

ABUAD Law Journal (ALJ)

(2025). Vol. 13, No. 1, Pages 46-67 <https://doi.org/10.53982/alj.2025.1301.03-j>

Published by College of Law, Afe Babalola University Law Journal,
College of Law, Afe Babalola University, Km 8.5, Afe Babalola Way,
P.M.B. 5454, Ado Ekiti, Ekiti State, Nigeria. ISSN: 2971-7027
www.abuad.edu.ng, abuadlawjournal@abuad.edu.ng

PROTECTION OF EXPRESSIONS OF FOLKLORE IN NIGERIA: THE EXPEDIENCY OF LEGAL IMPROVEMENTS

Olorunnipa, Temitope Abigail*

Dorcas A. Odunaike**

Bankole Sodipo***

Rights of traditional communities to their expressions of folklore deserve to be effectively protected through every legal means possible. Customary law governed expressions of folklore in the traditional sense but same is inadequate to ward-off intruders especially in the contemporary sense due to civilisation. Existing legal framework for protection through the intellectual property law systems seems inadequate. Review of these rights by the international community has indicated desire for more adequate protection in some jurisdictions. Hence, the move for sui generis measures and system to forestall abuse, misuse and misappropriation of folklore. Recent amendment of the copyright legislation of Nigeria did not cover the aspect of expressions of folklore. With the use of doctrinal method of research and an inductive content analysis of primary and secondary sources of information, this paper examines the legal regime of protection of folklore under contemporary intellectual property rights as provided under the Nigerian law with the aim of pinpointing the adequacy or otherwise of the protection so granted. The article discovers that being a multi-ethnic country and having transnational ethnic group, it is best that permission to make use of expressions of folklore resides in traditional communities where they are ascertainable than in the Nigerian Copyright Commission (NCC) where the source is uncertain or resides in more than one community and also recommends that the NCC rise to the task of performance of duties as the traditional custodians would have done.

Key words: Folklore, IPR, protection, *sui generis*, traditional communities, TCEs.

1.0 Introduction

As with other property rights, the law ensures protection for creations of the human minds being assets of the owners for different reasons in several forms. Intellectual property are works, innovations, inventions or products which are the creation of the human mind.¹ The law gives specific rights to the creator, innovator or inventor of such works for a period of time. Intellectual property right (IPR) are rights created by the law to protect creative efforts or commercial reputation and goodwill of inventors, creators and innovators as regards literary works, artistic works, films, computer programs, inventions, designs and marks to prevent unfair exploitation of creativity,² that is not acknowledging the creator or sharing economic benefits thereof.

This article focuses on the IPRs regarding creative works of traditional community that are expressed in one form cum the traditional knowledge that produced them. The protection for traditional cultural expression (TCEs) or expressions of folklore (EoFs) in Nigeria has become a source of concern in recent time due to threat to heritage products by imitations of cultural products without remedy in sight (such as the Adire imitation), digitalisation of traditional sacred arts such as video recording of traditional rites, misrepresentation of cultural property such as the Eyo masquerade contentions stemming from a film production and the appropriation of cultural expressions such as use of traditional knowledge in TCEs without acknowledgement of traditional communities.

1.1 Need for Protection of Cultural Intellectual Property

Discussing the importance of protecting the Nigerian cultural property, Sodipo stated that³

*Lecturer Lead City University and PhD Candidate Babcock University, Ilisan
Olorunnipa0202@pg.edu.ng

**Professors of Law, Babcock University.

¹ E. B. Deborah, *Intellectual Property: The Law of Trademarks, Copyrights, Trademarks and Trade Secrets* (4th Edn., Delmar Cengage Learning, 2012) p. 3.

² David I. Bainbridge, *Intellectual Property* (8th Edn., Pearson, 2010) p. 3

³ Titilayo Adebola and Bankole Sodipo, 'The Return of Looted Benin Bronzes: Art, History and the Law' *Afronomicslaw* (30 October 2021) < <https://www.afronomicslaw.org/category/analysis/return-looted-benin-bronzes-art-history-and-law> > accessed 25 November 2023.

...we needed to study our forms of creativity and innovation and protect it with suitable laws. That was my interest at the time. In the mid-1990s, the World Intellectual Property Organisation set up an investigative team to explore the intellectual property rights landscape around the world. It was at that time that ideas on traditional knowledge and traditional cultural expressions were birthed. Before then, people referred to folklore. In relation to Nigeria, we have not done enough to identify what constitutes folklore. For instance, we do not have a database for folklore. Since we do not know who constitute folklore, we do not value these works. That is one of the problems we have in relation to preservation and protection of our creative works. It is time for us to start placing value on our brilliant world class works. Hopefully, the return of these bronzes will spur a love for our arts and history. If the Benin and Ife dynasties 500/600 years ago were able to produce works which measured up to internationally celebrated standards, it means we had a high level of sophisticated civilisation before slavery and colonisation.

Traditional cultural expressions (TCEs) of indigenous or traditional communities are the product of their ingenuity which, though not a part of the contemporary intellectual property, are also protected by intellectual property law.⁴ TCEs is referred to as Expressions of Folklore in the Copyright Act, 2022.⁵ As such, both expressions will be employed herein.

TCEs are the common identity of a society which is expressed in the form of a common language, visual images, skills or know-how or traditional forms of performance.⁶ Rooted in tribal, religious or ethnic origin of a people, TCEs are presentable in the form of the classical categories of the arts namely dramatic and musical performance, writings, and visual arts or in the form of traditional categories of the arts like images, symbols, crafts, oral and performance arts.⁷ Thus, traditional knowledge (TK) that are expressed one way or the other are also part of TCEs.

⁴Copyright Act(CA) 2022, Part IX.

