

**BABCOCK UNIVERSITY
ILISHAN-REMO, OGUN STATE**

**THE SEVENTH UNIVERSITY
INAUGURAL LECTURE**

**THE ORACLE, INTELLECTUAL PROPERTY &
ALLIED RIGHTS, THE KNOWLEDGE ECONOMY
AND THE DEVELOPMENT AGENDA**

BY

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**THE ORACLE, INTELLECTUAL PROPERTY & ALLIED RIGHTS,
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1.0 Salutations

The President/Vice Chancellor,
The Senior Vice President/Deputy Vice Chancellor,
All other Vice-Presidents and Associate Vice Presidents,
The University Registrar,
The Dean/Provost, School of Law and Security Studies,
All other Deans, including the Dean, School of Post
Graduate Studies,
The Head of Department of Private and Commercial Law,
All other Heads of Departments,
Professors and Members of Senate,
Faculty and Staff of the School of Law and Security Studies,
All other Faculty and Staff of Babcock University,
My Lords, Judges of the High Court, Court of Appeal and
Supreme Court,
Senior Advocates and Members of the Outer Bar,
Director-Generals and Registrars of IP Regulatory Bodies
My Lords Spiritual,
Friends of the University/Special Guest,
Members of my Family,
Students of the School of Law and Security Studies,
All other Babcock University students,
Gentlemen of the Press,
Distinguished Ladies and Gentlemen,

1.1 Introduction

Mr. Vice Chancellor and President Sir, I owe a lot to you, to the School of Law and Security Studies and to the Babcock University for today. The word inaugural means marking the beginning of a new venture, series, office,

etc.¹ The synonyms of inaugural are foundational, initial, opening, first, introductory, & maiden. Thus, the first flight or sail for a plane or a ship is called its inaugural or maiden flight or sail. By insisting that all Babcock professors pay this huge debt of giving inaugural lectures, Babcock may be influencing change in Nigerian universities where some old professors only give their inaugural lectures when they are about to retire, or never at all.

An Inaugural lecture is not to be given at the end of a Professor's career rather it should be given as soon as possible, after a person is given a chair. It should be a foundational lecture, outlining his research in the past, his achievements and discussing some of the issues he intends to investigate in future. As academics, it is our duty to encourage Nigeria to eschew amoral culture that quickly permeates the fabric of our society. One of such is the culture of Nigerian stand-up comedians who should only act as masters of ceremony but have taken over the task of chairmen at events in Nigeria today.

Is there any exclusive right to the jokes of a stand-up comedian or can they be freely copied by others? Is there any right to the national anthem or can we make our own rendition or copy the rendition of others? Who owns the right to my *Selfie* or my photograph taken by another person and can such other person sell my pictures to the public? Today, the use of a smart phone can raise several

¹ Random House Kernerman Webster's College Dictionary, <http://www.kdictionaries-online.com/DictionaryPage.aspx?ApplicationCode=18>.

issues of law ranging from the logos and brands, to the data, the music, the film and attendant technologies used on smart phones. Some of these issues belong to the rubric of law known as intellectual property (IP).

The speech that follows reflects my intellectual engagement and advocacy for reforms in the law, administration, regulation, adjudication, enforcement and enlightenment for intellectual property (IP) and allied rights since the days of my national service as a lawyer and research assistant to the Dean of Laws at the then UNIFE, (now Obafemi Awolowo) University in 1986 to date. In particular, it portends the future of IP in Africa, circumscribing my future work - the possible way IP law/policy and allied rights may be used as a catalyst to accentuate the African Development Agenda.

2.1 Intellectual Property as the Cinderella of Law

Seventy years ago, as if peering into the future, Zachariah Chafee described copyright as the Cinderella of the Law.² The sisters of Cinderella copyright: trademarks, patents, & designs, and the cousins of copyright, the allied rights such as trade secrets, or confidential information, plants and animal varieties, traditional knowledge are all commonly referred to as intellectual property (IP) rights. IP rights were developed by statute and case law with roots in natural law, human rights and fairness. IP protects the products of human intellect including artistic and technological creations and inventions.

² Zachariah Chafee, Jr., "Reflections on the Law of Copyright: I", *Columbia Law Review*, Vol. 45, No. 4 (Jul., 1945), pp. 503-529 at 503.

Copyright protects literary works, artistic works, musical works, sound recordings, cinematographic films and broadcasts. Copyright laws often protect performers of certain literary and musical works and empower authors to restrain third parties from making false claim of authorship.

Patents protect certain inventions that are new, comprise an inventive activity (in the sense that they are not obviously arising from the knowledge in the relevant field of the invention) and are industrially applicable. Unlike copyright, patent protection only inures upon registration. The Nigeria Patents & Designs Act, 1970³ does not discriminate against any sector of the economy that an invention emanates.

Industrial design laws are used to protect designs or drawings of lines or three dimensional objects that can be used as a model or pattern (or moulds) for industrial application or the duplication of such drawings. This will include the drawings of textiles and three dimensional products including parts of equipment and machinery. Like patents, a design is only protected if registered. Designs are protected in Nigeria by the Patents and Design Act, 1970.

Trademarks are logos, names, labels, designs that are applied on goods or services to distinguish them from other services. Trade marks give information about the origin and quality of a product or service. They seek to ensure that consumers are not deceived into taking or treating the goods of one as the goods of another. Trade

³ *Laws of the Federation of Nigeria 2004 Chapter P2.*

marks may be registered or unregistered. Trade marks laws enable persons who have registered marks, (or unregistered marks that have acquired goodwill) to prevent third parties from using identical or confusingly similar marks for similar goods or services. Trademarks are protected primarily by the Trade Marks Act, 1965,⁴ and a sundry of other statutes including the Merchandise Marks Act, 1916,⁵ the Consumer Protection Council Act⁶ and the Counterfeit and Fake Drugs Act.⁷

Plant variety and animal variety laws or plant or animal breeders' rights are exclusive bundle of rights granted to breeders of plants or animals who have developed a breed of a plant or animal that has acquired consistent characteristics and uniformity. The breed or variety is registered and the breeders are granted exclusive rights to restrain third parties from copying or reproducing the breed. Like most patent laws, the Nigerian patent system does not permit anyone to register an invention for a plant or animal variety, or essentially biological processes for the production of plants or animals other than microbiological processes and their products.⁸

Confidential Information and Trade Secrets are two species of allied rights that share some similarity to Intellectual Property. They are largely derived from

⁴ *Laws of the Federation of Nigeria 2004 Chapter T 13.*

⁵ *Laws of the Federation of Nigeria 2004 Chapter M10.*

⁶ *Laws of the Federation of Nigeria 2004 Chapter C25.*

⁷ *Laws of the Federation of Nigeria 2004 Chapter C34.*

⁸ S 1(4) *Patents and Designs Act, 1970 now Laws of the Federation of Nigeria 2004 Chapter P2.*

common law and they do not need registration. They are information or secrets that are important to a business and may be shared with proposed or current business partners. The latter are obliged not to divulge or misuse the information or secret.

Traditional knowledge or indigenous knowledge is a body of knowledge, practices and innovation, often oral and undocumented, developed and shared by a community and passed on from generation to generation. It has the trappings of intellectual property in that the community or section of the community that “owns” or uses the knowledge shrouds it in secrecy or mystic practices to prevent copying. Some try to distinguish it from intellectual property in that it is not personally owned and it is not for a limited time. There is a growing lobby that traditional knowledge should be internationally recognized and protected like other intellectual property rights.

As can be recalled in Cinderella, a girl despised and maltreated by her half sisters after the demise of her rich father, lived in obscurity, only to blossom in her later years as the Princess. Perhaps Cinderella’s half sisters would have been more gracious to her if they could have peeped into the future to know what will become of Cinderella. Indeed, the average national, state, community, family, or business leader will pay a fortune to determine how today’s decisions will affect tomorrow’s events.

3.0 My Oracle Portends IP

To avoid the errors of Cinderella's sisters, we must not despise, ignore or look down, rather, we must act today in a manner that will enable us celebrate the future. As such, this lecture, examines possible scenarios of how our responses to IP can impact Africa's development agenda positively in the new knowledge economy. This lecture is an attempt at peering into the future as it impinges on, or could be influenced by, IP.

In gazing into the future, I posit that it will be politically incorrect for anyone to challenge or criticise me if I decide to consult an Oracle by whatever name my shrine is called as I am an African who is trying to decipher the future. Western academics will eschew criticising me if I indulge in Crystal Gazing or if I consult Buddha, Ouija Boards, or Ifa. You must therefore forgive me, as an African hardly does anything without consulting an oracle!

My African Shrine today, my source of divination, indeed my Oracle is the Holy Scriptures popularly known as the Bible. My Oracle made several postulations about the future and suggests that there will be a time known as the End Times. The Beginning of Times has at least three popular theories about the origin of man: the theory of evolution, the big bang theory and my Oracle's God's creation. One of the instructions of my Oracle is that Man should subdue the earth and replenish it. For the End Times, my Oracle gave two postulations that are apposite to our discourse: The first is that **Knowledge will increase**. The Second is that **Men will be lovers of**

themselves. You may venture to ask, what is the relevance of these two Oracle divinations and Oracle instruction to IP, the knowledge economy and the development agenda? Bearing these Oracle divinations in mind, how can we formulate and administer IP and allied rights in a manner that will actualise these divinations? The speech that follows attempts to encapsulate this.

