

**THE ENFORCEMENT OF INTELLECTUAL PROPERTY
RIGHTS AS A TOOL FOR ECONOMIC DEVELOPMENT IN
ZAMBIA**

**BY
MISOZI NGULUBE**

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RIGHTS AS A TOOL FOR ECONOMIC DEVELOPMENT
IN ZAMBIA**

BY

MISOZI NGULUBE

A dissertation submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

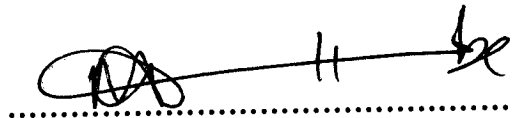
April, 2011

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ABSTRACT

The subject of intellectual property rights (IPRs) has become widespread in a world that is more and more globalised. Intellectual property exists in various forms and these include copyrights, patents, designs, performance rights and trademarks. It has been recognized throughout the world that intellectual property can be used to foster economic development. It is for this reason that the need to protect IP and the extent of protection has been the subject of debate both in the international and regional sphere. Some countries are in favor of a strong IP system, they feel that IP should be jealously protected as it has the potential to yield economic development. Other nations still feel that IP should not be given more protection than is necessary as this can be an obstacle to international trade.

The aim of conferring protection on IPRs is intended to generate development. It has been generally accepted that the enforcement of IPRs with a view to development is only possible if there is an effective and proficient IP system in place. This calls for effective laws and efficient enforcement mechanisms. Intellectual Property Rights (IPRs) are not to be viewed as an end but as a means to an end. Ultimately, the goal is to ensure that the enforcement of IPRs is used to achieve economic development of greater heights.

There are laws regulating IPRs and enforcement mechanisms designed to ensure the observance of IPRs in Zambia. However, the Zambian economy still remains undeveloped regardless of the fact that the area of IP provides an avenue for economic development. This paper looks at the laws regulating IPRs in Zambia and highlights their shortcomings. It also discusses the role of the courts and various enforcement agencies in the enforcement of IPRs. The research also undertakes a comparative study of how some developed nations have utilized IPRs in fostering economic development. The paper has also proposed changes in some areas of concern in so far as the enforcement of IPRs in Zambia is concerned. It is hoped that the proposed changes will go a long way in bringing about the desired economic development.

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Finally, I wish to say that all this would not have been possible without the help of Jehovah God. He is my Refuge and my Rock and things worked not according to my plans but according to his plans. Glory be to God.

DEDICATION

This work is dedicated to my parents Monica and Michael Ngulube who I love so much. You are and will always be my inspiration. It is also dedicated to my uncle, the late, Gabriel Nkhomah. I know you would be proud of me and I will always make you proud.

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The Copyright and Performance Rights Act (Amendment) Act No. 25 of 2010

The Patents and Companies Registration Agency Act No. 15 of 2010

The Zambia Police Act Chapter 107 of the Laws of Zambia

The Zambia Revenue Authority Act Chapter 321 of the Laws of Zambia

The Customs and Excise Act Chapter 322 of the Laws of Zambia

The Zambia Development Agency Act No. 11 of 2006

The Data Protection Act 1998 of England

The Copyright, Designs and Patents Act 1988 of England

The Trademarks Act 1994 of England

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TABLE OF INTERNATIONAL INSTRUMENTS

The Berne Convention for the Protection of Literary and Artistic Works 1886

The Paris Convention for the Protection of Industrial Property 1883

The Rome Convention 1961

The Agreement on Trade Related Aspects of Intellectual Property Rights 1994

The WIPO Performances and Phonograms Treaty 1996

The WIPO Copyright Treaty 1996

TABLE OF CASES

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Trade Kings Limited V Unilever Plc Limited and Lever Brothers (Zambia) Limited SCZ Judgment No. 2 of 2000

The People V Lawrence Nyirenda (2010) CRMP- unreported decision of Subordinate Court

The People V John Bobat (2010) CRMP- unreported decision of Subordinate Court

The People V Himalaya Enterprises (2010) CRMP- unreported decision of Subordinate Court

GLOSSARY OF ABBREVIATIONS

IP	Intellectual Property
IPRs	Intellectual Property Rights
ZRA	Zambia Revenue Authority
ZAMCOPS	Zambia Music & Copyrights Protection Society
PACRA	Patents and Companies Registration Agency
IPU	Intellectual Property Unit
ZDA	Zambia Development Agency
UNCTAD	United Nations Conference on Trade and Development
TRIPs	Trade Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
CAFC	Court of Appeal for the Federal Circuit
SMEs	Small Medium Enterprises
R & D	Research and Development

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CHAPTER 1

General Introduction and Definition of Concepts

1.1 General Introduction

Intellectual property is a term that has acquired wide usage in the world today. This is attributable to globalization and technological advancements. Human beings in relation to other creatures are unique and are able to reason. Owing to this, they are able to come up with inventions that benefit society as a whole. In order to encourage innovations and original works, most legal systems across the world have enacted legislation to protect such inventions. An inventor of an exclusive piece of work acquires an intellectual property right in the original work that they create. Like any other property, the author of an invention has rights over such property. Kanja¹ argues that intellectual property establishes the property rights that give the owner the right to do certain things in relation to the subject matter.

Intellectual property is a form of property that is capable of ownership. Intellectual property is defined as the property that results from intellectual creations in the industrial, scientific, literary and artistic fields. It comprises creations that result from the mind, the human intellect.² Therefore intellectual property law is the law that protects intellectual creations or works that result from human intellect. The need to protect property cannot be over emphasized. In order for IPRs to be adequately enforced, there must be a system in place that is designed to effectively protect these rights. An effective system is vital because the enforcement of IPRs has the potential to generate economic development.

1.2 Background of the Study

With the advancement in technology and improved international relations, there has been an increase in trade among nations. Zambia has not been left out from this trade. It is notable that in our everyday lives we use electronic gadgets and other such things. These gadgets and similar inventions are works of individuals that put their ideas into practice by producing the works. It is

¹ G. M. Kanja, Intellectual Property Law, Lusaka: Unza Press, 2006. p. 2

² G. M. Kanja, Intellectual Property Law p. 1

only fair that such individuals are rewarded for their unique works and effort. Intellectual property law is the legal framework designed to protect intellectual property rights (IPRs). Intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions.³

It is noteworthy that intellectual property law has not been fully developed in Zambia. However, noticeable development is evident in the area of copyrights and performing rights especially in the music and film industry. There is more that can be done in other aspects of this field of law. These aspects are industrial designs and patents.

1.3 Statement of the Problem

As earlier pointed out, intellectual property provides an avenue for economic development. Ensuring the observance of IPRs has the potential for wealth creation. The effectiveness of IPRs as far as economic development is concerned depends on the enforcement of these rights with a view to development. It is not enough to merely protect the interests of the right holders because it does not benefit the entire economy. The current Zambian legal framework focuses on the protection of individual rights. It has been said that the protection of IPRs can lead to development. How can Zambia capitalize on that protection for the entire nation to benefit? Can intellectual property be used as a tool to promote economic development in Zambia?

1.4 Purpose of the Study

The objective of the research is to assess how the enforcement of intellectual property rights can be used as a tool to promote economic development. Currently, Zambia is known to be a developing country with most of its population surviving on less than a dollar a day.⁴ The study looks at why Zambia has remained undeveloped when the area of intellectual property provides an opportunity for economic growth if properly explored. Ultimately, this research points out the

³ World Intellectual Property Organization (WIPO) Intellectual Property Handbook: Policy, Law and Use. 2nd ed. Geneva: WIPO Publication, 2004. p. 4

⁴ P. Todaro, Economic Development 8th ed. Delhi: Pearson Education, 2003. p.347

practical steps that need to be taken in order to ensure that Zambia attains the status of a prospering economy by means of enforcement of IPRs.

In order to achieve the purpose of this research, the following objectives were set as benchmarks to guide the research:

- ❖ To determine the legal framework within which IPRs operate in Zambia;
- ❖ To establish the extent to which the current legal framework has successfully enforced IPRs in Zambia;
- ❖ To determine the flaws in the intellectual property laws and enforcement mechanisms;
- ❖ To ascertain how the enforcement of IPRs can be used to promote economic development in Zambia.

1.5 Research Questions

The following research questions assisted in achieving the objectives of this study:

- ❖ What is the legal framework within which intellectual property rights operate in Zambia?
- ❖ To what extent has the current legal framework successfully enforced IPRs in Zambia?
- ❖ Are the remedies for breach of IPRs available to persons who hold intellectual property rights adequate to protect these rights?
- ❖ What are the flaws in the intellectual property laws and enforcement mechanisms?
- ❖ How can IPRs be used to promote economic development in Zambia?

1.6 Significance of the Study

The study is important and comes timely when the issues of infringement of IPRs have become a growing concern. The research seeks to identify the challenges faced in the enforcement of IPRs by critically analyzing the impact of these challenges on the enforcement of IPRs and economic development. The current legal framework provides for the protection of IPRs. However, there is need to take a step further so as to use the enforcement of IPRs to generate economic development. The enforcement of IPRs is not an end in itself but a means to an end. It is critical

that IPRs are enforced in a manner that will generate the much needed development for the nation.

The study is important as it shows how domestic laws and international instruments regulating IPRs can be harmonized to achieve development with particular emphasis on the enforcement of IPRs. This study is beneficial to policy makers in government as it offers suggestions of the viable policies that can be adopted in relation to intellectual property which can generate economic development. The information in this study is also useful for legislators because it highlights the various areas of the law that need revision. Various institutions will also benefit from this research as it indicates how they can better enforce IPRs if development is to be achieved. The research is also a contribution to a progressive legal framework in the enforcement of IPRs in Zambia.

1.7 Definition of Key Concepts

Intellectual property is very wide and is associated with things such as trademarks, patents, registered designs, copyrights, performing rights, and passing off. It is important that some of these key terms that have been used throughout the research are defined for easy understanding.

A patent is a right obtained by anyone who invents or discovers a new useful process, machine, article of any manufacture and this gives the owner of such patent the right to exclude others from making, using or selling the patented invention.⁵ It is important to note that not all inventions are patentable. In order to be eligible for protection an invention must fall within the scope of patentable subject matter otherwise the whole reason for protecting patent inventions would be in vain. Subject-matter which is patentable is provided by statute.

A trademark is defined as including any word, name, symbol, or device, or any combination of these, adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured and sold by others.⁶ A trademark must be distinctive otherwise it

⁵ R. A. Buckles, Ideas, Inventions, and Patents, New York: John Wiley & Sons, 1957, p. 11

⁶ A. H. Seidel, What the General Practitioner Should Know about Trademarks and Copyrights, New York: American Law Institute, 1967, p.4

does not qualify as such. Trademarks are important because consumers of goods who are accustomed to certain products are able to distinguish their preferences using these trademarks.

