

INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND THE MUSIC INDUSTRY: A
NEW RAY OF HOPE FOR ENHANCING AFRICAN INTERNATIONAL TRADE CAPACITY?
A SOUTH AFRICAN CASE STUDY.

A Minithesis submitted in partial fulfilment of the requirements for the degree of
LLM (International Trade and Investment Law in Africa)

By



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TITLE

Intellectual Property, Entrepreneurship and the Music Industry: A New Ray of Hope for enhancing African International Trade Capacity? A South African Case Study

KEYWORDS

TRIPS Agreement

Copyright and Related (Neighbouring) rights

Trademarks

International Trade

Capacity Building

Music Export Trade

Musical Entrepreneurship

WTO

South Africa

MOSHITO



DECLARATION

*I declare that **Intellectual Property, Entrepreneurship and the Music Industry: A new ray of Hope for enhancing African International Trade Capacity? A South African Case Study** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources used or quoted have been indicated and acknowledged by complete references.*

Jele Joel Baloyi

May 2005

Signed.....



PREFACE

When I first came across the idea of writing my minithesis on the viability of the music industry as a tool for participation in international trade it was more out of curiosity driven by my immense interest in music, rather than out of any considerable orientation I had on the subject. Although I had earlier "bumped onto" some information on the various studies conducted by the Department of Arts and Culture in South Africa concerning the development of the music industry, I was for example not aware of an initiative such as MOSHITO, which incidentally aims to be the first *music export market* in South Africa.

As I searched further on the subject, I found that several studies had in recent times been conducted by World bodies such as UNCTAD, WIPO, ILO, UNDP, UNESCO and the World Bank, among others, heralding the role that the music industry can play in enhancing economic growth for less developed countries. The MOSHITO initiative in South Africa, albeit still in its infancy stages, and although perhaps not indicative of the best example of initiatives that *could* be taken to enhance the export potential of music, still however represented to me an important example of efforts that could be taken by African countries to tackle this important task. The MOSHITO initiative is therefore presented as a typical example of efforts that could be taken for purposes of enhancing international trade in music.

Although the work is generally an analysis of the legal and institutional complexities relating to and supporting international trade, the reader shall soon realise that some portions of the study are based on extra-legal analysis (in particular Chapter 5 Part B, and part of chapter 6). This became necessary, however, owing to the fact that to fully appreciate the viability of the music industry as a tool for international trade one needs to have some background information on the intricacies of the industry, its dynamism and the challenges posed by new technologies. This notwithstanding, it is believed that the work maintains its integrity as a veritable analysis of the crucial international trade

issues and principles with regard to the music industry. It is hoped that the reader shall find the work stimulating, and that somehow the work shall become an “issue-highlighting analysis” forming the basis of further studies in this regard.

J. Joel Baloyi

Johannesburg

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In direct relation to this present work, my appreciation goes to Advocate Riekie Wandrag, my supervisor, whose token expression of leadership can, I believe, be attested to by all who have met her. Her tips of advice amidst a busy schedule, and often impeded by distance always sparkled like rare gems in a royal crown. May this represent the fruit of your intellectual zest.

Deep appreciation goes to Mr. Robert Hooijer, CEO at the Southern African Music Rights Organisation (SAMRO) and my boss, for not only affording me the opportunity to work for this darling of African collective rights societies, but also for going all the way in giving me support on my research writing efforts, providing me with useful music industry 'insider knowledge' including referring me to useful sources of information, and actually according me time within my work scope to do work on the research. May this add to the SAMRO cause and heritage, be it in a minute way. Mr. Nicholas Motsatse, Marketing Director at SAMRO and chairman of the MOSHITO initiative, the rare-found 'chat moments' that we have shared so far have left an indelible impression on me as to the nobleness and audacity of the vision you espouse for the music industry. Itumeleng "Tumi" Mokgoro of the MOSHITO Secretariat - without the useful first-hand information and documents you made available to me, my research efforts would have been deficient of an important dimension. Thank you, and thank you to all who have contributed in one way or another in my life.

ACRONYMS/ ABBREVIATIONS

CIGS	Cultural Industry Growth Strategy
DACST	Department of Arts, Culture, Science and Industry
GATT	General Agreement on Tariffs and Trade
IF	Integrated Framework for Technical Assistance to Least Developed Countries
IP	Intellectual Property
IPRs	Intellectual Property Rights
ITC	International Trade Centre
JITAP	Joint Integrated Technical Assistance Programme for Selected Least Developed and Other African Countries
LDCs	Least Developed Countries
MDG	Millennium Development Goals
MFN	Most Favoured Nation (Treatment)
MITT	Music Industry Task Team
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development
S & D	Special and Differential (Treatment)
TRIPS	Trade-Related Aspects of Intellectual Property Rights
U5MR	Under-5 Mortality Rate
UCC	Universal Copyright Convention
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation

WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation



CHAPTER 1: INTRODUCTION

1.1 Introductory remarks

Six years after the United Nations Millennium Declaration which adopted the ambitious Millennium Development Goals (MDG's), and almost halfway towards the target delivery date of 2015, the fanfare with which the initiative was announced has subsided, and Africa's impoverished condition remains glaring.¹ Against the backdrop of the goal to eradicate extreme poverty and hunger, and in particular to halve, between 1990 and 2015, the proportion of people living on less than a dollar a day is the disheartening fact that 'Sub-Saharan Africa has the highest proportion of people living in poverty, with nearly half of its population below the international poverty line of \$1 a day', translating into some 300 million people.² A bleaker picture is the forecast that '[if] current trends continue, Africa will be the only region where the number of poor people in 2015 will be higher than in 1990.'³



The prevalence of U5MR⁴ is another matter of great concern in Africa, with it being said that '[a]lmost one in six children in the region will not see their fifth birthday.'⁵ In the area of health, it has been estimated that of the 40 million people infected with the HIV virus in the world over 25 million of them are in Africa, with the result that HIV/Aids has become the leading cause of death in the continent.⁶ On the economic side sad stories of poor performance continue to sell themselves, with it being said that the annual average growth rate for the decade of the 1990's 'was a low 2.1 per cent.'⁷ Africa's share in international trade dropped from about 5% in the 1980's to

¹ For the Millennium Development Goals see the UN website at <<http://www.un.org/millenniumgoals/>> [Accessed on 22 April 2005].

² *The Millennium Development Goals in Africa: Promises and Progress*, (2002) at 3. <<http://www.undp.org/mdg/mdgreportinafrica.pdf>> [Accessed on 23 April 2005].

³ Ibid.

⁴ Under-5 mortality rate.

⁵ *The Millennium Development Goals in Africa*, op cit at 12.

⁶ Op cit, at 17ff.

⁷ Op cit, at 3.

less than 3% in the 1990's.⁸ These are but some of the problems plaguing Africa, as shortcomings can be observed in almost all the goals identified in the Millennium Declaration.⁹

In the face of all these pressing problems, it has been suggested that increased participation in international trade would enable Africa to ensure that she meets the targets for the MDG's.¹⁰ This comes against the backdrop of the observation that Africa's declining growth performance in the 1980's owed to 'a combination of trade-related factors', namely stagnant and declining exports earnings, export concentration in primary commodities¹¹, falling terms of trade, rising debt service payments and severe balance-of-payment problems.¹²

1.2 Statement of the problem

Less-developed nations, of which African nations form a large part, are experiencing problems in relation to their participation in the WTO-led international trade regime, the very thing that is supposed to be a healing balm for their ills. In this regard, the 1998 UNCTAD Report on Least Developed Countries has expressed the dichotomy that while 'strong LDC growth has not been accompanied by increased integration in the world trading system ... African LDCs risk being further marginalized in the multilateral trading system if they fail to implement their World Trade Organization (WTO) agreements effectively.'¹³

One of the well-documented areas in which African countries find difficulty with regard to greater participation in the WTO-based world trade system relates to their lack of, or limited capacity to participate more effectively, in particular incapacity relating to finance and human resources.¹⁴ Because of this situation, in which Africans are 'overwhelmed by the complexities of the

⁸ Op cit, at 23.

⁹ For a full discussion of this see *The Millennium Development Goals in Africa*, ibid.

¹⁰ *The Millennium Development Goals in Africa*, (2002) at 22.

¹¹ Although these have also declined in recent times - see *The Millennium Development Goals in Africa*, op cit, at 23.

¹² Ibid. It has been said in this regard that whereas Africa's export of manufactured goods totaled over 30% in the 1980's, it slowed down to a low under-3% in the 1990's (Ibid).

¹³ See Irving J, *Uncertain prospects for LDC growth*, <<http://www.un.org/ecosocdev/geninfo/afrec/vol12no2/1dcs.htm>> [Accessed on 26 April 2005].

¹⁴ *Capacity Building for WTO Participation - African Perspectives* (2001). <<http://www.cuts-international.org/arc%202001-3.pdf>> [Accessed on 17 April 2005]. One of the problems highlighted in this regard is the fact that many African member countries of the WTO do not have a mission in Geneva, where the WTO is base, or if they do, such mission lacks in the required capacity.

negotiations and [lack] negotiating experience and expertise in economic policy analyses and international trade law', Africans have derived minimal benefits from the multilateral trade system.¹⁵ This is worsened by the fact that where less developed nations would, notwithstanding their incapacity, choose the route of negotiating for better trade terms, it has been observed that the WTO negotiating process is based on inequality, with many less developed countries being 'under-represented, or even totally unrepresented, in the day-to-day activities of the WTO.'¹⁶

The problems of African countries are further compounded by the fact that developed country markets are closed in those areas where African countries do have a comparative advantage to participate in international trade.¹⁷ Thus it was, for example said that in the area of agriculture, (where African nations clearly have a comparative advantage¹⁸) subsidies granted among the members of the OECD totaled an alarming \$300bn a year, 'equal to Africa's entire annual income.'¹⁹ In the area of intellectual property, less developed nations have felt that they were losers from the TRIPS Agreement. Thus African countries, led in particular by the African Group, have *inter alia*, pushed for a reform of the TRIPS Agreement to ensure certain changes in the area of patents - in particular the exclusion of patent protection for microorganisms and other biotechnological inventions, and the inclusion of genetic resources, traditional knowledge and folklore within the IP regime. These are areas where developing nations have a comparative advantage, yet which are excluded from protection in IP systems.²⁰

All the foregoing concerns of developing nations are, it is submitted, legitimate ones, which need considerate attention. The worst scenario would however, be if developing nations see 'abandoning the system' as a solution, as some do,²¹ or else if they embark on 'trade in a negotiation agenda'²², rather than actual trade aimed at enhancing economic growth. It is suggested

¹⁵ *Capacity Building for WTO Participation* (2001).

¹⁶ *Ibid.*

¹⁷ See in this regard Stiglitz J, *Globalization and its discontents*, (2002), at 244ff.

¹⁸ See Irving J, *Uncertain Prospects for LDC growth*, *supra*, at 2.

¹⁹ *Capacity Building for WTO Participation*, *op cit.*

²⁰ Maskus K E, *Benefiting from Intellectual Property Protection*, (2002) at 371.

²¹ See Stiglitz J, *op cit.*, at 214ff.

²² 'Trade in a negotiation agenda', 'trade in negotiations' or 'trading in a lobby movement against the system' is the author's way of indicating a concerted effort to embark on negotiations to *reform* the system, with the ideal goal of fully participating in international trade once the system is more favourable, and not before. It is suggested that

that however many the 'discontents' of globalisation are, 'opting out' of the system cannot be the solution; neither is prolonging meaningful participation in international trade for when conditions shall be 'favourable'. Rather it is proposed that the adoption of a 'pragmatic' approach, in which despite the problems associated with the 'system', workable areas of participation in international trade are identified, and while negotiations with regard to 'reforming' the system continue, viable trade is at the same time conducted in those identified areas.

It is proposed in this regard that the music industry is one such area, which African countries in particular can use to enhance capacity to participate more meaningfully in international trade. In this regard it should be noted that despite the fact that developing nations are generally 'net importers' of IP products²³, '... industrial country markets are large and open to IP products from developing countries, and are much more open than to agricultural and manufactured products.'²⁴ Adopting such a pragmatic approach would, in the long run, prove beneficial to developing African countries rather than wishing away globalisation, or spending meagre resources to try and 'fight' it. As Stiglitz wrote, 'The problem is not with globalization....'²⁵

1.3 Aims of the minithesis



As a point of departure, the present work aims to examine the prevailing international IP regime as embodied especially in the TRIPS Agreement, for purposes of outlining some of the criticisms levelled against it especially by the less developed world.

The work aims to subsequently illustrate how, despite the imperfections of the system, certain IP rights could still be used strategically by African countries to bolster the entrepreneurial spirit, in the form of 'musical entrepreneurship', for purposes of enhancing their international trade capacity. In particular the study aims to:

- a) Introduce the basis of the demand for 'more policy space' by less developed nations, and the justifiability of such demand;

waiting for such eventuality before embarking meaningfully in international trade may be prove too long and detrimental to developing nations' economies.

²³ See Visser C J, *Making Intellectual Property Laws Work for Traditional Knowledge* (2002) at 208.

²⁴ Layton R, *Enhancing Intellectual Property Exports Through Fair Trade*, (2004) at 75.

²⁵ Stiglitz J, *Globalization and its discontents*, (2002) at 214.

- b) Provide an outline of the international IP regime and the criticisms levelled against it by the developing world, in particular the TRIPS Agreement;
- c) Contend for the adoption of a 'pragmatic approach' in relation to IP protection, and to outline how IP rights in relation to music trade can be used to benefit African countries;
- d) Generally reiterate the role of entrepreneurship in the process of economic development, and how IP can be used as an entrepreneurial tool for African countries, with particular reference to 'musical entrepreneurship, and
- e) Make a case study of efforts made in South Africa to promote the music industry, and to give further recommendations.

1.4 Significance of the research

This research should serve to ameliorate the frustration that is evident from the prevailing debate on the relevance of the WTO-led IP system for less developed countries, by highlighting aspects of IP that can benefit Africa. It will outline useful guidelines, which will be a point of reference for African policy makers and other relevant stakeholders in relation to building domestic and export capacity for the music industry.

Since this does not purport to be a comprehensive study on the subject but is merely a basic, introductory analysis of the issues relevant to the subject matter, it is hoped that the work shall spark continued academic interest and research on the subject, thus contributing to further solutions.

1.5 Research Methodology and Overview of Chapters

With regard to the general analysis of IP regimes, both international and national standard and complimentary texts on the subject are the major source of information. In relation to the specific issue of the role of music trade in enhancing economic growth for developing nations it should be recognized that there is scant literature available on the subject; consequently much reliance has been placed on the reports conducted in this regard by world bodies such as UNCTAD, UNESCO,

and WIPO. The same applies in relation to certain aspects of the deliberations on entrepreneurship. The Internet has also been a useful tool in this regard.

For purposes of the development of the South African music industry the major source of information has been the reports of the then DACST (Department of Arts, Culture, Science and Technology), in particular the CIGS and MITT reports, as well as the MOSHITO reports.

The minithesis comprises of seven chapters: Chapter one is an introductory overview of the situation, which encompasses a statement of the problem; Chapter two considers the problem of lack of capacity for international trade participation of less developed nations, the inadequacy of various capacity building programmes aimed at solving this, the resultant call for 'more policy space' by developing countries and its justifiability; Chapter three gives an overview of the international intellectual property system, as a way of highlighting some of the IP rights affecting the music industry, and in particular the TRIPS Agreement and some of the areas of discontent relating to it; Chapter four proposes the adoption of a 'pragmatic approach' as a way of dealing with the said discontent with TRIPS; Chapter five considers the connection between the concept of 'entrepreneurship' and intellectual property, and explores how 'musical entrepreneurship' can be used to develop the music industry; Chapter six makes a consideration of the development of copyright and performers' rights in South Africa and the present scenario, as well as making an account of efforts taken to develop the South African music industry; Chapter seven gives a conclusion of the research, and offers recommendations of what could be done to develop the music industry against the backdrop of the South African example.

CHAPTER 2: CAPACITY BUILDING FOR LESS DEVELOPED COUNTRIES AND THE JUSTIFIABILITY OF THE CALL FOR MORE 'POLICY SPACE'

2.1 Introduction

The transition from the old GATT system, in which developing nations acted more in a 'defensive' or 'passive' role, represented a major turning point for these nations in which many commitments had to be taken for the first time.²⁶ In view of the obvious massive demands imposed upon these nations in relation to participation in the new international trade system, especially with regard to adjustment of national trade policies to match the standards of the WTO agreements, it soon became clear that these nations would need assistance with regard to their capacity to fully participate in the new trade system.²⁷

The protests and various expressions of dissatisfaction which followed the pomp and ceremony with which the World Trade Organization was received, notably the failure of the Seattle Ministerial Conference in 1999, heralded, it is conjectured, a major awakening as to the many difficulties faced by the less developed world in relation to their obligations under the world trade system. African countries, in particular, have constantly given their attention to this problem of lack of capacity.²⁸

Some of these difficulties related to the costs imposed on these nations with regard to making the necessary transition, the significant offers they had to make on the basis of the 'single undertaking' approach, and institutional constraints.²⁹ Intellectual property represented one of the new complex

²⁶ Tussie D and Lengyel M F, *Developing Countries - Turning Participation into Influence*, (2002) at 485.

²⁷ Luke D F, *Trade-Related Capacity Building for enhanced African Participation in the Global Economy*, (2002) at 510.

²⁸ Luke D F, *op cit*, at 509.

²⁹ *Ibid*.

and 'slippery' issues which presented resource and research capacity constraints, in which 'many developing countries' capacity for analysis and for turning such analysis into sound negotiating positions was overtaxed.³⁰

2.2 Capacity Building efforts for African participation in international trade

As highlighted in the foregoing paragraph, the new expanded trade regime of the WTO created the need for greater institutional capacity for less developed nations. The 'ongoing' basis of the WTO negotiations, and financial requirements with regard to development of expertise in international trade for participation in the dispute-settlement mechanism perpetuates this need for capacity building.³¹

It has been said that the need for capacity building for African countries expresses itself in two areas:³² (i) Institutional capacity for more effective participation in the international trade system, i.e., lack of capacity with regard to the formulation and management of 'a dynamic trade policy and to meet the demands of participation in the WTO framework', and, (ii) Constraints in the supply-side of African countries as trading nations, which emanates from a decline in competitiveness of African economies.³³ These are very important areas for the present work, and much of the discussion in this work shall aim to respond to them, either directly or indirectly.

African world trade capacity can be explained in terms of 'two waves of responses' primarily involving the three Geneva trade agencies, (the WTO, UNCTAD and the International Trade Centre (ITC)), with certain bilateral donors and development agencies such as the United Nations Development Conference (UNDP), the World Bank and IMF also involved.³⁴ Luke shows however, that inter-agency cooperation with regard to trade-related capacity building has not been

³⁰ Tussie D and Lengyel M F, loc cit, at 486.

³¹ See Tussie and Lengyel, *Developing Countries - Turning Participation into influence*, (2002) at 487.

³² Luke D F, *Trade-Related Capacity Building for Enhanced African Participation in the Global Economy*, (2002) at 509.

³³ Ibid.

³⁴ Ibid.

easy.³⁵ Luke³⁶ further explains that the 'first wave' of efforts at building international trade capacity involved three initiatives which began with the adoption of the Joint Integrated Technical Assistance Programme for Selected Least-Developed and other African Countries (JITAP) at the UNCTAD IX conference in South Africa in 1996. This initiative targeted the areas of human resource development, institutional capacity building and the strengthening of export supply capacity.³⁷ The second was the Comprehensive and Integrated WTO Plan of Action for LDC's, adopted at the First WTO Ministerial Conference at Singapore in 1996, and which aimed at 'closer cooperation between the WTO and other multilateral and bilateral agencies assisting LDC's in the area of trade.'³⁸ This led to the Integrated Framework for Technical Related Assistance, Including Human and Institutional Capacity Building to Support Least-Developed Countries in their Trade and Trade-Related Activities (the Integrated Framework - IF), launched in 1997. Under the IF beneficiary countries were required to conduct a needs assessment in relation to trade-related technical assistance.³⁹

The last initiative under the 'first wave of efforts' arose out of the Singapore experience, in which less-developed nations felt that they were marginalized with regard to participation in the negotiations on what have come to be known as the 'Singapore issues' (which included labour standards, investment, competition policy, clothing and textiles, etc.). It was a separate initiative primarily under the UNCTAD's Positive Agenda programme, and included such organizations as the UNDP, the South Centre, the Commonwealth Secretariat and the OAU.⁴⁰ The aim of the Positive Agenda was to prepare African countries for future WTO negotiations, including negotiations on agriculture and services which were due to be tabled at the Seattle Ministerial Conference.⁴¹

³⁵ Op cit, at 509f.

