

**TRADITIONAL KNOWLEDGE, TRADITIONAL
CULTURAL EXPRESSION AND INTELLECTUAL
PROPERTY IN NIGERIA.**

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Abstract

Nigeria is a blessed nation comprising of several ethnic groups, societies, traditions, cultures, beliefs and way of life. They are usually passed down from one generation to another. These distinct traditions and cultures possess traditional knowledge and traditional cultural expressions that if adequately protected and harnessed, can be of economic benefits to these societies. Thus, the need to have these traditional knowledge and traditional cultural expressions protected by intellectual property rights, from piracy. Thus, in this work we shall consider the roles Intellectual Property play in the protection of traditional knowledge and traditional cultural expressions from misappropriation and in generating and equitably sharing benefits from their commercialization.

Introduction

Indigenous art copied onto carpets, T-shirts and greeting cards; traditional music fused with techno-house dance rhythms to produce best-selling ‘world music’ albums; hand-woven carpets and handicrafts copied and sold as ‘authentic’; the process for making a traditional musical instrument patented; indigenous words and names trademarked and used commercially.¹

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These are the kinds of examples that indigenous and other traditional and cultural communities cite when arguing that traditional creativity and cultural expressions require greater protection in relation to intellectual property².

Currently, Nigeria lack a legal framework for protecting traditional knowledge³ and traditional cultural expressions⁴ as IP. This guide shows how such a framework can be developed as part of an overall IP strategy, by improving existing mechanisms and/or creating new ones.⁵ There are a number of reasons why a diverse culture-based country like Nigeria may not have instituted systems for protecting TK and TCEs in the past. She may not have seen the need to do so, for example, because she had not identified any TK or TCEs to protect, because misappropriation did not appear to be a problem, or because it was not clear who would benefit from protection.⁶ TK and TCEs are implicated in ecology, agronomy, agriculture, medicine, animal husbandry, music, story-telling, cloth-weaving, et cetera across several thousands of different cultures and peoples. Given the multitudinous nature and diversity of indigenous knowledge systems, it becomes intellectually risky,

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¹World Intellectual Property Organization, 'Intellectual Property and Traditional Cultural Expressions/Folklore'

Available at www.wipo.int (accessed April 20, 2020)

² Hereinafter referred to as "IP"

³ Hereinafter referred to as "TK"

⁴ Hereinafter referred to as "TCEs"

⁵Ibid

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if not fraudulent for general claims to be made regarding the nature of traditional knowledge and traditional cultural expressions.⁷ Intellectual property is so broad that it has many aspects, yet it is an area of law that has not been fully explored by a nation like Nigeria⁸. This work aims to raise awareness of existing methods for the legal protection of TK and TCEs, as well as to improve understanding of the interrelations, at international, regional and national levels, between the IP system, on the one hand, and TK/TCEs and their implications for economic, social, cultural and technical development, on the other hand. It is hope that the outcome of this paper will assist in developing a legal framework for the protection of traditional knowledge and traditional cultural expressions. In line with this, we shall first understand certain concepts such as intellectual property rights, traditional knowledge and traditional cultural expressions.

Conceptual Clarifications.

The best place to start is with a consideration of the meaning of the word *property*, and thereafter, *Intellect* or *intellectual*. Thus *property* is defined as anything owned by a person or entity.⁹ It was also defined as anything that a person or business

⁷Ikechi Mgbeoji, African Indigenous Knowledge Systems and Patents: Is the Patent System Relevant to the Native Healers of Southern Nigeria? Tribes and Tribals, Special Volume No. 1, (2007), 77

⁸ C.C. Nwabachili, Intellectual Property Law and Practice in Nigeria, (2nd Edition, Lagos: Malthouse Press Ltd, 2016) 1

⁹ What is Property, available at www.definitions.uslegal.com/p/property-law (accessed on February 17,2020)

has legal title over.¹⁰ The outstanding features that most types of property share are that the owner of the property is free to use it as she/he wishes, provided the use is not against the law, and to exclude others from so using that owned item of property. *Intellectual* on the other hand describes something or anything related to or using the mind or brains or intelligence.¹¹

