

Enyinna Nwauche

The Protection of Traditional Cultural Expressions in Africa

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*Dedicated to
Sokeibelemaye
Chukwuemeka, Chibuikem and Tamunotonte*

Preface

This is a revised version of a doctoral thesis submitted to the North-West University (Potchefstroom Campus) in South Africa in 2016 under the supervision of Professor Andries van der Merwe and Professor Sunelle Geyer. I am indebted to both of them for their painstaking guidance, care, empathy and devotion. I acknowledge the support of Professor Stephen de la Harpe and Professor Christa Rautenbach, both of the Faculty of Law, North-West University (Potchefstroom Campus). Needless to say, the views and opinion in the original thesis and this revised version are entirely mine.

I have attempted to state the law as at 1 March 2017. I have tried to use as many examples from African countries as possible even though the bulk of evidence in support of arguments is drawn from South Africa, Kenya, Ghana and Nigeria. While these examples do not claim to fully represent the length, breadth and sheer diversity of Africa, they make a conscious effort to identify and discuss issues common to many African states.

It is my hope that this book stimulates discussions of the crucial role of traditional cultural expressions in particular and intellectual property in general to the development of Africa.

I am grateful to Springer International for agreeing to publish this book. I acknowledge the support and assistance of Julia Beiler and Anke Seyfried.

Many colleagues, friends and associates contributed one way or the other to the completion of the thesis and its revised version. I thank Chucks Okpaluba, Charles Fombad, Ritchard Aduche Wokocha, Vincent Nmehielle, Nlerum Okogbule, Amakevu Gabriel, Justice Nwobike, Danwood Chirwa, Achike Agbakoba, Doepie de Jongh, Lawrence Juma, Siraj Khan and Rosaan Kruger.

This book is in honour of my wife, Sokeibelemaye, and children, Chukwuemeka, Chibuikem and Tamunotonte.

Grahamstown, South Africa
March 2017

Enyinna Nwauche

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List of Abbreviations

ACPHR	African Commission on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
Afr J Int'l & Comp L	African Journal of International and Comparative Law
AHR LJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
All NLR	All Nigeria Law Reports
ALL FWLR	All Federation Weekly Law Reports
All SA	All South Africa Law Reports
ALR	Australian Law Reports
Am J Comp L	American Journal of Comparative Law
Am J Int'l Law	American Journal of International Law
Am Soc Intl L Proc	American Society of International Law Proceedings
AMU	Arab Maghreb Union
Am U L Rev	American University Law Review
Am UJ Gender Soc Pol'y & L	American University Journal of Gender Social Policy and Law
ARIPO	African Regional Intellectual Property Organisation
ASIL Insights	American Society International Law Insights
Australian Intell Prop J	Australian Intellectual Property Journal
Banjul Protocol	Banjul Protocol on Marks
BCLR	Butterworths Constitutional Law Reports
Botswana LJ	Botswana Law Journal
Buff HRR	Buffalo Human Rights Review
CA Ghana	Copyright Act Ghana
CA Kenya	Copyright Act Kenya
CA Nigeria	Copyright Act Nigeria
Cardozo Arts & Ent LJ	Cardozo Arts and Entertainment Law Journal
Cardozo J Int'l & Comp L	Cardozo Journal of International and Comparative Law
Ch	Chancery

