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Interview by Sara R. Benson and Siyao Cheng

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An Interview with Anthony C.K. Kakooza, J.D., Ph.D.

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Abstract

In this insightful interview, Anthony Kakooza engages in a comprehensive exploration of legal frameworks and their intersection with traditional cultural expressions (TCEs). The dialogue, facilitated by Sara R. Benson and Siyao Cheng from the Journal of Copyright in Education and Librarianship (JCEL), delves into a nuanced analysis of the role that copyright law plays in protecting TCEs. The conversation extends to encompass a wide array of topics related to the ongoing debates surrounding TCEs. Specifically, Kakooza addresses the prevalent misunderstandings associated with TCEs and sheds light on the intricate challenges posed by a regional framework for TCE protections. Furthermore, the conversation navigates to the merits of the *sui generis* approach to TCE protection and explores the implications of adopting a legal framework for indigenous communities and their TCEs. Drawing on Kakooza's educational background and field experience, the interview serves as a valuable reference for readers aiming to grasp the complex dynamics between legal mechanisms and the protection of TCEs.

Keywords: copyright, traditional cultural expressions, intellectual property, *sui generis*, indigenous communities

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Introduction

On January 11, 2024, Sara R. Benson (Guest Editor) and Siyao Cheng (Associate Editor) of the *Journal of Copyright in Education and Librarianship* (JCEL) engaged in a conversation with Anthony Kakooza regarding his insights into the legal framework and its significance in protecting traditional cultural expressions (TCEs). Anthony Kakooza, a visiting professor at the University of Illinois College of Law since 2011, imparts specialized knowledge through courses on intellectual property (IP), traditional knowledge, and TCEs. He has also been involved in extensive consultancy work for the World Intellectual Property Organization (WIPO). The interview, based on Kakooza's rich educational background and field experience, addresses some key debates surrounding TCEs. The content and flow of the interview have been carefully edited for coherence.

What kind of work have you been doing related to traditional cultural expressions in the legal field?

When I completed my doctorate in 2014, I immediately returned to Uganda. I was a Dean of one of the law schools here, but I started consulting with the Ugandan National Intellectual Property (IP) Office. I remember a particular conference I attended, and I was presenting a paper. Some people in the audience invited to help with the conference preparation were from the World Intellectual Property Organization (WIPO), including Director Wend Wendland. He was interested in my presentation in particular because I provided some empirical evidence about traditional cultural expressions (TCEs), which can be rare in the field. From then on, WIPO began inviting me to help develop a strategic action plan for Ghana because Ghana and West Africa were trying to put together legislation in the area of traditional knowledge and cultural expression. Therefore, I've visited those countries a number of times on behalf of WIPO to help with their strategic action plan in the area of traditional knowledge and TCEs.

I was hired as a consultant to assist my home country of Uganda in developing a strategic action plan towards legislating on cultural expressions and traditional knowledge leading up to legislation in that area. The same is true for the country of Malawi in Southern Africa. I've also done many workshops with WIPO in the past nine or ten years. Most recently was December. It was an online workshop for the Eastern and Southern Asian countries to come together, and they also wanted to think about how they could have a regional instrument for traditional knowledge and cultural expression. So again, I was contacted by WIPO to make a presentation on documenting traditional knowledge and cultural expressions.

Are there any misconceptions about traditional cultural expressions that you are aware of?

Yes. The biggest misconception, which is quite unfortunate, comes from Western IP enthusiasts. When I say Western, I am referring to countries like Canada, the United States of America, and Western Europe, which tend to consider traditional knowledge and cultural expressions as IP in the public domain. I've attended a number of Intergovernmental Committee on Intellectual Property and Genetic Resources, WIPO Traditional Knowledge and Folklore (IGC) meetings for the past year and a half as a co-chair of the group of experts to guide the IGC on key issues to deliberate on

traditional knowledge and cultural expression. Thus, when we've been having these meetings, most of the misconceptions that come out are that these are IP and have gone into the public domain, but individuals that represent indigenous groups or the indigenous communities do not want to look at them as such. I understand where they're coming from, saying these are not IP; it's part of our culture, the way we express our culture through our skills, leading to the traditional knowledge or the mere expressions of our culture, poetry, and art. If you call it public domain, that means it's free for anyone to use, but that's not what Indigenous Peoples want. That's the biggest misconception out there.

Another one is to look at traditional knowledge or cultural expressions as belonging to individuals who use their communities to display them. This is something that has to be appreciated from a case-by-case study because I've looked at some communities, particularly from the Aboriginal communities in Australia, where they have a system in place in which they give their blessings to specific individuals to display art that tells stories about the culture of these people. Therefore, some would perceive this as an individually owned IP or copyright, whereas to that group, it is still considered a cultural expression from the community rather than an individually owned expression.

What is the relationship between copyright law and traditional cultural expressions?

