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Intellectual Property Rights in Kenya:
Ignoring the Goose that could lay the Golden
Egg



Alex Njeru

Eastern Africa Policy Centre

Intellectual Property Rights in Kenya: Ignoring the Goose that could lay the Golden Egg

Kenya is an economy on the rise: that much, at least from the Africa Rising narrative is clear. Many swear by this narrative of optimism that assumes that the days of anaemic economic growth are over. Well, recent economic statistics does give to this narrative. Over the last fifteen years, Kenya has had average Gross Domestic Product growth of around 5.6% per annum.¹ This growth has been accompanied by substantial improvements in the quality of life in the country and a substantial increase in the middle. This growth has also transformed the country's economy from one anchored primary agricultural based production into one that is more dynamic and diverse. For example, Financial Services Deepening (FSD) estimates that 75% of Kenyans today have access to banking services.²

Perhaps, one of the most conspicuous characteristic of this growth has been the exponential growth of the of the telecommunications sector. For example, the Communication Authority (CA) estimates Kenya's mobile phone penetration rate to be 88%, approximately 37.8 million Kenyans own a mobile phone today.³ The implosion of the telecommunications space in Kenya has been accompanied by developments in innovative financial services like M-pesa. Approximately 42% of Kenya's GDP is transacted through M-Pesa, Kenya's revolutionary mobile money transfer service every year. What escapes mention though, is that none of this would have been possible without the liberalization and deregulation of the telecommunications sector in the early 2000s.

Although the growth mentioned above and developments are to be lauded, there are institutional challenges that hurdle the country's quest to become a dynamic knowledge-driven economy. One of these challenges is that the country does not have a culture that respects and upholds property rights, much less, intellectual property

¹ <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2015&locations=KE&start=2000>

² (Heyer, A., & King, M. (2015). *Kenya's Financial Transformation in the 21st Century*. FSD Kenya.

³ <http://www.ca.go.ke/index.php/what-we-do/94-news/366-kenya-s-mobile-penetration-hits-88-per-cent>

rights. One would expect that a country on an upward trajectory would at least pause to install institutional structures that would catalyse growth, but this is not the case. This does buck the trend of global economic development history, for example, countries that have been synonymous with economic growth in the 20th century, like “the Asian Tigers” did place quite a premium on institutions, like those of property rights to develop. The International Chamber of Commerce (ICC), for example, posits that “growth is closely related to the capacity of the economy to generate innovation and commercialize innovative products.”⁴ The ICC underscores the importance of Intellectual Property Rights for developing countries like Kenya arguing that they play an important role in the transformation of economies from those dependent on traditional agriculture and low-value manufacturing to dynamic and diverse economies.

The problem lies not in the lack of sufficient human capital capable of supporting a knowledge-driven economy. For example, the Executive Director of the Kenya Industrial Property Institute (KIPI), Mr Sylvanus Sange, quips that “Although Kenya is intellectually rich, as evidenced in numerous publications they make in leading scientific journals, the country is yet to benefit from this intellectual wealth since little of it is translated into commercially viable Intellectual Property assets.”⁵

This is a conundrum, the country does seem to have the right intellectual assets that could be transformed into real economic opportunities, and a relatively well-developed market whereupon these intellectual assets could be commercialized, yet the country does not seem to reap the economic benefits of intellectual property rights. At the heart of this problem is a philosophical problem of old. What is property and why should the protection of private property exist in society? This question finds expression in John Locke’s philosophy that provided the ethical and moral justifications for the protection of private property. Locke accorded property rights the same status as the right to life and liberty, meaning therefore that property rights were equally as important as the other two natural rights. In so doing, Locke upheld the sanctity of property rights and posed that all men had an innate natural right to appropriate as they so wished “that

⁴ International Chamber of Commerce. (2014). *Promoting and Protecting Intellectual Property Rights in Kenya*. International Chamber of Commerce, Business Action to Stop Counterfeiting and Piracy. International Chamber of Commerce.

which they created with their labour.” According to Locke, governments “or at least men got into ‘social contracts with the government to protect their natural rights.’” Because intellectual property rights had not been very well developed during Locke’s time, today it would be appropriate to extrapolate Locke’s philosophy into the intellectual property rights domain, mainly because property rights are products of a different kind of labour “ingenuity.” Rightfully speaking persons should have the right to appropriate as they so wish the products of their “genius.”

