

# AFRREV IJAH

An International Journal of Arts and Humanities

Bahir Dar, Ethiopia

Vol. 1 (2), May, 2012:112-132

ISSN: 2225-8590 (Print)

ISSN 2227-5452 (Online)

---

## **The Social Cost of Criminalizing a Civil act: TRIPS Section 5 Obligations in Africa**

**Manu, Thaddeus**

Center for Commercial Law Studies, Queen Mary University of London  
67-69 Lincoln's Inn Fields, London WC2A 3JB.

Email: [t.manu@qmul.ac.uk](mailto:t.manu@qmul.ac.uk)

+44 7887756049

### **Abstract**

*Intellectual property rights mandated by the World Trade Organization at the global level is meant to facilitate innovation through research and development. However, the underlying rationale for criminalizing copyright infringement is not clear. Against this backdrop the author weighs the cost and the benefit of the TRIPS Agreement within the least developed countries and posit that the cost outweighs the benefit due to small internal market size and the absence of international market. As a result, premised on the presumption that low volumes of innovation translate into low revenues generated from patent registration locally, poorer countries runs the risk of debts whilst discharging their TRIPS Section 5 obligation, which will eventually, benefit developed countries multinationals more than the*

*ordinary poor people on the continent.*

**Key words:** Africa, Copyright, Least Developed Countries, Trade Related Intellectual Property Rights, World Trade Organization.

### Introduction

Intellectual Property Rights (IPR) has become a global issue because the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement seems to outline minimum standards for intellectual property rights protection for World Trade Organization (WTO) members on a global front (TRIPS, 1994). However, the benefits of TRIPS Agreement have become controversial within the least developed countries where infrastructure for innovation, research and development are insufficient, that makes the TRIPS Agreement theoretically ambiguous not only on its complexities but on its underlying preconceptions on the controversy between patents provision and the delay of access to technology within the least developed countries, predominantly Sub-Saharan Africa. Globalization and its' negative consequences have premeditated the power position of the rich to unilaterally decide the kind of standard-setting needed by the least developed countries rather than poorer countries determining their needs (Stiglitz, 2003). This makes it difficult for least developed countries not only fail to capture cross-sector growth issues but also find it hard to learn lessons from failed policies that are occasionally founded on misplaced priorities normally driven by the developed countries with inadequate impact assessment locally and the lack of appropriate entry point for institutional change. Having identified patents as influential to the debate on access to technology, which middles on the loose entry into force of the TRIPS Agreement in 1994, the mandatory international minimum standards for intellectual property rights enforcements endorsed by WTO regime leave least developed countries with little flexibility to utilize patents to their needs.

The broader concern remains that societal cost of enforcing TRIPS Agreement can increase substantially under TRIPS section 5 (TRIPS Article 61) as the cost burden of enforcement makes it relatively less reasonable for poorer countries to deploy criminal procedures in copyright administration. Conversely, its' neither obvious the sort of civil legislative instruments requirement that can encourage the right kind of civil litigation that can prevent or punish elements of criminality in copyright management. This article pursues such exercise by firstly, focusing on the thought-provoking

issues that underline the financial burden that confronts least developed countries while enforcing TRIPS Agreement as embodied in Section 5, and whether it will be politically expedient based on cost-benefit analysis to use meager public resource to protect intellectual property rights that rewards little benefit to least developed countries societies but rather multinationals. In addition, the author will then sets firmly that strengthening of legal provisions alone is reasonably insufficient to reduce copyright exploitation without access to technology and therefore, if the greater rewards for enforcing intellectual property rights accrue to developed countries, then the latter has an unmitigated responsibility to make available access to technology to the continent to fight copyright abuse since counterfeiters employ modern technology to outsmart the outmoded customs on the continent.

### **Background**

The existence of perceptible degrees of slow dissemination of scientific knowledge within the African region, (Park et al, 2008) is further exacerbated by TRIPS Agreement on a belief that the Agreement imposes unprecedented obligation on unequal members to strictly guard patent provisions against the use of technology (TRIPS Article 27.1). From a more sympathetic estimation, reading the issue of poverty into the debate, it is profound that TRIPS Agreement has gradually placed more credence on the importance of private rights that seek to produce gains for those with the capacity to invent and innovate, (Love R, 2007) eventually, displacing the value of inalienable right to the enjoyment of scientific knowledge and common heritage for all. (Article 22(1) of the ACHPR, 1981; and UN Resolution 41/128). The issue of intellectual property rights within the least developed countries is central to its' hefty price tag. Stronger enforcement requires substantial investment of resources to support institutional infrastructures to complement policy reforms. Presumably, least developed countries face greater challenges in obtaining resources to provide their population with infrastructure to meet the basic needs of their people, let alone TRIPS enforcement (Yu P, 2010). Sadly, despite the widely documented hardships of these countries, some commentators continue to unrealistically blame the failure of least developed countries to enforce intellectual property rights on lack of political will (Yu P, 2008). Again, effective compliance with TRIPS Agreement demands concrete measures by individual countries to strengthen their law enforcement agencies to reduce incidents of copyright abuse, and recognizing

abackcloth of institutional incapacity issues that circumscribe the magnitude at which poorer countries can discharge their obligation under international treaties, persuades the concerns that by imposing intimidating obligations on poorer countries who are themselves struggling to provide basic social services including healthcare, education etc. cannot be justified.

