January 2022

Thought Leadership | *Sarah Ordiah*

Accountabilities: Towards Protecting Indigenous Cultures' Intellectual Property Rights – Options for Nigeria

Introduction

Some unfortunate or disastrous historic events like slavery, the holocaust, colonialism and the genocide of indigenous people have their roots in one category or race of people claiming superiority over others, with dangerously ambitious participants infiltrating, undermining and conquering economic, political and social wills of those they consider beneath them. While some many argue that the modern society has evolved with these sort of events left in the past, others believe that the systems that held these power imbalance in the classification of people are not fully dismantled and creates their own spectrum of privileges and pain under the term, "*Neo-colonialism*".

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Encyclopaedia Britannica defines neo-colonialism as "*the control of less-developed countries by developed countries through indirect means*".[1] Economic control falls within the perimeters of such control. The indirect control manifests in different ways but more popularly with synchronised activities from former colonisers and now developed countries preventing developing nations from growth so that they can continue to supply cheap resources (raw material and labour).

A popular view of colonialism is that it is primarily to, by force of arms: trespass, acquire and exercise control other peoples/nations' lands, as well as loot their resources, including their artefacts. Post colonialism, subtle institutionalised inequality is still prevalent. One of the similarities that developing countries share is distinct culture. These cultures are valuable assets that can become significant economic strength of these countries. The practices of these indigenous cultures are complex, rich, functional but vulnerable. The vulnerability of these cultures is rooted in these cultures forming mostly in minorities thus increasing the likelihood of being exploited if allowed to remain in the public domain.

This article highlights the peculiarities of indigenous cultures and explore ways to mine their economic value in their protection as Intellectual Property (IP), while acknowledging the significance of their cultural processes.

[1] Sandra Halperin. ***'Neo-colonialism'***, *Encyclopaedia Britannica*, *06.05.2020*: https://www.britannica.com/topic/ neocolonialism, (accessed 31.12.2021).

The Core: Basic Concepts in Intellectual Property for Indigenous Cultures

Intellectual Property Rights Protection (IPRP) has potential to cure the exposure of these cultures to unfavourable external influences, because it creates balanced incentives of economic compensation for the owners of creative expression and access to the public. These rights can be protected individually as patents, trademarks, copyrights or collectively as Geographical Indicators (GI), that is, indications of source and appellations of origin. For example, "*Tequila*" has been registered as a GI product in the European Union which means that only Mexicans can make similar alcohol beverages branded as "*Tequila*" because of the cultural significance of its manufacturing process.[2] Other examples of GIs are the "*Guatemalan Rum*", the "*French Champagne*" and the "*Italian Parmigiano Reggiano (Parmesan cheese)*".[3]

In ***Tea Board, India v. ITC Limited***,[4] one of the first cases with GI as its subject matter to be handled by an Indian court, it was reported that:

> *"The Calcutta High Court denied an interim injunction to the Tea Board of India, the registered proprietor of the GI, Darjeeling. The Tea Board sued ITC, inter alia, under the Geographical Indication of Goods (Registration & Protection) Act 1999, for infringement of its registered GI against the use of the name 'Darjeeling Lounge', alleging such use amounted to an act of unfair competition including passing off."*[5]

Article 31, United Nations Declaration of Rights of Indigenous People 2007 (UNDRIP)[6] acknowledges the right of indigenous people protect their Traditional Knowledge (TK), Genetic Resources (GR) and Traditional Cultural Expressions (TCE) as intellectual property. The World intellectual Property Organisation (WIPO) is making conscious efforts to ensure the espousal of an international protection of traditional knowledge as intellectual property under its WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC was established in October 2000 and subsequently in 2009, they agreed to develop an international legal instrument that would give TK, TCE and GR effective protection.[7]

The IGC has successfully set in motion draft provisions for the protection of TK. There have also been other programmes sponsored by the United Nations Environmental Programme (UNEP). Such initiatives include the ***Convention on Biological Diversity 1992 (CBD)***, ***Johannesburg's Plan of Implementation 2002*** and the ***2010 Nagoya Protocol to the CBD on Access and Benefit Sharing***.[8] These initiatives formulate policies and legislations for the protection of genetic resources ensuring that the control and financial compensation of these GRs stay with their local communities.

