

WIPO/CR/KRT/05/2

ORIGINAL: English

DATE: January 2005



REPUBLIC OF THE SUDAN



WORLD INTELLECTUAL
PROPERTY ORGANIZATION

**WIPO NATIONAL SEMINAR ON COPYRIGHT,
RELATED RIGHTS, AND COLLECTIVE MANAGEMENT**

organized by
the World Intellectual Property Organization (WIPO)

in cooperation with
the Ministry of Culture

Khartoum, February 28 to March 2, 2005

THE ROLE OF GOVERNMENT IN ESTABLISHING
A MODERN COPYRIGHT SYSTEM

*prepared by Mr. Henry Olsson, Judge at the Court of Appeal,
and Special Government Adviser, Ministry of Justice, Stockholm*

1. General about the duties of the Government

In very general terms the role of the Government of a country is to ensure the well-being of its citizens and to promote the economic, social and cultural development. One of the main rationale for intellectual property law, including copyright, is to stimulate creativity and to protect and encourage investments and transfer of technology. Consequently it must be seen as one of the duties of a government to also ensure that the intellectual property system of the country serves those aims.

Seen against this background, the role of a government is multi-faceted and involves at least two essential aspects.

The first concerns the domestic application, in the sense that the Government has to ensure that the copyright law provides sufficient protection to its authors and at the same time takes into account the balance against public and private interests.

The second aspect concerns the relations between the country and the outside world. The government has to ensure that – in this case – its copyright system is such that the country is welcomed in the international cultural and technology transfer activities.

2. Domestic Considerations

2.1 Meeting policy objectives

At the domestic level, there are a number of considerations that a Government needs to take into account when designing and operating an appropriate copyright system.

Among those considerations the following seem to be of particular importance. First of all there are some policy considerations, among them the following.

Taking into account the basic rationale for copyright protection.

One underlying very general policy consideration in connection with enforcement is to realise which are the basic rationale for copyright protection. As we know, copyright operates on the basis of exclusive rights for the author or his successor in title. We also know that the rationale for copyright protection is to stimulate creativity and inventiveness and thus contribute to social, economic and cultural progress and development. It also serves at facilitating and promoting investments in the culture, media and information sectors.

Mitigating negative effects of too far-reaching exclusive rights

Even if the copyright system thus has the overall purpose of promoting progress in society, this comes at a price. The price lies in the costs resulting from the exclusive rights that have to be paid by the users. This cost may be high or it may be low, but it has to be paid. If the rules are not respected, the enforcement system will impose economic sanctions.

From what is said now the conclusion can be drawn that a system of comprehensive all-covering rights making every kind of exploitation subject to the consent of the author of the work at issue is simply not workable.

Mechanisms to mitigate negative effects of exclusive rights

There are basically two types of mechanisms that can be used to mitigate negative effects of the exclusive rights.

The first one consists of limitations on the exclusive rights. All copyright laws, and also that of the Republic of the Sudan, contain provisions in this respect.

The second one consists of legislation outside copyright law, in particular law on unfair competition.

Relations to enforcement

Enforcement of copyright law is basically the implementation in practice of the existing legislation, and judges and prosecutors have little room for policy considerations when they have to implement the law.

What is important to keep in mind is, however, that intellectual property law is an important element in the legislative fabric of a country and that it has to be properly enforced. Otherwise it is useless and does not serve the purpose for which it is there. There is no need under any international instrument to create a special separate system for enforcement of intellectual property nor is there any obligation to devote more resources to enforcement of intellectual property than to other sectors of enforcement.

But the enforcement authorities have to use some resources and give attention also to the enforcement of intellectual property rights, including copyright.

It should also be noted that membership of the World Trade Organization and being a party to the TRIPS Agreement entails obligations to set up and operate an efficient enforcement system. Breach in this respect may – as our own experience shows – entail dispute settlement procedures within WTO.

2.2 Certain practical considerations

A number of practical measures should be considered by Governments in order to make the operations of copyright law and of enforcement mechanisms more efficient.

Some of those concern the creation of awareness in the country about copyright law and of its importance and of the need to ensure that it is in fact applied in practice.

Some other measures deal with a number of concrete measures in enforcement operations. The Government should as far as possible see to it that they are applied in practice. Some of those are mentioned below, in view of their considerable practical importance.

Information and training

The most important one is to devote sufficient resources and attention to information and training. The police and the prosecution authorities, and the customs officials, have to be informed about intellectual property and its enforcement. The same goes for the judiciary. The present workshop is a good example of such an activity, and WIPO has a number of tailor-made activities in this respect that could be used.

Use of interlocutory injunctions

Another element that is of great practical importance in the enforcement context is what is called “provisional measures,” mainly interlocutory injunctions, to prevent infringements from occurring and to preserve evidence. It is important that the judiciary does not hesitate to use such measures, and also to use them, in appropriate situations, without hearing the other party. Quick action is often called for in infringement cases and interlocutory injunctions serve that purpose.

Seizure, destruction etc. of infringing material

In infringement cases it is also important that infringing material is prevented from entering commercial channels. Consequently, such material should be seized, removed from the channels of commerce and, if necessary, destroyed

Damages

It has been for a long time a prevailing trend in courts in most countries to award damages which are generally too low to constitute a real reparation of the damage caused to the right-owner. It is therefore important that judges give consideration to the level of damages so that they award proper compensation to the injured party.

