

INTELLECTUAL PROPERTY & HUMAN RIGHTS

Understanding the implications of Uganda's IP reforms

What is intellectual property?

INTELLECTUAL property (IP) refers to creations of the mind, which include inventions, literary and artistic works, symbols, names, images, and designs used in commerce. Intellectual property rights (IPRs) are therefore the entitlements given to owners of intellectual property. These rights give the creator/inventor legal protection from competition so they can use or benefit from their creation exclusively for a specified period of time.

Examples of IPRs include:

- Copyright, for literary, artistic and scientific works;
- Related rights, for performances of performing artists, phonograms, and broadcasts;

- Industrial property, for scientific discoveries, industrial designs, marks and commercial names and designations;

These rights are specified in the Trade-Related Intellectual Property (TRIPS) Agreement. However, this Agreement also has provisions that balance these rights and with the interests of the users of the inventions in the broader society. It sets the minimum standards for the protection of IPRs as an incentive to encourage invention on one hand, and specifies limits and exemptions to these rights on the other.

Intellectual property and human rights

INTERNATIONAL human rights bodies are increasingly devoting unprecedented attention to IP issues, particularly in the way they relate to patented medicines; digital copyrights; technology transfers; economic, social and cultural rights; plant variety protection; and economic development. The current IP systems are privatising and commercialising science and creating inefficient, costly private monopolies.

This is contrary to the spirit of the TRIPS Agreement, which under article 7 requires that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and spreading of technology, to the common gain of producers and users of technological knowledge and in a way conducive to social and economic welfare, and to a balance of rights and obligations.

Human rights principles and mechanisms require that IP rules do not stifle access to essential goods for the welfare of society. These include: access to educational materials, affordable medicines and the preservation of the seed sovereignty for small farmers. In addition, human rights law calls for measures that respect, protect and fulfil the right to education and provide for the right to the enjoyment of the benefits of scientific progress and its applications

In spite of the strong IP regulation that the TRIPS Agreement contains, it recognises key human rights needs by allowing policy space for developing countries to protect them through what is referred to as the TRIPS flexibilities and other provisions. These flexibilities may be used to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.

The IP law reform process in Uganda

AS a low developed country (LDC), Uganda has a transitional period extending to 2013 to implement the general provisions of the TRIPS Agreement, and until 2016 in the case of provisions relating to pharmaceutical products. In preparation for full implementation, the country started reviewing its commercial laws to align them with the TRIPS Agreement in 2000. As a result, the Copyright and Neighbouring Rights Act and the Trademark Act were enacted in 2006 and 2010, respectively.

Other draft laws presently in the legislative process include:

- Industrial Properties Bill
- Plant Variety Protection Bill
- Trade Secrets Bill
- Geographical Indications Bill
- Competition Bill (2004)
- Counterfeit Goods Bill (2010).

Implications of the Industrial Properties Bill and the Competitions Bill for the right to access essential medicines



The Uganda Constitution (Objective XX) requires the State to take all practical measures to ensure the provision of basic medical services to the population including medicines.



The International Covenant on Economic, Social and Cultural Rights (ICESCR, Article 12) recognises the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health”. This particular article calls for ensuring that everyone has access to essential medicines without discrimination. Intellectual property should therefore not impend access to medicines.

THE Industrial Properties Bill is a proposed legislation that directly relate to access to essential medicines. While this Bill contains proposals that utilise some TRIPS flexibilities, it has gaps that compromise the substance and intent of some of the flexibilities, the objectives of the Uganda Constitution and the provisions of the ICESCR. Though the bill recognises the allowance for pharmaceuticals till 2016, it does not cater for any extensions that may arise.

For example, the Industrial Properties Bill unnecessarily requires Government to consult the patent owner – thereby giving them a chance to object – before exercising the “government use” provision, under which government may infringe on a patent to produce for its own use.

The bill also undermines the early entry of generic versions of patented medicines by restricting preparatory work to scientific research, leaving out regulatory approval and registration processes, meaning that generic medicines that tend to be cheaper will not enter the market as soon as the patent for the originator medicine expires.

It further requires applicants for a “compulsory license” to go through the lengthy court processes, yet procedures for granting such a licence should be simple and expeditious.

The Competition Bill under (section 43(6)b) links Intellectual Property issues with competition legislations by providing that the prohibition of certain anticompetitive agreements does not restrict the right of any person to restrain any infringement of intellectual property rights granted in Uganda or to impose such reasonable conditions as may be necessary for the purposes of protecting or exploiting such intellectual rights.

Implications of the Copyright and Neighbouring Rights Act and the Counterfeit Bill for the right to educational materials



The Uganda Constitution provides that the State shall promote free and compulsory basic education. In addition, the State shall appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible.



The ICESCR recognises the right of everyone to education.

THE Copyright and Neighbouring Rights Act, enacted in 2006, gives the author of an original work exclusive rights to reproduce, publish, and perform the work in public and to make adaptations of it throughout their lifetime plus 50 years after their death. The Act recognises the principle of “fair use”, under which one may produce, translate, adapt, arrange or transform copyrighted work for their private personal use. In addition, it caters for the educational needs

of visually impaired persons by exempting the transcribing into braille or sign language of copyrighted material for educational purpose of persons with disabilities.

