



## The Arts, Africa and Economic Development: the problem of Intellectual Property Rights

Patrick Kabanda

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### ARTICLE INFO

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**Issue:** 2016(1): *Special Issue 'Cultural Economies and Cultural Activism'*, ed. Vickery, J. P.

**This article was published on:** 1st May, 2016.

**Keywords:** Africa; Intellectual Property; the creative and cultural industries; economic development; global development.

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### ABSTRACT

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The subject of this article is the application of Intellectual Property Rights (IPRs) to Africa's cultural economy, and its implications for development. Drawing on extensive research, including field work in Africa and interviews with key people in the field, the study explores the concept, definitions and various ways in which Intellectual Property is formulated, particularly with regard the production and international trade in cultural goods. The paper tackles two widespread assumptions: the first is that Intellectual Property is a necessary condition of successful cultural production; and second, that Intellectual Property is antithetical to African culture -- that an effective Intellectual Property regime in Africa is inoperable. On the first point, the paper observes Africa's extraordinary levels of cultural production, without substantial IP protections; and on the second point, it explains that while property rights in Africa are complex, an effective IP regime could indeed be devised. With reference to various events and projects by the World Bank and others, the author sets out the necessary conditions for an IRP development in Africa.

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*Copyright:* Journal of Law, Social Justice & Global Development, University of Warwick, UK:  
<http://www2.warwick.ac.uk/research/priorities/internationaldevelopment/lgd/>

## INTRODUCTION

*Poor People's Knowledge*, a collection of case studies published in 2004 by the World Bank and Oxford University Press, reported that culture and commerce can and do complement each other, particularly within the contexts of development (Finger and Schuler, 2004). Citing examples, such as the World Bank's Africa Music Project and traditional African crafts, the collection authors suggest that if developing nations can promote intellectual property rights [IPRs], they can also increase both revenues and earnings from their peoples' traditionally exponential cultural innovation, knowledge and creative skills. Working with several African governments, the World Bank has, for one, recommended the establishment of relevant policy and legal reforms to help develop Africa's local, regional and national music industries. This article will explore the implications of supporting Africa with the international IP regime. From research that started in 2011, I will charter the conceptual and cultural-political issues of IP for the African continent's creative producers.<sup>1</sup>

In industrialised countries, artists, writers, inventors, and others who create 'intellectual property' are ascribed a legal identity and so widely benefit from intellectual property rights in terms of both monetary contributions to their countries' economies and professional credibility in terms of the value of their national-economic role. The economy of IPRs has been attributed to factors such as strong legal systems and infrastructure, as well as a robust professional class and civil society. And while African countries indeed have immense cultural resources, creative energy and countless cultural producers, intellectual property law and enforcement is weak. Artistic creations in Africa — from music and literature, to dance, film, and the

visual arts — are, by and large, not subject to strict protocols or processes of commodification and ownership, but are shared freely, in part due to a traditional understanding that 'knowledge' itself has communal ownership.

The free exchange of knowledge has helped Africans, from Cairo to Cape Town, and from Dakar to Dar es Salaam, to learn from each other. On the other hand, the lack of reward for knowledge-based products often stymies investment, professionalisation, innovation and marketing, generating the "monkey see, monkey do" phenomenon in the arts and other sectors, particularly pervasive from Kampala to Cairo and from Lagos to Lilongwe, for example. Among other disadvantages, African knowledge products, ideas and artistic forms, bleed beyond Africa and we can find them available 'for free' and thus often adapted for other's copyrighted material, enabling others to profit from African artistic creativity. Yet, if the transmission of culture or transfer of knowledge moves in the opposite direction — from the USA to Africa, for example — there are no shortage of international agencies or legal representatives that remind African nations to obey international intellectual property regime and its laws. Based on empirical research on this topic, as well as interviews with two leading experts involved in the World Bank Africa Music Project, this study will examine the relationship between the arts, IRPs and economic development. I will argue that if African countries can institute and enforce intellectual property rights, the African continent could more effectively use culture for economic development without exposing its culture to forms of international market commodification. African culture could be monetised and play an 'economic' role, without simply becoming a product for sale on the international market for cultural goods or services.

## Properties of Intellectual Property

Legal scholar Robert P. Merges argued in 2011 that intellectual property today is like the character of the "chaotic, sprawling mega cities in the developing world ... [such as] Mexico City, maybe, or Shanghai" (Merges, 2011: 1). It's an odd juxtaposition, but Merges suggests that the order and regulation required for Intellectual Property is not antithetical to the seeming chaos or confusion

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<sup>1</sup> This paper is related to my earlier World Bank working paper, 'The Creative Wealth of Nations' [see References]. Much of the research material used in this paper was derived from field and desk research conducted during the period 2010-11, after the publication of the second (revised) UNCTAD Creative Economy Report 2010. My references span the decade prior to this, in the content of the Millennium Development Goals (MDGs), but my conceptual approach assumes that the analysis and the principles I articulate remain valid to the contemporary situation in Africa and with regard the application of the international IP regime, as supported by WIPO and others. While I am not critical of the IP regime itself -- which is highly competent and valid for many Western markets -- but its application to Africa requires further critical scrutiny.

that accompanies emergent global economic activity (the vast portion of it taking place in today's rising metropolises). Rather, IP, like urbanisation, can locate order in dynamism. In his book, *Driving Innovation: Intellectual Property Strategies for a Dynamic World*, Michael A. Gollin suggests that Intellectual Property [IP] can be defined at least five different ways and that even people experienced in IP may be unfamiliar with all its available manifestations (Gollin, 2008: 22). By way of introduction, we must consider his definitions:

(i) IP (for a dictionary approach) "...is something intangible, created by the use of mental ability, to which legal rights attach." Such legal rights, of course, have been associated with property ownership since Roman times.

(ii) Lawyers use IP as a term by which to refer to a variety of legal doctrines, including industrial inventions, innovations and manufactured objects (patents, trade secrets, trademarks) and literary products (copyright).

(iii) In accounting, IP is viewed as a "form of intangible asset."

(iv) In business and management, IP is often understood as a "management tool for converting human capital into value by defining and capturing new knowledge". Gollin cites Patrick Sullivan's description of human resources and a firm's intellectual assets as "intellectual capital."

