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Health Related -Intellectual Property Rights in Africa in Light of the Covid- 19 Pandemic

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Abstract

This article argues that suspending IP rights considering the current COVID-19 pandemic would not necessarily lead to a win-win situation for African countries and Western Pharmaceuticals.

The first part introduces Intellectual property rights as a legal concept and provides its context considering the current COVID-19 pandemic.

The second part delves into the Regional Framework for intellectual property in Africa.

The third part analyses the current status of medical related intellectual property in Africa.

The fourth part provides the recommendations to enhancing intellectual property rights in Africa despite the current COVID-19 pandemic.

The last part provides the conclusion to the paper. It suggests that ultimately, Africa needs more sustainable solutions to meet emerging health emergencies as has been witnessed in the ongoing COVID-19 pandemic.

Key Words: Intellectual Property, Health Sector, COVID-19, pandemic, medical healthcare, developing countries.

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1.1. Introduction

Intellectual property (IP) is a legal concept that involves the protection of legal rights resulting from the creation of the mind; inventions, literary and artistic works, symbols, names as well as images and designs used for commercial purposes.²

Intellectual property rights have come into sharp focus in the wake of the current Covid-19 pandemic. This has especially been the case in the health sector that has come under pressure to meet the contemporary demands of vaccines, hospital equipment and medicine to bring the pandemic under control. The situation has been more dire in African Countries which have critical need of medicine and health facilities to combat the Covid-19 pandemic.

Before delving into the current situation of Covid-19 in relation to intellectual property, it is important to briefly outline the Intellectual property regime in Africa.

1.2. Regional Regime on Intellectual Property in Africa.

There are two major regional Intellectual Property Organizations in Africa: African Regional Industrial Property Organization (ARIPO) and the African Organization of Intellectual Property (OAPI).³

1.2.1. African Regional Intellectual Property Organization (ARIPO)

ARIPO was established in 1976 under the Lusaka Agreement to cater for English speaking countries on industrial property.⁴ This was after a regional seminar held in Nairobi in the early 1970s on patent and copyright for African countries which had recommended the establishment of a regional industrial

² Wanjiku Karanja, "The legitimacy of Indigenous Intellectual Property Rights' Claims." *Strathmore Law Review*, vol. I, no. 1, January 2016, p.165-190.

³ Dr. Patricia Kameri-Mbote, *Intellectual Property Protection in Africa: An Assessment of the Status of Laws, research and Policy Analysis on Intellectual Property Rights in Kenya*.

⁴ <https://www.aripo.org/about-us/our-history/> accessed 27/12/2021.

property organization to facilitate the harmonization and co-ordination of industrial property matters.⁵

This led to the establishment of the English-Speaking African Regional Industrial Property Organization (ESARIPO) on December 9, 1976 under the Lusaka Agreement. However, in 1982, the name ESARIPO was changed to ARIPO by the Harare protocol on patents and Industrial Designs within the framework of the ARIPO to reflect a new Pan-African outlook.⁶

Thereafter, The Council of Ministers decided to extend the mandate of ARIPO to include Copyright at its 8th session held in Malawi in 2002. A strategic plan by the strategic council changed the ‘I’ in ARIPO from Industrial to Intellectual.⁷

Objectives of ARIPO

The objectives of ARIPO are outlined in the agreement establishing the organization⁸. They include;

- i. To promote the harmonization and development of Industrial Property Laws;
- ii. To foster the establishment of close relationships among member states on matters relating to industrial property;
- iii. To promote effective and continuous exchange of information and harmonization of co-ordination of their member states’ Laws and activities in Industrial property matters; and
- iv. To create an African regional industrial property organization for the study and promotion of and co-operation in Industrial property matters.

⁵ Sihanya Ben, *Intellectual Property for Innovation and Industrialization in Kenya* (2008).

⁶ Ibid

⁷ Ibid

⁸ Agreement on the creation of ARIPO adopted by the Diplomatic conference for the Adoption of an Agreement on the creation of an Industrial Property Organization for English speaking at Lusaka on December 12, 1986 and November 27, 1996.

ARIPO therefore strengthens the intellectual property regime in Africa by providing a framework for the protection and registration of patents.⁹

Another protocol strengthening the ARIPO regime is the Harare Protocol on Patent and Industrial Design. It came into force in December 1982, empowering the ARIPO patent office to receive and process patent and Industrial design applications on behalf of its member states.

