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IP value capture: fostering trade by capturing the value of creative industries in developing countries

p. 4



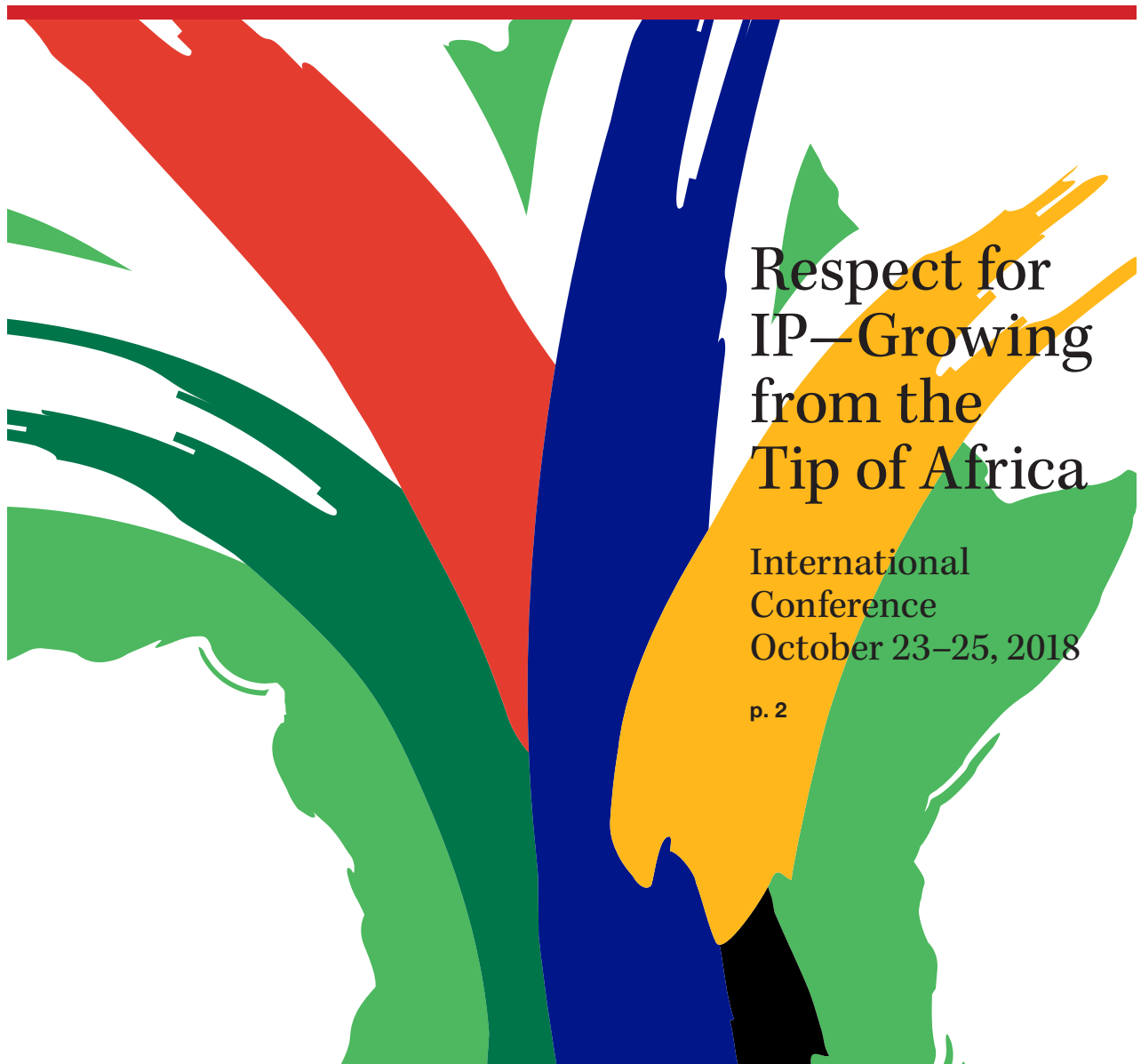
The global digital enforcement of intellectual property

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## Respect for IP—Growing from the Tip of Africa

International  
Conference  
October 23–25, 2018

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Editor: **Catherine Jewell**

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# Foreword

Photo: WIPO/Violaine Martin



Rory Voller, Commissioner,  
Companies and Intellectual  
Property Commission,  
South Africa.

The International Conference, Respect for IP – Growing from the Tip of Africa, in Sandton, South Africa, from October 23 to 25, 2018, is an opportunity to foster dialogue and ideas to support the development of a balanced and effective system for the enforcement of intellectual property (IP) rights.

More than 400 participants including government officials, policymakers, law makers, entrepreneurs and lawyers will cover a broad range of issues from the economic value of IP and its public rationale, to the daily practical challenges facing those on the front line of IP enforcement.

In South Africa, we regard the IP system as an important policy instrument for promoting innovation, technology transfer, research and development, industrial development and economic growth. However, public understanding of the benefits of IP remains incomplete in South Africa and many other countries. Consumers are often unaware of the socio-economic risks associated with the illegal trade in counterfeit goods and piracy and the threats it can pose to their health and well-being, to legitimate businesses, to employment and to the ability of governments to fund social services. This illegal trade poses significant challenges to all those who are seeking to convert national economic development aspirations into concrete social and economic progress.

This conference offers a timely and important opportunity to reflect on the important role that IP rights play in supporting value creation and economic performance. Participants will also be able to explore available options, mechanisms and systems to more effectively build respect for and enforce IP rights.

I applaud INTERPOL, the World Customs Organization (WCO), the World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO) for organizing this important event in cooperation with South Africa's Companies and Intellectual Property Commission (CIPC).

### **AFRICA'S INDUSTRIAL DEVELOPMENT IMPERATIVES**

History shows us that strategic use of IP is a means by which countries can break out of poverty and underdevelopment. Countries that have enjoyed economic success over the years have, without exception, nurtured clusters of forward-looking, high-value industrial activities that generate sizeable returns on investment.

This understanding has informed policymaking in South Africa as well as Africa's recognition that its sustainable development is dependent, in great measure, on pursuing structural transformation of its economies through industrialization and strategic use of IP.

Over the last decade, Sub-Saharan African countries have shown impressive economic growth, often outpacing advanced economies and other emerging and developing economies. Africa's abundant natural resources, the expanding consumer power of Africa's emerging middle class and favorable demographics, offer enormous potential for sustainable economic growth and development across the continent.

However, Africa's growth path has been based primarily on commodity exports, particularly to Asian countries, and strong consumption by a burgeoning middle class. There is a now widening consensus among African leaders that economic sustainability hinges on the structural transformation of Africa's economic base – a process that involves harnessing African creative and innovative capacities by catalyzing the development of an enabling environment where innovation and creativity can thrive and that is underpinned by a balanced, effective and widely-respected IP system.

Few countries deny the importance of IP rights and the need to respect them. IP can support and enhance the legitimate economic aspirations of all developing countries, including least developed countries, in developing and leveraging the value of their productive human and natural resources. But without broad understanding of the role that IP rights play and effective systems in place to acquire and enforce those rights, such efforts are hamstrung.

The illegal trade in counterfeit goods and piracy undermines efforts across the board to boost a country's fortunes; it siphons the life-blood of the creative sector, inhibits innovation, undermines legitimate business development and threatens employment creation and a government's ability to fund social services.

As countries pursue their ambitions to achieve sustainable development, they cannot afford to ignore the need to raise public IP awareness of the need to respect IP rights. Such a goal is as important as putting into place balanced and effective IP systems and enforcement mechanisms that foster local innovation, creativity and public welfare.

### **DEVELOPMENTS IN SOUTH AFRICA**

South Africa's National Development Plan (NDP) calls for greater emphasis on innovation, improved productivity and more intensive pursuit of a knowledge economy. The strategic use of IP has a central role to play in achieving that objective.

South Africa has had a long history of IP protection and, as signatory to major international treaties, we seek to ensure that appropriate balances are struck in providing protection to spur innovation on the one hand, and in sharing the benefits of innovation in society on the other hand. That also includes an emphasis on building respect for IP rights. We are committed to ensuring that South Africa's IP regime supports our broader national development objectives, including in the area of industrial development. And we recognize that this involves raising broad public awareness about the role that IP rights can play in supporting those goals.

This conference is an opportunity for thought leaders to come together to exchange ideas and experiences on ways to galvanize public support and respect for IP rights to help drive African economic, cultural, social and technological development in the years ahead. It will also help to boost awareness of the benefits that effective and strategic use of IP can bring, and ensure that appropriate action is taken to tackle IP crime. The continent's economic progress depends on it.

I wish you all a successful conference.

Rory Voller, Commissioner, Companies and Intellectual Property Commission, South Africa.





# IP value capture: fostering trade by capturing the value of creative industries in developing countries

In today's digitally-driven global knowledge economy, IP value capture offers developing countries significant growth opportunities. IP assets, for example, can be used to promote top-tier music festivals and carnivals, such as the annual Trinidad and Tobago Carnival.





Photo: Blaine Harrington III / Alamy Stock Photo



**Keith Nurse**, Senior Fellow, Sir Arthur Lewis Institute of Social and Economic Studies, World Trade Organization Chair, University of the West Indies, Barbados

In today's digitally-driven global knowledge economy, IP value capture – the commercialization of intellectual property (IP) assets – offers developing countries significant growth opportunities. Adding value through the use of IP helps these economies expand their participation in global value chains and reduces their dependence on traditional low value-added commodity agriculture, mineral, and services exports.

Given the potential of IP rights to promote economic diversification, and the limited industrial capacity of small and least developed countries, IP value capture within the creative industries should be a key consideration when crafting development and trade policy. But finding ways to enable developing countries and their micro-, small- and medium-sized enterprises (MSMEs) to participate in this growth is a key challenge. It involves developing a better understanding of the role that IP rights play in global value chains and how their value can be captured within the creative industries. IP policy also needs to move beyond compliance with the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and isolated attempts to protect and enforce IP rights.

IP value capture is particularly important for MSMEs. These are often the first movers in innovation and IP creation, but their ability to expand is often hampered by market access and trade financing challenges. The fact that many developing countries do not have in place either a strategic industrial development agenda or a framework to foster innovative IP-rich industries and entrepreneurs, compounds these challenges.

### IP VALUE AND THE CREATIVE SECTOR

Investment in the IP value embedded in the creative industries presents a number of opportunities. In particular, in terms of copyright and related rights income, for example, from the exploitation of authors' neighboring and synchronization rights. IP value capture in the creative sector does not stop there. Used strategically, IP rights can generate economic value in sectors like tourism (through destination and nation branding), manufacturing (through the use of geographical indications, appellations of origin, and own-brand manufacturing), and information and communication technologies (ICTs) (through ecommerce, media value, and data monetization). IP assets can also be used as collateral or security to finance the development of creative industries (see Figure 1).

**Figure 1: Framework for intellectual property value capture**

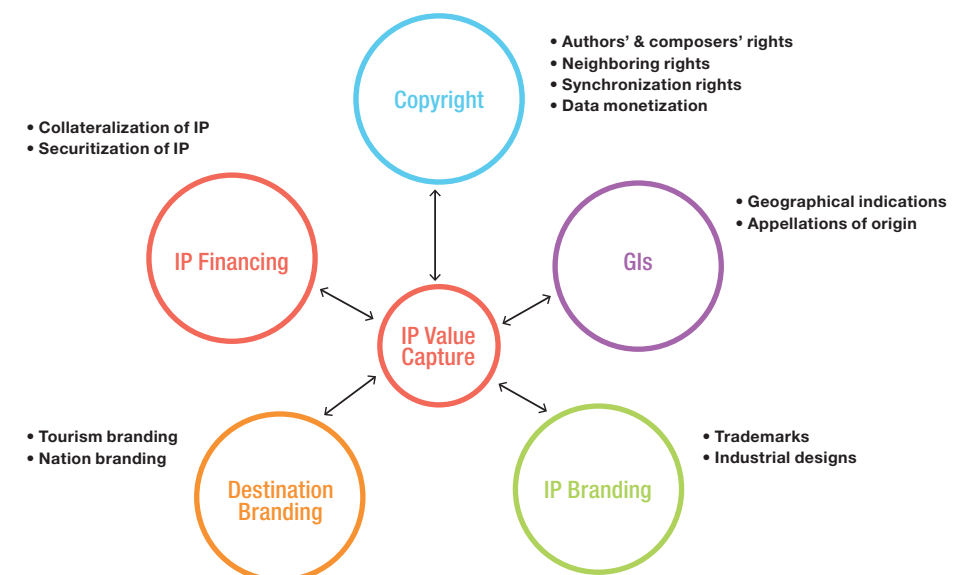






Photo: Paul Melling / Alamy Stock Photo



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The annual Trinidad and Tobago Carnival attracts up to 15 percent of tourist arrivals and generates an equivalent proportion of tourist spending. It has also been instrumental in fostering the country's creative sector as well as its music and masquerade design exports.





