

INTELLECTUAL PROPERTY IN INDIGENOUS TEXTILE DESIGNS AND PRODUCTION IN NIGERIA

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ABSTRACT

The relationship between intellectual property and indigenous textiles in Nigeria is intrinsically confounding and raises one of the most significant legal conundrums of the 21st century. At the heart of this complex intersection is the realisation that the existing intellectual property framework for the protection of indigenous textiles in Nigeria finds its root in a largely Westernized IP mechanism that is oblivious to communal ownership, restrictive access to know-how and lifelong protection periods. Besides, legislation in Nigeria has opted for a characterization of indigenous textiles as folklore, an approach which robs indigenous textiles of its uniqueness vis-a-viz other forms of cultural heritage. Against this backdrop, this article explores the nature of intellectual property present in indigenous textile design and production and critically assesses the suitability of folklore protection within the Nigerian context. After an examination of the existing legal framework, the article argues for sui generis system of protection that makes allowances for the peculiarities of indigenous textiles in Nigeria, while also encouraging regional and international cooperation towards a robust system that is recognizable globally.

1.0.INTRODUCTION

Our history constructs our identity, and our identity defines our nature.³ The preservation of cultural identity is fundamental to having a sense of well-being and self-respect that lie at the heart of human dignity. Culture being the values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions, and way of life through which a person or group expresses their humanity and meanings that they give to their existence and to their development.⁴ Clothing ornamentation is at the heart of cultural expression and identity. From time immemorial, different cultures and ethnic groups have adorned themselves in distinct ways, relying on localized textile production techniques and unique raw materials

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³ Tobenna Okwuosa, 2021. Adire and the progression of Layiwola's artistic logic.in Patrick Okolo(ed.) Peju Layiwola's Indigo Reimagined. Rethinking Adire in Yoruba Fashion and Textile Modernity. *Institute of African and Diaspora Studies, University of Lagos, Nigeria.*: 44

⁴ Fribourg Declaration on Cultural Rights (Institute of Human Rights, University of Fribourg) 2007, Article 2.

indigenous to their geographic delimitations.⁵ Centuries after, these indigenous styles of clothing ornamentation remain, and they have become a source of cultural identity to the different ethnic groups existing in Nigeria. However, this aspect of cultural heritage has serially been assaulted by globalization and technological advancement in recent times.⁶ Most importantly, the increasing adaptation of Western styles of dressing and adornment has largely eroded the popularity of erstwhile mainstay forms of traditional clothing.⁷ Besides, “cultural industries” have suffered neglect due to widespread importation, thereby causing surviving indigenous textiles to lose their status as normative modes of dressing.

As the candles of traditional clothing ornamentation and indigenous textiles slowly sniff out, governments and cultural institutions are engaging in a last-ditch effort to protect the production and economic exploitation of these heritage objects. However, this paper argues that the consolidated efforts are rather an attempt to preserve indigenous textiles as artefacts without any intention to promote them commercially or innovate towards mass production for mainstream purposes or even exportation. Although this intention is never overtly expressed, it is tacitly hinted at in the nonchalant approaches that most government interventions have taken. The resultant effect of this posture is usually reflective in the legal and administrative mechanisms designed to protect this form of cultural expression.

Put into proper context, home-bred textiles and clothing ornamentation have been ascribed various terminologies that find their roots in Western legal tradition. For instance, clothing as a form of cultural heritage is classified as indigenous intellectual property or traditional cultural expressions.⁸ In addition, while clothing styles from Western cultures or homogenous people groups in the global North are protected in the regions they originate from and in Nigeria as pure works of copyright, Nigerian locally made textiles have special legal framework under which they can be protected. More often than not, these laws counteract against commercial exploitation, usually under the guise of preventing misappropriation or misuse.

While it is arguable that misuse and misappropriation can be rampant with other forms of cultural heritage like folklore, traditional festivals or museums, the case is not usually the

⁵ Falola, T., 2001. *Culture and customs of Nigeria*. Greenwood Publishing Group. p. 5

⁶ Akande, W. (2002). Drawback of cultural globalization. *Yellow Times*. Retrieved from <https://archive.globalpolicy.org/globaliz/cultural/2002/1110cult.htm>

⁷ Ochon, M., 2008. Colonialism within colonialism: the Hausa-Caliphate imaginary and the British colonial administration of the Nigerian Middle Belt. *African Studies Quarterly*, 10(2-3), p.97.

