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Public and Private Institutions in the Administration of Intellectual Property Rights in Kenya

Abstract

The intellectual property rights system in Kenya may be termed as a recent development in comparison to the systems in the OECD countries. The IPR systems in developing countries are modelled along those of the OECD countries even though the former are more of consumers than creators of the IPRS that they seek to protect. There have been no conclusive studies to show the benefits of strong IPR protection for developing countries but this has not stopped the enhancement of the existing regimes in countries with limited intellectual property industries. Whether or not to protect intellectual property is no longer an issue especially with the TRIPS Agreement which makes it mandatory for all WTO member states to have the minimum standards of protection. One of the main problems that several developing countries face is lack or limited institutional capacity to implement the existing laws. The implementation of intellectual property rights requires clear policy and legislative framework as well as an efficient administrative and enforcement structure. Several developing countries are in the process of developing IPR systems that comply with the international standards of intellectual property protection. Kenya has in the last five years amended the existing laws to conform to the minimum requirements set out by TRIPS. The challenge however lies in the institutional framework required to implement these laws. Strong institutional structures are not only important in the administration of IPRS but are also the key to the informed and successful negotiations on trade and IPRS at the international level. The main purpose of this paper is to critically analyse the public and private institutions and their role in the administration of IPRS in Kenya. The paper further seeks to establish how the existing framework may be used to foster economic and cultural development in the country.

Introduction

The efficient protection and administration of IPRs has become central in the global economy especially with the advent of the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). For a long time the emphasis was on the legal instruments. The developing countries were under constant pressure to ensure that their laws were in conformity with the minimum requirements of the TRIPS Agreement.¹ The focus is now on the institutions that are mandated to implement the various legal provisions at national level. Although the international regime is harmonised, the implementing institutions vary from country to country as well as

¹ When Kenya was up for review by the WTO TRIPS review Council in 2001, the review dealt with the various laws in place and whether or not they were in conformity with the TRIPS Agreement. Nothing was raised on the issue of the institutions that are required to implement the laws. The same situation pertains for other developing countries. According to the report by the IPR Commission, developing countries were able to complete most of the legislative reforms required by the TRIPS Agreement. See Lsesti Mart and Pengelly Tom, (2002) Study Paper 9 “Institutional Issues for Developing Countries in Policy Making, Administration and Enforcement.”

from industry to industry.² The institutions that govern copyright and related rights are unlikely to be similar to those that deal with patents and other forms of industrial property. These institutions are either public or private. The main institutions that deal with industrial property tend to be public organisations situated within government ministries. Copyright administration can either be within the public realm or by specialised institutions that are created by the right holders within the industry.³

The success of any IP system depends on the institutional capacity and efficiency. Lack or limited resources within developing countries has greatly affected the administration and enforcement of IPRs in these countries. Countries like Kenya are still grappling with basic issues such as poverty, health and sanitation and administration of IPRs more often than not take the back seat. The recent years have however seen a major shift towards the IPRs. This is a common trend in several developing countries and often aided by organisations such as the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) to name a few. These offer technical assistance and training to personnel from the various IP Institutions.

The author shall in the following paragraphs undertake a critical analysis of the existing legal and administrative structure in the field of intellectual property rights in Kenya and their role in the economic and cultural development in the country.

Historical Outlook

Prior to the colonial era, the communities in Kenya had their own legal systems. These indigenous systems worked well before the arrival of the colonial powers. At the advent of colonialism, the main colonial powers, England assumed that these systems were not workable and they were replaced by their own legal systems and structure. The traditional and indigenous systems were made redundant and would only apply in matters that were of little or no consequence to the colonial regime.⁴ Anthony Allot clearly captured this in the following;

In the pre colonial era indigenous legal institutions were evolving, more rapidly than is sometimes appreciated, on a tribal or local basis. Each was autonomous, though there was some cross-cultural influence and the laws of macroethnic groups tended to keep their similarity. The laws were unwritten, except where Islam and the law of the sacred texts had intruded...Although deriving mainly in theory from ancient custom, in practice the indigenous laws relied on the contributions of legislation by state, tribal, or local authorities

² Brousseau Eric and Bessy Christian (2005) “ Public Institutions in the Governance of Intellectual Property Rights” In Andersen B (ed) *Intellectual Property Rights; Innovation, Governance and The institutional Environment*, London Edward Elgar Publishers.

