

**Intellectual Property Rights, Copyright and Development Policy in a
Developing Country: *Options For Sub Saharan African Countries***

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I. INTRODUCTION

It is our contention that intellectual property is a key to technological and economic development,¹ even for developing countries.² Thus for any developing country, it can never be out of fashion to interrogate the relationship between its intellectual property policy and its development. Put in another way, all developing countries must ask themselves whether their intellectual property policy is directly linked and in aid of their development. More pointedly, has the IP policy reduced poverty and encouraged growth? Has the IP policy led to the availability of educational resources itself a store of the information and knowledge needed for growth and development? Has the IP policy strategic interface with other public policy issues such as competition, public health, such that it is ultimately of advantage? This paper argues that a development oriented strong copyright protection is fundamental to the economic and technological advancement of Sub Saharan African countries (SSA) and synthesizes such a policy.

II. INTELLECTUAL PROPERTY TRADE AND DEVELOPMENT

Towards the end of the 19th Century multilateralism became the norm in the international intellectual property system through two treaties, the Paris Convention for the Protection of Industrial Property adopted in 1883 and the Berne Convention for the Protection of Literary and Artistic Works adopted in 1886. One of the fundamental pillars of these multilateral treaties was the principle of national treatment. Beyond this advantage, the Paris and Berne union imposed minimum guides and standards that were more of a framework nature. In fleshing out the system the nature of protection varied greatly from country to country.

The middle of the twentieth century saw the emergence of many developing countries that sought to address and manage the international intellectual property system to their peculiar

¹. See F.K Beier 'The Significance of the Patent System for Technical, Economic and Social Progress' (1981) 11 IIC663; Machlup and Penrose 'The Patent Controversy in the 19th Century' (1950) 10 JOURNAL OF ECONOMIC HISTORY, 1

². Osita Eze 'Patents and the Transfer of Technology with Special Reference to the East African Community' 1972 EAST AFRICAN LAW REVIEW 127; Oddi 'The International Patent System and Third World Development: Myth or Reality?' (1987) DUKE LAW JOURNAL, 831; Kunz-Hallestein 'Patent Protection, Transfer of Technology and Developing Countries' (1975) IIC 427

needs. Having joined the Paris and Berne Union, these countries demanded for the consideration that would enable them access goods and services of developed countries within the rules of the system. These desires manifested in the form of requests for transfer of technology as a goal of the grant of patents. Developing countries sought to compulsorily license the local production of goods, which because of public health, national security, educational needs and like considerations could not be left to the operations of the intellectual property systems that primarily breed monopoly and often-high prices. Their activities led to the revision of the Berne union by the Stockholm protocol of 1967. Many attempts were also made to revise the Paris Union through diplomatic conferences in 1980, 1981, and 1984. At a point the demands of developing countries deadlocked the reform of the Paris and Berne treaties and lead to a reaction by the developed world.

Meanwhile with the growth of developing countries power and influence, certain fundamental changes were already taking place in the western world in general and the United States in particular. There is no doubt that the Second World War sparked a technological revolution. With the development of the computer, and the emergence of the radio, television and satellite technology and their convergence, this revolution was accelerated often beyond imagination and laid the foundation of today's knowledge economy. With technology come better and more efficient goods and services. These goods and services become the centerpiece of the wealth of the countries that develop them and give them a competitive edge over others. The rise in better production promotion and distribution methods naturally results in increased trade and with it comes the need to protect those innovative qualities that give goods and services their competitive edge. Intellectual property laws protect these innovative qualities being intellectual capital. International trade often exposed the intellectual capital in these goods and services to misappropriation such that unrestrained counterfeiting and copying significantly reduced market share of these western goods and services. Naturally western countries became worried that inefficient national intellectual property systems would constitute non-tariff barriers, which would deprive them of the benefit of innovativeness. Thus intellectual property protected in their countries would be of no use if for example they meant nothing in developing countries whose nationals stood to benefit if they could easily and without significant investment copy and/or counterfeit these goods and services. Western interests therefore sought to integrate trade and intellectual property to protect their wealth generated

by intellectual capital. A weak intellectual property system would foster unfair competition in national markets as fake and counterfeit goods often cheaper would drive out the costlier original goods of an IP owner. On the other hand effective IP protection ensures substantial returns in investment of time, energy and money expended in IP works thereby boosting the economic growth of nations.