The reality is that despite least developed countries constantly negotiating and instilling pressure for more flexibilities within the international trading system, they are far from cementing their position to encourage treaties that can enhance key issues that affect their development including; technology transfer, fairer market access and more broadly, economic framework that can address the deep structural inequalities within the world economy thereby; making poorer countries more vulnerable to the international organizations that are more proactive in enforcing trade liberalization frameworks such as the World Trade Organization (Drahos P, 2002). Central to the conflict is the complexity of tension between what appears to be the use of commercial treaty to enforce private rights that have the tendency to strictly enhance monopoly and supernormal profit for multinational corporations at the cost of poor society. Fundamentally, least developed countries are disadvantaged in enforcing positive ruling against the larger WTO members as their share of international trade is not enough to impose sufficient economic and political threat to generate the requisite pressure to induce compliance for fairer market access within the international trading system. In fact, the suspension of any trade concessions as a countermeasure against any developed country may be more detrimental to that least developed country taking that action against larger non-complying member (Nottage H, 2009).

### **The injustices of globalization**

Broader conceptions of global governance are clearly not useful because it does not provide a fairer system to support poverty reduction but rather makes poverty worse and deeply rooted, as it ignores the place for least developed countries. The pace of changes in technology has naturally placed demand for global governance whose control have been unsurprisingly healthy for developed countries because the former has persistently resolved to the use of excessive regulations as a means of manipulating the global integration to their advantage in the event creating precarious structural economic weakness within their poorer counterparts. The global governance and it undesirable ramifications have lately been felt severely within the

parameters of the least developed countries than previously envisaged that breeds serious spillover effects with the economic activity in one up-stream booming while down-stream there is retard progress that constantly perpetuate poverty (Wade R, 2004).

The current global governance structures have not lived up to any credible international system that can serve as useful platform to uphold the interest of the poor down in Africa but rather with an impulse of poverty creation that has overwhelmingly achieved great success in meeting the needs of the developed countries alone. Although very few international institutions have taken important strides in poverty reduction but a considerable amount of them have continuously delivered their functions inconsistently to produce some devastating rules that have made the poor not so successful in mitigating the economic and capacity problems. The extent to which, global governance systems has supported co-operation among sovereign countries can never be underestimated but their negative effect of prioritizing the interests of the rich over the poor is a subject of concern to many who believe in fairness. Putting globalization and its effects in Africa into perspective, it is clear that the lives of the poor people have significantly been affected not just by the activities of the countries in which they live, but also by a complex web of both the activities of developed countries and their pro-globalized institutions.

### **The illusion of globalized free trade**

Innovation has become a catalyst for technological growth and giving the noticeable effect on development, innovation can thus become key indicator of quality life. In view of the cracks in economic wealth creation in Africa, patents can be assumed to hamper development rather than promote it, since the ambience at which the current globalized patent regime can hold growth is delimited on grounds of insignificant innovative activities (Persaud A, 2001). Reinforcing the background debate, African countries cannot successfully exploit new ideas to create economic and social value on their own individual strengths without a collaborative intervention to consolidate innovation programs. The default dynamics of the technology transfer process that has of late attracted enormous controversies in its own right is as a result of the potential complexity of technology transfer process to move research into production practice in Africa where market size is small (Archibugi D, 2003). Despite being called free trade the current system only bears the basic characteristics of freedom for developed countries and not the

poor, making its appellation not only shallow but also extremely disingenuous because series of policies and regulations serves to control the manner at which trade takes place between different countries particularly.

Thus, developed countries have consistently resorted to the use of all kinds of preventive strategies to prevent the poor from harnessing fairer international market access (Stiglitz et al, 2005), while they continue to use treaties like the TRIPS Agreement to create markets for their corporations. Epitomizing the above assertion is that developed countries have pushed forward for a misleading international trading regime that can never be free without supervision to the discretion of the rich. Such unruly influence is a prelude of the excessive power to monitor and regulate globalization to a degree that makes the former supervisors of even innovation policies being used within the least developed countries. As a result, poorer countries battle to liberally fathom how to expedite the integration of intellectual property rights into research and development strategies to improve investment efficiencies to hatch innovation as a forefront impetus for sustainable development. In this perspective, access to international markets is important for Africa, but recognizing that the channels to developed countries market continued artificially blocked, African countries cannot create wealth with patents if such knowledge remain untradeable in a market. From a foremost outlook, least developed countries however, do not put in place any restrictions when dealing with their developed counterparts.

