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African Journal of Intellectual Property

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An abstract of 150–200 words is required.

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UK English spelling is preferred; and should conform to the most recent edition of the Concise Oxford English Dictionary. However, should you use American spelling, be consistent; do not switch back and forth between the two.

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FROM THE MANAGING EDITOR

Welcome to the inaugural issue of the *African Journal of Intellectual Property (AJIP)*. The journal is published jointly by Africa University and the African Regional Intellectual Property Organization (ARIPO).

Within the last decade, the intellectual property (IP) field has grown tremendously in Africa. This scholarly, peer reviewed journal has been established in response to this growth. The AJIP aims to promote African intellectual property scholarship and research, while also facilitating the documentation and accessibility of research outcomes to strengthen evidence-based developments and improve learning in and across service delivery intellectual property organisations, academic and research institutions and industry. The journal will therefore facilitate the creation of synergies between the actors in the intellectual property eco-system. A special goal of the journal is to fill the gap in existing academic journals by encouraging research from multidisciplinary perspectives including law, science, agriculture, business, social sciences, the arts and other fields.

Submissions are welcome from these diverse fields, to the extent that they promote a deeper understanding of the impact of intellectual property rights on development and growth, while also drawing attention to areas where intellectual property laws, policy and practice may be further improved for the benefit of African populations. The content and empirical evidence is from an African perspective on IP.

The AJIP will be published bi-annually and each journal issue will feature six peer reviewed articles written by researchers and practitioners in the field of IP. It will also cover research articles from IP scholars, IP administrators, IP professionals and IP book reviews. All articles are peer-reviewed through a double-blind process.

The journal will be of interest to IP practitioners, policy makers, students, researchers and academics and indeed the entire IP fraternity to broadly cover generation, protection and commercialisation of IP. Journal articles will allow lecturers teaching IP to include scholarly articles in their syllabi thereby significantly strengthening the teaching and learning of IP.

This inaugural issue carries six articles focussing on North Africa, East Africa, West Africa and Southern Africa.
Victor Nzomo tackles the issue of laws regulating collective administration of copyright and related rights in three countries, namely, Kenya, Nigeria and South Africa. Nzomo contends that such regulation is necessary to bridge the gap between rights holders and users in order to achieve welfare maximisation. However the deregistration of the Music Copyright Society of Kenya (MCSK), the collapse of the South African Recording Rights Association Limited and the on-going battles involving the Music Copyright Society of Nigeria (MCSN) and the Nigerian Copyright Commission (NCC) are just a few recent examples that highlight the need to rethink the legal framework for regulation of collective management organisations in Africa. He concludes with several recommendations on reviewing the respective legislative frameworks for regulation of CMOs, the most important being the urgent need for empirical research on the impact of various legislative provisions on the collective management systems of Kenya, South Africa and Nigeria.

In his article on trading interests shaping intellectual property law, Reem Raslan posits that the tension between intellectual property rights (IPRs) and public interest goals, such as consumer protection, public health, food security and biodiversity needs to be examined through the lens of the policy and historical grounds for granting IPRs. An initial examination of the subject suggests that trading interests have played and continue to play a significant role in shaping IPRs regimes past and present. His article examines this hypothesis with the aim of providing a better understanding of the said debate. This, he begins by shedding some light on the mercantile origins of IP law, particularly in the western world, and then looks at the mercantile origins of the modern IP regime exemplified by the TRIPS Agreement. After a brief examination of the nature of property rights of IPRs, the article applies the findings to the modern conflict between IPRs and public interest goals, in particular the issue of plain packaging of tobacco products.

Jacob Holland provides an analysis of Part III Section 16 (a) (i) of the Botswana Copyright and Neighbouring Rights Act 2000, with a focus on Botswana's treaty obligations under the Berne Convention and the TRIPs Agreement. Holland identifies several factors within the stated clause, which make the library exception uncertain and unclear, with the possibility of making the exceptions ineffective in protecting the economic interests of copyright owners. The study concludes that although the Botswana Copyright and Neighbouring Rights Act seems to conform to the treaty obligations and there is a strong adherence to fair dealing, the clause in question is, uncertain, unclear and ambiguous, and needs to be revised. This article contends that language is a very important aspect and needs due diligence and strict adherence during law and policy-making for it has the effect of shaping the exact services that a library will offer.

In their research, Glenda Mutasa and Emmanuel Sackey assess the perception that people hold on traditional medicine (TM) and how this influences their utilisation of TM. The views of the producers of TM, as the traditional medicine practitioners and the protection of their knowledge, formed part of the assessment. The research findings indicate that there is a divided outlook between TM, in the form of herbs and utilisation of TM healers' services. There is also lack of a sui generis protection system for the TM knowledge as well as lack of adequate knowledge on the existing national, regional and international legal framework on TM protection by the TM practitioners. Mutasa and Sackey argue that Government should engage in the provision of a regulatory, political, economic and legal environment for the utilisation, promotion and production of TM.

Olugbenga Olatunji and Kayode Adam observe that since the emergence of the present knowledge-driven economy, intellectual property rights (IPRs) have become a veritable tool for the protection of entrepreneurs' business ideas, innovations, and creativities against public theft. When properly harnessed, IPRs offer protection against such theft and confer business advantage on entrepreneurs. Proceeding from the viewpoint that the primary purpose of trademark is consumer protection, the authors examine how the provisions of the Nigerian Trademark Act (Cap T13) on assignment and registered users meet this purpose. They argue that the current position of the law, where assignment is permitted 'with or without goodwill'; where the degree of control required for registered usership is unstipulated; and where registered usership is allowed without trade connection between the registered proprietor and the mark, has a high tendency of causing consumer confusion or deception.

Morncliff Mudzvatangi argues that recipients of donor aid especially towards technology capacitation to mitigate poverty and enable sustainable development have failed to significantly raise the quality of living prompting international discussion on how technology can be reorganised to work for everyone using appropriate technology. In this regard, the article aims to establish the connection between intellectual property, technology transfer activities and appropriate technology. A case study of Zimbabwe is examined to test the relationship of appropriate technology, IP and technology transfer as a microcosm of the situation obtaining in most developing and least developed countries.

We hope you will enjoy reading the articles in this inaugural issue of the *African Journal of Intellectual Property.*

Munani Mtetwa

RETHINKING THE REGULATION OF COLLECTIVE MANAGEMENT ORGANISATIONS IN AFRICA: LEGISLATIVE LESSONS FROM KENYA, SOUTH AFRICA AND NIGERIA

Victor B. Nzomo
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Abstract

From a utilitarian perspective, laws on collective administration of copyright and related rights are necessary to bridge the gap between rights holders and users in order to achieve welfare maximisation. The deregistration of the Music Copyright Society of Kenya (MCSK) in Kenya, the collapse of the South African Recording Rights Association Limited in South Africa and the on-going battles involving the Music Copyright Society of Nigeria (MCSN) and the Nigerian Copyright Commission (NCC) in Nigeria are just a few recent examples that highlight the need to rethink the legal framework for regulation of collective management organisations (CMOs) in Africa. In this regard, this article begins with an examination of the legislative frameworks for regulation of CMOs in Kenya, South Africa and Nigeria by considering whether CMOs, once accredited, are adequately supervised by the State to ensure that the former operate effectively for the benefit of both rights holders and users. After examining the state of the respective country laws, this article reviews the current copyright reform initiatives in each of the countries and whether the tabled legislative proposals would be able to address the persisting regulatory challenges in the collective administration of copyright and related rights. This article concludes with several recommendations on reviewing the respective legislative frameworks for regulation of CMOs, the most important being the urgent need for empirical research on the impact of various legislative provisions on the collective management systems of Kenya, South Africa and Nigeria.

Key words

copyright, collective management, regulation, legislation, Africa

Introduction

Copyright and related rights are bundles of different rights which can be exercised individually or, where it is impracticable to enter into individual arrangements, they can be managed by collecting societies also known as collective management organisations (CMOs) (Fiscor, 2002, p. 6; Gervais, 2001, p. 82; Goldstein, 2001, p. 228).The first known CMOs were established by the French in 1777 and 1852, followed by the British Empire in 1914 (Cornish and Llewelyn, 2007, p. 406; WIPO, 2004, p. 111). To date, the system of collective administration remains an indispensable and effective means of bridging the gap between rights holders and users of copyright works (Schepens, 2000, p. 15).

Collective administration of copyright effectively allows rights holders to grant exclusive mandates to a single entity namely the CMO, which acts on behalf of the rights holders to grant authorisations through licences to users under certain conditions and on the basis of a tariff system; to collect the remuneration from the licences; to distribute it among the rights holders; to monitor the uses of their works; to negotiate with prospective users; to prevent and detect infringement of rights; and to seek remedies for infringement (Fiscor, 2003, p. 1; WIPO, 1999, p. 14).

A legal framework for collective administration of copyright is necessitated by the fact that CMOs occupy a monopoly position in relation to both rights holders and users (Fiscor, 2002, p. 141). Such a position is, in practical terms, a necessary condition for the appropriate operation of collective management of copyright (Schepens, 2000, p. 22). Therefore, without appropriate legal guarantees, such a monopoly position might be abused by CMOs. These safeguards are needed both in the CMOs' relationship with rights holders as well as in the CMOs' relationship with users (Bently and Sherman, 2009, p. 299; Copinger and James, 1999, p. 1500).

In addition to preventing abuse of monopoly power, adequate legislative provisions for regulation of CMOs are necessary to ensure that the collective administration of copyright and related rights is carried out in the public interest (Gervais, 2001, p. 49). In this regard, it has been noted that a check before approving the registration of a CMO is not a sufficient guarantee in itself of the proper operation of the collective management system (Fiscor, 2002, p. 143). Therefore it has been argued that competent public authorities should regularly supervise certain key elements of the collective management system, such as whether the actual activities correspond to the approved statutes; whether the rules of collecting and distributing fees are correct; whether the costs of administration are reasonable; and whether the distribution and transfer of remuneration in fact take place as prescribed (Fiscor, 2002, p. 143).

In the African context, there have been several instances in Kenya, South Africa and Nigeria that have emphasised the need to rethink the legal framework for regulation of CMOs in order to protect the rights and interests of both rights holders and users. In Kenya, the government regulator, the Kenya Copyright Board (KECOBO) continues to face challenges in the licensing and supervision of CMOs. For instance in the year 2010, rights holders who are members of a CMO known as the Music Copyright Society of Kenya (MCSK) received a paltry 48 million shillings (Kshs48 million) in royalties out of a total revenue of 185 million shillings (Kshs185 million) in revenue collections with 137 million shillings (Kshs137 million) being consumed by the MCSK as administration costs (Okuttah, 2010; Muchiri, 2011). As a reaction to this sad state of affairs, KECOBO took the unprecedented step of deregistering MCSK as the CMO for composers, authors and publishers of musical works in April 2011 (Gakuru, 2011).

Meanwhile in South Africa, the accreditation for South African Recording Rights Association Limited (SARRAL) was withdrawn in 2010 after the court issued a liquidation order in 2009. SARRAL was a collecting society looking after the mechanical rights of performers and the owners of copyright in sound recordings (Copyright Review Commission, 2011, p. 43). The court ordered the liquidation of SARRAL due to insolvency. A significant number of music composers and artists lost huge amounts of money between 2003 and 2008 due to legal costs, reduced collections and other increased costs arising as result of legal disputes (Copyright Review Commission, 2011, p. 46).

Finally in Nigeria, there have been several court battles in respect of the powers of the government regulator, the Nigerian Copyright Commission (NCC) to approve CMOs as well as its statutory and regulatory oversight on collective administration in Nigeria dating as far back as 1994. These challenges were not only between the NCC and the CMOs, most notably the Music Copyright Society of Nigeria (MCSN), but also between CMOs like MCSN and users (Rotimi, 2012, p. 67).

The deregistration of MCSK in Kenya, the collapse of SARRAL in South Africa and the on-going battles involving MCSN and NCC in Nigeria are just a few recent examples that highlight the need to review the legal framework for regulation of CMOs in Africa. This issue is at the core of this article, with the ultimate aim of examining what other African countries could possibly learn from the legislative experiences of Kenya, South Africa and Nigeria in reviewing their legal framework for collective administration of copyright and related rights.

This article is divided into three parts. The first part traces the legislative history of collective administration of copyright which dates back to 1709. The second part examines the development of copyright legislations in Kenya, South Africa and Nigeria with a special focus on the legal provisions for the regulation of CMOs. The third and final part considers the current copyright reform initiatives in the three African countries under study and the likely impact on regulation of CMOs.

Legislative History of Collective Administration of Copyright

The 1709 Statute of Anne, which was passed into law by the British Parliament on April 10th 1710, is traditionally claimed to be the world's first copyright statute and has thus become viewed as the origin of a system of national laws that today exist in most countries of the world (Bently, Suthersanen and Torremans, 2010, p. 7). This statute vested exclusive rights to authors or purchasers in the copies of printed books. The preamble of this legislation emphasises the need to strike a balance between rights holders and users as it states that it is "an act for encouragement of learning" and "for the encouragement of learned men to compose and write useful books". The passing of this statute was intended to address a growing practice among users of exploiting printed and written works without the licence of the authors (Bently, 2010, p. 25).

In 1886, the Berne Convention for the Protection of Literary and Artistic Works administered by the World Intellectual Property Organisation (WIPO) was adopted as the first international agreement which harmonises the way that copyright is regulated at an international level (Chege, 1978, p. 98). Following the adoption of the Berne Convention, which recognises the right of public performance as a principal feature of the protection to be afforded to all authors from the Berne Union countries, it became apparent to authors in many other countries that in practice it was impossible to safeguard certain rights under copyright on an individual basis (Fiscor, 2002, p. 19). The United Kingdom (UK) became a party to the Berne Convention on December 5, 1887 and as was the practice, its adherence to Berne extended to the British Empire's protectorates, colonies and dominions such as Kenya, South Africa and Nigeria, among others (Sihanya, 2009, p.13).

In the UK, collective enforcement of rights dates back to the early 1900s when composers of most music and their publishers found it impossible to enforce their performing rights, work by work, against users such as concert promoters and theatre proprietors (Cornish and Llewelyn, 2007, p. 406). Therefore both composers and publishers found it necessary to rally for a proper performing rights regulation and a collecting agency to implement it (Albinsson, 2012, p. 14). As a result, the definition and scope of performing rights in the previous Acts of 1833 and 1842 were extended and modernised in the new Copyright Act of 1911. Thereafter the Performing Rights Society (PRS) was created in March 1914 to administer performing rights on behalf of composers and publishers (Albinsson, 2012, p. 14). At the time of the formation of PRS, Kenya, South Africa and Nigeria were colonies of the British Empire and by virtue of the reception and application of English law which had been extended to all British territories, the copyright systems of these African countries were modelled on the British Imperial Copyright Act of 1911 (Rens et al., 2010, p. 7; Rotimi, 2012, p. 23; Sihanya and Ouma, 2010, p. 86). Therefore PRS was responsible for the collective management of copyright throughout the British Empire, including Kenya, South Africa and Nigeria.

Although public performance and broadcasting of works were the first uses to give rise to collective licensing, the emergence of secondary mass by new means of exploitation of works made the need for collective administration of rights even more acute (Copinger and James, 1999, p. 1490). Increasingly, therefore, collective administration became the most realistic way for copyright owners to exercise many of their rights.

Between 1911 and 1984, performing rights CMOs began to sprout from all over the world. These included the American Society of Composers, Authors and Publishers (ASCAP) (1914) in the United States, the Mechanical-Copyright Protection Society (MCPS) (1924) in the United Kingdom, the Australasian Performing Rights Association (APRA) (1926) in Australia, the Norwegian Performing Rights Society (TONO) (1928) in Norway, the Society of European Stage Authors and Composers (SESAC) (1930) and Broadcast Music, Inc.(BMI) (1939) in the United States, the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) (1939) in Japan, and the SUISse Auteurs (SUISA) (1942) in Switzerland, among others. In Africa, the first CMOs were the Southern African Music Rights Organisation

(SAMRO) (1961) in South Africa, the Music Copyright Society of Kenya (MCSK) (1983) in Kenya and the Music Copyright Society of Nigeria (MCSN) (1984) in Nigeria.

With this legislative history in mind, we will now trace the development of indigenous copyright laws in Kenya, South Africa and Nigeria with particular focus on the evolution of legal provisions relating to the regulation of CMOs. These provisions will be critically examined and compared from the point in time when a CMO is accredited, registered or licensed by the relevant government regulator. Fundamentally, the next part of this article will examine the legislative differences in CMOs' obligations vis-a-vis their collective management functions on one hand and the powers granted to the relevant government regulators to supervise and intervene in the activities of CMOs on the other hand.

Legislative Development of Collective Administration of Copyright in Kenya, South Africa and Nigeria

Kenya

Kenya enacted its first domestic Copyright Act in 1966. Since 1966, there have been several legislative changes in the copyright law framework, that is, in 1975, 1982, 1989, 1992, 1995, 2000, 2001, 2004, 2011and 2012.

The 1992 Act is significant in that it establishes and sets out the functions of the first government regulator of CMOs, namely the competent authority. Section 17 of the 1992 Act defines the competent authority to mean an authority of not more than three persons appointed by the Attorney-General for the purpose of exercising jurisdiction under the Copyright Act whenever any matter involving a "licensing body" requires to be determined by it. The Section defines a "licensing body" to mean an organisation which has as its main object, or one of its main objects, the negotiation or granting of licences in respect of copyright work. In particular, section 17 empowers the competent authority to determine the reasonableness of licensing practices of a licensing body.

The 2001 Copyright Act is significant in that it establishes the Kenya Copyright Board (KECOBO) whose mandate is the overall administration of copyright and related rights in Kenya. KECOBO was previously a section within the office of the Department of the Registrar General, Office of the Attorney General (Ouma, 2006, p. 5-6). However, it was only from the year 2007 that KECOBO assumed its statutory role of regulation of CMOs (Sigei, 2011). Section 5(b) of the Act provides that KECOBO shall license and supervise the activities of CMOs as provided for under Part VI of the Act, which deals with collective administration of copyright.

It is noteworthy that KECOBO's powers to regulate CMOs are not defined or elaborated anywhere in the Act with the exception of the power to deregister a CMO under section 46(9). Section 46(9) of the Act states that KECOBO may by notice in the Gazette deregister a CMO if four conditions are found to exist within the latter's operation and management structures. These four conditions for deregistration are as follows:

1) the CMO is not functioning adequately as a collecting society;
2) the CMO is not acting in accordance with its Memorandum and Articles of Association or in the best interests of its members;
3) the CMO has altered its rules so that it no longer complies with section 46 (4) and;
4) the CMO has refused or failed to comply with any of the provisions of this Act.

With regard to the CMOs obligations, the Act refers to requirements such as whether a CMO is "functioning adequately" or "in the best interests of its members" or that the interests of members are "adequately protected". However, none of these terms are defined in the Act. Ironically, although KECOBO has a wide discretion to determine whether a CMO is performing "adequately" in the interests of its members, it lacks any clear supervisory, oversight or intervention powers vis-à-vis the regulation of CMOs. In this connection, the only elaborate obligation imposed on a CMO is to provide KECOBO with annual reports and copies of its audited accounts.

On October 3, 2008, KECOBO registered MCSK as a CMO with a licence to collect royalties on behalf of authors, composers and publishers in the category of musical works. KECOBO later deregistered MCSK with effect from April 1, 2011. KECOBO invoked section 46(9) of the Copyright Act as the basis for its decision, stating that MCSK had not complied with paragraphs (a) and (c) of section 46(9). On May 31st2011, MCSK moved to the High Court in the case of Republic v. Kenya Copyright Board seeking leave to apply for judicial review orders to quash KECOBO's decision to deregister it as a CMO. In granting MCSK's leave to apply for judicial review, the High Court ordered that the granted leave operate as a stay to suspend the implementation/enforcement of the decision by KECOBO to revoke the licence of MCSK and deregister it as a collecting society for music composers, authors and publishers. The case was eventually settled out of court and KECOBO had no choice but to register MCSK once more as a CMO (Nzomo, 2014).

South Africa

The primary source of law for regulation of CMOs is the Copyright Act No. 98 of 1978. On June 1, 2006, the Minister responsible for the Act exercised his powers under section 39(cA) of the Act and promulgated the "Regulations on the Establishment of Collecting Societies in the Music Industry Collecting Society". However this regulatory dispensation for CMOs was only applicable to public play rights leaving the more popular rights - performing and mechanical rights - outside the purview of the current regulatory regime (Rotimi, 2012, p. 118). This regulatory gap will later emerge as a significant contributing factor to the collapse of SARRAL.

Regarding the supervision of the activities of CMOs, section 4(1) of the South African Regulations vests this power on the Registrar of Copyright who is required to keep a register of all accredited collecting societies and ensure that these CMOs discharge their obligations under the law. Under section 4(2) of the Regulations, CMOs are required to invite the Registrar to their Annual and Special General Meetings of its membership in addition to submitting an Annual Activity Report, including financial records and any other documents that may be necessary to assess the degree of compliance of the collecting society with the Regulations, and the Copyright Act. Furthermore CMOs in South Africa have a duty under the Regulations to keep the Registrar of Copyright informed at all times of any and all occurrences or changes affecting its organisational and operational features within 30 days of the occurrence or change.

If an accredited CMO in South Africa does not comply with its obligations under the Regulations, the Registrar may provide a period of between thirty (30) and ninety (90) days for the CMO to remedy the situation. Where the CMO fails to comply, the Registrar is empowered under section 4(4) to withdraw the accreditation and/or apply to court for relief including placing the CMO under judicial management or winding up or dissolution.

Finally, within the context of regulation of CMOs, sections 6(1) and (2) of the Regulations expressly provide that all CMOs must distribute at least eighty percent (80 percent) of their incomes and not more than twenty per cent (20 percent) should be retained by the CMO after distribution to defray its administrative costs or apply otherwise.

Nigeria

The primary source of law for regulation of CMOs is the Copyright Act Cap. 28, Laws of the Federation of Nigeria 2004 and the Copyright (Collective Management Organisations) Regulations 2007. Section 39(8) of the Nigerian Act defines a CMO as "an association of copyright owners which has as its principal objectives the negotiating and granting of licence, collecting and distributing of royalties in respect of copyright works." NCC, established under section 34 of the Nigerian Act, is the statutory organ responsible for all matters affecting copyright in Nigeria as provided for in the Copyright Act. Under section 39(2) of the Nigerian Act, the NCC has the powers to give approval for any entity seeking to operate as a CMO for the purposes of the Act. Like the Kenyan Act, the Nigerian Act states that it is illegal for any person or group of persons to perform the duties of a CMO without the approval of the NCC. However the Nigerian Act goes further to criminalise this illegal act and prescribe a fine and a jail term on conviction.

Section 2(3)(vi) of the Nigerian CMO Regulations states that the Articles of Association of the CMO must make provision for the attendance of a representative of NCC as an observer at the Meetings of the Governing Board and General Meetings of the CMO. Section 2(4) of the Regulations provides that the NCC may require any new applicant to advertise, at its own cost, its application for grant of licence to operate as a CMO in designated national newspaper(s). Finally, section 2(9) of the Regulations provides that the licence granted by NCC is valid for three (3) years and may be renewed every two (2) years for a successive 2 year period.

During the registration of a CMO, the Regulations impose certain positive obligations on the CMO to furnish certain information both to the NCC as well as the general public. Section 8(1) provides that the NCC must be notified by the CMO on the following issues:
1) any alterations to its Memorandum or Articles of Association or any internal rules;
2) any adoption of Tariffs and alteration thereof;
3) any Reciprocal Representation Agreements entered into with foreign collecting societies;
4) any alteration to the standard membership agreement; and
5) any decisions in judicial or official proceedings to which the CMO is a party, where the Commission so requires.

Furthermore, under section 8(4), the CMO must publicise any change in the tariff rates for any category of users through a medium that is accessed publicly by them. In the event of breach of the above conditions, the CMO and/or its officers may be liable to a written caution and be required to rectify the breach within a specified time. Failure to rectify the breach within the specified period, the CMO shall be liable to a fine of fifty thousand Naira (N50, 000). The Nigerian Regulations also provide for the appointment of an auditor at any time to audit the accounts of a CMO and the cost of such auditing shall be borne by the CMO. However, the Nigerian Regulations empower the NCC to initiate criminal proceedings against the CMO where it appears that an offence has been committed by the CMO or by any of its officers.

An important feature of the Nigerian Regulations is section 11 which imposes a maximum limit of thirty per cent (30 percent) out of the total royalties and fees collected that may be deducted by a CMO for administrative expenses during a year. However under section 11(2), the CMO may make a prior written application to the NCC seeking the latter's approval to deduct more than 30 percent of its total revenue to cover administrative expenditures. In the event of breach, the CMO may be liable to a caution and/or written admonition from the NCC and be required to rectify the breach within a specified time. Where there is a dispute arising from any matter that falls within the purview of the Regulations, section 15 states that such disputes are to be referred to the NCC which may set up a Dispute Resolution Panel.

Within the context of supervision of CMOs, section 18 is significant as it set out certain conduct and practices deemed to be unethical including the following:
1) granting licences, collecting and/or distributing royalties in respect of works for which the CMO is not authorised to administer;
2) making false representation in respect of any matter to which it is required to provide information knowing such representation to be false;
3) discriminating in the provision of licence to members of the same user class; inducing a user who is in the process of negotiating for a licence with another society or right owner to refrain from completing the

licensing process; and

4) failing to make available to any other CMO information which is reasonably required by such other CMO to enable it effectively administer the rights held by it, doing anything or acting in a manner that has the effect of preventing any other CMO from carrying its functions as approved under the Regulations; among others.

With regard to the deregistration of a CMO, section 3(1) of the Nigerian Regulations states that NCC may on its own motion or on application by any interested person revoke the licence of a CMO. Section 20 of the Regulations addresses how the NCC deals with CMOs found to be in breach of the Regulations. In the first instance, the CMO may be liable to a written caution where it fails to act to address a breach of any of the sections in the Regulations. If the CMO fails to comply with a directive of the NCC, then its licence may be suspended pending the CMO's compliance. Where the CMO fails to comply with three months of the suspension, then the CMO's licence may be revoked. Any officer of a CMO who has been cautioned for two times may be disqualified by the NCC from holding any management position in any CMO unless he/she satisfies the NCC on why he/she shall not be disqualified or why such disqualification should be lifted.

