

A COMPARATIVE ANALYSIS OF REGIONAL AND NATIONAL PROTECTION OF
TRADEMARKS: A CASE OF THE GAMBIA AND THE AFRICAN REGIONAL
INTELLECTUAL PROPERTY OFFICE (ARIPO)

BY

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Abstract

The importance of trademarks in the conduct of trade especially in contemporary times cannot be overemphasised. Trade and commerce are overwhelmingly being spurred today and so too are the various techniques used to facilitate communication in business. It is for the above that it becomes absolutely important to devise means of protecting both traders and the consumers from the activities of unscrupulous persons. Within member states of the African Regional Intellectual Property Organisation (ARIPO), this protection is done through the Banjul Protocol on Marks administered by ARIPO on behalf of the Contracting States. In The Gambia, trademarks are protected through the Industrial Property Act No: 12 of 1989 administered by the Industrial Property Office which is a section of the Attorney General's Chambers and Ministry of Justice. The research therefore analysed in detail the two relevant legal instruments for trademark protection and made suggestions as to how protection therein could be better enhanced between the two offices.

Declaration

Declaration

I, Alieu Jallow hereby declare that this work is my original work except where sources have been acknowledged. The work has never been submitted, nor will it ever be, to another University in the awarding of a degree.

Student's Signature.....*Alieu Jallow*..... Date*17/04/2014*.....

Supervisor's Signature..... Date

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Dedication

This research work is dedicated to my family especially my dear mother Aja Mbassey Jawara and my children Ousman, Omar, Khadijatou Bella, Abibatou, Fatoumatta, Aminata, Mariama and Binta Jallow and my dear wife Aja Halimatou Jallow. I also wish to remember my late father Cherno Amadou Jallow who contributed a great deal towards my education.

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CHAPTER 1

INTRODUCTION

1.1 Background of the study

The Gambia, an independent state since February 18th 1965, is one of the smallest countries in West Africa with a population of under two million as of the figures of the 1990, population and housing census. It has a geographical area of 11,295 square kilometres. The Gambia is bounded on the north, south and east by its bigger and immediate neighbour the Republic of Senegal except on the West coastline to the Atlantic Ocean.

The Gambia is a largely politically stable cosmopolitan settlement comprising mainly Muslims, who constitute 95% followed by Christians and other small religious denominations who continue to co-exist peacefully. The Gambia was colonised by the British who maintained presence and dominance for over 150 years.

The colonial masters were mainly interested in the colony because of the River Gambia and its natural harbour. The River Gambia from which the country derived its name, is one of the most navigable in the continent and hence providing an alternative route for the trade in goods and services. The River Gambia flows from the Fouta Jallon Highlands in Guinea

through territory known today as eastern Senegal before emptying into the Atlantic Ocean (The Voice of The People, 1992, p. 1). In addition to providing easy communication from the coast into the hinterland, the River Gambia waters vast land lying within its basin for agriculture, thereby making it an integral part of the lives of the Gambian people.

In terms of economic activity, the main stay of the Gambian economy since independence is agriculture. The agriculture sector accounts for 70% of employment in rural Gambia and represents 29 percent of Gross Domestic Product (GDP) and 50 percent of national food supply as per the 2013 national estimates. Despite this significant contribution, the sector remains largely subsistence and un-mechanized. The main cash crop has been groundnuts which forms the bulk of agricultural produce exported to the international market; mostly with no value addition. Also exported to the international market was cotton but production of this crop has dwindled significantly over the past couple of years and the main processing plant in the provincial town of Basse in the Upper River Region of The Gambia is non operational today. In addition to the lack of technological progress, agriculture is also rain-fed with the rains lasting for only three months. This has further compounded efforts for an-all year round production in this sector. To ameliorate the situation, government has made it a priority to increase investment in the agriculture sub-sector. This is with a view to reducing reliance on rainfall and as well to modernize and make the sector a major supplier of food to both the local and international markets.

Another major activity for the Gambian economy is the tourism industry which is at its peak from December to April. The tourism industry continues to be a stabilising factor for the Gambian economy. In 2013, the sector showed a robust growth accounting for between 12-15 percent of Gross Domestic Product (GDP) as highlighted in the national estimates for 2014. This positive development is attributed to vigorous marketing strategies by the Ministry of Tourism in collaboration with the Gambia Tourism Board. Meanwhile, the Minister of Finance and Economic Affairs has hinted that plans are underway to promote the Gambia as an all-year round tourist destination (Budget Speech 2014, p. 23).

Today, The Gambia is experiencing a rapid growth and expansion in the business industry. A number of companies and other business undertakings have been established by both Gambians and non-Gambians. The service sector particularly has recorded tremendous improvements with the proliferation of publicly and privately owned, airlines, hotels, restaurants, banks, insurance companies, tour operators, car rental services and a host of other services including three privately owned cellular companies. This development is on the rise perhaps attributable to the peace and stability the country continues to enjoy. It could be recalled that over the years the West African sub-region has been riddled by many devastating political and civil conflicts, which not only led to an influx of refugees, but also to an increase in the number of business establishments in the neighbouring countries since; most investors were also forced to flee their troubled territories. As a result of these calamities in such countries as Liberia, Sierra Leone, Guinea Bissau to mention but a few many businesses tended to relocate to safer grounds and The Gambia was found to be a peaceful destination.

Meanwhile, in addition to private initiatives, the government through the Ministry of Trade, Industry, Regional Integration and Employment (MOTIE) continues to pursue trade-related programmes as spelt out in the National Trade Policy. In this bid, the Ministry is forging collaborative efforts with such development partners as the United Nations Development Programme (UNDP) to support and promote the development of Micro, Small and Medium Size enterprises. This is within the UNDP-Gambia Government Country Programme Action Plan (CPAP) (Budget Speech, 2014, p. 24). Under this programme, the Ministry is supporting a number of groups and private entrepreneurs that are engaged in value addition activities.

With the expansion in trade and commerce, it is therefore obvious that there would be a corresponding rise in competition in the business environment in The Gambia. The management of such competition to ensure fairness presupposes that all players would like to distinguish their respective undertakings from those of their competitors in the market. One effective way to protect one's business is through the use of trademarks. Since, for most times the average consumer is not in a position to differentiate between goods and services to ascertain their quality and source, they would have to rely on the signs attached or affixed to the goods and services offered for sale. Such signs speak to the consumers since they help them to identify the goods and services of one undertaking from those of other undertakings. "Trademarks are a shorthand way of communicating information that purchasers need in order to make informed purchasing choices" (Bently, L. & Sherman, B. 2009, p. 718).

This research shall explore the routes for trademark protection in The Gambia and the African Regional Intellectual Property Office (ARIPO). The focus will be The Gambia though an attempt will also be made to international initiatives relating to the protection of trademarks.

1.2 Statement of the problem

Trademarks are protected because of the economic importance associated with their use and also to prevent people unfairly benefitting from them. Unless such people are aware of their rights, they are likely to be duped and not see the advantage of trademark protection. This problem is compounded by the context of a seemingly weak IP legislation and general awareness of the frameworks or important legal documents guiding legislation of trademark and protection of the same. Two of such legal instruments are the Banjul Protocol on Marks and the Industrial Property Act of the Gambia.

1.3 Purpose of the study

This research is aimed at exploring the trademark protection regimes in the Gambia and at the African Regional Intellectual Property Office (ARIPO). In so doing the research will attempt to create the much needed awareness that is lacking in the field of Intellectual Property in The Gambia. In that it seeks to highlight the importance of protecting trademarks as a means to enhance economic activity. In the same vein, it would seek to suggest possible ways to harmonize the national laws with those of the African Regional Intellectual Property Organisation (ARIPO) especially as it relates to The Gambia signing up to the Banjul Protocol on trademark registration.

1.4 Objectives of the Study

The objectives of this study are to:

1. examine the level of awareness among trademark stakeholders in The Gambia on the legal instrument protecting trademarks;
2. investigate the effectiveness of trademark protection under the Industrial Property Office of The Gambia and the African Regional Intellectual Property Office (ARIPO);
3. discuss the importance of trademark protection to economic development of The Gambia; and

4. propose strategies that may facilitate a link between the Industrial Property Office and the African Regional Intellectual Property Office regarding trademark protection.

1.5 Research questions

The following are the research questions of this study:

1. What is the level of awareness of legal instruments relating to trademark among trademark stakeholders in The Gambia?
2. What is the effectiveness of the legal instruments on trademark protection in The Gambia?
3. How can trademark protection enhance competition in the business environment in The Gambia?
4. What appropriate strategies are needed to facilitate a link between the Industrial Property Office and the African Regional Intellectual Property Office for an effective trademark protection regime?

1.6 Significance of the study

The significance of this study is that it may serve as a means to broaden understanding of trademark concepts and their benefits to overall economic activity at a national and regional level. In this way, it shall play the role of strengthening economic activity through proper exploitation of the value of trademark protection, protecting the consumer in the course.

1.7 Scope of the study

The study is targeted at analysing how trademarks are protected in The Gambia after comparing it with the protection offered by the African Regional Intellectual Property Offices. It seeks views from these stakeholders as well as engaging in a robust content analysis of the Banjul Protocol on Marks and the Industrial Property Act of the Gambia in order to understand and eventually suggest additional ways to ensure a much more effective trademark protection in The Gambia.

1.8 Limitation of study

Some of the problems likely to be encountered with in the course of conducting this study are as follows:

Firstly, a great deal of time is needed in order to be able to extensively cover the subject area. Unfortunately, the time available is not sufficient to embark on such an extensive research.