(v) Unsurprisingly, many scholars maintain the broadest definition of IP, which "...refers to an ethical system that values all that is known...including individual creativity and socially adopted innovations as well as old and collective knowledge. [This interpretation] may go beyond the legal definition to include everything in the public domain." (Ibid: 23)

With such varying definitions, crossing vast tracts of industry, social and cultural life, as Gollin points out, individuals from varying professionals or academic disciplines easily misunderstand each other. Lawyers could misunderstand accountants, business people could misunderstand scholars, vice versa and so on. In this paper, the definition of intellectual property I will maintain is the definition '(ii)', which is the legal framework – of 'IPRs'. I will do this in order to identify a critical and 'political' issue central to international development and the emancipation of Africa as an actor in the global economy.

Today, intellectual property, particularly when discussed in the context of the global creative industries, is perhaps synonymous with the World Trade Organization's (WTO) 'Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS). Negotiated between 1986 and 1994, TRIPS debuted into a multilateral trading system at the Uruguay Round in 1995.<sup>2</sup> The Agreement invited members, including developing states, to enforce IPRs as a means, among other things, of encouraging innovation and the exploitation of the value of the products of innovation. Article 7 adequately articulates the TRIPS' aims:

"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".<sup>3</sup>

These aims indeed possess a certain economic logic, but there are many who point out that this Agreement does not begin to address the specific needs of developing countries in relation to IPRs. J. Michael Finger, former Lead Economist and Chief of the World Bank's Trade Policy Research Group, asserts that TRIPS "is about the knowledge that exists in developed countries, about developing countries' access to that knowledge, and particularly about developing countries paying for that access" (Finger and Schuler, 2004: 1). In an interview, Finger added: "TRIPS is about collecting across borders ... [but] if you are a Senegalese musician [for instance,] and your problem is piracy within the local economy, then the TRIPS agreement has no relevance."<sup>4</sup>

While intellectual property rights are consequently often viewed as a Western construct, their origins can historically, with some irony, be traced back to the African continent. Gollin writes that the "roots of intellectual property may be

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<sup>2</sup> World Trade Organization, Intellectual Property, Understanding the WTO: The Agreements: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm). (accessed 20th December 2015)

<sup>3</sup> World Trade Organization, WTO legal texts: [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPs](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs) (accessed 20th December 2015)

<sup>4</sup> J. Michael Finger, interview by author, tape recording, Somerville, MA, November 28, 2011.

found in the difficult skill of keeping a secret — choosing not to communicate information. The ancient Egyptians' respect for trade secrets is clear from Stele C-14 of Irtisen, a hieroglyphic tablet from 2000 BCE on display in the Louvre museum" (Gollin, 2008: 26-7). In translation, Irtisen, who identifies himself as the chief scribe and artisan of Pharaoh Nebhepetra Mentuhotep of the Eleventh Egyptian Dynasty, "boasts about his extensive knowledge of hieroglyphics ... ink making, magic, weights, sculpture ...[and] vows that no one will know these secrets except for him and his eldest son, permission having been given from the divine Pharaoh...Stele C-14, although it relates to a 4,000-year-old political and religious order, has the elements of a modern employee confidentiality agreement ... " (Ibid).

Like Gollin who notes that trademarks also existed in antiquity — "Egyptians branded cattle, Chinese marked their porcelain, and Romans used logos and brand names for stores, lamps, and other products" (ibid: 28). Scholars Christopher May and Susan K. Sell also argue that marking objects was perhaps the first practice of the differentiation and separating of goods, conditions of their designation as intellectual property: "Marks could indicate reliability and the reputation of the craftsman [or] maker as well as origin. Marking to establish ownership long precedes formalized laws to adjudicate disputes regarding ownership" (May and Sell, 2006: 44). Here is May and Sell in their chapter, 'Greek Ideas about Owning Ideas':

"Intellectual property did not emerge (in any form) in the Greek society of Simonides and other poets, but they seem to be the first "creatives" to become intellectual entrepreneurs in a sense that we might now recognize. Prior to the Greeks of sixth century B.C., patrons "kept" artists, poets, or singers, as well as intellectuals, who were expected to perform on demand. In the Greek city-states, direct support by patronage began to be supplemented by prizes for recitations in public as well as paid performances (similar to recitals)" (Ibid: 45).

As these above quotations indicate, IPRs are not actually an invention of advanced industrialisation, and thus will inevitably favour the most 'advanced' (or competitive) nations. There is something 'internal' to intellectual property that involves the identity of the producer, the place of production, the composition of the audience or market, and

the distribution or performative iteration of the art. In recent times, these have all become indissolubly bound up with the commodification of property and the politics of that commodification process, but we need to remind ourselves of the 'intellectual' and not just 'property dimension of intellectual property, and thus the 'rights' of IPRs.

### **The Case for Intellectual Property: Harvesting Riches from Africa's Arts?**

Africa is a continent of unimaginable proportions. At Harvard Law School on November 18th, 2011, Hauwa Abraham opened her remarks on human rights by exemplifying the vastness of Africa.<sup>5</sup> The continent, she said, could swallow the landmass of the United States, Western Europe, China, and India, and still leave extra space. Parallel to its scope, the continent's culture is equally grand. One can marvel about its cultural influences such as its music, visual arts and dance that have penetrated the world, but a question arises: How much does Africa benefit, profit or earn from these natural endowments? Contributing to an event entitled 'Workshop on the Development of the Music Industry in Africa' (sponsored by the World Bank and the Policy Sciences Center in 2001), philosopher and Nobel economist, Amartya Sen, wrote:

"[T]he contributions of the music industry to Africa's development extends far beyond the direct contribution that the development of music makes to the living standards and the quality of life of the people. In the list of contributions, a prominent place must be given to the economic returns from well designed programmes of distribution at home and abroad, with adequate protection of rights and entitlements. I am impressed to see in the "briefing book" (*Developing the Music Industry in Africa*) how much attention has been given to the diverse aspects of the task of commercial and economic use of the opportunities offered by the music industry, combining safeguards and fairness with availability and access. This can not only be a significant revenue earner (especially for some of the economically marginalized people), but also the support that this will provide to musicians can be expected to play a constructive role in making the

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<sup>5</sup> Unpublished.

