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Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya

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I. INTRODUCTION

A. Background

Intellectual property rights (IPRs) are property rights in something intangible and protect innovations and reward innovative activity.¹ IPRs comprise a bundle of rights focusing on the physical manifestations of intellectual activity in any field of human endeavour. IPRs are concerned with the expression of an idea for an invention, the details of which have been worked out and which takes the form of a product or process that can be applied industrially. Development over a century has given rise to various IPRs, which have become well known. These include patents, trade and service marks, copyright, rights in performances, designs, plant breeders' rights, utility models, appellations of origins, layout designs and topography.

Allocating IPRs to the creator of a work balances the private interests of the creator, by ensuring that s/he still has an incentive to create, against those of the society at large in having the information available for its use. Even though it does not diminish once it is shared, the role of IPRs is to ensure that information providers do not lose rights to the information by disclosing it, since such information can be used by an infinite number of persons simultaneously.² Indeed, one of the philosophic underpinnings of IPRs is to ensure disclosure of the information, the assumption being that lack of such right would discourage information holders from sharing their information for fear of losing it. The fear of losing exclusive rights to the information once shared is real because another person can use the same idea without having recourse to the originator of the idea.

Intellectual property has increasingly become a strong feature of international, regional trade arrangements and national legal instruments. From multilateral to regional and bilateral trade relations, IP issues almost inevitably come to the fore as a critical issue to be considered in any deals that are struck. An example of these regimes are the free trade agreements that have become a feature in international trade relations. The United States has concluded such agreements with Latin and Central American and Caribbean countries individually, in groups and collectively. It also has an agreement with Australia, Morocco, the South African Customs Union (SACU) countries, Singapore and Thailand.³ It is against this backdrop that that IP continues to be the subject of widespread legal and political debate especially regarding the role of IP law and IP generally in the progress of societies in terms of its contribution to economic, social and cultural progress.

The role of IP in development and related policy areas, for example, is controversial.⁴ Although most IP instruments protect the creator's private right, recent concerns on the right to development emphasize the judicious balancing of the private right of the creator to protection with the right of the community to access and enjoy the benefits of the IP.

Controversies on IP surround the subject matter of coverage, the range of rights that the holder of intellectual property enjoys and the equity of international arrangements for the protection of IP. While early intellectual property laws such as those on patents were designed to protect the product of the inventive genius who worked on his project in the attic or basement, technological advances have now become the recluse of industry with well equipped laboratories. Indeed the role of intellectual property in catalysing and stimulating industrial and commercial growth has come into sharp focus in recent years.⁵ Big corporate firms have taken over inventive activity from the inventor and increased their share of intellectual property portfolio as they buy the best brains and purchase patents of patentees who are not able to exploit their inventions.⁶ At a country level, this translates into larger portfolios for countries that have technological capability as there are more individual and corporate entities seeking protection of their intellectual property. The statistics available indicate that most patent applications emanate from North America and Europe while Africa accounts for less than two per cent of the total patent applications (See Table 1). This begs the question whether the investment that African countries have made in establishing intellectual property protection systems is justified. While African countries have invested in establishing IPR regimes, there is little evidence that these have impacted on the development of the individual countries. The argument that intellectual property contributes to development has not been

proved in most African countries which have had IPR regimes dating back to the early 1900s. Indeed discussions on IPR in Africa have been around the issues of their being barriers to access to proprietary technology necessary for development and more recently to essential medicines necessary to contain prevalent diseases such as HIV-AIDS.

Table 1: Sources of Patent Cooperation Treaty Patent Applications, 1998 and 2000

Region	Country of origin	No. patents filed, 1998	No. patents filed, 2000	% of total 1998	% of total 2000
North America	United States	28,356	38,171	42.3	42
	Canada	1,315	1,600	2.0	1.8
Total North America		29,671			43.8
Western Europe/EU	Germany	9,112	12,039	13.6	13.2
	United Kingdom	4,383	5,538	6.5	6.1
	France	3,322	3,601	5.0	4.0
	Sweden	2,554	3,071	3.8	3.4s
	Netherlands	2,065	2,587	3.1	2.8
	Switzerland	1,293	1,701	1.9	1.9
	Finland	1,092	1,437	1.6	1.6
	Italy	925	1,354	1.4	1.5
	Denmark	624	789	0.9	0.9
	Austria	421	476	0.6	0.5
	Norway	394	470	0.6	0.5
Total Western Europe/EU	Others	1,101	1,463	1.6	1.6
		27,286	34,526	40.7	38.0
East Asia and China	Japan	6,098	9,402	9.1	10.3
	Rep. of Korea	485	1,514	0.7	1.7
	China	322	579	0.5	0.6
Total East Asia and China		6,905	11,495	10.3	12.6
Eastern Europe	Russian Federation	429	590	0.6	0.7
	Others	402	627	0.6	0.7
Total Eastern Europe		831	1,217	1.2	1.3
Australasia	Australia	1,048	1,627	1.6	1.8
	New Zealand	178	264	0.3	0.3
Total Australasia		1,226	1,891	1.9	2.1
Total Middle East		707	925	1.1	1.0
Total Rest of Asia		146	473	0.2	0.5
Total Latin America/Caribbean		209	252	0.3	0.3
Total Africa		26	398	<0.1	0.4
Total number of applications		67,007	90,948	100.0	100.0

Source: International Centre for Trade and Sustainable Development & UNCTAD, Intellectual Property Rights: Implications for Development, Policy Discussion Paper, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Geneva (2003)

There are also issues of exclusion from the purview of intellectual property some forms of knowledge such as indigenous or traditional knowledge and the impact of intellectual property rights on access to medicine and food. The political economic context within which these discussions occur reflect an imbalance in the technological capacities between technology rich countries and technology poor ones. Economic inequalities between different parts of the world make it difficult to discuss the issues of property rights and biodiversity conservation without polarising the world into two major blocs of developed and developing countries. With two thirds of the world's biodiversity situated in developing countries and the technology for unlocking the value of that diversity in developed countries, the question of biodiversity conservation vis-à-vis property rights becomes essentially a political and economic one which divides developed and developing countries

into two uncompromising blocs.⁷ More specifically, Africa's wealth in biological resources and dependence on these resources for economic development and livelihoods makes the application of intellectual property rights particularly pertinent for these countries. The plethora of categories and for a discussing intellectual property rights is a source of concern for Africa in view of the dearth of resources. Of particular concern for Africa is traditional knowledge which communities have used over millennia for biodiversity management but which is not protectable under conventional IPRs.

The internationalisation of intellectual property protection through the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) ensures that the technology owner has protection of their IP in all areas of technology. Discussions about the implications of this provision in the context of a human right to food and healthcare have been the basis of heated discussions at the international level. The protection of IP in the realm of food and healthcare is not always easy to reconcile with these rights where access is hindered by the existence of IPRs. This statement is very relevant and should be developed further to capture in a few sentences Africa's experience in light of access to HIV drugs, traditional knowledge and benefit sharing.

B. Terms of Reference

1. Objectives

The main objectives of this study were to:

- To provide an analytical review, drawn from current research, state-of-the-art knowledge of IPR issues in Africa;
- To review current IPR practices and to identify the conceptual issues and challenges for policy formulation and implementation of an effective IP regime in selected countries, in the light of evolving international policies and practices;
- To contribute to the design of instruments, processes and procedures that allow African countries to better profit from global opportunities;

The specific objectives were to:

- To describe the capacity existing in Kenya and the analytical capacity in both research institutions and government departments to manage a satisfactory domestic IP regime and to engage in international IP discussions.
- To improve policy analysis capacity in order to enhance Kenya's negotiation and bargaining in international forums;
- To assist Kenya to promote coherence between their domestic economic policies and their international trade policies.
- Identify the relevant national and regional actors, including intergovernmental, public, research and academic institutions, and private and civil society organizations.

2. Specific terms of reference

The specific terms of reference were to:

- Identify the challenges for IPR legal & policy formulation and implementation in Kenya.
- Identify the institutional, financial, organizational and human capacity to research and conduct policy analysis in IPRs available in Kenya; and
- Identify specific IPR needs for Kenya.
- Establish the status of research on IPRs and IP protection and the direction it is taking in Kenya;
- Review & analyse current IPR practices in Kenya;

- Identify the conceptual issues and challenges for Kenya for policy formulation and implementation of an effective IP regime; and
- Assess IPR capacity in Kenya focusing on laws, policies and institutions; human resource capacity and the convergence and /or divergence between IPR laws and policies and national development imperatives.
- Identify areas requiring further in-depth research; Identify areas that require additional capacity to enhance effectiveness of the research institutions in Africa

3. *Scope of the Study*

In this report, we look at the trends in IPR protection, administration, enforcement and research in Kenya. We look at copyright, industrial property, plant breeders' rights and other emerging areas of IPP such as layout designs of integrated circuits and geographical indications. We will identify status of the law and policy, the administrative and management institutions and the challenges that Kenya faces in implementing international treaties for the protection of IP. The study is a part of a broader study covering Uganda, South Africa, Nigeria, Ghana and Kenya seeking to map the terrain of intellectual property protection and to identify the needs in terms of legislation, research and capacity.