⁸ Shyllon, F., 2015. Cultural heritage and intellectual property: convergence, divergence, and interface. *A companion to heritage studies*, p.56.

same with clothing. The value of folklore in all its forms lies in exclusivity and rarity. On the other hand, the inherent worth of clothing is in its demand, general acceptance and marketability. Clothing as a cultural expression is almost on all fours with music in that they both require popularity to be valuable. Fortunately, in Nigeria, the brains behind the nation's latest entertainment export, Afrobeats understand this phenomenon, and have since transformed a genre that has its roots in traditional apala, juju, highlife and fuji to a global phenomenon.

Much has been said about how counter-effective the existing legal framework is, but the reality of law is that it must be analysed as it is and not *de lege ferenda*⁹. Thus, it becomes necessary that this paper as a work which set out to explore the legal protection for indigenous textiles must do so relying on the existing framework and infrastructure. As earlier hinted at, most of these legal structures stem from international and local human rights instruments as well as intellectual property legislation or conventions. At this juncture, a brief definition of terms is instructive, as such activity will greatly help in delineating the connections between these different legal structures and cultural heritage.

2.0. MAPPING OUT THE HISTORY OF INDIGENOUS TEXTILES IN NIGERIA AND ASSESSING SOCIO-CULTURAL AND ECONOMIC CHALLENGES TO THE DEVELOPMENT OF INDIGENOUS TEXTILES

Indigenous textiles in Nigeria have their roots in traditions that date back to the pre-colonial period.¹⁰ This period is an important measure of change as colonialism was the first catalyst in the downward spiral of indigenous textiles in Nigeria, as in many other previously colonised nations across the world.¹¹ In the years before colonial rule, different parts of what is now known as Nigeria had unique traditions regarding clothing. These traditions are deeply entrenched in their clothing materials and textile-making processes. The former is largely influenced by the raw materials available in their area, with some cases of trading between tribes. On the other hand, the textile-making processes are unique to each person. Some parts of the Eastern region have unique fabrics like the Popo.¹² The Northern region fashioned their

⁹ Latin for "law as it ought to be."

¹⁰ Adejumo, À., 2010. A post-colonial analysis of the literary and cultural consequences of the abolition of the 18th century Trans-Atlantic Slave Trade on the Yoruba of Southwestern Nigeria. *Lumina*, 21(2), pp. 1-2

¹¹ Abdulqadir, U.A., 2016. Traditional rulers and security administration in Nigeria: Challenges for the 21st century. *Journal of humanities and social science*, 21(8), pp.4-5.

¹² Maiwada, S., Dutsenwai, S.A. & Waziri, M.Y. (2012). Cultural Industries and Wealth Creation: The Case of Traditional Textile Industry in Nigeria. *American International Journal of Contemporary Research*. Vol. 2, No.

Saki into different attires, while the Yorubas have the famed Aso-Oke and Adire textiles.

John Picton has noted that ‘in West Africa, textiles constitute a major and flourishing art... [and] acquire the capacity to be seen as embodying properties that they cannot literally possess. Indigenous textiles which have undergone skillful patterning marks out Yoruba historical and contemporary identity.¹³ Traditional values/ significance is embedded in the *adire* craft. The happenings in the environment are depicted by women on the designs made on the cloth using living and non-living things. The hand symbol on *adire* depicts labour that empowers. The labour of the potter’s hand that bring prosperity. ‘*Atewo l’ara*’ (the palm of your hand is your closest friend).¹⁴

In the precolonial time, handspun yarns and locally produced fabrics were used for making the Adire textiles in Yoruba land. The textile industry was natural, organic, and self-sufficient with all the production materials available within the country.¹⁵

From the 15th century the Esan people in Nigeria sold their locally made cloth to the Portuguese and the Dutch.¹⁶ Dyeing of cloth in Nigeria is said to date back to 16th century but Olusegun Oke believes it dates back to a much earlier time because Portuguese travellers to West Africa in 1445 claim that the people wear dark blue cloths.¹⁷ The trade in locally produced ‘*ijebu*’ and ‘*benin*’ textiles were marketed by the Dutch and British in Gold Coast, Gabon and Angola to the extent that the fabrics acquired the value of legal tender across the continent.¹⁸

Before the British introduced indirect rule, which administered the country through various local authorities, the people had governance systems that allowed their economic traditions to thrive. These systems are rooted in gender and class roles, where textile making was largely the job of women in most of these tribes.¹⁹ The Aso-Oke-making process can primarily be

5, May 2012.

