

**INTELLECTUAL PROPERTY, THE AFRICAN CONTINENTAL FREE TRADE
AGREEMENT, HARNESSING AND PROTECTING MODERN TECHNOLOGY IN
AFRICA**

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Abstract

The Ubuntu concept emphasizes the realization of one's self through the realization of another, and it is this concept that forms the foundational philosophy underpinning the African Continental Free Trade Agreement (herein AfCFTA). The AfCFTA establishes an ambitious trade pact to form the world's largest free trade area by connecting almost 1.3 billion people across 54 African countries. Thus, the AfCFTA, emphasizes the realization of individual countries within Africa through the realization of the African region. One of the concerns of the AfCFTA is the promotion of innovation and enterprise through the protection of the intellectual property rights of African entrepreneurs. The big question is how well has the AfCFTA addressed the issues of fragmentation of various laws across Africa especially in relation to filing of patent and registration of trademarks. This paper finds that the monotonous patent filing requirement in various countries in Africa is one of the barriers facing young entrepreneur in Africa. This paper suggests the move from national legislation, to supra national legislation so as to achieve a harmonized and standardized market within the African region which would solve the problem of having fragmented national laws and requirement.

Keywords: Intellectual property, The African Continental Free Trade Agreement, Modern Technology, Africa

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1.0 Introduction

The COVID-19 pandemic is highlighting the importance of technology within the global economy in Nigeria generally and African economy in particular. Thus, bringing to light the very importance of intellectual property right in protecting and harnessing these technologies. Intellectual Property protection is the backbone of Innovation and creativity. The World Intellectual Property Organization defines Intellectual property (IP) as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.² In principle, IP rights confer the right to prevent others from using, making and selling the subject of the protection³. The Laws regulating intellectual property are always country specific, national IP laws determine eligibility for protection, scope of exclusive rights of the IP right holders, duration of protection, conditions for acquisition and maintenance, and rules on enforcement of IP rights, making intellectual property laws jurisdictional.⁴

A functioning intellectual property regime should also facilitate the transfer of technology in the form of foreign direct investment, joint ventures and licensing. The African Continental Free Trade Agreement is concerned with trans boundary / regional trade. Which is much more than moving goods and services across borders. Innovation, creativity and branding represent a large amount of the value that changes hands in international trade. Trade policy should enhance this value and facilitate the flow of knowledge-rich goods and services across Africa's (and other)

² IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish. <https://www.wipo.int/about-ip/en/> < accessed 2nd October 2021>. According to the World Trade Organization, IP can be divided into two; (1) Copyright and rights related to copyright. The rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by copyright. (2) Industrial property. This could exist by protection of trademarks, industrial design, patent etc. see https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm < accessed 28 September 2023>

³ WIPO, what is Intellectual Property? WIPO Publication No. 450 (E), WIPO, International Bureau, World Intellectual Property Organization, Geneva, 2003.

⁴ See Schedule II of the Exclusive Legislative list of the 1999 constitution, particularly item 13 and 43, and the enactment of the Copyrights Act 2004, Patent and Design Act of Nigeria Cap P2 LFN 2004 and Trademark Act CAP T13 LFN 2004 pursuant therefrom.

borders. It has been said that the AfCFTA will promote innovation and enterprise through the protection of the intellectual property rights of African entrepreneurs. A strong intellectual property right regime also protects consumers, encourages innovation, rewards entrepreneurs and attracts investment.⁵ Article 4 of the AfCFTA Agreement is to the effect that for the purposes of fulfilling and realizing the objectives of the AfCFTA the State Parties shall cooperate on investment, intellectual property rights and competition policy. “Cooperation” in these disciplines should not be relegated to an inferior set of undertakings, as the basic objective of the AfCFTA is to create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent.⁶ The first phase of the AfCFTA negotiations focused on the framework agreement establishing the AfCFTA and negotiations on protocols on trade in goods and services and dispute settlement. A second phase is dedicated to negotiations on investment, competition policy and IP. Phase two is intended to be completed by June 2021 but this has been delayed by the pandemic.⁷ The effective protection and promotion of IPR are part of this agenda. Particularly, with an increasingly digitized economy and a store of innovative youth, working on IP registration and protection will be key to harnessing the full potential of the AfCFTA and securing Africa’s future.

