THE STATE OF INTELLECTUAL PROPERTY AND INDIGENOUS KNOWLEDGE IN AFRICA: IMPROVING SYSTEMS OF PROTECTION WITHOUT LIMITING INNOVATION

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Abstract

Africa stands as a rich continent in traditional knowledge and traditional knowledge systems. How these should be harnessed to contribute to development, protect a legacy of cultural heritage and promote cultural identity is a matter of contention in both academic scholarship and policy formulation. Areas that have attracted divergences in perspective include but are not limited to how ownership of traditional knowledge can be established and sustained; the scope of intellectual property policies and laws in relation to indigenous knowledge; balancing economic motivations with human rights protection; navigating competing visions of how indigenous knowledge can enhance both political and cultural sovereignty; navigating competing moral, political and economic claims to indigenous knowledge. This paper has adopted a desktop approach to interrogate these divergences and make recommendations as to how indigenous knowledge can be protected in a manner that is compatible with innovation.

Introduction

Africa's diverse cultural heritage and cultural identity remains vulnerable to manipulation and commercialisation. This partly is attributable to the lack of protection mechanisms that establish ownership and can allow for claims to be made where manipulation occurs. The question of ownership is a complex one. Indigenous knowledge systems have historically existed as a public resource – mostly intangible and orally passed down within and across generations. With the emergence of virtual spaces, what has been classified as indigenous knowledge has been shared extensively and subjected to modifications, in stratification and content.[1] In such a virtual landscape, where, according to Brown,[2] there is the 'blurring distinction between natives and non-natives,' the predicament of academic scholarship and intellectual property policies is that of establishing mechanisms through which this knowledge

[1] M Brown, 'Who owns native culture,' 2003, Harvard University Press, 6.
[2] Ibid.

can be recaptured and assigned an owner without clamping innovation and the free exchange of knowledge. The process of 'recapturing' is a herculean task because of the character of indigenous knowledge. It mostly "has no clear origins, boundaries and identifiable property owners."[3]

The linkage between indigenous knowledge and intellectual property gives rise to conflicting rationales between economic justice and human rights.[4] Economic justice is predicated on profitability and compensation that is within acceptable standards for the owner of knowledge and the appropriator of this knowledge. The human rights landscape on the other hand undermines profitability and places emphatic reference on cultural integrity, authenticity and the self-determination of indigenous communities. The two approaches have majorly failed to find compatibility because the logic of some indigenous rights activists has advanced that indigenous knowledge is sacred and should therefore not be quantified into a commercial product that is subjected to trade regulations. In contrast, economic justice proponents have rationalised indigenous knowledge as a resource of commercial value that should be used innovatively with appropriate safeguards erected to ensure that communities benefit from this innovation.[5] Within the landscape of self-determination however, both human rights and economic justice frameworks cannot be effected in jurisdictions where there is no recognition of indigenous communities, their distinct cultural heritage and the integrity of their indigenous knowledge. Most fundamentally, protection mechanisms, by manner of intellectual property rights and for the purposes of promoting innovation, are gravely limited by legal frameworks that do not recognise indigenous / minority groups. It is through recognition that states and state functionaries can be mandated to protect indigenous knowledge, their interpretation and the commercial creative expressions emanating from these. Concomitant to the recognition of distinct cultural communities, is the question of land rights. Intellectual property institutions such as the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) have been subjected to criticism for employing and effecting intellectual property protection systems that trivialise land rights and do not recognise that indigenous knowledge is legitimated by the linkages indigenous communities have with their territorial space that is defined by land ownership, geographical autonomy and land rights.[6]

[3] Ibid,. 7.
[4] Ibid., 234.
[5] J.M Finger, 'Poor people's knowledge,' 2004, World Bank, 3.
[6] P Drahos and S Frankel, 'Indigenous people's innovation and intellectual property: The issues,' 2012, ANU Press, 17.