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Products with characteristics that are rooted in a specific geography or culture may qualify for protection as a geographical indication (GI). *Batik* is protected as a GI in Indonesia. *Batik* exports grew from USD 22 million in 2010 to USD 340 million in 2014 and continue to expand.

Since the global economic crisis, the creative sector has outperformed most other sectors of the global economy. In part, this is due to the growth of the digital economy, where IP and trade in services have expanded as a share of global value-added.

From a global value chain perspective the creative industries in many developing countries operate within a highly fragmented and competitive ecosystem, featuring many independent but disconnected creators. Very few large firms or foreign operators participate as primary investors in the production end of the value chain. Larger foreign firms, and those operating in the diaspora, typically act as secondary investors in the more lucrative elements of the value chain, such as manufacturing, marketing, distribution, and copyright administration. As such, the creative sector tends to be poorly served when it comes to access to finance and trade facilitation. These important factors need to be addressed to enable businesses to develop and tap into export markets (See *Study on Alternative and Innovative Financing for ACP Cultural Industries*, Keith Nurse (2016)).

However, creative businesses can overcome some of these challenges associated with access to finance by using their IP assets as collateral (see *Using Intellectual Property Rights as Loan Collateral in Indonesia*, Selvie Sinaga (2017)). Music asset-backed securitization, for example, can be facilitated through the appropriate valuation of the catalogue of an artist or a copyright holder. Various famous artists, including David Bowie, James Brown, the Isley Brothers, and Marvin Gaye, have done so with some success.

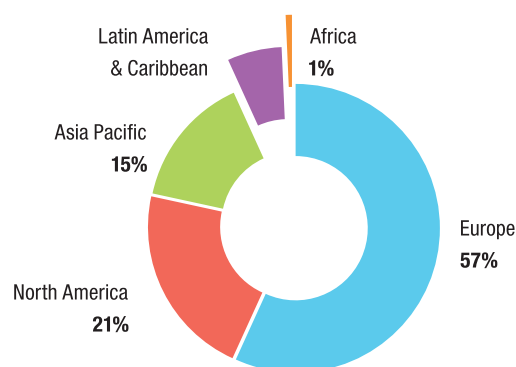
Royalties from a music catalogue can be substantial. The estate of Reggae icon Bob Marley, for example, is one of the top earning estates from a developing country. In 2017, that estate generated USD 23 million from music royalties, licensing, and branding deals according to *Forbes Magazine*, making Marley one of the highest earning dead celebrities in the world.

Various financial institutions are looking into IP asset-backed securitization, but the prospects of it becoming widespread in developing countries are limited by a general lack of IP awareness within the investment community of these countries. Moreover, the financial markets in developing countries generally lack effective IP valuation mechanisms or regulatory frameworks to

govern creditors' rights. This area of financing is still considered high risk and remains underdeveloped in terms of earnings. At present, the share of global income from royalties enjoyed by developing countries remains relatively small.

The largest share of global royalties income from the creative industries is generated in Europe (57 percent) and North America (21 percent), compared to the smaller shares in Asia/Pacific (15 percent), Latin America (6 percent), and Africa (1 percent), (see Figure 2). Global royalty collections rose from USD 7.7 billion in 2012 to USD 9.2 billion in 2016. The music industry collected 87 percent of that total. Although royalties from digital sources only account for around 10 percent of total global royalty collections, they are the fastest rising component with 50 percent growth in 2017.

**Figure 2: Global collections of royalties, share by regions, 2017**



## LEVERAGING IP VALUE CAPTURE

These upward trends in copyright royalties point to significant potential for IP value capture, in particular by creative industries in developing countries. However, IP value capture in the creative industries is not restricted to direct earnings from assets, such as the catalogues of authors or composers. Right holders can also leverage their IP assets to generate income from merchandizing, franchising, endorsement deals, and events management (e.g. festivals and concerts). The value captured in this way relies less on traditional brick and mortar assets. As such, it is therefore a relatively more accessible business option for small companies, especially those that have built up a strong brand identity in key target markets.



Photos: Rupert Sagar-Musgrave / Alamy Stock Photo



Africa's burgeoning audiovisual sector, where the majority of filmmakers and producers operate as micro- or informal enterprises, face numerous barriers to local and global market participation.

The governments of developing countries can also promote destination branding and tourism using the IP assets of their creative industries. IP assets can be used to promote top-tier events, such as music festivals and carnivals. In this way, they can support “nation branding” efforts to ensure the country stands out as a destination of choice. Trinidad and Tobago has done this with some success. The annual Trinidad and Tobago Carnival, for example, attracts around 12 to 15 percent of tourist arrivals and generates an equivalent proportion of tourist spending annually. The Carnival has also been instrumental in fostering the country’s creative sector and its music and masquerade design exports (see *The Creative Economy and Creative Entrepreneurship in the Caribbean*, Keith Nurse (2016)). For many developing countries, especially small island states, tourism is an important source of employment and export revenues. For these countries in particular, implementation of a cross-sectoral strategy that engages the creative industries offers improved growth possibilities and increased opportunities for value addition.

Another area where there is tremendous scope for value addition is in the use of geographical indications (GIs). Products with characteristics that are rooted in a specific geography or culture may qualify for protection as a GI. Indonesia, for example, has protected its traditional fabric, *Batik*, as a GI. Indeed, *Batik* gained

global recognition in 2009, when UNESCO recognized it as part of the Intangible Cultural Heritage of Humanity (see *The Protection of “Batik” Craft under Geographic Indication: The Strategy for Developing Creative Industry in Indonesia*, Mas Rahmah (2017)). Against this backdrop *Batik* exports grew from USD 22 million in 2010 to USD 340 million in 2014 and continue to expand.

#### MOVING UP THE VALUE CHAIN: KEY IMPERATIVES

Creative industries in developing countries face numerous other barriers to local and global market participation. These include a lack of production facilities, poor market organization, inadequate rules and regulations, limited understanding of global markets, language barriers, poor bargaining power, and limited commercial relationships. Take, for example, the burgeoning audiovisual sector in Africa, where the majority of filmmakers and producers operate micro or informal enterprises. The problems confronting these filmmakers are further magnified by the absence of distribution and marketing networks, making it difficult for them to enter and compete in the global audiovisual markets (see *Creative/Cultural industries financing in Africa: A Tanzanian film value chain study*, Martin R. Mhando, Laurian Kipeja (2010)).

Enhanced integration of the creative industries of developing countries in global value chains therefore requires a

shift in mindset and business practice. Businesses need to place greater emphasis on collaboration and support efforts to foster better coordination and organization within the sector; for example, through the establishment of national and regional industry or trade associations. Value chain integration also requires the development of digital entrepreneurship through tactics such as aggregation of creative content for digital platforms like Amazon, YouTube, Google, Spotify, Netflix, Tencent, or competing firms from the South. Only then will they be able to take full advantage of the opportunities arising from the expansion of digital trade and the proliferation of online streaming and subscription services.

Governments can support the development of their creative industries by establishing an institutional framework (i.e. legislation and incentives) that facilitates the sector’s development and expansion. In so doing, it is important to promote cross-sectoral linkages; only then will it be possible to harness the multiple markets and sources of income generated by creatives industries, many of which intersect with ICTs, manufacturing and tourism.

If developing countries are to take full advantage of the potential that the digital knowledge economy offers local creative industries, governments need to foster initiatives to support IP value capture supported by an expansive range of trade and industrial policies. This requires the design and implementation of a strategic and holistic export-oriented policy framework.

The key challenges here, however, lie in the fact that many existing institutions that support the creative sector operate in silos and are often decoupled from initiatives

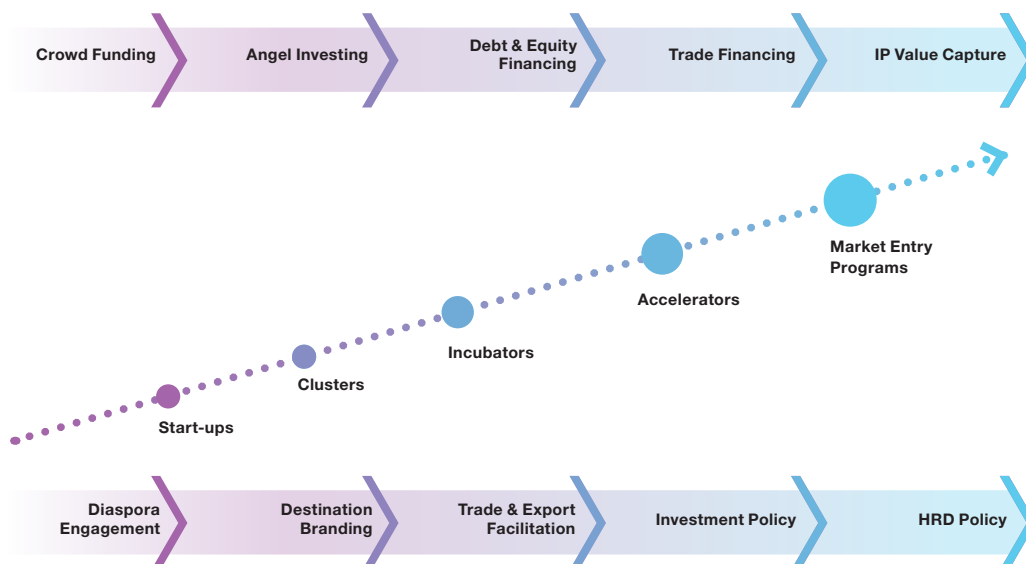
to enter wider markets. Often, ministries of culture and trade promotion agencies are not working in tandem and, in many cases, Aid for Trade mechanisms only focus on one component of the process, such as training.

From this standpoint, the provision of end-to-end business solutions and trade and financing support mechanisms would go a long way toward improving the export competitiveness of the sector. Implementing this approach would involve the development of start-ups hubs or camps, sector clusters, and incubators or accelerators for innovation-driven enterprises that are directly linked to market entry programs and new financing mechanisms such as crowdfunding, angel investing and venture capital, along with traditional debt and equity financing. Such measures need to be backed up by an array of strategic policy support measures, which could include diaspora engagement, destination branding, trade and export facilitation, investment policy and human resource development (see Figure 3).

The objective is to make creative entrepreneurs and their work more visible and accessible to wider markets, potential clients, sponsors, investors and policymakers.

In particular, these mechanisms promote youth entrepreneurship through additional facilities like networking, mentorship, and peer-to-peer-coaching. Consequently, business and trade support organizations play a critical role in minimizing the risks associated with the creative sector by offering market development grants, export assistance grants, trade fair access and business competitions.

**Figure 3: Trade and financing framework for creative entrepreneurship**



# Building respect for IP: Nigeria Customs Service on the frontline

By **Nnenna Ugo Awa**, Assistant Superintendent,  
Nigeria Customs Service, Abuja, Nigeria

With some 182 million residents, Nigeria is the world's seventh most populous country. It is also Africa's largest oil producer, pumping on average 1,943 million barrels per day. With a mixed economy and burgeoning financial, services, communications, technology, and entertainment sectors, Nigeria's huge economic potential and ability to attract foreign direct investment (FDI) are widely recognized.

However, translating this economic potential into reality presents many challenges. Not least of these is the need to improve the enforcement of intellectual property (IP) rights to clamp down on levels of counterfeiting and piracy. In 2002, the World Health Organization (WHO) reported that 70 percent of drugs in Nigeria were fake or substandard. But the problem of counterfeiting goes well beyond pharmaceuticals. Generally speaking, all categories of imported goods are susceptible to counterfeiting, and many of them find their way into Nigeria.

The huge influx of counterfeit products into the Nigerian market is driving down the country's ranking in global indices for FDI. For example, the *2017-2018 Global Competitiveness Report*, published by the World Economic Forum, ranked Nigeria 125 out of the 137 countries evaluated. Such indicators suggest that Nigeria is not a fertile destination for FDI, which is, of course, a major driver of rapid economic growth.

This worrying trend is evident in spite of Nigeria's accession to a number of international, regional, and bilateral agreements. At the international level, in 1995, Nigeria joined the World Trade Organization and signed up to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), which establishes the responsibilities of member governments with respect to the protection of IP rights.

At the regional level, Nigeria has signed the Common and External Act of Economic Community of West Africa (ECOWAS). Schedule 4 (Item 3) of the ECOWAS Common and External Tariff ([www.customs.gov.ng/Tariff/](http://www.customs.gov.ng/Tariff/)) prohibits the importation of "all counterfeit materials or articles, including base or counterfeit coins of any country."