COMESA	Common Market for Eastern and Southern Africa
CILSA	Comparative and International Law Journal of South Africa
Colum JL & Arts	Columbia Journal of Law and Arts
Comp Int'l LJ SA	Comparative and International Law Journal of South Africa
Connec L Rev	Connecticut Law Review
Critical Arts	Critical Arts: A Journal of South-North Cultural Studies
DA Ghana	Design Act Ghana
Dev & Change	Development and Change
DRIP	United Nations Declaration on Rights of Indigenous Peoples
Duke LJ	Duke Law Journal
EA	East Africa Law Reports
EAC	East African Community
ECCAS	The Economic Community of Central African States
ECDR	European Copyright and Design Reports
ECOWAS	Economic Community of West African States
EIPR	European Intellectual Property Review
ETMR	European Trade Marks Reports
Eur J Int'l L	European Journal of International Law
eKLR	Kenya Law Reports
Florida L Rev	Florida Law Review
FSC	Federal Supreme Court
Fordham Media & Ent LJ	Fordham Intell Prop Media & Ent LJ
F	Federal Cases
FWLR	Federation Law Reports
GATT	General Agreement on Tariffs and Trade
GI Ghana	Geographical Indications Act Ghana
GLR	Ghana Law Reports
Griffith L Rev	Griffith Law Review
Harare Protocol	Harare Protocol on Patents Utility Models and Designs within the Framework of the African Regional Intellectual Property Organisation
Harv Int'l LJ	Harvard International Law Journal
Howard LJ	Howard Law Journal
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICC-Int'l Rev Intell Prop & Comp L	International Review of Intellectual Property and Competition Law
ICCPR	International Covenant for Civil and Political Rights
ICESCR	International Covenant for Economic Social and Cultural Rights

ICLQ	International and Comparative Law Quarterly
ILDC	International Law in Domestic Courts
IKS	Indigenous Knowledge Systems
IIC-Int'l Rev Indus Prop & Copyright L	ICC-International Review of Industrial Property and Copyright Law
ILM	International Legal Materials
ILSA J Int'l & Comp L	ILSA Journal of International and Comparative Law
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
Int'l J Cultural Prop	International Journal of Cultural Property
Int'l J Group Rights	International Journal on Group Rights
Int'l JCP	International Journal of Cultural Property
Int'l Rev Intell Prop & Comp L	International Review of Intellectual Property and Competition Law
Int'l Soc Science J	International Social Science Journal
IPA	Industrial Property Act Kenya
IPLAB 2007	Intellectual Property Laws Amendment Bill 2007
IPLAB 2008	Intellectual Property Laws Amendment Bill 2008
IPLAB 2010	Intellectual Property Laws Amendment Bill 2010
IPLAA 2013	Intellectual Property Laws Amendment Act 2013
IPR	Intellectual Property Report
J Intell Prop L	Journal of Intellectual Property Law
J Int'l Economic Law	Journal of International Economic Law
J World Intell Prop	Journal of World Intellectual Property
JAL	Journal of African Law
JOL	Judgment Online
KLR	Kenya Law Reports
LJPC	Law Journal Privy Council Reports
LRC	Law Reports of the Commonwealth
Lusaka Agreement	Agreement for the Creation of the African Regional Intellectual Property Organisation
Macquarie LJ	Macquarie Law Journal
McGill LJ	McGill Law Journal
Melbourne J Int'l L	Melbourne Journal of International Law
MFN	Most Favoured Nation
Mich J Pub Affairs	Michigan Journal of Public Affairs
Minn Intell Prop Rev	Minnesota Intellectual Property Review
MMA	Merchandise Marks Act
NCJ Int'l L & Com Reg	North Carolina Journal of International Law and Commerce Regulation
Nigerian J Contemp L	Nigerian Journal of Contemporary Law
Nigerian LJ	Nigerian Law Journal
NPDA	Patent and Design Act Nigeria
Nordic J Int'l L	Nordic Journal of International Law
NT	National Treatment

