

EXAMINING THE NEXUS BETWEEN INTELLECTUAL PROPERTY AND HUMAN RIGHTS

The case of Uganda

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About ASK Justice

The ASK Justice project explores the nexus between intellectual property (IP) and human rights. The project seeks to bring about positive change in IP law and policy processes, by bringing the rights of access to medicines and to knowledge onto the IP policy agenda, providing research-based evidence for policy-making and civil society campaigns, and building the knowledge base and next generation of scholars on the IP and human rights interface.

ASK Justice publications

Model Curriculum: Human rights and intellectual property in Africa (including a resources inventory). Available at askjustice.org/model_curriculum_human_rights_and_ip_in_africa

Intellectual Property and Human Rights: An intellectual property primer for human rights teachers. Available at askjustice.org/ip_primer_for_human_rights_teachers

Human Rights and Intellectual Property: A human rights primer for intellectual property teachers. Available at askjustice.org/human_rights_primer_for_ip_teachers

Human Rights and Intellectual Property Processes: South Africa. Available at askjustice.org/human_rights_and_ip_processes_south_africa

Human Rights Considerations in Intellectual Property in Botswana. Available at askjustice.org/human_rights_considerations_in_ip_in_botswana

The Influence of Intellectual Property Laws and Instruments on Human Rights in Kenya. Available at askjustice.org/influence_of_ip_laws_and_instruments_on_human_rights_in_kenya

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Abbreviations and acronyms

ACHPR	African Charter for Human and Peoples Rights	LDC	Least Developed Country
AEC	African Economic Community	IP	intellectual property
ARIPO	African Regional Intellectual Property Organization	IPR	intellectual property right(s)
CEHURD	Centre for Health, Human Rights and Development	MITC	Ministry of Trade, Industry and Co-operatives
CNRA	Copyright and Neighbouring Rights Act	OHCHR	Office of the High Commissioner for Human Rights
COMESA	Common Market for Eastern and Southern Africa	PAO	Patricia Asero Ochieng and 2 Others v The Attorney General
EAC	East African Community	TRIPS	Trade-Related Aspects of Intellectual Property
eKLR	Kenya Law Reports (e-version)	ULRC	Uganda Law Reform Commission
FDG	focus group discussion	UNCST	Uganda National Council for Science and Technology
GATT	General Agreement on Tariffs and Trade	UPE	universal primary education
ICCPR	International Covenant on Civil and Political Rights	URSB	Uganda Registration of Services Bureau
ICESCR	International Covenant on Economic, Social and Cultural Rights	WIPO	World Intellectual Property Organization
IPA	Industrial Property Act	WTO	World Trade Organization
ISER	Initiative for Social and Economic Rights		

Part I: Introduction

The ASK Justice Project brings human rights concerns to the teaching and research of intellectual property (IP). This report presents the findings of a case study in Uganda on the role of human rights in intellectual property policy processes.¹

The study focuses on the extent to which human rights regarding access to medicines, knowledge and education are taken into consideration in the intellectual property policy development process in Uganda. The primary objectives of the research project were to provide evidence for the purpose of curriculum development at tertiary institutions, and for civil society advocacy.

This section discusses the context and background of research, sets out the scope and purpose of the research, identifies the intended objectives of the study and introduces the audience to the research findings.

Country context

Uganda is one of the original three Partner States of the East African Community (EAC).² Uganda has a population of 34.4 million people.³ For the past three decades, Uganda has made major strides in enacting human rights and intellectual property legislation at national, regional and international levels. This case study compares the interactions between human rights and intellectual property law. The comparison is necessary to give insights into the current dynamics and discourse of intellectual property policy-making, while also suggesting where human rights might (develop) or have developed policy traction in Uganda. The comparison is key in detailing the synergies, convergences and divergences between human rights and intellectual property law.

Uganda is a member of the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO), and (as a member of the WTO) is a signatory to the 1994 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement). At the regional level, Uganda is a member of African Regional Intellectual Property Organization (ARIPO). ARIPO brings together all anglophone countries in Africa (except Nigeria and South Africa) on matters of intellectual property. At the human rights level, Uganda is a member of the United Nations, and of most of its major international human rights instruments—such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. At the regional level, Uganda is a member of the African Union and thus subscribes to its African Charter for Human and Peoples Rights (ACHPR) of 1981. In a way, therefore, Uganda's legacy and traditions of human rights and intellectual property remain credible, especially at the normative level, although serious challenges may arise when it comes to implementation and enforcement.

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- 1 It is part of a set of research findings on current intellectual property reform processes in Uganda, Botswana, Kenya and South Africa. [The first 2 footnotes were in a bit of a muddle. I think (hope!) that I've fixed them.]
 - 2 Established by the Treaty for the Establishment of the East African Community 1999.
 - 3 Kwesiga P 'Census: Muslims Up, Catholics and Anglicans Drop' *The New Vision* (25 March 2016) 4–5. [Any chance of using the primary source instead? (the Census itself)]

Purpose of the research

The purpose of the research was given in the Terms of Reference and focused on the ever-disputed relationship and balance between intellectual property rights (IPRs) and human rights. This problem occurs both at the core level and the normative level, and the conflict remains apparent, especially when access to these rights is analysed in the context of a developing country such as Uganda. The purpose of the research is described as ‘The intersection of intellectual property and human rights is receiving increasing scrutiny from international human rights bodies’.⁴

One important recent example is a report by the Special Rapporteur for Cultural Rights.⁵ This report considered the right to benefit from science and copyright law. Two of the recommendations by the Special Rapporteur are particularly significant for the objectives of the ASK Justice Project, Recommendations 94 and 96. For clarity and emphasis, these recommendations are reproduced here *in extenso*:

94. International copyright instruments should be subject to human rights impact assessments and contain safeguards for freedom of expression, the right to science and culture, and other human rights.⁶

96. States should complete a human rights impact assessment of their domestic copyright law and policy, utilizing the right to science and culture as a guiding principle.⁷

Recommendations 94 and 96 can be considered seminal and ground-breaking in the emerging areas of copyright and of access to education materials, and, more broadly, in freedom of expression. Since copyright is a subset of the wider intellectual property law, recommendations 94 and 96 can be said to apply with equal force and measure to other key areas of intellectual property such as patents and trademarks. Thus, it has been observed that:

Since the report focused on copyright in relation to the right to science and culture, the recommendations are appropriately confined to that interaction. [However], might similar recommendations be appropriate for other human rights in relation to patent, trademark and other intellectual property regimes, in addition to copyright [which Uganda has (already) enacted or seeks to enact in the near future]? This research is intended to explore this question in the study case of Uganda.⁸

Thus the main purpose of this case study is to explore the extent to which Uganda’s copyright law and other intellectual property regimes can be said to be human rights ‘compliant’, and to examine the relationship between intellectual property rights and human rights within the context of Uganda’s legal, economic, social and political framework.

4 [Ref missing for ToR? See my Comment above.]

5 Shaheed F ‘The right to freedom of artistic expression and creativity’, Report to United Nations Human Rights Council, 23rd Session, United Nations General Assembly, New York (14 March 2015).

6 Ibid.

7 Ibid.

8 Extracted directly from the ASK Justice Terms of Reference, pp8–9.

Objectives of this investigation or case study

- To analyse the recent and current intellectual property reform processes in Uganda and investigate if and to what extent human rights were considered in these processes.
- To analyse the intersection (of) the impact of intellectual property rights regimes on access to knowledge and access to medicines through a human rights lens.
- To provide research-based evidence that can empower civil society organisations engaged in policy development processes.
- To contribute to the integration of human rights analysis into mainstream intellectual property teaching and research.⁹

Indication of the findings

The key findings from the study, based on both desk and field research indicate that:

1. Uganda has international and regional human rights obligations as enunciated in the numerous treaties to which it is signatory, at both international and regional levels. These treaties– most of which have been domesticated– have created human rights obligations for Uganda, including the right to education and the right to health.
2. Human rights in Uganda are legally and politically binding. Uganda’s Constitution has a full chapter (Chapter Four) dedicated to the Bill of Rights. The rights to education and health are derogable rights¹⁰, but even then must be observed. Articles 43 and 44 of the Constitution deal respectively with ‘general limitation on fundamental and other human rights and freedoms’ and ‘prohibition of derogation from particular rights and freedoms’. Human rights intersect with the rights given by copyright, patent and trademark, as both economic and moral rights ensue. Article 26 of the Constitution provides for the right to property, including the tangible and intangible property to which IPRs belong.¹¹ The law in Uganda not only provides protection but also offers remedies for any breach of the proprietary interests of rights holders in IPRs and other property (such as land, companies, etc.). Such remedies include damages, injunctions, and many more.
3. These IPRs must be locally interpreted, in order to conform to Uganda’s national and international commitments to human rights. However the actual situation has militated against this; IPRs have not been interpreted to conform to Uganda’s national and international human rights obligations. Instead, emphasis has been placed on the enforcement of IPRs at the expense of the country’s human rights obligations. Many factors can be advanced to explain this bizarre scenario, ranging from lack of sufficient knowledge on how to strike a balance between IPRs and human rights, to pressure from rights holders (of IPRs) to have their rights enforced at all costs.

⁹ Ibid.

¹⁰ Derogable rights are those rights which can be ‘suspended’ or temporarily done away with during periods of crisis or emergency.

¹¹ *Frederick Edward Ssempebwa v Attorney General* Constitutional Case No. 1 of 1987.

4. In a bid to solve the problem described in (iii) above, a National Human Rights Plan (NHRP) and a National Intellectual Property Plan (NIPP) have been set up. These policy processes are both currently at draft stage, but their aim is to drastically change the reach, scope and effect of IPRs in Uganda. It is hoped that, if finally adopted and passed by the relevant organs, these two policies will strike a balance between IPRs and Uganda's international, regional and national human rights obligations.
5. There is no doubt that specific human rights such as the right to education, the right to health and access to information are not only protected in Uganda but are also directly relevant to these intellectual property policy processes.
6. It is clear that human rights in Uganda include the right to health (through the right to life, Article 22) and the right to health has been interpreted as encompassing the right of access to medicines. Trademarks and patents bear directly on access to medicines, in some cases limiting such access. However, flexibilities within the law, such as compulsory licensing, can be taken advantage of. Alongside this, copyright, patents and trademarks bear directly on access to medicines, in some cases limiting access to medicines– since most patents are also marketed or use trademarks in some cases.
7. Human rights in Uganda include the right to access to knowledge and the right to education (Articles 41 and 30 respectively of the Bill of Rights). Read broadly, the right to education encompasses the right of access to learning materials.
8. The intellectual property regime in Uganda has hitherto been driven by elements in the private sector, specifically those which self-identify as 'rights holders'.¹² It is high time that civil society, including members of the academy, strengthened their influence in the call for including human rights in the intellectual property policy process. Universities in Uganda need to interrogate and question more the nexus between human rights and intellectual property rights, for research-based evidence can make a valuable contribution to university curricula, civil society advocacy, and policy debates on the role of human rights in the intellectual property policy process.
9. The major challenge facing the realisation of the right to health, education and knowledge in Uganda remains enforcement and the limited use of public interest litigation.¹³
10. The current stalemate or slow pace in implementing a human-rights-based approach to IPRs in Uganda is hampered mainly by the perception in some part of government that doing so would be tantamount to having the policy imposed upon it by the global North.

