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‘Justice Be Our Shield and Defender’: An Intellectual Property Rights Regime for Africa*

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Abstract

Protecting intellectual property rights has become essential in encouraging cutting-edge scholarship that advances the frontiers of knowledge. For a long time, the majority of Africa’s intelligentsia has worked in local and international environments that have exploited the continent’s intellectual capital. Even in contexts where intellectual property rights are enforced, certain constituencies remain at high risk for exploitation. In this paper I use three case studies to argue for a more comprehensive conversation on this issue encompassing intellectuals working in different contexts and with diverse agendas. The first of these involves the unequal power dynamics between individuals working in different kinds of institutions, in this particular case, complicated by the global North/South divide. The second explores the dynamics of power in intellectual relationships while the third deals with the challenges emanating from the development and use of endogenous epistemologies in conversation and confrontation with modes of scholarship traditionally privileged in the western(ised) academy. How do we move towards a comprehensive intellectual property rights regime that does not inhibit intellectual freedom of exploration as it protects even the most vulnerable from exploitation? How do we foster a vibrant intellectual environment that is especially nurturing to communities traditionally marginalised within the academy?

* ‘Justice Be Our Shield and Defender’ is a line from the Kenyan national anthem.

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Résumé

Protéger les droits de propriété intellectuelle est devenu essentiel si l'on veut encourager l'érudition de pointe qui repousse les frontières des connaissances. Pendant longtemps, la majorité des intelligentsias africaines a travaillé dans des environnements locaux et internationaux qui ont exploité le capital intellectuel du continent. Même dans des contextes où les droits de propriété intellectuelle sont respectés, certaines spécialités courent toujours le risque d'être exploitées. Dans cet article, trois études de cas me permettant d'inciter à des échanges de vues sérieux sur cette question, visent les intellectuels travaillant dans différents contextes et poursuivant des buts divers. La première de ces études de cas met en exergue l'inégalité des dynamiques de pouvoir entre personnes travaillant dans différents types d'institutions, dans ce cas particulier, et qui sont compliqués par la division Nord/Sud de la planète. La deuxième étude de cas explore les dynamiques de pouvoir dans les rapports entre intellectuels, tandis que la troisième traite des défis découlant du développement et de l'utilisation des épistémologies endogènes dans la conversation et la confrontation avec les modes d'érudition traditionnellement privilégiés dans le monde universitaire occidental. Comment allons-nous passer à un régime général des droits de propriété intellectuelle qui n'inhibe pas la liberté intellectuelle d'exploration tout en protégeant aussi les plus vulnérables de l'exploitation ? Comment allons-nous produire un environnement intellectuel dynamique qui soit particulièrement enrichissant pour les communautés traditionnellement marginalisées dans le monde universitaire ?

Introduction

The concept of intellectual property (IP) is receiving new attention in Africa today, with renewed focus on the local consequences of international protocols governing the protection of intellectual property rights (IPR). Within African knowledge institutions and networks, IPR is increasingly invoked as crucial to the production of cutting-edge scholarship. However it is also widely acknowledged that discourse on this issue, even among African intellectuals, is lamentably limited. IPR protection is little more than a pipe dream for most. This paper explores the unjust nature of current IP regimes in Africa, arguing that they serve the interests of the global North at the expense of the vast majority of African peoples and the continent at large. I examine the possibilities of re-conceptualising African IP regimes and argue for a prioritisation of IP discourse within African societies. I envision intellectual forums of all kinds and in all disciplines acting as catalysts in this process. I conclude by proposing ways in which African intellectuals and knowledge institutions can work together in creating an alternative future where, in defence of IPR in Africa, justice is not only done, but is seen to be done.¹

A number of studies have exposed, challenged, documented and theorised the exploitative nature of the global academy. These studies emphasise

the disadvantaged position from which African intellectuals enter into international discourses even when local societies, environments, innovation, expertise, issues and resources are at the centre of such conversations. In many cases, this exploitation is facilitated by infrastructure, resources and frameworks that legally, if not legitimately, position the global North favourably in academic relationships. In other cases, it degenerates into downright intellectual abuse, where the global South is forced into grudging compromises and even, at the most extreme, resigned acceptance of open theft of IPR. Apart from the unequal power relations that often skew the balance in favour of the global North however, situations also arise within local intellectual contexts that disadvantage a significant proportion of African intellectuals with regard to IPR. In particular, constituencies that have been historically marginalised within and by the academy on grounds such as age, gender, religious or socio-cultural identity, continue to remain at high risk for exploitation. In some cases, IPR abuses are so common that they are taken for granted, and little is done to either prevent them, or punish the perpetrators. This has resulted in a situation where as far as the IPR of the majority of African peoples are concerned, justice in the form of enforceable protection, even when it is done, is rarely seen to be done. Consequently, IPR protection is widely regarded all over Africa as a useless imposition that serves outside interests with little benefit to local populations.

Yet, despite the current emphasis on a particular discourse that suggests otherwise, IP is neither a foreign nor a useless concept in Africa. African intellectuals need to lead the way in recovering and re-fashioning African conceptualisations of IP that catalyse innovation and creativity in the continent.

Definitions

The term 'intellectual property' (IP) is generally associated with the protection of intangible ideas that have acquired some kind of transferable value. The concept began to develop in Europe in the sixteenth century, beginning a conversation between commercial interests, academic discourse and political expediency. It was to first have impact in the English publishing industry with the enactment of the first modern Copyright Law, the Statute of Queen Anne, in England in 1710. In 1886, the first International Copyright Convention was signed in Switzerland, demonstrating the growing legitimacy within the global North of the concept of knowledge as property that could be owned either by individuals or by entities including those comprising groups of individuals. Initial focus was placed on the area of copyright with individuals, institutions and states scrambling to own and control knowledge in the pursuit of profit, political expediency, privilege or policy. Later,

the area of patent rights would also become important, laying the groundwork for the prevailing emphasis on these two areas in current IPR discourse.

The World Intellectual Property Organisation (WIPO) defines IP as 'creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce' and goes on to identify these creations as comprising of:

Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs (WIPO 2005).

This standard definition which governs international discourse on this important area is however being rapidly overhauled by newer understandings. *A Dictionary of Computing*, for example, notes that IP is:

[a] term that is increasingly difficult to define. It combines the traditional core of rights covered by patent, trademark, and copyright law coupled with more recent additions such as the protection of registered designs, design right, plant-breeders' rights, semiconductor topography rights, performing rights, and lending rights. A working definition is that it is the species of legally enforceable right associated with intangible aspects of physical items.

This evolving understanding makes this field an exciting arena for academics of all disciplinary areas. I cannot think of any area of knowledge that has no stake in exploring and understanding the legally enforceable rights associated with intangible aspects of its content and methodologies.

Currently, IPR receiving most attention on the African continent are copyrights, trademarks, patents, trade secrets, utility models and industrial designs. Copyrights concentrate on restricting the use of original expressive information while trademarks focus on the protection of symbolic information. Patents safeguard against the circulation of processes or product designs. Commercially valuable and confidential information are defined as trade secrets; together with utility models (novel innovations that may not constitute an inventive step) and industrial designs (which cater to innovation in the area of visual appeal or appearance); these are also legally protected in several African countries (Sihanya 2002: 2). The most significant impetus to protecting IPR has been provided by commercial interests, particularly with regard to industrial property rights. The administration of copy-

rights has also become increasingly important in many African countries in the last two decades, with the growing music industry providing for a significant investment in this area. A survey of African national offices affiliated with the WIPO, most of which are housed by state institutions, reveals a concentration of patent and copyright issuing or enforcing offices.²

There is a need to re-examine the focus on these areas of IP. While it may indeed prove necessary to continue to strengthen and enforce existing IP legislation in African countries, it is important to question what is missing, what existing aspects need further development, what needs to be improved and in what ways, and crucially, whose interests are served. The narrow focus on implementing current copyright and patent rights in most countries contributes to the negative perception that, in most cases, IP in its present manifestation exists to serve a wealthy few at the expense of the majority.³ In general, the standard tools used internationally to protect IP – often the only ones applied in domestic situations – ignore the specific needs of significant populations in developing countries. For example, the burden of enforcement is generally placed with the owner of the rights who must identify infringements and pursue redress. This is simply impracticable and too expensive for most individuals, who must then belong to some kind of collective to even begin to hope for redress in case of violation. Such organisations, where they do exist, often are forced to get by provisions that are imported from elsewhere, often with little allowance made for the peculiarities of local situations and context.

Not only is there a need for a re-examination of standard tools, but new ground must also be broken with regard to significant areas that have been ignored or downplayed on the global stage, such as that generally defined as traditional knowledge.⁴ The latter interacts with crucial economic sectors such as those pertaining to artisan crafts and bio-prospecting, highlighting, in so doing, both the dilemma of maintaining balance between communal access and individual rights and issues of principal and competing understandings of IP. Current international protocols on traditional knowledge are still very much in their infancy, forcing those communities and countries that have paid attention to this area to begin to develop their own provisions.⁵ Since most African countries are dependent on international protocols or imported legislation for their domestic regimes, most have no legislation specifically conceptualised or even re-formulated to serve the interests emanating out of traditional knowledge.