A copyright is referred to as the right granted for the protection of original literary, dramatic, musical and artistic works that results from the authors own intellectual creation. Related rights refer to rights granted to persons who present creative works to the public but are not considered creators of those rights in their own right.⁷ Copyrights are meant to protect authors of original works whilst related rights protect the legal interest of persons who assist authors. A performer's right is a right to exploit a qualifying performance given by the author of such right to a qualifying person to perform by means of the recording, broadcast or inclusion in a cable program service of the performance.⁸

A registered design refers to the features of shape, pattern or ornament applied to an article by an industrial process which appeals to, and is solely by looking at the article and is registered according to the provisions of the law.⁹ An example of a registered design is the shape of a Coca-cola bottle.

1.8 Methodology

The researcher has employed two methods in conducting the research. Firstly, field work has been carried out in order to elicit data from various organizations and persons concerned with or affected by the enforcement of intellectual property rights. The following are some of the organizations and associations from where information has been collected: Zambia Revenue Authority (ZRA), Zambia Music & Copyrights Society (ZAMCOPS), The Patents and Companies Registration Agency and the Intellectual Property Unit (IPU) under the Zambia Police Service, and the Zambia Development Agency (ZDA).

Secondly, the study has also been conducted by desk research through which various pieces of legislation, legal commentaries as well as case law and other publications that have been written on this topic have been consulted.

⁷ A. H. Seidel, What the General Practitioner Should Know about Trademarks and Copyrights p. 4

⁸ Copyright & Performance Rights Act Chapter 406 of the Laws of Zambia, section 45

⁹ D. Keenan, Business Law 8th edition, London: Pearson Longman, 2007, p.447

1.9 Layout of Chapters

The research is divided into five chapters as follows:

Chapter 1: General Introduction and Definition of Concepts

This chapter gives a general introduction and overview of the research, the background of the research and the statement of the problem. It also includes the purpose of the study, the significance of the research, the literature review, the methodology and the layout of chapters. It lays down the foundation of the research.

Chapter 2: The Legal Framework Governing Intellectual Property Rights

The chapter discusses the laws regulating the current intellectual property system in Zambia. It has looked at the laws conferring IPRs both at the domestic and international level. It has analyzed the Acts of Parliament governing intellectual property law in Zambia. It has also discussed how the international instruments and the national laws can be harmonized.

Chapter 3: The Enforcement of Intellectual Property Rights in Zambia

This chapter focuses on the enforcement of intellectual property rights at the national level. It discusses in detail how the laws regulating IPRs have been enforced by the Courts and various enforcement agencies:

Chapter 4: The Impact of the Enforcement of Intellectual Property Rights on Economic Development

This chapter focuses on how enforcement of IPRs could be used to promote economic development. Experiences of how other countries have successfully done this have been highlighted to show how Zambia can follow on the path to development.

Chapter 5: Conclusion and Recommendations

This chapter concludes the research with a general conclusion and makes recommendations.

1.10 Conclusion

The aim of this chapter has been to introduce this work and give the foundation of the research. It has dealt with the fundamental facets of the study which include the background of study, the statement of the problem, the purpose of the research, the significance of the study, the methodology and the layout of chapters. It has also defined and briefly discussed the key concepts that will be encountered throughout this paper which need to be grasped from the very beginning. More importantly, it has brought out the issues that are to be discussed in the succeeding chapters.

As earlier pointed out, intellectual property law is the law that gives effect to IPRs. The next chapter outlines the current law governing IPRs. It looks at the law on intellectual property both at the national and international level. It is important that this is done before going into a discussion wholly centered on the enforcement of IPRs in Zambia.

CHAPTER 2

The Legal Framework Governing Intellectual Property Rights

2.1 Introduction

This chapter focuses on the legal framework governing intellectual property rights. The enforcement of IPRs as a tool for the promotion of economic development cannot be looked at in isolation. Therefore, it is imperative that the laws conferring IPRs are discussed at length. Accordingly, this chapter begins by discussing the national laws governing IPRs. It then proceeds to look at international instruments conferring IPRs which Zambia has acceded to. It highlights whether or not Zambia has benefitted from the international laws governing IPRs. It then concludes the chapter by pointing out the areas in which the national laws and international instruments can be harmonized.

2.2 The Laws Regulating Intellectual Property Rights in Zambia

2. 2.1 Copyrights and Performing Rights

Copyrights and performance rights are regulated by the Copyrights and Performance Rights Act.¹⁰ These rights are closely related and the law provides for them under the same Act of Parliament.

2. 2.1.1 Copyrights

The Copyrights and Performance Rights Act is designed to protect original literary, dramatic, musical and artistic works that results from the authors own intellectual creation in Zambia. It is important to note that section 8 (1) of the Copyright and Performance Rights Act lists the categories of work in which a copyright may subsist namely original works, compilations, audiovisual works, sound recordings, broadcasts, cable programs and typographical arrangements of published editions of literary works. This section is couched in a broad manner

¹⁰ Chapter 406 of the Laws of Zambia

to ensure that any type of work fits in any of these categories. A piece of work that does not fit in any of these categories cannot qualify as a copyright and may not be registered as such.

It is noteworthy that registration of a copyright is optional. In line with section 39 (4), of the Act the existence and enforceability of a copyright is independent of whether or not it is registered. This entails that a copyright can be enforced whether or not it has been registered. The registration of copyrights is provided for in section 40 (1) which states that an owner of a copyrightable work may register his work if he so wishes as long as he furnishes the documents and other necessities required under that section such as a claim for registration in an approved form, a copy of the work in which copyright is claimed and other particulars namely the type of copyright claimed and any limitations on the copyright as well as the date on which the copyright arose.

A copyright gives the owner exclusive rights to make use of his work as he pleases and prevents others from using the work without authorization. The duration of a copyright is provided for in section 12 (1) of the Act. According to this section, a copyright in a literary, musical or artistic work or compilation expires at the end of the period of fifty years from the end of the calendar year in which the author dies.

Infringement of a copyright occurs when any person exercises the exclusive rights of a copyright owner without consent. Section 17 of the Act provides that the owner of a copyright shall have the exclusive right to do or authorize others to copy or reproduce the work, publish or issue copies, to perform and so on. It follows therefore that the doing of the above listed items without authorization amounts to copyright infringement. Section 21 (1) lists the acts that will not amount to infringement and these include among others fair dealing with a work for private study or for the purposes of research otherwise than for profit, fair dealing with a work for the purposes of criticism or review, provided there is a sufficient acknowledgement, fair dealing with a work for the purposes of reporting current events. In the event of an infringement, a copyright owner is entitled to certain remedies as laid out in section 25 (2) of the Act such as damages, injunctions or accounts.

2.2.1.2 Performance Rights

Performing Rights are also regulated by the Copyrights and Performance Rights Act¹¹. In line with section 45 of the Act, a performance right is a right to exploit a qualifying performance given by the author of such right to a qualifying person to perform by means of a recording or broadcast. In order for a performing right to subsist, it is required under section 44 that the performance takes place in a qualifying country or given by a person of or a habitual resident in a qualifying country. Zambia and any country which is a party to the Rome Convention is a qualifying country.

The Act does not define who a performer is. However, persons who fall in this class include actors, singers, musicians and dancers. A performer has certain rights which include the reproduction rights, broadcasting live performance or inclusion in a live broadcast or in a cable performance, distribution rights and public performance rights.¹² The duration of a performance right is stipulated in section 47 of the Act. It subsists for fifty years from the end of the calendar year in which the performance takes place.

In accordance with section 48 of the Act, infringement of a performance right occurs when any person exercises any of the above mentioned rights without the consent of the performer. A person whose performing rights have been infringed has a right of action in the courts of law and is entitled to certain remedies which include damages, injunctions and accounts.¹³ Section 50 (1) of the Act is similar to section 21 (1), it stipulates the acts that will not constitute an infringement of a performance right. These acts include among others fair dealing with a performance or recording for private study or for the purposes of research done by an individual for his or her personal purposes, otherwise than for profit, fair dealing with a performance or recording for the purposes of criticism or review, whether of that performance or any other performance, provided there is a sufficient acknowledgement and fair dealing with a performance or recording for the purposes of reporting current events by broadcasting or by inclusion in a cable program service or by its use in an audiovisual work and the recording of a performance or reproduction of a

¹¹ Chapter 406 of the Laws of Zambia

¹² G. M. Kanja, Intellectual Property Law, Lusaka: Unza Press, 2006. p. 26

¹³ Copyrights and Performance Rights Act Chapter 406 of the Laws of Zambia, section 51

recording for the purposes of judicial proceedings, or of any other proceedings before a tribunal established by law, or for the purposes of a report of judicial proceedings or any other such proceedings.

2.2.2 Trademarks

Trademarks are regulated by the Trade Marks Act.¹⁴ A trademark is any sign or symbol that aids consumers to distinguish goods manufactured by different manufacturers. The Act in section 2 defines a trademark as follows:

Except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section forty-two.

The registration of a trademark is not optional as opposed to that of a copyright. The enforceability of a trademark in court is only possible if it has been registered. An unregistered trademark only entitles the owner to the remedy of passing off which will be discussed later in this paper.¹⁵ It is not every mark or sign that qualifies to be registered. In order for a mark to be eligible for registration, it must be distinctive. In addition, it is unlawful to register a trade mark which is likely to deceive or cause confusion or otherwise. The law also prohibits the registration of a trademark which is identical or resembles another trademark¹⁶.

In accordance with Section 14 (1) (a) to (e), an application for registration of a trademark must contain certain essentials which include among others the name of a company, individual or firm, the signature of the applicant and an invented word or invented words. The procedure to be complied with when registering a trademark is provided for in sections 22, 23 and 24 of the Act. In a nutshell, the process of registration following the submission of an application comprises of examination, publication, opposition and registration.¹⁷

¹⁴ Chapter 401 of the Laws of Zambia

¹⁵ Trade Marks Act Chapter 401 of the Laws of Zambia, section 7

¹⁶ Trade Marks Act Chapter 401 of the Laws of Zambia, section 16 and 17

¹⁷ G. M. Kanja, Intellectual Property Law, Lusaka: Unza Press, 2006. pp. 350-354

The duration of a trademark as laid out in section 25 of the Act is seven years. A proprietor of a trademark may renew the registration. Once registered, a trademark confers on the proprietor the exclusive right to make use of the trade mark in relation to his/her goods for purposes of distinguishing them from other goods. Infringement of a trademark arises where a third party exercises a proprietor's exclusive rights without consent.

