TIGHTENING THE NOOSE OF INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT: THE UGANDAN ANTI–COUNTERFEITING BILL 2010

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Flavia Nabakooza¹

ABSTRACT

There is a current wave of increased protection of intellectual property rights in the developed world. The anxiety to enforce this agenda in developing countries has led countries like Uganda to draft an anti-counterfeiting Bill without necessarily analyzing the impact these laws will have on her people. The Bill takes away the constitutional provisions of a right to a fair hearing. In order to enforce the anti-counterfeiting Bill government will need to spend the meager state funds on enforcing private intellectual property rights. This move is too ambitious for a resource constrained country that is already struggling to enforce the current legislation. The Uganda counterfeit Bill has no distinction between counterfeit medicines and generic medicines. Yet the majority of the population depends on generic medicines especially those with HIV/AIDS, malaria, Tuberculosis. The people will suffer if the genuine generic medicines are confused to be counterfeits by the enforcement officers. An analysis of this Bill from a human rights perspective is necessary.

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ABSTRACT

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I. INTRODUCTION

While the Anti-Counterfeiting Trade Agreement (ACTA) is still in a draft form, Uganda has already gazetted its Counterfeiting Bill 2010. There are several concerns raised by stakeholders about ACTA. For instance it’s being negotiated in secrecy with a few selected countries and limited public participation. The legality of ACTA in the U.S is in question. According to the letter of law professors to President Obama in which they pointed out that, the negotiation of ACTA as a sole executive agreement is unconstitutional. That only the Congress has the power over intellectual property and can make laws which regulate foreign commerce and intellectual property. This is what ACTA is about. That sole executive agreements may be made by the president if they are within his independent constitutional authority.²

The Professors further noted that although ACTA is referred to as the "Anti-Counterfeiting Trade Agreement" It might have little to do with counterfeiting or control of international trade in counterfeit goods. Instead ACTA will change international rules which govern trade in the field of communications.

knowledge goods. ACTA might establish new intellectual property set of laws and norms with no efficient investigation about the effects of ACTA on process of economic and technical innovation in the U.S. or overseas. This is the trend developing countries seem to have followed too.

Kimberly Weatherall a senior Lecturer in law at TC. Beirne school of law, the University of Queensland has branded ACTA as a new kind of International Intellectual Property Law –Making, Suzan Sell a director of institute for Global International studies, Professor of political science and international affairs, George Washington University has pointed out that the intellectual property maximalist have now launched an anti-access to knowledge campaign focused on “counterfeiting”, “piracy”, and “enforcement”.

However current scholarly works have not written about the Counterfeit Bills in East Africa. Peter Maybarduk briefly mentions that the recent East African anti-counterfeiting Bills criminalize the generic trade by extending criminal penalties to infringements of any intellectual property right held anywhere in the world.

Chimni analyses the role of international law in the third world countries that

“International law is playing a crucial role in helping legitimize and sustain the unequal structures and processes that manifest themselves in the growing north–south divide. International law is the principle language in which domination is coming to be expressed in the era of globalization. It is displacing national legal systems in their importance and having unprecedented impact on the lives of the ordinary people…the economic and political independence of the third world is being undermined by policies and Laws dictated by the first world and the international institutions it controls”

Chimni further points out that international law prescribe rules that deliberately ignore the phenomena of uneven development and it prescribes uniform global standards. That the idea of transitional periods or extensions to


least developed countries where differential treatment has to be granted to all third world countries follows\(^5\)

This is evident in many international agreements like Trade Related aspects of Intellectual Property Rights Agreement\(^6\) (TRIPs) an Agreement which internationalized intellectual property rights. The developing countries were given a transition period up to 2016 after wards in the Doha declaration.

The move to intensify the protection and enforcement of Intellectual property rights can be related to the above position which is now envisaged in the development of Counterfeiting laws in various developing countries in East Africa.

The Coalition for Health Promotion and Social Development HEPs-Uganda made a public campaign about the implications of the Ugandan Counterfeiting Bill on the access to essential medicines. Their concern was that this Bill undermines low cost generic medicines which most Ugandans can afford. HEPs-Uganda further scrutinizes the Bill in terms of its failure to distinguish goods from medicine, and the wide discretionary powers given to inspectors.\(^7\)

The standards laid in the Uganda Bill are too high, in terms of scope of enforcement Uganda will volunteer to do private work of safeguarding Intellectual Property rights. This is too ambitious for a country whose enforcement systems are derailed by lack of funds. Uganda is among the corrupt countries according to Transparency International Indexes\(^8\). The enforcement officers may just turn a blind eye as suspected counterfeits pass through the boarders into the markets.

