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MUCH ADO ABOUT NOTHING; THE INTELLECTUAL PROPERTY RIGHTS REGIME IN ZIMBABWE: THE CASE FOR REFORM

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INTRODUCTION

Zimbabwe is a developing country. Technological development has meant Zimbabwe is now part and parcel of the global economic village. The adoption of a market driven economy at the expense of the semi-command economy of our first decade of independence demands a re-look at Zimbabwe's Intellectual Property (IP) regime. In framing a policy of patent protection, a country needs to take into account the interests of the patent holder as well as the national interest. Thus:

Every country, South and North, will be affected by the new and integrated role by IP in all aspects of development and the environment. For the South in particular, the impact of IP on farmers, rural societies, and on biological (including genetic) diversity will be profoundly important.¹

In the developing world the debate on IP protection revolves around:

- (a) Whether protection is outweighed by factors like monopolies;
- (b) Whether a country should only protect national innovations at the expense of foreign innovations which would be for free;
- (c) Does IP protection actually promote transfer of technology.
- (d) Do multinational companies consider the presence of IP protection in a developing country before investing in that country? The answer is probably no as political and economic factors usually have an upper hand.²

It has been suggested that Zimbabwe should renounce the Paris Convention and the World Intellectual Property Organisation (WIPO), African Regional Intellectual Property Organisation (ARIPO) agreement, the latter which Zimbabwe adopted in 1982 and whose provisions became effective on 25th April 1984. In particular it is argued that Zimbabwe should jettison the principles of priority and compulsory licensing. Rhetoric aside it should be pointed out that historically, countries that have not been leaders in the development of new technologies have emphasized the rights of their citizens of free access to inventions without patents so that their access to foreign technology is unfettered. Once these same countries are sufficiently developed technologically, they often turn around and demand of developing countries restrictions which would have made their own progress impossible.³

Intellectual Property has assumed and will continue to assume an unassailable strategic niche in world trade. Between the half century 1947–1987, the share of United States export goods with a high intellectual property content rose from 10% to 20% of all exports. It is estimated that by the year 2007, the share of United States traded goods under patent or copyright could exceed 80%.⁴

1 The Crucible Group, *People Plants and Patents*, IDRC, p. xiii.

2 *Ibid* p. 89–90.

3 The Crucible Group, *People, Plants and Patents*, p57.

4 See UNDP; RAF1, *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation* p 8–9 (1994).

The strategic importance of the control and protection of innovative ideas cannot be overstated. One needs to consider recent attempts by the United States Government's National Institute of Health to patent 2851 genes and Deoxyribonucleic Acid (DNA) fragments associated with the human brain. Although the application was twice rejected by the United States Patents and Trademark office on account of lack of inventive step and utility, private companies have taken the lead in stacking a claim for 40 000 human genes and DNA fragments.⁵ This explains why intellectual property rights have assumed great significance in international trade negotiations.

The need for a vibrant policy on intellectual property in a country committed to development through exports assumes a greater urgency. This essay therefore is an analysis of the current Zimbabwean legal regime governing Intellectual Property Rights (IPRS) as compared to relevant and related aspects of regional and international IPR systems and the implication of international trade agreements such as the General Agreement on Tariffs and Trade (GATT), the Paris Convention and the Convention on Biological Diversity (CBD). The paper is structured as follows; First, it looks to the international and regional patents regime. Secondly, it focuses on the Zimbabwean intellectual property regime and legal mechanisms for enforcement of IPRS. Thirdly, it looks at the other forms of activities that should be considered for protection in view of international experiences. Fourthly, it suggests a framework for reform and possible model legislation for adoption by Zimbabwe.

WHAT IS INTELLECTUAL PROPERTY?

The conception of property normally takes the form of physical tangible objects. Yet legally property is an objective as well as a subjective phenomenon. It includes movables and immovables, corporeal as well as incorporeal property. The legal definition of property thus includes products of mental labour (ideas). Under this head we have intellectual property rights (IPRs) which include patents, industrial designs, copyrights, trademarks and plant breeder's rights. A layman's definition of intellectual property would be that it comprises all those things emanating from the exercise of the human mind, such as ideas, inventions, poems, designs, computers, books etc. In law, intellectual property means the legal rights which may be asserted in respect of the product of human intellect.⁶ Put simply, IPRs are the legal rights which accrue from activity in industrial, scientific, literary or artistic fields. There are various forms of IPRs, the most common of which are defined below.

(a) Patents

A patent is a legally enforceable right granted by a government to inventors and other persons deriving their rights from the inventor, for a fixed period of time, to exclude persons from manufacturing, using or selling a patented product or from utilizing a patented method or process. At the expiration of the time for which the right is granted, the patented invention is available to the public, or put simply, it falls into the public domain. For an invention to be patentable, it must be:

- (a) new in the strict sense of the word.
- (b) involve an "inventive step" i.e. it must be non-obvious.
- (c) it must be capable of industrial application.

5 The Crucible Group; *People, Plant and Patents*, p9 (1994).

6 See Jeremy Phillips, Alison Firth, *Introduction to Intellectual Property Law*, Second Ed. 3 (1990).

Thus, the following would be excluded from patentability:

- (i) a discovery of a hitherto unknown substance which exists in nature;
- (ii) a scientific theory such as Einstein's theory of relativity or accounts of black holes in space;
- (iii) a mathematical method for e.g. calculating square roots or solving equations;
- (iv) literary, dramatic or artistic work if aesthetic is covered by copyright;
- (v) a scheme, rule or method of performing a mental act;
- (vi) a scheme or rule of playing a game or doing business;
- (vii) a program for a computer;
- (viii) the presentation of information.⁷

(b) Trademarks

A trademark is a sign which distinguishes the product of one enterprise from the products of other enterprises. Trade names are the names which business enterprises trade in.⁸ Registration of a trademark establishes a right to take action against infringement of that mark or use of one similar in connection with goods or services such that it may lead to confusion of the public. An unregistered trademark can be protected under the common law delict of passing off.

(c) Industrial Designs

An industrial design establishes rights on the ornamental or aesthetic aspect of a useful article. This may take the form of a shape, pattern or colour of an article. To gain protection, it must be novel in the sense that it must not be an imitation of a design already known to the inventor, and further it must be capable of reproduction by industrial means.⁹

(d) Copyright

This exists automatically in original literary, artistic, audio-visual, photographic, architectural, paintings, dramatic and sculptural works.

(e) Plant Breeder's Rights

A protectable plant variety is one which is clearly distinguishable from any other variety, which has not been commercialized, which is sufficiently homogeneous and stable. The breeder's protection extends only to the production of reproductive material for purposes of commercial marketing (as distinct from the use of the protected variety as an initial source of creating varieties) and to the use of the registered name for selling any other variety within the same class.¹⁰

(F) TRADE SECRETS

These are basically covered by the common law. It is an implied term of every employment contract that the employee should not disclose information which is the property of the

7 *Ibid.*, 35.

8 M. Blackeney, *Legal Aspects of Transfer of Technology To Developing Countries*, 9-11 (1989).

9 *Ibid* at p. 10.