⁵ CA, s. 74-76; WIPO, 'Folklore' <<https://www.wipo.int/tk/en/folklore/>> accessed on 28 September, 2022; Martinet L, 'Traditional Cultural Expressions and Intellectual Property Law' (2019) 47 International Journal of Legal Information 6

⁶ ibid.

⁷Christine Steiner 'Intellectual Property AndThe Right To Culture' <[wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_2.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_2.pdf)> accessed on 20thSept, 2022

Traditional knowledge is the living body of knowledge, skill and know-how passed from generation to generation by a traditional community.⁸ It relates generally to agriculture, medicine, technology and other aspects of existence that are peculiar to a traditional community and is passed down from generation to generation. It extends to the use of biodiversity and genetic resources in the daily living of a community.⁹ Hence, words, pictures, designs and variants, monuments, performance, and sculpture are cultural representations bearing traditional knowledge and as such are cultural heritages that need be protected by intellectual property law. Therefore, this work touches on both tangible and intangible cultural heritage namely artistic interests, traditional songs, dances, painting, sculpture and other forms of folklore expressions.

It is believed in some quarters that though conventional intellectual property right systems tend to protect TCEs to certain extent, especially as regards the classical categories of arts, the traditional forms of art embodied in TK like the artistic skills and medicine seem to suffer greatly.¹⁰ Even international bodies on IPRs recognize that these aspects of human life requires peculiar protection and preservation.¹¹

Generally, the protection of TCEs are not in a distinct form of category of intellectual property right provision for reasons of being embedded in all the conventional forms of intellectual right provisions.¹² Tunisia took the lead in the protection of TCEs in 1967¹³ and about the same time, the international platform also provided for such protection vide the 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the

⁸ WIPO, 'Traditional Knowledge' (2023) <<https://www.wipo.int/tk/en/tk/>> accessed 2 November 2023

⁹ An example is the use of pawpaw leaves, neem leaves and mango tree bark to cure fever in south-west Nigeria, eating of hoodia to suppress hunger by the San people in South Africa, and the use of turmeric for traditional healing in India; Intellectual Property as a Lever for Economic Growth, The African Experience, Part II, WIPO Magazine, November-December 2003

¹⁰ *ibid*

¹¹ WIPO, 'Protection of Traditional Cultural Expressions and Traditional Knowledge – Key Issues' <<https://www.wipo.int/tk/en/folklore/>> accessed on 22 Sept., 2022

¹² Yudiaryani, Yudiaryani. 'A" Blue Print" of Intellectual Property Rights (IPR) Protection on Copyright of Artists and Traditional Cultural Expression (TCE) to Strengthen National Cultural Development.' (2021) 1 e-Prosiding Pascasarjana ISBI Bandung 1

¹³ Daphne Zografos, 'The Legal Protection of Traditional Cultural Expressions - The Tunisian Example' (2004) 7 The Journal of World Intellectual Property 229.

Protection of Literary and Artistic Works.¹⁴ Since then, the United Nations through World Intellectual Property Organisation (WIPO) and in collaboration with The United Nations Educational, Scientific and Cultural Organization (UNESCO) has been on top of the methods of protection required for folklores and TCEs from misuse and misappropriation.¹⁵

For instance, Tunis model law for protection of folklore for developing countries was adopted in 1976 and in 1982, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions were adopted. Also in 1996, WIPO Performances and Phonograms Treaty (the WPPT) was adopted and it came into force in 2002. The WPPT provides for the inclusion of performers of folklore in the ‘performers’ which was not contained in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”)¹⁶

States approach protection of TCEs is in different forms.¹⁷ Some states such as the United States use contemporary IPRs comprising copyright, trademark, patent, designs and geographical indication which is believed to provide adequate protection for cultural IP.¹⁸ Some other States such as the Republic of Panama and Kenya believe that the conventional IPR protection is considered not adequate thereby giving rise to the *sui generis* measures and systems.¹⁹ Yet other states such as South Africa believes that new specific measures and statutory systems should be established as complement to the existing IPR or as substitutes for them.²⁰ These approaches to protection are considered

¹⁴ WIPO, ‘Intellectual Property and Traditional Cultural Expressions/Folklore’ (Booklet No 1, 2005) <https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf> accessed 22 September 2022.

¹⁵ Thankam Krishnan, 'Folklore and Its Protection' (2020) 3 Int'l JL Mgmt & Human 616.

¹⁶ See Art. 3(a) Rome Convention

¹⁷ WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions* (WIPO/GRTKF/IC/5/3)

¹⁸ *ibid.*

¹⁹ *ibid.*; Panama Law No. 20 (June 26, 2000) and Executive Decree No. 12 (March 20, 2001); The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Act No. 33 of 2016).

²⁰ *ibid.*; WIPO, ‘Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore’ <https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf> accessed 15 May 2023

not to be mutually exclusive by the international community.²¹ Thus, conventional IPR protects TCEs while other measures complement them to close the perceived gaps in the existing laws.²² Hence, the protection of TCEs can be found in the conventional IP as well as in the *sui generis* options in different jurisdictions.

2.0 Benefits of Traditional Cultural Expression

It has been expressed that 'folklore is almost impossible to define succinctly'.²³ TCEs or EoFs²⁴ are the different forms in which the traditions or cultures of a people are expressed. TCEs are the cultural and social presentations of an indigenous community which are handed down from one generation to another. They are the cultural heritage of a people.²⁵ TCEs represent the cultural and social identities of indigenous and local communities, their general know-how and skills, and value systems and belief which include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.²⁶ TCEs are thus the ingenious creation and peculiar way of life, art, skills and products of a people or society which they have handed down to successive generations.