4.1 Oracle Says Knowledge Will Increase

From the stone age to the iron age, from the industrial age to the jet age, no other time in the history of man can attest more to my Oracle's prophecy that knowledge will increase, than today's internet age and the knowledge economy. The last fifty years has witnessed changes of seismic proportions in technological innovation and the transformation of man. From the main frame computer, the video cassette player, the video camera and the video recording and dubbing machines in the mid-seventies to the notebooks, the smart phones and the virtual world of the internet, has emerged an evolving culture, ethos and language precipitated by the social media and the birth of e-governance, e-health, e-wars, e-learning, et al.

If as advocated by Roscoe Pound, that Law is an instrument of social engineering,⁹ then law must play a role in influencing the flow of the burgeoning river known as the knowledge economy. The bedrock on which the river of the knowledge economy flows is intellectual property and allied rights.

⁹ See Roscoe Pound, *The Spirit of the Common Law* (Boston, 1921), p.196 onwards.

4.2 The Oracle Says the Entertainment Industry Will Grow

The Oracle prophesied that Man will be lovers of self. The love of self is epitomised in the entertainment industry. Never in the history of man has the entertainment industry played a more significant role than today, Nigeria is no exception.¹⁰ The press and media have always been influential from the times of the invention of the printing press that was met with government censorship. The attention paid to entertainment industry giants by politicians especially in the recent 2015 Nigerian campaigns is a pointer to this. We recall the songs for Lagos state gubernatorial candidates, Ambode's "AAM BO O" song to AGBAJE's "Everybody loves Jimi Agbaje".

We are engulfed by the entertainment industry, from photography to dancing, from sports to modelling, from music to film, from art to fashion, from advertising to theatre. Never in the history of Nigeria has the entertainment industry wielded as much influence such that today, the average Nigerian will not complain if his cherished child decides to make a career in the entertainment industry rather than the traditional professions or sectors of the economy. Almost attesting to this fact is the Babcock University Vice Chancellor's production of Pharrell William's HAPPY. The production

¹⁰ Bankole Sodipo, "Optimising the gains of the entertainment industry", being a lecture given At the National Conference on LAW AND ECONOMIC TRANSFORMATION IN NIGERIA, to mark 50 years of the Faculty of Law Obafemi Awolowo University, July 11-13, 2012

which has had over 85,000 hits¹¹ may have been more influential in marketing Babcock University than any other effort in recent times.

My thesis about the growing significance of the entertainment industry is corroborated by the speed with which the financial empires of the following persons have grown exponentially, swimming primarily on the river of IP. Jason Njoku, the founder of Iroko Television who has grown to become one of the richest young Africans (Iroko TV is worth \$30 Million),¹² J.K. Rowling (\$1 Billion), the creator of the Harry Potter character,¹³ Oprah Winfrey (\$3.2 Billion),¹⁴ Bill Gates (\$79.9 Billion),¹⁵ and Steve Jobs (\$11 Billion).¹⁶

Nigeria's entertainment industry generates about N9 Trillion.¹⁷ The industry has positively impacted the

¹¹ See www.youtube.com/watch?v=H-m846e5NzA, accessed 05/11/15

¹² <http://www.forbes.com/sites/mfonobongnesehe/2012/07/11/ten-young-african-millionaires-to-watch/>
Accessed November 5, 2015

¹³ <http://www.forbes.com/profile/jk-rowling/> accessed November 5, 2015
<http://www.celebritynetworth.com/richest-celebrities/authors/jk-rowling-net-worth/> accessed November 5 2015.

¹⁴ <http://www.forbes.com/profile/oprah-winfrey/>
Accessed November 5, 2015

¹⁵ Bill Gates set up Microsoft a year before Apple with his friend Paul Allen about 1973. <http://www.forbes.com/profile/bill-gates/>;
<http://www.fool.com/investing/general/2014/02/19/heres-why-bill-gates-was-so-much-richer-than-steve.aspx>

¹⁶ <http://www.fool.com/investing/general/2014/02/19/heres-why-bill-gates-was-so-much-richer-than-steve.aspx>
<http://www.therichest.com/celebnetworth/celebrity-business/tech-billionaire/steve-jobs-net-worth/>
<http://www.forbes.com/sites/investopedia/2011/10/06/how-much-would-steve-jobs-be-worth-today/>

¹⁷ <http://leadership.ng/entertainment/364405/entertainment-contributes-nigerias-gdp>

Nigerian brand internationally as Nigerian culture, her music and film are being disseminated all over the world – but is Nigerian music and film paying? How many Nigerian trademarks have become international? How many Nigerian inventions are household or office products today? Which Nigerian foods, spices or cosmetic are truly international?

5.1 The Cyprian Ekwensi-Sodipo Theory of the African Child

Can you pause and ponder on these significant thoughts? As you do so, permit me to share a plausible reason why the magic of IP has failed to work wonders in Africa. This is a theory originated by my client, one of Africa’s leading novelists, Cyprian Ekwensi,¹⁸ and developed by me.

Mr. Vice Chancellor sir, we were all the same at birth, African babies and Caucasian babies. On the average all babies respond the same way to moving or talking toys given to them. Babies break the toys! The African adult who buys the toys smacks the African baby. The Caucasian adult who bought the toy does not smack the baby. The African adult did not know that he was smacking out the creative genius in the African baby, that the baby was simply curious in ascertaining what made

<http://www.ngrguardiannews.com/2015/01/hammond-nigeria-s-entertainment-industry-will-dominate-gdp-with-adequate-funding/> accessed November 7 2015.

¹⁸ Ekwensi wrote hundreds of short stories, radio and television scripts, and several dozen novels, including children's books: *Drummer Boy* (1960), *Jagua Nana* (1961), *Jagua Nana's Daughter*.

the toy speak or move. Unfortunately, the smack taught the average African child not to question or investigate his surroundings, rather, he is taught to accept the status quo or believe it is from the gods. Some African proverbs appear to encourage us not to question the status quo. Pause to identify an African proverb that discourages you from questioning surroundings or situations or that suggests conclusions that scientifically may be unfounded.

The example that follows illustrates this point vividly. Following a dispute between X and Y, two poultry farmers, X threatens that he will deal with Y. The day after the dispute, Y's birds develop bird flu disease and die. Instead of investigating the cause of the epidemic, Y's family and community will say *Aje ke lana omo ku loni, tani ko mope aje to ke lana lo pa omo to ku loni*. That is, a witch cried yesterday, a child dies today. Who does not know that it is the witch that cried yesterday that killed the child that died today. Enmity may ensue between X and Y until the epidemic consumes X's birds and all the birds in that community. Many communities simply blame the gods for their calamity rather than investigate the cause of their experience with a view to preventing or dealing with such in the future.

It is no wonder that when the babies grow into their teenage years and beyond, the African baby will run away from a flash of light or strange sound in his surroundings that he cannot explain: *danger, the gods!*. The average Caucasian baby will probably probe and move towards the light or sound in his surroundings, with a

view to investigating the source of the *danger*. Our theory is that creativity and innovation of the African may be stifled from childhood, especially where this is encouraged by culture.

5.2 Relevance of the Ekwensi-Sodipo theory to IP

You may ask quizzically, “*What is the relevance of the Ekwensi-Sodipo theory to intellectual property*”? Surely, a full discussion of this is the subject of yet another lecture. But I must attempt to briefly elucidate the relevance and satisfy your curiosity which I have undoubtedly aroused.

My hypothesis: that part of African culture, part of our practice and upbringing is an anathema to IP. With regards to IP, that part of our culture that encourages us not to question or investigate is a possible extenuating factor as it can hardly engender innovation. If this hypothesis is correct, then I will posit that in order to fulfil the prophecy of my Oracle, that **knowledge will increase**, we have to eschew elements of our culture capable of exterminating innovation. Africa must adorn a new culture, research and development derived from a culture of questioning, investigating and an eagerness to improve, the bedrock of IP.

I will cite a couple of examples to drive home my point and link the Ekwensi-Sodipo theory to my IP fascination. If anyone drives from the Babcock Law School in Iperu campus to the main Babcock university grounds at Ilisan, a drive of less than seven minutes, he may observe local artisans using the traditional technology of making local sponges called *Kan Kan*. They

lay trunks of the tree on the roads to be trodden and softened by cars and then manually pound the tree trunks. This is a technology of over a hundred years that the African has not sought to improve. This sponge is hoarse to the skin and brittle that it cuts so easily that it can sufficiently clog the bath drain with snippets from the sponge. Yet our training does not suggest we could improve sponge or the technology surrounding it. In some cultures, the sponge *Kan Kan* has spiritual significance.¹⁹ Improvements may whittle down the spiritual efficacy and reduce the marketability of *Kan Kan*. This may explain why there is little or no improvement to *Kan Kan*.