C. Methodology

This study was carried out through library research and interviews with key informants including officials in the Industrial Property Institute, the Kenya Plant Health Inspectorate Service (KEPHIS), the Ministries of Trade and Agriculture, the Copyright Section in the Attorney General's chambers and the National Council for Science and Technology.

II. CONCEPTUAL FRAMEWORK

The emergence of new forms of wealth such as knowledge forms embedded in new technologies has brought enormous pressure to bear on existing forms of property rights. Some of these have not fitted as neatly into the dominant property rights' regimes as one would have hoped and problems have kept arising as to the appropriateness of those property notions in such cases. Developments in information technology have, for instance brought out questions concerning the capacity of existing copyright laws to protect the rights of actors in this sector while ensuring that the flow of information is not hampered.⁸ Another area in which this debate has been raised is that of biological resources.⁹ Existing IPR regimes ascribe greater value to germplasm that has been transformed through biotechnology than to land races.¹⁰ While the latter are designated as primitive cultivars, the former are characterised as elite varieties. This characterisation reflects value judgments that translate into monetary gains. The skewed valuation scale does not indicate a continuum from the raw material to a transformed product. There is thus a marked dichotomy between the valueless raw germplasm and the commodified varieties that are processed in laboratories.¹¹ Indeed the value of these resources is lowered by the standardisation of systems of production, knowledge and institutions across the world. While such standardisation has its benefits, it tends to disregard the need to preserve diversity and take into account the contribution of local knowledge and institutions in this effort.¹²

The implementation of an intellectual property rights system requires a clear legal and policy framework on these rights; a supportive infrastructure for the implementation of the laws and policies which includes trained personnel and office resources necessary to get the framework working. The role of law enforcement agencies such as the police, customs and revenue authorities cannot be overemphasized. The judiciary and legal practitioners ought to be aware of developments in IP law. In this regard, it is notable that most litigation on IP pertains to trademarks. There is very little case law on patents and breeders' rights. This may be attributable to lack of awareness and prevalence of exercise of these latter categories of IPRs.

The most critical test for an IP regime is the extent to which it promotes creation of new knowledge for national development. In the case of patents, the question of the development of endogenous technological capacity is critical. Further, an IP system that relegates traditional or indigenous knowledge to a subordinate position may serve only the interests of outsiders while leaving out forms of knowledge that are important in local domains.

Though most African countries have taken, or are in the process of taking the steps to ensure legislative compliance with international IPR norms, they lack capacity to effectively implement and harness these norms for national development. They have limited understanding of IPRs and the implications of instituting effective IP protection systems. There are very few people and institutions in the continent with experience and capacity to handle IPRs, especially with respect to trade, competition, investment and other recent global imperatives. Indeed the main drive behind the establishment of the International Lawyers and Economists against Poverty (ILEAP) in 2001 was a response to the identified capacity constraints of developing countries seeking to participate in the international trade arena.

The lack of expertise and dearth of knowledge on the state of research and policy analysis in IPRs relating to trade, existing capacity, level of policy analysis and demand, limited institutional capacity, communication of research findings and adequacy and effectiveness of research networks in IPRs is a big challenge to African countries seeking to domesticate the provisions of TRIPS. There is research being carried out on the interface between biotechnology and IPR and the impact of IPRs on access to drugs for ailments such as HIV-AIDS has assumed prominence in the wake of the case against the Kenyan government by pharmaceutical companies in 2001. However, there is no comprehensive analysis of IPR practices in Africa and the approach and challenges of policy formulation and implementation. There has also not been any assessment of the existing capacity in specific African countries and on the continent generally. In the South African region, a feasibility study is proposed to be carried out by the South Africa Research Management Association (SARIMA) in conjunction with the Association of Commonwealth Universities. It will explore possibilities of inter-university expertise sharing arrangement in intellectual property and technology transfer This is in recognition of the need to share the available expertise across the region.

Concerns about the negotiating capacity of African countries in WTO agreements such as TRIPS articulated in statements by most of the African ministers of trade at the Third Session of the Ministerial Conference held in Seattle, USA in November 1999 and more recently at the Fourth Session of the Ministerial Conference in Doha in November 2001 are indicative of the dearth of capacity of African countries to formulate workable IPR laws and policies and implement them effectively.

III. HISTORICAL CONTEXT

Intellectual property laws in Kenya, like most other laws, are a colonial heritage. It has been argued that British IP law was introduced into Kenya to advance general imperialist interests as at the stage at which it was introduced, the levels of literacy and technological advancement among the natives was relatively low and local innovation virtually non-existent.¹³ On becoming a British colony in 1897, the substance of the British common law, the doctrines of equity and the statutes of general application in Britain were extended to the colony. For instance, the 1897 East Africa Order in Council extended the application of the 1842 English Copyright Act, the International Copyright Act of 1844, the Fine Arts Copyright Act of 1862 and the Copyright (Musical Compositions) Act of 1888. The Copyright Act of 1842 comprised the main body of the law with the others supplementing it in the specialized areas.¹⁴ The amended Copyright Act passed in 1956 was extended to Kenya by the 1963 Order in Council. It is important to point out here that copyright laws applied to Kenya by the colonial authorities were designed to protect the monopoly rights of British publishers in Kenya, restrict the growth of the publishing industry in the country, provide censorship for publications that colonialists termed seditious, blasphemous, immoral or contrary to government policy and propagate the ideology of colonial superiority among the natives.¹⁵

The 1956 Act was superseded by the Copyright Act, chapter 130 of the Laws of Kenya, which came into operation in April 1966. While the enactment of a new legislation comprised an important political step of yoking out of colonial legal instruments, the substance of the law did not change much.¹⁶ The 1966 law was amended in 1975,¹⁷ 1982¹⁸ and 1989.¹⁹ The main thrust of these amendments were to make the Kenyan law better suited to Kenyan circumstances by for instance reflecting the economic situation in Kenya in fixing fees and also aligning the law to emerging international treaties on subject matter of coverage, enhancing penal sanctions for copyright infringement and providing for civil remedies for infringement. The most radical review of copyright law in Kenya however only happened in 2001 when a new Copyright Act was passed with a view to modernizing copyright law in Kenya to make it compliant with international treaties to which Kenya is a party and especially the Agreement on Trade related aspects of Intellectual Property Rights.

With regard to patents, it is notable that, even though the first registered patent in Kenya dates as far back as 1932, Kenya had no independent intellectual property protection system until 1989. Registration of patents was carried out by the Department of the Registrar General within the office of the Attorney General under the Patents Registration Act Cap. 508. Under Section 54 of this statute, only a person who was a grantee of a patent in the UK or a person deriving his right from a grantee by assignment or any other operation of law could apply to have his patent registered. Application had to be made within three years from the date of the UK grant and the patent would remain in force only as long as the patent remained in force in the UK.²⁰ This limited patent grant to persons with access to registration in the United Kingdom. It also made the process expensive and time-consuming. Moreover, the registration process did not address the criteria for obtaining protection or entail examination of applications.

It is against this background that National Council for Science and Technology and the Legal and Patents Committee were mandated to draw up guidelines for the best way in which the patent system could operate in Kenya, harmonize patent, trademarks and standards policies in Kenya and make recommendations pertinent to national patenting policy formulation and implementation. The Committee was convinced of the need to have an independent patent system. It pointed to the need for trained personnel and infrastructure for carrying out the examinations and processing applications. The Industrial Property Act Cap 509 was thus enacted in 1989 to replace the Patent Registration Act. It came into force in 1990. The Act was amended a number of times and finally replaced by the Industrial Property Act No. 3 of 2001 which reflects the current position of IP law and came into force on 3rd August 2001.

With regard to plant variety protection, Kenya has had a Seeds and plant Varieties Act since 1942. This was, however largely dormant until the 1990s when a plant breeders' registration office was established.

IV. LEGISLATIVE AND ADMINISTRATIVE FRAMEWORK

The principal legislations and formal instruments directly governing Intellectual Property Rights in Kenya include:

- (a) The Industrial Property Act, Cap 509 of the Laws of Kenya, 2001.
- (b) Trade Marks Act, Cap. 504 of the laws of Kenya
- (c) The Copyright Act, Chapter 130 of the Laws of Kenya, 2001
- (d) The Seeds and Plant varieties Act, Cap. 326 of the Laws of Kenya.