³⁶ Op cit, at 510.

³⁷ Luke D F, *Trade-Related Capacity Building for Enhanced African Participation in the Global Economy*, (2002) at 511.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Op cit, at 512.

⁴¹ Ibid.

These efforts emerged in response to the concerns raised by the Framework for Action for the Implementation of the Uruguay Round Agreements by African Countries, which was formed by African countries shortly after the Marrakech agreement. The Framework was formed for purposes of identifying capacity-building needs 'for the development and management of trade policy, including the implementation of the Uruguay Round agreements, participation in the WTO framework, and the promotion of exports.'⁴²

As to the 'second wave' of efforts, Luke writes:

"The "second wave" response, dating from around mid-2000, followed reviews of the JITAP and IF. It apparently has broader objectives and a much wider scope than the initiatives in the first wave. It is concerned with "mainstreaming trade" as an integral part of the development and poverty reduction effort... [it] is more explicit in its recognition of trade as a major engine of enterprise development, diversification, economic growth and poverty reduction. Consequently, it is focused on assisting the countries concerned to identify and prioritize structural supply-side constraints, including insufficient human, institutional and productive capacity and inadequate trade-related infrastructure."⁴³

It is said that the 'second wave' in particular, 'holds the key to a sustainable integration of African countries into the global economy and to their more effective participation in the WTO...[but will however] require complex interventions, demanding a coherent approach from African policy makers, development partners, and other actors.'⁴⁴ An important factor in relation to the second wave is the emphasis that was placed on the need for the strengthening of the role of ministries of trade '*as the focal point in the development of trade policy, including the provision of extension services to the private sector and engagement with the WTO.*'⁴⁵

2.3 The Inadequacies of Capacity Building efforts

⁴² Luke D F, *Trade-Related Capacity Building for Enhanced African Participation in the Global Economy*, (2002) at 512.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Op cit, at 513. Emphasis added.

Although it has been said that the various efforts at building international trade capacity helped sensitise African countries as to the requirements for compliance with WTO obligations⁴⁶, these efforts have in the large proved ineffective. The JITAP suffered from various deficiencies, whereas the IF failed to take off.⁴⁷ The 'second wave' response is a fairly recent initiative aimed at re-launching the JITAP and Integrated Framework initiatives, and it is therefore 'too early' to assess its effectiveness.⁴⁸

The main aim of the 'second wave' response, which, as indicated under 2.2 above is to 'mainstream' trade as an integral part of overall development and poverty reduction, is clearly recognized under paragraph 38 of the Doha Ministerial Declaration of 2001. The paragraph states:

'We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for *mainstreaming trade into national plans for economic development and strategies for poverty reduction...*'⁴⁹

Thus the aim of the 'second wave' efforts is to attempt to fit developing nations' international trade obligations within their developmental concerns, hence dubbing the Doha Round the 'Doha Development Agenda'. This was reiterated in the so-called 'July Package', where it is stipulated under 'Technical Assistance':

'[The] Council affirms that [developing countries and low-income countries in transition], and in particular least-developed countries, should be provided with enhanced TRTA and capacity building, to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules, and to enable them to adjust and diversify their economies. In this context the Council welcomes and further encourages

⁴⁶ Op cit, at 512.

⁴⁷ Ibid.

⁴⁸ Luke D F, Trade-Related Capacity Building for Enhanced African Participation in the Global Economy, (2002) at 514.

⁴⁹ Taken from *WTO Documentation in Electronic Form*, CD format, WTO (2003). Emphasis added.

the improved coordination with other agencies, including under the Integrated Framework for TRTA for the LDC's (IF) and the Joint Integrated Technical Assistance Programme (JITAP).'⁵⁰

As indicated however, the 'second wave' JITAP and IF initiatives were a response to the failure of the 'first wave' efforts in this regard, and there has not been enough time under the new initiatives to judge their effectiveness. What one could venture to say is that capacity building efforts aimed at facilitating developing nations' optimal participation in international trade have so far proved inadequate.

2.4 The Call for more 'Policy Space' and its justifiability

Amidst the various activities in relation to the enhancement of capacity building has been a growing feeling amongst less developed countries that their obligation in relation to conformity with WTO agreements is stifling their 'policy space' for pursuance of development-related domestic trade policy. In this regard it has been said, 'International policy arrangements should not deny developing countries the right to maintain their own policy space. This right is essential if they are to develop local industry and achieve more balanced integration into the world economy.'⁵¹



Neither the special and differential treatment (S&D) provisions of the WTO nor the adoption of the Doha Development Agenda has been of assistance in this regard. The General Council recognized in the 'July Package' that the S&D provisions had been limited to the granting of transition periods for the implementation of commitments,⁵² and '[recalled] the Ministers' decision in Doha to review all S&D treatment provisions with a view to strengthening them and making them more precise, effective and operational.'⁵³

⁵⁰ Paragraph 1(d) 'Development' of the Doha Work Programme, *Decision Adopted by the General Council on 1 August 2004*, document WT/L/579. See also paragraph 5 of Annex D on *Modalities for Negotiations on Trade Facilitation*.

⁵¹ *Trade and Development Board: UNCTAD's role as a think tank on trade and development more relevant than ever*. From <http://www.unctad.org/Template/Download.asp?docid=1&intItemID=2647>. [Accessed on 20 January 2005]

⁵² Annex D paragraph 2.

⁵³ *Decision Adopted by the General Council on 1 August 2004*, paragraph 1(d), 'Special and Differential Treatment'.

The General Council gave instruction to the Committee on Trade and Development in Special Session to 'expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005.'⁵⁴ It has to be mentioned however, that this period is an extension of time, as the Committee on Trade and Development had already been given instructions in this regard under the Doha Decision on Implementation, which were supposed to have been carried out by July 2002.⁵⁵ It is clear therefore that not much progress was attained in this regard, and this is exacerbated by the fact that the TRIPS negotiations recently reached a deadlock, and it was said that it is not known when the negotiations shall resume.⁵⁶

The adoption of the decision to review special and differential treatment provisions in the Doha Decision on Implementation arose out of concerns from less developed nations that too many obligations in relation to the rules of inter-governmental bodies, in particular the WTO, IMF and the World Bank left them with no option about pursuing national policies aimed at development and poverty reduction.⁵⁷ Developing nations felt that they needed 'policy space' to enable them to develop policies that would contribute to the nurturing of infant industries, thus ultimately resulting in a fairer participation in international trade. The mere extension of transition periods in the S&D provisions is therefore, not perceived to be adequate in achieving this, hence the incorporation of provisions for the review of S&D treatment in the Doha decision.⁵⁸ S&D treatment has consequently, come to be conceived by some as a development tool in the post-Doha dispensation, linked to the debate on 'policy space', and which could become a 'coherent paradigm' in addressing key trade-related developments.⁵⁹ Others from the developed world, however, have

⁵⁴ Ibid.

⁵⁵ Paragraph 12, *Doha Decision on Implementation-Related Issues and Concerns* (2001).

⁵⁶ See article, Hope dwindling that consensus possible on TRIPS (2005)
<http://www.tralac.org/scripts/content.php?id+3538> [Accessed on

⁵⁷ Khor M, *UNCTAD XI: Developing Countries fight for "Policy space."* <<http://www.twinside.org.sg>> [Accessed on 14 March 2005].

⁵⁸ *Key Challenges on Global Trade Agenda Addressed at UNCTAD*, (2002) at <www.un-ngls.org/documents/pdf/roundup/ru97unctad>

⁵⁹ Ibid.

expressed concern that S&D could become an 'escape clause' by which developing nations may want to avoid undertaking trade-related reforms.⁶⁰

The concerns over the dwindling policy space in the South surfaced again at the Cancun Ministerial Conference in 2003, fuelled by dissatisfaction with the lack of progress in the Doha Development Agenda, which someone dubbed the 'Doha Anti-Development Agenda' (DADA).⁶¹ In this regard Khor lamented, 'Post-Doha there was supposed to be a strong development dimension to the WTO's work. This has not been delivered. There has been no substantial progress on implementation issues (the programme intended to rectify the imbalances in the existing Uruguay Round rules) nor on strengthening special and differential treatment (S&D) for developing countries.... Implementation issues have been downgraded and neglected, whilst the 24 S&D proposed decisions in the Cancun draft *lack commercial value and do not expand policy space*.'⁶²

This debate was reinforced and clearly strengthened by the recent adoption of this concept by the Declaration of the eleventh session of the United Nations Conference on Trade and Development (UNCTAD XI) in June 2004 - the so-called *Sao Paulo Consensus*. It has been said that the endorsement of the 'policy space' debate by UNCTAD was perhaps the most important outcome of the UNCTAD XI conference, being the first time that the concept was recognized in an intergovernmental consensus.⁶³ Developing nations had felt that their space and flexibility to pursue national development policies had been eroded by international rules, and feared that such space could be further constrained by future international rules.⁶⁴ The issue was settled under paragraph 8 of the Consensus, which states *inter alia*, that 'it is particularly important for developing countries, bearing in mind their development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international

⁶⁰ Ibid.

⁶¹ See Khor M, *Some Key Issues in Cancun*, (2003) <www.twinside.org.sg/> [Accessed on 14 April 2005].

⁶² Khor M, *Some Key Issues in Cancun*, (2003). Emphasis mine.

⁶³ Raman M, *UNCTAD XI Consensus Declaration adopted after lengthy tussles*, at 1f. <http://www.choike.org/nuevo_eng/eventos/2.html> [Accessed on 14 March 2005].

⁶⁴ Op cit, at 1.

disciplines and commitments.⁶⁵ The text went further to lament that national policy space, especially in trade, investment and *industrial development*, 'is now often framed by international disciplines, commitments and global market considerations.'⁶⁶

Developing nations felt that being granted their right to policy space would bring a balance between pursuing policy space for purposes of development, and their obligations under international rules.⁶⁷ On the contrary, some developed nations felt that granting such 'policy space' under an inter-governmental body such as UNCTAD 'would enable [developing nations] to strengthen their bargaining position to elude the rich countries' pressure for them to undertake more liberalization and privatization commitments, especially at the WTO, and through IMF-World Bank loan conditionalities or through aid conditionalities.'⁶⁸ The policy space debate has emerged under the rubric of such concepts as 'open nationalism'⁶⁹ and 'development space'.⁷⁰ Recently the 'policy space' debate has come within the circles of WIPO, under the so-called 'WIPO Development Agenda'.⁷¹

In light of the foregoing, it is the author's opinion that developing nations' call for more 'policy space' is convincingly valid and justified, taking into cognisance the argument that the developed world itself had to resort to this 'policy space' in their development efforts.⁷² It is the author's opinion that it was just not fair to expect less developed nations to adjust their policies to conform to such sophisticated rules as many rules of the WTO are within just a decade of the advent of the new international trade regime, taking into cognisance the many developmental needs most of these nations have.

⁶⁵ Op cit, at 2.

⁶⁶ Ibid.

⁶⁷ Op cit, at 1.

⁶⁸ Raman M, *UNCTAD XI Consensus adopted after lengthy tussle*, at 1.

⁶⁹ Waghorne M, *Open Nationalism - How Much is too Much?* <http://www.world-psi.org/ContentGroups/English7/Focus2/Focus1/Focus_08-04.pdf>, at 20. [Accessed on 21 April 2005].

⁷⁰ See Wade R H, *What Strategies are available for developing Countries today? The World Trade Organization and the Shrinking of 'development space'* (2003) <<http://www.crisisstates.com/download/wp/WP31RW.pdf>> [Accessed on 24 February 2005].

⁷¹ In this regard see information on the statements of Brazil and India on this Development Agenda for WIPO, <<http://www.twinside.org.sg/title2/twninfo167.htm#26k>> [Accessed on 14 March 2005].

⁷² See *Integrating Intellectual Property Rights and Development Policy*, (Report of the Commission on Intellectual

It is proposed, however, that the solution lies in finding a balance between any granting of more 'policy space' and continued active participation in international trade within that framework. Developing nations must therefore *justify* the policy space cause, by showing that 'policy space' is really serving its intended purpose, namely to give less developed nations the 'space' to develop policies that will contribute to development and poverty reduction. In this way they shall allay the developed nations' fear that 'policy space' may be used as an excuse by developing nations from committing themselves to obligations under the WTO framework. Ultimately, the end purpose of more 'policy space' should be to give an opportunity for developing nations to prepare themselves to participate more effectively and efficiently in international trade. In this regard developing nations have to act swiftly, strategically and pragmatically, identifying areas where they have an advantage and building international trade capacity in those areas. The music industry, it is proposed, is one such area.

CHAPTER 3: INTERNATIONAL INTELLECTUAL PROPERTY AND THE TRIPS AGREEMENT



3.1 Introduction

When mention is made of 'International Intellectual Property' it should be clear that this is far from implying the existence of a uniform system of worldwide intellectual property. Such a uniform system is sad to say, non-existent.⁷³ What does exist is a framework of international intellectual property *relations* based on certain international instruments.⁷⁴

The protection of a particular category of intellectual property rights is therefore limited to the country granting such rights, so that if a particular country does not provide protection for a category of intellectual property rights, a right-owner from another nation shall not be able to

Property Rights, 2002) at 11 <<http://www.iprcommission.org>> [Accessed on 11 October 2004].

⁷³ See in this regard Gutterman and Anderson, *Intellectual Property in Global Markets*, (1997) at 4.

⁷⁴ See Baumgarten J talking about international copyright law in *Primer on the Principles of International Copyright* in Fourth Annual US Copyright Office Speaks: Contemporary Copyright and Intellectual Property Issues (1992) at 470f (quoted from "*Essential Copyright Law*" by Visser C and Pistorius T, Unisa-Wipo Study Guide, 2005).

protect his right in that other country.⁷⁵ One reason ascribed to this lack of uniformity in international intellectual property rights is that this

'reflects, to some extent, the fundamental schism that exists between developed and developing countries regarding the benefits and perceived dangers of property rights ... [whereby] governments in many developing countries are reluctant to provide any strong degree of protection to foreign investors and firms, since protection of this sort may work as a disincentive to local innovators to build their own research and marketing capabilities and, perhaps more importantly, allow foreign firms to exercise undue control over the availability and affordability of protected items.'⁷⁶

3.2 Overview of the International IP framework

It is now proposed to make a bird's eye view evaluation of the international IP framework, prior to an in-depth examination of the TRIPS Agreement. Before doing this however, a simple definition of 'intellectual property rights' is required. Intellectual Property rights (IPRs) have been simply defined as the rights given to persons over the creation of their minds, which usually give the rights-holders exclusive rights over the use of their works for a certain period of time.⁷⁷ IPRs are divided into two categories, namely copyright and rights related to copyright ('related rights', also called 'neighbouring rights'), and industrial property.⁷⁸ It has been said that this distinction emanated from the perception that cultural expressions differed from 'functional commercial inventions', but that with the advent of technological advancement and digital products 'this distinction has... been considerably blurred....'⁷⁹

Copyright includes the rights of authors of literary works (e.g. books, poems, plays and films, *musical compositions* and computer programmes) and artistic works (e.g. photographs, paintings,

⁷⁵ Gutterman and Anderson, loc cit.

⁷⁶ Gutterman and Anderson, at 4f.

⁷⁷ *Trade Related Aspects of Intellectual Property Rights* (TRIPS), from WTO Training Manual (Second Edition 2001), taken from WTO University Programme - Background Materials (WTO 2003).

⁷⁸ *What is Intellectual Property?* WIPO Publication, at 2.

drawings, sculptures and architectural designs). It has to be noted that it is the expression of the idea and not the idea itself that is protected in copyright, thus resulting in an idea/expression dichotomy, which 'enables others to express the same or similar idea and receive copyright protection for as long as the expression satisfies the test of originality.'⁸⁰ Related rights refer to the rights of performers in their performances, producers of phonograms and broadcasters in their television and radio programmes.⁸¹ These rights follow similar principles of protection as those of copyright, and protect persons other than the copyright owners, who are involved in the dissemination of copyright works, although in some jurisdictions these rights are incorporated within the copyright system.⁸² Industrial property can, in turn, be sub-divided into two spheres: (i) those used for the protection of distinctive signs such as trademarks and geographical indications, and (ii) those that are protected primarily for the stimulation of innovation, design and the creation of technology, such as inventions (protected primarily by patents, and by 'utility models' in certain respects), industrial designs and trade secrets.⁸³

Copyrights and related rights are normally protected for the lifetime of the right-owner and a period of fifty years thereafter, whereas trademarks and geographical indications may exist indefinitely, 'provided the sign in question continues to be distinctive.'⁸⁴ On the other hand, patents, industrial designs and trade secrets last for a limited period, with patents normally lasting for twenty years.⁸⁵ Probably the reason for the longer period of copyright protection is due to the fact that '[c]opyright laws recognize much wider limitations to the exclusive rights granted to the right holder than in any other category of IPR.'⁸⁶

The international intellectual property regime exists in the form of various international intellectual property instruments, which form the basis for international intellectual property relations. These include various international conventions, agreements and treaties, of which the

⁷⁹ Watal J, *Implementing the TRIPS Agreement*, (2002) at 360.

⁸⁰ Watal J, *Intellectual Property Rights in the WTO and Developing Countries*, (2001) at 207.

⁸¹ Watal J, *Implementing the TRIPS Agreement*, op cit.

⁸² Watal J, *Intellectual Property Rights in the WTO and Developing Countries*, (2001) at 208.

⁸³ *Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, WTO Training Manual, footnote 47 *supra*.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

major ones are aimed at attempting to harmonize the various laws of the member states, and to reconcile the differences in the national legal systems.⁸⁷ A comprehensive consideration of the international IP framework falls beyond the scope of this work; for this reason only the TRIPS Agreement shall be considered with some depth in this chapter, with the international copyright regime being considered in a latter chapter.⁸⁸

In the area of industrial property, the most comprehensive treaty, which 'applies to industrial property in the widest sense', is the *International Convention for the Protection of Industrial Property* ('Paris Convention'), and it was originally enacted in 1883.⁸⁹ The treaty covers such subjects as inventions (patents), utility models, trademarks, trade names, service marks, industrial designs, indications of source, appellations of origin and the repression of unfair competition. The treaty is supplemented by the Patent Cooperation Treaty (PCT), which came into effect in 1978.⁹⁰

In the area of trademarks the major international instrument is the *Madrid Agreement Concerning the International Registration of Marks* (Madrid Agreement) of 1891, which is a special union of the Paris Convention.⁹¹ The aim of the Madrid Agreement, which came into force in 1892 with several subsequent revisions,⁹² was to extend the general principles for trademark protection enunciated in the *Paris Convention* by establishing the Central Registration Bureau (CRB), a centralized international registration and protection system of marks administered by WIPO.⁹³ The *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (Madrid Protocol) of 1989 aimed at broadening the scope of the *Madrid Agreement* by rendering it

⁸⁶ Watal J, *Intellectual Property Rights in the WTO and Developing Countries*, (2001) at 208.

⁸⁷ Gutterman and Anderson, *Intellectual Property in Global Markets*, (1997) at 11.

⁸⁸ Chapter 5 below.

⁸⁹ *Summaries of Conventions, Treaties and Agreements administered by WIPO*, (2001) at 24. See also Gutterman and Anderson *loc cit*.