³ This will also depend on the country within which the institutions are located. In most of the French Speaking Countries in Africa, the collective management societies are mainly state run while in the English speaking countries in the same region, the collecting societies are mainly private organisations with the exception of Malawi and Tanzania.

⁴ For more comprehensive reading on the evolution of law in Africa, see Allot, Anthony N (1996) “The Future of African Law” in Kuper. H and Kuper L (eds.) (1996), *African Adaptation and Development*, University of California Press. Pp.216-240

and on judicial formulation by adjudicators or arbitrators for many of their detailed rules and for the modification of rules to suit changing circumstances.⁵

The colonial regimes failed to recognise these systems for various reasons; First, the laws in most of the communities did not exist in written form save for the communities that had a strong Islamic influence.⁶ Second, they did not understand the customs and cultures of the people they imposed their legal systems upon and did not take time to learn and adopt the relevant legal structures. They relegated the customary laws for secondary issues that arose among the communities. This had a negative impact on the traditional legal systems which have since been abandoned or used very rare cases. This had a bearing on the kind of systems and institutions that would eventually be put in place for the administration and enforcement of Intellectual property rights.

Intellectual property laws, like all other laws in Kenya were inherited from the colonial regime.⁷ This is courtesy of the 1897 reception clause which extended the application of common law and equity as well as the statutes of general application to then Kenya Colony. The colonial regime totally ignored the existing customary laws and practices. The laws were clearly meant to protect the interests of the British IPR owners within the colony. A brief look at the development of patent law proves this point.

The Patent system in Kenya was tied to that of the United Kingdom. One could only get a patent in Kenya if the patent was already granted by the UK patent office. The Kenyan patent was granted by the UK office. This means that there was no investment in institutional capacity in Kenya as all the work was done in the UK. The system proved too expensive for local inventors and innovators. Although the first patent in Kenya was granted in 1932, it was not until 1989 when the Kenya finally acquired its own patent system. The passing of the Industrial Property Act and the establishment of the Kenya Industrial property system heralded a new era for Industrial property rights in Kenya.⁸

The copyright system was also inherited from the colonial era. The 1911 UK Copyright Act was enacted throughout the British colonies including Kenya through various Orders in Council. The 1911 Act came into force in the protectorates in 1912. The Act was replaced by the UK copyright law of 1956 and subsequently replaced by the post independence copyright Act of 1966.⁹ The provisions of the 1966 Act were similar to those contained in the 1956 UK copyright Act. Several amendments were made to the Act with the most significant being in 1975, 1989 and 1995. The 2001

⁵ Allot, Antony N, *The Future of African Law*, in Kuper and Kuper, pp 216-240 as quoted by Endashaw, Assafa (1996) *Intellectual Property Policy for Non-Industrial Countries* Dartmouth Publishing. Pp. 146-160.

⁶ Examples are the Hausa in Nigeria, and the Banjuns along the East African Coast. Ethiopia and Eritrea had a written tradition although they were free from Islamic influence.

⁷ For further reading on the history and development of legal systems in Africa, see Allot, Antony N, *The Future of African Law*, in Kuper and Kuper, pp 216-240 as quoted by Endashaw, Assafa (1996) *Intellectual Property Policy for Non-Industrial Countries* Dartmouth Publishing. Pp. 146-160.

⁸ Kingarui Joseph (1989) "Towards a National Patent Law for Kenya", in Juma Calestous and Ojwang J.B (eds.) *Innovation and Sovereignty The Patent Debate in African Development*, Nairobi, Acts Press

⁹ See Chege J.W.(1978) *Copyright Law and Publishing in Kenya*, Nairobi, Kenya Literature Bureau, Endashaw Assafa (1986) *Intellectual Property Policy for Non industrial Countries* Dartmouth Publishing 146-160, Sihanya Bernard (2003) Ph.D Dissertaion, Stanford University.

Act eventually replaced the existing legislation with the main aim of ensuring that copyright protection was at par with international standards. The institutional framework was not elaborate as there was no copyright registration and the duties were delegated to one officer within the Department of the Registrar General.