TCEs can be in tangible or intangible or mixed form.²⁷ As already stated, the Nigerian Copyright Act²⁸ employed the term expression of folklore and defines "folklore" to be 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 folklore, folk poetry, folk riddles, folk songs, instrumental folk music, folk dances, folk

²¹ That is, use of conventional IPRs and adoption of *sui generis* system of protection,

²² *ibid.*

²³ Bankole Sodipo, *Copyright Law: Principles, Practice & Procedure* (2nd edn, Swan, 2017) 379.

²⁴ For instance, Copyright Act, S. 74

²⁵ K.C. Ying, 'Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent Is Copyright Law The Solution?' (2005) 32 JMCL 31.

²⁶ <<https://www.wipo.int/tk/en/folklore/>> accessed 22 September 2022

²⁷ Rosemary J. Coombe, 'First Nations' Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law' 247-277.

²⁸ Copyright Act 2022, s 74 (5)

plays and productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles. From the definition set out, it is clear that TCEs examples include traditional songs,²⁹ poetry,³⁰ stories, cultural festivals,³¹ marriage ceremonies, traditions tales and plays, traditional arts, carving, sculptures and paintings and all other traditional expression common to a people based on their ethnic or geographical origin.

Being original in their cultural forms and peculiar to a people, TCEs are potential and veritable means of growing the popularity and economy of a traditional community or locality and the nation at large. They are of economic benefits to owners of cultural heritage as custodians and the people living or doing businesses in the vicinity can have their sources of income and incomes increased. They represent several means of income for the people of a locality. Promotion and protection of TCEs can put a local site on global economic and tourist limelight. For instance, people travel from far and wide to participate or witness Osun Oshogbo festival, Eyo festivals in Lagos, Argungu Festival in Kebbi and to traditional sites like the Olumo Rock, Ikogosi Water sites, the Sacred *Mijikenda Kaya Forests in Kenya*³², Mapungubwe Cultural Landscape and Khomani Cultural Landscape both in South Africa³³, Mbanza Kongo (vestiges of the capital of the former Kingdom of Kongo in Angola)³⁴ to mention a few. TCEs thus represent good opportunity for tourism from which the government can earn income as well as enjoy popularity.

Also, if given proper attention and protection, TCEs have potential for growth of contemporary businesses of private individuals and corporate bodies through works of art, hospitality, food and beverages, textile and clothing, to list few, that can consequently serve as means of improving government revenue through tax payment. Little need be

²⁹ Such as *Ijala ode* and *orin aro* by Yoruba people of Nigeria

³⁰ Such as *ewi* by Yoruba people of Nigeria

³¹ such as Osun of Oshogbo, Eyo masquerade, Iggunnu masquerade

³² UNESCO <<https://whc.unesco.org/en/statesparties/ke>> accessed 20 September 2022

³³ *ibid.*

³⁴ UNESCO <<https://whc.unesco.org/en/list/1511/>> accessed 20 September 2022

said of cultural fair and exhibitions, museums and monuments, crafts and designs, plays and displays as means by which a nation can improve its Gross Domestic Product.

Against the backdrop of the foregoing, TCEs are assets economically and culturally. Modernization and civilization cannot stripe the owners of TCEs truthful importance of their proper deployment. Hence, it is essential to guard TCEs against misuse and misappropriation as the loss of any cultural expression is to be treated as a tragedy to the indigenous people and traditional communities. Being of economic importance and representing the cultural assets of the people, the law assiduously makes different provisions to ensure the people and community are given a pride of place as regards their property.

3.0 Analysis of Protection by Contemporary IPR

Protection of TCEs means preserving, promoting wider use, controlling use, preventing misuse or channeling a proper share of benefit to TCE holder.³⁵ Apart from IPR, legal and policy measures can aid the achievement of these forms of protection. TCEs are usually collectively owned by a community or more and they transcend one generation. Therefore, authorship of the expression may be unknown which means that current IPR may not cover the entire protection being sought.

However, contemporary literary or artistic work based on, derived from or inspired by traditional culture are protected by IP Law³⁶ if they pass the test of originality and newness respectively. Interestingly, the IP law does not investigate the authority or identity of the author. Which means that a person who is not a member of the traditional community may pass the test of originality as an author. This is one of the gaps in the IP system of protection. While some cultural heritage custodians believe TCEs as source of economic development, others believe it should be prevented from

³⁵ WIPO, Intellectual Property & TCEs/Folklore, WIPO document (Booklet No 1) (Published in 2005) p. 12

³⁶ for instance Copyright and Industrial design

unwanted use by third parties while still others believe that IPR should not be allowed to be obtained on common heritage.³⁷

As stated above, some schools of thought believe that conventional IPR provides the right protection while others believe that there should be *sui generis* measures and systems to supplement the protection being provided by the IPR. Traditional communities in Nigeria, as other African countries, had protected their tangible and intangible heritages through cultural practices such as magical beliefs, fines, ostracism and even death which was effective within the operation of customary law which the people were accustomed to practicing but which is highly ineffective to tackle contemporary issues such as unauthorized uses.³⁸ Thus, Nigeria has since been protecting TCEs through copyright and has still maintained same position in the new Copyright Act, 2022.³⁹ WIPO acknowledged that contemporary IPR caters for TCEs while some other measures are constantly being put in place to check the gaps.⁴⁰

Accordingly, existing IPR systems (copyright, geographical indications, appellation of origin and trade marks) protect TCEs. For example, contemporary adaptation of folklore can be copyrighted while performances of traditional songs and music may come under the WIPO Performance and Phonograms Treaty and the Beijing Treaty on Audiovisual performance. Also, trademark may be used to identify authentic indigenous arts like the Maori Arts Board in New Zealand.⁴¹ *Sui generis* systems and measures have also been adopted by some jurisdictions like Kenya, which also has multi-ethnic groups like

³⁷ WIPO, Intellectual Property & TCEs/Folklore, WIPO document (Booklet No 1) (Published in 2005) p. 15

³⁸ Bankole Sodipo, *Copyright Law: Principles, Practice & Procedure* (2nd edn, Swan, 2017); Ayoyemi Arowolo, *Intellectual Property Rights, Traditional Knowledge Systems and Jurisprudence in Africa* (2012, Ababa) 10.