The paper is comprised in 4 parts. Section I will discuss the intellectual Property rights in low developed countries. Section II will comprise of a discussion of the Global war against counterfeits focused on the enforcement

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\(^5\) Id pg. 5

\(^6\) Agreement on trade related aspects of Intellectual Property rights, Dec.,15 1993, Marrakesh Agreement Establishing the world Trade Organization, Annex 1C, Legal Instruments- Results of the URUGUAY Round Vol. 31, 33 I.L.M.81 (1994) [to be referred to as TRIPs herein after]

\(^7\) HEPs-Uganda Coalition for Health Promotion and Social Development. Counterfeits Campaign. Issues Arising from the draft Uganda Counterfeit Bill, 2008: the perspective of Access to Essential Medicines. [http://www.heps.or.ug](http://www.heps.or.ug) last visited 10/16/ 2010 at 10:45AM

Agenda, in Africa. Part III will discuss the Counterfeiting Bill of Uganda from a human rights perspective. Section IV will follow with recommendations and a conclusion.

II. BACKGROUND

A. Intellectual Property in Less Developed Countries

The belief that the increased protection of intellectual property rights is the path that led to development in the developed world is much harbored by low developing counties.

The transnational ruling elite have unprecedented influence in shaping global policies and law. There is a global governance system serving the interests of the transnational capital at the disadvantage of the third world peoples. The ruling elite of the third world play a junior role of guiding the process. They created a fertile ground for the global operation of capital, promotion, extension and protection of the internationalized property rights.

In developing Countries the shape of intellectual property rights has been influenced by what intellectual property rights are in the developed world. The leaders in the Low developed play a major role once they are convinced what the law should like. The fact that Intellectual property rights may create monopolies which set very high prices for their products is usually ignored. The majority of the population in Low developing countries cannot afford the high prices.

According to Sean Flynn, Aidan Hollis and Mike Palmedo in case there is no effective substitute for a patented product, patents may create monopolies if the patent covers an active ingredient for an essential medicine with no substitute then the patent holder can set any price they want only limited by consumers will to pay. If the demand for the medicine is inelastic, that is the consumption will not decrease due price increase. The poor people are likely to go untreated since they cannot afford the high price which may be dictated by the monopoly patent holder. So they recommend low developed countries with high income inequalities to adopt open licenses which will permit

\[9 \text{ Supra note 4 pgs. 7 & 14.}\]
competition from any qualified supplier for the essential needed medicines\textsuperscript{10}

The transnational’s interests are the priority of international law, in advocating for democracy the major goal is to create a stable environment for the global capital to flourish, property rights are now internationalized, the articulation, specification and enforcement of these rights is now through intervention of international law, as envisaged in creation of TRIPs.

For instance the transnational corporate sector constraints are being lifted through international law, like the bilateral investments protection treaties, the majority of which between the industrialized world and the third world countries. The World Bank Guidelines on foreign investment (1992) recommended that constraints on the entry and operation of transnational capital be limited.\textsuperscript{11} Many rules laid for markets transactions are designed to protect the corporate actor in the first world even if the third world is pried open for its benefits. The first world can construct non-tariff barriers against commodities exported from the third world, even the anti-dumping rules are designed to protect inefficient corporations in the developed world\textsuperscript{12}.

With the above ground as illustrated by Chimni the activities of the corporations aided by international law in the years that preceded the formation of TRIPs were very crucial in the internationalization of their intellectual property rights.

A number of American based transnational corporations comprised in the Intellectual Property committee (IPC) pushed for the development and adoption of TRIPs.\textsuperscript{13} Through IPC lobbying, the United States Trade Representatives (USTR) and the Congress all became supportive of the corporations agenda of heightened intellectual property protection. They argued that intellectual property rights were equivalent to general property rights and were essential to free trade, and inadequate intellectual property rights protection was a barrier to legitimate trade. So the IPC enjoyed excellent access to top level policy makers both at the domestic and multilateral levels for instance the Advisory Committee for Trade Negotiations (ACTN) gave these business people a channel to present their views on trade policy. These


\textsuperscript{11} Supra note 4, pg. 9.

\textsuperscript{12} Id pg. 10.

\textsuperscript{13} These corporations include; Bristol-Myers Squibb, Digital Equipment Corporation, FMC, General Electric, Hewlett-Packard, IBM, Jonson and Johnson, Merck, Pfizer, Procter and Gamble, Rockwell International, and Time Warner.
corporations needed state sanction for promoting the enforcement of other government’s intellectual property laws, and government support was also need at the inter-governmental multilateral arenas of the General agreement on Tariffs and trade (GATT) and the World trade Organization (WTO) 14

The enforcement agenda of these corporations has not been relaxed. In the Allegation Letter submitted on behalf of Health Gap and others to the United Nations Special Rapporteur it’s noted that the U.S uses policies which cause of suffering around the world. These are in the form of “Special 301”. (This is section182 of the Trade Act of 1974, commonly known as special 301, which provides for the identification of intellectual property rights priority countries). Other policies are; trade negotiations, Generalized System of Preferences, foreign aid and diplomatic pressure to promote intellectual property and Pharmaceutical regulations which limits access to medicines affordable in low developing countries15.

