



**PROMOTING CREATIVE ECONOMIES IN NIGERIA AND SOUTH
AFRICA THROUGH COMMUNAL AND COLLABORATIVE INTELLECTUAL
PROPERTY RIGHTS STRATEGIES**

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DEDICATION

To my loving and hard working mother, who recognised the value of education despite her lack of education due to the circumstances of her birth, and dedicated her youthful and active years in toiling for her children to receive proper education.

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I give Jehovah Yahweh all glory, praise and honour for the inspiration to embark on this project and the ability to execute it. When I look back to how it all started, I know for certain that it can only be Him. As they say, what God cannot do does not exist. We only have to put our trust in Him.

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ABSTRACT

The contention against and for extending intellectual property rights (IPRs) to traditional cultural expressions (TCEs) is strong on both sides: on one hand IPRs remain largely incompatible with TCEs and inadequate for safeguarding them. On the other hand, TCEs need protection in the interest of both the knowledge and their owners. The main challenges for Nigeria and South Africa as developing African countries in harnessing the benefits of their creative economy by exploiting the potential of their TCEs, particularly tradition-based arts and crafts, are tied to these contentions. IPRs remain the dominant framework for reaping the benefits of the creative economy; yet there are conceptual and practical challenges in applying IPRs to fully exploit the economic values of TCEs. Adopting a desktop and library-based research approach, this thesis seeks to resolve this dilemma by relying instead on alternative interpretations of narratives that underpin the dilemma, to justify the protection of tradition-based resources via IPRs. It also relies on the utilitarian outcomes from exploiting TCEs as valid rationales for the use of IPRs by the two study countries to fully exploit the economic benefits of their tradition-based arts and crafts. It examines how communal IPRs constitute a strong point of convergence between IPR and TCEs in ways that make them compatible and suitable measures to help derive greater benefits from TCEs in the market environment. It highlights the connections between the sector and the creative economy, and the socio-economic benefits of this nexus as justification for promoting, protecting and preserving tradition-based arts and crafts; and the suitability of communal IPRs in achieving these tripartite objectives. It concludes that the extant laws of the two countries do not adequately support the effective use of

communal IPRs to achieve the objectives as such, and makes recommendations for addressing the gaps.

ABBREVIATIONS

Af-CFTA	Agreement establishing the African Continental Free Trade Area
AGOA	African Growth and Opportunity Act
AMA	American Marketing Association
AO	Appellation of Origin
ARIPO	African Regional Intellectual Property Organization
AU	African Union
CCD	Convention on the Protection and Promotion of the Diversity of Cultural Expressions
CHOGM	Commonwealth Heads of Government Meeting
CMOs	Collective Management Organizations
DAC	Department of Arts and Culture
DACST	Department of Arts, Culture, Science and Technology
DCMS	Department of Culture, Media and Sports
dna	Date not available
DTI	Department of Trade and Industry
EAC	East African Community
ECOWAS	Economic Community of West African States
EFTA	European Free Trade Association
EoFs	Expressions of Folklore
EPA	Economic Partnership Agreement
FCTA	Federal Capital Territory Authority
FCS	Framework for Cultural Statistics
FCT	Federal Capital Territory
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Product
GI	Geographical Indication
GRTKF	Genetic Resources, Traditional Knowledge and Folklore
IACA	Indian Arts and Crafts Act
ICESCR	International Covenant for Economic Social and Cultural Rights
ICH	Convention on the Safeguarding of Cultural Heritage
ICTSD	International Centre for Trade and Sustainable Development
IGC	Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IGO	Indications of Geographical Origin
IK	Indigenous Knowledge
IKS Bill	Indigenous Knowledge Systems Bill
ILO	International Labour Organization
IP	Intellectual Property
IPLAA	Intellectual Property Laws Amendment Act
IPR/IPRs	Intellectual Property Right/Intellectual Property Rights
LDCs	Least Developed Countries
LFN	Laws of the Federation of Nigeria

MDGs	Millennium Development Goals
NCAC	National Council for Arts and Culture
NGO	Non-governmental Organization
NIAAA	National Indigenous Arts Advocacy Association
NWLR	Nigerian Weekly Law Report
OAPI	Organisation Africaine de la Propriété Intellectuelle
OAU	Organization of African Unity
PCT	Paris Convention for the Protection of Industrial Property
R&D	Research & Development
RECs	Regional Economic Communities
SADC	South African Development Corporation
SACR	Department of Sports, Arts, Culture and Recreation
TCE	Traditional Cultural Expressions
T-FTA	Tripartite Free Trade Area
TK	Traditional Knowledge
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UCLA	United Cities and Local Governments
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declarations on the Rights of Indigenous Peoples
UNDP	United Nations Development Program
UNESCO	United Nations Education Science and Culture Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
USA(US)	United States of America
USDA	United States Department of Agriculture
WFTO	World Fair Trade Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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CHAPTER ONE

INTRODUCTION AND OVERVIEW

Creativity, more than labour and capital, or even traditional technologies, is deeply embedded in every country's cultural context. Excellence in artistic expression, abundance of talent, and openness to new influences and experimentation are not the privilege of rich countries. With effective nurturing, these sources of creativity can open up new opportunities for developing countries to increase their shares of world trade and to 'leap-frog' into new areas of wealth creation.¹

1.1 Background of the Study

In its 2008² landmark report and the 2010³ sequel on the creative economy, the United Nations Conference on Trade and Development (UNCTAD) drew attention to the potential of the creative sector to generate growth, and development through economic activities derived from or based upon culture. UNCTAD identified the creative economy⁴ as a feasible development option for developing countries by relying on their traditional

¹ UNCTAD *Creative Industries and Development* (2004) 2 available at https://unctad.org/en/Docs/tdxibpd13_en.pdf, accessed on 1 March 2021 [hereafter: UNCTAD 2004].

² UNCTAD *The Challenge of Assessing the Creative Economy: Towards Informed Policy Making* (2008) [hereafter: UNCTAD 2008].

³ UNCTAD *The Creative Economy: A Feasible Development Option* (2010) [hereafter: UNCTAD 2010].

⁴ UNCTAD 2008 *supra* iii; UNCTAD 2010 *supra*; UNCTAD 2004 *supra*. The concept of 'creative economy' is credited to Howkins who referred to the term 'creative industries' as industries providing economic goods and services that result from creativity and has economic value. It became popular after the United Kingdom's (UK) Department for Culture, Media and Sports (DCMS) published its creative industries mapping report of 1998 which inspired world bodies, particularly the United Nations (UN) and its agencies, to begin articulating the connection between culture and development both in economic and social terms. See J Howkins *The Creative Economy: How People Make Money from Ideas* (2001). Howkins identified the interface between culture and economics and used the expression 'cultural industry' but with reference to the mass media. See also DCMS *The Creative Industries Mapping Document* (1998) available at <https://www.gov.uk/government/publications/creative-industries-mapping-documents-1998>, accessed on 1 March 2021 [hereafter: DCMS 1998]; SD Cunningham, J Hartley and JI Jones 'CIRAC Submission to House of Representatives: Inquiry into the Future Opportunities for Australia's Film, Animation, Special Effects and Electronic Games Industries' (2003) available at <https://eprints.qut.edu.au/4392/>, accessed on 1 March 2021.

knowledge (TK)/Traditional Cultural Expressions (TCEs),⁵ and creative capacities. It noted that this is because the creative economy relies on creativity, a resource which cannot be monopolised because it is inherent and abundant in every society and humanity.⁶ As such, it is not affected by certain challenges faced by developing countries in harnessing the necessary resources for economic growth, such as lack of capital, foreign direct investment (FDI), expertise, technology and basic infrastructure.⁷ Moreover, the creative industry comprises of a broad range of cultural resources from traditional arts and crafts to more technology and service-oriented activities. It also has a flexible market for both small and big players competing in their different categories and at different levels. Less developed countries can participate in and benefit from the available opportunities for growth and development relying on their cultural resources.

However, this interaction with cultural resources ushers in the intellectual property right (IPR) conundrum. IPRs serve as the default model by which creative goods and services are valued and commercialised, partly through the temporary monopoly

⁵ These two terms are often or sometimes seen as interchangeable, and also with other terms like 'indigenous knowledge', and 'expressions of folklore' (EoFs). WIPO *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (2001) 24; WIPO 'Traditional Knowledge: Operational Terms' (2002) 8&9 [hereafter: WIPO 2002a]; WIPO *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2018) [hereafter: WIPO 2018b]; UNCTAD 2010 *supra* 41. C Oguamanam 'Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept' (2018) 1 available at

https://www.cigionline.org/sites/default/files/documents/Paper%20no.185web_0.pdf, accessed on 1 March 2021; C Oguamanam 'Localizing intellectual property in the globalization epoch: the integration of indigenous knowledge' (2004) 11(2) *IJLS* 135-169 (135, 144); MA Girsberger 'Legal protection for traditional cultural expressions, a policy objective' in CB Graber and M Burri-Nenova (eds) *Intellectual Property and Traditional Cultural Expressions in the Digital Environment* (2008) 123-149. These publications also confirm that 'TCE' is similar in context and often treated as largely interchangeable with terms like 'indigenous knowledge', 'intangible cultural expressions', and 'expressions of folklore' (EoFs). Oguamanam 2004 *ibid* 135, uses the terms 'indigenous' and 'traditional' interchangeably.

⁶ UNCTAD 2010 *supra* 26; J Pérez de Cuéllar *Our Creative Diversity: Report of the World Commission on Culture and Development Part 64* (1996), confirming that creativity is inherent in every human.

⁷ UNCTAD 2010 *supra* iii; S Beji and A Belhadj 'What are the determining factors of industrialisation in Africa' (2014) available at <https://www.freit.org/WorkingPapers/Papers/Development/FREIT773.pdf>, accessed on 11 November 2021.

status they assign to the rights owner over the intellectual property (IP).⁸ Yet IPRs and TK/TCEs are not compatible spouses. Certain conceptual and practical challenges affect the application of conventional IP norms to these knowledge resources and create major obstacles in exploiting their development potential.⁹

For African countries, this summation has important implications. As the UNCTAD reports noted, African countries have comparative advantage in TK and TCEs, which could play an important role in stimulating economic activities in other sectors and lead to the growth of the creative economy.¹⁰ Earlier, the Heads of State and Government of the Organisation of African Union (OAU), currently the African Union (AU),¹¹ had expressed similar hope about the cultural resources of African countries driving development, which led to the adoption of the 1992 Dakar Plan of Action on Cultural Industries.¹² The leaders noted that if properly packaged and marketed, traditional cultural resources could play an important role in creating a niche for African societies in the emerging global economy. Even though no direct reference is made to TK/TCEs in

⁸ As would be seen in 1.4.3 ‘creative industry/economy’ is mainly defined in terms of IPRs. See WIPO *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (2015) 18.

⁹ See C Oguamanam *Intellectual Property in Global Governance a Development Question* (2012) 171-229; J Gibson *Community Resources Intellectual Property, International Trade and Protection of Traditional Knowledge* (2005); J Asmah ‘Stepping outside the box: traditional knowledge, folklore, indigenous textiles and cultural appropriation - is there room for folklore protection under intellectual property law?’ (Unpublished PhD Thesis, University of Ottawa 2010); P Andanda ‘Striking a balance between intellectual property protection of traditional knowledge, cultural preservation and access to knowledge’ *JIPR* (2012) 17(6) 547-558; J De Beer et al (eds) *Innovation and Intellectual Property: Collaborative Dynamics in Africa* (2014) 2014.

¹⁰ UNCTAD 2008 *supra* 5-8.

¹¹ The OAU was established in 1963 but disbanded and in its place the AU was established. See Africa Policy Information Centre ‘Africa: OAU to African Union. 07/18/01’ (2001) available at https://www.africa.upenn.edu/Urgent_Action/apic-091801.html, accessed on 1 March 2021.

¹² The Plan was adopted in recognition of the potential of cultural industries to drive socio-economic development. See Organisation of African Union (OAU) *Cultural Industries for Development in Africa: Dakar Plan of Action* (1992) available at <http://library.africa-union.org/cultural-industries-development-africa-dakar-plan-action-5>, accessed on 1 March 2021 [hereafter: OAU 1992]. See also the African Union (AU) *Plan of Action on Cultural and Creative Industries in Africa* (2005) [hereafter: AU Plan 2005] available at https://au.int/sites/default/files/pages/32901-file-auc_plan_of_action-_def.pdf, accessed on 1 March 2021. The 2005 AU Plan is the revised version of the 1992 OAU Plan.

the document, the leaders presumably also had traditional arts and crafts in mind when they referred to handicrafts.¹³ Moreover, the International Labour Organization (ILO) had recognised that Africa's development depended significantly on the informal cultural industry comprising also of arts and crafts.¹⁴

Traditional cultural resources have the potential to generate spill-over effects in socio-economic contexts through job creation, poverty alleviation and gender empowerment.¹⁵ Arts and crafts have been consistently identified among the most important creative products for export in developing countries with a substantial and expanding international market. A more recent UNCTAD report on the creative industry indicates an increase of arts and crafts export from \$19.9 billion in 2002 to \$35 billion in 2015, and an annual average growth rate of 4.42 percent during the period 2003-2015.¹⁶ As the report shows, 'artcrafts' make up to 18 percent of the world's imports of creative goods with the top importers being mainly developed countries.¹⁷ Artcraft is among the most important creative industry sectors for export earnings for developing countries'.¹⁸

However, these trends belie the poor condition of the arts and crafts sector in Nigeria and South Africa in relation to their economic value which needs to be addressed and which is the fundamental aim of this thesis.

¹³ AU Plan 2005 supra 4.

¹⁴ See International Labour Organisation (ILO) *Promoting the Culture Sector through Job Creation and Small Enterprise Development in SADC Countries: Crafts and Visual Arts* (2003) available at https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/@ifp_seed/documents/publication/wcms_117680.pdf, accessed on 1 March 2021.

¹⁵ M Kwanashie et al 'The Impact of Art and Creative Industries on Nigeria's Economy' (2009); UNESCO *Reshaping Cultural Policies Advancing Creativity for Development* (2018) 201 available at <http://uis.unesco.org/sites/default/files/documents/reshaping-cultural-policies-2018-en.pdf>, accessed 1 March 2021.

¹⁶ UNCTAD *Creative Economy Outlook Trends in International Trade in Creative Industries 2002-2015* (2018) 26 available at https://unctad.org/en/PublicationsLibrary/ditcted2018d3_en.pdf, accessed on 1 March 2021 [hereafter: UNCTAD 2018].

¹⁷ Ibid 23.

¹⁸ Ibid 26.

This chapter introduces the general background of the thesis and the basis of the inquiries. It specifies the research problem underlying the study, and explains the key concepts and the context in which they are relevant to the issues in question. It also specifies the significance of the study, the analytical framework, the methodology and the scope of the study, and provides a layout of the structure of the thesis.

1.2 Statement of the Problem

Despite their economic potential, the arts and crafts sector of countries in Africa remains poor with many countries recording trade deficits indicating that their imports exceed their exports in this field.¹⁹ For instance, not a single African country featured in the UNCTAD's ranking of the world's top 10 exporting countries of arts and crafts. Meanwhile, China recorded \$5.6 billion in arts and crafts exports, far above all of Africa's about \$297 million, and by 2015, had emerged as the world's leading exporter of creative goods, specifically art-crafts and visual arts.²⁰ These statistics simultaneously underscore the potential market for arts and crafts in the global market that could be harnessed by African countries, and the failure to leverage on this potential.²¹ They indicate prospects for the development of the sector as a viable industry, but first the challenges in effectively appropriating the value of the products must be addressed.²²

This study investigates how strategies based on communal or collective principles could help Nigeria and South Africa overcome the challenges of exploiting their

¹⁹ Ibid 321-323, 324-327, 389-392.

²⁰ Ibid 21.

²¹ Ibid 5-8, 116.

²² See UN *Strengthening the Creative Industries for Development in Zambia* (2011) and UN *Strengthening the Creative Industries for Development in Mozambique* (2011) both reports confirming and identifying the challenges.

tradition-based arts and crafts as a subset of TCEs to promote the growth of their creative economies. To this end, it focuses on communal IPRs as strategies guided by collectiveness. Thus, it examines the problems associated with promoting the traditional arts and crafts sector and the communal IPRs that could resolve the issues in question and help achieve the desired objectives. Emphasis is on three key issues: infrastructural problems associated with the creative industry in African countries, particularly the arts and crafts sector, such as small size, and a fragmented industry; limited commercialisation of their TCEs with long term effects on their survival;²³ and IPRs and the incompatibility problem.

The thesis argues that despite misgivings,²⁴ there are normative and practical justifications for the extension of IPRs or IP norms to TCEs, and some models of communal IPR create room for TCEs in ways that satisfy those justifications. It submits that the widely known frictions between IPRs and TCEs can be circumvented through the innovative use of specific forms of IPRs based on the principle of collectiveness.

1.3 Framing the Research and Scope of the Study

1.3.1 Framing of the Research Problem

Like other African countries,²⁵ Nigeria and South Africa²⁶ are rich in diverse forms of tangible and intangible TCEs.²⁷ The cultural industry in both countries is dynamic,

²³ UNCTAD 2010 supra 41.

²⁴ C McManis and Y Terán 'Trends and scenarios in the legal protection of traditional knowledge' in T Wong and G Dutfield (eds) *Intellectual Property and Human Development Current Trends and Future Scenarios* (2011) 139-174(140).

²⁵ See UN Mozambique Report 2011 supra and Zambia Report 2011 supra.

²⁶ The choice of Nigeria and South Africa is justified in 1.3.3.

²⁷ UNCTAD 2008 supra and UNCTAD 2010 supra. The words 'products', 'resources', 'goods', 'assets', and 'works' are used interchangeable to refer to tradition-based creative outputs such as handicrafts.

particularly in areas such as film, music, publishing and tourism; where viable industries have developed ushering in development at individual and aggregate levels.²⁸ Yet, they have remained marginal players in the global terrain of creative economies while their traditional cultural resources, including crafts, remain underdeveloped with low returns.²⁹ A 2008 mapping of the creative industry in South Africa's Gauteng Province estimated that the sectors with the largest number of entities follow this order: design (25 percent), craft (21 percent), audio-visual (11 percent), music (10 percent) and visual arts (10 percent). Yet in terms of remuneration, wages are highest in the print media and publishing sectors and lowest in the craft and fashion sectors.³⁰ More recent reports indicate that the majority of entities operating within the creative economy are small businesses generally needing help with the marketing of their products and operating on survival status.³¹

The Nigerian cultural sector is not significantly different from the above picture. Nigeria has experienced growth in specific industries like film and music. 'Nollywood', the brand name for the movie industry, is popular in Africa and the Diaspora,³² and

²⁸ British Council *Mapping of Nigeria Creative Industries: Report of Lagos Pilot Study* (2013) available at https://www.britishcouncil.org.ng/sites/default/files/lagos_pilot_mapping_report_2013.pdf, accessed on 1 March; A Joffe and M Newton 'The Creative Industries in South Africa' (2008).

²⁹ This is still the case in South Africa even after recognising the importance of developing the cultural sector long ago. See DACST *Creative South Africa: A Strategy for Realising the Potential of the Cultural Industries* (1998) [hereafter: DACST 1998a] available at https://www.gov.za/sites/default/files/gcis_document/201409/mso1ba0.pdf; DACST *The South African Crafts Industry Reports* (1998) [hereafter: DACST 1998b] available at https://www.gov.za/sites/default/files/gcis_document/201409/cigs0.pdf, accessed on 1 March 2021; AO Abisuga 'Protection of craft products embodied in cultural and creative industries in South Africa' in JC Sanchez-Garcia and B Hernandez-Sanchez (eds) *Sustainable Organizations - Models, Applications, and New Perspectives* (2021) 83-110.

³⁰ AMERU and CAJ *Gauteng Creative Industries: An Analysis* (2008) 8&135 Prepared by AMERU, Wits University and CAJ, for the Department of Sports, Arts, Culture and Recreation, Gauteng Provincial Government.

³¹ KM Makhitha 'Marketing strategies of small craft producers in South Africa: practices and challenges' (2016) 32(3) *JABR* 663-679, noting that craft producers face challenges of low demand of their products and in identifying niche market for their products.

³² O Arewa 'The Rise of Nollywood Creators, Entrepreneurs and Pirates' (2012).

allegedly is the world's second largest movie industry in terms of volume of production.³³ However, the traditional arts and crafts sector suffers stagnation, if not decline, despite being recognised as a potential stimulus for economic growth and diversification from a mainly oil-based economy.³⁴ A 2009 study which highlighted the potential of 'arts and craft as viable wealth creation areas' in Nigeria noted that government's strategy for growth is rather geared towards exploiting mineral resources than developing the arts and craft sector.³⁵ Also the 2017-2020 Plan for Economic Recovery and Growth which identified the creative industry as capable of stimulating growth by creating employment, focuses on the 'film, music, broadcasting and publishing' sectors, without mentioning arts and crafts, much less strategies for their development.³⁶ This non-inclusion of the arts and crafts sector in the development initiatives of the country's creative industry evidently persists.³⁷

The reasons for the poor performance of the arts and crafts sectors in the two study countries are varied, but also similar. They narrow down to poor reward from investments in arts and crafts activities. Poor perception of craftsmanship and unfair competition from counterfeits and imitations,³⁸ lack of capacity of the producers to

³³ UNCTAD 2018 *supra* 327.

³⁴ Kwanashie et al 2009 *supra*.

³⁵ GO Iriwieri 'Arts and craft as spring board for sustainable development in Nigeria' (2009) 1(1&2) *IJCTD* 1-18.

³⁶ Federal Republic of Nigeria (FGN) *Economic Recovery and Growth Plan 2017-2020* (2017) 64-66 available at <https://yourbudget.com/wp-content/uploads/2017/03/Economic-Recovery-Growth-Plan-2017-2020.pdf>, accessed on 1 March 2021.

³⁷ O Idowu 'The untapped power of Nigeria's creative industry' (2020) *StearsBusiness* <https://www.stearsng.com/article/the-untapped-power-of-nigerias-creative-industry>, accessed on 1 March 2021.

³⁸ A Adewopo et al 'A consideration of communal trademarks for Nigerian leather and textile products' in De Beer et al 2014 *supra* 109-131. Counterfeiting and imitation are distinct concepts. A counterfeit is an exact copy of an original item, while an imitation version of a product is similar to another product but is not by any means identical to it. Imitations become counterfeits when they deceptively presented to look like they are original. See A Le Roux et al 'A typology of brand counterfeiting and imitation based on a semiotic approach' (2016) 69(1) *JBR* 349-356.

effectively develop and market their products coupled with exploitation by middlemen, poor quality of the finished products, lack of access to the market of rich Western countries,³⁹ and the damaging effects of modernity on indigenous creativity,⁴⁰ are some of the factors responsible for the poor performance of the sector and poor remuneration. Ultimately, creative outputs in arts and crafts are not properly managed and commercialised to generate significant economic gains.⁴¹ IPRs play a key role in this context.

Broadly,⁴² IPRs refer to the range of legal rights in favour of owners of tangible and intangible knowledge resources for their intellectual activities.⁴³ IP could, for instance, take the form of inventions in products and processes protected by patents; original literary, artistic, musical and cinematographic works protected by copyright as works of expressions; designs protected by industrial design law which deals with works that have both functional and aesthetic qualities; and symbols, names, and other paraphernalia used in commerce protected by trademarks⁴⁴ with the primary intention of distinguishing a product in the market environment.⁴⁵ Other IPRs include utility model and trade secret. Trade secret and utility model, and indeed patent, would have similar impact on tradition-based arts and crafts to the extent that they deal with knowhow. Additionally, laws protecting against unfair competition have much relevance to some

³⁹ AU Plan 2005 supra 4-6.

⁴⁰ Kwanashie et al 2009 supra 33-34.

⁴¹ Kwanashie et al 2009 supra.

⁴² As a core concept of this thesis, IPRs is further discussed at the later part of this chapter and chapter two.

⁴³ WIPO *Intellectual Property Handbook: Policy, Law and Use* (2004) 3.

⁴⁴ This list is not exhaustive but these are generally considered the main types of IPRs.

⁴⁵ RW Sharma and S Kulhari 'Marketing of GI Products: Unlocking their Commercial Potential' (2015) available at <https://dokumen.tips/documents/studies-marketing-of-gi-products-unlocking-their-commercial-.html>, accessed on 1 March 2021.

forms of IP.⁴⁶ They protect against unjust market practices, including misleading uses of trademarks.⁴⁷ Like trademark law, unfair competition law protects, *inter alia*, against the unauthorised use of a trade insignia, an action which could result in the usurpation of a product's carefully established good reputation to gain unfair market advantages.

While the foregoing IPRs envisage an individual entity as owner, they sometimes accommodate collectives. Group trademarks, such as, collective marks, certification marks and geographical indications (GIs) are well known examples.⁴⁸ Collective management organisations (CMOs) are also examples of such group initiatives specifically in the management of copyright.⁴⁹ These models have their different *modus operandi* but share a common goal of harnessing the synergies associated with collectivism partly to help manage IPRs.⁵⁰ They are a part of what this thesis terms communal or collaborative IPR strategies based on their underlying philosophy of collectiveness/collectivism.

IPRs enable their owners to manage their intellectual outputs in economically beneficial ways by for instance, licensing use of the IP, transferring ownership to another party, or selling embodiments of the knowhow, such as, arts and crafts works. IPRs protect intellectual outputs in favour of their owners on the basic narrative of incentivising their production and optimising their benefits for both owners and the

⁴⁶ EN Yongych et al 'Unfair competition in the field of intellectual property rights: analyzing concepts, acts of unfair competition and laws' (2021) 14(3) *JP&L* 44-50.

⁴⁷ WIPO 2004 *supra*; Article 10bis, Paris Convention for the Protection of Industrial Property 1883.

⁴⁸ These are discussed in more details in chapter three.

⁴⁹ O Olukunle *Copyright Collective Management Administration in Nigeria: Lessons for Africa* (2013).

⁵⁰ See generally A Singh 'The Role of Collective Marks, Certification Marks and Geographical Indications' (2007) available at www.wipo.int/edocs/mdocs/.../wipo_smes_lhe_07_www_81475.doc, accessed on 1 March 2021.

public, by rewarding ingenuity in IP production.⁵¹ This is without prejudice to other more author-centric narratives and rationales discussed in more details in chapter two.

Where the commercialisation of tradition-based creative resources is concerned, IPRs could be relevant in two important and overlapping ways. First, IPRs could help to stimulate creative activities by providing the necessary incentives for boosting the production of new competitive tradition-based creative products. Secondly, IPRs could be useful in the proper management of existing quality tradition-based products to generate increased benefits from their quality. Overall, proper use of IPRs could deliver the necessary incentives for the effective appropriation of tradition-based creative resources to promote the growth of the creative economy, with use in this context implying the formalisation and/or proper management of the IPR.

Despite the foregoing, the normative and practical challenges of extending IPR norms to tradition-based arts and crafts as a subset of TCEs remain sticky.⁵² This underscores the predicament that African countries are confronted with when the communal nature of tradition-based products deprives them of much of the incentives derivable from the products due to incompatibility issues with IPRs, and structural weaknesses within the industry, such as small-size incapacities of the entities, hinders effective management of the remainder. It creates a twin agenda for the tradition-based arts and crafts sector: namely protection of the underlying knowledge through the formalisation of IPRs, and management of or exploitation of the IPRs to extract value

⁵¹ W Landes and R Posner 'An economic analysis of copyright law' (1989) 18(2) *JLS* 325-363. W Landes and R Posner 'Trademark law: an economic perspective' (1987) 30 *JLE* 265-309.

⁵² See WIPO 2012 supra 13-21; Oguamanam 2012 supra 171-229; Gibson 2005 supra; Asmah 2010 supra. These publications dwell on the challenges.

from the knowledge,⁵³ typically through commercialisation, monitoring and enforcement.⁵⁴

The conceptual incompatibility between TK/TCEs on one hand and the conventional IPR regime on the other is closely related to the differing but rigid principles underlining their respective nature.⁵⁵ Despite the lack of a universal definition of TK and TCEs,⁵⁶ they are largely interconnected concepts.⁵⁷ Therefore, they are largely affected by the same concerns, and so are their respective subsets.⁵⁸ For WIPO, TK refer[s] to:

tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields....⁵⁹

WIPO goes further to note that TK embraces ‘the content of knowledge itself as well as traditional cultural expressions’.⁶⁰ On their part, TCEs are ‘tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or

⁵³ W Fisher ‘Strategic management of IP: an integrated approach’ (2013) 55(4) *CMR* 157-183(158).

⁵⁴ WIPO *Managing the Intellectual Property Assets for Enhancing the Competitiveness of SMEs* (2002) available at https://www.wipo.int/edocs/mdocs/sme/en/wipo_ip_vmt_02/wipo_ip_vmt_02_3.doc (2002), accessed on 1 March 2021; WIPO *Making Intellectual Property Work for Business* (2011) available at .

⁵⁵ J Gibson *Creative Selves* (2006); Oguamanam 2004 supra 29.

⁵⁶ Girsberger 2008 supra 142, noting that authors are generally in agreement that there are no clear definitions of TCEs and that a working definition is necessary.

⁵⁷ WIPO 2018b supra; WIPO 2002a supra.

⁵⁸ This is because the social context in which they develop affects them in nearly the same way. This thesis endorses this approach. Thus, it considers references to issues concerning these other concepts and their subsets as applicable to TCEs except otherwise distinguished. See Oguamanam *ibid*.

⁵⁹ WIPO 2001 25; WIPO 2002a supra 11.

⁶⁰ WIPO 2018b supra 40; WIPO *List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May Be Found* (2010) 2.

manifested'.⁶¹ TCEs as tangible expressions include crafts and productions of art, such as, drawings, designs, paintings (including body-painting), sculptures, pottery, terracotta, jewellery, baskets, textiles, costumes; and other forms of handicrafts.⁶² Because TCEs and TK are closely knitted,⁶³ the incompatibility IPR-related questions commonly apply to a large extent.

Normatively, the key assumptions and principles which underlie IPR entitlements are inconsistent with the nature of TCEs as further explained in chapter two.⁶⁴ Also, there are potential perils in the commodification of TCEs and their exposure to the global market.⁶⁵ Even where IPRs are conceptually amenable to the management of TCEs, effective management may be hindered by inherent sectoral weaknesses at the industry level, like the small-size conundrum. Lack of capacity and wherewithal to individually manage their IPRs is a typical challenge for small-scale entities.⁶⁶ Generally, small-size related constraints hinder competitiveness and market access in the global arena due to a number of factors, such as, high quality requirements and lack of relevant knowledge about the global market, with the entities operating in less developed countries typically more affected.⁶⁷ Unfair competition from imitations and counterfeits are additional

⁶¹ WIPO 2018b *ibid* 39.

⁶² WIPO *The Protection of Traditional Cultural Expressions/EoF Revised Objectives and Principles* (2006) 11.

⁶³ WIPO 2010 *supra* 2-3; WIPO 2003a *supra* 28.

⁶⁴ Gibson 2006 *supra* 94-106; M Graner 'Opening remarks to the 2010 ATRIP Congress' in Rosen, J (ed) *Individualism and Collectivism in Intellectual Property Law* (2012) 12-17.

⁶⁵ E Wethey 'Creative commodification of handicrafts, the encounter between the export market and the indigenous weaver: comparisons of Latin American weaving communities' (2005) 35 *LAJ* 2-28 (5).

⁶⁶ Adewopo et al 2014 *supra* 109-131.

⁶⁷ OAU 1992 *supra*; UN Mozambique Report 2011 *supra*; UN Zambia Report 2011 *supra*; UNCTAD 2010 *supra* 84; Cunningham et al 'Financing creative industries in developing countries' in D Barrowclough and Z Kozul-Wright (eds) *Creative Industries and Developing Countries: Voice, Choice and Economic Growth* (2008) 65-110. In many developing countries, the proprietor normally fulfils a number of organizational roles – producer, agent, marketer and retailer. Generally, the supply chain of their creative industries is characterised by gaps and fragmentation, which are among the challenges that developing countries should

concerns for African countries regarding their traditional arts and crafts.⁶⁸ These dynamics beg the question whether and how communal approaches to the use of IPR could help African countries in overcoming challenges in deriving greater benefits from their TCEs - including tradition-based arts and crafts.

Communal and community-based strategies have been widely endorsed in the management of knowledge-based resources in agriculture,⁶⁹ cultural heritage, traditional medicine, artefacts,⁷⁰ fashion,⁷¹ and others,⁷² to overcome similar challenges in other jurisdictions.⁷³ Because of their collective nature, communal strategies promote synergies which individual efforts may not easily achieve in activities like marketing and IPR management. Yet they are uncommon in Nigeria and South Africa, and indeed in Africa.⁷⁴

This thesis argues that current IPR systems are malleable enough to allow the creative use of IPRs to manage tradition-based arts and crafts for economic gains. It agrees that TCEs are protectable under the IP framework,⁷⁵ but relies on alternative interpretations of IPR rationales to justify protection for tradition-based arts and crafts, and to determine the most appropriate models for the objectives in mind. The

address to boost their competitiveness in the global market for creative products. See also UNCTAD 2008 *supra* 69 and 103.

⁶⁸ R Haines et al 'Cultural and Creative Industry (CCI) Trends' (2018) available at <http://www.dac.gov.za/sites/default/files/Cultural%20and%20Creative%20Industry%20Trends%20-%20FINAL.pdf>, accessed on 1 March 2021.

⁶⁹ H Sereke-Brhan 'Coffee, Culture and Intellectual Property: Lessons for Africa from the Ethiopian Fine Coffee Initiative' (2010).

⁷⁰ AB Russell 'Using geographical indications to protect artisanal works in developing countries: lessons from a banana republic's misnomered hat' (2010) 19(2) *TLCP* 705-727.

⁷¹ M Torsen 'Anonymous, untitled, mixed media: mixing intellectual property law with other legal philosophies to protect traditional cultural expressions' (2006) 54(1) *AJCL* 173-198.

⁷² WIPO *Composite Study on the Protection of Traditional Knowledge* (2003) 15 [hereafter WIPO 2003b].

⁷³ UNIDO *Adding Value to Traditional Products of Regional Origin a Guide to Creating a Quality Consortium* (2010) [hereafter: UNIDO 2010a]; JM Finger and P Schuler (eds) *Poor People's Knowledge Promoting Intellectual Property in Developing Countries* (2004); P Drahos and S Frankel (eds) *Indigenous Peoples' Innovation Intellectual Property Pathway to Development* (2012).

⁷⁴ Adewopo et al 2014 *supra*.

⁷⁵ M Brown 'Can culture be copyrighted?' (1998) 39 *Current Anthropology* 193-222.

compromise is justified in the context of the creative economy on the basis that economic interests are primary and IPRs are the default mechanism for managing resources across the broad spectrum of the creative industry. Thus, those interests cannot be confined to interpretations of IPRs that would not foster their development. Alternative interpretations that support the IPR framework and simultaneously facilitate the objectives for tradition-based arts and crafts are necessary.

1.3.2 Research Aims, Objectives and Key Research Questions

The main aim of the study is to identify the relevant communal IPRs for protecting and managing tradition-based arts and crafts in Nigeria and South Africa in ways that could enhance their value and boost the creative economies. The study has the following goals:

- To underscore the importance of tradition-based arts and crafts in relation to fostering development through the creative economy for African countries in general, and Nigeria and South Africa in particular.
- To determine the feasibility of communal systems to enable the effective management of tradition-based arts and crafts.
- To seek a compromise between the contentions that TCEs are not protectable through a regime underpinned by exclusive rights of ownership as obtained under conventional IP frameworks on one hand, and that they should be so protected but through a *sui generis* system⁷⁶ other than a conventional IP framework considering their nature on the other.

⁷⁶ A *sui generis* system is specifically designed to address the unique attributes of a specific subject matter, such as TK or TCEs. According to WIPO ‘what makes an IP system a *sui generis* one is the moulding of its features to properly accommodate special characteristics and specific policy needs’. WIPO *Intellectual*

- To recommend communal approaches that would enable the effective management of tradition-based arts and crafts.

The study inquires mainly how conventional IPR systems can appropriately and meaningfully protect tradition-based arts and crafts to derive greater benefit in the market environment. The following sub-questions are also pertinent:

1. What role do tradition-based arts and crafts play in the development of the creative economy of both countries?
2. What are the theoretical issues underpinning the connection between IPRs and tradition-based creative economies and which IPRs are relevant?
3. How relevant is the communal approach to the management of tradition-based arts and crafts and in mediating the conflicts arising between IPR norms and TCEs?
4. What are the enabling factors for success of a communal IPR model established for the purpose of managing tradition-based arts and crafts?
5. What lessons, if any, are derivable from the use of communal models to protect tradition-based arts and crafts in other jurisdictions?

1.3.3 Significance and Scope of the Study

The study is significant because it addresses an unresolved important issue to Nigeria and South Africa as developing African countries, and indeed most developing countries. Tradition-based resources, including arts and crafts, remain an untapped ‘gold mine’ for most African countries.

The argument that conventional IPRs are not suitable for TCEs is well-founded and prevalent based on well-articulated practical and conceptual challenges derived from the differing nature of the two concepts, particularly in terms of knowledge creation and ownership.⁷⁷ De Beer et al, for instance, argue that the conventional IP system which focuses on individual IP ownership could potentially distort the vibrant and age-long collaborative and knowledge-sharing innovation and creation communities in Africa who rely mostly on their TCEs.⁷⁸ But other experts like Couttier and Panizzo,⁷⁹ and Andanda,⁸⁰ argue (and De Beer et al concede)⁸¹ that potentially useful strategies based on collectiveness exist within the conventional IP system which protect collective rights. Examples include communal marks under trademark law, GIs which have affinity with ‘communitarian rights of particular regions’, and collective management organisations (CMOs) which manage copyrights/related rights on behalf of their owners.

Nigeria and South Africa have not sufficiently utilised communal IPR strategies to safeguard and appropriate the full value of their tradition-based arts and crafts, and TCEs generally, despite the opportunities and sound rationales for the use of IPRs in connection with TCEs as witnessed in countries from other regions such as Australia,⁸² New Zealand and India.⁸³ Existing literature on the protection and management of TCEs

⁷⁷ See G Dutfield *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (2004) 100-109. This is further discussed in 2.3.1.

⁷⁸ J de Beer et al ‘Current realities of collaborative intellectual property in Africa’ in De Beer et al (eds) 2014 supra 373-393(373).

⁷⁹ T Cottier and M Panizzon ‘Legal perspectives on traditional knowledge: the case for intellectual property rights protection’ (2004) 7(2) *JIEL* 371-400.

⁸⁰ Andanda 2012 supra 555-556.

⁸¹ De Beer et al 2014 supra 393.

⁸² See T Janke *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (2003) 20.

⁸³ India and New Zealand offer useful lessons when contemplating using IPR strategies to promote traditional crafts. See K Guatam and N Bahl ‘Geographical Indication: Pochampally Ikat’ (2010) available at <http://www.aiacaonline.org/pdf/policy-briefs-geographical-indication-pochampally-ikat.pdf>, accessed on 1 March 2021; T Committee ‘Pochampally Ikat: Comparative Market Analysis of Pre and Post Registration

in Africa tend to focus more broadly on holistic protection with emphasis on a *sui generis* model. Even when IPRs are contemplated, the emphasis is on copyright which is more closely related to TCEs compared to other conventional IPRs. The more nuanced question of protection and management of the study countries' TCEs within the narrow context of the interests that are of priority in the creative economy as envisaged in this thesis (namely economic gain and commercialisation) has not been seriously addressed.

Nwauche follows this broad approach in his doctoral thesis on *sui generis* protection for Expressions of Folklore (EoFs) in Africa, which does not specifically address the issue of commercialisation within the framework of the creative economy.⁸⁴ He aligns with experts like Janke⁸⁵ and Lewinski,⁸⁶ Boateng⁸⁷ and Feris,⁸⁸ and many others⁸⁹ in their views that TCEs⁹⁰ should be protected but preferably under a *sui generis* framework.⁹¹ There are also model laws resulting from regional and international efforts

Periods After the Geographical Indications Act' (dna) available at <http://wtocentre.iift.ac.in/UNCTAD/01.pdf>, accessed on 1 March 2021. V Kulkarni and V Konde 'Pre- and post- geographical indication measures for handicrafts in India' (2011) 16 *JIPR* 463-469; PJ Chalk and A Dunlop 'Indigenous trademarks and human rights: An Australian and New Zealand perspective' (2009) 99(4) *TTR* 956-964.

⁸⁴ ES Nwauche *The Sui Generis and Intellectual Property Protection of Expressions of Folklore in Africa* (2016).

⁸⁵ T Janke et al *Our Culture our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998).

⁸⁶ S von Lewinski 'Adequate protection of folklore – a work in progress' in P Torremans (ed) *Copyright Law - a Handbook of Contemporary Research* (2007) 207-231.

⁸⁷ B Boateng *The Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana* (2011).

⁸⁸ L Feris 'Protecting traditional knowledge in Africa: considering African approaches' (2004) 4(2) *AHRLJ* 242-255.

⁸⁹ Asmah 2010 *supra*; P Drahos and S Frankel 'Indigenous peoples' innovation and intellectual property: the issues' in Drahos and Frankel (eds) (2012) *supra* 1-28; WIPO *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis* (2018) [hereafter WIPO 2018a]

⁹⁰ It is to be recalled that some of these experts use the terminology 'indigenous knowledge' sometimes interchangeably with TCEs and/or TK.

⁹¹ WIPO *Final Report on National Experiences with the Legal Protection of the Expressions of Folklore* (2002) [hereafter 2002b].

to provide guiding templates for countries desirous of following this path.⁹² These model laws are generally framed around a common understanding of the unique nature of TCEs which requires adjusting the basic tenets of conventional IPR in order to accommodate them.⁹³ However, the model laws do not adequately cater for the peculiar trade-related concerns in optimizing the economic benefits of TCEs,⁹⁴ even where they have been incorporated into national laws.⁹⁵

Meanwhile, Ncube addresses the issue of protection in the specific context of the creative industry in South Africa, but only in relation to copyright with reference to the publishing industry.⁹⁶ Certainly, attention has been given to the promotion of the creative economy in South Africa, but the larger proportion of this effort focuses on mapping the creative economy, and to some extent, protecting local agricultural species with GIs.⁹⁷ Joffe and Newton's report which focuses on the arts and crafts sector in the context of the creative industry analysis does not distinguish the tradition-based category and does not address the nuanced questions arising in relation to IPRs.⁹⁸ In close alignment with the subject matter of this thesis, Oriakhogba focuses on African women crafters working in

⁹² See the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organisation (ARIPO)* (2010); *Tunis Model Law on Copyright for Developing Countries* 1976; and UNESCO/WIPO *Model Provisions on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions* (1985).

⁹³ For instance, they grant collective ownership/perpetual rights.

⁹⁴ These concerns are fully discussed in chapter four.

⁹⁵ For instance, the incorporation of the Tunis modelled copyright protection for folklore in the Nigerian Copyright Act of 1988 has not yielded significant economic rewards to the host communities due to inherent ambiguities and loopholes which make it impracticable to effectively appropriate the economic value of their resources under the Act. It is to be noted that the Nigerian Senate recently passed a bill repealing the 1988 Act. The bill is tagged: A Bill for an Act to Repeal the Copyright Act CAP LFN 2004 and to Re-enact the Copyright Act 2021. See Vanguard 'A Bill for an Act to repeal the Copyright Act CAP LFN 2004 and to re-enact the Copyright Act 2021' (2022). However, the bill does not cure this weakness because it fails to amend the provisions on folklore in its Part 9. Section 5.3.1 further discusses the weaknesses of the 1988 Act regarding the protection of folklore and highlights the relevant new provisions of the bill.

⁹⁶ C Ncube 'The creative industry and South African intellectual property law' (2018) 11(2) *LDR* 589-607(592).

⁹⁷ AMERU & CAJ 2008 *supra*.

⁹⁸ See Joffe and Newton 2007 *supra*.

‘collaborative communities’, particularly rural Zulu women beadmakers. But unlike this study, he focused on how they can be empowered to harness the social and economic benefits of their creativity by moving beyond conventional IPRs. Towards this objective, he examined the potential role of business strategies such as ‘social entrepreneurship and inclusive innovation which are not underpinned by IP ownership and enforcement but rather ‘promote collaboration and knowledge sharing among rural craft women’.⁹⁹

In Nigeria, the lack of initiatives for handicrafts is such that the only mapping project of Nigeria’s creative economy does not cover arts and crafts.¹⁰⁰ Adewopo, et al, assert that not a single certification mark has been registered in Nigeria notwithstanding the existence of an enabling framework for the registration of certification marks.¹⁰¹ Evidence that this situation has changed could not be found.¹⁰² While their study established feasibility for the use of collaborative IPRs to promote the market for Nigerian produced handicrafts, it narrowly focused on handicrafts from specific clusters. Therefore, the important and nuanced connection between the creative economy and culture and the need to preserve cultural ethos, together with the apprehensions arising from exposing cultural goods to market dynamics, were not considered in the specific context of tradition-based handicrafts.

⁹⁹DO Oriakhogba ‘Empowering rural women crafters in KwaZulu-Natal: the dynamics of intellectual property, traditional cultural expressions, innovation and social entrepreneurship’ (2020) *SALJ* 137(1) 145-172; DO Oriakhogba ‘Empowering rural craft women through social entrepreneurship and open, inclusive innovation: my engagement with the Hillcrest Aids Centre Trust in KwaZulu-Natal, South Africa’ (2019).

¹⁰⁰ British Council 2013 *supra*.

¹⁰¹Adewopo et al 2014 *supra*.

¹⁰² A search through the database of trademarks applications file in Nigeria published by the Nigerian Law Intellectual Property Watch does not reveal any certification mark. See NLIP Watch ‘Database – trademark applications filed in Nigeria available at <https://nlipw.com/database-trademarks-in-nigeria/>, accessed on 1 March 2021.

This gap also applies to other African countries. Isolated cases of community initiatives can be found in Africa,¹⁰³ mainly utilising strategies and protocols outside IPRs typically concerned with preservation and benefit sharing from third party exploitation of the community's knowledge.¹⁰⁴ While these are desirable objectives for certain forms of TK, such as genetic resources, they do not offer much hope towards safeguarding the economic interests of handicrafts, where market challenges are a constant threat. This thesis seeks to address this gap by investigating how the workable aspects of IPRs could be creatively directed towards enhancing the protection of tradition-based arts and crafts.

The findings could be integrated into the ongoing discourse on the protection of TCEs at the national and international levels. It could help ongoing efforts - particularly that of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICG) - in developing an international instrument for the effective protection of TK/TCEs.¹⁰⁵

The focus on Nigeria and South Africa is underpinned by their status as among the most developed and the two largest economies in Africa in addition to their consistent leadership roles on the continent.¹⁰⁶ Thus, there is the tendency for both countries to help shape laws and policies in the region through their experiences, especially when it is

¹⁰³ E.g., Ethiopian Fine Coffee group trademark. See Sereke-Brhan 2010 *supra*.

¹⁰⁴ K Bavikatte and H Jonas 'Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy' (2010) available at <http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091086.pdf>, accessed on 1 March 2021.

¹⁰⁵ See DF Robinson et al *Protecting Traditional Knowledge the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore* (2019), chronicling the trajectory and challenges of this project, and the continuing need for more case studies and examples drawn from national jurisdictions. The ICG was established as a high power inclusive body to facilitate discussion of issues relating to access to genetic resources and benefit sharing, and the protection of TK and TCEs. See WIPO *Matters Concerning Intellectual Property and Genetics Resources, Traditional Knowledge and Folklore* WO/GA/25/6 (2000).

¹⁰⁶ World Bank 'Taking the pulse of Africa's economy' (2019) available at <https://www.worldbank.org/en/region/afr/publication/taking-the-pulse-of-africas-economy>, accessed on 1 March 2021; C Calderon et al 'An analysis of issues shaping Africa's economic future' (2019) available at <https://openknowledge.worldbank.org/handle/10986/31499>, accessed on 1 March 2021.

considered that the imperatives and challenges of managing TCEs are similar across Africa. Therefore, the two countries could help define the direction of law and policy on the tradition-based arts and crafts sector in Africa.

By focusing on tradition-based arts and crafts, the thesis draws attention to the potential for harmonising the conflicts between the cultural and economic values of TCEs in the market environment. It does so by looking at both values not as conflicting but as complementary and mutually beneficial. Like Ncube, it argues that the opportunities for IPRs should be fully exploited where they are available.¹⁰⁷ But additionally, it stresses the importance of satisfying the requirement of legitimacy, which many experts have insisted upon in view of the collision between owners' entitlements over tradition-based resources and the dreaded effects of such exclusionary private rights on the interest of the larger society.¹⁰⁸ These experts insist that like every other subject pertaining to the assignment of private rights, including conventional IPRs, protection of TCEs is a question that centres on legitimacy which requires valid reasons for protection to supersede all good reasons for the free flow of knowledge resources.¹⁰⁹ As Fisher argued, 'the free flow of ideas and information has myriad economic and cultural benefits' that should not be sacrificed 'without a good reason'.¹¹⁰

¹⁰⁷ Ncube 2018 *supra*.

¹⁰⁸ Oguamanam 2004 *supra*,

¹⁰⁹ R Coombe 'Intellectual property, human rights and sovereignty: new dilemmas in international law posed by the recognition of knowledge and the conservation of biodiversity' (1998) 6(1) *IJGLS* 59-115. Indeed, recent discourses are reviewing long established justification theories in view of the changing dynamics to knowledge creation, use and dissemination. See W Fisher 'Theories of Intellectual Property' (1987) 9 available at <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>, accessed on 1 March 2021; J Hughes 'Traditional knowledge, cultural expression and the sirens call for property' (2012) 49(4) *SDR* 1215; R Okediji 'Traditional knowledge and the public domain' (2018) 1 available at <https://www.cigionline.org/publications/traditional-knowledge-and-public-domain>, accessed on 1 March 2021; Oguamanam 2018 *supra*; W Fisher 'The puzzle of traditional knowledge' (2018) 67(7) *DLJ* 1511-1578.

¹¹⁰ Fisher 2018 *supra* 1542.

To establish, legitimacy, the thesis is uniquely concerned with the protection of tradition-based arts and crafts in ways that cater for both their economic and socio-cultural interests, and not one at the expense of the other. It does so with reference to the utilitarian theory of maximising the benefits for both IP owners and users following the metaphorical ‘greatest good for the greatest number’.¹¹¹ It also relies on justifications based on social justice while paying attention to the need to assuage the concerns that create uneasiness in extending IPRs to TCEs.

1.4 Preliminary Conceptual Issues and Clarifications

Clarification of key terms is fundamental to the accuracy of any analysis and resulting conclusions. It ‘guards against misleading assumptions’.¹¹² Clarifications also provide the right context of the analysis and avoid ambiguities. Whether one refers generally to TCEs or specifically to tradition-based arts and crafts, the challenge of definition arises, at the centre of which is the meaning of the qualification ‘traditional’. A proper understanding of the term ‘traditional’ is necessary in determining the scope of the subject matter, while a proper understanding of the creative economy clarifies the context in which IPRs are relevant.

1.4.1 Identifying the Subject Matter and the IPR Question

There are differing notions and unclear boundaries between arts and crafts and their background may affect how they are treated. These make identifying the subject matter

¹¹¹ Hughes 2012 *supra*.

¹¹² C Oguamanam ‘Local knowledge as trapped knowledge: intellectual property, culture, power and politics (2008) 11(1) *JWIP* 29-57(35). Also C Oguamanam *International Law and Indigenous Knowledge: Intellectual Property, Plant Diversity, and Traditional Medicine* (2006).

complex, but nevertheless unavoidable because, like Geyer correctly said, ‘the nature of the legal object will determine which intellectual property rights can apply thereto’.¹¹³

1.4.1.1 Arts and crafts

There is no standard way of classifying arts, and crafts and the lines between them could be blurred. The terms ‘art’ and ‘craft’ both have a narrow and broad meaning. In the narrow context of this thesis in which both subjects are contemplated, art refers to art work or fine art, such as painting or sculpture, and not the broader notion of art as a diverse range of creative activities such as painting, music, and literature.¹¹⁴ Art, for present purposes, represents the manifestation of creative activity as an object that conveys meaning or symbolism to the perceiver.¹¹⁵ Craft is a more opaque subject and could mean a process in a broad sense or an output in a narrow sense. As a process, craft means ‘the manual dexterity and artistic skill required in working with materials and in creating objects that can be ornamental, functional, or both’.¹¹⁶ Thus all arts are crafts in the general sense of the activity involved, but in the objectified context of this thesis, only the objects of such processes having practical uses are crafts.¹¹⁷ In reality, there is no

¹¹³ S Geyer ‘Towards a clearer definition and understanding of “indigenous community” for the purposes of the intellectual property laws Amendment Bill, 2010: an exploration of the concepts “indigenous” and “traditional”’ 2010 13(4) *PELJ* 127-143(127).

¹¹⁴ Oxford Lexico available at <https://www.lexico.com/definition/art>, accessed on 1 March 2021. A more comprehensive definition is basically of art as a wide range of cultural activities. See DAC *White Paper on Revision of the Department of Arts and Culture 1996 (Fourth Draft)* (2017) 5 available at <http://www.dac.gov.za/sites/default/files/Legislations%20Files/Revised%20WP%20Fourth%20Draft%2015062018%20JULY%202018.pdf>, accessed on 1 March 2021.

¹¹⁵ S Wehmeier et al *Oxford Advanced Learner’s Dictionary (Int’l Student’s Edition)* (7th edn) (2005)

¹¹⁶ G Clarke and J Brackner ‘Definitions for traditional and contemporary crafts’ in *Alabama Craft: Tradition and Innovation, Classroom/Support Materials* (dna) available at <http://www.aptv.org/IQLEARNING/ClassroomFiles/file/definitions.pdf>, accessed on 1 March 2021.

¹¹⁷ B Evans ‘African craft’ available at <https://www.contemporary-african-art.com/african-craft.html>; ‘Africa art’ available at <https://www.contemporary-african-art.com/> accessed on 1 March 2021.

universal definition or classification of crafts. As an object, it interfaces with handicrafts and artisanal products.

South Africa's former Department of Arts Culture Science and Technology (DACST) defines craft in a manner that underscores both its broad and narrow meaning as an activity and an object.¹¹⁸ It defines 'crafts' as 'the creation and production of a broad range of utilitarian and decorative items produced on a small scale, with hand processes being the significant part of the value-added content', and using a 'range of natural and synthetic materials'.¹¹⁹ The Cambridge English Dictionary defines 'handicrafts' as 'a skilled activity in which something is made in a traditional way with the hands'.¹²⁰ The United Nations Education Social and Cultural Organisation (UNESCO) describes artisanal products as 'those produced by artisans, either completely by hand, or with the help of hand tools or even mechanical means, as long as the direct manual contribution of the artisan remains the most substantial component of the finished product'. It states further that artisanal products 'are produced using raw materials from sustainable resources', and have inherent 'distinctive features, which can be utilitarian, aesthetic, creative, culturally attached, decorative, functional, religiously and socially symbolic and significant'.¹²¹ These definitions reveal significant commonalities of the

¹¹⁸ This definition captures most of South Africa's policy making agenda for her craft sector. The DACST has since ceased to exist following a major reconfiguration by the South African government. See South African Government 'President Cyril Ramaphosa announces reconfigured departments' (2019) available at <https://www.gov.za/speeches/president-cyril-ramaphosa-announces-reconfigured-departments-14-jun-2019-0000>, accessed on 11 November 2021.

¹¹⁹ DACST 1998b supra 8.

¹²⁰ Cambridge English Dictionary available at <https://dictionary.cambridge.org/dictionary/english/handcraft>.

¹²¹ UNESCO/ITC *International Symposium on Crafts and the International Market: Trade and Customs Codification* (1997) (1997) available at <http://www.unesco.org/new/en/culture/themes/creativity/creative-industries/crafts-and-design/>, accessed on 1 March 2021.

subjects, mainly the hand production method, use of organic materials, and the functions of the products.¹²²

From an IP perspective and a marketing and consumer perspective, arts and crafts overlap in the sense that they are both essentially hand-made products, often culturally rooted; whose distinctive quality has primarily an aesthetic appeal.¹²³ But additionally, craft items have functional attributes.¹²⁴

The lines between arts and crafts could be blurred in what can be referred to as the ‘convergence syndrome’ or what Nettleton calls ‘the fluidity between categories of art and craft’.¹²⁵ This happens when craft, such as a piece of pottery is indistinguishable from art by its sheer beauty, such that it can also be used as an ornament for decoration. Such an item could also fit into the rubric of ‘applied art’¹²⁶ protected as works of ‘artistic craftsmanship’. Irivwieri draws a distinction between utility crafts as items catering for basic functions such as clothing, and art crafts as more fanciful items, such as, jewellery.¹²⁷ The South African DACST 1998 Reports¹²⁸ identify five categories of crafts, namely: traditional art, designer good, craftart, functional ware and souvenir.

¹²² The terms ‘crafts’ ‘handicrafts’ and ‘artisanal products’ are sometimes used interchangeably. See KM Makhitha ‘Understanding the organisational buyer behaviour of craft retailers in South Africa’ (2015) 31(2) *JABR* 501-514(501).

¹²³ See Joffe & Newton 2007 supra 35.

¹²⁴ ITC/WIPO *Marketing Crafts and Visual Arts: The Role of Intellectual Property Rights: A Practical Guide* (2003) 4.

¹²⁵ A Nettleton ‘Life in a Zulu village: craft and the art of modernity in South Africa’ (2010) 3(1) *JMC* 55-77 (69).

¹²⁶ See A Elebute and E Odokuma ‘Arts and crafts as veritable sources of economic empowerment for marginalized people in Nigeria’ (2016) 4(3) *International Journal of Development and Economic Sustainability* 11-24 (12), noting that arts are of two types: pictorial art such as painting and sculpture, and applied arts, such as textile design and photography.

¹²⁷ Irivwieri 2009 supra 4.

¹²⁸ DACST 1998a supra 32; DACST 1998b supra 9.

In another context ‘art’ and ‘craft’ are perceived differently from the Western and African backgrounds. This is important because it impacts on their value since the yardstick for the evaluation of value from the two backgrounds differs.

The Western epistemological narrative makes a clear distinction between arts and crafts largely based on the process of their creation. A romanticised process of creation results in art being perceived as a more superior creative endeavour than crafts. In the more professional context of the Western connoisseur, art is ‘something exotic, original and limited in number’, quite unlike craft, which is mainly repetitive and functional with its aesthetic value of secondary importance.¹²⁹

In sharp contrast to the Western perception that pigeon-holes crafts as inferior to art, the African traditionalist, and indeed traditionalists from other backgrounds,¹³⁰ view craft as an embodiment of multiple values: economic, cultural and spiritual. The following observation aptly captures the multifaceted value of craft and its convergence with art to the African traditionalist:

African craft is often associated with the production of utilitarian objects but it is essentially about beauty, sometimes in its humblest and possibly purest form Ancient African artists believed that they had access to a certain pool of higher thoughts, said to be the origin of creation and that a man’s hands were only tools used to reflect some of the magnificence he could occasionally have fleeting sight of. Such a fundamental core

¹²⁹ Evans supra.

¹³⁰ The perception is not limited to African traditionalists. For instance, Indian Natives believe that what separates ‘Native Indian Art from the generic terminology ‘arts and crafts’ is the fact that the arts produced by Indian nations are an extension of their heart and soul, and that the making of an art or craft involves ‘a very spiritual act’. See Hearing Before the Committee on Indian Affairs, US Senate 106th Congress 2nd Session on Public Law 101-644 to extend the Power of the Indian Arts and crafts Board (May 17 2000) (Written Testimony of Traditional Court (Clan Elders) Ho Chunk Nation 109 available at <https://archive.org/details/gov.gpo.fdsys.CHRG-106shrg64725/page/n111>, accessed on 1 March 2021.

belief can only take a humble craft to another realm where a different evaluation system needs to occur.

The observer concludes that for African cultures still producing craft today, there is no separation between arts and crafts; that they are as one because of the innate and instinctive nature of the creator and good craft will have enduring and transcendent qualities.¹³¹

The traditionalist's perception is important to the assignment of certain normative principles to traditional arts and crafts as fundamental to the creative process, such as incentives. There is an underlying distinction between incentive to a traditional artist and incentive to an artist of Western epistemological background as necessary to the creative process. It also affects the kind of value ascribed to such works. Clearly, the traditionalist perception of craft assigns to it values that transcend merely functional or visual qualities. Symbolism and spiritualism are also crucial to the construction of its distinctiveness, such as the Nigerian traditional textiles, and the baskets and beadworks of the Zulu rural women discussed later.¹³² While these textiles have important spiritual functions and symbolism, the material culture of the Zulu women also has important socio-cultural values as a means of communication and medium of socialisation.¹³³ These qualities give the traditional works their identity and constitute the key attributes of their authenticity. But unless clarified, defining 'traditional arts and crafts' based on these qualities could be tricky, and could propagate a notion of traditional arts and crafts as static and antique which is inconsistent with their constantly evolving nature in form and in processes.

¹³¹ Evans *supra*.

¹³² Chapter three.

¹³³ C Boram-Hays 'Questions of identity in the beadwork of the Zulu Speaking People' (2005) 38(2) *African Arts* 38-93. This matter on the value of crafts is discussed in more details in chapter three of this thesis.

Another important question is the place of contemporary works derived from pre-existing traditional arts and crafts. The question arises as to whether such derivative works can be classified as traditional or contemporary works, and as arts or crafts.

The foregoing issues are signposts of potential areas of conflicts in identifying the subject matter, which should be avoided by specifying the applicable subject matter categorisation. Oftentimes, the substantive part of laws protecting traditional arts and crafts is shaped by the manner in which arts and crafts are perceived, either as converged following the traditionalist approach¹³⁴ or as bifurcated following the Western approach.

1.4.1.2 ‘Traditional’ or ‘tradition-based’ arts and craft?

There is significant disparity in existing literature on what constitutes ‘traditional’ when it comes to identifying the subject matter of protection, the beneficiaries, and the kind of protection required. It is indisputable that the word ‘traditional’ personifies the identity of the subject matter and the authenticity standard in addition to other qualities that may be required. But as Woltz suggests, the conception of authenticity should not be ‘at odds with the way societies evolve and transmit their cultures’.¹³⁵

Normally, the term ‘traditional’ suggests antiquity with notions of repetition, generational transmission and even oral transmission which altogether imply continuity

¹³⁴ The US Indian Arts and Crafts Act 1990, avoids the use of terms ‘art’ and ‘crafts’ and uses instead the term ‘handicraft’ in order to avoid imputing a distinction between the two from the perspective of the Indian Native who does not recognise such a distinction. See s308 (10) US Regulation for Use of Certificates of the Indian Arts and Crafts Board 2014 available at <https://www.govinfo.gov/app/details/CFR-2014-title25-vol2/CFR-2014-title25-vol2-part308> accessed 1 March 2021. See JD Woltz ‘The economics of cultural misrepresentation: how should the Indian Arts and Crafts Act of 1990 be marketed?’ (2007) 17(2) *FIPMELJ* 443-500.

¹³⁵ Woltz *ibid* 462.

with the past.¹³⁶ In this sense, ‘traditional’ could imply connection with a definite time¹³⁷ or historical old material only,¹³⁸ or connote the uncivilised and outdated pinned to a specific period in the past.¹³⁹ It connotes something static or unchanging, often associated with resistance to change.¹⁴⁰

But some experts argue that ‘traditional’ does not necessarily imply old because of the tendency for traditions to ‘recombine older sources’, and the fact that society has been evolving as traditions are reinvented. Basrh’s words, ‘all “tradition”, in actuality, is continually undergoing revision”.¹⁴¹ Thus perceptions that impliedly crystallize the evolution of cultural knowledge in fixed eras or a state of ossification are inconsistent with the notion of a perpetually evolving society.¹⁴²

The lack of clarity to the term ‘traditional’ is relevant to TCEs/TK, where it does not only invoke a notion of the ancient but also a certain lack of novelty or creativity with implications involving IPRs.¹⁴³ But even here, there is a strong rebuttal of the view that ‘traditional’ implies ‘old’. Some experts argue that ‘[W]hat is “traditional” about TK is not its antiquity, but the way it is acquired and used, which in turn is unique to each

¹³⁶ M Dommann ‘Lost in tradition? Reconsidering the history of folklore and its legal protection since 1800’ in CB Graber and M Burri-Nenova (eds) *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008) 3-16 (5).

¹³⁷ E Hobsbawm ‘Introduction: the invention of tradition’ in E Hobsbawm and T Ranger *The Invention of Tradition* (1983) 1-14.

¹³⁸ WIPO 2002a supra 9.

¹³⁹ Dommann 2008 supra 5.

¹⁴⁰ Ibid; G Dutfield ‘TRIPS-related aspects of traditional knowledge’ (2001) 33(2) *CWRJIL* 233-275(242); G Dutfield ‘Harnessing Traditional Knowledge and Genetic Resources for Trade and Development’ (2005) 4-5.

¹⁴¹ RL Barsh ‘Indigenous knowledge and biodiversity’ in ‘Indigenous peoples, their environments and territories’ in AD Posey *Cultural and Spiritual Values of Biodiversity* (1999) 73-75(74).

¹⁴² Ibid 6; Hobsbawm 1983 supra; J Bannister ‘Indigenous cultural heritage in Australia: the control of living heritages’ in M Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* (2015) 437-454(440).

¹⁴³ Dutfield 2001 supra 242.

indigenous culture’¹⁴⁴ while Dutfield posits that there is no accurate distinction between TCEs and contemporary knowledge and that the former is not ‘an entirely discrete category of knowledge’ because ‘a great deal of hybridization and cross-fertilization takes place’.¹⁴⁵ In a similar manner, the Alabama State Council on Arts notes that ‘traditional’ refers to those aspects of culture that are transferred orally through generations following established traditions ‘within a cultural group’. But it clarifies that the term ‘traditional art’ does not necessarily confine its meaning to such specific modes of knowledge transmission and each artist maintains time-honoured methods or techniques, laced with their personal inspiration.¹⁴⁶ Traditional arts and crafts are therefore distinguished by the manner of their making and the systems and processes of knowledge diffusion and acquisition. The question then arises as to the status of contemporary work derived from traditional arts vis-à-vis pre-existing works. The Alabama State Council differentiates between traditional crafts and contemporary crafts, noting that unlike traditional crafts, contemporary crafts ‘are an important form of art’; being ‘marked by innovation in design and materials’ and ‘new interpretations of traditional technique and style’. Also, the learning processes may take place outside community tradition and in more formal settings.¹⁴⁷ However, this does not seem to offer unambiguous demarcations between the two subjects especially in defining subject matter for the allocation of privileges. But WIPO has provided a plausible answer.