2.0 Interrelationship between intellectual property rights and the African Continental Free Trade Agreement (legislative gap in the AfCFTA)

An important feature of the AfCFTA is export diversification, and export diversification is an important component of innovation. Thus, for Africa to realize the full potential of the AfCFTA it will have to put in place policies that encourage and protect innovation by both residents and non-residents alike, with more emphasis on domestic innovation.⁸ The basis of this being that Africa is primed with innovation, due to its young, vibrant and increasingly educated population.

⁵ <https://www.tralac.org/blog/article/14066-the-proposed-afcfta-protocol-on-intellectual-property-rights.html> < accessed on 2nd March 2021>

⁶ Art 3 AfCFTA Agreement.

⁷ The Draft Intellectual Property Protocol to the African Continental Free Trade Agreement in Article provides the objective of the protocol, which is Establishing a continental framework on intellectual property which advances the interest of the State Parties and fosters innovation; Realizing the aspiration in Agenda 2063 for a continental market in goods and services; Formulating a common position on matters related to intellectual property during international negotiations.”

⁸ <https://www.brookings.edu/research/a-continental-strategy-for-economic-diversification-through-the-afcfta-and-intellectual-property-rights/> < accessed on 3rd March 2023>

Unfortunately, the current AfCFTA policy in the continent does not adequately protect and encourage innovation. For example, there is a need for innovation standardization across the markets. A good indication of innovation is the number of patent registrations filed in countries, and statistics have shown that Africa is lagging behind in this.⁹ The reason being the affordability of the patent registration fee for example, it is more expensive to register an idea in Côte d'Ivoire, Kenya, or Senegal than it is to register in Canada, the U.K., or Japan, the implication of this is that it creates an avoidably and prohibitively high barrier to innovation in African countries. The right to obtain a patent for an invention, for example, encourages the investment of money and effort in research and development. The granting of a patent itself encourages investment in the industrial application of the invention. The protection of IP rights does not therefore only promote fair trading but it also contributes to economic and social development.¹⁰ Thus an efficient patent system in Africa will stimulate innovation.

With New technology platforms developing across the African continent, from Ride in Ethiopia to health care platform Bylos in Rwanda,¹¹ the problem of lack of standardized market become compounded as these technologies which aim to empower new small and medium entrepreneurs, create jobs, diversify economies, improve productivity, and facilitate entry into new markets in Africa¹² are not properly protected by the AfCFTA, due to the lack of standardized market for innovation registration across Africa. The current practice in Africa is that new technologies have to be registered in every country of upon entry into such country,¹³ adding another barrier for young entrepreneurs already facing challenges like financing and poor infrastructure. Thus, for an innovation to be protected in another country in Africa, they ought to be register for patent

⁹ For example In 2017, African countries registered 1,330 patents by residents, compared to 1,682 in Latin America and the Caribbean, 592,508 in Asia and 116,359 in Europe (Figure 6.5). Moreover, contrary to the case of Latin America, Asia, and other developing market economies, in Africa, registration by non-residents is higher than by residents and growing faster. See generally (n 4).

¹⁰ Yeukai Mupangavanhu, "THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS WITHIN THE CONTINENTAL FREE TRADE AREA IN AFRICA: IS A BALANCE BETWEEN INNOVATION AND TRADE POSSIBLE?" (2018) International Journal of Business, Economics and Law, Vol. 15, Issue 4 (April) ISSN 2289-1552.

¹¹ In Kenya, for example, nearly 50 percent of all transactions are done through mobile payment. In 2018, Africa's services sector accounted for over 52 percent of Africa's GDP—largely boosted by the booming digital sector. (n 4).

¹² Martin Wolf, "The fight to halt the theft of ideas is hopeless," Financial Times, November 19, 2019. <https://www.ft.com/content/d592af00-0a29-11ea-b2d6-9bf4d1957a67> <accessed 4 March 2023>

¹³ See generally Section 3 of the Patent and Design Act of Nigeria Cap P2 LFN 2004. See also Section 9 of the Trademark Act CAP T13 LFN 2004.

protection in that country. This whole practice creates a major setback for young entrepreneurs who face financial challenges. What is needed with the enactment of the AfCFTA, is the protection of innovation by ensuring the application of affordable harmonized IP laws across the continent. There is a need to develop a unified approach with regard to IPR matters in Africa. There is a clear gap between the provisions of the AfCFTA and IPR, the provision of article 4 of the AfCFTA only mentions intellectual property rights without more, thus present state of affairs is characterized by some degree of fragmentation. This undermines the use of scarce resources and of legal certainty.