Framing the discussion

It is only recently that the creation and enforcement of IPR has begun to attract attention in Africa. In most countries, IP did not even receive any mention in the negotiation of independence constitutions where the focus was on more tangible assets such as land. Those countries that paid any attention to IP imported more or less wholesale existing provisions from their former colonial rulers. The consequences of this oversight for the continent are far-reaching, on both national and continental stages.

Mauritius provides a good example of the resulting complexities. Locally, IP entered the public consciousness as a foreign import, to be tolerated at best as a necessary evil sweetening the investment environment particularly for foreigners.⁶ At worst, IP was, and still is, regarded as an unreasonable and potentially harmful factor that local residents or citizens had to further deal with in their daily struggle to make ends meet. Commenting on a landmark case in Mauritius where the judge found in favour of the plaintiff, a large multinational company, Kaushik Goburdhun acknowledges the logic of the judgement but notes with concern that '[t]he plight of the more vulnerable usually gets a back seat treatment'. He further wonders if '[i]ntellectual property rights [are] gaining more importance than the welfare of the local citizens' (2005: 15).

Furthermore, the country's complex history with regard to British and French colonial rule bequeathed it an intricate tapestry woven from both French and British law that makes the enforcement of IP legislation such a complicated dance between one and the other, that even legal experts admit to often being confounded. Incidentally, in terms of affiliation to continental and regional IP organisations, Mauritius belongs neither to the Francophone L'Office Africain et Malgache de la Propriété Industrielle (OAPI) nor the Anglophone African Regional Industrial Property Organisation (ARIPO), although it has observer status, and therefore limited participation, in the latter.⁷

There is no doubt that regional co-operation has been useful in many ways with regard to IP as far as the obvious benefits in terms of networking and sharing of resources is concerned. On the other hand, the (il)logic of alliances based on colonial differences sometimes sets up 'iron walls' dividing geographical neighbours who share similar challenges, hence obstructing regional and continental growth in this area. Beyond the obvious linguistic challenges of translation, there are the core issues of legal principle and framework complicating regional co-operation on IP, further reflecting the diversity among the European colonial powers themselves, decades after they ceased to have legal jurisdiction over African nations. This makes it difficult for example for countries such as Francophone Burundi and Rwanda,

former Belgian colonies, today within an economic region dominated by Anglophone nations, to throw their lot in with either ARIPO or OAPI. Similar complications arise in the relationship between ARIPO member the Gambia, and its neighbour, OAPI-affiliated Senegal.

If the status quo has been more or less maintained for most of the last four decades, there is emerging consensus on the need for a new direction. Two factors have been influential in encouraging the development of alternative conceptualisations. The first of these is a new understanding of the potential of benefits, both financial and otherwise, that IP may afford individuals and nations. The second is the growing realisation of the complexities of tailoring specific IP regimes to cater for the diversity of contexts in which IP must be protected. This has been catalysed by both the move towards greater regional economic co-operation, which should facilitate the creation of geographical networks enabling cross-border enforcement of IPR, and that towards multilateral responses to challenges affecting nations with shared or similar interests. On a larger scale, there has been the unprecedented co-operation among member-countries of the global South with regard to international agreements. The World Trade Organisation's (WTO) treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS) is more responsive as a result to some of the needs of countries that have been historically disadvantaged in this area. However, in general, Africans have tended to benefit from such international protocols only incidentally, if at all. In almost all cases, as in TRIPS, the balance sheet is heavily skewed in favour of the global North.

Much of the impetus for a re-examination and development of IP regimes in many countries has come from recognition of the ways in which the global South has been short-changed in international partnerships involving IP, particularly in transactions that have financial and policy consequences. There is evidence that in many African countries, changes to existing IP regimes tend to be influenced by external factors. States have proven more responsive to incentives offered by the carrot of increased foreign investment or access to lucrative markets, or to the stick of donor pressure, than to the needs of local populations. Thus, to take one example, many African nations expressed strong reservations but ultimately acquiesced when it came to the adoption of the TRIPS treaty, primarily because of the promise of trade concessions by developed nations. A few of these African countries went on to attempt to adapt the provisions of the treaty to the needs and priorities of their situations; however, in most cases, it proved difficult to reform the already ratified treaty to the extent necessary to make it favourable to their situation. Similarly, the US African Growth and Opportunity Act

(AGOA) provided additional incentive for the two-thirds of African nations eligible for liberal access (within a particular framework) to US markets to streamline IP legislation to meet the approval of the US Trade representative with regard to IP protection.

It is perhaps not surprising therefore that the greatest internal impetus towards the development of IP regimes on the continent has come from those who wield economic and political power. Given evidence of the potential of such rights in ensuring financial gain, or enabling or facilitating policy, politicians and entrepreneurs have led the way in initiating conversations with legal experts on what they consider to be the important aspects of IP regulation. Emanating discourse has been characterised in three ways: it has tended to be conducted in 'legalese' – thus restricting it to a tiny majority, has favoured political and economic angles, and focussed on the protection of the vested interests of the national and global financial and political elites. In some cases, the benefits have trickled down to the general population, for example when governments have decided they have something to gain from standing their ground against commercial interests, notably with regard to suspending patents to make essential drugs available. In general, it could be argued that commercial interests usually triumph over collective interests, with rare exceptions in matters of public policy where it serves the interests of the political elite.

As a result, even frameworks that are ostensibly designed to protect local interests are more likely to primarily benefit outsiders. Intellectual property is often understood in the narrow sense of industrial property, and when it comes to industrial property, the balance sheets do not look good for Africa. WIPO found in a study of the patents issued in 1999, the overwhelming majority granted within Africa benefited non-residents of the respective granting countries. Out of 80,516 patent applications filed in Kenya for example, only 28 were by Kenyan residents, who were successful in acquiring only three out of the 91 granted. In the Gambia and Uganda, out of the 79,703 and 80,421 filed respectively, none was by a resident of that country. Only one resident each in both Malawi and Zimbabwe filed for a patent in the same year out of 80,430 and 80,167 respectively, and neither was granted. Egypt reported the highest number of patent applications by residents (536 out of 1146), of which 38 out of the 372 granted were successful. The only other African country whose residents came even close to filing this number of applications (116 out of 26,354), South Africa, did not however report the number of patents granted. In other words, only one African country according to the WIPO statistics reported a situation where more than 0.1 percent of the patent applications filed locally were by residents (not citi-

zens) of the said country. Even the African Regional Industrial Property Organisation (ARIPO) seemed to have not fared much better: of the 40,720 patent applications that it reported filing, only seven were by residents of the 15 countries represented in the organisation. Only two of these were granted.⁸

There has been some progress in tilting the balance towards the protection of national interests; for example many countries have seen greater public awareness and increased vigilance by enforcement agencies with regards to the enforcement of copyright legislation in their music industries. However, I, like Betty Mould-Idrissu, 'want to underscore the fact that the mere passage of [IP] legislation is no guarantee that a law is being enforced, and if there is no enforcement, the passage is useless' (2005: 4). Furthermore, one must examine non-economic implications and consequences of IP-related initiatives, especially in relation to their impact on the socio-cultural fabric of society. The crucial equilibrium between individual and collective interests is one that must be re-visited; individual rights need to be balanced with responsibility to collective, and the balance sheet must be calculated in sense not cents.

An important, yet woefully ignored consideration in the majority of cases where external factors are instrumental in providing, influencing or imposing IP-related initiatives or legislation, is the involvement of internal players. Local needs and priorities tend to bear the brunt of the consequences of policies and programmes that focus on narrow outcomes, especially those defined in monetary terms, especially where local voices and realities are factored into the equation only after projects are already conceptualised. When African perspectives are used to rubber stamp or legitimise initiatives that actually exist to serve the interests of others, questions must be asked as to what extent Africa should play along. Take for example, the African Music Project, an initiative of the World Bank (WB) in collaboration with the international non-governmental organisation Policy Sciences Center Inc. (PSC), set up to explore viable ways of making music a profitable sector of African economies – and to counter criticism against the WB's cultural programmes. One of the stated goals of this initiative was to 'find ways to make the WTO agreement on IP more supportive of development' (Penna 2004: 96). Senegal was chosen as the site for the pilot of the project, which commenced in 2000, with enthusiastic support from the state and other stakeholders. The project has been successful in many ways; most importantly, it has resulted in the strengthening of the local Musicians' Association, facilitating the capability of the music industry to deal with some of its biggest challenges in copyright law reform and royalty violation. If the

project's short-term goals are attractive albeit challenging to fully achieve, it is its long-term vision that is of concern to other people:

The vision for the Africa Music Project... is an African musician playing a song in an African studio [where] computerised equipment records the song, creates the records for his or her copyright, and mounts the song into a dot.com facility that listeners around the world can address. As a listener downloads or plays the song, his or her bank or credit account is automatically debited and the musician's account is automatically credited...

