

**THE CURRENT TRENDS TOWARDS TRADE RELATED ASPECTS OF  
INTELLECTUAL PROPERTY RIGHTS (TRIPS) COMPLIANCE BY THE  
LEAST DEVELOPED COUNTRIES: A RWANDAN PERSPECTIVE**

A Research paper submitted in partial fulfillment of the requirement for the degree of  
LL.M International Trade and Investment Law (Mode II)

By



Eustache Ngoga

Student No: 267499

Prepared under the supervision of Mr. Bernard Martin at the Faculty of Law, University  
of the Western Cape, Cape Town, South Africa.

May 2007

## TABLE OF CONTENTS

i.	Title page.....	i
ii.	Table of contents .....	ii-iii
iii.	Title and Keywords.....	iv
iv.	Declaration.....	v
v.	Acknowledgements.....	vi
vi.	Acronyms/Abbreviations.....	vi-vii

## CHAPTER1: INTRODUCTION

1.	Preface.....	1
2.	Statement of the problem.....	2
3.	Objectives and Significance of the research.....	3
4.	Methodology and Scope of the research.....	4
5.	Chapter outline.....	4

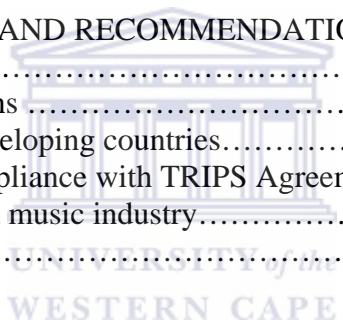
## CHAPTER 2: THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES.....5

1.	Overview of the TRIPS Agreement.....	5
2.	The role of IPRs in the development of society.....	6
3.	Views from both developed and developing countries.....	8
4.	How IPRs protection benefit developing countries.....	10
5.	Critical Analysis of special and differential treatment under TRIPS.....	13

## CHAPTER 3: RWANDA'S COPYRIGHT COMPLIANCE WITH TRIPS.....20

1	Introduction.....	20
2	Legal and Institutional framework for copyright protection.....	20
	2.1 TRIPS requirements on WTO	
	Members.....	21
	2.1.1 Adherence to the Berne	
	Convention .....	21
	2.1.2 Computer programs and compilation	
	of data .....	22
	2.1.3 Rental rights.....	23
	2.1.4 Term of protection.....	24
	2.1.5 Limitations and exceptions.....	25
	2.1.6 Protection of performers, producers of	
	phonogram(sound recording) and	
	broadcasting.....	26
	2.1.7 National treatment and Most favored-	
	Nation principles.....	29

2.2	Copyrights enforcement in Rwanda .....	29
2.2.1	Judicial enforcement .....	29
2.2.1.1	Civil remedies.....	30
2.2.1.2	Criminal remedies.....	31
2.2.2	Extra-judicial enforcement.....	32
3	The cooperation between WTO and WIPO in assisting LDCs to meet their Obligations under TRIPS.....	33
3.1	Assistance in capacity building.....	34
3.2	Transfer of technology to LDCs.....	35
CHAPTER 4: THE ROLE OF COPYRIGHTS PROTECTION IN PROMOTING DOMESTIC INDUSTRY.....		38
1	Copyrights and music industry.....	38
2	African perspective.....	40
3	The Rwandan music industry.....	41
3.1	Rwandan music and international trade .....	43
3.2	Main challenges for the Rwandan music industry’s development.....	48
CHAPTER 5: CONCLUSION AND RECOMMENDATION.....		50
1	Conclusion.....	50
2	Recommendations .....	51
2.1	TRIPS and developing countries.....	51
2.2	Rwanda’s compliance with TRIPS Agreement.....	52
2.3	Copyrights and music industry.....	53
	Bibliography.....	57



TITLE

The current trends towards Trade Related Aspects of Intellectual Property Rights by  
Least Developed Countries: A Rwandan perspective

KEYWORDS

TRIPS

WTO

WIPO

Least Developed Countries

Developing countries

Copyrights

Rwanda

Music industry

International Trade

Special and differential treatments



DECLARATION

*I declare that the current trends towards Trade Related aspects of Intellectual Property Rights by Least Developed Countries: A Rwandan perspective is my own work, that it has not been submitted for a degree or examination in any other university, and that all the sources used or quoted have been indicated and acknowledged by complete references.*

Eustache Ngoga

May 2007

Signed.....



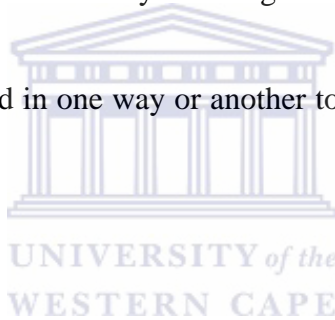
## ACKNOWLEDGEMENTS

My appreciation and acknowledgement go firstly to my parents for being with me in every step of my education;

Secondly, my deep appreciation goes to Mr. Bernard Martin my supervisor who, despite his busy schedule, kindly accepted to supervise me and whose encouragement and advice were of paramount importance and without whose help this work would have not been completed.

In addition, my acknowledgment goes to the sponsors of my studies at the University of the Western Cape and American University Washington College of Law

Lastly, to those who contributed in one way or another to the completion of this research paper I extend my gratitude.



## ACRONYMS/ABBREVIATIONS

AGOA	Africa Growth Opportunity Act
AMR	Association des Musiciens du Rwanda
CSIR	Council for Scientific and Industrial Research
COMTD	Committee on Trade and Development
DDAGTF	Doha Development Global Trust Fund
EPO	European Patent Office
GATT	General Agreement on Trade and Tariffs
IF	Integrated Framework for Assistance to LDCs
IFPI	International Federation of Phonographic Industry
IP	Intellectual Property
IPRs	Intellectual Property Rights
IFOAM	International Federation of Organic Agriculture
LDC	Least Developed Country
LYIP	Light year intellectual property
MIN	Ministerial Conference
NAMA	Non Agricultural Market Access
NEPAD	New Partnership for Africa Development
O.G	Official Gazette
OAU	Organization of African Unity
RBTA	Regular Budget Trade Assistance
SARL	Société d' Actions à Responsabilités Limitées
SADEC	Southern Africa Development Community
S&DT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary

TBT Technical Barrier to Trade

vii

TRIPS Trade Related Aspects of Intellectual property Rights

TRTA Trade Related Technical Assistance

UNCTAD United Nations conference on Trade and Development

UNESCO United Nations Educations, Science and Culture Organization

UNR Univeristé Nationale du Rwanda

WIPO World Intellectual Property Organization

WT/GC World Trade General Council

WTO World Trade Organization





## **Abstract**

Many criticisms have questioned whether the protection of IPRs would benefit developing countries. We have argued in this paper that developing countries have the interest in protecting IPRs as well. However, we showed that the benefit of this protection can be realized only if there is a fair rule of the game to all players in the multilateral trading system. In this regard, we emphasized the need for the review of special and differential treatment in favour of LDCs notably the provision relating to the transfer of technology as enshrined in the TRIPS Agreement. In addition, we showed that developing countries would have been better off if the protection were extended to cover traditional knowledge and biodiversity resources which are found mostly in developing countries.

In the effort to make their laws TRIPS compliant, LDCs have embarked on legal reform in the area of IP. This is evidenced by Rwanda's steps towards the TRIPS compliance in the Bill on copyright protection before the parliament. We showed that all aspects covered by the TRIPS were taken into consideration and if the current Bill is adopted, Rwanda's legislation will be TRIPS compliant even before the deadline set out under the TRIPS Agreement.

This paper has also shown that copyright can play a role in promoting domestic industry and that if this sector is well regulated it can play a significant role in the economy. Given the prevailing situation, we emphasized the need for the government and the international community to provide adequate and appropriate assistance to reach this goal. The Senegalese experience and Africa Music project was used to demonstrate that the goal of local industry promotion is attainable.

## CHAPTER I

### INTRODUCTION

#### 1 Preface

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)<sup>1</sup> was adopted at Marrakech on April 15, 1994 as Annex 1C of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation and it came into force on January 1995.<sup>2</sup> During this round, most developed countries such as the United States, Japan and European Union Member States insisted on negotiating rules and disciplines that would strengthen the standards of Intellectual Property Rights (IPRs) protection. Unlike the developed countries, developing countries did not see this as a priority given that most formal technology is created and owned by people from developed countries while Least Developed Countries (LDCs) were far more concerned with their own much more pressing social and development challenges.<sup>3</sup> Developing countries were also concerned about the cost implications of implementing the TRIPS agreement.<sup>4</sup>

---

<sup>1</sup> The TRIPS Agreement, as one of the Agreements annexed to the Agreement establishing the WTO, covers IPRs such as patents, trademarks, copyrights, industrial designs and geographical indications. It provides for minimum standards of protection, unlike the WIPO conventions which focus on ensuring the implementation of national legislation. Under the principle of national treatment provided for by TRIPS. The basic objective of the TRIPS Agreement is to confer adequate and effective protection to IPRs so that the owner of the rights receives the benefits of their creativity and inventiveness.

<sup>2</sup> Gervais, D., *The TRIPS Agreement: Drafting History and Analysis*, 2<sup>nd</sup> ed, London, Sweet & Maxwell, (2003), 27.

<sup>3</sup> Chisanga, E, “*Should trade related aspects of intellectual property rights be negotiated?*” Paper presented at the Wilton Park Conference, London: The World Trade Agenda, July, 2001, available at [www.ielcr.org/content\\_on](http://www.ielcr.org/content_on), last visited on 19/09/2006.

<sup>4</sup> *Ibid.*

However, in order to facilitate the implementation of this agreement by all World Trade Organization (WTO) members, albeit not legally binding, some special and differential treatment provisions were provided in favor of LDCs. Some of these provisions allowed for a transitional period for the compliance with TRIPS, provided for the technical assistance to these countries, nature of the technical assistance and incentives to be granted in their favor by way of technology transfer by developed countries. In this paper, it is the matter of analyzing the level to which these countries have gone in regard to these matters through a case study of Rwanda as an LDC.

## 2 Statement of the problem

The Agreement establishing the WTO requires each member to ensure that its laws, regulations, and administrative procedures comply with its obligations under article 16(4).<sup>5</sup> LDCs like the developed countries are expected to abide by this obligation. In addition, they are obliged to provide the IPRs of foreigners with protection equal to that enjoyed by their nationals as set out in the Agreement, working towards full TRIPS compliance by the 2013 in some cases and 2016 in others.

However, the main constraint to LDCs in reaching this goal remains the lack of effective legal protection due to the prevailing weak enforcement mechanisms to protect IPRs holders. These shortcomings are particularly significant in the era of increasing internet expansion which is making the world battle against piracy in most countries including LDCs more difficult. In addition, the LDCs due to their social and development challenges, do not perceive the protection of IPRs as a primary concern, since the view is widely held that there are no direct benefits in implementing the TRIPS Agreement.<sup>6</sup> In

---

<sup>5</sup> According to article 16(4), “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligation as provided in the annexed agreements”. In this regard the TRIPS Agreement as one of the Agreements annexed to that establishing WTO requires each member to comply with the obligations therein including LDCs.

<sup>6</sup> Chisanga, E, “*Should trade related aspects of intellectual property rights be negotiated?*” Paper presented at the Wilton Park Conference, London: The World Trade Agenda, July, 2001, available at [www.ielcr.org/content, on](http://www.ielcr.org/content, on) , last visited on 11/10/2006.

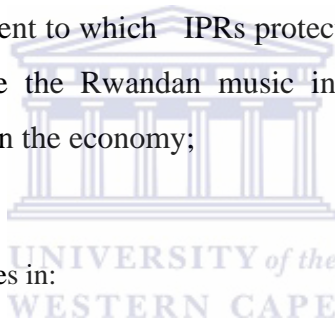
this regard the question is whether in fulfilling their obligations under this agreement they will derive any benefit in securing a share in the growth in international trade.<sup>7</sup>

### 3 Objectives and significance of the research

The general objective of the research is to examine the current status of IPRs protection and the levels of TRIPS compliance by Rwanda in the area of copyright.

The specific objectives of the research are to:

- i. Analyze the special and differential treatment provisions in favor of LDCs under the TRIPS Agreement;
- ii. Describe the present levels of legislative and institutional framework of IPRs protection in Rwanda *vis- a -vis* TRIPS compliance.
- iii. Examine the extent to which IPRs protection in the area of copyright can help to promote the Rwandan music industry which later can play a significant role in the economy;



The significance of the research lies in:

- i. Demonstrating the need for the application of substantive incentives by developed countries and for their enterprises to transfer technology to LDCs;
- ii. Emphasizing the need to review the special and differential treatment provisions which would be in favour of LDCs by making them binding;
- iii. Establishing that Rwanda can benefit from providing better protection to IPRs if there is a support structure and policies in this regard in favour of IPRs.

---

<sup>7</sup> In this regard, see paragraph 2 of the preamble of the Agreement Establishing the WTO which provides "...there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,..."; see also Article 7 of the TRIPS Agreement that reads as follows:

"The protection and enforcement of intellectual property rights should contribute to the promotion of technical innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge in manner conducive to social and economic welfare, and to the balance of rights and obligations".

#### **4 Methodology and scope of the research**

The research was primarily library based, making use of both primary sources (national legislation and international agreements with regard to general analysis of Copyright) and secondary sources (textbooks, reports and articles, both in journals and the internet) with regard to the role of copyright in the music industry and its impact on economic development. The researcher also conducted an interview with an experienced official in the field of IP. The results of the findings in the research are the basis of the conclusion and recommendations

With regard to the scope, and in order to keep the research within reasonable limits, copyright under TRIPS and Rwandan legislation and its role in promoting music industry were the main focus of the research. In addition, a brief comparative analysis of Senegalese music industry was undertaken.

#### **5 Chapter outline**

This paper is comprised of five chapters. Chapter one provides a statement of the problem the research is aimed at addressing, the general context of the research by giving an overview to the study and highlighting the significance of the research. The chapter also identifies the specific objectives for conducting the research. Chapter two deals with the issues of developing countries' perception of the TRIPS Agreement, the role of IPRs in socio-economic development and undertakes a brief analysis of special and differential treatment (SDT) under the Agreement. Chapter three focuses attention on the current status of copyright protection in Rwanda in light of the TRIPS Agreement. The role of IPRs (especially copyright) protection in promoting domestic industry, notably the music industry is dealt with in chapter four. Chapter five presents the conclusion of the research giving the recommendations in view of the assessment made in previous chapters.

## CHAPTER II

### THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES

#### 1 Overview of the TRIPS Agreement

TRIPS came into force on the first day of 1995, the result of lengthy negotiations as part of the Uruguay Round of Multilateral Trade Negotiations of the GATT.<sup>8</sup> These negotiations were formally concluded in April 1994 with the signing of TRIPS and the establishment of the WTO.<sup>9</sup> After years of hesitation on the part of a number of contracting parties there was agreement to establish new intellectual property standards in the GATT framework.<sup>10</sup> This Agreement is administered by the WTO, the successor organization to the GATT.<sup>11</sup> TRIPS presents WTO members with a single framework for dealing with the diverse aspects of intellectual property. It brings the fragmented set of treaties and sectoral agreements previously overseen by the WIPO into a single framework. However, as May argues “the TRIPS agreement is not a model piece of legislation that can be incorporated directly into national law but rather sets the minimum standards to be established by all WTO members.”<sup>12</sup>

---

<sup>8</sup> GATT stands for the General Agreement on Tariffs and Trade. The Uruguay round took from September 1986 to December 1993 to complete.

