

Intellectual Property Rights (IPR) protection in Tanzania: The Nightmare and the Noble Dream

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Abstract: *This paper examines the state of intellectual property rights protection in Tanzania. The author starts by exploring the meaning of intellectual property rights, different types and branches of intellectual property rights available. It proceeds to discuss the existing legal regime for the protection of intellectual property rights which includes the Patents Act 1987, Trade and Service Mark Act 1986, Copyrights and Neighbouring Rights Act, 1999 and many others. The paper argues that the rationale for affording protection to intellectual property rights are inter alia to encourage and reward creative works, to nurture technological innovation, to ensure fair competition, to protect consumers as well as facilitate the transfer of technology in the form of Foreign Direct Investment (FDI), joint ventures and licensing. The paper proceeds to argue further that lack of a clear policy on intellectual property and other trade matters to take care of WIPO/WTO related issues have brought hardship in implementation of intellectual property laws. It is suggested that it is important to ensure that the structure of our intellectual property systems is well suited to nurture and encourage innovation and invention.*

INTRODUCTION

Generally speaking intellectual property is the term applied to intangible forms of property the value of which derives generally from creative effort. The term seems to be the best available to cover that body of legal rights which arises from mental and artistic product of the human intellect. The phrase intellectual property rights therefore raises multiple questions. Whose intellect? What property? Whose rights? What rights?

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The concept, intellectual property can be broadly and roughly defined to include all those intangible human inventivity and inventively embodied in tangible and intangible human products of labour. Hence intangible property like any other kind of property capable of being owned, disposed off, transferred by way of sale or any other arrangement.

BRANCHES OF INTELLECTUAL PROPERTY RIGHTS (IPR)

Intellectual Property as such has two main branches. One is Industrial Property which also encompasses Patents of invention and innovation, Trade and Service Marks, Industrial designs, Geographical Indications and Utility Certificates.

Two is Copyright which includes Literally works, Artistic works and Folklore.

Before we proceed further looking the objective behind protecting Intellectual Property Rights let us quickly point out some acceptable and statutory definition of these different types of intellectual property.

Trademarks

A trademark constitute any sign that individualizes the goods of a given enterprise and capable of distinguishing such goods from the goods of competitors. This is also substantiated by section 2 of the Trade and Service Marks Act, 1986 Act No 12.

Thus a trademark is commercial asset intended to be used commercially by businessmen. It is considered to be a type of property, the owner of which gets perpetual right to its exclusive use in relation to his good and service in terms of service mark.

Device Mark

A device Mark is a sign used to distinguish between the different services such as security companies, insurance brokers, employment agents, clearing companies, funeral undertakers etc. The provisions of trade marks apply Mutatis Mutandis to those of service marks on registration, renewal, cancellation, licensing and assignment.

Trade Names

Trade names are generally names, terms or designations specifically designed to identify and distinguish enterprises and its business ventures from those of other enterprises.

Patents

A patent is a right granted by a public authority which confers on the owner the exclusive right to exploit his invention or innovation in a given country for a given period of time.

Patents tend to have two aspects. One they confer on their owner exclusive rights and they serve as a source of technological information for economic development.

Copyright

Copyright is the legal right of an author or creator to the exclusive control of the reproduction, publication and sale of certain literary or artistic works for a limited period of time.

Neighbouring Rights

Neighbouring rights is the aggregate of the protection offered to performers, producers of phonograms and broadcasting organizations.

Geographic Indications

Geographical indications are expressions, signs which indicate or identifies the origin of the product or services as manufactured in the territory of a country or region or locality in that territory, where a given quality, reputation or other characteristic of such goods, is essentially attributable to its geographical origin. The origin indicated under geographical indications will always refer to a country, region or specific place (Mittal. D.P:2000:18.1).

Industrial Designs

Industrial designs is an exclusive right or legal protection conferred and which concerns protection of the design elements in articles mass-produced by an industrial process.

An industrial design is the ornamental or aesthetic aspect of a useful article. Such particular aspect may depend on the shape, pattern or colour of the article. The design must appeal to the sense of sight. Moreover, it must be reproducible by industrial means, this is the essential purpose of the design, and is why the design is called "industrial".

Generally, industrial design refers to the creative activity of achieving an ornamental appearance for mass produced items that satisfies both the need for the item to appeal visually to potential consumers, and the need for the item to perform its intended function efficiently. Legally, industrial design refers to the right granted to protect a registered original ornamental an non-functional features of an industrial article that result from design activity. A visual appeal of a product can enable a manufacturer to achieve market success. Hence be protected and rewarded. The design can be two dimensional (such as sketches and drawings) or three - dimensional (such as sketches and drawings) or three-dimensional (cans, bottles).

WHY DO WE PROTECT INTELLECTUAL PROPERTY RIGHTS (IPRS)?

