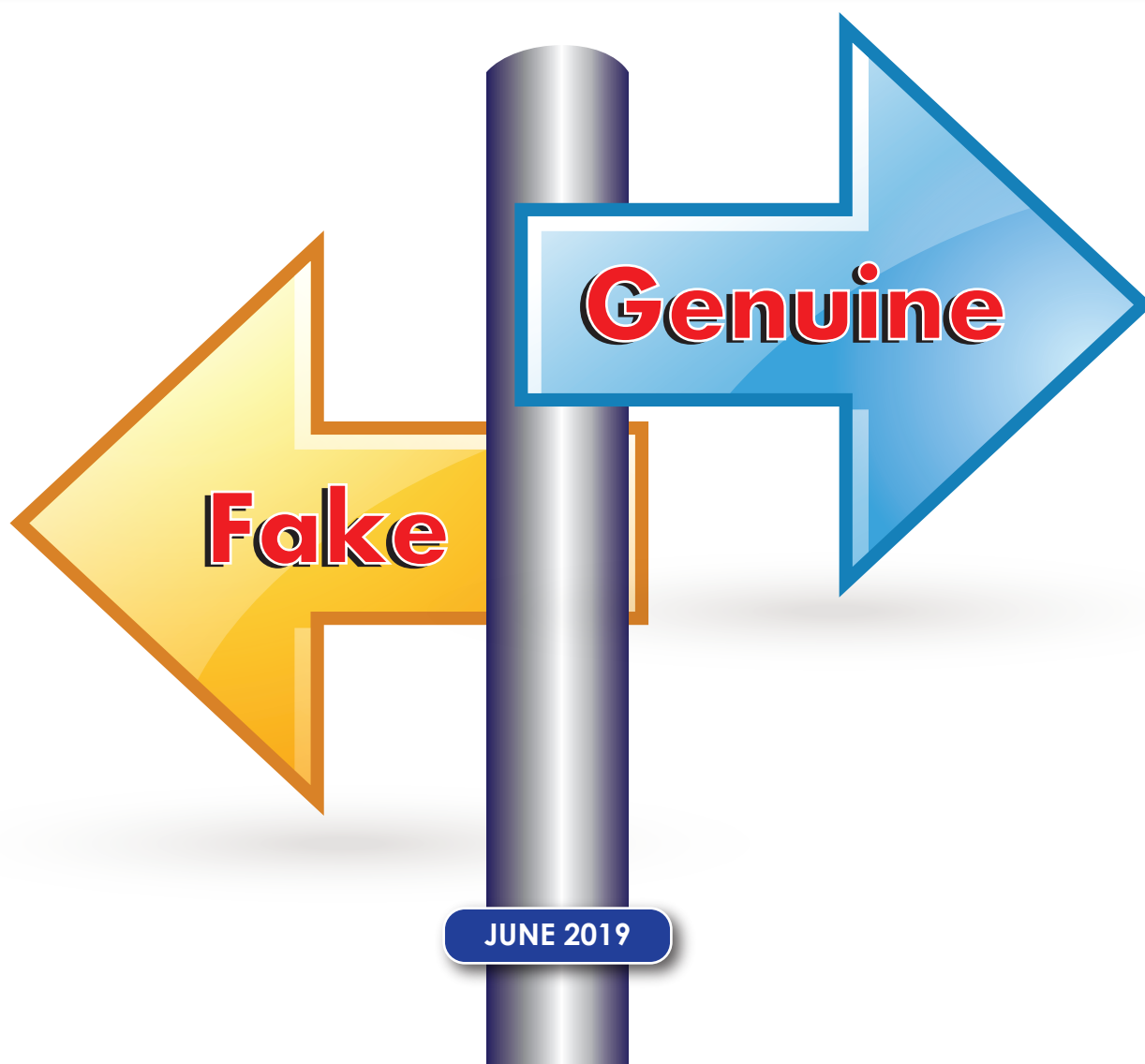


**PERFORMANCE AUDIT REPORT
ON
THE ENFORCEMENT OF
ANTI-COUNTERFEIT REGULATIONS
BY
THE ANTI-COUNTERFEIT AGENCY**



VISION

Accountability and effective management of public resources

MISSION

To audit and report on the management of public resources for improved service delivery to the Kenyan people.

CORE VALUES

Integrity

Objectivity

Professionalism Competence

Innovation

Team Spirit

MOTTO

Enhancing Accountability

FOREWORD BY THE AUDITOR - GENERAL

I am pleased to present this performance audit report which assessed the Enforcement of Anti Counterfeit Regulations by the Anti Counterfeit Agency (ACA). My Office carried out the audit under the mandate conferred to me by the Public Audit Act, 2015 Section 36. The Act mandates the Office of the Auditor – General to examine the Economy, Efficiency and Effectiveness with which public money has been expended pursuant to Article 229 of the Constitution.

Performance, financial and continuous audits form the three pillar audit assurance framework that I have established to give focus to the varied and wide scope of the audit work done by my Office. The framework is intended to provide a high level of assurance to stakeholders that public resources are not only correctly disbursed, recorded and accounted for, but that the use of the resources results in positive impacts on the lives of all Kenyans. The main goal of our performance audits is to ensure effective use of public resources and promote service delivery to Kenyans.

Our performance audits examine compliance with policies, obligations, laws, regulations and standards, and whether the resources are managed in a sustainable manner. They also examine the economy, efficiency and effectiveness with which public resources have been expended. I am hopeful that corrective action will be taken in line with our recommendations in the report.

The report shall be tabled in Parliament in accordance with Article 229 (7) of the Constitution. I have as required in Section 36 (2) of the Public Audit Act, submitted the original copy of the report to Parliament. In addition, I have remitted copies of the report to the Chief Executive Officer of the Anti-Counterfeit Agency, Ministry of Trade and Industrialization, the Principal Secretary, National Treasury and the Secretary Presidential Delivery Unit.

FCPA Edward R.O. Ouko, CBS

AUDITOR – GENERAL

28 June, 2019

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LIST OF ABBREVIATIONS

ACA	Anti-Counterfeit Agency
ACR	Anti-Counterfeit Regulations
ADR	Alternative Dispute Resolution
IO	Investigating Officer
IPR	Intellectual Property Rights
KAM	Kenya Association of Manufacturers
KEBS	Kenya Bureau of Standards
KEPHIS	Kenya Plant Health Inspectorate Services
KIPI	Kenya Intellectual Property Institute
KPA	Kenya Ports Authority
KRA	Kenya Revenue Authority
Kshs	Kenya Shillings
OAG	Office of the Auditor-General

DEFINITION OF TERMS

“Counterfeiting” According to the Anti Counterfeit Act. 2008, this means taking the following actions without the authority of the owner of intellectual property right subsisting in Kenya or elsewhere in respect of protected goods-

- (a) The manufacture, production, packaging, re-packaging, labelling or making, whether in Kenya or elsewhere, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods;
- (b) The manufacture, production or making, whether in Kenya or elsewhere, the subject matter of that intellectual property, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his licence;
- (c) The manufacturing, producing or making of copies, in Kenya or elsewhere, in violation of an author’s rights or related rights;
- (d) In relation to medicine, the deliberate and fraudulent mislabelling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging;

suo moto : On its own motion/own initiative.

Intellectual Property Right: Refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.

In situ: Refers to on site or in the original place instead of being moved to another place.

EXECUTIVE SUMMARY

Introduction

1. This is a report of a performance audit conducted by the Office of the Auditor - General on the Enforcement of the Anti-Counterfeit Regulations by the Anti-Counterfeit Agency (ACA) to combat counterfeit trade in Kenya. The study was carried out in accordance with Section 36 of the Public Audit Act, 2015 and Article 229 of the Constitution of Kenya 2010.
2. Counterfeit products are made to closely imitate the appearance of the original product so as to mislead consumers. This includes the unauthorised production and distribution of products that are protected by Intellectual Property Rights (IPR), such as copyrights, trademarks and trade-names. Among the leading industries that have been affected include software, music recordings, motion-pictures, luxury goods, fashion clothes, sportswear, perfumes, toys, motor vehicle spare-parts and accessories and pharmaceuticals.
3. The prevalence of counterfeiting is on the rise throughout all countries in the world, as per global statistics. The global impact of counterfeiting as of the year 2012 was estimated at USD 650bn per annum. A study by the Kenya Association of Manufacturers (KAM), estimated that the East African region loses about USD \$ 500 million annually to counterfeiting while the companies in the same region have lost 70% of market share in East Africa to Counterfeits. In Kenya, the manufacturers lose over USD \$ 42 million annually while the government loses approximately USD \$ 80 million in taxes and fees.

Audit Objective

4. The general audit objective was to assess the effectiveness of the Anti-Counterfeit Agency (ACA) in combating trade in counterfeits in Kenya. The sub-objectives were:
 - i. To establish how effectively the Enforcement Department is enforcing ACA Rules and Regulations.
 - ii. To ascertain how efficiently Research and Awareness is carried out and how it is utilized in carrying out the mandate of the ACA.
 - iii. To determine the extent of collaboration and coordination between ACA and their stakeholders.

- iv. To establish the extent to which ACA has capacity built staff to ensure it meets its mandate.

Scope of the Audit

5. The audit examined the performance of the Anti-Counterfeit Agency (ACA) in enforcing the Anti-Counterfeit Act and Regulations to combat trade in counterfeit goods in Kenya from the financial years 2011/12 to 2015/16. The study covered Nairobi headquarters, Mombasa, Kisumu and Eldoret Regional Offices as well as Namanga and Busia border points.

Summary of Audit Findings

a. Hindrances in Laying Complaints

6. The audit established that according to IPR owners and their agents, there was a cost implication in laying complaints ranging between Kshs. 17,000 and 18,000 which they consider not cost effective. This comes as a result of having to lay separate complaints for the same products in different outlets or for products whose value is lower than the complaint fee.

b. Prosecution

7. The low number of ACA prosecutors has affected the efficiency in handling of cases and thereby causing delays in prosecution of suspects. Furthermore, there are also gazetted prosecutors who are not involved in prosecution hence overloading their active colleagues.

c. Staff Integrity

8. Documentary review revealed that twelve staff have faced disciplinary cases in line with matters bordering on corruption and various allegations made by stakeholders. It was also reported that a number of officers received Show Cause Letters and upon their response, no further action or record to indicate any further action was taken by the management. There have been instances of officers using un-serialized inventory forms during raids and seizures as well as signing these forms using signatures different from the official one. Similarly, officers release goods that have been confirmed counterfeit and their destruction fees paid. In other instances, Kisumu and Mombasa offices have released goods without communication and approval of the Alternative Dispute Resolution Committee (ADRC). It was also noted that there were no correspondences in the files between the officers and the IPR owners to show that they were

involved in the ADR process as per the enforcement procedures.

d. Low Levels of Awareness

9. The audit established that the low levels of awareness are due to ACA undertaking limited media campaigns, roadshows and outreach programmes to create mass awareness on counterfeit goods. Additionally, the funds allocated to the Awareness Department are minimal, hence ACA majorly relies on stakeholder goodwill to carry out awareness programs.

e. Lack of Signage

10. During the audit it was observed that none of the ACA offices had any branding showing the presence of the Agency in the various office locations. This causes poor publicity among the general public and the stakeholders as most of them are not aware of the existence of the Agency and its mandate hence, the complainants face challenges in locating the offices to report complaints.

f. Inefficiencies in Training

11. Documentary review revealed that the trainings that have been carried out for the Anti-Counterfeit Inspectors are not adequate as they tend to heavily focus on legal aspects but leave out the bulk of the information necessary during the evidence gathering stage of the investigation (surveillance, collecting evidence, sampling and analysing evidence as well as compiling case files). Interviews with staff at the regional offices also established that those who joined the Agency in 2015 have never been trained on any course other than the induction. Additionally, it was revealed that Quality Assurance officers attended more trainings annually (3-6 trainings) compared to other staff. In other instances, some staff have done the same course twice. Further analysis disclosed that trainings were not offered based on the staff training needs and other staff that did not provide training needs also went for various trainings.

g. Research Division

12. Interviews with staff revealed that the research findings are not shared with the relevant core users, in effect the research findings are under-utilised. A review of the research reports showed that the recommendations are not in line with the findings and are not addressed to a specific department for action.

h. Appointment of Inspectors from Relevant Stakeholders

13. During the audit, it was noted that ACA has a staff establishment of 24 inspectors who are mandated to carry out surveillance, investigation, inspection and to seize goods. The geographical coverage is wide and the task is enormous hence the need for collaboration with other agencies to stop the trade in counterfeit products. Despite the provision in the law, the Board has not designated any officers from other agencies as inspectors to assist in combating trade in counterfeit goods. Hence they have failed to capitalise on the goodwill of other agencies to support them in achieving their mandate.

14. A visit to Namanga and Busia border points revealed that there were no established ACA offices and officers. In Mombasa port there are 16 Freight stations which are responsible for clearance of containers on a 24-hour basis. ACA has 4 technical staff at the Mombasa office who are required to carry out verification of the contents in the containers before they are released. The staff are unable to verify all the containers hence some goods are released without verification of their authenticity.

i. Inadequate Staff Establishment

15. According to the ACA management, staff establishment plan that was approved by the Board proposed that a staff compliment of 250 was needed by the Agency. As at the time of the Audit, however, ACA had a staff complement of only 69, three of whom are on contract, 65% are technical while 35% are support staff. This represent about 28% of the total staff required by the Agency to efficiently operate and achieve its mandate.

j. Logistic Constraints

16. During the audit it was established that ACA has leased two depots for storage of seized goods in Nairobi and Eldoret. However, Kisumu and Mombasa offices lack depots and store seized goods in the offices. As a result, these offices cannot store seized bulky and dangerous goods thus the safety of goods seized in-situ cannot be guaranteed as was the case in Mombasa.

