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RESEARCH ARTICLE

Reconstructing the future: taking ownership of copyright in Africa

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Abstract

What is the state of copyright in Africa today, when specialists in the field, notably in the USA, are sounding the alarm? Taking as its starting point a right that emerged in the West in the twilight of the nineteenth century, this article examines the ways in which copyright is discussed, established and experienced in sub-Saharan Africa. It questions the relevance of the vocabulary used and asks how Africa can be made intelligible in the context of a heterogeneous world. Since the 1990s, international organizations have promoted and imposed the economic notion of material goods, inventing a new tradition. The result is a heritage, the commons, that is reduced to a resource divorced from any historical or social context. How can we go beyond these rights, which are a source of a 'promise economy' for creators, to promote imprescriptible and inalienable human rights? How can experienced creators resist copyright that takes them back to the Middle Ages?

Résumé

Quelle est aujourd'hui la situation des *droits d'auteurs* en Afrique, lorsque des spécialistes de la question, notamment aux USA en tirent le tocsin ? Partant d'un droit en gestation au crépuscule du XIX^{ème} siècle en Occident ce texte propose de réfléchir à la manière dont se discutent, s'instaurent et se vivent les droits d'auteur en Afrique subsaharienne. L'article interroge la pertinence du vocabulaire mis en oeuvre et se demande comment rendre ainsi l'Afrique intelligible dans le contexte d'un monde hétérogène. Les organisations internationales promeuvent et imposent la notion économique des biens matériels à partir des années 1990, pour inventer une tradition nouvelle. Il en résulte un *patrimoine*, des *communs*, réduits à une ressource coupée de tout contexte historique et social. Comment dépasser ce droit, source d'*économie de la promesse* qu'on miroite aux créateurs, pour promouvoir des *droits humains imprescriptibles et inaliénables* ? Comment des créateurs et créatrices aguerris deviennent-ils rétifs au droit d'auteur qui les renvoie à un certain Moyen Âge ?

Resumo

Qual é a situação dos direitos de autor em África hoje em dia, quando os especialistas na matéria, nomeadamente nos EUA, fazem soar o alarme? Tomando como ponto de partida um

direito que surgiu no Ocidente no crepúsculo do século XIX, este artigo examina as formas como os direitos de autor são discutidos, estabelecidos e vividos na África Subsariana. Questiona a relevância do vocabulário utilizado e pergunta como se pode tornar a África inteligível no contexto de um mundo heterogéneo. Desde os anos 90, as organizações internacionais promoveram e impuseram a noção económica de bens materiais, inventando uma nova tradição. O resultado é um património, os bens comuns, que é reduzido a um recurso divorciado de qualquer contexto histórico ou social. Como ir além destes direitos, que são fonte de uma 'economia de promessa' para os criadores, para promover direitos humanos imprescritíveis e inalienáveis? Como podem os criadores experientes resistir a direitos de autor que os remetem para a Idade Média?

John Perry Barlow, a libertarian internet lawyer and keen observer of copyright for more than a quarter of a century, formulates a bold thesis: 'Intellectual property is a "sinking ship", and the lawyers preparing intellectual property for digitisation are merely rearranging the deck chairs' (Barlow 2019). Meanwhile, Chander and Sunder (2019: 143), two eminent lawyers, question the relevance of dancing on the tomb of copyright! Obviously, since we are in Cologne, I am also keeping the original title of Barlow's quoted work: *Selling Wine Without Bottles*. What's it all about? Barlow echoes the alarm for rights in his own country, the USA. In other words, in the West. Can we do the same in a context close to his? In this case, Africa at the end of the twentieth century and the beginning of our era. What is the status quo as regards intellectual property? Do we have any bottles (information storage forms) for the wine being sold?

I arrived in Bamako in July 2008 to carry out surveys in the domain of intellectual property in Mali, and then, in 2013, in Burkina Faso, where I was leading other surveys (Krebs 2013). The heavy context was marked by what James Boyle (1996) called 'the second enclosure movement'. Chander and Sunder (2013) note that few legal scholars had considered the importance of 'cultural products', with the notable exception of Keith Aoki (1996) and Rosemary Coombe (1998). Marc Getty, the world's largest copyright holder, calls them 'the oil of the twenty-first century' (Fredriksson 2018). The saga of the future, as seen by international organizations and the state, was taking off.

In a series of articles published in the 1990s, Simon Harrison and Marilyn Strathern drew attention to the importance of the subject of intellectual property for anthropology (Born 1996: 101). Georgina Born (*ibid*.) responded with an article devoted to the dynamics of intellectual property in the field of computer software. This right, which was in the making in the twilight of the nineteenth century in the West, provides food for thought about the way in which copyright is discussed, established and lived in Africa.