Now the term "*intellectual property*" is reserved for types of property that result from creations of the human mind, the intellect. Interestingly, the term intellectual property in the Convention Establishing the World Intellectual Property Organization, or "WIPO", does not have a more formal definition. The States that drafted the Convention chose to offer an inclusive list of the rights as relating to:

“Literary artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and "all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”¹²

¹⁰ Meaning of Property, available at www.investopedia.com/terms/p/property (accessed on February 17,2020)

¹¹ Meaning of Intellectual, available at www.vocabulary.com/dictionary/intellectual (accessed on February 17,2020)

¹² Convention Establishing the World Intellectual Property Organization (WIPO), Signed at Stockholm on 14 July,

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Intellectual Property refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.¹³ Thus IP is a section of law which protects creations of the mind, and deals with intellectual creations.

The Black's Law Dictionary defined it as a category of intangible rights protecting commercially valuable products of human intellect¹⁴.

From another angle, Intellectual property, or IP as it is commonly referred to, consists of all the pieces of your business that you or your employees have thought of. It's the things that differentiate you from the competition that you came up with using your intellect – your brain.¹⁵

Also, the term "Intellectual Property Rights" refers to the legal rights granted with the aim to protect the creations of the intellect. These rights include Industrial Property Rights (e.g. patents, industrial designs and trademarks) and Copyright (right of the author or creator) and Related Rights (rights of the performers, producers and broadcasting organisations).¹⁶

1967; Article 2(Viii)

¹³www.wipo (accessed on February 10,2020)

¹⁴**B.A. Garner**, Black's Law Dictionary (8th ed., United States of America, Thomson West, 2004) 824.

¹⁵www.shopify.com/encyclopedia/intellectual-property (accessed on February 17,2020)

¹⁶www.iprhelpdesk.eu (accessed on February 17,2020)

What Is Traditional Knowledge and Traditional Cultural Expression?

No single definition would do justice fully to the diverse forms of knowledge and expressions that are held and created by indigenous peoples and local communities throughout the world. Their living nature also means that they are not easy to define. There is not, as yet, any generally accepted, formal definition of these terms. We shall begin by firstly understanding what tradition is. Thus, what makes knowledge or cultural expressions “traditional” is not their antiquity: much TK and many TCEs are not ancient or inert, but a vital, dynamic part of the lives of many communities.

The adjective “traditional” qualifies a form of knowledge or an expression which has a traditional link with a community: it is developed, sustained and passed on within a community, sometimes through specific customary systems of transmission. In short, it is the relationship with the community that makes knowledge or expressions “traditional.”

“Traditional knowledge”, as a broad description of subject matter (*latosensu*), generally includes cultural heritage, practices and knowledge systems of indigenous peoples and local communities. In other words, TK in a general sense embraces the content of knowledge itself as well as TCEs, including distinctive signs and symbols associated with TK. “Traditional knowledge” is used in a narrower sense (*strictosensu*) to refer to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, which includes know-how, practices, skills and innovations. TK can be found in a wide variety of contexts, such as: agricultural knowledge; scientific knowledge; technical knowledge; ecological

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knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge.¹⁷TK is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. Some examples of TK related to medicine can be seen in the Igbo indigenous people who use items like; bitter kola (a seed containing fluid for detoxification) believed to be an antidote against poison; Uro (earth chalk) believed to possess curative powers when mixed with many chemicals, medicinal plants and animal wastes; Ose-oji (alligator pepper) seed of which is believed to cure coughs, indigestion and ointment for fracture inter alia. Among the Yoruba people of Nigeria, there exist a herbal remedy popularly known as “agbo” which is employed in treatment of several common diseases such as typhoid fever, malaria, and even less common diseases like gonorrhoea and staphylococcus.

From the forgoing, one would discover that though all the above mentioned TKs are of nature which are in the public domain, however there is need for the protection of these Traditional knowledge because there was a use of huge amount of intellect to combine these natural provisions and in the right proportion so as to get the result being attained.

