

INTELLECTUAL PROPERTY IN AFRICA

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Introduction

By intellectual property, we understand creations of the mind that include, among other things, inventions, literary and artistic works, but also symbols, names, images, drawings and designs that are used in commerce.

It can be presented from two perspectives: industrial property on the one hand, consisting of inventions (patents), brands, industrial drawings and designs, and geographic indications; and copyright on the other hand, comprising of literary and artistic works such as novels, poems and plays, films, musical compositions and art works composed of drawings, paintings, photographs and sculptures, as well as architectural creations. Rights relating to copyright are those held by performers over their performances, producers of audio recordings over their recordings and broadcasting organizations over their radio and television broadcasting programmes.

Copyright refers to all rights enjoyed by creators over their literary and artistic works. Works protected by copyright include literary works, databases, films, musical compositions and choreographic works, artistic works such as paintings, drawings, photographs and sculptures, architecture, and advertising creations, geographic maps and technical drawings.

The term appeared in 1967 with the establishment of the World Intellectual Property Organization (WIPO) and only became commonplace in the last few years.

Historical background

One of the first forms of conceptual monopoly granted in Europe goes back to the 6th century BC with the Law of Sybaris, an ancient Greek city in the South of Italy. This law related to the invention of recipes. The person who held a recipe had to reveal it or make it known to the public in exchange for a monopoly or patent that lasted for a limited period of time. With the arrival of liberalism and mechanization in the United Kingdom, the first copyright and patent laws really came about in the 17th and 18th centuries.

With regard to intellectual property rights, the public domain is a status under which fall intellectual assets such as works and inventions for which it is no longer necessary to request any licensing at the end of their term of protection. They are then said to have « fallen into the public domain » or more neutrally « entered into the public domain ».

When applied to music, every interpretation is an intellectual asset that is distinct from the interpreted work. Patented inventions are protected for twenty years starting from the date of application. Brands are protected for ten years starting from the date of application and can be renewed indefinitely.

The first industrial patent was granted in 1421 to the Italian architect and engineer Filippo Brunelleschi for inventing an improved method of transporting goods by boat.

The *Parta Venezia* in 1474 marks the first true appearance of intellectual property rights in modern terms relating to a patent. In France of the « Ancien Régime », the author obtained an operating monopoly in the form of a royal « privilege » that could both apply to an invention and an artistic design. Upon notification of a royal censor, this monopoly was granted by letters patent and published as a foreword.

Foundation

Various forms of intellectual property are put in place by advancing the will to favour technological progress and the emergence of new works. However, since a design is *cumulative*, new technology is only possible thanks to innovations that have come before: a work of art is linked to other works that had an influence on its designer; a scientific discovery relies on previous discoveries. According to Newton: « *If I have seen further [than certain other men] it is by standing upon the shoulders of giants* ».

Protecting works of the mind can have contradictory effects. It can:

- stimulate research by giving assurance to the researcher that the fruits of his work will go to him, as whoever wishes to take advantage will owe him something;
- accelerate and specialize research, as only the first person to register an invention would be able to have his intellectual property recognized; it is therefore essential to work as quickly as possible and to do so in an area where the risk of being overtaken by a competitor is as low as possible;
- slow down research by enabling the discoverer to prevent another discoverer to push it further without his permission;
- impose the diversification of research areas when a competitor has already blocked a more obvious area; this is more costly but can open up new tracks;
- consume common resources to identify discoveries that are worth being protected as opposed to those that are not, possibly to determine to which type or degree of property or level of remuneration they are entitled depending on the significance of their design, and also to respect the property.

In practice, intellectual property rights are based on finding a balance between encouraging the creation of modern innovators and protecting the ability of future designers to use this design. This arbitrage is quite clearly political and the manner in which current or expected intellectual property rights are distributed between political agents will have a direct impact on the adopted legislations and on the way in which they will be applied in reality.

