The Civil, Administrative and Criminal law Standards in Intellectual Property enforcement in Uganda: The Good, the bad and the hoped-for.

*By Anthony C.K. Kakooza**

Abstract

Uganda presently lacks a National Intellectual Property Policy framework developed and supported by all interested stakeholders, and covering the policy linkages between IP and public health (including implementation of the WTO Doha Declaration on the TRIPS Agreement and Public Health in Uganda); agriculture and the environment including Plant variety protection; education, science and technology; enterprise development and regulation; protecting Uganda's rich cultural heritage and traditional knowledge; and consumer interests.

This study therefore sets out to show how far Uganda has gone in stabilizing its Intellectual property rights environment, more especially in terms of enforcement of the rights involved. The first part of the study gives a summary of the Country profile with the objective of emphasizing the need for building on the Intellectual Property potential that Uganda has to offer in fostering knowledge - based economical growth.

The second part analyses the present regional and International IP Policy and legal framework from which Uganda derives its obligations as a member of the World Trade Organization. It proceeds to examine and discuss the efficacy of the enforcement mechanisms at the International and regional level particularly with Instruments ratified by Uganda. In the same vein, it also gives a connotational analysis of some issues prevalent in developing countries that are ignored by developed countries in their efforts to protect their trade interests through enforcement of Intellectual Property Rights.

The third part looks at the existing IP policy considerations, legal framework and Institutional framework in Uganda, including local jurisprudence related to IP, from which the enforcement mechanisms in place are determined. In the fourth part, this highlights the challenges and way forward for the future. It addresses recommendations as to how Uganda can come up with an effective enforcement structure for its IPR holders that befits the Country's political and socio-economic setting.

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LIST OF ACRONYMS

AGOA	African Growth and Opportunity Act
ARIPO	Africa Regional Industrial Property Organization
COMESA	Common Market for East and Central Africa
EAC	East African Community
EACU	East African Customs Union
EBA	Everything But Arms
EDF	European Development Fund
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tarrifs
GDP	Gross Domestic Product
IPR	Intellectual Property Rights
LDC	Least Developing Country
MoFPED	Ministry of Finance, Planning and Economic Development
MlTTI	Ministry of Trade Tourism and Industry
NARO	National Agricultural Research Organization
NITA - U	National Information Technology Authority - Uganda
PEAP	Poverty Eradication Action Plan
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property rights
UNCST	Uganda National Council for Science and Technology
UNCTAD	United Nations Center for Trade and Development
UPRS	Uganda Performing Rights Society
URSB	Uganda Registration Services Bureau
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Introduction

Effective enjoyment and management of Intellectual Property Rights stands on strong enforcement mechanisms. Without such mechanisms, there can never be any orderly IP system not only within specific local jurisdictions but also globally in terms of harmonization.

Enforcement of Intellectual Property Rights has a direct link to economic development basing on the underlying principles of Intellectual Property rights, which are encouragement of new ideas, and strengthening honest dealing[1]. Protection of IP Rights through effective and globally harmonized laws boosts investor confidence and as such promotes economic development. Uganda's Intellectual Property environment paints a picture of mostly archaic laws inherited in whole from Britain during the 1962 Independence. Prior to the 1990's, these laws were the Intellectual Property norm in the country, the general business community was not even aware of their existence and therefore did not exercise any protection of LP Rights or call for reforms in enforcement where the same was deemed to be lacking and thus, economic development in this area was sluggish.

However, Uganda's ratification of the agreement establishing the World Trade Organization in October 1994[2] influenced its embankment on the modification of its Intellectual Property laws in line with the requirements of the TRIPS Agreement under the WTO. Such considered modifications have expanded the focus of Uganda's horizon from the traditional confinements, that is, Trade Marks, Patents and Copyrights, to areas such as Geographical indications, Technovations, Trade Secrets, Plant Variety Protection, Traditional Medicinal Practice and establishment of an Industrial Property Office[3].

Nevertheless, improvements on the national provisions on Intellectual Property Rights enforcement appear more demanding then ever. As more countries are focusing on harnessing their knowledge - based economies, there is International pressure for local protection of Intellectual Property rights that flow from foreign investments into the country. Local investors are also weary of protection of their LP Rights both locally and where cross-border trade with immediate neighbors is concerned, amid increasing counterfeiting and smuggling of goods across the borders. These and more demands on the legislative drafters continue to emerge creating complexities as the country struggles to put in place laws that are in harmony with other member states of the W.T.O.

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[1] 'The Republic of Uganda: Uganda Law Reform Commission - The Intellectual Property Law Project Report, Advocacy Workshops, 21[55] - 24[5h] October 2003, at Pg. 14

[2] Ibid, Pg 4

[3] Atwine Jeffrey., *"A Review of Uganda's current situation with regard to Intellectual Property Policy Issues: Opportunities and Challenges "* (Dec. 2003) Vol. l No. 2, The Uganda Living Law Journal, pp. 192 to 215.

Through an analysis of the complexities involved in the modification of Uganda's LP laws, this highlights the extent of Uganda's efforts in streamlining its enforcement provisions: under the TRIPS obligations and leads to an appreciation of the realities on the ground. For instance, Uganda, as a developing Country, has inadequate infrastructure to move at the pace of developed countries in the modification of its LP laws. Furthermore, the enforcement of LP rights in the local context is a hard nut to crack where the majority of the population is in the poverty class, which relies on pirated products that are cheaper and easily accessible. The proposed modifications in the Intellectual Property law environment by the Uganda Law Reform Commission are sound, but there are concerns over deterrent provisions in criminal stipulations where LP infringements are concerned. More importantly, very few countries provide for imprisonment as an option for IPR infringement and we therefore need to address the efficacy of such an option.

There can also never be full harmonization of LP enforcement laws where countries, especially LDCs, enjoy varieties in culture. The proposed legislation on Traditional Medicinal Practice, for instance, is an area under Intellectual Property that deserves the confinements of Ugandan legislation and is also bound to encounter a number of complexities in the enforcement of rights accruing thereto. On a lighter note, however, Uganda's appreciation of its Traditional Medicinal Practice and the desire to protect it as an Intellectual Property Right shows that the Country is beginning to exploit aspects of creativity and innovation as it takes it place in the global village as a knowledge-based economy.

On the whole, these and various other challenges need to be adequately addressed as Uganda diligently works on a reformation of its Intellectual Property laws. Its enforcement provisions should not only be streamlined on the basis of conforming to the TRIPS requirements but should also be best suited for the country's SocioEconomic situation. Consideration should also go towards the Intellectual Property interests of the neighboring countries to encourage concerted efforts in addressing cross-border activities that boost I.P. Rights infringements.

1.0: BACKGROUND TO THE STUDY

1.1 COUNTRY PROFILE

Uganda is a small; land locked country in East Africa bordered by Tanzania, Rwanda, the Democratic Republic of Congo, Sudan and Kenya. Its population is estimated at approximately 30 million people. Uganda's economy is largely based on the export of unprocessed agricultural products. It is a member to a number of regional bodies such as the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the World Trade Organization (WTO) and others.

The manufacturing sector makes products largely for domestic consumption, although efforts are underway to increase the size of this sector in order to add value to exports[4]. Uganda offers a range of products for export that mainly target the United States and the European Union. It is one of the beneficiaries of the African Growth and Opportunity Act (AGOA). Under AGOA, over 1,800 products from Uganda, including textiles, arts and crafts enjoy duty - and quota - free access to the United States market. A similar preferential treatment is enjoyed under the EU's Everything But Arms (EBA) initiative and similar initiatives in Canada, Japan and other Countries[5].

The present Government policy objective is the development of the Private Sector through a five year National Development Plan (NDP). The National Development Plan, which was launched in April 2010, replaces the Poverty Eradication Action Plan of 1997. The NDP outlines the government's intention to improve road and rail networks, create employment opportunities, improve labour force distribution and use the private sector as the engine of growth and development. The National Development Plan is based on the theme: *Growth, Employment and Socio-Economic Transformation for Prosperity.*

Uganda's five year development plan is thus in line with the need for a sound Intellectual Property Policy. It should thus be noted that Uganda presently lacks a National IP Policy framework developed and supported by all interested stakeholders, and covering the policy linkages between IP and public health (including implementation of the WTO Doha Declaration on the TRIPS Agreement and Public Health in Uganda); agriculture and the environment including Plant variety protection; education, science and technology; enterprise development and regulation; protecting Uganda's rich cultural heritage and traditional knowledge; and consumer interests.

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[4] P. Asiimwe: IT Country Assessment of Uganda: *A survey Report on the status and use of Intellectual Property by Enterprises, Institutions and the Uganda Registration Services Bureau,: WIPO, July 2005;* at *p.9*

[5] United Nations & International Chamber of Commerce Report: An Investment Guide to Uganda: *Opportunities and Challenges ;* March *2004,* at *pr 17*

2.0: INTERNATIONAL AND REGIONAL POLICY FRAMEWORK

2.1 Introduction

This part addresses Uganda's IP position in the International Perspective in terms of treaty ratifications and obligations. It is considered relevant to analyze the International policy framework before looking at the local position in the next part of the study. Thus, apart from addressing the membership obligations, this part also provides a detailed critique of the TRIPS Agreement and the expectations placed upon developing countries like Uganda to fulfill their mandates as member states.

