

Africa Intellectual Property Newsletter Vol. 76

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News

1. Important topics

Africa: AfrIPI supports the creation of an association of judges for OAPI member states¹

AfrIPI, together with OAPI, will hold a Constitutive General Assembly of the Association of Judges in Dakar, Senegal from 12-14 October 2022. The aim is to adopt a statute of association, lay the foundations for the activities of the association, and address the issue of a jurisprudential database.

Egypt: Launching of the Intellectual Property strategy²

On 21 September 2022 Egypt's Prime Minister Mostafa Madbouly launched Egypt's National Strategy for Intellectual Property – the Director-General of the World Intellectual Property Organisation (WIPO), Daren Tang, was present at the launch.

The strategy aims to both pave the way for a legislative environment on IP and support digital transformation in government services. It further aims to incorporate concepts of innovation in the country's educational process. The strategy is in line with the WIPO Development Agenda, the UN's Sustainable Development Goals and Egypt's Vision 2030.

Kenya: Court rules that using a photo of a person in an advertisement without their consent infringes IP rights³

A university in Kenya used the photograph of a woman (a former student at the university) in its advertising for certain courses. But it failed to first obtain the woman's consent, or to pay the woman any compensation. The woman went to the High Court, alleging an infringement of, inter alia, her intellectual property and personality rights.

The court referred to a South African decision, which held that personality rights 'encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona... personality rights, generally speaking, consist of two types of rights, the right to privacy and the right of publicity'. The court said that 'a person's image constitutes one of the chief attributes of his or her personality.'

The court held that there had been an infringement of IP rights, rights of publicity and personality rights. The court awarded an injunction and damages.

Kenya: Anti-Counterfeit Authority is tackling online counterfeiting⁴

The Anti-Counterfeit Authority (ACA) is planning to partner with Kenya's Digital Markets to ensure that the country's e-commerce platforms are not conduits of counterfeiting – there are apparently many reports of counterfeiting shifting to online platforms, social media and instant messaging services.

¹ <https://internationalipcooperation.eu/en/afripi/activities/support-creation-association-judges-oapi-member-states>

² <https://english.ahram.org.eg/NewsContent/1/2/476525/Egypt/Society/Egypt-launches-National-Strategy-for-Intellectual-.aspx>

³ <http://kenyalaw.org/caselaw/cases/types/50/500/>

High Court of Kenya, Constitution and Human Rights Division, Catherine Njeri Wanjiru v Machakos University, LJ Muigai, dated 3 August 2022 Petition NO. E021 of 2021.

⁴ [HTTPS://WWW.ACA.GO.KE/MEDIA-CENTER/NEWS-AND-EVENTS/320-ANTI-COUNTERFEIT-AUTHORITY-EYES-A-PLAN-TO-PARTNER-WITH-ECOMMERCE-PLATFORMS-TO-WEED-OUT-ONLINE-COUNTERFEITING](https://www.aca.go.ke/media-center/news-and-events/320-anti-counterfeit-authority-eyes-a-plan-to-partner-with-ecommerce-platforms-to-weed-out-online-counterfeiting)

The thinking is that every online platform owner will evaluate its vendor base to ensure that the vendors meet certain requirements. In the process rogue sellers who trade in counterfeits will be weeded out.

Kenya: IP training on Intellectual Property Enforcement⁵

The Anti-Counterfeit Authority (ACA) has partnered with the National Industrial Training Authority (NITA) to develop a training curriculum on intellectual property (IP) enforcement.

The authorities feel that the need for IP and counterfeiting education is no longer limited to academic institutions or specialist IP practitioners and ACA staff – it now also extends to business executives, government agencies dealing with IP, and non-lawyers who operate with IP.

Kenya: Anti-Counterfeit Authority (ACA) explains IPR recordation⁶

The ACA has published an article on its website in which it sets out to explain the new and much-discussed IPR recordation requirement for foreign companies that export goods to Kenya. The article, inter alia, explains how the recordation is done through the ACA Integrated Management System (AIMS), and clarifies that the new operative date is 1 January 2023.

