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Effect of Intellectual Property Right and Fair Use in the Digital Era on Indigenous Knowledge: An overview

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An understanding of intellectual property right is specifically important in an academic, scholarly, and artistic environment where creators are continuously using the works of others to build and shape their own opinions and later use it to produce their own works. This paper examined the effect of intellectual property right and fair use in the digital era on indigenous knowledge. The researcher carried out a comprehensive extract on textbooks, journals and magazine, internet, Newspapers and other written documents that are related to the subject matter. The paper equally examined clarification of some basic terms used in the works which include intellectual property, protection, Indigenous knowledge, intellectual property protection and the digital era. Many other important areas were equally examined such as: the digitization of indigenous knowledge, relationship between the indigenous knowledge and intellectual property rights, the principle of fair use and fair use doctrine. From the empirical studies extracted from various journals textbooks and written document consulted and referenced, it is cleared that there is so much problems of enforcement of copyrights in the print- based world. It is even worst in the digital era where materials are freely available on World Wide Web and internet and in most cases it's a challenge to differentiate between original work and copies of the same work. Finally, some of the exception to intellectual property rights were highlighted including some problems of copyright of digitized indigenous knowledge and above all suggested way out are equally highlighted

Key words: Intellectual property, Digital era, Indigenous knowledge, Intellectual property protection

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INTRODUCTION

Intellectual property protection is generally ambiguous. According to Litmus (2000)this is ironic considering that it applies to everyday activities that people do for instance photocopying of documents, recording music's for their personal use, literary works of authors, writers, illustrators, editors, actors among others. So many people are blissfully unaware of what intellectual property protection entails and means to both the creators and users of knowledge. Kari, Ogar & Oyeniran (2014) affirmed in their study that intellectual property protection right is associated with the legislative rights given to an author, editor or any individual or institution responsible for the creation of original literary works as to prevent any likely abuse of use. Intellectual property rights are meant to reward, recognize and encourage innovation and creativity. They bestow upon the recipients the right to contest against anyone who appropriate their rights. Examples of intellectual property rights include the granting of copyrights, patents, trademarks and trade names.

Anaeme (2014) describes intellectual copyright as an intangible right protecting the products of human intelligence

and creation. Its therefore defined as the legal rights granted to authors or writers for their creative and original literary, dramatic or musical works as the exclusive right to do or authorize other persons to do certain acts in relation to the work. In the words of World Intellectual Property Organization (WIPO) document on intellectual property reads as follow:

> "*When a person creates a literary musical. Scientific or artistic Work, he or she is the owner of that work and is free to decide On its use. The person (called creator or the author or owner Of right) can control the destiny of the work. Copyright is the Legal protection extended to the owner of the right in an original Work that he has created. It comprises of two main sets of right :the economic right and the moral right (WIPO,2003)" P316*

Economic right means the right that the owners of the work have to make a profit from their works. These include the rights of reproduction, broadcasting, public performance, adaptation, translation and public recitation, public display, distribution and so on. While moral rights refer to the right of the author to have his/her name prominently indicated on the work and to object to any use of that work that he/she deems to be a distortion, mutilation or any other modification (Moahi, 2004).

Protecting the right of creators, authors encourage them to continue contributing to knowledge. Mears (2003) notes that, the purpose of copy right is to promote the progress of science and useful arts and to encourage others to build freely upon the ideas and information conveyed in a work" The ideas is that authors are encouraged to produce more knowledge by being given the rights to benefits commercially and otherwise from their work. The main international agreement on intellectual copyright is the Berne Convention of 1886, administered by World Intellectual Property Organization (WIPO), to which most countries have fashioned their own copyright laws. (WIPO) is an international organization tasked with promoting the intellectual property works. It's a UN specialized agency based in Geneva and has a country membership of 179. It administers a total of 23 treaties dealing with different aspects of intellectual property. One of these treaties is the berne convention of 1886 that has been revised several times over the years. The convection was signed to protect the rights of authors of literary and artistic works and all member countries that have ratified the convention are bound by its provisions. The Berne convention stipulated that copyright usually last for the life of the author, plus an additional 50 years. After which the work is then in the "public domain" that is can be used without the author's permission because copy right has expired

As the world of literary works increases individual, institution as well as organization faced with all manners of protection of intellectual property right use especially in managing digital environment that has to do with using technology to which many people in the world now have access to. With issues of copyright being unclear in the digital environment, developing or creating copyright of indigenous and cultural heritage in the digital environment world has become practically difficult if not totally impossible.