Within a 45 miles radius from Babcock university is the ancient city of Abeokuta home among others to the local blue *Adire* cloth or tie and dye cloth.²⁰ This technology is probably over 100 years old but we have not done much to improve same. As lovely as these *Adire* are, we complain that the dyes fade, the cloths shrink and the women who make them cannot produce sufficient quantity that could turn around their communities. Yet little has been done to invent around these problems and improve the *Adire*. The Chinese are beginning to “steal” from us by copying the designs and selling *Adire* to us.

¹⁹ For other uses of *Kan Kan*, see how Nigerians in London are still using *Kan Kan* for “spiritual baths” in the cold to keep their enemies at bay: www.megainsights.com/the-kankan-seller-of-london/ accessed October 30, 2015.

²⁰ Jane Barbour & Simmonds Doig, “An Exhibition of Traditional *Adire* Cloth”, Jane Barbour, & Simmonds, Doig, eds., *Adire Cloth in Nigeria* (University of Ibadan), 1971.

May I invite you to scan your environment, to implements and technology that we would rather not change. From the cutlass, to the *Omolanke*, to the pestle and mortar for Iyan, a delicacy made from cooked yam. When the University of Ife professor invented the yam pounding machine, it was patented and improved by the Japanese who do not eat Iyan. The Ijeshas, the Ekitis and the Tivs, who can eat Iyan three times a day will probably argue that Iyan which is not made from the pestle and mortar is not Iyan. They would even cite African proverbs to buttress their contention. Therein lies our dilemma, African attitudes that discourage many a would be inventors. How then can we effect a change? Or is IP extraterrestrial to Africa?

6.1 IP in traditional Nigerian Society

Mr. Vice Chancellor Sir, twenty years ago, I argued that the recognition and protection of proprietary rights in intangibles akin to modern intellectual property rights protection in traditional societies prior to western influence cannot be ignored.²¹ IP is therefore not a completely "foreign" concept in Nigeria. I boldly warned that the IP system cannot be sustained in developing countries where there is still traditional society unless the West accorded recognition and protection to traditional knowledge. It is not yet *Uhuru*, as my 20 year old prophecy is yet to

²¹ Sodipo, Bankole, *Piracy and Counterfeiting: GATT TRIPS and Developing Countries*, London, Boston, Hague, Kluwer Law International 1997 pp- to pp (based on my Ph.D thesis 1995 University of London); See also Suchman, Mark C., "Invention and Ritual: Notes on the interrelation of magic and intellectual property in preliterate societies", Vol. 89 1989 *Columbia Law Review* 1264.

materialise, but it has attained greater significance as the United Nations agency for IP, the World Intellectual Property Organisation opened a desk for Traditional Knowledge (TK) less than five years after my research was published.²²

Since then, two international treaties that seek to give better protection to aspects of TK have been signed and entered into force. They are the Convention for the Safeguarding of the Intangible Cultural Heritage,²³ and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.²⁴ Whilst it is arguable that two Conventions have incorporated traditional knowledge, these conventions do not go far enough as they do not require that TK should be treated as intellectual property or that sui generis bundle of rights be created to protect TK. Further, it is not certain if the Conventions' definition²⁵ of what cultural heritage

²² www.wipo.int/about-wipo/en/activities_by_unit/.../trad_knowledge.html

²³ Adopted by UNESCO on 17 October 2003 and entered into force in 2006. R. Kurin, "Safeguarding intangible cultural heritage: Key factors in implementing the 2003 Convention", *International Journal of Intangible Heritage*, 2007 pp9-20.

²⁴ Adopted in 2005 and entered into force in 2007. Jennier Chan-Tibergien "Cultural Diversity as Resistance to Neoliberal Globalization: The Emergence of a Global Movement and Convention" , *International Review of Education / Internationale Zeitschrift für Erziehungswissenschaft* Jan-Mar2006, Vol. 52 Issue 1/2, p89-105. Alex Khachaturian, "The New Cultural Diversity Convention and its Implications on the WTO International Trade Regime: A Critical Comparative Analysis", *Texas International Law Journal* Fall 2006, Vol. 42 Issue 1, p191-209. Walter Leimgruber, "Switzerland and the UNESCO Convention on Intangible Cultural Heritage", *Journal of Folklore Research* Jan-Aug2010, Vol. 47 Issue 1/2, p161-196.

²⁵ For instance, the Convention on Intangible Cultural Heritage defines it as "Intangible Cultural Heritage means the practices, representations, expression, knowledge, and skills - as well as the instruments, objects,

suffices for TK. Today, there is yet no definitive multilateral agreement on the effective protection of traditional knowledge along similar lines as IP.

Mr. Vice-Chancellor sir, my work has inspired a growing international movement, a school of thought calling for a new species of IP rights known as traditional knowledge.²⁶ These works have identified practices, beliefs, and technology in traditional societies that have been regarded as sacred, shrouded in mysticism but passed down from one generation to another and classifies them as traditional knowledge.

This section of my lecture outlines what traditional knowledge is and how it was protected by traditional society. It also proffers reasons why the traditional knowledge school of thought has not metamorphorsised into an international agreement on IP.

Traditional African society was characterised by drama sketches²⁷ often linked to rituals, religious festivities and activities²⁸ and folklore that was used to build the African character with virtues like loyalty, honesty, industry, etc.²⁹ Musical works were used in rituals and

artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”

²⁶ The World Intellectual Property Organisation, WIPO. Several Ph.D theses have been written building on this concept.

²⁷ Euba, Titi "*Dress, The living culture of Nigeria op cit*, p.29.

²⁸ Rotimi, Ola "*Drama, The living culture of Nigeria op cit*, p.33.

²⁹ Adewa, E.A. "*Qualities of African Folklore*", (1938) 15 Nigerian Magazine 210.

festivities,³⁰ helping *inter alia* to preserve and record historical events.³¹ Music served as a medium for communing with dead ancestors and spirits; as a palliative in healing, mental or physical illnesses by preparing the mind for healing acts; to provoke riots, or prepare for fights and battles; and as a social commentator, to criticise, or check abuse of government.³² Dance formed a basis of other performing arts³³ and had strong links to religion.³⁴

Artistic works including sculptures, drawings, designs on pots, clothes,³⁵ leather, wood, calabashes and those done with raffia, were common³⁶ and wall and rock paintings were symbolic.³⁷ Some traditional societies had concepts of literary property.³⁸ All these are akin to modern copyright works.

Beier, Ulli, "Yoruba folk operas", (1954) 1 *Journal of International Library of African Music* 12.

³⁰ Lane M.G.M. "The music of P" (1954-57) 1 *Journal of International library of African music* 12.

³¹ Euba, Titi "Music, The living culture of Nigeria, op cit. p.20.

³² Up, Meki "Folk music in Nigeria: A Communion" [1980] Vol.6, No.1 *Journal of international library of African music* 6. Up, Meki "Ese music: Honours for the dead: Status for the sponsor" (1987) 6 *Journal of international library of African music* 90.

³³ Harper, Peggy "Dance, The living culture of Nigeria op cit. p.25.

³⁴ Atimowo D.E., "Masquerade among the Itsekiri", (1938) 15 *Nigeria Magazine* 238.

³⁵ Euba, Titi "Dress, The living culture of Nigeria "op cit., p.29.

³⁶ Wagboje, Irein, "Arts and Crafts, the living culture of Nigeria" op cit. p.17 at 18.

³⁷ Beier, Ulli, *Contemporary Art in Africa*, Pall Mall Press (1968); Fagg, B.E.B., "The rock gong complex today and in the pre-historic times" 1956-59) 1 *UP* 27. Most of them have been destroyed and replaced by roads or buildings.

³⁸ Dock, Marie-Clause, op. cit.; Wincor, R., "From rituals to royalties, An Anatomy of Literary Property", (1962) 20-22. Mould-Iddrisu, Betty Nah-Akuyea, "Industrial Designs - the Ghanian Experience", *MIP* 1991, April/May, No.7/8 p.29.

³⁸ Golvan, Colin, "Aboriginal Art and Copyright: The Case for Johnny Bulun"

Traditional society had technology, ranging from traditional doctors, to builders of thatched roof with its cooling technology, to the internationally acclaimed Benin Kingdom "court art" that was the exclusive preserve of the King's Iguh guild,³⁹ to crafters of equipment and instruments including drums, boats, looms etc. All these are akin to modern day patents, trade secrets or confidential information. Traditional logos and marks including *Ere Ibeji*⁴⁰ and tribal marks gave information.

6.2 Protection of IP in Traditional Society

Traditional society was ruled by royal decrees made by kings as representatives of gods⁴¹ and taboos that classified certain objects, activities and persons as sacred. These unwritten laws prohibited or accursed, offenders and obedience was engendered by and webbed in superstitious belief that breaches attracted the anger and curses of the gods against the offender or even against the whole community.⁴² It was a taboo for other members of the community who did not belong to a group to participate in activities of that group. Traditional knowledge was recognised and guarded through three main systems of enforcement of laws and norms: the

[1989] EIPR 346; Golvan, Colin, "*Indigenous Cultural Rights*" [1992] EIPR 227; *Yumbulul v Reserve Bank of Australia & ors.* (1991) 21 IPR 481.