17. Interviews with the Regional Heads revealed that the offices have only one vehicle each, which are used for both administrative and enforcement purposes. This hinders service delivery as they cannot run concurrent activities. The Regional offices also cover vast geographical areas without clear demarcation of jurisdiction of each regional office.

k. Incomplete and Disorganised Record Keeping

18. The Agency is required to keep up to date records of its operations. However, documentary review revealed that the enforcement files at the headquarters were disorganised and tracking paperwork from individual cases was not easy as records were kept as per the Investigating Officers rather than per the case. Similarly, the Enforcement data base is highly disorganised and not up to date. It was also realised that some ACA 2 Forms (Inventory of Seized Goods) were not signed by the depot manager as is required when receiving the goods. In other instances, the officer who seized the goods also received the same on behalf of the depot manager.
19. The ACA 2 Form is filled in quadruplicate, an original and three other copies. Documentary review revealed that it's not clear which copy is to be issued to the suspect, the complainant and which copy remains in the inventory of seized goods book. The files reviewed had a mixture of either original, duplicate, triplicate or quadruplicate inventory forms.

Conclusion

20. The continued production and trade of counterfeit products in Kenya is primarily due to weak enforcement of the laid down Rules and Regulations by the ACA. This was mainly attributed to the high cost of charges associated with laying complaints and the failure of the Agency to act promptly when counterfeit cases are reported. The ACA has only prosecuted 4 cases with a backlog of over 200 cases still pending.
21. The lack of a clear job description for the role of Depot Manager as well as lack of a clear chain of command in the regional offices has led to inconsistencies in storage and security of seized goods leading to loss of goods as well as difficulties in carrying out physical verifications.
22. There are low levels of public awareness about ACA. There was limited media campaigns, roadshows and outreach programmes to create mass awareness on counterfeit goods due to limited funds. Furthermore, although research is carried out findings are not being shared with the relevant core users; in effect the research findings are never utilised.
23. Due to Kenya's large geographical coverage, there are many entry and exit border points. In view of the findings, ACA has a limited number of staff that

are not able to handle the verification of goods at these border points, even though the law provides that the Agency can appoint and train inspectors from relevant stakeholders in the fight against counterfeit trade, this has not been done. There is limited collaboration and coordination between ACA and its various stakeholders.

Recommendations

24. For a clear complaints procedure, the Agency should install an internal control mechanism of their processes to finalise the three months' timeline given.
25. There is need to create awareness programs on identification of counterfeit goods and Intellectual Property Rights by the public. The Agency needs to work closely with intellectual owners, Judiciary and other stakeholders to create a multi-sectoral team.
26. To create and enhance public awareness, The Agency needs to consider increased use of social media. Greater awareness creation campaign schedules should be instituted to increase the level of public awareness on counterfeit goods.
27. For enforcement of regulations, a collaborative mechanism to bring on-board all stakeholders should be instituted, especially at the entry ports
28. A central registry to store case files may be considered for easy access by relevant stakeholders rather than being in custody of inspectors.

CHAPTER 1

BACKGROUND OF AUDIT

Introduction

- 1.1 This is a performance audit report on the Enforcement of the Anti-Counterfeit Regulations by the Anti-Counterfeit Agency (ACA) to combat counterfeit trade in Kenya. The Office of the Auditor - General conducted the audit in accordance with Section 36 of the Public Audit Act, 2015 and Article 229 of the Constitution of Kenya 2010.
- 1.2 A report on Economic Impact of Counterfeiting by the Organisation for Economic Co-operation and Development (OECD) shows that, counterfeit products are made to closely imitate the appearance of the original product so as to mislead consumers. This includes the unauthorised production and distribution of products that are protected by Intellectual Property Rights (IPRs), such as copyrights, trademarks and trade-names. Among the leading industries that have been affected include software, music recordings, motion-pictures, luxury goods, fashion clothes, sportswear, perfumes, toys, motor vehicle spare-parts and accessories and pharmaceuticals.
- 1.3 Global statistics as outlined indicate that the prevalence of counterfeiting is on the rise throughout the world. Countries from Europe, America, Asia and Africa are all affected by counterfeiting. The global impact of counterfeiting as of the year 2012 was estimated at USD 650bn per annum. A study by the Kenya Association of Manufacturers (KAM), estimated that the East African region loses about USD \$ 500 million annually to counterfeiting while the companies in the same region have lost 70% of market share in East Africa to Counterfeits. In Kenya, the manufacturers lose over USD \$ 42 million annually while the government loses approximately USD \$ 80 million in taxes and fees¹. A research study by ACA revealed that China is the largest exporter of counterfeits to Kenya², with goods such as electronics for instance phones, sound equipment, cables as well as automobile spare parts and clothing etc.
- 1.4 Intellectual Property Rights (IPR) in Kenya are protected by the Industrial Property Act, 2001, and includes patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create.

By striking the right balance between the interests of innovators and the wider public interest, the Intellectual Property system aims to foster an environment in which creativity and innovation can flourish.

Motivation for the Audit

- 1.5 Concerns have been highlighted in the media on increased counterfeit products in the market, most of which are suspected to be inferior to the genuine products. Further these products may cause harm to human health and the environment.
- 1.6 Counterfeit trade causes economic sabotage as the government and IPR owners lose revenue; unfair competition from counterfeit products, tax avoidance, illicit imports and dumping that leads to a reduction in market share³. The continuous increase in counterfeit and unlicensed products like alcoholic and illicit brews in circulation in Kenya is denying the Country over Kshs 30 billion in annual revenue. The consumption of the illicit brews, most of which are counterfeits has led to loss of lives of many people.
- 1.7 During the preliminary investigations, the audit noted that KAM received reports that IPR owners and traders are experiencing a lot of challenges when working with the enforcement department.
- 1.8 Despite the efforts by the ACA to combat trade in counterfeits, their prevalence continues to be high as more goods are continuously being imported into the Country and more people are taking part in this trade.

1 Ongwae, E. (n.d.). Study Outlines key to stamp out counterfeits menace. Nairobi: Kenya Association of Manufacturers

2 ACA Research Report: Prevalence of Counterfeiting in Nairobi. June 2014

3 <https://www.standardmedia.co.ke/business/article/2000193411/manufacturing-nightmare-that-is-turning-kenya-into-graveyard-for-companies>

CHAPTER 2

DESIGN OF THE AUDIT

Audit Objective

- 2.1 The general audit objective was to assess the effectiveness of the Anti-Counterfeit Agency (ACA) in combating trade in counterfeits in Kenya.
- 2.2 The specific objectives were:
 - i. To establish how effectively the Enforcement Department is enforcing ACA Rules and Regulations.
 - ii. To ascertain how efficiently Research and Awareness is carried out and how it is utilised in carrying out the mandate of the ACA.
 - iii. To determine the extent of collaboration and coordination between ACA and their stakeholders.
 - iv. To establish the extent to which ACA has capacity built staff to ensure it meets its mandate.

Scope of the Audit

- 2.3 The audit examined the performance of the Anti-Counterfeit Agency (ACA) in enforcing the Anti-Counterfeit Act and Regulations to combat trade in counterfeit goods in Kenya from the financial years 2011/12 to 2015/16. The study covered Nairobi headquarters, Mombasa, Kisumu and Eldoret Regional Offices as well as Namanga and Busia border points.

Methods Used to Gather Data

- 2.4 The audit was conducted in accordance with International Standards of Supreme Audit Institutions (ISSAIs) issued by the International Organization of Supreme Audit Institutions (INTOSAI), Performance Audit Manual and other procedures established by the Office of the Auditor-General, Kenya (OAG-K). The methods used to gather audit evidence are as outlined below:

Documentary Review

- 2.5 During the audit, various documents were reviewed so as to understand the role of ACA, the stakeholders and operation of ACA as an entity as well as how ACA relates with the stakeholders in combating counterfeit trade in Kenya.
- 2.6 We reviewed the ACA Act 2008 to understand the legal framework and its mandate as well as the Anti-

Counterfeit Regulations, 2010 operationalizing the Act. Documents reviewed are listed in **Annexure 1**.

Interviews

- 2.7 We interviewed staff at ACA Headquarters, Regional Offices in Mombasa, Kisumu and Eldoret to obtain information and understand the operations of the organisation.
- 2.8 We also interviewed KEBS and KRA staff at the Namanga and Busia border points to obtain information on the collaboration and coordination between the stakeholders.
- 2.9 To gather information on the coordination and collaboration in combating trade in counterfeit goods, key stakeholders of ACA were interviewed as well. Details of the people interviewed and information obtained is as outlined in **Annexure 2**.

Observation

- 2.10 To verify the management and storage of seized goods at the depots, field visits were carried out in Nairobi, Mombasa, Kisumu, Eldoret as well as Namanga and Busia border points.

Assessment Criteria

- 2.11 The criteria for the audit is based on the following thematic areas: enforcement, awareness creation, collaboration and coordination.

A. ENFORCEMENT

II. Complaints

- 2.12 As per the ACA Act, 2008, any holder of an intellectual property right, his successor in title, licensee or agent may, in respect of any protected goods, where he has reasonable cause to suspect that an offence under section 32 has been or is being committed, or is likely to be committed, by any person, lay a complaint with the Executive Director. The complainant shall furnish, to the satisfaction of the Executive Director, such information and particulars, as may be prescribed, to the effect that the goods with reference to which that offence has allegedly been, or is being, or is likely to be, committed, prima facie are counterfeit goods. Where the Executive Director is reasonably satisfied, the complainant is entitled to lay a complaint. The Executive Director shall cause appropriate steps to be taken in accordance with section 23(1). An inspector is also allowed to take any appropriate step(s) on his/her own initiative in relation to any act or conduct believed or suspected to be an act of dealing in counterfeit goods.

III. Complaints Fee

2.13 According to ACA Regulations 2010, an intellectual property right owner (or his agent) who wishes, to have suspected counterfeit goods seized shall apply in Form ACA 10 set out in the First Schedule. The application shall be accompanied by the fee specified in the Second Schedule and any other relevant document in support of the application.

IV. Management of Depots

2.14 According to the Anti-Counterfeit Act, goods that have been seized shall be stored and kept in safe custody at a Counterfeit Goods Depot until the person in charge of the depot is ordered by a court to return, release, destroy or otherwise dispose of those goods as specified in the order: such goods shall be destroyed at the expense of the local manufacturer or importer based on the environmental considerations and the capacity of the Country to destroy the goods, or shall be reshipped.

V. Staff Integrity

2.15 According to Constitution of Kenya 2010, public officers are guided by the following principles of leadership and integrity: selection on the basis of personal integrity, competence and suitability; objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

B. AWARENESS CREATION

2.16 Under Anti-Counterfeit Act 2008, the Agency shall enlighten and inform the public on matters relating to counterfeiting; as well as devise and promote training programmes on combating counterfeiting

Training Programs

2.17 Under the Anti-Counterfeit Act 2008, the Agency should devise and promote training programmes on combating counterfeiting; while under PSC Human Resources Policies and Procedures 2016, the Government policy on training is to ensure continuous upgrading of Public Servants' core competencies, knowledge, skills including their ability to assimilate technology. All trainings shall be based on identified training needs.

C. COLLABORATION AND COORDINATION

Appointing Inspectors from Relevant Stakeholders

2.18 According to the Anti-Counterfeit Act, ACA should co-ordinate with national, regional or

international organizations involved in combating counterfeiting; further in Section 22 (3), the Board should appoint inspectors from other agencies who are designated as inspectors for purposes of this Act. As well as in Section 22(4), the Board may designate other public officers to be inspectors for purposes of this Act.

D. STAFFING

Staff Establishment

2.19 According to ACA staff establishment revised and approved in October 2016, the Board proposed a staff of 250 for the Agency.

CHAPTER 3

DESCRIPTION OF THE AUDIT AREA

Ministry of Industry, Trade and Cooperatives

3.1 The mandate of the Ministry is to promote Industrialization and Enterprise Development through:

- v. Industrialization and Cooperative Policy formulation and implementation;
- vi. Implementation of the Industrial Property Rights regime;
- vii. Private Sector Development Policy and Strategy;
- viii. Quality Control including Industrial Standards development;
- ix. Co-operative Savings, Credit and other Financial Services Policy and regulation;
- x. Development of Micro, Small and Medium Enterprises and Buy Kenya Policy.

Anti-Counterfeit Agency (ACA)

3.2 The Anti-Counterfeit Agency was established under the Anti-Counterfeit Act 2008 as a State Corporation with the mandate to enlighten and inform the public on matters relating to counterfeiting, combat counterfeiting, trade and other dealings in counterfeit goods, devise and promote training programs to combat counterfeiting and co-ordinate with national, regional or international organizations involved in combating counterfeiting.