Also at the bilateral level, Nigeria is working with its partners to strengthen IP enforcement. For example, at an IP seminar in Accra, Ghana, in 2009, which was co-organized by ECOWAS and the United States Department of Commerce, ECOWAS members agreed to "establish within their respective customs agencies, "a unit that shall be responsible for IP matters. The unit so established shall represent the agency and member state in regional Customs Union IP under the auspices of ECOWAS." This culminated in the establishment, in January 2014, of an IP Rights Unit in the Nigeria Customs Service (NCS), the lead IP enforcement agency in Nigeria.

While NCS's statutory presence at the country's borders makes it the first link in the chain of IP enforcement, its ability to deliver on its IP mission is hamstrung by a number of factors. These include:

## **A. INSUFFICIENT POLITICAL WILL**

Despite the existence of an enabling framework of IP laws, insufficient political will makes it difficult to enforce IP rights in Nigeria. In a country with multiple challenges, policymakers can easily lose sight of the importance of IP enforcement to the nation's economic performance. For example, in July 2016, the Presidential Enabling Business Environment Council (PEBEC) was set up by the President of Nigeria to remove bureaucratic constraints, with a view to making Nigeria an easier place to start and grow a business. Yet, the PEBEC has put IP enforcement on the back-burner in a





Photo: Courtesy of Nigeria Customs Service

Nigeria's huge economic potential and ability to attract foreign direct investment (FDI) is widely recognized. However, translating that economic potential into reality presents many challenges, including the need to clamp down on levels of counterfeiting and piracy.





Photos: Boaz Rottem / Alamy Stock Photo



In 2002, the World Health Organization (WHO) reported that 70 percent of pharmaceuticals in Nigeria were fake or substandard. All categories of imported goods are susceptible to counterfeiting and many of them find their way into Nigeria.

Photo: Courtesy of Nigeria Customs Service



Photo: Courtesy of Nigeria Customs Service

In partnership with various regulatory border agencies with a mandate to enforce IP, the Nigeria Customs Service has been able to seize IP-infringing goods worth several million Naira.

move that suggests that it does not recognize that the protection of IP rights is one of the biggest challenges facing businesses in Nigeria today.

### **B. LACK OF EX-OFFICIO POWERS**

The legal framework governing the work of the NCS does not provide customs officers with *ex-officio* authority for IP enforcement. The NCS's recently established IP Enforcement Unit relies heavily on partnerships with right holders to apprehend illicit imports of counterfeit products. While it has scored some recent successes, these are limited in their scope and could be significantly boosted by empowering customs officers to confiscate suspect goods in the face of compelling evidence of infringement.

### **C. UNWILLINGNESS OF RIGHT HOLDERS TO PARTNER WITH NCS ON IP ENFORCEMENT**

NCS has fostered a number of partnerships with right holders under the WCO Customs-Business Partnership initiative, and has made positive moves to strengthen IP enforcement. However, many right holders operating in Nigeria are reluctant to partner with NCS in enforcing their IP rights regardless of the advantages of doing so.

A 2017 study (available from the author) on the relationship between the NCS and right holders highlights a number of factors that weaken right holders' interest in engaging with the Service. These include low-levels of awareness about the role NCS plays in IP enforcement; opaque IP-related customs procedures; the cost of IP enforcement; the slow pace of NCS processes; and corruption.

To address these concerns, the study highlights the need to improve information-sharing between customs and other stakeholders; to update the IP legal framework governing NCS's activities; and to tackle ethical issues, such as corruption. Such action, the study suggests, would greatly improve right holder engagement with NCS.

### **THE JOURNEY SO FAR**

NCS enjoys a robust relationship with various regulatory border agencies with a mandate to enforce IP. These include the National Agency for Foods and Drugs Administration and Control (NAFDAC), the Standards Organisation of Nigeria (SON), and the Nigeria Copyright Commission (NCC). These partnerships have made

it possible to seize IP-infringing goods worth several million Naira. In 2017 alone, over 3 million counterfeit medicines were intercepted. NCS has also recently signed an agreement with the Nigeria Copyright Commission to better coordinate border management of copyright-infringing imports.

In some instances, close collaboration with right holders has made it possible to significantly reduce the illicit trade in counterfeit goods. NCS's collaboration with British-American Tobacco (BAT), for example, which dates from 2001, has helped to significantly reduce the smuggling of cigarettes into the country and, indeed, to boost the company's commercial performance. Such outcomes can flow from robust customs-right holder partnerships.

In March 2018, the Anti-Counterfeiting Collaboration of Nigeria (ACC) whose members include Gongoni (a producer of high-quality aerosols and other consumer products), Japan Tobacco International (JTI), Diageo, Nestlé, Tara Cosmetics, Canon Inc., Glaxosmithkline, Pfizer, Gucci, and Nike, joined ranks with NCS. In an attempt to tackle the scale of counterfeiting and its all-pervasive nature, the ACC and NCS undertook a two-week capacity-building program to train 124 front-line officers from across the country on IP enforcement.

This highly successful initiative helped build IP awareness among border officials and boost the confidence of right holders in NCS operations. It also has given rise to a number of additional initiatives that promise to further strengthen relations with right holders.

These promising first steps will enable us to make even greater strides towards enabling more effective IP enforcement in the coming months and years.



# Raising IP awareness among Malawi's download generation

By **Thomas Dillon**, Building Respect  
for IP Division, WIPO

Photo: © WIPO



WIPO recently teamed up with the Copyright Society of Malawi (COSOMA) in rolling out a project that demonstrates that young people are very receptive to the concepts of intellectual property when they are presented in an engaging way.

The sun is rising on a cool winter morning in Lilongwe as Ludo, 15, walks to catch the bus to school. On her way, she listens on her headphones to the music she has downloaded from the Internet. “I don’t really care about where my music comes from,” she says, “I feel like it’s still music at the end of the day. I don’t really think sharing music with my friends is bad, we just listen to music together.” Ludo’s views are shared by many teenagers across Malawi. That’s why WIPO recently teamed up with the Copyright Society of Malawi (COSOMA) to roll out a project that sought to change these perceptions.

Thanks to these efforts, Ludo and her classmates at the Mount Sinai International School now have a completely different take on copyright. In June 2018, the school took part in a WIPO-led project, undertaken in cooperation

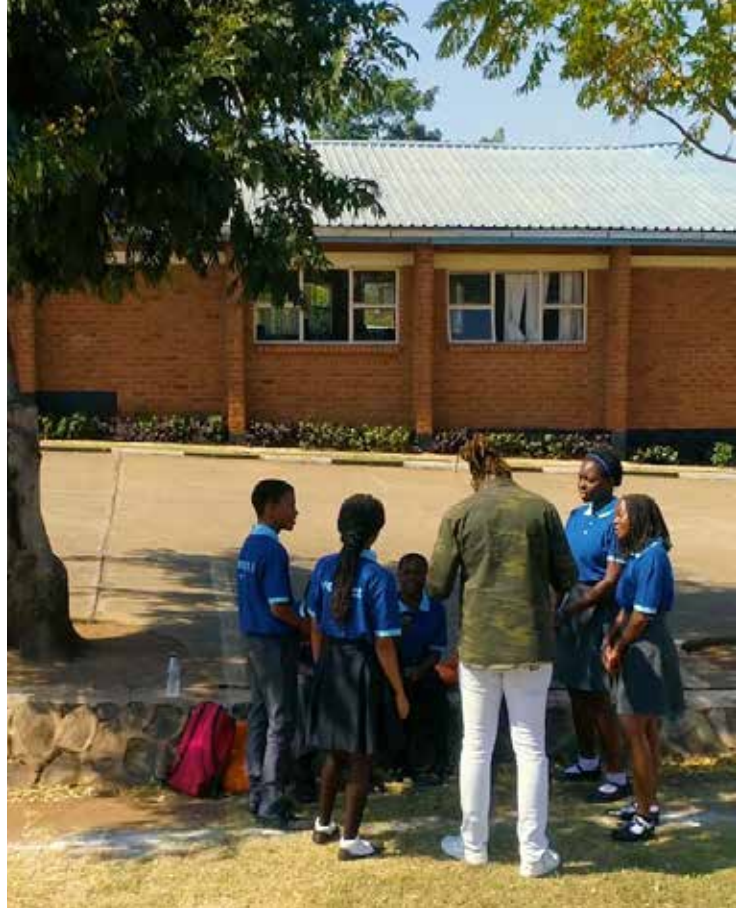
with COSOMA, to raise awareness among teachers and school children about the role and importance of copyright. The project made use of teaching materials created by WIPO, with the support of the Ministry of Culture, Sports and Tourism (MCST) of the Republic of Korea (see box).

## POP-STAR SEALS COPYRIGHT AWARENESS

The pupils learned about copyright and the need to respect creators’ rights during a workshop in which they met with the Malawian pop star, Tay Grin. The musician explained how copyright enables him to earn a living from his work and to keep making music, and how when his music is downloaded illegally, he doesn’t get a penny.



“People don’t understand copyright; they don’t know what it is there for. And when you don’t know you’re breaking a law, it’s easy to go ahead and continue doing what you’re doing,” says Tay Grin, highlighting a key barrier to building respect for the rights of creators in Malawi and elsewhere.



Photos: © WIPO

The Malawian pop-star, Tay Grin, meets with pupils and explains how copyright enables him to earn a living from his music.

“It’s difficult to make a living from music in Malawi, because we don’t have platforms where we can actually sell our music. It is easy for anyone to load it up onto sites where it’s downloaded illegally,” the musician explains.

“People don’t understand copyright; they don’t know what it is there for. And when you don’t know you’re breaking a law, it’s easy to go ahead and continue doing what you’re doing,” he says, highlighting a key barrier to building respect for the rights of creators in Malawi and elsewhere.

#### **NEW IP AWARENESS VIDEOS**

To capture the pupils’ experience and ensure that others can better understand the importance of copyright, WIPO and its partners engaged South African producer, Shane Potgieter, to create a short video for use in broader IP awareness-raising activities. That video, and a shorter two-minute interview with Tay Grin in which he shares his thoughts on the importance of copyright to the music industry and his own career, are available on WIPO’s YouTube channel at: [www.youtube.com/watch?v=nQlzcKWWB98](http://www.youtube.com/watch?v=nQlzcKWWB98). Other subtitled language versions will be available in due course.

The five-minute video focuses on Ludo, who explains how much she enjoys music, including the work of Tay Grin, which she downloads and shares with friends. At first she doesn't see anything wrong with this.

The video then cuts to Tay Grin at work in his studio. He takes a pause to talk about the predicament facing musicians in Malawi. These talented artists want to build a career around music and present Malawian culture on the world stage, but their efforts are hamstrung by widespread online piracy.

Back at school, students are concentrating on their teacher's explanation of copyright, using the teaching materials developed by WIPO with MCST's support. Ludo is thoughtful. "When the teacher was talking about intellectual property, I didn't really think that someone could steal something that is not physical, like music, or writing," she reflects. "He taught me a lot, especially about copyright and how we have to respect each other's creative ideas and thoughts."

In the next scene, Tay Grin strides into the school gymnasium, and is greeted with rapturous cheers by a hundred or so students. This is certainly a day they will remember for a long time. Tay Grin engages with the students and asks how many of them like his music. "Do you download my music legally, as in, do you pay for it? Or do you download it illegally? Be honest, be honest..." he urges. The pupils aren't quite sure how to respond, but most admit that they typically download his music illegally. This comes as no surprise to the musician.

He takes the opportunity to explain the impact their actions have on musicians. "Let me tell you why that is wrong. You see, the more you download something illegally, what happens is we don't make money, and, in the future, you may start to ask yourself, 'There used to be this guy called Tay Grin, and he used to do music. He doesn't do music anymore, what happened?' Usually that happens because artists are not making their money and people are infringing on their copyright. You understand the importance of that, right?"