Kenya: Counterfeit petroleum products seized in Kenya⁷

The Kenyan Anti-Counterfeit Authority (ACA) has seized 467 items of petroleum products bearing trademarks and insignia similar to the Total trademark – the goods were seized at a raid near the Kenya-Uganda border, following a complaint lodged by Total. A Total spokesman said that the counterfeits were of a very poor quality and could have damaged engines and even caused explosions and fires.

It is estimated that some 20% of lubricants on sale in Kenya are counterfeit.

Nigeria: Nigerian IP law to be updated⁸

At a recent conference* Nigeria's Solicitor-General and Permanent Secretary of the Ministry of Justice, Mrs. Beatrice Jedy-Agba, announced that the Nigerian authorities are committed to modernizing the entire IP system in Nigeria, including the legislation covering trademarks, patents and registered designs - Nigerian copyright law has already been updated.

**Three-day National multi-stakeholders workshop for the validation of the draft National Intellectual Property Policy and Strategy of the Federal Republic of Nigeria, held at the United Nations House, Abuja.*

South Africa: Patent law needs updating to incorporate constitutional imperatives⁹

In an article dealing with the Covid crisis and vaccine patents the authors, Candice Sehoma and Baone Twala, argue as follows:

- South African patent law is urgently in need of updating - it was last updated in the 1970s.

⁵ <https://www.aca.go.ke/media-center/news-and-events/324-partnership-with-nita-to-develop-training-of-trainers-curriculum-and-training-manual>

⁶ <https://www.aca.go.ke/media-center/news-and-events/323-ipr-recording-rules-a-key-weapon-in-counterfeits-battle>

⁷ <https://www.aca.go.ke/media-center/news-and-events/319-counterfeit-motor-vehicle-engine-oil-trade-busted-in-busia-kenya-uganda-border-town>

⁸ <https://trojan.com.ng/un-group-fg-to-strengthen-intellectual-property-policy/>

⁹ <https://www.news24.com/news24/columnists/guestcolumn/opinion-trips-non-waiver-outcome-highlights-need-for-domestic-intellectual-property-law-reform-20220907>

- Since then South Africa has introduced a Constitution that, inter alia, places an obligation on the state to ensure that people have access to medicines.
- Although the South African authorities recognized the need to introduce examination for patents some years ago, the necessary changes have still not been implemented.
- Introducing patent examination will ensure that overly-broad patents - such as the one that Moderna has for mRNA technology and which, despite being granted in South Africa was refused in other countries like Brazil and China - will not be granted.

South Africa: Software patents¹⁰

In a magazine article patent attorney Lance Abrahamson, discusses the fact that in South Africa the issue of software patents is a vexed one.

He pointed out that Section 25(2) of the South African Patents Act excludes computer software from patentability. This exclusion is, however, qualified by section 25(3), which provides that the exclusion applies only to the extent to which the invention relates to that subject matter 'as such'. This has been interpreted to mean that software that has a technical effect can be patented, in other words the software must provide a technical solution to a problem.

Yet there is no case law in South Africa as to exactly what this section means. Abrahamson therefore suggests that software developers who believe that their software is new and inventive should not hesitate to seek patent protection. As there is no substantive examination in South Africa the application will be accepted and the patent will be enforceable unless a third party successfully challenges it.

South Africa: Lower chamber passes controversial Copyright Amendment Bill¹¹

On 1 September 2022, the Copyright Amendment Bill was passed by the South African National Assembly. The Bill will now go to the upper chamber, the National Council of Provinces, for consideration.

The Copyright Amendment Bill was first introduced in 2015 and it has been highly contentious. There have been suggestions that the US government (acting on the request of US tech companies) placed considerable pressure on the South African authorities to introduce fair-use provisions similar to those that exist in the USA - it is thought that provisions like these will benefit tech giants, whose business models depend on using the material/content created by others.

In an article, *New Copyright Bill Will Take South Africa Into the 21st Century At Last*, copyright consultant Denise Nicholson, favours the fair-use provisions and she makes the point that more than a dozen countries have them in their copyright laws. Nicholson argues that the new legislation will have many benefits. One of these is cheaper access to legal remedies through a new Copyright Tribunal which will be available for copyright disputes.

A study done back in 2016 indicated that the South African arms industry could create 10 000 direct jobs in South Africa and 40 000 indirect jobs.

