

African Contributions in Shaping the Worldwide Intellectual Property System

TSHIMANGA KONGOLO

African Contributions in Shaping the Worldwide Intellectual Property System

TSHIMANGA KONGOLO



ASHGATE

© Tshimanga Kongolo 2013

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Tshimanga Kongolo has asserted his right under the Copyright, Designs and Patents Act, 1988, to be identified as the author of this work.

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
110 Cherry Street
Suite 3-1
Burlington
VT 05401-3818
USA

www.ashgate.com

British Library Cataloguing in Publication Data

Kongolo, Tshimanga.

African contributions in shaping the worldwide intellectual property system.

1. Intellectual property (International law)
2. Intellectual property--Africa.

I. Title

The Library of Congress has cataloged the printed edition as follows

Kongolo, Tshimanga.

African contributions in shaping the worldwide intellectual property system / by Tshimanga Kongolo.

pages cm

Includes bibliographical references and index.

ISBN 978-0-7546-7740-6 (hardback) -- ISBN 978-0-7546-9471-7 (ebook) 1.

Intellectual property--Africa. I. Title.

KQC370.K66 2013

346.04'8096--dc23

2012034191

ISBN 978-0-7546-7740-6 (hbk)

ISBN 978-0-7546-9471-7 (ebk – PDF)

ISBN 978-1-4724-0425-1 (ebk – ePUB)



Printed and bound in Great Britain by the
MPG Books Group, UK

AFRICAN CONTRIBUTIONS
IN SHAPING THE WORLDWIDE
INTELLECTUAL PROPERTY SYSTEM

About the Author

Tshimanga Kongolo is an intellectual property researcher. He was formerly Assistant Professor, Osaka University, Osaka, Japan. His key areas of interest are International Intellectual Property Law and global IP challenges. He has published widely on these areas in books and articles in renowned international IP journals.

This well-written volume puts forward African initiatives on intellectual property matters which affect their development. The nicety of this book is that it displays in an accurate manner, present intellectual property negotiations taking place at several international organizations where the African Group is an active actor through its revolutionary initiatives in the areas of traditional knowledge, public health, and access to genetic resources. It will enable readers to well perceive the role played by Africa in this new area of international trade—trade of ideas.

Luanga Mukela Faustin, World Trade Organization, Switzerland

Dedication

To my wife Mieko, my son Kazadi, and my daughter Awoi

Preface

Since I embarked on intellectual property research 21 years ago, my geographical boundaries of research have been defined within three realms: *international–developing countries–Africa*. My own interest in the issues related to these spheres grew when I started questioning the *raison d'être* of the current IP system for developing countries in general and African countries in particular. After several years of research, I came to the understanding that the best IP system is the one which is beneficial to all stakeholders, takes into consideration all their interests and concerns, and, in the end, is well balanced.

At the international level, this means that the outcomes of any negotiations leading to the adoption of international IP laws must be the result of this approach. This is not, however, easy to achieve.

Subsequent to the publication of my earlier book, *Unsettled International Intellectual Property Issues*, where I discussed IP issues in the international context without a particular focus on African countries, a question came to my mind about how African countries were contributing to efforts to achieve a balanced international IP system. So I decided to deepen my research and examine initiatives taken by African countries, mainly as a Group, in the negotiations of international norms. The results of that work are presented in this book.

Up until recently, the standards of most international IP norms were proposed by developed countries and were based on their own IP environment and needs. At the negotiating table, there was a clear divide between developed and developing countries. The latter were considered to be essentially powerless or, at best, to possess a limited bargaining power. Nowadays, the international IP environment has changed dramatically. In the last 15 years, the African Group has emerged as a dynamic Group on the international scene with its breakthrough proposals on many IP issues, most importantly including traditional knowledge, traditional cultural expressions, access to genetic resources, biodiversity, public health, and exceptions and limitations to copyright. Twenty years ago, no one could have imagined that Africa would become an active participant in the international consideration of IP rights, introducing influential initiatives in respect of the subject matters mentioned above.

Questions to be asked, and answered, in this book are, *inter alia*, the following: Why did the African Group take the lead in IP and public health issues? What made Africa appear at the forefront of debates and negotiations on traditional knowledge, traditional expressions of culture, and access to genetic resources and biodiversity? Why is the African Group supportive of exceptions and limitations to copyright for visually impaired persons/persons with print disabilities, for archives and libraries, and for educational and research institutions? What is the position

of the African countries on the protection of life forms, the research exemption/exception to the exercise of patent rights, or genetically modified organisms? This book will provide an indispensable insight into the essential considerations of these subject matters.