Institutional framework

The institutional framework involves both the legal and administrative/regulatory framework. The laws lay the basis upon which the administrative and enforcement framework can operate within. Part II of the TRIPS Agreement sets out the minimum standard for the acquisition and maintenance of intellectual Property rights within the member states. Kenya being a member of the TRIPS Agreement has tried to ensure that it is TRIPS compliant. The emphasis has been on the amendment and enactment of new laws.

Intellectual Property Laws in Kenya

Kenya has several legislative instruments on the protection of Intellectual Property Rights (IPRs). These include the Copyright Act No 12 of 2001, the Industrial Property Act No.3 of 2001, the Trade Marks Act Cap 506 of the laws of Kenya and the Seeds and Plant Varieties Act. These Acts are administered by three different institutions with separate and distinct parent ministries. The Industrial Property Act and the Trade Marks Act are administered by the Kenya Industrial Property institute (KIPI) which falls under the Ministry of Trade. The Kenya Copyright Board (KCB) is currently under the office of the Attorney General and was recently delinked from the Department of the Registrar General.¹⁰ The Kenya Plant and Health Inspectorate is in charge of the Seeds and Plant Varieties Act which is within the ambit of the Ministry of Agriculture. The decentralisation of these administrative functions has been criticised by various commentators who believe that the IP offices should be located in one office. However, the decentralised system, while being costly has its own advantages as will be discussed later in the paper.

Administration of the Rights

Institutions three important roles;¹¹ First, they make the rules that regulate intellectual property enforceable. They do this by making the various creators, innovators and users aware of the laws that govern their rights.¹² Second, the institutions are likely to design the formal rules either by creating the laws or offering and interpretation of the rules that are already in existence. In countries that follow the common law tradition such as Kenya, the courts are very important as their decisions are often binding in subsequent disputes. The institutions are also the ones in charge of the formulation of the laws and policies. Third, they regulate the behaviour of the right holders within the industry. From the foregoing, it is clear that institutions play an important role in

¹⁰ See Kenya Gazette of 22nd July 2006

¹¹ Brousseau Eric and Bessy Christian "Public and Private Institutions in the Governance of Intellectual Property Rights" in Andersen B. (ed) (2005) *Intellectual Property Rights: Innovation, Governance and the Institutional Environment* Edward Elgar Publishers

¹² It is also through these institutions that the players within the intellectual property institutions are made aware of their rights either through sensitisation and publicity. For instance, the innovators are likely to make an enquiry with the patent office and from there are able to know what steps to take to ensure that their rights are protected.

the management and administration of intellectual property rights. These institutions could either be public or private or even a combination of both. The administration of intellectual property rights involves the acquisition of rights.¹³

Public Institutions

Public Institutions are those that are created by the State. These include structures that are created within the government machinery such as the patent office, the copyright office and the plant breeders' rights office. In Kenya, these were initially departments within the various government ministries. In the recent past, there has been a move to create independent bodies to ensure the specialised and efficient administration of intellectual property rights in the country.

The Kenya Industrial Property Institute was established in 1989 under the Industrial Property Act of 1989.¹⁴ The institute was established as a State Corporation to give it some autonomy from the parent ministry. Its mandate includes the administration of the Industrial Property Act and the Trade Marks. KIPPI has established a Patent Information and Documentation Centre (PIDOC) which has a data base of over 14 million patent documents. The office registers both local and international patents and trademarks under the relevant national and international instruments.¹⁵ However, the majority of applications that are received come from foreign applicants. For instance, between 1990 and 2001, of the 1842 trademark applications received by the office, only 539 were domestic, 1303 were foreign. The number of patents registered is even fewer. Between 1998 and 2003, there were a total of 118 patent applications, 89 of which were foreign. The office receives more local applications for industrial designs than foreign applications for the same.¹⁶ The grant of industrial property rights can only be done through the industrial property office. The Act also establishes the Industrial Property Tribunal which has the right to hear appeals that arise from the registration or non-registration of rights. The Institute has over 80 administrative and professional members of staff. The core function of KIPPI is the registration of industrial property rights. The tables below give an indication of the number of applications that are received and granted each year for the last four years. Without the registration, the right holders will not be able to enjoy the necessary protection granted by the law. The enforcement function as we shall illustrate below is carried out by both the public and private sector.