Another challenge is limited financial resources. Research works are usually very costly. The researcher has no budget to embark on the research. This is likely to impede the collection of data relevant to the research.

Scarcity of relevant materials on Intellectual Property in The Gambia could be another problem. This is due to the fact that in most countries, including The Gambia, IP is a relatively new field.

Lack of awareness of Intellectual Property issues among the population could also limit the extent of information gathering in this study.

One may also be faced with lack of cooperation by the relevant institutions and other stakeholders who could be reluctant to divulge important data.

1.9 Definition of key terms

Registrability: the qualities required for registration.

Individualising: making something appear different from others and give it a recognisable identity.

Distinguishing: making different from others due to a special quality or feature.

National Treatment: According the same treatment to non national as done with citizens.

ARIPO: African Regional Intellectual Property Organisation.

The 'Office': The Secretariat of the African Regional Intellectual Property Organisation.

The Act: The Industrial Property Act No.12 of 1989 of The Gambia.

Registrable: That which has the features to qualify for registration.

Distinctive: different and easily recognisable among others due to certain features.

MOTIE: Ministry of Trade, Industry, Regional Integration and Employment.

TRIPS: Trade Related Aspects of Intellectual Property rights.

The Protocol: The Banjul Protocol on Marks.

OHIM: Office of Harmonization in the Internal Market.

OAPI : African Intellectual Property Organization.

Opposition: The right given to third parties to challenge the registration of a trademark upon filing in order to prevent the registration of a sign that does not fulfil the registrability criteria or that which belongs to another proprietor.

IPR's: Intellectual Property Rights.

1.10 Outline of study

This research comprises five main chapters.

Chapter One of the research is the Introduction. Chapter Two is the Literature Review. Chapter Three is the Methodology. Chapter Four (Data Presentation and Analysis) analyses and interprets the data gathered. Finally, Chapter Five, Discusses the Findings of the research.

1:11 Conclusion/summary

There has been a significant increase in the number of business establishments in The Gambia which presupposes a corresponding rise in the number of trademarks in The Gambia. Although, a member of the African Regional Intellectual Property Organization, The Gambia is not a signatory of the Banjul Protocol on trademarks administered by ARIPO. This research work focuses on how trademarks are protected in The Gambia and at the African Regional Intellectual property Office(ARIPO). This Chapter thus gave the introduction to this question. The following Chapter will present the literature review on the same.

CHAPTER 2

LITERATURE REVIEW

1.12 Introduction

This chapter aims to prowl into literature available on trademark especially in relation to the Banjul Protocol and the Industrial Property Act of The Gambia as regards trademarks. In this, the author will trace the history of trademark protection, its importance and some procedures on registration. The last part of the review will look at the process on registration as provided for in the Banjul Protocol and The Industrial Property Act of The Gambia. In this way, this research will put the main hypothesis into its proper place as informs Vockell (1983) on the power of literature review. This shall also help the research to avoid duplicating work that has already been done better by someone (Borg, W.R.)

1.13.1 Defining Trademark

Authors have variously defined the term “trademark” in a rather descriptive style. According, Hart, T., Fazzani, L. & Clark, S. (*Intellectual Property Law*, p. 81), “A trade mark can be described as a sign or symbol placed on, or used in relation to, one trader’s goods or services to distinguish them from similar goods or services supplied by other traders.” The World Intellectual Property Organization (WIPO) on the other hand, defines a trade mark as “any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors” WIPO (*Intellectual Property Law*, 2004, p. 68).

Succinctly put a trademark is “any visible sign capable of distinguishing the good or services of an enterprise from those of other enterprises” WIPO (Intellectual Property Law, p. 68).

The above definitions suggest that a trademark is used to differentiate goods belonging to different traders. Therefore one can logically infer that trademarks are only needed when different players are operating in the same market environment.

Article 15.1 of the TRIPS Agreement identified the primary function of a trademark as “to distinguish the goods and services of one undertaker from those of other undertakings” (Carvalho, N.P., 2006, p. 212).

However, the author slightly defers with the above definition and maintains the view that the definition would be more correct if it did not make reference to the “goods and services of other undertakings”. He maintained that the correct wording of Article 15.1 should have read: “Any sign, or combination of signs, capable of distinguishing goods and services from competing goods and services, either from the same undertaking or other undertakings.” The author's view is that trademarks not only distinguish goods and services of different competitors but those offered by the same enterprise as well. This view could make more sense in a context in which one supermarket belonging to one proprietor different goods are always on offer and people make their choices based on the labels attached to the goods.

The author's view seems to be in line with what is emphasised in the Industrial Property Act of The Gambia. This Act defines a mark as "A visible sign capable of distinguishing the goods (trademark) or services (service mark) of an enterprise." The distinguishing role mentioned in the Industrial Property Act is rather more general as it can mean for goods and services within an enterprise as well as between enterprises.

From the definitions provided one may further define a trademark simply, as "an identification sign" used by different traders or the same trader and are either applied to goods or services to differentiate them from other goods and services. It is therefore evident that a trademark could be anything that can perform the function of identifying and differentiating goods and services in any given situation.

1:14 Some Types of Trademark

Trademarks are of different types and for different things. The subject matter of identification is somewhat not exhaustive, that is to say, a trademark can apply to many kinds of enterprises.

1:15 Service Mark

A service mark is a mark applied by a service provider to identify the particular service being provided. Just as a trademark distinguishes the goods of one enterprise from its

competitors', a service mark also differentiates the services offered by one company from those of all other companies. Services marks are common in such companies to do with insurance, air transportation, banks, mobile phones, hotels, car renting and a host others.

The importance of service marks cannot be overemphasized, giving that the modern day customers are faced not only with a wide ranging number of goods, but also with an increasing number of services (WIPO Intellectual Property, 2004, p. 68).

It is important to note that same conditions as for trademarks in terms of registration, renewal and cancellation apply to service marks. The difference between trademarks and service marks being the name and to what they are applied to but their functions remain the same.

1:16 Collective Mark

A collective mark belongs to an association, and its members may use the mark provided that they adhere to stipulated rules and regulations governing its use. These regulations regarding the use of a collective mark are normally found in an application for the registration of the collective mark (WIPO Intellectual Property, 2004, p. 69).

In many countries a collective mark may not be registered and or its registration may be cancelled if the mark is used for something other than what the regulation for its use

prescribes. As per article 7bis of the Paris Convention, countries of the Paris Union have made an undertaking to accept for filing as well protect collective marks provided that the existence of the association owning the collective mark is not contrary to the law of the country of origin, whether or not such associations possess an industrial or commercial establishment.

1:17 Certification Marks

A certification mark and a collective mark are different only in terms of the requirements for their use. While a collective mark is used only by members of an association that owns the mark and who abide by the rules and regulations for its use, a certification mark may be used by any person who conforms to a given standard. Thus, the users of a collective mark form a “club” while, in respect of certification mark, the “open shop” principle applies. WIPO (Intellectual Property, 2004, p.69).

It is however important to point out that meaning of “certification mark” is not universal and therefore it can be different depending on the jurisdiction. For example as opposed to compliance with a certain standard, in the United States of America, “a certification mark may be used only by enterprises which have been authorized by the owner of the certification mark to use that mark” (WIPO Intellectual Property, p.70).

Succinctly put, the function of a certification trademark is to serve as an indication that the goods attain a standard or possess certain characteristic, defined by its proprietor. The registered proprietor of a certification trademark does not trade in the goods himself or

provide any services to which the mark is approved but authorises others to do so in accordance with published rules (Kenya Industrial Property Institute—KIPI—Trade Mark Manual of Examination Procedures 2007, p. 10). If the proprietor does trade in the goods or provides the service himself, he cannot register the mark as a certification trademark, although he may, in case, register it as an ordinary trademark and appoint licensees.

To be registrable as a certification trademark, a mark must be adopted to distinguish certified goods or services from those which are not so certified. The certification must be in respect of origin, material mode of manufacture, quality, accuracy, or other characteristics. Clearly the materials and mode of manufacture can only apply to marks for goods (KIPI Trade Mark Manual of Examination Procedures, 2007, p. 10).

1:18 Emergence of Trademarks

The practice of attaching signs to goods in the course of trade has been in existence for several centuries now. “As long as 3000 years ago Indian craftsmen used to engrave their signatures on their artistic creations before sending them to Iran” (WIPO Intellectual Property, 2004, p. 67). Similarly, Chinese manufacturers have also applied their marks on goods they sold in the Mediterranean area over two centuries ago and it has been approximated that at one time “about a thousand different Roman pottery marks were in use” (WIPO Intellectual Property, 2004, p. 67).

Some of the accounts provides that in the ancient times traders applied marks on their goods in order to indicate ownership. These are referred to as proprietary or possessory marks (Bentley & Sherman, 2009, p. 712). It is also captured that merchants also made use of marks on their goods before shipping them. This was a precautionary measure that was done purposely for ease of identification of goods that may be recovered in case of an accident at sea.

For a slightly different purpose, marks were also used by Guilds. The Guilds were said to be trade organizations with the authority to determine who should produce certain goods or offer certain services. Additionally, the Guilds were also minded in seeing to it that the goods produced were of satisfactory quality. Thus, in order to know the origins of unsatisfactory goods, the Guilds made it a requirement for their members to apply identification signs on their goods. (Bentley & Sherman, 2009, p. 712.)

With the growth of international trade coupled with the increase in factory production during the Industrial Revolution, many traders kept applying marks on their manufactured goods. It has been acknowledged that since that time; purchasers made their decisions to buy based on the signs that were applied to the goods because they considered these signs as indications of the true origins or source of goods. (Bentley & Sherman, 2009, p. 712.)

