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Over the last two decades, Intellectual Property Rights (IPRs) - Patents, Copyrights, Trademarks, Geographical Indications (GIs) have transited from the obscure area of legal analysis and policy isolation to the vanguard of global economic policymaking. At the multilateral level, the successful conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in the World Trade Organization (WTO) hoists the protection and enforcement of IPRs to the level of international commitment. Africa is seen to have positive developments in the IP landscape but has often struggled to realize its full economic potential. For this reason; the fragmentation of the IP system in Africa has been seen as a major stalemate to IP development in Africa. Hence, the move toward harmonization of IP has become a critical subject worth consideration for the development of the Intellectual Property system in Africa.

2 ibid
3 http://africainternationaltrade.com/aripo-under-afcfta-should-nigeria-join-or-not/
2.0 OPENING REMARKS

Mr Sand Mba Kalu: Executive Director- Africa International Trade & Commerce Research opened the webinar by stating that we live in a world where businesses are no more confined to a country's border. And that IPRs protection is increasingly becoming international, rather than national. Mr Mba-Kalu mentioned that fragmented IPRs systems at regional levels limit coordinated protection of inventions and creative works, and this can directly stunt social and economic development. He noted that currently, Africa has two main intergovernmental IPRs organizations- African Intellectual Property Organization (OAPI) and African Regional Intellectual Property Organization (ARIPO) which operate two different systems and approaches to IPRs protection and administration. And that the Intellectual Property (IP) protocol to be negotiated in Phase II of the African Continental Free Trade Area (AfCFTA) agreement opens up questions about regional and continental harmonization of IPRs in Africa. He closed his remark with a question: with the existence of different IPRs systems in Africa, OAPI, ARIPO, as well as IPRs provisions at the Regional Economic Communities; Can Africa achieve the needed technical clout to facilitate cross border IPRs protection?

Dr Titilayo Adunola Adebola- Lecturer and Theme Coordinator, Intellectual Property Law- University of Aberdeen, UK, served as the moderator of the webinar. Opened her statement by mentioning that innovation and creativity are widespread in Africa and that from the cultural viewpoint, taking provenance associated goods that are protected under geographical indication systems as an example -we have Oku white honey and Penja pepper from Cameroon, Ziama-Macena coffee from Guinea, Rooibos from South Africa and Argan Oil from Morocco. She further expressed that from the creativity viewpoint, we have a thriving Nollywood industry in Nigeria, which is the second-largest film producer in the world and Gollywood from Ghana, which are creative works produced in the film industries and are protected under copyright systems. She further referenced Professor Caroline Ncube (2018) who neatly delineates the emergence and development of intellectual property rights in Africa through four periods: (i) pre-colonial; (ii) colonial (fifteenth-century century onwards); (iii) post-colonial (twentieth-century century onwards); and (iv) post-TRIPS (1995 onwards). She believes Africa is about to enter another period with the AfCFTA.

Moreover, she expressed that IPRs, broadly covering (i) industrial property -patents, trademarks, geographical indications, industrial designs, (ii) copyrights and allied rights, and (iii) sui generis rights, are not derived from science. And that they are culturally construed and negotiated between state and non-state actors. She finally asserted that the IPRs developments, as she already outlined were mostly driven by external influences such as colonisation and the multiple multilateralisms and that with this renewed interest in IPRs in Africa through the IP Protocol in the AfCFTA, this is an opportunity for the continent to define its IPRs architecture.

3.0. The Status-Quo of Intellectual Property Right in Africa: Case of Pan-Africa Intellectual Property Organization (PAIPO) and Africa Continental Free Trade Area (AfCFTA)

Mr Million Habte: The Coordinator - IPRs negotiations under AfCFTA in his response to the call to discuss the current state of IPRs at the African Union vis-à-vis PAIPO and AfCFTA and also on how OAPI and ARIPO, as well as the Regional Economic Communities (RECs) function within PAIPO started by mentioning that IPRs is slated for phase two negotiations of AfCFTA.

He stressed that going for a continental IPRs institutional and system would not be an easy task. But he advised that as a continent when discussing IPRs, we should be able to ask what does the continent have? He mentioned that the continent already had regional intergovernmental organizations that deal with IPRs issues together with
the agenda 2063 which has its clear vision and aspirations. He hence posited that it is expected that these aspirations and vision will inform and give some guidance for negotiators when they develop the specific protocol for IPRs under AfCFTA.

