manufacturing, producing or making of copies, in Uganda or elsewhere, in violation of an authors rights or related rights.</p>		
Institutions to Administer the Law	The Anti Counterfeit Agency, Section 3 of the Act.	The Interdepartmental Task Force, Regulation 8 of the Act.	Uganda National Bureau of Standards, Section 3 of the Bill.	Administered by the relevant Ministry,	NONE

				either Ministry of Industry or Ministry of Youth, Sports and Culture, Article 10, 11 and 12 of the Draft Law on IP.	
Enforcement Mandates	Part IV of the Act provides for inspectors who enforce the rights of right holders	PART IV of the Regulations provide for the powers the Chief Inspector has to receive applications where violations of IP have been suspected. The procedure is specified for interrogation of a claim and the detention of the suspected goods.	PART III of the Bill provides for the mode of inspection to be conducted by inspectors appointed under the Bill which includes seizure of suspected counterfeit goods. PART IV provides for the procedure for lodging a complaint by any right-holder, his successor in title, or licensee counterfeit goods.	Article 38, 39, 102, 116 provide for enforcement of rights of right holders when different Intellectual Property rights are offended.	NONE
Remedies	Section 35(2) of the Act provides a fine not exceeding Kshs. 2,000,000 or a term not exceeding 3 years imprisonment for any infringement of the rights contained in the Act.	Section 48-50 of the Act provides for sanctions on offending of the rights of the right-holder. The penalty for breach of provisions of the Regulations is the payment of fines determined by the Chief Inspector but not exceeding Tshs. 5,000,000. The chief	Under section 20 of the Bill, any person who is convicted for any offence prescribed under section 16 in the case of first convictions faces a fine of not less than three times the value of the prevailing retail price of the goods,	Article 262 provides that any person who knowingly performs an act constituting an	NONE

<p>and Penalties</p>		<p>inspector may commit a suspected offender for prosecution to the Director of Public Prosecutions for criminal sanctions.</p>	<p>imprisonment for a term not less than three years or both. For a subsequent conviction the offender will be fined not less than five times the value of the prevailing retail price of the goods, imprisonment for a term not less than five years or both. The fines recovered by the court are apportioned according to section 20 (4), 10% to the complainant, 40% to the consolidated fund, 50% to the Bureau.</p>	<p>infringement of any of the rights in the Act shall commit an offence and shall be liable to fines ranging from twenty thousand Rwandan Francs to ten million Rwandan Francs or a maximum imprisonment term ranging between six months and ten years or both.</p>	
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