2.2.3 Patents

The law that provides for protection of patent rights is the Patents Act.¹⁸ A person must fall within the category of persons found in section 11 of the Act in order to be able to register a patent. In order to qualify to register a patent, one must either be a person claiming to be the inventor of the invention in Zambia or an assignee or a person who resides in country which is a member of the Paris Convention or the legal representative of any person who immediately before his or her death or disability was entitled to make such application.

Section 12 (1) provides for the application of a patent which is required to be made in a prescribed form and the applicant may need to furnish proof of title of the patent as the Registrar may require. The application must state that the applicant owns the invention, must give the full name of the inventor and where the inventor is not the applicant or one of the applicants, must declare that the applicant believes him to be the inventor. After lodging in a patent application, the registration process consists of publication, examination as to form and substance and a search before the patent is granted.¹⁹ The elaborate procedure of registration of a patent is contained in part IV of the Act. According to section 29 of the Act, the duration or term of a patent is for a period of 16 years. However, a patentee may apply for an extension.

A patent gives the patentee the liberty to make, use, exercise and vend the patent invention as he wishes and to decide who should or should not exploit the invention.²⁰ The patentee also has power to grant licenses under the patent. Section 37 provides for the granting of a compulsory license. This is the practice by government to authorize itself or third parties to use the subject

¹⁸ Chapter 400 of the Laws of Zambia

¹⁹ G. M. Kanja, *Intellectual Property Law* pp. 253-255

²⁰ Chapter 400 of the Laws of Zambia, section 28 (4)

matter of a patent without authorization of the right holder for reasons of public policy.²¹ This is done to reduce the abuse of IPRs by the patent owner. An infringement of a patent occurs in a situation where any person exercises the rights of a patentee in respect of an invention whether product or process without the patentee's consent. In line with section 53 (1), an action for infringement of a patent may only be instituted by the patentee or an exclusive licensee.

2.2.4 Registered Designs

Registered designs are regulated by the Registered Designs Act.²² Section 7 (1) provides for registration of designs by a person claiming to be the proprietor, his assignee or legal representative, in respect of any article or set of articles specified in the application. In order to qualify for registration, a design must have features of shape, configuration, pattern or ornament. Further the design must be new or original, must appeal to the eye and must be applied to industrial process.²³ An application for registration of a design must be made in a prescribed form. Section 9 (2) of the Act empowers the Registrar of Designs to conduct searches for the purposes of ensuring that the design is new or original. The Registrar may refuse any application or grant an application subject to modifications that he deems fit.

The effect of registration of a design is that it grants the proprietor the exclusive right to make or import for sale or for use for the purposes of any trade or business, or to sell, hire or offer for sale or hire, any article in respect of which the design is registered.²⁴ Section 15 (1) of the Act provides for the duration of the right in a design once it is registered. The said section provides that:

The copyright in a registered design shall, subject to the provisions of this Act, subsist for a period of five years from the date of registration.

Subsection 2 of section 15 allows for the extension of the duration of a design on application by a proprietor of the design. A person infringes the right in a design when he exercises the proprietor's rights without consent and this entitles such proprietor to an action for infringement.

²¹ M. F. Schultz and D. B. Walker, "The New International Intellectual Property Agenda," Are Intellectual Property Rights Human Rights? Washington: The Federalist Society for Law and Public Policy Studies, 2005. p.11

²² The Registered Designs Act Chapter 402 of the Laws of Zambia

²³ G. M. Kanja, Intellectual Property Law, Lusaka: Unza Press, 2006. p.303

²⁴ Chapter 402 of the Law of Zambia, section 14 (1)

2.3. A Critique to the Laws Governing Intellectual Property Rights in Zambia

As shown above, the Copyright and Performance Rights Act, the Trademarks Act, the Patents Act and the Registered Designs Act regulate intellectual property rights. There are some weaknesses or flaws that are apparent in these laws which need to be addressed in order to ensure that IPRs are adequately enforced.

2.3.1 The Copyright and Performance Rights Act

It must be noted that copyright protection concerns itself with the expression of an idea and not the idea itself.²⁵ In a situation where a person has a brilliant idea but does not express it into work that is copyrightable, a person who copies such an idea will not be said to be infringing because there is no copyright yet. Further, the Act does not take into account technological and scientific advancement. The Copyright and Performance Rights Act is lagging behind in so far as the internet and copyright protection are concerned. Lyrics and other copyrightable subject matter are easily downloaded from the internet as a result of which authors lose out on income. The Act can also be faulted on grounds that it provides for innocence as a defence to infringement which if successfully pleaded deprives the copyright owner of the right to damages.²⁶ It is difficult to tell whether or not someone is innocent as to infringement of a copyright. Unscrupulous infringers may always use this defence to escape liability in damages.

2.3.2 The Trademarks Act

The Trademarks Act²⁷ is inadequate in the sense that it does not protect unregistered trademarks. This gives manufacturers the liberty to come up with trademarks which are similar to those of unregistered trademarks with the intention of confusing members of the public. It is likely that these manufacturers will benefit from the goodwill of these unregistered marks without the trademark owners having legal redress. The Act should at least provide for the protection of unregistered trademarks where it can be shown that the mark qualifies as a trademark as defined

²⁵ Section 8 (3) The Copyrights and Performance Rights Act Chapter 406 of the Laws of Zambia provides that a copyright shall not subsist in a literary or musical work or in a computer program unless and until it is recorded in writing or in some other form.

²⁶ The Copyrights and Performance Rights Act Chapter 406 of the Laws of Zambia, section 25 (4)

²⁷ Chapter 401 Of the Laws of Zambia

by the Act. Further, protection of trademarks is only with regard to goods and does not extend to services. The provision of services is as important as the provision of goods, accordingly service marks need to be protected. Another weakness which seems to be present in almost all the laws governing IPRs is that the provisions of the Act are archaic and do not take into account scientific progress. It is also notable the duration of a trademark is considerably short which puts proprietors at a disadvantage in a situation where the trademark is not renewed.

2.3.3 The Patents Act

This Act does not take into account science and technology, this is largely attributable to the fact the laws have not undergone substantial revision since enactment to bring them up to speed with the levels of development around the world. Further, the Act does not provide for parallel imports. Parallel importation is defined as the importation of a good or service in relation to which exhaustion of an IPR has occurred abroad. Exhaustion is said to occur when the IPR holder's control over the goods or services ceases.²⁸ These serve a good purpose especially in the Health Sector because they make it possible to source medicines from cheaper sources. The Act does not recognize inventions that are traditional in nature such as traditional medicines, inventors of such work lose out on income as they are not protected.

2.3.4 The Registered Designs Act

The Registered Designs Act has not undergone significant revision since its enactment therefore it is out of touch with science and technology. Further, the Act does not provide for the recognition of geographical designs. A geographical design is an indication which identifies manufactured goods as originating, or manufactured in a certain territory or country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin.²⁹ There is an interesting provision in section 18 of the Act which allows any Government Department or any person authorized by the Minister in writing to use any registered design for the services of the State. The entire section is

²⁸ United Nations Conference on Trade and Development Report, 27th November 2004, pp. 92-93

²⁹ T.C James, "Protection of Geographical Indications: The Indian Experience," International Center for Trade and Sustainable Development, Volume 13 (September 2009)

couched in an ambiguous manner which flies in the teeth of the exclusive rights in a design if in the name of a Government department or authorized person the rights are infringed. The Act only states that any dispute between a registered proprietor of a design and a Government Department or any person authorized by the Minister as to the use of a design will be determined by the High Court.

2.4. International Instruments Governing Intellectual Property Rights

International instruments have been concluded by nations around the globe to ensure international peace and security. The area of intellectual property has seen international agreements sanctioned in order to achieve a uniform standard in the enforcement of IPRs. These international agreements include the Berne Convention for the Protection of Literary and Artistic Works 1886, the Paris Convention for the Protection of Industrial Property 1883, the Rome Convention 1961 and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) 1994. Zambia is a party to most of these multilateral agreements and has domesticated some of the provisions of these agreements in Acts of Parliament.

The Berne Convention is an international treaty in the field of copyrights. It is based on three principles namely national treatment which entails that works originating from a foreign country which is a member of the Convention are to be given the same protection as local copyrights. The Convention is also based on automatic protection that is protection is automatically granted whether or not there has been registration. Lastly, it is also based on independence of protection whereby the exercise of rights is granted independent of the existence of protection in the country of origin.³⁰ Recently, the WIPO Copyright Treaty 1996 was created. It grew out of the inability to produce a revised version of the Berne Convention and subsequent attempts to produce a protocol to this Convention. The treaty is a supplement to the existing convention and it reflects technological changes and changes in practice.³¹

The Rome Convention recognizes the rights of performers, producers and broadcasters. Like the Berne Convention, the central principle of the Convention is national treatment. The Convention

³⁰ D. I. Bainbridge Intellectual Property Rights 4th edition. London: Pitman Publishing, 1998. p. 168

³¹ L. Bently, Intellectual Property Law 3rd edition.. New York: Oxford University Press Inc, 2009. P. 43

requires producers, performers and broadcasters to be granted certain substantive rights. For performers these are relatively limited to being restricted to matters such as fixation of unfixed performances without consent.³² An attempt was also made to revise this convention which culminated in the creation of the WIPO Performances and Phonograms Treaty 1996. It is a supplement to the Convention but only contains provisions relating to rights of performers and phonogram producers and not broadcasters.

The Paris Convention for the Protection of Industrial Property 1883 was created to provide for the protection of industrial designs. It contains provisions on national treatment with regard to protection of designs in member states. The Convention imposes an obligation to recognize well known designs even if they have not yet been registered.³³ The Convention prohibits preemptive adoption of marks by interlopers in countries where the proprietor has not yet commenced marketing. The Convention also makes it possible for members to obtain compulsory licenses to prevent abuses which might result from exercise of exclusive rights.³⁴

In 1994 the TRIPs Agreement was concluded, it operates under the umbrella of the World Trade Organization (WTO). This Agreement was largely influenced by the earlier Conventions discussed above which provided for the protection of IPRs. It sets the minimum standards for the protection of IPRs around the globe in a single document. It establishes multilateral obligations to provide for and to enforce IPRs in the area of patents, copyrights, trademarks and industrial designs. The aim of the Agreement is to ensure that measures and procedures designed to enforce IPRs do not themselves become barriers to legitimate trade. This agreement is necessary to ensure the protection of these inventions without marginalization of the users of such inventions.

Since TRIPs is an Agreement under the WTO, all member states are bound by the standards set in the agreement without reserve. The Agreement contains detailed obligations for governments to provide effective means of action that enable affected persons to secure the enforcement of

³² L. Bently, Intellectual Property Law 3rd ed.(New York: Oxford University Press Inc, 2009) p. 9

³³ L. Bently, Intellectual Property Law p. 9

³⁴ L. Bently, Intellectual Property Law p. 640

their rights.³⁵ This places an obligation on member states to bring their national laws in conformity with the Agreement. If a state fails to do so, an aggrieved state may set in motion the dispute resolution procedure by making a complaint to the WTO.