After the key findings of the study have been presented, it will be imperative to examine Uganda's human rights commitments at both international and national levels, with a clear emphasis on health, knowledge and education, as discussed below.

12 The term 'rights holders' is contested since the bearers of human rights might equally be regarded as rights holders. However, in the context of this paper, 'rights holders' refers to the creators, innovators or owners of IPRs.

13 Mbazira C, Lomo Z & Zariffs I *Economic, Social and Cultural Rights Litigation in Uganda: A Manual for Public Interest Lawyers and Litigators* (2013).

Part II: Uganda's human rights commitments

Uganda has made significant commitments at both the international (regional) and national level with regard to health, knowledge and education. Uganda is a State Party to the two major international human rights instruments,¹⁴ viz. the International Covenant on Civil and Political Rights (ICCPR)¹⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁶ Article 15 of the ICESCR states that States Parties to the present Covenant (Uganda inclusive) recognise the right of everyone:

1. To take part in cultural life;
2. To enjoy the benefits of scientific progress and its application;
3. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.¹⁷

The debate on the potential clash between copyright and IPRs on the one hand and human rights on the other has been going on for over two decades, much to the relief of those who believe that IPRs should conform to human rights standards. According to Chapman:

To be consistent with the provisions of Article 15, intellectual property law must assure that intellectual property protections complement, fully respect, and promote other components of Article 15. Put another way, the rights of authors and creators should facilitate rather than constrain cultural participation on the one side and broad access to the benefits of scientific progress on the other.¹⁸

Chapman's view echoes Article 25 of the Universal Declaration of Human Rights of December 10, 1948¹⁹:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.²⁰

In a bid to reconcile Uganda's obligations under the human regimes and intellectual property normative frameworks, and especially to secure the right to health, Salazar counsels states such as Uganda as follows:

... the State cannot guarantee an individual's right to health in the same way as the other rights could be implemented, such as the right to freedom for instance; health is therefore a product of the combined action of a series of variables, some of which are beyond human control. What the State does have to guarantee, however, is the combination of situations, which,

14 States Parties are countries which have adhered to the World Heritage Convention.

15 Uganda became a State Party to the ICCPR on 21 September 1995.

16 Uganda became a State Party to the ICESCR on 21 January 1987.

17 The ICESCR is one of the major human rights instruments under of[?] the United Nations human rights regime.

18 Chapman AR 'Approaching Intellectual Property as a human right: Obligations related to Article 15(1)(c)' (2001) XXXV *UNESCO PUBLISHING* 3.

19 Salazar S 'Intellectual Property and the Right to Health, in Intellectual Property and Human Rights' (1999) *WIPO PUBLICATION* 762(E) 67.

20 Ibid.

like food, nutrition, medical assistance, hygiene, etc., contribute to the improvement of health.²¹

Within that set of variables, access to drugs and techniques for therapeutic diagnosis, and also access to sophisticated apparatus for the diagnosis, prevention and cure of disease, become essential factors guaranteeing the health of human beings.²²

Uganda's obligations in terms of the highest attainable standard of physical and mental health have been keenly studied and examined by Twinomugisha. In examining this nexus, Twinomugisha notes:

Uganda is a State Party to the ICESCR which provides for the 'right of everyone to the [...] highest attainable standard of physical and mental health'. Article 12 outlines the following steps to be taken by State Parties to achieve the full realisation of this right:²³

- The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- The improvement of all aspects of environmental and industrial hygiene;
- The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- The creation of conditions which would assure to all medical service and medical attention in the event of sickness.²⁴

The views espoused above by Twinomugisha have strong grounding in both human rights and constitutional setting in Uganda. Indeed the Constitution of the Uganda provides for the right to life²⁵ (which, by implication, also covers the right to health) and the right to education²⁶ (which, by implication, also covers the right of access to knowledge).

In Uganda, IPRs are protected as a right to property.²⁷ Intellectual property is the type of property that results from the creations of the human mind. The Ugandan Constitution also provides that the rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned.²⁸

21 Ibid.

22 Ibid.

23 Twinomugisha BK *Fundamentals of Health Law in Uganda* (2015) 21.

24 Article 12(2) (a)–(d).

25 Article 22.

26 Article 30.

27 Article 26, 189, Sixth Schedule (6). Article 26 states:

(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied:

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for:

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

28 Article 45.

The intellectual property regime in Uganda

The intellectual property regime in Uganda has been a subject of intense discussion and study not only by Ugandan academics but also by foreigners. According to Bakibinga and Kakungulu, in a recently published book:²⁹

developments within the area of copyright at the international level have had a tremendous impact on the development of copyright law in Uganda. Such developments can be traced back to the passing of the 1710 Statute of Anne, which paved the way for the development of copyright laws in the United Kingdom.³⁰

Uganda's commitment at the international and regional levels to a host of binding instruments best explains the above scenario. It remains, however, imperative to examine, with a very keen eye, the implications and influence of international developments— not only on the development of intellectual property law in Uganda in the form of domestication of such international norms, but also the likely and actual impact of such processes on human rights in the country.

Again Bakibinga and Kakungulu make similar observations on Uganda's dilemma when it comes to domesticating international intellectual property norms, observing:

This was subsequently amplified by the coming into force of the 1971 Berne Convention, which set out standard principles for copyright protection. Subsequent international instruments forming the basis for regulation of international copyright included the Universal Copyright Convention, and the 1994 General Agreement on Tariffs and Trade (GATT). The 1995 World Trade Organisation's 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (the WTO's TRIPS Agreement) seeks to set standards and harmonise the regulation, administration and enforcement of intellectual property generally.

These have had a great impact on the growth of copyright law in Uganda.³¹ Indeed, Uganda's 2006 Copyright and Neighbouring Rights Act is a clear attempt at trying to meet the country's obligations under international law and also to harmonise the country's laws and policies on copyright and neighbouring rights.

At the regional level, Uganda has an active membership in the African Economic Community (AEC), the Common Market for Eastern and Southern Africa (COMESA), African Regional Intellectual Property Organisation (ARIPO) and the East African Community (EAC).³²

An international and regional legal regime similar to the one above binds Uganda in respect of its industrial property legislation, with key implications on access to medicines— as discussed below. As a Least Developed Country (LDC), Uganda has a transitional period, extending to 2021, in which to implement the general

29 Bakibinga DJ & Kakungulu RM 'Intellectual Property Law in East Africa' (2015) *LawAfrica* 3–4.

30 Bently L & Sherman B, *Intellectual Property Law*, (2014) 33.

31 See generally Section 1 of Part II of the TRIPS Agreement, which deals with copyright and related rights.

32 Uganda Law Reform Commission (ULRC) 'A Report on the Background Study on the Legal Implementation of the World Trade Organization Agreements' (2004) *ULRC Publication No.* 32, 31.

provisions of the TRIPS Agreement, and until 2033, in the case of provisions relating to pharmaceutical products (which can be further extended).

Intellectual property in Uganda covers three broad areas of copyright, and is defined as:

a set of exclusive rights granted by a state to the creator of an original work or their assignee for a limited period of time in exchange for public disclosure of the work. This includes the right to copy, distribute, and adopt the work. Copyright owners can license or permanently transfer or assign their exclusive rights to others.³³

The rights to copy, distribute, and adopt the work need to be balanced fairly so as to increase access to copyrighted materials in Uganda. What seems to be practised at present is more a strict adherence to authors' rights rather than users' rights (for example giving users access only within specified limits).

Another new yet significant area of intellectual property, which needs to be examined very carefully, is that of patents. A patent is

a set of exclusive rights granted by a state (national government) to an inventor or their assignee for a limited period of time (usually twenty years, non-renewable) in exchange for the public disclosure of an invention. A patent protects an invention, and grants to the owner the exclusive rights to use his/her invention for a limited period of time.³⁴

Of similar significance are trademarks, especially considered in light of the fact that trademarks deal with marketing and identification of the goods by the customer or final consumer. A trademark can be thought of as 'a sign that is used to distinguish the goods and services offered by one undertaking from those of another.'³⁵

The reforms being initiated by the Parliament of Uganda also cannot go without mention, for these have been key in the access debate, and potentially in the relationship between IPRs and human rights.

According to parliament, several factors necessitated the passing of the Industrial Property Act (IPA), as explained here: The Industrial Property Bill, 2009 (now IPA, 2014) is a part of the program of reform of commercial laws of Uganda to support private sector development, commercial justice reform and to encourage private investment. [Ref for this?]

As mentioned above, Uganda is a member state of the World Intellectual Property Organization (WIPO)³⁶ and a signatory to the WTO/TRIPS Agreement³⁷, as well as being a signatory to the Paris Convention³⁸ and the Patent Cooperation Treaty.³⁹ The country is also a recognised user of the Nice Agreement on Classification of Goods and Services for the Purposes of the Registration of Marks. As a new engine of growth for the enactment of social and economic prosperity it is therefore

33 Du Plessis ED, Kotze GS, Brown SB, et al., *Adams & Adams Practical Guide to Intellectual Property in Africa*, (2012) 634.

34 Ibid 628.

35 Ibid 622.

36 Since 1994.

37 Since 1995.

38 Since 1965.

39 Since 1995.

obligated, among other reasons, to enact laws that seek to protect Ugandan inventions, creations or designs of inventors operating within Uganda.⁴⁰

Such was the pressure that was put to bear on Uganda to enact laws that conform with its obligations under international law. The policy spaces in the current laws—mainly the IPA— are listed below.

The Industrial Property Act

Section 101(15)— The rights accruing from patents for pharmaceutical processes shall not be enforceable until January 1, 2016, or such other period as may be granted to Uganda or other least developed countries by the Council;

Section 43(1)— The rights under the patent extend only to acts which are done for industrial or commercial purposes but do not extend to acts which are done for scientific research;

Section 43(2)— The rights under the patent do not extend to acts in respect of articles which have been put on the market in Uganda or in any other country or imported into Uganda by the owner of the patent or with his or her consent.

Section 58— After the expiration of four years from the filing date of an application or three years from the grant of a patent, whichever last expires, a person may apply to the Minister for a licence to exploit the patented invention on the grounds that the market for the patented invention is not being supplied, or is not being supplied on reasonable terms, in Uganda.

Section 44(e)— It is not an infringement of a patent ... to manufacture and export to another country a patented healthcare invention where the export of the invention addresses a health need identified by the other country.

From the afore-going, it is clear that Uganda has to a great extent used the LDC waiver⁴¹ in its IPA.

40 Parliament of Uganda *Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Industrial Property Bill, 2009* (2013) 2.

41 See https://www.wto.org/english/thewto_e/minist_e/mc10_e/1982_e.htm.

Part III: Primary intellectual property policy instruments

Uganda has a host of primary intellectual policy instruments, including legislation, regulation and draft regulation. This part of the study seeks to locate each of these in the policy cycle.

