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THE PROTECTION OF THREE-DIMENSIONAL WORKS AS A MEANS OF PROMOTING INNOVATION: A COMPARATIVE BASIS OF NAMIBIA AND BURKINA FASO

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Abstract

For years intellectual property (IP) has been an area that has been neglected in its protection and promotion in comparison to other types of the property despite its uniqueness. There is more neglect in industrial designs, specifically from innovators from developing countries, because of the lack of assistance to innovators or government prioritizing areas concerned with the public interest. IP does not only benefit its creators. However, it has contributed to the economies of many countries. Hence the need to have effective legal systems that recognize IP and have remedies and enforcement mechanisms. When there are mechanisms in place for protection, it gives innovators more confidence and helps them develop new technology. Both Namibia and Burkina Faso are members of the World Intellectual Property Organization and the World Trade Organization. They are obliged to apply the minimum in the Trade-Related Aspects of Intellectual Property Rights agreement and related WIPO treaties. A comparative study was made on three-dimensional work to identify the strengths and shortcomings of the applicable national laws. The findings show that laws in Burkina Faso are clear and specifically provide for the protection of three-dimensional in terms of all IPRs, while Namibian laws, apart from copyright law, do not expressly provide for three-dimensional. However, the provisions are broad enough to protect three-dimensional. It is recommended that the legislature revises current laws to be clear and adequate for protecting three-dimensional.

Keywords :industrial design, intellectual property, three-dimensional.

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I. INTRODUCTION

Intellectual property (IP) refers to creations of the mind such as inventions, literary and artistic works, symbols, names, and images used in commerce. There are two categories of IP copyright which include musical, artistic, literary, and other original works and industrial property category consisting of trademarks, industrial designs, patents, and geographical indications. Three-dimensional regardless if its art, images, or drawing have or appear to have width, height, and length. Three-dimensional work includes digital images, computer-aided designs (CAD), and sculptural works such as three-dimen-

sional models from characters from movies and video games. Three-dimensional work is recognized as IP and can be protected by copyright, trademarks, industrial designs, and patents, putting creators of three-dimensional work at an advantage because of the different means of protection.

The intellectual property benefits its creators; however, it has contributed to the economies of many countries and international trade over the years. Hence the need to have effective legal systems that recognize intellectual property, prevent violations, and have remedies and enforcement mechanisms for intellectual property rights holders when there are violations. Knowing that there are mechanisms in place regarding protection and assistance gives innovators more confidence and helps them develop new technology.

One cannot mention intellectual property without making references to creativity and innovation. Innovation has to do with developing a new or improved way of doing things. Innovation can be described as follows:

“Innovation refers to the process of bringing valuable new products (goods and services) to market, i.e., from the idea/concept formulation stage to the successful launching of a new or improved product in the marketplace, or the result of that process, so as to meet the explicit or implied needs of current or potential customers.”

Both Namibia and Burkina Faso are African countries that are members of the World Intellectual Property Organization (WIPO) and members of the World Trade Organization (WTO). As members, they are obliged to apply the minimum standards as provided for in the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement and related WIPO treaties. A comparative study will be made in terms of the protection of industrial design with the specific focus on three-dimensional work with the objective of identifying the strengths and shortcomings if any in the applicable national laws of Namibia and Burkina Faso and giving recommendations thereof. The legal issues in the study relate to the overlap of the protection of three-dimensional and the inadequate legal protection of three-dimensional in legal systems. The methodology used is qualitative in that articles, books, and journals were consulted to carry out the study. In addition, international agreements, conventions, and national laws were analyzed.

II. THREE-DIMENSIONAL WORKS UNDER TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

The predecessor to the WTO was the General Agreement on Tariffs and Trade (GATT) which sought to address issues related to international trade in goods. Over the years, the operation of the GATT resulted in the lowering of tariffs in general in international trade. As a result, increasingly, other domestic policies of nations came into the focus of the trading nations. The developed countries, including the United States, started facing increasing competition in manufactured exports from Newly Industrializing Countries (NICs) of Asia. For intellectual property issues in general, the negotiators were required to “clarify GATT provisions and elaborate as appropriate new rules and disciplines” to reduce distortions and impediments to international trade. As technology became more important in goods and commodities, having a higher proportion of invention and design (intellectual creativity) in their value, IPR became important in international trade. As a result, in the Uruguay Round negotiations, intellectual property rights dominated the discussions.