3.0 Why an intellectual property protocol in the AfCFTA?

The initial rationale for an IP rights protocol in the AfCFTA can be explained in the context of the continental agenda for increased intra-African trade and economic integration. The experience of the European Union provides an example of similar circumstances. The conflict between nationally limited IP rights and the promotion of regional trade and economic integration forced the European courts to develop norms for what is now called “regional exhaustion”¹⁴. Another rationale is to avoid the differential treatment of the AfCFTA countries compared to countries outside Africa arising from participation in different multilateral and bilateral IP rights treaties. And finally, to provide for harmonized approaches to key IP issues of interest for Africa that are not adequately covered under multilateral treaties, including plant variety protection and the protection of genetic resources, traditional knowledge and cultural expressions.¹⁵

4.0 The way Forward (recommendations)

¹⁴ Over time, the European courts have acknowledged that IP rights should not be used to fragment the internal market, starting from the early stages of regional integration in 1960. Consequently, once a right holder has placed a product protected by IP rights into the European market, it cannot prevent the circulation of the product within the regional market. See generally “ASSESSING REGIONAL INTEGRATION IN AFRICA | ARIA IX” <https://repository.uneca.org/bitstream/handle/10855/42218/b11963189.pdf?sequence=1&isAllowed=y> < accessed 2 March 2023> pg 123.

¹⁵ See the case of the case of *Hoodia gordonii*. Supra Note 13.

One overarching issue that must be considered is how the AfCFTA partner states will structure some form of continental IP law¹⁶, especially in light of harnessing and protecting modern technology in Africa. Africa's existing law and broader proposals on IP, are illustrative of where the AfCFTA might substantively press forward¹⁷, thus it is the writer's opinion, there should be an intellectual property protocol to the AfCFTA which leverages on already existing regional IP regimes, such as ARIPO and OAPI, in order to streamline the continent's IP policies. [Africa has two regional patent systems, OAPI (Organisation Africaine de la Propriété Intellectuelle or African Intellectual Property Organization) and ARIPO (African Regional Intellectual Property Organization)¹⁸ e.g., ARIPO's regional trademark filing system, which extends to its nineteen member states. These two system has the aim to promote, develop and harmonize IP laws and policies. Its objectives include the integration of IP into development programmes and policies, IP administration (registration, exploitation and enforcement), undertaking IP awareness initiatives, promoting capacity building and development of human resources in IP and promoting the dissemination of technological information and transfer of technology.¹⁹ Also under the OAIP, the organization encourages creativity and technology transfer using industrial

¹⁶ These laws may be in form of minimum standards, as it would be impossible to established a unified law for 55 African countries. It has been suggested that the provision of Article 8 of the draft protocol provides minimal or no guidance on core issues such as beneficiaries, scope of rights, scope of protectable subject matter and exceptions and limitations and that the questions are perhaps intended to be left to domestic law. see Wend Wendland MULTILATERAL MATTERS #7: THE DRAFT PROTOCOL ON INTELLECTUAL PROPERTY RIGHTS TO THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT (AFCFTA): ANNOTATIONS ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS, <https://infojustice.org/archives/42674> < accessed on 5th March 2021>. See Also the argument in KATRIN K AND AKINYI L. A. , "THE AFRICAN CONTINENTAL FREE TRADE AREA: TOWARD A NEW LEGAL MODEL FOR TRADE AND DEVELOPMENT", (2020) GEORGETOWN JOURNAL OF INTERNATIONAL LAW, Vol. 5,. The Draft Intellectual Property Protocol to the African Continental Free Trade Agreement in Article provides the objective of the protocol, which is Establishing a continental framework on intellectual property which advances the interest of the State Parties and fosters innovation; Realizing the aspiration in Agenda 2063 for a continental market in goods and services; Formulating a common position on matters related to intellectual property during international negotiations."