Western interests criticized the framework of the international IP system represented by the Paris and the Berne Unions as inadequate in the scope of protected material due to emergent technologies, lacking in substantive minimum standards, sympathetic to compulsory licensing by developing countries without a requirement of full adequate and prompt compensation and an inefficient dispute settlement mechanisms even though there were provisions for recourse to the International Court of Justice. A standard for national enforcement measures was also absent. As a fulfillment of unilateral and bilateral initiatives of linking trade and intellectual property protection, the United States with the support of the European Communities and other OECD countries persuaded the General Agreement on Tariff and Trade to include in the September 20 1986 Uruguay Round Ministerial Declaration a mandate for the negotiations on trade-related aspects intellectual property rights. After intense negotiations, (well over 7 years) the Uruguay round ended by the signing on 15 April 1994 in Marrakesh Morocco of the Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations. The Final Act contains an agreement establishing the World Trade Organisation, which is a common institutional framework for the conduct of trade relations among member States. The Annexes to the Act contain multilateral agreements of a substantive nature. Annex 1C contains the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

TRIPS which represents a watershed in the formulation of norms to guide the international protection of intellectual property is a product of the western world or appropriately described as the 'first world'. The dominant interests protected by TRIPS were not primarily intended for developing countries. However the structure of the existing international trading system is such that intellectual property protection has been linked to trade. Any country wishing to take advantage of the benefits of reduced tariff and non-tariff measures in the system is obliged to implement the norms of TRIPS. It is therefore no use in crying over the marginalisation induced by agents of globalisation but to seek how to strategically position developing countries so that in the context of a globalised international intellectual

property system, economic development can take place. A development imperative is recognized by article 7 of the TRIPS which declares as one of its objectives:

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

The challenge for developing countries is therefore to develop a mix of policies that fosters creativity, and innovation and promotes the protection of intellectual property both as an end and as a means to an end.

III. APPROPRIATE COPYRIGHT PROTECTION POLICY FOR A DEVELOPING COUNTRY

III.I An Overview: If as the Commission on Intellectual Property Rights rightly pointed out:

“ ... the availability of copyright protection may be a necessary but not a sufficient condition for the development of viable domestic industries in the publishing, entertainment and software sectors in developing countries.”³

it follows therefore that if there is no copyright protection, these industries will disappear. On the other hand if the copyright system is to be in aid of development then the challenge for these countries is to adopt a mix of policy options as a basis of designing an appropriate copyright protection policy that enables the system to become a sufficient condition for the development of cultural industries.

In rewarding authors for their creativity as a basis of stimulating further creativity, the copyright system allows the exercise of monopolistic powers that must be balanced by ensuring that the goods protected by the system are available to sustain creativity that provides information needed for development. In copyright protection, information is of critical importance. However most SSA are unable to satisfy their informational needs and

³ . REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, Chapter 5, p. 108

have to depend on foreign copyrighted goods. Copyright protection is security for ideas and capable of being used to prevent access to information.

The dilemma of most developing countries lies in how to satisfy its informational needs largely dependant on foreign creators, and nurture an indigenous copyright base.

One option would be to lower copyright protection in order to access foreign works. Even if this were possible in view of the globalised norms imposed by TRIPS and other treaties, the strong possibility is that a low protection threshold coupled with a policy of discrimination against foreign works will also impact on the protection of indigenous works. Since most of these countries are at different threshold of literary and artistic inventiveness, a weak system of protection may deny the local copyright industry of one of the variables that will sustain its existence. It may be a point- given the experience of developed countries- that at the appropriate time where the local copyright industry is perceived to be ready, the protection system may be enhanced to enable growth. The danger is that a weak system breeds a culture of piracy. An enormous amount of resources would have to be spent to change this attitude when the country decides to institute a stronger level of protection.

