

Advisory Committee on Enforcement

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NATIONAL AND REGIONAL EXPERIENCES WITH WIPO'S CAPACITY-BUILDING ACTIVITIES IN THE AREA OF BUILDING RESPECT FOR INTELLECTUAL PROPERTY

Contributions prepared by Botswana and the Eastern Caribbean Supreme Court

1. At the thirteenth session of the Advisory Committee on Enforcement (ACE), held from September 3 to 5, 2018, the Committee agreed to consider, at its fourteenth session, the “exchange of success stories on capacity building and support from WIPO for training activities at national and regional levels for Agencies and national officials in line with relevant Development Agenda Recommendations and the ACE mandate”. Within this framework, this document introduces the contributions of one Member State (Botswana) and one Observer (the Organization of Eastern Caribbean States (OECS)).
2. The contributions underscore the importance of capacity building as an effective approach to empowering authorities to undertake successful intellectual property (IP) enforcement activities. Both contributions underline the quality of capacity-building activities provided by the World Intellectual Property Organization (WIPO), with reference to the programs, the choice of experts and the practical approach of the activities. The contribution by the OECS highlights the synergies between the work of the WIPO and the Judicial Education Institute of the Eastern Caribbean Supreme Court in the area of building respect for IP. The contribution by Botswana illustrates the impact the legislative assistance provided by WIPO in the area of IP enforcement has had on national legislative reform and stresses the utility of customized WIPO training materials in providing law enforcement authorities with the necessary understanding and knowledge to target counterfeiting and piracy.

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WIPO'S CAPACITY-BUILDING ACTIVITIES AND SUPPORT FOR TRAINING ACTIVITIES IN THE AREA OF BUILDING RESPECT FOR IP AND IP ENFORCEMENT IN BOTSWANA

*Contribution prepared by Mr. Conductor Paul Masena, Registrar General, Companies and Intellectual Property Authority (CIPA), Gaborone, Botswana**

ABSTRACT

After an introduction to Botswana, the Companies and Intellectual Property Authority (CIPA) and the intellectual property (IP) laws in force in Botswana, the contribution describes the assistance Botswana received in recent years from the World Intellectual Property Organization (WIPO) in form of both legislative assistance in the area of IP enforcement and the organization of several building respect for IP capacity-building activities. To further support capacity building in the area of IP enforcement in Botswana, WIPO, in collaboration with CIPA, also developed a customized training manual entitled *Investigation and Prosecuting Intellectual Property Crimes in Botswana* for use by law enforcement authorities and prosecutors. The contribution also reports on a number of improvements in IP enforcement that Botswana made following the assistance provided by WIPO.

I. INTRODUCTION

A. BOTSWANA AT A GLANCE

1. Botswana is a land-locked country situated in Southern Africa. It borders South Africa, Namibia, Zambia and Zimbabwe. Approximately two-thirds of the country lie within the tropics. The country has a population of 2,230,905 (Statistics Botswana, 2016 estimate), with a growth rate of 1.8 per cent per annum (World Bank, 2016 estimate).

2. Botswana's major export revenue earners are gem diamonds followed by copper, soda ash, beef and tourism. Attempts to diversify the economy away from diamonds are ongoing through the Economic Diversification Drive initiated by the Ministry of Investment, Trade and Industry (MITI).

B. THE COMPANIES AND INTELLECTUAL PROPERTY AUTHORITY (CIPA)

3. The Companies and Intellectual Property Authority (CIPA) is a parastatal entity under the MITI established through the Companies and Intellectual Property Authority Act, 2011 (CAP 42:13).

4. The objectives of establishing CIPA as a parastatal entity were to: improve operational efficiency, thereby enhancing the ease of doing business in Botswana; establish an organization with the potential to sustain itself; and attract and retain human capital.

5. CIPA's mandate is to register businesses and to protect intellectual property (IP) rights. In so doing, it administers four pieces of legislation: the Companies Act (CAP 42:01), the

* The views expressed in this document are those of the authors and not necessarily those of the Secretariat or of the Member States of WIPO.