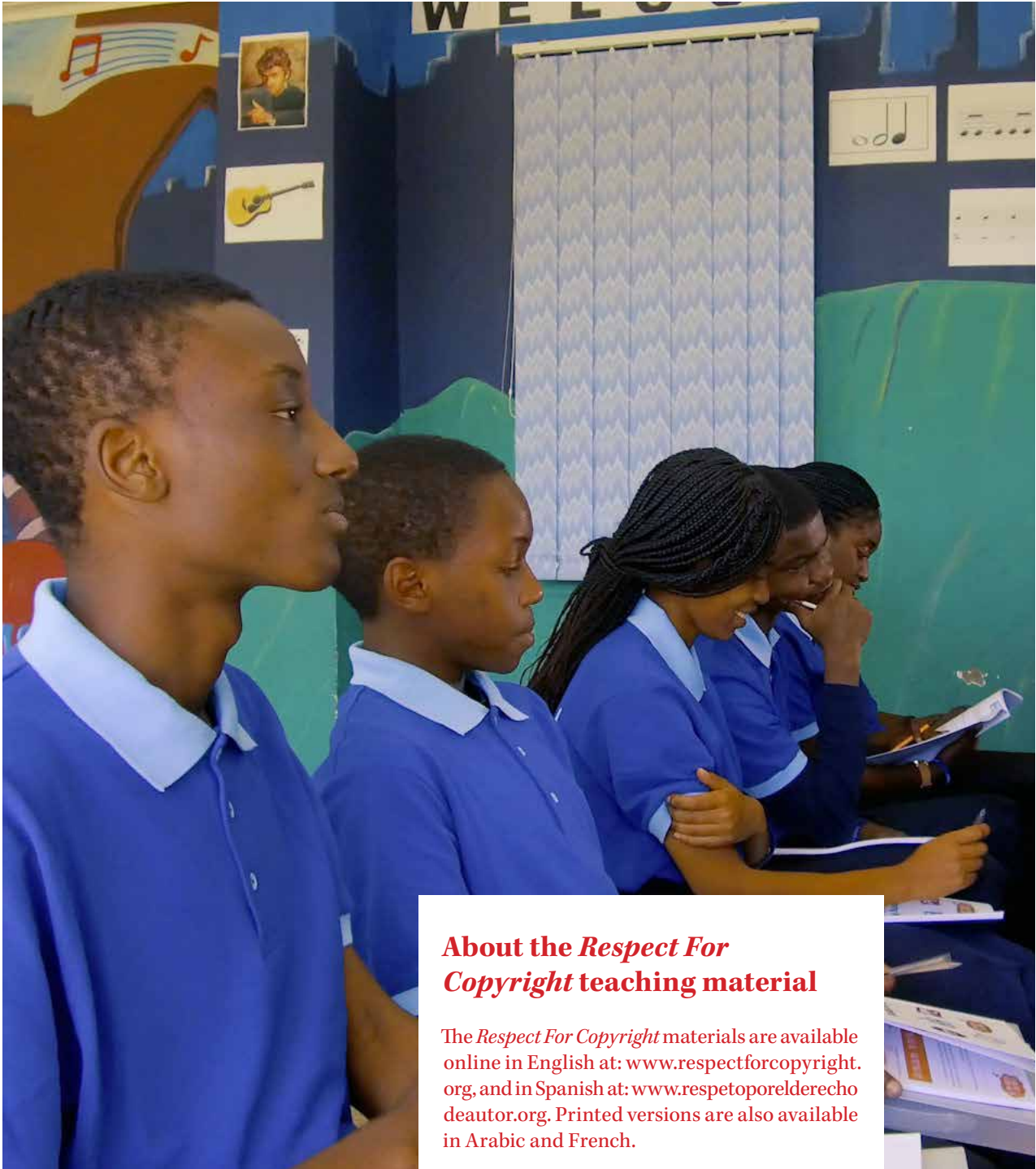
Tay Grin's explanation strikes a powerful chord among the students. In the shade of a tree on the school grounds, Ludo and her friends are clearly impressed by his explanation and thank him for taking the time to tell them about copyright. He, too, is delighted that they seem to have taken on board his message about the role that copyright plays and how it enables musicians to earn a living from their work and continue to make music. The clip ends on a positive note, with Ludo and her friends joining with the musician in singing a few bars of his latest hit.

This experience in Malawi demonstrates that young people are very receptive to IP concepts when they are presented in an engaging way. From this beginning, COSOMA will seek to extend its work with schools across Malawi to raise awareness of the role of copyright in sustaining Malawi's musical culture and the livelihoods of its many talented artists. And for the Mount Sinai International School, this year's workshop promises to become an annual event.

Other WIPO-sponsored video projects on the theme of building respect for IP are in the pipeline. Alongside [www.respectforcopyright.org](http://www.respectforcopyright.org), WIPO is promoting its online learning tool [www.respectfortrademarks.org](http://www.respectfortrademarks.org), which provides teachers and pupils with a range of engaging teaching materials on the importance of trademarks and what it takes to create them.

These and other engaging tools that explain the role and importance of IP rights in a clear and compelling way will help build a young generation that is IP-aware and more respectful of creators' IP rights in the future.





Photos: © WIPO

### About the *Respect For Copyright* teaching material

The *Respect For Copyright* materials are available online in English at: [www.respectforcopyright.org](http://www.respectforcopyright.org), and in Spanish at: [www.respetoporelderecho deautor.org](http://www.respetoporelderecho deautor.org). Printed versions are also available in Arabic and French.

The materials are designed to help teachers introduce copyright to young people between the ages of 10 and 15 and to encourage pupils to think about the importance of intellectual property (IP) for culture and the economy.

The concept of respect lies at the heart of the materials, which lead students, through debate and discussion, to a better understanding of the links between creative activity and IP.

In June 2018, the Mount Sinai International School in Malawi took part in a WIPO-led project, undertaken in cooperation with the Copyright Society of Malawi (COSOMA), to raise awareness among teachers and school children about the role and importance of copyright.

# Innovating for the whole world: IP's role in development

By **Aline Flower**, Associate General Counsel, Global Development, Bill & Melinda Gates Foundation

Photo: imageBROKER / Alamy Stock Photo



Wherever poverty, hunger, or disease require innovative solutions, intellectual property has a role to play.

What could intellectual property (IP) possibly have to do with helping the poorest people in the world's least developed countries? At first blush, the concepts of IP and development seem diametrically opposed. IP is often regarded as the manifestation of sophisticated legal infrastructures created by wealthy nations to incentivize innovation and mobilize advanced economies.

Yet, closer analysis reveals intimate and nuanced connections between IP and development, touching both micro- and macro-economic issues, including:

- Which people are served by commercial markets and which ones are not?
- The role for the private sector in development?

- How can research, development, and delivery of a particular product be driven where the product's ultimate consumers are poor people in poor countries?

IP has a place in each of these analyses. Wherever poverty, hunger, or disease, require innovative solutions, IP may have everything to do with development\*.

In some cases, the product needed already exists, and its surrounding IP is well-protected in developed world jurisdictions. In these cases, the international development challenge may involve distributing that product in the poor world. In other cases, an existing product may need to be adapted and improved to better tailor its specifications to resource-constrained conditions or





Photo: laboratory / Alamy Stock Photo

Gavi, “the Vaccine Alliance,” works to ensure that people in poor countries do not die from diseases that people in wealthy countries are routinely vaccinated against.

Photo: Courtesy of the Bill & Melinda Gates Foundation



IP issues abound in developing low-cost vaccines – particularly when it comes to in-licensing different viral strains from different entities and ensuring successful technology transfer.

the preferences of the people living there. In yet another category, bold innovation may be called for to meet the needs of people in the poorest parts of the world to solve unique, unmet challenges.

Below are a few illustrations of how IP figures in development projects, along with insights into the approach of the Bill & Melinda Gates Foundation to IP in development. In each case, a deliberate approach to IP is critical to ensuring the success of the project.

**EXISTING PRODUCTS**

Some of the most familiar examples of development involve interventions where the IP-protected product may already exist in its basic form and now needs to be made available to people in poor countries.

**GAVI: EXISTING VACCINES**

Gavi, “the Vaccine Alliance,” works to ensure that people in the developing world do not die of diseases that people in the developed world are routinely vaccinated against. Gavi is an international organization created in 2000 to improve access to underused (as well as new) vaccines for children living in the world’s poorest countries.





While IP issues may seem straightforward in a model that appears to rely exclusively on the procurement of existing product, that impression can be deceptive. IP issues abound in developing low-cost vaccines – particularly when it comes to in-licensing different viral strains from different entities and ensuring successful technology transfer.

### **BOLD INNOVATION**

In other cases, brand new technologies are needed to improve the lives of people in low-resource settings. These technology solutions may also have market applications in rich world settings and, therefore, carry a high likelihood of new IP.

### **THE REINVENTED TOILET**

According to United Nations statistics, 4.5 billion people live without a household toilet that safely disposes of human waste. Diarrheal disease caused by a lack of safe sanitation is estimated to contribute to 2.5 million preventable deaths a year, and is the fifth leading cause of death globally. Figuring out how to dispose of human waste safely in communities with no access to electrical grids or piped sanitation is therefore a central global health and development challenge. The flushing toilet, invented in 1596, simply cannot serve those households and communities.

Can we reimagine a more integrated sanitation appliance? Exciting experimentation is underway that would create energy-efficient household and community sanitation systems based on dewatering technology processes. These biochemical processes convert the solid and liquid waste into safe – and potentially reusable – byproducts. Such developed sanitation appliances and systems could potentially represent commercial products for global application and distribution.

### **THE VACCINE COLD CHAIN**

Reconsider the apparently straightforward example of an existing vaccine that simply needs to be distributed. In addition to the IP issues associated with product development mentioned above, let's assume successful in-licensing and technology transfer has enabled the development of that low-cost vaccine and that we have procured sufficient quantity of the product.

The innovation challenges are not behind us. We also need systems for reliably identifying and precisely locating which people need to receive that vaccine, as well as an effective tracking method to confirm its administration. Between vaccine development and vaccination tracking, a further innovation challenge involves safely and effectively delivering that vaccine in low-resource settings to remote areas lacking basic infrastructure. "Cold chains," or the temperature-controlled supply chain that maintains a vaccine's thermostability (and viability), need to be significantly improved to close the routine immunization coverage-gap and eradicate diseases globally.

### **IMPROVEMENTS AND ADAPTATIONS**

A third, intermediate approach to IP in development is presented where existing technologies form a critical basis for – but not the complete – innovative intervention. These projects build on background IP rights and almost always involve the prospect of new IP through further research, development and technology improvements.

Photos: Science Photo Library / Alamy Stock Photo



Between vaccine development and vaccine tracking, a further innovation challenge involves safely and effectively delivering that vaccine to remote areas lacking basic infrastructure.



Photo: Joerg Boethling / Alamy Stock Photo

Diarrheal disease caused by lack of safe sanitation is the fifth leading cause of death globally. Finding innovative ways to dispose of human waste safely in communities without access to electricity and piped sanitation is a central global health and development challenge.



Photo: Courtesy of the Bill & Melinda Gates Foundation

Photo: Courtesy of AATF



The chronic risk of drought threatens small-holder farmers in sub-Saharan Africa. A team of scientists led by the African Agricultural Technology Foundation (AATF) has developed and deployed drought-tolerant maize varieties adapted to the prevailing weather conditions and diseases of different regions.

### **WATER-EFFICIENT MAIZE FOR AFRICA (WEMA)**

The chronic risk of drought critically threatens small-holder farmers in sub-Saharan Africa who are trying to feed their families from household plots. A team of scientists led by African Agricultural Technology Foundation (AATF) has generated elite maize hybrids with enhanced drought tolerance adapted to sub-Saharan Africa and targeted to the preferences of small-scale farmers. Further research and development has been successful in conferring insect resistance to save the crops from stem borers and other toxins.

WEMA's research emerges from a public-private partnership involving the International Maize and Wheat Improvement Center (CIMMYT), AATF, the National Agricultural Research Systems (NARS), and a private sector partner which donated the drought-resistant trait and valuable IP to create royalty-free products under license via private seed companies for small-holder farmers.

### **USER-CENTERED CONTRACEPTIVE INNOVATIONS**

Consider the choices available to the mother in that small-holder farming household – which likely lacks ready access to clean water – who wishes to manage family resources by trying to space her children. Informed by the preferences of women in low-resource settings, several family planning projects are currently exploring technical interventions for longer-acting injectables and contraceptive implants. Some projects involve the use of a proprietary platform to develop longer-acting injectable formulations. Others involve development of biodegradable contraceptive implants. All involve innovation and, therefore, IP – both background and foreground.

### **INNOVATIVE MARKET SOLUTIONS**

A nascent intervention strategy being explored in various fields is premised less on a binary, polarized view of the world as “developing” versus “developed,” where the so-called “developing” world is exclusively non-commercial and the “developed” is the only viable commercial market. This emerging view posits that even poor people in poor countries make considered choices about how to spend or save their limited resources, and represent a largely untapped market.

### **NUTRITIONALLY ENHANCED PRODUCTS**

How can an existing food or beverage product already being sold to millions of poor consumers be improved to deliver better nutrition without compromising appeal? Product improvements may well involve IP protection. Potential models that would improve global nutrition for the poorest consumers while remaining commercially sustainable for the product manufacturer are being explored. In addition to improving nutrition for poor consumers, these models could potentially introduce the product developer to broader market segments with an improved product. In the long run, such a hybrid approach that merges both business and charitable goals could potentially even eliminate reliance on philanthropic funding.

### **HOW THE BILL & MELINDA GATES FOUNDATION APPROACHES IP FOR DEVELOPMENT**

At the Foundation, we recognize the importance of IP for two principal reasons. First, we respect IP as a proprietary asset. If a proposed project relies on third-party IP, we require prospective funding recipients to adopt a committed strategy to acquire licensing rights or non-assert agreements from that third party for that background IP.