James Boyle (1997), Rosemary Coombe (1998) and Lawrence Lessig (1999; 2001) have condemned what they describe as 'the expansionism of copyright', the sole purpose of which is to contribute to the privatization of culture and information. They are forerunners of the disciplinary field known as 'Critical IPR Studies' (Fredriksson 2018).

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The Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreements of 1 January 2005 were presented as a major step forward. However, in 2009, Netanel noted that, despite criticism of the World Intellectual Property Organization (WIPO), it held on to its credo centred on intellectual property as a 'powerful tool' for development (2009: 2–3). This original paradigm is strongly denounced by other experts, including de Beer, Armstrong, Oguamanam and Schonwetter (2014: 7). Miranda Forsyth confirms this, taking the example of the Pacific Islands, and beyond:

> Global IPR regimes are promoted as the best vehicle for developing countries to stimulate their own domestic innovation. They are also said to open up new sources of wealth, such as the development of cultural industries and commercialisation of traditional knowledge, and to stimulate foreign investment. (Forsyth 2016: 4, 8)

The numerous and decisive consequences on the ground consist, first, in creating copyright offices, and, second, in facilitating a phenomenon known as piracy. A dense bibliography discusses the issue around the world, including Africa, in an edited volume published by Ute Röschenthaler and Mamadou Diawara (2016: 1–34). The study answers the topical questions posed by the world of intellectual property on intangible goods. There are three key trends. First, there are those, including non-governmental organizations, who are demanding that these rights be enforced in order to better protect the heritage and societies that generate them (notably Brush and Stabisky 1996; Dutfield 2000; Globerman 1988; Hewitt 2007; Mills 1996; Ouma 2006; Strathern *et al.* 1998; Strathern 2006). Second, some advocate free access to this heritage, presented as a potential resource (such as *Harvard Law Review* 2005; Benthall 1999; Guillebaud *et al.* 2010; McLeod 2005; Rowlands 2004; Vaidhyanathan 2001). Finally, there are some analysts who criticize legislation that is alien to the majority of the world that is subject to it. The examples are legion, especially in Africa (Diawara 2011a; 2011b; 2016; Boateng 2004; 2011; Geyer 2010), America (Seeger 1992), Asia (Lehmann 2006; Yung 2009) and beyond (Strathern 2006; Sundaram 2010).

Among the myriad of new norms challenging the boundaries of intellectual property, Chander and Sunder (2019: 144) identify new phenomena appearing on the internet, gaming or dance in particular. I would like to add to this diversity of objects what is known in UN jargon as the *intangible goods of the South*, in this case music, oral traditions, performances and so many others that call into question intellectual property as hitherto conceived by WIPO and Western jurists.

Reading Chander and Sunder (2019), one wonders whether African artists did not anticipate this rejection. If you look closely at a number of artists and businesspeople, you will see that they are happy to accept piracy, even to be pirated, and to waive their rights, provided that they are promoted and known. As such, they can perform elsewhere – abroad, for example. The aim is to accumulate performances for families and in concert halls with potential royalties. Above all, one is not satisfied with copyright alone.

Veit Erlmann (2022: 18), an ethnomusicologist and anthropologist, in a fine work, rightly formulates the following fundamental question: 'How does copyright render old forms of social order obsolete while fashioning novel ones almost from scratch?' I would stress that the first element relates to history, the poor parent of copyright

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analysts. Indeed, specialists of the past are rare in this domain, and they confine themselves to examining the past in terms of written works, the original subject of copyright. Isabella Löhr's (2010) book on intellectual property is an excellent illustration of this, but it does not focus on Africa and it avoids orality, in this case radio. Yet the latter is the medium used by pioneers interested in the issue in Africa. Indeed, the use of radio as a modern medium has led Africanists, and anthropologists in particular, to study the history of radio on the continent, without, however, addressing the issue of copyright (Leyris 2018; Losch 2020; White 2022).

Why are historical specialists so shy about what might be called the history of copyright? Their silence is all the more paradoxical in that they are the first, after ethnologists, to take a close interest in the sources of history, and even in the conditions of production of oral and other texts that they have celebrated, criticized and analysed since Jan Vansina (1961).

We will first question the method.

Methodology

Raising this question brings me back to two problems: the language spoken by the actors in the domain of law whom I meet on a daily basis, the ordinary people; and the language of the analysts that we are. The first situation takes me to Bamako, in the Sahel. The second takes me back within the confines of law.

The language of the common people

Customary greetings – and more – include the following:

Aw ni sogoma!	Hello!
M ba, a ni sogoma.	Hello.
Ntogo ye X.	I am called X.
I bisimilla. Ko cogo di?	Welcome. How can I help you?
Ni yen nka kaseti ye. N b'a fe k'a deklare	This is my cassette. I'd like to declare it.
O kanyin. I ni jon?	Very well. Who would you like to do it with?
Nkelen	I am alone.