Registration of Business Names Act (CAP 42:05), the Industrial Property Act (CAP 68:03) and the Copyright and Neighboring Rights Act (CAP 68:02). When CIPA was established, it was also recognized that there was a need for CIPA to fulfill an effective public relations function to create general awareness of the requirements specified in the Acts administered by CIPA, the penalties for non-compliance, the respective rights of the various stakeholders and the services that CIPA provides. It was in view of the above that the Department of Compliance, Awareness and Client Services (CACS) within CIPA was established.

C. INTELLECTUAL PROPERTY LAWS

6. Botswana has modernized IP laws covering both copyright and industrial property. The current Industrial Property Act (CAP 68:03) was amended in 2010 to enable Botswana to effectively comply with its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Patent Cooperation Treaty (PCT) and the Madrid Agreement and Protocol Concerning the International Registration of Marks.

7. The Copyright and Neighboring Rights Act (CAP 68:02) was enacted in 2000 and amended in 2006. It is generally compliant with the TRIPS Agreement, the Berne Convention for the Protection of Literary and Artistic Works, the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

II. WIPO ASSISTANCE TO BUILD RESPECT FOR IP IN BOTSWANA

A. LEGISLATIVE ASSISTANCE

8. In its quest to improve the IP landscape and for the country to fully derive the benefits of the IP system, Botswana requested WIPO, in 2013, to undertake a diagnostic assessment of the national legislative framework for IP enforcement. This diagnostic work entailed interviews and Workshops with various stakeholders and an assessment of Botswana's laws to determine whether they were adequate for an effective enforcement of IP rights in line with Part III of the TRIPS Agreement. The entities involved included the Registrar of Companies and Intellectual Property (now CIPA), the customs authorities, the police, the consumer protection office, the bureau of standards, prosecutors, the Attorney General's Chambers, the Copyright Society, right holders' associations and the legal fraternity.

9. The laws that were assessed were, *inter alia*, the Drugs and Related Substances Act, 1992 (CAP 63:04), the Proceeds of Serious Crime Act, 1990 (CAP 08:03), the Control of Goods, Prices and Other Charges Act, 1973 (CAP 43:08), the Standards Act, 1995 (CAP 43:07), the Food Control Act, 1993, (CAP 65:05), the Penal Code, 1964 (CAP 08:01), the Customs and Excise Duty Act, 1970 (CAP 50:01), the Copyright and Neighboring Rights Act, 2000 (CAP 68:02), the Industrial Property Act, 2010 (CAP 68:03), the Consumer Protection Act, 1988 (CAP 42:07) and the Consumer Regulations, 2001.

10. The WIPO assessment revealed that Botswana had adequate laws that could be used to enforce IP (despite a potential need for review in some of the laws). The challenges of IP enforcement can therefore not be completely attributed to the legal framework. However, the entities involved indicated a number of difficulties encountered in enforcing the various legislative Acts. The main difficulties was the lack of coordinated efforts in the sense that while legislation may be in place, certain powers of arrest, charging and investigation may not be prescribed for the officers, therefore making their enforcement role minimal. Police officers, as much as they have been assigned the responsibility to enforce all written laws of the country, lack capacity in terms of awareness of the laws and charges that apply in case of

IP infringements. The lack of coordinated efforts results in an unabated flood of pirated and counterfeit goods onto the market, which is a health risk to consumers, a hindrance to investment, a disadvantage to the rights holders and has many other negative effects.

11. The assessment made recommendations for changes to several laws to strengthen IP enforcement. Key among the recommendations was the introduction of a provision on border measures in the Customs Act to tackle the importation of allegedly counterfeit trademark and pirated copyright goods. Other recommendations concerned the civil remedies in both the Copyright and Neighboring Rights Act and the Industrial Property Act.

12. At the operational level, another key recommendation was the setting-up of an inter-agency body with representatives of the relevant ministries and law enforcement agencies, the prosecution and the judiciary. It was also recommended to establish a specialized unit on IP crime within the police. The assessment also re-emphasized the need to raise the public awareness of the importance of respect for IP and to ensure the availability of accessible information as to what do and where to turn in case of IP infringement.

