

A new intellectual property organization for Africa?

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Final Draft Statute of the Pan-African Intellectual Property Organization (PAIPO) (Ref: AU/STRC/522)

The Final Draft Statute of PAIPO, the constitutive document for a new African IP organization created under the auspices of the African Union (AU), has now been published.

Legal context

Intellectual property issues in Africa are governed by two regional IP organizations: the African Regional Intellectual Property Organization (ARIPO) for English-speaking Africa and the Organization Africaine de la Propriété Intellectuelle (African Intellectual Property Organization) (OAPI) for francophone Africa. ARIPO, established in Nairobi in 1986, has the following countries as members: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. South Africa and Nigeria have observer status. The members of OAPI are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal and Togo. Although these two organizations have been serving their members fairly well, it has been repeatedly argued that having two separate IP organizations is not to the advantage of Africa's quest for greater integration and unification (see eg T Kongolo 'New Options for African Countries regarding Protection of New Varieties of Plants' (2001) 4(3) *J World Intellectual Property* 349).

Other African regional groupings also recognize the importance of co-operation in IP issues and engage in IP norm setting. A case in point is the Southern African Development Community (SADC) which, in its Protocol on

Science, Technology and Innovation of 2008 recognizes the '[i]mportance of Intellectual Property Rights (IPR) protection in promoting the development and application of STI' (see Preamble, para 7). Another example is the Common Markets for Eastern and Central Africa (COMESA) block which is developing a Model Copyright Law for COMESA members through the Southern and Eastern Africa Copyright Network (SEACONET). It is in this multi-forum context that Pan-African Intellectual Property Organization (PAIPO) has been conceptualized.

Facts

The creation of PAIPO began in 2006 with the publication of a concept paper by the African Union's (AU) African Ministerial Council on Science and Technology (AMCOST). According to its website, AMCOST was established in November 2003 under the auspices of the New Partnership for Africa's Development (NEPAD) and the AU 'as a high-level platform for developing policies and setting priorities on science, technology and innovation for African development'; its key mandate is oversight of 'the implementation of Africa's Science and Technology Consolidated Plan of Action (CPA)'. In January 2007, at its general assembly, the AU voted in favour of the establishment of PAIPO. Following this decision, it appears that the AU's Scientific, Technical and Research Commission (AU-STRC) was mandated to draft the PAIPO statute, which it reports to have done 'in consultation with stakeholders in AU Member States, ARIPO, OAPI and Collective Management Organizations with the support of the [World Intellectual Property Organization] WIPO' ('Draft PAIPO Statute', AU-STRC, January 2007, online edition). At its fourth conference, held in Cairo in March 2010, AMCOST decided to create a panel of IP experts to evaluate and thoroughly consider the existing PAIPO documents and submit them to the next Bureau Meeting in a bid to expedite the implementation of the AU Assembly decision on PAIPO. No further disclosure has been made about the AU-STRU consultations or the work of the IP Expert Panel. However, the Draft Statute has been finalized and published on the AU-STRC website.

It has been reported that the draft will be considered at the fifth AMCOST conference (AMCOST V), scheduled to be held in Congo Brazzaville in November 2012 (see William New 'Move Toward New Pan-African IP Organisation Alarms Observers', IP Watch, 27 September 2012, online edition).

Analysis

The draft PAIPO statute consists of a preamble and 26 articles. The articles provide for the following: establishment of PAIPO (Art 2), status (Art 3), privileges and immunities (Art 4), PAIPO objectives (Art 5), functions (Art

6), organs (Art 7), Council of Ministers (Art 8), Committee of Experts (Art 9), Board of Appeal (Art 10), Director General's Office (DGO) (Art 11), DGO functions (Art 12), PAIPO membership and obligations (Arts 13–14), observers (Art 15), relationship with other institutions, co-operating states and organizations (Art 16), Headquarters (Art 17), finances (Art 18), sanctions (Art 19), entry into force of statute (Art 20), amendments (Art 21), the prohibition of reservations (Art 22), withdrawal (Art 23), dissolution (Art 24), settlement of disputes (Art 25) and deposit (Art 26).