A similar treatment was given to South Africa when it enacted the medicine and Medical Devices Regulatory Authority Act in 1997, article 15c allowed the health minister to revoke patents on medicines and allow compulsory licenses for a generic version of HIV AIDS drugs16.

Some low developed country leaders have not yet come to terms with hidden agenda of the corporations behind the heightened intellectual property protection which is now packaged under the guise of counterfeits goods yet the idea is to kill competition with their already established businesses. The market preference available in the law developed countries is turning to the affordable options seen in the products produced by competition.


16 Supra note 14 at pg. 501.
B. TRIPs, in low developing countries

“What provides legitimacy to a process that secures the commercial interest of a few corporations over decisions in sovereign countries that determine whether people shall live or die?”\textsuperscript{17}

The above question was raised by Amit Sengupta when trying to understand why low developed countries bow to the pressure in this problem. He comes to a conclusion that low developed countries are in the dilemma of respect the TRIPs, but wonders what can justify commercial interest at the cost of human life.

TRIPs in low Developing countries is characterized by threats of sanctions, being listed on the Special 301, if a country tries to utilize the TRIPs flexibilities, like compulsory licenses, or transitional period as seen in the 2009 Special 301 report, which targets Brazil, India, Thailand and other countries\textsuperscript{18}.

The U.S Coercion has led the Thai government to become desperate and make efforts to get off the Watch List of Special 301 List. The commerce Ministry suggested that no new compulsory licenses should be issued. Efforts are being made to amend the intellectual Property Laws like the Thai Patent Act, punitive Measures and actions will be adopted against Intellectual Property Infringements\textsuperscript{19}.

Suzan Sell, gave a background of how the IPC and their counterparts in Europe organized under the Union of Industrial and Employer’s Confederation of Europe (UNICE), and Japan, developed a transnational private sector Consensus in which they agreed to take intellectual property to the Uruguay Round. The corporation’s document was relied on by the USA in its negotiation, and being a powerful state it prevailed in the Uruguay Round since the United States had been using coercive means to lure other countries.


\textsuperscript{18} Supra note 17 pg. 7.

\textsuperscript{19} Allegation Letter to United Nations Special Rapporteur on the Right to Health. In the Matter of the use “special 301”Program section 182 of the Trade Act of 1974, to limit Access to Medicines in violation of the international Right to Health. A submission of Mr. Apiwat Kwangkaew (Chairperson, Thai Network of People Living with HIV/AIDS), Mr Nimit Tienudom (Director, AIDS Access Foundation), Ms Supatra Nacapew (Director, Foundation for AIDS Rights), bullet no 17 pg 5. at American University Washington college of Law. Thursday October 28\textsuperscript{th}, 2010.
into adopting stricter intellectual property policies among its large domestic market. Countries adopted the TRIPs since it was a multilateral rule-based system with the hope that it would eliminate USA’s coercive economic diplomacy. Many countries thought the Uruguay round would make special 301 disappear.20

This kind of pressure from U.S threatens low developing. Although countries may want to make their populations access the much needed medicines they are discouraged. This is because all countries would want to be in good books with a super power like the U.S. The countries will do anything to avoid economic sanctions, or lose the benefits given to developing countries.

At the time of negotiating the TRIPs most people didn’t know how the agreement would affect their lives. As the corporate actors enjoyed the benefits of TRIPs and effected the enforcement. The effects were now evident in the increased number of people continued to die of AIDS when the patented medicines could not be afforded by the low developed countries.21

A group of consumers (Ralph Nader and James Love of Consumer Project on Technology CPT) and health activists like Health Action International (HAI), Medicines Sans Frontiers (MSF) mobilized to protest the negative effects of TRIPs by fronting intellectual property rights as a public issue not as trade issue. That these were two competing sets of rights, the right to essential medicines versus the right to intellectual property rights. Developing countries’ resistance to TRIPs emerged late after its adoption although there was some resistance during the negotiation.22

The access to medicine activists advocated for compulsory license and parallel importing, they emphasized public health against commercial concerns. They urged the low developing countries to take advantage of the time extension of the TRIPs and also apply sections 7 and 8, urged WTO members to stop the use of trade sanctions against countries which did not implement TRIPs plus. These efforts saw the Clinton era change towards promoting access to medicine especially for HIV/AIDS, even the global pharmaceutical announced a reduction in the prices but the activists saw this as a move to prevent countries from issuing compulsory licenses and other TRIPS flexibilities.23

The above shows that the corporate actors no longer face un informed

20 Supra note 14 Pgs 488-489
21 Id
22 Id pg. 497-498
23 Ids pgs. 504-509
Tightening the noose of intellectual property rights enforcement.

group like they did during the negotiations of Trips, the low developing countries and the middle income countries now know the effects of the strict application of the trips and they will rely on the flexibilities whenever they are available despite they sharp resistance from the US.