13. The WIPO assessment of the legislative framework for IP enforcement of Botswana has become the blueprint upon which all CIPA initiatives to build respect for IP are anchored. Some of the recommendations have been implemented. A new Customs Act, incorporating provisions for border measures under its Part III, was passed in 2018. In addition, an inter-agency body was been set up to deal with IP enforcement issues.

14. According to the 2018 International Property Rights Index of the Property Rights Alliance, Botswana ranks 62 globally and seven within the Southern African Development Community (SADC) Region in terms of the protection of IP rights¹. To strengthen IP enforcement, Botswana is currently developing a national IP Policy that entrenches IP enforcement as a critical issue to be addressed. The proposed IP Policy will be presented to Parliament in the course of 2019. In addition, both the Copyright and Industrial Property Laws are being reviewed, taking into account the legislative comments received from WIPO.

B. CAPACITY-BUILDING INITIATIVES

15. Several IP trainings and awareness-raising activities have been carried out with the assistance of WIPO to build capacity within different enforcement authorities.

16. From June 27 to 29, 2018, CIPA and WIPO organized a *Workshop on Building Respect for IP for Senior Police Officials, Public Prosecutors and Magistrates*. The goal of the Workshop was to impart knowledge on IP enforcement. Examples of topics covered include copyright piracy, trademark counterfeit and civil remedies under the TRIPS Agreement, the environmentally safe disposal of IP-infringing goods and the investigation and prosecution of IP crimes.

17. Prior to the Workshop, WIPO had developed, in collaboration with CIPA, a customized version of its training materials *Investigating and Prosecuting Intellectual Property Crimes* for use in Botswana. The resulting training manual *Investigating and Prosecuting Intellectual Property Crimes in Botswana* has been designed specifically as a guide to law enforcement authorities and prosecutors and provides general guidance on the legal elements of piracy and counterfeiting and relevant investigative and evidential issues. It was launched during the Workshop.

¹ <http://www.internationalpropertyrightsindex.org/country/botswana>.

18. Following the Workshop, Botswana has made progress in the area of IP enforcement. In particular, the country is moving from charging infringers of IP-protected works with admission of guilt and trading without license, which had been relied upon over a long period of time, to applying the criminal enforcement mechanisms that the IP laws contain. To foster the use of criminal enforcement mechanisms (which is still in its infancy), CIPA collaborates with both the Directorate of Public Prosecutions (DPP) and the police. The DPP, which depends on the groundwork laid down by the police in gathering evidence, has never handled an IP case before and, when approached by CIPA, expressed its willingness to collaborate with CIPA on prosecuting IP crimes.

19. CIPA nurtures an effective collaboration with the police. This entails joint raids and educating new recruits and services officers in application of the Copyright Act and the enforcement powers it contains. For the past four years, CIPA has collaborated with the Botswana Police to undertake 39 raids, during which pirated DVDs and music CDs amounting to BWP 2,863,920 (approximately USD 266,239) were confiscated. Through checks CIPA and the police continue to survey the market for hot spots of IP-infringing goods.

20. The collaboration between CIPA, the DPP and the police aims at ensuring that perpetrators of IP crimes are charged in accordance with criminal provisions contained in the national IP laws and receive appropriate sanctions. A successful collaboration to build up case law in this area could be a stepping stone for identifying possible improvements in other areas of the IP system to further ensure efficient and effective enforcement of IP rights in Botswana.

21. CIPA has also entered into an agreement with the Botswana Unified Revenue Services (BURS) and the University of Botswana in an effort to strengthen IP enforcement and educate the country about IP. BURS officials inform CIPA and the International Criminal Police Organization (INTERPOL) when allegedly IP-infringing goods enter the country. The goods are seized and handed over to allow CIPA and INTERPOL to engage with right holders to assist in taking the infringers to court.

22. One major problem, however, is the unwillingness of right holders to provide the evidence necessary to prosecute the perpetrators of IP crime. To address this, CIPA is in a process of engaging brand owners to ensure that they have local representatives who can timely assist in identifying IP-infringing goods and support CIPA, the BURS and INTERPOL in prosecuting the infringers.

