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Review of Botswana IP Law Related to Enforcement

Eric Garduño
Executive Director

International Intellectual Property Institute

egarduno@iipi.org

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Overview

- Current Copyright Law
- Updated Copyright Law
- Current Industrial Property Law

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Current Copyright Law

1965 Copyright Act

Protected Works

3. Copyright in literary, dramatic and musical works

- (1) Copyright shall subsist, subject to the provisions of this Act, in every original literary, dramatic or musical work which is unpublished, and of which the author was a qualified person at the time when the work was made. . . .
- (2) Where an original literary, dramatic or musical work has been published, then, subject to the provisions of this Act, copyright shall subsist in the work (or, if copyright in the work subsisted immediately before its first publication, shall continue to subsist) if—
 - (a) the first publication of the work took place in Botswana, or in another country to which this section extends;
 - (b) the author of the work was a qualified person at the time when the work was first published; or
 - (c) the author had died before that time, but was a qualified person immediately before his death.

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Current Copyright Law

1965 Copyright Act

Exclusive Rights

3. Copyright in literary, dramatic and musical works

(5) The acts restricted by the copyright in a literary, dramatic or musical work are—

- (a) reproducing the work in any material form;
- (b) publishing the work;
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) causing the work to be transmitted to subscribers to a diffusion service;
- (f) making any adaptation of the work;
- (g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) of this subsection.

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Current Copyright Law

1965 Copyright Act

Who May Bring an Action and Remedies

18. Action by owner of copyright for infringement

(1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright; and in any action for such an infringement all such relief, by way of damages, interdict or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.

20. Proceedings in case of copyright subject to exclusive licence

(2) Subject to the following provisions of this section—

- (a) the exclusive licensee shall (except against the owner of the copyright) have the same rights of action, and be entitled to the same remedies, under section 18 as if the licence had been an assignment, and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under that section;

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Current Copyright Law

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Limits to Penalties for Defendant With No Notice of Infringing Action

18. Action by owner of copyright for infringement

(2) Where in an action for infringement of copyright it is proved or admitted—

- (a) that an infringement was committed; but
- (b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work or other subject-matter to which the action relates,

the damages which may be claimed by the plaintiff in respect of such infringement shall be restricted to the profit enuring to the defendant by reason of such infringement.

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Penalties for Defendant Who Knowingly Infringes

18 Action by owner of copyright for infringement

(3) Where in an action under this section an infringement of copyright is proved or admitted, and the court, having regard (in addition to all other material considerations) to—

- (a) the flagrancy of the infringement; and
- (b) any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances



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Current Copyright Law


1965 Copyright Act

Criminal Infringement

22 Penalties and summary proceedings in respect of dealings which infringe copyright

(1) Any person who, at a time when copyright subsists in a work—

- (a) makes for sale or hire;
- (b) sells or lets for hire, or by way of trade offers or exposes for sale or hire;
- (c) by way of trade exhibits in public; or
- (d) imports into Botswana, otherwise than for his private and domestic use, any article which he knows to be an infringing copy of the work, shall be guilty of an offence under this subsection.



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Criminal Penalties

22 Penalties and summary proceedings in respect of dealings which infringe Copyright

(7) A person guilty of an offence under subsection (1) or (2) shall—

- (a) if it is his first conviction of an offence under this section, be liable to a fine not exceeding P4 for each article to which the offence relates;
- (b) in any other case, be liable to such a fine, or to imprisonment for a term not exceeding two months:

Provided that a fine imposed by virtue of this subsection shall not exceed P100 in respect of articles comprised in the same transaction.

(9) The court before which a person is charged with an offence under this section may, whether he is convicted of the offence or not, order that any article in his possession which appears to the court to be an infringing copy, or to be a plate used or intended to be used for making infringing copies, shall be destroyed or delivered up to the owner of the copyright in question or otherwise dealt with as the court may think fit.



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Amended Copyright Law

Protected Works

3 (1) A literary and artistic work shall not be considered as a work protected by copyright under this Act unless it is an original intellectual creation in the literary or artistic domain.

(2) Literary and artistic works under this Act include -

- (a) books, pamphlets, articles, computers and other writings;
- (b) speeches, lectures, addresses, sermons and other oral works;
- (c) dramatic, dramatic-musical works, pantomimes, choreographic works and other works created for stage productions;
- (d) stage productions of works referred to in paragraph (a) and of expressions of folklore;
- (e) musical works with or without accompanying words;
- (f) audiovisual works;
- (g) works of architecture;

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Amended Copyright Law

Duty of Police

29 (1) Subject to subsection (2) where a complaint of the contravention of the provisions of this Act is made and it is considered that a document, book or other object connected to any investigation in regard to the complaint, is being concealed within specified premises, a Police Officer or such other person as the Minister may, by Order, appoint and grant investigating powers, shall enter the premises to conduct a search and seize any item found within the premises.