³⁹ Picton, note 183 *supra*, p. 255.

⁴⁰ <http://grains-of-africa.blogspot.com.ng/2008/09/ere-ibeji-yoruba-twins.html> accessed November 7, 2015.

⁴¹ Justice Mason Begho, in his book, *Law and Culture in the Nigerian and Roman World, Benin-City, Nigeria*, 99. Egharevba, J.U., *op. cit.*

⁴² Begho *op. cit.* at 100. See also the classical works of Talbot, P. Amaury, *The Peoples of Southern Nigeria*, Oxford University Press, 1926, particularly, Vol. III, chapter XXIX.

family/age/clan/king, religion/cults, and guilds.⁴³ Certain works could only be made by sections of the community organised as clans, families, or guilds. The exclusive rights to make artistic works as grave sculpture among the Dakakari women of south western Sokoto in northern Nigeria were held by women of particular families, usually one per family.⁴⁴ The right to perform the recitation of *Oriki*⁴⁵ at important ceremonies was the exclusive preserve of certain families or certain members of the family.⁴⁶ Leaders punished breaches⁴⁷ with penalties ranging from fines of local gin, goats, sacrifices or ostracism from the larger family, community, or neighbouring communities.⁴⁸ Guilds guarded trade groups whose members⁴⁹ were often initiated into a guild with a god or ancestral spirit believed to protect them and

⁴³Oloko, Olatunde, *"The impact of advanced technology on the social structure of traditional societies"*, (1964) 16 No.1 Nigerian Journal of Economic and Social Studies 23.

⁴⁴Sue Picton op cit. p. 263-4. Alan Bassing, *"Grave monuments of the Dakakari"*, *African Arts*, VI (4), 1973.

⁴⁵A praise singing poetry among the Yorubas of south western Nigeria.

⁴⁶Kingslake, The Rev Brian *"Musical Memories of Nigeria"* (1957) 1 *Journal of international library of African music* 20.

⁴⁷Adewoye, *The judicial system in southern Nigeria 1854-1954* London: Longman (1977). For a discussion of how the "ebi" (family) system helped the system of enforcement of laws in the government of the Oyo empire (western Nigeria) of the 18th century, see Akinjogbin I.A., "Oyo empire in the 18th Century - A Re-assessment" (1964-67) 3 JHSN 449.

⁴⁸In an interview with the author in February 1993 in Benin. Chief Inneh, the Inen'igun of Benin, Uzaman'ibe is the head of the blacksmiths community in Benin. The author was directed to him from the King's palace as the King's spokesman on such crafts.

⁴⁹Falola, C., *The political economy of a pre-colonial African State: Ibadan, 1830-1900*, 96-100, University of Ife, 1984. Goups included products or skills, or industrial groupings such as soap making, black-smiths, ceramics, carving, and textiles.

punishing erring members, interfering outsiders,⁵⁰ or non-members of the guild.⁵¹

Religion was so significant that some communities had shrines in every house,⁵² with beliefs that breaches were punished by gods.⁵³ Most trades and families had supervisory ancestral spirits or gods which deterred interference by non-members of the trade, and punished erring members. Some activities could not be undertaken by any member of the community unless the king gave the go-ahead.⁵⁴ Some musical instruments were exclusively dedicated for the use of some cults⁵⁵ who were feared and

⁵⁰ Talbot op cit. p.772, narrates how this operated among some Ibos of south eastern Nigeria.

⁵¹ Picton, op cit p. 259; Perani, Judith, "*Patronage and Nupe craft industries*", African Arts, XIII (3), 1980. Nadel,S.F., in his book, *A Black Byzantium*, Oxford University Press, 1942, (chapters xxiv-xxv), discusses the organisations of guilds in mid-twentieth century Nupe Kingdom of Nigeria's middle belt. This may be a fair picture of the organisation of guilds in the pre-colonial period.

⁵² Egharevba, J.A., *A short history of Benin* 4th ed (1968), Ibadan University Press; Goodwin A.J.H. in "Archaeology and Benin Architecture (1956-59) UP 65, confirms this of the Benin.

⁵³ This concept is still strong in some communities today. Sodipo J.O. "*A note on the concepts of cause and chance in Thought - Second Order?*" *An African Journal of Philosophy* Vol II No.2 July 1973. Alo, Oladimeji & Gbadegesin, Segun "*The theme of causation in Nigerian World-View: Some Implications for Contemporary Attitude to Work*" (1987)31 *A Journal of West African Studies ODU* p.15.

⁵⁴ Babayemi S.O. in "*Bere festival in Oyo*" (1973-75) 7 UP 121, showed that no one dared cut grass for thatching of their homes or any other purpose before the Bere ceremonies were performed by the king who cuts the first fresh grass of the season, to mark the end of a planting season and thanked the gods. It was a strong belief that violators of this custom would be punishable by the gods. His larger family would probably have their own punishment too.

⁵⁵ The drum, *Bata*, was dedicated to the worship of Sango - "*The talking drums of the Id*" (1954-57) 1 *Journal of international library of African music* 29. For an account of the events in Ghana, see Arorgbedor, Daniel "*The construction and manipulation of temporal structures in Yeye cult music: A multi-dimensional approach*" 1987 6 *Journal of international library of African music* 4.

non-members would abandon the streets whenever there was any outing of the cults.⁵⁶ Some rights or powers were transferable for consideration.⁵⁷ Similar regimes for the protection of traditional knowledge existed in some old cultures⁵⁸ outside Africa.⁵⁹ This is not uncommon in modern Nigeria. Time and again, the Babcock university Registrar issues warnings directing members of the university community to stay off the neighbouring roads during some traditional festivities like *Oro*.⁶⁰

6.3 Traditional Knowledge and Modern IP Compared

Mr. Vice Chancellor sir, I wish to advance a number of reasons why the traditional means of protecting traditional knowledge in traditional society did not evolve into a modern system. I also suggest what we must do to push the frontiers of IP to so that we can have a multilateral treaty on traditional knowledge.

First, traditional knowledge was based on communal or group ownership, IP is individually owned. Common and civil law did not recognise communal ownership⁶¹ but

⁵⁶ Udo, Ema "The Ekpe Society" 1938 Nigerian Magazine 314.

⁵⁷ Privileges conferred by spirits were believed to be transferable - Lowie, R., *Primitive Society*, (1920) 238; Johannes, "Many Medicines in One: Curing in the Eastern Highlands of Papua New Guinea, 4 Culture, Med. & Psychiatry (1980) 43, at 52; Atkinson, "The Effectiveness of Shamans in an Indonesian Ritual", 89 Am. Anthropologist 342, 347, (1987).

⁵⁸ For instance, it has been strongly suggested by Wincor, R., "From rituals to royalties", *An Anatomy of Literary Property*, (1962) 20-22, that literary property was originally bound up with magic and in the case of every mystery cult, with secret information.

⁵⁹ Sodipo IDA & Myatis

⁶⁰ www.refworld.org/docid/3df4be794.html;

www.premiumtimesng.com/.../187654-ile-ife-anxiety-mounts-women-re...

⁶¹ Golvan, Colin, "Aboriginal Art and Copyright: The Case for Johnny Bulun" 2

communal ownership of real property is recognised in Nigeria.⁶² Second, the printing press that was a catalyst for the modern copyright system had writing and the printing press never appeared in traditional Nigeria, perhaps it may have impacted traditional knowledge.

Third, intellectual property is an economic right but it is arguable that traditional knowledge never attained that function in traditional Nigeria. For instance, most artistic works were not produced for sale or export in traditional Nigerian society, thus, it was not until the first contact with the Portuguese in Benin that the blacksmiths and sculptors began to make goods for sale.⁶³ The traditional custom was to make such only for the king, or for religious festivities or rituals and protection was largely shrouded in magical beliefs.⁶⁴ Five, Christian and Islamic beliefs against idolatry led to the decline in the development of traditional knowledge as most faiths discouraged traditional beliefs that was an integral part of most TK.⁶⁵

[1989] EIPR 346 at 347; & Golvan, Colin, *"Indigenous Cultural Rights"* [1992] EIPR 227 at 229-230.

⁶² James, R.W., *Modern Land Law in Nigeria* University of Ife Press, (1973) pp.21 & 35.

⁶³ Picton op cit., at p. 255.

⁶⁴ Ekpo, Eyo, *"Sculptor"*, *The living culture of Nigeria*, p.15 rightly points out that nearly all of the extant art traditions in Nigeria have their roots in religion.

⁶⁵ See Wagboje, *"Arts and craft"*, *The living culture of Nigeria*, p. 17. cf. Chabot, Maria *"The marketing of art products"* (1938) 15 *Nigerian Magazine* 216, who highlights how the French and the Belgians assisted craftsmen in the territories they governed. They chose crafts which were commercially viable and supported them.

7.1 Selling Traditional Knowledge for International Treaty

We must sell traditional knowledge to the international community before an international treaty can be signed on TK. First, there is a need to conduct more studies on traditional knowledge in order to reach a consensus. There can be no international instrument unless there is a consensus on what constitutes traditional knowledge; what ought to be protected, the minimum type of protection and the bundle of rights that should attach if any and the boundary of protection. For instance, should it include folklore that is already protected in many African countries?

