



Developing Legal Frameworks for the Protection of TK and TCEs: Challenges and Opportunities

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Synopsis

- Understanding “Challenges and Opportunities”
- Genesis of my Study
- Appreciating Conflicts in TCEs
- Research findings
- Recap on the challenges
- Recommendations and way forward



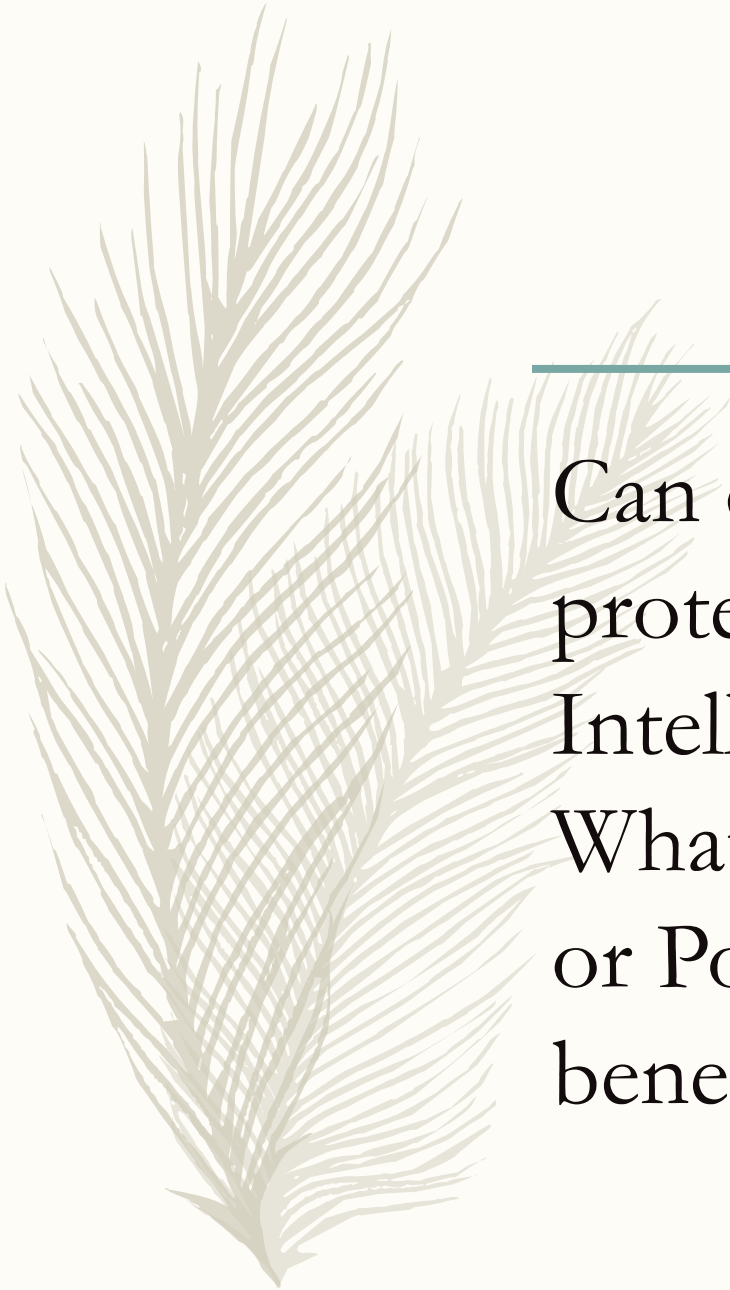



“Challenges and Opportunities in TK/TCEs” ???

- If property is not well defined, it will be subjected to ill use and if no one owns or has an interest in the resource, it will be over-used. – Garrett Hardin, *The Tragedy of the Commons* (1968)
- Unlike IP, no individual ownership and ascertainable durability in TK and TCEs

Challenging questions

Can culture be owned? Is it property? Can it be protected in the same way that we protect Intellectual property? Who has the mandate? What is the purpose of protection (Defensive or Positive protection)? How do we stand to benefit socially and economically?