10 UK Green Paper "Intellectual Property Rights and Innovation" p. 35 (1983).

employer, e.g. machine design, production methods and customer lists. Because of the doctrine of privity of contract, third parties are covered by the law of delict. The factors which courts take into account in determining whether a matter is a trade secret are:

- (a) the extent to which the information is known, the measures taken to keep its secrecy;
- (b) the value of the information to the business and to rivals;
- (c) the efforts or costs expended in developing the information;
- (d) the ease with which the information can be copied or properly acquired by others.¹¹

The International Patents Regime

The protection of IPRs is at national, regional and international levels. The international IPRs system is largely based on the Paris Convention of 1883. It has 91 members, over 50 of whom are developing countries. The Paris Convention is based on two basic principles:

1. The right of national treatment which obliges member states to grant to national members of other states all the advantages which nationals of the member states enjoy in regard to the protection of intellectual property. Accordingly foreign inventors are treated in the same way as national inventors.
2. The right of priority. Under this right any person who has applied for protection in one of the contracting states enjoys a right of priority for 12 months for claiming similar rights in other signatory countries.

Article 4 of the Paris Convention enshrines the right of priority i.e. once a patent, trademark or industrial design is filed in any country which is signatory to the Convention, it will be prioritised in any of the member countries, for a period of 12 months in respect of patents and 6 months in respect of industrial designs and trademarks. The same Article 4 gives a discretion to member states in relation to the nullity and forfeiture.

Each country can decide if a particular application qualifies as an IPR. Thus one may make an unsuccessful application to register a patent in the United States, but there is nothing to stop that person from registering the patent in a developing country which lacks the necessary resources to determine the patentability of that patent. In that event, the patent will be protected in the United States. In the United Kingdom 56% of invalidated patents were in the pharmaceutical field between the years 1918 and 1949, while in the United States 62% of all patents made between 1948-1954 were invalidated on account of fraud. Yet in Zimbabwe which has no extensive examination system on account of constraint in resources, it is easier to register a false patent.

While Articles 5 (a) and 5(b) allow compulsory licensing, in practice this is of little help to developing countries (DCS). Most inventors, particularly Transnational Corporations (TNCs) guard jealously the process by which the IPR can be exploited. In any event Article 5 (a) gives the following privileges to a patent holder:

- (a) an exclusive right to manufacture, import and distribute the product.
- (b) the patent holder need not work the patent in the country of registration.
- (c) the holder has a right to prevent others from manufacturing, importing and distributing the product in the country of registration.

Thus one could register a drug patent in Zimbabwe, manufacture the drug in the United Kingdom, and export it to Zimbabwe! This is the crux of the problem, as transport costs, packaging and handling costs and an unequal international foreign exchange regime means that the drug would be more expensive in Zimbabwe.

11 Blakeney; *The Legal Aspects of Technology Transfer to Developing Countries*, 13.

In terms of Article 5 (a) (2) and 5 (a) (4) (which are incorporated in section 31 of the Zimbabwean Patent Act, Chapter 26:03), compulsory licensing cannot be granted on the basis of failure to exploit or insufficient exploitation unless and until 4 years have lapsed from the date of the filing of the patent application or 3 years from the date of the grant of the patent. In any event a compulsory license will be refused if the patentee justifies his inaction for "legitimate reasons" such as lack of funds or further research. Further, a compulsory license is non inclusive; other players, including the patentee can take advantage of the compulsory license.

In terms of the Harare Protocol on Patents and Industrial Designs, it is possible to file one application with ARIPO and obtain protection in any of the designated countries within ARIPO. The argument is that such a system avoids the problem of extensive examination in each of the member countries. Yet in a way such a system entrenches the provisions of the Paris Convention in that whether the application is patentable, obtains protection before examination.

Criticism has been levelled against the two basic principles of the Convention and the Paris Convention in its entirety. The first criticism is the principled national treatment which is enshrined in Article 2 of the Convention. According nationals the same treatment as foreign nationals favours TNCs/Multinational Companies (MNCs) at the expense of nationals in developing countries. It is argued that the Paris Convention is essentially a Charter for Intellectual Property rights holders in the sense that its concern is to determine the rights and safeguards of the individual stakeholder. As such there is very little recognition of the public interest principle. It has been argued that the Paris Convention was drafted to serve the interests of the imperial powers. As such it is an anomaly for developing countries to adopt wholesale, what amounts to a colonial legal anachronism.¹² In general intellectual law has not received the same recognition in developing countries as that which it receives in the industrialised countries. In the field of copyright, monopoly profits are extracted through the use of exclusive distributorship arrangements. For developing countries which have been sidelined in the global commercial and trading system, transfer of copyright "technologies is of importance but not so important as to ensure the enforcement of such rights".¹³

The need to achieve some measure of harmonization in the legal regime governing the IP worldwide became obvious as was the need to take action to prevent the endemic violation of IPRs. Thus the General Agreement on Tariffs and Trade (GATT) addressed these issues in its Uruguay Round of Multilateral Trade Negotiations. These negotiations came to a successful end with the Final Act of the Multilateral Trade Negotiations which contains a comprehensive agreement on Trade Related Aspects of Intellectual Property (The TRIPs agreement).

The TRIPs agreement now falls under the institutional aegis of the World Trade Organisation (WTO) the successor in title to GATT. The Final Act became effective in January 1995 and Zimbabwe is a signatory to the Final Act. Compliance with the agreement is monitored by the Council for Trade Related Aspects of Intellectual Property, which is created in terms of Article 68 of the agreement and which is one of the 3 councils of the WTO.

12 See for e.g. Cornish, *Intellectual Property, Patents, Copyright, Trademarks and Allied Rights* (1993).

13 Fredrick S. Ringo, "The Trade-Related Aspects of Intellectual Property Rights in the GATT and Legal Implications for Sub-Saharan Africa — Prospective Policy Issues for the World Trade Organisation", Vol. 28, No. 6, *Journal of World Trade*, 124 (1994).

The TRIPs agreement requires member countries to adopt its provisions as a basic minimum standard in their IP laws. Individual member countries are at large to enact legislation giving greater protection, provided such protection does not contravene the TRIPs agreement. Article 3 reinforces the Paris convention by requiring equal treatment of nationals and foreigners. Article 7 of TRIPs agreement states the objectives of IPRs:

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

Article 8 (1) is a catch all provision that seeks to accommodate the individual self interest of members, while at the same time reminding them of their obligations to others in the interests of socio economic welfare. It provides that:

Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided such measures are consistent with the provisions of this Agreement.