1:19 Protectable Subject Matter

The word “any” in the definitions dealt with so far would give an impression there are no exemptions to signs that can be used as trademarks. This is however not the case for there are signs capable of “identifying” and “individualising” and are distinctive but are not protectable for reasons of public policy and public morality. Thus, the word “any” is not loosely used, but connotes the fact that the list of things that are capable of being used as trademarks is inexhaustive.

It should be remembered that what may contradict public morality and public policy differs from jurisdiction to jurisdiction. For example, a sign depicting and advertising a gay marriage may not be contrary to public policy and public morality in say, the United States of America, but it would certainly be unacceptable in The Gambia because while American society and law recognises such a union, Gambian law and society frowns at it.

So protection of a sign as a trademark, strictly speaking, is not of universal application but rather depends on the law as well as the customs and belief systems of a society.

The Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) explains what signs can be protected as trademarks. In its article 15(1) it provides as follows:

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, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as 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.

From the above statement it is clear that a sign must meet certain criteria before it can qualify for protection as a trademark. This can be deduced from the phrase “eligible for registration”. Eligibility for registration is not restricted to the sign being capable of identifying, distinguishing and individualizing but also among other registrability requirements, the sign must be acceptable to public policy and morality as earlier stated. This is determined by the legislation relating to the registration of trademarks, thus emphasising the principle of territoriality governing the protection of intellectual property rights.

1:20 Economic importance of Trademarks

The importance of a trademark cannot be emphasised, for “a good trade mark is an essential tool for selling goods. As such, it is invaluable to the purchaser. In a market swamped by competing goods, the trade mark is a shorthand description for the product” (Hart, T. et al., p. 82). Hart, et al., further observe that without a trademark, promotion, buying and selling would be a tedious process. They argue that the trade \mark is therefore “useful to the consumer as she will choose goods based on personal or vicarious experiences of a product and the trade mark allows easy identification of the product which previously gave satisfaction, thus leading to repeat purchases” (p. 82).

Conversely, a trade mark will serve as a warning for a customer who had a bad experience with a particular good bearing the mark to desist from making another purchase of the same good. Since the function of a trademark is to help in differentiating the goods of one enterprise from those of other enterprises, it follows naturally that the owner of a trademark which he applies to his goods will endeavour to ensure that his goods are always of quality. This ensures that the economic interest of the proprietor is maintained through maintaining the value of his trademark as opposed to the legal guarantee. In other words, trademark enables the consumers to rely on the quality of goods.

The economic importance of trademarks can be aptly summarised in a statement from *Intellectual Property: A Power Tool for Economic Growth*, p. 154:

Trademark protection has significant economic advantages for a society because it encourages sellers to invest in the quality of products that are being advertised. Sellers make such investments in quality because they know the power of branding. They appreciate that the consumers' experience with the brand and the product may not be short-lived but can lead to a long-term product preference because of brand loyalty based on repeated satisfactory experiences with the product.

It thus becomes the preoccupation of the proprietor of the mark to ensure that the quality of the goods represented by the mark is always maintained. This is because any negative experience with the goods will result in damaging consequences for the business, since the consumers' decisions are informed by the experience they had of a product in a previous transaction.

This preoccupation considered, it follows that the economic benefits of trademarks are two-fold: first, “to facilitate consumers’ decision-making about their choice of products in the market; and (second) they provide incentives for an enterprise to invest in development and delivery of goods and services with the qualities consumers’ desire” (*Intellectual Property A Power Tool for Economic Growth*, p. 150)

1:21 Why protect trademarks

It is no secret that people will make effort to protect something only when that thing is of benefit to them in one way or another. It follows that investors protect trademarks because the subject matter is of benefit to them as well as to consumers. In short, protection is benefit-driven.

In their discussion on the purpose of protecting trademarks, Cornish, W., Llewelyn, D. and Aplin, T. (1978, p. 665), outline three functions of a trademark: the origin function, quality or guarantee function and investment or advertising function.

Cornish, et al, observe that trademarks deserve protection so that they may operate as indicators of the trade source from which goods or services come, or are in some other way connected. On the second function, quality or guarantee function, they state that marks deserve protection because they symbolize qualities associated by consumers with certain goods or services and guarantee that the goods or services measure up to expectations.

Lastly, they say marks are protected for investment or advertisement purpose in that they are assets around which investment in the promotion of a product is built and that investment is a value which deserves protection. This protection is regardless of whether there is abuse or not arising from misrepresentations either about origin or quality.

It must be understood that in the global competitive market, acts of unfair competition are very likely to occur. In this, players may attempt to confuse the consumers and thus mislead them when making their choices in the market. This they do by taking undue advantage of the reputation of already well established and credible players. This may be in the form of trademark piracy, counterfeiting and imitation. Today, it is not a secret that many unscrupulous people are on the rampage to assert position in the market by means of misrepresentation.

Thus, a fundamental basis for trademark protection is to safeguard those engaged in the production and sale of goods and services. Unlike patents and copyright, trademarks are not necessarily new things or new creations; the exclusive rights granted owners of inventions is based partly on the fact that creating original inventions could be pretty expensive both in terms of money, time, skill and labour invested into coming up with such inventions.

Another reason for granting exclusive rights to owners of inventions is that it serves to motivate others to engage in creative works for the benefit of society. In other words, the

protection accorded to patents and copyright owners is a means to stimulate creativity and more creations.

Notwithstanding the fact that the investment in coming up with a trademark is not necessarily high, as has been discussed, the reasons are diverse and crucial for trademark protection.

Another justification for the protection of trademarks is one based on ethical considerations of fairness and justice. It is that persons should not be allowed to “reap where they did not sow”.

1:22 Ways of Protecting Trademark

While protection can be granted on the basis of use, the proper way however to secure protection of a trademark is through the modern formal requirement of registration. Registration of trademarks can either be through a national office or a regional office representing various countries. The Paris Convention requires member states to provide for a trademark register and virtually all states have provided such a register. Thus, “full protection is properly secured only by registration” (WIPO Intellectual Property, 2004, p. 77). This is not to say that use is of no relevance, since in countries that base trademark protection on use, registration merely confirms the trademark right that has been acquired

by use. Under this arrangement, the first entity to use the mark will have priority should there be a dispute over the mark against the one who first registered it.

However, the very process of registration varies from jurisdiction to jurisdiction depending on the respective national legislations and the regional instruments that are available for the protection of intellectual property rights.

1:23 Legal Instruments and Protocols for Protection of Trademarks

Intellectual Property rights are generally territorial rights. Thus in order for one to protect a mark, he or she is required by the national or regional laws to register the mark in all territories where protection is sought. Registration constitutes nationwide constructive notice to others that the trademark is owned by the party that registered it. The advantages of registration are that the registrant is in a position to prevent others from using the same mark and in that regard it also enables him or her to institute legal action in case of an infringement.

There are several international agreements that coordinate the procedure of filing for trademark registration. Through these instruments, it is possible for one to have his or her mark registered in several countries through a centralized system. For instance, a registration with the Benelux Office for Intellectual Property (BOIP) covers Belgium, Luxembourg and the Netherlands. A Community Trade Mark (CTM) protects a trademark in all of the member countries of the European Union. Contrary to the procedure for European patents, where the European Patent Office (EPO) issues a series of national

patents, a successful trademark application to the OHIM results in the grant of a single trademark which operates for the entire European Community (Bentley & Sherman, p. 795). Bentley and Sherman further observe that the main advantage of the Community system is that it enables trademark owners to protect their marks throughout the European Community on the basis of a single application, as opposed to filing separate applications in each of the member states.

The Madrid Agreement and Madrid Protocol administered by the International Bureau of the World Intellectual Property Organization, provide an opportunity to file an application for an international registration that will cover several member countries. Such an application is open only to natural persons or legal entities with a real and effective industrial or commercial establishment in, or is domiciled in, or is a national of, a country which is a party to the Madrid Agreement or the Madrid Protocol (WIPO Intellectual Property, p. 288).

Filing with the African Intellectual Property Organization (OAPI) protects trademarks in all of the member countries in Africa. There is also the possibility of filing with the African Regional Intellectual Property Organization (ARIPO), under which a trademark owner can protect its trademark in all the Contracting States through the Banjul Protocol on Marks.

Since this research centres on the Banjul Protocol and the Industrial Property Act of The Gambia, the next section of this literature review confines itself to what is provided in other

pieces of literature on these two legal instruments. This also answers on the facet of content analysis of this research.

1:24 Legal Protection

Owners of trademarks are not under any legal obligation to protect their marks. The basis for protection sought by trademark owners is simply that they want to avoid a situation where unscrupulous competitors would use the same mark to pass-off goods of inferior quality and thus, negatively impact their businesses. Another reason being people should not “harvest where they did not sow”. Thus, protection is not legally sanctioned, it’s as a matter of choice, owners of marks seek to avoid being misrepresented in the market and to prevent purchasers from making the wrong choices. According to Bentley and Sherman (2009, p. 717), trade marks “transform mental confusion into mental harmony and . . . convert social distrust into mutual understanding.” Simply put, trademark protection helps to maintain trust between the consumers and the traders since the source and quality of goods can be determined.