Genesis of the Study: ‘Hip-Hop’ President saga: “You want another rap?” – Oct. 2010.

- Sec. 5 of Ugandan copyright law: Traditional Folklore & Knowledge are part of works **eligible for copyright**; pre-existing works are not affected by protection of derivative works (emphasis mine). The Law is vague.



Conflicts in protection of TK/TCEs:

“... Who can assert a right to define the normative use of a cultural product; or who may give permission to copy a cultural product [?] The issue of control does not arise when source-community members have exclusive possession of their cultural products and use them in consensual manner. Rather, conflict may appear in the case of contested or nonconforming use by source-community members or in the case of any use by non-members.” (Susan Scafidi, Who owns Culture? 2005)

Examples of conflicts:

a) Conflicts between Countries:

i. Who owns the Agbadza and Gahu traditional drum-dances of Ghana, Togo and Benin, or the Kente cloth designs of Ghana and the Cote D'Ivoire?

ii. Indonesia and Malaysia's 2007 Folklore Dispute: The Folksong is from the ethnic community of the Malay Archipelago, located in Indonesia, Malaysia, Southern Thailand and Brunei.

b) Conflicts between individuals and communities:

i. The case of Turmeric patented in Mississippi and India's quest for revocation. But was it originally from India alone?

ii. From Mbube (Zulu Community – 1860s to Solomon Linda – 1939) to Wimoweh (Pete Seeger) then to 'The Lion Sleeps tonight' (Walt Disney's Lion King, 1994)

b) Individual & Community conflicts - cont'd:

iii. From Kuo Ying-Nan's folk song of the Ami People of Taiwan (the 'jubilant drinking song' to Song of Joy/Return to Innocence (Enigma, 1993).

iv. Skilled photography of performances by the Wik Apalech aboriginal dancers in Australia (1995)

v. 2008-2012 Kikoi case in Kenya: British attempt to register "Kikoy" trademark and opposition by Kenyan Government (Sec. 49(d) of Copyright Act of Kenya)

b) Individual & Community conflicts - cont'd:


vi. The E.A. Community and the use of the 'Maasai':

The word 'Masai' is used as a brand name worldwide with over 80 products labelled with the name. No permission has ever been sought from the Maasai – per Isaac ole Tialolo of the Maasai Intellectual Property Initiative (National Geographic, December 2013, Vol. 224, No. 6. See, 'Culture Stock' at p. 21)

vii. In the Matter of an Application No. 25 of 2010 for registration of Copyright by Yoweri Kaguta Museveni in the song "You want another rap" and In the Matter of an Objection by Mr. Mwambusya Ndebesa and Dr. Katono Nzarwa Deo.

c) Conflicts between individuals and individuals:

