

# A DEVELOPMENT ORIENTED INTELLECTUAL PROPERTY REGIME FOR AFRICA

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## I. INTRODUCTION

I argue in this paper that the crisis which intellectual property in the world is currently undergoing is because enough attention has not been paid to the nature of the right to intellectual property and that it is in this concept that the foundation of a development oriented intellectual property regime for the world lies. I argue that the crisis of intellectual property in Africa is even more profound because there is no evidence of any significant awareness that intellectual property is crucial in the development of a knowledge economy which is so essential if Africa is to move forward. Thus while Africa is a net consumer of intellectual property, it relatively does not create much. Because of this unusual situation it is not enough to identify the the theoretical framework for a development oriented intellectual property regimes. I also construct a model of instrumental framework that combines the synergies of private (collecting societies) national regional and international intellectual property organisations to enable the implementation of a development oriented agenda.

Accordingly this paper is divided into six parts. After the introduction the next section identifies the nature of the crisis of intellectual property in Africa. In the third section I construct a theoretical overview of a human rights based intellectual property regime and then demonstrate the nature of this regime by considering three sectoral issues - patent protection and public health issues; access to information and copyright; and the protection of communal intellectual property. In this section I also discuss specific measures that can strengthen a human rights based intellectual property regime. In the fourth section I examine how the enhanced intellectual property protection advocated by bilateral and multilateral investment treaties pose a threat to a development oriented intellectual property regime. I construct a model of instrumental framework appropriate for a human rights based intellectual property regime in the fifth section and then make concluding remarks in the sixth and final section.

## **II. THE CRISIS OF INTELLECTUAL PROPERTY IN AFRICA**

The Geneva Declaration on the Future of the World Intellectual Property<sup>1</sup> captures the nature of the crisis of contemporary intellectual property. According to the Declaration:

“ Humanity faces a global crisis in the governance of knowledge, technology and culture. The crisis is manifest in many ways:

- Without access to essential medicines, millions suffer and die;
- Morally repugnant inequality of access to education, knowledge and technology undermines development and social cohesion;
- Anticompetitive practices in the knowledge economy impose enormous costs on consumers and retard innovation;
- Authors, artists and inventors face mounting barriers to follow-on innovation;
- Concentrated ownership and control of knowledge, technology, biological resources and culture harm development diversity and democratic institutions;
- Technological measures designed to enforce intellectual property rights in a digital environments threaten core exceptions in copyright law for disabled persons, libraries, educators, authors and consumers and undermine privacy and freedom;
- Key mechanisms to compensate and support creative individuals and communities are unfair to both creative persons and consumers;
- Private interests misappropriate social and public goods and lock up the public

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1 The text of the Declaration is available at [www.cptech.org](http://www.cptech.org) . Hereafter the Geneva Declaration.

domain”

An analysis of the manifestation of the crisis listed above show clearly that a significant part resonate with human rights concerns. For example access to medicines is a critical component of the right to health, while access to education knowledge and culture implicate the freedom of expression, the right to education and the right to information. Generally it is without doubt that the manifestations outlined above reflect a lack of access to goods and services which are protected by intellectual property rights. This is a point we return to later.

If the Geneva Declaration mirrors the crisis in the world it does not completely represent the nature of the crisis for Africa. While it is true that Africa has access problems, it in addition has problems of innovation and creativity.. For Africa it is increasingly doubtful if intellectual property is of any meaningful purpose because Africa is a net consumer of intellectual property and does not produce intellectual property. Africa's consumptive intellectual property habit is evident in the number of foreign intellectual property rights it protects. In brief, foreign intellectual property rights dwarf African intellectual property. The statistics are indeed grim. For example the number of foreign patents granted in a number of African countries<sup>2</sup> over the period between 1997 and 2002 is 7564.<sup>3</sup> Out of this number, 7153 are foreign patents while only 411 are local patents. The same is true of trademarks. Out of a total of 86126 trade marks granted in these African States between 1997 and 2001<sup>4</sup>, 8308 are local trademarks while 77818 are foreign trademarks. Other statistics of knowledge goods worthy of copyright protection as well as the infrastructure for their creation are abysmal as well. In 2002, there were 523 telephones per 10000 people in sub Saharan Africa in 2002 and 119 persons had computers per 10000 persons in the same region.<sup>5</sup> To sum up these statistics, Africa generally is not being creative. Accordingly it can be argued that intellectual property is irrelevant to Africa, especially as one of the main objectives of intellectual property is creativity. Of course this assumes that Africa is *incapable* of being creative. However Africa is capable of enormous creativity, but is doing so at a worrisome pace.

The fact that Africa is a consumer of intellectual property presents an enormous problem since it is at the mercy of the owners of intellectual property rights who are endowed with the right to decide the manner in which their goods and services are to be accessed. For example, if in furtherance of the monopoly conferred by an intellectual property right goods and services are priced beyond the reach of consumers, the fact that Africa is a consumer of intellectual property becomes a disadvantage and a major challenge. The unavailability of these goods and services directly impact on Africa's capacity to develop. It may be important to point out the linkage between innovation and access as they are intimately interwoven. Inability to access certain goods such as copyrighted goods which control information may be part of the reason why African countries like similar countries are not able to produce knowledge goods.

The profound nature of the African crisis lies in the fact that it seems that Africa does not care or is not willing to make intellectual property work for her. The challenge is therefore that of innovation access and awareness. While the two challenges of innovation and access could be said to underlie the world crisis of intellectual property, the third challenge which is awareness seems uniquely African and perhaps explains the sorry state of intellectual property in Africa.

How did the world in general and Africa arrive at the present crossroads of an intellectual property

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2 The countries are Algeria, Botswana, Egypt, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Malawi, OAPI countries (infra see note ); Sierra Leone, Sudan, Swaziland, Uganda, Tanzania, Zambia, Zimbabwe, ARIPO countries (infra see note ).

3 Statistics compiled from records available at [www.wipo.int/int/ipstats/en/statistics/patents/index.html](http://www.wipo.int/int/ipstats/en/statistics/patents/index.html)

4 Statistics compiled from records available at [www.wipo.int/ipstats/en/statistics/marks/pdf/marks/index.htm](http://www.wipo.int/ipstats/en/statistics/marks/pdf/marks/index.htm)

5 See World Development Indicators Database, August 2004. Available at [www.worldbank.org/data/countrydata/countrydata.html](http://www.worldbank.org/data/countrydata/countrydata.html).

crisis? An important watershed and an appropriate basis in understanding this crisis is the nature of international intellectual property regimes. An important milestone and the fundamental restructuring of the international intellectual property regime occurred in the wake of the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) which is an annex to the Final Act Embodying the Results of the Uruguay Round.<sup>6</sup> It can be said that TRIPS heralded an international intellectual property system. Unlike the pre TRIPS international intellectual property regime underpinned by the Paris<sup>7</sup> and Berne<sup>8</sup> Conventions, TRIPS is a complete system. For the first time TRIPS ensured mandatory minimum standards of substantive intellectual property rules in WTO states.<sup>9</sup> This universality ensured that different levels of intellectual property protection in different countries did not act as non tariff barriers to trade. Accordingly WTO members would be subject to the same treatment irrespective of the standard of the member State intellectual property protection. Intellectual property rights are essentially territorial requiring that each nation recognise a right. Where some nations recognise certain rights and others do not there is a strong possibility that the latter countries could become a barrier to trade as it may be easy to misappropriate the intellectual property reflected by the goods in that country.<sup>10</sup> In addition to these rules, there were provisions that laid out the philosophy of the system in the form of agreed principles,<sup>11</sup> an institutional mechanism to ensure compliance with the agreed principles<sup>12</sup> and a dispute settlement mechanism.<sup>13</sup> The TRIPS Agreement is essentially trade

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6 See Agreement on Trade Related Aspects of Intellectual Property Rights, April 15 1994, Annex IC of Marrakesh Agreement Establishing the World Trade Organisation, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994). Hereafter referred to as TRIPS Agreement.

7 The Paris Convention for the Protection of Industrial Property of 20 March 1883 as last revised at Stockholm on July 14 1967 and amended in 1979. Available at [www.wipo.org](http://www.wipo.org)

8 The Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 as last revised at Paris on 24 July 1971 and amended in 1979. Available at [www.wipo.org](http://www.wipo.org)

9 The preamble to the TRIPS Agreement states that members “*Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade*”

10 See Abbott Cottier and Grury eds. *The International Intellectual Property System* ( Kluwer International ) 2 1999: “ As goods and services move freely and quickly through an increasingly through a global economy, producers and distributors need to be assured that the creative and innovative elements of these goods and services, and the elements which give these goods and services their unique character and thus their competitive advantage are protected against misappropriation.

11 See article 1, 7 and 8 of the TRIPS Agreement. Article 1 provides that “ Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”. Article 7 provides that “ 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.” and article 8 provides that “ 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.”

12 See article 68 of the TRIPS Agreement which provides that “ The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may

induced evident even in its name.<sup>14</sup> The TRIPS Agreement sought to globalise intellectual property rights in a manner that maximises the interests of authors/inventors. Accordingly since the developed countries dominate the creative world, the Agreement is favourable to them and a disadvantage to developing countries.

The enforcement of the TRIPS Agreement has drawn considerable attention from many quarters more so from human rights organisations. For example, the UN Sub Commission on the Promotion and Protection of Human Rights in Resolution 2000/7 titled: ‘Intellectual property and Human Rights’ stated that:

“ Since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human right, including the right of everyone to enjoy the benefits of scientific progress and its application, the right to health, the right to food, and the right to self determination, there are apparent conflicts between the intellectual property regime embodied in the TRIPS Agreement on one hand, and international human rights law on the other hand.”<sup>15</sup>

Subsequent events to the TRIPS Agreement in norm setting in the international intellectual property system has been geared towards strengthening the pro author/inventor standards in the TRIPS Agreement. These events essentially has seen a move from the multilateral basis of TRIPS to the bilaterally negotiated free trade and bilateral agreements between the United States and Europe on one hand and other countries. The provisions of concluded agreements are such that they are TRIPS Plus. Furthermore the post TRIPS work of international intellectual property organisations include norm setting agenda that are TRIPS Plus. For example the patent agenda of the World Intellectual Property Organisation include the promotion of the ratification of the patent Law Treaty, the reform of the Patent Cooperation Treaty and negotiations on a Substantive Patent Law Treaty all designed to raise minimum patent standards beyond what is found inn TRIPS.

In the next section I shall examine the nature of a human rights based intellectual property regime which I consider a fitting response to the crisis discussed above.

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consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.”

- 13 See annex 2 of the Agreement Establishing the World Trade Organisation: Understanding on Rules and Procedures Governing the Settlement of Disputes.
- 14 See the 20 September 1986 Uruguay Round Ministerial Declaration which contains a mandate for negotiations on trade related aspects of intellectual property rights: “ In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights,, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.”
- 15 See Resolution 2000/7 Intellectual Property and Human Rights, 17 August 2000, U.N Doc. E/CN.4/Sub.2/2000/7. See also P. Drahos “ Thinking Strategically about intellectual property rights” 21 *Telecommunication Policy* 201 (2001): “TRIPS was not the product of a carefully coordinated economic analysis. Rather it was the manifestation of rent-seeking desires of multinationals that saw opportunities for themselves in redefining and globalising intellectual property rights.”

### III A HUMAN RIGHTS BASED INTELLECTUAL PROPERTY REGIME

#### III.I THEORITICAL OVERVIEW

In the preceding section, we identified the crisis of intellectual property in the world in general and Africa in particular. In response to this crisis and the challenge it poses, I devote this section of the paper to a theoretical overview that argues that a human rights based intellectual property regime anchored on the right to intellectual property recognized by article 15(1) of the International Covenant for Economic Social and Cultural Rights (ICESCR)<sup>16</sup> is a fitting response to the crisis.

There seems to be two ways of constructing an intellectual property regime based on human rights. One way is to imagine intellectual property and human rights as distinct values.<sup>17</sup> In this way, human rights would be an external value competing with intellectual property. The view that intellectual property rights are different from human rights is the central plank of the work of the UN Sub-Commission for the Protection and Promotion of Human Rights whose numerous resolutions on the matter<sup>18</sup> recommend that human rights should be at the centre of intellectual property regimes.

Another way is to acknowledge the right to intellectual property as a human right and intellectual property regimes as manifestations of this right. I prefer the second option because it is conceptually clearer. In this way, the right to intellectual property can be recognized as foundational right that is overarching and has manifestations in other human rights. We return to this point later.

The right to intellectual property is found in article 15(1) of the ICESCR. The said article provides that:

“(1) The States Parties recognize the right of everyone  
(a) To take part in cultural life;  
(b) To enjoy the benefits of scientific progress and its applications;  
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is an author”

The critical feature of article 15(1) is that it recognises the need to reward innovative activity on the one hand and on the other hand ensures that society has access to the fruits of innovation. There is therefore a balance that characterises the right to intellectual property. The challenge has always been the nature of this balance. Should this balance be framed in such a way that the reward for innovative activity is dominant? Should this balance be framed in such a way that societal access to the fruits of innovation is privileged? Or should the balance be equal such that neither the reward for innovative activity nor public access to the fruits of innovation is dominant over the other? It is my submission that the balance should be *equal*.<sup>19</sup>

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16 Hereafter ICESCR. The ICESCR is an international human rights treaty. It is with the International Covenant for Civil and political Rights the foundation of international human rights. The only African countries that are not State Parties of the ICESCR are South Africa, Nigeria. Even these African countries who have not ratified the Convention have signed them and as such incur some obligation to ensure that they refrain in accordance with article 18 of the Vienna Convention on the Law of Treaties ( for those who have ratified or acceded to the Vienna Convention) from acts that would defeat the object and purpose of the ICESCR.