The overall administration of copyright and related rights is within the mandate of the Kenya Copyright Board. The Board was established in 2001 under the Copyright Act of 2001. It was previously a section within the office of the Department of the Registrar General, Office of the Attorney General. The Board was officially

¹³ This could be through applications and registration in the case of industrial property rights. Copyright and related rights do not require registration.

¹⁴ When it was established, it was then known as the Kenya Industrial Property Office (KIPO) and was still a Department within the Ministry of Science and Technology. It was later moved to the Ministry of Trade and Industry and became the Kenya Industrial Property Institute (KIPPI) in 2001 with the passing of the Industrial Property Act of 2001.

¹⁵ These include the Patent Cooperation Treaty, and the Madrid Agreement.

¹⁶ Between 1998 and 2003, there were a total of 239 applications filed for industrial designs of which 193 were local applications while 46 were foreign. This is based on the information supplied by the Kenya Industrial Property Institute.

inaugurated on 23rd July 2003 but started its full operations in August 2006.¹⁷ Copyright, unlike industrial property rights does not require registration. The KCB has nonetheless introduced the voluntary registration of copyright and related rights. This will help in the administration of the anti piracy security device and will also create a data base for the creative works within the country.

In Kenya, plant breeders' rights are fall under the Kenya Plant Health Inspectorate Service (KEPHIS). It was founded in 1997 and it falls under the Ministry of Agriculture.¹⁸ The Plant Breeders Registration Unit administers the applications for plant variety protection under the Seeds and Plant Varieties Act.

The choice of public institutions to administer intellectual property rights is both historical and functional. The institutions that preceded the current institutions were government bodies. There have been various arguments for the establishment of a single industrial property office under one supervisory government ministry. According to the IPR Commission report of 2002, a single semi autonomous IPR office would allow for centralised efficient administration of IP. This would allow for the separation of the regulatory and administrative functions and allow for more efficient service delivery. In Kenya as illustrated above, the formation of separate entities in different ministries shows that it is unlikely that there will be one Intellectual Property office in the near future.

There are other public institutions that deal with Intellectual property rights such as the research institutions and public universities.¹⁹ For the purposes of this paper, the author shall restrict the discussion to the administrative structures discussed earlier.

Private/Other Institutions

Administration of copyright is largely seen as the domain of the public institutions. There are instances where the private sector steps in to fill the gaps that are left by the public institutions. Private institutions are normally organised to ensure that the rights of the members are collectively enforced. The right holders in such cases want to have full control of their rights with minimal state interference. This is more common in the copyright industry.²⁰ In Kenya, collective management is left to the private sector and the collecting societies are often incorporated as companies limited by guarantee. These societies are private to the extent that they are not part of the government mechanisms.

¹⁷ The Kenya Copyright Board and the Kenya Industrial Property Institute are currently in the process of de linking from the various parent ministries to become independent state corporations under the various Acts that established them.

¹⁸ The government is in the process of amending the Seeds and Plants Variety Act to establish KEPHIS as a body corporate like KIPI and KCB. There are various commentators who are of the opinion that the Intellectual Property Offices should be brought under one body.

¹⁹ Examples are the Kenya Agricultural Research Institute (KARI) The Kenya Medical Research Institute (KEMRI) and the Kenya Forestry Research Institute (KEFRI).

²⁰ It is important to note that this is not always the case. For instance, in the French speaking countries such as Senegal, Benin, Togo and Burkina Faso, the collective management of copyright and related rights is a function of the government. The Collecting societies in these countries are departments within the relevant Government Ministries. There are advantages and disadvantages in both cases but this will be discussed in greater detail in this paper.