Whilst Sir Victor Uwaifo's *If you see Mamie Water* was derived from folklore, it is an original work in which copyright belongs to Uwaifo. But Channel TV's signature tune *Ise Oluwa* which many consider to be folklore, was actually an original composition of Dedeke and it was not derived from folklore. The longer it takes us to unite and agree on the parameters for identifying and treating TK, the longer we postpone an international agreement.

Second, we must endeavour to raise local and international awareness on traditional knowledge. At the inaugural summit of the African Intellectual Property Group, it was agreed that one of the best ways of selling the concept of traditional knowledge to the West is through the platform of an African Story - Film. I therefore call on Nollywood, African writers, MNET, etc to take this free advice and rise up to the challenge and produce a film that sells the concept of traditional

knowledge to the international community. Mr. Vice Chancellor sir, I hope that the coronation of the new Oni of Ife will serve as an impetus to this film that will sell TK.

7.2 Ekwensi-Sodipo Theory and Selling TK to the West

As explained above, the Ekwensi-Sodipo theory shows that we must eschew practices and beliefs in our African culture that teach us to accept and not to question our surroundings and not to probe. What does this mean for the African Development Agenda in our Knowledge Economy? If the Oracle is right and knowledge is bound to grow, we must create an enabling environment for knowledge to flourish.

We must stop smacking our toddlers for questioning how or why the toys move or make sounds. Second, we must encourage a culture that questions and investigates, rather than accepting that the gods are to blame. To this end, we must encourage the sharing and documentation of traditional knowledge. Third, we must seek to improve our environment. Our educational curricula should encourage innovation, research and development especially of our traditional knowledge.

We must aim to evolve a culture that promotes research and development (R&D). My Oracle instructed us to subdue the earth and replenish it. It suggests to me that the answers to many African ailments and challenges in our environment, our bio diversity. We must encourage studies that ask such questions like: "What is

in the medicinal plants that our grandmas use?"⁶⁶ Our teaching must become more practical by investigating how can we get the active ingredient and improve on the knowledge handed to us by grandpa from the use of our plants and biodiversity?⁶⁷ We must not rely on foreign for too long, we must develop our own remedies. Knowledge will increase even as we aspire to investigate and subdue the world around us, answers will come.

8.0 Promotion of Research and Development R&D Culture

The level of R&D in Nigeria is arguable very low but a discussing of the factors responsible for this⁶⁸ is beyond the purview of this presentation lecture. The Nigerian government is arguably the largest funder of research in Nigeria and the government underfunds research.⁶⁹ Private sector funding for R&D in Nigeria is low and very

⁶⁶ R. Bhat, A. Adeloye, E. Etejere, "Some Medicinal Plants of Nigeria", *J. Econ. Tax Bot* (1985) p.161.

⁶⁷ Ayo Fatubarin, "Plant Biodiversity of Nigeria and our Religions and Cultures in a Changing World", *European Journal of Botany, Plant Science and Pathology* Vol.1, No.3, pp.1-9, September 2014, www.eajournals.org/.../Plant-Biodiversity-of-Nigeria-and-Our-Religions, accessed on October 17 2015.

⁶⁸ Lucky Osaretin Odia, Samson Imasogie Omofonmwan, "Research and Development Initiatives in Nigeria: Challenges and Prospects", *Mediterranean Journal of Social Sciences* Vol 4 No 2, May 2013, 257. Patience F Tunji-Olayeni and Ignatius O Omuh, "Strategies For Improving Indigenous Contractors Participation In R&D In Nigeria", http://eprints.covenantuniversity.edu.ng/347/1/INDIGENOUS_CONTRACTORS.pdf, accessed November 9, 2015.

⁶⁹ Ogunwusi, A.A. and H.D Ibrahim, "Promoting Industrialization Through Commercialization of Innovation in Nigeria", *Industrial Engineering Letters*, Vol.4, No.7, 2014, 17, <http://www.iiste.org/Journals/index.php/IEL/article/viewFile/14178/14486>, accessed November 9, 2015.

few companies spend a noticeable portion of their profit on funding R&D. This is despite the fact that our tax laws permit Nigerian companies to spend up to 10% of their profits for R&D.⁷⁰ Companies that conduct research and development activities that are connected with their businesses are permitted to deduct 20% as investment tax credit on their qualifying expenditure for that purpose where the R&D is conducted in Nigeria.⁷¹ In practice, this works out at 120% of the cost of R&D.⁷² Companies that use local raw materials qualify for 30% tax concession for five years.⁷³

We must pursue and evolve R&D culture in line with my Oracle's instruction to subdue the earth especially as knowledge will increase. Researchers and inventors must engage the private sector in order to deal with the lack of confidence or awareness of their potentials for R&D. Schemes must be driven to promote private sector R&D. We are yet to see any significant local innovation by multinational companies who have large research facilities in some cities abroad. For instance, the cosmetics industry relies heavily on the results of foreign R&D to produce products for Africans in Africa. Very little use is made of our local biodiversity to produce

⁷⁰ S. 26(2) of the Companies Income Tax Act.

⁷¹ S.26(3) of the Companies Income Tax Act.

⁷² <http://www.fmti.gov.ng/about-nigeria/investment-incentives.html> accessed November 9 2015,

⁷³ But the industries must attain the minimum local raw materials utilisation as follows: agro 80% - agro allied 70% - engineering 65% - chemical 60% - petro-chemical 70%. See <http://www.fmti.gov.ng/about-nigeria/investment-incentives.html> accessed November 9 2015.

cosmetics for Nigerians. Our herbalists and traditional healers have significant TK that must be harnessed.

If my Oracle is correct, companies that invest in local R&D may evolve to be major companies in Africa as they will be seeking to subdue the earth with the awareness that knowledge will increase. Companies that ignore this will lose their market share. Africa needs angel investors, venture capitalists and institutions that will take ideas to the market place.

9.0 Lessons from the Patent System

Today, we sell our cocoa to the West in exchange for the finished product chocolate, our crude oil in exchange for and finished petroleum products. This was the situation in medieval Europe. English farmers would shear their sheep and sell the raw material wool to the Flanders of Belgium who turned same into cloths and sold to England at higher prices. Queen Elizabeth I used a legal instrument to reverse this culture of the sale of wool in exchange for cloths at higher prices. The Queen offered privileges in form of *Letters Patent* or open letters to Flemish makers of woollen cloth to come to England on the protection of the Crown provided they taught two sets of apprentices (each set for seven years), the art of making cloths from wool.⁷⁴ That way, the technology was taught. These privileges (which could be annulled

⁷⁴Phillips J., "The English Patent System as a reward for invention: The importation of an idea" (1983)

2 EIPR 41, Vaughan, F.L., *The United States Patents System, Legal and Economic Conflicts in American Patent History*, Norman: University of Oklahoma Press, 1956.

for non-compliance), stipulated the time production must commence, the quantity to be produced and the level of training Englishmen must be given to acquire the new skills.

Like today's *Area Boys*, the guilds of medieval Europe opposed the introduction of new trade into any territory. Each trade was protected by a guild and no new trade could be introduced without interference from the guilds. The privileges protected skilled foreign workers from interference by the guilds and from competition from the guilds. Those who introduced new trade into the territory were able to open their scroll or letter patent that bore the seal of the Crown whenever guilds disturbed them. That was the foundation to the modern patent system.

On the contrary, when the patent system was introduced in many parts of English speaking Africa, rather than promoting local training and manufacture, it was to protect British exports and British patents. This is because most African countries operated a law similar to the Registration of United Kingdom Patents Ordinance, 1925⁷⁵ that was in force in Nigeria up to 1970. The 1925 Ordinance permitted a re-registration of UK patents only. There was no requirement that the UK patent be worked in Nigeria, neither was there any requirement to teach the working of the art of the invention to local artisans. It was an anomaly that local inventors could only obtain local

⁷⁵ No. 6 of 1925, Cap. 182, 1958 Laws of Nigeria and Lagos. This statute only provided for the re-registration of UK patents in Nigeria. The Patents Ordinance, 1916, No. 30 of 1916, Cap. 141, 1923 Laws of Nigeria, predated the 1925 Act but the two statutes were on all fours with the exception of their title.

protection by first obtaining a UK patent,⁷⁶ a weak foundation for R&D and the patent system.⁷⁷ Unlike the UK government that could enjoy compulsory licensing of the patent that would allow the patent to be worked for the public good, Nigerian courts held that this was not possible in Nigeria under the registration of UK patents system.⁷⁸ This negates the very essence of patents, an exchange between a state and an inventor. Further, the absence of a Crown user provision meant there was no balance between the private and public interests in the patent system as introduced.

The court decisions were not welcome by the Nigerian government who responded by passing the Patents Rights (Limitation) Act, 1968.⁷⁹ The 1968 Act granted the Nigerian government and its agencies, powers similar to those vested in the Crown under s.46 of the UK Patents, 1949, to grant compulsory licences for Crown use. Similar powers can be found in Nigeria's 1970 Patents Act.