The history of the legal protection of trademarks has been less well charted than most areas of intellectual property, and the early developments are particularly obscure. It seems that the courts first began to protect 'marks' at the behest of traders in the sixteenth century. Acknowledging that such signs operated as an indication of source, the courts held that, if another trader were allowed to use the same sign, this would allow a fraud to be committed on the public. Initially, protection was provided by the Common Law Courts through the action for deceit. The idea was that if a trader had already used a mark, the deliberate use of the same mark by another trader would amount to a form of deceit. No much later, the Courts of Chancery used the action for “passing-off” to protect a trader who had developed a reputation or “goodwill through use of a particular sign or symbol.” (This included the protection against innocent misrepresentations)The passing-off action is still available today. In reflection of its origins in the common law of deceit, passing-off always required a trader to establish that there had been a “misrepresentation” (Bentley & Sherman, p. 713).

It is however important to know that trademark protection is not automatic as is the case with copyright. For one to have his or her mark legally protected, the mark must be registered within all geographical bounds where protection is sought. Thus, without registration in the prescribed manner, there cannot be any legal protection of trademarks. At the international level the Paris Convention 1883, is the instrument which provides for a uniform registration of trademarks and other forms of industrial property and requires member states to apply the principle of “national treatment” under its articles 2 and 3. The application of the principle of national treatment is to the effect that member states of the Paris Convention will accord foreigners who are members of the Convention the same treatment as they do for their own nationals. Such treatment as per article 3 of the Paris Convention also extends to nationals of non-member countries provided that such nationals are domiciled or have an industrial or commercial venture in a member country. The Paris Convention *inter alia* also provides for a “right of priority,” meaning that on the basis of a regular application for an industrial property right filed by an applicant in any member country of the Paris Convention, the same applicant may, within a prescribed period of time, apply for protection in any or all member countries (*WIPO Intellectual Property Handbook*, 2004, p. 243).

Prior to the approval and coming into force of the Paris Convention, the protection of industrial property beyond a country’s national borders was somewhat difficult. This was due to the divergence in the laws of the different countries. The diplomatic conference in Paris in 1883 which culminated to the approval of and signature of the Paris Convention

therefore brought to rest the challenges posed by the multiplicity of laws regarding the protection of industrial property administered by the different countries of the world.

The convenience brought about by the Paris Convention in terms of trademark registration of a trans-national nature notwithstanding, did not establish a mechanism for the international application for trademarks. This lacuna was dealt with by the Madrid Agreement of 1891 and the Madrid Protocol of 1989.

Under these arrangements, after making a “home registration” or “home application”, an individual or company may apply to the Bureau of the World Intellectual Property Organisation for an international registration. The Bureau passes the application on to relevant national trade mark offices. If the office of the contracting party does not refuse the application within a limited time, it is treated as registered. (Bentley & Sherman, 2009, p. 721).

At the African Regional Intellectual Property Organisation (ARIPO), trademark protection is mainly through the Banjul Protocol on Marks. The Banjul Protocol is administered by the African Regional Intellectual Property Organization. The Protocol facilitates the protection of marks within territory of the nine member states to the Protocol. The Protocol was adopted by the Administrative Council of the African Intellectual Property Organization (ARIPO) in Banjul, the Republic of The Gambia, on November 19, 1993 and amended on November 28, 1997, May 26, 1998 and November 26, 1999 and as amended by the Council of Ministers on August 13, 2004. The Banjul Protocol was adopted in fulfilment of the wishes and aspirations of ARIPO to provide for the establishment of common services or organs for the co-ordination, harmonisation and development of the intellectual property activities affecting its member states. The adoption of the protocol was also deemed necessary in consideration of the advantages presented by pooling resources towards the

administration of industrial property. In exercise of its functions under the Banjul Protocol, the African Regional Intellectual Property Organisation (ARIPO) shall act through its Secretariat otherwise referred to as the “office”.

Through the Banjul Protocol, ARIPO registers and administers marks on behalf of the contracting states. As per section 2 of the Banjul Protocol, all applications for the registration of a trademark are filed directly with ARIPO, alternatively, they can be filed with the Industrial Property Office of contracting States. This could be done by the applicant or his or her appointed representative. Sub-Section 2:2 of the Protocol requires that where (a) an application is filed directly with ARIPO but the applicant’s principal place of business or ordinary residence is not in the host country of ARIPO; or (b) an application is filed with the Industrial Property Office of the contracting State by an applicant whose principal place of business or ordinary residence is not in a contracting State; the applicant shall be represented. Such a representative as per sub-section 2:3 of the Protocol shall be a patent or trademark agent or a legal practitioner who has a right to represent applicants before the Industrial Property Office of any of the contracting states.

Sub-Section 2:4 provides that where an application is filed with the Industrial Property Office of a contracting state, such office shall, within one month of receiving the application, transmit the application to the office.

Section 3 of the Banjul Protocol requires applications made for the registration of marks to identify the applicant and as well designate the contracting States in which registration is sought. Such an application shall indicate the goods or services as the case may be in respect of which protection of a trademark is claimed, including the corresponding class or classes provided for under the Nice Agreement Concerning the International Classification of Goods and Services for the purposes of the Registration of Marks of June 15, 1957 as revised. In regards such a classification, the ARIPO Office ensures that the applicant makes the indication of the class or classes in the prescribed manner and where the indication is found to be incorrect or has not be made at all, the Office shall classify the goods or services under the appropriate class or classes of the Nice Agreement upon payment of the prescribed classification fee.

According to Sub-section 3 of section 3 of the Banjul Protocol, where colour is claimed to be a distinctive feature of a mark, the applicant is required to make a statement to that effect as well as the name or names of the colour or colours claimed. Further to that, the applicant must also make an indication in respect of each colour, of the principal parts of the mark which are in that colour.

Where a mark is three-dimensional sub-section 4 provides that the applicant shall add a statement to that effect and attach to the application a reproduction of the mark consisting of a two-dimensional graphic or photographic reproduction either of a single view of the mark or several different views of same. An application for the registration of a mark shall

also contain a declaration of actual use of the mark or an intention to use the mark, or that it be accompanied by an application for the registration of a person as a registered user of the mark in question as provided for under sub-section 5.

Provided that where there is an application for a registered user the Director General of the Office is satisfied that

- (i) the applicant intends it to be used by that person in relation to those goods or services; and
- (ii) that person shall be registered as a registered user thereof immediately after registration of the mark.

In respect of filing date section **3bis** provides that the Office shall accord as the filing date of an application the date on which the following indications or elements were received by the Contracting State in which the application was filed or were received by the Office:

- (i) an express or implied indication that registration of a mark is sought;
 - (ii) an indication allowing the identity of the applicant to be established;
 - (iii) indications sufficient to contact the applicant or his representative, if any, by mail;
 - (iv) a clear reproduction of the mark;
 - (v) a list of goods and/or services for which the registration is sought;
- provided that the Office may accord as the filing date of the application the date on which it received only some of the indications or elements referred to.

Regarding the right of priority, section 4:1 provides that “An applicant shall have the right to claim priority rights provided under Article 4 of the Paris Convention for the Protection of Industrial Property of 20th March, 1883 as revised.” However such right of priority shall subsist only when the application is made within six months from the date of the earlier application as contained under section 4:2.

In respect of formalities examinations and notifications the Office, as per section 5:1, shall examine whether the formal requirements under section 3 *supra* have been complied with and shall accord the appropriate filing date to the application. Where the Office finds that the application has not complied with the formal requirements, section 5:2 provides that it shall notify the applicant accordingly inviting him or her to comply with the requirements within a specified period of time. Accordingly, the application shall be refused if the applicant fails to comply with the requirements within the stipulated time frame. On the other hand section 5:3 states that if the application satisfies all the formal requirements, the Office shall within the time prescribed, notify each designated State. As per 5:4,

Where the Office refuses an application or a reconsideration in terms of Section **5bis: 1** is refused or an appeal in terms of Section **5bis: 2** is unsuccessful, the applicant may within a period of three months from the date on which he receives notification of such refusal or result of appeal, request that his application be treated, in any designated state, as an application according to the national laws of that State.

Applicants for trademark registration are provided with the opportunity under section **5bis 1**, to request the Office to reconsider its decisions in case of refusal under section 5:4; while section **5bis 2** provides that, if after the Office has reconsidered the application, the Office still refuses the application, the applicant may lodge an appeal against the decision of the Office to the Board of Appeal established in terms of Section *4bis* of the Protocol on Patents and Industrial Designs Within the Framework of the African Regional Intellectual Property Organization (ARIPO)(the Harare Protocol).

Pursuant to section 6:1 of the Banjul Protocol, applications for the registration of marks shall be examined according the national laws of a designated state. This means that

Contracting states are at liberty to accept or refuse the protection of a mark in their territories. Thus, section 6:2 provides that before the expiration of twelve months from the date of the notification referred to in section 5:3 supra, each designated state may through a written communication inform the Office that a mark registered by it, shall have no effect in its territory whether on absolute or relative grounds, including the existence of third party rights. Such a designated state is required to give reasons based on its national laws to the Office for refusing the application under section 6:2. These reasons as per section 6:3 shall within a period of one month of the decision being made, be communicated to the Office which shall transmit same to the applicant.

However, an applicant whose application has been refused by a designated state shall be given the opportunity to respond directly to such state to the decisions to refuse his or her application. Such decisions according to section 6:4 shall be subject to appeal or review under the national laws of the designated state concerned.

The above notwithstanding, section 6:5 provides:

A communication to the Office under Section 6:2 or a refusal by a designated state shall not prejudice the issuance by the Office of a certificate of registration having effect in those designated states in respect of which the application has not been subject to a communication under Section 6:2 or has not been refused.

According to section 6:6 if designated state which makes a communication under section 6:2 supra withdraws such communication, or where the designated state initially refused the application but subsequently accepts the same, the designated state shall within one month communicate this fact to the Office. In this case, the Office shall extend the registration to such designated state.