The Relationship Between Indigenous Knowledge and Intellectual Property

The starting point in the exploration of a relationship between indigenous knowledge and intellectual property should be a discussion of the imperatives of intellectual property regulations, their implications and what they seek to achieve. Intellectual property systems and regulations for indigenous knowledge are rationalised as instruments that ensure that cultural communities can:

a) Derive economic benefit for the commercialisation of their knowledge
b) Reclaim their distinct identity and protect it from appropriation
c) Protect indigenous knowledge from manipulation that undermines its authenticity
d) Make cultural claims as a matter of economic justice or human rights
e) Achieve autonomy in defining how their knowledge can be interpreted and commercialised, by whom, for what benefit and through what means

Intellectual property mechanisms have universally been rights based and have defined a criterion of indigenous knowledge ownership through the identification of proxy measures that act as a standard of requirement of what needs to be satisfied or proven before protection is granted as a matter of right. An objection to such a system is that culture is translated into property that is "defined and directed by law" by manner of subjecting it to "litigation, legislation and other forms of bureaucratic control" that limit innovation and information exchange[7]. A 2006 World Bank report[8] on cultural heritage and intellectual property conceded that intellectual property rights, by virtue of identifying individual owners to property, have limitations and can "foster a disassociation of knowledge from the context within which it is produced and shared." Rather than calling for intellectual property rights that are rationalised through 'identifiable one or more individuals' the report calls for 'collective intellectual property rights instead.' The rationale of collective intellectual property rights captures that "the inventive and creative processes of communities are often collective and the use of information, ideas and resources generated on the basis of such collective processes are broadly shared" and not taken ownership of by specific individuals who form a collective.[9]

Frankel and Drahos[10] however, are vehemently opposed to this rationalisation of the relationship between indigenous knowledge and intellectual property rights. On the question

[7] M Brown, 8.
[8] World Bank Report, 'Cultural heritage and collective intellectual property rights,' 1, http://web.worldbank.org/archive/website01219/WEB/IMAGES/IKNT95.PDF, accessed 3 August 2018.
[9] Ibid.
[10] P Drahos and S Frankel, 9.

of law, framed either as intellectual property rights or collective intellectual property rights, they argue that intellectual property systems mirror disparities between the reality of indigenous groups and the abstract dictates of legal regimes. They express that,

> Law is obsessed with definition…Indigenous peoples do not usually attach the same value to abstract definition. If called upon to define their traditional knowledge, they will emphasise not the analytical facets of knowledge, but rather the relational boundaries and dynamics created by the possession of knowledge. This includes indigenous peoples' relationship with their knowledge, and their responsibility to maintain and develop the knowledge for the good of society and future generations.[11]

Frankel and Dahos further condemn legal instruments for adopting a technical scope that does not recognise 'ancestors as legal persons' who have historically owned indigenous knowledge that has continued to be a generational inheritance.[12] The scope of these instruments has also been criticised for failing to acknowledge the innovative nature of non-patentable indigenous knowledge systems.[13]

Scope of the Research

From the background that has been provided above, this research paper aims to present these following issues for determination:

i. What is the current state of protection for indigenous / traditional knowledge in Africa? What are the limitations?
ii. What are the mechanisms employed to ensure protection and preservation of indigenous knowledge as a generational legacy without limitations in innovation?
iii. How can African societies collectively regulate against the commercialisation of their cultural heritage?
iv. What best practice recommendations can be recommended to enhance indigenous knowledge preservation and innovation?

The State of Indigenous Knowledge Protection by Jurisdiction

African states and communities lack a collective mechanism of regulating the appropriation of indigenous knowledge. Presently, indigenous knowledge protection is limited by each state's

[11] Ibid.
[12] Ibid.
[13] Ibid., 8.

territorial jurisdiction. For the purposes of identifying some instruments of protection that can map a recommendation mechanism, this research focuses on South Africa and Kenya.