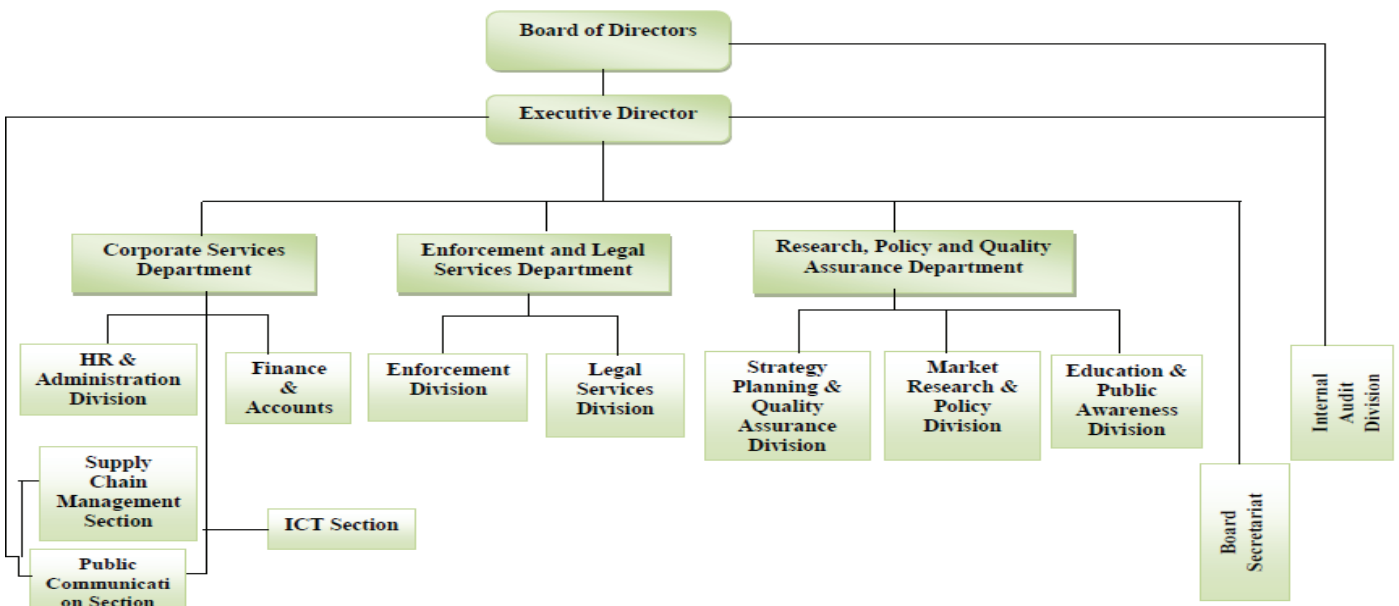
Although the Act was passed by Kenya’s Parliament in 2008, it came into force on 1st July 2009 with the principal aim of prohibiting trade in counterfeit goods. The Agency came into operation in June 2010 and is currently domiciled within the Ministry of Industry, Trade and Cooperatives. The Agency is under the State Department of Trade.

3.3 The functions of the Agency are indicated in Section 5 of the Act. These are, to-

- i. Enlighten and inform the public on matters relating to counterfeiting;
- ii. Combat counterfeiting, trade and other dealings in counterfeit goods;
- iii. Devise and promote training programs to combat counterfeiting;
- iv. Co-ordinate with national, regional or international organizations involved in combating counterfeiting;
- v. Carry out any other functions prescribed for it under any of the provisions of this Act or under any other written law; and
- vi. Perform any other duty that may directly or indirectly contribute to the attainment of the foregoing.

3.4 The vision of ACA is to have “A Counterfeit-Free Kenya” while its mission is to “Prohibit Counterfeiting through Promotion and Enforcement of Intellectual Property Rights.”

3.5 The organization structure of ACA is as shown in the figure below.



Source: ACA Strategic Plan 2017-2020

3.6 The **Office of the Executive Director** is responsible for the overall operations and performance of the Authority. It ensures that the relevant sections, divisions and departments are facilitated adequately in terms of financial, human resources and physical assets. The responsibilities for ACA departments is as follows

- i. The **Corporate Services Department** supports the operations of other departments of the Authority.
- ii. The **Enforcement and Legal Services Department** is responsible for enforcing the provisions of the Act as well as the Anti-Counterfeit Regulations, 2010. The department has inspectors with police powers to inspect, impound, arrest and prosecute offenders of counterfeiting. The department also utilizes external inspectors from other government agencies who have been given the mandate to enforce the Anti-Counterfeit Act. The department has two divisions, Enforcement and Legal Services.
- iii. The **Research, Policy and Quality Assurance Department's** core functions are to enlighten and inform the public on matters relating to counterfeiting, devise and promote training programs on combating counterfeiting, and carry out research on counterfeit issues. The department has three divisions, Strategy Planning & Quality Assurance, Market Research & Policy and Education & Public Awareness. The research division is responsible for writing and dissemination of research papers while the awareness division is responsible for public outreach and stakeholder training, content development and dissemination as well as media engagements through print and electronic media. Awareness is also created through branded t-shirts, banners, e-newsletters, use of social media (Facebook, Twitter, LinkedIn), roadshows and trade fairs⁴.

3.7 A diagrammatic description of the anti-counterfeit agency process interactions is as shown in **Annexure 5**.

ACA's Stakeholders Analysis

3.8 The ACA stakeholders are Government Ministries/ Agencies; the Private Sector; customer and customer organisations; Research Institutes; Intellectual Property Rights Owners and Development Partners. The enforcement agencies that ACA collaborates with include, Kenya Revenue Authority, Kenya

Bureau of Standards, Kenya Industrial Property Institute, Kenya Ports Authority, Kenya Plant Health Inspectorate Service, Kenya Police Service, Weights and Measures and the Judiciary. The ACA's stakeholder analysis is as shown in **Annexure 3**

Process Description

Laying Complaint

3.9 This procedure begins with the Regional Head on behalf of the Enforcement Department receiving an IPR complaint. Upon receipt, the Regional Head shall verify whether the complaint complies with the provisions of Section 33 of ACA 2008 and Regulation 13 of Anti-Counterfeit Regulations (ACR) 2010. If the complaint complies with the Act and Regulation the following are considered:

- a. Laying of Complaint Form ACA 8 properly completed, duly signed and dated by the complainant;
- b. Indemnity Form ACA 9, properly completed, duly signed and dated by the complainant, two guarantors and two witnesses;
- c. Affidavit sworn by the complainant or agent in support of the complaint⁵.
- d. Copy of valid IPR registration certificate;
- e. Power of Attorney Form ACA 15 from IPR owner properly completed and stamp duty paid (where the complaint is laid by an agent on behalf of the IPR owner);
- f. Official receipt for payment of complaint fee;
- g. Samples of the genuine product where applicable.

3.10 In the event the complaint does not comply with the Act and Regulation, the Regional Head shall advise the complainant to comply. Upon confirmation of compliance, the Regional Head shall forward the documents to the registry for file opening.

3.11 Once the file has been opened, the Regional Head shall assign the file to at least two Investigation Officers (IO) who will report to the Assistant Director Enforcement (ADE) on a weekly basis.

Investigation

3.12 Upon receipt of the investigation file, the lead IO shall commence investigations as provided for in the ACA 2008 and ACR 2010. He/she shall ensure that the investigation file contains all documents

⁴ Ibid

⁵ ACA Enforcement Procedure

as per the prosecution book mark and any other relevant information whilst continuously entering information when it arises.

- 3.13 The lead IO shall then prepare a cover report and ensure that it is filed in the investigation file. The Regional Head shall review the files and report to ADE on quarterly basis. In the event that there are grounds for prosecution, the Deputy Director of Enforcement and Legal Services shall review and sign the charge sheet prepared by the IO for filing in court⁶.

Suo motto Investigations

- 3.14 This procedure begins with an IO initiating an investigation as a result of any of the following:
- i. Market Surveillance
 - ii. Targeting
 - iii. Random spot checks
 - iv. Reasonable suspicion
 - v. Market sweeps
 - vi. Research Reports
 - vii. Informants
 - viii. Consumer complaints
 - ix. Intelligence
 - x. Media Reviews
- 3.15 The Regional Head shall record the particulars of the complaints in the Suo motto register and advise the informant/consumer accordingly; he/she shall open, reference and assign a Suo Motto file to the IO for investigations.
- 3.16 The IO shall record the statement of the informant/consumer and conduct further investigations including sending samples for analysis by the IPR owner.
- 3.17 Upon establishment of grounds that goods are reasonably suspected of being counterfeit, the IO shall initiate the investigations. In the event that there are no grounds for carrying out the investigation, the IO shall write a report to the Regional Head recommending closure of the file.
- 3.18 In case the prospective complainant is willing to lay a complaint, laying the complaint procedure shall be followed. If the complainant is unwilling to testify in court, then the goods shall be returned. In case the complainant and the suspect are willing to settle the matter through Alternative Dispute

Resolution (ADR), the IO shall bring that to the attention of the Regional Head who shall allow the same provided that ACA ADR conditions are met⁷.

Prosecution

- 3.19 Prosecution begins with the lead IO forwarding the investigation file to the Regional Head who then reviews and forwards it to the ADE immediately after the conclusion of investigations and before the lapse of the statutory 3 months' investigation period. In reviewing the investigation file, the Regional Head shall consider a number of aspects captured in **Annexure 4**;
- 3.20 The ADE shall review the investigation file after receipt of the file as guided by the ACA 2008 and ACR 2010. In case the ADE is not satisfied with the investigation file, he shall return the file to the Regional Head who will return the file back to the IO with comments. In case the ADE is satisfied with the investigation file, he shall forward the file to Deputy Director of Enforcement and Legal Services who shall then review it, sign the charge sheet and forward it to the Head of Prosecutions. At this point, the investigations file becomes the prosecution file.
- 3.21 The head of prosecutions shall then ensure the case is registered in court and the case number entered into the prosecution report. The prosecutor shall ensure the prosecution diary is dully updated before the file is returned to the IO for safe keeping;
- 3.22 The prosecutor shall inform the lead IO on the court dates, and the IO will then prepare witnesses and exhibits for the hearing; The head of prosecution shall prepare and submit status reports on the case(s) to the Deputy Director of Enforcement and Legal Services who shall in turn notify the Enforcement Department on a regular basis; The Enforcement Department shall ensure immediate compliance with any court orders thereof. In the event the Agency decides to appeal, the Enforcement Department shall advise the Deputy Director of Enforcement and Legal Services accordingly⁸.

Depot Management

- 3.23 This process begins with the Depot Manager receiving the seized goods. He shall verify the quantity and details of the seized goods as appears in the inventory Form ACA 2 and confirm that it conforms to the physical quantity of goods delivered by the IO. The Depot Manager shall receive the seized goods into the counterfeit

⁷ Ibid

⁸ Ibid

⁶ Ibid

goods depot from the IO noting any variance if any in the inventory of seized goods. The Depot Manager shall release samples of seized and stored counterfeit goods to the IO on application in form ACA 5 for analysis.

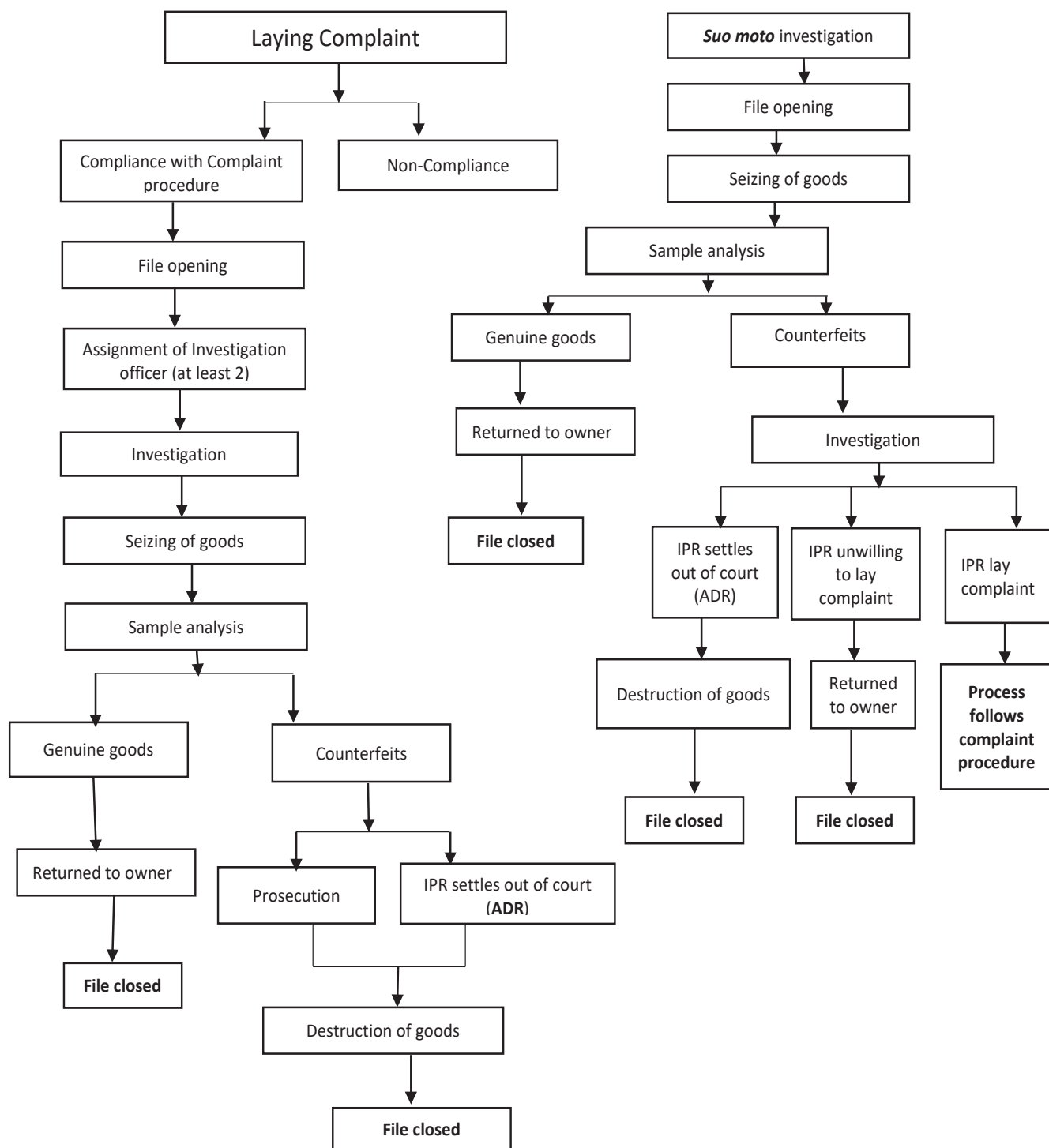
Release of Seized Goods

3.24 This process begins with the IO issuing an approved release of Seized Goods Form ACA 14. Upon receipt of the approved release form, the Depot Manager shall release the goods to the IO. In the event that the goods are returned to the depot, the Depot Manager shall indicate in the Goods Movement Register.