A. Intellectual Property Administration

The administration of intellectual property rights in Kenya is the shared responsibility of the registrar's department in the Attorney-General's chambers, the Kenya Industrial Property Institute (KIPI) and the Kenya Plant Health Inspectorate Service. It has been the intention of KIPI since inauguration to provide a one-stop shop for all intellectual property protection but this intention has not yet been realised. It is unlikely to be realised given that the Copyright Act 2001 has established an independent Board to administer copyright and that KEPHIS' role in the administration and management of plant breeders' rights has been entrenched through giving the institution greater autonomy.

The situation currently obtaining in Kenya currently therefore is that plant breeders' rights (PBRs) are administered by the Kenya Plant Health Inspectorate Service (KEPHIS) under the Ministry of Agriculture and Rural Development through The Seeds and Plant Varieties Act, Cap 326 of the Laws of Kenya. Copyright and neighbouring rights, comprising literary, artistic, audio-visual, broadcasting, software as well as the rights of performers, on the other hand are administered by the Office of the Registrar General under the Attorney General Chambers through the Copyright Act, Cap 130. Administration of industrial property rights in the form of trademarks, patents, industrial designs and utility models is the mandate of the Kenya Industrial Property Institute (KIPI) through the Industrial Property Act Cap 509 and the Trademarks Act cap 506 and under the general rubric of the Ministry of Trade and Industry.

1. *The Industrial Property Act*

The Industrial Property Act provides for the establishment of KIPI and sets out its statutory functions as being to grant original industrial property rights, screening technology transfer agreements and licences, provide to the public industrial property information for technological and economic development and promote inventiveness in Kenya. The Institute is placed under a board of directors drawn from a diversity of stakeholders who include the relevant line ministries and institutions such as the Attorney-General's Chambers, Ministries of Finance and Education Science and Technology. Other institutions represented on the board include the Kenya Medical Research Institute (KEMRI), the Kenya Industrial Research Development Institute (KIRDI), the Kenya Association of Manufacturers (KAM) and the Jua Kali Association.

As pointed out above the genus of intellectual property covered under this Act includes patents, utility models, industrial designs and technovations. Patents are granted for product or process inventions that are new, non-obvious or involving an inventive step and industrially applicable. The Act excludes discoveries, scientific theories, mathematical methods, schemes, rules or methods of doing business, performing purely mental acts or playing games, mere presentation of information among others from the ambit of patent protection as not being inventions. Plant varieties and inventions contrary to public order, morality, public health and safety, principles of humanity and environmental conservation are also excluded from patentability.

The Act defines utility models to mean 'any form, configuration or disposition of element of some appliance, utensil, tool, electrical and electronic circuitry, instrument, handicraft mechanism or other object or any part of the same allowing a better or different functioning, use or manufacture of the subject matter or that gives some utility, advantage, environmental benefit, saving or technical effect not available in Kenya before...'. This provision takes care of the informal sector Kenya for whom meeting the requirements of patentability may be a daunting challenge.

It is important to point out at this juncture that the Industrial Property Act was revised to align it to the provisions of the World Trade Organization's Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS). At section 58, the Act allows for parallel importation by limiting patent rights 'in respect of articles put on the market in Kenya or in any other country or imported into Kenya'. This provision was intended to facilitate access to essential drugs especially for HIV AIDS.

2. *The Trade Marks Act*

The Trade Marks Act, Cap. 506 of the Laws of Kenya deals with the registration of trade marks and service marks. The main criteria for registration of trademarks and service marks are distinctiveness and originality. Distinctiveness relates to the possibility to distinguish the goods that a trademark is connected with from goods for which there is no such connection. The Act provides for registration under parts A and B on the basis of distinctiveness and capability of distinguishing the goods of one proprietor from those of another. Marks that are likely to deceive or cause confusion, contrary to law and morality, scandalous, identical to or resembling registered trade marks are exempt from registration under the Act.

The Act has been amended several times and there is currently a proposal for amendment to, among others:

- a) Provide for the interpretation of the Nice Agreement concerning the International classification of goods and services for the purposes of registration of marks;
- b) Provide interpretation of the Vienna Agreement establishing an International Classification of the Figurative Elements of Marks;
- c) Align with the provisions of the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS) and specifically provide for protection of well-known marks as required by Article 16 of that Agreement;
- d) Bring the Act into conformity with the provisions of Trade Marks Law Treaty;
- e) Give effect to the provisions of the Madrid Agreement and the Protocol in Kenya following accession to the Madrid Agreement and Protocol; and
- f) Make provision for requirements of trade mark agents to be legal practitioners.

Trade mark law is the most frequently used IP legislation. The first trademark was registered in 1936. KIPRI receives very many trademark applications from foreign applicants with only about 10% of the total applications bring local. The law requires that foreign applicants employ service of local agents to register their marks. There have been a number of cases brought before Kenyan courts for infringement of trademark rights.

3. *The Copyright Act*

The main sources of copyright law in Kenya are the Copyright Act, 1966, the Copyright (Amended) Act, 1975 (Act No. 5 of 1975), the Copyright Act Cap 130 of the Laws of Kenya, 1983 and revised in 1991 and the Copyright Act 2001. The English common law also provides a source of Kenyan copyright law. The 2001 Act establishes the Kenya Copyright Board which is charged with the responsibility of:

- a) Directing, coordinating and overseeing the implementation of laws and international treaties and conventions to which Kenya is a party and which relate to copyright and neighbouring rights;
- b) Licensing and supervising the activities of collective management societies;
- c) Devising promotion, introduction and training programmes on copyright and related rights;
- d) Organise legislation on copyright and related rights and propose other arrangements to ensure constant improvement and effectiveness;
- e) Enlighten and inform the public on matters relating to copyright;
- f) Maintain an effective data bank on authors and their works; and
- g) Administer all matters of copyright and related in Kenya provided for under the Act.

Administration of copyright has traditionally been the remit of the Attorney-General's Chambers' Office of the Registrar General. The appointment and inauguration of the board, however indicates the intention to have a fully fledged office administering copyright outside the Attorney-General's office and run by an executive director. The Board is drawn from registered software associations, musicians' associations, filming associations, publishers, authors and writers associations, performing artistes associations, public universities, associations of producers of sound recordings, associations of broadcasting stations, producers and distributors of audio-visual works among others. The board has not yet appointed an executive director.

The subject matter of copyright under the Act includes literary works, musical works, artistic works, audio-visual works, sound recordings and broadcasts. Kenya's copyright law also provides for protection of folklore.

4. *The Seeds and Plant Varieties Act*

This Act deals with both phytosanitary requirements as well as the grant of plant breeders' rights (PBRs). PBRs are granted for clearly distinguishable, homogenous, uniform and stable varieties of plants. KEPHIS deals with PBRs which it grants for a limited period of up to 25 years. Generally, the scope of the breeder's rights is quite extensive. The breeder has rights to control the production, commercialisation, offering for sale and the marketing of propagating material of the protected variety. The Plant Variety Protection Office (PVPO) was established within KEPHIS in 1997 with the objective of implementing the dormant Part IV of the Seeds and Plant Varieties Act. The criteria for granting PBRs are very similar to the postulated by the 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV), although Kenya is only a signatory to UPOV 1978.

Once KEPHIS receives an application for PBRs, it has to conduct tests and satisfy itself that the variety qualifies as per the criteria of novelty, distinctness, stability and uniformity. There are two ways of handling the application and the duration from the time of the application up to the time a certificate is granted depends on the method followed. The two ways are as follows:

1. KEPHIS may opt to carry out the variety tests itself. Thus two growing seasons are required and this means that the applicant has to wait for a period of two years. At the same time KEPHIS will conduct searches at the UPOV level to ensure that similar varieties have not been protected elsewhere in the world. Normally KEPHIS conducts the tests locally for food crops such as maize and beans.
2. KEPHIS may also opt to take over the results of tests from other PVP offices under UPOV. This process of obtaining test results from other sources takes about three months. Normally this method is applied for horticulture applications. Kenya lacks the requisite resources to run tests for ornamentals developed in foreign countries. The applicant bears the costs of obtaining the results. Kenya has entered into agreements with various UPOV members with a view to accessing test results.

V. MAJOR INSTITUTIONAL STAKEHOLDERS

A. Kenya Industrial Property Institute

As indicated above, The Kenya Industrial Property Office (KIPO) was established in December 1989 upon enactment of the Industrial Property Act (IPA) Chapter 509 of the Laws of Kenya, which came into force on 2nd February 1990. The repeal of the Industrial Property Act cap 509 by the 2001 Industrial Property Act which conforms with the requirements of the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPs) also changed the name of KIPO to the Kenya Industrial Property Institute (KIPI).