¹⁷ Efforts to include IP protection for access to medicines may be illustrative of how a change in law in this area could be incorporated at the multilateral level. Bethel Uzoma Ihugba & Ikenna Stanley Onyesi, "International Intellectual Property Agreements as Agents of Sustainable Development of Developing Countries", (2016)9 AFR. J. LEGAL STUD. 1, 10 .

¹⁸ ARIPO was established in 1976 and currently has 19 member States. It is designed to consolidate resources for the regional administration of IP rights and to provide a forum for negotiations. Whilst the OAPI was created in 1962 and currently operates under the Bangui Agreement, which was adopted in 1999 and came into force in 2002. The Bangui Agreement established the substantive laws and procedures for acquisition, maintenance and enforcement of patents, utility models, trademarks, industrial designs, trade names, geographical indications and layout designs of integrated circuits.

¹⁹ (n 13) at p 110.

property networks; and making its territory attractive to private investment through the creation of an enabling environment for the effective application of IP principles. Even though the larger African economies of South Africa, Nigeria and Egypt do not form part of the regional systems, the OAPI and ARIPO system provide a relatively cheap, easy and effective way of extending IP protection to a total of 35 African countries²⁰, in which a protocol to the AfCFTA on Intellectual property can draw from, with the purpose of facilitating and protecting modern technology.

Additionally, the protocol should Consider the appropriate role of other international registration systems such as the Patent Co-operation Treaty (PCT), the Hague System regarding registration of designs, and the Madrid Protocol regarding the international registration of trade marks. Agreement on a consistent approach in using these systems could benefit the use and protection of IPR in Africa, and in effect protect modern technology in Africa.

What is more, Stronger IP laws are not necessarily going to promote innovation within the African continent²¹, as a conservative IP regime which favours minimalism should thus be preferred. The protocol to the AfCFTA should not emphasize on stronger regional IP laws.²²

The IP rights protocol in the AfCFTA can include norms to safeguard African interests, in particular Providing for non-discrimination among States parties on matters of IP rights, Establishing a regional IP exhaustion system in order to prevent fragmentation of the AfCFTA market and encouraging the development of regional value chain integration, Providing the minimum requirements to ensure the mutual supportiveness of the protection of IP rights and the protection of traditional knowledge, genetic resources and cultural expressions, with sufficient flexibility for domestic law and multilateral negotiations on the issue, Addressing the challenges of African countries concerning plant varieties protection by developing minimum standards on availability, scope of protection and exceptions to plant breeders' rights and the protection of traditional and new farmers' varieties. • Developing guidelines to strike the appropriate balance under the procedures for enforcement of IP rights amongst others.

²⁰ <https://www.un.org/africarenewal/magazine/january-2021/afcfta-how-intellectual-property-rights-can-help-create-jobs> < accessed on 4th March 2023>

²¹ (n 9) at p 19.

²² For example, South Africa which has a relatively strong IP system yet it has experienced less foreign direct inflows compared to China, India and Russia which have weaker IP systems (UNCTAD, 2017).

5.0 Conclusion

In conclusion, this paper addresses the legislative gap in the AfCFTA in relation to intellectual property rights in the African region makes a critic of the Draft Protocol on IPR, and argues that with the growth of modern technology in the region, there needs to be a standardized market for innovation registration across Africa and suggest a movement from national to sub national regulation.²³ This paper further proposed that the standardized market take the form of setting minimum standards rather attempting to formulate a regional legally binding statute on IP laws for the 55 African countries. The implication of having a standardized market would do away with fragmentation of laws across various countries in Africa and have the ripple harnessing the growth of innovation in the region and also ensuring protection for such innovations.²⁴

²³ Of relevance maybe the practice in the Association of Southeast Asian Nations (ASEAN) countries have adopted the operational aspect of IP rights management as their priority, opting to develop a regional cooperation scheme, which remains robust, instead of adding layers of substantive IP norms, based on the Framework Agreement on Intellectual Property Cooperation (1995) see The ASEAN member States are Indonesia, Thailand, Singapore, Malaysia, Philippines, Viet Nam, Myanmar (Burma), Cambodia, Brunei, Laos.

²⁴ Although this in itself raises some legal questions. One of which is what happens where the obligations owed by some African countries in other treaties and instrument are above the standards set by the Protocol? Thus the Drafting stage of the Protocol on IPR need to take into consideration prior obligations of African countries in various IP Instruments.