In view of the challenges discovered from the extract of journal, textbooks and other documents, the researcher was able to discuss basic principle of intellectual property right (copyright laws) relating to protection of intellectual right. All these are instructive and act as a guide in analyzing intellectual property right's challenges especially in the era of World Wide Web (digital environment). In all, the researcher also examines the intellectual property right; the doctrine of fair use; intellectual property protection; intellectual property and fair use in the digital era; intellectual property rights and indigenous knowledge; digitizing indigenous knowledge in the digital era.

Conceptual Clarification of Terms

i. **Protection**:

The concept protection is described in various ways. In a common sense it means providing security against danger or taking away or threatening the liberty (freedom) of any person. Cambridge Advance Learners Dictionary (2008) defined protection as a noun, the act of protecting or state of being protected. Protect as a verb means to keep someone or something safe from injury, damage or loss.

ii. Indigenous knowledge:

Indigenous knowledge is defined as a system of complex arrays of knowledge, know-how, practices and representations that guide human societies in their innumerable interactions with the natural environment. Indigenous knowledge is unique to every culture or society. In other words, it is described as the systematic body of knowledge acquired by local

people through the accommodation of experiences, informal experiments and intimate understanding of the environment in a given culture. It is the basis for local level decision making in natural resources material and most of other activities.

iii. Intellectual Property:

The concept intellectual property is a legal term describing authorship and ownership of discoveries, inventive or literary works. Anaeme (2014) sees intellectual property as human intelligence and literary creation. In a researcher`s view Turok and Fredrick (2010) observed that intellectual property refers to original work of authorship as contained in 1976 revision, copyright act. From above understanding it could be understandably defined as any original literary works either in manuscripts, printing or internet. Whose authorship, artistic and literary creation reached to an individual corporations, institutions or agencies such as colleges, polytechnics and universities.

iv. Intellectual Property Protection:

The concept intellectual property protection is associated with a legislative right given to an author, editor or an individual or institution responsible for a creation of original literary work as to prevent any likely abuse of use. Kari, Ogar, and Oyeniran (2017) described intellectual property right as an intangible right protecting the product of human intelligence and creation. It is therefore defined as the legal rights granted to authors and writers, for their creativities and originality in literary, dramatic or musical works as the exclusive rights to do or authorize other person to do certain acts in relation to that works. Isiakpona (2012) defined copyrights as a set of exclusive rights granted by Government for a limited time to protect the particular form, or manner in which an idea or information is expressed.

The Principle of Fair Use:

The fair use principle consists of a set of rules that outlines what constitutes allowable use of copyright materials. The fair use principle enables or encourages the development and progress of knowledge by making copyrights flexible enough to allow copyright materials to be the basis of new knowledge. There are four conditions used to judge whether the use of intellectual property right and protected materials constitute fair use or not. These conditions have been used by various works especially in the United States of America (USA), to evaluate whether there has been an infringement of copyright. The conditions are as follows;

i. The creative nature of the original work: this means that when the copyright work has been used to produce a non-fiction work, then the individual gets more points for fair use than someone who has produced a fictional work.
ii. The effect that the use of the work has on the market value of the copyright works, that is whether the use of a copyright work has affected the economic gains of that work due to the creator.
iii. The purpose and the characters of use: that is whether the work is used for educational purposes and research. If the materials have been used for other purposes, for example, for commercial gain, the copyright has been infringed.
iv. The amount and substantive value of the work being copied relative to the work as a whole: reproducing a large portion of the work, such as the whole book or more than a third of it is regarded as an infringement of intellectual property right(copyright). The rule is that if a work is used to create a new work, which is called transformative use, then this constitutes fair use.

