The Need for Protection of Traditional Knowledge under the Nigerian Intellectual Property Framework

Richard U. Oyiwona*

Zion Machem Lashom**

Abstract

Traditional knowledge is evolving in the intellectual property regime. It is a practice where people showcase their traditional expertise in traditional medicine, traditional herbs, research in traditional ideas and values change, and general traditional knowledge passed down from generation to generation. The article aims to showcase the importance and contribution of traditional knowledge in society and why practitioners deserve recognition under intellectual property laws. The methodology adopted in the article is doctrinal, in that the available intellectual property laws were examined vis-à-vis articles written on the subject to ascertain how far traditional knowledge gained recognition under the extant intellectual property laws in Nigeria. It was found that the Nigerian intellectual property law has not adequately made concrete provisions for the protection of traditional knowledge in Nigeria despite the contribution of traditional knowledge practitioners. On the strength of the foregoing, it was recommended that there should be a legal framework for the protection of traditional knowledge and its practitioners in Nigeria under the intellectual property laws. It was concluded that the lack of a legal framework to protect traditional knowledge practitioners exposed their work to a lack of protection and could be manipulated by unauthorized persons.

KEYWORDS: Copyright, Intellectual Property, Traditional knowledge (TK)

1. INTRODUCTION

Traditional knowledge (TK) is an emerging intellectual property right put in place to preserve the traditional knowledge of their owners. Emerging TK particularly in the area of intellectual property is an important topic that encompasses culture, innovation, and legal frameworks. It must be recognized under the intellectual property right so that those subject to the practice of traditional knowledge are given legal protection. This is so because traditional knowledge is passed on from generation to generation and practiced by a particular group of persons for the benefit of the people. Nigeria as a country is made up of about 250 ethnic groups with each having its unique traditional knowledge which includes traditional practices, agricultural techniques, arts and crafts, and traditional herbs. The cultural diversity has made it a challenge to document and protect the traditional knowledge of each ethnic group. The absence of protection for traditional knowledge has exposed the practitioners to infringement of their rights as orthodox medicinal practitioners take advantage of the lack of protection under the Intellectual property laws to tap from the knowledge of traditional medicinal practitioners. Pharmaceutical industries may use traditional knowledge without adequately compensating and giving acknowledgment to the originating communities which leads to biopiracy. Traditional knowledge should be given recognition under the Intellectual property laws.

2. CONCEPTUAL FRAMEWORK

Traditional Knowledge (TK) refers to the traditional skills, information, practices, Innovations/know-how, and technologies developed within communities and generally held collectively,[1] According to the World Intellectual Property Organization (WIPO), TK 'is a living

* **Richard U. Oyiwona,** FCarb LLB, BL, LLM, PhD. Lecturer, Faculty of Law, Admiralty University of Nigeria, Email-oyiwona-law@adun.edu.ng

** **Zion Machem Lashom,** Lecturer Faculty of Law, Admiralty University of Nigeria, Email-lashom-law@adun.edu.ng

[1] J. H. Mike & G. Uloko "Modern Approach to Intellectual Property Laws in Nigeria" (2nd edn Princeton & Associates Publishing Company Limited Lagos 2022) 362 - 371

body of knowledge passed on from generation to generation within a community,'[2] The types of TK could include agricultural knowledge, scientific knowledge, technical knowledge, ecological knowledge, medicinal knowledge, including related medicines and remedies, biodiversity-related knowledge, and elements of language, such as names, geographical indications, and symbols,[3] TK is essentially a part of an indigenous community's cultural identity which has evolved and is transmitted orally through generations. Use and access to TK are largely governed by unwritten customary laws and informal traditional practices. In many African communities, for example, many traditional healers provide primary healthcare services for people in these communities and herbal practitioners know the different types of local medicinal plants, which they use and develop. Such knowledge has ancient roots and has been passed down from generations; some have acquired their communities' distinctive character. A piece of medicinal knowledge developed from a given combination of herbs by a community in India, for example, can substantially differ from knowledge developed by an African community, based on simple herbs. The 'reason is that the origination of medicinal knowledge by traditional communities, despite its predominantly technical nature, does not only attend to a certain practical need but also responds to cultural approaches and beliefs,[4]

2.1 Importance of Preserving Traditional Knowledge

It is important to preserve the Traditional Knowledge (TK) of the people in their indigenous and local government as part of their very cultural identities. The reasons are as follows: first, maintaining the distinct knowledge systems that give rise to TK can be vital for future well-being and sustainable development and their intellectual and cultural vitality. Second, several rural communities have spent years developing their biological resources, herbal medicines, important technologies, and ecosystems, many through trial and error, and so preserving their TK from exploitation by outsiders or extinction is crucial. In this manner, it is important to prevent the authorized and commercial misuse of such indigenous knowledge and to preserve their practices. Third, protecting TK serves a broader need for sustainability in society by encouraging the maintenance of traditional practices and lifestyles, conserving bio-genetic materials, maintaining sustainable agriculture, and protecting the environment. According to a prominent advocate for Indigenous knowledge in Africa, *Ezeanyu-Esiobu*,[5] 'empowering Indigenous knowledge as a fundamental aspect of research in Africa will make for spontaneity which has been identified as the bedrock of creativity and innovation.' Protecting this knowledge is also important for members of the communities to commercially exploit and benefit from their knowledge,[6]