Another part of the vision is Nashville, Tennessee. Sixty years ago, Nashville was part ... of the poorest region of the United States. Today, it is the seat of the U.S. country music, a US \$3 billion a year agglomeration of musicians, composers, recording studios, managers and so forth. At present, virtually all African music that enjoys international market is produced in Paris or London – the agglomeration of jobs that successful African music generates is not in Africa. The dream for improving the African music industry is that African countries would create their own Nashvilles. The Nashvilles of six or seven African countries would also be connected with a central electronic hub, also in Africa, that would be the seat of the dot.com vendor (Penna 2004: 97).

The project implementers note the financial and marketing promise of this kind of a programme to the individual artists (targeted ultimately at 30,000 low-income musicians projected as potential beneficiaries) as well as the national economies represented in such an initiative. There is however little said about the cost/benefits to the rest of the community, although assurance is given that '[t]he bottom line [reinforces] music [as] an integral part of African life, society and communications, and the development objective is to enrich African life' (Penna 2004: 97). How the vision as articulated above will achieve this objective – given the realities on the ground where it is difficult to imagine local audiences relying on an 'African Nashville's dot.com vendor' for their music in the immediate future – is not clear.

It is also worth noting the limitations of local involvement in the project in terms of decision-making, especially in the crucial stages of delineating the project. Senegalese participation was solicited only after the project had been delineated elsewhere and by external actors, under the guidance of people who admittedly 'knew little about the music business' when they first started.⁹ In terms of the IP related aspects of the project, an attorney was 'imported' from Germany to 'analyse local legislation and discuss IPR', a role that surely would have been better carried out by Senegalese legal experts with better understanding of the local legal frameworks. The business lawyer later contracted by the Musicians' Association, Mr Mbaye Dieng, whose commitment to this issue is such that he was willing to promote copyright

legal reform on a *pro bono* basis, offers living testimony to the availability of local professionals able and willing to carry out such a brief.¹⁰

It is tempting, given the current situation, to wonder if critics who argue against the establishment of IPR regimes in Africa do not have a valid point to make. The most uncritical observer would be forced to conclude that even with the best intentions, current frameworks only seem to legitimise and legalise the exploitation of the continent by outsiders. Some of the apathy towards discourse and action on IP in African countries must be read in this context. I am convinced that the problem lies less with IP as a concept and more with its current definition, articulation, legislation and practice.

Two factors stand out as persuasive arguments for a serious engagement with IP. First, given the reality of globalisation, it would be futile and self-defeating simply to refuse to engage in IP discourses and the practicalities of enforcing IPR. Rather than level the playing field, history has shown that lack of IP protection in the present era of globalisation simply facilitates exploitation.¹¹ Secondly, to refuse to engage IP because of the hegemony of particular discourses would be to take away the agency of self-definition allowing African understandings of IP, encouraging innovation and creativity in ways that would be of great benefit to the continent. It would therefore be far more useful to challenge prevailing understandings of IP by offering alternatives specifically conceptualised to suit the contexts out of which they emerge.

I propose therefore the setting up of IP regimes that are appropriate for African countries, regulatory frameworks ensuring that IPR protection is a practical and desirable reality for the citizens of the countries in which it is enacted. I argue that while African IP regimes can and should be in dialogue with international discourse and practice, they must first and foremost be African in character and pluralistic in response to the diversity of different contexts to which they must respond. Without ignoring the reality of the global nature of contemporary society, they need to be conceptualised by Africans for Africans, taking into consideration African needs and realities, and emphasising African priorities. In order to do so, they need to emerge out of wide-ranging conversations encompassing multiple perspectives drawn from different sectors of their societies. The current situation where only a select few are able to influence or actively participate in the process of creating and implementing IP legislation has brought us to an impasse. The future lies in bringing into discussion other perspectives. I argue then that all professionals, no matter their field or work, need to own, shape and implement the results of this discourse since its power lies in the extent to which it has impact on the everyday realities of people's lives. The primary chal-

lenge is three-fold: integrating IP into the public sphere, increasing its visibility in the workplace, and creating a pervading consciousness of individual and collective stake, right and responsibility in this issue.

Intellectual property and African intellectuals

With a few exceptions, primarily those with pedagogical and research interests in IP, African intellectuals have remained largely removed from these discourses. European intellectuals were central players in the initial conceptualisation of knowledge as property and subsequently property with transferable value.¹² In Europe, IP developed in relation to economic, social and cultural developments taking place within the general society and intellectuals played a significant part in influencing related discourse and legislation. In contrast, in Africa, most work with regard to IP in the first decades following the independence of African states was a translation of the system inherited from the colony into post-colonial institutions and frameworks. Intellectuals were neither called upon to conceptualise IP in relation to previous African conditions, nor to re-formulate it to fit in with the contexts to which it was being applied. The lack of attention paid to IP by policy-makers and its insignificance as a political issue severely limited its visibility not only in society in general, but also in intellectual discourse. The prevailing emphases within the African academy – emanating in particular out of the nationalist, development and democracy agendas – seemed far removed from the intangible concerns of IP.

As a direct result, intellectual investment in IP discourse continues to be limited to a handful of scholars scattered mainly in a few law faculties. There is very little research being conducted and that which prioritises an African agenda is limited by a dearth of resources. Most researchers remain isolated and dependent on foreign support in terms of both material and human resources. In general, IP discourse has by-passed scholars who are not specifically engaged in teaching or researching this issue. This has severely weakened the impact of those few who are interested in raising the profile and quality of IP discourse, which, as noted above, is dominated by politicians, policy makers and business entrepreneurs.

Not surprisingly, little exploration is undertaken of the Western epistemological foundations of African IPR regimes, or of the socioeconomic and political contexts that were historically instrumental in mapping out the contours of ensuing discussions. Nor is much attention paid to the consequences of the unquestioning wholesale importation of these concepts. Kouliga Nikiema reminds us that:

L'état des lieux montre bien que la propriété intellectuelle n'est pas apparue dans notre droit positif par les mêmes voies qu'en Europe. Le droit d'auteur n'est pas fait petit à petit comme l'oiseau a fait son nid, à l'instar de ce qui s'est passé en Occident où le privilège libraire a pris le temps de muer en droit de l'auteur. En Afrique, le droit d'auteur est né adulte, à l'âge de cinquante ans, et avec toutes ses capacités de se faire respecter '*usque ad sideros et ad infernos*'. J'ignore si c'est une chance ou une malchance qu'il en fut ainsi; mais la conséquence est que la propriété intellectuelle plus que d'autres domaines du droit apparaît encore aux yeux des populations africaines comme une curiosité (2005: 6).¹³

Despite the integration of IP protection into the African legal codes, the level of public awareness of IP, including among scholars, remains woefully inadequate. This is noted by Tom Ogada in his survey of IP awareness in Kenya, a country which, 'in terms of legal framework and policies on IPR is ahead of most African countries'. He observes: '[M]ost people in government, industries, universities and R&D institutions can not differentiate between patent, copyright, industrial design and utility models', the best known manifestations of IPR in that country (3,4).

Numerous stories abound with regard to textbook cases where African intellectuals have been short-changed, deceived or betrayed when it came to the protection of their IPR. In 2000 for example, senior researchers from the University of Nairobi's department of Microbiology were shocked to find out from the Kenyan media that their colleagues from the Human Immunology Unit of Oxford University (UK) had sidelined them in a patent application filed in the UK with regard to a joint study they were undertaking in Nairobi. Four years later, another case surfaced in the media, this time reports of a civil suit involving another team of Oxford researchers and the head of virology at the Institute of Primate Research (Kenya). The allegations this time involved not only the carrying out of unauthorised research, but also the theft of research samples and research data, leading to the publication of research papers.

Such cases are only the tip of the iceberg and reinforce perceptions that IPR violations are not taken seriously, not only within the academy but also by the justice system. Countless others remain invisible and unresolved. In particular, little attention is paid to IPR violations involving scholarship in the social sciences, humanities and arts that do not generally translate into immediate political, policy or economic benefits for national power brokers. On the plus side, however, there is growing interest in those working with faculties of commerce and areas associated with the rapidly developing field of indigenous knowledge, especially as this relates to the natural sciences.