There's a close relationship. For example, there are Aboriginal ethnic communities in Australia, and part of the cultural heritage is that they have specific artistic people within the communities that they allow or authorize to display their art through barkcloth. When looking at this barkcloth with beautiful designs, you would say this is copyrighted. As an outsider, you would consider it copyrighted because it's been done by an identifiable person, but to them, they look at this as communal cultural expression. So, our understanding of copyright has been placed into some material forms or fixed forms, and that's our general perception of copyright. However, someone from a specific community would say we don't have an individual to connect to this expression. It's community owned. It's a very thin line; when you understand certain things as community-owned, you speak about cultural expression. However, when you look at them as something created by an individual, such as a song or a piece of art, then you are talking about copyright.

Now, the confusion in the modern-day world, which goes back to the question about misconceptions, is that we have certain creative people within particular communities. In those communities, some folk tales or poetry can be hundreds of years old, and they pick from these tales and poems and may turn them into rap songs. If they go to the studio, add some beats, and release a song, they will be considered the owner of that song. They are considered the author of that song, so it's their copyright. In fact, this was one of the case studies in my doctoral thesis. The Ugandan president was campaigning for presidential elections, so he picked two poems from his community, added some beats to them, and produced a song out of it, a rap song, and he owned the copyright. Copyright, in a way, can be looked at as derived from TCEs, and that's a close relationship between the two.

Currently, there is no clearly defined international legal protection for the use of traditional cultural expressions. Do you think that the current formal IP system, including copyright law, can offer adequate protection over traditional cultural expressions, in general?

It's a really tough one. The general answer would be no, that we can't use the IP regime or IP system to protect TCEs because, in a broad sense, IP is individually owned. You have a person as

a human being, or you even have a company or an institution that's also considered a person as a legal entity. When such a person files for copyrights, the duration kicks in. Of course, we know that copyright starts with placing it into a fixed form; that's when copyright kicks in. But in the US system, and even in my home country of Uganda, registration is helpful. Registration is part of the evidence, so from the time you create the copyright in the US, of course, we know that the duration is 70 years after the death of the creator, or if it's a company, it's 90 years from creation.

In Uganda, it's currently 50 years from the death of the owner—the life of the person plus 50 years in duration. For TCEs, on the whole, you do not know who created them; they're just some expression that has been there for so many years, maybe even a hundred years or even more. It's just that communities identify with it, and they take it as part of the display of their culture. It becomes difficult to rely on the corporate regime to start protecting cultural expressions because the communities that identify with the cultural expressions or even own them do not want to say that their culture will expire. Their culture doesn't have a duration. It grows as opposed to diminishing. That's a major aspect of it. The duration is only one factor.

The second thing that is intertwined with that is the fact that this is a general community that owns the quasi-IP as opposed to having one person or a company or an institution owning a copyright. Because of those differences, it becomes very difficult to rely on the copyright regime. To an extent, there have been arguments about maybe using geographical indication protection, but that is more in the sense of traditional knowledge as opposed to TCEs because there are many synergies or similarities between how geographical indication protection comes about and how you can have protection in the sense of traditional knowledge.

What are some of the challenges to the development of a regional framework for the protection of TCEs?

The major challenge, especially coming from developing countries, is that most developing countries share a historical element of having been colonized. The former colonial masters divided the boundaries between these countries for convenience's sake. In the United Kingdom, for example, there was what they called the Berlin Conference. In the 1880s, different colonial masters in Europe met in Berlin and divided different chunks of Africa amongst themselves without even really knowing where these places were. When you get to the ground, you will find that one community had been split up in two, with Colonial Master England taking one branch and Colonial Master France taking another. But with the same community, same father, and same mother with kids, some of them were falling into one country, and others were falling into another. That also affected communities; large communities were split up by these boundary divides. Now that it is 2024, many of these countries are saying that they want to start protecting their cultural expressions and their traditional knowledge, which are tied to these communities.

However, that becomes difficult when part of the committee is in one country that does not prioritize protecting the TCEs, and you have the second part of the community falling in another country where they prioritize this priority. There's a multitude of examples in Asia, Africa, and West Africa; we have the Akan community, which is well known for the Kente cloth. We've seen the Kente cloth used even in movies such as *The Black Panther*. The Akan community is in Ghana as well as in the Ivory Coast. However, the majority of this community falls in Ghana. Ghana has a national folklore board pushing for the protection of TCEs, whereas the other part of the Akan community in the Ivory Coast is not bothered about this. They're not following up on it. The Ivory

Coast was colonized by France, and Ghana was colonized by Great Britain or England. That becomes a problem.

We have the same problem in East Africa. You have the Maasai community; 90% are in Kenya, and 10% are in Tanzania. Over a hundred forms of cultural expressions amongst the Maasai have been misappropriated by so many countries and communities rather than companies. How do you start protecting something where the complainants or the communities would come out to say that this belongs to us and needs a legal framework to back them up, but a legal framework only exists in one country and not another? It becomes quite a huge challenge for them.

