Intellectual Property and the New Competition Act in Kenya

“Future Competition in the World is IP Competition” – Chinese Premier, Wen Jiabao.[1]

Kenya’s newly gazetted competition law, cited as the Competition Act Chapter 12 of 2010, laws of Kenya (the “Act”) is yet to be given a commencement date. Once the Act is in force it will repeal the Current Restrictive Trade Practices Monopolies & Price Control Act (the “RPTA Act”).

The Act will seek to promote and safeguard competition in the economy whilst protecting consumer rights. Section 3 of the Act, states that a key aim of this law is to prevent unfair competition and misleading market conduct in order to create an environment favorable to local and foreign investment. The Act introduces a Competition Authority whose mandate will be to enforce the provisions of the new Act.

Intellectual property has been dealt with in this new law in the following sections:

- Restrictive Trade Practices, part III of the Act;
- Consumer Welfare, part VI of the Act;
- The Extra Territorial Effect, part I of the Act; and
- Mergers, part IV of the Act.

Restrictive Trade Practices

Part III of the Act specifically ousts restrictive trade practices and other practices that warp competition. This means that in as far as the new law is concerned, any dealings in Intellectual Property rights that can be classified as restrictive trade practices will be illegal.

Section 21 (1), (3)(a) & (3)(h) of the Act states that agreements that are undertaken with the objective to prevent or distort competition in trade Kenya are prohibited. Linked to this, agreements that directly or indirectly fix purchase or selling prices including *the manner in which Intellectual Property Rights are used by the concerned parties and* which could go beyond the limits of legal protection are prohibited.

It is a recognized fact that intellectual property is a key ingredient to market growth as there will be increased competition as businesses come up with new innovations and inventions. This will strengthen their identity and goodwill in their brand promoting competitive edge. Therefore, business success may be largely attributable to the manner in which IP rights a business owns are managed, protected and commercialised. Ensuring a business is able to effectively protect its IP portfolio can prove to be crucial in maintaining the goodwill in the company and/or its brand in the long term.

The new law firmly prohibits the abuse of a dominant position in the Kenyan market, and there are strong penalties set aside for those who do not comply with this abuse of position. A dominant undertaking has been defined as an undertaking which produces, supplies, distributes or controls more than one-half of the goods of any type that are produced, supplied or distributed in Kenya. Under sections 24 (1) & (2)(e) of the Act, any demeanor that amounts to the abuse of a dominant position in a market is forbidden . An abuse of an intellectual property right has been included in the new law to be an abuse of a dominant position. It is instrumental to note that this law governs transactions outside Kenya as long as the transaction touches a

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[1] How to maximize the value of your intellectual property, pp31, John Pryor - The Innovation Handbook, Adam Jolly, 2nd Edition 2010

Kenyan entity or asset, inclusive of intellectual property generated or protected in Kenya. Under section 6 (c) and (d) of the Act, it is provided that the Act applies to persons affiliated with acquisitions of shares or other assets outside of Kenya ensuing change of control in a business or asset in Kenya. Under the new law, intellectual property has been included as a business asset.

Consumer Welfare

Consumer rights will now be protected under the Act under section 55, as it will be an offence to supply goods to customers where the products do not meet the laid out product safety standards. This will force businesses operating in Kenya to be more cautious about their product and service offering to consumers.

Consumers who have suffered loss or damage as a result of the supply of poor quality goods will now have a statutory remedy under Section 63 of the Act. Products will therefore have to comply with consumer safety standards and companies can no longer take advantage of consumers.

The Authority will have powers to refer consumer complaints to specialised Government agencies, like the Anti-Counterfeit Agency, that will inform and advise the complainants and the Authority accordingly. This is set out under section 68 of the Act.

In conclusion, the Act is a striving piece of business legislation aimed at protecting consumers.

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