2.2 International obligations

In April 1994, Uganda signed the agreement establishing the World Trade Organization (WTO) and ratified the same in October 1994. By 31st December 1994, Uganda had fulfilled all the conditions necessary to become a founder member of the WTO. Article XVL4 of the Agreement establishing the WTO provides that each member state shall ensure that its laws and regulations are brought into conformity with its. obligations under the Agreements. Some of the obligations, rights and benefits, can only be accessed and taken advantage of with the correct legal framework in place[6].

It is imperative that Uganda's legislation is at par with the international commitments to which Uganda is bound as is provided for under Article 1 of TRIPS. Article 1 of the TRIPS Agreement provides that "members shall give effect to the provisions of this Agreement and the members may but shall not be obliged to implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement".

As stated in the Business Guide to the Uruguay Rounds[7], "The Multilateral legal Instruments resulting from the Uruguay Round are treated as a single undertaking. All WTO member countries are required to adopt national legislation and regulations to implement the rules prescribed by GATT 1994 (General Agreement on Trade and Tariffs) and its associate agreements, General Agreement on Trade in Services (GATS) and the agreement on Trade Related Aspects of

[6] U.L.R.C: *A study report on Intellectual Property Rights - Trademarks & Service Marks Law;* Law Corn Pub. No. 15 of 2004, at p. 17

[7] Business Guide to the Uruguay Round published by UNCTAD/WTO and the Common Wealth Secretariat, 1996; at p.15, cited in U.L.R.C. report supra note 8

Intellectual Property Rights (TRIPS)". It goes on to state that "... the single undertaking rule has automatically made all WTO members including developing countries and transitional economies, parties to the associate agreements and other multilateral agreements."

By virtue of being a signatory to the WTO, Uganda is bound to fulfill specific obligations that have a bearing on its domestic legislation. Thus the legal regime with regard to commercial laws is affected and in particular, legislation related to TRIPS.

All WTO Agreements are essential and of immediate concern to Uganda although the degree varies from one agreement to the other as shall be seen below. The different agreements give varied time frames within which member countries are expected to implement them. Uganda, as a developing country, benefits from the special and different clauses that give longer periods for the application of particular agreements or not being required to implement certain provisions of the agreement because of the additional burden in form of resource requirements needed to implement these agreements and possible effect on the infant and non competitive industries. Accordingly, under the Declaration on the Agreement on TRIPS and Public Health of the Ministerial conference of the WTO dated November 14, 2001 in Doha, Qatar, pharmaceuticals in Least Developed Countries (LDCs) may be excluded from patent protection[8].

The need for the amendment and development of the TRIPS related laws in Uganda cannot be overstated. The need for strong and globally uniform laws directly affects investor confidence in a country's economy. In the Business Guide to the Uruguay Round[9], it is stated that "... Industries and trading organizations were complaining that because of differing national standards for the protection of Intellectual property rights such as Patents and Trademarks ... trade in counterfeit goods was on the increase." The effect of increased trade in Counterfeit goods is that business is discouraged and investor interest wanes. This fact in the wording of the WTO is stated thus; The absence of adequate protection was also considered a deterrent of foreign investment in the production of patented goods and a reason for the reluctance of industries in developed countries to sell or license technology to industries in developing countries."[10]

2.2.1 Overview of the TRIPS Agreement

2.2.1 (a) Obligations under Intellectual Property Conventions

Article 2 of the TRIPS Agreement requires that in respect of **Part II** *(Standards*

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[8] Uganda has no obligation to implement TRIPS until 1st July 2013. With regard to pharmaceutical products, Uganda does not need to apply provisions on patents and protection of undisclosed information until 1st January 2016.

[9] Ibid, note 7 supra

[10] Ibid

concerning the availability, scope and use of Intellectual property Rights, i.e. Copyright and Related Rights, Trademarks, Geographical Indications, Industrial Designs, Patents, Layout Designs of Integrated Circuits, Protection of Undisclosed Information/Trade Secrets, Control of Anti-Competitive Practices in Contractual Licenses), **Part III** *(Inclusive of Civil and Administrative procedures and remedies as well as criminal procedures),* and **Part IV** of the Agreement *(Acquisition and maintenance of Intellectual property Rights and related inter-parties procedures),* members shall comply with articles 1 to 12 and article 19 of the Paris Convention (1967). It further provides that nothing in Parts I to IV of the Agreement shall derogate from existing obligations that members may have to each other under the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in respect of Integrated Circuits.

2.2.1 (b) General obligations on enforcement of Intellectual property rights

It should be noted that the Berne Convention[11] contains very few provisions concerning enforcement of LP rights. Article 15 provides that the author of a literary or artistic work protected by the Convention is entitled to institute infringement proceedings in the Countries of the Union. Furthermore, article 16 also provides that infringing copies of a work can be seized in any country of the Union where the work enjoys legal protection.

It is however apparent that the technological means for creation and use of protected material have evolved over time since the establishment of the Berne Convention. Secondly, there is also an increasing economic importance in the realm of international trade with regard to the movement of goods and services protected by IP rights[12]. The new trend that relates Intellectual Property rights to trade therefore portrays a movement away from the reliance on the Berne Convention with regard to enforcement mechanisms for IP rights as countries are now being urged to have enforcement procedures available under their own domestic legislations so as to permit effective action against any infringement of IP rights.

The TRIPS Agreement is evidence of this new trend. Part III of the TRIPS agreement provides for the issue of enforcement of Intellectual property rights in general. Under article 41, this is inclusive of availing enforcement procedures under member laws such as provision of expeditious and deterrent remedies; fair and equitable, timely and affordable remedies. This study later on addresses how Uganda has attempted to implement these provisions in its domestic legislation.

2.2.1 (c) Civil and Administrative procedures and remedies

Sections 2 and 3 of the TRIPS Agreement provide for the judicial procedures that should be made

[11] Berne Convention for the Protection of Literary and Artistic Works, of September 1886 (October 2, 1979)
[12] *W.LP.O: Understanding Copyright and Related Rights; WIPO Publication No. 909(E) at p. 14*

available to IP right holders to guarantee protection of their rights. This includes ensuring that the procedures are fair and equitable *(article 42),* provision of evidence *(article 43),* injunctions to prevent further infringements and damages for injury suffered *(articles 44 and 45 respectively),* as well as any other remedies available in order to deter further infringement *(article 46).* Article 47 provides for the right to information by a rights holder about third parties and article 48 provides for the indemnification of a defendant against whom wrongful enforcement procedures were taken as well as limiting the protection of pubic authorities. Article 49 gives direction of administrative measures. It provides that, "to the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this section".

2.2.1 (d) Criminal procedures

Section 5 of the TRIPS Agreement provides for Criminal enforcement mechanisms. Article 61 therein is to the effect that member states shall apply criminal procedures and penalties in cases of "willful trademark counterfeiting or copyright piracy on a commercial scale." The remedies available include imprisonment, monetary fines, seizure, forfeiture and destruction of the infringing goods. Materials and implements predominantly used to make infringing goods may also be forfeited, seized and destroyed. The provision in article 46 with regards to *other remedies* available applies in this respect.

2.2.2 A critical appraisal of the TRIPS Enforcement mechanisms[13]

It should be appreciated from the onset that the TRIPS' own standards of IP rights protection are expressed in such general terms that Member States can freely vary the protection and enforcement that they actually give[14].

Pursuant to TRIPS, WTO members are therefore obligated to provide minimum levels of substantive IPRs protection and to provide adequate mechanisms for the enforcement of those prescribed levels of protection. Such obligations of each WTO member are enforceable by other members by proceedings under the WTO Dispute Settlement Understanding (DSU)[15].

There are three essential principles under the TRIPS Agreement: First, it establishes minimum

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[13] Extract from Kakooza Anthony C.K: *Enforcement of Intellectual Property Rights in Uganda: The complexities and Realities;* University of Warwick, Master of Laws Degree Dissertation, 2004, at p. 14 -15

[14] Arup, C. (2004) *TRIPS: Across the Global Field of Intellectual Property, Vol.* 26, Issue 1 January 2004, European Intellectual Property Review, Pgs 7-16

[15] Abbott F., Cottier T. and Gurry F., *The International Intellectual Property System, Commentary and Materials - Part Two* (1999) Kluwer Law International, The Hague, at p. 1570

standards for WTO members in the protection and enforcement of IPRs. Signatory States are free to operate higher standards as long as there is no, conflict with the standards enshrined in the TRIPS Agreements[16]. Articles 63 and 64 provide for the prevention and settlement of disputes under the WTO Dispute Settlement Understanding (DSU). Herein, the obligation of a WTO Member is enforceable by other Members pursuant to DSU proceedings. This is a cheap and timesaving means of resolving disputes between Member States.