³⁹ See Copyright Act, 2022.

⁴⁰ for instance, The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) undertakes text-based negotiations to finalize an agreement on an international legal instrument(s) for the protection of traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs) <<https://www.wipo.int/tk/en/igc/>> accessed 22 September, 2022; WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is also negotiating international legal protection of TCEs.

⁴¹ *ibid*

Nigeria, with the enactment of specific and special legislations as sui generis system to protect expression of folklore.⁴²

To qualify as folklore under the Nigerian Copyright Act, an expression must be (a) a group-oriented and tradition-based creation of groups or individuals; (b) reflecting the expectation of the community; (c) as an adequate expression of its cultural and social identity, its standards and values (d) as transmitted orally, by imitation or by other means. Thus, it is unnecessary that the author is anonymous.⁴³

3.1 TCEs and Performer's right

IPR provides for the protection of a performer of cultural expression.⁴⁴ The question to be asked is whether the performer of an indigenous folklore is from the indigenous community as to accord him the right so granted. What happens to the indigenous communities' right if a performer is merely performing an adaptation of a folklore?

3.2 TCEs and Patent

Patent of an invention may also be granted for methods of producing a tangible cultural item just as it is done to the Russian Porcelain Glaze. Processes leading to cultural inventions such as pottery and terra cotta in Nigeria should also be subjects of patent protection if the right laws are in place to accommodate them. Some decades past, Nigeria was able to achieve the invention and patenting of a medication named NIPRISAN for the maintenance of sickle cell disease through collaboration of the National Institute for Pharmaceutical Research and Development (NIPRD) with a traditional knowledge custodian.⁴⁵ The question arising as regards the possibility of patent grant for traditional knowledge based innovation is whether patentability requirements would be satisfied just as in the case of NIPRISAN. Would patent have been granted

⁴²Protection of Traditional Knowledge and Cultural Expressions Act 2016

⁴³Bankole Sodipo, *Copyright Law: Principles, Practice & Procedure* (2nd edn, Swan, 2017) 380.

⁴⁴ See for instance Copyright Act, ss. 63-73.

⁴⁵ Obi Peter Adigwe, Godspower Onavbavba, and Solomon Oloche Onoja, 'Impact of Sickle Cell Disease on Affected Individuals in Nigeria: A Critical Review' (2023) 16 Int J Gen Med. 3503, doi: 10.2147/IJGM.S410015. PMID: 37601802; PMCID: PMC10438428; Kumar Perampaladas, Hassan Masum, Andrew Kapoor, Ronak Shah, Abdallah S Daar, and Peter A Singer, 'The road to commercialization in Africa: lessons from developing the sickle-cell drug Niprisan' (2010) BMC Int Health Hum Rights 10 Suppl 1(Suppl 1):S11<doi: 10.1186/1472-698X-10-S1-S11> accessed 1 october 2023.

NIPRISAN if the National Institute for Pharmaceutical Research and Development (NIPRD) was not involved? Lack of ‘western’ technological advancement in production of most traditional knowledge based products poses as a challenge for Nigerian and indeed African cultural society due to ‘prior art’ status of most cultural items.⁴⁶ Therefore, the requirements for an invention to be patentable under contemporary patent system would be difficult to meet for most folklore.

3.3 TCEs and Unfair Competition

Acts contrary to honest practices in industrial or commercial matters are unfair competitions.⁴⁷ These acts include conducts which may cause confusion with the products or services of a competitor, false allegations which may discredit the product or services of a competitor, and indications or allegations which may mislead the public as regards manufacturing or quality of goods or services. The essence of this aspect of IP is to prevent misleading of people as regards the origin of a product especially where such will be disadvantageous to an indigenous community or traditional people. For instance, production of TCEs which quality demean the status of a cultural locality such as substandard cultural product being branded by a third party as belonging or emanating from the indigenous community amounts to passing off, an unfair competition for which the law of torts should apply. An example is the recent influx of the Nigerian markets with fake *Adire* fabrics by Chinese companies which is still begging legal remedial intervention.⁴⁸

3.4 TCEs and Geographical Indications

According to Art. 22(1) TRIPS Agreement,⁴⁹ geographical indications are indications which identify a good as originating in the territory of a member or region or locality in

⁴⁶Ayoyemi Arowolo, *Intellectual Property Rights, Traditional Knowledge Systems and Jurisprudence in Africa* (2012, Ababa) 129.

⁴⁷ TRIPs Agreement 1994, arts 22.2 and 22.3; Paris Convention for the Protection of Industrial Property, 1883, Art 10^{bis} para 2.

⁴⁸ Temitope A. Olorunnipa, Yewande Fatoki, and Matilda A. Chukwuemeka, ‘Rights in Traditional Cultural Expressions: Weaving Intellectual Property Protections into *Àdìrẹ* Textiles’ (2024) 4(1) JIPIT 69-100 (ISSN: 2788-6727) <<https://doi.org/10.52907/jipit.v4i1.503>> accessed 21 January 2025; Olufemi Adediran, ‘Fgto Subsidise *Adire* Production to End Incursion of Fake Fabrics – Edu’ *New Telegraph* (Nigeria, 5 November 2023) <<https://newtelegraphng.com/fg-to-subsidise-adire-production-to-end-incursion-of-fake-fabrics-edu-2/>> accessed 6 November 2023.