17 See D. Vaver “ Intellectual property and the state of the art” 116 *Law Quarterly Review* 636 (2000) who argues that intellectual property is not absolute and that : ranged against it “are values of at least equal importance: the right of people to imitate others, to work, compete, talk and write freely, and to nurture common cultures.”

18 See note 26 infra.

19 See Ruth Okediji “ The international relations of intellectual property: Narratives of developing country participation in the global intellectual property system” (2003) 7 *Singapore Journal of International and Comparative Law* 315, 345-346: “ There are two ways of thinking about the function of human rights in the international intellectual property system. The first is to consider human rights as a situs for public rights to the fruits of innovative endeavor on equal footing with the right of the innovator. Each claim-the public and the individual exerts its own force within the system,

It can therefore be stated that the key components of the right to intellectual property rights are protection and access. How they mix and how they find expression in national and international intellectual property rights regimes is often a reflection of dominant economic social and cultural preferences. The concrete expression of the right to intellectual property are intellectual property rights. These rights represent reality and often changing while in my opinion the right to intellectual property represent the ideal. As reality intellectual property rights are in a constant flux. Within a national or international regime for example, consistent pressure from different stakeholders especially in the context of significant technological developments result in the recognition or extension of new intellectual property rights.<sup>20</sup> Challenges fueled by emerging phenomena also call into question whether the appropriate balance dictated by the right to intellectual property rights is present in intellectual property rights. For example it is pertinent to point out that it was *inter alia* the fatal consequences of patent protection of HIV/AIDS drugs in denying access to these drugs in Africa that called into question the adequacy of appropriate balance in existing national and international patent regimes. The reaction of the international community can be summarised as a resounding disapproval. The right to intellectual property law is a foundational right and is overarching as it is manifest in other rights which are but a specific example of one of its components. For example a key aspect of the right to health which is access to medicine is an concrete manifestation of article 15(1)b of the ICESCR. Another example is the freedom of expression and the right to education. Without information, these rights can not be fulfilled. Even if they are self-standing rights, article 15(1)b of the ICESCR which can be taken to support access to information which is controlled by copyright can be said to be the general right of which the freedom of expression and right to information are specifics. The foundational nature of the right to intellectual property is therefore key in understanding the relationship between the right to intellectual property and other rights.

The nature of the balance between protection and access often results in tensions between the two components of article 15(1) of the ICESCR. The diminished importance of either of these components often leads to sustained agitation for redress that demands legislative or judicial response. Since intellectual property rights manifest in products that concern human beings and human rights essentially protect those ideals and aspirations that enhance the dignity of human beings, particular human rights such as the right to food health education call into question either component of the overarching right to intellectual property. Thus if there is inadequate protection of the creative ability of individuals their concern is a legitimate human rights issue. On the other hand questions of access are also legitimate concerns of human rights since they mirror the desires and aspirations of citizens. For example concerns about access to copyrighted goods because they affect information education and culture is a fundamental public policy issue in many developing countries.

The desire for recognition by one of the components of article 15(1) of the ICESCR intellectual property regimes manifests in the belief that intellectual property clashes with human rights.<sup>21</sup> What may be clashing may really be the desire for recognition of access or protection withing an intellectual

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thus forcing a balancing Act that provides room for the exercise of limitations and exceptions to promote public access”; UN High Commissioner for Human Rights “ The impact of the Agreement on Trade-related Aspects of Intellectual Property Rights on Human Rights” UN Doc. E/CN.4/Sub.2/2001/13: “ Article 15 of the Covenant...identifies a need to balance the protection of both public and private interests in intellectual property...article 15 could be said to bind States to design IP systems that strike a balance between promoting general public interests in accessing new knowledge as easily as possible and in protecting the interests of authors and inventors in such knowledge.” See also A.Chapman “ Approaching intellectual property as a human right: Obligations related to article 15(1)(c)” XXXV *e-copyright Bulletin* 4 (2001).

20 See the cases of *Eldred v Ashcroft* 123 S.Ct 769 ( 2003) – which extended the term of copyright in the United States to seventy years; *Diamond v Chakbraty* 447 U.S 303 (1980) – extending patent protection to genetically engineered bacterium. A classic example is the TRIPS Agreement and the WIPO Digital Treaties, note *infra*.

21 See note 26 *infra*

property regime. While access to HIV/AIDS drugs is a classic example, the desire for the recognition of communal intellectual property such as expressions of folklore and traditional knowledge is another example. The root of this desire can be located in the inherent dignity of the communal intellectual creative process and it does show that a human rights based intellectual property regime is not only pro access but also pro protection. When however the desires for protection are demanded by trading concerns in the form of multinational corporations, these concerns become predominantly trade induced and the protection offered to authors and inventors ultimately become over enhanced. A good example is TRIPS and there is no doubt that its provisions seek to enhance the protection offered to the goods which are protected by multinational intellectual property rights.<sup>22</sup> It is therefore not surprising that within such a framework there is more concern about access issues.

For African countries a human rights based intellectual property right is especially important since as we saw in the preceding section we are net consumers of intellectual property products. If intellectual property is to be of service in our development goals we ought to ensure that the equal balance in the right to intellectual property is reflected in African intellectual property rights. I argue later as I have elsewhere<sup>23</sup> that Africa can only develop if it is a knowledge society and that copyright protection is intimately intertwined with the creative process because it is concerned with information. A copyright regime with inadequate access provisions for African countries would mean lack of access to information so important to the creative process and a knowledge economy.

The determination in specifics of the aforementioned equal balance in article 15(1) of the ICESCR is not an easy task that is continually dealt to international and national regimes. They are forged from the dominant economic social and cultural forces. The manner in which this is done in international regimes is not the same with how different national regimes react. While the international intellectual property regimes negotiate and agree on minimum broad principles determining the nature of the protection and the manner of access to different rights, national intellectual property regimes are far more specific often reflecting peculiar national consequences but within the parameters of the internationally regulated minimum standards. Our specific survey in the other parts of this section demonstrate how international and African intellectual property regimes have reacted to the need to infuse the appropriate balance or redress an improper balance. I will argue that a human rights approach remains a far more conceptual tool not only for the legislature but also for national judiciaries to grapple with the specifics of the right to intellectual property as it does for international intellectual property regimes.

Since the locus of the right to intellectual property is in article 15(1) of the ICESCR, it may be important to dwell on the national manifestations of this critical right. Even though most African countries have either signed or ratified the ICESCR,<sup>24</sup> none of them has a specific clause on the right to intellectual property.<sup>25</sup> This is not fatal since all African countries have intellectual property regimes

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22 See J Stiglitz “ Intellectual property rights and wrongs” *Daily Times* (Pakistan) August 17 2005. “ Society has always recognized that other values may trump intellectual property. The need to prevent excessive monopoly power has led anti-trust authorities to require compulsory licensing (as the US government did with the telephone company AT&T). When America faced an anthrax threat in the wake of the September 11, 2001, terrorist attacks, officials issued a compulsory license for Cipro, the best-known antidote. Unfortunately, the trade negotiators who framed the intellectual-property agreement of the Uruguay trade round of the early 1990's were either unaware of all of this, or more likely, uninterested. I served on the Clinton administration Council of Economic Advisors at the time, and it was clear that there was more interest in pleasing the pharmaceutical and entertainment industries than in ensuring an intellectual-property regime that was good for science, let alone for developing countries.” Available at <http://lists.essential.org/pipermail/a2k/2005-August/000555.html>

23 See E.S Nwauche “ African countries access to knowledge and the WIPO digital treaties” 8 *The Journal of World Intellectual Property* 361 (2005).

24 See status of signatures and ratifications of the ICESCR at [www.unhcr.ch/htm/menu3/b/a\\_icescr.htm](http://www.unhcr.ch/htm/menu3/b/a_icescr.htm)

25 South Africa is the only country where there was a failed attempt to include the right to intellectual property in the Bill of Rights. See *In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC).

which can be justified on the basis of obligations arising from the ICESCR. Furthermore these countries protect intellectual property rights which have close relationship with the right to intellectual property as explained above and could be taken to indirectly recognise the right to intellectual property. A major advantage of a human rights based intellectual property regime is that the nature of the right to intellectual property in the relationship of the equal priority of its component parts and the need to realign intellectual property rights to manifest this equal priority to reflect the balance is an example of a balancing of rights which is inherent in all human rights regimes. If intellectual property is a human right it is easy to imagine the resolution of the clash of its component parts which as we have stated earlier manifest in other human rights.

The consequences of the right to intellectual property law must be seen in the overall context of the primacy of human rights<sup>26</sup> in international and national law. Even it is assumed that intellectual property is a value different from human rights,<sup>27</sup> the primacy of human rights means that in the event of a conflict human rights obligations would prevail. If as we have argued above the right to intellectual property is reflected in intellectual property rights, then the primacy of human rights would mean that States incur an obligation to design or redesign their intellectual property rights to accord with the equal balance in the right to intellectual property.<sup>28</sup>

### **III.II CERTAIN SECTORAL ISSUES IN A HUMAN RIGHTS BASED INTELLECTUAL**

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26 See the following: In 1998 the UN Sub-Commission on the promotion and Protection of Human Rights adopted a resolution where it emphasised “ the centrality and primacy of human rights obligations in all areas of governance in development, including international and regional trade, investment and financial policies, agreements and practices. The Resolution emphasised that “ the realisation of the human rights and fundamental freedoms described in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other international and regional human rights instruments is the first and most fundamental responsibility and objective of States in all areas of governance and development.” See UN Sub-Commission on the promotion and Protection of Human Rights: “ Human Rights as the Primary Objective of Trade Investment and Financial Policy” Resolution 1998/12 (20 August 1998) UN Doc. E/CN.4/Sub.2/Res/1998/12. See also UN Sub-Commission on the Promotion and Protection of Human Rights. “ Trade Liberalisation and its impact on Human Rights” Resolution 1999/30 (26 August 1999), UN Doc. E/CN.4/Sub.2/Res/1999/30; UN Sub-Commission on the promotion and Protection of Human Rights “ Intellectual Property Rights and Human Rights” Resolution 2000/7 (17 August 2000), UN Doc. E/CN.4/Sub.2/Res/2000/7; UN Sub-Commission on the Promotion of Human Rights. “Intellectual Property and human rights” Resolution 2001/21 (16 August 2001), U.N Doc. E/CN.4/Sub.2/Res/2001/21: In this resolution, the Sub Commission noted that the 1993 Vienna Declaration confirmed that promoting and protecting human rights is “ the first responsibility of governments. It further stressed that under Article 27 of the Universal Declaration of Human Rights and Article 15 of the ICESCR, the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is a human right subject to limitations in the public interest and reminded all Governments of the primacy of human rights obligations under international law over economic policies and agreements...”. In 1993 member states of the United Nations reaffirmed the fundamental interrelatedness of all human rights and the human rights obligations of States in the Vienna Declaration and Programme of Action adopted by 171 States at the UN's World Conference on Human Rights. This Declaration states that: “ All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” See also Article 2 of the International Covenant for Economic Social and Cultural Rights; General Comment No. 14 of the UN Committee on Economic, Social and Cultural Rights.

27 See note 17.

28 “ Article 15 of the Covenant ...identifies a need to balance the protection of both public and private interests in intellectual property...article 15 could be said to bind States to design IP systems that strike a balance between promoting general public interests in assessing new knowledge as easily as possible and in protecting interests of authors and inventors in such knowledge” See U.N High Commissioner for Human Rights : The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Right, note 19.

## PROPERTY REGIME

In setting out the theoretical overview of the nature of the right to intellectual property especially the equal importance of its two components, we pointed out the fact that the diminished importance of any of the components of the right to intellectual property leads to agitation for an adjustment of intellectual property rights to enable the restoration of the neglected component to prominence. In this part we consider three sectoral issues of intellectual property rights, their relationship to other human rights and the manner in which international and national legal regimes have reacted positively or negatively to concerns of neglect of one of the components of article 15(1) of the ICESCR. The examples are firstly patent protection and public health issues; copyright protection and access to information and the protection of communal intellectual property. It is significant that with respect to the first two issues, the neglected component is that of access, while the problem with the protection of communal intellectual property is that of protection.

### *III.II(A) Patent Protection and Public Health Issues*

A good example of the manifestation of the right to intellectual property in intellectual property rights can be found in the interface between patent protection and public health. Patent protection essentially enables the patent owner to obtain protection for invention that is new involves an inventive step and is capable of industrial application. This protection confers on the patent owner exclusive property rights to exclude others from making or using offering for sale selling or importing the products and processes based on the patent. These exclusive rights enable a patent owner to determine the conditions of access to his product which includes the price which can be set at will irrespective of any considerations whether they are affordable. Thus even if a cheaper substitute were possible patent protection ensures that it will not be offered to the public. Within a patent regime are also considerations of access that range against the protection which are offered to inventions. These considerations of public benefit require access on non exclusive terms often at odds with the patent owner's rights. All patent regimes therefore have this balance. The nature of this balance in national and international patent regimes vary and is especially significant in the interface between patent protection and public health issues.

