

“Enforcement of Intellectual Property Rights- A blessing or a curse?” Perspective

from Mauritius

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Introduction

It is hereby argued that as the Mauritian economy is facing serious economic difficulties, the government is pressurised to maintain the competitive edge of various industries by giving a panoply of incentives- including the certainty of a jurisdiction that has the legislations and institutions that can effectively protect Intellectual Property Rights¹ – to the business community both local and foreign. Firstly this paper looks at the main economic challenges of Mauritius and the need for the country to look for further Foreign Direct Investment (FDI) to maintain a reasonable economic growth. Secondly it looks at the various intellectual property (IP) legislations enacted post the adhesion of Mauritius to the World Trade Organisation (WTO). Thirdly it looks at the harsh response of the law enforcement institutions where the weaker and more vulnerable people have to pay a heavy price. This paper also queries whether Mauritius complied with the World Trade Organisation (WTO) obligations by implementing the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement into its legislations, in order to benefit from the African Growth and Opportunity Act (AGOA). Finally the paper concludes that the enactment of various legislations to enforce intellectual property rights may certainly send a positive signal to businesses willing to invest and expand but that weaker segments of the population may on the other hand find it hard to sustain a decent livelihood. Finding a balance between ethics and economics is not an easy task. It is proposed that legislations may have to be changed to allow Courts to understand the social circumstances of a person breaching the provisions of intellectual property legislations. The role of the court may not necessarily be that of inflicting punishment. It should also, depending on the circumstances, be capable of fostering a deep sense of responsibility and accountability on the part of the offender.

The economic challenges & the need for investments

The small island state of Mauritius, has in the eighties and mid-nineties grown out of a mono-crop economy into a middle income country² due to a successful diversification of its economic structures especially through its textile, tourism and financial industries. Lately the setting of an information technology industry has been ear-marked as a new and promising economic pillar for the country. The Mauritian Government is constantly working to provide a proper investment climate to promote economic growth, to curtail (a) growing unemployment, (b) increasing public sector deficit and (c) increasing domestic debt.

In fact Mauritius provides a number of incentive schemes for investors. These incentives include reduction in corporate tax, exemption of custom duties on equipment and raw

¹ The term intellectual property rights is hereby used in this article to refer to trademarks, patents and copyrights. It should be noted that in light of the local legislations intellectual property rights will normally denote the economic rights subsisting in a work (copy-right) whereas Industrial Property Right is the term used to refer to patent, industrial designs, geographical indications, tradename, service-mark etc. Reference is some times purposely made to both intellectual and industrial property legislations such that the reader is aware of the distinction the local legislations make as regard these terms.

² “Selected Economic Indicators 1996-2005”, Bank of Mauritius. The GNI per capita for 2005 is estimated at around Rs 150,872 (roughly US\$5000)

material, preferential loan rates, reduced tariffs on electricity and water, exemption of tax on dividends paid to shareholders....³

To combat unemployment the Industrial and Vocational Training Board⁴ has been training the unemployed such that the latter can acquire skills that are sought after in the job market. Training has been provided to those already in employment too, in order to upgrade their skills in light of new technology and techniques. Training programmes are given in a variety of fields such as construction, welding, printing, textiles, agriculture, driving.... It is also believed that these skills will enable many people to set up their own enterprises (SME).

As at April 2002, 26 826⁵ persons were registered as unemployed in Mauritius.

The table⁶ below shows the break-down of this figure in relation to the level of education attained.

Level of education	No
Education Nil	161
Std I to VI (Failed)	7357
Std I to VI (Passed)	3271
Form I to V	4252
SC/GCE (OL) Failed	4531
SC/GCE (OL) Passed	3881
SC/GCE (OL) 5 credits (Including English, French and Maths)	287
HSC (F)/GCE (AL) in 1 or 2 subjects	1279
HSC (P)/GCE (AL) in 3 or more subjects	1807
Total	26826

The rise in unemployment figures has been explained partly by the mismatch between the demand and supply of labour. However it seems that training the unemployed has not played a significant role to curtail unemployment. In 2003, unemployment figures jumped to 10.2% of the labour market (approximately 54,400).⁷

Size, location and limited workforce⁸ are inherent handicaps with which Mauritius needs to live with. To make matters worse, the traditional economic pillars have been seriously shaken recently, by external events.