⁷⁶ Ntagoba, Ntagoba, "In search of the relevant technology for Africa" (1988) *Lesotho Law Journal* 63 note --- *supra*. Compare with Osita C. Eze, "Patents and the transfer of technology - with special reference to the East African community", 5 *East African Law Review* 127 at 136 (1972), who suggests that the re-registration system saves costs which can be applied elsewhere and has nothing to do with sovereignty; Bentley, J.G., "Patents, trademarks and designs in West Africa" *Proceedings and Papers of the Sixth Commonwealth Law Association*, 1980: Lagos.

⁷⁷ Nijar *supra* note 113 at cxcix, notes that the re-registration system in Malaysia was a weak foundation which failed to provide a good infrastructure for the administration of the patents system.

⁷⁸ *Rhone Poulenc and anor. v Lodeka Pharmacy* (1965) LLR 9; *Ciba Ltd v Lodeka Pharmacy Ltd*, 1968 ALR(Commercial) 352.

⁷⁹ No. 8 of 1968. But see a case decided under this: *Welcome Foundation Ltd v Lodeka Pharmacy Ltd & anor.* 1971 All NLR 536.

9.1 Employee Inventor Scheme

If according to my Oracle, Knowledge will increase, then, it is expected that inventive activity will increase. The relevance of patent laws is that employees need awareness of the rewards of the patent system and they must be adequately rewarded where they are inventive.⁸⁰ Unfortunately, Nigeria's employee inventor scheme is not very employee friendly. The right to a patent emanating from an invention made in the course of employment resides by statute in the employer unless the employment contract or other agreement otherwise provides.⁸¹ I therefore call for enlightenment campaigns about the patent system especially at research institutes and universities. It is uncertain if there is adequate awareness of the patent system in these institutions.

The Nigerian Act provides that where an employee inventor 's contract "does not require him to exercise any inventive activity but he has in making the invention used data or means that his employment has put at his disposal, ... he is entitled to fair remuneration taking into account his salary and the importance of the invention".⁸² Where an employee inventor's contract requires him to exercise an inventive activity, he may still be entitled to remuneration if he negotiates such remuneration or if

⁸⁰ See the following for a consideration of arguments on either side of the divide for the USA and the UK employer - employee: Robert P. Merges, "The Law and Economics of Employee Inventions", *Harvard Journal of Law & Technology* Volume 13, Number 1 Fall 1999, pp.1-55; Jeremy Phillips, *Employees' Inventions and the Patents Act 1977*, London 1978.

⁸¹ S.2(4) Patents and Designs Act, 1970.

⁸² S.2(4)(a), Patents and Designs Act, 1970.

“the invention is of exceptional importance, he is entitled to fair remuneration taking into account his salary and the importance of the invention”.⁸³

The Act seeks to safeguard employee inventors in that the entitlement to fair remuneration provided above “is not modifiable by contract and may be enforced by civil proceedings”.⁸⁴ Albeit, this is arguably insufficient as employee inventors may need to resort to court to first determine whether they are entitled to fair remuneration and then establish what is fair remuneration. If employee inventors are to be encouraged, the Act may need amendment to permit relevant professional bodies to determine whether an invention is of exceptional importance and what is fair remuneration, without recourse to law courts.

9.2 Public Needs for Essential Medicines, Food et al

One of the issues that has divided developed economies where most patent owners originate from and developing economies who need access to essential medicines is patents. It is believed that patentees whose essential medicines are too expensive for the public in developing countries hold the latter to ransom. The argument is that the existing creator and inventor doctrine has impact on access to public goods, especially in the field of food, agriculture, health and education hence the debate legal protection that may bridge public interest and private

⁸³ S.2(4)(a), Patents and Designs Act, 1970.

⁸⁴ S.2(4)(b), Patents and Designs act, 1970.

interest continues to rage.⁸⁵ Nigeria developed a response to the problems encountered by government agencies in the Nineteen Sixties, this regime appears to cater for those who clamour for access to cheaper essential medicines, food and the like that are protected by patents in Nigeria. In balancing the needs of the public with the private interests of the patentee, the Nigerian Patents and Designs Act, 1970 has a regime for non-voluntary use of patents.⁸⁶ This can be either by a private party who applies for compulsory licence or by government use. The Act does not limit the kind of sector or nature of the goods for which these non-voluntary uses can be made, hence it is not limited to medicines.

Any time after the expiration of a period of four years after the filing of a patent application or three years after the grant of a patent, whichever period last expires, a person may apply to the Court for the grant of a compulsory licence on one or more of the following grounds: (a) that the patented invention, being capable of being worked in Nigeria, has not been so worked; or (b) that the existing degree of working, of the patented invention in Nigeria does not meet on reasonable terms the demand for the product. However, the patentee may rely on the slow court process to delay or frustrate an applicant for compulsory licence.⁸⁷ For instance, a

⁸⁵ Hayyan ul Haq "Creating Appropriate Legal Framework in the Utilization of Intellectual Property Products", *Journal of International Commercial Law and Technology* Vol.9, No.2 (2014) 69.

⁸⁶ S. Patents and Designs Act, 1970 provides that the provisions of the First Schedule to the Act shall have effect in relation to compulsory licences and the use of patents for the service of government agencies.

⁸⁷ Para. 1, First Schedule Part I, Patents and Designs Act, 1970.

compulsory licence will not be granted in respect of a patent if the patentee satisfies the court that his actions in relation to the patented invention are justifiable in the circumstances, but he shall not be held to have so satisfied the court if he merely shows that the patented article is freely available for importation.⁸⁸

However, the provisions of the government use under the Patents and Designs Act, 1970 are unduly wide and may be abused by political opponents of a patentee. The Act empowers a Minister where he "is satisfied that it is in the public interest to do so, he may authorise any person to purchase, make, exercise or vend any patented article or invention for the service of a government agency in the Federal Republic."⁸⁹

Such Ministerial authority may be given before or after the relevant patent has been granted; (b) before or after the doing of the acts in respect of which the authority is given; and (c) to any person whether or not he is authorised directly or indirectly by the patentee to make, use, exercise or vend the relevant article or invention.⁹⁰ The Ministerial authority exempts the Government; any person authorised; any supplier of the Government or of any such person; and any agent of any such supplier, from liability for the infringement of any patent relating to the relevant article or invention and from liability to make any payment to the patentee by way of royalty or otherwise.⁹¹ This power is exercisable

⁸⁸ Para. 4, First Schedule Part I, Patents and Designs Act, 1970.

⁸⁹ Para. 15, First Schedule Part II, Patents and Designs Act, 1970

⁹⁰ Para. 16, First Schedule Part II, Patents and Designs Act, 1970

⁹¹ Para. 17, First Schedule Part II, Patents and Designs Act, 1970

by a state commission or a federal minister.⁹²The authority can be issued to a government agency, a federal or state ministry or department or local council or a company owned or controlled by the federal or state government or a voluntary agency hospital.⁹³

This provision is hardly ever used. If the Nigerian government was aware of this provision, it could have used it in the recent case where the government agency, Independent Electoral Commission, INEC lost a patent suit based on the Direct Data Capturing machines used for the voter registration exercise and was awarded the stiffest patent damages in Nigeria ever of N17.3 Billion.⁹⁴ The Minister could have authorised the use of the data capturing machines and this could have exempted INEC from liability. The danger in this provision is that it may be abused by political opponents of patentees who abuse the authority to issue.

10.0 Empirical Research and Pre-Colonial Historical Intercourse in Legal Research

Mr. Vice Chancellor Sir, two of the gaps in our legal education in Nigeria must be addressed: the dearth of empirical research and pre-colonial historical intercourse.

⁹² "Minister" means a Minister of the Federation and a State Commissioner "Ministry" means a Federal or State Ministry or Department of Government.

⁹³ A hospital in Nigeria (not being a hospital operated by the government) which is wholly or partly maintained by the Federation or a State by way of grant in aid or otherwise. See para. 23 that defines all these.

⁹⁴ <http://nigeriapoliticsonline.com/patent-infringement-court-awards-n17-3bn-damages-against-inec/>, accessed November 9 2015.

<http://www.premiumtimesng.com/news/154165-court-orders-inec-pay-company-n17-3-billion-damages.html>, accessed November 9,2015.

Most of us analyse law primarily from the doctrinal perspective. This means that we hardly analyse the impact of law with the help of empirical data. The global trend in legal studies today is in the direction of Applied Legal Studies as legal research slowly but gradually inches away from the dominance of doctrinal research.⁹⁵

Providers of university-based legal education are being called to turn their classrooms and law clinics into laboratories in which theory and practice meet. Lawyers and law teachers often suggest why laws are not obeyed or why laws do not work rather than investigate plausible causes by going to the field. If African governments pass IP laws, they may not engender development. Empirical research will aid to addressing lapses that may be identified as IP may need an African face.