The political significance of the establishment of PAIPO

Since it was first mooted in 2006, the creation of PAIPO has progressed rather slowly. The fact that matters seem to have come to a head, and firm strides taken recently to establish PAIPO can be linked to a rejuvenated spirit of 'pan-Africanism' in Science Technology and Innovation after the official Inauguration by the AU of the Pan African University in December 2011. On the political landscape, PAIPO is seen as a step closer to greater co-operation and singularity of position in key international IP affairs. The conspicuous absence of Africa's leading economies, particularly South Africa and Nigeria, from the membership of the two regional bodies has long been lamented. It formed the basis of some calls for attempts to establish an all-inclusive (truly) pan-African Organization to enhance integration in the continent which was perceived as being necessary in order to increase the 'economies of scale' to marshal scientific and technological resources for development (see eg John Mugabe 'Regionalism and science and technology development in Africa' in: Louk Box and Rutger Engelhard (eds) *Science and Technology Policy for Development, Dialogues at the Interface* (2006)).

Proponents of PAIPO hope that Nigeria and South Africa will join, and indeed lead, PAIPO. It may be that South Africa will join PAIPO as her former minister of Home Affairs, Dr Nkosaza Dlamini-Zuma, has recently assumed her position as Chairperson of the AU Commission and the country has to be seen to support AU initiatives considering her current leading role in the AU. However, in the absence of express confirmation of these countries' intention to join PAIPO, this remains to be seen.

Concerns about the wording of the preamble

The Draft PAIPO statute does not have any provisions on substantive IP law, although it provides for the perspectives that will inform these laws in its preamble. The preamble thus becomes the focal point for analysis. This section flags a few issues which are raised by the wording of the preamble and argues for a revision of the text to more meaningfully reflect African developmental aspirations.

The preamble refers to socio-economic development and effective IP

systems. However, it does not go far enough in affirming the perspectives on IP and development that coalitions formed to advance common causes at the WIPO, namely the African Group and the Development Agenda Group (DAG), have been cultivating over the last several years. For example what exactly is the 'effective intellectual property system' envisaged by the preamble?

The African Group and the DAG have repeatedly said that it is an appropriately balanced or nuanced system that takes a country's socio-economic condition and development goals into account and not one that is based on a 'one size fits all' and 'IP as an end itself' perspective. These views are clearly articulated in para 7 of the African proposal for the establishment of a development agenda for WIPO (WIPO Doc IIM/3/2 Rev, 31 July 2005) as follows:

IP is just one mechanism among many for bringing about development. It should be used to support and enhance the legitimate economic aspirations of all developing countries including LDCs, especially in the development of their productive forces, comprising of both human and natural resources. IP should therefore, be complimentary and not detrimental to individual national efforts at development, by becoming a veritable tool for economic growth.

The same perspective was expressed in para 1 of the DAG's Guiding Principles (WIPO Doc CDIP/5/9 Rev, 26 April 2010) where the DAG applauded the adoption of the WIPO Development Agenda (DA) as: a milestone in achieving the historic aspiration of developing countries for a paradigm shift in the international perspective of intellectual property (IP): a shift from viewing IP as an end in itself, to viewing it as a means to serve the larger public goals of social, economic and cultural development.

This vision has refuted the universal applicability of 'one size fits all IP protection models' or the advisability of the harmonization of laws leading to higher protection standards in all countries irrespective of the levels of development. It is thus surprising that, having won a hard-fought battle with the adoption of the WIPO Development Agenda (DA), the Draft PAIPO Statute's preamble does not incorporate the essence or language of the DA.

Similarly concerning is the fact that there is no mention of the challenges facing Africa with respect to access to medicines and learning materials, its efforts to realize the Millennium Development Goals (MDGs), among many others in the preamble. For example, research has shown that copyright policy, legislation and practices in several African states need to be revised to improve access to learning materials, a key developmental goal in many nations (C Armstrong et al (eds) *Access to Knowledge in Africa: The Role of Copyright* (2010)).