However, if it is just a direct copy, with no transformative value then this is definitely copyright infringement. In addition, if that work is copied in other to gain commercially then the copyright has been infringed or violated.

Exception to Intellectual Property Rights (copyright law):

i. This, fair use rule is an exception of the copyright laws, when materials can be produced without first seeking the author`s permission. This apply when the use of the materials is not for financial gain, but it is used for educational purposes or informing the public. This is why scholars are able to freely reproduce materials from journals and books and to also quote from other sources, as long as it is not done for financial gain but for education and research purposes.
ii. Fair use is not considered to have been applied when the use of a work may affect the return of the materials in terms of sales. An example, is when by photocopying or recording an item, potential buyers are prevented from going out to purchase the items. This obviously affects even libraries when lending of books may be considered to be harming the potential returns of the authors. Fair use, especially in the USA has been built through lawsuit over the years.

Intellectual Property Right and Fair Use in the Digital Era:

There is no doubt that ICTs have remarkably transformed intellectual property rights as they have affected many other things. The first concerns of copyright in the digital world which was first raised in the USA. Subsequent to the Information Infrastructure Task Force (IITF). formation by one-time president of America (President Clinton). Infrastructure Task Force was tasked with articulating the administration`s vision of a National Information Infrastructure (NII). This issue became the mandate of the working group on intellectual property rights. The working group considered that a Conference on Fair Use in the digital era (CONFU), bringing together copyright holders and educationist and interested was required to try and develop guidelines for fair use in the digital era. The working group met many times and developed guidelines, although they failed to reach consensus on the applicability of these guidelines. In the absence of anything else guiding fair use in the digital environment in many institutions and universities especially in the USA, have adopted the guidelines. These guidelines refer to a number of circumstances when digital copying might need to be carried out. For example, it covers the digitization of images for use in teaching and scholarly work. It is permissible for education to digitize analogue images as long as they use thumbnail sketches of those images. Educators may also use images for teaching and scholarly presentations but would be required to seek permission if they were to be published. Multimedia works may be created for either teaching or for scholarly presentation, but with limitations on the amount included in the presentation. The multimedia work may only be used for a period of two years only.

Fair use makes the utilization of libraries materials either in traditional or electronic format within the provision of copyright law relating to the authorized and ownership of literary work. It makes it possible for individual to make reference to other people ideas and reproduce them provided this is for academic study. An example is carrying out research or for teaching purposes. While this could work very well or fairly well when the material is in printed format such as books and periodicals. Copyright enforcement in the printed environment by nature could be difficult. First, creators and authors have the right to prohibit them if they perceive that their rights have been infringed.

However, the monitoring required in this case is practically impossible for them. Hence, the existence of collective copyright management organization who look after the interest of creators and authors in many countries. Secondly, even though the restriction on the use of material is set out in the copyright laws, interpretation of these have been subjected to a lot of debate and lawsuits especially in the USA (Samuelson, 2002). In the advert of world wide web, the internet has made implementation for both publishers and users easier. It is easy to publish information and the information becomes instantly available to millions of people all over the world. This is an advantage to publishers /creators because it has allowed the cost of distribution to be reduced after the initial production. However, this has created a problem for both publisher/ owners and the users of information.

On the other hand, for publisher/owner, the easy distribution and availability of materials on the internet means that the economic returns of the works would be suddenly curtailed because once the material is available digitally, distribution becomes easy. Also, for users, the concerns of the owners means that publishers/ owners would want to take measures to curtail access to information through licensing. This is the dilemma currently of copyright law's enforcement in the digital era. More importantly, in the digital world opportunities for theft are much greater than they were before (Strong, 1994).

Consequently, materials that are available on the internet are regarded as being in a fixed tangible medium because they are stored somewhere in dome file server(Stanford Voversiby,2003). This means therefore that such work is subject to copyright and therefore, should not be copied. However, the use of digital materials involves copying or downloading the materials in order to read them. This means that the use of digital materials is in itself an infringement of copyright because the basic fundamental concept underlying copyright is copying of materials. There is an inherent contradiction that seemingly readers of the concept of intellectual property right in the digital era untenable. This is an issue that has not been resolved as some people believe that downloading is legal and other believe that it is not (Mearr, 2003).