On access to knowledge or education, it is the Copyright and Neighbouring Rights Act of 2006 (CNRA) and the Copyright and Neighbouring Rights Regulations of 2010 that are instrumental. In the field of health, it is the Industrial Property Act 2013 (IPA) and the proposed Anti-Counterfeit Bill 2015 that would have a significant impact on access to medicines, if passed in its current form. The Government of Uganda, through the line Minister,⁴² is yet to pass regulations to operationalise the Industrial Property Act 2013, which was signed by President Museveni on January 6, 2014. While promising in terms of its scope, it can safely be said that the IPA is yet to be tested.

In contrast, the Law on Counterfeiting has been vigorously applied, albeit through the window of criminal law and sanctions, mainly on 'pirated' or 'fake' goods.⁴³ Likewise, the CNRA has been tested now for more than a decade (since 2006).

In analysing the impact of the copyright law on access to knowledge and education in Uganda, it is important to note that the rights holders and the courts have shown little enthusiasm for attempting to strike a balance between access rights and the rights of IPRs holders. This scenario is best captured in the cases, which have been adjudicated upon by the courts for the last decade or so.

The above situation is historical, taking into account that Uganda's current copyright law was pushed mainly by the rights holders in the music industry.⁴⁴

Uganda has two draft policies, namely the National Intellectual Property Policy and the draft Industrial Property Regulations, both of which seek to streamline the management of IPRs at the national level.

In the university setting, Makerere University has key policies on Research and Innovations (2008), IPR Management (2008) and Information, Communication Technology (ICT) policy/Communications policy (2013). These policies aim at strengthening the management and exploitation of intellectual property within the academy.

Unfortunately, little effort seems to have been made towards ensuring that these policies adhere to the country's human rights standards at the national, regional and international levels. The sole motive was to have the policies in place, and little or no attention has been paid to human rights obligations.⁴⁵ This is evident in the hurried and rushed manner in which the policies were passed, without even a human rights audit on the policies. However, a ray of hope still exists, in that these policies can be reviewed periodically, by both cabinet and parliament, with a view to assessing their human rights implications, among other things.

42 The Minister of Trade, Industry and Cooperatives.

43 In Uganda, the words 'pirated' and 'fake' are used interchangeably to refer to counterfeits.

44 Kawooya, Kakungulu & Akubu. [Details? Not in Refs.]

45 Interview with representative of Makerere University.

Part IV: Identification of Makerere University IPRs policy

According to Bakibinga⁴⁶ the rationale for the Makerere University, IPRs policy includes:

1. Implementing the Makerere University Vision of providing research and service relevant [to the] sustainable development needs of society;
2. Commercialising government/university-funded research for the public good;
3. Facilitating the recruitment, reward and retention of faculty and staff resulting from the financial proceeds of licensing innovations commercially;
4. Inducing collaboration with the private sector generally, and industry in particular, for the ultimate public good; and
5. Promoting economic activity arising from the products of research and innovation.⁴⁷

Bakibinga further observes that

the policy defines intellectual assets and property. The former refer to all intellectual products that are created by the University staff, while the latter refers to intellectual assets that are protected under the relevant laws including Copyrights and Neighbouring Rights, Industrial Property and Trademarks Act.⁴⁸

The above two policies at Makerere University have gone a long way in helping to create IPRs and harmonising any tensions that arise in the context of intellectual assets and property, research and innovations in a university setting. The policies detail, for example, benefit-sharing arrangements from the proceeds of such intellectual creativity.

The body in Uganda charged with the management of IPRs is the Uganda National Council for Science and Technology (UNCST), established by the UNCST Act, which details its mandate in s 4(1). In an interview with the author, a UNCST official observed that 'UNCST has a broad mandate of management of IPRs in Uganda, but this mandate has been somewhat hindered by limited funding from the central government towards UNCST activities'.⁴⁹

Elisam Magara⁵⁰ notes that the intellectual property policy has helped in protecting intellectual property works generated at the university. He argues further that the most important principles, values and objectives in intellectual property policy making –especially at the university level– should be 'universality, inalienability (civil, economic, political, cultural and social), independence and interdependence, non-discrimination, participation and inclusive and accountability'.⁵¹ Magara's thesis is premised on the strong need to strike a

46 Bakibinga DJ 'Recent developments in intellectual property law in Uganda', Paper delivered at the 4th Global Congress on Intellectual Property and Public Interest, New Delhi, India, December 2015, 20.

47 Ibid.

48 Ibid.

49 Interview with representative of UNCST, 15 June 2016.

50 Magara is Professor of Records & Archives at the East African School of Library and Information School, College of Computing and Information Sciences (CoCIS), Makerere University, and Chairman of the Uganda Textbook-Academic and Non-Fiction Authors' Association (UTANA).

51 Ibid.

balance between IPRs and human rights, especially within the context of access to education materials and essential medicines.

Most of the materials used by university students in most African universities, including Makerere, are based on 'handouts' or massive photocopying, much of which is clearly beyond that stipulated by law as permissible.⁵²

52 Kawooya D 'Theorizing and Practicing Fair Use: Copyright for Africa's Higher Education, The Fourth Commonwealth Forum on Open Learning',. Available at <http://pcf4.dec.uwi.edu/viewpaper.php?id=36> (viewed on 8 June 2017).

Part V: How the research was carried out

The research described in this paper was carried out mainly in one of two ways. The first was the doctrinal analysis of the existing literature on the topic under study. The second was by interviewing key stakeholders who were deemed to be very knowledgeable on the subject under review. In total, nineteen interviews were conducted.⁵³

The researcher made use of primary and secondary documents and stakeholder interviews in the case study. In reviewing the documents and interviewing the stakeholders, intellectual property policy processes were analysed through a framework of human rights, in order to explore the intersection between human rights and intellectual property, and ascertain the ways in which this impacts on access to medicine and access to education.

In a way, therefore, a human rights perspective permitted a multi-disciplinary approach. The case study method included both the legal and socio-economic research, in a bid to understand what happens to real people in real situations, and to take account of resource constraints. A systematic analysis of the primary and secondary documents enabled the researcher to grasp the doctrinal theories that underline the access to medicine and access to education debate in Uganda. Similarly, interviews with stakeholders enabled the researcher to 'test' the ground and determine, as far as possible, the actual situation amongst the potential beneficiaries of this debate.

53 See Annex C.

Part VI: Primary policy drivers of IP policy

Policy analysis: Intellectual property policy processes examined

The main government initiatives and policies regarding intellectual property law in Uganda have mostly been driven by the private sector and donors. The Government of Uganda handles matters of intellectual property through its Ministry of Trade, Industry and Co-operatives (MTIC) and the Uganda Registration of Services Bureau (URSB). The URSB is a government agency, established in 1998 by the URSB Act, which grants and administers IPRs in Uganda.⁵⁴ Among the URSB departments are the Intellectual Property Department, which also serves as the National Intellectual Property Office. This office is mandated (among others):

to create general awareness on intellectual property matters, to promote creativity, innovation and intellectual property enforcement in Uganda, to advise on intellectual property matters, to propagate emerging intellectual property issues, to consider applications for and grant intellectual property rights, to provide to public intellectual property information.⁵⁵

Another lead government agency in the formulation of intellectual property policy in Uganda is the Uganda Law Reform Commission (ULRC), established by the Uganda Law Reform Commission Act.⁵⁶ The Uganda Law Reform Commission Act was passed on November 16, 1990 thus operationalising Article 248 of the Constitution. Article 248 states:

- (1) There shall be a Law Reform Commission for Uganda, the composition and function of which shall be prescribed by Parliament by law.
- (2) The Law Reform Commission established under clause (1) of this article shall publish period reports on its findings and submit annual reports to Parliament.⁵⁷

The preamble of the ULRC Act states that the Act is ‘an Act to establish the Uganda Law Reform Commission; to prescribe its composition; to define its functions and powers; to provide for its finances and to make provision for other matters connected therewith or incidental thereto.’ The core functions of the ULRC in line with Art 248 of the Constitution are to revise and update the laws of Uganda, including those laws pertaining to human rights and IPRs.

Universities in Uganda, being leading centres of research and innovation, have developed intellectual property policies far ahead of the Government of Uganda, which has merely created an enabling legal environment by passing the requisite legal instruments. For example, Uganda’s biggest, oldest and leading public university– Makerere⁵⁸– has two key policies: on Intellectual Property and on Technology and Innovations. Makerere University has been, and remains, a trailblazer in relation to research and innovations in the country.

That Makerere University is a leader in policy-making is not in doubt. It is, however, imperative to examine these policies in the consultative processes and venture some findings on them in respect of the topic under study, as discussed below.

54 Cap 210 of the Laws of Uganda.

55 See ss 3–4 of the URSB Act.

56 Section 2 of ULRC Act, Cap 25 Laws of Uganda.

57 The ULRC Act is the enabling law in respect of all ULRC matters.

58 Note that the author is based at Makerere.

Uganda's Copyright and Neighbouring Rights Act, 2006 was a Private Members' Bill, backed mainly by rights holders and foreigners. It is noted in the parliamentary report on the Bill thus:

The Copyright and Neighbouring Rights Bill, 2004 is a Private Members' Bill, which was tabled before Parliament under Article 94(4) of the Constitution of Uganda 1995, and under Rules 96 and 97 of the Rules of Procedure of the Parliament of Uganda.

The Committee considered the Bill in accordance with Article 90 of the Constitution of Uganda 1995 and Rule 103(5) of the Rules of Procedure of Parliament.

The Bill seeks to update the law on copyright to bring it into line with international standards and to repeal the existing Copyright Act (Cap 215) of 1964, which is outdated.⁵⁹

However, the subsequent acts, namely the Trademarks Act, 2010 (TMA), the Trade Secrets Protection Act, 2009 (TSPA), the Geographical Indications Act, 2013 (GIA), and the Industrial Property Act, 2014 (IPA), have been passed by parliament at the initiative and with the support of the government. Although it is clear that the rights holders, development partners and other external forces brought pressure on the government of Uganda to introduce the above legislative reforms in the intellectual property area, it is at least consoling that the legislation was brought to Parliament by the government itself, as opposed to in private members' bills. A backdrop to this is the fact that intellectual property legislation in Uganda, which has been initiated by the private sector mainly through private members' bills (as was the case with the CNRA), has tended to be tilted in favour of the IPRs holders, at the expense of the users.

According to Kenneth Rutaremwa, the primary drivers of intellectual property policy making in Uganda are 'the Government, research/education institutions such as Makerere University, civil society organizations/performing artists, Government agencies/institutions such as the Uganda Registration Services Bureau and the Parliament of the Republic of Uganda'.⁶⁰

59 Parliament of Uganda Report of the Committee on Legal and Parliamentary Affairs on the copyright and Neighbouring Rights Bill, 2004 (2006) 1.

60 Rutaremwa is a Senior Principal Legal Officer at the Uganda Law Reform Commission, in charge of Law Reform and Intellectual Property Rights.