⁴⁹ Agreement on Trade-Related Aspect of Intellectual Property Rights.

that territory where a given quality, reputation or other characteristics of the goods is essentially attributable to its geographical origin.⁵⁰ Art. 22(2) states the need to provide legal means for interested parties to prevent:

- a. The use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in the geographical area than the true place of origin in a manner which misleads the public as to the geographical origin of the goods
- b. Any use which constitutes an act of unfair competition within the meaning of Art. 10bis of the Paris Convention, 1967

By reason of Art. 22(3), a state may refuse or invalidate the registration of trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated if the use of the indication in the trademark for such goods in that state is such a nature as to mislead the public as to the true place of origin.

Also, Section 43 of the Trademark Act⁵¹ provides for the registration of certification trademark.⁵² These provisions do not seem to sufficiently protect geographical indications and even enforcement outside Nigeria. This is because although Nigeria is a signatory to TRIPS Agreement, she is yet to domesticate the geographical indication aspect of the TRIPS agreement in accordance with section 12 of the 1999 constitution. Thus, the Paris Convention, the TRIPS Agreement and other relevant international treaties to which Nigeria is a signatory on geographical indication can only have persuasive effect until they are domesticated.

3.5 TCEs and Copyright

Copyright covers literary works, artistic works, musical works, audio-visual works, sound recording and broadcast.⁵³ Many TCEs expressed as cultural heritages are potentially protectable such as dance, play, stories, ceremonies, rituals, artworks, sculpture and

⁵⁰ See Princy Varghese, 'Traditional Knowledge and Limitations of IPR' (2020) 21 *Supremo Amicus* 264.

⁵¹ Cap P2 LFN, 2004

⁵² Ayoyemi Lawal-Arowolo, 'Geographical Indications and Cultural Artworks in Nigeria: A Cue from Other Jurisdictions' (2019) 22 *J World Intell Prop* 364

⁵³ Berne Convention for the Protection of Literary and Artistic Works 1971, Art. 2(1) – (5) and Copyright Act, s. 1

painting. The moral and economic rights protected by copyright can well suit the desires of indigenous owners through royalty payment for use and damages for infringements.⁵⁴ There are however limits to the applicability of copyright to TCEs as a means of protection.

A cardinal requirement of copyright protection of work is originality — that is, the creator must have expended some effort on making the work ‘to give it an original character’.⁵⁵ In copyright law, originality means input of some degree of intellectual effort in a work rather than it being copied. This requirement, TCEs may not be able to fulfil as it were; meaning that TCEs ordinarily do not qualify as original works.⁵⁶ Thus, this requirement of originality prevents protection of the categories of works described as TCEs by copyright principles.

Under the general law and in accordance with the common law, tradition based works are considered original for protection if some new expression is added beyond the traditional expression.⁵⁷ Furthermore, the law does not distinguish the identity of the author. Thus, a person who is not a member of a traditional community could secure copyright in contemporary expression or adaptation. This may disturb a community wishing to protect their cultural creations by copyright. Hence, such persons are supposed to have obligations like royalties or acknowledgment or some moral right to the indigenous communities. But there are issues where the work is an unoriginal creation or mere recreation of pre-existing cultural heritage which would not meet the requirement of originality. It would depend on the sui generis policy of each state.⁵⁸

Another requirement in copyright is that the identity of the author must be known. Creators of cultural heritages are unknown because TCEs are communally created and so there exists communal ownership or at best the main creator is anonymous. Although

⁵⁴ Copyright Act 2022, s. 75-76.

⁵⁵ Copyright Act 2022, s 2(a); *University of London Press v University Tutorial College Press* (1916) 2 Ch 601.

⁵⁶ WIPO Hungary’s Questionnaire p.2 at <www.wipo.int/tk/en/questionnaire> accessed on 30 September 2022.

⁵⁷ CA

⁵⁸ See CA s.74

copyright can protect group creators as joint creators, the identity of the creators must be known. There would be joint authors but each retains their copyright. Usually, contemporary tradition-based cultural expressions meet this requirement.⁵⁹

Moreover, the concept of ownership in copyright is different from that of customary law. Copyright confers exclusive private property right on authors while indigenous authors are subject to regulations and responsibilities more or less like management right which are, by nature, communal. Thus, some things that copyright may naturally permit like licensing of rights may not be permissible by customary tradition.⁶⁰ For example, artworks and ritual utensils considered to be sacrilegious may not be subject to license as contemplated under copyright.

Furthermore, a cogent requirement of copyright is that the work must be fixated in a medium of expression. That requires fixation of intangible or oral expressions like songs, tales, and stories in some form of medium of expression or form of media. TCEs may fall short of this requirement. Even some fixed expressions would not meet this requirement ordinarily. A good example of this is face painting during festivals and cultural displays, though fixed but not of a permanent nature.

Copyright has term duration set for protected work before it goes to the public domain. This duration of term before the protection would lapse may not meet the need of traditional communities or indigenous people because TCEs are trans-generational and so exist in perpetuity. The effect is the exposure of TCEs to abuse but WIPO member states have the liberty to establish indefinite protection policy.

Besides, there is limit to what copyright can protect as it relates to TCEs. In copyright, there is no defensive protection (by which communities prevent access to intellectual property rights of their heritage by third parties) to deter exploiters of TCEs. There is a crucial need for defensive protection against exploiters which is lacking in copyright

⁵⁹ See Copyright provides for anonymous and pseudonymous works in Art. 7(3) Berne Convention but there is no author for pre-existing TCEs.

⁶⁰Yumbulul, T. v Reserve Bank of Australia, Aboriginal Artists Agency Ltd - [1991] FCA 448 - 21 IPR 481

towards TCEs. It is essential that there should be provisions targeting deterrence of third parties who might infringe on the copyright in TCEs. This is to forestall situations of successful contemporary adaptations of TCEs or grant of right to new tradition-based expressions on grounds of exceptions⁶¹ or imitation of style of TCEs.⁶²

Another inadequacy of copyright protection of TCEs is in terms of adequacy of remedy for infringement. As already said, TCEs are collective property of a traditional community, hence, copyright remedy for infringement may not be adequate for infringement of right in a particular expression especially where such is sacred to the community. Remedies in copyright may not be adequate to deter third parties from infringing on folklores. Damages contained in the Copyright Act are grossly low and as such not suitable to compensate a traditional community for infringement on their cultural expression.