¹³ Patrick Oloko, 2021. Peju Layiwola’s indigo reimagined. Rethinking Adire in Yoruba Fashion and Textile Modernity. *Institute of African and Diaspora Studies, University of Lagos, Nigeria*

¹⁴ Patricia Oyelola, Rhapsody in Blue: Trad style. Page 78.

¹⁵ Ayo Adeduntan, 2021. Indigo reimagined, Indigo diehard: Incursion, Survival and Contestation in Patrick Okolo(ed.) Peju Layiwola’s Indigo Reimagined. Rethinking Adire in Yoruba Fashion and Textile Modernity. *Institute of African and Diaspora Studies, University of Lagos, Nigeria.*: 112

¹⁶ Anthony I. Okoduwa, 2007. Where bottom dropped off manufacturing innovation in Nigeria: an example of the Esan people in Edo State. *Studies of Tribes and Tribals* 5(1):29-34 at 31

¹⁷ Olusegun Oke (2016) the Chemistry of Dyeing in Dong Simmonds, Pat Oyelola and Segun Oke (eds.) *Adire Cloth in Nigeria*. (UK: Doing D. Simmonds) Pp35-40 at 36

¹⁸ Tunde Akinwumi 2008. The ‘African Print’ Hoax: Machine produced textiles jeopardize African print Authenticity. *Journal of Pan African Studies* 2(5): 6.

¹⁹ Ojo, E.B., 2007. Printing contemporary handwoven fabrics (aso-oke) in southwestern Nigeria. Design issues, 23(2), pp.31-33.

divided into two categories, the first of which is the pre-weaving and the second, the weaving.²⁰ The pre-weaving practices involved farming the cotton used in making the textiles and turning the harvested cotton into fabric that can be woven into fabrics. Women and men do this part, though the latter is often more dominant in history.²¹ The weaving process is largely done by women who weave at the looms and create the unique patterns that have come to represent the tribe's clothing fashion.

Indigenous textiles in Nigeria thrived until colonialism weakened their essence and left the craft in danger of extinction. After annexation, the European merchants and missionaries introduced foreign fabrics to the colonies. In the global commerce, cloth features as a part of the evidence of how culture is appropriated for profit. The policies of the Europeans enforced value on the imported fabrics as the local weaving industry posed a threat to the expansion of the exports of British cotton.²² Cost and availability made the consumers go for the imported cloth and this shut down the indigenous industry. Imported cloth became the major fabrics for the dyeing industry while imported wool became the thread for the weaving industry.²³ Chemists from Germany also produced synthetic indigo from coal which was quicker and cheaper than the natural dye.²⁴ European clothes thus subverted the indigenous cloth industry. The print wax cloth that evolved from multiple traditions of the Indian, Japanese, Indonesian and Dutch thrived in West Africa and became labelled as 'African print' despite not having any African input in its production process.²⁵ The global textile trade with Europe and Asia being the production sites have targeted Africa as the consumption site to truncate the development and growth of indigenous enterprise and local commercial exchanges.²⁶

Now, few Yorubas can recognise the distinct blue hue of the '*Etu*' to the rich crimson of '*Alaari*' or the regal flare of the '*Sanyan*'. This poses a risk to an industry that is almost moribund, with attempts to save it doing more than expose how much has been lost to modernisation and globalisation.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Halls, Julie and Allison Martino. 2018. Cloth, copyright, and cultural Exchange: Textile designs for export to Africa at the National Archives of the UK. *Journal of Design History*. 31(3):236-254 Amah M. Edoh 2016. Redrawing power? Dutch wax cloth and the politics of good design. *Journal of Design History*. 29(3): 1-15

²³ *Ibid.*

²⁴ Olusegun Oke (2016) the Chemistry of Dyeing ... *op.cit.* at 36

²⁵ Halls, Julie and Allison Martino. 2018. *Op.cit.*

²⁶ Patrick Oloko, 2021.. Peju Layiwola's indigo reimagined. Rethinking Adire in Yoruba Fashion and Textile Modernity. *Institute of African and Diaspora Studies, University of Lagos, Nigeria*