Most of us treat the history of different areas of law without sufficient analysis of how our forebears dealt with possible legal issues in those aspects of the law we teach. My investigation into the recognition and protection of intangibles akin to IP has been useful. I commend similar exercise for all aspects of law and call on fellow law teachers to embark on this. We may find principles and practices that will be instructive about how we could deal with the present and the future from how our fathers dealt with them in the past. The teaching of history at the high schools remains imperative and as

⁹⁵ Ayo Atsenuwa, *In Search of Transformative Justice: the Proselytism of Legal Feminism* 2014 Inaugural Lecture, University of Lagos Press.

such, the West African Examinations Council must encourage the teaching and examinations in history.

11.0 Surveillance Security Technology and Communications Technology

My Oracle says that the world will evolve a *big brother is watching you* culture. This suggests that there will be an increase in surveillance and security technology. This has increased since the 911 attack. The tension between laws permitting surveillance security technology such as biometrics, robotics, aerial drones and the like and constitutional rights to freedom and privacy may increase.⁹⁶ Whilst it is not certain whether African will play any significant role in this, it is not impossible that some Africans will seek to draw the past practices and TK by seeking to streamline them as scientific practices. For instance, the taking of oath at the Okija Shrine arguably aided parties to a dispute to determine the truth about issues in contest.

There is TK for ascertaining whether a person is of royal descent. There is TK that ensured that a thief who steals in your house at night will sweep the house till he is arrested at daybreak. There is TK that protected certain persons such that bullets fired at them are either caught by them or are harmless to them. It is not certain whether such TK will ever be treated as scientific to earn a patent or IP right. It is not certain if our religious faith will permit such practices.

⁹⁶ <https://law.stanford.edu/stanford-lawyer/articles/civil-liberties-and-law-in-the-era-of-surveillance/> accessed November 9, 2015.

The phenomenon growth in the telecommunications industry of the Value Added Services (VAS) that provide various technologies and applications that are used on telecommunications platforms is a welcome development. Originally invented for voice communication, the telephone has transited as smart phones to be a computer with several technologies and applications. Some of the technologies that are patented in Nigeria are arguably not new at the time patents are filed, or even may not be patentable. Yet, there is an increase in the number of such patent filings and litigation to enforce the patents. Some appear to specialise in “stealing foreign technology” and filing patents for them in Nigeria with a view to licensing Nigerian telecommunications companies. This practice is going to increase. The telecommunications industry must seek ways to deal with this.

One way to tackle this is to have watch services that monitor patent applications and then to institute pre-emptive actions to nullify such patents on the grounds that they ought not to have been granted in the first place. This is important as the rules of the Federal High Court do not permit defendants to seek to nullify a patent in an action instituted by writ of summons to prove patent infringement. You can only seek to nullify a patent in Nigeria by way of a petition.

12.0 Sports, IP, the Oracle & Development

The Oracle says men will be lovers of self. The sports industry epitomises this position of the Oracle. IP can

play a role in Africa's development agenda in the knowledge economy area of sports. Television rights and sponsorship deals drive sports. There will be no television rights or sponsorship deals without IP. This is exemplified in the copyright in broadcasts, the trade marks in endorsements and merchandising and the exclusive bundle of rights that attach to sporting events. Nigeria can use IP in sports to drive our development agenda. This can be done if the National Broadcasting Commission enforces its Broadcasting Code on the ratio of the Local Content. The Code stipulates that there must be 60% local content. If the Code is enforced and we have local sports as 60% of sports broadcast on our airwaves, Nigeria will witness significant increase in sports revenues. An increase in sports revenues will boost sporting activities, engage idle hands and reduce unemployment significantly.

Let us examine the position with the broadcast of football, especially the English Premier League EPL that is perhaps the most popular sports on our airwaves. Relying on copyright, the EPL generates £5.136bn from domestic broadcasting rights alone. Relying on trade mark endorsements, Barclays Bank paid to own exclusive title rights such that the EPL championship was co-branded and named the Barclays Premiership for 15 years. In the last 3 years Barclays had paid £40 Million annually for this right.⁹⁷

⁹⁷ It had been called Barclays for 15 years: Sam Wallace, Thursday 4 June 2015, <http://www.independent.co.uk/sport/football/premier->

Nigeria paid \$100 Million for broadcast rights to EPL for 2010-2012 despite our population on only 170 Million people and between 200,000 to 400,000 subscribers.⁹⁸ Despite a population of over 1.3 Billion people, China's leading Pay TV firm 'Win TV' paid \$50 million for the exclusive rights to the EPL, for 4 years, 2010-2013. With India's population of 1.2 Billion people, and 20 Million Pay-TV subscribers, ESPN Star Sports paid \$13.5 million for exclusivity to EPL for 3 years for 2007-2009. This means, that together, China and India paid about \$63.5 Million for 3 to 4 years despite the population of 2.5 Billion people. This raises a lot of concern when compared to the \$100 Million paid in Nigeria as the value placed on these IP rights in Asia suggests that we may be overcharged in Nigeria.

If Nigeria paid \$100 Million for the television rights to EPL alone, it leaves to your imagination how much was paid by broadcasters for all international soccer championships broadcast in Nigeria. \$100 Million is equivalent of ~~N~~20 Billion Naira, that is, ~~N~~7 Billion per year for TV rights to EPL for Nigeria. This money is generated from Nigerian companies that advertise during the matches, from Nigerian consumers, the Nigerian public and not from foreign consumers. Is it right, wise or legal that Nigeria should use its foreign exchange to promote foreign soccer leagues? Surely, whatever the

league/premier-league-to-end-15-year-association-with-sponsors-barclays-10298549.html, accessed on November 7 2015.

⁹⁸ www.nairaland.com/484254/dstv-regains-lucrative-english-premiership accessed on November 7, 2015.

excuse, broadcasters are in breach of the Broadcast Code that prescribes that local content must be up to 40% of the sporting programmes on our airwaves.

The leading television stations and leading advertisers need to demonstrate more patriotism especially by not breaching our Broadcast Code. IP has had some impact on soccer in Nigeria, albeit, this can be significantly increased. In Nigeria, Globacom paid N1.896,736,000⁹⁹ to get the right for the Nigerian Premier League to be co-branded as the Glo Premier League for three years from 2013 to 2015 with a fee of N550 Million per annum rising with ten per cent every year.¹⁰⁰ Supersport, part of the DSTV group, paid \$34 Million (N6.8 Billion) for the exclusive television rights to the Nigerian League for four years, from 2015 to 2019 with an addition of \$2 Million (N400 Million) per year for 2013 and 2014.¹⁰¹

This is equivalent to N6.8 Billion in total, and N1.7 per annum from 2015 to 2019. How much of local soccer championship is broadcast in Nigeria? Up until the late Nineteen Eighties, the average Nigerian household in the major cities supported one local soccer team or the other. In those days, it was customary for at least a member of a household in the major cities to watch soccer league on

⁹⁹ One Billion, Eight Hundred and Ninety Six Million, Seven Hundred and Thirty Thousand Naira.

¹⁰⁰ <http://www.gloworld.com/ng/latest-news/glo-now-title-sponsor-of-nigeria-premier-league/>

¹⁰¹ <http://www.goal.com/en-ng/news/4093/nigeria/2013/08/20/4200238/sports-minister-lauds-nff-and-lmc-for-landing-34m-tv-deal> accessed on November 7 2015..

television at least every weekend. This was made possible by the Nigerian Television Authority, NTA. What then happened to us? A full discussion of this is beyond the purview of this lecture. Some say the standard of soccer has fallen hence they prefer to watch foreign soccer. Yet we want our national team to be triumphant in matches. We do not think we owe ourselves any measure of sacrifice in order that local soccer will improve. We did not give any support to Nollywood, yet today, it is a job creation, national brand building and revenue generating industry. If well promoted, sport can be a major job creation, national brand building and revenue generating industry.

To make up 40% of the sporting content on our airwaves, Nigerian broadcasters and content developers will need sporting programmes. I recall with some nostalgia that Stephen Keshi, the immediate past coach of Nigeria's national soccer team, the Green Eagles, came to the lime light when he played for his High School. Nigerian Commonwealth 100 metres gold medallist, Modupe Oshikoya came to the lime light when she competed for her High School.

Sadly, there is very little local sporting content on our local television channels today. It is certainly not up to 40% of the content of the genre of programmes classified as sports. This breach of the Broadcast Code demands immediate remedy. I hereby call on the National Broadcasting Commission to end this flagrant breach of its Code and order that broadcasters, content providers and advertisers should ensure that local sports

must constitute 40% of the genre of programing classified as sports on their air waves. The Nigerian Bar Association, the local sports agencies and ministries and the local clubs and sporting personalities must form a coalition to enforce the Broadcasting Code as a veritable source of making IP influence our development agenda. Join in taking the right step in pursuing the realisation of what the Oracle predicted: men will be lover of themselves - the entertainment industry will flourish.

13.0 Enforcement Issues

In order for the Oracle's prophecies to be fulfilled, IP enforcement must be tackled. I call on the Federal High Court to increase the number of judges and ensure that IP litigation can be given speedy hearing. I urge the Chief Justice of Nigeria to give priority to IP cases, and commercial cases or for the Justices to move for us to have a final Commercial Court of Appeal if they can only give political cases speedy hearing. Foreign Direct Investments is jeopardised by the pace of commercial litigation in Nigeria. I urge Governor Ambode of Lagos to tackle ALABA, the largest counterfeit market in Africa with the help of the police. IP cannot thrive if ALABA in its present form thrives! I urge the National Assembly to pass the various Bills seeking to amend IP.