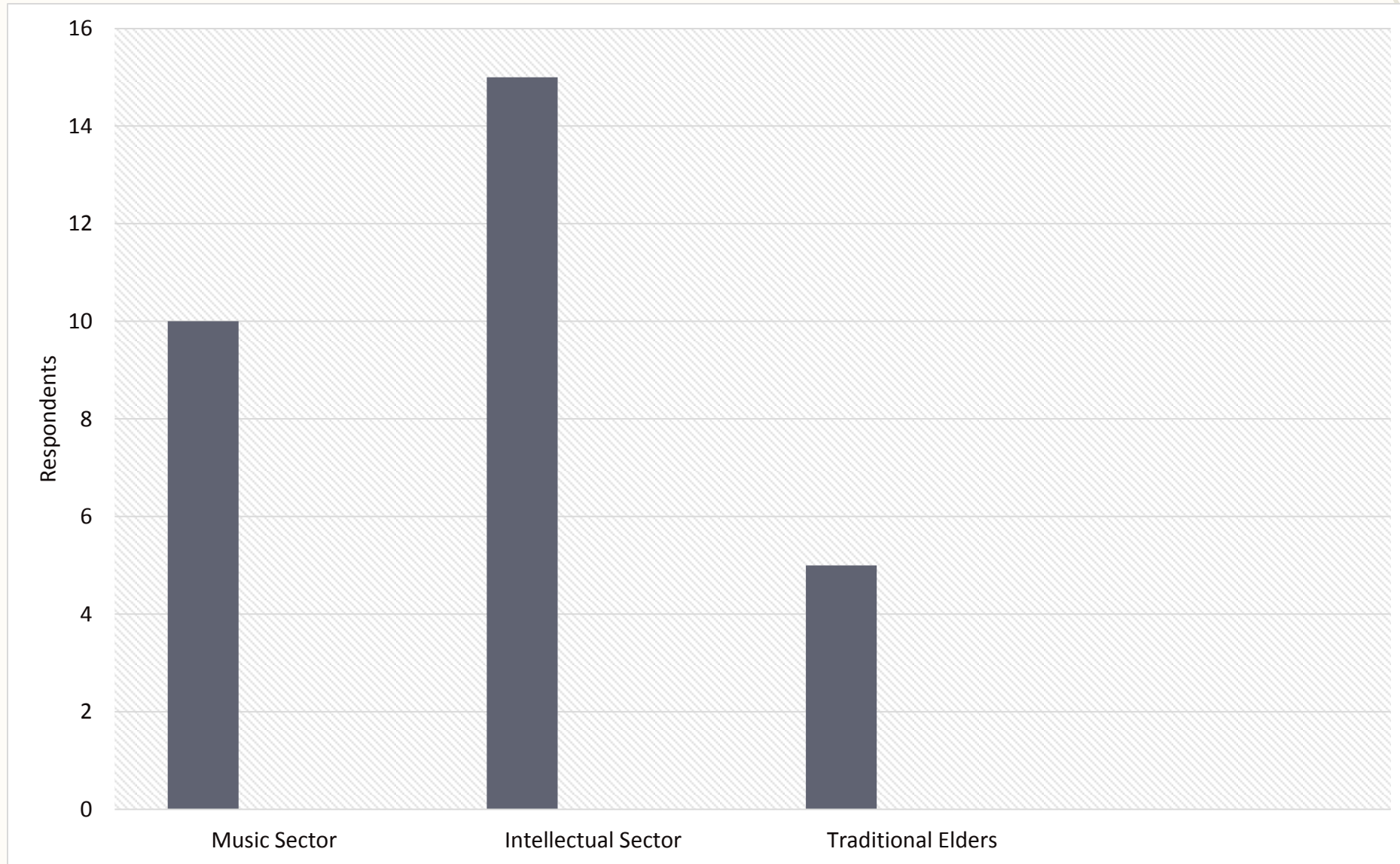
Akpovi Athananse v. Kidjo Angelique – A case in Benin in which Court rejected defendant's argument to the effect that plaintiff's song was a word-per-word copy of folklore – in case of copyright infringement (but consider Plaintiff's own additions).



2011 – 2014: JSD Research (University of Illinois, USA)