So begin the daily conversations that I was able to follow discreetly, when a would-be artist from the Bamana-language community comes to declare his work to the Malian Bureau of Copyrights (Bureau malien des droits d'auteurs or BUMDA). It is interesting to note the phenomenon of linguistic borrowings from Bamana to French through two terms: *kaseti* and *deklare*. The cassette is the medium for the pieces of music that the artist wants to declare. *Declaring* necessarily refers to the copyright he now wants to claim on the product. Two loaded notions emerge, which are not self-evident: *the author* and *his rights*. Added to this is the question of translation, which the artist, illiterate in French, resolves without a moment's hesitation by adopting the original French terms, as is done in everyday life. The anthropologist, confronted with this experience, quickly raises questions of methodology that refer to three major figures, notably Elísio Macamo (2018), and Katherine Verdery and Caroline Humphrey (2004).

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Macamo (2018: 343) asks: How can Africa be made intelligible using terms forged elsewhere, in this case that of the empire? In this regard, he takes the example of the term 'democracy' and studies the itinerary of this 'conceptual social apparatus' when it is applied uncritically to Africa. The author notes that the concept is widely applied, ignoring its history of which it is a product. The result is a process of 'black box' reduction, a concept that Macamo borrows from Bruno Latour (1999). The result is this kind of shortcut thinking. Since democracy is 'valid' and 'successful' in Europe, it must be imposed everywhere, especially in Africa. Moreover, Europe's current social and political conditions are seen as the product of planned social engineering. Macamo therefore recommends considering *democracy* as an ethnographic object that needs to be analysed, in order to ensure that it is translated and put to the best possible use, rather than seeing it as a finished product, ready to be exported around the world. This perspective will guide us as regards the terms 'law' and 'copyright'.

Katherine Verdery and Caroline Humphrey (2004: 2), in their book on property rights, state from the outset that the term is not self-evident. Above all, they require it to be problematized. Unlike other works on the subject, this one examines the concept in the light of how it is used in the various societies reviewed. Instead of looking for a better definition, the two authors prefer to know 'how this concept works, who uses it, to what end and with what effects'. Verdery and Humphrey point out that the term 'property rights', so ubiquitous throughout the world, is indeed of Western origin. Even if its content, they write, varies according to case and discipline, it carries its own implicit theories and ideologies. Verdery and Humphrey (2004: 2–3) invite us to interrogate the work done by the concept of property rights in the new Euro-American configuration it deploys. To understand these underlying dimensions, we need to consider copyright itself and the set of related notions as an ethnographic object, and, as Macamo (2018) demands, take cognisance of the history of its construction as a concept. It is a matter, as the author writes, of translating the detected black box.

The new context of the notion of property rights is undoubtedly reminiscent of the copyright fascination on the African continent and beyond. Copyright should therefore be considered from the moment it became a reality in sub-Saharan Africa, in the late 1970s onwards. The advent of copyright in a context dominated by orality brings to mind two independent but parallel studies, published in 1996 by Georgina Born and in 2006 by Jean-Paul Gaudillière and Pierre-Benoît Joly (2006). Born (1996) deals with the dynamics of intellectual property rights in the microcosm of software research in the USA. In the specific case of computer programs, she points to 'the conflictual dynamics of intellectual property in process'. Gaudillière and Joly study the appropriation and regulation of biotechnological innovations in order to draw a transatlantic comparison. Born defines two distinct fields, even though, based on Appadurai (1986: 13), she relativizes the dichotomy. Be that as it may, let us retain both, the second in particular, which the author refers to as *the informal and practical discourses relating to intellectual property*. Without wishing to revive the old and fruitful debate on the formal versus informal dichotomy as applied to intellectual property, the notion of informality refers to the *discourses* that circulate on the ground. The author refers both to the colonial library, which was keen on intellectual property, and to the ancestral practices of the local people we are interviewing. The French researchers, for their part, are trying to contribute to 'the emergence of a new regime

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of knowledge production characterized by tensions between "market" regulation [in France] and "civic-consumerist" regulation [in the USA]'. We are quite familiar with the great proximity between the two countries, compared with the relationship between each of these countries and the South, especially Africa. If the difference between these two countries, which are so close, arouses so much scientific curiosity in the field of knowledge production and management, what can be said about the field that is created when copyright, which came from the North through colonization from the General Agreement on Tariffs and Trade (GATT) or WIPO, is established in the South?[1]

In the wake of the new information technologies, John Frow (1988), a specialist in matters related to computer software and copyright, notes the desire in the USA to base the economy on the 'commodification' of information, at the cost of major contradictions in US copyright law. Frow (*ibid.*: 4–11) criticizes 'the conceptual status and legal viability of the key terms of intellectual property law – "author", "work", "originality", "idea", "expression" – terms which, moreover, reveal their instability in different legal systems'. We are well aware, moreover, that these concepts apply to societies and texts that are far more different from Western ones than Western texts are from each other. Reading Frow, you would think you were listening to an observer of the African scene from the 1980s onwards, except for one difference. How does one respond to the American anthropologist's sweeping assessment of his own society when studying the realities in Africa? The new legal situation certainly contradicts aspects of copyright and authors' rights inherited from the colonial era. But it contradicts even more the precolonial management of intellectual production that many authors have analysed, especially in the Mande world and in Cameroon (Diawara 1990; 2003; Röschenthaler 2011).