In regards publication and registration of a mark by the office section **6bis** provides that if the registration has been accepted by any designated state or in respect of which any designated state has not made the communication referred to in section 6:2 above cited such application shall be published in the Marks journal as having been accepted by such a designated state or designated states as the case may be. According to section **6bis:2**, “Subject to the provisions of section 6bis:4, three months after the publication of the journal referred to in Section 6bis.1, the Office shall register the mark on payment of registration fees. Such registration shall be recorded in the Marks Register and the Office shall issue to the applicant a certificate of registration.”

The fact of registration as per section 6bis 3 shall be published in the Journal. Section 6bis4 states further that:

At any time after the publication in the Marks Journal of an application as accepted by the designated state or designated states in terms of Section 6bis:1 but before the registration of the mark in terms of Section 6bis:2, any person may give a notice of opposition to the application for registration in a designated state or designated states. Thereafter, the application shall be treated according to the opposition procedures laid down under the national laws of the designated state or designated states concerned.

The duration and renewal of registration of a mark is provided for under section seven of the Protocol. In regards registration section 7:1 provides a period of ten years from the filing date while section 7:2 provides for renewal of registration for a further period of ten years upon payment of the prescribed fee for renewal. Such renewal according to section 7:3 to be effected on or before the date of expiration of the original registration or of the

last renewal of the registration provided that a grace period of six months shall be allowed, in either case, on payment of a surcharge. As per section 7:4 the registration of a mark which has not been renewed due to non-payment of the renewal fees within the period stipulated in Section 7:3 shall be deemed to have lapsed and shall be removed from the Register. Where a mark has been removed from the register for non-payment of the renewal fee; section 7:5 provides that it may be restored upon request by the owner provided the prescribed restoration fee has been paid within the period prescribed.

1:25 Effect of Registration

The registration of a mark by the Office shall according to section 8:1 of the Banjul Protocol have the same effect in each designated state, with respect to rights conferred by the mark, as if it was filed and registered under the national law of each such state. Section 8:2 provides that the national laws of each Contracting State shall apply to the cancellation of a registration, whether based on non-use or any other grounds. And where registration has been cancelled, the Contracting State concerned shall, within one month of cancellation, notify the Office. The Office shall publish this fact in the Marks Journal and record it in the Register.

Section 8:3 provides that the indication of classes of goods or services provided for under the Protocol shall not bind the Contracting States with regard to the determination of the scope of protection of the mark.

In The Gambia, trademark protection started as early as 1899, with the establishment of an Industrial Property office which was responsible *inter alia* for the registration of

trademarks. The Industrial Property Office is under the purview of the Attorney General's Chambers and Ministry of justice. It is today supported by the World Intellectual Property Organization WIPO with the provision of computers, scanners and printers to facilitate its work. Additionally, the staff had and continue to benefit from short-term training programmes offered by WIPO and the African Regional Intellectual Property Organization (ARIPO) to enhance capacity.

While the Industrial Property Office was established as early as 1899, actual protection of trademarks did not happen until 1905. The British Trade Mark Act of 1916 formally applied in The Gambia and it established a national trademark system which was based on the United Kingdom law before 1938. Under this old British system, marks could only be registered for goods and not for services as is the case under the current law in force today. Also, under the British classification system only fifty classes of goods applied as opposed to the international classification system under the Nice Agreement Concerning the International Classification of Goods and Services for the purposes of the Registration of Marks of June 15, 1957 as revised, which now applies in The Gambia. Furthermore, the Paris Convention priority, which was not available under the repealed law, can now be claimed under the current legislation. Examination is still to be on relative and absolute grounds and provisions are also retained for the publication of accepted trademark applications as well as for opposition. However, trademarks registered by the African Regional Intellectual Property Organisation are yet to be recognised in The Gambia.

The revised Industrial Property Act No.12 of 1989 administered by the Industrial Property Office makes provision for the protection of inventions—utility models, industrial designs,

trademarks and connected matters. A person seeking exclusive rights over any trademark, shall acquire such right by registration in accordance with the procedure set out in the Industrial Property Act. This is provided for under section 27(1) of the Act. The Act like many other acts does not give protection to marks that are contrary to public morality, misleading to the public, identical or is an imitation of another mark. Any person or entity intending to protect their trademarks, are granted such protection when they comply with the registration procedures outlined under section 28 of the Act. Section 28 provides as hereinunder reproduced:

(1)The application for registration of a mark shall be filed with the Registrar-General and shall contain a request, a reproduction of the mark and a list of the goods or services for which registration of the mark is requested, listed under the applicable class or classes of the International Classification, and shall be accompanied by the payment of the prescribed application fee.

(2)The application may contain a declaration claiming the priority of an earlier national or regional application filed by the applicant or his or her predecessor in title, in which case, the Registrar-General may require that the applicant furnish within the prescribed time limit, a copy of the earlier application, certified as correct by the office with which it was filed.

(3)The effect of the declaration shall be as provided in any Convention to which The Gambia is party, and if the Registrar-General finds that the requirements under this subsection and the regulations pertaining thereto have not been fulfilled, the declaration shall be considered not to have been made.

(4)The applicant may withdraw the application at any time during its pendency.

It is important to note that where an applicant for trademark protection in The Gambia has his or her place of business outside The Gambia, he or she shall be represented by an agent who shall be a legal practitioner practicing in The Gambia.

The Act provides for opposition procedures and counter opposition statements as the Registrar-General shall determine under section 29 of the Act. Section 29 of the Act requires the Registrar-General to examine whether the application complies with the requirements of section 28(1). The Registrar-General shall examine and determine whether the mark is a mark as defined in section 26(a), and is registrable under section 27(2) of the Act and the regulations thereto. Where the Registrar-General finds that the conditions referred to in sub-sections (1) and (2) of section 19 are fulfilled, he or she shall cause the application, as accepted, to be published in the prescribed manner.

As per sub-section (4) of section 19, a person may, within three months or such further time, not exceeding nine months in all, as the Registrar-General may allow, of the advertisement of the application, give notice to the Registrar-General of opposition to the registration of the mark on grounds that one or more of the requirements of section 26(a) and section 27(2) of the Act, and the regulations pertaining thereto are not fulfilled. The notice shall be given in writing and duplicate, and shall include a statement of the grounds of opposition in accordance with sub-section (5) of the Act. Furthermore, sub-section(6) of the Act provides that the Registrar-General shall send a copy of the notice to the applicant, and within one month after the receipt of the notice, or such further time, not exceeding three months in all, as the Registrar-General may allow, the applicant shall send to the Registrar-General a counter-statement in duplicate of the grounds on which he or she relies for his or her application and if such applicant fails to do so, the application is deemed to have been abandoned.

According to sub-section(7) where an applicant sends a counter-statement, the Registrar-General shall furnish a copy thereof to the person giving notice of opposition, and shall require him or her to give security in such manner and to such amount as the Registrar-General may require, for such costs as may be awarded in respect of the opposition, and if the security is not given within fourteen days after the opposition was made or such further time as the Registrar-General may allow, the opposition is deemed to be withdrawn.

Pursuant to sub-section(8) of the Act, if a person giving notice of opposition duly gives the security, the Registrar-General shall inform the applicant thereof in writing and thereafter the case shall be deemed to stand for the determination of the court. Where a case stands for the determination of the court under the provisions of section 29 of the Act, the Registrar-General shall require the applicant to make a written application to the court for an order that, notwithstanding the opposition of which notice has been given, the registration of the mark be proceeded with by the Registrar-General, or to take such other proceedings as may be proper and necessary for the determination of the case by the court.

Additionally, sub-section (9) of the Act requires that if the applicant abandons his or her application, after notice of opposition, he or she is liable to pay to the opponent such costs in respect of the opposition as the Registrar-General may determine.

The protection of trademarks in The Gambia as provided under the Industrial Property Act is further strengthened by the courts since all matters that cannot be resolved by the

Industrial Property Office will have to go to court for a final determination in accordance with section 30 of the Act.

Conclusion

This section looked at what literature has said on trademark in general and on the Banjul Protocol and the Industrial Property Act of the Gambia. The following chapter discusses the methodology used in this research and tool for gathering data besides some important requirements when conducting research.

CHAPTER 3

METHODOLOGY

1:27 Introduction

This study is a comparative analysis of the national protection of trademarks in The Gambia against an international protection of the same form of IP as offered by the Banjul Protocol. This chapter describes the methodology and strategies the research employed to collect and break down the data into manageable units so that the researcher would eventually use it to give meaning to themes developed and therefore to answer the questions as derived from the objectives of this study.

1:28 Study Design

This research required the view of the stakeholders of trademark. These stakeholders are members of the business community, policy makers, lawyers and users. Since the enquiry aimed to seek views from these stakeholders and eventually interpret them to attach meaning to the study, the research mainly used the qualitative approach. However, in some cases where compiling of quantifiable data was crucial, the research used the quantitative methodology. However, the greater part of this research used qualitative methodology. In short, this research used a mixed-method approach though the larger part leaned on the qualitative method.

Since the research sought views from the respondents in question in order to interpret them qualitatively, it used the interpretative paradigm. According to Cohen, L., et al. (2003), the interpretative paradigm, as opposed to its normative counterpart, is characterised by a concern for the individual. Normative studies are positivist, but all theories developed within the context of the interpretative paradigm tend to be anti-positivist. The cornerstone of the interpretative paradigm is basically to understand the subjective world of human experience, in this case, the views of these stakeholders to the two routes of protection at the centre of this enquiry.