3. Intellectual Property and the Protection of Traditional Knowledge

Nigeria like many other countries has intellectual property laws that focuses on protecting copyright, trademarks, patents and industrial design. However, these intellectual property laws have failed to protect traditional knowledge in the society. TK does not fit into any of the categories of intellectual property laws making it prone to adoption by unauthorized individuals. As

[2] WIPO, 'Traditional Knowledge' https://www.wipo.int/tk/en/tk#:text=Traditional%20knowledege%20(TK)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity

[3] Mgbeoji, I. 2011. Bio-Cultural Knowledge and the Challenges of Intellectual Property Rights Regimes for African Development. NIALS' Convention Lecture Series. Abuja: NIALS Press, 43

[4] https//www.wipo.int,Intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore Fourth Session Geneva, December 9 to 17, 2002, WIPO/GRTKF/IC/4/8 para 28. Accessed 1/12/2024

[5] Chika Ezeanya-Eziobu, Indigenous Knowledge and Education in Africa (Springer Open 2019) 105.

[6] J. H. Mike & G. Uloko "Modern Approach to Intellectual Property Laws in Nigeria" (2nd edn Princeton & Associates Publishing Company Limited Lagos 2022) 362 - 371

innovations are made in traditional knowledge, it ought to benefit from intellectual property protection like other related copyrights because of its importance. Such TK ought to be protected as a trade secret or confidential information. When people within a community make innovations within the traditional framework, they may use the patent system to protect indigenous innovations. However traditional knowledge (TK), besides the aforementioned situation, is not protected by the conventional intellectual property systems. The lack of specific protection is largely due to the nature of intellectual property which is founded on private economic rights, whereas indigenous people's systems are values-based and collective.[7] Traditional knowledge cannot be easily identifiable or associated with a single creator or innovator. Generally, traditional knowledge does not fit into the forms of intellectual property such as patents and copyrights. Traditional knowledge should be eligible for protection under either intellectual property protection or a system known as 'sui generis', or a combination of both,[8] Some experts have argued for the application of existing intellectual property systems to Traditional Knowledge subject matter to prevent the global misappropriation of traditional knowledge, especially the extension of the Traditional Related Aspects of Intellectual Property Rights (TRIPS) agreement to cover the protection of Traditional knowledge,[9] for instance, the express disclosure of biodiversity/genetic resources, plant variety and traditional knowledge used in product development. Although the TRIPS agreement makes provision for the members to exclude patentability as it provides that 'plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and micro-biological processes',[10] members of the World Trade Organization can make provision for the protection of plant varieties either by patents or by an effective sui generis system or by both.[11] Accordingly, sui generis protection gives members more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties, such as novelty and disclosure,[12] the TRIPS agreement sets the minimum Intellectual Property Rights standards and leaves members free to determine the appropriate method of implementing them in their legal systems and practice, as long as it remains compatible with the Agreement,[13] The *sui generis* protection gives members flexibility to adopt a legal protection that is adaptable to particular circumstances. Countries can develop an Intellectual Property regime that is appropriate to preserve the cultural identity of traditional communities, commercially enhance the rights of TK holders, and prevent their knowledge from being commercialized and used in an insensitive manner by modern knowledge. The protection given by Intellectual Property would confer users of traditional knowledge a stronger right over third parties that engage in the unauthorized use of their traditional knowledge.

[7] UNCTAD. 'New Avenues Needed to Protect Traditional Knowledge, Urge Experts at Unctad Meeting' Geneva, Switzerland, 3 November 2000. https://unctad.org/press-material/new-avenues-needed-protect-traditional-knowledge-urge-experts-unctad-meeting, Accessed 1/12/2024

[8] Convention on Biological Diversity Article 8(j)

[9] UNCTAD (n7)

[10] TRIPS Agreement Article 27.3 (b)

[11] http/www.wto.orgThe Convention on Biological Diversity and the Agreement on Trade Related Aspects of Intellectual Property Rights, Note by the Secretariat, WTO document IP/C/W/216, of October 3, 2000, paragraph 33. Accessed 1/12/2024