Furthermore, he stated that regional IP organizations such as ARIPO, OAPI and regional economic communities such as COMESA, EAC, SADC have touched upon issues of IPRs in their respective legal frameworks. So given all these one can find it most unlikely to have the 55 African countries coming up with a single legal document on IPRs because of the level of fragmentation seen across the continent. According to Mr Million Habte, developing a protocol is going to be a member state-driven process. He explained that the IP Protocol in the AfCFTA will build on the existing continental IPRs frameworks such as the ‘African Model Legislation for the Protection of the Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources’ and the Continental Strategy for Geographical Indications in Africa 2018 – 2023.

He also stated that when we consider the number of patent and trademarks, registration in the continent, they are very limited in the number when you compare it with other regions of the world. The reason is that they are very expensive and the detailed process of securing patents and trademarks, is cumbersome. And in fact, that more numbers of patents and trademarks are held by non-residents or non-Africans. Finally stated that in all the objective of the intellectual property rights under the AfCFTA would be within the objective of the whole purpose of the AfCFTA that it should be enhancing development and support trade. Either trade in goods or trade in services.

3.1. Intellectual Property Harmonization: Structure and Perspective of OAPI and ARIPO

Mr Denis L. Bohoussou: Director-General, OAPI; opened his statement with the background on the creation of OAPI in 1962 and that the Bangui accord was just a precedent to the creation of OAPI. He also mentioned that OAPI has 17 member states of which most of them are French-speaking member countries in West Africa. He also mentioned that OAPI has a unitary system for deposit of patents or trademarks. In response to the concern raised by Mr Habte, of the AU- the DG stressed that processing IP registration is cheaper under OAPI. Relating to the harmonization of intellectual property interests in Africa, Mr Bohoussou emphasized the need for caution and the need to understand what Africa wants. He further asked does Africa want to harmonize the already existing laws? Or Africa wants a single authority or plurality of the administration responsible of IP. He stated that most laws in Africa comply with international laws and with international treaties. He rounded up his statement by saying consideration should be given to the fundamental principles of each regional intergovernmental IP administration in Africa when we discuss the issue of harmonization.

Mr Fernando Dos Santos: Director General – ARIPO took the turn to introduce the creation and structure of ARIPO. Mr. Dos Santos stated that the19 members of ARIPO are spread across the continent of Africa, and the organization was established in 1976. He also stated that the structure of ARIPO consists of four organs; comprising the highest governing body, the Council of Ministers who comprises ministers, responsible for intellectual property in each country, the Administrative Council, the Secretariat, and the Board of Appeal.

On the harmonization of activities between ARIPO and OAPI, he stressed ARIPO and OAPI covers different jurisdictions and therefore, there is no competition between the duos. He further emphasized on the existence of vacuum because Africa still has countries that are neither members of OAPI nor ARIPO. Moreover, there’s a big gap in terms of administration of intellectual property, which impacts on the users, especially when users are not in the continent of Africa. According to him, statistics reveal that majority of the users of these systems are indeed located outside of the continent.

of Africa. And that this makes things a bit complex for users to file an application and secure the protection as they desire. Mr Dos Santos further explained that ARIPO and OAPI signed the first agreement in 1996 with the intending objective of coordinating activities for better results in the continent. This he said resulted in cooperation in several areas. This agreement was further consolidated in 2005 by incorporating more of the initiative of cooperation. The DG, however, stated that in 2017 ARIPO and OAPI went further to explore new ways of collaboration. The aim is the harmonization of both IP organizations’ operations. According to him, issues on the exchange of documentation and information where some of the things that were considered by both Organizations.

He also mentioned that both organizations consulted diplomats of the Africa group in WIPO Geneva to brief them of the ongoing harmonization discussion, which has led to WIPO, ARIPO and OAPI signing an agreement in 2018 called tripartite agreement also known as WAO. Within the WAO, agreement is the request for a study to identify possible areas to harmonize within the two systems. He also posited that the future expectation is to solidify the 2017/2021 agreement between ARIPO and OAPI, in such a manner, where users of the system will commence their application process with ARIPO and could expand it to OAPI, which would be mutual recognition. And also, if ARIPO conducts an examination and concludes their assessment, there will be no need to replicate the same in OAPI.