(i) Kenyan Perspective:

In Kenya, traditional knowledge (TK) is recognised under the Constitution as 'the foundation of the nation and as a cumulative civilisation of the Kenyan people and nation'.[14] The constitution obliges the state to promote all forms of national and cultural expressions and recognise the role of science and indigenous technologies in the development of the nation.[15] The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (PTKCE) was enacted as an enabling statute to this constitutional right and also Kenya's state responsibility under article 15(1) of the International Covenant for Economic, Social and Cultural Rights as part of the right to culture[16]. It seeks to define traditional knowledge and cultural expressions and grant protection to all communities that are:

> [H]omogeneous and consciously distinct group of the people who share any of the following attributes: (a) common ancestry; (b) similar culture or unique mode of livelihood or language; (c) geographical space; (d) ecological space; or (e) community of interest) …against derogatory treatment and any unauthorized third-party exploitation of their traditional knowledge and cultural expressions.[17]

Prior to its enactment, TK was referred to and protected under the Copyright Act as folklore.[18] Folklore was defined as:

> a literal, musical or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya and includes- (a) folktales, folk poetry and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; and (d) the production of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metalware, jewellery, handicrafts, costumes and indigenous textiles.[19]

Under the Copyright Act, the Minister was empowered to prescribe the terms and conditions governing any specified use of folklore, except by a national public entity, for non-commercial purposes, or the importation of any work made abroad which embodies folklore.[20]

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[14] Constitution of Kenya 2010, Article 11, Art 40(5) and Art 69
[15] ibid
[16] Adopted 16 December 1966, entry into force 3 January 1976
[17] Constitution of Kenya 2010, Art 2
[18] Copyright Act Cap 12 of 2001, Laws of Kenya
[19] Ibid s2
[20] Ibid s49

However, its infringement provisions only applied to unauthorized use, wilful misrepresentation and distortion of folklore within Kenya.[21] Also, it limited any further development of TK since it only sought to protect that part of TK that has an unidentified author and has survived at least a generation. It also failed to create a threshold on which point would such TK be deemed to have begun to constitute as basic element of a community's cultural heritage. TK did not have any *sui generis* recognition and was considered as a constituent of other forms of copyright works. This lack of recognition led to inadequate protection of TK since it did not fit the criteria of other forms of works. As such significant normative institutional constraints posed a great challenge to its individual and collective management.[22]

In light of the above, the PTKCE was enacted to offer *sui generis* protection, widen the scope and criteria of protection,[23] establish equitable benefit sharing,[24] procedure of obtaining prior informed consent,[25] right for remedial action for aggrieved parties and the establishment of a national competent authority[26].[27]

Although the Act states that TK shall not be subject to any formalities, county governments shall collect information documentation and register cultural expressions within their counties for the purpose of recognition.[28] This registration is voluntary and after obtaining prior consent from the owners of the cultural expressions.

Under the PTKCE, the owners of TK have moral rights which entail the right to the attribution of ownership/ paternity and protection from false misleading claims to authenticity and origin.[29] It gives the local communities, as owners of TK, licensing rights. It encourages community participation in the assignment of any license or execution of user agreements and provides for compulsory clauses in any such agreement such as royalty compensation, duration of use among others.[30]

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[21] Copyright Regulation 2004 r20(2)
[22] B Sihanya, 'Copyright Law in Kenya' (Innovative Lawyering & Sihanya Mentoring) < https://innovativelawyering.com/> accessed on 2 August 2018
[23] PTKCE s6
[24] Ibid s24
[25] Ibid s27
[26] Ibid s25
[27] V Nzomo, 'A Look at Kenya's Draft Bill on Protection of Traditional Knowledge and Expressions of Folklore' 16 October 2012 IP Kenya <https://ipkenya.wordpress.com/tag/folklore/> accessed on 2 August 2018
[28] PTKCE Act s15(2)
[29] Ibid s21
[30] Ibid s32

Limitations of Kenyan protection measures

It is not very clear what would happen when a community seeks to enforce against a third party that is located out of the country since TK, as Intellectual property rights, are territorial in nature. It would also be difficult to enforce against foreign infringers in as much as the law provides remedies such as fines and civil remedies. This is enhanced by rise in technology where access to traditional knowledge without having a physical presence is possible.[31]

(ii) South African Perspective:

South Africa faces a similar legislative past to that of Kenya and hence shares similar limitation in the protection of TK as a form of intellectual property. The South African Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill (Traditional Knowledge Bill 2016) proposes a *sui generis* protection approach to the protection of TK as intellectual property. This includes knowledge of a scientific or technical nature, knowledge of natural resources and indigenous cultural expressions. Indigenous cultural expression has been described to include language, music and other forms of expression whose content has been assimilated into the cultural make up or essential character of an indigenous community.