Destruction of Goods

3.25 This procedure begins with the Head of Prosecutions preparing and submitting a list of all forfeited goods to the Depot Manager; Upon receipt, the Depot Manager on a quarterly basis shall liaise with the Regional Heads and Chief Procurement Officer for destruction as per procurement procedure number 2 in the Procurement Procedures Manual in compliance with NEMA Regulations. The Depot Manager shall ensure that the destruction is done and a destruction certificate is issued.

Enforcement Procedures



Source: OAG Analysis 2018

Funding

3.26 The main sources of funding for ACA are the Government of Kenya through the Exchequer release by Ministry of Industry, Trade and Cooperatives. A summary of planned budgets and disbursed funds to the ACA for the period 2011/12- 2015/16 is as shown in **Table 1**.

Table 1: Funding for ACA

Year	Planned Budgets (Kshs)		Actual Disbursement (Kshs)	
	Recurrent	Development	Recurrent	Development
2011/2012	525,380,000	358,000,000	200,067,816	0
2012/2013	365,260,437	50,000,000	172,951,199	36,000,000
2013/2014	348,983,158	68,000,000	172,051,200	59,875,000
2014/2015	353,425,000	70,000,000	170,225,000	20,000,000
2015/2016	418,378,000	110,000,000	237,352,500	56,250,000

Source: Analysis of ACA Financial Statements

CHAPTER 4

FINDINGS OF THE AUDIT

A. WEAK ENFORCEMENT

I. Hindrances in Laying Complaints

4.1 The Anti-Counterfeit Act 2008, Section 33(1 to 4) gives the provisions for laying complaints as follows;

- i. Section 33 (1) Any holder of an intellectual property right, his successor in title, licensee or agent may, in respect of any protected goods, where he has reasonable cause to suspect that an offence under section 32 has been or is being committed, or is likely to be committed, by any person, lay a complaint with the Executive Director.
- ii. Section 33 (2) The complainant shall furnish, to the satisfaction of the Executive Director, such information and particulars, as may be prescribed, to the effect that the goods with reference to which that offence has allegedly been, or is being, or is likely to be, committed, prima facie are counterfeit goods. Section 33(3) Where the Executive Director is reasonably satisfied-
 - a. that the complainant is a person entitled to lay a complaint under subsection (1); and
 - b. that—
 - i. the goods claimed to be protected goods, prima facie are protected goods; and
 - ii. the intellectual property right, the subject matter of which is alleged to have been applied to the offending goods, prima facie subsists; and
 - c. that the suspicion on which the complaint is based appears to be reasonable in the circumstances, the Executive Director shall cause appropriate steps to be taken in accordance with section 23(1) of the Act
- iv. Section 33(4) The preceding provisions of this Section shall not preclude an inspector from taking any appropriate steps on his own initiative in relation to any act or conduct believed or suspected to be an act of dealing in counterfeit goods, provided the provisions of this Act are complied with.

4.2 According to ACA Regulations 2010 Section

14(1) An Intellectual Property Right owner (or his agent) who wishes, to have suspected counterfeit goods seized by the Commissioner, under Section 34(1) shall apply in Form ACA 10 set out in the First Schedule.

(2) The application under paragraph (1) shall be accompanied by—

(a) the fee specified in the Second Schedule.

4.3 The Act requires the IPR owners to lay complaint(s) when they suspect that their products are being counterfeited. During the audit it was established that some IPR owners fail to lay complaints as outlined in **Annexure 6**. The audit also established that ACA carries out suo moto and acts on consumer complaints. The audit further noted that in cases of suo moto, the IPR owner may fail to cooperate in laying a formal complaint to ACA to charge the suspect thus posing technicalities in prosecution of these cases.

4.4 Interviews with staff revealed that it costs the IPR owner Kshs 18,000 or Kshs 17,000 as shown in **Annexure 6** to lay a single complaint with ACA. The IPR owners consider this not to be cost effective especially when they have complaints on one product but involving several suspects or stores and they are required to pay for each suspect or store. In addition, the value of suspected goods may sometimes not be worth the legal cost involved.

4.5 As a result, this compels ACA to release suspected counterfeit goods back to the suspect after the lapse of the three months required timeline for laying complaints. This may lead to continued trade of counterfeit goods.

4.6 There have been instances where complaints have been laid, however, they were not promptly acted on by ACA. There have also been reports of IPR owners experiencing challenges when working with the enforcement department (harassment of traders and corruption). This may result in the loss of trust of the Agency by stakeholders, a decrease in consumer complaints and increased civil action suits.

II. Challenges in Prosecution

4.7 Combating counterfeit trade involves prosecution of suspects. Analysis of the data provided shows that ACA has successfully prosecuted five suspects with each being fined three times the value of the seized counterfeit goods, with the fines totalling to Kshs. 12.2 Million.

4.8 Interviews with the Head of Enforcement revealed that ACA has 24 inspectors. Out of these

24 inspectors, ten are gazetted prosecutors. However, only five of these are capable of prosecuting cases. Currently, two of the five skilled prosecutors have left the Agency. Further, it was noted that the prosecutors are each stationed in Nairobi, Eldoret and Mombasa. Subsequently, each of the prosecutors are forced to not only handle cases beyond their area of jurisdiction but also a high number of cases.

4.9 Based on the data provided, 220 cases have been filed in court for the audit period. The court process is lengthy as shown in **Table 2** and since court cases are running concurrently, hearings and mentions may often fall on the same date in different regions and courtrooms yet the prosecutor handling the cases is one. This leads to frequent adjournment of cases.

Table 2: Sampled Cases and the Periods Taken Before Conclusion

	Case No /File No	Commencement Year	Conclusion Year	Period Taken(Years)
1	992/2011	2011	2013	2
2	724/2012	2012	2017	5
3	731/2012	2012	ONGOING	6
4	1831/2013	2013	ONGOING	5
5	3267/2014	2014	2017	3
6	3269/2014	2014	2017	3
7	IPRC/007/10	2010	ONGOING	8
8	IPRC/048/15	2015	ONGOING	3

4.10 Some of the challenges also faced by the prosecution counsel that may lead to delay of cases are; incomplete documentation from the complainant (IPR owner/agent), provision of expired documents by IPR agents as well as failure to provide analysis reports within the required timeline. Further, some witnesses are reluctant to appear in court to testify citing loss of market share as well as negative brand image.

4.11 During court hearings the prosecution is required to avail exhibits as evidence in the proceedings. This requires the exhibits to be moved from the warehouse depot to the court. Frequently, the exhibits are bulky and since ACA does not own a large covered truck they transport goods in a double cabin pickup truck exposing them to risks of contamination, damage and loss/theft. This can hinder successful prosecution of cases due to contamination of evidence and countersuits in the case of damage or loss of exhibits.

4.12 There have been instances of negligence on the Investigating Officers' and Prosecutors' side in handling of cases that have led to loss of cases as shown in **Table 3** below:

Table 3 Mishandling of Cases by the Prosecution

No	Case No	Reason for acquittal
1	1261/11	-Defective Charge sheet -Prosecution sent a representative to appear in court though the person was not conversant with the case. -Failure to produce Exhibits in court - Non-appearance of the prosecution.
2	1388/12	The inspector failed to seal off the premises. Did not verify all the goods. Evidence adduced did not comply with the Evidence Act. No evidence of the identity of the accused person.
3	3268/14	They charged the wrong person.
4	1226/11	There was contradiction in the evidence presented by the prosecution. The prosecutor did not object the release of counterfeit goods.
5	333/12	No case against the accused as there was no sufficient evidence.

- 4.13 These have been caused by under staffing and inadequate competent prosecutors within the Agency. This has resulted in continuous adjournments, backlogs and loss of cases due to non-appearance of prosecutors.
- 4.18 The inventory form has a provision for Depot Manager to endorse his/her signature upon receipt and verification of goods. Documentary review revealed that majority of the forms for the goods seized were not signed yet the goods were in the depot. It was observed that although the Agency keeps a register of the seized goods held in their depots it was difficult tracking amount of seized, amounts taken for analysis and the amounts at the depot with exception of Eldoret Office.

III. Management of Depots

4.14 According to Section 27 (1) of the Anti-Counterfeit Act, Goods that have been seized under Section 23(1) shall be stored and kept in safe custody at a counterfeit goods depot until the person in charge of the depot: -

- a. is ordered by a court to return, release, destroy or otherwise dispose of those goods as specified in the order: Provided that in the case of counterfeit goods, such goods shall be destroyed at the expense of the local manufacturer or importer, as the case may be, based on the environmental considerations and the capacity of the Country to destroy the goods, or shall be reshipped;
- b. is directed by an Inspector under Section 28 to release the goods to the person from whom they were seized.

a. Lack of Regional Depots Managers

- 4.15 According to ACA Act section 29(2) The Board shall appoint a fit and proper person to be in charge of a counterfeit goods depot.
- 4.16 The Act does not define the relevant knowledge, skills and ability required to be a depot manager. Moreover, the office has not developed career guidelines for depot managers hence creating room for placement of any officer. For instance, in Eldoret the depot assistant was not competent enough to handle the task as previously he was serving as a driver in the Nairobi Office and did not undertake training to serve in this capacity.
- 4.17 During the audit it was established that Regional Offices did not have depot managers but the Regional Heads were charged with the responsibility of ensuring safe custody of the goods. However, in their absence there is no clear chain of command on who takes over. Additionally, it was also established that Kisumu and Mombasa do not have depots, however their offices are gazetted as the depots. The Mombasa Office lacks enough space to store the seized goods hence, seize goods *in situ* and stores some at other stakeholders' warehouse and mainly being KPA, KRA and Kenya Police. As a result, the safety of these goods cannot be guaranteed as ACA lacks control of the warehouses.

b. Loss of Goods

- 4.19 During the audit, it was revealed that some of the seized goods from the depots had been reported missing. For instance, in Eldoret, assorted seized goods worth Kshs 1,138,714 had gone missing (**OB 78/03/04/2017**) just a day before the audit team went for physical verification. Another reported case was in Nairobi in 2016 regarding missing HP cartridges. In Mombasa, suspected counterfeit LPG gas cylinders had been seized *in situ*, however, a few days later the Inspector received a report that the premises had been broken into and most of the gas cylinders had been stolen (16 cylinders out of 20 were stolen).
- 4.20 In the cases where there were no depots, there is lack of effective control systems in place to monitor goods coming in and goods being released. Furthermore, there is also a laxity in the security that has been hired to ensure safe custody of seized goods. In Mombasa the office doubles up as depot, it is much harder to manage and monitor goods seized *in situ*. In regions with depots the records of goods seized, samples taken for analysis and goods released are kept independently of each other but there is no consolidated database hence tracking of goods becomes a challenge.
- 4.21 As a result, cases of missing exhibits pose a threat to the successful prosecution of counterfeit traders. Similarly, they also expose ACA to a risk of litigation and tarnish the public image of the Agency.

c. Lack of Physical Verification of Destroyed Goods

- 4.22 According to ACA Regulations 2010 Section 16(3); Any goods forfeited under Section 28(2) of the Act shall be destroyed or disposed off in such manner as the Executive Director may determine.
- 4.23 During the audit it was established that goods are destroyed in accordance with NEMA Regulations and under Kenyan Environmental Law (EMCA 1999 and Waste Management Regulation 2006). A list of goods due for destruction and their value is prepared by the Depot Manager and approved by a witness. However, during actual destruction it is

unclear whether an actual physical count is done in the presence of the witnesses to confirm the authenticity of the same goods on the list.

4.24 There is no defined procedure on the destruction of goods that have been forfeited to ACA. This can result in goods going missing or returning back into the market as there are no control systems.

d. Lack of Uniformity in Operations

4.25 During the audit, it was observed that the ACA charges destruction fee for counterfeit goods. Interviews revealed that ACA is supposed to charge 20% of the value of goods as the destruction fee. However, documentary review showed varying charges for different suspects. The regional offices charge 20% of the value of the goods as destruction fee, as per the policy with exception of Nairobi office which charge based on a case by case basis.

4.26 The law allows for ADR in settlement of cases; therefore, the Agency established an ADR Committee that has to approve out of court settlements. However, documentary review in Mombasa and Kisumu Regional Offices revealed that Investigation Officers did several out-of-court settlements without informing or seeking approval of the ADR committee.

e. Staff Integrity

4.27 According to Article 73 (2) of the Constitution of Kenya 2010, public officers are guided by the following principles of leadership and integrity: -

- a. selection on the basis of personal integrity, competence and suitability;
- b. objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices.

4.28 Documentary review revealed that thirteen staff have faced disciplinary cases in line with matters bordering on corruption and harassment of traders made by stakeholders. Additionally, the staff were suspected to have leaked confidential information to unauthorised persons. Five of those staff faced disciplinary action but were later exonerated due to anomalies in the disciplinary procedures. However, it was also reported that a number of officers received Show Cause Letters and upon their response no further action or record to indicate any further action was taken by the management⁹.

4.29 The audit established that ACA staff in Kisumu in some instance used un-serialised inventory forms

during raids and seizures. The officer designated P/NO 201510102 signed the inventory forms using different signatures from the official one and also recorded them in a different handwriting. The instances were only observed in the un-serialised forms.

4.30 Similarly, officers release goods that have been confirmed counterfeit and their destruction fees paid without evidence of requisite procedure being followed. In other instances, Kisumu and Mombasa offices have released goods without communication and approval of the Alternative Dispute Resolution Committee (ADRC). It was also noted that there were no correspondences in the files between the officers and the IPR owners to show that they were involved in the ADR process as per the Enforcement Procedures.