The preference for the term ‘tradition-based’ for the topic of this thesis is not a random choice or for convenience. It finds authority in WIPO’s effort to provide a

¹⁴⁴ Barsh 1999 supra 74; Dutfield *ibid*.

¹⁴⁵ *Ibid*.

¹⁴⁶ Clarke & Brackner *supra*.

¹⁴⁷ *Ibid*.

working definition to guide ongoing discussions on developing an international framework for the protection of TCEs.

Through the IGC, WIPO has attempted to provide a practical and nuanced meaning of ‘traditional’ in the bid to avoid the problematic perceptions and interpretations attributable to the term, by specifying that such subject matter categorised as TK are ‘tradition-based’ knowledge in different categories including TCEs as stated earlier.¹⁴⁸ It defines ‘tradition-based’ as ‘knowledge systems, creations, innovations and cultural expressions’ with three characteristics: ‘trans-generational transmission, link to a particular community or territory’ and constant change in response to the environment’.¹⁴⁹ It further explained that ‘the term “traditional” does not mean “old” but rather that the cultural expressions are derive from or are based upon tradition, identify or are associated with an indigenous or traditional people and may be made or practiced in traditional ways’.¹⁵⁰ This is consistent with the view that ‘traditional’ refers to the process of knowledge acquisition and use, with sharing ‘at the very heart of its traditionality’.¹⁵¹ ‘Traditional’, understood in the above context, creates room for newer works. While the term ‘traditional’ could lend itself to notions of statist or antiquity, ‘tradition-based’ implies three conditions irrespective of age: that the knowledge has been in practice for more than one generation of people; (2) that it is identified with a particular community or people not necessarily confined to a particular environment; and (3) that it changes in

¹⁴⁸ See 1.3.1; WIPO 2001 25 and WIPO 2002a 11; WIPO 2018b supra 42 where ‘tradition-based creations are defined as ‘Tradition-based creations or innovations refer to innovations and creations based on traditional knowledge as such, developed and innovated beyond a traditional context’.

¹⁴⁹ WIPO ibid 25; WIPO 2002a 11.

¹⁵⁰ WIPO *Consolidated Analysis of the Legal protection of Traditional Cultural Expressions* (2003) 25 [hereafter: WIPO 2003a].

¹⁵¹ Barsh 1999 supra 73, 74-75 and Dutfield 2001 supra 242.

response to its environment.¹⁵² The question whether contemporary arts and crafts qualify as ‘traditional’ then depends on the extent to which they remain true to the traditional modes and mores of knowledge acquisition, use and transfer.

Accordingly, this thesis defines tradition-based arts and crafts as items that are created following time-honoured methods of production and traditions of knowledge acquisition transferred from one generation to another, and evolving within a particular community or people in response to changes in the environment within which they are produced, without prejudice to the freedom of the individual makers adding their creativity to those processes while still maintaining the ethos which distinguish the item as of or derived from the stock of such knowledge. This definition would include a mosaic of decorative and useful items. It will also cover a broad range of activities, including, weaving, carving, pottery, painting, dyeing and beading. It makes it clear that tradition-based arts and crafts encompass this wide range of works as original pre-existing or replicated works, and as derivatives of the original works.¹⁵³

Though the definition may harbour its own practical challenges, it avoids the conceptual misnomer of imputing or implying a non-existent and unrealistic state of inertness to TCEs in the pristine imaging of ‘traditional’. The term ‘tradition-based’ does not wholly confine the subject to a static state of time or form. Instead, it focuses on the underlying knowledge characterised by specific paradigms which give the subject matter in question an identity. These elements define authenticity not only in terms of the item

¹⁵² WIPO 2001 25.

¹⁵³ See D Igweze ‘A journey through Nigerian art part I’ (dna) The Hour Glass available at <https://www.hourglassgallery.com/a-journey-through-nigerian-art-part-1/>, accessed on 1 March 2021, noting that the mobility and trade of tribes is depicted by the embellishment of product with beads and that style patterns and structural forms on pottery indicates just how outside influences impacted on traditional practices.

but also with reference to the maker's claim to being a part of the community, and with reference to the social and cultural environment in which the item is created.

The definition also aligns with the distinctions as well as connections between pre-existing TCEs *stricto sensu* as generally old, collectively owned, and anonymously created on one hand, and contemporary works of expression derived from or inspired by folklore in respect of which the creator is generally identifiable. It is in this context that handicrafts are seen 'as both traditional and contemporary' and that WIPO observes that TCEs 'reflect a living culture and evolve despite being based on traditional forms and know-how'.¹⁵⁴

Potential areas of concern following this definition of the subject matter would include protecting the integrity and preserving the 'traditional' character of the TCE in the global market ecosystem. Conceptual conflicts would occur when such derivative works also qualify for protection under conventional IPR models, such as copyright, or where they are associated with more than one community. The right approach in terms of protecting them in the market environment as envisaged should be capable of mitigating these conflicts.

1.4.2 Defining the Creative Economy

There is no standard definition of the creative economy.¹⁵⁵ Rather, defining the creative economy seems to be mainly based on pragmatism, with each country or institution free to adopt a model that suits its needs.¹⁵⁶ Indeed, there seems to be confusion as to whether

¹⁵⁴ WIPO 2003a *supra* 10.

¹⁵⁵ UNCTAD 2010 *supra* 255.

¹⁵⁶ See M Keane et al *Key Concepts in the Creative Economy* (2012); A Alanen 'What's wrong with the creative economy' (2007) 6 *Framework, the Finnish Art Review*; UNCTAD 2010 *supra* 9; UNCTAD 2008

the ‘creative industry’ and the cultural industry are interchangeable concepts,¹⁵⁷ or distinct, with the cultural economy constituting a subset of the creative economy.¹⁵⁸ This lack of standardisation also applies to the delineation of the component industries or sectors of the creative economy,¹⁵⁹ with no wrong approach considered wrong.¹⁶⁰ Broadly, the ‘creative industry’ represents knowledge activities, while the ‘creative economy’ represents the aggregate monetary value of those activities and the outcomes they generate. Both concepts are thus metaphorically alternate sides of the same fabric.¹⁶¹

UNCTAD does not provide a succinct definition of the creative economy other than a nebulous note that it ‘is an evolving concept based on creative assets potentially generating economic growth and development’, followed by an outline of the potential outcomes it can generate.¹⁶² But it notes that creative industries are at the heart of the creative economy,¹⁶³ and defines ‘creative industry’ as ‘the cycles of creation, production and distribution of goods and services that use creativity and intellectual capital as

supra 3-4, 11 & 15; L Babin and B Milotová ‘Different Views on the Definition of the Creative Economy and Creative Industries’ (dna); D Hesmondhalgh and AC Pratt ‘Cultural industries and cultural policy’ (2005) 11(1) *IJCP* 1–14. These resources agree no single definition applies to the concept.

¹⁵⁷ See UNCTAD 2008 supra 12. Joffe & Newton 2007 supra, see the ‘creative industry’ and the ‘cultural industry’ as interchangeable terms/concepts. S Galloway and S Dunlop ‘A critique of definitions of the cultural and creative industries in public policy’ (2007) 13(1) *IJCP* 17-31 (17), note that there is little clarity about these terms and little appreciation of the differences between them. UNESCO’s position is prevaricating. It sometimes treats the two concepts as interchangeable. See UNESCO *Culture, Trade and Globalisation: Questions and Answers* (2000) 11-12. But it treats them as distinct in UNESCO and Global Alliance for Cultural Diversity *Understanding Creative Industries: Cultural Statistics for Public-Policy Making* (dna) [hereafter: UNESCO & Global Alliance].

¹⁵⁸ See UNCTAD 2008 supra and British Council *Mapping the Creative Industry: A Toolkit* (2010) 13.

¹⁵⁹ J O’Connor ‘The Cultural and Creative Industries: A Review of the Literature’ (2007) 41 available at http://kulturekonomi.se/uploads/cp_litrev4.pdf, accessed on 1 March 2021. J Carr ‘Creative Industries, Creative Workers and Creative Economy: A Review of Selected Recent Literature’ (2009); ACF Reis (ed) *Creative Economy as a Developing Strategy: A View of Developing Countries* (2008) 23-25 available at https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5519/ebook_eng.pdf?sequence=1, accessed on 1 March 2021.

¹⁶⁰ UNCTAD 2008 supra 12.

¹⁶¹ Ibid iv, noting that ‘at the heart of the creative economy lays the creative industries’.

¹⁶² UNCTAD 2010 supra 10.

¹⁶³ Ibid 10 & 255.

primary inputs’.¹⁶⁴ On its part, the UK’s DCMS, whose definition is favoured in the mapping exercise of both Nigeria and South Africa,¹⁶⁵ defines creative industries as ‘those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property’.¹⁶⁶ Despite the significant variations in the various definitions of ‘creative economy’, three key inputs remain standard which interact closely to foster its development potential. These are culture, creativity and economic value.¹⁶⁷ Throsby, whose ‘concentric circles’ model of classification of the creative economy remains an important contribution towards defining and delineating the creative economy/industry notes that ‘it is the cultural value of cultural goods that gives these industries their most distinguishing characteristic’.¹⁶⁸

1.4.2.1 Cultural input as a benchmark for classification

Despite the lack of a standard classification of the components of the creative economy, there is some convergence of a core group of activities that form the creative economy with arts and crafts included either as distinct subjects, or with crafts subsumed in the heritage sector.¹⁶⁹ UNCTAD’s model¹⁷⁰ groups creative industries into four broad categories: namely, heritage, arts, media and functional creations, which are sub-divided

¹⁶⁴ UNCTAD 2008 supra 4.

¹⁶⁵ See British Council 2013 supra 10; AMERU & CAJ 2008 supra.

¹⁶⁶ DCMS 1998 supra 3; DCMS *The Creative Industries Mapping Document* (2001) 4.

¹⁶⁷ Reis 2008 supra 15.

¹⁶⁸ D Throsby *Economics of Cultural Policy* (2010) 26.

¹⁶⁹ UNCTAD follows the later approach. See UNCTAD 2008 supra p 14. The DCMS model does not demarcate the industries between cultural outputs as a niche of the creative economy and other more functionally defined creative activities or outputs. Instead, it provides a random list of activities and industries falling within the creative industry including arts and crafts. See DCMS 1998 supra. UNESCO on its part classifies arts and crafts broadly under cultural domain without any distinction between arts and crafts as TCEs and the other forms. See UNESCO *Framework for Cultural Statistics* (2009) 24.

¹⁷⁰ UNCTAD 2008 *ibid*.

into nine groups comprising a variety of cultural works with TCEs (including arts and crafts) placed under heritage.¹⁷¹ This confirms tradition-based arts and crafts as a subset of the creative economy.¹⁷²

The association of the creative economy with culture assigns to the creative economy strong socio-economic values with positive impacts on development. As Ana CF Reis, former special adviser on the creative economy for the UN, noted; creative industries ‘are not only economically valuable per se, but they also catalyse and add intangible values to other types of processes, organisation, economic relations and dynamics of different sectors....’¹⁷³ UNESCO observes that the creative economy allows culture and creativity to drive development¹⁷⁴ (specifically ‘sustainable development’) with culture key to this process.¹⁷⁵ For developing countries, particularly in Africa, the socio-economic values of the creative economy collectively have the potential to stimulate growth and human development through the spinoffs they generate.¹⁷⁶ It has been observed that earnings, working conditions and employment could be enhanced if the cultural industries of African countries were more effectively organised, capacities for

¹⁷¹ UNCTAD 2008 supra 14; D Hesmondhalgh *The Cultural Industries* (2018).

¹⁷² UNCTAD 2008 *ibid* 37.

¹⁷³ Reis 2008 supra 25. See also UNCTAD 2008 *ibid*.

¹⁷⁴ YR Isar ‘Creative Economy Special Report Widening Development Pathways’ (2013) 9 available at <http://www.unesco.org/culture/pdf/creative-economy-report-2013.pdf>, accessed on 1 March 2021; UNESCO *Reshaping Cultural Policies* (2018) available at <https://en.unesco.org/creativity/global-report-2018>, accessed on 1 March 2021.

¹⁷⁵ Culture is valued in terms of sustainable development following UNESCO recognising culture as one of the pillars. See UNESCO Declaration on Cultural Diversity, 2001 article 3. See also UCLG *Culture: The Fourth Arm of Sustainable Development* (2010) available at https://www.agenda21culture.net/sites/default/files/files/documents/en/zz_culture4pillarsd_eng.pdf, which contains the declaration by the Executive Bureau of United Cities and Local Governments (UCLG) at its meeting in Chicago in April 2010, recognising culture as the Fourth Pillar of Sustainable Development, joining economic growth, social inclusion and environmental balance as ‘the paradigm of sustainable development’ as declared by the UN in 1987. See also World Commission on Environment and Development *Our Common Future* (1987) available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>, accessed on 1 March 2021.

¹⁷⁶ UNCTAD 2010 supra 34; UNCTAD 2008 supra 26-35 noting that the creative economy could help African countries reach the Millennium Development Goals (MDGs).

cultural entrepreneurship strengthened and new market opportunities identified and fully exploited.¹⁷⁷ These pro-development attestations regarding the creative economy underscore the value of culture and the need for its preservation as an important raw material for the creative economy.¹⁷⁸ The foregoing signal strong rationales for promoting TCEs as components of the creative economy while also addressing the potential perils in trading culture particularly on its values.

1.4.2.2 Tradition-based arts and crafts as a subset of the creative economy

Tradition-based arts and crafts are certainly cultural resources. Nevertheless, certain inherent attributes make them more affiliated to the market and yet more vulnerable to market dynamics than other kinds of products. This underpins the opportunities and perils that should be strategically managed when exposing them to the market.

Unlike other products, tradition-based arts and crafts are inherently both tangible and intangible, and embody both economic and cultural values. This creates multiple windows of exploitation of their economic value. While the tangible items are tradable and therefore subject to market competition, the intangible component which adds value to the physical manifestations can be appropriated with the use of special mechanisms, most relevantly IPRs as the ‘best available tool for creating and maintaining exclusivity over creative and innovative outputs in the market place’.¹⁷⁹

The commercial interests and cultural values associated with arts and crafts in the global market are not perpetually in agreement; nevertheless, they are symbiotic. This

¹⁷⁷ UN Zambia Report 2011 *supra* 7.

¹⁷⁸ As the fourth arm of sustainable development, culture is rightly assigned equal imperatives with the other three arms, including preservation. See UCLG 2010 *supra*.

¹⁷⁹ ITC/WIPO 2003 *supra* iii.

relationship has different dimensions which could be destructive to the knowledge and simultaneously facilitate gains from trade.

Arts and crafts constitute the basis of economic activities of people especially in rural areas, and they are embodiments of cultural identities. The much emphasised pro-development gains of the creative economy resonate strongly with tradition-based arts and crafts by generating positive impacts in areas like gender and youth empowerment, inclusive development and environmental sustainability. Moreover, the economic value of tradition-based arts and crafts is not only directly derived from the tangible productions but also from their link with other sectors like tourism and fashion thereby generating benefits for both the traditional artists and crafters, and their communities.¹⁸⁰ But given the cultural value of tradition-based arts and crafts, subjecting them to market dynamics raises concerns relating to their survival, integrity and overall benefit to the community. WIPO observes that what is creativity from the market perspective ‘may erode traditional culture’, and that ‘imitation or marketing of cultural forms and culturally specific artistic works by the commercial sector might be counterproductive to the welfare of the source community’.¹⁸¹ Market exposure of tradition-based arts and crafts thus raises concerns of unauthorised appropriation of their values. Given such symbioses, promoting economic interests above the cultural value of tradition-based arts and crafts could upset the social well-being of the society just as protecting their cultural value above economic interests may leave the beneficiaries impoverished.

¹⁸⁰ See J Hollowell ‘Intellectual property protection and the market for Alaska Native arts and crafts’ in M Riley (ed) *Indigenous Intellectual Property Rights, Legal Obstacles and Innovative Solutions* (2004) 55-98(37), noting the linking of commercialisation of native arts in Alaska to the fast growth of tourism.

¹⁸¹ WIPO 2003a supra 11.

Also, tradition-based arts and crafts appeal to a diverse collection of consumers with equally diverse purposes in mind for desiring to acquire them. The differential market potential open to tradition-based arts and crafts ranges from basic local consumption to the tourist and export market; and ‘mass-produced to ‘high-end’ items.¹⁸² Paradoxically, this market viability constitutes two of the major threats to the survival of traditional arts and crafts; first, as makers strive to adjust production techniques to market demands; and secondly, as an attraction for counterfeiters. Yet in some cases, particularly in relation to cultural tourism, the market is seen as complementary to the revival of authentic local cultures following tourists’ and connoisseurs’ desire for ethnic goods.¹⁸³

A strong booster of the differential market potential of tradition-based arts and crafts is the association of their quality with their origin. Removed from the context of their origins, they lose their value and authenticity. The attribute of origin is particularly significant in connection with the growing trend of ethical consumerism and demand for speciality products with cultural value which have initiated a burgeoning interest in and demand for tradition-based arts and crafts.¹⁸⁴ The existence of a differential market creates the tendency for confusion if products are not properly designated, and engenders a proclivity to imitation and counterfeiting with harmful consequences. Counterfeits, for instance, usurp the market for authentic versions, rob their makers of income from their knowledge, and dilute quality which decreases consumer confidence in the product.

¹⁸² See M Liebl and T Roy ‘Handmade in India: traditional craft skills and in a changing world’ in Finger and Schuler (eds) 2004 supra 53-73, noting the existence of market for low quality and high-end Indian traditional crafts. G Richards ‘Culture, crafts and tourism: a vital partnership’ in G Richards (ed) *Developing and Marketing Craft Tourism* (1999) 11-35, noting that crafts and tourism are fast becoming partners.

¹⁸³ Wethey 2005 supra, noting how the need to meet market demands for traditional textiles encouraged hybridisation, standardisation and alteration of traditional techniques in some communities in Latin America and still, the flourishing tourist market revitalised interest in traditional textiles.

¹⁸⁴ UNCTAD 2010 supra 34.

Ultimately, counterfeits could threaten generational continuity in practicing the knowledge, leading to extinction of the knowledge.¹⁸⁵ These harmfulness calls for protective measures for TCEs as knowledge and for the producers in the global market arena in ways that implicate IPRs.

1.4.3 IP: The Grand Narrative of the Creative Economy

This section examines the centrality of IPRs to the promotion of the creative economy with particular reference to tradition-based arts and crafts, and the framework for determining the suitable models in relation to the stated concerns and the objectives.

1.4.3.1 Brief background

When the concept of IPRs is described as the ‘grand narrative of the knowledge economy’, it is mainly because IPRs remain ‘the persistent framework within which discussions relating to knowledge systems occur’, whether such knowledge is Western-based or tradition-based.¹⁸⁶ This also applies to the creative economy where efforts to define ‘creative’ and ‘cultural’ industry appear incomplete without reference to their propinquity with IPRs.¹⁸⁷ WIPO’s view of the creative economy is perhaps the most unequivocal pronouncement of the primacy of IPR as the linchpin of the creative economy. It sees the creative economy as constituted mainly by industries that actually produce copyright materials, as distinct from intermediary activities in the conveyance of

¹⁸⁵ Woltz 2007 supra 456.

¹⁸⁶ Gibson 2005 supra 73.

¹⁸⁷ See J Newbiggin ‘The Creative Economy: An Introductory Guide’ (2010); UNCTAD 2008 supra; UNCTAD 2010 supra; the DCMS 1998 supra 3; and DMCS 2001 supra.

the copyright goods and services to the consumer.¹⁸⁸ A common principle traversing the various perspectives of the creative economy is that the creative industry must incorporate some form of valuable or potentially valuable IP capital resulting from creative activities. And IPRs remain the tool for appropriating the creative input.¹⁸⁹ This assigns to IPRs a significant functional role in the valuation and valorisation of creativity and in sustaining those activities.¹⁹⁰

The strength of any IPR lies in the fact that it allows the knowledge that adds value to a product to be dissociated from the product and be dealt with separately.¹⁹¹ Therefore, at any given time, more than a single value can be derived from an IP by exploiting both its tangible and intangible intellectual component. Also, an intellectual asset may embody more than a single kind of IP and may accommodate more than one user or business interest without unduly affecting the individual experiences. These different but non-exclusive, non-excludable and non-rivalrous interests constitute the quintessential value of IP/IPRs which can be contemporaneously exploited.¹⁹²

¹⁸⁸ WIPO *National Studies on Assessing the Economic Contribution of the Copyright-based Industries* (2011) 17 available at https://www.wipo.int/edocs/pubdocs/en/copyright/1036/wipo_pub_1036.pdf, accessed on 1 March 2021.

¹⁸⁹ Gibson 2005 supra 13; See WIPO 2002a supra 27.

¹⁹⁰ This is clearly underscored in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, which emphasises the importance of IPRs ‘in sustaining those involved in cultural creativity’. See UNESCO *Basic Text of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2011 preamble para 17. It is also seen in the works of some scholars, e.g., RE Caves *Creative Industries: Contracts between Art and Commerce* (2000); T Desurmont ‘Considerations on the relationship between the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the protection of authors’ rights’ (2006) UNESCO *Copyright Bulletin* 14-17.

¹⁹¹ See ITC/WIPO 2003 supra 16.

¹⁹² T Jefferson ‘Letter to Isaac Macpherson’ (1813) available at <https://www.red-bean.com/kfogel/jefferson-macpherson-letter.html>, accessed 1 March 2021. This means that use by one does not exclude use by others, including the owner. See also ITC/WIPO 2003 ibid 16.

1.4.3.2 Connection between tradition-based arts and crafts and IPRs, and related Concerns

The centrality of IPR norms to the creative economy implies that the key role of IPRs as a system that operates on the philosophy of rewarding creativity in symbolic expressions also extends to the activities of the different sub-sectors of the economy.¹⁹³ This equally implies that tradition-based arts and crafts are also affected by the general uneasiness between TCEs and IPRs, in addition to the separate concerns of tradition-based arts and crafts which would either strengthen or weaken the case for IPR protection.

Efforts to place TCEs within the IPR framework are longstanding and controversial,¹⁹⁴ and galvanised by the increasing awareness of the economic and cultural values of TCEs to the communities hosting them and the public at large.¹⁹⁵ Nevertheless, it has been acknowledged that tradition-based arts and crafts are among the TCEs that have a certain degree of compatibility with conventional IPRs and are less affected by the discords between IPRs and TCEs.¹⁹⁶ The core attributes of IPRs as foundations of their incompatibility with TCEs will be fully examined in the next chapter.

The core attributes of IPRs aside, IPR protection for tradition-based works of expression has been questioned on grounds that it focuses primarily on economic

¹⁹³ Ibid.

¹⁹⁴ Over the years, WIPO has been coordinating efforts to address the protection of TK and TCEs and recently through the ICG, while the debate continues outside the ICG. See T Wong and C Fernandini 'Traditional cultural expressions: preservation and innovation' in T Wong and G Dutfield (eds) *Intellectual Property and Human Development: Current Trends and Future Scenarios* (2011) 175-217(184). See article 15(4) of the Berne Convention for the Protection of Literary and Artistic Works 1886, whose objective was, *inter alia*, to ensure protection of folklore.

¹⁹⁵ TK has been described 'as holding the key to achieving sustainable national development without greater dependence on imported capital, materials and technologies'. EI Daes 'Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples' (1993) 40.

¹⁹⁶ WIPO 2003a *supra*. This would however depend on whether they are pre-existing or contemporary (derivatives of pre-existing knowledge).

significance at the expense of cultural significance.¹⁹⁷ However, it is also true that the IPR framework facilitates the connection of cultural value to economic interests in mutually supportive ways through the adoption of specific IP tools that promote such values as an intrinsic quality or identity of the product in question. This happens when the cultural value constitutes the distinguishing quality of the product in the market and the basis of its authenticity. IPRs for tradition-based arts and crafts could become the unifying factor between their cultural and economic values where such cultural values are the criteria for authenticity and the assignment of IPR privileges. Such balancing could potentially facilitate gains from commercialisation.¹⁹⁸

Such balancing is even more imperative in the economic sphere where potentially complex dynamics are in question.¹⁹⁹ For TCEs, the desired objectives could be complex and different across subject matters, such as, where typical issues of concern like misappropriation and preservation have different imperatives. Where economic interests are primary, excessive focus on commercialisation may overlook and adversely affect preservation. In Nigeria, for instance, major policy interest in the development of the handicrafts sector emphasises marketing to unlock the potential of handicrafts as a catalyst for development, with focus on issues like poverty alleviation and empowerment for traditional arts and crafts producers.²⁰⁰ Thus, commercialisation of tradition-based arts and crafts with technological input to enhance quality is strongly advocated without

¹⁹⁷ N Duxbury and H Campbell 'Developing and revitalising rural communities through art and creativity a literature review' (2011) 3(1) *Small Cities Imprint* 111-122 (117); Asmah 2010 *supra*.

¹⁹⁸ Gibson 2005 *supra* 13; See WIPO 2002a *supra* 27.

¹⁹⁹ WIPO *Towards the Establishment of a Regional Framework for the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources in the Caribbean Region* ((2009) available at

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtk_kin_08/wipo_grtk_kin_08_caribbean_brochure.pdf, accessed on 1 March 2021.

²⁰⁰ IB Kashim 'Visual arts and material culture in the context of industrial designs: the contemporary Nigerian experience' in DA Coelho (ed) *Advances in Industrial Design Technologies* (2013) 223.

commensurately emphasising the imperative of preserving the traditional techniques and ethos. Whereas, if both concerns are equally considered, the economic revival of the sector could be programmed to serve as a strategy for encouraging preservation as marketability of the traditional qualities becomes the needed impetus to preserve them.²⁰¹ Moreover, the notion of preservation is not only ambiguous but could be asymmetrical with the dynamic nature of culture if not properly mediated.

Promoting the economic value of tradition-based arts and crafts as a viable sector of the creative economy brings them in direct confrontation with the IPR question, and underscores the imperative of multi-dimensional or differential systems as variously suggested. Gibson, for instance, believes that the protection of community resources must be realised through a truly multi-dimensional approach to achieving the legitimacy of custom, of which IP in cultural products may be one aspect within customary management of knowledge by communities, as distinct from defining protection according to established criteria of Western legal systems.²⁰² But in response to calls for *sui generis* systems, Okediji argues that even though ‘the value system and forms of creativity differ in developing countries, these differences in themselves do not justify the need for an entirely separate system of protection’. She notes further that the arguments projected in support of *sui generis* systems overemphasise the differences between IP and indigenous knowledge, and underemphasise the cultural relevance of IPR to all societies.²⁰³ These two views appear divergent but actually converge at some point. A multidimensional approach supports sectionalised strategies that allow different types of

²⁰¹ Kwanashie 2009 *supra* 13.

²⁰² Gibson 2005 *supra* 10.

²⁰³ R Okediji ‘The limits of development strategies at the intersection of intellectual property and human rights’ in D Gervais (ed) *Intellectual Property, Trade and Development Strategies to Optimize Economic Development in a TRIPS-Plus Era* (2007) 355 (376).

IPRs to co-exist even with non-IPR measures for the same subject matter, which is not significantly different from the current conventional IPR framework which incorporates more than one form of IP, each protected separately but applicable jointly. Implicit in the stratified approach is the recognition that the IPR framework is malleable enough to accommodate some categories of TCEs and can be exploited by focusing on the specific issues affecting particular forms to determine the applicable IPR strategies.²⁰⁴

1.4.3.3 Analytical framework for determining the relevant IPRs

The analytical framework described in this section helps in answering the legitimacy question. It also helps in determining the IPRs which are applicable to tradition-based arts and crafts and equally suitable in achieving the desired objectives. The main concept of analysis is the utilitarian justification, which will be further explained in chapter two.

Broadly, utilitarianism envisages optimum advantages for as many interests as are concerned. It is underpinned mainly by a goal-based narrative of achieving intended societal goals. Therefore, the utilitarian justification for TCEs focuses on the potential benefits of protecting TCEs to the society. Okediji argues that the utilitarian logic of incentives which validates conventional IPR norms should also apply to claimants of TK, ‘if there is any expectation that property rights will lead them to continue to invest in their creative activities’. She sees this ‘utilitarian logic of incentives’ as necessary in order to encourage sustainability of the ecosystem and safety from the threats of ‘misappropriation and globalization’ on the capacity of traditional societies to ensure such sustainability.²⁰⁵ Though her focus is on the conservation of biodiversity, her view is

²⁰⁴ Gibson 2005 *supra*; Asmah 2010 *supra*.

²⁰⁵ Okediji 2018 *supra* 12.

nonetheless true of cultural resources like TCEs, which are necessary for the preservation of cultural diversity, with communities playing an important role.²⁰⁶ While the larger concern for preservation is for the benefit of the society at large, there is the immediate interest of the resource owners to be considered in association with the consequential benefits of safeguarding such interests to the society as envisaged by the utilitarian justification for IPR.²⁰⁷ Okediji was probably alluding to such ‘resource owners’ interests in observing that ‘the treatment of traditional knowledge as merely an extension of the public domain has significant implications for the welfare and economic development opportunities of Indigenous groups’;²⁰⁸ and indeed there are socio-economic impacts which could bother on social justice. But Munzer and Raustiala doubt that protection of TK could enhance the capital status of traditional communities because it is not supported by data. They argue plausibly that it is one thing to create IPRs in TK and ‘another for these rights to have financial value as capital or collateral security’, possibly alluding to management.²⁰⁹

Both Sampath and Brahy²¹⁰ rely on the instrumentalist value of the utilitarian theory constructed on the basis of incentives to determine the most suitable IPR strategy for certain types of TK. They rely on the usefulness of ethno-botanical knowledge in drug research as justification for the grant of specific exclusive rights over that knowledge for

²⁰⁶ This is explained further in chapter two.

²⁰⁷ Fisher 1987 *supra* 9 & 24-25, discussing the weakness of some key theories, including the utilitarian theory, and noting that even though they fail ‘to provide comprehensive prescriptions concerning the ideal shape of intellectual-property law’, they are not completely valueless.

²⁰⁸ Okediji 2018 *supra* 2.

²⁰⁹ SR Munzer and K Raustiala ‘The uneasy case for intellectual property rights in traditional knowledge’ (2009) 27 *CAELJ* 37-97(68).

²¹⁰ PG Sampath ‘Intellectual property rights on traditional medicinal knowledge: a process-oriented perspective’ (2004) 7(5) *JWIP* 711–737; N Brahy ‘The contribution of databases and customary law to the protection of traditional knowledge’ (2007) 58(188) *ISSJ* 259 - 282.

the benefit of the host community in order to ensure the conservation of biodiversity, the social good of such preservation being to protect drug research.²¹¹

Other experts disagree with the utilitarian justification for the protection of traditional resources, especially the link with preservation. Hughes argues that ‘exclusive rights do not by themselves trigger preservation’ in all cases. He however notes that in the case of TCEs/TK, effort at preservation ‘typically comes down to moneymaking potential’, because ‘preservation of TK and TCEs involves preservation of practices, activities, and skills’, and not mere preservation of existing cultural objects. Thus, ‘if granting exclusive rights to typical art and craft designs, forms, and styles would curb industrial production of the same and enhance the capacity of local communities to maintain local production, surely this would be a form of preservation’.²¹² Fisher is more unequivocal in questioning the validity of the incentive justification with reference to TCEs/TK. In the absence of empirical evidence, he doubts whether indigenous groups would typically be more motivated to preserve their knowledge for the good of all if adequately protected or better placed to commercialize it.²¹³ However, Fisher’s examples in support of his views are not exhaustive given the diversity of the TCEs/TK ecosystem even nationally.²¹⁴ Cases of misappropriation undermining the business of local handicraft producers abound. The paradigmatic case of dying craftsmanship in African traditional textiles and handicrafts generally is a direct consequence of original traditional versions competing unfairly with knockoffs for market.²¹⁵ Conversely, expectation of

²¹¹ Brahy argues for a community property right over such knowledge pooled in a database and managed through contracts while Sampeth recommends the use of trade secrets.

²¹² Hughes 2012 *supra* 1245, 1246.

²¹³ Fisher 2018 *supra* 1548 citing Hughes *ibid*.

²¹⁴ *Ibid* 1548-49.

²¹⁵ Adewopo et al 2014 *supra*; Boateng 2011 *supra*.

profit has been instrumental to the revival and preservation of many dying craftsmanship.²¹⁶ It has been observed that some types of exclusive rights like GIs could encourage crafters to remain in their communities and produce their crafts rather than seeking opportunities for living in cities.²¹⁷ These cases underscore the importance of ensuring increased and sustained interest in traditional knowhow as an effective strategy for ensuring its survival. Whether the benefits of preservation to the society exceed the sacrifice of part of the public domain is another question entirely.

But it is to be noted that because of the highly diverse nature of TCEs, different strategies may be required by the different subject matters.²¹⁸ In articulating the differential approach, and by way of illustration, Oguamanam draws a distinction between TCEs of more economic value to their owners, such as, *adire*²¹⁹ and those of mainly cultural symbolism. While diffusion could harm the integrity of the knowledge where cultural symbolism is high, diffusion could actually benefit rather than harm preservation in the case of *adire* which has higher entrepreneurial import as the production techniques of *adire* become tied to its popularity thereby keeping the techniques alive. Therefore, protecting *adire* may require strategies that would promote instead of stifle diffusion while ensuring that diffusion does not threaten the socio-economic interests of the indigenous producers and the survival of the techniques (knowhow).²²⁰ Generally, trade-related IPRs like trademarks would be more relevant to TCEs with higher entrepreneurial potential than to TCEs valued mainly for their cultural

²¹⁶ Russell 2010 *supra*.

²¹⁷ M Sunder 'The invention of traditional knowledge' (2007) 70(2) *LCP* 97-124(99).

²¹⁸ Oguamanam 2018 *supra* 5-11.

²¹⁹ *Adire* is an indigo dyed cloth commonly associated with parts of Western Nigeria, particularly the Yoruba tribe, but it is highly diffused with diversified uses. See MO Areo and RO Kalilu 'Origin of and visual semiotics in Yoruba textile of Adire' (2013) 12 *ADS* 22-34.

²²⁰ See Liebl & Roy 2004 *supra* 53-74.

worth. Ideally, the IPR strategy should promote the market for the TCE in ways that aid diffusion without imperilling their cultural value.

In the context of the creative economy, all IPRs would be relevant at some point along the value-added chain from production to distribution, but the scope of relevant IPRs must be narrowed down to those affecting arts and crafts with reference to their nature. As one-dimensional creative pieces, the basic IP component in art is the aesthetic quality, unless such quality is the result of a novel scientific technique.²²¹ Craft, on the other hand, presents a more intricate situation given its dual values as functional and aesthetic. Therefore, the mechanisms for protecting crafts vary with some degree of uncertainty. It must be emphasised that to be fully accomplished in determining the applicable IPRs for tradition-based arts and crafts in the creative economy, the preferred types must also address the objectives for tradition-based arts and crafts. While IPRs grant to rightsholders the privilege to control use of the protected work, it is the ability to exercise control over or manage the right that makes IPRs commercial assets.²²² Ultimately, IPRs are only useful where they are gainfully exploited. Therefore, what is at stake for tradition-based arts and crafts in the creative economy and for this thesis is not only protection but also effective management.

1.5 Methodology

The study is non-empirical and doctrinal in nature. It adopts a desk-top approach and applies a critical analysis of primary and secondary materials, including legislations, journal publications, reports, scholarly text, and sundry online materials. The secondary

²²¹ In which case they become the subject of patents, utility models and trade secrets which protects ideas or know-how.

²²² Ncube 2018 *supra* 489-590.

materials are authenticated through personal observations where feasible. The process of reviewing literature continues in chapter two to clarify concepts, identify previously determined grounds, and leverage on previous findings in developing the thesis. It aligns with the purposes stated by Clark that a literature review demonstrates ‘that the writer has insightfully and critically surveyed relevant literature on his or her topic in order to convince an intended audience that the topic is worth addressing’.²²³

1.6 Outline of Chapters

The thesis comprises of six chapters, beginning with the current chapter which states the main focus of the study, and provides the general background of the study and analytical framework as foundations for the development of the thesis.

Chapter two applies the analytical framework outlined in chapter one to further establish how, despite major views to the contrary, IPRs can be utilised to manage TCEs, particularly tradition-based arts and crafts and bolster growth of the creative economy in South Africa and Nigeria. It establishes that despite arguments to the contrary, there are legitimate rationales for extending IPR protection to tradition-based arts and crafts as a subset of the creative economy, and that there is room for both concepts to co-exist.

Chapter three provides an overview of the tradition-based arts and crafts sector in Nigeria and South Africa to highlight underlying strength and weaknesses that could be enhanced or assuaged through collectiveness principles and potential platforms and spaces for their implementation. It also determines the imperatives and rationales for protection as envisaged in the study.

²²³ IL Clark *Writing the Successful Dissertation: Entering the Discussion* (2007) 105.

Chapter four identifies the main dimensions of protection needed by the subject matter in question and focuses more deeply on the most suitable IPRs for realising the objectives for tradition-based arts and crafts in the creative economy.

Chapter five focuses on the legal framework in South Africa and Nigeria to determine their fitness in protecting tradition-based arts and crafts as envisaged.

Chapter six synthesises the findings to the questions identified for the thesis, and recommends ways of strengthening the framework for the protection of tradition-based arts and crafts in the two study countries where necessary in order to realise the desired objectives for the sector and their creative economy.

CHAPTER TWO

IDENTIFYING THE INTERSECTIONS AND RECONCILING THE CONFLICTS

2.1 Introduction

This chapter seeks to mediate the conflicts/incompatibilities between tradition-based arts and crafts and IPRs in the context of the creative economy and explicate how communal models could be useful. It does so by identifying common ground on the basis of which IPRs could enable adequate protection and exploitation of tradition-based arts and crafts in the creative economy. The chapter further answers one of the fundamental questions raised by this thesis pertaining to the theoretical conflicts between IPRs and tradition-based arts and crafts in the creative economy and the potential of resolving them by adopting communal strategies.

The conflicts are of two dimensions: the disagreement regarding the commodification of TCEs and more specifically tradition-based arts and crafts, and the conflicts between TCEs and IPRs in the creative economy milieu. Essentially, the chapter explicates why, despite major frictions, IPRs remain relevant in managing tradition-based arts and crafts to generate greater benefits in the context the creative economy. It underscores the opportunities and perils in locating TCEs within the market environment, and endeavours to establish the legitimacy imperative for the protection of TCEs by considering alternative but plausible answers to objections to the commodification of culture generally and the protection of tradition-based arts and crafts in particular vide IPRs. Common rationales and concepts that create room for positive interaction between IPRs and TCEs are partly the focus of the chapter. There are four key areas of perceived

conflicts in which to determine possible intersections as follows: the creative economy, culture and creativity as its key inputs; the concerns about commodification of culture;¹ the conflicting nature and attributes between IPRs and TCEs; and incompatibility with regards to the IPR justifications. Ultimately, it concludes that communal models, especially trademarks, offer a comfortable space for tradition-based arts and crafts.

2.2 The Economics and Culture Nexus, and Implications

The dichotomy between economics and culture begins from the manner in which cultural activities are distinguished from other activities which together constitute the creative economy. Though the different activities are broadly grouped as creative industries,² the cultural industry remains distinct by the manner in which culture is intermediary and relevant.³ It is at this level that the extension of economic perceptions to cultural resources are controversial and has greater impact.

2.2.1 Culture through the Lens of Economics – Brief Background

The extension of economics precepts to culture is a subject of longstanding debate especially among cultural theorists.⁴ At the head of the disdainful attitude towards treating culture in an economic context was the Frankfurt School of thought, whose

¹ T Cowen *Creative Destruction: How Globalization is Changing the World's Cultures* (2002); Wethey 2005 supra; UNCTAD 2010 supra 41.

² See UNCTAD 2008 supra iv & 4 noting that at the heart of the creative economy lie the creative industries'.

³ Rossello & Wright supra 15; UNESCO & Global Alliance supra.

⁴ G Welty 'Theodor Adorno and the culture industry' (1984) available at http://www.wright.edu/~gordon.welty/Adorno_84.htm, accessed on 1 March 2021 and A Blunden 'The culture industry: enlightenment as mass deception' (1998) both discussing the works of such cultural theorists like Adorno and Horkheimer. See also R Hoggart *The Uses of Literacy* (1957) 3-4. See also J Carey *The Intellectual and the Masses: Pride and Prejudice among the Literary Intelligentsia, 1880-1939* (1992); H D'Orville 'Intangible cultural heritage: a global public good of a special kind' in L Wong (ed) *Globalization and Intangible Cultural Heritage* (2005) 142 -151.

subscribers particularly disapproved of the commodification of ‘art’⁵ in the so called ‘culture industry’ milieu. They distinguished between commercialised cultural activities as ‘popular’ culture,⁶ and puritan culture as ‘fine arts’. Arising from this thinking was the prevalence of a cultural policy that focused on ‘de-commodification’ based on the recognition that cultural goods are ‘of the nature of public goods’ which are not economically viable but have high social value.⁷

The increasing endorsement of an economic narrative of culture follows the works of experts like Cave,⁸ Howkins⁹ and Florida,¹⁰ who all saw in culture the potential to stimulate and foster mercantile activities through human creative instinct, and add value to other activities.¹¹ Creativity was perceived as the catalyst that transforms culture into an economic asset.¹² However, as earlier noted,¹³ contemplating culture within a framework underpinned by mercantile rationales could have perils due to the distinctive nature of cultural goods from other goods and the relationship between creativity and culture.¹⁴

⁵ This refers to ‘art’ in the broad sense as a diverse range of activities in the cultural field. See 1.3.1.1.

⁶ T Adorno and M Horkheimer *Dialectic of Enlightenment* (1947). This school of thought saw popular culture as lacking in taste.

⁷ D’Orville 2005 supra. Public goods have specific problems making them economically unviable as an entrepreneurial venture hence the reliance on subsidy for their production. See also O’Connor 2007 supra.

⁸ Caves 2000 supra articulated the creative industry in confinement to traditional cultural activities in the media and the industries that ‘mediate between artists and consumers.

⁹ Howkins 2001 supra.

¹⁰ Florida talked about the creative class referring to ‘a cohort of professional, scientific and artistic workers whose presence generates economic, social and cultural dynamism, especially in urban areas’ who share a common creative ethos that values creativity, individuality, difference and merit. See R Florida *The Rise of the Creative Class* (2002).

¹¹ See also O’Connor 2007 supra 42-43.

¹² See J Liep *Locating Cultural Creativity* (2001) 8.

¹³ See 1.4.2.2.

¹⁴ MTS Rajan ‘Strange bedfellows: law and culture in the digital age’ in HK Anheier and YR Isar (eds) *Cultures and Globalisation: The Cultural Economy* (2008) 67.

2.2.2 Relationship between Creativity and Culture

The connection between creativity and culture has economic and socio-cultural impacts, which are simultaneously interconnecting and conflicting. Understanding ‘culture’ in the right context is pertinent to understanding this link.

Generally, culture is seen as a complex and nebulous concept, and difficult to define in a single context.¹⁵ However, two main relevant and connected contexts can be distilled from the diverse notions of culture, viz: a broad view of culture construed in relation to meanings, values and identities; and a narrow view of culture in relation to arts as an output in expressive format.¹⁶

Through the broad lens, culture is ‘that complex whole which includes knowledge, belief, art, law, morals, custom and any other capabilities and habits acquired by man as a member of society’.¹⁷ A significant attribute of culture in this sense is that ‘cultures’ or ‘cultural standards’ are learned by transfer from one generation to the next.¹⁸ Culture thus incorporates a functional as well as an aesthetic component both of which are mutually reinforcing and interconnecting in an integrated whole.¹⁹ In their working definition for their ‘Cultures and Globalization Series and the Cultural Economy’ publications, Anheier and Isar capture the complex and intertwining notion of culture thus:

¹⁵ J Tomlinson *Globalization and Culture* (1999) 17, citing R Williams *Culture* (1981), who saw culture as ‘a whole way of life and also saw culture as referring to the ‘arts and learning’; J Clifford *The Predicament of Culture* (1988); J Tomlinson *Cultural Imperialism: A Critical Introduction* (1991). See also Keane et al 2012 *supra*.

¹⁶ HK Anheier and YR Isar ‘Introducing the culture and globalization series and the cultural economies’ in Anheier et al (eds) 2007 *supra* 1.

¹⁷ WA Haviland *Cultural Anthropology* (1987) (5th edn) 27.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Culture ... refers to the social construction, articulation and reception of meaning. Culture is the lived and creative experience for individual and the body of artefacts, symbols, texts and objects. Culture involves enactment and representation. It embraces art and art discourse, the symbolic world of meanings, the commodified output of the cultural industries as well as the spontaneous or enacted, organized or unorganized cultural expressions of everyday life, including social relations. It is constitutive of both collective and individual identity.²⁰

The notion of culture as an ‘integrated whole’ is endorsed by UNESCO which describes culture as ‘the set of distinctive spiritual, material, intellectual and emotional features of society or a social group’, which ‘encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs’.²¹ It is in this broad context that culture becomes the fountain of the creative process and creative inspiration or aspiration,²² out of which emerges art as something tangible and of a symbolic nature capable of being commodified.

The narrow definition of culture focuses directly on the physical manifestations of creativity as expressions of culture, such as tradition-based arts and crafts.²³ This objectifies both the symbolic and functional value of culture as a source of identity and an embodiment of the beliefs, values, social structures and social markers of both

²⁰Anheier & Isar 2007 supra 3.

²¹ See the Preamble to the Universal Declaration on Cultural Diversity 2001 [hereafter: Cultural Diversity Declaration]. Up until the early 1980s, UNESCO also ‘maintained a traditional ‘arts and literature’ (functional) definition of culture. The 1982 World Conference on Cultural Policies in Mexico City, 1982, marked a turning point where culture is casted in an anthropological frame as defined in the 2001 Cultural Diversity Declaration, which is still widely used today. See K Stenou (ed) *Universal Declaration on Cultural Diversity: A Vision, a Conceptual Platform, a Pool of Ideas for Implementation, a New Paradigm* (2002) 18 available at <https://unesdoc.unesco.org/ark:/48223/pf0000127162>, accessed on 1 March 2021.

²² Ibid 9-15, 18.

²³ M Nowotny ‘Putting Culture First: Commonwealth Perspective on Culture and Development, Commonwealth Foundation’ (2008) 11-13.

individuals and their communities.²⁴ In this context, the aesthetic and symbolic character of culture is primary and co-exists to form the integrated whole. While the aesthetic forms of its expression are convertible as economic items, the cultural meanings and identities that the expressions symbolise have instead cultural values. Nevertheless, the two are linked and mutually beneficial where culture serves as ‘the order of life in which human beings construct meaning’ by applying their creative instincts.²⁵ In this sense, culture is the source of inspiration for symbolic representations which is animated through creativity. And the objectified forms are the vectors conveying meanings and values.

This concise analysis of culture establishes TCEs including tradition-based arts and crafts as cultural resources encompassing key attributes of culture as symbolic, dynamic, and transmitted from one generation to the next. WIPO notes that in many respects, culture is contemporaneous with tradition; and that ‘tradition is a source of creativity’.²⁶ WIPO sees this as the reason why ‘many tradition-bearing communities’ are able ‘to combine tradition with the influences of modernity for the purpose of maintaining their identity and improving their social and economic circumstances’.²⁷

Creativity is a broad concept with highly subjective meaning. For example, a psychologist’s interest in the subject involves exploring the creative mind of the

²⁴ H Clark and I Bokova ‘Let’s put culture on the agenda now’ cited in Isar 2013 *supra* 8, and available at <https://www.youtube.com/watch?v=mWS3UPqm9iU>, accessed on 1 March 2021. This understanding usually guides projects mapping the creative economy. The approach draws from the anthropological meaning of culture to map out the cultural domain encompassing diverse creative activities, including traditional artistic domains and other specific domains like design and advertising as separate from the cultural domain but part of the creative industry.

²⁵ Tomlinson 1999 *supra* 18.

²⁶ WIPO 2003a 10.

²⁷ *Ibid.*

individual.²⁸ The anthropologist views creativity in terms of social and cultural processes and practices.²⁹ But in practice, these notions of creativity co-exist in the ‘social environment’ in which creativity occurs, such environment inevitably incorporating cultural norms and practices.³⁰ Hence, creativity relies as much on the creative instincts of individuals as on the socio-cultural environment in which it occurs.³¹

In the context of the creative economy, creativity has a more nuanced meaning which distinguishes activities in the creative economy and points to the type of IPRs that are relevant.³² The focus is on creativity with economic value, and only cultural creativity, which is largely seen as ‘art as an end in itself’.³³ This is distinguishable from functional/scientific creativity which applies to other sectors of the knowledge economy outside the creative industry.³⁴ While functional creativity is primarily motivated by the necessity to satisfy a specific need, cultural creativity is mainly symbolic and aesthetic.³⁵ The notion of creativity as expressive and symbolic within the creative economy paradigm underpins the workings of the normative framework through which creativity generates economic value and is appropriated mainly through specific IPRs.

The foregoing analysis depicts culture and creativity as closely related and mutually reinforcing concepts. Creativity revitalises and sustains culture by enabling the

²⁸ HE Gruber and SN Davis ‘Inching our way up Mount Olympus: the evolving systems approach to creative thinking’ in RJ Sternberg (ed) *The Nature of Creativity: Contemporary Psychological Perspectives* (1998) 243-270; T Troward *The Creative Process in the Individual* (2009); RH Jones (ed) *The Routledge Handbook of Languages and Creativity* (2015). These writers seek to comprehend the thought processes and backgrounds of exceptionally creative people and their relations to their surroundings, with more focus on the individual creator.

²⁹ Blanes et al ‘Micro-utopias: anthropological perspectives on art, relationality, and creativity’ (2016) 5(1) *Cadernos de Arte e Antropologia* 5-10; Tomlinson 1999 supra 2-19.

³⁰ Ibid.

³¹ See Liep 2001 supra 1-3.

³² I De Voldere et al ‘The Creative Economy Challenges and Opportunities for the DC Region’ (2006).

³³ L Koenigsberg ‘Art as a commodity? Aspects of a current issue’ (1989) 29(3/4) *AAJ* 23-35(25).

³⁴ Liep 2001 supra 1-3.

³⁵ Koenigsberg 1989 supra.

depiction and communication of the value systems, traditional norms and beliefs that culture represents. In what it terms the ‘power of culture’, UNESCO notes that ‘creativity and culture are processes or attributes that are intimately bound up in the imagining and generation of new ideas, products or ways of interpreting the world’.³⁶ In a way that underscores the importance of this kingship to humanity, Article 1 of the Universal Declaration of Cultural Diversity (UDCD), 2001, declares that cultural diversity is ‘as necessary for humankind as biodiversity is for nature’. This unequivocally assigns to cultural diversity the same preservation and sustainability imperative as the environment which, in the case of cultural diversity, aims at preventing the depletion of mankind’s creative sources³⁷ as ‘the common heritage of humanity’.³⁸ Article 7 says that ‘heritage in all its forms *must* be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity ...’.³⁹

The concept of sustainability has different perspectives. Sustainability envisages ‘a criterion for the long-term survival prospects of any desirable human arrangement’.⁴⁰ From the development perspective, it refers to ‘the capacity to reproduce and revitalise key human resources, including culture, in the context of new kinds of global market integration and new possibilities for intercultural dialogue’.⁴¹ For the creative economy, sustainability is about cultural diversity and the preservation of individual cultures as the

³⁶ Isar 2013 *supra* 15.

³⁷ Stenou 2002 *supra* 9-15.

³⁸ This is what UNESCO refers to as intangible cultural heritage which article 2 (1) of the Convention for the Safeguarding of the Intangible Cultural Heritage (ICH) 2003 defines as: ‘the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage’.

³⁹ Article 7 UDCD *supra* [emphasis added].

⁴⁰ *Ibid*; Stenou 2002 *supra* 11.

⁴¹ *Ibid* 11.

key inputs of the economy,⁴² and the source of its enrichment.⁴³ UNCTAD emphasizes the importance of preserving individual cultures to the society thus:

The tangible and intangible cultural capital of a community, a nation or a region of the world is something that must be preserved for future generations just as natural resources and ecosystems need to be safeguarded to ensure continuation of human life on the planet. Cultural sustainability implies a development process that maintains all types of cultural assets, from minority languages and traditional rituals to artworks, artefacts and heritage buildings and sites.⁴⁴

Cultural diversity is also critical to the creative economy given that culture stimulates and bolsters creativity in all spheres. As Throsby noted, ‘cultural diversity makes an important contribution to artistic and cultural dynamism which, in turn, has flow-on effects in the economy’.⁴⁵ Critical to the sustainability narrative with regards to culture are the perils of contemplating culture in mercantile terms and the commodification/commercialisation.

2.2.3 Distinguishing Cultural Goods from other Goods

Cultural goods are unique by their role as vehicles conveying symbolic messages to those who consume them.⁴⁶ While other goods have mainly a functional end, cultural goods

⁴² This underpins the likening of the importance of sustaining cultural diversity to concerns for environmental and biodiversity sustainability. Cultural diversity is perceived as renewable and exhaustible.

⁴³ J O’Connor ‘Resources of Hope: Creative Economy and Development in the Global South’ (2019) https://unctad.org/system/files/non-official-document/J.O%27Connor_Resources%20of%20Hope_Creative%20Economy%20and%20Development%20in%20the%20Global%20South.pdf, accessed on 1 March 2021.

⁴⁴ UNCTAD 2008 *supra* 26.

⁴⁵ D Throsby ‘On the Sustainability of Cultural Capital’ (2005) available at https://www.researchgate.net/publication/5165805_On_the_Sustainability_of_Cultural_Capital, accessed on 31 March 2021.

⁴⁶ UNESCO 2000 *supra* 13.

communicate meanings, values and identities.⁴⁷ Thus, the real value of cultural goods could embody all of the contexts of culture as an object of art/craft and symbolic expressions of meanings, values and identities, to those interacting with them. This assigns to cultural goods both economic and socio-cultural values,⁴⁸ which manifests in the manner in which culture is increasingly the determinant of consumer choices as consumers strive to construct their personal identity around their choice of commodities.⁴⁹ The increasing demand for eco-friendly or organic products tied to traditional methods of production exemplifies this interaction. So are recent trends towards cultural tourism and the increasing demand for authentic heritage goods⁵⁰ The ability to convey different socio-cultural values through semiotic processes like branding gives cultural goods a social value (particularly for the consumer) that has little correlation with their cost of production. Thus, the socio-cultural values often complement the economic value⁵¹ where they effectively distinguish a product in a competitive market setting and sway consumer choices.⁵² The economic advantages are reinforced by the quality of cultural goods as unique with the potential to attract premium

⁴⁷ Tomlinson 1999 supra 18-19. For this reason, cultural industries have also been defined following the 'symbolic text' approach as 'those activities which deal primarily in symbolic goods whose primary economic value is typically derived from their cultural value', See J O'Connor 'The definition of the "cultural industries"' (2000) 2(3) *The European Journal of Arts Education* 15-27.

⁴⁸ See the CCD and article 8 of the UDCD. UNESCO 2009 supra. Cultural goods are also distinct from other goods in that they have both tangible and intangible components which can be appropriated. The tangible component represents the medium or format in which the symbolic expression is conveyed, such as books, while the 'intangible element' 'determines their content, through meaning or symbolic representation'. See also B Anderson, Z Kozul-Wright and R Kozul-Wright 'Copyrights, Competition and Development: The Case of the Music Industry' (2000).

⁴⁹ T Flew 'Beyond Ad Hocery: Defining the Creative Industries' (2002) available at https://eprints.qut.edu.au/256/1/Flew_beyond.pdf, accessed on 1 March 2021; O'Connor 2000 supra; Galloway & Dunlop 2007 supra 24.

⁵⁰ See UN Zambia Report 2011 supra 10; UNCTAD 2010 supra.

⁵¹ UNCTAD 2004 supra 6. See also Hesmondhalgh 2018 supra; Hesmondhalgh & Pratt 2005 supra.

⁵² UNCTAD 2008 supra 10.

price.⁵³ While other goods rely mainly on their aesthetic and/or functional competitive advantage, cultural goods also depend on their symbolism for competitiveness.⁵⁴ Because the aspiration for cultural values enhances the economic value of cultural goods, preserving the cultural value becomes a desirable market strategy.

2.2.4 Commodification and the Creative Destruction Concern

Commodification and commercialisation of culture are contentious.⁵⁵ Of particular concern is their potential to endanger cultural diversity.⁵⁶

Commodification of culture is often associated with technological reproducibility,⁵⁷ similar to the kind inaugurated by the printing press invention, which resulted in phenomenal changes in the dynamics of cultural production, dissemination and consumption.⁵⁸ Such repetitive technologies have the undesirable consequence of standardization by suppressing authenticity and the spontaneous creative instinct which bestows on each handmade product a unique identity.⁵⁹ This could be worrisome where individuality is an important signature of quality or authentication.

Commodification of culture and the economic environment in which it occurs are ordinarily unhelpful to the objective of preserving individual cultures, with the major threat being globalization.⁶⁰

⁵³ Nowotny 2008 *supra*.

⁵⁴ Howkins 2001 *supra*.

⁵⁵ O'Connor 2007 *supra* 7.

⁵⁶ Daes 1993 *supra*; R Guins and OZ Cruz (eds) *Popular Culture a Reader* (2005) 85.

⁵⁷ O'Connor 2007 *supra* 10.

⁵⁸ National Research Council 'The digital dilemma: intellectual property in the information age' (2001) 62(2) *OSLJ* 951-971 (951).

⁵⁹ W Benjamin *The Work of Art in the Age of Mechanical Reproduction* (1935) cited by Guins & Guiz 2005 *supra*.

⁶⁰ H Redner *Conserving Culture: Technology, Globalization and the Future of Local Cultures* (2004).

Globalization is a phenomenon of multiple dimensions with no clear meaning to be identified.⁶¹ But in its general connotation of the market as a global arena partly driven by culture and technology, globalization serves the purpose of cultural development by fostering cross-cultural exchange and liberalising the opportunities for cultural experience.⁶² As the AU leaders noted in Dakar in 1992, globalization creates more impetus and a strong platform for cultural trade by expanding the opportunities for trade.⁶³ On the flipside, commodification of culture and globalization raise such fears as⁶⁴ cultural homogenisation,⁶⁵ hybridity,⁶⁶ risk of cultural trivialisation or dilution,⁶⁷ and the dumbing down effect.⁶⁸ These phenomena have different meanings and implications; but they sum up to the fact that commodification and globalization destroy individual cultures either entirely or by altering their original forms in ways that downgrade their

⁶¹ See WIPO 2002b supra 82 and Tomlinson 1999 supra.

⁶² Cowen 2002 supra.

⁶³ OAU 1992 supra.

⁶⁴ Some experts question the belief that globalization is harmful to culture, arguing instead that it increases the potential for inter-cultural exchange leading to cultural diversity. They include Cowen 2002 supra; L Arizpe 'Intangible cultural heritage, diversity and coherence' (2004) 56(1-2) *Museum International* 130-136(133); Wong 2005 supra; K Matsuura 'Address on the Convention for the Safeguarding of the Intangible Cultural Heritage' Copenhagen Denmark' (2004); I Kaul, I Grunberg and MA Stern 'Introduction' in I Kaul et al (eds) *Providing Global Public Goods: Managing Globalization* (2003).

⁶⁵ Redner 2004 supra; MU Nwegbu et al 'Globalization of cultural heritage: issues, impacts, and inevitable challenges for Nigeria' (2011) *LPP(e-journal)* 674 available at <https://digitalcommons.unl.edu/libphilprac/674>, accessed on 1 March 2021.

⁶⁶ Tomlinson 1999 supra 71.

⁶⁷ D'Orville 2005 supra 142.

⁶⁸ Referring to 'the replacement of 'authentic folk culture by tasteless industrialised artefacts produced on a mass scale in order to satisfy the lowest common denominator'. See IM Baranuaskaitė 'The evidence of "dumbing down" in the fields of popular culture: music and human soul, and its key factors' 2011, 2 available at <http://ievamarijabaranauskaitė.com/files/article-by-ieva-marija-baranauskaitė%20C4%97-2011.pdf>, accessed on 1 March 2021. It is also described as a sort of cultural imperialism which encourages local cultures to be dumped in favour of more pervasive and stronger foreign cultures. Cowen 2002 supra, chronicles a list of authorities developing this thesis, including J Tunstall *Media are American* (1977), who defined the 'cultural imperialism thesis' as the view that 'authentic, traditional and local culture in many parts of the world is being wiped out by the indiscriminate dumping of large quantities of slick commercial and media products, mainly from the US; F Jameson 'Globalization and political strategy' 2000 *New Left Review* 49-68, noting the standardisation of world culture, with traditional forms driven out or dumped down to make way for American culture as the result of globalization; and J Gray *False Dawn: The Delusions of Global Capitalism* (2002), arguing that global free trade is ruining the world's politics, economies, and cultures; Cowen himself notes that markets promote hegemony, alienation, and a dumping down of taste. These authors all focus on the thinking which criticizes market-driven culture.

values or transform their entire character. These occur where local cultures are unable to compete favourably and flourish within imbalanced global trading systems due to underlying systemic asymmetries that allow stronger cultural products, mainly of developed country origin, to overpower local cultural forms, practices and experiences.⁶⁹ Therefore, globalization puts pressure on cultural diversity⁷⁰ by threatening the survival or integrity of individual cultures. The following statement gives a sense of such pernicious effect of globalization on Nigerian local culture:

... what was once an element of Nigeria's cultural way of life has become a product, rather than something unique which they have made to suit their specific needs and circumstances. Nigerian markets are increasingly bombarded with new images, new music, new clothes and new values. The impact is that the familiar and the old artefacts are being discarded. The fact is that these will be lost simply because they are not valued by global markets.⁷¹

In general, Drahos notes that in a world where markets operate to commodify and standardise as part of the process of achieving economies of scale, markets are generally targeted towards eliminating local customs than preserving them.⁷² UNESCO also warns that globalization and the commercialisation of the cultural heritage domain threaten to 'erode and diminish more localized and historically vulnerable cultural forms, both within and across societies'.⁷³ Thus, despite the increased possibilities for cultural

⁶⁹ Cowen 2002 *supra*.

⁷⁰ The Director-General of UNESCO, Koichiro Matsuura, has stressed that 'accelerating globalization is placing enormous new pressures upon cultural diversity'. See I Kaul et al (eds) 2003 *supra* 185.

⁷¹ Nwegbu et al 2011 *supra*.

⁷² P Drahos 'A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge' in Daniel Gervais (ed) *Intellectual Property, Trade and Development Strategies to Optimize Economic Development in a TRIPS-Plus Era* (2007) 385 – 415.

⁷³ Stenou 2002 *supra* 14.

experiences and the potential gains from trading in cultural products, there are downsides when trade invariably and/or ultimately endangers the survival of weaker local cultures.⁷⁴

One of the arguments that have been used to analyse the long term effects of commodification and globalization on culture is the creative destruction assumption.⁷⁵ In its original context as conceptualised by Schumpeter,⁷⁶ creative destruction refers to the effects of technology and innovation on the survival of firms. Specifically, it refers to the constant process whereby new businesses deploying new innovations destroy established ones in a competitive environment.⁷⁷ This results from the incessant replacement of outdated ideas, processes, goods and services by new ones as a necessity of innovation, prosperity and progress.⁷⁸ Thus, it is largely seen as prescriptive, inevitable and justifiable.⁷⁹ A good example is the upsets and improvements in the publishing industry caused by technological advancements in data processing, storage and dissemination constantly rendering preceding generations of publishing technologies obsolete.⁸⁰ The creative destruction assumption has been relied upon to explain the serial annihilation of the old by a better new in other contexts,⁸¹ such as, the effects of the market on culture as descriptive of the normal process of the evolution of culture, and more emphatically in

⁷⁴ Cowen 2002 supra 47- 48.

⁷⁵ Ibid.

⁷⁶ JA Schumpeter *Capitalism, Socialism, and Democracy* (1950); JA Schumpeter *The Economics and Sociology of Capitalism* (1991).

⁷⁷ Schumpeter cites the example of Wal-Mart's innovative supply and inventory chains on small local businesses; this is one form of creative destruction. We have also seen the way in which the innovation of computer technology has made any number of previous technologies obsolete for instance the once ubiquitous Lexington built typewriter. See also A Greenspan *The Age of Turbulence: Aggressions in a New World* (2007).

⁷⁸ Schumpeter supra 83.

⁷⁹ Schumpeter 1950 supra. D Trefler 'The long and short of the Canada-U.S. Free Trade Agreement' (2004) 94(4) *AER* 870-895.

⁸⁰ KP Lines 'From creative destruction toward creative transformation: mission beyond critical contextualization in a complex global era' in J Grana (ed) *Essays of Hope* (2012) 59-76. This goes back to the printing press invention which revolutionized the act of publishing.

⁸¹ Lines *ibid*; CJ Coyne and CR Williamson 'Trade openness and cultural creative destruction (2012) *Journal of Entrepreneurship and Public Policy* 1(1) 22-49.

Cowen's seminal treatise which analyses whether and how globalization and trade are harming cultures.⁸²

Cowen's creative destruction offers a critique of the effects of commodification, commercialisation and globalization not only on (local) traditions, but also on the global cultural menu. In explaining 'the "cost" of cross-cultural economic exchange', Cowen captures the hypothesis of the creative destruction phenomenon with reference to culture as follows: 'Cultural growth, like economic development, rarely is a steady advance on all fronts at once. While some sectors expand with extreme rapidity, others shrink and wither away'.⁸³ However, as to whether the market creates cultural standardisation, homogenisation, and similar effects, Cowen seems ambivalent.

Cowen argues on one hand that globalization and the cross-cultural exchange it fosters have created diversity by providing 'a richer menu of choices to people' who are exposed to far remote cultural forms, thereby being 'liberated from the tyranny of place' as 'cultural participation is no longer limited to local' forms.⁸⁴ But he admits that there are attendant costs to local cultures. For example, local traditional arts are neglected or abandoned in favour of Western goods, while others manage to exist 'on the margins of Western achievement'.⁸⁵ Ultimately, cross-cultural exchange has short-term benefits on creative diversity, but long term perils on individual cultures and their ethos, particularly weaker ones. Like Schumpeter's world of businesses, Cowen's creative destruction is inevitable given that all cultures - both weak and strong - 'are themselves products of this

⁸² Cowen 2002 *supra*.

⁸³ Lines *supra*. It is important to note that the creative destruction in relation to culture involves analyses that go beyond local cultures. It relates to the effects of the world's cultural heritage and cultural diversity.

⁸⁴ Cowen 2002 *supra* 5.

⁸⁵ *Ibid* 10-11.

process, having emerged ‘out of the interactions with other cultures’.⁸⁶ But unlike Schumpeter’s capitalist world, the positive impact of commodification and commercialisation of indigenous cultures is short-lived. While Cowen insists that the effects of commodification, commercialisation and globalization are not harmful but instead are beneficial to the overall interest of cultural diversity, the relevant issue for this thesis is the effects on individual (local) culture.

