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INTELLECTUAL PROPERTY & TECHNOLOGY OPPORTUNITIES IN EAST AFRICA

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OVERVIEW OF INTELLECTUAL PROPERTY IN EAST AFRICA

The East African region is made up of six countries: Uganda, Kenya, Tanzania, Rwanda, Burundi and South Sudan. It is comprised of approximately 150 million people with 22% of this being an urban population. This population generates a combined GDP of USD 146 billion (EAC statics 2016).

The people of East Africa are yet to harness the true potential of Intellectual property (IP). How could they when only just a handful of the population know what a Geographical Indication, GMO, Copyright, Trademark or Patent is.

In the last 20 years, we have seen exponential growth in the sectors of business and technology. Yet somehow, this growth has not extended to the field of intellectual property. Uganda is still one of the lowest ranked countries in Africa in intellectual property applications.

According to the World Intellectual Property Organization (WIPO), by 2012, Uganda had only 2 Patent applications compared to 70 in Rwanda, 256 in Kenya and 7,444 in South Africa. Although we are somewhat atoned by the number of Trade Mark applications; 1,288 by 2012 to be precise, this is disconcerting compared to the 4,090 in Zambia, the 4,193 in Kenya and the whopping 34,604 in South Africa. The disparity is alarming seeing as we are yet to see any applications for Industrial Designs or Utility Models at the Intellectual Property Office at Uganda Registration Services Bureau (URSB).

The Government and relevant stakeholders still have a lot to do in emphasizing and promoting creativity and innovation. Creativity and innovation are considered crucial tools for growth and sustainable development. Education and training are seen to contribute to the promotion of these capacities. Hence, further action is needed both at the national and regional level to incorporate creativity and innovation into lifelong learning.

In all fairness, East Africa has made significant advances in strengthening the administration and management of intellectual property rights. Through the integration of the five countries, a Common Market Protocol was promulgated and is in force as of 1st July 2010. This Protocol provides for the governance and administration of IP rights.

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It calls for cooperation in areas that encourage and promote trade within the EAC and Intellectual Property is a focus of this intended cooperation (Articles 76 and 104).

Specifically, the governance of IP is provided under Articles 5(3) (K) and 43 of the same protocol. These provisions, are to the effect that partner states shall promote and protect creativity and innovation for economic, technological, social and cultural development within the EAC in areas of copyrights and related rights, patents, layout designs of integrated circuits, industrial designs, new plant varieties, geographical indications, trade secrets, utility models, traditional knowledge, genetic resources, traditional cultural expressions and folklore and any other areas that may be determined by the partner states.

In order to achieve the protection and promotion of IP within the region, Partner states are called upon to put in place measures that prevent infringement, misuse and abuse of intellectual property rights.

The Ugandan Parliament has enacted considerable IP legislation like the Trade Marks Act 2010, Copyright and Neighboring Rights Act 2006, The Geographical Indications Act 2013, Plant Varieties Act 2014 and Industrial Property Act 2014. These have given a lifeline to an otherwise struggling sector and strengthened the enforcement of IP rights. Needless to say, these laws need constant review if they are to keep up with the ever-changing nature of IP.

The Trade Marks Act 2010 for example, recognizes an exclusive licensee as having the same rights as an owner of Trade Mark. However, the act does not clearly indicate whether/how a licensee can maintain an infringement action. This is in contrast with the UK Trade Marks Act 1994 that spells out specific provisions for rights of Licensees in case of infringement and clearly provides for the procedure that an exclusive Licensee can follow in a suit against a Trademark infringer.

Other legislation like the Industrial Property Act 2014, which were enacted to address lacunas in the law have provisions which in this authors view, further stifle creativity. Section 8(3) (f) of the Act excludes pharmaceutical inventions from protection under the act. Such exclusions can only be explained in more developed countries but not in a least developed country (LDC) like Uganda that barely has any known modern inventions in the field of pharmaceuticals. It is important for an LDC promote scientific inventions, in whatever field they might be, as long as they fulfill the requirements of patentability. This is why Article 66 of the Trade Related Aspects of Intellectual Property Rights agreement (TRIPS) to which Uganda is a signatory, gives extensions to LDC's in applying such exclusions/provisions to domestic laws.