Local Applicability: Status Check

Despite the WIPO, the UN and other organisations' attempts to protect the vulnerability of indigenous IP

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[2] Nicola Carruthers, ***'EU Approves Tequila GI'*** *The Spirit Business, 26.03.2019:* (accessed 31.12.2021).
[3] ***'Geographical Indication'***, *Wikipedia*, https://en.wikipedia.org/w/index.php?title=Geographical_indication&oldid=1050080929 (accessed 31.12. 2021).
[4] MANU/WB/0277/2019
[5] ***'First Case on Infringement of a GI'*** *ManagingIP, 30.05.2011:* https://www.managingip.com/article/b1kc1d4wxxjnrq/first-case-on-infringement-of-a-gi (accessed 31.12. 2021).
[6] UN General Assembly, ***'United Nations Declaration on the Rights of Indigenous Peoples'***, *A/RES/61/295, 02.10.2007:* https://www.refworld.org/docid/471355a82.html (accessed 31.12.2021).
[7] WIPO, ***'Intergovernmental Committee (IGC)'*** https://www.wipo.int/tk/en/igc/ (accessed 31.12. 2021).
[8] ***'Report of the United Nations Conference on Environment and Development'***, *Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and Corrigenda), Vol. I: Resolutions Adopted by the Conference, Resolution 1, Annex 1.*

rights, a lot of such culture remains in the public domain and at risk of being exploited for commercial gain by anyone; especially those unrelated to such indigenous culture). Considering the relative circumstances of the developing countries hosting indigenous cultures, it is not a realistic expectation that indigenous IP rights would be protected without conscious local efforts that optimise or even extend the international initiatives.

For quite some time, Nigerian music (or Afrobeats) has been on the ascendancy. *Wizkid* and *Tems* charted Top 10 on *Billboard 100* with *"Essence"*, dubbed the song of the summer.[9] *Ckay's "Love Nwantiti"* equally became the world's most shazamed song after dominating the social app *Tiktok*.[10] These feats amongst several others, have cemented the place of Afrobeats globally. Other sectors like fashion, art and literature are also applying the cultural flavour of the country to putting their works on the map.

Although most of these outputs can arguably be protected by the creators individually, there is a need for collective protection for these variations that are "authentically Nigerian". Balenciaga's adaptation of the *"Ghana must go"* tote bags and the performance of Afrobeats like songs by Korean artists ignites the conversation around gatekeeping the control and profitability of Nigerian cultures and creations to those who can appreciate the nuances of these works.

Gatekeeping these cultures goes beyond the thin line of cultural appreciation and appropriation; the standard that the "cancel culture" (enforced by social media activists), often bases the access of these cultures. It envisages the gentrification of the cultures to the point where sharing it distorts its origin. For instance, Kim Kardashian's attempt to reclaim *"Fulani braids"* as *"Bo Derek braids"*.[11] The disadvantage of this is the death of the nuances that forms part of the distinctiveness of the product. The result of that death is leaving these creations to those who have the financial resources to push them, a battle that minorities simply cannot win.

At the crux of intellectual property rights (IPRs) is the incentive of economic compensation for those who create it. This should apply to collective rights like TKs. Gatekeeping and public outages are not sufficient to cover this vulnerability. Nigeria should focus on international protection of the traditional distinction of Nigerian culture under the different kinds of IP rights applicable to them so the citizens can be custodians and controllers of these assets. This will facilitate cultural appreciation while limiting access to indigenous cultures giving power to those within these communities to create the standard of appreciation and appropriation.

Opportunities: Framework Protection Leverage

Nigeria has products that are exclusive to them or that they share

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[9] Mankaprr Conteh, ***'You Don't Need No Other Body: An Oral History of Wizkid's Essence'*** *RollingStone, 27.08.2021:* https://www.rollingstone.com/music/music-features/essence-oral-history-wizkid-justin-bieber-tems-1217905/ (accessed 31.12.2021).

[10] Joe Walker, ***'How Ckay's "Love Nwantiti" Became The Most Shazamed Song in the World'*** *HipHopDX, 14.10. 2021:* https://hiphopdx.com/news/id.65186/title.ckay-love-nwantiti-most-shazamed-song-world# (accessed 31.12.2021).