Secondly, there should be mutual treatment amongst Member states in that each country should protect nationals of other parties by granting them the rights provided for in the agreement[17]. This is the principle of national treatment.

Thirdly, the IPRs protection granted to nationals of signatories should be no less favourable than that granted to nationals of other parties. There should not be any discrimination in the granting of rights to nationals. This is known as the *"most favoured nation"* principle[18]. Countries are therefore encouraged to treat the interests of other countries at the same level as they treat their own.

Following the obligation enshrined in paragraph one of Article 41 of the TRIPS Agreement in the provision of enforcement measures, the agreement sets out guidelines in the subsequent paragraphs and in article 42. As aforementioned, these are, inter alia, with regard to what is fair and equitable; to be in writing; and to be subject to review. However, it is argued that the Agreement is not clear as to the procedure to be followed where a Member claims that another Member has not provided effective enforcement measures. This argument is better illustrated hereunder:

(a) Uncertainty as to when to institute a claim.

Abbott argues that the TRIPS Agreement is not clear as to *"whether one member may obtain a remedy against another for a single breach of the obligation to provide effective enforcement, or alternatively whether the TRIPS Agreement only envisages claims and remedies for systemic failures."*[19] Abbott's discomfort is as to whether a Member whose IPRs have been infringed by another Member, should seek enforcement on a case by case basis or alternatively demonstrate a consistent failure in having its IPRs protected by the other Member state. The basis for this confusion is in the use of the word ***"any"*** in Article 41.1, which stipulates for Members to provide procedures *"so as to permit effective action against any act of infringement" (emphasis mine).* To

[16] Worthy J., "Intellectual Property Protection after GATT" (1994) 5 EIPR 195, *Firth A., Lane S., and Smyth Yvonne: Readings in Intellectual Property,* (1998) Sweet & Maxwell, at p. 4

[17] ibid

[18] ibid

[19] Abbott F., Cottier T. and Gurry *F., The International Intellectual Property System, Commentary and Materials - Part One (1999)* Kluwer Law International, The Hague, at p. 1570

Abbott, the word *any* might be interpreted to mean that there should be adequate enforcement in each and every case that arises or alternatively that any *type or kind* of IPRs claim should provide a basis of relief[20].

However, I would also opine that the word ***"any"*** should cover a case-by-case basis, as this would make the provision more realistic. In the aforementioned provision, the words that follow are: *"act of infringement"* and not ***"acts** of infringement"* which can imply that the drafters intended the application of the provision to be on a case-by-case basis.

Furthermore, claims for systemic failures can also be seen to arise out of one individual case and as such should not have to be interpreted differently. This was the case with the General Agreement on Tariffs and Trade (GATT) disputes involving Section 337 of the United States Tariff Act of 1930. When Canada first raised a complaint against Section 337 in 1981, this was *de facto* a single private case, but in 1988 when the European Community brought the second GATT complaint against Section 337, the focus that time was on a systemic failure of the U.S in that the said Section violated national treatment principles because imported products alleged to have infringed upon a U.S. - granted patent were given less favourable treatment under Section 337 than treatment received by U.S Products[21].

(b) Uncertainty on evidence and quantum of damages in a claim.

The TRIPS Agreement is also criticized over the *"quantum of inadequate enforcement measures a Member would need to prove to obtain a remedy, and the evidence that a Member submits to prove its case".*[22] This argument focuses on the fact that the TRIPS Agreement is not clear as to what amounts to "adequate evidence" under Article 43 and "adequate damages" under Article 45. Blakeney[23] adds weight to this argument by asserting that there is no guidance under Article 45.1 to cater for the complexity of quantifying damages suffered as the result of an Intellectual Property infringement.

(c) Defendant's rights under Provisional Measures.

Article 50, paragraph 2 of the TRIPS Agreement provides for the adoption of provisional measures where, inter alia, there is *"demonstrable risk of evidence being destroyed".* In instances where there is a likelihood of the defendant destroying evidence of infringement before prosecution, the IPRs

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[20] Ibid

[21] American University International Law Review (2002): Rogers J.W., and Whitlock J.P. - *Is Section 337 consistent with the GATT and TRIPS Agreement?* at p. 7.

[22] Abbott (note 19 supra) at p. 1573

[23] Blakeney, M. (1996), *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement,* Sweet & Maxwell, London., pg. 129

holder can proceed to obtain an exparte injunction against the defendant on the basis of the above provision. However, it is argued that this creates a likelihood of abuse of the defendant's rights, with due regard to the obligation on providing for safeguards against abuse provided for under Article 41.1 of TRIPS[24].

Caution should therefore be exercised in the execution of such provisional measures with the consideration of having a lawyer present to ensure that the defendant is aware of his rights and that these rights are respected.

(d) Lack of clarity on provision of Information

The stipulation under Article 47 is an order upon the infringer to provide information to the IP Right holder pertaining to any other party involved in the production and distribution of the infringing goods. The exercise of this power is cancelled where it is not "out of proportion to the *seriousness* of the infringement". However, as Blakeney argues, no guidance is given with regard to the evaluation of what constitutes seriousness or whether this should be looked at under the perspective of the LP.R holder or that of the general public[25].

(e) Element of Good faith b Public Officials.

Article 48.2 of the TRIPS agreement stipulates that in administrative instances pertaining to the protection or enforcement of I.P.Rs, public authorities and officials shall only be exempted from liability where their actions have been undertaken in good faith. However, there is no set guideline as to what would constitute good faith, leaving a question mark for Court to determine.

2.3 Regional obligations

(a) The East African Community

Kenya, Tanzania and Uganda signed an agreement establishing the East African Cooperation[26]. The agreement was upgraded into a treaty, signed on 30th November, 1993. Having ratified the Treaty, there was need to domesticate the requirements set out in Article 8(2) of the Treaty, within 12 months from the date of signing the Treaty. In effect, each state was expected to secure enactment of a law to give effect to the Treaty.

In Uganda, the East African Community Act was enacted in May and came into force by Statutory' Instrument. Having domesticated the treaty, article 8 (1) provides that Partner States shall -

[24] Vaver D., *Some Aspect of the TRIPS Agreement: Copyright Enforcement and Dispute Settlement (Working Paper No. 1, April 2000)* Oxford Intellectual Property Research Centre, at St. Peters College

[25] Supra note 23 at pg. 131

[26] Later on joined by Rwanda and Burundi

(a) plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the community and the implementation of the provisions of this Treaty;

(b) abstain from any measures likely to jeopardize the achievements of the objectives or the implementation of the provisions of this Treaty.

Accordingly, the partner states have gone ahead to approximate their laws in relation to Intellectual property rights with various proposals. Some of these include proposals to -

(a) include service marks in Uganda's legislation;

(b) comply with the TRIPS Agreement; and

(c) Harmonize laws of the East African Community Partner states.

Another significant development was the signing of the Common Market Protocol on 20 November 2009 by the EAC Heads of State[27]. The mandate for the Partner States to negotiate the EAC Common Market is derived from Article 5(2) of the Treaty and more specifically from; Article 76(1) which states that "*There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital, and the right of establishment"; and, Article 76 (4) of the Treaty which states that "For purposes of this Article, the Partner States shall conclude a Protocol on a Common Market.*"

Going by such regional developments, it is thus necessary to have Uganda's Intellectual Property Law framework reviewed so as to have a smooth development of Intellectual Property Interests within the East African Community.

(b) The African Regional Industrial Property Organization (ARIPO)

The ARIPO was founded by the Lusaka Agreement of December 9, 1976 to facilitate the harmonization and development of industrial property matters affecting its member states[28]. Uganda is a founder member of ARIPO and became a State Party in August 1978. The advantage that comes with registration of IP rights under ARIPO is that you have a centralized registration that compliments (not conflicts) with local registration of IP rights. As such, under ARIPO, protection of IP rights is territorial through the member states[29].

[27] http://www.eac.int/component/content/351.html (accessed 7th June 2010)

[28] See note 6 supra at p. 37

[29] These include: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, Tanzania, Zambia and Zimbabwe.

The member countries of ARIPO, for instance, adopted the Banjul Protocol catering for Trademarks and Service Marks, administered by ARIPO, in November 1993. This protocol provides for a centralized trademark registration procedure. Applications for registration may be submitted either to the ARIPO office or to the Industrial Property Office of a member state.

On the other hand, the Harare Protocol[30] caters for a centralized registration of Patents, Industrial Designs and Utility models under ARIPO. A patent granted to a local applicant by ARIPO *(Harare Protocol)* has the same effect as one granted under the Patents Act[31] except where the Registrar has notified ARIPO office that the patent shall be ineffective in Uganda[32].