It is as a result of the dilemma that online publishers have opted for the licensing of materials, so that only those with the permission may download materials in order to use them. In some instances, publishers have used technology to disable the downloading and therefore, stop access to their materials. In all these challenges the intent of the copyright, which is not only to protect the rights of the creators but to also make it possible for the public to access materials in order for them to be able to create more from the espoused ideas and notions.

Intellectual Property Protection Right and Indigenous Knowledge

Indigenous knowledge (IK) is defined as a systematic body of knowledge acquired by local people through the accumulation of experiences, informal experiments and understanding of the environment in a given culture. Indigenous knowledge(IK) is a body of knowledge that arises from life experiences and which is passed down from generation

through word of mouth in the form of idioms, proverbs, folklore, songs, rites of passage and rituals. Indigenous knowledge is home-grown knowledge that enables communities to make sense of who they are and to interact with their environment in ways that sustain life. While knowledge is generally described as being explicit or tacit; Indigenous knowledge is mainly tacit as it resides in people`s heads and as to most parts not been codified.

There has been recognition of the economic potential of indigenous knowledge over the past few years, and this has brought issues of intellectual rights of indigenous knowledge to the fore It is very clear that IK has contributed immensely to some medicinal and cosmetic products in use today but it was not until 1992 that the importance of IK was recognized and the Conventions of Biological Diversity (CBD) was put in place.

There is however a contradiction between intellectual property and indigenous knowledge. Intellectual property, according to Blakeney (1997) represents propertization of traditional knowledge and by definition traditional knowledge is not individual property. IK is generally perceived to be a collective property and is owned by communities. However, such communities are usually not able to take control of this knowledge and this often becomes the responsibility of custodians such as chiefs. It has historically been the case that these chiefs have “sold” indigenous knowledge without due consideration for the long-term implication of this on their communities.

Patenting is a way of protecting intellectual property that goes some ways in assigning intellectual property right. An example is the granting of patent for the Hoodia Cactus to the San commonly in South Africa (Mutula, 2002). The problem though for most other communities is that they have limited legal know-how, Savvy and means to engage agents of multi-nationals who appropriate their IK for their own gain where they can negotiate for their right, the struggle has been protracted. The experience of the San people in securing recognition of ownership and a share of the profits from the Hoodia Cactus patent is a case in point that illustrates the difficulties that communities have in claiming their right.

The record shows that the negotiation took three years with San sued South African council for scientific and industrial research. The question is how many communities will have the wherewithal and tenacity to engage an organization as big as the national research council. However, because IK is not documented, there is a danger that it would disappear or die off as people stepped in the ways and knowledge of communities. This is very real danger because as more people become educated, they come into conclusion that only knowledge that has been through the rigour of scientific, laboratory experimentation as real knowledge. They tend to view IK as inferior and based on hunchesand superstitions. There is therefore a need to preserve this information and knowledge as it is in fact valuable to the society. Preserving it however, means documenting it and once a work is documented in a fixed format, it is automatically copyright. The question is who owns the copyright? Is it the community from which it was obtained or is it the individual or organization that took the responsibility to document the knowledge? Ideally, the community should have the controlling right, but practically, this has not always been the case. In so many occasions historians and anthropologists have studied communities and recorded their culture, traditions, ways of life and indigenous knowledge, and have claimed the credit.

For example, Oladunwo Egungun cultural festival celebrates bi-annual by the Okemesi community in Ekiti state, Nigeria that enjoys so much patronage from multi-nationals, NTA, MTN, and other mobile networks and many other organizations all over the world has become a such of concern and worries to all the members of the community as most of these organizations and multinationals come to watch and record the cultural activities and appropriate the indigenous knowledge for their own gain. In most cases they hardly acknowledge the community role and the people involvement (OCF, 2021). Indigenous knowledge property rightis generally a part in the branch of intellectual property known as industrial property.

