



# **CONTEMPORARY ISSUES IN INTELLECTUAL PROPERTY LAW IN AFRICA**

Edited by  
Olasupo Owoeye



# Contemporary Issues in Intellectual Property Law in Africa

This book discusses the impact of intellectual property and international investment agreements within Africa. It investigates how African nations can enhance their current intellectual property legislation across various regions of the continent, while simultaneously fostering the development of local industries and stimulating innovation and creativity within the region.

Despite intellectual property remaining a major issue in global trade governance, African countries have room to maximise the advantages that global intellectual property law can offer. Highlighting discourse on investment, intellectual property, and competition policies in Africa, the book underscores the need for African nations to develop intellectual property frameworks that can facilitate economic transformation. Using data from international intellectual property conventions, WTO dispute settlements and African regional organisation conventions, the book is a comprehensive call to action for African intellectual property lawyers and policymakers.

The book will be of interest to students and scholars in the field of intellectual property law and international investment law.

**Olasupo Owoeye** is Senior Lecturer in Law at Massey University, New Zealand, a stipendiary Researcher at Max Planck Institute for Innovation and Competition Law, Munich, Germany and a Professor of Law at Lead City University, Nigeria. He is a law academic with research expertise in Intellectual Property Law and International Human Rights Law, especially Health and Development Rights. He was a Humboldt Research Fellow and Humboldt Alumni Fellow at the University of Augsburg, Germany between 2015 and 2023. He was also a Visiting Scholar at SOAS University of London in 2023. He is the founder of LAYEBS LAW, a law practice with offices in Australia, Nigeria, and New Zealand.



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**Edited by Olasupo Owoeye**

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**Dedicated to**

**Geoffrey Jideofor Kwusike Onyeama**

***BA (Cambridge); LLM (LSE); MA (Cambridge)***

***Former Minister of Foreign Affairs of the Federal Republic  
of Nigeria and Former Deputy Director General of the World  
Intellectual Property Organization***



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# Preface

Intellectual property rights reward innovation and creativity, and they are generally considered important to sustainable economic development. While the protection of intellectual property is essential to spurring innovation, intellectual property must also be designed to accommodate the protection of social welfare to ensure a fair balance of rights and obligations. The Agreement Establishing the African Continental Free Trade Area entered into force on 30 May 2019, thereby creating the African Continental Free Trade Area with a population of about 1.3 billion people.

The objectives of the African Continental Free Trade Agreement include fostering sustainable and inclusive socio-economic development, structural transformation, and industrial growth on the continent. Attainment of these goals requires the implementation and enforcement of intellectual property frameworks that are carefully designed to make Africa a desirable destination for foreign direct investment, international trade, and technological innovation while ensuring that the social welfare and public interest objectives of African states are adequately protected.

Bringing together a wide range of contributors based in research institutions in different parts of the world, including Australia, Canada, Germany, India, New Zealand, Nigeria, the United Kingdom and the USA, the book addresses some of the contemporary issues in the field of intellectual property law that are of immense significance to Africa's sustainable development goals.

The book examines the nexus between intellectual property and international investment law and how transnational investment treaties voluntarily entered into by states may substantially deprive them of the ability to use a number of the public interest flexibilities otherwise available to them under international intellectual property law. The book further examines intellectual property, health governance, and public health debates, with further calls for action in addressing the challenges that IP may pose to access to medicines and public health in the region. The book equally examines how the use of blockchain technology may be helpful curtailing trade in counterfeit drugs in Africa. The patentability of inventions made by artificial intelligence is discussed, and the need for reforms to address the gap in patent law is highlighted. The book also covers the adequacy of copyright law in dealing with works made by artificial intelligence as well as the authorship rights of journalists in relation to works made in the course of their employment.

While the book has only addressed a few of the several issues that African states will need to consider in using intellectual property to foster innovation and economic growth on the continent, the aim of the book is to promote further engagement with the issues raised by policy makers and researchers with interest in intellectual property law in Africa.

