Intellectual property in Africa

Wayne Meiring looks at how companies can protect their intellectual property in Africa, discussing both opportunities and challenges

In this article, we look at how companies can protect their intellectual property (IP) in Africa, discussing both opportunities and challenges. But first a few words about the continent and its economy.

Africa

Africa is the world's second largest continent and it has a population in excess of one billion. In many of the continent's 54 independent states colonialism has left its mark. There are, for example, English-speaking countries such as Nigeria, South Africa and Kenya, French-speaking countries such as Cameroon, Ivory Coast and Mali, and Portuguese-speaking countries such as Angola and Mozambique. In the north, Arabic is the main language.

Africa's economy

The term 'Africa rising' is often heard. It refers to the fact that Africa is the fastest growing economic region in the world, housing nine of the world's 15 fastest growing economies. The size of the African economy has more than trebled since the year 2000, and the IMF's growth forecast for Africa is 4.5%.

Although commodities are extremely important, consumer spending is also a significant driver of economic growth. There has, for example, been a dramatic increase in the size of the middle class in countries like Nigeria, South Africa, Egypt, Ghana, Angola and Kenya, and there is a huge demand for consumer goods in these countries. Foreign direct investment into Africa is also on the up, with the continent receiving some US$128 billion in investment in 2014.

With a population of some 170 million, Nigeria is Africa's most populous country. It is also Africa's largest economy, with a GDP in excess of US$510 billion. Africa's second biggest economy is South Africa, and its GDP is in the order of US$370 billion.

IP Protection in Africa

General

Although IP protection in Africa has not always been easy, there have been significant improvements to the continent's IP statutes and systems of late. For example, IP laws have recently been modernised in a number of countries including Burundi, Djibouti, Ethiopia, Gambia, Ghana, Kenya, Libya, Mauritius, Rwanda, Seychelles, Uganda and Zanzibar. There have also been significant improvements on the technology front, with the IP registries of Nigeria and ARIPO now being able to offer online services. These are very positive developments.

International treaties

Companies wishing to invest in Africa will be encouraged to hear that most African countries have signed up to the major international IP agreements that industrialised countries belong to, such as the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the World Intellectual Property Organisation (WIPO), the Paris Union and the Berne Convention. These agreements basically ensure that there is equal treatment for IP throughout the world.

There is a strong need to increase the infrastructure across Africa, especially regarding enforcement

Many African countries belong to the Patent Co-operation Treaty (PCT), with the result that inventions can be protected in Africa by way of PCT filings. A number of African countries also belong to the Hague System regarding the international registration of designs. The international IP treaty that has been most in the news, however, is the Madrid Protocol regarding the international registration of trade marks.

Madrid Protocol

The international trade mark registration system is one that allows a company that is based in a member country to file an application to register its trade mark in its home country, and then file a further application for a single international registration, designating as many of those member countries that it wants to cover. The company then has trade mark protection in all the countries of interest through one international registration.

The following African countries and regions belong to the international trade mark registration system:

Algeria, Botswana, Egypt, Gambia, Ghana, Kenya, Lesotho, Liberia, Madagascar, Morocco, Mozambique, Namibia, OAPI, Rwanda, Sao Tome & Principe, Sierra Leone, Sudan, Swaziland, Tunisia, Zambia and Zimbabwe.

Although the international trade mark registration system works well in much of the world, in Africa there have been problems. The first problem is that there are concerns that international registrations may not be valid and enforceable in a number of the so-called 'British law countries' in Africa. A British law country is one where the state needs to pass legislation that incorporates an international treaty into the national law before the treaty becomes effective. A number of British law countries that have signed up to the Madrid Protocol have failed to pass such enabling legislation, and there are therefore doubts as to the validity and enforceability of international trade mark registrations in these countries. The countries of concern are Lesotho, Liberia, Namibia, Sierra Leone, Zambia and Zimbabwe.

A second problem flows from the fact the system requires each country that is designated in an application to advise the international office within a period of 18 months if protection in that country is being refused–protection may be refused, for example, on the basis of a clash with an earlier registration. If no notice is given within the 18-month term, the registration is automatically valid in that country.

Unfortunately, a number of the African countries that belong to the Madrid Protocol, such as Ghana, do not examine applications within 18 months, which means that international registrations become valid in these countries by default. Although this might sound like an attractive proposition, it can in fact be dangerous–someone who is adversely affected by an international registration in such a country might apply to cancel the international registration in that country on the basis that it was wrongly registered.

The third problem with international trade mark registrations in Africa revolves around the fact that the OAPI regional IP union has recently joined the Madrid Protocol, and there are doubts about whether this was done lawfully.

Regional protection

Africa has two regional registration systems. The first of these is known by the French name *Organisation Africaine de la Propriété Intellectuelle*, or by its acronym OAPI.