More success was registered by the activists as seen in the U.S’s withdrawal of the cases against Brazil, the 39 pharmaceutical companies also with the case against South Africa. The low developed countries became more assertive when it came to access to medicines, as seen in 2001 during the Doha ministerial meeting which led to Doha declaration. Although the Developing countries failed to secure a binding agreement from the U.S. the least developed countries were given an extension up to 2016 to implement TRIPs, the developing countries with no or limited capacity to manufacture the medicines are still in challenged and the limitation of exporting drugs produced under the compulsory license under article 31 of the Trips are still a big challenge the pro heightened intellectual property group look at the Doha as mere declaration.

This may be a mere declaration but it exposed the hidden agenda of the corporate actors who hide behind the USTR. And another reminder to that analogy of one size fit all has never worked and will never work when developing countries and middle income countries still exist.

However the intellectual property war is not yet over, from the current look of thing the hope above is now lost in the negotiation of ACTA which is being negotiated with the friends of the USA which is aimed at tightening the noose of intellectual property protection.

According to Kimberlee Weatherall the countries participating in the ACTA negotiations are parties to the United States of America’s Free Trade Agreements like Singapore, Morocco Mexico Australia, and Korea has an FTA pending before the U.S for signatory, and so on.

In Africa only Morocco is Negotiating the ACTA, one wonders why it’s only Morocco among the African negotiators this should be a cause for the non-negotiators to shun this agreement which might soon be international just like the TRIPs turned out to be. None of the East African countries is participating in the negotiation of ACTA but they have already drafted their counterfeit laws.

24 Id pgs. 512-518

A desire to become a developed country is the dream of all developing countries. This may be the belief that if they adopt laws and policy in the developed countries then poverty will become history. There is also hope that this will attract foreign investors in the country, but it should not be forgotten that at the end of the day these foreign investors will repatriate their profits back into their countries. Yet they enjoy some tax free investments at the initial stages. The anticipated development may not be realized.

III. GLOBAL WAR AGAINST COUNTERFEITING: ENFORCEMENT AGENDA, IN AFRICA

The global war against counterfeits has now reached in Africa as evidenced in statements like

"An anti-counterfeit law is essential in Uganda and East Africa as a whole; one only has to look at the number of deaths arising from counterfeit pharmaceutical products, electronic goods and auto spare parts. This is an evil which is killing innocent people and legislation to prevent it is essential"\(^\text{26}\).

According to Wambi Michel, Chalker’s campaign is to see intellectual property rights laws against counterfeits be passed in east Africa. These laws threaten the population which depends on life-saving generic medicines by 90 percent of their healthcare needs. This explains the Anti-Counterfeit Act of 2008 in Kenya and the Counterfeit Goods Bill 2010 under consideration in Uganda.

Since Chalker is the as chairperson of Africa Matters Limited (AML), an advisory consultancy to companies operating in developing countries she has used her position to push for the adoption of these laws through meeting with the East African Community Senior members\(^\text{27}\) in April 2007. Chalker believes that, there is a need for strict Intellectual Property rights enforcement


\(^{27}\) Id wambi Michel’s article, Chalker met with, EAC secretary general Juma Mwapachu and counsel to the EAC Wilbert Kaahwa. The parties agreed that urgent and concerted efforts were necessary to combat the illegal trade in counterfeits and ensure the harmonization of laws in all five EAC states.
through police and customs authorities\textsuperscript{28}. In the Ugandan counterfeit Bill the enforcement agents have been given wide discretionary powers which I will analyze further in this section.

Wambi further notes that President Yoweri Museveni once remarked that Uganda should follow the Chinese example of hanging counterfeiters when he opened the conference for Ugandan ministers and government technocrats on the strategies to fight counterfeiters organized by Chalker through AML. In February 2009. This clearly shows that Ugandan is now converted follower of Chalker’s campaign.

A statement that most of the anti-malaria medicines in Africa are counterfeit as made by Chalker at that meeting was so alarming that any president in Africa where Malaria is one of the killer diseases would be concerned. However, there is a need to distinguish between counterfeit medicines and Generic competitive medicines. If the producer is passing off their medicine to look like that of a given patented drug or trademark that situation deserves redress. But in case big pharmaceuticals are trying to fight competition and remain the biggest players in the market then developing countries need to be more careful before blindly following the developed world’s enforcement Agenda.

One wonders if the motive behind the enforcement agenda of strict Intellectual Property rights is actually revealed to the African leaders, this might lead to a situation which led to Doha declaration when the strict enforcement of the TRIPs was not in favor of the developing countries.

Chalker mentions pharmaceuticals among the counterfeit products that kill a number of people in Africa. These statements are general one can interpret them to either refer to counterfeit or the generic medicines.