Some Comparisons between Laws for Collective Administration of Copyright in Kenya, South Africa and Nigeria

Out of the three countries under examination, Kenya seems to have the least stringent legal provisions for regulation of CMOs whereas Nigeria appears to have some of the strongest legal provisions while South Africa is close behind Nigeria. Two common denominators of the legal frameworks in South Africa and Nigeria are noteworthy: firstly, the powers and functions of the regulator have been significantly enhanced and secondly, there is a wide array of obligations and duties imposed on registered CMOs vis-à-vis the respective government regulator. Unlike Kenya, both South Africa and Nigeria have created special legislative regulations dealing exclusively with the establishment, control and supervision of CMOs.

One area of divergence in the three African countries is on the duration of a CMO's registration or accreditation. South Africa's accreditation period is the longest at 5 years, followed by Nigeria at 3 years and Kenya's CMO registration period is the shortest at 1 year. There is no available data or literature on the impact of various durations of accreditation on the overall performance of a CMO or on the effectiveness of CMO regulation by the State.

With regard to a CMO's operations, it is noteworthy that only the South African and Nigerian legislations have set cost-royalty ratios with the former's ratio at 20:80 and the latter's ratio at 30:70. In addition, the Nigerian regulations provide that a CMO may make a prior written application to the NCC seeking the latter's approval to deduct more than 30 percent of its total revenue to cover administrative costs. It is generally accepted that if the cost remains within some 30 percent of income from the management of performance and broadcasting rights or within 25 percent of the income from the management of reproduction rights then the CMO can be deemed economically sufficient and viable (Uchtenhagen, 2005, p. 7).

Another aspect of the CMO's obligations during its operations is to always keep the government informed of its activities. In both the Nigerian and South African regulations, all registered CMOs are required to keep the regulator informed at all times, in addition to providing certain information to the users of their copyright works. The CMO must inform the regulator within a 30 day period in the event of any changes to the Constitution or rules of the CMO, Tariffs, Reciprocal Representation Schedule, Standard Membership Agreements, and any decisions of judicial or official proceedings involving the CMO. The CMO would also be under a duty to notify the public, in particular, its licencees, about changes in its tariffs, licences and other related information through pubic advertisements at the CMO's own cost.

One unique feature of the Nigerian legislative framework is the obligation placed on CMOs not to engage in conduct and practices deemed to be unethical within the scope of collection and distribution of royalties.

CMOs are also prohibited from engaging in certain conduct and practices deemed to be anti-competitive and/or monopolistic vis-à-vis both users, members and other registered CMOs. This includes making any representations made to the users and the citizenry at large that any CMO is the sole CMO in the country without recognising the other CMOs that may exist within the particular industry.

As noted earlier, Kenya's legal framework does not provide any mechanisms or measures for KECOBO to effectively supervise the activities of CMOs. In contrast, there are useful provisions on government supervision of CMOs from the legislations of Nigeria and South Africa. In Nigeria, the audit of a CMO's activities by the regulator is clearly spelled out in law. Such an auditor is vested with statutory powers relating to the supervision of a CMO's activities and appears to have a great deal of independence and autonomy from both the CMO and the Commission.

Quite separately from audit, the inspection of a CMO by the regulator is an important aspect of the regulator's supervisory role which ought to be clearly spelled out in the law. Unlike audits, inspections ought to be continuous in nature and are intended to assess the degree with which the CMO's day to day activities are in compliance with the terms and conditions of its registration or accreditation.

Unlike Kenya's legislation, deregistration of a CMO in South Africa and Nigeria is seen as a measure of last resort and therefore the respective country laws prescribe other less drastic measures and actions to deal with non-compliant CMOs. In South Africa, the CMO is given a notice of non-compliance and a period of between thirty (30) and ninety (90) days is provided to remedy the situation. Where the CMO fails to comply, the Registrar is empowered under section 4(4) to withdraw the accreditation and/or apply to court for relief including placing the CMO under judicial management or winding up or dissolution. Nigeria arguably has the most systematic framework for dealing with non-compliant CMOs. This framework is a combination of fines, penalties, cautionary letters, suspensions and disqualifications. As discussed above, the law vests the NCC with a wide array of powers aimed at deterring non-compliance on the part of registered CMOs in Nigeria.

With no clear legal procedures in place, deregistration of CMOs in Kenya remains totally unregulated by the Act. In this regard, one must distinguish the grounds for deregistration from the procedure for deregistration itself. Therefore, once the grounds for deregistration are found to be present, the regulator ought to have legislative options to compel the CMO to remedy the situation failing which the procedures for deregistration may come into effect.

As an option before deregistration, the South African Copyright Review Commission recommended in 2012 that the Registrar of Copyright should be empowered to take over the administration of any CMO should he or she be satisfied that such society is being run in a manner that is detrimental to the respective rights holders (Copyright Review Commission, 2011, p. 53).

Finally, special mention must be made of section 17 of the Nigerian Act, which is arguably the most contentious legal provision for CMO regulation in the three countries under review. The section titled "limitation to the right of action" states that no action for the infringement of copyright or any right under the Act shall be commenced or maintained by any person who is: a) carrying on the business of negotiating and granting of licences; and b) collecting and distributing royalties in respect of copyright works or representing more than fifty owners of copyright in any category of works protected by the Act, unless it is approved under section 39 of the Act to operate as a CMO or is issued with a certificate of exemption by the NCC. The effect of this provision is to prevent unregistered persons or groups of persons from any operations as exclusive assignees of copyright works. However this provision is open to constitutionality challenges particularly since it appears to limit the right to property and freedom of association. In Nigeria, the issue of constitutionality of sections 17 vis-a-vis the right to freedom to own property has been contested by the MCSN in the courts against the NCC (Rotimi, 2012, p. 88).

Current Legislative Reforms of Collective Administration of Copyright in Kenya, South Africa and Nigeria

Kenya

In January 2016, KECOBO published several draft proposals for amendments to the Copyright Act and new Copyright Regulations (Nzomo, 2016). A key feature in these draft proposals is the introduction of strong legal provisions for regulation of CMOs. One proposal is to amend section 46(3) of the Act to empower KECOBO to issue a provisional licence of four months rather than the statutory period of one year, in cases where KECOBO is of the view that a CMO "has not submitted complete documents or there are certain administrative shortfalls". Another proposal seeks to criminalise and penalise any persons that carry out the functions of a CMO "without authority of KECOBO" and prescribes a fine not exceeding five hundred thousand shillings (Kshs 500,000) or imprisonment for a term not exceeding four (4) years, or both.

With regard to KECOBO's supervisory powers, it is proposed that the regulator should be empowered to require periodic reports from a CMO "on any matter touching on members' interest". In particular, KECOBO would be empowered to order that a special audit of a CMO be carried out by audit firms appointed by it and paid for by the CMO. In addition, KECOBO would have the option of having its representative attend a CMO's board meetings "to advise where members' interests are being discussed". In this connection, KECOBO proposes that the jurisdiction of the Competent Authority be expanded to include claims that "the CMO has refused or neglected to pay due royalties to a member".

With regard to KECOBO's power to deregister a CMO, it is proposed that the CMO shall only be deregistered only after a written notice is sent by KECOBO to the CMO requesting the latter to make written representations within a period of twenty one (21) days from the date of the notice. After considering the CMO's representations, KECOBO will determine whether the CMO is "materially prejudicing or has materially prejudiced its members" following which KECOBO has the option to either withdraw the CMO's registration or "otherwise order for specific administrative measures against the CMO's Board of Directors or Management".

In addition, the proposed draft Copyright Regulations has additional legal provisions on deregistration of CMOs. The draft states that where no CMO exists in respect to certain category of rights, or the licence for a CMO in the category has been revoked, KECOBO shall through a public notice in a newspaper with largest circulation invite applications. Where more than one organisation has applied for the same class of works, the draft requires KECOBO to be guided by the provisions of the Act and evaluate each application separately.

The draft also introduces new considerations for renewal of CMO registration which in turn impose new obligations on CMOs. The draft requires that KECOBO must be satisfied that the CMO has the capacity to collect and distribute the royalties and in addition, it shall consider among others:-

i. Whether there is demonstrated integrity, transparency and accountability in collection and distribution of the royalties,.

ii. Whether the CMO adheres to national values and principles of governance provided for under Article 10 of the Constitution of Kenya,

iii. Particulars of the directors and their antecedents,

iv. Whether membership is fully representative of the class that it collects and distributes royalties for,

v. Whether the administrative costs are as a matter of policy minimal. In this regard, KECOBO will be guided by the international rules whereby the administrative costs do not exceed 30 percent if the royalties collected,

vi. Whether the royalties are regularly and properly distributed using the popularly approved distribution rules,

vii. The particulars of the senior management and the number of staff and their qualifications,

viii. The systems put in place to ensure that the royalties are collected and properly distributed efficiently, and

ix. Submission of quarterly reports before the 10th day of the next quarter.

It is important to note that the above proposals are merely draft provisions suggested by KECOBO and will be subject to reviews and changes once rights holders, users and members of the public have had a chance to give their input.

South Africa

On November 18, 2010, the South African Minister of Trade and Industry established the Copyright Review Commission (CRC) to assess concerns and allegations about the CMOs model that is in place for the distribution of royalties to musicians and composers of music (Copyright Review Commission, 2011, p. 7). In the aftermath of the collapse of SARRAL, the CRC recommended that the Act should be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant CMO if the Registrar has reason to believe that there has been a material breach of the Copyright Act or Regulations (Copyright Review Commission, 2011, p. 45).

Furthermore, the CRC recommended that the Act should be amended to allow for one collecting society per set of rights with regard to all music rights governed by the Copyright Act of 1978. In this regard, the CRC noted that only the needle-time collecting societies are supervised by the Registrar. Due to the recent collapse of SARRAL and inadequate protection of its members, the CRC argued that it would be appropriate to regulate all relevant collecting societies (Copyright Review Commission, 2011, p. 46).

In July 2015, the Minister of Trade and Industry published the Copyright Amendment Bill for public comments. The Draft Amendment Bill addresses key provisions of the Copyright Act, No 98 of 1978 and the Performers Protection Act, No 11 of 1967 adopting all the recommendations by CRC on regulation of CMOs. Section 9F of the Bill gives the regulator three options for dealing with non-compliant CMOs that is, CMOs that contravene the registration conditions in the Act or are managed in a manner detrimental to the interests of the rights holders concerned. Firstly, Section 9F(1) empowers the regulator to issue a compliance notice to a non-compliant CMO or apply to the Copyright Tribunal for an order to institute an inquiry into the affairs of the CMO. Secondly, Section 9F(2) allows the regulator to apply to the Tribunal for an order suspending the registration of a CMO pending an inquiry for such period as may be satisfied in the order. Lastly, Section 9F(3) states that the regulator may, after an inquiry and if it is of the opinion that it will be in the interest of the rights holders, apply to the Tribunal for an order of cancellation of the CMO's registration.

Nigeria

In November 2012, the NCC formally launched the reform of the copyright system in Nigeria. The key objective of the reform was to re-position Nigeria's creative industries for greater growth; strengthen their capacity to compete more effectively in the global marketplace, and also enable Nigeria to fully satisfy its obligations under the various international copyright instruments, which it has either ratified or indicated interest to ratify. Since the formal launch of the reform, the NCC has undertaken a number of activities, including review and comparative analysis and case studies of similar national reform efforts; stakeholders' consultations; collation of commentaries; and analysis of stakeholder feedback.

In October 2015, the NCC published the draft copyright bill inviting stakeholders and interested members of the public to submit their comments on the draft to NCC. It is important to note that the contentious section 17 in the current Act has been retained in section 35 of the Bill. In addition, the proposed penalties for the offence of performing the duties of a CMO without the approval of the NCC have significantly increased from two thousand Naira (N2,000) and six (6) months in jail to five hundred thousand Naira

(N500,000) or three (3) years in prison.

An interesting provision in the 2015 Bill is section 74(10) which states that a CMO may issue licences permitting the use of works of owners of copyright who are not members of the CMO under several circumstances namely: (a) such works are of the same category as works for which it is approved to issue licences; (b) the owners of copyright in such works are not otherwise represented by any other CMO; (c) the owners of copyright in such works have not specifically opted out of collective management of their rights and (d) the CMO does not discriminate against such owners in terms of the tariffs for the use of their works and the royalties paid to such owners. This provision creates a significant incentive for a person or groups of persons to register with the NCC as a CMO; however it is open to abuse by CMOs to the detriment of owners of copyright, users and members of the public.

Conclusion

This article demonstrates that African countries known to have robust legislative provisions on the regulation of CMOs continue to face significant challenges in interpretation and enforcement. This is evident in the case of section 17 of the Nigerian Act which has been at the core of numerous heated court battles between MCSN, the NCC and some copyright users.

In the South African context, this article shows that laws governing the regulation of CMOs should require the latter to comply with accepted principles of good governance and corporate governance. This aspect does not seem to feature in the current South African copyright bill despite the fact that the collapse of SARRAL was attributed in major part to corporate governance failure.

In the Kenyan context, this article provides several legislative options that would be useful to strengthen KECOBO's supervisory role vis-à-vis CMOs. In particular, future amendments to the Copyright Act should consider the introduction of a statutory management system similar to the South African model to deal with non-compliant CMOs. In addition, the Nigerian legislative experience underscores the importance of ensuring smooth transition in the event of a CMO deregistration or any decision taken not to renew a CMO's registration.

In the final analysis, the question remains whether the current copyright legislations and on-going legislative reforms in Kenya, South Africa and Nigeria would be adequate to ensure that there is no repeat of a MCSK deregistration dilemma, a SARRAL collapse or MCSN-NCC battles respectively.

In order to answer this question, there is urgent need for research to be done based on data collected from judicial and executive authorities in the three countries in order to properly contextualise the country-specific regulatory challenges that exist against the backdrop of the legislative provisions in place. Such research should also take into account the views of rights holders and users regarding the types of legal provisions on CMO regulation that would best serve their interests and those of the public at large.

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ARE TRADING INTERESTS SHAPING INTELLECTUAL PROPERTY LAW? THE EXAMPLE OF PLAIN-PACKAGING OF TOBACCO PRODUCTS AND TRADEMARK LAW

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Abstract

The tension between intellectual property rights (IPRs) and public interest goals, such as consumer protection, public health, food security and biodiversity to name just a few, needs to be examined through the lens of the policy and historical grounds for granting IPRs in the first place. An initial examination of the subject suggests that trading interests have played and continue to play a significant role in shaping IPRs regimes past and present. This article examines this hypothesis with the aim of providing a better understanding of the said debate. This article begins by shedding some light on the mercantile origins of IP law, particularly in the western world, and then looks at the mercantile origins of the modern IP regime exemplified by the TRIPS Agreement. The article then briefly examines the nature of property rights of IPRs. Finally, the article applies the findings of the previous sections to the modern conflict between IPRs and public interest goals, in particular the issue of plain packaging of tobacco products.

Key words

intellectual property rights, trademarks, plain-packaging, public interest

Introduction

There is a growing need to regulate tobacco consumption by the international community. The WHO Framework Convention on Tobacco Control (WHO FCTC) which aims to regulate the Tobacco epidemic is an ambitious treaty that addresses this issue both on the supply side and the demand side. Among the most important issues regulated by the FCTC is the regulation of packaging and labelling of tobacco products. Article 11 of the FCTC provides some guidelines in relation to advertising of tobacco products and packaging of tobacco products. In general, the FCTC provides for the prevention of any false, misleading, deceptive tobacco packaging and labelling or packaging and labelling which is likely to cause confusion about the product's characteristics or health effects. Article 11 also provides for the inclusion of health warning in a particular font and size on the tobacco package.

Some states have taken these regulations a step further by issuing tobacco plain packaging legislation. Plain packaging of tobacco products refers to "the standardisation of pack colour and removal of all branding from packaging, with the exception of brand name which appears in a standardised font and position on the package. (Stead M, 2013). The idea of plain packaging of tobacco products was first suggested by a Canadian physician in the 1980s (Stead M, 2013). During the discussion of Canada's first tobacco control law, the Tobacco Products Control Act, it was suggested that plain or generic packaging be included in the law (Tobacco Documentation Centre, 1994). However, this suggestion received little awareness. In 2012, Australia introduced the world's first plain packaging legislation the "Tobacco Plain Packaging Act 2011 (Tobacco Plain Packaging Act 2011, Act No. 148 of 2011, "An Act to discourage the use of tobacco products, and for related purposes"). The Australian legislation provides for standardised, single-colour, logo-free packaging accompanied with health warnings covering a significant portion of the package (Chapter 2, part 2 of the Tobacco Plain Packaging Act 2011). The measures further provide that individual cigarettes may not display trademarks, geographical indications or any other marking other than an alphanumeric code for product identification purposes (Chapter 2, part 2 of the Tobacco Plain Packaging Act 2011).

The tobacco industry was quick to challenge the measure in many fora including the WTO dispute settlement body (Ukraine, Honduras, the Dominican Republic, and Cuba, Indonesia (DS434 (authority of the panel lapsed due to suspension of proceedings), DS435, DS441, DS458 and DS467, respectively). Apart from the WTO challenge, Phillip Morris, one of the biggest tobacco companies in the world, challenged the Australian legislation under the 1993 Bilateral Investment Treaty (BIT) between Australia and Hong Kong (Bridges Weekly, 2012)However, former Australian health minister and former Attorney-General Nicola Roxon has alleged that Philip Morris deliberately moved ownership of its parent company to Hong Kong in order to be able to launch proceedings under the BIT; the company counter-argued that the transfer was due to legitimate business reasons (Bridges Weekly, 2012).

Meanwhile, the Australian law faced legal challenges by major tobacco companies, including Philip Morris International, Japan Tobacco, British American Tobacco and Imperial Tobacco before domestic courts. These companies claimed that the plain packaging legislation was unconstitutional. Australia's High Court ruled in favour of the Australian government (JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth [2012] HCA 43, 2012).

At the WTO, five complainants (Cuba, the Dominican Republic, Honduras, Indonesia, and Ukraine) initiated a case against Australia for breaching, inter alia, the TRIPS, GATT 1994 and the TBT Agreement. (Bridges Weekly, 2014). The outcomes of the disputes in this area are of interest to many states who have issued or contemplate issuing plain packaging legislation, including the United Kingdom, Ireland, Norway, France, New Zealand and Turkey (Bridges Weekly, 2015). The possibility of introducing plain-packaging legislation at the level of the European Union has also been discussed (WTO, 2015). However, the 2014 EU Tobacco Directive does allow EU member states to introduce plain packaging legislation (Bridges Weekly, 2015).

The main claims of the complainants in the WTO Plain-Packaging disputes referred to above, in the context of the TRIPS Agreement in relation to trademarks, can briefly be stated as breaches of the following TRIPS provisions:

a. Article 6quinquies of the Paris Convention (incorporated by reference in the TRIPS Agreement), claiming trademarks registered in a country of origin outside Australia are not protected "as is;

b. Article 15.4 of the TRIPS Agreement, claiming the nature of the goods to which a trademark is to be applied forms an obstacle to the registration of the trademark;

c. Article 16.1 of the TRIPS Agreement, claiming the measures prevent owners of registered trademarks from enjoying the rights conferred by a trademark; as well as interfering with the enjoyment of the rights of the owner of a well-known Trademark or prospective well-known trademarks (Article16.3of the TRIPS Agreement);

d. Article 20 of the TRIPS Agreement, calming standardisation requirements unjustifiably encumbers the use of trademarks in relation to tobacco products by special requirements, and plain packaging legislation diminishes the ability of a trademark to distinguish the tobacco products of one undertaking from the other, see for example: (WTO, 2014).

To sum up, the central claim of the complainants in the WTO Plain-Packaging disputes, is that Plain-packaging legislation violates WTO rules by prohibiting or limiting the use of trademarks and geographical indications or both by requiring tobacco products to be sold in a standardised manner (WTO, 2015).

Australia's counter-arguments are not available publicly. However, leading commentators have pointed out that Australia has a relatively strong case, based on, inter alia, the following:

a. Subject to certain restrictions, the Australian legislation allows a tobacco product to have a brand/variant name on the packaging, along with trade descriptions. Thus, brand recognition is still possible and there is no likelihood of confusion.

b. Section 28(3) of the Australian Legislation, specifically provides that the fact that a person is prevented from using their trademark on tobacco products is not a circumstance that makes it reasonable or appropriate not to register a trademark or to revoke the registration of a trademark. Thus, tobacco related trademarks are granted effective protection 'as is', the said Australian Legislation does not deny or invalidate their registration

c. The Australian legislation does not 'encumber' the use of a tobacco trademark by 'special requirements', and, even if this was the case, as it is necessary measure it is a justifiable encumbrance. (Parliament of Australia (by Jaan Murphy), 2014).

Our initial response to the dispute, suggests that the claimants have a weak case against Australia for the arguments mentioned above. The Australian Plain-Packaging legislation aims to:

- reduce the appeal of tobacco products to consumers;
- increase the effectiveness of health warnings on retail packaging of tobacco products, and
- reduce the ability of retail packaging of tobacco products to mislead consumers about the harmful effects of smoking (Tobacco Plain Packaging Act 2011. No. 148, 2011 as amended. 2011).

Early studies of the effect of the Australian Legislation suggest its relative effectiveness in achieving these goals (Ausralian Government, Department of Health, 2016) (Melanie Wakefield, n.d.). Tobacco industry, in our view, is merely abusing the dispute settlement fora by launching multiple disputes in many fora even where the amount of trade is non-substantive, not to protect their trademarks, as they claim, but to preserve the practice of appealing tobacco packaging which serves in reality an advertising purpose rather than being primarily geared against prevention of confusion among tobacco products. Tobacco industry is trying to manipulate IP Law to get to protect their trading interests. The Financial Times has reported the dispute between the Australian Government and the Tobacco industry. The Financial Times report showed that the vigorous campaign of the tobacco industry against Plain Packaging legislation indicates that the legislation has a positive effect on reducing the use of tobacco products. (The Financial Times , 2016). As one commentator has put it "Plain Packaging is the tobacco industry's worst nightmare as it takes away their last marketing opportunity" (The Financial Times , 2016).

The tension between plain packaging legislation and trademark law, as an example of conflict between private trade interests 'and public policy goals is the focus of this article. We have chosen Trademark Law since it is an area of Intellectual Property Law which emphasises the protection the goodwill and investments of a given business entity as an indirect way to protect consumer choice and deceptive business practices. The Plain-Packaging debate highlights the attempts of holders of Intellectual property rights (IPRs) to further broaden their rights to override other public interest goals such as public health.

We use public interest in this context to refer to the "The good of the general public, as contrasted with the particular individuals or firms involved in a decision…" (Oxford Reference, 2016). While we mean by trading interests: the individual interests of a business entity whether a natural or a legal person.

It is obvious that this tendency of underestimating public policy goals of IP law is evident in the current IP practice. It is posited that this tendency of giving preference to private trade interests finds its roots in the origins of IP law itself and this tendency has been exacerbated by the globalization of IPRs in the WTO system.

We are also aware of the myriad constitutional, business and consumer law issues raised by the Plain-Packaging dispute. Nevertheless, the scope of this Article is focused on the IP issues involved in the said dispute and their tension with public interest goals such as public health.

This article is dived into three sections: the first section uncovers the mercantile roots of IPRs tracing it through today's TRIPS system. The second section briefly discusses the nature of IPRs. The third section then applies the findings of the previous sections to the current problem of the conflict between measures taken to promote public health such as the Plain-Packaging laws and private IP rights. The last section offers concluding remarks.

IPRs as Vehicles for Trade

This section argues that IPR law and policy are primarily driven by trade interests. This has been the case since the inception of the modern IP law in the Western World until the present day since the adoption and implementation of the "Trade Related Aspects of Intellectual Property Rights" (TRIPS Agreement) as part of the WTO package. This section briefly outlines the mercantile origins of IPRs and then sheds some light on the mercantile foundations of IP law in the modern age.

The Evolution of IPRs in Major Anglo- American Jurisdictions

The evolution of modern IP law reflects its mercantile roots. It is, for example, well documented that the patent system was introduced to Great Britain in the Sixteenth Century to encourage foreign innovators to introduce continental technologies to England (Merges, 2006, pp. 118-119).It is argued that the Anglo-American Patent System originated as a mercantilist instrument, or 'strategic international trade' policy in today's terms (Merges, 2006, pp. 118-119).

To illustrate, the requirement to work a patent was a central canon of old patent law. The oldest discovered legislation on patents the "Venetian Patent Act of 1474", required the active exploitation of patents subject to the penalty of cancelation by the Venetian state. Patent laws were issued in industrial countries in a trend that continued into the 19th Century. These patent laws were used to encourage domestic industrialisation (Todorovska, n.d.).

Cornish, Llewellyn and Aplin contend that the patent system was introduced in many countries to attract foreign technology. The United States allowed foreign patent applications long before it granted copyright protection to foreign authors. Compulsory working of patents provisions are now common in most modern IP Laws. The Paris Convention allows the imposition of compulsory licenses as a sanction for failure to work the invention provided some conditions are met (Cornish, 2007, pp. 120-121)(Article 23 of the Egyptian IPR Law allows the grant of compulsory licenses in case of failure to work the invention).

The history of trademarks in the Anglo- American world also shows the mercantile underpinnings of trademark law. The origins of American trademark law are in the English trademark law. In medieval England, trademarks were used to establish that a particular merchant owned a particular product just as cattle brands put on cattle to identify their ownership (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1850). These marks were especially important in case of goods in transit. Later on marks were used by guilds to protect their goodwill and to police guild members who produced defective products. (McKenna, "The Normative Foundations of Trademark Law, 2013, pp. 1850-1851).

As for the historical development of trademarks in the United States, it is documented that the courts did not decree measures to protect trademarks until 1884. The economy was land based and IPRs had little significance. "Intellectual property, despite the name, was not valued for intellectual reasons at all, but because of mercantile and industrial applications" (Friedman, 1985, p. 257). This article argues that today this is still largely the case.

To further make the case of the mercantile roots of trademark law, one must look at the intended functions of trademark law, past and present. It must be mentioned that there is a debate among scholars on the functions of trademark law, in particular, whether it is primarily geared towards protection of the interests of consumers and the public at large through the prevention of deceptive practices or whether it is geared towards the protection of the goodwill of producers (McKenna, "The Normative Foundations of Trademark Law, 2013) (McKenna, A Consumer Decision-Making Theory of Trademark Law, 2012, p. 67). It is beyond the scope of this article to provide a thorough coverage of trademark theories. This work has been done by other commentators and needs not be duplicated. Yet, the major arguments on the functions of trademarks are highlighted.

McKenna in his article "The Normative Foundations of Trademark Law" (McKenna, "The Normative Foundations of Trademark Law, 2013) traces the development of trademark policy through the nineteenth century up until the current century. He argues that in the nineteenth century "Trademark law traditionally was intended only to prevent competitors from dishonestly diverting customers who otherwise would have gone to the senior user of a mark (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1843). In the twentieth century preventing consumer confusion became the dominant theory. McKenna then argues that "the real shift in trademark policy is not from consumer-protection to producer protection but rather the real shift is in the function of a trademark which has dramatically changed from a mere vehicle to promote consumer choice into a business asset". (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1843).