It must be understood that in order to maintain the integrity of the phenomena being investigated, one ought to make efforts to get inside the person and to understand from within. Thus, the use of external forms and structure are resisted, because they reflect the views of the observer as opposed to those of the actors actually involved. In the instance case, these actors are the stakeholders of trademark protection. In the design of this research, thus, the researcher used a lot of caution in order not to influence the outcome.

It is important to know that the interpretative approach starts with individuals and seeks to understand these individuals' interpretations of the world around them. Theory is emergent and must arise from particular situations. In other words, the theory is born or "ground" on data generated rather than on preconceived ideas or theories (Glaser and Strauss, 1976).

Investigators work directly with experience and understanding to build their theory on them.

To avoid influencing the outcome of this study, the researcher approached the study with a critical mind, employing a critical theory approach (action research) which requires evaluating and monitoring of the research work. This approach however, was used to a small extent owing to the limitation of time.

1:29 Study population and data collection techniques

This enquiry is a small survey and the main tools used to gather or collect data were the interviews and questionnaires. The qualitative survey focused on whether the main stakeholders are aware of the existence of the ARIPO Banjul Protocol on Marks and the Industrial Property Act of The Gambia.

The main targets for this research were members of the business community in The Gambia. These are the people who own and make use of trademarks and should therefore be concerned with their protection. In this regard, the researcher endeavoured to interview on a one-to-one basis businesspersons dealing in general merchandise and have their principal places of business within the Greater Banjul Area.

Initially, the researcher distributed a number of questionnaires of both the close-ended and open-ended types depending on the background of the recipient. This strategy appeared to the researcher to be the best option and with the aid of university students enrolled at the University of The Gambia (UTG) Law Faculty embarked on the exercise. After a few days in the field it turned out that most of the businesspersons were reluctant to complete the questionnaires. This forced the researcher to change strategy, to go for personal interviews. This did not cause all that much inconvenience since the major way in which qualitative researchers seek to understand the perceptions, feelings, and knowledge of people is through in-depth, intensive interviewing (Patton, M.Q., 1990, p. 25).

The one-on-one interviews proved even more effective because the researcher managed to convince the respondents by explaining the basis for the research. One may be surprised why for a non-sensitive topic like the one in question could not attract high completion rate. It must be made known that this researcher had once worked as a newspaper journalist and later as a broadcast journalist for state media for a period of twelve years. This fact, coupled with the fact that most respondents in the category of business persons do not have conventional education, the questionnaire had proved a difficult technique to the research (for this category).

The interviews were conducted in a relaxed manner and most of the questions required 'yes' or 'no' answers. One main reason, for interviewing these people was to establish whether they are aware of the ARIPO Banjul Protocol on Marks and the Industrial Property

Act of The Gambia and intellectual property rights in general. Having toured Wellington Street, Kairaba Avenue, and the Serrekunda Market, only seventeen people could be interviewed.

Another category of people targeted for this research were Lawyers (legal practitioners) and other professionals. According to section 19 of the Legal Practitioners Act of The Gambia, a person whose name is entered on the roll shall be known as a legal practitioner. The lawyers/Legal Practitioners were especially targeted because they are the representatives of people seeking to protect their marks in The Gambia whether Gambians or non-Gambians. In case of applicants whose ordinary residence or principal place of business is outside The Gambia, section 38 of the Industrial Property Act provides that they shall be represented by a legal practitioner resident and practising in The Gambia.

The other professionals included were members of staff from corporate bodies, among them The Gambia Revenue Authority (GRA) whose head of Corporate Affairs, Ousman Bah, and lawyer, Manyima Bojang, accepted to complete the questionnaires. The Managing Director of Prime Insurance Company Mr. Dawda Serge also answered questions.

Others targeted were lecturers, teachers and students of tertiary institutions and Senior Secondary Schools (High Schools). The institutions targeted were University of The Gambia, the Gambia Technical Training Institute (GTTI) the Management Development

Institute (MDI), Methodist Academy Senior Secondary School, Gambia Senior Secondary School, Saint Augustine Senior Secondary School and Daddy Jobe Comprehensive Senior Secondary School. The reason for including these educational institutions is that some of them offer courses in Business Studies with the University being the only institution offering lectures in Intellectual Property Law. Apart from the above stated reasons these particular Senior Secondary Schools were chosen for reasons of proximity the researcher enjoyed. However, due to lack of time only three of these educational institutions- University of The Gambia Faculty of Law in Kanifing, Daddy Jobe Comprehensive Senior Secondary School and the Gambia Technical Training Institute GTTI were visited.

1:31 Validity

Validity is an important prerequisite to an effective research (Cohen, et al., 2003). In this research, the researcher insisted on maintaining validity by ensuring that the facts presented are accurate and a true reflection of the exercise. All the data collected for the purposes of this research was done purposefully with the highest degree of honesty and integrity. In order to ascertain this, the researcher took it upon himself to personally meet most of the key respondents in their respective places of work as well as collect most of the completed questionnaires by himself.

1:31 Research ethics

According to Cross, J. (2004),

All research, as human activity, involves moral and ethical choices, because it is about people, and because it is often about fundamental issues such as power and equality. It can raise some very acute ethical issues...research can lead to

things being given to or taken away from people. It often involves relatively powerful groups in society finding about less powerful or oppressed groups.

The researcher, in line with this great believe in the value of ethics in research, endeavoured to observe ethics in the collection of data. Respondents were categorically told to remain anonymous if they chose to. The researcher also ensured he stayed free from bias.

1:32 Content analysis

Two legal instruments on trademark protection in The Gambia and ARIPO were analysed. The exercise demanded an extensive exploration of the relevant legal instruments relating to trademark protection both at the ARIPO Office and in The Gambia. In this regard, the researcher thoroughly analysed the Banjul Protocol on Marks administered by ARIPO as well as the Industrial Property Act of The Gambia administered by the Attorney General's Chambers and Ministry of Justice through the Industrial Property office. During the analysis, he developed themes from the discussion to use in making interpretations and recommendations. Since the analysed involved dealing with documents, the researcher put the content analysis under literature; however, the themes developed and interpretations arising therefrom were displayed later in the chapter 4, on data presentation and analysis.

Other frameworks which were briefly but often referred to were the Paris Convention of 1883 on Industrial Property; the Madrid Agreement and Protocol; and the Trips Agreement.

1: 33 Data Presentation and Analysis

The data was mostly collected qualitatively. Having personally collected this qualitative data, the researcher transcribed the same before analysing and presenting it through mathematical representations such as percentages, graphs and tables. The larger part was analysed qualitatively for their meaning though some quantifiable figures were used.

As for meaning from content analysis, the researcher gave interpretation from each analysis. In the end, he formed a broader picture on the two legal instruments analysed.

Conclusion

This chapter presented the details and structure of the study population and instruments which were used to collect and analyse the data gathered. Two main research methods were used: the simple survey method and the content analysis method (on two legal documents, one from ARIPO, the other from The Gambia). The following chapter uses these tools to analyse and interpret data.

CHAPTER 4

DATA PRESENTATION AND ANALYSIS

1:35 Introduction

This chapter breaks down the data collected through instruments described in Chapter Three. The presentation and analysis is on the responses to questions on the legal instruments: The Banjul Protocol on Marks, and the Industrial Property Act of The Gambia. To bring clarity to the presentation and analysis, the respondents were grouped into five categories: lawyers; policy makers; traders/businesspersons; students and teachers; and the public. The general questions were coded or reduced into the following four themes or categories: awareness of intellectual property; knowledge of ARIPO Banjul Protocol on Marks; knowledge of the law that protects industrial property in The Gambia; and view on whether trademarks should be protected. The data is presented graphically and in some case, through tables.

1:36 Responses from lawyers, policy makers and other professionals

In this category, a total of thirty five questionnaires were distributed. Out these, eighteen were returned. When followed up, some potential respondents claimed having misplaced them, and others complained of having no time to complete them. Table 4.1 displays the themes against number of respondents on each (category) for the first category of respondents: lawyers and policy makers.

Theme	Yes	No
Intellectual Property Rights Awareness	12	6
Knowledge of the ARIPO Banjul Protocol on Marks	5	13
Knowledge of the Industrial Property Act of The Gambia	5	13
Should Trade Mark be Protected	17	1

1:37 Responses from Traders/Businesspersons

Considering the close link between trade and business on one hand, and trademark as a form of Intellectual Property, traders and businesspersons formed a key component of this research. However, questionnaire turn out from this group was very low. Thirty questionnaires were distributed to this category but only three were returned to the researcher and his assistant. These three questionnaires had a lot of gaps, depriving the research of much needed data.

To fill in this information gap, the researcher resorted to another technique: the face-to-face interviews. This was mostly crucial because omitting the traders and businessperson category owing to non-response would render the research deficient.

Seventeen face-to-face interviews were thus conducted. The data collected were analysed qualitatively.

On theme one: Intellectual Property Awareness, four of the seventeen interviewees said they were aware of the rights. On the second theme: whether they know the ARIPO Banjul Protocol on Marks, only one businessperson indicated knowing this. None of the seventeen businesspersons managed to pinpoint the Industrial Property Act of The Gambia though all the seventeen respondents affirmed to trademarks being important and therefore deserving of protection.

These responses on the four themes are presented in Table 4.2.

Question	Yes	No
Intellectual Property Rights Awareness	4	13
Knowledge of the ARIPO Banjul Protocol on Marks	1	16
Knowledge of the Industrial Property Act of The Gambia	0	17
Should Trade Marks be protected	17	0

Figure 4.1 shows the responses as percentages.