The Geographical Indications (GI) Act 2013 was enacted to protect locally manufactured products peculiar to specific regions in the country and also promote their uniqueness and reputation. GI's may include the Buganda Bark Cloth, Bugisu Coffee and Pakwach Stools among others.

Other measures include: National Industrialization Policy 2008; the National Science, Technology and Innovation (STI) Policy 2009; the National Development Plan 2010 and the Operation Wealth Creation that avails funds to mainly Youth Projects across the country.

Other countries in the region have also enacted policies to foster creativity and innovation amongst their citizenry.

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In Rwanda, various institutions take part in the Science, Technology and innovation (STI) drive. To harmonize its innovation and technology endeavors, the country through the office of the Prime Minister, the Knowledge Initiative Partnered with National Commission of Science and Technology (NCST) to come up with a five-year plan among whose objectives is to monitor multi-sector innovation.

In Rwanda, registration of Patent alone with respect to national and international filing rates rose in 2016 with over 41% filing more than half of their patent applications overseas in 2016 (compared to just 34% last year).

This is attributed to innovation and creativity environment across the region new with businesses and ideas are developed everyday due to the stable political and economic environment favoring development of supporting structures such as technology, infrastructure and systems that work.

The biggest hindrance to IP growth in Uganda seems to be the limited awareness of the population on the importance and value of IP as assets. Perhaps it is time to shake the lackluster attitude towards IP in Uganda and join the rest of the world in reaping the rewards of IP. Developed countries must also encourage technology transfer to least-developed countries like Uganda in order to enable them to create a sound and viable technological base.

The latter would require accepting developments like Genetically Modified Organisms (GMOs) & Living Modified Organisms (LMOs). The President of Uganda, recently rejected the GMO bill after countrywide calls to ignore the bill.

GMO's are defined under Directive 2001/18/EC, to mean organisms, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination.

The Cartagena Protocol defines, "Living modified organism to mean any living organisms that possesses a novel combination of genetic material obtained through the use of modern biotechnology or any biological entity capable of transferring or replicating genetic material.

Uganda also lacks regulations to operationalize laws like the Geographical Indications Act 2013 and Plant Varieties Act, 2014. The Plant Varieties Act was enacted in June 2014 to protect plant variety rights in Uganda which in turn would incentivize technological innovation, stimulate creativity and increase income through export of plant genetic resources.

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Table A- Domestic Laws

Uganda	Kenya	Tanzania	Rwanda	Burundi	South Sudan.
The Industrial Property Act, 2014	Industrial Property Act, 2001. Together with amendments.	Copy Right and Neighboring Rights Act, 1999	Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property	No. 1/13 of July 28, on Industrial Property in Burundi	The Copyright and Neighboring Rights Protection Act, 1996
The Geographical Indications Act, 2013	Trademark Act, Cap 506	The Patents (Registration) Act, 1995		Law No. 1/021 of December 30, 2005, on the Protection of Copyright and Related Rights in Burundi.	Literary and Artistic Works Act, 2008
The Trade Marks Act, 2010	Anti-Counterfeiting Act, 2008	The Trade and Service Marks, Act, 1986			Industrial Designs Law No, 18 of 1974
The Trade Secrets Protections Act, 2009	Copyright Act, No.12 of 2001	Merchandise Marks Act, 1963 (Act No, 20)			Patent Law No.58 1971
The Copyright and Neighboring Rights Act, 2006	The Seeds and Plant Varieties Act, Cap 326				Trademark Law No. 8 of 1969

These laws are not read in isolation but are considered together with other supporting Acts, Regulations and Amendments made there under.