Photo: Courtesy of the Bill & Melinda Gates Foundation

Different models are being explored to improve global nutrition for the poorest consumers through product improvements that may well involve IP protection.



Photo: Courtesy of the Bill & Melinda Gates Foundation

Informed by the preferences of women in low-resource settings, several family planning projects are currently exploring technical interventions for long-acting injectables and contraceptive implants. All involve innovation and, therefore, IP



Second, we respect IP for its inherent potential to incentivize product research and development. In some cases, a successful project could result in a technology that might have commercial value in rich (or developed) world markets. Since the results of a project funded under a Foundation grant are owned by the grantee, the prospect of both “doing good” and “doing well” may inspire an entity to submit a proposal for Foundation funding. Would the Foundation fund a project that could result in a technology that is intended to benefit the poor world but may also have commercial application in the rich world? Yes – under certain conditions.

These conditions are called “Global Access.” The Foundation requires that a grantee structures funded projects in a way that will further the Global Access objectives of the Foundation. That charitable obligation is increasingly safeguarded by the Foundation through a sub-licensable non-exclusive Foundation license. Under the Foundation’s Grant Agreement, “Global Access’ means that the grantee agrees to conduct and manage the project research, project technologies and information in a manner that enables (a) the knowledge gained during the project to be promptly and broadly disseminated, and (b) the intended product(s) to be made available and accessible at reasonable cost to people most in need within developing countries.”

Global Access is the legal mechanism that ensures that the project’s charitable goals remain paramount, regardless of any windfalls that may accrue to the grantee co-incidentally to the Foundation’s purpose in funding that project, for example, through dual market technology. This approach to managing IP ensures that the projects we fund can achieve the programmatic impact intended by the Foundation. It also ensures that the Foundation complies with Internal Revenue Service (IRS) rules for private foundations in the United States, by ensuring the charitability of its investments.

One specific tactic for achieving this objective is to require our grantees to develop a “Global Access Strategy” (also described as a “charitable business plan”). A Global Access Strategy involving IP – such as the projects described above – must demonstrate how any new IP rights associated with inventions developed within the context of a project will be managed. This may involve cross-licensing rights to the other project collaborators as well as developing a strategic commercialization plan that balances the inherent market incentives of selling product into commercial markets with the charitable obligation to make the product accessible to a poor market segment. Such strategic plans may out-license to different territories or on the basis of different applications of the technology – serving richer or poorer market segments, respectively. The Foundation invites its grantees to further demonstrate how they intend to leverage potentially commercial market applications for long-term success and sustainability of the project’s global development goal.

### **AN INVITATION TO ACCEPT THE INNOVATION CHALLENGE**

We are still developing our understanding about the many ways in which IP is critical to development. This article shares just a few examples from the Foundation’s experience in grant-making. With so much work still to be done to address the needs of people in the poorest parts of the world, there is extraordinary room for innovation. We invite everyone to accept the challenge to innovate – whether boldly or incrementally – to make this a world where every person has the chance to lead a healthy, productive life.

\* For purposes of this article, the terms “developing” and “developed” countries are used. However, the author acknowledges the need to reconsider their utility in light of Hans Rosling’s critically important book, *Factfulness: Ten Reasons We’re Wrong About the World—and Why Things Are Better Than You Think*, Flatiron Books, 2018.







Photo: Courtesy of the Bill & Melinda Gates Foundation

The Bill & Melinda Gates Foundation recognizes the importance of IP as a proprietary asset and for its inherent potential to incentivize product research and development.



# The global digital enforcement of intellectual property

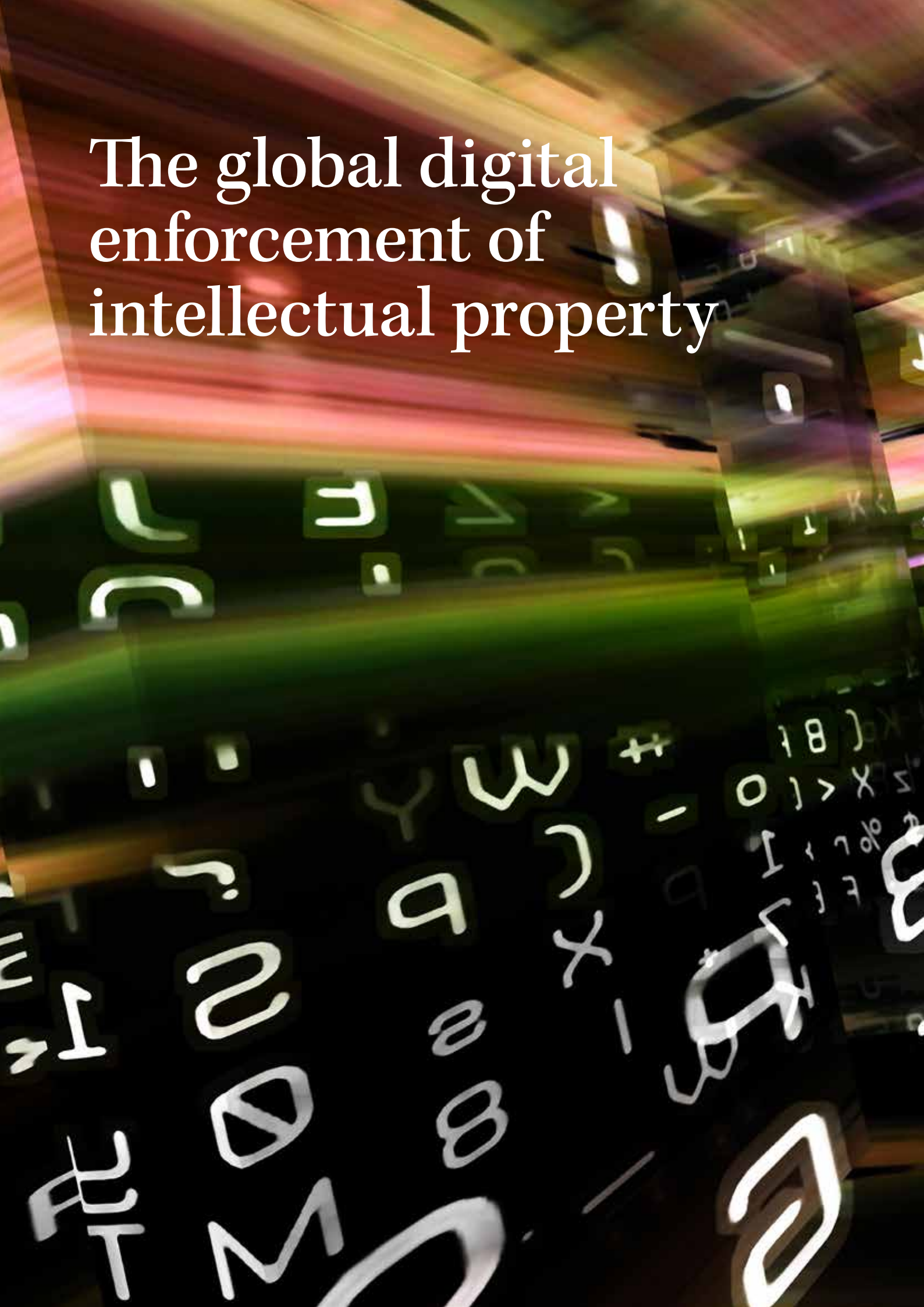






Photo: Raymond Pettitt / Alamy Stock Photo

Digital technology has transformed our lives, but increasingly, the interconnected technologies we embrace are being turned against us. For example, Bad Actors are using technology to flood the online market with pirated and counterfeit goods.

By **Frederick Mostert**,  
 Professor of Practice  
 at the School of Law,  
 King's College, London  
 and Research Fellow at  
 the Oxford Intellectual  
 Property Research Centre,  
 University of Oxford\*,  
 United Kingdom

Digital technology is arguably humankind's greatest achievement since speech. Thanks to Big Tech and the advent of platforms such as Google, Alibaba, Amazon, Facebook, and Twitter, the way we live, search for things, shop, communicate, and even woo each other have all changed fundamentally.

Digital technology has freed up our time from manual tasks; it enables us to keep in touch globally and to be informed on a scale never experienced in history. But as we open our houses to ever more interconnected technology, as governments ponder the idea of "smart cities," and as the hunger for convenience and speed push caution to one side and increase our attack surface, the same technology we are embracing is being turned against us.

Bad Actors are exploiting technology in multiple ways: by pilfering private data to steal funds from bank accounts; by misusing social media and advertising data; by placing false ads to unsuspecting consumers; by posting child abuse; by texting hate speech, or by spreading fake news. The Bad Actors engage in these activities while hiding behind the hallowed tenets of free speech. They are also weaponizing technology and they are using it smarter and more efficiently than Good Actors.

A case in point is the ruthlessly efficient way in which Bad Actors use technology to flood the online market with pirated and counterfeit goods. Their success in churning out perfect copies at unprecedented volume and speed stands in stark contrast to the slow and faltering way in which Good Actors use technology to authenticate their product through supply and distribution chains.

How then does one reconcile these seemingly irreconcilable fundamental issues in our new world?

### **THE CHALLENGES OF THE DIGITAL ENVIRONMENT**

Existing solutions in the digital environment are often subject to intractable challenges. First, the identity of the counterfeiter is often unknown to the brand or content owner. Second, the anonymity problem exacerbates the "whack a mole" phenomenon – where a webpage is taken down and another online listing pops up under a different URL almost instantly – as the infringers themselves evade identification. Third, the sheer volume and velocity of online counterfeit sales make online listings very time sensitive – they are typically posted for a few hours or days only, making timely online tracking and tracing of counterfeit listings extremely difficult. Fourth, pirates and counterfeiters typically use more than one website in different countries raising questions of international jurisdiction and the enforcement of foreign judgments. And fifth, there is no uniform, international mechanism for delisting and blacklisting online pirated goods and counterfeits.

These challenges raise the thorny issue of whether regulation may be an effective response to the smart use of technology by Bad Actors in the digital world. Regulation intuitively goes against the very grain of the prime directive of the original dreamers of the digital age when they built the Internet. Digital pioneers John Postel, Sir Tim Berners-Lee, and Vincent Cerf postulated a free and unfettered cyberworld – a glorious environment where information flows freely, where the right to know is a given,

\*Professor Mostert is also the founder of the Digital Communities Lab (London), United Kingdom.



where scientific collaboration is easy, where you can express your opinions without censure, and where free competition allows you to set up an online business that knows no boundaries or borders. So how then to reconcile that which is potion with that which is poison?

There is, though, an even larger and more pressing issue in the digital era. Courts and legislatures around the world have become woefully inadequate in dealing with, and stopping, the actions of Bad Actors online. As Professor Tim Wu has warned, the volume and frequency of online activities are unprecedented. The law has traditionally lagged behind commercial and technological development. And playing catch-up in the online context has turned into an increasingly desperate struggle by courts trying to keep up with the explosively rapid pace of technological development, as foreseen by Moore's Law (by which the number of transistors per square inch on integrated circuits has doubled every year since they were invented). It makes no sense for a brand or content owner to run to court – at great expense – to stop the single sale of a pirated or counterfeited product on a digital platform because the actual listing typically appears online for only a few hours. Moreover, such action does

nothing to address the multitude of other fake listings posted by other Bad Actors.

### **SOCIAL MEDIA, PIRATES AND COUNTERFEITERS**

A new and particularly insidious threat is the proliferation of counterfeits on social media. A recent UK Intellectual Property Office study warns that “social media is increasingly a key part of a complex eco-system to divert traffic from authentic sites covering myriad rogue online platforms.” The official pages of internationally well-known brands on Facebook, Instagram, and WeChat have all been subjected to counterfeiters using them openly to tout their pirated goods and counterfeits. Jenny Wolfram, CEO of BrandBastion, notes that “during a two weeks’ period earlier this year, one brand pirate posted 114 comments, advertising counterfeit goods on the Instagram accounts of many internationally famous brands.” (See *WIPO Study on Approaches to Online Trademark Infringement*).

Apart from lost sales for the legitimate brand owner, pirated goods and counterfeits listed on social media can pose a significant threat to public health and safety.

Existing solutions in the digital environment are often subject to intractable challenges, which raise the thorny issue of whether regulation may be an effective response to the smart use of technology by Bad Actors in the digital world.

Photo: gordenkoff / iStock / Getty Images Plus



Photos: MBI / Alamy Stock Photo



A recent UK Intellectual Property Office study warns that “social media is increasingly a key part of a complex eco-system to divert traffic from authentic sites covering myriad rogue online platforms.”



Photos: vichai phububphapan / Alamy Stock Photo

Digital technology has transformed the way we live, search for things, shop and communicate.