A. THE AGREEMENT

As mentioned above, both Namibia and Burkina Faso are members of the World Trade Organization (WTO) and parties to the TRIPS Agreement. In terms of the preamble of the Agreement, the following are the objectives:

“Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. Recognizing, to this end, the need for new rules and disciplines concerning:

- (a) the applicability of the basic principles of GATT 1994 and relevant international intellectual property agreements or conventions;*
- (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;*
- (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;*
- (d) the provision of effective and expeditious procedures for the multilat-*

eral prevention and settlement of disputes between governments; and
(e) transitional arrangements are aiming at the fullest participation in the results of the negotiations.”

Like the other WTO agreements such as the GATT and GATS, the main objective of the TRIPS agreement is the reduction of distortion and impediments to international trade and the promotion of trade liberalization. In addition, the principles of National Treatment and Most Favoured Nation as applicable to goods and services are also applied in respect of intellectual properties. The TRIPS agreement has three main features, namely, the minimum standards of protection to be provided by each member, secondly, the enforcement procedures and remedies, and thirdly the dispute settlement for disputes between WTO members. The TRIPS agreement covers the areas of copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information. The provisions of the agreements also apply to service marks, appellations of origins, new varieties of plants, trade secrets, and test data.

There is an agreement between WTO and WIPO, which provides for cooperation in the areas of notification of national laws, access to and translation of national laws and regulations, and implementation of procedures to protect national emblems and technical cooperation. The cooperation is seen with the mention and application of WIPO administered Treaties in the TRIPS Agreement such as the Paris Convention (1967), the Berne Convention (1971), and the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits.

The national and most-Favoured national treatment is provided for articles 3 and 4 and is important in preventing discrimination. The national treatment provision requires that,

“each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its nationals concerning the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits...”

While in respect of the Most-Favoured-Nation Treatment, TRIPS require concerning the protection of intellectual property, to provide “any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals

of all other Members.” Exempted from the national treatment is an advantage from a member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (e) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

B. THREE-DIMENSIONAL WORKS UNDER TRIPS

Three-dimensional works under the TRIPS Agreement can be protected under copyright, trademarks, industrial designs, and patents.

In terms of protecting three-dimensional works under copyright, article 1, which covers copyright and related rights, is applicable. The Berne Convention (1971) is applied with articles 1 to 21 of the Convention made applicable. In terms of article 2 (1) of the Berne Convention, the following works are protected:

“The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico- musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving, and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture

or science.”

The definition of literary work is broad enough to cover three-dimensional works. There is even specific reference to “three-dimensional works relative to geography, topography, architecture or science” specifically stipulated. If three-dimensional work is granted copyright protection, the term of protection shall be not less than 50 years from the end of the calendar year of the person’s life. Three-dimensional digital files, sculptural works, 3D models of characters from movies, video games, and comics can be protected by copyright.

Industrial designs are not defined in terms of the TRIPS Agreement; however, it has been understood to refer to the ornamental or aesthetic aspect of the article and not the technical feature of an article. According to article 25 (1) of TRIPS, industrial designs can be protected if they are new or original. The design should not have been necessitated merely by the technical or functional purpose. A design is not new if it does not scientifically differ from a known design or a combination of known design features. Hence it should be independently created. Unlike patents and trademarks that have formal requirements before protection, there are no formalities regarding industrial designs. However, textile designs are given specific attention in article 25 (2) because they typically have a short product cycle and can be easily copied. Because of this, members should not make the requirements concerning costs, examination, and publication to obtain protection for textile designs unreasonably impair the opportunity to obtain protection. In addition, the agreement also provides that members may also opt to grant protection in terms of textile designs under copyright law. Considering the provisions of TRIPS, it shows that designs consisting of three-dimensional features such as the shape of an article with an aesthetic design can be protected by industrial design and be protected as industrial designs as long as the features are not technical or functional.

The owner of the protected industrial design shall have the right to prevent third parties from making, selling or importing articles embodying a design which is an exact copy or a substantial copy of the protected design when such copying, selling or importation is undertaken for commercial purposes. In terms of article 26 (2), the discretion is left to the members to come up with exceptions to the protection of industrial designs provided that such exceptions do not unreasonably prejudice the legitimate interests of owners and do not unreasonably conflict with the normal exploitation of the protected industrial designs. The term of protection for industrial design shall be a minimum of at least ten years in terms of article 26 (3).