In the modern age, the business value of trademarks has increased sharply. This change has led to the expansion of the rights of trademark owners in the present day. Lemley and Dogan point out that trademarks are doctrinally justified by the desire to prevent a business owner from "free-riding" on another business' goodwill. Economically, trademarks are justified by reducing consumer search costs and protecting goodwill by protecting the investment put into advertising and product quality (Lemley, 2005, p. 461).

Furthermore, Lemley and Dogan correctly point out that trademarks are becoming "products" themselves, which might have severe consequences on the policy goals of trademark law:

> Trademark law seeks to promote, rather than hinder, truthful competition in markets for products sought by consumers; if a trademark is the product, then giving one party exclusive rights over it runs in tension with the law's pro-competitive goals, frequently without any deception-related justification (Lemley, 2005)

It is argued that the mercantile origins of trademark law are shaping the contemporary doctrine. To illustrate, Bently states that:

> It is a common criticism of contemporary trademarks law … that legislatures and judges have expanded the rights of trademark owners too far, at the expense of the needs or interests of other traders and the public interest. More specifically, it is argued that trademarks are granted too readily, that the rights granted to trademark owners are too strong, that the situations in which trademarks rights are capable of being invalidated or revoked are too limited, and that the grounds on which a defendant can escape liability are too narrowly formulated or restrictively interpreted. For many of these commentators, the criticism is normative: positive law now affords trademarks owners broader and stronger rights than can be justified by reference to principle or policy (Bently, 2008, p. 1)

Nevertheless, many commentators have acknowledged the public interest component of IP law including trademark law (For instance, see: May, C. and Sell, S., 'Forgetting History is Not an Option! Intellectual Property, Public Policy and Economic Development in Context', Presented at Intellectual Property Rights for Business and Society Conference, Birkbeck College, University of London, Friday 15 September 2006<http://www.dime-eu.org/files/active/0/MaySell.pdf. Accessed 15 January2016).

The High Court of Australia in the Tobacco- Plain Packaging decision summarized this position:

> Registered trademarks, designs, patents and copyright in works and other subject matter give rise to, or constitute, exclusive rights which are property …. They are all rights which are created by statute in order to serve public purposes (emphasis added). (2012, p. 16)

However, it is argued that trade interests have had strong influence on modern IP law including trademark law, especially in modern era of TRIPS. Trade interests have diverted IP law and policy from its original goal of serving public interest into the narrow goal of predominantly serving private interests.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

In the pre-WTO era, the Paris and the Berne Conventions afforded piecemeal protection to IP rights holders but they lacked an effective enforcement mechanism. When concluding the WTO Agreements, Industrial nations realized the increasing importance of IPRs in international trade, thus they were keen to include the protection of IPRs in the WTO package. The inclusion of IPRs in the WTO package entails the use of the WTO enforcement mechanism (the WTO Dispute Settlement Body) to enforce IPRs (GuTowsKi, 1999, pp. 714-715). The TRIPS Agreement also aimed at international harmonisation of IP rules by establishing minimum standards of protection of IPRs.

It is clear that the inclusion of TRIPS in the single undertaking was in response to the trading interests of developed countries. Higher standards of IP protection and the adoption of enforcement mechanisms were traded for enhanced market access for textiles and agricultural products originating from developing countries to developed countries (Fisher III, 1999).

The Max Planck IP Research Centre in Munich, Germany has pointed out that the reason of the proliferation of IP heightened standards of protection is the inclusion of these standards in bilateral and multilateral agreements (Hestermeyer, 2013). In the case of Egypt, for instance, the EU-Egypt Association Agreement (EU-Egypt Association Agreement, 2001) has prescribed higher standards of IP protection than those provided by TRIPS (TRIPS-PLUS) standards.

Hestermeyer traces the evolution of "trade related aspects" of IPRs in the world trading system. He points out that the GATT 1947 Agreement only mentioned IP by referring to the right to restrict trade in goods to protect IP (Hestermeyer, 2013). Further on, the Uruguay Round negotiations witnessed a North- South divide over the inclusion of "trade related aspects" of IP in the negotiating agenda. The term "trade-related aspects" is a fluid concept to the detriment of developing countries. The end result was a document stipulating global IP norms that is now commonly regarded as the minimum standard of IP Protection, namely the "TRIPS Agreement" (Hestermeyer, 2013). It is noted that what was introduced as a mere "trade-related aspects" discussion of IP turned out into a global minimum standards treaty of IPRs which is binding on all WTO members and subject to national and international enforcement measures. This trade-focused approach to IPRs produced unbalanced results which ignored other important public goals of IPRs and overstepped the main rationale of enacting IP laws as tools for public policy. IPRs in the new trading system are treated as a commodity themselves rather than vehicles for promoting public policy goals.

The TRIPS Agreement dealt, in general, with public policy goals through providing for the so-called "TRIPS Flexibilities". This approach dealt with public policy goals of the IP system as side goals of the IP system, trade was the major goal. This approach is heavily criticised; Bhagwati contends that "Intellectual property protection is a matter of collecting royalties, and including them in a trade institution such as the WTO seriously distorted what the organisation should accomplish." (Bhagwati, 2004, p. 52).

Stiglitz points out to the failure of these flexibilities, in practice, to accomplish their intended goals:

> Defenders of TRIPS claim that it contained "flexibilities" to address these concern the right to issue compulsory licenses. But the drug companies intended to make it difficult for developing companies to issue these compulsory licenses, and subsequent bilateral trade agreements have made it even more difficult. Had the intention been to retain access to lifesaving generic medicines for developing countries, TRIPS would have provided for an automatic right to issue compulsory licenses for expensive, life-saving medicines. The United States has put enormous pressure on countries that have threatened to issue compulsory licenses not to do so, and few have. The issue is not only of concern to developing countries. In the United States, with nearly 47 million individuals not having health insurance and with health insurance often not paying for newer drugs, the high prices also reduce access to life saving medicines (Stiglitz, 2008, p. n.22)

The right of IP producers to be justly rewarded for their creation is not being disputed. However, one must be mindful that IPRs are primarily granted to achieve general public goods; they are the "carrots" given to promote innovation and stimulate trade. It is noted that innovation is not necessarily dependent on IPRs (many innovations occurred before the development of the modern IP system), but they are important for trade. Stiglitz concludes:

> Intellectual property rights are important, but the importance of IPR has been exaggerated, as they form only one part of our innovation system. IPR should be seen as part of a portfolio of instruments. We need to strengthen the other elements of this portfolio and redesign our intellectual property regime to increase its benefits and reduce its costs. Doing so will increase the efficiency of our economy—and most likely even increase the pace of innovation. (Stiglitz, 2008, p. n.22)

The main focus of IPRs nowadays is linked to stimulating trade rather than stimulating innovation. The trading interests of nations are shaping the current IP doctrine. This is obvious from the proliferation of IP norms in multilateral, regional and bilateral treaties:

> Underpinning the WTO and the now almost 300 regional or bilateral trade agreements is the fact that the bulk of the trade rules agreed upon, implemented and enforced through a formal, mandatory dispute resolution process are primarily related to removing or eliminating restrictions at the border on a transparent and non discriminatory basis. At the core of existing international trade agreements, therefore, is the fact that trade rules are primarily directed at what governments should not do with respect to goods, services, technology and ideas that cross borders. **The introduction of intellectual property into this mix for the first time in the mid-1990s — both in the North American Free Trade Agreement (NAFTA) and almost simultaneously as a trade-related intellectual property chapter in the multilateral Uruguay Round — was thus revolutionary and game-changing. These two agreements set out in detail the intellectual property standards and enforcement mechanisms that member governments had to adopt domestically as legal obligations and component elements of the overall trade agreement.** (emphasis added). Not only was an entire regime of domestic, "inside-the-border" intellectual property rights-related rules, regulations and enforcement procedures introduced into a major trade agreement for the first time, **but also these standards and enforcement provisions were to be harmonised at a high level, irrespective of the signing member's level of economic, social or cultural development, and of their technical or institutional capacity to implement their obligations** (emphasis added) (CURTIS, 2012)

In concluding this section, it is posited that the mercantile origins of the modern IP regime was strengthened within the framework of the TRIPS Agreement and the "TRIPS- Plus" system found in in many agreements is one of the main reasons for the confusion towards formulating a conclusive IP theory. The classic justification of an IP system is achieving public policy goals in the national interest. However, the current IP doctrine and practice tilt towards the goal of serving private trading rights.

IP as "Property": The Impact on the Plain-Packaging Dispute

The nature of IPRs is far from settled. To date there is no clear theory to explain the nature of IPRs (for an overview of IPR theories see (Fischer W, 1999). This is further reflected in the debate of whether "IPRs" are considered property rights as such. To elaborate, there is a heated debate on whether IPRs are proper property rights and whether they involve negative or positive rights. This tension is obvious in the Tobacco Plain-Packaging dispute, where the idea of a positive right in a trademark has been advocated (Voon, 2011). Prof. Davidson, to the contrary, casts doubts on the existence of the right to use a trademark to achieve certain objectives and goes on to show how difficult it is to assert the parameters of this right:

> If there is an implied right to use trademarks, what, precisely, is the nature and extent of that

> right? Does the right to use mean that the goods or services in relation to which the trademark is used can be offered for sale anywhere, anytime, to anyone? Would alcohol licensing provisions regulating the age of patrons who may enter the premises where branded alcohol is served and restrictions on opening hours be contrary to the right? (Davidson, 2012, p. 7)

The Panel in EC- *Geographical Indications* held that the right to use a trademark may be provided for in national law, but that the TRIPS Agreement does not oblige WTO Members to provide rights holders with a right to use their marks (2005, p. 7.611).

It is posited that the contention that there is a positive right to use a trademark is a modern claim that arose due to the increase of the monetary and trade value of trademarks. It is not intended to get into the positive/negative right to a trademark debate, but the difference between traditional property rights and "IPRs" is briefly highlighted. The result of this comparison shall illustrate the claim that modern IPRs were created as vehicles of trade and this is a primary reason for the difficulty in formulating a conclusive theory of the nature of IPRs.

Property rights traditionally involve exclusive rights over a tangible asset enforceable against third parties (in rem). Furthermore, unlike tangible property such as land, it is very difficult to determine the boundaries of IP, namely it is very difficult, in the context of IP to determine, what your property is, what somebody else's property is and what is in the public domain. This may result in IP disputes that have a negative effect on innovation (Stiglitz, 2008, p. 711).

In addition, the possession of a tangible property is exclusive by nature. If you occupy a car, itis yours, nobody else can use it the same time. However, IPRs are different, if someone possesses information and shares it with other people, he or she would not be deprived of that knowledge. In other words, the consumption and possession of ideas are "non-rivalrous". Thus, the traditional economic justification of tangible property does not fit IP (Merges, 2006, p. 2).

It is argued that the fact that IPRs are generally treated as property despite the fact that the possession and consumption of ideas are "non-rivalrous" is a manifestation of the fact that the IPR system is largely driven by trade interests. If the possession and consumption of ideas are "non-rivalrous", yet the financial benefits driven from the use of ideas can be to a large extent rivalrous. The first person to get and exploit a patent is likely to reap huge monopoly profits which cannot be reaped by other competitors. It is argued that these monopoly profits are the "carrots" necessary to promote innovation. The dominant IP theory, the utilitarian theory, asserts that IP rights are granted as a tool of public policy to stimulate innovation. However, the link between the grant of IPRs and innovation is not well established (Stiglitz, 2008, p. 711).

In the context of trademarks, MCKenna contends in the "Normative Foundations of Trademark Law" that in contrast to the traditionally held view that trademark law was consumer centred, it has never focused primarily on consumer's interests (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1841). McKenna further contends that:

> … trademark rights were protected as property, but it was not the words or the symbols themselves that were protected; those were merely representations of the property. Property rights arose out of particular uses of words or symbols in connection with a business, which was the ultimate object of protection (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1855)

Shoemaker clearly stated that " it is the business which is to be protected, and not the trade-mark as a mere collection of words or symbols (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1865)

In *Hanover Star Milling* (Hanover Star Milling Co. v. Metcalf), the Court quoted Vice Chancellor Wood in *Ainsworth v. Walmsley* (Ainsworth v. Walmsley), an 1866 English decision:

> This court has taken upon itself to protect a man in the use of a certain trade-mark as applied to a particular description of article. He has no property in that mark per se, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with

> reference to his trade. (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1889)

Francis Upton, in his 1860 treatise, asserts that the whole purpose of adopting a trademark was to "enable [the merchant] to secure such profits as result from a reputation for superior skill, industry or enterprise" (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1859). McKenna then explains that courts in the US, backed by Congress, have significantly expanded trademark rights in the twentieth Century. McKenna, asserting his position that trademark law was always property-based, further contends that:

> Modern doctrinal innovations, however, do reflect a fundamentally different view of the property trademark law seeks to protect. Early cases sought to protect producers from illegitimate diversions of customers they had worked to attract. Modern trademark law, by contrast, seeks to protect brands, construed broadly" (emphasis added) (McKenna, "The Normative Foundations of Trademark Law, 2013, p. 1896)

It is noted that the TRIPS framework being allegedly concerned with "trade-related aspects" of IP, has reflected the modern trends of giving preference to the private rights of IP holders. The doctrine of "well-known trademarks" is an illustration of the phenomenon. The TRIPS Agreement has extended the protection afforded to well-known trademarks in Article 6bis of the Paris Convention to non-similar goods and services, provided the trademark is registered and the use of the trademark as such may indicate a connection between the products at issue and the owner of the well-known trademark where the interests of the owner of the Well-known Trademark are likely to be damaged by such use (TRIPS Article 16; Article 68 of the Egyptian IP Law). This is a manifestation of the pro-trade stance in the TRIPS Agreement.

A further illustration is the right of a trademark owner, in TRIPS, to dispose of his or her trademark without the enterprise (TRIPS Article 21). This is an expansion of the rights of trademark holders. The Paris Convention did not grant such a right (Article 6 Quarter) and so did many national laws. The Egyptian law, before the adoption of TRIPS, expressly prohibited the transfer of a trademark without the enterprise using the trademark to distinguish its products (Article 18 of Law No.57 of 1939 on Trademarks). The current Egyptian IP Law, which is based on TRIPS, abolished this prohibition on the transfer of the ownership of a trademark without the enterprise (Article 87 of Egyptian IP Law).

Finally, a trademark must be used "in trade" to be protected. The Egyptian law makes the acquisition of trademark rights primarily based on use (Article 65 of Egyptian IP Law) (al-Qulioubi, 2009, pp. 522-525) (Lotfi, 2002, pp. 218-220). In fact, under Egyptian Law, a registered trademark may be cancelled in case of non-use for five consecutive years without a just cause (Article 91 of the Egyptian IP Law). The requirement of "use in commerce" reflects the nature and raison d'être of trademark rights: they are primarily seen as vehicles of trade, once they seize to perform this function then they cannot be legally protected. A person cannot monopolize a word or symbol without continued investment in trade.

Nevertheless, if trademarks are primarily "vehicles of trade", this does not mean that trademark owner's rights are absolute. If a state is free to cancel a trademark for non-use, this indicates that the rights of trademark owners, like all IPRs, are qualified rights. *In Mogul S.S. Co. v. McGregor, Gow & Co (Mogul S.S. Co.* v. McGregor, Gow & Co), the Court noted that "the right of the plaintiffs to trade is not an absolute but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition." (p. 625)

In addition, citing Article 17 of TRIPS, the Panel in EC – *Trademarks and Geographical Indications* (DS174) held that the interests of a trademark owner must be something different from merely the full enjoyment of the legal rights conferred by a trademark (2005, p. 7.662).

The Panel said that : "Given that Article 17 creates an exception to the rights conferred by a trademark, the "legitimate interests" of the trademark owner must be something different from full enjoyment of those legal rights" (2005, p. 7.662). The Panel further clarified that:

> The function of trademarks can be understood by reference to Article 15.1 as distinguishing

> goods and services of undertakings in the course of trade. Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorised undertakings. Taking account of that legitimate interest will also take account of the trademark owner's interest in the economic value of its mark arising from the reputation that it enjoys and the quality that it denotes (2005, p. 7.664)

In a study by the Max Planck Institute (2011), it was asserted that " There is no doubt, however, that full recognition of the private and public interests affected by the acquisition and use of distinctive signs is of crucial importance for the correct understanding and application of trademark law"

In our view, the modern problems faced by trademark law, as reflected in the Tobacco Plain-Packing dispute, are primarily caused by the trade-focus of current IP law and policy. Ideally, trademarks, as well as other forms of IPRs, are to be afforded protection in the first place to further public interest. In conclusion, it is argued that most developed countries treat trade-interests as the main interests to be promoted in the context of IP. The function of IP is far more expansive than collecting royalties from IPRs. It is time that trade interests are subjugated to the right of countries to regulate in the public interest.

Conclusion

The influence of trade interests on shaping IP policy and doctrine, past and present, is evident. The TRIPS framework with its focus on "trade aspects" of IPRs is the most obvious manifestation of this approach. It is suggested that a trade-driven IP system is not the most optimal system to promote innovation, disseminating knowledge or achieving other public interest goals consumer protection, bio-diversity, food security to name just a few. Rather than debating whether IP rights are "negative" or positive" rights and are proper "property rights" or not, IP Law and policy should conform to the major policy goals for granting such IPRs which is achieving public interest.

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LIMITATIONS AND EXPECTATIONS UNDER COPYRIGHT LAW IN RELATION TO LIBRARIES AND ARCHIVES: BOTSWANA COPYRIGHT AND NEIGHBOURING RIGHTS ACT 2000

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Abstract

This article provides an analysis of PART III Section 16 (a) (i) of the Botswana Copyright and Neighbouring Rights Act 2000, with a focus on Botswana's treaty obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). It identifies several factors within the stated clause, which make the library exception uncertain and unclear, with the possibility of making the exceptions ineffective in protecting the economic interests of copyright owners. The study concludes that although the Botswana Copyright and Neighbouring Rights Act seems to conform to the treaty obligations and there is a strong adherence to fair dealing, the clause in question is, uncertain, unclear and ambiguous, and needs to be revised. This article contends that language is a very important aspect and needs due diligence and strict adherence during law and policy-making for it has the effect of shaping the exact services that a library will offer.

Key words

Botswana Copyright and Neighbouring Rights Act 2000; PART III Section 16 (a) (i); exceptions; Berne Convention; TRIPs agreement

Introduction

Copyright is a bundle of exclusive rights granted to the owner of a work for a statutorily limited fixed term (Prashant I, 2010, p.1). "The immediate effect of copyright law is to secure a fair return for an author's creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good". This is to say Copyright law balances the interest of authors and other right holders, on the one hand, and the interest of the public. The interest of the author is his exclusive right over his work to which he economically exploit whereas such exclusive right is granted to him so that society is benefited by receiving the information and knowledge, apart from economic exploitation the author also has moral rights which protect his reputation and allows the author to: (1) be identified as the creator of his work, (2) object to his work being used in a derogatory way and (3) not be attributed as the creator of a work he did not create.

The British Imperial Copyright Act 1911 was made operable in Botswana by Order in Council. When Britain enacted the Copyright Act 1956 which was applicable in Botswana in 1965 by Statutory Instrument.[1] When Botswana became independent in 1966, the British Copyright Act 1956 remained in force (Kiggundu 2009, p.5). With time, the Act proved to be outdated and not in line with the emerging copyright issues especially due to rapid technological advances.

Botswana is a signatory to the international Treaties, Conventions and Agreements; TRIPS Agreement came into force the 1st of January 1995, developing countries had a transition period of five years (with effect from the 1st of January, 1995), i.e. until the 1st of January, 2000 to apply the provisions of the agreement.

Botswana signed the Agreement in 1998. She is also a party to the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), she acceded to this Convention in April 15, 1998. Botswana is also a member of the African Regional Intellectual Property Organisation (ARIPO). Acceding to these treaties means that Botswana is obligated to adhere to the international norms and standards laid out in the treaties and agreements.

The three-step test has become the cornerstone for almost all exceptions to all intellectual property rights at the international level. The three-step test was introduced in 1967 in Article 9(2) of the Berne Convention as a general criterion for determining under which circumstances the right of reproduction may be curtailed in national law. Acceding to the Berne Convention means a great deal for the shape of copyright law in Botswana. Joining Berne meant that Botswana must reform its laws to conform to the requirements of the agreement. For example, Berne prohibits the requirement of formalities as a precondition to copyright protection (Berne Convention, Art. 5(2)). Therefore, member countries may not impose requirements of copyright notices or registration as a means to obtaining protection (Kenneth C, 2008). The Berne Convention does not mention libraries or archives among the allowable exceptions. Therefore, the authority under Berne to adopt a library exception is founded on Article 9(2).

The "three-step test," permits countries to enact statutory exceptions, but only if they are within the bounds of the three criteria: (1) certain special cases; (2) no conflict with normal exploitation of the work; and (3) cannot unreasonably prejudice the author's interests. Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs agreement) version embodies language that is nearly identical to Berne, but with some important differences. Most important for this report is that Berne Article 9(2) addresses only exceptions to the reproduction right. TRIPs Article 13 permits exceptions to any of the owner's rights. The TRIPs language is also more demanding. Berne states the three-step test as a proviso to the exceptions. TRIPs declares the test in mandatory terms, requiring how countries "shall confine" their statutory provisions. (Kenneth C, 2008) further states that Berne refers to the interests of "authors"; TRIPs references the interests of "right holders." The obligation to these treaties gave birth to the current instrument Copyright and Neighbouring Rights Act 2000.

Copyright exceptions are one of the problematic areas in the Botswana Copyright and Neighbouring Rights Act 2000 because many provisions in this area are unclear and uncertain. In this instrument exceptions are covered in PART III Section 12-22, which narrates on different uses that will not constitute an infringement[2] of copyright, including private reproduction for personal purposes, reproduction and adaptation of computer programmes, reprographic reproduction by libraries and archives to mention but a few. These 'exceptions to exclusive rights ' were inserted as safeguards to ensure that the operation of copyright law did not yield outcomes that encumbered the very objective of copyright itself – the widest dissemination of knowledge (Prashant I, 2010, p.2).

This article will not address all copyright exceptions, it specifically seeks to analyse Section 16 (a) (i) of the Act in consideration of recent technological advancements, and with an eye on Botswana's treaty obligations under the Berne Convention and the TRIPs agreement. The Act states:

> Any library or archive whose activities do not serve direct or indirect gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by reprographic reproduction- where the work reproduced is a published article, other short work or short extract of a work, and where the purpose of the reproduction is to satisfy the request of a person, provided that- the library or archive is satisfied that the copy will be used solely for the purposes of study, scholarship or private research.

To lay a foundation for this discussion, it is useful to first understand the background history of Botswana public libraries. It should be noted that the full history and roles of libraries in Botswana is beyond the scope of this study, however a brief background is drawn to help relate and interpret the library clause defined in this study so that we may end up with a library clause for users, as opposed to a library clause for lawyers. It should also be noted that the background was extensively drawn from a paper written by Kgomotso Radijeng (2013) titled The Role of public libraries in the attainment of Botswana's vision 2016.

Secondly the study will introduce libraries and copyright. And finally discuss the copyright exception in the Botswana copyright Act which is the core of this article, and relates it to the international framework, before drawing of conclusions and proposals.

Libraries and Library Services in Botswana-Background

Botswana is a very small country in terms of population density; there are about 2,100,000 people in an area of 581,730 square kilometres (Statistics Botswana, 2011). The country is a former British protectorate which gained independence in 1966. Government has taken on a policy stand to have children sent to school from primary to junior secondary without a break, and made it compulsory for all children to be educated (Revised Education Policy); most Batswana have gone through at least primary school education. The establishment of public libraries is a nearly as old a development as the independence of Botswana. The Botswana National Library Service was established in September 1967 by Act of Parliament (National Library Service Act No 29, 1967). The first public library and was officially opened by the first president of the Republic of Botswana the late Sir Seretse Khama on 8 April 1968 (Ministry of Youth Sport and Culture website).

In the past few years a lot of changes have been taking place in public libraries which have changed the perception of library customers (actual and potential) towards public libraries. First public libraries have become more visible and attractive; there are many new library buildings that have been commissioned and completed. Secondly, through the Botswana Sesigo Project (2009 - 2013), several libraries have been equipped with computers and internet connection that are available to the public for free. Further, libraries have introduced programs aimed at addressing their customers' needs and therefore the customers see value in visiting the libraries.

Libraries and information centres are central to the implementation copyright in the sense that the primary role of libraries is to collect, preserve, organise and disseminate information. In the past, libraries dealt with print information so this role was fairly straight forward and copyright responsibility was not complex to discharge. However, this has become more challenging with the advent of computer and related technology. This challenge emanates from the nature in which digital information is transmitted from one point to the other. In the print environment the library is the direct link between the right holder and the user through the first sale doctrine and fair use while in the electronic environment the library is more of a conduit (Radijeng K.F, p.1).

Section 16 of the Act provides a copyright exception for libraries. The provision states that a non-profit library may without the authorisation of the author or other owner of copyright make a single copy of the work by reprographic reproduction on request by a person for the purposes of study, scholarship or private research. Paragraph 'b' of the same provision provides for reproduction for archival purposes. The Act does not specify the conditions under which such copying is to be made in respect of digital copies. This can pose a huge problem for libraries.

There is a need for specific provisions on electronic reproduction that will define the copyright exceptions for libraries in the digital environment including the role that licensing agreements play in fair use. The legislation must balance the rights of copyright holders and users of information and allow for libraries to serve users needs freely. Failure for the law to make it possible for information to be disseminated to different members of society equally amounts to discrimination. Legislators should look at the different members of society and make information accessible to them equally. For example a person with a hearing disability should not be denied access to information simply because the information is produced in a format that they cannot use. Rao, (2003) says that areas that need to be addressed by the law are: a ban on licensing agreements that attempt to override statutory exceptions, allow libraries to have more privileges to be able to transcribe materials to suit users needs (e.g. users with disabilities), electronic archiving and access of such materials, electronic distribution of e-content for distance learning, and clarity on liability for abuse of digital information. Knowledge is of not much value if it cannot be shared. The whole point of creating knowledge in the first place is to share it with others and libraries play a critical role in the sharing process. The original intention of copyright law was to promote research and the sharing of information and it is imperative for sustainable development that this intention continues. With that brief background in mind this article sought to analyse the library exception in the Botswana copyright Act considering the international treaties acceded to.