<sup>9</sup> Watal J, “*Intellectual Property Rights in the WTO and Developing Countries*”, Kluwer Law International, the Hague Netherlands, 2001, 11.

<sup>10</sup> Gervais D, *The TRIPS Agreement: Drafting History and Analysis*, 2ed, Sweet & Maxwell, London, 2003, 27.

<sup>11</sup> GATT governed trade from its creation in 1947 at Breton woods until the end of 1994 when the WTO came into existence at the signing of Marrakech Agreement embodying the final Act of the Results of the Uruguay Round. The decisions, procedures and customary practices of the GATT guide the WTO in its actions. Article XV: 1 of the WTO Agreement states: “except otherwise provided under this agreement or Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1994”

<sup>12</sup> May C and Sell S.K, *Intellectual property Rights, a Critical History*, Lynne Rienner Publisher Inc 2006, 162.

TRIPS requires national legislatures<sup>13</sup> to ensure that IPRs are protected, but does not prescribe the method for this protection. It is only the consequences that are important, not the form in which it is provided, given that the Agreement is concerned with ends and not means. Unlike WIPO administered treaties, the governing of IPRs through the WTO offers a considerably more robust enforcement mechanism for countries' governments to appeal to when the laws of a particular country are seen to impede the rights of other nationals.<sup>14</sup> This Agreement sets out a substantive minimum standard in virtually all areas of intellectual property protection.<sup>15</sup> It further demands adequate administration and enforcement, and also brings IP within the dispute settlement mechanism of the WTO.<sup>16</sup>

Watal points out that the negotiations of this Agreement were “long, arduous and, sometimes, acrimonious”<sup>17</sup> He further indicates that there were many differences among the developed countries themselves on the details of IP protection, particularly on geographical indications.<sup>18</sup> But despite this disagreement between developed country members, there was a greater degree of consensus among them, than there was between the developed and developing countries. The most significant divergences between the developed and developing countries concerned the scope of protection granted to foreign intellectual products as part of their “catch-up strategies”<sup>19</sup>, given the view held that

---

<sup>13</sup> See Article 41 (1) with regard to General obligation.

<sup>14</sup> See article 64 of the TRIPS Agreement with regard to dispute settlement mechanism among WTO members.

<sup>15</sup> Particularly significant are changes in patent eligibility, requirements for protection for plant varieties, copyrights for computer software and electronic transmissions, protection for well-known trademarks, and effective measures to safeguard confidential information. For full details see part II sections 1-7 of the TRIPS agreement.

<sup>16</sup> TRIPS Agreement article 64.

<sup>17</sup> Watal J, *op cit*, 11

<sup>18</sup> *Ibid.*

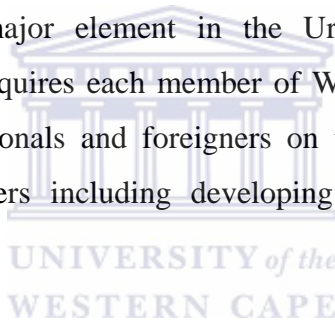
<sup>19</sup> Many developing countries advocate for weak intellectual property rights regime basing on the fact that the developed countries which are preaching the strong protection of intellectual property rights developed thanks to a weak intellectual property rights. They argue that access to foreign intellectual property rights will help them to reach the economic development. As Chang points out, for example countries like the United States of America, Switzerland and the Netherlands did not respect foreign intellectual property rights. He further notes that the United States of America



most IP products are owned by nationals of developed countries and a general lack of consensus about the proper role of intellectual property rights in society.

## 2 The Role of IPRs in the development of society

The significant importance intellectual property rights (IPRs) has taken on with the adoption of the TRIPS Agreement is new. The role of IPRs in the society has long been the subject of contentious debate between developed and developing countries.<sup>20</sup> As some scholars point out, IPRs provides incentives to invest in and develop new technologies but at the same time it increases the cost of these new technologies to developing countries.<sup>21</sup> Despite disagreement on the proper role of IPRs in the global economy, IPRs became a major element in the Uruguay Round of The TRIPS Agreement. This agreement requires each member of WTO to ensure the protection of IPRs<sup>22</sup> for the benefit of nationals and foreigners on the basis of national treatment principle.<sup>23</sup> All WTO members including developing countries are subject to this requirement.




---

did not recognize foreign's copyright until 1891, adding that through the 19<sup>th</sup> century, there was a widespread violation of British trademark laws by the German firms producing fake "Made in England" goods, see Chang, H., J "The Real Lessons for Developing countries from the History of the Developed World: 'Freedom to chose", in Kicking Away the Ladder- Development strategy in historical perspective, London, Anthem Press, 10 June 2002.

<sup>20</sup> Tulloy D. L, "Prospects for progress: The TRIPS Agreement and developing countries" available at <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/> last visited on 13 May 2007.

<sup>21</sup> *Ibid.*

<sup>22</sup> Article 41(1) of the TRIPS Agreement states that "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute deterrent to further infringement."

<sup>23</sup> This principle is provided for under article 3(1) of the same Agreement which states that "Each member shall accord to the nationals of the other members treatment no less favorable than that it accords to that of its nationals with regard to the protection of intellectual property."



There are conflicting views with regard to the role of IP protection: critics of strong IP protection suggest that protection will benefit the developed countries more than the developing countries, especially those in Africa<sup>24</sup> while the proponents of strong IP protection oppose that idea.<sup>25</sup>

Proponents of a stricter IPR regime have argued that it would encourage innovation and contribute to the technology transfer.<sup>26</sup> Opponents point out that granting exclusive right to IPRs holders enables them to monopolize the technology, hinder research by other parties and prevent the use by and spread of technology to other parties.<sup>27</sup> The analysis of the use of patents by foreign companies in developing countries has shown that some

---

<sup>24</sup> With regard to the criticisms of strong intellectual property rights, Ben-Atar suggests that the weak intellectual property laws may allow developing countries to catch up through copying innovations from abroad. , D. “*Trade secrets: Intellectual piracy and the origins of American industrial Power*” New Haven: Yale university press, 2004.

See Also Finger M and Schuler P, *Poor People’s Knowledge: Promoting Intellectual Property in Developing Countries*, The World Bank and Oxford University Press, 2004.

Further critic suggests that, while TRIPS would reduce developing countries’ access to knowledge and force them to pay billions in royalties, it was meant to be part of the “ Grand Bargain” in which the developing countries would get greater access in agriculture and reduced agricultural subsidies by the advanced industrial countries. The developed countries did not keep their side of the bargain. For further discussion of the bargain between developed countries and developing countries, see Stiglitz, E.J., *Making Globalization Work*, W.W. Norton & Company, Inc., New York, 2006, 74-80.

<sup>25</sup> Maskus argues that adopting strong intellectual property rules can directly benefit developing countries economically to promote innovation that can in turn help domestic firms. See Maskus, K.E., “*Intellectual Property Rights and Economic Development*,” *Case western Reserve Journal of International Law*, 2000, 32,471-506. See also Homere, J.R., “*Intellectual Property Rights can help stimulate the Economic Development of Least developed countries*,” *Columbia Journal of Law and Arts*, 2004, 25, 277-299. On his part, Bambauer notes that adopting strong intellectual property rights may stimulate foreign direct investment. He further notes that strong protection can signal potential investors about the economic and legal climate of a country and thus, improve the nation’s economy, see Bambauer, *op cit*, 64.

<sup>26</sup> *Ibid.*

<sup>27</sup> In the related development Cottier T., *Trade and Intellectual Property Protection in the WTO Law, Collected Essays*, (Cameron May, 2005) suggests that the absence of protection of IPRs has not advanced technology transfer. He further argues that short of adequate protection, industries have not been prepared to transfer know-how, trade secrets, but final compounds and products with little to learn from. In his analysis, he concludes that the absence of IPR protection is comparable to excessive protection such as trade barriers which often have a similar effect to quantitative restrictions or distortion of competition. Article XI of GATT 1994 prohibits WTO members from imposing quantitative restrictions.

multinational corporations use patents as a 'defensive strategy'.<sup>28</sup> However, the patent systems of some countries recognize the need to prevent such use of patenting.<sup>29</sup> As I stated earlier, there are conflicting views as to whether the protection of IPRs in the framework of TRIPS will benefit both developed countries and developing countries especially the least- developed countries to gain a share in international trade in order to boost their economic growth as stated in the preamble of the Agreement establishing the WTO and whether the implementation will contribute to the balance of rights and obligation between users and producer.<sup>30</sup>

### 3. Views from both developing and developed countries

Opponents of creating strong IPRs protection in developing country have argued that developing countries need maximum access to western technology to increase development.<sup>31</sup> In addition to this, they go on to suggest that technological information should be provided with minimal restriction because the development of the Third World is in the interest of all nations. Some have even gone further stating that IP protection is “of no use to developing countries.”<sup>32</sup> Other opponents of strong IPRs protection have

<sup>28</sup> Dasgupta, B, “*Patents Lies and Latent Danger: a study of the political economy of patents in India.*” Economic and Political Weekly, April 17-24, 1999

<sup>29</sup> One of the objectives of the Indian Patent Law, for example, is the need to prevent registration of patents merely to enable patentees to enjoy monopoly for the importation of the patented article. See Oh C, *IPRs and Biological Resources: Implications for developing countries*, Third world Network, <http://www.twinside.org.sg/title/ipharare.htm> accessed on, 25 Jan 2007. See also Khor M, *ibid.*

<sup>30</sup> See article 7 of the TRIPS that states

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

<sup>31</sup> For example Ben-Atar notes that the weak intellectual property laws may allow developing countries to catch up through copying innovations from abroad. See in this regard Ben-Atar, D. “*Trade secrets: Intellectual piracy and the origins of American industrial power*” New Haven: Yale university press, 2004.

<sup>32</sup> Bambauer D.E, “*Why Intellectual Property Rights matter to Less-developed Countries,*” Information Technologies and International Development, MIT Press, vol 1 (April 2004) 63-71.

also pointed out that during their own economic development during the 18<sup>th</sup> and 19<sup>th</sup> centuries most developed countries enjoyed unprecedented freedom to exploit IPRs. Developed countries, including the United States, prospered from weak enforcement of IPRs protection and widespread copying.<sup>33</sup>

Such views are strongly opposed by the proponents of strong IPRs protection from developed countries. They argue that if developing countries enforced IPRs as the TRIPS agreement specifies, they would attract considerable foreign investment. In addition, they argue that industrial country based-companies would have the incentive to create products aimed at problem solving, such as tropical diseases that were of particular concern to developing countries.<sup>34</sup>

In my submission to say that IP protection is of no use to developing countries given that most of the IP is owned by developed country nationals and any benefit from IP protection can therefore only be in the interests of the owners of the IP, is to exaggerate the issue. Most IP holders are in developed countries where we find registered pharmaceuticals patents, in the copyright area with advanced publishing industry, film industry and other areas of IP such as software.

Even though most IP is owned by non-developing country nationals, the developing world does have IP that needs to be protected. For example Africa has a vast store of genetic resources, traditional knowledge and a wealth of cultural expression that require the protection both within Africa and outside Africa. Strong protection will help Africa gain more from the resources just mentioned by the potentiality of their richly biodiversity resources, their traditional knowledge by protecting them against biopiracy, often committed by persons and entities such as companies from developed countries. The inadequate protection in biological diversity resources has allowed persons and entities from developed countries to exploit the situation by collecting biological

---

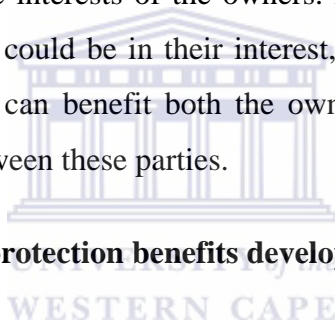
<sup>33</sup> *Ibid.*

<sup>34</sup> Finger M and Schuler P, *op cit*, 4.

resources patenting the product derived from the resources and utilizing the knowledge abroad without adequate compensation or benefit sharing.

The exploitation of Africa's biological resources has been detrimental to Africa when, for example, the product patented in the area of pharmaceutical drugs becomes too expensive and cannot be afforded by the vast majority of Africans.

Another point is that, African musicians could gain more if IP was well protected because the lack of protection could mean a loss of profit in the music industry where the rate of piracy is too high. To this end, and through further concrete examples shown below, demonstrate that IP protection is useful and beneficial to Africa in particular and developing countries in general to some extent and oppose the argument that its protection will be 'only' in the interests of the owners. As I mentioned above Africans also own IP and its protection could be in their interest, as shown below where I show how IP protection benefits or can benefit both the owners and the users, though it is difficult to strike a balance between these parties.



#### **4 How Intellectual property protection benefits developing countries**

Adopting strong IPR rules can directly benefit developing and least developed countries economically to some extent. For example, if we are to look into a comparative analysis using a study done in Lebanon, as a developing country that has common characteristics with African developing countries, where a study of apparel producers found that weak enforcement of trademark laws hindered innovation, development of new products, and market entry by new firms.<sup>35</sup> This provides evidence that safeguarding intellectual innovation can help domestic firms and industries to develop.

Copyright aids the domestic development of creative products such as songs, films, and computer software, as was argued by the panelists in a discussion that took place at the World Intellectual Property Organization (WIPO) in Geneva on June 22 2005 in order to reassure developing countries which had questioned whether IP particularly the patent

---

<sup>35</sup> Baumbauer, D.E, *op cit*, 64.

system, was of benefit to their people.<sup>36</sup> In this discussion, Mohammed Ramzy, Chief Executive of El Nasr Film Company in Egypt made an impassioned plea to WIPO and governments to act against piracy of IP by saying

"None of my efforts as a creative producer would lead to the successful completion of a film unless I was protected by copyright. To continue to make films that support economic growth and cultural diversity in the Arab world, I need international intellectual property norms that are the same in all the countries where our films may travel."

One could argue that, without the protection of IP in terms of copyright, artists would be deprived of the benefits of their works. Weak enforcement of IP allows piracy to take place in many African countries. Many African musicians have been successful in international markets, but their recording is done almost exclusively outside of Africa.<sup>37</sup> Piracy or unauthorized copying and selling of recordings, is a pervasive problem. Almost no country in Africa has piracy level of less than 25 per cent; some estimates for West Africa suggest that the piracy level is as much as 85 to 90 percent.<sup>38</sup>

Strong IP can help African countries in general and LDCs in particular protect their indigenous resources. These resources include naturally occurring items, such as biological resources. African countries can utilize the IP resources to promote development, bolster the local economy and compete in foreign markets. For example Peter Bloch, Chief Operating Officer of Light Years IP (LYIP), an NGO specializing in helping developing countries increase export revenue through IP rights, described during a discussion held at WIPO in Geneva<sup>39</sup> how LYIP was helping the Ethiopian government use IP techniques to capture a larger share of the intangible value of its premium *Harar* coffee. He indicated that the project could add US\$50 million to Ethiopia's export income. This tends to indicate that IP can assist in poverty alleviation and could play a

---

<sup>36</sup> Yong-d'Hervé D., "How IP benefits developing countries" available at <http://www.iccwbo.org/iproadmap> last visited on 13 May 2007.