⁹⁰ Gutterman and Anderson, *Intellectual Property in Global Markets*, (1997) at 12.

⁹¹ *Op cit*, 14.

⁹² Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957), Stockholm (1967).

⁹³ Gutterman and Anderson, *Intellectual Property in Global Markets*, *loc cit*.

'more flexible and more compatible with the domestic legislations of certain countries which had not been able to accede to the agreement.'⁹⁴

In the field of copyright, the most important international treaty is the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention) of 1886,⁹⁵ and it provided the highest form of international protection of copyright prior to TRIPS.⁹⁶ In the field of related rights the existing international standards are incorporated in the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the Rome Convention) of 1961. The *Universal Copyright Convention* of 1952 is an initiative of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and was formed as an alternative to the *Berne Convention*.⁹⁷

Recent developments within the 'digital agenda' of WIPO include the *WIPO Copyright Treaty* (on copyright) and the *WIPO Performances and Phonograms Treaty* (on 'related rights'), both of 1996.⁹⁸ A full discussion on copyright and related rights is made in a latter chapter.⁹⁹

3.3 The WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS)



The TRIPS Agreement has been called 'the most comprehensive multilateral agreement on intellectual property.'¹⁰⁰ The purpose of the negotiations leading to the TRIPS Agreement is said to have been to supplement and not to override the terms of any international convention or multilateral agreement made within the auspices of the WIPO.¹⁰¹ WIPO was the main body dealing

⁹⁴ *Summaries of Conventions, Treaties and Agreements Administered by WIPO*, (2001) at 17.

⁹⁵ Gutterman and Anderson, op cit at 12.

⁹⁶ Watal J, *Intellectual Property Right in the WTO and Developing Countries*, (2002) at 207.

⁹⁷ Gutterman and Anderson, op cit, at 13.

⁹⁸ See Visser and Pistorius, *Performers' Rights; Exploitation and Intellectual Protection of Intellectual Property; Collective Rights Management* (2004), at 1.1.1 and 1.1.9.

⁹⁹ Chapter 5 Part B.

¹⁰⁰ See the information on the TRIPS Agreement from the WTO website <<http://www.wto.org>> [Accessed on 14 January 2005].

¹⁰¹ Gutterman and Anderson, *Intellectual Property in Global Markets*, (1997) at 17. Note however that of late there is concern about the insistence of some to incorporate a TRIPS-plus agenda. In this regard see Chapter 4 below.

with IPRs before the advent of the TRIPS Agreement.¹⁰² The following is an elaboration on the fundamental obligations, principles and objectives of the TRIPS Agreement.

3.3.1 The Nature and Scope of the TRIPS Agreement

Article 1 of the Agreement enjoins members to ‘give effect’ to its provisions.¹⁰³ This restates the basic international law obligation on states to perform an international agreement in good faith (*pacta sunt servanda*) as determined in the *Vienna Convention on the Law of Treaties*, and by customary international law.¹⁰⁴ The Agreement further stipulates that members may, although not obliged to, implement *more extensive* protection in their laws than that provided, provided such protection does not contravene the provisions of the Agreement.¹⁰⁵ Thus the TRIPS Agreement has been said to establish 'minimum standards' for the protection of intellectual property rights.¹⁰⁶ Furthermore, members are given the latitude to determine the appropriate method of implementation of the provisions of the Agreement ‘within their own legal system and practice.’¹⁰⁷ Unlike in the case of the GATS (General Agreement on Trade in Services) where members can enter exceptions in Schedules of Commitments, the TRIPS Agreement specifically prohibits members from making reservations with regard to any of the provisions of the Agreement without prior consent of other members.¹⁰⁸ Owing to the negative/reverse consensus nature of WTO obligations and the controversial nature of the TRIPS Agreement, it is very unlikely that members will have unanimous consensus to allow a member’s expression of reservation to a provision of the TRIPS Agreement.

The fact that a Member may determine the appropriate method of implementing the provisions of the TRIPS Agreement within its legal system and practice should not be construed to mean that the

¹⁰² See *TRIPS and Development: Resource Book*, UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development (October 2002) at 9 <<http://www.iprsonline.org/unctadictsd/docs>> [Accessed on 12 January 2005].

¹⁰³ Article 1, TRIPS Agreement.

¹⁰⁴ *TRIPS and Development: Resource Book*, Part One, at 9.

¹⁰⁵ Article 1.

¹⁰⁶ See *TRIPS and Development: Resource Book, Part One* (2002) at 9.

¹⁰⁷ Article 1.

¹⁰⁸ Article 72.

Member has a 'right to *self-certify* compliance with TRIPS obligations.'¹⁰⁹ This position was held in the so-called *India-Mailbox* case.¹¹⁰

Article 1(2) refers to the scope of 'intellectual property' covered in the Agreement by stating that '[f]or the purposes of [the] Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of the Part II.' These are outlined in Part II as Copyright and Related Rights (Section 1), Trademarks (Section 2), Geographical Indications (Section 3), Industrial Designs (Section 4), Patents (Section 5), Layout-designs (Topographies) of Integrated Circuits (Section 6) and Protection of Undisclosed Information (Section 7). In this regard it was said, 'By defining "intellectual property" by reference to "all categories" of intellectual property that are the subject of certain sections of the Agreement, the definition excludes other potential categories of intellectual property that are not the subject of those sections.'¹¹¹ Note however, in relation to this, that proposals have been made, especially by developing country members, that aspects such as traditional knowledge, folklore and genetic resources be incorporated within the scope of TRIPS.¹¹²

Article 2(2) aims to preserve Members' obligations with regard to the *Paris Convention*, *Berne Convention*, *Rome Convention* and the *Treaty on Intellectual Property in Respect of Integrated Circuits* by stipulating that nothing in the Agreement derogates from obligations that members may have under these laws. In relation to the *Berne Convention*, Article 9(1) sets out the formula for the incorporation of its rules, by stipulating:

'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.'

The inclusion of copyrights (and related rights) within the WTO system heralded the first time that these rights became the subject of international trade law.¹¹³ One of the reasons given for the inclusion of copyright, in particular, within the GATT negotiations leading to the TRIPS

¹⁰⁹ See *TRIPS and Development: Resource Book, Part One*, at 21. Emphasis added.

¹¹⁰ *Appellate Body, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997.

¹¹¹ *TRIPS and Development: Resource Book, Part One*, at 35.

¹¹² *TRIPS and Development: Resource Book*, (2002) at 29.

¹¹³ Watal J, *Intellectual Property Rights in the WTO and Developing Countries*, (2001) at 207.

Agreement is that this arose out of recognition of the economic importance of copyright to the success of the cultural industries, which reflected several years of study in this regard.¹¹⁴ In this regard three developments have been identified as contributing to this recognition of not only the economic, but also the juridical and political significance of copyright, namely the growth of piracy, the advent of satellite communications and the advent of the Internet.¹¹⁵

The problem arising out of the incorporation of the provisions of the Paris and Berne Conventions in the TRIPS Agreement is the fact that although a number of developing and least-developed members of the WTO were not party to these Conventions,¹¹⁶ by virtue of their membership in the WTO they are expected to comply with these the provisions. Another concern of less developed nations has been that TRIPS does not make any reference to the *Convention on Biodiversity*, which they would like it to do.¹¹⁷ Furthermore, developing nations have an interest in the expansion of existing provisions of TRIPS to include traditional knowledge and folklore, together with genetic resources, since this is an area in which they have significant strength.¹¹⁸

The basic principles underlying the TRIPS Agreement are national treatment (Article 3) and most-favoured-nation treatment (MFN - Article 4). Article 5 stipulates that national treatment and MFN obligations do not apply to procedures relating to the acquisition and maintenance of IP rights in WIPO-controlled multilateral agreements. Whereas national treatment is at the core of both the *Paris* and *Berne Conventions*, both national treatment and MFN form the cornerstone of the WTO system.

National treatment requires that members should give at least the same treatment to nationals of other members as it gives to its own, whereas the MFN principle requires *equivalent* treatment of nationals of all other members.¹¹⁹ It is important to note that the articles on national treatment and the MFN (Articles 3, 4 and 5) did not form part of transitional arrangements in favour of developing and least-developed country members.¹²⁰

¹¹⁴ Davies G, *Copyright and the Public Interest*, (2002) at 239ff.

¹¹⁵ Sterling J A L, *World Copyright Law*, (2003) at 6.

¹¹⁶ *TRIPS and Development: Resource Book, Part One*, at 40.

¹¹⁷ *Op cit*, at 45.

¹¹⁸ *Op cit*, at 48.

¹¹⁹ *TRIPS and Development: Resource Book, Part One*, (2002) at 52.

¹²⁰ *Ibid*.

Article 6 of the Agreement deals with the issue of exhaustion of IP rights, and stipulates that nothing in the Agreement shall, for the purpose of dispute settlement and subject to the national and MFN treatment provisions, be used to address the issue of exhaustion of IP rights. In this regard it has been said:

'The doctrine of exhaustion addresses the point at which the IPR holder's control over the good or service ceases. This termination of control is critical to the functioning of any market economy because it permits the free transfer of goods and services. Without an exhaustion doctrine, the original IPRs holder would perpetually exercise control over the sale, transfer or use of a good or service embodying an IPR, and would control economic life.'¹²¹

Article 5(d) of the *Doha Declaration on the TRIPS Agreement and Public Health* provides that the effect of the provisions on the exhaustion of IP rights 'is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4. This provision on exhaustion of IP rights is a very sensitive one, as it has a bearing on the issue of parallel imports.'¹²²



3.3.2 Discontent with the TRIPS Agreement

In Chapter 2 an outline was provided of the debate on 'policy space' which arose out of a conviction that developing nations lack the capacity to fully participate in the world trade system on an equal footing with the developed world. Perhaps this discontent with the WTO regime is nowhere more explicit than in the domain of the TRIPS Agreement.¹²³ Because of the limitations of this present work, a comprehensive analysis of the issues surrounding this TRIPS controversy is not possible. Only a brief outline of some of the pertinent issues relating to this controversy shall therefore be made.

The following are some of the areas of discontent with the TRIPS Agreement:

¹²¹ Op cit, at 78.

¹²² Op cit, at 78ff.

¹²³ See for example in this regard Shiva V, Protect or Plunder? *Understanding Intellectual Property Rights* (2001)

(1) Adjusting to the new TRIPS international IP system imposes heavy costs on less developed nations;¹²⁴

(2) Under growing pressure for harmonisation, developing nations are restricted on how they can apply IP rights, whereas the developed world used IP flexibly in their periods of development by employing discriminatory and exclusionary policies for purposes of protecting their fledgling industries (eg, denying foreigners IP protection or charging them high fees, and excluding sectors such as food and pharmaceuticals from patentability);¹²⁵

(3) Since many developing nations were not part of the historical development and evolution of the international IP system such as the Paris and Berne Conventions, many provisions of which are now incorporated in TRIPS, the argument contends that they should not be, as it were, held hostage by a system the interpretation of which is based on the state practice of the developed world;¹²⁶

(4) While IPRs are perceived to foster innovation in the developed world, for example in the area of pharmaceuticals, it is argued that this stimulation of technology is rendered ineffective in the less developed world due to the technological divide. Transfer of technology and the development of technological capability are therefore the key issues in the less developed world - in this regard it has however been said that IPRs are not the only determinant factor;¹²⁷

(6) TRIPS is also lambasted for strengthening the global protection offered to suppliers of technology, while not at the same time strengthening global competition policies, resulting in a situation where 'companies are wary of transferring technology in ways that may increase the competition they face.'¹²⁸

(7) TRIPS has been accused of not playing a role in combating diseases such as diabetes and heart problems in the developing world, since 'there is also a substantial market in the developed world' for such diseases, (while also not fostering research related to diseases primarily affecting

(London and New York: Zed Books).

² *Integrating Intellectual Property Rights and Development Policy* (Report of the Commission on Intellectual Property Rights, 2002) <<http://www.iprcommission.org>> at 11f. [Accessed on 11 October 2004].

¹²⁵ Op cit.

¹²⁶ See *TRIPS and Development: Resource Book Part One*, at 40. The phrase 'held hostage' is the author's own coinage.

¹²⁷ *Integrating Intellectual Property Rights and Development Policy*, at 12.

the developing world), thus resulting in higher costs in medicine prices for the developing world;¹²⁹

(8) In the area of agriculture and genetic resources, the areas of concern relate to the belief that the switch to private sector research will result in the diminishing of research efforts relevant to poor farmers in the developing world, as well as the fact that not much has been done to recognise the services of farmers in the selection, development and conservation of traditional varieties of genetic material;¹³⁰

(9) Despite the provisions of Article 27(3)(b) of the TRIPS Agreement, which allows the use of patents or *sui generis* systems for the protection of plant varieties, it has been argued that evidence indicates that such *sui generis* systems have not aided research for ‘the kind of crops grown by poor farmers’, pose a threat to these farmers’ practice of reusing, exchanging and informally selling seeds, as well as leading to costly disputes retarding the conduct of research;¹³¹

(10) The lack of recognition of traditional knowledge in the TRIPS Agreement, as well as its misappropriation in the form of granting of patents for mere discoveries construed as ‘inventions’, the lack of consent from communities providing such traditional knowledge or genetic resources, the lack of arrangements for sharing in the benefits from commercialisation, and the fact that no disclosure of the source of any genetic material resource used in an invention is required when applying for a patent;¹³²

(11) Concerns have also been raised in the area of geographical indications, (especially in relation to the possible extension of the protection granted to spirits and wines, to other products), as well as the copyright system (in relation to the high costs of computer software and restrictions in ‘fair usage’ due to technological protection measures such as encryption;¹³³ and

(12) The push by certain developed countries for ‘TRIPS-plus’ standards in bilateral and regional negotiations, held to be contrary to the WTO and TRIPS spirit of providing a secure framework

¹²⁸ Ibid.

¹²⁹ Op cit, at 13f.

¹³⁰ Op cit, at 16.

¹³¹ Op cit, at 16f.

¹³² Op cit, at 18f. For an interesting argument in this regard see also Shiva V, Protect or Plunder? Understanding Intellectual Property Rights, loc cit.

¹³³ *Integrating Intellectual Property and Development Policy*, 92002) at 19ff.

for conducting international relations;¹³⁴ thus several developing countries have suggested the amendment of the TRIPS Agreement to exclude such bilateral or regional pressure which precludes members from taking advantage of flexibilities provided in TRIPS.¹³⁵

In this chapter an attempt was made to provide an overview of the international intellectual property system. In this regard the distinction between copyright and industrial property was given briefly, and it was mentioned that, (unlike in patents for example), in the case copyright it is not the idea but the expression of the idea that is protected. More importantly, some in-depth examination of the TRIPS Agreement, inarguably the most-comprehensive international intellectual property instrument¹³⁶, was made. In this regard the relationship between TRIPS and other IP instruments, in particular the Paris and Berne Conventions was delineated, together with the dissatisfaction expressed by some developing nations in relation to the incorporation of certain provisions of these instruments within the TRIPS Agreement. Some elaboration of the three main principles of TRIPS, namely national treatment, most-favoured nation treatment and the exhaustion of IP rights was made. Finally, it was shown that no other Agreement of the WTO has attracted so much dissatisfaction as the TRIPS Agreement, and in this regard some of the reasons underlying this dissatisfaction were indicated. In the following chapter a recommendation shall be made about adopting a 'pragmatic approach' to these problems.

CHAPTER 4: ADOPTING A PRAGMATIC APPROACH TO THE PROBLEM OF INTERNATIONAL TRADE PARTICIPATION BY AFRICAN COUNTRIES

4.1 Introduction

In view of the foregoing outline of the many problems besetting Africa, what would one say is the viable option for developing nations - should they negotiate for a better, more favourable IP framework, or should they opt out of the system, as some have suggested?¹³⁷

¹³⁴ *TRIPS and Development: Resource Book, Part One*, (2002) at 17.

¹³⁵ *Op cit*, at 27.

¹³⁶ See 3.3 above.

¹³⁷ See Stiglitz J, *Globalization and its discontents*, (2002) at 214.

It is submitted that 'opting out' of the system should not even be an option, seeing that it might do more damage than help. Globalisation (and its often-unfortunate consequences) is a reality of our modern times, and it cannot merely be wished away. We are living in an era where competitiveness in the global arena often spells the difference between survival and stagnation, and therefore every nation has to be geared up for this reality of our times. No nation can afford to isolate itself from the 'global trade playground', as such nation will soon find itself left out in the cold of national despondency and misery. International trade is the name of the game in our modern times, and for this reason even hardliner communist states such as China have deemed it fit to join the bandwagon, (and needless to say, are beginning to 'reap the benefits' from doing so). Thus Joseph Stiglitz, one of the most outspoken critics of the globalisation process, has said, after posing the question 'Why has globalisation - a force that has brought so much good - become so controversial?'

Opening up to international trade has helped many countries grow far more quickly than they would otherwise have done. International trade helps economic development when a country's exports drive its economic growth. ...Globalization has reduced the sense of isolation felt in much of the developing world....¹³⁸



What of the issue of negotiating for a better and more favourable international trade framework? This of course is the ideal, and it is common cause that negotiations are an ongoing concern in the WTO. For this reason, and as an indicator of developing nation 'bargaining power', an agreement was reached in the WTO to pursue negotiations with a view of reviewing certain aspects of the TRIPS agreement, as reinforced in the Doha Declaration on TRIPS and Health, (although such negotiations have lately reached a deadlock, for the second time after the Declaration).¹³⁹ It has to be noted further however that many developing countries, including African countries, lack the capacity to effectively negotiate their interests in the WTO, owing to lack of training, a shortage of experts in international trade negotiations, and budgetary constraints.¹⁴⁰ This capacity should be

¹³⁸ Op cit, at 4.

¹³⁹ *Hope dwindling that consensus possible on TRIPS* (2005) <<http://www.tralac.org/scripts/content.php?id=3538>> [Accessed on 22 April 2005].

¹⁴⁰ See *Strengthening Developing Countries' Capacity For Trade Negotiations: Matching Technical Assistance to Negotiating Capacity Constraints* (2004) <http://www.southcentre.org/publications/doha/doha_strengthening_southern_traderelated_negotiations_capacity.pdf> [Accessed on 28 April 2005].

strengthened, because African countries need to effectively participate in world trade negotiations. Africans should therefore use 'policy space' to also build capacity for trade negotiations.

It is however proposed that African countries cannot wait until they shall have first developed their negotiating capacity, or 'won the negotiations' before they can participate meaningfully and efficiently in international trade. That, it is proposed, might be too late. Africa's economic ills are pressing and malicious, and continue to haunt her in the form of millions living below the poverty line, thousands starving and thousands living with, and dying of serious diseases. That invokes a moral responsibility that African governments cannot continue to ignore - a responsibility to find viable mechanisms to deal with these conditions.

4.2 The adoption of a 'pragmatic approach'

In Chapter 1, an allusion to the adoption of a 'pragmatic approach as a way of dealing with the problem of Africa's lack of capacity to participate fully in international trade was made. It is proposed that the adoption of this pragmatic approach would go a long way in helping to address Africa's pressing economic and social needs. What is this 'pragmatic approach'? The dictionary defines 'pragmatic' as '[S]olving problems *in a way which suits the present conditions rather than obeying fixed theories, ideas or rules.*'¹⁴¹ This it is proposed, is a viable option for Africa, and represents the middle way balancing out two options, namely: (i) pursuing a policy of relentlessly negotiating for 'better terms' in the world trade system, even if it means coming to terms with the lack of capacity to do so, and (ii) having to reckon with the continuing misery in Africa emanating from high poverty levels and low standards of living.

A 'pragmatic approach' as defined above would dictate that whereas 'better deals' continue to be sought through more bargaining and negotiations, *at the same time practical solutions of participating in international trade in relation to those areas of trade where a country has a comparative advantage, and in which less restrictions apply*, are formulated and pursued. This will ensure that a country *does not have to wait for the positive outcome of negotiations* before it

¹⁴¹ *Cambridge International Dictionary of English* (1995, Cambridge University Press). Emphasis added.

can begin participating meaningfully in international¹⁴² trade. A contrary approach could have crippling effects, as negotiations often come to a deadlock.