As for Copyright and related rights protection, there is no regional provision for such under ARIPO though the Organization is coming up with a data base on Copyright in Africa. Protection for such is therefore presently only catered for by the World Intellectual Property Organization (WIPO)[33]

(c) Other Conventions worth noting

The Paris Convention for the Protection of Industrial Property, March 20, 1883

Uganda is a signatory to this Convention as of June 14, 1965. This Convention covers the protection of Industrial Property amongst the member states including Patents, Utility Models, Industrial designs, trademarks, service marks, trade names, indications of source or appellation of origin and the repression of unfair competition. Under the Paris Convention, for instance, a person who has duly filed an application for a patent or for the registration of a utility model or of an industrial design or of a trademark, in one of the countries of the Union, he or she or his or her successor in title, shall enjoy for the purpose of filing in the other countries, a right of priority during the periods fixed[34].

Uganda is not a Member of the Berne Convention for the Protection of Literary and Artistic Works. Neither is Uganda a member of the Convention on the International Union for the Protection of New Varieties of Plants (UPOV). Uganda is party to the Convention on Biological Diversity (CBD) and, as a member of the African Union (AU), may wish to take cognizance of the AU Model Law

[30] The Harare Protocol on Patents and Industrial Design, 1982

[31] The Patents Act, Cap. 216, Laws of Uganda, 2000 Ed.

[32] Bakibinga David *(Prof):*Intellectual property rights in Uganda: Reform and Institutional Management Policy formulation; paper delivered at the Network of Academies of Sciences in Organization of Islamic Countries (NASIC), International Seminar on *"Intellectual property and innovation: Value creation in the Knowledge Economy"* held in Islamabad, Pakistan, 12-14 December 2006

[33] Sibanda *G.:* Intellectual Property as a Tool for National Development: Imperatives for a National Intellectual Property Policy - The Regional Perspective (ARIPO); Presentation at National Symposium on IP Education, Training and research - Kampala, Uganda; May 11- 13 2009

[34] Uganda Law Reform Commission: *A Study Report on Intellectual property Rights – Trade Marks and Service Marks Law,* ULRC Publication No. 15 of 2004, at pg 28

on Access
to Genetic Resources[35].

2.4 IPR Enforcement in developing countries: Can one size fit all ?

It is argued that on the basis of infrastructural and socio-economic differences, it is obvious that there cannot be complete harmonization in the area of IPRs enforcement[36]. The same argument holds the view that consideration of this fact brought the architects of the TRIPS provisions into focusing on *a result - oriented* criteria instead of giving the details as to how enforcement should be regulated. This, as such, is the reason behind PART III of TRIPS containing such vague phrases as "effective," "reasonable," "undue," "unwarranted," "fair and equitable" and "not ... unnecessarily complicated or costly."[37] Therefore, by calling this *result - oriented,* the focus on such phraseology is to enable WTO member states to draw up their own regulations as to IPR enforcement.

John Barton argues that it is not appropriate for one size to fit all, to wit, that developing countries should be allowed to have IPR regulations that fit their conditions rather than to conform to the TRIPS obligations favoured by developed countries[38]. He presents three reasons in support of his argument:

a) Resource imbalance

The basis for Intellectual Property systems is the provocation and creation of incentives for research and creativity. However, there is an inadequate number of scientists and technicians in developing countries to take up such creativity, as well as the infrastructure and finances to support their efforts.

b) Imbalance in equity

Incentives for IPRs holders mainly come from increased prices for their products. Therefore, if such products are highly priced, the poor in developing countries cannot afford such products especially pharmaceutical products, which are highly priced to cater for the research costs involved. The way out is for the developing countries to pay for such products at a lower price than developed countries.

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[35] M. Leesti & T. Pengelly: *Technical and Financial Co-operation Needs for Implementation of the WTO TRIPS Agreement in Uganda:* Draft Report of Needs Assessment Diagnostic (2007) - for ICTSD & MITT at *p. 9*

[36] Dreier, T., *TRIPS and the Enforcement of Intellectual Property Rights:* Article in Abbott F., Cottier T. and Gurry F., *The International Intellectual Property System, Commentary and Materials - Part One (1999)* Kluwer Law International, The Hague, at p. 631

[37] Ibid

[38] Barton, *J. Nine Months after the UK Commission Report on Intellectual Property Rights: Taking Stock and Priorities for future action.* Presentation at Chatham House, June 17, 2003 - Seminar on Intellectual Property Rights: Driver of Competition and Growth or Unnecessary Constraint?

c) Industrial strategy

Industrial development in the developed countries was partly characterized by imitation. Barton therefore argues that enforcement of IPRs is meant to block out industrial development along the same lines by other nations and yet *"the greater the portion of human knowledge that is in the public domain, the greater the opportunity for new entrants."* This argument has also been presented by many developing countries that view the obligations imposed through agreements such as the WTO's IRIPS as mainly protecting the interests of developed countries at the expense of developing Countries.

2.4.1. Other realities affecting enforcement of IPRs within developing countries:

a) Opting for cheaper market products

It is noted that IPR Infringement in developing countries is mainly in the areas of copyright (counterfeiting of products such as computer software and music cds which are easy to copy) and trademark infringements[39]. Low-income countries are characterized by market forces that prefer cheap products to quality expensive products. Counterfeit products are therefore sold on the black market to satisfy such consumers and their growth is further strengthened by the absence of strong enforcement institutions and structures to discourage their operations. It has been reported in the media, for instance, that a software company in Uganda, which manufactures the 'loan performer' micro-finance software, discovered that its software products were being copied without a license and sold cheaply locally[40].

b) Disguised monopolies

Barton raises another argument to the effect that today's leading firms in developed countries hold strong IP positions and ensure the use of both domestic and international regulations to discourage new entrants in the same fields[41]. In this regard, IPR protection becomes a means of creating a disguised monopoly to beat out competition[42]. Much as TRIPS provisions provide for the creation of licenses, it is still difficult to envisage how firms holding such licenses or firms from developing countries that start out as allies of the major companies can develop into industrial competitors. The difficulty created by the multinational oligopolies in bringing about new competitive entrants only encourages local industries in developing countries to imitate foreign products that already have a niche in the market through exploiting the weak enforcement laws.

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[39] *Integrating Intellectual Property Rights and Development Policy* Report of the Commission on Intellectual property Rights (London, September 2002)

[40] *"Software Pirates on the Loose"- By Christopher Kiwawulo* in http://www.newvision.co.ug/detail.php?newscategeryid -last visited 1[51] March 2004

[41] ibid, note 38 supra

[42] The same criticism has been leveled in various fora against the proposed Uganda Counterfeit Goods Bill, 2009 that *inter alia* allegedly appears to propose outrageous intellectual property enforcement measures that favour international firms over and above the socio-economic interests of Uganda.

Therefore, whereas Barton is not advocating for a renegotiation of TRIPS, the focus should be on the imbalance on its use and maximising the benefits from Intellectual Property protection among its member states. Developed countries have been exploiting TRIPS provisions to a great extent in the protection of their interests. The focus should thus turn to developing countries and how TRIPS can better be exploited to serve their interests as well while giving consideration to their shortcomings.

3.0: A review of Uganda's IP legal framework and policy

This part of the study analyses the present Intellectual Property environment within Uganda. It addresses the legislative set up; reviews recent and past case law with a view of highlighting the jurisprudential position of IP rights and enforcement within Uganda It sums up by looking at the major institutions in place that cater for IP rights. On the whole, the civil, administrative and criminal aspects of enforcement of IP rights in Uganda are catered for.

3.1 Over view of existing IP legislation in Uganda

As the paramount law, the 1995 Constitution of the Republic of Uganda caters for protection from deprivation of property under article 26. This, by inference, covers intellectual property protection although it is too generic. The provision states that every person has a right to own property, either individually or in association with others, and that no person shall be compulsorily deprived of property or any interest in property unless it is for public use and that person has been fairly compensated. However, the specific laws that provide for protection of intellectual property are:

- The Patents Act, Cap 216.
- The Copyright and Neighbouring Rights Act, No. 13 of 2006
- The Trademarks Act, Cap 217.
- The UK Designs (Protection) Act, Cap 218.
- The Uganda National Council for Science & Technology Act, Cap 209
- The Uganda Registration Services Bureau Act, Cap 210.

Other laws that may have ramifications on the use of intellectual property, though still in draft form, include the Electronic transactions Bill, the Computer Misuse Bill and the Electronic signatures Bill. All the three pieces of legislation above are to be implemented by the National Information Technology Authority (NITA-U)[43].

3.1 (a) The Patents Act, Cap. 216

This law provides for the registration and protection of patents and utility models in Uganda. It was

[43] See Sec. 5(g) of the National Information Technology Authority, Uganda Act, No. 4 of 2009.

last revised in 1991 but is presently due for further revision by the Uganda Law Reform Commission so as to bring it into conformity with the TRIPS Agreement. Under the present law, applicants can register Patents for protection of 15 years, whereas the duration of protection for utility models (certificates) is 7 years. The law also makes possible the filing of regional patent applications through the ARIPO system. Currently, the country does not have an examination office. For this reason, applications are only filed at the Uganda Registration Services Bureau (URSB) for onward transmission to ARIPO in Harare for examination.