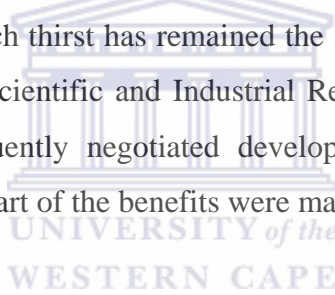
<sup>37</sup> Penna FJ et al, *The Africa Music Project' Poor People's Knowledge : Promoting Intellectual Property in Developing Countries*, World Bank and Oxford University Press, 2004, at 95.

<sup>38</sup> *Ibid.*

<sup>39</sup> 22 June 2005.

role in assisting countries that are struggling to compete in export markets against the world's most efficient producers and manufacturers.<sup>40</sup> In this regard we can conclude that IP protection can help African countries not only offensively in competition but also in a defensive way. Defensively, these countries can prevent unwanted or uncompensated use and exploitation of their resources by other nations, companies, and multinationals. Thus, protecting IP may aid African countries in maintaining control over valuable, possibly unique, assets.<sup>41</sup>

A concrete example in this regard is the *Hoodia* case. In this case, the San a group of South African hunter-gatherers who today still inhabit the desert regions of Southern Africa, reached an agreement with South Africa's leading research organization to share any benefits arising from the commercialization of an appetite-suppressing substance in the Hoodia cactus. For thousands of years, the knowledge that a slice of Hoodia cactus can stave off hunger and quench thirst has remained the sole preserve of the San hunter-gatherers.<sup>42</sup> The Council for Scientific and Industrial Research (CSIR) had isolated the active ingredient and subsequently negotiated development rights with a UK-based pharmaceutical company and part of the benefits were made available to the San.<sup>43</sup>



Lastly, IPRs protection may be the cost of admission to favorable trade relationships with important developed country partners to the benefit of developing countries. The concrete example is AGOA (Africa Growth Opportunity Act) passed by the US congress and signed by the US President in 2000 in favor of African countries. AGOA, passed as part of The Trade and Development Act of 2000, provides beneficiary countries in Sub-Saharan Africa with the most liberal access to the U.S market available to any country or

---

<sup>40</sup> Yong-d'Hervé D., "How IP benefits developing countries" available at <http://www.iccwbo.org/iproadmap> last visited on 13 May 2007

<sup>41</sup> Bambauer DE, *op cit*, 63

<sup>42</sup> Kahn, T., "Bushmen to share Gains from slimming cactus" available at <http://www.scidev.net/News/index.cfm?fuseaction=readnews&itemid=133&language=1>. Last visited on 13 May 2007.

<sup>43</sup> *Ibid.*

region with which the US does not have a Free Trade Agreement.<sup>44</sup> It reinforces African reform efforts, provides improved access to U.S. credit and technical expertise, and establishes a high-level dialogue on trade and investment in the form of a U.S.-Sub-Saharan Africa Trade and Economic Forum.

This point shows how the protection of IP can be useful to African countries in boosting their economies. It should be noted that the implementation of the TRIPS Agreement which is mandatory for all WTO members including less developed countries is not an easy task for the latter, given that the implementation implies heavy cost and other factors such as human resource capabilities and technical expertise that these countries do not have.

However, during the negotiation of the TRIPS agreement, the situation of LDCs was taken into account by providing them with some special arrangements contained in provisions known as Special and Differential Treatment (S&DT). Despite S&DT there is a view that these provisions are not really effective in attaining the purpose for which they were enacted. This is the subject matter of the following paragraph.

UNIVERSITY of the

## **5 Critical Analysis of Special and Differential Treatments under TRIPS**

For the last fifty years, the rules affecting developing country participation in the multilateral trade system have evolved, as has the thinking about the nature of trade policies appropriate for development. When the GATT was established in 1947, 11 of the original contracting parties would have been considered developing countries<sup>45</sup> although at the time, there were no formal recognition of such a group, nor were there any special provisions or exceptions in the agreement that concerned their rights or obligations.

<sup>44</sup> *Africa Growth Opportunity Act (AGOA)* accessed at <http://www.agoa.gov/faq/faq.html#q6> (30/11/2006). Under section 104 of the US Trade and Development Act, the President is authorized to designate a sub-Saharan African country as an eligible Sub-Saharan African country if the president determines that the country has  
 (1) established, or is making continual progress towards establishing ...  
     (c) The elimination of barriers to United States trade and investment including by...  
         (ii) The protection of intellectual property rights.

<sup>45</sup> Breckenridge A., “*Developing Countries and the Multilateral Trading System: Past and Present*” paper presented at symposium on Trade Development, WTO, Geneva, March 17-18, 1999.

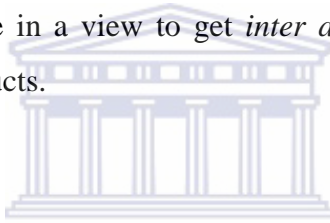


Indeed, the fundamental principle of the original agreement was that the rights and obligations applied uniformly to all contracting parties.<sup>46</sup>

The preamble to the Agreement GATT 1947 stressed the importance of substantially reducing discriminatory treatment and emphasised reciprocal and mutually advantageous arrangements.<sup>47</sup>

Today developing countries account for two thirds of the 150 Members of the WTO,<sup>48</sup> and the WTO agreements contain a very extensive set of provisions addressing the rights and obligations of developing countries.<sup>49</sup>

While the original GATT contained no explicit provisions regarding developing countries, soon thereafter developing countries started to raise concerns and identify special challenges that they faced in international trade<sup>50</sup> and began to develop new strategies in international trade in a view to get *inter alia* greater access to developed countries market for their products.




---

<sup>46</sup> See paragraph 3 of the preamble of General Agreement on Tariffs and Trade(GATT 1947) that states “ Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and elimination of discriminatory treatment in international commerce, ...”

<sup>47</sup> Paragraph 3, *Ibid*.

<sup>48</sup> This was the position as on 11 January 2007. Understanding the WTO: The Organization, Members and Observers , accessed at [http://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm), last visited on 13May 2007.

<sup>49</sup> Despite these references, there is still no official WTO definition of what constitutes a “developing country” or a “developed country”. Countries use the designation on the basis of self selection although this is not necessarily automatically accepted in all WTO bodies. However, other members can challenge the designation of a member to make use of provisions available to developing countries. By self determination, for instance Singapore with a per capita income of \$ 32,810 in 1997 and Ghana with a per capita income of \$390(World Bank,) are both supposed to benefit from the same provisions. On the other hand among the developing countries, the WTO recognizes LDCs those countries which have been designated as such by the United Nations. There are currently 50 LDCs on the UN list, 32 of which to date have become WTO members. Eight additional LDCs are in the process of accession to the WTO: Bhutan, Cape Verde, Ethiopia, Laos, Samoa, Somalia, Sudan and Yemen.

<sup>50</sup> Michalopoulos C, “*The role of Special and Differential Treatment for developing countries in GATT and the World Trade Organization,*” Policy Research Working Paper No.2388, The World Bank, Washington DC., July 2000, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=630760](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=630760), last visited 13 May 2007



The trade strategies pursued by developing countries during this early period gave rise to request for changes in the multilateral trading system in three main areas: <sup>51</sup>

- (1) Improved market access for developing country exports of manufactured goods to developed markets through the provision of trade preferences;
- (2) Non reciprocity or less than full reciprocity, in trade relations between developing countries and developed countries, in order to permit developing countries to maintain protection that was deemed necessary to promote development; and
- (3) Flexibility in the application by developing country members of GATT, and later WTO obligations.

In the period between the early GATT and Uruguay Round, developing countries sought to emphasize the uniqueness of their development problems and challenges and the need to be treated differently and more favourably in the GATT, in part by being permitted not to liberalize their own trade and in part by being extended preferential access to developed country markets.

The good news for the developing countries was that after the conclusion of the Uruguay Round, new S&D provisions were introduced into the legal texts of the Agreements embodied in the WTO in favour of developing countries and least developed countries in particular with for example the LDCs benefiting from longer transitional periods in implementation of certain agreements, including TRIPS. <sup>52</sup>

It is the view of most developing countries, widespread sectors of informed civil society, and even that of some developed countries, <sup>53</sup> that the WTO Agreement on TRIPS needs

---

<sup>51</sup> *Ibid.*

<sup>52</sup> See note 51 *supra*.

<sup>53</sup> See for example the report of British Commission on IP where it reveals that  
 “In the long term, stronger copyright protection may help to stimulate local cultural industries in developing countries...but in the short to medium term it is likely to reduce the ability of developing countries and poor people to close the gap by getting the textbook...they need at affordable cost.” available at  
[http://www.iprcommission.org/graphic/Views\\_articles/Publishers\\_Association.htm](http://www.iprcommission.org/graphic/Views_articles/Publishers_Association.htm), last visited on 28/11/2006.

to be immediately and thoroughly reviewed and adapted to take into consideration the interests developing countries.

However, the most problematic element in TRIPS when viewed from the perspective of a developing country or LDC is the fact that there are some provisions enshrined in the Agreement which are in favour of these countries but are not legally effective. The good news however is that these countries managed to attract the attention of developed Countries<sup>54</sup> to deal with the review of the TRIPS agreement by addressing their needs bearing in mind the level of their development during the Doha declaration.<sup>55</sup>

This is the background against which paragraph 44 of the Doha Declaration states:

*“We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.”*

In the view of LDCs, developed countries and the WTO, have not yet met their aspirations as to the full implementation of the Doha Declaration, which recognized the need to review the special and differential treatment provisions under TRIPS

---

<sup>54</sup> This attention is made specifically in the preamble of Dhaka Declaration of the second LDCs Trade Ministers’ Meeting. Part I, section 15 states “Invite the attention of the Members of the WTO to the particular vulnerability of least developed countries and the special structural difficulties they face and call upon the WTO bodies and Fifth Ministerial Conference to agree on: iii. Resolving, by Cancun, all implementation-related issues and concerns, and all S&D proposals with a view to strengthening them and making them precise, effective and operational as mandated by the Doha Declaration; and substantially expanding and binding special and differential treatment provisions to reverse the continued marginalization of LDCs.

<sup>55</sup> See paragraph 35 and 36 of Doha Ministerial Declaration WT/MIN (05) DEC/, 22 December 2005.

Agreement.<sup>56</sup> However, in our analysis, we will focus only on the S&DTs under the TRIPS Agreement that are in favour of LDCs. It is important that some provisions which are expressly in favour of LDCs under TRIPS (articles 66 and 67) and other provisions which would operate in their favour even though it is not expressly mentioned in this agreement namely *inter alia* Articles 27, 30, 31, 40, be reviewed.

Article 66.1 provides for a transitional period in favour of LDCs to implement the TRIPS agreement. In light of this provision, LDCs are not required to apply the provisions of the TRIPS Agreement other than Articles 3, 4 and 5 until 2013,<sup>57</sup> and 2016 for patents on pharmaceuticals.

Paragraph 2 of the Article 66<sup>58</sup> provides for the transfer of technology by developed country members of the WTO by encouraging their enterprises to transfer the technology in order to enable LDCs to create a sound and viable technological base. To this end, one could argue that the implementation of TRIPS by LDCs would actually depend on developed countries' implementation of Article 66.2.

We do consider that LDCs need, as stated in paragraph 2 of Article 66, a “sound and viable technological base” as a starting point for implementing the TRIPS Agreement. It should be noted that Article 71.1 provides for flexibility<sup>59</sup> with regard to the review of

---

<sup>56</sup> See paragraph 11 of the Dhaka Declaration at the second LDC Trade Ministers' Meeting that states “Disappointed with the lack of progress in making existing Special and Differential (S&D) provisions more precise, effective and operational”.

<sup>57</sup> Article 66(1) of the TRIPS Agreement states : “In view of the special needs and requirements of least-developed country Members...such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65...” These provisions include national treatment, most favored nations and the Multilateral Agreement on acquisition or maintenance of protection. It should be reminded that this period has been extended by the TRIPS Council, See note 63, *Infra*.

<sup>58</sup> This paragraph reads as follow : “Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”

<sup>59</sup> See paragraph 1 of the Article 71 that states: “...The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement

the Agreement. In this regard, we can conclude that the review should take place in the framework of the stated Article.

There is no encouragement for LDCs to implement the TRIPS Agreement, since this Article still has not been implemented 12 years after the Uruguay Round.<sup>60</sup> What is clear is that little or nothing has been done by developed countries to either provide concessions to developing countries or provide incentives to (or impose obligations on) their enterprises or institutions to disseminate or transfer technology to developing countries.<sup>61</sup>

It should be noted that as LDCs have been given a time frame to implement their obligations with regard to the protection of IPRs under TRIPS up to 2013 and 2016, likewise, developed country members of the WTO should have been given a time frame to implement their obligation to facilitate the technology transfer to LDCs given that this provision is legally binding. This development would be beneficial to both developed countries in protecting their citizens' IPRs and LDCs in boosting their technological capacity for innovation,<sup>62</sup> which is one of the major benefits IPR protection is intended to bring.

Insofar as Article 67<sup>63</sup> is concerned and given that the enforcement obligation imposed under the agreement is heavy for developing countries, the review should take into account the level of development of these LDCs and thus, create a scheme for financing

---

<sup>60</sup> For example, in paper to the WTO General Council and to the TRIPS Council, the Indian delegation stated: "There has been little effort to implement this provision (Article 66.2), raising doubts about the effectiveness of the Agreement to facilitate the technology transfers" India, Government, 2000a "proposals on intellectual property rights issues." See communication from India to the WTO: Council for Trade Related Aspects of intellectual Property Rights (IPC/W/195), 12 July 2000.

<sup>61</sup> Khor M, *op cit*, 100.

<sup>62</sup> See for example Shapiro R.J, and Hasset K.A, "*The Economic Value of Intellectual Property*" (2005) available at [http://www.usaforinnovation.org/news/ip\\_master.pdf](http://www.usaforinnovation.org/news/ip_master.pdf), last visited on 12 May 2007.

<sup>63</sup> This provision states "In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members..."

the implementation of TRIPS Agreement. In related development, with regard to the implementation of paragraph 1 of Article 66 stated above, it is not obvious that LDCs will be ready to implement the Agreement by the years 2013 and 2016 if developed countries do not provide them with incentives and assistance.