The case involving the San community, South Africa's Council for Scientific Industrial Research and Pfizer cooperation in the use of an indigenous plant for diet medication arguably provided a measure of how the protection of intellectual property rights can be effected to navigate indigenous community development, cultural conservation and innovation. Through a benefit-sharing model, the San were guaranteed to benefit from both licencing and royalties from commercialisation.

Limitations of the Traditional Knowledge Bill

The 2016 Indigenous Knowledge Systems Bill (IKS) still contains a definition of "indigenous cultural expressions", but, arguably, it may no longer be the exclusive source of substantive protection of traditional cultural expressions (TCEs). First, it is important to note that although

[31] Mputhia, 'Come up with rules to breathe life into cultural protection laws' Business Daily, 19 February 2017 <https://www.businessdailyafrica.com/Come-up-with-rules--breathe-life-cultural-protection-laws/539444-3819260-hjnk5m/ > accessed on 2 August 2018

clauses 2(2) and 9 of the 2016 IKS Bill *prima facie* only apply to "indigenous knowledge", the definition of "indigenous knowledge" now includes "indigenous cultural expressions". In contrast, the substantive provisions of the 2015 IKS expressly listed "indigenous knowledge" and "indigenous cultural expressions" as a separate protected subject matter, and did not subsume the latter into the definition of the former.

Discussion and Recommendations

From the exploration provided in this paper, the following challenges, to some degree, punctuate the status of indigenous knowledge protection mechanisms on the African continent:

- The territorial nature of intellectual property rights
- Lack of recognition of indigenous communities, their distinct cultural heritage and land rights
- Vague intellectual property rights instruments that have not made indigenous knowledge compatible with indigenous cultural expressions
- The tension between the dictates of human rights and economic justice
- The adoption of intellectual property rights rather than collective intellectual property rights
- Lack of intervention mechanisms that can allow communities to reclaim knowledge that already is in public domain
- Restricting intellectual property rights to state intervention without engagement with indigenous communities
- Ineffective intellectual property enforcement mechanisms
- Emphasis on indigenous knowledge preservation rather than innovation
- Absence of compatibility between what is rationalised by indigenous communities and what is rationalisable through legal regimes

Broadly, African intellectual property systems have identified intellectual property as a conduit in the realisation of indigenous knowledge innovation. Frankel and Dahos[32] find this instrumentalisation of intellectual property limiting and contrary to the imperatives of innovative approaches. They favour a model of indigenous innovation rather than indigenous knowledge innovation through intellectual property. This means innovation should be driven by a nexus of systems that do not exclusively possess an intellectual property orientation. These

[32] P Drahos and S Frankel, 12.

systems are about identifying a plethora of mechanisms that match the function of innovation and can range from the employment of land rights, traditional law, customs, kinship ties, only to highlight a few.[33] Frankel and Dahos[34] further posit that this approach of elevating innovation offers a systems perspective that is an amalgamation of indigenous knowledge institutions and modern economic institutions. A systems perspective in this regard is a critical exploration of the relationship between 'cosmological institutions, sacred ties, kinship systems, universities, industrial research laboratories, taxing and venture capital markets, government and external actors utilising indigenous knowledge.'[35] Mainstream intellectual property regimes make a parallel between institutions of legal utility and institutions within the framework of indigenous knowledge. They grant primacy to the former. What the indigenous innovation model advances is the creation of a landscape where these institutions can engage and can achieve elevation based on how they fulfil very particular needs of indigenous knowledge innovation.