In the manner in which it is extrapolated to cultural discourse, creative destruction is presented as a natural and justifiable outcome where cultures compete for survival on the bases of relevance and usefulness, and are eliminated partly through redundancy. On this basis, the culture ecosystem could be likened to the natural ecosystem ruled by ‘survival of the fittest’. Another plausible analogy is a simple market situation where values determine choices by rational consumers and cultures lacking value to consumers are eliminated to allow for greater opportunity and efficiency in both the production and experience of those of value.

Seen from Cowen’s perspective, the creative destruction is not only inevitable but also deflates concerns about commodification not necessarily that commodification is good for culture, but on the bases that change is inevitable due to the dynamic nature of culture and trade is an integral part of the process by which culture evolves. However, for critics of commodification, the more important issues are the nature and implications of the change that markets foster, especially in the context of preserving individual cultures. While commodification and cross-cultural exchange may be necessary for the flourishing

⁸⁶ Ibid 59. This view is widely supported. See Arizpe 2004 *supra* 131, who notes that ‘most intangible cultural heritage is the result of long series of historical experiences and influences from other cultures’ and that ‘it is the resonance and blending between cultures that leads to great masterpieces of human ideas, skills, exchanges and co-operation’.

of diverse cultures, the attendant costs to the survival and integrity of individual cultures and cultural experiences cannot be ignored.

Even though it could be argued that change is consistent with the dynamic nature of culture and its process of evolution, and therefore justifiable, there are compelling reasons to reconsider this view. First, the assumption that interaction, modification and reinvention of cultures will foster diversity is only feasible where cultures interact and compete equally. In reality, the playing field is not always equal. The strength of culture depends on and is judged by the ability to survive and eventually dominate. This in turn depends on certain dynamics that create opportunities for some cultures to be experienced more than others, thus harbingering destruction for the weak. Such dynamics include: technology, capital, market access, access to information, education, and perceived hierarchies of prestige between cultures.⁸⁷ Secondly, the emerging market for traditional cultural experiences has significant socio-economic benefits which are worth safeguarding, and should be fully exploited, but and thirdly, the harmful consequences of cross-cultural exchange and trade on the integrity of local cultures, which is the real merchandise of the market, poses threat to the market.

The socio-economic merits of culture in the market place being strongly tied to cultural values are relevant not only to the custodians of traditions but also to consumers and the society at large. Such values could be diluted or lost in an unequal trading system that constricts weaker cultures, especially of traditional communities, potentially leaving their owners culturally and economically impoverished. Producers of tradition-based assets are impoverished when they are forced out of the market without the ability to

⁸⁷ D Throsby 'Globalization and the cultural economy: the crisis of value' in HK Anheier and HK YR Isar (eds) *Cultures and Globalisation: The Cultural Economy* (2008) 31.

easily adapt to new trends. Consumers who desire the experience of the threatened culture also suffer lost opportunities to enjoy that experience. For the society as a whole, it creates a situation where one form of creative experience displaces another and possibly leaving the society poorer by the forfeiture of the other experience.

The realities of these scenarios can be illustrated with reference to traditional textiles, one of the TCEs much implicated in this conundrum. Traditional textiles are a source of income and identity to their makers and the fulfilment of an aspiration for the user including outsiders. The introduction of machine-made versions could have any of the following outcomes: producers that can adapt to the new methods of production would do so and remain viable, and could potentially thrive. Others may not be able to adapt. Either way, the survival of the traditional textile is threatened, and the consumer whose aspiration was tied to the origin of the textile can no longer be fully served. A better outcome for everyone should ensure opportunities for the experience of both the traditional and machine-made textiles as guarantee for a richer menu of choices. This is only feasible where the traditional textiles can survive alongside the newer brands in a competitive environment.

The underlying asymmetries of the global trading system and their effects on individual cultures question the dogma of the creative destruction assumption that change is good, and calls for remedial measures to intercept the process of ‘destruction’ in order to protect individual cultures. Such measures could target three main imperatives, namely: capture the potential market; protect that market against unfair competition and; preserve the qualities or ethos constituting the market. Consideration of IPRs as a means of protecting the market from misuse and unfair competition therefore becomes relevant.

The creative destruction assumption is therefore relevant to answering some of the questions of concern to this thesis and in guiding its objectives. By recognising that culture is dynamic and (sometimes) profits from exchange, it underscores the need to avoid strategies that impliedly disown this fact. By recognising that cultures do not develop in isolation but rather are ‘produced within the social world from an engagement with the market’,⁸⁸ it underscores the fact that traditional arts and crafts do not necessarily restrict themselves to ‘antiquity’ but also include derivative works of the nature described by WIPO’s IGC as ‘contemporary, tradition-based expressions and representations of traditional cultures’.⁸⁹ By recognising the vulnerability of weaker (indigenous) cultures in the global trading system, it endorses the rationale for intervention. And by recognising the role of the market in ensuring a richer experience of culture, it provides support for commodification and commercialisation. Kidd captures the mind-set of this thesis in stating that Cowen’s recognition of the role of the market in the production of cultural forms ‘forces us to contend with the market as a constitutive element of culture’.⁹⁰ The needful is to determine how the tensions of this relationship can be eased.

2.2.5 Gains from Trade and the Development Paradigm

In contemplating culture in economic terms, gains from trade as a recipe for development should be weighed against the threats of the market on cultural forms. It is expected that

⁸⁸ D Kidd ‘Commodification and creativity: a review of Tyler Cowen’s creative destruction’ (2003) 5(2) *The Hedgehog Review* 1-6, reviewing Cowen’s book and coming to this apt conclusion as part of Cowen’s submissions.

⁸⁹ WIPO 2003a supra 4, noting that they may include a new creations adapted from ‘public domain pre-existing cultural heritage and expressions’, or their ‘re-packaging’ in digital formats.

⁹⁰ Kidd 2003 supra 5.

the potential gains should outweigh the perceived or actual costs to local cultural activities such that the activities are not unduly imperilled. ‘Gains from trade’ in the present context refers to the positive impact of trade on individuals and the society at large.⁹¹ Just as individuals benefit from their activities in cross-cultural exchange, trade typically makes countries and societies materially and culturally richer.⁹²

The increasing recognition of the creative economy as a feasible development option for developing countries is born out of the undeniable potential gains from trade in cultural products. This arises from the new opportunities for developing countries to create new products from their cultural resources, access new markets and derive gains from trade.⁹³ The reliance on creativity and culture as main inputs means that emerging economies with rich cultural heritage could compete strongly based on the unique qualities and values of their cultural heritage. The gains result from the primary output of creative activities and the spinoffs which could foster sustainable development.⁹⁴ It also results from the lower entry threshold into the sector for individual businesses in terms of resources,⁹⁵ especially businesses in the informal sector including arts and crafts businesses. Creative industries can gain competitive advantage by relying on creativity and culture as ‘infinite’ resources.⁹⁶

The development paradigm of the creative economy is based on the understanding of development in quantitative and qualitative terms as the totality of the wellbeing of

⁹¹ See UN Zambia Report 2011 *supra* 9.

⁹² Cowen 2002 *supra*.

⁹³ UNCTAD 2010 *supra* 22.

⁹⁴ Festivals are a good example of creative activities that generate spill-over income and activities from other sectors such as hospitality, gastronomy and transportation.

⁹⁵ Cost of production is dependent on cost of factors of production, which can be high if they also involve capital intensive processes, or high technology or expertise. See Nowotny 2008 *supra* 17.

⁹⁶ *Ibid* 8.

humanity, which extends beyond material riches.⁹⁷ Therefore, it is believed that an economy focused on achieving competitiveness in the production of cultural goods and services has increased potential to achieve development because it relies on creativity and the active use of culture in ways that not only generate substantial economic rewards but also yield significant socio-cultural payoffs.⁹⁸ The optimal use of culture as economic and social empowerment of the community has potential to address the MDGs in six strategic areas,⁹⁹ now SDGs.¹⁰⁰ Correct use of culture and creativity could create jobs and generate income, while also ‘promoting social inclusion, cultural diversity and human development’.¹⁰¹

The prospects of the creative economy to drive development can be seen in its role in critical issues like poverty eradication, gender empowerment and inclusive economic growth which are of great concern to African countries and also key markers of

⁹⁷ A Sen *Development as Freedom* (1999). M Nussbaum *Women and Human Development: The Capabilities Approach* (2000).

⁹⁸ Nowotny 2008 supra 10.

⁹⁹ UN Zambia Report 2011 supra 9. The Millennium Development Goals (MDGs) are the world’s time-bound and quantified targets for addressing extreme poverty in its many dimensions while promoting gender equality, education, and environmental sustainability. They are tied to basic human rights as pledged in the Universal Declaration of Human Rights and the UN Millennium Declaration. The six areas are: poverty eradication and reduction of inequality; sustainable development strategies, gender inequality, global partnerships for development; strategies for the social inclusion of youth, and spreading access to new communications. See UN Millennium Declaration, General Assembly Resolution (2000). See also DJ Sachs *Investing in Development: A Practical Plan to Achieve Millennium Development Goals* (2005) 1; UNCTAD 2008 supra 34 and Gauteng Province *Creative Industry Development Framework in the Gauteng Province of South Africa* (2005). UNCTAD explains the contribution of the creative industries to social development goals such as community participation in cultural activities; regional integration across Africa, poverty alleviation, particularly in disadvantaged communities and among the youth; and public-private partnerships in community-based cultural programmes such as indigenous music, carnivals and festivals.

¹⁰⁰ The MDG was further ‘articulated’ in the Sustainable Development Goals (SDGs). In the present context, the emphasis is on Goals 1 and 10. Goal 1 emphasises the reduction of poverty while 10 emphasises the reduction of poverty by providing equal opportunities among countries with greater focus on disadvantaged individuals and nations, and the economic advancement of poor and marginalised communities. See Giving Compass ‘Addressing global issues: Sustainable Development Goals overview’ available at <https://givingcompass.org/article>, accessed on 1 March 2021.

¹⁰¹ UNCTAD 2008 supra iii.

sustainable development.¹⁰² This is in part attributed to the fact that craft activities are traditionally associated with women, particularly women in the rural sector.¹⁰³ It has been established that engaging in creative activities yield economic and social benefits especially for women.¹⁰⁴ The constraints to women participation in commerce and key areas of societal matters are well documented. Lack of access to capital, lack of opportunities for decision making, and demanding domestic roles are core constraints particularly for women in rural settings.¹⁰⁵ However, these constraints are minimal in the handicraft sector where patriarchal norms and practices - such as inheritance norms, male domination and other socio-cultural dynamics that constrain women's economic empowerment - are not prevalent.¹⁰⁶ One of the key harmonising philosophies in this domain is communalism guided by subtle or strong matrilineal and matriarchal tendencies.¹⁰⁷

These benefits are even more pronounced in respect of tradition-based arts and crafts, where it has been established that arts and crafts production as leisure-based activities yield significant benefits for participants, including improved wellbeing, self-

¹⁰² See SDGs particularly goals 1 and 8; UN *Transforming our World: 2030 Agenda for Sustainable Development* (dna); N Jatana and A Currie 'Population and Sustainable Development' (2020) available at <https://populationmatters.org/sites/default/files/Hitting%20the%20Targets%20-%20Population%20and%20the%20SDGs.pdf>, accessed on 1 March 2021.

¹⁰³ Kwanashie et al 2009 supra; UNESCO 2018 supra 27, 201 available at <http://uis.unesco.org/sites/default/files/documents/reshaping-cultural-policies-2018-en.pdf>, accessed on 1 March 2021.

¹⁰⁴ DR Malema and S Naidoo 'Spaces for the empowerment of women: rural arts and crafts projects' (2017) 6(2) *African Journal of Hospitality, Tourism and Leisure* 1-18.

¹⁰⁵ P Brenton et al 'Women and Trade in Africa: Realizing the Potential' (2013) available at <http://documents.worldbank.org/curated/en/115591468211805723/Women-and-trade-in-Africa-realizing-the-potential>, accessed on 1 March 2021.

¹⁰⁶ TL Akinbogun and SR Ogunduyile 'Crafts engagement in the economic survival of South-Western Nigeria and rural women' (2009) 3(2) *JEC: People and Places in the Global Economy* 217-34.

¹⁰⁷ H Ekwe-Ekwe 'Cheikh Anta Diop: a celebration' (2006) available at <http://nigeriaworld.com/articles/2006/feb/270.html>, accessed on 1 March 2021.

efficacy, and economic gains.¹⁰⁸ For instance, Malema and Naidoo found that community based arts and crafts projects in some rural areas in South Africa serve as a means for economic empowerment, enhancing a sense of community and establishing networks of support for women; and that these activities are also therapeutic for the women. Moreover, practicing arts and crafts by women serves as a way of preserving their African heritage.¹⁰⁹ According to the South African government, the dynamics that facilitate such socio-economic gains include: (1) low entry barriers into the industry which allow women to join by employing their traditional skills; (2) the home-based nature of craft making which allows them to combine it with other responsibilities; and (3) the close linkage of the craft with a number of sectors such as tourism, fashion and design, which boosts the viability of the craft sector.¹¹⁰

The potential gains from trade reinforce the rationales for promoting the creative economy through tradition-based arts and crafts. But this entails the ability to effectively commercialise tradition-based arts and crafts, which, as seen in chapter one, implicates the effective use of IPRs.

2.3 Incompatibility of Theories and Intersections between IPRs and Tradition-based Arts and Crafts

IPRs have certain attributes in common in addition to the unique ones that define their respective terms.¹¹¹ Basically, the protection of a subject matter is premised upon its

¹⁰⁸ Malema & Naidoo *supra*.

¹⁰⁹ *Ibid*.

¹¹⁰ DACST 1998a *supra* 33 and DASCT 1998b *supra* 6.

¹¹¹ Liep 2001 *supra* 12 & 13, where the common features are listed as: (1) treatment as property; (2) control particular uses; (3) of a specified type of intangible asset; (4) granted only to intangible assets attributed to an individual creator or identifiable group of creators; (5) enforced by both civil and criminal law.

amenability to these attributes. But the objectives for protection are also important such that a framework in sync with the subject matter but not the desired objectives is hardly suited for the protection of the subject matter. The conflicts between IP and tradition-based arts and crafts are mainly grounded in the conceptual and, to some extent, the substantive terms of IPRs. The consequentiality of the terms sometimes contradicts their original objectives when applied to TCEs. This section examines the IP theories in question, their limitations and possible intersections with tradition-based arts and crafts .

2.3.1 Incompatibility of Theories: Originality, and Individual Ownership versus Communal Ownership

The attributes that create conceptual frictions and practical challenges in assigning IPR tenets to TCEs are well-rehearsed.¹¹² Still, it is important to understand the context in which the two subjects are relevant to the creative economy. Fundamentally, their different epistemological background is at the centre of the frictions and challenges.¹¹³

One of the principal concepts guiding IPR norms is ‘authorship’ or ‘ownership’,¹¹⁴ which presumes that the IP in question results from the creativity or inventiveness of a specific (determinable and identifiable) entity as the primary beneficiary of the assertion of rights based on ownership of the of the IP.¹¹⁵ This recognises mainly ‘a single highly centralized creative entity’ or unit as a ‘unique legal

¹¹² Oguamanam 2004 supra; Wong & Dutfield 2011 supra; Dutfield 2004 supra; Andanda 2012 supra; Munzer & Raustiala 2009 supra.

¹¹³ Oguamanam *ibid*.

¹¹⁴ Authorship mainly refers to copyright but is used here together or interchangeably with ownership to refer to an identifiable owner as beneficiary of the copyright. In the case of patent ‘author’ refers to the inventor.

¹¹⁵ Gibson 2006 supra 106.

focal point’,¹¹⁶ on whom property-like rights are conferred. IP is defined following the principles of private property¹¹⁷ whose cardinal narrative is the privilege of individuals to control the use of their assets in what Merges refers to as a ‘one-to-one mapping between owners and assets’.¹¹⁸ Authorship and ownership operate closely with the originality/novelty principle as cardinal conditions for IPR protection. Together, they ensure that IPRs are recognised only for creative or innovative works produced by a definite entity and encompassing some element of originality,¹¹⁹ inventiveness,¹²⁰ or distinctiveness.¹²¹

However, the assumption of individual creativity is tenuous, not only with reference to TCE. Litman and Boyle argue logically that the development of IPRs on the basis of this assumption largely portrays ‘a one-sided author understanding of IP theory that ignores an author’s debt to previous authors for the starting material’.¹²² Supporters of their view believe that it projects a false image of an author as one who creates *ex nihilo* without acknowledging the appropriation of material from ‘an intellectual common’.¹²³ For TCEs, the notion of individual creativity is even more questionable given what Andanda aptly described as ‘a dynamic interplay between collective and individual creativity’ typical of traditional creativity frameworks.¹²⁴

¹¹⁶ R Merges ‘Locke for the masses: property rights and the products of collective creativity’ (2008) 36(4) *Hofstra Law Review* 1179-1191 (1180, 1187).

¹¹⁷ A Mossoff ‘What is property – putting the pieces back together’ (2003) 45(2) *ALR* 371- 444.

¹¹⁸ RP Merges *Justifying Intellectual Property* (2011) (chapter one) 5 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924567, accessed on 1 March 2021

¹¹⁹ Applicable to copyright but subject to the downgraded meaning of ‘originality’ as not necessarily implying ‘newness’. See AO Oyewunmi *Nigerian Law of Intellectual Property* (2015).

¹²⁰ In patent; *ibid*.

¹²¹ In trademark. Similar precepts of novelty apply to design rights. *Ibid*.

¹²² J Litman ‘The public domain’ (1990) 39 *ELJ* 965; HC Mitchell *The Intellectual Common: Toward an Ecology of Intellectual Property* (2005) 21-67(2); J Boyle *Shamans, Software and Spleens: Law and the Construction of Information Society* (1996).

¹²³ *Ibid*.

¹²⁴ Andanda 2012 *supra* 549.

TCEs are much different from IP as presented above in ways that accentuate the incompatibilities between them. The differences can be seen in Girsberger's and WIPO's outline of the characteristics of TCEs which identifies some of its key features as: intergenerational transmission orally and by imitation; reflection 'of the cultural and social identity of a community or group'; constant development and recreation within a community or group; unknown authorship or at best community or group effort; low commercial interest or purpose and high cultural interests.¹²⁵ However, as 'living' cultural heritage, TCEs are not only about imitating and reproducing works of preceding generations; they also involve innovation and creativity within the traditional framework as traditional artists bring fresh perspectives to their work.¹²⁶

Similarly, contrary to the concept of individual ownership that governs IP, ownership of TCEs largely signifies communal ownership.¹²⁷ As Aragon and Leach,¹²⁸ and Hansen and VanFleet¹²⁹ revealed, the very concept of 'individual ownership' as envisaged by IP norms is often alien to many indigenous people. 'Ownership' is also averse to public access to and use of TCEs which by custom are freely available unless secrecy or sacredness is required in accordance with customary norms.¹³⁰ Also, most IPRs generally protect against unauthorised use of the subject matter of protection without rules guiding the manner of usage when permitted; whereas the use of TCEs often compels obligations and responsibilities relating to preservation and respect for the

¹²⁵ Girsberger 2008 *supra* 127; WIPO 2002a *supra* 14.

¹²⁶ WIPO 2003a *supra* 3.

¹²⁷ Gibson 2006 *supra* 94-106; Graner 2012 *supra*.

¹²⁸ LV Aragon & J Leach 'Art and Owners: Intellectual property law and the politics of scale in Indonesian arts' (2008) 35(4) *American Ethnologist* 607-631.

¹²⁹ SA Hansen & JW VanFleet *A Handbook on Issues and Options for Traditional Knowledge Holders in Practicing their Intellectual Property and Maintaining Biological Diversity* (2003) 24.

¹³⁰ Andanda 2012 *supra*.

knowledge on the part of the user.¹³¹ Essentially, IPR protection may not sufficiently serve the interest of TCEs. For instance, protection could assure ownership right over the TCE without serving the purpose of market promotion; whereas, adequate protection should ensure gainful use of the IP.

Additionally, the creative standards adopted by IPRs are criticised for ‘oversimplifying’ the creative process as a singular event or an autonomous production process.¹³² This is quite different from the traditional creative process applicable to TCE, which is mainly based on imitateness or incremental change, and is not always understood as an individual endeavour to justify an exclusive personality taking full credit for the work and laying claim to reward against the collective interest of the community.¹³³ Consequently, the Western perception of creativity as an independent effort and its preoccupation with originality is seen as antithetical to traditional notions of creativity.¹³⁴ Such romantic idealism of an author working *ex nihilo* creates problems for TCEs which are not resolved even by the general recognition that originality in the context of IP does not imply newness. Instead, it is argued that the downgraded originality standard creates another challenge for TCEs; it legitimises the appropriation of TCEs as original creations even by outsiders since it treats the knowledge as public domain resource free for all purposes including commercial use. The originality standard of IPRs treats some TCEs as ‘unoriginal’ even in their ‘original’ context of being

¹³¹ Copyright is different because it provides rules safeguarding integrity and attribution of the work. However, these safeguards are largely author-related rights which apply to the person of the author and not the work itself. TK can hardly benefit from such because it has no known or ascertainable author(s).

¹³² Gibson 2005 *supra* 79.

¹³³ UNESCO ‘Our Collective Diversity’ *supra* 23. See also Gibson 2005 *supra* 73-104.

¹³⁴ Gibson 2006 *supra*; Gibson 2005 *supra* 73.

authentically traditional and so banishes them from the conventional IPR systems.¹³⁵ In effect, the custodians of TCEs are largely prevented from asserting rights over their knowledge by the same system that allows outsiders to benefit from the knowledge. Moreover, TCEs are strongly concerned with preservation; thus while IPRs generally require novelty, the more strategic concern for TCEs is the threat of technological innovations replacing time-honoured manual processes.

Furthermore, while IPRs are freely assignable by their owners, rights over TCEs are collective in nature (sometimes cutting across communities) and assignable mainly through traditional methods of knowledge transfer.¹³⁶ Given the prevalent anonymity of the creator(s) of TCEs and the communal nature of ownership under traditional systems,¹³⁷ identification of creators or owners is often difficult, if not impossible.

Also, IPRs are mainly short-term privileges which do not match the age of most TCEs. Moreover, the cultural value of TCEs as a source of identity to their host community or group has a timeless connotation contrary to the time-limited life of most IPRs. Limited term implies that a protected work eventually enters the public domain. Gibson argues persuasively that subjecting TCEs to such a fate exposes them to indiscriminate exploitation which may potentially harm their value to the host group.¹³⁸

Nevertheless, some components of TCEs and certain objectives concerning their wellbeing fall within the ambit of current IP laws as would be seen shortly.

¹³⁵ NIAAA *Submission to the Inquiry into the Enforcement of Copyright in Australia* (dna) 1 available at http://www.aphref.aph.gov.au_house_committee__laca_copyrighthenforcement_sub46nia.pdf, accessed on 1 March 202; Gibson 2005 supra 79.

¹³⁶ T Janke 'Don't give away your valuable cultural assets: advice for Indigenous people' (1998) 4(11) *ILB* 8; WIPO 2003a supra.

¹³⁷ *Bulun Bulun v Nejlam Property Limited* FCA 1998.

¹³⁸ Gibson 2005 supra 121, citing H Morphy *Ancestral Connections: Art and an Aboriginal System of Knowledge* (1992) 45.

2.3.2 IPR Justification Theories

As mentioned earlier, IPRs have required valid reasons for their existence which informs the various IPR justification theories in operation,¹³⁹ which are often intercepting. The utilitarian theory which sees IPRs as the short-term price to the public for the availability of IP resources as needed was briefly mentioned; *ditto* the incentive justification which posits that creativity is motivated by the grant of IPRs. This section examines the limits to how the justification theories can be extrapolated to TCEs and, by extension, tradition-based arts and crafts, to justify IPR protection.¹⁴⁰

Certainly, the various justification theories¹⁴¹ are not of the same import to the different categories of intellectual activity. For instance, the personality theory which underpins moral rights is not central to the economic interests of IP, being more focused on protecting the author's person.¹⁴² As such, it is not of relevance to the present focus.

2.3.2.1 The rights-based arguments

Where the question of protecting TCEs, and indeed TK, is concerned, a right-based author-centric narrative arguably provides support in favour. One of the pillars of the rights-based narrative is the fairness argument which springs from Locke's theory on just reward for labour.¹⁴³ Rooted in Western notions of private property rights, the fairness argument posits that each person has a natural right to the fruits of his or her (intellectual) labour which should be legally protected by way of property redress or

¹³⁹ Landes & Posner 1987 *supra*.

¹⁴⁰ Liep 2001 *supra* 6.

¹⁴¹ Landes & Posner (1987) *supra*.

¹⁴² The personality theory on the other hand posits that IP is an extension of the personalities of their creator on the basis of which moral rights are justified. It enjoins that law should be organised to respect and nourish the psychic between creators and their expressive products. P Yu 'Moral rights 2.0' 2014 1(4) *TAMLR* 873-900.

¹⁴³ J Locke 'Second treatise of government' in H Ron (ed) *Two Treatises of Government* 138-40

monetary reward commensurate with the labour invested;¹⁴⁴ and IPRs provide the mechanism for such reward.¹⁴⁵ The natural right theorist recognises the entitlement of labourers to some benefits from their contribution in producing something of value to others beyond a moral obligation on the labourers to produce it.¹⁴⁶ Thus, the natural rights narrative supports protecting TCEs for the benefit of the owners as long as some value can be attributed to the TCEs by the efforts of the owners.

The human rights framework provides another rights-based foundation upon which experts have argued for the protection of TCEs as an entitlement. Guided by the provisions of article 15(1) of the International Covenant for Economic Social and Cultural Rights, 1966 (ICESCR), Nwauche argues that a properly articulated human rights regime supports the protection of EoFs either via a *sui generis* framework or an IPR-based framework. He considers such a regime justifiable because it naturally dedicates itself to an appropriate balance between the private interests of communities in protecting their EoFs and the public interest in accessing these resources.¹⁴⁷

However, while the rights-based approach endorses the protection of TCEs, how to achieve such protection remains an intractable question, mainly because of the doctrinal issues that render IPRs incompatible with TCEs. As Nwauche himself acknowledges, a human rights regime still has to determine who qualifies as a community and the criteria to base such a determination for the purposes of assigning rights to the proper beneficiaries.¹⁴⁸ For UNCTAD, the challenge is to work out balanced and

¹⁴⁴ J Hughes 'The Philosophy of Intellectual Property' (1988).

¹⁴⁵ Fisher 1987 *supra*.

¹⁴⁶ *Ibid*.

¹⁴⁷ E Nwauche 'Protecting expressions of folklore within the right to culture in Africa, (2010) 13(4) *PER* 49-92 (83).

¹⁴⁸ *Ibid* 83.

workable measures to fill the gaps in the current knowledge management system in accordance with the aspirations of the communities involved and the general public.¹⁴⁹

The rights-based argument raises what Andanda describes as the normative challenge of maintaining a balance between two contending interests: namely the right of the TCE holders to claim ownership over their knowledge on one hand, and the right of the public to have access to such knowledge for their legitimate use based on the notion that TCEs mainly belong in the public domain and protecting them as IP would remove them from that domain, on the other hand.¹⁵⁰

It is partly to achieve such balances that the utilitarian thesis and the incentive theory become relevant.

2.3.2.2 The incentive argument and the utilitarian principle

The incentive rationale underpins the centrality of IPRs to the creative economy where economic interest is paramount, and cuts across the various theories. Given its rationale to encourage creativity,¹⁵¹ the incentive rationale assigns a more functional role to IPRs as the means by which creators benefit from their creativity.¹⁵² IPRs enable creators to individuate their creative instincts to the point of being subject to ownership and economic exploitation.¹⁵³ With the help of IPR-driven mechanisms, creators can monetise the value of their creativity which otherwise remains an intuitive and largely abstract input. The incentivising role of IPRs in the creative economy is founded upon the

¹⁴⁹ UNCTAD 2008 *supra* 156; Gibson 2005 *supra*.

¹⁵⁰ See Andanda 2012 *supra* 550; Munzer & Raustiala 2009 *supra*.

¹⁵¹ See also P Drahos *A Philosophy of Intellectual Property* (1996) 188.

¹⁵² Liep 2001 *supra*.

¹⁵³ There are other ways of monetising arts and crafts, e.g., by selling the physical embodiments of it while retaining the IPR.

perception of creativity as an economic activity with calculable risks and uncertainties, outputs, returns, and individual gains;¹⁵⁴ and different from its socio-cultural context as inherent, altruistic, infinite and universal.¹⁵⁵

The perception of creativity as a risky venture derives from the problems associated with IP as public goods in the classical analogy of a light house, which is costly to erect yet difficult to control its use by the public.¹⁵⁶ Typical public goods problems include high cost of production and low marginal cost of reproduction.¹⁵⁷ IPRs supposedly solve the resultant problems of unfair competition and ‘the tragedy of the commons’¹⁵⁸ which otherwise could affect the sufficiency of the production of IP as public good. In the case of unfair competition, competitors appropriate the market merits of IP without contributing to the initial high production cost.¹⁵⁹ A temporary monopoly in the form of IPRs debatably becomes necessary to curb the liberties of such free riders.¹⁶⁰ The tragedy of the commons refers to the overuse and underproduction of public goods¹⁶¹ in the absence of a mechanism for coordinating the actions of users,¹⁶² which eventually

¹⁵⁴ Liep 2001 *supra*.

¹⁵⁵ Gibson 2006 *supra* 7.

¹⁵⁶ D’Orville 2005 *supra*.

¹⁵⁷ W Fisher et al ‘The economic analysis of art law’ in VA Ginsburgh and D Throsby (eds) *Handbook of the Economics of Art and Culture* (2006) vol 1 211-251. R Benko *Protecting Intellectual Property Rights: Issues and Controversies* (1987) 17.

¹⁵⁸ G Hardin ‘The Tragedy of the Commons’ (1968) 162(3859) *Science New Series* 1243-1248.

¹⁵⁹ D’Orville 2005 *supra*.

¹⁶⁰ Monopolies are seen as anti-public interests. This is one of the strongest basis upon which the validated IPRs have been criticised and has remained an issue of controversy among experts.

¹⁶¹ A classic example is a meadow for grazing cattle. See Hardin 1968 *supra*. As would be seen later, the analogy of the commons has been extrapolated to the cultural or knowledge domain giving rise to ‘cultural commons’ and ‘knowledge commons’ concepts respectively. See e.g.,

¹⁶² In the example of the cattle grazing meadow, uncoordinated grazing MJ Madison, BM Frischmann and KJ Strangburg ‘Constructing the commons in the cultural environment’ (2010) 95(4) *Cornell. Law Review* 657 available at <http://scholarship.law.cornell.edu/clr/vol95/iss4/10>, accessed on 1 March 2021g could lead to depletion. See also W Eastman ‘Telling alternative stories: Heterodox versions of the prisoners’ dilemma, the Coase Theorem and supply-demand equilibrium’ (1996-1997) 29 *CLR* 727-825, explaining the tragedy of the commons phenomenon with reference to the zero sum game theory and the prisoners’ dilemma analogy.

leads to insufficiency.¹⁶³ Madison, et al., explain that the tragedy of the commons is the result of individuals ‘acting rationally in pursuit of their own self-interest, without regard for the costs imposed on other existing and future resource users’.¹⁶⁴ The role of IPRs is based on the assumption that the assignment of private rights akin to IPRs over public goods reduces free riding and encourages the efficient allocation of resources.¹⁶⁵ Despite the debates over the validity of these precepts, they remain the primary basis upon which IPRs are legitimised.¹⁶⁶

The incentive argument has strong intersection with the utilitarian rationale for IP protection whose underlying thesis holds that the objective of law and public policy should be to promote the greatest happiness of the greatest number.¹⁶⁷ The operation of the utilitarian justification for IP protection is associated with economic efficiency¹⁶⁸ underpinned by the incentive principle.¹⁶⁹ Generally, it assumes that with the right incentives, the quality and quantity of social goods produced will be maximised and not under-produced thereby enhancing overall social utility. IPRs are supposedly incentives for the production of IP assets¹⁷⁰ albeit not founded upon a perceived natural right over the IP as owner,¹⁷¹ but rather seen as interventions towards the achievement of societal goals.¹⁷² The utilitarian perspective therefore tacitly recognises that IPRs are an unnatural

¹⁶³ RB Solum ‘Questioning cultural commons’ (2010) 95(4) 817.

¹⁶⁴ Madison 2010 *supra* 675.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Fisher 1987 *supra*; EC Hettinger ‘Justifying intellectual property’ (1989) 18(1) *Philosophy and Public Affairs* 31-52 and JS Mill *Utilitarianism* Roger Crisp (ed) (1998) available at <https://www.utilitarianism.com/mill1.htm>, accessed on 1 March 2021; J Bentham *An Introduction to the Principles of Morals and Legislation* (2000).

¹⁶⁸ Merges 2011 *supra* 6, who also referred to the theory as ‘efficiency principle’.

¹⁶⁹ DJ Gervais and EF Judge *Intellectual Property: The Law in Canada* (2nd edn) (2011) 9.

¹⁷⁰ Bentham 2000 *supra*; JS Mill *Principles of Political Economy* (John William Parker) 1848.

¹⁷¹ As the fairness theory suggests.

¹⁷² J Driver ‘The history of utilitarianism’ (2014) *The Stanford Encyclopaedia of Philosophy* available at <https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>, accessed on 1 March 2021.

construct laced with the potential peril of restricting access to a public good, but must nevertheless be tolerated in order to achieve a much higher social good or justice.¹⁷³

The incentive and utilitarian theories collaboratively consider the interests of investors in the production of IP resources and the public as their users. While the instrumentalisation of IPRs as an incentive provides an economic tool to achieve market efficiency by focusing on investors' interest in cushioning potential risks to investments, such advantages are expected to inure to the overall and long-term benefit of the public.¹⁷⁴ This elevates the social good above every other consideration and gives it strong backing as justification for IPR protection.

2.3.2.3 Incompatibility with the incentive and utilitarian arguments

The utilitarian and incentive principles have been criticised on specific grounds, one of which is that they cannot effectively explain other important aspects of IPRs, such as moral rights, which mainly protect the personality of authors in relation to their works.¹⁷⁵ But this is hardly of major concern to the creative economy.¹⁷⁶ More importantly, the suggestion that activities in IP production and their overall social benefits would decline without IPR protection is questioned for not being evidence-based.¹⁷⁷ Nevertheless, there are cases which confirm that IPRs generate increased economic benefits and value for

¹⁷³ Drahos 1996 supra 188.

¹⁷⁴ Sampath 2005 supra; Brahy 2007 supra. Both scholars relied on the utilitarian theory to argue for the protection of traditional medicines and ethnobotanical knowledge as necessary for the greater benefit of the society, and proposed a suitable model of protection. Sampath suggested trade secrets while Brahy suggested databases.

¹⁷⁵ Yu 2014 supra.

¹⁷⁶ However, moral rights could become an important issue where cultural ethos, meanings and identities are threatened by the consequences of commodification in the pursuit of economic interests.

¹⁷⁷ Merges 2011 supra 6; EC Hettinger 'Justifying intellectual property' in D Vaver (ed) *Intellectual Property Rights: Critical Concepts in Law* Volume 1 (2006); Fisher 1987 supra.

their owners. The positive and increasing role of IPRs in the branding of products and services associated with a particular community is well-documented.¹⁷⁸

The incentive justification is also at odds with TCEs for the presumption that all activities relating to creativity are similarly motivated by pecuniary gains;¹⁷⁹ whereas, some creative activities - including those related to TCEs - could be altruistic.¹⁸⁰ But as Hughes argues, the incentive theory could be understood as a consequentiality argument that people will be encouraged to add value to the commons if some of the added value accrues to them personally.¹⁸¹ This justifies incentivising TCEs especially when it is considered that the absence of such conscious efforts to add value is what leads to ‘the tragedy of the commons’, and that many dying craftsmanship have been revived by expectation of profit through the use of IPRs like GIs.¹⁸²

The nebulous notion of the public also creates problems for the legitimacy of the theories. The ‘public’ with reference to the utilitarian justification of IPRs is not a singular or homogenous colony. Liep correctly posits that what is in existence is a ‘pluralities of “public”’.¹⁸³ And so different interests could exist which may be impacted by the normative designs of IPRs in different ways. And pluralities of ‘public’ does not only signify diverse but sometimes conflicting interests. The interests of the public as the host community would certainly be different from that of outsiders, particularly outsiders

¹⁷⁸ M Torsen ‘Intellectual Property Options for Protecting and Marketing Traditional Textiles’ (2010) available at https://iipi.org/wp-content/uploads/2010/07/Traditional_Textiles.pdf, accessed on 1 March 2021; See also WIPO *Overview of Activities and Outcomes of the Intergovernmental Committee* (2003) 9 [Hereafter: WIPO 2003b].

¹⁷⁹ Gibson 2005 *supra* 87.

¹⁸⁰ As WIPO notes ‘Artisans or visual artists have very many different motivations for producing creative products’. See ITC/WIPO 2003 *supra* 12.

¹⁸¹ Hughes 2012 *supra*.

¹⁸² Russell 2010-2011 *supra*.

¹⁸³ Gibson 2006 *supra* 49 citing Liep 2001 *supra*.

from a different cultural or epistemological background. This envisages a more complex arena of interests with diverse permutations of incentives.

To further illustrate the above point, misappropriation of knowledge, which simply means ‘exploiting a right over the knowledge ... without the consent of the owner’, could be multifaceted.¹⁸⁴ Misappropriation is a foe within and from outside, and so it could have mixed effects within the same ecosystem. This can be seen in the mainly female orchestrated misappropriation of Ghana’s *kente* and *adinkra* cloths produced mainly by men as described by Boateng.¹⁸⁵ While the women gained a source of livelihood by trading in knockoffs, the men experienced declining market. Intervening in such a situation begs the question of whose interest should supersede. The morality question of ‘stealing’ someone else’s work and misleading the public by marketing counterfeits as originals is certainly condemnable; but the local (informal) economy which benefits from such activities is a compelling flip-side socio-economic rationale. A balanced system would be one that allows every interest group to engage with the TCEs through a differential market accommodating consumer choices ranging from traditional hand-woven niche textiles to knockoffs. Such a market would also preserve the public domain and its utility as the staple for derivative works, and accommodate the diverse ‘publics’.

The creative economy arena presents such varied permutations of incentives and interests regarding TCE;¹⁸⁶ economic interests matter as much as cultural values. Thus, justifications on the premises of ‘the good of the public’ should consider and mediate all interests. The economic and cultural benefits of TCEs to the owners, the importance of

¹⁸⁴ WIPO 2004 *supra*.

¹⁸⁵ Boateng 2011 *supra*.

¹⁸⁶ UNCTAD 2008 *supra* and UNCTAD 2010 *supra* 8.

TCEs as raw material for further creativity, access to an enriched public domain for third parties, and related concerns about the survival of individual cultures for the enrichment of cultural diversity are pillars of diverse beneficiaries and sometimes conflicting interests as metaphors for ‘the public’.

2.3.3 Finding Common Ground

At this point, it is clear that TCEs and IPRs are not complete strange bedfellows. Interfacing objectives and concerns provide a basis for the legitimate extension of IPR to TCEs as would be discussed forthwith.

2.3.3.1 IPRs and TCEs: common ground

Fundamentally, IP and TCEs are both knowledge-based products, albeit of different epistemological backgrounds.¹⁸⁷ To this extent, they have certain attributes in common. First, they are valuable in their individual capacity as end products of creative activity while also serving as raw materials for further creativity. As such, access to both the end product and raw material is important to the public. Any form of protection must properly safeguard the public interest related concern of equitable access and the enrichment of the public domain as fundamental objectives.

Secondly, TCEs and IP have dual natures as tangible and intangible assets. The exclusive right they embody is in both the abstract ideas or knowhow and their physical manifestations, which are not only marketable, but also protectable.¹⁸⁸ Thus individual ownership could be exercised over the physical component of some categories of

¹⁸⁷ Being that IPs are based on private property rights within the Western understanding while TCEs are based on traditional norms of ownership.

¹⁸⁸ ITC/WIPO 2003 *supra*; WIPO 2003a *supra*

individually created TCEs using specific IPRs like copyright and design rights, while the pre-existing underlying knowledge itself remains the property of the community.¹⁸⁹ The relevance of copyright thus depends on whether the works in question are ‘pre-existing, underlying cultural heritage and traditional culture’ or ‘contemporary tradition-based cultural expression’.¹⁹⁰ Inasmuch as the notion of authorship is relevant at all, pre-existing TCEs are generally not protected by current copyright or industrial design laws. However, a contemporary work derived from or inspired by TCE or other pre-existing traditional knowhow but infused with novel interpretations could be protected as copyright or industrial design provided ‘they are sufficiently “original” and “new” respectively’.¹⁹¹ The originality or newness requirement for protection does not require an author or maker of a derivative work to be a member of the community in which the work originated.¹⁹² Moreover, the objectives of preservation of knowledge where contemporary works are concerned is achievable not by imitation but through revitalisation, innovation and active use in accordance with IPR tenets thereby signifying a common ground.¹⁹³

Thirdly, individualism and novelty do not apply to goodwill and reputation, which are the domain of trademark. Goodwill and reputation are regarded as very distinct forms of IP.¹⁹⁴ This creates a common ground for IPRs and TCEs to interact through trademark.

Fourthly, the cultural meanings and symbolisms associated with tradition-based knowledge have often been analogised with moral rights which safeguard IP’s integrity.

¹⁸⁹ This is clearly demonstrated in the *Bulun Bulun* case where copyright resided with the community but could be exercised individually by indigenous traditional artists on an equal basis.

¹⁹⁰ WIPO 2003a *supra*.

¹⁹¹ *Ibid* 4 and 7.

¹⁹² *Ibid*.

¹⁹³ William van Caenegem ‘Geographical indications and Indigenous intellectual property’ in Rimmer 2015 *supra* 289-310 (195).

¹⁹⁴ *Ibid*.

There is agreement among experts that the integrity and non-commercial values of TCEs should equally be protected, but the challenge has always been how to effect such protection where TCEs are exposed to the market,¹⁹⁵ which is not the immediate focus.

Finally, IPRs do not wholly feature individualism as their respective frameworks also contain collective structures.¹⁹⁶ This represents a solid common ground in the form of communal IPRs.

Overall, IPRs are pro-TCEs in many ways. Indeed, the recognition of IPRs as tools that could help communities eradicate poverty and achieve development is equally a recognition of their relevance to the effective management of TCEs.¹⁹⁷ No doubt, the public domain concern remains vital for both TCEs and IP in contemplating the right kind of protection given the opportunities for the revitalization of culture offered by the public domain. Still, it could be argued that safeguarding the public domain and access to TCEs should not be a basis for discarding IP protection for TCEs. It should instead be safeguarded the same way conventional IP laws safeguard IP from complete enclosure with the aid of limitations and exceptions.

2.3.3.2 Incentives as a common ground, but of a different nature

Notwithstanding contrary opinions, incentives as justification for IPR protection could be relevant to TCEs depending on the imperatives and desired objectives. Incentives for the creation of cultural expressions could be pecuniary, altruistic or simply the urge to create.

¹⁹⁵ Wong & Fernandini 2011 supra 175, where they suggest that both affirmative and defensive measures are necessary in addressing this challenge. See also McManis & Terán 2010 supra 140.

¹⁹⁶ E.g., group trademarks, collective marks, certification marks and geographical indications discussed further in the next chapter.

¹⁹⁷ Drahos & Frankel 2012 supra xvi; ILO 2003 supra; UNCTAD 2004 supra; UNCTAD 2010 supra.

But from the economic perspective, incentives remain relevant to TCEs in achieving the economic objectives.¹⁹⁸

Generally, IPRs are handy for reaping the fruits of handwork where returns are key motivations for creative endeavours.¹⁹⁹ One should also not forget Hughes instrumentalist argument in support of incentives as encouragement for the creation of TK.²⁰⁰ It should be recalled that the primary goal of incentives as justification for IPRs is to serve social good according to the utilitarian theory, and that the social benefits attached to TCEs are largely due to the longstanding efforts of their custodians. This underscores the context in which incentives become relevant as instruments to ensure the generation of the social benefits, which entails preserving the knowledge in a form that retains the qualities that ensure those benefits. In this sense, the generation of social benefits validates measures geared towards rewarding the consistent efforts of the custodians in maintaining those qualities.

Although it is conceivable that TCEs, like other forms of knowledge-based resources, are non-rivalrous and inexhaustible, TCEs could in reality become corporeal, finite and exhaustible if attention is not given to preservation.²⁰¹ This nullifies the argument that incentives are not relevant to the production of TCEs - at least with respect to preserving the knowledge. The growing market for authentic ethnic goods provides what could be termed first generation incentives for their production in adequate quantities for the market. Because the quality standards of the products are determined by

¹⁹⁸ M Torsen and J Anderson *IP and the Safeguarding of Traditional Culture: Legal Issues and Practical Options for Museums, Libraries and Archives* (2010) 18-20.

¹⁹⁹ ITC/WIPO 2003 *supra* 12.

²⁰⁰ Hughes 2012 *supra*.

²⁰¹ H Fourmille 'Indigenous peoples, the conservation of traditional ecological knowledge, and global governance' in N Low (ed) *Global Ethics and Environment* (1999) 215-246 (235-37); AB King and PB Eyzaguirre 'Intellectual property rights and agricultural biodiversity: literature addressing the sustainability of IPR for the protection of Indigenous resources' (1999) 16(1) *Agriculture and Human Values* 41-49.

the market as the pipeline for tapping incentives, and could change in response to market trends, incentives again become relevant to ensure preservation of the ethnic ethos of TCEs. This validates interventionist measures aimed at generating the needed second generation incentives. Interventionist measures are vital to motivate the sustenance of artists' individuality in defining and shaping artistic content without being influenced by market trends. Such measures should ensure that the market follows the product and not contrariwise.

So far, interventionist measures align with the utilitarian concern for the interests of the greater number. But there could also be strong imperatives to safeguard the TCEs for the benefit of the custodians as the fulcrum of their cultural identity and socio-economic wellbeing to ensure social justice. This would justify measures, including IPRs, aimed at safeguarding TCEs in the interest of the custodians notwithstanding that such measures could have negative effects on the larger society, for instance, restricting access to or use of TCEs.

Overall, the obligations over TCEs in the creative economy inspire three main considerations: (1) protection from misappropriation that could have an overall undermining effect on the integrity of the knowledge; (2) promotion and appropriation of the economic potential of the knowledge; and (3) preservation of the knowledge through active practice, revitalisation and transfer to the younger generations. In the global effort to articulate an acceptable framework for protecting TCEs/TK, protection through IP law is distinguished from safeguarding – a concept and objective covering wider concerns to ensure the sustainability of cultural heritage including preservation. These wider concerns

are often addressed via a different set of strategies.²⁰² Yet, IPRs can complement them by providing the mechanism for incentivising practices that support preservation, provided that such mechanism addresses the aforementioned conflicts between IPRs and TCEs. The question then is which communal approach would be relevant in managing tradition-based arts and crafts and mediating the conflicts arising between IPR norms and TCEs?

2.4 The Case for Communal IPRs

Communal IPRs, which as earlier explained²⁰³ refers to those categories of IPRs with traits of collectiveness/collectivism, are exceptions to the general rule of individualism that govern IP norms.²⁰⁴ They are naturally compatible with TCEs because of their communal nature, in contrast with the individualism philosophy. Communal IPRs have the basic advantage of addressing challenges of small size in the global market. They are therefore helpful in addressing the incompatibility issues affecting TCEs and IPRs, and the small-size challenges of managing them. The import of and rationale for communal IPRs in the protection and management of TCEs can be further explained with reference to the concept of collectivism and the theory of the commons.

2.4.1 Collectivism/Individualism

The collectivism/individualism concept is well known in cultural psychology.²⁰⁵ It is an analytical approach used to explain or compare behavioural patterns and relationships in

²⁰² WIPO 2003a *supra*.

²⁰³ Chapter One.

²⁰⁴ WIPO 2004 *supra*.

²⁰⁵ G Hofstede *Culture's Consequences: Comparing Values, behaviours, Institutions, and Organizations across Nations* (2nd edn) (2001). HC Triandis *Individualism and Collectivism* (1995) available at <https://doi.org/10.4324/9780429499845>, accessed on 1 March 2021; HR Markus and S Kitayama 'Culture and the self: implications for cognition, emotion, and motivation' (1991) 98(2) *PRC* 224-253.

culturally diverse or cross-cultural settings, including communities. As a theory, individualism/collectivism has been applied to different scenarios to determine tolerance among people in a diversified cultural environment:²⁰⁶ in corporate culture contexts;²⁰⁷ in comparing individuals' way of thinking socially;²⁰⁸ and in defining relations in institutions or groups.²⁰⁹ Individualism/collectivism is said to refer to the degree to which a culture encourages, fosters and facilitates the aspirations and values of the self against those of a group.²¹⁰ Individualism describes a tendency to focus on the self rather than on the group with group wishes regarded as secondary.²¹¹ In contrast, collectivism reflects patterns that promote dependence and focuses on 'group orientation'.²¹² It symbolises loyalty to a group as opposed to individual loyalty in what Hui and Triandis sum up as 'concern for others'.²¹³ Collectivist settings prioritise the group's wishes in both personal and professional action.²¹⁴ Traditional settings ideally exhibit collectivism syndromes.²¹⁵ One of such syndromes is communal ownership/rights over tradition-based resources.

It is trite that individualism defines the IP narrative being so largely guided by individual authorship/ownership. Still, collectivism is not entirely alien as seen in the utilitarianism justification of IP with focus on the collective good. The rationale for

²⁰⁶ GAJ Van Dyk and FS de Kock 'The relevance of the individualism – collectivism (IC) factor for the management of diversity in the South African national defence force' (2004) *SAJIP* 30(2) 90-95.

²⁰⁷ Hofstede 2001 *supra*.

²⁰⁸ OA Rudenstam 'Individualism vs Collectivism' (2012).

²⁰⁹ See also *Culture's Consequences: International Differences in Work Related Values* (abridged edn) (1984).

²¹⁰ See Hofstede 1995 *supra* and Y Omi 'Collectivistic individualism: transcending a traditional opposition' (2012) 18(3) *CP* 403-416 (403).

²¹¹ *Ibid*.

²¹² *Ibid*.

²¹³ CH Hui and HC Triandis 'Individualism-Collectivism: a study of cross-cultural researchers' (1986) 17(2) *JCCP* 225-248 (231).

²¹⁴ B Latham 'The Collectivism/Individualism Dimension: Raising Awareness for Technical Communicators and Educators' (2007).

²¹⁵ V Ma and TJ Schoeneman 'Individualism versus collectivism: a comparison of Kenyan and American self-concepts' (1997) 19(2) *BASP* 261-273.

collectivism in the context of IPRs has a normative and social context. Normatively, while IPRs protect individual rights, such rights can be held in common by a group as an indivisible entity with the holders sharing equally, as is the case with joint authorship in copyright. In the social context, individuals could have interests in the property based on group values and societal norms governing property. Ownership of community resources adheres to these contexts, whereby ownership or custodianship may not be wholly collective; but the regulation of ownership is communal in the sense that it is undertaken according to shared community values.²¹⁶

The strength of collectivism is the platform it provides for synergies. It has been recommended for organisations because it promotes ‘cooperation and productivity’ contrary to individualistic values which are known to ‘incite destructive conflict and opportunism’.²¹⁷ Still, in situations where creativity is of higher currency, individualistic principles could be more valuable than collectivism.²¹⁸ Communal IPRs could create room for the exploitation and optimisation of both collectivist and individualistic advantages.

2.4.2 The Theory of the Commons

The management and protection of tradition-based resources also invokes the theory of the commons. In a way, the commons is utopian by presupposing a boundless world where appropriation and consumption of resources by one person will ‘always leave as

²¹⁶ See *Bulun Bulun v R & T Textiles Property Ltd* 1998 41 IPR 513; Gibson 2005 *supra*.

²¹⁷ JA Goncalo and BM Staw ‘Individualism-collectivism and group creativity’ (2006) 100(1) *Organisation Behaviour and Human Decision Processes* 96-109(96).

²¹⁸ *Ibid*.

much and as good for others’.²¹⁹ However, the theory of the commons has been brought closer to reality with reference to the efficient management of natural resources,²²⁰ and the management of information rights.²²¹ Regimes referred to as ‘commons’ are generally characterised by ‘common ownership structures of a tangible resource by a specific group, accompanied by rights of the group members to use the resource and exclude non-members’.²²² But there is an associated obligation on the ‘commoners’ to maintain the commons for the benefit of all.²²³

From its original conception in connection with the management of natural resources,²²⁴ the ‘commons’ concept has been extended to the management of cultural resources.²²⁵ According to Madison, et al, who coined the phrase ‘constructed cultural commons’, ‘commons’ in this context refers to ‘environments for developing and distributing cultural and scientific knowledge through institutions that support pooling and sharing of that knowledge’ in the same way that ‘a natural resource commons refers to the managed sharing environment for natural resources’.²²⁶ But while natural resource commons occur naturally; cultural commons could be artificially constructed.²²⁷ Constructed commons are grounded in laws that deviate from the default IP law, and therefore stand in between the ‘natural’ or ‘utopian’ state of information without IP

²¹⁹ Mitchell 2005 supra 2.

²²⁰ Hardin 1968 supra; E Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (1990) 58–87; JM Acheson *Capturing the Commons: Devising Institutions to Manage the Maine Lobster Industry* (2003).

²²¹ Madison et al 2010 supra 657.

²²² Solum 2010 supra 817.

²²³ See C Armstrong and H Ford *The African Digital Commons: A Participant’s Guide* (2005) available at <https://dlc.dlib.indiana.edu/dlc/handle/10535/5864>, accessed on 1 March 2021.

²²⁴ Ostrom 1990 supra 104–32, 144–78 (1990); JM Acheson *The Lobster Gangs of Maine* (1988).

²²⁵ Madison et al 2010 supra.

²²⁶ Ostrom 1990 supra, on ‘natural resource commons’ discussing the example of the Maine lobster fishery as a natural common.

²²⁷ These are a pool of contributed IPRs managed on behalf of the contributors as a group. Examples include collective management of copyright and patent pools. Madison et al 2010 supra 659–682.

protection and fully protected information. Consequently, a constructed commons may lead to creativity, innovation, and improvement that are unattainable in either extreme.²²⁸

A number of differences have been identified by experts between a natural resource commons and a 'constructed cultural commons'. For instance, the management goals of a natural resource commons often focus on sustainability; whereas constructed cultural commons address additional issues which could be to:- provide a shared open platform for the advancement of creativity and quality; overcome transaction costs in the management of IP resources of members who are interested in exploiting those resources; and help in resolving coordination problems existing outside IP frameworks.²²⁹ Most importantly, unlike natural resource commons, constructed cultural commons usually require a governance structure.²³⁰ This entails establishing rules in connection with the operation of the constructed commons, including rules pertaining to membership, contribution, use of pooled resources, production and sharing of the knowledge resource by members.²³¹

Commons are often guided by cooperative behaviour among members regarding the pooling and use of their resources. In such arrangements, the resource remains in the common for free use and sharing by the commoners. This differs from other functional collaborative initiatives for the purpose of attaining a specific objective without

²²⁸ Ibid.

²²⁹ A good example of the later is the Human Genome Project, part of which is the publicly available database of genomic sequences. See MA Heller 'The tragedy of the anti-commons: property in the transition from Marx to markets' (1998) 111(3) *HLR* 621-688(625).

²³⁰ HT Dykman 'Patent licensing within the Manufacturer's Aircraft Association (MAA) (1964-09) *JPOS* 646, 648-50; RP Merges 'Contracting into liability rules: intellectual property rights and collective rights organizations' (1996) 84(5) *CLR* 1293-1343(46). However, Madison et al 2010 *supra*, identify a number of differences between the two. For instance, 'unlike resources in the natural world, resources of information and expression must be created before they can be shared. Because of their public good character, a cultural commons is necessary to manage both their use and production as cultural resources.'

²³¹ Ibid.

necessarily requiring the pooling and sharing of resources, such as a CMO. Members may participate but retain their individual and independent existence to a large extent.²³²

Experts agree that there is no standard form that commons could take and each depends on the circumstances and desired objectives. Thus, fundamental issues like the degree of openness apply differently. While commons by default are closed to the public (outsiders) - particularly with reference to natural resource management owing to their finite nature - the non-rivalrous nature of intellectual resources makes them naturally open to the public. A constructed commons therefore becomes necessary to regulate the dissemination of intellectual output through the use of artificial barriers conceptualised as norms and practices among owners and users,²³³ including rules defining membership. It has also been argued that a commons does not need to demand that individual rights be derived from community rights. Rather, both rights could exist side by side and independent of each other.²³⁴

There is no doubt that TCEs correspond to some kind of commons at any given time. In their unregulated state as *terra nullius*, TCEs are closely aligned with the natural resource commons. The near absence of private property rights, the existence of common ownership structures, and their organic process of evolution suggest a natural resource common. The concerns over dilution analogise a natural resource common under threat by overuse in the absence of regulation. Yet their general nature and particularly their non-rivalrous characteristics suggest an intellectual common. In contemplating the proper strategy for the protection and management of TCEs as such, these factors become relevant considerations. The merits of a constructed commons approach would appear

²³² UNIDO 2010a *supra*.

²³³ See DS Karjala 'Congestion externalities and extended copyright protection' (2006) 94(4) *GJ*1065-1086.

²³⁴ Madison 2010 *supra*.

most suitable given the non-rivalous nature of TCEs. This reinforces the endorsement of IPRs for TCEs and provides guidance on the appropriate type.

2.4.3 Utilising Communal Models of IPRs

The foregoing supports the use of communal IPRs to protect and manage tradition-based arts and crafts in the creative economy. Communal IPRs sometimes bear the attributes of a cultural commons by being internally open-shop and externally closed-shop by nature. They are designed to, *inter alia*, overcome small-size related challenges and/or fragmented value chains, including transaction costs issues.²³⁵ Overall, communal IPRs are useful by promoting collective interests instead of individual interests.²³⁶ Their core attributes of collectivism which encourages collaboration and interdependence generates the needed synergies for the IP owners to overcome small-size related challenges in effectively integrating their products in the global economy.²³⁷ The platform for knowledge sharing which characterises a collectivist and collaborative setting is commensurate with the practice in most traditional settings where knowledge is open and shared. As Russell said, ‘through this ethos of communal cooperation, impoverished communities can work to build the local economy and preserve culture’.²³⁸

However, as mentioned earlier, not all forms of communal IPRs would be relevant; likewise, some models are more suitable than others in addressing the relevant concerns over tradition-based arts and crafts. The appropriate model would be IPRs with

²³⁵ UNIDO 2010a supra; UNIDO 2010b supra.

²³⁶ G Hofstede et al *Cultures and Organisations Software of the Mind: Intercultural Cooperation and its Importance for Survival* (2010); Latham 2007 supra.

²³⁷ UNIDO 2010a supra.

²³⁸ Russell 2010 supra 705-728.

patterns of collectivism in tune with the concerns, and also addressing the question of applicability. In effect, it must lawfully accommodate tradition-based arts and crafts.

2.5 Conclusion

The creative economy is important for its socio-economic and socio-cultural benefits. For developing countries, the rhetoric of the creative economy is even more melodious because it involves resources in which they are mostly well-endowed.²³⁹

Though building the creative economy around tradition-based arts and crafts could bring them in collision with IPRs in view of their conflicting nature, IP and TCEs are not complete opposites. They share some common attributes, interests and objectives on the basis of which they could complementarily co-exist. Notwithstanding the strong concern over the commercialisation and commodification of TCEs, commercialisation of tradition-based arts and crafts has merits that serve the social good. These findings provide legitimacy for the use of IPRs to appropriate the value and qualities of tradition-based arts and crafts. It is now left to determine the suitable communal IPRs in conjunction with the underlying conflicts, imperatives and challenges raised in this chapter. But first, the tradition-based arts and crafts condition in the two study countries needs to be examined in context with these dynamics.

²³⁹ This is subject to the good use of culture which is susceptible to erosion, dilution or extinction.

CHAPTER THREE

THE NIGERIAN AND SOUTH AFRICAN TRADITION-BASED ARTS AND CRAFTS LANDSCAPE

3.1 Introduction

This chapter examines the tradition-based arts and crafts scenario of the two study countries in the light of the analytical frameworks articulated in chapters one and two, and the background against which they were developed. The specifics of the frameworks border on the nature of tradition-based arts and crafts as cultural products, their quality for potential market viability, the gains from trade, the threats to the market and the utilitarian considerations based on their social values that justify protection, promotion and preservation. It also takes cognisance of the conclusions in chapter two, particularly regarding the relevance of communal platforms upon which tradition-based arts and crafts could harmoniously interact with IPRs in addressing the concerns relating to their wellbeing. The main objective of the chapter is to place the study in the specific context of Nigeria and South Africa, and to further answer the research question of ‘the relevance of the communal approach to the management of tradition-based arts and crafts’. It also addresses the question of ‘the enabling factors for success of a communal IPR model established for the purpose of managing tradition-based arts and crafts’. More particularly, it adumbrates the ‘role that tradition-based arts and crafts play in the development of the creative economy of both countries’. Therefore, it underscores the value of tradition-based arts and crafts, the specific market challenges faced by the sector in the two countries, and the need to address them.

Some important questions are reserved for this chapter with reference to the two study countries, which are relevant in establishing the imperatives of protection as adumbrated and in answering the research questions as reproduced above. It is important to determine whether there is: potential market for tradition-based arts and crafts including high-end market; reason or reasons to be concerned; and a need and place for launching communal models. Some of these concerns are addressed in the next section which focuses on individual crafts, while the rest are addressed as the chapter proceeds.

3.2 Historical Background, Nature of the Sector and Pertinent Issues

There are different ways to look at the background of arts and craft with reference to any particular country. It could be examined from a geographical context of the whole country or just a particular community. It could also focus on specific handicrafts or take a sweeping look at handicrafts generally.¹ Similarly, the nature of the industry could refer to any combination of subjects, including scope, structure, and operations. There is no end to what constitutes ‘the nature’ if not delineated. The historical narrative takes neither a strict geographical context nor a specific subject-matter context. Instead, it examines generally the developments that weigh on the protection of the tradition-based arts and crafts in the two countries as envisaged in this study, and that partly define their quality.

The history of crafts in Nigerian and South Africa runs deep, corresponding with the evolution of craft forms as a necessary part of that history.² While not much of that ancient knowledge or the manifestations thereof remains except as highly priced relics in

¹ The City of Prague Museum ‘Crafts in guilds: the history of craftsmen’s association from the Middle Ages to the present’ (2014) available at <http://en.muzeumprahy.cz/crafts-in-guilds-the-history-of-craftsmen-s-association-from-the-middle-ages-to-the-present/>, accessed on 1 March 2021.

² DD Alau ‘Adaptation of traditional designs on crafts of Southern Kaduna as motifs for textiles resist techniques’ (Unpublished PhD Thesis, Amadu Bello University, 2006).

museums, some have survived and are still being practiced. Others can hardly be recognised from their antique prototypes as the techniques of producing them have progressively mutated as they encounter other cultures. Thus, the circumstances of a country are important to the development of its arts and crafts sector, and to some extent in understanding the needs of the sector and how such needs can be met. The overview provided in this section is intended to establish a preview of three main considerations that make communal IPRs relevant to traditional arts and crafts, namely that: commercialisation is important, survival is threatened, and ownership concerns relating to the knowhow as knowledge asset are pertinent.

3.2.1 Historical Perspective of the Tradition-based Arts and Crafts Sector

Crafts have been around for as long as man began to articulate his needs and match this with the aspiration to address those needs. In Africa, archaeologists have been able to exhume traces of man's efforts in craftsmanship from the earliest of times.³ Items like the 9th Century *Igbo Ukwu* ceremonial roped pot in Nigeria,⁴ and the 8th Century glass beads in South Africa are discoveries that date the existence of advanced craftsmanship in these two countries to ancient times.⁵ Thus, the nature of their arts and crafts industry cannot be separated from their respective historical and cultural backgrounds. One of the greatest defining occurrences in the history of Nigeria and South Africa is political hegemony by foreign authorities, which had all the destabilising trappings usually accompanying such

³ Ibid.

⁴ M Berns and T Shaw *Unearthing Igbo-Ukwu: Archaeological Discoveries in Eastern Nigeria* (1977-1978) 14.

⁵ M Wood 'Interconnections: Glass beads and trade in Southern and Eastern Africa and the Indian Ocean 7th – 16th Century AD' (2012) 47(2) *Azania: Archaeological Research in Africa* 248.

political impositions, not the least disruption of culture.⁶ The colonisation of Nigeria by the British had significant consequences on the arts and craft sector. Even more devastating and disruptive was the apartheid debacle in South Africa.

Generally, foreign invasion and occupation is not only associated with disruption of the established traditional systems of governance in the occupied territory; it also leads to the institution of new ways in culture, including religion, social practices and material culture.⁷ Craftsmanship and crafts as material culture respond in like manner to cater for the needs of the society resulting from these disruptions. Current dynamics of the global trading system also have their own effects on the sector and impact on how the imperative of protection of tradition-based arts and crafts resonate with the two countries.

3.2.1.1 Nigeria

The Nigerian cultural landscape is diverse, which has to do with her political history. Nigeria is a federation⁸ with a multitude of ethnic groups within its 36 autonomous states and the Federal Capital Territory (FCT), Abuja.⁹ The unique age-long cultural practices of the different ethnic groups¹⁰ in the country made up a rich cultural heritage which provides inspiration for a wide range of tradition-based arts and crafts forms.

⁶ DA Mungazi *Gatherings under the Mango Tree Values in Traditional Culture in Africa* (1996).

⁷ BO Igboin 'Colonialism and African cultural values' (2011) 3(6) *AJHC* 96-103.

⁸ S1 of the Constitution of the Federal Republic of Nigeria 1999 Cap C23 LFN 2004.

⁹ Ibid s3.

¹⁰ The three dominant ethnic groups are Hausa/Fulani in the North, Yoruba in the South West and the Ibo in the South East. AR Mustapha 'Ethnic Structure, Inequality and Governance of the Public Sector in Nigeria' (2005) available at https://www.researchgate.net/publication/255602498_Ethnic_Structure_Inequality_and_Governance_of_the_Public_Sector_in_Nigeria, accessed on 1 March 2021. The exact ethnic composition is not clear. It is asserted that there are over 250 distinctive ethnic groups. See Alau 2006 *supra*. Also, the conception of ethnic minority in Nigeria is controversial. It is unclear whether it is determined by number of people speaking the language or other indices. See EE Osaghae 'Ethnic minorities and federalism in Nigeria' (1991) 90(359) *African Affairs* 237–258.