Be that as it may, the Nigerian Copyright Act⁶³ vests ownership of TCEs in Nigeria the Nigeria Copyright Commission, thereby displacing the traditional communities who are the real owners and custodians of the expressions. This, in itself, opens TCEs in Nigeria up for abuse, misuse, misappropriation and other forms of infringements.

Essentially, there are limits to what copyright can cover in terms of protection of TCEs. Where copyright does not cover like the area of style, other aspects of IP like patent will be applicable. This is where the sui generis system can be said to operate. Thus, copyright protects tangible, contemporary traditional-based TCEs while in some countries not requiring fixation, such works are also protected. International law principles allow countries to also amend their law to incorporate the gaps or establish sui generis systems and measures as Kenya has done.⁶⁴

3.6 TCEs and Trademark

⁶¹ For instance, where government owned cultural troupe displays folklores with the effect of sending a wrong signal about the sacredness of such folklore to the indigene.

⁶² Style in TCEs are in fact vulnerable to imitation because copyright does not extend its protection to style or process or method of manufacture.

⁶³ S. 74(4)

⁶⁴ See Kenya's Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Act No. 33 of 2016)

Trademarks are the distinctive signs used in commerce to distinguish peoples' goods and services from each other.⁶⁵ The mark may be in form of words, drawings, devices, shapes and signs. It is a concern whether non-members of an indigenous community can use a community's marks be it names, designs, symbols and other distinctive marks in the course of their trade and consequently registering them as their trademark as community marks and words are usually unregistered.⁶⁶ Therefore, there is international set standard for the protection of indigenous marks or symbols and any use that is deceptive suggesting association with or endorsement by indigenous community.⁶⁷ This means it is expected that there should be laws or specific IPR developed to define or give notice of the distinctive reputation or signs and symbols of indigenous communities such as authenticity labels and certification marks, and prohibition of the use of some terms and symbols. Nigeria has the Trade Marks Act 1967.

There could be registration of words, names and marks trademarks by third party.⁶⁸ The use and registration of trademark by non-member of indigenous communities can cause confusion in the mind of consumers as regards the origin of such mark, word or name. Such use can mislead consumers to believing the product or services has links or ties genuinely or quality-wise with the indigenous community when in fact there are no such links or ties. It may also lead to distrust as regards the kind of product or quality of products or services so associated with the community. If the products are inferior, it gives a negative impression of the indigenous community. Therefore, although in Nigeria, trademarks law does not allow for remedy for unregistered marks under the statute, it does not prevent remedy through unfair competition law such as passing off, laws on misleading and false advertisement and labelling.⁶⁹ Some regions of the world

⁶⁵ Deborah E. Bouchoux, *Intellectual Property: The Law of Trademark, Copyright, Patent and Trade Secrets* (Fourth Edition, Cengage Learning, 2012) 3-4; TRIPS Agreement, art. 15; *The Procter and Gamble Company v Global Soap and Detergent Industries Ltd* (2012) 19 WRN 83.

⁶⁶ WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis* (WIPO/GRTKF/IC/45/7, 2022) para 58; WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions* (WIPO/GRTKF/IC/5/2, 2003) page 48 para 149-150.

⁶⁷ That is use of industrial property law.

⁶⁸ Trade Marks Act 1967, s 5 & 6.

⁶⁹ Trade Marks Act 1967 CAP T13, LFN 2004, s 3.

have in time past come up with the defensive protection of TCEs through trademarks registration.⁷⁰

Another important aspect of trademark is the role of opposition and cancellation procedures. Trademark law allows for opposition or cancellation of registration of a trademark by a person including indigenous people on ground that the mark lacks distinctiveness, is contrary to the law or scandalous or that the proposed mark is deceptive and confusing as to the applicant's goods and services or a third party rights held by a community or that the right or mark belongs to a community.⁷¹ But most times indigenous people are not always aware of the relevant government gazette and journals when trademark registration are notified.⁷²

Despite the protection offered under trademark law, the trademark system does not meet the desire of traditional communities to protect their marks or symbols as heritage because some indigenous mark, names or symbols may be sacred or are not being used in the course of business. In other words, traditional communities desire protecting their words and other marks against exploitation by third parties as heritage materials not necessarily because they are engaged in the course of businesses which does not meet the requirement that trademarks be used in the course of trade or have genuine intention to trade.⁷³ But this does not prevent the communities from protecting their marks and words.⁷⁴ Other challenges to the trademark system are renewal fees, lack of awareness of

⁷⁰ USA Patent and Trade Office put policy in place to establish a comprehensive database of Native Americans tribes insignia thereby preventing third parties from registering the marks or insignia that belongs to an indigenous community- S. 2 (a) Trademark Act, 1946, Trademark Law Treaty Implementation Act, 1998); also in New Zealand, registration of marks offending the Maori community was rejected- S 1(1)(b)(i) New Zealand Trademark Act; in Colombia, registration of the expression 'Tairona' was rejected because it belonged to an indigenous community and only their representative could use it - Art. 136 (g) of Decision of the Commission of the Andean Community; In Australia, for instance, the law allows indigenous label of authenticity (Trademark number 772566 of Australia protects indigenous people's right, culture, respect, values and protocols); Petroglyph (ancient rock painting images) held to have special and religious significance in Canada and has helped in stoppage of commercial use of the painting in T-shirts and other commodities.

⁷¹ Trade Marks Act 1967, s 20.