Table B- Regional Treaties

Applicable Treaty	Uganda	Kenya	Tanzania	Burundi	Rwanda	South Sudan.
Banjul Protocol on Marks within the Framework on the Regional Industrial Property	✓		✓			
Cultural Charter for Africa	✓		✓	✓	✓	✓
Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional	✓	✓	✓		✓	✓

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Industrial Property Organization.						
Lusaka Agreement on the Creation of the African Regional Intellectual Property Office.	✓	✓	✓		✓	✓
Treaty for the Establishment of the East African Community	✓	✓	✓	✓	✓	✓
Treaty Establishing the Common Market for Eastern and Southern Africa.	✓	✓	✓	✓	✓	✓

Table C - International Treaties

Treaties	Uganda	Kenya	Tanzania	Rwanda	Burundi	South Sudan
Patent Cooperation Treaty	✓	✓	✓	✓		✓
Convention Establishing the World Intellectual Property Organisation	✓	✓	✓	✓	✓	
Paris Convention for the Protection of Industrial Property	✓	✓	✓	✓	✓	✓
Nairobi Treaty on the Protection of Olympic Symbols	✓	✓				
Marrakesh Treaty to facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled.	✓	✓				
Madrid Agreement Concerning the International Registration of Marks		✓				✓

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Berne Convention for the Protection of Literary and Artistic Works	✓	✓	✓	✓	✓
Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.		✓			
Hague Agreement Concerning the International Registration of Industrial Designs.			✓		

Consideration should be made of the protocols passed with respect to the different treaties during the application of regional and international laws.

While the parties are signatories to a number of international treaties, the Paris Convention on the Protection of Industrial is the commonest and most relied upon when dealing with foreign Patents and trademarks.

INTELLECTUAL PROPERTY AND THE NEW AND EMERGING ASPECTS IN THE FIELD OF TECHNOLOGY

The global shift to knowledge-based economies and increasingly rapid pace of technological advancement means that the question of how society deals with intellectual property and structures institutions and communities to manage and disseminate knowledge is critically important to our future. Our choices reflect and shape our societal values, practices and culture.

We are interested in emerging technologies such as synthetic biology, artificial intelligence and electric cars; forms of manufacturing such as 3D-printing. These new technological advancements raise questions of intellectual property rights.

TRADEMARK REGISTRATION TO ADDRESS CYBER AND TYPO SQUATTING

Domain names are a hot commodity and the rise in domain name commerce has resulted in an abundance of frauds targeted towards acquiring domain names from legitimate owners.

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Cybersquatting and typo squatting entails the registration of unique web-identities (URL's/domain names), linking to a website that may possibly be sought after by another party to which the web-identity's incorporated trademark or business name in truth relates.

Cybersquatting is typically centered around the registration of someone else's trademark or business name as a domain name for the purpose of making a profit off the domain by selling it back to the proprietor of the trademark or business owner; or, the registration of the unique domain for the purpose of preventing the "true" owner from being able to use it, for malicious or competitive reasons. Usually, the name is registered with the aim of selling the domain name to that company or to post paid advertising links on a website at the domain name in order to profit from visitors looking for the Trademark owner or its business. Or maybe the registrant is a competitor seeking to divert customers to a business competing with the trade mark owner

Allowing e-commerce sites to be able to register their domains, is imperative as it improves the businesses brand and provides comfort against Cybersquatting and typo squatting. Giving express Intellectual property protection/recognition to domain names especially in the realm of e-commerce, is necessary if Uganda is to move with the digital age. Recognition of domain names as a form of intellectual property, may be crucial to curbing cybersquatting and will likely to be a pre-requisite to undertaking domain dispute proceedings in Uganda.

Trademark registration in Uganda, is governed by the Trademarks Act 2010 and accompanying regulations. The Act, does not expressly provide for registration of a Trademark for a domain name.

Under Section 4 of the Act, only a graphically represented sign or combination of signs, capable of distinguishing goods or services of one undertaking from those of other undertakings, can be registered as a trademark.

