

**Global Intellectual Property Strategy Center, P. C.SM
1629 K Street, NW, Suite 300
Washington, D.C. 20006**

July 1, 2019

Via Email

RE: US ITC Investigation 332-571 (US Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments)

Secretary
US International Trade Commission
500 E Street, SW
Washington, DC 20436

Dear Secretary Barton:

I am responding to the USITC's invitation to comment on its collection of information as part of the investigation referenced above. Specifically, the following comments address Issue Number 3 (the IP environment issue includes IP enforcement and infringement challenges of the SSA region).

The IPR enforcement challenge is and will continue to be significant in the SSA region because of the high levels of counterfeit and substandard goods that dominate a number of national markets as reported on by SSA regional media. These media reports describe the situation as told by SSA government officials and regional business leaders. The multi-faceted challenges include national markets and product sectors that are overwhelmed by counterfeit goods, counterfeit goods that pose health and safety risks, and ineffective enforcement.

Illustrating the market penetration by counterfeit and substandard goods, at the conclusion of a recent enforcement operation in Uganda, the legal and corporate affairs director for the national Anti-Counterfeit Network stated that

counterfeit goods made up 70% of the Ugandan market¹; although the Ugandan National Bureau of Standards estimated the percentage of counterfeit/substandard goods at only 54%.² In Nigeria, an official from the Standards Organization of Nigeria (SON) was quoted in May stating that “The reason why textile industry is no more is due to substandard products. We all allowed our country to be flooded with lots of fake products,” vowing to end the flow of such goods into Nigeria.³

The threat to public health and safety is also significant. In a June 2019 statement in Ghana, the executive director of Communications for Development and Advocacy warned that the country was becoming a safe-haven for traders marketing counterfeit electrical products that are causing fire outbreaks in the country.⁴ In South Africa, an IPR lawyer expressed concern about counterfeit auto parts as “there are no parts that are immune as counterfeited parts tend to be the most frequently replaced parts”.⁵ In Nigeria, the SON is committed to thwarting the influx of fake and substandard building materials such as fake re-bagged cement, fake and substandard iron rods, electrical appliances and cables, mostly imported from China.⁶ Earlier this year, police in Niger seized 10

¹ Ephraim Kasozi, *Seven Arrested by INTERPOL Over Fake Goods*, Monitor (Uganda), 2019 WLNR 18241983 (June 14, 2019).

² *Police, Agencies Start Crackdown on Counterfeit Products*, <https://www.busiweek.com/police-agencies-start-crackdown-on-counterfeit-products/> (Apr. 17, 2019).

³ *SON Eyes Synergy in Fight Against Substandard Products*, Business Day (Nigeria), 2019 WLNR 15865857 (May 22, 2019); <https://businessday.ng/news/article/son-eyes-synergy-in-fight-against-substandard-products/>.

⁴ *Gov't Must Adopt Stiffer Punishment Against Counterfeiters*, Ghana News Agency (June 12, 2019).

⁵ Sakhile Ndlazi, *Fake Merchandise Crippling Tshwane Economy*, Pretoria News, 2019 WLNR 17921511 (June 12, 2019).

⁶ Rilwan, *SON to Check Entry of Substandard Goods in South*, The Nation (Nigeria) (May 9, 2019); <https://thenationonlineng.net/son-to-check-entry-of-substandard-goods-in-southsouth/>.

tons of locally made fake medications and imported ingredients used to make drugs and beauty products.⁷

The few examples above reflect a continental challenge to protect and enforce IPR. It was reported in January 2019 that an audit of Kenya's Anti-Counterfeit Agency found that the Agency's ability to combat counterfeits would be hampered for the foreseeable future because it had only 30% of the required staffing.⁸ The Kenya Private Sector Alliance, consisting of local companies, estimated that illicit goods accounted for 40% of all goods traded in Kenya.⁹ In October 2018, the head of Kenya's Anti-Counterfeit Agency said that Kenyan manufacturers were going out of business because of the influx of counterfeit goods.¹⁰

A 2016 Tanzanian study commissioned by the Confederation of Tanzania Industries concluded that 50% of the goods used in the country were fake.¹¹ In Nigeria, it is estimated that 70% of all imported goods are fakes.¹²

Last year, Kenyan manufacturers asked the Common Market for Eastern and Southern Africa for assistance in battling the flood of counterfeit goods flowing into markets.¹³ In Ghana, industry has asked the government to increase

⁷ *Niger Busts Fake Medicines Lab*, <https://medicalxpress.com/news/2019-03-niger-fake-medicines-lab.html> (Mar. 5, 2019).