In the rest of this paper I focus on the strategic place of the African academy in relation to IP discourse because of its centrality as a site to influence and connect African intellectuals, irrespective of the different contexts of their work. The academy is uniquely placed to provide a forum for academics to exchange ideas, conduct teaching and carry out research. It also has the potential through its graduates to penetrate every professional sphere and enter into the everyday within African communities. For many however, the academy is also the site where they are first introduced to IPR abuse as a non-issue. It is here that stories abound of unrestrained plagiarism perpetrated not only by students but also faculty; of invisible, ineffective and unregulated frameworks that discourage any attempts to confront abuse; and of a general attitude that confirms suspicion of IP regimes as irrelevant to most people in society.¹⁴

Beginning 2004, through a succession of conversations with intellectuals working in different environments, my attention was drawn to the consequences of IPR ignorance or abuse. These cases triggered off a series of other conversations, in which I began to approach colleagues, peers, teachers, and mentors for their experiences with IP. I talked specifically to scholars who had no research interest in this area, focusing in particular on those working in the social sciences, the arts and the humanities, asking what they thought about it, what they knew about it, and what training they had received dealing with IP-related issues.¹⁵ Almost without exception, I found that those I spoke to felt inadequately prepared to engage with IP related situations or discourses. Most people understood IPR to cover only two issues – patents and copyrights – most had little idea what exactly these meant; the majority could not think of how these were relevant to them; or in what ways they were appropriate to their situation. One person, a university lecturer working in a literature department summed it up thus:

I am unlikely to ever come up with anything that will need a patent; I don't work in the fields that have to worry about such things. As far as copyright goes, it would be miracle enough for me to get published without worrying about copyright issues. Worrying about copyright for those of us here [in Africa] is a luxury. Most times, the students cannot afford to buy all the books we would like them to, so we have to get them to make photocopies. If they can get the material, that is all I am interested in, how they get it is their affair.¹⁶

At this point, I want to introduce three case studies that were instrumental in provoking me into thinking about these issues. Indeed, my primary purpose in this paper is not to give an exhaustive survey of the state of IPR on this continent, nor to theorise on the epistemological or other foundations of African IP regimes. Instead, I want to use case studies to displace statistics

with faces, and to argue in the most compelling way I know how for a more comprehensive conversation on this issue.

I tell these stories for a number of reasons. First, I tell them because I want to dispel the fantasy that IPR does not affect the majority of us, or that these are issues that can be safely left to a small handful working in a limited number of fields. Secondly, they challenge intellectuals working in diverse environments with multiple agendas to join in this conversation. Thirdly, these stories make the point that not only do the everyday experiences that we so often ignore or brush aside matter, but that the cost of not talking about them is greater than can be calculated in simple figures.

In the three stories that I pass on below, African intellectuals working in different knowledge contexts found themselves at significant change-points in their careers as creators / transmitters / custodians of knowledge. In each of the cases, as a direct consequence of what happened, these witnesses emerged with a changed perspective on members of the academy, with at least one of the witnesses developing an instinctive mistrust of university scholars. Each case also had a profound impact on the way those testifying have continued to work. The value of these particular stories lies in the possibilities they open out in terms of discussion, possibilities I myself have witnessed eliciting opinions and initiating discussions.

I also tell these stories as an act of witnessing. These stories are true in themselves, but they also stand in for others that are lost to us, stories that have been silenced, ignored, suppressed or dismissed.¹⁷ Over and over again, in the course of talking to people about experiences such as I present below, I was confronted by real emotions, sometimes so searing in their pain that I wanted to turn away, to turn off the recorder, or to change the subject. One witness told me that s/he felt s/he had been 'violated', and I remember thinking at the time, 'surely that is too strong a word to use'. And when s/he repeated it, I found myself wanting to censor her/him, to question his / her interpretation of events, to suggest, ever so gently, that maybe s/he was over-reacting, that this was not such a big deal after all. I wanted to explain that I was looking for material I could use in an academic paper, that this term was so emotionally charged with so many other images that I hesitated to use it. It was only later on that I realised that in even contemplating stripping these accounts of the 'messiness' that the academy often associates with subjectivity, I was implicating myself in the very silencing I am seeking to challenge. So I am telling these stories, because 'I have come to believe over and over again that what is most important to [us] must be shared, made verbal and shared, even at the risk of having it bruised or misunderstood. That the speaking benefits [us] beyond any other effect' (Lorde, 1984: 40).

Testimonies

Testimony One: Muthoni Likimani¹⁸

She is a well-known writer with a reputation that transcends geographical boundaries. This part of her story begins two decades ago, when she was just about to publish the book that she is most associated with. At the time that this happened to her, she had just received the proofs for correction from her publisher. At the time, as far as local publishers were concerned, the fastest way to get work through the system was to do the actual typing of the manuscript yourself after the publisher had finished marking up original proofs with whatever changes were needed. One day, she was introduced to a scholar from the global North, who she was told was very interested in her work. In the course of the conversation that ensued, she told this scholar about this new work which was already in manuscript form. The scholar was so eager to have a look at it that the writer finally agreed to give her the manuscript copy. The scholar was immensely enthusiastic about the book. Praising it highly, she offered to write an introduction; pointing out that such an introduction would probably give the book the attention it deserved within international academic circles.

The writer agreed, well aware of the difficulties of marketing, especially internationally. Even though she was already enjoying some success locally, she figured out that additional exposure, and especially by a member of the academy, could only do her book some good. And so, they agreed that the scholar would go on to write the introduction and get back to her when she was done, by which time the rest of the book would be about ready to go to press.

When the introduction came, the writer was somewhat taken aback at its length; it was almost the same length as the manuscript itself! It seemed to her that the scholar was using her book to get a platform for her own work, and not the other way around. Apart from the fact that she knew that her publisher would never stand for this, she herself was sure that her book did not need such an extensive introduction to make sense. So she made the decision that she would only agree to publish a severely edited version. The scholar resisted, the writer stood her ground. And that was how things rested.

A couple of years later, the writer was travelling in the United States on a non-related business trip, where she found out, somewhat accidentally, of a new edition of her book being circulated within that country that she had no knowledge of. Mystified as how this could be when she, the author of the work in question had no relationship with this particular publisher (who was different from her international publisher), she set out to investigate if this

could be indeed so. Armed with an address, she made her way to the publisher's office where she proceeded to pass herself off as a graduate student in need of the book in question. Yes, they had copies, sure they could sell them to her, and so buy them she did, all the copies she could afford. A careful examination of this new edition of her book – published in her name for distribution in the US by a publisher she had no knowledge of – revealed an ISBN number different from the original and the omission of the copyright notice found in that edition. It also had the full introductory essay that she had rejected.

Her initial reaction was to sue. However, in a foreign country, with little money for such a venture, unsure if her copyright extended to this country, and how to enforce it from her home, she gave up. In the end, although she never received any royalties for books sold by this publisher, she was able to force a withdrawal of their edition of her book. Unfortunately, this had unexpected consequences with her original (international) publisher, who also withdrew the book from circulation; even threatening to destroy all the copies they still possessed. The book in question is now available through the author's own publication company and the new edition, understandably, has replaced the original introductory essay included in the first edition with one written by a local scholar.

Testimony Two: Mkawasi Mcharo ¹⁹

For her final year as an undergraduate student, she chose to do an honours thesis, writing up a practical project that she had participated in. She felt that she was very lucky to have, as the supervisor for her thesis, a scholar who himself had undertaken similar projects in the past and who was extremely enthusiastic about her work. Because this was a project that meant so much more to her than mere marks, she poured her heart and soul into it. When it was complete, it was more than just an honours thesis; it was the most significant research project she had undertaken to date. Even more importantly, writing up the project and thinking through the larger implications of it had awakened something inside her; a desire to continue to do the kind of work she had researched for the thesis. She was proud of the 'A' grade that rewarded her effort, thrilled that her thesis would remain for posterity in the departmental library.

A couple of years after graduation, she happened one day to come across a new book edited by a faculty member in her former department. This was someone she had come to know after graduation as he had been on study leave, pursuing his doctoral studies, during her time there. Words are probably inadequate to describe how stunned she was when she found, as part of a chapter by this scholar, with no word of acknowledgement, a significant part of her thesis. Word for word, idea for idea, with no changes, and very

little additional comment, parts of her analysis of the project had been merged into his chapter. She could scarcely believe her eyes; hardly wait to look for a copy of her thesis so that she could compare the two. No, she was not hallucinating; it was the same work. But how? She knew she had deposited a copy of her thesis with the department, but was it truly possible that this person could have used her work in his research, and gone as far as plagiarising it in a book without any acknowledgement?

Her first reaction was to confront him, to ask him why he had stolen her ideas, used her work without citing her. She thought too of telling someone else about it – but who? And for what? She was confused – she felt she had been wronged, but she did not know how to articulate the wrong or to whom. This person was someone who was well known within both academic and professional circles; was she really ready for the consequences of her revelation? What if she made a big deal of it and it turned out that this was standard practice? She had, after all, heard rumours before of faculty plagiarising the work of their students, but they had never seemed more than stories and certainly nothing ever appeared to result from the circulated gossip. Since her work had never been published, and she held no legal copyright, what exactly would she accuse him of? Was plagiarism a crime? Besides, this was Dr X, someone who was becoming one of the best-known names in this discipline within the country, someone she herself had come to respect and even work with; could she really be the one to shame him before his colleagues? What if there were serious repercussions to his career – was she prepared to be responsible for that? What would people think, not only of him, but also of her?