³ Board of Investment Website- www.boimauritius.com

⁴ A pre-vocational training institution

⁵ Paper submitted by the Mauritius National Commission for UNESCO- Training for the Unemployed- The Programme of IVTB (Mauritius)

⁶ Paper submitted by the Mauritius National Commission for UNESCO- Training for the Unemployed- The Programme of IVTB (Mauritius)

⁷ Figure from the US Department of State

⁸ At the opening of a BPO centre of Hinduja HTMT at the Ebene Cyber Tower, in September 2005, it was reported that the co- chairman of the Company, Mr Ramkrishna Hinduja, stated that the lack of human resources in IT in Mauritius can impede the growth of the IT industry **L'Express Newspaper 21 Sep 2005**

For instance when the EU decided to review its sugar regime in light of the decision of the WTO Appellate body ⁹ to the effect that EU export subsidies on sugar was in violation to the WTO Agreement of Agriculture, it was feared that the EU would be reviewing the preferential agreements of the ACP countries in relation to their sugar export under the Sugar Protocol. That fear became a real nightmare when the EU resolved that it will cut the price of sugar it imports from the ACP countries by a staggering 39% by 2009. Though the local sugar industry has entered into a process of reform by lowering the cost of sugar production and decreasing the number of sugar mills, it is feared that the EU sugar reform will cause losses of hundreds of jobs and a significant decrease in foreign revenue.

Furthermore with the lifting of Multi-Fibre Agreement quotas in 2005, the local textile industry is facing fiercer competition from China. In fact China increased its apparel export by 64% during January –April 2005, thus taking over a bigger share of the world market. African export in apparels on the US` market has dropped by 12% during the first semester of 2005. Unless Mauritius proves to be innovative enough to take full advantage of the African Growth and Opportunity Act (AGOA) it will stand to lose a golden opportunity to export several types of eligible products, duty free to the US.¹⁰

External events can affect the local tourism industry too. Travelling to a beach resort is not an idyllic concept to tourists anymore as the images of the brunt forces of a sudden tsunami on beach resorts in Asia are still alive in the minds of many. A fear of such an event occurring may trigger a change in the minds of some tourists who may initially have contemplated visiting a beach resort in the Indian ocean but who may, out of fear, settle for other travel destinations that are believed to be safer. Such behavioural pattern can certainly hinder economic growth. Furthermore recent world events have shown that no regions in the world are safe from a terrorist attack. A terrorist attack in the region may seriously dampen a person’s enthusiasm to travel, causing a fall in the number of tourists arriving and thus affect the performance of the tourism industry.

The financial services sector was also not spared. The double taxation agreement with India and Mauritius has enabled Mauritius to position itself as a gateway for capital investment in India. The recent decision of India signing a double-taxation agreement with Singapore sent cold tremors to the offshore businesses activities in Mauritius and it is now feared that Mauritius will stand to lose businesses because of the agreement between Singapore and India.

In light of these economic challenges the government has no alternative but to seek Foreign Direct Investment (FDI) in a variety of fields to promote economic growth. The table¹¹ below shows that Mauritius ranks among the countries in Africa that have a poor performance in attracting Foreign Direct Investment. According to The World Investment Report 2004, Foreign Direct Investment in Africa grew in 2003 by 28% to \$15 billion but same was due to investment in natural resources.

Africa country distribution of FDI inflows by range 2003

Range	Economy
More than \$2 billion	Morocco
\$1-1.9 billion	Angola, Equatorial Guinea, Nigeria and the Sudan

⁹ Decision of the 28th April 2005 (available at the WTO website)

¹⁰ ***AGOA its future***” Danielle Wong, Director Mauritius Processing Zone Association – Mauritius Chamber of Commerce and Industry(MCCI) Chamber News July 29 2005

¹¹ United Nations Conference on Trade and Development- World Investment Report 2004; The Shift towards Services.