With regard to Article 27, though it does not specifically refer to LDCs, we suggest that the access to genetic resources on mutually agreed terms, as well as the requirements for prior informed consent and benefit sharing be included.<sup>64</sup> Such a provision could help LDCs or other developing countries rich in biological resources or traditional knowledge to protect their resources from biopiracy<sup>65</sup> and in the long run enables them to reap the benefit of the protection of their resources. Such a provision is enshrined in the Convention on Biological Diversity (CBD).<sup>66</sup> Given that some developed countries are not signatories of this convention, for example the US, the only adequate forum to address the protection of traditional knowledge and plant varieties would be TRIPS, of which the US is a signatory.

---

<sup>64</sup> The inclusion of the concept of prior informed consent and benefit sharing in article 27 would make TRIPS protective of genetic resources as well as traditional knowledge from developing countries. Such provision is found in the convention on Biological Diversity. See in this regard Article 15(5) that states : “Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.”

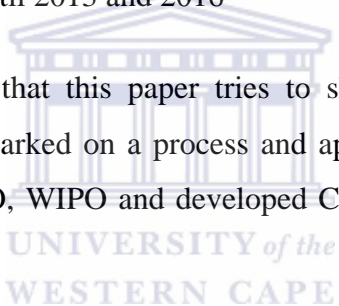
<sup>65</sup> This could also be emphasized by reference to the case brought before the European Patent Office to revoke a patent when the European Patent Office upheld a decision to revoke in its entirety a patent on a fungicidal product derived from seeds of the Neem, a tree indigenous to the Indian Subcontinent. The historic action resulted from a legal challenge mounted ten years previously by three Opponents: the renowned Indian environmentalist Vandana Shiva, Magda Aelvoet, then Member of European Parliament and President of the Greens in the European Parliament, and the International Federation of Organic Agriculture Movements (IFOAM). Their joint Legal Opposition claimed that the fungicidal properties of the Neem tree had been public knowledge in India for many centuries and that this patent exemplified how international law was being misused to transfer biological wealth from the developing world into the hands of a few corporations, scientists and countries of the developed world. See “*Landmark Victory in World’s First case against Biopiracy!! EPO upholds decision to Revoke Neem Patent*”, Press Release. 09 March 2005, available at <http://www.grain.org/bio-ipr/id=435>., last visited on 18/10/2006. See also the *Hoodia* case, note 42, *supra*.

<sup>66</sup> One of the three objectives of the Convention on Biological Diversity signed in Rio de Janeiro in 1992 set out in Article 1 is  
 “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies taking into account all rights over those resources and to technologies, and by appropriate funding”.

In a related development, articles 30, 31 and 40 which by implication invest ability government with the power to grant compulsory licenses, these provisions should be reviewed to provide enough flexibility to enable governments to take health and nutrition measures in case of public emergency or public interest and implement policies geared towards the diffusion of technology. In addition, developing countries should be free to implement compulsory licensing to achieve public health objectives and safeguard their citizen's rights to technology, without pressure from other governments or corporation's necessary measures.

In light of the above suggestions, while there is still debate regarding the proper role of IP protection and the enforceability and effectiveness of special and differential treatment provisions under TRIPS among WTO members as discussed above, LDCs still have to comply with this Agreement until 2013 and 2016<sup>67</sup>

It is against this background that this paper tries to show, through a case study of Rwanda, how LDCs have embarked on a process and approach toward the compliance with TRIPS and how the WTO, WIPO and developed Countries are helping the LDCs. This is discussed in chapter 3.



---

<sup>67</sup> See WTO Press Release(2005), Press/424, Intellectual Property, 29 November 2005

## CHAPTER III

### RWANDA'S COPYRIGHT LAW COMPLIANCE WITH TRIPS

#### 1 Introduction

Rwanda, like other several LDCs, is facing new development and challenges in the process of strengthening her IP system in order to comply with her under TRIPS obligations. This goal cannot be achieved unless there is an appropriate legal and institutional framework. Rwanda acceded to the Agreement establishing WTO on 22 May 1996 and by virtue of being a signatory of the WTO, the country is bound to fulfill specific obligations that have a bearing on its domestic legislation. This means the legislation affected by TRIPS must be amended and new laws developed to ensure that Rwanda's legal regime conforms to her international obligations.

#### 2 Legal and institutional framework for copyright protection

Rwanda is currently undertaking legal reform in the area of IP protection in order to meet its TRIPS Agreement obligations. The legislation that is being amended was modeled to the Berne Convention which the TRIPS Agreement requires all WTO members to adhere to, from Article 1 through 21. In addition, the TRIPS Agreement introduced new requirements that were not covered by the Berne Convention, hence the need for Rwanda to enact a new legislation. In the proposed new legislation that is before the Rwandan parliament, several areas were taken into account.

The Bill covers the protection of all aspects of IP prescribed by the TRIPS Agreement, notably Industrial property (patents, utility model certificates, industrial design and models, layout designs (topographies) of integrated circuit, trademarks, collective marks and trade names). It also covers the protection of geographical indications, unfair competition as well as copyright protection.<sup>68</sup>

---

<sup>68</sup> This copyright bill was presented before the Rwandan Parliament and discussed in February 2007



In the following section, the analysis of the compliance of Rwanda will be done *vis-à-vis* the TRIPS requirements on all members.

## 2.1 TRIPS requirements on WTO Members

As stated above, the TRIPS agreement imposes certain minimum standards with which WTO Members must comply. In addition to the basic principles set out in the Agreement, namely: National Treatment and Most Favored Nations principles, it imposes other obligations, notably adherence to Berne convention, the protection of computer programs and compilation of data, obligation with regard to rental rights, the protection of related rights (protection of performers, producers of phonograms and broadcasting organizations) as well as limitations or exceptions.

### 2.1.1 Adherence to the Berne Convention<sup>69</sup>

Article 9(1) of TRIPS Agreement states: “Members shall comply with Articles 1 through 21 of the Berne convention (1971) and the Appendix thereto. However, Members shall not have the rights or obligations under this agreement in respect of the rights conferred under Article *6bis* of that Convention or of the rights derived therefrom”. Rwandan copyright law, which defines the works protected includes works expressed by writing (lectures, speeches, sermons, lithography, tapestry and other works of fine art; works of architecture; photographic works; including works made by means similar to photographic process, illustrations, maps, plans, sketches and three-dimensional works relating to geography, topography, architecture or science)<sup>70</sup> and deals with derivative works that are protected as well.<sup>71</sup> Given that these provisions are modeled to article 2 of

<sup>69</sup> Rwanda acceded to the Berne convention on August 18, 1983 by the law No. 18/1983. This means that the new legislation in light with the TRIPS agreement will have to maintain the existing provision of the Berne Convention for as long as they are not conflicting with the said Agreement.

<sup>70</sup> See Articles 2 and 4 of the Law Governing Copyright of 15 November 1983.

<sup>71</sup> Article 4 of the copyright law of November 1983 These are translations, adaptations, arrangements and other transformations or modifications of works; collections of works, collection of mere data



the Berne Convention, the new bill on copyright law maintained them in their entirety since they are in line with article 9 of the TRIPS agreement. One of the innovative requirement of TRIPS is that computer programs that were not recognized as copyright works are now included as a subject under copyright to be protected in Rwandan law.<sup>72</sup>

### 2.1.2 Computer programs and compilation of data

Article 10(1) of the TRIPS Agreement<sup>73</sup> provides that computer programs should be protected as literary works in the sense of the Berne Convention. Article 1 of this convention, defines the objective of the Berne Union as the protection of the rights of authors in their literary and artistic works.<sup>74</sup> Article 2 defines literary and artistic works as “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”. Computer programs were not included in the Berne Convention and now they are expressly included in TRIPS and hence, they are eligible for copyright protection.

The current Rwandan copyright law did not consider computer program as copyrighted work.<sup>75</sup> The current Bill relating to copyright and related rights has taken this obligation under TRIPS into account, and now computer programs are subject to be protected under

---

whether in machine readable or other form, and collection of expressions of folklore, provided that such collections are original intellectual creations by reason of the selection or arrangement of their contents; works derived from Rwanda national folklore.

<sup>72</sup> See Article 165 of the copyright bill that states: “Literary and artistic works that are original intellectual creations in the literary and artistic domain are subject to protection granted by this Law, including...computer programs...”

<sup>73</sup> This Article reads as follow: “Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention”.

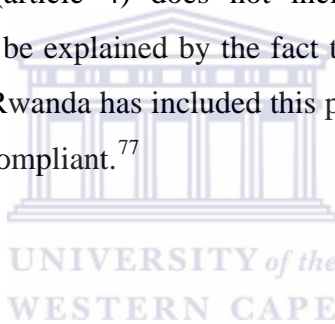
<sup>74</sup> See Article 1 of the Berne Convention that states: “The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works”.

<sup>75</sup> In my opinion, the fact of not including this program into copyright law or in other IP category is due to the fact that Rwanda, at the time of enactment of this law, did not have computer access and also the fact that the Berne Convention to which Rwanda adhered to did not address the issue of computer programs.

copyright law. This shows that the law in place was not TRIPS compliant. With regard to compilation of data, Article 10(2) of the TRIPS agreement provides:

“Compilation of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creation shall be protected as such. Such protection shall not extend to the data or material itself, shall be without prejudice to any copyright substituting in the data or material itself.”

This provision of TRIPS elaborates on article 2(5) of Berne Convention<sup>76</sup> to include a data base or other compilation of data or other material, material in both machine-readable and other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. As far as the Rwandan legislation is concerned in this regard, the current legislation on copyright relating to derivative work (article 4) does not include protection for the above intellectual creation. This may be explained by the fact that the Berne Convention itself did not take this into account. Rwanda has included this provision in its draft law in a bid to make its legislation TRIPS compliant.<sup>77</sup>



### 2.1.3 Rental rights

The right of authors to authorize or prohibit rentals of the work was not recognized under the Berne convention or Rwandan copyright law. The concept of a rental right<sup>78</sup> was

<sup>76</sup> Article 2 (5) of this Convention provides

“Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections”.

<sup>77</sup> Article 166 of the Bill that states

“ The following shall also be protected as works....collections of mere data(database), whether in machine readable or other form, ...provided that such collections are original intellectual creation by reason of the selection or arrangement of their contents;...”

<sup>78</sup> Article 11 of the TRIPS Agreement reads:

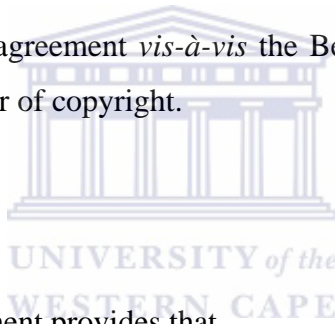
“In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of original or copies of their copyright works. A Member shall be exempted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of the reproduction conferred in that Member on authors and their

introduced as part of the TRIPS requirements. It is against this background that the Rwandan Bill on copyright law provides that the owner of copyright shall have the exclusive right to authorize or prohibit the use of his work.<sup>79</sup> The same provision states that the

“right of distribution of the original or a copy of the work to the public by sale or other transfer of ownership does not apply to the original or copy of the work that has already been subject to a sale or other transfer of ownership in the national territory of Rwanda authorized by the owner of copyright...”

Article 170 embraces the full wording of the last sentence of Article 11 of the TRIPS Agreement in that it says that the right of rental of the original or a copy of an audiovisual work, a work embodied in a phonogram or a computer does not apply to rental of computer program where the programs itself is not the essential object of the rental.

The innovation of the TRIPS agreement *vis-à-vis* the Berne Convention is also seen in terms of protection of the owner of copyright.



#### 2.1.4 Term of protection

Article 12 of the TRIPS agreement provides that

“Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on the basis other than the life of a natural person, such term shall be no less than fifty years from the end of the calendar year of authorized publication, or, failing such authorized publication within fifty years from the making of the work, fifty years from the end of the calendar year of making.”<sup>80</sup>

---

successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not essential object of the rental”.

<sup>79</sup> Article 170 of the copyright bill

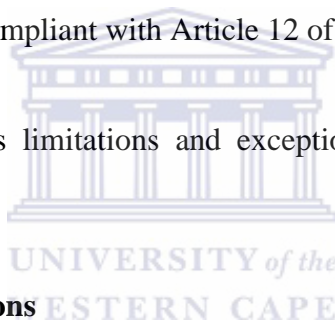
<sup>80</sup> This provision is based on the principle as Article 7(2) of the Berne Convention in relation to films. This Article provides

“However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making”.

The Rwandan copyright law provides the same term of protection in respect of both moral and economic rights,<sup>81</sup> even though the former is not required by the TRIPS Agreement.

In terms of economic rights that are protected as by TRIPS, Article 26 of the copyright law of November 1983 provides that the economic rights shall be protected during the life of the author of the work and for fifty years after his death. Article 29 of provides further that the author of a cinematographic work shall enjoy protection for fifty years after the date of first publication of the work. With regard to the protection of a work of an applied art, this provision does not refer to it. Rather the protection of applied art is found in Article 191 of the copyright bill that provides that in case of a work of applied art, the economic rights shall be protected for twenty five years from the making of the work. This provision is fully compliant with Article 12 of TRIPS.<sup>82</sup>

The TRIPS Agreement allows limitations and exceptions to the above obligation in certain cases.



### 2.1.5 Limitations and exceptions

Article 13 of the TRIPS Agreement permits members to impose some limitations and or allow exception to the exclusive rights,<sup>83</sup> provided that the limitations are not in conflict with the right holder's interest. In this regard, Rwandan copyright law (both the current law and the Bill) provides some limitations to the exclusive right of the owner. For

---

<sup>81</sup> However the current Bill provides that the moral rights have no limitation in time that they are imprescriptibly inalienable and transmissible to author's heir after his death or conferred to third person by testamentary disposition (the details are contained in article 186).

<sup>82</sup> This provision leaves flexibility for members to grant the term of protection with regard to a work of applied art or photographic work according to their discretion.

<sup>83</sup> The Berne Convention allows exceptions to the exclusive right of reproduction given by the copyright law. Article 9(2) states:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.

instance, the Bill provides for the exception in cases of private reproduction, temporary reproduction, quotation, reproduction for teaching, reprographic reproduction by libraries and archives; reproduction for judicial and administrative purposes; reproduction, broadcasting and other communication to the public for informatory purposes; reproduction of pictures of works permanently located on public places; reproduction and adaptation of computer programs;<sup>84</sup> ephemeral recordings by broadcasting organizations; public performance; importation for personal purposes and reproduction of a published work for visually impaired persons.<sup>85</sup>

The TRIPS Agreement requires members to protect related rights or neighboring rights in their copyright laws.

### **2.1.6 Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations**

Under the TRIPS Agreement Members are obliged to grant to performers the right to authorize or prevent the fixation of their unfixed performance and the reproduction of such fixation, broadcasting by wireless means and the communication to the public of their live performance.<sup>86</sup> Even though Article 92 of Rwandan copyright law recognizes the same rights to performers, it does not provide a term for the protection. Article 211 of the Bill on copyright grants a period of protection as provided for by the TRIPS Agreement, namely, fifty years following the year in which performance was fixed, or following the year in which the performance took place, if performance has not been fixed on phonogram.