The Nigerian society suffers from many setbacks largely attributed to poor governance. Endemic poverty, massive corruption,¹¹ and insecurity are just a few examples. It is therefore not atypical that despite being endowed with an abundance of cultural and natural resources, she lags behind in most economic performance and development rankings.¹² A rich deposit of petroleum and mineral resources has not translated to good livelihood for the majority of her citizens.¹³ Thus, many Nigerians are forced to embrace arts and crafts business as a means of survival either as producers or marketers or both.

The implications of above trend for tradition-based arts and crafts are mixed. On one hand, lack of attention to the development of rural areas has resulted in rural urban migration as rural dwellers - including crafters - abandon their communities and sometimes their trade in search of livelihood outside. On the other hand, it continuously threatens the survival of traditional crafts whose techniques are adapted to or abandoned for modern trends by crafters to ensure marketability. What should have served as a good impetus for preservation - i.e., increasing interest and increased activities in the sector - could be stifled by a loop-sided focus on economic gains and market trends.¹⁴

Government's interest in the development of cultural activities had hitherto focused mainly on promoting cultural nationalism through indigenous art as a source of national identity with crafts seen as 'symbols of Nigerian material culture and spiritual

¹¹ Nigeria has consistently ranked poorly in most corruption rankings.

¹² See UNDP *Human Development Report 2015*.

¹³ FI Ogebeide et al 'Revisiting the determinants of unemployment in Nigeria: do resource dependence and financial development matter?' (2016) 28(4) *ADR* 430-443.

¹⁴ Y Ojo 'Research into the Impact of Arts, Culture and Creative Industries on Africa' (2009) 14 available at https://www.academia.edu/31230499/RESEARCH_INTO_THE_IMPACT_OF_ARTS_CULTURE_AND_CREATIVE_INDUSTRIES_ON_AFRICAS_ECONOMY, accessed on 1 March 2021; Kwanashie et al 2009 *supra*.

heritage’.¹⁵ It would appear that the merits of the UNCTAD reports on the economic potential of cultural resources was not lost on Nigeria as the 2009 Vision for Economic Transformation identified the development of arts and crafts as part of the blueprint for achieving economic transformation.¹⁶ A 2009 exploratory research on Nigeria’s creative industry estimated ‘that millions of Nigerians are engaged in some form of creative activity that when organised could boost the creative economy’.¹⁷ However, the 2013 creative industry mapping exercise conducted for this purpose was limited in two critical dimensions: it omitted arts and crafts and covered only Lagos State out of 36 states in the country.¹⁸ Nevertheless, there is an increasing recognition of the economic potential of tradition-based arts and crafts which is largely motivated by the desire to improve the welfare of economically vulnerable groups like rural dwellers, women and youths.¹⁹

It would appear that the limited effort to develop the arts and crafts sector has focused largely on economic gains and the ripples of social benefits that follow without equal concern for the importance of preserving the knowhow in the market place. According to more recent statistics on Nigeria’s economic growth, the creative sector contributes a significant portion of the country’s Gross Domestic Product (GDP), confirming that it could serve the critical need to diversify the economy from its sole reliance on petroleum.²⁰ Though the contribution of the craft sector to this growth seems

¹⁵ Kashim 2013 *supra* 223.

¹⁶ Nigeria Vision 20: 2020 *Economic Transformation Blueprint* (2009) 43.

¹⁷ See Omi (2012) *supra* and E Ebhota ‘Art, craft can become Nigeria’s goldmine - D Keshi’ *Daily Trust* September 13 2015 available at <https://dailytrust.com/art-craft-can-become-nigerias-goldmine-dayo-keshi>, accessed on 1 March 2021.

¹⁸ British Council 2013 *supra*.

¹⁹ One example is the ‘Better Life for Rural Women’ project which was designed in 1987 and coordinated under the ‘Office of the First Lady’ to better the lot of Nigerian rural women. See UI Bola ‘Better Life for Rural Women Programme: an agenda for positive change?’ (1994/95) 20(4) *Africa Development* 69-84(69).

²⁰ Competing with petroleum is agriculture. See Y Kale ‘Measuring better: preliminary results of the rebased nominal Gross Domestic Product (GDP) estimates for Nigeria 2010 to 2013 (2014)’ available at

to have gone unnoticed,²¹ it cannot be gainsaid that Nigeria is endowed with diverse arts and crafts culture from time immemorial as evident from the array of iconic ancient arts and crafts originating from her ancient background.²² The *Nok* terracotta cultures,²³ the bronze vessels of *Igbo Ukwu*,²⁴ and works of Benin and Bida beads²⁵ are examples from the rich repertoire of her traditional arts and crafts forms. The consummate nature of these ancient arts and crafts forms has remained a dependable stimulus for creative ideas which are being reincarnated in contemporary arts and crafts forms.²⁶ Naturally, the regions that hosted these craft traditions have also evolved into renowned clusters of arts and crafts following their historical and cultural roots', while deliberate efforts have been made to also promote similar clusters as part of the country's economic development plan.²⁷ The significance of this rich history of craftsmanship is that Nigerian arts and crafts tradition has a pedigree upon which the products of that tradition can be distinguished or earmarked for singularity. It also underscores a rich cultural heritage that should be exploited and equally preserved for the benefit of present and future generations.

<https://www.nigerianstat.gov.ng/pdfuploads/Nigeria%20GDP%20Rebasing%20Presentation.pdf>, accessed on 1 March 2021.

²¹ The sector is omitted in the rebase document and the Lagos Mapping Report supra. See *ibid*.

²² KC Murray 'Arts and craft in Nigeria: their past and future' (1943) 14(4) *JIAI* 155-164.

²³ The unique identities of *Nok* culture are the invention of terracotta figurines and statues mixed with iron. The progenitors of *Nok* culture are regarded as one of the earliest settlers in Nigeria and parts of Africa. The culture is have continued to inspire the growth of cultural activities in Nigeria. See Alau 2006 supra 21.

²⁴ Berns & 1977-1978 supra 14.

²⁵ I Ezeike 'Arts and crafts, a goldmine for economic growth, tourism Nigeria news' (2016) available at <http://tourism-news-nigeria.blogspot.com/2011/06/arts-and-crafts-goldmine-for-economic.html>, accessed on 1 March 2021.

²⁶ M Akintunde and MO Areo 'Art and craft of old Oyo: it's manifestation in the present Oyo' (2013) 15(6) *JHSS* 50-59; F Ugiomoh 'Still in search of an African renaissance: re-mapping the past in the contemporary' in Anueyiagu, O (ed) *Contemporary African Art: My Private Collection of Onyemam Offoedu-Okeke* (2012) 36-40; Adewopo et al 2014 supra.

²⁷ See 3.4.2. See also Alau 2006 supra.

3.2.1.2 South Africa

The South African arts and craft sector has also been shaped by its past. Though this is not a comparative study of South Africa and Nigeria, one cannot help but notice the sharp difference between the two countries regarding the background and nature of their arts and crafts sector, which is expected since cultures evolve differently in response to their changing circumstances.

South Africa's cultural landscape is also highly diverse with a cultural demography that has been broadly categorised as follows: Black African, White, Coloured, Asian, and the Khoe-San.²⁸ Among the predominant black African group are the Zulus, Xhosa and Ndebele.²⁹ The political background of South Africa creates a unique problem in understanding the notion of 'traditional', and in determining what it covers. This is because the different cultural groups all have their unique traditions and cultures, including the settler races whose origins are traceable to Europe and Asia. There is also the typical conflict between indigenous community and settlers. This thesis focuses on ethnic African tradition-based arts and crafts.

The cultural heritage of South Africa is symptomatic of her political background with strong racial demarcations and distinctions among the major racial groups.³⁰ Obviously, the cultural sector has not been spared from the lingering effects of racism - racial discrepancies, stigmatisation, and inequalities in accessing opportunities and dependable sources of livelihood. Therefore, the demographic formation of the cultural sector is denominated along racial lines, with white South Africans identified with fine art

²⁸ See C Ncube 'Intellectual property protection of traditional knowledge and access to knowledge in South Africa' in Rimmer 2015 supra 543 -564 (544).

²⁹ D O'meara 'In search of a hat' (2004) *Cape Library* 42-43, noting the four ethnic African groups as the Nguni, Sotho, Shangaan-Tsonga and Venda.

³⁰ Ibid.

perceived as superior to craft, while the crafts sector is dominated by blacks.³¹ Nevertheless, the *Ndebele* wall painting art and the ‘rock art’ of the ‘Bushmen’ tribe remain early examples of art of black origin in South Africa.³²

South Africa’s crafts sector is characterised by two distinct developmental periods: before 1998 and after. Prior to the UNCTAD Reports, the 1998 reports of the studies commissioned by the DACST to inform policy formulation for the growth of the cultural industry had noted the dual potential of culture to create wealth and identity in a globalized world, and the kind of threats confronting culture and how to address them.³³ They also underscored the importance of promoting and maintaining traditional ethos, as clearly stated in the following passage in one of the reports:

In a globalising and homogenising world, local identity is increasingly facing threats. The maintenance and development of local cultural distinctiveness is important both economically and socially. In a world where boundaries are fast disappearing, what is unique, special and local, gains greater currency in creating a sense of place and pride.

Furthermore, locally distinctive cultural products are increasingly seen as desirable.³⁴

Up until 1998, government policy towards crafts was mainly driven by community development objectives and the promotion of culture as heritage, with craft development mostly sponsored through grants. The DACST reports marked the beginning of a policy transition on culture from a narrow public-funding dependent interest to a broader field encompassing more activities with commercial value. They pioneered the recognition of

³¹ This is a fall-out from the notion that fine art is the higher end of creativity while craft is inferior. Historically, better opportunities were available to white men, and it was only in the age of affirmative action and retrenchment that white males began to enter the craft sector in increased numbers.

³² O’meara 2004 *supra*.

³³ DACST 1998a *supra* and DACST 1998b *supra*.

³⁴ DACST 1998a *ibid* 13.

the economic potential of cultural activities beyond ‘arts for art’s sake’.³⁵ More importantly, the crafts sector was named among the four vital sectors for implementing and growing the South African creative economy.³⁶ The reports affirmed that the sector has the potential to compete internationally, ‘create employment and offer opportunities for rural and urban job creation’.³⁷ It is predominantly rural-based but extends to urban settings; has a high percentage of women particularly black women; has significant positive social and economic spin-offs and serve as inputs into other sectors, such as tourism, fashion and design.³⁸ This makes the sector particularly important for disadvantaged and marginalized people, such as youths and women. Craft development has since remained on the front roll of government’s plans for the creative economy.³⁹

3.2.2 Nature, Significance and Current Status of Arts and Crafts

3.2.2.1 Significance and Nature

One of the difficulties in assessing the state of the tradition-based arts and crafts sector in the two study countries is the dearth of quality data especially for Nigeria. Therefore, the actual potential of the sector remains unclear. However, the government of South Africa has made significant efforts to provide data on the sector to guide policy.⁴⁰ In contrast,

³⁵ Joffe & Newton 2007 supra 2.

³⁶ DACST 1998a supra; DACST 1998b supra.

³⁷ Alongside the music, publishing and film sectors. See DACST 1998a ibid 4; DACST 1998b ibid 1.

³⁸ Ibid. Newer studies corroborate these findings of the DACST studies as contained in the reports. See Kaiser Associates ‘The Scope of the Craft Industry in Cape Town, First Paper (2005) 1 available at https://www.westerncape.gov.za/other/2005/11/final_first_paper_craft.pdf, accessed on 1 March 2021; CM Rogerson and JM Rogerson ‘Craft routes for developing craft business in South Africa: is it a good practice or limited policy option?’ (2011) 5(30) *AJBM* 11736-11748.

³⁹ See also Joffe & Newton 2007 supra 40-41.

⁴⁰ Formerly, the following departments were at the forefront of these efforts: Department of Sports, Arts, Culture and Recreation (DSACR); DTI; and DACST. New departments have emerged from a 2019 major reconfiguration now spearheading these efforts, including the following: Department of Sports, Arts and Culture (DSAC); Department of Trade, Industry and Competition (DTIC). See South African Government 2019 supra.

there is lack of sufficient exploratory studies geared towards designing a coherent policy for the development of the Nigerian creative/cultural sector, much more for arts and crafts.⁴¹ The National Council for Arts and Culture (NCNC) - which is assigned to coordinate, develop and promote Nigeria's 'living arts and culture'⁴² and to ensure the preservation and promotion of unique crafts and other TCEs -⁴³ appears to have failed to articulate a clear policy on its mandate.⁴⁴

A logical starting point for examining the nature of the industry in both countries is their policy articulation of the creative industry/economy concept and the place of tradition-based arts and crafts within the economy, starting with South Africa.

South Africa adopts the DCMS definition of the creative economy and uses the term 'cultural industry' to refer to different types of cultural expressions embedded with symbolic meaning. This follows UNESCO's definition of 'cultural industry'⁴⁵ as consisting of goods whose primary economic value is derived from their cultural or symbolic value.⁴⁶ This is more evident in one of the DACST reports which does not only uses the term 'cultural industry', but also emphasises its broader context as 'cultural activities which all have commercial organisation as their prime motivating force'.⁴⁷ Craft is also defined to demonstrate the convergence syndrome which presents craft as

⁴¹ IE Okonkwo 'The product categories, challenges and prospects of handicrafts production in Nigeria' (2017) 3(5) *IAJAH* 133–157. The only significant study is the Lagos mapping project. See British Council 2013 *supra*.

⁴² S3 National Council for Arts and Culture Act Cap N25 LFN 2004.

⁴³ <http://www.ncac.gov.ng>, accessed on 1 March 2021.

⁴⁴ This study did not find any such policy in existence.

⁴⁵ As discussed in chapter one.

⁴⁶ O'Conner 1999 *supra*. See also 2.2.3 FN 49 defining of cultural goods.

⁴⁷ DACST 1998 *supra* 4.

one with handicraft and overlapping with art.⁴⁸ Yet a clear distinction between craft and visual art is perceivable.

The DTI defines craft as ‘the creation and production of a broad range of utilitarian and decorative items produced on a small scale with hand processes being a significant part of the value-added content’.⁴⁹ It identifies with the five-item broad categorisation of crafts devised by the DACST which comprises traditional arts, designer goods, craftarts, functional wares and souvenirs,⁵⁰ and which can further be grouped under traditional crafts and contemporary versions. In a manner that is reminiscent of the arts and crafts convergence from the traditionalist perspective, the DACST defines ‘traditional art’ as constituting ‘culturally specific products, whose meaning and significance is generated and shared by members of a specific community, e.g., clay beer pots in KwaZulu-Natal’; while designer goods are the result ‘of the deliberate adaptation of traditional art to satisfy the tastes of the high-income market and are often decorative in nature’. It notes that ‘craftart’ overlaps significantly with ‘traditional art’ and refers to products that are produced entirely by hand, by skilled producers but which are not considered ‘fine art’.⁵¹ Clearly, in determining what constitutes crafts in South Africa, emphasis is on the production process and use; these works are crafts because they are predominantly hand-made, useful and one-off productions.⁵² At least, they converge with traditional crafts at some point.

⁴⁸ As discussed in chapter one. This can be seen in the manner in which the DACST outlines categories of crafts. See DACST 1998a supra 32; DACST 1998b supra 9.

⁴⁹ Joffe & Newton 2007 supra 34-35 and Kaiser Associates 2005 supra; both citing ACTAG (1994) *Final Report Arts and Culture Task Group*, and also confirming the overlap between craft and visual art. Like the DACST, the DTI has also been scrapped following the major reconfiguration and replaced by DTIC. See South African Government 2019 supra.

⁵⁰ DACST 1998a supra 5; DACST 1998b supra 8.

⁵¹ DACST 1998a supra 32.

⁵² Ibid.

Nigeria also adopts the DCMS definition of the creative economy and uses the term ‘cultural industry’.⁵³ However, there is no clear baseline on what constitutes ‘craft’ even from the NCAC. As such, what constitutes craft or even tradition-based arts and crafts remain unclear. However, one can decipher a distinction being made in literature between arts and crafts, but with indisputable overlaps considering the hand method of production as a common attribute. This distinct and overlapping nature can be seen in the definition of arts as ‘involving the use of one’s imagination to ‘express ideas and feelings’ and crafts as ‘an activity involving a special skill at making things with your hands’.⁵⁴ Ultimately, tradition-based arts in Nigeria are theoretically distinct from but also significantly overlapping with traditional crafts.

According to reports, the creative industry in South Africa is a mix of big and small-time operatives, with the former found mainly in film, music, publishing and media where formal, semi-formal and informal business structures co-exist. The crafts community in both countries is diffuse, loosely organised and typically consists of self-employed small-scale artisans in rural and urban settings (including youths) operating informally,⁵⁵ with prevalence of sole proprietors fulfilling a number of multitasking roles: as producer, promoter and retailer.⁵⁶ This comes with much of the constraints of small-size, including access to market. Also, a significant portion of the enterprises operate informally and on a ‘survivalist’ status, opting for crafts mainly due to lack of other

⁵³ British Council 2013 supra 10.

⁵⁴ MA Muhammed ‘Mass employment generation: potentials of the arts and crafts sector’ in MM Maidugu and B Ekanem (eds) *Arts and Crafts in Nation-Building Proceedings from the African Arts and Crafts (AFAC) Expo’s Investment Forum (2008-2014)* (dna) 2; Wehmeier et al 2006 supra 341.

⁵⁵ J Thomasian ‘Arts and the Economy: Using art and Culture to Stimulate State Economic Development’ (2009) 8; See DACST1998a supra 7; DACST 1998b supra; Kaiser Associates 2005 supra; AO Abisuga-Onyekunle and IR Fillis ‘The role of handicraft micro-enterprises as a catalyst for youth employment’ (2017) 10(1) *CIJ* 59-74; Okonkwo 2017 supra.

⁵⁶ CM Rogerson ‘Tracking: SMME research in South Africa’s priority sectors’ (2008) 11(1) *SAJEMSNS*. 54-68.

means of survival and barely coping.⁵⁷ The above characteristics naturally affect the nature of governance in the sector. Nevertheless, some degree of semi-formality and community exists in studios and workshops where artists commonly work.⁵⁸ The typical implication of the small-scale and diverse nature of the craft sector is increased difficulty in establishing and sustaining industry associations for greater collaboration, while the entities mainly lack the capacity to act individually.⁵⁹ The sector is largely a concentration of craft production and marketing enterprises in urbanised provinces like KwaZulu-Natal, the Western Cape and Gauteng in South Africa,⁶⁰ and also in other less urbanised provinces like Mpumalanga. Generally, craft markets are more clustered in high tourist regions.⁶¹

Like South Africa, the Nigerian craft community is diffused and widely dispersed throughout the country, with high concentrations in urban areas. Cities like Abuja, the administrative capital and Lagos, the commercial capital, boasts of large markets for arts and crafts.⁶² Adewopo, et al, note that there is the tendency for craft activities and crafters to cluster and form communities with semblances of communal organisational structures in Nigeria. While they attribute the relatively effective organisational infrastructure in one of the clusters of their study mainly to its matriarchal traditions of managing and preserving the knowhow, their study corroborates other findings that organisational setups in similar clusters are usually ineffective.⁶³ The determining factor of the success of the cluster as established by Adewopo, et al, is its organic development based on deep-

⁵⁷ DACST 1998b supra. See also Rogerson & Rogersons supra 11741; Makhitha 2016 supra.

⁵⁸ AMERU & CAJ supra 39.

⁵⁹ Ibid.

⁶⁰ Ibid 35-39.

⁶¹ T Connor and LL Nawa *Rural Cultural Policy in South Africa: Analysis Parameters and Definitions* (2017); ibid 29.

⁶² See 4.4.

⁶³ Adewopo et al 2014 supra and Okonkwo 2017 supra 146.

rooted communal traditions and customs as opposed to *ad hoc* artificially created clusters based strictly on exigencies such as market access.⁶⁴

The demographics of the craft sector in both countries are certainly similar except for the racial character of distribution in South Africa's case. Demographics help in understanding the social implications and significance of what the numbers depict. It would appear that the craft sector is strongly gendered with more women engaged in crafts production than men, although as would be seen shortly, this pattern varies for specific craftworks. The background behind this gendered nature is not identical for both countries. While issues like low entry barriers and flexibility of work schedules are common motivations for women engaging in craft production in both countries, and indeed generally, marginalisation and lack of employment opportunities as fallout of the apartheid regime make South African black women even more drawn to crafts.⁶⁵

The tradition-based arts and crafts sector has high economic and social significance to both countries. It serves as a source of livelihood for many and contributes to economic development, in some cases in South Africa contributing a total of 35 percent to total household income.⁶⁶ It has been noted that it creates employment even 'for the most economically disadvantaged people in South African society, particularly rural women and youths.'⁶⁷ As at 2013, it was contributing about R11 billion annually to

⁶⁴ This is further discussed below.

⁶⁵ DACST 1998b *supra* 2-3. See also DO Oriakhogba 'Empowering rural women crafters in Kwazulu-Natal: the dynamics of intellectual property, traditional cultural expressions, innovation and social entrepreneurship' (2020) 137(1) *SALJ* 109-145.

⁶⁶ A Taruvunga et al 'The nexus of indigenous knowledge (IK) based crafts and rural women's welfare at household level: Evidence from rural South Africa' (2019) 6(3) *Journal of Advanced Agricultural Technologies* 231-235 (232), citing YO Adam and CM Shackleton 'Distribution and use of cash income from basket and mat crafting: implications for rural livelihoods in the Eastern Cape, South Africa' (2016) 25(3) *FT&L* 1-13.

⁶⁷ Abisuga-Onyekunle & Fillis 2017 *supra* 1; Makhitha 2016 *supra*; Abisuga 2021 *supra*, noting that crafters in South Africa are largely black middle-aged women operating at subsistence levels.

the GDP and employing approximately 38 000 people.⁶⁸ The benefits from the craft sector have much impact in the political and socio-cultural context in which the country has developed. Given South Africa's historical background, craft is seen as an avenue to deliver on political promises and government's responsibility to the people to create opportunities for a better life.⁶⁹

The significance of South Africa's craft sector to the growth of the creative economy is not only linked to its contribution from income derived directly from craft activities. It also provides stimulus to other sectors to boost their growth and cumulatively the growth of the creative economy. Several programs have been linked with crafts development as a strategy for their own development, including tourism, sports, designs (and interior décor), fashion and other service-oriented sectors.⁷⁰ This leads to the question of the potential market for traditional arts and crafts.

Primarily, the global market is huge but requires capacity to exploit. The market potential of South Africa's arts and crafts has also benefitted from demand push factors like consumer taste and cultural tourism that has engendered a constantly expanding global market for arts and crafts.⁷¹ The rise in local interest in South African craft [which] is also attributed to a general trend towards African styles allows the market for crafts to expand in sync with the growth of these other sectors.

⁶⁸ Arts and Culture: Pocket Guide to South Africa 2012/2013 available at <https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/pocketguide/2012/04%20Arts%20and%20Culture.pdf>, accessed on 1 March 2021.

⁶⁹ J Gaylard 'The craft industry in South Africa a review of ten years of democracy' (2004) 37(4) AA 26-29 (26), citing the African National Congress (ANC) slogan.

⁷⁰ AMERU & CAJ *supra* 15.

⁷¹ The 2018 UNCTAD Report shows a significant increase from the figure on global trade in crafts and corresponding increase in the demand or import by developed countries.

Nigeria's craft sector is also vital to the country and the creative economy. But it lacks some of the supportive factors found in South Africa.⁷² A number of factors hinder the development of the tourism sector, including insecurity and poor governance,⁷³ while government efforts to develop the sector are anything but coherent. Nonetheless, the global market remains open for Nigerian traditional works if proper measures to overcome market barriers are implemented.

An important market booster for tradition-based arts and crafts generally is the possibility of market differentiation. The existence of formal, semi-formal and informal marketing channels ranging from boutiques and shops,⁷⁴ galleries, and museums to online platforms, provides multiple windows of access to markets in both wholesales and retails from low-end to high-end.⁷⁵ Market potential of tradition-based arts and crafts also exists in the wide range of craft commodities, including basic functional items, gift items, souvenirs, collectibles or craft art.⁷⁶ Thus, tradition-based arts and crafts remain valuable in boosting both the formal and informal economy if properly managed.

3.2.2.2 Marketing challenges

Given the promising market viability of the arts and crafts sector in the two study countries, one would expect a more robust performance in the global market. Instead, Nigeria and South Africa remain marginal players,⁷⁷ with South Africa contributing less

⁷² J Buhari 'Art can drive the Nigerian economy' (2015) 5(15) *Journal of Economics and Sustainable Development* 107-112. Though this view is with reference to Nigeria, it is a universal truth.

⁷³ Developed countries often caution their citizens against visiting Nigeria. See <https://www.gov.uk/foreign-travel-advice/nigeria>, accessed on 1 March 2021.

⁷⁴ KM Makhitha 'Challenges affecting small craft producer business growth and survival in South Africa' (2017) 11(3) *JBRMR* 1-12.

⁷⁵ Kaiser Associates 2005 *supra*.

⁷⁶ *Ibid i*.

⁷⁷ UNCTAD 2018 *supra*.

than 1 percent to the global trade in crafts;⁷⁸ and Nigeria, even without statistics, not expected to fare better all things considered. One of the constraints, as Gaylard aptly suggested, is ‘the absence of any meaningful interface between producers and marketers’.⁷⁹ He underscores the concerns of this study for the arts and crafts sector in observing as follows:

This [absence of proper market coordination] is seen in both the inability of the majority of craft producers to adapt their works, modes of organization, and production to market demands and opportunities, and the fact that the majority of craft producers struggle to eke out a living far removed – both geographically and conceptually – from the real or potential markets. The poor performance of the sector has been compounded by the gradual fragmentation and loss, in the course of the twentieth century, of the cultural traditions and practices.⁸⁰

The disconnection between producers and the market takes different forms: difficulty in sourcing raw materials, poor quality of end products, lack of co-ordination along the entire value chain which is predominantly informal in nature; lack of market intelligence on the part of producers and lack of adequate training and skills development;⁸¹ exploitation by intermediaries such as galleries and unscrupulous middlemen;⁸² a tendency to focus on supply efforts more than demand;⁸³ and lack of research and development.⁸⁴ It has been suggested that producers in South Africa should capitalise on the opportunities available in the market, especially the craft retail market, by applying

⁷⁸ Kaiser Associates 2005 supra 12.

⁷⁹ Gaylard 2004 supra 27.

⁸⁰ Ibid.

⁸¹ White Paper 2017 supra 23.

⁸² Makhitha 2017 supra.

⁸³ Kaiser Associates 2005 supra; OM Yakubu ‘Arts, crafts and Indigenous industries in Nigeria’ (2002) 4(1) *JCS* 215-234 (145).

⁸⁴ AMERU & CAJ supra 39.

appropriate marketing strategies to boost their competitiveness.⁸⁵ Branding and marketing as important strategies were found wanting even in regions with potential for cultural resources as ‘a driver of economic and social development’.⁸⁶

The Nigerian sector faces the additional constraint of lack of adequate government support at all stages from production to consumption. Nothing underscores this more than the near neglect of the sector in national development plans. It has been observed in Nigeria’s case that capacity building programs and technical support are minimal for a sector that requires updated skills in and outside production, especially when it comes to meeting quality standards and consumer protection requirements.⁸⁷ Yakubu notes that the market for Nigerian crafts is largely the US and EU, and that these countries insist on specific health and environmental standards for the products which are difficult for the crafters to comply with individually.⁸⁸ Moreover, unlike South Africa, fairtrade practices are not well developed in Nigeria.⁸⁹ Like South Africa, the potential for expansion of the Nigerian export market remains weak due to the inability of operators to afford basic market promotion on their own.⁹⁰

Generally, craft producers have failed to strategically exploit the potential for market differentiation. Makhitha decries such lack of effort noting that craft producers ‘lack a clearly defined target market and sell to every customer that comes along’.⁹¹ It has been asserted that while craft producers in South Africa brand their products of higher quality and offer different product ranges as a way of creating advantages for them

⁸⁵ KM Makhitha ‘Supply chain practices and challenges in the craft industry in Gauteng South Africa’ (2015) 31(6) *JABR* 1209-2224.

⁸⁶ Connor & Nawa 2017 *supra* 40.

⁸⁷ Yakubu 2002 *supra* 145.

⁸⁸ *Ibid* 145.

⁸⁹ Okonkwo 2017 *supra*.

⁹⁰ *Ibid*.

⁹¹ Makhitha 2016 *supra*.

through product differentiation, this could be counterproductive since they are small and lack the resources needed to produce different ranges of products. Thus, they should focus on a limited product range for a specific and defined target market. Product differentiation has also been recommended to avoid the problem of homogeneity in the Nigerian and South African craft sector. In the case of South Africa, it has been further suggested that given the increasing consumer taste for cultural content and handmade products, women in Mpumalanga or Kwazulu-Natal provinces could focus on designing ‘products that reflect the culture of those regions to entice’ visiting tourists.⁹² The unique qualities of these products could be the basis for differentiation for high-end markets. And as was seen in chapter one, IPRs are common and effective tools for product differentiation, especially trademarks, the role of which is fully discussed in chapter four.⁹³ But the predominantly small-time crafters in both countries may not be aware of their IPRs, or may lack the capacity to exploit them even if they are aware.⁹⁴ An inspiring example of how to overcome such challenges and successfully differentiate unique cultural crafts for high-end markets is the Coopa Roca Trademark used by Rocinha women belonging to the Coopa Roca cooperative, and specialised in making high fashion fabrics. Rocinha is described as one of the poorest neighbourhoods in Rio de Janeiro, Brazil.⁹⁵ According to Torsen, products bearing Coopa Roca’s trademark have gained international reputation for their high quality workmanship and a unique aesthetic quality which is tied to the use of ‘traditional Brazilian artistic techniques’.⁹⁶

⁹² Ibid 675 and Makhitha 2017 supra 8.

⁹³ See 4.4.2.4 and 4.5.

⁹⁴ Adewopo et al 2014 supra 121; Oriakhogba 2020 supra 165-166 and Okonkwo 2017 supra.

⁹⁵ Torsen 2010 supra.

⁹⁶ Ibid. See also B Pozzo ‘Fashion between inspiration and appropriation’ in RE Cerchie and B Pozzo (eds) *The New Frontier of Fashion Law* (2020) 1-26(17); J Engelen ‘The artisans of Coopa-Roca’ (2012) available at <https://www.dedeceblog.com/2012/10/09/coopa-roca-brazil/>, accessed on 11 November 2021.

Of great significance is the problem of imitation as a bane for the craft sector,⁹⁷ which again implicates IPRs. Generally, the tradition-based arts and crafts sector faces threats from the growing influx of look-alike, low-cost, fully or partly mechanised crafts and decorative products from other countries.⁹⁸ For South African crafters, there is additional threat from immigrants from some other African countries also producing or selling traditional arts and crafts in competition with the South African versions.⁹⁹ But again, effective product differentiation could help resolve such threats. This could be achieved with the aid of schemes that use logos to differentiate the items upon which they are fixed from other similar ones. Such a scheme could help to differentiate South African tradition-based arts and crafts from the rest and certify them as ‘authentic South African’. The Alaska State Native Art Identification Scheme established in 1961¹⁰⁰ is one of such examples.¹⁰¹ The Silver Hand logo created by the State government under the scheme certifies that the items on which they are fixed are authentic native handicrafts from Alaska, while the process via which permission to use the logo is obtained ensures that only Native Alaskans are granted permission.¹⁰² Thus, the seal indicates that the item on which it appears is created by hand in Alaska by an individual Alaska Native artist.¹⁰³

⁹⁷ Adewopo et al 2014 supra.

⁹⁸ Joffe & Newton 2007 supra 39.

⁹⁹ AMERU & CAJ supra; Connor & Nawa 2017 supra 48.

¹⁰⁰ See the Alaskan Native Art Identification Seals Act. See also E Moore ‘Authenticating the Alaska Native art, craft and body’ (2009) 1(2) *JMC* 197–220 (200); D Zografos *Intellectual Property and Traditional Cultural Expressions* (2010) 113.

¹⁰¹ The fate of the scheme remains shaky following the closing down of the Alaska State Council on Art (ASCA) that hitherto managed the logo. C Bieri ‘Crowd gathers in Anchorage to mark closing of Alaska State Council on the Arts’ *Anchorage Daily News* 17 July 2019 available at <https://www.adn.com/alaska-news/2019/07/16/alaska-state-council-on-the-arts-closes-due-to-budget-veto/>, accessed on March 1 2021.

¹⁰² See also s10(1) of the Alaskan Native Art Identification Seals Act. See Moore 2008 supra 207; Torsen 2010 supra 11-16.

¹⁰³ Federal Trade Commission Consumer Information ‘Buying Alaska Native Art’ available at <https://www.consumer.ftc.gov/articles/buying-alaska-native-art#identifying>, accessed on 11 November 2021; Alaska State Council on Art (ASCA) Silver Hand Program and Permit Application available at

This general background confirms the socio-economic benefits and market viability of the tradition-based arts and crafts in the two study countries which could help in the development of the creative industry in the two study countries, and the potential for individuation of the products based on their background and quality. It also confirms the general threats and underscores the challenges. Attention will now be given to specific types of tradition-based arts and crafts to further contextualise these findings.

3.3 Specific Types of Traditional Handicrafts

The handicraft sector in Nigeria and South Africa comprises a continuum of different types of artefacts,¹⁰⁴ with no standard methodology of classifying them.¹⁰⁵ Crafts are often categorised according to their forms such as jewellery, textile and pottery; or the technique involved in making them, such as, beading and weaving. Either way, there are overlaps, e.g., when a particular skill is applied to produce different crafts forms, as seen in weaving applied in textiles, baskets and mat making. Ultimately, ‘there are almost as many variations on the theme ‘arts and crafts’ as there are crafters and perhaps societies’.¹⁰⁶ Crafts come in assorted materials such as beads, clay, wood, wire and glass.

<https://arts.alaska.gov/silverh>; https://arts.alaska.gov/Media/ArtsCouncil/pdf/silver_hand_application.pdf, accessed on 11 November 2021.

¹⁰⁴ See A Hodge *Nigeria's Traditional Crafts: A Survey* (1982) 117. Hodge's research is however criticised as inaccurate in many aspects. See J Perani 'Nigeria's traditional crafts: a survey by Alison Hodge' (1984) 17(4) *African Art* 86-88. The bottom-line is that there is lack of accurate data on the exact size of the sector.

¹⁰⁵ Evans, an art blogger and a trained artist, classifies textiles and clothes under African art on her website, 'Contemporary African Art'; whereas some other authorities consider textiles and cloth under crafts. See B Evans 'Contemporary African art' available at <https://www.contemporary-african-art.com/african-textiles.html>, accessed on 1 March 2021; MM Maidugu et al *Nigerian Crafts and Designs: Limitless Investment Opportunities* vol. 1 (2009).

¹⁰⁶ See Ibid 1-7 and B Ekanem 'Finishing, packaging and presentation of Nigeria's cultural products in a global village' in MM Maidugu and EO Ben-Iheanacho (ed) *A Compendium of NAFEST Colloquium 2010-2011* (2012) 21 (27).

The lack of coherent scholarship on the classification of crafts also fails to provide a standard model of classifying traditional crafts.¹⁰⁷ Rather than contend with this unclear terrain, a few examples of standard craft forms in South Africa and Nigeria are selected on the basis of their significance, and examined to firmly establish the imperatives for protection and the kind of protection needed.

3.3.1 Pottery

Pottery is of great antiquity in both Nigeria and South Africa with largely similar attributes.¹⁰⁸ In one of its catalogues, the NCNC lists pottery as among the most significant craft in Nigeria, in terms of market viability.¹⁰⁹ The antiquity of the art of pottery in Nigeria can be inferred from the famed terracotta crafts of the *Nok* culture. Traditional pottery is one of the oldest forms of craftsmanship still practiced in most parts of Nigeria with little variation in the techniques used in the past.¹¹⁰ It is therefore not fortuitous that some of the regions associated with the ancient practice have evolved into important pottery making communities.¹¹¹

Traditional pottery is of high esteem in the handicraft setting of Nigeria and South Africa because of the many economic, social and cultural values it represents. Pottery

¹⁰⁷ In its maiden Nigerian crafts catalogue, the NCAC lists the range of crafts rather haphazardly but confirms that it is vast and inexhaustible. The criteria for listing is crafts that present opportunities for investment. The leading ones are textiles, jewellery, leather, pottery and furniture. However, the catalogue makes no distinction between traditional and contemporary crafts. See Maidugu *ibid*; Ekanem 2012 *supra*.

¹⁰⁸ E Okunna 'Living through two pottery traditions and the story of an icon: Ladi Kwali' (2012) 1 *M-JAS* 1-10.

¹⁰⁹ Maidugu 2009 *supra*.

¹¹⁰ Vanguard 'Art of traditional pottery in Nigeria' *Vanguard* 7 July 2011 available at <https://www.vanguardngr.com/2011/07/art-of-traditional-pottery-in-nigeria/>, accessed on 1 March 2021. There is discrepancy in existing literature regarding the exact timelines, but the existence of pottery is generally traced to prehistoric times.

¹¹¹ As seen in chapter three. See also O Adeboye 'Ilorin: home of traditional pottery' *The Nation* 8 October 2014 available at <https://thenationonlineng.net/ilorin-home-of-traditional-pottery-2/>, accessed on 1 March 2021.

items are produced for household use, decoration and religious purposes. As such, they converge as both arts and crafts.¹¹² As an industry, many of the conditions that make it necessary to promote and protect them apply.

The unique processes and place-based materials that enhance the inimitability of crafts resonate strongly with pottery. These include the use of locally sourced materials such as clay, and use of special, mainly manual production methods which may differ from one community to another as inspired by the cultural and ecological backgrounds of the makers.¹¹³ As such, the end products remain distinctive in shapes and patterns, and distinguishable from similar products of different origins. Thus, a piece of Zulu pottery from South Africa is quite distinct from a similar piece from the Dada community, a community of predominantly women potters located in Ilorin, Kwara State of Nigeria who are renowned for their cooking pots.¹¹⁴ The mainly manual process of production and use of special materials and skills make pottery a good item for differential market and product singularity through trademark, with enhanced potential for multi-targeted markets targeting the wide range of uses. Ultimately, trademark could help the Zulu crafters boost market, which is generally a major challenge for crafters in Africa.¹¹⁵ As discussed in 4.4.2.4, trademarks are effective marketing strategies, with substantial

¹¹² S Smith 'African pottery in South Africa: life after the village' (2010) available at <http://journalofmoderncraft.com/responses/african-pottery-in-south-africa-life-after-the-village-by-steven-smith>, accessed on 1 March 2021..

¹¹³ Okunna 2012 supra.

¹¹⁴ Similar in terms of their use, such as, a clay pot. O Adebimpe 'Pottery production, an entrepreneurship perspective for job creation and poverty alleviation: a case study of Dada pottery, Okelele, Ilorin, Kwara State, Nigeria' (2015) 6(2) *Journal of Economics and Sustainable Development* 172-178. See O Adeboye 'Ilorin: home of traditional pottery' *The Nation Newspaper* 8 October 2014 available at <https://thenationonlineng.net/ilorin-home-of-traditional-pottery-2/>, accessed on 1 March 2021. 'Dada Potters' is discussed in more details in 3.4.2.1 below.

¹¹⁵ See Adewopo et al 2014 supra; Oriakhogba 2020 supra and Ola supra.

evidence of their successful use globally to create niche (high-end) markets for tradition-based craft works.¹¹⁶

Like most craft forms, trade is important in the promotion and preservation of pottery. Smith hints of a symbiotic relationship between trade and pottery preservation by suggesting that increased trade in pottery by Europeans ensured the survival of pottery because it allowed potters to develop and hone their skills and motivated more people in the community to learn the craft.¹¹⁷ Therefore, a vibrant market could support preservation of the knowledge of pottery. However, as explained in chapter two, the positivity of this symbiosis will depend on the extent to which market trends and knowhow remain at par such that markets do not significantly precipitate changes to the knowhow.

The trend of pottery making in South Africa and Nigeria has witnessed some changes in response to growing interest in pottery as an enterprise. However, these changes are more in relation to shape, design and function, and not necessarily in the production process.¹¹⁸ Traditional uses of pottery mainly for household, ceremonial and religious purposes, have gradually been replaced with alternative brands of household wares or displaced by the introduction of modern ideologies and preferences thus threatening the market for traditional handicrafts. Nevertheless, a notable change in pottery uses is their transformation into decorative items and collectibles for which Zulu

¹¹⁶ Indeed, as seen in 4.4.2.1. trademarks - particularly communal trademarks - are effective strategies in resolving the concerns and imperatives for tradition-based arts as crafts in the market context, including preservation of the knowledge. The imperatives are discussed in chapter four in determining the appropriate IPRs in the broad context of safeguarding tradition-based arts and crafts in the market.

¹¹⁷ Smith *supra* 2010.

¹¹⁸ KD Fowler 'Production in the Lower Thukela Basin, KwaZulu-Natal, South Africa' (2008) 20(2) *SAH* 477-511(501), noting that in the Lower Thukela Basin in South Africa, it is still the matriarchal responsibility to pass down the knowledge but the ritual connected with this has changed.

pots are renowned, consequently exemplifying revitalisation and opportunity for high-end market.¹¹⁹

There is no doubt that Zulu pot (*izinkamba*) as a concept has experienced changes over the years in response to market preferences. While the forms have remained close to their ancient versions distinguished by their blackened hue, an influential tourist market has propelled diversification of form from the standard traditional sizes to miniaturised versions for long travel purposes. Ultimately, design and style depend on the target markets and market pressure has engendered innovation into the traditional forms.¹²⁰ As Fowler noted, ‘with a continued preference for blackened beer vessels, different consumer groups are redefining the modern Zulu potting tradition’.¹²¹ The scholar further notes that well-made tradition-based crafts are considered ‘collectable objects d’art’, while the traditional ‘beer-making, serving and drinking vessels’ are also being made ‘for important social and ritual occasions’.¹²² This, according to the writer, indicates ‘that modern Zulu pottery making has developed into a complex system in which production is designed to accommodate both local and regional consumer demands’.¹²³ It could therefore be posited that Zulu pot has high market demand but its traditional ethos could be vulnerable to market trends, a concern which reinforces the idea of motivating preservation by linking the unique qualities of the pots and its market value, with the unique quality serving as the competitive edge as explained in chapter two. This underscores the imperative of preservation which could be achieved by capitalising on and exploiting the traditional qualities of the pots - the source of their uniqueness and

¹¹⁹ Fowler 2008 supra.

¹²⁰ See *ibid.*

¹²¹ *Ibid* 502.

¹²² *Ibid.*

¹²³ Fowler 2008 supra 501-502.

appeal to high-end market - as the basis for market differentiation and promotion. Typically, Zulu pottery has significant socio-cultural value in South Africa. It remains fundamental to Zulu ancestral ‘worship’ and ceremonies like weddings.¹²⁴ It is also dominated by women mainly operating at subsistence level in their communities to support their household.¹²⁵ Thus, not only is preservation imperative, but also the means of achieving preservation is validated by the social justice it will guarantee to the producers and their communities. However, the means of achieving preservation is beyond the capacity of the women.

Zulu pots exhibit a high propensity for market differentiation or product designation due to their reputation as ‘high-end handicraft collectibles’.¹²⁶ Indeed, Zulu pots can be demarcated into two main grades: the high-end pots earmarked for galleries and collectors,¹²⁷ and the rest which targets anyone from locals to tourists who is unwilling to patronise the high-end versions. One implication of such market stratification is that market dynamics may affect the respective markets differently. For instance, the market for lower grade pots typically faces competition from mass-produced studio pots and also from white South Africans’ ‘quasi-African’ style ceramics.¹²⁸ But such competition has little impact on the high-end market which does not necessarily depend on price. In both scenarios, the creation of identity is necessary to distinguish the high-end brands and prevent consumer confusion. Identification appears to be an age-old practice of Zulu potters who generally leave their mark on their pots. Such marks remove

¹²⁴ Smith 2010 *supra*.

¹²⁵ Fowler 2008 *supra*, referring to an unsubstantiated report of only one case of a man known to have engaged in pottery making in South Africa.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* 501 notes that ‘Zulu pottery sold at galleries in the United States and the United Kingdom can fetch \$200–500 USD a pot’.

¹²⁸ *Ibid*.

the pots from the sphere of anonymity. Zulu potters also distinguish their pots by decorative patterns which vary according to family.¹²⁹ This aligns with the principles of trademark generally and communal trademarks in particular which are fully discussed in 4.5.1. Like the age-long strategy of Zulu potters, communal trademarks allow group and individual identifications to co-exist.¹³⁰ With a more formalised approach to the practice through a communal trademark system, Zulu potters may be able to better distinguish their products and capture their real and potential market value.

Fowler's elaborate account of the processes involved in Zulu pottery making suggests that collectiveness is not alien to Zulu potters and the community could qualify as a sort of commons. While production is mainly an individual task, certain activities like sourcing for raw materials is the collective responsibility of the family. Production is also organised 'at the multiple-household level' where individual potters from different homesteads gather at a single homestead to make pottery with several such spaces operating at once.¹³¹ Marketing of the products follows the same pattern occasionally assisted by cooperatives.¹³² Thus, marketing and distribution can be organised at the household and multiple-household levels through the cooperatives serving as a platform for the launching of communal trademarks for marketing purposes.¹³³

¹²⁹ E.g., the Nala family have been able to give their pots a distinctive quality by incorporating a unique design style in her pots. See Atelier55 'Ceramics: the Nala Potting Dynasty' (2012) available at <https://www.atelier55design.com/ceramics-south-africa-the-nala-potting-dynasty/>, accessed on 1 March 2022; E Himmelberger 'Carrying on tradition through clay: Jabulile Nala' (2018) *Cultural Survival Quarterly Magazine* <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/carrying-tradition-through-clay-jabulile-nala>, accessed on 1 March 2021

¹³⁰ One such example is the Nala family whose pots have become renowned through the many local and international awards bestowed on their matron Nesta Nala. Following her footsteps, the succeeding generation of females also engage in pot making with their own particular style and the common tradition of signing their work among Zulu potters. See *ibid*.

¹³¹ Fowler 2008 *supra* 500.

¹³² An example of such an institution is the African Art Centre in Durban and cooperatives.

¹³³ Such as the potters in the 'Magwaza tribal authority' who 'formed a kind of co-operative to handle pricing and distribution'. See Fowler 2008 *supra* 500.

The pottery scenario in Nigeria is much similar to South Africa's. Traditional pottery making is practised all over Nigeria and mostly by women. Nevertheless, some communities are more renowned for their pots than the rest. Procedures differ across the country such that the geographical origins of the pots can easily be identified based on their unique forms and designs. Diversification and innovations occur within the sector with the production of items for new uses targeting new markets. For instance, Dada potters have been compelled to add flower pots to their repertoire in order to remain viable. The need for preservation, product differentiation and protection associated with the Zulu potters and their trade also applies to Dada pots as would be seen further below. As would be seen in the case of Dada potters, competition is mainly from pottery studios producing ceramics of different types. But this is limited since traditional pottery and studio pottery are quite distinct in style and, to a large extent, function. Pottery for decoration is a market stream explored mostly by pottery studios engaged in the production of contemporary pottery, while the mainstream of traditional potters remains closely tied to their traditional shapes and forms. The replacement of traditional clay pots with modern wares is a serious threat for the market together with inability to compete in quality. However, there have been attempts to promote clay pots by highlighting their unique qualities in connection with environmental and health benefits.¹³⁴

3.3.2 Jewelleries and Ornamented Items

Traditional jewelleries is another category of crafts of great significance to Nigeria and South Africa mainly tied to its function as ornaments for fashion and the embellishment

¹³⁴ A O'Hear 'Pottery making in Ilorin: a study of the decorated water cooler' (1986) 56(2) *AJIAI* 175-192.

of traditional costumes for assorted uses.¹³⁵ As such, traditional jewellerys are primarily luxury items. This quality instantly separates them from crafts for basic household uses, and makes traditional jewellerys important in every community, despite certain religious beliefs condemning the use of jewellerys.¹³⁶ Traditional jewellerys are of many types and shapes, and are made from a variety of materials, including metals, precious stones, and glass.¹³⁷ Some communities are renowned for particular types of jewellerys as part of their cultural heritage, while some ethnic groups have followed their ancient traditions and their communities have naturally evolved as famous clusters for their kind of jewellerys, e.g., the Bida community of the Nupe tribe in Niger State, Nigeria, who are renowned for their glass beads.¹³⁸

Like other African countries,¹³⁹ beads constitute a significant component of Nigerian and South African cultural attires and costumes.¹⁴⁰ In South Africa, the Ndebele and Zulu tribes are known for their beaded jewellerys and beadwork material culture.¹⁴¹ In most African communities, jewellerys represent more than a fanciful item. Beaded jewellerys, for instance, have material and spiritual functions which underscore their

¹³⁵ For instance, coral beads have been a popular culture in Nigeria for many ceremonies as well as a culture or royalty. See AO Ibebabuchi 'Bead making and ornamentation in Nigeria' *Vanguard* June 28 2012 available at <https://www.vanguardngr.com/2012/06/bead-making-and-ornamentation-in-nigeria/>, accessed on 1 March 2021.

¹³⁶ E.g., some Christians condemn the use of jewellerys based on their religious beliefs.

¹³⁷ For types of jewellerys, see AA Nzoivu 'Aesthetics, typology and functionality of beads among the peoples of Nigeria' (2014) 1(4) *TBEJ* 507-511.

¹³⁸ Discussed in 3.4.2.1. For popular types of traditional jewellerys in Nigeria, see *ibid*.

¹³⁹ Existing literature shows that most African countries have this in common. See J Ashe 'Progression of Aesthetic: A Study of Beads and Adornment in Contemporary Krobo Society' (2012); MM Nguru and SM Maina 'Social-cultural impact of bead work in East Africa: the nexus between the Dinka, Samburu & Masaai ethnicities' (2020) 9(7) *IJIR&D* 87-94.

¹⁴⁰ For instance, coral beads remain a popular culture in Nigeria for many ceremonies. It is worn as part of the regalia for royalties. See Ibebabuchi 2012 *supra*. For the various types of traditional jewellerys in Nigeria, see Nzoivu 2014 *supra*.

¹⁴¹ H Adrienne 'The commodification of art: Ndebele women in the stream of change' (2000) *QSM* available at <http://www.sahistory.org.za/article/ndebele>, accessed on 1 March 2021.

socio-cultural significance.¹⁴² They could also have political significance.¹⁴³ Common practices have developed among some African communities regarding the cultural significance of beads one of which is their role as a means of social interaction and communication.¹⁴⁴ According to Nettleton, the opening up of barriers between communities as a result of communication has minimised the differences in the style of beadwork among the different communities in South Africa; nevertheless, enough variations exist in the beads of the two tribes to distinguish one from the other.¹⁴⁵

The importance of traditional jewellery in the global context is mainly tied to their decorative function, but oftentimes they are also valued as collectibles. Thus, there is no gainsaying the fact that traditional jewellery have high economic value and therefore are susceptible to changes in designs due to market pressure, although not so much in form and technique. Generally, jewellery making requires special skills to produce the desired aesthetic features. But unfair competition and threats from counterfeits in the market discourage continued practise of the knowhow and underscore the imperative of protection. This further underscores the imperative to protect the traditional jewellery economy from unfair competition from the counterfeits. Like in the case of pottery, trademarks could be relevant as a strategy in addressing the threats from

¹⁴² For instance, they are used as decorative items to complement dressing; as amulets for protection; to designate social status, such as chieftaincy or royalty, to mention a few. Ibebabuchi 2012 *supra*. Maidens wore beads as their only body adornment until a certain age, while women wore waist-beads under their 'wrappers' to enhance their femininity. See C Achebe *Things Fall Apart* (1958). Beadwork is hereafter referred to as 'beads' unless otherwise indicated.

¹⁴³ A Proctor and S Klopper 'Through the barrel of a bead: the personal and the political in the beadwork of the Eastern Cape' in Emma Bedford (ed) *Ezakwantu: Beadwork from the Eastern Cape* (1993) 56–65, 57.

¹⁴⁴ See M Bhat 'Bead and Beadwork Traditions: A Study of Trade and Cultural Exchanges across the Coast of Gujarat, East Africa and the Red Sea' (2016) available at <http://digitalcommons.unl.edu/tsaconf/965>, accessed on 1 March 2021.

¹⁴⁵ A Nettleton 'Beadwork: inventing "African traditions" in South Africa' (2018) *ArtAfrica* available at <https://artafricamagazine.org/beadwork-inventing-african-traditions-in-south-africa-anitra-nettleton/>, accessed on 1 March 2021.

counterfeits in addition to the merits of trademarks as a potential tool for branding and market differentiation of traditional jewelleryes.

3.3.3 Traditional Textiles

Traditional textiles are important forms of crafts in both economic and socio-cultural contexts.¹⁴⁶ They cover a broad range of cloths produced using different methods to achieve the desired texture and design, with methods and designs varying from one community to another,¹⁴⁷ and their forms mainly determined by custom, religion and environment.¹⁴⁸ Like clothing,¹⁴⁹ traditional textiles mean more than a piece of cloth for personal adornment of the body. As material culture, they are a form of communication and a medium for self-expression; every component of the fabric could communicate meaning, including designs and colours. Usually, communities are identified by their textiles which may sometimes differ in only minor things like colour.¹⁵⁰

In most cases, the surviving textiles have been in practice long enough to form part of the cultural heritage of the communities associated with them, with the knowledge preserved through generational transfer, albeit different from their antique prototypes

¹⁴⁶ Traditional textiles should be distinguished from 'African prints or fabrics'. African prints are mainly machine made, e.g., Wooden, Da Viva.

¹⁴⁷ S Maiwada et al 'Cultural industries and wealth creation: the case of traditional textile industry in Nigeria' (2012) 2(5) *AIJCR* 159 -165 (160), identifies various types of traditional textiles including textiles produced by hand spinning and weaving methods, tie-dye resist methods, garment embroidery, screen printing, hand block printing, and traditional calendaring called 'bugu' in Hausa. See also Kashim 2013 supra 227.

¹⁴⁸ W Kade and R Wielandt (eds) *Islam Art in the 19th Century: Tradition, Innovation, and Eclecticism* (2006).

¹⁴⁹ R Moletsane et al (eds) *Was it Something I wore? Dressing, Identity and Materiality* (2012).

¹⁵⁰ For instance, among the Tivi speaking tribe of Nigeria, the traditional attire is black and white known as 'a'nger'. See RN Gwa 'An evaluation of decorated traditional cloth used in Tiv cultural activities in Benue State, Nigeria' (Unpublished PhD Thesis, Ahmadu Bello University, 2016) 13. A similar cloth of the same horizontal strips but of red and black colour known as 'lli K' Idoma or 'atu', is identified with the Idoma speaking people. See A Akpa 'Institutionalising Idoma cultural heritage through the dress code emblem' (2017) 3(4) *RJHC* S 1.

through evolution.¹⁵¹ Like other forms of crafts, traditional textiles are indisputably both aesthetic and functional. They could qualify as craft with reference to their functional role mostly as clothing,¹⁵² or works of art based on their aesthetic features, or an integration of both.¹⁵³ They also serve as motifs for other creative works.¹⁵⁴ Consequently, traditional textiles have multiple uses and values, which make the threat of unfair competition and extinction more critical.

Nigeria boasts of unique traditional textiles from her diverse ethnic groups, with virtually every ethnic group identified with at least a specific type of textile.¹⁵⁵ Amongst the many techniques of textile production existing in Nigeria, weaving and resist dying appear the most prominent. Some communities have evolved into famous weaving and resist dyeing centres following their ancestral roots.¹⁵⁶ Modalities differ in some respects across communities, particularly in processes and methods, designs, and knowledge transfer. But even within the same setting, woven cloths are distinguished by the kind of equipment or locally sourced materials used,¹⁵⁷ while *adire* is distinguished by the differences in the processes of dyeing across the different regions which help to

¹⁵¹ Ibid.

¹⁵² Kashim 2013 supra. *Aso-Oke*, for instance, has many uses: it is used to make clothes for the women (wrapper), men's wear (agbada) and men's hat (fila) and it is popularly used ceremonies.

¹⁵³ E.g., when they are used for wears which are not only intended for covering the body but also for fashion.

¹⁵⁴ Adewopo et al 2014 supra 113.

¹⁵⁵ See Maiwada et al 2012 supra.

¹⁵⁶ Woven cloths are made in some South-western communities while *akwete* cloth is made in the South East. Centres of traditional textiles production are also found in the Northern part of Nigeria. Nigerian Artist Directory: Some Indigenous Nigerian Arts and Crafts (2011). See also L Aronson 'Weaving in Southern Nigeria' (dna) available at <https://africa.uima.uiowa.edu/topic-essays/show/19?start=0>, accessed on 1 March 2021, who gives graphics of such activities and highlights their nuanced distinctions.

¹⁵⁷ In some societies, cloths woven by men were distinguished by a number of attributes including the kind of loom employed since both genders traditionally used different looms. See O Asakitikpi 'Functions of hand woven textiles among Yoruba women in South-western Nigeria' (2007) 16(1) *NJAS* 101–115.

differentiate and identify the origins of the textiles.¹⁵⁸ Yet traditional textiles could exhibit enough homogeneity as ethnic items which can be collectively exploited across regions through trademark. This creates a unique advantage for traditional textiles which is the possibility for the application of strategies at different levels from community up to national.¹⁵⁹ But typically, the high economic value of Nigerian traditional textiles is a major attraction for counterfeiters, making protection of the goodwill and branding imperative for optimum exploitation of their market value, and further underscoring the potential utility of a well-conceived trademark strategy.¹⁶⁰

The traditional textile landscape in South Africa is equally rich and exotic. Black tribes have their individual wears as an important part of their material culture.¹⁶¹ For some tribes, ornamentation plays a higher role in the production of their attires and beads are a major component of ornamentation. As such, beading is an important part of the design processes that distinguish their traditional attires, and ‘beadwork’ on fabrics is yet another important form of craftsmanship. Beadwork is used as design motifs on apparels, or to produce traditional jewelleryes.

Amongst the different ethnic groups in South Africa, the Zulu and Ndebele tribes are renowned for their colourful beadworks which the Ndebele women complement with their unique geometric designs. The artistic prowess of these two tribes is legendary,

¹⁵⁸ For instance, dyeing is done in large pots in the Yoruba communities of the South West region, with cassava starch as the basic resist material; but in the Northern region, dyeing is done in open dye pits using indigo colour extracted from a local vegetable. See Kashim 2013 *supra*.

¹⁵⁹ The Ethiopian example is a national strategy which applies to specific types of coffees cultivated in the country as a whole and not limited to any region. See Sereke-Brhan 2010 *supra*; Serele-Brhan 2011 *supra*.

¹⁶⁰ This is only one of the measures required to boost competitiveness. There are other challenges that must be addressed for effective branding, such as, poor quality, lack of finance, absence of basic infrastructure like electricity, and poor conceptualisation in designs and methods. See Adewopo et al 2014 *supra*.

¹⁶¹ C Lee-Shay ‘An introduction to South African traditional dress’ *Culture Trip* (2017) available at <https://theculturetrip.com/africa/south-africa/articles/an-introduction-to-south-african-traditional-dress/>, accessed on 1 March 2021.

coupled with a history of bravery and a rich culture. This background enriches the reputation of their works, which have acquired the status of a national identity thus enhancing their value and uniqueness. The beadworks of both tribes have great economic, social, cultural and political values.¹⁶² Women of both tribes make beadwork for a living.¹⁶³ For the Ndebeles, beads adorn clothing as embellishment especially for traditional ceremonies. Additionally, the colourful clothes are a mark of identity for the 'Ndebele culture within the broader world of inter-ethnic politics' and is mostly attributed to their women.¹⁶⁴ Beaded customary clothing is equally associated with Zulu women with distinctive stylistic concepts.¹⁶⁵ These regional stylistic variations in beadwork serve as emblems of the two tribes and therefore have significant economic and great cultural values, while the knowhow itself remains a valuable asset as their heritage.



Fig. one: Image showing the beaded combo of an *Ndebele* woman.¹⁶⁶

¹⁶² Boram-Hays 2005 supra 3.

¹⁶³ See Collison 2017 supra, discussing Esther Mahlangu, a renowned contemporary artist whose works are a reflection of her Ndebele heritage. Her designs adopt the Ndebele stylistic concepts.

¹⁶⁴ South African History Online (SAHO) 'Ndebele' available at <http://www.sahistory.org.za/article/ndebele>, accessed on 1 March 2021.

¹⁶⁵ See Boram-Hays 2005 supra; Oriakhogba 2020 supra.

¹⁶⁶ K La Grange 'Single little elephant craft market: The Ndebele experience' (2015) available at <http://www.mpumalanga.com/blog/little-elephant-craft-market-the-ndebele-experience>, accessed on 1 March 2021.

Mention should also be made of the South African indigo cloth, locally named *shweshwe*. Although of foreign origin, *shweshwe* is currently regarded as part of South Africa's textile tradition and cultural identity, especially among the Xhosa women who are said to have incorporated the concept into their traditional ochre-coloured blankets, and adopted it as part of the costume for royalty before the 1840s.¹⁶⁷ *Shweshwe* is distinguished by an elaborate and expensive traditional method of production which gives the cloth its unique texture and appearance easily distinguished from fake versions.¹⁶⁸ It is instructive that Da Gama, a private company, has appropriated the production techniques by the use of its seal on the fabric as a form of trademark.¹⁶⁹ Thus, Da Gama's *shweshwe* is not only identified by its unique features, but also by its logos. This however does not preclude local producers of *shweshwe* from adopting the same methods of production and also distinguishing their own versions by using identification tools; it only prevents them from signifying that their versions are Da Gama made by unlawfully using the Da Gama logo.¹⁷⁰

3.3.4 Baskets, Mats and Sundry Handicrafts

Besides textiles, weaving is also used to make an assortment of other items which share many of the attributes and concerns of other traditional crafts. A close look at two examples – baskets and mats – suffices to illustrate this point.

¹⁶⁷ C Wilbanks '10 Popular African textiles and fabrics' (2014) *The Moguldom Nation* available at <https://moguldom.com/66437/10-popular-african-textiles-and-fabrics/>, accessed on 1 March 2021. See also Da Gama Textiles available at <http://www.dagama.co.za/>, accessed on 1 March 2021.

¹⁶⁸ B Pheto-Moeti et al 'Perceptions of Seshoeshoe fabric, naming and meanings of motifs on fabric' (2017) 2 *JCS* 24-39.

¹⁶⁹ Ibid.

¹⁷⁰ Da Gama Textiles *supra*.

The trajectory of traditional basketry in South Africa and Nigeria confirms that the knowhow is longstanding and the baskets have similarly evolved from their basic function as containers for holding stuffs to collectibles and decorative items thereby increasing their market potential especially for tourists.¹⁷¹ According to Nettleton, baskets ‘are often favoured by tourists because they are’ easy to transport, and favoured by interior designers because, their natural neutral hue complements ‘a large variety of decorative schemes’.¹⁷² One could also add that traditional baskets fit definitions of authenticity as well as modernity, which makes them appealing to interior designers.

Basket weaving is another vital female dominated craftsmanship in South Africa, although opinion is divided on which gender was originally in charge of making baskets.¹⁷³ There are two major traditional basket types in South Africa, namely: the *ilala* baskets woven from *ilala* palm and the wirework baskets, both largely associated with the Zulus. In the past, *ilala* baskets had significant cultural value within the Zulu society in addition to their basic household uses as they were also used for cultural and religious ceremonies.¹⁷⁴ The shapes, sizes and designs of the baskets all depended on the intended use. Generally, the baskets have maintained their traditional form with changes limited to designs and colour variations which may have distanced them from older versions but, as van Heerden noted, do not completely remove them from the category of ‘traditional’.¹⁷⁵ They have also acquired good reputation over the years. The value attached to the modern forms of *ilala* baskets is reinforced by the fact that the *ilala* palm and recycled

¹⁷¹ Nettleton 2010 supra 60-61.

¹⁷² Ibid 61.

¹⁷³ N Leibhammer ‘Technologies and transformation: baskets, women and change in Twentieth Century Kwazulu-Natal’ in M Arnold and B Schmammann (eds) *Between Union and Liberation: Women Artists in South Africa 1910-1914* ((2016) 111-131 (113-116).

¹⁷⁴ Van Heerden 1996 supra 64.

¹⁷⁵ Ibid 40.

materials from telephone wires used for making them are considered environmental friendly.¹⁷⁶ This makes them attractive to ethically and social capital driven consumer preferences, and good examples for branding.

Nigeria may not have a strong reputation for its traditional baskets but not so with mats. Traditional mat making generally involves weaving with the use of plant-based fibres. The function of mat as a basic household item stems from its perennial use as beddings to provide comfort. But now mats are used for a number of other functional and decorative purposes, including table and seat covering, curtains and burial objects.¹⁷⁷ Mat weaving cuts across ethnic groups in Nigeria who utilise mostly locally sourced materials, creating distinctions according to the materials and the weaving and design technique adopted in the various communities.¹⁷⁸ Though it is largely a non-gendered enterprise, gender trends exist in some communities where mats are mainly produced by women. One of these communities is the Ogotun community known for her high aesthetic quality mats.¹⁷⁹ According to a study on the community's mat making, '[t]he sheer artistic qualities of the mats coupled with their varieties have made' them reputable.¹⁸⁰ The study established that the techniques that give the beautiful effect on the mats have remained largely unchanged and unaffected by technology. It also found that though the weavers work individually, they belong to guilds through which they are able to collectively coordinate some aspects of their activities and interests concerning their trade. Thus, they realise and understand the need to work as a collective. The economic

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ F Ajayi 'Craft industry in Nigeria: Ipetu-Ijesa traditional woven mat craft example' (1990) 58(3-4) *Nigeria Magazine*; F Aig-Imoukhuede *A Handbook of Nigerian Culture*, Department of Culture, Ministry of Information and Culture, Nigeria (1992).

¹⁷⁹ Akinbogun & Ogunduyile 2009 *supra*.

¹⁸⁰ Ibid 219-220.

viability of traditional mat making and its social benefits to the Ogotun community received government support through the selection of the community to benefit from the government's 'Better Life for Rural Women Programme'. Efforts to implement the program were channelled through the guilds and included marketing the mats globally and improving quality to meet international standards, thereby deepening the local and international market for the mats.¹⁸¹ However, Ogotun mats face competition from mats produced using synthetic materials and mechanical means coupled with the fact that traditional mats have been ominously displaced by modern sleeping materials even as competition from synthetic mats adds to the troubles of traditional mats. Still their value as a viable form of craft remains valid.