Author's rights

Author's rights refer to the exclusive privileges a creator has over his original work of the mind. They consist of moral and proprietary rights.

Proprietary rights make it possible for the author to be remunerated every time his work is used. They are only granted for a limited term that varies from country to country and according to the nature of the work. At the end of this term of protection, the work enters into

the public domain and can be freely used by everybody. The author's rights give the exclusive right over the publication, reproduction, adaptation and translation terms of the works for a given period of time. Their fundamental role is in fact to enable the author to be remunerated for his work by protecting him from unauthorized copies, including piracy.

Moral rights are essentially linked to the author's personality and refer to the right to claim authorship of the work, the right to decide on the moment and terms of publication, the right to be opposed to any distortion or mutilation of the work while respecting the work, the right to be opposed to any use of the work that is likely to harm the author's reputation or honour. In countries like France, these rights also include « the right of withdrawal », i.e. an author has to right to request that his work be withdrawn from circulation in exchange for compensation from those persons involved in its distribution who would moreover enjoy the right of priority in the event of the said work being redistributed.

Contrary to proprietary rights, these moral rights are inalienable, perpetual and imprescriptible: an author cannot transfer them. Since they are perpetual and do not expire they can be inherited but not waived.

Copyright

Copyright or the right to copy is the concept equivalent to the author's right applied by common law countries. Copyright follows the protection of proprietary rights more closely than that of moral rights. However, since 164 countries are members of the Berne Convention for the Protection of Literary and Artistic Works, the author's rights and copyright have largely been harmonized, and registering the work with an accredited body is generally no longer necessary in order to enjoy legal protection.

Patents

In the United States, the origins of patents go back to Thomas Jefferson who took part in establishing the *US Patent and Trademark Office* (USPTO). He defended a restrictive vision of the notion of patent by being particularly opposed to patenting ideas. The scope of patents in the United States is particularly wide. It is possible to patent everything that can be realised by man. As a result, there are patents for software or commercial methods.

With regard to industrial property, the patent relating to the patented invention confers an exclusive operating right to its holder for a limited term and over a defined territory. In return the invention must be revealed to the public. The aim of the patent is to avoid having to resort to trade secrets: the innovator keeps his innovation an absolute secret (the exact formula of Coca-Cola, for example) and has a monopoly for as long as a competitor does not come up with the same innovation. In terms of the trade secret, the patent enables the applicant to protect himself against another person making the same discovery in exchange for the immediate disclosure of the discovery.

The patent therefore represents a mode of arbitration: revenue from the temporary monopoly granted to the inventor provides him with the necessary motivation to innovate, whereas the obligation to disclose protects against other innovators wishing to quickly take advantage from the patented innovation. The essential terms of the patent are its term, extent and depth.

Legal criteria of the patent

The term, extent and depth are normative characteristics that are decided upon by the lawmaker. In law, attention is focused in particular on the conditions for obtaining and exercising a patent. Firstly, the patent protects a manufacturing process and not a simple idea. In support of his application, the applicant must therefore be able to present a real manufacturing process of the product.

Secondly, the process must follow three essential criteria: novelty, where the process has not been brought to the attention of the public in any way whatsoever; inventiveness, where the process does not appear technically evident or well-known to a suitably qualified person in the field and; applicability, where the process must be the object of an industrial application, which excludes crafts or works of art.

Criticisms of intellectual property

As with all notions of property, they are disputed. It is necessary to distinguish industrial and commercial property from cultural property as disputes are different and do not stem from the same persons.