Libraries and Copyright

Networks of libraries and information services are important channels of communication in society. They are gateways to the universe of knowledge accumulated over centuries and recorded until recently principally on print media. Libraries have been instrumental in all aspects of development in society by providing continual information back-up services to sustain economic growth of nations, emancipation of the masses and their education (Hauroo, P. 2009, p.1). Without the provision of library services and materials to support education, research and the supply of information for the improvement of trade, social and economic progress would not have been on such scale.

Copyright exceptions applicable to libraries have been an important part of the world copyright laws at least since 1956, when the English Parliament revised the British copyright law and enacted the first copyright exception specifically for libraries[3.] As copyright law took on an increasingly international character, and as lawmakers looked to the laws of other countries for statutes to emulate, library exceptions became prevalent in many parts of the world through the last few decades. The growth of libraries, the expansion of computer technology, and the proliferation of library services have added to the demand for exceptions under copyright law to permit libraries to make copies of many works for research, preservation, and other purposes (Kenneth, 2008. p.14). For these reasons, library provisions have become relatively common in copyright law, and they have become diverse and complex as countries have grappled with the context of library services as well as the changing expectations of copyright owners and publishers.

It is true that the copyright owner or creator has the right of commercial exploitation of his work as he is the creator of his idea. This right of economic exploitation is one of the incentives for people to come up with the new ideas. In the absence of this incentive no one would be motivated to come up with new ideas or expressions. However, the main objective to give protection to the new work was public interest and not the individual interest. State grants this protection with an intention that more and more creative works would come into the society, which would result in development (Kishor, 2011, p.3). Just like the creators have access to other materials in creating their work, new researchers should equally have access to ensure progress and continuity in the pursuit of new knowledge and for the advancement of science. Scholarly research and communication are impaired if all copyrighted materials are inaccessible or are exclusively available through purchase of the rights for use. For developing countries, the case may be even more catastrophic as lack of funds dramatically limits their acquisition programmes. The object of the limitation is to disseminate knowledge to pursue greater public interest objective and therefore the limitation has been granted to public funded and non-profitable library and not to commercial library. However, it may lead to a debatable issue as well.

It is for the above reasons that the international regime provides countries with some flexibility in creating exceptions and limitations to their national copyright laws for libraries and archives. Even though the international regime has such provisions it is argued here that, given the fundamentally uncertain requirements of the "three-step test", and taking into account the role that it was originally designed to fulfill, these claims are generally little more than misleading wishful-thinking. The article argues for the definitions and explanations of certain terminologies used in the clause but not adequately defined nor explained in the instrument nor the Copyright panel, in the absence of such definitions, it allows for a freedom of importation of the definition from other international enactments or other mediums, in this case it renders the terms uncertain and ambiguous. The following were noted as the uncertainties of the three step test which the author believes may misinform and mislead the creation of the national Copyright laws including the instrument in question (Botswana Copyright and Neighbouring Rights Act 2000).

1.1. "Certain special cases"

Professor Sam Ricketson in his seminal book on the Berne Convention is of the opinion that "special" means that the exception must have a purpose and be justified by public policy. Indeed, if the meaning of "special" as used in Article 13 of TRIPS and Article 9(2) of the Berne Convention is that there should be a sound policy justification; few countries will act in a purely arbitrary way (Daniel JG, (2005). Any exception to copyright is arguably "special" because any exception short of a complete repeal of the Copyright Act would arguably be "limited in its field of application." Although the copyright panel marked in its interpretation that the term "certain" related to legal certainty, whereas "special" was supposed to mean narrow in a qualitative as well as a quantitative sense, i.e. that it must have "a narrow scope as well as an exceptional or distinctive objective", it is still arguably debatable as the term "narrow" relating to "special" is uncertain and ambiguous.

The question is how narrow is narrow enough? This article argues that it remains impossible to justify the degree of "narrowness". For copyright law, the panel's interpretation of the word "certain" has triggered an animated debate about the compatibility of the fair use clause in Sec. 17 US Copyright Act with the three-step test. It is believed that the test requires all the three conditions to be satisfied for exemption of usage to be granted, this means if one of the steps cannot be passed the rights owner must be granted the right to prohibit the usage concerned. With the brief argument already presented above and in relation to the library exception, could this step (certain special cases) be passed? "Research and private study is a notoriously difficult purpose to define (thereby likely to fail the first step of the three step test". One might argue that any purpose-specific limitation complies with this requirement almost by definition, making the first step basically unnecessary. If research and private study can be difficult to define hence there is a library exception of research and private study, we might as well conclude this to be a two-step rather than three. "It is, however, surely no more difficult to define "research and private study" than it is, for example, to define such concepts as "private use" or "criticism or review" (Griffiths, 2010).

No conflict with a normal exploitation of the work

What is the meaning of "exploitation" in the context of this second step of the test? It seems fairly straightforward: any use of the work by which the copyright owner tries to extract or maximize the value of her right. Normal is more troublesome. Does it refer to what is simply common or does it refer to a normative standard (Daniel, 2005). During the last substantive revision of the Berne Convention in Stockholm in 1968, the concept was clearly used to refer to "all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance.[4] If exploitation can be clearly understood in this clause, the question will be what is considered to be normal? What about the new forms and emerging business models which have not thus far been common or normal in an empirical sense? One issue of major importance in the copyright context concerns the question whether in order to measure the normal exploitation of "a work" one needs to take into account the options for deriving revenue from the bulk of rights attached to a work in its entirety? Or whether each exclusive right conferred by copyright must be evaluated as such, without any difference between rights of major or minor importance in view of the exploitation possibilities in their entirety (Kur, 2009).

As Professor Goldstein noted, the purpose of the second step is to "fortify authors' interests in their accustomed markets against local legislative inroads." It thus seems that the condition is normative in nature: an exception is not allowed if it covers any form of exploitation which has, or is likely to acquire, considerable importance. In other words, if the exception is used to limit a commercially significant market or, a fortiori, to enter into competition with the copyright holder, the exception is prohibited.

We can, therefore, agree with the WTO panel on this point. It concluded as follows: It appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.

Do not unreasonably prejudice legitimate interests of authors/right holders

The third step is perhaps the most difficult. As the study earlier argued for more adequate definitions and explanations the first question one would ask is what an "unreasonable prejudice is" and what are "legitimate interests"? This step in question asks whether exceptions and limitations "unreasonably prejudice the legitimate interests of the author". Upon reading this clause this study concludes that this means not all interests of right holders are relevant because the step vouches only for legitimate interests. What does legitimacy depend on? The step continues to present another uncertainty bringing another term of unreasonable prejudices, thus meaning not each and every prejudice to legitimate interests is relevant. Only unreasonable prejudices are inacceptable. The third step, therefore, offers several filters that transform it into a refined proportionality test: the legitimacy of the interests invoked by authors and right holders are to be weighed against the reasons justifying the use privilege (Christophe G, Daniel J. G, and Senftleben M, 2014).

Botswana Copyright and Neighbouring Rights Act 2000 - The library Exception

Taking a closer look in this Act specifically Section 16 (a) (i) the author noted that the following applies (1) Any library or archive, activities that do not serve direct or indirect gain (2) making a single copy of the work by reprographic reproduction (3) other short work or short extract of a work (5)the reproduction is to satisfy the request of a person provided that the library or archive is satisfied that the copy will be used solely for the purposes of study, scholarship or private research.

Direct or indirect gain

This study noted that there is no clear meaning or explanation of what a "direct or indirect gain means". The clause further states that any library or archive whose activities do not serve *direct or indirect* gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by reprographic reproduction, there is no clear cut of which gain is referred to whether it's economic gain, social gain or others means, what qualifies direct or indirect gain? It is noted that even though there is this provision there has not been any exclusion that prevents for-profit libraries and those operated by business from taking the benefit of the libraries and archives provisions. It is also noted that the clause mentions of a single copy, there is no clear understanding of the timeframe in relation to a single copy, whether a single copy in a day, a month etc. or if a person does eight (8) different copies from different publications at a given time whether its regarded as a single copy or multiple copies. The same clause however does not define reprography as comprehensively as it is understood today as a process of duplicating a work through printing, photocopying, scanning, burning on CDs or DVDs and electronic storage for dissemination or distribution over networks, it is only limited to physical copying.

Short extract of a work

With reference to short extract of a work, there is no judicial decision analysing the meaning of the phrase 'short extract of a work' and also no definition of short but only 'work' is defined. The question arises of what amount can be considered as 'short extract of a work', it is now subjective, for short can be defined in different ways, for instance short maybe defined in terms of need, what is short to one person according to their needs may not be short to the next, short needs to be specifically defined in the Act. As it is now it's difficult to know what amount of reproduction should be considered as unreasonable prejudice to the legitimate interest of the copyright owners or as conflicting with a normal exploitation of the copyright work if short extract cannot be determined and has not been explained. (Supasiripongchai, 2014, p. 42) concludes that as a result of this unclear exception and the resultant lack of clear limitations, copyright materials can be freely reproduced and distributed without the appropriate limitations.

Satisfaction

The other ambiguity noted in the Act is where it relates that reproduction is to *satisfy* the request of a person, the question is when does satisfaction officially occur or begin? When the librarians accede to a request or when a copy is made or it's according to the need fulfilment of the person requesting a copy? According to the law what really defines a person allowed to make copies? Does it mean a physical person? In a case of an institution, is it a legal person of that institution or even private persons that can take advantage of this provision? Satisfaction in this clause is general and can be objectively biased which may constitute infringement if its personally defined, even though the clause states that *provided that the library or archive is satisfied that the copy will be used solely for the purposes of study, scholarship or private research,* that does not solve the ambiguity of satisfaction in this case, rather the clause continues to use satisfaction now in relation to the library, the former argument on satisfaction still stands in this section, this study suggests that in this clause there should be inclusion of "proof of users purpose" in relation to research and scholarship. Cambridge English Dictionary defines to satisfy as to please someone by giving the person something that is wanted or needed or to make someone feel pleased because a particular desired result has happened. From the definition it's evident that the word *'satisfy'* unless explained in the act it's vague and ambiguous and can be personally defined and interpreted which might go beyond the scope of limitations and exceptions. When the clause is read harmoniously with other provisions of the Copyright Act, it is apparent that many like private citizens, libraries retain their "first sale"[5] and "fair dealing" rights[6] which would permit more than mere archival copying. This reading supports a conclusion that the copies that are made by virtue of PART II Section 16(a)(i) may be used for the full range of the library's activities.

Moral rights

Although the moral right of the author to be identified as the creator of the work under Article 6bis of the Berne Convention is specifically recognised and implemented in section 8 of the Botswana Copyright and Neighbouring Rights Act 2000, educational exceptions especially in the list of permitted acts in section 16 do not support this right of the author because they do not require that such reproduction of the work under the exceptions must be accompanied by a sufficient acknowledgement of the author and the work. For example, the exception for research and study in section 16 (a) (i) allows users to reproduce copyright works for non-commercial research and study, but without requiring sufficient acknowledgment of the author. The lack of a condition of sufficient acknowledgement in the clause under study indicates that the current provisions do not respond to the nature of the use of research materials. The condition of sufficient acknowledgement is based on the fact that research and educational materials normally owe their existence to what has been researched before; indeed the authors of these types of works often use some idea or knowledge from the previous works in order to build or create a new one. The condition of sufficient acknowledgement therefore seems to be necessary so that the person receiving a copy of the work may know the original author.

Even though Botswana Copyright and Neighbouring Rights Act 2000 did not explicitly adopt the three step test, it is evident that the exceptions provided in the Act for the Copyrighted work for library complies with the International treaty obligation despite the arguments of the paper on the uncerternity of the treaty provision. This therefore means that even though there is evidence of adherence to the international norms the Botswana Act is still questionable as it adopted the limitations and exceptions guide from an instrument that is also questionable.

Other Cases

To show similar uncertainty and ambiguity of language this study draws from the WIPO Library Exception study about Copyright library exception uncertainty from Canada and Germany respectively.

Section 30.1 of the Copyright Act of Canada permits libraries to make copies of works under various circumstances for purposes of preserving or maintaining library collections. Among the provisions of that statute is authorisation for the library to make a copy "in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable." Librarians and lawyers have divergent views on the meaning of the language and about whether certain formats are actually "obsolete" within the meaning of the statute. One interpretation concludes that the format is obsolete if the equipment necessary for using the materials is in fact no longer available. An alternative interpretation would not set such a demanding standard, but would regard the format as obsolete if the equipment is not readily available or is difficult to obtain on the market. The question arose in the context of photographic slides. One library in Ontario proposed to digitize its slide collections and received conflicting opinions from two law-firms about the legality of such a move. In the end the library adopted a broader view and chose to proceed with digitisation.

Another example in the same study discusses recently concluded litigation in Germany over the right of public libraries to transmit digital copies of journal articles to users for their private study as a part of the library's Inter Library Loan facilities[7.]

As a point of closure to this subject, it should be noted that the existence of this specialised privilege in the Library Exception clause does not preclude the public library from taking advantage of other, generally available, fair dealing rights (Prashant, 2009, p.14). For instance, the public library, like other users has the right to make copies for "private use including research" (Sec 16(a)(i)) or to make copies of computer programmes in order "to utilise it for the purposes for which it was supplied" or to make "backup copies" (Sec 17(1)(b)).

With the emergence of the internet and increasing use of the worldwide web, possibilities of infringement of copyright have become extreme, free and easy access on the web together with possibilities of downloading has created new issues in the area of copyright infringement. Just like Canada and Germany Botswana is also challenged with this technological advancement which seems to be a step ahead of the current legislation. This digital technology has posed new challenges for the traditional interpretation of individual rights and protection. There is still a gap concerning the interpretation of the clauses in the Act and the cases of Canada and Germany may also help legislators in amending the act so it may be in line with the ever changing technology.

Even though there are such challenges there are provisions in the act that can be safely relied on in light of library and archives and other provisions of the act.

a. The inclusive definition of literary work includes computer programmes, tables and compilations including computer databases. 13 Thus, the legislature has taken adequate care and provided sufficient protection for computer related copyrights.

b. The copyright in a work is infringed if it is copied or published without its owner's consent. The Copyright Act provides that a work is published if a person makes available a work to the public by issue of copies or by communicating the work to the public.

c. The Copyright Act also makes it clear that the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use will not amount to copyright violation.

International Legal Framework

Regarding the treaty obligations under the two international instruments in this study, the Berne Convention and TRIPS Agreement respectively this article draws from the facts mentioned in the WIPO SCCR by Kenneth Crews and the team 'Study on Copyright Limitations and Exceptions for Libraries and Archives' (the "WIPO Libraries Study, Seventeenth session")

1. Botswana is a signatory to the Berne Convention for the Protection of Literary and Artistic Works which is regarded the most important of the international copyright agreements. Its origins date to 1886, and the most recent revision is from 1971, with amendments from 1979. Acceding to this agreement means that Botswana must reform its laws to conform to the requirements of the agreement.

2. The Berne Convention does not mention libraries or archives among the allowable exceptions. Therefore, the authority under Berne to adopt a library exception is founded on Article 9(2): It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author

3. Known as the "three-step test," this provision permits countries to enact statutory exceptions, but only if they are within the bounds of the three criteria: (1) certain special cases; (2) no conflict with normal exploitation of the work; and (3) cannot unreasonably prejudice the author's interests.

4. Article 9(2) and many other provisions of Berne, however, are now enforceable through the World Trade Organisation and the incorporation of Berne into TRIPs, or the Agreement on Trade Related Aspects of Intellectual Property.

5. TRIPs incorporate by reference Article 9(2) of Berne, the three-step test. TRIPs goes further and includes its own version of the test in Article 13: Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

6. The TRIPs version embodies language that is nearly identical to Berne, but with some important differences. Most important for this study is that Berne Article 9(2) addresses only exceptions to the reproduction right. TRIPs Article 13 permits exceptions to any of the owner's rights. The TRIPs language is also more demanding. Berne states the three-step test as a proviso to the exceptions. TRIPs declares the test in mandatory terms, requiring how countries "shall confine" their statutory provisions. Berne refers to the interests of "authors"; TRIPs references the interests of "right holders."

7. Most important, TRIPs is enforceable. A country seeking to avoid having to justify its statutes before a WTO panel will probably give high regard to the language of the three-step test. Incorporating the language into the national statutes may be one means of preventing enforcement actions. At the least, the use of the language in the statutes may satisfy the lawmakers that they have met their WTO obligations.

Many countries have included the language of the three-step test in their statutes[8]. Sometimes the test is included in a separate statute, and sometimes it is made a part of the library exception. In any case, the incorporation of the language reveals the important role of the international agreements in shaping the context and parameters of domestic law. The use of this language also has the effect of transforming the test from a measure of international cooperation to a standard for local enforcement of the scope of a statutory exception.

Botswana has not explicitly done so. However since non-conformity with the conditions of the three step test could potentially expose Botswana to sanctions it is necessary to examine whether the language in Section 16 (a) (i) of the Botswana Copyright Act conforms to it.

PART III Section 16 (a) (i) - International Treaty Obligation

In this section the study seeks to find if Section 16 (a) (i) of the Botswana Copyright and Neighbouring Rights Act conform to the International Treaty obligation and "three step tests". The section of the Act reads:

> Any library or archive whose activities do not serve direct or indirect gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by reprographic reproduction- where the work reproduced is a published article, other short work or short extract of a work, and where the purpose of the reproduction is to satisfy the request of a person, provided that- the library or archive is satisfied that the copy will be used solely for the purposes of study, scholarship or private research.

While Section 9 (2) of the Berne Convention and Section 13 of the TRIPS Agreement makes the “three step test” mandatory and reproduction of any copyrighted work is permissible:

i. In a special case;

ii. It must not conflict with the normal exploitation of the work

iii. It must not unreasonably prejudice the legitimate interests of the author.

Taking a closer look of this three step test and apply it to Section 16 (a) (i) the following can be concluded:

i. Clause (i) is confined to special case i.e. only to libraries and archives whose activities do not serve direct or indirect gain that may make a single copy by reprographic reproduction

ii. It is confined to libraries and archives.

iii. This clause does not give any other limitation or exception which would conflict the legitimate interest of the author.

Upon analysing all the above international conventions and treaty it has been found that the three- step test has much relevance even today for it is the foundation of exceptions and limitations. It is the acid test till now to determine the infringement of copyright work. With the time, the dimension and scope of the test has broadened to bring more certainty and clarity in the law. Most of the countries in the world have incorporated this three-step test in their local laws to determine the copyright infringement (Kishor K, 2011, p.6).

Conclusion

This study concludes that language is very important aspect and needs due diligence during law and policy formation for it has the effect of shaping the exact services that a library will offer. If the statute, for example, permits single copying of a published article only under specific conditions, then presumably a library will comply and accordingly set parameters for its activities. From the WIPO study on library exception it’s evident that there is relevance of three three-step test at the present time to help countries on the provisions of exceptions. First, the library exception should be judged from the yardstick of its utility to the library movement and to the widest possible dissemination and flow of knowledge. Supasiripongchai N, (2014) suggests that the major problems arising from unclear copyright exceptions give several lessons for global copyright protection. The first lesson is that the uncertainty and unclarity about what copyright law allows under the exception is likely to bring some damage to the economic interests of copyright owners and to incentives for creativity in society, as well as making copyright protection regime ineffective because the infringers and users might rely on such uncertain and unclear provisions to reproduce copyright works and then escape from copyright infringement liability. The library exception in the Botswana Copyright Act is uncertain, not clear, general and ambiguous; more revision is required especially in the clause in question. It is of no doubt the Act conforms to the treaty obligations and there is a strong adherence to fair dealing despite the unclear and uncertain clauses.

Proposals

The article proposes the following expansions to the Act:

1. There should be clear definitions and explanations of different terms used in the provision to avoid freedom of borrowing the meanings from other state enactments even from other mediums which might lead to the abuse of the clause. Such terms may include libraries, archives, direct/indirect, short etc.

2. A clear limitation on the amount of reproductions and a clear prohibition on multiple reproductions should be inserted into the library exceptions under the number of copies to be made. Even though

the Act advocates for 1 copy and subsection (a) (iii) tries to explain it is still not clearly defined on a single copy scope or timeframe.

3. The definition of reprography should be amended and be comprehensive as it is understood today as a “process of duplicating a work through printing, photocopying, scanning, burning on CDs or DVDs and electronic storage for dissemination or distribution over networks”, and not only limited to physical copying
4. The requirement of sufficient acknowledgement should be inserted into the copyright exception for research in order to ensure that the moral rights to be acknowledged as an author will be recognised. Inserting this caption would allow these exceptions to support the protection of the moral right to be identified as the creator of the works
5. In terms of purpose of copying this study proposes that in the clause there should be inclusion of “proof of users’ purpose”. This exception will require that copies are supplied only to persons satisfying the librarian that they require them for the purposes of non-commercial research or private study and will not use them for other purposes. The librarian may require the researchers or students to provide proof of registration on a course of study with an educational institution, while a declaration may need to be signed by the student before a copy of a work can be made for him or her.
6. There is a need for specific provisions on electronic reproduction that will define the copyright exceptions for libraries in the digital environment including the role that licensing agreements play in fair use
7. There should also be some guidelines though not the law but helps in interpretation of the act. D’Agostino (2008) notes that the conflicts over the unclear scope of the copyright exceptions can be solved by the formulation of guidelines because they can help to clarify and make the exceptions more certain. Similarly, Guibault (2002) explains that guidelines for educational uses have succeeded in providing educators and users with some certainty as to what is acceptable under the copyright exceptions while preventing copying where permission could reasonably be requested and where the market or the value of the works is likely to be affected. Likewise, Burrell and Coleman (2005) states that a guideline is an important instrument which provides users, educational institutions and libraries with a degree of certainty.

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Notes

[1] The Copyright (Bechuanaland) Order 1965 (S.I 1965/2009).

[2] Copyright infringement is the use of works protected by copyright law without permission, infringing certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works

[3] The chronology of early drafting of library exceptions is surveyed in: "Photo-duplication of Copyrighted Material by Libraries," in Studies on Copyright, Study No. 15, at 49-67 (1963).

[4] Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967, WIPO, Geneva, at 1145 (1971) [hereinafter Records of the Stockholm Conference].

[5] Referring to the doctrine that a person who buys a legally produced copyrighted work may subsequently sell or otherwise dispose of the work as he sees fit, subject to some important conditions and exceptions.

[6] PART III Section 16 (a)(i) permits fair dealing for 'private use' including research

[7] Adapted from Prashant Iyengar study on Library exceptions in India

[8] See for eg. Australia, Belgium, Bolivia, Bulgaria, Congo, Djibouti, Georgia, Jordan, Lesotho, Lithuania Malawi, Mali, Rwanda, South Africa, Sri Lanka, and Tanzania

THE UTILISATION AND PROTECTION OF TRADITIONAL MEDICAL KNOWLEDGE IN ZIMBABWE

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Abstract

The principal aim of the study was to undertake an assessment of the perception that people hold and how this influences their utilisation of traditional medicine (TM). The views of the producers of TM, as the traditional medicine practitioners and the protection of their knowledge, formed part of the assessment. The researcher employed desk research, questionnaires and interviews to gather the relevant data. Responses received from the 50 respondents on which questionnaires were administered to, indicated that there is a correlation between religion and negative perception of TM. The research findings indicate that there is a divided outlook between TM, in the form of herbs and utilisation of TM healers' services. There is also lack of a sui generis protection system for the TM knowledge as well as lack of adequate knowledge on the existing national, regional and international legal framework on TM protection by the TM practitioners. The Government should engage in the provision of a regulatory, political, economic and legal environment for the utilisation, promotion and production of TM. It should develop a comprehensive sui generis legal framework and the appropriate institutional mechanisms for the effective protection of TM knowledge and further research into the subject is essential.

Key words

traditional medicine, utilisation, protection, Zimbabwe

Introduction

Traditional Knowledge (TK), in the form of Traditional Medicine (TM) or Traditional Medical Knowledge (TMK) has been part of the Zimbabwe cultural identity and has been used for the treatment of almost all kinds of diseases including spiritual ailments. With the advent of colonisation and Christianity, TM practice has been stigmatised and mystified, which has led to negative perception of TM and its use by many. However, a huge percentage of the rural folk continue to utilise TM for most of their primary health care needs. According to the Zimbabwe Parliamentary Health Committee (2010) report, more than 80 percent of the Zimbabwe population make use of TM.

The Zimbabwean people, especially the Shona and the Ndebele, have made use of TMK to prevent chronic illnesses and diseases which are spiritually influenced. There are many instances where the Zimbabweans make use of TM for most of their healthcare practices. TM has also been widely used in the Shona or Zimbabwean culture as protective and preventive medicine, especially for what they call nhova (fontanel) in newly born babies against outside wicked influences that may lead to the death of the infant. Hence, traditional medicine (TM) plays a very significant role within the cultural context of Zimbabwe.

However, a number of issues have led to negative perception of TM, and among them, the widespread usage of western medicine, the general adaption of the Christian religion, and lack of protection and conservative measures towards TMK.

This study was undertaken to assess the importance of TM and the need to accord adequate protection at the national, regional and international level. Assessment of the applicability and impact of regional instruments such as the Swakopmund Protocol on the national system for TK protection is also important in this study. Furthermore, the ongoing deliberations by the World Intellectual Property Organisation Intergovernmental Committee (WIPO IGC), for an international instrument on TK protection are much anticipated in the efforts being made for protection of TK.

It is imperative to understand the interplay of various factors that may have hampered the full appreciation of the role of TM within the socio-economic framework of the country. It is also the aim of this study to examine the challenges that are being faced in line with the lack of appropriate sui generis measures for the protection of TM knowledge, as well as low perception in regard to TM, which has an impact on utilisation. The study is significant in acquiring adequate and comprehensive insight on the utilisation, promotion and possible protection measures for TMK in Zimbabwe. It is of crucial importance to get an incisive analysis of the root cause of the problem of inadequate appreciation of TK. This will become the point of reference in attempts to come up with an all-encompassing solution to the problem of utilisation, promotion and protection of TMK in the socio-economic development of Zimbabwe. Ways or methods of re-invigorating the acceptance of TM, strategies to deal with the low perception accorded to TM, especially by the urban population need to be developed, for the promotion of utilisation and protection of TM. Although the legal framework for the protection of TM exists in Zimbabwe, there is no sui generis system to comprehensively cater for the TM knowledge protection.