On the whole, the bane of tradition-based arts and crafts in both countries remains threats of imitation and unfair/unfavourable competition from non-traditional versions from within and outside the countries. Generally, imitation versions of tradition-based arts and crafts capture a substantial part of the potential market forcing producers to abandon their trade or resort to mechanical production methods.¹⁸² Going by examples from other regions,¹⁸³ the survival of tradition-based arts and crafts can be achieved by collectively boosting competitiveness in quality through branding to capture the high-end market not accessible to imitations and cheap knockoffs. These examples establish that trademarks and similar identification schemes have been successfully used by groups and

¹⁸¹ Akinbogun & Ogunduyile 2009 *supra*.

¹⁸² Adewopo et al 2014 *supra*.

¹⁸³ For instance, India has used GIs as a strategy to revive interest in their TK including textiles, and to preserve the knowledge. This was done to stem harmful competition from counterfeits which made the traditional brands unprofitable and the trade unsustainable. K Das 'Socioeconomic Implications of Protecting Geographical Indications in India' (2009) 2 available at <http://ssrn.com/abstract=1587352>, accessed on 1 March 2021; see K Das 'Prospects and challenges of geographical indications in India' (2010) 13 *JWIP* 148-201; TW Dagne 'Harnessing the development potential of geographical indications for traditional knowledge-based agricultural products' (2010) 5(6) *JIP&P* 441-458; D Zografos 'Geographical indications and socio-economic development' (2008).

communities to collectively boost the market potential of their tradition-based arts and crafts.

3.4 Traditional Arts and crafts Spaces and Collectivism/Communalism

Collectivism/communalism is not a new ideology in African communities, and certainly not in Nigeria and South Africa. Traditionally, African communities enjoy a kind of social environment which is captured in the *Ubuntu* philosophy and animated through ‘interdependence, communalism, sensitivity towards others and caring for others’ without necessarily negating the individual.¹⁸⁴ According to Venter, the direction of this philosophy ‘leads to social harmony and cohesion starting at the family and cultural community, circling out to the global community’.¹⁸⁵ If there is one area in the tradition-based arts and crafts arena where communalism/collectivism has strong flavour, it is in their work and market spaces.

‘Spaces’, as contemplated in this study, has a geographical connotation, although some have entered the digital realm. ‘Spaces’ indicates an expedient geographical sphere within which communal approaches can be implemented. Though there appears to be no organised scholarship on the classification of such spaces, four broad categories can be identified with some overlaps. These are markets, community-based clusters, centres, and independent (art/craft) spaces.¹⁸⁶ This section discusses spaces within the tradition-based arts and crafts sector in Nigeria and South Africa with greater emphasis on their affinity with collectiveness and communalism as their underlying philosophy; and as attractive

¹⁸⁴ J Le Roux ‘The concept of “*Ubuntu*”: Africa’s most important contribution to multicultural education?’ (2000) 18(2) *Multicultural Teaching* 43–46(43).

¹⁸⁵ E Venter ‘The notion of ubuntu and communalism in African education discourse’ (2004) 23(2) *Studies in Philosophy and Education* 149–160 (152).

¹⁸⁶ See Fowler 2008 supra 9–10.

and amenable to the use of communal strategies - including communal trademarks - for deriving greater benefits from tradition-based arts and crafts.

3.4.1 Market Places as Craft Spaces

In the economic context of crafts as products, markets as places for trade are vital. Where one sells is as important as what one sells because place could determine success of trade. The term ‘market’ itself can be understood in different contexts. Oftentimes, it means more than just the atypical geographical place for buying and selling. According to the Encyclopaedia Britannica,¹⁸⁷ market is ‘a means by which the exchange of goods and services takes place as a result of buyers and sellers being in contact with one another, either directly or through mediating agents or institutions’. It also means the entire region in which sellers compete with each other for customers. Thus, market could mean a system or a geographical space with the connecting idea being the interplay of supply and demand or buying and selling.¹⁸⁸ While these different notions of ‘market’ are relevant to handicraft trade, some hardly represent the men and women who gather at a particular location to trade their crafts in the hope of eking out a living from their small craft business. Market as used in this section is understood as a physical space where crafters trade their goods, without prejudice to the fact that these spaces may also maintain online presence. This would align with Good’s idea of ‘market place’ as ‘sites of petty commerce’ and the role of the ‘market place’ as a ‘locus of market activity’.¹⁸⁹

¹⁸⁷ Encyclopaedia Britannica available at <https://www.britannica.com/topic/market>, accessed on 1 March 2021.

¹⁸⁸ Ibid.

¹⁸⁹ CM Good ‘Markets in Africa: a review of research themes and the question of market origins’ (1973) 13(52) *Cahiers d’études Africaines* 769-780(771).

From this narrow context, the notion of market as a physical space is what has been termed ‘African indigenous market’ spaces described as ubiquitous structures existing side by side with more modern spaces for selling and buying in African communities. Usually, they are also a place for social interactions, while strong ‘family, friendship or ethnic bonds’ form ‘the basis for social and economic transactions’ depending on the location.¹⁹⁰ The level of communalism would depend on factors like homogeneity of the products and the relationships between the members of the market.

Even in their narrow context, markets differ in nature; they could specialise in specific types of products, or they could be eclectic. They could evolve naturally or be created as part of the municipal responsibility of government or similar authority to promote trade and commerce. It is not uncommon for arts and crafts markets to be strategically located to link tourists and sellers.¹⁹¹ Also, as mentioned earlier with reference to South Africa,¹⁹² the cosmopolitan nature of urban settings provides more advantages for craft endeavours to agglomerate driven by the desire for an easily accessible location for buyers. It is therefore not coincidental that such markets are mainly located in areas of high attraction to visitors.¹⁹³

3.4.1.1 Market spaces in Nigeria

Markets for arts and crafts exist in both rural and urban settings in Nigeria and typically comprise of small-time artisans operating within the informal sector. Besides nuanced

¹⁹⁰ MN Kinyanjui ‘Ubuntu nests and the emergence of an African metropolis’ (2016) 37 *SJTG* 418–431; N Kinyanjui *African Markets and the Utu-Ubuntu Business Model: A Perspective on Economic Informality in Nairobi* (2019) Pt 3.

¹⁹¹ Rogerson & Rogerson *supra*.

¹⁹² See 4.2.2.1.

¹⁹³ UNESCO reports that ‘Most craftspeople sell their products either from their homes, at specialized sales centres and online shops, or through dedicated projects’. See UNESCO *Culture Urban Future: Report on Culture for Sustainable Urban Development* (2016) 74.

differences in their outlook, the markets have much in common in terms of administration and even challenges, in addition to peculiarities tied to their locale. Though the wares are presented as ‘authentic traditional’ arts and crafts from Africa, there is hardly anything to guide the customer as to the authenticity or providence of the products other than the verbal assurances of the marketers.¹⁹⁴ This appears to be common with most arts and crafts markets of similar nature in Africa.¹⁹⁵ Good examples of such markets are the Abuja Arts and Crafts Village located in Abuja, Nigeria’s capital city,¹⁹⁶ and the Lekki Arts and Crafts Market in Lagos,¹⁹⁷ No doubt, the two markets are strategically located to attract influential visitors, including expatriates and tourists especially when the economic, political and cultural influence of the two cities is considered.¹⁹⁸ This potentially creates market for high quality tradition-based arts and crafts.

The Abuja Arts and Crafts Village exemplifies a market space that emerged in response to externalities like market access.¹⁹⁹ It is an example of an urban-based market with an eclectic array of arts and crafts products for various uses. It also qualifies as a market artificially created to achieve specific public interest goals, particularly to provide an accessible arts and crafts market for the expected participants of the Commonwealth Head of Governments Meeting (CHOGM) of 2003 hosted in Abuja. As such, market

¹⁹⁴ The Traveller ‘Inside Abuja arts and craft village’ (2020) available at <https://www.youtube.com/watch?v=khjdLfzHK7Y>, accessed on 1 March 2021.

¹⁹⁵ Going by the literature cited in respect of South Africa and other countries, including the UN Zambia report 2011 *supra*.

¹⁹⁶ The market is currently closed for renovation work following a 2017 fire incident that significantly damaged it. But a temporary location has emerged as the Mama Craft Arts and Craft Centre, located along the international Airport Road, Jabi, Abuja, also easily accessible to tourists and other visitors. See G Omokhunu ‘Hope rises for Abuja crafts village two years after fire disaster’ *The Nation* 6 December 2019 available at <https://thenationonlineng.net/hope-rises-for-abuja-crafts-village-two-years-after-fire-disaster/>, accessed on 1 March 2021,

¹⁹⁷ Also popularly known as the Jakande Market/Oba Elegushi International Market.

¹⁹⁸ Such as the Abuja Carnival and several cultural festivals in Lagos. They also host a large number of art and intermediary institutions including galleries and museums

¹⁹⁹ For a while, its administration was under the Federal Capital Territory Authority (FCTA). This was subsequently transferred to the NCAC.

access was critical to its existence.²⁰⁰ While in operation, it showcased a wide range of African artefacts making it both a market for finished products and a workshop.²⁰¹

Similarly, the Lekki Arts and Crafts Market - allegedly one of the biggest arts and crafts markets in Nigeria - enjoys market advantage by being located in a high brow area in Lagos²⁰² It was established in the 1990s no doubt with tourists as the target. It has slowly evolved into a destination for art enthusiasts and connoisseurs with the help of high profile art intermediary organisations clustered within the same region, such as the Centre for Contemporary Art (CCA) Lagos and Africa Artists Foundation (AAF), which are largely semi-formal in nature or operate within the peripheries of the formal sector.²⁰³

Given the cosmopolitan and eclectic nature of these markets, it would be a major challenge to create a common identity for their products as envisage by communal IPRs. Also, because the products are from different sources, quality assurance and control which are essential for branding could be difficult to achieve. The heterogeneous nature of the markets also create doubts as to whether the strong social bonds that hold communal societies and maintain cohesion and harmony exist.

Nevertheless, it is plausible that the notion of traditional as antique - even symbolically - holds a strong appeal for customers, and determines the value that they attach to tradition-based arts and crafts items and the price they are willing to pay for the items. This may explain why artefacts are oftentimes (falsely) marketed in ways that

²⁰⁰ The market is located close to the Shehu Musa Yar'adua Centre - a popular venue for hosting international and important local events; the Silverbird Entertainment Centre - a one-stop shop for entertainment and the Sheraton Hotel - a four-star hotel with an endless string of influential guests.

²⁰¹ Ibid.

²⁰² Travalwaka 'Lekki arts and crafts market – celebrating African arts' 11 May 2020 available at <https://www.travelwaka.com/lekki-art-market-celebrating-african-arts/>, accessed on 1 March 2021.

²⁰³ J Das 'For the love of Nigerian art: supporting arts and crafts in Lagos' (2020) available at <https://theculturetrip.com/africa/nigeria/articles/for-the-love-of-nigerian-art-supporting-arts-and-crafts-in-lagos/>, accessed on 1 March 2021.

suggest such antiquity. Some form of framework may be needed to exploit this trend by ensuring that authentic traditional products are marketed and branded as such through a certification strategy like a trademark. What is then required would be a strong institutional system for quality regulation and control.

3.4.1.2 Market spaces in South Africa

Markets for artefacts are found across South Africa in both rural and urbanised settings. Major cities provide spaces and opportunities for crafters (or crafts traders) and buyers to meet and trade. Shackleton, et al,²⁰⁴ classifies such spaces as including ‘immediate village markets, markets within neighbouring villages and local towns, roadsides, harbour or junction selling points, and markets in the nearest large urban centres and cities’. Markets also include street hawkers like those operating alongside the Tshwane Zoo in Tshwane, and the beads market of the Nine Markets of Warwick Junction in Durban. The beads market specialises mostly in traditional Zulu beadworks.²⁰⁵ Like in Nigeria, these markets showcase a broad range of works from diverse (usually anonymous) sources, which makes it potentially difficult to identify or verify their authenticity as ‘tradition-based crafts’.

The market for tradition-based arts and crafts in South Africa has three major components namely domestic, export and tourist customers, with the tourist market said to have the highest potential for growth owing to a burgeoning tourist industry.²⁰⁶ Eeden

²⁰⁴ S Shackleton et al ‘Invisible but viable: recognising local markets for non-timber forest products’ (2007) 9(3) *IFR* 697-712 (700).

²⁰⁵ SA-Venues.Com Blog ‘If there is one thing you do in Durban - the 9 Markets of Warwick Tour’ available at <http://blog.sa-venues.com/provinces/kwazulu-natal/markets-of-warwick-tour/>, accessed on 1 March 2021.

²⁰⁶ South Africa 2013 *supra* 67.

notes that craft traders in South Africa ‘tend to cluster at points ... generally related to key tourism nodes or areas’.²⁰⁷ The connection between tourism and craft is behind the high concentration of arts and crafts markets in major tourist provinces like Mpumalanga and Western Cape. For instance, Mpumalanga attracted the third largest share of international tourists after Gauteng and the Western Cape, with a total share of around 14 percent in 2015 and 2016.²⁰⁸ The Greenmarket Square in Cape Town is an example of a market linked to a touristic area. The square itself is said to be popular with tourists and ‘has a history as an arts and crafts market where visitors can purchase from a unique range of merchandise’.²⁰⁹

From the foregoing, the nature of markets in South Africa are generally similar to Nigeria and so much of the analysis in terms of the potential usefulness of a certification system in the spaces apply.

3.4.2 Community-based Clusters

Generally, there are different ways in which clusters emerge depending on the industry. This makes them different in modalities and outlook. Nevertheless, there are fundamental principles guiding the emergence of clusters which are underpinned by network advantages and benefits from synergies. In a 2008 World Bank study of seven African countries (including Nigeria and South Africa) on the evolution of enterprise clusters among other objectives, three main trajectories were identified as follows: clusters emerge as spontaneous agglomerations of enterprises and other related actors; are

²⁰⁷ A Eeden ‘The geography of informal arts and crafts traders in South Africa’s four main city centres’. (2011) 59 *Town and Regional Planning* 34-40(37).

²⁰⁸ Connor & Nawa 2017 supra 42.

²⁰⁹ Eeden 2011 supra 38.

induced by public policies such as ‘technopoles’; or are ‘constructed’, such as Export Processing Zones.²¹⁰ In the context of commerce, clusters could occur at different points along the value chain from production to marketing, such as a cluster of craft producers or a cluster of traders in finished products. Sometimes, the chain could be limited to a single (usually shared) space for both production and marketing with communalism as the dominant philosophy.²¹¹ One of the major advantages of clusters is the platform they provide for the operators to collaborate and build synergies for their common good. Such clusters could harbour the necessary platforms for implementing communal strategies to promote the businesses operating within them, for instance by providing support institutions for establishing certification systems, setting and monitoring standards, and coordinating brand building and marketing. For this reason, clusters are vital to small-size enterprises.²¹²

There is no coherent data on how arts and crafts clusters develop, but where traditional arts and crafts are concerned, two main ways stand out: namely clusters that developed organically and constructed clusters. In the context envisaged in this thesis, arts and craft clusters develop organically when their emergence is stimulated by factors that naturally conduce to the agglomeration of business entities, such as, market access²¹³

²¹⁰ DZ Zeng (ed) *Knowledge, Technology and Cluster-Based Growth in Africa* (2008) available at <https://openknowledge.worldbank.org/handle/10986/6918>, accessed on 1 March 2021

²¹¹ Typically, these spaces are not strictly workshops or market spaces. Their activities are often merged. The same enterprise may engage in production and selling of the products directly to consumers.

²¹² Clusters provide support institutions for registering certification marks, setting and monitoring standards, and coordinating brand building and marketing. G Savithri et al ‘Pochampally – an unique silk handloom cluster’ (2014). UNIDO 2010a supra; JM Finger & P Schuler (eds) 2004 supra; Drahos & Frankel 2012 supra; UNIDO *A Cluster Development for Pro Poor Growth: the UNIDO Approach* (2010) [hereafter: UNIDO 2010b] available at https://www.unido.org/sites/default/files/2013-11/Unido_2010_-_Clusters_development_for_pro-poor_growth_0.pdf, accessed on 11 November 2021; United Nations *Globalisation of Production and the Competitiveness of Small and Medium Enterprises in Asia and the Pacific: Trends* (2009).

²¹³ This is particularly true of clusters in urban settings as seen in the Abuja Arts and Crafts Village and the Greenmarket Square.

or access to raw materials. Organic arts and crafts clusters could also occur when rural communities known for specific forms of handicrafts evolve naturally as centres of such crafts over time.²¹⁴ Alternatively, arts and crafts clusters could be intentionally created to achieve specific goals tied to the knowledge involved.²¹⁵ These two main ways could overlap, e.g., when government implements strategic measures aimed at developing a community-based cluster.

As the name implies, community-based clusters within the contemplation of this thesis are space-based and connotes communalism and collaboration. They fit into the broader notion of market as a geographical area in a case where buying and selling occurs within the space. They are a kind of mini-economy where production and marketing of the products in question are merged in an informal way. Individualism and collectivism may exist side by side but in shared spaces where producers operate their individual businesses and share services. Unlike markets, selling may not always occur within the community as producers may also chose to market their products outside the locale. Community-based clusters so conceptualised are inherently communal in nature, having evolved organically from the cultural endeavours of past generations devolved along family lineage.²¹⁶

Certain qualities are common to community-based arts and crafts clusters irrespective of their location. They mostly involve products of the same genre which ensures homogeneity. Moreover, the common kinship between the members of the cluster as a result of their genealogy ensures that they remain close-knitted and share common

²¹⁴ Examples include the Abeokuta *adire* makers, the Ilorin and Suleja pottery makers, leather clusters in Kano and other parts of Northern Nigeria. See U Amakom 'Export Constraints of the Kano Leather Industry: A Study of Industrial Clusters in Nigeria' (2006); Adewopo et al 2014 *supra*.

²¹⁵ E.g., the Ushafa Pottery Studio discussed forthwith.

²¹⁶ Adewopo et al 2014 *supra*.

interests. Such consanguinity makes collectivism a natural phenomenon nurtured by inherent cultural norms and practices, and familial sentiments.²¹⁷

3.4.2.1 Community-based clusters in Nigeria

There are many community-based arts and crafts spaces scattered across Nigeria.²¹⁸ Renowned examples include the Bida glass beads makers,²¹⁹ the Dada potters and the Itokun community of Abeokuta well-known for *adire* production.²²⁰ These communities have some attributes in common particularly regarding their challenges, knowledge transfer norms, antiquity of the knowledge, in addition to their individual traits and concerns, weaknesses and strengths.

A number of factors contribute to the uniqueness of the products of these communities, such as their aesthetic attributes, cultural symbolism, and cultural background or origin which adds value to the products due to the associated good reputation established over time with potential to boost their market competitiveness as niche products if properly managed. For instance, as far back as 1911, Bida beads²²¹ drew world attention when the technique became a subject of scholarly research.²²² The Nupe community itself hosting the knowledge has been described as the ‘epicentre of Nigerian

²¹⁷ Adewopo et al 2014 *ibid*; Kinyanjui 2019 *supra*.

²¹⁸ Adewopo et al *ibid*.

²¹⁹ Two types are predominant: red (pupa) and black (dudu). EM Alemaka and EA Ali ‘The potentials of indigenous glass bead making industry as a viable springboard to technological advancements in Nigeria, environ’ (2015) 3(9) *Journal of Environmental Studies* 151-161.

²²⁰ Adewopo et al 2014 *supra*.

²²¹ Two types are predominant, viz: red (pupa) and black (dudu).

²²² ‘Beaded Splendour ‘Migration of beadmaking and beadworks throughout Africa’ (dna) available at <http://www.smithsonianeducation.org/migrations/beads/essay1.html>, accessed on 1 March 2021. H Veunon-Jackson ‘Craft work in Bida’ (1960) 30(1) *Journal of the International Africa Institute* 55-61.

Art',²²³ while Bida has been declared a member of the UNESCO Creative Cities Network in the category of crafts and folklore,²²⁴ with glass beads cited as one of its heritage treasures preceding the arrival of missionaries in Africa.²²⁵

Generally, community-based clusters have inherent organisational structures and rules that are much influenced by their traditions and customs,²²⁶ including rules governing knowledge sharing and transfer. The economic importance of the handicrafts associated with the communities to them is boosted by the fact that the raw materials in use are obtained locally. For instance, the raw materials used in making Bida beads are obtained mainly from discarded glass objects and sand, which are processed to make the beads.²²⁷ The knowledge has important socio-economic value by contributing to the livelihood of the community members, including women.

One of the basic challenges faced by such communities is declining market for their products. A number of reasons account for this, one of which is unfavourable competition from similar products of outsiders, including counterfeit or imitations of their craft. In Adewopo et al's study of the *adire* producing Itokun Community, much of the attributes of a community-based cluster were found. The study established that *adire* faces unfair competition from imitation versions which sell at cheaper prices. It did not matter to some of the consumers that the imitation versions were invariably of lower quality than authentic *adire*, while others could not tell the difference. Consequently, there was the tendency of producers of authentic *adire* switching to machine-made

²²³ O Onoko 'Nupe as epicentre of Nigerian arts' *Daily Trust* 30 March 2014 available at <https://allafrica.com/stories/201403311206.html>, accessed on 1 March 2021.

²²⁴ UNESCO *Creative Cities Network*, 'Bida' available at <https://en.unesco.org/creative-cities/bida>, accessed on 1 March 2021.

²²⁵ L Lababidi 'Bida glass: bangles and beads' (2015) available at <https://nomad4now.com/articles/bida-glass-bangles-and-beads/>, accessed on 1 March 2021; Veunon-Jackson 1960 *supra*.

²²⁶ L Lababidi 'The red walls of Bida glass bangles' (2019).

²²⁷ Other local materials like quartz and sand are also used.

versions in order to survive.²²⁸ It has been established that marketing challenges for Dada potters include declining market and decreasing profit from sales due to the unscrupulous activities of middlemen who exploit the ignorance of the women potters about the market value of their products.²²⁹ For the Bida beads community, declining market discourages interest in the knowhow by both the youths and older generations which, among other things, threatens the survival of the knowhow.²³⁰ These challenges make effective marketing strategies a strong imperative for promotion and protection of the community's knowledge, and communal approaches important options to overcome small-size incapacities.

The communities also share a common tradition in knowledge transfer with a semblance of joint ownership. Typically, the knowledge is freely transferred within but guided from outsiders as atypical of a knowledge common.²³¹ In the case of Itokun²³² and Dada,²³³ the knowledge is transferred along the maternal lineage but closely guided from outsiders. It is taught to interested outsiders as tradition determines, with often the belief that sharing the knowledge without following traditional norms could attract curses. A similar myth holds in the case of the Bida beads to the effect that it is a taboo for foreigners trained in the ancient craft to establish bead making businesses outside the

²²⁸ Adewopo et al 2014 supra.

²²⁹ Adebimpe 2015 supra and S Nwogu 'Dada pottery, where women potters hold sway' (2014) available at <https://www.ilorin.info/fullnews.php?id=11464>, accessed on 1 March 2021. One of the causes of declining market is the replacement of clay pots with modern pots. See also Ibebabuchi 2012 supra; AO Okhiria 'Pottery production, an entrepreneurship perspective for job creation and poverty alleviation: a case study of Dada pottery, Okelele, Ilorin, Nigeria' (2015) 6(2) *JESD* 172-178.

²³⁰ The British Museum 'Lost Legacy of Bida Bikini' (2021) available at https://drs.britishmuseum.org/articles/media/Lost_legacy_of_Bida_Bikini/14535420, accessed on 1 March 2021.

²³¹ See 2.4.2.

²³² Adewopo et al 2014 supra.

²³³ Nwogu 2014 supra.

Community.²³⁴ As a community of crafters that has evolved organically, communalism/collectivism is the guiding philosophy of these communities based on the tight filial bonds characterising them. In the Itokun and Dada communities for example, communalism is coupled with a firm leadership structure founded on matriarchal norms.²³⁵ The Bida community comprises of households grouped into customary compounds following family lineages.²³⁶ The crafters work in distinct wards organised into close-knitted guilds with defined roles for the men and women.²³⁷ Some work alone, but still remain connected to the larger bead-making community.²³⁸



Fig. two: Bida glass beads - Photo from amazing village²³⁹

²³⁴ See A Ndagi 'The Nupe people; Bida glass beads making' (2019).

²³⁵ These are not to be taken as exhaustive. Other sundry crafts are produced in communities in Nigeria, e.g., blacksmithing in parts of Eastern Nigeria.

²³⁶ Encyclopaedia Britannica 'Bida' (dna) available at <https://www.britannica.com/place/Bida>, accessed on 1 March 2021.

²³⁷ Lababidi 2019 supra 7.

²³⁸ Ibebabuchi 2012 supra; Adewopo et al 2014 supra.

²³⁹ 'The lost legacy of Bida Bikini' available at https://www.google.com/search?q=bida+glass+beads&sxsrf=ALeKk01ySVbSUxoBkfS_2OpEnPvxnmNclQ:1615861351838&source=lnms&tbm=isch&biw=1366&bih=657#imgrc=I6QEYBKZ7D_YyM, accessed on 1 March 2021.



Fig. three: Dada Pots²⁴⁰

It can firmly be asserted that the platforms for the implementation of communal strategies already exist in these communities but need to be strengthened. The unique qualities of the products and their market appeal makes strategies capable of boosting competition and effective branding imperative.

3.4.2.2 Community-based clusters in South Africa

In South Africa, communities of crafters have also evolved naturally from their age long engagement in certain crafts. Good examples are the pottery and bead making communities of Zululand mentioned earlier. The communal tradition existing in these communities provide cohesion and the basic platforms for mounting and coordinating communal models, particularly geographical indications which places emphasis on qualities associated with geographical origin or placed-based attributes.²⁴¹ An interesting aspect of the Zulu communities of pottery and beadwork crafters is the fact that they also

²⁴⁰ Available at <http://kwarastatetourismboard.blogspot.com/2015/09/dada-pottery.html>, accessed on 1 March 2021.

²⁴¹ See 4.5.1.3.

endorse their products with individual markings by way of style or otherwise thereby establishing some form of personal but informal individuation alongside collective identification.²⁴² This exemplifies the interaction between collective and individual creativity typical of traditional creativity.²⁴³

3.4.3 Centres as Clusters

Centres, within the contemplation of this thesis, differ from markets in some respects with some common attributes. It envisages those spaces where the activities involve more than buying and selling as the tail end of the production chain.²⁴⁴ Centres could exist as a common space for crafters to work together as a collective: sharing ideas, infrastructure and resources, including training. Their trade could be of a homogenous nature. They could also be created for the purpose of coordinating the market end of crafts production for the benefit of producers within a community in the sense of a space for them to sell their works at a fair price. In the later sense, arts and crafts centre has been defined as ‘a facility from which products with artistic and/or souvenir value are sold, along with a range of products which emanate from local cultural groups’.²⁴⁵ They could exist as an open-air facility or inside a building, and are distinguishable from a street-market or flea-market which sells arts and crafts items sometimes alongside a range of other goods.²⁴⁶ One of the ways in which governments and development partners have sought to

²⁴² Nettleton 2018 supra. A good example is the Nala family potters discussed by Fowler 2008 supra.

²⁴³ Andanda 2012 supra 549.

²⁴⁴ G Hagg ‘The state and community arts centres in a society in transformation: The South African case’ (2010) 13(2) *IJCS* 163-184.

²⁴⁵ ‘How to establish an art and craft centre’ available at <https://zulu.org.za/dedi878.jnb3.host-h.net/archive/how-to-establish-an-arts-and-craft-centre-F57997>, accessed on 1 March 2021.

²⁴⁶ South Africa ‘How to establish an arts and craft centre’ available at <https://www.zulu.org.za/archive/how-to-establish-an-arts-and-craft-centre-F57997>, accessed on 1 March 2021.

encourage craftsmanship is to establish centres in recognition of their crucial role as vectors for promoting community growth and achieving the SDGs.²⁴⁷ Such centres could be assisted in achieving their goals through measures that promote their products. A centre in this sense also differs from centres as independent arts and crafts spaces whose roles are often more restricted to things like training, funding and R&D.²⁴⁸

One of the key attributes of government established centres is a predetermined administrative system supervised by relevant government institutions or development bodies. Examples from countries like India concerning its GI system indicate that the responsibility over the management of communal strategies or even conceptualising and inaugurating them often lies with such institutions.²⁴⁹

3.4.3.1 Centres in Nigeria

Craft centres exist across Nigeria to promote community craft.²⁵⁰ Usually, the initiatives make no distinction between traditional and contemporary crafts, yet the two have different needs. However, a few projects have identified with a clear objective of rescuing specific traditional arts and crafts from looming extinction. One of these is the government established Ushafa Pottery Centre.

²⁴⁷ Hagg 2010 *supra*.

²⁴⁸ See 3.4.4.

²⁴⁹ Liebl & Roy 2004 *supra*. India's GI system was closely guided and strongly facilitated by the government through key institutions. For this reason, India's approach has been suggested as a proper model for African countries due to their state of poverty, lack of grassroots institutions to fund such as initiative. See D Marie-Vivien 'The role of the state in the protection of in the protection of Geographical Indications: from disengagement in France/Europe to significant involvement in India' (2010) 13(2) *The Journal of World Intellectual Property* 121–147.

²⁵⁰ Gbenga 2015 *supra*.

Ushafa Pottery Centre²⁵¹ lies within Ushafa village located just outside the Abuja metropolis. It could be described as a cluster that straddles an urban and rural category. It also differs from an organic community-based cluster²⁵² in that it was planned for the specific goal of poverty eradication for the women of the community.²⁵³ It therefore provides an important socio-economic benefit.

Ushafa villagers are renowned for their craftsmanship in different types of crafts, and the ancient and unique knowledge of pottery curated by the women folk stands out. The centre has been described as ‘a community rich in pottery tradition’.²⁵⁴ It’s establishment in 1991 was partly motivated by the existence and viability of this age long knowledge which the government sought to harness as a means of empowering the women.²⁵⁵ The centre specialises in traditional pottery in a wide range of wares, and doubles as a workshop and market for the finished products. It also conducts training in ceramic production for interested persons including outsiders. The women work manually to create the desired shapes and designs on the finished products, using locally sourced clay.²⁵⁶

Ushafa Pottery Centre is managed by the government thereby ostensibly guaranteeing a reliable foundation for the establishment and management of a communal

²⁵¹ For the history of the centre see OF Emeafor and PI Eze-Uzomaka ‘Native craft and tourism: a study of Ushafa pottery’ (2018) 2(3) *IJRDEHR*1-9.

²⁵² See 5.4.2.

²⁵³ It was planned as part of the earlier mentioned Better Life for Rural Women Project.

²⁵⁴ Emeafor & Eze-Uzomaka 2018 supra 2-3. The village has had the honour of hosting a number of world leaders, including former Egypt President Hosni Mubarak and former US President, Bill Clinton, who visited the village in 2000 and was awarded a chieftaincy title and citizenship of the village. The village has since bore the name ‘Bill Clinton Art Village’. See AS Isah ‘Ushafa pottery: Abuja’s abandoned tourist centre’ *Daily Trust* 2 January 2016 available at <https://allafrica.com/stories/201601042275.html>, accessed on 1 March 2021; G Obike ‘Ushafa pottery centre left to rot after Clinton’ *The Nation* 10 December 2013 available at <https://thenationonlineng.net/ushafa-pottery-centre-left-rot-clinton/>, accessed on 1 March 2021.

²⁵⁵ The centre was established in 1991 as part of the Better Life for Rural Women Project. See *ibid*.

²⁵⁶ Emeafor 2018 supra.

strategy for the products with the government as proprietor.²⁵⁷ The objective of collectiveness is primary. It has been noted that the main reason for the establishment of the centre was to provide a common space for the women - who were already making pots in their various residences as a tradition - for effective coordination to improve the quality and competitiveness of their craft. This was necessary following the decline in the demand for their clay cooking pots. An important outcome of having the centre in Ushafa is that at some point it became a touristic attraction for visitors interested in witnessing the traditional technique of making the pots and owning a piece of that tradition manifested in the pots.²⁵⁸ However, this appears to be of the past going by the reported present state of deterioration of the centre owing to persistent low patronage, which in turn is attributed to poor finishing and the influx of competing modern utensils. Of more pertinence is the lack of a coherent marketing strategy for the Ushafa products,²⁵⁹ making intervention and communal strategies relevant.

3.4.3.2 Centres in South Africa

Centres are also a part of the development of the arts and crafts economy in South Africa with an aim towards community development. The concept of community art centres has emerged as part of a development policy strategy for local communities by both government and NGOs.²⁶⁰ An example of a craft-based development driven centre is the Kaross Rural Embroidery Project, established in the Letseitele Valley in Limpopo, to help

²⁵⁷ The centre is managed by the FCT Social Development Secretariat.

²⁵⁸ Isah 2016 supra.

²⁵⁹ Obike 2013 Supra; Emeafor 2018 supra; T Adebayo 'Ushafa: a pottery village with global tourism appeal' *Daily Independent* 22 February 2018 available at <https://www.independent.ng/ushafa-pottery-village-global-tourism-appeal/>, accessed on 1 March 2021.

²⁶⁰ Hagg 2010 supra.

create jobs and uplift the local community through their traditional arts and crafts skills. From a humble start with three women farm workers, it now employs nearly a thousand people from the nearby communities, giving a modern voice to traditional Tsonga culture. The potential value of a certification scheme for such a project cannot be overlooked.

The centre specialises in the creation of 100 percent handmade, high quality items including linen, tableware, art pieces, wall hangings, and fashion accessories, with design concepts drawing on Tsonga mythology. Kaross is an example of a craft centre that doubles as both a shop and a studio. Thus, like Nigeria's Ushafa model, people can actually visit the workshop and witness how the items are produced. In the words of Irma tan Rooyen, the Centre's founder, 'Kaross is rewriting Tsonga culture by exploring its heritage and reapplying it to modern, marketable products and artworks'. One of the key successes of the project is its sustainability and contribution in boosting cultural awareness in the area.²⁶¹

The Tsongo Kaross project is not a government initiative but enjoys government support through grants which are derived from government's policy of supporting the development of community-based craft entrepreneurship as part of its wider plans for the craft sector. Such support could be geared towards assisting the marketing of their products (and products of similar centres) by developing and implementing a functional market differentiation/branding scheme, the attributes of which are the focus of 4.5. On the whole, the qualities identified in these spaces are part of the enabling factors for success of a potential communal IPR model established for the purpose of managing

²⁶¹ South Africa, Modern Forms for Traditional knowledge images – Kaross embroidery project' available at <https://www.southafrica.net/gl/en/travel/article/modern-forms-for-traditional-images-kaross-embroidery-project>, accessed on 1 March 2021.

tradition-based arts and crafts in order to generate greater value from them, which this study seeks to determine.

3.4.4 Independent Arts and Crafts Spaces

Until recently, the mediation of arts was basically the responsibility of public institutions and organisations like arts galleries and public museums.²⁶² The private sector and non-governmental institutions have now stepped into this arena to promote cultural entrepreneurship around arts and crafts in recognition of their increasing socio-economic potential, particularly in the South African context where crafts is seen as a way of solving the socio-economic needs of vulnerable groups like black rural women. Although there appears to be no standard classification of the different models of independent arts and crafts spaces, they usually include workshops, galleries, studios, cooperatives or guilds, associations, and art foundations.²⁶³ There are diverse independent art (craft) spaces spread across Nigeria and South Africa, which are helping in the training, nurturing and promotion of the work of artists and crafters, including those engaged in the production of traditional crafts. A comprehensive analysis of these spaces may not be presently feasible; nevertheless, it should be noted that they serve largely similar and interrelated functions relevant in the implementation of collective strategies. Some independent arts and crafts spaces are traditional partners of crafters helping to promote entrepreneurship while others are new.

²⁶² UC Nzewi 'A Nigerian tradition of independent art spaces/initiatives' in K Printher, UC Nzewi and B Fischer (eds) *New Spaces for Negotiating Art and Histories in Africa* (2015) 36-52(37).

²⁶³ Ibid; Independent art spaces include cooperatives, associations, and galleries. L Nachum and D Keeble 'Localised clusters and the eclectic paradigm of FDI: Film TNC's in Central London' 2000 *Transnational Corporations* 9(1) 1-37.

As traditional partners of art/craft entrepreneurship, cooperatives and market associations play a strong role in the promotion of traditional crafts both economically and in utilitarian directions by providing a common platform to cater for their collective needs. This is seen in the Vukani Collective (Hlabisa, KwaZulu-Natal) which was established by Zulu traditional basket makers under the auspices of various church missions to help promote and market their baskets, and improve quality for wider marketing opportunities.²⁶⁴

Similarly, the *ilala* Weavers is a Hluhluwe-based fairtrade cooperative also for Zulu basket weavers to promote the quality of their crafts. Although the baskets promoted by the cooperative are more of a contemporary genre, they are marketed as ‘traditional’ through close identification with the historical types in materials and techniques. The *ilala* Weavers initiative illustrates how traditional craft techniques could be preserved by innovatively developing and modifying their aesthetic qualities within boundaries that preserve their identity, as stated in the cooperative’s website thus:

Feel the mystery and essence of Africa with these superb Zulu baskets, each one unique and lovingly hand-stitched. In this age of modern technology and mass production, it is a joy to see and feel the dignified elegance and beauty of a rich Zulu heritage that has become a collectable art form, preserving an age-old tradition proudly safeguarded and handed down through the generations.²⁶⁵

As a fairly new space for the development of art entrepreneurship, galleries are relevant to handicrafts through various activities aimed at promoting arts and crafts,

²⁶⁴ Nettleton 2010 supra 67.

²⁶⁵ Ilala Weavers ‘The Baskets’ available at <https://www.ilala.co.za/the-baskets/>, accessed on 1 March 2021.

including training, marketing of outputs, and publicity.²⁶⁶ Until recently, crafts were invariably alien objects in galleries and studios because by the mores of these institutions, crafts were not perceived as art. But this has since changed following the increasing recognition of craft curios and craftart as collectibles. Galleries now stock crafts, particularly those that fit their specifications of creativity. They play a key role in the promotion of entrepreneurship in local arts and crafts by helping to showcase them, while also providing opportunities for investments.²⁶⁷ Nevertheless, because they are mostly driven by entrepreneurial motives, they could push cultural development in directions that may not always align with more utilitarian concerns like preservation. Because enterprise objectives are prioritised, their narratives that see craft as inferior to art, anonymous, and antique, and seek to remedy this by encouraging the adoption of new trends in craft designs and techniques, has the tendency of accelerating such changes. Nettleton notes relevantly that ‘as crafters ascended the art hierarchy, the objects they made also changed in function and form; from being beautiful objects useful in indigenous contexts’, they became largely use-free beautiful objects sold beyond local communities.²⁶⁸ Although this may be seen as good for the purpose of promotion, it ultimately threatens preservation. Moreover, because of their entrepreneurial motives, galleries may tend to invest only in craftsmanship with high potential to connect to the art world leaving out obscured forms which are actually more in need of revitalisation and preservation.

²⁶⁶ The Senate ‘Indigenous art: securing the future Australia’s indigenous visual arts and craft sector’ Standing Committee on Environment, Communications, Information Technology and the Arts (2007) chapter 3 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2004-07/indigenousarts/report/index, accessed March 1 2021.

²⁶⁷ C Okeke ‘Revisiting Nigerian arts as untapped goldmine’ (2015) available at <https://afrart.org.za>, accessed on 1 March 2021.

²⁶⁸ Nettleton 2010 *supra* 67.

Overall, these institutions have drawn attention to traditional crafts by recognising the outstanding works of some crafters or artist adopting traditional craft techniques. Capitalising on the expertise of individual crafters, the institutions help to elevate them by promoting their works as high-end renditions of traditional crafts distinguishable from the nameless, unanimous and largely monotonous versions found in craft (or flea) markets.²⁶⁹ Such is the role of the African Art Centre in Durban, South Africa.

The African Art Centre was established in 1984 to provide ‘an enabling environment for the sustainable development, promotion and preservation of African arts and crafts’.²⁷⁰ It serves a vital intermediary role in the value chain by linking producers of high quality products to potential buyers. It also helps in skills development through free workshops. Generally, the centre encourages the injection of new ideas into traditional techniques of craft making without losing connection with traditional cultural practices.²⁷¹ It also serves an important role of ensuring quality standardisation by insisting on high quality from the artists/crafters and for the items they deal with. A similar example in Nigeria is the Nike Arts Gallery with branches across the country.²⁷²

Given such strategic roles, independent arts and craft spaces could be good partners for differentiating tradition-based arts and crafts constituting part of their collections based on their authenticity, although it may be hard to associate these spaces with a strong collectivism tradition.

²⁶⁹ Nettleton 2010 supra 69.

²⁷⁰ African Art Centre ‘About us’ available at <https://afri-art.co.za/pages/about-us>, accessed 1 March 2021.

²⁷¹ S Kaori Hippard ‘Beads, sculptures and baskets: South African traditional crafts as a means of economic empowerment’ (2012) *Independent Study Project (ISP) Collection* 1346 29 available at https://digitalcollections.sit.edu/isp_collection/1346, accessed on 1 March 2021.

²⁷² NCAC, Nike Art Gallery: A Virtual Tour available at <https://ncac.gov.ng/culturalvirtualtour/nikeartgallery/>, accessed on 1 March 2021.

3.5 Key Observations and Conclusion

This section synthesises the findings on both countries to confirm answers to the questions raised at the beginning of the chapter which help to answer part of the research questions and point to the required measures.

3.5.1 Analysing the Findings

The first issue to analyse is the question of the value of the tradition-based cultural resources in growing the creative economy and the related question of commercialisation as important to and *in tandem* with the promotion of tradition-based arts and crafts. This can be analysed with reference to the well-established market potential of tradition-based arts and crafts as high-end products tied to their unique quality, and their appeal to diverse groups and consumer preferences and uses both local and foreign. Therefore, contrary to the apprehensions relating to the commodification of cultural resources, the category of resources discussed in this chapter are in agreement with commercialisation and market promotion. The social benefits tied to their market potential further supports commercialisation and provides justification and validity for the use of measures that would help achieve these benefits as a common good. It derives from the various groups that derive their livelihood from the sector whose interests are equally threatened by the dynamics that threaten the market.

Still, the perennial struggle between tradition-based arts and crafts and the market with the survival of the integrity of the knowledge at stake is not in doubt as the examples in this chapter show. Left on their own, the need to survive has the tendency of propelling crafters towards market trends. This conflict can be resolved through strategies that

enable the crafters to exploit the market advantages by successful linkage of the unique quality of their products with the market to help them appropriate the quality.

But there are further causes for concern one of which is the incapacity of the predominantly small scale crafters to single-handedly achieve such linkage. This brings in the relevance of communal/collaborative schemes for the sector. The existence of the key factors of the tradition of collectivism has been identified in the communities and spaces where the crafters operate - perhaps not much so in the more heterogeneous market spaces like the Abuja Arts and Crafts Village where deep-rooted familial bonding to support collectivism/communalism may not exist, and the independent art spaces. Nevertheless, a strong unifying dynamic for the artists/crafters and the traders operating in these space is the common attribute of 'traditional' that describes the items they are dealing with, even when such allusions and descriptions of the items and the impression of antiquity they create in the mind of the consumer are false. The fact is that whether falsely or truly attributed, the notion of 'traditional' remains the defining attribute for the undiscerning consumer. This creates a common interest for all concern in authentically and collectively promoting the products as authentically traditional through proper certification and monitoring.

It is also important to briefly note potential IP issues which could also require communal IPR models in resolving them. IP issues could arise in three ways: first, when non-members of the commune produce similar but cheaper versions of the articles produced by the members of the commune and market them as original. This could present a typical case of trademark infringement subject to the existence of a valid trademark whether individual or communal; or a case of copyright infringement where

the articles meet the criteria for copyright protection under the law. Secondly, IP issues could arise in the case of unauthorised misappropriation of the designs of the tradition-based arts and crafts items within the spaces identified in this chapter, which may be difficult to address mainly because of the anonymous status of most of their original makers. Thirdly, there is the question of how communities could benefit from the goodwill of their products which has become national heritage. A good example is the Ndebele colourful geometrical design patterns which is now a national identity and mark of the South Africa brand. These issues may require reference to different branches of IPR besides trademarks law as discussed in the next chapter.

3.5.2 Conclusion

All said, the importance of safeguarding the tradition-based arts and crafts in Nigeria and South Africa can no longer be doubted. What matters at this point is to determine the most appropriate strategies in the light of the concerns and objectives highlighted so far. It is also left to be determined whether the legal frameworks in the two countries provide the necessary support. The next chapter will address the question of the most appropriate strategies.

CHAPTER FOUR

COMPATIBILITY/ APPLICABILITY/SUITABILITY ANALYSIS OF THE LEGAL FRAMEWORK FOR COMMUNAL IPRS

4.1 Introduction

As seen in the previous chapters, IPRs are relevant in promoting the creative economy; and protecting and managing the interests of tradition-based arts and crafts in the creative economy entails three key imperatives, namely: protection, promotion and preservation.¹ But, the divergences between TCEs and IPRs in context and purpose, which are also relevant to tradition-based arts and crafts, raise incompatibility concerns and question the applicability of IPRs. Nevertheless, the ‘collective’ principle shared by communal IPRs and TCEs creates room for compatibility. This sets this chapter on the path towards answering one of the research questions of this study, viz: What are the enabling factors for success of a communal IPR model established for the purpose of managing tradition-based arts and crafts?

Compatibility in the context of this study has two dimensions along which this chapter proceeds. The first is the normative dimension, which inquires whether existing IP legal norms can apply to tradition-based arts and crafts. This question comes before the question whether a particular model is suitable for the purpose of achieving the objectives of promoting the creative economy as the second dimension. While a particular type of communal IPR may be legally amenable to tradition-based arts and crafts, it may not adequately address all three objectives. The fitness for purpose analysis of this chapter determines whether a model is both legally applicable and adequate. Thus, in order to be compatible, the qualified model must satisfy both the normative and the

¹As identified in chapter two.

suitability requirements by being legally applicable and potentially helpful in achieving the desired objectives.

The chapter builds on the conclusions of chapter two which recognises the suitability of communal IPRs in the promotion of tradition-based arts and crafts as a subset of TCEs. It discusses the relevant communal IPRs, their legal foundation and the basis for their compatibility. It highlights their specific rationale, characteristics and modalities to determine their potential of guaranteeing the triple objectives for tradition-based arts and crafts: namely, legal protection, promotion as viable economic assets and preservation as cultural heritage.

4.2 Some Conceptual Reflections

There are different types of communal IPRs and strategies, and like ordinary IPRs, they serve different purposes. They could exist as part of the different branches of IPRs or independently.² In the entire contexts of communal strategies, the notion of ‘collectives’ holds sway both in terms of knowledge production and exploitation of the strategies. Knowledge is collectively created, and collectively exploited with the help of the communal strategies. Nonetheless, communal IPRs are not completely divested of the ‘individual’ attribute because they are connected to a discernible entity by virtue of ownership, even if that entity is a body of individuals such as a cooperative, or a trustee. Such a body could serve as the proprietor of a collective strategy which is intended for

² E, g, GIs.

use by its members as is the case with communal trademarks³ or exist to serve the interests of a group of individual entities as is the case with CMOs.⁴

It should be further clarified that collective or communal IPRs in the context of this thesis are contemplated narrowly and do not include those with customised tenets that mimic IPR's archetypical exclusivity, as may be provided in *sui generis* legislation⁵ or independent certification schemes, such as, fairtrade,⁶ and evolving forms of certification such as ecolabels.⁷

Further distinction should be made between communal IPRs and joint ownership under certain types of IPRs, such as copyright. While, a legally established communal IPR scheme defines the conditions for eligibility to use the scheme under its rules with use open to whoever satisfies those conditions, joint ownership pre-determines at the very inception that the owners of the right are entitled to its exclusive exploitation. In that case, eligibility to use is not based on the satisfaction of stipulated conditions, but by virtue of (equal) ownership under the law in conjunction with others as joint owners.⁸ Additionally, communal IPRs should be distinguished from emerging and alternative trends in creativity and innovation practices and environments, where creativity and innovations are occurring in collaborative open environments instead of closed settings,⁹

³ See 4.5.

⁴ For more on CMOs see Olukunle 2013 *supra*.

⁵ E.g., the Panamanian *Sui Generis* Law No 20 of 2000; WIPO *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions* WIPO/GRTKF/IC/INF/3 (2003c).

⁶ CB Graber and JC Lai 'Indigenous cultural heritage and fair trade: voluntary certification standards in the light of WIPO and WTO Law and policy-making' in P Drahos and J Frankel (eds) (2012) 95-120.

⁷ J Belson *Certification and Collective Marks Law and Practice* (2017) chapter 7.

⁸ Asein 2012 *supra*; Oyewunmi 2015 *supra*.

⁹ See H Chesbrough 'Open Innovation: a new paradigm for understanding industrial innovation' in H Chesbrough, W Vanhaverbeke and J West (eds) *Open Innovation: Researching a New Paradigm* (2006) 1-12, who first explained the paradigm. See also AU *Science, technology and Innovation Strategy for Africa 2024 (STISA-2024)* (2014).

but guided by open systems of knowledge governance such as open licenses.¹⁰ In collaborative settings, sharing of ideas is the dominant philosophy and the catalyst for unleashing innovative instincts in contrast to conventional IPRs which are governed by hoarding.¹¹ Like collaborative innovation spaces, sharing characterises communal IPR models but within enclosed boundaries that excludes the rest of the public. While open and collaborative innovation identifies with forms of IPRs that are not strictly governed by gatekeeping and hoarding,¹² such as open licenses,¹³ communal IPRs remain closely bounded to IPR tenets of hoarding against outsiders.

4.3 The Normative Question and the Imperative of Protection

The normative question is primary as it determines the IPRs that could legally protect the tradition-based arts and crafts and the precepts that make them so. It is deeply rooted in the conceptual and legal underpinnings of IPRs which determine protectable subject matter, and which have been partially resolved in the preceding chapters leading to the endorsement of communal IPRs. Given the collective nature of communal IPRs as described in 4.2, contentious issues, such as, individual ownership, which underpins the incompatibility concerns between TCEs and IPRs, become attenuated.

The normative question is pertinent to protection as the first of the three standards for determining compatibility. Seeking the proper meaning of protection for the purpose

¹⁰ E.g., the General Public License (GNU-GPL) for the distribution of open source software. Other examples of communalism in the management of IP are patent pools and CMOs. CMOs manage copyrights on behalf of their owners. De Beer et al 2014 *supra*, is a useful study of these new trends in knowledge creation and management in different sectors in a number of African countries.

¹¹ This point should be qualified with regards to certification mark which operates as an open shop that allows the public to opt-in provided they meet the standards for participation. See 4.3.1.2.

¹² J De Beer and C Armstrong 'Open innovation and knowledge appropriation in African micro and small enterprises (MSEs) (2016) 15 *AJIC* 60.

¹³ E.g., free and Open source software licenses such as the GNU.

of determining the right strategies for effective protection of TCEs is not new.¹⁴ But this study focuses on protection in the specific context of the market environment to determine the appropriate strategies. Basically, all IPRs are *ipso facto* intended as a legal mechanism to secure ownership interests over intellectual outputs, be it creative content in copyright, innovative ideas in patent, and product goodwill in trademarks. But protection means more than legal safeguard.

Protection has different meanings from the very broad to the nuanced depending on the objective and the subject matter in question.¹⁵ In the broadest terms as devised by WIPO, protection of TCEs means safeguarding, which envisages measures aimed at ensuring their vitality; including preserving, promoting wider use, controlling use, preventing misuse and commercial misappropriation by third parties, and channelling a proper share of benefits to TCE holders.¹⁶

Protection in this sense entails the use of different measures, including identification, documentation, research, commercialisation and legal safeguards.¹⁷ This however does not prevent misappropriation or misuse. Thus, protection could also mean safeguarding in the narrow sense of legal protection against misappropriation or

¹⁴ WIPO 2002b supra 10; WIPO 2020 supra; Cottier & Panizzon 2004 supra; WIPO 2018a supra; WIPO *The Protection of Traditional Cultural Expression of Folklore: Revised Objectives and Principles* WIPO/GRTKF/IC/9/4 (2006); WIPO *The Protection of Traditional Knowledge: Collation of Written Comments on the List of Issues* WIPO/GRTKF/IC/11/5(A) (2007) [hereafter: WIPO 2007a]; Andanda 2012 supra; all dwelling on the proper meaning of protection in questioning or determining the adequacy of IPRs in securing various interests concerning TCEs either specifically or holistically.

¹⁵ See Girsberger 2008 supra, for a brief overview of how different international instruments conceptualise ‘protection’, including article 8 (j) of the Convention on Biological Diversity (CBD), 1992, and article 2(3) of the ICH. The ICG has endeavoured to explain the broad and narrow meaning of protection. See WIPO 2003a supra 3; WIPO 2006 *ibid*; WIPO 2007 *ibid*; WIPO 2003b supra para 38; WIPO *The Protection of Traditional Cultural Expression of Folklore: Revised Objectives and Principles* (2007) 226 para 14 [hereafter: WIPO 2007b).

¹⁶ WIPO 2003b supra 8 and WIPO 2003a supra 3. UNESCO favours this broad understanding of protection in connection with safeguarding the intangible cultural heritage. See WIPO 2002a supra. See also Torsen & Anderson 2010 supra 18.

¹⁷ WIPO 2003b *ibid*.

inappropriate use by third parties,¹⁸ which is the core preserve of IPRs. Owners and custodians of TCEs can use specific IPRs to prevent others from undertaking any of the restricted activities once the criteria for protection are met.¹⁹ Protection in this sense covers three aspects of TCEs, namely: the idea or underlying knowhow reserved for patents, utility models and trade secrets; the manner in which TCEs are expressed protected by copyright and industrial designs; and the reputation and goodwill of TCEs protected by trademarks and IGOs,²⁰ and sometimes laws protecting against unfair competition.

For tradition-based arts and crafts in the context of this study, protection is relevant both broadly and narrowly construed. While legal protection in the narrow sense is necessary, promotion and preservation are also important forms of safeguard. Therefore, even as one inquires whether a specific type of IPR is legally applicable to tradition-based arts and crafts, one should also inquire whether it can address the other safeguards. It should be understood that the safeguards are often intertwined and so are the measures for achieving them which could also be complementary.²¹ This can be illustrated with reference to Nigerian traditional textiles.

As seen in chapter three, traditional textiles have high social values as material culture, with some more diffused than others based on their functions.²² The Nigerian *aso-oke* cloth, for instance, functions as basic clothing, ceremonial costume, and material

¹⁸ See WIPO 2007 supra 6-7; WIPO 2007a supra; where the ICG differentiates between legal protection through IPRs and broad protection in the sense of safeguard which address other concerns such as transmission, revitalisation, promotion and preservation.

¹⁹ Uses of TCEs protected by IPRs include: commercial exploitation, insulting or degrading use, false or misleading indications or claims as to the authenticity or origin of a product, or claiming a relationship with the communities in which the TCE has originated. See WIPO 2003b supra 8 and 17.

²⁰ WIPO 2003b supra 41.

²¹ Girsberger 2008 supra 145; P Kuruk 'Key Policy Issues on Intellectual Property and Traditional Cultural Expressions' (2017).

²² Nwauche 2016 supra 90-91.

for spiritual worship. *Aso-oke* is a fabric woven by the Yoruba people of Nigeria using handlooms.²³ *Aso-oke* and other Nigerian traditional textiles like *adire* have been commodities of trade from time immemorial as some ethnic groups seek to create, define or establish their identity through these cloths.²⁴ But traditional textiles invariably face declining demand and patronage, as well as looming extinction. Design theft, competition from imitations and new technologies are serious contributions to this decline.²⁵ But waning interests is also as a result of changing cultural practices, especially for cloths with less versatile functions, such as, *ukara ekpe*, a strictly religious cloth.²⁶ One of the widely cited reasons for the declining demand for *aso-oke* is the nature of the cloth which hampers its versatility and appeal to younger generations and modern trends. Nwauche describes *aso-oke* as ‘hard, stiff and heavy’ which ‘considerably limits the potential for the use of the cloth in contemporary fashion designs’.²⁷ Against the foregoing background, different measures would be required to safeguard each of the two classes of textiles. Because of the highly restrictive use for *ukara ekpe*, the foremost concern is to preserve the knowhow for which documentation would be helpful. Measures to improve versatility would have no effect unless other uses outside religious purposes can be encouraged bearing in mind that inappropriate uses could be harmful to the knowledge’s integrity and cultural values. For the more diversified and diffused textiles, protection would involve measures to prevent misuse and improve marketing, while paying attention to preservation. But preservation should not negate innovations as a guarantee

²³ MD Olajide et al ‘Aso-Oke production and use among the Yoruba of South-Western Nigeria’ (2009) 3(3) *The Journal of Pan African Studies* 55-72; Asakitikpi supra 2007.

²⁴ Ibid; Adewopo et al 2014 supra.

²⁵ Ibid.

²⁶ Nwauche thinks that the restricted use of the Nigerian *Ukara Ekpe* cloth to religious purposes only could be the reason why it has not been as widely diffused as the *Akwete* cloth. See Nwauche 2016 supra 96.

²⁷ Ibid.

of continued market demand.²⁸ For this latter concern, other IP measures that reward original creativity and innovation, particularly copyright and patent, could also complement market improving measures specifically for derivatives of the textiles.

Generally, where tradition-based arts and crafts face challenges of declining market and/or unfair competition, specific IPRs targeting marketing, consumer protection, and unfair competition, such as trademarks, are useful options.²⁹ Protection should also aim at preventing unauthorised uses envisaged under design protection and copyright within the narrower sense of ‘legal protection’. As WIPO noted, clarity on what is meant by ‘protection’ is key because it provides clarity as to the type of measures which are suitable for achieving the objective of protection.³⁰ The preferred measures should be carefully constructed in order to not preclude each other or other applicable measures,³¹ and bearing in mind that all relevant measures have their individual strengths and weaknesses, and could sometimes co-exist to achieve more holistic protection.³²

4.4 Are Communal IPRs Fit for Purpose?

There is a compelling reason to pay attention to the fitness of the strategies to achieve the desired objectives. This underlines a cornerstone objective of this study, which considers the need to exploit the economic value of tradition-based arts and crafts, but in a way that

²⁸ Leadership ‘Modernising Aso-oke to attract younger generation’ *Leadership* 8 September 2018 available at <https://leadership.ng/2>, accessed on 1 March 2021.

²⁹ E.g., Australia’s Authentication scheme was motivated by the desire to protect consumers from been misled to purchase fake traditional arts and crafts marketed as authentic, to hinder the activities of counterfeiters, and to also help market the works as traditional arts and crafts produced by the indigenous people. See Janke 2003 *supra*.

³⁰ WIPO 2003a *supra* 4.

³¹ E.g., in Nigeria, protection of a work as ‘artistic craftsmanship under the Copyright Act Cap C28 LFN 2004 precludes copyright protection for the same work as industrial design, although this is rationalised on the grounds of avoiding double protection. See chapter five discussing Nigeria’s copyright law.

³² See also Janke 2003 *supra*.

safeguards their wellbeing and promotes the creative economy. Achieving one without the other is incomplete. Thus, it is not enough that the communal strategy facilitates the commercialisation of tradition-based arts and crafts without addressing the corresponding need of protecting and preserving them, mainly because these needs could have wider implications on the society and long term effects on the creative economy due to their impact on individual cultures.³³ Similarly, addressing preservation without safeguarding the economic interest would not facilitate the growth of the sector, and could indeed be counterproductive to preservation due to possible waning interest in the knowhow resulting from lack of incentives. Such half measures could eventually lead to the extinction of the knowledge.

4.4.1 The Suitability Question: Promotion and Preservation

Like the normative question, suitability or fitness for purpose is primarily rooted in the legal and conceptual framework of IPRs. But in addition, it considers the twin imperatives of promotion and preservation in the broad context of safeguarding tradition-based arts and crafts in the market which the qualified IPR fulfils either independently or together with other schemes. It is necessary to understand the two imperatives in their right contexts.

4.4.1.1 Promotion of TK-based products

In the context of the creative economy, promotion is of high currency being fundamentally premised on economic interests. Promotion is about enhancing the marketability and competitiveness of tradition-based arts and crafts as goods in order to

³³ Redner 2004 *supra*.

yield substantial economic benefits. While promotion entails gaining market advantages over product ‘peers’ by taking actions that make the product more competitive, it is important to understand the dynamics that create the competitive advantage as a prelude to determining the modalities for promotion.

WIPO opines a valid perspective to promotion which is adopted here. Underpinning this perspective is the difference between cultural goods and other goods, and the non-applicability of conventional economic norms to cultural goods.³⁴ Conventionally, competitiveness and demand are partly influenced by price, but not above values where creative goods are concerned. This has transformed ‘values’ into the index for quality and the linchpin for competitiveness where creative goods are concerned. But in the competitive market environment, success depends on connecting the values of the goods with the aspirations of the customer. This can be achieved only by guaranteeing three key factors: quality product; distinctive brand; and effective marketing.³⁵ These three dynamics sum up what promotion entails. A particular strategy will be partly suitable if it can sufficiently facilitate all three factors.

The term ‘quality’ is ambiguous and absolutely subjective. It could mean different things to different customers depending on their individual circumstances which determine their preferences, desires and expectations. Therefore, what one person considers good quality may not measure up in the eyes of another person. According to WIPO, quality with reference to a product ‘implies that the consumer perceives it to be better than competing products because of its functional or technical attributes and/or

³⁴ See chapter two. See also ITC/WIPO 2003 *supra* 14.

³⁵ *Ibid.* See also Flew 2002 *supra*; O’Connor 2002 *supra*; and Galloway & Dunlop 2007 *supra* 24.

because of its outward appearance and style’.³⁶ But quality could also be tied to more esoteric interests and social currencies like ethical or cultural values, or eco-friendly links with the product. Good quality meets the expectations of the targeted customer and could be enhanced by branding, while branding could equally be facilitated by good quality.

The difference between a ‘distinctive brand’ and ‘effective marketing’ is nuanced. This is because they both involve branding as a strategy, but marketing is not entirely dependent on branding for the purpose of promoting a product. Effective marketing could involve measures that promote the marketability of the product including promotional strategies, such as, freebies, bonuses and discounts; while branding entails a more scientific process albeit with similar if not the same objectives as marketing.

The American Marketing Association (AMA) defines a ‘brand’ as a ‘name, term, design, symbol, or any other feature that identifies one seller's good or service as distinct from those of other sellers’.³⁷ This implies that the term ‘brand’ does not merely refer to a product, but to one that has a distinct identity. A ‘distinctive brand’ is one that stands out from similar products by way of its unique feature, such as symbol, smell, shape, and sound, such feature being its identity which is easily perceivable not necessarily through the totality of the experience of its use, but by recognition through any of the senses of sight, smell and hearing. Distinctiveness of a brand can occur individually or collectively. A product may be distinctive to an individual based on his/her unique preferences and experience of the product, but remain relatively unknown to the larger public. But the replication of similar experiences in other individuals using the same product may

³⁶ ITC/WIPO 2003 *supra*.

³⁷ AM Muñoz ‘Brands and branding’ available at <https://onlinelibrary.wiley.com/doi/abs/10.1002/9781405165518.wbeosb047>, citing the American Marketing Association (AMA) available at <https://www.ama.org/topics/branding>, accessed on 1 March 2021.

eventually result to collective distinctiveness.³⁸ Sharma and Kulhari observe that what makes branding so powerful is the collective nature of perceptions formed from stories, images and associations which are strengthened and re-enforced over time by the organisation, by its customers, by popular culture and by other influencers. While individual distinctiveness is largely independent of marketing strategies, collective distinctiveness depends more on marketing or branding. This makes branding and marketing important tools for promoting a product.³⁹

In the context of the creative economy, branding is important and targets two main goals, namely: identification and differentiation. According to Sharma and Kulhari, branding is based on identification through the mark or symbol associated with a product; and differentiation derives from the unique qualities of the product, especially where there are other homogenous versions competing within the same market.⁴⁰ Branding benefits both producers/marketers and customers. It provides marketing advantages to producers by decreasing vulnerability to unfair competition as customers can easily identify with and remain loyal to products that meet their aspirations. Branding benefits customers by keeping them informed about the quality of products in the market and helping to reduce their search cost when shopping for their choices. It also helps customers to realise their aspirations by being able to easily identify specific brands that satisfy their desired lifestyle.⁴¹ Most importantly, it assures consumers of product quality and authenticity. Branding is particularly compatible with tradition-based products. It has been observed that things like heritage, exclusivity, and aspirational image are known to

³⁸ Sharma & Kulhari 2015 *supra*.

³⁹ *Ibid*.

⁴⁰ *Ibid* 25.

⁴¹ BD Carlson 'Brand-based community: the role of identification in developing a sense of community among brand users' (Unpublished PhD Thesis, Oklahoma State University, 2005).

contribute to personal upliftment and emotional wellbeing, and therefore influence consumer choices. Such yearnings increase market share and price premium.⁴² As such, the commercial advantages which accrue from branding can be instrumental in preserving and protecting heritage and unique tradition-based products by creating an identity and awareness for them in the domestic and foreign markets.⁴³

Building blocks to achieving good brands include creating brand identity and awareness which refers to customers' ability to recognise the brand and connect with its underlying values. It has been posited that customers' emotional reactions to the brand relate to the social currency the brand evokes.⁴⁴ WIPO notes that the utility of branding lies in its efficacy as a marketing strategy, which implies achieving recognition and respect for a product and its origin in the market place.⁴⁵ The distinction between 'distinctive product' and 'effective marketing' as important dynamics of promotion thus lays in the modalities adopted to individuate products by names and other markers as envisaged by trademarks on one hand,⁴⁶ and to popularise products through marketing, on the other hand. In the global arena of commerce, this is ordinarily not an easy task for business entities to achieve. For small businesses, it is a herculean task to singlehandedly accomplish.⁴⁷

⁴² Sharma and Kulhari 2015 *supra*.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ ITC/WIPO 2003 *supra* 14.

⁴⁶ BJ Reynolds 'Branding for success: trademarks, product certification important to many cooperatives' (2007) 74(2) *RC* 12.

⁴⁷ See UNCTAD 2010 *supra* 84, discussing some of the problems that small businesses typically experience which hinders their integration into the global economy, including: lack of access to finance to develop creative projects, inability to afford expert services, lack of business skills relating to marketing and financial management, lack of access to information and up-to-date technologies. See also D Cunningham et al 2008 *supra*.