### **The challenge of setting up appropriate patent system in Africa**

The current patent system has evolved with a view to promote innovation and also encourage economic development on a premise that by offering exclusive rights for a limited period, an inventor may recover research and development costs that can increase the motivation for cycles of discovery and innovation. As a result, many countries, in particular least developed countries have only begun to address the challenges of setting up appropriate patent systems to reap economic and social benefits that can be accumulated from innovation. And to benefit from innovation through research and development, countries need to set up conceits of national strategies that can respond with inimitable priorities of the local innovational objectives. Unfortunately, the current global patent landscape is such that once poorer countries agree to be bound by the rules; they completely surrender their sovereignty and innovation policy space to WTO to monitor the use of technology as a tool for development. The World Bank estimated that a

comprehensive upgrade of the intellectual property rights regime within the least developed countries could require capital expenditure of \$1.5 to 2 million but later projected that these costs could be far higher (World Bank 2002, Chapter 5), due to the reminiscence of structural adjustment program (Stein H, 1992), which left many least developed countries with huge debt and little infrastructure, hence, any obligation that will strictly impose financial burden can potentially plunge Africa into further debts(Reinhart C, 2010).

With unrealistically, little financial generosity creeping in towards capacity building (TRIPS Article 67), African countries requiring to run a better copyright related administration has to arrange loans through bilateral platforms. This will be a recycle of the same old debts problem meaning countries will use their depressed taxpayer's money to service debts accrued while attempting to strengthen and maintaining intellectual property rights regime to the benefit of the multinationals. To meet the minimum administrative requirement by TRIPS, the number of staff required for office handling for very low volumes of intellectual property rights applications would be perhaps 10 professionals and a similar number of administrative support staff. A considerable number of African countries face shortages of professional staff in their national intellectual property right setting; especially, the availability of technical and legal expertise tends to be in short supply and where legal expertise does exist, there are few intellectual property right specialties to handle the volumes of workload (Lehman B, 2000. p.62). By far the most challenging aspect of intellectual property administration is the substantive examination of patent applications to ensure that applicants meet the disclosure requirement to claim invention is novel, inventive and industrially applicable. Some patent applications now run into at least thousands of pages of technical data that requires skilled professionals with technical competence, who are up to date with international patent information database (Leesti et al, 2002). Unfortunately, such capacity requirements are pretty much beyond the means of most poverty ridden countries in Africa.

### **Overburdening poorer countries with trips section 5 obligations**

Within a realistic thought, developed countries have long been skeptical about the inefficiency of domestic public institutions in Africa to deliver the policies needed to facilitate development. However, on a balance, the idea of feasibly binding these countries to use inefficient institutions to guarantee

certain standards of TRIPS enforcement is not clear. Least developed countries accept restrictions on their sovereignty in the hope that they can mutually benefit from signing up to treaties such as TRIPS Agreement or on anticipation that they can profit from technology transfer and market access. On the basis of rationalization, it will be challenging for African countries to use their resources to enforce international treaties like TRIPS Agreement, if such obligation will cost more money and make them worse off. To be able to implement fit for purpose TRIPS Agreement, countries require changes in both legislations and institutions that can suck resources cost, and the key is infrastructure (Ayogu M, 2007). Financial cost that would be incurred in such a transformational process will predominantly, involve a range of one-time cost such as the acquisition of buildings, equipment etc. and again, recurrent costs such as training, salaries, maintenance of IT and communication software's etc. UN report once estimated that institutional costs of compliance with TRIPS Agreement in least developed countries could run into millions of dollars (UNCTAD, 1996).

Developed countries can easily afford to enforce TRIPS Agreement with ease because they are not expected by any obligation to calibrate their internal systems and processes to give effect to TRIPS. Secondly, they can deploy scientific innovation as safeguard measures in critical situations as there seems to be good infrastructure already laid down to respond with legislative instruments to support private companies to invest in social intervention programs that are unattractive to the multinational enterprises (Orphan Drug Act 1983; and Regulation (EC) No. 141/2000). Setting the records straight, enforcing private right under TRIPS Article 61 can impose financial burden on African countries in the face of ill-equip law enforcement agencies including; the police and the justice departments already at odds to confront basic law enforcement, notwithstanding the lack of specialized commercial courts, intellectual property related lawyers and judges to handle volumes of intellectual property rights prosecutions in a continent undergoing restructuring.