She further stated that the objective of IP harmonization under AfCFTA is to create a single continental market, expand intra-Africa trade, and enhance a fair competition between different industries and to achieve a Common Customs Union, for Africa. Then she proceeded by stating that the principles of AfCFTA would be driven by member states and that the member states will grant each other most favoured nation status. Which according to her is called the best friend status in legal practice among clients. She, likewise, stressed that this kind of relationship should be reciprocal.

3.2. Discussions on IP Harmonization and IP Fragmentation in Africa: Academic and Legal Perspective

Ms Uche Nwokocha: Partner at Aluko & Oyebode Law firm, opened her submission by first stressing the need for Africa to develop a system that speaks with one voice on IPRs issues is long overdue and that AfCFTA protocol on IPRs is providing an opportunity for Africa to articulate that voice. She further indicated that the IP regime should encourage innovation, protect the brand owners and the consumers alike and more importantly, encourage the investments and increase’s revenue for countries where IPRs are duly protected.

She, further, stated that the main challenge that lies ahead would be an enforcement issue. Which, in summary, have to do with ensuring effective enforcement across different jurisdictions with different classification systems for goods. She also mentioned that after the challenge of enforcement comes to the challenge of determining the currency for trade and funding under AfCFTA. Finally, she mentioned that the opportunity of harmonization lies in the power of numbers and so with the unification of all members’ efforts, there will be more robust IP policy for Africa. And also there will be business and career opportunities for African citizens were all Africans see themselves as one.

Adejoke Oyewunmi Phd: Professor of Intellectual Property, Faculty of Law, at the University of Lagos, Nigeria took a turn by describing the theoretical and philosophical dimension of IP in Africa. She asserted that intellectual property protection is informed by two fundamental objectives, which are to protect the Private ownership rights of those who engage in creative and innovative activity and secondly, the public interest imperative. She explained that public interest generally comprises the interest of members of the public to access intellectual works or to access the outcome of creativity. She further mentioned that IP registration bodies play a very critical role in an effective IP system. So IP registration needs to be readily accessible and affordable
to applicants. Going forward on this, she mentioned that the first intellectual property law was promulgated in 1900. She, however posed a question of the rationale behind the formation of the system as to whether it was born out of genuine desire to foster creativity, development and growth of the continent or was it primarily targeted at the protection of technology, rights and the interests of the colonialists who came in to exploit Africa resources.

She, therefore, emphasized the need for going back to history to understand the current state of IPRs in Africa. Moreover, she emphatically opined that whatever we do—must be done also with the primary objective of ensuring that it meets local situations, local needs and local circumstances. On this note, she commended ARIPO for coming up with the Swakopmund Protocol and AU model law that aim to protect traditional knowledge at the regional level.

In conclusion, she mentioned that the IP system should be better strengthened to deal with anyone who attempts to register a patent having used the underline traditional knowledge or genetic resources without complying with the existing framework in terms of concepts, access and benefit-sharing. But many African systems do not have these creative solutions or creative approaches to IPRs protection, which Africa needs to increase the number of African applications. She also said it is a positive development that in many parts of the continent, academic and research institutions are more aware of some of the prospect and the benefits of the IPRs system.

3.3. Issues on IP Fragmentation in Africa: Historical and Contemporary Standpoint

Professor Johnson Ekpere: former Executive Secretary and Head of Mission, African Union Commission, Scientific, Technical and Research Commission opened his statement with two remarks. The first was on the negotiations of the Uruguay Round of GATT that had more than 56 members, which African Union is a member, and the negotiators could come out with an acceptable document, titles and trade agreements. On this, he believed that the difficulties that African may be having are self-inflicted, and they can be overcome. Secondly, Professor Ekpere introduced the Africa Model Law to everyone. He expressed his disappointment that only very little has been said about the African model in the literature and even by the African Union itself.

He stated that harmonization was the core objective of the GATT negotiations. He further expressed the need to come up with a generic description and definition of what harmonization is to Africa so that everyone will be on the same page. Unless Africa begins from that base ground rules, Africa might not go very far in the Africa IP system. Professor Ekpere stated that harmonization is not a zero-sum game and that Africa has to be able to craft what it considers to be acceptable, not just in the language, but the spirit and content of that phrase. He, therefore, stated that unless that is done there will be challenges along the way to have harmonized Africa IPRs system.