Encourage and reward creative work

The main social purpose of protection of copyright and relating rights is to encourage and reward creative work. This is also relevant to protection in other areas. (e.g industrial designs and patents)

Technological Innovation

Intellectual property rights are designed to provide protection for the results of investment in the development of new technology, thus giving the incentive and means to finance research and development (R&D) activities.

Fair Competition

The protection of distinctive signs and other IPRs aims to stimulate and ensure fair competition among producers.

Consumer Protection

The protection of distinctive signs should also protect consumers, by enabling them to make informed choices between various goods and services.

Transfer of Technology

A functioning intellectual property regime should also facilitate the transfer of technology in the form of foreign direct investment (FDI), joint ventures and licensing.

INTELLECTUAL PROPERTY LEGAL REGIME IN TANZANIA

The Intellectual Property Laws of Tanzania are the Patents Act, 1987 Act No. 1, The Trade and Service Marks Act, 1986 No. 12, The Fair Trade Practices Act, 1994 Act No.4, the Copyright and Neighbouring Rights Act, 1999 Act No. 7, The U.K Designs (Protection), Ordinance, Cap 213 of 13th November, 1936, and Traditional and Alternative Medicine Act of 2002 Act No. 23 and the Protection of New Plant Varieties (Plant Breeder's Rights) Act of 2002 Act No. 22. Most of these laws were enacted during colonial rule and subsequently amended or repealed to fit particular circumstances like the coming into force of the TRIPs and the trade liberalization policy which Tanzania adopted in 1980s to respond to the global change of atmosphere as far as trade and commerce is concerned.

However it may be noted that despite all the changes which have taken place nationwide and internationally the laws governing intellectual property in Tanzania have not undergone proper changes to fit the existing socio-economic conditions prevailing globally. A notable example of this is the fact that at the moment there is no ad hoc legislation on Geographical Indications despite the fact that Tanzania is committed to protect certain tourist attractions under the geographical indications.

There is also no legislation on Layout Design of Integrated Circuits and Trade Secrets.

Something of vital importance to be pointed out here is the fact that some of these intellectual property laws need to be evaluated and/or amended since some of them are outdated, not operative, incompatible with the TRIPs Agreement and do not enable us to seize the best opportunities offered by the international conventions.

Having discussed the meaning and various types of intellectual property and the legal regime in Tanzania let us now discuss briefly each piece of legislation.

Patents Act

The introduction of colonial legal system in Tanzania, also brought legal intellectual property protection systems, which implied the recognition of

modern intellectual property notions in the country though by then it meant to protect foreign inventions. In 1931 the Patents (Registration) Ordinance Cap 217 was enacted and came into operation on 10th May, 1931. Later the Patents, Design, Copyright and Trade Marks (Emergency) Ordinance Cap 220 was enacted and came into operation on 3rd September, 1934. This was repealed and replaced by the Patents, Design, Copyright and Trade Marks (Repeal of Sundry Obsolete Provisions) Ordinance Cap 352 which came into operation on 10th December, 1954.

On 20th January, 1987 a new and modern law was enacted to govern matters relating to patents in Tanzania and this is the Patents Act, 1987 Act No. 1 which was assented by the President on 31st April, 1987 and came into operation by 1st September, 1994 by virtue of Government Notice Number 457 of 1994. This legislation effectively repealed and replaced the Patents (Registration) Ordinance cap 217 of 1931.

The new Act is a modern piece of legislation and has all the regulatory powers of a modern patent protection legislation, which requires equally modern patent infrastructure to comprehend an effective patent protection system. The new legislation also includes petty patents and utility models.

The Patent law requires that the invention to be protected must be new and useful art, process, machine, manufacture or composition of matter which is not obvious, capable of being used or applied, in trade or industry. Industry in this respect should be understood in a broader sense to include agriculture.

In order for an inventor to be entitled to patent rights he or she must invent a new and useful invention and fully disclose it.

The technology contained in patents is very diverse and ranges from sophisticated technological fields such as computers to simplified fields such as agricultural implements and tools like spade or electrolysis of water.

A patent is always open for the public except for patents considered to be of vital importance for defense.

Trade Marks Act

Like any other law which were introduced during colonial rule the Trade Marks Act was first introduced in Tanganyika way back in 1922 and came into operation on 1st April 1922 as Trade Marks Ordinance Cap 216. This was repealed and replaced by the Trade Marks Ordinance Cap 394 which became operational on 1st July, 1958 and which was also repealed and replaced by the Trade and Service Marks Act 1986 Act No. 12. Regulations therein were made in 2000 vide Government Notice Number 40 published on 3rd February, 2000 to make the act modern and effective in its operation.