Conceptual Framework

TK is a term which has attracted widely varying definitions and interpretations. Attempts to come up with a standard definition of TK have remained futile. WIPO uses the term "Traditional Knowledge (TK)" to refer to tradition-based innovations and creations resulting from activity in the industrial, scientific, literary or artistic fields. The term "tradition-based" refers to transmission of knowledge from generation to generation. Various definitions have tried to bring out what TK is but overall, the major characteristic of what precisely constitutes TK drive home the point that TK is intergenerational in nature, must be intrinsically linked to the community of origin and must form part of the cultural identity of the concerned communities. It is important to note that TK is a clear proof of great creative and innovative activities transmitted from generation to generation and in constant evolution. There has not been a consensus on a standard definition due to its complexity and the heterogeneous nature in terms of locality, form and context. It is not merely learnt by rote and handed down from one generation to another. It is inherently dynamic and subject to a continuous process of verification, adaptation and creation. TM knowledge is a major component of TK.

Traditional medicine, a component of TK which is subject matter of this study, is defined by the World Health Organisation (WHO, 2000) as "the sum total of the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health, as well as in the prevention, diagnosis, improvement or treatment of physical and mental illnesses." The knowledge of traditional medicine has been underscored as a very important genre of indigenous knowledge or traditional knowledge (Oguamanam, 2004).

Historically, many people, especially in developing countries used TK but its value as knowledge that warrants protection has been taken for granted. For decades, TK went unnoticed and unprotected under the conventional IP regime and for that reason that it did not constitute the subject matter that is eligible for protection. For instance, in patents, an invention has to meet the patentability criteria in the form of novelty, inventive step and industrial applicability.

It is important to explore the reasons why TK or traditional medical knowledge (TMK) has been excluded from the purview of protection within the conventional IP regime. Indigenous or traditional knowledge's model of entitlement is the community unlike individual entitlement under the IPRs system. The nature of TK is characterised by information which is intergenerational. This makes it fail to meet the novelty requirement as well as the originality requirement. Furthermore, Correa (2001) asserts that TK has been regarded as common heritage of mankind thus considered as public domain information. Because of its intergenerational nature, TK had also been excluded since all IPRs have a limited duration in terms of protection.

The importance of TMK, or bio-cultural knowledge(Mgbeoji, 2012), in human health care has been underscored in the majority of developing countries as well as the developed world(Unnikrishnan, (2010). In Ethiopia it continues to play a critical role which has been attributed to its holistic approach to health care problems that is embedded in traditional medicine (Dejene, 2011). In some countries such as China, the world market for herbal products has reached billions of dollars, with estimates of annual growth of about 12 percent and a projection to reach US$88 billion by 2017 (Songwanich, 2014).In 2000, world sales of herbal medicines were estimated at US$36 billion (Sandu, 2010). Millions of people worldwide are utilising traditional medicines in addressing their health needs (Wangchuk, 2008).Those in research, especially multinational companies who deal in pharmaceuticals have obtained and secured intellectual property rights (IPRs) over traditional or indigenous knowledge traditional medicine and biological resources through the increase in patent applications. Hence those researchers have been flourishing financially especially through bio-piracy and bio-prospecting (Oguamanam, 2006). Avon Products, a company which is United States of America USA based has filed 6 patent applications making use of 16 Asian plants (Hammond, 2013).During the period 1994 to 1999, around 70 patents were granted to western universities, drug and cosmetic companies and genetic researchers in the USA. Patent grants incorporating TK were characterised by average grant rates of around 67 percent and 64 percent at the European Patent Office (EPO) and Japan Patent Office (JPO) for the period 1995-99 and during 1993-98, between 87 and 97 percent at the United States Patent Office (Stenton, 2003). It has been noted that patents in pharmaceuticals have been produced through advanced technology and have high commercial value (Gathii, 2015).

Several scholars have presented the various challenges that are met in the utilisation of TM. The operation of charlatans, urbanisation, Western religion and education, and according to Abdullahi (2011), 'ethnocentric and medico centric tendencies of the Western hegemonic mentality' pose as some of the impediments to the full appreciation of TM. It has also been noted that although people look down upon TM and its richness publicly, they secretly seek the services of the TM healers, usually during the night when no one is watching them. People do not want to be associated with soliciting the services of TM practitioners to the knowledge of other people because of the stigma attached to it. These have led to the impediments to the full appreciation of TM. This has led to debates and attempts to protect TK through various legal mechanisms.

The debate on the protection of traditional knowledge has taken the centre stage in the global debate on the actions that could be taken to preserve, protect and promote the development of the knowledge. Cross-cutting issues including rights of indigenous populations to benefit from the use of their resources, the relationship between the patent requirements of the TRIPs Agreement and the substantive obligations of the Convention on Biological Diversity (CBD), the asymmetry between the benefits obtained by companies that exploit traditional knowledge-based products and the lack of equitable benefit for knowledge holders have attracted the attention of the international community. Considerable discussions have taken place in different forums (WIPO, CBD, FAO, WHO, UNCTAD, UNESCO and WTO) and a number of regulations and policies on the protection of traditional knowledge have been proposed or adopted. The deliberations and debates taking place at the international forums have contributed significantly to the clarification of many of the substantive issues and resulted in the development of national regimes and policies which countries like Zimbabwe can take advantage of.

At the regional level, the African Regional Intellectual Property Organisation (ARIPO) has managed to come up with a regional framework for the protection of TK and TCEs, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. It was adopted through a diplomatic conference of ARIPO on 9 August, 2010 at Swakopmund in Namibia. The Protocol entered into force after ratification by six states on 11 March, 2015. The countries that have ratified are Botswana, Gambia, Namibia, Malawi, Zambia and Zimbabwe. The rationale for the development of the Swakopmund Protocol included the need to address trans-boundary TK and TCEs in Africa, to provide a model for national legislative development, and to provide a legal framework that empowers TK holders to utilise their resources for socio-economic development. It is left for the countries that have ratified the protocol to domesticate it.

Methodology

Primary and secondary (desk research) data were employed to identify the relevant information needed for the research study. On primary data, questionnaires and interviews were used for data collection. Questionnaires were administered to different respondents which comprised people from various occupations and professions from the private and the public sector, students and those who were not formally employed. The purposive sampling technique was used to select traditional practitioners based in Harare, Zimbabwe.

In the case of secondary data, national legal frameworks such as the Environmental Management Act (EMA), Forest Act, Traditional Medicine Practitioners Act (TMPC) and Zimbabwe National Traditional Medicine Policy (ZNTMP) were analysed Because Zimbabwe is a member of international and regional organisations and their treaties, protocols and conventions, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, the Convention on Biological Diversity (CBD), the Nagoya Protocol, WIPO IGC, WTO TRIPS Agreement and the United Nations Declaration on the Rights of Indigenous People were also part of the analysis.

Quantitative analysis techniques were used to analyse the primary data obtained and where necessary, qualitative content analysis was employed through collecting, evaluating and organising data to detect identifiable themes. Certain challenges were experienced during data collection and these included limited time for the study and secrecy surrounding the subject matter which did not allow for the relevant information to be collected.

Results and Discussions

Data was collected and analysed as elucidated under methodology. The data obtained from stakeholders were correlated to find common trends on perception, use and general understanding of the role that TM plays in the Zimbabwean society. The discussions accompanying the findings were presented under four major subheadings below. These were: the role of the government, legislative development and reviews, institutional frameworks and perception of traditional medicine in Zimbabwe.

The role of the government

The Constitution of Zimbabwe Amendment (No.20) Act 2013; acknowledges the increased emphasis on culture and indigenous knowledge systems in its national objectives, as highlighted in section 16[1] and 33.[2]

Furthermore, the government of Zimbabwe has come up with the ZIMASSET, a national economic blueprint which is central to directing the government strategic plan of action for the period 2013 – 2018has its emphasis on IKS including related intellectual property rights derived from these and the need to embrace emerging technologies to enhance the effective exploitation of IKS products for the purposes of socio-economic transformation towards sustainable development. Furthermore, the government put in place the Zimbabwe National Traditional Medicine policy that contains a comprehensive perspective on the TM agenda. For the government's efforts towards promotion and protection of TMK to be effective, the active involvement of the traditional communities and knowledge holders have to be prioritised.

Legislative development and reviews

There is the Zimbabwe National Traditional Medicine Policy in place which seeks to address a holistic approach on the TM agenda through the government's commitment in taking a leading role. In the policy's executive summary, the government's role in resources mobilisation to ensure the effective implementation of the policy through the engagement of both local and international partners is highlighted. As one of its objectives, the policy seeks to promote research and local production of TM. Protection of IPRs of TM and IK, education and training of THPs and AHPs and the need to recognise and promote TM in economic development are some of the major objectives that that the policy seeks to address.

The policy has got the health, economic and legal goals which it seeks to achieve. In its legal goal, it highlights the development and review of policies and legislation on TM research, development and practice. The objective on promotion of research and local production of TM goes hand in glove with what is contained in ZIMASSET, manufacturing cluster, under value addition and beneficiation. In promotion of IPR protection of TM and IK, the government seeks to create an appropriate legal framework for protection of THPs, TM knowledge, TM and practices. It is important to note that there is no developed legislation on protection of the TM knowledge. Despite the goals set out in the policy, nothing much has been done to achieve these goals in all its aspects. The Ministry of Health and Child Care (MoHCC) is supposed to take a leading role in coordinating all the activities relating to TM practice and use of TM, it is taken a passive role in as far as this is concerned. This goes to show the lack of political will and lack of support for TM in preference to allopathic medicine. It is evident that the Zimbabwean national health care system does not fully recognise the socio-economic role and significance of TM.

The Traditional Medicine Practitioners Act (TMPA) of 1981 with its revisions has been put in place to regulate the practice of TM. It makes reference to the establishment of the Traditional Medical Practitioners Council (TMPC) with the powers of registering, regulating, controlling and promoting the TM practice in the country. Furthermore, the functions of the TMPC are to play a supervisory role on the practice, encouraging research into, and development of the practice, administering the TMPA and providing grants and loans in a bid to achieve its mandate.

The EMA is responsible for implementing the country's CBD obligations on the conservation of biological diversity. Section 116 of the Act[3] makes reference to this responsibility. Although it does not expressly provide for access and benefit sharing, it forms the backdrop for a national framework which caters for this.

Regionally, the country has ratified the ARIPO Swakopmund protocol on the protection of TK and expressions of folklore. The onus is on the government to ensure the domestication and implementation of the resulting legislation. At the international level, the country is party to the CBD, WHO, WIPO IGC and other organisations. Although there is enabling legislation in terms of promotion and use of TM, to a very great extent, there are shortcomings in relation to effective implementation of the law. In terms of protection, there lack of a sui generis protection system for TMK in Zimbabwe and the government needs to put in place effective and effective legislation for this.

Institutional framework

The Zimbabwe National Traditional Healers Association (ZINATHA) is a traditional healers' association which was formed in the year 1981. The association is responsible for the promotion of TM and its practice. In terms of research in TM and healing methods, it is the mandate of the organisation to see that this goal is met. Promotion of training in spiritual and herbal healing is also undertaken by the organisation. It is apparent that there are occasions where bogus practitioners may be found. It is the goal of ZINATHA to ensure that the practice is effectively supervised such that instances of abuse of the practice are minimised. ZINATHA does not necessarily operate on its own but it also cooperates with the MoHCC to foster better relationship between TM and modern medicine. It has been reported that there is a relationship between Shona sculpture and TM and such centres exists in the country, but these were not part of the study.

Under the Ministry of Justice, Legal and Parliamentary Affairs, the Zimbabwe Intellectual Property Office is responsible for the registration of patents which might emanate from TMK. However, because of lack of a sui generis legislation for the protection of TMK in the country, there is also lack of an enabling institutional framework in place.

Perception of traditional medicine in Zimbabwe

Fifty (50) responses were received and according to the gender dimension, 56 percent of the respondents were male and the remaining 44 percent were female. The sample incorporated respondents from different age groups since the respondents were randomly selected. The different categories of age groups that were part of the research were 15-20 years, 20-30 years, 30-40 years, 40-50 years and above 50 years. Nine (9) TM practitioners were interviewed, five (5) of them were divine healers (svikiro), three (3) were herbalists and one (1) was a bone setter (n'anga). On the gender dimension, four (4) females and five (5) males were interviewed. On level of education, two (2) indicated they had gone up to university level, three (3), secondary level and the remaining four (4), primary level. All the respondents were full time practitioners except one (1).

Figure 1 shows utilisation of traditional medicine in relation to the respondents' gender dimension. From the whole sample, 26 percent respondents indicated that they had never used traditional medicine before. Of these, 16 percent were male and 10 percent females. Amongst the 74 percent who had used TM in the form of herbs, 40 percent were male and 34 percent were female. There wass an indication that males tended to use TM more than females, especially consulting TM practitioners. Most men still used the services of TM healers for their healthcare needs. Both male and female respondents indicated that they used TM but mainly in the form of herbs, and not through visiting or consulting the healers.

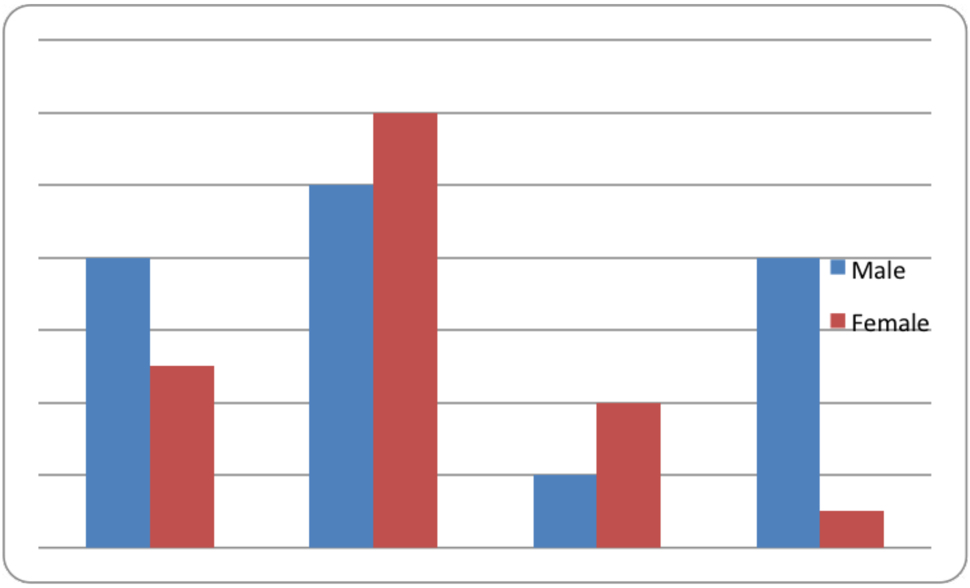

Figure 1: Utilisation of traditional medicine and gender

Among the proportion that indicated they had used herbs before, 43 percent attributed their use of herbs to their affordability and (38 percent) indicated that they had used herbs before because they work. This pointed to the fact that they believed in the effectiveness of herbs in the treatment of various ailments. The remaining 19 percent reported that they utilised herbs because these had fewer side effects when compared to the synthetic modern drugs. TM might not necessarily be 100 percent perfect but with regard to side effects, being natural, one might expect them to be more ideal.

The majority of males who had visited healers had sought solutions to different common ailments like stomach problems, headaches and sexually transmitted infections. Almost all the males indicated that they had sought these services, not just once, but several times. All the females that had visited TM healers before indicated that they did so once and their problems that they sought remedies for included, continuous bleeding, period pain (jeko), hypertension, cleansing and medication for delivery (masuwo).

For the 30 percent who had once visited the TM healers before, 18 percent indicated that they continued to seek the services of traditional practitioners in their health seeking behaviour. Of the eight (8) males who still visited, three (3) indicated that they still did for cultural reasons, two (2) indicated that they preferred TM, two (2) gave the reason that they could not be cured at the hospital and one (1) gave the reason of accessibility For the female who still visited, she cited cultural reasons and that the hospital failed to provide a cure. From this analysis, it is evident that the users of TM perceived the importance of TM practitioners' services as vital both culturally and in terms of effectiveness. Thus their continued trust in the traditional healers in seeking good health and wellbeing through utilising their services motivates them.

The relationship between utilisation of TM and age (Figure2) indicated that the younger generation, especially below 30 years of age, did not utilise the services of TM healers as they viewed consulting healers as old culture or they did not want to be associated with the poor environmental conditions of the practitioners' 'surgeries'. Those who fell within the 30 years and above bracket tended to use TM and consulted the healers in their health seeking behaviour. This showed that they had a better perception on TM as compared to their younger counterparts. Furthermore, as people age, it appeared they chose to seek for cheaper health care, as some become prone to chronic ailments and other illnesses with age.

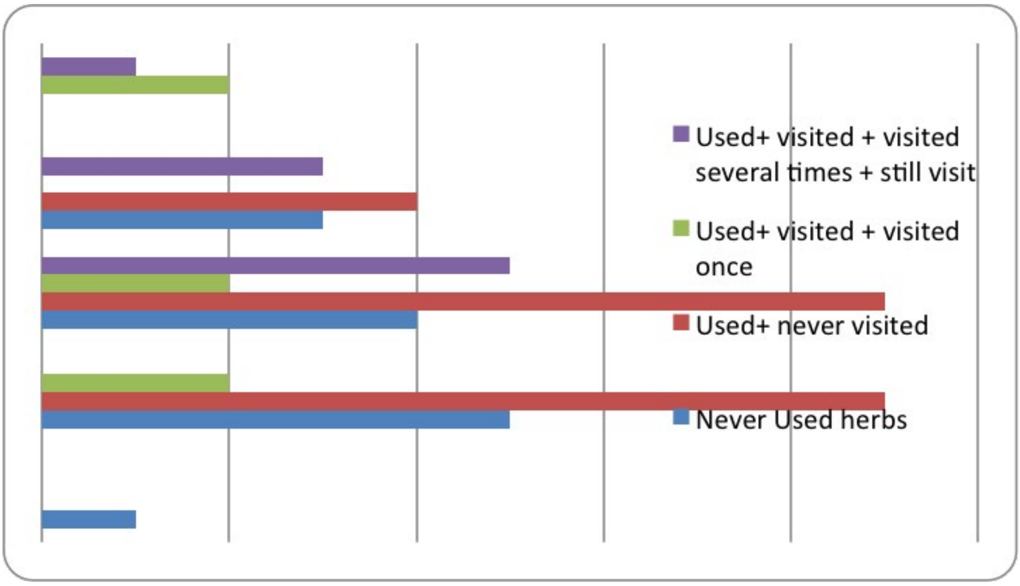

Figure 2: Utilisation of traditional medicine and age

Seventy-four percent (74 percent) who had used TM before, all came from a Christian background. Religious people, especially Pentecostals were against visiting THPs because it contradicted their faith resulting from the preaching they received from their gatherings. However, people from other denominations also continued to consult healers regardless of their religious background as influenced by personal preferences and beliefs.

Of the proportion that was still visiting TM healers, nine (9) people showed that they had witnessed or seen TM being prepared by the practitioners. Seven (7) indicated that the preparation was hygienic but two (2) indicated the contrary. From this, it could be deduced that the proponents of TM healers' services were strongly supportive of their health care system despite a lot of demerits in regard to hygiene in medicine preparation.

In terms of dosages, there is clear evidence that there was lack of standardisation in administering the medication. This was supported by the responses given by the users. Some would be instructed to drink a cupful, some took the contents of the medicine straight from its container, some would be told to drink as much as they like. In regard to users' perceptions on efficacy of the treatments they got, all indicated that the treatments were very effective. TM healers concurred that they determined the effectiveness of their treatment through the feedback from clients and the magnitude of the thanksgiving from the client, which might either be in cash or in kind.

Amongst the six (6) who no longer visited the healers, four (4) admitted that it contradicted their religious faith. This indicated that they might have sought these services before they had joined their current religion and thus, their religious beliefs were now influencing their perceptions in consulting TM healers. Two (2) indicated the reason that the medicines were not medically certified, which meant they now look down upon TM and are more inclined to use allopathic medicines which were medically certified. One (1) indicated the operation of quacks as a reason for no longer seeking the healer's services.

Although a number of people indicated that they had used TM (herbs) before, 22 out of the 50 who were sampled indicated that they had never visited a TM healer before. Fourteen (14) cited that they did not visit the healers because of their religious faith, four (4) indicated that it was because of the many bogus healers that had permeated Harare in search of quick money. Others said the medicine was not medically certified, the ritual and spiritual part was demonic and that the packaging was not hygienic. Three (3) of therespondents felt that they had not had or seen any reason why they should visit TM healers. This was an indication that the majority of the sample had negative perception on consulting TM healers, although they used herbs.

The respondents who indicated they had never visited healers before purported to use TM in the form of herbs. It showed that people's perceptions on TM as a whole, were divided. People had a tendency to use herbs especially those that were widely known for example, chifumuro, aloe vera and ginger. There was a tendency to use the herbs that were normally common and easy to access, although some may have visited herbal shops to look for specific herbs for particular diseases and sicknesses. Because of Christian beliefs, the consultation of TM healers is demonised. This has led to stigma associated with visiting TM healers, which has however led to people soliciting their services at night to evade public prosecution by their counterparts.

More than 50 percent of the respondents indicated their agreement on the notion that most modern medicines are derived from traditional medicinal plants. Thirty-one (31) respondents indicated that they strongly agreed with this statement. This showed that most people were aware that TM plays a vital role in both their traditional context as well as beyond. Half the respondents agreed that TM plays a crucial role in primary health care with the other half in the neutral, disagree and strongly disagree segments. The 14percent in the strongly agree range indicated they had a high perception on TM and were likely to utilise it. Those in the neutral disagree and strongly disagree, indicated they had low perception on TM playing an important role in primary health care, hence less likely to utilise TM for their primary health care needs.

Forty-six percent (46 percent) of the respondents agreed that TM was more effective in the treatment of chronic ailments like cancer and diabetes, whilst 44 percent fell in the category of neutral, disagree and strongly disagree. This indicated that although research had shown that TM is effective in treatment of such diseases, majority of people still had a low perception on the knowledge of TM healers to cure such ailments, and hence were less likely to utilise their services. On the other hand, the healers that were interviewed indicated that the users of TM came to solicit their services because they strongly believed in their knowledge and trust them more than they did allopathic practitioners on provision of treatment for such diseases. Forty-two percent (42 percent) of the respondents indicated that they agreed with the statement that TM use is against their religion, with 22 percent being neutral. This indicated that most people are likely to use herbs despite their religious beliefs. The other 36 percent agreed that their religion does not allow them to use TM, with the 12 percent strongly agreeing to this showing that they were somehow too religious.

On religion and consultation of TM healers, 68 percent agreed that it was against their religion, with 22 percent neutral and 10 percent disagreeing with the statement. Culture was being undermined and all the nine (9) TM practitioners that were interviewed pointed to religion being a major challenge in delivering their services to society as this had led to them being stigmatised and looked down upon.

The majority of the respondents (70 percent) agreed that there was nothing wrong in using TM, with 20 percent being neutral and 10 percent disagreeing. Indications are that the people who agreed were more likely to use TM. The statement that most people use TM secretly, garnered support from 90 percent of the respondents, with 8 percent being neutral and 2 percent disagreeing. This indicated that people are more likely to utilise TM, it in the form of herbs or through consulting healers, regardless of their religion or social status, as long as they did it secretively. The TM healers highlighted that most people, even pastors and others of high social standing solicited their services especially during night time.

Fifty-eight percent (58 percent) of the respondents agreed that TM was more available than modern medicine, 28 percent gave the neutral response, 6 percent disagreed and 2 percent strongly disagreed. The perceptions of the majority on this view indicated that most people used herbs, especially those that were commonly known as some did not need to be bought but are readily available at their homesteads or their vicinity. Since most modern drugs are imported, they might not be readily available in the pharmacies.

More than 50 percent of respondents agreed that modern medicines had more side effects than traditional medicine. With 28 percent strongly agreeing with the statement, using natural rather than man-made medications was a preferred option, three (3) of the TM healers who were interviewed concurred with the issue of fewer side effects as one of the reasons for the acceptance of TM by society.

Seventy-six percent (76 percent) people agreed with the notion that TM is more available than modern medicine due to affordability of TM, especially herbs, and hence were more likely to use TM. Unlike in modern hospitals, there was no requirement for cash up front and people could also pay under friendly conditions (either cash or kind) where they could negotiate or fail to pay at all. The herbalists who sold herbs also contended that people would almost always negotiate for the lowest price when purchasing the herbs. For treatment of chronic ailments like cancer, it was more affordable going the traditional way instead of paying huge amounts of money to modern practitioners to undergo chemotherapy and the related surgery where a patient had to pay thousands of dollars to obtain treatment. The compensation system in traditional health care indicated a low perception on the recognition of the rights of healers, unlike in the modern system where the patented drugs and knowledge of practitioners, are fully compensated for. This might be attributed to the nature of TK whereby the profit motive in terms of economic benefits, was not necessarily a priority.

Perception of non-users of traditional medicine

Seventy-seven percent (77 percent) of the non-users of TM agreed that most modern medicines were derived from TM plants, with half of them strongly agreeing with the statement. This meant that the fact that most modern drugs emanate from TM, however did not influence them to use TM. Sixty two (62 percent) fell in the neutral category on the statement that modern medicines have more side effects than TM. This indicated a low perception on TM and hence their propensity to use modern drugs. They had little faith in the performance of TM.

The non-users indicated their lack of confidence in the role TM plays in primary health care as more than 50 percent scored neutral on this. The fact that not even one of them strongly agreed with this sentiment indicated that they have low perception and are less likely to utilise TM for their primary health care needs. Rated on their level of agreement with TM being more effective in the treatment of chronic ailments, the majority fell in the neutral and disagree category, indicating that since they had never used TM before, they had no knowledge regarding its effectiveness in the treatment of chronic diseases, more or less, any other ailment. On affordability of TM, more respondents fell in neutral, disagree and strongly disagree. There is also the same trend on the sentiment that TM is more available than modern medicine.

Almost 85 percent of the respondents who had never used TM or visited TM healers before concurred with the statement that most people use TM secretly. This indicated that most of them were more likely to use TM or visit healers secretly, despite their religious beliefs as well as their low perception on TM as a whole. Through our research, it appeared that most people within the urban population had low perception on the significance of the role played by TM practitioners as compared to their perceptions on traditional herb use. However, further research would be of paramount importance to validate these findings.

Socio economic impact of traditional medicine

It is apparent to note that although the practitioners' knowledge is very crucial within the health sector, to a great extent, they did not commensurately benefit economically, from their knowledge. For the herbalist category, two (2) of them highlighted that they charge US$10 and one (1), US$5 as consultation fees. As for the medicines, they ranged from US$5 depending with the type of illness. For the divine healers, three (3) charged US$10 and two (2), US$5 for consultation or what they call dare, a dialogue with the healer on patient's historical background. The bonesetter, charged US$I0 for consultation. On the rationale behind the amount they charged, two (2) healers gave the opinion that they tried to charge as much an amount as that charged for consultation by modern practitioners, and for those who charged US$5, that which is charged at modern clinics for consultation. The charges for the medicines varied with the type of ailment and treatment, with charges as much as between US250-300 for cleansing the household or kupinga musha.