⁸ Sam Kiplagat, *Anti-Counterfeits Agency Staff at 30pc*, Business Daily (Africa), 2019 WLNR 678215 (Jan. 8, 2019).

⁹ *Id.*

¹⁰ Lynet Igadwah, *Sh8.5 BN Fake Goods Seized in Six Months: Agency*, Business Daily (Africa), 2018 WLNR 31623351 (Oct. 12, 2018).

¹¹ *Over Half of Imported Goods Used in Tanzania are Fake*, The Citizen (Tanzania), 2016 WLNR 18600123 (June 17, 2016).

¹² Steve Agbota, *How Ethics, Integrity in Shipping Trade'll Restrain Fake Products Importation*, The Sun (Nigeria), 2019 WLNR 10928789 (Apr. 8, 2019).

¹³ Victor Kiprop, *Kenya Seeks Comesa Help to Fight Fakes*, East African (Kenya), 2018 WLNR 25301841 (Aug. 19, 2018).

customs resources due to weak border measures.¹⁴ Kenyan officials admit that most of its land borders are porous, which facilitates movement of illicit goods across its borders.¹⁵

In addition to the examples listed above are very recent reports that are evidence of the IP challenges in the SSA region:

- Seizure of tons of fake alcohol and cosmetics products in Uganda,¹⁶
- Influx of fake and substandard feminine hygiene products in Nigeria,¹⁷
- Ongoing circulation of fake medicines and medical kits in Ghana,¹⁸
- One month's haul of seized goods includes auto spares, toner, electrical appliances in Kenya,¹⁹ and
- Fake and substandard lubricants, electric cables and cylinders top the list of seized goods of over \$800 million worth of goods seized in Nigeria in a few months' time.²⁰

These reports prove that there are major efforts on the part of SSA governments to combat the IP counterfeiting/infringement problem. The volume of goods reportedly seized in the SSA region demonstrate the enforcement

¹⁴ Josephine Nettey, *Gov't Urged to Tighten Border Security to Check Fake Products*, The Herald (Ghana), 2019 WLNR 6592059 (Mar. 1, 2019).

¹⁵ *War on Bogus Goods: Hurdles Agency Needs to Jump*, Sunday Nation (Kenya), 2018 WLNR 38886528 (Dec. 16, 2018).

¹⁶ *Police Warns Against Counterfeit Products*, New Vision (Uganda), 2019 WLNR 18708614 (June 18, 2019).

¹⁷ Omolabaki Fasogbon, *Tackling the Menace of Substandard Sanitary Pads in Nigeria*, <https://newsflagship.com/tackling-the-menace-of-substandard-sanitary-pads-in-nigeria/> (June 7, 2019).

¹⁸ *FDA and CEPS Bust Unregistered and Fake Drugs in Volta Region*, 2019 WLNR 15864060 (May 23, 2019), <https://www.businessghana.com/site/news/general/187966/FDA%2C-CEPS-bust-unregistered-and-fake-drugs>.

¹⁹ *Counterfeit Goods Worth Sh100m Seized in One Month—Agency*, The Star (Kenya), 2019 WLNR 14126698 (May 6, 2019).

²⁰ Angela Okisor, *SON Confiscates N300Bn Worth of Substandard Products*, Nigerian News Agency (Apr. 24, 2019), <https://www.sunnewsonline.com/son-confiscates-n300bn-worth-of-substandard-products-dg/>.

efforts. However, the sheer volume of IP infringing goods that are being shipped to the region or made within the region is a cause for concern for any IP owner considering commercial activity in the region. The pharmaceutical sector, hit hard by fake/counterfeit medicines is attempting to use technology to combat the problem, but it is still a significant battle as technology alone is not enough when local behavior and corruption are cited as basic problems.²¹

The current state of IPR protection and enforcement as reported from these countries is important for both the U.S. government and the U.S. business community when considering future engagement in these and other countries in Africa. From an IPR perspective, the current IPR environment is, at best, extremely challenging if these countries reflect the overall continental situation.

For example, Kenya reportedly has a system whereby IP owners can record with Kenyan customs authorities.²² Nevertheless, there are reasons for concern as to effective enforcement when corruption and economic crimes remain as obstacles to growth and investment.²³ In 2018, concerns about the level of counterfeit goods in Kenya resulted in news reports that the country might be controlled by counterfeiters by 2030.²⁴

²¹ Helen Lock, *Fight the Fakes: How to Beat the \$200 BN Medicine Counterfeiters*, The Guardian (June 5, 2019), <https://www.theguardian.com/global-development/2019/jun/05/fake-medicine-makers-blockchain-artificial-intelligence>.