It has been proposed under various fora to extend the term for patent protection from 15 to 20 years in accordance with the TRIPS agreement[44]. The Patent Act is also seen to portray ambiguity on patentability of life forms. Sec.7 (2) (b) of the Patents Act, for instance provides for inventions not capable of protection and goes further to refer to *'plant or animal varieties or essentially biological processes for the production of plants or animals, other than biological processes and the products of those processes'*.

The provision highlighted above seems to suggest that the results of biotechnology are prevented under law from being patented. If this is indeed the intention of the provision, then it ultimately hinders creativity and innovation in Uganda. Nonetheless, there is need for clarity so that the country can ensure that its legislation is in compliance with key provisions of the TRIPS agreement, including article 27 (3) (b) on plant and animal varieties, before July 2013.

The United Nations Convention on Biological Diversity, 1992, to which Uganda is a signatory, provides for the setting up of protection regimes for plant varieties and recognition of the dependence of local communities on biological resources as well as the roles that these communities play in the conservation and sustainable use of the resources[45]. In pursuance of Uganda's obligations thereof the Uganda Law Reform Commission has drafted a Plant Variety Protection Bill[46]. The Bill is aimed at, amongst other points, recognizing and protecting the rights of private and public breeds over the varieties developed by them.

A major shortfall of the Uganda Patents Act is that the requirements of patentability (novelty, inventive step and industrial application) are hard to place within the context of Uganda's socio-economic environment[47]. To mitigate this, the Patents Act permits the issue of utility certificates where the invention does not fulfill patentability especially the requirement of an inventive step[48].

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[44] Article 33 of the TRIPS Agreement
[45] See note 32 supra at p. 7
[46] See note 3 supra at p. 208
[47] See *Bakibinga* note 32 supra, citing *Atwine,* note 3 supra on pg 204 as
[48] See sections 42 - 43

The certificate is valid for seven years but may be useless where there is lack of patentability in the form of an invention.

Another shortfall in this Act is that it has weak civil remedies for infringement of Patent Rights of the holder[49]. The Act rules out infringement in instances where acts are done in pursuance of scientific research; with the consent of the owner; acts done in good faith[50]; as well as instances of exploitation of a Patent by the Government or persons employed by the Government[51].

3.1 (b) The Copyright and Neighbouring Rights Act (No. 19 of 2006)

This Act is fairly new having been enacted in 2006. It repealed the Copyright Act, Cap. 215, which had been in existence since July 1964. The old Act was originally Cap. 81 under the 1964 Revised Edition of the Laws of Uganda. Prior to that, Uganda followed the Copyright Ordinance (Cap.220), which applied the Copyright Act of 1911 from Britain. The old Copyright law was rather shallow in addressing Intellectual property concerns and there was pressure on the Government to come up with a law that is in conformity with the standard requirements of the World Trade Organization, in particular, the TRIPS Agreement. The Copyright and Neighbouring Rights Regulations of 2010 (S.I No. 1 of 2010) have also been created to cater for registration of Copyright Works.

The present law thus serves the purpose of updating Uganda's Copyright law to conform with the international standards on Copyright. It provides for the protection of literary, Scientific and artistic Intellectual works and their neighboring rights. The law takes into account technological advances and provides for the protection of computer programmes and electronic data banks and other accompanying materials (sec. 5(1(e)). It also provides that illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science are also eligible for copyright protection (sec. 5 (1(h)). The law also imposes criminal sanctions against unauthorized use of copyright work belonging to a rights holder (sec. 47).

Much as it is apparent that this law has made significant strides to steer away from the old Copyright law in Uganda and closer to adhering to TRIPS, its major downside is on the practicability of its enforcement provisions[52]. The general public (inclusive of would-be rights holders, law enforcement personnel and the usual abusers of such) are to a great extent not aware about the existence of the Copyright law. Obviously this affects the principle of deterrence from acts of Copyright infringement; understanding what such infringement entails as well as ways of

[49] Section 26
[50] Sec. 28
[51] Sec.29
[52] However, advocates for the Counterfeit Goods Bill argue that its stringent enforcement provisions will help curb Copyright piracy in Uganda

combating the vice.

However, we should be weary of heavy criminal sanctions being imposed on abusers (in various forms) of copyrights in Uganda. Professor Ruth Okediji argues[53] that when you use criminal penalties, you have to think about the implications on innovation. Since Intellectual property law is essentially about knowledge building on knowledge, then heavy criminal penalties suffocate economic development. In the United States of America, for instance, in the wake of legislation increasing the criminal penalties for copyright infringement or unauthorized duplication of motion pictures and sound recordings, the computer software industry did not enjoy a mass market and stagnated in its infancy stage of development for a while[54].

3.1 (c) The Trademark Act, Cap. 217

This Act basically extends protection to individuals and corporations to trade marks registered under it. It gives the registered owner of a trademark a right to use it to the exclusion of all other persons[55] but permits the owner a license or assign it to other persons to use the trademark[56]. Under S.22, marks are valid for 7 years and can thereafter be renewed for 14 year durations.

This Act lacks provisions on enforcement of Trademark rights of the holder. It only provides punitive measures against making false entries in the Trademarks registers[57]. It lacks civil and criminal provisions against infringement of Trademarks. The Act, therefore, does not have any provisions on enforcement in line with TRIPS requirements. However, counterfeiting of Trademarks is covered as an offence under Section 357 of the Penal Code.

Current challenges to the enforcement of trademark law in Uganda include lack of a specific institution charged with fighting counterfeits[58] and disinterest of small and mediums sized enterprises to use the law due to the time it takes to get a mark registered; as well as non registability of service marks in Uganda[59].

Reform of the trademarks regime is necessary given the provisions of the WTO TRIPS agreement

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[53] Okediji R. (Prof. of Law, University of Minnesota, U.S.A) Intellectual Property law presentation at Uganda "Trade and Intellectual Property Program: Legislative Review, Grand Imperial hotel, Kampala, 14th May 2009

[54] L. Saperstein *(1997): Copyrights, Criminal Sanctions and Economic Rents: Applying the rent seeking model to the criminal law formulation process; Northwestern University School of Law; Journal of Criminal law and Criminology.*

[55] See section 8

[56] See sections 25 to 34

[57] Ibid, see S. 56

[58] There is always a confusion in this regard basing on the mandates of the Uganda National Bureau of Standards, the National Drug Authority, the Uganda Revenue Authority and the Uganda Police. The same confusion has resurfaced time and again during the stakeholders debates on the proposed Uganda Anti Counterfeit Goods Bill.

[59] See Asiimwe, note 4 supra

on trademarks *(Articles* 15-21), regardless of the fact that these provisions are largely in line with the provisions of the Uganda Trademarks Act[60]. Suffice to note that the Counterfeit Goods Bill, spearheaded by the Ministry of Tourism, Trade and Industry (MTTI) addresses Trademark infringement. As of January 2010, the draft Bill was back with the First Parliamentary Council, Ministry of Justice and Constitutional Affairs for incorporation of views received from various stakeholders on the provisions in the Bill.

The Uganda Law Reform Commission has also drafted a Trademarks Bill that, once enacted, will replace the existing law. This Bill is more in line with TRIPS requirements and provides for better procedures in registration, administration and enforcement of Trademarks in Uganda. The Trademarks Bill was passed by Parliament in early 2010 but is not yet operational as law.

3.1 (d) The United Kingdom Designs (Protection) Act, Cap 218.

As its short title suggests, this is "an Act to provide for the protection in Uganda of designs registered in the United Kingdom". This law was applicable in the United Kingdom as far back as 1934. More importantly, this law states further as follows:

> *"Subject to this Act, the registered proprietor of any design registered in the United Kingdom tinder the Patents and Designs Acts, 1907 to 1932, or any Act of the United Kingdom amending or substituted for those Acts shall enjoy in Uganda the like privileges and rights as though the certificate of registration in the United Kingdom had been issued with an extension to Uganda"*[61].

The implication of the foregoing provisions shows that Uganda effectively has no design law and relies entirely on the UK legislation which was last revised in 1995[62], though in context, its provisions remain the same. The fact that the short title restricts itself to designs registered in the UK puts most potential beneficiaries in Uganda outside its ambit as few can afford to register designs there. Secondly, few lawyers in Uganda have taken off time to acquaint themselves with the numerous developments in UK design laws to enable them to competently advise those who may wish to file applications[63].