Part VII: Relationships between policy drivers

The relationship between these policy drivers, namely rights holders, development partners, enforcers of IPRs, foreign governments, donor agencies, etc., is that of maximum exploitation of IPRs. Foreign development partners view it as a way of 'helping' Uganda comply with its international obligations in the intellectual property area, while at the same time creating a 'safe environment' for the protection of the IPRs of their development partners within Uganda.

The Government of Uganda and its agencies such as the URSB view IPRs as a tool for economic progress and revenue collection, through the many registration and income activities associated with IPRs in Uganda. The rights holders view their IPRs as a road to economic prosperity and as a means of getting rich. In a way therefore, an description of the relationships between these key policy drivers could be that of 'making intellectual property work for all', at least in the economic sense.

Part VIII: Limitations on owners' rights

This part of the report seeks to examine how limitations on owners' rights on patents, trademarks and copyrights can be used as a tool to aid access to health, access to knowledge and access to educational materials.

To start with the law on copyright: the CNRA places a number of limitations on owners' rights on copyrights, which can be used as a tool to aid access to knowledge and access to educational materials. As a general rule, copyright protects only the expression of ideas and not ideas themselves.⁶¹ Indeed, 'ideas, concepts, procedures, methods or other things of a similar nature shall not be protected by copyright under this Act'.⁶² By excluding ideas, concepts, procedures, methods or other things of a similar nature from copyright protection, the CNRA offers a tool to aid access to health (since procedures and methods play a key role in the medical field). Similarly, ideas ignite the main basis upon which copyright thrives, to an extent thus enabling access to knowledge and access to education materials.

The biggest window for access to knowledge and access to education in Uganda is the 'fair use' provision as enunciated in Section 15 of the CNRA. Section 15 details the instances and circumstances under which the use of a copyright work will not amount to infringement. Thus:

1. The fair use of a protected work in its original language or in a translation shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright where:
 - (a) the production, translation, adaptation, arrangement or other transformation of the work is for private personal use only;
 - (b) a quotation from a published work is used in another work, including a quotation from a newspaper or periodical in the form of a press summary, where
 - (i) the quotation is compatible with fair practice; and
 - (ii) the extent of the quotation does not exceed what is justified for the purpose of the work in which the quotation is used, and
 - (iii) acknowledgement is given to the work from which the quotation is made;
 - (c) a published work is used for teaching purposes to the extent justified for the purpose— by way of illustration in a publication, broadcast or sound or visual recording in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;
 - (d) the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institutions, or for professional training or public education in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;
 - (e) the work is reproduced, broadcast or communicated to the public with acknowledgement of the work, in any article printed in a newspaper, periodical or work broadcast on a current economic, social, political or religious topic, unless the article or work expressly prohibits its reproduction, broadcast or communication to the public;

61 CNRA s 6.

62 Ibid.

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- (f) any work that can be seen or heard is reproduced or communicated to the public— by means of photograph, audio-visual work or broadcast to the extent justified for the purpose when reporting on current affairs;
 - (g) any work of art or architecture in a photograph or an audio-visual or television broadcast is reproduced and communicated to the public where the work is permanently located in a public place or is included by way of background or is otherwise incidental to the main object represented in the photograph or audio-visual work or television broadcast;
 - (h) for the purposes of current information, a reproduction in the press, broadcast or communication to the public consists of
 - (i) a political speech or a speech delivered during any judicial proceeding; or
 - (ii) an address, lecture, sermon or other work of a similar nature delivered in public.
 - (i) for the purpose of a judicial proceeding, work is reproduced;
 - (j) subject to conditions prescribed by the Council, a reproduction of a literary, artistic or scientific work by a public library, a non-commercial documentation centre, a scientific institution or an educational institute, on condition that the reproduction and copies made
 - (i) do not conflict with the normal exploitation of the work reproduced; and
 - (ii) do not unreasonably affect the right of the author in the work; and
 - (k) any work transcribed into braille or sign language for educational use by persons with disabilities.
2. In determining whether the use made of a work in any particular case is a fair use the following factors shall be considered:
- (a) the purpose and character of the use, including whether the use is of a commercial nature or is for a non-profit educational purpose;
 - (b) the nature of the protected work;
 - (c) the amount and substantiality of the portion used in relation to the protected work as a whole; and
 - (d) the effect of the use upon the potential market for value of the protected work.
3. The fact that a piece of work is not published shall not of itself prejudice the requirement of fair use in accordance with subsection (2).⁶³

Section 15(1) (a)– (k) lists situations where the use of a work may not be tantamount to infringement; s 15(2) (a)– (d) gives the factors to consider in determining what amounts to fair use. The *fair use* provision is wide enough to accommodate access to knowledge and access to education materials. However herein lays its own ‘undoing’, for s 15(2) narrows down this window of hope by creating several conditions that must be met in order to qualify for benefit under

63 See, for example, CNRA s 12 (Tz). [What is Tz in this context?]

s 15(1). The *fair use* provision in the CNRA thus needs to be amended to include more exemptions to copyright so as to increase access to knowledge and access to education materials.

It should be noted that, although entitled 'Fair use', this provision has only a closed list of uses– unlike 'fair use' in the United States. It is thus more akin to 'fair dealing' in the United Kingdom than to 'fair use' as it is generally understood. The fair use doctrine is a shield for protecting copyright work by non-owners.

Analysed on a case by case basis, the four key factors under s 5(2) of the CNRA (copied from s 107(2) of the USA Copyright Act) are: (a) the purpose of the use; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion taken; and (d) the effect of the use upon the potential market. Such is the scope and nature of the fair use doctrine and its application in Uganda.

Apart from the fair use provision, access to knowledge and materials is made possible by the expiry of copyright and because works were made in the course of the author's employment under a contract of service. Sections 13 and 26 of the CNRA deal with the duration of copyright and performer's rights respectively.⁶⁴ The duration of copyright and related rights is not renewable: once it has expired, the work automatically falls into the public domain.⁶⁵ The fact that the duration for copyright protection cannot be renewed once it has expired creates a rare opportunity for access to knowledge and access to education materials since the works can now be used freely. The only limitation is that sometimes the lapse of time between the start of the term of protection and the time when the work falls into the public domain is so long that the work may not be of as much use, after the expiry of copyright, as it was during the term of protection.

Under s 8 of the CNRA, the copyright of employed authors and commissioned works or authors working for international organisations belongs to their employer, unless evidence is shown to the contrary. Also, under s 7 of the CNRA, public benefit works shall not be protected by copyright. Such works include:

- (a) an enactment including an Act, statute, decree, statutory instruments or other law(s) made by the legislature or other authorized body;
- (b) a decree, order or other decision by a court of law for the administration of justice and any official translations from them;
- (c) a report made by a committee or commission of inquiry appointed by government or any agency of government; and
- (d) news of the day, namely reports of fresh events or current information by the media, whether published in written form, broadcast, put onto the internet, or communicated to the public by any other means.

For all the above works, government shall be the trustee for the public benefit of the works specified in subsec 1.⁶⁶

A remaining window of hope is that of 'license, assignment, transfer or authorization to use the copyright (if available)'– since the use of none of these

⁶⁴ See s 45.

⁶⁵ Bakibinga DJ & Kakungulu RM (op cit).

⁶⁶ CNRA s 7(2).

can be tantamount to infringement of copyright or related rights.⁶⁷ For example, for urgently required materials intended to enable access to knowledge and/or access to education materials, the government or any other stakeholder can acquire a licence, assignment, transfer or any other form of authorisation to use the copyright from the author or owner of such a work or works. Indeed, the CNRA allows the owner of a copyright 'to enjoy it as if it were moveable property—by assigning, licensing, or transfer to another person'.⁶⁸

67 Bakibinga DJ & Kakungulu RM (op cit).

68 Parliament of Uganda (2006) (op cit) 3–4.

Part IX: Patents and access to health care

Access to health is affected mainly by patents. It is for this reason that the EAC came up with guidelines on the Utilization of Public Health Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation⁶⁹ to streamline the issue of public health WTO-TRIPS flexibilities and to align the national intellectual property laws of the Partner States with these flexibilities.

According to the IPA, several limitations have been placed on the owner of a patent. Section 42 limits the owner of a patent to the terms of the claim as filed with the Registrar. Thus, the patent owner may not go beyond or above the claim as filed with the Registrar. Section 43 deals generally with the 'limitation of rights' (of a patent). Section 43 explains the limitation of rights as follows:

- (1) The rights under the patent extend only to acts which are done for industrial or commercial purposes but do not extend to acts which are done for scientific research.
- (2) The rights under the patent do not extend to acts in respect of articles which have been put on the market in Uganda or in any other country or imported into Uganda by the owner of the patent or with his or her consent.
- (3) The rights of the patent do not extend to variants or mutants of living forms or replicable living matter that is distinctively different from the original for which patents were obtained where those mutants or variants are deserving of separate patents.

Furthermore, s 44 of the IPA places defines the rights of a patent owner by stipulating that the following rights apply:

- (a) the right to carry out any acts related to experimental use or research on the patented invention, whether for scientific or commercial purposes;
- (b) the right to make use of a patented invention for teaching or educational purposes;⁷⁰
- (c) the right to carry out acts, including testing, using, making, or selling a patented invention solely for the purposes reasonably related to the development and submission of information required under any law of Uganda, or of another country, which regulates the manufacture, construction, use, or sale of any product;
- (d) the right to make use of the patented invention for the preparation for individual cases, in a pharmacy or by a medical doctor, of a medicine in accordance with a medical prescription; and
- (e) the right to manufacture and export to another country a patented healthcare invention where the export of the invention addresses a health need identified by the other country.⁷¹

69 Parliament of Uganda *Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Industrial Property Bill, 2009* (2013) 13.

70 Clause 44 (a)(b) on Exception to exclusive rights was amended by the Committee to include the words 'research' and 'educational', with the justification 'to broaden the clauses to include research and educational purposes'. See Parliament of Uganda (2013) (op cit) 12.

71 Bakibinga DJ (2015) (op cit) 9.

According to Bakibinga, 'a recent example of this (s 44(e) of the IPA) was the provision of drugs and immunization for Ebola in West Africa'.⁷² Most of these drugs were manufactured in least developed countries.

The limitations to rights are well summarised by Bakibinga thus:

The restriction on the rights of a patent owner in relation to experimentation, teaching and medical use appears to be an extension of Article 27 of the TRIPS Agreement and Section 8(3) of the Industrial Property Act, 2014.

Other limitations on the owner's rights are embodied in provisions on compulsory licensing of a patent relative to non-working and similar reasons and interdependent patents. Related to this is the authorization of the Minister for government to exploit patents in the public interest, including national security, nutrition, health, environmental conservation, national emergency or the development of other vital sectors of the national economy requires. These two limitations are broadly encompassed in Article 31 of the TRIPS Agreement.