This book discusses not only the African contributions in the ongoing international negotiations on these controversial and unsettled IP issues. It also puts forward African regional initiatives taken within the framework of the African Union, the African Regional Intellectual Property Organization, and the Organisation Africaine de la Propriété Intellectuelle on the subject matters mentioned above.

This book will not only assist scholars and academics concerned with international IP issues in understanding how the African nations have most recently not only contributed to but also significantly influenced the contemporary direction of discussions on IP law. It is also expected to provide both context and guidance to policy-makers from Africa or elsewhere who are interested in IP issues that are of concern to African countries.

This book is a complex work that addresses several IP issues. With the exceptions of the Introduction and the General Conclusion, each chapter/section deals with a very specific issue. The table of contents may be a useful guide to lead readers to the chapter(s)/section(s) that may address their particular interest.

One thing this author has learned in his 21 years of research, however, is that every 'single issue' or 'particular interest' about IP is inextricably linked to all the others. If this is true, then it becomes even more essential that whatever regime for the protection of IP rights is adopted by the international community, it incorporates those criteria mentioned earlier: that it is beneficial to all stakeholders, takes into consideration all their interests and concerns, and, in the end, is well balanced.

Finally, I faced a lot of challenges while writing this book. I knew exactly what to write about and how to write. But I did not know *when* to write. I am thankful to my family for allowing me to use the living room as part of my virtual office (instead of using my existing separate office at home). My children were an important part of my inspiration. I could write for an hour, play with them for 30 minutes, and then do research for another 30 minutes before writing again. I enjoyed very much this family atmosphere while doing such serious work.

Acknowledgments

The author is grateful to his wife Mieko for her support and understanding, and to his son Kazadi and daughter Awoi for their patience and for being part of the scenario with their noises while writing this manuscript, which sounded like Congolese music to him, the source of his inspiration.

The author is thankful to Mr. James Boyce, who devoted his time to edit this book and for his valuable advice.

Disclaimer

The views expressed in this book are solely those of the author and should not be interpreted otherwise.

Acronyms and Short Forms

ARIPO	African Regional Intellectual Property Organization
AU	African Union
Bangui Agreement	Agreement Relating to the Creation of an African Intellectual Property Organization of March 2, 1977 (also known as the OAPI Agreement)
Banjul Protocol	Banjul Protocol on Marks of November 19, 1993 (ARIPO)
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886
CBD	Convention on Biological Diversity of June 5, 1992
EoF	Expression of folklore
ESARIPO	English-Speaking Africa Regional Industrial Property Organization (predecessor to ARIPO)
EU	European Union
GI	Geographical indication
GMO	Genetically modified organism
GRs	Genetic resources
Harare Protocol	Protocol on Patents and Industrial Designs within the Framework of the ARIPO of December 10, 1982
HIV/AIDS	Human immunodeficiency virus/acquired immunodeficiency syndrome
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO)
IP	Intellectual property
IPRs	Intellectual property rights
IRCC	Internationally Recognized Certificate of Compliance
IWG	Inter-sessional Working Group (IGC)
LDCs	Least developed countries
MAT	Mutually agreed terms
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization of October 29, 2010 (CBD)

OAPI	Organisation Africaine de la Propriété Intellectuelle (also known as the African Intellectual Property Organization)
OAU	Organization for African Unity (predecessor to the AU)
PAIPO	Pan-African Intellectual Property Organization (proposed)
Paris Convention	Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised
Paris Union	States Signatories to the Paris Convention
PCT	Patent Cooperation Treaty of June 19, 1970
PIC	Prior informed consent
R&D	Research and development
SCCR	Standing Committee on Copyright and Related Rights (WIPO)
SCP	Standing Committee on the Law of Patents (WIPO)
STRC	Scientific, Technical and Research Commission (AU)
Swakopmund Protocol	Protocol on the Protection of Traditional Knowledge and Expressions of Folklore of August 9, 2010 (ARIPO)
TCEs	Traditional cultural expressions
TK	Traditional knowledge
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO)
TWN	Third World Network
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNO	United Nations Organization
UPOV	International Union for the Protection of New Varieties of Plants
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Contents