\$0.5-0.9 billion	Algeria, Chad, Libyan Arab Jamahiriya, South Africa and Tunisia
\$ 0.1-0.4 billion	Cameroon, Congo, Democratic Republic of Congo, Cote D'Ivoire, Egypt, Ghana,, Mali, Mauritania, Mozambique, Uganda, United Republic of Tanzania and Zambia
\$ less than 0.1 billion	Benin, Botswana, Burkina Faso, Cape Verde, Central African Republic, Comoros, Djibouti, Eritrea, Ethiopia, Gabon, Gambia, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritius, Namibia, Niger, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Swaziland, Togo and Zimbabwe.

To be successful in its endeavour and to promote business activities, the country needs to convince investors that their intangible intellectual property assets are well protected and that in the event of a breach of such rights they may have recourse to effective redress. The Mauritius Chamber of Commerce and Industry is keen to foster awareness among Mauritius Business operators, of the value of their Intellectual Property assets and it is believed that businesses should protect their trademark and trade-name in order to use same in a branding strategy that will make their products more marketable¹². It has also been argued that Intellectual Property rights are a major component of licensing, manufacturing, purchasing and distribution agreements and that the development of Intellectual Property rights legislations can contribute to a significant growth in Foreign Direct Investment.¹³

A very strong signal that Mauritius can give to the business community is that it has complied with its' WTO requirement and has actually implemented provisions of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS)¹⁴ in its legislations. A series of legislations have been enacted to that effect. These are the Copyright Act of 1997, the Patent Industrial Designs and Trademarks Act (PIDTA) 2002, the Protection Against Unfair Practices (Industrial Property Rights) Act 2002, the Geographical Indications Act 2002 and the Layout Designs (Topographies) and Integrated Circuits Act 2002.

IP Legislations in Mauritius

The Copyright Act 1997 covers protection of artistic, literary and scientific works. Under that Act, works are deemed to include illustration of a map, lecture, musical work, audio-visual work, sound recording, computer programs etc....¹⁵. The said Act also created the Mauritius Society of Authors¹⁶ that has, among its functions, the duty to represent and defend the

¹² “ **Trade Opportunities through Trade Mark Strategy**” Barlen Pillay Manager Legal & Business Facilitation Division (MCCI) Chamber News 16th September 2005

¹³ “ **Intellectual Property A power tool for economic growth**” Kamil Idris, WIPO June 2003

¹⁴ TRIPS is an agreement of the WTO which looks at : (i) how basic principles of the trading system and other international property agreements should be applied (ii) how to give adequate protection to intellectual property rights (copyrights, trademarks, Geographical indications, Industrial designs, patents, Lay-out designs (Topographies) of integrated circuits, protection of undisclosed information), (iii) how countries should enforce these rights adequately in their territories and (iv) how to settle disputes on intellectual property between members of the WTO- **Intellectual Property: protection and enforcement (WTO website)**

¹⁵ S 2 Copyright Act 1997

¹⁶ S32 Copyright Act 1997

interests of its members in Mauritius and abroad¹⁷. Any person can apply to be a member so far as he or she is the copyright owner or licensee of a work¹⁸. The enactment of such legislation had come at a time when local artists were complaining that their works were being re-produced, sold and distributed without their consent. Years after the enactment of the said Act, the re-production of CDs of local artists has remained rife. This has caused local artists to re-group themselves to condemn the re-production of their works and to ask the local enforcement authorities for more robust action on their part.

It is usually said that Mauritians have a culture to buy cheap materials and that they are not interested in procuring better CD recordings at a higher cost. Such statements when made, commonly undermine the fact that a strong component of the Mauritian Society is poor¹⁹ and thus cannot afford the original CDs that purport to be of better quality. In a study carried out by Duncan and Valenti (2001) it was found that 9.7% of the Mauritian Population lived below the poverty line and that 9.4 % of the population lived below the 50% per capita income in 1996/1997.²⁰ It was also found that incidence of poverty was higher in rural areas and among the general population (creoles)²¹. The Copyright legislation is however not so rigid. It allows limited reproduction of certain specific works in certain circumstances, without the authorisation of the copyright owner or author²², in field such as teaching for instance²³. The Act provides that economic rights relating to the work of an author shall be protected during his life-time and for 50 years thereafter. Furthermore a person acting in contravention to the provisions of the said Act is liable on his first conviction to a fine not exceeding MUR 300

¹⁷ S34(1)(b) Copyright Act 1997

¹⁸ S35 copyright Act 1997

¹⁹ **Consortium for street children 2004** states that 10% of the population of Mauritius lives below the poverty line <http://www.streetchildren.org.uk/resources/details/?type=country&country=146>. It should be noted that there is no poverty line established by the Mauritius Government but that the world bank has fixed such poverty line to an income of \$2 per day

²⁰ Growth working paper I- Explaining African Economic Growth Performance The case of Mauritius by Shyam Nath and Yeti Nisha Madhoo of the Department of Economics and statistics of the University of Mauritius.