Pharmaceutical patents are of considerable significance because they affect access to medicines which are at the core of the right to health.<sup>29</sup> While patent protection enable right owners to recoup their investment in research and development and enables further drug development, the high prices that are set for these drugs keep them out of the reach of consumers.<sup>30</sup> At a general level inaccessibility of these

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29 See article 16 of the African Charter on Human and Peoples' Rights which provides that "(1) every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take all necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." Section 27 of the Constitution of the Republic of South Africa (Hereafter the South Africa Constitution) provides for the right to health care, food, water and social security. The said section provides that "(1) Everyone has the right to have access to (a)health care services, including reproductive health care... (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right . Article 12 of the ICESCR establishes a right to health: "(1) The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases."

30 See Executive Summary *TRIPS and Rights: International Human Rights Law, access to medicines and the interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*. p.i. (2001). Available at [www.aidslaw.com](http://www.aidslaw.com) : " In recent years , in large measure because of the global HIV/AIDS crisis, the issue of access to affordable medicines in many of the world's poor and developing countries is finally receiving the attention it deserves.

drugs become a profound public policy issue. When there are epidemics such as HIV/AIDS, malaria and tuberculosis the matter is further confounded. It is the fatal consequences of the lack of access to essential medicines that has shaped the response of intellectual property rights regimes to the improper balance between protection and access. In the spectrum of the international intellectual property regimes it may be correct to argue that patent protection in public health is the only area where intellectual property rights is increasingly demonstrating what appears for now to be an equal balance required by the right to intellectual property. How did this come about?

To put the analysis in the context, it may be necessary to examine the present state of the international patent protection and access to medicines. It may be necessary to examine the nature of the TRIPS Agreement. This is evident in the preamble to the Agreement, and articles 1, 7 and 8 of the Agreement. A combined reading of article 1,7 and 8 can be said to indicate that the TRIPS Agreement supports the need to balance owner and user rights a fact which seems to be implicit in any intellectual property regime. Even though TRIPS Agreement certainly does not expressly indicate the nature of this balance, it is clear from the manner of the elaboration of its provisions that it is predominantly in favour of owners rights. In a review conducted by the UN High Commissioner for Human Rights on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights,<sup>31</sup> the Commissioner stated that:

“ Protecting public health and nutrition, protecting the environment, encouraging technology transfer, advancing socio-economic development as stated in article 7 of the TRIPS Agreement, and promoting fairness and international cooperation are measures that- at least in theory- are conducive to the promotion and protection of human rights and the balance sought under article 15...the overall thrust of the TRIPS Agreement is the promotion of innovation through the provision of commercial incentives. The various links with the subject matter of human rights... are generally expressed in terms of exceptions to the rule rather the guiding principles themselves and are made subject to the provisions of the Agreement. A human rights approach would explicitly place the promotion and protection of human rights in particular those of the ICESCR, at the heart of the objectives of intellectual property protection, rather than es permitted exceptions that are subordinated to other provisions of the Agreement...while the Agreement identifies the need to balance rights with obligations, it gives no guidance as to achieve this balance. On the other hand, the Agreement sets out in considerable detail the content of intellectual property *rights*-the requirement for the grant of rights, the duration of the protection, the modes of enforcement. On the other hand the Agreement only alludes to the *responsibilities* of IP holders that should balance those rights in accordance with its objectives.”<sup>32</sup>

The international patent protection system established in the wake of the TRIPS and its effect on access to essential medicines is aptly summarised by Professor Baker:

“In starkest terms, the current, expansive system of internationalised intellectual property rights (IPRs) means that research based drug companies can obtain patents that grant them exclusive territorial rights to market innovative pharmaceutical processes and products almost everywhere in the world. In turn, these globalised patents permit pharmaceutical companies to

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Nobody disputes that making medicines accessible to those who need them requires action on many fronts. Given the evidence to date, it is clear that one of the fronts is the role played by private patents in medicines in keeping drugs priced above prices that are affordable for many of those most in need of them.”

31 Note 19.

32 Ibid, paras 20-23.

exclude low-cost generic competitors and to set profit-maximising monopoly prices. In addition to having expanded their patent rights internationally, research based companies are gaining increased protection for data supplied to drug regulators for purposes of establishing the safety, efficacy and quality of their medicines...Although this intertwined system of intellectual property protections for patents, data, and their associated high prices is often defended as providing resources and incentives for research and development for the next generation of life-saving medicines, there is little doubt that higher prices affect access to existing (and future) medicines that are often unaffordable to developing countries and their impoverished residents.”<sup>33</sup>

The patent provisions of the TRIPS Agreement require that WTO members must provide patent protection for a minimum of twenty years for any invention whether products and processes in all fields of technology provided they are new involve an inventive step and are capable of industrial application. With respect to public health the key innovation of the TRIPS Agreement is that pharmaceutical patents are now mandatory. While the patent provisions contained in the TRIPS Agreement as seen above can be said to be pro-owner in elaboration, the consequences evident in high prices led to the need to at the least clarify and/or infuse pro-access mechanisms into the international pharmaceutical patent system and therefore enable WTO members take advantage of these mechanisms in the national front.

What follows hereunder in this section are an analysis of pro-access mechanisms supported by the TRIPS Agreement as reinforced by the Doha Declaration on TRIPS Agreement on TRIPS Agreement and Public Health<sup>34</sup> and Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health.<sup>35</sup> The first four paragraphs of the Doha Declaration indicate the tensions in this area and the broad trajectories of its resolution:

- “ 1. We recognize the gravity of the public health problems afflicting many developing and least develop countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.
3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.
4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIP Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.”

Paragraph 6 of the Doha Declaration provides that:

“We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the

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33 See Brook K Baker “ Processes and Issues for Improving Access to Medicines: Willingness and Ability to Utilise TRIPS Flexibilities in Non-Producing countries” pp.5-6. (2004) Available at [www.healthsystems.org](http://www.healthsystems.org)

34 Hereafter *Doha Declaration*. Available at [www.who.int/medicines/areas/policy/tripshealth.pdf](http://www.who.int/medicines/areas/policy/tripshealth.pdf)

35 Hereafter *Implementation of paragraph 6*. Available at [www.wto.org/english/tratop\) e/trips e/implem para6 e.htm](http://www.wto.org/english/tratop) e/trips e/implem para6 e.htm)

TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.”

Transition Periods: One pro-access mechanism that ensures that the mandatory provisions of the TRIPS Agreement are not applied in WTO countries is the transition periods provided for under article 66(1) of the TRIPS Agreement and Paragraph 7 of the *Doha Declaration*.<sup>36</sup> Accordingly there are three transition periods. The first two transition periods ended in Jan 2005. On this date, all WTO except for Least Developed Countries (LDCs)<sup>37</sup> had to become TRIPS compliant which includes recognition of pharmaceutical patents. The third transition period concerns only least Developed Countries (LDCs) which comprises mostly African countries<sup>38</sup> and is pursuant to paragraph 7 of the Doha Declaration ends in 2016.<sup>39</sup> There is some possibility for further extensions and this underscores the importance of the transition periods because for African LDCs this means that they are not obliged to protect pharmaceutical patents or to enforce existing patent rights. Where however pharmaceutical patents have been granted, African LDCs may incur an obligation to enforce consequent rights even though government use and compulsory licences may be used to ensure access.

Parallel Importation: Firstly since article 6 of the TRIPS Agreement and Paragraph 5(d) of the *Doha Declaration*<sup>40</sup> leaves it open to States to adopt any principle of exhaustion of intellectual property rights. Accordingly an African country could adopt an international exhaustion principle whereby the entry of goods covered by intellectual property rights anywhere in the world exhausts the rights of the IPRs owner to object to the entry of those goods into particular markets. In this way African countries could ensure that cheaper goods from other countries could be imported into their market to compete with the goods of the national patent owner. If a national or regional exhaustion principle is in force, then it is open to an IPRs owner to object to the importation of otherwise cheaper legitimate goods. A review of some African intellectual property laws indicate differences in the use of parallel

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36 Paragraph 7 of the *Doha Declaration* provides that We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

37 For a definition and listing of LDC's see [www.nationsonline.org/oneworld/least\\_developed\\_countries.htm](http://www.nationsonline.org/oneworld/least_developed_countries.htm) . It is interesting to note that LDC's have demanded for an extension of the exemption granted to them under article 66.1 of the TRIPS Agreement. See communication dated 13 October 2005 by Zambia on behalf of the LDC's. Available at [www.cptech.org/ip/wto/zambia10212005.pdf](http://www.cptech.org/ip/wto/zambia10212005.pdf)

38 The following African countries are in the LDC's category: Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, Zambia.

39 See Extension of Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products, IP/C/25 (July 1, 2002) Available at [www.wto.org/english/tratop\\_e/trips\\_e/art66\\_1\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/art66_1_e.htm); Least-Developed-Country Members- Obligations under Article 70.9 of the TRIPS Agreement with respect to Pharmaceutical Products , WT/L/478 (12 July 2002) available at [www.wto.org/english/tratop\\_e/trips\\_e/art70\\_9\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/art70_9_e.htm)

40 Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include...The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4 :

importation. While a country such as Kenya<sup>41</sup> permits parallel importation, South Africa does so with respect to copyright<sup>42</sup> and does not with respect to trade marks<sup>43</sup> confidential information<sup>44</sup> and patents<sup>45</sup> generally except medicines.<sup>46</sup> It is therefore difficult to imagine why this pro-access mechanism is not present in many African patent legislation. For those countries that are availing themselves of the 2016 deadline, parallel importation is a concrete manifestation of user rights and in line with the right to intellectual property. The introduction of international exhaustion by the Kenyan industrial Property legislation is to be commended.

Exceptions and Limitations Pursuant to Article 30 of the TRIPS Agreement: Article 30 of the TRIPS Agreement enables member States to provide limited exceptions to the exclusive rights conferred by patents provided such exceptions do not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties. There is no guide as to what these limited exceptions are except that they are to be subjected to the three step test which as we shall discuss below serves to protect the owner's right. Thus the exception can be to remedy anti competitive practices, promote the transfer of technology and and/or protect the protection of public health seem permissible. A good example of such an exception is the Bolar exception which enables a generic drug manufacturer to formulate a generic medicine even before a patented drug expires such that it can be introduced immediately the patent expires.<sup>47</sup> The Bolar exception has been adopted by Kenya in its Industrial Property Act.<sup>48</sup>

Compulsory Licensing and Government Use Orders: By virtue of Article 31 of the TRIPS Agreement compulsory licences of the subject matter of a patent can be issued pursuant to local legislation<sup>49</sup> for

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- 41 Kenya has moved from banning parallel importation to approving the principle. Section 36 of the then Industrial Property Act 1989 precluded inter alia the importation of a product covered by a patent. However this was reversed by section 58.2 of the Industrial Property Act 2001 : “ The rights under the patent shall not extend to acts in respect of articles which have been put on the market in Kenya or in any other country or imported into Kenya.” See Clause 37 of the Industrial Property Regulations (2002): “ The limitation on the rights under a patent in section 58(2) of the Act extends to acts in respect of articles that are imported from a country where the articles were legitimately put on the market. It is important to note the OAPI countries (note 117 infra ), adopt a regional exhaustion principle. See Article 8 of the Revised Bangui Agreement.
- 42 See *Protective Mining and Industrial Equipment Systems (Pty) Ltd v Audiolens (Cape) Pty* 1987 (2) SA 961 (A); *Television Radio Centre v Sony Kabushika t/a Sony Corporation* 1987 (2) SA 994(A).
- 43 *Frank Hirsch (Pty) Ltd v A Roopanand Broters (Pty) Ltd* 1993 (4) SA 279 (A)
- 44 *Taylor & Horne (Pty) v Dentall (Pty) Ltd* 1991 (1) SA 412 (A).
- 45 Section 45 (1) of the Patents Act 1978 provides that the effect of the grant of patent shall be the right granted to the owner to exclude others from making, using, exercising, disposing or offering to dispose of , or importing the invention.
- 46 Section 15C of the Medicines and Related Substances Control Act 1997 provides that the acts of the patent owner does not extend to acts in respect of such medicine which has been put onto the market by the owner of the medicine, or with his consent.
- 47 The WTO has accepted that the Bolar exception is an example of limited exceptions under article 30. See *Canada- Patent Protection of Pharmaceutical Products*, Report of the Panel, WT/DS114R, March 17, 2000.
- 48 See Baker, note 33, p. 27 (Footnote 40).
- 49 In this regard see the following provisions in African patent legislations: Sections 72-78 of the Industrial Property Act of Kenya provides for compulsory licensing and are modeled on article 31 in a TRIPS compliant manner. Section 72(1) provides that an applicant may apply for a compulsory licence on the grounds that a market for a patented invention is not being supplied on reasonable terms in Kenya. Another ground is that imposed by section 73(1) that a compulsory licence may be granted to the extent necessary, in respect of a patented invention upon which the working of a later patented invention is dependant where the later invention constitutes an important technical advance of considerable economic significance in relation to the invention claimed in the earlier patent. The conditions for grant include evidence of reasonable prior negotiations; inability of the patent owner to prove circumstances justifying the lack of ability to supply the market and guarantees to remedy the deficiencies justifying the compulsory licence; non exclusivity;

use by third parties and government agencies, without the consent of the patent holder. In this regard, the patent owners exclusive rights are disregarded. It is instructive that Article 31 does not signify the grounds for issuing compulsory licences. Another reason for a compulsory licence is government use orders in accordance with article 31(b) of the TRIPS Agreement. Under this heading governments in the event of national emergency or other circumstances of extreme urgency or in the case of public non-commercial use may resort to compulsory licences.<sup>50</sup> Another reason for a compulsory licence is to remedy a judicially determined anti competitive practice in accordance with Article 31(k).<sup>51</sup>

A distinguishing factor of normal compulsory licences and government use orders is that the former requires the prior notification and negotiation with the patent holder pursuant to article 31(b). For government use orders there is no such requirement, a fact which seems evident because of the reasons outlined above. Furthermore the license is non-exclusive,<sup>52</sup> and non-assignable.<sup>53</sup> and must be predominantly for the supply of the domestic market and the right holder must be paid adequate remuneration taking into account the economic value of the authorisation.<sup>54</sup> The adequacy of the remuneration and the authorisation shall be subject to a judicial review or independent review by a distinct higher authority.<sup>55</sup> Compulsory licencing seems to be a flexibility of choice by African countries. Zimbabwe,<sup>56</sup> Zambia,<sup>57</sup> Mozambique<sup>58</sup> have all issued compulsory licences. .

### Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health

Paragraph 6 of the Doha Declaration recognises that even though developing countries could not

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adequate remuneration; limitation to extent necessary to work invention; and limitation for predominant supply of the domestic market. See also section 80 of the Kenyan Industrial Property Act for government use authorisation. See also section 37 and 38 of the Malawian Patents Act for compulsory licence and sections 40-42 for Government Use Orders. Section 40(1) of the Malawian Patents Act enables the Minister to authorise any government department or any person in writing to make use or exercise any invention for the service of the Government. See also article 46(1) of the Revised Bangui Agreement.

- 50 A good example of this procedure occurred in 2003 when the government of Zimbabwe issued a compulsory licence. On May 27, 2004, Zimbabwe's Minister of Justice, Legal and Parliamentary Affairs declared a Period of Emergency in order to override antiretroviral drug patents. Text of the Declaration available at [www.cptech.org/ip/health/cl/recentexamples.html](http://www.cptech.org/ip/health/cl/recentexamples.html)
- 51 In this regard, the South African Competition Law prohibits anticompetitive practices such as excessive pricing, refusals to license and denial of access to essential facilities in section of the Act. Breach of these prohibitions would be a very good ground for a compulsory licence. The finding of the South African Competition Commission that the two Pharmaceutical giants- GlaxoSmithKline (GSK) and Boehringer Ingelheim (BI)- had breached the South African Competition Act were on these ground and facilitated the issuance of voluntary licences to South African generic drug manufacturers. In response to the finding of the Commission, the pharmaceutical companies and the Commission settled the matter. See terms of settlement at [www.cptech.org/IP/health/sa/settlement/20903.pdf](http://www.cptech.org/IP/health/sa/settlement/20903.pdf)
- 52 Article 31(d)
- 53 Article 31(e)
- 54 Article 31(h)
- 55 Article 31(i) and (j).
- 56 See note 50.
- 57 On September 21, the Zambian Minister of Domestic Trade and Consumer Affairs issued a compulsory license for lamivudine, stavudine and nevirapine. The license was granted to Pharco Ltd., a local producer, which will produce a triple fixed-dose combination. A maximum royalty rate of 2.5% applies. See text of the compulsory licence at [www.cptech.org/ip/health/cl/recent\\_examples.html](http://www.cptech.org/ip/health/cl/recent_examples.html)
- 58 On April 5, 2004, Mozambique's Deputy Minister of Industry and Commerce issued a compulsory licenses for patent rights to Lamivudine, Stavudine and Nevirapine. The license was granted to Pharco Moçambique Lda, a local producer that plans on manufacturing the antiretrovirals as a fixed-dose combination. Royalties are not to exceed 2% of sales. Text of the License is available at [www.cptech.org/ip/health/cl/recent\\_examples.html](http://www.cptech.org/ip/health/cl/recent_examples.html)

effectively use the tool of compulsory licensing because of insufficient or lack of manufacturing capacity in the pharmaceutical sector. In order to address the problem the WTO General Council adopted a decision of 30<sup>th</sup> August 2003 on the implementation of paragraph 6 of the Doha Declaration. The decision contains an elaborate and cumbersome set of procedures that permits an exporter to supply specified quantities to an importing country with little or no manufacturing capacity. Professor Baker describes the procedure thus:

“ Paragraph 6 constructs a complex, procedural labyrinth that stands between a willing, low-cost supplier and a country desperately needing imported generics. Although the Agreement has produced a modicum of certainty, it does so at a high cost in terms of ease of use. Indeed, it may have erected such substantial procedural barriers that a generic entrants will be deterred from ever venturing into the production-for-export market.”<sup>59</sup>

### Exemptions From Patentability:

Article 27(1) of the TRIPS Agreement defines the criteria of novelty inventiveness and industrial applicability as a basis for the grant of patents. It does not determine the nature of the invention which shall be recognised. WTO member States are therefore at liberty to exclude new uses of patented inventions in order to promote access. For example the Commission on Intellectual Property Rights recommends that “ most developing countries particularly those without research capabilities should strictly exclude diagnostic, therapeutic and surgical methods from patentability, including new uses of known products.”<sup>60</sup> Another form of exclusion from patentability is offered by section 21(3) e of the Kenyan Industrial Property Act which provides that public health-related methods of use or uses of any molecule or other substance whatsoever used for the prevention or treatment of any disease which the Minister responsible for matters relating to health may designate as a serious health hazard or as a life threatening disease.

### Voluntary Licenses

These are usually negotiated between the pharmaceutical companies or as in the South African example, a product of a threat to resort to compulsory licensing. On September 19, 2002, the Treatment Action Campaign launched a complaint with South Africa's Competition Commission against GlaxoSmithKline and Boehringer Ingelheim. The complaint charged these corporations with excessive pricing in respect of ritonavir, lamivudine, ritonavir+lamivudine and nevirapine. GSK and BI were found to have contravened the Competition Act of 1998, and to have abused their dominant positions in their antiretroviral markets. The terms of the final settlement require the firms to 1) extend the voluntary licence granted to Aspen Pharmacare in October 2001 in respect of the public sector to include the private sector; 2) grant up to three more voluntary licences on terms no less favourable than those granted to Aspen Pharmacare; 3) permit the licensees to export the ARVs to sub-Saharan African countries; 4) permit the importation of the drugs for distribution in South Africa if the licensee does not have manufacturing capability in South Africa; 5) permit licensees to combine the relevant ARV with other antiretroviral medicines; and 6) charge royalties of no more than 5% of the net sales of the relevant ARVs.<sup>61</sup>

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59 Note 33, p. 31.

60 See Executive Summary *Integrating Intellectual Property Rights and Development Policy* Report of the Commission on Intellectual Property Rights. p. 16. Available at [www.iprcommission.org](http://www.iprcommission.org). Hereafter *CIPR ExecSumReport*.

61 See note 51.

To sum up this section, African patent laws in the Pre TRIPS Agreement period could be said to be an example of a fairly balanced intellectual property right. While patents were granted to protect inventions by giving a limited monopoly of exclusive rights, there were enough provisions which that were exceptions and limitations which would qualify as user rights that served to ensure that the public had access to the products covered by patent protection.

### ***III. II(B) Copyright and Access to Information in Africa***

Copyright is a person's exclusive right to authorise certain acts with respect to a wide range of works such as every original<sup>62</sup> literary, dramatic musical artistic work and computer programs. Copyright law protects the idea and not the expression of the idea. This serves as a general access mechanism because what is not protected by copyright is available to the public. This is because in the promotion of the public ideal of creativity, there should be no monopoly of ideas. Like all intellectual property rights, as articulated above copyright has a dual mandate of public interest and private benefit.<sup>63</sup> Again the challenge of the application and interpretation of copyright law is to determine the proper balance between these mandates. The Canadian Supreme Court in the case of *CCH v Law Society of Upper Canada*<sup>64</sup> believes that this balance “lies not only in recognising the creator's right but in giving due weight to their limited nature.”<sup>65</sup> In recognising a user right, the Court clearly seems to have elevated the standing of exceptions and limitations to be of comparable standing with the rights of the creator. This view is supported by other parts of the judgment. For example, the Court declares : “ The Copyright Act sets out the rights and obligations of both copyright owners and users.”<sup>66</sup> In another opinion the Court declares: “ The exceptions to copyright infringement, perhaps more properly understood as user's rights...”<sup>67</sup> Yet another opinion explains the true import of copyright exception:

“... the fair dealing exception is perhaps more properly understood as as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.”<sup>68</sup>

It is easy to surmise that a combined and purposeful reading of the relevant parts of the Supreme Court judgment may be said to mean that owners and users rights are not only comparable but should be equal. I submit that regarding exceptions and limitations as user's rights is consistent with the right to

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62 The threshold of the requirement of 'original' is not very high. See two contrasting views of originality in the cases of *University of London Press Ltd v University Tutorial Ltd* [1916] 2 Ch. 60; *Feist v (Publications) Inc v Rural Telephone Service Co* 499 U.S. 340. A middle ground is taken by the Canadian Supreme Court in *CCH v Law Society of Upper Canada*.

63 Commenting on the Canadian Copyright Act, Binnie J in *Theberge v Galerie d' Art du Petit Champlain Inc* [2002] 2 S.C.R. 366 paras 30-31 said : “ The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator....”

64 [2004] 1 S.C.R. 339

65 *Ibid*, para 10.

66 *Ibid* para 11.

67 *Ibid* para 12

68 *Ibid* para 48

intellectual property. Copyright protection can only be meaningful if owners and user's rights are regarded as *equal*. The significance of this case is succinctly captured by the opinion of Professor Tawfik

“ In sum, by introducing the language of user rights and by adopting a broad and expansive interpretation of 'fair dealing' the Supreme Court has shifted the locus of analysis away from the preeminence of the copyright interest. What is therefor being advanced is equality of treatment of both rights holders and users in which neither takes precedence over the other.”<sup>69</sup>

Be that as it may I submit that this judgment is should be internalised by African policy makers and judiciaries as it demonstrates the proper way to approach copyright law in particular and intellectual property rights.

The significance of this balance and especially of users rights lie in the fact that copyright is all about information. Thus it can be said that users right is all about access to information. Information is the live-wire of a knowledge society. The truth is that most African countries are not knowledge societies. As I stated elsewhere:

“ A knowledge society is one in which the diffusion, production and application of knowledge are at their utmost and form the driving force of the society...All components of a knowledge society depend critically on information, which is organised and represented in knowledge products that become commodities by virtue of copyright protection.”<sup>70</sup>

If African countries are to become knowledge societies, they need access to information contained in these knowledge products. If access to information is to be meaningful within the context of copyright protection users rights as articulated above should be not only of comparable but of equal priority.

A review of African copyright law<sup>71</sup> can only be meaningful if it is done through a review of copyright and access to information in the analogue and digital environment to ascertain the nature of the balance that exists in their copyright law and make suggestions that can ensure that the balance required by the right to intellectual property is respected.

### Access to Information in the Analogue Environment

For a very long time African copyright law has regulated only the analogue environment where the physical copy is of dominance. Within this environment African copyright legislations that underpin African copyright law have been based essentially on the Berne Convention.<sup>72</sup> These legislations reflect the dual mandate of copyright protection. They protect owners and users rights. For example the Nigerian Copyright Act provides for owner rights in sections 5, 6,7,and 8 amongst others. Users rights are found in the second schedule to the Act which is titled 'exceptions to copyright control'. In the third

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69 See Myra Tawfik “ International Copyright Law and 'fair dealing' as a 'user right' *e-copyright Bulletin* April-June 2005 6. Available at [www.unesco.org](http://www.unesco.org)

70 See E.S Nwauche note 23, p. 363.

71 See the following legislations: The Copyright Act 2000 of Zimbabwe; the Law Approving Copyright of 2001 of Mozambique; The Law on Authors Rights 1990 of Angola; the Law on Copyright and Neighbouring Rights 2000 of Cameroon; the Law on the Protection of Copyright 1984 of Benin Republic; the Copyright Act 1977 of Mauritius; the Nigerian Copyright Act 1988 (as amended) the Copyright and Performance Rights Act 1994 of Zambia; the Copyright and Neighbouring Rights Act 1999 of Tanzania and the Copyright Act (as amended) of South Africa.