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industry and the practitioner's more secure and resourceful."<sup>6</sup>

While the global music industry has been dominated by Europe and the USA, the fastest growing music markets today are in the so-called developing countries. With modern technology, young countries can easily transmit their creative "raw materials," providing a fresh perspective on the global cultural stage. The greatest advantage is that the music is there, a natural bequest impossible to deplete, and needing no synthetic products to make it. African nations, however, are not gaining an adequate share from their indigenous creations, so that a self-sustaining economy of artistic production can compete with the West.<sup>7</sup>

However, one of the major obstacles that prevent the African continent from drawing adequate capital and earning rightful profits from the arts is, of course, piracy. According to Gerard Seligman, General Director of Womex<sup>8</sup> (and a World Bank Africa Music Workshop participant), nearly all African countries have piracy levels no less than 25 percent of gross production. In West Africa, where one of the leading cultural hubs of Africa are located, studies invariably suggest that piracy is at a huge 85 percent to 90 percent of production. Finger has said that in Senegal, contrary to the belief that consumers are the major pirates, once a recorded song became popular, the recording engineer (with the master tape) would often covertly reproduce and sell copies quite apart from the interests of the musicians.<sup>9</sup> Walking the streets in any city or even town across Africa, one will routinely notice the presence of street vendors selling items ranging from vegetables and

jewellery to newspapers and apparel, but also CDs and other recording-based products. The item that most of them carry illegally are copied music and video discs. Moreover, it is commonly known that many if not most of these vendors are likely to have little knowledge their sales are not simply breaking the law, but involves a kind of theft from artists that has huge consequences – social, cultural and ethical.

Another central issue is that many African countries on the whole do not possess the kinds of strong legal and administrative mechanisms by which enforcement, the collect and distribution of royalties, can take place systematically. Finger explained what he saw in Senegal: the Senegalese musicians complained that radio stations do not pay them royalties. The radio stations said they do not pay royalties because the cultural ministry does not distribute them the money collected from taxes from users of radios and TVs. The cultural ministry said that it does not distribute the money because it does not get taxes from the taxation collection authorities.<sup>10</sup> In such a cycle, artists are inclined to accept short-term deals in which they "sign away their rights to the music" in exchange for small sums of money from producers.<sup>11</sup> In the West, of course, things are not at all pitch perfect either. But the opposite is generally true: in addition to signing an initial advance, an artist can be legally entitled to royalties on future sales of their works from all media sources, enforceable by law but also internal to the funding of production and the cycle of distribution and consumption and further production (Penna, Thormann and Finger, 2004). Piracy and the lack of efficient royalty collection mechanisms cause African nations not only to lose from individual payments and profits, taxable income, and the public funds that result, but lose substantial domestic and foreign investments, and lose the mechanisms to construct a self-sustaining economy. Moreover, it is not just the primary industries of recording, production and distribution, but secondary industries of marketing and communications media, ancillary manufacturing of materials and merchandise, artist's agents and specialist agencies (and other, what since Bourdieu have been called 'intermediaries') are lost or simply fail to develop.

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<sup>6</sup> The World Bank, The Development Economics Research Group on International Trade, Workshop on the Development of the Music Industry in Africa, June 20-21, 2001. [http://siteresources.worldbank.org/INTCEERD/Resources/CWI\\_music\\_industry\\_in\\_Africa\\_synopsis.pdf](http://siteresources.worldbank.org/INTCEERD/Resources/CWI_music_industry_in_Africa_synopsis.pdf) (accessed 20th December, 2015)

<sup>7</sup> See Birgitte Andersen, Zeljka Kozul-Wright & Richard Kozul-Wright, 'Copyrights, Competition And Development: The Case Of The Music Industry', United Nations Conference on Trade and Development, January 2, 2000: <http://www.unctad.org/Templates/Page.asp?intItemID=2101&lang=1> (accessed 20th December, 2015)

<sup>8</sup> According to the UNESCO Global Alliance for Cultural Diversity, Womex is "[t]he most important international professional market of world music of every kind." [http://www.womex.com/realwomex/main.php?id\\_headings=65&id\\_realwomex=10](http://www.womex.com/realwomex/main.php?id_headings=65&id_realwomex=10) (accessed 20th December, 2015)

<sup>9</sup> J. Michael Finger, interview by the author.

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<sup>10</sup> Ibid.

<sup>11</sup> Cited at the Workshop on the Development of the Music Industry in Africa (see note 6).

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Taking into account these issues central to the development of the African music industry, it is evident that IPRs are central. If intellectual property rights can help to create a strong music industry in African nations, it is important to examine and critique models of IPR within the creative economies of the West. The World Bank Africa Music Workshop suggested a 'Nashville model' for Africa. Dubbed the 'Music City' Nashville, Tennessee, grew from an economically poor city four decades ago to a global music center, generating billions of dollars a year, but more importantly, generating a critical mass of artists and artistic innovation (Ibid: 97). Data from a 2006 study sponsored by Belmont University and Nashville's Chamber of Commerce, illustrated that the music industry's impact on Nashville's economy was as follows:<sup>12</sup>

Nashville's music production industry supports about 19,500 jobs directly, generating about US\$722 million in labor income annually. A so-called 'ripple effect' continues to grow as music industry workers (for example graphic designers, lighting and sound technicians, marketing specialists) spend their income, creating an estimated 19,800 ancillary jobs. An additional 14,995 jobs are generated from sectors that 'piggyback' on music — these include music-related industries such as tourism and the restaurant and beverage industries. So in summary, the city's music industry generates about 54,000 viable jobs in Nashville, and this could be a conservative number: it is not only dated but also it does not include such areas as the 'informal' economy or visiting freelancers and arts education. After all, Nashville's music industry is an amalgamation of global corporations and local business that support independent artists.

The study reports that Nashville generated US\$2.64 billion from the music industries' primary expenditures; the secondary expenditures were US\$3.96 billion. The grand total of the direct and indirect impact of Nashville's music industry was US\$6.38 billion. Using data from the Tennessee

Department of Revenue, the study made the following observations: Nashville's core music business contributed over US\$24 million in sales tax. The property taxes that filled the coffers of local governments totaled US\$45.1 million; and accommodation taxes related to music-related tourism generated US\$7 million. The study concluded that Nashville's music industry generated more than US\$75 million in taxes in 2006.<sup>13</sup>

While I am not suggesting that the urban economy of US cities and its free market ideologies are universally valid or even adaptable to development contexts, we can learn much from the basic economic mechanisms of productivity itself -- the interconnections that cultural production generates between individual capabilities, rights, freedoms and opportunities, and the places within which, through which, and for which, this can incubate and develop. While empirically, Nashville's music industry has little relevance to Africa's developing economies, there are acute points of relevance. For example, Nashville and Kinshasa, (the capital of the Democratic Republic of the Congo), have one thing in common: a large proportions of their musical production is defined within and by global markets. Moreover, the evolution of music and artistic innovation in both places has taken place without economic micro-management or explicit cultural policies for music. Perhaps Adam Smith's invisible hand was at work here through the music itself – but there is good reason to see a linkage between a Nashville in America and a "Nashville" in Africa. After all, whatever the location, when there is a confluence of musicians, and economic conditions that enable the empowerment of the producer (in this case artists) an industry can begin a process of self-definition, differentiation, professionalisation and internal sub-cultural intensity that makes for both direct and indirect economic benefits to a given place.