²¹ Growth working paper I- Explaining African Economic Growth Performance. The case of Mauritius by Shyam Nath and Yeti Nisha Madhoo, of the Department of Economics and statistics of the University of Mauritius.

²² S13(1) of the Act permits the private reproduction of a published work in a single copy, where the reproduction is made by a physical person exclusively for his own personal purposes. However s13(2) does not allow such permission to be extended to (i) a work of architecture in the form of a building or other construction,(ii) a reprographic reproduction of an entire book, a musical work in graphic form, the original or of a copy of a work made and signed by the author, a work of fine art and (iii) a data base. S18 of the Act allows a Computer program to be reproduced in a single copy by the lawful owner of that program for (i) archival purpose (ii) replacement of a lawful owned copy of a computer program and (iv) the use of the computer program in conjunction with the use and to the extent to which the computer program has been obtained.

²³ s15 of the Copyright Act 1997

000 and to imprisonment not exceeding 2 years. To a subsequent offence the offender is liable to a fine not exceeding MUR 500,000 and to imprisonment for a term not exceeding 8 years.²⁴

The Patent, Industrial Designs and Trademarks Act (PIDTA) 2002 provides for the establishment of the Industrial Property Office²⁵ and that of an Industrial Property Tribunal²⁶. The Industrial Property Office is headed by a Controller whose main functions are to consider applications and grant patents, register (i) marks, (ii) industrial designs, (iii) geographical indications or layout designs. The Controller has extensive investigative powers including that to apply to a Judge in Chambers for a right to search premises.²⁷ The main functions of the tribunal are among others to hear appeal by any person who feels aggrieved by the decision of the Controller and to give rulings on the interpretation of any provisions of industrial property enactments²⁸. A patent²⁹ registered with the Controller will generally expire 20 years³⁰ after the filing date of the application for the patent. The registration of an industrial design³¹ is valid for a period of five years from the filing date of the application and the said registration is renewable for a further period of five years³². The registration of a mark³³ is valid for a period of 10 years and is renewable for consecutive periods of 10 years thereafter.³⁴ From the time an invention, industrial design or mark is validly registered, no person is allowed to exploit such invention, industrial design or mark, without prior approval of the owner of the patent, industrial design or mark.³⁵

²⁴ *s44(3) of the Copyright Act 1997*

²⁵ *S3 of the Patents, Industrial Designs and Trademarks Act 2002*

²⁶ *s9 of the Patents, Industrial Designs and Trademarks Act 2002*

²⁷ *s5 of the Patents, Industrial Designs and Trademarks Act 2002*

²⁸ *S10 of the Patents, Industrial, Designs and Trademarks Act 2002*

²⁹ *an invention is defined under sections 11 and 12 of the Patents, industrial Designs and Trademarks Act 2002 as being an idea of an inventor which provides the solution to a specific problem in the field of technology. An invention will only be patentable provided it is a new one, involving an inventive step and is capable of an industrial application*

³⁰ *S22 of the Patents, Industrial Designs and Trademarks Act 2002*

³¹ *an industrial design is defined under S27 the Patents, Industrial Designs and Trademarks Act 2002 as any composition of lines or colours or any three-dimensional form, or any material, whether or not associated with lines or colours, provided that such composition, form or material- (a) gives a special appearance to a product of industry or handicraft; (b) serve as a pattern for a product of industry or handicraft and (c) appeals to and is judged by the eye.*

³² *S33(i) of the Patents, Industrial Designs and Trademarks Act 2002*

³³ *a mark is defined under s35 of the Patents, Industrial Designs and Trademarks Act 2002 as being any visible sign capable of distinguishing the goods (trademark) or services (service mark) of an enterprise from those of other enterprises.*

³⁴ *S41 of the Patents, Industrial designs and Trademarks Act 2002*

³⁵ *Sections 21(1),32 (1) and 40(1) of the Patents, Industrial Designs and Trademarks Act 2002*

The Protection Against Unfair Practices (Industrial Designs) 2002 protects against unfair practices in the context of an industrial or commercial activity.

