

INTELLECTUAL PROPERTY AND HUMAN RIGHT

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A brief analysis of the nature of Intellectual Property rights as human rights.

Introduction

On 10th of December, 1948 (exactly 71 years ago), the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly. The UDHR is a milestone document¹ in the history of human rights and this is why the World Human Rights Day is celebrated on the 10th of December every year.

The adoption of the UDHR was influenced by the effects of the Second World War (WW II), a global war which lasted for six (6) years from the year 1939 – 1945. WW II was recorded as the “**deadliest conflict**” which mankind had ever experienced as at 1945², ostensibly, as a result of death toll which were direct or indirect results of the war. Arguably, about 85 million casualties were recorded from massacres,

genocide of the holocaust, bombings, starvation, diseases and the use of nuclear weapons.³

The United Nations (UN) was consequently created and UN Charter adopted. The UDHR was then adopted to compliment the UN Charter.⁴

The UDHR, ICESCR and Intellectual Property

What are Intellectual Property Rights?

The subject matter (IP) is very wide but “Intellectual Property” simply stated refers to creations of the mind, such as inventions; literary and artistic works, designs, and symbols, names and images used in commerce.⁵ It appears that it is almost a given that a person (natural or artificial) would have at least an intellectual property in his/her lifetime.

Having established this, Intellectual Property Law is that area of Law

¹ <https://un.org/en/sections/universal-declaration/history-document/index.html> accessed on 4.12.2019

² https://en.wikipedia.org/wiki/World_War_II accessed on 4.12.2019

³ Ibid

⁴ <https://un.org/en/sections/universal-declaration/history-document/index.html> accessed on 4.12.2019

⁵ <https://www.wipo.int/about-ip/en/> accessed on 5.12.2019

that protects the rights accruing to Intellectual Properties addressing specific problems faced by writers, inventors, commercial undertakings and right-holders in general such as to prevent the exploitation of benefits by unauthorized persons. This enables right-holders claim damages in the event of an infringement either through Alternative Dispute Resolution mechanisms or Litigation.⁶ In addition, IP law seeks to strike a balance between the interests of the inventor and that of the public. The aim is to encourage and foster innovation, creativity and consequently improve economies (national and international).

Intellectual Property rights in Nigeria include;⁷

- Copyright and 'related rights' (such as rights in performance

or broadcast of a copyright work)

- Registered Trademarks
- Design rights
- Patents

Enshrined in the UDHR are obligations on UN member states to promote respect for and observance of human rights and fundamental freedoms such as right to life,⁸ freedom of opinion and expression,⁹ *right to property*¹⁰ inter alia.

Crucial to the consideration of Intellectual Property right (IPR) as human right are Articles 17 and 27 of the UDHR reproduced hereunder.

Article 17:

- (1) *Everyone shall have the right to own property alone as well as in association with others. (emphasis mine)*
- (2) No one shall be arbitrarily deprived of his property.

⁶ David I. Bainbridge, *Intellectual Property* (10th Edition, Pearson 2018) pg. 3

⁷ As pointed out, IPL cuts across a vast area of Law which augments the inadequacies of IP laws such as passing-off and unfair competition, competition law, law of contract and torts. Some other areas of IP are rapidly developing such as image rights, IP and sports rights, plant varieties and pharmaceuticals.

⁸ Article 3 of the Universal Declaration of Human rights, 1948

⁹ Article 19 of the Universal Declaration of Human rights, 1948

¹⁰ Article 17 of the Universal Declaration of Human rights, 1948

Article 27:

- (1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the *right to the protection of the moral and material interests* resulting from any scientific, literary or artistic production of which he is the author. (emphasis mine)

In addition to the UDHR, another International Human Rights instrument- International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the need to protect interests in Intellectual Property although it does not expressly use the term 'Intellectual Property'. Article **15(1)(c)** provides thus:

"Everyone has the right to benefit from the protection of the

moral¹¹ and material interests¹² resulting from any scientific, literary or artistic protection of which he is the author". (Emphasis added)

Pursuant to the preamble of the UDHR, national laws of member states are expected to replicate the protection of these human rights in substantive laws. The 1999 Constitution of the Federal Republic of Nigeria (CFRN), which remains the fundamental law of the Federal Republic, recognizes the right to property as human right.¹³ It however qualifies the term 'property' as immovable property. Although 1999 CFRN makes no express provision for the protection of intangible properties, Section 251(1)(f) confers exclusive jurisdiction on the Federal High Court to entertain matters in relation

¹¹ Moral interest in Intellectual Property simply refers to the right an author has over his creation to be identified as the author of such work. It extends to the right to prevent his work from mutilation or degrading treatment.