Finally, the duration of a patent is twenty years.⁷³

The above limitations on patents in Uganda as espoused in the IPA are not only in line with the TRIPS Agreement but can also be used to act as a window of access to medicines. The Doha Declaration has been heralded as the vanguard of flexibilities of the TRIPS Agreement. Twinomugisha reflects on the Doha Declaration and concludes thus:

... in the Doha Declaration, members recognized the question of limited pharmaceutical production capacities in developing countries and LDCs and thus the fact that they could 'face difficulties in making effective use of compulsory licensing under the TRIPS Agreement'. Members were concerned about the requirement that production should be 'predominantly for the supply of the domestic market'. This provision effectively limited the ability of countries that cannot manufacture pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are patented. In response to this challenge, the WTO on August 30, 2003 gave an interim waiver to an exporting country from having to comply with the article 31(f) restriction if it is exporting to countries with no or insufficient manufacturing capacity. The August 30 decision allows any member country to export pharmaceutical products made under compulsory licenses provided that the country of export and the country of import have issued such licenses and notified the TRIPS Council of such importation or exportation. The decision covers patented products or products made using patented processes in the pharmaceutical sector, including active ingredients and diagnostic kits.⁷⁴

It is therefore quite clear that Uganda can effectively take advantage of the flexibilities of the TRIPS Agreement as domesticated in its IPA law to increase access to health or essential medicines.

72 Ibid.

73 Ibid.

74 Ibid; Twinomugisha BK (2015) (op cit) 60.

Under s 44 and s 60(2) of the IPA, the government can grant compulsory licences for medicines in particular national emergencies while the Doha Declaration, read with the WTO-TRIPS Agreement, permits compulsory licensing. Uganda has complied with the requirements of compulsory licensing under the WTO-TRIPS Agreement by providing for flexibilities in the IPA, which permits compulsory licences for manufacture or import.

The next and last discussion in this section focuses on limitations on trademarks and how these may be used to aid access to health. Since the law of trademarks deals with the branding of products, these brands certainly have an impact on the right to health, as well as on access to education materials and access to knowledge.

The Law of Trademarks in Uganda is regulated by the Trade Marks Act, 2010⁷⁵ which repealed the Trade Marks Act, Chapter 217 of 1953.⁷⁶ The Trade Marks Rules issued under the repealed Trade Marks Act, Chapter 217 of 1952 are still applicable.⁷⁷

The limitations on the rights of the Trade Mark Owner are best captured by Bakibinga, as follows:

There are a number of limitations on trade mark registration. First, registration is ineffective in relation to a bona fide use by a person of his/her own name or the name of his or her place of business or the name of the place of business. This applies to trade names and artificial legal persons such as companies designated as 'limited' or 'plc'. Second, registration does not affect 'the bona fide, use by a person of any description that is likely to be taken as importing the reference mentioned under section 36(2)(b). Third is a similar limitation in relation to services. Fourth, registration does not apply to a trade mark being used in line with the permitted use or implied consent of the owner or registered user either in relation to the goods or services. Fifth, a defendant to an action for infringement can plead that the trade mark has been used without infringement and the use is reasonably necessary in order to indicate that the goods are adapted to form part of or to be accessory to other goods in relation to which the trade mark has been used, or to indicate that series are available for that use. Sixth, in defence to an action for infringement of trade mark it can be pleaded that the trade mark is one of two or more registered trademarks relating to goods or services identical or resembling each other pursuant to use of the registered mark. Seventh, a defendant to an infringing action can plead that the use of the trademark is not deceptive or confusing or that the use is not indicative of any connection in the course of trade between the goods or services and the owner or registered user. Finally, a prior user of a registered trademark is protected from actions by registered users for infringement.⁷⁸

75 Act No. 7 of 2010.

76 Du Plessis ED, Kotze GS, Brown SB et al. (op cit) 621.

77 Ibid.

78 Bakibinga DJ (2015) (op cit) 11.

Unlike copyrights and patents, whose duration or term of protection expires, that of trademarks is renewable almost indefinitely in all jurisdictions– as is the case in Uganda. The limitations on trademarks in Uganda, such as limitation to service, can be used to assist in the right to health and access to education materials and to knowledge. Since the main purpose of a trademark is to identify the owner’s goods, and to avoid confusion in the market, limitation to service in respect of trademarks in Uganda means that trademarks which are not in respect of the same service or business will merely ‘dilute’ the ‘other’ trademarks but are not likely to confuse consumers, or make consumers fail to identify the goods.

Part X: Influence of human rights on IP policy

The extent to which intellectual property policy and laws have been influenced by human rights, particularly in respect of access to medicines (required by the right of access to health), access to knowledge, and access to education materials (required by the right to education), and how these processes and policies measure up against human rights principles remains largely unexplored in the Ugandan context.⁷⁹ According to a study conducted by the Human Rights Centre Uganda, the following was observed:

The enjoyment and observance of Economic, Social and Cultural Rights (ESCR) is largely insufficient in Uganda and this inadequacy is more pronounced among the poor and vulnerable communities and groups. A significant number of people lack access to quality education, health care, social security, food, clean and safe water, and housing, among other rights.

A Uganda Service Delivery Indicators (SDI) survey published in November 2013 showed that the quality of education and health services remains weak, posing serious challenges to the country's long-term social and economic progress as outlined in the Uganda Vision 2040.⁸⁰

The Government of Uganda has tried to harness human rights in both the National Development Plan of 2010 and the 2016 National Action Plan. Indeed, even the ESCR includes the rights of access to health, access to knowledge and access to educational materials required by the right to education, as articulated in Article 30 of the Constitution of the Republic of Uganda. Equally, the question enforcing both human rights and IPRs remains a challenge.

According to Sekaggya, 'the government (of Uganda) has not taken enforcement or issues of intellectual property very seriously'. 'Intellectual property,' he continues, 'is a very new area which should be brought onto the human rights agenda, but lack of knowledge and awareness remains a challenge.'⁸¹ In a bid to streamline issues of human rights in the key organs of the Government of Uganda, namely parliament and the executive, a new and highly innovative model was developed. 'On May 21, 2012, the Human Rights Committee of the Parliament of Uganda was created with the mandate to ensure compliance with human rights standards in all business before parliament.'⁸² The checklist is detailed and explicitly includes the right to education as provided for in Article 30 of the Constitution of Uganda, and economic rights as given in Article 40.⁸³ Ideally, the committee should monitor all matters relating to human rights and government's observance of human rights as an oversight committee. In doing its work, Muhindo notes:

...the committee should work as a clearing house by testing the compatibility of policies, practices and legislation, and ensure conformity to internationally agreed standards, by subjecting them to the human rights checklist. The checklist, which was made by the committee, is meant to ensure compliance with human rights in regard to policy, bills, budgets, government programmes and all business handled by Parliament.⁸⁴ Although the Human Rights Committee of Parliament

79 Interview with Mrs Margaret Sekaggya, CEO, Human Rights Centre, Uganda at her office in Bugolobi, Kampala, 6 May 2016.

80 Human Rights Centre Uganda (HRC-U) *The Ten Critical Human Rights Challenges for the Priority Attention of the Parliament of the Republic of Uganda* (2015) HRC-U Kampala, 7.

81 Sekaggya (interview— *supra*).

82 Parliament of the Republic of Uganda *Checklist for Human Rights Compliance* Standing Committee on Human Rights (2015) 3.

83 *Ibid.*

84 Muhindo J 'Parliament, Human Rights and the 2016 Elections' (January 2016) *Pilac Today* 3.

has created a lot of hope and enthusiasm regarding the observance of human rights in key government decision making, what remains to be seen is the impact of this Committee and its checklist system on the actual enjoyment of the rights of access to health, access to knowledge and access to education in Uganda.⁸⁵ The 'impact of the Committee if seen from the four (4) years it has been in existence is still wanting'.⁸⁶

It is now common practice that a human rights impact assessment is carried out on any chosen intellectual property policy or law before any such policy or law can be passed by the executive or parliament respectively.⁸⁷ The works of the Human Rights Committee of Parliament are intended to be a furtherance of Article 20 of the Constitution, which states that 'fundamental rights and freedoms of the individual are inherent, and not granted by the State',⁸⁸ and that 'the rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons'.⁸⁹ All individuals, organs of the state and other non-state actors– including security organisations– are obliged to observe human rights in Uganda.⁹⁰ This role in respect of the executive and parliament is also in line with the implementation and operationalisation of 'all treaties, conventions, agreements or other arrangements made between Uganda and any other country, or between Uganda and any international organization or body, in respect of any matter'.⁹¹

The stage is now set for human rights to influence intellectual property policy processes in Uganda. To a great extent, and especially since 2012 when the Human Rights Committee of Parliament was created, intellectual property processes and policies measure up against human rights principles in Uganda.⁹² In a bid to entrench a culture of human rights in Uganda's legislative framework, parliament is to set up the Institute for Parliamentary Studies. Among other topics to be covered, the syllabus specifically mentions the training of members of parliament on the human rights implications of their work.⁹³ A similar move is yet to be tabled by Ugandan members of the East African Legislative Assembly (EALA) since 'some of the bills at Uganda's national assembly are largely informed by the regional instruments or developments at EAC'.⁹⁴

Indeed, regarding the access to health and essential medicines regime, the EAC Medicines Regulatory Harmonisation Programme has enabled EAC partner states by facilitating access to essential medicines in the entire EAC region.⁹⁵ The Government of Uganda plans to support the works of the Human Rights Committee of Parliament with a comprehensive National Human Rights Policy. The proposed policy is still in draft form but is very detailed and will go a long way in streamlining issues of intellectual property and human rights among others.⁹⁶

85 Ibid.

86 Ibid.

87 Ibid.

88 Article 20(1) of the Constitution.

89 Article 20(2) of the Constitution.

90 Article 221 of the Constitution.

91 Article 123(1) of the Constitution.

92 Interview with Mr Solomon Kirunda, Principal Legal Officer, Parliament of the Republic of Uganda, conducted at his office at the Parliamentary building, 3 May 2016.

93 Ibid.

94 Ibid.

95 Interview with National Drug Authority (NDA) official (who preferred anonymity), conducted at the NDA offices on Buganda Road, Kampala, 6 May 2016.

96 Interview with Ms Maureen Nalubega, Human Rights Officer, Uganda Human Rights Commission, conducted at the UHRC Head Office on Twed Towers, Lumumba Avenue, Kampala, 17 May 2016.