Thus an act that:-

- (a) causes or that is likely to cause confusion with respect to another enterprise³⁶;
- (b) damages or is likely to damage the goodwill or reputation of another enterprise³⁷;
- (c) misleads or is likely to mislead the public to an enterprise or its activities³⁸;
- (d) discredit or likely to discredit another enterprise or its activities³⁹,

shall constitute an unfair practice. A person found guilty of an unfair practice is liable to a fine MUR 250,000 and to a term of imprisonment not exceeding 5 years.

Two further legislations have been enacted in the context of implementing the TRIPS agreement. These are the Geographical Indications Act 2002 and the Layout Designs (Topographies) of Integrated Circuit Act 2002. These legislations have not yet been proclaimed and therefore are not enforced in Mauritius. The Geographical Indications Act 2002 protects against the unfair practice⁴⁰ of misleading the public by indicating or suggesting that a product originates in a geographical area other than the true place of origin. Apart from the fact that the Act provides that such a practice may give rise to a claim in damages, it also provides for criminal sanctions.⁴¹ The Layout Designs (Topographies) of Integrated Circuits Act 2002 provides for the protection to layout designs⁴² of integrated circuits where these layout designs are original or where these designs have not been exploited or where these layout designs have been exploited for a period of less than two years. A breach of the provisions of the Act is punishable by a fine of MUR 250,000 and a term of imprisonment not exceeding 5 years⁴³

The enforcement of IP Legislations

³⁶ S5 of The Protection Against Unfair Practices (Industrial Property Rights) Act 2002

³⁷ S6 of The Protection Against Unfair Practices (Industrial Property Rights) Act 2002

³⁸ S7 of The Protection Against Unfair Practices (Industrial Property Rights) Act 2002

³⁹ S8 The Protection Against Unfair Practices (Industrial Property Rights) Act 2002

⁴⁰ s3 of the Geographical Indications Act 2002

⁴¹ S7 of the Geographical Indications Act 2002 provides penalty of a fine not exceeding MUR 250 000 and to imprisonment for a term not more than 5 years.

⁴² a layout design is defined under S2 of the Layout designs (Topographies) and Integrated Circuit Act as being synonymous with “topography” and means the three-dimensional disposition, however expressed, of the element at least one of which is an active element and some or all of the inter-connections of an integrated circuit or such a three dimensional disposition prepared for an integrated circuit intended for manufacture

⁴³ S16 of the Layout designs (Topographies) and Integrated Circuit Act

“Words without actions are the assassins of idealism”⁴⁴. Investors will not be fooled by legislations that have been enacted but will inevitably query whether the law enforcement authorities are enforcing these legislations effectively. Combating intellectual property offences has been the duty of the Anti Piracy Unit that was set up in August 2001 under the aegis of the Police Force. The Unit works in close collaboration with the Mauritius Society of Authors (MASA), the Ministry of Arts and Culture as well as with the Industrial Property Office and has investigated a number of cases of breaches of Copyright and breaches of Trademarks. In fact seizures of counterfeited materials are commonly reported by the press⁴⁵ and as such the press plays not only an important role in sensitizing the public that counterfeit materials are illegal but also plays an important role in deterring businesses to sell counterfeit materials. The Anti-Piracy Unit has over the years seized a number of products with counterfeit marks namely Polo Ralph Lauren, Louis Vuitton, Quick Silver, etc....As far as CDs are concerned the latest trend reported by the police is that there are now fewer pirated/counterfeited CDs of local artists on the market but there are still a significant number of pirated/counterfeited CDs of foreign artists.