The language of analysts

It is natural for researchers to wonder about their debt to their colleagues and their respective disciplines. It is obvious that theory is subject to empiricism in my domains of specialization. However, two eminent jurists, Anupam Chander and Madhavi Sunder, comment on law as observed in Julie E. Cohen's work. Dismayed, they write: 'How ironic that the scholarship on the area of law most directly regulating the culture industries has long resisted learning from scholarship on culture!' (Chander and Sunder 2013: 1397).

My debt as an anthropologist and historian to legal scholars is immense, even if two of their eminent representatives, Chander and Sunder (2013), point out the paradox that their colleagues have so far turned more to economics than to the 'sciences of culture' as a basis for their method. The means I use to argue my method can perhaps be explained by the term 'law' that marks the notion of copyright. As soon as it is mentioned, law as a discipline arises. For Chander and Sunder (*ibid.*), the inspiration should rather come from culture-centred disciplines, which I translate as social sciences and humanities. Taking their well-founded critique seriously, I observe, however, that the question of the appropriation of so-called immaterial goods cannot be evacuated.

[1] Let's not forget the vastness and diversity of the South.

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Let us take a look at the philosopher Paul Ricoeur (1969a; 1969b) and the anthropologist Denis-Constant Martin (2014) to convince ourselves of this, before returning to humans, to society, which is at the heart of the debate. According to Martin (2014: 47), appropriation, a common phenomenon in the field of music, refers 'generally to all kinds of copying, borrowing or recycling that result in the creation of a piece of music using pre-existing elements'. According to Ricoeur, it is a matter of 'making something one's own ("*propre*") in order to affirm or recover the act of existing, proclaiming a desire to be' (Ricoeur 1969b: 323–5). 'It indicates that being and existing, and better still, understanding oneself, depends on the Other, on understanding the Other [Ricoeur 1969a: 20–1], of the relations that the Self maintains with this Other who, at the same time, is in the Self and, in his otherness, is another Self' (Martin 2014: 54).

The question of appropriation is therefore intimately linked to copyright, as much as to the actors at the centre of creation. This is why lawyers, social scientists and humanities specialists all have an essential role to play, as Chander and Sunder (2019) put it. However, this does not absolve those lawyers from other criticisms.

Julie E. Cohen (2012) is a fair and uncompromising critic of the economico-legal approach of copyright lawyers. She recommends that they accept flexibility and loopholes. To achieve this, Cohen suggests three strategies: access to knowledge, operational transparency and semantic discontinuity. For the third, Cohen observes 'an incompleteness in the legal and technical landscape that leaves unregulated spaces for individual action' (*ibid.*: 31; see Chander and Sunder 2013: 1399). She concedes the incompleteness – which deserves to be explored further – in order to capitalize on individual initiative and action. But incompleteness, to me, seems essential, including in the first two strategies that Chander and Sunder (2019) take for granted. If the law is to apply to others in a field as new as intellectual property, there is good reason for jurists, and perhaps the law, in a fit of modesty, to accept their incompleteness. As a product of the Enlightenment, this law cannot be applied blindly to an empire that is no more. What Netanel (2009) refers to as the 'neoliberal one-size-fits-all' no longer applies.

What is this one-size-fits-all? How have actors reacted to it?

Berne: the expansion of intellectual property and the invention of tradition

Berne is famous for its eponymous Convention for the Protection of Literary and Artistic Works. In 1886, ten European countries agreed on a set of legal principles for the protection of original works. Of course, this legislation was also in force in the colonies. An abundant bibliography discusses this subject from the mid-nineteenth century to the independence of the majority of African countries in the 1960s (cf. Masouyé 1962; Okediji 2003; 2004; Peukert 2012; 2015; Rahmatian 2009; Sherkin 2001). Although this debate is fascinating, my interest here is different. In 1967, the mission 'to promote the protection of intellectual property throughout the world' was launched. Its unambiguous aim was to 'harmonise intellectual property laws upwards', with a maximalist tendency that persisted beyond 1974, when WIPO came under the control of the United Nations (Netanel 2009).

The 1990s and the dawn of the third millennium marked a historic turning point, with some interest in the intimate relationship between local knowledge and

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biodiversity and the need to protect the societies that generate knowledge. A broad coalition of environmentalists and indigenous peoples amplified the legal discourse on the rights to local knowledge and so-called folklore. This struggle was crowned by the Convention on Biological Diversity signed in 1992 (Erlmann 2022: 124). The coincidence of these interests, hitherto considered separately, was concluded by the 1997 UNESCO and WIPO conference in Phuket, Thailand. By 2022, 181 of the world's 195 countries had ratified it, providing authors, musicians and poets with the legal means to protect the use of their works.[2] As it was no longer simply a question of written texts, it was necessary to find a common framework for this knowledge, by inventing a *tradition*.