4.31 A case in point, counterfeit goods estimated at Kshs 25 Million were released back to the suspect even after an ADR was conducted with the IPR owner, and it was agreed that the goods were to be forfeited to the Agency for destruction as per the Act.

4.32 A visit to Eldoret Depot revealed that assorted goods had gone missing although the depot is manned by a security firm 24 hours a day. This occurred just a day before the audit team had requested to visit the depot to carry out physical verification. It was suspected to be an inside job; collusion between staff and the security guards. The case was reported to Central Police station under the occurrence book number **OB78/03/04/2017**.

4.33 In addition, interviews with ACA staff revealed that since penalties are punitive on many occasions, suspected counterfeiters opt to compromise Inspectors or Judicial Officers rather than pay the hefty fines. Further, 3 officers from Kisumu Office are on suspension pending hearing and determination of corruption allegations case by the Ethics and Anti-Corruption Commission.

4.34 The lack of integrity of the officers involved in the effort to combat counterfeit trade leads to continuous trade in counterfeit goods as counterfeiters can compromise the system. Furthermore, IPR owners seemed to have lost trust in ACA and its ability to deliver on their mandate resulting in bad publicity for the Agency.

B. AWARENESS CREATION

I. Low Public Awareness

- 4.35 Under Anti-Counterfeit Act, 2008 Section 5 (a); the Agency shall enlighten and inform the public on matters relating to counterfeiting; as well as (c) devise and promote training programmes on combating counterfeiting.
- 4.36 Interviews with staff revealed that the level of awareness on counterfeit goods among the general public is still low. A report from ACA Research Department established that the level of awareness in Kenya is at 51.35%¹⁰. Comparing regional responses to the national average, the level of awareness on counterfeits in Kisumu was 53.3% which was slightly higher than that of Mombasa which stood at 53.1%. Nairobi closely followed with their level of awareness on counterfeiting being 52.4%; whilst those in Nakuru and Eldoret registered 49.6% and 49.2% respectively which is slightly below 50%¹¹.
- 4.37 The low levels of awareness are attributable to ACA undertaking limited media campaigns, roadshows and outreach programmes to create mass awareness on counterfeit goods. Additionally, the funds allocated to the Awareness Department are redirected to other departments in the course of the financial year due to varying priority needs of the agency, hence ACA majorly relies on stakeholder goodwill to carry out awareness programs.
- 4.38 The low level of awareness results in the public purchasing counterfeit products that may expose them to harmful side effects.

II. Lack of Outdoor Signage

- 4.39 According to the Company's Act Section 67(1) (a) A company shall display its name and other prescribed information in specified places.
- 4.40 During the audit, it was observed that none of the ACA offices had any branding showing the presence of the Agency in the various office locations. This causes poor publicity among the general public and the stakeholders as most of them are not aware of the existence of the Agency and its mandate hence, the complainants faces challenges in locating the offices to report complaints.

III. Inefficiency in Training

- 4.41 Under the ACA Act Section 5(c) the Agency should devise and promote training programmes on

¹⁰ ACA research report 2015: Level of Public Awareness On Counterfeiting in Urban Kenya

¹¹ Ibid

combating counterfeiting; while under PSC Human Resources Policies and Procedures 2016 Section H.1 (1) The Government Policy on training is to ensure continuous upgrading of Public Servants' core competencies, knowledge, skills and attitudes including their ability to assimilate technology to enable them create and seize opportunities for social advancement, economic growth and individual fulfilment; (5) All training shall be based on identified training needs.

- 4.42 Interviews conducted with the Chief Anti-Counterfeit Inspector, revealed that the trainings that have been carried out for the Anti-Counterfeit Inspectors are not adequate as they tend to heavily focus on legal aspects while leaving out the bulk of the information necessary during the evidence gathering stage of the investigation (surveillance, collecting evidence, sampling and analysing evidence as well as compiling case files). Documentary review revealed that 12 staff were trained on Intelligence Forensic and Criminal Investigation out of which only 4 are currently based in the Enforcement Department as inspectors. The other staff are involved in the administrative departments within the organization.
- 4.43 Further, in the Financial Year 2014/15 the Agency trained nine (9) Inspectors on Senior Management Course (SMC) while in 2015/2016, seven (7) Inspectors were trained on Strategic Leadership Development Programme course (SLDP). These courses are not in line with the duties they perform which include; drafting of charges and filing cases in court, investigation of complaints from IPR owners, prosecution of cases, conducting raids and seizing goods. Additionally, an Awareness Officer (AO) I was trained on SLDP while the job description entails lecturing in trade fairs and schools, organizing public barazas, preparing brochures and pamphlets on matters of counterfeits. Additionally, Awareness Officer (AO) II was trained on SMC whereas the job description is to assist in collecting, collating and compilation of data from the field, assist in writing brochures and pamphlets on counterfeit matters.
- 4.44 Senior Management Course (SMC) is for senior managers who are responsible for making policy related decisions, managing resources in their organizations, strategic operations and result areas, normally for Job Group K and above while Strategic Leadership Development Program (SLDP) course are for officers in Job Group N and above.

4.45 Interview with staff at the Regional Offices also revealed that those who joined the Agency in 2015 have never been trained on any other courses apart from the induction. Documentary review revealed that Quality Assurance Officers attended more trainings annually (3-6 trainings) compared to other staff. In other instances, some staff have done same course more than once. Further analysis disclosed that trainings were not offered based on the staff training needs and other staff that did not provide training needs also went for various trainings.

4.46 A review of the audited financial statement for the financial years listed in the **Table 4** showed a variance in the training expenditures and training expenses showed in the audited statements. When the approved budgets are overspent, money has to be moved around from other departments to facilitate the over-expenditure.

Table 4: Variance in the Training Expenditures and Training Expenses

Year	Approved Budgets (a) - Kshs	Audited Financial Statements (b) - Kshs	ACA Training Expenditure (c) - Kshs	Variance (b-c) - Kshs
2011/12	-	4,148,004	5,462,080	1,134,076
2012/13	-	4,700,110	1,715,970	2,984,140
2013/14	3,890,700	7,315,760	4,610,552	2,705,208
2014/15	3,587,800	4,390,382	4,066,432.45	1,018,488.85
2015/16	4,155,380	13,142,524	6,641,507.45	6,501,016.55

Source: OAG Analysis 2018

4.47 Additionally, there was a difference noted in the cost of undertaking Certified Public Accountant (CPA) course within the same institution. For instance, 3 staff were sponsored at Pinnacle Business School at a cost of Kshs 70,000, Kshs 49,300, Kshs 37,500 and Kshs 25,650 respectively in 2015/16 financial year.

4.48 The inefficiencies in training are due to non-adherence to the staff training needs, ACA Act Section 5(c) on devising and promoting training programmes on combating counterfeiting as well as PSC Human Resources Policies and Procedures 2016. It can also be attributed to failure of some staff to provide their training needs. The variation in cost is due to the inability of the training committee to carry out due diligence on costing of invoices.

4.49 As a result, there is no improvement on service delivery as the courses are not relevant to the day-to-day operational duties. The difference in costing leads to unnecessary over expenditure on the same course.

C. RESEARCH DIVISION

4.50 The division is mandated to conduct research in counterfeiting to assist formulation of policies for enforcement and awareness activities. Research involves identification of gaps and needs, however, the process lacks engagement of core users such as the enforcement and awareness departments who ought to share their areas of interest.

4.51 Interviews with staff revealed that although research is carried out, findings are not shared

with the relevant core users; however, evidence available show 6 out of the 23 reports are available in ACA website. Hence, there is limited correlation between the research department and other departments resulting in research findings being under-utilized. There was no evidence of research department carrying out follow up on implementation of their recommendation.

4.52 Recommendations should be made as a corrective action against specific causes of the problems, they should be derived from findings and must include the entities responsible for action. A review of the research reports showed that the recommendations are not in line with the findings and are not addressed to a specific department for action. This renders the research null and a wastage of the limited resources.

D. COLLABORATION AND COORDINATION

Not Appointing Inspectors from Relevant Stakeholders

4.53 According to the Anti-Counterfeit Act Section 5 (d) ACA should co-ordinate with national, regional or international organizations involved in combating counterfeiting; Further, Section 22 (3) of the Act state that in addition to the inspectors appointed under Section 22 (1), any member of the Board, police officer, authorised customs officer, trade development officer, industrial development officer, trade mark and patent examiner, seed and plant inspector, public health inspector, and inspectors appointed under the Standards Act (Cap. 496), the Weights and Measures Act (Cap. 513), the Copyright Act (No. 12 of 2001), the Food,

Drugs and Chemical Substances Act (Cap. 254), the Pharmacy and Poisons Act (Cap. 244) and the Pest Control Products Act (Cap. 346) are hereby designated as Inspectors for purposes of this Act. As well as in Section 22(4) The Board may designate other public officers to be inspectors for purposes of this Act.

4.54 During the audit, it was established that ACA has a staff establishment of 24 inspectors who are mandated to carry out surveillance, investigation, inspection and to seize goods. The geographical coverage is wide and the task is enormous hence the need for collaboration with other agencies to stop the trade in counterfeit products. Despite the provision in the law, the Board has not designated any officers from other agencies as Inspectors to assist in combating trade in counterfeit goods. Hence they have failed to capitalize on the goodwill of other agencies to support them in achieving their mandate.

4.55 A visit to Namanga and Busia border points revealed that there were no established ACA offices and Officers. Lack of ACA presence at the border points leaves room for entry of goods into the Country without verification of their authenticity since the stakeholders have never been trained on identification of counterfeits.

4.56 In Mombasa Port, there are 16 Freight Stations which are responsible for clearance of containers on 24-hour basis. ACA has 4 technical staff at the Mombasa Office who are required to carry out verification of the contents in the containers before they are released. The staff are not able to verify all the containers hence some goods are released without verification of their authenticity. Similarly, at the border points the stakeholders at the port have not been trained on how to identify counterfeit goods.

4.57 As a result, ACA has not been able to handle the enormous task of combating trade in counterfeit products as they have limited national and regional presence.

E. ADMINISTRATIVE CONSTRAINTS

I. Inadequate Staff Establishment

4.58 According to the ACA 2016 staff establishment plan that was subsequently approved by the Board, there was a need for 250 staff.

4.59 As at the time of the audit, ACA had a staff complement of 69, three of whom are on contract, 65% being technical while 35% are support staff. This represent about 28% of the total staff required

by the Agency to efficiently operate and achieve its mandate.

4.60 This is mainly caused by inadequate financial resources to hire the required number of staff. As a result, ACA had only managed to set up four Regional Offices. As at the time of the audit, the Garissa Office had been closed due to insecurity.

II. Logistic Resources Constraints

4.61 During the audit it was established that ACA has leased two depots for storage of seized goods in Nairobi and Eldoret. However, Kisumu and Mombasa Offices lack depots and store seized goods in the offices. As a result, these offices cannot store seized bulky and dangerous goods thus the safety of goods seized in-situ cannot be guaranteed as was the case in Mombasa.

4.62 Interviews with the Regional Heads revealed that the offices have only one vehicle each, which are used for both administrative and enforcement purposes. This hinders service delivery as they cannot run concurrent activities. The Regional Offices also cover vast geographical areas without clear demarcation of jurisdiction of each Regional Office.

4.63 The main cause of logistic constraint is due to insufficient resources to meet the competing needs of the Agency and lack of effective utilisation of the available resources. Hence, the Agency is unable to achieve the objectives it was set up for.

F. INFORMATION RECORD KEEPING

4.64 The Agency is required to keep up clear, accurate, reliable timely and relevant information of its operations. However, documentary review revealed that the enforcement files at the headquarters were disorganized and tracking paperwork from individual cases was not easy as records were kept as per the individual Investigating Officer rather than per case. Similarly, the enforcement data base is highly disorganized and not up to date. Despite the existence of procedures for record keeping, the same is not being observed by inspectors.

4.65 It was also realized that some ACA 2 Forms (Inventory of Seized Goods) were not signed by the Depot Manager as is required when receiving the goods. In other instances, the officer who seized the goods also received the same on behalf of the Depot Manager.

4.66 The ACA 2 Form is filled in quadruplicate, an original and three other copies. Documentary review revealed that it's not clear which copy is to be

issued to the suspect, the complainant and which copy remains in the inventory of seized goods book. The files reviewed had a mixture of either original, duplicate, triplicate or quadruplicate inventory forms. There is no set format for issuing inventory of seized good form and as a result, it's not easy to evaluate the progress of cases at a glance.

4.67 It was also noted that Consumer Complaint and Intellectual Property Rights Complaint Registers were often not being updated as cases that have already been closed have no comments in the remark section to indicate that they have been closed, others lacked action that was taken, while some are still under investigation from the year 2016 and even earlier.

CHAPTER 5

CONCLUSION

- 5.1 The continued production and trade of counterfeit products in Kenya is primarily due to weak enforcement of the laid down rules and regulations by the Agency. This was attributed to the high charges associated with laying complaints and the failure of the Agency to act promptly when counterfeit cases are reported.
- 5.2 At the time of the Audit, the Agency had only prosecuted 4 cases with a backlog of over 200. The delays in prosecution of cases are due to the low number of prosecutors as well as negligence on gathering and handling of evidence.
- 5.3 The lack of a clear job description for the role of Depot Manager as well as lack of a clear chain of command in the regional offices has led to inadequacy in storage and security of seized goods. This inadequacy resulted to loss of goods as well as difficulties in carrying out physical verifications.
- 5.4 There are low levels of public awareness about ACA since they have undertaken limited media campaigns, roadshows and outreach programmes to create mass awareness on counterfeit goods due to limited funds. In addition, although research is carried out, findings are not being shared with the relevant core users; in effect the research findings are only utilized in a limited manner
- 5.5 The Agency is not located in many entry and exit border points. Verification of goods at these border points is therefore difficult and not always done. Although the law provides that the Agency can appoint and train inspectors from relevant stakeholders in the fight against counterfeit trade, there is limited collaboration and coordination between ACA and its various stakeholders.