The table below shows the outcome of cases that have been reported to the Police over the past three years or so, as well as the number of CDs, VCDs and DVDs that have been seized⁴⁶

	2002	2003	2004	- August 2005
No of cases reported	97	60	63	41
No of cases of Breach of Copyright Act 1997	86	47	41	31
No of cases o Breach of Trade Marks Act	11	12	2	5
No of Cds, Vcds, & Dvds secured	29 903	8569	9920	1087
No of persons arrested	60	39	43	23
No of convicted cases	24	14	5	Data Not available

The table shows a tendency that the number of cases being reported is decreasing. Should it therefore be concluded that Mauritius is eradicating Intellectual Property offences? Indeed the Police and the Customs should be given credit in combating counterfeit materials in Mauritius but they can only act where there is a complainant. In fact if the rightful copyright owner or

⁴⁴ Herbert Hoover

⁴⁵ *The latest article at the time the present paper was being drafted concerns the seizure of fake Louis Vuitton and Ralph Lauren articles in Mauritius- “ Des faux Eden Park et Louis Vuitton saisis a Grand Baie” L’express Newspaper Wednesday 21st Sep 2005*

⁴⁶ *Figures provided by the Anti-Piracy Unit, Mauritius Police Force*

the rightful mark owner is unaware that their products are being sold without their authorisation, the said practice will continue until they decide to act and seek redress.

The Courts in Mauritius have neither been soft in dealing with people breaching Intellectual Property legislations nor have they been homogeneous in their approach to sentencing. It is reported that persons have been sentenced to pay fines ranging from MUR 10,000 to MUR 100,000.⁴⁷ Such fines have been imposed for the offence of having- without the express authorisation of the copyright owner- in one's possession, (whilst being in the course of a trade) copies of a work or several works that constitute an infringement of the copyright of the owner.⁴⁸ The question that needs to be addressed are who are those people that are selling the counterfeited articles and why are they involved in such businesses? No person visiting Mauritius should be surprised to find that designer marks items can be obtained from either a road-side seller or in a shop within a trendy shopping mall at very competitive prices. Any lay person will understand that these items are counterfeited. However irrespective of their trading locations, both entrepreneurs (the road- side seller and the shop owner) will most likely argue that the cost of living is increasing annually and that people cannot afford to pay high prices for the original articles and thus by selling counterfeited articles, they argue that they are serving the society. In some circumstances one should not be surprised to be told by these same entrepreneurs that the counterfeit materials (specially clothing) are made of better quality materials than the original ones. Obviously the intellectual property right owner will claim that the acts of these sellers constitute unfair practice, impede upon their share of the market and potentially on their image. The difference between these two entrepreneurs might be that the shop owner can be the importer of these counterfeited goods whereas the road-side seller is a mere agent of a bigger Cartel that sells counterfeited materials on the local market. Should these two persons be given the same sentence if they are prosecuted for say, doing an act which amount to an unfair practice, in breach of sections 4(1), 7 and 10 of the Protection Against Unfair Practices (Industrial Property Rights) Act 2002; that is doing an act which, in the course of a commercial activity misleads the public with respect of the products offered by an enterprise? Given that the shop owner has actually imported these materials and has played an active role in causing the counterfeit/pirated materials to enter the local market, one would expect the shop owner to be given a harsher sentence than the road side seller. However the police are not required to determine the source of these counterfeited/pirated products to secure a conviction under the Protection Against Unfair Practices (Industrial Property Rights) Act 2002 or even under the Copyright Act 1997 for the offence of having- without the express authorisation of the copyright owner- in one's possession, (whilst being in the course of a trade) copies of a work or several works that constitute an infringement of the copyright of the owner. The seriousness of the offence (normally determined by the number of counterfeited/pirated materials that have been secured and such other relevant surrounding circumstances) and the character and antecedents of the accused play a crucial role to sentencing. It may be the case that both entrepreneurs will be sentenced in the same manner by a court of law.

No one can allude to Intellectual Property Rights in Mauritius without referring to the landmark cases of Polo/Laurent Co Ltd Partnership v/s Dinoo & others⁴⁹ and Polo/Laurent Co Ltd Partnership v/s Regent Ltd and 2 others⁵⁰. In these cases the Applicant sought and obtained an injunction against the Respondents to prevent the latter in trading into products bearing the polo player marks and marks such as POLO, POLO SPORT, POLO USA, RLX POLO SPORT, RL FLAG LOGO,etc. The Respondents contention were that, as no one had registered these marks locally there were legally entitled to exploit these marks. One of their further arguments was that if the injunction was to be granted then this would result in