It may well turn out that the indigenous cultural industries may be stimulated. It is arguable that given the cultural content of local copyrighted goods, the demand for such goods will always be there. This is true of some SSA where increasing levels of copyright protection is part of a combination of factors that have led to the blossoming of viable sectors of the entertainment industry. An example is the Nigerian video/film industry, known as 'Nollywood' widely regarded as the third largest in the world and dominant in the West African sub region.⁴ The publishing industry in Nigeria is also growing in many areas.⁵ Indeed in the area of pre-primary, primary and secondary books, it can be said that Nigeria is self-sufficient. The high level of piracy of these local products suggest that if piracy is curbed, the market share of these goods will increase thereby stimulating creativity and further investment.

More importantly a lower level of protection that breeds piracy leads to the flight of foreign stakeholders. But their goods still find their way to the markets of SSA because the demand

⁴ . The number of censored films in Nigeria for the period 1993- 2003 is as follows: 1994(3), 1995(200), 1996(254), 1997(260), 1998(387, 1999(490), 2000(750), & 2001(1030). See FILM AND VIDEO DIRECTORY IN NIGERIA 2002, p.116

⁵ Two volumes of the Nigerian Publishers Association (NPA) book NIGERIAN BOOKS IN PRINT records over 7000 titles in print. NPA has over 65 publishers listed in the book.. It may well that there are many other publishers who are not members.

for these goods is very high. They are often cheaper than the local goods whose market share is reduced. A good example is the Nigerian music and film industry that witnessed the divestment of foreign stakeholders who are still not interested in engaging in the market. The high Nigerian demand for these products has led to a burgeoning pirate industry principally supplied from the Far East. Indeed the absence of the foreign stakeholders and even their reluctance to license their products have made it very difficult to engage in effective enforcement. Local retailers willing to stock the originals of their products in order to meet demand are often unsatisfied leading to their recourse to the pirated copies.

A strong commitment to copyright protection leads to the inflow of foreign investment leading to the creation of jobs and some dissemination of technology. Ghana has joined the league of developing countries that handle outsourced jobs for the international software industry. While it is true that some of these foreign investments may primarily serve to promote foreign goods, there is no doubt that the technological know-how that they bring is useful. The better production of copyrighted goods sometimes assists in the fight against piracy. In Nigeria for example, the establishment of foreign duplicating factories has led to a cheaper and better quality cassettes, which has largely driven cassettes pirates out of the market.

As we stated earlier, another option is to develop a policy that can be the basis of effective protection. Without a policy it is unlikely for any country to structure interpret and reinterpret its laws and international obligations for its development. A policy enables and should provide for an on-going public discourse of its strength, weakness, opportunities and threat.

What follows hereunder is a discussion of policy options drawn from the experience of SSA that can be the basis of an effective copyright protection policy.

III.II Ensuring Access to Information: One of the key policy options for any developing country is to ensure access to information protected by copyright. Most countries seek to balance the inherent monopoly of copyright protection by limiting the period of protection and by granting exemptions for educational research and library use. For developing countries this is especially critical for the additional reason that most of the goods involved are foreign. In pursuance of articles 9& 10 of the Berne Convention, the copyright laws of

SSA contain exemptions in this regard.⁶ These exemptions range from fair use provisions⁷ to compulsory licensing for translation⁸ and reproduction of certain works.⁹ Use of these provisions will ensure some access to information needed for development. It is not easy to accurately ascertain whether SSA have used the limitations and exemptions to satisfy information needs. Yet it is arguable that this does not mean that the provisions have not been used. The fact that they may not have been used underlies a lack of capacity by these countries in understanding the utility of these provisions and using them intelligently to ensure access.