Furthermore, the practitioners highlighted that it was not mandatory for the clients to provide cash upfront for their services. They sometimes treated the clients and ask them to pay later. Under some circumstances, they paid in kind in the form of groceries and some other stuff. They also indicated that sometimes, the clients do not pay at all due to economic hardships. For some patients, the spirit may tell them that the person may not survive. In that case they refused to accept any payment. One (1) of the practitioners indicated that sometimes the spirit will instruct that she be paid in the form of a goat or a hen, or the equivalent in monetary terms. This variation and lack of standard in payment, as compared to modern medical system, pointed to the need to formalise the healers' field for them to be adequately compensated for their skills and knowledge.

The healers raised concern on the way their knowledge was perceived even by the users or clients. They claimed that the clients would negotiate for very low prices such that they do not realise much from their services. They attributed this to lack of proper recognition of the value of their knowledge as most people perceive that the medicines are just natural, as in the medicinal plants and not necessarily theirs, as most of it is bequeathed by the spirits. They also disregarded the knowledge behind the use of those medicinal plants. One of the healers highlighted that the spirit could just direct him to take ordinary plants that were not even known to have any medicinal value, and prepare it in a particular manner, and then it becomes potent medicine.

For most of the herbalists who sold herbs at informal markets (e.g. at Mupedzanhamo, or Mbare in Harare), although they got to gain economically, they still realised less for their medicines as clients would negotiate for the lowest prices. For instance, if they charge US$10 for a certain herb, they might end up selling for as little as US$ 4 for that particular herb.

Although the THPs knowledge is very valuable when it comes to the health and well-being of the population, the economic benefits that they derived from their knowledge was to a large extent, not commensurate, especially due to the lack of a formal system within their field. However, to a lesser extent, a few of the practitioners had been fortunate enough to realise better economic benefits from their practice, as some receivedl clientele from abroad, who would be willing to pay graciously for their services, owing to respect for the services they would have sought from the practitioner

Existing methods of traditional medicine protection

All then THPs revealed that they used secrecy as the only form of protection for their TM knowledge. They highlighted that they did not divulge the exact names the medicine, because of misappropriation and bio-piracy. They all indicated their unwillingness to work with researchers due to mistrust and the need to safeguard their knowledge. They expressed total satisfaction with this method of protection and maintained that it was very effective.

The practitioners were asked about their level of awareness on the Zimbabwe legal framework for the protection of their knowledge. Four of them indicated they were familiar with the Environmental Management Act (EMA), Forest Act and the Traditional Medicine Practitioners' Act (TMPA). Two were aware of the Patent Act and three (3) were not familiar with any. As for the regional instrument, in the form of the Swakopmund Protocol and international instruments on TK protection, they were all not aware of them. This indicated the need for increased awareness to enable the healers to fully realise the benefits from their IP.

In regard to prevailing legal framework in the field of TM in Zimbabwe, it is apparent that the existing legislation for protection in the form of instruments like the Patents Act and EMA, fail to adequately cater for the TM knowledge holders' interests. There is need to implement a sui generis system to adequately protect the knowledge and to ensure that maximum benefits are realised.

It has been noted that for the possibility of an effective TK protection regime, the requirement for international standards becomes apparent. Hence, there have been various debates and negotiations to adequately attempt to address the issue of TK for the benefit of the knowledge holders. The implementation of the Convention on Biological Diversity (CBD), United Nations Declaration on the Rights of Indigenous People, and the outcomes of the WIPO Intergovernmental Committee (IGC), among others, will facilitate the effective protection and utilisation of TK.

Conclusion

It is concluded that TM plays a critical role in the lives of many Zimbabweans, especially through the use of traditional herbs. However, there exists evidence that most people in the urban areas have negative perception on utilisation of TM through consulting TM practitioners and this is mainly attributed to their Christian religious beliefs. In terms of protection of TM knowledge, the major method of protection is secrecy and this indicates the lack of a national comprehensive legal and institutional framework to effectively cater for the TM knowledge holders' rights.

There is need to map out clear strategies to promote and invigorate the acceptance and utilisation of TM in Zimbabwe. Since the existing methods of TM knowledge protection have proved to offer inadequate effective protection, there is need to develop a sui generis system of protection at the national level as well as the regional level. The outcomes of the IGC negotiations will also have a great influence at international level.

Recommendations

The following recommendations are made:

Churches leaders should find ways to communicate their messages without tainting or preaching against the utilisation of TM. This will ensure that religion does not get in the way of downplaying TM and its practitioners such that utilisation of TM can be engendered.

The Government should engage in the provision of a regulatory, political, economic and legal environment for the utilisation, promotion and production of TM. This would also include regulation of traditional herbs as well the conduct of the TM practitioners.

The Government should also fund and support TM practitioners through provision of space and physical infrastructure for the creation of an enabling environment (in the form of surgeries and pharmacies). The provision of such would enable the practitioners to execute their services better and this would also create conducive atmospheres for users to utilise TM.

There is need for the government to conscientise THPs on the value of their knowledge within the IP framework and how to harness such for their socio-economic development within a global context.

The Government should develop a legal framework for a comprehensive sui generis system for the protection of TM and ensure that effective and efficient institutional mechanisms are put in place. This would enable the TM knowledge holders to fully assert their rights as well as enforce them.

The domestication of the Swakopmund Protocol should be done within the national legislation. It is only then, when the Protocol is domesticated and the relevant implementation of the Protocol is done, that capability of the regional instrument can be evaluated as an appropriate solution to the protection of TK.

Lastly, the researcher recommends that further research be done in the unexplored areas of the subject.

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Notes

[1] Section 16(1) The state and all institutions and agencies of government at every level must promote and preserve cultural values and practice which enhance the dignity, well-being and equality of Zimbabweans.

[2] Section 33 The State must take measures to preserve, protect and promote indigenous knowledge systems, including knowledge of the medicinal and other properties of animal and plant life possessed by local communities and people.

[3] Conservation of and access to biological diversity (1) The Minister shall take such measures as may be necessary for the conservation of biological diversity and the implementation of Zimbabwe's obligations under the United Nations Convention on Biological Diversity adopted in 1992 and may, in so doing¾¾ (a) identify the components of the biological diversity of Zimbabwe; (b) determine the components of biological diversity which are threatened with extinction; (c) prepare and maintain an inventory of the biological diversity of Zimbabwe; (d) determine actual and potential threats to the biological diversity and devise such measures as are necessary for preventing, removing or mitigating the effect of those threats; (e) devise measures for better protection and conservation of rare and endemic species of wild fauna and flora; (f) develop national strategies, plans and programmes for the conservation of the biological diversity of Zimbabwe; (g) promote the integration of conservation and sustainable use of biological diversity into relevant sectoral policies, plans and programmes; (h) require in writing any developer, including the government, to integrate the conservation and sustainable utilisation of the biological diversity in any project the implementation of which has or is likely to have detrimental effects to the biological diversity of Zimbabwe; (i) protect indigenous property rights of local communities in respect of biological diversity with scientific knowledge; (j) support the integration of traditional knowledge on conservation of biological diversity with scientific knowledge; (k) prohibit or restrict access by any person to or the exportation of any component of the biological diversity of Zimbabwe. (2) The Minister may, on the advice of the Board

THE REQUIREMENTS OF 'GOODWILL' AND 'QUALITY CONTROL' IN TRADEMARK COMMERCIALISATION UNDER THE NIGERIAN TRADEMARKS ACT: A CALL FOR REFORMS

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Abstract

Since the emergence of the present knowledge-driven economy, intellectual property rights (IPRs) have become a veritable tool for the protection of entrepreneurs' business ideas, innovations, and creativities against public theft. When properly harnessed, IPRs offer protection against such theft and confer business advantage on entrepreneurs. Trademark (as one of these IPRs) stands out because of its uniqueness and functional flexibility which make it an easy target for commercialisation through assignment and registered usership (licensing). Proceeding from the viewpoint that the primary purpose of trademark is consumer protection, we examine how the provisions of the Nigerian Trademark Act[1] (Cap T13) on assignment and registered users meet this purpose. We argue that the current position of the law, where: assignment is permitted 'with or without goodwill'; the degree of control required for registered usership is unstipulated; and registered usership is allowed without trade connection between the registered proprietor and the mark, has a high tendency of causing consumer confusion or deception. Relying on the US position on assignment and licensing, we propose a reformation of the provisions of Cap T13 on "assignment with or without goodwill", "degree of control", and "trade connection", arguing that such reform will balance the interests of both trademark owners and the consuming public.

Introduction

Trademark is an indicative medium relied upon by consumers to create an imaginary link between a product (on which such mark is used) and its seller. Its major hallmark is its ability to differentiate the goods of one seller from those of others in the same line of business. The Nigerian Trademark Act (subsequently referred to as Cap T13) defines it as "a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark…" (section 67, Cap T13) Even though this definition is unnecessarily verbose, the important function of distinguishing is not lost in that verbosity.

Once a proposed mark meets the requirements contained in the above section and is either inherently distinctive (section 9, Cap T13) or capable of becoming distinctive (section 10, Cap T13) and is not successfully opposed (section 20, Cap T13) or offends against the provisions on non-registrable marks (sections 11, 12 and 13, Cap T13), it is registered by the registrar under part A or B, depending on its level of distinctiveness. Upon registration, the proprietor enjoys a limited but renewable monopoly (section 23, Cap T13) which confers exclusive use of the mark on him, including the right to authorise other users (sections 5 and 6, Cap T13; Olatunji, 2016). This authorisation can take the form of (partial) assignment (sections 26, 29 and 30, Cap T13) or the registration of registered users (sections 33 and 34, Cap T13).

Assignment can take place with or without the goodwill of the business and either in respect of all or some of the goods for which a mark is registered (section 26, Cap T13). Even though the word "licensing" is not used throughout Cap T13, a registered user arrangement which has the same effects as licensing is provided for (sections 33 and 34, Cap T13). Parties are required to provide for expected "degree of control" in their statutory declarations (section 34(1)(a), Cap T13) but there is a total silence on what degree of control is required. Trade use of the mark by a registered proprietor is also not mandatory in a registered user arrangement (sections 35 and 67, Cap T13). Finally, while Cap T13 permits partial assignment of trademark (by providing that a mark can be assigned in respect of all or some of the goods for which it is registered), it does not impose a quality control requirement. These are the germane legal issues on trademark commercialisation in Nigeria which are identified and discussed in this paper. Apart from indicating how these provisions can affect the trademark function of consumer protection, we also discuss how the highlighted sections can be repositioned for optimal benefits to both trademark owners and the consumers.

For ease of discussion, this paper is divided into six parts. In the second part, we examine those features which stand trademark out in the midst of other IPRs. We also discuss some salient factors which make trademark apt for commercialisation. The issue of trademark commercialisation under Cap T13 is discussed in the third part. In particular, we examine the relevant provisions of the law on assignment of trademark and registered usership; discuss how trademark owners can benefit from commercialising their marks; and identify and discuss how commercialisation of trademark by trademark owners can negatively affect the consumers. The fourth part focuses on a brief examination of the United States (US) position on assignment and licensing, particularly the construction of the concepts of "quality control" and "goodwill", while the fifth part addresses the identified shortcomings to trademark commercialisation under Cap T13 and makes recommendations. To achieve this, we draw useful lessons from the US jurisdiction on how "quality control" and "goodwill" should be construed to avoid consumer confusion in trademark commercialisation. We go further to identify the perceived shortcomings in the current construction of these terms under the US law and suggest that such should be avoided under the proposed amendment to Cap T13. Conclusion is drawn in the sixth part where we recap the major highlights of our discussion and summarise our recommendations.

Trademark, a Perfect Right for Commercialisation

As part of a company's intangible assets, IPRs provide multiple commercialisation options through which proprietors convert invisible rights into financial gain. Commercialisation results not only when an IPR-holder uses his IPRs by himself, but also when he maximises such use by permitting other users to use them in accordance with the agreed terms. It can take the form of assignment or licensing. We discuss below the outstanding features and advantages of a trademark which make it apt for commercialisation.

Starting with its exceptional features, the right conferred by a registered trademark is enjoyable in perpetuity[2] unlike other IPRs which have limited duration.[3] Also, the fact that a trademark is registered does not stop other competitors from dealing in the goods or services on which it is used. This is because the monopoly conferred on the proprietor is only to exclude others from using a similar mark in manners that are likely to cause confusion or deception among purchasers, and not to "prevent anyone else from making or selling competitive goods under a different mark" (Diamond, 1961-1962, p. 295).

Furthermore, the threshold for trademark protection is the lowest when compared with other IPRs. For instance, while patent and industrial design protection requires some degree of novelty or creativity; and copyright requires originality, there is no equivalent requirement for the protection of trademark. "Distinctiveness" which is required under trademark laws is not measured in terms of novelty or outstanding creativity; it is measured in terms of the ability of the chosen marks to in fact assist consumers in differentiating among the array of goods and services from which they have to choose. Attempts to equate 'distinctiveness' or accumulation of goodwill in trademark to creations have therefore been rightly labelled 'weak' by Bently and Sherman (2009, p.717).

Trademark is also advantageous to business growth and it confers benefits on both proprietors and consumers in the following important ways.

Firstly, trademark confers benefits on both proprietors and consumers by protecting the property right of the proprietors while guiding the consumers against deception or confusion resulting from falsely marked goods. This benefit is recognised by Bainbridge (2009) who rightly notes that a trademark protects the "business reputation and goodwill" of a proprietor, while at the same time, it shields consumers away from deception (Bainbridge, 2009, p. 627).

Trademark protection is also beneficial because it helps consumers in making a reasonable choice among array of similar products. Particularly, it has become an instrument used by consumers to determine the quality of products and to build some brand loyalty. While consumers may be willing to try out new products, they will be unwilling to repeat their purchase choice if the new products fail to meet up with their quality expectations. This is only possible where products are rightly marked. Marking of products therefore helps to reduce consumers' search cost (see the English court in *SA Cnl-Sucal NV v. Hag GF AG*[4]).

The role of trademark in quality identification is further elucidated upon by Advocate-General Ruiz-Jarabo Colomer who acknowledges that even though the primary purpose of trademark is to indicate trade origin or source, "there is nothing to prevent a consumer, unaware of who manufactures the goods or provides the services which bear the trademark, from acquiring them because he perceives the mark as an emblem of prestige or a guarantee of quality."[5]

MacQueen, Waelde and Laurie have also identified another reason why trademark is advantageous. According to the authors, trademark helps to balance the conflicting interests existing among the trio of trademark proprietors, their competitors and the end consumers (MacQueen, Waelde and Laurie, 2008, p.543). For instance, the interest of a trademark proprietor is to have absolute monopoly to the use, not only of his mark but also of any closely resembling marks, especially where his mark has become a success. His competitors' interest however lies in being able to indirectly free-ride on the goodwill already acquired by the proprietor's successful mark either by creating an association with him or by using a similar mark in a dissimilar line of business; while the consumers want value for their money and want to avoid deception about the origin or quality of the products they buy. Trademark balances these diverse interests by defining the scope of a proprietor's exclusive rights, including when he can get protection for use of a mark similar to his own on dissimilar goods or services. It has also provided for when a competitor can use or reference the proprietor's mark without any liability especially if properly done. As for the consumers, their interest is taking care of by the various provisions of trademark laws prohibiting consumers' deception or confusion.

Lastly, trademark is too economically important not to be protected. For example, the inventions of a patentee, the works of a copyright holder as well as the designs of an industrial design owner will all be marketed under trademarks chosen by their owners. It may therefore be argued that business-related activities of a company such as marketing, sales, etc. will be impossible or difficult without trademark protection. This is why Griffiths notes that trademark can gain a "psychological hold" on the minds of consumers which give them a selling power above that of the underlying goodwill.[6] Cornish and Llewellyn also opine rightly that "marks are ciphers around which investment in the promotion of a product is built and that investment is a value which deserves protection as such, even when there is no abuse arising from misrepresentations either about origin or quality" (Cornish and Llewellyn, 2008, p.620).

Thus, it is the aura of consistent quality delivery or of some unique styles already created around a trademark that is responsible for selling the goods or services of its proprietor; and the worth of a business therefore majorly lies in the value of its trademark, not in the value of its tangible products. For instance, while nobody or few people will be interested in buying an unknown TEMI[7] Jean, many people will buy LEVI jeans, not because the former is of poor quality but because the trademark of the latter has become popular and has been known to deliver on quality or some unique satisfactory characteristics. To underscore this economic importance of trademark in relation to the business success of the Coca-Cola Company, Bainbridge submits thus:

> It is difficult to estimate the economic value of the power of symbolism in marketing. For

> example, the value of the Coca-Cola trademark must be immense when one considers the size of worldwide sales in what could be described as a beverage based on a formula for an unexceptional syrup. (Bainbridge, 2009, p.626).

The afore-discussed features and advantages of trademark are the reasons why it is suitable for commercialisation.

Cap T13 and Trademark Commercialisation

Trademark commercialisation refers to the unbundling of the many-sided rights contained in a registered mark. It offers a proprietor multiple options of commercially exploiting his trademark. For instance, he can use his registered mark by himself exclusively; he can use it alongside licensees;[8] he can assign it completely (section 26, Cap T13) or partially; and finally, he can self-use in respect of some goods or localities and assign in respect of other goods or localities. In this part of the work, the provisions of Cap T13 on assignment and registered usership as means of trademark commercialisation are highlighted and discussed. How commercialisation can benefit proprietors of marks and how they can negatively affect consumers are also discussed.

(i) Trademark Assignment

Cap T13 contains no detailed definition of "assignment" as it only provides that "assignment" means "assignment by acts of the parties concerned" (section 67, Cap T13). This terseness is understandable in the light of the general difficulty associated with definition of concepts. For our purpose, however, assignment is a permanent transfer of the rights of a trademark proprietor in his mark to another person for a consideration and without a reversionary interest remaining in him. This attribute of permanency is the major feature which distinguishes assignment from licensing because "once a trademark owner has assigned the trademark, they no longer have any interest in, or responsibility to maintain the trademark" (Bently and Sherman, 2009, p. 962).

Provisions dealing with assignment of trademark are contained in sections 26, 29, 30 and 35 of Cap T13. The right of a registered proprietor to assign his mark is preserved (section 29, Cap T13) and this can be done with or without the goodwill of the business (section 26(1), Cap T13) and in respect of either all or some of the goods for which the mark is registered (section 26(2), Cap T13). All assignments must be registered in accordance with the provisions of the law (section 30(1), Cap T13), while assignment without goodwill must be advertised in a manner prescribed by the registrar (section 26(4), Cap T13). Cap T13 also permits the registration of trademark with a view to assigning it to a corporate body in the process of formation provided the conditions stipulated under the relevant subsections of the law are complied with (section 35(1-4), Cap T13).

Despite the centrality of goodwill to trademark assignment, it is not defined in Cap T13. Because of this importance, we briefly examine the origin as well as the meaning of goodwill in the following paragraphs. We also examine how trademark and goodwill relate to each other.

Bone (2005) and Calboli (2005) in their works trace the origin of goodwill to the common law. According to Bone, earlier practice at common law was to recognise trademarks as a property such that proprietors were at liberty to deal in their properties as they deemed fit (Bone, 2005, pp. 561-269). However, with the realisation that trademarks were consisted in symbols and words, both of which were limited in supply, common law upped the requirement for protecting trademark as property such that technical trademarks (known as arbitrary and fanciful trademarks) continued to receive protection as property, while descriptive marks (such as trade names and packaging) received lesser protection by way of action for fraud or unfair competition (Bone, 2005, pp. 561-569). Common law later completely moved away from regarding trademarks (whether technical or descriptive) as property and it was in an attempt to find an alternative means of protecting trademarks that the concept of goodwill emerged (Bone, 561-569) such that what is protected today is not the mark per se but the goodwill acquired by the mark over the years. The emergence of goodwill in this manner has been very helpful because it creates a dichotomy between trademark and goodwill, such that a trademark proprietor can decide whether to assign his mark, while keeping his goodwill, or whether to assign his goodwill, while keeping his mark, or whether to assign both goodwill and the mark (see also Calboli, 2005, pp. 799-803).

How then do we define "goodwill"? In spite of the problem of definition associated with legal concepts like "goodwill", some authors and judges have offered a guide. Lord Macnaghten,[9] after recognising the difficulty of definition, describes goodwill as follows:

> It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in customers. It is the one thing which distinguishes an old established business from a new business at its first start… However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.[10]

The English court in *Reuter v. Mulhens (No.2)*[11] identifies the "value of the attraction to customers" [12] as the hallmark of goodwill, while a US court[13] perceives it as a term generally "used to describe that component of value attributed to a business' reputation in the community, loyal customer base and ability to attract new customers."[14]

All these attempts at conceptualising goodwill, though varied, have a common trend, namely, the ability to ensure repeat purchase over and over again. Thus, regardless of this difficulty in defining goodwill, "the concept of goodwill was still highly useful for lawyers committed to a property idea because it reified the economic value associated with patterns of repeat purchasing and thereby named an entity to which property rights could attach." (Bone, 2005, p. 571)

From the explanation above, it is obvious that, though trademark and goodwill are different, their roles are largely complementary. Calboli (2005) identifies their difference in the fact that "a mark is the name or logo of a product while goodwill represents the positive feelings that consumers associate with that name or logo" (Calboli, 2005, p. 809). This complementary nature is well spelt out by Schechter (1927) who points out that "…today the trademark is not merely the symbol of goodwill but often the most effective agent for the creation of goodwill, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions." (Schechter, 1927, p.819)

For instance, a distinctive trademark may help in building goodwill for start-off businesses. Likewise, the positive goodwill of an existing business may help promote and popularise a new trademark in the mind of the consuming public. In such a situation, a consumer will purchase a product introduced under a new trademark, not because he trusts the product but because of a connection he can establish between the product and the goodwill already acquired by the company introducing the new trademark through such company's other well-known trademarks. It is, however, arguable if goodwill can be built by a business without the use of trademark. For instance, the Coca-Cola Company has acquired tremendous goodwill today among some of its buyers because of its various tested and trusted trademarked products. The multiplier effect of this is that any marked product newly introduced into the market by Coca-Cola may easily attract patronage from some customers, not because they are convinced of the quality of the new product, but because the company has built a redoubtable goodwill with its Coca-Cola trademark. Seen from this complementary perspective, it is understandable while most trademark laws create separate tradable intangible property in "trademark" and "goodwill" for the sake of assignment.

(ii) Trademark Licensing (Registered User)

Trademark licensing is a temporary permission to use a mark, granted by a proprietor known as the licensor to another person known as the licensee, allowing the latter to carry out acts in respect of the mark which would otherwise have been infringing, in return for royalty payment and in accordance with other terms provided for in the parties' agreement. Cap T13 provides for a registered user arrangement under which a registered proprietor can apply to the registrar in the prescribed manner to register a person as registered user of his mark under the Act (section 33(1), Cap T13). Such registration can be in respect of all or some of the goods for which the mark is registered (section 33(1), Cap T13). However, such registration shall not extend to marks registered defensively (section 33(1), Cap T13).[15] For the registration to be valid, section 34 imposes conditions such as the filing of applications to the registrar by both parties and the submission of a statutory declaration stating the conditions governing the agreement. Upon being satisfied that the registration will not be contrary to public interest (section 34(2), Cap T13) or promote trademark trafficking (section 34(3), Cap T13), the registrar enters the particulars of the transaction in the trademark register. This registration can however be cancelled or varied, but in all applications for such variation or cancellation, the registrar must notify all the necessary parties (section 34(6), Cap T13). Right to bring infringement action lies, in the first instance, with the registered proprietor. But where he fails to act within two months, the registered user can institute the action in his own name (section 33(4), Cap T13).

The concepts of registered user, quality control and trade connection are briefly explained below because of their importance to this discussion.

Registered User[16]

A person seeking to be a licensee under Cap T13 must be registered as a registered user, failing which any agreement between him and the registered proprietor will be void. The justification for this requirement is found in the traditional function which trademark performs, that is, source-indication. It is thus believed that to allow licensing arrangements without prior registration of licensees with trademark registries will not only defeat this function, but will also amount to fraud and deceive the general public as to the origin of the marked products. Such use, Pearson and Miller (1990, p. 319) observe, will be "potentially deceptive and contrary to the basis for protecting marks." Registration as users, they continue, is justified because it gives the needed assurances that the proprietor will be able "to control the use of the mark by the user, including control over the quality of the goods or services that the licensee will supply under the mark" (Pearson and Miller, 1990, p. 319). The requirement of registered user therefore helps the trademark system to maintain the requisite link between the mark and the registered proprietor.

Trade Connection

In Nigeria, the relevant sections of Cap T13 make the requirement of trade connection mandatory for registered users but not for the proprietor. For instance, section 33(2) (a) provides that "the use of a trademark by a registered user" shall be "in relation to goods—with which he is connected in the course of trade". Section 33(3) also provides that use by a registered user shall be deemed to be use by the proprietor for the purpose of section 31.[17] Under section 35, the registration of a mark shall not be denied because of absence of evidence of use or intention to use on the part of an applicant if the applicant accompanies his application with "an application for registration of a person as a registered user of the trademark." Finally, in defining trademark, section 67 requires "…a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user…" All of these provisions show that actual use of the mark (trade connection) by the proprietor is not a pre-condition for the validity of a registered user arrangement under Cap T13. As we argue below, this is dangerous because it permits a registered proprietor to register a mark without having any business of his own and with the sole purpose of "hiring" the mark out to willing businesses. This will not only promote trademark trafficking; it will also deceive consumers about the real origin of the marked products.

Quality Control

A licensing arrangement without a quality control obligation may deceive consumers. This is more so with the present extension of the function of trademark from a mere indication of origin to include indication of quality. It is now largely accepted that "trademarks could indicate commercial origin not only as actual product sources, but also in terms of consumers' expectations by guaranteeing that all products bearing the same mark shared the same quality regardless of the manufacturer." (Calboli, 2007, p. 344)

Since trademarks now indicate quality, it is ideal that a proprietor who is registered as owner of mark and known to consumers as the source of the marked products should exercise power of quality control on his licensee(s) as a way of assuring the consuming public that the licensing arrangement will not affect the quality of the products in any way. Section 34(1)(a) appears to provide for quality control even though the provision of that subsection is not clear enough on the degree of control required. The section provides that the registered proprietor shall furnish the registrar with a statutory declaration which should give "particulars of the relationship, existing or proposed, between the proprietor and the proposed registered user, including particulars showing the degree of control" and "stating any conditions or restrictions proposed with respect of the characteristics of the goods…" (Section 34(1)(c), Cap T13). Taken together, these provisions are short of expectations required to satisfy the quality control requirement because they do not provide for how much control a proprietor is expected to exact on his registered users. We shall address this issue more extensively under the fifth part of this discourse.