The Kenyan Constitutional Court suspended some sections of Kenya’s Anti-Counterfeit Act applicable to generic medicines. This move was seen by Chalker as a weakness to anti-counterfeiting efforts she encouraged the drafters of anti-counterfeiting legislation to do more consultation and deeper research when drafting laws, as Wambi noted.

This was a welcome development to the poor population in Kenya who depend on generic medicines. This is the spirit which should be embraced by all low developing countries which cannot afford the patented medicines but rely on the lawfully produced generic substitutes.

Many Ugandan laws fail due to lack of facilitation enforcement. For instance the Land Act of 1998 had very good provisions about the establishment of Land tribunal, the tribunals failed due to lack of facilitation

\textsuperscript{28} Id, in October 2007 Chalker addressed a conference on intellectual property rights (IPRs) in Darla Salaam, Tanzania, where she highlighted the
and all the cases were taken back to courts already in place in each district of the country. Therefore when Chalker mentions that the Governments must avail the adequate resources to the customs and police who are at the frontline of the battle of enforcing Intellectual Property rights and she envisaged that the trade mark owners should assist the authorities. This will create a difficult situation for both the country and the enforcement officers who may want to impress their sponsors that they are really working. So abuse of the powers in seizure of genuine competition goods is likely to occur.

The Uganda National bureau of standards must not relax since a registered trademark or Patent is no guarantee against substandard products which are the main cause of problems. Pfizer Pharmaceutical Company received approval from the Nigerian government to treat children with its new antibiotic Trovan although it was not yet approved by FDA, when an epidemic of bacterial meningitis broke out in Nigeria Kano in 1996. Pfizer treated two hundred sick children they gave half of the children Trovan, and the other half was given a lowered dose of Ceftriaxone. After the treatment eleven children died. Five of those given Trovan died and six who had received the lowered dose of Ceftriaxone also died. A total of 12 suffered paralysis, blindness, deafness, or brain damage. Pfizer was sued by the relatives of the dead and injured children (the Abdullahi plaintiffs) under the Alien Tort Statute (ATS) in the U.S. District Court for the Southern District of New York. The plaintiffs alleged that Pfizer violated the principle of informed consent, they never told the patients of the likely risks associated with Trovan and Ceftriaxone. The failure to provide the best treatment by administering an under dose. Several suits followed including the Nigerian government suit but the parties settled out of court in 2009 by Pfizer agreed to pay $75 million in April 2009 of which $35 million was allocated to create a fund for people who participated in the drug trial, $30 million allocated to health care initiatives in Kano state and $10 million was to pay the state's legal costs.

\[Id\] Wambi’s Article.

\[Abdullahi V Pfizer\] case available at http://www.harvardlawreview.org/media/pdf/vol123_abdullahi_v_pfizer.pdf visited 12/22/10 at 1:37PM.

\[PfizerlawsuitreNigeria\] visited 12/23/2010 at 11:23AM.
From the above it's clear that even the strong advocates of heightened intellectual property rights have set backs in the development and testing of their drugs so the developing countries not only have to guard against counterfeits but even the well respected drug companies can miss use the trust already developed by the unsuspecting consumers of drugs.

Generally, intellectual property rights are national, that is a copyright in the United States does not afford you any protection in Kenya. However, some Anti-Counterfeiting Laws, including Kenya’s and Tanzania’s, define a counterfeit good as a good infringing intellectual property rights subsisting in that country, “or elsewhere.” This standard allows Kenyan and Tanzanian authorities to enforce intellectual property rights of other countries, regardless of whether the IP rights holder has intellectual property rights in those countries. By doing this, Kenya and Tanzania are not only taking large burdens on their limited governmental resources, they are also imposing a burden on those doing business in their countries to make sure their products do not violate any intellectual property rights held anywhere in the world.

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32 The Anti-Counterfeit Act, 2008, Cap. 469 § 2 (Kenya); Subsidiary Legislation to the Merchandise Marks Act § 2(a)-(c) (Tanzania).

IV. WHAT IS UGANDA’S INTEREST IN THE ENFORCEMENT AGENDA IN AFRICA

A. Human rights analysis of the anti-counterfeiting bill of Uganda 2010

Uganda is at the forefront of fighting counterfeits as pointed out in the previous section. The jurisdiction of courts referred to in this Bill is not defined. This has the effect of giving rise to protracted litigation procedures if a matter is to be filed in the lowest court and one opts to appeal up to the highest appellate court in regard to a given matter. This will affect either parties but has a greater effect on the importer whose goods might be detained as the subject of the allegation. Ultimately, the Act should either have defined court say as being the High Court of Uganda and this would mean possibly two appeals, or better still the Bill should have created a special tribunal or mention the Commercial court34.

The Uganda National Bureau of Standard is mandated to combat counterfeiting and also coordinate with national, regional and International organizations concerned with counterfeits in its administrative work under section 4(d)35.