However, Lockean philosophy and the value it places on property rights is not one that has much currency this side of the world. The idea that private citizens have a right to property receives curious suspicion. A superficial examination would posit that property rights are at odds with cultural practice, but that is hardly the truth.⁶ Colonial states truncated African property systems. Before that the property rights system including the intellectual property rights system existed albeit in their primordial form as is evidenced in trades such as metal working, pottery and medicine.⁷ However, the colonial states appropriated land and other means of production, so much, so that the idea of private property became transformed from a practical idea into a theoretical one, or at least private property rights accrued to those deemed fit by the colonial government. After independence, African governments took up the relegation of private property rights in favour of property rights protection of the political elite through various state corporations. In Ethiopia, for example, all land belongs to the state. In Kenya, a culture that places a fleeting premium on the sanctity of individual property rights coupled with a discretionary rule of law system and substantial public sector corruption act as hindrance to the development of the property rights system. This situation sits discordant with the institutional histories of other economies, particularly at the onset of the industrial revolution that used property rights and to a great extent intellectual property rights to develop thereby achieving prosperity for a substantial proportion of their populations.

What be the problem?

⁶ Kameri-Mbote, A. P., & Cullet, P. (1997). Law, colonialism and environmental management in Africa. *Review of European, Comparative & International Environmental Law*, 6(1), 23-31.

⁷ Robert, S. (1972). *Comparative Development strategies in East Africa*. Nairobi: East African Publishing House.

From the onset, it would be worth noting that Kenya does not have a culture that respects and upholds property rights. For example, the International Property Rights Index 2016⁸ ranks Kenya at position 89 out of 128 countries when it comes to respecting property rights. The same index identifies the country's legal environment as the genesis of the abhorrence institutions and people have for property rights. It is thus not surprising that the country's Intellectual Property Rights score on the same index is well below the average at 4.37 out of a total score of 10. This is exemplified by a 2012 Code Armour Study, which showed that 79% of Kenyan's use pirated software.

The second problem concerning property rights in Kenya is cultural. Kenya, like other sub-Saharan African countries, have has quite an ambiguous property rights system that fuses traditional or cultural ownership of property with modern and formal ones. In such cases, establishing robust individual or private property systems is always a herculean task.

The preceding points to a convergence of institutional and cultural factors that would not create an environment where intellectual property rights would spring. Problems in the physical property sphere transcend into the intellectual property domain. For example, a study by I-Hub Research showed that most tech start-ups did not register or protect their innovations with intellectual property protection laws because they honestly did not know "where to begin." Those that knew where to start neither registered for intellectual property protection because they found the processes "too costly and cumbersome."

Administrative Hurdles

Whereas the genesis of the malaise that surrounds adoption of intellectual property rights in Kenya could be laid on legal and non-supportive social-cultural institutions, the administrative regime does not seem to help. The property rights administration system seems insidious and difficult for would-be investors and beneficiaries of intellectual property rights.

⁸ <http://internationalpropertyrightsindex.org/ipri2016>

Flemming Omondi observes that one of the main challenges about intellectual property rights stems from the indistinguishable and duplicate roles of the Kenya Copyright Board (KECOBO) and the Anti-Counterfeit Agency: *“These two institutions have powers to raid, cease and prosecute for copyright infringement. Nonetheless, everyday practice has seen Kenya Copyright Board deal with matters exclusively pertaining to copyright counterfeit, whereas the Anti-Counterfeit Agency deals with issues of infringement of both copyright and trademarks. From the legal perspective, this difference is blurred. This calls for auditing of the existing laws.”*⁹

The cost of intellectual property rights litigation is also prohibitively high, both in financial costs and time lapses between the institution of an Intellectual Property related case and its closure. For example, a court case between “Macmillan Kenya Publishers and Mount Kenya Sundries” took 13 years to determine. These costs of Intellectual Property litigation prove too costly particularly for small and medium enterprise (SMEs) and start-ups in their early stages of development.¹⁰

Administrative reform in institutions and the legal framework that govern intellectual property rights would lead to the adoption of intellectual property rights as a veritable tool for economic development in the country.