⁷² Janke WIPO

⁷³ Trade Marks Act 1967, ss 9 and 31.

⁷⁴ For instance, indigenous Australian applied to register their cultural festivals, soaps, body lotions and other natural resources products, textiles and clothing and so on but many of them are not registered because they are either deceptive or not properly applied for.

the law and its possibilities as discussed above especially as concerns invalidation and cancellation of proceedings.

3.7 TCEs and Industrial Designs

Most tangible cultural heritages are eligible for protection by industrial designs. There is however the challenge of third parties exploiting cultural designs without authority, acknowledgement or even sharing the benefits with the traditional owners. Some third parties even register them as their new and original designs especially in the area of style which amounts to misappropriation of TCEs. Industrial design law caters for the protection of the external appearance of independently created functional items which are new and original.⁷⁵ Design right comes from creation or registration and it confers exclusive right to the owner of the design for 10 years⁷⁶ or longer depending on the jurisdiction. It gives the right holder or owner exclusive right to prevent third parties from reproducing, selling, or importing articles embodying same or similar design for commercial purposes.⁷⁷ This protection is not automatic as stated before. It requires that the design be new or original.⁷⁸ Some TCEs meet this requirement in countries like China with their Tea sets and Kazakhstan's headdresses known as *Sakyele*.⁷⁹

The issue with designs protection is that while contemporary versions of TCEs may meet the requirements, older designs may not. Thus, one of the gaps in the protection offered by industrial design in IP system is disclosure. Designs registration entails disclosure of secret to the public.⁸⁰ Cultural designs may be sacred in nature and as such not expected to be in the public. The sacred part may be protected as undisclosed information though.⁸¹ Designs which are not sacred may not be eligible for protection because they would be known to the members of the community which means that they are no longer new or

⁷⁵ TRIPs Agreement art 25; Patent and Designs Act 1971 s 13.

⁷⁶ Art. 26(3) TRIPs; in Nigeria, it is 5 years term, renewable for two further consecutive terms of 5 years – Patents and Designs Act, s. 20,

⁷⁷ Art. 26(1)

⁷⁸ (Art. 25(1); S 13(1) Patent and Designs Act, Cap P2 LFN 2004)

⁷⁹ WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions* (WIPO, 2003) 51.

⁸⁰ Patent and Designs Act, s 15.

⁸¹ Irini Stamatoudi, 'The Notions of Intellectual Property and Cultural Heritage: Overlaps and Clashes' in Irini Stamatoudi (Ed.) *Research Handbook on Intellectual Property and Cultural Heritage* (Edward Elgar Publishing 2022) 27.

original.⁸² The limited period of protection covered by Designs is another gap in the contemporary IP because TCEs require indefinite period of protection.⁸³ Other issues include the legal capacity of communities when it comes to collective rights in Designs protections and the cost of registration and enforcement of right which may deter communities from pursuing registration of designs.⁸⁴ TRIPS Agreement member states are to ensure that the requirement for securing protection for textile designs, as regards cost, examination or publication do not unreasonably impair the opportunity to seek and obtain such protection.⁸⁵ Documentations can also be done for protection. Note that existing sui generis systems have been established in some cases to cover traditional designs too. For instance, UNESCO-WIPO gave a model for nations to follow in UNESCO-WIPO Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Judicial Actions, 1982, section 2 which provides for the protection of designs as tangible expression of folklore against unauthorized use or reproduction.⁸⁶

4.0 Copyright Provision in Nigeria

Just like the previous Copyright Act of 1988, the Copyright Act 2022 in section 74 to 76 provides for the protection of ‘expression of folklore’ not folklore thereby allowing adaptation of folklore to be protected.⁸⁷ Although expression of folklore is no longer under the captioned under ‘Neighbouring Right’ as it was in former Copyright Act, the new Act still confers rights in expression of folklore in the Copyright Commission as against any particular community and also makes provisions for civil and criminal liability of infringers.⁸⁸ The vesting of right in expression of folklore in the Commission may not be unconnected with the fact that some of the expression of folklore may not be

⁸² Patent and Designs Act, s 13.

⁸³ WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* (wipo_pub_785.pdf, 2003) 52; WIPO, *The Protection of Traditional Cultural Expressions: Updated Drafted Gap Analysis* (2022) para 34 (b); TRIPS Agreement art 26.3.

⁸⁴ s. 4; Art 25(2)

⁸⁵ TRIPS Agreement, Art 25.2.

⁸⁶ see also the Panama’s law No. 27 of July 24, 1997; response of Panama to folklore Questionnaire on WIPO sites

⁸⁷ Dorcas A. Odunaike, *Performers’ Rights in Nigeria*, (2017, Princeton) 16.

⁸⁸ See The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works, Art. 15(4)

traceable to a particular community or that the tribe or community is transnational or have multiple heads making it difficult to identify a particular custodian of cultural items. The question begging an answer is what happens to the traditional communities where the Commission fails to act in the face of a breach of right or undue exposure of expression of folklore to misuse and so on? What about traditional knowledge that are not expressed, or better still how are traditional knowledge protectable in Nigeria?

According to Arowolo,

Traditional communities practice distributive justice which advocates the allocation of equal material goods to all members of a community or society. It is therefore possible to conclude that the commons for traditional peoples is to the advantage if all members of their communities.

The tripartite system of ownership – individual, communal and spiritual – is a mechanism used to ensure that both tangible and intangible properties remain available to the communities at large. The available resources does not hinder innovation or productivity at the communal level. Thus, intellectual commons of traditional communities is well regulated by traditional norms.⁸⁹

She concluded that African jurisprudence should not be brushed aside. Legal pluralism is to be allowed to run in this crucial aspect too.