As an illustration of how a model of indigenous innovation would restructure the linkage between indigenous knowledge and intellectual property rights as they currently exist, Frankel and Dahos assert that,

> A society may choose to invest its resources into information that expresses itself more in services and processes than in technological artefacts. It may also emphasise the symbolic manipulation of information, meaning, amongst other things, that more time is devoted to the coding and transmission of information through story-telling, dance, ritual, art and other forms of symbolic manipulation.[36]

On the question of patenting specifically they demonstrate that,

> A patent may represent the best fit between an active ingredient derived from a plant and the indigenous group with traditional rights over the plant, but it does not follow that the patent system is the best system for the innovation system of people of which that group is a part.[37]

What a model of indigenous innovation proves is that the positioning of intellectual property rights under the assumption that they are guaranteed to advance indigenous knowledge innovation is unjustified. Innovative approaches should not be confined only to legal regimes and institutions legitimised by these regimes. What is required is a mechanism that makes a deterministic calculation of what innovation is in each context and each instance, and

[33] Ibid,. 2.
[34] Ibid,. 4.
[35] Ibid.
[36] Ibid., 21.
[37] Ibid., 5.

prescribes both legal and non-legal instruments that best can achieve innovation. This fundamentality is the fulcrum of how indigenous innovation is conceptualised.

This research paper makes the recommendation that a model of indigenous innovation rather than 'indigenous knowledge innovation though intellectual property' should be adopted. The adoption of this approach should be concomitant with the incorporation of the following:

i. ***Scope of Legal Frameworks***: Legal regimes need to encourage the creation of community-based and community-led protection initiatives such as the Maasai Intellectual Property Initiative Trust (MIPI). MIPI's objective is to reclaim the Maasai ownership of their cultural heritage and establish control over its commercial exploitation around the world.[38] The initiative is supported by other foreign NGOs such as, Light Years IP and African IP Trust.[39] MIPI primarily engages in awareness creation, lobbying and letter writing against companies that use their images in offensive ways.[40] It is also seeking IP protection through registration of their cultural heritage as trademarks

ii. ***Empowerment of Cultural Communities***: In the spirit of both cultural integrity and economic justice, local communities should be empowered with rights to deny access to specific forms of indigenous knowledge that are sacred and should not be subjected to commercialisation. Where commercial rights are granted, communities should be empowered with the decision to make a deterministic calculation of how their knowledge should be advanced or subjected to innovation

iii. ***Recognition of Collective Ownership***: There should be the establishment of a model that recognises that "any traditional knowledge associated to genetic heritage can be the ownership of the community, even if one individual member of the community holds that knowledge"[41]

iv. ***Effective Enforcement Mechanisms***: There should be the creation of supranational enforcement mechanisms that monitor the use and ownership of indigenous knowledge systems. This should be in tandem with the prescription of what would qualify as the most appropriate remedy where an infringement has been identified

v. ***Improving the Design of Multilateral Institutions***: Intellectual property rights and systems of advancing indigenous innovation should not be limited to state jurisdictions.

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[38] Maasai Intellectual Property Initiative (MIPI), 'About Us' <http://maasaiip.org/about-us/> accessed on 2 August 2018
[39] ibid
[40] ibid
[41] World Bank Report, 'Cultural heritage and collective intellectual property rights, http://web.worldbank.org/archive/website01219/WEB/IMAGES/IKNT95.PDF, accessed 3 August 2018.

Multilateral institutions such as the African Union should promote a common understanding of intellectual property rights and indigenous innovation, promote greater recognition of indigenous community self-determination, defend indigenous community land rights and have mechanisms that can allow local communities to seek remedies against external actors that illegally commercialise their knowledge. These institutions, while advocating for cultural preservation, should place emphatic reference on innovation

vi. ***Creating a Software Climate for Intercultural Value Creation***: Create policy structures that unequivocally recognise that commercialisation is not the only route through which indigenous knowledge can be translated into intercultural value creation. What indigenous communities characterise as innovative approaches in relation to their knowledge should be legitimated through these policy structures. Where commercialisation is identified as the best route of advancing indigenous knowledge innovation, there should be the formulation of a 'standard practice model' of profit sharing. A minimum threshold percentage of what is deemed reasonable profit-sharing should be prescribed

vii. ***Strengthening the Incorporation of Indigenous Knowledge into Mainstream Education***: Indigenous knowledge should be grafted into mainstream education to preserve cultural heritage and explore opportunities of innovation. Custodians of indigenous knowledge should be empowered to be active agents in the study of their knowledge.