Traditional Cultural Expressions on the other hand can also be referred to as folklore. Thus, ‘Traditional cultural expressions’/ ‘expressions of folklore’ means productions consisting of

¹⁷World Intellectual Property Organization, ‘Intellectual Property, Traditional Knowledge and Traditional Cultural

Expressions/Folklore: A Guide For Countries in Transition’[2013] (n.1)

characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community. Some examples of TCEs are; verbal expressions, such as folk tales, folk poetry and riddles, signs, words, symbols and indications; musical expressions, such as folk songs and instrumental music; expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and, tangible expressions, such as: - productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basket weaving, needlework, textiles, carpets, costumes; crafts; musical instruments; architectural forms.¹⁸ TCEs are handed down from one generation to another, and are maintained, used or developed by their holders. They are constantly evolving, developing and being recreated.

Characteristics of Traditional Cultural Expressions (TCES)/FOLKLORE

- a. they are handed down from one generation to another, either orally or by imitation,
- b. they reflect a community's cultural and social identity,
- c. they consist of characteristic elements of a community's heritage,
- d. they are also made by 'authors unknown' and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so,

¹⁸World Intellectual Property Organization, 'Intellectual Property And Traditional Cultural Expressions/Folklore'(n.1)

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- e. they are often not created for commercial purposes, but as vehicles for religious and cultural expression, and
- f. they are constantly evolving, developing and being recreated within the community.

Why Protect Traditional knowledge and Traditional Cultural Expressions?

TK and TCEs are important elements of the cultural heritage and identity of many indigenous peoples and local communities, as well as of many countries and regions. They may contribute to the welfare, sustainable development and cultural vitality of those communities. Moreover, TK and TCEs were historically, and sometimes still are, recognized as part of the “common heritage of humanity”, meaning that their benefits belong to all mankind.¹⁹

Furthermore, TK and TCEs have economic potential, forming a basis for creation and growth of culture-related enterprises and industries in the holder communities. The task of governments is to foster preservation and development of TK and TCEs, and facilitate their use by indigenous peoples and local communities to contribute to economic development, improve living standards and help overcome poverty. Without the strong backing of government policies and/or laws protecting TK and TCEs, indigenous people possessing this knowledge do not have the capacity to pursue the recognition of their knowledge or to challenge acts of appropriation of their existing knowledge by

¹⁹World Intellectual Property Organization, ‘Intellectual Property, Traditional Knowledge And Traditional Cultural Expressions/Folklore (n.1)

others.²⁰This ends up being a great loss not just to the people, but to the economy of the country from which the TK and TCEs are derived.

TK and TCEs can also serve as a source of inspiration for other creators and innovators. However, the process of commercialization has raised concerns about the risks of misappropriation by third parties of the TK and TCEs held by indigenous peoples and local communities. There are a number of cases where indigenous creations have been copied by others for commercial gain, or where patents have been granted for TK-based inventions, that have bypassed the holders and deprived them of a fair share of the economic benefits.

Who are the Holders of Traditional Knowledge and Traditional Cultural Expressions?

Another issue is the identification of beneficiaries. It is important to determine who should benefit from any such protection or who holds the rights to protectable TK and TCEs. Should it be:

- a. the traditional communities where such TK and TCEs emanated from?
- b. or the indigenous people of the community?

²⁰For instance, the yellow yam in Nigeria is known to be effective in treating diabetes. Whilst denying legal protection to this bio-cultural knowledge, a patent on the same herbal remedy was said to be granted to one Prof.

Maurice Iwu by the United States Patent Office. The difference, as argued by Mgbeoji, is that Prof. Maurice Iwu is a trained scientist, while the herbalists in his village who shared the knowledge with him are regarded as unlettered folks.

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- c. or any other individuals within the community?
- d. or is it the cultural organizations?
- e. or other persons?

One central issue in the debate over the protection of TK and TCEs is the identity of their owners, bearers or custodians.