---

<sup>84</sup> Article 181 of the Bill specifically provides that the reproduction in a single copy, or the adaptation of a computer program by lawful owner of a copy of that computer shall be permitted if the copy or adaptation is necessary for the use of the computer program with a computer for the purpose and extent for which the computer program has been obtained or for the archival purposes and for the replacement of the lawfully owned copy of the computer program in the event that the said copy of the computer program is lost, destroyed or rendered unusable. Also of note is the fact that this limitation was not included in the current copyright law.

<sup>85</sup> See Articles 173 to 185 of the Copyright Bill.

<sup>86</sup> See Article 14(1) of the TRIPS Agreement.

With regard to producers of phonograms,<sup>87</sup> the Rwandan copyright law provides for the right of phonograms producers to authorize or prevent the direct or indirect reproduction of copy of phonograms, importation of those copies in order to distribute them to the public and the distribution of such copies to the public.<sup>88</sup> However, Article 205 of the Bill goes further in that it clearly states that such distribution must be by sale or other transfer of ownership,(but provides except when the transfer has been subject to sale or other transfer of ownership in Rwanda authorized by the author), a rental of the copy of the phonogram to the public; the making available to the public of the phonogram, by wire or wireless means, in such a way that members of the public may access it from a place or at a time individually chosen by them.

Article 212 of the Bill also grants protection of fifty years unlike the current law which grants the protection for twenty five years following the year of publication.<sup>89</sup> This Article grants a period of fifty years of protection following the year of publication or, if the phonogram has not been published from the fixation of the phonogram until the end of the fiftieth year calendar year, following the fixation.

Insofar as broadcasting organizations<sup>90</sup> are concerned, they have the right to authorize or to prevent the fixation, the reproduction of fixations and retroacting by wireless means of broadcast, as well as the communication to the public of the television broadcasts of the same. In the event that a Member does not provide for this right, the owner of copyright matter of broadcasts will be granted the right to prevent such acts. The Rwandan copyright law both the current law and the Bill provide for this protection in articles 103 and 206 respectively, in the sense that a broadcasting organization has the right to authorize or prevent the rebroadcast of its broadcast; the communication to the public of its broadcast on television.

---

<sup>87</sup> Article 14(2) of the TRIPS Agreement.

<sup>88</sup> See Article 99 of the Copyright Law of 15 November 1983

<sup>89</sup> Article 100, *Ibid.*

<sup>90</sup> Article 14(3) of the TRIPS Agreement.

The TRIPS Agreement requires all members to grant protection of IP holders regardless of their nationality as they protect their own national's IP rights under the principle of national treatment and most favored nation.

### **2.1.7 National treatment and the most favored nation principle**

Given that article 9(1) of TRIPS requires all members to adhere to articles 1 through 21 of the Berne Convention, all countries are supposed to accord national treatment to foreign IP under their domestic laws.<sup>91</sup> Article 5(1) of the Berne Convention requires the protection of all authors in member countries, irrespective of their nationality or place of publication. In addition, it gives automatic protection immediately to foreign authors upon creation without subjecting such creation to any formality.<sup>92</sup> Both the Bill and current Rwandan copyright law recognize that the copyright ownership is deemed to exist upon creation.<sup>93</sup>

This principle however is subject to exception given that a Member can apply a shorter term to foreign author in case the protection granted to him by his country of origin is shorter than that in the foreign country where protection is sought.<sup>94</sup>

---

<sup>91</sup> Article 5(1):  
 “Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention”.

<sup>92</sup> Article 5(2)  
 “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work authors upon creation without subjecting such works to any kind of formality”.

<sup>93</sup> See article 33 of Copyright Law of November 1983. However, the Bill provides for the possibility for the author to register his work at the Copyrights Promotion Service in the Ministry in charge of Culture.

<sup>94</sup> The term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work, see article 7(8) of Berne Convention. This exception is



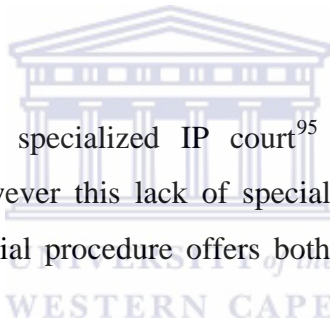
In addition to the requirement of the protection of right holders, the TRIPS Agreement also requires members of WTO to put in place mechanisms of enforcement of IPRs in case of infringement.

## 2.2 Copyright enforcement in Rwanda

Articles 41 through 61 of TRIPS lay down procedures for domestic enforcement, both internally and at the border. In this regard, Rwanda is bound to enforce the IPRs both for nationals and foreigners through judicial and extrajudicial mechanisms in order to curb the infringement of IPRs in Rwanda.

### 2.2.1 Judicial enforcement

Rwanda does not have any specialized IP court<sup>95</sup> to deal specifically with the enforcement of the latter; however this lack of specialized court does not violate the TRIPS agreement.<sup>96</sup> The judicial procedure offers both civil and criminal remedies in case of infringement.




---

allowed under the TRIPS Agreement through article 9(1) that requires country Members of the WTO to adhere to the Berne Convention.

With regard to Most Favored Nation treatment, this concept is relevant to copyright as much as it pertains to areas where WTO members give better treatment to one set of foreign nationals than given to their own national and to others. This concept was borrowed from GATT and applied to IPRs in TRIPS: see article I of the GATT 1994.

<sup>95</sup> This is understandable given that most judicial authorities do not have extensive knowledge of IP law and its special enforcement requirements. In Rwanda only the National University teaches IP law which is however an optional course. This means that most Judges are not necessarily well acquainted with IP law given that the Rwandan judiciary is composed of graduate from many universities around the country who do not have the IP expertise. There is a lack of economic resources to institute this kind of court. The advantage of such institution is that Judges can enjoy intensive training and later gain experience and it can be expected that the judgment originating from such court will be coherent and consistent, thus making for greater legal security for IP holders.

<sup>96</sup> See article 41.5 of the TRIPS Agreement.



### 2.2.1.1 Civil remedies

The TRIPS Agreement requires Members to make available to right holders civil judicial procedures concerning the enforcement of any IPRs covered by it.<sup>97</sup> In an effort to make her law TRIPS compliant, Article 214 of Rwandan Bill on copyright protection states that

“the competent tribunal<sup>98</sup> having jurisdiction of a civil action arising under this law, shall have the authority ...to grant injunctions to prohibit the committing of infringement, of unlawful act or in violation of any right protected under copyright law, or to preserve relevant evidence in regard to alleged infringement”.

In addition, the competent tribunal may grant damages<sup>99</sup> and any compensation for an alleged infringement provided for by Rwandan civil and commercial legislation.

Article 215 of the Bill provides for the court to order the cessation of infringement and any infringing act in relation to the right protected.<sup>100</sup>

---

<sup>97</sup> See article 42 of the TRIPS Agreement.

<sup>98</sup> Neither the current Rwandan copyright law nor the Bill uses the term competent tribunal. The current Rwandan copyright law refers to ordinary court while the Bill does not indicate precisely what a competent tribunal is. However, the newly proposed bill establishing the commercial court which was approved by Ministerial Council December 13, 2006 provides in article 2(12) that actions related to intellectual property rights including trade marks shall be of the competent of the commercial court.

<sup>99</sup> This is in line with article 45 of the TRIPS agreement with regard to damages to be awarded to the right holder in case of infringement of his intellectual property right.

<sup>100</sup> The competent tribunal may order :

- cessation of infringement and any infringing act to right protected under this Law;
- the seizure, impoundment or destruction of copies of works or phonograms suspected of being made or imported without the authorization of the owner of any right protected under this Law;
- the seizure, impoundment or destruction of the packaging of copies or phonograms, the implements, instruments or materials that could be used for the making of, and the documents, accounts or business papers referring to such copies;
- disposal of copies, phonograms and their packaging outside the channel of commerce in such a manner as to avoid harm, or continuation of being harmed, to the right holder;
- disposal of the implements, instruments or materials that are used to commit or continue to commit acts of infringement, outside the channel of commerce.

This provision is in line with articles 44 , 46 and 59 of he TRIPS agreement concerning respectively injunction and other remedies to prevent the entry into the channels of commerce of imported goods that infringe intellectual property rights

The enforcement measures also provide criminal remedies for infringement of IPRs.

### 2.2.1.2 Criminal Remedies

The TRIPS agreement requires WTO Members to provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.<sup>101</sup> While the current law and the bill both mount any infringement of copyrights or related rights with a commercial aim to an offence of forgery,<sup>102</sup> the two laws differ however in terms of criminal penalties imposed on the alleged infringer. For example article 76 of the current law provides the penalties of imprisonment of two months to one year and a fine of 20 000 Rwandan Francs or either. This provision is not up to date given the level of penalties imposed on the infringer.<sup>103</sup> Nevertheless, article 217 of the Bill not only imposes tougher criminal penalties unlike the former, but also categorizes infringers.<sup>104</sup>

---

<sup>101</sup>

Article 61 that states:

“Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of the same gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on commercial scale”.

<sup>102</sup>

See article 76 of the law of November 1983 on copyright and article 216 of the copyright Bill. These two provisions provide also that any third person who knowingly sells, offers on sale, is making rent, detains or introduces on the territory of the Republic of Rwanda, the alleged infringing goods for commercial purposes, shall be considered as committing the same offence. However article 216 of the bill goes further by providing that the competent tribunal shall order by the request of the right holder, provide damages and adequate compensation for the infringement of the intellectual property rights.

<sup>103</sup>

This provision does not fully comply with TRIPS article 61 that require Members to put in place remedies which include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of the same gravity. With the current economic situation in Rwanda, this fine is not sufficient to curb further infringements.

<sup>104</sup>

This article provides penalties of 5 to 10 years of imprisonment or a maximum of a fine of 5.000.000 to 10.000.000 Rwandan Francs, or both; for distributors and booksellers: a maximum term of imprisonment of 1 year to 5 years or a maximum fine of 500.000 Rwandan francs, or both;

### 2.2.2 Extra-judicial enforcement

Though the TRIPS agreement focuses more on the judicial enforcement, this is not the only mechanism that deals with IP protection in Rwanda. Among other institutions that can play a role in the protection of IP include Rwanda Bureau of Standards (though in regard to copyright it does not play a role) and Rwanda Revenue Authority.

One of the measures to combat trade in counterfeit products is by refusing their entry into the country. Control of entry points of counterfeit products by Rwanda Revenue Authority through its customs department is good preventive measure to stop trade in counterfeit goods.

It is worth noting that Rwandan law on the protection of IP does not provide for specific laws on border measures to curb trade in counterfeit goods. The reference to counterfeit goods is made in law no. 21/2006 of 28/04/2006 establishing the customs system where it provides that “prohibited goods include: counterfeits and any other goods determined by the law”.<sup>105</sup> In the effort to make her law TRIPS compliant, Rwanda Bill on Copyright protection specifically provides for the boarder measures as required by the TRIPS Agreement.<sup>106</sup> Under Article 221 of the Bill, among other border measures include suspension of release into free circulation, procedures for suspension of release into free circulation, inspection and examination of goods.<sup>107</sup>

---

For a retailer: a maximum fine of 20 000 to 100 000 Rwandan Francs; for a broadcasting organization or communicating company by means of radio electrical waves which communicate a protected work, without previous authorization: maximum fine of 500 000 Rwandan Francs. This provision also provides for possibility for the competent tribunal to order the seizure, confiscation and destruction of the infringing items and of all materials or instruments used for the crime to be committed.

<sup>105</sup> See article 102(5) and (8), of the law no.21/2006 of 28/04/2006, establishing the customs system, O.G., no.13 of 1/07/2006. Article 59 paragraph 4 of the law provides that

“Customs may take any measures necessary, including destruction or sale by public auction where necessary or appropriate, in order to regularize the situation of prohibited or restricted goods which are found to have entered the customs territory in breach of the legal provisions in force”.

<sup>106</sup> See article 51 of the TRIPS Agreement with regard to suspension of release by customs authority.

<sup>107</sup> See articles 144, 145 and 146 of the Copyright Bill.

In conclusion, the analysis in this section of both the current law and the Bill on copyrights demonstrates that the steps taken by Rwanda will, if the Bill is passed by the legislature, make Rwandan law TRIPS compliant. Rwanda, as is the case with other LDCs, does not have sufficient financial resources to deal with the enforcement of IPRs without international assistance. In our view, the protection guaranteed in law cannot be meaningful unless there is enforcement so that the benefit of TRIPS agreement is realized for both the owner and the users of IPRs.

### **3 The cooperation between the World Trade Organization and the World Intellectual Property Organization in assisting LDCs to meet their obligations under TRIPS**

On 1 January 1995 the WTO and WIPO signed an agreement of cooperation in a view to assist the developing and less developing countries to meet their obligations imposed under the TRIPS Agreement. Following this WIPO-WTO Agreement, WIPO reorganized its programs in assistance to developing countries and less developed countries in cooperation with the WTO. The main purpose of the WIPO-WTO agreement was legal and technical assistance to developing and less developed countries.<sup>108</sup>

In a related development the WTO and WIPO launched a joint initiative in 2001 with the main purpose of promoting assistance to LDCs members of the WTO to meet their obligations under the TRIPS agreement.<sup>109</sup> This joint initiative has provided assistance to the LDCs to bring their IP laws into line with the TRIPS Agreement.<sup>110</sup>

---

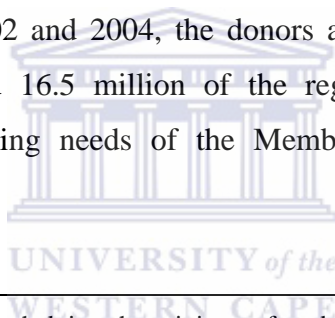
<sup>108</sup> See WIPO's legal and technical Assistance to developing countries for implementation of the TRIPS agreement from January 1, 1996 to June 30, 2000 accessed at [www.wipo.int/documents/en/meetings/2000/ace\\_ip/pdf/wipo\\_trips\\_20000\\_1.pdf](http://www.wipo.int/documents/en/meetings/2000/ace_ip/pdf/wipo_trips_20000_1.pdf) (last visited 18/03/2007).

<sup>109</sup> The deadline which was then supposed to elapse on January 1, 2006 has been extended up to 2013 and 20016.

<sup>110</sup> During an interview with the legal officer, Mr. KALISA Furaha, in the ministry of trade in Rwanda on December 30, 2006, he revealed that in 2006 alone, WTO and WIPO experts on IP organized training for official in the ministry of trade who are in charge of IP protection. In

### 3.1 Assistance in capacity building and technical cooperation

In November 2001 at the Doha Ministerial Conference, technical cooperation and capacity building were recognized as important components of the development dimension of the Multilateral Trading System. Subsequently, the Doha Development Agenda Global Trust Fund (DDAGTF)<sup>111</sup> was established to finance Trade Related Technical Assistance (TRTA) activities in line with: (i) the technical cooperation and capacity building mandates in the Doha Declaration<sup>112</sup>; (ii) the New Strategy for Technical Co-operation for Capacity-Building, Growth and Integration<sup>113</sup>; and (iii) the Coordinated WTO Secretariat Annual Technical Assistance Plan<sup>114</sup>. The annual resources for TRTA and training have doubled, both in the regular budget and in extra-budgetary funds. Between 2002 and 2004, the donors allocated SwissFr 50 million of extra-budgetary resources and 16.5 million of the regular budget (RBTA) to meet technical assistance and training needs of the Members concerned in all areas of multilateral trade.<sup>115</sup>




---

addition, WIPO experts were helping the ministry of trade to draft the Bill currently before the parliament which is TRIPS compliant.