3.0.SOCIO-CULTURAL AND ECONOMIC CHALLENGES TO THE DEVELOPMENT OF INDIGENOUS TEXTILES

Textile-making, like many other indigenous crafts, is often passed down in families for generations. Post colonialism, the collapse of the West African trade network in the 1930's, temporarily led to the decline in the 'adire' industry during the worldwide economic depression. Post colonial politics in the 1960's led to the revival of the indigenous traditions suppressed by the colonial government. While depending on the assorted colours of the fast-drying synthetic dyes from Europe, people embraced the use of 'adire' as a symbol of national pride and Kampala, a modern form of 'adire' was introduced for the Kampala Peace Conference in 1968. The future of 'adire' has once again become uncertain with the influx of the readily affordable mass-produced imported fabrics that is stifling the local textile industry.²⁷

In some parts of the country still holding onto traditions, some of these families can be seen where matriarchs and patriarchs painstakingly teach their latest generations the art of textile making. In these parts, one can see children barely in their adolescence already versed in the art their families have practiced for centuries. One such area is Iseyin in Oyo State, where aso-oke weaving is still a common practice, with many relying on it for their livelihood.²⁸

Despite the enduring stance of people like those in Iseyin, Okeho, and several other parts of the country, the survival of indigenous textiles is still in peril. This reality is created by the socio-cultural and economic challenges these textile makers must combat. Some of the challenges militating against the development of indigenous textiles in Nigeria include the following.

i. Competition against mass producers

Efforts to improve the position of the indigenous owners of the knowledge to make these textiles have often been thwarted by the distrust they now have for outsiders inquiring about their craft. This is because they have seen many who come to them to learn about their craft, only to go on and produce factory versions of the designs, affecting the market for the hand-

²⁷ Janine A, Sytsma, Peju Layiwola's Indigo Markets for a shifting Geopolitical Sphere, in Peju Layiwola's indigo reimagined. Rethinking Adire in Yoruba Fashion and Textile Modernity. *Institute of African and Diaspora Studies, University of Lagos, Nigeria*: 68

²⁸ The Secretary to the Aso Oke Association gave this information during a visit to the weavers to inquire about the challenges of their trade in Iseyin in Oyo State. March 2023.

made products. Factory-produced textile designs are typically cheaper than hand-made ones, with Ankara Kampala (factory-made Adire) being about half the price of handmade Adire.²⁹

The situation has gotten worse with the unrestrained importation of China-made textiles in local designs, making it difficult for locally made ones to gain patronage. These imported fabrics are often cheaper and made in more colourful versions, attracting more of the younger generation.³⁰

ii. Unavailability of raw materials in bulk

Indigenous textile designers and producers regularly face the daunting task of securing enough raw materials for their works. Since the colonial period, when the majority of cotton planted by locals was exported by the colonial administrators, the weavers have struggled to get enough materials for their work. The problem of inadequate raw materials has been stated over time to be a major challenge to developing indigenous textile production in Nigeria.

Despite over six decades of independence, the industry still struggles to gain a foothold in the textile market. Indigenous textile designers struggle to secure quality materials for their work as large corporations, local and foreign, seize most of the available materials.

iii. Low level of patronage

The influx of factory-produced alternatives means that handmade indigenous textiles suffer a highly reduced patronage. Like many other countries that went through colonial rule, the British made English attire the formal wear in Nigeria while controlling the country. The emphasis on English dressings in formal settings gradually spread to casual outfits, drastically reducing interest in traditional attires.

The low patronage of indigenous textiles has also been attributed to a lack of effective policy enforcement as government agencies often import textiles for their needs rather than buy locally-made ones³¹. This practice is opposed to all the policies and regulations made by the government to improve local production and consumption.

iv. Low desire of new apprentices to learn

²⁹ Areo, M.O. & Areo A.B. (2014). Ankara Kampala: Property Rights as Revamps for the Adire Indigenous Knowledge. *Journal of Law, Policy and Globalization*. Vol. 26, 2014.

