Intellectual Property Rights: Global Rules, Regional and National Realities

By:

Titilayo Adebola
Amaka Vanni

October 6, 2020

This symposium constitutes the initial publication output for the Afronomicslaw.org webinar III, 'Intellectual Property Rights: Global Rules, Regional and National Realities' held on Monday, 13 July 2020. In the webinar, the panelists brilliantly discussed salient subjects pertinent to global intellectual property (IP) rights rules and relevant implementation mechanisms at regional and national levels. In quintessential Afronomicslaw.org fashion, the discussions underscored Global South interests and reinforced the importance of fostering development-oriented IP systems.

At the core of conversations about the novel coronavirus disease (COVID-19) are twin conundrums concerning the production and access -or barriers- to effective vaccines, treatments and therapeutics. IP systems can serve as an

incentive for innovation or reward for investments in research and development. At the same time, inflexible IP systems can function as a barrier to the innovation produced. The Herculean task for policymakers is to creatively circumnavigate competing interests of stakeholders, especially the inventors and the general public. The first three essays in this symposium invite policymakers to reimagine the orthodoxies of IP systems by constructing IP regimes contoured to suit the cultural, social, economic and technological contexts of Africa and the Global South. Foregrounding the World Trade Organisation (WTO) system for its intervention, the fourth and final essay assesses the application of the national security exceptions delineated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The first essay by Susan Strba Isiko reviews the roles of innovation and health technologies in tackling the COVID-19 pandemic. Focusing on the World Health Organisation's (WHO) Solidarity Call to Action, she makes a case for Africa to design and develop homegrown technologies suitable to its local needs. Isiko asserts that 'innovation has not died in Africa, [though] it may not be defined or understood the same way as in the West.' In particular, she emphasises that the IP Protocol negotiation scheduled for Phase II of the African Continental Free Trade Area (AfCFTA) Agreement presents a timely opportunity to craft laws that attend to the health needs of Africa beyond COVID-19, bearing in mind the other health challenges prevalent in Africa such as HIV/AIDS, tuberculosis, or neglected tropical diseases. Notably, Isiko delivers two excellent examples of burgeoning projects on the intersections of IP and technological development within the East African Community (EAC). The first is an innovation from the Centre of Excellent for ICT (CENIT@EA), a regional innovation hub that offers skills for digital transformation in East Africa. The second is an innovation from the School of Computing and Informatics Technology, Makarere University, Uganda. Isiko concludes that one way to promote innovative capacity in Africa is through regional innovation. She proposes that the AfCFTA negotiators should include provisions that encourage collaboration and nurturing of innovative capacity in Africa.

Expanding on his earlier article published by Afronomicslaw.org, titled 'An Exceptional International Intellectual Property Law Solution for COVID-19: Spurring Innovation to Facilitate Access to Affordable Medicines', David Enrique

Betancourt Cruz proposes four action points to enhance global Solidarity and confront COVID-19. First, the deployment of knowledge-sharing schemes to safeguard equal access to tests, treatments and vaccines. Second, the establishment of a COVID-19 technology pool as Costa Rica has suggested. This involves sharing innovation, data and know-how required to prevent, detect and treat COVID-19. Third, the introduction of a new form of multilateralism that protects the most vulnerable populations and contributes to achieving the public health objectives in the Sustainable Development Goals by 2030. Fourth, the bold reform of international IP regimes through the full utilisation of the flexibilities offered for patents. Cruz concludes by recommending the adoption of 'open science frameworks to overcome COVID-19.'

Centring the AfCFTA as a case study, Daniel Acquah examines the avenues through which technical assistance reproduces western-styled IP norms in Africa. Acquah expresses reservations about the outcomes of the tripartite World Intellectual Property Organization (WIPO), African Regional Intellectual Property Organization (ARIPO) and the Organization Africaine de la Propriété Intellectuelle (OAPI) engagements. His reservations stem from the chequered history of WIPO-ARIPO-OAPI technical assistance agreements and programmes that have crystallised in the institution of IP norms that are antithetical to social and economic development in Africa. In Acquah's words, the AfCFTA should prioritise 'our IP [systems]: that is, those embedded in traditional knowledge and biodiversity.' He aptly notes Africa 'is most likely to receive substantial benefits from the protection of traditional knowledge, traditional cultural expressions and genetic resources.' Acquah avers that African IP instruments that reflect 'our IP' include the African Model Legislation for the Protection of the Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources along with ARIPO's Swakopmund Protocol on Traditional Knowledge and Expressions of Folklore. He concludes by urging the AfCFTA IP Protocol negotiators to proceed with caution by filtering the technical assistance sought or received to avoid repeating Africa's IP missteps of the past.

Emmanuel Kolawole Oke's essay is dedicated to a detailed analysis of WTO Members ability to invoke the national security exception in TRIPS as a measure to combat COVID-19. To carefully analyse this topic, Oke examines a seminal

WTO panel decision of 2020 ‘Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights’, that addressed the application of the security exception in Article 73 (b) (iii) of TRIPS. He notes that the panel considered four factors in arriving at a decision. First, whether the existence of a “war or other emergencies in international relations” has been established in the sense of subparagraph (iii) to Article 73(b). Second, whether the relevant actions were “taken in time of” that war or other emergency in international relations. Third, whether the invoking Member has articulated its relevant “essential security interests” sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests. Fourth, whether the relevant activities are so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency. Oke concludes that a WTO Member seeking to invoke the security exceptions in Article 73(b) (iii) of TRIPS as a defence to suspend the enforcement of IP would be required to demonstrate that the measures introduced are related to the emergency.

The HIV/AIDS epidemic of the 1990s triggered amendments to TRIPS as embodied in the Doha Declaration on the TRIPS Agreement and Public Health (WTO Ministerial 2001) and cemented with Article 31*bis of* TRIPS, which provides for compulsory licenses to export patented pharmaceuticals to countries with insufficient manufacturing capacity. The essays in this symposium remind us the global community is witnessing another watershed public health crisis, which ought to engender a reconfiguration of IP ecosystems at global, regional and national levels. Such radical reconfiguration is of utmost importance not only to efficiently tackle this current pandemic, but in preparation for future virus pandemics.

Contributors

Susan Isiko Štrba: Technological Innovation and COVID-19: Lessons for the AfCFTA

Emmanuel Kolawole Oke: Can States Invoke the National Security Exception in the TRIPS Agreement in Response to COVID-19?

Daniel Acquah: AfCFTA, Technical Assistance and the Reproduction of Western-Style IP Norms in Africa

David Enrique Betancourt Cruz: Beyond Intellectual Property? “Open science” to overcome COVID-19

View online: Intellectual Property Rights: Global Rules, Regional and National Realities

Provided by Afronomicslaw