23. Judges and magistrates in Botswana are now confident with prosecuting IP crimes and ready to handle such cases. In order to offer continues training for judges, Botswana has recently made a request through the WIPO Academy to enroll judges in the general course on IP for judges. The judges and magistrates are pleased with the assistance offered by WIPO and look forward to more programs.

24. In addition to the training offered to the law enforcement officers, judges and magistrates, Botswana has also benefited from other WIPO programs, such as the WIPO online courses. Since 2010, WIPO, in collaboration with the African Regional Intellectual Property Organization (ARIPO), has offered Botswana a chance to pursue Masters Degrees in Intellectual Property Law offered by the Africa University in Zimbabwe. These contributions are highly appreciated as they have made a great difference in ensuring that Batswana understand IP, which ultimately makes the journey to build respect for IP a little bit easier.

C. OTHER ENFORCEMENT INITIATIVES

25. In 2016 and 2017, CIPA collaborated with the embassy of the United States of America (USA) in Botswana on carrying out IP Workshops for right holders and law enforcement agencies. The Workshops gave all actors in the field of IP a chance to learn from the best practices that developed in the USA.

26. From April 23 to 25, 2019, the embassy of the USA, in collaboration with ARIPO, hosted a Workshop in Botswana, intended to equip judges from the SADC with knowledge of IP prosecution. The Workshop was attended by judges from the SADC and the USA as well as officials from ARIPO and the United States Patent and Trademark Office (USPTO).

27. From May 20 to 22, 2019, Botswana hosted a *Regional Train-the-Trainers IP Enforcement Workshop for Police Instructors and Prosecutors* to train police officers and prosecutors to deal with IP crimes. The workshop was supported by WIPO, ARIPO and the United States Department of Justice.

28. The above initiatives show a commitment by the Government of the USA to build Botswana as a center of excellence for combating IP crimes in the region.

D. AWARENESS-RAISING ACTIVITIES

29. As part of its efforts to improve IP enforcement, Botswana has developed a concept for the establishment of IP clubs in schools as a sustainable way of creating IP awareness among schoolchildren. It is foreseen that the project be coordinated by ARIPO with the support of WIPO and Republic of Korea. Botswana would be one of the three ARIPO member states to implement the project, which is scheduled to commence in 2019.

30. Since 2012, Botswana has commemorated World IP Day to create awareness on the importance of IP. Many activities including workshops, seminars, debates on national television, anti-piracy marches, radio programs and engagements at universities and secondary schools have been undertaken to sensitize the country on the value of IP. In 2019, Botswana commemorated World IP Day under the theme *Reach for Gold: IP and Sports*. The event was attended by sports stakeholders, and activities included a debate by secondary school students and a key note address by a Sports Attorney from the United States of America. The event was also graced by 44 judges from SADC, who were in Botswana for a Workshop organized by ARIPO and the USPTO.

III. CONCLUSION

31. Botswana is greatly honored by the assistance that WIPO has extended in the field of building respect for IP. The advice given through various experts invited to present at the Workshops and the guidance offered through the Training Manual has contributed immensely to prosecuting IP cases. CIPA has now partnered with the DPP for the prosecution of IP cases. CIPA also works in collaboration with various enforcement agencies such as the BURS and INTERPOL in ensuring the implementation of all Acts that support the protection of IP in Botswana. Through this initiative, the Customs Act, the Cyber Crime Act and the Penal Code have also been brought into the picture to assist in prosecuting IP crimes.

[End of contribution]

THE EASTERN CARIBBEAN SUPREME COURT AND CAPACITY-BUILDING IN INTELLECTUAL PROPERTY

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ABSTRACT

This contribution considers the importance of capacity building for the administration of justice in the Organization of Eastern Caribbean States in the area of enforcing intellectual property rights (IPRs) and the benefits of assistance received from the World Intellectual Property Organization (WIPO) in the training of judicial officers. IPRs are of little value unless they can be enforced effectively and expeditiously. To accomplish this goal, judicial officers must be properly trained to adjudicate in intellectual property (IP) cases. WIPO, with its own expertise and access to external experts in this field, has proven that it is well equipped to provide training in various areas of IP, including on civil and criminal remedies that a court may grant in infringement proceedings. The contribution concludes with a suggestion of how WIPO could enhance the training of judicial officers.