4.4.1.2 Preservation

Preservation requires different measures to achieve depending on its purport. In one context, preservation envisages a state of inertness quite contrary to the ‘living’ nature of culture where it involves archiving specific forms of TCEs, as suggested for the *ukara ekpe* cloth earlier. But preservation could also entail active use in another context which makes the effects of ‘gatekeeping’ and ‘hoarding’ strategies potentially harmful. Redner perceptively argues that cultural diversity cannot operate strictly within bounded spaces, and that sustainability of cultural diversity can only be guaranteed when culture co-exists with and borrows inspiration from others.⁴⁸ Similarly, UNESCO declares that ‘cultural diversity does not constitute an inert reserve of curios in need of preservation alone’.⁴⁹ Article 7 of the UDCD states: ‘creation draws on the roots of cultural tradition, but flourishes in contact with other cultures’. Cowen warns that when national cultural forms are unable to interact with other cultures, it might lead to lack of development and eventual death of the cultural forms.⁵⁰ In essence, preservation is not only about preserving the physical forms of TCEs typically in museums or archives. It is equally about preserving the knowhow by practice, transmission and revitalisation. The IGC has explained that preservation as such ‘has the goal of assisting the survival of the TCEs for future generations of the original community and ensuring its continuity within an essentially traditional or customary framework’.⁵¹

⁴⁸ Redner 2004 *supra*.

⁴⁹ Stenou 2002 *supra* 61.

⁵⁰ He makes reference to France’s sanctions against on French films fundamentally motivated by the need to prevent French cinemas from being overrun by Hollywood blockbusters. Cowen 2002 *supra* 48.

⁵¹ WIPO 2003b *supra* 7.

Preservation is an important rationale for the protection of TCEs for reasons which have been given considerable amount of attention above.⁵² They centre on the importance of cultural diversity and TCEs as part of the cultural heritage. Like other forms of TCEs generally, tradition-based arts and crafts serve as a means of cultural identification of their holders,⁵³ raw material for further creativity and a source of livelihood. While preservation in the form of a memorabilia is good for cultural heritage, the larger concern for preservation entails active practice of and continuous interaction with the knowledge in question irrespective of changing circumstances. Thus, where cultural values and practices are no longer in alignment with societies' needs in response to the processes and dynamics of cultural evolution, designing and encouraging ways by which such practices can be revitalised is a form of preservation. Liebl and Roy share this view and note that as far as handicrafts are concerned 'two promising ways to improve livelihoods while saving skills and knowledge are: adapting traditional skills to new products for changing markets'; and 'repositioning skills and products for upscale markets with an appetite for handcrafted quality and character'.⁵⁴ This aligns with Pager's suggested 'innovation approach' in protecting TCEs which 'encourages tradition to evolve into new forms of expression'. Pager argues that the innovation approach 'offers the most viable strategy for sustaining traditional culture in the long run'.⁵⁵

It is important to note that the imperative for preservation remains valid even where individual claims to ownership of a particular TCE are applicable. This is because

⁵² Chapter two.

⁵³ WIPO 2002a *supra* 13.

⁵⁴ Liebl & Roy 2004 *supra* 68. They illustrate 'this type of adaptation and repositioning' with reference to the increasing number of fashion designers who are drafting skilful traditional textile artists to produce Indian and fusion clothing with a good international market, and diversifying into accessories and home decorative products using traditional skills.

⁵⁵ SA Pager 'Folklore 2.0: preservation through innovation' (2012) (4) *ULR* 1835-1895(1835).

preservation, like integrity, is also linked to concerns about knowledge or culture as collective objectives other than individual interests in the knowledge.⁵⁶ It has been argued with respect to TK that preservation constitutes part of the very essence of TK through ‘the nature of the connection between traditional knowledge as such and the community within which it originates’. Thus, even where ‘ownership’ is contestable over TK, particularly if this is seen as connoting individual or private ownership, there may still be related senses of responsibility for protection and custodianship independent of ownership.⁵⁷ This is tied to a right-based and ethical rationale for preservation.

Preservation is not only necessary to achieve certain goals but is also seen as both a right and a moral obligation on mankind to preserve traditions inherited from the past.⁵⁸ The UNESCO’s 1966 Declaration of the Principles of International Cultural Co-operation gives fillip to this view by stating that ‘each culture has a dignity and value which must be respected and preserved’,⁵⁹ and article 11 of the United Nations Declaration on the Rights of Indigenous People 2007 (UNDRIP) provides as follows:

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, *artefacts*, designs, ceremonies, technologies and visual and performing arts and literature.

Such obligations and guarantees are founded on the importance of TCEs to both the custodians and humanity as a whole.⁶⁰ However, there is a more discernible moral than a legal obligation to preserve, which is founded on fairness. Throsby explains that the

⁵⁶ WIPO 2002a *supra* 14.

⁵⁷ *Ibid* 13-14.

⁵⁸ S Arai ‘Japan and the preservation of intangible cultural heritage’ in Wong 2005 *supra* 26-29.

⁵⁹ Article 1.

⁶⁰ Daes 1993 *supra*; R O’Keefe ‘World cultural heritage: obligations to the international community as a whole?’ (2004) 53(1) *ICLQ* 189-209.

moral obligation to preserve is founded on a principle of intergenerational and intra-generational equity similar to the sustainable development rhetoric, which asserts the right of the present generation to fair treatment in cultural matters and imposes a duty to preserve and protect culture for use by future generations.⁶¹ This understanding based on social equity infers an integrated public with varied interests or groups who are conflated as that future generation, and safeguarding their interests is a strong justification for measures aimed at preservation and protection of cultural resources.

Thus, relationships with TCEs may entail a strong sense of responsibility or an obligation on the part of the community or the society to preserve and use the knowledge appropriately with the interest of future generations in mind. It may also entail an adverse reaction to the misuse or pejorative misappropriation of knowledge which may be seen as harmful or offensive to the community or a set of collective values.⁶² Understanding the importance of preservation as the very essence of TCE/TK is reflected in the attempt by the IGC to construct an acceptable definition of TK by underscoring the role of the community in and commitment to preservation as a key attribute of what constitutes TK.⁶³ Thus, an inalienable responsibility on the part of communities to preserve their TK is recognised alongside the imperative of preservation as an independent goal at all times.

It is even more imperative to pay attention to preservation in the market environment because of the increased vulnerability of tradition and culture. Ordinarily, economic interest is of higher currency when contemplating promotion in the context of deepening market access. Consequently, any strategy that increases demand is ostensibly meritorious, and the consumer remains the main target. No doubt, where creative goods

⁶¹ D Throsby 'Culture, economics and sustainability' (1995) 19(3) *JCE* 199-206 (204-205).

⁶² WIPO 2002a *supra* 14.

⁶³ *Ibid.*

are concerned, values other than price count. But because the market is not pristine, consumers' tastes or perceptions of value may be influenced by other dynamics of the global market which allow more predatory cultural products to unduly influence choice preferences and suppress other cultures.⁶⁴ UNESCO notes that globalization in its culturally most marketised forms threatens to erode and diminish more localised and historically vulnerable cultural forms, both within and across societies.⁶⁵ Because of the dual nature of TCEs as symbols of lifestyle and commodities, their promotion in such a liberalised market environment centred largely on economic gains in collusion with consumers' whims may leave long-term blemishes on their existence following the (creative) destruction phenomenon and the dumbing ground effect.

The foregoing establishes that in promoting tradition-based arts and crafts, the importance of preserving the core values and ethos of the products as cultural heritage must not be sacrificed on the platter of economic gains. Both concerns should be equally safeguarded.⁶⁶ At the centre of these potentially conflicting goals and concerns are IPRs, a point made by WIPO when it observed that there is a question of how or if the intellectual property system can reconcile tensions between the modernisation of products and the preservation of their 'traditional' nature.⁶⁷ Weighing in on this view, the question is how to commercialise tradition-based arts and crafts and still preserve their intrinsic traditional character. And part of the answer as pointed out is to incentivise the preservation of the intrinsic qualities as the products' signature brand. The feasibility of achieving this is analysed through the lens of communal IPRs.

⁶⁴ See the Preamble of *Mexico City Declaration on Cultural Policies* (1982) available at https://culturalrights.net/descargas/drets_culturals401.pdf, accessed on 1 March 2021.

⁶⁵ Stenou *supra* 2002 14.

⁶⁶ *Ibid.*

⁶⁷ ITC/WIPO 2003 *supra*.

4.4.2 Compatibility Analyses of Communal IPRs

In examining how communal IPRs could protect tradition-based arts and crafts, it must be emphasised that while all communal IPRs may be potentially useful in promoting tradition-based arts and crafts, the focus is to determine the most appropriate following the standards set out above. This is not to imply that the other forms of IPRs do not apply contemporaneously where the conceptual frictions between IPRs and TCEs, and the practical challenges of extending IPR protection to TCEs are absent.

Fundamentally, Communal IPRs do not exist *in vacuo*.⁶⁸ They are governed by the principles guiding the operation of IPRs either generally as discussed in 2.3.1 and 2.3.2, or with specific reference to a given IPR within their respective frameworks. The differences across the models lay in the nature of the subject matter of protection and the specific rationales for protection. It is not the plan to exhaust the list of legally applicable communal IPRs to TCEs in this section. A more streamlined approach is to discuss the most appropriate or compatible models guided by the objectives of the thesis. Nevertheless, it is essential to provide a panorama of IPRs (including their communal forms) and settle their compatibility status in recognition also of their potential complementary role for optimal benefits.

4.4.2.1 Copyright

No doubt, as the arm of IPR that deals with intellectual creations in expressive forms,⁶⁹ copyright is central to the creative economy which comprises largely of works of

⁶⁸ This may not apply to GIs which are established as special systems.

⁶⁹ Today, the scope of works considered copyrightable are diverse and include publications, works of literature, music, art works, folklore, computer programs, databases and architectural works. See UNCTAD-ICTSD *Resource Book on TRIPS and Development* (2005) 136

symbolic expression with creativity as the main input. Indeed, as mentioned earlier, cultural goods are seen as ‘potentially subject to copyright’.⁷⁰ Ordinarily, copyright protects the original manner and style in which facts and ideas are expressed⁷¹ including attributes like text, images, colour, and sound⁷² - which are captured in a definite and more than transient format.⁷³ In the case of the Nigerian and South African crafters, this would include: designs on traditional textiles, pots, mats and other surfaces within the parameters of their individual copyright statutes.⁷⁴ Copyright is important in terms of granting positive protection to TCEs as cultural expressions, but tenuous when it comes to crafts because of the utilitarian component of crafts in addition to their aesthetic components, and the resultant uncertainty as to whether copyright or design protection is the applicable framework.⁷⁵ However, most jurisdictions make provision for crafts as three-dimensional works.⁷⁶ Generally, the aesthetic components of crafts, such as, pictorial, graphic or sculptural features would be protectable if they can exist independently of the utilitarian component and meet the criteria for copyright protection, such as originality.⁷⁷ Thus, the protection of a designer dress or handbag in their entirety as copyright may be subject to debate because of their strong utilitarian function, but any of their pictorial design or fabric pattern could be protected. However, where the designs

⁷⁰ FCS 2009 supra 2.

⁷¹ This is the main difference between copyright and patent protecting inventions. WIPO 2003a supra 3.

⁷² Today, the scope of works that may fall under copyright is wide and also includes publications, music, computer programs, databases and architectural works. See UNCTAD-ICTSD 2005 supra 136.

⁷³ Fixation is not specifically required in a core copyright convention like the Berne Convention.

⁷⁴ This is further discussed in chapter 4.

⁷⁵ As would be seen later, there could be some uncertainty as to whether some forms of craft should be protected as copyright or design as seen in 4.4.2.3. See E Derclaye *The Copyright Design Interface: Past, Present, and Future* (2018).

⁷⁶ In the US for instance, three-dimensional works are protected under copyright as ‘useful articles’ guided by specific rules. For instance, the aesthetic and functional features of the article at issue must be separable. See *Star Athletica LLC v Varsity Brands Inc* 580 U.S. Nigeria, on her part, protects three-dimensional works as artistic works, which is defined under the Copyright Act to include works of artistic craftsmanship. See s51 of the Nigerian Copyright Act. See also 5.3.1 of this thesis for further explanation.

⁷⁷ S51.

have also an integrated functional purpose (such as the Nigerian *ukare ekpe* cloth which symbolises a spiritual meaning), a merger between the utilitarian and artistic components exists such that one cannot be easily separated from the other. In that case, the question whether copyright applies becomes more difficult to answer.

Nevertheless, where applicable, the owner of a copyrighted work has the exclusive right to prevent others from undertaking any of the protected uses of the work and a corresponding right to authorise the uses, which includes reproduction, adaptation, and different acts of communication to the public.⁷⁸ Thus copyright would typically protect against unauthorised production of imitation copies of a tradition-based art or craft.⁷⁹

But even though copyright ostensibly accommodates TCEs under its framework, and, *a fortiori*, tradition-based arts and crafts, the individual ownership, known authorship and originality principles underpinning copyright as discussed in 2.3.1 and 2.3.2, would constrain the extension of copyright to these works due to the fact that copyright is out of sync with the nature of traditional knowledge systems as a mix of collective and individual creativity.⁸⁰ This may not be as much the case for contemporary cultural expressions derived from pre-existing TCEs as it is for the pre-existing works themselves whose authors are typically unknown. Such a contemporary work of expression may easily fulfil copyright's requirements of originality and individual authorship where it is sufficiently infused with the individual creativity of a determinable

⁷⁸ Article 9 of the Berne Convention and the TRIPS Agreement. It is important to note that the scope of the subject matter was expanded by article 10 of the TRIPS Agreement to accommodate new forms of expressive works and new uses besides reproduction (copying).

⁷⁹ See WIPO 2002 *supra*.

⁸⁰ Other key concepts are term duration and the originality requirement discussed in 2.3.1. See also article 7 Berne Convention.

maker to give it a new character. While the criteria for copyright protection could be a thorny issue because of the nature of TCEs, special provisions exist for folklore, which construe criteria for protection of folklore differently in order to accommodate them under the copyright framework.⁸¹ These provisions are however largely ineffective⁸² since they only address the need for legal protection and not promotion and preservation and copyright is not designed for these roles.

In a case where preservation is understood to documentation and/or archiving in archival institutions like galleries, archives, libraries and museums (GLAMS) as part of efforts to promote and safeguard TCEs, Andanda argues that such institutions may be able to exercise some claims to copyright over their TK/TCE collections.⁸³ In that case, copyright could serve some usefulness towards preserving and safeguarding TCEs. But as Andanda aptly noted, the question of ‘how to ensure that third parties do not protect unmodified TK’ remains relevant for most pre-existing TCEs which may not fulfil the stringent rules of authorship governing copyrightability.⁸⁴ This is in addition to the fact that these activities, i.e., documentation and archiving could result in GLAMS inadvertently placing some aspects of their TK/TCE collections in the public domain and open to all manner of use by the public without considering the interests of the traditional owners of the knowledge, thus creating the need for legal protection against misappropriation/ misuse through copyright with all the conceptual and practical hurdles. However, even if copyright protection can be asserted, it would still not fulfil the current objectives for tradition-based arts and crafts. Being naturally a negative right, the grant of

⁸¹ For more on African countries that protect TCEs under copyright laws as ‘folklore’, see Nwauche 2016 *supra*. Nigeria is among. See s31 of the Nigerian Copyright Act and Part 9 of the Copyright Bill.

⁸² *Ibid*

⁸³ Andanda 2012 *supra*.

⁸⁴ *Ibid* 547.

copyright is not equivalent to an automatic economic privilege over the protected work.⁸⁵ Owners must of necessity exercise the rights in order to unleash their economic advantage which may be beyond the capacity of the crafters. Though collectivism is not alien to copyright in the pursuit of this need through the traditional role of CMOs, such role does not specifically address the objectives of promotion and preservation. Though it facilitates the effective management and appropriation of the economic benefits derivable from copyright works, it does not directly address branding as primary in promoting tradition-based arts and crafts in the creative economy. In other words, copyright would not provide the needed incentives and impetus to encourage crafters to preserve the unique qualities of their products against the onslaught of market trends.

Moreover, by allowing derivative works which by law must be ominously different from the original versions, copyright could encourage the erosion of the ethos of TCEs.⁸⁶ This is so notwithstanding the rules safeguarding the integrity of copyright work as moral rights, mainly because moral rights are primarily author-related. They apply to the author and not to the work itself. Thus, with the authorship of TCEs mostly unknown, the integrity safeguard of moral rights remains tenuous for TCEs. Hence, granting permission for the use of aspects of TCEs to create new works may subsequently dilute their authenticity.

The foregoing arguments eliminates copyright as appropriate for realising the current goals for tradition-based arts and crafts but not entirely out of relevance to TCEs.

⁸⁵ Ncube 2018 *supra*.

⁸⁶ Gibson 2005 *supra*.

4.4.2.2 Patents

Unlike copyright, patents protect novel ideas and processes generally referred to as inventions, on the condition that the invention is new, not obvious and applicable industrially.⁸⁷ In other words, no such invention existed before and a person with ordinary skill in the relevant field could not easily make or anticipate the invention based on prior art.⁸⁸ Nevertheless, patents could also cover a substantive improvement of an earlier tool or process.

Patents rarely apply to creative expressions except to protect the scientific or technical knowhow underlying their creation. However, patents could be useful to tradition-based arts and crafts by indirectly protecting the tools or processes applied in making them. But the tools or processes must satisfy the conditions for patentability. Examples include new functional features of working tools like brushes, paints and musical instruments; and significant functional improvements to machines like looms and furnaces used in making handicrafts.⁸⁹ Patents would be relevant to the technique of mixing colours or other organic substances to achieve a specific colour tone or texture of a traditional textile like *adire*. Thus, for arts and crafts, patents remain ancillary as value derived from the incorporation of an innovative idea or process in making them.⁹⁰ In this specific context, patents could be valuable to the creative economy.

⁸⁷ Article 27(1) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). There is also what is known as a ‘petty’ patent or utility model. ‘A petty patent is similar to a patent but with less stringent conditions for protection and a shorter term. In some jurisdictions like the US, a distinction is made between design patent and utility patent. See *In Re Anita Dembiczak and Benson Zinbarg* US Court of Appeals for the Federal Circuit 98-1498 (SNo 08/427,732).

⁸⁸ Oyewunmi 2015 *supra*.

⁸⁹ B Krages ‘Patent protection for your craft’ (dna).

⁹⁰ E.g., software patterns or designs whose aesthetic component also has a functional purpose or a new method of weaving or dyeing textiles to give them a distinctive expressive look.

Still, like copyright, the novelty criterion which underpins patentability⁹¹ could also constrain the application of patent to TCEs which are inherently opposed to technological innovations replacing time-honoured valuable manual processes. The same goes for the requirement of naming an inventor which may not be easily determinable for TCEs.⁹² Fundamentally, patents remain unsuitable for tradition-based arts and crafts where the relevant focus is on symbolic creativity manifested in the aesthetic outlook of their forms.

Even if applicable to TCEs, a patent would only remit exclusive ownership and control of the knowhow without addressing the objectives of promotion and preservation, because like copyright, patents are not strictly designed for marketing of the subject matter. Instead, patents could work against the objective of promotion where the owner(s) of the work lack the capacity to develop or commercialise the patented knowhow, with the likelihood of the knowhow remaining unused or under-utilised, and therefore susceptible to extinction. This argument is directly pertinent to TK and has been the basis for strong opposition to the idea of granting patents to TK even where normatively feasible. It has been argued that it serves a better purpose pertaining to the realisation of the utilitarian rationale to have an IP system that allows the free exploitation of TK, including a *sui generis* system, as this would facilitate use of TK given that the host communities generally lack the wherewithal to optimise their use.⁹³

⁹¹ Article 27(1) TRIPS Agreement *supra*, which grants patent protection to products and processes ‘provided that they are new, involve an inventive step and are capable of industrial application’; however subject to exceptions. See, e.g., article 27(2).

⁹² Andanda 2012 *supra* 549.

⁹³ WIPO 2003b *supra*.

Like copyright, these weaknesses equally apply to communal patent regimes, such as patent pools.⁹⁴ But they do not preclude the use of patents alongside other IPRs where applicable for stronger protection. One of the extra measures suggested to enhance the role of patents towards the protection and preservation of TK is joint inventorship. Joint inventorship entails the inclusion of custodians of TK as co-inventors especially where the contribution of the custodian to the development of the invention substantiates a legitimate claim to such inclusion.⁹⁵ This nullifies the earlier mentioned objection to the granting of patents over TK to communities or other custodians holding the knowledge on grounds of lack of competency on the part of the communities/custodians to develop the knowledge independently.

4.4.2.3 Design protection laws

While the dominant framework of art works remains copyright, crafts oscillate between copyright and design rights - more commonly known as industrial designs - because they have both aesthetic and functional qualities. Designs are simply aesthetic and functional features applied to an article. ‘Industrial design’ protection is closely related to copyright since it also protects the manner in which a work is expressed, including visual features like colour, shape, and texture of the product itself. But unlike copyright works, industrial designs also have a functional role.⁹⁶ They also require the quality of ‘newness’ in order to qualify for protection as a form of IP.

⁹⁴ I Mgbeoji ‘Patents and traditional knowledge of uses of plants: is a communal patent regime part of the solution to the scourge of bio-piracy (2001-02) 9(1) *IJGLS* 163-186.

⁹⁵ Andanda 2012 *supra* 555.

⁹⁶ See WIPO 2004 *supra*.

Design rights are somewhat ambiguous. UNCTAD notes that the concept of ‘industrial designs’ refers to all types of aesthetic, useful and functional designs including subject matter protected as ‘works of applied art’ or ‘works of artistic craftsmanship’ under copyright law. It can also ‘include indigenous and folkloric iconic symbols and designs’, including craft items.⁹⁷ Obviously therefore, this lack of a clear delineation of design rights results in overlaps with other branches of IPR, mainly copyright and trademark.⁹⁸

Generally, the protection of designs as IP rewards creative efforts in making functional objects more appealing to the consumer thereby giving the objects a competitive advantage over products of similar function. The social value for protection is the rationale that such aesthetic value could indeed determine consumers’ preferences. Design laws could protect three-dimensional objects as ‘works of artistic craftsmanship’, such as, the traditional textiles, baskets and pots, wood carvings and sculptors.⁹⁹

Designs are an important part of TCEs given their ornamental manifestation as the IP component protected by law. But like copyright, the ‘newness’ requirement that holds sway in designs protection¹⁰⁰ technically excludes pre-existing communal designs, even though it could accommodate contemporary tradition-based designs, subject to other qualifying conditions as determined by national laws.¹⁰¹ As would be seen in chapter five, national design legislation usually determines whether a design is protected under copyright or a separate design legislation, for example, a two-dimensional work, such as,

⁹⁷ UNCTAD-ICTSD 2005 supra 329.

⁹⁸ Ibid.

⁹⁹ See *Response Clothing Limited v The Edinburgh Woollen Mill Limited* [2020] WLR(D) 88 [2020] EWHC 148 (IPEC)

¹⁰⁰ See article 25(1). Although these requires are obligatory, they are usually implemented in national laws. See s13(1)(a) of the Patent and Designs Act Cap P2 LFN 2004.

¹⁰¹ S12 of the Patent and Designs Act provides that it must be ‘capable of industrial application’.

traditional ‘handmade’ textiles. Ultimately, the question whether communal designs can be protected as IP depends on national laws and how they define ‘newness’ and ‘originality’.¹⁰² Even so, like copyright, protection of handicrafts as design IP will only provide legal safeguard against unauthorised uses, without fully addressing the objectives of promotion and preservation in the dynamic sense of this study. Nevertheless, they could be used alongside the more suitable options to protect traditional designs against misappropriation.

4.4.2.4 Trademarks

Branding of intellectual assets falls within the domain of trademark law which protects a sign or any ‘combination of signs capable of distinguishing’ a product or service from similar (competing) brands in the market.¹⁰³ Trademarks are products of efforts to create brand reputation and recognition. They create an identity for a product for easy recognition and differentiation in the market, with the fundamental public-interest-related rationale of preventing the injustice of consumers being misled into purchasing fake items believing that they are authentic. As good tools for building strong brands, trademarks are potentially valuable in helping developing countries to develop brand recognition for their high-quality arts and crafts in the global market.¹⁰⁴

¹⁰² Nwauche 2016 *supra*, citing Ghanaian Industrial Designs Act 2003 (Act 660).

¹⁰³ WIPO *Brands – Reputation and Image in the Global Market Place* (2013) available at <https://ideas.repec.org/b/wip/report/2013944.html>, accessed on March 1 2021. See also article 15 of TRIPS which states that ‘(a)ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark’.

¹⁰⁴ UNCTAD-ICTSD 2005 *supra* 264; S Frankel ‘Trademarks and Traditional Knowledge and Cultural Intellectual Property’ (2011) 8 available at https://www.researchgate.net/publication/228136506_Trademarks_and_Traditional_Knowledge_and_Cultural_Intellectual_Property_Rights, accessed on March 1 2021.

From the cultural perspective, trademarks are generally seen as suitable instruments for protecting the goodwill of TCEs against infringement and dilution of their integrity. In their treatise on the justification theories for TK,¹⁰⁵ Munzah and Raustiala explained that infringement of goodwill typically occurs where fake items are produced and passed off as the original/authentic version or there is confusion among consumers as to the identity/origin of a product. Still, they doubt the usefulness of trademarks to TK holders on the grounds that ‘trademark is mostly applicable to those TK-related products that are widely sold in markets’, which they believe is hardly the norm for TK.¹⁰⁶ But they acknowledge that exceptions exist, in which case, it can be argued that the case of tradition-based arts and crafts falls within the exceptions. In the absence of a clear explanation of what the experts mean by ‘widely sold’, one can reasonably assert that some kinds of tradition-based arts and crafts enjoy a large market both locally and globally, such as the highly diffused *adire*. Therefore, the likelihood of consumer confusion cannot be ruled out where imitations of these products are successfully passed-off as original, as Adewopo, et al established.¹⁰⁷ Unlike Munzer and Raustiala, Okediji sees strong intersections between TCEs and trademarks. She notes that ‘[t]he demands of Indigenous groups and local communities for perpetual association with their knowledge assets are no different from the perpetual association possible between a product or service and the indication of source that trademark law protects’.¹⁰⁸

¹⁰⁵ Munzer & Raustiala 2009 *supra* 78-81.

¹⁰⁶ *Ibid* 79.

¹⁰⁷ Adewopo et al 2014 *supra*.

¹⁰⁸ Okediji 2018 *supra* 11 & 12, citing DJ Gervais ‘Reinventing Lisbon: the case for a protocol to the Lisbon Agreement’ (2010) 11 *CJIL* 67. See also J Hughes ‘Champagne, Feta, and Bourbon: the spirited debate about geographical indications’ (2006) 58 *HLJ* 299.

Earlier, it was observed that, broadly, the IP system is the best available tool for creating and maintaining exclusivity over creative and innovative outputs in the marketplace.¹⁰⁹ Trademarks are completely at the crux of this assertion, given their role as effective tools for marketing.¹¹⁰ The utility of a trademark as a powerful marketing strategy is derived from its ‘traditional’ and ‘essential functions’¹¹¹ as ‘a badge of origin identifying the product or trade source of a product’;¹¹² bridging information asymmetries in the market regarding available products for consumers to make informed choices; protecting producers against unfair competition;¹¹³ and rewarding investment in building a product’s reputation.¹¹⁴ As consumers rely on the reputation of a strong mark to make choices on their purchases, ownership of a trademark with a good reputation provides the user with a competitive edge.¹¹⁵ The rationale for trademark protection is the security it offers for investments in brand building.¹¹⁶ The real IP is not the trademark *per se*, but the reputation and good goodwill attached to it. Where such good standing is based on the intrinsic quality of the product as tradition-based, trademarks provide the incentive to consciously preserve such qualities thereby serving the purpose of preservation.

In terms of protection, trademarks serve the same function as copyright and patents by protecting against unauthorised use of a duly registered trademark and riding

¹⁰⁹ See 1.4.2.2 citing ITC/WIPO 2003 supra iii.

¹¹⁰ K Idris ‘The Making of a Mark: An Introduction to Trademarks for Small and Medium-sized Enterprises’ (2006) available at <https://www.wipo.int/publications/en/details.jsp?id=106&plang=EN>, accessed on March 1 2021.

¹¹¹ ECJ Case C-273/00 *Ralf Sieckmann v Deutsches Patent und Markenamt* [2000] para 35.

¹¹² This is its traditional function as stated in *Hanover Star Milling Co v Metcalf* 240 US 403 412 (1916).

¹¹³ *Hanover Star Milling Co v Metcalf* supra and *Ferodo Ltd v Ibeto Ind Ltd* [2004] 5 NWLR Pt 866 at 317-347; ECJ Case C-487/07 *L’Oréal/Bellure* [2009] ECR I-05185 para 58.

¹¹⁴ Idris 2006 supra 4.

¹¹⁵ SJ Dilbary ‘Famous trademarks and the rational basis for protecting irrational beliefs’ (2007) 14(3) *GMLR* 605-666.

¹¹⁶ Munzer & Raustiala 2009 supra and J Litman ‘Breakfast with Batman: the public interest in the advertising age’ (1999) 108(7) *YLJ* 1717-1735(1727–28). See also JE Rothman ‘Initial interest confusion: standing at the crossroads of trademark law’ (2005) 27(1) *CLR* 105-191 (124-130); Landes & Posner 1987 supra.

free on its good reputation. Principally, protection entitles the trademark owner to claim exclusive ownership of the trademark and to prevent others from using it in a deceptive manner in the course of business.

In terms of promotion, trademarks are ahead of other IPRs mainly because of their potency as tools for branding. No doubt, there is a ‘distinction between a trademark as a legal instrument and a brand as a business tool’. Trademark has been described ‘as the legal anchor for the use of the commercial functions of brands’.¹¹⁷ But as Reynolds plausibly observed, in the global market consisting of myriad identical and somewhat physically indistinguishable products, trademarks become synonymous with branding by providing names and identities to otherwise nondescript products, and helping producers and consumers to distinguish between them.¹¹⁸ WIPO hinted at this synonym when it stated that ‘a brand or trademark is a sign or any combination of signs capable of distinguishing a product or services ... from other products or services in the market’.¹¹⁹ Thus, trademarks are potentially instrumental to boosting competitiveness in a market where quality standards are components of competitiveness and are integral to defining consumers’ preferences. They are a more functional and proactive mechanism for boosting the market potential of a product.¹²⁰ In the same vein, the utility of trademarks to small enterprises desirous of improving the market for their products cannot be gainsaid. But effective marketing involves cost, and optimising the benefits of a trademark may be too formidable for the small entities involved in the tradition-based

¹¹⁷ C Fink et al *World intellectual Property Report: Brands – Reputation and Image in the Global Market Place* (2013) 22 available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_944_2013-chapter1.pdf, accessed on 11 November 2021.

¹¹⁸ Reynolds 2007 *supra*.

¹¹⁹ ITC/WIPO 2003 *supra* 10 [emphasis added].

¹²⁰ See *ibid*; UNIDO 2010a *supra*.

arts and crafts sector to achieve, which makes communal trademarks a credible option. Below are the reasons why.

First, communal trademarks are connected to the nature of the tradition-based arts and crafts sector, which, as earlier noted, typically comprises mainly of small and individual businesses with weak (mostly informal) and oftentimes non-existent platforms for collective efforts in successfully promoting business interests.¹²¹ The institutional support and synergies provided by communal trademark systems could provide the pillars to strengthen the efforts of the small businesses and existing collective platforms in promoting their business interests. Secondly, the fundamental proposition of this thesis that the most effective way of preserving TCEs is to incentivise preservation through the valorisation of their authentic unique qualities implicates branding and effective marketing as key roles of trademarks.

The normative requirement that trademarks must be legally applicable to tradition-based arts and crafts also favours communal trademarks. No doubt, similar contentious issues like originality, inventiveness and newness required of other IP remain extant through the requirement of distinctiveness for qualification as a trademark. To be protectable, a trademark must be original in the sense that it is unique, and is capable of distinguishing a product in the market.¹²² But the distinctiveness required by law as a criterion for trademark registrability has no direct effect on tradition-based arts and crafts. This is because ‘distinctiveness’ is required of the trademark and not the item of trade for which the trademark is intended. In other words, the trademark rather than the tradition-

¹²¹ This was seen in chapter three. In 3.2.2.1 and 3.2.2.2, the craft sector is shown to be dominated by small and/or individual entities lacking the capacity to market their products and fully capture their market potential. In 3.4.1, 3.4.2 and 3.4.3, it was established that platforms for collective efforts exist but are weak.

¹²² S10 of the Nigerian Trademark Act Cap T13 LFN 2004.

based art or craft is the primary subject matter of protection subject to distinctiveness of the mark.

Moreover, although the formalities of maintaining a valid trademark requires registration and periodic renewal as due, a trademark can exist indefinitely once it is duly renewed. This aligns trademarks with TCEs which are perceived as perpetual by their custodian communities in the context of ownership.¹²³ Finally, the incompatibility question based on the concepts of individual versus communal ownership of IPRs and TCEs is resolved through the existence of communal trademarks.

Communal trademarks are therefore more to TCEs than any other type of IPR; they are potentially fit for the purpose of protecting, promoting and appropriating the commercial value of tradition-based arts and crafts. Even so, it would be wrong to assume that the different types of communal trademarks are of equal efficacy given their different modalities and objectives. Some would be more suitable than others depending on the subject matter, specific objectives, and legal system in place. The different types will now be examined.

4.5 Communal Trademarks

It is important to note that ordinary trademarks can also be ‘collective’ by the manner of their usage. This happens when a duly registered ordinary trademark is intended for use by many.¹²⁴ This is the model adopted in designating Ethiopia’s specialty coffee brands. Use of the registered trademark is licensed to distributors of the specialty coffees for free

¹²³ Daes *supra* 7-9, 37-40.

¹²⁴ E.g., in franchising arrangements.

who are then required to help market the trademark.¹²⁵ The model differs from communal trademarks which, unlike ordinary trademarks, require customised rules for the use of the trademark, e.g., the Coopa Roca. Communal strategies could be government or private sector driven. They could also be national or regional.¹²⁶ The three types of communal trademarks commonly provided in trademark statutes and treaties are collective trademarks, certification marks and GIs. Their terms differ across national jurisdictions and all three may or may not apply concurrently.¹²⁷ Their general modalities and objectives will now be examined.

4.5.1 Communal Trademarks: General Rationales, Objectives and Characteristics

Communal trademarks share the basic features and functions of ordinary trademarks as badges of origin, a consumer protection measure against counterfeits and protection of producers against unfair competition. They are therefore effective for marketing and branding. But they remit additional advantages over ordinary trademarks by the advantage of collectiveness which is useful to small businesses based on qualitative and quantitative synergies derived from collective efforts. Outside these general traits, each model has its own specific features and modalities as espoused below.

¹²⁵ See G Mengiste 'Ethiopia: Fine Coffee' in M Blakeney et al (eds) *Extending the Protection of Geographical Indications: Case Studies of Agricultural Products of Africa* (2012) 150-174; Sereke-Brhan 2010 *supra*.

¹²⁶ Examples of regional strategies are the European Union GIs.

¹²⁷ For instance, as seen in chapter five, Nigeria does not protect collective trademarks while South Africa does.

4.5.1.1 Collective trademarks

WIPO defines ‘collective trademark’ as a sign capable of distinguishing the geographical origin, quality or common characteristics of goods or services of different enterprises that simultaneously use the collective trademark under the control of its owner.¹²⁸ The owner could be an organisation of the producers or enterprises dealing in the goods and services, a cooperative or any other entity.

The uniqueness of collective trademarks is their ownership structure. Ownership of a collective mark is distinct from the intended users who are exclusively the members of the association or other entity that registered and manages the trademark whether private or public. The primary purpose of a collective trademark is to distinguish the product of members of the association or entity as a distinct legal person. While the association itself does not typically trade with the mark, it could assist in promoting the goods of its members using the mark. Therefore, where branding is desired exclusively within a specific industry constituted primarily by small and/or isolated entrepreneurs, a collective trademark would be useful.

Collective trademarks are also useful where the goal is to maintain specific qualities or values within an industry. They can be used alongside an individual trademark,¹²⁹ which makes them even more helpful as individual producers can further distinguish their product from other products using the collective trademark. Producers can therefore personally differentiate their products and still benefit from the distinctiveness of the collective trademark, and the synergies and institutional support accompanying the scheme. Because it is the responsibility of the organisation that

¹²⁸ See WIPO *Introduction to Trademark Law and Practice: The Basic Concepts* (1993) 87 available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_653.pdf, accessed on 1 March 2021.

¹²⁹ Ibid. See also Belson 2017 *supra*.

registers a communal trademark to ensure compliance with the stipulated standards for its use, collective trademarks greatly ease the burden of IP management from the users.

In view of the above, collective trademarks could be useful for the tradition-based arts and crafts of the study countries in all of these ways given the small-size nature of the crafters and craft businesses, and where the need to maintain their unique traditional quality or value is paramount. The Coopa Roca case shows how a collective trademark could be useful in achieving the objective of maintaining a unique traditional quality or value of a community's knowledge, notwithstanding that it involves an ordinary trademark and not a collective trademark. As Torsen explained, the motivation for the registration of the trademark by the Coopa Roca cooperative was the quality workmanship and use of traditional Brazilian sewing techniques, which was recognized as having potential for a high-end market niche in the fashion industry.¹³⁰ In the present study, a collective trademark would be even more feasible in cases where a cooperatives already exists like the *ilala* basket weavers Hluhluwe-based fairtrade cooperative and the Vukani Collective (Hlabisa, KwaZulu-Natal) also for Zulu basket weavers in South Africa.¹³¹ A collective trademark could also be contemplated for the Ushafa centre in Nigeria.

One of the disadvantages associated mainly with collective trademarks is the fact that they could suppress competition due to the fact of linking an association with the quality of the products. It has long been argued that 'allowing a single, shared, symbol to identify the goods or services of several producers [in a closed group] can reduce competition in a given industry and prevent consumers from choosing preferred

¹³⁰ Torsen 2010 *supra* 6.

¹³¹ See section 3.4.4.

products’.¹³² However, it is possible to cure this weakness by strict adherence to high quality standards which create a wide market for all the co-operators as a common concern and stronger impetus for competition outside rather than within the group.

4.5.1.2 Certification marks

Certification marks and collective trademarks appear similar but have important differences which may determine the more appropriate option in any given circumstance. Like collective trademarks, certification marks go beyond the classic paradigm of trademarks which typically certifies standards and qualities defined by their owners. Certification marks regulate and harmonise standards at the industry level or in the interest of public safety or other concerns. A good example of the later is the SON and ISO marks.¹³³ Certification marks in the context of this study differs from non-statutory certification and statute-based labelling outside the trademarks law to certify quality standards, hence the statement that ‘[All] certifications are labels, but not all labels are certifications marks’.¹³⁴ Certification marks can be based on specific requirements indicating unique quality, such as the source of origin in a geographical sense, or a special process of manufacture which gives the product added value over similar products of different origins.¹³⁵ They are also registered by a single entity, but used by many. This implies that ownership and use are not unified in the same entity. But unlike collective trademarks, the owner could be an entirely independent entity with no specific prior

¹³² Author not available ‘The collective trademark: invitation to abuse’ (1959) 68(3) *The Yale Law Journal* 528-541 (529-530).

¹³³ For instance, the SON and ISO marks. See Belson 2017 *supra*.

¹³⁴ Inho Choi ‘Important distinctions between Labels and Certifications and why they matter’ (2014) 10(3) *Discussions* 10.

¹³⁵ Oyewunmi 2015 *supra* 271.

connection with the intended users. Moreover, certification marks operate an open-shop policy meaning that use of the registered mark is uniformly available to all producers who comply with the required standards irrespective of their affiliation.¹³⁶

A vital requirement for the registration of a certification mark is that the entity applying for registration must be competent to certify the products for which the mark is proposed in order to ensure authenticity of the product.¹³⁷ This, and the dichotomy between ownership and use,¹³⁸ are seen as necessary to ensure transparency and fairness in the certification process. The proprietor of a certification mark is required to ensure certain quality standards for the certified products. This reinforces the ‘essential function’ of the mark as a confirmation that the products adhere to those standards,¹³⁹ thus making certification marks an effective tool for product differentiation and authentication, and a quality assurance symbol to the public.¹⁴⁰ For example, the WOOLMARK® certification mark, which is owned by the Australian Wool Innovation Ltd (AWI) and its associated affiliates, signify that the products bearing it are made from 100 percent ‘new wool and comply with strict performance specifications set down by the AWI’.¹⁴¹ Accordingly, it is licensed only to producers who satisfy these quality obligations.

However, certification marks can also be used more broadly as labels of authenticity for tradition-based arts and crafts for a particular country, region or ethnicity. Indeed, one of the established ways of deploying certification marks to achieve similar

¹³⁶ See WIPO 2004 supra 69. See also WIPO *Making a Mark, An Introduction to Trademarks for Small and Medium-Size Enterprises, Intellectual Property for Business Series* (2017a) 17 available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_900_1.pdf, accessed on 1 March 2021 and ‘The collective trademark: invitation to abuse’ supra 530.

¹³⁷ Belson 2002 supra 6 at 99; Belson 2017 supra.

¹³⁸ See the Proviso to s43 of the Nigerian Trade Marks Act 1965.

¹³⁹ Belson 2002 supra 9; Belson 2017 supra.

¹⁴⁰ WIPO 2017a supra 14. See also Australian Wool Industry (AWI) ‘Woolmark Certification’ available at <https://www.wool.com/marketing/woolmark-certification/>, accessed on 1 March 2021.

¹⁴¹ WIPO supra 6 and 17.

objectives of protecting, promoting and preserving tradition-based cultural expressions is through national authentication schemes, a cardinal point of which is also to ensure a fair and equitable return to indigenous communities and artists for their cultural produce.¹⁴² Well-known examples are Australia's defunct indigenous arts certification/authentication system for indigenous art,¹⁴³ the extant and pioneer *Igloo* mark for the certification Inuit art objects in Canada,¹⁴⁴ and New Zealand's Toi IhoTM scheme for Maori artists.¹⁴⁵

Like other national authentication schemes, Australia's National Indigenous Arts Certification system emerged in 1999 partly to address the inadequacy of copyright law in safeguarding the knowledge of her indigenous communities against misappropriation.¹⁴⁶ The scheme aimed at protecting indigenous artists and their works against counterfeits, and promoting indigenous works as a means of empowering the artists.¹⁴⁷ The scheme consisted mainly of two categories of certification marks, namely:

¹⁴² M Annas 'The Label of Authenticity: a certification trade mark for goods and services of Indigenous origin' (1997) 3(90) *Aboriginal Law Bulletin* 4-8.

¹⁴³ L Wiseman 'The protection of Indigenous art and culture in Australia: the Labels of Authenticity' (2001) 23(1) *EIPR* 14-25. Despite its failure, the Australian example is widely cited perhaps because failure had to do more with implementation than the soundness of the idea itself.

¹⁴⁴ Hollowell 2004 *supra* 79.

¹⁴⁵ Chalk & Dunlop 2009 *supra*.

¹⁴⁶ These two cases underscored this lacuna, viz: *Bulun Bulun and Milpurrruru v R & T Textiles* (1998) 41 IPR 513 (FC Aus) [hereinafter *Bulun Bulun*]; and *Milpurrruru v. Indofurn Pty Ltd* (1994) 30 IPR 209 (FC Aus) [hereinafter 'Carpet case']. In the *Carpet Case*, the Judge recognised communal ownership of Indigenous art and cultural expression. But in *Bulun Bulun*, the judge acknowledged the lack of accommodation for communal ownership rights over cultural expressions in the 1968 Copyright Act but relied on 'equitable principles to supplement copyright law. The Judge perceived a relationship between Bulun Bulun as trustee and the Ganalbingu people which gave rise to a fiduciary duty on Bulun Bulun to legally challenge misuse of artistic works. See also M Rimmer 'Australia icons: authenticity marks and identify politics' (2004) 3 *ILJ* 139-179 (145 155).

¹⁴⁷ See National Indigenous Arts Advocacy Association 'The Label of Authenticity and Collaboration Mark' (1999) available at https://www.dlsweb.rmit.edu.au/Toolbox/Indigenous/ecotourismtoolbox/topic_cc/cc_t03_res02.htm, accessed on 1 March 2021; Attorney General's Department 'Stopping the Rip-offs Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' (1994); T Janke *Indigenous Knowledge Issues for Protection and Management* (2018) 9-19 available at https://www.ipaustralia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf, accessed on 1 March 2021 describing how the option of a certification scheme was considered along with other options, viz: copyright law reform to incorporate terms that favour TCEs, a sui generis law in folklore,

the Label of Authenticity for primary works made by Indigenous persons¹⁴⁸ and the Collaboration Mark for products produced under license in collaboration with Indigenous persons.¹⁴⁹ Both schemes were registered under the Australian trademarks law in a wide range of arts and crafts products, and managed by the National Indigenous Arts Advocacy Association (NIAAA).¹⁵⁰

According to Janke who played a major role in the creation of the scheme, the certification mark option for establishing a National Indigenous Authentication Mark was preferred because of its advantage of serving as proof of rights. Additionally, a certification mark extended beyond the standard function of a regular trademark in identifying the source of the goods and services using the trademark. It allowed for the denotation of the quality and characteristics of the goods and services.¹⁵¹

The rules guiding the usage of the marks take cognizance of Australia's indigenous customary laws and ensure their compliance. Accordingly, they express and animate elements of the definition of authenticity as understood by Indigenous people. For example, the applicant must be properly identified as an indigenous person.¹⁵² Thus the scheme defines authenticity mainly on the basis of the artist's cultural identity and not based on the product.¹⁵³

administrative measures, and amendment to the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

¹⁴⁸ The Label of Authenticity Certification Mark 772564.

¹⁴⁹ The Collaboration Mark 772566.

¹⁵⁰ The NIAAA, now defunct, was an NGO established in 1990 to advocate 'for the recognition and protection of the rights of Indigenous artists and their works. See NIAAA 'Policy and Objectives' available at <https://www.culture.com.au/exhibition/niaaa/about.htm>, accessed on 11 November 2021. See also Janke 2003 *supra* 135.

¹⁵¹ See Janke *ibid* 137-8. Other trademark options were also considered, including a collective trademark.

¹⁵² See Label of Authenticity Rule 3.2 & 3.3.

¹⁵³ Janke 2003 *supra* 137.

Though currently defunct, the scheme is still being widely referenced as a case study for the protection of TCEs notably as indicative of the potential merits of collaborative strategies that involved stakeholder institutions at all levels both the public and private sectors. Its continuing relevance as a case study could further be because failure of the scheme is largely attributed to administrative weaknesses rather than its substantive terms.¹⁵⁴ This can be contrasted with the equivalent New Zealand Toi Iho certification trademark¹⁵⁵ used to ‘promote and sell authentic, quality Maori arts and crafts’.¹⁵⁶ The scheme’s continued existence is possibly the result of more effective and robust management which the Australian scheme lacked.¹⁵⁷

A common objective defines these indigenous authentication schemes. They generally aim to help consumers distinguish authentic indigenous or native works from fake items. But while this has the undertone of consumer protection, there is also a strong objective to encourage tradition-based creativity on fair terms and improve the returns to Indigenous artists on sale of cultural products.

Certification marks could also be regional-based, such as the European Union’s (EU) collective mark which covers all member states of the EU; or confined to a particular state or municipality within a country like the Alaska Silver Hand logo. They could also be non-geographical like WOOLMARK®.

¹⁵⁴ See the following discussing the findings of the investigation of the failure of the scheme: Rimmer 2004 supra 154-161; Wiseman 2001 supra; DZ Johnsson ‘The branding of traditional cultural expressions: to whose benefit?’ in Drahos & Frankel 2012 supra 147-164 citing Australia Council *Final Report of the Review of the National Indigenous Arts Advocacy Association* (2002); Attorney General’s Department 1994 supra 19.

¹⁵⁵ The Toi Iho™ is registered in the New Zealand Trademark Office as Mark No 629775.

¹⁵⁶ Toi Iho ‘About us’ available at <http://www.toiio.com/aboutus/>, accessed on 11 November 2021; Torsen 2010 supra 10.

¹⁵⁷ Chalk & Dunlop 2009 supra.

Certification marks have much benefit when used for tradition-based products such as handicrafts, where authentication is crucial in certifying provenance.¹⁵⁸ They could help small-scale dispersed crafters harness the special qualities that are native to their products and capture market niche. This presumably takes care of the responsibility of managing the IPR as an asset. The open-shop nature of certification marks allows anyone whose product fulfils the stipulated quality standards to participate in the scheme irrespective of their affiliation. Like collective trademarks, certification marks can be public or private owned. Given these attributes on both sides, certification marks would be feasible and potentially useful to the tradition-based arts and crafts of Nigeria and South Africa in all spaces, be it markets, community-based clusters, craft centres and independent arts and crafts spaces as defined and captured in the previous chapter.

Certification marks are protected differently across jurisdictions. They could be protected as trademark. They could also be deployed as part of consumer protection laws as is the case with the Alaska State Silver Hand logo which was mounted on a US consumer protection legislative framework.¹⁵⁹

4.5.1.3 IGOs/GIs

There is a nuance difference between the various types of IGOs, which may explain why the term ‘geographical indications’ tends to be treated as a generic term for place-based IPRs or systems. However, while all GIs are IGOs, not all IGOs are GIs. An IGO could

¹⁵⁸ The use of labels of authenticity for traditional handicrafts has a long history, but is usually traced to the Igloo trademark of Canada created since 1958 and identified as the ‘first of its kind’. See Chalk & Dunlop 2009 *supra*.

¹⁵⁹ The Alaska Native Arts and Crafts Sales Act (HB4) was first introduced in the Alaska State Legislature in 1961 as a consumer protection law safeguarding consumers against imitation products. It is now under the Alaskan Native Art Identification Seals Act Alaska Statutes Title 45 Chapter 65. (AS.45.65.010-070). See also Hollowell 2004 *supra*.

be an indication of source in which case it indicates a geographical location as the place where a product originates, such as, ‘Made in Nigeria’ or Product of South Africa’; without attributing any qualitative link between the product and the place. An IGO could also be an appellation of origin (AO) which also designates a product by its geographical origin. But unlike other GIs, AOs impute a more qualitative link with the place of origin, usually requiring that all production processes from sourcing raw materials to finished product must be carried out in that particular place.¹⁶⁰ Because of the nuanced difference between them, I will treat GIs and AOs as one except where it becomes necessary to be more specific.

Though of different variants, GIs generally establish a clear link between a product or service and its place of manufacture in very complimentary contexts, usually such link with the place being the basis for differentiation. A GI could indicate a specific place in which a product is made without any attribution of its quality to local culture or geographical conditions; or it could indicate a more intimate and inextricable link between the product and the place of origin which is associated with some geographical element, such as, climate, soil and other place-specific factors.¹⁶¹ In simple terms, ‘geography is at the heart’ of GIs.¹⁶² In the first sense, the product can be manufactured in other places as people with the knowhow relocate to those place.¹⁶³ This is typical of

¹⁶⁰ WIPO ‘Frequently asked questions, geographical indications’ available at https://www.wipo.int/geo_indications/en/, accessed on 1 March 2021.

¹⁶¹ Torsen 2010 *supra* 9.

¹⁶² See CJ Anson ‘Geographical indications: a marketing stance’ (2012) 2(2) *IJEER* 11-17 (12-13) using the term ‘the “Terroir” as the core of GIs and noting thus: it ‘encompasses the interaction between physical (natural) and human factors that has built up over time. It is a delimited geographic area where a human community has developed, over the course of history, a collective production method and know-how in relation with the environment.’

¹⁶³ Marie-Vivien has shown that in some jurisdictions like India, knowhow associated with a product from a geographical location is enough to qualify for GI protection. Indeed, this is the basis for the use of GIs as part of India’s cluster development approach to poverty alleviation. See UNIDO 2010a *supra*; D Marie-

handicrafts;¹⁶⁴ quite unlike the case of agricultural products where such transferability could compromise the integrity of the knowledge because of the intimacy between the quality of the product and the geographical conditions of the place of origin.¹⁶⁵

In relation to crafts, GIs have gained much credibility as good strategies for preserving the knowledge, protecting it against misappropriation, and enabling the crafters to gain greater benefits from their knowhow.¹⁶⁶ India provides an inspiring example of such use of GIs. Enabled by the Geographical Indication of Goods Act of 1999,¹⁶⁷ India has designated a number of its prime tradition-based arts and crafts - including traditional textiles, jewellery, pottery, and baskets - in recognition of, *inter alia*, their market potential.¹⁶⁸ Speaking about the anticipated benefits of obtaining a GI for Kullu Shawls (which is indigenous to people of the Kinnaur District of the State of Himachal Pradesh), the then Secretary for the Department of Science and Technology of the Himachal Pradesh Government once noted as follows:

Vivien and E Bienabe 'Geographical indications for agricultural and handicraft goods: the strength of the link to the origin as a criterion' (2012); D Marie-Vivien 'A comparative analysis of GIs for handicrafts: the link to origin in culture as well as nature' in DS Gangjee (ed) *Research Handbook on Intellectual Property and Geographical indications* (2016) 292–326.

¹⁶⁴ Torsen cites the example of 'Swiss' watches which can be manufactured anywhere based on the transferability of the knowledge with the word 'Swiss' a well-known GI for watches. Torsen 2010 *supra*.

¹⁶⁵ *Ibid* citing the example of Rochefort Cheese.

¹⁶⁶ Johnsson 2012 *supra* 147-164 (156-7). See UNESCO/ITC 1997 *supra* (1997) 6; K Basu 'Marketing developing society crafts: a framework for analysis and change' in JA Costa and GJ Bamossy (eds) *Marketing in a Multicultural World: Ethnicity, Nationalism and Cultural Identity* (1995) 261; DS Gangjee 'Geographical indications protection for handicrafts under TRIPS' (Unpublished MPhil Thesis, University of Oxford, 2002) 5.

¹⁶⁷ M Hirwade and AW Hirwade 'Geographical indications: Indian scenario' available at <http://eprints.rclis.org/7878/1/EF6C0C53.pdf>, accessed on 1 March 2021.

¹⁶⁸ AIACA 'Geographical indications of India socio economic and development issues' available at <https://www.scribd.com/document/77184458/Aiaca-GIs-of-India-Socio-Economic-and-Development-Issues>, accessed on 11 November 2021.

[T]he quality and specific uniqueness of the shawl will be maintained and the brand will be promoted and the misuse would be stopped.... The people who are involved in the production of (the shawl) will get the benefit of the brand name'¹⁶⁹

One of the policy objectives linked to India's GI scheme is poverty alleviation through cluster development and the use of GI for market growth of the products originating from the clusters.¹⁷⁰

GIs could be protected following different conceptual frameworks: as collective trademarks,¹⁷¹ certification marks¹⁷² or stand-alone provisions under trademark law'; as *sui generis* laws;¹⁷³ and as part of the laws governing business practices including unfair competition laws.¹⁷⁴ The example of the PARMIGIANO REGGIANO® for instance is a protected designation of origin in the EU under its *sui generis* system, while in the US, both the name and the logo are registered as certification marks. The logo may be used only on cheese certified as originating in the PARMIGIANO REGGIANO® delimited geographical area of Italy, and complying with the relevant specifications.¹⁷⁵ Generally, GIs are signs that designate the place of origin of goods as possessing unique qualities

¹⁶⁹ Torsen 2010 supra 10, citing Rajiv Kimta 'Himachal Pradesh gives geographical status to Kullu shawls, Kangra tea' available at *Plentea.com* 25 January 2005, also available at <https://www.indonesia-product.com/blog/himachal-pradesh-gives-geographical-status-to-kullu-shawls-kangra-tea.html>, accessed on 1 March 2021.

¹⁷⁰ The outcome of linking the GI program to poverty alleviation is that it has attracted strong support from UNIDO in pursuit of its development program. See UNIDO 2010b supra.

¹⁷¹ WIPO 2004 supra 120, identifying Cognac, Champagne, and Darjeeling as some well-known examples of collective marks registered as GIs associated with products of a unique quality.

¹⁷² As is the case in the US under the Lanham Act ss4 and 45.

¹⁷³ See s3 of the TRIPS Agreement and the European Council Regulation No. 510/2006, 20 March 2006. In the US, GIs can be registered as certification marks and collective marks or standalone laws.

¹⁷⁴ See C Oguamanam and T Dagne 'Geographical indication (GI) options for Ethiopian coffee and Ghanaian cocoa' in De Beer et al (eds) supra 77-108. See also D Rangnekar *A Review of Proposals at the TRIPS Council: Extending Article 23 to Products other than Wines and Spirits* (2003) available at https://unctad.org/system/files/official-document/ictsd2003ipd4_en.pdf, accessed on 1 March 2021, endorsing three broad options, namely: laws focusing on business practices, trademark law, and special means of protection with wide diversity in the definition of the subject matter and the conditions for protection.

¹⁷⁵ WIPO 2017 supra 19.

attributed to the peculiarities of that place be it, geographical features, traditional skills or manufacturing processes.¹⁷⁶ These qualities give the product a distinct value that differentiates it from similar goods of different geographical origins.¹⁷⁷ The efficacy of GIs as a branding strategy lies in their potential to create an identity for the designated product, and to establish quality perceptions about the product especially among consumers outside the geographical region.¹⁷⁸

GIs have been specifically identified as effective in preserving the cultural heritage of a geographical area and protecting TCEs for many reasons.¹⁷⁹

Firstly, GIs can help tradition-based arts and crafts which are produced using special skills and/or materials and processes unique to a geographical region gain singularity in the market and attract premium price.¹⁸⁰ This helps in boosting the market potential of the products and provides the incentive to preserve the unique factors responsible for the competitive edge. Studies have established a positive reaction in consumer preferences towards GI protected goods, concluding that consumers often attach a status symbol to them.¹⁸¹ UNCTAD made a relevant point when it stated that it is less expensive to market products that reflect traditions as their signature brand and less expensive to market culture, art, and the chance to own a piece of history in the form of a traditional craft. It attributed this to consumers' increasing preference for products that are 'perceived as authentic and genuine' with strong traditional roots, in a globalised and connected world where trade liberalisation has engendered standardisation and

¹⁷⁶ WIPO 2004 supra 120.

¹⁷⁷ Das 2009 supra.

¹⁷⁸ Woltz 2007 supra.

¹⁷⁹ Van Caenegem supra; B Sherman and L Wiseman 'From terroir to pangkarra: geographical indications of origin and traditional knowledge' in DS Gangjee (ed) 2016 supra 484–507.

¹⁸⁰ Sharwa & Kulhari 2015 supra 3; Anson 2012 supra.

¹⁸¹ Russell 2010 supra 628–647.

homogenisation of products.¹⁸² GIs signify such authenticity, and where this is the root of economic gain from a traditional knowhow, GIs could help the producers to profit from the intangible value of their product and be encouraged to maintain the unique qualities constituting the intangible value and cultural roots.¹⁸³ This is because the producers would recognise that the maintenance of the geographical specificity of their products is essential for product distinction and for the privilege of protection under the GI. As Bérard and Marchenay said, GIs remain meaningful in enabling ‘people to translate their long-standing, collective, and patrimonial knowledge into livelihood and income’.¹⁸⁴

Secondly, GIs contribute to the socio-economic development of the area to which they belong due to their rippling effects.¹⁸⁵ Given their archetypical focus on local resources, particularly products that are deeply rooted in tradition, GIs support rural development by strategically creating job opportunities for members of the community in production, processing and other related services based on their cultural resources. Such rippling effects are further enhanced by the generated spinoffs in boosting gainful economic activities in other sectors, such as, tourism and fashion, thus leading to the growth of the creative economy at different levels.¹⁸⁶

Thirdly, the nature of GIs and the scope of protection they provide are consistent with the communal nature of TCEs. To begin with, GIs are collective rights belonging to all producers within the demarcated geographical region who maintain the required production processes. Also, a double-decker inbuilt safeguard mechanism ensures that the

¹⁸² UNIDO 2010a supra; P Van de Kop et al ‘Origin-based products: lessons for pro-poor market development’ (2006) *Bulletins of the Royal Tropical Institute* 372; Russell 2010-2011 supra 727

¹⁸³ Ibid.

¹⁸⁴ L Bérard and P Marchenay ‘Tradition, regulation, and intellectual property: local agricultural products and foodstuffs in France’ in SB Brush and D Stabinsky (eds) *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (1996) 230-243 (240).

¹⁸⁵ Sharma & Kulhari 2015 supra.

¹⁸⁶ Woltz 2007 supra.

GI remains the exclusive property of the collective. On one layer, the right of assignment which is available to conventional IPR owners does not apply to GIs.¹⁸⁷ On the second layer, the product-quality-place link which defines GI-protection technically bars transfer of the indication to outsiders or use of the GI on ‘similar’ goods of different geographical origin, and even on goods of the same geographical origin produced differently. Therefore, in a way that is atypical of the TCEs management ecosystem, GI protection limits ‘the class and/or location of people who may use the protected indication’.¹⁸⁸ Furthermore, GIs are mostly perpetual: they exist for as long as the product-place-quality link is maintained, subject to renewal of registration where applicable.¹⁸⁹ This aligns with the mind-set of indigenous communities who largely perceive their knowledge as a life time heritage and collective tradition to be protected in perpetuity. As such, GIs are not always market driven. They could also be driven by utilitarian concerns like community development¹⁹⁰ and preservation.

Fourthly, GIs serve the public domain agitations against protecting TCEs as IP since protection involves the codification of well-established production techniques into rules that form part of public knowledge. This sets GIs apart from trademarks which are only indicative of the quality of the product without any obligation to disclose the production techniques.

But GIs have their limitations. Primarily, GIs would not protect the name of a particular region or product that has become generic. In that case, a collective trademark

¹⁸⁷ For instance, articles 21 and 28(2) of the TRIPS Agreement provide for such rights of assignment for trademarks and patents respectively.

¹⁸⁸ D Rangnekar ‘The Socio-economics of Geographical Indications: A Review of Empirical Evidence from Europe’ (2004) available at <http://ictsd.net/downloads/2008/07/a.pdf>, accessed on 1 March 2021.

¹⁸⁹ Renewal could be required for GIs under trademark law which typically requires periodic renewal.

¹⁹⁰ Rangnekar 2004 *supra*.

or certification mark would be the more feasible option since they are not yoked to geographical origin. Also, handicrafts related GIs have generally recorded less success than GIs in agricultural products. This is attributed to the fact that differentiation by geographical attribute is more in affinity with place-based endeavours such as agriculture than crafts production which could be portable and easily replicated, and ownership could be contested by different communities.¹⁹¹

4.5.2 Strengths and Limitations of Communal Marks for the Present Purpose

So far, much has been said about the merits of communal trademarks and GIs in safeguarding handicrafts. But it is also necessary to examine more closely the vitality of these strategies¹⁹² in general in protecting tradition-based arts and crafts.¹⁹³

4.5.2.1 Merits of communal marks

Fundamentally, the establishment of a communal mark requires an existing legal framework as the launch pad and basis for compatibility, and as central to the research question seeking to determine the enabling factors for success of a communal IPR model established for the purpose of managing tradition-based arts and crafts. Communal trademarks satisfy the compatibility question by addressing some of the conceptual and practical barriers which invalidate most IPR options for TCEs, including tradition-based arts and crafts.

¹⁹¹ Sharma & Kulhari 2015 *supra*, citing the case of India whose GI schemes on cultural products have been less successful than her GIs on agricultural products such as Basmati Rice.

¹⁹² Generally referred to as communal marks in the sub-section to also accommodate GIs outside the IP framework.

¹⁹³ Some of these foregoing points also apply to GIs.

As seen earlier, communal marks function in a similar way as ordinary trademarks. Thus, they render information to the public, but in a specific context which relates to the quality of the subject matter. Therefore, they not only help in bridging information asymmetry between producers and consumers, but also help in authenticating products' originality and in facilitating product differentiation. For tradition-based arts and crafts, the core merit of communal marks is preventing the usurpation of the reputation or goodwill of the protected product which is mostly the result of efforts invested by the community in the production process, honed over time and carefully preserved.¹⁹⁴ Because communal marks enable product differentiation and market segmentation, they can help safeguard a niche market segment of tradition-based arts and crafts exclusively for the producers of products possessing the necessary quality, reputation or other characteristics.¹⁹⁵

Communal marks assuage the opposition to assertive rights over TCEs on the basis that they are public domain property which should not be monopolised, and that extending IPR protection to TCEs would exhaust their public domain status. This is because the kind of protection that communal marks provide does not prevent others from producing similar products using the same underlying techniques, unless the techniques are further protected by other types of IPRs like patent. Communal marks only prevent the unauthorised use of the protected symbol on a product to falsify a link with the symbol. No institution, individual or entity has exclusive power to control the underlying technique of producing the designated product thus technically securing the knowledge in the public domain.

¹⁹⁴ For more on the role of communal trademarks, see generally Singh 2007 *supra* and Rangnekar 2004 *supra*.

¹⁹⁵ Johnsson 2012 *supra* 159.

Related to the above is a weakening of the ‘monopoly’ criticism against IPRs. Generally, ordinary trademarks are absolute monopolies because of their exclusionary tendency in favour of a single entity. In contrast, communal marks are not limited to any particular enterprise. For instance, GIs are enjoyed by all enterprises within the demarcated geographical area that satisfy the criteria for use of the GI. Certification marks are not typically bounded by geographical limit and can be used by anyone who satisfies the necessary conditions. Thus, these models are more appropriately collective monopoly rights, and are exclusive only to the extent that permission for their use is conditioned upon the fulfilment of specific requirements. This way, they mitigate the harmfulness of IPRs as monopolies because they grant group as opposed to individual monopoly. The contest is therefore between one group against another group and not an individual against the public. Nonetheless, in the eyes of an economist, they remain a monopoly of sorts that erects barriers against potential new entrants to the market, and could suppress competition.¹⁹⁶

Communal marks provide both defensive and positive protection to tradition-based arts and crafts where other IPRs fail. While defensive protection involves strategies that prevent third parties from gaining illegitimate IP rights over TCEs, positive protection involves asserting rights in the protected subject matter in a way that enables the rights holders to check unauthorised or inappropriate uses by third parties.¹⁹⁷ Ordinarily, the ‘public domain’ status of TCEs inhibits their hosts in protecting them through IPRs. But while the host communities may not freely assert ownership rights

¹⁹⁶ ‘The collective trade: invitation to abuse’ 1959 *supra*.

¹⁹⁷ WIPO *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015) available at http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf, accessed on 1 March 2021; WIPO *Information on National Experiences with the Intellectual Property Protection of Traditional Knowledge* (2003c).

over their TCEs, they could assert positive rights over the good reputation of their TCEs through the instrument of communal marks, and be able to prevent others from arbitrarily asserting IP rights over the same good reputation even in cases of unknown authorship.¹⁹⁸

Communal marks help in building harmonious relationships among a diverse community, connecting widely dispersed entities and streamlining the disjointed chain from production to marketing. An example is the Melinda collective mark used by over 5200 members of 16 apple producing cooperatives working in Valle di Non and Valle di Sole in Italy.¹⁹⁹ Communal marks reduce in-house competition to a large extent.²⁰⁰ While entities could still compete locally amongst themselves, the basis of such competition is narrowed down by the largely calibrated product standards binding the entities to the mark. The concerns and interests of the producers in battling competitors, building reputation, marketing, and such other challenges are mainly addressed as a group. Otherwise, the pursuit of individual interests could create social disharmonies and disparity in quality which could harm the reputation of the product and preservation of the knowledge, such as where traditional production processes are replaced or altered haphazardly by profit driven individual interests. This is said to be currently the case with many handicrafts in Africa which are being gradually transformed as their makers

¹⁹⁸ This was one of the concerns that triggered the move to protect the *Mola*, one of Panama's traditional cloths belonging to the Kuna community, through Law No 20 of 2000. See De Obaldia 'Western intellectual property and the case of Panamanian Indigenous Intellectual Property Law' (2005) 23 *BUILJ* 337-394.