Further, the Banjul Protocol on Marks, like the Harare Protocol on Patent and Industrial Design was adopted by the ARIPO members on November, 13, 1993. Its main aim was to provide a centralized trade mark (™) registration system.¹⁰

ARIPO was put in place as a mechanism by African Countries to protect intellectual property rights and encourage innovation through science and technology. Through the years, innovation requiring intellectual protection has been robust and in depth globally. In Africa, countries such as South Africa is the number one contender in the Patent list under ARIPO and OAPI when it comes to pharmaceutical innovations. Many other countries in the African region have given lee way for compulsory licensing which one may argue does not really provide a fertile ground for innovation which is desperately needed during these unprecedented times. This is a fact that has partially contributed to the crises experienced in the wake of the Covid-19 pandemic.

The Covid-19 crisis exposed heavy reliance on Western pharmaceuticals. This has subsequently led to calls of suspension of Intellectual property rights among countries to help developing countries and Africa to curb the Covid-19 pandemic.

1.2.2. African Organisation of Intellectual Property (OAPI)

⁹ Ugwu, Uchenna, African Journal of Intellectual Property (2017) African Journal of Intellectual Property. 1. 116-127.

¹⁰ The Madrid Agreement on the International Registration of Marks, 1891.

OAPI was established to cater for and co-ordinate Intellectual Property activities in Francophone Africa. It was established under the Libreville Agreement of September 13, 1962, which was later revised by the Bangui Accord of 2nd March 1977.¹¹

Unlike ARIPO, OAPI has a uniform system that applies across member states. Patent applications are filed at the patent office based at the Secretariat in Yaoundé, Cameroon.¹²

The objectives of OAPI include: to promote socio economic growth through the protection of intellectual property, to centralize and coordinate information on the protection of intellectual property, to provide intellectual property training and to protect the intellectual property of member states.¹³

The above objectives point to an intent to steer socioeconomic growth by encouraging innovation in science and technology. However, in the wake of the Covid-19 pandemic, and countries calling for compulsory licensing and the suspension of intellectual property rights, it is debatable intellectual protection would achieve positive results for the health sector in Africa.

More relevantly, section 56 of OAPI gives leeway to countries to effect non voluntary licensing regimes in the interest of the economy of the country, general public interest or health matters. This would certainly be relevant during such a period as this.

Nevertheless, the provision is not binding upon any entity to provide licensing of its products in the medical field. This means that the licensing of the same is wholly dependent on political goodwill and a fair amount of lobbying amongst key stakeholders in the health manufacturing industry.

¹¹ https://www.wipo.int/export/sites/www/patent_register_portal/en/docs/oapi.pdf accessed 10/2/2022

¹² www.oapi.org/index.php <assessed on 27/12/ 2021 at 15:12>

¹³ <https://www.worldtrademarkreview.com/guide-oapi-what-you-need-know> accessed 10/2/2022

1.3. Current Status of Intellectual Property Rights in Africa in the wake of Covid-19 Pandemic.

When the Covid-19 pandemic struck in Africa in 2020, there was immediate imbalance in the economy as demand surpassed supply in the health sector.¹⁴ This also corresponded with a global rush to come up with a vaccine to contain the spread of the ravaging virus.¹⁵ Soon thereafter, there were emerging discussion and calls for the suspension of medical related IP rights in favor of developing countries to help them cope with the effects of the pandemic.¹⁶

In October 2020, South Africa and India, two powerhouses of generic pharmaceuticals manufacturing in the developing world, made a very broad proposal calling on members of the World Trade Organization, to suspend, for a limited time, intellectual property protection for patents, copyrights, industrial designs, and undisclosed information in relation to “the prevention, containment, or treatment of Covid-19 until widespread vaccination is in place globally, and the majority of the world’s population has developed immunity.”¹⁷

The suspension proposal was driven by the fear that developing countries will bear the brunt of the pandemic and will be devastated by it if they do not have rapid access to affordable Covid-19 vaccines, diagnostics, and treatment.¹⁸

From 2020 to date, one of the ways in which international organizations such as the World Health Organization have sought to curb the pandemic in the

¹⁴ Adebisi, Yusuff & Alaran, Aishat & Olaoye, Omotayo, COVID-19 and Access to Medicines in Africa (2020) Online Journal of Health and Allied Sciences.

¹⁵ Ibid

¹⁶ Adebisi YA, Oke GI, Ademola PS, Chinemelum IG, Ogunkola IO, Lucero-Prisno III DE. SARS-CoV-2 diagnostic testing in Africa: Needs and challenges. Pan Afr Med J 2020; 35:4

¹⁷ Ann Danaiya Usher, South Africa and India Push for Covid-19 Patents Ban, World Report, Volume 396, Issue 10265, P1790-1791, December 05, 2020.