Efforts have been made to ensure that state parties are in compliance with the TRIPs Agreement. The TRIPs Agreement itself set forth some transition provisions which gave WTO Members periods of time in order to adapt their legislation and practices to their TRIPs obligations. Those periods differ according to the type of obligation in question and the stage of development of the country concerned. With respect to those transition provisions which relate to the application of the obligations on the standards for the protection of pharmaceutical inventions, developing countries had been given up to 1st January 2006 to comply with TRIPs Agreement standards of protection. The Doha Declaration on the TRIPs Agreement and the Council for TRIPs extended the deadline from 1st January 2006 to 1st January 2016 to comply with TRIPs standards.³⁶ It has been clearly stated that the deadline will not be extended any further.

The question that comes to mind pertains to whether Zambia has derived any benefits from the international system which protects IPRs. It seems as though the only benefit being derived from this system is the influx of intellectual creations in the form of goods and services from other countries especially developed nations. The international laws make it possible for these nations to freely bring their goods in our country and still protect them from infringement. In this regard, Gerhart³⁷ comments as follows:

Although the intellectual property instruments that have been developed at the international level have occasionally recognized the peculiar needs of developing and least developed countries, the globalization of intellectual property standards has largely been a process whereby the wish-list of various developed world lobby groups are inscribed into public international law.

The concern that needs to be addressed relates to the action that needs to be taken in order to ensure that Zambia and other developing countries benefit from the international system governing IPRs. The problem is not resolved by developing countries casting the blame on

³⁵ R. Khalid and P. Levy, The World Trade Organization and the Developing Countries, The OPEC Fund, Pamphlet series No. 31 February 1999, Vienna, Austria p. 20

³⁶ The World Trade Organisation, TRIPs: Drug Patents, Technical Note, Pharmaceutical Patents and the TRIPs Agreement, 21st September, 2006.

³⁷ P. Gerhart , Why Lawmaking for Global Intellectual Property is Unbalanced, (2000) Enforcement of Intellectual Property Rights (EIPR). p. 309

developed countries for their lack of development. There is need for developing countries to play an assertive role in the international standard setting of IPRs if they are to benefit. This is because when developed countries are setting standards of protection of IPRs, they have their economies in mind. In addition, there is need to harmonize national laws and international instruments. This does not only mean that national laws must be amended to suit the international standards but the international laws sanctioned must also take into account the development needs of all nations especially developing countries.

2.5. Harmonization of National Laws and International Laws in the Enforcement of Intellectual Property Rights

Having discussed the national laws and international instruments regulating IPRs, it is of essence that this study addresses the issues relating to the harmonization of these two systems. It must be borne in mind that international laws move with the levels of development in terms of technology and scientific development. Zambian laws were brought by the British through colonialism and adopted at independence. They have not undergone significant revision or reform since then. Therefore, the laws are archaic and thus need revision so that they are as close as possible brought in conformity with international laws. This must be done in order to ensure that the national laws comply with the minimum global standards for the protection of IPRs. Of course this is a gradual process which is achievable with concerted effort and dedication on the part of the nation.

There is need for international laws to also take into account the varying interests of various states and their levels of development. There are some inventions in developing countries relating to traditional medicine which are valuable but are not protected by international instruments conferring IPRs only because they are seen to be primitive. Authors of such inventions lose out on income for their unique work.

2.6. Conclusion

This chapter has analyzed the laws regulating IPRs both at the national and international level. It has discussed the salient provisions to the various Acts conferring IPRs in Zambia. The chapter has called for the revision of the laws as they are outdated. The chapter has looked at the international instruments governing IPRs to which Zambia has acceded. It has been observed that these instruments especially the TRIPs Agreement place more emphasis on the free movement of intellectual property as compared to the protection of IPRs. The chapter has concluded by emphasizing the need to harmonize national laws and multilateral agreements with a view to better enforcement of IPRs.

The following chapter focuses on the enforcement of intellectual property rights at the national level by the Courts and various enforcement agencies. It also looks at how these rights are violated and what remedies are available to persons who own intellectual property.

CHAPTER 3

The Enforcement of Intellectual Property Rights in Zambia

3.1 Introduction

The previous chapter dealt with the law governing IPRs in Zambia. This chapter deals with the enforcement of IPRs in Zambia. The existence of the laws conferring IPRs is not a guarantee that these rights are observed and respected. Therefore, the Courts and enforcement agencies play a significant role in ensuring the observance of IPRs. The main focus of this chapter is to look at how the courts and various enforcement agencies have put the laws regulating IPRs into effect. It also highlights the constraints encountered in the implementation of IPRs. The latter part of the chapter is directed at looking at how IPRs are violated and the remedies available to the right holders.

3.2 The Role of the Courts in the Enforcement of Intellectual Property Rights

The Courts play a vital role in the enforcement of intellectual property rights. The Patents Act³⁸, the Registered Designs Act³⁹ and the Trademarks Act⁴⁰ in sections 57A, 42 and 59 respectively all provide for the High Court as the forum for the hearing of any legal proceedings under the respective Acts of parliament. The Copyrights and Performance Rights Act as amended⁴¹ provides that court means High Court or Subordinate court.

An evaluation of the cases decided by the Courts reveals how they have enforced IPRs. It is notable that there are very few decided cases on intellectual property in Zambia. Nevertheless, the few cases in which the Courts have had the opportunity to adjudicate on IPRs are very helpful for the purposes of analyzing how the Courts have fared in the enforcement of these rights.

³⁸ Chapter 400 of the Laws of Zambia

³⁹ Chapter 402 of the Laws of Zambia

⁴⁰ Chapter 401 of the Laws of Zambia

⁴¹ Chapter 406 of the Laws of Zambia, the amendments were effected by the Copyright and Performance Rights Act (Amendment) Act Number 25 of 2010

The Courts had occasion to deal with copyrights in the case of **Performing Right Society Limited V Francis Anthony Hickey trading as Bar-b-que Drive in Restaurant**.⁴² In that case, the plaintiff took out an action for infringement of a copyright. The defendant played three musical records in public without obtaining a licence from the plaintiff who was the owner of the copyright. The defence raised by the defendant was that the infringement was done innocently and under a mistake. The Court held that it was not disputed that there was an infringement on the part of the defendant. However, the Court took into account the defence put up by the defendant and held that the plaintiff was not entitled to damages but to an account of profits. An injunction was also granted against the defendant.

There is need to exercise care in admitting the defence of innocence of infringement of a copyright. The Halsbury's Laws of England⁴³ in paragraph 938 state that a defendant does not establish that he had no reasonable grounds for suspecting the existence of a copyright by showing that he held an honest but erroneous view of the law. Emphasis is placed on the fact that the innocence as to the infringement must be reasonable. Otherwise the law trying to protect copyrights will be used to create a mischief in that any person can claim the defence of innocence of infringement and escape liability from damages.

The case of **Trade Kings Limited V Unilever Plc and Lever Brothers (Zambia) Limited**⁴⁴ dealt with the enforcement of trademarks. This case involved two popular soaps, namely Geisha and Geza Beauty Soap. The respondents commenced an action against the appellants alleging infringement of their trademark. The appellant was a registered proprietor of Geza Beauty Soap and Flower Device trademark. The learned trial judge did not deal with the case as presented by the complainant but sought to reopen the registration process of the trademark at a point where an objection would have been made and ordered that the registration of GEZA be expunged and that the statutory processes consequent upon the receipt of a valid objection be proceeded with.

On appeal it was held that the procedure before registration of the trademark could not be resorted to after the event and the registration process could not be reopened. A retrial was

⁴² (1979) Z.R. 66 (H.C.)

⁴³ 4th edition, Vol. 9

⁴⁴ SCZ Judgment No. 2 of 2000

ordered. The Court stated that in trademark cases, it must always be kept in mind that the actual issue is not whether or not the Judge would or would not have personally been deceived, but whether or not after hearing the evidence, comparing the articles, and having had all the similarities pointed out, the true conclusion is that the ordinary average customer or retail dealer is likely to be deceived.

Following the amendment that was made to the Copyright and Performance Rights Act through Amendment Act No. 25 of 2010 changing the definition of court to include subordinate court, the Magistrates courts have presided over copyright infringement cases. In the case of **The People V Lawrence Nyirenda**,⁴⁵ the accused was charged with offering for sale infringing copies of Journey to Paradise (Chintelelwe) Parts I, II and III. The accused was found guilty and convicted of copyright infringement. He was sentenced to 6 months imprisonment or payment of a fine of K 2,000,000.00.

The courts also encountered the enforcement of IPRs in the case of **The People V John Bobat**.⁴⁶ The accused an Indian national was charged with installing an infringing copy of the software Windows 7 which belonged to Microsoft Corporation Limited into a computer. He was convicted and fined 4000 penalty units. Another case concerning copyright infringement is the case of **The People V Himalaya Enterprises**⁴⁷ in which the accused was making counterfeit sweets of a brand that had been registered by Trade Kings Limited. The accused was selling them in Solwezi and Congo DR. An investigation revealed that there was no plant on the ground that was manufacturing these sweets. It was discovered that the sample of the sweets were being sent to some manufacturers in India who counterfeited them and shipped them. The accused was found guilty of copyright infringement and was fined K200,000,000.00. The Court also ordered that infringing copies be handed over and destroyed.

The Courts face some difficulties in the enforcement of IPRs. To begin with, litigation tends to be lengthy. As a result, people are reluctant to bring matters to court. This deprives the courts the chance of putting IPRs into effect. Additionally, even when an opportunity to adjudicate on IPRs

⁴⁵ (2010) CRMP- unreported decision of Subordinate Court

⁴⁶ (2010) CRMP- unreported decision of Subordinate Court

⁴⁷ (2010) CRMP- Unreported decision of Subordinate Court

presents itself, it is likely that a case may be allocated to a Judge or Magistrate who is not conversant with intellectual property law making it intricate to obtain an informed decision. The laws governing IPRs are outdated thus making it difficult for the Courts to apply them.

3.3 Enforcement of Intellectual Property Rights by Various Agencies

3.3.1 The Role of the Patents and Companies Registration Agency in the Enforcement of Intellectual Property Rights

The establishment of the Patents and Companies Registration Agency (PACRA) is provided for by the PACRA Act.⁴⁸ Under section 5 (1) (a) of this Act, the Agency is charged with the administration of the Patents Act, the Trade Marks Act, the Registered Designs Act. The agency houses the Designs Office, the Patent Office and the Trade Marks Office. The agency is responsible for the registration of patents, trademarks and designs.

