

Owen H Dean

A unified intellectual-property law system for southern Africa

Part 2: Multinational registrations in Africa

Multinational registration systems have been set up in some parts of Africa. African countries have thus already begun following international trends pioneered in Europe. These regional arrangements include the following:

- *African Intellectual Property Organization (OAPI)*: This organization administers a centralized system for registering intellectual property. It has a membership of 14 West African countries that were formerly French colonies and are members of the Paris Convention, and was established by the Accord de Libreville in 1962 and varied by the Accord de Bangui of 1982. Its central office is in Yaounde, Cameroon. The OAPI system in effect creates a common intellectual-property law and common registers for all the member countries. The centralized law provides for protection for trade names, appellations of origin, copyright, and cultural heritage. This system works reasonably well and enables intellectual-property owners to cover the 14 member countries with single registrations.
- *African Regional Intellectual Property Office (ARIPO)*: In December 1976, at a conference held in Lusaka, Zambia, an agreement on the creation of an industrial-property organization for English-speaking Africa was reached. This became known as ESARIPO (an acronym for the English-Speaking Regional Industrial Prop-



erty Organization). The membership of ESARIPO was originally open to certain member states of the United Nations Economic Commission for Africa. Among the original members were Botswana, Lesotho, and Swaziland. Later Zimbabwe also subscribed to the Agreement. Membership was also open to other members of the United Nations Economic Commission for Africa.

In 1982 a protocol was adopted in terms of which ESARIPO was empowered to grant patents and register industrial designs and to administer these patents and industrial designs for the contracting states. In 1985 the name of the organization was changed to the African Regional Industrial Property Organization (ARIPO), to open membership of the organization to all member states of the United Nations Economic Commission for Africa. The ARIPO office is located in Harare, Zimbabwe.

An applicant for an ARIPO patent or a design can designate any one or more of the contracting states as countries in which registration is desired. The application for an ARIPO patent or design must be lodged at the national office of any contracting state. It is then sent to the ARIPO office which examines it for compliance with formal requirements. Once the formal requirements are met, a filing date is allotted. The application is then examined on a substantive basis.

If the office refuses an application, the applicant can request that it should be treated in any designated state as an application according to the national law of that state. In this event the ARIPO office sends copies of the application and all relevant documents to the national office in question.

If the ARIPO office grants an application, it notifies the applicant and each designated state. Within six months of such notification a desig-

nated state may inform the ARIPO office that it will not give effect to the patent or design in its territory. This notification can be given on the basis that the patent or design does not meet the requirements of local legislation. If a national office does not reject the patent or design within a given period, the ARIPO office grants the patent or design, which has the same effect in the designated countries as a national patent or design in such country. The grant of an ARIPO registration is published in the *ARIPO Journal*, a quarterly publication.

Intellectual property in the southern African region

In sharp contrast to events elsewhere in the world and even elsewhere in Africa, there are no regional intellectual-property systems operating in southern Africa. Indeed, if anything, the opposite trend has manifested itself in southern Africa. When the Transkei, Bophuthatswana, and Venda received 'independence', new intellectual-property systems and offices were carved out of the then-existing South African system. In other words, there was a fragmentation of intellectual-property systems rather than a consolidation as in other parts of the world. This fragmentation process was motivated by political considerations, and was in no way determined or influenced by intellectual-property considerations. The political influences and factors that gave rise to this fragmentation have now disappeared, and there is an opportunity to reverse the position and to place the southern Africa region in step with intellectual-property developments elsewhere in the world.

The considerations and circumstances that have promoted the establishment of multinational or regional intellectual-property systems elsewhere in the world apply equally to southern Africa. They are particularly pertinent in southern Africa now, because of the current political and economic circumstances in this part of the world. A reformed South Africa is hoping for an economic renaissance, and other countries in southern Africa are expecting that renaissance to provide the impetus or stimulus for economic growth and development throughout the region. The existence and availability of an efficient and cost-effective intellectual-property system providing creators of this property, particularly foreigners, with good and practical protection can only benefit the region and serve as a beacon for attracting or assisting in the attraction of foreign investment and technology. Both of these are sorely needed if the

sought-after economic renaissance is to materialize. The existence of the Southern African Customs Union can, like the European Union, provide an economic foundation for a regional southern African intellectual-property system. There is much benefit to be gained from setting up a multinational system enabling owners of intellectual-property to obtain the single registration of a patent, design, or trade mark in the southern African region without necessarily having to file separate applications in each of the constituent countries. On the premiss that effective protection for industrial property in a country provides an incentive for foreign investment in, and technology transfer to, that country, it is clear that especially the smaller countries in the southern African region will benefit from a regional registration system. For example: an intellectual-property owner may be unwilling to register his patents, designs, and trade marks in, say, Botswana, and so may be reluctant to do business there. But if a southern African registration covering not only South Africa but also a country such as Botswana can be obtained by means of a single application, then registration and resultant economic activity in Botswana become a different proposition.