In respect of trademarks, article 15(1) defines what constitutes a mark below:

“Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, particularly personal names, letters, numerals, figurative elements, and combinations of colors, and any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.”

What constitutes a mark is very broad and allows three-dimensional signs to be recognized as marks if they comply with the applicable requirements. This requirement from the definition is that such a mark should be capable of inherently distinguishing the goods or services of one trader from another and where signs are not capable of inherently distinguishing such goods or services by distinctiveness acquired through the use of the sign. However, article 16 (3) prevents members from refusing an application for registration of a trademark solely for the purpose that there was no actual use, or the intended use has not yet taken place.

This means that if a shape or configuration that constitutes three-dimensional meets the abovementioned requirements can be registered as a trademark. In order for a product shape or configuration to function as a mark, it must in itself be recognized by consumers as indicating a particular commercial origin. The shape of the product must provoke an aesthetic empathy in a prospective buyer, and it must also convey the information that all products are having that particular shape have been manufactures by a particular entity, and the shape of the product, therefore, distinguishes it from competing products. Three-dimensional signs, particularly the shapes of products or parts, any part thereof, or their packaging or containers, may be registered as three-dimensional marks.

Upon registration of the trademark, the owner of the registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of the trade identical or similar goods or services that are identical or similar to those in respect of which the trademark is registered, where such use is likely to cause confusion. In terms of article 17, members may provide limitations as exceptions to trademark protection, such as the basis of fair use of descriptive terms. However, such exceptions

should take into consideration the legitimate interest of the owner of the registered trademarks and third parties. The duration of trademark registration is for an initial period of not less than seven years, and after that, it is renewable indefinitely.

In respect of patents, any inventions, whether products or processes in a field of technology on condition that they are new, involve an inventive step and are capable of industrial application. However, the following are excluded from patentability in terms of article 27 (3):

“(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.”

In addition, members may also exclude from patentability inventions for commercial exploitation, which is necessary to protect public order or morality, including protecting health, human, animal, or plant life or avoiding serious prejudice to the environment. This is provided that such exclusion is not made merely because their law prohibits exploitation. Upon registration of a patent, an owner will be conferred the exclusive right to prevent third parties without the patent owner's consent from making, using, offering for sale, selling, or importing for purposes of the product concerning a patent being the subject matter. In addition, the owner of the patent is conferred the exclusive right in respect of a patent being a process to prevent third parties without the owner's consent from using the process and from using, offering for sale, selling, or importing the product obtained directly by such process. Patent owners have also conferred the right to assign or transfer by succession to third parties and the right to conclude licensing contracts in terms of article 28 (2) of the TRIPS agreement. The term of protection shall be for a period not less than twenty years from the filing date in terms of article 33. Three-dimensional software, printer, or scanner are examples that can be protected as a patent.

C. OVERLAP IN THE PROTECTION OF THREE-DIMENSIONAL UNDER IP

There are concerns of overlap in-laws in terms of the provisions of the TRIPS agreement. However, the various means of protecting articles with three-dimensional features are when an article has a combination of features capable of protection under copyright or trademark or industrial design or patents. The owner may opt to have either cumulative or separate protection. In respect to the cumulative approach, protection of three-dimensional as copyright is based on the theory that recognizes art as an expression in many ways and fixed in any material support, as art is regarded as a unitary concept and artistic work should not be distinguished or discriminated based on the aesthetic mode of expression.

An industrial design like a work of art would be protected by copyright as its creation in tangible form. This means the same design can benefit from protection under design law and copyright law regarding non-functional features of products. Likewise, the shape of a product with three-dimensional features capable of functioning as a mark and distinguishing goods and services on the market may enjoy protection as an industrial design and as a trademark. In addition, in respect of a patent, it is also possible that a shape of products with an aesthetic concept can be expressed or fixed in a utilitarian product capable of performing a technical function, which means that such product can be regarded as functional designs and work of art.