The process of organizing a national team and sending it for negotiations in the WTO is arguably often costly, and therefore if some form of strategically-identified trade activity with the capability of reaping export earnings is kept going while negotiations continue in other areas, the costs of the negotiations process can be justified and offset against the benefits from the trade activity.¹⁴³ Another important consideration however, as stated above, is the fact that trade negotiations often arrive at a deadlock; therefore if a nation had determined that it would only begin trading in a particular area after receiving favourable terms of trade from negotiations, this would mean that the nation's hopes would have been thwarted. For example, with regard to the TRIPS Agreement, the recent deadlock in the negotiations would mean that the hope for participating in international trade under 'perfect conditions' arising out of a negotiated settlement would have been thwarted.¹⁴⁴

This present work wishes to indicate that the music industry represents a "forgotten" or overlooked dynamic area within the international IP regime, in which there are less restrictions in the international markets as compared to other areas of IP, in which there are low to non-existent start-up costs, and in which developing nations have a certain comparative advantage to participate in international trade.¹⁴⁵ In any event African countries owe it to the NEPAD mandate, which recognizes 'the creativity of African people, which in many important ways remains under exploited and underdeveloped' as one of its four main development issues,¹⁴⁶ to ensure that such creativity is used to enhance Africa's economic recovery. The ensuing chapters shall give an outline of the music industry and its positioning as a competitive arena for international trade by

¹⁴² In this regard see *Strengthening Developing Countries' Capacity for Trade Negotiations* (2004).

¹⁴³ Of course this is not to imply that African countries are only interested in negotiating for a "better deal" while not conducting any form of trade. African nations participate and have been participating in international trade. The statement is used rather as an analogy, to paint a vivid picture of what could be said to be taking place figuratively speaking. However, it still remains that Africa's share in world trade remains negligible.

¹⁴⁴ For the negotiations deadlock see Hope dwindling that consensus possible on TRIPS (April 2005)

<http://www.tralac.org/scripts/content.php?id=3538> [Accessed on 16 April 2005].

¹⁴⁵ Concerning the comparative advantage that African countries have with regard to the music industry, especially in relation to the 'World Music' genre see Penna F J, and Visser C J, *Cultural Industries and Intellectual Property Rights*, (2002) at 390.)

¹⁴⁶ See OAU, *A New African Initiative: Merger of the Millennium Partnership for African Recovery Programme and Omega Plan* (2001).

African countries, and make recommendations as to what needs to be done to ensure that maximum benefits are reaped in this regard.



CHAPTER 5: THE MUSIC INDUSTRY, MUSICAL ENTREPRENEURSHIP AND THE BUILDING OF INTERNATIONAL TRADE CAPACITY FOR AFRICA

PART A

5.1 Introduction

In a previous chapter¹⁴⁷ it was indicated that one of the areas in which the need for capacity building expresses itself is with regard to constraints in the supply-side of African countries, emanating from a *decline in the competitiveness* of African countries. The main thrust of this work is to show that the music industry is well positioned to place African countries in a competitive position with regard to international trade. This will, as indicated in Chapter three, result in a pragmatic solution to the difficulties experienced by African countries with regard to participation in international trade within the present WTO dispensation.

According to the author, two important factors distinguish the music industry from other expressions of the intellectual property system, which make it more suitable for African nations as a tool for economic recovery, and these are (1) The fact that music is based mainly on the *natural talent* of the right-owner, and very little if any research and development costs are involved in the *initial* process of composition or performance of music;¹⁴⁸ (2) The fact that 'virtually all people simply love and appreciate music of some kind. Consequently new employment markets and avenues do not necessarily have to be first researched for starting a successful career in music.'¹⁴⁹

Since developing nations have often decried the great costs involved in conforming to WTO obligations, the first 'factor' mentioned above would ensure that it is easier for them to invest in music trade as compared to other forms of trade. On the other hand, the advent of digital technology, if used effectively, is geared to further minimise costs with regard to music production

¹⁴⁷ Chapter 2, at 2.2.

¹⁴⁸ It is of course true that great levels of investment are often required to record, market, promote and generally develop an 'act's career. This however, has to do more with the development of the artist for market competitiveness and less with the development of the artist's talent (i.e. the marketable product). This is very unlike for example the field of patents, where large costs are often involved in the *initial* development of the patentable product through research and development (R&D). Although it is true that the role of the Artist and Repertoire (A&R) staff in a record company is "overseeing the development and 'career'" of the artist, it should be noted that, '[the] major record companies have been increasingly looking for acts which have already undertaken a significant process of development, or who are able to provide a clear indication of their commercial potential.' (Negus K, *Producing Pop, Culture and Conflict in the Popular Music Industry*, 1992, at 40). In any event, the musical entrepreneur shall need to look beyond the major record labels for opportunities as elaborated on later, and seek new ways of promoting him/herself, since 'Major labels today, with very rare exception, are no longer willing to be in the business they have built over the last forty years. The train of thought today is that the "old" process of signing, recording and developing talent takes far too long and is way too costly to achieve the results they desire in the time they have allotted.' <http://www.mio.co.za/article.php?cat=industry_labels_pub&id=429> [Accessed 24 March 2005].

¹⁴⁹ *Musical Entrepreneurship in the World Today*, Tutorial Letter 102/2003 (University of South Africa), at 2.

and distribution.¹⁵⁰ With regard to the second factor it has been said that entertainment (including musical entertainment) has become one of the most lucrative businesses in the world today,¹⁵¹ with the annual turnover of music recordings estimated at some 40 billion US dollars.¹⁵² Thus it has been said, ‘...”There is a global hunger for Information and [e]ntertainment....[yet] [f]eeding the appetite for information and entertainment [d]oesn’t satisfy the hunger - *It increases it.*”....’¹⁵³

The music industry forms part of what is called the ‘core copyright industries’, which contributed \$260 billion to the US economy in 1999, (with over \$60 billion in foreign exchange earnings)¹⁵⁴ and topped the list in the top six categories of US industries.¹⁵⁵ Notwithstanding the fact that the music industry is a significant international market,¹⁵⁶ its significance has not yet been fully realised among developing countries, although it has been said that this is likely to change owing to the growing knowledge-based service sector in those countries and its significance for closer integration in global markets.¹⁵⁷ Although the music industry has been seen as one of the fastest growing export sectors in the global service sector, the bulk of the studies done in the area of the economic role of intellectual property has been limited to issues of technological change and industrial research and development, an area in which patents dominate.¹⁵⁸ Furthermore, ‘in most developing countries the music industry remains under-researched with insufficient information or reliable data on its economic performance, and in many countries policy makers are still reluctant to accord it the status given to more traditional industries.’¹⁵⁹

5.2 Entrepreneurship and its role in economic development

¹⁵⁰ See in this regard Drury J D, *Musical Entrepreneurship in the World Today*, Tutorial Letter 103/2003 (University of South Africa), at 21.

¹⁵¹ Drury op cit, at 22.

¹⁵² Penna F J and Visser C J, *Cultural Industries and Intellectual Property Rights*, (2002) at 390.

¹⁵³ Negus K, *Producing Pop, Culture and Conflict in the Popular Music Industry*, (1992) at 5. Emphasis added.

¹⁵⁴ The ‘core copyright industries’ include the printing and publishing industries, computer industry, radio, recording, music, televisions and advertising (See Andersen et al, *Copyrights, Competition and Development: The Case of the Music Industry*, (200) at 1). Note that Idris K, (*Intellectual Property, A Power Tool for Economic Growth* (2003)) gives much higher figures for the contribution of the copyright industries to the US economy (at 192).

¹⁵⁵ See Idris K, *Intellectual Property, A Power Tool for Economic Growth*, (2003) at 192.

¹⁵⁶ Penna and Visser, *Cultural Industries and Intellectual Property Rights*, (2002) at 390.

¹⁵⁷ Anderson et al, *Copyrights, Competition and Development*, op cit t 1.

¹⁵⁸ Anderson et al, op cit, at 2.

¹⁵⁹ Ibid.

Multiple studies have been conducted in view of highlighting the critical role played by entrepreneurship and entrepreneurial endeavour in the economic development of nations.¹⁶⁰ This role of entrepreneurship, especially as regards developing nations, cannot be over-emphasised, considering that developing nations continue to contribute very little to the turnover in world trade.¹⁶¹ Building an 'entrepreneurial culture' can prove very helpful in solving the problem of constraints in the supply side referred to above, which has hampered African countries from participating effectively in international trade. Entrepreneurship has come to be considered as the fourth factor of production after natural resources, labour and capital, which in turn, 'mobilises the other three resources and harnesses them in different combinations to meet the needs of society.'¹⁶² The need for more entrepreneurial endeavours amongst developing nations has become greater, if the growing proportions of poverty and unemployment are to be intercepted. For example, it has been suggested that some 400 000 additional small enterprises, each employing ten people, are needed to totally eradicate unemployment in South Africa¹⁶³

5.2.1 Entrepreneurship and its relationship to intellectual property

Defining entrepreneurship simply as 'self employment'¹⁶⁴ is very important for the present work in that it traces the entrepreneurial process to an individual - the man or woman - before the big establishments and finance houses, which might, or might not enhance his entrepreneurial drive, come into the picture. The definition is significant and truer for the music industry because it reinforces the fact that the whole process of building such an industry begins with individual musicians deciding to create employment opportunities for themselves based solely on natural talent. This is unlike other areas of industry where an entrepreneur, though having a business idea,

¹⁶⁰ See for example studies and projects conducted by the International Labour Organisation at <www.ilo.org/dyn/empet/empet.portal?p_lang=> [Accessed on 23 March 2005].

¹⁶¹ See discussion in Chapter One, Introduction.

¹⁶² See De Cronje et al, *Introduction to Business Management*, (2003) at 36f.

¹⁶³ De Cronje et al, op cit at 46.

¹⁶⁴ See *Musical Entrepreneurship in the World Today*, Tutorial Letter 102/2003, at 4.

may not even think of beginning unless he/she has some form of capital or working tools.¹⁶⁵ Quite differently, a performing musician may commence a singing career even without such things as musical instruments, microphones etc or by simply using traditional instruments which may be cheaper to make. A good example is the so-called 'A cappella music'¹⁶⁶, which is based simply on the blending of voices with no musical instruments involved. Much traditional African music can be performed in this way. An example of a 'success story' in this regard is the South African group 'Ladysmith Black Mambazo', which sings a variety of *A cappella* music called 'isicathamiya'. The group has won two Grammy awards, the first in 1987 for 'Best Traditional Folk Recording' for their 'Shaka Zulu' recording, and the second in the 2005 awards, in the 'Best Traditional World Music Album' category, for their 'Raise your Spirit Higher' recording.¹⁶⁷

The relationship of entrepreneurship to intellectual property is evident in its definition as 'the process of mobilising and risking resources... to utilise a business opportunity *or introduce an innovation* in such a way that the needs of society for products and services are satisfied, jobs are created, and the owner of the venture profits from it.'¹⁶⁸ In the same breath, an entrepreneur has been defined as 'usually a *creative person* with high achievement motivation who is willing to take calculated risk, and who views new opportunities as a challenge.'¹⁶⁹ The use of the words "innovation" and "creative" shows the close relationship between entrepreneurship and intellectual property. Schumpeter for example believed that it is left to entrepreneurs to take a basic *invention* (ie, a patent - intellectual property), and to transform it into economic *innovation* (an element of entrepreneurship), and that such inventions would be 'economically irrelevant until entrepreneurs got involved, to make them operational and to market them.'¹⁷⁰ In the same breath, some

¹⁶⁵ For example, a person deciding on such a 'simple' job as car-washing cannot even think of commencing until they have some form of 'capital' (eg, soap/detergents, buckets, access to water, vacuum cleaner etc).

¹⁶⁶ A cappella" is defined as 'without instrumental accompaniment', that is, 'choral singing without instruments.'^{<http://www.answers.com/topic/a-cappella>} [Accessed 5 April 2005].

¹⁶⁷ From ^{<http://www.southafrica.info/what_happening/arts_entertainment/mambazo.htm>} [Accessed on 5 April 2005].

¹⁶⁸ Cronje et al, *Introduction to Business Management*, (2003) at 40. Emphasis added.

¹⁶⁹ Ibid. Emphasis added.

¹⁷⁰ Referred to by Idris K, *Intellectual Property, A Power Tool for Economic Growth*,(2003) at 26.

economists have recently ‘postulated that an IP system is to be regarded as an important factor influencing the behaviour of the entrepreneur *in encouraging innovators, applying the innovation, introducing it into the economy, and marketing the product in a creative or innovative way.*¹⁷¹ This is because the rewards associated with the ownership of inventions and creative works results in a “continuum” in which further inventions and creative works are stimulated, thus enhancing economic growth¹⁷²

5.2.2 Entrepreneurship and its role in the music industry: 'Musical Entrepreneurship'

The quest to tackle the growing problem of unemployment and poverty by encouraging entrepreneurship led to the processes of decentralisation of governments, privatisation and unbundling of large enterprises, which initially resulted in massive losses of jobs through retrenchments.¹⁷³ Music and the arts have also not been left intact by these changes. For example, the transformation process in South Africa which began in 1994 resulted has resulted in restrictions being imposed on the offering of music in governmental schools, or its total phasing out; there has also been a collapse of national arts councils and a restructuring and “descaling” of music in the armed forces, resulting in loss of jobs.¹⁷⁴

Another important factor relates to the loss of traditional jobs in the music industry due to the new technological wave of digitization of music. Up to 90% of the global music market used to be controlled by a “Big Five” of major multi-national corporations for many years, being EMI Records, Sony, Vivendi Universal, AOL Time Warner and BMG.¹⁷⁵ Last year however saw this changing into the “Big Four”, when Sony and BMG merged. Of this merger, which would result in the retrenchment of some 2,500 employees, it was said, ‘What’s so sad about the merger in particular is that, unlike some mergers, where the intention in coming together is a vision of

¹⁷¹ Idris op cit, at 27. Emphasis added.

¹⁷² Idris K, *Intellectual Property, A Power Tool for Economic Growth* (Overview), at 3.

¹⁷³ *Musical Entrepreneurship in the World Today*, Tutorial Letter 102/2003, at 3.

¹⁷⁴ Ibid.

¹⁷⁵ See <http://www.bbc.co.uk/worldservice/specials/1042_global_music/page3.shtml> [Accessed on 6 April 2005].

creating something greater, better and something that neither company could achieve alone, this merger seems to be a grasp at mere survival.’¹⁷⁶

This situation has resulted in many believing that a new business model is needed for the music industry to be able to deal with problems posed by new technology.¹⁷⁷ This scenario presents many opportunities for the ardent “musical entrepreneur”, who can take advantage of the increasingly “less-formal” music market to enhance profitability. The advent of the new digital music technology has resulted in the “disintermediation” of the major record labels, a scenario where their dominance and clutch over musicians is diminishing - where the entrepreneurial musician can dispense with them because of the availability of more opportunities and alternative choices.¹⁷⁸

What has been termed 'musico-cultural entrepreneurship' presents yet another area in which the entrepreneuring musician may find opportunities.¹⁷⁹ All these possibilities will require an ardent entrepreneurial spirit. Of the musician’s entrepreneurial spirit it was said:

To be successful, a musician often has to be an entrepreneur: someone who starts a performing venue, develops patrons, and promotes the project aggressively. Accomplishing this requires musicians to acquire social and business skills and to be highly opportunistic in what they do.’¹⁸⁰

Other ways in which musical entrepreneurship may express itself, as with entrepreneurship in general, is the “revitalisation” of existing forms of music business through improvement of present methods of doing business¹⁸¹ (or maximization of all possible avenues). The cover page of an interesting work by entertainment lawyers Jeffrey and Todd Brabec¹⁸² gives a wonderful idea on

¹⁷⁶ <http://www.mio.co.za/article.php?cat=industry_labels_pub&id=429> [Accessed on 24 March 2005].

¹⁷⁷ See for example, *The New Economics of Music: File-Sharing and Double Moral Hazard* (2004) <<http://www.bubblegeneration.com/index.cfm?a=a&resource=musicrisk1>>; also article by Ashish Banerjee, *Need for a new business model in music industry*, <<http://www.sulekha.com/weblogs/weblogdesc.asp?cid=26715>> [Accessed on 6 April 2005].

¹⁷⁸ See article *Open Source Art – Copyright Issues Online* (2002) <<http://www.artsandmedia.net/cgi-bin/dc/expo/2002/09/opensource>> [Accessed on 07 March 2005].

¹⁷⁹ For an elaboration on this term see *Musical Entrepreneurship in the World Today*, Tutorial Letter 103/2003, at 5.

¹⁸⁰ <<http://www.indiana.edu/~iupress/books/0-253-34456-5.shtml>> [Accessed on 06 April 2005].

¹⁸¹ See *Musical Entrepreneurship in the World Today*, Tutorial Letter 102/2003, at 16.

¹⁸² *Music, Money and Success - The Insider’s Guide to Making Money in the Music Industry* (2003).

how maximum profits may be reaped from the full maximisation of all the opportunities available for a “hit song”. The authors indicate the following sources of income from the song:

Both local and foreign ‘single’ and album sales, local and foreign radio and Television performances, including ‘Web performances’, television series theme song and underscore, sheet music and folios, advertising commercial, song in a television series and in motion pictures, foreign movie theatre performances, ‘Broadway show’, lyric reprint in a novel, video jukebox, karaoke, background music score fee, movie score royalties, home video, Internet/downloads and ‘streaming’, ‘miscellaneous royalties’, total writer and publisher royalties, both motion picture, television and advertising master use licences, and recording artist royalties.¹⁸³ In all, the proceeds from the ‘maximisation’ of that one “hit song” could come to over US\$10 million. Of course not every artist will ever reach this profit margin from the exploitation of a “hit song”, but this gives an idea of the potential that exists from the full exploitation of even one song!

PART B

5.3 The Role of Intellectual Property Regimes in promoting the Music Industry



5.3.1 Introduction

The possibilities outlined above would be but a mere fancy dream without the existence of relevant intellectual property regimes, in particular copyright systems. Copyright plays a pivotal role in organizing the cultural industries, of which the music industry forms an integral part. This is the case mainly because the music industry, which involves the production and distribution of audio-visual products, is very closely connected to the creation of a rent system, which the copyright system is well suited to accomplish.¹⁸⁴ Consequently, '[w]here the required institutions associated with copyright are weak or missing, as in most developing countries, *the chances of becoming competitive in this sector are greatly diminished.*'¹⁸⁵ The previous section of this chapter aimed to highlight the suitability of the music industry as an entrepreneurial tool for purposes of promoting economic growth amongst less developed countries. It has to be noted however, that

¹⁸³ Cover Page, *Music, Money and Success - The Insider's Guide to Making Money in the Music Industry* (2003).

¹⁸⁴ See Andersen et al, *Copyrights, Competition and Development*, (2000) at 2.

merely having talent or potential in music cannot suffice to ensure a viable, competitive music industry. Rather strong institutional structures, of which the copyright system forms an integral part, are needed.¹⁸⁶ In this way the rights holder can ensure that he reaps maximum benefits from his talent.

In explaining this phenomenon of "rent creation" in the copyright industries, Andersen *et al* have said,

[U]nlike a public good, it is possible for the creator of an idea to exclude others from using it, opening the opportunity for wider economic exploitation. Property rights for ideas must... mean a market price higher than its marginal cost (which tends to zero) giving rise to rents. At the same time, because the value of non-rival goods depends on the size of their market, there is an incessant drive to expand the market for ideas so as to realize greater rents. However, the larger the market for a particular idea, the greater the threat from copying; and the more so, the lower the marginal cost of reproducing and distributing the idea.¹⁸⁷

Thus copyright serves the dual purpose of both enhancing economic activity¹⁸⁸ with regard to the copyright industries, and protecting the rights holders from unlawful use (ie, copying and counterfeiting) of the copyrighted products.