However, the IK property rights are still very much under discussion locally and internationally. Even the world intellectual property organization has not yet been able to promulgate the regulation of intellectual property for traditional or IK holders. However, some progress has been made with the establishment of working bodies within WIPO to establish procedures of protecting traditional IK. The Berne convention on copyright and the agreement on Trade Related aspects of Intellectual Property Right (TRIPR) and some agreement that attempt to protect indigenous knowledge from theft and piracy.

Digitization of Indigenous Knowledge

There have been a number of activities and initiatives aimed at digitizing and captioning African IK. One of which is the world Bank IK programming which maintains a data base of IK., where people and communities can contribute IK. While this maybe a positive development that enables people who would not otherwise know or come to appreciate other`s people culture to do so, it also poses a number of moral questions (Britz & Lor, 2003). Britz and Lor pose the following question: “will the originating communities be identified as the original creators of their cultural heritage and will they have the right to control access and non-disclosure of certain categories of their cultural heritage e.g., artefact? Up till now the traditional knowledge are folklore set up in 2000 and the WIPO Intergovernmental Committee on Intellectual

Property as Genetic Resources, does not have the answers to these questions (WIPO, 2003).

In general, intellectual property rights for IK are needed for the following reasons;

i. The right to benefit commercially.
ii. The right to prevent and control commercial use of the knowledge.
iii. The right to own and control one`s own knowledge.
iv. The right to be acknowledged and attributed to the knowledge
v. The right to prevent offensive and fallacious use of the knowledge

Indigenous knowledge generally belongs to communities, and once such knowledge is digitized, then one may wonder whether the communities from which it originates will have right to it and if so, what sort of rights, given the general powerlessness of communities against multinationals. Will they able to exercise the rights outlined above? History has shown otherwise. Communities have been unable to control their rights once their knowledge has been codified or digitized: they have been powerless to prevent their knowledge from been commercialized and used in derogatory ways which against the interest of the communities.

Consequently, Britz and Lor (2003) proposed a few numbers of basic principle that should assist in the digitization of indigenous knowledge in this digital era. Among which is the writer view that digitization should not lead to trivialization of the culture where it is used offensively and for enriching other people other than the community who own the knowledge. Indigenous knowledge owners should maintain their ownership rights. Above all, the IK ownership should not fall into the hands of those digitizing it but have no say in what should or should not be digitized.

CONCLUSION

It's quite obvious that the digitization of information and the proliferations of networks as a result of internet has been the major obstacles of copyright. Intellectual property right has now moved from being a concern of creators 'publishers and writers but now at the very heart of using technology to which many people in the world now have access. With issue of copyright being unclear in the digital environment. There is every need therefore, for those countries to take note of some of the issues that arise from intellectual property right and the digital environment. For instance, there should be legislations to cover all possible scenarios to avoid infringement into someone right by reproducing another person work without his knowledge, especially as it relates to commercial content producers who now make use of protection software encryptions, licensing and so on to protect the copyright of their materials. This however, does not really encouraging for under developed countries that lack the resources to acquire access to information. Even though, WIPO through the intergovernmental Committee on Genetic Resources Traditional Knowledge and Folklore still working out measure to preserve indigenous knowledge,

Suggestion

i. There is need for government and civil society especially in the developing countries to think very critically about what needs to be done to safe guard the intellectual property of communities that own indigenous knowledge
ii. More countries should come up with indigenous databases that would be used such that the database could check whenever individual is claiming or applying for intellectual property rights.
iii. Again, when indigenous knowledge is being digitized, a clear statement of intellectual property rights should be included to shows who the owners are and under what condition the Indigenous Knowledge could be used.
iv. There is also need for the cultural and moral rights of owners of Indigenous knowledge be guided and protected
v. Digitization should also not lead to trivialization of the culture where it is used offensively and enriching other people other than the community who owns the IK
vi. Indigenous Knowledge owners should maintain their ownership rights. They should not fall into the hands of those digitizing them –as it happened in the past where those who claimed they were documenting it later went out to commercialize it without the knowledge of the communities.

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