¹⁹⁹ WIPO 'Collective marks' (dna) available at http://www.wipo.int/sme/en/ip_business/collective_marks/collective_marks.htm, accessed on 1 March 2021. See WIPO 'Melinda: the first designer apple' (dna) https://www.wipo.int/ipadvantage/en/articles/article_0015.html, accessed on March 1 2021).

²⁰⁰ WIPO *Collective Marketing: Adding Value through Geographical Indications, Certification Marks and Collective Marks* (2003) available at https://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_pnh_13/wipo_smes_pnh_13_g_sinha.pdf, accessed on 1 March 2021).

struggle to capture new markets, with less concern for maintaining authentic qualities.²⁰¹

The application of collectivism in protecting producers' interests means that interests are better streamlined and could be managed in a semi-structured or organized manner.

This ushers in the validity of communal marks to aid the management of tradition-based arts and crafts as intellectual assets with the merits of collectivism at play. They could address the constraints of small-size by being potentially more effective in collectively marketing the products of a group of producers or marketers of tradition-based arts and crafts like those identified in chapter three, who ordinarily would find it hard to do individually.²⁰² Communal systems potentially provide support services for proper management through their administrative institutions which individuals may find difficult to afford on their own. These institutions create a common platform for the enhancement of the quality and viability of the craftsmanship through capacity building, marketing, access to capital, quality monitoring and control. Cooperatives for instance could help small-time producers and traders of the protected products access capital for their trade. Communal marks potentially provide synergies for proper monitoring and enforcement of the schemes. They take on an even more valuable role in this context when it is considered that they can be combined with individual marks. Thus, one's business can benefit from the synergies and the goodwill of a collective scheme, while also utilising a separate private trademark to further distinguish its products.²⁰³ This does not in any way contradict the overall collective objectives and interests of the communal

²⁰¹ EF da Silva and PP Peralta 'Collective marks and geographical indications - competitive strategy of differentiation and appropriation of intangible heritage' (2011) 16(3) *JIPR* 246-257.

²⁰² WIPO 2017a supra 16. See also United States Department of Agriculture (USDA) *Committed to the Future of Rural Communities* available at www.rurdev.usda.gov/rbs/coops/vadg.htm, accessed on 1 March 2021, citing the example of the US Department of Agriculture's Agricultural Marketing Service marketing agreements which provide inspections and certification for agricultural product distributors.

²⁰³ WIPO 2017a supra.

mark as long as the products for which the individual trademark is used satisfy the conditions mandated for use of the collective mark. A good example is INTERFLORA® which is an international brand connecting florists worldwide with a centralized channel of delivering flowers to customers by local florists using the INTERFLORA® mark. Nevertheless, members of INTERFLORA® use their individual business trademarks alongside the INTERFLORA® collective mark on their promotional platforms to indicate their association with the collective brand.²⁰⁴

Communal marks enhance the prospects for differential market through product differentiation and connects smoothly with the recent trends in ‘ethical’ consumerism, or ‘socially-constructed quality criteria’ exhibited in alternative distribution networks, such as fairtrade.²⁰⁵ Generally, they help to protect authentic high-end products while leaving the market for knockoffs alone provided that the knockoff market does not arbitrarily usurp the market for originals.

Like other forms of IPRs, communal marks can be used in combination with other IPRs to provide more comprehensive protection for a product. Going back to three scenarios of infringement identified in chapter three,²⁰⁶ the answer to the first scenario²⁰⁷ is to register a communal mark which could operate alongside individual trademarks in order to stem illegal copying. A communal mark will be helpful where the constraints of small size may hinder the effort of the individual crafters in battling infringements. The second scenario which is a case of in-house copying may not require a collective strategy but if the copied work is sufficiently original, it could benefit from copyright protection

²⁰⁴ WIPO 2017a *supra* 19.

²⁰⁵ Rangnekar 2004 *supra*.

²⁰⁶ See 3.5.1.

²⁰⁷ I.e., where outsiders of a commune produce similar but cheaper versions of the tradition-based arts and crafts produced by the members of the commune and market them as original.

or individual trademarks which would allow such infringement to be prevented. However, given the public domain status of most traditional works, copyright would not prevail against in-house copying of the works of other artists. In the third case which inquires how communities could benefit from the good will of their products which has become national heritage, the issues of individual ownership, originality and anonymity which raise barriers in extending IPRs to TCEs would come into play. But where the heritage is traceable to a specific community, it could be a subject for collective differentiation subject to national laws.

On the whole, communal marks guarantee the advantages of collective action and collaboration. Their essential merit is that they generate synergies and cost effective community effort from production to marketing as costs are much reduced by economics of scale.²⁰⁸

4.5.2.2 Weaknesses of communal marks

There is a popular saying that everything has both advantage and disadvantage; this is certainly true of communal marks.²⁰⁹ Communal marks have one major limitation: they are not designed to prevent the misappropriation of the subject matter of protection the way that copyright, patent and other IPRs do.²¹⁰ For instance, a GI would not protect against unauthorised production of knockoffs of a designated traditional textile by third parties. It would only prevent linking the knockoff with the GI, although as earlier

²⁰⁸ SMEs face hurdles in accessing IP systems, including limited knowledge of the benefits of the system to them. For discussion of these challenges, see P Muredzi and O Mkhali 'Using IP for Business Growth: The Case of SMEs in SADC - a Review (2015); M Nkomo 'Regional integration in the area of IP: the case for Southern African Development Community' ((2014) 18 *Law, Democracy and Development* 317-333.

²⁰⁹ As seen in 4.5.1.3.

²¹⁰ Dutfield 2000 *supra*.

mentioned,²¹¹ this serves a good purpose of helping to protect reputation or goodwill of the TCE acquired over time and safeguard a niche market segment. This makes communal marks inadequate solution for industries battling unfair competition from imitations as is currently the case with many African handcrafts.²¹² Additional protection would be required by such industries by way of copyright or design rights where applicable, or other supporting laws outside the IPR framework. And good a thing, the use of communal trademarks does not preclude these additional safeguards.

Moreover, registering a communal trademark does not guarantee safety; effective management and enforcement is required to unleash the advantages.²¹³ Generally, the management and enforcement of these schemes could be problematic for their owners due to the global dynamics of the market, the transnational nature of misuse and the high costs of enforcement. In their study highlighting post-registration challenges in unlocking the market potential of India's GIs, Sharma and Kulhari identified eight points which are necessary for a successful GI, which sum up to: proper organisational structure and control; quality control at all stages from production to distribution; effective branding and marketing; and monitoring and enforcement against unlawful uses.²¹⁴ Generally, these points apply to all the collective models. For instance, a successful GI requires 'the triple association between product, place of origin and quality-related factors', which are fundamental to achieving product differentiation and creating market segments in order to earn a premium on price.²¹⁵ It could be difficult to establish an assurance of 'quality' in

²¹¹ See section 4.5.2.1

²¹² J Asmah 'Intellectual property protection of traditional textile designs: The Ghanaian experience and African perspectives (2008) 15(3) *International Journal of Cultural Property* 271.

²¹³ Guatam & Bayl 2010 *supra* on India's experience.

²¹⁴ Sharma & Kulhari 2015 *supra*.

²¹⁵ Rangnekar 2004 *supra* 5 and Sharma & Kulhari *ibid*.

the minds of consumers where several factors constitute ‘quality’ with ‘origin’ being just one of them.²¹⁶

As WIPO notes, ‘Trademark management should be an integral part of the branding strategy of any business, large or small’.²¹⁷

The need to properly construe the ‘public’ as a heterogeneous forum when justifying IP protection on the basis of public interest following the utilitarian theory applies strongly to communal marks. Thus, in as much as communal marks could ensure significant economic benefits for their associates, ‘protection’ may adversely affect other local entrepreneurs dealing in similar products but not affiliated with the communal scheme, or whose products do not carry the mark of designation. Their products could be perceived as fake. This was one of the challenges that purportedly led to the collapse of Australia’s authentication scheme.²¹⁸

A related concern is the potential rivalry between individual interests and collective interests in a collectivist ecosystem. There could be tension between the rights of individual members of the collective and the overall group interest which could compromise the objectives of a communal system if not properly mediated within the framework. This has been identified as one of the weaknesses of the Panamanian *sui generis* law which endorses a customised certification scheme for indigenous cultural expressions. While it seeks to protect indigenous works of expression, especially the Panamanian *mola* produced by women of the Kuna tribe, from usurpation of their quality

²¹⁶ Dwijen 2004 *supra* Sharma & Kulhari *ibid*.

²¹⁷ WIPO 2017a *supra* 6.

²¹⁸ See also T Kuriakose ‘Legal analysis of international policy response to the protection of traditional knowledge’ (Unpublished PhD Thesis, School of International Legal Studies of the Jawaharlal Nehru University, 2010) 242, accessed on 1 March 2021.

by banning unauthorised production outside the community,²¹⁹ the women producers of the *mola* oppose such controls which affects their source of livelihood.²²⁰ As Rangnekar observed, ‘despite the merits of collectivism, achieving coherence and authenticity between different firms and within each firm’s supply chain raises substantial collective action problems’.²²¹

While standardisation facilitated by communal strategies helps in maintaining standards and preserving knowhow, it could also limit competition and stifle creativity within the sector if not properly modulated.²²²

4.6 Conclusion

Based on the compatibility criteria stipulated by this thesis, this chapter confirms communal trademarks as most compatible with the objectives of promoting the creative economy through tradition-based arts and crafts because it could help in protecting and promoting them as necessary, and also provide a potentially most effective means of gainfully appropriating and managing them as valuable intellectual assets. It explained why other types of communal IPRs outside trademark law are inadequate despite their compatibility with tradition-based arts and crafts thereby addressing the question of factors that would enable the success of a communal strategy. It established that no single strategy is perfect, but the strengths have to be weighed against the weaknesses. With this blueprint, the next chapter turns to the IPR framework in support of communal trademarks in the two study countries.

²¹⁹ Law No 26 of 1984 (Prohibiting Importation of Mola) and Law No 27 of 199) and Law No 20 of 2000.

²²⁰ De Obaldia 2005 *supra*.

²²¹ Rangnekar 2004 *supra* 3.

²²² Kuriakose 2010 *supra*.

CHAPTER FIVE

NATIONAL LEGAL FRAMEWORKS

5.1 Introduction

Like most other concerns, appropriating the economic benefits of tradition-based arts and crafts is governed by law. Chapter four determined the relevance of communal trademarks in mediating the conflicts between IPRs and TCEs and in helping to generate greater revenue for the tradition-based arts and crafts of the two study countries. It also determined the enabling factors for the success of a communal trademark towards achieving these objectives. It confirmed the use of communal marks as more suitable in and more amenable to the management of tradition-based arts and crafts for greater benefits. Weighing in on this finding, this chapter critically examines the legal frameworks in the two study countries which are implicated in the effective utilisation of communal trademarks. This scrutiny requires extending the lens beyond IP laws to cover other supportive laws outside the conventional IPR framework for the protection of tradition-based arts and crafts. A core objective of the chapter is to identify gaps in the system guided by insights and foresights gained from the previous chapter.

The chapter is significant because like every other concept or policy, communal IPRs do not exist in a vacuum. They operate within an enabling framework which comprises of a mix of relevant or supportive laws, sometimes including drafts bills. As Tong noted in a similar study to determine the right framework for the protection of TK in South Africa, the legal framework involves ‘legislation which must be applied, legislation which exists but is not in force; and legislation in the making’. Past efforts provide useful lessons and basis to compare and determine best options; while pending

legal reforms could eventually become substantive laws thus making understanding their implications necessary. The legal framework also covers international instruments and arrangements, which in many ways affect the scope of the national framework.¹

It should be noted that Nigeria and South Africa do not belong to any of the two foremost regional systems governing IPRs in Africa, namely: the Organisation Africaine de la Propriété Intellectuelle (OAPI),² comprising mostly of African French speaking countries, and the African Regional Intellectual Property Organisation (ARIPO) comprising mostly of English speaking African states.³ Consequently, the relevance of ARIPO to the two as English speaking countries remains mainly prospective and speculative. The effect of the totality of the ARIPO framework is that a member state could rely on ARIPO's institutions where her national institutions are weak and also rely on the organization's streamlined process of trademark registration. The fundamental implication of Nigeria's and South Africa's non-membership in ARIPO is deprivation of these advantages.

5.2 Relevance of the International Framework

No doubt, the regulation of communal trademarks is largely dependent on national law. However, regional and multilateral instruments mainly designed to standardise and harmonise processes to ease global trade take effect at national levels and sometimes create obligations which countries are committed to. The relevance and effects of the various IPR treaties depends on the manner in which Nigeria and South Africa define

¹ LA Tong 'Aligning the South African intellectual property system with traditional knowledge protection' (2017) 12(3) *JIPLP* 171-190(181).

² OAPI, Agreement Revising the Bangui Agreement of 2 March 1977, Bangui.

³ See Agreement on the Creation of the African Regional Industrial Property organization (ARIPO), 1996 available at <https://www.aripo.org/member-states/>, accessed on 1 March 2021.

how foreign treaties apply under their respective laws. Nevertheless, to the extent that Nigeria and South Africa are bound by the international treaties, such treaties form part of the legal framework that should be considered.

5.2.1 Legal Implications/Applicability of International Treaties

Basically, the principles guiding the extension of treaty obligations to municipal domains depend on a nation's constitutional pronouncement on whether treaties have direct effect as part of the national laws or require domestication through legislative action.⁴ However, the obligations arising from treaties do not follow exactly these two straight paths. For instance, the Supreme Court of Nigeria has held that where the treaty evinces a clear intention that the ratifying states would be bound by its provisions, it could be enforced on the strength of the 'legitimate expectation' principle.⁵ An independent approach is for the treaty to incorporate an autonomous enforcement system as seen in the inbuilt dispute resolution mechanism framework and single understanding philosophy of the TRIPS Agreement, which requires a single assent to all the General Agreement on Tariffs and Trade (GATT) treaties and submission of member states to its dispute resolution system.⁶ This makes the TRIPS Agreement binding on all member states, including Nigeria and South Africa. The main rules governing the treatment of foreign treaties by Nigerian institutions is enshrined in the 1999 Constitution.⁷ Section 12 of the Constitution provides: 'No treaty between the Federation and other country shall

⁴ See RF Oppong 'Making regional economic community laws enforceable in national legal systems' in B Anton and T Hartzenberg (eds) *Monitoring Regional Integration in Southern Africa* (2009) 149-178.

⁵ In *Abacha v Fawehinmi* (2001) 51 WRN 29, the Nigerian Supreme Court adhered to this doctrine and held that it applies where the treaty obligations arouse a legitimate expectation in the mind of the public that its provisions would be respected and implemented.

⁶ Article II.2 WTO Agreement and M Matshushita et al *World Trade Organisation: Law, Practice and Policy* 2ed. (2007) 7. See WTO Agreement Article II:2

⁷ See also *Abacha v Fawehinmi* supra 585.

have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly'. The dualist approach enshrined in s12 creates uncertainty regarding the legal status of foreign treaties that have been ratified but not domesticated. Ostensibly, non-domestication renders the treaty non-binding on and unenforceable against Nigeria and her citizens.⁸ But as the Supreme Court held in *Abacha's* case, 'policy framers and lawmakers would be acting right if they guide themselves by the provisions of the treaties when reviewing' national laws.⁹

South Africa's position on the local application of international treaties differs slightly from Nigeria's and is more divided,¹⁰ but with similar implications. While there appears to be a need for domestication of foreign treaties following the dualist approach, there is also provision for treaties ratified by the country to have direct effect in some cases.¹¹ Like Nigeria, undomesticated international treaties are still relevant to South African courts and institutions, and courts are required to give precedence to international treaties over national laws where reasonable,¹² and to consider international treaties when interpreting human rights norms.¹³

Because of their primary objective to harmonise standards globally, international IPR treaties play a significant role. They level the playing field to a large extent by

⁸ Nigeria recently ratified four WIPO Treaties, namely: WIPO Copyright Treaty 1996, WIPO Performances and Phonograms Treaty 1996, WIPO Beijing Treaty for Protection of Audiovisual Performances of 2012 (BTAP); and the Marrakesh Treaty for the Blind and Visually Impaired Persons of 2013 (Marrakesh Treaty). See WIPO 'Nigeria joins four key copyright Treaties' (2017) available at http://www.wipo.int/portal/en/news/2017/article_0017.html, accessed on 1 March 2021).

⁹ *Fawehinmi v Abacha* supra.

¹⁰ *Glenister v President of the Republic of South Africa* [2011] ZACC 6 para [100] where the Court presented a divided opinion on this issue with the minority holding that treaties had direct application and the majority disagreeing. See also G Ferreira and A Ferreira-Synman 'The Incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2017) 17(4) PELJ 1470-1496.

¹¹ *Ibid.*

¹² See s233 of the Constitution of South African Act 108 1996.

¹³ S39(1) of the South African Constitution.

stipulating rules and guidelines that are intended to apply uniformly. As such, the international framework is particularly important in facilitating trade through a simplified and cost effective system for the registration of trademarks. For poorer countries with inadequate IP laws, weak institutions and dearth of expertise,¹⁴ international treaties could supplement and boost their capacities and that of their entities to protect and manage their IP resources.¹⁵ It is on this basis that the international framework becomes a relevant part of the national framework for the protection of communal trademarks. However, in the specific context of Nigeria and South Africa, not all IP-related treaties are applicable due to non-ratification and/or domestication. For instance, South Africa is yet to ratify the WIPO Internet Treaties,¹⁶ while both countries are not party to the Madrid system.¹⁷

5.2.2 Relevant Multilateral Treaties

In the context of this study, the applicable multilateral treaties are of two categories: those providing legally binding support for tradition-based arts and crafts and those providing guidelines or minimum standards for protecting them. While the former category stipulates terms which serve as additional layers of protection or justification for protection, the later establishes benchmarks of the ideal standards to guide national law

¹⁴ See I Mgbeoji 'African patent offices not fit for purpose' in De Beer et al supra 234-247.

¹⁵ SJ Otieno-Odek 'Situational analysis of legal and policy framework for IPRs in EAC, SADC and COMESA' (2013) available at <https://trapca.org/wp-content/uploads/2019/02/TWP1306-Situational-Analysis-of-Legal-and-Policy-Framework-for-Intellectual-Property-Rights-in-EAC-SADC-and-COMESA.pdf>, accessed on 1 March 2021.

¹⁶ WIPO 'WIPO administered Treaties' available at https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16, accessed on 1 March 2021.

¹⁷ WIPO 'List of Contracting Parties to the Madrid Agreement or the Madrid Protocol in the alphabetical order of the corresponding ST.3 codes' available at https://www.wipo.int/madrid/en/madridgazette/remarks/2009/50/gaz_st3.htm, accessed on 1 March 2021.

and policy making by member states. On the whole, they provide three kinds of support: legitimacy for the protection of tradition-based arts and crafts, guidelines on the appropriate terms of protection, and administrative support.

5.2.2.1 Human rights framework

The rights-based argument relating to the justification of IP protection is underpinned by international human rights norms recognising the right to the protection of IP both collectively and individually, as contained in some human rights instruments including the UN Universal Declaration of Human Rights (UDHR), article 27; the ICESCR articles 1 and 15, and the UNDRIP, article 31.

Article 27 (1) of the UDHR guarantees to everyone ‘the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’; and (2) ‘the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which’ they are authors. Likewise, article 1(1) of the ICESCR guarantees to ‘all peoples’ ‘the right of self-determination’, i.e., the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’. Article 15 further provides:

- (1) The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.¹⁸

With reference to indigenous people, Article 31 of the UNDRIP provides as follows:

(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

On the whole, these instruments not only impose on state parties the obligation to implement laws and policies that serve collective and individual interests in TCEs but also enjoin states to ensure the preservation of the knowledge as an obligation.

5.2.2.2 Paris Convention Treaty

Signed in 1883 under the auspices of WIPO, the Paris Convention Treaty is easily one of the flagship treaties providing protection for a wide range of IPs under the rubric of industrial property, including trademarks, patents, industrial designs, GIs and unfair competition.¹⁹ It has witnessed several reviews since 1883, addressing mainly the novel issues arising from technological changes.

¹⁸ ES Nwauche 'Protecting expressions of folklore within the right to culture in Africa' (2010) 13(4) *PELJ* 49-92 (55)

¹⁹ Article 1(2).

One of the key provisions of the Paris Convention is the establishment of a Union of member states,²⁰ which has great significance on the registration of trademarks in any Union country.²¹ While each country is free to determine the conditions of trademark registration under their respective laws, nationals of Union countries can file trademarks in any Union country without necessarily filing same in their own countries. These becomes eligible for protection in other Union countries subject to certain reservations.²²

Substantively, the Paris Convention protects collective marks, as well as indications of source and AOs²³ but with scant details of the terms of protection. By virtue of article 7*bis*, collective marks are eligible for registration and are protectable in countries outside the country of the entity owning the mark with State Parties free to apply their own conditions for protection. Article 10 protects against ‘the direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant’. Article 10*bis* enjoins States to protect against unfair competition,²⁴ which includes trade-related claims that are likely to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose, or quantity of the goods.²⁵

²⁰ Article 1.

²¹ Article 6.

²² Article 6(1)*quinquies*. This will not apply where the trademark already has third party vested interests in the country where protection is claimed, where they lack a distinctive character, on grounds of morality or public order. See article 6B*quinquies*.

²³ Article 1(2).

²⁴ See GHC Bodenhouse ‘Guide for the Implementation Protection of the Paris Convention for the Protection of Industrial Property as Revised at Stockholm’ 1968.

²⁵ Article 6*bis* (3)

The major advantage of the Paris Convention to South Africa as a ratifying member is the fact that its citizens could utilize the Convention's harmonized processes to register and protect their indications of origin and OAs, if any, abroad.²⁶

5.2.2.3 TRIPS Agreement

The TRIPS Agreement²⁷ is administered by the WTO, as part of the GATT framework, thereby locating global IPR governance in the arena of trade.²⁸ It is highly useful to member states that can afford the use of its inbuilt dispute resolution mechanism. In line with its primary objective of calibrating the rules and standards relating to the protection of IPR globally, it imposes an obligation on member states to apply the principles of the Paris Convention.²⁹ Thus, in relation to trademarks and GIs, the provisions of the Paris Convention apply *mutatis mutandis* to the TRIPS Agreement.

Still, article 22 provides for GIs generally while article 23 provides additional protection for GIs in wines and spirits. Article 22(2) enjoins member states to protect GIs against misleading uses either as *sui generis* legislation or unfair competition laws within the meaning of article 10*bis* of the Paris Convention. Article 23 protects GI in wines and spirits differently by not requiring the element of deception and confusion as conditions for establishing infringement of the GI. This dichotomous approach has raised much

²⁶ This took effect on December 24, 1974. See Notification available at http://www.wipo.int/treaties/en/notifications/paris/treaty_paris_60.html, accessed on March 1 2021. It entered into force on March 23 1975. See for South Africa's Laws available at <http://www.wipo.int/wipolex/en/profile.jsp?code=ZA>, accessed on March 1 2021.

²⁷ Supra.

²⁸ The TRIPS Agreement is one of the many treaties annexed to the Marrakesh Agreement, which is the basic agreement of the WTO. Some of the other annexures may be relevant to the trade in tradition-based arts and crafts, particularly those in Annex 1A governing market access, such as, the Agreement on Technical Barriers to Trade (the TBT Agreement) which relates to quality standards, rules on customs duties and quantitative restriction, and seeks to ensure that foreign goods are not impeded by tariff barriers or quotas. But these issues are not directly related the application and operation of communal trademarks.

²⁹ TRIPS Agreement, supra Article 2.

controversy³⁰ with some experts questioning the justification for double standards in protecting GIs.³¹ Nevertheless, the scope of protection offered by both the Paris Convention and the TRIPS Agreement remains largely similar for GIs.

The TRIPS Agreement is silent on the protection of other communal trademarks. However, protection can be inferred from the tone of its article 15(1) and article 2 which consequentially incorporates article 7*bis* of the Paris Convention dealing with the protection of collective trademarks. Article 15(1) of TRIPS defines the subject matter of protection broadly and accommodates communal trademarks to the extent that they are signs or a ‘combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings’.³²

In effect, the manner in which communal trademarks are protected under national laws in line with both the Paris Convention and the TRIPS Agreement is significantly within the discretion of member states.

5.2.2.4 Madrid System

Though neither Nigeria nor South Africa is a party to the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods³³ and the Madrid Protocol,³⁴ the Madrid System is worth mentioning because of its importance in aiding

³⁰ Rangnekar 2004 *supra*.

³¹ Sharma & Kulhari 2015 *supra*, while at least one expert sees no reason why the same protection provided under article 23 which recognises GIs ‘for certain categories of products, based upon their inextricable relationship to a people and place’ should be denied ‘to the creations of unique indigenous people for whom these creations exude or embody the particular qualities of their community’. See Torsen *supra* 2006.

³² Article 15(1) defines the protectable subject matter as: ‘[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings’.

³³ The Madrid Agreement Concerning the International Registration of Marks 1891.

³⁴ Madrid Protocol 1989. WIPO ‘Members of the Madrid Union’ available at https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf, accessed on 1 March 2021.

the management of trademarks in the global economy. They deal with the registration of international trademarks for the purpose of standardisation and cost effectiveness of procedure across borders. Under the Paris Convention, individual filings of applications still have to be made in the different countries of the Union where protection is desired. The Madrid system addresses this incongruity by validating any trademark registered under the system as automatically effective in all the Union countries.³⁵ Article 1 of the Agreement establishes the Special Union of the members. It also stipulates the registration process which applies only to applicants from Union countries,³⁶ while other applicants are confined to the more cumbersome process under articles 2 and 3.

A direct consequence of the non-membership of Nigeria and South Africa in the Madrid system and similar cost-effective frameworks for the management of IPRs globally is the fact that the work owners of both countries seeking protection overseas are largely confined to the national system for the registration of trademarks.³⁷

5.2.2.5 International Classification of Goods and Services (Nice Classification) 1957

The Nice Classification ensures uniformity across various jurisdictions. It is used by several countries including Nigeria and South Africa for the registration of trademarks. The system groups together similar goods and services into 45 different classes with goods listed in classes 1-34 while services are listed in classes 35-45. Its importance lies in the fact that it determines the class under which any particular trademark can be

³⁵ Madrid Agreement, article 4.

³⁶ Ibid article 1(2).

³⁷ See C Oguamanam 'Beyond 'Nollywood' and piracy: in search of an intellectual property policy for Nigeria' (2015) Maiden edn *NJIP* 3-37, discussing the inadequacies of the Nigerian trademark regulation system.

registered and conditions for the registration of a trademark in multiple classes; such condition being mainly additional fees.

5.3 Core Domestic IP Frameworks

The laws guiding the protection of TCEs locally do not invariably start with IP laws. Sometimes, the root of the imperative for protection is traceable to the Constitution.³⁸ The Constitutions of both Nigeria and South Africa do not directly provide for the protection of IP in the manner of the US Constitution.³⁹ However, under the rights-based narrative, the constitutional guarantees of property rights can be extended to IP. Additionally, the guarantees of social justice entrenched in their respective constitutions and backed by the international human rights framework support the protection of IPs and could be extended to TCEs as a form of IP that supports livelihoods. This is perhaps more so for South Africa following the provisions of s22 of the South African Constitution (‘Freedom of trade, occupation and profession’) which has been interpreted as an endorsement of the obligation to protect TCEs and consequently tradition-based arts and crafts.⁴⁰ Section 22 guarantees to every South African ‘the right to choose their trade, occupation or profession freely’. Ncube posits that the right to work under s22 is ‘sacrosanct’ and ‘may entail trading in cultural artefacts ... for traditional communities’.⁴¹ It has been argued that the constitutional implications on the protection of TK in South

³⁸ E.g., in the US IP protection is a constitutional guarantee. See article 1(8) of the US Constitution 1789.

³⁹ Article 1(8) of the US Constitution 1789.

⁴⁰ Ncube 2015 *supra* 545.

⁴¹ *Ibid.*

Africa could equally be founded upon the constitutional guarantee of the right to work and the ICESCR.⁴²

Broadly, IP protection in Nigeria and South Africa concerns four main areas, namely copyright, design, patent and trademark. Despite the first three not being the most appropriate for achieving the three-prong objectives for traditional handicrafts, it is necessary to briefly analyse their potential role as complements of communal trademarks, except for patents because of its remote connection with the subject matter in the context of the creative economy as seen in the previous chapter.⁴³

5.3.1 Copyright

Copyright protection in Nigeria and South Africa goes back in time. In the case of Nigeria, it pre-dates the colonial era with the recognition of a pre-existing IP system under customary law and practices.⁴⁴ As a legally enforceable privilege, copyright first appeared in Nigeria via the English Copyright Act of 1911.⁴⁵ It was not until 1970 that the first indigenous copyright legislation was enacted, and later replaced by the extant Copyright Act of 1988.⁴⁶ In the case of South Africa, the principal statute for the protection of copyright is the Copyright Act of 1978.⁴⁷ The Copyright Amendment bill⁴⁸

⁴² This is very relevant to South Africa as discussed in 5.3.

⁴³ 4.4.2.2.

⁴⁴ O Kunle *Copyright Collective Administration in Nigeria: Lessons for Africa* (2013).

⁴⁵ See the Extension Order in Council of 1912 of the English Copyright Act of 1911. See also Ola *supra* 7 and A Adewopo *Nigerian Copyright System: Principles and Perspectives* (2012).

⁴⁶ See Decree No 61 of 1970. As noted earlier, the Act will be replaced by the recently passed Copyright bill which is partly aimed at aligning the law with the digital age.

⁴⁷ Act No. 98 of 1978 as Amended by Act No. 9 of 2002.

⁴⁸ As introduced in the National Assembly (*Proposed s75*); *Explanatory Summary of Bill Published in Government Gazette No. 40121 of 5 July 2016*).

earlier passed by Parliament and awaiting assent by the president has since been returned back to Parliament by the president for further consideration.⁴⁹

Generally, the Copyright Acts of the two countries comply with the basic norms governing copyright protection as established by the Berne Convention and the TRIPS Agreement.⁵⁰ As such, the scope of the protectable subject matters follows largely the same pattern with adherence to the core principles of originality, fixation and time-limited term of protection.⁵¹

The Nigerian Copyright Act provides two kinds of rights which could be relevant to tradition-based arts and crafts: namely copyright⁵² and neighbouring rights.⁵³ It lists the range of copyrightable subject matter broadly which includes literary, musical and artistic works, cinematograph films, sound recordings and broadcasts.⁵⁴ The most relevant of these is ‘artistic works’. But the problematic requirement of originality discussed in chapters two and three which create frictions in associating pre-existing tradition-based artistic works with IPR norms holds sway.⁵⁵ ‘Artistic works’ include: (a) paintings, drawings, etchings, lithographs, woodcuts, engravings, and prints; (b) works of sculpture; (d) works of artistic craftsmanship and pictorial woven tissues and articles of applied handicraft and industrial art.⁵⁶ These broad categories of works are protectable

⁴⁹ D Nicholson ‘South Africa’s Copyright Amendment Bill – 5 years on’ *Infojustice* 17 August 2020; M. Palmedo ‘South Africa’s Copyright Amendment Bill returned to Parliament for further consideration’ (2021) available at <https://infojustice.org/archives/42426>, accessed on 1 March 2021.

⁵⁰ T Schonwetter ‘Public hearings on Copyright Amendment Bill 2017’ (2017) https://static.pmg.org.za/1/170801T_Schonwetter_2.pdf, accessed on 1 March 2021.

⁵¹ S1(2) Nigerian Act and s2 South African Act.

⁵² Part I.

⁵³ Part II. Parts VIII and IX in the newly enacted bill. Part IX deals with the protection of performer’s rights while Part IX deals with the protection of folklore.

⁵⁴ S1(1) of the Copyright Act.

⁵⁵ See s1(2) of the Copyright Act. As would be seen later the requirement of originality may constitute a problem for some forms of handicrafts. But the requirement of fixation is not an issue for crafts which are usually in physical permanently fixed forms.

⁵⁶ S51(1) Copyright Act.

irrespective of their artistic quality. But only a few would qualify as tradition-based arts and crafts including works of artistic craftsmanship,⁵⁷ furniture and jewellery making.⁵⁸

In practice however, the true interpretation of ‘artistic craftsmanship’ remains uncertain. Scholars have sought guidance from the UK Copyright law which serves as the template for the Nigerian provisions. UK courts have mainly decided that what constitutes ‘artistic craftsmanship’ can only be determined by the facts of each case as established before the court.⁵⁹ Generally, the question whether the producer is an artistic craftsman or a mere ‘fabricator’ is relevant in determining whether the product is one of artistic craftsmanship thus laying emphasis on the producer.⁶⁰ For instance, in the English case of *Vermaat and Powel v Boncrest Ltd*,⁶¹ the court held that ‘for a work to qualify as artistic craftsmanship, one should be able to say that the author was both a craftsman (meaning a skilful craftsman) and an artist.

Section 1(3) makes it clear that an artistic work shall not be eligible for copyright if it was made with the intention of using it ‘as a model or pattern to be multiplied by any industrial process’.⁶² This implies that a work that qualifies as an artistic work under copyright law cannot also be protected as an industrial design. In effect, machine-made mass-produced articles, including arts and crafts, do not qualify as artistic works under the Act and so cannot enjoy copyright protection. But tradition-based arts and crafts made

⁵⁷ S51(1) (f) also known as ‘applied art’. It is to be noted that the definition of what constitutes ‘artistic work’ under the Act is retained in the newly passed bill under s108(1). Same goes for the originality criterion and irrelevance of artistic quality for protection.

⁵⁸ Asein 2012 supra 66, citing *William Grant & Sons v McDowell & Co Ltd* [1994] FSR. 690.

⁵⁹ *George Hensher Ltd v Restavile Upholstery Ltd* [1976] AC 64 [HL].

⁶⁰ Ibid. See also Asein 2012 supra 64.

⁶¹ [2001] FSR 5.

⁶² S2(6) of the Copyright Bill.

substantially by hand could qualify either as artistic works or works of artistic craftsmanship subject to the conditions for protection.⁶³

A touch of collectivism in the Act can be inferred from the approval of CMOs as a collective platform for the management of copyrights.⁶⁴

While the foregoing is about conventional copyright, the Act also provides *sui generis* provisions for EoFs.⁶⁵ Section 31(5) defines ‘folklore’ as:

a group – oriented and traditional – based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally by imitation or by other means including folklore, folk poetry, folk dance, folk plays and productions of folk arts in particular drawings, paintings, carvings, sculptures, poetry, terracotta, mosaic, woodwork, metal ware, jewellery, handicrafts, costumes and indigenous textile.⁶⁶

The Act protects EoFs against certain uses without authorisation from the Nigerian Copyright Commission (NCC) as the authorizing body, subject to exceptions.⁶⁷ These include reproduction, communication to the public by performance, broadcasting, adaptations, translations and other transformations, when such uses are either for commercial purpose or made outside the traditional context of the expression. It also grants to communities in ownership of folklore the right of attribution.⁶⁸ Breach of s31

⁶³ Discussed in 5.3.2.

⁶⁴ S39 and s88(1) of the Bill which is basically a reproduction of s39. By virtue of s39, the Nigerian Copyright Commission (NCC), the body charged with the administration of copyright in Nigeria, approved the establishment of the Copyright Society of Nigeria (COASON), which up until 2017, served as the sole CMO in Nigeria. But on 22 March 2017, the NCC also approved the Musical Copyright Society Nigeria (MCSN) as a second CMO in Nigeria. See ‘At last, MCSN gets license as collecting society’ *The Nation* 14 April 2017 available at <https://thenationonlineng.net/last-mcsn-gets-licence-collecting-society/>, accessed on 1 March 2021.

⁶⁵ The provisions however remain largely ineffective as no record of a single instance when the provisions have been utilised can be found. See also Adewopo 2006 *supra*.

⁶⁶ S31(5).

⁶⁷ S31(1)(2)(4). Such as non-commercial and educational uses.

⁶⁸ S31(3).

could attract civil liability to the Commission and criminal penalties where the misuse is intentional.⁶⁹

From the face of the provisions, folklore, including pre-existing traditional arts and crafts, could enjoy protection on the basis of a framework that does not require the problematic originality and individual ownership criteria. But the provisions suffer from a number of weaknesses.⁷⁰ Substantively, key issues like ownership and reward are not properly addressed especially in relation to cases where a particular folklore is traceable to more than one community. This diminishes the prospects of economic gains from tradition-based arts and crafts as folklore for the communities practicing the craftsmanship.

The current South African Copyright Act also contains basic terms relating to subject matter and criteria for protection, including the originality criteria.⁷¹ Section 2(1) lists the protectable subject matter broadly which includes fixed original works in the field of literary, musical and artistic activities.⁷² Section 1 defines ‘artistic work’ in three categories, namely: (a) paintings, sculptures, drawings, engravings and photographs; (b) architectural works; and (c) works of craftsmanship which do not fall within the previous two categories. The criteria for protection is provided in s2(2). Accordingly, a literary, musical or artistic work shall not be eligible for copyright unless (a) sufficient effort or skill has been expended on making the work to give it a new and original character; and (b) the work has been written down, recorded or otherwise reduced to material form.

⁶⁹ S33.

⁷⁰ A Adewopo ‘Protection and administration of folklore in Nigeria’ (2006) 3(1) *Scripted*. A Lawal-Arowolo, ‘Copyright law and the recognition of “folkloric creations” and “folk medicine” in Africa’ (2011) 5(1) *JBAA&C* 33.

⁷¹ S2.

⁷² Others are cinematograph films; sound recordings; broadcasts; programme-carrying signals; published editions; and computer programs.

Typically, the Act emphasizes that these works are protected irrespective of their artistic quality.

A common challenge for tradition-based arts and crafts in both the Nigerian and South African Acts is the requirement of originality. Both Acts provide a hint on the test for determining originality by allowing protection for artistic work only where ‘sufficient effort has been expended on making the work to give it an original character’⁷³ and ‘sufficient effort or skill has been expended on making the work to give it a new and original character’, respectively. But with no further guidance on what constitutes ‘sufficient effort’ and ‘original character’, it is left for judges to provide the right interpretation. Nigerian courts have applied the ‘sweat and brow’ doctrine credited to English Courts to the effect that ‘originality’ in the context of the Act ‘does not mean newness or novelty.’⁷⁴ What is required is sufficient amount of labour, judgement and skill in making the work,⁷⁵ ‘to give it a new character’.⁷⁶ This simply requires of the author effort, labour and time in producing the work and that the work is not copied from another source.⁷⁷

South African Courts have also had to confront the difficult task of determining what constitutes originality as prescribed in s2(2)(a) of the Copyright Act with inconsistent findings. Still, they largely adhere to the ‘sweat and brow doctrine’

⁷³ S1(2) of the Nigerian Act.

⁷⁴ Oyewunmi 2015 supra 32 and Asein 2012 supra 75. See also *University of London Press v University Tutorial Press* [1916] 2 Ch 601 and *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] WLR 273. They do this because of the similarities between the Nigerian provisions and the English Act on the basis of which the English cases were decided. English cases have no binding effect on Nigerian courts but are relied upon as persuasive authorities.

⁷⁵ See *University of London Press v University Tutorial Press* supra.

⁷⁶ *Emerson v Davies* (1845) 3 Story 768 (778); Asein 2012 supra citing *Dicks v Brooks* (1880) 15 ChD 22.

⁷⁷ Asein *ibid*.

approach.⁷⁸ The court in *Saunders Valve Co Ltd's case*⁷⁹ held that a work need not be inventive or new to be original. However, it should be the product of one's own endeavours, independent skill, and effort, and should not have been copied from another source. In *Waylite Diaries CC v First National Bank*,⁸⁰ the low threshold for originality in South Africa was further confirmed as follows:

The application of (the authors) knowledge, skill and labour must produce a result which is not merely commonplace. It must have a quality of individuality not necessarily requiring intellectual novelty or innovation but which is at least sufficient to distinguish the work from the merely common place....

As Berger AJ acknowledges,⁸¹ the sweat and brow doctrine 'is imprecise' and so the nature of the work in question could influence the manner in which the court would construe the originality requirement. The Supreme Court also pointed out in *Haupt t/a Soft Copy v Brewers Marketing Intelligence and Others*⁸² that the amount of labour, skill or judgment which is required is a question of fact and degree in every case. The Court rejected the opinion of the High Court⁸³ that creativity was a requirement for originality, and held instead that a work is original 'if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour', thus endorsing the sweat and brow doctrine.

⁷⁸ See T Schonwetter and D Oriakhogba 'Data series: data, databases and copyright protection in South Africa, Part I' (dna) available at <https://ip-unit.org/2018/data-databases-and-copyright-protection-in-south-africa-part-i/>, accessed on 11 November 2021 and NI Moleya 'Evaluating the copyright protection of databases in South Africa: a comparative analysis with the European Union' *SAIPLJ* (2020) 8(1) 56-79. See, e.g., *Saunders Valve Co Ltd. v Klep Valves (Pty) Ltd*, 1985 (1) SA 646 (T); *Appleton v Harnischfeger Corporation* 1995 2 All SA 693 (A); *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA).

⁷⁹ *Ibid.*

⁸⁰ 1993 (2) SA 128 (W) at 133.

⁸¹ *Moneyweb (Pty) Ltd v Media 24* (2016) 3 All SA 193 (GL).

⁸² (2006 (4) SA 458) para 35.

⁸³ *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2005 (1) SA 398 (C) paras [413]–[414].

A contrary position is seen in *Da Gama Textile Co Ltd v Vision Creations CC*,⁸⁴ where the Court avoided the traditional ‘sweat of the brow’ test and embraced instead the personality or creativity test. The Court saw the pattern drawing on the subject matter in question as original because it had more innovations than imitations and its features were distinctive products of the maker’s ‘personal creativity, imagination, skill and labour’. But in *Moneyweb (Pty) Ltd v Media 24*, the Court said the law still considers the time and effort spent by the author in determining originality, but these factors must involve more than a ‘mechanical, or slavish, copying of existing material’.⁸⁵

Despite the flexible approach in the interpretation of the originality criteria favoured by the copyright jurisprudence of both countries, it will be tenuous to accommodate pre-existing tradition-based arts and crafts under their respective copyright framework. Conversely, the eligibility of contemporary works derived from pre-existing knowledge for copyright protection may not be affected by the originality criteria where they are distinctive enough. For example, if a Bida jeweller or Ndebele basket maker could be conceived as individual creators, it is possible to ascribe originality to their products on the basis of the sweat and brow doctrine where they have individually applied enough skill and effort to give the products a distinct quality that stands them out from others. The real challenge is to satisfy all the other necessary conditions for their eligibility. The requirement of authorship under their respective copyright laws could be particularly difficult to establish where community knowledge is concerned and artisans work in communities governed by openness and collaboration, with individual members of the community contributing their personal touch at different stages to add value to the

⁸⁴ 1995 1 SA 398 (D & CLD) para [400].

⁸⁵ (at para 15).

end product, as is the case with Bida beadmakers and Zulu potters. In such cases, the final output is not entirely attributable to any specific individual or entity in a way that satisfies the true meaning of authorship or ownership of copyright under the Acts, not even joint authorship as provided in s1(1) and s2(1) of the Nigerian and South African Acts respectively.⁸⁶ Originality could also be difficult to establish under both Acts despite the amount of time and skill expended in producing the crafts if that additional personal touch that gives them a new character is missing.

Protection of TCEs has also been of concern to South African policy makers going by recent efforts to develop a TCE-friendly statute. Originally, South Africa's Copyright Act does not follow the path of Nigeria and many other African countries in incorporating *sui generis* provisions for TCEs in the copyright legislation. But the recent efforts appear to be a subtle attempt to incorporate customised provisions in the extant copyright framework to cater for TCEs in place of or in conjunction with an entirely new and separate framework, the Intellectual Property Laws Amendment Act, 2013 (IPLAA).⁸⁷ The Copyright Amendment Bill⁸⁸ for instance which seeks to align the current Copyright Act with the digital age and global IP standards has in addition novel provisions on indigenous cultural expressions in support of remuneration for indigenous artists by providing for the payment of royalties to indigenous works.⁸⁹ However, it does not define 'indigenous cultural expression' neither does it provide specific rights that

⁸⁶ By virtue of s2(1) of the Act, copyright is conferred on every work eligible for copyright where the author, or any of the authors in the case of joint ownership, is a Nigerian citizen or resident in Nigeria; or where the author is a body corporate under Nigerian laws.

⁸⁷ Discussed in 5.4.4.1

⁸⁸ B013B-2017.

⁸⁹ S7C. The other relevant provisions which seek to bring the Act up to date with the digital era and developments at the multilateral level include exceptions for print disabled persons, protection for audio-visual works; protection for technological protection measures; better protection for computer programs and exceptions for galleries, libraries, archives and museums (GLAMS).

entitles their owners to earn royalties. Thus, the provisions have been criticized as superficial and ‘in any event meaningless’.⁹⁰

In the current copyright laws of both countries therefore, the manifestation of the theoretical constraints in connecting TCEs with IPRs confirms the laws as problematic and inadequate in promoting their tradition-based arts and crafts in the market place.

5.3.2 Designs

Designs are protected in Nigeria and South Africa following different approaches, which also affects their nomenclature. In Nigeria, industrial designs, as they are known, are protected together with patents under the Patents and Design Act;⁹¹ whereas South Africa adopts a standalone statute for designs, viz: the Designs Act.⁹²

Like copyright, the origins of the protection of industrial designs in Nigeria is rooted in the British system, first by extension of British laws to Nigeria,⁹³ and subsequently by the enactment of an indigenous patents and designs protection legislation with heavy reliance on the British model.⁹⁴

The Nigerian Patents and Designs Act defines an industrial design as -

any combination of lines or colours or both and any three dimensional form, whether or not associated with colours which is intended by the creator to be used as a model or

⁹⁰ The Anton Mostert Chair of Intellectual Property Law ‘Written comments on the Copyright Amendment Bill 2017’ 17 available at <https://blogs.sun.ac.za/iplaw/files/2018/07/Written-comments-on-the-Copyright-Amendment-Bill-2018-final.pdf>, accessed 1 March 2021.

⁹¹ Nigerian law on the protection of designs uses the terms ‘industrial design’. See the Patents and Designs Act 1971 Cap P2 LFN 2004.

⁹² No. 195 of 1993.

⁹³ These were extended via colonial legislative instruments. For more on the history of patent legislation in Nigeria see Oyewunimi supra 144-146.

⁹⁴ The British system as applicable before the advent of an indigenous system had limited function in terms of patent protection. It merely provided a system for the registration of patents already granted in Britain and did not support the grant of local patents whether for local or indigenous inventors. See Ibid 146-7.

pattern to be multiplied by industrial process and not intended solely to obtain a technical result.⁹⁵

The seeming amicability between industrial designs and handicrafts is negated by the requirements that for a work to qualify as industrial design under s12, it must be reproducible by mechanical processes or is meant for application to industrial products through such means as painting or engraving.⁹⁶ This contradicts the nature of traditional handicrafts as predominantly handmade and eliminates one-off objects of creativity which are not originally intended for replication through mechanical processes.⁹⁷

For a work to qualify for protection as an industrial design, it must be new; and it is new only if it has not been publicly available by any means or by use prior to the day the application for registration was made.⁹⁸ Like copyright, newness is given a flexible meaning which does not require an entirely new and hitherto unknown design. Instead, it suffices that an existing concept is applied to a product in a novel way.⁹⁹ In the English case of *Dower Limited v Numberger*, Duckley LJ further explained the criterion of newness to the effect that it ‘involves the idea of novelty either in the pattern, shape or in the way in which an old pattern, shape or ornament is to be applied to some special subject matter’.¹⁰⁰ Ultimately, even with a flexible interpretation of ‘newness’, the incongruity in associating tradition-based handicrafts with newness within the meaning of

⁹⁵ S12 Patents and Designs Act and s15 of the Designs Act of South Africa 1993. See also *FO Ajibowo & Co Ltd v Western Textiles Mills Ltd* [1976] 7SC 97 (115).

⁹⁶ Oyewunmi 2015 supra 207 & 208.

⁹⁷ Ibid.

⁹⁸ Section 13(3).

⁹⁹ Oyewunmi supra 209, citing the Nigerian case of *Controlled Plastics v Blank Horse Plastics Industries Ltd* (1990-91) FHCLR 180 where the court held the ‘new’ or ‘original’ as implying novelty either in the pattern, shape or ornament itself or in the manner these are intended to be applied to some specific subject matter.

¹⁰⁰ [1910] Ch D 25 at 29.

the Act is not cured; at best it is case-specific. And it effectively disqualifies pre-existing tradition-based works.

The South African Designs Act shares similarities with the Nigerian version in protecting designs as a form of IP. Nevertheless, there are significant differences, one of which is the express distinction that the South African Act makes between aesthetic and functional designs and protects them as such.¹⁰¹ A design is protected as an aesthetic design if it is new and original,¹⁰² while it is protected as a functional design if it is new and ‘not commonplace in the art in question’. Section 14(1) (b) defines what ‘newness’ entails. A design is new if it has not formed ‘part of the state of the art’ as determined under the Act.¹⁰³

But more importantly, like the Nigerian Act, a design is not registrable if it is not for articles intended to be multiplied by an industrial process’ thus ousting tradition-based articles which are typically handmade.¹⁰⁴

On the whole, the requirements for eligibility for protection as designs operate against tradition-based arts and crafts, which are: mainly repetitive following age-long practices, predominantly handmade and hardly intended for industrial application. Moreover, the kind of protection envisaged by the design statutes under scrutiny would not address the objective of promoting traditional designs as articulated in chapter three.

¹⁰¹ S14.

¹⁰² S14(1) (a).

¹⁰³ S14.

¹⁰⁴ S14(3).

5.3.3 Trademark

Having earlier established trademark systems as most suitable for the protection of tradition-based arts and crafts as contemplated in this thesis,¹⁰⁵ this section now closely examines the trademark framework of Nigeria and South Africa to determine their level of support for the protection of communal trademarks.

The operation of trademarks in Nigeria is governed by the Trademarks Act of 1965. The outdated status of the Act seen from the date of its enactment leaves no doubt as to its inadequacy in the context of today's global commerce.¹⁰⁶ The eligibility criteria for the registration of a trademark in Nigeria largely conform with global standards.¹⁰⁷ A registrable trademark must be capable of distinguishing the product bearing it.¹⁰⁸ In other words, it must be naturally 'adapted to distinguish' or must have become so adapted by use.¹⁰⁹ Section 67 defines a trademark as:

... a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or registered user to use the mark, whether with or without any indication of the identity of that person.

The Act also stipulates the persons entitled to apply to register a trademark, the procedure to be followed and the effects of a successful registration.¹¹⁰ A successful application grants to the applicant an 'exclusive right to use the trademark in relation to' the particular class of goods for which the mark is registered.¹¹¹ This allows entities acting on

¹⁰⁵ Chapter Four

¹⁰⁶ Like the Patents and Designs Act, the Trademarks Act has not been amended since its inception.

¹⁰⁷ Ss9 and 10.

¹⁰⁸ See ss9(3) and 10(2).

¹⁰⁹ S9(2) and (3).

¹¹⁰ Parts A and B.

¹¹¹ A joint reading of ss5 and 6 are to this effect.

behalf of collectives to register a trademark for use by members of the collective. To this end, s46 provides for certification mark as follows:

A mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of region, material, method of manifestation, quality, accuracy or other characteristic, from goods not so certified, shall be registrable as a certification trademark in Part A of the register in respect of those goods in the name, as proprietor thereof, of that person; provided that a mark shall not be so registrable in the name of a person who carries on a trade in goods of the kind certified.

Section 46 contains the key attributes of certification marks. Together with s67, they partly govern the nature and *modus operandi* of certification marks as applicable in Nigeria. Firstly, the mark must be intended for use on goods in the course of trade.¹¹² Secondly, it must identify the goods for which it is registered with reference to the certifying authority and not the producer or other dealer as is the case with ordinary trademarks, thus effectively separating ownership and use of a certification mark. However, the Act protects only certification marks.¹¹³ This limits the options for communal trademarks, which could impact negatively on the goals of promoting tradition-based handicrafts. One could argue that s46 is broad enough to cover GIs going by the inclusion of region-base distinction of goods by certification marks. But given the more technical requirements of GIs, s46 is hardly sufficient as support for the establishment of a GI.

Nigeria follows the Nice International System of trademark classification which means that registration of multiple trademarks is allowed subject to certain conditions. A

¹¹² OA Olatunji 'Fundamentals of the Nigerian Trade Marks Act and implications for foreign trade mark owners' (2016) 11(2) *JIPLP* 130 – 137 (131).

¹¹³ L Schüßler 'Protecting 'Single-Origin Coffee' within the global coffee market: the role of geographical indications and trademarks' (2009) 10(1) *ECIJLTP* 149-185.

trademark may be registered in more than one class where the applicant is seeking protection in both classes. And where the applicant is seeking protection in multiple classes, separate filing fees must be paid for each of the classes.

In Nigeria, perennial efforts to amend the trademark provisions have not yielded results. This has been mainly geared towards overhauling Nigeria's Industrial property laws as seen in the 2008 bill on Industrial Property Commission (IPCOM) under the auspices of the Federal Ministry of Industry, Trade and Investment. Basically, the IPCOM Bill aims at creating an Industrial Property Commission of Nigeria through the harmonisation of current industrial property laws, repealing existing laws, and providing comprehensive legislation of the subject matter. There is also in the picture a private member Trademark bill of 2016¹¹⁴ which has already passed second reading at the National Assembly and is awaiting further legislative action.¹¹⁵ The Trademark bill makes provisions for more forms of trademarks, including collective trademarks. It also makes provisions for the domestication of the Madrid Protocol in s57.

The South African trademark legislation exhibits similar characteristics with the Nigerian Act but differs in some material respects. Unlike Nigeria's law, South Africa's Trademark Act protects both certification and collective trademarks. Section 9(1) and (2) provide the standard criteria for trademark registration. Section 9(1) states that a mark is registrable only where it is:

... capable of distinguishing the goods or services of a person in respect of which it is registered or proposed to be registered from the goods or services of another person either

¹¹⁴ Trademarks Act 2004 (Repeal and Re-enactment) Bill, 2016, 2016 SB 357.

¹¹⁵ PLAC Bill Track available at <https://www.placbillstrack.org/view.php?getid=2409>, accessed on 1 March 2021.

generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within those limitations.

(2) A mark shall be considered to be capable of distinguishing within the meaning of subsection (1) if, at the date of application for registration, it is inherently capable of so distinguishing or it is capable of distinguishing by reason of prior use thereof.

Therefore, the requirement of distinctive quality for registrability of a trademark under the Act obtains by virtue of s9. A mark could be registered subject to limitations, including a disclaimer by the proprietor of the (proposed) trademark of ‘any right to the exclusive use of all or any portion of’ the trademark.¹¹⁶ These provisions buttress the argument that distinctiveness is required of the trademark itself as the subject matter of protection rather than the product in respect of which it is registered.¹¹⁷

It can be discerned from s10 that place-based marks, such as GIs and AOs, are not protectable as ordinary trademarks,¹¹⁸ but they can be protected as communal trademarks under Part XII of the Act. Section 10 (2) (b) includes the following among marks that are not registrable as ordinary trademarks:

... a mark which consists exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or

¹¹⁶ S15(a). S15(a) provides that if a trademark contains matter which is not capable of distinguishing within the meaning of s9, a court may require that the proprietor disclaim any right to the exclusive use of all or any portion of the matter, as long as such rights arise out of the registration of the trademark in respect of which the disclaimer is made. In *Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd* 2000 (2) SA 771 (SCA), the Court held that s15 ‘is not concerned with the question whether a trade mark itself is incapable of distinguishing, but whether matter contained in a trademark lacks this capability’. It further held that such a disclaimer is primarily intended to prevent the registration of a composite mark from operating so as to inhibit the use of the disclaimed element by others’. Thus, it held that Beacon is not entitled to the exclusive use of the description: ‘Liquorice Allsorts’ as a component of its trademark because it is used by Beacon and others in the trade to describe the product and not to distinguish Beacon's product from that of others.

¹¹⁷ See 4.4.2.4.

¹¹⁸ However, they can be registered as certification marks.

other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services.

The recently passed Regulations Relating to the Protection of Geographical Indications Used on Agricultural Products Intended for Sale in the Republic of South Africa (the GI Regulations) further strengthens the legal support for the registration of GIs in the country, but mainly for GIs intended for local agricultural products.¹¹⁹

Part XII of the Trademark Act protects both certification and collective trademarks and makes it clear that unlike in the case of ordinary trademarks, place-based values are protected. Section 42(1) provides for certification marks as follows:

A mark capable of distinguishing, in the course of trade, goods or services certified by any person in respect of kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services, as the case may be, from goods or services not so certified, shall, on application in the prescribed manner, be registrable as a certification trade mark in respect of such first-mentioned goods or services, in the name, as proprietor thereof, of that person: Provided that a mark may not be so registered in the name of a person who carries on a trade in the goods or services in respect of which registration is sought.

Similarly, s43 protects collective trademarks as follows:

(1) A mark capable of distinguishing, in the course of trade, goods or services of persons who are members of any association from goods or services of persons who are not members thereof, shall, on application in the manner prescribed and subject to the

¹¹⁹ N Haworth 'Geographical indications: are they on the map in South Africa?' (2020) available at <https://www.mondaq.com/southafrica/product-liability-safety/977468/geographical-indications-are-they-on-the-map-in-south-africa>, accessed on 1 March 2021.

provisions of this section, be registrable as a collective trademark in respect of such first-mentioned goods or services in the name of such association as the proprietor thereof.

(2) Geographical names or other indications of geographical origin may be registered as collective trademarks.

The totality of ss42 and 43 stipulates the standard conditions and attributes that define certification and collective marks globally. They are communal in nature, and managed by an institution but used by individual entities. A trademark, including a communal trademark, will not be registered where the applicant has no clear intention of using it in the course of trade.¹²⁰

Overall, South Africa's position differs from that of Nigeria by protecting collective marks and GIs in addition to certification marks.

5.4 Other Intersecting Laws

There are other laws in the two countries of study that intersect with IP protection and could also complement and support the use of communal models.

5.4.1 The Merchandise Marks Statutes in Nigeria and South Africa

The Merchandise Marks Act is common to both Nigeria and South Africa. In many ways, the statutes align with and complement trademark protection.

The Nigerian Merchandise Marks Act¹²¹ protects against false description of the characteristics of a good in terms of material facts such as quantity, weight or measure; place of manufacture; production method; materials of which the goods are made; false

¹²⁰ S3(3)

¹²¹ Cap M10 LFN 2004. The current Act is a reproduction of the Merchandise Marks Act 1916 [23 of 1915; 15 of 1956; LN 47 of 1955].

allusion to existing IPRs and false use of marks.¹²² This applies to both traders and manufacturers of goods. Section 2(2) is particularly important because of its direct reference to trademarks. It states:

The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to the goods of any such figures, words or marks, or arrangement or combination thereof whether including a trademark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

Section 2(3) protects against false attribution by way of impersonation or forgery of names or initials on goods, where such forgeries are not a trademark or part of a trademark. In effect, the Act prohibits false description in two main dimensions: false information regarding the material facts of a product in terms of quantity, quality and production processes; unauthorised use of trademark or false description of source of origin. False description could be by way of impersonation or use of fictitious names, or forgery of a trademark, which includes using a genuinely registered trademark which falsely describes the good.

To strengthen protection for trademarks, sections 3-5 prohibit and criminalise certain actions that are harmful to trademarks. These include: (a) forging a trade mark; (b) falsely applying trademarks or deceptive trademarks to goods; (c) applying false trade description to goods; (d) making of devices to be used for forging a trademark; (e) possessing devices used for forging of trademarks; and (e) aiding the doing of any of the

¹²² S2(1).

above actions.¹²³ Section 4 stipulates what amounts to forgery of a trademark and this includes: (a) making a mark closely resembling an existing trademark without the consent of the owner; or (b) falsifying a genuine trademark. By s5(4), a trademark is considered as false application if it is applied without the consent of its proprietor. This applies also to marks that closely resemble an existing trademark. Two types of offences can be distilled from these provisions: forging an existing trademark and/or fixing an existing trademark on an item without the consent of the owner.

The South African equivalent statute, the Merchandise Marks Act,¹²⁴ also contains provisions which are intended to prevent the false description of goods in the market arena through, *inter alia*, deceptive use of marks, including trademarks. Section 1 defines ‘trade description’ as:

... any description, statement or other indication, direct or indirect, as to the number, quantity, measure, gauge or weight of any goods, or as to the name of the manufacturer or producer or as to the place or country in which any goods were made or produced, or as to the mode of manufacturing or producing any goods, or as to the material of which any goods consist, or as to any goods being the subject of an existing patent, privilege, or copyright, and includes any figure, word or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the aforementioned matters, but does not include a trademark.

Accordingly, false description is:

... any trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of

¹²³ S3(1).

¹²⁴ 17 of 1942, as amended by the Merchandise Marks Amendment Act 61 of 2002.

addition, effacement or otherwise, if that alteration makes the description false in a material respect.¹²⁵

The marked difference between the Nigerian and South African statutes is the fact that Nigeria considers and treats trademark forgery as false description, while South Africa distinguishes between false description and trademark forgery, and treats them individually. This is reflected in ss1 and 6(a)(b) of the South African Act where s6(a) deals with alteration of trademarks and ss1(2) and 6(b) deal with false trade description, including false application of a trademark to any good.

The core essence of the Merchandise Marks statutes of the two study countries is to protect the public against misleading information about goods in the market, in relation to their quantity, quality, origin and more. Its scope is therefore similar to trademark regimes which protect the public against misleading information concerning the origin of a good. However, additionally, the Merchandise Marks statutes seek to ensure that the facts relating to the content of goods are not false. This is not the case with conventional trademarks which are only concerned about the identity of a product and not the veracity of its qualitative and quantitative substance. Communal trademarks are however more closely aligned with the rationale of the Merchandise Marks because they require adherence to specific standards usually pertaining to quality of goods using the mark. They both ensure that the public is not deceived about the quality of a product.

The Merchandise Marks Act could be useful in protecting authentic traditional handicrafts against piracy. Thus, it could be argued that under the Merchandise Marks Acts model, both the manufacturers and the sellers of fake tradition-based works would

¹²⁵ S1.

be culpable by the manner in which their products are presented in the market to give a false appearance of antiquity.

5.4.2 The Trademark Malpractices (Miscellaneous Offences) Act of Nigeria

The Trademark Malpractices Act¹²⁶ is another supportive legislation for trademarks in Nigeria. It criminalizes trademark related misconduct like false labelling, false packaging, sale, offering for sale, false or misleading advertising of any product in respect of its quality, character, brand name, value composition or safety. Its equivalent does not exist in South Africa.

5.4.3 The Counterfeit Goods Act of South Africa

South Africa's Counterfeit Goods Act¹²⁷ also provides further protection for copyright and trademark owners against the misappropriation of their IP by third parties. The Act prohibits and criminalises the making and selling of imitation goods which are IPR protected.¹²⁸ The following acts constitute counterfeiting when undertaken without the consent of the IPR owner:

- (a) manufacturing, producing or making of imitations or identical copies or versions of protected goods within and outside South Africa;
- (b) or applying to goods, whether in the Republic or elsewhere, the subject matter of that intellectual property right, or a colorable imitation hereof that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or manufactured, produced or made under his or her licence;

¹²⁶ Cap T12 LFN 2004.

¹²⁷ No. 37 of 1997.

¹²⁸ S2.

- (c) using a particular mark in relation to goods where usage of such mark is restricted in accordance with s15 of the Merchandise Marks Act, 1941 (Act No 17 of 1941),¹²⁹ and the usage is without the authority of the relevant authority specified under the notice restricting usage.¹³⁰

This Act differs from the Merchandise Marks Act by preventing not only the illegal use of trademarks but also the production and marketing of fake IP protected goods.

5.4.4 Law Reforms in South Africa

In recent years, South Africa has exerted much effort to devise an appropriate legal framework for the protection of TK.¹³¹ Much of this effort has been overshadowed by criticisms pertaining to practical issues like lack of wide consultation with stakeholders and more substantive issues like lack of clear objectives in the proposed statutes.¹³² Still, it has given rise to two key statutes with strong implications for TCEs/TK which could be of relevance to the current objectives for tradition-based arts and crafts.

¹²⁹ S15 allows the Minister to prohibit or restrict the use of the following by notice in the Gazette: (a) National Flags of the country, (b) 'any mark, word, letter or figure or any arrangement or combination thereof, in connection with any trade, business, profession, occupation or event, or in connection with a trade mark, mark or trade description applied to goods'.

¹³⁰ S1(1)(iv).

¹³¹ Tong 2017 *supra*.

¹³² Ibid 180; See C Ncube 'Comments to Parliament on the Draft Protection of Traditional Knowledge Bill' (2013) available at https://www.academia.edu/3351706/COMMENTS_TO_PARLIAMENT_ON_THE_DRAFT_PROTECTION_OF_TRADITIONAL_KNOWLEDGE_BILL, accessed on 1 March 2021; 'Unveiling the Wolf', 11 Feb 2014, <http://blogs.sun.ac.za/iplaw/2014/02/11/unveiling-the-wolf/>. The IPLAA was widely criticised on this ground. See 'A better second attempt - protection of indigenous knowledge' 8 April 2015 available at <http://blogs.sun.ac.za/iplaw/2015/04/08/a-better-second-attempt-protection-of-indigenous-knowledge/>, accessed on 1 March 2021.

5.4.4.1 Intellectual Property Laws Amendment Act 2013 (IPLAA)

Efforts to amend South Africa's laws as stated above has followed two principal approaches: a *sui generis* approach or amendment of the existing IPR framework to accommodate certain aspects of indigenous knowledge, including indigenous cultural expressions. The IPLAA can be described as an attempt to achieve the former through the efforts of the then DTI.¹³³ The IPLAA is strongly criticised for the 'procrustean' approach it adopted, which is considered unsuitable for TCEs for which a *sui generis* law is recommended to ensure adequate protection.¹³⁴

Essentially, the IPLAA recognises certain manifestations of indigenous knowledge as an aspect of IP and seeks to protect them by amending four principal existing IP laws, namely the Copyright Act, the Performers' Protection Act, the Trade Mark Act and the Design Act. It evinces a strong objective (in close alignment with the main objective of this thesis) to not only protect the knowledge but to also facilitate their commercialisation.¹³⁵ Specifically, it seeks to bring Indigenous Knowledge holders into the mainstream of the economy and to improve the livelihoods of the communities hosting the knowledge by empowering them to commercialise their knowledge in ways that would also benefit the national economy.