For days she agonised. She knew she needed to deal with it if only to enable her to move on. Finally, she approached a scholar in the same area of study but from a neighbouring African country who she felt would understand the context of her dilemma, be objective in the situation but would not be likely to deduce whom she was referring to. At least, he could answer her questions as to what to do. Well, this person listened to what she had to say carefully and then asked, ‘What is your problem? Your work is now out there as it should be; it is now being read by other people. Surely it does not matter who gets the credit, the important thing is that the ideas are out there’.

To this day, she has never taken the matter any further.

Testimony Three ²⁰

It was the most significant project of his experience as an actor. There had been other projects in which he had played a bigger role, productions in which he had signalled his potential as one of the most versatile performers in this country of his generation. But there was something about this project

that had changed him irrevocably, something that still, over many years after it was over, made him pause and reflect on the lessons he had learnt, as both a performer and a human being. This production 'grew him up', not only as an actor but also as a human being, as a citizen of his country. It also matured him as a performer who understood the process of performance as an act of creating, sharing and processing knowledge within a community. It was different from other productions put on by the company he worked with. Until then, they had mostly worked with published scripts; this one slowly evolved from fragments of folklore woven around a concept, into a fully-fledged production.

Years later, they would sit around and try to remember who first provided the seed for its genesis; they never could pinpoint that with certainty. Some people would remember it one way, others another, and the rest, well they misremembered the whole beginning, some imagining new beginnings, others skipping over the gaps in their memory, others simply forgetting what they once knew. At the time of devising, it did not seem important who would be credited with the final product; they had just gathered in all manner of spaces and laboured the production into being. One person would supply an idea here, another tell a story there, a third embroider it with a song, a fourth add a movement, another take on the challenge of combining all of these in a particular role thus embodying the collective. Later on they would realise that the process was as engrossing and fulfilling as the product they created. When they were done, or at least when they paused to let audiences in to see it for the first time, it was a joint effort of which they were justifiably proud.

It became the kind of production that refused to die easily. It survived political censorship, lack of resources, several productions and the coming and going of several company members over many years before its final drum roll. Along the way, after the first memorable production, a member of the company, in his 'day job' a university lecturer, offered to set the script down in writing. It would indeed be a couple of years in between productions. The rest were pleasantly surprised to find that the writer had done a good job of not only recording what they had devised together, but also in significantly supplementing it. The revised work was substantially stronger, based as it was on the original production but benefiting from careful editing as well as the addition of more material reflecting ongoing political changes within the nation.

Those who were still members of the company at this time were eager to work together with new people in continuing the revision of the script through the rehearsal process. More than a mere 'story on stage', the production became a significant intellectual intervention, a historical ethnography of the nation that went beyond the present to suggest a possible solution to the

challenges facing the country at that particular moment of its history. Judging from the audience response to this and yet another subsequent production a year later, it was successful as a catalyst for collective celebration, bringing diverse perspectives into dialogue around several topical issues.

A couple of years later, the grapevine was buzzing with news that a book publisher was seeking to publish the play and had been talking to the writer who had set down the script after the collective devising process. Initially flattered to hear of this initiative, several members of the theatre collective became concerned when they further heard that the play would be credited solely to the writer of the piece, effectively ignoring, or at least minimising, the contributions of all the others who had participated in the creation of the project. Although it had not seemed a big deal before to them who was credited with the writing of the show, now that it came to legal ownership, a significant number felt it would not be fair for the writer to own the sole rights to the script. This writer argued in turn that since he had penned the words, even though they had been collectively devised, he had the right to claim ownership of the script, even if not of that of the actual play. Several others disagreed. It got ugly. People took sides; some made the case for group ownership, but then, that too got complicated. The work had seen several productions with different casts by the time it got to its final reincarnation. Each company had left its mark; which version should be used to determine who got how much of what credit? In any case, the original theatre company which was the legal entity that had first devised the show had long since been dissolved, and its members were so scattered it would be difficult to bring them together purely for this. There were also those who made the argument that the work was in the public domain because of the liberal use of well-known folklore.

In the end, it turned out people just did not know enough to make a case or where to go to find out what the legal status was; the publishers hesitated to proceed with the publication, and, just like that, the matter was dropped. To date, the script remains unpublished.

Towards an intellectual property rights regime for Africa

Each of the stories above presents a human face to the challenges presented by IPR today. The first of these involves the unequal power dynamics between intellectuals working in different kinds of institutions, in this particular case complicated by the global South/North divide. The second explores the dynamics of power in relationships between intellectuals while the third deals with the challenges emanating from the use of alternative epistemologies, where some are privileged within particular contexts at the expense of others.

In conducting this research, I was especially struck by the non-financial cost of IPR violations; in each of these cases there were negative percep-

tions with regard to members of the academy, even though the latter are also often victims of such abuse themselves. Attention must be paid to the long-term implications for the African academy with regard to mentoring, networking, collaborative projects and other knowledge-based partnerships involving members of the African academy. Each of these cases, although a unique experience with its own peculiarities, illustrates common issues, and therefore begs closer examination.

Muthoni Likimani shares her experience as a published author attempting to navigate the complexity of enforcing copyright across international borders. Complicated by the South/North divide, this case bears testimony to the hard realities of operating in a global context. It raises the issue of enforcement – it is definitely not enough to enact legislation protecting IP; ultimately, IP regimes will be judged on their efficacy in actually providing redress for those who are wronged. The question is raised here of the benefit of international protocols and agreements to local people. One must also ask how realistic is it to put the burden of enforcement on the victim – especially in a situation like this – where practical and financial considerations make a mockery out of the paper possibility of pursuing legal options.

Likimani is not alone in her frustration at her inability to seek appropriate action against a corporate body that is simply too big to fight. Ghanaian *kente* artist Gilbert ‘Bobbo’ Ahiagble, whose creative work has been reproduced by American company J.C. Penney on bed-sheets without his permission, could probably identify all too well. Needless to add, J.C. Penney has also not felt the obligation to share even the smallest portion of its profits with either Ahiagble or any other *kente* artist or community.²¹

Mkawasi Mcharo’s story is that of a junior scholar whose work is ‘silently harvested’ by a senior scholar. It introduces us to the issue of power – and the vulnerability of those historically or otherwise marginalised within the academy (and other institutions).²² This may be on grounds of seniority, gender, ethnicity, race, content or methodological choice (for example, focus, community of study, use of ‘alternative’ frameworks), or access to visibility (through publishing, speaking or networking opportunities). This case also highlights two aspects that IP discourse rarely engages: the consequences of ineffective, invisible or non-existent IPR regulatory frameworks in social institutions, and the existence of unwritten social and cultural codes which often are considered to be more legitimate or more effective alternatives to the legal code.²³

The third of the case studies focuses on alternative understandings of IP with regard to competing knowledge processes, products and concepts. This situation draws attention to the unfinished business of developing en-

ogenous IP discourses and regimes out of the diversity offered by both indigenous and exogenous roots. This is an issue of increasing importance as is evidenced by the growing visibility of traditional knowledge in global and local IP discourses, and the re-visiting of what knowledge as property means in different contexts. At the present moment, there are attempts in several countries to shift the conversation ensuring that in issues of traditional knowledge at least, it is not dominated by Eurocentric understandings, priorities and methodologies. Rather than replacing one centre with another, this is one area where it is crucial to acknowledge multiple understandings of IP.

These stories are not fictional accounts. They bear testimony to what is happening away from the headline cases that deal with patent and copyrights; from the high stakes that make policy makers sit straighter when people talk about possible HIV vaccines and the potential of bio-medicine. In fact, they are chosen for their ordinariness, for the fact that they could happen to almost anyone who embraces the identity of an intellectual, in the sense defined by Ngugi wa Thiong'o as 'a worker in ideas using words as means of production' (1998: 90). They demonstrate the importance of raising the public profile of IP in every African country, and in diverse sites, in and outside the courts and within the professional contexts of our work. In the final part of this paper, I zero in on the academy as a site for engaging IP discourse, but I argue for recognition of the multiple perspectives from which this discourse should be approached, shaped and translated into active experience. I reiterate the need to re-visit the fundamental premises of IP, tracing the origins of contemporary legal concepts, processes and practices in relation to their application to historical and contemporary African contexts. '[J]e pense que le défi de la recherche dans ce domaine serait de permettre à l'Afrique de "s'approprier" la propriété intellectuelle' (Nikiema 2005: 6).²⁴ To meet this challenge, I propose engaging theory through practice, examining the efficacy of policy in relation to people's lived experiences. I found that in seeking to elicit people's opinions about IPR, the stories detailed above were effective in provoking a lively conversation with intellectuals working in different contexts, a conversation that quickly moved beyond the detailing of violations to the examination of alternatives.