It is generally agreed that protection should principally benefit TK/TCEs holders, in particular the indigenous peoples and local communities that develop, maintain and identify culturally with them and seek to pass them on between generations.

TK/TCEs are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than in individuals, including in cases where TK/ TCEs are developed by an individual member of a community. In some instances though, beneficiaries may also include recognized individuals within the communities, such as certain traditional healers or individual farmers working within the community. Typically, this recognition arises through customary understandings, protocols, laws or practices.²¹It could be that more than one community qualifies for protection of their TK/TCEs, including communities which share the same or similar TK/TCEs in different countries. Thus, it must not be limited to just a community.

²¹World Intellectual Property Organization, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' [2015] <https://www.wipo.int> (accessed April 30, 2020)

Protection of Traditional Knowledge and Traditional Cultural Expressions in Nigeria

IP is typically protected by laws that establish private property rights in creations and innovations in order to grant control over their exploitation, particularly commercial exploitation, and to provide incentives for further creativity. Copyright, for example, protects the products of creativity, in the form of original literary and artistic works, against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. It can also provide protection against demeaning or degrading use of a work, an issue that is often of concern in relation to traditional cultural materials.²²

The elements and principles of the copyright system are particularly relevant to the protection of TCEs because many are literary and artistic productions and therefore already or potentially the subject matter of copyright protection. This is why many countries already protect folklore within copyright law. Nigeria is one of such countries. Taking a look into Section 28 of the Copyright Act,²³ the law provides for the protection of the performer's right. A performance according to the Act is defined as a dramatic performance (which includes dance and mime); or a musical performance; or a reading or reciting of literary act or any similar presentation which is or so far as it is, a live performance given by one or more individuals.²⁴

²²World Intellectual Property Organization, 'Intellectual Property And Traditional Cultural Expressions/Folklore' [2013] (n.1)

²³ Cap C28 LFN, 2004.

²⁴ Section 26 Copy Rights Act

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Rights related to copyright, particularly the rights of performers, are also directly useful. The other main branch of IP law, industrial property, has also been used to protect TCEs – especially trademarks (such as collective marks) and geographical indications, industrial designs (including textile designs), and the suppression of unfair competition. In the case of Trademarks, the Trade Marks Act²⁵ provides for the ability to extend the life of trademarks indefinitely and the possibility of collective ownership of such rights suggest that they may be especially suitable for protecting some forms of TK.

Note however that even though it may be possible to apply or adapt existing IP systems to protect TK and TCEs just as some countries or holders of TK and TCEs. However, in many cases the conventional IP system is not well adapted to protect TK and TCEs. For example, the concept of exclusive rights does not normally apply to collective rights. And there may be difficulties applying IP concepts to material that is already known not only to indigenous peoples and local communities or in the public domain.

From the foregoing, IP-type protection could make it possible, for example, to protect traditional remedies and indigenous crafts and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation. Non-IP options are also available, such as trade practices, consumer protection laws, the use of contracts, customary and indigenous laws and protocols, cultural heritage preservation, civil liability and common law remedies

²⁵ Section 23 of the Trade Marks Act, Cap C13 LFN, 2004

such as unjust enrichment, privacy rights, as well as criminal law.

Two Approaches to Intellectual Property Protection

According to the WIPO²⁶, The IP system can be approached from two different angles to ensure protection of TK and TCEs. These two approaches— generally referred to as “positive” and “defensive” protection—can be undertaken together in a complementary way.

Under a first approach — “positive protection”— the IP system is designed to enable holders, if they so wish, to acquire and assert IP rights in their TK and TCEs. This can allow them to prevent unwanted, unauthorized or inappropriate uses by third parties (including culturally offensive or demeaning use) and/or to exploit TK/ TCEs commercially, for example through the granting of licenses, as a contribution to their economic development. In brief, positive protection is the granting of rights that empower communities to promote their TK/TCEs, control their uses by third parties and benefit from their commercial exploitation.²⁷

A second approach — “defensive protection”— is designed to prevent the illegitimate acquisition or maintaining of IP rights by third parties. Stated otherwise, defensive protection aims to stop people outside the community from acquiring IP rights over TK and TCEs. India, for example, has compiled a searchable

²⁶World Intellectual Property Organization, ‘Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions’ [2015] (n.21).