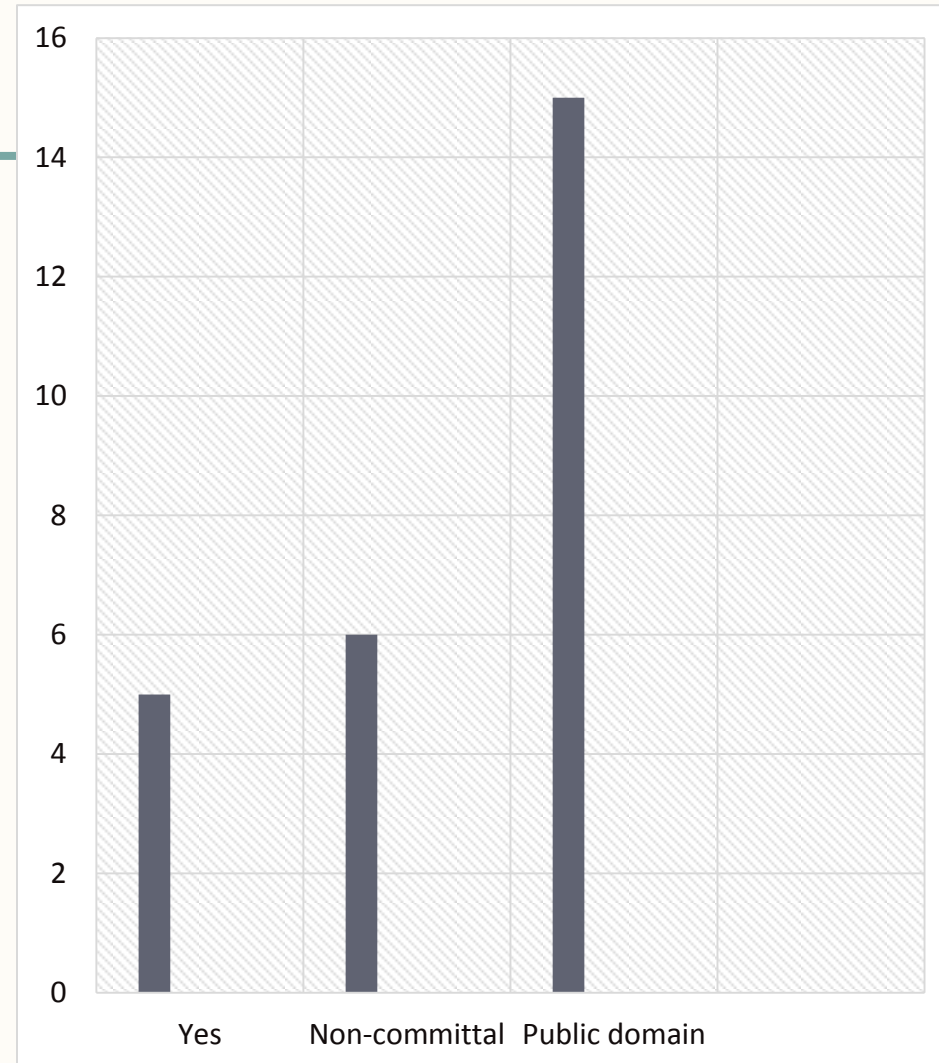
- **Topic** – “The Cultural Divide: Traditional Cultural Expressions and the Entertainment Industry in Developing Economies”
- **Research Aim:** To advance an understanding of the role TCEs can play in socio-economic development of Society.

Primary Data: Clusters Represented:



Empirical findings in Uganda: Is Authorization necessary before use of TCEs in Uganda?