KIPO is organized in three departments namely, Administration; Legal (trademarks & service marks); and Technical (patents, industrial designs, utility models and innovations). It has an established Patent Information & Documentation Centre (PIDOC) with over 14 million patent documents that are available to the public at a small fee. The Institute has staff strength of about 83 with technical/legal staff holding at least a degree. Most of the work is processed using IT equipment which the institute has invested heavily in. There is ongoing a process of getting the trademark information online.

It is worth noting at this juncture that KIPi aspires to be the one-stop shop for intellectual property rights and makes provision in its establishment for copyright officers even as its main remit is industrial property. Further, while section 26 of the Industrial Property Act excludes plants from patentability in Kenya, parts of plants and the processes and products of biotechnology are patentable. In this regard KIPi has already received applications for plant biotechnology products although not from local investors. KIPi is also set to deal with ABS (Access and benefit sharing) problems before granting a patent. This means that the applicant must disclose the origins of the materials and knowledge encapsulated in the invention. This is a step forward towards curbing biopiracy. In terms of biosafety, KIPi is also involved and was involved in the negotiations leading to the conclusion of the Cartagena Protocol on Biosafety. KIPi is also a member of the National Biosafety Committee (NBC) and liaises closely with the National Environmental Management Authority (NEMA), the implementing agency of the Environment Management and Coordination Act, 2000 to safeguard the environment.

B. Kenya Plant Health Inspectorate Service (KEPHIS)

The office that administers PBRs in KEPHIS was founded in 1997 and has functioned since 1998. Proposals for amendment of the Seeds and Plant Varieties Act proposes to establish KEPHIS as a body corporate with perpetual succession and capable of suing and being sued and performing all such other things or acts as are necessary for the performance of all functions under the Act. The management of the corporation is proposed to be vested in a board of directors for the corporation which shall appoint a managing director. The functions of the corporation include among others:

- a) To establish a plant variety protection office to liaise with the International Union for the Protection of New Varieties of Plants (UPOV); and
- b) To register and deregister seed merchants, seed growers, agents and any other person required by the Act to be registered and deregistered.

C. Attorney General's Chambers

The Office of the Registrar General

A section of the Attorney General Chambers handles copyright. An officer, the only full time employee of the section, works with WIPO and other international copyright organizations in the work. This office is more focused on law reform than on the day-to-day administration of copyright although, the AG's office is represented in the Music Copyright Society of Kenya (MCSK).

The Copyright Board

The Copyright Board was inaugurated in July 2003. While the intention under the Act is to have the board delinked from the Attorney-General's chambers, the process of delinking has not occurred as yet. The Board has developed implementing regulations for the Act but has not yet begun to perform its functions in earnest.

D. The National Council for Science and Technology

The National Council for Science and Technology established under the Science and Technology Act, Cap 250 of the Laws of Kenya is mandated to regulate research activities in Kenya. It is charged with the responsibility of granting research licences for research carried out in Kenya. Some of these research activities may generate IPRs. Indeed the Council is represented in the KIPi board.

E. Other Stakeholders

Public Research Institutions

Kenya Agricultural Research Institute (KARI)

This is a national institution which employs most of the individual local plant breeders. It is renowned for breeding new varieties of food crops such as tissue culture bananas and other disease free planting materials. In the past KARI has concentrated on conventional breeding techniques such as crossing and tissue culture. One of the main projects at KARI has been the development of tissue culture banana. This project has been successful and by June 2003, over 5,000 local farmers were growing tissue culture bananas.

Recently, KARI set up a Biotechnology Centre which is working on three genetic engineering projects. The projects are still in the field stage and concrete results are yet to be realized. The genetic engineering project involves the development of Bt maize, Bt cotton and transgenic sweet potatoes.²¹

The Kenya Forestry Research Institute (KEFRI)

KEFRI conducts extensive activities that have IP implications. It catalogues and conserves medicinal plants. The cataloguing of medicinal plants has proved problematic as in the absence of any regime regarding the ownership of this knowledge; the catalogue cannot be made public without risking the loss of any IPRs whether they are individual, communal or national.

The Kenyan Medical Research Institute (KEMRI)

KEMRI's research has IP implications, particularly the research on traditional medicine and drugs. The research is both for their potential as phytomedicinal products and for more sophisticated pharmaceutical products. This area is likely to expand rapidly with the drafting of a traditional Health Practitioners Bill published by the Ministry of Health in late 2002.

Others

Other national institutions are the Kenya Trypanosomiasis Research Institute (KETRI) and the Kenya Marine and Fisheries Research Institute (KEMFRI), and those involved with particular agricultural products such as the Pyrethrum Board of Kenya and other organisations focussed on Tea and Coffee production.

Public Universities

The role of higher institutions of learning in innovation has recently come into sharp focus. The activities of researchers at these institutions are likely subjects of intellectual property protection. Some of these institutions have begun to work towards establishing technology transfer offices with intellectual property policies guiding activities in such offices. Local universities which have faculties of engineering, medicine and agriculture can potentially develop technologies warranting protection as IP. The joint project between the University of Nairobi and the University of Oxford on the development of an AIDS vaccine where there was contestation between the two institutions on who should be the owner of the IP has highlighted the need for clear IP policies in Universities.

Seed Companies

The seed industry in Kenya has been liberalized since the early 80s. It is a key industry since the maximum expression of PBRs is to be found in seed technology. Most seed companies have the capacity to carry out plant breeding activities. Large companies such as Syngenta and Monsanto have not yet applied for any PBRs in Kenya and they are simply waiting for the law to be modernized with a view to accommodating genetic engineering. Local seed companies have been developing varieties for food crops while foreign companies are

involved mainly in the development of horticulture and floriculture varieties.

Flower Companies

Most flower companies are foreign with their parent companies being incorporated in Europe (and particularly in The Netherlands or Germany). Consequently they are not interested in breeding locally and most varieties of flowers are developed abroad. In Kenya the companies just multiply the cuttings for commercial planting. However, the government (through the Kenya Plant Health Inspectorate Services-KEPHIS) has been encouraging them to register their varieties locally through an agent. Indeed most of the applications to KEPHIS relate to Rose varieties.

STAK (The Seed Trade Association of Kenya)

This is an association of seed merchants whose membership includes seed companies, local universities such as Egerton University and Moi University and plant breeders presented by the Plant Breeders Association of Kenya (PBAK). STAKS' main aim is to represent the seed industry in Kenya's, both regionally and internationally. Previously, only KARI used to breed new plant varieties but after the economy was liberalised seed companies have been engaged themselves in plant breeding. For this reason, STAK is interested in the development of PVP policy and law in order to achieve more enhanced intellectual property rights. One must also note that PBAK is a member of STAK. The local seed companies have been breeding food crops while foreign seed companies breed horticultural crops such as flowers. The plant breeders (including KARI) have to liaise with seed companies which multiply and commercialise the new varieties. For example KARI has had to enter into agreements with seed companies for them to multiply and produce seeds of the variety. The seed companies are required to pay royalties to KARI.

STAK is an active member of the Africa Seed Trade Association (AFSTA) and the International Seed Federation (ISF). Indeed STAK is the founder member of AFSTA and it hosts the secretariat of AFSTA. One of the objectives of STAK is to act a source of seed information for both members and interested parties nationally, regionally and internationally. It also seeks to promote activities that facilitate the determination of seed policies and legislation in Kenya and the East African Region. Towards this objective, STAK hosts the secretariat for harmonization of seed policy and regulations in Eastern and Central Africa. STAK assists Uganda, Kenya, Tanzania, Ethiopia, Rwanda and Burundi to develop capacity for developing PVP Policy and legislation.

STAK collaborates with Moi University to develop capacities for seed technology and currently it sponsors one master's student. It also participated in the development of the curriculum for Moi University in order to make the syllabus suitable for the seed industry. For example, the sponsored student is researching on the life time of seeds and the result thereof are to be used to propose changes in seed law. Further STAK feels that individual seed companies also have capacity to undertake research on PVP law and policy and the only thing that remains is to actualise this capacity.

As an association, STAK does not have legal personnel, to carry out reservation law and policy. However, STAK hires lawyers whenever there is technical PVP work. STAK tries to influence PVP law and policy by making proposals to KEPHIS and in particular it participates in the committee of KEPHIS which deals with PVP law review.

In the region STAK supports and participates in the Eastern and Central Africa programme for Agricultural Policy Analysis (ECAPAPA) which deals with issues relating to national variety lists and food security.