The reform of this law is also necessary to bring it into conformity with our local settings. The United Kingdom, as a member of the European Union, has re-aligned its laws to fit into the general interests of the European Union which obviously does not meet the needs, aspirations and

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[60] See Bakibinga, note 32 supra

[61] Section 1

[62] See http://www.vanuatu.usp.ac.fj/paclawmat/Solomon_Islands_legislation/Solomons_UK. Visited 28th July 2004

[63] See Asiimwe, note 4 supra

technological levels of Uganda[64]. For these reasons, there is need to rapidly repeal this law following proposals under the study conducted by the Uganda Law Reform Commission leading to the drafting of the Industrial Property Bill 2009. This Bill was tabled in Parliament and read for the first time on the *7th* of July 2009 and thereafter committed to the Legal and Parliamentary Affairs Committee of Parliament. According to its long title, this proposed law is meant to *inter alia* serve the purpose of promotion of inventive and innovative activities, facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs.

3.1 (e) The Uganda National Council for Science and Technology Act, Cap 209

This Act provides for the establishment of the Uganda National Council for Science and Technology, (UNCST), of which the most fundamental function is the promotion of science and technology in Uganda through the transfer of technology and support of local innovation systems.

The Act also gives the UNCST the mandate to protect intellectual property through appropriate patent laws, to promote the utilization of natural resources and local manpower and to operate a patent office.

However this provision requiring the Council to operate a patent office is in contradiction with the provisions of section 4 of the Patents Act which also establishes a patent office to run under the Uganda Registration Services Bureau (URSB). The National Patent Office does not exist in practice, however, the Council is required to handle the technical requirements of applications for IPR-related applications and advise the Registrar General's office. Proposals have been made during consultations through the Uganda Law Reform Commission that in the event of a national industrial property office being formed, the UNCST could handle substantive 'technical examination, while the URSB handles preliminary examination to ensure compliance of applications with the law.

3.1 (f) The Agricultural Seeds and Plant Act, Cap. 28[65]

This law provides for mechanisms for the identification, registration and release of new varieties of plants and seeds. The Act establishes a National Seed Authority under whose auspices variety release committees may be established. The Act further provides for the establishment of a National Seed Certification Service whose principle duty is to register and license seeds either imported or produced locally[66]. Section 8(4), which is relevant to Plant Breeders' rights provides to the effect that the Authority may grant plant breeder's rights for a variety of seeds on the recommendation of

[64] See Atwine, note 3 supra at *p. 205*

[65] Cap. 28, Laws of Uganda, 2000 Ed. 66

[66] Sections 7 & 8

the Variety Release Committee.

The Act however falls short of identifying Plant Breeders' Rights and basing on the fact that Uganda is not a party to any of the Conventions relating to Plant Breeders rights (PBRs), it is thus difficult to determine the content for such within the Ugandan legal setting. This is also likely to affect enforcement of such rights by the right holders, who would also find it difficult to identify themselves with such rights basing on the fact that the relevant Act does not define them explicitly.

Recommendations follow that action be taken to specify the PBR within subsidiary legislation made under the Act, which legislation should give consideration to current international trends in this area.

3.1(g) The Uganda Registration Services Bureau Act, Cap 210

The long title of this law is to the effect that it is to *"establish an agency for miscellaneous registrations and collection and accounting for revenues under various relevant laws and for the enforcement and administration of those laws ..."* The overall functions of URSB are discussed in the section below pertaining to Uganda's institutional IP structure (see Sec. 3.4.1 below).

3.2 Analysis of jurisprudence on IP in Uganda

A look at Uganda's IP legislative structure cannot stand alone without an analysis as to how the Ugandan Courts have appreciated and applied rulings touching on IP matters over the years. A number of cases illustrate the existing civil and criminal enforcement mechanisms in place and the application of the same under our legislations[67]:

3.2.1 Civil enforcement of IPRs.

In Uganda, only the High Court[68] and superior courts have jurisdiction over intellectual property disputes. The commercial court's advent has tremendously aided the expeditious hearing of commercial cases and increased business confidence in the resolution of trade related disputes in Uganda. The creation of the commercial court within the High Court has also tremendously assisted in the adjudication of intellectual property disputes. Although the court does not have an intellectual property specific unit, all judges have the competences necessary to handle IP matters expeditiously. A few cases will be pointed out to show the nature of cases that the court has handled

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[67] Key findings and analysis adapted with kind permission from P. Asiimwe, note 4 supra.

[68] Under the Trademarks Act, Cap 217, s. 1,: `Court' means the High Court; while under s. 26 of the Patents Act, Cap 216, infringement proceedings can only be brought to the High Court. However, sec. 45 of the Copyright and Neighbouring Rights Act is more elaborate and stipulates that infringements of Copyright proceedings are instituted in the Commercial Court. The interpretation therefore is that the Commercial Division of the High Court has the jurisdiction to hear matters related to Intellectual Property Rights.

of recent.

The first two significant cases handled subsequent to the signing of the TRIPS Agreement were ***Attorney General*** *v* ***Sanyu Television***[69] in which court granted an injunction against further infringement of a Copyright; and ***Britania Products (U)*** *Ltd v.* ***Riham Biscuit Industries (U) Ltd***[70]***,*** in which Court established that due to differences in trademarks between the parties, the defendant had not infringed against the Plaintiff's Trademark.

Vitafoam (U) Ltd V Euroflex Ltd[71]*:* This was an application under the Judicature Statute and the Trademarks Act for a temporary injunction to restrain the respondent. The applicants claimed that their trade mark was in use for some 27 years of which the respondents continued to infringe on their mark in the trade b_y using a similar mark of the applicant to confuse the public. Both companies are manufacturers of foam mattresses. The applicant company is older on the Ugandan market and had registered various trademarks for its products. On the basis of the applicant company's evidence, court granted it an injunction restraining the respondent company and its officials from continuing activities amounting to infringement of the applicant's trademarks.

In another application heard by the commercial court; ***Burundi Tobacco Company*** *V.* ***Mastermind Tobacco Uganda Ltd***[72]***,*** this was an application by Burundi Tobacco Company *Societe Anonyme* for a temporary injunction to restrain the respondent, Mastermind Tobacco Uganda Ltd, from using its 'Supermatch' Trade Mark pending the disposal of the main suit. The applicant had previously allowed the respondents to use its 'Supermatch' trade mark registered under class 34. The applicant subsequently wrote a letter to the respondent informing it that it had granted user rights of the mark to a company called Leaf Tobacco and Commodities (U) Ltd, and gave the Respondent one month's notice of discontinuance of its license to use the trademark. When the respondent refused to comply with the applicant's letter, the applicant further filed a civil suit seeking for a permanent injunction against the respondent amongst other remedies.

The court refused to grant the injunction requested by the applicant company, holding that it had granted the respondent an 'unlimited' license, and therefore, its chances of success in the main suit were limited. Court also held that any injury suffered by the applicant in the meantime could be compensated by way of damages.

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[69] High Court Civil Suit No. 614 of 1998
[70] High Court Civil Suit No. 1188 of 1999
[71] Misc. Appln. No. 605 of 2002 (Arising from Civil Suit No. 585 of 2002), October 14, 2002
[72] High Court Misc. Application No. 582 of 2002 (arising from civil suit No. 514 of 2002), February 13, 2003

Uganda Performing Rights Society Limited V Fred Mukubira[73] was a landmark case in the sense that it is the first suit brought by a copyright collecting society in Uganda. In an application before disposal of the main suit, the court set a precedent by granting the first ever Anton pillar order for the searching and seizure of the defendant's premises regarding infringing copies of the plaintiff's music. In the words of the presiding Judge:
"Copyright infringement of musical works is a big threat to the budding musical industry in Uganda and so it needs the protection of the courts. The Anton Piller Order appears to be a good tool to achieve this protection. It has been followed in Kenya and I find no good reason why it should not also be applied in Uganda."

The plaintiff Company which is an umbrella organization incorporated to promote and protect the copyright and intellectual property of local artistes and music publishers brought this case against Mr. Fred Mukubira, a music dealer for alleged infringement of copyright. The plaintiff brought this suit as an assignee of copyrights in various musical works from the authors of the said work. The plaintiff claimed that by the said assignments they had the exclusive rights to control distribution of copies of the musical works and broadcasting. The court entered judgment for the plaintiffs, finding that the defendants had reproduced and distributed copyrighted works that had been assigned to the plaintiff by various artists. Court awarded the plaintiffs part of the exemplary damages claimed, ordered delivery up of the infringing copies of tapes and half of the costs of this suit.

This is an important decision because it shows that there are available avenues for local copyright owners to extract economic value from their works through such a collective society. It also shows that the courts recognize the role of such associations and are ready to enforce rights where clear licensing arrangements have been concluded.