³⁰ *Ibid.*

³¹ Olakitan, Y. (2015). Nigeria's Troubled Textile Industry at

Textile design and production are primarily family crafts, passed down from generation to generation. However, the prospect of getting better paying and more fanciful jobs after schooling has made many recent generations unwilling to learn their family crafts. This low interest of new apprentices in learning has forced many older people to teach outsiders to prevent their knowledge from dying with them. The exposure that comes with this option means it is easier for knowledge largely protected by trade secrets and no other forms of IP laws to be put at risk of unauthorised exploitation.

The visit to the weavers at Iseyin town revealed that the low desire of new apprentices to learn is attributable to the tedious nature of the craft. Textile production processes such as ginning cotton, weaving, spinning and so on are characteristically hard and physically demanding. The younger generations are typically less inclined to take physically demanding jobs, and many abandon their family occupations to do other formal and informal work outside their place of heritage.³²

v. Inadequate enforcement of existing laws protecting indigenous knowledge

Section 13(1) of the Patent and Design Act provides that an indigenous design is only registrable if it is new and not contrary to public order or morality. While it is easy for indigenous textile designs to satisfy the second requirement, the first is almost impossible. Apart from these designs having existed for centuries, newness in this context also implies originality, which means that the particular patterns or shapes have not occurred to anyone before.³³ Section 14(1) of the Act also poses a problem as it identifies a creator, not as the person who is the true creator of a design, but was first to file or validly claim a foreign priority for an application for registration of the design.

4.0.EVALUATING THE INTELLECTUAL PROPERTY

The challenges to the development of indigenous textile design and production have largely resulted in an almost total disregard for the intellectual property rights of the textile creators. The government's policies so far have proven to be ineffective in protecting the rights of the

³² Adewumi A. A. (2023) Jurisprudential Basis of the attitude of traditional healers in South-West Nigeria on Covid-19 Infection in Ibadan, Oyo State, Nigeria. 10 (2) *Kwame Nkrumah University of Science and Technology (KNUST) Law Journal* 127

³³ Definition of originality and newness by Duckley L.J. in the English case of Dower Limited v. Numberger [1910] Ch. D.25 at p.29.

indigenous people who created textile designs that have since become largely exploited without prior informed consent.³⁴

Evaluating the intellectual property associated with indigenous textile design and production requires an overview of available laws under which traditional knowledge, like the indigenous textile designs and production processes, can be protected. Copyright laws protect some forms of traditional knowledge like folklore and artistic expressions of indigenous traditions.³⁵ However, textile designs are hard to protect under these laws as they do not conform to the requirements of originality and fixation.

Trademarks³⁶ are often the best bet for many territories, as they permit indigenous people to protect their craft through collective marks or geographical indication. This method has, however, proven to be fallible, as it does not totally protect the knowledge from being exploited by others. It only allows people to know which product came from them and which is, possibly, an imitation. This option does not prevent others from making their versions, which may divide the product's market, with some people choosing imitations due to various reasons like affordability.

In some territories, patent laws have protected some forms of traditional knowledge from being exploited by outsiders.³⁷ However, these forms are mostly related to genetic resources and biodiversity. Indigenous textile production has not found its way into such protection due to reasons like the difficulty in fulfilling patent requirements.

Importantly, protecting traditional knowledge as intellectual property has been arduous because of the difficulty in defining what traditional knowledge is and what it encompasses.³⁸ There is a problem with ownership of the knowledge being collective as the knowledge is often known by many people in the area. Meanwhile, most IP laws protect creators as

³⁴ Adewumi A. A (2022) Protecting intangible cultural heritage in the era of rapid technological advancement. *International Review of Law, Computers & Technology*.36(1): 3.(Hereafter referred to as Adewumi, Protecting intangible cultural heritage...)

³⁵ *ibid*

³⁶ Burri, M., (2022). The protection of cultural heritage by trademarks. In Research Handbook on Intellectual Property and Cultural Heritage (pp. 56-72). Edward Elgar Publishing.; I.P. Byron (2019). An Examination of the Property Rights of Trademark in Nigeria. *IRLJ*, Vol. 1 at 11; I.P. Byron (2018). The Challenges of Trademark Protection Law in Nigeria. A Thesis in the Department of Commercial and Industrial Law Submitted to the Faculty of Law in partial fulfilment of the requirements for the Degree of Doctor of Philosophy of the University of Ibadan. November 2018.