An interview conducted at the Agency revealed that about 98% of the Patents are registered by corporations and the remaining 2% are registered by individuals. Most trademarks are registered by foreigners. The statistics show that about 25% of the trademarks are local and 75% are foreign. It must be noted that there are very few designs registered. The following table indicates the number of patents, designs and trademarks granted between the years 2006 and 2009.

Table 1: The number of patents, designs and trademarks granted between 2006 and 2009

Year of Registration	Number of Patents	Number of Trademarks	Number of Designs
2006	58	660	10
2007	51	521	18
2008	8	564	11
2009	47	961	18

Source: Patents and Companies Registration Agency

⁴⁸ Act Number 15 of 2010

The agency mainly carries out administrative functions relating to the registration of intellectual property. It is not the agency's mandate to ensure that the registered designs, patents and trademarks are not infringed. Since intellectual property is a form of personal property, it is up to the owner of the intellectual property to ensure that his or her rights are not violated. In the event of an action for infringement of IPRs, the agency may validate the existence of intellectual property which has been registered with it.

3.3.2 The Enforcement of IPRs by the Intellectual Property Unit (IPU)

The IPU is a division which operates under the Zambia Police Service. It was established in 2003 as the Antipiracy Unit with concentration on copyright infringement. It changed its name to the IPU in 2008 and started covering the infringement of copyrights, patents, trademarks and registered designs. The Zambia Police Act⁴⁹ does not provide for the establishment of the unit. It is for this reason that it is not gazetted and does not attract any funding from the government.

The Unit works in collaboration with the Courts and is mainly responsible for bringing the violators of IPRs to book. The IPU charges and prosecutes people who are alleged to have violated IPRs. The IPU acts on complaints made to it by interested persons whose IPRs have been infringed. The unit also conducts searches in premises or buildings of person who are alleged to have infringed IPRs in order to establish that an infringement has occurred.

In an interview⁵⁰ at the IPU, the employees of the unit shared experiences of how people in society have disregarded IPRs. For example the unit pounced on a person in Kapiri who was making counterfeit Fanta under the Coca-cola trademark without authorization. The infringer was exposed when he wrongly packed the Fanta soft drink in a Coca-cola bottle. The unit notified the owners of the trademark about this who said this mistake could not have been made by their machines taking into account the manufacturing process. The case is still under investigation.

⁴⁹ Chapter 107 of the Laws of Zambia

⁵⁰ The oral interview was conducted with two Assistant Investigations Officers of the Zambia Police Service namely Mr. M. Mwale and Mr. J. Banda on 20th January 2011

The unit also came across people making the Mazoe drink in compounds using the original plastic bottle which people collect from households after they have been used and disposed. This would make it difficult for a consumer to distinguish the counterfeit product from the original. This had been going for a long time. The perpetrator of this infringement was arrested and prosecuted in the courts of law.

Assistant Investigations Officers of the unit, Mr. M. Mwale and Mr. J. Banda in an oral interview stated that the unit discovered an Indian manufacturing Johnson's baby powder using talc powder which is ordinarily used for embalming dead bodies. The original Johnson's perfume was added to the talc powder to make it smell original. This poses a health hazard to people in society. In the year 2011, there was a person arrested for making his own mealie meal and packing it in sacks of roller meal using the CHAT Milling trademark. There seems to have been an inside job of a person who was providing the sacks because they were exactly the same as those used by the milling company. The officers confiscated the machine that was being used for packaging and the infringer was arrested and put in police custody.

Although the unit is doing exceptionally well in the enforcement of IPRs, it is facing a number of constraints. The unit is still new under the Police Force and has not yet been gazetted. Owing to this, it does not attract any funding from the government. Due to lack of funds, the unit does not have transport to ferry seized goods to the exhibit room. There is also lack of decentralization of the unit. In the whole of Zambia, there are only two offices all situated in Lusaka to cater for the entire nation. Further, the unit is understaffed; there are only 20 officers, 16 at the Police Force Headquarters and 4 at the station located at the Lusaka International Airport to perform all the functions of the IPU. The laws conferring IPRs are outdated making it difficult for the unit to charge and prosecute violators of IPRs.

3.3.3 The Role of the Zambia Music and Copyright Protection Society (ZAMCOPS) in the Enforcement of Intellectual Property Rights

The Zambia Music and Copyright Protection Society is a collecting society established under the Copyright and Performance Rights Act. The Society was formed in 1996 and has been in operation for 15 years. The functions of ZAMCOPS are as follows:

- i) To establish and operate licensing schemes, so that a user obtains, for a single payment to the society, a licence covering all works under the society's control;
- ii) To collect royalties and licence fee on behalf of its members, this includes royalties in other countries;
- iii) To enforce the copyright against infringers.

In the event that there is a dispute between a collecting society (ZAMCOPS in this case) and a person who requires a licence from the collecting society regarding the decision of the collecting society to grant or refuse to grant a licence, either party is at liberty to refer the dispute to the Registrar for arbitration.⁵¹

The society is specialized in the protection of musical copyrights only. It is noteworthy that the society does not represent related rights. Apart from the collection and distribution of copyright royalties, the society also conducts antipiracy projects on behalf of its members. In 2008, 2009 and 2010, about 1625, 588 and 600 people respectively registered with the society. All members of the society are *Zambian* nationals. Of these registered copyright owners, 4928 are individuals whilst 45 are publishers. There has been an increase in piracy in Zambia. An employee of the society attributed the increase in pirated music to advancement in technology which makes it easy and faster to make several copies of pirated music, high demand and low supply and a bad culture of preferring cheaper products by people in society.

The constraints affecting the society mainly relate to low financing, which makes it difficult to monitor copyright users who obtain licences from ZAMCOPS. The Society is also not decentralized because there is only one office in the whole country situated in Lusaka. Musicians from the other provinces have to come and register their copyrights in Lusaka, which tends to be cumbersome, expensive and time consuming. In addition, there is a shortage of human resource to undertake the functions of the Society.

⁵¹ Section 23 (1), the Copyright and Performance Right Act Chapter 406 of the Laws of Zambia

3.3.4 The Zambia Revenue Authority and Intellectual Property Rights

The Zambia Revenue Authority is a body corporate established under the Zambia Revenue Authority Act.⁵² The authority has been in operation since 1st April 1994. The authority administers the Customs and Excise Act⁵³ which provides for the controlling and prohibiting of imports and exports. Customs officers are stationed at border posts to control the imports into and exports out of the country. These officers play a significant role in the enforcement of IPRs as they have control over the goods entering the country. A lot of goods which are in violation of IPRs are brought into the country through borders. Majority of the pirated music of local music which is sold around town is said to be coming from Tanzania. It is puzzling how unscrupulous individuals are able to cross the border whilst in possession of the pirated music.

An interview conducted with Mr. M. Hafwuma,⁵⁴ a customs officer at ZRA, confirmed that most pirated music comes from Tanzania. He pointed out that the Nakonde border is very porous and has no natural demarcations. The controls at the border are very minimal which makes it easy for people to evade the customs officers and get away with the pirated music. Inland controls are usually undertaken with the assistance of the Intellectual Property Unit which operates under the umbrella of the Zambia Police Force. Usually when the authority finds someone in possession of counterfeit products at the border, the customs officers confiscate the goods and they are destroyed by the police. The offender is let go and he is likely to repeat the offence. In extreme cases, the infringers abandon the goods at the border for fear of arrest.

The authority is facing a number of constraints in the enforcement of IPRs. It is difficult to ascertain the authenticity of certain products without the aid of the owners of these products. With the exception of counterfeit music which is easy to identify, it is difficult to ascertain that any other forms of intellectual property have been counterfeited. As there is no interaction with the business community, customs officers cannot easily identify the counterfeit products from the original without the assistance of the owners of these products. They cannot impound products which they not sure are counterfeit because if it is later found that they are not, they

⁵² Chapter 321 of the Laws of Zambia

⁵³ Chapter 322 of the Laws of Zambia

⁵⁴ The oral interview was conducted between 24th and 28th January 2011

might be sued by the owners for interfering with their products. Further, there is no specific training of the customs officers to identify counterfeit products.

3.4 Violations of Intellectual Property Rights

An infringement of IPRs occurs when a person exercises any of the exclusive rights of an author of an intellectual creation without authorization from such author. A person infringes a copyright when he copies or reproduces the work, publishes or issues copies, performs and the like without the consent of the owner of the copyrighted work.⁵⁵ The most common type of copyright infringement happens where a piece of music is used in television or radio advertisements without permission from the owner. Further, people are in a habit of making remixes of other peoples music without permission. An infringement of a performance right happens when a person without permission exercises certain rights such as the reproduction right, distribution right and public performance right.⁵⁶ Often people perform other peoples work especially songs without obtaining permission. This is also known as miming.

A trademark is infringed when another person makes use of another person's trademark in relation to his/her goods without permission from the owner of a trademark. This usually happens when a manufacturer copies another manufacturer's trademark with the aim of confusing consumers. At times unscrupulous people collect packing material of already used original products which have been disposed off. They package their own products under the trademark of another manufacturer. For example, some people were found making Mazoe drink in compounds using the original packaging. This makes it very difficult for the consumers to distinguish the counterfeit from the original product.

A patent infringement occurs where a person other than the patent owner uses and vends the patent invention without consent from the owner of the patent.⁵⁷ An example of a patent is a sausage making machine or unique drug such as Terfenadine which is successfully used for

⁵⁵ Section 17 of the Copyrights and Performance Rights Act Chapter 406 of the Laws of Zambia

⁵⁶ G. M. Kanja, Intellectual Property Law, Lusaka: Unza Press, 2006. p. 26

⁵⁷ Chapter 400 of the Laws of Zambia, section 28 (4)

antihistamine treatment. The use of such patents without authorization amounts to infringement of the rights in the patent.

Rights in a design are violated when a person makes or imports for sale or for use for the purposes of any trade or business, or to sell, hire or offer for sale or hire, any article in respect of which a design is registered.⁵⁸ A typical example to illustrate how a design is infringed is what was transpiring in Kapiri where some people were manufacturing coca-cola without permission from the Coca-Cola Bottling Company. A coca-cola bottle is an industrial design and its use without authorization is a violation of the rights in the design.

3.5 Remedies for Infringement of Intellectual Property Rights

The remedies for the infringement of intellectual property rights can be classified into two broad categories namely civil remedies and criminal sanctions. The civil remedies are in the form damages, injunctions and accounts where as criminal sanctions are in the form of fines and prison sentences.