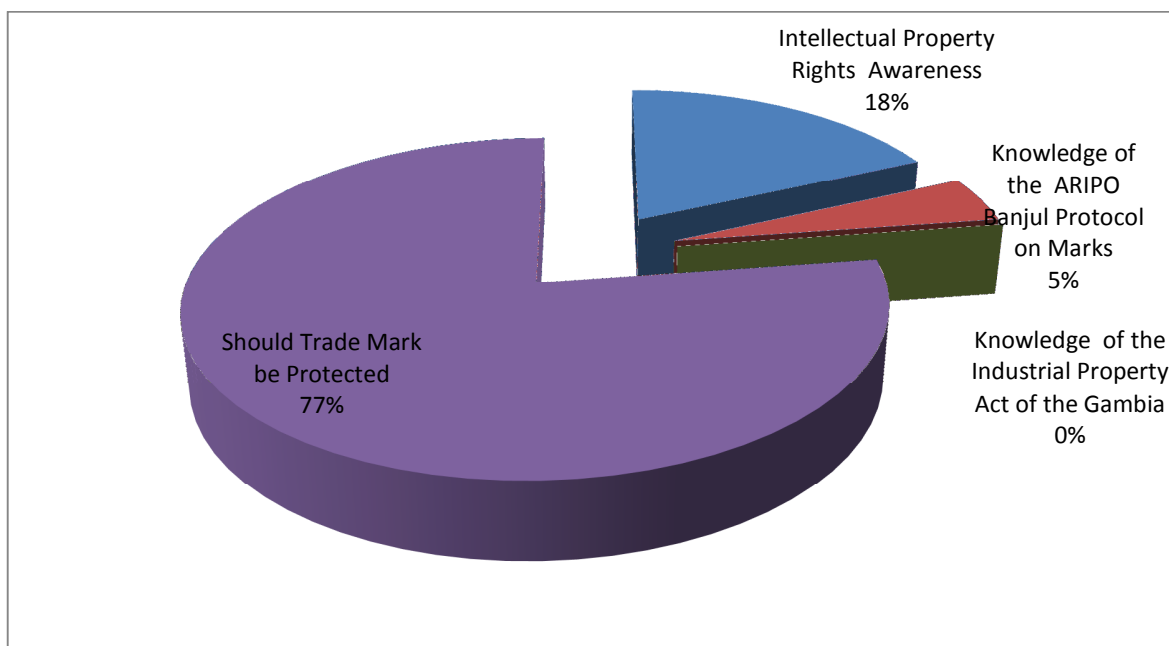


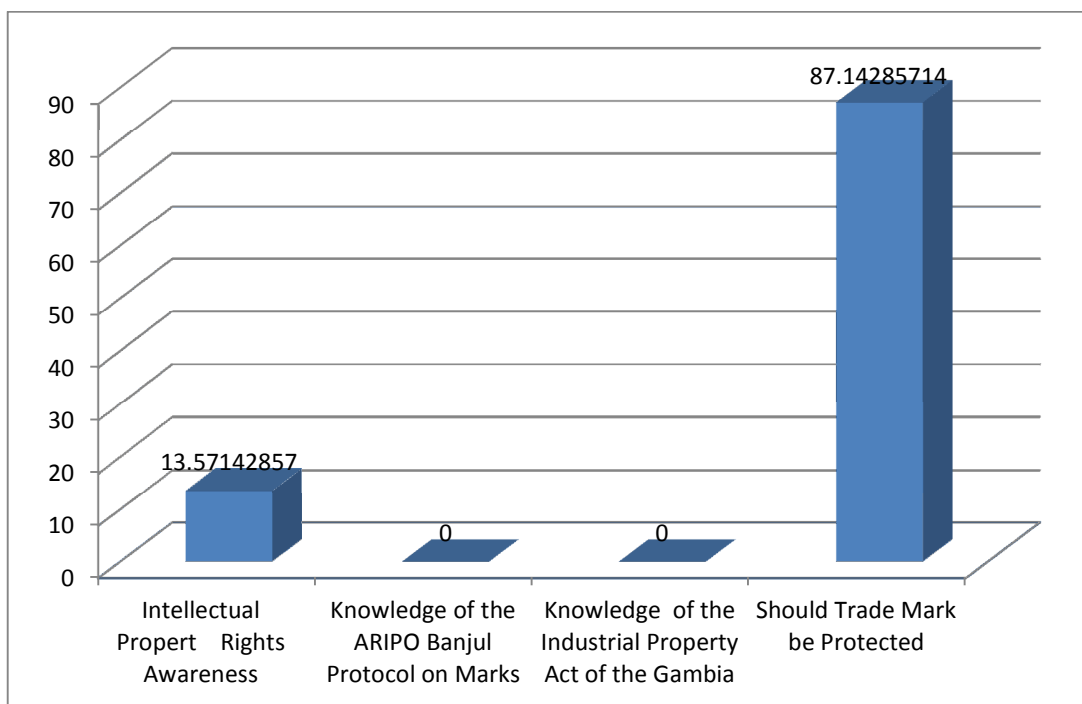
Figure 4.1: Responses of Traders/Business Persons as percentages

1:38 Responses from Students, Teachers and the Public

As was the case with respondents on the category of traders/businesspersons, the response return rate was very low in the category of Students, Teachers and the public. As a result, the researcher decided to use the interview technique to gather data from this category. The researcher was accorded overwhelming support from students, principals, teachers and lecturers. Some of the institutions visited were the University of The Gambia, Daddy Jobe Comprehensive Senior Secondary School and The Gambia Technical Training Institute (GTTI).

Out of a total of one hundred forty people, only 19 indicated being aware of Intellectual Property Rights, representing 13.5%. However, none of these 140 people indicated being aware of the ARIPO Banjul Protocol on Marks or the Industrial Property Act of The

Gambia although 122 stated that trademarks are important and should be protected, representing 0% and 87.1% respectively. Figure 4.2 proffers this presentation.



1:39 Summary of all responses

The respondents put together are as presented in Table 4.3. Overall, one hundred and seventy-five people responded to the survey. As indicated in Table 4.3, thirty-five people are aware of intellectual property rights while 140 responded in the negative, representing an awareness level of 20%.

Regarding knowledge of the existence of the ARIPO Banjul Protocol on Marks, only 6 people responded in the affirmative while 169 are not aware of the Protocol representing

3.5%. As to what law protects industrial property in The Gambia, only 5 people could state the exact law while 170 answered in the negative, representing 2.9 % awareness level.

In response to the question as to whether trademarks should be protected 156 of the respondents believe that marks should be protected. Meanwhile 19 people answered in the negative, representing 89.15% of total awareness.

Questions	% Positive responses	Positive Responses	Negative Responses
Are you aware of Intellectual Property Rights?	20	35	140
Do you know the ARIPO Banjul Protocol on Marks?	3.428571429	6	169
What law protects industrial property in the Gambia?	2.857142857	5	170
Do you think Trade Marks should be protected?	89.14285714	156	19

1:40 Narration of content analysis: The Banjul Protocol and Protection in the Gambia

The literature reviewed on the question of trademark protection under the African Regional Intellectual Property Office and under the Industrial Property Office of The Gambia presents an opportunity for this research to do a comparative analysis of the two systems.

From the literature provided it is clear that both the Banjul Protocol on Marks and the Industrial Property Act of The Gambia have provided for substantial mechanisms for the registration and protection of trademarks. Accordingly, both systems provide for opposition procedures to ensure that marks which do not qualify for protection are not registered as well as to prevent the registration of marks belonging to third parties. In The Gambia such opposition is provided for under sub-section (4) of section 19 wherein one may within three months; or such time not exceeding nine months as may be determined by the Registrar-General give notice to the Registrar-General or opposition to the registration of the mark on grounds that the requirements have not been fulfilled.

In this bid, the Industrial Property Office of The Gambia ensures that proper searches are conducted before the granting of any application. The investigation revealed that because of the effectiveness of such searches conducted by the Industrial Property Office, virtually no oppositions are encountered. Opposition at the African Regional Intellectual Property Office is considered on the basis of the respective laws of the Contracting States to the Banjul Protocol on Marks.

With respect to refusals, clear-cut procedures have been put in place by both offices for those affected applicants for trademark registration to appeal. Applicants for trademark registration at the ARIPO Office are provided with the opportunity under section *5bis* 1, to request the Office to reconsider its decisions in case of refusal under section 5:4; while section *5bis* 2 provides that if after the Office has reconsidered the application, the Office still refuses the application, the applicant may lodge an appeal against the decision of the Office to the Board of Appeal.

Under the Industrial Property Office of The Gambia examination is still to be on relative and absolute grounds and there are also provisions for the publication of accepted trademark applications. However, trademarks registered by the African Regional Intellectual Property Organisation are yet to be recognised in The Gambia. Thus, applicants in the ARIPO region seeking protection in The Gambia are required to use an agent who must be a legal practitioner practising in The Gambia. This arrangement could be costly for such applicants considering that in addition to the filing fees of 2,500 U.S Dollars charged on foreign applicants; they are also required to pay legal fees to such agents which could be pretty expensive. Such a legal and financial reality could be an obstacle to trademark protection in The Gambia. While the trademark protection regime is comparatively up to date, it has not provided for flexibilities for applicants who want to be represented by their agents or attorneys.