³⁷ Adewumi, A.A (2019) The regulatory regime of genetically modified organisms (GMOs) in Nigeria and its implications on relevant WTO Agreements. *Kampala International University Law Journal (KIULJ)* Vol. 3, Issue 2: 151-163

³⁸ Adewumi, Protecting intangible cultural heritage...*op.cit*

individuals. Therefore, the protection offered by these laws in their regular senses is often not sufficient to cater to traditional knowledge.

Below is a look at the protection some regular intellectual property laws offer within national and international frameworks.

i. Copyright Act 2022

Copyright is the foremost law on intellectual property ownership relating to literary and artistic creations. As the knowledge of indigenous textile design is often passed down across generations orally, the provisions of the Copyright Act 2022 can protect an expression of the processes but not the processes themselves. Therefore, copyright laws may protect indigenous textile designs as a form of pictorial works if they can scale the hurdles of other requirements, such as novelty.

In Nigeria, the Copyright Act 2022 protects traditional knowledge such as folklore but not textile design.³⁹ The only way indigenous textile designs can thus be protected under Nigerian copyright laws is to render such textile designs as drawings in a book.⁴⁰ This content will be protected for 70 years before it enters the public domain.⁴¹ This period is, unfortunately, too short for a category of knowledge that has been passed down for centuries.

The Copyright Act has proven inadequate in protecting indigenous knowledge because this information is considered to be within the public domain, even if it is known exclusively to a few people within the society.⁴² It may be difficult to satisfy the protection requirements under Section 2 of the Copyright Act 2022. The only way these people can protect their knowledge is to ensure it is not available to others outside their community to prevent unauthorised exploitation.

A major problem with the protection the Act offers traditional knowledge like textile design is that the Act is mostly an offshoot of the Western copyright system, which is unfit for the African system. Copyright within an African setting is largely communalistic and collectivistic in nature.⁴³ The goal of creating this intellectual property at inception was not to

³⁹ Copyright Act 2022 (Nigeria), Section 74

⁴⁰ *Ibid*; Section 17

⁴¹ Copyright Act 2022, Section 19

⁴² Adewumi, Protecting intangible cultural heritage...*op.cit*

⁴³ Ogwezzy, M.C. Protection of Indigenous or Traditional Knowledge Under Intellectual Property Laws: An Examination of the Efficacy of Copyright Law, Trade Secret and Sui Generis Rights. *International and Comparative Law Review*, 2012, Vol. 12., No. 1, pp. 7-37. DOI: 10.1515/iclr-2016-0076 ; I.P. Byron. 2019. A comparative appraisal of Trademark Infringement in Nigeria and United Kingdom. *Unimaid Journal of Private and Property Law*. Vol.4: 100-115

make profits but to propagate the culture of the people. Hence, attempts to protect such IP under copyright laws may undermine the people's interest rather than promote it.⁴⁴

Notably, despite the peculiarities of indigenous textiles, which make the possibilities of its protection spread across different categories of IP protection laws, copyright still provides the most protection for this craft.

ii. Trademark Act

Some countries have leveraged trademark laws to protect some aspects of traditional knowledge, such as granting collective marks.⁴⁵ Collective marks have enabled societies like the Mosi weavers in the Hansan region of South Korea to protect their fabric from exploitation by those who seek to make similar ones.⁴⁶ Cases like this make many people see the Trademark Act as the local legislation with the most potential to protect indigenous textile designs, as it primarily focuses on brand images and distinctive styles. However, the protection offered by the Trademark Act in Nigeria is severely limited and inadequate to protect indigenous textile designs from unauthorised exploitation.

The Nigerian Trademark Act also provides for the registration of collective marks in Section 44. However, such a mark does not hold much promise for indigenous textile makers, as it only distinguishes their products from fakes, not stop the latter's creation. This has posed severe problems for people who have to battle with competition from mass producers, who provide cheap alternatives to their fabrics.