Article 65 (2) gives developing countries an effective grace period of 5 years before they can enforce the agreement, while Article 66 (2) enjoins developed country members to give incentives to companies that transfer technology to the least developed country members. Article 8 (2) allows member countries to protect their IPR interests using legal and economic means, over and above the protection given by agreement. The appropriate measures which a member state may adopt are in no way defined by the agreement. This provision thus gives license to countries to legislatively coerce dissident members into protecting IPR. It is under the auspices of this clause that the US passed its super 301 legislation. This legislation allows the US government to identify countries which it believes engage in unfair trade practices and at the first instance to negotiate for the removal of such practices. If negotiations fail, the government is allowed to retaliate in the form of punitive trade sanctions. The super 301 has been specifically refined to address IPR, with that refinement known as the Special 301. So strict is the Special 301 that the US has acknowledged no country would meet its criteria for the effective protection of IPR.¹⁴

The United States maintains a Watch List and a Priority List, which target the most serious "offenders". These lists are in effect a black list, whose purpose is to coerce listed countries into making improvements to their IP laws to the satisfaction of the US or risk punitive retaliatory trade sanctions. Indeed some of the affected countries, in South East Asia, have already effected improvements to the IP laws. While Article 8 (2) can have a potent effect in the hands of powerful countries, it is of little value to developing countries like Zimbabwe who lack the muscle to effect trade sanctions.

Article 28 of the TRIPs agreement confers an exclusive right on the holder to prevent authorised parties from selling, using, or offering for sale a product subject to patent. It is the owner who has the power to assign, transfer by succession and to conclude licensing contracts. These rights are absent in the Paris Convention. Article 41 requires members to adopt stringent enforcement measures, with a deterrent component (e.g. the use of criminal

¹⁴ See Office of the US Trade Representative, "Fact Sheet, 'Special 301' on Intellectual Property", in *Digest of Intellectual Property Laws of the World* Vol. 3.

sanctions) to prevent the abuse of IPRs. The Article further provides that procedures covering the enforcement of IPRs must be fair and equitable and must not involve complicated or costly procedures.

Courts are required to have regard to equity when determining IP disputes. Articles 42–48 deal with the civil procedures for protecting IPRs. Defendants must be given sufficient written notice of the claim together with their cause of action. All parties are at liberty to be represented by legal counsel and the court can order the defendant to release information in his exclusive domain. The courts can grant injunctions and award damages. Other remedies that can be ordered without compensation are destruction of goods complained of, and the seizure and sale of equipment used to manufacture the pirated goods. This normally applies to breach of copyright. In addition courts may, grant provisional orders *ex parte*, ie. without hearing the other side, where it is likely irreparable harm may be caused to the right holder¹⁵ Section 63 requires transparency in the laws relating to IP. Judicial rulings must be made public and be accessible to interested parties.

The substantive aspects of IP law are to be found in Part II of the Agreement. It is pertinent to mention that the provisions in Part II apply insofar as they are not in conflict with national legislation and insofar as they cover aspects not covered by national legislation.¹⁶

Section 1 of Part II covers copyright and copyright related rights. Members states are required to give effect to Articles 1–2 of the 1971 Berne Convention on the Protection of Literary and Artistic Works, to which Zimbabwe is a signatory. In terms of Article (11) of the agreement, copyright protection “extends to expressions as opposed to ideas, procedures, methods of operation or mathematical concepts.”

This goes further than the current Zimbabwean laws which despite protecting “unpublished” literary, dramatic or musical work, does not define whether the word unpublished requires the need for a positive or tangible expression of the work or not. While the Zimbabwean Copyright Act does not make express reference to computer software programmes as qualifying for protection, Article 10 of the Agreement specifically refers to copyright protection for computer software. In addition copyright protection is extended to compilation of data (e.g. statistics) or other material which by reason of the selection or arrangement of their contents constitute intellectual creations. Trade marks are covered under Section 2 of Part II and its provisions are in tandem with those currently in the Zimbabwean Trade Marks Act.

Geographic indications are protected under Article 22 (2). In terms of S. 23, it is unlawful to give a description which misleads the public as to the origin of a wine or spirit, even if the true origin is stated. In terms of Article 25 and 26, industrial designs must be new or original and be independently created in order to qualify for protection. Computer integrated circuits and layout designs or topographies are protected, by Article 35 but these appear to have no protection in Zimbabwe. Also protected are trade secrets.¹⁷ Information lawfully in the control of a person cannot be disclosed “in a manner contrary to honest commercial practices” as long as it is secret and has an economic value because it is secret and has been subjected to reasonable steps to keep it secret. Manners contrary to honest commercial practices includes breach of confidence, breach of contract and acquisition of undisclosed information by a third party who knows that such practices were involved in the acquisition of that information.

15 Article 50.

16 See Article 1 of the Agreement.

17 See Article 39 (2).

Article 27 (1) provides that patents shall be available for any inventions whether as products or processes, "in all fields of technology provided they are new and involve an inventive step (i.e. are non obvious). Articles 27 (2) and 27 (3) allow members from derogating from what should be patentable in the interests of public order or morality, including protection of human or plant life or health or in order to avoid damage to the environment.

Compulsory licensing is dealt with in terms of Article 31. This Article restricts the powers of governments from compulsory use of patentable matter without the IPR holder's consent. In the event of compulsory licensing, such use must *inter alia*;

- (a) be considered on its individual merits.
- (b) be non-exclusive
- (c) be non-assignable
- (d) be predominantly for the domestic market of the member.
- (e) make provision for payment to the patent holder of "adequate remuneration" in the circumstances of each case, taking into account the economic value of the authorization.

In the long term, the TRIPS agreement is beneficial to developing countries like Zimbabwe. The agreement explicitly recognises the right of developing countries to accord priority status to their own economic and social interests in the area of IPRs while at the same time enhancing free trade. The harmonization of intellectual property laws makes it easier for developing countries to attract the transfer of technology, as long as patent holders are protected. Because the agreement is a product of consensus, it maintains the balance of conflicting demands and claims, between developing and developed countries.¹⁸

THE ZIMBABWEAN REGIME

Registration and Protection of Trade Marks In Zimbabwe

Trade marks are legislatively protected and in certain circumstances by the delict of passing off. The law of passing off protects only the established goodwill of lines of goods. It does not provide a shield behind which new goodwill can be built! This is what the Trade Marks Act Chapter 26:03 seeks to remedy. Wrongful passing off is defined as a representation by one person that his business or merchandise is that of another or that it is associated with that other. In order to determine whether the representation amounts to passing off, one enquires whether there was a reasonable likelihood that members of the public may be misled, into believing that the business is, or one connected with that other.¹⁹ In order to succeed, the Plaintiff must prove that this business or merchandise has acquired a reputation.²⁰ It is the tempering with reputation that leads to patrimonial loss.

A trademark is protected as soon as it is registered so that goodwill can be built up behind the protection given by the Trade Marks Act Chapter 26:04. A registered trade mark means a trade mark that is entered in the Register in terms of the Act. In terms of section 2 of the Act, a trade mark is a mark in relation to goods so as to indicate a connection in the course of trade between those and the trader who deals in those goods. A mark includes a distinguishable guide i.e. the shape or configuration of containers of goods; slogan, device, brand, heading, label, ticket, name, signature, word, letter or numeral of any combination thereof, whether rendered in two dimensional or three dimensional form.

18 See unpublished essay Nilesh S. Trivedi "An Analysis of the Agreement on Trade-Related Aspects of Intellectual property."