<i>Preface</i>	<i>xiii</i>
<i>Acknowledgments</i>	<i>xv</i>
<i>Disclaimer</i>	<i>xvii</i>
<i>Acronyms and Short Forms</i>	<i>xix</i>
1 Introduction	1
2 African Countries' National Perspectives on Various Intellectual Property Issues	9
Introduction	9
Scope of Protection of Patents	10
Disclosure Requirements	13
Exclusions from Patentability	15
Exceptions to Patent Rights	19
Compulsory Licensing in the Field of Patents	22
Non-Traditional Marks	45
Well-Known Marks Protection	48
Trademarks and the Internet	54
Exceptions and Limitations to Breeders' Rights	56
Traditional Knowledge, Traditional Cultural Expressions, and Genetic Resources	58
Genetically Modified Organisms (GMOs)	69
Conclusion	73
3 African Regional Intellectual Property Systems and Regional Initiatives	75
The African Regional Intellectual Property Organization (ARIPO)	75
<i>Background</i>	75
<i>Protocol on Patents and Industrial Designs within the Framework of the ARIPO</i>	77
<i>The Banjul Protocol on Marks</i>	79
<i>The ARIPO-PCT Relationship</i>	81
African Intellectual Property Organization (Organisation Africaine de la Propriété Intellectuelle) (OAPI)	82

<i>Background</i>	82
<i>Patents</i>	84
<i>Trademarks and Service Marks</i>	88
<i>Protection of Plant Varieties</i>	92
African Regional Initiatives	93
<i>Protocol on the Protection of Traditional Knowledge and Expressions of Folklore adopted by the ARIPO on August 9, 2010</i>	94
<i>Introduction</i>	94
<i>Protection of traditional knowledge</i>	95
<i>Criteria of protection</i>	95
<i>Beneficiaries</i>	96
<i>Rights conferred</i>	96
<i>Equitable benefit-sharing</i>	97
<i>Exceptions and limitations</i>	98
<i>Compulsory licenses</i>	98
<i>Duration of protection</i>	99
<i>Protection of expressions of folklore</i>	99
<i>Criteria of protection</i>	99
<i>Beneficiaries</i>	100
<i>Protection of expressions of folklore against unlawful acts</i>	101
<i>Exceptions and limitations</i>	102
<i>Duration of protection</i>	103
<i>The ARIPO Draft Protocol on Plant Varieties Protection</i>	104
<i>Preamble</i>	104
<i>Purpose</i>	106
<i>Genera and species to be protected</i>	106
<i>Conditions of protection</i>	106
<i>Persons entitled to apply for protection</i>	106
<i>Granting and rejection of the plant breeders' right</i>	106
<i>Scope of the plant breeders' right</i>	107
<i>Exceptions to the plant breeders' right</i>	108
<i>Exhaustion of the plant breeders' right</i>	108
<i>Restrictions on the exercise of the plant breeders' right</i>	108
<i>Duration of the plant breeders' right</i>	108
<i>Appeals and enforcement procedures</i>	108
<i>Transitional provisions</i>	109
<i>The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources</i>	109
<i>Objectives</i>	109
<i>Scope</i>	110
<i>Access to biological resources</i>	111
<i>Community rights</i>	113
<i>Farmers' rights</i>	114

<i>Plant breeders' rights</i>	115
<i>The AU Model Law on Biosafety</i>	119
<i>Preamble</i>	120
<i>Objectives</i>	120
<i>Scope</i>	120
<i>National Biosafety Committee</i>	121
<i>Application</i>	121
<i>Risk assessment</i>	121
<i>Identification and labeling</i>	121
<i>Export</i>	121
<i>Liability and redress</i>	122
<i>Community rights for GMO-free zones</i>	122
<i>Conclusion</i>	122
<i>The Establishment of the Pan-African Intellectual Property</i>	
<i>Organization</i>	122
<i>The African Intellectual Property Organizations: necessity</i>	
<i>of adopting one uniform system for all Africa</i>	123
<i>Discussions on the establishment of PAIPO</i>	125
<i>Background and premise to the adoption</i>	125
<i>Final Draft Statute of the Pan-African Intellectual</i>	
<i>Property Organization (PAIPO)</i>	127
<i>Preamble</i>	127
<i>The way forward</i>	131
<i>Conclusion</i>	132
 4 African Initiatives at the International Level	 133
<i>Introduction</i>	133
<i>Traditional Knowledge, Traditional Cultural Expressions or</i>	
<i>Expressions of Folklore, and Genetic Resources</i>	134
<i>Work Done Within WIPO</i>	135
<i>Background and premises to the debates</i>	135
<i>African initiatives, positions, and proposals in the</i>	
<i>context of the IGC</i>	136
<i>The pre-text-based negotiation period</i>	136
<i>Text-based negotiations</i>	148
<i>Current status of the negotiations</i>	150
<i>Traditional cultural expressions</i>	153
<i>Subject matter of protection</i>	153
<i>Beneficiaries</i>	155
<i>Scope of protection</i>	156
<i>Exceptions and limitations</i>	157
<i>Term of protection</i>	159
<i>Other matters</i>	159
<i>Traditional knowledge</i>	162