In the United Kingdom, a recent law enforcement operation seized “tens of thousands of counterfeit and unsafe goods, including dangerous cosmetics, perfumes, razor blades, electrical products and chargers, as well as clothing, footwear, leather goods and tobacco products.” (See *WIPO Study on Approaches to online trademark infringement*). The haul ranged from such items as “Android TV boxes with unsafe mains chargers, to several hundreds of counterfeit Cinderella dolls containing high levels of toxic phthalates.” The UK National Trading Standards warns that “fake goods are not subject to the stringent safety checks that genuine goods, made by legitimate businesses, must comply with.”

In addition, listings of counterfeit goods on social media inflict serious reputational harm on brands. Customers of the genuine brand are confused by listings that piggyback onto the genuine social media pages of brands and are tricked into buying fake products. These disgruntled customers, in turn, post their own very damaging remarks about the brand on the same media page for all other customers to see. Counterfeiters have established dedicated storefronts on social media platforms such as Facebook, possibly in an attempt to evade the more stringent anti-counterfeit measures increasingly being adopted by online e-commerce platforms like Alibaba, Amazon and eBay.

The root cause of nefarious activity is anonymity on the Internet. The cloak of anonymity allows Bad Actors to evade detection. Only if the wrongdoing is systematically tracked and traced to the source of the problem – from the digital world to a physical location – can enforcement make any substantive headway.

Although it seems logical to stop the toxic flow of counterfeit and pirated goods at the distribution point of the gatekeepers – the web, and social media platforms – this is as successful as trying to make a river reverse its flow at the estuary.

#### **ALIBABA'S ALTERNATIVE APPROACH**

Alibaba has adopted an alternative approach, following up on initiatives developed by the Chinese and UK governments. It is tracking and tracing pirated and counterfeit goods directly from the digital platform listing to the physical source (see *Intellectual Property and e-commerce: Alibaba's perspective*, page 35).

It has spearheaded the use of new technologies such as big-data analytics and machine learning, thereby setting a new benchmark for web and social media platforms in this area. These measures serve to both proactively remove counterfeit listings and track down the source of counterfeits and the factories that produce them.

By working with law enforcement authorities, Alibaba's system is able to intelligently parse information to identify counterfeiters and potentially reveal the manufacturing source by tracing the movement of funds. Alibaba's initiative has already borne fruit. By sharing information gleaned from these tools with law enforcement officials in China, authorities have seized counterfeit goods worth RMB 1.43 billion (approximately USD 209 million) and eliminated 417 production rackets.

#### **DIGITAL TOOLS**

Social media and web platforms, intermediaries, and right holders around the world are at the forefront of the battle against digital copying. These groups have responded to the problem by developing and adopting an array of digital tools in surprisingly similar ways. But what are the intended and unintended norm-setting consequences of these digital tools?

The current online environment cries out for a legal analysis of the contemporary technical tools employed to combat digital infringements. They include Blockchain applications; social media tools; blacklisting and whitelisting; follow-the-money tools; domain name tools; search engine de-indexing; hack-back and active defense; and various notice actions.

As much as one would like a court of law to mete out individual justice in every single case, this ideal is unrealistic and makes no sense in the digital environment. As pointed out in the *Financial Times* (8 June 2016), “Pirates are more adept at using new technologies than those trying to shut them down.” Michael Evans, Alibaba's president, has asserted, however, that Alibaba has “the tools to change the way the war is waged ... using data and technology ... to defeat the counterfeiters... If Alibaba delivers, it will be a game changer by stopping counterfeiting at source rather than at platform level.”

In response to an increase in online sales of pirated and counterfeit products, voluntary cooperation between





Photo: Peopleimages / E+ / Stock / Getty Images Plus

online platforms and right holders has proven successful, to some extent, but has not been fully effective in stopping online counterfeit sales. These measures are designed by web and social media platforms themselves (the new gatekeepers), drafted in cooperation with right holders, or supported by states and their administrative authorities.

#### THE NEED FOR GLOBAL GUIDELINES

*De facto* guidelines have already developed around the world with right holders, online and social media platforms, and government law enforcement authorities voluntarily cooperating across borders. These guidelines are in need of further evolution because the Internet is by its nature global. As anyone in charge of enforcement efforts will attest, the borderless digital environment and associated global jurisdictional issues make matters vastly challenging. They represent some of the great digital challenges which directly affect the law on online private data, social media advertising, hate speech, fake news, counterfeiting, and piracy at this moment. They also bring a certain provocative element and excitement to this body of law.

Effective digital counter-measures are dependent on voluntary, collaborative, technical, and legal standards. In-depth research is urgently needed into the new norm-setting which flows directly from the use of digital tools that are already paving the way for new legal standards throughout the world.

The borderless digital environment and associated global jurisdictional issues represent some of the great digital challenges that directly affect the law on private data, social media advertising, hate speech, fake news, counterfeiting, and piracy today.

# Intellectual property and e-commerce: Alibaba's perspective

By **Jungong Sun**, Director of the Alibaba Intellectual Property Research Institute and Vice-President of the Alibaba Group

E-commerce emerged in China just 25 years ago, in 1993. Two years later, the country's first e-commerce company was established, and three years after that, in 1998, the first e-commerce transaction took place. From these modest beginnings, China's e-commerce landscape has evolved beyond recognition. And in that process, it has moved away from mirroring the practices of Western economies to developing its own model which embraces globalization.

Since the 1990s, several pioneering global internet companies have emerged. These include giants like the Alibaba Group (Alibaba), JD.com, and Suning.com. Since 2013, China has led global rankings for the volume of online retail transactions. In 2016, four Chinese online retailers – Alibaba, JD.com, Xiaomi, and Suning.com – ranked among the top ten global e-commerce companies. With a market share of 26.6 percent, Alibaba topped global rankings for that year.

Founded in 1999 by Jack Ma, China's online business pioneer, and his associates, the Alibaba Group now employs more than 70,000 people around the world and has more than 70 offices in Greater China, India, Singapore, the United Kingdom and the USA. The Alibaba Group has since developed leading businesses in consumer e-commerce, online payment, business-to-business (B2B) marketplaces and cloud computing. More recently it has expanded into a range of new areas, including mobile apps, mobile operating systems and Internet TV. Alibaba's mission is to make it easy to do business anywhere.

## **ALIBABA SPEARHEADS A NEW MODEL FOR INTELLECTUAL PROPERTY PROTECTION**

The protection of intellectual property (IP) rights in today's innovation-driven and increasingly knowledge-based global economy is an important consideration for policymakers and businesses around the world. IP protection has also become a central concern for online retailers, including the Alibaba Group which has had IP protection in its sights since it began operating.

In an attempt to tackle the proliferation of counterfeit products more effectively, and the growing number of related complaints, many on-line retailers have set about building user-friendly, internal governance systems that support the protection of IP and their reputation as socially responsible corporate citizens. The Alibaba Group, for example, has, through experimentation, pioneered the development of an ever-more sophisticated and effective IP protection system. Using advanced computing technologies and big data, Alibaba's Platform Governance Department has crafted and rolled out an effective system for spotting and disciplining offers involving counterfeit goods on its platforms. Alibaba's governance model is built

Photo: RaymondAsiaPhotography / Alamy Stock Photo



Alibaba's pioneering approach to tackling online trade in counterfeit goods using advanced technologies, including AI, has become a reference for other online platforms.

around proactive monitoring and an effective IP rights infringement notification system. The so-called Alibaba Model for IPR protection in e-commerce is governed by technology, innovative business practice and the law.

#### **USING TECHNOLOGY TO IMPROVE ONLINE GOVERNANCE**

Alibaba is harnessing various advanced technologies to tackle online counterfeiting and piracy. To identify counterfeit goods it uses fake product identification modelling, image recognition techniques, semantic

recognition algorithms, product information databases, real-time interception systems and data collaboration platforms. Thanks to its algorithms, every day Alibaba identifies up to 600 million product images with an accuracy rate of 97.6 percent. Using these sophisticated technologies, over 97 percent of suspected infringing goods are removed from Alibaba platforms as soon as they are posted online. In 2017, twenty-seven times more goods were removed from Alibaba platforms using these technologies than were removed with takedown notices issued by IP rights holders.



## STRENGTHENING GOVERNANCE THROUGH INNOVATIVE BUSINESS PRACTICE

As a leading e-commerce player, Alibaba is at the forefront of efforts to shape China's e-commerce landscape. Since it opened its doors for business, the Alibaba Group has been working to build an open, collaborative and thriving e-commerce ecosystem that benefits consumers, merchants and the economy as a whole by making it easy to do business anywhere. With this in mind, Alibaba is leading the development of the private sector-led Electronic World Trade Platform (eWTP), a multi-stakeholder initiative which seeks "to incubate e-trade rules and foster a more effective and efficient policy and business environment for cross-border electronic trade development."

By April 2018, seventeen countries and regions had set up pavilions on the Alibaba's Tmall platform, the preferred channel for large overseas brands and small and medium-sized enterprises seeking to enter China's sizeable and expanding online consumer market. To date, over 100,000 brands – representing 75 percent of the world's most valuable consumer brands – have a presence on Alibaba's e-commerce platforms. The commercial power of e-commerce in China has made it a magnet for global brands, and has allowed it to become the touchstone for best practice with respect to IP protection.

Alibaba is constantly exploring new ways to tackle the illegal online trade in counterfeit goods. In July 2016, the company launched its IP Joint-Force System, a world first, which combines the strengths of e-commerce operators and right holders. The system uses big data modelling identification to provide IP rights holders with links to suspected IP infringements, giving them "one-click rights protection." So far, over 250 rights holders have joined the initiative.

In August 2017, Alibaba launched the Alibaba Express IPP, which offers global IP rights holders a range of benefits free of charge. Beyond managing a world-leading online IP protection system for all brand owners, the program provides right holders with an upgraded IP enforcement service, in particular, by eliminating frivolous, bad faith complaints. Under the program, 95 percent of IP notifications (excluding bad faith notifications) can be processed within 24 hours. This is yet another global first for the Group.

## GOVERNANCE UNDERPINNED BY THE LAW

The rules governing the use of Alibaba's platforms are rooted in law and are made publicly available to all parties via those platforms. Under development since 2010, the rules cover all types of IP infringement and govern the full range of activities undertaken by all parties using Alibaba platforms. To date, there have been more than 60 iterations of the rules for Taobao.com, Alibaba's biggest website and over 70 iterations of the rules for Tmall.com. These rules cover penalties, access permission, transactions, and marketing. The group has also developed a variety of mechanisms to protect IP right holders. For example, in 2017, Taobao introduced its "three strikes and you are out" policy to clamp down on repeat offenders.

Since 2016, Alibaba has also actively initiated civil actions against vendors of counterfeit products on its platforms. In 2017, the Group won a landmark case when a Shanghai court ordered a vendor of pet foods to pay RMB 120,000 (approximately USD 17,700) in damages. The case attracted widespread attention in judicial and media circles as it was the first time an e-commerce platform had successfully sued a purveyor of counterfeit goods online. The case was selected as a top ten case for "Promoting the Process of the Rule of Law in China" by the Supreme People's Court and China's state broadcaster, CCTV.

## INNOVATIVE DISPUTE RESOLUTION MECHANISMS

To resolve disputes arising from online transactions, Alibaba has developed its highly innovative Public Review Mechanism which canvasses public views on whether or not proposed rules to discourage certain online behavior are considered reasonable. Following its launch in December 2012, users of the Taobao platform were asked to vote on whether the platform's rules regarding fictitious trading were reasonable. They concurred. The mechanism was subsequently rolled out to support the resolution of transaction-related disputes. The mechanism is proving highly successful and has been further enhanced. It now uses consumer inputs to support the identification of copycat brands. So far, nearly five million people have taken part in the Public Review Mechanism and over 100 million dispute judgments have been completed.

“The Alibaba model for IP governance in e-commerce seeks to protect IP rights by integrating technology, business models and the law.”

Jungong Sun, Vice-President of the Alibaba Group

With Alibaba leading the charge, Chinese e-commerce enterprises have developed an innovative framework of e-commerce governance which combines proactive prevention and control measures with effective complaint handling and dispute resolution. The Alibaba model for IP governance in e-commerce seeks to protect IP rights by integrating technology, business models and the law.

Alibaba's model is now widely referenced and is being implemented by other e-commerce platforms. Its strength lies in the fact that the technology it uses can be easily adapted to areas beyond e-commerce to support the protection of IP rights across a broad range of sectors. In this way it supports efforts to build greater respect for IP rights across the economic and social spectrum.

#### THE FUTURE

Looking to the future, scientific and technological developments promise to boost creativity, innovation and business growth in coming years. However, if we are to achieve inclusive trade – where many more small companies and individuals are able to participate in and enjoy the benefits of global trade – it is important that trade barriers are minimized and new global trade rules are adopted.