STAK is regulated by KEPHIS and when KEPHIS misuses legislation, and then STAK has to complain to the Minister for Agriculture. STAK may also lodge complaints with the minister when KEPHIS imposes excessive fines which may strangle the already struggling seed industry. STAK may also object when KARI applies for PBRs over varieties, which are not new or which do not meet the criteria set out in Part .IV of the Seeds and Plant Varieties Act.

Collecting Societies

Societies that collectively manage copyright are also key stakeholders. These include the Music Copyright Society of Kenya (MCSK), The Reprographic Rights Organization of Kenya (KOPIKEN) and The Society of Reforming Activists of Kenya (SPAK). Under the Copyright Act, these are represented on the Copyright Board and must apply for registration to the Board.

International Institutions

Consultative Group on International Agricultural Research (CGIAR)

Kenya hosts a number of International Agricultural Research Centres (IARCS) under the Consultative Group on International Agricultural Research (CGIAR). The mandate of these institutions includes promotion of the conservation and sustainable use of plant genetic resources for the benefit of present and future generations (International Plant Genetic Resources Institute-IPGRI) and research on livestock (International Livestock Research Institute – ILRI) and agro-forestry (World Agroforestry Centre-ICRAF). The work of these institutions has IPR implications. The centres have individually and as a collective under the CGIAR formulated IP policies to guide their investment in research. The main thrust of these policies is developing public goods and putting all IP generated in the public domain.

Building the capacity of partners is a major thrust of CG centres. In this regard IPGRI has established the Genetic Resources Policy Initiative (GRPI). The GRPI is a project aiming to strengthen the capacity of national policy makers in southern countries to develop comprehensive genetic resources policy frameworks. The GRPI is currently focusing its work in six countries. In Africa it is focusing on Ethiopia, Egypt and Zambia. IPGRI has also promoted awareness of international laws on genetic resources among the participating governments. For example, IPGRI in consultation with the African Centre for Technology Studies (ACTS) has produced a report on the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in a bid to inform countries of the provisions of the treaty and assist governments that have ratified it to domesticate its provisions.

United Nations Food and Agriculture Organisation (FAO)

It has been difficult to establish the scope of the activities of FAO in Kenya as not much information has been available. The reason given is that FAO works in collaboration with the government and the content of any reports cannot be disclosed until approved by the relevant ministry. However, there were indications that FAO funded the review of local phytosanitary laws in order to bring them to conformity with the International Plant Protection Convention (IPPC) and the revision of the seeds and Plant Varieties Act. Specifically the new Draft Bill combines the Crop Protection Act (cap 324) and the Suppression of Noxious Weeds Act (cap 325).

FAO has also supported workshops on the understanding of the International Treaty on Plant Genetic Resources for Food and Agriculture held under the rubric of the research liaison office at the Ministry of Agriculture.

The African Centre for Technology Studies (ACTS)

The African Centre for Technology Studies is an international policy research organization based in Nairobi. It was formed in 1988 to conduct policy research on issues of critical importance to Africa's development. ACTS provides affiliation to researchers working on science, technology and environment. ACTS was very instrumental in the promulgation of the independent industrial property law in Kenya in 1989.²² ACTS also contributed significantly to the debate on technology and IPR in the negotiations on the Convention on Biological Diversity and has contributed to discussions on the relationship between TRIPS and the CBD on the question of IPRs and specifically on the issue of plant variety protection. More recently ACTS' research has focused on the place of IPRs in the national innovation system in the context of agricultural biotechnology development in African countries. It has also organised meetings for African diplomats in Geneva to meet various stakeholders in Africa and discuss African positions at international meetings.

Non-Governmental Organizations (NGOs)

Non-governmental organizations have also joined the fray on IPRs in terms of informing Kenya's position at international meetings as well as pushing for favourable provisions in IP laws. Some of the NGOs are: Econews Africa; Actionaid; African biotechnology Stakeholders' Forum; Biotechnology Trust Africa; African Technology Policy Studies (ATPS) and Kenya Association for Access to Essential Medicines (KAEM).

VI. INTELLECTUAL PROPERTY STATISTICS

KIPI has invested a lot in IT and putting documentation online with the help of the World Intellectual Property Organization (WIPO). Statistics available indicate that no significant change has occurred in the number of patent applications since the promulgation of the Industrial Property Act in 1989. There are very few applications for patents from resident Kenyans. For instance in 1988, only one (1) resident application was received compared to eighty-nine (89) from non-residents. Out of these applications, seventy-five (75) non-resident applications were granted along with the one (1) resident application.²³ In the 1987 figures, a hundred and twenty (120) non-residents applied for patents compared to nil residents. Further, between 1980 and 1986, six hundred and seventy-five (675) non-resident patent owners were registered while no residents were registered in the same period.²⁴

A. Applications filed at the Kenya Industrial Property Institute

Trademarks & Servicemarks

Period	Foreign	Domestic	Total
Total number of applications for registration of Trademarks and Servicemarks filed between 1990 and 2001	1303	539	1842

Patents

Period	Foreign	Domestic	Total
Number of patents granted from 1998 to October 2003	89	29	118

Industrial Designs

Period	Foreign	Domestic	Total
Number of designs registered in Kenya between 1998 and September 2003	46	193	239

Source: KIPI, Ministry of Trade and Industry, Nairobi, 2004

Plant Breeders' Rights

Table 1: Distribution of PBR Applications for Agricultural Products

Crop	Category	Source of Application				Total
		Foreign	Local			
			Public	Private	Joint Public & Private	
Oat	Cereal	-	1	-	-	1
Finger Millet	Cereal	-	-	-	2	2
Barley	Cereal	-	-	7	-	7
Proso millet	Cereal	-	-	-	1	1
Pearl millet	Cereal	-	3	-	-	3
Sorghum	Cereal	-	2	-	5	7
Wheat	Cereal	-	4	1	25	30
Maize	Cereal	-	25	14	15	54
Tea	Industrial	-	12	21	-	33
Pyrethrum	Industrial	-	23	-	-	23
Coffee	Industrial	-	4	-	-	4
Cotton	Industrial	-	1	1	-	2
Macadamia	Industrial	-	4	7	-	11
Sugarcane	Industrial	-	6	-	-	6
Safflower	Oil	-	1	-	-	1
Sunflower	Oil	-	5	5	-	10
Castor Oil	Oil	-	2	-	-	2
Soybean	Oil	-	7	-	-	7
Bracharia	Pasture	-	1	-	-	1
Rhodes grass	Pasture	-	5	-	-	5
Guinea grass	Pasture	-	1	-	-	1
Setaria	Pasture	-	2	-	-	2
Clover	Pasture	-	-	1	-	1
Pigeon pea	Pulse	-	4	-	-	4
Dolichos bean	Pulse	-	2	-	-	2
Runner bean	Pulse	-	-	1	-	1
Dry beans	Pulse	-	6	1	6	13
Peas	Pulse	7	-	-	-	7
Cow pea	Pulse	-	3	1	-	4
Mung bean	Pulse	-	2	1	-	3
Cassava	Root crop	-	2	-	-	2
Totals		7	128	61	54	250

Source: Kenya Plant Health Inspectorate Services (KEPHIS), Statistics of Applications for Plant Breeders Rights in Kenya as at June 2003.

Table 2: Distribution of PBR Applications for Horticultural Products

Crop	Category	Source of Application				Total
		Foreign	Local			
			Public	Private	Joint Public & Private	
Strawberry	Fruit	3	-	-	-	3
Passion fruit	Fruit	1	-	-	-	1
Raspberry	Fruit	1	-	-	-	1
Alstroemeria	Ornamental	25	-	-	-	25
Aster	Ornamental	1	-	-	-	1
Carnation	Ornamental	2	-	-	-	2
Eryngium	Ornamental	1	-	-	-	1
Gysophila	Ornamental	3	-	-	-	3
Limonium	Ornamental	8	-	-	-	8
Pelagornium	Ornamental	4	-	-	-	4
Phlox	Ornamental	4	-	-	-	4
Rose	Ornamental	231	-	-	-	231
Solidago	Ornamental	2	-	-	-	2
Tegetes	Ornamental	1	-	-	-	1
Calla lily	Ornamental	3	-	-	-	3
Aramanthus	Vegetable	-	-	4	-	4
Rape seed	Vegetable	14	-	-	-	14
Pepper	Vegetable	1	-	-	-	1
Sweet potato	Vegetable	1	-	-	-	1
Tomato	Vegetable	-	-	1	-	1
Irish potato	Vegetable	-	4	-	-	4
French bean	Vegetable	13	-	-	-	13
		319	4	5	0	328

Source: Kenya Plant Health Inspectorate Services (KEPHIS), Statistics of Applications for Plant Breeders Rights in Kenya as at June 2003.