Part XI: Notable results from research by interviewees

In *CEHURD97 & 3 Others v Attorney General*,⁹⁸ a case concerned with maternal health care in Uganda, the Constitutional Court declined to find the government in violation of its obligations under the right to health.⁹⁹ The case was dismissed on a technicality raised by the Attorney General regarding the ‘political question doctrine’. On appeal, the Supreme Court ordered the Constitutional Court to hear and determine the case on its merits. The Constitutional Court is yet to render a verdict on the merits of the case.¹⁰⁰ The case is very important in indicating the extent to which there is a right to health in Uganda. However, Oloka-Onyango notes that ‘the CEHURD decision was also influenced by the absence of the right to health in Uganda’s Bill of Rights.’¹⁰¹

Another case involving access to education, a right which is provided for in Article 30 of the Constitution, has set the stage for a protracted legal battle and indeed is the first of its kind on the right to education in Uganda. In *Initiative for Social and Economic Rights (ISER) and Hon Ssewungu Gonzaga Joseph v The Attorney General of Uganda*¹⁰², the case was instituted because the government had reduced the per pupil grant (to pupils through public schools) from Ug.Shs.7,560 to Ug.Shs.6,800. This action was described by the petitioners as detrimental to all universal primary education (UPE) beneficiaries because it would in effect reduce the benefits which accrued to individual pupils under the programme– not to mention the fewer resources that would be available for UPE schools. While the hearing of the main suit was pending, the petitioners sought an injunction restraining the government from ‘...implementing or enforcing any reduction in the UPE Capitation Grant, pending disposal of the main application’. Oloka-Onyango writes:

In refusing to grant the injunction, the court observed that ‘... the intention of the government as a whole is never to deprive any school going child from the right to education’. To grant the application for an injunction, the court continued, would amount to ‘...taking the wheels off the vehicle of the Government in its drive to provide education to the children of Uganda’. According to the court, the action of the applicants would have the effect of stopping the allocation of up to 10% of the national budget, and would thus ‘...deprive the children of Uganda the right to an education as set out in Art 30 of the Constitution. Such interference cannot be remedied or corrected by any of the proposals made by the Applicants.’¹⁰³

The court was of the view that if the application were to be granted the financial management of the country would be placed in ‘uncertainty’ and ‘...even the Courts which are dependent on the National Development Plan may cease to function due to lack of appropriation of funds under the budget’.

At the end of the day, the government decided not to cut the budget. The parties to the suit (ISER and the government) then entered mediation in order to work out a compromise position with respect to the main suit...

97 Centre for Health, Human Rights and Development.

98 Constitutional Petition No. 16 of 2011.

99 Oloka-Onyango J ‘Ghosts and the Law: An Inaugural Lecture’ (2015) Makerere University 45.

100 The decision of the Supreme Court in the case of *CEHURD & 3 Others v Attorney General* Constitutional Appeal No. 1 of 2013.

101 Ibid 47.

102 Misc. App. No. 173 of 2014.

103 Ibid 6–8; Oloka-Onyango (op cit) 48.

but the case demonstrates that the courts still remain reluctant to engage with the state over economic, social and cultural rights.¹⁰⁴

According to Namusobya, the government increased the UPE Capitation Grant to Ug.Shs.10,000 due to pressure, but the mediation failed. ISER has fixed the case for hearing of the main suit and a hearing date is yet to be assigned by the Constitutional Court.¹⁰⁵

The CEHURD case came up against the backdrop of the *Patricia Asero Ochieng and 2 Others v The Attorney General*¹⁰⁶ case ('PAO'), in which the petitioners successfully challenged the overly broad definition of 'counterfeit' in Kenya's Anti-Counterfeit Act, which in essence covered the generic drugs.¹⁰⁷ The decision in the PAO case was widely celebrated in East Africa and beyond. As a consequence, similar legislation, such as the 2010 EAC Anti-Counterfeit Bill and the 2009 Counterfeit Bill of Uganda, lost credibility and have been stalled. The EAC regional bloc's legislative and administrative framework has had a tremendous impact on access to health, access to knowledge and access to education in the region.

The success in the PAO case as opposed to the CEHURD case can best be attributed to the failure of Uganda's Constitutional Court to interpret domestic law. This is captured by a senior judge in Uganda in the Dictum of Egonda-Ntende, Ag. Justice of the Supreme Court, in *Attorney General v Susan Kigula & 417 Others*,¹⁰⁸ who noted that 'the judiciary should strive to interpret domestic law in a manner that as far as possible conforms to international legal obligations already assumed.'¹⁰⁹

On the other hand, Twinomujuni, Justice of Appeal in the lead judgment of the Constitutional Court implored the courts in Uganda always to 'interpret international agreements, treaties and conventions as valid upon the coming into force of the Constitution, taking into account Article 286 of the Constitution'.¹¹⁰

In June 2016, performing artists in Uganda entered into a Memorandum of Understanding between the Uganda Federation of Movie Industry, the Uganda Police Force and the URSB.¹¹¹ By virtue of this arrangement, the Government of Uganda agreed to form a police unit to crack down on commercial copyright infringement. The unit is in charge of arresting people who infringe on intellectual property– including patents, trademarks and copyright– created by musicians, artists, authors and other innovators. The Intellectual Property Enforcement Unit of the police will include the use of holograms, with the help of collective management organizations, to identify originals from infringing copies.¹¹² However, as noted earlier, large-scale copying of learning materials helps provide access to learning materials.¹¹³

104 Oloka-Onyango (ibid).

105 Telephone interview with Ms Salaam Namusobya-Ssekaana, ISER CEO, 14 October 2016.

106 [2012] eKLR, decided 20 April 2012.

107 Andanda P 'Striking a Balance between Protecting Trademarks and Public Health Interests in Combating Trade in Counterfeit Medicines: Lessons from Kenya and South Africa' (2016) 60 *Journal of African Law* 323.

108 C Constitutional Petitions Nos. 2 & 8 of [2009] UGCC (5 February 2009).

109 Ibid.

110 Ibid.

111 Okwera O 'Otafiire tips artists on Copyright' *New Vision* (20 June 2016) at 16.

112 Ainebyoona E 'Police unit to enforce copyright law' *Daily Monitor* (Kampala, 20 June 2016) at 6.

113 Kawooya op cit.

There is thus a pressing need to strike a balance between copyright (ownership) and access to knowledge and access to education.¹¹⁴ Whereas the creators and artists should benefit from their intellectual creations, they should at the same time respect the rights of others and the limitations that have been placed on copyright, trademarks and patents in Ugandan law.¹¹⁵

114 Interview with Mr James Wasula, CEO, Uganda Performing Rights Society (UPRS), at UPRS, Kamwokya, Kampala, 3 May 2016.

115 Interview with Mr Denis Kibirige, Senior State Attorney, Ministry of Justice and Constitutional Affairs, at the Ministry Head Offices, Kampala; 3 May 2016.

Part XII: Integration of human rights into IP policy

In a bid to deepen access to knowledge and education in Uganda, Uganda should ratify the Marrakesh Treaty, which came into force on 30 September 2016, to facilitate access to published works for persons who are blind, visually impaired or otherwise print-disabled.¹¹⁶

There is an increasing need for Uganda and the other Partner States in the EAC region to explore the flexibilities within the TRIPS Agreement. Such flexibilities include the use of parallel importation of expensive books from a cheaper source (though not thus intended to restrict parallel imports to only essential medicines or patents) and compulsory licensing for unaffordable, unavailable or out-of-print books or study materials.¹¹⁷

According to Abbott, 'the TRIPS Agreement authorized each WTO Member to apply its own doctrine of exhaustion, including to allow parallel importation of drugs.'¹¹⁸ Similarly, under 'the amendment to the 2001 Doha Declaration on the TRIPS Agreement and Public Health' in 2015, 'the WTO Council extended until January 2033, the period under which LDCs can choose whether or not to protect pharmaceutical patents and clinical trial data.'¹¹⁹ However Tamale argues that the LDCs should be automatically allowed to choose whether or not to protect pharmaceutical patents and clinical trial data– as long as they remain LDCs without needing to apply for an extension of time after 2033.¹²⁰ Tamale argues further that the EAC Regional Intellectual Property Policy on the Utilization of Public Health Related WTO/TRIPS Flexibilities should be used in the EAC regional bloc to guide and enable increased access to health.¹²¹ Uganda's IPA, although yet to be tested since it is a 2014 legislation, has already been hailed as good legislation, capable of benefiting from the TRIPS flexibilities.

The 'disconnect' and lack of harmony in the mandate of key government institutions responsible for access to health, access to knowledge, and access to education needs to be harmonised. In Uganda only a line ministry can initiate a policy, so the URSB needs to work hand in hand with the Ministry of Trade, Industry and Cooperatives, which is the line ministry responsible for trade and intellectual property. The URSB, although a semi-autonomous entity in the Ministry of Justice and Constitutional Affairs, cannot initiate a policy since it is not a line ministry. Otherwise, the URSB remains a key player in all the intellectual property processes in Uganda and these must be and have of recent been informed by human rights.¹²²

As Ncube notes in respect of a comparable situation in South Africa, 'the position that states take in the international sphere on health and intellectual property (IP) policy matters is influenced by their national experiences and positions. Similarly, the national arena is influenced by global health diplomacy.'¹²³

116 Interview with Mr Charles Batambuze, CEO, Uganda Registration of Rights Organization (URRO) at Fountain House, Nkrumah Road, Kampala, 3 May 2016.

117 Interview with Ms Elizabeth Tamale, Assistant Commissioner/Enhanced Integrated Framework (EIF) Coordinator, TRACE II, at the Ministry of Trade, Industry and Cooperatives Headquarters, Parliamentary Avenue, Kampala, 24 June 2016.

118 Abbott FM 'Access to Medicines and Intellectual Property Rights', available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_074747.pdf (viewed on 6 December 2017) [Please see note for this ref in the References.]

119 Anthony CK Kakooza (via questionnaire) 21 September 2016.

120 Tamale (interview– supra).

121 Ibid.

122 Interview with Mr Gilbert Agaba, Intellectual Property Officer, at Uganda Registration Services Bureau (URSB) Office, Amamu House in Kampala, 6 May 2016.

123 Ncube C 'The Politics of National Intellectual Property Policy Design and the Provision of Health Services in South Africa' (unpublished paper) 1.

There is need to carry out a massive sensitisation of the population about their rights of access to knowledge, access to education and access to health.¹²⁴ Such a sensitisation is key firstly because access to health information can help improve health care.¹²⁵ There is also need to carry out a human rights audit on all the intellectual property laws in Uganda to examine the extent to which these laws respect human rights.¹²⁶ African or Ugandan solutions also need to be harnessed to enhance access to health, access to knowledge and access to education. Himonga argues that:

ubuntu may contribute to the solution...by providing a basis for harmonizing individual and collective rights through its attributes of (moderate) communalism, interdependence and solidarity, all of which serve to contextualize the interests of the individual in relation to those of the community.¹²⁷

To a great extent, Uganda's intellectual property laws comply with the country's human rights obligations.

124 Interview with Mr Norman Mbabazi, CEO Audio Visual Rights Society (AVRS) and formerly CEO, Uganda Federation of Movie Industry (UFMI), at the School of Law, Makerere University, 24 May 2016.

125 See generally MGN Musoke *Informed and Health Theoretical and Applied Perspectives on the value of Information to Health Care* (2016).

126 Interview with Mr Sylvester Kyagulanyi, CEO, Sikia Media Services/Records, at the School of Law, Makerere University, 25 May 2016.

127 Himonga C 'The Right to Health in an African Cultural Context: The Role of Ubuntu in the Realization of the Right to Health with Special Reference to South Africa' (2013) 57 *Journal of African Law* 186.

Part XIII: Conclusions

There is an urgent need to prioritise the passing of a National Intellectual Property Policy so as to guide the intellectual property processes in Uganda. 'Limited resources' is always cited as the main cause of limited access to health, knowledge, and to education. Any consideration of Uganda's intellectual property laws must engage with a human rights approach.

Lastly, the current stalemate or slow pace in implementing a human rights-based approach to IPRs in Uganda is hampered mainly by the fact that the government does not want to feel that the terms of the policy are being imposed upon it by the western world.