Legal systems are struggling to keep pace with the needs of the new information age. The traditional means of protecting IP rights are no longer fit for purpose in today's seamless, high-tech-driven world. Those rights which are territorial in nature, meaning they only have a legal effect in the jurisdiction in which they are granted, are being challenged by the borderless nature of e-commerce. The legal penalties and enforcement mechanisms of the 20<sup>th</sup> century are toothless in tackling e-crimes such as online fraud, ID theft, spamming, and so on. We need to find new, more effective solutions to create robust systems for tackling these challenges. New technologies can help us better regulate the online ecosystem to ensure that it continues to expand.

In 2016, Alibaba introduced five new strategies for retail, manufacturing, finance, technology, and energy. As reflected in the company's "Made in Internet" theme, the internet, and use of big data to identify consumer preferences, will become an important driver for incubating and cultivating improved IP rights.

Only by respecting IP and fostering the development of IP rights that are effective in fostering online trade can we achieve high-performing, competitive markets. The issue of IP protection in e-commerce is a complex challenge, especially when tackling the online sale of counterfeit products. It involves more and better cooperation and joint governance among relevant stakeholders, and the sharing of data and technologies among government authorities, IP rights holders and e-commerce platforms. Such an approach is essential if we are to make a real difference, achieve mutual benefit and ensure that e-commerce continues to thrive.

# Making disposal of counterfeits sustainable: the REACT way

By **Ronald Brohm**,  
Managing Director, REACT,  
Amsterdam, Netherlands

REACT is an association that brings together some 280 rights owners from across the globe in the fight against the illegal trade in counterfeit goods. The Association has a large international network with strategically placed offices and partners around the world, making it a compelling option for businesses seeking to enforce their intellectual property (IP) rights.

## **BRIDGING THE GAP BETWEEN RIGHTS HOLDER AND CUSTOMS AUTHORITIES**

REACT offers a comprehensive and global package of assistance to enhance the anti-counterfeiting strategies of well-known brands and customs authorities alike. In 1995, we established our customs enforcement program. Uptake among rights holders has been strong. The program guides rights holders through the process of providing customs authorities with the relevant paperwork – such as a customs recordal – to request that they monitor and detect infringing goods. This is an important starting point for rights holders in protecting their brands at the border. The program also provides guidance on the type of information that customs officials require to help detect infringing goods, as well as advice on how to follow up with them when goods have been detained.

REACT also offers training modules for customs officials to strengthen their capacity on the ground in identifying and detecting infringing goods. This has become particularly challenging in light of huge leap in the number of online transactions involving smaller shipments being sent to destinations across the globe. In this context, it has never been more important for customs authorities and rights holders to work together. Strengthening these partnerships is a top priority for REACT.

REACT's long-standing relationship with customs authorities (the Association works with more than 90 countries around the world) and the strong backing of a large group of rights owners has made it possible to seize and destroy billions of counterfeit products. These products pose a threat to consumer safety, legitimate business interests, employment, national economic performance, and the environment.

## **IN SEARCH OF ECO-FRIENDLY SOLUTIONS**

Protecting consumers against the trade in fake goods and disposing of seized goods in an environmentally responsible way are top priorities for REACT. For well over a decade, we have been exploring more eco-friendly ways to manage the rising volume of counterfeit goods seized by customs authorities. In many countries, these goods are simply incinerated or put into landfill sites, with potentially harmful environmental consequences.

With social and environmental concerns uppermost in our mind, REACT has spearheaded an innovative approach that yields dividends for rights holders, customs authorities, and, ultimately, society at large. In 2006, we joined forces with Dutch Customs and a social enterprise called DWZ (which we now co-own) that provides a sheltered workplace for socially vulnerable individuals.

Under the arrangement, counterfeit goods seized by customs authorities in the Netherlands and Belgium are brought from major ports, such as Antwerp, Ostend, Schiphol, and Rotterdam, to DWZ's storage facility in the Netherlands, (which REACT also co-owns), where they are processed, dismantled, and made available for recycling.



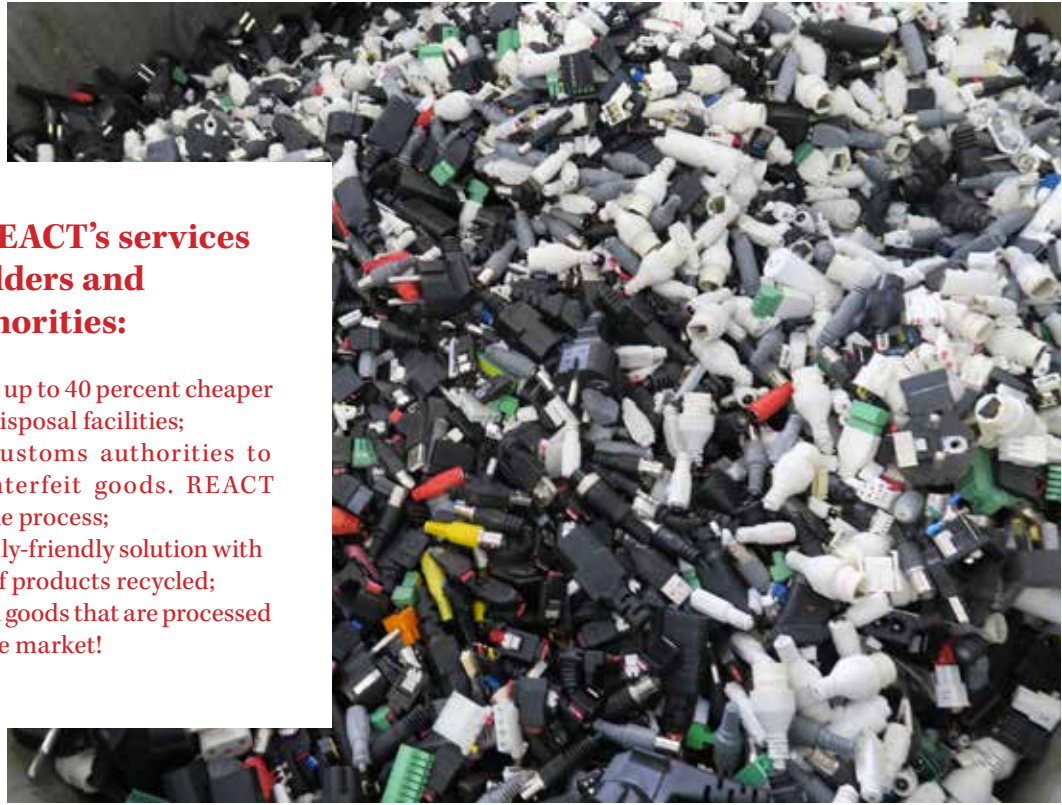


Photo: Courtesy of WIPO/Louise Van Greunen

### Benefits of REACT's services for rights holders and customs authorities:

- Disposal costs are up to 40 percent cheaper than traditional disposal facilities;
- No burden on customs authorities to dispose of counterfeit goods. REACT manages the whole process;
- An environmentally-friendly solution with up to 99 percent of products recycled;
- All falsely branded goods that are processed never return to the market!

REACT is responsible for the seizure of a huge quantity of counterfeit goods. Disposing of these goods in an environmentally responsible way is a top priority.

The project offers recovering psychiatric patients an opportunity to re-enter the work force in a controlled and orderly manner. Materials recovered by dismantling seized counterfeit goods are sold on to various parties in the recycling industry. This allows us to convert unusable counterfeit goods into valuable commodities, while protecting the environment in terms of reducing landfill and the carbon dioxide emissions associated with incineration. Thanks to the efficiency and scale of our operation, REACT is able to cut the cost of disposing of these products by around 40 percent compared to traditional waste treatment facilities.

While the majority of the goods processed are handled by REACT, the facility may also be used by other companies, including law firms and government agencies.

#### PRIORITIZING RECYCLING AND RE-USE

Amid growing concerns about global warming and natural resource depletion, REACT has made recycling of seized counterfeit goods a priority. Many of the counterfeit products seized by customs authorities contain valuable base materials, such as plastic, metal, wire, and so forth. Once dismantled, these materials can often be safely recycled and turned into useful products with commercial value. This is a far more

constructive way of dealing with these goods than simply destroying them, which itself is a potentially costly and polluting option.

Amid growing interest among governments and businesses to improve their environmental credentials and boost their reputation as socially responsible actors, REACT recently launched REACT SUSTAINS. This global initiative effectively expands our recycling program and is a response to the projected increase in volume of counterfeit goods requiring disposal and recycling as a result of increased capacity by customs authorities to intercept counterfeit merchandise.

#### IMPLEMENTING REACT SUSTAINS

REACT SUSTAINS is designed to motivate customs authorities to store all seized goods in bonded warehouses, which will be maintained, managed, and supported by REACT. We provide assistance with the infrastructure, finance, staff, and/or know-how to have the goods dismantled and all recovered materials sold on to the recycling industry – with the approval of both customs authorities and rights owners, of course.

The initiative is flexible and its implementation can be adapted to the prevailing operating conditions within

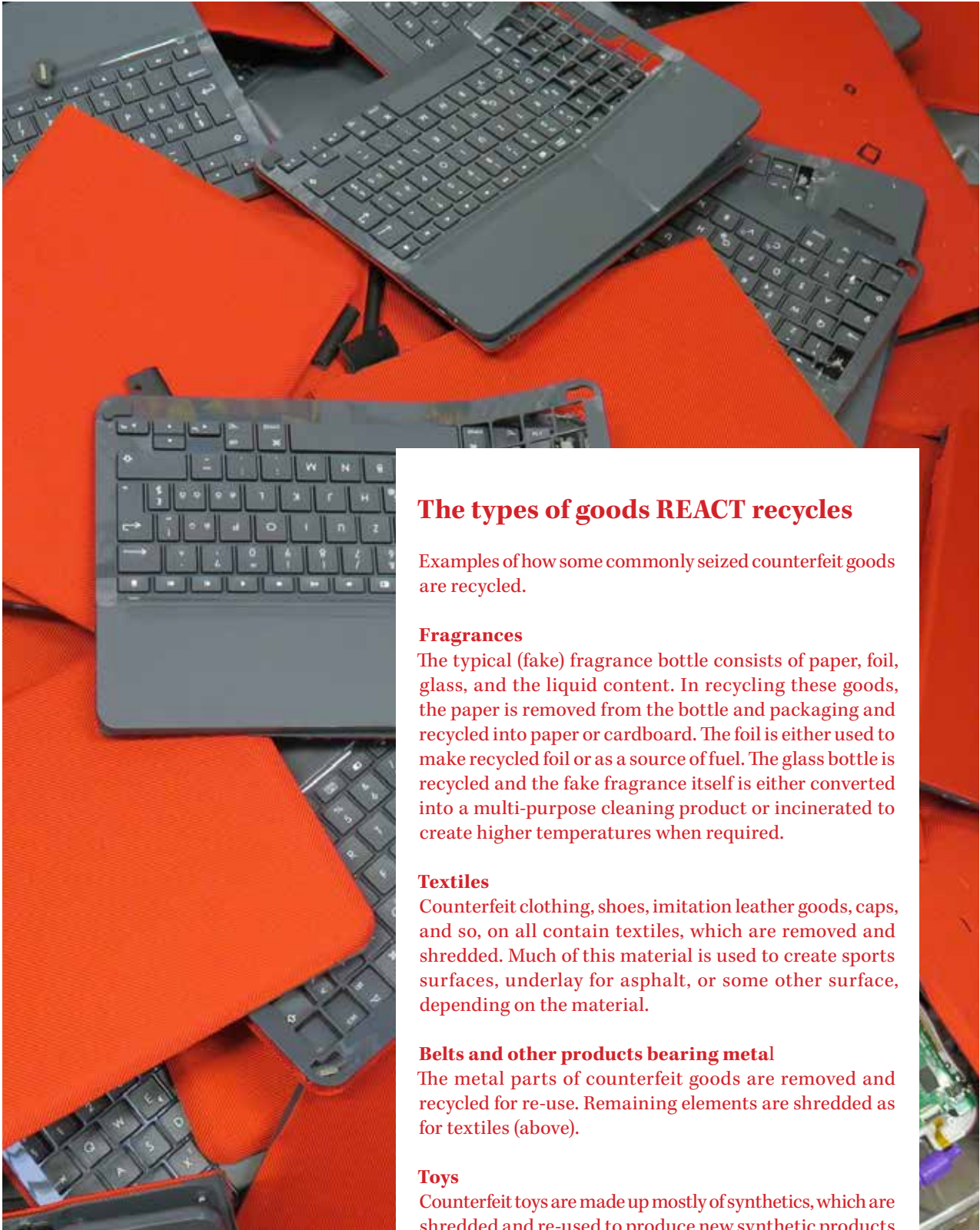


Photo: Courtesy of WIPO/Louise Van Greunen

## The types of goods REACT recycles

Examples of how some commonly seized counterfeit goods are recycled.