19 See *Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Incorporated* 1991 (2) SA 916 (A); *Union Wine Ltd v Snell Co Ltd* 1990 (2) SA 189).

20 *Royal Beech Nut (Pty) Ltd v United Tobacco Co Ltd* 1992 (4) SA 188 at 122 E-G.

The essential protection given by a registered trade mark is that a person who has a registered trade mark is entitled to institute legal proceedings to prevent and or recover damages for the infringement of that registered trade mark. It follows that no person is entitled to institute proceedings to prevent infringement or to recover damages for the unlawful use of the unregistered trademark.²¹

The application for registration of a trademark must be made in the prescribed form, which must be dated and signed by the Applicant or his agent. Upon receipt of an application the Registrar of Trademarks shall cause a search to be made amongst both registered trademarks and pending applications to ascertain whether there is an identical trademark to the one applied for. In addition, he may consult with the Registrar of Companies to establish whether the trademark would likely cause confusion with names of companies already registered. Once the application is accepted with or without conditions or limitations the applicant must advertise in the Patents and Trademarks Journal. This journal is an official government gazette to which anyone can have access. Within two months from the date of registration, any person may give notice in writing to the Registrar of opposition to registration. Such opposition must clearly state the grounds of opposition.²² In terms of section 23, if at the expiration of two months from the date of the advertisement, no opposition has been filed or the opposition has been decided in favour of the applicant, then the applicant may apply to register the Patent in the prescribed form (Form T.M.12).

A trade mark can be removed on application to the Tribunal (The High Court sitting as a specialist court) by the applicant or any aggrieved party on the grounds that (a); the application for registration was not *bona fide* in that no *bona fide* use has been made of the trade mark in relation to the goods or services for which it was being registered; and (b) that trademark has not been in use for a period of five years from date of registration.²³

In terms of section 97, a person who has applied for protection for any trade mark in a convention country (e.g. a WIPO or Paris Convention Member) or his representative or assignee, is entitled, if his trade mark is otherwise registrable in terms of the Act, to registration of his trade mark in priority to other applications, if the application for registration is made within six months from the date of the application in the convention. This however, does not entitle such applicant to recover damages for infringements prior to the date of actual registration in Zimbabwe.

Any person aggrieved by the decision of the Registrar can appeal to the Tribunal. An appeal from the Tribunal goes to the Supreme Court, which may confirm, set aside or vary the order or decision of the Tribunal or order that the Tribunal hears the matter afresh.²⁴ Forgery of a registered trade mark is a criminal offense and so is trade or importation of goods or services with a forged trade mark.²⁵ Deceiving or influencing the decision of the Registrar or his employees is also punishable at criminal law. The maximum sentence is a fine not exceeding \$2 000.00 or two years imprisonment or both. The cost of registering a trademark is relatively cheap. Trademarks are renewable for 10 years. The initial registration fee is \$500.00 and thereafter is \$200.00 per year for renewals. Failure to renew means the protection lapses.

21 See Section 6 of the Trademarks Act.

22 See section 22(2) of the Act.

23 See section 31 of the Act.

24 See section 80.

25 See generally parts xiii and xiv of the Act.

Patents and Industrial Designs

The Zimbabwean Law on Patents and Industrial Designs meets and conforms with the basic standards of the TRIPs agreement. The effect of a patent is to grant to the patentee the right to exclude others from making, using, exercising or disposing of the invention within Zimbabwe, so that he shall have and enjoy the whole profit accruing by resign of the invention.²⁶

For a patent to be registered, it must be new, non obvious, and be capable of industrial application. In terms of S. 13, a patent application which is frivolous or contrary to well established natural laws cannot be registered. In addition, substances that are capable of being used as "food or medicine which is a mixture of known ingredients possessing only the aggregate of the known properties of the ingredients or process producing such substance by mere admixture, is not patentable".²⁷ Zimbabwean law follows the first to file priority system. Thus it is crucial to file the application first before advertising the discovery. Otherwise should one advertise before making application, he stands the risk of somebody else filing an application, in which case his application receives priority. This is in contradistinction to the American system of first to invent, which allows the adducement of evidence to prove who was the first to invent.

In terms of section 7, the application for a patent can only be made by the inventor or his assignee. The application must be in the prescribed manner, with a stated address in Zimbabwe. Such application, whether local or convention application, must be accompanied by complete specification in the case of a convention application, and complete or provisional application in the case of local application. If a complete application is not accepted within 18 months from date of lodgment, then it shall lapse, unless an appeal has been lodged.

The term for a patent is 20 years. On acceptance of a complete specification, the Registrar of Patents must within one month advertise that fact in the Patent and Trade Mark Journal. Before acceptance, the application is examined to ascertain whether the application and supporting documents comply with the Act.

Once accepted, maintenance fees are payable annually on an upward scale, before the expiration of each year with the term of the patent, starting in the 4th year. The cost is inexpensive. The initial registration fee is \$500.00, thereafter \$80.00 per year up to the 10th year, \$120.00 per year from the 11th to the 15th year and \$150.00 per year for the 16th to the 20th year.²⁸ The Patent Act requires that not only are patents granted to encourage and secure inventions, but also that as far as possible, patents must be worked on a commercial scale in Zimbabwe, without undue delay.²⁹

Failure to comply risks the grant of a compulsory license, where an interested party can show that after three years from grant or four years from lodgment, the patent has not met the reasonable public interest. Public interest is not met;

- (a) if the invention is capable of being worked in Zimbabwe, but there has been no such commercial exploitation;

26 Section 24 of The Patents Act, Chapter 26:03.

27 The Patents Act, Chapter 26:03, Section 13 (1)(c). Traditional herbs cannot be patentable, on account of their not being new and being obvious.

28 See Patent Regulations, Statutory Instrument 128/96.

29 Per Section 31 (6) of the Act.

- (b) if the exploitation of the patent within Zimbabwe is being hindered by the patentee or his agents or associates.
- (c) if the demand for the article is not being met in Zimbabwe.
- (d) if the refusal by the patentee to voluntarily grant a license is prejudicing industry or commerce in Zimbabwe.

Further, any interested party may at any time after two years following an order granting a compulsory license, on the grounds of abuse or non working of an invention, apply to the High Court or Patents Tribunal for revocation of the patent.³⁰ The public interest fears about TNCS monopolizing patents in vital areas like food and medicine are well catered for by section 32 of the Act. This section provides in part that where there is in force a patent in respect of:

- (a) A substance capable of being used as food or medicine or in the production of food and medicine;
- (b) A process of producing food or medicine, or
- (c) Any invention capable of being used as or as part of a surgical or curative device, then, the Patents Tribunal shall, on application by an interested party, grant a license to such party on terms the Tribunal thinks fit. Such license limits the exploitation of the patent to the above stated grounds. In granting the license, the Tribunal shall endeavour to ensure that the food, medicine or surgical or curative device, is available to the public at the lowest possible price, consistent with patent holder obtaining a reasonable return.³¹ Section 34 of the Act covers the national interest. The state has power to make, use or exercise any registered patent, during peace times and particularly during a state of emergency.