3.5.1 Civil Remedies

A person whose rights in intellectual creations have been infringed is entitled to relief by way of damages, injunctions, accounts or any other remedy which is available in respect of the infringement of any other property right. Damages for infringement of IPRs are similar to those in tort. The monetary compensation given to the copyright owner should restore him to the position he would have been had the infringement not occurred. There are some defences that can be raised in a suit for infringement of IPRs. Under the Copyrights and Performance Rights Act, innocence is a defence to infringement which if successfully pleaded deprives the copyright owner of the right to damages.⁵⁹ The Patents Act in section 55 also places some restrictions on recovery of damages for infringement.

Injunctions are granted at the discretion of the court. The Court may grant this remedy and order a person and his agents to stop making infringing copies or to prevent an infringer from using the

⁵⁸ The Registered Designs Act Chapter 402 of the Law of Zambia, section 14 (1)

⁵⁹ The Copyrights and Performance Rights Act Chapter 406 of the Laws of Zambia, section 25 (4)

work without authorization. In terms of the remedy of delivery up, the Court may order an infringer who is still in possession of infringing products to hand over these products for the purposes of destroying them.

The remedy of accounts of profits is made available to a claimant as an alternative to damages to recover the net profits or to an account of the profits the infringer has made from the infringement. The case of **Performing Right Society Limited V Francis Anthony Hickey trading as Bar-b-que Drive in Restaurant** is instructive to show the instances when the court may award this relief. The Court took into account the defence put up by the defendant and held that the plaintiff was not entitled to any damages but to an account of profits in respect of the infringement.

As already noted, unregistered trademarks are not enforceable in the courts of law. The remedy of passing off is a common law remedy available to an owner of an unregistered trademark. Passing off is concerned with the protection of the reputation and goodwill of the business. This remedy prevents someone from misrepresenting his goods or services as being the goods or services of an owner of an unregistered trademark and also prevents a person from holding out his good or services as having some association with the owner of an unregistered trademark when it is not true.⁶⁰

3.5.2 Criminal Sanctions

Some Acts of Parliament governing IPRs provides for criminal sanctions as remedies against infringement of IPRs. This could be a prison term or a payment of a fine or both. For instance the Copyrights and Performance Rights Act as amended in section 28 (1) provides that if a person commits an offence on first conviction he is liable to 100,000 penalty units or 20,000 penalty units for each infringing copy; whichever is greater or to imprisonment for a term not exceeding 5 years. In practice, usually an infringer is charged a fine and if he is not able to pay, he may then be imprisoned.

⁶⁰ G. M. Kanja, Intellectual Property Law (Lusaka: Unza Press, 2006) p. 7

3.6. Conclusion

The chapter has discussed the enforcement of IPRs in Zambia by the Courts and various enforcement agencies. It has been noted that the Courts and the enforcement agencies are facing a number of challenges which have had adverse effects on the efficiency in the enforcement of IPRs. There is need to address these constraints if IPR enforcement is to improve. Lastly, the chapter has looked at the violations of IPRs and the ensuing remedies.

The subsequent chapter is devoted to discussing the impact of the enforcement of IPRs on economic development. It is intended to show how Zambia can make use of IPRs in promoting development.

CHAPTER 4

The Impact of the Enforcement of Intellectual Property Rights on Economic Development

4.1. General Introduction

The preceding chapter was looking at the enforcement of IPRs in Zambia. This chapter looks at how the enforcement of IPRs can be used to promote economic development. It begins by discussing the concept of development. This is followed by a discussion of the role of the Zambia Development Agency in the promotion of economic development. The chapter then analyzes the impact of the enforcement of IPRs on economic development. Experiences of how various states have managed to use the enforcement of IPRs as a tool for the attainment of economic development are highlighted.

4.2. The Concept of Development

Development is a broad and multifaceted concept which defies concrete definition. It cuts across different dimensions which include among others political, economic, social, cultural and human development. Development is defined as the process by which major changes in social structures, acceleration of economic growth, reduction in inequality and eradication of poverty are brought about.⁶¹ Basically the whole process of development involves the improvement of the quality of all human lives and helps people in society reach their maximum potential.

Although, the notion of development is versatile, the main focus of this paper is economic development. Economic development has been defined as the steady progress by which, the productive capacity of the economy is increased over time to bring about rising levels of income.⁶² There are various means by which the capacity of the nation can be increased in order to achieve economic development. The area of intellectual property is seen as one of the mediums through which a nation can expand the prolific capacity of the economy so as to increase the levels of income for society. All the available ways of achieving economic development need to be utilized because development is very valuable to society. It leads to an

⁶¹ M. P. Todaro, *Economic Development* 8th edition, Delhi: Pearson Education, 2003. p. 51

⁶² P. Todaro, *Economics for a Developing World* London: Longman Group Limited, 1977 p. 416

improvement of the livelihood of people in society in that the economic capacity of a nation is able to sustain the needs of people in society. The livelihood of people is the core of the existence of human society.

4.3. The Role of the Zambia Development Agency in Fostering Economic Development

The Zambia Development Agency is a body corporate which is established under the Zambia Development Agency Act.⁶³ Section 5 (1) of this Act provides for the functions of the agency. The said section provides that:

The functions of the agency shall be to further the economic development of Zambia by promoting efficiency, investment and competitiveness in business and promoting exports from Zambia.

Further, Subsection 2 of section 5 in paragraph (a) to (z) provides for the other detailed functions of the agency. Some of these include to develop entrepreneurship skills and a business culture in citizens of Zambia, to promote and facilitate the development of micro and small business enterprises, to formulate investment promotion strategies, to undertake research generally on matters relating to industry, industry development and productivity as well as to encourage and promote the transfer of appropriate technology and promote public understanding of matters relating to industry development and productivity. Despite the fact that the agency is responsible for the promotion of economic development in general, the agency largely concentrates on attracting foreign investment.

Foreign investment involves the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country.⁶⁴ It is undisputed that foreign investment has its advantages such as infrastructure development, job creation, technological or scientific development. Although foreign investment is a good source of revenue for the government, there are certain evils that follow from leaving almost the entire economy in private foreign hands. There is need to always take into account the fact that foreign investors have the sole goal of making profits and are not under any obligation to undertake their investment for the benefit of the host state in this case Zambia. There is also the ever present danger that foreign investment

⁶³ Number 11 of 2006

⁶⁴ M. Sornarajah, *The International Law on Foreign Direct Investment*, 2nd Edition Cambridge: Cambridge University Press, 2008 p. 7

will result in loss of sovereignty, externalization of profits, poor labour standards and environmental degradation.⁶⁵

4.4 The Role of the Enforcement of IPRs in Promoting Economic Development: Experiences of Various Countries

There is a correlation between the enforcement of IPRs and economic development. Research reveals that IPRs are associated with greater trade and investment flows, which ultimately transform into faster rates of economic growth.⁶⁶ The protection of IPRs affects economic growth indirectly. It encourages intellectual creations which lead to productivity enhancements. Productivity enhancement generates wealth when the people sell their products on the local market and when they export them to other countries. Kumar⁶⁷ suggests that:

Stronger protection increases the revenue productivity of a firm's or an individual's IP and should help exporters by making counterfeiting more difficult as has been corroborated empirically by studies.

Thus if IP created by enterprises and individuals is not protected, they will not receive any revenue for their hard work. It is for this reason that most developed nations advocate for stringent standards in the protection of IP both in their own economies and at the international level.

Poor countries seem to offer weaker protection for IPRs. This could be the reason why these countries remain undeveloped with heavy reliance on the production of raw materials as a source of revenue. It has been argued that weak enforcement of IPRs results in widespread infringement that stunts domestic business development.⁶⁸ It is therefore possible to link the nature of protection attached to IP to the levels of development of an economy because strong IP protection is linked to increase in development and weak IP protection is linked to lack of development.

⁶⁵ United Nations Convention on Trade and Development, World Investment Report, 2007

⁶⁶ The World Bank's Global Economic Prospects Report for 2002

⁶⁷ N. Kumar, Intellectual Property Rights, Technology and Economic Development, New Delhi: Research and Information System for Developing Countries, 2008. p.17

⁶⁸ F. Carsten and K. E. Maskus, Intellectual Property and Development: Lessons from Recent Economic Research, New York: World Bank and Oxford University Press, 2005. p. 311

The creation of unique works whose use is relevant in society leads to high demand of these works. The inventors of such work benefit from the income that comes from the sale of such products especially when they are on demand. Thus there is need to protect such an inventor so that he or she can benefit from the fruits of his or her labour. If this is not done, counterfeiters will reap where they did not sow to the detriment of the inventor. In addition, the nation will lose out on income which would have been derived from the exportation of these unique works. Having established that economic development and IPRs are closely linked, a consideration of how some countries have successfully enforced IPRs and achieved development is rendered necessary.

4.4.1 Japan

Japan is a classical example of a developed nation that has derived substantial benefits from the enforcement of IPRs. In so far as patents are concerned, patent protection in Japan has been designed with an ultimate objective of contributing to the industrial development and not as an end in itself and contains several features that have helped the absorption of spillovers of foreign inventive activity by domestic enterprises.⁶⁹ For instance, food, beverage, pharmaceutical products and chemical compounds were excluded from the scope of patent protection. This was done to facilitate the process innovations. Process innovations were facilitated in that people were able to make improved inventions of what would otherwise have been protected works without fear of being sued for infringement. It was not until the mid 1970s that these aspects were included in patent protection. After the economy had sufficiently developed enough inventions in the aforementioned areas for the benefit of society, they were included as subject matter for patent protection.

The Japanese IPR system provides for utility models to encourage minor adaptations or improvements over imported machinery or equipment by domestic inventors and protection of industrial designs that need to demonstrate novelty and not inventiveness. The utility models and industrial designs have allowed Japanese firms to receive protection on technologies that were

⁶⁹ N. Kumar, Intellectual Property Rights, Technology and Economic Development, New Delhi: Research and Information System for Developing Countries, 2008. p. 22

only slightly modified from the original invention.⁷⁰ In its enforcement of IPRs, the Japanese IPR system is designed to favour adaptations by domestic enterprises. Therefore, most of the utility models and industrial designs have been granted to nationals. Evidence of this deliberate move to encourage domestic enterprises is clear in that in 1980, Japan had awarded 49000 utility models to its nationals compared to just 533 to foreigners. Similarly Japanese nationals were granted 31000 industrial design patents in comparison to 600 to foreigners.⁷¹

The Japanese IPR system has led to economic development because an increase in process innovations has led to more people participating in inventing improved versions of already discovered works. This has been a source of income for those who would otherwise be unemployed. Indirectly, this has assisted in reducing the levels of crime because people in society are motivated to work hard in order to earn a living instead of indulging in bad vices such as theft, robbery and so on. In addition, the granting of IPRs to locals has led to an increase in the number of domestic enterprises. The market is flooded with locally produced works as opposed to foreign products which tends to empower local producers to contribute to the economy. Further, local manufacturers have benefited from exportation of their products as opposed to the bulk of exportation belonging to foreign investors. As such the income obtained from the exported works is kept within the economy to further other manufacturing industries.