Enforcement

Enforcement of intellectual property rights may be carried out by both public and private institutions. From an economic perspective, there are various reasons for the existence of public law enforcement.²¹ First, the cost of enforcement; this might be prohibitive in relation to the offence or claim. A private enforcer will be driven by the ability to maximise on the returns and if the cost of apprehending the offender is higher than the expected return, then the private enforcer is unlikely to pursue the claim to apprehend the offender. The right owner or private organisation within the industry would find the cost of trailing and apprehending the criminal too high. The costs include investigation, arresting and confining the offender, raiding the premises and cost of prosecuting the case in court. Public enforcement on the other hand is publicly funded and the cost is not a central issue as most public enforcement agencies such as the police operate on an annual budget from the central government. The cases will however be handled according to priority. Criminal cases involving drugs, murder and other capital offences will definitely take precedence over the criminal infringement cases in music. Secondly, the budgets granted to the public enforcement bodies tend to be small in relation to the potential gains from the enforcement especially as a private profit making maximising enforcer would appraise them. An example is the police force whereby the cost of enforcement of law is higher than the expected return from the private enforcer's point of view. Third is the prospect of the innocent person being prosecuted by the private enforcers. This is because the private enforcer is driven by the promise of reward per prosecution. Generally, the industry supports public enforcement. This is due to various factors such as the cost of enforcement especially at the individual level; piracy is considered an economic crime that has a negative impact on the author, the economy as well as culture. The increasing levels of piracy as well as the link to organised crime requires more than the private enforcement.

According to Posner, a major criticism of the public enforcement is that it creates incentives for the bribery and corruption because the gain to the enforcer from enforcement is generally less than the offender's potential penalty. Indeed, cases of corruption within the public law enforcement in copyright cases abound. From an industry perspective, public enforcement has its shortcomings. The success rate of copyright prosecution cases is quite low due to various factors such as the lack of knowledge of copyright among the lawyers, police and the Judiciary. This would lead to wrongly drafted charges and other technicalities that would have cases dismissed.²² It could also be attributed to the general altitude of the society as a whole to copyright infringement as it would not be seen as a criminal offence.

The role of private enforcement of laws is two fold, first, private suits can be used for the purposes of stopping an infringing act, deterring future infringements as well as correcting socially harmful violations of the law. Second, the private enforcement

²¹ Posner *op cit* For further reading on the public and private institutions in the enforcement of copyright see Eric Brousseau and Christian Bessy 'Public and Private Institutions in the Governance of Intellectual Property Rights' in B.Andersen (ed.), (2005) *Intellectual Property Rights: Innovation, Governance and Institutional Environment*, Edward Elgar Publishers, The chapter discusses the differences in performances among contrasted systems of property rights which depend on both the wording of the law and the governance mechanisms that implement and complete the law. It approaches the subject from the perspective of Institutional Economics.

²² This is true in developing countries which are yet to develop serious copyright litigation.

serves to compensate the right holder for the harm or damage occasioned by the infringement of the rights. The infringer is compelled to comply with the law, make restitution and perhaps pay damages or civil fines. These two functions are normally intertwined.²³ There are many reasons for the existence of private enforcement of rights using the existing legal mechanisms. Private enforcement can increase the social resources devoted to law enforcement and in a way complementing the Government enforcement efforts. The private parties are in some instances in a better position to monitor the compliance of copyright laws and detect the violations. This is attributable to the fact that most private agencies are specialised in a particular area. They are in a better position to monitor and identify the violations or infringement of their rights. The government might not be able to monitor such violations effectively and thus would rely on the private enforcers. For instance in the music industry, the Government often acts on information supplied by the private enforcer such as the Anti Piracy organisation and is able to follow up on the violations.²⁴ This contrasts with the situation in the public sector where the agencies are set up to deal with a broad spectrum of issues. The police force has the role of enforcing all the laws in a particular jurisdiction and is unlikely to be specialised in one area of the law.²⁵ The State may however make provisions for specialised enforcement agencies such as special IP courts or enforcements units such as the copyright inspectors who are specialised in the requisite area of law.²⁶ Specialisation is desirable for the law enforcement agencies as it reduces inefficiencies that might be occasioned by lack of specialisation.

Private enforcement faces various challenges and has its own disadvantages. One, the availability of resources might hinder the enforcement efforts by the private enforcer. This is due to the fact that the players in the industry especially in Africa lack monetary and administrative resources to follow up the enforcement. They often have to raise the money from the various individuals and other sponsors for their enforcement activities. Private enforcers sometimes lack the capacity to decide on the merits of the case and would take up cases which are not meritorious. Public agencies, it is argued have the capacity to sieve out the non meritorious cases and save on resources. This is debatable as evidence exists that the private agencies will only pursue cases which they view have merit and due to their limited resources will prioritise the cases. The role of the public agencies was inferred as opposed to being explicitly provided for in the laws. Public enforcement agencies include the Judiciary, the Police, the Copyright Offices, Customs Department and the Standards Agency. Private enforcement agencies include; industry based organisations and Trade Unions and Collecting Societies.