### Fragrances

The typical (fake) fragrance bottle consists of paper, foil, glass, and the liquid content. In recycling these goods, the paper is removed from the bottle and packaging and recycled into paper or cardboard. The foil is either used to make recycled foil or as a source of fuel. The glass bottle is recycled and the fake fragrance itself is either converted into a multi-purpose cleaning product or incinerated to create higher temperatures when required.

### Textiles

Counterfeit clothing, shoes, imitation leather goods, caps, and so, on all contain textiles, which are removed and shredded. Much of this material is used to create sports surfaces, underlay for asphalt, or some other surface, depending on the material.

### Belts and other products bearing metal

The metal parts of counterfeit goods are removed and recycled for re-use. Remaining elements are shredded as for textiles (above).

### Toys

Counterfeit toys are made up mostly of synthetics, which are shredded and re-used to produce new synthetic products like garbage bins.

### Electronics

Electronic goods are dismantled, with each component sold on for different uses.

In 2017, REACT was able to recycle 99 percent of all the counterfeit goods processed. The remaining 1 percent was incinerated.



Photo: Courtesy of WIPO/Louise Van Greunen



The overriding objective of the recently launched REACT SUSTAINS project is to lower the costs of disposal and to encourage greater re-use of the raw materials from which fake goods are made.

any given country. The project's overriding objective is to lower the costs of disposal and to encourage greater re-use of the raw materials from which fake goods are made. In this way, it will contribute to consumer safety and help protect the environment.

In rolling out the initiative, our overriding aim is to further strengthen REACT's environmental credentials. REACT is responsible for the confiscation and seizure of a huge quantity of illegal counterfeit goods. We therefore believe that it is our responsibility to maximize the efficiency with which these products and the raw materials they contain are processed and, where possible, recycled in a secure and orderly way.

The REACT SUSTAINS program is designed to ensure that the recycling of counterfeit goods is a cost-effective option for all parties concerned. That requires the availability of certain minimum volumes of such goods. But storing seized goods for long periods can be expensive. That is why REACT stands ready to rent storage facilities for customs authorities and rights owners.

Our approach has numerous benefits. It will help boost REACT's profile as a "one-stop shop" for practical and socially responsible IP enforcement solutions. It will also relieve the heavy burden on customs administrations to dispose of counterfeit goods and provide businesses with a low-cost solution for the disposal of IP-infringing goods.

## HOW TO SUPPORT REACT SUSTAINS

Since REACT began its recycling program some 15 years ago, we have acquired a great deal of experience in recycling fake products, and we are very happy to share this expertise with anyone interested in improving the efficiency and sustainability of their disposal operations. To this end, we have produced guidelines on the various recycling opportunities available for different types of products. We are also compiling a list of recycling industries that can process different raw materials. In addition, we are setting up a hotline to respond to questions about recycling opportunities for fake products.

Law enforcement authorities are confronting increasing volumes of seized goods and are natural partners in the successful implementation of this exciting new initiative. REACT SUSTAINS offers them a low-cost and environmentally sustainable management option for disposing of these goods.

REACT SUSTAINS is an integral part of our goal to provide rights holders and society as a whole with a low-cost, end-to-end solution for more effective and constructive disposal of counterfeit goods.



# Is plagiarism unlawful?

By **Owen Dean**,  
Spoor & Fisher,  
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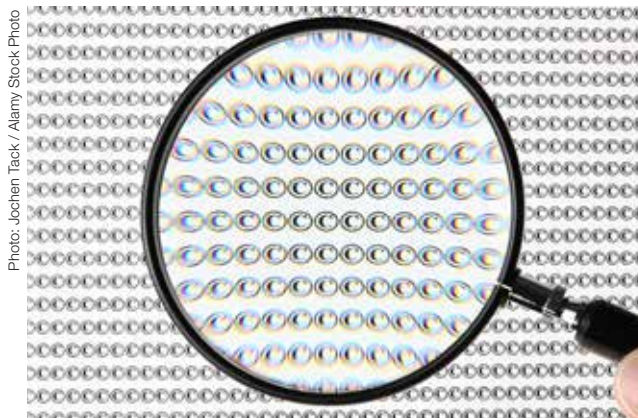


Photo: Jochen Track / Alamy Stock Photo

“Plagiarism” is widely misunderstood and often used as a synonym for “copyright infringement”. While they share common elements, plagiarism and copyright infringement are not the same.

“Plagiarism” is a much misunderstood and misused term in common parlance. In layman’s terms, it is generally used to convey the notion of copying or reproducing the work of another in a clandestine manner, usually without the permission of the author. It is often used as a synonym for “copyright infringement,” and it is generally thought to amount to the same thing. Presuming that plagiarism is copyright infringement by another name, it would naturally be unlawful. But is this perception correct?

*The New Shorter Oxford English Dictionary* defines the verb “plagiarize” as follows: “Take and use as one’s own (the thoughts, writings, inventions, etc., of another person); copy (literary work, ideas, etc.) improperly or without acknowledgement; pass off the thoughts, work, etc. of (another person) as one’s own.” “Plagiarism” is the noun form of this verb.

The term is said to have its origins in the writings of Martial(is), the Roman poet, who in one of his works drew a parallel between his poems and freed slaves; he termed another poet who had misrepresented his (i.e. Martial’s) works as being his own, a “plagiarus,” or, an abductor, of them.

## IMPORTANT DIFFERENCES

Although they have certain common elements, plagiarism and copyright infringement are not the same. There are important differences. Copyright protects *works*

embodying intellectual output. The works must exist in a material form. Copyright has as its subject matter the material *expression* of intellectual output, not the ideas, information, etc. embodied in the material expression. As evidenced in the dictionary definition, plagiarism additionally covers thoughts, inventions, ideas, and the like. All these conceptions are not, *per se*, protected by copyright. Plagiarism is thus a wider concept than copyright infringement. In a sense, copyright infringement may broadly be considered to be a *species* of the *genus* “plagiarism.”

## COPYRIGHT

Copyright is a so-called “creature of statute” and its ambit is circumscribed by the life-giving statute. The “works” (expressed in a material form) protected by copyright are primarily (for the present purposes) literary, musical, and artistic works, as conceptualized in copyright law. Copyright has a limited duration; in general, the term of protection is the lifetime of the author plus 50 (or 70, in some countries) years.

The copyright in a work is infringed by reproducing, adapting, and performing various other acts, without the authority of the copyright owner, in relation to a substantial part. There are exceptions or exemptions from copyright infringement that allow unauthorized reproduction in certain circumstances. Copyright can be infringed by unauthorized acts for purely personal use. Copyright can only be enforced by its owner or by a

duly appointed exclusive licensee. The remedies flowing from copyright infringement comprise an interdict or injunction restraining the infringing conduct, damages, and delivery of infringing copies.

### PLAGIARISM

Plagiarism is an ethical norm or standard. It is not, *per se*, a rule of law. Perpetrating plagiarism violates the ethical norm, but it does not in itself constitute unlawful conduct. The rule of plagiarism finds particular expression in the academic environment. Someone who commits plagiarism is seen as acting dishonorably and warrants exposure and societal condemnation; it is a blight on his or her integrity and reputation.

The seriousness with which plagiarism is considered in academia is typified by the following quotation from the Stellenbosch University Policy on Academic Integrity: *The Prevention and Handling of Plagiarism*, 2010, "All cases of plagiarism amount to a serious offence, which can have dire consequences for the person concerned, including suspension or expulsion (in the case of a student) or dismissal (in the case of a member of staff) from the University, besides possible criminal or civil action." Most South African universities and academic institutions have similar policies. Such a policy statement transforms the universal ethical norm into a censurable offense (in the figurative, non-criminal sense) according to the rules governing the conduct of the university's community.

The ethical rule regarding plagiarism covers (and essentially protects) works in the copyright sense, but it also covers other intellectual outputs that consist of ideas, concepts, theories, and the like, irrespective of whether or not they have been reduced to a material form. The intellectual output enjoys protection indefinitely. Outputs that have been in existence for centuries continue to enjoy this form of protection forever.

Plagiarism, in essence, amounts to a person making a misrepresentation publicly as to the authorship of an output that he or she has made; he or she represents that he or she is the original author of that output. The antidote to plagiarism is the accreditation of source in favor of the original author of the output.

The plagiarism rule is violated by copying intellectual output in whatever manner or form, even if the original author of the output agrees to a copyist using it.

As long as the copyist incorrectly represents that it is his or her own authorship, and does not accredit source in the original author, the consent of the original author is irrelevant. The focus is on the truth of the representation made by the copyist.

In the event that output is copied, the quantum of the copied output is irrelevant. Subject, perhaps, to the *de minimis* principle – a legal doctrine to dismiss frivolous matters – it is not necessary that a substantial part of the output be copied to violate the rule. On the other hand, copying an output for purely personal use does not constitute a violation of the rule, as in this situation no misrepresentation as to authorship is made to any third person.

Plagiarism can be, and generally is, censured by an interested third party, for instance a university, irrespective of whether the original author of the output raises an objection. The "wrong" of plagiarism is visited on third parties who are misled by the misrepresentation of authorship as much as on the original author. Enforcement of the rule against plagiarism thus falls, in the first instance, with the victims of the misrepresentation. The sanctions for plagiarism comprise dishonor, discredit, and perhaps even vilification of the plagiarist, and, depending on the circumstances, his or her suspension, expulsion, or dismissal from membership of a body. Violation of the rule carries no economic or proprietary sanctions, such as those a court would impose on someone infringing a legal right.

### COPYRIGHT INFRINGEMENT VERSUS PLAGIARISM

A classic case of infringement of copyright in, for instance, a literary work (existing in a material form, such as a book, article in a journal, and so on) entails someone reproducing a substantial part of that work without the permission of the copyright owner and without any accreditation of the author of that work. Such an act of infringement would also constitute plagiarism, as it has all the elements of an act of plagiarism. In this situation, copyright infringement and plagiarism run in parallel. However, if, for instance, the source work does not enjoy copyright because the term of copyright has expired (e.g. the works of Shakespeare), or it does not exist in a material form (e.g. an impromptu, unscripted speech), there would be no copyright infringement, but there could still be plagiarism. Conversely, if the copyist reproduced an unreasonably substantial part of the copyrighted literary work and credited the copyright

There are many cases where using someone else's work can constitute copyright infringement and not plagiarism, and *vice versa*.



Photo: Brain light / Alamy Stock Photo

owner as the author of the copied passage, no plagiarism would be committed, but there would be copyright infringement if no permission for the use of the copied part had been given by the copyright owner.

So, by analyzing and applying the respective elements of copyright infringement and plagiarism as set out above, one can think of a myriad of cases where using someone else's work can constitute copyright infringement and not plagiarism, and *vice versa*. Where plagiarism falls within the ambit of copyright infringement, it can be a violation of the ethical norm and be unlawful at the same time – not because it is plagiarism, but rather, because the conduct in question also constitutes copyright infringement.

#### **OTHER SITUATIONS WHERE PLAGIARISM CAN BE UNLAWFUL**

Copyright infringement is not the only situation in which conduct constituting plagiarism can also fall foul of some branch of the law and thus be liable to censure under the law.

Being essentially a misrepresentation of a factual situation, plagiarism can constitute a common law delict or offense. The common law protects someone who suffers damage as a result of an intentional or negligent misrepresentation by another. Consequently, if the original author of the intellectual output can show that the copyist's misrepresentation as to the authorship of

the derivative output causes him or her damage, he or she will have a remedy for an interdict restraining the objectionable conduct and damages. Similarly, in certain circumstances, the copyist's misrepresentation can constitute the criminal offense of fraud.

Section 20 of the Copyright Act of South Africa (Act No. 98 of 1978) (derived from Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works) creates the author's so-called "right of paternity" (one of the moral rights) in his or her work. This right entitles the author to claim authorship of his or her work, no matter how it is used. An author whose work has been plagiarized could exercise this right to enforce accreditation of him or her in respect of a reproduction of his or her work, or a part thereof, thereby nullifying the plagiarism. The section provides that this right can be enforced as though the act is an infringement of copyright.

#### **THE ANSWER**

As the above demonstrates, the answer to the question posed in the title to this article is that conduct that amounts to plagiarism, but not plagiarism *per se*, can be unlawful in certain circumstances.

The author has written a novel entitled *The Summit Syndrome*, in which the interplay between copyright infringement and plagiarism is enacted (see IPSTELL: [blogs.sun.ac.za/iplaw/tag/summit-syndrome/](https://blogs.sun.ac.za/iplaw/tag/summit-syndrome/)).





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