### **Cost-benefit analysis: the rationality discourse for enforcing trips in Africa**

On a mind-set, TRIPS Agreement with it underlying principle to prevent copyright abuse can rather fuel copyright abuse. The intellectual proposition here is that, TRIPS Agreement can make access to some essential products extremely unreachable due to patents, which translate into high cost, in the

event creating artificial shortages that encourage infringers to copy in order to serve the demand placed on these essential products. Moreover, if copyright infringers do not find patent owners threat of going to court (civil litigation) whereas the state is also not effectively prosecuting (criminal procedure), imitators then exercise greater market power on counterfeiting while demand is already guaranteed. Strengthening criminal law regime to curtail the importation of affordable essential products (counterfeits) could be morally challenging and politically unreasonable decision for any government in Africa, especially, to commit to effective law enforcement to stop counterfeit goods while people are in demand of such products. Enforcing TRIPS Agreement satisfactorily could be counterproductive if the Agreement can impose significant financial strain at the same time restricting access to essential products (ICESCR 1966: Art 15.1; and Chapman A, 2009). The concept of cost-benefit analysis can settle two important conflicts on TRIPS Agreement, firstly, to demystify whether it worth for poorer countries to enforce copyright laws, and secondly, who should be responsible to shoulder the cost of enforcement?

The answer seems straightforward if the cost of enforcement outweighs the benefits then why running the risk of debt. By reducing this to a simple comparative conception, would society as a whole be made better off when TRIPS Agreement is fully enforced? Least developed countries do not clearly foresee that sooner from 2013 the burden of enforcing TRIPS Agreement will be on national governments. High cost of running intellectual property rights regime will make it extremely uncertain to enforce long-term intellectual property rights, as low volumes of research and innovative activities can obviously translate into low revenue generation from patents registration. World Intellectual Property Organization is currently boosting capacity in mainly least developed countries to facilitate their migration process into full TRIPS compliance, however, the almost entrenched poverty; makes Africa not so convincing to sustainably enforce TRIPS Agreement in the long run without adequate support since fighting copyright involve the use of technology, and now Africa will be required to borrow money for access to technology to enforce patents on behalf of corporations from the developed countries.

### **Copyright abuse: the conceptual undepining of deterrence**

General deterrence theory posits that increasing the risk of apprehension and punishment for crime deters individuals from committing crimes, (Becker G,

1968) and that under normal circumstances individuals respond to the costs and benefits of committing crime more carefully. In effect criminals are not different from law-abiding people as they rationally maximize their own self-interest (utility) subject to constraints (prices, incomes) that they face in the marketplace where a decision has to be reached by criminal rational actors based on the net costs and benefits of each alternative. The question of the capability of stringent sanctions deterring criminals has set off intense discussions as to whether the concept of unconditional reality in criminal sanction is indeed an appropriate act in response to copyright abuse. The rationale for people engaging in deviant criminal acts is a notion of understanding the conception of rationality based on personal choice, which is normally rooted in the analysis of human behavior controlled through the perception of the potential punishment that will follow an act judged to be in violation of the social contract (Polakowski M, 1994). Human beings are rational actors who freely choose from all behaviors both conforming and deviance based on their rational calculations involving cost-benefit analysis and that final decision is directed towards the maximization of individual pleasure.

Accordingly, law-violating behaviour should be viewed as an event that occurs when an offender decides to risk violating the law after considering his or her own personal situation (need for money, personal values etc.) and situational factors (how well a target is protected, how efficient is policing) before choosing to commit a crime. The rational criminal actor thus evaluates the risk of apprehension, the seriousness of the expected punishment, the value of the criminal enterprise, and his or her immediate need for criminal gain. General deterrence strategies focus on future behaviours, preventing individuals from engaging in wrongdoing or deviance by examining their rational decision making process whereas, specific deterrence focuses on punishing known deviants in order to prevent them from ever violating the specific norms they have broken. The concern here is that motives and rationales that lie behind the original behaviour can perhaps never be delineated through rational use of punishment. (Wright et al, 2004) Copyright abuse imposes two types of related harms; first, the harms of financial interests of depriving the copyright holder of their statutory right to act as the sole distributor of copyrighted material and thus to receive income from sales and licenses and secondly, harm of discouraging invention; as inventors are less likely to spend time and money creating knowledge if they cannot earn a profit, which could also undermine economic and social development, in

event deterring copyright abuse makes it more likely that individual or corporations will profit substantially from their creative ideas they put on the market (Saw C, 2010).

### **The challenges of deterring copyright abuse in Africa**

People will engage in crime and deviant activities if they do not fear apprehension and punishment. When legal provisions and its enforcement mechanisms function properly, they can become potential tool for curbing disruptive behavior. General deterrence cannot at all times reduce the probability of deviance if the nation with the primary responsibility for maintaining law, order and preserving the common good with systems of laws designed to counter criminal act become object of failure (Rotberg R, 2002). The swiftness, severity, and certainty of punishment are the key elements in understanding legal provision's ability to control human behavior. Following from the preceding discussion, it's assumed that punishment must be severe to deter crime based on the fact that the process of detection and conviction remain costly exercise to society (Garoupa N, 1997). Copyright abuse always involves faceless people who may never be made culprit of the law due to their influence in society. The real perpetrators normally walk free because first of all, they associate themselves with politics, and secondly, they remain part of wider machinery for law enforcement (Morris et al, 2006). The irony is that in worse cases counterfeiters are imprisoned leaving their system intact to reoffend or in most cases fined, knowing that fines are unlikely to deter copyright abuse.