¹⁸ Ibid

long term and short term is to equally suggest a suspension/waiver of Intellectual Property rights to enable faster manufacturing of drugs and vaccines that can stimulate the deteriorating health sector more so in third world countries.¹⁹

This move has since gained popularity and has been supported by superpowers such as the USA. Whereas the thought behind it is commendable and noble to say the very least, it is still questionable whether this is the solution Africa needs to boost its health sector. The Covid-19 pandemic has illuminated the loopholes in our health care management systems and temporary solutions, helpful as they may be, would not necessarily lead to a better health care management system that we envision post the pandemic.²⁰

The protection of intellectual property rights has always been essential in encouraging innovation and technological advancements even in the field of healthcare. Suspending such rights has a negative effect on this purpose as it will have an impact on research, innovation and development.

Intellectual property also places the owners of innovation in strong negotiating positions which allows them to profit from their innovation as well as allows for the resolution of conflict as intellectual property conflict is clearly resolved at the initial stages.²¹

However, strong intellectual property protection may hinder the free flow of scientific knowledge making follow-on innovation costly.²² It also allows large corporations to disproportionately benefit as they are able to use their

¹⁹<https://www.who.int/news/item/05-05-2021-who-director-general-commends-united-states-decision-to-support-temporary-waiver-on-intellectual-property-rights-for-covid-19-vaccines> accessed 10/2/2022.

²⁰<https://phmovement.org/the-india-south-africa-waiver-proposal/> accessed 28/12/2021.

²¹ Mendonça S, Pereira TS, Godinho MM., 'Trademarks as an indicator of innovation and industrial change.' *Research Policy*. 2004 Nov 1;33(9):1385-404.

²² Gangopadhyay, K. and Mondal, D., 'Does stronger protection of intellectual property stimulate innovation?.' *Economics Letters*, 116(1), 2012. pp.80-82.

intellectual property rights to entrench themselves in the market as opposed to small and medium firms that are likely to use their intellectual property rights to establish market reputation and increase their revenues.

Weak patent protection on the other hand leads to suboptimal innovation and increased cost to protect the patents such as increased litigation.²³

Moreover, most countries are usually keen on protecting their Intellectual property rights to maintain a competitive edge over other renowned pharma countries.

In a separate vein, given the weak food and drug regulatory capacity in most African Countries, such a leeway as suspension of Medical-related Intellectual Property rights has the potential of causing infiltration of counterfeits in the pharmaceutical market, which infiltration is already rampant.

Further, it is not a solution that would directly benefit African countries on any front as it would instead open doors to lesser and lesser innovative endeavors in the midst of the present health care needs. Needless to mention, the big pharma companies in the West are least likely to be favorable to the suspension push as it could make their cutting-edge technological advancements open to their competitors.

International organizations such as the World Health Organization have sought to curb the pandemic in the long term and short term is to equally suggest a suspension/ waiver of Intellectual Property rights to enable faster manufacturing of drugs and vaccines.

1.4. Recommendations on Intellectual Property rights in the wake of Covid-19 Pandemic in Africa.

A more viable approach perhaps would be to create an exchange forum where the West and the developing countries in Africa can exchange ideas and innovation techniques that would result into long-term expertise, capability and competence in the medical field. Africa already has an IP regime to protect

²³ Anton, James & Greene, Hillary & Yao, Dennis, Policy Implications of Weak Patent Rights. Innovation Policy and the Economy (2006) 6. 10.1086/ipe.6.25056178.

its innovations. What it needs is to be equipped to come up with innovations that can meet health related emergencies as has been witnessed during the Covid-19 pandemic.

This could be augmented by offering scholarships and sponsorships to professionals for training and capacity building in technologically advanced countries which would in turn benefit the health sector in their mother countries. The aim would be to ensure that Africa carves out lasting solutions and is better prepared for future health emergencies.

Voluntary pledges to make intellectual property broadly available to address urgent public health crises can overcome administrative and legal hurdles faced by more elaborate legal arrangements such as patent pools and thus achieve greater acceptance than governmental compulsory licensing.²⁴

Equipping experts in the developing countries and adequate funding of the health sector along the lines of technological innovation would go a long way in ensuring that the health care management systems improve. It would also rid Africa of the incessant dependence on medicine and vaccine from the West while we are awash with experts in the field who could benefit from further training and targeted information exchange that enables them to be more useful and innovative to meet our health emergencies.