(iii) Commercialisation Benefits Proprietors

Like other trademark laws, the provisions of Cap T13 on trademark assignment and registered usership offer a proprietor the opportunity of multiple exploitations of his registered marks for financial gains. Instances of such multiple commercialisation options are discussed below.

As explained above, section 26(1) provides for assignment with or without goodwill, while section 26(2) permits total (in respect of all the goods) or partial (in respect of some of the goods) assignment. These options allow a trademark owner to unbundle the various rights he has in his registered trademark, using particularly the advantage of partial assignment and assignment without goodwill. Partial assignment provides the opportunity of "selling" a trademark in respect of some of the goods for which it is registered, while using the same mark on other goods in respect of which it is not assigned. Where the assignment is without goodwill, a proprietor can continue trading in the goods covered by his assigned mark, though under a new trademark. In this case, such proprietor relies on his already acquired goodwill to endear his new trademark to his consumers. By so doing, the proprietor benefits financially from the assigned mark and still carries on business in the goods covered by the assignment under a new trademark.

Furthermore, the provisions of Cap T13 on registered user offer more opportunities to proprietors to commercialise their marks. Firstly, the registration of a person as registered user can be "in respect of all or any of the goods" (section 33(1), Cap T13) for which the mark is registered. As a result, trademark proprietor can have as many registered users as the number of goods for which the mark is registered. Secondly, registered user registration is permitted on the basis of localities. Cap T13 particularly provides that the parties' statutory declaration must state the place or mode[18] of permitted use. Thirdly, a statutory declaration is required to state "whether the permitted use is to be for a period or without limit of period" (Section 34(1)(c), Cap T13). A proprietor can thus allow a registered usership for one, two, three etc. years. The advantage in this is that delimiting licensing by duration makes initial study of a proposed licensee's business acumen possible, especially where payment is based on turnover (as opposed to a fixed sum) by licensees. A proprietor is not likely to extend a registered usership agreement with a user who fails to meet the set target of turnover or profitability at the end of an agreed duration.

(iv) Some commercialisation options may cause consumer confusion and deception

From the foregoing discussion, it is clear that while partial assignment, assignment without goodwill, partial registered usership, and usership based on localities, duration or mode are largely beneficial to trademark proprietor, they may lead to confusion/deception for consumers who may have difficulty identifying the main source of marked products. This is because a trademark is traditionally intended to indicate the source or origin of marked products to the consumers. Anything short of this will negatively affect the primary duty of a trademark.

The problem of confusion or deception of consumers is more probable under Cap T13. For instance, even though the law requires that parties' statutory declaration should provide for the degree of control, it does not state what degree of control is required. Also, a trademark proprietor is not required to personally use his registered mark in the course of his trade. The effect of this is that consumers may erroneously presume that the goods emanate from the proprietor without knowing that they are being manufactured and sold by some registered users. Finally, the law does not require quality control where partial assignment occurs. A partial assignment connotes that both the assignor (the registered proprietor) and the assignee are using the mark and such use can take place at the same or different locations. For instance, if the SONY mark is registered in Nigeria in respect of electronics and mobile phones, the proprietor can assign the mark in respect of electronics and keep the mark in respect of mobile phones. Some of the consumers who encounter the mark on the two products may erroneously assume a connection between the two users. These may have negative influence on the consumers.

Trademark Assignment and Licensing: the US Position

The jurisprudence of trademark commercialisation through assignment and licensing is far more advanced in the US than in Nigeria. While the US jurisprudence is far from perfect, Nigeria can leverage on some of its crucial provisions to reposition Cap T13 for optimal efficacy. Before discussing these crucial lessons, we briefly examine below the US position on assignment and licensing under the Lanham Act of 1946 (as amended).

a) Assignment

Section 10 of the Lanham Act provides that trademark is assignable with the goodwill of the business or part of the business to which such mark relates. Apart from the assignment of registered trademark, application for the registration of mark is also assignable. The assignment of an application brought under section 1(b) will however be invalid except the application subsequently complies with the provisions of section 1(c) and(d) of the Act. The import of these additional requirements vis-à-visthe assignment of application for registration is to ensure that no assignment takes place in gross.

The Lanham Act adopts the common law position which prohibits assignment in gross because of its likelihood to confuse and deceive the consuming public. The justifications for the rule against assignment in gross have been emphasised in the US literatures on the subject. Desmond (2001-2002:198), for instance, rightly notes that "until someone invests the necessary resources to establish identification between the mark and a product or service, there is nothing to assign." This position is admitted by Calboli (2005, p. 774) who also argues, correctly too, that "if a mark could not exist apart from its goodwill, the mark could not be assigned without it." The judiciary has equally ruled on the importance of keeping both trademark and goodwill together to avoid confusion of the consuming public. The court in *Marshak v. Green*[19] states that to allow the assignment of mark without its goodwill could amount to "a fraud on the purchasing public who reasonably assume that the mark signifies the same thing, whether used by one person or another." There is therefore a large consensus in American jurisprudence that the rule against assignment in gross is necessary.

In recent time however, some scholars have argued that the rule against assignment in gross should be jettisoned because it does not reflect the current business realities. They base this argument on what they term the inconsistent judicial decisions on assignment coming from the different divisions of the US courts. According to Calboli (2005, p. 774), one of the leading opponents, this rule is contrary to what is obtainable in practice going by the numerous irreconcilable decisions of the US courts on the subject. He contends that in order to hold an assignment valid under the law, the courts have required from "identity" to "substantial similarity" and then "sufficient similarity" between the products being traded under the mark prior to the assignment, and those being traded after the assignment (Calboli, 2005, pp.831-832).

We agree with Calboli on this point of judicial inconsistency to a greater extent. The initial interpretation given by the US courts to assignment with goodwill was that the assignee must use an assigned mark on the exact same kind of product as the one on which the assignor was known to be using the mark. The focus of this, as stated above, is to avoid confusion or deception of the consumers. However, in *Hy-Cross Hatchery, Inc. v Osborne*[20] the Court of Custom and Patent Appeal moved away from this generally accepted interpretation to hold valid an assignment where the assignee was not using the assigned mark on a product of the exact same kind as that on which the assignor was known to be using the mark prior to its assignment. In fact, in *PepsiCo, Inc. v Grapette Co.*[21] the court stated that what is required is substantial similarity. This apparent judicial inconsistency has made authors like Calboli (2005), Desmond (2001-2002), McDade (1989-

1999), Meinhardt and Havelock (1983) and Johnson (1995) argue for the recognition of "assignment with or without goodwill" to reflect business realities. This inconsistency has been attributed to two factors: inability to agree on a definition of goodwill and the inability to determine what the current concept of trademark entails among business men (Calboli, 2005, p.775-776).

One relevant question in respect of the arguments for the adoption of "assignment without goodwill" under the Lanham Act is: how will the issue of consumer confusion and deception be dealt with should the proposition of these authors be accepted?

These authors have argued that confusion and deception may not result if the right follow-up actions are taken. For instance, Calboli opines that once the new owners of the marks adopt the necessary means to inform the public of the change in ownership, the public are not likely to be deceived or harmed (Calboli, 2005, p.774). Additionally, all of them claim that advertising by the new owner of the assigned marks can prevent such confusion and deception. Thus, Meinhardt and Havelock (1983, p.59) note that an advertisement requirement will "ensure that no confusion or deception of the public arises as a result of assignment without goodwill." McDade (1998-1999, p.473) also suggests that advertising in trade publications or major newspapers or labelling of the product with information on change of ownership may solve the problem of consumer confusion and/or deception.

All the above arguments notwithstanding, assignment of trademark in the US will only be valid if it is done with the goodwill of the business. We however agree with these scholars that the inability to properly conceptualise "goodwill" under the Act has left room for inconsistent decisions from the US courts.

b) Licensing

Historically, the idea of licensing of mark was prohibited under the US Trademark Act of 1905 because of the assumption that such licensing would defeat the primary function of a mark to indicate origin and would therefore deceive or confuse the consumers (Calboli, 2007:346). A combined reading of sections 5 and 45 of the Lanham Act reveals that a trademark can now be licensed to interested parties. According to section 5 of the Act, any legitimate use of a registered mark, or a mark proposed for registration, by related companies shall inure to the benefit of the registrant or applicant for registration of the mark, provided the mark is not used in a manner likely to deceive the public. This is unlike the position under the 1905 Act where uses by persons other than the mark owners would render the mark invalid. Section 5 now clearly provides that "such use by related companies shall not affect the validity of such mark or of its registration."

It is important to iterate that the whole rationale for protecting trademark is to assist consumers in making choices and to indicate the sources of these choices. To ensure that this function is not lost in the labyrinth of trademark licensing, the Lanham Act provides for the circumstances under which such uses by other parties can be valid. This is done in section 45 where the term 'related company' is defined as "any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality (emphasis supplied) of the goods or services on or in connection with which the mark is used."

Thus, for a licensing agreement to be valid, it must comply with the requirement of "quality control". This requirement is "based upon a concern for the public, which presumably associates with a trademark not only the origin of the goods, but also a continuing standard of quality or characteristics" (Krayer, 1961, p.575). It is also helpful in assuring consumers of "consistency in the quality of products or services bearing the mark" (Doll, 2001-2002, p.203). Finally, a quality control requirement in licensing arrangements may protect consumers against confusion and deception regarding product sources.

While some US scholars have argued that this quality control requirement should be relaxed, others have called for its extension to apply, not only to a licensee, but also to the licensor himself. The arguments of scholars advocating for the two positions are briefly examined below.

Marks (1988, p.642) is of the opinion that the requirement of quality control should be relaxed such that a licensor should only be required to ensure quality control at the beginning of parties' relationship and should not be required to constantly police whether his licensees continuously comply with quality control requirement or not. He notes further that it is only when the licensee tampers with the set quality standard of licensor that the "licensor has an obligation to act and to reassert quality control standards over the marketing and distribution of goods…" (Marks, 1988, p.654)

Calboli also argues for flexible application of the quality control requirement. In his view, the failure of the Lanham Act to define quality control and provide for the required degree of quality control has led to inconsistent judicial decisions such that the courts have required from "adequate" to "sufficient" to "minimal" control to validate trademark licensing (Carlboli, 2007, pp.346-347). The effect of this, the author contends, is that the courts have now moved away from protecting the primary purposes of trademark (consumer protection and prevention of unfair competition) to protecting the property right of a trademark proprietor in a mark (Calboli, 2007, p.387). He recommends that, instead of holding on to the current unrealistic approach, the law should be amended to reflect business reality by providing for licensing "with or without" quality control and that the degree of control required should be stated in such amendment (Calboli, 2007, pp.396-400).

Genel has argued for the extension of the quality control requirement to the trademark owner. His reason is that "consumers will suffer equivalent injuries whenever they buy goods that fluctuate in quality, regardless of whether they purchase them directly from the trademark owner or from the owner's licensee" (Genel, 2001-2002,p.289). This expansionist interpretation of the quality control requirement appears good because if the licensee is expected to sustain the quality with which the trademark owner's products are known, then the trademark owner must also not secretly reduce his own quality to the detriment of the consuming public.

It is equally important to note that quality control requirement is not met simply by providing for it in parties' agreement; it is met by the licensor actually exacting quality-related control on his licensees. Thus it has been stated that to meet the requirement of quality control, a licensor is required to "actively enforce those standards with an ongoing program of actual quality control that includes the monitoring of licensees and insistence on licensee's compliance with the licensor's standards of quality for products and services bearing its marks" (Doll, 2001-2002, p.208). To ensure that actual control takes place, three methods have been suggested namely direct control by the licensor, control through a third party, or reliance on the licensee for control (Doll, 2001-2002, p.205).

Finally, it appears from the provisions of section 1 of the Lanham Act and judicial decisions that trade connection between the licensor and the goods or services in respect of which a mark is registered must be established before a licensing agreement can be valid. Under section 1, a mark cannot be registered except an applicant shows conclusive evidence of use of the mark in commerce. The section recognises the filing of two types of applications: one, application in respect of a mark that is already being use in commerce (section 1(a), Lanham Act), and two, application for bona fide intention to use trademark (section 1(b), Lanham Act). Where an application is brought under section 1(b), it must subsequently comply with the provision of section 1(c) and (d). While section 1(c) requires a subsequent amendment of this application to comply with the provisions of section 1(a), section 1(d) provides for the filing of a verified statement that the mark proposed for registration under section 1(b) is now used in commerce. Such statement must be filed within 6 months of submitting the application under section 1(b). This can be extended to a maximum period of 24 months provided the stipulated conditions are met (section 1(d)).

Even though it has been argued that "there seems to be no logical impediment in the way of introducing a new trademark through licensees when a *bona fide* commercial purpose is served" (Diamond, 1961-1962, pp. 301-302), the Trademark Trial and Appeal Board in *In re CB Donald Co.*[22] has disagreed with that argument because it is a proposition that can affect the end consumers negatively. All these provisions and judicial decision point to the importance of use of a registered mark by the proprietor before he can license the mark.

Reforming Cap T13: Lessons from the US

Pursuant to our discussion of the US position above, we propose the following aspects of Cap T13for reform. We, however, observe, where necessary, the need to modify some of the discussed US provisions and practices to suit local circumstances. We particularly emphasise the need to avoid the current uncertainties in the application of statutory provisions on assignment and licensing by the US courts.

a) Adopt "assignment with goodwill"

From our discussion above, assignment without the goodwill of the business operates to the benefit of the assignor because he is able to "sell" his mark and still deal in the goods for which the mark is registered, using a new trademark and his already acquired goodwill. This is capable of causing consumer confusion and deception; hence the reason for recommending that assignment of trademark should be valid only if accompanied by the goodwill of the business as is currently the case under the US Lanham Act.

It is however important to examine whether it makes practical sense for Nigeria to adopt this approach at a time when respected American scholars like Calboli, Desmond, McDade, Johnson, etc. are advocating for a change in the Lanham Act to recognise "assignment with or without goodwill". The major justification given for this call by the learned scholars is inconsistency in judicial decisions because of lack of definition of important concepts like "goodwill". They also allude to the fact that adopting this approach will not result in consumer confusion and deception. We attempt to briefly counter these justifications below and conclude that Nigeria should still adopt an "assignment with goodwill" regime in the place of its current "assignment with or without goodwill". Because of the depth of Professor Calboli's article on this issue, we use his arguments to benchmark our ripostes.

One of Calboli's reasons for arguing that the extant rule be changed from "assignment with goodwill" to "assignment with or without goodwill" is that neither the courts nor the scholars in the field have been able to come up with a universally acceptable definition of goodwill. As argued above, even though a consensus definition of goodwill may not be possible, there is a general idea of what goodwill entails, which is the ability of a mark to provoke and sustain repeat purchase. The fact that goodwill is not conclusively defined in the Lanham Act cannot therefore be a justification for conferring legal recognition on assignment in gross.

Calboli further argues that assignment with or without goodwill will benefit consumers by providing alternative products or multiple product sources to them. In as much as this may be true, the danger of the confusion that may result is enough reason to require that the assignor transfers the right to trade in the products covered by the assigned mark at the same time he transfers the mark. Other competitors can easily enter the market with the same or similar products under different trademarks, thus providing the advantage of multiple sources to consumers and an additional advantage of absence of consumer confusion and/or deception.

Why we are not entirely disputing the usefulness of advertising in reducing consumer confusion or deception as canvassed by Calboli and others, we maintain that it can only be useful in advanced economies where the literacy level is appreciably high and it cannot provide a total solution to the confusion/ deception conundrum. For instance, Cap T13 presently provides for the requirement of advertisement where assignment is without goodwill in section 26(4). There is also an additional requirement in section 26(5) that the notice of such assignment should be published in Trademark Journals. However, these requirements have not worked in Nigeria for two reasons. First, there is high illiteracy level[23] in the country which makes it difficult, if not impossible, for such advertisement to reach the majority of the consuming public who majorly identify their favourite products through colour and product dress. Secondly, the Trademark Journals are hardly published on time and are only available to members of the public at a cost.[24] These requirements of advertisement and publication in trademark journal therefore make no difference; hence, the need to adopt assignment with goodwill in Nigeria which could save consumers from confusion and deception.

In fact, it has been rightly pointed out that "if the goodwill is simply left to atrophy in the hands of the assignor of the trademark, the assignee is likely, in practical terms, to gain the benefit of it. If that is so, it is likely to be preferable to assign it [the goodwill] in a formal sense as well" (Kitchin et al, 2005, p.350). This will be beneficial to the assignor, the assignee as well as the consumers.

Finally, we note that Calboli and others call for an expansion of the existing rule in the US because of their restrictive interpretation or definition of the concept of "assignment without goodwill". According to Calboli, "assignment without goodwill" occurs only where an assignee completely or substantially abandons the products on which the assigned mark was used by his assignor, or where he substantially alters the quality for which his assignor was known by his consumers. This definition is adopted from some of the inconsistent judicial decisions critiqued by the author. It is, however, our view that this type of narrow interpretation over-simplifies the problem by ignoring the other meaning of "assignment without goodwill"; a meaning that is more probable to cause consumer confusion. Thus, assignment is also without goodwill where an assignor parts with his mark without parting with the right to trade in the products on which he uses the mark such that he continues dealing in those products using a new trademark. Thus, on the one hand, there is an assignee trading with a trademark associated by consumers with the assignor, while on the other hand, there is an assignor, trading in the goods for which he has been known by consumers but under a different mark. Some of the consumers may continue to assume that the products with assignor's mark still originate from the assignor when these actually originate from another seller, the assignee.

In view of the above discussion, how can Nigeria avoid the pitfalls observed in the practice of this approach in the US? For Nigeria to avoid subsequent watering down of statutory provisions on assignment with goodwill as is currently being witnessed in the US where inconsistent judicial interpretations of the provisions of section 10 of the Lanham Act have led to calls for statutory recognition of "assignment with or without goodwill", the amendment being suggested to Cap T13 should provide guidelines for defining/interpreting goodwill. Additionally, even though "assignment with goodwill" is being advocated, the Act should go a step further to define "assignment without goodwill" in its interpretation section. Such definition should reflect the elements of abandonment of or alteration in product type or quality by assignee (as argued by Calboli) as well as the right of discontinuance in the kind of products for which the mark is assigned by an assignor (as we currently propose). With such clarification in the definition of goodwill and extension in the scope of "assignment without goodwill", a balance will be struck between the interests of the assignor/assignee on the one hand, and those of the consuming public, on the other.

b) Specify the degree of quality control required in registered usership

Since the realisation that the function of trademark goes beyond mere indication of source to include indication of quality, the issue of quality control has become central to trademark licensing. The rationale behind this is that most consumers repeat their purchase options because of earlier satisfactory experience with quality and, though they may not know the real origin of the products, they expect that the products will continue to emanate from the same origin and maintain the same quality. This expectation will be disturbed where a trademark proprietor licenses his mark without overseeing whether the quality for which his products are known is maintained by his licensees. Failure in this regard may affect both the licensor and the consuming public negatively because the moment the quality is reduced by the licensees, consumers get disappointed on the long run and they may stop patronising the licensor's marked products for no direct fault of the licensor.

There is practically no much difference between the US and the Nigerian position on quality control as both the Lanham Act and Cap T13 provide for quality control without specifying the degree of control required for validity. For instance, since what Cap T13 requires is a degree of control without specifying what type of control is contemplated, a licensor may rely on his examination of his licensees' accounting books as control despite the fact that this does not go to the issue of quality which affects consumers' confusion or deception. We are therefore left with looking for solution in the US literatures on quality control discussed above.

Mark (1988, p.642) advocates for a relaxation of the quality control requirement such that a licensor will only be liable to maintain quality control at the inception of his relationship with the licensee. This cannot be a desirable option for the amendment sought to Cap T13 because a licensor will only know of his licensee's lowered quality if he continuously polices such licensee's business activities.

For Calboli (2007, pp.396-400), Lanham Act should be amended to allow licensing "with or without control." The basis of his suggestion is the lack of consensus by the court on the interpretation of "quality" and "control", terms which are not defined anywhere in the Lanham Act. He further suggests that the degree of control required should be stipulated in the amendment he is proposing to the Lanham Act. These arguments strengthen our view that an explicit approach be adopted where the law will be clear on the required degree of control in licensing arrangement. However, we do not share Professor Calboli's view that trademark licensing should be permitted with or without control because to do so will deceive consumers more and defeat the primary function of consumer protection that we intend to preserve.

Genel's proposition is very interesting. He suggests that, owing to the importance of quality assurance, the requirement of quality control should apply to both the licensor and the licensee. He therefore suggests that the requirement be extended to trademark owners (Genel, 2001-2002, p.205). We admit that this is a very good proposition since it makes sense to insist that both the licensee and mark owner must not deceive the consuming public about the quality of the products being introduced to the market under their marks. We are, however, of the view that enforcing this type of arrangement under a trademark law will be both difficult and superfluous. It is a problem that can be best addressed through separate quality control bodies set up under the laws of most countries. For instance, in Nigeria such quality control functions for trademark owners are performed by bodies set up under the Consumer Protection Council Act (Cap C25), the Trade Malpractices (Miscellaneous Offences) Act (Cap T12), and the Merchandise Marks Act (Cap M10). These are statutes which "provide platforms for consumer redress through public complaints mechanisms that may eventually culminate in public prosecution and criminal sanctions for counterfeiting and other forms of false or deceptive labelling of goods" (Oyewunmi, 2015, p. 233). It is therefore not necessary to extend the provision of quality control to trademark owners.

Resulting from the foregoing discussion, the relevant provisions of Cap T13 already discussed should be amended to specify the degree of control expected from the registered proprietor; to clarify that actual control is required; and to adopt any or all of the three methods suggested by Doll as options for executing the requisite quality control over licensees. The current arrangement under which quality sustenance by registered proprietors is overseen by national quality control bodies is preferable to Genel's recommendation and should be sustained.

c) Make "use of mark" by trademark owner a pre-condition to registered user's validity

Under Cap T13, there is no obligation on the trademark owner to use his mark before he can license it. Statutory confirmation of this position can be found in sections 33(2)(a) (only registered user has a mandatory obligation to show connection in the course of trade), 33(3) (use by registered user deemed use by the proprietor), 35 (trademark application can be filed with the intention of registering someone as a registered user and not with the intention of personally using the mark), and 67 (the connection in the course of trade required to register a trademark can be shown either through the applicant or through a registered user), all of which have been discussed above (see Part III sub-section ii).

We therefore recommend that Cap T13 should be amended to adopt the position under section 1 of the Lanham Act where an applicant is required to use his mark in commerce before he can register such mark. Where a mark proposed for registration has not been used in commerce prior to the filing of application, an application for registration in respect of such mark can be filed under section 1(b), though registration will not take place until: one, a verified statement of use in commerce is filed by the applicant within the timeframe stipulated under section 1(d), and two, the application is amended as required under section 1(c) to make it comply with the provisions of section 1(a). These provisions will ensure that a trademark proprietor is directly involved in the use of his mark. The provisions will also help obliterate trademark trafficking. One good advantage of a mark owner using his mark in commerce is that, being commercially involved in the goods for which a mark is registered and licensed, he can effectively perform his quality control duty without being deceived by an unscrupulous licensee. Cap T13 should therefore adopt this position.

Conclusion

Cap T13 recognises that trademarks can be commercialised through assignment and registered usership. This paper has discussed the features and importance of trademark which make it apt for commercialisation. It has also discussed the two options available under the Act for commercialising a mark: assignment and registered usership. In particular, the paper explains how these options can benefit registered proprietors at the expense of the consuming public who may be confused or deceived by a change of ownership of trademark without an accompanying change in business goodwill or by a duplication of trademark rights through registered usership with little or no control. Important factors in trademark assignment and registered usership, such as advertisement and registration of assignment, the concepts of registered user, quality control, and trade connection are adequately analysed. The paper advocates for the reform of three important aspects of Cap T13 dealing with trademark commercialisation. These are: that assignment should only be valid if accompanied with the goodwill of the business; that guidelines on what will amount to goodwill be clearly defined; that the degree of quality control required should be explicitly provided for; and that it should be a pre-condition to the validity of a registered usership for a registered proprietor to use his mark in the course of trade rather than entirely relying on use by his registered users. These reforms will go a long way in protecting consumers against confusion and deception while at the same time, they will ensure that trademark proprietors are able to benefit from the commercialisation of their registered marks.

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Notes

[1] Trademark Act Cap T13 Laws of the Federation of Nigeria, 2004, available at http://lawnigeria.com/LawsoftheFederation/TRADE-MARKS-ACT.html accessed 9 May 2016

[2] This is possible if the proprietor keeps renewing at the expiration of the initial duration of protection. In Nigeria for instance, the initial duration is 7 years but this can be renewed perpetually if the provisions of section 23 Cap T 13 are complied with. Coca-Cola Company is a good example of a company which has employed trademark to enjoy brand monopoly in perpetuity.

[3] Patent is protected for a time-certain of 20 years, while Industrial Design's protection cannot exceed 15 years altogether. See sections 7 and 20 of the Patents and Designs Act (PDA5) Cap P 2 Laws of the Federation of Nigeria 2004. The First Schedule to the Copyright Act Cap C28 Laws of the Federation of Nigeria 2004 also contains limited durations for the different categories of works protected under the Act.

[4] [1991] FSR 99.

[5] [2003] ETMR 19, 47.

[6] See Griffiths [2001] IPQ 326, 329.

[7] This is a non-existing trademark/brand.

[8] This is possible where the licenses granted are not exclusive. But where it is exclusive, the licensor will also be precluded from using the mark within the locality agreed by the parties. Licensing as a way of commercialisation is given detailed discussion below.

[9] Commissioner of Inland Revenue v Muller and Co's Margarine Ltd[1901] AC 217

[10] bid. at 223.

[11] (1953) 70 RPC 235.

[12] Ibid. at 254.

[13] See State Department of Transport v. Cowan 103 P. 3d 1 (Nev. 2004).

[14] Ibid. at 5.

[15] Section 32 of Cap T13 allows "words" which are invented and well-known to be registered defensively. The purpose of this provision is to protect such "invented" and "well-known" marks against diffusion.

[16] Section 67, the interpretation section of Cap T13, defines a registered user as "a person who is for the time being registered as such under section 34 of this Act."

[17] Section 31 of Cap T13 provides for removal of trademark on the ground of non-use.

[18] The mode can refer to the right of export. Thus, the proprietor may license his trademark to a licensee for use on products meant for export.