<sup>111</sup> See paragraph 43 of November Doha declaration that states that “we endorse the integrated framework for Trade Related Technical Assistance to Least developed countries (IF) as Viable model for LDCs’ trade development. We urge development partners to significantly increase contributions to IF trust Fund and WTO extra-budgetary trust funds in favor of LDCs. We urge the core agencies, in coordination with developed partners, to explore the enhancement of the IF with a view to addressing the supply-side constraints of LDCs and the extension of the model to all the LDCs, following the review of IF and the appraisal of the ongoing Pilot Scheme in selected LDCs. We request the Director-general, following coordination with heads of the other agencies, to provide an interim report to the General Council in December 2002 and a full report to the Fifth session of the Ministerial Conference on all issues affecting LDCs.

<sup>112</sup> WT/MIN(01)/DEC/1.

<sup>113</sup> WT/COMTD/W/90.

<sup>114</sup> WT/COMTD/W/95/Rev.3; WT/COMTD/W/104/Rev.2 and WT/COMTD/W/119/Rev.2.

<sup>115</sup> Subject areas currently covered by WTO TRTA are as follows: Accession; Agriculture; Competition Policy; Dispute Settlement; Government Procurement; Implementation Issues; IT/WTO Reference Centres; Integrated Framework/LDCs; Investment; Mainstreaming; NAMA; Rules; Services; STPC; SPS/TBT; Textiles & Clothing; Tools for TA; Trade and Development; Trade and Environment; Trade Facilitation; Trade Negotiation Skills; TRIPS.

More precisely, the technical cooperation and capacity building were recognized during the negotiation in order to facilitate the implementation by LDCs of the TRIPS Agreement.<sup>116</sup> In this regard, Rwanda as an LDC, benefited from the assistance of WIPO in drafting the Bill on copyright protection.

In the same development, the issue of transfer of technology was also raised under TRIPS to allow LDCS to have access to modern technology in order to benefit from the multilateral trading system.

### 3.2 Transfer of technology to LDCs

The commitment by developed country members of WTO to transfer the technology was emphasized in Doha Ministerial Declaration<sup>117</sup> when the ministers gave the instructions to the council for TRIPS to put in place a mechanism to monitor the implementation of article 66(2) relating to transfer of technology.<sup>118</sup> Pursuant to these instructions, the council for TRIPS adopted a decision setting up this mechanism.<sup>119</sup> It details the information developed countries are to supply by the end of the year, on how their incentives are functioning in practice.<sup>120</sup>

<sup>116</sup> See Article 67 of the TRIPS Agreement.

<sup>117</sup> It was adopted on 14 November 2001 (MIN(01)/17,WT/).

<sup>118</sup> Developing countries, in particular, see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights. The TRIPS Agreement includes a number of provisions on this. For example, it requires developed countries' governments to provide incentives for their companies to transfer technology to least-developed countries (Article 66.2).

<sup>119</sup> This was done in February 2003.

<sup>120</sup> See section 1 of the Decision of the Council for TRIPS of 19 February 2003  
Developed country Members shall submit annually reports on actions taken or planned in pursuance of their commitments under Article 66.2. To this end, they shall provide new detailed reports every third year and, in the intervening years, provide updates to their most recent reports. These reports shall be submitted prior to the last Council meeting scheduled for the year in question.

The reports on the implementation of Article 66.2 shall, subject to the protection of business confidential information, provide, inter alia, the following information:

- the type of technology that has been transferred by these enterprises and institutions and the terms on which it has been transferred;
- the mode of technology transfer;

However, since the conclusion of the agreement establishing the WTO and all its annexes notably the TRIPS Agreement, there has not been any substantial technology transfer flow to LDCs by the developed WTO Members<sup>121</sup> despite the number of WTO decisions in this regard. The main problem with regard to the implementation of this commitment by developed Countries is that government does not have the monopoly of technology: most technology belongs to private sector firms and multinational corporations.<sup>122</sup>

As a concluding remark with regard the prospect of technology transfer, while most LDCs are bound to implement the TRIPS agreement like developed countries, it is not obvious that the latter will full comply with their obligation of transferring the technology to LDCs. Corporations from developed countries are currently reluctant to undertake technology transfers and there is no special strategy in many developed countries to encourage this. IP protection is intended to be beneficial to both sides and in order for LDCs to gain a meaningful share in international trade, developed members should be willing to provide the technology needed in order to have a balanced trade taking into account that technology is linked with trade.<sup>123</sup> During the Uruguay Round, developing countries agreed to the protection of IPRs in exchange of the promise of technology transfer from developed countries who argued that this protection will be beneficial to all WTO Members including LDCs. However, the provisions of TRIPS agreement will not be authoritative<sup>124</sup> unless LDCs see some benefits in it for themselves.<sup>125</sup>

---

- least-developed countries to which these enterprises and institutions have transferred technology and the extent to which the incentives are specific to least-developed countries.

See also paragraph 37 of Doha Declaration. "We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination". WT/MIN (05)/DEC (22 December 2005).

<sup>121</sup> See note 49, supra

<sup>122</sup> Kasto, J., *International Law of Technology*, London Print Center ,1992, p.31

<sup>123</sup> See paragraph 37 of Doha Declaration.

<sup>124</sup> Authoritative means that those who are ruled believe that the law is worth implementing.



The following chapter seeks to examine the extent to which any benefit can be derived from complying with TRIPS in the area of Copyrights through the case study of Rwanda music industry.



---

<sup>125</sup>

See Finger, M., “*Workshop on the development of the music industry in Africa*” The World Bank and The Policy Sciences Center, Inc., Washington, D.C., June 20-21, 2001



## CHAPTER IV

### THE ROLE OF COPYRIGHT PROTECTION IN PROMOTING DOMESTIC INDUSTRY

In this chapter we will investigate the extent to which copyright can play a role in economy by promoting the domestic industry in general, and particularly its role in economic development of LDCs. Only copyright and its impact on music industry will be dealt with in this paper, focusing on Rwanda music industry and see whether this protection would allow LDCs to gain a share in international trade meeting one of the objectives of the multilateral trading system under WTO.

#### 1 Copyright and Music industry

Copyright protection grants authors the exclusive right to freely exploit their work on a commercial or non-commercial basis. Copyright legislation is complemented by the neighboring rights<sup>126</sup>, which protect performers, phonogram producers and broadcasting organizations. The main purpose of copyright and its neighboring rights protection is to encourage and reward creative work, ensuring that creators are remunerated for the product of their labors - a key ingredient for the successful development of cultural industries.<sup>127</sup> The value of the music industry can be measured in copyright terms.<sup>128</sup>

---

<sup>126</sup> Under neighboring rights, performers have the exclusive right to authorize reproduction and public communication of their performances. Phonogram producers enjoy the exclusive right to authorize reproduction; distribution and public communication of their phonograms, and broadcasting organizations are granted the exclusive right to authorize broadcast, satellite retransmission, recording and public communication of their own broadcasts.

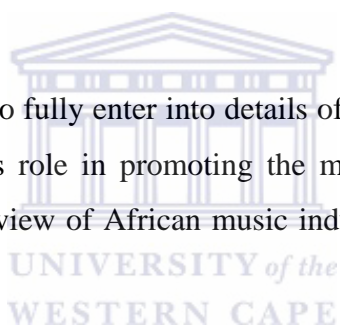
<sup>127</sup> Towse, R., “*Copyright and Cultural Industries: Incentives and Earnings*,” Paper for presentation to Korea Infomeia Lawyers Association, Seoul, 30<sup>th</sup> October 2000, available at [http://www.kafil.or.kr/old\\_kafil/seminar/17-1.PDF](http://www.kafil.or.kr/old_kafil/seminar/17-1.PDF), last visited on 04/04/2007.

<sup>128</sup> Frith, S. and Marshall, L., *Music and Copyright*, 2<sup>nd</sup> ed, Edinburgh University Press, (2004), 90.

In addition, copyright serves the dual purpose of both balancing economic activity<sup>129</sup> with regard to the copyright industries, and protecting the right holders from unlawful use (i.e., copying and counterfeiting) of the copyrighted products. To this end one could argue that copyright plays a pivotal role in organizing the cultural industries, of which the music industry forms an integral part. This is the case mainly because the music industry, which involves the production and the distribution of audio-visual products, is very closely connected to the creation of a rent system, which the copyright system is well suited to accomplish.<sup>130</sup>

As Anderson *et al* state, without the copyright regime, and for all its flaws, a modern music industry is simply not possible, unless developing countries develop this system, they will be unable to fully realize the benefits from the creativity and talents of people in their audio-visual sector.<sup>131</sup>

The aim of this section is not to fully enter into details of copyright law, but to make the link between copyright and its role in promoting the music industry<sup>132</sup> particularly in Rwanda while giving an overview of African music industry of which Rwandan music industry is part.



---

<sup>129</sup> Andersen, B., *et al.*, “Copyrights, Competition and Development: the case of the music industry”, Geneva, UNCTAD Discussion paper No. 145, January 2000, at 4

<sup>130</sup> *Op cit*, at 2

<sup>131</sup> *Op cit*, at 24

<sup>132</sup> See chapter 3 for a more detailed discussion of copyright.

## 2 African perspectives on the music industry

The music industry in Africa<sup>133</sup> and especially in sub Saharan Africa is dominated by South Africa in terms of sales and commercial production. Elsewhere in the region, although musical activity is as an essential ingredient of social and cultural life, the commercialization of music is in its infancy with little development yet in production, circulation and distribution beyond small scale, low-volume recording and local broadcasting.<sup>134</sup> Not all African countries have data available on record sales, according to the report from International Federation of Phonographic Industry (IFPI).

For example in 2001 IFPI report, only South Africa and Zimbabwe had available data in this regard in SADEC<sup>135</sup> countries.<sup>136</sup> In light of the report by the by Development Work,<sup>137</sup> Rwanda does not have much data on music industry and has no visible music industry in this regard.



<sup>133</sup> According to the Development Work Report, in thirty percent of all countries in sub-Saharan Africa there is very little evidence of the existence of a music industry, the situation is as follow: 16 % of all the region have established industry (Congo (Republic), Congo (Democratic Republic), Kenya, Mali, Senegal , South Africa and Tanzania, 24 % of the sub-Saharan African countries have emerging industry, 17 % of sub-Saharan countries have embryonic industry , 16 % craft-like scale and in 27 % of remaining countries there is unclear evidence of industry. Development Works, “*Take note, the R(e)naissance of the Music Industry in Sub –Saharan Africa*”, Paper prepared for The Global Alliance for Cultural Diversity, Division of Arts and Cultural Enterprise, UNESCO, Paris, June 2004.

<sup>134</sup> Throsby, D., “*The Music industry in the new millennium: Global and Local perspectives*”, paper prepared for the Global Alliance for Cultural Diversity Division of Arts and culture Enterprise, UNESCO, Paris, October 2002.

<sup>135</sup> These are: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>136</sup> According to the report, South Africa sales rose strongly through the early 1990s, from \$ US 187 million in 1991 to \$US 218 million in 1996. Since then sales declined to around \$US 150 million in 2000, or \$US 3.50 per head of population. Only 23 per cent of record sales in South Africa are of domestic product. The South African situation contrasts with that in Zimbabwe, where per capita incomes and hence record sales are much lower. Recorded music in Zimbabwe declined in the early 1992, from \$US 9.1 million in 1991 to as low as \$US3.9 million in 1995. Since then, however, there has been steady growth, in defiance of trends in sales elsewhere in the world. By 2000, record sales had reached \$US 14.0 million, or \$US 1.10 per head of population, with the major format being the music cassettes.

<sup>137</sup> Development Works, *supra*.

### 3 The Rwandan music industry

In Rwandan music industry,<sup>138</sup> the big challenge for the copyright holders in general and musicians in particular is the lack of adequate protection of their works despite there being the copyright law of 1983. Much of the infringement is done by individuals or by government institutions, notably Rwanda Office of Information (ORINFOR) through National Radio and Television. In the late 1980s' the widespread presence of sound recordings has exacerbated the piracy of music works for both local and foreign artists. Restaurants, bars and hair saloons, continuously broadcast music without artists' authorization. The infringement done by the ORINFOR are the most significant and old given the impact of the radio which broadcasts nationally.<sup>139</sup>

After the enactment of the copyright Act of 1983, artists did not dare denounce the infringement of their rights by the ORINFOR fearing that the government would accuse them of hindering the spread of Rwandan culture.<sup>140</sup> However, musicians and artists have created an association in order to protect their interest: the “*Association des Musiciens du Rwanda*” (A.M.R). The aims of the Association were among others, to represent musicians before public and private forums both at national and international level.<sup>141</sup> Later in the 1990s after the multiparty era was introduced by the constitution of June 10, 1991 and the inauguration of democracy era, many artists began to publicly denounce the infringement of their work by the public service through local media and conferences. Nevertheless, even though the musicians had this opportunity to address their claims, and

---

<sup>138</sup> Rwandan music industry is classified among the category of those countries in sub Saharan Africa that do not have an established music industry. According to the Development Works (2004) - Rwanda is among those countries where there is unclear evidence of music industry.

<sup>139</sup> Musicians have accused the national radio of broadcasting their music as the right holder without paying royalties. See Gakwerere, J.P “*De la protection des oeuvres musicales en Droit Rwandais*” Faculte de Droit, UNR, (1998).

<sup>140</sup> Gakwerere, *op cit*, 18.

<sup>141</sup> See Ministerial Order no. 57/07 of February 2, 1982 granting legal personality to the Association of Rwandan musicians, O.G, no.7 of April 1, 1982.

given that no action was taken by the government, they resorted to a measure through their letter to the ORINFOR Director to stop broadcasting their music on radio.<sup>142</sup>

In the aftermath of the 1994 war and genocide that claimed the lives of many Rwandan artists, artists have embarked on a process of organizing themselves to better be productive. The problem relating to the protection of musicians still persists and has become more pressing in many aspects: piracy and illegal recording have had a huge impact on music in Rwanda. Infringement by Radio Rwanda continues to be denounced.<sup>143</sup> Another problem of note is that the Service in Charge of protecting the interest of artists has failed in its mission. In Rwanda the biggest consumer of music used to be the National Radio before the liberalization of the press in 2004 and is the biggest infringer of the musicians' rights, hence the need for the artists themselves to work together in a strong and powerful association in order to resist against the infringers of their rights either public actors or individuals.<sup>144</sup>

With regard to the capacity of industry, sound recording is the most significant medium of communicating the music work to the public. Rwandan musicians do not gain from the sale of reproduction rights, in other words they derive their incomes from the sale of Discs and Cassettes, but also through the revenues from live concerts and royalties paid by radio stations<sup>145</sup> when broadcasting their songs. This situation resulted in the country lagging behind in terms of international trade in music industry.