Under the aegis of the UN, the Berne Convention was extended to countries of the South, under the guise of copyright. It was a true IT 2.0, IT as *Invention of Tradition*.[3] Indeed, the debate on the administration and appropriation of 'traditional knowledge' was raging in the 1970s and 1980s. It was a question of opting for a holistic philosophy and a mode of traditional appropriation (indigenous ownership) defended by the First Peoples of former settlement colonies such as Australia and New Zealand, or for the shared vision by the EU and certain countries in the Middle East and Africa, which opted for 'the principle of the national sovereignty of states over their resources'. Here we have a revival of tradition, this time in an IT 2.0 version. They are referred to as *Traditional Knowledge* (TK) and *Traditional Cultural Expressions* (TCEs), which are subsumed under the term *Indigenous Cultural Heritage* (ICH). Music and the copyright granted to the author fall within this category.

The notion of 'indigenous community', a 'discursive bricolage' par excellence (Erlmann 2022: 114, 124), serves a dual purpose: first, to justify the existence of a department in charge of the subject; and second, to clear the name of the First Peoples. The latter are, moreover, virtually non-existent, since the specialist in copyright is concerned with the real holders of the rights. UNESCO and WIPO have given national legislators the option of managing an asset that they have now labelled 'folk expression'.

Governments were given the task of looking after their assets – or rather, of giving communities the means to market their 'traditional knowledge'. It is in this context that the attitude of making culture the second pillar of the national economy emerges. All that is left to do is make a profit from it, thereby prospering the ethno-entrepreneurs (Comaroff and Comaroff 2009). The resulting cultural commodity encourages locals to shape themselves as individuals, cultural entrepreneurs ready to serve a clientele in search of the exotic (Erlmann 2022: 133; cf. Coombe 1997: 85; Boateng 2011: 180). The private sector began to dream of revitalizing a dormant informal economy (Erlmann 2022).

Disenchantment did not take long to set in, given the universalizing discourses of jurists, whether they belonged to the socio-legal stream or to the critical legal stream, obsessed by the instrumental logic of ends and means (Erlmann 2022: 21, 23).

[2] See <https://en.wikipedia.org/wiki/Berne_Convention>, accessed 17 May 2023.

[3] Africanists usually invent tradition (Hobsbawm and Ranger 1983; Ranger and Vaughan 1993). Terence Ranger devotes two articles to this subject. The second revises the previous one, taking into account the criticisms that I am happy to adopt. If we were to number these two canonical works, we would retain the final one for the invention of the tradition that occurred in Berne.

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> Traditional knowledge[4] is considered as … knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community … but there is no recognised international definition. Often TK and TCE are subsumed under the general expression *Indigenous Cultural Heritage* (ICH). (Rahmatian 2021: 125)

Since the term 'tradition' is so vague, how can it be protected? For the jurist Andreas Rahmatian (2021: 136–7), such a so-called legally protected tradition is merely an 'arbitrary legal construct' different from a 'lived tradition'. Moreover, he pursues the argument that protecting the TCEs goes hand in glove with protecting ex-colonized peoples. The TCEs carry this whiff of customary law adapted to ensure colonial domination. Indeed, any protection of an ethnic minority runs the inherent danger of difference, which inevitably leads to discrimination by the dominant. The protective grid of the minority inexorably turns into a cage. But does this mean that we are giving up on protecting these populations? No, it should be individual protection enshrined in the constitution, not a 'nebulous collective protection' (Rahmatian 2021: 145).

Another jurist's point of view arises: Samantha Besson's, who delivered a great lecture entitled 'Le droit international de la science' (The international law of science) at the Collège de France (Besson 2024). According to the author, the economic notion of material goods, which has been gaining ground since the 1990s, engenders that of heritage, of that which is common, which is more a matter of appropriation than protection. Once these goods are separated from their historical and cultural contexts, they are reduced to meagre resources. To counter this trend, there is nothing better than 'breaking the vicious cycle of the commercialization of scientific knowledge', to go beyond 'proprietary logic'. According to Besson, it is a matter of promoting another right, that of scientific creators, synonymous with imprescriptible and inalienable human rights. This right of creators confirms the human's right to earn a living from their creation.

The promise economy

We owe the concept of the promise economy to the science sociologist Pierre-Benoît Joly (2010). Foyer *et al.* (2017), who take up the notion, define the economy of promise in the field of floral genetics as the promise of a synergy between biodiversity conservation and the market – that is, between copyright and the market.