72 See Ruth. L. Okediji “ *THE INTERNATIONAL COPYRIGHT SYSTEM: Limitations, exceptions and public interest considerations for developing countries in the digital environment*” Available at [www.iprsonline.org](http://www.iprsonline.org) .

schedule to the Act, are 'special exceptions in respect of sound recording of a musical work'. The Fourth Schedule makes provisions for 'compulsory licences for translation and reproduction of certain works' in line with the Appendix to the Berne Convention. The exact nature of this balance varies from country to country. On an general level, it can be said that the nature of the balance largely reflects the balance required by the right to intellectual property.

With respect to exceptions and limitations, State Parties to the Berne Convention were to decide which of the exceptions they were to create and recognise. There was only a restriction with regard to the reproduction right because Article 9(2) of the Convention provides for States to legislate the permission to reproduce certain works so long as such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. This is the three step test which we shall consider fully in the next paragraph. The exceptions and limitations that appear in African copyright legislations can be summarised as including fair dealing exceptions; parody pastiches and caricatures; quotations; educational exceptions and limitations; the making of ephemeral copies; public lectures and addresses and official texts, political speeches and news items. Some African countries notably Nigeria<sup>73</sup> Namibia<sup>74</sup> and South Africa<sup>75</sup> provide for fair dealing with respect to certain works. There is little jurisprudence in these countries as to how fair dealing should be interpreted. It may well be that the jurisprudence of the Canadian Supreme Court in the case of *CCH Canadian Ltd v Law Society of Upper Canada*.<sup>76</sup> In this case the Canadian Supreme Court construed s 29 of the Canadian Copyright Act which provides that fair dealing for the purpose of research or private study does not infringe copyright.” In this case the plaintiffs who were a group of commercial legal publishers sued the Law Society of Upper Canada for copyright infringement. The alleged infringement was in respect of single copies of copyrighted works made by the Great Library- maintained by the society- for its patrons who intended to use the works for private study and research. The defence of the Law Society was that the single copies were exempted because they were fair dealing. The Supreme Court determined that fair dealing should be interpreted in broad and expansive manner. It further determined that a set of factors that could help in the interpretation of 'fair dealing'. These factors are as follows: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing with the work. Applying these principles the Court upheld the defence of the Law Society. Whether s 29 of the Canadian Copyright Act will pass the three step muster as compared to other fair dealing provisions such as section 107 of the US Copyright Act<sup>77</sup> and s 40(2) of the Australian Copyright Act<sup>78</sup> is as observed by Professor Tawfik an open question.<sup>79</sup> After reviewing comments of

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73 See paragraph A of the Second Schedule to the Act which specifies that the fair dealing should be for the purposes of ' research, private use, criticism or review or the reporting of current events, subject to the condition that , if the use is public, it shall be accompanied by an acknowledgment of the title of the work and its authorship except where the work is incidentally included in a broadcast.

74 See s 10 of the Namibian Copyright Act 2002.

75 See s 12 of the South African Copyright Act.

76 Note 64.

77 See section 107 of the U.S Copyright Act provides by that” ...the fair use of a copyrighted work, including such use by reproduction in copies or phone records or by any other means specified by that section for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in a particular case is fair use the factors to be considered include- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose; (2)the nature of the copyrighted work; (3)the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use up[on potential market for or value of the copyrighted work

78 Section 40(2) of the Australian Copyright Act provides that: “ For the purposes of this Act, the matters to which regard should be had in determining whether a dealing with a literary, dramatic of musical work, being a dealing by way of reproducing the whole or part of the work for adaptation constitutes fair dealing with the work or adaptation for the

Professor Rickertson that section 107 of the US Copyright Act may not pass the three step muster<sup>80</sup> and s 40(2) of the Australian Act will<sup>81</sup> he concluded that:

“ A comparison of the impugned US provision and the compliant Australian one, read in the light of Rickertson's conclusions, would indicate that there is only a very fine line between formulations that, in his opinion, would conform to Article 13 and those that would not...At the very least, what these varied scholarly opinions demonstrate is that there is, at present no definitive answer to the question of whether a 'fair dealing' style of exception is WTO/TRIPS compliant. Therefore until such a time as some authoritative decision resolves this issue, there is no reason to assume that, 'fair dealing' would not withstand international scrutiny.”<sup>82</sup>

To sum up this aspect of our discussion, it is evident that there is no consensus as to the permissible user rights in the form of exceptions and limitations. This then is an opportunity for African judiciaries and legislatures to craft fair dealing exceptions that give expression to user rights. This is certainly optimistic since there is little evidence that these exceptions and limitations have been of any meaningful use in many African countries. It may well be that weak enforcement of copyright and high copyright infringement is the reason for the seeming lack of interest in the exceptions and limitations. It could also be possible that there was general lack of awareness of the nature of copyright talk less of the existence of exceptions and limitations. Or as Professor Ruth L. Okediji and other scholars point out, the requirements for the operationalisation of the Berne Appendix is cumbersome.<sup>83</sup>

#### Access to Information in the Digital Environment

There is a digital divide between developing countries of the south including African countries and the developed countries of the North. This divide is a significant difference in information and communications technology manifested in hardware software and content. While hardware in the form of telephones and computers are significant in bridging this divide, we are here concerned with aspects of the divide that are facilitated by copyright which are software and content.

Software is protected in African copyright law as copyright. The challenge of software protection is that of competition between proprietary and non proprietary software. The appeal of open source

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purpose of research or study include: “ (a) the purpose and character of the dealing; (b) the nature of the work or adaptation; (c ) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) in a case where part only of the work or adaptation is reproduced- the amount and substantiality of the part copied.

79 See Myra J Tawfik , note 69, 14.

80 “ It is quite possible that any specific judicial application of Section 107 will comply with the three step test as a matter of fact; the real problem however, is with a provision that is framed in such a general and open ended way. At the very least, it is suggested that the statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step).” S. Rickertson “ WIPO Study on Limitations and Exceptions of Copyright and Related Rights in a Digital Environment” SCCR/9/7 Report for the Standing Committee on Copyright and Related Rights, June 2003 at p. 69. Report available at [www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr\\_9\\_7.pdf](http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf)

81 “ ...in the case of subsection 40(2), compliance with the three-step test is established without great difficulty. The factors listed in that subsection are directed specifically at the kind of issues raised by the three-step test and allow, moreover, for a case-by-case determination of whether there will be fair dealing for the purposes of research or study. This subsection, indeed, is a shining example of compliance with the three-step test.” See S. Rickerstson “ The three-step test, deemed quantities, libraries and closed exceptions” Report prepared for the Centre for Copyright Studies. Report available at [www.copyright.com.au/reports%20&%20papers/CCS020Berne.pdf](http://www.copyright.com.au/reports%20&%20papers/CCS020Berne.pdf)

82 See Myra Tawfik, note 69 p. 14

83 Note 72.

software is strong in a continent where the access to software is heavily restricted by price. Accordingly the Commission for Intellectual Property recommended open source software for African Countries:

“Developing countries and their donor partners should review policies for procurement of computer software, with a view to ensuring that options for using low-cost and/or open- source software products are properly considered and their costs and benefits carefully evaluated. In order that software can be adapted to local needs, developing countries should ensure that their national copyright laws permit the reverse engineering of computer software programmes, in ways that are consistent with relevant international treaties which they have signed.”<sup>84</sup>

Within a digital environment the question of access to content held in this environment is of considerable importance because content in that environment is protected by digital rights management procedures and contractual devices. The easier means of misappropriation of copyright works in a digital environment poses a considerable concern to owners especially because the digital copies of copyrighted works are perfect and works can be globally available in seconds. The reaction of content owners has been to devise a technological response to what is essentially a technological problem. Thus digital rights management procedures enable a restriction of access to content. When access is additionally dependent on contractually agreed terms that often involve relatively considerable monetary consideration, access is further restricted. The problem that this poses to user's rights is that they are meaningless and completely at the mercy of content owners. The policy challenge for copyright law is therefore to ensure that the users rights are meaningful by permitting technological measures to circumvent the technological barriers and regarding the contractual devices that impede access pursuant to users rights as void.

The concern that the digital environment facilitates widespread misappropriation of content led the international community to adopt two treaties, the WIPO Copyright Treaty<sup>85</sup> and the WIPO Performances and Phonograms Treaty.<sup>86</sup> The nature of the balance between owners and users rights can be gleaned from the preamble to the WCT:

“ Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and as uniform as possible,

Recognising the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social cultural and technological developments,

Recognising the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasising the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognising the need to maintain a balance between the rights of authors and the larger public interest, particularly education research and access to information, as reflected in the Berne Convention...'

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84 See note 60 chapter 5 p.22.

85 Hereafter the WCT.

86 Hereafter the WPPT.

As I have also argued elsewhere:

“ There is little doubt that the economic incentive for the author is at the heart of the digital treaties, even though they profess to reflect the balance in the Berne Convention. The larger public interest as in the Berne Convention, is a supplementary concern.”<sup>87</sup>

The digital treaties contain provisions which seek to address digital copyright infringement. Article 11 and 12 of the WCT provide for obligations concerning technological measures and rights management information. Article 11 provides that:

“ Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are authorised by the authors concerned or permitted by law.”

Article 12(1) provides that:

“ Contracting parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts, knowing or with respect to civil remedies having reasonable grounds to know that it will induce, enable facilitate or conceal an infringement of any right covered by this treaty or the Berne Convention.”<sup>88</sup>

The exceptions and limitations to the WCT are found in article 10:

“ (1) Contracting Parties may, in their national legislation provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting parties shall, when applying the Berne Convention, confine any limitation of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”<sup>89</sup>

The Agreed Statement to Article 10 of the WCT sets the context of exceptions and limitations in a digital environment and provides that:

“ ...it is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions have been understood to permit contracting parties to devise new exceptions and limitations that are appropriate in a digital environment. It is also understood that Article 10(2) neither reduces or extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”

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87 E.S Nwauche, note 23 p 370.

88 See also articles 18 and 19 of the WPPT

89 See also article 16 of the WPPT

As stated above exceptions and limitations are affected by technological measures because the access to work permitted by a user right is controlled in the same way as access to other works. Thus the technological measure is capable of restricting access. To be meaningful therefore in a digital environment the technological measure must be such that its operation does not restrict access. This is the challenge for countries who become parties to the digital treaties.

Seven SSA countries-Botswana, Burkina Faso, Mali, Gabon, Guinea, Senegal and Togo – have become parties to the digital treaties. Of all these countries only Botswana can be taken to have conducted a review of its legislation in the wake of the digital treaties. Even at that African countries must decide how to devise appropriate user rights. While the implementation of the digital treaties in other countries may be instructive,<sup>90</sup> it may be worthwhile for African countries to note the advice of the Commission on Intellectual Property Rights:

“Internet users in developing nations should be entitled to fair use rights such as making and distributing printed copies from electronic sources in reasonable numbers for educational and research purposes, and using reasonable excerpts in commentary and criticism. Where suppliers of digital information or software attempt to restrict “fair use” rights by contract provisions associated with the distribution of digital material, the relevant contract provision may be treated as void. Where the same restriction is attempted through technological means, measures to defeat the technological means of protection in such circumstances should not be regarded as illegal. Developing countries should think very carefully before joining the WIPO Copyright treaty. Countries should also not follow the lead of the US and the EU by implementing legislation on the lines of the DMCA or the Database Directive.”<sup>91</sup>

I have advocated elsewhere that:

“ The appropriate response of developing countries, including African countries to the WIPO digital treaties has attracted the attention of individuals and groups alike. The fact that there is no agreed consensus on the expression of exceptions and limitations at the international level under the Berne framework and under the WIPO digital treaties underscores the point that they ought to be created in response to the circumstances of each nation. A national response expresses the needs and aspirations of each country. *An analysis of the human rights obligations of African countries must have a significant impact on these exceptions and limitations.*”<sup>92</sup>

It is important to note that whatever user rights are crafted by African countries must grapple with the three step test. This is important since all user rights have to pass the three step muster. While this test only dealt with the reproduction right in the Berne Convention, it is under the digital treaties as shown by article 10 of the WCT reproduced above, very pervasive and affect all owner rights. In an interpretation of the three step test in the Berne Convention and Article 13 of the TRIPS Agreement,<sup>93</sup> a WTO Panel interpreting exemptions to exclusive rights contained in section 110(5) of the Copyright Act of the United States as amended by the fairness in Music Licensing Act of 1998, has interpreted the three step test in such a strict manner that may render all user rights of no practical importance. In the

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90 See the U.S Digital Millennium Copyright Act; Article 5 of the European Union Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society; and the Australian Copyright Amendment (Digital Agenda) Act 2000.

91 See CIPR ExecSumReport, note 60, p. 22.

92 E.S Nwauche, note 23, p. 377. ( emphasis supplied).

93 Article 13 of the TRIPS Agreement provides that: “ Members shall confine limitations or exceptions to the 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”

panel's opinion

“ We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of normal conflict with a normal exploitation of a work (i.e the copyright or rather the whole bundle of exclusive rights conferred by the ownership of copyright), if uses, that are in principle are covered by that right but exempted under the exception and limitation, enter into economic competition with the ways in which right holders normally extract economic value from that right to the work (i.e the copyright) and thereby deprive them of significant or tangible commercial gains. In developing a benchmark for defining the normative connotation of normal exploitation, we recall the European Communities' emphasis on the potential impact of an exception rather than on the market at a give point in time, given that, in its view, it is the potential effect that determines the market conditions”<sup>94</sup>

There is broad support for the view that the three step test may be inimical to user rights.<sup>95</sup> If user rights are to be regarded as of equal priority to owner rights, then the three step test ought to be interpreted as a broad permissive guideline which ought to help define the extent of an owner's right in such a way that they are meaningful and does not restrict any user right. There is no doubt that the challenge of the nature and extent of user rights before national and international courts will be frequent and often controversial. African judiciaries are urged to heed the jurisprudence of the Canadian Supreme Court as outlined above.