There are several models for multinational intellectual-property registrations which could be followed in the southern African region. Before deciding upon a particular system it is necessary to establish which countries should be involved in the southern African multinational system. At the outset it is envisaged that the proposed southern African system should include South Africa (including the former self-governing homelands — Transkei, Bophuthatswana, and Venda (the 'TBV' territories)), Botswana, Lesotho, and Swaziland (the 'BLS' countries), and Namibia. Forming a multinational system in these countries will involve two separate and distinct phases. The first will be to reverse the fragmentation of the South African registers which occurred when Transkei, Bophuthatswana, and Venda became independent and to consolidate those registers in the South African register. This consolidation will accord with current political developments in South Africa. The second phase will be to arrive at a joint registration system for the consolidated South Africa, Namibia, and the BLS countries.

Consolidation of TBV registers and the South African registers

When Bophuthatswana, Transkei, and Venda became 'independent', all existing South African

patents, designs, and trade marks at the time were deemed also to be on separate registers created in each of these countries. When these registrations came up for renewal in South Africa, they had to be renewed separately in each of the independent countries. If they were not separately renewed in those countries, they lapsed. If protection was required in any of these territories after their independence, separate applications had to be filed, and registrations obtained, in those territories. These registrations have no direct links with any South African registrations.

Ciskei did not follow this approach and, for purposes of registration of intellectual-property, it in effect remained part of South Africa. As a result, South African registrations were valid and had full force and effect in Ciskei, regardless of whether they were obtained before or after the independence of Ciskei.

Southern Africa needs regional intellectual-property systems to attract the foreign investment and technology needed for the economic renaissance sought in the region

It is possible that current South African patents, designs, or trade-mark registrations have no counterparts in the TBV countries, or that counterpart registrations are in the name of different proprietors in South Africa and in those territories. It is also possible that registrations exist in one or more of the TBV countries which do not have counterparts in the other TBV countries or in South Africa. These circumstances make consolidation of these registers into the South African registers problematical.

Consolidation of the TBV registers and the South African registers must take place. It would be anachronistic for the separate registries to continue to exist, particularly when the TBV countries no longer have identities or administrations separate from South Africa. How this consolidation should take place and what status should be given to these separate territorial registrations are complicated issues. None of the precedents which have occurred in the past (such as the consolidation of the two Germanies) are completely comparable with the South African situation. To a large extent a fresh approach is required.

The South African Institute of Intellectual Property Law has suggested a proposal to the Govern-

ment for achieving the desired consolidation. This proposal is briefly as follows:

- The rights of any South African patent, trademark, or design registration should extend to the whole of the unified territory, except where, and for so long as, there are prior registered rights in existence in a particular territory.
- If any person had an existing application or registration in any reincorporated state, the rights arising from that registration will continue to exist only in respect of the geographical area of that state. Corresponding South African rights will not extend to that area for so long as such prior rights in that area exist.
- Any lawful use by any person of a trade mark, invention, or design commenced in the geographical area of a reincorporated state will remain lawful after the date of reincorporation of that state, but only in the territory of that reincorporated state.
- All pending applications and registrations in existence in a reincorporated state at the time of reincorporation will be transferred to the South African office and will be deemed to be South African applications and registrations having limited territorial effect.

I feel that this proposal is both practicable and fair to all concerned and it takes account of economic and other realities. It should be adopted by the South African Government as soon as possible. The result would be that in future, for purposes of an extended multinational southern African system, only the South African, Namibian, and TBV systems need be considered.

Multilateral southern African arrangement

Both Namibia and Lesotho have completely separate and independent intellectual-property registration systems. The Namibian legislation governing the registration of intellectual property is essentially South African law: the statutes are mostly South African statutes that have been amended or repealed in South Africa since Namibian independence. The Lesotho legislation is unique in the sense that it is not adapted from South African legislation. In Botswana and Swaziland the systems operate on the basis that South African or British registrations can be extended to those countries by means of applications to that end. So Botswana and Swaziland already have the beginnings of a multinational system closely related to South Africa. Before 1984 the position in Lesotho

was the same as in Botswana and Swaziland. So in Lesotho also, a link with South African intellectual-property law and registration systems is not a new idea. Until a few years ago the Namibian (or South West African) registry was based in South Africa and was merely an extension of the South African registry. Consequently Namibia also has a strong South African intellectual-property heritage.