One important case touching on the significance of Non-disclosure agreements and the duty of confidentiality in Copyright matters is that of ***Digital Solutions Limited Versus MTN Uganda Limited***[74]**.** This case involved an action for a Permanent Injunction and an application for a Temporary injunction. In this matter, the Applicant developed and wrote a software programme which operates an application that enables peer-to-peer airtime, and service fee transfers between two pre-paid mobile telephone subscribers by way of a Short Messaging Service ("SMS") command. The Applicant named its application "Me2U" and in order to interest the Respondent in acquiring a license to use it, disclosed the software programme and the functional specifications of the application to the Respondent (MTN UGANDA LTD), in circumstances that imported a duty of

[73] High Court Civil Suit No. 842 of 2003; preceded lay Misc. Application No. 818 for a temporary injunction and an Anton Pillar Order.
[74] Miscellaneous Application No. 546 of 2004 arising from High Court Civil Suit No. 570 of 2004

confidentiality and without assigning its copyright to the Respondent or licensing it to exploit the said copyright.

The Applicant alleged that after full disclosure of the software and its functionalities were made to the Respondent, the Respondent pulled out of negotiations for a commercial license from the Applicant and instead went ahead to unlawfully use the information obtained from the Applicant to launch the software application by way of Short Messaging Service (SMS) command also under the name "Me2U". The Applicant was thus prompted to file the action in Court seeking for a permanent injunction restraining the Respondent from further infringing its copyright and breaching its duty of confidentiality by using the offending application it has also named "Me2U" and restraining the Respondent from using the mark "Me2U". The Respondent denied the claim contending that the said software was internally developed and there was no reliance on information from the Applicant.

The Application for a temporary injunction did not succeed because the status quo had already changed, considering that the Respondent, MTN Uganda Ltd, was already using the software application in the market. Interestingly though, the parties settled the main suit out of Court.

Many other cases on enforcement of Intellectual property rights have been handled and resolved through Court and alternative dispute resolution mechanisms portraying the fact that Uganda is making headway in its appreciation of IPR protection.

3.2.2 Enforcement through Criminal Courts

The infringement of intellectual property laws has largely gone on unabated due to poor enforcement of penal provisions that seek to punish infringers. The reason for this poor enforcement is generally an issue of awareness. It is partly due to lack of specific training of the police to sensitize them on the importance of untiringly fighting counterfeiting. Under Ugandan law, private citizens can initiate criminal prosecutions. However, due to the complexity of criminal procedure and the notion that only the state can prosecute, few intellectual property rights owners have taken advantage of this provision to enforce their rights. The recent enactment of the Copyright and Neighbouring Rights Act[75] introduced criminal penalties under enforcement of IPRs in Uganda particularly with regard to infringement of Copyrights[76]. The Penal Code Act also criminalizes the counterfeiting of products under s. 379. This section provides that: *"Any person who sells or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or things,*

[75] No. 19 of 2006
[76] Section 47

with a counterfeit trademark affixed to or impressed upon them or to or upon any case,. package or other receptacle in which the goods are contained, unless he or she proves that, having taken all reasonable precautions against committing an offence against this section, he or she had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, commits a misdemeanor".

In a decision of the Buganda Road Magistrates' Court in Kampala, the Penal Code Act was put to good use in prosecuting a trademark infringer. In ***Uganda V. Lubega Charles***[77], the court heard a case in which the accused was charged with selling goods marked with a counterfeit trademark contrary to the Penal Code Act[78]. Charles Lubega, the accused in this case, was charged with having sold or exposed for sale six hundred thirty (630) cartons of Kiwi Shoe polish with a counterfeit trademark affixed to it, whereas the cartons contained produce and a trademark owned by Sara Lee household and body Care Kenya Ltd. These goods were impounded at the Tanzania - Uganda border in transit from China from where they were exported by Zhejiang Yuwu China Co.

Evidence was adduced by employees of Sara Lee to prove that Sara Lee Kenya was the only company with a license to export Sara Lee products to Uganda. The Registrar of trademarks also testified for the prosecution stating that she issued a trademark Kiwi Polish to Kiwi European Holdings BV on 11/5/04. However, there was no assignment on record in the registry of trademarks.

In his defence, the accused admitted that his goods were impounded but later they were released and he sold them. He further stated that he did not know that Sara Lee Kenya were the only authorized dealers in Kiwi shoe polish.

The court acquitted the accused. Whereas it found that the accused possessed and disposed of counterfeit products contrary to the Penal Code Act, there was no proof beyond reasonable doubt that he did so knowingly. The court's decision was fortified by the fact that apart from the trademark registration, the assignment granted to Sara Lee Kenya over Kiwi products on the Ugandan market was not registered with the Registrar of Trademarks. Furthermore, Sara Lee Kenya employees testified that they were aware of counterfeits on the Ugandan market before but that they did no more than hold sensitization seminars.

In this case, ignorance of the existence of an exclusive licensee on the market acted as a shield for

[77] Criminal Case No. 0028 of 2004
[78] Section 379

the defendant, especially since he claimed to have taken all reasonable precautions not to breach the law. However, this judgment shows that IP rights owners need to be vigilant in utilizing, even the minimum entitlements within IP laws if they are to take benefit of the protection offered under existing laws. For instance, under S. 24 (5) of the Trademark Act:

> *"The proprietor of a registered trademark who proposes to assign it in respect of any goods in respect of which it is registered may submit to the registrar in the prescribed manner a statement of case setting out the circumstances, and the registrar may issue to the proprietor a certificate.. "*

The case further illustrates the importance of harmonizing laws for various states as well as exploring registration of IPRs in foreign jurisdictions. In this case, it is possible that the court would have been more sympathetic with the complainants' case had they registered their assignment in Uganda. Although this is not an entirely exciting precedent for trademark owners to jubilate about, it lays the foundation for more rights owners to make use of the criminal law as a deterrent to infringement of trademarks. It has been argued in various fora that because of the existence of such enforcement mechanisms against Trademark infringement under the Penal Code Act, we have no need for the Counterfeit Goods law which is yet to be passed by Parliament.

3.4 Administration of IP: Analysis of Uganda's IP Institutional structure

Administration of IPRs covers a number of different dimensions of institutional capacity, such as organizational and management arrangements; staffing and human resource issues; and operating procedures and automation models. The administration of intellectual property rights involves receiving of applications, examination of those applications as to formalities and substance, refusing or granting and registering and publishing the IPRs[79].

There are a number of Institutions (both public and private) that are responsible for IP Policy formulation, administration and enforcement in Uganda. The key institutions in this regard are the Uganda Registration Service Bureau (URSB) under the Ministry of Justice and Constitutional Affairs; and the Uganda National Council for Science and Technology under the Ministry of Finance, Planning and Economic Development.

3.4.1 The Uganda Registration Services Bureau

This is a statutory body that falls under the Ministry of Justice & Constitutional Affairs[80]. It is

[79] See note 35 supra at p. 12
[80] It is governed by Cap. 210, Laws of Uganda

responsible for administering Intellectual property rights, namely patents, trademarks, industrial designs and copyrights. It is also responsible for the registration of births, deaths, marriages and businesses.

The key functions conducted by URSB include the following: Promotion of IP protection; formulation of IP Laws; Provision of advice to government on IP issues; providing a link to ARIPO; providing a link to WIPO[81]. The URSB promotes the protection of IP through effecting registration of trademarks and Patents. However, URSB currently operates a paper-based registry for industrial property rights and trademark searches are conducted manually rather than using an automated system[82]. As such, there is inadequate information supplied in soft form with regard to IP registrations. That notwithstanding, the more specific functions of URSB include maintaining registers, data and records on registrations effected by the bureau and to act as a clearing house for information and data on these registrations, evaluate and monitor performance of relevant laws, carry out research and dissemination of findings.

The URSB carries out a trademarks registration function, including publication for opposition, registration and renewal. There is little, if any, administrative workload performed by the Bureau on patents. The majority of patents that are registered arrive via the ARIPO route and the determination of patentability of applications is outsourced to ARIPO. There is a minimal workload associated with the registration of utility models and industrial designs[83].

3.4.2 The Uganda National Council for Science and Technology[84]

The Uganda National Council for Science and Technology (UNCST) was established by Statute No. 1 of 1990 (now Cap. 209) as a body corporate, *Inter alia* to advise Government on and coordinate the formulation of an explicit national Policy on all fields of Science and Technology[85]. The UNCST Act also clearly stipulates that one of the functions of the Council *'Shall be ... to protect Intellectual Property through appropriate patent laws and to operate a national patent office ...'*[86] *In* practice, the National Patent Office does not exist at the Council, however the Council is required to handle the technical requirements of applications for IPR-related applications and advise URSB.

Both UNCST and URSB are the main institutions dealing with the administration and enforcement

[81] Findings by P. Asiimwe, note 4 supra
[82] See note 35 supra, p.13
[83] Ibid
[84] See Atwine, note 3 supra at p.210
[85] Sec. 3
[86] Sec. 3(e)

of IP rights in Uganda. They are ordinarily supposed to work together and coordinate their activities.