Beginning with studies by Jean Foyer, Aurore Viard-Crétat and Valérie Boisvert, how can we analyse the case of intellectual property based essentially on the Romantic author imposed by the West in societies that ignore it (Diawara 2016)? The

[4] The concept of 'traditional knowledge', ex situ, takes another step away from the study field and the science that created it: anthropology. What are we to make of such a vague concept? Is it not simply an ideograph, in the sense of Van Lente *et al.* (2010; cf. Joly 2010: 6)? Van Lente explains that the linguist McGee introduced the term ideogram to designate these notions:

> An ideograph is an ordinary language term … a higher order abstraction, representing collective commitment to a particular but equivocal and ill-defined normative goal. It warrants the use of power, excuses behaviour and belief … and guides behaviour and belief in channels easily recognised by a community as acceptable and laudable. (McGee 1980)

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medium that requires the privatization of culture, in order to generate an industry in this field (Skinner 2015: 131ff.) that responds to market concerns, is analogous to what is taking place in the field of bioprospecting, as mentioned by Foyer *et al.* (2017). Genetic resources, like cultural resources (including music), are raised to the level of raw materials, as 'goods'. The vocabulary used for this purpose bears witness to this: 'cultural property', 'intangible cultural property'. They are blithely appropriated, as echoed in Michael F. Brown's (2004) eloquent title *Who Owns Native Culture?* Better still, as in bioprospecting, the introduction of copyright 'should make it possible to implement development mechanisms for the benefit of local communities' (Foyer *et al.* 2017: 5). Kamil Idris, the director general of WIPO, drives home the point: 'Intellectual property is a "powerful tool" for economic development and wealth creation' (Idris 2003).

In the case of Mali, a whole raft of figures is being bandied about to convince the government of the enormous cultural potential that exists, provided that it is privatized within the framework of the *law* (Diawara 2013). Figures are an essential tool in the policy of expanding copyright. They are 'the formulation of *an epistemic advocacy*' (Hayden 2003: 32), 'of a promotional discourse, of figures' to consolidate that promise. WIPO, especially in Mali, promises money to members and huge sums to the state. In addition, the annual charts presented to BUMDA's board of directors prove the validity of the new credo: 'faith in numbers' (Supiot 2015: 152, 141). We come to dream that 'numbers alone make the *law*' (*ibid.*: 119).

These prophets of numbers and their apostles obscure a fundamental problem, the problem of *poor numbers*, to which Morten Jerven (2013) opportunely draws our attention. The cases of Mali, South Africa and Burkina Faso illustrate this error.

In Mali, BUMDA estimated the potential of the cassette market in 2005 at 7,360 billion CFA francs (US$13.99 million), of which 20 per cent was legal. The remaining 5,888 billion CFA francs (US$11.16 million) is given over to counterfeiters.[5] By having its market monitored, it is explained to the state how much it stands to gain.[6]

South Africa is not to be outdone. The official political discourse counted on the absorption of the dormant informal (cultural) economy by the dominant economy to herald a dawn synonymous with creative industry, full employment and social security (Erlmann 2022: 31). In December 2011, South Africa's police minister declared a 'people's war' on piracy, and that piracy was 'tantamount to daylight robberies' (*ibid.*: 175). In the early 2000s, entire warehouses of CDs and DVDs from Singapore and elsewhere were raided. In 2004 alone, 1.9 million CDs were seized. A campaign led by the Creative Workers Union of South Africa, backed by generous media coverage, predicted the apocalypse, with 3.6 million monthly downloads and an annual loss of US$24 million. Units of the South African Armed Forces, the South African Police and an alliance of industry associations seized 21,000 physical music recordings in the first two months of 2012 alone. Two years later, the fervour had largely died down (*ibid.*: 178–9).

[5] Counterfeiting of all kinds of music remains the order of the day. Given the sophistication and diversification of electronic means of reproduction, the 'pirates of yesteryear', like the state, have withdrawn from the scene. On the subject of numbers in Mali, cf. Diawara (2021).

[6] *Le Républicain* (Mali), 14 July 2005; cf. <http://donnees.banquemondiale.org/pays/mali>, accessed 7 May 2024. For conversion and exchange rates, see <https://exchangerates.org/usd/xof/in-2005>.

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Erlmann (2022: 22, 195) reports on an experience that lasted from 2010 to 2018. From 2010 to 2014, most of the interventions were coordinated by the Anti-Piracy Unit (RAPU) of the Record Industry of South Africa (RiSA). RAPU had one assistant officer and four investigators. Following budget cuts and a change in policy, RiSA reduced the number of investigators to one. From 2012 onwards, interventions against street vendors were outsourced to the South African Federation Against Copyright Theft.