NLR	Nigerian Law Reports
NSCC	Nigerian Supreme Court Cases
NWLR	Nigerian Weekly Law Reports
NYUL Int'l L & Pol	New York University Journal of International Law and Politics
OAPI	African Intellectual Property Organisation
PELJ	Potchefstroom Electronic Law Journal
Revised Bangui Agreement	Agreement Revising the Bangui Agreement of March 2 1977 on the Creation of an African Intellectual Property Organisation 1999
REC	Regional Economic Communities
SA	South African Law Reports
SACA	Copyright Act South Africa
SADA	Design Act South Africa
SALJ	South African Law Journal
S Cal L Rev	Southern California Law Review
SCGLR	Supreme Court of Ghana Law Reports
SA Merc LJ	South African Mercantile Law Journal
SAHRA	South African Heritage Resources Agency
SA NHRA	South African National Heritage Resources Act
SAJHR	South African Journal on Human Rights
SAJHR: Religion and Human Rights	South African Journal on Human Rights: Religion and Human Rights
SALJ	South African Law Journal
SAPPA	Performer's Protection Act South Africa
SAPL	South African Public Law
SARDQ	South African Rural Development Quarterly
SA TMA	Trade Marks Act South Africa
SAYIL	South African Yearbook of International Law
SCR	Supreme Court Reports
Swakopmund Protocol	Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore
Tenn L Rev	Tennessee Law Review
Texas L Rev	Texas Law Review
Texas WLR	Texas Wesleyan Law Review
T-FTA	Tripartite Free Trade Area
TMA Kenya	Trade Marks Act Kenya
TMA Nigeria	Trade Marks Act Nigeria
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems
TLGA	Traditional Leadership and Governance Framework Act
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

U Botswana LJ	University of Botswana Law Journal
UNESCO	United Nations Educational Social and Cultural Organisation
UNTS	United Nations Treaty Service
U Pa J Int'l L	University of Pennsylvania Journal of International Law
U Queensland LJ	University of Queensland Law Journal
UC Davis J Int'l L & Pol'y	University of California Davis Journal of International Law and Policy
UC Davis L Rev	University of California Davis Law Review
UCL HRR	UCL Human Rights Review
UCLA L Rev	UCLA Law Review
UNSW LJ	UNSW Law Journal
Virginia J Int'l L	Virginia Journal of International Law
WACA	West Africa Court of Appeal
WIPO	World Intellectual Property Organisation
Wis Int'l JL	Wisconsin International Law Journal
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty
WRN	Weekly Reports of Nigeria
WTO	World Trade Organisation
Yale LJ	Yale Law Journal
ZACC	Constitutional Court
ZAKZPHC	Kwa-Zulu Natal High Court Pietermaritzburg
ZASCA	Supreme Court of Appeal

Chapter 1

Introduction: Key Issues in the Protection of Traditional Cultural Expressions in Africa

‘Traditional cultural expressions’ is defined in the World Intellectual Property Organisation (WIPO) document *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*¹ (hereafter *WIPO Legal Options*) as follows:

Traditional cultural expressions’ or ‘expressions of folklore’ are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- verbal expressions, such as:
 - stories, epics, legends, poetry, riddles and other narratives;
 - words, signs, names, and symbols;
 - musical expressions, such as songs and instrumental music;
 - expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and
 - tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:
 - (a) the products of creative intellectual activity, including individual and communal creativity;
 - (b) characteristic of a community’s cultural and social identity and cultural heritage; and
 - (c) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

The nature of traditional cultural expressions evident in the definition above is central to the difficulty and controversy in designing a suitable regime for their

¹WIPO/GRTKF/IC/9/4 of 9 January 2006, a 1(i). This document contains a set of policy options and legal mechanisms for the protection of traditional cultural expressions. In this work, the term ‘traditional cultural expressions’ is used interchangeably with ‘folklore’.

protection. Two facts are crucial here. The first is the question of its origin, and the other is the categorisation and reality of traditional cultural expressions. With respect to its origin, traditional cultural expressions are created by communities but protected in many cases as state and private property. The pushback from communities seeking control and management of their property from state and private control stoke many of the challenges in this area. To what extent can and will national and international legal frameworks recognise and protect communal claims to traditional cultural expressions seems a central concern. The articulation of separate legal protection for tangible heritage and intangible heritage for long, even though both are intricately connected, is another central concern. It is because traditional cultural expressions are part of intangible heritage that it is thought that tangible heritage protection has little to do with traditional cultural expressions. The widespread recognition is that tangible heritage is intricately concerned with intangible heritage, and thus traditional cultural expressions raise a number of challenges, which this book considers.