The ever-mushrooming digital technologies may bring about changes in the music production scene as they increasingly penetrate Africa and elsewhere in the developing world. But when the majority of African music is produced in places like London and Paris, as has been the case, we should not be surprised if this generates jobs not in Africa but in

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<sup>12</sup> Patrick Raines and LaTanya Brown, 'The Economic Impact of the Music Industry in the Nashville-Davidson-Murfreesboro [Metropolitan Statistical Area] MSA', Commissioned by the Nashville Area Chamber of Commerce; conducted by the College of Business Administration, Belmont University, January 2006  
[http://meiea.org/Journal/html\\_ver/Vol07\\_No01/2007\\_Vol\\_7\\_No\\_1\\_A1.htm](http://meiea.org/Journal/html_ver/Vol07_No01/2007_Vol_7_No_1_A1.htm)  
(accessed November 20, 2011-- original webpage now expired).

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<sup>13</sup> Ibid. These serve, of course, as indicative only given their date.

the West (Finger and Schuler, 2004: 97). And it is in such places as London and Paris that young Africans may find and experience and learn from intense place-based musical sub-cultures as much as a viable industry. While surviving economically has never been easy for many artists (many often supplement their income by working multiple jobs) it is in such places that they are likely to develop in their competency, resources, and mobility.

The main advantage for America's Nashville, however, is that its industries are physically integrated – structurally in an economic sense, socially in an urban sense and mutually beneficial in a legal sense. David Sanjek, who was Director of Archives at Broadcast Music Inc. (BMI), discussed the Nashville experience at the World Bank Africa Music Workshop in 2001:

"One of the notable features of the music industry in Nashville is its physical integration. Recording studios, publishing companies and performance rights agencies are literally within eyeshot and in some cases virtually earshot of one another. This is a physically integrated landscape. BMI (Broadcast Music Inc) and ASCAP (The American Society of Composers, Authors and Publishers) collect performance royalties from broadcasters, concert promoters and the like on behalf of composers and publishers: "...It is the existence of these other institutions, such as BMI, which are as important as the economic structures that allowed the cultural activity to flourish initially. It was these that make Nashville a global enterprise, and also to allow the creators to be rightfully compensated. If we are to help in creating a Nashville in Africa we must also help create a music industry infrastructure."<sup>14</sup>

The creation of an infrastructure of accessible production facilities and equitable distribution is a priority for development, and I have been indicating that such an infrastructure for music has a number of dimensions, of which IPRs are central. Regarding infrastructure in Africa, the Internet-based mechanisms of music distribution and collection of rights are within reach. At the Africa Music Workshop, IBM and the World Bank envisioned an electronic media management system that would be mounted on a truck serving as a roaming sound studio. The truck would travel

across the continent, recording artists who want to record their music. The music would be copyrighted, uploaded to a satellite in South Africa, and then transmitted worldwide. Listeners around the world would pay for it via credit card or other online payment mechanisms, and the musicians would be credited. The Bank offered to come up with US\$4 million for the truck, and South Africa, which had the technology, had agreed to work with other African nations. Nevertheless, the project never materialized, as the governments of the countries initially approached — Ghana, Mali, Senegal and Kenya — simply did not (for a range of reasons) want to cooperate in an international music distribution system.<sup>15</sup>

According to international development policy consultant Betsy J. Fowler, the crafts industry is traditionally the major source of income for many developing countries (Fowler, 2004). The industry represents an estimated US\$30 billion in global markets. In some countries the production and sales of handcrafts contribute a considerable percentage to GDP. In Burkina Faso, for example, directly and indirectly crafts have been said to comprise up to nearly 20 percent of GDP, and in so doing employs over half the working population<sup>16</sup> and in Morocco, 10 percent. The industry's workers are mainly the rural poor who generally make most of the crafts (Ibid: 114). Besides monetary benefits, the crafts industry also helps to preserve indigenous arts and culture.

Burkina Faso, a major crafts hub in Africa, is one of the poorest countries in the world, with a population of around 17 million and a GDP of only between 10-13 billion USD per annum.<sup>17</sup> Nevertheless, Burkina Faso's developing cultural niche has earned it a place on the international stage: it hosts the Festival Pan Africain du Cinéma et de la Télévision de Ouagadougou (Pan African

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<sup>15</sup> Frank J. Penna, interview by author, tape recording, Medford, MA, November 29, 2011.

<sup>16</sup> The Burkina Faso Embassy in Canada reports that the "Burkinabe craftsmen contribute up to 20% of the gross domestic product." The October 1998 Periodic Report of Burkina Faso to the African Commission on Human and Peoples' Rights reports that the crafts sector contributes 15% to the GNP. The Report also indicates that the crafts industry employs 54% of Burkina's population. [http://www.univie.ac.at/bimtor/dateien/burkina\\_faso\\_acomhpr\\_2003\\_2nd\\_periodic\\_report.pdf](http://www.univie.ac.at/bimtor/dateien/burkina_faso_acomhpr_2003_2nd_periodic_report.pdf) (accessed 20th December 2015)

<sup>17</sup> Figures vary. I am using an indicative average derived from a variety of sources for the last decade. For a current overview, see: <http://www.worldbank.org/en/country/burkinafaso/overview> (accessed 25th March 2016)

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<sup>14</sup> Cited at the Workshop on the Development of the Music Industry in Africa (see note 6).