¹² Material interests as it implies, relates to the author's right to control, manage or exploit his Intellectual Property usually for financial or other material gain.

¹³ 1999 Constitution of the Federal Republic of Nigeria, Section 43

to Federal Enactments on Intellectual Properties such as Copyright,¹⁴ Patents and Designs,¹⁵ Trademarks,¹⁶ Industrial Designs *inter alia*. Various Federal legislations govern the protection and enforcement of IP rights over the different segments of Intellectual Property. The requisite criteria or standard for protection differs under the various categories of IP, as well as the accruing term or duration of protection.¹⁷ In addition to the constitution, as highlighted above, Nigeria has its enacted laws on the protection of the various rights of Intellectual Property.¹⁸

Intellectual Properties are 'property rights'

Although the discussion as to the extent of the relationship between intellectual property and real property (immovable property) remains unsettled, the question one

must answer is *why distinguish between real and personal property?*

This unsettled distinction results in the consideration of real property a *qualified right* high above personal property (in this case intellectual property). Although IP advocates agree, almost without exception, that IP rights are **full property rights**, some writers are of the view that Intellectual Property rights are generally rights *in personam*¹⁹ as opposed to rights *in rem*. An act directed against or with reference to a specific person, for example, an action in contract or tort is *in personam* while a right available against the 'world'²⁰ at large because it is directed against the property, for example, rights over a land is a right *in rem*.

This writer opines that IP rights can neither be perfectly categorized as rights *in personam* nor *in rem*. IP rights are generic and should not be limited by an attempt to categorise them into one of the two. For example, a registered Trademark or Patent in a given jurisdiction is as

¹⁴ Copyright Act, CAP 28 Laws of the Federation of Nigeria 2004

¹⁵ Patents and Designs Act, CAP P2 Laws of the Federation of Nigeria 2004

¹⁶ Trademarks Act, CAP T13 Laws of the Federation of Nigeria 2004

¹⁷ These will be considered in detail in subsequent articles.

¹⁸ Ibid n. 14-16

¹⁹ David I. Bainbridge, *Intellectual Property* (10th Edition, Pearson 2018) pg. 3

²⁰ This is subject to the issue of jurisdiction.

much a right *in rem* as the right over a landed property. A mutilation of copyrighted work such as a novel or painting, on the other hand, may be seen as a right *in personam* because it is derogatory and offensive to the person of the author. What is important to note is that it appears to vary on a case to case basis.

It is safe to say then that to the extent that Intellectual Property Law recognises the creation of an individual as a reflection of the creator and affords such a creator the right to claim against a determinant individual in the event of mutilation, it is a personal right. Again, to the extent that a registered invention is enforceable against the 'world' they are **real rights**. This writer reiterates that the character of Intellectual Property as human right provided for under Article 27 of the UDHR is not fully appreciated.

Human Right, Right to Property and Intellectual Property

Having highlighted the provisions of the UDHR and ICESCR on right to property and their relationship with

Intellectual Property, the arising issue is a consideration of the status of the right to property at an international level. It has been argued that although states such as Nigeria recognize the property rights of their citizens, it is difficult to understand the level or scope of this right; are they negative or positive right? Can they be regarded as fundamental human rights? Does encroachment in the right to property of citizens by the government amount to breach of human right?

Writers such as Schemers²¹ have argued that most property rights cannot be categorized as human rights. According to Schemers, Fundamental Human Rights, he suggests, are human rights of such importance that their international protection is recognised and perhaps commands the obligation and international enforcement. For

²¹ H. G. Schenners, "The international protection of the right of property", in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag KG, Köln, 1988) pp. 565-580

Schemers, most property rights do not fit into this category.²²

For persons who share in this school of thought, they posit that private and public international law recognize that sovereign states reserve the right to regulate property rights within their territory, including the enforcement of these rights. Whereas with fundamental human rights such as right to life, international application and enforcement is inherent and they constitute customary international law. Sovereign states are not allowed to interfere with or adjust these laws for state convenience.