3.4.3 Other key Institutions

There are a number of other key institutions, both private and public, that are responsible either directly- or indirectly for IP policy formulation, administration and enforcement. These include the following:

(a) Uganda Investment Authority (U.I.A)

The investment authority is one of the key statutory bodies in the public sector charged with the mandate of registering technology licenses. This duty was placed on this institution because of its central position in interacting with foreign investors and through its vetting of investments.

(b) The Ministry of Tourism, Trade and Industry (MTTI)

The department of industry and technology under the Ministry of trade is the key player in implementing the proposed industrialization policy. One of the main aims is to improve industrial capacity and capabilities through skills development, entrepreneurship, quality enhancement and operationalization of the innovation and industrialization Fund, and Research and Development Fund that are intended to support industry-led growth.

(c) Uganda Industrial Research Institute (UIRI)

The UIRI is a key institution under the Ministry of Trade, Tourism and Industry. Its role is to facilitate industrial development through research interventions in key sectors of the economy. The institute is working towards establishing an institutional intellectual property policy that will help it manage its IP assets and direct its investments in new knowledge.

4.0: Challenges and way forward

The final part of the study addresses the viability of a developing country like Uganda fulfilling its obligations on enforcement of IPRs pursuant to the TRIPS

Agreement. It concludes with an input as to how IPRs can be better enforced in developing countries.

a) Awareness and appreciation of the law[87]

Part of the challenges facing intellectual property owners in Uganda is the attitude that there is no law, or that the existing law is weak and ineffective. This caliber of people has largely resigned

[87] Asiimwe , note 4 supra

themselves to counterfeiters using their works and managers paying them a pittance for public performances. There has also been a perception, largely encouraged by corporate users of copyright works, particularly among artists and musicians, that due to the ongoing reform of intellectual property laws, the existing legislation is no longer in force. For this reason, some are waiting for the revised laws to assert their rights. The public education and sensitization role is thus important to set the record straight and enable IP rights owners to benefit maximally from the existing laws as the reform and policy formulation process goes on.

The aspect of inadequate awareness needs to be dealt with by the URSB and other non profit IP related agencies, both local and international. These include the UPRS and any other associations that may come up to support inventors. Since these organizations and the URSB are in the nascent stages of performing their IP functions, they need all the technical and financial support they can get, both from government and intergovernmental organizations such as COMESA, WIPO, and UNCTAD, among others.

b) Adequate enforcement mechanisms and networking among enforcement agencies[88]

IPRs are only valuable if they can be enforced. For many LDCs, establishing an effective enforcement regime presents considerable institutional challenges for policing and judicial systems, civil and criminal procedures and the customs authorities (regarding border enforcement measures). Moreover, for an effective enforcement system to operate, close co-operation is required between the enforcement agencies and those institutions dealing with IPRs administration.

c) Training of stakeholders in IP expertise[89]

There is still an inadequate number of specialized lawyers to teach Intellectual Property law, as a result of which, it is a hardly appreciated field of law in practice. Neither has it brought out enough fully knowledgeable persons to join the requisite institutions where such manpower is needed. Poor funding of LP related institutions has also slowed down the process of updating the IP- related legislation and general operation of such institutions, thus slowing down further the road map to full implementation of the TRIPS Agreement in Uganda and more significantly, the establishment of an LP Policy framework in Uganda.

There is thus a need to train and qualify private sector practitioners to effectively represent the interests of applicants and owners of IPRs before the URSB and the courts. There is a current shortage in Uganda of lawyers and agents, particularly in the field of patents; with the combination

[88] See note 35 supra at p.16
[89] Ibid

of legal and scientific knowledge and skills that are needed to assist applicants to obtain IP Rights and later to help them defend those rights. Ugandan lawyers need to take advantage of the study opportunities in LP training facilitated by the WIPO.

It is widely recognized that the value of IPRs is, in the first instance, dependent on the validity of the rights established. Validity, in turn, is largely determined by the quality of prosecution of the application before the national administrative authorities. Ultimately, success in defending or challenging IPRs in Court is heavily dependent on the competence of the lawyers handling the matter.

There is also an urgent need for technical and financial support to develop and deliver training programs for attorneys as well as engineers and scientists in matters relating to patent prosecution and litigation. Such training could be delivered through a professional development or continuing education program at the Law Development Centre, for example. In the longer term, the government may choose to establish standards that must be met by private sector IP practitioners in order to qualify to represent applicants before the URSB. Ultimately, another factor that boosts investor confidence, particularly in knowledge-based sectors, is the presence of adequate enforcement mechanisms and skilled legal practitioners in the relevant field.

d) Training of enforcement agencies in IPR concepts [90]

There is also a need for training trainers in IP concepts and enforcement matters for the full range of enforcement authorities and such other organizations that play important roles in contributing to effective enforcement of IPRs. Such training should initially target core groups of senior officers in the Uganda Police Force, the National Revenue Authority's Customs and Excise Department, the Uganda National Bureau of Standards and the National Drug Authority. At the same time, specialized training should be designed and delivered for the office of the public prosecutor and members of the commercial division of the High Court. In addition, training in enforcement of IP rights should be designed and made available to other interested organizations (governmental and private sector) that play a key role in the development of IP in Uganda. All training programmes should be carefully sequenced to the promulgation of new IP legislation and related public education campaigns on IPRs in Uganda in order to be effective.

e) Establishment of effective and well-networked databases on Ugandan IP[91]

There is a need for technical and financial support in the provision of access to networked,

[90] Ibid
[91] Ibid

computerized databases on intellectual properties that are in force in Uganda, for use by enforcement authorities in co-operation with the Uganda Registration Services Bureau. Additionally, on-line communications with and access to World Customs Organization (WCO) databases to improve 'risk profiling' and to identify counterfeit trademarks and fake goods should also be provided to the Customs authority and, if feasible, to the Ministry of Health. Technical co-operation from the WCO and International Criminal Police Organization (INTERPOL) would be required in establishing the latter system and training staff in its use. An initial pilot project could be run in the Customs service at Entebbe or Kampala regions and then rolled out to the three other customs regions over the longer term. This project should be synchronized with general training of enforcement agencies as well as development of IP legislation in Uganda.

f) Effective networking and coordination between local and international IP Institutions

Whereas it can be argued that reciprocity of IPR enforcement between countries can be difficult to attain due to financial, logistical, infrastructural and related differences, coordination and co-operation between the IP institutions within Uganda and another concerned country can be a starting point paving way for protection and enforcement of each country's IPRs. Such institutions can also serve a good purpose in targeting their respective local entrepreneurs and facilitating the dissemination of domestic and foreign knowledge in IPRs.

It should be noted, however, that in reforming its IPRs systems along such lines, Uganda should match its roles to its capacities and not simply copy the institutional structures and procedural formats of the countries with which it coordinates its IP Office[92]. Thailand, another developing country, established an Intellectual Property and International Trade Court in 1997 to provide for a mechanism to satisfy its TRIPS obligations[93]. Uganda, therefore, can gain from studying the structure and operation of the Thailand IP Court in the establishment and running of a National IP office in Uganda in conjunction with the Ugandan Commercial Court.

(g) The role of developed countries

The overriding basis of TRIPS being the creation of free trade at a global level, developed countries have a key role to play in assisting low-income countries like Uganda in fulfilling its obligations under TRIPS. The TRIPS Agreement obligates industrialized countries to provide "technical and

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[92] Braga C. A. P., Fink C, and Claudia Paz Sepulveda: *Intellectual Property Rights and Economic Development,-* Article in Abbott F., Cottier T. and Gurry F., *The International Intellectual Property System, Commentary and Materials - Part Two (1999)* Kluwer Law International, The Hague, at p. 2008

[93] Morgan, A., *Trips to Thailand: The Act for the establishment of and procedure for Intellectual Property and International Trade Court.* (March 2002) Fordharn International Law Journal, Fordharn University School of Law.

financial cooperation in favour of developing and least - developed country members"[94]. Such assistance includes supporting the IPRs reform process, implementation and building IPRs institutions; enhancing the IPRs environment and improvement in the understanding of the socio-economic effects of IPRs protection. Presently, Uganda's Intellectual Law Project has received funding from the United States Aid for International Development (USAID), as well as the Commercial Justice Reform Programme under the Justice Law and Order Sector[95]. Funding and donor programmes therefore play a big role in broadening Uganda's IP enforcement system.

CONCLUSION

This study has addressed Uganda's position in the enforcement of IPRs pursuant to the TRIPS Agreement. The challenges posed and the huddles to be jumped only go to show that Uganda is part of the global village and the improved protection and enforcement of IPRs internally will contribute to the nurturing of a knowledge-based economy within the country with regards to IP related matters. This will thus impact positively on the general economy. This effectively involves building a national consensus on IP protection, establishment of strong institutions and infrastructure with the necessary capacity to handle administration and enforcement of IPRs. Uganda will reap more from its membership under TRIPS if it follows such an approach.

[94] Abbott F., Cottier T., and Gurry F., Supra Note 20 at p. 2014
[95] Supra note 1, at p. 6

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