²³ Stephenson. Mathew C. (1994) "Public Regulation of Private Enforcement: The Case for Expanding the role of administrative agencies" *Virginia Law Review* Vol 91:93 93-170 at 96 Stephenson's paper focuses more on enforcement federal laws in the United States and with a specific interest to the Environmental laws. The literature is however relevant to the research as he deals with pertinent issues with regard to private enforcement of law which can be applied to copyright and related rights.

²⁴ See Stephenson M. op cit at 108. and Cohen Mark A. and H. Rubin Paul, (1985) Private Enforcement of Public Policy, 3 *Yale J. on Reg* 188-189 at 167.

²⁵ Except in cases where the State deems it fit to create a special unit that will deal with a specific area of the law such as the Anti Fraud Unit, Special Crimes unit etc.

²⁶ The United States for instance has specialised courts that deal with intellectual property in infringement which strengthen their overall enforcement of the said rights. Countries like the France and United Kingdom on the other hand like most developing countries do not have specialised courts.

While civil and criminal jurisdictions are legally distinct, in practice, the use of both private and public enforcement measures in the enforcement of intellectual property rights; namely the monitoring, detection, investigation and prosecution is a mixture of both the public and private enforcement.²⁷

Challenges

The institutions that are mandated to administer and regulate these laws have faced their fair share of challenges which shall be highlighted in detail below.

One of the biggest challenges has been the lack of clear government policy on Intellectual Property rights. The different government ministries in charge of IP have not had clear guidelines and this could actually explain the current structure in the government in relation to intellectual property. This has had an impact on the institutional capacity, in terms of human resources and expertise. The administration of industrial property involves the processing of applications, granting of rights through registration, renewals and documentation. It also involves the determination of appeals in relation to the registration or non registration of the rights. KIPI has a staff of about 83 members of staff but less than 25% of these are professional. This has an impact on the ability of the institute to process applications especially the patent examiners who are required to go through the lengthy and often complex patent applications. The office is however trying to remedy the situation by training more staff. The volume of applications received and processed is quite small compared to that of industrial property offices in developing countries. The tables below give a brief idea of how many applications are received and the registrations granted.

Patent Applications and Grants

Year	Local Applications	Foreign Applications	Total
2003	21	03	25
2004	31	03	34
2005	31	05	36
2006	18	02	20

Industrial Designs

Year	Local Applications	Foreign Applications	Total
2003	44	09	53
2004	46	12	58
2005	104	10	114
2006	39	03	52

Trade Mark Statistics

Year	Applications	Registration
2001	3 036	1 945
2002	2 921	2 108
2003	2 857	2 154
2004	2 771	2 277

²⁷ See Urbas Gregor (2005) 'Criminal Enforcement of Intellectual Property Rights: Interaction Between Public Authorities and Private Interests' in Heath Christopher (eds.) *New Frontiers of Intellectual Property Law*. IIC Studies Hart Publishing Oxford p305-306; For Further reading on the enforcement of rights see Ouma M. (2006) 'Optimal Enforcement of Music Copyright in Sub-Saharan Africa: Reality or a myth?' P 592-627

The administration of copyright and related rights as noted earlier more in the realm of collective management. The Copyright Act has introduced the voluntary registration system which is yet to be implemented. Once the office is in full operation, the officers shall be receiving applications and verifying the originality of the works to ensure that pirated works are not deposited at the office. The office is currently understaffed. It has 7 members of staff, five professional and two administrative. There are however several collective management societies that cover the rights of creative authors in various sectors of the copyright industries.²⁸ The advantage of the collective administration of rights is that it allows the author to collect his rights from the various users at minimal costs. At the same time, the various users are able to use the works under the blanket license issued by the collecting society reducing the cost of seeking out the various artists to obtain individual licences. Through the collective management, the copyright owners are able to reduce their risks and act collectively to ensure the proper enforcement of their rights.²⁹ The problem of lack of specialised human resources also prevails in the collecting societies. The Music Copyright Society of Kenya (MCSK) for instance only has one staff member with expertise in copyright and collective management. The rest of the staff are administrative staff.