The following can be mentioned in particular:

- criticisms of brands, which are characteristic of anti-globalist movements. The most famous work in this regard is *No Logo* by Naomi Klein.
- criticisms of patents, particularly in areas such as patents relating to software, culture or molecules of medication. The existence of such patents is blamed for preventing people in the third world, especially in Africa and Asia, from having access to AIDS treatments.
- criticisms of software copyrights issued by large IT companies such as Microsoft. On the other hand, there are proponents of free software who defend the copyright and are opposed to software patents. Copyrights should increasingly take into account the "designs-tools" whose state of originality is highly questionable. Instead, they can be regarded as utilitarian objects.
- criticisms of the term "intellectual property": it was considered ambiguous in particular by Richard Matthew Stallman who wrote an essay on the matter where he clarifies his position and fights against, among other things, the meaning of the term. He condemns the fact that the term "property" reminds one of a physical property whose legislation is very different, affirms that the term represents a set of disparate laws whose objectives and functions are too divergent (even conflicting) to be grouped together, and recommends that each property be considered separately (copyright, patents) and that the term "intellectual property" be dropped, especially in the name of the World Intellectual Property Organization. In fact, part of the free software community as well as some free software actors, reject this term and follow Stallman's point of view in this regard.

Intellectual property is necessarily destined to being regularly questioned and re-oriented according to the times while knowing full well that, by definition, it is supposed to represent solutions to two contradictory objectives, namely:

- encourage creation by means of special privileges granted to the creator and temporary barriers to competition;
- realise maximum value of creation, meaning that it can be implemented and utilized as widely as possible by the highest possible number of people.

Intellectual property rights in Africa

In principle, intellectual property is a notion that aims to protect and promote creativity and innovation with the objective to stimulate progress and economic development. Even though this legal concept seems to be well accepted in the West, in the sacrosanct name of a free market, intellectual property rights (IPR) in Africa and in most developing countries (DC) have difficulty being relevant in the economic space, despite international agreements.

Even though intellectual property rights, based on the founding principle of private and exclusive property, are plausible and justifiable for every country, whether it is from an industrial or commercial perspective or the perspective of public health and custom revenue, the question is raised as to whether they really benefit the consumer. In other words, does the development of IPRs benefit the users of goods and services?

In most developing countries where economies are generally extroverted, i.e. those that are mainly dependent on outside assistance, the use and role of intellectual property are the subject of lively and open debates. Indeed, a number of voices are regularly being heard denouncing the development and impact of intellectual property rights in the world. It is said that IPRs are responsible for maintaining the technological gap between producing countries, most of which are situated in the West, and consumer or developing countries. Despite pressures from multinationals and large industrial monopolies, the criticisms and controversies that are fuelling the debates on IPRs in developing countries are being noticed, albeit slowly, by international regulatory authorities. The world is slowly realising that the development of IPRs has a treacherous impact on consumers from the South and the fragile economies of the developing countries. It is thus that the Agreement on Trade-Related Aspects of intellectual property rights (TRIPS) relating to intellectual property in international trade, authorizes poor States, in certain conditions, to limit exclusivity rights that are guaranteed by industrial or cultural property titles.

Intellectual property rights in Francophone Africa

While being aware of the fact that « cognitive capitalism » has been a strategic economic challenge for a number of years and fearing that the adoption of intellectual property rights by countries domestically would probably fail, 19 Francophone countries signed the Bangui Agreement on the creation of the African Intellectual Property Organization (AIPO) on 2 March 1977. The aim of this Agreement was to harmonize national legislations on intellectual property. For each of the member States, AIPO with its head office in Yaoundé, Cameroon, and local divisions, serves as a national body that is responsible for the protection of intellectual property. For opponents of IPRs, AIPO is really a kind of appendix to the international popularization system and the development of intellectual property.

Where innovation and creativity generate wealth and economic growth in the West - a consumer society par excellence - the development of IPRs in Africa has more harmful consequences as it is characterized by predation and the frantic exploitation of its enormous

natural wealth that does not or hardly benefits the local people. The most important consequence is the alienation of our economies and the inexorable destruction of the local industrial fibre, already badly affected by the dumping of imported goods and other endogenous factors. In Africa and the developing countries in general, strengthening IPRs is done solely for the benefit of the northern industries most of which placed research and development at the centre of their expansion and conquest strategy of new markets. Western companies hold 97% of the most widely used industrial patents and commercial brands in the world. Africa is nevertheless one of the main sources of raw materials used in a number of manufacturing and innovation processes.