[12] ibid

[13] TRIPS Agreement Article 1

China,[14] Cooks Island,[15] Peru,[16] Brazil,[17] Nepal, and Bhutan[18] are examples of countries that have made efforts to protect several aspects of their traditional knowledge and preserve their country's heritage. India is said to be the forerunner of most bio-diverse developing nations. Indian Parliament passed sui generis laws such as, 'The Indian Biological Diversity Act 2002' and Plant Verify Protection and Farmer's Rights Act 2001', which effectively set out to protect their traditional knowledge in unique ways. For example, the Traditional Knowledge Digital Library (TKDL) was developed in India to ensure that its Traditional knowledge is not misappropriated by third parties using more traditional means of Intellectual Protection such as patents,[19] The steps taken by the Indian government have helped to protect the use of neem extract and turmeric as a healing agent and to also win patenting claims in Europe,[20]

4. Traditional Knowledge Protection in Nigeria

Nigeria is yet to develop a *sui generis* system for the protection of TK within the context of IP. Despite its rich biodiversity, plant varieties, and genetic resources and the importance of TK to the development of a country's heritage, Nigeria is yet to emulate countries such as South Africa and India that have put in place legal measures for the recognition and protection of TK. Nigeria as a nation stands to benefit greatly from the protection of TK, taking giant strides to protect their TK from bio-piracy. Several research studies have indicated the medicinal properties of plant species found in Nigeria.[21] For instance, *Odebunmi's* work on the Igbo bitter cola, (*Akuilu in Igbo; Orogbo in Yoruba* and *Namijin-Goro in Hausa*) demonstrates that it is an essential resource for cancer and HIV-retroviral drugs.[22] Similar Pumpkin leaf, which is locally known as 'Ugu,' is one of those plants that contain important health benefits**.** It is said that Nigeria has several distinct species and is endowed with an enormous wealth of plant resources,[23] There are over 12 volumes of research reports and documentation prepared and published by the Nigerian Natural Medicine Development

[14] Regulations on Protection of Traditional Chinese Medicines (promulgated by Order No. 106 of October 14 1992 of the state council of the People's Republic of China) https://wipolex.wipo.int/en/text/337301 x; Regulations on Protection of Traditional Arts and Crafts, 1997, Accessed 1/12/2024

[15] Traditional Knowledge Act 2013

[16] Law No. 27811 on the Introduction of the Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources, 2002 https://wipolex.wipo.int/en/text/179597 x; Law No 28131 on performers (as amended up to Legislative Decree No 1391), 2003 https://wipolex.wipo.int/en/text/508130 x Beneficiaries (Article 2) Legislative decree No 1075 on Approval of Supplementary Provisions of Decision No 486 of the Andean Community Commission Establishing the Common Regime on Industrial Property (as amended by Law No 29316) 2009, Accessed 1/12/2024

[17] Law No 13.123 of May 20, 2015 (Access and Benefit Sharing of Genetic Resources and Associated Traditional Knowledge) Decree No 8.772 of May 11, 2016, on the Implementation of Law No 13. 123 of May 20, 2015.

[18] The Biodiversity Act of Bhutan 2003

[19] Deekshitha Ganesan, 'sui generis the answer: Positive Protection of Traditional Knowledge in India' Journal of Intellectual Property Law & Practice, Volume 11 Issue 1, (2016) 49-55. https://doi.org/10.1093/jiplp/jpv215

[20] Mukherjee R. 2013. Traditional Knowledge, culture can be patented. The Times of India, Dec 27, 2013. Retrieved on 23/6/2014 from http://www.timesofindia.indiatimes.com/business/indiabusiness/Traditional-knowledge-culture-can-be-patented/articleshow/27994684.cms.htm; Accessed 1/12/2024

[21] Odugbemi, T & Akinsulire, O. 2006. 'Medicinal Plants by Species Names. Outlines and Pictures of Medicinal Plants from Nigeria'. Odugbemi, T ed. Lagos: University of Lagos Press. 73-161

[22] Odebunmi, E. and Others 2009. 'Proximate and Nutritional Composition of Kola Nut, Bitter Kola and Alligator Pepper'. African Journal of Biotechnology. 8:2. 308-310.

[23] Maurice M. Iwu, Handbook of African Medicinal Plants. (CRC Press, 4 Feb 2014)

Agency, including digital identification and documentation of medicinal, aromatic, and pesticides plants (MAPPS), animal/animal parts, and minerals used in traditional medicine in Nigeria,[24]

The lack of protection may expose these herbal medicinal properties to exploitation and bio-cultural policy.[25] So far, a few but inadequate, efforts have been made to protect TK. Certain aspects of TK can be found in the protection of Folklore in Section 74(1) of the Copyright Act,[26] which states that:

Expressions of folklore are protected against-

(a) Reproduction;
(b) Communication to the public by performance, broadcasting, distribution by cable or other means; and
(c) Adaptations, translations, and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context.