The economic costs of poor IP

Although intellectual property rights remain on the periphery of public policy in the country, industries that revolve around the same have substantial benefits in the country. The World Intellectual Property Organization (WIPO), estimates that copyright-related industries contribute around five per cent to Kenya’s GDP and three per cent to employment figures.¹¹ However, the costs of ignoring Intellectual Property related policy remain high for the Kenyan economy. Research suggests that the

⁹ Omondi, F. (2016). *How Can Kenya Tighten Its Intellectual Property Rights Law To Ensure Maximum Benefit To The Copyright Owners?* Retrieved from Academia: https://www.academia.edu/11822407/How_Can_Kenya_Tighten_Its_Intellectual_Property_Rights_Law_To_Ensure_Maximum_Benefit_To_The_Copyright_Owners?auto=download

¹⁰ Gitonga, A., & Kieyah, J. (2010). *Overview of intellectual property rights: The case of Kenya.*

¹¹ World Intellectual Property Institute (WIPO). (2012). *Overall contribution of copyright industries to GDP and employment. & WIPO, Studies on the Economic Contribution of the Copyright industries.* World Intellectual Property Institute . WIPO.

counterfeiting business in the country is worth around 70 billion Kenya Shillings, (700 Million USD). It creates a real disincentive for potential investors in the intellectually-driven innovation in the country as returns are not guaranteed. The government is also estimated to lose around 84 million USD in tax revenue.¹²

Poor intellectual regimes also discourage Foreign Direct Investment (FDI). The OECD has found that the strength of a country's patent rights is positively correlated to inward FDI, holding other factors constant. Economists found that a 1% increase in a country's patent protection correlates to a 2.8% increase in FDI, and a 1% improvement in trademark and copyright protection increases FDI by 3.8% and 6.8%, respectively.¹³

Conclusions and Recommendation

The foregoing sections lay bare what seems to be an irreparably damaged Intellectual Property Rights system in Kenya. However, all is not lost. Whereas it would be appropriate to suggest reforms that acutely revolve around the intellectual property rights, that in itself would be inadequate. Such reform would be superficial at best and would barely scratch the surface of the whole myriad of issues that beset intellectual property rights in Kenya.

With that in mind, it would be appropriate to note that intellectual property lies within the larger purview of Kenya's legal ecosystem. As such, reforms within the sub-system of intellectual property rights without wholesome reform of the general legal environment would be foolhardy. With this in mind, reforming the legal system by reducing corruption and the arbitrary rule of law would go a long way in instilling confidence in the legal system. It is worth to note that various reports such as the Economic Freedom of the World Report by the Fraser Institute¹⁴ identify a weak rule of law system in Kenya as one of the stumbling blocks for economic freedom in the country.

¹² International Chamber of Commerce. (2014) *Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries*.

¹³ (Park, W. G., & Lippoldt, D. C. (2008). *Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries*. Paris: OECD.)

¹⁴ <https://www.fraserinstitute.org/studies/economic-freedom>

Administrative reform should also be targeted on institutions that regulate the knowledge and intellectual property rights industry. Critically, agencies with a mandate to regulate the intellectual property rights sphere should be collapsed in order to reduce the regulatory burden and attain regulatory efficiency within the spheres. The aforementioned sections indicate that one of the reasons for the low uptake of intellectual property rights in the country is the complex regulatory processes that one has to navigate through before one acquires intellectual protection. Collapsing the regulatory agencies into a single one-stop-shop would reduce the disincentives for intellectual property protection in the country.

Perhaps the most important reform within the intellectual property rights regime should be a re-alignment of the focus of intellectual property protection. Previous efforts in intellectual property rights in the country have paid a disproportionately high focus on biogenetic related intellectual property and industry. While this focus has its justifications, it has come at the cost of the promotion of “*knowledge-driven*” intellectual property. Maybe this focus is ideological in nature, but that should not derail the essence of intellectual property rights protection in the country, and that is providing incentives for the development of “*knowledge-driven*” industries and economies in the country.

A crowning of these reforms should be anchored on the role of property rights in in the country. From a philosophical foundation, it should be without doubt that property rights are an integral non-negotiable component of an economy’s quest to develop and provide value to players in the same economy.



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Mission

To be a premier Centre for: Free-Market oriented and Liberal policy analysis, education and reform in Eastern Africa. EAPC endeavors to become a proactive tool for goal and development oriented policy reform and provide governments, organizations and individuals with evidence based policy alternatives.

To promote and widen the frontiers of; social, economic, and individual freedoms within Eastern Africa through by carrying in-depth policy research and analysis.



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