

WIPO : Frontier Technologies and IP Policy

Intervention Topic: As a group of young lawyers and law students running a platform for discussions on tech law and policy through articles written by marginalized groups, we would like to provide an understanding of how value is attached to data in the IP regime across the global south. Through this intervention, we intend to provide insight into the cultural nuances in regulatory responses which tackle disruptive technologies and its impact on data access and ownership.

I. Introduction:

The genesis of intellectual property rights stemmed from the Industrial revolution which was itself marred by various cultural approaches. The concept of property rights, as explained in the Lockean Theory, is influenced by the religious and political considerations in its backdrop. Thus, it would be easy to appreciate the cultural influences on regulatory regimes. This problem heightens when regulators frantically try to extend the application of traditional laws to advanced technologies, while ignoring the ground realities of the society. Through this intervention, r-TLP intends to provide insights into the cultural nuances in regulatory responses which tackle disruptive technologies with specific reference to the Global South perspective. The regulatory environment of countries which collectively form the Global South often tends to be sidelined in the mainstream narrative on technology law and policy. These countries, though culturally diverse, often face similar social, economic, and political hurdles in their development. For this reason, our intervention focuses on the current regimes governing data and IP in these countries. In our submission we look at how the regulation of data and IP, both separately and at their intersection, is not best suited for the needs of these countries even sans disruptive technologies.

2. Nuances in exposure to innovation as a community:

The digital age comes with its own set of challenges in the realms of data privacy, infrastructural functionality and cultural responses. In the following section, the authors sketch out the variations in IP regulatory regimes across different regions of the Global South vis-à-vis exposure of their population to innovation and big data opportunities.

a) Latin America:

In order to attach a specific value to the treatment of data in the IP regime, an important aspect to consider is whether the regulators are in control of market information regarding data. In Latin America, this area presents certain policy gaps and regulatory oversight as the big data companies are private actors and there is little to no synergy between them and regulatory authorities¹. Regulatory gaps and effective administration continue to grapple the system in Latin American countries such as Brazil,² Argentina and Panama to name a few. The ideology to mimic the EU-GDPR has left the data protection regime in Latin America in shambles, scouting for some resonance with the ground realities. Big tech companies with an immense resource pool continue to take a larger share of the pie at the cost of fundamental rights of citizens. The dilapidated data protection regime has a direct bearing on the ‘internet of production’ as the government continues to be less conversant about the intricacies of tech and policy. Increasing human rights inadequacies are a solid source of concern for value for data as it nestles in the fabric of every-day life in Latin America. In the wake of weak political institutions and rising instability³ harnessing innovation is a loss-making strategy. Lack of human resource, high levels of counterfeiting and large market information gaps are cited as common obstacles to innovation in the Latin American region.⁴ The aforementioned obstacles among others also coincide with the reasons as to why TRIPS was of no consequence to LAC’s patenting activities, in specific.

b) Africa

African policy was centered around the abundance of its raw materials and the transition to digitized economies places the continent in a unique position.⁵ The treatment of data greatly depends on the way it has been categorized by each country. Many tech companies have sprung up all over the continent and have brought with it growth and development in key areas. Cities have responded by ensuring that these areas have enough facilities such as incubators, innovation

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² Katitza Rodriguez and Veridiana Alimonti, ‘A Look-Back and Ahead on Data Protection in Latin America and Spain’ (EFF, 2020) <<https://www.eff.org/deeplinks/2020/09/look-back-and-ahead-data-protection-latin-america-and-spain>> accessed 14 September 2021

³ Diego Sánchez-Ancochea, ‘Latin America: inequality and political instability have lessons for the rest of the world’ (The Conversation, 26 February, 2021) <<https://theconversation.com/latin-america-inequality-and-political-instability-have-lessons-for-the-rest-of-the-world-152929>> accessed 14 September 2021

⁴ RICYT, Obstacles – Manufacturing 2009-2018 <http://app.ricyt.org/ui/v3/comparative.html?indicator=OBSTAxMANUF&start_year=2009&end_year=2018> accessed 14 September 2021

⁵ Cathrine B Ncube., 2021. *Science, Technology & Innovation and Intellectual Property / Open AIR*. [online] Openair.africa. Available at: <<https://openair.africa/science-technology-innovation-and-intellectual-property/>> [Accessed 23 September 2021].