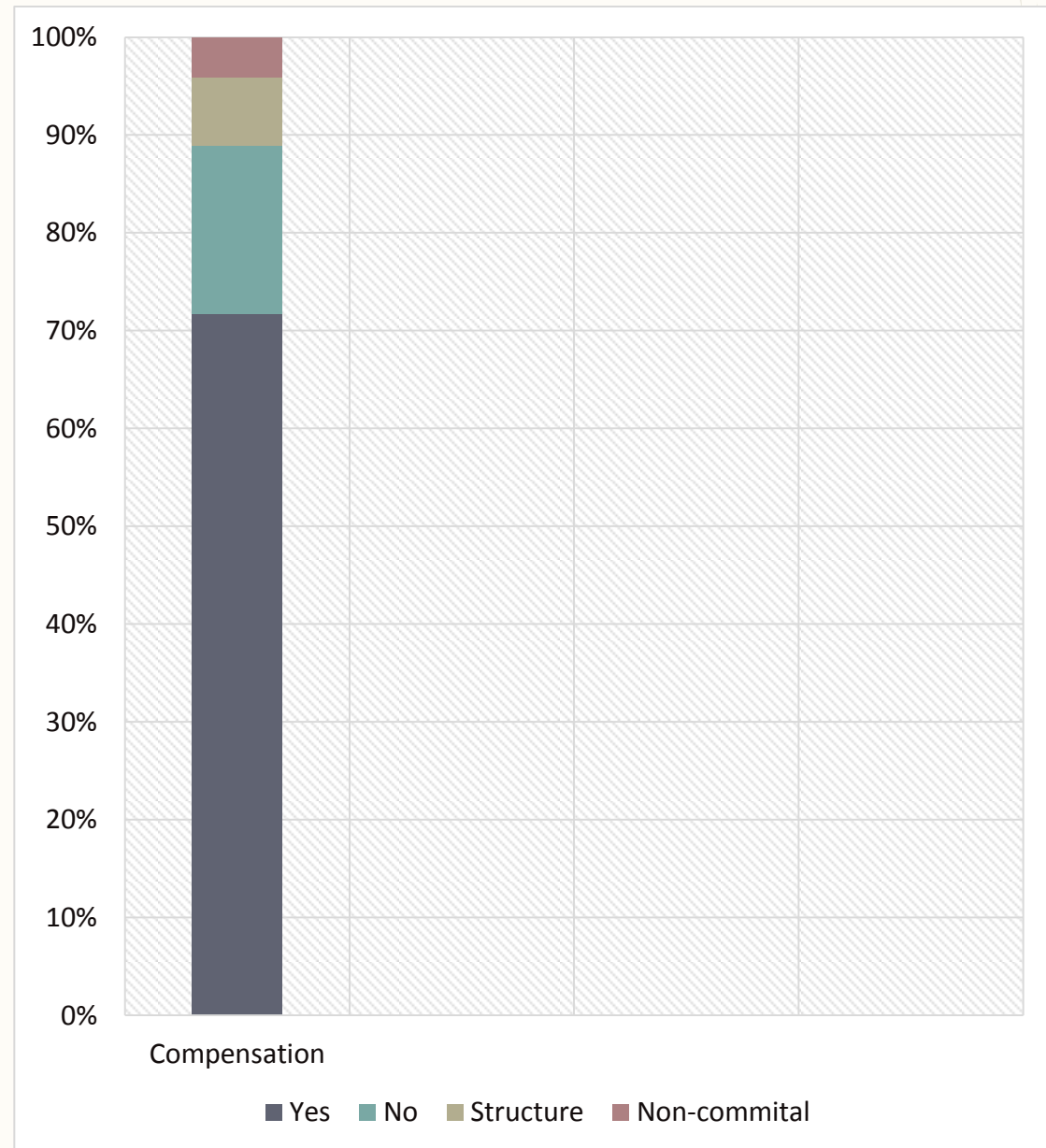
- 5 – Yes, provided there is a guiding structure
- 6 – Non-committal
- 15 – don't see the need for permission since TCEs are considered in the public domain.



Whether ethnic communities are entitled to compensation:

Out of 28 interviewed-

- 20 (71%) – Yes
- 5 (18%) – No
- 2 (7%) – structural guidance
- 1 (4%) – Non committal





Study findings on regulation of TK/ TCEs:

[TCE protection under Model laws and Regional Instruments.docx](#)

[TCE protection under select African National laws.docx](#)

Challenges faced by developing countries in exploiting their TK/TCEs:

- Inadequate data on TK/TCEs: Governments do not have the statistics.
- Question of Taxation: It is impracticable and has not been well received in countries like Ghana.
- Government red tape (bureaucracy).
- Challenges in administering TK/TCEs over Cross-border communities.

Recommendations in addressing the needs of the different parties:

- Involving the State – Establishment of a Government Cultural Authority.
- Preservation of Culture, e.g., an archival base, Educational Institutions, Museums and Cultural Centers.
- Negotiated use of TCEs over issues such as economic and moral rights, as well as respecting sacred rites in TCEs.
- Developing a partnership for TCE usage: Key partners should be the State and traditional communities.
- Encouraging creative content.

Conclusion & Way forward:

- Relying on Garrett Hardin's *Tragedy of the Commons* – without understanding what TK/TCEs are, we cannot utilize them appropriately.
- TK/TCEs are a unique representation of property rights for communities and require unique (*sui generis*) regulations that will guide socio-economic development for communities and States.





THANK YOU

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