However, the Act also contains provisions that undermine the right of Ugandans to access educational materials. For instance, the Act’s list of the works that are eligible for copyright includes, among others: articles, books, pamphlets, lectures, addresses, sermons and “other works of a similar nature”. All these are materials used in day-to-day education.

Under Section 5(1)(e), the Act broadly refers to “electronic data banks” without requiring (as the TRIPS Agreement does) that the selection or arrangement of such data banks should constitute an original creation for them to be granted copyright protection. This means that a lot more databases that would have been available as resources for teaching, learning and scientific research will be copyright protected and therefore not readily accessible and usable

Under Section 46, the Act further outlaws importation of

copyrighted work into Uganda except with the permission or licence from the holder of the copyright in Uganda. This restriction does not make sense if the copyright holder has already marketed the copyrighted material in the country of import, and effectively denies Ugandans, including government, the opportunity to import cheaper educational materials from other countries.

The Counterfeit Goods Bill on the other hand, has one of its objectives stating to the effect that trade in counterfeit goods

that infringe upon protected intellectual property rights is prohibited. In essence, it does not recognise the flexibilities in the TRIPS Agreement that allow goods to be legitimately produced under certain circumstances without the authority of the intellectual property owner, for example under “compulsory licensing”, “government use order”, “fair use clauses” and Parallel Importation provisions. Further, by referring to the “successor in title, a licensee or agent” of the IPR holder, the bill strangely extends rights to even those whose IPRs are not registered in Uganda.

Implications of the Plant Variety Protection Bill for the right to food



The Uganda Constitution provides for food security and nutrition. It requires the State to take appropriate steps to encourage people to grow and store adequate food; establish national food reserves; and encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State.



The Uganda Constitution further requires government to endeavour to fulfil fundamental rights to social justice and economic development and, in particular, food security.

THE Plant Variety Protection Bill has draft provisions that will entrench the rights of breeders and companies and at the same time curtail the rights of small farmers to exchange, save and breed new varieties using hybrid

seeds. Breeders are usually the giant companies that pay research institutions to propagate new hybrid seed varieties with improved characteristics, such as yield performance, appearance, early maturity, and disease and drought resistance.

If the bill is passed in its current form, the protection of breeders’ rights is likely to further increase the availability of hybrid seeds on the market. As this happens over time, certain forms of traditional seeds will become scarce, threatening the biodiversity of the country as well as the financial viability of farming for the rural poor.

This is contrary to the concept of farmers’ rights as developed by the UN Food and Agricultural Organisation (FAO) arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity. The purpose of these rights is to ensure full benefits to farmers and support the continuation of the farmer’s contributions which plant breeder’s rights may not address.

The role of the media in shaping IP reform and upholding human rights



Alan L. Otten, Wall Street Journal: “Well-done investigative reporting produces public outrage (or policymaker outrage) that forces new regulations and laws or tougher enforcement of existing ones”



Henry Arnold Waxman, U.S. Congress: “Policymakers’ ability to bring about change often depends on whether and how the press reports the issue”

IT is unrealistic to expect government leaders to be able to promote reform by themselves. As a watchdog of society

and instrument of public accountability, the mass media has a major role to play in promoting good policies and building decent societies. Cases of reforms that have been initiated, halted or adjusted in different parts of the world as a direct result of articles or commentaries in the media are well documented. This is just as true in the area of trade and IP policies as it is in other areas.

The media is the primary source of information and news for most people across the globe, and plays a key role in shaping public opinion. By drawing the attention to behaviour that is generally perceived as acceptable and exposing what is unacceptable, media can raise public awareness, activate values, and generate outside pressure from the public and international community against bad policies and practices.



David Nexon, health specialist:
 “The media senses the public is interested in or unhappy about something and so they write about it. Then the public starts telling pollsters and writing to congressmen that there’s a big problem. It takes the media to legitimate an issue as an issue of public concern.”

As far as IP issues are concerned, examples of what the media may do include:

- Build their own capacity to understand IP issues, which tend to be technical and dynamic. It is important to understand the WTO system and how it functions; the ongoing negotiations; which country or region is taking which position on an issue on the table and why it is taking such a position; and to assess which position is in the best interest of Uganda and the region.

- Ensure that negotiating positions and decisions taken by government leaders are constantly scrutinised, and that when top leaders take good decisions they get strong support from the media.
- The media should also follow ongoing policy and legislative processes and report and evaluate them at every stage.
- generate community support to promote social and economic change across the country, which the media is best positioned to generate
- Persuade the public and parliament to demand that the President and cabinet act in public and national interest.
- Empower ordinary citizens through civic education, information and mobilisation to participate more directly in the discussion and debate of ongoing IP reforms and their impact the different aspects of social life.

Conclusion



THE IP and commercial law reform process is both an opportunity and challenge; an opportunity to promote technological progress while also protecting human rights, but also a challenge because of an unhealthy combination of lack of sufficient knowledge at the population level and a weak negotiating position vis-à-vis other countries and negotiating blocs. The current laws and draft laws are not even taking advantage of the limited opportunities available

through the TRIPS flexibilities, and a lot is at stake, including public health, food security and education. How well media influences the ongoing reform process will depend, among other things to their own capacity to understand, interpret and inform their audiences about all important developments in the IP and commercial law reform process.

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