CHAPTER 6

RECOMMENDATIONS

- 6.1 For a clear complaints procedure, the Agency should install an internal control mechanism of their processes to finalise the three months' time line given.
- 6.2 There is need to create awareness programs on identification of counterfeit goods and Intellectual Property Rights by the public. The Agency needs to work closely with intellectual owners, Judiciary and other stakeholders to create a multi sectoral team.
- 6.3 To create and enhance public awareness, The Agency needs to consider increased use of social media. Greater awareness creation campaign schedules should be instituted to increase the level of public awareness on counterfeit goods.
- 6.4 For enforcement of regulations, a collaborative mechanism to bring on-board all stakeholders should be instituted, especially at the entry ports
- 6.5 A central registry to store case files may be considered for easy access by relevant stakeholders rather than being in custody of inspectors.

ANNEXURES

Annexure 1; List of documents reviewed

Document	Information derived
The Constitution of Kenya 2010	Leadership and integrity of public officers.
The ACA Act. 2008	The establishment and mandate of ACA. Management of ACA
The ACA Regulations 2010	Operationalization of the Act and enforcement procedures. ACA forms.
ACA Internal Audit Reports	The day to day operations of ACA, effectiveness and compliance with procedures manuals, guidelines, rules and regulations.
ACA Financial Reports	The budgets, disbursement and expenditures.
ACA Research Reports	The researches carried out and the outcomes.
Enforcement Data Base	The cases that are ongoing, closed, withdrawn, lost and won Seized goods and their management.
Human Resource Career Guidelines	Job description and specifications
PSC Human Resource Policies and Procedures	Training and Development
Staff establishment	Required staffing levels

Annexure 2: List of people interviewed

	Interviewee	Information Requested
1	Head of Quality Assurance	General overview of ACA and was the contact person.
2	Head of Human Resource	Human resource information
3	Enforcement Officer	Information on enforcement and legal issues Prosecution
4	Prosecutor Officer	
5	Chief Investigation Officer	
6	Head of Internal Audit	Internal audit reports and control systems in place.
7	Head of Accounts	Financial records and statements.
8	Research Officer	Research carried out, reports and outcomes.
9	Awareness Creation Officer	Awareness activities and public participation.
10	Depot Manager	Management of depot and seized goods.
12	Regional Head - Mombasa	Management and operations of Mombasa regional office.
13	Regional Head - Eldoret	Management and operations of Eldoret regional office.
14	KPA staff	Collaboration and coordination with ACA in combating counterfeit trade.
15	KRA staff	
16	KEBS staff	
17	KIPI staff	
18	Polucon staff	

Annexure 3: Other Relevant Stakeholders

Stakeholder	Stakeholder Expectations	ACA Expectations
1. Government and Government Agencies	<ul style="list-style-type: none"> • Enforcement of the Act • Public awareness on counterfeiting • Enhanced revenue collection • Creation of employment opportunities • Develop and implement training programmes on counterfeits • Create partnerships with national, regional and international enforcement agencies • Good corporate governance 	<ul style="list-style-type: none"> • Adequate funding • Policy guidelines and support. • Legislative support
2. Enforcement Agencies such as: <ul style="list-style-type: none"> • Kenya Revenue Authority • Kenya Bureau of Standards • The Kenya Police Service • National Intelligence Service • Kenya Industrial Property Institute (KIPI) • Kenya Ports Authority (KPA) • Kenya Plant Health Inspectorate Services (KEPHIS) • Weights and Measures • The Judiciary 	<ul style="list-style-type: none"> • Co-ordination of anti-counterfeit strategies and activities • Co-operation in investigation and enforcement • Intelligence and database sharing • Public awareness on matters of counterfeiting 	<ul style="list-style-type: none"> • Co-operation in investigation and enforcement. • Intelligence and database sharing • Public awareness of Agency's mandate and functions.
3. Manufacturers and their Associations, Dealers and Agents	<ul style="list-style-type: none"> • Effective enforcement of the Act • Public awareness • Protection of intellectual property rights thereby protecting local and international trade and investments • Creation of strong linkages 	<ul style="list-style-type: none"> • Resource support • Intelligence sharing • Training and capacity building • Co-operation in market research and awareness
4. Consumers and Consumer Organisations <ul style="list-style-type: none"> • Public Health advocacy groups 	<ul style="list-style-type: none"> • Enforcement of the Act • Public awareness on matters of counterfeiting • Consumer protection in accordance with the Constitution 	<ul style="list-style-type: none"> • Intelligence (consumers) • Intelligence sharing (consumer organisations)
5. Owners of Intellectual Property Rights	<ul style="list-style-type: none"> • Enforcement of the Act • Training programmes • Database of Intellectual Property Rights owners 	<ul style="list-style-type: none"> • Co-operation in the enforcement of the Act • Compliance with intellectual property rights legislation • Intelligence • Resource support
6. Development Partners <ul style="list-style-type: none"> • Regional Bodies East African Business Council, East African Community, COMESA, etc. • Foreign Embassies– US Embassy, Indian High Commission, among others. • BASCAP (Business Action to Stop Counterfeiting and Piracy) 	<ul style="list-style-type: none"> • Enforcement of the Act • Compliance with good governance, principles and procedures • Develop and implement training and public awareness programmes • Conduct and share research findings • Share programmes and achievements 	<ul style="list-style-type: none"> • Resource support • Intelligence • International linkages • Training and capacity building

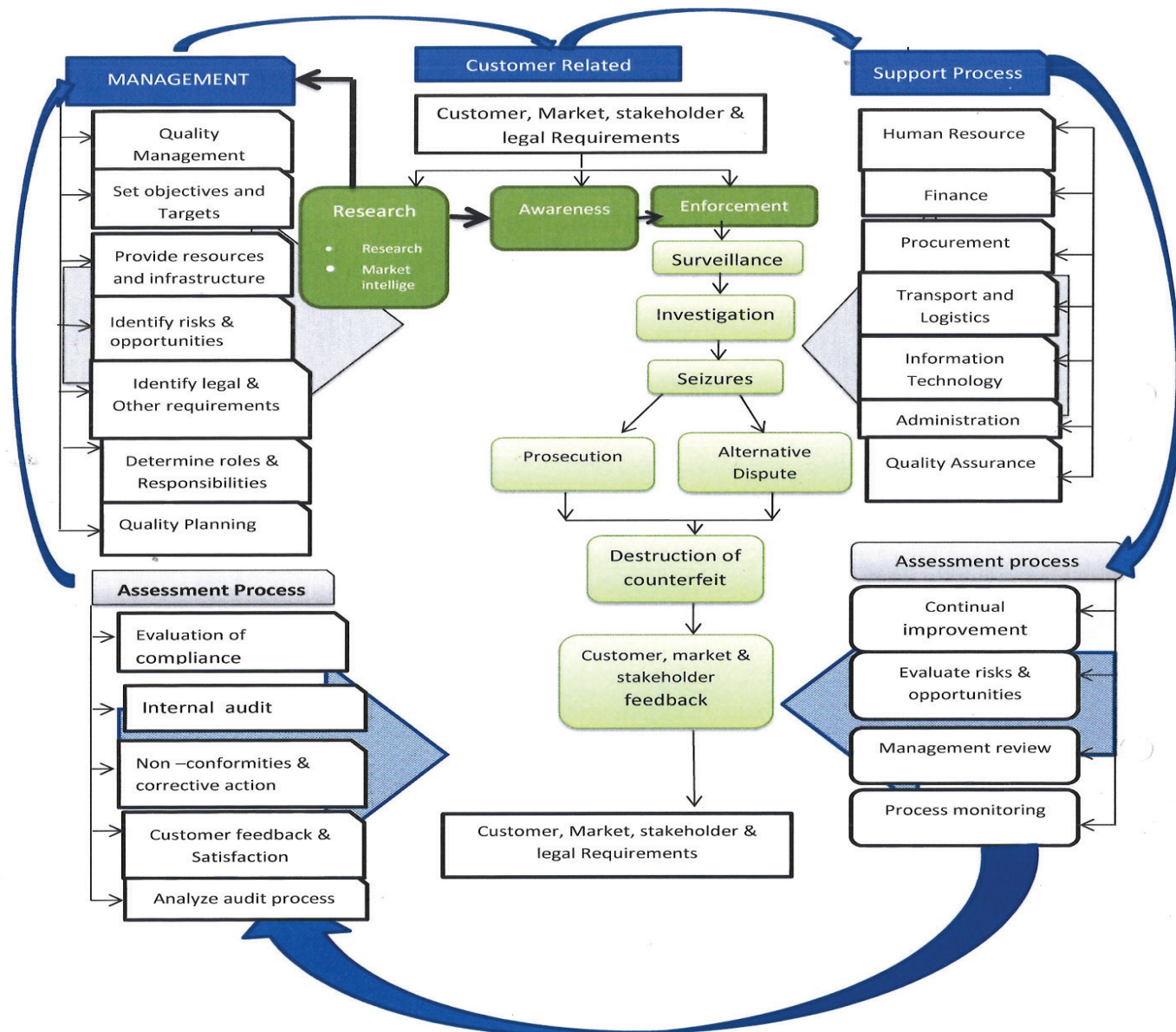
Source: ACA Strategic Plan 2011-2016

Annexure 4: Prosecution Procedures

All the evidence is available in accordance with the prosecution bookmarks including;

- a. The charge sheet has been properly drafted and there is evidence to support the charges;
- b. That the Investigation file has been properly segmented into the various sub-files;
- c. That all complaint documents are available in Subfile A
- d. That all documentary evidence is available in Subfile B,
- e. That the analysis report, price list and Trademark Certificate for Use in Legal Proceedings are available in Subfile C;
- f. That all prosecution statements clearly proving the offense are in Subfile D;
- g. That the statement(s) of the accused person(s) is/are available under Subfile E;
- h. That copies of the IO's Investigation Diary are available under Subfile F;
- i. That copies of Documents to be read to the accused, including the Charge Sheet and the facts of the Case are available in Subfile G;
- j. That the list of Witnesses, Exhibits and Accused Person's criminal record, properly listed according to who shall MFI and produce the exhibits, is available in Subfile H;
- k. That the covering report is available in Subfile I; and
- l. Correspondences are available under Subfile J

Annexure 5: Anti-Counterfeit Agency Process Interactions



Source: ACA

Annexure 6: IPR owners who did no lay complaint

No	IPR Owner	File Number
	Maxwel Africa Limited	ACA/HQ/ENF/IPRC/063/15
	Sony Company Limited	ACA/HQ/ENF/IPRC/006/13, ACA/HQ/ENF/IPRC/087/12, ACA/HQ/ENF/IPRC/086/12, ACA/HQ/ENF/IPRC/084/12
	LG Electronics	ACA/HQ/ENF/IPRC/006/13
	Toyota/Mitsubishi	Complaint dated 28.03.2013
	Truck Benz parts	Complaint dated 04.05.2013
	Colgate Palmolive RSA & Sinar Anti-jol Indonesia	Complaint dated 23.07.2013

Annexure 7: Applicable Fees

Form	Description	Ksh
ACA 3	Application for copies of statements per page additional fees for certification per document	50 1000
ACA 4	Application for inspection of seized goods	2,000
ACA 5	Application for samples	5,000
ACA 8	Laying of a complaint	10,000
ACA 10	Application to the Commissioner to seize suspected counterfeit goods	10,000
ACA 13	Application for search	1,000
ACA 15	Power of Attorney	1,000