[19] 746 F.2d 927, 929 (2d Cir. 1984)

[20] 303 F.2d 947, 949-50 (C.C.P.A. 1962)

[21] 416 F.2d 285, 288 (8th Cir. 1969)

[22] The Trademark Trial and Appeal Board 122 USPQ [TTAB 1959].

[23] By the end of 2015, 65 million Nigerians were said to be illiterate. See Muhtar Bakare, "65 Million Nigerians are Illiterates – UNESCO" Vanguard (Nigeria 17 December 2015) available at http://www.vanguardngr.com/2015/12/65-million-nigerians-are-illiterates-unesco/ accessed 5 May 2016. See also UNESCO Institute for Statistics, "Adult and Youth Literacy, 1990-2015: Analysis of Data for 41 Selected Countries" where target illiterate population for 2015 was estimated at 77.4 million people, available at http://www.uis.unesco.org/literacy/Documents/UIS-literacy-statistics-1990-2015-en.pdf accessed 5 May 2016.

[24] A visit to the official website of the trademark office at www.iponigeria.com will confirm this assertion.

APPROPRIATE TECHNOLOGY, INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER

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Abstract

Many years of investment in highly complex and mainstream technology has failed to solve the recurring socio-economic problems in developing and least developed countries (LDCs)s. Even so, these countries have been recipients of billions of dollars of donor aid especially towards technology capacitation to mitigate poverty and enable sustainable development, but this has failed to significantly raise the quality of living prompting international discussions on how technology can be reorganised to work for everyone using appropriate technology. The aim of this paper is to establish the connection between intellectual property, technology transfer activities and appropriate technology. A case study of Zimbabwe is examined to test the relationship of appropriate technology, intellectual property and technology transfer as a microcosm of the situation obtaining in most developing and least developed countries. The research looked at the benefits of adopting appropriate technology in solving socio-economic problems, and especially tackling the newly devised United Nations sustainable development goals.

Key words

appropriate technology, technology transfer, intellectual property, developing and least developed countries, patent

Introduction

Technology, in its various forms, is one of the core drivers of the modern knowledge based economies. It is primed from inventiveness and largely protected and diffused through the intellectual property system. It is one of the bases on which economic and social development can take shape (Zaman and Goschin, 2010; Moon, 2011). It is accepted that technology is the basic foundation for development, because from it countries are able to utilise and work resources, enhance productivity, competitiveness, and ultimately strengthen the economy (Organisation for Economic Co-operation and Development, 2015).

But despite the facts of all what technology can achieve, questions have arisen as to why it has not helped much in lifting economic and social development levels in the larger parts of the Third World. It has failed to provide a lasting solution to tackle poverty, make sustainable use of resources and enhance environmental sustenance, improve health and sanitation, create jobs and generally raise the standards of living (Akubue, 2000; White, 1976). The failure of technology is largely attributed to situations where preferred choices and adaptation strategies are not planned or rational, are simply imposed, or implemented by a few without due regard to the social, political, economic and environmental considerations of the communities in which they are being applied. Technology has a propensity to be effective in the societies were it is embraced, and is in sync with the people's cultural and social realities and expectations.

Problem Statement

In recent years, a number of countries and organisations have taken the route of adapting and using appropriate technologies to address socio-economic problems[1]. The desire to make use of appropriate technology was necessitated by the need to strike a fair balance between local choice, technology advancement, development and resource

[15] Section 32 of Cap T13 allows "words" which are invented and well-known to be registered defensively. The purpose of this provision is to protect such "invented" and "well-known" marks against diffusion.

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Problem Statement

In recent years, a number of countries and organisations have taken the route of adapting and using appropriate technologies to address socio-economic problems[1]. The desire to make use of appropriate technology was necessitated by the need to strike a fair balance between local choice, technology advancement, development and resource utilisation efficiency. The use of appropriate technology has become more of a response to setbacks of mainstream technology which include the undesired, often catastrophic impact on the environment, negative externalities, its high cost of capital and maintenance, frequent replacement of human labour with mechanical systems and/or machines, its role in social and cultural destruction and its large scale depletion of natural resource bases.

Research Gap and Objectives

The core of this study was to encourage and emphasise the importance of securing appropriate technology in trying to solve the socio-economic problems in most developing countries using existing patent literature, streamlined technology sourcing, creating an appropriate technology aligned policy framework, and making use of open source appropriate technology. The study sought to focus on three key principal areas below:

a) Appropriate technology and intellectual property: Differing philosophies

Appropriate technology (AT) just like other technologies, is a creation of the human mind. It derives itself from intellectual activities. Apart from being a result of mental activities, AT can also rely on other existing intellectual property for its conception. Intellectual property rights protect creations of the mind to enable the owner to reap rewards, and to enable disclosure valuable to enrich the body of science and arts, and enhance competition and trade. Intellectual property in most instances gives a negative right. However, AT though a subject of intellectual creativity is a social phenomenon and a philosophy that tries to move away from protectionism and profits. AT promotes free, open (source) sharing of ideas and unencumbered methods of innovation and creativity. A unique common link is that appropriate technology seems to benefit from reverse engineering and patent information in this modern day.

b) Appropriate technology and patent information

The relationship between patents and appropriate technology (AT) has not been thoroughly and explicitly studied due to the fact that the latter will unlikely seek patent protection (Whiteley, 1993). The accepted notion for years was that AT had little to do with patents. In fact, there is a probable antagonism between AT and patents in principle. AT seeks free, open source information without encumbrances while patents on the other hand seek to protect the inventor, offering a limited monopoly. Recently, a number of inventions closely resembling appropriate technologies have been patented. A good practical example is the patent on a system of water purification using a portable straw (US patent number 4, 995, 976). The technology is in need in Africa for example, but is encumbered by a patent right. The provision of the patent information can allow those in the developing countries to reverse engineer and come up with a similar technology. The challenge with reverse engineering with regards to developing countries and LDCs is the lack of useful infrastructure, facilities, materials, equipment, capacity and policy direction.

Appropriate technology creations can also be derived from expired patent information in the public domain. However, care should be taken when utilising patent information from currently effective and valid patents as it may lead to encroachment into other inventors' IP rights, and it must also be remembered that engaging users is vital in the process of adapting an already existing innovation. Whiteley (1993) notes that appropriate technology is often developed free from the patent dominion. A research by the Commission on Intellectual Property Rights in their 2002 publication affirmed that patents actually have a potential to hinder poverty reduction in Third World countries as technology owners avoid weak markets.

c) Technology transfer, foreign direct investment and appropriate technology

Technology in developing countries is mainly received through Foreign Direct Investment (FDI), Official Development Assistance (ODA) and donor aid. ODA has come as an alternative to FDI, as private equity holders are often reluctant to invest in less profit making and public sector oriented businesses like those dealing with provision of bulk water, sewer reticulation, energy distribution, sanitation and public health. Many years of financial and technical aid to developing and least developed countries has not yielded the desired results if any (Black, 2007; Moyo, 2009). Much of the technical aid has not worked or been sustained in the communities where it is being applied due to the diversity of social, economic, legislative and political challenges (Chambers, 1983; Black, 2007; Smith, 2007). Appropriate technology can be used to reduce over reliance on donor aid by switching to locally devised and assembled technologies.

Literature Review

Appropriate technology: Origins and movement

The appropriate technology gained popularity in the 1970's. The movement advocated for the adoption of socially viable, less complex, adaptable, inclusive, endogenous and less capital intensive techniques of solving problems by the developing and least developed countries (Schumaker, 1973). The general feeling by AT scholars was that the adoption of exogenous technologies exacerbated the dependency by least developed countries on the developed countries. Further, the developing world whose majority people lived on less than a dollar and a quarter a day could not afford the luxuries of complex technologies and their products (Polak, 2008; Carr 1985). Technologies from the developed world are often capital intensive, demanding less labour (Carr, 1985), profoundly reliant on expatriate technical knowledge and safeguarded by intellectual property rights like patents, industrial designs and trade secrets.

Appropriate technology

Appropriate technology is dynamic and circumstantial in application (Tharakan, 2006), and best described as philosophical in principle and design (Drengson, 1982). In defining appropriate technology, Schumacher (1973); Streeten (1979; Smillie (2000); Wicklein and Kachmar (2001), perceived it as technology that tries to solve social problems efficiently using local resources at a minimal cost, characterised by high levels of community involvement, and can be mastered by locals in terms of manufacturing, maintaining, repairing and from which the users derive a higher level of functional utility and efficiency (Uphoff et al. 1979). The Handbook on Appropriate Technology (1983), defines appropriate technology as that technology which is most suitably adapted to the conditions of a given situation, be compatible with the human, financial and material resources that surround its application.

Appropriate technologies serve principally three purposes, first, they solve human problems with the least possible (or combination of) local resources, secondly they seek to minimise the cost of production, thus seek to provide low priced technologies and thirdly appropriate technologies seek to solve social problems, thus are not primarily driven by commercial premise, but rather by their desire to meet social goals and needs.

For technology to be integrated into a community, it must be acceptable within the communities' cultural values, ethics and social construct. Most technologies transferred to the developing countries fail due to the inability of the locals to accept or comprehend new technologies, especially for those communities whose cultural doctrines are excessively adhered to. AT faces a serious challenge when it comes to overcoming a behavioural position that has been long standing.

The technology limits attributed to culture and societal complexities originate from differing viewpoints. A community may fail to accept a technology availed to it; normally because the provider of the technology failed to appreciate the values of the community or failed to involve them in the process prior to introduction.

Appropriate Technology Movements

Professor E. F. Schumacher

The AT movement has its roots in the 'intermediate technology' advocacy by Professor Ernst Friedrich Schumacher which started in the 1950's. Professor Schumacher popularised the movement in his book Small is Beautiful (1973). Professor Schumacher became an enthusiast of intermediate technologies well before the publication of his book. As an economist and government advisor with vast work experience from the National Coal Board in England, Prof. Schumacher had a first-hand evaluation of the problems that complex technology presented as he experienced in Burma (now Myanmar) after moving from England. He noted that the developed world favoured out of proportion technologies for the developing countries, which came in form of donor aid and multinational investment. These donations and investments almost always failed to have meaningful impact in the target communities. He noticed that the failure was more in terms of social, economic and environmental terms than technical functionality. His work in Small is Beautiful is revered even today and is touted as one of the most important pieces of literature on appropriate technology and rated as one of the most influential texts of the past century.

Small is Beautiful is a unique compilation of Schumacher's past essays, speeches (Kane, 2009) and undocumented thoughts and experiences put into a book narration. Schumacher tries to articulate throughout the book the importance of people centric economics and the need to move away from capitalist gigantism. He believed that any economic order or system that originates from a humanist/socialist core had a better opportunity of sustainability. The book shows the philosophical views of Schumacher. The book is instrumental in championing the cause of what Schumacher himself termed 'intermediate technologies', principally the basis of the concept of appropriate technologies.

Mohandas Mahatma Ghandi

Ghandi could arguably be the early proponent of appropriate technology. He led a large scale resistance of western systems of industrialisation arguing it was not suited for a country like India and was more of a tool to supress the locals. He believed in production by masses rather than in capitalist mass production, a concept which is acknowledged in Schumacher's Buddhist economics essay. Ghandi's resistance to western sponsored industrialisation and technological systems was based on political, social and economic struggle for development. His vision and resistance is often attributed to the increased innovation by Indian weavers who came up with local textile production technologies and managed to bolster their textile industry. Apart from influencing the behaviour of the Indian people, Ghandi also played a larger role in influencing the ideology and philosophical vision of Schumacher.

He had a different philosophy on the western global development model which he viewed as a profit maximisation system for the first world rather than a socially relevant system for the Third World. His argument primarily held on the notion that these advanced technologies were not targeting the majority rural folk, but rather concentrated on a few cosmopolitan areas. Akubue (2000), supported Ghandi's view by arguing that a radical consequence of constantly importing technology is a creation of "dual economy", where economic growth is biased towards urban centres and leaving the rural areas under lethargic, recessive growth. Owners of technology often prefer areas or markets where they can recoup capital investments or costs sunk on making the technology or its products available. Rural markets are often imagined as not having ready, high return markets.

Ghandi's Swadeshi and Swaraj philosophies

Though these philosophies are extensive, covering a variety of social disciplines, The Swadeshi and Swaraj values have similarities to those of AT philosophy. The Swadeshi and Swaraj movements were based upon a notion of self-sufficiency in all aspects of socio-economic development. These were intended for the poor and disadvantaged masses. They presented clean and non-violent solutions to socio-economic problems. Ghandi also emphasised the need to be conscious of the environment as it played an important role in shaping the general living of its habitants. With respect to technology, Ghandi fought for village centric endogenous technology. He despised western complex technologies for their tendency to tie people to it. This was against his 'liberated society' principle (Moniz, 1996).

The new movements - CDIP/3/7 World Intellectual Property Organisation (WIPO) Committee on Development and Intellectual Property (CDIP)

The Korean Intellectual Property Office (KIPO) submitted a proposal on "Use of Patent Information in the Transfer of Appropriate Technology" for the third session of the Committee on Development and Intellectual Property (CDIP) under the Development Agenda in 2009 (CDIP/3/7). The Republic of Korea through KIPO realised that developing countries had little or no chance of replicating high-end technologies from developed countries and thus proposed an accommodative system of information dissemination to LDCs on appropriate technology in the spirit of solving their pressing social problems. KIPOs interest was to find a way to identify and disseminate useful information on appropriate technology that will be made available to identified LDCs. The idea was to strategically get relevant patent information and relay it to those countries in dire need of such technology. The project is the first of its kind to match make patent information with appropriate technology.

The proposal looked at two stages of implementing the project with the first stage titled "Dissemination of AT Information" covered in four steps and the second stage titled "Support for the Implementation of AT". The first stage basically dealt with the identification of essential technologies within a guiding framework which would enable the condensing of gathered patent information into simple, usable format available online. The second stage was mainly concerned with the strategy on how to implement the identified AT into practical use. KIPO articulated the need for a consultant to assist in such implementation.

The project was approved by WIPO in 2010 (document CDIP/5/6) under a theme "Capacity-Building in the Use of Appropriate Technology Specific Technical and Scientific Information as a Solution for Identified Development Challenges". The Approval complemented stage two's implementation strategy under document CDIP/3/7. The project is closely linked to document CDPI/4/6 on Developing Tools for Access to Patent Information and document CDIP/4/12 which delved on proposals presented by the delegations of Japan (document CDIP/3/8) and the Republic of Korea (document CDIP/3/7) for the implementation of certain identified Development Agenda Recommendations. It is for this cause that the World Intellectual Property Organisation supported Millennium Development Goals (MDGs) activities under its Development Agenda (DA). WIPO's DA Recommendations 19, 30, 31 are specifically lined to help the thematic project on Appropriate Technology under the CDIP Document CDIP/5/6REV which was approved in April 2010.

Appropriate technology transfers: Some of the common points of conflict

Appropriate technology transfer, just like mainstream technology, is often viewed from differing viewpoints of the giver or seller and receiver or buyer. As is with business philosophy, the giver or seller of technology often anticipates or desires a return to his gesture, whilst in many occasions the recipients or buyer often expect a free or cheap technology. The giver or seller in many circumstances has the upper hand in bargaining and the receiver on the other has limited options in the technology transactions.

Appropriate technology transfer: Some of the common points of conflict

Technology Holder:	**Technology Recipient:**
Has a profit motive	Free, cheap technology
Desires exclusive rights through patent protection	Non-encumbered technology
Strong bargaining position	Weak bargaining position
Investment tool	Social responsibility tool
Research and Development protection	Low technology capacity
Exert control over technology use	Lacks local control capacity

Sustainable Development Goals and Appropriate Technology Transfer

International agenda

Matters of world development took centre stage in global politics markedly in the late sixties as witnessed by the New Delhi Conference held in 1968 and the United Nations (UN) Commission on the Second Development Decade, held in 1969. In those international conferences, the issue of technology was at the fore of discussions. Since then, global policies on development are strongly lined along and advocate for technology solutions among other factors that could help in achieving such development goals.

The UN Sustainable Development Goals (SDGs), the World Trade Organisation's Trade Related Aspects of Intellectual Property Rights (TRIPS), and World Intellectual Property Organisation's Committee on Development and Intellectual Property (CDIP) have objectives that touch on technology in solving problems bedevilling the world ranging from access to safe water, sanitation, education, health, energy and agriculture.

A sample of statistics show that almost three billion people in mostly the Third World still do not have access to safe water or sanitation (United Nations Development Programme, 2011). In sub-Saharan Africa approximately 60 percent of the population had no access to safe water in 2011 (World Health Organisation, 2013), it is estimated that 80 percent of the people in Sub-Saharan Africa rely on inefficient biomass for energy (Millennium Development Goals Report, 2010). It is estimated that two thirds of urban dwellers in the developing and least developed countries do not have efficient means of disposing excreta (Hardoy et al. 2001). Concerned Countries and Institutions are pursuing ways of alleviating the appalling state of global affairs using the UN and other multilateral bodies within normative frameworks supportive of SDGs (Shawki, 2016). One of the ways is by using adaptive technologies.

Discussions at the GATT Round Table identified technology transfer as an important element to help in strengthening socio-economic standing of developing countries and least developed countries. This led to the inclusion of Article 66 of TRIPS. Technology is essential in solving many if not most of the global social and economic problems; however, the critical question when it comes to developing countries and LDCs has always been on how technology will eventually build up to comparable levels with the developed world. The issues of patent information use, technology transfer and licensing and the creation of local conducive laws and policies that would allow for innovation and technology development would come to mind.

The renewed interest in using technologies at the world stage, to help solve problems affecting the world at large is taking shape at the same time when it has been realised that there is a greater need to have effective north - south and south - south technology transfer and Foreign Direct Investment (FDI) initiatives. Under the UN auspices, Official Development Assistance (ODA) to the underdeveloped and developing world, is estimated to be raised or maintained by the first world nations at a level of about 0.7 percent of their GNI's to help fight socio-economic problems (UN, 2010). However, with the economic instability affecting most of Europe and America, to continue getting such grants will be difficult. This leaves the developing world to learn, find and finance most of the appropriate solutions to solve some of their pertinent problems.

The Millennium Development Goals (MDGs), Sustainable Development Goals (SDGs) and technology

The millennium development goals (MDGs) came about as a United Nations' Millennium declaration resolution which was agreed upon at the Millennium Summit in 2000. The objective of the MDGs was to encourage development of poorer countries by devising practical strategies and systems that would enable progress on the socio-economic front. There were eight MDGs which were meant to find ways of eradicating extreme poverty and hunger, achieving universal primary education, promoting gender equality and empowering women, reducing child mortality rates, improving maternal health, combating HIV/AIDS, malaria, and other diseases, ensuring environmental sustainability, and developing a global partnership for development.

The majority of MDGs could not be met by the year 2015 thus the UN post-2015 development agenda, under the 2030 Agenda for Sustainable Development, member states unanimously agreed to broaden MDGs and create Sustainable Development Goals during the UN General Assembly in September 2015. MDGs could not be achieved especially in developing and LDCs where issues of maternal health, child mortality, environmental sustainability, water and energy remained dire. The European Commission in 2015 through its Expert Group report titled 'Follow-up to Rio+20, notably the SDGs' subscribes that there is a need to reassess cultural and political systems, restructure models of aid, to be more relevant, participatory in nature and enhance better, effective, holistic partnerships to achieve the SDGs. One of the core elements identified to achieve the SDGs once again is technology. It remains to be seen how far the UN and its agencies will go to be able to address the technology disparity and effective and efficient adoption by developing and LDCs.

With the cost of obtaining technology becoming expensive, and other various negative factors playing a role in adapting them, there is need to go for cost effective, socially, morally, economically and locally acceptable technologies. The SDGs can be met by efficient use of technology, in this case appropriate technology. Appropriate technology can be considered a formidable poverty reduction mechanism (World Bank/IBRD, 2008). It is important for developing countries and LDCs to know that there is an information repository that can be tapped into and streamlined to come up with locally acceptable, adaptable and workable technologies.

Appropriate technology transfer – the effect of globalisation, TRIPS and the north-south divide

Globalisation has perceivably removed most barriers to trade and helped in opening up international markets. However powerful MNCs have emerged and taken a strangle hold on the technology market. These large corporates are owners of capital goods and prime sources of foreign direct investment, hence the power to dictate markets. In other words, globalisation has increased global reliance on the free market economy where demand and supply dominates the distribution of resources. However, it will be noted that the working of these resources is often financed by private investors who in turn tend to monopolise and distort resource allocation.

The perfect model of globalisation would have brought about more technology transfer from developed countries' to developing countries and LDCs through partnerships and FDI on capital goods. The coming in of TRIPS enticed most developing countries to comply with the idea of strengthening intellectual property systems and regimes. The effect of such a move actually has aided an increase in the technological gap between the north and the south. Most IP rights are owned by the MNCs and they jealously guard these rights which gives little chance to local innovation as IPR regimes limit the possibility of free access to technology. Private investors who own these IP rights are not willing to give them to third parties for free or no benefit.

Developing countries have called for a review of TRIPS principles on technology transfer to expand the scope of exceptions. This would allow developing countries to have greater access to patent information, data and actually work such inventions. With respect to appropriate technology, TRIPS article 7 calls for:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The TRIPS Agreement recognises the need and importance of enhancing technology transfer between developed and the least developed countries. A balanced and sustainable technology transfer mechanism between developed and developing countries and LDCs would reduce global disparities in economic growth.

Methodology

Appropriate technology (AT) is phenomenon enshrined in ideologies of communities and society at large. It is a philosophical principle ordained by humanity. In that respect the study used extensive literature review from globally renowned authors, a case study and semi structured interviews. The literature mainly proffered explanations on the origins, application and development of AT, patent information and intellectual property. A Zimbabwean case study provided a narrative of the situation in most developing countries with regards to AT use and substance. Semi structured interviews designed to proffer questions on the knowledge of AT, the use of AT, the challenges in using AT, the existing frameworks and policies around AT concepts in Zimbabwe. For interviews a careful selection was required in order to present balanced and factual responses. A total of 10 government related institutions, 10 non-governmental organisations, five individual AT engineers, and five researchers participated in the interview. An analysis of the case study is detailed below. Observation was also used to gather evidence on the application of AT.

Case study: Research, development and application of AT in Zimbabwe

Zimbabwe, being a developing country and coming out of a protracted economic recession that lasted almost a decade,[2] is experiencing a number of socio-economic related problems. Its problems relate mainly to a stressed health system[3], ageing and inefficient water reticulation, sewer and sanitation systems serving more people than what it was intended to (Moyo and Mtetwa, 2002), power and energy constraints[4], [5], inadequate educational technology capacity, an agricultural sector which is underperforming and yet to recover from political and policy initiatives and recently severely affected by the El Niño phenomenon, and an industry certainly short of creativity and innovation. These problems need urgent attention and consideration within a sustainable framework. A failure to tackle these problems would severely impact on the general development and welfare of the citizens.

A point of importance and worth noting is that of agriculture. The Zimbabwean economy is still considered agro-based, a sector which is vital on the political, social and economic spheres. The sector has over the years been hit by a severe input shortage. This sector can be more productive if appropriate technology can be applied to it rigorously.

The creation, selection and consideration of technology in Zimbabwe, has been an unguided process lacking checks and balances. There are no strategies or policies for the uptake and adaptation of foreign technologies neither is there an environment conducive for encouraging endogenous creativity. The country has suffered from trying to attract sophisticated technologies at the expense of trying to device a system for appropriate technology integration. Zimbabwe's socio-economic problems mainly lie in the fields of health, education, transport, water, sewer reticulation, sanitation, energy, small sector industry and agriculture, which high tech external technologies have failed to mitigate.

It is clear that Zimbabwe can benefit from appropriate technology and a classical example is the Blair toilet which was a phenomenal success and ultimately exported to other African countries. The Blair toilet is intellectual property. If the Blair toilet had been protected it would have taken a longer time period to reach the communities. It is a typical example where the absence of IP protection made sense. In Zimbabwe other appropriate technologies include localised hydro thermal stations in Nyanga area, simple land cultivator and hydro foot and solar pumps, the latter being a good example of appropriate technology transfer in which the focus was not profit but rather a humanitarian effort.

Discussion

Zimbabwe case study findings

The relevance of technology transfer and use of patent information in appropriate technology development in Zimbabwe

In trying to ascertain if patent information, technology transfer and FDI were essential in helping develop appropriate technology, the researcher found out that though these factors were important in trying to develop this technology, the country lacked supporting structures to allow for their successful implementation. Zimbabwe does not have explicitly cohesive policies on technology development, especially endogenously generated technologies.

The researcher felt the existence of patent information, technology transfer and FDI were not separately able to bring a change to the status quo. The appropriate technology matters required a wider strategy that also included elements like infrastructure, smart engineering capacity, finance, technology laws and regulations, and feasible compensation or reward systems for innovators.

The relevance of appropriate technology in socio-economic development

There is no deep appreciation by the Zimbabwean populace on the importance of appropriate technology in assisting socio-economic development. As its stands locals who have considerable knowledge are mostly those with higher exposure to non-governmental organisations. Zimbabwe needs appropriate technology more than ever, especially at a period it is coming from a long financial crisis.

The relevance of policy framework in creating a conducive environment for the creation, use and management of appropriate technologies

The lack of a defining policy framework has generally contributed to Zimbabwe not being a producer of appropriate technology. This has left Zimbabwe being heavily reliant on foreign technologies. A policy framework would solve issues pertaining to policies, laws, systems and defining guide lines for the creation, use and management of appropriate technologies.

Conclusion

The results of the study show that AT is a beneficiary of intellectual activities, however, the principles that drive AT are divorced from the general ideology behind IP rights. Appropriate technology is a social technology that is created for the benefit of communities so that they can sustain themselves without encumbrances. IP rights are a limited type monopoly which is meant to create a conducive environment for the holders to benefit for a period of time barring other players from using the same creation. This creates a frictional point between AT and IPR.

Appropriate selection of technology taking into consideration the various mitigating factors unavoidable to its utilisation in specific contexts will make it more relevant. Technology will be acceptable from the recipients or beneficiaries point of view if it can overcome socio-cultural barriers. In the modern day technological era the power that IP rights, especially patents wield cannot be ignored. Patent information is a vital source of technological knowledge and can enhance the creativity of those who make use of it. Appropriate technology will thrive further by making use of patent information without the limitations often imposed.

Technology transfer is also a vital source of knowledge and is essential in technology diffusion and adaptation. However, the specifics of technology transfer are complex and require a guiding national framework for it to be effective, beneficial and be able to attract investments either through local initiatives or via FDI. It is the researcher's finding that appropriate technology in this polarised world will go a long way in acting as a tool for reducing overdependence on donor aid, at the same time acting as a tool to help developing and least developed countries to achieve newly crafted SDGs through its socio-economic principles.

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Notes

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