Since ACTA is being negotiated, Uganda will definitely coordinate its work with this international organization since it will be dealing with the same subject matter that is counterfeiting. However the fact that Uganda is not a party to the negotiations is still a major concern since in the end she will be required to coordinate her activities. But the negotiators of ACTA have not found it necessary to invite the very active east African countries in the fight against counterfeits; Kenya already passed its law.

The liability for damages against a complainant in case of wrongful seizure is good under section 5(1) but it seems to be taken away in section 5(2) since the complainant might claim that they gave information in good faith, it’s very difficult to determine what a person has done in good faith or not since it’s a matter of the heart which is not open to any one even the court’s sometimes can be deceived of whether good faith existed in someone’s action or not.

Sub section (3) only renders the Bureau or Inspector liable only in

34 For instance in the Copyright Act and neighboring rights Act (S2006) under section 45, one applies to the Commercial court in case of any infringement.

35 Id Part II of Administration of the Bill.
situations of gross negligence by its staff or acting in bad faith. These are very subjective standards that might be very difficult to prove especially for complaints arising out of Sub section (2).

The person who may suffer loss after a wrongful seizure may actually go without redress yet the spirit of the 1995 Ugandan constitution is that the victims of wrongs should adequately be compensated. This is against their rights as victims.

On the other hand the law may fail to achieve its purpose since section 5 may actually deter people from reporting some real counterfeits since they may fear to be victimized by paying huge compensation in case it turns out to be a wrongful seizure.

The people whom the government may want to protect from counterfeits may actually lose out on the protection since complaints may not be raised although subsection 2 tries to give some immunity to the complainant who does so in good faith.

Some trademark owners may also fear to lose their already existing market and good reputation since the news of the counterfeits among their brand may scare off customers from buying that particular product. Therefore in an effort to keep their consumers, the persons who may wish to complain may keep quiet, in order to avoid a situation of losing their long term customers, when they start to doubt their quality of products.

Under the inspection part\textsuperscript{36} the inspectors are to work with Police and customs officers. The qualifications of these personal must be made known to the general public to guard against employing unqualified persons due to corruption in the recruiting department. Mere publishing of the appointed people in the Uganda gazette will not guard against unqualified personal in the inspection offices.

Related to the above police, Judiciary Uganda Revenue Authority are among the departments which top the list of most corrupt departments in Uganda as reported by Inspector General of Government (IGG) For instance the household rating of public institutions of 2008 survey revealed that the General Police is 88.2%, Traffic Police is 87.9% the Judiciary follows by 79.4%, the Uganda Revenue Authority is rated 77.0% and District Service Commissions is 73.7%. This National Survey showed that the demand and payment of bribes is no longer a secret. That corruption has become an acceptable way of life, since People seem to adore those who obtain prosperity through graft and ridicule those who uphold principles of integrity and moral values\textsuperscript{37}.

\textsuperscript{36} Ibid Sections 6(1)-(5)

\textsuperscript{37} The Inspector of Government 3rd National Integrity Survey Report, Oct. 2008,
The powers given to these enforcement officers may lay a fertile ground for corruption by being bribed by intellectual property owners just to seize good of their competitors to keep them out of business.

Kimberlee noted that ACTA provisions increase the power of administrative authorities, police, prosecutors, and judges. Yet some of the countries in the negotiations like Mexico and Morocco lay in the 89th position out of 180, of the corrupt countries per the Transparency International’s corruption Perception Index for 2009. The system is likely to be abused in places where corruption is a problem like in Uganda.

According HEPs-Uganda, the national drug regulatory agency in Uganda should be the one to administer those aspects of the law dealing with counterfeit medicines instead of the Uganda National Bureau of Standards which might not have the required knowledge of dealing with counterfeit medicines. According to Mulumba promoting the use of police and customs to enforce "standards" suggests that an Intellectual Property rights agenda is being enforced rather than an agenda that is about access to safe medicines. Drug regulatory agencies are better placed to distinguish between generic and counterfeits medicines.

Under section 7(1b) an inspector can take necessary steps to terminate the manufacturing, or making of a counterfeits and prevent a recurrence of such activities with the authority of a warrant from court. This implies that the inspector can investigate and determine the case himself as long he/she has a warrant. This power will not only be abused but it’s also an erosion of human rights which are provide for in the Uganda constitution of a right to fair trial and equal treatment before the law. This will mean an inspector can summarily determine the issues and even prevent further recurrences.

Private person’s power to arrest with a warrant is likely to be abused under section 7(6). Although the private person is supposed to hand over the arrested person to police without delay this may be abused to the detriment of the suspect. This may lead to a situation of intellectual persons taking the law in their hands either by arresting themselves or hiring a private person to arrest.

available at [http://www.igg.go.ug/content/ig-publications](http://www.igg.go.ug/content/ig-publications) last visited December 10 2010.