Erlmann (2022: 283, 286–90) recounts the sad saga of the South African copyright-collecting society, the Southern African Music Rights Organisation (SAMRO), in August 2018, three years after the fact. SAMRO's chief executive officer expressed the wish to set up a copyright-collecting society in partnership with a company based in the United Arab Emirates, the Arab Emirates Music Rights Organisation, in collaboration with the Emirati government. This was done while ignoring the rules of law. To counter them, American, Canadian, British and French companies operating in the United Arab Emirates joined forces until SAMRO withdrew its application for establishment. On 8 September 2018, the Confédération internationale des sociétés d'auteurs et compositeurs (CISAC), the international umbrella organization of 228 collecting societies in 120 countries, refused to recognize SAMRO, which had already hired staff and consultants at great expense and rented luxury offices. The scandal cost SAMRO US$2.8 million.

In the same vein, the Burkinabe chief of the Copyright Office expressed the same disillusionment in October 2015 during an interview he granted me at his office in Ouagadougou: 'We [now] let it happen.' He pointed out that the cost of a police raid far outweighed the fines and confiscations imposed on counterfeiters. What could he do about the small retailers trying to make a living while the big counterfeiters lived in peace? The situation is similar in Mali. A. Kéïta, who once coordinated the regional offices of BUMDA, bitterly remarked on the actions of custom officers, who were supposed to stop counterfeiters: 'The counterfeit goods that interest customs officers are those that make billions.'[7]

In fact, the promise of liberating the Romantic artist who is both brilliant and unique has run aground on the reef of the precariousness that characterizes post-industrial society. South Africa and the rest of the continent are living out the lost illusion of the West, including the USA, described by Matt Stahl (2013: 11–15; Erlmann 2022: 31).

Refusal to return to the Middle Ages

Taking the Mande world as an illustration, what can we say about the role of history and the timidity of specialists in the debate? The Mande world covers the former zone of cultural influence of the Mali empire. This area covers countries as diverse as Burkina Faso, northern Côte d'Ivoire, the Gambia, Guinea, Guinea Bissau, Mali, Mauritania, Senegal, northern Liberia and northern Sierra Leone. We have noted elsewhere that each clan of poets, known as griots and originally as clients, depended on a clan of patrons or benefactors (Diawara 1990). The griots document throughout life the deeds and actions of their patrons, in whom they are recognized specialists

[7] Oral testimony, field notes, Bamako, 2009.

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(Camara 1975; Conrad and Frank 1995; Diawara 1990; 1996; 2003; Hoffman 2000; Jansen 2000a; 2000b; Schulz 2001). However, the griots developed an erudition about the past of many other clans. Whatever the case, their knowledge, which they passed on from one generation to another, belonged to their patron, who in return was obliged to lavish them with gifts. The same is true of the stories and songs produced as part of youth associations and ceremonies marking key moments in life, such as the giving of first names, initiation, marriage and death. We recall Ibn Baṭṭūṭa's beautiful description of the visit of the chief of the griots of Mali to the court of the sovereign Mansa Suleyman (1341–60). Ibn Baṭṭūṭa (1304–69?) spent eight months at the court of Mansa Suleyman (in 1352 and 1353), emperor of Mali. The sovereign offered her 900 grammes of gold (Baṭṭūṭa 1982)! The day after this imperial gift, each patron was free to reward his client who came to greet him. It would be interesting to examine what happens when the postcolonial state, under the leadership of international organizations, decides to grant copyright to creators, some of whom are griots.

These poets narrate, act and sing their texts for real or imaginary benefactors, and in return receive all kinds of rewards, which, nowadays, can border on the fanciful. Offering millions in cash, gold, villas or even plantations is not uncommon (Diawara 1996). These creators have an age-old heritage that is constantly being updated. The most renowned griots count both on this income and on what can be generated by their rights. In a situation where they agree to play the rights game, these neo-artists happily combine the two statuses. One can think of the great ladies of the Malian scene who reduce their impresario to the rank of a bag bearer as soon as the artist finds herself or himself in the salons or courtyard of a generous donor.

One of them bitterly recalls:

> I am A. I worked with D. D. because of D. Kane, director of Mali K7, the company in Bamako that releases her cassettes here, and director of operations at Seydoni-Mali! Obviously, I worked without a contract with this great diva, but not without consequences. I showed her off, even holding their car door. I negotiated live TV coverage ... They [the diva, her instrumentalists and other accompanists] performed in Port-Gentil, Gabon. They went to several *sumu* parties, including one at the home of tycoon Habib Sylla. I asked for my fee, but she and her people denied me. I immediately left that evening. The plan was to continue to the USA, but in view of the success and the high income from Gabon, they refused ... The husband insulted me and they stayed in Gabon for a month! Moral: You always have to train these people, help them, to turn them into real professionals![8]

In this way, the poet retains control over her patron, the *jaatigi* or *jatigi*. As for the law, it refers the artist to the Copyright Office. This institution sets itself up as a new patron that the neophyte analyses coldly. This new boss sends the artist back to the Middle Ages, with its drawbacks. Without having read Ruth Towse (2005), an economist and specialist in cultural industries and copyright, on the relationship between copyright and the economy, the artist knows that the law is not their only means of gratification. They know that they can be rewarded with 'other forms of

[8] Interview with A. Kéïta, field notes, Bamako, 2008 and 2009.