Increasing evidence of copyright abuse in mostly least developed countries is an indication of ineffective use of criminal sanctions as a deterrent judicial tool for combating such abuse. Again, the prescription of stiff punishment has had virtually no effect on copyright abuse due to the fact that counterfeiters can easily predict the outcome of the judicial process to their advantage. Defiance can increase reoffending unless deterrent effects counterbalance defiance especially, when people perceive punishment as excessive. Deep rooted copyright abuse in many least developed countries is a yardstick to expound that the absence of effective law enforcement further increases and perpetuate such activities (Pogarsky et al, 2004). By implication, crime might not necessarily be reduced by police and courts dishing out severe punishments, however, by community involvement in disowning a deviant behavior. Certainty and the frequency at which punishment is discharged to deter crime are paramount than the severity of

criminal codes on paper to deter crimes. Within the concept of specific deterrence is the idea that punishment must be effective (Higgins G, 2005). Does this mean that questions concerning the effectiveness of deterrent strategies especially, the appropriateness of retributive justice become digestible with the notion that criminal sanctions embedded within TRIPS Section 5 provisions is indeed enough to curb copyright abuse in every country including African countries that cannot guarantee basic law enforcement?

### **The difficulty of relying on criminal sanctions for a perceived civil act**

In theory, the law of sanctioning has long distinguished between criminal procedure and civil litigation. Whiles the former were meant to punish, the latter were designed to compensate injured person. Certain legal dogmas considers the possibility of loss of freedom (incarceration) to be much more serious than merely paying damages to an injured plaintiff and that criminals will always welcome being subjected to civil litigation rather than criminal procedure. This bifurcated judicial models of criminal and civil judicial concepts and TRIPS Agreement (Section 5) proffered criminal procedure constitute an imperfection in it fundamental construction to reduce copyright abuse, if the economic reality of assessing the effect of legal rules is that most people would prefer to spend, for example, one year in prison than pay a million dollars from their personal assets raises the possibility that offenders may increasingly, view prison as easier or less punitive and will prefer the use of criminal procedure more than any other form of punishment (Crouch B, 1993). Hence, the above proposition reinforce the logic that criminal sanctions are not better option to reduce copyright abuse after all; most infringers are unfazed by it content as well as it application.

The idea that criminal sanctions can be imposed by courts or administrative agencies as a measure to deter copyright abuse may not be reasonable justification because criminal procedures avoids confronting the basic role of legal regime to deter criminal act as they do not accurately reflect the existing array of effective judicial tools needed for perceived offenses like copyright abuse in mostly poorer countries. The underlining principle here is not to conclude or smack criminal justice as unproductive judicial weapon to regulate crimes in general; however, to subject the rationale for over criminalizing copyright abuse into scrutiny and justify its effectiveness in responding to reducing copyright abuse in predominantly, least developed countries on assumption that copyright infringers are criminals who do not

respect the law and strategically carry out their activities explicitly to avoid justice. Under what circumstances can any right thinking man fairly blame copyright infringers without questioning already established legal prescription such as TRIPS Article 61; that heralds growing chorus of weakness incapable of curbing copyright abuse? Hence, Section 5 can potentially render itself obnoxious and worthless if it cannot be used to dispose copyright abuse.

### **Does civil judicial remedy have any impact on crimes?**

If so, why did the architect of the TRIPS Agreement envisage Section 5 at all? Technically, there is preconception on the fact that civil remedy is incapable of becoming effective mechanism to fight criminality in copyright abuse without even considering that criminal sanctions will neither be effective for act perceived as civil. It is however, not surprise if one understand the background of the TRIPS Agreement as emanating from commerce, and surprisingly, economists tend to conduct their studies under the assumption that severe punishment does always deter crime (Tullock G, 1974). Legal provisions do not work on their own axis but needs enforcement, and if state institutions fail to preserve effective law enforcement, criminals become the ultimate winners (Herbst J, 1996).

Due to feeble legal enforcement mechanisms already bedeviled least developed countries; law enforcement in general seems to be tilted to protect criminals more than victims of crimes especially, when criminals assume the responsibility of regulating the law more than the law taking it natural cause of protecting the innocent. The major cause of increasing copyright abuse in least developed countries is not only that counterfeiting is lucrative rather the ineffective law enforcement. The presumption that criminal sanctions can reduce copyright abuse is not based on any exact outcome but mere assumptions that may be highly prickly to proof pragmatically in the context of many least developed countries, as there is no credible evidence that even capital punishment has had any discernible impact on heinous crimes (Cohen-Cole et al, 2009). Another troubling aspect of criminal sanctions on a behavior widely accepted by society as normal from utilitarian point of view will always be tedious to control with harsh punishment on grounds that society may perceive criminal sanctions as an attack on morality.