Earlier in this chapter¹⁸⁹ reference was made to the book written by the Brabecs, and how they show the various sources of revenue that the full maximization of a single "hit song" can bring to the songwriter. Copyright is instrumental in realizing this, more particularly because it has been called 'a bundle of rights'.¹⁹⁰ This means that it comprises 'a monopolistic right to a number of different acts'.¹⁹¹ Thus in the South African case of *SA Broadcasting Corporation v Pollecutt*¹⁹² the judge, where the respondent was, *inter alia*, commissioned by the SA Broadcasting

¹⁸⁵ Ibid. Emphasis mine.

¹⁸⁶ Andersen et al, *Copyrights, Competition and Development*, (2000) at 2.

¹⁸⁷ Op cit, at 2.

¹⁸⁸ Andersen et al speaks of copyrights 'shaping the performance' of the cultural industries. (at 4).

¹⁸⁹ 5.2.2.

¹⁹⁰ See Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-81.

¹⁹¹ Ibid.

¹⁹² 1996 1 SA 546 (A).

Corporation to make musical compositions for the film 'Shaka Zulu', and to record a master tape for television use, showed that in such cases 'a number of different and distinct intellectual property rights' had to be taken into account.¹⁹³ These rights can basically be outlined as: *the right of the composer in his musical composition; the right of the author in his literary work; copyright subsisting in the sound recording (master tape); copyright subsisting in the cinematograph film, including the sound in the sound-track; the performers' rights, and ownership of the master tape, which (the latter) of course, is a matter of property law.*¹⁹⁴ Thus it can be argued that copyright (and related rights) has the potential to extend the profit margins for the musician, as well as enabling others to benefit in the same right, thus creating a ripple effect of profitability through the rent system. If this happens on a large scale then many will benefit, poverty will be reduced and the economy shall be boosted. To summarise the role of copyright in organizing and promoting the music industry, it would be apt to agree with Andersen *et al*, when they say, 'Without the copyright regime, and for all its flaws, a modern music industry is simply not possible, and unless developing countries develop this system, they will be unable to fully realize the benefits from the creativity and talents of people in the audio-visual sector.'¹⁹⁵ It is now proposed to look more closely at the international copyright framework as embodied in some important international instruments.

5.3.2 Overview of the international copyright regime

5.3.2.1 The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)

The **Berne Convention** of 1886 emerged as a response to the lack of uniformity and comprehensiveness of the various bilateral treaties that had been entered into by certain countries,

¹⁹³ At 551F-G.

¹⁹⁴ See Visser and Pistorius, *Essential Copyright Law*, Study Guide prepared for the WIPO-UNISA Specialisation Programme in Intellectual Property, (2005). .See also Greely et al, *Entertainment Law*, LAWSA Electronic Resources at 400.

¹⁹⁵ Andersen et al, *Copyrights, Competition and Development*, (2000) at 24.

marking it the oldest international treaty in the international copyright law.¹⁹⁶ The **Berne Convention** is administered by WIPO, and it has been said of it that 'it provides a high level of protection and gives authors the most comprehensive set of rights it is possible to give them.'¹⁹⁷ The convention has undergone several revisions since its promulgation¹⁹⁸, the latest being the 1971 revision. The convention lays down minimum standards of copyright protection that all member countries have to comply with. In this regard three fundamental principles are set out in the Convention, being **national treatment**¹⁹⁹, **lack of formality**²⁰⁰ and **independence** of protection.²⁰¹

Article 5(1) of the Convention, on **national treatment**, stipulates:

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.'

This has been called 'the underlying principle of the Berne Convention.'²⁰² It should be clear however, that neither this article, nor any other provision of the Convention requires member countries to grant to the work of another member country the level of protection granted to the work by that other member country, 'although... it follows that the protection granted in the various countries which are signatories of the convention should be basically the same.'²⁰³

The principle of **lack of formality** is an important one, which is to the effect that protection is granted automatically and is not subject to registration, deposit or any formal notice in connection with the publication.²⁰⁴ The principle of **independence** of protection stipulates that the enjoyment

¹⁹⁶ Visser and Pistorius, *Essential Copyright Law*, (2005) at 1.2.4.

¹⁹⁷ *Guide to the Berne Convention*, WIPO Publication, (1978)

¹⁹⁸ Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-91.

¹⁹⁹ Article 5(1).

²⁰⁰ Article 5(2)

²⁰¹ Ibid.

²⁰² Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-91.

²⁰³ Ibid.

²⁰⁴ Visser and Pistorius, *Essential Copyright Law*. (2005) at 1.2.4.

and exercise of the rights enshrined in the Convention 'shall be independent of the existence of protection in the country of origin of the work.'²⁰⁵ In this regard it has been said, '[W]hat is at issue is the recognition and scope of protection and not the various possible ways of exploiting the rights given by law.'²⁰⁶ The Appendix to the Berne Convention contains certain provisions favourable to developing nations, relating to the granting of compulsory licenses.²⁰⁷

5.3.2.2 The Universal Copyright Convention

For some time the United States of America felt that she was unable to accede to the **Berne Convention**, owing mainly to the fact that the latter precludes members from prescribing any formalities for the recognition of copyright, whereas the United States had formalities relating to the registration of copyright.²⁰⁸ Consequently, the United States sponsored the passing of the **Universal Copyright Convention (UCC)** by UNESCO in 1952.²⁰⁹ Although the UCC also provides for national treatment, this is however on less demanding conditions - for example, the UCC does not recognize moral rights.²¹⁰ The UCC has special provisions for developing nations similar to those provided for in the Appendix to the **Berne Convention**.²¹¹ It has been said that the accession of the US to the **Berne Convention** 'marked the end of the significance of the Universal

²⁰⁵ Article 5(2).

²⁰⁶ *Guide to the Berne Convention*, (1978) at 33.

²⁰⁷ In particular articles II-V. The articles generally stipulate that a national of a developing country may be authorized by a competent authority in that country to translate a printed foreign work into a national language, and to publish such work for teaching, scholarship or research purposes, provided three years have elapsed since the first publication of such work (Article II, Appendix). Article V provides for an alternative in terms of which the author's translation right shall expire if the work has not been translated after ten years of original publication (Article V, Appendix). Article III of the Appendix provides for the authorization of a national to publish a work if the rights holder has not published the work within a certain period. In all cases copies of the works must be limited to the national market, and just compensation has to be given. (Article IV(6), Appendix).

²⁰⁸ Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-92.

²⁰⁹ The US has since acceded to the Berne Convention.

²¹⁰ Visser and Pistorius *Essential Copyright Law*, (2005) at 1.2.6.

²¹¹ *Ibid.*

Convention with the result that it is now no longer an important factor in international copyright.²¹²

5.3.2.3 The TRIPS Agreement was referred to in Chapter 3 above²¹³ including the fact that substantial provisions of the **Berne Convention** have been incorporated into the TRIPS Agreement.²¹⁴

5.3.2.4 The WIPO Copyright Treaty

The **WIPO Copyright Treaty (WCT)** (and the **WIPO Performances and Phonograms Treaty**) were adopted in 1996 following the so-called "digital agenda", which was aimed at extending the scope of the WIPO treaties on copyright and neighbouring rights (the **Berne** and **Rome Conventions**, respectively) in order to incorporate new norms capable of addressing problems raised by new digital technology such as the Internet.²¹⁵ The WCT was entered into in terms of Article 20 of the **Berne Convention**, which allows signatories to the **Berne Convention** to enter into special agreements if such agreements grant to authors more extensive rights than those offered by the Convention, or non-contrary provisions to those of the Convention.²¹⁶ Article 1(4) enjoins contracting parties to comply with Articles 1 to 21 and the Appendix of the **TRIPS Agreement**. The provisions of Articles 2 to 6 of the **Berne Convention** in relation to principles of qualification are also incorporated in the WCT.²¹⁷ In summation of the provisions of the WCT, Dean writes:

"The WCT provides for rights of distribution, rental and communication to the public for certain types of works. It deals specifically with computer programs and databases. It requires members to provide legal

²¹² Dean O H, loc cit.

²¹³ At Para. 3.4.

²¹⁴ Article 9(1), TRIPS Agreement.

²¹⁵ See Visser and Pistorius, *Performers' Rights; Exploitation and Contractual Protection of Intellectual Property; Collective Rights Management* (2004) at 1.1.9.

²¹⁶ See Visser and Pistorius, *Essential Copyright Law*, (2005) at 1.2.9.

²¹⁷ Article 3.

remedies against the circumvention of technological anti-copying measures and also to introduce measures against the removal or altering of rights management information.'²¹⁸

5.3.2.5 The Tunis Model Law on Copyright

For purposes of providing developing nations with guidance relating to copyright legislation while taking into cognisance the particular conditions these nations have, both with regard to special fields such as folklore and the granting of exceptions in areas capable of imposing undue hardship to them, the **Tunis Model Law** was adopted in 1976 at Tunisia.²¹⁹ The **Model Law**, in seeking to incorporate the special provisions provided to developing nations in both the **Berne Convention** and the UCC, provides for a wide range of possible limitations of the author's exclusive rights 'in so far as it is necessary for cultural development.'²²⁰ It has however, been noted that although the Model Law is compatible with the 1971 revisions of both the Berne Convention and the UCC, '[t]oday, the provisions of the Model Law should be approached with caution, as they do not comply in all respects with the demands of the TRIPS Agreement and the WCT.'²²¹



5.3.3 Related (Neighbouring) rights, and other IP rights relevant to the music industry

The evolution of neighbouring rights (that is, the rights of performers, producers of phonograms and broadcasters) can be traced back to the **Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations** (the Rome Convention) of 1961.²²² In its adoption, the **Rome Convention** 'was considered as a pioneer, since it had established norms ... which, in the great majority of countries, did not yet exist.'²²³ When the **Rome Convention** was adopted however, the entertainment industries were still at an early stage of development, and

²¹⁸ Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-94.

²¹⁹ Visser and Pistorius, op cit 1.2.10.

²²⁰ Ibid.

²²¹ Ibid.

²²² Visser and Pistorius, *Performers' Rights; Exploitation and Contractual Protection of Intellectual Property; Collective Rights Management* (2004) at 1.1.2ff.

sound recordings and films 'could not be copied routinely to produce copies nearly, or just as good as the originals.'²²⁴

New technological developments in the 1970's and '80's such as video technology, cassette systems which facilitated home taping, satellite broadcasting, cable television and computer technology highlighted the deficiency of the **Rome Convention** in dealing with these new developments, and gave rise to the need for a new instrument.²²⁵ The guidance provided to governments arising from discussions in the Intergovernmental Committee of the Rome Convention, and at WIPO meetings in relation to these problems were soon perceived to be insufficient; so was the **TRIPS Agreement** which followed after these discussions, because although TRIPS has possible broad application in relation to the issues raised by digital technology, 'it did not respond to all challenges posed by the new technologies.'²²⁶ As a result, and as part of the WIPO 'digital agenda', the **WIPO Performances and Phonograms Treaty (WPPT)** was adopted, alongside the WCT, in 1996.²²⁷

Other deficiencies of the **Rome Convention** relate to the following: (1) Although '[at] the outset' the Convention confirms the independence of copyright and neighbouring rights, the kind of national treatment it provides for is weak, (unlike that provided by the **Berne Convention**), since it is limited to conditions stipulated in the Convention; (2) The Convention does not grant exclusive rights to performers, merely according to them 'the possibility of preventing' certain acts;²²⁸ and (3) Although performers are granted a remuneration right ('needle time or 'pay for play'), the right is subject to reservation, so that '[a] Contracting State may decide not to extend

²²³ Op cit, at 1.1.2.

²²⁴ Op cit, at 1.1.3.

²²⁵ See Visser and Pistorius, op cit, at 1.1.2.

²²⁶ Op cit, at 1.1.2f.

²²⁷ Op cit, at 1.1.9.

²²⁸ Please note in this regard that the TRIPS Agreement also only accord to performers the possibility of preventing certain acts (See article 14.1), which acts are similar to those stipulated in the Rome Convention. Note however, that the TRIPS Agreement provides for a limited rental right subject to an impairment test (Article 14.4), and the term of protection for performers is extended to 50 years from the end of the calendar year in which the fixation was made or the performance took place. (Article 14.5).

this right at all, or may limit its application, or subject its application, to reciprocity.²²⁹ The definition of 'performer' is limited to the performance of literary or artistic works,²³⁰ although it is provided that a Contracting State may, in its domestic law, extend protection to performers who do not perform literary or artistic works.²³¹ It has been said in this regard, that '[a]lthough this provision was initially intended to relate to variety and circus artists, it can also cover performers of expressions of folklore, which opens up the possibility of indirect protection of expressions of folklore.'²³²

In summary, the WPPT provides for the following: (1) Granting to performers and copyright owners of sound recordings the rights of reproduction, distribution, rental and making available to the public; (2) Granting moral rights to performers in their performances; (3) National treatment of foreign works; (4) In relation to the broadcasting and communication to the public of sound recordings, performers and copyright owners of sound recordings are to obtain a single equitable remuneration to be divided amongst them;²³³ (5) The provision of rights in relation to the storage and transmission of performances and phonograms in digital systems; (6) Limitations on and exceptions to rights in a digital environment; (7) Technological measures of protection and (8) A system of electronic rights management information.²³⁴

As hinted on above, other forms of IP are also significant to musical products and trade in music, albeit indirectly. In this regard trademarks, which are distinctive signs identifying goods or services 'as those produced or provided by a specific person or enterprise'²³⁵, immediately come to mind. This is particularly so with regard to the area of music business and musical

²²⁹ Visser and Pistorius, *Performers' Rights; Exploitation and Contractual Protection of Intellectual Property; Collective Rights Management*, (2004) at 1.1.3ff.

²³⁰ Article 3.

²³¹ Article 9, Rome Convention.

²³² Visser and Pistorius, op cit, at 1.1.4f. Note in relation to this that the extension of the definition of "performer" to include performers of folklore was one of the recommendations of the Music Industry Task Team appointed by the then Department of Arts, Culture, Science and Technology in South Africa.

²³³ See Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-94.

²³⁴ Visser and Pistorius, op cit at 1.1.9ff.

²³⁵ See 'What is Intellectual Property?', WIPO Publication, at 8.

entrepreneurship, owing to the role of trademarks in business development, namely that they 'can be very useful elements in a marketing strategy, to develop a brand image and customer loyalty.'²³⁶ Many however, would think little of patents in this regard, they having been the centre of contention in relation to the TRIPS controversy. Patents, however, play a pivotal role in the music industry, being used to protect new inventions of musical instruments and modern music-making and development gadgetry, without which the melodious sound of music would be missed.²³⁷ In the same way, industrial designs, which cover the ornamental or aesthetic aspect of an article²³⁸, may be used to give particular design to music-making instruments or the like.²³⁹ Musical expression of folklore bear greatly on the music industry, especially for developing countries. Expressions of folklore are generally not recognised in international copyright instruments, but many developing countries, taking advantage of Article 15(4)(a) of the **Berne Convention**, regulate the use of expressions of folklore within the framework of their copyright laws.²⁴⁰ This situation has been called 'complex', on the basis that expressions of folklore 'fit uncomfortably into the copyright paradigm', especially because they fall short of the requirement of authorship and originality.²⁴¹ A feature of the WPPT is that expressions of folklore are included in the definition of 'performers'.²⁴²

²³⁶ See article by Kamara Y, *Keys to Successful Cultural Enterprise Development in Developing Countries*, (2004) at 30. <http://portal.unesco.org/culture/fr/file_download.php/fe94198361349448c3a28412936e663bPDF.pdf> [Accessed on 22 April 2005].

²³⁷ For the various ways in which patents can be used to develop musical instruments see <<http://www.till.com/articles/arp/patents.html>> and <<http://www.patenting-art.com/database/musical.htm>> (for novel ways of using patents in relation to the music industry). [Accessed on 26 April 2005].

²³⁸ *What is Intellectual Property*, WIPO Publication, at 12.

²³⁹ IPods for example.

²⁴⁰ See Penna F J and Visser CJ, *Cultural Industries and Intellectual Property Rights*, (2002) at 391.

²⁴¹ Ibid.

²⁴² Article 2(a).

CHAPTER 6: THE SOUTH AFRICAN EXAMPLE

6.1 Introduction

The example of South Africa in regard to efforts made at national level to enhance export trade in music relates mainly to a recent initiative dubbed **MOSHITO Music Conference and Exhibition**, which however is the product of a number of years of studies conducted on how to improve the viability of the music industry in South Africa. Although the initiative is agreeably still in its infancy stage,²⁴³ and therefore not much in terms of the impact it has had in enhancing musical activity in Africa can be said, it yet represents, to the author, an appropriate example of the type of efforts that could be taken by other African countries and less developed nations with regard to the promotion of the music industry. Various other less formal yet important initiatives have been taken in South Africa to promote the music industry, and these shall, where appropriate, be referred to also.

Preliminary to making a discussion of these efforts however, it becomes necessary to examine the legal framework within which the music industry operates in South Africa, and whatever developments there may be in this regard. The music industry is of course, part of the larger entertainment industry, which has traditionally included the film industry, television, theatre, the music industry and print publishing.²⁴⁴ It has been said in relation to the entertainment industry in South Africa that it is in a constant state of development, 'with the result that the legal principles which apply in existing areas of our law will, in the absence of legislation, need to be visited with a view to their application within the emerging entertainment context.'²⁴⁵

6.2 Framework of the South African Music Law

²⁴³ Itumeleng Mokgoro of the MOSHITO Music Conference and Exhibition insisted on this in my conversation with him concerning MOSHITO on 19 April 2005.

²⁴⁴ Greely et al, *Entertainment Law*, from Law of South Africa LAWSA Electronic Resources, at 395.

²⁴⁵ Greely et al, *Entertainment Law*, LAWSA Electronic Resources, at 395.

6.2.1 Copyright Law

Music law in South Africa, as in many other jurisdictions, is primarily regulated through copyright law, which in South Africa is a creature of Statute,²⁴⁶ the South African **Copyright Act 98 of 1978** (the Act). Prior to 1917 a variant of Roman-Dutch common law copyright, (which in fact derived from a Copyright Act passed by the Batavian Republic) applied.²⁴⁷ South Africa passed its first IP statute in 1916, which was called the **Patents, Trade Marks, Designs and Copyright Act 9 of 1916**, which repealed the various Provincial Copyright Acts and in effect provided for the application of the British Copyright Act of 1911 (popularly known as the **Imperial Copyright Act**), subject to some variations.²⁴⁸ The 1916 Act was repealed by the **Copyright Act of 1965**, which was largely based on the British **Copyright Act of 1956**; the 1965 Act was in turn repealed by the present Act of 1978, and concerning this Act it has been said that 'it departed from the British Act in several material respects and it really amounts to our legislature departing on an independent course in the field of copyright law, as compared with its predecessor.'²⁴⁹ It is very vital to understand this history of copyright legislation, owing largely to the fact that copyright law normally provides for the subsistence of copyright up to a certain period after the death of the copyright holder, usually fifty years. It is on the basis of this interesting phenomenon that lawyers for Solomon Linda's deceased estate were able to institute action against Disney Enterprises Inc and others, for violation of copyright in the song 'The Lion Sleeps Tonight', based on the song 'Mbube' composed by Solomon Linda earlier. The basis for the action is a provision of the **British Imperial Act of 1911**, which provided that twenty five years after copyright is assigned to another, such copyright shall revert to the original owner (the so-called 'reversionary rights').²⁵⁰

Works eligible for copyright are indicated in Section 2(1) of the Act, and these are **literary works, musical works, artistic works, cinematography films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs**. All these works

²⁴⁶ Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-2Af.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ See *Copyright infringement claim in respect of "The Lion Sleeps Tonight"* (2004) <<http://www.spoor.co.za/article.php?no=491>> [Accessed on 21 April 2005].

clearly have a bearing on the musical product, with the possible exception of ‘artistic works’.²⁵¹ **Musical work** is defined as ‘a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.’ The definition of ‘musical work’ was only incorporated in a South African Act in the 1992 Amendment of the 1978 Act, so that prior to this the term was given its ordinary meaning, subject to the requirement that the music should have been reduced to writing or musical notation, or otherwise preserved in material form (eg, recorded in a tape or compact disk).²⁵² The incorporation of this definition in the Act ‘does... underline the point that the lyrics of a song or the libretto of an opera do not constitute musical works. They are eligible for protection as **literary works**.’²⁵³ Thus the lyrics upon which a musical composition is based find protection as literary works, resulting in there being different authors for the musical composition and the literary work, unless the music composer is also the writer of the lyrics.²⁵⁴

In the process of exploitation of a musical work, the work is often incorporated in a **sound recording**. It should be understood however, that *copyright subsists separately* in the sound recording from that subsisting in the musical work.²⁵⁵ The copyright dealt with regard to sound recordings relates to the actual tape or record, although the tape in essence embodies another copyrighted work.²⁵⁶ ‘Sound recording’ is defined in the Act as ‘any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a *sound-track* associated with a **cinematograph film**’.²⁵⁷ However, ‘[once] the sound recording of music for a film is mixed into the soundtrack which forms part of that film, copyright in the soundtrack is protected as part of the copyright in the cinematograph film.’²⁵⁸

The rights granted to the owner of copyright in musical (and literary) works are enunciated in Section 6 of the Act. These rights are: reproducing the work in any manner or form; publishing the work if it was not published before; performing the work in public; broadcasting the work; causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast,

²⁵¹ In this regard see the reference to copyright being a ‘bundle of rights’, at 5.3.1 *supra*.