[11] Danielle Gray, ***'Kim Kardashian Slammed for Calling Cornrows Bo Derek Braids'***, *Allure, 29.01.2018:* https://www.allure.com/story/kim-kardashian-called-cornrows-bo-derek-braids-lol-come-on-girl (accessed 31.12. 2021).

with neighbouring African cultures. Prime examples of these products are fabrics like "*Adire*",[12] cosmetic products like African black soap and their respective production and cultural expressions like afrobeats. These resources should be leveraged to create renewable revenue for the nation. The protection of IPRs should be proactive, in envisaging the possibility of infringement instead of reactive which is creating a stir for infringement.

IP protection in TKs, GRs and TCEs are protected by ***positive and defensive protection*** according to ***WIPO's IGC legislative arrangements for the protection of TK.***[13] *Positive protection* allows owners of these IPRs to assert them, preventing unlicensed uses

of the TKs which could translate as insulting to the custodians of that particular culture from third parties. *Defensive protection* precludes the proscribed acquisition and maintenance of IPRs from cultures by third parties who are not members of the culture. For instance, the outage from *Culturetree* with their hashtag *#yorubaisnotforsale* concerning the inappropriate trademark of the word "*Yoruba*" by UK retail clothing firm, *Timbuktu Global*.[14]

The ***Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958(as amended in 2015)***[15] is an international framework for the registration of GIs and the ***CBD 1992*** which Nigeria has signed and ratified is also a framework for genetic resources.[16] It is noteworthy that Nigeria is not a signatory to the ***Lisbon Agreement*** unlike African countries like Algeria, Burkina Faso and Gabon and has no registered appellation of origin.[17]

Reflections: Proactive Steps for Establishing a Functioning Ecosystem

Africa has made efforts as a continent to establish a framework for the protection of TKs. The first of such initiatives was when in 2002, the Organisation for African Unity (OAU) now the African Union (AU) adopted a ***Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and the Regulation of Access to Biological Resources***. Over time, a better structure has been formed under the wings of the African Regional Industrial Property Office (ARIPO).[18]

In April 2020, Kenya proposed an ***Intellectual Property Bill***[19] which included provisions on the registration of GIs as IP while Nigeria has no national legislation for the GIs. Although Nigeria is signatory to some international treaties that recognise the protection of GIs like the ***Trade Related Intellectual Property Agreement (TRIPS Agreement)***, ***Paris Convention*** and the ***CBD***, conscious efforts to give these treaties a domestic flavour pursuant to ***section 12 1999 Constitution of the Federal Republic of Nigeria (CFRN) as amended*** have to be set in motion.[20]

Nigerian regulatory framework arguably grants fair protection for TCEs under copyright and related rights. However, TKs need more attention with patent and GI to prevent both bio piracy and gentrification while goods are in the public domain.

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[12] *Adire* is a 'tie and dye' technique indigenous to South Western Nigeria, amongst the Yorubas. It is an indigo dyed cloth production using a variety of dye resisting procedures. Some popular types of this technique are *Onikan*, *Eleko* and *Alabere*. See ***'Adire (Textile Art)'***, *Wikipedia*, https://en.wikipedia.org/w/index.php?title=Adire_(textile_art)&oldid=1060740234 (accessed 31. 12.2021).

[13] WIPO, '***Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions***' *(2020), pp. 22-25.*

[14] Ines Sequiera, '***Yoruba Trademark Case Sparks Nigerian Cultural Appropriation Debate***', *Inventa, 02.08.2021*: https://www.inventa.com/en/ng/news/article/664/yoruba-trademark-case-sparks-nigerian-cultural-appropriation-debate (accessed 31.12.2021).

[15] WIPO, '***Lisbon Agreement for the Protection of Appellations of Origin and their International Registration***' *IPServices*: https://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html (accessed 31.12. 2021).

[16] Nigeria became a signatory to the CBD on the 13th of June 1992 and ratified the Agreement on 29th August 1994.

[17] About 196 countries globally, (48 in Africa) are currently signatories to the ***CBD***: https://www.cbd.int/information/parties.shtml (accessed 31.12.2021).