### **Social context of punishing act that can be justified**

In his article, Andrew Ashworth criticized the unprincipled and chaotic

construction of modern criminal law that unnecessarily punishes neutral behavior for good cause (Ashworth A, 2000). Copyright infringers in least developed countries reckon they have a moral responsibility to supply cheaper (substitute) versions of products to the communities who are in dying needs of these essential products and cannot afford the expensive ones protected by patents. Again, Kadish Sanford blamed modern democratic societies reluctant to affix blame to conducts that lack culpability and observed that social costs of punishing conducts that does not significantly, harm society can be demeaning (Kadish S, 1963). Procedural justice with effective punishment is essential for the acknowledgment of shame whereas, the absence of fairness and illegitimate criminal procedure can condition deterrence. Punishment seen as unjust can lead to unacknowledged shame and defiant pride that create cycles of crimes.

On a whole community standard plays a large role in crime prevention but deterrent effect can be undermined when community view punishment as disproportionate and unjust (Robinson H, 1995). Community can reject rules that target people unfairly and similarly reject the legal system that promulgates and enforces such rules. In these circumstances, enforcing rules that do not embody a shared community norm may actually undermine the formation of a norm against the forbidden conduct. Criminal enforcement actions that impose harsh penalties on conduct that is not viewed as immoral or harmful can lower the respect for the criminal law and thereby diminish both its legitimacy and its general effectiveness. Criminal law has lost its biting power and has thus failed to enhance the role of effective judicial tool to deter copyright abuse in mostly least developed countries that sees intellectual property rights as set of ideologies being imposed on them.

### **Reducing copyright abuse: civil verses criminal judicial remedy**

The imperfect conception that the absence of proper civil judicial recourse within the least developed countries make it reasonable to rely on criminal judicial model (Thailand Patent Act B.E. 2522 as amended) is incorrect and understatement; this is because there is a structural problem with law enforcement in general and not only civil within the least developed countries. As a fear factor criminal procedure would have been the appropriate remedy to curtailing copyright abuse, but criminal prosecutions can no longer intimidate infringers. The irony is that, while developed countries have significantly developed a civil enforcement system with inbuilt punitive provisions for copyright abuse; (Section 10(f) of the US Anti-

Counterfeiting Consumer Protection Act of 1996) least developed countries are still strengthening their criminal legislations (WIPO and Ghana Judicial Training Institute, 2010). Relatively, very small jurisdictions have discovered that indeed civil remedy can be an effective means of combating copyright abuse (EU Parliament draft Directives on Criminalizing Copyright Infringement (2005/0127(COD), April 2007). Most of the least developed countries did not inherit colonial judicial legacy that encourages the use of civil judicial remedy, which makes it harder to use now, however, using civil statutes to regulate criminal act with tailor-made civil enforcement can make a dent in a number of criminal activities that have previously appeared immune to criminal law including copyright abuse (Finn et al, 1994).

Developed countries are particularly, successful in reducing incidents of copyright abuse partly because they encourage the use of civil judicial remedy for copyright enforcement (Section 501(b) of the US Copyright Act 1976). Few developed countries including Japan have adopted a strapping stance of relying heavily on criminal sanction to counter copyright abuse (Article 196 of Japanese Patent Act No. 121 of 1959). The European Parliament's Criminal Directives adopted a soft approach on criminalizing copyright abuse (EU supplementary Directive 2004/48/EC of 29 April 2004). The civil judicial remedy has many advantages over criminal sanctions including wider claimants by individuals, grassroots neighborhood groups, organizations etc. all of whom can initiate claims in courts without public prosecutors. Again, there is a lower burden of prove based on the "Balance of Probability" than criminal prosecution "Beyond all Reasonable Doubt." Civil judicial remedy can reduce court costs to society on probability that criminal trials are complex and expensive. Civil laws with their generous statutory damages can achieve a better balance because they do not run the risk of over burdening society (Park W, 2010).

Currently, many least developed countries criminal courts suffer from serious backlogs of criminal cases. The period between arrest and trial may be unacceptably long. Witnesses may disappear as they loose interest, exhibits may vanish and the prosecutors may regard the matter as stale. The process of criminal prosecution involving arrest, prosecution, and incarceration at the highest level can collapse if the government or attorney general decides not to prosecute despite the fact that there might be incontrovertible evidence to persuade conviction (Lord Goldsmith, UK Attorney-General announced the

SFO was dropping the corruption probe into a defense deal with Saudi Arabia citing security; and Attorney-General of Ghana refuses to defend \$58 million claim by the government financier Alfred Woyome). On the other hand, the probability that a copyright owner who has suffered losses from copyright abuse will sue for damages or adequate compensation is high. Civil remedies thus represent a growing area for crime prevention that has been largely unexplored in Africa as effective judicial tool to reduce certain categories of crimes with relatively less financial burden on society.