²² Sibongile Dee, *No 'One-size Fits All' for Branded Goods Entering African Countries*, 2019 WLNR 15647716 (May 21, 2019).

²³ *We Support the War Against Graft and Counterfeits, EU Envoys Tell Pres. Kenyatta*, 2019 WLNR 15349881 (May 18, 2019).

²⁴ Mwangi Muiruri, *Rising Fears Over Fake Products*, Nation (Kenya), 2018 WLNR 16337515 (May 28, 2018).

As the examples already listed show, many of these countries are overwhelmed by IP infringing goods. Moreover, like Kenya, staffing of the relevant agencies is a challenge.

The lack of resources to protect and enforce IPR requires both a government's financial commitment to staff all the relevant agencies (administrative and enforcement) and to provide training to new staff who will have to carry out the functions of their new positions. This, too, requires an examination of existing staff expertise to provide training to an expanded staff in order to fulfill duties effectively. Even if additional funds were made available, would these governments be able to conduct their own IPR related training to meet the expectations of the U.S. government and the U.S. business community? If not, what type of financial and human resource commitment would have to be made by the U.S. (government and private sector) and for how long?

In addition, based upon the SSA regions reporting of IP enforcement deficiencies, it would be naïve to believe that any single country can effectively wall itself off from its neighbors and provide the level of IP protection and enforcement that US enterprises would expect. The porous borders that exist currently are not likely to become well-protected in any short or medium term. Given the US experience in other parts of the world, it is hard to believe that what the US might deem to be effective IP protection can be achieved in a matter of a few years.

The high levels of counterfeit and infringing goods in these markets signal the need for massive amounts of assistance. From the perspective of the U.S. government and IPR stakeholders, undertaking an in-depth and detailed assessment would seem to be necessary to safeguard valuable IPR assets exposed in these markets.

It is well known that the US and its IP stakeholders already have a list of countries that appear in USTR's annual Special 301 Report issued identifying IP deficiencies abroad. In some cases, countries have failed to address their IP deficiencies for many years and have appeared in the Special 301 Report year upon year.

In an effort to avoid the type of ongoing and repeated identification of a country for many years due to IP deficiencies, I would recommend that the US and the IP stakeholder community undertake a comprehensive assessment of any country that the US might consider as a trade agreement partner. The IP chapters of our free trade agreements obligate our trading partners to a high level of IP protection and enforcement.

To move forward with any country or countries in the SSA region, the US Government and IP stakeholder community should be required to create a comprehensive plan for:

- Sustained IP awareness education programs addressing the benefits of IP to the following audiences:
 - relevant government officials,

- local business groups to help locals understand how they can benefit from any trade agreement, and
- universities in order to expand IP-related knowledge and address the benefits of IP to a population that has aspirations for improved economic conditions;
- sustained program of enforcement training for:
 - border enforcement authorities,
 - police,
 - prosecutors,
 - judiciary, and
 - any other ministerial, administrative agencies involved in IP enforcement.

To enter into any trade agreement without fully realizing the capabilities or lack thereof of the trading partner in the area of IP protection and enforcement would be irresponsible on the part of the US. Related to effective protection and enforcement of IP is the necessity to ensure that a greater swath of the population understands what IP is, its importance in the commercial environment and how IP can contribute to economic growth and development. In short, the local community must be invested in improving the commercial environment. These are major components to improving the commercial environment. IP enforcement alone is insufficient.

As recently as June 11, 2019, an official at US ICE's IPR Center stated that "We'll never seize or arrest our way out of intellectual property rights-related

crimes”.²⁵ If that sentiment applies to the situation in the US with all of its IP-related government resources, then it most certainly applies in most, if not all, of the countries in the SSA region. We should avoid entering into a situation where seizures and arrests seem to be the only metric available in assessing a government/country’s IP performance.

I hope that the information and comments provided above are helpful. Should there be any questions regarding this submission, please do not hesitate to contact me.

Sincerely,



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²⁵ U.S. Immigration and Customs Enforcement, Press Release, *IPR Center Outreach Efforts Engaged More Than 30,000 in 2 Years*, June 11, 2019, <https://www.ice.gov/news/releases/ipr-center-outreach-efforts-engaged-more-30000-2-years#wcm-survey-target-id>.