---

<sup>142</sup> The prohibition by the majority of artist in the letter of September 22, 1992 to the Director of ORINFOR was important since it is thanks to it, that the public opinion realized the true picture of the claim by musicians.

<sup>143</sup> For example, ORINFOR broadcasts song requested by listeners by an amount of 1200 Rwandan Francs without consulting the composers or their representatives.

<sup>144</sup> During the radio magazine called "music and ideas" aired on June 12, 1997, artists KAGAMBAGE and MBARAGA advocated the creation of a strong association of musicians.

<sup>145</sup> Currently there are more radio stations than before the genocide of 1994, an era of state monopoly on radio broadcasting. The liberalization of the audiovisual sector took a big step forward in February 2004 when the High Council of the Press (HCP) recommended the Ministry of information to issue broadcasting-licenses to a number of private radio stations. At the moment, radio stations are on air: Four commercial stations (Radio 10, Flash FM, Contact FM and City Radio which broadcast from Kigali), three religious radio stations (Radio Maria which broadcasts from Gitarama in the centre of Rwanda, Radio Umuco and Sana Radio both broadcasting from

### 3.1 Rwandan music industry and international trade

The music industry in Rwanda is not recognised as a business, but it is considered simply as a cultural activity<sup>146</sup> yet it has the potential to be an important symbol as well as substantive element in bringing a poor society forward.<sup>147</sup> Also to note, is that the music industry is not recognized by the government in its vision 2020 development as one of the tools to enhance the economy. This lack of government policy and absence of institution support constitute a major hindrance to the music development. In terms of volume, music is consumed mainly through radio broadcasts. Live performance is a key point of access, in bars, restaurants, motels, hotels, community halls and to a certain extent stadia.

The Rwandan music sector is characterized by a dual industrial structure, with a small minority of well known artists<sup>148</sup> who have achieved some success on the international market and who operate under competitive conditions since they take advantage of the diaspora market especially in Belgium and France.

The majority of local musicians, artists and producers, however, function under far less organized and fortuitous circumstances. In addition inadequate financial structures to support the industry, there is an absence of formal institutional structure within the market itself. Another matter of note is that lack of specialised enterprise<sup>149</sup> in sound recording

---

Kigali) and two community radio station (Radio Izuba which broadcasts from Kibungo in Eastern Rwanda) and the school of journalism's radio broadcasting from Butare).

<sup>146</sup> Music and dance play an important role in the traditions of Rwandans. The Rwandan people have a variety of music and dance which range from acts that demonstrate epics commemorating excellence and bravery, humorous lyrics to hunting root. Intore Dance Troup is the finest model of Rwanda's varied and dynamic traditional musical and dance styles.

<sup>147</sup> Collier, P. 2001 "The *Rationale*" in World Bank, Policy Sciences Center, Inc. Workshop on the Development of the Music Industry in Africa web page at [http://www.worldbank.org/research/trade/africa\\_music2.htm](http://www.worldbank.org/research/trade/africa_music2.htm), (last visited on March 14, 2007).

<sup>148</sup> Eg Samputu Jean Paul, Cecile Kayirebwa, Intore massamba and Ben Rutabana.

<sup>149</sup> The market of sound recording and publishing was dominated by 'MUSIC FABRIC S.A.R.L' before the tragic event of 1994 genocide. Almost all Rwandan artists used this company for

makes most musicians go to record their songs in the US or South Africa and those who can not afford the cost of recording in these countries use Ugandan recording studios.<sup>150</sup> Currently and historically, most of the local musicians and recording artists do not receive adequate compensation for their creative efforts, either through royalties or shares of income from the sale of recorded music<sup>151</sup> due to lack of strong collecting society. Moreover, they are inadequately trained and receive little support for improvement. This results in the industry remaining underdeveloped.

According to a report by UNCTAD, there are numerous factors which account for the relative state of the industry's underdevelopment, such as :

- (a) inefficiency in manufacturing processes, in part associated with small scale, resulting from underdeveloped technological equipment and capabilities;
- (b) insufficiency of viable professional associations and other business support systems;
- (c) the institutional hiatus, witnessed by an absence of critical institutions, such as national (c) collective administration agency for copyrights, effective professional musicians and producers's associations, and other requisite institutional support structures to complement and enhance the industry's innovative performance<sup>152</sup>

---

recording and publishing their musical works. MUSIC FABRIC S.A.R.L has among other objectives the following activities: production and marketing of music in Rwanda and abroad, organizing the music events, and representing foreign music publishing companies in Rwanda. Nowadays, it has lost its production capacity due to the war and genocide of 1994; it deals only with commercialization of music. It is obvious that for the time being only the protection of artists and strong support by the government will help to reinstate this house with its capacity and also help boost the creation of other publishing and recording companies.

<sup>150</sup> For instance in 2005, a thriving modern musical band "The Sowers" composed of Rwandan and Congolese artists moved to Uganda due to loss of revenue from their recorded music and loss in their overall revenues to lack of adequate protection of their rights in Rwanda.

<sup>151</sup> Gakwerere, *op cit*, at 17

<sup>152</sup> UNCTAD, 1995 "Trade and Development Report", UN sales publications, New York:United Nations.



This is true in Rwandan situation especially after the genocide of 1994 which claimed the lives of many music industry stakeholders. With regard to international trade, while globalisation of music business exerts multiple and contradictory effects on this sector,<sup>153</sup> currently Rwandan music industry does not have the strengths or capabilities required to meet the export potential and most Rwandan music is consumed locally. Unless the local producers are able to upgrade their assets and capabilities, the risk of being left behind in the non-growth or very slow growth modes and marginalization is greater than ever. In order to respond to the new opportunities offered by the liberal trading system aimed at enhancing the overall capabilities of less developed country like Rwanda, domestic industrial capabilities need to be built up and there is room for policy.

The strengthening of supply capabilities is urgently required in order to take full advantage of market access opportunities which have opened up for exports within the multilateral trading system.<sup>154</sup> There is no doubt that in order to gain a share in the multilateral trading system, a competitive export oriented industry is required. Unfortunately many LDCs if not all do not have a sound export oriented music industry. With this objective in mind, adequate and appropriate assistance at all levels to the productive sector will be required to deal effectively with numerous transitional community difficulties and constraints. Albeit critical, the role of the government and of the international community at large in the building up of the industry exceeds assistance in training and dissemination of information. This suggests that capacity building and technology transfer play a key role in this regard to help LDCs to become competitive in international trade. Once appropriate policies<sup>155</sup> and

---

<sup>153</sup> Kozul-wright, Z. and Standury, L., “*Becoming a globally competitive player: The case study of the music industry in Jamaica*”, October 1998, available at [http://www.unctad.org/en/docs/dp\\_138.en.pdf](http://www.unctad.org/en/docs/dp_138.en.pdf) (last visited April 23, 2007).

<sup>154</sup> This factor has been recognised as a condition *sine qua non* for a more effective strategic participation into global market economy: see UNCTAD, *ibid*.

<sup>155</sup> Where strong import regulations exist, the availability of imported music instruments, recording and reproduction equipment is generally limited. Recent trade liberalisation processes have facilitated the acquisition of the “tools of the trade”. In Zambia, this is the primary factor, which is enabling the birth of the recording industry. In Tanzania, the establishment of new bands was greatly facilitated by the economic liberalisation programme, which allows importation of musical instruments by private businesses.



support structures are put in place, a strong export potential exists in the industry to make it viable and a lucrative segment of the entertainment industry contributing to Rwandan economy.<sup>156</sup> The music economy is very much in its infancy in Rwanda. Its means of production, circulation and distribution are mostly undeveloped. On the down side, this means that much still needs to be done to unleash the economic potential of the music industry. On the up side, this also means that country production and consumption mechanisms are incredibly responsive to strategic interventions.<sup>157</sup>

The importance of music in development was recognized as one of the major contributing factors in boosting the economies of LDCs so that in 2003, the World Bank initiated a project called “The Africa Music Project”<sup>158</sup> in Senegal after recognizing that the music

---

For instance, in Zimbabwe, most industrial equipment is treated as capital goods. However, music equipment is treated as a luxury good and carries a 25% import tax. In Rwanda according to the tariff schedule, musical goods and equipment carry 30 % import tax , In Ghana, import duties of up to 160% were once placed on music instruments and the government also embargoed tax waivers for private companies for sponsoring artistic or cultural event, see Collins, J., ‘*Making Ghanaian Music Exportable*’ available at <http://www.scientific-african.de/scholars/collins/musawards.pdf> (last visited on March 25, 2007).

<sup>156</sup> Many analysts of music industry have argued that a well established music industry can play a positive role in economy. While comparing the Nashville music industry in the United States of America of 1940s with that of today’s many african countries, and given the impact that music has made on its economy, there is hope that once appropriate policies are put in place, african countries can reap the huge benefit from the music industry ...and become competitive in international trade( emphasis added)

See in this regard Penna, F.J , Thormann, M., and Finger,J.M., “*The Africa Music Project*”, Poor People’s Knowledge: Promoting Intellectual Property in Developing Country (2004) at 97; Sanjeck, D., “*The Nashville Experience*” paper presented at the Workshop on the Development of the music industry in Africa, Washington, D.C. June 20-21, 2001.

Also of note is the importance of creativity to boost the development. The New Partnership for Africa’s Development(NEPAD), initiated in July 2001 by the African Union, identifies as one of four main development issues “the creativity of African people, which in many important ways remains “underexploited and underdeveloped” (OAU 2001).

<sup>157</sup> For instance, in Zimbabwe, record sales of 100 000 units per album were never heard of until the early 1990s, when significant investment was made to enhance production, circulation and distribution by Zimbabwe’s major record labels. In some LDCs as diverse as Tanzania, Zambia and Mali experience suggests that the music economy can increasingly be a viable industry, provided it is cared for and adequately regulated: see Development Works, “*Take Note! The (Re)naissance of the Music Industry in Sub-Saharan Africa*”, Paper prepared for The Global Alliance for Cultural Diversity, Division of Arts and Cultural Enterprise, UNESCO, Paris, June 2004.

<sup>158</sup> The aims of the project were, to increase the earnings of african musicians, to support african culture and demonstrate that such support would be a boost to the economy rather than a drain on it and to find ways to make the WTO agreement on intellectual property more supportive to development.

has a significant business potential given that it currently makes up about half of the fast-growing “World Music” segment of recorded music.<sup>159</sup> To promote this industry, the World Bank approved in Summer 2003 a US\$ 46 million credit for private investment promotion. One component was to finance music industry ventures; another component was dedicated to rewriting the copyright law. Rewriting the copyright law begun in January 2003, financed by an advance on that credit.<sup>160</sup> The attention the project has brought to what the music industry contributes, to its potential to contribute more, plus the attention it has focused on possibly corrupt practices has stimulated action on further legal and regulatory reform.<sup>161</sup> More immediately, it has sparked action by the existing collection society to reduce piracy of recorded music and to collect royalties from radio stations for payment to the musicians.

In sum, the major success of the Africa Music Project to date has been to assist musicians in Senegal in recognizing that they can help themselves. The project has involved and activated local musicians and empowered them to identify their own interest, to deal with the government, and to deal with the market. The musicians themselves now have clearer idea of how they will proceed, and a stronger feeling that they will be successful and will spur the development of their country. Today, in Senegal,

---

<sup>159</sup> Collier P, 2001, “*The Rationale*” in World Bank, Policy Sciences Center, Inc. Workshop on the Development of the Music Industry in Africa web page at [http://www.worldbank.org/research/trade/africa\\_music2.htm](http://www.worldbank.org/research/trade/africa_music2.htm) (last visited on March 29, 2007).

<sup>160</sup> Penna, F. J *et al*, “*The Africa Music Project*” at 111.

<sup>161</sup> This suggests that the protection of copyright itself cannot play a key role in a domestic industry particularly in music without other support structure from either government or international organizations. The Africa Music Project recognized as priorities, the legal training, and development of standardized contracts, legal assistance, and basic business training. Also of note, is the potential of E-Commerce to contribute to African musicians to advertise and to sell their music to the world market. In Senegal, the project has already begun in instructing musicians in several outlying regions how to use MP3.Com as way of selling unencrypted music over the internet. In this regard, the commissioner of patents in South Africa has given consent to establish a hub for hardware and software in South Africa so that each participating country could have a small digital studio or even mobile digital studio from which they send music recording to the hub in South Africa for advertising, production, distribution(including export), and payment: see FJ Penna, *et al*, *ibid*

the result is seen from the project to the extent that a distributor can sell more than 4 million cassettes per year.<sup>162</sup>

### IV.3.2. Main challenges for the Rwandan music industry's development

Access to finance capital by musicians is still a major problem and there are too few development bank loans. There is no industrial association to coordinate access to financial services or make effective representations to government, for example over import taxes on musical equipment.<sup>163</sup> As I stated earlier, the Rwandan music industry is still considered as a cultural value and not perceived as a matter of business that can have an impact on development.<sup>164</sup> This is true since there is insufficient if not absence of public sector support for the industry.

What is clear is that there is no effective institutional framework incorporating private sector and government organizations, lack of industry specialists in government entities to enhance public sector effectiveness and credibility. However, even though there are many challenges to the industry due to lack of support by the public sector, the most problematic issue with regard to the development of music in Rwanda or elsewhere in Africa is piracy. According to Gerard Seligman, the great limiting factor on the sales of music within Africa is piracy.<sup>165</sup> Also of note is the fact that collections societies,

---

<sup>162</sup> Development Works (2004), *ibid*.

<sup>163</sup> For instance the music instruments are taxed at 30%; hence many musicians do not have the capabilities to import the equipment due to lack of access to financial services and the high import duty on equipment. This situation does impact even to non musician community. For instance lack of sophisticated musical instruments due to high import duty impacts negatively to other sector that consume music notably churches. In the vent of a big crusade, churches hire musical equipment from Kenya or Tanzania in order to convey their message to the audience.

<sup>164</sup> There is no clear policy with regard to music industry in the vision 2020 development agenda.

<sup>165</sup> There are some markets that, at a conservative estimate, are 50 % pirate and almost no country in Africa has piracy level of less than 25% and some estimates for West Africa suggest that the piracy level is as much as 85 to 90%: Gerard Seligman, "The market for African music", Paper presented at workshop on the development of the music industry in Africa, The World Bank and The Policy Sciences Center, Inc., Washington, D.C., June 20 -21, 2001.

organizations that track the use of music and ensure that artists are paid royalties, are key institutions in industrialized countries: these unfortunately, in Africa, are ineffective.<sup>166</sup>

With this record in mind, only proper protection of copyright can help combat the practices that hinder the development of music in the short run and in the long run negatively impact on African economies. In countries where the music industry is well regulated and where there are institutional support and policies either by the government or by international institutions, music can play an important role in the national economy. The Senegalese experience and the Africa Music Project suggest that if the music industry is well regulated through copyright along with adequate institutional support, there is no doubt that Rwanda can reap a benefit in the multilateral trading system by complying with TRIPS agreement.