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Film and Television Festival of Ouagadougou: FESPACO). This biannual film festival held in the capital, Ouagadougou, is the largest African film festival worldwide. Burkina Faso also biannually hosts one of the most important African handicraft fairs in the world, Le Salon International de l'Artisanat de Ouagadougou (International Arts and Crafts Fair, Ouagadougou: SIOA). With such rich cultural capital, the crafts sector has a strong presence in Burkina Faso's economy. A 2003 African human rights report notes:

"Industry and crafts are the most important economic sectors in Burkina Faso after agriculture and livestock farming. Although [the] industry is still in an embryonic phase, crafts constitute a thriving sector...Crafts, like agriculture, are a traditional activity in Burkina Faso. This sector contributes 15% of the Gross National Product and occupies 54% of the population. Various forms of crafts activities exist...artistic crafts, service crafts and production crafts."<sup>18</sup>

Moving up to North Africa, Morocco, like Burkina Faso, has a rich crafts industry that links the country's tourism, culture and economic sectors. The following are observations from the study 'Tourism, Culture and Development in the Arab Region', a part of UNESCO's World Decade for Cultural Development (1998 to 1997).<sup>19</sup>

In the early 1970s, Morocco's Ministry of Tourism estimated that 54 percent of tourists spent their daily expenditures on crafts. The direct and indirect spin-offs from the crafts industry comprised 8 percent of GNP and supported on average one in three urban households and one in ten rural households. Unlike Egypt, a North African "tourism superpower," Morocco does not have iconic attractions that match Egypt's great pyramids or Nile cruises. Nonetheless, Morocco's crafts "are one of the most effective means of

tourist promotion. In particular, one thinks of the 400,000 to 500,000 Moroccan carpets that [have been routinely] exported worldwide straight into people's homes."<sup>20</sup> Also, tourism is promoted via Moroccan artisans who are often sought after to decorate mosques, palaces and other major sites around the world — the Morocco pavilion at Disney World in Orlando is one of such examples. Discussing the synergy between Morocco's tourism and crafts industry M. Mohamed Berriane concludes: "By making the most of the quality and diversity of the crafts industry, tourism is improving its brand image, while tourist demand for craft items energizes the craft industry."<sup>21</sup>

Like music piracy, the major problem facing the crafts industry is counterfeits. As Fowler notes, along with modern economic globalization, industrialized counterfeiting is proliferating. Artisans may be driven out of the industry all together, as they cannot compete with the mass reproductions and lower prices of machine-made handicrafts that mimic their designs.

The implementation and enforcement of intellectual property rights, one would surmise, could help curb the problem of counterfeits. However, the legal stipulations and jurisdictions of property rights are often shrouded in mystery in African countries. "Although standard legal mechanisms are in place to protect artisans in general, in most countries [in Africa and elsewhere] this protection is not sufficient to prevent counterfeiting of artisan crafts."<sup>22</sup> Ghana is one example. While a law aimed to register textile designs was passed in the 1960s, some celebrated designs like the Kente were purposely omitted "because of their communal nature".<sup>23</sup> Here, for example, we see that although Ghanaian artist Gilbert "Bobbo Ahiabile's Kente weaving has garnered international attention, appearing in places like the Smithsonian and selling globally, Bobbo has no legal protection for his designs. When J.C. Penny reproduced his designs on bed sheets that ended up in American malls there was no legal mechanism to help Bobbo."<sup>24</sup> Frank J.

<sup>18</sup> African Commission on Human and Peoples' Rights, Status on Submission of State Initial/Periodic Reports to the African Commission, 'Periodic Report of Burkina Faso to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights', October 1998 – December 2002, (July 2003).

[http://www.univie.ac.at/bimtor/dateien/burkina\\_faso\\_acomhpr\\_2003\\_2nd\\_periodic\\_report.pdf](http://www.univie.ac.at/bimtor/dateien/burkina_faso_acomhpr_2003_2nd_periodic_report.pdf) (accessed 15 March 2016)

<sup>19</sup> M. Mohamed Berriane, 'Tourism, Culture and Development in the Arab Region: Supporting Culture to Develop Tourism, Developing Tourism to Support Culture', UNESDOC, 1999. [http://www.unesco.org/ulis/cgi-bin/ulis.pl?catno=118316&set=4ECE8200\\_2\\_351&gp=1&lin=1&ll=1](http://www.unesco.org/ulis/cgi-bin/ulis.pl?catno=118316&set=4ECE8200_2_351&gp=1&lin=1&ll=1). (accessed 25 December 2015)

<sup>20</sup> Ibid: 22.

<sup>21</sup> Ibid: 24.

<sup>22</sup> Ibid: 113.

<sup>23</sup> Ibid: 126.

<sup>24</sup> Ibid: 126-7.

Penna added, “This is the new form of imperialism. ... It is economic colonization.”<sup>25</sup>

At the 1999 World Intellectual Property Organization (WIPO) Roundtable on Intellectual Property and Traditional Knowledge, Ghanaian representative and Chief State Attorney Betty Mould-Iddrissu reported that copyright infringement in Africa stunted cultural creativity: “For a developing country [like Ghana] whose national identity and cultural roots are inextricably linked with its national economic development, [cultural piracy] may have far-reaching consequences” (Fowler, 2004: 127). These factors augment the need for intellectual property rights in Africa. But, upon examination of other factors, the question arises, are intellectual property rights adequate to the broader and more complex requirements of developing a self-sustaining economy?

### The Case Against Intellectual Property

It is common knowledge how Africa’s traditional, continent-wide and central values are embedded in an investment in community. Through communal ties, Africans generate their identity, sociability and social skills, learning and mobility, and the social capital that extends beyond sharing chores and food, but also to physical and intellectual assets. While ever evolving, Africa’s legal and regulatory systems tend to address and favour the collective or group rather than the individual. For example, in many African communities a strong sense of communal land ownership prevails, and in addition to physical commodities, intangibles such as communal knowledge sharing are central to the economy of a given place; and they are valued and commonly practiced in a way that passes them down from generation to generation. In essence, community is integral to the social economy of African culture.

Arguments against strengthening or initiating intellectual property rights notes that its inherent individualisation of the concept of property will make it harder for people, especially the poor, to access knowledge. With Africa’s immense challenges, the last thing any policy should do is to close access routes to knowledge. Legal scholar

Irwin A. Olian, Jr.’s comment from 1974, still rings true today: “Of the many problems facing developing countries, none is more urgent than the need for wider dissemination of knowledge, for ultimately this will act to further the educational, cultural, and technical development of their people” (Olian, 1974: 88).