It is interesting to note that foreign applicants do not apply for protection of food and industrial crop varieties. Further, it is notable that most of the applications for PBRs are made by public research institutes such as the Kenya Agricultural Research Institute (KARI). Among the local breeders, only Oserian Flowers has applied for PBRs over ornamentals. The other local breeders such as KARI and Kenya Seed Company have made applications in relation to food crops as well as industrial crops such as tea, sugarcane, macadamia, cotton and pyrethrum. Kenya Malt has also made about six applications over Barley varieties.

One may also observe that foreigners are highly involved in the development of horticultural crops and specifically the ornamentals such as roses. The varieties of roses alone account for over 70% of all the applications for horticulture products (This is 40 % of all the applications for both agricultural and horticultural varieties).

Most applicants are however financially incapacitated and cannot afford to pay the requisite fees for the grant of PBR certificates. Some public universities have not applied for PBRs citing high fees as an obstacle. Individual breeders are also inhibited by the high costs. One individual breeder has gone all the way but is now unable to pay the certificate fee.²⁵

Due to the high fees levied as well as other reasons, only 169 applications had been granted by the end of October 2003. By then a total of 604 applications had been submitted. It is also worthwhile to note that the process of dealing with applications is quite transparent and to illustrate this there is evidence to show that at least 85 applications have been objected to by at least five objecting bodies.

VII. INTERNATIONAL AGREEMENTS AND ARRANGEMENTS

A. Membership of International Bodies

Kenya is actively involved in the formulation and implementation of international policy on IP. She is a party to the following regional/international treaties and agreements on IP:

Paris Convention for the Protection of Industrial Property (1883); Nairobi Treaty on the Protection of the Olympic Symbol (1981); Trademark Law Treaty (TLT) (1994); Madrid Agreement Concerning the International Registration of Marks (1891) since 26th June 1998; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989) since 26th June 1998; the World Trade Organization's Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS Agreement) of 1995; Patent Co-operation Treaty (PCT) of 1970 since 1994; Lusaka Agreement establishing ARIPO of 1976; Harare Protocol for the Protection of Patents and Industrial Designs of 1982; Banjul Protocol for the Registration of Marks; WIPO Treaty Establishing WIPO of 1970; and the International Union for the protection of New Plant Varieties (UPOV), 1978 since 1999.

Kenya also recognises and uses the following regional/international treaties and agreements in IP: Berne Convention for the Protection of Literary and Artistic Works (1886); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961); Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971); Brussels Convention Relating to the Distribution of Programme-Carrying Signals transmitted by Satellite (1974); WIPO Copyright Treaty (WCT) (1996); WIPO Performances and Phonograms Treaty (WPPT) (1996); Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977); Hague Agreement Concerning the International Deposit of Industrial Designs (1925); Strasbourg Agreement Concerning the International Patent Classification (1971); Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957); Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (1973); Locarno Agreement Establishing an International Classification for Industrial Designs (1968); Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891); and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989). KIPI is a Receiving Office, Designated Office and an Elected Office for PCT applications and ARIPO.

Kenya has ratified the International treaty on Plant Genetic Resources for food and Agriculture but has not put in place national legislation to domesticate its provisions. Of particular importance here are the provisions on farmers' rights which are a genus on IPRs. These are provided for at article 9 of the Treaty as follows:

9.1 *The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.*

9.2 *The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:*

(a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;

(b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and

(c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

9.3 *Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.*

VIII. REGIONAL INSTITUTIONS IN INTELLECTUAL PROPERTY RIGHTS

A. African Regional Industrial Property Organization (ARIPO)

ARIPO is made up of a Treaty and a Protocol to the Treaty. The Treaty²⁶ basically sets up the administrative organs and financial obligations of its member states. It is constitutional in nature. It currently has 16 members and KIPI is designated as an official receiving office for ARIPO applications. The objectives of the Treaty are:

- a) the promotion of the harmonisation and development of the industrial property laws, and matters related thereto, appropriate to the needs of its members and of the region as whole;
- b) the establishment of such common services or organs and development of the industrial property activities affecting its members;
- c) assisting its members in the development and acquisition of suitable technology; and
- d) the evolution of a common view in industrial property matters.

The offices of ARIPO are in Harare, Zimbabwe where the established Patent Documentation and Information Centre (PIDOC) provides members and potential member states with technological information available from patent and patent-related documentation. The Protocol regulates industrial property rights and each ARIPO member state is implicitly allowed to operate distinct national patent regimes. At present, there are three categories of patent regimes operating in the ARIPO member states. The first category includes those countries such as Botswana, Lesotho and Swaziland which confer automatic protection to patents registered in South Africa. The second category includes countries which require that patents be granted in the United Kingdom prior to their re-registration in these countries. The third category of states is those that operate independent

patent regimes.²⁷ These are Kenya, Malawi, Sudan, Zambia and Zimbabwe.

The ARIPO regime has three distinct features on patentable subject matter. First, the regime has no concept of non-patentability. Second, it adopts the absolute novelty criteria for patentability. Third, both the concept and criteria for patentability are conditional upon national patent laws. The system that ARIPO adopts is that everything is patentable unless the designated state legislation stipulates otherwise. The regime confers on its member states the power to refuse to acknowledge an ARIPO patent on the grounds that the invention is not patentable in accordance with the Protocol and that patent cannot be granted under the national law of that State because of the nature of the invention.

Consequently, the scope and content of the subject matter of ARIPO patent protection is determined by the national law of the designated state. In the ARIPO system, the national patent law is the final determinant of patentable subject matter, the duration of the patent, the enforceability of patent rights and the effectiveness of the grant of an ARIPO patent. If conflict arises between the ARIPO patent regime and national patent laws, the national patent regime prevails. Thus the ARIPO patent system loosely regulates the national interests of its member states. This reflects the level of interaction between the ARIPO patent regime and the national patent systems. There are, however, potential areas of tension and conflicts could arise upon the application of the regional and national patent regimes within the same jurisdiction.

Under section 3 (9) of the Protocol, ARIPO patents are granted for inventions upon fulfilment of three criteria of novelty, inventive step and industrial applicability. With respect to the novelty criteria, absolute novelty is adopted. The ARIPO Protocol provides that “an invention is new if it is not anticipated by art.”²⁸ Further, “everything made available to the public anywhere in the world by means of written disclosure shall be considered prior art.” The adoption of the absolute novelty concept is incompatible with the economic needs and development goals of the ARIPO States for several reasons.

Apart from ARIPO, there are two regional documents that attempt to address the issues of patent protection, namely the Lomé Convention and Lagos Plan of Action. These two documents espouse policies that relate to acquisition and absorption of foreign technology. However, the documents emphasize trade in tangible as opposed to intangible products.

B. Lomé IV Convention

In the Lomé IV Convention, patent protection is mentioned as a general undertaking on the part of the European Community “to assist the ACP countries to develop their technological base and indigenous capacity and, specifically, to assist these countries in ... evaluation, acquisition ... and ... negotiation of foreign patents on favourable terms and conditions.”²⁹ However, the Convention does not address the question of how protection and enforcement of patent rights is to be achieved. Although the Convention refers to transfer of technology,³⁰ and is clear on the modes and terms of acquisition,³¹ it does not, provide any structure or mechanism for enforcement of the proprietary rights embodied in some of these technologies. Further, the Convention does not refer to the GATT Uruguay Round on this subject as it does for trade in services.³² From this omission, it can be aptly stated that Lomé IV does not link regional patent protection with IPP regimes.

C. The Lagos Plan of Action

The Lagos Plan of Action represents an initiative by the Organization of African Unity, in conjunction with the Economic Commission for Africa, to develop a regional social and economic strategy for African development.³³ Despite its elaborate provisions, the Plan is silent on matters of regional patent protection.

The Plan aims “to put science and technology in the service of development” by reinforcing the autonomous capacity of the African countries in this field.³⁴ The Plan however, is mute on the question of how patent rights embodied in these technologies are to be acquired, protected and enforced. Under article 73 (c), the Plan stipulates that inventions, patents and technical know-how should be made available freely by the indus-

trialized countries. This provision has its roots in the right to development associated with the call for a New International Economic Order.³⁵ It is however a matter of discussion as to whether this provision is, firstly realistic and secondly, whether it enhances regional patent protection.

Given the proprietary nature of patent rights, the call for free access to patents is a remote goal. In the IPP system, patent rights are private property rights and cannot be freely acquired as stipulated in the Lagos Plan of Action. Any expropriation thereof is subject to the international standards of adequate, prompt and effective compensation. Further, free access to patent rights as advocated by the Lagos Plan is counter-productive as it removes the incentive that is deemed essential to spurring inventive activity. It also encourages free riding which is a cost to established enterprises. These practices are viewed as a distortion of international trade. In this respect, the Lagos Plan needs refinement to reflect emerging regional issues related to contemporary patent protection. To make the Plan more appropriate to regional patent protection issues, provisions for regulating the acquisition, forfeiture, and enforcement of patent rights and obligations must clearly stipulated.