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patronage' that enable them to bypass the cultural industries (*ibid.*: 3). Like Towse, the artist realizes that, once the economic benefits have been granted, they no longer have any control over them. First, according to Towse (2001), the income of the average artist is usually low. Second, the artist is powerless if the publisher decides to remove their work from the catalogue. Since artists generally fall within this average range at most, the new patron is likely to retain control over the product, while the customer's control over the owner disappears.

Ruth Towse sums up the management of copyrights in a striking way, as can be read in her lines, which sound like an ode by Sahelian artists to their own corporation:

> *Copyright gives rights, but it cannot guarantee rewards* . . . Copyright gives rights to authors and performers but they only have financial value when transferred in some way to the cultural industries: control over works follows the economic logic of the allocation of property rights, usually ending up with the industry rather than the artist (Caves 2000) . . . *'Copyright giveth and copyright taketh away.' The unintended consequences threaten intended consequences*. (Towse 2005: 5, italics added)

The artists who adhere to the copyright system intend to benefit from it, immediately if possible. They want the same results as their bosses of yesteryear, in the days of Ibn Baṭṭūṭa, or as in the Gabonese way. How can they accept this uncertainty that Towse (2005) describes so well? Moreover, how can they accept the bitter reality that Towse concedes: copyright takes away what it gives? This unexpected consequence alarms the rights neophytes. It frightens them all the more because copyright orders them to lose the advantages they once enjoyed. What is the point of sticking with a system that pegs you to a market that has now taken over and stripped you of your age-old advantages? Why trust a new boss, an institution synonymous with so many disadvantages?

First, copyright is impersonal. At most, the person who calls himself or herself an artist faces an office, even if he or she tries to tame it by giving it a face. Then there is an absence. The right is claimed only once a year, even if the artist has access to health insurance as an individual as a result of this right.[9] What is more, the *jeli*, or any other artist accustomed as a client to relying on their patrons, and vice versa, at all times and in all circumstances, adheres to a system that puts them face to face with their new bosses or their rights. So where are the patrons, these people, families and villages that we have known and interacted with for generations?

Finally, the break. Everything about copyright seems to boil down to a financial transaction, where individuals with the rights collect them and manage them as and where they see fit. But what remains once the money is gone? Or what can be done when the promise made is not kept, as Towse so clearly shows?

Knowing all this, the neo-artists refuse to return to the Middle Ages invented in the late nineteenth century in Berne. If possible, they combine the advantages of the different systems.

[9] In reality, there are so few elected representatives – see, for example, the case of Senegal, often cited as a good example, where the jurist Youssou Soumaré (2008) explains the destitution of artists.

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Conclusion

In order to expand copyright to the post-independence era, a 'promise economy' was propagated, announcing a radiant future for the Romantic author, in Africa and beyond. Like the 'romance of development' (Diawara 2014–15; Chander and Sunder 2004), copyrights are sold to governments, but also to populations. What have these people done with what we wanted to do with them, to borrow from Jean-Paul Sartre? Adamant, they retain the secular advantages accumulated and subvert the responses and solutions enacted by the colonial and postcolonial state. They continue to refine a strategy that has so far worked for them: accumulate and sort. *Travelling models* hardly frighten them.

My interest in copyright as an anthropologist and historian of Africa quickly brought me face to face with the poverty of my tools. The two academic disciplines I studied were challenged by the complexity of the facts. I am immensely indebted to literary scholars, sociologists and lawyers, to name but a few. The latter nurture the hope of overcoming the 'proprietary logic' in the future and promoting the rights of creators, synonymous with imprescriptible and inalienable human rights (Besson 2024). The paucity of academic tools highlights the incompleteness of our disciplines, as Francis Nyamnjoh (2024) would say, and reminds us of the imperative need for empirical work, which, alas, is sinking like a stone. Any excuse is good enough to explain or even justify this shortcoming. For my part, I am struck by the strength of current academic trends based on the argument of insecurity on the continent.

I attempted to look at copyright as an ethnographic object, to borrow Elísio Macamo's phrase, to question our conceptual apparatus on the basis of empirical surveys. Like a black box, the concepts and notions behind copyright are examined and put into context. I worked using what I learned at the Pilot African Postgraduate Academy in Bamako.

This study brought me face to face with a paradox: the 'invention of tradition' IT 2.0 for use in the postcolony of the twentieth century – not in Bamako, but in Berne. This tradition is hard to sell, even though millions of women and men, promoted to the status of artists, are waving its banner.

Supplementary material. To view supplementary material for this article, a French version of the text, please visit <https://doi.org/10.1017/S0001972024000974>.

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