I. INTRODUCTION

1. The Eastern Caribbean Supreme Court (ECSC) was established by the West Indies Associated States Supreme Court Order No. 223 of 1967. The ECSC comprises the High Court of Justice in each member state and territory and a Court of Appeal. The member states served by the Supreme Court are Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and the three British Overseas Territories of Anguilla, the British Virgin Islands and Montserrat.

II. THE ORGANIZATION OF EASTERN CARIBBEAN STATES

2. The member states and territories served by the Supreme Court form part of the sub-regional Organization of Eastern Caribbean States (OECS). The OECS is dedicated to economic harmonization and integration, the protection of human and legal rights and the encouragement of good governance in independent and non-independent Eastern Caribbean countries. The 1981 Treaty establishing the OECS was revised in 2010 and re-named the Revised Treaty of Basseterre (RTB). In addition to the member states and territories mentioned above, the French departments of Martinique and Guadeloupe are also members of the OECS, having acceded to the Treaty in 2016 and 2019 respectively.

3. The purpose of the OECS is:

- to promote cooperation among its member states at the regional and international levels, having due regard of the Revised Treaty of Chaguaramas and the Charter of the United Nations;

* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

- to assist member states in the realization of their obligations and responsibilities to the international community, bearing in mind the role of international law as a standard of conduct; and
- to serve as an institutional forum for the discussion and facilitation of constitutional, political and economic changes necessary for the successful development of member states and their participation in the regional and global economies.

4. In line with the outlined objectives of the OECS, the RTB mandates member states, in implementing decisions of the Organization, to undertake joint action and pursue joint policies in various fields including: (a) the judiciary and the administration of justice; (b) education, including tertiary education; and (c) intellectual property rights (IPRs).

5. OECS member states are also members of the World Trade Organization (WTO) and are bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Since their accession to the WTO in 1995, OECS members have been active in providing legal protection for intellectual property (IP). The states and territories served by the ECSC all have legislation on IPRs, including copyright, trademarks, patents, geographical indications, integrated circuits, industrial designs and new plant varieties. Moreover, they protect trade secrets and traditional knowledge.

III. INTELLECTUAL PROPERTY INFRINGEMENT AND ENFORCEMENT

6. The Supreme Court decides on IPR cases in its capacity as a domestic court hearing matters at first instance in the High Court of Justice in each state and territory served by the ECSC and in the Court of Appeal. Such domestic disputes may relate to IPR infringement and enforcement pursuant to legislation in these states and territories.

7. Moreover, under the RTB, the Court of Appeal has original jurisdiction for any dispute arising from the RTB, which may include IPR disputes. It is recalled that OECS members otherwise endeavor to coordinate, harmonize and undertake joint action, and, in particular, to pursue joint IPR policies.

8. The ECSC must, therefore, be familiar not only with the various IPRs that may form the subject of domestic disputes between parties in a given member state or territory, but also with trade-related aspects of IPRs that underpin the RTB, since the Court has exclusive original jurisdiction to deal with such matters.

IV. THE JUDICIAL EDUCATION INSTITUTE

9. The Judicial Education Institute (JEI) was established by the ECSC with a mandate to:

- enhance the administration of justice through education and training, by highlighting and providing the knowledge, skills and awareness required by judicial officers and their support staff to effectively perform their responsibilities;
- engender a high level of public awareness of the judicial system; and
- act as a certifying body for training programs.

10. Accordingly, the JEI is committed to coordinating and organizing various conferences, programs and projects, symposia, training sessions and workshops, in accordance with its mandate.

V. THE COLLABORATION BETWEEN THE JUDICIAL EDUCATION INSTITUTE AND THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

11. Given the ECSC's mandate to decide IP disputes that come before it and to settle disputes between member states and territories concerning the RTB, including on IP, the ECSC must familiarize itself with those IP laws and the IP trade-related aspects under the RTB. The JEI is therefore best placed to drive IP-related continuing education programs for the judicial officers of the ECSC.