Annexure 8: ACA Response and Auditor Comments

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>A. Weak Enforcement</p> <p>I. Hindrances in Laying Complaints</p>		
<p>Para 4.1-4.2 in the Report (8-9 in the Management Letter)</p> <p>Laying of complaint fees regarded as a hindrance.</p>	<p>Payment of fees is tied to the provisions of Section 16(1) of the Anti-Counterfeit Act that requires that complaints are laid in good faith.</p> <p>The fees are appropriate to ensure genuine complainants and that complaints are not frivolous or laid in bad faith.</p>	<p>The audit findings alludes to the criteria used to assess the performance of ACA.</p>
<p>Para 4.3 in the Report (10 in the Management Letter)</p> <p>That <i>suo moto</i> {own motion initiatives} actions are due to failure by intellectual property rights owners to lay complaints due to high complaint fees.</p>	<p><i>Suo moto</i> actions are premised in law {Section 33 (4) & (5) of the Anti-Counterfeit Act} and are not a consequence of failure by intellectual property rights owners to lay formal complaints.</p> <p>The <i>suo moto</i> actions also spring naturally from the power of inspectors to seize goods reasonably suspected to be counterfeit under Section 23 (1) of the Anti-Counterfeit Act.</p> <p><i>Suo moto</i> actions are also imperative as inspectors must be proactive in enforcing the law and not reactive by merely waiting for formal complaints to be laid.</p> <p><i>Suo moto</i> actions therefore do not bridge any gap left by the failure of intellectual property rights owners to lay complaints.</p> <p>The observation by the Auditor-General is also based on general assumption that all brands are counterfeited and that since not all brand owners have not laid complaints then it is because of high complaint fees.</p> <p>There are brands that do not suffer from counterfeiting at all but from other issues like parallel importation.</p>	<p>The explanation on <i>Suo moto</i> is noted and the finding amended to reflect the same.</p>
<p>Para 4.3 in the Report (10 in the Management Letter)</p> <p>Non-cooperation of intellectual property rights owners in <i>suo moto</i> operations.</p>	<p>It is true that some intellectual property rights owners or their agents fail to fully cooperate to facilitate investigations and prosecution of matters.</p> <p>However, this is an inevitability that the Agency has to deal with on a case by case basis.</p> <p>To this end, the Agency has in place a framework plan for a robust stakeholder engagement in the fight against counterfeiting.</p>	<p>Agreed with the response of the Agency on the collaboration of some intellectual property owners.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.4 in the Report (11 in the Management Letter)</p> <p>Complaint involving several suspects or stores and intellectual property rights owners are required to lay formal complaints with respect to each suspect or store.</p>	<p>The Anti-Counterfeit Agency is involved in the criminal enforcement of the law.</p> <p>One of the integral facets of criminal law is specificity.</p> <p>Crime and compliant of criminality are specific. Consequently, every complaint by an intellectual property rights owner must be against a specific person or entity. It can never be general.</p> <p>Intellectual property rights owners must by law lay individual complaints against suspects, however many they are.</p>	<p>We agree with the auditee on the legal requirement of each complaint. However, this may be a hindrance due to time and financial other resource requirement from the complainant</p>
<p>Para 4.4 in the Report (11 in the Management Letter)</p> <p>Value of goods seized not worth the cost of laying formal complaints.</p>	<p>It is true that in certain cases the goods seized may be minimal and less than the cost of laying formal complaints. This is an issue that the Agency has to grapple within specific cases.</p> <p>However, it should be noted that fighting counterfeiting and protecting reputation of brands is not a profit-making venture.</p> <p>These instances will come up from time to time and the Agency has been dealing with them on a case by case basis.</p> <p>One of the ways to address this has been by encouraging out of court settlements through Alternative dispute resolution (ADR) so as to avoid taking small quantity seizure cases to court.</p>	<p>The finding was based on the perspective of the IPR owner and their motive for laying complaints specifically where the cost of the complaint was much higher than the value of goods seized</p>
<p>Para 4.5 in the Report (12 in the Management Letter)</p> <p>Release of seized goods back to the suspects after the lapse of 90 days.</p>	<p>Section 28(1) of the Anti-Counterfeit Act requires that goods are released back to the person from whom they were seized if no person is charged with an offence under the Act.</p> <p>This is a legal imperative where we have to comply with the law.</p> <p>However, the mistaken presumption in the report is that all seized goods are counterfeit. This is far from the truth.</p> <p>It is ONLY the Court to determine under Section 28(3) of the Anti-Counterfeit Act that goods are counterfeit. Not the Agency or the intellectual property rights owners.</p> <p>Release of seized goods is a statutory question and this has only been done, on a case by case basis, within the law.</p>	<p>The finding has been amended to read ; “Suspected counterfeit goods”</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.6 in the Report (13 in the Management Letter)</p> <p>Complaints not acted on promptly by the Agency.</p>	<p>Generally, complaints are acted on in compliance with the service charter. However, each and every case has its own unique challenges both internal and external.</p> <p>Externally, the complainant may not have provided actionable information. Internally, the Agency might actually lack adequate inspectors due to workload and previous engagements to act on a complaint on timely basis.</p> <p>Each case should therefore be treated on its on merit. There is no general trend to deliberately delay action on complaints.</p>	<p>The response on the need to follow the laid down legal requirements is hereby noted.</p>
<p>Para 4.6 in the Report (13 in the Management Letter)</p> <p>Harassment of traders and corruption.</p>	<p>The Agency has not received any complaint of actual harassment of any trader from any member of the public. Agency inspectors are always under firm instructions to be civil to suspects as required by the Constitution.</p> <p>Similarly, the Agency has not received any specific complaint with actionable evidence of corruption from its officers.</p> <p>The Agency has a policy on corruption and handling of public complaints and once credible and actionable information is obtained, the Agency will definitely act accordingly.</p>	<p>The audit finding was informed by minutes of the “22nd Joint campaign against counterfeiting” as well as the disciplinary meeting against some staff as captured in human resource internal audit report.</p> <p>We however note the intervention of management where complaints are received.</p>
<p>II. Challenges in Prosecution</p>		
<p>Para 4.8-4.9 in the Report (15-16 in the Management Letter)</p> <p>Inadequate number of prosecutors.</p>	<p>The Agency faces acute shortage of prosecutors and this is impacting negatively on the prosecution of matters as stated in the report.</p> <p>The Agency is actively engaging the Director of Public Prosecutions to gazette more prosecutors for the Agency.</p> <p>The Agency has also secured funding to recruit more Advocates of the High Court as legal officers who can be gazetted by the Director of Public Prosecutions.</p> <p>This issue requires active engagement and collaboration with the Director of Public Prosecutions which is work in progress.</p>	<p>The response is noted. Verification of interventions made will be done at a future follow up audit.</p>
<p>Para 4.10 in the Report (17 in the Management Letter)</p> <p>Incomplete documentation from complainants and failure to provide analysis reports.</p>	<p>This has been the case in certain files and has hindered proper investigation and prosecution of matters.</p> <p>Once again, this is a problem that will not die away but will be dealt with by the Agency on a case by case basis.</p> <p>One of the ways to deal with it will be through more stakeholder engagement and public awareness creation.</p>	<p>We agree with the response from the agency. Results from the action plan indicated will be verified at a later date.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.10 in the Report (17 in the Management Letter)</p> <p>Reluctance of witnesses to appear in Court to testify.</p>	<p>Counterfeiting is part of the wider illicit trade and there are always security concerns and risks. The risks and threats to witnesses in criminal matters are ever-present and that is why there is the Witness Protection Act and the Witness Protection Agency.</p> <p>The Agency's approach is to build confidence in its stakeholders and to constantly engage with them.</p>	<p>This being criminal proceedings we agree that risks exist to potential witnesses. However, the Agency in collaboration with the prosecution need to assure the safety of potential witnesses.</p>
<p>Para 4.11 in the Report (18 in the Management Letter)</p> <p>Transportation of exhibits to Court {danger of loss, contamination of damage}</p>	<p>Exhibits have to be moved to Court during scheduled court hearings.</p> <p>The Agency, subject to availability of funds, is considering purchase of suitable transport means.</p> <p>The Agency has, however, all along ensured that the chain of custody is maintained in handling court exhibits.</p>	<p>The response is noted. The intervention will be verified at a follow-up audit.</p>
<p>Para 4.12-4.13 in the Report (19-20 in the Management Letter)</p> <p>Negligence of the investigating officers' and prosecutors' side in handling of cases that have led to loss of cases</p>	<p>There is no specific finding of negligence in the cases cited by the Court that can be attributable to deliberate acts by the inspectors.</p> <p>The cases cited were mostly handled by the police prosecutors and there is no specific finding by the Court that a specific prosecutor was negligent.</p> <p>Besides, the cases cited were among the very first cases handled by ACA inspectors at inception. There were naturally teething problems as most of them were learning on the job as investigators.</p> <p>There has also been acute shortage of inspectors and prosecutors and this, as rightly acknowledged in the report, has had a negative impact on prosecutions.</p> <p>Lastly and most importantly, the law is that a person is either convicted or acquitted. An acquittal is one of the natural outcomes of a criminal process. It cannot be attributed to negligence.</p>	<p>The burden of proof being very high in criminal cases, the Police Officers should have been adequately briefed. We however note the measures the agency has taken to solve the challenge.</p>
<p>III. Management of Depots</p>		
<p>Para 4.15-4.16 in the Report (22-23 in the Management Letter)</p> <p>Lack of regional depot managers</p>	<p>This is true and has been due largely to understaffing. Staffing issues has been escalated to the relevant entities like the parent Ministry and Treasury. It is hoped that this will be resolved over time.</p> <p>It is also true that there are no career guidelines for the depot manager. This will be dealt with in the proposed review of the career guidelines.</p>	<p>We agree with the response from the agency but measures should be put in place to remedy the situation.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.17 in the Report (24 in the Management Letter)</p> <p>Lack of regional depots in Kisumu and Mombasa.</p>	<p>The regional offices of the Agency are all designated by law as counterfeit goods depot.</p> <p>Gazette Notice No. 14525 of 26th November 2010 lists designated counterfeit depots and that includes offices of the Agency.</p> <p>The issue is that the depots are not adequate in terms of space.</p> <p>The Agency has received funding from the government this financial year to purchase a depot and there is commitment from the government to assist in the acquisition of more depots in the next financial year. This should mitigate this issue of depots in the regional offices.</p> <p>By law the persons in charge of the various gazetted counterfeit goods depots such as customs officers are responsible for the safe custody of the goods. They sign for the goods. The safety of the goods therefore is thus guaranteed.</p>	<p>We note the response and have amended the report to reflect the gazette notice.</p> <p>Regardless, the safety and custody of seized goods is responsibility of the agency.</p>
<p>Para 4.17 in the Report (24 in the Management Letter)</p> <p>Inadequate storage space for seized goods</p>	<p>This is a problem the Agency is grappling with.</p> <p>The Agency has secured funding from the government to purchase a depot this year.</p> <p>The Agency is also seeking leased space from other government agencies like Kenya National Trading Corporation. This will alleviate this problem of storage space.</p>	<p>We have noted the response from the Agency and the measures to remedy the situation.</p>
<p>Para 4.18 in the Report (25 in the Management Letter)</p> <p>Majority of the Inventory of Seized Goods Forms not signed.</p>	<p>The Agency appointed a depot manager for the first time for the Nairobi depot in 2015 and goods seized thereafter have been inventoried, signed and taken to the depot by the depot manager.</p> <p>Prior to 2015, there was no depot manager and naturally there was no one to sign. Inspectors were responsible for safe custody of the goods.</p> <p>In regional offices with no depot assistants to manage the depots, this has not been easy.</p> <p>However, this is a purely staffing constraint and it is hoped that it will be mitigated as the government avails funds to recruit more personnel.</p>	<p>We have noted the measures put in place to ensure proper and complete recording of seized goods.</p>
<p>Para 4.18 in the Report (25 in the Management Letter)</p> <p>Comprehensive list of seized goods</p>	<p>The Agency has a record of all the inventories of all the goods seized and this is reported on weekly and quarterly.</p> <p>The registers kept by the Agency have a record of all seized goods and it is always updated regularly.</p> <p>The Agency shall endeavour to translate the record into a list.</p>	<p>This was the situation at the time of the audit. We will verify the list at a future follow up audit.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.19 in the Report (26 in the Management Letter)</p> <p>Loss of goods</p>	<p>The Agency is under a statutory obligation to ensure safe custody of seized goods.</p> <p>The Agency is also indemnified at law by the complainants with respect to seized goods.</p> <p>The Agency has always initiated administrative action on loss of goods {Eldoret as an example} attributable to its employees.</p> <p>The law at Section 25(1) (c) of the Anti-Counterfeit Act allows seizure in situ in appropriate circumstances. It should be appreciated that seizure in situ has its risks.</p> <p>Generally, the Agency has striven, within its limited resources to secure seized goods and ensure safe custody.</p>	<p>We have noted the response. However, we were not furnished with the report of any administrative action initiated.</p>
<p>Para 4.20 in the Report (27 in the Management Letter)</p> <p>Lack of effective control systems to monitor movement in and out of the depot.</p>	<p>There is an effective control system at the Nairobi and Eldoret depots.</p> <p>For a start, the access in Nairobi is only with the authority of the depot manager who personally keeps keys. In Eldoret it is the regional head.</p> <p>There are hired security guards at the Nairobi and Eldoret depots 24/7.</p> <p>The Agency maintains a register for every person entering and departing the depots at any time.</p> <p>There is also CCTV cameras at the Nairobi depot.</p> <p>There are plans to have CCTV cameras in all the depots.</p> <p>There are also plans to continually assess the risks associated with storage of counterfeit goods and come up with mitigating measures like insurance.</p> <p>For goods stored in depots operated by partner institutions, those institutions have internal controls on the safety of goods and the Agency is satisfied with the arrangement so far.</p>	<p>We have noted the response and amended as appropriate.</p>
<p>Para 4.22-4.24 in the Report (28-30 in the Management Letter)</p> <p>Lack of physical verification of destroyed goods</p>	<p>Since the second half of 2017, the Agency appointed a Destruction Committee to verify goods destined for destruction, oversee the destruction process and hand over a report and destruction certificate to the Executive Director.</p> <p>There is therefore an elaborate process in the destruction of goods process with sufficient internal controls that has served the Agency well.</p> <p>There is a procedure in place that regulates the destruction of seized goods.</p>	<p>We note that the Agency appointed a Destruction Committee after the audit</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
IV. Lack of Uniformity in Operations		
<p>Para 4.25 in the Report (31 in the Management Letter)</p> <p>Varying charges as destruction fees</p>	<p>The destruction fees policy is express on the factors to consider when coming up with destruction fees payable.</p> <p>It should be noted that cost of destruction varies depending on the type of goods to be destroyed and also on other factors.</p> <p>It is in recognition of these myriad of factors that the destruction fees policy introduced flexibilities pegged at a minimum of 20% of the value of goods seized.</p> <p>The flexibility is important and is beneficial to the Agency in raising appropriation-in-aid.</p> <p>The mistaken presumption in the report is that destruction a fee is pegged at 20%.</p> <p>The policy places a minimum of 20% to take care of each and every situation as each set of seized goods is unique in terms of cost of destruction. Cost of destruction is not uniform.</p>	<p>We have noted the response from the Agency and subsequently amended our finding</p>
<p>Para 4.26 in the Report (32 in the Management Letter)</p> <p>Alternative Dispute Resolution Committee</p>	<p>The current policy of the Agency and the procedures do not have a provision for alternative dispute resolution policy.</p> <p>The alternative dispute resolution committee was found to be too bureaucratic and delayed out of court settlements.</p> <p>Besides, it should be appreciated and noted that not all out of court settlements could be accommodated by the Committee.</p> <p>Alternative dispute resolution is a constitutional and statutory imperative that is not dependent on the approval of the Agency.</p> <p>For instance, there are many instances where intellectual property rights owners just write to the Agency that they have agreed with the suspects with a proviso that the goods be destroyed at the cost of the suspect.</p> <p>In such cases, the Agency is left with nothing but to just receive the destruction fees and destroy the goods and proceed to close the file.</p>	<p>We have noted the response. This may however require a future verification at a follow up audit</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.27-4.32 in the Report (33-38 in the Management Letter)</p> <p>Lack of staff integrity</p>	<p>The Agency is unaware of judicial officers or inspectors being compromised by counterfeiters.</p> <p>The Agency is unaware of any loss of trust from intellectual property rights owners.</p> <p>The Agency has noted that officers have made mistakes in filing of statutory documents and the Board did direct that proper training be undertaken. This has been ongoing.</p> <p>No counterfeit goods worth Kshs. 25 Million that had been forfeited for destruction were released. There was no forfeiture of any such goods.</p> <p>The matter in Court by the Ethics and Anti-Corruption Commission is <i>sub judice</i>. The officers are by law presumed innocent until proven guilty and no adverse inference ordinarily should be made against them as the matter is before Court.</p> <p>The loss of goods at the Eldoret Depot is an ongoing administrative disciplinary action matter that is yet to be concluded. The Agency has taken appropriate action.</p> <p>As a general rule, the Agency takes action on cases of corruption based on sound evidence and within the confines of the law.</p>	<p>The audit finding was based on an internal audit report. Any administrative action may require a verification at a future follow up audit</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
B. AWARENESS CREATION		
<p>Para 4.35-4.38 in the Report (41-43 in the Management Letter)</p> <p>Low Public Awareness – low levels of awareness are attributable to ACA undertaking limited media campaigns, roadshows and outreach programmes to create mass awareness on counterfeit goods</p>	<p>The Agency over the years has undertaken many targeted stakeholders’ audience sensitization and training programs as well as public outreach programs. This has gradually raised the level of awareness as demonstrated by the agency’s research findings. Through the training programs, the Agency has been able to build the capacities of law enforcement agencies and the private sector to appreciate their role in combatting counterfeiting within their mandates. For instance, through the training programs for magistrates and judges, the Agency developed better collaborations, e.g. 1) Case handling of Nivea in Mombasa where the suspect was found guilty and fined, 2) ruling of the Bringi cigarettes as counterfeits.</p> <p>Media campaigns and coverage were undertaken within the budgets available alongside roadshows. This was mainly around the World Anti-Counterfeit Day where a PR agency would be engaged to hype media coverage (as evidenced in 2018, 2017, 2016, 2013 and 2012) while in 2011, it was done internally.</p> <p>To address the above, a budget has been allocated for media management and communications and a media campaign is underway both as ACA and under a Multi-Agency Anti-Illicit Trade Outreach (MAAITO) program, being coordinated from the agency. Mobilization of funds is underway to supplement the available budget. A PR agency has been engaged to complement the agency’s activities. For the first time, the PR agency is being engaged for 6 months.</p>	<p>Despite the increase of stakeholder awareness, more needs to be done to increase consumer awareness. Hopefully with the PR firm being on board, awareness would increase.</p>
<p>Para 4.39-4.40 in the Report (44-45 in the Management Letter)</p> <p>Lack of outdoor signage – the audit observed that none of the ACA offices had any branding showing the presence of the Agency in the various office locations. This cause poor publicity among the general public and the stakeholders as most of them are no aware of the existence of the Agency and its mandate.</p>	<p>The Agency’s IEC (information, education and communication) materials distributed to the public and target audiences during forums indicate the locations and contacts for all ACA offices, and with some signage at the buildings.</p> <p>The branding has been considered in several occasions but implementation was delayed due to budgetary constraints.</p> <p>Currently, the Agency has planned for all the offices to be branded, and part of the PR Agency’s TORs is to advise based on feasibility study on placement of the signage for the offices.</p>	<p>The effort of the Agency to improve on signage for visibility is noted. This may be verified at a follow audit</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.42 in the Report (47 in the Management Letter)</p> <p>Inefficiency in training - Trainings that have been carried out for the Anti-counterfeit inspectors are not adequate as they tend to heavily focus on legal aspects while leaving out the bulk of the information necessary during the evidence gathering stage of the investigation. 12 staff members were trained on intelligence forensic and criminal investigation out of which only 4 are currently based in the Enforcement Department as inspectors. The other staff members are involved in the administrative departments.</p>	<p>The Agency has developed a system to identify training needs. The training needs will be identified during performance evaluation with the immediate supervisor. This will then be forwarded to Human Resource Division and finally to the training committee for rationalization.</p> <p>To deal with the shortage of enforcement officers, the Agency took a drastic action by training officers from other departments who were temporarily deployed to undertake enforcement operations as the Agency awaits approvals to recruit additional enforcement officers. This action led to the Agency to handle a backlog of IPR and suo moto complaints.</p>	<p>The effectiveness of the new measures introduced to identify training gaps will be verified during a future follow up audit</p>
<p>Para 4.43-4.44 in the Report (48-49 in the Management Letter)</p> <p>In the financial year 2014/15 the Agency trained 9 inspectors on Senior Management Course while in 2015/16, 7 inspectors were trained on Strategic Leadership Development Programme. These courses are not in line with the duties they perform. Additionally, an awareness officer was trained on SLDP while the job description entails lecturing in trade fairs and schools, etc.</p>	<p>The officers trained in senior management course and strategic leadership programme were in job group K and N respectively as per the Agency's civil service job group mapping. Currently, most of them are in charge of the Regional offices and satellite offices which require such training.</p>	<p>The response is noted. However, the beneficiaries were not eligible for the said trainings unless they had been identified to hold the said positions.</p>
<p>Para 4.45 in the Report (50 in the Management Letter)</p> <p>Officers who joined the Agency in 2015 have never been trained on any other courses apart from induction.</p>	<p>According to the human resource and procedures manual, 2014 applicable at the time, clause 9.7.2 required officers to have been in the service of the Agency for at least one year with satisfactory performance. Hence, the officers were not eligible for training. However, the Agency has received adequate funding in the financial year 2017/18 and is developing a training plan that will give priority to the officers who have not been trained before.</p>	<p>We concur with the response. However, it is hoped priority will be given to them when training budgets allows.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.45 in the Report (50 in the Management Letter)</p> <p>Trainings not offered based on the training needs and other staff that did not provide training needs also went for various trainings</p>	<p>These are trainings/workshops invitation from various government institutions not captured in the training needs assessment.</p>	<p>We have noted the response from the Agency and the measures to remedy the situation.</p>
<p>Para 4.46 in the Report (51 in the Management Letter)</p> <p>Variance in the training expenses</p>	<p>The actual training expense is as captured in the audited financial statements. The variance is as a result of government trainings and workshops arising in the course of the financial year not included in the training plan.</p>	<p>The response from the Agency is noted although a reconciliation would have been important to address the variance</p>
<p>Para 4.47 in the Report (52 in the Management Letter)</p> <p>Difference in the cost of undertaking similar Certified Public Accountant (CPA) course within the same institution</p>	<p>The Certified Public Accountant course was at different levels, hence the cost difference. Further, some officers opted for payment of tuition and examination while others opted for payment of examination only</p>	<p>The response is noted.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
C. RESEARCH DIVISION		
<p>Para 4.50 in the Report (55 in the Management Letter)</p> <p>The process of identification of gaps and needs lacks engagement of core users such as staff in the Enforcement and Awareness Departments</p>	<p>The division has always engaged all members of staff for input through various approaches including emails and brown bag meetings. Annual work plans for the division are discussed both at management and board levels where they give their input.</p>	<p>The response from the Agency is noted. However, the details of the engagement will be confirmed during a follow-up audit.</p>
<p>Para 4.51 in the Report (56 in the Management Letter)</p> <p>Findings not shared with the relevant core users hence underutilization of research findings</p>	<p>The Agency shares research findings with the core users in meetings, by emails as well as on its website as demonstrated by the attached evidences. The research findings have informed the operations of the Agency both in awareness and enforcement.</p>	<p>Noted the response and have amended our report to reflect the response.</p>
<p>Para 4.52 in the Report (57 in the Management Letter)</p> <p>The recommendations of the research reports are not in line with the findings and are not addressed to a specific department for action</p>	<p>The Agency has conducted 23 in-house research reports on counterfeiting. The research recommendations uptake from those papers by the enforcement and awareness departments stands at 70%. All research recommendations are derived from the findings. These include those that are suggested by specific sectors during focus group discussions and those derived from the analyses of data. An action matrix is always generated from the recommendations to be implemented by the respective departments.</p>	<p>We have amended our report to reflect the response.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
D. COLLABORATION AND COORDINATION		
<p>Para 4.53-4.54 in the Report (58,59 in the Management Letter)</p> <p>Not appointing inspectors from relevant stakeholders.</p>	<p>This is a misconception of the express wording of Section 22(3) of the Anti-Counterfeit Act.</p> <p>The persons listed there are designated inspectors and have similar and equal powers to enforce measures under the Anti-Counterfeit Act.</p> <p>There is no requirement of appointment of persons by the Agency under Section 22(3) of the Anti-Counterfeit Act.</p> <p>Section 22(4) of the Anti-Counterfeit Act provides for designation of other public officers by the Agency. This is easier said than done.</p> <p>The existing designated officers have not helped significantly in the fight against counterfeiting e.g. the police. The aspect of designation therefore poses a huge debate on its effectiveness and desirability.</p> <p>The Agency has opted to pursue strengthening its internal capacity as opposed to presumed leveraging on other institutions that has not yielded any significant results.</p> <p>It is not true and therefore debatable whether there exists goodwill from other institutions to support the Agency in the fight against counterfeiting.</p>	<p>We have noted and concur with the response of the Agency</p>
<p>Para 4.55 in the Report (60 in the Management Letter)</p> <p>Presence at the border points</p>	<p>It is true that the Agency does not have a presence at the land borders.</p> <p>However, the Agency has received funds from the government in the recent past and will post officers at some of the key land borders by early 2019 on a priority basis.</p>	<p>The response is noted</p>
<p>Para 4.56 in the Report (61 in the Management Letter)</p> <p>Low verification rate at the Mombasa Port</p>	<p>The Agency is understaffed and has been unable to cover all the container freight stations in Mombasa effectively.</p> <p>However, the government has acknowledged this and it is hoped that the capacity at the Port of Mombasa will be strengthened in early 2019 with the new recruitment.</p> <p>The aim of the Agency is to cover all the entry points 24/7 resources permitting.</p>	<p>The response is noted</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.58-4.60 in the Report (63,64,65 in the Management Letter)</p> <p>Inadequate Staff establishment – As at the time of audit ACA had a staff complement of 69, three of whom are on contract, 65% being technical while 35% are support staff. This represents about 28% of the total staff required by the Agency to efficiently operate.</p>	<p>The Agency has received approvals to recruit 58 additional staff increasing the total staff in post from 74 to 132.</p>	<p>We note the response which will be verified during a follow up audit.</p>
<p>Para 4.61 in the Report (66 in the Management Letter)</p> <p>Logistic resource constraint – During the audit it was established that ACA has leased two depots for storage of seized goods in Nairobi and Eldoret. However, Kisumu and Mombasa offices lack depots and store seized goods in the offices. As a result these offices cannot store seized bulky and dangerous goods</p>	<p>The Agency has received development budget for purchase of 4 depots from FY 2018/19 to FY 2020/21 in Mombasa and Nairobi counties. The Agency has also initiated the process of leasing a depot for Kisumu region.</p>	<p>We have noted the response of the agency. Confirmation of the initiative will however be done during a future follow up audit</p>
<p>Para 4.62 in the Report (67 in the Management Letter)</p> <p>Geographical jurisdiction of regional offices</p>	<p>It is true that regional offices cover wide areas and in certain cases with limited transport that hinders service delivery.</p> <p>The Agency has noted this and subject to resources will procure additional motor vehicles.</p> <p>The Agency is developing a decentralization strategy that will deal with issues of, inter alia, geographical reach of regional offices.</p> <p>The Agency has, in the meantime, given general directives on geographical reach of regional offices. These however still extremely huge and unmanageable.</p> <p>Resources allowing, the Agency will establish more regional offices or sub-offices as the resources may allow.</p>	<p>The agency agrees with our findings. The measures taken to address the issue will be verified at a future audit.</p>