In respect of the separate protection approach, there is a separation in terms of IP protection. For instance, where an object can be protected by copyright, then the same object cannot be protected by the system of industrial design. It is based on copyright protection that operates the notion of separability and independence of a particular shape or configuration from the product in which it is embodied. Under this approach, an overlap of IP regimes for the same product is not allowed. Countries like the United States of America are an example where this approach is adopted, and for instance, copyright is reserved exclusively for works of art. This means that under this approach, the overall shape or configuration of utilitarian, industrial, or consumer products may not receive copyright protection, regardless of how aesthetically pleasing its value or how valuable the shape or configuration may be. It is also important to note the purpose that the IP tries to serve. For instance, industrial designs and trademarks have different roles in the economy and are protected as IP for different reasons. The function of industrial designs is to make products more pleasing to the eye and more aesthetically attractive to prospective buyers. At the same time, trademarks allow consumers to select and buy products and

services based on their preferences. The TRIPS agreement leaves it up to the members to decide which approach to follow and only provides the minimum standards for protecting IP.

III. THREE-DIMENSIONAL WORKS PROTECTION UNDER BURKINA FASO'S LAWS

A. OVERVIEW OF THREE-DIMENSIONAL WORKS PROTECTION UNDER THE BANGUI AGREEMENT

Burkina Faso is a member state of the African Intellectual Property Organization (OAPI). OAPI is a union of seventeen countries, predominantly former French Protectorates who, by the Accords of Libreville and Bangui, established common Intellectual Property Laws and a single Intellectual Property Office in Yaounde, Cameroun. The OAPI Agreement establishing the Organization is mandated to register technical and ornamental creations and distinctive signs.

Inventions, innovation, trademarks, artistic creations, and industrial designs are three-dimensional works that can be protected using patents, trademarks, copyright, and industrial design. The Revised Bangui Agreement is regional, and at the same time, the national legal instrument for the protection of intellectual property rights (IPR) in all 17 Member countries. OAPI has a unique IPR protection system globally, whereby a single filing grants relevant to Intellectual Property (IP) protection across all 17 member states. It means that all the 17 member states, the OAPI Agreement is applied, and member countries do not have different IP-related legislation. This creates harmonization of IP laws in the Union and makes the predictable law and knowing that there will not be any surprises.

As such, regarding the protection of three-dimensional works, the Revised Bangui Agreement, which is the primary Intellectual Property legal instrument in Burkina Faso, provides that:

“Any arrangement of lines or colors shall be considered a design, and any three-dimensional shape, whether or not associated with lines or colors, shall be considered a model, provided that the said arrangement or shape gives a special appearance to an industrial or craft product and may serve as a pattern for the manufacture of such a product”.

According to the statement above, the agreement offers protection to three-dimensional as a trademark and industrial design.

Moreover, if a three-dimensional work can be considered as a new design and a new invention, suppose the novelty element of the design are inseparable from those of the invention. In that case, the three-dimensional work can only be protected under the provisions of Annex I on Patents or Annex II on Utility Models. Therefore, the protection of three-dimensional works granted under Annex IV does not exclude other rights deriving from other legislative layouts of member States, particularly the copyright and neighboring rights. Like TRIPS, Burkina Faso Laws, the Bangui Agreement provides three-dimensional works protection through trademarks, copyright, industrial designs, and patents.

The above definition of industrial design is derived from the Model Law of WIPO. However, in the Revised Bangui Agreement, the definition of three-dimensional works uses the notion of “three-dimensional shapes”. The dual characteristic of industrial designs as aesthetic and functional works gives the possibility to protect them through two forms of protection according to the Revised Bangui Agreement and industrial design laws of many countries. Particularly, industrial designs, namely three-dimension works, can be protected by the regime of registration and copyright. Three-dimensional works can be granted *e a sui generis* designs protection regime and copyright protection as a work of art or applied art.

According to the Annex IV of the Bangui Agreement, the term two or three-dimensional shapes refers to industrial design. The following analysis will focus on the protection of three-dimensional works as industrial designs.

B. PROTECTION OF THREE- DIMENSIONAL WORKS AS INDUSTRIAL DESIGNS

According to Annex IV of the Revised Bangui Agreement, an industrial design can be registered, if:

- it can be registered if it is new;
- it has not been disclosed anywhere in the world by publication in tangible form, by use, or by any other means before the filing date or, where applicable, before the priority date of the application for registration.