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# Introduction

## An Overview of Contemporary IP Issues in Africa

*Olasupo Owoeye*

With a population of over one billion people, Africa has the population and the market to achieve substantial economic growth and development. Even though intellectual property continues to be a major issue in the global governance of trade, African countries have a lot more to do to maximise the benefits the global intellectual property system may offer. While IP can contribute significantly to socio-economic development, Africa has not benefitted much from intellectual property economically, largely because of its low contribution to the global innovation landscape.<sup>1</sup> The low contribution of Africa to the global innovation landscape has been attributed to a number of factors, including dependence on government and foreign aid for funding R&D and weak intellectual property enforcement structures, as well as a challenging investment climate.<sup>2</sup> IP may play a prominent role in enhancing sustainable development and economic growth in Sub-Saharan Africa if the right policies and structures are put in place. The challenges IP may pose to the promotion of public health have been of significant international interest for decades, and the recent COVID-19 pandemic has brought the issue to the forefront of the global IP policy formulation discussion again. It is also of note that the entry into force of the African Continental Free Trade Agreement is a development that offers great prospects in relation to African economic growth. With ongoing discussions on investment, intellectual property, and competition policy under the African Continental Free Trade Agreement, it is important for African countries to devise intellectual property frameworks that can facilitate economic transformation on the continent.

The International Monetary Fund in a recent report observed an abrupt interruption in Africa's economic recovery, which it attributes to the spillover effect of the worldwide slowdown in economic growth, tough global financial situation,

1 Soumitra Dutta, Bruno Lanvin, Lorena Rivera León and Sacha Wunsch-Vincent, *Global Innovation Index: What is the Future of Innovation Driven Growth?* (World Intellectual Property Organization;2022)48.<https://www.wipo.int/edocs/pubdocs/en/wipo-pub-2000-2022-en-main-report-global-innovation-index-2022-15th-edition.pdf>.

2 See World Intellectual Property Organization (n 2) 84.



and volatile state of commodity prices worldwide.<sup>3</sup> Intellectual property equally enhances investment in the commercialisation of innovative products and processes while spurring creativity. Thus, intellectual property is an essential part of a conducive investment climate.

The book explores contemporary issues relating to intellectual property and international investment agreements as they affect Africa. The book examines how countries may strengthen existing regimes for intellectual property protection on different parts of the continent while promoting the growth of local industries and spurring innovation and creativity.

In Chapter 1, Emmanuel Kolawole Oke spotlights the nexus between intellectual property and investment law with particular focus on the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment. He notes that while both intellectual property and investment law can spur direct foreign investment, they could also constitute impediments to the attainment of public interest objectives. He highlights the need for states to ensure their international investment agreements do not limit their ability to adopt necessary public interest measures in pursuit of their national development objectives. Oke notes that only intellectual property assets that constitute ‘significant contribution to the Host State’s sustainable development’ may amount to investment under the AfCFTA Investment Protocol. Oke opines that the Protocol provides sufficient safeguards for African states to adopt measures in public interest where necessary in relation to the expropriation standard. He observes that the exclusion of the fair and equitable treatment standard under the Protocol would allow African states sufficient policy space in pursuing national interests. He equally highlight the challenges that the ‘Administrative and Judicial Treatment’ standard of the protocol could pose to the right of states to self-regulate.

In Chapter 2, Dominic Npoanlari Dagbanja, Brett Kenneth Davies, and Sadhvi Sinha explore the intellectual property and investment narrative further by examining how international investment agreements signed by African states may create public health challenges with the use of flexibilities relating to compulsory patent licensing otherwise available to them under international intellectual property law. By examining the compulsory licensing regimes operative in Ghana, Nigeria, and South Africa, they highlight how compulsory patent licensing measures may potentially conflict with obligations under bilateral investment treaties. They propose reforms to investment treaties that preserve the rights of African states to pursue legitimate public interest objectives through the use of compulsory patent licensing.

In Chapter 3, Oladapo Fabusuyi further builds on the investment and intellectual property discourses by noting that there are reforms underway in Africa to ensure that direct foreign investment aligns with the pursuit of sustainable development

3 International Monetary Fund, ‘Regional Economic Outlook’ in *Sub-Saharan Africa: Living on the Edge* (2022) vi. <https://www.imf.org/en/Publications/REO/SSA/Issues/2022/10/14/regional-economic-outlook-for-sub-saharan-africa-october-2022>.

and highlights how such reforms may be used to foster public health objectives. Fabusuyi notes, for example, that the Revised Investment Agreement for the COMESA Common Investment Area (CCIA) 2017 excludes intellectual property from the definition of investment and that the Morocco-Nigeria BIT 2016 contains sufficient safeguards for public health measures. He argues that African states must ensure they define expropriation, the fair and equitable treatment standard, national treatment principles, and the most favoured nation standard in a manner that preserves the legitimate public health objectives of African states.