Uganda: Trademark infringement / passing off judgment¹²

A notification was received of a rare trademark judgment in Uganda - a judgment of the Commercial Division of the High Court of Kampala, handed down during August 2022. Please note that this notification was received from a Ugandan IP lawyer. The judgment is concerning, and it contains important lessons for multinational companies doing business in Uganda.

¹⁰ <https://techcentral.co.za/the-patent-absurdities-surrounding-software-patents/215200/>

¹¹ <https://allafrica.com/stories/202209150072.html>

¹² Paul Asiimwe. Sipi Law Associates <https://sipilawuganda.com/>

Facts

Intel, the US company, was founded in 1968 and it registered the name Intel as a trademark in the USA in 1972. In Uganda Intel registered the name as a trademark in class 9 in 1999 and in class 42 in 2011. A Ugandan company, Intel Computers Limited, was incorporated in 2002 - its objects are the sale, repair and installation of computer software.

Intel sued Intel Computers Limited for trademark infringement. Intel's evidence showed that the name Intel has been used worldwide on a very large scale and in respect of a wide range of computer-related goods and services.

The defence

The Ugandan company's defence was that there had been no infringement because it had conducted a company search in Uganda and found that the name Intel Computers was available. It also claimed that its main business for computer repair services had commenced before the US company had registered its class 42 mark in Uganda. It claimed that it had built up a significant goodwill in the name.

The court

The court said that the test for infringement is this – is there a likelihood of confusion on the part of a reasonable consumer? It held that there was no evidence to suggest a likelihood of confusion. The judge castigated the US company for not providing evidence that controverted the defendant's claim that it had adopted the name Intel Computers in good faith.

Analysis

The rapporteur feels that this decision is concerning and suggests that the court should have ordered a change of company name. He is alarmed by the fact that the court found that there was no likelihood of confusion, and suggests that the court has raised the standard of proof required in a case like this to an unrealistic level. Yet he also believes that Intel erred in not filing evidence to show that the mark Intel is well known in Uganda, and therefore entitled to protection under Article 6bis of the Paris Convention.

The lesson suggested is that trademark owners cannot rely on common law rights, they must have trademark registrations.

Zambia: Trademark registration certificates to be issued electronically¹³

On 23 August 2022 the Zambian registry, the Patents and Companies Registration Agency (PACRA), issued the following announcement - with effect from 1 September 2022, all trademark registration certificates will be issued electronically. The status of a registration can be viewed online.¹⁴

Zambia: A new draft trademark law¹⁵

The Trademarks Bill 2022 has been published for comment. If and when passed this legislation will replace the existing 1958 Zambian Trademarks Act, legislation that was based on UK trademark legislation dating back all the way to the 1930s. The new law, when passed, will significantly update trademark law in Zambia. Important changes will include:

- Provision for service marks, collective marks and certification marks.
- Provision for GI registrations.
- Incorporation of the Madrid Protocol, and therefore provisions for international registrations.
- Provision for well-known marks.

¹³ <https://www.pacra.org.zm/?p=2128>

¹⁴ <https://www.tmdn.org/tmview/#/tmview>

¹⁵ <https://spoor.com/new-trade-mark-legislation-in-zambia-the-trade-marks-bill-2022/>

- Multi-class filing.
- Ten-year registration and renewal terms.
- Provision for broad infringement claims based on unfair advantage and detriment to distinctive character or repute.
- Evidence-preserving measures.
- Border measures.

2. Additional topics:

Nigeria:

Ensure Copyright Compliance in Library Services – DG, NCC

<https://copyright.gov.ng/ensure-copyright-compliance-in-library-services-dg-ncc/>

Nigeria Modernizing IP Law in Line With Current Realities – Malami

<https://allafrica.com/stories/202209130313.html>

South Africa:

Groups Ask Ramaphosa to Protect mRNA Use Against Moderna Patents

<https://www.bloomberg.com/news/articles/2022-09-13/groups-ask-ramaphosa-to-protect-mrna-use-against-moderna-patents?leadSource=uverify%20wall>

South African defence IP on offer at AAD 2022 exhibition

<https://www.defenceweb.co.za/featured/south-african-defence-ip-on-offer-at-aad-2022-exhibition/>

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