This writer suggests that although this line of argument is well founded, it is constructively inadequate. The argument pays more attention to the exception as opposed to the right being conferred by substantive law which is the right to own and dispose of property. To illustrate this point, Article 14 of the African Charter on Human and Peoples' Right (the Banjul Charter) 1981 provides for right to property. It is

an international human rights instrument adopted to promote and protect human rights and basic freedoms in the African Continent.²³ Nigeria as a member of the Organisation of African Unity (now African Union) ratified and domesticated the Banjul Charter,²⁴ replicating Article 14 which provides thus:

"The right to property shall be guaranteed: it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".
(Emphasis mine)

The general principle is the guarantee of the right to property. The exception(s) allows then for encroachment for public interest, the role *criminal laws* play in right to life

²³https://en.wikipedia.org/wiki/African_Charter_on_Human_and_Peoples%27_Rights accessed 7 December 2019

²⁴ African Charter on Human and Peoples' Right (Ratification and Enforcement) Act, CAP A9, LFN 2004

²² Ibid p. 565, 579

for example. It is suggested that the underlying commercial nature of property rights may be a major factor influencing the exceptions to the property rights.

Intellectual Property on the other hand, it is suggested, extends beyond the general principles of property rights and into the right of **expression**, the right to **dignity**, the right to **life** (in this case, the right to earn a living). An invention or creation as already established may be tangible or intangible but it is also the expression of an idea in a choice manner and a reflection of the author, such that a distortion or mutilation amounts to disregard of the dignity of the author. If authors, creators or inventors could understand this then there will be a better and vigilant IP system especially in Nigeria. In the same way, if the law makers understood these rights as inherent, they will adopt a lower standard approach to registration of Intellectual Properties particularly in the patents sector.

With respect to the international application and protection of Intellectual Properties, the world has

experienced a major shift from just national protection of IP rights to an international Intellectual Property framework such as the adoption of Patent Cooperation Treaty (PCT)²⁵- an international patent application system; The Madrid system which is an international trademark registration system covering up to 122 countries²⁶ and the Hague International Designs registration system which enables the registration of up to 100 designs in 73 contracting parties covering 90 countries.²⁷ The World Intellectual Property Organisation²⁸ (WIPO) leads this IP movement.

Why protect your IP?

Equity it is said does not aid the indolent but the vigilant. Just as one would guard his or her life, title to immovable properties and other rights jealously, the same attention

²⁵ Patent Cooperation Treaty, 1970 was amended in 1979, modified in 1984 and 2001. It has over 150 contracting states.

²⁶ <https://www.wipo.int/madrid/en/> accessed on 5 December 2019

²⁷ <https://www.wipo.int/hague/en/> accessed on 7 December 2019

²⁸ WIPO is a global forum for Intellectual Property (IP) services, policy, information and cooperation with 192 member states established in 1967.

should be channeled into intellectual properties. There are IP advocates and educators²⁹ at national and international levels at our disposal ready to lend their assistance all in furtherance of the IP movement.

The effect of the Intellectual Properties in growing economies and developed economies cannot be over-emphasized. Innovation and creativity is highly driven by a functional IP system which serves as an incentive *inter alia* to inventors and authors. The rapid growth of IP in pharmaceuticals, plant-variations and geographical indications, sports and image rights is an indication that the world's developed economies have realised the necessity and significance of IP in these areas. This writer encourages Nigeria and other under-developed countries to pay more attention to Intellectual Property system as a channel for development. This goes beyond the enactment of Intellectual Property laws, establishment of unrealistic methods of enforcement and inadequate commissions and bodies

to the actual consideration of the peculiarity of each economy. *Did you know that a strong IP system contributes to attracting foreign investments from multinational companies and activities such as the Olympic Games?* This in effect means that a functional IP system could be the next best thing that has happened to a developing or under-developed economy.

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²⁹ Visit www.myiplawguide.com for IP related articles and discussions