### ***III.I I(C) Protecting Communal Intellectual Property***

The protection of communal intellectual property such as traditional knowledge and expressions of folklore find concrete justification in human rights. As evidence of collective creative process these intellectual property stake a claim for recognition and enforcement on the inherent dignity of the community just as individual human rights rely on the dignity of the individual. It is true that many African countries have legislated *sui generis* systems of protection of various forms of communal intellectual property<sup>96</sup>, yet these forms of protection have been mired in controversy emanating largely from concerns about how the protection will affect and exclude the large corpus of communal cultural materials that mankind needs needs for creativity.<sup>97</sup> In this regard, a somewhat interesting tussle framed by the components of article 15(1) of the ICESCR is in issue. Developing countries who are the usual campaigners for access to the benefits of intellectual property rights are in the driving seat of the campaign for protection of their communal intellectual property. The developed world and its entertainment and pharmaceutical industries on the other hand are at the heart of the demand for access. The *sui generis* legislations mentioned above have not been of much help in determining the appropriate balance like most IP rights legislation that are pro author/inventor. Accordingly a human rights approach ensures that communal intellectual property is protected and that there are access provisions of equal priority.

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94 United States-Section 110(5) of U.S Copyright Act, WTO Dispute WT/DS/160, Report of the panel at paras. 6.183 and 6.184. Available at [www.wto.org](http://www.wto.org)

95 See for example Ruth L Okediji, note 72, where she argues that the growing importance attached to the three step test requires careful examination of whether this test originally conceived to deal with exceptions and limitations to the reproduction right, can effectively serve the public interest with respect to all rights recognised by international copyright.

96 See for example many Copyright Acts listed in note 71. These Acts protect expressions of folklore. For example see s 28 of the Nigerian Copyright Act, and ss 58-60 of the Namibian Copyright Act. See also the National Environmental Management Biodiversity Act 2004 which protects traditional Knowledge in South Africa.

97 See for example M. Brown “Can Culture be Copyrighted” 39 *Current Anthropology* 193.

### III.III MEASURES DESIGNED TO STRENGTHEN A HUMAN RIGHTS BASED INTELLECTUAL PROPERTY REGIME

A number of measures are necessary if African countries are to be able to design, apply and interpret an intellectual property regime that recognises the equal balance in article 15(1) of the ICESCR. While some of these measures have been considered in the immediately preceding section, they need to be pointed since the exact mix of what different African countries need can only result from national and regional peculiarities. Most of the measures recommended below are *pro-access* because of the current international intellectual property system is *pro protection*.

Recognise and enforce economic social and cultural rights: Recognising and enforcing economic social and cultural rights in any country provides the stimulus and context for the campaign and realisation of pro access IP rights. I pointed out earlier that the right to intellectual property is a foundational right, and other human rights serve to give the components of article 15(1) of the ICESCR the clarity and specificity it needs to be meaningful and concrete. The demand for the enforcement of economic social and cultural rights bring the deficiencies of an intellectual property regime into clearer relief. Since the right to intellectual property is an overarching right, its public benefit component finds expression in a number of other rights. Thus the campaign for the enforcement of these rights exerts tension in the nature of the intellectual property regime. For example the campaign for access to medicines found strong anchor in the right to health and also in the nature of user rights in a patent. Accordingly all African countries should recognise and enforce economic social and cultural rights in the constitutions as well as ratifying the International Covenant of Economic Social and Cultural Rights. There is no doubt that the recognition of the right to health in the South African Constitution helped in no small measure in the campaign for access to HIV/AIDS drugs.<sup>98</sup> For countries such as Nigeria which does not recognise the enforcement of economic social and cultural rights, there is evidence that these may be part of the doctrinal obstacle to pro access activities and IP regime.<sup>99</sup>

Legislating TRIPS compliant IP Law Reform: Even though TRIPS compliance with respect to pharmaceutical patents have been postponed at least till 2016, there is need for Africa countries to undertake a reform towards complying with the TRIPS Agreement so that they can utilise all the TRIPS flexibilities as discussed above in respect of other intellectual property rights including non pharmaceutical patents. Generally African countries ought to make sure that the standards in the TRIPS Agreement is their ceiling. Accordingly all other *TRIPS Plus* standards existing in their IP laws should be expunged and are not directly or indirectly contained in compliant provisions.

#### Resist TRIPS Plus Standards in Bilateral and Multilateral Trade Agreements

We discuss the threat posed by TRIPS Plus standards contained in Free Trade Agreements and Bilateral Trade Agreements and conclude that African countries should be wary of these standards and resist them.

Legislating Non IP Access Reform Non IP access reform can complement IP access reform. In this regard, the example of South Africa in legislating a series of non IP reforms in the form of controls in

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98 See for example the cases of *Treatment Action Campaign v Minister of Health* 2002 (5) SA 721 (CC).

99 Note the relative lack of civil society campaign or advocacy on access to medicines in Nigeria.

the production, importation, distribution and sales of medicines by virtue of the Medicines and Related Substances Control Act 1965 (as amended)<sup>100</sup> is commendable.

### Legislate Competition Policy and Law Reform in Identifying Appropriate Competition Law/Intellectual Property Law Interface.

Since IP rights confer exclusionary power, they may enable a right holder to exercise market power in a way that may be judicially or administratively determined to be anti-competitive. However the mere existence and exercise of intellectual property right is not anti-competitive. It is when the exercise of the IP right results in market power that IP rights are viewed as harmful. Mechanisms such as parallel importation and compulsory licences are tools to remedy anti competitive practices. It is therefore important that African countries develop a competition regime that is able to determine the threshold when the exercise of IP rights is anti competitive.<sup>101</sup> For countries that have a competition regime,<sup>102</sup> efforts should be intensified to develop appropriate expertise and jurisprudence.

### Recognise and Deepen the Protection of New Intellectual Property Rights

Even though it is generally accepted that TRIPS forms a charter of minimum standards of intellectual property, it is also true that certain intellectual property rights that are new and outside the purview of existing IP rights in the TRIPS Agreement and other multilateral intellectual property treaties can be recognised and protected especially if they are so crafted that they are able to offer protection as means of stimulating innovation and appropriate provisions exist to ensure that the public has access to these IP rights. A good example of such an IP right is the Utility Model. This IP right is a lesser patent because the stringent requirements for a patent are not applicable<sup>103</sup> often requiring only novelty and industrially applicability dispensing with the highly technical patent requirement of inventive step. In addition Utility Models are usually protected for a lesser period than the minimum 20 year period for patents.<sup>104</sup> This type of IP right is appropriate for many African countries whose level of inventive

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100 The general tenor of the Act has received approval of the South African Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd* Case CCT/59/04 decided on 30 September 2005. Available at [www.concourt.gov.za](http://www.concourt.gov.za)

101 See for example the provisions of article 40(2) of the TRIPS Agreement: “ Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.”

102 The South African Competition regime is an example to follow. It was the determination of the South African Competition Commission that GlaxoSmithKline and BI had a case to answer in response to complaints of anti competitive practices such as excessive pricing ,abuse of dominant position and refusal to licence generic manufacturers that led to the settlement referred to in note 51. See also the Restrictive Trade Practices, Monopolies and Price Control Act of 1990 of Kenya;

103 OAPI protects Utility Models which it defines in article 1 as “ implements of work or objects to be utilised or parts of such implements or objects in so far as they are useful for the work or employment for which they are intended on account of a new configuration, a new arrangement or a new component device and are industrially applicable. ARIPO provides registration procedure for Utility Models. Section 3ter of the ARIPO [Harare Protocol defines a Utility Model thus](#) : “Utility model”, means any form, configuration or disposition of elements of some appliance, working tools and implements as articles of everyday use, electrical and electronic circuitry of other object or part thereof in so far as they are capable of contributing some benefit or new effect of saving in time, energy, or labour or improving the hygienic or sociophysiological working conditions by means of new configuration, arrangement or device or a combination thereof and are industrially applicable. “

104 Article 6 of Annex II to the Revised Bangui Agreement provides that Utility Models shall be protected for 10 years. See [www.oapi.wipo.net](http://www.oapi.wipo.net) Some ARIPO countries protect Utility Models. See s. 18(4) of the Industrial Property

activity is still low. If properly managed this may act as a boost to a robust research and development initiative.

#### Develop Critical Intellectual Property Human Resource

One of the major constraints in the development of African IP regimes is the lack of African intellectual property personnel that can engage with civil society to enable a sufficient space for the discussions of the nature and exercise of intellectual property rights in their countries. Unfortunately even with years of technical assistance, the necessary human personnel does not exist. Consequently except in areas like access to medicines there is virtually no serious debate about the mission of intellectual property in African countries. To redress this problem would need a lot of measures including increased public awareness campaigns; the teaching of intellectual property law and development in relevant faculties in African universities<sup>105</sup> infrastructural support for national enforcement agencies and a rethink of the nature of technical assistance presently available to African countries.<sup>106</sup>

#### Achieve deeper continental harmonisation and integration in Intellectual Property Administration

This last point is considered in more detail in the next section.

### **IV. THREATS TO A DEVELOPMENT ORIENTED INTELLECTUAL PROPERTY REGIME :TRIPS PLUS PROVISIONS OF MULTILATERAL AND BILATERAL INVESTMENT TREATIES AND AFRICAN COUNTRIES**

The rise in bilateralism in the wake of rising demand for a human rights approach to intellectual property poses considerable threat to a human rights based intellectual property regime. As Professor Laurence Helfer points out, one of the consequences of the new intersection between human rights and intellectual property is the articulation of maximum standards of intellectual property.<sup>107</sup>

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Order of Lesotho 1989.

105 See Samuel Wangwe *et al* 'Country Case Study 9: Institutional Issues for Developing Countries in IP Policy-Making, Administration and Enforcement : The Case of Tanzania'. The Report was commissioned by the Commission on Intellectual Property Rights as a Background Paper, Available at [www.iprcommission.org/papers/pdfs/sp9\\_Tanzania\\_case\\_study.pdf](http://www.iprcommission.org/papers/pdfs/sp9_Tanzania_case_study.pdf) : '...extensive training is required to cause awareness of intellectual property laws, considering that until recently, Intellectual Property Law was not formally taught in the country: but now some aspects of IP have been introduced in the Law Curriculum at the University of Dar es Salaam' p.5. This is also the case for Uganda : 'The Institutions that are involved in the teaching, administration and enforcement of IPRs are inadequately staffed and hence generally lack the institutionally capacity to execute their mandates. Makerere's University Faculty of Law was the only academic institution cited as having a course on IPRs. But they do not have enough personnel to teach and offer training adequately. That is why the course is optional.'. See Wangwe *et al* 'Country Case Study 9: Institutional Issues for Developing Countries in IP Policy-Making, Administration and Enforcement:: The Case of Uganda' Available at [www.iprcommission.org/papers/pdfs/sp9\\_Uganda\\_case\\_study.pdf](http://www.iprcommission.org/papers/pdfs/sp9_Uganda_case_study.pdf)

106 See for example S. Musungu "Designing Development-Oriented Intellectual Property Technical Assistance Programmes" ICTSD-UNCTAD Dialogue, 2<sup>nd</sup> Bellagio Series on Development and Intellectual Property, 18-21 September 2003. Available at [www.iprsonline.org](http://www.iprsonline.org)

107 L. Helfer "Human rights and intellectual property: Conflict or coexistence" 5 MINN. INTELL. PROP. REV. 47 (2003). Available at [www.mipr.umn.edu/archive/v5h1/Helfer.pdf](http://www.mipr.umn.edu/archive/v5h1/Helfer.pdf). See also Carlos Correa "Bilateral investment agreements: Agents of new global standards for the protection of intellectual property rights?" GRAIN Briefing August

A recent letter written by Medicines San Frontier (MSF) to the New Director General of the World Trade Organisation encapsulates the threat of bilateralism to some of the pro access mechanism we have discussed above. The letter reads *inter alia*:

“The HIV/AIDS crisis has shown the urgent need to ensure that essential medicines are available at affordable prices. Today approximately half of the one million people in the developing world who receive anti retroviral drugs rely on generic production. The fixed-dose combinations, produced in India, greatly simplify the administration of anti retroviral therapy and have been critical to scaling up treatment in resource-poor settings.

The 2001 WTO Doha Declaration on TRIPS and Public Health was a vital step in increasing access to medicines. It provides unambiguous support to any government that need to protect the health of their people to use the TRIPS flexibilities to overcome the barriers posed by patents, and helps the least developed countries by extending the transition period for enforcing and granting pharmaceutical product patents until at least 2016.