The development of IPRs hampers the transfer of intellectual resources from North to South; blocks access to goods produced by research, destroys traditional agricultural and medical know-how and introduces money-based discrimination. In most of the Francophone African countries, where the economies' advanced state of neglect greatly aggravates the fragility of the consumer who does not enjoy any legal status, IPRs are preventing the development of competition, which could cause consumer prices to decrease. Moreover, IPRs force the States, under the terms of international agreements, to mortgage their food sovereignty by adopting legislations to the benefit of large private monopolies. This very often happens to the detriment of aid to local agriculture. Legislations and national policies on research in all African countries make only marginal space for the promotion and enhancement of local scientific and technological outcomes. Where some laboratories are branches, most laboratories on the continent are financed by large European or North-American laboratories.

Art and Culture in Cameroon

Law n° 2000/011 of 19 December 2000 on Copyright and Neighbouring Rights governs copyright and neighbouring rights in Cameroon.

A work inspired by "folklore" comprises of elements that are borrowed from traditional cultural heritage of the country. "Folklore" shall mean all productions involving aspects characteristic of traditional cultural heritage, produced and perpetuated by a community or by individuals who clearly reflect the expectations of such community, comprising particularly folk tales, folk dances and shows, as well as artistic expressions, rituals and productions of popular art.

The right of drawings and industrial designs in Cameroon shall be governed by the Bangui Agreement, as is the case in the sixteen countries of the African Intellectual Property Organization (AIPO). A drawing is defined in the text as the entire collection of lines or colours and as a design of all plastic shapes that are associated or not with lines or colours provided that this appearance or shape gives the industrial or traditional product a special look and can be used as a design for manufacturing an industrial or traditional product. However, it must be mentioned at this stage that there may be similarities between a new drawing and a patentable invention. If the components of the drawing and invention are inseparable, protection is only envisaged in terms of invention patents or utility models. It must also be mentioned that the industrial drawing or design can be protected as a work of art in accordance with the author's rights.

The distinction between the author's right which protects the creator above all else and the copyright which applies to the investor is a reality. The first has authority to protect the

financial risk-taker whereas the second protects the one who takes the risk to create. The work is regarded by the first especially as a product that can be commercialized, whereas the second sees it first as a product of the mind.

The protection criteria are as follows: an industrial drawing or design only enjoys protection if it is new and does not go against public policy and morality. An industrial design is new if it has not been disclosed anywhere in the world by publication in tangible form or by use. However, the novelty shall not be denied if the industrial drawing or design was the subject of disclosure resulting from an obvious violation in relation to the applicant or the fact that the applicant or his predecessor in title has displayed it at an official or officially recognized international exhibition.

Moreover, the industrial drawing or design must not be contrary to public policy or morality. The exploitation of the said industrial drawing or design is not considered contrary to public policy or morality merely on account of it being prohibited by a legal or regulatory provision.

The industrial drawing or design must be registered in order to be protected. In that regard, the applicant shall file it with the Organization or with the Ministry responsible for industrial property, or send it by registered mail with a request for acknowledgement of receipt. His application must be accompanied, among other things, by a document proving payment of the prescribed fees to the Organization, an unstamped private power of attorney if the applicant is represented by an agent, a mention of the type of product for which the design or drawing is to be used, and two identical copies of a graphic or photographic representation of the design or drawing.

The Organization shall examine whether the above-mentioned conditions of form have been met, and whether the prescribed fees have been paid. If necessary, the irregularity shall be notified to the applicant or to his agent, who shall be invited to put the documents in order within a period of three months following the date of notification.

With regard to the term, it must be specified that the certificate of registration of an industrial design or drawing shall expire at the end of the fifth year following the filing date of the application for registration.