⁴⁷ Figures made available from the Anti-Piracy Unit

⁴⁸ S44(1)(vi) of the Copyright Act 1997

⁴⁹ 2004 SCJ 44

⁵⁰ 2004 SCJ 45

the loss of thousands of jobs. The Court had no problem to rule that the use of the polo player marks was in breach of the Copyright Act 1997 and that a copyright owner is fully entitled to object to the use of the said design and label irrespective of the fact that he has or has not registered the design or label. As far as the use of the words POLO, POLO SPORT etc were concerned the Court was of the view that the acts of the Respondents amounted to unfair practice under the Protection Against Unfair Practices (Industrial Property Rights) Act 2002 and that in light of the clear wording of s5 (2)(a) and s6 (2)(a) of the said Act, protection can be extended to trade marks irrespective as to whether these are registered in Mauritius or not. As far as the unemployment crisis that may arise the Court stated the following “If thousands of people will be affected by the stopping of an illegality in the granting of an interlocutory order protecting the rights of the copyright owner (or the owner of an internationally well-known mark) the fault does not lie with the copyright owner (or the trade mark owner) but with those purveyors of other people’s ideas and works who have created the situation and who have been enjoying a very lucrative market. Furthermore, especially in matters relating to the infringement of copyright – or trade mark-, no person must be allowed to steal and reap the fruits of those who through their skill, judgment, expense and know-how had created a work which seemed to appeal.....it is fraudulent to appropriate what belonged to another and its use is contrary to commercial morality. No person should be allowed to obtain a free ride on the goodwill associated with the products of another.” Certainly the words of the Learned Judge can only be sweet music to the ears of foreign and local investors. Out of the 108 outlets nation wide trading in Polo Ralph Laurent garments, 75 outlets ceased Ralph Lauren sales by the end of July 2004 and 33 larger outlets stopped Ralph Lauren sales at the end of December 2004. The value of goods declared to be affected by such measure was estimated to be around MUR 608 M.⁵¹ It was found that an average of 5 people was employed per outlet. There are no statistics to show precisely how many people lost their jobs as a result of the court judgments but fortunately there have not been job losses in the thousands as it was initially feared. It is true that the entrepreneurs who benefited from a loophole in the legislation were able to make millions overnight. There is unfortunately a tendency to look as those who have become rich. The plight of the more vulnerable usually gets a back seat treatment. The workers who were employed by these entrepreneurs suddenly found themselves jobless and no one seem to care whether they were able to obtain another job. Are Intellectual property rights gaining more importance than the welfare of the local citizens? It is a bit too early to tell but no doubt an interesting issue to follow up.

AGOA, TRIPS AND AFRICA

Mauritius was indeed too eager to show its willingness to embrace the TRIPS by providing for imprisonment in cases of breach of its intellectual property rights legislations. It should be noted that such a stand allows Mauritius not be on the priority watch list of the Office of the United States Trade Representative. If a country is found on the said list then it risks to be sanctioned by the United States. In the executive summary of the 2004 special 301 report, the Office of the United States Trade Representative named the following countries as being those that give rise to significant concerns in relation to Intellectual Property issues: Argentina, The Bahamas, Brazil, Egypt, India, Indonesia, Israel, Korea, Lebanon, Pakistan, Paraguay, The Philippines, Poland, Taiwan, Russia and Turkey. The report further states that “The US will consider all options including but not limited to initiation of dispute settlement consultation, in cases where the countries do not appear to have complied with the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Mauritius as many other developing African States have no choice but comply with zeal with the TRIPS agreement in order not to antagonize the United States for our economic survival depends much on the access of the goods we export on the American market.