III.III The Impact of Digital Technology: A consideration of the impact of new technologies on the protection of intellectual property rights resulted in the WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances Treaty (WPPT). As of 2002 when the two treaties came into force, six sub-Saharan African countries: Burkina Faso,¹⁰ Mali¹¹ Gabon¹² Guinea,¹³ Senegal¹⁴ and Togo¹⁵ are parties to the treaties. None of these countries has however conducted an extensive review of their copyright laws in view of their treaty obligations. The slow pace at which SSA are becoming parties to the treaties may be indicative that a lot of deliberation is going on as to its desirability or otherwise. Whenever these reviews take place in the copyright laws of State parties, it is important that the public interest needs of developing countries reflected in article 10 of the WCT and article 16 of the WPPT should be borne seriously in mind. Indeed the preambles of the two treaties reflect this concern. That of the WCT recognizes

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

⁶ . See for example, Article 343-37 of the Ordinance Concerning Literary and Artistic Property of Mali; Article 10-14 of the Law on the Protection of Copyright of Senegal; Article 11-14 of the Law on Copyright and Related Rights 2001; Section 18 of the Copyright Law; Article 33-25 of the Law Instituting Protection for Copyright and Neighboring Rights 1987; Section 21 of the Zambian Copyright and Performances Act 1994; Section 7 of the Copyright Act (as amended); Section 67 of the Copyright and Related Rights Law 2000; and Second and Third Schedules of the Nigerian Copyright Act (as amended).

⁷ . See the second schedule to the Nigerian Copyright Act 1990(as amended)

⁸ . Paragraph 2 of the Fourth schedule *ibid.*

⁹ . Paragraph 3 of the fourth schedule *ibid.*

¹⁰ . March 6 2002 (WCT) and March 20 2002 (WPPT)

¹¹ . April 24 2002 (WCT) and May 20 2002 (WPPT)

¹² . March 6 2002 (WCT) and May 20 2002(WPPT)

¹³ . May 25 2002 (WCT and WPPT)

¹⁴ . May 18 2002(WCT) and May 20 2002(WPPT)

¹⁵ . May 21 2003(WCT and WPPT)

In this regard very extensive studies must be carried out for developing countries to enable them amend their laws accordingly.¹⁶

Part of the digital agenda is the issue the protection of computer software. It is true that extensive unauthorized copying of computer software has enabled access for developing countries. Even though local software industries in SSA cannot compare to the Indian experience, it cannot be correct to assume that weak copyright protection and enforcement enabling access will stimulate an indigenous software industry on its own.

To ensure access for educational needs SSA must obtain all advantages that exist including negotiating favourable bulk licensing terms with software producers. A recent example is the Nigerian federal government that negotiated with Microsoft fairly favorable licensing terms for itself and educational institutions.

III.IV Enforcement In many SSA there are ineffective enforcement regimes even though the copyright laws are of a strong disposition. Their inability to enforce these laws often drives the argument that these laws are not adequate for their development. Inadequate funding of enforcement agencies; political and ethnic considerations; lack of trained and properly motivated staff; stakeholder apathy in the enforcement of their rights; a weak institutional base; poorly trained and paid enforcement (police, customs and specialized institutions) agents; a cumbersome and tardy judicial systems; and unorganized stakeholders are at the heart of the ineffective enforcement regimes in SSA.

The inefficiency of regular enforcement agencies like the police have led to the establishment of national administrative agencies endowed with enforcement powers. A good example is Nigeria where enforcement powers were endowed on the Commission following a perceived incapacity of the Nigerian Police Force to effectively curb piracy. The success of these organizations is mixed often depending on the level of government funding. Ultimately SSA must determine the best model of enforcement based on their experiences. It may be better in the long run to strengthen regular enforcement agencies while leaving national administrative agencies to formulate policy.

The criminalisation of certain forms of copyright infringement has led stakeholders to imagine the enforcement of copyright as entirely in the public domain requiring very little

¹⁶ See “WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment” prepared by Mr Sam Ricketson. Available at www.wipo.int/documents/en/meetings/2003/scr/doc/scr_9_7.doc

contribution on their part even when there are available resources. Enforcement activities can never be effective without the active involvement of the IPR owners who must individually and/or with their associations fight infringement. Intellectual property rights are essentially private rights. The extent of government involvement belies the public interest component of these rights as they foster our culture and lead to economic development. However, individuals remain the principal beneficiaries and must not rest because public institutions have been created. What is ideal therefore is a practical partnership between the associations and government agencies to fight piracy.