The creator of an industrial design or drawing shall have the exclusive right to exploit the said design or drawing and to sell or cause to be sold for industrial or commercial purposes the goods in which the design is incorporated. This right enables him to prevent third parties from making use of the industrial design or drawing without his consent.

However, the registered industrial design or drawing shall not be binding on third parties who, at the time of filing of the application for registration, were already exploiting the said design on the territory of one of the member States or had taken the necessary steps with a view to exploiting it.

The patent in Cameroon

The patent confers an exclusive right on the invention. Patent rights in Cameroon are governed by the Bangui Agreement, as is the case of all member countries of the African Intellectual Property Organization. It means that the protection granted to an invention is not national but regional.

In order to patent an invention, it must be new (art. 2), involve an inventive step (art. 4), and be considered industrially applicable (art. 5). The invention is new if it has not been disclosed before the first patent application. It involves an inventive step if a person having knowledge in the art has not found it spontaneously. An invention shall be considered industrially applicable if it can be made or used in any kind of industry.

Summary of Cameroon's legislation on copyright

Under article 13-1 of Law n° 2000/11 of 19 December 2000, authors of any works of the mind shall enjoy, by the mere fact of its creation, an exclusive incorporeal property right in the work which shall be enforceable against all persons. Copyright shall include attributes of a proprietary and moral nature.

Under the terms of article 14 of the Law of 19 December 2000, the attributes of a moral nature confer to the author the right to disclose his work and to determine the disclosure process and lay down the conditions thereof; to claim authorship of his work; to defend the integrity of his work by opposing any distortion or modification of his work; to halt distribution of his work and to make alterations. According to article 15 of the above-mentioned Law, the attributes of a proprietary nature shall give an author the exclusive right to exploit or the authorization to exploit his work in any form whatsoever and to obtain monetary advantage.

Policy on Copyright Protection in the sub-region and Cameroon

AIPO's objective is to contribute to ensuring the protection and publication of industrial property titles, making the legal space attractive to private investments by creating conditions that are favourable to the effective application of intellectual property principles, encouraging creativity and the transfer of technology, implementing efficient training programmes to improve the capacity of the AIPO system so as to offer quality services, creating conditions for national companies that are favourable to enhancing research outcomes and to exploiting technological innovations.

In Cameroon, intellectual property rights apply more to digital musical works than to art and cultural works. This branch of intellectual property seems to be particularly fragile due to forgery and the piracy of digital works. This situation is extremely worrying to the government of Cameroon and its international partners. Following the illegal and fraudulent exportation of art works – often seemingly orchestrated with the complicity of port authorities - intellectual property rights have become a matter of public security in the 16 member States (Benin, Burkina Faso, Cameroon, Central-African Republic, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal, Chad and Togo). The technological development branch of the Ministry of Industry, Mines and Technological Development is tasked with representing Cameroon in the organization. The Ministry of Justice, the Copyright Office (SOCAM, CMC, etc.), the Customs division, the Police, the legal national institute and members of the industrial, pharmaceutical, digital, musical and cinematographic community are also involved in protecting intellectual property rights in the sub-region in general and in Cameroon in particular.

For a number of years, the government of Cameroon has drawn attention to the safety of food and pharmaceutical products as well as to the protection of the environment with the objective to adopt the experts' arguments according to which the correct application of intellectual property rights is an important requirement for good economic growth and development. According to these experts, the rights conferred by patents, brands and copyright encourage

local companies, artists and industrialists to create, to favour competition and to stimulate productivity.

On 13 September 2009, the day on which the African Intellectual Property Organization celebrated its 47th anniversary, officials from the organization in collaboration with Cameroonian officials observed and confirmed that the protection of works does not drive many Cameroonians away. The gathering of these regional officials indicated that there are many researchers in Cameroon's ministries. However, they do not always make an effort to have their works protected within the organization. During this meeting in Douala, AIPO officials were disappointed by the situation and called on all creators to move closer to the structure whose general objective is precisely to be involved in the development of the organization's member countries by highlighting all the opportunities presented by industrial and intellectual property.