4.4.2 China

Over the years the Chinese economy has evolved from a developing country to one of the strongest economies in the world. Most products whether ordinary products or intellectual creations which are currently on the world market are manufactured in China. The Chinese government recognizes the need for a workable intellectual property rights system. This recognition is spreading among modern Chinese enterprises, which likely suffer the largest losses from IP infringement in the economy. Chinese manufacturers are also aware that their access to the frontiers of foreign markets depends to a large extent on intellectual property

⁷⁰ K. E. Maskus, and C. McDaniel, "Impacts of the Japanese Patent System on Productivity Growth," Japan and the World Economy, Vol. 11(1999), pp. 557-574.

⁷¹ R. E. Evenson, "Intellectual Property Rights, R&D, Inventions, Technology Purchase, and Piracy in Economic Development: An International Comparative Study," Yale University, 1991

rights.⁷² Products which have intellectual property content tend to perform better than other ordinary products that do not have IP content. In most parts of the world, economies especially developed countries are calling for a stronger system that will ensure the protection of IPRs. The Chinese government has experienced substantial external pressure in favor of a stronger system of IPR protection.

The change in trends advocating for stronger IP protection and the external pressure has prompted the government to make necessary changes. China has undertaken a dramatic reform of its IP laws. Since 1990, China has revised and updated its laws covering copyrights, trademarks, patents and trade secrets and has adopted protection for integrated circuits. China has also enacted protective systems for plant varieties and pharmaceutical marketing rights.⁷³ This is commendable because it is difficult to envision how IPRs can be effectively enforced using outdated laws.

There is a close link between the observance of IPRs and the orientation of people in society. It is unlikely that a society which is ignorant as to the existence of IPRs or ignorant as to their relevance will in fact respect these rights. In this regard, educational and training programs in IPRs were launched in the 1990s in Beijing the capital city of China.⁷⁴ Society was generally sensitized about intellectual property and its significance. Further, the Chinese government has established and upgraded its administrative and legal systems for enforcing IPRs. Recently, China set up special IPR courts in eight cities. Furthermore, in 1997, a Software Title Verification Office was established as a joint Sino-U.S. initiative to examine the legitimacy of software purchases by Chinese factories and offices.⁷⁵

The educational and training programmes have led to an increase in the number of people manufacturing IP related works. This has increased the production capacity of the economy. The

⁷² F. Carsten and K. E. Maskus, Intellectual Property and Development: Lessons from Recent Economic Research, New York: World Bank and Oxford University Press, 2005. p. 296

⁷³ F. Carsten and K. E. Maskus, Intellectual Property and Development: Lessons from Recent Economic Research p. 296

⁷⁴ F. Carsten and K. E. Maskus, Intellectual Property and Development: Lessons from Recent Economic Research p.296

⁷⁵ F. Carsten and K. E. Maskus, Intellectual Property and Development: Lessons from Recent Economic Research p.297

country is not only able to produce IP enough for the entire population but also enough to export across the world. Substantial income has been derived from the sale of these products within China and exportation of these products. The Software Verification Office has ensured that factories and offices purchase legitimate software. This has closed up the market for counterfeiters ensuring that only owners of unique works benefit from their hard work. Thus industries in China are sustained by making certain that counterfeiters are not given a chance to even sell their products.

4.4.3 United States of America

The United States of America (USA) is one of the viable economies in the world. The economy largely depends on intellectual creations as a source of income. In the United States alone, for example, studies in the past decade have estimated that over 50 percent of US exports now depend on some form of IP protection, compared to less than 10 percent 50 years ago.⁷⁶ The USA has put in place a well-functioning national system of innovation. This system stresses the importance of closer ties between universities and public research institutions on one hand, and the private sector on the other. To this end, the USA enacted the Bayh-Dole Act of 1980, a statute aimed at promoting the transfer to industry of federally-funded technology developed within universities and other non-profit and small business recipients of federal research funding.⁷⁷

In 1982, the Court of Appeal for the Federal Circuit (CAFC) was created in the US which was critical to developing a better enabling environment for the enforcement of IP. This court is based in Washington DC. It is the Court of Appeal for all US patent cases and ensures consistency in patent litigation.⁷⁸ Before this development, appeals were heard by numerous appeals courts for the federal circuit. These courts all had different interpretations of patent law.

⁷⁶ T. G. Field, "What is intellectual Property?" Focus on: Intellectual Property Rights U. S. Department Of State Bureau of International Information Programs, 2006 p.2

⁷⁷ R. Wolson, Intellectual Property Rights, Innovation and Sustainable Development in Eastern and Southern Africa, United Nations Convention on Trade and Development, Regional Dialogue, 29 June – 1 July 2004; Cape Town, South Africa

⁷⁸ A. Rifut, Innovation, Patents and Economic Growth, London: Imperial London College Press, 2006. p. 5

These differences in the interpretation of the law resulted in inconsistency in the law of patents.⁷⁹ The Court of Appeal for the Federal Circuit has brought consistency in enforcing patent laws.

The USA recently established the office of the US Intellectual Property Enforcement Coordinator (IPEC) under the Prioritizing Resources and Organization for Intellectual Property Act of 2008. The purpose of this office is to help protect the ideas and creativity of the American public. The Coordinator's task is to assist coordinate the work of the federal agencies that are involved in stopping the infringement of IPRs.⁸⁰ It was recognized that there was a need to protect the hard work, creativity, resourcefulness, investment and ingenuity of the American public. The infringement of intellectual property could cripple the US economy. Congress therefore saw the need to create IPEC in order to fight the infringement of IPRs.

The cooperation of the government with universities in promoting IP has led to an increase in the number of discoveries which have benefited people generally and made life convenient. It has also improved the country's participation in international trade seeing that IP is on demand everywhere around the world. The establishment of a specialized court has increased people's confidence in the IP system as such companies have greater motivation to establish expensive research & development and IP management programs. The office of Intellectual Property Enforcement Coordinator has improved the coordination of federal agencies in the US. This has bridged the gap between the various states and the federal government in IPR enforcement. This has led to an increase in unique inventions in the various states and the Coordinator has ensured that federal government is made aware of the new inventions for the benefit of the entire American population.

4.4.4 Great Britain

Zambia's colonial history necessitates a discussion of the enforcement of IPRs in the United Kingdom. This is because most of our laws including IP laws emanated from Britain. It must be noted that Britain is part of the European Union. The enforcement of IPRs is high on the agenda of the European Union. This regional grouping has mechanisms that member states are expected

⁷⁹ A. Rifut, *Innovation, Patents and Economic Growth*, p. 5

⁸⁰ <http://www.whitehouse.gov-visited> on 17th January, 2011

to employ in the enforcement of IPRs. For instance, a directive of the European Parliament was issued on 29th April 2004 on the enforcement of intellectual property rights. It is known as the IPR Enforcement Directive (2004/48/EC).

The European Union directive was made under the internal market provisions of the Treaty of Rome. The directive covers the remedies that are available in the civil courts, but not criminal offenses. The directive harmonizes the rules on standing, evidence, interlocutory measures, seizure, injunctions, damages, costs and judicial publication.⁸¹ Member states can be censured in the European Court of Justice if their procedures on the infringement of IPRs are unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.⁸² England as a member state is under obligation to comply with this directive in the enforcement of IPRs.

The Copyright, Designs and Patents Act of 1988 provides for IP laws in England. The Magistrates Courts are actively involved in the enforcement of IPRs in Britain. In 2006, the Magistrates Courts sentenced 69 offenders under the Copyright, Designs and Patents Act 1988, a slight increase on the previous year, with 16 cases dealt with by the Crown Court. The Magistrates Courts also handles matters relating to the enforcement of trademarks under the Trademarks Act of 1994. The Magistrates Courts convicted 604 offenders under the Act in 1994. It is notable that the number of convictions under the Copyright, Designs and Patents Act is remarkably different from those under the Trademarks Act of 1994. The discrepancy between the number of copyrights and trademark cases is perhaps not surprising given that trademark law is perceived as a simpler law to apply in that trademarks are a registered right and consequently the evidential burden is usually smaller for trademark offences.⁸³

The United Kingdom IP system also makes available a data protection system. Data protection regulations will apply when one holds information either on computer or on paper. An owner of intellectual property is able to know who is making use of his property especially customers or suppliers. As such one is able to know who is infringing his or her IP and this makes it easier to

⁸¹ European Parliament & Council, European Union Directive (2004/48/EC), L157 30th April 2004, pp. 32 – 36

⁸² European Parliament & Council, European Union Directive.

⁸³ The United Kingdom Intellectual Property Office, Taking Forward the Gowers Review of Intellectual Property, A consultation paper issued by the United Kingdom Intellectual Property Office on behalf of the Minister of State for Innovation Universities and Skills, 2008

pursue the infringer. Under the Data Protection Act 1998, there are certain obligations that have to be complied with in order to be eligible for protection.⁸⁴ One's IP must meet the requirements of a trademark, copyright, design or patent under the Copyright, Designs and Patents Act or Trademarks Act. This is intended to protect IP owners whose information is made available through the internet or on hard copy in printed form.

By Britain adhering to the IPR Enforcement Directive of the European Union, it has created friendly relationships with other member states of the regional grouping. This has made it easy for England to participate in international trade of IP products with member states thus increasing the amount of foreign exchange. The increase in the number of convictions by the Crown courts and the Magistrate Courts has encouraged the respect for IPRs by the public. This has motivated individuals and companies to exploit IP and has led to an increase in intellectual creations. The Data Protection Act is also useful in that it has ensured that IP users on the internet pay for its use. The system by making it easier to locate infringers has made it cheaper to bring offenders to book. Essentially, IP owners are assured of receiving remuneration for their hard work which is important for their livelihood. Indirectly, the IP system has helped reduce crime and other vices as people are motivated to work hard when they see other people being rewarded for their hard work.

4.5. Conclusion

The chapter has been directed at discussing the role of the enforcement of IPRs in promoting economic development. The chapter has briefly discussed the concept of development before discussing the role of the Zambia Development Agency in stimulating economic development through IPRs. The chapter has also looked at the role of IPRs in generating economic development. Experiences of how various countries have successfully enforced IPRs and have achieved economic development have been illuminated.

The IPR systems adopted by Japan, Britain, the United States and China have led to economic development. This is evidenced by the fact that the IP systems have resulted in an increase in the number of domestic enterprises and the participation of locals in IP exploitation. This has

⁸⁴[http:// www.ukbusiness.com-visited](http://www.ukbusiness.com-visited) on 9th February 2010

improved the income realized from the sale of IP for the benefit of the entire economy. The educational and training programmes implemented by these states have led to an increase in the number of people manufacturing IP related works thus increasing the production capacity of the economy. Some systems like the Chinese have ensured that factories and offices purchase legitimate software. This has closed up the market for counterfeiters ensuring that only owners of unique works benefit from their hard work.