In countries like the USA and the UK, domain names can be registered as Trademarks. In order to acquire a Trademark, an applicant would have to prove that the domain is being used for some other purpose than for people to find and contact the applicant.

Current trends

In a recently decided case, [Dow Jones & Company, Inc. and Dow Jones LP v. John Zuccarini](#)

[Case No. D2000-0578](#) before the WIPO Arbitration and Mediation Center the panel noted that;

“It is plain that Zuccarini registered and has used the two domain names solely for the purpose of trading on the global reputation of THE WALL STREET JOURNAL, taking advantage of the tendency of Internet users to misspell, and attracting such users to his own sites, and thus to profit from his own sales of advertising and from links to other websites. Zuccarini’s admissions in the Shields case [an earlier cybersquatting dispute], and the Court’s [later] findings in that case (e.g. “there is overwhelming evidence that Zuccarini acted with a bad-faith intent of profit”) buttress this conclusion”.

The reason for this is that registering domain names with typographical errors of words, phrases, and surnames with marketplace associations implicitly admits knowledge of the mark. So, unless respondents persuasively explain the registration (again, extremely rare) the domain name will either be cancelled or transferred.

In this instant case, its trademark registration that protected the legitimate claim of Dow Jones & Company and Dow Jones LP.

PATENT SOFTWARE INSTEAD OF COPYRIGHT?

Modern society relies heavily on computer technology. Without software, a computer cannot operate. Software and hardware work in tandem in today’s information society and it is no wonder that intellectual property protection of software is crucial not only for the software industry, but for other businesses as well.

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In an ever present and evolving environment, protecting your software from intellectual infringement can be complex. The simple answer to why software needs patent protection in addition to copyright protection is that a copyright protects from the exact replication but does not necessarily protect from similarities and likeness.

Copyright vs patent inventions

In software cases, copyright will protect the exact duplication of your software, but similarities are harder to protect. The case of [Diamond Vs Diehr 450 U.S. 175 \(1981\)](#) a case involving a program that calculated the proper temperature for making rubber set a precedent for the future of software patents

In recent years, there have been several high-profile cases of software patent litigation, including [Stac Electronics v. Microsoft](#) and [Apple v. Samsung](#) and payouts from these cases have exceeded one billion dollars.

Software needs patent and copyright protection seeing that software is big business. Software drives some of the largest business and industries the world market has to offer. Because of the polarizing nature of software, copyright, and patent law, many have become involved in court battles.

Although copyright protects the literal expression of computer programs, it does not protect the ideas underlying the computer program, which often have considerable commercial value. There is therefore needing to reform our legal system to offer software patents.

US investment bank [Goldman Sachs](#) was awarded a patent for its "[SETLcoin](#)" cryptocurrency settlement system. The concept envisions a system for settling securities trades using a built-in cryptocurrency.

Since patent law is applicable to inventions in any field of technology without discrimination, to be patentable, software-related inventions and business method-related inventions must also comply with those requirements.

USE OF IP FOR TECH INNOVATORS: COPYRIGHT SOFTWARE AND PATENT INVENTIONS

A Brief Background

In the 1970s and 1980s, there were extensive discussions on whether the patent system, the copyright system, or a sui generis system, should provide protection for computer software.

These discussions resulted in the generally accepted principle that computer programs should be protected by copyright, whereas apparatus using computer software or software-related inventions should be protected by patent.

Copyright law and patent law provide different types of protection.

- Copyright protection extends only to expressions, and not to ideas, procedures, and methods of operation or mathematical concepts, Computer Programs, software and Apps.
- A patent is an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something or offers a new technical solution to a problem.

Protection of Copyright Software

Copyright relates to literary and artistic creations, such as books, music, paintings and sculptures, films/movies and technology-based works such as computer programs, software and electronic database). Sometimes, copyright is also referred to as authors' rights

Software copyright is used by Software Developers and proprietary software companies to prevent the unauthorized copying of their software.