Among the most popular questions arising in these discussions from the first case study, for example, are the following. Could this indeed happen today to African scholars interested in extending their reach outside their own countries? In what places of the world are rights that are issued in African countries respected and enforced? What possibilities for redress exist for people in similar positions today? In what ways are we – as nations or as individual intellectuals – complicit in allowing or enabling the violation

of our IPR?²⁵ The second case tended to lead into explorations of the institutional and societal frameworks facilitating the existence of such dilemmas. Which unwritten social codes do we respect and how do we reconcile diverse, sometimes competing, perspectives? How well do these traditions serve us? In what circumstances and through what channels is it 'OK' to bring in legal advice? What alternatives exist, not only for redress but also for objective advice? When do social consequences or possible career ramifications outweigh our legal rights? How do supporting frameworks for 'unofficial' solutions compare to legal alternatives in terms of efficacy in addressing these issues? And with regard to the third case, the following was put forward for discussion. What does 'public domain' mean when dealing with traditional knowledge? Who decides who 'owns' material or processes emerging from collective reflection? How does one reconcile into one legal position diverse perspectives emerging from different traditions, especially where the law is not clear on which one is pre-eminent? Where does the weight of justice fall between rights and responsibilities, individual and collective, access and reward?

We move beyond impasse towards alternatives when we create policy that addresses real-life situations in a manner that makes people's involvement in such issues worthy of their investment.

The role of African knowledge institutions

In arguing for the establishment of epistemological bases of IPR within historical and contemporary African understandings of knowledge and property, I do not suggest that we cannot apply present conceptualisations imported from elsewhere. It is in fact important to engage conceptualisations of IP emerging out of other contexts, and especially those that are being developed within the global South, keeping in mind however that these must also be appropriate and relevant to our needs.²⁶ The example offered by the Yekuana people of Venezuela is worth emulation. In the last two decades, the Yekuana have begun the long-term process of developing a socio-cultural, political and economic community programme whose epistemological foundations provide a basis for, among other things, an alternative way of conceptualising and developing IP policy. They appreciate this goes beyond merely 'changing one element of social structure (their customary collective rights) and replacing it with another (Western intellectual property rights)' (Arvelo-Jiménez 2004: 47). Instead, they seek to continue the trajectory which respects their own indigenous political and juridical institutions, and which understands that these can continue to develop to meet the challenges offered by the present without compromising on essential principles funda-

mental to their worldview. Refusing to be hurried or pressurised into hasty compromises, the community has taken steps to use Venezuelan law to protect themselves from IPR violation until they are satisfied with their own framework and code. They are also simultaneously engaging other Venezuelan and indigenous Amazonian communities on this issue. This seems to me to be an excellent alternative to the current norm in Africa. And this is where African intellectuals working in all sectors of the academy and other knowledge institutions and networks can provide valuable leadership to the continent.

As observed above, most teaching and research on IP currently takes place in university faculties of law and associated research institutions. The handful of workshops that are conducted outside these specialised sites are usually tailored to benefit those professionals working primarily on IP issues such as lawyers or investors and tend to concentrate on industrial property or copyright issues. It is clear from the case studies and examples above that this is far from adequate. There is an urgent need to change this by investing heavily in the critical twin areas of pedagogy and research, beginning from within academic institutions and extending to all knowledge bodies.

In terms of pedagogy, IP must be included in core curricula across all the disciplines, making it mandatory at some level for all students in institutions of higher learning. This will mean the development of curricula and syllabi that reflect and reflect on the peculiarities of disciplinary areas and national contexts. The major challenge in this regard is that of resources; the continent currently suffers from dire lack of human and material resources to accomplish this successfully. Only a handful of universities have faculties of law that prioritise IP in teaching and research. There must be an increase in the number of faculty qualified to teach IP, and these must be distributed across various disciplines and institutions of all kinds.²⁷ These in turn need to be supported in the development of appropriate and adequate resources, methodology and personnel catering for the needs of different disciplinary areas, bearing in mind that many institutions may be unable to provide much more than minimal investment with regard to technology. Thus, pedagogical methods ought to be reviewed, to provide not only for the ICT and multimedia tools currently among the top recommendations of those already invested in this area, but also for the development of endogenous pedagogies and research paradigms utilising embodied and material performance.

The inclusion of academic protocol with a specific focus on IPR protection in all introductory courses at all levels of teaching and research in African universities would facilitate the resolution, if not the elimination, of a significant number of plagiarism incidents. This would be especially true if

these are supported by easily accessible, transparent and effective regulatory systems. The benefits of such courses should also spill over into different professional fields as graduates begin their careers well-equipped to exploit the full benefits of IP regimes in their areas of influence and interest, as well as to protect themselves from IPR abuse. This should ultimately raise the profile of IP discourse within the public sphere, benefiting many more than graduates of higher education institutions, including people like the witnesses above who are often invisible in discourses of this nature.

In the light of the emphasis placed in most African universities on teaching at the expense of research and the development of supporting theory, it is essential that attention be paid to the latter areas. Inter-disciplinary, inter-institutional and international networking provides the best foundation for the development of collective approaches to common issues. The number of researchers working on IP-related issues is relatively small, leading to the problem of isolation and a lack of resources. Most are heavily dependent on foreign funding; consequently, research agendas are often compromised to reflect donor interests. The development of regional and continental research networks is a priority as this would help ameliorate these problems, facilitating the pursuit of research questions that currently receive little or no funding. This is particularly important in cases where such research challenges are of minimal interest to global or national financial and political elites, or where they have the potential to tip the balance in the favour of those historically disadvantaged in global or local IP discourse.

In closing, I would like to suggest three levels of practical action that are imperative in translating the broad agenda of centring the African academy in continental IP discourse. Each level focuses on the areas of research and pedagogy identified above, and can be translated into relevant policy on the ground, taking into consideration institutional, national or regional differences.

At the grassroots level of individual departments and institutions, resources can be pooled in departmental or faculty-wide initiatives supporting research into the specificities of particular disciplinary areas, the development of core curricula, or the sharing of the teaching load of core classes. For example, departmental or faculty seminars can catalyse research on particular aspects of IP, while syllabi, faculty members and teaching resources can be pooled across classes. In addition, this theorising and teaching of IP should be supported by practice. Peer development, review and mentoring mechanisms must be set up within university departments and faculties emphasising collegial partnerships that facilitate the propagation and protection of IPR. Institutional frameworks that promote innovation, that enhance protection and

provide redress sans favouritism or prejudice, should be developed, regularly evaluated and maintained.

The next level emphasises networking between institutions, especially within national or regional confines. This will involve bringing together on one hand scholars (and other intellectuals) researching and teaching IP in different knowledge institutions, and on another, such intellectuals with other professionals whose work engages IP in all its different aspects. This is the crucial space where the stakes are raised within the public sphere and IP moves into the everyday, and therefore becomes an issue that is no longer the preserve of a secluded few. Intellectuals can and should become the driving force behind related public discussion. This includes high profile matters such as those involving genetic and biological research, industrial property and copyright issues, and other emerging IP questions. All should be exhaustively engaged before any form of legislation, including the ratification of international agreements or treaties, is enacted. This kind of engagement would feed ongoing teaching and research, as well as provide impetus for the work being carried out on the third.

Finally, intra- and inter-continental networks including but also extending beyond linguistic, economic, political or other socio-cultural blocs, should provide the basis for continuing and far-ranging continental and global conversations. Research is a crucial factor at this level, especially given the current difficulties of accessing adequate resources to support IP research. CODESRIA and other continental organisations prioritising the work of African intellectuals should take a leading role in mainstreaming and facilitating the growth of endogenous IP discourses on this continent. This can take place both in terms of funded research activities and the raising of IP discourse in all ongoing forums, for example through the inclusion of focus panels and presentations in non-thematic events and publications. Most importantly, the protection of African IP must become part of the political and intellectual agenda for all African knowledge institutions.

Conclusion

The development of robust IPR regimes ranks as one of the most important challenges facing African nations. Current practices leave a lot to be desired, with discourse centring on models that have not integrated well into most African societies. African intellectuals need to take the lead in revolutionising innovative practices globally, through an integrated multi-faceted approach to increasing the practicality, visibility and scope of IP discourse. This needs to happen first within the local contexts in which they work, and then, at national, regional and continental levels. African IPR regimes must be Africa-

centred; conceptualised for Africans by Africans, taking into consideration African needs and realities, and emphasising African priorities. Only then can we begin to have confidence that justice truly will be the shield and defender of African intellectual property.