A number of measures need to be highlighted because they can enhance enforcement. The first is the use of copyright levies. Some SSA has legislation¹⁷ backing copyright levies, which are designed to indirectly tax goods that are capable of being used for piracy. These levies are then paid over to collecting societies for distribution. The other measure is the introduction of anti-piracy devices such as banderoles and holograms.¹⁸ These devices enable consumers to identify original products. In addition, if properly administered at the points of production and importation, it is also a source of information of the products that it is affixed to. In the musical industry, it can be the basis of the administration of mechanical rights. This is the experience of Ghana and Nigeria.

III.V Collective Administration In many SSA, collective administration of rights is a preferred means of copyright administration. Collecting societies exist for musical works¹⁹ and reprography.²⁰ Apart from South Africa where the collecting societies began operations in the sixties, most of the other SSA collecting societies are of a recent origin. For example KOPIKEN was established in 1995 and has not begun licensing, while ZimCopy was established in 1995 but began licensing in 2001. REPRONIG- the Nigerian RRO- was established in 2001 and has just started operations.

¹⁷ . See the section 32C of the Nigerian Copyright Act.. Ghana uses an anti piracy device that is modified form of a hologram.

¹⁸ . See the Copyright (Collecting Societies) Regulations 1993.

¹⁹ .BBDA (Burkina Faso); BCDA(Congo-Brazzaville); BGDA(Guinea); BNDA(Niger Republic); BSDA(Senegal); BUBEDRA(Benin Republic); BUCADA(Central African Republic); BUMDA(Mali); BURIDA(Cote d' Ivoire); BUTRODA(Togo); COSGA(Ghana); COSOMA(Malawi); COSOTA(Tanzania); DALRO, SAMRO & SARRAL(South Africa); MCSK(Kenya); NASCAM(Namibia); OMDA(Madagascar); SGA(Guinea-Bissau); SONECA(The Democratic Republic of Congo); PMRS(Nigeria); ZAMCOPS(Zambia) and ZIMRA(Zimbabwe)

²⁰ . KOPIKEN (Kenya); DALRO(South Africa); REPRONIG(Nigeria); ZIMCOPY(Zimbabwe)

Collecting societies are attractive because in exercising the exclusive rights of members, they are the principal means by which some stakeholders are sure of recompense for their work. The widespread presence of these societies for musical works, is evidence of this assertion. Their importance is also illustrated in the fact that in most SSA the collecting society (especially musical performing societies) is embedded in national copyright administration bodies. Examples include Senegal, Malawi, Togo, Ghana, Burkina Faso, Congo, Guinea, Niger, Benin Republic, and Cote d'Ivoire. The activities of these bodies including the funds collected complement copyright protection in all ramifications. An indication of the functions of these societies is pointed out by Dr Ficsor :

‘The cultural and social functions of collective management organizations are particularly important in developing countries where frequently extra efforts are needed to strengthen creative capacity. In general the same may be said about net importer countries (frequently small ones) where, through an efficient fulfillment of such functions, national collective management organizations may achieve two important objectives: first, they may contribute to the preservation of national cultural identity; and, second, they may improve public acceptance of copyright where the copyright system, unfortunately, is frequently in quite a weak and very defensive “public relations” situation.’²¹

Describing the experience of Malawi in collective management, Serman Chavula highlights COSOMA’s role:

‘... in the implementation and enforcement of the economic rights of authors at both national and international levels; in the promotion of cultural industries and the fight against piracy’²²

Some of the objects of the Nigerian RRO- REPRONIG- give an idea of the scope of the activities of a typical African RRO:

- ‘ 3 (e) to promote the categories of works and rights produced or created by members or affiliates;
- (f) to promote and support creativity;
- (k) to ensure that the conditions laid down for the grant of compulsory licences are complied with and respected.’²³

²¹ COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, 22 (2002)

²² . ‘Collective Management of Copyright: The Experience of Malawi’ paper presented at the Forum for Strategic Issues for the Future at the Third Session of the permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) held between October 28 – November 1 2002.

