March 2022

Thought Leadership | Afolabi Elebiju and Gabriel Omoniyi[1]

Unfinished Business: Intellectual Property under the Africa Continental Free Trade Agreement

Introduction

The commencement of the ***Africa Continental Free Trade Agreement (AfCFTA)*** in January 2021 was a happy culmination of years of working to make African countries trade more with one another. According to Vera Songwe in ***'A Continental Strategy for Economic Diversification through the AfCFTA and Intellectual Property Rights'***, *"many on the continent look to the AfCFTA as an investment, economic diversification, and job creation blueprint that will shape the future of Africa in the years to come, help meet the SDG targets by 2030, and consolidate progress toward the African Union's Agenda 2063."*[i]

Central to these permutations and potential impacts of the ***AfCFTA*** is intellectual property rights (IPRs) in Africa. ***Article 6 AfCFTA*** covers *"trade in goods, trade in services, investment, intellectual property rights and competition policy"*. IPRs is basically an aggregate of rights that include copyrights, trademarks, patents, designs, trade secrets, confidential information and such other rights that accrue to an individual or organisation for his ingenuity and discovery.

Undeniably, IPRs is key to incentivising innovation, sustainable profitability and market leadership. However, ***Article 7***

[1] This article was originally submitted in March 2022 as a Chapter contribution to an ***AfCFTA*** specialist publication. We have chosen to publish it in accordance with the stylistic requirements of the original format required by the publishers. For example, this article features endnotes, instead of LeLaw's usual footnotes. Gabriel Omoniyi (now an alumnus), co-authored this article whilst he was a LeLaw Associate. *Subsequently published in BusinessDay, 19.05.2023;* https://businessday.ng/news/legal-business/article/unfinished-business-intellectual-property-under-the-africa-continental-free-trade-agreement/

AfCFTA still subject the full operation of ***the Protocol*** to the negotiations by the Member States, which is mandated to commence after ***AfCFTA's*** coming into force. By ***Article 23(2) AfCFTA***, the related ***Protocol*** is expected to come into effect after the 22nd Member State (Sierra Leone) had on 30th April 2019 deposited its instrument of ratification, and rank *parri passu* with the other ***Protocols on Trade in Goods, Trade in Services and the Rules and Procedures on the Settlement of Disputes***. Unfortunately, three years after, there is yet to be the envisaged ***IPRs Protocol***.

The first anniversary of the commencement of the ***AfCFTA*** having passed in January 2022, it is auspicious to ponder the delay in getting ***the IPRs Protocol*** released, given the contributions that a continent-wide IPRs framework will make towards actualising ***AfCFTA*** goals. Therefore, this article seeks to examine broadly the regime of IPRs in Africa and how the ***AfCFTA*** through ***the Protocol*** can midwife the desired economic prosperity in Africa.

IPRs in Africa: Pre-AfCFTA Era

According to the World Trade Organisation (WTO), IPRs can be divided into two major groups: (a) copyright and rights related to copyright; and (b) industrial property which is further sub-divided into: (i) protection of distinctive signs that is, trademarks and geographical indications; and (ii) other industrial property to stimulate innovation, design and creation of technology such as patents, designs and trade secrets.[ii]

Notably, IPRs in Africa cannot be solitarily discussed without the global considerations, principally, inputs vide applicable treaties on IPRs. Some of these treaties include the ***Paris Convention for the Protection of Industrial Property 1883, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961*** *and* ***Berne Convention for the Protection of Literary and Artistic Works 1971***. In Africa, the major treaties are those establishing the African Regional Intellectual Property Organisation (ARIPO) and the Organisation Africaine de la Propriete Intellectuelle (OAPI) in 1976 and 1977, respectively.

According to the World Bank, while there have been quite a number of regional economic communities in Africa, only the East African Community (EAC) makes provision for IPRs. It is trite that IPRs are territorial and until the various countries incorporates (domesticates) and/or subjects its laws to the treaties, the international treaties cannot be seen to automatically apply. Thus, in achieving uniformity for national laws or treatment of IPRs, the principle of reciprocal national treatment is often deployed.

The Lusaka Agreement 1976

On 9th December 1976, 8 countries (out of 13 countries that attended) were the first set of signatories to the ***Lusaka Agreement***, which itself led to the formation of Industrial Property Organisation for English Speaking Africa (ESARIPO) with the sole aim to pool national resources for the modernisation, harmonisation and development of Intellectual Property laws and policies.[iii] ESARIPO (which came into force on 15th February 1978 when the first five members ratified the Agreement) became ARIPO in 2003.

