
**WIPO Regional Seminar on
Intellectual Property and Traditional
Knowledge, Genetic Resources and
Traditional Cultural Expressions**

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Topic 3:

**Establishing Policy, Legal and
Practical Measures for the
Protection of TK, GRs and TCEs**

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Opening Thought . . .

Although there is growing activity in the intersection between Intellectual Property (IP) and the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs), very little success or economic gain would be achieved without a deliberate domestic initiative that includes:

- a) The development of broad-based, well-informed, credible and workable national policies on IP the subject areas;
- b) A combination of various practical measures, not limited to legal mechanisms, to add value to the protection and preservation of these assets;
- c) The Formulation of strategic action plans to promote the sustainable exploitation of the assets by the local communities and individuals that have held it from generation to generation.

Elements of TKs and TCEs

- Identified as belonging to a people, local or cultural community
- Tradition-based and developed within the community's knowledge system
- Recognized by the concerned community concerned as part of its cultural identity
- Crucial thread in the fabric of public and communal harmony
- Transmitted and maintained from generation to generation
- Involve intellectual activity and manifests in both tangible and intangible forms
- Adapt constantly in response to changing cultural environments
- Different from but often interwoven with other aspect of the community's knowledge systems such as traditional knowledge
- Confers direct and indirect economic benefit

Economic imperatives

Traditional cultural industries represent the highest employers of labour in most developing countries and they have immense potentials for employment generation and wealth creation.

It is therefore imperative as a deliberate national social and economic policy not only to focus on the protection but also the promotion of these industries.

Most of the needed tools are already available and may only need to be adapted to the needs of local communities.

Although rooted in culture, care should be taken in discussing the imperatives of protection of TK, GRs and TCEs, not to treat them merely as “the relic of a dead past whose remains, if time and resources allow, one may dig up [only] as a pastime.” Political/cultural renaissance does help to give a nation the needed push.

Practical Imperatives

We must recognize the fragile nature of TK and TCEs, particularly those embedded in oral traditions with the attendant risk of being lost either to the death of their custodians or changes in lifestyles and core values.

The safeguarding, promotion and protection of TK, GRs and TCEs necessarily involves a close partnership between government concerned local communities and relevant individuals within the communities as well as informed civil society groups.

Conscious effort should be made to address the various challenges confronting the preservation and sustainable use of the knowledge including the desecration of sacred and/or secret materials

Aggressive, commercial exploitation by “strangers” must be regulated to give traditional holders and practitioners the needed competitive advantage.

Need for Clear Definition of Terms and Goals

“**Protection**” refers to the whole panoply of regulatory mechanism for the protection of rights and the sustenance of the integrity and value of traditional knowledge.

- ***Positive Protection:*** The right to take action or seek remedies against certain forms of misuse.
- ***Defensive Protection:*** Safeguards the subject matter against the acquisition of (IP) rights by others.
- Protection from what? Against who? And from whose benefit?

The need to consider all these questions is borne out of the experience in many countries that have introduced one form of legislative mechanism or the other. The Nigerian provision on TCE (Expressopns of folklore) is a good example.

The Regional Initiative

- The two African intellectual property organisations (ARIPO for 16 mainly English speaking countries and OAPI for 16 French speaking countries) have developed legal instruments for the protection of TK and TCEs:
 - Both organisations have played key roles in formulating the African position at international forums
 - The African Union has acknowledged the need to pay special attention to the protection of TK and TCEs
 - Both OAPI and ARIPO have received immense technical support from and worked closely with WIPO in this area.
 - Both organizations have involved their member states at the different stages of the process
 - Regional experts were involved in the process

Content of the “African” Legal Framework – TK (1)

I I - PREAMBLE

- Recognize value of TK
- Ensure and promote respect
- Meet the actual needs of TK holders
- Empower TK holders and Communities
- Respect customary practices
- Enhance the preservation and safeguarding of traditional cultures
- Prohibit abuse, unauthorized exploitation and unfair practices
- Consistency with International Agreements and Processes

Content of the “African” Legal Framework – TK (2)

[PREAMBLE CONTD.]

