

Global players behind anti-counterfeit law campaign

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KAMPALA: The international push behind Kenya's controversial Anti-Counterfeit Act of 2008 dates back as far as October 2006 when the World Customs Organisation held its first intellectual property rights (IPRs) seminar in Kampala, the capital of neighbouring Uganda, focusing on East African governments' enforcement of these rights.

The Kenyan law was the first of a string of similar legislative measures in Uganda, Zambia, and Malawi and at regional level in the East African Community. Health rights activists have campaigned against these measures as they threaten access to legitimate generic medicines which currently represent about 90% of medicines consumed in these countries.

The 2006 seminar was sponsored by pharmaceutical multinational companies - British-based GlaxoSmithKline (GSK) and US-based Procter & Gamble - and other multinational companies.

IPRs firm Spoor & Fisher, based in South Africa and the Channel Islands, was hired to provide technical advice at the seminar.

Peter Malinga, Uganda's commissioner for customs who is also the chairperson for the World Customs Organisation (WCO) in East and Southern Africa, admitted to IPS that the 2006 meeting in Kampala influenced the drafting of the Kenyan law.

"Aspects of what is outlined in the World Customs Organisation model law are part of the recently enacted Kenyan law. But you should know that a model law just gives guiding principles. It is up to individual countries to implement the law or not," he added.

The World Customs Organisation (WCO) describes itself as an "independent intergovernmental body whose mission is to improve the administration of customs."

The "model law" is a WCO document containing "model provisions for national legislation to implement fair and effective border measures consistent with the agreement on Trade-Related Aspects of Intellectual Property Rights", or TRIPS.

Some content in Kenya's Anti-Counterfeit Act and Uganda's Counterfeit Goods Bill is similar to that of the WCO model law.

In particular, the model law defines "goods infringing intellectual property rights" as "(a)ny goods which are made, reproduced, put into circulation or otherwise used in breach of the intellectual property laws and without the consent of the rights holder or a person duly authorised to do so by the rights holder."

The WCO model law states that the Uruguay Round of the General Agreement on Tariffs and Trade (the predecessor to the World Trade Organisation or WTO) was partly aimed at "ensur(ing) that measures and procedures to enforce intellectual property rights do not become barriers to legitimate trade".

The rationale for the model law, according to the document, is to assist governments with the implementation of TRIPS provisions in border measures.

However, this is not borne out by its abovementioned definition of IPR-infringing goods. The definition contradicts the WTO's Doha Declaration that confirmed TRIPS's allowance of measures such as parallel importation to address public health problems.

Parallel importation involves the importation of non-pirated goods without the permission of the rights holder.

According to the World Health Organisation (WHO), "the rationale for parallel importation is to enable the import of lower priced patented products. Parallel importing can be an important tool enabling access to affordable medicines because there are substantial price differences between the same pharmaceutical product sold in different markets."

Therefore, parallel importation is an essential and legitimate tool if poor countries are to ward off public health crises.

East African politicians have justified the anti-counterfeit legal measures as necessary to ensure the quality of medicines. But health rights proponents regard the use of customs authorities as a sign that the agenda is about enforcing IPRs rather than quality standards.

"The players engaged (are) customs authorities and police whose primary role is not medicine regulation. Standards organisations are left out," Sisule Musungu, president of Geneva-based IQsensato, told IPS in an interview.

IQsensato is a non-profit research organisation serving as a platform for developing world researchers to influence international policy-making on development.

According to Musungu, police and customs "are easier to use (to serve an IPRs agenda) because if you go to the medicines regulatory agencies, they know what the issues are and you cannot just tell them what to do. But if you go to customs, once you give them the law, they just implement it.

"They are not concerned about the effects of what they are doing, while a health person will know what they are dealing with because they know the distinction between a generic and fake product and how to deal with it.

"If you are really concerned with issues of quality of medicines, the people you go to are the drug regulatory agencies, the ministries of health and the WHO."

Malinga confirmed that the WCO works with IP holders to fight cross-border trade in counterfeit goods. He however denied that the institution has been used by multinational companies, including pharmaceutical corporations, to push an IPRs enforcement agenda under the guise of fighting counterfeits.

"Those people who are saying that, would they be happy to use fake drugs or counterfeits drugs for their families? And they say we are trying to use this to fight generic medicine and TRIPS? I don't think that is right," he said.

The seminar participants agreed to increase their engagement with international agencies such as the International Chamber of Commerce (ICC), which drives a global agenda of IPRs enforcement through its Business Action to Stop Counterfeiting and Piracy (BASCAP), launched in 2004. BASCAP also champions the WCO model law.

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