38 supra note 27. pg 15


40 Supra note 28.

41 Article 28 1995 Uganda constitution
suspected counterfeiters on their behalf.

The inspector who has seized goods under section 8 is supposed to make an inventory which will serve as a receipt within five working days. If the good are seized on Friday in Uganda Saturday and Sunday are not working days so this will mean a person whose goods have been seized will be subjected to unnecessary delay. The situation will be worse if the goods are seized wrongly.

The presumptions in section 10 of the Bill are unconstitutional. For instance the complainant is presumed to be the owner of the intellectual property in section 10(4), the evidence is presumed to be correct until a contrary is proved (10(6), and a presumption that goods in possession of a suspect were for trade purposes. These provisions take away the presumption of innocence until proven guilty laid in the Uganda constitution.\footnote{Article 28 clause 3(a) and article 44 (C) of the 1995 Uganda Constitution}

The right to affair hearing is taken away by Section 10 subsections (4, 6 & 8). The supremacy of the 1995 Uganda constitution is provided for in article 2(2), that if any law is inconsistent with the provisions of the constitution, the law will be void to the extent of the inconsistency. The same constitution also prohibits derogation from this right.

Any person who is not the owner, agent, or has any link to a given intellectual property also has a right to complain under section 17(5) of the Bill. Since those who may be affected by the use of counterfeits can complain under 17(d) .This implies that anyone can make a complaint even if not affected by the counterfeit. This move is aimed at making intellectual property protection every one one’s business, thus tightening the noose of intellectual property rights enforcement.

Section 19 will be abused, to the disadvantage of the business owner whose goods are subjected to detention. First, it states the goods shall be kept in detention until the final disposal or order of court. There is a case backlog problem in the Ugandan judiciary. The court may take one year to decide or less. This time is too long for any business to survive without knowing the fate of their commodities. Secondly, the process is mostly handled at Commissioner’s level, which is a political appointment. This has the possibility of compromising trade dealings of those opposed to the government.

In addition to that section 19 also takes restraint measures without informing the purported counterfeiter. The goods can be seized as long as the commissioner is satisfied with application of the complainant. The right to a fair hearing already mentioned means both parties should be heard, but the commissioner can decide to seize the goods without the knowledge of the
suspected importer.

This does not only deny him/her of the chance to prepare all possible documentations/information and avail it to the authorities without undue delay. Financial implications may arise in situations where such an importer has already signed pre-arrival contracts with some of his/her customers. This might give rise to legal liabilities to the importer which would have been avoided if the relevant authorities had taken measures to inform such importer of the complaints against his imports in time.

HEPs-Uganda also noted that the the Commissioner of Customs was given wide discretion powers to determine what an alleged counterfeit product is, without the opinion of any other authority. The Commissioner bears the burden of cost of enforcing private actions on behalf of patent holders. HEPs recommends that, the Commissioner of Customs is not the right institution to seize alleged counterfeit goods but should seek court order for seizure of the alleged counterfeit products based on the information provided by the aggrieved person.\(^{43}\)

This will create a situation of the authorities wanting to impress their sponsors that they are really working so abuse of the powers in seizure of genuine competition goods is likely to occur.

As pointed out by Kimberlee an intellectual property rights importing country is likely to receive little benefits and may endure further costs from further consolidation of stringent intellectual property rights standards.\(^{44}\) This is what will happen to Uganda by spending the meager resources on implementing heightened intellectual property rights. This can be done by the individual holders of the rights.

Maybarduk\(^{45}\) also noted that ACTA will shift the burden of extra market vigilance to identifying infringement from the private rights holders to the public law enforcement officers. This is going to be the same position in Uganda where the Police, Uganda Revenue Authority (URA), the Uganda National Bureau of Standards (UNBS) officers will be on the watch for infringement, besides the general public.

Section 22 makes the drafting of implementing and guiding regulations to the Act discretional upon a minister.\(^{46}\) This has effects that may hamper the effective enjoyment of rights of those whose businesses are presumed contrary to the provisions of this Act. Creation of Regulations should be mandatory

\(^{43}\) Supra note 7. Pg.3  
\(^{44}\) Supra note 25 pg. 14.  
\(^{45}\) Supra note 3 pg. 18.  
\(^{46}\) The language “The minister may make ” this is not a mandatory statement.
upon the relevant authorities, in order to guide those entrusted with enforcing this Act. Their mandatory existence will also help the business community in Uganda to obtain a better perspective of the spirit behind the law and how the law actually operates.

Article 23 of the Bill, provides for courts to recover fines, 10% to be paid to the complainant. HEPs-Uganda noted that this section makes the courts agents of the intellectual property owners since they will be paid by courts. The fines from court become government revenue the individuals are paid from the government treasuries for goods delivered.

When this Bill is passed into law Ugandans will be locked out on new information and access to knowledge. Very few Ugandan can afford to buy copyrighted materials.