<i>Subject matter of protection</i>	162
<i>Beneficiaries</i>	166
<i>Scope of protection</i>	167
<i>Scope of protection and sanctions</i>	170
<i>Exceptions and limitations</i>	170
<i>Term of protection</i>	173
<i>Other matters</i>	175
<i>Genetic resources</i>	178
<i>Traditional knowledge and the public domain</i>	179
<i>Conclusion</i>	182
<i>Work Done Within the WTO</i>	182
<i>Background and premises to debates</i>	182
<i>African main positions relating to the review of Article 27.3(b), the relationship between the TRIPs Agreement and the CBD, and protection of traditional knowledge and folklore</i>	187
<i>The relationship between the TRIPs Agreement and the CBD</i>	188
<i>An effective sui generis system</i>	190
<i>Protection of traditional knowledge and folklore</i>	191
<i>Current status of the debate</i>	192
<i>Proposal on the Disclosure of Origin of Biological/ Genetic Resources and/or Associated Traditional Knowledge</i>	192
<i>Draft Modalities Text for TRIPs related issues</i>	196
<i>Conclusion</i>	197
<i>Patents and Public Health</i>	197
<i>Introduction</i>	197
<i>African Contributions within the WTO in the Context of Patents and Public Health</i>	199
<i>Background and premises to the debates</i>	199
<i>The Doha Declaration on the TRIPs Agreement and Public Health</i>	206
<i>Decision of the General Council of WTO of August 30, 2003 implementing Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health</i>	208
<i>The Protocol Amending the TRIPs Agreement</i>	213
<i>Conclusion</i>	219
<i>African Contributions within WHO in the Context of Public Health, Innovation and Patents</i>	219
<i>Background and premises to the debates</i>	219
<i>Final report and recommendations of the Commission on Intellectual Property Rights, Innovation and Public Health of 2006</i>	220
<i>The Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property</i>	222
<i>Collaboration among WHO, WTO, and WIPO on public health and patents</i>	231

<i>Draft Resolution on Counterfeit Medical Products</i>	231
<i>Conclusion</i>	233
<i>Patents and Public Health within WIPO</i>	234
<i>Tripartite cooperation between WHO–WIPO–WTO</i>	234
<i>Patents and health in the WIPO Standing Committee on the Law of Patents (SCP)</i>	235
<i>Joint proposal by the African Group and the Development Agenda Group, SCP Work Program on Patents and Health</i>	235
<i>Patents and Health: the US proposal</i>	237
<i>Other Contributions of WIPO in the Field of Patents and Health</i>	238
Exceptions and Limitations to Copyright	239
<i>Background and Premises to the Debates</i>	239
<i>Proposals on Exceptions and Limitations and Debated Issues from 2009 to 2012</i>	241
<i>Exceptions and limitations for visually impaired persons/persons with print disabilities and other reading disabilities</i>	243
<i>Proposal of Brazil, Ecuador and Paraguay</i>	244
<i>Proposal of the United States of America</i>	246
<i>Proposal of the European Union</i>	247
<i>International Instrument on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities: Proposal of the Chair</i>	250
<i>Exceptions and limitations for libraries and archives</i>	260
<i>Proposal on Limitations and Exceptions for Libraries and Archives submitted by Brazil, Ecuador and Uruguay</i>	260
<i>Proposal on Objectives and Principles for Exceptions and Limitations for Libraries and Archives submitted by the United States of America</i>	261
<i>The Case for a Treaty on Exceptions and Limitations for Libraries and Archives: Background Paper by IFLA, ICA, EIFL, and INNOVARTE</i>	263
<i>Provisional Working Document Containing Comments on and Textual Suggestions Towards an Appropriate International Legal Instrument (in whatever form) on Exceptions and Limitations for Libraries and Archives</i>	265
<i>Exceptions and limitations to copyright for educational, teaching, and research institutions</i>	270
<i>The proposal of Brazil</i>	271
<i>The proposal of Ecuador, Peru, and Uruguay</i>	272
<i>Provisional Working Document</i>	272
<i>Proposal of the African Group: Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers</i>	274