The procedure and conditions for actions against infringement are set out in Part VI of the Act. In order to ascertain whether or not there has been an infringement of a patent one must:

- (a) decide whether the acts complained of are of such a nature that they could constitute an infringement of the patent or are excusable.
- (b) construe the claims to determine whether or not the alleged infringement falls within the scope of the claims.
- (c) decide whether or not the defendant has a valid defence.

In practice the third question is considered first so that if the defendant has a defence, infringement does not arise.

It will be recalled that the patent holder has the right to exclude others from making, using, exercising or disposing of the invention within Zimbabwe. The making of a patent article for sale, even though not followed by an actual sale is an act of infringement. But making solely for experiment is not an act of infringement.³²

The principle is that you can prolong the life of a licensed article, but you must not make a new one under the guise of repair.³³ With usage, innocent possession, purchase, transport or storage of a patented article does not amount to use and hence does not constitute infringement. *Bona fide* experiment does not amount to use and does not constitute an act of infringement. Commercial importation of patented articles, nor articles made abroad by a patent process or apparatus, is an act of infringement.³⁴

30 See Section 32(2).

31 See Section 32 (2).

32 *The British Motor Syndicate v John Taylor & Sons* (1900) 17 RPC, 723 at 729.

33 See *Sidir Rubber Company and Maclueich v Wallington Western Company* (1907) 24 RPC 539 at 543.

34 See *Pfizer Corporation v Ministry of Health* [1965] AC 512 at 557-8.

The doctrine of infringing importation is exemplified by the famous case of *Saccharin Corp Ltd v Anglo-Continental Chemical Works Ltd* (1900) 17 RPC 307. Saccharin was a well known product and so was its method of synthesis from a derivative of coal, tar, ortho-toluene sulpho-chloride, by a chemical reaction in which the chloride was substituted by an amino group and the product oxidised to Saccharin and water. The invention was an improved process for the manufacture of ortho-toluene sulpho-chloride. The alleged infringement was not the importation into the UK of ortho-toluene sulpho-chloride *per se*, but of Saccharin which had been synthesized abroad from ortho-toluene sulpho-chloride manufactured by the patented process. The court held that the use of patented process in the last stage of the manufacture of the imported article was an infringement. However, each case depends on its own merits, i.e. the process must have played more than an unimportant or trifling part in the manufacture abroad of the product.

The action for infringement can only be made by the patentee or exclusive licensee.³⁵ The action for infringement is brought about by way of summons, issued by the High Court specifying the cause of action and calling on the defendant to enter appearance to defend if he wishes to contest.

Industrial designs are protected by the Industrial Designs Act, Chapter 26:02. In the Act designs are features of shape, configuration, pattern or ornamentation applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye.

To qualify for protection, the design must be new or original. Novelty or originality is not lost by:

- disclosure of the design by the proprietor to any person in confidential circumstances;
- disclosure in bad faith by a person other than the proprietor;
- communication of the design by the proprietor to a state department;
- exhibition at an industrial or international fair, certified as such by the Minister.

Primarily artistic or literary matter is not protected eg. photographic matter, calendars, greeting cards, leaflets, maps, plans, stamps etc.³⁶ There must be an application for registration in the prescribed form and manner. The Registrar has authority to search for purposes of deciding whether the design is new or original in terms of section 9 (1) and 9 (2) of the Act. The application must be accompanied by a statement of novelty, sufficient to define the design for which the novelty is claimed.

Registration gives the registered proprietor copyright in the registered design. He acquires an exclusive right in Zimbabwe to make or import for sale or use for purposes of any trade, business, or to sell, hire or offer for sale or hire, any article in respect of which the design is registered being an article to which the registered design or a design not substantially different from it has been applied and to make anything enabling such article to be made.³⁷ A registered design or share in it can be assigned, transmitted, mortgaged or licensed by the registered proprietor. In terms of S. 9 (5) and 15 of the Act, registered design lapses after 15 years.

35 s48 of the Act.

36 See S. 6 (4) of the Act.

37 S. 14 of the Act.

Trade Secrets

Trade secrets are not legislatively provided for, but are protected by the common law of contract and delict. Information which is public knowledge and public property cannot be confidential. Contract law covers cases where the employee may have access to information which is of such a nature that the employee may never use it except for the benefit of the employee. However, customers can also abuse the confidential information of a supplier. A good example is the case of *Harchris Heat Treatment Pty v Iscor* 1983 (1) SA 548 (T). Plaintiff had designed an innovative furnace and had spent a fortune on such design. There was no secrecy about the components of the furnace. The defendant had previously placed orders with the plaintiff and the plaintiff had allowed the defendant's engineers to inspect the furnace in anticipation of future orders. The defendant's engineers, within a short time of inspecting the plaintiff's furnace, designed and produced their own furnace by copying plaintiff's. The plaintiff was successful in obtaining an interdict stopping the defendant from further producing the furnace.

It must be pointed out that information which is confidential may be disclosed in the public interest. In this instance, the court balances the interests of the plaintiff and the interests of the public's right to free communication.

Remedies for Unlawful Competition

A party can either claim an interdict, which is a court order barring the errant party from making further use of such information. In addition, the injured party can also bring a claim for damages, as long as patrimonial loss is proved. The case of *Schultz v Butt* 1986 (3) SA 667 (A) deals with the general remedy for unlawful competition. Respondent had for many years developed the hull of a ski-boat known as the Butt Cat. This was unpatented since it was public knowledge. The appellant, a rival boat builder, bought a second hand Butt Cat and used it to design hulls which he sold in competition to respondent. The court upheld respondent's application for an interdict.

In cases of this nature, the Plaintiff is often confronted with a practical problem, that of proof. A competitor, once served with summons, may destroy all evidence linking him to the unlawful competition. The South African courts have adopted an English remedy; the Anton Piller Order.³⁸ The order is granted by a judge on application, which application is made without notice to the other side, i.e. it is *ex parte*. Plaintiff must make the necessary averments, on affidavit, sufficient to establish a *prima facie* case. The application is granted where there is fear evidence may be destroyed before trial. The judge may authorize the search and preservation of evidence. The requirements of the order are:

1. The applicant must be able to establish a *prima facie* cause of action.
2. That respondent has in his possession specific documents or things that constitute vital evidence.
3. There must be a real or well founded apprehension that this evidence may be hidden or destroyed before the case comes to trial.

Copyright

The Zimbabwean law on copyright is contained in the Copyright Act, Chapter 26:01. In terms of section 5 thereof, copyright shall subsist in every original literary, dramatic or

38 The Zimbabwe Courts will probably adopt this remedy since South African decisions are persuasive authority.

musical work which is unpublished and of which the author is a citizen or resident of Zimbabwe and in the case of body corporate, if the body is incorporated in Zimbabwe. Where the work is already published, then it will only subsist, if:

- (a) the work was first published in Zimbabwe, or
- (b) the author of the work is a Zimbabwean citizen or resident of Zimbabwe at the time it was first published or
- (c) the author died before the work was published but was a Zimbabwean citizen or resident immediately before his death.