Criminal sanctions

Criminal sanctions have proved to be an efficient deterrent in intellectual property violation cases. This applies, however, under one condition, namely that they are severe enough to serve as a deterrent and are not merely symbolic. At least in cases where organised criminal activities are involved and the activities are on a commercial scale, it would be quite appropriate to adjudicate prison sentences, if the law so admits.

Publication of judgements

In many countries it has proved to have a particularly deterrent effect to publicise judgements in infringement cases. This serves both as a reminder to potential future infringers and it is also useful in that it reminds the public at large about intellectual property and about the consequences of violation of those rights.

2.3 Management of intellectual property

Intellectual property has to be managed in efficient and cost-effective ways. As far as industrial property is concerned, industrial property offices are to be set up. Their principal task is to administer the patent, trademarks and industrial designs system, to make it possible to obtain valid registrations as a basis for the rights.

In the field of copyright, it is necessary to set up functioning collective management organisations, principally in the fields of copyright and of literary works. Such organisations are eminently necessary in order for the national authors to control the use of their works in an increasingly developing mass market. Without effective organisations, they would not be able to reap any proper benefits from their creativity. It would be an illusion to believe that they would, at this point in time, be able to manage their rights themselves by means of any Digital

Management System or similar. Collective management organisations are therefore, in my view, absolute necessary.

Basically any such organization would be set up by the right-owners themselves. The Government has, however, an important role to play, through promoting and setting up such organizations and to facilitate the operations of such organisations. Both CISAC and IFRRO who are represented here have a lot of experienced and also, I believe, technical assistance available in order to facilitate this opera

3. The relations to the outside world.

In this era of globalization, countries are increasingly depending on each other. International trade increases and so does more generally the cultural exchange and the transfer of technology in different fields.

These activities presuppose that the legal environment in the participating countries does not differ too much. If the standards in one of the participating countries differ too much from that of the others the result may be that the country be excluded from the activity. In the late 1880's the Paris Convention on Industrial Property came into being because inventors refused to participate in international exhibitions because they felt that they were not sufficiently protected against others stealing their ideas. And the inclusion of intellectual property in the Uruguay Round was due to the fact that so much of international trade to-day consisted of intellectual property goods and services that a certain harmonization of the protection standards was considered necessary.

As a consequence almost all countries have considered it to be in their interest to join the international IP protection system, including copyright. In this respect of course the TRIPS Agreement within WTO has been a particularly forceful element. The whole trade system set up under the WTO is seen as bringing benefits for countries in the form of better access to markets. As the results of the Uruguay Round is "a single undertaking" this has meant that countries have also been encouraged to update their intellectual property system.

Obviously, this general assessment is true also for the Republic of the Sudan as it has applied for membership in the WTO and is negotiating its accession to that organization.

The main obligation in the copyright field for a country when it becomes a member of the WTO/TRIPS is to ensure that that there exists an *efficient* copyright protection. This means that the legal standards correspond to what is required under TRIPS and that the national treatment principle is applied in relation to right-holders from other WTO members that the requirements as regards enforcement are met, and that sufficiently effective infrastructures exist for the implementation of the obligations; otherwise the protection would not be efficient.

What does then this mean in practice?

Legislation

One basic requirement that a government has to ensure is that the intellectual property legislation meets the international obligations that follow from the international instruments of which it is bound.

This means, first, that the rights must correspond to what is prescribed in the international obligations and that those rights are made applicable also for the benefit of the right-owners from other members of the same convention or treaty. It is consequently important to ensure that the national treatment obligations is prescribed and also upheld in practice.

Enforcement

Secondly, the government has to respect the obligations in respect of enforcement. There are few specific enforcement obligations in the Berne Convention of which the Sudan is presently a member. The situation will change when it becomes a member of the World Trade Organization and the obligations under the TRIPS Agreement will have to be applied.

As regards the enforcement standards there are some which are rather important to keep in mind and which the government must ensure.

Criminal sanctions must be prescribed and applied in respect of trademark counterfeiting and copyright piracy on a commercial scale.

Damages must be adequate to compensate for the injury suffered.

Injunctions must be available, and

Provisional measures must also be available (this is a particularly important feature in IP law).

The Government also has to ensure that there is in fact an enforcement system in place that is able to actually enforce properly the rights. Such a system has to be set up.

At the same time it has to be recognized that, for instance, the TRIPS Agreement explicitly states that countries are not requested to set up enforcement systems that are distinct from the ordinary enforcement system, nor is there any obligation to re-direct resources from that enforcement system to IP enforcement.

4. The role of the private sector

The private sector, including industry, has a significant role to play in the context of enforcement in at least two respects.

The first one concerns cooperation with enforcement authorities. The right-owners in private sector have everything to gain from a close cooperation with the police and the prosecutors. They can in fact greatly facilitate the work of enforcement authorities by providing information, evidence and technical assistance, for instance in helping to identify infringing material. This is sometimes not so easy; for instance many infringing CD's are hardly possible to distinguish from the real ones. This is one example of a situation where the industry can be of particular assistance.

The other way in which the private sector/the industry can assist in enforcement activities has to do with the identification of infringing material. The music industry has developed a number of identification codes and a wide use of those codes assists in monitoring the manufacture of optical discs and thus helps in the efficiency of the enforcement chain.

[End of document]