It is this ability to engage in copyright protection and stimulate local creativity that outweighs the fact that since foreign works dominate the markets of SSA, these collecting societies may well be collecting more royalties for foreign works. This is the view of the Commission on Intellectual Property Rights, which cites the example of the Dramatic, Artistic and Literary Rights Organisation (DALRO) of South Africa²⁴. Mr Alan Story in answer to the question as to whether in the current copyright and publishing conjuncture the RRO model should be exported to Africa submits that:

‘ The experience of the South African RRO, DALRO, is instructive. ...DALRO distributed to national (i.e South African) rights holders a total of EUR 73,545.89 in reprographic(essentially photocopying) royalty fees during its 1999 financial year. By contrast DALRO distributed a total of EUR 136,523.07 to foreign RROs (and hence to foreign right holders) in 1999. During the same period, DALRO received a total of EUR19,802.62 from other (i.e non-South African) RROs for reprographic copying ...as the above figures show, the RRO system leads to a highly unequal balance of payments to the advantage of richer countries and reinforces existing patterns of dependency. If a fully functioning and active RRO were to be established in any other African country, especially a least developed country, the financial inequality would even be greater; such an African RRO would primarily become a royalty collector for foreign publishers and authors²⁵

If the RRO model should not be exported to Africa, what is the alternative? Mr Story advocates that :

‘ ... a new country-wide licence system be created for LDCs that would allow free use of copyright-protected, hard copy works from developed countries for an initial 20- year period; all non-profit educational, research, public health and related uses would be exempt from paying royalties. RROs are not required for such a system and LDCs should actively discourage the establishment of RROs in their own countries²⁶

A few comments are in order. What would replace the money generated for local rights holders. Isn't this the critical variable to be used in stimulating local creativity, which should eventually surpass the market share of foreign goods? Using the same example of DALRO, its official website discloses that in the financial year 2001, the total domestic reprographic

²³ . See O. Oladitan WHAT AN RRO IS, 1996, pp. 56-57. Section 48 of the Copyright and Neighbouring Rights Act, No 7 of 1999 states the functions of the Copyright Society of Tanzania (COSOTA) as including ‘promotion and protection of authors, performers, publishers, translator of works and broadcasters’.

²⁴ . REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, Chapter 5pp.108-109. This aspect of the report is based on the Study Paper No 5 written by Alan Story “Study on Intellectual Property Rights, Copyright and the Internet” Both reports available at www.iprcommission.org

²⁵ . Study Paper 5 ibid p. 53

²⁶ . Ibid, p. 6

collections was EUR749.118.34. The total reprographic distributions in that period was EUR 162.048,25, while for foreign right holders it is EUR319.623,09. DALRO received EUR13.581,39 from other RROs in the same period. A total of EUR 267.446,00 presumably went into its operations (which may have included promotion of creativity) or was retained. We may conclude that DALRO is becoming more efficient in its collections and even if the ratio of foreign/local distributions remains the same, the net income to local right holders is *improving*.²⁷

It is arguable that in future this balance will tilt in favour of local right holders. It is implicit in Mr Story's analysis that if there is at least less distribution to foreign right holders, there will be 'inter-jurisdictional equity' in what is received and what is paid out making the RRO model sensible. Story also concludes that there is little enthusiasm for RRO in other parts of Africa by pointing out that KOPIKEN and ZimCopy established in 1995 did not license in 1999. In further proof of our thesis that the situation is evolving, the official website of Zimcopy for the financial year 2001 reported a modest EUR 850.00 as reprographic collections. Surely this is likely to improve.

The Nigerian Copyright Commission has recently approved an RRO known by the name REPRONIG. Given Nigeria's population-well over 120 million-, vast educational and business establishments- well over 200 tertiary institutions and over a million students- it is not difficult to imagine the potentials for the organization. Even though the RRO is not part of the national copyright administration, there is no doubt that it will stimulate creativity especially as it is made up of associations. Of the eight associations that make up REPRONIG, one of them the Academic and Non Fiction Authors Association of Nigeria (ANFAAN) has the potential of stimulating creativity if its share of the proceeds of licensing is used principally in promoting research activities. At least in Nigerian universities, -staff of whom constitute the majority of the members of ANFAAN,- lack of funds have stalled research activities. What better way to break the monopoly of foreign textbook writers than to provide capacity for local authors to thrive. Surely, it will be better for ANFAAN to do *something* in the near future than to continue to do *nothing* as is the present case.