- Encourage community creativity and innovation
- Permit intellectual and cultural exchange
- Enhance cultural diversity
- Promote community development and legitimate commercial activities
- Preclude the grant and exercise of improper IPR
- Enhance certainty, transparency and mutual respect

Content of the “African” Legal Framework – TK (3)

■ II - GENERAL GUIDING PRINCIPLES

- Principle of recognition of rights
- Principle of recognition of rights
- Principle of recognition of the specific nature of traditional knowledge and cultural expressions
- Principle of effectiveness, efficacy and accessibility
- Principle of responsiveness to aspirations and expectations of relevant communities
- Principle of balance
- Principle of respect for customary use and transmission of traditional knowledge and expressions of folklore
- Principle of mutuality with other international and regional instruments and processes

Content of the “African” Legal Framework – TK (4)

III - SUBSTANTIVE PROVISIONS

1. Objectives and Scope;
2. Criteria for protection
3. Formalities
4. Beneficiaries
5. Protection against unlawful acts
6. Prior Informed Consent
7. Equitable remuneration and recognition of knowledge holders
8. Legal form of protection
9. Exceptions and Limitations
10. Duration of Protection
11. Administration and Enforcement
11. Consistency with general Legal framework
12. International/regional protection
13. Transitional measures

Lessons from Nigeria on Protection of TCE

- Like most other countries with provisions on TCEs, Nigeria adopted the Tunis model and protects TCEs (Referred to in the Act as “Expressions of Folklore”) against:
 - (a) reproduction;
 - (b) communication to the public by performance, broadcasting, distribution by cable or other means;
 - (c) adaptations, translations and other transformations,
- when such expressions are made either:
for commercial purposes or
outside their traditional or customary context.

Lessons from Nigeria on Protection of TCE . . . 2

- The following are expressly excluded:
 1. the doing of any of the acts by way of fair dealing for private and domestic use, subject to the condition of acknowledgment of title and source;
 2. the utilisation for purposes of education;
 3. utilisation by way of illustration in an original work of an author:
Provided that the extent of such utilisation is compatible with fair practice;
 4. 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;
 5. the incidental utilisation of expressions of folklore.

Lessons from Nigeria on Protection of TCE . . . 3

Challenge 1: Definition of terms

- The definition of expressions of folklore is often muddled up when lawyers, anthropologists and stakeholders meet
- The notion of community authorship is probably a fiction. There is no such thing as a *folk mind* as an empirical entity capable of taking credit for the authorship of a work of art.

Challenge 2: Constitutional provisions and ethnic delineation

- By section 15 of the Constitution, the Nigerian state is founded on **Unity and Faith, Peace and Progress** and accordingly

1. national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.

Lessons from Nigeria on Protection of TCE . . . 4

2. For the purpose of promoting national integration, it shall be the duty of the State to:

- provide adequate facilities for and encourage free mobility of people, goods and services throughout the Federation;
- secure full residence rights for every citizen in all parts of the Federation.

Challenge 3: Width of exemptions and limitations

The formulation of the exceptions and limitations under the Act does not discriminate between local and international users

Challenge 4: Lack of ownership and Contending enforcement priorities

It has been argued that the “conferment” of the right on a national authority separates it from the immediate owning communities

Concluding Thoughts

While thinking global States should act with the local interest in mind. Policies and legal frameworks should never be developed without due regard to the local communities and the cultural environment. Any mechanism or legal regime should:

- Recognise the rights of communities over their TK and TCEs.
- Prohibit unauthorised acquisition of IP rights over TK and TCEs.
- Reflect the values and aspirations of the communities or holders of the TK and TCEs.
- Promote respect for indigenous customary laws and practices.
- Factor in the economic & sustainable development needs of the community.

Put in place appropriate regulatory mechanism for access and control without allowing such mechanism to become a hindrance to the beneficial exploitation of the materials in

Concluding Thoughts . . . 2

- Any mechanism put in place should be simple; supportive; sensitive; strategic and sustainable.
- Provide legal assistance and promote the use of classical IP system by TK and TCE holders as a complementary legal mechanism.
- There is need for a comprehensive national strategy within the framework of cultural and economic development.
- Proper identification and documentation of a country's TK and TCEs would be a useful exercise.
- The State should stimulate growth and promote the wide use of TK and TCEs among its locals.
- Necessary infrastructure must be provided to support the private and informal sectors of the economy where much of the exploitation of TK and TCEs begin.

Thank you

*Nigerian
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Commission*



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