14.0 My Contributions

1. I cut my teeth as a researcher and academic during my national service as a research assistant to the Dean of Law, University of Ife, Professor J.O. Fabunmi. I wrote

a critic of the first Supreme Court decision on copyright in 1986 and had the effrontery to send a copy to the revered Justice Kayode Eso who was the presiding justice in that case. His Lordship wrote me a letter thanking me for the review of the case and stated that he could probably have come to a different decision had he had seen my paper before the judgment was delivered. One of my lecturers/mentors, Kiser Barnes, an American, was so enamoured by Justice Eso's letter to me, that he urged me to frame it. To this end, Babcock University may need to review the policy that we will not hire Youth Corpers who graduated from Babcock to serve their compulsory one year at Babcock University.

2. As a member of the Copyright Law Drafting Committee 1988, I contributed to drafting the Copyright Act, 1988 and since then I have played prominent roles in assisting with drafting or amending IP and IP related laws and bills in Nigeria.
3. I contributed to the revival or renaissance in the teaching of IP in the Nigerian Law School and some Nigeria universities. In 1989, under the auspices of the law firm of G.O. Sodipo & Co, I organised a series of conferences and workshops on copyright with the British Council and the United States Information Service (now USIA). One of such was a five day workshop that featured the Director General of the Nigerian Law School, Chief - Ibronke SAN, and the

Deans of the Faculty of Law in the University of Lagos, the Obafemi Awolowo University and the Lagos State University. This ignited the teaching of intellectual property in these institutions. For three sessions, I became a visiting guest lecturer at the Nigerian Law School teaching intellectual property law. Some of the first lecturers who laid the foundation for teaching IP in some of these universities are products of the seeds sown by the programmes I organised and my teaching at the Nigerian Law School.

4. **Copyright Notes:** I was the first Nigerian to write a weekly column on intellectual property law in a Nigerian Daily.¹⁰² The intellectual property bar criticised this as IP was a closed bar and a closed door. I was accused of sharing knowledge freely and this led me to question the wisdom behind my column. I now know better today, with the benefit of hindsight. The Oracle says “Give and it shall be given unto you, good measure pressed down shaken together and running over”, I was not sure whether the pro bono services I rendered then did not generate my scholarship for a Ph.D in IP at Queen Mary, University of London.
5. **Traditional Knowledge movement:** Between 1993 and 1995, I demonstrated that there were concepts akin to intellectual property rights in traditional Nigerian society and this was alluded to by Ida for

¹⁰² The Nigerian Vanguard.

Malaysia and Maniatis for Greece. This has inspired several Ph.Ds in the field and is endorsed by WIPO. It has accentuated the call for an international instrument for traditional knowledge. This is circumscribed by some dangers. Our Babcock Ph.D class (International Law and diplomacy) in cultural property identified sites that are used as rituals that are arguably cultural property that should be preserved rather than pulled down on the grounds of Christian faith's abhorrence to idolatry. We must seek how we will deal with issues of conflict of faith with TK.

6. **Regulatory Advocacy:** I have acted as a consultant and or advisor to regulatory agencies in the IP sector including the National Broadcasting Commission, the Registries of Trade Marks, Patents, and Designs, the National Agency for Food and Drug Administration and Control NAFDAC and the Nigerian Copyright Commission.
7. **Judicial Advocacy:** I have participated and directed several capacity building programmes for the Nigerian judiciary especially in the area of IP and allied rights.
8. **African IP movement:** I birthed the African Intellectual Property Group (AIPG) which is an African voice for IP issues in Africa comprising

membership from over 20 African nations. I am currently the C-Chair of the AIPG.

9. **Administration of IP:** As leader of the Intellectual Property Law Association of Nigerian, IPLAN, through the association, I have been at the fore of lobbying for reforms in the law, administration, adjudication and enforcement of intellectual property laws in Nigeria. NCC.
10. **Advocacy in Court:** through advocacy in the courts, I have contributed to cutting edge cases expanding frontiers of law in this area.
11. **At Babcock University:** I served as head of department for three sessions and as a dean for two sessions. I am a member of the Senate and several of committees. I have served on panels and I have supervised Ph.Ds and several undergraduate dissertations. Most of the Babcock Law graduates who have an LL.M or are pursuing an LL.M are specialising in IP or allied rights. I am glad I inspired them.
12. As academic, apart from teaching and writing, I have been external examiner for Ph.Ds and assessed Professorship positions in private and government universities in Nigeria and abroad.

15.0 Acknowledgements

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I thank my teachers at the University of Ife, Professor Sagay SAN, Professors Ijalaiye, Adediran, Okorodudu-Fubara, Fabunmi, (and the younger ones then), Professors Wale Ajai, Popoola, Ikariale and *Jingo*, Dr. Fasina; my teachers in University of Lagos for my masters, Emeritus Professor Agbede, Professor Omotola, Senator Professor Osunbor, Professor Akanki. I thank the supervisors of my Ph.D thesis, Professr Gerald Dworkin and Emeritus Professor Alison Firth, my external examiners, Professor Lionel Bentley and Professor Allison Coleman; I am grateful for the inspiration I received from Professor Jeremy Phillips, Professor Sir Robin Jacob. The team that undertook the Ph.D in IP my college from 1990 to 1997 are dispersed in leading academic institutions in Europe and Asia. They were and they remain a source of

inspiration as we check on each other's progress and boast about our productivity. I must mention Professors Spyros Maniatis QMUL, Professor Uma Suthernassen QMUL; Professor Anselm Kamperman-Sander (Maastricht); Professor Ida (Malaysia), Professor Lim (Malaysia). Our latest fad is: "How many Ph.Ds candidates have you produced?" We boast about the exploits of our students, how they finish and excel and certainly not about how we torture them, because it is not our culture! I have commended the spirit we had to my Ph.D group everywhere I go, you must bond together as the Ph.D programme is a lonely journey.

I thank the members of the Inaugural Lectures Committee without whom this would not have been a reality, for their various suggestions and guidance especially Professors Onajobi, Omolewa, Akinboye, Alegbeleye, Akinsoyinu, Tayo and Dr. Ayodele. I also thank Dr. Adam and his team members Charles and Osaro at BU Press for the excellent work done.

I thank my parents, late Chief Gabriel Sodipo and my mother, Chief Mrs. Janet Adenike Sodipo for laying the foundation and nurturing me. Although I never gave them any problem, I was a very sickly kid, "*ko ji na de inu*" that is, he was not fully baked when he was born, but they showered me with love. I thank my siblings, Dr and Dr. Mrs. Kolawole and Titilade Sodipo; Mr and Mrs Victor and Folasade Famakinwa, Mr. and Mrs. Segun and Bolaji Ajayi and Mr. & Dr. Mrs. Yinka and Lawunmi Tomori.

I thank the partners, associates and paralegals of the law firm G.O. Sodipo & Co., for giving me such time off that I can give my contribution to the academic world at this level. In particular, I thank Mr. Fajolu and Mr. Ozoma. I am indebted to my in laws, and most especially to my friend, my precious jewel, my lover and wife, Mrs. Uhunoma Osaro Olusegun Sodipo aka *Auntie Noma*, who has made me grow younger over the years because of her wisdom, tender love, peace, and patience. I hope to release my love song that I sang on our wedding day 25 years ago in a hit single very soon. I thank our children, Olikoyejo, Abisoye and Akintoye who are most wonderful. You make us so fulfilled. To the Oracle, the Teacher who speaks, guides and guards, I will keep consulting.

16.0 Conclusion

Mr President and Vice Chancellor sir, I have reached the end of my lecture. It is my hope that some of the strands drawn by this lecture will generate future research, more thinking and a renaissance that will channel development in Africa.

Previous Inaugural Lectures

- 1. Seventh-day Adventist Church in Nigeria since 1914: An Impact Analysis**
Lecturer: Prof. David O. Babalola
Date: Thursday 2nd December 2010
- 2. The truth about truth: Postmodernism and its Epistemological Implications for Christian Education**
Lecturer: Prof. Ademola S. Tayo
Date: Thursday 5th February 2015
- 3. Food for Thought in Thought for Food: Conceptual Genius of Local Ingredients in Global Diets and Food Habits of African Population**
Lecturer: Prof. Yetunde Olawumi Makinde
Date: Thursday 2nd April, 2015
- 4. One Kingdom, Many Kings: The fungi-once sidelined and maligned, now irrepressible and irresistible**
Lecturer: Prof. S. Dele Fapounda
Date: Thursday 7th May 2015-11-03
- 5. The Hand that Handles the Scalpel**
Lecturer: Prof. Iheanyichukwu Okoro
Date: Wednesday 10th June 2015-11-03
- 6. Parasitic Infections: Challenges of Control and Eradication in Public Health**
Lecturer: Prof. Dora Oluwafunmilola Akinboye
Date: Thursday 15th October 2015

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