The problem of lack of expertise in intellectual property law permeates both the public and private sector. The situation may however be remedied in the public sector which has the ability to send the members of staff for various training sessions at both the academic and professional level. The private sector would however view this as an additional operational cost and it would thus not be a priority.

The lack of a clear policy also gives rise to the problem of lack of autonomy especially for the public agencies which are still answerable to the parent ministries. They have to rely on the central government for the funding of their budget. For instance, the Copyright Office is currently in the process of de-linking from the office of the Attorney General and cannot carry out its activities unless they receive funding or are cleared by the parent ministry. This in turn affects the ability of the agency to adopt the best practices in the administration of intellectual property rights including the use of information technology.

The judiciary and other law enforcement agencies are public institutions that deal with the enforcement of the rights. There are very few cases that have been determined by the courts in matters of intellectual property. The capacity of the judiciary to deal with intellectual property cases is limited. There are no specialised courts and all intellectual property matters have to be determined by the commercial courts which normally have to deal with other issues as well. Before the cases have to be brought to the court, the right holders have to institute the proceedings. In the case of criminal

²⁸ The Music Copyright Society of Kenya (MCSK) for composers, authors and publishers, The Reprographic Rights Society of Kenya (KOPIKEN) for literary authors, the Society of Performing Artists of Kenya (SPAK) for performers, The Kenya Association of Music Producers (KAMP) for the producers of sound recordings.

²⁹ Collective management is restricted to the performing rights and broadcasting rights. In certain cases, the authors may allow the collecting society to collect the synchronization rights upon signing the relevant contracts.

proceedings, they have to engage the services of the police to detect and apprehend the infringers. In the case of civil infringement, they have file the suit in court.

Can the Existing Framework be used to foster economic and cultural development?

The intangible nature of intellectual property rights as well as being public goods influences the choice of public or private administration of the rights. Intellectual property rights are private rights but their administration is not restricted to the private sector. It is notable that both the private and public bodies have their own advantages and disadvantages. In normal practice, both the private and public agencies are employed in the administration. Public institutions are able to ensure the mandatory registration of rights as these rights affect the entire community although they belong to the individual. For instance, the patent for a drug may be granted to an individual pharmaceutical company but the impact of the registration will be felt by the entire community. The public organisation has the potential to raise capital to ensure the regulation of the intellectual property rights. The case of KIPi is illustrative of this point. In the last five years, the money raised by KIPi has not been sufficient to run the office. But since it is a state corporation, it has been able to obtain funds from the parent Ministry to ensure administration of the rights. Private organisations have to rely on their own funding. In the case of collecting societies, they have to obtain the money from the royalties collected and where the collection is limited, the operations of the society are affected.

It is notable that Kenya has invested in both the legal and institutional framework but the registration but there are very few registrations done by the industrial property office. This could be mitigated that Kenya at the moment relies heavily on imported goods and there are very few innovators and creators who seek the services of the industrial property office. Knowledge of intellectual property rights is limited to very few lawyers. Most universities and research institutions have only recently created the intellectual property offices to deal with intellectual property issues.

Private organisations tend to be more specialised than the public institutions. This is due to the fact that they are often created to serve a specific function. This is an advantage in that they may be able to dispense with their functions more effectively than if the same were allocated to the public institutions. Specialisation can also be found in the public institutions. In the Copyright office in Kenya, all the staff members have received specialised training in the field of copyright and related rights. This is however the exception rather than the practice. When it comes to private administration of the rights, the government has made provisions to ensure that they are efficient in their operations. The copyright industry, it is agreed has the potential to increase contribute substantively to the economy of a country.³⁰ This may only be possible where there are proper structures in place to realise the potential. One step taken by the Government is to ensure that the collective management societies actually collect and distribute royalties.

Conclusion

³⁰ This has been the cases in countries like the United States where the creative industries contribute close to 7% to the GDP.

Kenya has in the last five years set out not only to make the laws TRIPS compliant but it has also tried to ensure that it provides for the necessary administrative and enforcement framework. The extent to which these institutions have contributed to the national economy is yet to be tested. There are no empirical studies that have been carried out to show the extent to which the institutional framework has contributed to the economic growth in Kenya.