The Act further stated in section 74(2) that the right conferred by section 74(1) shall not include the right to control the following acts: (a) the doing of any of the acts by way of fair dealing for private and domestic use, subject to the condition that if, the use is public, it shall be accompanied by an acknowledgment of the title of the work and its source; (b) the utilisation for purposes of education; (c) utilisation by way of illustration in an original work of an author; (d) the borrowing of expressions of folklore for creating an original work of an author; provided that the extent of such utilisation is compatible with fair practice; or (e) the incidental utilisation of expressions of folklore.

In section 74(3) the Act further stated that in all printed publications or any communication to the public of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by stating the community or place from where the expression utilised has been derived. The Act provides in section 74(4) that the right to authorise acts referred to in subsection (1) vests in the Commission. For section 74, the Act defines 'folklore' to mean a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means including-

a) folklore, folk poetry, and folk riddles;
b) folk songs and instrumental folk music;
c) folk dances and folk plays; and
d) productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles.[27]

Furthermore, the collective right and ownership element of trademarks in Nigeria suggests that the Trademark Act can protect TK. Outside IP Law, there are laws regulating the sale of traditional

[24] Kasim Musa Waziri, and Awomolo Omotayo Folasade (2014), 'Protection of Traditional Knowledge in Nigeria: Breaking the Barriers'. Journal of Law, Policy and Globalization, 29, 176.
[25] Mgbeoji, I. 2005. Global Biopiracy: Patents, Plants and Indigenous peoples. Vancouver: UBC Press; Roht-Arriaza, N. 1996.' Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities. Michigan Journal of International Law. 17:19:19.
[26] Copyright Act 2020 S. 74
[27] Copyright Act 2020 S. 74(5).

medicinal remedies in Nigeria, i.e. the National Agency for Food and Drug Administration Control (NAFDAC) Herbal Medicine and Related Products Labelling Regulations 2019 and the Traditional Medicine Act. The government also set up the Nigeria Natural Medicine Development Agency (NNMDA) in 1997 to research, develop, document, preserve, conserve, and promote Nigeria's natural medicine, traditional/indigenous healthcare systems, medications, and non-medication healing arts, science & technology.[28] Likewise, the Digital Virtual Library is a comprehensive national inventory of Medicine and Medicinal, Aromatic, and Pesticidal Plants (MAPPs) that was designed to develop observational studies and document scientific evidence for herbal therapies and topical ailments.[29] It also aims to develop an appropriate mechanism for the intellectual property rights mechanism for the development and promotion of traditional medicine and to serve as a reference center for traditional medicine knowledge & practice,[30]

Traditional knowledge has not been protected due to reasons such as the lack of awareness of communities about their rights to traditional knowledge and the threat to their traditional knowledge by non-indigenous persons. Also, traditional knowledge has been passed down through generations by word of mouth rather than through documentation. The inadequate documentation of this knowledge is a hindrance to the protection of TK.

In particular, however, Nigerian IPR laws require significant reforms for the recognition, protection, control, and management of TK. The lack of strong legal support and government policies to protect TK may dispose the Indigenous people of Nigeria of their bio-cultural knowledge and limit their capacity to challenge the inappropriate and unlawful appropriation of their existing knowledge by others. A distinct and positive sui generis IP legal regime (either as a substitute or as a complement to the existing mechanisms of IP) must be enacted to comprehensively assist, promote, preserve, and protect the very rich and bio-diverse indigenous knowledge, cultural heritage, and nation's IP rights. Similarly, measures are needed to avoid over-exploitation of TK and to make commercialization sustainable.

5. Findings

Despite the contribution of traditional knowledge and its significance to society, it is found that the practitioners are adequately protected under the Nigerian intellectual property laws thereby subjecting their lofty ideas to the mercy of unauthorized persons to tap from. The lack of a legal framework for the protection of traditional knowledge tends to discourage local practitioners whose importance and relevance cannot be undermined in society.

Conclusion

It is concluded that the lack of a legal framework for the protection of traditional knowledge and its practitioners has left the works of these practitioners to be exposed to taping by unauthorized persons which is not healthy for the practitioners. Traditional knowledge is used by non-indigenous communities and persons without compensating or recognizing the originating communities of the traditional knowledge and this prevents or limits local growth and innovation. It is therefore concluded that a quick legislative framework, community awareness and engagement, and national and international cooperation are not only desirable but expedient for the protection of traditional

[28] Nigeria Natural Medicine Development Agency, 'About Us' http://nnmds.gov.ng/about-us/>
[29] Nigeria Natural Medicine Development Agency, 'Services' http://nmda.gov.ng/services/ Accessed 1/12/2024
[30] Ibid.

knowledge practitioners. Through these, the traditional knowledge of ethnic groups in Nigeria can be safeguarded for future generations.

6. Recommendation

It is recommended that there should be a legal framework for the recognition and protection of traditional knowledge and its practitioners owing to its importance in society and the fact that it is an emerging area in the intellectual property right