Conversely, a mark registered by the ARIPO Office has the same effect in each designated state, with respect to rights conferred by the mark, as if it was filed and registered under the

national law of such state. Nonetheless, the Contracting States reserve the right to accept or refuse the protection of a trademark in their territories. Thus, it is correct to say that rights over trademarks are protected within the ARIPO region at the discretion of the respective contracting States to the Banjul Protocol on Marks. For instance, while the ARIPO office may provide services for the indication of the class or classes of goods or services on behalf of applicants; section 8:3 of the Banjul Protocol provides that the Contracting States are not bound with regard to the determination of the scope of protection of the mark.

From the above synopsis, one can argue that whereas the procedure for trademark protection is clear, applicants still may find themselves having to choose between two unfavourable alternatives.

Conclusion

This part presented and analysed data, reducing it to manageable components in readiness for interpretation. The following chapter will use this reduced data to attach meaning to the research in form of discussion.

CHAPTER 5

DISCUSSION OF THE FINDINGS

1:42 Introduction

This Chapter presents a discussion of the results analysed in Chapter 4. It does this by attaching meaning to the results. The meanings attached to the results are then used to give lessons of the research and recommendations. First, however, the Chapter will present a summary of the research.

1:43 Summary of the Research

This research is an exploration of the trademark protection regimes under the African Regional Intellectual Property Office and the Industrial Property Office of The Gambia. The research looked at the requirements for protecting trademarks under the two offices in question. It perused the two relevant legal instruments, that is to say, the Banjul Protocol On Marks, and the Industrial Property Act of The Gambia. To validate the content analysis of the two documents, the study also looked at the Paris Convention, the Trips Agreement amongst others as they relate to trademark protection. In addition, although the topic of this research is on protection, the researcher thought adding a component on gauging the people's level of intellectual property rights would provide a necessary information dimension to the research findings.

The researcher collected data from the relevant stakeholders. These stakeholders were: Lawyers and other professionals including policy makers and officials of corporate bodies; Members of the business community; Lecturers, teachers, High School and University students; and Members of the general public.

The data collected from the respective categories of respondents were qualitatively and quantitatively analysed.

1:44 Level of awareness on trademark protection and on the two legal instruments

The results on level of awareness showed that out of the 175 respondents whose views, knowledge and opinion were sought, only 35 indicated they were aware of the trademark protection and therefore trademark rights. This means that the majority of respondents are not aware of issues of protection of trademarks in the Gambia.

In the same light, most Gambians are not aware of the African Regional Intellectual Property Organisation more so of the Banjul Protocol On Marks administered by it. Of the 175 respondents asked, only 6 were aware of these legal instruments. This raises concerns on the level of protection such people can seek. This is because for someone to seek protection, they must first of all understand the existence of the ways and means of obtaining such protection. Trademark protection in The Gambia is therefore under threat

because the people are not aware of the very means they can seek to protect their intellectual property in the area of trade.

1:45 Economic importance of trademark and need for protection

The analysis of the two documents shows that trademarks registered under ARIPO are yet to be recognised in The Gambia. This is because applicants seeking protection in The Gambia have to use an agent who must be a legal practitioner in The Gambia. This research finds the arrangement expensive and prohibitive because in addition to the filing fees, the applicants are also required to pay legal fees to the agents in question. This has not afforded applicants flexibilities when they wish to be represented in The Gambia.

The research also finds that even in the case of the ARIPO route, that is to say, though the Banjul Protocol, the applicants are still not as free. This is because rights over trademarks are protected in the ARIPO Region at the discretion of the respective contracting states to the Banjul Protocol on Marks. Thus whichever way, applicants are forced into a situation in which they have to choose between two unfavourable alternatives.

Although, a record number of respondents have acknowledged the importance of trademarks to the Gambian economy, they still have no idea as to the legal instruments and methods of protection available. It is therefore the researcher's view that such reactions were not well informed. However, uninformed as they may, the responses were correctly depictive of the reality. Many people are protecting their trademarks in The Gambia. A significant portion of these applicants are foreign nationals whose fees constitute a chunk of the revenue generated by the Industrial Property Office under the auspices of the Attorney

General's Chambers and Ministry of Justice on behalf of the Government of The Gambia. This has been confirmed by the Registrar of trademarks at the Industrial Property Office Mrs Badjan. The investigation conducted at the Industrial Property Office revealed that no less than 500 applications are received in a year.

1:46 Observations

1. General lack of awareness of intellectual property rights in the Gambia. 35 out of 175 respondents representing 20% awareness.
2. Lack of knowledge of the Banjul Protocol on Marks. 6 out of 175 representing 3.5%.
3. Lack of knowledge, Industrial property Act of the Gambia. 5 out of 175 representing 2.9 % awareness level.
4. The reluctance of some ARIPO member states to sign the Banjul Protocol On marks .
6. The African Regional Intellectual Property Organisation itself is not known to most people.
7. Foreign applicants seeking to protect their marks in The Gambia needs an agent.
8. Gambian applicants who wants to protect their marks outside the Gambia are also required to file individual applications.
9. There is no centralised procedure for trademark applicants.
10. The Gambia is not a party to the ARIPO Banjul Protocol On Marks.

1:47 Recommendations

The research recommends as follows from the findings of this study:

1. The Gambia and the African Regional Intellectual Property Organisation (ARIPO) should launch a collaborative awareness-raising programme on general intellectual property rights for The Gambia. This will be instrumental in raising awareness among the people since for people to start appreciating intellectual property rights, they must understand the concept first. Law enforcement agents such as police and border guards at entry points should be among the beneficiaries of such initiatives as well as members of the Gambia Chamber of Commerce and Industry. Such awareness raising initiatives could take the form of workshops and seminars on various topics in intellectual property.
2. Apart from general awareness of IP, the stakeholders should be educated on the Banjul Protocol On marks and the Industrial Property Act of The Gambia. This could be an effective means to stimulate interest about intellectual property among the stakeholders. Furthermore, such tailored programmes will help its beneficiaries to understand and appreciate the legal instruments for the protection of trademarks in The Gambia and the at the African Regional Intellectual Property Office.
3. Training in Intellectual Property should also be extended to Judges and Magistrates to ensure efficiency in the adjudication of IP infringement cases in the country. This could also take the form of workshops and seminars, short terms courses in

intellectual property as well as their inclusion in the Masters Degree in Intellectual Property(MIP)

4. On the question of training, the University of The Gambia should offer courses in Intellectual Property Law not just in the Faculty of Law but other faculties as well. Such efforts will complement all IP training initiatives in the country.
5. In order to encourage other member states of ARIPO to sign the Banjul Protocol On Marks, it would stand to benefit the Banjul Members if the current fee sharing be reviewed as suggested by the Registrar-General at the Attorney General's Chambers and Ministry of Justice of The Gambia.
6. The African Regional Intellectual Property Organisation(ARIPO) and the Industrial Property Office of the Gambia need to work on a joint strategy to establish a centralised, well-coordinated , simplified and less-expensive system for trademark protection.
7. Similarly, the ARIPO Region and its sister regions should work towards the harmonisation of their laws on trademark protection and thus come up with a common union for the protection of trademarks in the entire Africa Region. Such a move however; should take into consideration the specific needs and interests of the respective states.
8. The Gambia should pursue an idea of developing its own National Intellectual Property Policy in order to give direction to many issues revolving around IP in the country.

1 : 48 Conclusion of the Study

The research analyses the Banjul Protocol On Marks and the Industrial Property Act No. 12 of 1989 of The Gambia. The research finds both instruments elaborate as far as issues of trademark protection are concerned. However, there is a need for the two offices, that is to say, the ARIPO Office and the IP office in The Gambia to work closely for purposes of establishing a centralised system that would facilitate trademark protection. ARIPO needs to do more to encourage member states to join the Banjul Protocol. In this regard, there is a genuine need to sensitise the people not just on trademark protection but general intellectual property rights. This could take the form of joint ventures by ARIPO and the member states through the respective Industrial Property Offices.

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APPENDICES

1: 50 APPENDIX A

Survey Questions on Trademark Protection at ARIPO and The Industrial Property Office of The Gambia.

1. What is your Gender M/F?
2. Which of the following age categories best describe you?
30 Or younger
30-35
36-45
46-55
56 or above
3. What is your occupation
5. How long have you been in this job?
6. What do you know about intellectual property rights?
7. Are you aware of trademarks(TM's)
8. Name any trademark that you know.
- 9.Are trademarks important to the society?
- 10.If your answer to question 9 is yes, briefly explain why you think trademarks are important
- 11.Should trademarks be protected?
12. Can The Gambia benefit from trademark protection? If yes, please briefly explain how?
13. What national, regional or international organization do you know that deals with trademark protection?
14. What law protects trademarks in The Gambia and which office or agency administers this law?
15. Do you think the trademark protection regime in the Gambia is satisfactory? **YES or NO**. Please tick or circle accordingly.
16. If your answer to 15 above is **No**, please give reasons and make suggestions, if any, for improvement

17. Do you know about the Banjul Protocol on trademarks?

18. Should The Gambia sign the Banjul Protocol? Please give reasons why you say **yes** or **no**

19. Do you have any suggestions regarding trademark protection in the Gambia and the ARIPO office?

1:51 APPENDIX B

Some of the key Respondents

- 1.The Solicitor General & Legal Secretary at the Attorney General's Chambers and Ministry of Justice.
- 2.The Registrar-General at the Attorney General's Chambers and Ministry of Justice.
- 3.Head of Corporate Affairs at The Gambia Revenue Authority(GRA)
- 4.The Managing Director of Prime Insurance Company Limited.
- 5.The Curator of Intestate
- 6.Registrar of trademarks.

Educational Institutions.

The University of The Gambia

Gambia Technical Training Institute(GTTI)

Daddy Jobe Comprehensive Senior Secondary School.