According to Article 8 of Annex IV of the Revised Bangui Agreement, in order for an author to register a three-dimensional work, he or she shall file an application with OAPI or the OAPI local office in each Member State or send by registered mail with a request for acknowledgment of receipt:

- the application;
- a proof payment of the prescribed fees;

- a mention of the type of product for which the design is to be used; and
- two identical copies of a graphic or photographic representation of the design.

The same application filed can enclose from one to a hundred three-dimension works. The Revised Bangui Agreement and its provisions comprise procedural and substantive disposals to protect three-dimension works. The OAPI examines each application about background and form. If all the conditions are met, the OAPI proceed by registering and publishing the deposited designs, namely the deposited three-dimension works.

C. RIGHTS CONFERRED BY THE REGISTRATION OF INDUSTRIAL DESIGNS

The agreement provides that any creator of an industrial design and his successors in title shall have the exclusive right to exploit the said design and sell or cause to be sold for industrial or commercial purposes the goods in which the design is incorporated. Industrial designs are registered in the OAPI region for five years and can be renewed two times, making it 15 years of registration.

However, the registered industrial design shall not be binding to third parties who were already exploiting the said design on the territory of one of the member States or took the necessary steps to exploit at the time of applying for registration.

D. PROTECTION OF THREE- DIMENSIONAL WORKS AS COPYRIGHT

The agreement also provides for three-dimensional work to be protected as work of applied art under copyright. The agreement specifically defines work of applied art as ‘means a two-dimensional or three-dimensional artistic creation having a utilitarian function or embodied in a utilitarian article, whether a work of handicraft or a work produced by industrial processes’, therefore making three-dimensional a type of work legible for copyright protection. Regarding the subject matter of copyright work, the agreement also expressly stipulates that the provisions on literary and artistic work shall also apply to three-dimensional works relating to geography, topography, architecture, or science. In addition, three-dimensional work reproduction by making a copy of such work is also prohibited under the agreement. Like industrial designs, authors of graphic and three-dimensional works are granted the exclusive right to participate in the proceeds of any sale of such work or manuscript by public auction or through a dealer.

Apart from industrial designs, trademarks and copyright, three-dimensional work is also expressly protected as layout-designs of integrated circuits in the agreement. In this regard, the agreement defines layout designs as follows:

“Layout-design” (synonym of “topography”) means the three-dimensional disposition, however, expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such three-dimensional disposition prepared for an integrated circuit intended for manufacture.”

IV. THREE-DIMENSIONAL WORK UNDER NAMIBIAN LAWS

Namibia is a member of the African Regional Intellectual Property Organization (ARIPO), founded in 1976 in terms of the Lusaka Agreement. There are currently 20 member states. In terms of article 4 of the Lusaka Agreement, membership to the Organization is open to States that are members of the United Nations Economic Commission for Africa (ECA) or States members of the African Union (AU).

In respect of trademarks, In November 1993, the Administrative Council of ARIPO adopted the Banjul Protocol on trademarks that provide for filing a single trademark application at the ARIPO Office (currently situated in Harare, Zimbabwe), which will cover any member state designated by the applicant. The Protocol came into force on 6 March 1997, and to date, only ten countries have acceded to the Protocol, including Namibia. Namibia is one of the few members of ARIPO, including Botswana, Malawi, Mozambique, and Zimbabwe, that have amended their national legislation in order to recognize ARIPO registration in terms of industrial designs, patents, and trademarks. This Namibia did in terms of its Industrial Property Act 1 of 2012.

In terms of international law, Namibia automatically applies international law including treaties upon ratifications and without the need to transform international law into domestic laws. This is provided that, it is not in conflict with the Constitution. This is a unique provision in the Namibian Constitution as many countries require international conventions to be incorporated or transformed into their national laws by an Act of Parliament. Article 144 of the Constitution reads as follows:

“Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding

upon Namibia under this Constitution shall form part of the law of Namibia.”

Unlike Burkina Faso that applies the Bangui Agreement derived from TRIPS, by being part of the OAPI region, Namibia has a different system. This is despite being a member of AIPO. Different legislations protect IP, and the different types of IP are not contained in a single instrument.