Protection extends to the entire lifetime of the author and for a further 50 years after the death of the author. It follows from above that works not published as above receive no protection at all. Unlike other forms of IP, copyright does not need registration. The acts restricted by copyright in a literary, dramatic or musical work are: reproducing the work in any material form, publishing the work, performing the work in public, broadcasting the work, causing the work to be transmitted to subscribers to a diffusion service; making any adaptation of the work.³⁹ The rules in relation to copyright for literary, dramatic and musical works apply *mutatis mutandis* to copyright in artistic works.

In terms of s. 9 (1) dealing with a literary, dramatic or musical work for purposes of research, private study or personal and private use, criticism or review of work, and report on current event does not amount to infringement of copyright. With recordings of music, the manufacturer of the records, disc, tape or matrix does not infringe copyright as long as he gives notice to the copyright owner. In that event the manufacturer must pay a royalty which is set at the rate of 5% of the ordinary retail price of the record.

Part III of the Act provides for copyright in sound recordings, cinematograph films, broadcasts and published editions of works.⁴⁰ An action for infringement of copyright lies with the owner. Section 22 (2) confirms copyright as a proprietary right. The owner of a copyright is not only protected from infringement, by civil remedies, but also by criminal law. It is an offence to sell or hire, import other than for personal use, distribute for purposes of trade copyrighted material.⁴¹ The Copyright Tribunal is mandated to determine disputes between licensing bodies and bodies requiring a licence. In terms of section 42, the Minister can extend the benefit of the Copyright Act to other countries which are members of a convention to which Zimbabwe is a signatory. However, countries which do not reciprocate, risk their citizens being denied protection in terms of section 45.

Plant Breeder's Rights

Like most IP rights, Plant Breeders fall under the region of private law, ie. it is up to the owner to assert them. Plant Breeder's rights constitute a right of defence enabling the breeder to prevent the misuse of his protected variety. Such rights also form the basis for the commercial utilization of a variety. The plant variety has its origin in the intellectually creative act of a plant breeder and this gives the motivation to the breeder to produce and market the seed or plant variety. Such activities can be transferred to seed production firms or seed trading firms under licensing arrangements.⁴²

39 S. 5 (4).

40 For a comprehensive Global list of Copyright laws in Sound Recordings, film and video, See J. Sterling *Intellectual Property Rights in Sound Recordings, Film & Video* (1993).

41 S. 27 (1) of the Act.

42 A.G. Kiey "How Are Plant Breeder's Rights Exercised by Plant Breeders? International Union for the Protection of New Varieties of Plants (UPOV) Seminar Nairobi, 1993.

In terms of section 2 of the Plant Breeders Rights Act, Chapter 18:16, a breeder is defined as a person who directed the final breeding of the new variety or who developed or discovered a new variety or his legal representative.

An application for a grant of plant's breeder's right must be made in the prescribed form and lodged with the Registrar in the prescribed manner. The date of receipt of the application is crucial, since it establishes the priority of the application.⁴³

Publication is an important factor, it is necessary to advertise that an application has been made and by whom. This enables an interested party to challenge the application or to bring relevant information to the office.⁴⁴ Once all the technical and legal requirements have been met, it is necessary to publish the proposal to grant the right, so as to enable interested parties to appeal. The best way of establishing whether a plant variety is clearly distinguishable, sufficiently uniform and stable in all its relevant characteristics as required by s3 is grow out tests. This involves observing the morphological and physiological characteristics in comparison with similar varieties. In general, vegetatively and self fertilizing crops are easier to test than out breeding species.⁴⁵

To qualify for protection, the plant must have its origin in Zimbabwe and be new in that, before the date of application, it was not publicly available; was generally unknown and is distinct by at least one characteristic from any variety; is uniform and stable.⁴⁶ The office of the Registrar of Plant Breeder's Rights is required to investigate and conduct searches on all applications. In terms of s17 of the Act, it is not an act of infringement for persons to use the plant concerned as an initial source of creating new, different varieties. Further it is permissible to grow and sell the plant or use the seed as long as the purpose is not to reproduce or multiply the plant. Thus the use of heterozygous breeding would be permitted as long as the intent is to create a new, hopefully superior variety.⁴⁷ Thus biological plant variety, i.e. where a hybrid variety is produced by crossing genetically different parents, is allowed. Protection is afforded because the continued breeding of superior varieties requires a fair return to those who invest in plant breeding.

Once the right is registered the holder of the Plant Breeders' Rights (PBR) may impose any conditions, limitations or restrictions on licensees. A party who is refused a license to exploit the PBR can apply for a compulsory license as long as it is in the public interest. Foreign PBRs may be recognised in terms of s32 of the Act. Of interest is s42 which provides that the maximum claimable damages for infringement is \$200-00. While this could amount to a virtual *carte blanche* for people to infringe PBRs, the same section allows the appropriate court (probably the Magistrates Court) to grant an interdict. Disregarding an interdict amounts to contempt of court, which may attract criminal sanction.

Synthesis and Evaluation

Economically it should be acknowledged that IP is not only a form of compensation but also an incentive for innovation. It is a truism that IPRs promote industrialization and the

43 S. 7 (5) of the Act.

44 See J. Harvey "The Administration of a Law Conforming with the UPOV Convention", UPOV Seminar, Nairobi 1993; S. 12 of the Act.

45 H.C. Ghijsen, "Technical Criteria for the Grant of Protection and Their Practical Application", UPOV Seminar Paper, Nairobi, 1993.

46 S.3 (1) of the Act.

47 L Geadelmann, "Plant Variety Protection — A Breeder's View Point", UPOV Seminar, Nairobi (1993).

transfer of technology. Thus as early as the 1330s patents were being granted in England. The Inventors Act of Venice of 1474, being the first European patent statute, provided:

We have amongst us men of great genius, apt to invent and discover ingenious devices . . . now if provision were made for the works and devices discovered by such persons, so that others who may see them could not build them and take the inventor's honour away, more men would then apply their genius, would discover, and would build devices of great utility and benefit to our commonwealth.⁴⁸

The establishment of a manufacturing enterprise in a developing country typically passes through the following stages.

1. Pre-investment studies i.e. feasibility studies and project report.
2. Detailed engineering, plant design and factory layout.
3. Selection of equipment, plant construction, erection and installation of machinery.
4. Acquisition of manufacturing technology.
5. Training and management.

It is the fourth stage that involves the formal transmission of IPRS.⁴⁹

The benefits that any nation can get by an effective regime of IP protection are:

- Increased incentive for business to conduct domestic R & D activity;
- transfer of technology and its diffusion within the economy.
- Incentive for direct foreign investment.

Sight must not be lost of the fact that IP protection can only promote innovative activity in an economy that already has the infrastructure to make innovative activity possible.

Some level of IP protection, it is submitted, is critical in structuring an economy for growth because IP protection encourages the development of a skilled human capital and promotes innovative business strategies and new technologies. Investment in technology and innovation is based on expected future economic value. Accordingly innovation is driven by the corresponding economic payoff. Hence there is a need to encourage research and development in a developing nation. One such way is the giving of tax credits in industries engaged in R & D.