However, in order to reach this objective as set out in paragraph 2 of the preamble to the Agreement establishing the world trade organization<sup>167</sup> and article a 7 of the TRIPS agreement<sup>168</sup>, the WTO Members concerned with the implementation of articles 66(2)<sup>169</sup> and (67)<sup>170</sup> of the same agreement should implement them in order to help LDCs to boost their economies. Lack of this implementation will mean that even though LDCs comply with the TRIPS agreement, they will not gain any share in international trade given their current level of development.

---

<sup>166</sup> See Penna, F., *J et al, op cit*, at 101.

<sup>167</sup> “Recognizing further that there is need for positive efforts designed to ensure that developing countries and especially the least developed countries among them, secure a share in the growth in international trade commensurate with the needs of their economic development”.

<sup>168</sup> The protection and enforcement of IPRs should contribute to the promotion of technical innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

<sup>169</sup> Developed Member Countries of the WTO are supposed to give incentives to their enterprises and institutions in order to promote and encourage technology transfer to LDCs.

<sup>170</sup> It deals with technical and financial cooperation in favor of developing countries especially the least developed countries.

## CHAPTER V

### CONCLUSION AND RECOMMENDATIONS

#### 1 Conclusion

This paper was aimed at showing that the protection of IP can benefit both the users and the owners of IPRs, opposing the idea that this protection under TRIPS agreement would only benefit the developed countries who own most IP. We have argued that developing countries have the interest in protecting IPRs as well, given that they have a comparative advantage in some aspects of IP related for example to biodiversity resources and traditional knowledge as well as music that needs to be protected under copyright law. However, this can be achieved only if there is a fair rule<sup>171</sup> of the game to all players in the multilateral trading system. In this regard, we emphasized the need for the review of special and differential treatment in favour of LDCs notably the provision relating to the transfer of technology as enshrined in the TRIPS Agreement. We argued that the developed countries feel not bound due to lack of any time frame for the implementation of their obligation in this regard. In addition, as LDCs have been given the time frame to comply with the TRIPS Agreement, developed countries should be given the time frame as well to implement their obligation in favour of LDCs. In addition we showed that developing countries would have been better off if the protection were extended to cover traditional knowledge and biodiversity resources which are found mostly in developing countries. Hence, the need of reviewing these special and differential treatments and making them precise, effective and more binding.

---

<sup>171</sup> There is a criticism of TRIPS in the sense that it was unfair to developing countries, in two aspects. While it provided the advanced industrial countries the protection they wanted, it did not provide developing countries protection for their traditional knowledge. In addition, while TRIPS would reduce developing countries' access to knowledge and force them to pay billions in royalties, it was meant to be part of the "Grand Bargain" in which the developing countries would get greater access in agriculture and reduced agricultural subsidies by the advanced industrial countries. The developed countries did not keep their side of the bargain. For further discussion of the bargain between developed countries and developing countries, see Stiglitz, E.J., *Making Globalization Work*, W.W. Norton & Company, Inc., New York, 2006, (pp. 74-80)

In the effort to make their laws TRIPS compliant, LDCs have embarked on legal reform in the area of IP. This is evidenced by Rwanda's steps towards the TRIPS compliance in the Bill on copyright protection before the parliament. All aspects covered by the TRIPS were taken into consideration and if the current Bill is adopted, Rwanda's legislation will be TRIPS compliant even before the deadline set out under the TRIPS Agreement. In the related development, during the negotiation of the TRIPS Agreement, developing countries including LDCs agreed to protect intellectual property of both foreigners and local owners in exchange of the promise of transfer of technology and technical assistance. However, what is clear is that given the current state of compliance by many LDCs with TRIPs compliance, there is no concret effort made by the developed countries to help them to reap the benefit of multilateral trading system as enshrined in the preamble to the agreement establishing the WTO, as well as in Article 7 of the TRIPS Agreement<sup>172</sup>

This paper has also shown that copyright can play a role in promoting domestic industry and that if this sector is well regulated in turn can play a significant role in the economy. Given the prevailing situation, we emphasized the need for the government and the international community to provide adequate and appropriate assistance to reach this goal. The Senegalese experience and Africa Music project was used to demonstrate that the goal of local industry promotion is attainable.

The role of the government and international community should not be limited to assistance in training and dissemination of information, but should go further in capacity bulding, technology transfer as well as assistance in training personnel. Once this done, a strong domestic music industry will emerge and will in the long run help LDCs to gain a competitive advantage in the multilateral trading system.

This research, is clearly not a comprehensive study on the subject but is merely a basic, introductory analysis of the issues relevant to the subject matter. It is hoped that this work shall spark continued academic interest and research on the subject.

---

<sup>172</sup> See Supra notes, 148 and 149.

## 2. Recommendations

In light of the above analysis, we deem that the following recommendations will prove helpful to LDCs and particularly Rwanda in their efforts to build a viable legal framework for IP protection which in turn could benefit their economies.

### 2.1. TRIPS and developing countries

The WTO should consider a review of article 62.4 of the TRIPS Agreement, providing a binding time frame for the developed countries to comply with this obligation in the same way that LDCs have a deadline to comply with their obligations set forth in article 16(4) of the Agreement establishing the WTO.<sup>173</sup> The fact that the modalities of transfer of technology was not provided for has resulted in developed countries not feeling bound. Providing the necessary modalities will ensure a win-win situation between both developed countries<sup>174</sup> and the LDCs<sup>175</sup> that are WTO members. This will ensure that developing countries do not continue to question the importance of IPRs in the economy.

The WIPO and WTO should help developed countries to establish a trust fund dedicated to IP promotion to help the LDCs in their endeavors in implementing the TRIPS agreement in all aspects including enforcement, assistance, and capacity building. This capacity building should not only benefit the IP enforcement authorities but also other the stakeholders in the area of IP such as musicians.

---

<sup>173</sup> Article 16(4) reads as follow “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. In this regards, developed Members are bound to implement their obligation under TRIPS as annexed Agreement.

<sup>174</sup> Their interest being in strong IPR protection.

<sup>175</sup> They seek to gain from that protection by way of the transfer of technology that can be beneficial in boosting their industries where they have a competitive advantage in the long run promoting their economies.



## 2.2 Rwanda's compliance with TRIPS Agreement

The analysis of Rwandan law on copyright of November 1983 shows that much need to be done to make the law TRIPS compliant. The current Bill pending before the parliament if adopted will result in Rwanda being fully TRIPS compliant. The Bill<sup>176</sup> should also provide for the protection of rights holder in case of cinematographic work even after the sale in the event of widespread copying of the work that is materially impairing his exclusive rights of distribution. We suggest that the right holder be granted this power in keeping with the distribution right as provided for by the TRIPS Agreement.<sup>177</sup>

The Bill provides for substantial criminal remedies to deter copyright infringement. The Rwandan government should set up a trust fund to promote the copyright development and in case of infringement, the fines imposed on infringers be transferred into the fund to provide compensation for IP dead of infringements.

IPR enforcement stakeholders, notably judges, customs officials and police, should be trained in the area of IP protection. In addition, Intellectual Property should be made a compulsory component of academic curricula around all the universities in Rwanda, not an optional course.

---

<sup>176</sup> Article 169 of the Bill states that  
 "... The right of rental of the original or copy of the work to the public of an audiovisual work, a work embodied in a phonogram or a rental or a computer does not apply to the original or a copy of the work that has already been subject to the sale or other transfer of ownership in the national territory of Rwanda authorized by the owner of copyright."

<sup>177</sup> Article 11 of the TRIPS states that  
 "In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be accepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental."



### 2.3 Copyright and music industry

The role of the music industry should be rethought and cease to be considered as only a cultural industry. Support structure and policies need to be taken to enhance the industry. Copyright promotion service should be included in the ministry of trade. This will help the minister of trade to play a pivotal role in formulating policies for the music industry.<sup>178</sup>

Institutional support should be put in place through a framework aiming at enhancing the capacity of musicians notably (i) providing them with computer literacy and (ii) removing import duties on musical equipment. In addition, Rwanda should draw a lesson from Senegalese experience with “Africa Music Project” and seek a partnership with international donors to build a modern music industry that will enhance the capacity of trade so that it becomes export oriented industry.

Finally, the lack of any strategy in this regard will result in Rwanda not realizing the goal of using the music industry as an instrument fostering a growth in its international trade capacity. Without international trade, any copyright protection would be of limited benefit to Rwandan IP holders since they will not derive significant profit and this will confirm the view that IPR protection does not benefit developing countries.

---

<sup>178</sup> Many reasons support this rationale for the ministry of trade to formulate and implement trade policies: any policy not formulated or commissioned by the ministry of trade risks being overridden by a subsequent policy of the said ministry. Secondly, the ministry of trade is generally best equipped in dealing with international trade issues; since issues of the music industry are regulated internationally within TRIPS Agreement, it should be expected that, since Rwanda is in the process of complying with the said Agreement, any dispute arising in under TRIPS agreement be handled by the ministry of trade as representative of the aspirations of Rwandans musicians.

## Bibliography

### 1. Legal Text

Annex 1C to the Agreement establishing the WTO (Trade-Related Aspects of Intellectual Property Rights)

Convention on Biological Diversity signed in Rio de Janeiro in 1992.

Rwandan copyright law of November 1983

Rwandan Bill on copyright of February 2007

Rwandan Bill establishing the commercial court of December 2006

Ministerial Order no. 57/07 of February 2, 1982 granting legal personality to the

Association of Rwandan musicians, O.G, no.7 of April 1, 1982.

### 2. Books and articles

**Bambauer D. E.**, “*Why Intellectual property rights matter to Less-developed countries*,” Information Technologies and International development, MIT Press, vol. 1(3-4), p.63-71, April 2004.

**Ben-Atar, D.** “*Trade secrets: Intellectual piracy and the origins of American industrial power*” New Haven: Yale University Press, (2004).

**Breckenridge, A.**, “*Developing Countries and the Multilateral Trading system: Past and Present*”, background note, WTO, Geneva, March 17-18, 1999

**Cottier, T.**, *Trade and Intellectual Property Protection in the WTO Law, Collected Essays*, Cameron May, (2005).

**Cecilia, O.**, *IPRs and Biological Resources: Implications for developing countries*, Third world Network, accessed on <http://www.twinside.org.sg/title/iprharare.htm>, 25 Jan 2007.

**Chisanga, E.** *Should trade related aspects of intellectual property rights be negotiated?* London: The World Trade Agenda, July, 2001 retrieved on [www.ielcr.org/content](http://www.ielcr.org/content) (last visited on 19/09/2006).

**Collier, P.** “*The Rationale*” in World Bank, Policy Sciences Center, Inc. Workshop on the Development of the Music Industry in Africa, 2001

**Dasgupta, B.**, “*Patents Lies and Latent Danger: a study of the political economy of patents in India.*” *Economic and Political Weekly*, April 17-24, 1999

**Development Works**, ‘*Take note, the R(e)naissance of the Music Industry in Sub – Saharan Africa*’, Paper prepared for The Global Alliance for Cultural Diversity, Division of Arts and Cultural Enterprise, UNESCO, Paris, June 2004.

**Finger, M.**, “*Workshop on the development of the music industry in Africa*” The World Bank and the Policy Sciences Center, Inc., Washington, D.C., June 20-21, 2001

**Finger, M., and Schuler, P.**, *Poor people’s knowledge :Promoting intellectual property in developing countries*, the World Bank and Oxford University Press, (2004).

**Frith, S. and Marshall, L.**, *Music and Copyright*, 2<sup>nd</sup> ed, Edinburgh University Press, (2004)

**Gakwerere, J.P** “*De la protection des oeuvres musicales en Droit Rwandais*” Faculté de Droit, UNR, (1998).

**Gervais, D.**, *The TRIPS Agreement: Drafting history and Analysis*, 2<sup>nd</sup> ed., Sweet & Maxwell, London, (2003).

**Homere, J.R.**, “*Intellectual Property Rights can help stimulate the Economic Development of Least developed countries,*” *Columbia Journal of Law and Arts*, 25, 277-299, (2004).

**Kahn, T.**, “*Bushmen to share Gains from slimming cactus*” available at <http://www.scidev.net/News/index.cfm?fuseaction=readnews&itemid=133&language=1>. Last visited on 13 May 2007

**Kasto, J.**, *International law of technology*, London Print Center, (1992).

**Kozul-wright, Z. and Standury, L.**, “*Becoming a globally competitive player: The case study of the music industry in Jamaica*”, (October 1998), available at [http://www.unctad.org/en/docs/dp\\_138.en.pdf](http://www.unctad.org/en/docs/dp_138.en.pdf) (last visited April 23, 2007).

**Maskus, K.E.**, “*Intellectual Property Rights and Economic development,*” *Case western Reserve Journal of International Law*, 32,471-506.(2000).

**May, C., and Susan, K.**, *Intellectual property Rights, a Critical History*, Lynne Rienner Publisher, Inc., (2006).

**Michalopoulos C**, “*The role of Special and Differential Treatment for developing countries in GATT and the World Trade Organization*,” Policy Research Working Paper No.2388, The World Bank, Washington DC. (July 2000)

**Penna, J. et al.**, *The Africa Music project, Poor people’s knowledge: Promoting intellectual property in developing countries*, World Bank and Oxford University Press, (2004)

**Sanjeck, D.**, “*The Nashville Experience*” paper presented at the Workshop on the Development of the music industry in Africa, Washington, D C., June 20-21, 2001.

**Seligman, G.**, “*The market for African music*”, in the Development of the music industry in Africa, World Bank and The Policy Sciences Center, Inc., Washington, D.C., June 20 -21, 2001

**Shapiro, R.J, and Hasset, K.A.**, “*The economic Value of intellectual property*” ’ accessed at [http://www.usaforinnovation.org/news/ip\\_master.pdf](http://www.usaforinnovation.org/news/ip_master.pdf), (October 2005), last visited on 11May 2007.

**Stiglitz, E.J.**, *Making Globalization Work*, W.W. Norton & Company, Inc., New York, (2006).

**Throsby, D.**, *The Music industry in the new millennium: Global and Local Perspectives*, The Global Alliance for Cultural Diversity Division of Arts and Cultural Enterprise, UNESCO, Paris, (October 2002)

**Towse, R.**, “*Copyright and Cultural Industries: Incentives and Earnings*,” Info media Lawyers Association, Seoul, 30<sup>th</sup> October 2000, available at [\[http://www.kafil.or.kr/old\\_kafil/seminar/17-1.PDF\]](http://www.kafil.or.kr/old_kafil/seminar/17-1.PDF), (last visited on 04/04/2007)

**Tulloy D.**, “*Prospects for progress: The TRIPS Agreement and developing countries*” accessed at <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/> last visited on 6/10/2006

**UNCTAD**, ‘*Trade and Development Report*’, UN sales publications, New York:United Nations (1995 )

**Watal, J.**, *Intellectual Property Rights in the WTO and Developing Countries*, Kluwer Law International, the Hague Netherlands, (2001)

**Yong-d’Hervé D.**, “*How IP benefits developing countries*” available at <http://www.iccwbo.org/iproadmap> last visited on 13 May 2007