D. OAU Model Law

At a regional level, the then Organization of African Unity (OAU) – now Africa Union (AU) has developed and adopted a model law for the recognition and protection of the rights of local communities, farmers and breeders and for the regulation of access to biological resources. The main aim of the legislation is to ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources, and knowledge and technologies in order to maintain and improve their diversity as a means of sustaining the life systems. Among others the specific objectives include, for instance, the recognition, protection and support of the inalienable rights of local communities including farming communities over their biological resources and crop varieties, knowledge and technologies. The aim of the model law is to create coherence among national legislation.

The model law, while making provision for community rights, farmers' rights and plant breeders' rights, does not recognise patents over life forms.³⁶ The issue of community rights is a very sensitive one at national levels. It remains to be seen whether African countries will adopt the model law as a basis for plant variety protection at national levels. It is indeed noteworthy in this regard that some countries like Kenya have adopted UPOV (1978 version). Such issues as land tenure and protection of traditional knowledge are very complex and their discussion at national level tends to challenge the rights and authority of governments.

IX. INTERNATIONAL PROCESSES

A. Participation in negotiations

Kenya's participation in international processes and negotiations is better than most African countries'. However, there are problems of capacity to send adequate personnel to address the breadth of issues covered at such fora. In certain instances, representation at key fora is by diplomats who may not have the situation on the ground at their finger tips. There is also the problem of dispersed responsibility for IPRs among different departments which may hinder effective representation and articulation of issues.

X. NEW LAWS

While the copyright and industrial property laws in Kenya have been aligned to TRIPS provisions, the revision of the Trademarks Act and the Seeds and Plant Varieties Act is still ongoing. Further, a need has arisen for the promulgation of new laws to deal with geographical indications and layout designs of integrated circuits.

A. Trademarks Act

As pointed out above, the amendment of the trademarks law seeks to among others:

- a) Provide for the interpretation of the Nice Agreement concerning the International classification of goods and services for the purposes of registration of marks;
- b) Provide interpretation of the Vienna Agreement establishing an International Classification of the Figurative Elements of Marks;
- c) Align with the provisions of the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS) and specifically provide for protection of well-known marks as required by Article 16 of that Agreement;
- d) Bring the Act into conformity with the provisions of Trade Marks Law Treaty;
- e) Give effect to the provisions of the Madrid Agreement and the Protocol in Kenya following accession to the Madrid Agreement and Protocol; and
- f) Make provision for requirements of trade mark agents to be legal practitioners.

B. Seeds and Plant Varieties Act

The changes sought to be made to this Act include, among others:

- a) Establishment of KEPHIS as a body corporate; and
- b) Establishment of a plant variety protection office;

C. Geographical Indications

The draft Bill on Geographical Indications introduces legislation in this area for the first time and seeks to protect geographical indications regardless of registration and makes provision for homonymous geographical indications. It also provides for the remedies for infringement.

D. Layout-Designs of Integrated Circuits

The new Bill also introduces legislation in this area for the first time and seeks to provide protection of layout-designs of integrated circuits in order to comply with Article 35 of the Agreement on TRIPS; makes provision for duration of protection and remedies for infringement.

XI. ASSESSMENT OF NEEDS AND RECOMMENDATIONS

A. National infrastructure

Kenya's IPR management infrastructure has benefited significantly from WIPO's magnanimity. KIPi has a fairly good library and has benefited from training courses provided and sponsored by WIPO in developing its human resource base and the provision of computers and software for IP management. The PIDOC was established with assistance of WIPO and KIPi is able to carry out research exhaustively by accessing international IP databases online.

The situation is different for KEPHIS and the Registrar-General's Department and by association the Copyright Board. The latter have inadequate infrastructure and resources (human and financial) to effectively carry out their mandates. Retaining the trained human resource base remains a challenge for all IPR management institutions which, being within the government, are unable to offer competitive pay packages compared to international and regional organisations requiring IP expertise. It is therefore no unusual for personnel trained under staff development programmes of IPR management institutions to move to other institutions upon returning from the training programmes.

B. Human Resources Capacity

Institutional Capacity

The staffing of IP management and implementing institutions remains a major challenge as pointed out above. One of the main challenges is attracting and maintaining a multi-disciplinary staff in the institutions. It is noteworthy that IP management institutions such as KEPHIS are manned mainly by scientists who have no training in law while the office of the Registrar-General's staff are predominantly lawyers with no persons trained in disciplines such as computer programmes and music.

With respect to enforcement of copyright, the training of enforcement officers such as the police, inspectors, customs and revenue officers is critical to the effective implementation of the law.

Legal Practice

Traditionally, only two main law firms have invested in IP legal practice and mainly in the area of trademark registration serving as trademark agents. The IP work in these firms is within the commercial law departments at the firms and for the longest time was the exclusive preserve of non-Kenyan lawyers trained in England. Recently, however, a number of firms have invested in IP practice in the realm of copyright for software and musical works. There is not much litigation and interpretation of IP law in the courts. The Kenyan Law Society and the Council for Legal Education have increasingly shown interest in continuing legal education and IP should be one area that they should invest in. This is especially critical because most practising lawyers studied law before IP was part of the law curriculum.

C. Educational Institutions and Training

Only two of the Kenyan Universities offer law courses. The University of Nairobi, the oldest public university started offering IP as a course in the early nineties. It is worth noting that there are a number of members of the faculty that have specialised in diverse aspects of IP law at doctoral level. The course is offered both at the undergraduate and postgraduate levels. At the undergraduate level, it is offered as an optional course in the fourth

year of study. In most years, about two-thirds of the class will opt for the course. About a tenth of students in every graduating class also opt to write their final year research paper on IP issues. The fact that the University of Nairobi also offers a course on Law, Science and Technology which has a number of classes devoted to the role of IP in science and technology (biotechnology and information and communication technology) increases the number of students who seek to pursue graduate study in IP law. At the graduate level, the Faculty of Law at the University of Nairobi has a masters' programme that allows students to specialise in IP law and in law, science and technology.

At another level, different departments of the University of Nairobi have courses that touch on IP such as the Masters' degree in crop science where issues of plant variety protection are canvassed. In such cases, the staff from the Faculty of Law services the departments in delivering lectures on IP related topics. The major challenge for the Faculty in implementing its programmes remains access to materials that are locally available. The lack of internet facilities hampers the effective implementation of programmes.

An office of science and technology is proposed to be established at the University of Nairobi to deal with research agreements and the management of IP issues arising from the work of University staff. This need was underscored by a controversy between the Universities of Nairobi and Oxford over the ownership of IP generated in a joint research project for the development of an AIDS vaccine in 2000. The development of an IP policy for the University is in the advanced stages and IP provisions are particularly stringent in memoranda of understanding for collaborative research projects between University of Nairobi staff and researchers from other institutions especially outside of Kenya. There are also plans afoot to restructure the legal office of the University of Nairobi to enable it to effectively deal with emerging issues and IP capacity has featured prominently in that regard.

The University of Nairobi also participates in KIPi and other national institutions' activities on public education. The current representative of public universities on the Copyright Board is drawn from the Faculty of Law University of Nairobi and there is also an expert on copyright issues from the same Faculty sitting on the board.

The author was not able to establish whether Moi University, the other public university offering training in law, has a course on IP.

D. The Judiciary and Judicial Process

Litigation on IP issues in Kenya is law and concentrated mainly in the area of trademarks. The Industrial Property Act makes provision for a Tribunal charged with the function of hearing appeals against decisions of the Director of KIPi. It is made up of a Chairman who should have served as a judge of the High court or qualified to be appointed a judge. Other members include at least two persons who have been qualified and entitled to practice as advocates for not less than seven years and two more members with experience and/or expertise in industrial, scientific and technological fields. Appeals from the Tribunal lie to the high court. The Copyright and Seeds and Plant Varieties Acts do not provide for Tribunal and the high court therefore has original jurisdiction.

The capacity of the judiciary to deal with IP issues may be limited by the lack of judicial officers well versed in IP issues. The need for training of judges in IP cannot be gainsaid given, as noted above, that most of them studies law before IP was part of the law curriculum.

E. International Negotiating Capacity

IPRs are a cross-cutting issue and are discussed at different fora ranging from trade, national development planning, tax, environment to agriculture. There is therefore need for capacity creation to engage at these fora. This calls for a concerted move to identify national needs and create capacity to address these needs and articulate them at international meeting dealing with IP.