OAPI

This system applies in much of French-speaking Africa and it covers patents, registered designs and trademarks. It is a single-registration system, which means that a single filing covers all the OAPI member countries-the OAPI member countries in fact do not even have national IP systems. The countries that belong to the system are:

Benin, Burkina-Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal, Togo and the Union of the Comoros.

The OAPI system is well established and effective. There is, however, a problem that flows from the fact that in 2015 OAPI became a regional member of the international trade mark registration system (Madrid Protocol). What this means is that a company that is based in a country that belongs to the Madrid Protocol can now get trade mark protection in the OAPI countries by simply designating OAPI as part of an application for an international registration. In other words, the company no longer needs to file a separate OAPI application.

Many believe that OAPI's accession to the Madrid Protocol was invalid. That is because it was done by way of a resolution of the body's Administrative Council. What was required, was an amendment to the document that founded the OAPI union, the Bangui Agreement, as well as a ratification of that amendment by every member country. It is felt that OAPI designations of international registrations will therefore not be valid or enforceable. It is likely that the issue will eventually end up in a court of law.

Until such time as there is more clarity on this issue we feel that there are serious risks attached to covering OAPI through an international registration.

ARIPO

The second regional registration system is called the African Regional Intellectual Property Organisation (ARIPO). This system applies in much of English-speaking Africa. The member countries are:

Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sao Tome e Principe, Sierra Leone, Sudan, Swaziland, Uganda, United Republic of Tanzania, Uganda, Zambia and Zimbabwe.

This registration system came about through various treaties and it covers patents, designs and trademarks. It is different from OAPI, in that it isn't a single filing system, but rather a designation system. In other words, applications are filed at a central office in Harare, Zimbabwe, and the applicant designates those member countries that it wants covered. Each individual IP office has an opportunity to refuse protection in their country within a period of 12 months. Each member country also offers the option of national registrations.

ARIPO works well for patents. There are, however, serious problems with trademarks. One reason relates to the issue that we discussed earlier about British-law countries, in this case ARIPO member countries that have not incorporated the ARIPO treaty relating to trade marks into their national laws. As a result there are doubts about the validity and enforceability of ARIPO trade mark registrations in Liberia, Malawi, Namibia, Swaziland, Tanzania and Uganda. Our view is that the ARIPO registration system is best avoided for trademarks.

National protection

With the exception of the OAPI member countries, the countries of Africa do have national registration systems. Many of these are perfectly normal, but some are anything but. Here are a few examples:

- The Libyan Trade Mark Office closed in July 2014 but it has since re-opened and is run by a militia group. Trade mark applications can be filed, but there is no guarantee that they will be considered valid if the political situation changes. The Patents Office, on the other hand, is run by Government officials.
- There is no formal IP law in South Sudan, but the Code of Civil Procedure Act provides for the Sudan Trademarks Act to be applied in the absence of a substantive law, and for a while the Business Registry within the Ministry of Justice was accepting and processing trade mark applications under its provisions. However, fil-

ings have now been suspended, and are unlikely to be resumed until the substantive law is in place. A Trademark Bill has been drafted since 2013 but it is not known when it will be enacted.
- Somalia has been in a state of civil war for many years. As a result there is simply no IP law in this country.

Some unusual aspects of IP in Africa

As much as Africa follows many of the IP norms and trends of the developed world, there are some interesting variations:

- **European co-operation:** an interesting development has been Morocco's recent decision to sign an agreement with the European Patent Office (EPO), allowing for the validation of European patents in Morocco. A European patent validated in Morocco has the same legal effect in Morocco as a Moroccan patent, and it is subject to Moroccan patent law. Tunisia has signed a similar agreement with the EPO, but this is not yet in effect.
- **Traditional knowledge:** the protection of traditional knowledge is a big issue in Africa, and we have seen it introduced in different ways. In Gambia the authorities have introduced protection of traditional knowledge by way of specific legislation. In South Africa, on the other hand, protection of traditional knowledge has been introduced by way of amendments to the existing IP laws.
- **IP philosophy:** there is a strong perception in much of Africa that IP benefits industrialised nations far more than it does African nations. We see this particularly in the context of pharmaceuticals, where there is a strong feeling that African consumers are exploited by multi-national companies. The South African authorities have announced that they will take steps to put a stop to the 'ever-greening' of pharmaceutical patents, in other words the practice of extending the life of pharmaceutical patents through the patenting of amendments to the original formulation. It has also been announced that patent examination will be introduced in South Africa.

Conclusion

There is a growing interest in Africa. The evident proliferation of new laws is a positive development. There is, though, a strong need to increase the infrastructure across Africa, especially regarding enforcement. ■

Wayne Meiring is Managing Director of Spoor & Fisher Jersey