Some argue that for developing countries to catch up with new ideas, simply copying ideas and patents is a good way to jumpstart innovation. Some developed countries have undergone this phase. For example, while the United States today is criticizing developing countries for failing to enact stronger intellectual property rights enforcement, in the 19th-century the rapidly industrializing America was a bold intellectual property pirate.<sup>26</sup> Citing the book publishing industry, Steve Lohr, a New York Times reporter on technology, business and economics, asked America to look at its past in order to understand where developing countries are coming from. He makes an important observation (and I paraphrase): The works of English authors were copied and sold at low cost and price to an American public hungry for books, a situation that so irritated Mr. Dickens — whose *Christmas Carol* sold for only 6 cents a copy in America, versus \$2.50 in England — that during his 1842 tour of the United States, he called for the national adoption of international copyright protection, deemed to be in the long-term interests of American authors and publishers as well as everyone else.<sup>27</sup> Yet these appeals were fruitless, until 1891. The United States possessed a thriving literary culture and book industry and decided it needed its own intellectual property protections. Congress duly passed a copyright act, extending IP protection to foreign works in return for similar protections for American authors overseas. The concern about trade treaties like TRIPS, Lohr notes, “is that it is too much of a one-size-fits-all approach that works to the detriment of developing nations.”<sup>28</sup> Jeffrey D. Sachs, a noted development economist, agrees: “It would be fine if we lived in a world of all rich

<sup>26</sup> Steve Lohr, (2002) 'New Economy: The Intellectual Property Debate Takes a Page from 19th-century America', New York Times, October 14, 2002:

<http://www.nytimes.com/2002/10/14/business/new-economy-intellectual-property-debate-takes-page-19th-century-america.html>. (accessed 25 December 2015)

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>25</sup> Frank J. Penna, Phone conversation with author, Somerville, MA, November 30, 2011. Frank J. Penna was instrumental in implementing the World Bank’s Africa Music Project.

people. ... The danger with TRIPS is that it will mostly hurt the developing countries' access to ideas."<sup>29</sup>

Exploitation in the arts and knowledge-based industries is rampant. So enacting strong intellectual property rights may not, as has been broadly cited, necessarily help the creator, but benefit the owner, who is often not the creator. Or enforcement may not help the poor, but benefit those with capital already. On the macro level today, it is no secret that rich countries benefit more from intellectual property rights than their poor counterparts. Under the discussions leading up to the TRIPS protections, most of which were anticipated to take effect in 2005, the USA, a supporter of stronger intellectual property protections, was projected to gain immensely compared to developing countries. Lohr points to the World Bank study that indicated that "American companies would pocket \$19 billion" U.S. dollars while developing countries, including China, India and other importers of knowledge like African countries would, instead pay more for intellectual property.<sup>30</sup>

On a micro level one could easily see a situation in which industries that own rights would make money that the artists or creators would never see – where artistic production becomes a form of corporate administered industrial production (South Korea's music industry is an example). Artists themselves, even as members of professional associations, have very limited ability to structure the economy in which they work, or even to organise and collect royalties. This demands a form of corporate organisation, on the level of the State or commercial corporations; if the latter, then the emerging system of production, distribution and consumption, would damage the very people responsible for its emergence and whom it therefore ought to protect, even if that 'protection' is conceived purely on an economic level.

### **The Costs of Implementing Intellectual Property**

In January 2011, after the worst of the global financial crisis, the World Bank reported that "[t]he strong growth of domestic demand in [developing countries] will continue to lead the world

economy."<sup>31</sup> This surely generates some welcome scenarios, but by 2016 this hopeful forecast has not materialised with such force as one would have hoped. Nonetheless, the majority of developing countries have remained in a virtual economic hibernation for decades. The conundrum is that most of these countries have tremendous physical and culture resources, but are plagued with chronic economic difficulties, and can only but scrape the funds to mine their resources at a subsistence level. The result is a dependency on foreign aid, or foreign direct investment tied to the mechanisms of foreign aid. Implementing the necessary legal and social conditions — such as strong intellectual property rights — for a developing infrastructure can rightly be seen as 'a die out of reach.' It is simply too costly for growing countries.

To be sure, a number of African countries have intellectual property laws. The African Regional Intellectual Property Organization (ARIPO) to date has 19 member states. These include Sudan and Zimbabwe, states that are accused of blatant human rights abuses. While intellectual property laws may be in place, enforcing them could be akin to lions fighting for prey on the African savanna. In the brutal battle, the one that can take the biggest piece wins. Piracy currently takes a big piece. It always wins in places where laws are weak. So for developing countries, the opportunity cost to enforce intellectual property may not be worth it, especially when their state coffers are normally in the red.

One of the ways to promote intellectual property is to educate both the inventors (creators) and consumers. But that, too, is expensive. In a developing country like Burkina Faso, teaching about intellectual property rights to the public would not be easy, even if it becomes a priority at all. A notable commission report 'Integrating Intellectual Property Rights and Development Policy', regarding the cost issue, published in 2002, is telling. I quote:

"Establishing the infrastructure of an [intellectual property rights] regime, and

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> The International Bank for Reconstruction and Development/The World Bank, 'Global Economic Prospects: Navigating Strong Currents', Vol. 2, January 2011. <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1322593305595/8287139-1327345093457/GEP2011JanFullReport.pdf> (accessed 25 December 2015)

mechanisms for the enforcement of [intellectual property] rights, is costly both to governments, and private stakeholders. In developing countries, where human and financial resources are scarce, and legal systems not well developed, the opportunity costs of operating the system effectively are high. Those costs include the costs of scrutinising the validity of claims to patent rights (both at the application stage and in the courts) and adjudicating upon actions for infringement. Considerable costs are generated by the inherent uncertainties of litigation. These costs too need to be weighed against the benefits arising from the system."<sup>32</sup>

Considering this picture, opponents of intellectual property rights argue that African countries may benefit more by using their resources elsewhere, than trying to fight a costly and seemingly perpetual battle. The arguments for and against intellectual property are sound from intellectual, ethical and religious perspectives, and in many African states, religion is an integral part of the culture and social order. One could argue that if people take seriously the commandment "Thou Shalt Not Steal," then piracy is blatant theft. On the other hand, the same religious orders promote sharing among themselves, and especially with the poor. So for those who need the knowledge or music, it seems entirely reasonable to share such goods (or rather services). The danger with this seemingly moral ethic of the common share is that there are significant actors who will abuse the equitable practice of sharing. Why do radio and TV stations, of which some are state-owned, abuse copyright laws? Why do wealthier producers and artists exploit poor artists?