### **Conclusion**

Though copyright abuse is a class of fraud whose criminalization did not originate from the TRIPS Agreement, however, by using commercial treaty designed to address a single narrow interest of protecting and cementing profit at the same time enhancing competitive advantage for multinationals could not be justified against a background of poverty characterized by severe deprivation of basic human needs. Without immediate incentive for enforcement, it will be irrational for least developed countries to enforce intellectual property right with their scanty resources to the advantage of multinationals. Social cost for full compliance can be greater than the benefit that can be enjoyed in the short and the medium terms, especially, if there is a deficit between revenue generated from patent registration and the costs of running copyright administration, then enforcement actions can indeed infringe on society's right to enjoy the benefit of scientific process and their applications.

Many policy makers within the least developed countries felt impelled by political pressure from developed countries to craft intellectual property rights without questioning its long-term implication on access to scientific knowledge, while indisputable concerns over the impact of TRIPS Agreement on the generation of new knowledge and the maintenance of rules fostering open trade and competition remain (Shaffer G, 2004). Notwithstanding the immoral content of copyright violation as a crime, harsh criminal penalties for copyright abuse is likely to stifle the free flow of goods needed by less fortunate people, which may also affect the innovative activities that can be generated from copying for humanitarian use (Moohr G, 1999). As profoundly depicted even though developed countries recognizes the decrepit infrastructural conditions within the least developed countries, enough evidence exist to exemplify the unwillingness on the part of the developed countries to compromise on access to technology and market.

## Reference

### Journals

- Ashworth, A. (2000). Is the Criminal Law a Lost Cause? *Journal of Law Quarterly Review*, volume 116, pp. 225-256.
- Archibugi, D. & Pietrobelli, C. (2003). The Globalization of Technology and its Implications for Developing Countries: Windows of Opportunity or further Burden? *Technology Forecasting and Social Change*, volume 70, issue 9, pp. 861-883.
- Ayogu, M. (2007). Infrastructure and Economic Development in Africa: A Review, *Journal of African Economies*, volume 16, suppl.1, pp. 75-126.
- Becker, G. (1968). Crime and Punishment: An Economic Approach. *Journal of Political Economy*, volume 76, number 2, pp.169-217.
- Chapman, A. (2009). Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications. *Journal of Human Rights*, volume 8, issue 1, pp.1-36.
- Cohen-Cole, E., Durlauf, S., Fagan, J., & Nagin, D. (2009). Model Uncertainty and the Deterrent Effect of Capital Punishment, *American Law Economic Review (2009) volume 11, issue 2*, pp. 335-369.
- Crouch, B. (1993). is incarceration really worse? Analysis of offenders' preference for prison over probation. *Justice Quarterly*, volume 10, issues 1, pp. 67-88.
- Drahos, P. (2002). Developing Countries and International Intellectual Property Standard-Setting, *The Journal of World Intellectual Property*, volume 5, issue 5, pp.765-789.
- Garoupa, N. (1997). The Theory of Optimal Law enforcement, *Journal of Economic Surveys*, volume 11, issue 3, pp. 267-295.
- Higgins, G., Wilson, A., & Fell, B. (2005). an Application of Deterrence Theory to Software Piracy. *Journal of Criminal Justice and Popular Culture*, volume 12, issue 3, pp.166-184.

- Herbst, J. (1996). Responding to State Failure in Africa. *Journal of International Security*, volume 21, number 3, pp. 120-144.
- Kadish, S. (1963). Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations. *30 University of Chicago Law Review*, volume 30, number 3, pp. 423-449.
- Love, R. (2007). Corporate Wealth or Public Health: WTO/TRIPS Flexibilities and Access to HIV/AIDS Antiretroviral Drugs by Developing Countries. *Journal of Development in Practise*, volume 17, number 2, pp. 208-219.
- Park, W. (2010). On Patenting Costs, *WIPO Journal*, volume 2, issue 1, pp. 38-48.
- Persaud, A. (2001). The Knowledge Gap. *Foreign Affairs*, volume 80, number 2, pp. 107-117.
- Pogarsky, G., Piguero, A., & Paternoster, R. (2004). Modelling Change in Perceptions about Sanction Threats: Neglected Linkage in Deterrence Theory. *Journal of Quantitative Criminology*, volume 20, number 4, pp.343-369.
- Polakowski, M. (1994). Linking Self-and Social Control with Deviance: Illuminating the Structure Underlying a General Theory of Crime and its Relation to Deviant Activity. *Journal of Quantitative Criminology*, volume 10, number 1, pp.41-78.
- Reinhart, C. & Rogoff, K. (2010). "Growth in a Time of Debt," *Journal of American Economic Review*, volume 100, issue 2, pp. 573-578.
- Rotberg, R. (2002). The new nature of nation-state failure. *The Washington Quarterly*, volume 25, issue 3, pp. 83-96.
- Saw, C. (2010). The Case for Criminalising Primary Infringement of Copyright: Perspective from Singapore. *International Journal of Law and Information Technology*, volume 18, issue 2, pp.995-126.
- Stein, H. (1992). Deindustrialisation, Adjustment, the World Bank and the IMF in Africa, *Journal of World Development*, volume, 20, issue 1, pp.83-95.
- Tullock, G. (1974). Does Punishment Deter Crime? *Journal of Public Interest*, volume 14, issue 36, pp. 103-111.