The establishment of specialized courts in some of these countries has increased people's confidence in the IP system as such companies have greater motivation to establish expensive research & development and IP management programs. The increase in the number of convictions by the courts has encouraged the respect for IPRs by the public. Data protection through the internet has ensured the remuneration of IP owners for their hard work which is important for their livelihood. Indirectly, these IP systems have helped reduce crime and other vices as people work hard to earn their income.

CHAPTER 5

Conclusion and Recommendations

5.1 General Conclusion

The focus of this dissertation has been to look at how the enforcement of IPRs can be used as a tool to promote economic development in Zambia. Having been acknowledged that IPRs have the potential to bring about economic development, it is crucial to ensure that there are laws and enforcement mechanisms in place designed to attain this development. The second chapter was centered on looking at the national laws and the international instruments regulating IPRs in Zambia. It has been identified that the laws regulating IPRs are outdated. The most recent amendments that were made to the IP laws were aligning the various Acts with the PACRA Act. The changes were not substantial. Further, it was also noted that the IP laws are at variance with international instruments providing for IPRs.

The existence of intellectual property laws in place is not enough; there is need for the Courts and various enforcement agencies to put them into effect. The Courts and various enforcement agencies namely ZRA, ZAMCOPS, PACRA, IPU and ZDA must be commended for the significant role they play in the enforcement of IPRs. However, these agencies and institutions are facing a number of challenges which must be looked into. It has been emphasized that the enforcement of IPRs is not an end in itself but a means to realize economic development. Experiences of how other states namely Japan, China, the United States of America and the United Kingdom have enforced IPRs and achieved development have been elucidated in the fourth chapter. These countries should be emulated if economic development is to be attained in Zambia.

5.2 Recommendations

It has been stressed throughout this paper that the enforcement of IPRs can be used to attain economic development. The lack of economic development prevailing in Zambia can be negated by the enforcement of IPRs. However, it is difficult to do so as there are shortfalls in the intellectual property laws and in the enforcement mechanisms of IPRs. There is need to offer solutions to the problems identified during the study.

5.2.1 Training and Sensitization of People in Society

It was noted in the course of the research that generally people in society are unaware of the existence or the importance of IPRs. It is difficult to envision the respect or observance of IPRs if people in society are generally ignorant about the existence of IPRs and later on if they do not even understand their importance. As the saying goes, “knowledge is power.” The enforcement of IPRs can be made better if the society is oriented in such a way that they are enlightened about the existence and importance of IPRs. In this regard, the government can partner with various stakeholders in society as well as learning institutions in particular, secondary schools, colleges and universities in undertaking training programmes targeted at sensitizing and educating people in society about the significance of IPRs. When this is done, people in society will respect intellectual property rights because they will understand their importance as opposed to fear of being punished for the infringement of these rights.

5.2.2 Adoption and Implementation of Policies

It is also recommended that government must actively engage in the adoption and implementation of viable policies that will encourage innovative creations. In implementing these policies, the government in the consideration of the budget could appropriate funds specifically intended to encourage the development of IP. The government can also work with Small Medium Enterprises (SMEs) to encourage the involvement of domestic enterprises in the development of intellectual creations. This will encourage local people to participate in the exploitation of IP. Ultimately, there will be an increase in domestic enterprises which will increase the productive capacity of the economy.

5.2.3 Law Reform

The law serves a lot of functions in society especially a developing country like Zambia. The law does not operate in isolation; it functions within the context of a particular society. The law must adapt to changing trends in society and accommodate the needs of people in society. Therefore, the lawmakers must continuously engage in amendments to the laws. Accordingly, there is need to modify the current intellectual property laws in order to ensure that they serve the needs of society. Ultimately, the goal is to be able to use intellectual property rights to achieve economic development. Some of the lacunas in the laws regulating IPRs were highlighted in the second chapter. It was generally observed that most of the IP laws do not take into account science and technology. In addition, all the other flaws in the specific Acts of Parliament regulating IPRs that were identified in chapter two must be addressed in order to improve the enforcement of IPRs. Law reform must be effected as follows:

1. The laws must accommodate science and technology and at the same time ensure that it protects IP holders from infringements occasioned by use of such technology because it is only IP products that are scientifically advanced that will compete on the world market;
2. The law on trademarks must provide for protection of service marks, automatic protection of well known marks and protection of unregistered marks if it can be proved that such marks qualify as a trademark within the meaning of the law, this will increase the exploitation of trademarks;
3. The patent laws must provide for parallel imports especially in the health sector as they make it possible to source medicines from cheaper sources. The Act must also recognize inventions that are traditional in nature such as traditional medicines. Currently, these are not protected and a lot of income is lost especially when it comes to traditional medicine where an invention is utilized without authorization;
4. The law on designs must provide for the protection of geographical designs, these have become important on the world market as such their exploitation will benefit the economy. This law must also clearly state any provisions that give the government more power than necessary to use designs without remunerating the proprietor, the arbitrariness of such provisions must be removed;

5. All the laws on IP must impose serious sanctions against the infringement of IPRs as opposed to payment of meager fines by infringers. When people in society understand the seriousness of the infringement of IPRs, they will be compelled to respect them and people in society will be inclined to come up with unique works;
6. The laws must also facilitate the improvement of IPRs in a manner that yields economic development in order to encourage the exportation of products that have IP content.

Our laws are also inconsistent with international instruments that have been ratified. There is need to harmonize our laws with these international instruments. This has to be done gradually because it is not tenable immediately. As alluded to earlier, as far pharmaceutical patents are concerned developing countries have been given a deadline of 1st January 2016 to ensure that they are TRIPs compliant. This deadline was extended from the initial deadline being 2006. Therefore, Zambia has to make concerted efforts to ensure that the laws regulating patents are TRIPs compliant by 2016.

5.2.4 Improvement of Enforcement by the Courts and the Establishment of Specialized Tribunals

It is well known fact that the allocation of cases to Magistrates and Judges is randomly done. It is likely that cases will be allocated to Magistrates and Judges who are not acquainted with intellectual property. This makes it difficult to have informed decisions on intellectual property. There is need to ensure that all Judges and Magistrates are adequately trained in IP in order to ensure that IPRs are adequately enforced. This will inspire the confidence of people in the Judiciary and encourage inventions of unique works. Currently, the Magistrates do not have jurisdiction to deal with matters relating to industrial designs, patents and trademarks under the respective Acts. It is proposed that the jurisdiction of the Magistrates is extended to handle the aforementioned types of intellectual property like the way the jurisdiction of Magistrates has been extended under the Copyrights and Performance Rights Act.

In addition, serious sanctions must be meted out against infringers of IP as opposed to allowing them to pay a meager fine. This is because the infringer is likely to repeat the offence if he or she knows that the punishment is not grave. Serious sanctions against the infringement of IPRs will

make people in society to respect IP as property belonging to other people and that its theft will not be condoned.

Presently, there is the Commercial list in the High Court which is specifically intended to dispose commercial matters quickly. This has really helped because most IP matters are commercial in nature and it would affect the businesses of the parties to an action if their dispute is not settled promptly. In the long run, there is need to establish specialized courts or tribunals especially designed to handle IP matters to ensure efficiency and expediency. Efficient and expedient handling of IP matters will encourage people in society to undertake expensive research in the area of IP.

5.2.5 Improvement of Enforcement by Agencies and Establishment of New Agencies

It is noteworthy that almost all the enforcement agencies are faced with the challenge of inadequate financing. Currently, most of these agencies do not have enough resources to use to investigate infringers of intellectual property. There is need to increase funding of these enforcement agencies. This will improve their efficiency and reduce the infringement of IPRs.

It was also found that most of these agencies are only situated in Lusaka but are intended to cater for all the 9 provinces of Zambia. This has made it difficult for persons who would like to take advantage of these agencies but cannot do so because of the location. In this regard, there is need for the decentralization of these agencies to make them available at least in all the 9 provinces. In the long run, their services could also be extended to the district level as well. When these enforcement agencies are made easily accessible, they will be able to monitor the use of IP and receive complaints on behalf of IP owners. These institutions also need sufficient and well trained human resource to ensure efficiency. There is a shortage of human resource in the enforcement agencies which makes the enforcement of IPRs difficult. Increasing the labour force will improve the efficiency of these agencies.

The Zambia Development Agency as the agency specifically mandated to promote economic development. The agency mainly concentrates on attracting FDI; however, there is still room for improvement. The ZDA can explore the area of IP and utilize it to promote economic growth.

The agency has a significant role to play in encouraging the exploitation of IP. The agency can work in collaboration with the government and stakeholders in coming up with programmes that encourage people in society to exploit IP.

There is also need for the establishment of more enforcement agencies specifically intended to handle the enforcement of patents, trademarks, designs and performance rights. Currently, PACRA only deals with the registration of patents, trademarks, designs which is merely an administrative function. An agency aimed at ensuring the observance of these rights is necessary as the case is with copyrights. In addition, there is no agency monitoring the use of performance rights. Presently, ZAMCOPS does not deal with related rights such as performance rights. Therefore, it is important that an enforcement agency designed to monitor performance rights is established. This will actually lessen the burden on the courts in the enforcement these rights.

5.2.6 Enhancement of Enforcement at the Borders

It is recommended that the customs officers acquire the necessary skills and machinery to improve the enforcement of IPRs at the borders. They can do this by acquiring automation or electronic gadgets to aid the identification of infringing copies from original creations. Manual identification of products tends to be cumbersome. In the interim, the customs officers must work hand in hand with IP owners to assist in the identification of trademarks and other forms of intellectual property. The customs officers must also undertake patrols intended to curb the smuggling of infringing copies or materials used to create infringing copies. This will assist in reducing the number of counterfeit copies being brought in the country. Usually, when people are found in possession of infringing material, they are let free. In extreme cases, infringers of intellectual property abandon these goods at the border. The customs officers must work hand in hand with the courts and the police in bringing offenders to book to ensure that they do not continue smuggling counterfeit copies.

5.3. Conclusion

The need for the enforcement of IPRs cannot be overemphasized. The enforcement of IPRs can only generate economic development if there is an effective and proficient IP system in place. However, the current Zambian IP system is problematic and is facing numerous challenges as already pointed out. It is necessary that these challenges are addressed so as to ensure effectiveness. The IPR system will improve and perform better if the above recommendations are carried through. Resources both human and natural must be channeled to the enforcement of IPRs. Thus all the members of society must participate in enforcing IPRs, this is the only way that economic development can be realized.

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