Issues Raised by Auditor-General	Comments by the Agency	Auditors remarks
<p>Para 4.62-4.63 in the Report (67,68 in the Management Letter)</p> <p>The regional offices have only one vehicle each, which are used for both administrative and enforcement purposes. This hinders service delivery as they cannot run concurrent activities.</p>	<p>Mombasa and Eldoret regional offices already have two vehicles which were deployed in 2015 and 2017 respectively to improve service delivery. Additional vehicles have been procured by the Agency in the current financial year to be deployed to the regional offices once the current recruitment process is completed.</p>	<p>The findings reflect the position during the audit. Additional resource deployed will be verified during a future audit</p>
F. INCOMPLETE AND DISORGANIZED RECORD KEEPING		
<p>Para 4.64 in the Report (69 in the Management Letter)</p> <p>Record keeping</p>	<p>This has been noted and remedial measures have been taken. For instance, centralization of files is at an advanced stage and it is hoped that all files will be securely kept in the central cabinets.</p> <p>There is a movement register whose use is being implemented.</p> <p>The Agency is also in the process of training officers on basic and critical skills like record keeping and on the proper filling in of the statutory documents.</p> <p>The Agency has also introduced a review of files system in its procedures and it is hoped that this review will also deal with issues of proper keeping of records.</p>	<p>We have noted the response and measures taken to address the record keeping challenges</p>
<p>Para 4.67 in the Report (72 in the Management Letter)</p> <p>Updating of intellectual property rights complaint register and consumer complaint register</p>	<p>This has been noted and communication made to ensure that there is constant updating of the registers.</p>	<p>We have noted the response and measures taken to update the intellectual property rights and consumer complaints register.</p>

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