References

- Abbott FM 'Access to Medicines and Intellectual Property Rights', available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_074747.pdf (viewed on 6 December 2017).
- Ainebyoona E 'Police unit to enforce copyright law' *Daily Monitor* (Kampala, 20 June 2016) at 6.
- Andanda P 'Striking a Balance between Protecting Trademarks and Public Health Interests in Combating Trade in Counterfeit Medicines: Lessons from Kenya and South Africa' (2016) 60 *Journal of African Law* 323.
- Bakibinga, DJ and Kakungulu RM 'Intellectual Property Law in East Africa' (2015) *LawAfrica*.
- Bakibinga DJ 'Recent developments in intellectual property law in Uganda' Paper delivered at 4th Global Congress on Intellectual Property and Public Interest, New Delhi, India, December 2015, 11.
- Bently L and Sherman B *Intellectual Property Law* (2014) 33.
- Chapman AR 'Approaching Intellectual Property as a human right: Obligations related to Article 15(1)(c)' (2001) XXXV *UNESCO PUBLISHING* 3.
- Du Plessis ED Kotze GS Brown SB et al. Adams & Adams Practical Guide to *Intellectual Property in Africa* (2012) 621, 634.
- Himonga C 'The Right to Health in an African Cultural Context: The Role of Ubuntu in the Realization of the Right to Health with Special Reference to South Africa' (2013) 57 *Journal of African Law* 186.
- Human Rights Centre Uganda (HRC-U) *The Ten Critical Human Rights Challenges for the Priority Attention of the Parliament of the Republic of Uganda* (2015) HRC-U Kampala, 7.
- Kawooya D 'Theorizing and Practising Fair Use: Copyright for Africa's Higher Education, The Fourth Commonwealth Forum on Open Learning', available at <http://pcf4.dec.uwi.edu/viewpaper.php?id=36> (accessed on 8 June 2017).
- Kwesiga P 'Census: Muslims Up, Catholics and Anglicans Drop' (25 March 2016) *The New Vision*.
- Mbazira C, Lomo Z & Zariiffs I *Economic, Social and Cultural Rights Litigation in Uganda: A Manual for Public Interest Lawyers and Litigators* (2013).
- Musoke MGN *Informed and Health Theoretical and Applied Perspectives on the value of Information to Health Care* (2016).
- Muhindo J 'Parliament, Human Rights and the 2016 Elections' (January 2016) *Pilac Today* 3.
- Ncube C 'The Politics of National Intellectual Property Policy Design and the Provision of Health Services in South Africa' (unpublished paper) 1.
- Okwera O 'Otafire tips artists on Copyright' *New Vision* (20 June 2016).

Oloka-Onyango J 'Ghosts and the Law: An Inaugural Lecture' (2015) Makerere University 45.

Parliament of Uganda *Report of the Committee on Legal and Parliamentary Affairs on the copyright and Neighbouring Rights Bill 2004* (2006) 1, 3–4.

Parliament of Uganda *Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Industrial Property Bill, 2009* (2013) 2.

Parliament of Uganda *Checklist for Human Rights Compliance* Standing Committee on Human Rights (2015) 3.

Salazar S 'Intellectual Property and the Right to Health, in Intellectual Property and Human Rights' (1999) *WIPO PUBLICATION* No. 762(E).

Shaheed F 'The right to freedom of artistic expression and creativity' Special Rapporteur Report to United Nations Human Rights Council, 23rd Session, United Nations General Assembly, New York (14 March 2015).

Twinomugisha BK *Fundamentals of Health Law* in Uganda (2015) 21, 60.

Uganda Law Reform Commission (ULRC) 'A Report on the Background Study on the Legal Implementation of the World Trade Organization Agreements' (2004) *ULRC Publication* No. 32, 31.

Africa scholars of knowledge justice

Documentary sources

National

- The Constitution of the Republic of Uganda (Arts 1, 2 and 26, 189, Chapter IV (Sixth Schedule), 1995
- The Copyright and Neighbouring Rights Act, No. 19, 2006
- The Copyright and Neighbouring Rights Regulations, S.I No.1, 2010
- The Patents Act, Cap 216
- The Patents (Amendment) Act, 2002
- The Patent Regulations, S1 216-1
- The Trademarks Act No. 17, 2010
- The United Kingdom Designs (Protection) Act Cap 218
- The Trade Secrets Protection Act, 2009
- The Computer Misuse Act, 2011
- The Industrial Property Act, 2014
- The Plant Variety Protection Act, 2013

International

- The International Covenant on Civil and Political Rights (1966)
- The International Covenant on Economic, Social and Cultural Rights (1966)
- Special Rapporteur to UN OHCHR (2015). Report of the Special Rapporteur in the field of cultural rights; Farida Shaheed: Copyright policy and the right to science and culture, OHCHR. Human Rights Council 28th Session, 14 March, UN General Assembly, New York.
- Special Rapporteur to UN OHCHR (2015). Report of the Special Rapporteur in the field of cultural rights; Farida Shaheed: Copyright policy and the right to science and culture, OHCHR. Human Rights Council 70th Session, 4 August, UN General Assembly, New York.
- UN Committee on Economic, Social and Cultural Rights (UN CESCR). (2006). General comment 17: The right of everyone to benefit from the protection of moral and material interests resulting from scientific, literary or artistic production of which he or she is the author (art 15, para 1 (c)). E/C.12/GC/17, 12 January.

Primary intellectual property statutes in Uganda

The research team reviewed the following statutes to determine the extent to which they take into account human rights concerns, briefly examining the genealogy, purpose and function of each statute and its relationship to human rights. The review identifies provisions that explicitly take human rights into account, provisions that accommodate human rights, as well as ways in which the statutes unduly limit the enjoyment of human rights. The review also identified any major cases that have involved both a statute and human rights.

- The Constitution of the Republic of Uganda (Arts 1, 2 and 26, 189, Chapter IV (Sixth Schedule), 1995
- The Copyright and Neighbouring Rights Act, No. 19, 2006
- The Copyright and Neighbouring Rights Regulations, SI No.1 of 2010
- The Patents Act, Cap 216
- The Patents (Amendment) Act, 2002
- The Patent Regulations, S1 216-1
- The Trademarks Act No. 17, 2010
- The United Kingdom Designs (Protection) Act Cap 218
- The Trade Secrets Protection Act, 2009
- The Computer Misuse Act, 2011
- The Industrial Property Act, 2014
- The Plant Variety Protection Act, 2013
- Anti-Counterfeit Act, 2004
- Anti-Competition Act, 2004
- Consumer Protection Act, 2004¹²⁸

Interviewees

Government

- Representatives from the Ministry of Trade, Industry and Co-operatives
- Representatives from the National Council for Science and Technology
- Representatives from the Ministry of Justice and Constitutional Affairs

¹²⁸ There is a proposal by the Government to collapse these two bills into the 'Anti-Competition and Consumer Protection Bill 2016'.

-
- Representatives from the Uganda Law Reform Commission
 - Representatives from the Uganda Registration of Services Bureau
 - Representatives from the Ministry of Health
 - Representatives from the National Drug Authority
 - Representatives from the National Council for Higher Education
 - Representatives from the Ministry of Education, Science, Technology and Sports
 - Representatives from Makerere University

Industry

- Rights holder representatives (of the three collecting societies in Uganda)
- Internet service providers
- Uganda Pharmaceutical Industries/Generic Medicine Manufacturers

Book sellers/Industry

Human rights organisations

- Uganda Human Rights Commission/National Human Rights Institution
- Uganda Human Rights Defenders
- Center for Health, Human Rights and Development (Makerere University)
- Uganda Consumer Protection Network
- Médecines Sans Frontières
- Lawyers for Human Rights/in private practice

Difficulties and challenges

- Lack of human rights advocates' understanding of the relevance of intellectual property other than regarding access to medicines.
- The 'culture' of transport refund/refreshments in focus group discussions.
- Lack of a clear government policy on IPRs.

**Timeline: To be sent separately. Interview Template
Consent Form/Sample Questions**

Annex A: Consent form and sample questions

You are invited to participate in a research study that explores the extent to which human rights regarding access to medicines, knowledge and education are taken into consideration in intellectual property law and policy development processes. You were selected as a possible research subject because of your experience in intellectual property or human rights in Uganda.

The study is funded by the Open Society Foundations (OSF). The following researcher who will be conducting the study:

Dr. Ronald Kakungulu-Mayambala, Makerere University

We ask that you read this form and ask any questions you may have before agreeing to participate in the study.

The purpose of the research study

The purpose of this study is to examine recent and current intellectual property reform processes in Uganda through a human rights lens. We are using a case study method that allows for an in-depth study and a comparison of the interactions between human rights and intellectual property law in different countries.

Your role in the study

Your role in the study would be to be interviewed by the researchers. Examples of the kinds of questions we would like to ask you are attached to this consent form. If you agree to participate, you will be one of {xyz} subjects who will be participating in this research.

Interview procedure

If you volunteer to participate in this study, you will be interviewed by the researcher. Interviews will be conducted at a time and place arranged with you. The interview is expected to take 60 to 90 minutes and will be conducted in one session unless otherwise requested. If you agree, the interview will be digitally recorded. Otherwise, the interviewer will take notes.

Risks of taking part in the study

Participation in any research may lead to a discomfort in answering questions. At any time during the interview you can tell the researcher that you feel uncomfortable, that you do not want to answer a particular question, or that you want to stop participating.

Participation may involve a loss of privacy and confidentiality. All efforts will be made to keep your personal information private and confidential.

Benefits of taking part in the study

There is no direct benefit to any individual participant in this study. However, your participation in this research may contribute to a better understanding of the link between intellectual property and human rights in teaching and advocacy.

Taking part in this study is voluntary

Taking part in this study is entirely voluntary. You can choose whether to be in this study or not. You can refuse to answer any question that you are not comfortable with and you can stop the interview at any time. You may choose not to take part at all.

You can also leave the study at any time. Leaving the study will not result in any penalty or loss of benefits to which you are entitled. Your decision whether or not to participate in this study will not affect your current or future relations with the researcher, their institutions or Makerere University.

Your personal information will be confidential

Efforts will be made to keep your personal information and contact details confidential. We cannot guarantee absolute confidentiality. Your personal information may be disclosed if required by law. Your records will be handled as confidentially as possible.

In order to limit the risk, recordings of the interview and transcribed interviews will be identified only by code number. All study information will be kept in a password-protected computer and locked file cabinet that only the principal investigator and co-investigators will have access to.

Your identity

You can choose to have your identity known in the research, or kept confidential. The interviews can be conducted in one of two ways:

- “On the record” meaning that you can be quoted or cited by name in reports of the research. If you choose to do an “on the record” interview, you may designate at any time during the interview that any particular remarks or topics of your choosing should be handled as “off the record” and may not be quoted or cited to you.
- “Off the record” meaning that you will not be quoted or cited by name in reports of the research. All personally identifying information will be removed from all interview excerpts and a pseudonym will be used.