²⁵² Dean O H, *Handbook of South African Copyright Law* (2003) at 1-8A.

²⁵³ Dean O H, *op cit*, at 4-130. [Emphasis added].

²⁵⁴ See Greely et al, *Music Law*, LAWSA Electronic Resources, at 446.

²⁵⁵ *Op cit*, 447(5).

²⁵⁶ See Dean O H, *loc cit*.

²⁵⁷ Emphasis added.

²⁵⁸ Greely et al, *Entertainment Law*, LAWSA Electronic Resources, at 400.

including the work, and is operated by the original broadcaster, and making an adaptation of the work. In addition to this there is a case of 'indirect or secondary infringement', which relates to instances whereby a person permits a place of public entertainment to be used for a public performance of a work where such performance constitutes infringement of the copyright on the work. This will be the case where the person concerned fails to show that he was not aware, and had no reasonable ground to suspect that the particular performance was an infringement of copyright.²⁵⁹

The right of a copyright owner over his work is not an unlimited one, however, there being 'instances in which it is considered to be in the public interest that the copyright owner should not have a monopoly in the performance of particular acts in relation to his work.'²⁶⁰ It should be noted, however, that such exemptions only become relevant where there has actually been an act of infringement, so that where for example copies of a work reproduced are not 'substantial', the exemption shall not apply since no infringement is deemed to have occurred.²⁶¹ Examples of exemption to copyright infringement include instances of **fair dealing** - eg, research or private study and criticism or review of the work - provided appropriate acknowledgment of the source and name of author if applicable;²⁶² use of the work for purposes of **judicial proceedings**, or reproducing the work in order to make a report for purposes of judicial proceedings;²⁶³ **quotations** from the work, provided such quotation is 'compatible with fair practice, the extent of it must not exceed the extent justified by the purposes for which it is used and the source from which the material is taken as well as the name of the author, if same appears in the work, must be mentioned.'²⁶⁴ use of the work as an illustration for **teaching purposes**;²⁶⁵ '**ephemeral copies**' used in broadcasting, provided such copies are destroyed within six months of having been made, or a longer period by agreement;²⁶⁶ use in a **bona fide demonstration** of radio or television receivers

²⁵⁹ Section 23(3). See also Dean O H, op cit at 1-33.

²⁶⁰ Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-51.

²⁶¹ Ibid.

²⁶² See Sections 12(1), 15(4), 16-18, 19A and 19B in the Act.

²⁶³ Section 12(2) and the rest of the sections in footnote 161 above.

²⁶⁴ Dean O H, op cit, at 1-53.

²⁶⁵ Section 12(4) and rest of sections as in footnote 162.

²⁶⁶ Section 12(5), and rest of sections as above.

or any type of recording equipment etc, made to a client by a dealer²⁶⁷, and mechanical rights in a musical work.²⁶⁸

Copyright in literary and musical works lasts for the lifetime of the author and a period of fifty years after the death of the author.²⁶⁹ The duration of copyright has therefore been said to be 'a very generous one' as opposed to that granted for patents and designs.²⁷⁰ After the expiry of the duration period, the work falls into public domain, meaning that it may now be used or copied without infringing copyright in it.²⁷¹

Section 21(1) of the Act provides for several ways through which copyright in a protected work may be disposed of, namely assignment, licensing, transmission by testamentary disposition and operation of law as movable property. From the viewpoint of exploitation of the rights, assignment and licensing are the most commonly used methods.²⁷² By assignment, the author completely divests himself of one or more of his rights under the copyright, so that the assignee no longer has any claim on these rights, nor can he perform any of the acts covered by the particular rights without the authority of the assignee.²⁷³ Through licensing of his rights, on the other hand, the copyright owner retains ownership of the right and merely allows the licensee to exercise the said right without fear of being sued for infringement thereof.²⁷⁴ The license may be exclusive or non-exclusive, and the licensee has to pay the owner royalties for the use of the rights.²⁷⁵

Copyright has been said to be a right of prohibition, a negative right, enforceable against others in order to prevent them from performing infringing acts against in relation to the work.²⁷⁶ 'The power or facility to enforce copyright through the court is thus the crux of copyright.'²⁷⁷ The Act provides for the following remedies in instances of infringement: an interdict restraining the carrying out of

²⁶⁷ Section 12(120) read as above.

²⁶⁸ Section 14 read with ch 2 of R2530 published in GG No 6252 of 22 December 1978 - see Dean O H op cit at 1-55.

²⁶⁹ Section 3(2)(a). Although in 1998 the South African Recording Rights Association Limited (SARRAL) 'successfully obtained consensus for a recommendation to Government to extend the period of Copyright from life plus 50 years to life plus 70 years.' <<http://www.sarral.org.za/composer.html>> [Accessed on 22 April 2005].

²⁷⁰ See Dean O H, *Handbook of South African Copyright Law* (2003) at 1-31.

²⁷¹ Ibid.

²⁷² See Visser and Pistorius, *Performers' Rights; Exploitation and Contractual Protection of Intellectual Property; Collective Rights Management*, (2004) at 1.3.1 et seq.

²⁷³ Dean O H, op cit, at 1-82.

²⁷⁴ See Dean O H, ibid.

²⁷⁵ Visser and Pistorius op cit, at 1.2.2.

²⁷⁶ Dean O H, op cit, at 1-71.

the infringing act; damages, or payment of a reasonable royalty; and delivery-up of the infringing copies and plates used or intended to be used for making infringing copies.²⁷⁸ Action in regard to this may be instituted by the owner of the copyright or an exclusive licensee (including an exclusive sub-licensee).²⁷⁹

6.2.2 Performers' Rights, and recent developments

In making a discussion of music rights, it is important to draw a distinction between copyright and the rights of performers who actually perform, or give a rendition of the music constituting the copyright, (which form part of the so-called related or neighbouring rights). The latter rights are covered by the **Performers' Protection Act 11 of 1967**, as amended (the Act), which 'grants a measure of protection to performers in respect of their performances of literary, musical, dramatic, dramatico-musical and artistic works.'²⁸⁰ Performers' rights do not constitute copyright, and their protection does not in any way restrict or affect the protection given by means of copyright in literary and artistic works through any other law.²⁸¹ These rights have however, been said to be 'analogous to', 'in the nature of' and 'supplementary to' copyright.²⁸² Although South Africa is not a member of the **Rome Convention**, it has been said that the **Performers' Protection Act** was patterned after this Convention (as well as the British legislation), and 'clearly passed with the view to enabling South Africa to accede to it.'²⁸³

The Act defines a "performer" as an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs, literary or artistic works, and "literary and artistic works" are defined as including musical, dramatic and dramatico-musical works and expressions of folklore.²⁸⁴ Protection is granted to performances which take place, are broadcast without fixation or are first fixed in the Republic.²⁸⁵ The use of a performer's performance in

²⁷⁷ Ibid.

²⁷⁸ Section 24(1).

²⁷⁹ Sections 24(1) and 25.

²⁸⁰ See Dean O H, Handbook of South African Copyright Law (2003), at 1.111.

²⁸¹ See section 2, Performers' Protection Act 11 of 1967 (as amended).

²⁸² Dean O H, loc cit.

²⁸³ Op cit, at 1-111.

²⁸⁴ Section 1, 'Interpretation of terms'.

²⁸⁵ Section 3.

relation to any of the acts mentioned in section 5, without prior consent from the performer concerned, is prohibited.²⁸⁶ In the absence of an agreement to the contrary, a performer's consent to the broadcasting of his performance is deemed to include consent to the rebroadcasting of the performance, fixation of the performance for broadcasting purposes, and reproduction for broadcasting purposes.²⁸⁷ The manager, other authority in charge or the group leader has to give authority in the case of a group of performers.²⁸⁸

Performers' protection takes place from the day when the performance first takes place or, in the case of performances fixed in a phonogram, first fixed in such phonogram, and lasts for a period of fifty years calculated from the end of the year of first performance or first incorporation into a phonogram.²⁸⁹ However, certain exceptions similar to those granted in terms of copyright protection exist with regard to performers' protection, entitling the use of the performance without the performer's consent.²⁹⁰

It is a criminal offence in terms of the Act for a person to knowingly contravene the provisions of section 5(1), or to knowingly sell or let for hire, or distribute for purposes of trade, or expose or offer for sale or hire, any performance of the performer; or making or possessing a plate or similar contrivance for purposes of making a fixation of the performance in contravention of section 5.²⁹¹ Upon application by the wronged performer, and without proof of any damages, the court may order the offender to pay damages to the offender in an amount determined from time to time in the Government Gazette by the Minister of Trade and Industry.²⁹²

A noteworthy recent development in South African law relates to the incorporation within the copyright system of the so-called 'needle time' or 'pay for play rights', such as contemplated in section 5 of the **Performers' Protection Act** on behalf of performers.²⁹³ It has to be noted that the

²⁸⁶ Section 5. The prohibited acts include the broadcasting or communication to the public of a performance, unless such performance is itself already a broadcast performance, made from a fixation of the performance or made from a reproduction of the fixation; making of a fixation of an unfixed performance or making a reproduction of a fixation of a performance under certain listed circumstances; or generally the so-called 'needle time' or 'public playing rights'.

²⁸⁷ Section 5(2).

²⁸⁸ Section 6.

²⁸⁹ Section 7, Performers' Protection Act.

²⁹⁰ See section 8, Performer's Protection Act.

²⁹¹ See section 9(1).

²⁹² See Greely et al, *Entertainment Law*, LAWSA Electronic Resources, at 443.

²⁹³ See section 9A of the Copyright Act 98 of 1978, incorporated by the Copyright Amendment Act 9 of 2002. For an elaboration on 'needle time' or 'pay for play right' see Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-35ff.

issue of the incorporation of performers' 'needle time' rights into the copyright sphere was the first recommendation of the Music Industry Task Team Report (MITT Report)²⁹⁴, which stated that 'The absence of needletime legislation is one of the key obstacles to the development of local music and the music industry.'²⁹⁵ Whereas section 5 of the Act confers upon performers the right to receive a reasonable royalty for such public play of their performances embodied in sound recordings, section 9A of the **Copyright Act** requires that a rights owner of copyright in a sound recording must share any 'needle time' royalty with a performer whose performance is embodied in the sound recording. It has been said that this situation has the effect of bringing South Africa in line with Article 15 of the WPPT, which gives performers and producers of phonograms right to a single equitable remuneration for the direct or indirect use of their phonograms for commercial purposes.²⁹⁶ Section 5(5) of the **Performers' Protection Act** however provides that if a user of the needle time right pays royalty to the performer in terms of the Act, such user shall be absolved from his obligation to pay the royalty to the owner of copyright in terms of section 9A of the **Copyright Act**. In this regard it has been lamented that this is 'somewhat inconsistent with the approach that the owner of the copyright in a sound recording is intended to administer the needletime right for both rights holders.'²⁹⁷ However it is clear that the intention is to ensure that [the] discharge of the obligation to pay the royalty to one of the rights holders, whichever right holder that may be, at the same time discharges any obligation to pay the other rights holder.²⁹⁸

This problem relating to the administration of needle time is however set to change, in view of the recent promulgation by the Department of Trade and Industry (DTI) of regulations in terms of section 39(cA) of the **Copyright Act**, which provides for the making of regulations 'providing for the establishment, composition, funding and functions of collective societies contemplated in section 9A, and any other matter that it may be necessary or expedient to regulate for the proper functioning of such societies.'²⁹⁹ Some of the objectives of these regulations are:

- to ensure that a major portion of the royalties collected is distributed to the rights holders;

²⁹⁴ Referred to in Chapter 7 below.

²⁹⁵ *MITT Report*, at 8.

²⁹⁶ See Greely et al *Music Law*, LAWSA Electronic Resources, at 448(6), footnote 2.

²⁹⁷ Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-36A.

²⁹⁸ *Ibid.*

- to provide for equal sharing of the royalties collected between the rights holders of the copyright in sound recordings, and the rights holders of the performances embodied in the sound recordings;
- to provide for collecting societies which will be representative of rights holders, and in which members will have a significant say in decision-making bodies and processes;
- to establish a supervisory authority responsible for administering a transparent accreditation, reporting and accounting system for the operation of collective societies, in order to ensure an equitable dispensation for all parties; and
- to provide for the pursuance of cultural and welfare activities by collecting societies subject to set parameters.³⁰⁰

6.2.3 The Law Relating to the Counterfeiting of Goods

A discussion of South African music law would not be complete without making reference to legislation relating to the combat of counterfeit goods, seeing that this is central to an efficient system of copyright protection. The problem of counterfeiting or illicit copying of musical products was referred to by Andersen et al, who expressed it this way:

In these industries, vulnerability arises not only from supply-side problems surrounding asset specificity but also from the unpredictable role of fashion in shaping market tastes, and because illicit copying and imitation can reduce the potential size of the market...³⁰¹

The Act responsible for the combat of counterfeit goods in South Africa is primarily the **Counterfeit Goods Act**,³⁰² which was intended to enable intellectual property owners, including copyright owners, to take action against such counterfeiting of goods.³⁰³ It has been said that the Act brings South Africa in line with certain requirements of the **TRIPS Agreement**; that it complements the **Copyright Act**, especially with regard to the latter's criminal provisions and the

²⁹⁹ Notice 479 of 2004 GG 26167 of 19 March 2004. Cited with permission of Mr. Robert Hooijer, CEO of the Southern African Music Rights Organisation (SAMRO), from the SAMRO 'Discussion Document with Comments', in relation to the said regulations.

³⁰⁰ SAMRO *Discussion Document with Comments on the DTI Regulations*, at 2.

³⁰¹ *Copyrights, Competition and Development: The Case of the Music Industry*, (2000) at 6.

³⁰² Act 37 of 1997.

³⁰³ See Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-121.

provisions on seizure of goods by customs authorities; as well as being complementary to certain equivalent procedures provided in legislation such as the **Criminal Procedure Act**.³⁰⁴

The Act was enacted alongside the making of substantive amendments to the **Merchandise Marks Act**³⁰⁵ in terms of the **Intellectual Property Laws Amendment Act**,³⁰⁶ which resulted in the provisions relating to counterfeit of goods in the **Merchandise Marks Act** being transferred to the Counterfeit Goods Act, so that the latter 'has become the manual for dealing with the problems of counterfeit goods.'³⁰⁷

6.3 Efforts taken to promote the music industry in South Africa

6.3.1 Efforts leading to MOSHITO

In South Africa the Department of Arts and Culture (DAC) (formerly Department of Arts, Culture, Science and Technology - DACST) has been the major governmental player with regard to policy formulation relating to the development of the music industry.³⁰⁸ Three institutions are directly involved in the development of the music industry, being the Arts and Culture Trust, the National Arts Council and the Provincial Departments of Arts and Culture.³⁰⁹

As early back as 1995, the DACST released a White Paper on Arts, Culture and Heritage, which culminated in two important strategic initiatives with regard to the development of the music industry, namely, the Cultural Industries Growth Strategy (CIGS) and the Music Industry Task Team (MITT).³¹⁰

CIGS arose out of the appointment of the Cultural Strategy Group (CSG) by the then DACST, which was a multi-disciplinary consortium including KPMG, the Centre for African Transformation

³⁰⁴ Ibid.

³⁰⁵ Act 17 of 1941.

³⁰⁶ Act 38 of 1997.

³⁰⁷ Dean O H, *Handbook of South African Copyright Law*, (2003) at 1-121.

³⁰⁸ *MOSHITO '04 Report*, February 2005, (MOSHITO Report) at 5. Made available to the author by Itumeleng Mokgoro of the MOSHITO Music Conference and Exhibition Secretariat.

³⁰⁹ *CREATIVE SOUTH AFRICA - A Strategy for realizing the potential of the Cultural Industries*, A Report to the Department of Arts, Culture, Science and Technology by the Cultural Strategy Group, November 1998 (The Creative South Africa Report), at 18. <<http://www.dac.gov.za/reports/reports.htm>> [Accessed on 20 April 2005].

³¹⁰ *MOSHITO '04 Report*, at 5.

(CART), LMA/sqw policy and research consultants and BDM consulting.³¹¹ The CIGS Report resulted in a fifth document, the Creative South Africa Report, of which it was said that it 'presents the argument for taking cultural industries seriously and develops a strategy for doing so.'³¹² The Music Industry Task Team (MITT), which was appointed by the DACST 'in response to an expression of problems within the music industry by musicians and their representative organisations' met between February and June 2000, and included representatives from the music industry, including members' representative organizations, the DACST, the DTI (Department of Trade and Industry), the legal profession and the National Arts Council, among others.³¹³ The MITT's terms of reference centred on making recommendations to the Minister of Arts, Culture, Science and Technology (the Minister) with regard to strategies to be used in addressing problems facing the South African music industry, and to indicate priorities in regard to these recommendations.³¹⁴ One of the issues highlighted by the MITT Report was the fact that the South African music industry, 'like any South African industry, is infused with the legacy of apartheid's political economy', resulting in the suppression and distortion of indigenous culture.³¹⁵ The result was that local music was not developing as fast as it should owing to the fact that eighty percent of the music sold by 2000 was international music.³¹⁶

The CIGS Report of the Music Industry was one of four sector-based reports aimed at making an industry strategy analysis culminating in certain strategic policy recommendations, namely to (1) maximise investment opportunities in each sector; (2) highlight areas of government participation and legislation; (3) identify potential private sector initiatives; (4) leverage multiple funding sources, and (5) benefit all stakeholders and practitioners within the industry and the economy at large.³¹⁷

³¹¹ *Cultural Industries Growth Strategy - The South African Music Industry, Final Report to the Department of Arts, Culture, Science and Technology*, November 1998 (The CIGS Report), at 7. <<http://www.dac.gov.za/reports/reports.htm>> [Accessed on 20 April 2005].

³¹² CIGS Report, at 8.

³¹³ *Music Industry Task Team Report* (MITT Report), at 4.

³¹⁴ *Ibid.*

³¹⁵ *MITT Report*, at 6.

³¹⁶ *MITT Report*, at 6.

³¹⁷ *CIGS Report*, at 7f.