Cameroon and the different intellectual property conventions

In terms of literary and artistic property, Cameroon is a member of International Treaties and Conventions such as the Berne Convention for the Protection of Literary and Artistic Works (since 1964), the Universal Copyright Convention (since 1973), the Agreement on Trade-Related Aspects of intellectual property rights of the WTO (since 1995), the Bangui Agreement of 2 March 1977 on the creation of the African Intellectual Property Organization (revised on 24 February 1999), the Paris Convention of 20 October 2005 on the Protection and Promotion of the Diversity of Cultural Expressions.

Penalties

In case of violation of or threat to violate the rights provided in this law, the natural persons or corporate bodies or their legal representatives who own such rights, may request a judicial police officer or a bailiff to establish the said infringements and, if need be, seize, on the authorization of the State Counsel or competent judge, the forged copies, the illegally imported copies and objects and the equipment used or to be used for performance or reproduction, and set up to commit such forbidden acts. Works, performances, phonograms, videograms and programmes by Cameroonians shall be protected by this law.

The offences relating to forgery and similar offences (imports, exports, reproductions, etc.) referred to in Sections 80 and 81 shall be punishable by imprisonment of from 5 (five) to 10 (ten) years or a fine of from 500,000 to 10,000,000 CFA francs or by one of the two. The penalties provided for in this section shall be doubled where the offender is a partner of the owner of the infringed right.

The authorities responsible for the application of Law n° 2000/11 of 19 December 2000 relating to copyright and to rights in Cameroon are judicial police officers, bailiffs, the State Counsel, the President of the Civil Court, the Minister in charge of Customs, the Minister in charge of Culture as president of the National Anti-piracy Committee.

There is no court specialized in matters of copyright and intellectual property rights, but in terms of borders, application of the Law is provided for by article 90 of Law n° 2000/11 of 19 December 2000. In fact, where the owner of a copyright or neighbouring rights suspects

imminent importation or exportation of goods that infringe his rights, he may petition the Minister in charge of customs or the president of the court to request the customs authorities to suspend the free circulation of the said goods (article 90(1)).

Awareness campaigns in Cameroon

Awareness campaigns are organized by the anti-piracy committee. There is no information available today on the promotion of legal exploitation. Information on associations and organizations in terms of awareness is obtained from activities by the Association Culture Mboa.

Capacity building, training, the creation of specialized services and intersectoral groups, the creation of a National anti-piracy committee placed under the authority of the Minister of Culture who assists artist groups in their fight against piracy are some of the initiatives launched by the government.

Contact details to get further information on the protection of intellectual property in Cameroon can be obtained from Mr Binam Bikoi Ruben of the Association Culture Mboa, the SOCADAP (Collective management organisations of copyright), SCAAP (Civil Society for audiovisual and photographic art), SOCILADRA (Civil Society for Literary and Dramatic Art).

Conclusion

In principle, intellectual property is a notion that aims to protect and promote creativity and innovation with the objective to stimulate progress and economic development. It represents all exclusive rights granted in terms of intellectual creations. Its first branch is the Literary and Artistic Property applicable to works of the mind and consisting of copyright and neighbouring rights. The second branch of intellectual property is industrial property. On the one hand, it consists of utilitarian creations such as the patent and plant variety rights, and on the other hand, of distinctive signs such as the trademark, domain name and label of quality. Since the Bangui Agreement of 2 March 1977 revising the Agreement of Libreville, the AIPO is currently made up of 16 member States. In Cameroon, the government has adopted the experts' arguments according to which the correct application of intellectual property rights is an important requirement for good economic growth and development. However, officials in the organization have observed that creators of art works do exist but that they do not approach the structure to highlight the opportunities presented by industrial and intellectual property.

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