If you so desire, your identity will be held in confidence in reports in which the study may be published and in databases in which results may be

stored. The principal investigator, co-investigators, and a transcriber will be the only persons with access to research data, including tape recordings. Students will only have access to the data for purposes of analysis and will not be able to link the information to you, unless you give permission to be "on the record." In order to further protect your privacy, the transcriber has been asked to sign a non-disclosure agreement to keep your information confidential.

You have the right to review the recordings made as part of the study to determine whether they should be edited or erased in whole or in part.

Organisations that may inspect and/or copy the research records for quality assurance and data analysis include groups such as the study investigator and his/her research associates, Institutional Review Board or its designees, the study sponsor, and as allowed by law.

Contacts for questions or problems

If you have any questions or concerns about the research, please feel free to contact the researchers:

Name: Dr. Ronald Kakungulu-Mayambala
Email Address: rkakungulu@law.mak.ac.ug
Designation: Senior lecturer
Telephone Number: +256 772 318 528
Institution/Organisation: Makerere University School of Law
Office Address: School of Law, Old Building Office No. 126.

If you have concerns about the research, its risks and benefits or about your rights as a research participant in this study, you may also contact the University of Cape Town Law Faculty Research Ethics Committee Administrator, Mrs Lamize Viljoen, at 021 650 3080 or at lamize.viljoen@uct.ac.za.

Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.28 Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701, South Africa.

Signature of research subject

I understand the procedures described above. My questions have been answered to my satisfaction, and I agree to participate voluntarily in this study. I have been given a copy of this form.

I would like my interview to be:

- "On the record" (with limits noted here):
- "Off the record" (nothing you say will be cited to you)

Name of Subject:
.....

Signature of subject:
.....

Date:
.....

Signature of investigator or designee:

In my judgment the subject is voluntarily and knowingly giving informed consent and possesses the legal capacity to give informed consent to participate in this research study.

Name of investigator or designee:
.....

Signature of investigator or designee:
.....

Date:
.....

Annex B: Uganda's compliance

(Entries are for example only)

	International Right	National Right	IP Provisions	Other sources of law e.g. cases, regulations etc.
Right to health	Article 12 CESCR	Article 40 Uganda Constitution Section 27	Industrial Property Act 2013	<i>CEHURD & Anor v AG</i> (Constitutional Court and Supreme Court)
Right to benefit from science	Article 15 CESCR	Article 26 and 189 Uganda Constitution	Copyright & Neighbouring Rights Act, Industrial Property Act, Intellectual Property Rights from Publicly Financed Research Act	
Right to information	Article	Articles 1 & 41 Constitution	Copyright & Neighbouring Rights Act, Industrial Property Act, Intellectual Property Rights from Publicly Financed Research Ac	
Right to education	Article 13 CESCR	Article 30	Copyright & Neighbouring Rights Act	<i>Basic Education For All and Others v Minister of Basic Education and Others</i> (23949/14) [2014] ZAGPPHC 251
Other relevant rights		Right to just administrative action (patents) Section 16- 46 Industrial Property Act		

Sample questions

Intellectual property

1. What is the interviewee's experience with intellectual property?
2. The interviewee is currently working in:
 - government
 - industry
 - civil society
 - other_____ (describe other)
3. Who are the major national actors in forming intellectual property policy in Uganda?
4. Who are the major international and (regional) foreign actors affecting intellectual property policy in Africa?
5. What is the principle organization or forum where intellectual property policy in Uganda is formulated?
6. What are the primary drivers of intellectual property policy making in Uganda?
7. What are the most important principles, values and objectives in intellectual property policy making?
8. What are the most important intellectual property policy documents over the last three years?
9. What processes produced those documents?
10. What are the primary international obligations of constraint on intellectual property policy making in Uganda?

Human rights

11. What is the interviewee's experience with human rights?
12. Which human rights are relevant to your work with intellectual property?
13. Who are the primary actors involved with each of those rights?
14. Whose human rights are affected (most) by the intellectual property policy-making processes discussed so far?
15. What reference do the documents listed in answer to 8 make to human rights—especially with regard to the rights to health, knowledge and education?
16. Was a human rights impact assessment carried out for the chosen intellectual property policy?
 - (a) If a human rights impact assessment was carried out for the chosen intellectual property policy, then describe who carried it out, at what point in the process, how it was carried out, and what the conclusions were. Were recommendations made, and if so were they followed in the policy process?

- (b) If a human rights impact assessment was not carried out, is it possible to ascertain why not?
17. In the future if a human rights impact assessment were to be carried out for intellectual property policy making, which stakeholders should be consulted?
18. In the future if a human rights impact assessment were to be carried out for intellectual property policy making who could carry it out, for example; a government department or agency, consultants, international NGO or national NGO?
19. What other important laws, policies, policy dynamics, actors or other factors at the intersection of intellectual property law and human rights do the previous questions miss?

Researcher's introduction letter

21st April, 2016

Dear Sir/Madam;

RE: Request for Interview

I write to request you to authorize Dr. Ronald Kakungulu-Mayambala to conduct interviews with your staff for the period April 26 to May 6, 2016. Dr. Mayambala is a Senior Lecturer in my department, the Human Rights and Peace Centre (HURIPEC), and a Researcher on the Access to Knowledge (ASK Justice) project.

The ASK Justice project brings human rights concerns to the teaching and research of intellectual property. The primary objective of the research project is to provide evidence for the purpose of curriculum development at tertiary institutions, and for civil society advocacy. It seeks to contribute positive policy change to increase access to medicines and access to knowledge, through building a strong network of engaged faculty members at Southern and East African universities who through research, teaching and public voice from a human rights perspective influence current and future Intellectual Property law and policy reform processes in Africa. The research is being carried out in four African countries Botswana, Kenya, South Africa and Uganda and Makerere University is one of the participating institutions, through HURIPEC.

The case study of Dr. Mayambala's research will focus specifically on the extent to which human rights regarding access to medicines, knowledge and education are taken into consideration in intellectual property policy development processes.

Any assistance rendered to Dr. Kakungulu-Mayambala will be greatly appreciated.

Sincerely,

Zahara Nampewo, LL.B (Mak.), LL.M (Notts), SJD (Emory)
Lecturer / Director

Annex C: Intellectual property actors

Academic institutions

- Makerere University

Persons involved in the performing arts

- Mr Charles Batambuze and Mr Paul Wasula
- Also musicians, artists, producers, etc.

Human rights bodies

- Uganda Human Rights Commission
- Government ministries and departments
- Ministries of Trade, Industry and Cooperatives
- Ministries of Gender, Labour and Social Development; Justice and Constitutional Affairs

Agencies

- National Drug Authority (Uganda) Uganda Law Reform Commission
- Uganda Registration Services Bureau

Annex D: Policy drivers in Uganda

- Public Interest Litigation (PIL)
- Standardisation/Approximation/Harmonisation of (EAC) Laws with those of Partner States such as Uganda
- Enforcement of IPRs, which takes into account human rights considerations

List of interviewees

- Makerere University representative (requested anonymity).
- National Drug Authority (NDA) Representative (preferred anonymity).
- UNCST representative (requested anonymity).
- Gilbert Agaba, Intellectual Property Officer, Uganda Registration Services Bureau (URSB).
- Charles Batambuze, Chief Executive Officer, Uganda Registration of Rights Organization (URRO).
- Dick Kawooya, Assistant Professor, School of Library and Information Science University of South Carolina, USA.
- Anthony CK Kakooza, Dean, Faculty of Law, Uganda Christian University.
- Denis Kibirige, Senior State Attorney, Ministry of Justice and Constitutional Affairs.
- Solomon Kirunda, Principal Legal Officer, Parliament of the Republic of Uganda.
- Sylvester Kyagulanyi, Chief Executive Officer, Sikia Media Services/Records.
- Elisam Magara, Professor of Records & Achieves, East African School of Library and Information School, College of Computing and Information Sciences (CoCIS), Makerere University, and Chairman of the Uganda Textbook-Academic and Non-Fiction Authors' Association (UTANA).
- Norman Mbabazi, Chief Executive Officer, Audio Visual Rights Society (AVRS) and former Chief Executive Officer, Uganda Federation of Movie Industry (UFMI).
- Maureen Nalubega, Human Rights Officer, Uganda Human Rights Commission.
- Salaam Namusoby-Ssekaana, Chief Executive Officer, Initiative for Social and Economic Rights (ISER).
- Kenneth Rutaremwa, Senior Principal Legal Officer, Uganda Law Reform Commission, in charge of Law Reform and Intellectual Property Rights.
- Margaret Sekaggya, Chief Executive Officer, Human Rights Centre, Uganda and former UN Special Rapporteur on the Situation of Human Rights Defenders.
- Elizabeth Tamale, Assistant Commissioner/Enhanced Integrated Framework (EIF) Coordinator, TRACE II, Ministry of Trade, Industry and Cooperatives.
- James Wasula, Chief Executive Officer, Uganda Performing Rights Society (UPRS).

List of treaties

- International/regional conventions
- The International Covenant on Civil and Political Rights (1966)
- The International Covenant on Economic, Social and Cultural Rights (1966)
- Banjul Protocol (of ARIPO)
- Harare Protocol (of ARIPO)
- Lusaka Agreement (ARIPO)
- Paris Convention
- Patent Cooperation Treaty
- WIPO Convention
- WTO/TRIPS
- Treaty for the Establishment of the East African Community (EAC) 1999.

List of legislation

- Anti-Counterfeit Bill 2015
- Constitution of Uganda, 1995 (Amended)
- Copyright Act 1964, Cap 215 (repealed by the 2006 Act)
- Copyright and Neighbouring Rights Act, Act No. 19 of 2006
- Copyrights and Neighbouring Right Regulations, S.1 No. 1 of 2010
- Industrial Property Act, 2014
- Judicature Act, Cap 13, Laws of Uganda
- Patent Regulations, 1993
- Patents (Amendment) Act of 2002
- Patents Act, Cap 216 of 1993
- Trade Marks Act, Cap 217 of 1953 (repealed by the 2010 Act)
- Trade Marks Act, No. 17 of 2010
- Trade Marks Rules (issued under the repealed Trade Marks Act, Cap 217 of 1953 and expressly retained in force)
- Trade Secrets Protection Act, 2009
- Uganda Law Reform Commission Act, Cap 25 Laws of Uganda
- Uganda National Council of Science and Technology Act
- Uganda Registration Services Bureau Act, Cap 210 of the Laws of Uganda
- United Kingdom Designs (Protection) Act, Cap 218 of 1937

List of cases

- *Frederick Edward Ssempebwa v Attorney General Constitutional Case No. 1 of 1987.*
- *Initiative for Social and Economic Rights (ISER) and Hon. Ssewungu Gonzaga Joseph v The Attorney General of Uganda Misc. App. No. 173 of 2014.*
- *Patricia Asero Ochieng and 2 Others v The Attorney General [2012] eKLR.*
- *Attorney General v Susan Kigula & 417 Others Constitutional Petitions No. 2 & 8 of [2009] UGCC (5 February 2009).*
- *CEHURD & 3 Others v The Attorney General Constitutional Petition No. 16 of 2011.*

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