Since then, however, there has been a systematic dismantling of the Doha Declaration through bilateral trade agreements in which much higher levels of intellectual property protection are demanded than required by the WTO.”<sup>108</sup>

TRIPS Plus standards are contained in Free Trade Agreements (FTA's) and Bilateral Investment Agreements concluded between developed countries and developing countries wherein standards of intellectual property rights way beyond what the TRIPS Agreement requires become enforceable obligations. In this way the potential and real pro access mechanisms are of no real consequence. These TRIPS Plus standards stand in contrast with the equal balance required by the right to intellectual property and favour pro author/inventor.

While a number of FTAs have been concluded<sup>109</sup>, it is only the FTA between the United States and the Southern African Customs Union that is under negotiations.<sup>110</sup> A perusal of the concluded FTA's<sup>111</sup> indicate the presence of the following TRIPS Plus standards with regard to patent protection and copyright protection: (i) limiting compulsory licences to national emergencies, to governmental, non commercial use and to remedy anti competitive practices<sup>112</sup>; (ii) bar parallel importation<sup>113</sup>; (iv) extend patent monopolies for administrative delays,<sup>114</sup> (v) inclusion of the three step test<sup>115</sup> which we have seen may severely affect user rights. Happily there is some evidence that some of the African countries and regional groupings involved in the negotiations recognise the harm these would do their intellectual property regime.<sup>116</sup> It is hoped that other regions and countries emulate them so that the pro

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2004. Available at [www.grain.org](http://www.grain.org)

108 Available at [www.msf.org](http://www.msf.org)

109 See the FTA's between US and Singapore May 6 2003 (available at [www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final\\_Texts/asset\\_upload\\_file708\\_4036.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf); US and Chile, June 6 2003. Available at [www.ustr.gov/assests/Trade\\_Agreements/Bilateral/Chile\)FTA/Final\\_Texts/assest\\_upload\\_file912\\_4011/pdf](http://www.ustr.gov/assests/Trade_Agreements/Bilateral/Chile)FTA/Final_Texts/assest_upload_file912_4011/pdf). See also article 46 of the Partnership Agreement between members of the African Caribbean and Pacific Group and members of the European Union signed in Cotonou on 23 June 2000.

110 Information on the US-SACU negotiations can be found at [www.ustr.gov/Trade\\_Agreements/Bilateral/Souther\\_Africa\\_FTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Souther_Africa_FTA/Section_Index.html)

111 See for example the US-Australia FTA. Text is available at [www.ustr.gov/Trade\\_Agreemments/Bilateral/Australi\\_FTA/Final\\_Text/asset\\_upload\\_file148\\_5168.pdf](http://www.ustr.gov/Trade_Agreemments/Bilateral/Australi_FTA/Final_Text/asset_upload_file148_5168.pdf)

112 See Art 17.9 (7) *ibid*.

113 See Art17.9(4) *ibid*.

114 See Art. 17.9 (8)

115 See Article 17.9(2) *ibid*.

116 With respect to the US SACU Free Trade Agreement, see Lukyano Mnyanda *Trade Talks Grind to a Halt* Sunday Times (Johannesburg) 19 September 2004: “...the US-SACU negotiators have so far failed to resolve fundamental

access mechanisms already in place are not sacrificed on the altar of expediency.

## V AN INSTRUMENTAL FRAMEWORK FOR A DEVELOPMENT ORIENTED INTELLECTUAL PROPERTY REGIME IN AFRICA

The measures outlined above in addition to others will make a difference in the creation and sustenance of a human rights based intellectual property regime. Ideally these measures should be undertaken at a national level given the territorial nature of intellectual property. However the reality of the African situation is such that inadequate resources, weak infrastructure and lack of skilled personnel make it difficult to expect that any meaningful national initiative can take place in many of these countries. A regional initiative that maximises available human and material resources would be a viable initiative. Accordingly an effective instrumental framework for a development oriented intellectual property regime in Africa lies in the establishment of a single continental intellectual property organisation that effectively coordinates the activities of national intellectual property offices and collecting societies. Of much more importance is the philosophy of such an arrangement. Should such instrumental framework be pro protection essentially registering intellectual property rights, documenting same and enforcing same. Or should it also seek to develop and implement policy to ensure that there is adequate access. I submit that a instrumental framework that is meaningful for Africa is one that ensures that it not only protects IP rights but that it also ensures that there is access to the goods and services which the IP rights protect. The mandate of this organisation would be to ensure that equal priority is given to the protection of the rights of authors/inventors and ensuring that there is adequate access to the fruits of innovation.

A single continental organisation does not presently exist but can be forged out of two existing organisations which are the African Intellectual Property Organisation (OAPI) and the African Intellectual Property Organisation (ARIPO). We shall now examine the two organisations.

**V.I(a) The African Intellectual Property Organisation (OAPI):** OAPI was created in 1977<sup>117</sup> and is governed by the Revised Bangui Agreement.<sup>118</sup> Article 2(1) of the Revised Bangui Agreement sets out the objectives of the organisation, which are *inter alia*:

- implementing and applying common administrative procedures deriving from a uniform system for the protection of industrial property, as well as the provisions of international organisations to which member States have acceded, and providing services related to industrial property;
- contributing to the promotion of the protection of literary and artistic property and to the recognition of cultural and social values of artistic and literary property;
- encouraging the creation of associations of national authors in those member States where such bodies do not exist;

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differences on a number of key issues in which SACU negotiators believe that US demands run counter to the region's development agenda. These include intellectual property and investment rules. See also T. Avafia *The potential impact of US-SACU FTA negotiations on public health in southern Africa*. Available at [www.tralac.org](http://www.tralac.org).

117 OAPI was established on 13 September 1962 pursuant to An Agreement relating to the Creation of an African and Malagasy Office of Industrial Property in Libreville. This Agreement was revised in Bangui in 1977 by an Agreement called "The Agreement Relating to the Creation of an African Intellectual Property Organisation" and it came into effect on 8 February 1982. Negotiations to revise the Bangui Agreement started in 1994 and culminated in the Agreement on the Revision of the Bangui Agreement (hereafter Revised Bangui Agreement) which came into force on 28 February 2002. OAPI made up of the following countries: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Cote d' Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal, and Togo. These countries are hereinafter referred to as the OAPI countries.

118 The Revised Bangui Agreement is available at [www.oapi.net/doc/en/bangui\\_agreement.pdf](http://www.oapi.net/doc/en/bangui_agreement.pdf).

- centralising, coordinating and disseminating information on all kinds relating to the protection of literary and artistic property and communicating the information to any Member State requesting it;
- promoting the economic development of Member States notably by means of effective protection of intellectual property and related rights;
- providing intellectual property training;
- acting for each of the member States as both the National Industrial Office within the meaning of Article 12 of the Paris Convention and as the central patent and documentation body.

The Revised Bangui Agreement creates a system of procedural and substantive intellectual property law because it grants intellectual property rights in accordance with the annexes<sup>119</sup> to the Agreement and these rights operate in member States as “independent national rights”<sup>120</sup> Even though these intellectual property rights are subject to the laws of member States, the substantive content is regulated by the annexes.<sup>121</sup> In this way the OAPI states are closely integrated and could be considered a common intellectual property market.

**V.I(b) The African Regional Intellectual Property Organisation (ARIPO):** ARIPO was established in 1976 pursuant to the Agreement for the creation of an Industrial Property Organisation for English Speaking Africa.<sup>122</sup> The objectives of ARIPO are set out in Article III of the ARIPO Agreement (as amended.)

- promote the harmonisation and development of the intellectual property laws, and matters related thereto, appropriate to the needs of its Members and of the region as a whole;
- foster the establishment of a close relationship between its Members in matters relating to intellectual property;
- establish such common services or organs as may be necessary or desirable for the co-ordination, harmonisation and development of the intellectual property activities affecting its members;
- establish schemes for the training of staff in the administration of intellectual property laws;
- organise conferences, seminars and other meetings on intellectual property matters;
- promote the exchange of ideas and experience, research and studies relating to intellectual property matters;
- promote and evolve a common view and approach of its Members on Intellectual property

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119 The annexes are I. Patents, II. Utility Models, III. Product or Service Marks, IV. Industrial Designs and Models, V. Trade names, VI. Geographical Indications, VII. Literary and Artistic Property, VIII. Protection Against Unfair Competition, IX Layout-Designs (Topographies) of Integrated Circuits; and Protection of New Plant Varieties.

120 See article 3 and 4 of the Revised Bangui Agreement.

121 Note however that harmonisation in the field of industrial property is deeper than in the field of copyright. This seems evident from the wordings of Annex VII and in practice. See L.Y Ngombe “ Copyright in the Member States of the African Intellectual Property Organisation: An Uncompleted Harmonisation” January-June 2005 *e-copyright Bulletin*. Available at [www.unesco.org](http://www.unesco.org)

122 The organisation was known as ESARIPO at inception. In 1985 the name of the organisation was changed to African Regional Industrial Property Organisation. In 2002, the mandate of the organisation was changed to include copyright hence the change of name. The organisation is made up of the following countries: Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, Tanzania, Zambia and Zimbabwe. These countries are hereinafter referred to as the ARIPO countries and their relationship is governed by the Agreement for the Creation of the African Regional Intellectual Property Organisation. Hereafter referred to as the Lusaka Agreement. The Lusaka Agreement is available at [www.aripo.org/Documents/Protocols/lusaka\\_agreement.pdf](http://www.aripo.org/Documents/Protocols/lusaka_agreement.pdf) In addition some of the mandate of the organisation is governed by the Harare Protocol on Patents and Designs and the Banjul Protocol on Trade Marks.

- matters; and
- assist its members, as appropriate, in the acquisition and development of technology relating to intellectual property matters.

ARIPO's activities are essentially procedural because through two existing protocols on patents and industrial designs<sup>123</sup> and the other on marks<sup>124</sup> ARIPO is empowered to grant and administer patent industrial designs and marks on behalf of Contracting Parties to the protocols. The substantive content of these intellectual property rights are governed by the laws of member States.<sup>125</sup> Thus ARIPO is facilitative body which enables a faster process of registration.

### **V.I(c) One Intellectual Property Organisation in Africa**

An assessment of the nature of the two organisations outlined above is necessary to determine the nature of the continental organisation that could emerge thereby. ARIPO like OAPI essentially protects the author/inventor through the rights that are recognised and enforced. These organisations believe that technological innovation will as of course follow this manner of protection in addition of course to training. Our analysis of the character of intellectual property rights in Africa indicate clearly that the two organisations are at best foreign intellectual property rights registration agencies. They are not only pro author/inventor, they are also pro foreign IP. Their ability to maintain a balanced view of intellectual property is therefore suspect.

Since these organisations are pro author/inventor they do not adequately address the issue of access both in respect of the enabling statutes and in their operations. It seems that the question of user/access rights may be perceived to be a matter of private rights which can be claimed by citizens as provided for in the law. This may be correct, except that these organisations through the administrative decisions that determine when rights are to be granted can protect user rights. For example the determination administratively and judicially that an invention is not qualified for patent protection automatically releases that invention into the public domain. Furthermore they can enhance the manner in which their member States are able to use pro access mechanisms such as the TRIPS flexibilities discussed above. In this regard, the technical capacity to issue compulsory licenses by member States can be boosted by a regional intellectual property organisation. Moreover they can act as norm setting and review body effectively articulating common positions in the continually evolving international intellectual property system.

A single continental intellectual property organisation is not only desirable<sup>126</sup> but may be a legal necessity. This is because the mandate of the African Union<sup>127</sup> is based on the Abuja Treaty Establishing the African Economic Community<sup>128</sup> whose aim is the African Common Market of which intellectual property organisations are building blocks. Since intellectual property organisations in harmonising intellectual property rules can serve to remove non-tariff barriers and thereby facilitate trade, they become critical to a common market whose primary aim is the free movement of goods and

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123 . This is the Harare Protocol which binds fourteen member States: Botswana, The Gambia; Ghana, Kenya, Lesotho, Mozambique, Sierra Leone, Sudan, Malawi, Sudan, Swaziland, Uganda, Tanzania, Zambia, and Zimbabwe. [www.aripo.org/Documents/harare\\_agreement.pdf](http://www.aripo.org/Documents/harare_agreement.pdf)

124 This is the Banjul Protocol. [www.aripo.org/Documents/Protocols/banjul\\_protocol.pdf](http://www.aripo.org/Documents/Protocols/banjul_protocol.pdf)

125 See section 3(11) of the Harare Protocol and Rule 2 of Regulations Implementing the Banjul Protocol.

126 See T. Kongolo “ The African Intellectual Property Organisations: The Necessity of Adopting One Uniform System for All Africa” 3 *Journal of World Intellectual Property* 265 (2000).

127 See the Constitutive Act of the African Union. Available at [www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm)

128 See article 33(2) of the Union Act. The text of the treaty is available at [www.uneca.org/tca/ariportal/abuja.htm](http://www.uneca.org/tca/ariportal/abuja.htm)

services. As stated above the possibility of a single intellectual property organisation in Africa can result from a merger of the two organisations. The obstacles to these merger include the fact that while ARIPO is a facilitative body, OAPI is a more integrated intellectual property system.