The preamble fails to assert the importance of public interest imperatives as done in proposals for the WIPO DA where it was argued that African and other developing countries need to 'strive for an outcome that unequivocally acknowledges and seeks to preserve public interest flexibilities and the policy space of member states' (Proposal by Argentina and Brazil for the establishment of a Development Agenda for WIPO (2004) Ref: WO/GA/31/11 p 2). It is suggested that the text of the Preamble be revised to emphasize such perspectives as is done by Articles 7 and 8(1) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (1869 UNTS 299; 33 ILM 1197 (1994)) which read as follows:

Article 7 Objectives

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 and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 Principles

1. Members may, in formulating or amending their 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 that such measures are consistent with the provisions of this Agreement.

The wording of these articles is direct, brief, uncontroversial and in keeping with African aspirations. Similar text could easily be incorporated into the PAIPO Statute without making it too long.

An additional concern is that the preamble fails to consolidate many notable achievements that have been made by developing countries at WIPO and the World Trade Organization (WTO) such as the Declaration on the TRIPS Agreement and Public Health ('Doha Declaration' WT/MIN(01)/DEC/220 November 2001). This leaves readers of the Draft statute wondering how PAIPO is intended to further the advances that have been made at these fora and fearing that they be lost in the new dispensation (Brook Baker 'Proposed Pan-African IP Organisation a Terrible Idea' Infojustice.org, 28 September 2012). There have thus been calls and even a petition by African scholars and activists for the revision of the PAIPO statute.

The reference to combating piracy and counterfeits in the preamble against a backdrop that exhibits the shortcomings highlighted above lends credence to the view that the preamble may be advocating a one-sided view.

Some substantive law issues raised by the rest of the PAIPO Statute

Beyond the preamble, certain provisions of the PAIPO Statute are noteworthy. Article 5(vi) of the statute refers to strengthening the capacity of PAIPO

member states to 'maximise the benefits of the intellectual property system to improve public health'. However, this reference is vague at best. It does not cure the deficiencies noted in the comments above on the preamble. Article 5(iii) refers to the harmonization of IP laws in Africa. While there are obvious benefits to harmonization, adequate care needs to be taken to ensure that such harmonization has a beneficial result for Africa. That is why it is crucial that a firm bedrock be laid for beneficial harmonization in the preamble so that fundamentals are clear and agreed to at the outset.

Practical significance

The preamble emphasizes that the AU appreciates and respects the autonomy of ARIPO and OAPI and Article 16(i) of the Draft Statute provides that PAIPO will 'establish and maintain close and continuous working relationship' with these organizations. This raises the question of how exactly these working relationships with ARIPO and OAPI will be negotiated, established and maintained. It has been noted that ARIPO and OAPI initially opposed the creation of PAIPO as they had not been consulted by the AU and because they believed that PAIPO was not feasible (Michael Blakeney and Getachew Mengiste 'Intellectual Property Policy Formulation in LDCs in Sub-Saharan Africa' (2011) 19(1) *African Journal of International and Comparative Law* 66, 72).

There are also concerns about how it may be counterproductive to use substantial resources in creating yet another African IP organization rather than spending those resources on strengthening existing ones or advancing the African cause at WIPO and other international fora. However, there are clear roles which could be set aside for the regional organizations to ensure their continued relevance. For example, PAIPO could meet every two years and in the intervening year African states could meet in their regional blocks to consolidate views to be presented at the continental PAIPO meeting.

The emergence of PAIPO will have a marked impact on IP policy approach dynamics both within Africa and internationally. Depending on how co-operative African states are, this impact will either be positive or negative. For example, PAIPO may lead to the revitalization of ARIPO and OAPI if their role in the new continental dispensation is clearly demarcated as suggested above. It is hoped that there will be co-operation and meaningful strides towards a development-friendly united approach which will lead to a positive impact. The first step towards this would be the postponement of the adoption of the draft statute as it stands, until a wider consultative process is conducted.



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