It is imperative that Kenya develops a negotiating position in consultation with like-minded African countries in the discussions on IPR issues at for a such as TRIPS rounds and review; protection of indigenous and/or traditional knowledge and folklore and rules on access to genetic resources and benefit-sharing under the Convention on Biological Diversity.

F. Status of Intellectual Property Research in Kenya

The main arguments put forward for instituting IPRs in a country are that they spur technological growth, encourage innovation, promote trade and contribute to overall development in a country. While Kenya has invested in IPR laws and management institutions as pointed out above, there is not much research carried out to establish whether these laws and institutions have contributed to the overall development of the country.

Much of the research carried out has been on the regimes of IPRs and their implications for various sectors such as biotechnology, music and information communication technologies. The implications of the IPR laws and policies for foreign investment, technology transfer and dissemination of information technology, promotion of indigenous research and development, promotion of trade (both locally and internationally) remains unmapped.

It is suggested here that the assertion that IPRs are a necessary stimulus for economic growth, which in turn leads to poverty reduction, remains largely untested in the Kenyan context. It would, for instance be interesting to explore the impact of the following developments in the Kenyan context:

1. The patenting of living things and materials found in nature as opposed to man-made product and processes more readily recognizable to the layman as inventions.
2. The modification of protection regimes to accommodate new technologies particularly biotechnology and ICTs.
3. Extension of protection to nascent areas such as software and business methods.
4. The focus on the relationship between IP protection and traditional knowledge (TK), folklore and genetic resources.
5. The geographical extension of minimum standard for IP protection through the TRIPS agreement and of higher standards through bilateral and regional trade and investment agreements.
6. Widening of exclusive rights, extension of duration of protection and strengthening enforcement mechanisms.

XII. CONCLUSION AND WAY FORWARD

Kenya has invested substantially in IP laws and institutions. The question however remains on the extent to which these laws and institutions have contributed to national development. As pointed out above, the link between IP and endogenous technology development and inventive capacity generally is not established in the Kenya context. It is necessary to carry out sectoral in-depth studies to establish the role of the different categories of IP in Kenya's development and to justify the investment of public resources in the normative and institutional frameworks for the protection of these rights. This is especially urgent given that the available statistics on IP registration indicate that most IP holders are foreigners and that in the seeds and plant varieties' sector a lot of activity pertains to ornamentals which are developed outside of Kenya.

The following activities need to be done as a follow-up to this study:

1. Mapping of the role of IP in Kenya's development
2. Research on the strategic areas that Kenya should invest in for IPP that would impact on national development
3. Exploring the viability of a multi-sectoral approach to IPP through for instance the establishment of an Intellectual property Institute that would constitute a one-stop shop for different IPRs but linked to different sectors that are relevant.
4. Training legal practitioners and judicial officers in IPP
5. Working out ways of mobilising expertise in IPP and IPR through the creation of a national database and establishing a national IPR research centre as the national home for IP expertise.

Endnotes

- ¹ US Council for International Business A New MTN: Priorities for Intellectual Property (1985) at p. 3.
- ² Karen W. Baer, *A Theory of Intellectual Property and the Biodiversity Treaty*, 21 SYRACUSE J. INT'L L. & COM. 259 (1995).
- ³ Sisule S. Musungu, "General Trends in the Field of Intellectual Property: Issues and Challenges for the Establishment of a Development Oriented Framework, *Regional Dialogue on Intellectual Property Right, Innovation and Sustainable Development in Eastern and Southern Africa*, Organised by the International Centre for Trade & Sustainable Development (ICTSD), the United Nations Conference on Trade and Sustainable Development (UNCTAD) and Trade and Industrial Policy Strategies (TIPS), 29 June-1 July 2004, Cape Town, South Africa.
- ⁴ It is argued that IPRs in their present form do not serve the interests of developing countries with little technological innovation capacities..
- ⁵ See Patricia Kameri-Mbote, 'Patents and Development', in YASH VYAS ET. AL., LAW AND DEVELOPMENT IN THE THIRD WORLD, Faculty of Law, University of Nairobi, Nairobi, Kenya (1994).
- ⁶ Peter Drahos, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan, London, 2003.
- ⁷ See Timothy Swanson, *Diversity and Sustainability: Evolution, Information and Institutions*, in INTELLECTUAL PROPERTY RIGHTS AND BIODIVERSITY CONSERVATION - AN INTERDISCIPLINARY ANALYSIS OF THE VALUES OF MEDICINAL PLANTS I (Timothy Swanson ed., 1995) noting that 12 developing countries hold about 50% of all biodiversity.
- ⁸ See John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, 2.03 WIRED 83 (1994) and Margaret Jane Radin, Property at the Crossroads: Two Paradigms in Need of Reinterpretation (mimeographed / work in progress).
- ⁹ See, e.g., John H. Barton, *Patent Scope in Biotechnology*, 26 IIC 605 (1995).
- ¹⁰ Land races are defined as actively cultivated crop varieties that have been developed in traditional agricultural systems through both natural and human selection. See, e.g., Steven C. Witt, *Biotechnology and Genetic Diversity*, in BIODIVERSITY 23 (E. O. Wilson ed., 1988).
- ¹¹ See VANDANA SHIVA, MONOCULTURES OF THE MIND : PERSPECTIVES ON BIODIVERSITY AND BIOTECHNOLOGY (1993). See also John H. Barton & Eric Christensen, *Diversity Compensation Systems: Ways to Compensate Developing Nations for Providing Genetic Materials*, in SEEDS AND SOVEREIGNTY - THE USE AND CONTROL OF PLANT GENETIC RESOURCES 338 (Jack R. Kloppenburg, Jr. ed., 1988).
- ¹² Swanson, *supra* note 7.
- ¹³ Sijthoff, Leyden, Design Protection, Butterworths, London, 1976
- ¹⁴ J. W. Chege, *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau, Nairobi (1978)
- ¹⁵ *ibid.*
- ¹⁶ *Ibid.* at p.102
- ¹⁷ Act No. 5 of 1975
- ¹⁸ Act No. 5 of 1982
- ¹⁹ Act No. 14 of 1989

- ²⁰ Joseph Kingarui, “Towards a National Patent Law for Kenya”, in Calestous Juma & J.B.Ojwang eds., *Innovation & Sovereignty: The Patent Debate in African Development*, ACTS Press, Nairobi (1989).
- ²¹ BT is a bacterium that produces a poison that kills pests and hence the resultant variety will be economical for farmers since the cost of pesticides will be reduced. However people are worried that the pests may be wiped out from the ecosystem and the answer to this worry is that farmers are already using the bacteria in its powder form as a pesticide. Further the masses are also afraid that the BT may harm human beings. This fear has been rested since BT is a soil bacteria and it has no harmful effects on human beings
- ²² See Calestous Juma & J.B.Ojwang, *supra n. 15*.
- ²³ See World Intellectual Property Organization, *Industrial Property Statistics*, 1988 Publication A, WIPO, Geneva, 1988.
- ²⁴ See World Intellectual Property Organization, *Industrial Property Statistics*, 1989, WIPO, Geneva, 1990.
- ²⁵ The fees are as follows: Application fee- \$200; Growing tests fee - \$600; Certificate fee -\$240 and Annual fee - \$100.
- ²⁶ See Agreement on the Creation of the African Regional Industrial Property Organization (ARIPO) adopted by the Diplomatic Conference for the Adoption of an Agreement on the Creation of an Industrial Property Organization for English-Speaking Africa at Lusaka (Zambia) on December 12, 1986 and November 27, 1996.
- ²⁷ See Calestous Juma & J.B.Ojwang, *supra n. 15* at p. 23-24
- ²⁸ Section 3 (9).
- ²⁹ Article 85 (e)
- ³⁰ For instance under Articles 85 and 275 (b)
- ³¹ Article 85 (d) and (f)
- ³² Article 185 (4) and 185 (5)
- ³³ OAU, *Lagos Plan of Action For the Economic Development of Africa*, 1980-2000, (Addis Ababa: OAU, 1981)
- ³⁴ Article 3 (iv) (b) of the Lagos Plan of Action
- ³⁵ In the 1970’s, it was evident in developing countries that neither decolonization nor aid programs had generated any meaningful transformation of the former colonial territories. The deduction of the developing countries was that their poor performance was due not to an inadequate strategy or performance but in a large measure to the prevailing rules of the international trading and investment game, rules which they did not take part in shaping. Consequently, they concluded that these rules have to be changed. See Wil D. Verwey, “The New International Economic Order and the Realization of the Right to Development and Welfare - A Legal Survey”, (1981) 21 *Indian Journal of International Law* p.1-24; see also Upendra Baxi, “The New International Economic Order, Basic Needs and Rights: Notes towards Development of the Right to Development” (1983) 23 *Indian Journal of International Law* at p.2.
- ³⁶ Article 9 Model Law