5.0 The Kenyan Model

The Kenyan Parliament enacted the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Act No. 33 of 2016), which as a *sui generis* statute that deals with the protection of cultural expression, traditional knowledge, genetic resources and cultural property in general. Kenya is a former British colony and a multi-ethnic State like Nigeria with three dominant ethnic groups – the Kikuyu, Luhya, and Kalenjin which informed curiosity on how its *sui generis* Act works and whether it can serve as model for Nigeria. It is a peculiar Act that places the responsibility of protection on both the national government and county governments. It recognises community, customary law and individual ownership of TCEs thereby providing for their protection and preservation

⁸⁹Ayoyemi Arowolo, *Intellectual Property Rights, Traditional Knowledge Systems and Jurisprudence in Africa* (2012, Ababa) 234-235

upon satisfaction of conditions of formalities including registration of TK and TCEs by community of origin.⁹⁰

The Act enjoins the Kenya Copyright Board (KECOBO), acting for the national government to establish and maintain a “Traditional Knowledge Digital Repository” (TKDR), which shall contain information relating to both TK and TCEs that have been documented and registered by county governments.⁹¹ It establishes a board to see to misuse and misappropriation. By this Act, TCEs are protected - owners of TCEs have right to protection, appropriate royalties and remedy in case of breaches. It provides for the protection of cultural expressions but same is not subject to any formality as done in contemporary IP. Cultural expression is protected against all acts of misappropriation, misuse, unlawful access or exploitation for as long as the cultural expressions fulfil the protection criteria set out in section 14 - A person shall not, in any way, misappropriate, misuse, abuse, unfairly, inequitably or unlawfully access and exploit traditional knowledge and cultural expressions.

As in all IPR, prior consent of the owner or holders must be obtained before any use and government has the responsibility to ensure mechanisms to ensure protection against misuse and misappropriation. Moral rights in property and rights of assignment and licensing vests on the owners. Also incorporated into the Act is the IPR on derivative works and appropriate agreement with cultural owners. The Act also provides defensive protection preventing third party from acquiring IPR in a traditional community’s TK and TCEs through database and repository maintenance.

Interestingly, owners of traditional knowledge and cultural expressions hold rights under this Act in addition to rights granted under the conventional IPR and other moral rights according to the Act. Section 24 is on equitable sharing benefits from works. Owners may grant authorization of the use of traditional knowledge and cultural expression including access to genetic resources. Where there is no known owner, the county or

⁹⁰ The Protection of Traditional Knowledge and Cultural Expressions Act, 2016, s 5-6

⁹¹ The Protection of Traditional Knowledge and Cultural Expressions Act, 2016, s. 8

national government shall hold on behalf of the people. Both criminal and civil liabilities for breach is provided under the Act including sanctions, penalties and remedies in respect thereof.

6.0 Conclusion

The position and importance of Traditional Cultural Expressions is grossly undermined. Being the manner in which traditional communities express themselves, that is tell their stories and manifest their resourcefulness, TCEs deserve appropriate protection of the law to eliminate abuse, misuse and misappropriation. The international community as well as its member states such as Nigeria adopt the use of the conventional IPR, especially copyright law to protect folklore. The Nigerian system does not have a database of what constitutes what folklore is which exposes them to the danger of misappropriation and misuse.

There are shortfalls in the provisions and operations of the conventional IPR as discussed above. Therefore, other measures may need to be put in place to ensure effective and adequate protection which necessitated the birth of the '*sui generis*' measures and systems. To forestall this kind of situation, Sodipo suggested and rightly so that,

‘In relation to protection of cultural property in Nigeria, I would say we have two options. The first option: it could be owned/held by the Obas or Kings in trust for their peoples. Culturally, the communities where those works arise from should own and benefit from them. The second option: it should be owned/held by the Federal Government of Nigeria in trust for Nigerians. While state governments could have been an option, the production of some works cross the boundaries of states. The Constitution of the Federal Republic of Nigeria includes the protection of monuments in the Exclusive Legislative list (Second Schedule: Part 1, Item 60 (b)).⁹²

7.0 Recommendations

Against the backdrop of the forgoing, it is recommended that the Copyright Commission put programmes in place to educate traditional communities as regards legal protection by the law from unwholesome exploitation, misuse and misappropriation. This enlightenment should include modes of promoting the protection of the TCEs and ways

⁹² Titilayo Adebola and Bankole Sodipo, ‘The Return of Looted Benin Bronzes: Art, History and the Law’ *Afronomicslaw.org*< <https://www.afronomicslaw.org/category/analysis/return-looted-benin-bronzes-art-history-and-law>> accessed 25 November 2023

of seeking remedy where necessary in cases of misuse and misappropriation. In addition to this, the others IP laws, namely the Trade Marks Act and the Patent and Designs Act should be improved to indicate specific interest in protection of cultural property such as Geographical Indication or better still develop a *sui generis* system of protection for TCEs.

Beyond these, the concept of customary ownership should be reckoned with in pursuit of ensuring the right over property in TCEs where the traditional ownership is not in dispute or is traceable through an amendment by the National Assembly. Rather than have the Nigeria Copyright Commission as the authority over all expressions of folklore, in ascertainable cases, the communities should be allowed to exercise their property rights through their members representing them like the traditional rulers according to their ranking where applicable like the Oba of Benin did over the returned artefacts. Where the ownership of an expression of folklore is unknown, then the Commission should stand as owner just as the Kenya law vests in national or county government in such circumstances.⁹³ It is further recommended that the Nigeria Copyright Commission should rise to the challenge of promptly seeking remedy for infringement of rights in TCEs and not allow ‘modernity’ to erode tradition.

⁹³ That is, the Nigerian legislatures should take a cue from Kenyan law by vesting title in TCEs in traditional communities through their traditional rulers as custodians where the origin of the TCEs are ascertainable and where the origin involves communities beyond the borders of a particular state, or is disputed, the NCC should retain custody of same as contained in the Copyright Acts.