²⁷Ibid

database of traditional medical knowledge that can be used as evidence of prior art by patent examiners when assessing patent applications. Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words, from being registered as trademarks.²⁸

In short, a range of IP tools can be used to protect TK and TCEs in Nigeria. For their holders, positive protection means making use of these tools for their own purposes. Defensive protection, in contrast, means preventing anyone else from having access to these tools, when it would go against the interests of TK and TCE holders.

It suffices to state that protection of TK/TCEs is not undertaken as an end in itself, but as a means to reach broader policy goals and to respond to the needs of their holders

Conclusion

In recent years, indigenous peoples, local communities, and governments mainly but not exclusively in developing countries—have demanded IP protection for traditional forms of creativity and innovation, which, under the conventional IP system, are generally regarded as being in the public domain, and thus free for anyone to use. Indigenous peoples, local communities and many countries reject a “public domain” status of TK and TCEs and argue that this opens them up to unwanted misappropriation and misuse. Nigeria happens to be one of these countries. Nigeria is well known to be a multicultural state with diverse traditions, cultures, tribes and beliefs. This multicultural state of Nigeria has brought about the need to develop IP

²⁸Ibid

protection for TKs and TCEs originating from these diverse cultures and tradition. What makes knowledge or cultural expressions “traditional” is not their ancientness or antiquity it is in short worthy of note that such TK and many TCEs are not ancient or inert, but a vital, dynamic part of the lives of many communities today. It suffices to note that protection of Traditional Knowledge or Traditional Cultural Expressions is not undertaken as an end in itself, but as a means to reach broader policy goals and to respond to the needs of their holders. Diversity is the very essence of TK and TCEs, precisely because they are so closely intertwined with the cultural identity of many diverse communities. It is therefore not surprising that no single template or comprehensive “one-size-fits-all” solution is likely to suit all the needs of holders in all countries. This diversity requires flexibility in fashioning an international instrument including when considering the possibilities for creating a system of IP protection in Nigeria, the following options can be considered: existing IP laws and legal systems; extended or adapted IP rights specifically focused on TK/TCEs; and new, stand-alone sui generis systems specifically designed for protection of TK/TCEs in Nigeria. The law/policy should focus on the customary laws of the people, and as there is no universal customary law in Nigeria, should provide at least basic provisions for each of the geo-political zones, or using other classification systems that bring together communities with similar cultures. TCEs in Nigeria can sometimes be protected by existing systems, such as copyright and related rights, geographical indications (GIs), trademarks and certification and collective marks. Copyright protects the products of creativity against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. Laws for the protection of marks, GIs, and industrial

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designs, as well as unfair competition law may offer direct or indirect protection to TCEs. These branches of IP aim at the protection of established reputation, distinctiveness and goodwill, such as may be enjoyed by the Nigerian traditional communities in the production of handicrafts, artworks and other traditional products. Hence, some indigenous and traditional signs and symbols can be protected as trademarks. Existing IP laws have been successfully used to protect against some forms of misuse and misappropriation of TK, including through the laws of patents, trademarks, GIs, industrial designs, unfair competition and trade secrets or confidential information. In most cases, conventional IP systems and adaptations thereof are not considered sufficient to cater to the unique character of TK/TCEs. This has prompted a number of countries and regions to develop their own distinct *sui generis* (specific, special) systems for protecting TK/TCEs. However, Nigeria is yet to embrace this aspect and IP protection and also design for herself a distinct *sui generis* system(s) for protection of TKs and TCEs. WIPO members however are developing an international legal instrument (or instruments) that would give TK and TCEs balanced and effective protection. If the approach recommended here is adopted, it will go a long way in the protection of TK/TCEs and which will ultimately yield economic benefits to the holders of such intellectual property rights.