[18] Adejoke Oyewunmi, '***Nigerian Law of Intellectual Property***' *(2015, Unilag Press), p. 354.*

[19] Catherine Kariuki Mulika *et al*, '***Legal Alert: Intellectual Property Bill 2020 Analysis***' *TripleOKLaw, 06.07.2020*: https://tripleoklaw.com/legal-alert-intellectual-property-bill-2020-analysis/ (accessed 31.12.2021).

[20] ***Section 12 CFRN*** provides that a treaty would not have the force of law until it is enacted as an Act of the National Assembly. In ***Abacha v. Fawehinmi [2000] 6 NWLR (Pt. 660), 228 at 239D*** the Supreme Court affirmed that if a treaty is not incorporated into municipal law, domestic courts lack jurisdiction to apply them.

The Nigerian climate however makes patenting difficult for registering TKs because of the requirement of *"newness"*.[21] The inventors of such TKs are most times unidentifiable and even when they are, they could lack the technical know-how to express the applicability of the product/process. In this regard, Nigeria could borrow a leaf from India in their creation of a database for verifying TKs as a defence mechanism for the above mentioned difficulty in registering them.[22]

The best form of GIs registration in Nigeria would be international registrations with IP offices being the custodians of these GIs, so that it can cater to a larger reach of Nigerians who need it for leverage in their businesses while being effectively controlled. However, since Nigeria lacks a specific law that explicitly provides for GIs, the concept seems alien to our jurisprudence and economic ecosystem. This omission needs to be cured, given Nigeria's wealth of natural resources and bio diversity.

Nigeria should, after establishing effective GI frameworks, leverage on fostering bilateral trade agreements with other countries. This has potentials to increase the value of GIs, as evidenced by the ***EU- Korea Free Trade Agreement 2015***[23] and most recently, the ***EU-China Agreement on GIs 2020***.[24]

Conclusion

Nigeria should see to it that some of these nuanced products are registered internationally as GIs so that Nigerians could, out of these products, create other individual kinds of IPRS without having to compete with (citizens/residents of) developed countries who may have more resources to market these assets. The protection of culturally inclined IP rights should not be left to moral discretion,[25] but carry the force of law and institutions to combat the vulnerability of TKs, TCEs and GRs in Nigeria.

[21] ***Section 1(1), Patents and Designs Act Cap. P2, Laws of the Federation of Nigeria (LFN) 2004 (PDA)*** establishes two conditions that define an invention as patentable: newness and industrial application. The condition of newness could either be "complete newness" (that is, creating something out of nothing), or an improvement on an already patented invention.

[22] ***Section 25, Indian Patents (Amendments) Act (No.15) of 2005***. See also the '***Indian Traditional Knowledge Digital Library***': http://www.tkdl.res.in/tkdl/langdefault/common/Home.asp?GL=Eng (accessed 31.12.2021). It is stated to comprise "*Representative Database of Ayurvedic, Unani, Siddha and Sowarigpa Formulations*" and that "*access to the full database is available to Patent Offices only under TKDL Access Agreement*".

[23] '***European Union–South Korea Free Trade Agreement***,' *Wikipedia:* https://en.wikipedia.org/w/index.php?title=European_Union%E2%80%93South_Korea_Free_Trade_Agreement&oldid=1062375924 (accessed 31.12.2021).

[24] Council of the European Union, '***EU-China: Council Gives Final Green Light to the Agreement on Geographical Indications'***, *European Press Release, 23.11.2021:* https://www.consilium.europa.eu/en/press/press-releases/2020/11/23/eu-china-council-gives-final-green-light-to-the-agreement-on-geographical-indications/ (accessed 31.12.2021).

[25] For some discussion, see Afolabi Elebiju and Gabriel Omoniyi, '***Incidences: Moral Rights in Nigerian Intellectual Property Regulatory Framework***' *LeLaw Thought Leadership, September 2021:* https://lelawlegal.com/add111pdfs/AE_GO-Incidences_Moral_Rights_in_Nigerian_Intellectual_Property_Regulatory_Framework.pdf (accessed 31.12.2021).