- Wade, R. (2004). Is Globalization Reducing Poverty and Inequality? *World Development*, volume 32, number 4, pp. 567-589.
- Wright, E., Caspi, A., Moffitt, E., & Paternoster, R. (2004). does the perceived Risk of Punishment Deter Criminally Prone Individuals? Rational Choice, Self-Control and Crime. *Journal of Research in Crime and Delinquency*, volume 41, number 2, pp.180-213.
- Yu, P. (2010). Enforcement, Economics and Estimates. *The WIPO Journal*, volume 2, issue 1, pp. 1-19.
- Yu, P. (2008). Three Questions That Will Make You Rethink the US-China Intellectual Property Debate. *Journal of Marshall Review Intellectual Property Law*, volume 7, issue 3, pp. 412-432.

### **Books**

- African Charter on Human and Peoples' Rights 1981.
- European Union Parliament Draft Directive on Criminal Measures for Patent Infringement in April 2007 (2005/0127(COD)).
- Finn, P., & Hylton, M. (1994). *Using Civil Remedies for Criminal Behaviour: Rationale Case Studies*, Diane Publishing.
- International Covenant on Economic, Social and Cultural Rights 1966.
- Japanese Patent Act No. 121 of 1959
- Legislations and international legal provisions
- Orphan Drug Act 1983.
- Regulation (EC) No. 141/2000 of the European Parliament and the Council of 16 December, 1999 on Orphan Medicinal Products.
- Robinson, H.& Darley, M. (1995). *Justice, liability and blame: Community views and criminal laws*. Boulder: Westview Press.
- Stiglitz, J. & Charlton, A. (2005). *Fair Trade for All: How Can Trade Promoted Development*. Cambridge: Cambridge University Press.
- Thailand Patent Act B.E. 2522 as amended by the Patent Act (No. 2) B.E. 2535 and the Patent Act (No. 3) B.E. 2542.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1994.

The proposed European Union Directive on Criminal Measures aimed at ensuring the Enforcement of Intellectual Property Rights, to the supplement Directive 2004/48/EC of 29 April 2004.

United Nations General Assembly Resolution 41/128.

US Anti-Counterfeiting Consumer Protection Act of 1996.

US Copyright Act 1976.

### **Published documents**

Criminal Enforcement of IPR: The Problem of ‘Over-Criminalization’, the Sixth Anniversary Special Issue 2003 of the Intellectual Property and International Forum, Thailand.

Global Economic Prospects and the Developing Countries: Intellectual Property: Balancing Incentives with Competitive Access, World Bank Washington DC 2002.

Nottage, H. (2009) Developing Countries in the Dispute Settlement System, Global Economic Governance Working Paper: 2009/47.

Lehman, B. (2000) “Modernizing Jamaica’s Intellectual Property System” published by the International Intellectual Property Institute, Washington DC.

Leesti, M., & Pengelly, T. (2002) “Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement”, Commission on Intellectual Property Rights Background Paper 9, Commission on Intellectual Property Rights, London.

Lord Goldsmith, the UK Attorney General announces Serious Fraud Office is dropping the corruption probe into a defense deal with Saudi Arabia citing security. (Friday, 15 December 2006), (Retrieved 06/12/2011) <http://news.bbc.co.uk/1/hi/business/6181977.stm>.

Morris, J., & Stevens, P. (2006) Counterfeit Medicines in Less Developed Countries, Problems and Solutions, International Policy Network Press.

- National colloquium on "Building Respect for Intellectual Property (IP) Rights," organised by the World Intellectual Property Organisation (WIPO) in collaboration with the Government of Ghana and the Judicial Training Institute (JTI) to promote the development and enhancement of mechanisms in IP rights in Ghana. 11th Dec. 2010.
- Park, G., & Lippoldt, C. (2008) "Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries," OECD Trade Policy Working papers, No. 62.
- United Nations Commission on Trade and Development (1996) "The TRIPS Agreement and the Developing Countries", UNCTAD, Geneva.
- "World Intellectual Property Organization's Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement from January 1 1996 to December 31 2000", WIPO, Geneva.
- Woyome has no contract with government: Attorney-General reveals. Available at <http://edition.myjoyonline.com/pages/news/201201/79900.php> (Retrieved 17/01/2012).