Nonetheless, it is important to state that while the Act itself, even if amended, may not be sufficient to protect indigenous textiles from undue exploitation, it can provide a framework to establish a sui generis system to protect these IPRs.⁴⁷

iii. TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) has been particularly at the fore of the campaign for a sui generis model of protection for indigenous knowledge. This international instrument was created by the World Trade Organisation (WTO) to create a protection system for intellectual property forms that can be

⁴⁴ Dutfield, G. (2001). TRIPS-Related Aspects of Traditional Knowledge. Case Western Reserve Journal of International Law. Vol. 33, Issue 2 at <https://scholarlycommons.law.case.edu/jil/vol33/iss2/4>

⁴⁵ Burri, M., 2022. The protection of cultural heritage by trademarks... *op.cit*

⁴⁶ *Ibid.*

⁴⁷ Lawal-Arowolo, Ayoyemi, Constructing A Model Intellectual Property Policy for Development in Nigeria (May 2, 2015). Available at SSRN: <https://ssrn.com/abstract=2685222> or <http://dx.doi.org/10.2139/ssrn.2685222>

commercialised by countries to improve trade. The Agreement requires the WTO and the World Intellectual Property Organisation (WIPO) to work in conjunction with countries to protect intellectual property forms that have commercial value and regulate how they can be leveraged to promote trade within member countries. The forms of intellectual property under this Agreement include copyright, trademarks, geographical indications, patents, industrial designs, and undisclosed information.

The TRIPS Agreement is seen by many as providing better protection for indigenous knowledge as it makes provision for places where the earlier regulations, the Berne Convention and the Paris Convention, were silent. However, the inability of developing countries to fulfil the Agreement's requirements is often seen as a setback for its enforcement. Meanwhile, the failure to bring desired results since decades of its creation has created the impression that traditional knowledge cannot be protected under a system that does not understand the peculiarities of this IP form.⁴⁸ There is also the problem of most developing and least developed countries being unable to comply with enforcing the Agreement, even with some assistance from the developed countries.⁴⁹

iv. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC or IGC-GRATK) is currently providing an increasing amount of protection for Genetic Resources. The elaborate plans and actions of the Committee have led to many indigenous nations enjoying more protection for their traditional knowledge, especially those related to Genetic Resources.⁵⁰ These plans and actions have, however, been sparse when it comes to some other forms of traditional knowledge, like indigenous textile designs.

Unlike widely acclaimed forms of traditional knowledge like genetic resources, indigenous textile designs are yet to enjoy a comprehensive form of protection from necessary parties, especially State actors. While some of the laws on traditional knowledge protection can be said to cover textile designs, these laws are not specific enough on how these forms of

⁴⁸ Anele, K.K., 2020. Harvest of arrests but no prosecution: ideation toward strengthening the legal regime for prosecuting pirates in Nigeria. *Commonwealth Law Bulletin*, 46(4), pp.611-639

⁴⁹ *Ibid*;

⁵⁰ Tobin, B., 2017. 10 Now you see it now you don't. Protecting Traditional Knowledge: *The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, p. 192.

traditional knowledge and cultural expressions are to be protected. As a signatory to many of these international legal instruments, Nigeria can leverage the protection of traditional knowledge by these laws to protect the indigenous textile designs of her people, such as *Adire*, *Popo* and *Saki*.

v. AfCFTA Protocol on Intellectual Property Rights

As a party to the African Continental Free Trade Agreement, the Agreement's Protocol on Intellectual Property Rights is an important protection for traditional knowledge, such as indigenous textile designs. The Protocol was created to enable the fulfilment of Article 6 of the Agreement, which covers "trade in goods, trade in services, investment, intellectual property rights and competition policy."⁵¹ The objective of the Protocol is to enable State Parties to protect and enforce intellectual property rights, which has been deemed a necessary step in fulfilling some of the objectives of the Agreement.

Ratifying the Protocol means that various indigenous textiles from Nigeria can be protected from unlicensed exploitation while enjoying access to the markets covered by the Free Trade Area. As an Afro-centric instrument, the Protocol is an excellent tool for protecting traditional knowledge as most African countries have their own indigenous textile designs, and these designs have deep cultural meanings to their people. The Committee can focus on policies that will prioritise areas of comparative advantage for African countries, which have failed to be focused on by global instruments such as the IGC.⁵²

5.0 PRAGMATIC RECOMMENDATIONS FOR PROPER RESOURCE EXPLOITATION: A CASE OF THE MAYAN WEAVERS AND THE GUATEMALA GOVERNMENT

One of the major reasons traditional knowledge, especially in forms like textile designs, has been excluded from protection for years is the inability to identify an owner. Most conventional intellectual property laws recognise only individual ownership, not collective ownership of creative works. The Mayan weavers of Guatemala have provided an endearing and practical case for any group of people looking to protect their traditional knowledge and traditional cultural expression from unauthorised exploitation.