Notes

1. I would like to thank those who contributed to this paper, especially Muthoni Likimani and Mkawasi Mcharo and the unnamed artist who provided the testimonies used here. I also thank all those who shared their own experiences and thoughts on this subject, and Godwin Murunga in particular for challenging me to channel the emotional energy generated by the testimonies I collected productively.
2. In Kenya for example, there are three national offices dealing with IP issues: the Kenya Industrial Property Institute, the Copyright Office and the Plant Breeders Rights Office. Most countries have two offices looking after industrial property and copyright issues.
3. In many cases, the owners of the copyright are simply those who can afford to pay for them and not those who are the innovators themselves who have designed or invented the product or process in question. For example, Kenyan and Tanzanian *khanga* designers rarely own the copyright to their work; instead the factory owners who commission the designs – often for a pittance – claim ownership when registering them.
4. As far as WIPO is concerned, ‘There is to date no universally recognised definitions for traditional knowledge as such. “Traditional knowledge” itself has a number of different subsets, some of them designated by expressions such as “indigenous knowledge”, “folklore”, “traditional medicinal knowledge” and others. Contrary to a common perception, traditional knowledge is not necessarily ancient. It is evolving all the time, a process of periodic, even daily creation as individuals and communities take up the challenges presented by their social and physical environment. In many ways therefore, traditional knowledge is actually contemporary knowledge. Traditional knowledge is embedded in traditional knowledge systems, which each community has developed and maintained in its local context. The commercial and other advantages deriving from that use could give rise to intellectual property questions that could in turn be multiplied by international trade, communications and cultural exchange’ (‘Intellectual Property’).
5. Latin American countries in particular have demonstrated significant interest and commitment in this area, and there is great potential for mutually beneficial South-South partnerships with regard to research and networking in this regard.
6. I am indebted to Kaushik Goburdhun for drawing my attention to the situation in this country. One of the important points that he makes in his discussion on intellectual property rights in Mauritius is the overwhelming influence of

external protocols (such as TRIPS), actors (such as the World Trade Organisation), and incentives (such as the African Growth and Opportunity Act) on domestic legislation in Mauritius.

7. These two, which are the major IP-related organisations with respect to Africa, have retained the legacy of the African colonial empires of France and Britain. OAPI was formed first, in 1962 in Libreville and specifically targeted former French colonies, which had until then had used French patent laws. Its membership today is made up of 16 Francophone countries. ARIPO, its Anglophone counterpart resulted from the 1973 draft Agreement on the Creation of the Industrial Property Organisation for English-speaking Africa (ESARIPO), which was adopted in 1976 in Lusaka. The organisation evolved into ARIPO in 1985, and although its membership (15 countries) and observers (10 countries) now includes non-Anglophone states like Mozambique, English remains the sole official language of the organisation.
8. Quoted in 'Considering' (6). It should be noted that this is by no means a phenomenon peculiar to Africa. With the exceptions of very few such as Japan and the USA, most countries reported a higher number of patent applications by non-residents; in the UK and Singapore for instance 31,326 and 374 out of the total of 161,549 and 51,121 respectively were filed by residents of those countries. What is remarkable in the case of African countries, however, is the range.
9. The project implementers note that the project kicked off with a workshop in June 2000, which 'brought together African musicologists and people with experience with the music business in Africa' (Penna 2000: 96). However, the actual target participants for this project do not seem to have been considered by the implementers to be significant contributors to the vision at this stage, even though that first workshop was supposedly an opportunity for the implementers to learn from stakeholders. Even high profile Senegalese artists who do have an international reputation, and who might be expected to have invaluable insight with regard to reaching out to both local and global markets were apparently only invited in as stakeholders six months later.
10. Dieng later on took on the role of providing the Musician's Association with legal advice, including with respect to working with the Senegalese government in reviewing draft legislation on copyright.
11. Peruvian Andean craftspeople for example, found their designs had been registered outside their country by certain European designers who had copied the designs in their jewellery. This meant that they themselves were unable to market their work in certain countries with serious consequences, even leading in the some cases to the confiscation of their products and contract violations (Fowler: 115).
12. Philosophical discourses exploring new understandings of knowledge as property, and property that could be owned by individuals as opposed to general society were central in the formulation of Western IP regimes. Writers such as Daniel Defoe (England), Denis Diderot (France) and Gottheld Lessing

- (Germany) and academics such as John Locke, Edward Young (England) and Johann Gottlieb Fichte (Germany) were instrumental in arguing first for the right of an author/writer to be credited as creator of his work and therefore to profit financially from it and secondly for exploring the philosophical dimensions of this question. Thus began a robust conversation among intellectuals of the European Enlightenment period that had an important impact on the shaping of public policy in this regard. For a discussion of this, see Hesse.
13. 'This state of affairs demonstrates that intellectual property does not appear in our positive law in the same way as in Europe. Copyright was not forged step by step the way a bird weaves its nest, following the example of what happened in the West where publishing / bookselling rights took time to transform into copyright. In Africa, copyright was born as an adult of 50 years, with all its provisions enacted "usque ad sideros et ad infernos". I am not sure whether this is a good thing or not; but the consequence is that intellectual property more than any other area of law seems in the eyes of African populations an idiosyncrasy' (My translation).
 14. The seriousness of this issue was noted at the 11th General Assembly of CODESRIA in December 2005, where it was reported that evidence of plagiarism had led to a number of papers previously presented at CODESRIA conferences being withdrawn from the organisation's website.
 15. These conversations took place in 2004 and 2005, and involved mainly scholars in Kenya, although I also talked to people from, or working in, at least five other African countries.
 16. Private interview, September 2004. Name withheld on request. When I sought permission to use this quotation in this paper, it was granted on the proviso that the speaker would remain anonymous. Although s/he had been perfectly frank when I first held this conversation, s/he was concerned of the possible consequences of naming. 'I could get into trouble for saying we do that, you know, the telling students to make photo-copies thing ... no, maybe you better not use my name. I'll deny it if you identify me, you know. But it's true'.
 17. As narrated below, each story, although a testimony of an individual's experience, is re-told to represent those of other people, thus I have chosen to leave out specific details – names, places etc. – while indicating my sources. Full details are available from this author.
 18. Private interview, September 2004, Muthoni Likimani. See the full story in the chapter 'Even with my Creative Work' in Muthoni Likimani, *Fighting Without Ceasing*, 324-329.
 19. Mkawasi Mcharo, Private interviews, March, September, 2005.
 20. Name withheld. This story was first recounted to me in 1998. I was very familiar with the project in question, Theatre Workshop Productions' Drumbeats of Kerenyaga, having been involved in part of the initial phase of conceptualising the production and later, as a member of the artistic and production teams of two of the subsequent productions. Some of this was recorded in private correspondence between the artist, whose story is told here, and me. Years

later, in 2004, I was reminded of this conversation at a public lecture that revisited this piece, initiating a robust discussion into its merits. The point was made that the work is not presently available for scholarly and other discussion because it was never published. One controversial opinion that this was proof of the inferior quality of the material was countered by observations that the unresolved debate with regard to ownership was the real factor that had precluded publishing, and that might well determine the place of this play in the history of Kenyan theatre.

21. Ahiagble's designs were not copyrighted. This was not only because kente designs cannot be copyrighted under Ghanaian law, but also because he felt that it would be wrong, as a kente designer himself, to prevent other genuine *kente* designers in Ghana from continuing the tradition of replication ensuring that a particular design is interwoven into the community's fabric as historical record or social commentary. In some countries, for example in Australia, indigenous art or craft is protected in certain circumstances in such a way so as to allow artists from a particular community to collectively own the right to particular designs.
22. This is by no means confined to local contexts – as illustrated in the short story 'Trials of an Academic Tourist', in Paul Tiyambe Zeleza's *Manufacturing African Studies and Crises*, pp.1-9.
23. Pamela Andande observes however that what she calls the 'traditional' Kenyan practice of 'naming and shaming' alleged culprits, currently the most popular way of attempting to pressure violators to refrain from IPR abuse, is not an adequate answer to the problem of IPR abuse.
24. 'I think that the challenge of research in this area would be to allow Africa to adapt intellectual property to its own context' (my translation).
25. This question is prompted by a recent discussion on the (US-based) H-Africa discussion listserv precipitated by a query seeking the names of African novels/authors that members of the listserv thought 'deserve[d] to be brought back into print' for the benefit of 'a US publisher' interested in publishing such works (Nfah-Abbenyi, 2005). After a robust discussion which elicited an extensive list, the thread came to a somewhat abrupt end. This happened when questions were raised with regard to the identity of the mysterious publisher and the consequences of even undertaking such a discussion without evidence of prior, on-going, or future consultation with even a tentative group of authors or copyright holders (Murunga, 1 September 2005). It was pointed out that by remaining silent on these issues, members of the listserv risked participating in the marginalisation of the identified writers. No evidence had been given or assurance offered that their involvement (or that of any heir or copyright holder) would be sought should the project prove viable, nor was such an assurance forthcoming even after the issue was raised. I found it interesting that no one responded to these issues. Works that were identified for potential re-publication included some that are not yet out of print (such as Ayi Kwei Armah's *The Healers* recently re-issued by the Senegal-based Per

Ankh founded by Armah) and others whose authors or copyright owners (such as Armah) have deliberately chosen to avoid working with publishers from the global North because of their negative experiences in protecting or benefiting from their IPR. This is not to say that African work must not be published outside the continent, or to imply that there are not many happy endings out there with regard to trans-continental publishing relationships. However there is more than enough evidence, here and elsewhere – as illustrated in Muthoni Likimani’s testimony, or the even more tragic case of Bessie Head – that it is safe to make no such assumptions, especially when no one seems willing to respond when tough questions are asked.