On a 2005 trip to southern Africa in order to research 'music as social action', these two approaches — communal sharing and the respecting of property rights — was illustrated to me in vivid ways. Lindokuhle Mpungose, a music lecturer at the University of KwaZulu-Natal, asserted that to boost creativity, enthusiasm and a sense of pride, several more traditional of the music teachers had encouraged their students to

make their own instruments.<sup>33</sup> Mpungose added, that unlike West Africa, South Africa is not known for a diverse drumming culture, and so instead of simply purchasing imported drums they started making their own, based on West African designs. Indeed, (in my presence at the music shop, Fields of Rhythm), Mpungose was completing a drum that he had modeled from a Nigerian traditional drum. And yet, what if it was prohibited for Mpungose to directly adapt (even to copy) ideas and designs from this Nigerian drum? What scenario would ensue if he understood that he would be acting outside of patent protection? He would either desist from the cultural production that became so much a part of this and many other educational practices, or that he would face legal infringement (and it would be unlikely that this kind of dissemination of knowledge would continue — and that the Nigerian knowledge of such benefit to his students, would be made redundant).

On the other end of the spectrum, some musicians in Cape Town, Durban, and Gabarone, whom I interviewed, were reluctant to talk to me precisely because they were tired of people from the West taking their knowledge and writing books or papers about their work, or reproducing their music and profiting from it. To their ire, they never hear from such people again. They said that they needed to be compensated fairly, hence, in one instance there was a significant charge for me to interview a traditional music virtuoso.

As one of Africa's major economies, South Africa has many social and economic institutions that are absent in other African states. The Southern African Music Rights Organization (SAMRO), which, we are told, serves over three million music creators worldwide, is one of them.<sup>34</sup> In an interview at SAMRO headquarters in Johannesburg, Mzilikazi Khumalu, one of South Africa's celebrated composers, a music professor, and SAMRO board member, commented on how SAMRO benefits South Africa's traditional music: the "traditional music sung by Ladysmith Black Mambazo is making lots of money; they sing

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<sup>32</sup> Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy, Final Report', 2002. [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm). (accessed 25 December, 2015)

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<sup>33</sup> Patrick Kabanda, 'Music as Social Action in Southern Africa', Unpublished Manuscript (2005) <http://musikaba.net/projects/category/botswana-southafrica-swaziland/>. (accessed 25 December 2015)

<sup>34</sup> SAMRO, company profile: <http://www.samro.org.za/about-SAMRO/company-profile> (accessed 25 December 2015)

beautifully and their music is accepted all over the world.”<sup>35</sup> The impact that SAMRO has had on piracy in South Africa is unclear, but as Africa’s leading rights organization it “ensures that composers’ and authors’ talents are adequately credited both locally and internationally for music usage.”<sup>36</sup> SAMRO, which is affiliated with a number of rights organizations worldwide, reports that it collected the majority of its income from Europe and the least from Africa, but is committed to working with African countries. On celebrating its 50th anniversary, in 2012, SAMRO considered “pragmatic ways to become pro-actively involved in assisting fellow African societies in the development of Collective Administration [a central agency] in their countries so that, in turn, just dues for the use of our music on our continent may accrue to our members.”<sup>37</sup>

It is impossible for African artists to fight the copyright battle without organization. The SAMRO example demonstrates the need for a collective force of representation. While it is true that some intellectual property rights discourage the sharing of ideas, as indicated, there is strong evidence that artists and some fields such as the African music industry need its mechanisms of protection. Africa has some rights organizations such as the Uganda Performing Rights Society, but few have the muscle that SAMRO has. Strong advocating organizations such as SAMRO could be useful across Africa — in East and Central Africa, West Africa, and North Africa. An effective intellectual property regime needs to be created to support artists, and the broader communities and nations within which they work — where the emphasis of the legal practice of IPR implementation is the protection of the creators and their artistic communities, and the

cultivation of cultural production, not the systematic extraction of profit from an abstracted property form by a third party operator (like a foreign corporation).

### On the Ground in East Africa

Growing up, as I did, learning classical and jazz music in Uganda in the 1980s, was difficult. The lack of music scores and recordings made it hard to access the knowledge required to develop any level of expertise or professional competency. Ultimately, my friends and I resorted to copying not one or two pages but complete music books and CDs. That, in such circumstances was, we judged at the time, the only way to learn. At our first performances in Tanzania and Kenya many attendees, including European diplomats, indeed wondered where we obtained our music education. Musicians, like myself, later received scholarships to study in the United States and Europe. We competed with some of the most talented musicians from around the world, whose beginnings in music education was far different than ours. However, the fact that Europeans and Asians learned ‘legally’, and we learned ‘illegally’, in time mattered little. We all found ourselves in the same situation.

Meanwhile, back home in Uganda talented musicians who had no access to music books and records, whether illegal or otherwise, simply could not improve on their artistic talents. Many of them simply became stuck; they had little or no access to educational resources. In this case, it is not hard to see how intellectual property rights can completely inhibit the very development of embryonic forms of cultural production or the next generation of producers. Pragmatically, in many situations facing developing countries, there is no alternative to the scenario that those who seek to learn from copied works should have the opportunity to do so. How does an African intellectual property framework accommodate this material and educational necessity?

Years later, as we began performing, composing and collaborating professionally with other musicians, it became apparent that we ourselves did not want our works to be copied illegally. Moreover, our artistic aim in performing and composing music was not only emotional satisfaction or aesthetic fulfillment, but

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<sup>35</sup> Mzilikazi Khumalo, interview by author, tape and video recording, Johannesburg, South Africa, summer 2005  
[http://musikaba.net/projects/comments/music\\_as\\_social\\_action\\_in\\_southern\\_africa/](http://musikaba.net/projects/comments/music_as_social_action_in_southern_africa/)  
(accessed 25 December 2015)

<sup>36</sup> SAMRO, Purpose Statement:  
<http://www.samro.org.za/about-SAMRO>  
(accessed 25 December 2015)

<sup>37</sup> SAMRO, International Standing:  
<http://www.samro.org.za/about/internationalstanding/>  
[Accessed November 27, 2011. Original page configuration has expired: see: <http://www.samro.org.za>. Accessed 25 December 2015].  
See:  
<http://www.samro.org.za/sites/all/themes/corporateclean/images/newsletters/samroNotes/50thSpecialEdition/samroNotes-50thSpecialEdition.pdf>  
(accessed 25 December 2015)

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professional life with consistent remuneration. We realized that our income would disappear if our works were widely pirated. As stated earlier, even state-owned radio and televisions abuse copyright laws, particularly those running commercial programs.