⁵¹ Article 6 of the African Continental Free Trade Agreement's Protocol on the Protection of Intellectual Property Right.

⁵² Nkomo, M., Mthombeni, J., & Lehong, T. (2020). The African Continental Free Trade Agreement: a Significant Role for IP. WIPO MAGAZINE at https://www.wipo.int/wipo_magazine/en/2020/04/article_0005.html

The predominantly female population of Mayan weavers took action to stop the exploitation of their indigenous designs in 2016. Under the aegis of the Women's Association for the Development of Sacatepequez (AFEDDES), several organisations and communities of Mayan weavers sued the Guatemalan government for excluding provisions that could have protected their textiles from exploitation. While the Guatemalan Constitutional Court heard the case, the women submitted a bill to the National Congress, prompting them to amend five laws to protect the weavers' rights. The laws affected include the Copyrights and Related Rights Law, the Industrial Property Law, the Artisanal Protection and Development Law and the Criminal Code.

The objective of the Mayans was to ensure that collective ownership of IP is recognised, allowing indigenous people to own the right to stop outsiders from exploiting their heritage. They also sought to be recognised as intellectual authors, enabling them to earn from the corporations exporting their textiles. The national action would later galvanise a global reaction, with the World Intellectual Property Organisation (WIPO) creating a committee to look into the possibility of a sui generis system to protect traditional knowledge. Since a WIPO resolution will not have an automatic binding force, member-states were encouraged to create similar domestic laws to protect indigenous people's right to exploit their knowledge.

The outcome of the Mayan weavers' battle to protect their designs as part of their collective heritage can help Nigeria make giant strides in protecting indigenous textile designs and production. Existing intellectual property laws have proven inadequate to protect these textiles from unpermitted exploitation.⁵³ It is, therefore, reasonable to follow in the footsteps of other countries that have created unique systems to protect indigenous crafts. The South African Act for the Protection, Promotion, Development and Management of Indigenous Knowledge 2019 exemplifies such laws. The Act follows the model of the Swakopmund Protocol of the African Regional Organisation of Intellectual Property. The model enables countries to protect indigenous knowledge systems without subjecting them to the limitations of regular laws like the Copyright Act, the Trademark Act and the Patent and Design Act.⁵⁴

Indigenous textile designs and production are the primary sources of income for those who practice the craft. However, protecting the knowledge from outsiders goes beyond the

⁵³ Kalu, U.C. and Kene, E.C., 2020. Protecting Traditional Knowledge/Secrets Under Intellectual Property Law: A Comparative Analysis of The Adequacy of Protections Using Nigeria as a Case Study. *The Nnamdi Azikiwe University Journal of Commercial and Property Law*, 6(1), p. 110; I.P. Byron 2017. The Importance of Trademarks Protection in Nigeria. *Akunga Law Journal* Vol.5 216-230

⁵⁴ *Ibid*;

economic impact. These designs have cultural meanings to the people, which outsiders rarely appreciate, undermining such meanings. Protecting the resources from outsiders will give the people a sense of cultural reassurance, which is crucial in reclaiming their almost moribund heritage in a rapidly changing world.

6.0. CONCLUSION

The existing laws on intellectual property protection have proven inadequate in protecting indigenous knowledge, like indigenous textile designs and production in Nigeria. The requirements for protection under these laws, such as novelty and fixation, make it difficult for indigenous textile designers and producers to enjoy the dividends of their intellectual property. The calls for a *sui generis* system to protect traditional knowledge have largely failed to consider processes such as indigenous textile design and production.

An examination of several relevant laws reveals severe limitations on protecting the rights of Nigerian indigenous textile designers. It is also noteworthy that while Nigeria is a party to many international legal instruments, Section 12(1) of the Constitution of the Federal Republic of Nigeria limits the force of these laws. It has, therefore, been recommended that more is done to enforce existing laws and create a more dedicated and unique system for protecting indigenous textile design, particularly and not just traditional knowledge.

The case of the Mayan weavers of Guatemala has proven to be a model for many indigenous textile designers. Indigenous textile designers in Nigeria may not be able to unite under a single association like the Mayans, but they can form a coalition of representative individuals and groups to pursue their interests.