Copyrights and Neighbouring Rights Act

The modern copyright concept was first introduced into then Tanganyika through the UK Imperial Copyrights Act of 1911. That legislation was revised in 1924 as Copyright Act Cap 218. It became operational on the 1st August, 1924. This was later repealed and replaced by the Copyright Act, 1966 Act No. 61 which was later repealed and replaced by the Copyright and Neighbouring Rights Act 1999, Act No. 7. The new law have departed much from the old law by incorporating new aspects relating to neighbouring rights, computer protection as well as protection of Folklore of traditional knowledge.

Industrial Designs

As pointed out early an industrial design is the ornamental or aesthetic aspect of a useful article. Industrial designs protect the ornamental features of a useful product (the shape of the article, lines, designs and colours). The requirements for protection are weak in the sense that designs need only to be novel or original to qualify for protection. There is on record an ordinance which provides for the protection in Tanganyika of designs registered in the United Kingdom, and this is the UK DESIGNS (PROTECTION) ORDINANCE, CAP 219 OF 13 November, 1936 which merely extends protection of designs registered in the UK to Tanganyika. Hardly anybody in Tanzania is aware of, and uses, this law. There are many demands now from manufactures (e.g. of soaps textiles, bottles) to enact a modern law on this matter. (Mtetewaunga: 2003:8)

All industrial design laws require that protection through registration shall be granted only to designs which are novel or original. The novelty standard can be absolute/universal or qualified (territorial, regional etc).

This law is now outdated and toothless. A model law and regulation on Industrial Design is therefore required.

Geographical Indications

Geographical indication legislation is the enactment that provides for the registration and better protection of Geographical Indications relating to goods.

In Tanzania there is no law on Geographical indications to protect the interests of producers and also the consumers from deception by unauthorized persons indicating their products as if originating from a country or territory because goods originating therefrom have quality, reputation and some characteristics. The law on Geographical Indications if enacted will add to economic prosperity of the producers.

It is pertinent to ensure that the new law if enacted reflects current trading practices as well as guaranteeing i.e conforms to the Uruguay Final Agreement on TRIPs relating to Geographical Indications as provided for in Article 22 of the TRIPs Agreement.

POLICY ON INTELLECTUAL PROPERTY RIGHTS

In Tanzania until recently there was no Intellectual Property Policy per se. The only policy which seemed to touch on intellectual property issues in a peripheral manner was the National Science and Technology policy. Under the general objectives the policy stipulates briefly that the broad objectives of the science and technology policy are inter alia:-

- To establish appropriate legal framework for the development and transfer of technology including intellectual property rights (NSTP: 1996:9)
- To institute a mechanism for identification promotion and development of special-talents and aptitudes in science and technology among Tanzanians, especially youths, in order to benefit from the rich tapestry of human intellectual capabilities which are necessary for national development (NSTP: 1996:9).
- The fact that there is no intellectual property policy to take care of WIPO/ WTO related matters have brought great hardship in the implementation of IP laws. However it is imperative to point out at the outset that Tanzania have recently formulated the Trade Policy which explicitly spells out matters of IP to ensure conformity to the TRIPs Agreement.

BOTTLENECKS

I call this a nightmare in the light of the complexity and the existing weaknesses and bottlenecks in the protection and implementation of intellectual property rights in Tanzania.

Poor intellectual property protection systems have discouraged investments which need technological transfer. No serious investor would wish to put investments involving technological transfer, where there is no comprehensive and effective intellectual property protection system.

It is important to note that the continued development and diffusion of new technologies around the world is not automatic. It does not just happen.

Innovation has to be nurtured and encouraged and innovators must be appropriately rewarded for their new ideas. This needs to take into account the fact that we need to have a level playing ground which is totally missing when it comes to negotiations between the poor South and the rich North.

Technological changes and thus, the health of our nation's economy depend to a large extent upon the structure of our intellectual property systems and how well they work. It is therefore important to ensure that the structure of our intellectual property systems is well suited to nurture and encourage innovation and invention.

WHAT NEEDS TO BE DONE?

I call this a noble dream in the light of the fact that appropriate intellectual property rights protection system will enable innovations and new inventions to take place and hence serve as incentives for their future technological development.

A comprehensive intellectual property policy is needed to implement the mandates and regulatory aspects of the overall intellectual property objectives. However a mere policy does not suffice hence we need appropriate laws and mechanisms to protect intellectual property rights.

Tanzania needs to put in place policies and incentives which encourage local inventions and innovation and discourage piracy, copying and counterfeit.

There is also a need for a comprehensive review of intellectual property legislation as a pre-requisite for international harmonization of substantive intellectual property laws.

Moreover, a serious rethinking is needed about the appropriateness of prescribed penalties and the whole mechanisms which brings them into play.

It is further suggested and recommended that there is need to develop the necessary human resources in order to cope with these developments in intellectual property. Hence there is need to formulate policies geared to the training of technologically minded lawyers and engineers and to employ competent people with professional discipline in the Government departments as well as public institutions that touches on intellectual property rights.

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