Copyright protection is formality-free in countries party to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), which means that protection does not depend on compliance with any formalities such as registration or deposit of copies.

However, Uganda is not party to the Berne convention therefore copyrights are protected under the **Copyright and Neighboring Rights Act, 2006 and Copyright and Neighboring Rights Regulations, 2010**.

The **Copyright and Neighboring Rights Act, 2006** provides that in the case of a computer program the economic right of the author is protected for **fifty (50) years** from the date of making the program available to the public.

Patent Inventions

A patent is an exclusive right granted by the government for an invention, which is either a product or process.

Generally, it is a new way of doing something, or offers a new technical solution to a problem. The exclusive rights help inventors to prevent others from taking advantage of their ideas/inventions.

In Uganda, the Industrial Property Act, 2014 provides protection of a patent for **Twenty (20) years** to an inventor for a new product or process in return for the disclosure of their invention which is renewable.

A patent is usually granted after completing an examination procedure by a government agency.

The law relating to the patentability of software is still not harmonized internationally, but some countries have embraced the patentability of computer software and others have adopted approaches that recognize inventions assisted by computer software.

In Uganda, the **Industrial Properties Act, 2014** makes a general provision in regard to the registration of patents which may encompass the patentability of computer software.

The general rule is that patent protection shall be available for inventions in all fields of technology however, there are exceptions such as discoveries, theories, and business methods are examples of things that are not patentable.

Requirements for an invention to be patented briefly are as follows;

1. Novel/new – The invention should not be described in any publication published anywhere in the world.
2. Inventive – The new product or process should not be obvious to a skilled person.
3. Industrial applicable – Should be Patentable subject matter.

Illustrations of inventions/ software that may be considered;

1. Blockchain

Blockchain took the world by storm with the emergency of “Bitcoin” a crypto currency. The first blockchain was conceptualized in 2008 by an anonymous person or group known as Satoshi Nakamoto and implemented in 2009 as a core component of bitcoin where it serves as the public ledger for all transactions.

The invention of the blockchain for bitcoin made it the first digital currency to solve the double spending problem without the need of a trusted authority or central server. The bitcoin design has been the inspiration for other applications.

A blockchain is a continuously growing list of records, called blocks, which are linked and secured using cryptography. By design, block chains are inherently resistant to modification of the data. Once recorded, the data in any given block cannot be altered retroactively without the alteration of all subsequent blocks, which requires collusion of the network majority

Blockchain is currently viewed as the future of commerce due to the myriad of benefits it offers. In property and real estate for example, Blockchain has the potential to greatly reduce property fraud at a time when this has become a growing concern for Uganda’s land registry.

This is premised on the nature of the technology that does not allow alteration of records once entered and it requires collusion from all network users.

Blockchain offers a unique code for each property and this code is linked to a smart key which is only held by the owner. Transfer of the property would then require surrender of the smart key by the owner and without it, a transfer of property cannot be effected.

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The use of Blockchain to record property transactions could also produce more effective property management as information could be reviewed in real time with less on-going management time required.

Blockchain technology also underpins 'smart contracts', which are programmable contracts that self-execute when certain conditions are met and offer the possibility that transactions could complete much more quickly when combined with a Blockchain registry.

For instance, title to the property could be transferred to the purchaser automatically on receipt of funds into the vendor's account. The result would also be to speed up the registration process. With the ledger updating immediately, the registration gap would be eliminated. This, in turn, would also lead to greater efficiencies and cost savings for land registries.

Countries have long considered, explored and implemented Blockchain technology in their land registries. States like Ukraine, Georgia, Sweden and Ghana are actively exploring Blockchain based land registries.

Blockchain technology has today been incorporated in a number of sectors with immense data volumes that require authentication at every stage and quick access and transparency.