Zimbabwe recognises IP protection of technological inventions relating to life, health and feeding of human beings. Yet these should be of universal use, reproduction and imitation because of their public interest content. Although Zimbabwean statistics show the scope of IPR as mostly of foreign origin, it is not because of the patent system *per se*. It appears there is little innovation coming from our own people.

During the period 1989-1993, 961 patent applications were filed, of which 729, i.e. over 75% originated from foreign sources. Only 232 were made by residents of Zimbabwe. Of the 729 foreign applications, 630 were convention applications i.e. subject to examination in the country of origin, but not in Zimbabwe. In principal we should subject all foreign patents applications to substantive examination i.e. Zimbabwe should use its own criteria, rather than automatically recognizing foreign registered patents.

Most Zimbabwean companies do not have Research and Development Departments. In Zimbabwe there is no searching system. The onus is on he who alleges that the patent is novel if infringed. In countries where there is a searching system, the onus is on the infringer to show that the patent is not novel. Most companies have not moved from the licensing of

48 Quoted in Blakeney, *Legal Aspects of Technology Transfer* p. 49.

49 *Ibid* 13.

foreign technology. Invariably many Zimbabwean entities pay vast sums of money for technology, the patent of which has already lapsed.⁵⁰ The patent office needs a complete overhaul. Among its current weaknesses is lack of technical personnel. In developed countries, patent offices are staffed by scientists, engineers and lawyers. There is no reason why this should not be so in Zimbabwe. This would greatly reduce the chances of false "inventions" being patented in Zimbabwe. Such qualified personnel would ensure that the country benefits from the provisions of section 30 of the Patents Act, which requires that patents registered in Zimbabwe must be commercially worked in Zimbabwe, failing which compulsory licenses may be granted to interested parties. There is need to correct the anomaly that allows people to register patents locally and work them elsewhere. Further there is need for Zimbabwe to adopt the first to invent system. This would be to the advantage of local innovators, whose projects normally take years to bear fruition.

The IP policy of a developing country should reflect a strategy based on making technology available within the domestic market at the lowest price possible. The issue is not one of doing away with the IPR protection, but rather one of broadening the scope and coverage. Of concern is the issue of copyright for computer software, satellite broadcasting and rights for musicians which are not explicitly covered by the current Copyright Act. The 1988 draft bill which was supposed to cover these and cultural rights has yet to see the light of day. Copyright should confer on authors the right to prohibit commercial rental to the public of originals or copies of their copyright, unauthorised recording of live performances and reproduction of such tapes, broadcasting by radio of live performances, such right covering phonogram producers and broadcasting organizations. One needs to balance such protection with the interests of other players such as students who are the major users of unauthorized copies of books and software. Improved intellectual property protection that increases the cost of education, can be viewed as a threat to the attainment of education.⁵¹ There is further need to harmonize Zimbabwean copyright law with the internationally recognised norms by explicitly protecting computer software and topographies. The Copyright Act should have an Administering Authority, which is currently not provided for.

While Zimbabwean law meets the required standards, the problem appears to be one of illiteracy, both at a legal and at a scientific level. While anyone can invent, they appear not to know how to protect the invention by registration. Very few people know of the existence of an IPR office in Zimbabwe. There is an obvious need to publicise the IPRs regime to the ordinary people. A way would be the holding of Technological Fairs.

THE CHALLENGE OF BIOTECHNOLOGY

Biotechnological invention, especially in the field of genetic engineering, has assumed critical importance in the treatment of diseases and agriculture. Frederick S. Ringo⁵² argues that technologies, particularly in the pharmaceutical and chemical industries, which rely on patents in production and process and on trademarks in marketing should not be protected by IP laws in developing countries. Most industrialised countries only introduced

50 Source: Office of the Controller of Patents, Trademarks and Industrial Designs.

51 R. M. Gadbow and T. J. Richards Eds. *Intellectual Property Rights, Global Consensus, Global Conflict?* 15 (1988).

52 "The Trade-Related Aspects of Intellectual Property Rights in the GATT and Legal Implications for Sub-Saharan Africa — Prospective Policy Issues for the World Trade Organisation" Vol. 28, No. 6, *Journal of World Trade*, pp. 121-139, (1994).

protection, after the development of their domestic industries.⁵³ He makes the observation that patenting plant life in economies that are agro-based can result in food insecurity, and in some cases, the disappearance of drought and sickness resistant strains. TNCs are the only beneficiaries in these circumstances.⁵⁴

Originally, the view was that discoveries involving living organisms and materials were not patentable inventions. Exceptions were micro organisms used in fermentation in antibiotics. The turning point was in 1969 when the German Supreme Court held that animal breeding techniques were patentable as long as the technique was repeatable. The US Supreme Court followed suit in 1980 when it ruled that genetically engineered bacterium, capable of breaking down crude oil components was patentable. The issue is not whether the invention involves living or inanimate matter, but whether it involves a human made invention.⁵⁵

Industrial application includes agriculture. Thus in Zimbabwe patents are granted to uses of chemical substances in the production of plants and animals for commercial purposes. In the developed world methods of treating human or animal bodies are generally not patentable. A new substance or compound unknown in the art is patentable and so are claims to the methods of production which deploy micro-organisms.⁵⁶ Access to biotechnology has become a pressing issue to developing countries.⁵⁷ The developed world holds two thirds of all gene bank collections and over four fifths of microbial material. Yet most biodiversity is found in the developing world the largest plant diversity being in Southern Africa.⁵⁸

It is true that genetic interdependence characterises the entire globe. For example, in 1990 bovine embryos of 269 Tuli cattle and 264 Boran cattle were exported from Zimbabwe and Zambia to Australia to improve Frisian herds with higher fertility levels, docility and stress resistance. Using multiple ovulation and embryo transfer techniques, the imports are now regarded as the saviours of the Northern Australian Cattle industry.⁵⁹ Yet the communities from whence these cattle breeds originate have not benefitted from the use of their cattle.⁶⁰

Concrete concerns like agricultural biodiversity, farmers' rights cannot be catered for under the formal IPRs system in Zimbabwe for the simple reason that such a system is private rights oriented. Thus the argument for adopting a *sui generis* IPR system in relation to plants, animal breeds, cultural artifacts, historical names and geographic indications sounds attractive. Under such a system an inventor's certificate could be issued to a vesting authority representing communities in which economically useful animals, plants, or artifacts are known to exist. Accordingly there is a need for further debate on whether public law should cover such new concerns. That debate should consider the following:

- The desirability of recognizing IPRs over genetic resources at the level of individual farmers, traditional healers or community levels.

53 *Ibid.*, 123.

54 *Ibid* at 131.

55 See *Diamond v Chakrabaty* 447 US 303 (1980).

56 W. R. Cornish, *Intellectual Property: Patents, Trademarks and Allied Rights*, 145-149 (1989).

57 Blackeney, *Legal Aspects of the Transfer of Technology to Developing Countries*, 12.

58 RAFI Study, *Conserving Indigenous Knowledge; Integrating Two Systems*, 39.

59 *Ibid.*, 66.