The anti-competitive potentials of collecting societies in SSA attracts enough concern, even though in practice, there is not much experience. In Nigeria, paragraph 15(1) of the

²⁷ In 1999, 40% of the total distribution went to local rights' owners, in 2001 this went up to 49%. This is likely to go up as a negotiated blanket licencing scheme in higher institutions goes into effect in South Africa.

Copyright (Collecting Societies) Regulations 1993 enables the formation of a Tariffs Arbitration Panel to settle disputes between a collecting society and a user. Section 51 of the proposed Ghana Copyright Act 2001 makes provisions for a Copyright Tribunal.

SSA must continue to supervise the activities of collecting societies to ensure that in management, and accountability they remain relevant in the discharge of their functions. In this regard, particular care must be taken to ensure that whenever the society is embedded in the national administrative body, supervisory mechanisms including judicial review are available to members and users alike.

III.VI Human Resources Human resource capacity in this very important area of the law is deficient. Lawyers and other policy personnel view intellectual property as esoteric and more imagined than real. There is little interest and it is not taught in most SSA faculties of law.²⁸ In the area of legislative activities, this has resulted in foreign dominated advisory services. Peculiar national experiences needs and opportunities are often not taken into consideration in law making. To move SSA forward, there must be a well-trained local personnel who are able to understand the goals of copyright law and its adaptation to local circumstances. How can an effective intellectual property policy be developed and implemented if there no competent and skilled local personnel.

III.VII Public Awareness Achieving public awareness and appreciation for copyright protection is a very important policy option. Lack of awareness predisposes people to believe that infringement is harmless. Part of the problem seems to be that people consider the concept of copyright strange. This is not true as all societies have long standing practices that at the minimum protects the moral rights of creators. SSA must therefore creatively enlighten its public as to the benefit of copyright protection. One good way of doing this is to undertake a study of the contribution of the cultural industry to the Gross Domestic

²⁸ Assessing Tanzania, Samuel Wangwe et al have this to say: ‘...extensive training is required to cause awareness of intellectual property laws, considering that until recently, Intellectual Property Law was not formally taught in the country: but now some aspects of IP have been introduced in the Law Curriculum at the University of Dar es Salaam’ ‘Country Case Study 9: Institutional Issues for Developing Countries in IP Policy-Making, Administration and Enforcement : The Case of Tanzania’p.5 The Report was commissioned by the Commission on Intellectual Property as a Background Paper. This is also the case for Uganda: ‘The Institutions that are involved in the teaching, administration and enforcement of IPRs are inadequately staffed and hence generally lack the institutionally capacity to execute their mandates. Makerere’s University Faculty of Law was the only academic institution cited as having a course on IPRs. But they do not have enough personnel to teach and offer training adequately. That is why the course is optional.’. See Wangwe et al ‘Country Case Study 9: Institutional Issues for Developing Countries in IP Policy-Making, Administration and Enforcement:: The Case of Uganda’ In Nigeria only 5 law schools teach intellectual property.

Product. Furthermore public enlightenment is very critical in the success of anti piracy identification devices such as banderoles and holograms presently in use in many SSA. Public enlightenment turns citizens into enforcement agents as they are led to make conscious decisions to only purchase legally identified originals.