Decades of *sui generis* (negative) and intellectual property law (positive) protection in African countries does not seem to have protected traditional cultural expressions effectively. Two seemingly opposing factors impede the formation of an effective protection regime in Africa: the need to harness traditional cultural expressions in the development and enhancement of national and local cultural industries and the protection of traditional cultural expressions from undue misappropriation.² While African states have been actively engaged in the *sui generis* protection of traditional cultural expressions, the same cannot be said of the protection of traditional cultural expressions by intellectual property law. First, I review the *sui generis* protection of traditional cultural expressions. This is followed by an analysis of the protection of traditional cultural expressions under intellectual property law.

A review of the negative protection of traditional cultural expressions can commence in the early 1970s of the previous century when the importance of traditional cultural expressions as the basis of cultural identity and as a source of creativity and wealth creation became clear to, amongst others, African countries. In addition, the incipient digital revolution that facilitated and enhanced the improper exploitation of traditional cultural expressions on a massive scale brought home the reality of the need for some form of protection.³ The inability of the *Berne Convention for the Protection of Literary and Artistic Works* (1971),⁴ to deal effectively with the protection of traditional cultural expressions, led to further calls in this regard. The protection of traditional cultural expressions was first discussed in 1967 during the Stockholm Revision Conference of the *Berne*

²Brown (2003), p. 1; Janke (2003), p. 12.

³See Von Lewinski (2009), pp. 207–226.

⁴Hereafter *Berne Convention* 828 UNTS 221.

Convention. That conference adopted article 15(4)⁵ as a summary of the work of a committee charged with overseeing the possibility of including the protection of folklore in the treaty. Article 15(4) did not mention folklore by name but required designation by the relevant national authority of the state of which the maker of the work appeared from available evidence to be national, before protection would be accorded to unpublished works. Further steps were advocated for the development of a protection regime.

In 1976, a Committee of Governmental Experts representing WIPO and the United Nations Educational Scientific and Cultural Organisation (UNESCO) adopted the *Tunis Model Law on Copyright for Developing Countries* 1976,⁶ which dealt with folklore as part of a copyright-protection regime. There is little doubt that the provisions of the *Berne Convention* and the *Tunis Model Law* influenced the earliest legislation enacted by African countries to protect traditional cultural expressions through copyright legislation.⁷ Even at this stage, the protection granted to traditional cultural expressions recognised folklore as part of the cultural heritage of the nation and required authorisation before it could be fixed or performed by foreigners. Because it was not well elaborated, this protection proved inadequate—to say the least. Even though protection was written into the copyright legislation of these African countries, there is no convincing evidence of any serious attempt to use the principles of copyright or intellectual property law protection for the benefit of traditional cultural expressions. Perhaps this was due to the obstacles to such protection, which include the questions of originality, fixation and duration.⁸

Another milestone in the search for a *sui generis* protection regime for traditional cultural expressions occurred in 1985, when UNESCO and WIPO adopted the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Forms of Prejudicial Actions* 1985.⁹ This influential document recommends a *sui generis* protection of traditional cultural expressions and, amongst others, provides for principles of protection, the scope of the subject matter, the manner of obtaining authorisation, the exceptions to

⁵A 15(4) of the *Berne Convention* provides as follows: ‘(a) In the case of unpublished works where the identity of the author is unknown but where there is any ground to presume that he is a national of a country of the Union, it shall be a matter of legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union, (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning authority thus designated. The Director General shall at once communicate this decision to all other countries of the Union.’

⁶Hereafter the *Tunis Model Law*.