The departure point for a multinational southern African intellectual-property system is the degree of unification in intellectual-property systems desired for the region. The two basic models which could be followed are the looser type of system that forms the essence of the WIPO multinational treaties, or the tightly-knit type of system that, generally speaking, characterizes the European multinational systems. I suggest that the southern African region, which has an economic foundation in the Customs Union, is well suited to the application of the more tightly-knit European systems as exemplified in the European Patent and the Community Trade Mark. In other words, what is required are central patent, design, and trademark registries operating under a treaty that in effect creates a law and procedure for registration that override national legislation; a registration obtained under this system would have the same force and effect as a national registration. Such registration would be enforced according to the national laws of the country in which enforcement takes place.

An alternative might be to follow the OAPI route and to unify the intellectual-property systems and laws of the countries to the extent that a single body of laws operates throughout the member countries. It seems, however, that given the recent political history of the region, it might be going too far to set up a system in the region that is as closely knit as the OAPI system, at least for the time being. It may be something which could be striven for in the long term if considered to be desirable.

If a multinational system such as has been proposed comes to fruition, extension of its ambit could be considered. Zimbabwe, Zambia, and Malawi are countries to which the system might fairly easily be extended because the BLS countries, with Malawi, Zambia and Zimbabwe, are all members of ARIPO. Perhaps the proposed southern African system could be extended to include all the ARIPO countries, or at least some form of link-up between the southern African system and ARIPO could be achieved. For these purposes it would be

desirable that ARIPO should be extended so as to cover trade marks in addition to patents and designs. Such a link-up would not be unprecedented: a similar arrangement exists between the European patent system and the Patent Convention Treaty (PCT). A similar link-up is contemplated between the European Community trade mark and the international system operated under the Madrid Agreement relating to trade marks. Indeed, it is quite feasible and in a way it would be logical for the proposed southern African systems to have links of this nature with the PCT and the Madrid Union. In this way the proposed southern African system could broaden its links and influence and provide the nucleus and the channel for the southern African countries to be linked up with the existing network of multinational intellectual-property systems. The proposed southern African intellectual-property system could become for southern Africa what the European Patent has been for Europe and what the Community Trade Mark is likely to be for Europe. As regards intellectual property, the southern African region could become a clone of the intellectual-property systems that have arisen in the countries of the European Community.

Conclusion

On the premiss that adequate and reasonably cheap protection for intellectual property in a region is a basic prerequisite and an incentive for industrial development and foreign investment in, and technology transfer to, that region from abroad, southern African can only benefit from the establishment of regional intellectual-property registrations. It is difficult to envisage disadvantages that could flow from the creation of such a system. There would be some loss of sovereignty in intellectual-property matters on the part of the individual countries, and in some cases there may also be a loss of revenue. National laws would have to be amended so as to grant recognition to regional registrations, and it may be that substantive changes to intellectual-property laws might be required in some countries. These problems are, however, mild in comparison to the equivalent problems faced in Europe where intellectual-property laws diverge widely from one another in some countries; for instance, those of the United Kingdom as compared to those of the countries of continental Europe. In the southern African countries there is a large measure of commonality in the intellectual-property laws in existence, and the

degree of integration of these laws necessitated by a multinational regional system ought to be easy to achieve. Loss of revenue in certain instances could be compensated by a sharing of the revenue derived from operating single registries. It is quite likely that unified registries would attract more applications and registrations than would the national registries of any one country, including South Africa.

As already mentioned, the Southern African Customs Union is ideally placed to provide the economic foundation for a southern African multinational system. The political and economic climate which is in the offing in southern Africa by virtue of the profound political changes that have occurred in South Africa provides an ideal opportunity for South Africa to join with its neighbours in igniting a flame of industrial and economic development in southern Africa. Comprehensive protection for intellectual property in the region

can assist in fanning that flame. Creating a multinational intellectual-property system in the region can enhance the ability of intellectual property to increase the size of that flame and cause it to spread. The field of intellectual property is also a good catalyst and perhaps forerunner for increased economic and industrial cooperation among the countries of the southern African region. Innovation is the cornerstone of intellectual-property law, and cooperation in intellectual-property matters throughout southern Africa can itself be innovative in bringing about cooperation and a pursuit of common interests in the sub-continent. □

Owen H Dean: Spoor and Fisher

THE ELECTRONIC BARD?

'More than iron, more than lead, more than gold I need electricity.
I need it more than I need lamb or pork or lettuce or cucumber.
I need it for my dreams.'

'Night sky and fields of black
A flat cracked surface and a building
She reflects an image in a glass
She does not see, she does not watch.'

These poems are from a book called *The Policeman's Beard is Half-Constructed*. They are supposedly written by a computer program. It chooses words quasi-randomly, but subject to constraints that allow the result to make some sense.