The CIGS Report identified limited investment finances for the development and promotion of South African artists as the primary weakness facing the music industry.³¹⁸ The Report also found that although South African music 'has always had an international profile... South Africa has negative music trade balances with the major markets of the United Kingdom and the United States of America in the export and import of physical music product.'³¹⁹ It was therefore suggested that South African had to gain greater access 'in at least the American market.'³²⁰

One of the deficiencies in the South African music industry unveiled by the CIGS Report was the lack of integrated promotion and development of South African music.³²¹ In this regard it was noted that increase in the levels of coordination between and within the various sectors in the music industry could serve to overcome restrictions on finance and increase the overall market awareness of South African music.³²² It was further noted that lack of coordination meant that developmental efforts were often duplicated, and investment is often fragmented.³²³ Some institutional players in the South African music industry are identified in the Report, such as the African Promoters' Organisation (AFPRO); the Association of the South African Music Industry (ASAMI), representing the majority of record companies,³²⁴ and the Music Industry Development Initiative Trust (MIDI), a privately-funded organization with the purpose of development of the music industry through the training of musicians.³²⁵ This latter initiative has been involved in the increasingly popular 'South African Music Week', together with other initiatives to bring music education at schools. A recent initiative on government level is CREATE South Africa, which is part of the Department of Labour's skills development training programme through the SETAs (Sectoral Education and Training Authorities) and aimed at the creative industries.³²⁶

The CIGS report also recognized information needs as being crucial to the growth of the music industry and in facilitating coordination, and noted that the Report was the first step in improving

³¹⁸ *CIGS Report*, at 10.

³¹⁹ *CIGS Report*, at 50.

³²⁰ *CIGS Report*, at 51.

³²¹ *CIGS Report*, at 74.

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ ASAMI is now called RISA - Recording Industry of South Africa.

³²⁵ *CIGS Report*, at 33f.

³²⁶ See http://www.southafrica.info/doing_business/economy/development/skills/creative-skills.htm [Accessed on 29 May 2005].

the information base for the music industry.³²⁷ Some of the policy recommendations of the CIGS Report were:

- the creation of an industry development structure that would fulfil functions such as providing regular information to the industry, coordinating a variety of music industry development initiatives and coordinating training initiatives. This clearly made possible the formation of the MOSHITO initiative;
- the formation of a South African Music Day;
- a Joint [Music] Export Promotion, which would, inter alia, take the form of a South African stand at MIDEM;
- human resource development and
- formulating a strategy for dealing with piracy.³²⁸

Building international exposure was seen as necessary in order to achieve the ambitious goal of building South Africa as 'a music nation'.³²⁹ The Creative South Africa Report was a parallel work to the CIGS Report, and 'presents the argument for taking cultural industries seriously and develops a strategy for doing so'.³³⁰ The Creative South Africa Report made two recommendations in this regard, namely the establishment, in the short term, of Cultural industries Development Programme within DACST, and in the medium to longer term, the establishment of a Cultural Industries Development Agency.³³¹

Some of the recommendations in the MITT Report having direct legal implications were recommendations on:

- the recognition of 'needle time' for performers within copyright legislation;
- extension of the period for copyright protection to 70 years for composers and 50 years for performers;
- South Africa's implementation and accession to the WIPO digital agenda treaties;
- broadening of the definition of 'performer' in the Performers' Protection Act to include artists performing works of folklore; and

³²⁷ *CIGS Report*, at 75.

³²⁸ *CIGS Report*, at 84ff.

³²⁹ *CIGS Report*, at 88.

³³⁰ *CIGS Report*, at 8.

³³¹ *Creative South Africa Report*, at 44 et seq.

- law enforcement with regard to fighting piracy, including legislative amendments in this regard.³³²

6.3.2 The MOSHITO Music Conference and Exhibition

It was indicated under the discussion of the CIGS Report above that one of the deficiencies in the South African music industry unveiled by that Report was the lack of integrated promotion and development of the music industry, resulting in the duplication of efforts. This observation was recognised by a number of industry stakeholders and role-players, who increasingly realised 'that the success of any effort to develop the industry depended to a large degree on their willingness to cooperate and work together as a unit.'³³³ This resulted in the formation of the South African Music Industry Cooperation Initiative (SAMICI), which adopted three themes, namely (1) the development of local and international markets for South African music brands; (2) socio-economic support for musicians in the areas of health, education and social security; and (3) responding to the music piracy threat.³³⁴ This goes along SAMICI's *raison d'etre*, which includes maximising 'the role of the music industry in economic development, job creation, poverty alleviation and socio-cultural development within South Africa in particular and Africa in general.'³³⁵ It was then decided to hold 'an action-oriented' conference in July 2004 in Johannesburg, to be called MOSHITO '04, which 'was meant to be the first chapter of what would develop into an annual event.'³³⁶ The MOSHITO Music Conference and Exhibition, set up under the institutional control of SAMICI, is therefore perceived as the latter's first project.³³⁷ SAMICI itself is perceived as 'a broad-based alliance' of stakeholders in the South African industry, with public-sector partners in the form of the DAC, DTI (Department of Trade and Industry) and ICASA (the Independent Communications Authority).³³⁸

³³² The *MITT Report* made 37 recommendations. For these see page 8ff of the Report.

³³³ *MOSHITO '04 Report*, at 5.

³³⁴ *Ibid.*

³³⁵ *MOSHITO '04 Report*, at 15.

³³⁶ *MOSHITO '04 Report*, at 15.

³³⁷ *Draft Report on the MOSHITO Strategy Workshop*, made available to the author by Itumeleng Mokgoro of the MOSHITO Music Conference and Exhibition Secretariat.

³³⁸ The latter, a successor of the Independent Broadcasting Authority, is an administrative body responsible for the regulation of broadcasting and telecommunications, and has as its mandate, among other things, to develop and promote the broadcast of South African music on both radio and television. (See *MOSHITO '04 Report*, at 13).

Meanwhile the Department of Arts and Culture had planned to stage the first South African Music Market (SAMM) in the 2003/2004 financial year, as part of the implementation of the CIGS and MITT policy reports.³³⁹ Given the synergy between the planned MOSHITO music conference and the DAC's SAMM initiative, it was agreed to combine the two events and to 'jointly plan, execute and follow-up the events.'³⁴⁰ MOSHITO '04 was the result, and although it was limited to the music conference component (involving *inter alia*, music business seminars, information exchange and music business education), it was 'widely acclaimed as a success.'³⁴¹ As for the overall MOSHITO initiative itself it was said:

'MOSHITO was conceived as a music market, and is an industry trade-show event comprising of exhibitions, sale of music products and services, music business seminars and live events. The purpose of staging the event is to promote collaboration amongst players from both the private and the public sector to strengthen the SA music industry's global competitiveness. It is envisaged that the event will be an annual feature of the South African music calendar and a premiere attraction for the most influential players in the industry....'³⁴²

The MOSHITO initiative is seen as one that will ultimately benefit not only South Africa but also the whole SADC region, and indeed the whole of Africa, and in this regard the planned MOSHITO '05 is poised to host representatives from the Senegalese music industry.³⁴³ As to the plan ahead it was '[it] is envisaged that the trade-show component to the event will be added in MOSHITO '05, and the live events component added at MOSHITO '06.'³⁴⁴ To ensure that the MOSHITO initiative succeeds, it has been necessary to develop a corporate identity for MOSHITO Music Conference and Exhibition, the institutional body behind MOSHITO '04.³⁴⁵ Thus the MOSHITO Music Conference and Exhibition was established as a Section 21 company (association not for gain) under the South African Companies Act, with its corporate identity centering around the three pillars of commercial development, South Africanness and internationalism; and with the MOSHITO event itself guided by the principles of inclusiveness,

³³⁹ *MOSHITO '04 Report*, at 5.

³⁴⁰ *Ibid.*

³⁴¹ *Draft Report on the MOSHITO Strategy Workshop*, at 3.

³⁴² *Draft Report on the MOSHITO Strategy Workshop*, at 4.

³⁴³ Conversation with Itumeleng Mokgoro of the MOSHITO Music Conference and Exhibition Secretariat, on 19 April 2005. See also *MOSHITO '04 Report*, at 6, and the *MIDEM 2005 Project Report*, at 8.

³⁴⁴ *MOSHITO '04 Report*, at 4.

³⁴⁵ *Ibid.*

quality and action.³⁴⁶ The MOSHITO Music Conference and Exhibition is housed at the headquarters of the Southern African Music Rights Organisation (SAMRO) in Johannesburg, and consists of a secretariat that carries out its daily administrative matters, and a board of directors.³⁴⁷ The Secretariat reports to the board, which 'meets regularly to discuss pertinent matters, take decisions and give direction to the Secretariat for implementation.'³⁴⁸

As a result of its 'action-oriented' objective, MOSHITO '04 adopted certain actionable recommendations from the deliberations of the conference, implementation of which was considered to be a key element in the overall success of MOSHITO '04.³⁴⁹ The recommendations required thorough, detailed implementation plans and strategies to ensure coordinated and structured, rather than haphazard implementation.³⁵⁰ SAMICI was charged with overseeing³⁵¹ the implementation of the recommendations emanating from MOSHITO '04. MOSHITO '05 is intended, *inter alia*, to 'form the platform at which progress on the implementation of MOSHITO '04 recommendations will be reported to the broader industry.'³⁵² In planning for MOSHITO '05, a two-day strategy workshop was recently organised with two critical issues on the agenda, being the giving of a report-back on implementation of the MOSHITO '04 recommendations, and 'the over-arching theme and programme for MOSHITO '05, it being agreed that MOSHITO '05 should not merely be a sequel to MOSHITO '04, but should have its own independent over-arching theme and programme.'³⁵³

The recommendations that arose from MOSHITO '04 generally fell under five categories, being international markets, digital exploitation of music, social welfare, music piracy and general items (the latter related, *inter alia*, to the encouragement of SMME growth in the music industry).³⁵⁴ The strategy workshop, which included representatives from the DAC, SAMRO, SARRAL, MUSA, NORM, SAMPA, SARA, RISA, MOSHITO Secretariat, ICASA, MUSA and others, deliberated

³⁴⁶ *MOSHITO '04 Report*, at 3f.

³⁴⁷ *Op cit*, at 16.

³⁴⁸ *Ibid*.

³⁴⁹ *Draft Report on the MOSHITO Strategy Workshop*, at 3.

³⁵⁰ *Draft Report on the MOSHITO Strategy Workshop*, at 3.

³⁵¹ *MOSHITO '04 Report*.

³⁵² *Draft Report on the MOSHITO Strategy Workshop*, at 3f.

³⁵³ *Op cit*, at 4.

³⁵⁴ *Draft Report on the MOSHITO Strategy Workshop*, at 6.

on the recommendations from MOSHITO '04 and highlighted four recommendations for immediate implementation and report-back at MOSHITO '05.³⁵⁵ The four recommendations which received priority are: (1) Lobbying government to support national pavilions at international events (international markets category); (2) Establishment of a South African music export council (international markets category); (3) Development of a rights-holder based server of South African music files for on-line commercial exploitation (digital exploitation of music category)³⁵⁶, and (4) The formalisation of SAMICI (general items category).³⁵⁷

As part of the 'over-arching theme' for MOSHITO '05 it was felt that MOSHITO should formulate a value proposition that would distinguish it from duplications of the same concept in future, thus giving it a 'defendable competitive advantage'.³⁵⁸ The agreed "value proposition" for MOSHITO '05 incorporates the vision of "inform and inspire", ie, informing and inspiring the South African music industry *to achieve its commercial potential*, based on the following specific objectives: (1) Creating a platform for the development of the South African music industry; (2) Ensuring that there is (that is, having) and audience; (3) strengthening of relationships with and between the various players in the industry, and (4) Building the MOSHITO brand.³⁵⁹ As for the MOSHITO '05 itself it was agreed that this shall take place over three days in July 2005, and that it shall be divided into three components - the conference, trade exhibition and live showcasing/concerts.³⁶⁰ Some of the seven themes identified for the conference activity are: MOSHITO '04 report-back, developing markets, industry development, trends, and governance in the industry.³⁶¹ Some of the topics that shall be covered under the various theme are: 'Updates on the successes regarding music piracy', 'The South African Pavilion at MIDEM 2005 and 2006', ('Developing markets' theme); 'SA media growing the SA music industry - myth or reality?' ('Industry development' theme); 'Digital exploitation of music and digital rights management' ('Trends' theme); and

³⁵⁵ Op cit, at 5ff.

³⁵⁶ In this regard it was noted that SAMRO had done preliminary work around this.

³⁵⁷ *Draft Report on the MOSHITO Strategy Workshop*, at 7. The latter recommendation was added to the original list of MOSHITO '04 recommendations at the workshop. Ibid.

³⁵⁸ *Draft Report on the MOSHITO Strategy Workshop*, at 8.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Op cit, at 8f.

'Copyright management - sub-sahara Africa experience' ('Governance in the Industry' theme).³⁶² Concerning the trade exhibition, there were inconclusive talks as to whether the trade exhibition should be 'B2B' (that is, business-to-business) or 'B2C' (that is, business-to-consumer), and it was agreed that considerable work was still needed to come to a final consideration in this regard.³⁶³

A discussion on MOSHITO would not be complete without reference to the opportunity that availed itself for South Africa to have her first own pavilion on the MIDEM Music Conference in France early this year. It shall be remembered that participation of South Africa at MIDEM was one of the recommendations of the CIGS Report, discussed above. The participation of South Africa at MIDEM, in which close to twenty South African companies were part of the South African Pavilion, is considered as a first response to the MOSHITO '04 recommendation for the development of strategies for the increased export of South African music products and services.³⁶⁴ As 'the world's largest music market, it is widely accepted that MIDEM is the most apt platform to begin the journey to fulfil South Africa's export aspirations.'³⁶⁵ One of the interesting aspects about this maiden experience is the fact that financial subsidies, mainly from the DAC, were given to the South African companies that featured at the South African Pavilion, either in the form of partial (excluding travel, accommodation etc) subsidies or 'more substantial' subsidies (inclusive of travel, accommodation etc).³⁶⁶ The motivation for MOSHITO's participation at MIDEM were three-fold, namely (1) the encouragement of the export (or licensing out) of South African music products and services in the global marketplace; (2) the building of an international profile for MOSHITO, (ie, by forming new relationships and strengthening existing ones which have the capability to assist in the fulfilment of 'South African music's export aspirations.') and (3) the empowering of the South African delegation 'with the latest intellectual capital in the global music industry'.³⁶⁷ Some of the significant results of attending the MIDEM event was the opportunity to gain deeper insight (and possible future interaction) from the Secretary-General of the European Music Office, who is also the Director of the French Music Export Council,

³⁶² Op cit, at 9f.

³⁶³ *Draft Report on the MOSHITO Strategy Workshop*, at 10.

³⁶⁴ *MIDEM 2005 Project Report*, at 3. Report made available to the author by Itumeleng Mokgoro of the MOSHITO Music Conference and Exhibition Secretariat.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

concerning the establishment of the South African Music Export Council, and the possibility of developing a relationship between MOSHITO and the Europe-based World Music Expo (WOMEX).³⁶⁸

In this chapter the South African music industry was evaluated in terms of the development of the legal infrastructure regulating the music industry and the various recent efforts that have been taken to build the industry's international trade capacity. This was in a way to illustrate the fact that a viable legal institutional framework is crucial to the success of any efforts to build greater capacity for the music industry. In the study it was shown that the various efforts taken involved a number of stakeholders, including representatives from the music industry itself, the DAC and the DTI. Thus arising out of the CIGS, which was commissioned by the DAC, the MITT Report recommended that 'needle time' for performers should be incorporated within copyright legislation. This led to the insertion of section 9A in the **Copyright Act**, an activity falling within the authority of the DTI, resulting in the recognition of performers for 'needle time' royalties (pending the final promulgation of relevant regulations by the DTI). Finally it was shown that the MOSHITO initiative represents the final expression or embodiment of the various efforts that were taken to arrive at a mechanism that could be used to enhance music export trade. It is contended that the MOSHITO initiative, though still in its infancy stage, is yet a prototype of efforts that could be taken by other African countries to enhance international trade capacity for domestic music industries.

³⁶⁷ *MIDEM 2005 Report*, at 3.

³⁶⁸ *Op cit*, at 8.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

In previous chapters care was taken to highlight the critical scenario of problems that less developed nations, of which Africa is a part, experience with regard to the new international economic order and the hefty obligations imposed upon these nations in terms of this system.

It was shown that African countries find it difficult to attain a competitive edge in the global trade system, and that the one area in which she does have a comparative advantage, that is, agriculture, continues to be plagued with varied forms of restrictive and distorted trade practices. It was also shown how African nations find it difficult to acquire the necessary capacity in the form of adequate infrastructures and skilled human capital to enable them to tackle head-on the issue of effective participation in international trade. In this regard it was shown that the various international efforts aimed at building capacity to facilitate more trade activity by African countries have so far proved inadequate. Africans have also not been immune to the controversy relating to the WTO TRIPS Agreement, centering mainly on the issue of patent rights, and in particular issues of access to health care, the patenting of life forms and the inhibition of farmers' rights, as well as the patenting of traditional-knowledge based products.

As a result of these varied problems, and a general discontent with the international trade system, in particular the WTO IP regime, many of the developing nations have deemed it appropriate to demand 'more policy space', in order to enable them to pursue their developmental concerns, nurture infant industries and generally develop capacity to enable them to participate more effectively in modern world trade. It was argued, in support of these nations, that the call for 'more policy space' is justifiable considering the difficult circumstances in which many of these nations find themselves. The argument has been canvassed within this debating circle that the developed world

itself, in its developing stages, had to resort to the same practices that less developed nations are now contesting for in their developmental endeavours.³⁶⁹

In connection with this dissatisfaction of the less developed countries and the acknowledgement of their entitlement to their demand for 'more policy space', the thrust of this work has however, been to implore these nations to ensure that 'more policy space' does not aggravate into a lame excuse to absolve themselves from fulfilling obligations in terms of international trade. It was, it is hoped, shown that such an excuse could only prove to be of detriment to these nations. It was therefore recommended that 'more policy space' should be used efficiently to ensure that capacity is built for meaningful future participation in international trade. It was further suggested, in relation to present international trade issues, that while negotiations for a more favourable trade regime should be encouraged, a *pragmatic* and strategic approach should at the same time be adopted in the sense of exploring areas within the international trade system, which, despite its great fallibility, could still be used to enhance African international trade capacity. It is only true that in the maze and rage of dissatisfaction it is often very easy to overlook something that could still be to one's benefit amidst the problems and frustrations. With very little having been achieved in the efforts to review unfavourable provisions of the international trade system, it should be clear that merely investing in a stronger negotiating position while overlooking a vibrant on-going trade may not solve Africa's pressing needs of continued suffering, poverty and other forms of destitution.

Against the backdrop of this menacingly dismal situation, it was suggested that the creative sector, in particular the music industry, is one seemingly forgotten area which African policy makers should begin to consider very determinedly, in view thereby of building greater capacity for international trade. The better positioning of the music industry was canvassed for, in particular by pointing out that setting up an industry based on music is poised to demand much less costs, because of the nature of the musical product, than developing other areas of industry. Some of the factors indicated in this regard relate to the fact that music is chiefly based on natural talent (with which Africa is richly endowed), and the fact that virtually every person enjoys music of some kind, so that not much costs would be involved in developing a music market.

³⁶⁹ See also Layton R, *Enhancing Intellectual Property Exports through Fair Trade*, (2004) at 86.

An overview of the intellectual property system that makes the success of the cultural industries possible, in particular the copyright system for the music industry, was given, and the role that entrepreneurship should play in support of the institutional frameworks was considered in some depth, even risking making an excursus from a purely legal debate. This was a painstaking attempt to highlight the viability of the music industry as one that African countries should begin seriously considering as being an important tool to enhance greater participation in international trade.

The last chapter was an outline of the legislative framework underlying music trade in South Africa, including some recent legislative developments, and a highlight of the efforts taken in a bid to developing a viable music industry in South Africa. The development of a viable music market in South Africa is an on-going reality in South Africa at the moment, and this is how far the present discussion has gone. It would therefore be now appropriate to throw in some inputs of valuable lessons learnt from the South African efforts, and to propose some recommendations which, it is hoped, will contribute useful ideas as to the considerations to be taken when planning to develop a strong music industry in Africa. Such recommendations shall, it is hoped, provide a schematic representation of what African countries could do to embark on a music market development strategy; it is hoped that South African policy makers and other stakeholders will also find the recommendations helpful in further developing the South African music industry.