⁷Examples include the Kenyan *Copyright Act*, 1975; the Senegal *Copyright Act* 73–52 of 1973; Burundi’s *Copyright Act*, 1978.

⁸See Kuruk (1998), *Am U L Rev.*, p. 769; Nwauche (2002), *ICC-In’tl Rev. Intell Prop & Comp L.*, p. 599.

⁹Hereafter *The Model Provisions*.

and limitations on authorisation, the moral rights attached to copyright, civil and criminal sanctions, the designation of the competent authority to administer copyright and the protection of traditional cultural expressions of foreign countries.

The *Model Provisions* have influenced the protection of traditional cultural expressions in African states in two ways. Many African states have located the protection of traditional cultural expressions in second-generation African copyright legislation. For example, in Cameroon, section 5(1) of the *Law on Copyright and Neighbouring Rights* 11 of 2000 (hereafter *Cameroonian Law*) states that folklore shall be classed with and protected as national cultural heritage. Section 4(2) of Ghana's *Copyright Act* 690 of 2005 (hereafter *CA Ghana*) provides that rights of folklore are vested in the President for the people of the Republic, while section 17 provides that they exist in perpetuity. Sections 59–64 establish a National Folklore Board to administer, monitor and register traditional cultural expressions. Section 49(d) of the *Kenyan Copyright Act* 2001 (Cap 130 2014) (hereafter *CA Kenya*) authorises the Minister responsible for copyright and neighbouring rights to make regulations prescribing the terms and conditions governing the use of folklore for anyone other than a national public entity and for non-commercial purposes. In Nigeria, section 28 of the *Copyright Act* C28 of 2004 (hereafter *CA Nigeria*) vests the regulation of exploitation of traditional cultural expressions in the Nigerian Copyright Commission. In Malawi, section 24 of the *Copyright Act* 9 of 1989 vests copyright in traditional cultural expressions in the government on behalf of and for the benefit of the people of Malawi, while in Mozambique, article 31 of the *Law Approving Copyright and Repealing the Code of Copyright* 4 of 2001 (hereafter *Mozambique Law*) provides that ownership of copyright in works of folklore shall vest in the state, which shall exercise its rights through the Council of Ministers.

Available evidence points to negligible recourse to the protection offered by the *sui generis* provisions within the African copyright and neighbouring rights' legislative environment. One reason is that embedding traditional cultural expression protection within copyright protection ties the success of the former to copyright protection. For example, the designation of the national copyright authority as the competent authority to protect traditional cultural expressions invariably ties the latter to the competence and capacity of that office. The diverse demands for attention placed on under-resourced and ineffective national copyright offices by other equally important copyright issues—piracy, for example—leave many of these offices incapable, and often unwilling, to enforce provisions on the protection of traditional cultural expressions. Since the communities are not involved, directly or indirectly, in the protection of their traditional cultural expressions, the result to date has been that existing protection of traditional cultural expressions has been observed mainly in its breach. Yet there are features of the *Tunis Model Law* that appear to hold the potential to enhance the effectiveness of traditional cultural expressions.¹⁰

¹⁰See Nwauche (2005), p. 263.

A further reason appears to be the weak articulation of national heritage laws and the protection of traditional cultural expressions. In this regard, enough attention has not been paid to how Africa's numerous pieces of heritage legislation impact on the protection of traditional cultural expressions. For example, it is unclear how the *National Heritage Council Act* 11 of 1999, the *National Heritage Resources Act* 25 of 1999 (hereafter *SA NHRA*), the *South African Geographical Names Council Act* 118 of 1998 and the *National Council for Library and Information Services Act* 6 of 2001 can be used to protect traditional cultural expressions. The same can be said of heritage legislation in Kenya (*National Museums and Heritage Act* 216 of 2012 (hereafter *Kenyan NMH*) and *National Library Service Board Act* 225 of 2012), Ghana (*Library Board Act* 327 of 1970 and *National Museums Act* 387 of 1969 (hereafter *Ghana MH Act*) and Nigeria (*National Archives Act* N6 of 2004, *National Library of Nigeria Act* N56 of 2004, *National Commission for Museums and Monuments Act* Cap N19 of 2004 (hereafter *Nigcom MM*) and *National Council for Arts and Culture Act* N25 of 2004). A third reason is the absence of other non-proprietary approaches that enhance *sui generis* legislation such as equitable remuneration schemes, trade practices and marketing laws and the use of registers, inventories and databases.