Alex Tapscott through his book "**The Blockchain revolution**" listed the **Golden Eight Block Chain Transformations of Financial Services** and they are summarized below;

THE GOLDEN EIGHT

Block chain Transformations of Financial Services

FUNCTION	BLOCKCHAIN IMPACT	STAKEHOLDER
1. Authenticating Identity and Value	Verifiable and robust identities, cryptographically secured	Rating agencies, consumer data analytics, marketing, retail banking, payment card networks, regulators
2. Moving Value- make a payment, transfer money, and purchase goods and service	Transfer of value in very large and very small increments without intermediary will dramatically reduce cost and speed of payments	Retail banking, wholesale banking, payment card networks, money transfer services, telecommunications, regulators
3. Storing Value- currencies, commodities, and financial assets are stores of value. Safety deposit box, a savings account, or a checking account. Money market funds or Treasury bills	Payment mechanism combined with a reliable and safe store of value reduces need for typical financial services; bank savings and checking accounts will become obsolete	Retail banking, brokerages, investment banking, asset management, telecommunications, regulators
4. Lending Value- credit card debt, mortgages, corporate bonds, municipal bonds, government bonds, asset-backed securities, and other forms of credit.	Debt can be issued, traded, and settled on the blockchain; increases efficiency, reduces friction, improves systematic risk. Consumers can use reputation to access loans from peers; significant for the world's unbanked and for entrepreneurs	Wholesalers, commercial, and retail banking, public finance (i.e government finance), micro lending, crowdfunding, regulators, credit rating agencies, credit score software companies

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<p>5. Exchanging Value – speculating, hedging, and arbitraging. Matching orders, clearing trades, collateral management and valuation, settlement and custody</p>	<p>Blockchain takes settlement times on all transaction from days and weeks to minutes and seconds. This speed and efficiency also creates opportunities for participate in wealth creation</p>	<p>Investment, wholesale banking, foreign exchange traders, hedge funds, pension funds, retail brokerage, clearinghouses, stock, futures, commodities brokerages, central banks, regulators</p>
<p>6. Funding and investing in an Asset, Company, Start-up _ capital appreciation, dividends, interest, rents, or some combination</p>	<p>New models for peer-to-peer financing, recording of corporate actions such as dividends paid automatically through smart contracts. Titles registry to automate claims to rental income and other forms of yield</p>	<p>Investment banking, venture capital, legal, audit, property management, stock exchanges, crowdfunding, regulators</p>
<p>7. Insuring Value and Managing Risk-protect assets, homes, lives, health, business property, and business practices, derivative products</p>	<p>Using reputational systems, insurers will better estimate actuarial risk, creating decentralized markets for insurance. More transparent derivatives</p>	<p>Insurance, risk management, wholesale banking, brokerage, clearinghouses, regulators</p>
<p>8. Accounting for Value- new corporate governance</p>	<p>Distributed ledger will make audit and financial reporting real time, responsive, and transparent, will dramatically improve capacity of regulators to scrutinize financial actions within a corporation</p>	<p>Audit, asset management, shareholder watchdogs, regulators</p>

2. Artificial Intelligence

As the population's dependence on technology deepens, developers have gone into overdrive, inventing tools and applications that feed the technology addiction. The appeal, lies in the simplification of previously complex tasks and this in turn, saves time. Since more time spent on performing a task in most professions equals more money, technology that saves time also saves money.

AI or Artificial Intelligence, is technology that mimics human behavior. AI uses machine learning, where a computer program constantly perfects performing an assigned task by processing massive amounts of data and then identifying and analyzing new data more easily.

AI is faster, more efficient and more accurate at performing tasks than an ordinary human. For example, Apple's AI virtual assistant, Siri can respond to emails, and won't forget to remind you about a scheduled appointment.

For legal tasks, AI has been designed to learn how a lawyer drafts a contract or prepares pleadings. It then adapts, replicates and automates the process.

So, if it takes 2 hours for a lawyer to prepare a land sale agreement, AI will do it in half the time, more efficiently and at a cheaper rate. It doesn't help that most AI is designed to make the user experience as much like interacting with a human as possible.