To achieve the desired objectives, the Act treats traditional works (which includes indigenous works and indigenous cultural expressions)¹³⁶ as 'artistic works' as defined in

¹³³ No 28 of 2013; The IPLAA has received executive assent, but will come into operation on a date to be proclaimed by the President.

¹³⁴ The IPLAA generated a wave of criticism, including the presentation of an alternative *sui generis* bill (Wilmot Bill) as a private member bill. See 'Unveiling the Wolf' available at http://blogs.sun.ac.za/iplaw/2016/04/18/the-protection-promotion-development-and-management-of-indigenous-knowledge-systems-bill-2016-has-the-dst-lost-its-resolve/#_ftnref2, accessed on 1 March 2021.

¹³⁵ See the preamble to the Act.

¹³⁶ S1(1).

the Copyright Act,¹³⁷ and uniquely protects both pre-existing indigenous expressions and their derivatives. This can be deciphered from s28B which stipulates works eligible for protection as follows:

- (1) Subject to the provision of this Act, traditional works shall be eligible for copyright.
- (3) Copyright shall be conferred on a traditional work only if – (a) the traditional work is a derivative indigenous work and was created on or after the date of commencement of the intellectual property amendment act, 2013, and the indigenous community from which the work, or a substantial part therefor originated, is or was an indigenous community when the work was created; or (b) the traditional work is an indigenous work.

Section 1(1) defines ‘indigenous work’ as-

a literary, artistic, or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community.

This recognises collective works and provides a two-prong criteria for protection all based on indigenous community: first, on membership of the maker to an indigenous community and secondly, on the origin of the work itself linked to the indigenous community. Derivative indigenous works include any work substantially derived from an indigenous work.¹³⁸

¹³⁷ S1(a) defines ‘artistic works’ as including traditional works.

¹³⁸ S1(1).

Furthermore, to qualify for protection, such works must have been written down or captured in a material form or, are ‘capable of substantiation from the collective memory of the indigenous community’.¹³⁹

Protection grants to the beneficiaries exclusive rights to control certain actions/activities over the traditional works.¹⁴⁰

The conceptual hurdles of authorship and individual ownership are circumvented by treating indigenous communities as juristic persons and assigning authorship of works and ownership of the copyright over them to the communities.¹⁴¹ Such ownership can be transferred to a duly appointed representative of the community.¹⁴² But where the authorship cannot be determined, ownership shall vest with the National Trust for Indigenous Knowledge.¹⁴³

Of great significance are the provisions which treat indigenous communities as juristic persons and allow them to establish private companies or other establishments for the purpose of promoting and exploiting their indigenous cultural expressions.¹⁴⁴ Additionally, indigenous communities can request and pay the National Trust to manage the commercialisation of the resources on their behalf.¹⁴⁵ The National Trust has the overarching responsibility of ensuring the promotion and preservation of indigenous cultural expressions. Encompass in this responsibility are, *inter alia*, the responsibility of commercialising the resources, training on and creating awareness of IP and associated

¹³⁹ S28B(2).

¹⁴⁰ S28E.

¹⁴¹ Ss 3, 21 and 28D.

¹⁴² S28J(1)(b).

¹⁴³ Ss28D.

¹⁴⁴ Ss28D(1) and 28I(8).

¹⁴⁵ S28I(9).

rights for the indigenous communities, and helping the communities to operationalise the Act.¹⁴⁶

Once eligible, the copyright owner of the indigenous work enjoys exclusive control over uses such as, reproduction, publishing, and broadcasting of the work.¹⁴⁷

Part XIIA is very crucial and potentially useful in designating South Africa's tradition-based arts and crafts. It provides for the registration of traditional terms and expressions as certification or collective marks and GIs provided they can be so classified.¹⁴⁸ In the case of certification and collective marks, the subject matter must be 'capable of distinguishing the goods or services of an indigenous community in respect of which' they are 'registered or proposed to be registered, from the goods or services of another community or person ...'.¹⁴⁹

The Act stipulates key provisions for facilitating the commercialisation of TCEs by identifying and establishing the needed institutions, in addition to the National Trust. These include collecting societies, business enterprises and other legal entities that could be established by the indigenous communities to manage their knowledge, such as, community trusts and cooperatives. Besides managing copyrights, these institutions could register communal marks on behalf of the communities in question.¹⁵⁰

One of the unique qualities of the IPLAA is the reference to the constitutional guarantees upon which it anchors its objectives for the extension of IP protection to indigenous cultural expressions. Its preamble states:

¹⁴⁶ S28I.

¹⁴⁷ S28E.

¹⁴⁸ 43B(2) – (5).

¹⁴⁹ 43B(3).

¹⁵⁰ S43E 5(a)(iii)

whereas it is important in order to give effect to the recognition of cultural values and the freedom to participate in cultural activities as contemplated in sections 30 and 31 of the constitution of the Republic of South Africa, 1996, that the wealth of indigenous knowledge held by the indigenous people of SSA be recognized, preserved, protected and promoted and made accessible to the public.

This upholds some form of protection for indigenous cultural expressions as well as measures safeguarding the public domain on the basis of fairness. It also emphasises the need for commercialisation in order to realise those guarantees based on fairness.¹⁵¹ Fairness entails helping communities to secure their indigenous knowledge as the source of their livelihood and at the same time guaranteeing access to third parties in need of the knowledge. Despite the laudable aims of the IPLAA, experts consider the Act cumbersome and unworkable particularly because it deviates from the more favoured option of a customised law for the protection of TCEs/TK as endorsed by the ICG,¹⁵² which caters for their unique characteristics.¹⁵³

The IPLAA has attracted much criticism even to the extent of the presentation of the Wilmot Bill as an alternative bill. One of the key deviations of the Wilmot Bill from the IPLAA, and indeed, the IK Act discussed below is in the nomenclature of the subject matter. The Wilmot Bill uses the term ‘traditional knowledge’ instead of ‘indigenous knowledge’. It also creates a new category of IPs and IPRs, one of which is traditional work (right), which it defines as a literary, musical or artistic work in the sense of conventional copyright ‘which evolved in, or originated from, a traditional community,

¹⁵¹ The Act uses these terms in a way that suggests they are interchangeable. It is not clear what the true position is.

¹⁵² See WIPO *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Outline of Policy Options and Legal Mechanisms* (2004) WIPO/GRTKF/IC/7/4. This is indeed what the Wilmot Bill sought to achieve. It was designed as a sui generis model contrary to the IPLA. See also Ncube 2013 *supra*.

¹⁵³ Ncube *ibid* 4.

and in respect of which no individual maker is known'. This aligns with the basic meaning of TK. Like the IPLAA's focal point of 'indigenous community', authenticity is based on membership of a traditional community. It also covers derivative works as 'adaption of a traditional work'.

5.4.4.2 Protection, Promotion, Development and Management of the Indigenous Knowledge (IK) Act 2019

A more recent effort to ensure adequate protection for TCEs in South Africa is the 2019 IK Act introduced by the Department of Science and Innovation (DSI).¹⁵⁴ The Act endorses to a large extent the context and principles of the IPLAA but with significant differences, not the least its *sui generis* approach and provision for perpetual, strictly community-based, property rights. Like the IPLAA, it recognises the utility of the public domain going by the aspiration it expresses of encouraging 'the use of indigenous knowledge in the development of novel, socially and economically applicable products and services'.¹⁵⁵

The primary objective of the IK Act is to facilitate the protection, promotion, development and management of indigenous knowledge. This is reaffirmed in its stated objectives, which include some of the concerns that this study hopes to resolve in relation to the wellbeing of tradition-based arts and crafts: namely, protection from misappropriation and promotion in the context of trade and commerce. These are seen in s3(a)(e), viz: (a) 'to protect the indigenous knowledge of indigenous communities from

¹⁵⁴ Act 6 of 2019. The Act which was enacted in 2019 amends the 2015 Amendment Bill, Notice Number 243 No 38574 Government Gazette 20 March 2015, Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, 2014, (prepared by the Department of Science and Technology (DST)).

¹⁵⁵ The Act's preamble.

unauthorised use, misappropriation and misuse’; and (e) to ‘promote the commercial use of indigenous knowledge in the development of new products, services and processes’. It is to be noted however that in the context of this study, the concern for promotion is for both pre-existing and new products derived from the knowledge and not for only derivatives as s3(e) seems to indicate. The IK Act also deals with preservation but more in the context of registration (or documentation) although one could argue that objective (b) envisages practice and revitalisation of indigenous knowledge which are established means of preservation. It states the Act’s objective of promoting ‘public awareness and understanding of indigenous knowledge for the *wider application and development thereof*’.¹⁵⁶

Section 1 defines ‘indigenous cultural expression’ as –

expressions that have a cultural content that developed within indigenous communities and have been assimilated into their cultural and social identity, including but not limited to— (a) phonetic or verbal expressions; (b) musical or sound expressions; (c) expressions by action; and (d) action tangible expressions.

It however provides no further guidance on the meaning of ‘action tangible expressions’. But reference can be made to the definition of ‘indigenous cultural expression’ in the IPLAA as including ‘tangible expressions, such as material expression of art, handicraft, architecture, or tangible spiritual forms, or expressions of sacred places’.¹⁵⁷

To achieve its objectives, the Act protects indigenous knowledge as the collective property of the community subject to registration with the relevant authority.¹⁵⁸ Eligibility for protection is spelt out in s11. In particular, the subject matter must be one which has

¹⁵⁶ Emphasis added.

¹⁵⁷ S1(1).

¹⁵⁸ S9.

been ‘passed on from generation to generation’; ‘developed within an indigenous community’; and is ‘associated with the cultural and social identity of that indigenous community’. Once eligible, protection remains for as long as the criteria for eligibility are sustained.¹⁵⁹ Thus, as the basis for protection, the emphasis is on the product developed *in situ*.¹⁶⁰ Therefore, manifestation of the knowledge outside the community by its member(s) would not qualify for protection. This contrast with the two-prong criteria stipulated in the IPLAA based on the manifestation’s link with the indigenous community and the maker as a member the community. It could be argued that in the case of the IPLAA, the manifestation must also be *in situ* and not *ex situ* if one understands the two-prong criteria as mutually inclusive.

Ownership of the rights over indigenous knowledge vests in the indigenous community and can be held by a third party in trust for the community. Such trustee is not only responsible but also accountable to the community for the protection of their rights.¹⁶¹ But where the knowledge holder cannot be identified and designated, NIKSO is mandated to act as custodian of the knowledge with similar rights and obligations as a trustee.¹⁶² Section 12 reinforces the collective property rights granted to indigenous communities over their indigenous knowledge.

The Act also confers specific exclusive rights to the owners of the protected subject matter, which includes the rights to ‘any benefits arising from its commercial use’; to ‘be acknowledged as its origin’; and to ‘limit any unauthorised use of the

¹⁵⁹ S10(1).

¹⁶⁰ This is reinforced by the definition of ‘indigenous knowledge’ in s1 of the Act as ‘knowledge which has been developed *within* an indigenous community and has been assimilated into the cultural and social identity of that community, and includes— (a) knowledge of a functional nature; (b) knowledge of natural resources; and (c) indigenous cultural expressions’ [emphasis added].

¹⁶¹ S12(1)(2).

¹⁶² S12(3).

indigenous knowledge’.¹⁶³ The then DTI had suggested ways by which these rights can be appropriated using trademarks;¹⁶⁴ for instance, by registering a trademark and licensing it to third parties for use under terms which can be agreed in a benefit sharing contract. The community could also use the trademark directly to develop, market and commercialise the knowledge if they have the capacity to do so. Alternatively, a third party could on the strength of a benefit sharing agreement concluded with the community, apply for a trademark in its own name and then develop, market and commercialise the product, and share benefit with the community as holder of the knowledge, in line with the conditions of the benefit sharing agreement.

The IK Act and the right it provides make significant inroads into resolving the issues with tradition-based arts and crafts in relation to conventional IPRs. It provides a platform whereby the works can be holistically protected by registration which confers actionable rights, and by appropriation through trademarks. It therefore potentially resolves both the issue of protection in terms of ownership and promotion using trademark.

When it comes to institutional support in the commercialisation of indigenous knowledge, the Act singles out NIKSO.¹⁶⁵ NIKSO may accede to requests made by indigenous communities for assistance in the commercialisation of their indigenous knowledge. But even if it does nothing else, it is under an obligation to ‘promote partnerships for innovation and product development, coordinate funding, develop market strategies and promote commercial use of’ the products. Cast in such strong roles,

¹⁶³ S13.

¹⁶⁴ Implementation of the Intellectual Property Laws Amendment Act, No 28 of 2013, Briefing to the Portfolio Committee on Trade and Industry, March 4 2020, pp 11-12 available at <http://www.thedtic.gov.za/wp-content/uploads/thedti-IPLAA.pdf>, accessed on 1 March 2021.

¹⁶⁵ Section 25.

NIKSO can help significantly in facilitating the establishment and management of a communal trademark or GI for viable South African tradition-based arts and crafts.

5.5 Are the Frameworks Fit for Purpose?

Having closely examined the legal framework of the two study countries, the question that follows is whether they are fit for the purpose for which they were examined i.e., to secure greater benefits for their tradition-based arts and crafts as a subset of TCEs and the creative economy. More specifically, with the guiding standard underpinned by the norms of collectivism and communalism, this chapter was to determine whether the existing framework helps in addressing the IPR management incapacities associated with the small-size crafters, circumvent the conceptual hurdles between IPRs and some forms of tradition-based arts and crafts, promote marketing, and contemporaneously ensure preservation of the knowledge and secure its social value.

While the copyright originality huddles could be satisfied by contemporary work forms derived from TK/TCEs going by the low threshold of originality largely favoured by both countries, most pre-existing tradition-based works would be caught up unless rescued by the provisions on folklore in the Nigerian Copyright Act, and the IPLAA in South Africa.

Trademark, as the most suitable IP tool for marketing tradition-based arts and crafts is inhibited by the limited options for the registration of communal trademarks in Nigeria, especially when it is considered that the options have their individual strengths and weaknesses, which makes some more appropriate than others in any given case. Consequently, a broader range of choices is more proactive. The lack of sufficient options

is compounded by the non-membership of both study countries in key regional and multilateral harmonised platforms designed to make the administration of trademarks simpler and cost effective at the global level. This confines trademark registration in both countries to mainly their respective national trademark registries.¹⁶⁶

The IPLAA and IK Act have made significant inroads into addressing some of the issues raised above, but unlike the IPLAA, the IK Act relies on an entirely separate system rather than pushing the communal approaches through the tight cracks of the conventional IPR framework. Both statutes support group rights, including communal trademarks for tradition-based arts and crafts by relying on criteria that are not based on ‘novelty’ and individual owner. By recognising community-based institutions as legal entities and granting them custodianship over the community’s resources and rights over same, both statutes theoretically solve the problem of anonymous works and treat communities as a sort of commons naturally governed by collectivism. Thus, communal approaches are best suited in dealing with their needs.

Despite its many weaknesses, the IPLAA is potentially supportive in achieving the desired objectives for South Africa’s tradition-based arts and crafts in the creative economy as strongly stated in its preamble and provisions. It emphasises the imperative of commercialisation. It also underscores the importance of addressing the three-prong necessities of protection, promotion, and preservation. By basing protection and commercialisation on fairness, it establishes a key point of intersection with this thesis.

¹⁶⁶ See Ncube 2013 *supra* 6 noting that the Swakopmund Protocol which is the Model law designed by ARIPO to guide its members in designing protection for TK/TCEs is relevant to South Africa because the country shares borders with several ARIPO member states and her traditional communities have very close affinity with similar communities across these borders and may even own TK jointly with these neighbouring communities. She concludes that it would be wise to adopt a similar approach to the protection of TK in South Africa.

Another common ground is the recognition of the IPRs framework as a potential legal dispensation and legal tool to provide protection for appropriate manifestations of IK as creative works of expressions. It grants authorship of an indigenous work to the community who are free to exploit the work commercially through various strategies, including registration of a trademark. However, with regards to derivative indigenous works, it partially maintains the conservationist notion of the self-sufficient author in the creative process by vesting authorship in an identifiable maker as the person who first produced the work, albeit in addition to the cultural background of the original work linking it to an indigenous community.¹⁶⁷ Similarly, with regards to the question of originality of indigenous works, the emphasis is on the work as originating from an indigenous community and the maker as a member of the indigenous community.¹⁶⁸

Like the IPLAA, the IK Act is also concerned about the commercialisation¹⁶⁹ but does not provide much guidance on how this can be done. It is arguable that the context in which commercialisation is envisaged differs from marketing through product identification and differentiation. This can be seen in the manner in which the objectives of the Act,¹⁷⁰ the rights conferred¹⁷¹ and what constitutes commercialisation in the context of indigenous knowledge¹⁷² are stated with more emphasis on benefit sharing, registration of the subject matter and prior art. However, this does not preclude further appropriation through product differentiation strategy and the use of trademarks as suggested by the DTI.

¹⁶⁷ S28B3.

¹⁶⁸ S1.

¹⁶⁹ See s3(a)(e).

¹⁷⁰ S3.

¹⁷¹ S13.

¹⁷² S25.

The strengthening of institutional role in both the IPLAA and the IK Act could be regarded as a recognition of the incapacity of the knowledge holders to act for themselves. The IPLAA's National Trust and the IK Act's NIKSO are the kind of national institutions that could manage a communal strategy on behalf of the indigenous communities given their stated mandates and roles, although there is indication that the National Trust may not be established.¹⁷³ In any event, the functions of the two institutions and the scope of the subject matter they oversee are too broad. Therefore, they may not adequately serve the specific purpose of managing and implementing a certification scheme for tradition-based arts and crafts.

The IK Act strengthens the role of NIKSO as a departmental body with responsibility to facilitate the protection of indigenous knowledge systems and their commercialisation, and a specific mandate to implement the Act.¹⁷⁴ Three key functions that could facilitate commercialisation are reserved for NIKSO. It may assist indigenous communities in concluding benefit-sharing agreements with third parties.¹⁷⁵ It could also assist in others ways as part of its responsibility under s5(f), for example, by facilitating product improvement and marketing to capture the international market for tradition-based arts and crafts, and through capacity building and training of the communities to understand and enhance the market value of their products. Furthermore, NIKSO could work with (or supervise) a trustee of an indigenous community to successfully register and manage a communal trademark for their viable tradition-based arts and crafts

¹⁷³ See Implementation of the Intellectual Property Laws Amendment Act (2020) supra 9, where the DTI indicated that the functions and institutions of some proposed institutions in the IPLAA, including the National Trust, 'constitute overlaps and duplications of the functions' with others in the IK Act and therefore will not be established.

¹⁷⁴ S5(a).

¹⁷⁵ S5(1)(i).

knowledge. The Act does not specify the qualities and criteria for qualification to be appointment as a trustee, and as Pigliasco argued, this ‘leaves the matter open for all kinds of representation’,¹⁷⁶ certainly and more optimistically including a cooperative or cultural group.

Another potentially useful institution is the Advisory Panel comprised of representatives drawn from different relevant government departments; indigenous knowledge practitioners; industry stakeholders; and specialists in the discipline of practice.¹⁷⁷ And whose functions include to:

- (a) provide expert and strategic advice to NIKSO in respect of the protection, promotion, development and management of indigenous knowledge; (b) assist with the mobilisation of indigenous communities for purposes of pursuing specific activities conducted by NIKSO; and (c) advise NIKSO on any specific issue referred to it and execute any task that NIKSO may entrust to it in terms of this Act.

With such wide supportive obligations, the Panel could help in conceptualising and designing an appropriate communal trademark scheme for South Africa’s tradition-based arts and crafts.

On the whole, the Nigerian and South African IP-related frameworks provide support and justification for the contemplation of communal models to promote tradition-based arts and crafts notwithstanding the lack of specific acknowledgement of product differentiation and trademark as a means of exploiting the market potential of South Africa’s indigenous knowledge. One would agree with the then DTI that the IK Act provides a *sui generis* system for the protection of South Africa’s indigenous knowledge

¹⁷⁶ GC Pigliasco ‘The custodians of the gift: intangible cultural property and commodification of the Fijian Firewalking ceremony’ (Unpublished PhD Thesis, University of Hawai’i, 2007).

¹⁷⁷ S7(2).

in perpetuity which is complimented by the IPLAA's protection of derivatives of the knowledge as IP.¹⁷⁸

¹⁷⁸ Implementation of the Intellectual Property Amendment Act 2020 *supra* 17.

CHAPTER SIX

SUMMARY OF ISSUES AND SYNTHESIS OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Handicrafts do not seek to last millennia, nor are they possessed by the haste of dying soon. They go by with the days: they flow with us. They wear out slowly, they do not seek death, nor do they deny it: they accept it. Handicrafts are the heartbeats of the human time.¹

6.1 Introduction

I could not conclude this thesis without reference to the above quote from the 1990 Nobel Prize winner in literature, Octavio Paz, because to a large extent, it captures the context in which this study has proceeded and which shapes the objectives and possible options for achieving them. Tradition-based arts and crafts do not conjure a state of inertia. Protecting them should not amount to shielding them from change or interaction with their environment. Still preserving them is as important to their communities as ecology is to man's existence, and without proper preservation, they can die.

This thesis aimed primarily to explore how conventional IPR systems can appropriately and meaningfully protect tradition-based arts and crafts to derive greater benefit in the market environment as the overarching question. Encompassed in this inquiry were dynamics and considerations that encouraged linking TCEs with the market, as well as well explained conflicts and challenges that needed to be resolved to unleash the positive outcomes of such linkage: the challenges for the predominantly small-size businesses; the conflicts between TCEs and IPRs as the main tool for appropriating the

¹ Octavio Paz, "Los Privilegios de la Vista" cited in 'International Experiences in the *Sui Generis* Protection of Handicrafts' WIPO National Seminar on Omani Traditional Values in a Globalized World (2005) available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf, accessed on 1 March 2021.

values of cultural products in the market; and the misgivings about cultural products and the market especially pertaining to their survival and preservation.

In addressing the overarching question, the thesis proceeded from the background that Nigeria and South Africa are endowed with an abundance of tradition-based arts and crafts culture; yet these are not properly and effectively managed to derive full benefit from them. It also proceeded on the premises that tradition-based arts and crafts have potential to help boost the creative economy through their economic and socio-cultural values; and despite the conflicts between IPRs and TCEs, communal IPR strategies create room for TCEs based on their common underlying philosophy of collectivism and collaboration. Against this background, it distilled the following sub-questions:

1. What role do tradition-based arts and crafts play in the development of the creative economy of both countries?
2. What are the theoretical issues underpinning the connection between IPRs and tradition-based arts and crafts in the creative economy, and which IPRs are relevant?
3. How relevant is the communal approach to the management of tradition-based arts and crafts and in mediating the conflicts arising between IPRs and TCEs?
4. What are the enabling factors for success of a communal IPR model established for the purpose of managing tradition-based arts and crafts?
5. What lessons, if any, are derivable from the use of communal models to protect tradition-based arts and crafts in other jurisdictions?

The study adopted a doctrinal approach and relied mainly on primary and secondary data sourced from existing literature. Ultimately, it aimed, *inter alia*, to determine the

feasibility of communal IPRs in enabling the effective management of tradition-based arts and crafts in the two study countries and make recommendations that would facilitate the use of the resources to help grow their creative economy.

6.2 A Recap of the Chapters

Chapter one outlined the structure of the thesis, stating the background to and relevance of the study, the research question and scope of the research. It also provided clarification on concepts in the context of the study, particularly the exact context in which tradition-based arts and crafts should be understood and how IPRs become relevant. It outlined the analytical framework for arriving at the answers and the methodology followed in gathering and analysing data. Chapter two developed and applied the analytical framework to clearly identify common ground to accommodate the use of conventional IPRs for TCEs. It explained the principles and philosophies underpinning the common grounds, mainly their shared objectives and their underlying philosophy of collectivism. Chapter three focused more closely on the arts and crafts sector in the two countries to highlight two attributes, viz: their market potential and the imperative of protection based on their socio-economic significance and market related threats; and the potential relevance and feasibility of implementing communal strategies. Chapter four further examined the key imperatives - protection, promotion and preservation - for boosting the creative economy and deriving benefits from tradition-based arts and crafts in the proper context to determine the right communal strategies for achieving the imperatives in respect of tradition-based arts and crafts. Using the compatibility, applicability and suitability analysis, the chapter elucidated why communal strategies are not only

applicable but also suitable for the subject matter, and compatible with the objectives concerning them. Chapter five discussed the legal framework in the two countries and how they support the use of communal IPRs for the sector. Specifically, it identified the weaknesses in the respective national systems in ensuring the protection, promotion and preservation of tradition-based arts and crafts with the use of communal IPRs. The current chapter has the primary objectives of distilling and recapitulating the answers to the questions itemised above from the findings in the previous chapters, and providing suggestions for improvement.

6.3 Summary of the Findings

When UNCTAD pointed out the developmental potential of the creative economy for African countries and underscored the role of traditional arts and crafts as a catalyst for the growth of their creative economy, it was only restating a well-known point. However, the means for achieving this remained problematic because of the inherent weaknesses of the sector, but more particularly because of the inadequacy of IPRs in protecting TCEs due to inherent incompatibilities between IPRs and TCEs, and challenges in the proper management and appropriation of IPRs on the part of the entities, in addition to perceived fears in relation to the commercialising and commodifying of culture. The findings are presented in relation to three main issues: the link between tradition-based arts and crafts and the creative economy, the conceptual hurdles between TCEs and IPRs together with the fear of commodification, and communal models as the way out.

6.3.1 Tradition-based Arts and Crafts and the Creative Economy

6.3.1.1 The destruction of culture is not a myth

Experts like Cowen may rationalise concerns that globalization destroys culture as a myth with the counter illustration of a ‘richer menu of choices’;² yet disappearing cultures remain a visible trend in all facets of cultural experiences. Chapter three, which focused on the state of the tradition-based arts and crafts sector in the two study countries showed that there is a strong link between the creative economy and tradition-based arts and crafts in not only the economic context, but also in social and cultural contexts. But there are real concerns for the survival of some arts and crafts cultures.

The complementary link between tradition-based arts and crafts and the creative economy has many faces. First trade in tradition-based arts and crafts boosts activities in other sectors, such as tourism. In South Africa, this link with tourism and other sectors is such that government’s policies on these other sectors are sometimes tied together with the tradition-based arts and crafts sector. In both countries, this link can be seen in the location of arts and crafts markets in areas with strong touristic attraction and the markets themselves often becoming sources of touristic attraction. Furthermore, activities in arts and crafts help in creating jobs within the sector from production to marketing, and sustains livelihood. Because tradition-based arts and crafts activities typically have their roots in rural communities, they help in the development of such communities. As was seen in the case of the Ushafa potters, the activities of the centre transformed the village into a touristic site that attracted influential visitors.

Despite the foregoing, the study found that tradition-based arts and crafts forms in Nigeria and South Africa face the threat of ‘uncreative’ destruction with socio-economic

² Cowen 2002 *supra*.

implications for the communities pertaining to loss of heritage, and loss of livelihood for those who depend on the heritage to survive, particularly women. This trend arises mainly because of the inability of the individual crafters to compete equally in the global market. As seen in the case of the Dada potters, such incapacity forces the crafters to abandon their longstanding trade or divert into other types of handicrafts or other endeavours. The potential value of the study countries' tradition-based arts and crafts in the global market and the corresponding increase in threats from the market calls for best measures to safeguard them and secure their benefits.

6.3.1.2 TCEs are dynamic but protection is not an inauguration of stasis

Connected to the above is the concern for preservation. But there is also the rationale that preservation is not in alignment with the dynamic nature of traditional resources on the basis of which the destruction of individual cultures as a process becomes prescriptive and inevitable. This position is not unfounded in the two study countries. Traditions are clearly living and therefore flexible, regenerative, and adaptive. One is then left with a dilemma. On one hand, protecting tradition-based arts and crafts in Nigeria and South Africa from outside influences may stifle their evolving nature which is necessary for the flourishing of cultural diversity. On the other hand, failure to protect them from the forces of change may have long-term negative effects on the survival of individual forms, and on the livelihood of their producers who are unable to adapt to new trends inspired by the market. Nevertheless, diversification was seen as a form of preservation of the knowledge in the case of Dada pottery and Ndebele wall paintings and baskets. These examples indicated that the threats to the survival of tradition-based arts and crafts culture in the

market can be assuaged through measures that encourage revitalisation and innovativeness within boundaries that preserve the traditional ethos of the knowledge and their usefulness. While it is sometimes necessary to preserve physical cultural forms like museums pieces, the more transformative and socially beneficial form of preservation is practicing the knowledge, which includes adapting dying cultural practices to more useful purposes, because this form of preservation aligns with the living nature of cultural knowledge. Thus, while protection of tradition-based arts and crafts as contemplated encourages the continued practice of the knowledge in its traditional form, the unregulated aspect remains open for use by the public within the context of an evolving society.

6.3.1.3 The public domain is important and so are derivative works

Contesting the rationale for assigning private property economic rights to TCEs in relation to safeguarding the public domain is not unfounded. But the rationales upon which conventional IPRs were conditionally allowed are equally relevant to TCEs which indeed have also been enriched by the influence of other cultures. It is therefore hard to justify protection for pre-existing traditional arts and crafts on the basis of exclusive rights of ownership, unless one embraces alternative arguments for protecting TCEs, such as, the social justice rationale³ and the utilitarian justification of catering for the greater good as an eventual outcome of the temporary enclosure of the public domain by the

³ An example of the application of the social justice rationale is in Panama which formed the basis of its *sui generis* law for indigenous cultural expressions especially the *mola* motif produced by women of the Kuna tribe in Panama. The law implemented customised interpretations of key concepts like ‘originality’ to accommodate the subject matter and protect it accordingly. It conceptualised ‘originality’ to mean authentically traditional.

exclusive rights of IPRs as suggested by Okediji.⁴ The question of misappropriation of TCEs and the injustice of the enrichment of one party from the public domain through a system whose rules prevent the cultivators of that domain from also receiving part of its benefit cannot be downplayed and speaks to the social justice rationale. No doubt, the public domain serves the need of society by providing a rich fountain of creative ideas; but where there are attendant threats to a knowledge which traditionally serves the needs of the host community, then the social justice argument becomes tenable. A mediatory approach is one that allows both parties to reap the benefits of the knowledge for the increased enrichment of society in harmony with the utilitarian philosophy. And as was seen in chapter four, such an approach lies within the IPR system as communal trademarks which secure the value of tradition-based arts and crafts, including pre-existing knowhow to the custodian without depriving the larger society of the benefit of the residue of the knowledge as public domain resource.

There is no denying the fact that derivative works are a form of preservation where dead or dying cultural forms or knowhow are revived or reinvented into new more useful forms. The Ndebele house painting art can be cited in its shift from its original (wall) medium to other media. As such, any measure to protect tradition-based arts and crafts would have to be such that does not hinder its dynamism and yet preserves its core identity. Such an approach has the advantage of preserving the culture while simultaneously allowing revitalisation through derivative works. Derivative works as a form of preservation can also be seen in the *adire* cloth which remains versatile and responsive to changes in design and even process, and still manages to retain its

⁴ Okediji 2018 *supra*.

character. Part of its survival strategy has been innovativeness⁵ and market segmentation with *adire* makers producing different categories in response to the different markets.⁶

6.3.2 The Role of Communal Models as the Answer

The trademark-based communal approach which this study endorses for tradition-based arts and crafts reconciles the contending positions and creates opportunity for market segmentation. It balances the need to preserve the public domain and the need for indigenous communities to benefit from their knowledge economically by reserving a niche segment of the market whose value lays in the reputation and goodwill of the knowledge accumulated over time. While the public's right of access to TCEs which are inherently public domain resources is unassailable, the social justice narrative in favour of the community and its members as artists and crafters and the utilitarian argument in support of preservation are equal but competitive imperatives which justify the protection of their cultural resources.

Chapter three further confirms the relevance of communal models for the subject matter in question by establishing the rationales and potential platforms for their existence. It reveals the strong alignment between the sector and communalism in terms of the nature of the sector, the collectivism driven type of knowledge governance system in place, the practical challenges of small-size operators and the attendant incapacities which can be addressed through collaborative efforts as characteristic of communal strategies. Communal IPRs also solve another problem identified in the course of the research, namely the different effects that protective measures could have on a pluralistic

⁵ TM Akinwumi *Adire Eleko Fabric Art: A Vanishing Nigerian Indigo Impression* (2015).

⁶ OO Braide 'Stylistic features of contemporary *adire* in Nigerian textile practice' (2016) 11(1) *Journal of Humanities, Social Sciences and Creative Arts* 2016, 11 (1): 104–116 (108).

society. A good example is the fact that ‘imitations’ has local and international dimensions with different implications, which become relevant in contemplating the appropriate form of intervention. Whether from within or outside, imitations serve the needs of some people as a source of livelihood. This consideration recalls the importance of the public domain and may confirm why it should not be privatised. Nevertheless, where falsehood or consumer confusion is involved, imitations are condemnable, thus, the more utilitarian solution is one that prevents imitations in the market while also considering the gains from genuine imitations to the society in a competitive market. By preserving the public domain, communal strategies protect the segmented tradition-based arts and crafts from such falsehoods but allow the legitimate use of the underlying knowledge by third parties provided such use is not misleading as to the true identity of the knowledge.

6.3.3 The Conceptual Hurdles are not Cast in Stone

The communal strategies examined by this study circumvent the conceptual hurdles between IPRs and TCEs, and their flexibility allows for the customisation of norms to suit their individual objectives. Whether based on consumer protection principles, social justice, cultural identity or quality control, these norms commonly form part of the existing and recognised standards by which the societies in custodian TCEs are governed which allows the adjustment of terms of protection to circumvent non-conforming IP concepts. For instance, the recognition of a constitutional right to partake in cultural activities under the South African Constitution imposes on the State an obligation to ensure that the TCEs of South African indigenous communities are preserved in order to

ensure the constitutional right.⁷ Similarly, the SDGs 1 and 10⁸ and social justice rationales provide the impetus for Nigeria's focus on the arts and crafts sector to eradicate poverty.

6.3.4 Specific Issues for Consideration by Nigeria and South Africa

No doubt there are a myriad of issues to be addressed to ensure the development and wellbeing of the traditional arts and crafts sector in both Nigeria and South Africa. But those that have implications for the promotion of the creative economy can be categorised as follows:

6.3.4.1 Misappropriation of tradition-based arts and crafts

The misappropriation of the goodwill of tradition-based arts and crafts and the resultant loss of value resonate strongly with the Nigerian and South African sectors. Such actions may not always manifest as wrong doings under the existing legal frameworks and so leave the traditional owners without a remedy, particularly in the context of trade liberalisation which defines the international market. As the laws of the two countries show in chapter five, imitations in the absence of misconduct do not always mean infringement of IPRs in the absence of any recognised rights. The absence of any form of IP protection over most tradition-based arts and crafts, especially those falling outside the ambit of existing laws leaves them unprotected.

Thus, without the right intervention, the traditional owners may not have any legal remedy against unfair competitive acts.

⁷ Ncube 2015 *supra* 543.

⁸ Giving Compass *supra*.

6.3.4.2 Are the current supportive frameworks adequate?

Chapter five established that the extant frameworks in Nigeria and South Africa suffer from different degrees of deficiency. Their copyright laws do not adequately protect tradition-based arts and crafts to meet the desired objectives, particularly with respect to the commercialisation of pre-existing works and preservation. Inherent weaknesses concerning the provisions on folklore in the Nigerian Copyright Act inhibit the implementation of the provisions and make them unattractive to would-be claimants of pecuniary benefits from folklore. More significant is the limited options offered by the Trademark Act for establishing communal trademarks in failing to provide for the registration of collective marks and GIs.

Deficiencies were also uncovered in South Africa's legal framework despite the more robust effort to provide an appropriate framework for the protection of her TCEs. The IPLAA and the IK Act, while focusing on indigenous works, leave some ambiguities with regards to the subject matter based on the reliance on indigenous community as the criteria for determining subject matter of protection.

A significant gap in the legal systems of both countries in connection with communal trademarks is their non-membership in some key regional and multilateral organisations. The advantages of belonging to these institutions would have been reassuring to Nigerians and South Africans seeking protection for their works abroad. Thus, the benefits of the Madrid System and the ARIPO regional system are inaccessible to both countries. This leaves trademark registration in both countries largely restricted to national laws.

6.3.4.3 Other rationales for intervention

Though the arguments against the protection of TCEs as detrimental to the public domain cannot be disputed, like Throsby, I argue that the contending need to survive may dilute sentiments or dispositions of altruism in support of the public domain argument as a cultural common pool. Ordinarily, the need for survival is mitigated where supplementary sources of income exist. But chapter four confirms that for the crafters in the two countries, such alternatives are often lacking and the choice between maintaining artistic integrity in their works and pandering to market influences is often a choice for survival. While the creative economy offers hope for the arts and crafts market, it also heightens the conflicts of values for the local crafters, making it harder for them to make that balanced choice. This is aggravated by other challenges in optimising the market potential of their products.⁹ Pandering to market needs for survival manifests in several ways, e.g., replacing materials with synthetic low quality ones or handmade processes and techniques with mechanised processes; changing design concepts from folkloric symbolic messages to more universally (or market) appealing designs; diverting to other genres like the Dada potters' switch from cooking pots to flower pots.

These tendencies create the need for intervention, which implies measures that would protect cultural diversity by sustaining artists and crafters in sticking to traditional methods and ethos in combination with their individuality in creating derivative works.

6.4 Guiding Rules in Deciding the Appropriate Strategy

It is now ripe to consider the right approach for South Africa and Nigeria in resolving the issues arising from the findings summarised above and in deciding the right communal

⁹ Usually their only source of knowledge of the market is from the intermediary distribution agents.

model. The guiding rules for such determination relates to both legal issues and implementation strategies. Basically, three concerns should be considered when determining legal issues, viz: the subject matter of protection, the criteria for protection and the nature of the preferred scheme including the geographical scope.

6.4.1 Deciding the Subject Matter

The subject matter of protection is relevant in two contexts, namely the legal framework subject matter and the scheme's subject matter. Deciding the subject matter is particularly important in the context of the dichotomy between pre-existing works and contemporary works where the former is usually not covered by IPRs unless special provisions are made to accommodate them. Specifying the scope of the subject matter is also important to avoid double protection for contemporary works. Finally, subject matter is relevant in the context of the differential market potential of tradition-based arts and crafts.

Generally, while the subject matter of communal strategies could be broadly classified as tradition-based arts and crafts, the manner in which they are defined is not uniform and could be presented in either of two ways: by specific reference to both traditional and contemporary (derivative) works as protectable works;¹⁰ or by leaving the question of the protection of pre-existing works open.¹¹ The terms in which the subject matter is defined could also determine whether it covers only arts and crafts¹² or covers

¹⁰ E.g., the Australian Certification Schemes NIAAA refers generally to traditional arts and makes it clear it includes both pre-existing and contemporary works.

¹¹ Panama's *generis* law refers to indigenous works generally and defines indigenous works in such a way that presumably includes their derivatives thereby leaving the question whether derivative works are protected under the scheme uncertain. See De Obaldia 2005 *supra*.

¹² Australian and Alaskan models. Alaska's Silver Hand identification scheme defines authentic 'work of art', the subject matter of protection, as '...a visual article, including a painting, a sculpture, a drawing, a mosaic, a photograph, an etching, a lithograph, and a serigraph (silk screen); calligraphy; clay, textile, fiber, wood, metal, plastic, or glass, or a combination of these materials ...'. See ALASKA STAT. § 45.65.070(9).

all forms of TCEs.¹³ The implications of these different options should be carefully considered. For example, Australia's experience shows that pigeonholing all artists and crafters in the same category as traditional artists, as the scheme did, may be resented by some renowned artists who may see it as a derogation of their status due to the lack of distinction between fine art and other popular (touristic) arts and crafts culture.¹⁴

No doubt, the market demarcations for tradition-based arts and crafts in both study countries is a mix of both the commercial market which is mostly tourist and local consumer driven; and the high-end collectors' market. The nature of the target market should therefore determine how distinctions are made between arts and crafts as the subject matter of protection. If high-end markets are the target of the scheme, then the distinction between arts and crafts could be more pronounced because of the specific qualities that define high quality art in the eyes of the connoisseur. But if the lower end commercial market is the target, then such a distinction may not have much effect given the absence of those values by which art is strictly differentiated from craft and considered superior. Instead, consumer choice could be influenced by anything between or a combination of aesthetic quality, function and heritage link. If both markets are targeted, then it may be wise to consider making the distinction between arts and crafts in order to establish a tiered structure which accommodates all market cadres from low-end to high-end, with authentic traditional quality a part of the requirements. Where quality is a criterion, what constitutes quality should be clearly defined to avoid controversies. Where the subject matter is defined in a way that covers contemporary works derived from TCEs, care should be taken to avoid conflict with existing laws or creating double

¹³ As is Panama's *sui generis* statute and India's GI legislation.

¹⁴ Rimmer 2004 127-158.

protection given that such derivative works may fall within the purview of existing IP frameworks like copyright and utility design protection. It is also important to consider whether the scheme should cover handicrafts generally or only a specific type of handicraft like *adire* or *ilala* baskets. For a heterogeneous market space like the Abuja Village, an umbrella classification (requiring a general mark) would be more feasible given the different origins of the items on display and the difficulty of classifying them under specific categories. Conversely, a more specific subject matter helps in defining criteria by distinctive quality such as origin, material, or process; and is easily applicable to specific clusters or spaces like the Vukani collective in Hlabisa, KwaZulu-Natal and the *ilala* Weavers in Hluhluwe in South Africa; and to community-based clusters in Nigeria like the Bida beads and Dada pottery makers.

6.4.2 Choosing the Right Strategy

Choosing the desired strategy or framework depends on the subject matter, the objectives for intervention and the legal and institutional structures on ground for mobilising initial stages of implementing a strategy; while law amendment and the creation of new institutions remain long term interventions. Two issues should be recognised: first that no single measure is self-sufficient in all circumstances. Therefore, the benefits and shortcoming of the different strategies should be carefully weighed. Secondly, a combination of options could be applied in any given circumstance to achieve the desired objectives. This emulates the manner in which a single IP framework cannot adequately protect the broad spectrum of knowledge resources, thus accommodating different types of IPRs for the same work. Deciding the right framework also means deciding on their

geographical scope and whether the scheme should be government or private sector driven, or a collaboration of both. The more important concern is to ensure ‘effective promotion, endorsement and robust authentication processes’.¹⁵

Given the natural tendency of the sector for market hierarchy, it may be wise to adopt more than one strategies, for example a tiered certification scheme that provides different marks for different categories of tradition-based arts and crafts marked by distinctive criteria for differentiation. To illustrate, a certification mark system may have different sets of marks for the souvenir market, the high-end connoisseur market for collectibles; the market for derivative (contemporary) works, etc. The point is that within the same system, different types of marks are used to authenticate various categories of works which target different markets.¹⁶

Similarly, a national or uniform mark dedicated to the protection of tradition-based arts and crafts does not prevent the adoption of a more localised certification or collective mark or GI to further distinguish handicrafts of a particular community or region provided the marks are not confusing or contradictory. A national framework has the advantage of providing a common standard thereby avoiding the confusion that may arise at the global market from the existence of several marks for products of the same origin. Moreover, national standards usually enjoy the support of the government which may help in the management of the scheme, a welcome approach in situations where well-structured industry-based organisational frameworks are absent as seen in the two study countries, provided that the different communities are carried along.

¹⁵ According to experts, the failure to ensure these is the reason why the Australian initiative failed. See Janke et al 1998 *supra*.

¹⁶ *Ibid*.

Certification schemes of the nature contemplated in this thesis - whether private sector or government driven - would not be possible where the enabling framework is non-existent. Thus, the contemplation of a communal trademark scheme would require an enabling trademark law or a standalone GI law as the case may be. The lack of such a framework in Nigeria would require amending the current Trademark Act or enacting a fresh GI law which is not normally an easy process. It may also be necessary to decide between a system that precludes any other form of differentiation outside the communal trademark and a dual or multi-layer system that allows use of additional marks alongside the communal trademark for the same product, including individual marks. A two-tier model appears to enjoy more favour and is not precluded under the laws of the two study countries. According to an Australian Report, '[t]he advantage of having a dual system is that it allows for the existence and flourishing of other more specific marks including collective models and individual trademarks'.¹⁷

Where there are concerns about misappropriation emanating from within, trademark protection helps in aligning the objectives of safeguarding the public domain, access, preservation, integrity of the knowledge, and other recognised obligations regarding knowledge resources.¹⁸ In addition to their traditional role of establishing authenticity and product identity, they prevent usurpation of the identity of the knowledge but not use of the knowledge.

¹⁷ Choi 2014 *supra*; See also Janke (1998) *supra*.

¹⁸ Such as contained in the ICESCR, the CCD, ICH and the guiding principles of the ICG.

6.4.3 Defining the Criteria

Clear criteria are important for the operation of any strategy. As the yardstick for qualification for use of a scheme, criteria serve as the distinguishing element and identity of the products for which the scheme is devised and the linchpin of segmentation/differentiation. A clearly defined criteria helps to avoid future controversies. The choice lies between criteria with reference to the subject matter and criteria with reference to the producer. It is also important to base criteria on attributes that are not susceptible to change; for instance, criteria that are strictly dependent on a particular method of production may not survive because such processes could change.

A well-considered criterion for participation in the scheme helps to ensure harmony with the interests of the beneficiaries. For instance, considering that industry efforts are largely economic interest driven, an association of traditional textile makers in Nigeria may not support a scheme that allows only textiles made from cotton grown in Nigeria to be certified based on a secondary government policy to encourage the development of the local (cotton) industry, when indeed the local producers believe that relying on Nigerian cotton is risky and ultimately costlier due to unreliable supply and lack of quality control,¹⁹ or unsuitability of the local cotton for the design of textiles that the crafters have in mind.²⁰ Such bifurcation of interests has been identified as partly the

¹⁹ Agency Report ‘We’re returning Nigeria’s cotton industry to “good old days” – Buhari’ 9 November 2018 *Premium Times* available at <https://www.premiumtimesng.com/business/294921-were-returning-nigerias-cotton-industry-to-good-old-days-buhari.html>, accessed on 1 March 2021; A Adegbite ‘Newly released cotton to Nigerian market are not harmful, FG replies critics’ *Nigerian Tribune* 20 November 2018 available at <https://tribuneonlineng.com/174620/>, accessed on 1 March 2021.

²⁰ Kudi, TM, J.G. Akpoko, JG and Z. Abdulsalam, Z ‘Assessment of the cotton industry using the global commodity chain analysis approach in Katsina State, Nigeria’ (2007) 7 *Journal of Applied Sciences* 3557-3561.

reason behind the failure of the Australian certification scheme as it could not gain popularity with the artists as beneficiaries.²¹

A key question in defining criteria is whether it should be based only on authenticity or on both authenticity and good quality,²² considering the importance of quality as a competitive edge. A mark or scheme that also requires good quality as a criterion for protection not only helps in branding but also bridges the perceived value gap between arts and crafts and the attendant contest of prestige by transforming items under both categories into high quality prestigious products. But questions regarding who and what determines quality must be addressed, again with emphasis on accommodating the interests of all potential beneficiaries of the scheme. An example of a certification scheme with both quality and authenticity based criteria is New Zealand's Toi Iho™. Use of the mark certifies a work 'as genuinely Maori Made',²³ and additionally serves as an assurance of quality. This is derived from the rules governing usage of the mark. Rule 3.1(b) provides that not only must the work of an applicant for a licence to use the Toi Iho mark be 'distinguishable as a work of Maori art or craft', it must also be a 'work of quality' as determined by the Panel of Experts established under the Rules.²⁴ Quality is assessed based on certain criteria, including: the Maori components of the work, the design and media, the process and technique used and the level of skill and expertise required to produce the work, and the aesthetics of the work. Thus, the Maori example also addresses the concern for preservation of the knowledge by insisting on these qualities. This appears to be lacking in India's GI system which has led to the 'self-

²¹ Wiseman 2001 *supra*.

²² E.g., the New Zealand Maori Toi Iho™.

²³ Toi Iho Website available at <http://www.toiiho.co.nz/> accessed on 1 March 2021

²⁴ 3.1(b)(i)&(ii) and s5.3(c); Chalk & Dunlop 2009 *supra*.

dilution' of the traditional quality of some of India's textiles through the replacement of traditional materials, such as silk, with newer and cheaper synthetic fabrics.²⁵

Use of a mark that combines both quality and authenticity certification following the Maori standard could serve as a prestigious mark denoting success as an artist and help to preserve the knowledge. On the Toi Iho website, artists who are registered with the scheme are glowingly described as 'established, experienced Maori artists who have high quality creative expressions and who epitomize the best of our [Maori] culture'.²⁶

Considering whether criteria should be defined with reference to the producers or to the products or both would depend on each country. In Nigeria, the indigeneity question has a strong political character as a fallout or contrivance of the colonial policy to achieve their political goals for the then colony. However, culturally, ethnic groups remain seamlessly connected across politically delineated boundaries and only become aware of their geographical placement as non-indigenes during the assignment of political privileges based on indigeneity.²⁷ Moreover, the legal and policy frameworks that support culturally defined issues of indigeneity are almost absent in Nigeria, with more emphasis on ethnicity.²⁸ Thus, the indigeneity denomination or standard of certifying traditional cultural resources is not a strong argument for Nigeria. Questions of one's indigene arise in Nigeria, but not in the context in which it has featured in international discourse on protecting indigenous knowledge. Thus, unless a strategy is regional or community-based, framing criteria on the indigeneity narrative may not serve

²⁵ Y Pai and T Singla 'Vanity GIs: India's legislation on geographical indications and the missing regulatory framework' in I Calboli and WL Ng-Loy (eds) *Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific* (2017) 333-358.

²⁶ Toi Iho Website available at <http://www.toiho.co.nz/toi-iho-artists/>, accessed on 1 March 2021.

²⁷ See EE Osaghae 'Ethnic minorities and federalism in Nigeria' (1991) *African Affairs* 90(359) 237-258.

²⁸ International Crisis Group *Nigeria's Faltering Federal Experience* Africa Report Mo 119 25 October 2005.

the same purpose for a country like Nigeria as it does for Australia where indigenous groups and settlers are distinct and so are their cultures. Additionally, because some cultural forms are shared or similar across ethnic groups in Nigeria, some tradition-based works may not be easily differentiated with reference to particular ethnic groups. The better approach is to adopt the more generic reference to ‘traditional’ works and define criteria with reference to the characteristics that make the works traditional. Differentiation on the basis of ethnicity should be restricted to products that are unique to a specific ethnic group or ethnic tainted community, such as the Bida beads or *ilala* baskets among the Ndebele.

There are strong merits in requiring adherence to good quality standards in the market as a criterion for protection. A ‘high quality’ criterion is important in aiding the differential market strategy for deepening market, such that distinction is made between cheap works and high quality works. Defining criterion by quality could also help resolve the fear that commodifying culture could result in a disconnection between the cultural value and the market value of the product and potentially precipitate cultural destruction. The incorporation and strict enforcement of quality could nudge aspirations and values towards the desired parameters. Indeed, it is strongly believed that the requirement of quality is behind the success of the Maori scheme and the high quality of the works in contrast with Australia’s identification scheme which lacked ‘high quality of the item’ as requirement for qualification to use the marks.²⁹

²⁹ Rimmer 2004 supra 78.

6.5 Recommendations

This thesis strongly deplores a one-size-fits-all standard due to the differing circumstances of countries and the different nature of the sectors and their products in individual countries. Nevertheless, there are standard measures of potential benefit to both study countries. Fundamentally, because it may be impossible to define a standard that would be acceptable to all concerned, an opt-in system which leaves the choice of using a communal trademark up to the crafters is a realistic solution to the problem of acceptability.

6.5.1 General Recommendations

6.5.1.1 Two-tier synchronised system and other levels?

The merits of a multi-level system cannot be over-emphasised. Thus, to further encourage entrepreneurship and healthy competition within and outside the industry, producers of tradition-based arts and crafts should be able to also rely on their individual or other group marketing strategies. Similarly, a national framework adopting a uniform standard could operate alongside a regional or community-based scheme. A multi-level system could take various formations depending on the administrative structures on ground. It could thus be based on any of the following options: national GI legislation, national certification scheme or a *sui generis* law, not ruling out smaller certification schemes targeting the works of specific collectives like the Vukani Cooperative, and the Dada and Ushafa Potters.

In adopting a multi-level system, it is important to maintain synchrony and ensure that it does not conflict with existing laws, including binding international norms, and

that the different levels are harmonised. A multi-level system is particularly necessary for Nigeria considering the tiered structure of governance in place which defines policy implementations in accordance with the structure. Thus, a strategy to protect tradition-based arts and crafts could operate at the federal, state and local government levels in addition to cluster or more specific community-based strategies as proposed by Adewopo et al.³⁰ Protection in South Africa could also be national or more municipal or grassroots-based. As mentioned earlier, the success of a national system depends on its acceptability to the potential beneficiaries and the existence of the relevant institutions to implement and manage it.

6.5.1.2 Institutional framework

The importance of institutions in the protection of tradition-based arts and crafts can be seen in their role as intermediaries at the industry level such as the African Arts Centre in Durban; or as administrative bodies, e.g. the NCC which manages folklore in Nigeria and the IK Act's proposed NIKSO in South Africa. Generally, the relevant institutions could play an important role in implementation and post-implementation concerns of the scheme. It is also important to contemplate institutional role with the community in mind, and decide whether they should be government or private, and their role national or regional in scope. Institutions could be relevant in specific ways like ownership and management of certification marks, verification of would be users as traditional crafters/artists; and marketing and enforcement of standards through quality control. An

³⁰ Supra.

important institutional role for the management of communal trademarks is a clearing house for the verification of works on an opt-in basis.³¹

6.5.1.3 Post plans

‘Post plans’ refers to adequate provisions for the effective operation of a scheme once it is established. It should address concerns such as building brand reputation and marketing, publicity to create awareness of the scheme; standard monitoring and regulation; education and training to provide necessary knowledge to the producers, and enforcement against infringers. Janke’s report on Australia’s unsuccessful attempt to develop a certification scheme adumbrates the benefits of such education;³² while the poor performance of India’s handcrafts GIs in the global market underscores the importance of post-plans for the success of such schemes.³³

6.5.2 Specific Recommendations - Nigeria

Despite the limited options for communal schemes in Nigeria, a certification mark provides opportunity for securing the benefits of the high quality values of the country’s tradition-based arts and crafts pending legal reform to accommodate other options. A certification mark scheme would guarantee quality standards which are currently lacking, yet are essential in accessing the high-end global market for Nigeria’s tradition-based arts and crafts. A well designed certification mark scheme under the Trademarks Act would help in overcoming the challenges faced by the small-time artists and crafters in

³¹ Moore supra footnote 19.

³² Janke et al 1998 supra; Janke 2003 supra.

³³ Guatam & Bahl 2010 supra.

individually satisfying the high quality standards required of their products at the global market level as elucidated in chapter three.

The non-existence of a well-known certification mark in the country despite the rich heritage in cultural expressions should be addressed by more enlightenment of all relevant interests groups since it has been attributed partly to ignorance of the parties concerned and lack of will on the part of the government.³⁴

Generally, there is a strong disposition towards a specialised system for TCE protection as one of the most effective ways for nations to self-reliantly construct laws on safeguarding their TCEs.³⁵ Ultimately, effort towards establishing a *sui generis* system is needed in Nigeria, including immediate action to amend the Trademark Act to include collective marks and specific and more comprehensive provisions for GIs, while corresponding legislative action is also needed to ensure the country's membership of key multilateral institutions like the Madrid System in order to ease the process of trademark registration and management at the global level. Finally, in contemplating a *sui generis* law, including a special and independent framework for protecting GIs, an important lesson can be derived from India's experience from the fact that her GI initiative was mostly top-down driven through the effort of the government and international development bodies.³⁶ Such top-down approach was helpful for a country and a sector whose institutions at the grassroots were also incapable of singlehandedly mobilising a GI system.

³⁴Adewopo et al 2014 supra 121.

³⁵ Nwauche 2016 supra.

³⁶ D Marie-Vivien 2010 supra.

6.5.3 Specific Recommendations for South Africa

Arguably, South Africa is steps ahead of most African countries in the effort to design appropriate laws for the protection of her TK/TCEs. Chapter five revealed a more robust legal system than Nigeria's for the protection of tradition-based arts and crafts, including both IP and non-IP laws like the IK Act. While the recently passed Geographical Indications Regulations is a booster of the GI framework, it would have limited effect on the South Africa's tradition-based arts and crafts since it mainly focuses on agricultural products.

6.5.3.1 The IPLAA and the IK Act

Despite some criticisms, the IPLAA and the IK Act are many steps towards legally protecting tradition-based arts and crafts, and indeed TCEs. From the onset, opinion is divided between modifying the current IP laws to accommodate tradition-based works following the IPLAA approach and the highly favoured option of creating an entirely new law for reasons that include compliance with international dispositions.³⁷

There is much to be said in favour of a carefully designed *sui generis* system, especially one that co-exists with other useful strategies, provided the drafters ensure deep consultation with stakeholders and experts to avoid future conflicts. This appears to be where the IPLAA and the IK Act missed their first steps.³⁸

One of the issues which the IPLAA and the IK Act leaves unresolved is the nature and scope of the subject matter when having the market promotion of tradition-based arts and crafts in mind as envisaged in this study. The terminology is also not resolved as

³⁷ Ncube 2013 *supra* and 'Written Comments on the Copyright Amendment Bill *supra*.

³⁸ *Ibid*.

between IK or TK. The IPLAA and the IK Act use the terminology ‘indigenous knowledge’ upon which the subject matter and the privileges over them as well as the relevant institutions are referenced: indigenous cultural expressions, indigenous communities, etc. But some experts criticise this approach and would prefer the designation traditional knowledge.³⁹ This issue is however peripheral in the context of this thesis where the more important concern is for a properly defined terminology clearly designating the subject matter scope to include tradition-based acts and crafts as defined herein and specifying the position of pre-existing and derivative works. Both the IPLAA and the IK Act are satisfactory in both regards.

However, from a general perspective, the question of choice of terminology between IK and TK in delineating the subject matter has strong significance in South Africa in contrast to Nigeria, due to the settler phenomenon as a part of South Africa’s history. But the very broad manner in which ‘indigenous’ is defined to include the settler races is quite unique to South Africa. It differs from the perception of ‘indigenous’ in other countries where indigenous’ mainly refers to the original occupants of the country, e.g., the Aborigines in Australia and Native Indians in the US and Canada. The IPLAA and the IK Act both provide a potential basis of authenticity or criterion for protection under a communal strategy based on indigeneity, i.e., the indigenous background of the works in question, by basing criteria for protection on the indigenous community linkage of the product and/or the maker. They both define ‘indigenous community’ in a similar context with the IK Act defining the concept as: ‘any recognisable community of people— (a) developing from, or historically settled in a geographic area or areas located within the borders of the Republic; (b) characterised by social, cultural and economic

³⁹ E.g., the Wilmot Bill and the supporters of the bill as a replacement to the IPLAA and IK Act.

conditions, which distinguish them from other sections of the national community; and (c) who identify themselves as a distinct collective'.⁴⁰ But as noted, the required indigenous community nexuses exclude works produced outside the community even by or within a community of members of the indigenous community settled elsewhere. In such a scenario, the more appropriate strategy would be an ordinary certification mark. Adopting South Africa's broad conception of 'indigenous' under the two legislations as the definition of authenticity and the criterion for individuation of tradition-based works would cover virtually all works of creative expression made by South Africans of any of the races. However, if the intention is to singularise only the works of blacks in line with this thesis, then a more nuanced definition of criteria based on cultural orientation would be necessary. Nevertheless, creating a South African brand on the basis of a broadly defined indigeneity criterion is feasible and could be achieved by requiring additional qualities to give the works of all the races a truly unique and unified South African identity.

In contemplating a *sui generis* system, such as a standalone GI legislation for the protection of South Africa's tradition-based arts and crafts, the *sui generis*-modelled IK Act hardly fits the purpose due to the absence of provisions on the modalities of such a scheme. The communities would still have to fall back on the Trade Marks Act. The new trademark provisions inserted in the IPLAA also fall short because they are made in respect of traditional trademarks as the subject and not tradition-based arts and crafts. A more direct provision is the kind provided in the Panama *sui generis* law. It incorporates specific modalities to promote branding through the registration of a certification mark for the country's indigenous cultural expressions. The procedure for registration of a

⁴⁰ A similar definition is contained in s1 of the IPLAA.

collective right is provided with a clear objective of simplifying the process and encouraging tribes to register their TCEs. As such, registration is free and simple enough not to require the services of a lawyer.⁴¹ Nevertheless, the IPLAA and the IK Act could be complemented to fit the purpose of safeguarding tradition-based arts and crafts as envisaged by exploiting the possibilities of branding and increased market access through a registered communal trademark.⁴²

In contemplating and determining the necessary institutional support, the NIKSO presents potential if only it can solidly connect with the local communities involved. Indeed, the example of the failure of Nigeria's NCC to properly operationalise the responsibilities given to it under the Nigerian Copyright Act and ensure effective protection and management of folklore has been pinned on the fact that the body does not directly connect with the interests of the local communities.⁴³ No doubt, the idea of vesting ownership of TCEs on institutions as trustees for the community as the IPLAA has done conforms to WIPO's stance and may be justified on the basis that the traditional communities lack the capacity or organised systems and framework to effectively manage their resources themselves.⁴⁴ Nevertheless, it is equally true that such institutions may not always be as effective as grassroots bodies or traditional governing bodies which are conversant with the desires and needs of the communities, more in line with what the Wilmot Bill named 'community proxy', whereby the rights over a protected TK are assigned to a person as the community proxy, such as a traditional chief of the traditional

⁴¹ Article 7.

⁴² See 5.4.3.2.

⁴³ Adewopo 2006 *supra*.

⁴⁴ *Ibid*.

community from which the TK originates.⁴⁵ Ncube supports the proxy arrangement and considers it simple because ‘it is aligned to existing traditional community structures’, which makes the creation of new structures in traditional communities unnecessary in order to exercise rights over traditional works. The scholar notes that the risk of abuse of powers by the community proxy is mitigated by assigning responsibility over the determination of key terms of engagement, such as license fees, to an independent governmental body.⁴⁶ Arguably, the provision of ‘appointed community representative’ under the IPLAA leans towards such ‘community proxy’ as the non-specification of criteria for appointment of representatives leaves an open room for the community’s choice of a representative, likewise the provision for a community trustee under the IK Act. The potential of abuse of position is circumscribed by the supervisory role and oversight function of the two respective national institutions, viz: the Trust Fund and the NIKSO.⁴⁷

Additionally, it could be argued that assigning ownership to tribal institutions has the advantage of ensuring continuity and sustainability because they are more permanent, unlike government institutions that may change in accordance with policy changes. One could cite the experience of the Alaska Silver Hand Logo scheme which was managed by the Alaska State Council of Art (ASCA) and its demise as a result of the closure of the ASCA due to lack of funding.⁴⁸ Another example is seen in the Itoko community in Nigeria, which showed that organisational structures based on traditional norms and

⁴⁵ Ss1 and 40.

⁴⁶ Ncube 2018 *supra*.

⁴⁷ S43D(5).

⁴⁸ D Cole ‘Dunleavy eliminates state-wide programs for arts’ (2019) available at <https://www.dermotcole.com/reportingfromalaska/2019/6/29/dunleavy-eliminates-statewide-programs-for-the-arts>, accessed on 1 March 2021

institutions have more likelihood of success than non-traditional institutions. The better option would be a body like NIKSO working in collaboration with traditional institutions to manage a communal trademark scheme for the tradition-based arts and crafts of the indigenous community in a balanced top-down approach.

Generally, adopting a certification system would require defining the criteria for use and authentication in such a way that creates distinction as well as motivation for preservation. It should serve the three needs of protection, promotion and preservation. South Africa and Nigeria may not adopt exactly the ‘indigeneity’ criteria, which defines authenticity on the basis of indigene; instead they could define criteria in a way that links the product with its cultural background as the intrinsic quality of the product which can be appropriated. However, care should be taken not to reinforce existing divides by creating rivalries between ethnic groups. An opt-in method would allow stakeholders to freely decide whether to be part of the scheme. Whether based on the maker’s cultural background or the process of production, the designers of the strategy should appreciate the changing nature of culture and ensure that the criteria does not impose a system that amounts to a fixed instead of an evolving cultural ecosystem.

6.6 Concluding Remarks

Overall, the protection of tradition-based arts and crafts, like every other subject matter, depends on the objectives. Against the background of the market place, tradition-based arts and crafts as knowledge-based assets remain tied to IPRs as the rules governing knowledge-based resources with regards to safeguarding them. They are thus also afflicted by the conflicts that affect TCEs in connection with IPRs. The tradition-based

arts and crafts sectors in Nigeria and South Africa have important links with the creative economy. Boosting the viability of tradition-based arts and crafts in the market place has significant socio-economic benefits which justify strategies that would help optimise these benefits. But there are legal and practical challenges in effectively marketing and exploiting the value of these resources. Communal trademarks present opportunities to overcome some of these challenges. But as this thesis has established, the legal framework in the two study countries are not fully equipped to support the effective application of communal trademarks. Still, they provide ample room for the use of communal IPRs to market, protect and preserve their tradition-based arts and crafts in ways that could ensure greater benefits for the individuals engaged in tradition-based arts and crafts activities, the custodians of the knowledge and the country at large. The thesis also found that structures for the potential application of communal trademarks to differentiate and brand tradition-based arts and crafts exists at the industry level in both countries. However, the lack of a robust legal framework in Nigeria and the lack of membership of both study countries in key international bodies to ease the management of communal trademarks at the global level remain a strong inhibiting factor. Nevertheless, in determining the right strategy in the present circumstances, the guidelines outlined in this thesis would serve a useful purpose.

The thesis made key findings of potential relevance to other African countries and in the management of TCEs generally. Previous works have not directly articulated the TCE/IPR incompatibility conundrum in the context of the creative economy where IPRs remain the dominant framework. This thesis fills this gap. This thesis did not set out to provide an answer to all the questions concerning the protection of tradition-based arts

and crafts. A key area is the lack of a policy framework in Nigeria not just for the protection of tradition-based arts and crafts but for IP generally. The greatest limitation was the reliance on mainly secondary empirical data especially for Nigeria given the general dearth of credible data across most fields. But that was addressed by referring to a large number of materials for proper validation of facts.

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