As at 2016, there were 19 Member and 12 Observer States under its ***Article VI***. The Agreement has been extended by the introduction of ***the Harare Protocol on Patents and***

Industrial Designs 1982, the Banjul Protocol on Marks 1993, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 2015, and ***the Arusha Protocol for the Protection of New Varieties of Plants 2015***.

The Bangui Agreement 1977

On 2nd March 1977, 10 countries met at Bangui, Central African Republic to form the OAPI by revising the erstwhile ***Libreville Agreement 1962*** establishing the African and Malagasy Office of Industrial Property (OAMPI). The ***Bangui Agreement*** came into force on 8th February 1982 and had been revised in 1999 and in 2021.

The approach of OAPI to IPRs and its regulation in its contracting States is unique in that it divests the member States the ownership or administration of independent national intellectual property offices like the trademark and patent office (see ***Article 3 Bangui Agreement***). By ***Article 8(1)***, every member States has a centralised procedure for the application for patents, the registration of utility models, trademarks or service marks, industrial designs, trade names, geographical indications or layout designs (topographies) of integrated circuits and application for plant variety certificates.

Whilst ***Article 8(2)*** allows the application in a member State where the applicant is domiciled, such an application must be transmitted to OAPI within five working days of receipt. In addition, *per* ***Article 4***, the enforcement of IPRs and exclusive jurisdiction over related criminal matters shall be vested in the courts of Member States.

Future of IPRs in Africa: Potential AfCFTA 'Leapfrog'

One significant area the ***Protocol*** can improve on present framework is on the grant of patent. Considering the divergent legal landscapes in Africa, some parts of Africa like Nigeria adopts the depository system in the grant of patent while ARIPO adopts the substantive search and examination system (SSE) in granting patents.

While arguably the SSE regime has an increased cost implication for nations, its long term influence in phasing out frivolous patent applications, increase the value of the patent and protect the applicants from costs for the defence/ challenge of patents wrongfully granted, makes it the more optimal system. Where the SSE is fully adopted, the experience and expertise of workers across Africa, most especially under the Pan-African Intellectual Property Organisation (PAIPO), if eventually in operation, can help cut the cost of training and running of a functional patent office for Africa.

Thus, the trademark regime in Africa has been influenced with the multi-system approach practiced across the continent. Depending on the country and its regional body membership, the registration can either be national or regional. For OAPI Countries, the registration of trademarks is centralised through the Yaounde-based office while some of the ARIPO Countries can either file at their respective National Office or the Harare-based regional office. The challenge with these systems is that applicants, most especially where they have to apply for trademarks across the continent, are either left to just apply through the ***Madrid System*** for registration of patents, make application through the ARIPO/OAPI offices, and still make individual applications to countries not covered by ARIPO and OAPI. ***The Protocol*** can therefore propose a simplified uniform system for the registration of trademarks in Africa.

Another area ***the Protocol*** may want to address is the Genetic Resources

"While arguably the SSE regime has an increased cost implication for nations, its long term influence in phasing out frivolous patent applications, increase the value of the patent and protect the applicants from costs for the defence/ challenge of patents wrongfully granted, makes it the more optimal system."

(GR), Traditional Knowledge (TK) and Traditional Cultural Examination (TCE). While there has not been a globally affirmed provision that protects these sets of IPRs, it is important for ***the Protocol*** to leverage on existing frameworks and discussions over the past 20 years in protecting these specific IPRs.

For Africans and considering the locality and her documented position at the WIPO-established Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the recognition of the interplay between the IPRs and TK,[iv] TCE[v] and GR, an adequate protection of these rights *"would enrich the IP system by expanding the range of its beneficiaries to include vulnerable and marginalised communities, strengthen its contribution to sustainable development and, therefore, bolster the credibility and legitimacy of the IP system and foster greater respect for it across all regions"*[vi] (Wendland, 2019).

The Protocol, like the ***Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended 2017) ((TRIPS)' Article 1)***, must provide a leeway for the least developing countries (LDCs) to catch up with the developments to allow those LDC have a wide acceptance for some of the provisions of ***the Protocol***. The effective use of flexibilities and the principle of special and differential treatment will be imperative to ensuring that the IP protection safeguards the advancement of basic development goals as well as the needs of LDCs,[vii] (Yeukai Mupangavanhu, 2018).

Considering the possibility of infringement and misappropriation, the ***IPRs Protocol*** must make provision for protective measures that guarantees the maximisation of IPRs in Africa. The respective judicial offices in each Member State must see to the recognition and quick continent-wide dispensation of IPRs-related disputes and enforcement.