In a recent study conducted by LawGeex, a leading AI contract review platform, it was revealed that AI was 94% more accurate at reviewing non-disclosure agreements than 84% for a human. This is because AI will not get tired and miss crucial information like a human lawyer would.

As Charles Seife, writes in his book, *Proofiness: The Dark Arts of Mathematical Deception*, numbers never lie. It is clear that the lawyer of tomorrow has to adapt in order to remain relevant. Luckily, adapting in this case does not mean competing with AI-which would be a futile effort, but rather embracing its possibilities.

Law firms like Baker McKenzie in the United Kingdom, Ashurst in Australia & KTA in Uganda, are incorporating AI into their service offering. KTA, for example has developed AI that prepares routine agreements and complex agreements.

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JPMorgan, is using software called Contract Intelligence, or COIN, which can in seconds perform document review tasks that took associates 360,000 hours.

AI-powered document discovery tools that can be trained to peruse documents, and cases will reduce the time a lawyer needs to prepare for a case. By using natural language processing, AI programs can search, identify and process required/relevant data from hundreds of documents almost instantly compared with the hours or days it may take a human lawyer.

AI can help firms work smarter by freeing up time that would otherwise be spent going over stacks and stacks of legal documents. This time can be channeled to working on building firm culture and strategy.

For litigation, AI software can be used to aptly prepare for a case. Litigation juggernauts can use AI to assess the strengths and weaknesses of a case based on precedents.

Conclusively, individuals or entities that have invented software or apps like most youth in Uganda today have, can go ahead to register them as patents if they fit the criteria or protect their software by registering them under the copyright regime.

IMAGE RIGHTS PROTECTION

Image rights are basically proprietary rights that an individual has in his or her image, and other unique characteristics associated with their personality. They entail the right to keep ones image from being commercially exploited without permission or contractual compensation and the right to anonymity.

Image Rights Vis a Vis Social Media

The dawn of social media, 4G and connected devices such as smartphones and tablets has meant sharing photos on Facebook, Twitter and Instagram is common practice. Inevitably, the rise in the number of platforms where individuals can easily access professional and amateur images alike has brought the age-old issue around copyright back to the fore.

High profile cases, like the closure of Napster at the turn of the century have meant consumers understand copyright rules when it comes to downloading music and video content, but it would seem that a number of misconceptions exist around image copyright.

Arguably, when it comes to image sharing on social media, we enter a bit of a grey area over who owns what. A lot of people believe that if the photographer/user puts the picture into the public domain like Twitter, it is free for anyone to use and replicate. The truth is that under the law, it is the photographer that owns the copyright. Twitter's terms of service allow the platform to use the photo or video but not anyone else.

A recent example of this issue being thrown into the limelight was the helicopter crash in London. The Evening Standard used an eye-witness image taken on a smartphone and then posted on Twitter as the front-page splash.

The rise of social media and connected devices has severely altered the way news is broken and subsequently reported. Smartphones have automatically made a lot of us 'citizen journalists.' When we witness something obscure, our gut reaction is to take a photo and then share it across our social media platforms for our friends and family to see. Consequently, news is often broken on social platforms first and therefore many journalists and picture desks use Twitter in a similar way to a news wire.

Nevertheless, it is vital to remember that no matter where they are posted or by whom, images remain bound by copyright.

In the past, both The Wall Street Journal and Agence France Press were found by a judge to have infringed copyright laws by using photographer Daniel Morel's images of the Haiti earthquake that were posted on Twitter.

If permission by the photographer is granted or an image is successfully purchased, it is also imperative that you have the correct licenses for images. For example, Apple was recently sued by a Swiss photographer for using an image commercially.

Image Rights in Uganda

In Uganda, for a claim of breach of image rights under personality rights to stand, the plaintiff must demonstrate that he/she was identifiable, that the defendant's act was intentional and for a commercial purpose. The plaintiff will be held to be identifiable by use his/her persona.