The critical engagement of intellectual property law in the *positive* protection of traditional cultural expressions is not a significant feature in many African countries even though there are legislative provisions in this regard. For example, trademark legislation contains provisions on certification marks that may be adapted to protect traditional cultural expressions. Examples can be found in sections 40 and 40A of the *Kenyan Trade Marks Act* 506 2012 (hereafter *TMA Kenya*), sections 42 and 43 of the *South African Trade Marks Act* 194 of 1993 (hereafter *SA TMA*) as amended by the *Intellectual Property Laws Amendment Act* 28 of 2013 (hereafter *IPLAA 2013*), section 36 of the *Ghana Trade Marks Act* 664 of 2004 (hereafter *Ghana TMA*) and section 43 of the *Nigerian Trade Marks Act* T13 of 2004 (hereafter *Nigeria TMA*). Another example is the recognition of traditional words and signs in the public domain that can lead to a denial or cancellation of trademark registration. Even in design law, the possibility exists that in the definition of prior publication, traditional designs can be relied on to assess compliance with this registration requirement. In this regard, examples include sections 84 and 86 of the *Kenyan Industrial Property Act* 3 of 2001 (hereafter *Kenya IPA*); section 14 of the *South African Designs Act* 195 of 1993 (hereafter *SADA*); section 2(2)d of the *Textile Designs (Registration) Act*, 1973, of Ghana; and section 13(2) of the *Nigerian Patent and Designs Act* P2 of 2004 (hereafter *NPDA*). Yet another example is the protection offered to public performances of traditional cultural expressions as neighbouring rights. Again, there are examples in section 4(1) of *CA Ghana* and the *South African Performance Protection Act* 11 of 1967 (hereafter *SA PPA*), which define 'literary and artistic works' to include traditional cultural expressions.¹¹

¹¹See in this regard Visser (2002a), *SA Merc LJ*, p. 656; Visser (2002b), *Fordham Intell Prop Media & Ent LJ*, pp. 753–803.

In addition, African states can adapt intellectual property rights or develop new intellectual property rights to enhance the protection of traditional cultural expressions. The effectiveness of intellectual property protection is influenced by how national judiciaries interpret intellectual property rights legislation, the level of awareness of the possibilities presented by intellectual property, the ability of folklore-bearing communities easily to approach the courts and the inherent contestations of the scope of the available rights.¹² In most cases, there is a need for substantial amendment of the enabling legislation and common law principles to tailor these rights to protect traditional cultural expressions effectively. How this can be done presents a creative challenge that is to some extent already being explored in South Africa through *IPLAA 2013* and in Kenya by *The Protection of Traditional Knowledge and Cultural Expressions Act 33 of 2016* (hereafter *TKCE 2016*). In other African countries where no such amendment is ongoing, a wide range of intellectual property and related rights exist that may be used in this regard. How this can be achieved presents an interesting challenge.

It appears that another reason why both the existing *sui generis* protection and protection through intellectual property law are ineffective in Africa is the inappropriate recognition of customary norms for the protection of traditional cultural expressions. The agency of customary law underscores the customary and traditional context of the creation of traditional cultural expressions. Unfortunately, the nature and content of customary law are often steeped in controversy. Furthermore, the importance of customary law must be understood within and defined by the right to culture and other human rights.