III.VIII Regional Protection: Developing countries ought to take advantage of regional intellectual property groupings to foster copyright protection. Two of such groupings exist in Africa- The African Regional Industrial Property Organisation (ARIPO)²⁹ and the African Intellectual Property Organisation(OAPI).³⁰ ARIPO operates two protocols, the Harare Protocol on Patents and Industrial Designs and the Banjul Protocol on Trade Marks. The organization facilitates the grant of industrial property rights that are enforceable in member countries. At its Eighth Ministerial Council meeting in Malawi in 2002, it resolved to include copyright and related rights as part of its mandate. The African Intellectual Property Organisation (OAPI) had always covered copyright and related rights and is a more integrated system because it facilitates the acquisition of rights by rights holders, and its elaborated substantive law applies in all member countries.³¹ One area that these regional bodies can assist SSA is the provision of technical and human capacity. Moreover the access to the huge markets of these groupings for member States is also alluring. In deed the fact these bodies may eventually facilitate the realization of the African union is also a welcome development. It is our belief that countries such as Nigeria and South Africa should join one of these bodies. Their membership, given their size will further strengthen these bodies enhancing already vibrant trading relations.

An effective coordination of the activities of these bodies with regional economic bodies such as ECOWAS, and SADC in the removal of tariff and non tariff barriers of trade will ensure a bigger market for copyright goods which in turn will drive and stimulate creativity. If the removal of non tariff barriers by an effective intellectual property protection will be

²⁹ . The members are Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, Tanzania, Zambia, and Zimbabwe. Countries like Angola, Egypt, Eritrea, Liberia, Ethiopia, Mauritius, Namibia, Nigeria, the Seychelles and South Africa maintain an observer status. The organization was created in 1976 with its headquarters in Harare.

³⁰ . The members are Cameroon, Central African Republic, Republic of Congo, Cote d' Ivoire, Benin, Burkina Faso, Gabon, Mauritania, Senegal, Chad, Niger, Guinea, Guinea- Bissau, Togo, Mali and Equatorial Guinea. The organisation was created in 1977 with its headquarters at Yaounde, Cameroon

³¹ .See Annex VII of the Revised Bangui Agreement

the result of TRIPS if faithfully implemented then a necessary condition for intra SSA trade will be in place.

III.IX The Protection of Folklore: SAA need to deepen their protection of folklore. The copyright laws of all SSA contain provisions protecting the folklore of their country. Usually folklore rights are vested in the national government and exercised by the national copyright administrative body. Most of the legislation enable the copyright administration to permit the use of the folklore on the payment of a fee and on the condition that the moral rights of the folklore originating community is acknowledged.

Folklore is capable of being protected by regular intellectual property rights and mostly by *sui generis* legislation. Most SSA resort to the latter. Whatever the nature of protection, it is very underdeveloped in SSA due to a number of reasons principal of which is a lack of documentation and a clear policy direction of the protection. A few examples of the policy dilemma will suffice: What effect would protection have on creativity? Will it be enough to acknowledge the source and respect the integrity of the folklore in the way it is reproduced? Would monetary recompense through fees or extended monetary considerations be appropriate? Would it be enough if the originating communities are allowed access to the use of the copyrighted work as an exception or limitation? Furthermore a number of problems exist especially in multi-ethnic nations and intra-national ethnic groups. For example, what political arrangement would be the unit of protection? Jurisdictional problems of the latter would include deciding the beneficiaries of the protection. It may also be a problem in determining the works that would qualify for protection and those that lie in the public domain.

The demand for the protection of traditional knowledge, which includes folklore is a reaction against the misappropriation and transformation of the knowledge of indigenous people into goods and services protected by modern intellectual property rights thereby denying them access and the benefits thereof. For example the use of traditional knowledge by first world pharmaceutical countries to produce drugs protected by patents continues to generate controversy. In our particular context, it is possible that folklore can be transformed into a work subject of copyright protection, which in turn would make it difficult for the originating community to have access to it. This would be especially

traumatic if the folklore constitutes a critical source of information for that community. Inadequate protection and documentation may mean that a huge amount of knowledge is being wasted.

SSA must therefore confront this problem and develop their existing framework legislation.

CONCLUDING REMARKS

The foundation of all development is peace, good governance and stability. In addition, development must come from within to be meaningful. More often than not, aid of whatever sort including free copyright goods is paternalistic at the least and induces dependence not development. SSA must stop believing that they are helpless in the face of an unjust international intellectual property system. They need to confront their problems and come up with imaginative solutions. Each country must encourage a debate amongst a wide spectrum of stakeholders to fashion out policies that ensure that their intellectual property rights are in aid of their development.