The people resort to cheap pirated products because of poverty. When the laws have no flexibilities they end up being abused and this will be done secretly the enforcement officers might never get wind of this.

It should also be noted that the innovations are sometimes guide by the existence of market for instance in James Boyle’s words

*The market measures the value of a good by whether people have the ability to pay and willingness to pay to pay for it, so the whims of the rich may be more “valuable” than the needs of the destitute. We may spend more on pet psychiatry for the traumatized poodles on East 7st street than on developing a cure for sleeping sickness, because the emotional wellbeing of pets of the wealthy is “worth More” than the lives of the tropical world’s poor.”*

This is clear that the poor are not a very attractive market to be an incentive for innovations. So since the Low developed countries have the majority of poor consumers care should be taken when they are regulating intellectual property rights. The poor are potential market which should not be ignored. Prahalad pointed out that when the poor are turned into consumers they not only get access to products and services previously consumed by the middle class and the rich but also gain dignity of attention and choices from the private sector.

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47 supra note 7. Pg.3  
V. RECOMANDATIONS

Uganda should first halt the passing of the Bill into law until it’s very sure of the real Agenda of the counterfeit campaign. In order to avoid what the countries landed into when they blindly followed the negotiators of TRIPs who thought they were dealing with intellectual property rights plainly yet it had adverse effect on the health of the majority of population who could not afford the patented drugs.

The copyright and Neighboring Right No.19 of 2006, is in place it can still serve the purpose the anti-counterfeiting law is trying to achieve. There is no need to have so many laws all providing for the same thing to a resource constrained nation like Uganda. Enforcement of laws is difficult due to limited resources.

Related the above the Trade Mark Act provides for offences for forging or counterfeiting a trade mark in part VIII. Importation into and exportation from Uganda of any goods with a false trademark is prohibited under section 78. Remedies in form of an injunction, damages, account of profits are also catered for in case any infringement of the trademarks. The role of the inspectors in this law can serve the purpose of looking out for counterfeits.

Uganda should merge the Counterfeit Bill in the already existing laws to avoid conflict of laws. This will make it easier cheaper for enforcement and monitoring. Not every offence or legal issue should give rise to enactment of a new law when it can be addressed in the existing laws.

Uganda should design regulations to guide the implementation of the Counterfeit and Copyright law. These should help the respective agencies mandated to effect these legislations, but also the copy rights holders.

Mexican senate unanimously voted to withdraw Mexico from ACTA negotiations this agreement will affect access to information and knowledge, which is the main component for development of a nation. If Uganda is not

50 Section 45 provides for civil remedies for infringement like application for an injunction to prevent infringement from the Commercial court and one can claim damages as well. Offences for infringement of a copyright is provide for under section 47, this includes imported work. If one uses the imported work in a manner which, constitute an infringement of copyright in Uganda they can be punished.

51 The Trade Mark Act of Uganda No 17 (2010)

one of the negotiators of ACTA, yet the border enforcement provisions are similar provisions to the Anti-counterfeiting Bill. It’s clear that if a country which in the negotiations considers quitting then Uganda should think twice before rushing to make a law that may have serious impact on the country.

Uganda should not burden herself with investing in protecting private intellectual property rights when the right holders have a remedy in the existing laws, the right holders can have the infringers taken to court. The country doesn’t have the resources to do this. Many good laws have failed due to lack of funds for enforcement.

The idea of the right holders facilitating the enforcement officers may have effect of the enforcement officers serving interests of those of funding them. Their impartiality in making the decisions about what is a counterfeit may be clouded.

A distinction between counterfeit should be drawn between counterfeits and the genuine competition goods. In case of the counterfeit then the law should take its course since counterfeit not only confuse the consumers who are already accustomed to a particular good and they are sure of what they are buying.

CONCLUSION

The right to affair hearing and presumption of innocence provide for in the Ugandan constitution will be eroded by the Counterfeiting Bill. Since the commissioner can take restraint measures without informing the purported counterfeiter. The goods can be seized as long as the commissioner is satisfied with application of the complainant. Both parties will not be heard, and the commissioner can seize the goods without the knowledge of the suspected importer. This will take away the peoples human rights mentioned above and the Counterfeit Law will be challenged in the courts of law for being inconsistent with the supreme law of Uganda.

In addition to that, the motive behind the heightened intellectual property rights should be taken into account before any law is passed. An examination of the rationale behind denying the poor population knowledge and medicine should not be compromised with individual’s intellectual property right which can be adequately compensated through other existing Laws.

It therefore follows that legislation as a process should not only be informed by necessity but also the prevailing domestic and international realities. A good law should be in position to serve the interests of the population it seeks to protect and comprehensively address the absurdities through among other factors legal harmonization, amendment and repeal.
23  Tightening the noose of intellectual property rights enforcement.

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