60 For example of how such communities can benefit see the alternative models. See the Crucible Group, *People, Plants and Patents* (1994).

- The need for inventors to enter into contractual relationship with the farmer, community or nation
- The possibility of introducing IP rights that only protect the inactive step but do not extend to the subsequent natural evolutionary modification of the organism.
- The need to ensure agricultural and research policy to foster local innovation and conservation of genetic resources.⁶¹

It is difficult to protect agricultural genetic resources because of the self reproducing nature of the seed. The purchaser of a seed possesses not only the physical asset containing the innovation, but the means of reproducing them at low cost. Hence legislation on PBR grants the exclusive right to sell a specific variety but does not preclude farmers from saving the seed.

By recognizing Plant Breeders rights Zimbabwe appears to favour breeders, ostensibly as a measure to stimulate innovation. The arguments for such a system are that Chemical plant breeding would not take place without the incentive provided by IPR. Extending the protection of IPRs to unimproved sources is problematic in that the market value of the material involved is usually low. While knowledge of potentially valuable medicinal plants is important the pharmaceutical process of "screening the possible candidates, isolating active compounds, testing for possible toxicity and then undertaking clinical trials",⁶² involves great cost.

As a matter of survival, indigenous peoples have long carefully nurtured and developed biodiversity. But they have received little benefit from its commercial exploitation. Most genetic material is stored and controlled by scientists of the North. Thus:

- (a) 68% of all crop seed from developing countries is stored in industrialised countries.
- (b) 85% of all foetal populations of livestock breeds, originally domesticated in the south is stored in the north.
- (c) 86% of the global microbial cultured collections such as yeasts, fungi and bacteria is also banked in the industrialised countries.⁶³

Some 40% of the world's market economy is based on biological products and processes. In developing countries rural dependence on biomaterial can exceed 90% of the human survival needs.⁶⁴ It would thus be folly for a developing country like Zimbabwe to allow the patenting of biological material *in toto* without examining the pitfalls. A PBR system may encourage the development of plant varieties with the largest market potential, at the expense of crops that are better adapted to larger areas and with characteristics that best meet the requirements of larger segments of the farming community.

It is estimated that more than two thirds of the global plants with medicinal value originate from developing countries. At least 7 000 compounds in the western pharmacopoeia, ranging from aspirin to birth control pills, are drawn from plants. Since the development of medicinal plants is dependent on the knowledge of local peoples, benefits sharing becomes an issue.

Although traditional healers may believe in trade secrecy, this carries the risk of reverse engineering. While trade secrets can last a long time, they are increasingly becoming difficult

61 M Khalil *et al*, *Property Rights, Biotechnology and Genetic Resources* p. 56 Acts Press (1992).

62 *Ibid* p. 39.

63 Source : RAFT, *Conserving Indigenous Knowledge* pp22.

64 The Crucible Group: *People, Plants and Patents* p23.

to keep. The allure of money in today's market economy multiplies the chances of unauthorized disclosure. Knowledge of herbs on its own cannot be protected under the current regime because herbs exist in nature. What can be patented is a new use of that herb or some other element. Most traditional healers do not add anything to their herbs. Therefore it makes sense for the protection of herbs to fall under a *sui generis* system wherein the rights to such herbs vest in an organ on behalf of the entire community. The same holds true for folklore and local knowledge.

FRAMEWORK FOR REFORM

The starting point for whether plant or biological inventions should be patented is Article 27(3) of the TRIPS agreement which provides that members may exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals.
- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

The above section gives governments a number of choices, depending on what they perceive to be in their best interests. They may protect plant varieties under patent laws or under PBR (the later is the current Zimbabwean option). Alternatively they may opt for *sui generis* legislation. The advantage of *sui generis* legislation as a form of IP protection is that it can be especially designed to meet local priorities and needs.

The Convention on Biological Diversity (CBD), which came into force in 1993, recognizes national sovereignty over bio-resources. The CBD lays out the framework for global bio-diversity protection. Article 15(10) of the CBD self explanatorily provides:

recognising the sovereign rights of states over their natural resources, the authority to determine access to generic resources rests with the national governments and it is subject to national legislation.

In terms of follow up and policy formulation it is imperative for Zimbabwe to consider Article 8(J) which requires a member state,

subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional life styles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and *encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices* (emphasis mine).

Under the doctrine of national sovereignty countries are free to adopt any IP arrangement affecting genetic resources. The current PRB system is tilted heavily in favour of plant breeders at the expense of farmers. Agriculture, which is the backbone of our economy, should not become an expensive business. Further, there are no safety mechanisms for genetically engineered plants and other life forms i.e. their effect on future generations is currently unknown. One is immediately drawn to the mad cow crisis in Great Britain. It is apparent that the IPR system cannot be superimposed on agriculture and bio-diversity.

The patent system is unsuited to plant life because of the distinction between discoveries and inventions. Discovery relates to new knowledge, which may suggest a new thing. An invention is a new process or product. Thus the sequence of a gene is in general a discovery; it is knowledge of something that already exists. This is different from genetically engineered genes which are patentable.⁶⁵

RECOMMENDATIONS

There is need for regulatory legislation to regulate the exchange and compensation of biological resources. Such a regulatory framework will be to the mutual advantage of scientists and local communities and innovators. In terms of the CBD, access can be linked to technological transfer. "By consulting indigenous peoples, specialist bio-prospectors can increase their success ratio from one out of 10 000 samples to one out of two."⁶⁶ Under such a regulatory framework, materials held in gene banks, whose passport indicates that it was unlawfully collected from Zimbabwe, should be regarded as forming part of the intellectual integrity of the country as a whole.

Under a *sui generis* regulatory regime, government can introduce a system of inventor's certificates. For international recognition, the government need only inform the WTO that such legislation now exists. Forms of recognition or compensation can either be determined by legislation or through regulation. A system of inventor's certificates allows the government flexibility in varying the methods of recognition, permitting or excluding monetary compensation, granting licence ensuring that the technology is applied nationally and varying the period of protection.

To prevent unfair trade practices, bio-prospecting agreements should not be directly between the community and the TVs, rather it should be made within the framework of broader intergovernmental arrangements. Under a *sui generis* system, Material Transfer Agreements can be recognised. It would provide for payment of specific germplasm; reporting provisions advising the community of research related to the germplasm, technology transfer etc.⁶⁷

There is need not only to put in place a system that not only prohibits bio-piracy, but one that also provides for benefit sharing to the country of origin of the bio-material. Such benefits can be in the form of access and compensation to the country of origin. Obviously one must distinguish between the commons and the individual, e.g. the community and the individual herbalist. The regulatory system must recognise both i.e. some plants are in the commons, while others maybe in the exclusive domain of a specialist herbalist. The system suggested should foster co-operation between the formal and informal sector. Covenant agreements can provide the co-operative link between the formal and informal sectors and at the same time provide for benefit sharing.

65 *Ibid* at p 104.

66 *Ibid.* p 32.

67 *Ibid.* pp46-49.



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