Furthermore, Professor Ekpere pointed out the significance of the TRIPS agreement for developing countries as a well set out rules for those that have been operating intellectual property laws over the years. However, the sections, which are relevant to areas, such as compulsory licenses for pharmaceutical products, the protection of genetic and biological resources, and traditional knowledge can be further developed. He noted that the formation of the Africa model law was thorough because it brought together a team of like-minded Africans who came up with a new way of dealing with emerging areas of IP.

On harmonization Professor, Ekpere clearly stated that harmonization of laws that are relevant to IP development in Africa has proven difficult based on dependence on donor fund to undertake such harmonization, limited legislative implementation capacity as well as the slow bureaucratic process of lawmaking in Africa, and the poor technical knowledge and negotiation skills, conflict of interest, political considerations, and ideology and sovereignty issues.
Professor Ekpere concluded that to mitigate some of the problems, there is a need to build trust and consensus, involve a multidisciplinary team of IP expert consultants and not IP lawyers who are only competent in the translation of IP laws. And also there is a need to prescribed terms of reference predicated on African interests.

4.0. Wrap Up and Closing Remark

In conclusion, the panellists discussed questions around the expected system of settling Intellectual Property disputes under AfCFTA, National government to prioritize Intellectual property right and the possibility of PAIPO or AfCFTA increasing the number of intellectual Property application in Africa?

Mr Million HABTE believed from the current circumstance and the way things are going is very clear that AfCFTA can be a good fit for more IP application in Africa given that AfCFTA has achieved a significant number of ratification by the member states. Mr Denis BOHOUSSOU in his concluding remark indicated that the issue is not about the fragmentation of the IP system because the IP system is, by definition, fragmented. He, therefore, stated that the main issue is on how the IP system can be more efficient for Africa. Mr Fernando DOS SANTOS pointed out that having a single IP framework will be problematic in Africa. He referred to the challenge Africa is having with TRIPS agreement because it is a single framework that does not allow Africa to customize the system to meet its objective. He further illustrated that Africa has to build an IP system that works for Africa and to achieve this objective Africa has to initiate a phrasing mechanism, by having a unifying IP policy framework, as well as continental IP norm-setting and having an administrative institution that targets the interest of Africa.

Ms Uche NWOKOCHA, in her wrap-up remark, expressed concern about the current IP registration and dispute settlement systems of the continent. She emphasized the potentials of IP for social and economic growth in Africa. However, she noted that OAPI and ARIPO should be harmonized to build strong IPRs systems on the continent. By so doing the issue of fragmentation will be addressed.

Professor Adejoke OYEWUNMI in her concluding remark stated that the time was right for AfCFTA to take advantage of the gold mine in intellectual property existing on the continent and more so, to look inward and find out how Africa can strengthen its capacity to leverage on indigenous intellectual property and not just traditional knowledge. Prof. Johnson EKPERE in his closing remark stated that there’s a direct relationship between IPRs and national development. He also mentioned that if OAU has transited into the African Economic Community as originally intended, there would have been less difficult with harmonization.

Dr Titilayo Adunola Adebola, in her closing remark, appreciated the panellist and said the session has been informative and enlightening with the overall consensus by the heads of the two major regional intergovernmental IP organisations to work towards addressing the concern of fragmented IP systems the continent, which will produce an IP system that works for Africans.

Mr Sand Mba Kalu also acknowledged the excellent interventions from the panellists. Going forward he said that through concerted operation and regular interaction Africa can improve the understanding, build trust and confidence required to forge a lasting and effective IP system. He proposed a private sector continental-wide IP network that will consider membership and participation from the English, French, Portuguese, Swahili, etc. Speaking countries. He said the network should be open to all Africans who are interested in having an IPRs system that works for Africa. In his final remark, Mr Mba Kalu said the network will support already established regional intergovernmental institutions that are working on IPRs in Africa by presenting the private sector perspective on issues of IPRs in Africa. This will be in the form of offering a coordinated private-sector technical perspective to support the ongoing harmonization discussion on IPRs system that works for Africa as well as phase two negotiations of AfCFTA on IPR.

If you are interested to join the Africa IP Network initiative contact us via email oluwafemio@africainternationaltrade.com
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