The other challenge I would probably think of is we've become too modernized in a way that there's a cultural erosion, not a stagnation, but a cultural erosion. In some places, the youth are not as embracing or appreciative of their cultures as their parents or grandparents. Sadly, this can be part of why some cultural expressions may die away with certain people.

There is a discussion of a sui generis approach to protect traditional cultural expressions, not based on copyright law. Is there any support for such a perspective?

With the research that I've been doing across different parts of Africa and Asia, the majority of opinions are that a sui generis approach would be the best because sui generis is really about having a unique kind of legislation that is not so skewed in one direction or another but looks into the current situation and how it can be applied or looks into the current circumstances or environment, and how one can apply specific legislation to protect TCEs for that. I've seen it work with Zambia. Zambia has one of, to me, not perfect, but one of the best legislations on TCEs, and they cater to the three key players or stakeholders. What are the government's interests in cultural expression? What are the interests of the communities within the state, the indigenous people, and the ethnic communities? Finally, what are the interests of the users? The users may be people within the country who do not belong to one community or another, or there may be foreigners who come into the country and want to utilize native poetry, art, or any other things. If you cater to these three different categories of stakeholders in a unique setting, as long as you consider prior informed consent from communities and you enter into some sort of licensing agreements with them, *and if* the government comes in and represents them because many of these communities are not legal entities and don't have the right to sue or to be sued, then every stakeholder will be happy. That's where a sui generis approach comes in and can serve the purpose.

What would be the immediate and long-term implications of adopting legal instruments for indigenous communities for traditional cultural expressions?

Studies show that indigenous communities are amongst the poorest of the poor, so they're rich and yet poor—rich in the sense that they have a richness of culture that they can utilize in changing their economic status, but then poor in the sense that they do not have any financial assets to speak of or infrastructure to help them through. When we bring to light their cultural expressions and the way they perform certain annual festivities, we can compare these to what we know about the Brazilian festivals, the Chinese New Year festivals, and various festivals amongst different African communities. Tourists love to come and attend and watch these festivals. When tourists come in, and that's foreign exchange, they can use their money within the local setting, and the local people benefit from this foreign exchange.

Documenting the cultural expressions of various art forms, such as photography, as long as it's not breaching their sacred norms, can help them capitalize on this market and their products, but they also get to advertise to the rest of the world. The people out there would get to know that there's this committee in this country. I would want to be one of the people who go and visit them next year. I can see these festivals face-to-face as they're happening, so all that is bringing a lot of foreign income, much-needed income, into these committees where they are. It would help those who are not employed to be part of these festivals and also get to partake in or display their cultures, but it also helps them know that they should value their cultures more. Therefore, the short term is that you have all this influx of foreigners with the foreign exchange that helps, but then, in the long term, it goes back to the challenge I mentioned earlier, that the youth are not so appreciative of their cultures, but in this way, they begin to appreciate their culture. They begin to see all this value in our cultures, the history of our forefathers, and things of that nature. If they get to study this as information being passed onto them from their parents and grandparents, having this place within the national curriculums to understand their cultures can serve a long-term benefit.

How do you think the global landscape for traditional cultural expressions will change if an international instrument for protection is developed or passed?

The global landscape would be more balanced if we get regional or international instruments or protection of cultural expression because, as things are right now, so much of the talk or the focus is skewed in the direction of IP rights; IP rights need to be protected, they need to be valued, and so on and so forth, which is more about the song coming in from the West. It's more about how IP equates to Western civilization and how IP has helped Western cultures to develop at humongous levels. The US thrives on music and movies, all of which are part of the IP system. However, when you have developing countries from South America, Africa, and Asia that are rich in cultural heritage but very poor in IP, when you have legislations that help them protect their cultural heritage and start benefiting from tourism and other things that I've mentioned, it also lifts them economically. They present their quasi-IP through cultural expressions and traditional knowledge. Anyone from the IP dimension who wants to come and tap into the cultural expressions needs to go through certain parameters or directions as directed by legislation or international instruments; then, such a person gets to respect this and value their economies. It becomes more balanced in that way, and it's something that we all wish for.

There's a diplomatic conference on genetic traditional knowledge this summer. Do you think the movement ahead in that particular area will help move the TCE discussion forward? Or are they completely separate?

When things started with the first IGC in 1999 and 2000, part of the negotiations and discussions was to have one instrument that protects genetic resources, traditional knowledge, and TCEs or traditional workload. As the years progressed, they started seeing more of the differences between the three as well as the similarities. What picked up very fast, however, was the draft instrument on the protection of genetic resources, and this has moved so fast that we feel and believe it's at the tail end. We believe that the diplomatic conference will be very successful, and a new instrument will be created on genetic resources. By all means, and without a doubt, it'll also speed up the

other two instruments—the one on traditional knowledge and the one on TCEs. When you look more at the similarities between the three than the differences, those similarities will help push for a faster instrument of TCEs.