1.5. Conclusion.

In conclusion, suspending IP rights must be viewed as a stop-gap measure in the fight against the pandemic but there is a dire need for long term sustainable solutions that address the peculiar needs of Africa and other developing countries.

²⁴ Contreras, Jorge & Eisen, Michael & Ganz, Ariel & Lemley, Mark & Molloy, Jenny & Peters, Diane & Tietze, Frank, Pledging intellectual property for COVID-19 (2020). *Nature Biotechnology*. 38. 1146-1149. 10.1038/s41587-020-0682-1.

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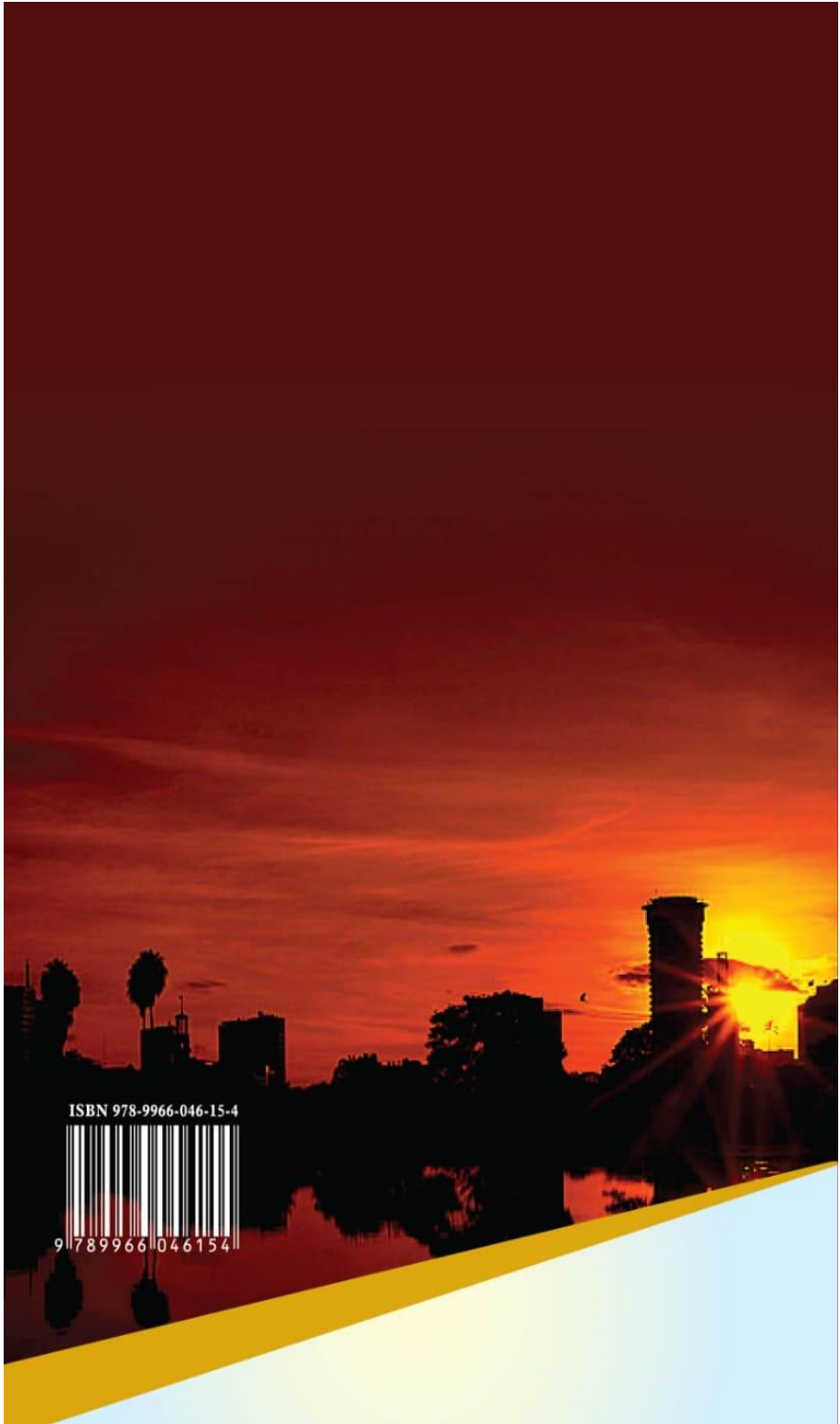
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