12. At the World Intellectual Property Organization (WIPO), a lot of work is dedicated to building respect for IP. This involves helping to create an environment in which IP can fulfill its role to stimulate innovation and creativity and fostering an environment in which the IP system provides equitable benefits for IP owners and users alike. The aims of the WIPO Division for Building Respect for IP are to:

- support informed and empirically well-founded policy discussions at the international level;
- strengthen capacities in Member States for the effective enforcement of IPR in the interest of social and economic development and consumer protection; and
- promote a culture respectful of IP through education and awareness raising.

13. Consequently, there are natural synergies between the JEI and WIPO's Building Respect for IP Division. Under its programs, the JEI has collaborated with WIPO in providing IP training for the judiciary at both the High Court and the appellate level. WIPO's capacity-building activities and support for training activities in building respect for IP and IP enforcement are not of recent vintage. A WIPO Symposium on IP for the ECSC Judiciary was held in Saint Lucia as early as July 2001. On July 28 and 29, 2006, in collaboration with WIPO, a colloquium on the Protection of IPRs was held at Fort Young Hotel, Dominica, for judges of the Court.

14. On July 25 and 26, 2018, the JEI and WIPO held a two-day Colloquium on IP as part of the JEI's Annual Judicial Conference in Saint Lucia. Topics covered during this activity included:

- Building Respect for IP – A Balanced Response to the Infringement of IPRs;
- IP Crimes and the Public Interest;
- IP Protection and Enforcement in the Eastern Caribbean;
- IP Crimes;
- Sentencing, Proportionality and Disposal;
- Consumer Attitudes;
- Piracy, Counterfeiting and Copycat Packaging; and
- Enforcement of IPRs for the Judiciary.

VI. THE USEFULNESS OF INTELLECTUAL PROPERTY TRAINING

15. The presentations of the 2018 Colloquium were clear, succinct and informative. Together with the ensuing discussions, they were of great interest to the participants, who expressed high satisfaction with the training overall. More generally, in providing much-needed IP training to judicial officers over the years, WIPO's Building Respect for IP Division took a very practical

approach that enabled substantial interaction between presenters and participants. Furthermore, owing to the inclusion in the trainings of local personnel who were familiar with regional IP laws and local challenges, the issues raised were considered in a local context. In relation to the 2018 Colloquium, the judicial officers found the PowerPoint materials and other information useful. Approximately 80 per cent of them attended an IP training for the first time. They thus gained a much better understanding of the application of both civil remedies, such as damages, injunction and seizure, and criminal remedies, including orders for delivery and destruction, fines and imprisonment, as well as the various factors that should guide a court in making its determination in a given case. Only three months after the 2018 Colloquium, an IP case came before the Court of Appeal, which was able to deal with the matter expeditiously.

VII. THE WAY FORWARD

16. It may be beneficial if the next round of training were provided by IP judges who have vast experience in dealing with IP cases. Aside from providing knowledge on the various forms of IP infringement, enforcement and other related issues, training by a judge dealing almost exclusively with IP cases would provide the members of the ECSC judiciary with additional practical knowledge of the way in which IP disputes are resolved at the trial or appellate level. In this respect, it would be useful to not only get the perspective of a judge based in the United Kingdom but also of one from the United States of America. A meeting similar to the inaugural Intellectual Property Judges Forum that was organized in Geneva from November 7 to 9, 2018, by the recently established WIPO Judicial Institute, would be useful to the judicial officers of the ECSC, with the exception that such meeting should be organized primarily as a training exercise rather than a forum for discussion.

VIII. CONCLUSION

17. The increasing role that IPRs play in international transactions in goods and services has raised the demand for IP protection. The existence of IPR laws and their well-organized and efficient administration are necessary elements of such protection. However, without proper enforcement mechanisms, IPRs become virtually meaningless. Courts constitute a critical component of IP enforcement mechanisms, and it is against this background that the JEI has recognized the need to build the capacity of the ECSC judicial officers to enable them to apply the relevant IP laws effectively. The provision of training will therefore remain a priority.

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