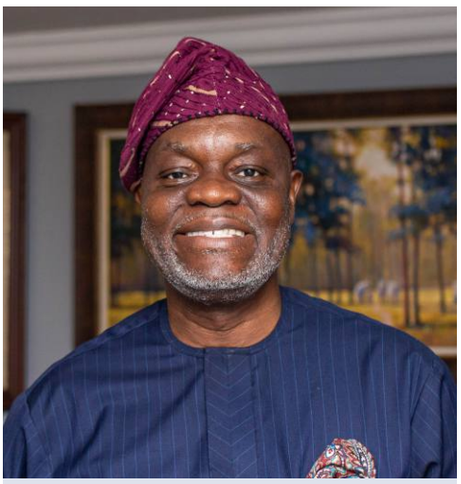
Is the Pan-African Intellectual Property Organisation an 'Abandoned Project'?

On 30th January 2016, the African Union (AU) at its 26th Ordinary Session at Addis Ababa, Ethiopia adopted the ***Statute of the Pan-African Intellectual Property Organisation (Statute)***. This ***Statute*** established the PAIPO bearing in mind the role of IPRs as a tool for development. PAIPO according to ***Article 4(1) and (2)*** is to *"harmonise intellectual property standards that reflects the needs of the AU, its Member States and RECs; ARIPO and OAPI; facilitate the realisation and harmonisation of national legislation of regional treaties with continental intellectual property standards."*

With its headquarters in Tunisia and four organs created under the ***Statute***: the Conference of State Parties; Council of Ministers; Secretariat; and Body of Appeal, PAIPO has not kicked off operations since its adoption. As at 2022, only six member States have signed up (the sixth signatory did do on 19th June 2019) and while there has been no accession or ratification. As it stands, the PAIPO is still in the limbo - until 30 days after the 15th Member State would have deposited the instrument of ratification. Considering the ambitious provision of ***the Statute***, ***the Protocol*** may make reference to it and charge it with the implementation of ***the Protocol*** when finally enacted.

Conclusion

The highest position attained by an African country (Mauritius at 52nd) in the ***Global Innovation Index 2021*** shows that Africa is seriously lagging behind in innovation initiatives. The cause of innovation in Africa needs a boost and ***the Protocol*** can be a significant catalyst in that regard. Considering its handicap to realising the potentially increased intra-African trade under ***AfCFTA***, the current disintegrated approach of African nations on IPRs is no longer tenable. Efforts to close the gap so that ***the IPRs Protocol*** can come into existence and effectiveness need to be intensified immediately.



a.elebiju@lelawlegal.com

LeLaw Disclaimer

Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the lead author, Afolabi Elebiju at: a.elebiju@lelawlegal.com or via Firm email: info@lelawlegal.com.

[i] Vera Songwe, ***'A Continental Strategy for Economic Diversification through the AfCFTA and Intellectual Property Rights'***, *Brookings:* https://www.brookings.edu/research/a-continental-strategy-for-economic-diversification-through-the-afcfta-and-intellectual-property-rights/ (accessed 18.02.2022).

[ii] WTO, ***'What are Intellectual Property Rights?':*** https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm (accessed 18.02.2022).

[iii] ARIPO, ***'1976 - 2016: 40 Years of Cooperation in IP'***, *p. 15:* https://www.aripo.org/wp-content/uploads/2020/08/ARIPO@40.pdf (accessed 18.02.2022).

[iv] ***'African Group Comments on the Gap Analysis Document issued by the WIPO Secretariat on Traditional Knowledge':*** https://www.wipo.int/export/sites/www/tk/en/igc/gap_analyses_pdf/tk_african_group.pdf (accessed 21.02.2022)

[vi] Wend Wendland, ***'International Negotiations at WIPO on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: Analysis of the Process So Far and Thoughts on Possible Future Directions'***, *The Journal of The Intellectual Property Society of Australia and New Zealand, Issue 114, p. 32:* http://ip-unit.org/wp-content/uploads/2019/02/Wendland_114IPForum31.pdf (accessed 18.02.2022)

[vii] Yeukai Mupangavanhu, ***'The Protection of Intellectual Property Rights Within the Continental Free Trade Area in Africa: Is a Balance Between Innovation and Trade Possible?'***, *International Journal of Business, Economics and Law, Vol. 15, Issue 4 (April) 2018, p.20:* https://www.ijbel.com/wp-content/uploads/2018/05/LAW-48.pdf (accessed 21.02.2022).