hubs, etc. Two main factors have been identified as crucial in terms of maintaining and fostering this development which includes (i) strategic partnerships and (ii) changes in the IP regime.⁶

i) Strategic partnerships at various levels, including at the sub-regional and regional space will ensure that the development is more evenly spread out and sustainable in the long run. Regional policies still remain rather ambiguous, unfragmented and uncoordinated which impedes the sustainability of these ventures. Data is also a valuable asset and data interoperability and harmonization has been noted to be significant to forming an effective trade policy while ensuring that Africa's best interests are kept in mind. Another significant point would be to ensure that the economic and trade policies set to be adopted take into consideration the local and traditional business enterprises.⁷

ii) Like the Latin Americas, Africa is attempting to patch up its regulatory lapses by relying on International standards such as those introduced by the GDPR, with a recent study on Orange and Vodafone subsidiaries by the Internet Sans Frontières (ISF) advocacy group noting that African citizens have fewer digital rights in comparison to European subscribers.⁸ The lack of a robust legal regime also extends to the IP space where it is noted that Copyright and Trademark Law flexibility would prove crucial in ensuring that innovation is not impeded. For instance, the South African copyright law was amended to incorporate this flexibility in a bid to ensure that the country could keep up with global demands and requirements.⁹

c) Asia

The landscape of data protection and privacy laws differs greatly from country to country. Some countries have regimes that have been established for decades while others have adopted laws in response to international pressure, in conformity with standards laid down by international instruments such as TRIPS, GDPR and the like. Therefore, these laws remain fragmented and

⁶ Chidi Oguamanam, 'The Partnership Imperative For African Innovation In The Fourth Industrial Revolution — Chidi Oguamanam' (Chidi Oguamanam, 2021) <<https://www.oguamanam.com/publications/2019-11-7/the-partnership-imperative-for-african-innovation-in-the-fourth-industrial-revolution>> accessed 23 September 2021

⁷ 'Scaling Innovation: How Open Collaborative Models Help Scale Africa'S Knowledge-Based Enterprises | Open AIR' (Openair.africa, 2021) <<https://openair.africa/scaling-innovation-how-open-collaborative-models-help-scale-africas-knowledge-based-enterprises/>> accessed 23 September 2021

⁸ Abdi Dahir, 'Africa Isn'T Ready To Protect Its Citizens Personal Data Even As EU Champions Digital Privacy' (Quartz, 2021) <<https://qz.com/africa/1271756/africa-isnt-ready-to-protect-its-citizens-personal-data-even-as-eu-champions-digital-privacy/>> accessed 23 September 2021.

⁹ Chidi Oguamanam, 'The Partnership Imperative For African Innovation In The Fourth Industrial Revolution — Chidi Oguamanam' (Chidi Oguamanam, 2021) <<https://www.oguamanam.com/publications/2019-11-7/the-partnership-imperative-for-african-innovation-in-the-fourth-industrial-revolution>> accessed 23 September 2021.

Luxmore Chiwuta, 'Using Intellectual Property Assets To Grow Institutional Revenue – The African Regional Intellectual Property Organization (ARIPO)' (Aripo.org, 2021) <<https://www.aripo.org/success-stories/using-intellectual-property-assets-to-grow-institutional-revenue/>> accessed 23 September 2021.

inconsistent, the protection of the rights of citizens by governments remain unaddressed in some respects. For instance, the definition of personal sensitive data depends greatly on the cultural as well as socio-political contexts of its use meaning that the scope of protection afforded under an IP regime would depend on the approach adopted by each country. Asian markets remain as one of the largest with regards to data.¹⁰ IP valuation is an issue faced by most Asian countries given that the approach that is followed depends on the unique intersection between the local laws and its interpretation by firms and associated entities. This means that there are key differences with regards to regulation making it hard to set down a specific standard.¹¹ The same remains true with regards to data valuation. Some countries like Singapore have put in place robust systems that aim at properly valuing their data while also protecting the interests of their citizens. Western countries developed safeguards and protections for their citizens way before other countries could keep up. This makes Asian countries a very lucrative source for free and easily accessible data.¹² In spite of being one of the largest sources of data used to design models and other software, little is done to address the biased and discriminatory aspects of models once they are made into their final product.¹³ This adds to the issue of IP valuation as most of the data is not owned or controlled by entities within Asia. The potential to address systemic issues is most often ignored simple because it is easier and convenient to do so. Data breaches and cyber security additionally remain as another significant issue that countries are grappling with.¹⁴

3. Data Access and Ownership in Cultural Context

Data, as an intangible property, has mostly been handled by private players and, consequently, proprietary access to such data has been the norm. While private players do not, in actuality, ‘own’ the data in its legal sense as it is held for business reasons such as processing. However, that does not preclude the possibility that these stakeholders may attempt to ‘own’ the data in its legal sense, in the future. In order to prevent such usurpation, ownership of data must be established. This brings us to the nuanced question of how cultural settings in the Global South treat property rights, in general. Property rights are a part of a bundle of rights called bio-

¹⁰ Robert Walters, Leon Trakman and Bruno Zeller, 'Data Protection Law A Comparative Analysis Of Asia-Pacific And European Approaches'.