The factors conducive to merger include the fact that the reform undertaken by ARIPO and OAPI to comply with the TRIPS Agreement at least in theory will standardise intellectual protection in Africa. Thus there are more commonalities than there used to be. Secondly language and colonial affiliations may not seem to pose much of a threat. While ARIPO was English in origin and content for a long while, Mozambique-a Portuguese speaking country- has joined her, while two other Portuguese's speaking countries – Equatorial Guinea and Guinea Bissau - have joined OAPI. Thirdly the two organisations signed a cooperation Agreement<sup>129</sup> in the recent past, even though there is not much evidence to indicate if any progress has been made.<sup>130</sup> Fourthly the two organisations potentially cover the same area. While OAPI has from inception dealt with all intellectual property rights, ARIPO was until recently only concerned with industrial property. At its Eighth Session held in Mangochi, Malawi from August 29 to 30, 2002, the Council of Ministers decided to extend the mandate of the Organization to include copyright and related rights following a proposal made by the Republic of Malawi which was submitted to the Administrative Council at its Twenty-fifth Session held in Accra, Ghana from November 26 to 30, 2001. Thus in no distant time the two organisations will deal with the same subject matter making it somewhat easier to merge. Considerable problems remain however with respect to the mandate of the proposed organisation given the fact that their approach is essentially different. This is not fatal because there can be a negotiated consensus that concentrates on the functional commonality as a starting point. In this regard the continental organisation may begin by facilitating registration and documentation of IP rights

## **V.II A BALANCED MANDATE FOR NATIONAL INTELLECTUAL PROPERTY OFFICES**

The determination of the appropriate mandate and structure of national intellectual property offices in Africa could go a long way in improving the manner in which they operate. At present most of them are pro author/inventor because they primarily serve to register intellectual property rights. In addition many of them also serve as enforcement agencies or are saddled with enforcement of intellectual property rights. With a weak human and material resource base and a conceptual bias towards pro author initiatives, many of these offices are not able to cope with their public service functions in facilitating access as a legitimate function. As stated above they seem to consider the protection of rights holder as their real public function while access concerns are regarded as private at the initiative of other agencies and interested individuals. It seems that ensuring the enforcement is located in traditional law enforcement agencies such as the police and the customs would free scarce resources and enable these offices to concentrate on a balanced intellectual property policy.

## **V.II I STRENGTHENING THE DEVELOPMENT POTENTIALS OF COLLECTING**

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129 See the ARIPO-OAPI-ARCT-WIPO Quadripartite Agreement of 22 July 1985. There is also a cooperation agreement between OAPI and ARIPO signed in 1996. See [www.oapi.net](http://www.oapi.net). See also A. Zikonda “ Sub-Saharan Africa” Country case Study for Study, p.9: Institutional Issues for Developing Countries in IP Policy-Making, Administration and Enforcement. : “ At the present moment ARIPO OAPI and WIPO have an agreement which enables them at least once every year to meet and plan a strategy in matters relating to IP” Available at [www.iprcommission.org/papers/pdfs/study\\_papers/sp9\\_SSAfrica\\_case\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp9_SSAfrica_case_study.pdf)

130 For example none of the fourteen States- Angola, Algeria, Burundi, Egypt, Eritrea, Ethiopia, Liberia, Libya, Mauritius, Nigeria, Rwanda, Seychelles, South Africa and Tunisia - who are declared by ARIPO to be potential member States is an OAPI member State. See [www.aripo.org/membership.html](http://www.aripo.org/membership.html)

## SOCIETIES IN AFRICA

Collecting societies as authors collectives are certainly pro author. Their role in stimulating creativity lies in the fact that they ensure that authors are rewarded for the use of their works and thereby encourage further creativity. The task of promoting creativity and getting Africa- at least in the area of copyright - to produce intellectual property can be facilitated by collecting societies in the continent.<sup>131</sup> At present these societies principally exist to act on behalf of their members to license the works of their members and collect royalties for distribution to its members and through reciprocal agreements with foreign societies to foreign authors who do the same. It is because of the fact that Africa is net consumer of copyright goods that seems to be the basis of the serious concern of the role of some of these African collecting societies as foreign revenue collector since royalties will be paid for foreign copyright works that dominate Africa.<sup>132</sup> While these concerns are genuine, they have to be balanced

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131 Three types of collecting societies exist in Africa. The first type are the private societies that are created furtherance of members right of association. Examples of these societies are the collecting society for Mozambique known as SOMAS; the three collecting societies in South Africa- the South African Music Organisation (SAMRO) representing music performing rights, the Dramatic Artistic and Literary Rights Organisation (DALRO) protecting a broad spectrum of copyright in literary dramatic and artistic works, and the South Africa Recording Rights Association (SARRAL) representing rights of composers of musical works. The second category of collecting societies can be described as semi-public societies because while they are essentially private, there is some form of government participation. Examples include the Copyright Society of Tanzania (COSOTA); the Copyright Society of Ghana (COSGA); Three Nigerian collecting societies – PMRS (Performing and Mechanical Rights Society of Nigeria), MCSN (Musical Rights Society of Nigeria) and REPRONIG (Reproductive Rights Organisation of Nigeria). The third type of collecting societies are the public sector collecting societies because they also function as the national copyright institutions. Examples include the Copyright Society of Malawi (COSOMA): 'THE COPYRIGHT SOCIETY OF MALAWI (COSOMA) is a statutory body established in 1992 with the main aim of promoting creativity and protecting the rights of creators. It functions both as a copyright office responsible for implementing the copyright law of 1989 and as a collective management society for rights owners who have mandated it to administer the rights on their behalf.' [www.cosoma.org/about.index.html](http://www.cosoma.org/about.index.html) See section 42 of the Copyright Laws of Malawi 1989; the Togolese Copyright Bureau (BUTRODA). See Article 73 of the Law on the Protection of Copyright, Folklore and Neighbouring Rights of Togo 1991; the Copyright Office of Senegal (BSDA); and the Copyright Office of Benin Republic known as BUBEDRA.

132 With respect to Reproduction Rights Organisations (RRO's) which are collecting societies in the book industry, Alan Story in his study paper "Study on Intellectual Property Rights, the Internet, and Copyright" Study Paper 5 to the CIPR Report note 60, 52-53, had this to say of the model of RRO's in Africa: "The main purpose of a reproduction rights organisation (RRO) is to collect copyright royalty fees from users on behalf of rightholders, both publishers and authors. Such fees are mostly generated through licensing schemes between RROs and user groups; educational institutions are the predominant licensees and the principle source of revenue for RROs. Hence RROs deserve particular attention in any assessment of copyright and educational issues in least developed countries. At present, there are a total of 33 RRO national organisations, mainly in the developed world. Three RRO's currently exist in Africa: the Dramatic, Artistic and Literary Rights Organisation (Pty) Limited (DALRO) in South Africa, Zimcopy in Zimbabwe, and Kopiken in Kenya. (IFRRO website) One of the key functions of national RRO's is to ensure the collection and transmission of copyright fees to foreign rightholders and, to facilitate such distributions, national RRO's are members of the International Federation of Reproduction Rights Organisations (IFRRO). ... The experience of the South Africa RRO, DALRO, is instructive. According to the latest available financial date posted on the DALRO website, DALRO distributed to national (i.e. South African) rights holders a total of EUR73,545.89 in reprographic (essentially photocopying) royalty fees during its 1999 financial year. By contrast, DALRO distributed a total of EUR136,523.07 to foreign RROs (and hence to foreign rightholders) in 1999. The main source of DALRO revenues was the educational sector, particularly universities and technikons. During the same period, DALRO received a total of EUR19,802.62 from other (i.e. non-South African) RROs for the reprographic copying done in these countries and presumably for distribution to S.A. rightholders. What these figures reveal is that distributions from S.A. reprographic users to foreign holders were more than 2.5 times higher than the total distributions made to South African rightholders by DALRO. As is well known, South Africa is a much richer country than any other in Africa and has a significantly larger and more robust publishing and education sector (the latter being the location of many authors.) But even here, as the above figures show, the RRO system leads to a highly unequal balance of payments to the advantage of richer countries and reinforces existing patterns of dependency. If a fully functioning and active RRO were to be established in any other African county, especially a least developed country, the financial inequality

against the fact that these collecting societies can indeed stimulate creativity, because the royalties paid to local creators are often significant and have a bandwagon effect.<sup>133</sup> Furthermore by promoting the social and cultural functions<sup>134</sup> of these collecting societies those of them that are also part of the national intellectual property administrative structure will play a critical role.. These social and cultural functions if properly articulated and managed may serve to break the vicious circle alluded to above and stimulate creativity as much as royalties paid by collecting societies. If the social and cultural functions include training, fellowships and other support to enable access to information, it may be extensive if they are open to all potential creative persons. Collecting societies may also manifest these social and cultural functions and assist in the development of the creative potentials of African countries if they support reasonable pro access mechanisms and flexibilities.<sup>135</sup>

## VI CONCLUDING REMARKS

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would be even greater; such an African RRO would primarily become a royalty collector for foreign publishers and authors. For the establishment of a national RRO to make economic sense, that is, to facilitate some level of inter-jurisdictional equality in distributions, a country must, if it is required to pay significant royalty revenues, also have a significant publishing and publishing export sector. For example, the UK's CLA received a total of £3.6 million from non-British RROs in 1998-1999; in that same year, the CLA distributed £3.5 million to non-British rightholders. In the 1999- 2000 financial year, the US Copyright Clearance Center, which represents 9600 US publishers and tens of thousands of authors, collected \$US79 million and distributed an estimated \$US57 million to its own national rightholders. The conclusion: the publishing and copyright picture in a country such as Senegal or Zimbabwe bears no relationship whatsoever to that in the UK, US or even South Africa. The RRO model simply does not fit, it is an artificial transplant from another copyright and publishing climate. In fact, there is so little enthusiasm for the RRO model in other parts of Africa that Kenya's Kopiken or Zimbabwe's Zimcopy , the two other African RROs and both established in 1995, did not make a single financial reprographic collection during their last financial year according to documents published on their websites."

133 See my comments on Alan Story's Study paper: E.S Nwauche " Intellectual Property Rights, Copyright and Development Policy in a Developing Country: Options for Sub Saharan African Countries."pp. 11-12. Paper presented at the Copyright Workshop at the Zimbabwe International Book Fair: "What would replace the money generated for local rights holders. Isn't this the critical variable to be used in stimulating local creativity, which should eventually surpass the market share of foreign goods? Using the same example of DALRO, its official website discloses that in the financial year 2001, the total domestic reprographic collections was EUR749.118.34. The total reprographic distributions in that period was EUR 162.048,25, while for foreign right holders it is EUR319.623,09. DALRO received EUR13.581,39 from other RROs in the same period. A total of EUR 267.446,00 presumably went into its operations (which may have included promotion of creativity) or was retained. We may conclude that DALRO is becoming more efficient in its collections and even if the ratio of foreign/local distributions remains the same, the net income to local right holders is improving. It is arguable that in future this balance will tilt in favour of local right holders. It is implicit in Mr Story's analysis that if there is at least less distribution to foreign right holders, there will be 'inter-jurisdictional equity' in what is received and what is paid out making the RRO model sensible." Available at [www.kopinor.no](http://www.kopinor.no)

134 See M. Ficsor *Collective Management of Copyright and Related Rights*, (World Intellectual Property Organisation Geneva 2002) 22.: " The cultural and social functions of collective management organizations are particularly important in developing countries where frequently extra efforts are needed to strengthen creative capacity. In general the same may be said about net importer countries (frequently small ones) where, through an efficient fulfillment of such functions, national collective management organizations may achieve two important objectives: first, they may contribute to the preservation of national cultural identity; and, second, they may improve public acceptance of copyright where the copyright system, unfortunately, is frequently in quite a weak and very defensive "public relations" situation."

135 See A.Story, note 132, p. 53: "... a new country-wide licence system be created for LDCs that would allow free use of copyright-protected, hard copy works from developed countries for an initial 20- year period; all non-profit educational, research, public health and related uses would be exempt from paying royalties. RROs are not required for such a system and LDCs should actively discourage the establishment of RROs in their own countries." I differ with Mr Story on the necessity of RRO's. I believe that the existence of pro access mechanisms can exist harmoniously with RRO's.

What Africa needs is an African Intellectual Property law. At present what we have is intellectual property law applied to Africa. This should not be surprising as there is evidence of no concerted effort to develop a philosophy of intellectual property. Indeed key development plans do not prioritise intellectual property as a means of development. For example, the New Partnership for African Development (NEPAD)<sup>136</sup> has no initiative based on intellectual property reform even though key components of NEPAD impact directly or indirectly on intellectual property. Specific examples can be found in Part B of NEPAD that deals with bridging the infrastructure gap by bridging the digital divide;<sup>137</sup> and taking urgent steps to ensure the protection of indigenous knowledge.

What this paper has done is to draw attention to the restructuring of African intellectual property regimes from the perspective of human rights. Reorienting Africa intellectual property is a herculean task viewed from any perspective and demands not just the political will but enormous resources. For example Africa is not a homogeneous entity but is made up of different countries with their national and regional peculiarities aspirations and levels of development. I submit that reform based on extensive study analysis and reflection along the lines sketched above will be beneficial.

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136 Available at [www.chr.up.ac.za/hr\\_docs/nepad/docs/Nepad-Eng17pt.pdf](http://www.chr.up.ac.za/hr_docs/nepad/docs/Nepad-Eng17pt.pdf)

137 Ibid p. 23