A. THREE-DIMENSIONAL AS INDUSTRIAL DESIGN

The Industrial Property Act 1 of 2012 provides for the registration of trademarks, industrial designs, and patents in Namibia. A design is defined as following in terms of the Act:

“Any feature or combination of features or shape or configuration, or any feature or combination of features of pattern or ornamentation, including any composition of lines or colours, applied to an article to give it an appearance having such features discernable by the eye, but does not include any feature serving solely to obtain a functional or technical result.”

The above definition is broad enough to register three-dimensional as an industrial design, provided that other requirements such as that the design is new, it is intended to be used for commercial purposes. It is not contrary to public interest or morality in Namibia. The creator of the design is the one who is eligible to apply for registration. Upon registration, the owner of the design will be accorded exclusive rights over the design. This includes the right to exclude third parties from making, importing, using, disposing, or offering to dispose of in Namibia any article in the class in which the design in question is registered.

The right to exclude others relates to when such acts are done for commercial purposes. The right is concerning the registered design or a design not substantially different from the registered design. The design owner also has the right to enter into license contracts to exploit the registered design by third parties. The duration for registration expires 15 years after the filing date of registration.

B. THREE-DIMENSIONAL AS TRADEMARK

Trademark application and registration in Namibia is also provided by Industrial Property Act and is defined as follows under the Act:

“Other than a certification or a collective trademark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing those goods or services from the same kind of goods or services connected in the course of trade with any other person.”

While a mark is defined as any sign capable of visually represented, including a device, name, signature, word, letter, numeral, figurative element, shape, color, or container for goods, or any combination of such signs. The definition is wide enough for three-dimensional marks to be registered as a trademark when used to distinguish goods or services of the same kind. Hence, the main requirement for trademark registration is distinctiveness. This is in terms of two circumstances, namely if the mark can distinguish the same type of goods or services of other persons or if the sign becomes capable of distinguishing the goods or services because of its prior use.

The application is filed with the Registrar of trademarks at the Business and Intellectual Property Authority (BIPA) office in the prescribed forms. The representation of the mark and payment of the prescribed fee as determined in the regulations should be done. Such a day will be regarded as the filing date. The Act also allows the Namibian office to receive trademark applications trademarks in the African Regional Intellectual Property Organization (ARIPO).

The Act refers and gives the option to claim the right of priority as required under the Paris Convention for the Protection of Industrial Properties as amended in 1979 (Paris Convention). In terms of the Act, the application may contain a declaration claiming the priority of an earlier national, regional, or international application filed by the applicant or his or her predecessor in title, provided that the application is made within six months after the date of the earlier application. If the Registrar is satisfied with the requirements complied with, the registration will be granted. The trademark owner will be issued with a certificate, and publication of the trademark will be featured in the Bulletin.

When registered as a trademark, a three-dimensional mark owner will be granted the exclusive right to prevent others from using the registered trademark without the owner's authorization and the right to institute legal proceedings from those who infringe the trademark. The registration is valid for ten years and after that for consecutive periods of 10 years, provided that renewal fees are paid.

C. THREE-DIMENSIONAL AS PATENTS

Three-dimensional can be registered as patents in terms of the Industrial Property Act since the Act makes patents available for any invention regardless of it is a product or process in any technology field. This is, however, provided that such invention is new, involves an inventive step and is capable of being an industrial application. The same requirements regarding the na-

ture of the patent application regarding other inventions are also applicable to three dimensions. The invention owner has the right to apply for a patent in the prescribed form and upon the payment of the applicable fees and other requirements under the Act, such as providing the description, claims, and drawings of the patent.

In examining the patent application, the Registrar considers any international search report results and any international preliminary examination report established under the Patent Cooperation Treaty (1970) concerning the application. Once the Registrar is satisfied that all requirements are complied with, the application will be granted. The registrar is also required to issue a certificate for the patent, publish a reference to the patent in the Bulletin and record it in the patent registry. The Act also allows the BIPA office to be the receiving office for applications for the registration of patents in the African Regional Intellectual Property Organization (ARIPO).

The owner is conferred with the right to exploit the patent, exclude others from exploiting the patent without the owner's authorization, and the right to assign or to license in respect of the patent. The duration in terms of the registered patent is 20 years after applying the patent and annual fees need to be paid to maintain the patent.