Such human rights affirm that as a creator, a community is entitled to the protection offered by the rights to property and culture in conjunction with other rights such as the right to privacy, the right to dignity and the right to equality available in national constitutions such as the *Constitution of the Republic of South Africa 1996* (hereafter the *South African Constitution*) and the *African Charter on Human and Peoples' Rights 1986* (hereafter the *African Charter*).¹³

A human rights protection paradigm can either stand alone or be part of the protection offered under *sui generis* protection or by intellectual property law protection. Serious thought ought to go into elaborating a human rights regime for traditional cultural expressions for the additional reason that the development of customary international law for the protection of indigenous peoples is taking on concrete form through the adoption of the *United Nations Declaration of the Rights of Indigenous Peoples 2007* (hereafter *DRIP*).¹⁴ In this regard, it is significant to note that while there may be ethnic groups that qualify as indigenous peoples in Africa, many other African communities that do not so qualify also deserve protection of their traditional cultural expressions.¹⁵ The protection of traditional

¹²Amegatcher (2002), p. 33.

¹³1982 (21) *ILM* 580.

¹⁴UNGA res 61/295 of 2007. UN Doc A/161/49(2008).

¹⁵Coombe (1998), *Ind J Global Legal Studies*, p. 59.

cultural expressions has a significant regional and continental dimension in Africa. First, Africa's artificial national boundaries—the product of colonial expediency—find ethnic communities straddling two or more countries. A good example is the *San* Community found in Botswana, Namibia and South Africa; the *Yoruba* found in Benin, Togo and Nigeria; and the *Fulani* found in Nigeria, Niger, Benin, Togo and Ghana. If effective protection of traditional cultural expressions recognises communities as worthy beneficiaries, there must be an understanding of how a national legal system will recognise and protect traditional cultural expressions of foreign kith and kin in order to maintain the cultural integrity of the traditional cultural expressions. In this context, the involvement of continental and regional economic communities such as the African Economic Community (AEC), the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC) and the East African Economic Community (EAC) in the protection of culture should bring home the reality that free movement of cultural goods within these communities requires, at very least, regional understandings in an area where protection rests essentially on exclusivity, protectionism and national measures.

Note must also be taken of the two intellectual property organisations in Africa: the African Intellectual Property Organisation (OAPI) established by the *Bangui Agreement Relating to the Creation of an African Intellectual Property Organisation Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property 1977*¹⁶ and the African Regional Intellectual Property Organisation (ARIPO) established by the *Agreement for the Creation of an Industrial Property Organisation for English Speaking Africa 1976*¹⁷ (hereafter *Lusaka Agreement*). These organisations are also competent to

¹⁶OAPI was established on 13 September 1962 pursuant to the *Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property* in Libreville. This Agreement was revised in Bangui in 1977 by the *Agreement Relating to the Creation of an African Intellectual Property Organisation* and came into effect on 8 February 1982. Negotiations to revise the *Bangui Agreement* started in 1994 and culminated in the *Agreement Revising the Bangui Agreement of March 2 1977 on the Creation of an African Intellectual Property Organisation 1999* (hereafter *Revised Bangui Agreement*) which came into force on 28 February 2002. OAPI is made up of the following countries: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Cote d' Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal and Togo.

¹⁷The organisation was known as ESARIPO at inception. In 1985 the name of the organisation was changed to African Regional Industrial Property Organisation (ARIPO). In 2002, the mandate of the organisation was changed to include copyright so necessitating the change of name. The organisation is made up of the following countries: Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, Tanzania, Zambia and Zimbabwe. These countries are hereafter referred to as the ARIPO countries and their relationship is governed by the *Agreement for the Creation of the African Regional Intellectual Property Organisation 1976* (hereafter *Lusaka Agreement*). In addition, some of the mandate of the organisation is governed by the Protocol on Patents and Industrial Designs within the Framework of the African Regional Intellectual Property Organisation (ARIPO) 1982 (hereafter *Harare Protocol*) and the Banjul Protocol on Trade Marks 1993 (hereafter *Banjul Protocol*).

deal with issues of copyright and traditional cultural expressions in member states. In particular, ARIPO recently adopted the *Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions 2010*¹⁸ (hereafter *Swakopmund Protocol*). Through their normative frameworks, both organisations illustrate one way in which a continental and regional understanding of the protection of traditional cultural expressions has emerged.

