

The Protection of Traditional Cultural Expressions in Africa

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*Dedicated to
Sokeibelemaye
Chukwuemeka, Chibuikem and Tamunotonte*

Preface

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

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

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

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

Grahamstown, South Africa
March 2017

Enyinna Nwauche

Contents

1 Introduction: Key Issues in the Protection of Traditional Cultural Expressions in Africa	1
Organisation of this Book	9
References	9
2 Traditional Cultural Expressions in Africa	11
Introduction	11
Traditional Cultural Expressions and Traditional Knowledge	17
Key Issues and Challenges in the Protection of Traditional Cultural Expressions in Africa	19
Culture and Traditional Cultural Expressions	20
Communities in African States and Expressions of Folklore	22
Perpetuity of Traditional Cultural Expressions	32
Traditional Cultural Expressions as Information Goods:	
An Appropriate Balance Between Protection and Access	32
Examples of Traditional Cultural Expressions in Africa	35
Detailed Examination of Selected Traditional Cultural Expressions	37
Conclusion	48
References	49
3 The Negative Protection of Traditional Cultural Expressions in Africa	53
The Features of a Negative Model for the Protection of Expressions of Folklore in African States	54
Vesting Ownership of Traditional Cultural Expressions in the State	54
Conditions for the Authorisation of Use of Traditional Cultural Expressions	57
Use Put to Funds Raised from Authorizations to Use Traditional Cultural Expressions	59
Free Use of Traditional Cultural Expressions	59
Protection of Moral Rights	61

Administration of the Protection of Traditional Cultural Expressions Regime	62
The Negative Protection Model of the <i>Swakopmund Protocol</i>	67
Objectives and Criteria for Protection	68
Formalities in the Protection of Expressions of Folklore	70
Duration of Protection of Expressions of Folklore	71
Third Party Use of Expressions of Folklore	71
Exceptions and Limitations	73
Sanctions, Remedies and Enforcement	75
Expressions of Folklore in Neighbouring Communities in ARIPO States	75
Protection of Foreign Expressions of Folklore	75
Recognition of Communities as Owners of Expressions of Folklore	76
Moral Rights	76
Preferential Treatment of Members of Communities of Origin	77
Conclusion	77
References	78
4 Heritage Protection and Traditional Cultural Expressions in Africa	79
Tangible Heritage Protection as National Heritage in African States	82
The Meaning of Heritage	82
Identification of Cultural Heritage	85
Ownership of Tangible Heritage	86
Management of Heritage Protection	88
Community Ownership Management and Participation in Heritage Protection	90
Conclusion	94
References	94
5 The Positive Protection of Traditional Cultural Expressions by Intellectual Property Rights in Africa	97
African States That Recognise ‘Traditional’ Intellectual Property Rights as a Means of Protecting Traditional Cultural Expressions	98
Protection of Traditional Cultural Expressions by Intellectual Property Rights in South Africa	107
Merchandise Marks Act	108
IPLAA 2013	110
The Protection of Traditional Cultural Expressions by Intellectual Property Rights in Kenya	144
Conclusion	148
References	149

- 6 A Rights Framework for the Protection of Traditional Cultural Expressions in Africa** 151
 - Fundamental Human Rights 152
 - Collective Rights 152
 - Specific Fundamental Human Rights 158
 - Enforcement, Limitation and Balancing of Rights 162
 - Remedies 169
 - Peoples’ Rights 170
 - Peoples’ Right to Traditional Cultural Expressions 172
 - Customary Law as a Manifestation of a Peoples’ Right to Traditional Cultural Expressions 175
 - Eligible Communities 187
 - Balancing the Peoples’ Right to Traditional Cultural Expressions and Other Human Rights 189
 - Conclusion 191
 - References 195
- 7 Conclusion** 201
 - Subject Matter of Traditional Cultural Expressions 201
 - Creation and Origin of Traditional Cultural Expressions 202
 - Communities, Individuals and the National Interest 204
 - The Impact of a Rights Framework 207
 - Preference for Positive Protection of Traditional Cultural Expressions 209
 - Protecting Traditional Cultural Expressions Through Tangible Heritage Protection 210
 - Regional and International Protection of Traditional Cultural Expressions 211
- Case Law** 213

List of Abbreviations

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

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

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

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

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