26. Speaking of the applicability of model transfer, J. H. Reichman observes, ‘The importance of university research in the United States’ system of technological innovation has been much admired, and it is often cited as a model that other countries should emulate, particularly developing countries’. However, pointing out the importance of unique socio-historical circumstances contributing to the specific provisions of all important Bayh-Dole Act of 1980, he warns, ‘I personally believe that the American experience with regard to the collaboration between universities and industry is worthy of emulation by developing countries, but only if we clarify the context that made Bayh-Dole work in the US and if we take pains to identify the conditions in developing countries that are needed to transplant such a model to those countries’ (1). In fact, while the US is often pointed out as providing models for African countries with regard to IP protection, Reed Hundt, former chairman of the US Federal Communications Commission, suggests rather that the US urgently needs to ‘radically revamp [its] patent system’ which he describes as an ‘18th century relic’. Arguing that the latter is ‘a mess’ that discourages rather than promotes innovation, Hundt argues for a radical reworking of the that takes into account the realities of the present context (2006: 36).
27. These courses can and should be taught by faculty from the disciplinary areas in which they are being offered. This will stimulate interest within different fields into IP related issues.

References

- Arvelo-Jiménez, Nelly, 2004, ‘Kuyujani Orignario: The Yekuana Road to the Overall Protection of their Rights as a People’, in J. Michael Finger and Phillip Schuler, eds., *Poor People’s Knowledge: Promoting Intellectual Knowledge in Developing Countries*, Washington DC: The World Bank and Oxford UP, pp. 37-51.
- Andanda, Pamela, 2004, ‘A Golden Chance for Medical Ethics in Kenya’, *SciDev.Net: Science and Development Network*, 15 June, <http://www.scidev.net/>, Accessed 25 Sept 2005.
- Barnett, Anthony, 2004, ‘Oxford Scientists Accused of Stealing AIDS Orphans’ Blood for Illicit Research’, *The Observer*, 30 May, Accessed 30 September 2005, <http://www.guardian.co.uk/aids/story/0,7369,1227897,00.html>

- Boustani, Maroun, 2005, 'Défis que les pays en développement doivent relever dans les domaines de l'enseignement et de la recherche en matière de propriété intellectuelle', Présenté au Colloque Internationale de l'OMPI sur l'Enseignement et la Recherche en Matière Propriété Intellectuelle', Juin, Juillet 2005, Accessed 28 September 2005, http://www.wipo.int/academy/en/meetings/iped_sym_05/program_detailed.html.
- 'Considering Kenya's Intellectual Property after TRIPS', 2001, *The Point: Bulletin of the Institute of Economic Affairs* 48.
- Finger, J. Michael and Phillip Schuler, eds., 2004, *Poor People's Knowledge: Promoting Intellectual Knowledge in Developing Countries*, Washington DC: The World Bank and Oxford UP.
- Fowler, Betsy, J., 2004, 'Providing Counterfeit Craft Designs', in J. Michael Finger and Phillip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Knowledge in Developing Countries*, Washington DC: The World Bank and Oxford UP, pp. 113-131.
- Goburdhun, Kaushik, 2005, 'Enforcement of Intellectual Property Rights: A Blessing or a Curse? Perspectives from Mauritius', Paper presented at the CODESRIA 11th General Assembly, Maputo, 6-10 December, 2005.
- Gopalakrishnan, N.S., 2005, 'Challenges faced by Academic institutions in the Teaching of IP and Carrying Out IP Research', Paper presented at the International Symposium on Intellectual Property Education and Research, Geneva, 2005. http://www.wipo.int/academy/en/meetings/iped_sym_05/program_detailed.html. Accessed 28 September 2005.
- Hesse, Carla, 2003, 'Literary and Intellectual Property', *Encyclopaedia of the Enlightenment*, edited by Alan Charles Kors, Oxford University Press, Northwestern University, <http://www.oxfordreference.com>, Accessed 29 September 2005.
- Hundt, Reed, 2006, 'Patently Obvious', *Forbes*, Vol. 177, No. 2, p. 36.
- 'Intellectual property', 2004, *A Dictionary of Computing*, Oxford University Press, Oxford Reference Online, Oxford University Press, Northwestern University, <http://www.oxfordreference.com>, Accessed 20 September 2005.
- 'Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore', http://www.wipo.int/about-ip/en/studies/publications/genetic_resources.htm, Accessed 25 September 2005.
- 'Intellectual property', World Intellectual Property Organisation, <http://www.wipo.int/about-ip/en/> Accessed 20 September 2005.
- Likimani, Muthoni, 2005, *Muthoni Likimani: Fighting without Ceasing*, Nairobi: Noni's Publicity.
- Likimani, Muthoni, 1985, *Passbook Number F.47927: Women and the Mau Mau in Kenya*, Nairobi: Noni's Publicity.
- Likimani, Muthoni, 1985, *Passbook Number F.47927: Women and the Mau Mau in Kenya*, Connecticut: Greenwood Press.
- Lorde, Audre, 1984, 'The Transformation of Silence into Language and Action', *Sister Outsider: Essays by Audre Lorde*, Freedom: The Crossing Press, pp. 40-44.

- Mkandawire, Thandika, 1997, 'The Social Sciences in Africa: Breaking Local Barriers and Negotiating International Presence', *African Studies Review*, Vol. 40, Issue 2, pp. 15-36.
- Mould-Idrissu, Betty, 2005, 'A Developing Country's Perspective', <http://usinfo.state.gov/products/pubs/intelprp/perspect.htm>, Accessed 29 December 2005.
- Ngetich, Kibet, A., 2005, 'Indigenous Knowledge, Alternative Medicine and Intellectual Property Rights Concerns in Africa', Paper presented at the CODESRIA 11th General Assembly, Maputo, 6-10 December 2005.
- Nikiema, Kouliga Daniel, 2005, 'Défis que les établissements d'enseignement doivent relever dans les domaines de l'enseignement et de recherche en matière de propriété intellectuelle', Présenté au Colloque Internationale de l'OMPI sur l'Enseignement et la Recherche en Matière de Propriété Intellectuelle, Juin, Juillet 2005, http://www.wipo.int/academy/en/meetings/iped_sym_05/program_detailed.html, Accessed 28 September 2005.
- Njubi, Nesbitt, 2003, 'African Intellectuals in the Belly of the Beast: Migration, Identity, and the Politics of Exile', *African Issues* 1, pp. 70-75.
- Ogada, Tom P. M., 2005, 'Challenges Faced by Developing Countries in Teaching and Conducting Research on Intellectual Property', Paper presented at the International Symposium on Intellectual Property Education and Research, Geneva, http://www.wipo.int/academy/en/meetings/iped_sym_05/program_detailed.html, Accessed 28 September 2005.
- Okwembah, David, Victor Bwiire and Patrick Nzioka, 2004, 'Shame on Children used in Experiments on AIDS', *Daily Nation*, 23 May, <http://www.nationmedia.com/> Accessed 30 September 2005.
- 'Out of Print African Novels/African Novels Reply', 2005, H-net Africa Discussion log, August 2005–September 2005, <http://www.h-net.org/~africa/>.
- Penna, Frank J., Monique Thormann and J. Michael Finger, 2004, 'The Africa Music Project', in J. Michael Finger and Phillip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Knowledge in Developing Countries*, Washington DC: The World Bank and Oxford University Press, pp. 95-112.
- Reichman, J.H., 2005, 'University-Industry collaboration: The United States experience', Paper presented at the International Symposium on Intellectual Property Education and Research, Geneva, http://www.wipo.int/academy/en/meetings/iped_sym_05/program_detailed.html, Accessed 28 September 2005.
- Sihanya, Ben, 2002, 'The Constitution and Intellectual Property', *Katiba Notes*. 1.2., Ed. Institute of Economic Affairs (Kenya).
- Slater, David, 1995, 'Challenging Western Visions of the Global', *European Journal of Development Research*, Vol. 7, No. 2, pp. 366-388.
- Soetendorp, Ruth, 2005, 'Collaboration in Intellectual Property Education and Research', Paper presented at the International Symposium on Intellectual Property Education and Research, Geneva, http://www.wipo.int/academy/en/meetings/iped_sym_05/program_detailed.html, Accessed 28 September 2005.

wa Thiong'o, Ngugi, 1998, *Penpoints, Gunpoint and Dreams: Towards a Critical Theory of the Arts and the State in Africa*, Oxford: Clarendon Press.
Zeleza, Paul Tiyambe, 1997, *Manufacturing African Studies and Crises*, Dakar: CODESRIA.