The AGOA is an American legislation that provides for certain countries in Sub-Saharan Africa with the most liberal access to the US market. The said legislation provides enhanced

⁵¹ Figures obtained from the Custom and Excise Department, Port-Louis, Mauritius

access to credit and technical expertise from the United-States. It establishes a high level dialogue on trade and investment in the form of a US Sub-Saharan Africa Trade and Economic forum.⁵²This legislation is crucial to the textile industry as it provides duty –free and quota free treatment for eligible apparel articles in qualifying Sub-Saharan African countries. Those eligible apparel articles are (a) apparel made of US yarns and fabrics, (b) apparel made of Sub-Saharan African (Regional) yarns and fabrics subject to a cap, (c) apparel made in designated lesser-developed country of third-country yarns and fabric subject to a cap, (d) apparel made of yarns and fabrics not produced in commercial quantities in the United States, (e) certain cashmere and merino wool sweaters, (f) eligible hand-loomed, handmade or folklore articles and ethnic fabrics.⁵³

Countries can be designated to receive the benefits of AGOA depending on their progress in (a) establishing a market-based economy, (b) maintaining the rule of law and pluralism, (c) eliminating of barriers to US trade and investment, (d) *devising protection of intellectual property law* , (e) combating corruption, (f) establishing policies to reduce poverty, (g) making available health care and educational opportunities (h) protecting human rights and workers rights, and (i) eliminating child labour practices.⁵⁴ The countries eligible for AGOA benefits are: Angola; Benin; Botswana; Burkina Faso; Cameroon; Cape Verde; Chad; Republic of Congo; Democratic Republic of Congo; Djibouti; Ethiopia; Gabon; The Gambia; Ghana; Guinea; Guinea-Bissau; Kenya; Lesotho; Madagascar; Malawi; Mali; Mauritania; Mauritius; Mozambique; Namibia; Niger; Nigeria; Rwanda; Sao Tome and Principe; Senegal; Seychelles; Sierra Leone; South Africa; Swaziland; Tanzania; Uganda; Zambia.⁵⁵ There is perhaps no need to mention that these developing countries are not within Priority Watch List of the Office of the United States Trade Representative. A question that arises is whether AGOA was the incentive for Mauritius to adopt IP legislations? Irrespective as to whether this question can be answered affirmative or not, few will dispute that eligibility to adhere to AGOA has benefited the economy. Yet petty offenders of IP legislations tend to suffer unfairly from the harshness of the law.

Conclusion

The author of these lines is not advocating that no protection should be given to owners of Intellectual Property assets. However selling a counterfeit material is certainly different to selling dangerous drugs. The person who breaches Intellectual or Industrial Property legislations should not be regarded as a criminal solely because he has indulged in these illegal acts for the purpose of meeting his subsistence needs and to cater for the basic needs his family. Indeed Article 61 of the TRIPS agreement provides that criminal procedures and penalties be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. The said Article further states that “Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity

When dealing with petty offenders, legislations should perhaps be enacted to make it mandatory for a Court of law to consider imposing a community service⁵⁶ order in lieu of a

⁵² <http://www.agoa.gov/>

⁵³ http://www.agoa.gov/eligibility/country_eligibility.html

⁵⁴ *ibid*

⁵⁵ <http://www.agoa.gov/faq/faq.html>

⁵⁶ As per the provisions of the present Community Service Order Act 2002, granting a community service order is at the sole discretion of the Court in instances where (i) the offender is over 18 years

fine. Such a provision in the law will not be in contravention of Article 61 of the TRIPS agreement, given that the said Article does not exclude Community Service as a form of punishment. The fact of being prosecuted and being sentenced by a court of law is itself a deterrent. Adopting a soft approach to sentencing may give time to the offender to reflect on his act, to build new skills and as such he may less likely re-offend. Granting of a community service order will remain at the discretion of the Court after it has taken into consideration various factors including (i) whether the offender consents to the making of such order and (ii) a probation report. It is important to bear in mind that the ultimate goal behind a healthy growing economy is to provide for the welfare of the people. Many people in Mauritius are employed in the informal sector. There are unfortunately no surveys to establish the extent of the trade in counterfeited/pirated materials in the informal sector in Mauritius. This sector usually consists of the most vulnerable persons in society. It is essential to sensitize people in general and those forming part of more vulnerable groups that they can be part of a wealthier society. Inflicting heavy fines on these vulnerable groups and ultimately putting them behind bars are not proper steps in that direction.

Countries should not enforce legislations solely for the benefit of the rich and powerful and sideline the needs and aspirations of the poor. Finding the balance between ethics of enforcing intellectual property rights and the plight of the more vulnerable is no easy task but unless we raise the alarm bell, developing nations like Mauritius may find that its international obligations has made a large proportion of its own residents into second class citizens.

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