(2) The Police Officer or the person appointed by the Minister under subsection (1) (hereinafter both referred to as "the investigating officer") shall not enter, conduct a search or seize any item in terms of subsection (1) unless he has obtained -

- (a) the consent in writing of the owner of the premises or the person in charge of the premises; or
- (b) a search warrant.

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Amended Copyright Law

Warrant Requirements

29 (3) The court shall grant the application for a search warrant if it appears, on information given on oath or affirmation, that there are reasonable grounds to suspect that -

- (a) there are works that infringe the rights protected under the Act in the premises;
- (b) there is in the premises equipment or other device specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a work or to impair the quality of copies made (the latter device or means hereinafter referred to as "copy-protection or copy-management device or means") or
- (c) a document, book or other object which may afford evidence of such contravention of the provisions of this Act is within those premises.

Amended Copyright Law

Civil Remedies

- 30 (1) The court shall, subject to any other Act of Parliament, and on such terms as it may deem reasonable, have the authority to –
- (a) grant injunctions to prohibit the committing, or continued committal, of infringement of any right protected under this Act;
 - (b) order the impounding of copies of works or sound recordings suspected of being made or imported without the authorization of the owner of any right protected under this Act, where the making or importation of copies is subject to such authorization, as well as the impounding of the packaging of, the implements that could be used for the making of, and the documents, accounts or business papers referring to, such copies.
 - (c) order payment of any damages suffered in consequences of the infringement, including any profits enjoyed by the infringing party, that are attributable to the infringement; and
 - (d) award exemplary damages where it finds that the infringement is prejudicial to the honour or reputation of the person whose rights were infringed



Amended Copyright Law

Destruction of Goods

- 30 (2) . . . the court shall have the authority to order the destruction or other reasonable disposition of infringing copies, where they exist, and their packaging outside the channels of commerce in such a manner as to avoid harm to the holder of the right, unless the owner of the right requests otherwise;
- (3) Where there is a danger that implements may be used to commit or continue to commit acts of infringement, the court shall, whenever and to the extent that it is reasonable, order their destruction or other reasonable disposition outside the channels of commerce in such a manner as to minimize the risks of further infringements.
- (4) Any person who in contravention of the provisions of subsections (2) and (3), fails to carry out the order of the court for the destruction or other reasonable disposition of the infringing copies or implements, shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding P 10,000 or to imprisonment for a term not exceeding five years or to both.



Amended Copyright Law

Criminal Penalties & Border Provisions

- 31 (1) Any person who contravenes the provisions of this Act so as to infringe a right protected under this Act for profit, shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding P20,000 or to imprisonment for a term not exceeding ten years or to both.
- (2) Any person convicted of a second or subsequent offence shall be fined a minimum of P30,000 or a maximum of P5,000,000 or be imprisoned for a term not exceeding ten years, or to both.
- 32 Any goods imported into the country that are in contravention of the provisions of this Act, may be placed under an embargo, destroyed officials or otherwise disposed of as provided for under sections 115 and 116 of Cap 51:01 of the Customs and Excise Duty Act.




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Industrial Property Law

Trademarks

Definition of a Mark

2 "mark" means any visible sign capable of distinguishing the goods or services of an enterprise;



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Industrial Property Law


Trademarks

Infringement of a Mark

60 (1) The owner of a mark shall . . . have the right to institute court proceedings against any person who infringes the mark by using that mark without his authorization or by performing acts which make it likely that infringement will occur.

(2) The right conferred under this section shall extend to the use of a sign similar to the registered mark in relation to goods and services similar to those for which the mark has been registered, where confusion may arise in the public.

(3) The right conferred under this section shall extend to the use of a sign which constitutes a reproduction, an imitation or a translation of a registered mark which is well known in Botswana in relation to goods or services which are not similar to those in respect of which a trade mark is registered: Provided that such use of the mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered mark, and the interests of the owner of the registered mark are likely to be prejudiced by such use.



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Industrial Property Law

Trademarks

Remedies for Infringement of a Mark

60 (4) A plaintiff in proceedings for infringement shall be entitled to relief by way of an interdict, delivery up or destruction of any infringing product, article or product of which the infringing product forms an inseparable part, damages or an account of the profits derived from the infringement.

(5) The court shall not, in awarding damages, also order, in respect of the same infringement, that the plaintiff be given an account of the profits derived by him from the infringement.



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Industrial Property Law

Trademarks

Criminal Penalties for Infringement of a Mark

76 (4) Subject to the provisions of sections 24(3)(a), 30, 31, 47 (4) and 58(2), the performance of any act referred to in section 24, 47 and 58 by a person other than the owner of the title of protection and without the agreement of such owner shall constitute an infringement.

(6) Any person who intentionally or willfully performs any act which constitutes an infringement as defined in subsection (4) of this section or an unlawful act as defined in subsection (4) of this section . . . shall be liable, on conviction, to a fine of not less than P2000.00 but not more than P5000.00, or to imprisonment for a term of not less than six months but not more than two years, or to both such fine and imprisonment.



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Thank You

Eric Garduño
Executive Director

International Intellectual Property Institute

egarduno@iipi.org