In Chapter 4, Anu Adeyemi delves into the negotiation history of the TRIPS Agreement and how African states were marginalised in its making, resulting in asymmetrical provisions that continue to foster inequality, especially in relation to access to medicines for populations in African states and other developing countries. Adeyemi adopts a jurisprudential discourse to examine the power asymmetries that characterise the making of the TRIPS Agreement and how the recent COVID-19 pandemic is one of many examples highlighting its challenges in promoting public health in Africa.

In Chapter 5, Tolulope Adekola builds on the intellectual property and access to medicines discourse by accentuating the importance of local pharmaceutical production on the African continent. He observes that the COVID-19 pandemic brought to the fore once again the unresolved tension between incentivising innovation through intellectual property protection and facilitating access to medicines. Adekola places a spotlight on the mRNA technology transfer hub initiative of the World Health Organization in the wake of the COVID-19 pandemic. Adekola explores how local production has become a desideratum in guaranteeing equitable access to medicines.

In Chapter 6, Kunle Ola discusses the COVID-19 vaccines waiver adopted by the Council for Trade-Related Aspect of Intellectual Property Rights (TRIPS) on 17 June 2022. He notes that while the waiver has the potential to significantly boost access to COVID-19 vaccines in the Global South, the full realisation of the objectives of the waiver may be hindered by the lack of significant manufacturing capacity in most African countries. He argues that the continent should place more emphasis on building pharmaceutical capacity and strengthening the regional trade in pharmaceuticals.

In Chapter 7, Uchechukwu Ngwaba discusses the need for African states to adopt regional strategies in engaging with global frameworks for health governance. He posits that the global architecture for health governance is ill suited to the health and development needs of African states. He notes that economic constraints can make it highly daunting for most African states to deal with transnational health threats on their own and recommends a regional approach in dealing with public health governance as well as the use of the TRIPS flexibilities in Africa.

In Chapter 8, Ezinne Mirian Igbokwe discusses intellectual property and the need to combat trade in counterfeit pharmaceuticals through the use of block-chain technology. Igbokwe notes that trade in counterfeit drugs is an acute public health challenge in Africa which is largely due to weak regulatory and enforcement mechanisms. She highlights the grave implications of substandard and falsified

medicines for public health in Africa and makes a case for the use of blockchain technology for the detection of counterfeit drugs in the African pharmaceutical supply chain.

In Chapter 9, Olasupo Owoeye and Omolara Ajayi examine the patentability of artificial intelligence inventions in Nigeria against the backdrop of international developments in the field, with particular focus on judicial and administrative decisions from South Africa, the USA, the United Kingdom, Australia, and Germany. They note that while patent law generally requires human inventorship for patentability, the increasing significance of artificial intelligence in innovation has made legislative reforms recognising AI inventions exigent.

In Chapter 10, Oluwatobi Victoria Taiwo discusses the protection of works created by artificial intelligence using the legal frameworks in South Africa and the United Kingdom. Taiwo observes that in neither jurisdiction does copyright law specifically extend to works generated by artificial intelligence and makes a case for legislative intervention to address the gap in the law. She highlights the inadequacy of copyright's originality test in dealing with works created by artificial intelligence. She advocates reforms that take into account artificial intelligence creativity while recognising the risks it might engender.

In Chapter 11, Oluwaseyi A. Leigh discusses copyright ownership of photographic works made by employees of media institutions based on a comparative analysis of Portuguese and Nigerian law against the backdrop of the copyright case between Portuguese photojournalist Francisco Leong and French media giant Agence France Presse. Leigh notes that Nigerian law did not adequately protect the authorship rights of employees of media houses before the Nigerian Copyright Act was amended in 2022. He expresses disappointment at the fact that the Nigerian Copyright Act 2022 missed the opportunity to address the problem and makes a case for further reforms to provide more clarity on the subject.