¹¹ 'Demystifying IP Valuation In Asia' (Iam-media.com, 2012) <<https://www.iam-media.com/article/305094786B3EC8E9A82472529784CB627045D265/download>> accessed 23 September 2021.

¹² Chinmayi Arun, 'AI And The Global South: Designing For Other Worlds' [2019] Oxford Handbook of Ethics of AI, ed. M. Dubber, F. Pasquale and S. Das 2019 (forthcoming) <https://www.researchgate.net/publication/334670382_AI_and_the_Global_South_Designing_for_Other_Worlds> accessed 23 September 2021.

¹³ Michael Kwet, 'Digital Colonialism Is Threatening The Global South' (Aljazeera.com, 2019) <<https://www.aljazeera.com/opinions/2019/3/13/digital-colonialism-is-threatening-the-global-south>> accessed 23 September 2021.

¹⁴ 'Intellectual Property: How Can Asia Protect Its Most Valuable Assets? - The One Brief' (*The One Brief*) <<https://theonebrief.com/asia/post/intellectual-property-how-can-asia-protect-its-most-valuable-assets/>> accessed 23 September 2021.

cultural rights exercised by communities especially in the global south countries. Other examples of such rights would include the right to environmental stewardship and right to community culture fall, as they identify themselves with communities and are package rights.¹⁵ Community ownership is a cultural practice and serves the people well providing them legal, technical and social support¹⁶. An important aspect of community ownership is the access of its constituents to the system, itself i.e. the means and ends are decided by the community in line with socio-economic conception of the society. Coincidentally, data ownership has similar claims. As previously established, innovation is monopolized in the hands of the resourceful private players. Despite having a direct bearing on the local population, data based intellectual property rights such as ownership claims are brushed under the carpets of oblivion, leaving the local community outside the discussion. Community ownership of data based IPR almost never makes it to the conversation about economic development of the global south as they frantically try to ape the west. It is true that there is certain level of shared understanding to data protection ideals and digital governance¹⁷ across different cultural settings. However, regulatory responses in the global south need to reflect its cultural practices in order to be considered in the global narrative on disruptive technologies. By introducing regional practices such as community ownership, innovation as a resource, gets redistributed and there is socio-economic-cultural recognition of data subjects.

Overall, the limitations in accessing data, coupled with an unsuitable IP regime, are monumental hurdles in stimulating innovation and development in Global South countries. Movements and philosophies like Open Access and FOSS (Free and open-source software) can play a significant role here. Based on the principles of liberty, equal and free access, and freedom to use, these movements seek to remove the financial, legal, or technical barriers which prevent people from accessing research and data.¹⁸ In addition, FOSS is fundamentally structured around the concept of liberty. It is often suggested that to understand its core notions, one should think of “free” as in “free speech,” not as in “free beer.”¹⁹

By incentivising and incorporating these ideologies into their regulatory regimes, Global South countries may be able to combat the monopolisation in data ownership and access, and consequently, invigorate entrepreneurship in the local population.

¹⁵ Rise of biocultural Rights, <http://www.bollier.org/blog/s>, 2015

¹⁶ Rights and Resources, ‘Factsheet’ (November 2015) <https://rightsandresources.org/wp-content/uploads/FactSheet_English_WhoOwnstheLandinLatinAmerica_web.pdf> accessed on 23 September 2021

¹⁷ Subhajit Basu, ‘Privacy Protection : A Tale of Two Cultures’, (Masaryk University Journal of Law and Technology, 2014) < <https://journals.muni.cz/mujlt/article/view/2593/2157> > accessed on 23 September 2021

¹⁸ Budapest Open Access Initiative, ‘Budapest Open Access Initiative’ (February 14, 2002) <<https://www.budapestopenaccessinitiative.org/read>> accessed on 23 September 2021

¹⁹ GNU Free Software Foundation, ‘What is Free Software’ < <https://www.gnu.org/philosophy/free-sw.html> > accessed on 23 September 2021

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