At the international level, it must be remembered that because most African states are members of the WTO 1994,¹⁹ they are committed to national treatment standards and the removal of tariff and non-tariff measures that inhibit the free flow of cultural goods that are often based on traditional cultural expressions. Furthermore, it may also be asked how conventions for the protection of cultural heritage—*Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970*²⁰ (hereafter *UNESCO 1970*); *Convention Concerning the Protection of World Cultural and Natural Heritage 1972*²¹ (hereafter *WCH*); *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*²² (hereafter *CCH*); *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995*²³ (hereafter *UNIDROIT 1995*); *Convention for the Protection and Promotion of Cultural Diversity 2007*²⁴ (hereafter *CCD*)—have assisted African states to protect their traditional cultural expressions.

¹⁸Hereafter the *Swakopmund Protocol*. On 9 August 2010, ARIPO and its member states held a Diplomatic Conference at the coastal town of Swakopmund in Namibia for the adoption of the *Protocol on the Protection of Traditional Knowledge and Traditional cultural expressions*. The Protocol was adopted by the member states and signed by nine (9) states which presented their credentials at the Conference. The nine (9) member states are: Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia and Zimbabwe. The Protocol is known as the *Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional cultural expressions*. The Protocol will enter into force when six (6) member states of the Organisation either deposit instruments of ratification or instruments of accession. The nine (9) states that signed the Protocol will be required to deposit instruments of ratification, whilst those that did not sign will have to deposit instruments of accession. Accession to the Protocol by such states shall entail acceptance of the agreement on the creation of the African Regional Intellectual Property Organisation. Other than the member states, the Protocol is open to any state that is a member of the African Union or United Nations Economic Commission for Africa.

¹⁹The WTO is established by the *Agreement Establishing the World Trade Organisation 1994* (33) *ILM* 1144.

²⁰823 UNTS 231.

²¹1037 UNTS 151.

²²2368 UNTS 1.

²³34 *ILM* 1322.

²⁴2440 UNTS 311.

Organisation of this Book

It is important to circumscribe the geographical scope of this work as it is neither practicable nor necessary to examine all African countries. Africa is differentiated by multiple pluralities. An obvious one is language in that, in addition to the numerous indigenous languages differentiating many ethnic communities, English, French and Portuguese are spoken in different African countries. Another is the legal system. In line with Africa's colonial heritage, the continent is also made up of states that have either a common law or a civil law system. To reflect Africa's peculiarities, I have selected the following countries: Nigeria, Ghana, South Africa and Kenya. Use is therefore made of the legal comparative method. In this regard, while Nigeria, Ghana and Kenya follow a common law tradition, South Africa operates under a mixed legal system of Roman-Dutch law and common law. All four countries have common features in that they recognise customary law and operate within a constitutional framework with a bill of rights.

This chapter is an introduction, which sets the context for the rest of this work by addressing the challenges in the protection of traditional cultural expressions in Africa. Chapter 2 examines the nature of traditional cultural expressions in Africa exploring the different types of these expressions and broad issues that define and frame them. Chapter 3 examines the negative protection of traditional cultural expressions in Africa through what is often regarded as *sui generis* mechanisms. In Chap. 4, this book turns to examine how the protection of tangible heritage in Africa impacts on the protection of intangible heritage and therefore traditional cultural expressions. In Chap. 5, the positive protection of traditional cultural expressions through a critical examination of how intellectual property rights can be used is undertaken. Chapter 6 examines how a rights protective model can assist in the protection of traditional cultural expressions.

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