A claim for breach of image rights would fail where the torso is the only trait of the plaintiff's image depicted in a photograph and the plaintiff could not be identified as the person in the picture. The photograph must be associated with the individual's likeness, name and reputation for the claim to succeed.

In the cases of **Al Hajji Nasser Sebagala v MTN, H.C.C.S No. 283 of 2012** and **Agaitano v Uganda Baati, H.C.C.S No. 298 of 2012**, the High Court has come out in **Asiege v Opportunity Bank (U) Ltd & Maad Ltd H.C.C.S No. 756 of 2013**, to set a precedent on image rights in Uganda, carefully steering away from the law of Copyright.

In the Sebagala case of 2012, the plaintiff sued MTN claiming that the defendant had used his voice in creating call/ring tunes without his authorization. Although it was apparent that it was his voice on the call tunes, as Justice Madrama rightly held, the Plaintiff did not own copyright to the creativity.

This is because he was not the author of the caller tunes. Nonetheless, the case left ordinary folks puzzled as to how different persons can gain from an individual's personality and still get away with it.

Agaitano as opposed to Sebagala (a Ugandan celebrity in his own right), is such an ordinary person. He sued his employer, Uganda Baati Ltd, for using his image on their brochures and other promotional material. But, just like Sebagala, he too lost the case because he was not the author of the expression of the work. Agaitano had actually been informed by his employer that they would be taking pictures of staff members for promotional purposes. These two cases clearly spelt out that copyright law and image rights are not necessarily the same thing.

In **Asiege Winnie v. Opportunity Bank (U) Ltd & Another, H.C.C.S No. 756 of 2013**, the matter of image rights in Uganda was put to rest. Briefly, the plaintiff sued the defendant for using her image in large promotional billboards, advertising flyers, brochures and calendars that the Bank used in different parts of the country.

Her claim was for a breach of her constitutional right to privacy, passing off, misrepresentation and false endorsement, breach of confidence and unjust enrichment in the unauthorized use of her image.

She argued that she had never commissioned or licensed the defendant to use her image on their promotional materials and that the same was obtained without her authorization hence invading her constitutional right to privacy. The Bank denied the Plaintiff's claim and stated that it obtained her images from the second defendant (a third party in the proceedings) whose professional services had been sought as an advertising company. Maad Limited, on its part, claimed that it lawfully obtained the plaintiff's photo images from an internet-based website known as Shutter Stock Inc. as well as from the New Vision Printing and Publishing Company Ltd. The Plaintiff rebutted these arguments by pointing out that the New Vision and Shutter Stock Companies did not acquire any copyright in her image because when the picture was taken, it was for a single usage only and not transferable for recurrent usage.

Justice Henry Adonyo pointed out how ***the issue of image rights is a grey area in Uganda*** hence the reliance on common law principles of personality rights. He opined that publicity rights fall under the tort of "passing off" with the notion that every individual should have a right to control how, if at all, his or her "persona" is commercialized by third parties who intend to help propel their sales or visibility based on such product or services.

In his wisdom, basing on the common law jurisprudence, Justice Adonyo established three basic elements that have to be present for one to succeed in an action for infringement of image rights:

- a) The Plaintiff must be identifiable.
- b) The defendant's action was intentional.
- c) The defendant must have acted for the purpose of commercial gain.

In addressing these elements, Justice Adonyo navigated outside of copyright law in stating that the Plaintiff's claim is not established under the Ugandan copyright Statute but under a common law remedy resulting from the unlawful use of her image.

Relying on evidence adduced during the court proceedings, all three elements were proved to the satisfaction of court.

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As for the third element, it was also evident that the plaintiff's image was used by the Bank to promote their so called "Agro Save Account" hence commercial promotion.

Justice Adonyo concluded by asserting that "every individual has a right to his/her personality which extends to the name of the individual and image and has a right to control the use of either."

The Defendant and Third party were thus found to have infringed upon the Plaintiff's image rights and damages, totaling 150,000,000 (One hundred and fifty million Uganda Shillings) were awarded in her favor.

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