7.2 Recommendations

In light of the foregoing analysis, it is hoped that the following recommendations will prove helpful in African countries' efforts to build and nurture strong music industries, and hopefully to spark a 'Nashville experience' for Africa.³⁷⁰ In this way *pragmatic* solutions to the problem of lack of capacity for participation in international trade can be arrived at.

7.2.1 The music industry must be brought within the mainstream of trade policy

³⁷⁰ For a discussion on how the development of the music industry in Africa could be patterned after the development of the music industry in Nashville see Penna, Thornmann and Finger, *The Africa Music Project*, (2004) at 97.

It is a well-noted fact that policy makers in many developing countries 'are still reluctant to accord [the music industry] the status given to more traditional industries.'³⁷¹ Developing nations continue to rely on exports of commodities into the markets of the developed world, with commodities accounting for more than two-thirds of the total exports from Africa and the Middle East.³⁷² However, the fact that Africa's contribution to the turnover in world trade continues to be negligible illustrates the truism that continuing to rely solely on primary commodities for international trade is not assisting Africa to win her battles against hunger and underdevelopment. Neither is hoping for an opening of world markets in agriculture, an area where they have a comparative advantage. The solution then is to consider alternative areas of enhancing international trade, and as this work aimed to illustrate, the music industry is an appropriate area in this regard. The first step therefore, is to integrate the music industry within the mainstream of trade policy.

7.2.2 Ministries of trade must play a pivotal role in formulating policy for the music industry

Following naturally from the above point is the fact that ministries of trade have to play a leading role in formulating policy relating to the music industry. This is in line with the recommendations given within the second wave of capacity building efforts referred to above³⁷³, where it was said that ministries of trade should be the 'focal point in the development of trade policy.'

This recommendation applies equally to South Africa, where although the DTI is recognised as 'the main formulator and implementer of trade policy in South Africa'³⁷⁴, it is, as illustrated above, the DAC which has been in the forefront of efforts at developing government policy for the music industry.³⁷⁵ A clear identification of ministries of trade as the main policy formulator would avert

³⁷¹ See Andersen et al, *Copyrights, Competition and Development: The Case of the Music Industry*, (2000) at 2.

³⁷² See article, *To Liberalise or Not to Liberalise? A Review of the South African Government's Trade Policy*, (2003) at 6. <<http://www.saiia.org.za/images/upload/tr1.pdf>> [Accessed on 24 February 2005].

³⁷³ At 2.2, Chapter two.

³⁷⁴ *To Liberalise or Not to Liberalise*, (2003) at 2.

³⁷⁵ Although the DTI in South Africa did identify the cultural industries as one of the target 'growth sectors' earmarked for development, these industries have not been considered as priority areas by the DTI. (<<http://www.thedti.gov.za>>) The main involvement of the DTI in the music industry has been in relation to the enactment of relevant legislation.

the 'turf wars at the national level that usually plague developing nations'³⁷⁶ with regard to which institution should articulate and implement trade policy.

Obvious reasons avail themselves for the appropriateness of trade ministries in the formulation and implementation of trade policy: For one thing, as usually the main formulator of trade policy, any policy not formulated or commissioned by the ministry of trade risk being overridden by a subsequent policy of the said ministry. Secondly, the ministry of trade is usually the one equipped in dealing with international trade issues; since issues of the music industry are regulated internationally within the TRIPS Agreement, it should be expected that although there is presently some laxity with regard to the implementation of the TRIPS Agreement owing to the controversy surrounding it, sooner or later less developed nations should expect to be required to comply fully with the Agreement. Under those circumstances it is the ministry of trade that should be able to represent the aspirations of a country's music industry, including within the dispute settlement mechanism of the WTO. Ministries of trade cannot wait until such an eventuality before they assume the role of main formulator of policy, as it may then be too late to deal with the matter at hand.



7.2.3 There must be an integration of both national and regional efforts

One of the problem areas identified in the CIGS Report of the then Department of Arts, Culture, Science and Technology (DACST) in South Africa³⁷⁷ in relation to the South African music industry was the lack of integrated promotion and development of the music industry. It is recommended that this is indeed an essential issue which African countries needing to develop their *national* music industries have to seriously consider. For efforts to develop the music industry to succeed, all possible stakeholders, whether government, music industry stakeholders, the business fraternity and even civil society organisations have to be brought aboard such initiatives. As the CIGS Report suggested, this will prevent the duplication of efforts and the 'fragmentation' of investment, in this way overcoming restrictions on finance and increasing overall market

³⁷⁶ See Tussie and Lengyel, *Developing Countries - Turning Participation into Influence*, (2002) at 491.

³⁷⁷ Discussed in 6.3.1, Chapter Six above.

awareness.³⁷⁸ It has been recognised that although several African musicians have been successful in the international market, they yet represent 'a small fraction of the number of musicians in Africa.'³⁷⁹ Many 'MOSHITOS' are therefore needed to integrate music development efforts in Africa.

It is further recommended that the integration of efforts is essential not only on national level, but also on a *regional* level, that is, encompassing the whole African region, in particular Sub-Saharan Africa. In this regard the MOSHITO initiative, which gratefully aims not only to develop a South African music market but also to include other African countries,³⁸⁰ could benefit a lot from liaising with another important initiative in building the African music industry - the World Bank's Africa Music Project presently still focussing on the Senegalese music market.³⁸¹ It is interesting that plans are already under way to invite Senegalese music industry representatives to MOSHITO '05.³⁸² Hopefully the issue of integrating efforts within the MOSHITO initiative and the Africa Music Project will then be addressed. It is noteworthy that the Africa Music Project has already identified South Africa as a centre in which an E-commerce 'hub' can be created, to which other African countries could send digital recordings 'for advertising, production, distribution (including export), and payment.'³⁸³ Such an effort could be linked with the MOSHITO initiative to develop a rights-holder based server of music files for commercial exploitation³⁸⁴, to ensure that the initiatives complement each other, rather than duplicating or competing against each other.

7.2.4 There must be strong IP protection laws

Any effort to develop the music industry in Africa is doomed to fail without the existence of strong copyright, neighbouring rights and anti-piracy legislation. In this regard note the words of Maskus:

'...[Inadequate] copyrights cannot support the complex contracts that allocate rights in modern creative industries. Poor copyright enforcement is thought to be a critical factor in the inability to create music

³⁷⁸ See *CIGS Report supra*, at 74.

³⁷⁹ See Penna *et al*, *The Africa Music Project*, (2004) at 97ff.

³⁸⁰ See discussion of the MOSHITO project at 6.3.2, Chapter six above.

³⁸¹ For a discussion of the Africa Music Market see Penna *et al*, *The Africa Music Project* (2004)

³⁸² *MIDEM Report*, at 8.

³⁸³ Penna *et al*, *The Africa Music Project*, *op cit*, at 111. It is reported that 'the commissioner of patents in South Africa has given consent' to establish such a hub. (*Ibid*).

³⁸⁴ See *MIDEM Report*, at 7.

industries in Sub-Saharan Africa, despite the abundance of musical talent, for it retards the establishment of collection societies and recording facilities.³⁸⁵

Without such strong music protection laws, African countries risk to see the perpetuation of the 'Big Fish Eat Little Fish' or 'iron triangle' phenomenon³⁸⁶, which is a situation where 'little fish' composers of music are paid on work-for-hire basis for their compositions, which the 'big fish' purchaser (an established producer or recording studio owner) then sells into the international market.

Strong protection legislation will ensure the existence of viable collective rights societies. Without these laws, it will be difficult for the collective societies to fulfil their mandates. For example, the local collective society in Kenya has found it very difficult to collect royalties from the broadcasters, and as of 2004 had managed to sign a licensing agreement with *only one* of the all the local broadcasters.³⁸⁷ In contrast, developments in South Africa, which boasts a number of collective rights societies in the wide spectrum of the rights in copyright, include the possibility of the establishment of a regulatory framework for oversight of rights management societies.³⁸⁸ In the area of anti-piracy measures, the use of a blank tape levy such as was suggested at the MOSHITO strategy workshop of 2005³⁸⁹ and supported by the DAC;³⁹⁰ or the use of a 'copyright tracking system' such as the 'difficult-to-counterfeit hologram stickers' affixed on cassettes or CDs as part of the Africa Music Project³⁹¹ could prove very effective. The latter method in particular, has been reported to reduce piracy from 80 percent to 20 percent in Ghana.³⁹²

Ensuring compliance with international obligations of course necessitates that less developed nations either adopt comprehensive new legislative and judicial instruments creating new or renovating old institutions, or modify aspects of their legal and administrative systems.³⁹³

³⁸⁵ Maskus K E, *Benefiting From Intellectual Property Protection*, (2002) at 371.

³⁸⁶ For these phenomena see Penna et al, *The Africa Music Project*, and Maskus K E, *Benefiting from Intellectual Property Protection*, (2002) respectively.

³⁸⁷ See CISAC 2004 *Copyright Map*, at 3.

³⁸⁸ Ibid.

³⁸⁹ See *Draft Report on the MOSHITO Strategy Workshop*, at 6.

³⁹⁰ <<http://www.info.gov.za/speeches/2004/04062408451001.htm>> [Accessed on 28 April 2005].

³⁹¹ See Penna et al, *The Africa Music Project*, (2004) at 104.

³⁹² Ibid.

³⁹³ Primo Braga and Fink, *Reforming Intellectual Property Rights Regimes: Challenges for Developing countries*, (1998) at 547.

7.2.5 Emphasis must be placed on music exports

An important consideration regarding any efforts to develop viable music industries in Africa is the fact that such music industries need to be *export*-driven and oriented, rather than merely majoring on domestic markets or local considerations. The removal of an export dimension in such development efforts shall result in Africa not realising the goal of using the music industry as a tool to enhance international trade capacity and earnings. Obvious reasons avail themselves to this scenario, in particular the fact that the world's largest music markets are located in North America, Europe and Japan, at one stage reported to constitute 84% of the recording industry's value;³⁹⁴ furthermore, of the world's largest national markets, it is in the top 10 to 15 industrial country markets that 'almost all worldwide revenue will be gained,'³⁹⁵ since only Brazil has been identified as a large national market amongst developing countries.³⁹⁶ The motivational factor for adopting an export-driven approach would be based on the submission that industrial country markets 'are large and open to IP products from developing countries', more so than in agricultural and manufactured products.³⁹⁷ The use of music *export councils* in this regard would prove very essential, as has been proposed through the MOSHITO project. It is noteworthy that the DTI in South Africa has expressed its support, incorporating a financial assistance scheme, for the formation of industry-based export councils.³⁹⁸

Of course on the domestic level developing nations could earmark the tourism sector to derive some revenue in the form of the concept of 'musico-cultural entrepreneurship' referred to earlier, such revenues cannot be expected to contribute much to gross musical revenues. One concern for the music industry has of course centred on the issue of 'local content' or music quotas, with it believed that there should be more 'air play' for local musical works within the national broadcasting system.³⁹⁹ The main reason submitted for this is of course the fact that the less

³⁹⁴ *CIGS Report*, at 26.

³⁹⁵ Layton R, *Enhancing Intellectual Property Exports through Fair Trade*, (2004) at 86.

³⁹⁶ *CIGS Report*, loc cit.

³⁹⁷ Layton R, *Enhancing Intellectual Property Exports through Fair Trade*, (2004) at 75.

³⁹⁸ <<http://www.thedti.gov.za/exporting/exportorganisations.htm>> [Accessed on 28 April 2005]. It is interesting to note that Senegal is also contemplating starting a music export council (See MIDEM Report, at 8).

³⁹⁹ See the *MOSHITO '04 Report*, at 13ff for a highlight of the developments in this regard in South Africa.

developed world attaches great value on culture,⁴⁰⁰ and obviously also the consideration that for a local act to make it in the international market, it must have had significant success in the local market.⁴⁰¹ It should be noted with regard to this latter consideration that there has been a trend in recent times of artists making it in foreign markets with almost no domestic success at all,⁴⁰² and it is submitted that owing to globalisation and the new online environment, this trend is poised to grow phenomenally.

While placing an emphasis on 'local content' might be the norm at present, it should be recognised that 'in the long run', if African countries hope to have a permanent impact on the international market, they must be prepared to take into cognisance the principles of international trade (namely national and MFN treatment). As it were, with the present emphasis with regard to the international IP system being concentrated on thorny issues such as patents, traditional knowledge and biodiversity, it could be argued that less developed nations already have the 'policy space' to nurture strong national music industries (whether by using 'local content' or otherwise).

African countries should take ample advantage of this 'policy space' to develop a strong export-oriented music market, before such policy space starts to wane, which it will surely do in the unpredictable future. It would then be required of a country to give the same treatment to foreign music that it gives to its own local music, virtually meaning the removal of quotas. In any event concentrating a nation's musical activity to the domestic market might not result in increased revenues, as is illustrated by the fact for example that while local music sales had increased by 2003 in South Africa, overall music sales had *declined*, so that whereas the music industry was valued at R1-billion in 1999, the value had decreased to R700-million in 2003.⁴⁰³ Concerns about culture should therefore not impede African countries from realising the economic value that cultural products, which represent one of the important national resources for African countries, can bring to them; lest others unfairly exploit those products for their own benefit, as they have done with Africa's other national resources. Cultural preservation and commercial exploitation of cultural products for economic development should therefore be seen as two sides of the same

⁴⁰⁰ See the *MOSHITO '04 Report* at 10.

⁴⁰¹ See *CIGS Report*, at 29.

⁴⁰² *CIGS Report*, at 29.

⁴⁰³ See article, *SA Music Industry should go Global* (2004)

<<http://www.anc.org.za/anc/newsbrief/2004/news0722.txt>> [Accessed on 22 February 2005].

coin, so that strategies should be developed to ensure that the promotion of the one contributes to the development of the other. On a civil society level, making use of the fair trade movement in this regard could prove very practicable.⁴⁰⁴

7.2.6 Use of music rights awareness campaigns and national musician development programmes

It is suggested that the widespread infringement of copyright systems often (copying of CDs and music tapes, public performance of copyright music etc) owes to a general lack of knowledge about the legal protection of music amongst the general populace. It is therefore imperative to conduct nationwide campaigns about the IP rights, in a bid to creating a culture of IP respect and protection. In the same vein, musicians need to be educated on the various rights accruing to them in terms of copyright law, and to receive basic training on the law of contract so as to enable them to acquire a stronger bargaining position with record companies.⁴⁰⁵ The use of standardised contracts such as is proposed by the DAC would greatly assist artists in this regard.⁴⁰⁶

On the other hand, to be better prepared for participation in the music industry, musicians need to have general training in music, in particular music business. In this regard, initiatives such as the MIDI Trust's South African Music Week initiative (SAMW), Music in Public Places and the in-school education programme run as a partnership between the DAC and the Department of Education are very exemplary.⁴⁰⁷ The objective of SAMW is to provide education on the music industry, and in this regard a 30-minute video on careers in the music industry has been designed, and it was hoped that some 1.4 million learners would be exposed to the video.⁴⁰⁸ SAMW goes hand in hand with the 'Music In Public Places' initiative, the purpose of which is conduct some 120 free public performances in all the nine South African provinces, thus exposing some 1512

⁴⁰⁴ For further information on the general use of the fair trade movement to enhance international trade see <http://www.ilo.org/dyn/empent/docs/F430993842/WP30_2002.pdf> [Accessed on 1 April 2005]; for information on fair trade specifically dealing with IP products see Layton R, *Enhancing Intellectual Property Exports through Fair Trade* (2004).

⁴⁰⁵ In regard to the latter proposition see the CIGS Report, at 58ff.

⁴⁰⁶ See <<http://www.info.gov.za/speeches/2004/04062408451001.htm>> [Accessed on 28 April 2005].

⁴⁰⁷ Ibid.

⁴⁰⁸ See <http://www.musica.co.za/eMusica/news_article.asp?segmented=99&GenreID=99&Ar...> [Accessed on 28 April 2005].

new artists to 75 000 people during the music week.⁴⁰⁹ Another initiative is the learnership offered to musicians through Create South Africa as part of the Department of Labour' skills development programme.

In view of the role that computers and the Internet play in the modern music industry, it will also be imperative to embark on programmes aimed at educating musicians in computer literacy. Owing to the high levels of illiteracy in Sub-Saharan Africa,⁴¹⁰ advantage could be taken of programmes such as the World Bank's World Links for Development Programme,⁴¹¹ which may be used in themselves or as part of music-industry specific projects, thus 'linking IT and education projects to overall economic development goals.'⁴¹² Seeing that the provision of IT education is obviously costly, mainly because it necessitates having access to computer hardware and software, and Internet connectivity, *inter alia*, the use of what has been called 'information literacy "unplugged"', which refers to learning and practicing 'how to find and manage information in intelligent ways even if [students] do not have access to digital technologies'⁴¹³ could be one way of countering this problem. This will not be possible in developing countries without active national involvement, including support from policy makers.⁴¹⁴



This work attempted to highlight the sensitive problems that less developed nations, in particular African countries, face in relation to their efforts to participate more effectively in international trade, and in this regard to comply with the requirements of the WTO system. It was shown these nations experience special handicaps, especially in the area of finance and human resources, which greatly undermine their ability to benefit from international trade. The various capacity building

⁴⁰⁹ Ibid.

⁴¹⁰ See *Making Literacy a Priority* <http://www.choike.org/nuevo_eng/informes/1325.html> [Accessed on 06 April 2005].

⁴¹¹ This programme is aimed at integrating information and communication technologies (ICTs) into the formal education system. For the programme see <<http://www.unites.org/html/projects/world.htm>> [Accessed on 06 April 2005].

⁴¹² See

<http://www.info.worldbank.org/etools/docs/library/98771/Policy%20Makers%20workshop/policymakers/html/pol_ereadiness.html> [Accessed on 07 April 2005].

⁴¹³ See Stern C M, *Information Literacy "Unplugged": Teaching Information Literacy Without Technology* (2002) <<http://www.nclis.gov/libinter/infolitconf&meet/papers/stern-fullpaper.pdf>> [Accessed on 07 April 2005].

⁴¹⁴ See *Policy makers*

<<http://www.info.worldbank.org/etools/docs/library/98771/Policy5Makers520workshop/html/policymakers.html>> [Accessed on 07 April 2005].

efforts have also proved inadequate to deal with the special problems faced by these countries. On the other hand, in the area of intellectual property rights, African countries, as with other developing nations, have expressed a discontent with the TRIPS Agreement, the chief international instrument dealing with IP rights, which has introduced 'minimum standards' for compliance with international IP laws. Various reasons have been given for this discontent, such as the great costs involved in trying to adjust to the TRIPS regime, the contention that many of these nations did not recognise some IP forms protected in TRIPS, and ethical issues surrounding the invasion of traditional resources belonging to these nations (including traditional knowledge and indigenous plant forms).

Against the backdrop of these problems, developing nations have called for more 'policy space' to enable them to pursue development goals unique to their situations. It was contended in this work that although such 'policy' or 'development' space is justifiable, African countries should not use it as a pretext for not participating in international trade, as this can only be to her detriment. Rather the 'policy space ' should be used to identify and develop areas which provide a competitive edge for the participation of these countries in international trade. At the same time, adopting a 'pragmatic approach' with regard to the TRIPS Agreement, despite its being a source of great contention, by identifying those areas within the Agreement in which Africa has a comparative advantage could prove very beneficial for Africa. In this regard the music industry, in which Africa has great potential to participate prolifically, owing to her rich cultural heritage (especially in the 'World Music' genre), is a case in study. It is hoped that the foregoing recommendations shall prove of great use to African policy makers and other stakeholders concerned with the plight of this great Continent, and believing in its cultural heritage.



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