D. THREE-DIMENSIONAL AS COPYRIGHT

The Copyright and Neighbouring Act 6 of 1994 (the Copyright Act) is applicable in terms of copyrights and related rights in Namibia. The objective of the Act is to provide for the protection of copyrights and performer's rights. The works legible for copyright in terms of the Act include literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, program-carrying signals, published editions, and computer programs, amongst other things. Although three-dimensional works are not included in the description of works that are eligible for copyright protection under the Copyright Act, the reproduction of three-dimensional work is an infringement of copyright. The Act provides "an artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form". In addition, under the general exception regarding the protection of artistic works, copyright in artistic work with three-dimensional reproductions made available to the public or with the consent of the copyright owner shall not be regarded as infringement. It can be implied that three-dimensional work that constitutes any of the abovementioned work is eligible for copyright if it falls within the description of such work.

Having the option to protect three-dimensional work as copyright is important considering that the duration of protection of copyright and patents and industrial designs is longer. The copyright owner has a lifetime period and often a minimum of 50 years from the end of the year in which the copyright owner dies. Although trademarks can be protected indefinitely, this is subject to renewals often every ten years, the administrative process involved in the renewal of the trademarks and renewal fees apply. In addition, there can be original work. However, that does not constitute any novelty or not capable of industrial application and merely serves a technical or functional purpose. An example is that some of the objects from three-dimensional printers are new or worth the trouble, time, and costs of patenting them. Such work of three-dimensional nature may not meet the requirements for registration as patents or industrial designs in such circumstances.

V. CONCLUSION

It is undeniable that intellectual properties play an important role in our daily lives. Not only in respect of making our lives easier through the development of technology, however, it can also economically benefit both individuals, companies, and states through the payment of fees, licensing and assignment of patents and trademarks, and the payment of royalties. In addition, trademarks help customers distinguish goods and services of those of other traders. Hence the need to have effective legal systems that recognize intellectual property, prevent violations, and have remedies and enforcement mechanisms for intellectual property rights holders when there are violations. The TRIPS agreement is the model law for WTO members. It aims to promote effective and adequate protection of intellectual property rights and ensure that the measures and procedures to enforce IPRs do not become barriers to legitimate trade.

The findings show that Both Namibia and Burkina Faso are WTO members, WIPO, and IP legal systems that protect three-dimensional. The identified laws protecting three-dimensional as intellectual property in Namibia are the TRIPS agreement, the Banjul Protocol under ARIPO, the Industrial Property Act and Copyright Act, and the Neighbouring Act, the national legislation applicable. This is in terms of trademarks, industrial designs, and patents. There are also mentions of international registrations in respect of trademarks and patents under international conventions in the Industrial Property Act, which give innovators, especially those intending to conduct businesses or their products being used in foreign countries, to obtain international registrations. Through the protection of three-dimensional, innovators may be mo-

tivated to continue being innovative. The Copyright Act is the only national legislation in Namibia that expressly references three-dimensional work and prevents the reproduction of three-dimensional work. However, by considering the definitions of what constitutes a mark, industrial design, and patent under the Industrial Property Act, one can conclude that three-dimensional marks, signs, and inventions can also be protected as the definitions are broad and do not seem to be exhaustive. This is a shortcoming from the national laws that the legislature needs to address by considering the provisions of the Banjul Protocol and the TRIPS agreement, which are the regional and international agreements that Namibia is a party to.

In comparison to three-dimensional under Namibian law, the legal system used by Burkina Faso for protecting and registering three-dimensional is more harmonized. This is because the applicable laws are the TRIPS agreement under international law and the Bangui Agreement under the national laws, a model law taken from TRIPS applied by all the members of OAPI. In addition, unlike Namibia, Burkina Faso's law expressly provides for the protection of three-dimensional through trademarks, copyright, trademarks, and patents. The findings also show an overlap in the protection of three-dimensional in both Namibia and Burkina Faso. In some instances, the same work or article may be protected by copyright, industrial design, or patents. Law reform is recommended under both legal systems. In terms of Namibia, it is so that the applicable legislation can be clearer and specifically refer to three-dimensional marks or works as included in the Copyright Act and under the Burkina Faso legal regime. For both courts or legislature in Namibia and Burkina Faso, to develop guidelines on how to resolve issues of overlap of laws protecting three-dimensional. There can be a balance in terms of the rights of creators and innovators on the one hand and limitations for fair use to protect the public interest, encourage innovation through research, and avoid abuse of rights.

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