The Uganda Performing Rights Society has formally requested that the Ugandan government help enforce copyrights. Licensing all users, the Society argues, will expose infringers and directly increase the revenue of the artists. James Walusa, Secretary-General of the Society, described the benefits of government involvement: "If the government can work with us to enforce copyright and other relevant laws, music will be among the top 20 taxpayers in the country."<sup>38</sup>

In 2009, the Society collected 16 million Uganda shillings (about US\$7,804) in fees. Nearly 300 copyright owners shared that sum. However, only 11 radio stations out of the 200 broadcasters paid copyright fees. That figure could dramatically multiply if broadcasters complied with the copyright law. For Moses Matovu, the Society's chairman and founding member of Afrigo Band: "If the government supports us, we can collect over Ush3 billion (US\$1.4 million) annually."<sup>39</sup>

The Uganda experience also shows that intellectual property rights involve complex cross-sections of social, public, economic and governmental interests and are too important to be ignored, and given their lack of relative political power, not left to artists. In attempting to identify where the laws should allow 'copying', especially for educational purposes, yet still to penalize theft or individual profiteering, strong legal and public policy mechanisms need to be in place. The failure of governments and NGOs to assist the arts, creative and cultural industries, is in part because the economic benefits accrued to individuals and communities are not easily quantifiable. As we see even from the Nashville 'model', economic benefits are not abstract from the social and cultural life of a place, and a self-sustaining economy that emerges within that particular place.

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<sup>38</sup> Bamuturaki Musingizi, 'No Royalty in Music Industry', *The East African*, June 14, 2010: <http://www.theeastafrican.co.ke/magazine/No+royalty+in+music+industry/-/434746/937536/-/mo1h4k/-/index.html>. (accessed 25 December 2015)

<sup>39</sup> Ibid

Regarding foreign direct investment, it can be argued that lax intellectual property laws can entice foreign investors; yet it can also be argued that the lack of laws and public policy can hinder foreign investment. Either way, many African entrepreneurs are jumping on opportunities the African arts industry can provide. Anyone who has seen "Osofia in London" a Nigerian comedy, cannot help but marvel about Nigeria's booming movie industry, Nollywood. While Nollywood has benefited from modern digital technology, besides piracy, it faces numerous hurdles. "In Nollywood we don't count the walls. We learn how to climb them"<sup>40</sup> said Bond Emeruwa, a Nigeria film producer. Despite functioning on shoestring budgets — the average cost is about US\$15,000 per movie — Nollywood is the second largest movie industry in the world in terms of output.<sup>41</sup> In addition to slim budgets, "Electricity goes out. Street thugs demand extortion money. The lead actor doesn't show. During one crucial scene, prayers blast from loudspeakers atop a nearby mosque."<sup>42</sup> These obstacles, however, have not deterred Nigerian entrepreneurs from investing in an industry that produces from 500 to 1000 movies a year — the average time for producing a movie is 10 days. Each week, on average, the industry sells 50,000 copies at about US\$2. Nollywood generates about US\$250 million per year and employs thousands of people.<sup>43</sup>

The commercial benefits of Nollywood are evident, but Nollywood's contribution to African culture is not so easily quantifiable. African movie consumers from Accra to Harare, and London to New York, are loyal patrons. In Nollywood Africans see something that Hollywood and Bollywood cannot match: the presence of their own experiences in the plots. These are movies of Africans, by Africans, for Africans. Nollywood producers argue that their work helps to educate Africans about social issues. The documentary film,

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<sup>40</sup> 'This Is Nollywood': <http://www.thisisnollywood.com/film.htm>. (accessed 25 December 2015)

<sup>41</sup> UNESCO, Culture, Creativity, News, Nollywood Rivals Bollywood in Film/Video Production, May 5, 2009: <http://www.un.org/apps/news/story.asp?NewsID=30707#.Vxt2i5MrJ2Q>. (accessed 25 December 2015).

<sup>42</sup> 'This Is Nollywood'

<sup>43</sup> 'This Is Nollywood'. A more recent indication of figures are to be found here: [http://www.nytimes.com/2016/02/11/insider/how-the-times-named-nollywood.html?\\_r=0](http://www.nytimes.com/2016/02/11/insider/how-the-times-named-nollywood.html?_r=0) (Accessed March 2016)

This Is Nollywood, sums up that philosophy: “Many of the films deal with AIDS, corruption, women’s rights, and other topics of concern to ordinary Africans. The impetus behind Nollywood is not purely commercial; the traditional role of storytelling is still alive and well — just different.”<sup>44</sup>

Though Nollywood is standing strong, piracy is biting its back. CNN reports that “Nollywood insiders estimate that up to 50 percent of the industry’s profits are currently being lost to Nigeria’s endemic piracy and corruption problems” -- one insider, Emmanuel Isikaku, a Nollywood producer told CNN that “Piracy has dealt a big blow to the industry.”<sup>45</sup> His 2007 film, *Plane Crash*, was popular, but he claims that he lost so much money, that he failed to breakeven. “A lot of people watched the film,” Isikaku said, “but unfortunately they watched pirated copies.”<sup>46</sup>

Industries like Nollywood might internally corrode, or incubate sub-cultures of piracy and corruption unless the greater good they can do, both economically and socially, is strengthened, and this can be done through intellectual property laws. However ‘unAfrican’ it may sound, the creative industries need to be empowered economically through the support of legal and policy instruments, not only rendering artists their rightful royalties, but giving the industry a means to police itself, protect itself and develop a sphere of free and honest association.

This will be crucial in cultivating aspects of Africa’s creative economy that remain weak. Africa’s culture of reading and writing is slight. Even more striking, most of the books about Africa for sale in Africa are not written by Africans. Part of the reason, is that there is virtually no market for books in Africa, and writers are not encouraged with any form of institutional or state support to write, as once a book hits the market it is susceptible to massive copyright abuses. The lack of immediate market value, raises the question of value per se. In Kenya, for example, Ashley Lime in 2011 reported that the country loses about 2 billion shillings (US\$22 million) per year in book

piracy.<sup>47</sup> The issue is therefore not simply a matter of making revenues, but protecting realms of culture from impoverishment; and many realms of culture are intrinsic to the civil well-being and general order of society.

While folk tales, ideas and stories in Africa have been passed on orally from generation to generation, epidemics like AIDS are challenging that tradition; people are dying young, taking their knowledge with them. It is not difficult to see a pressing need for African people to write, and generate personal histories and accounts of life and society, and stories that explore a range of ideas — political, scientific, social, and personal. IPR legislation and enforcement can be a framework through which cultural production can increase; a new generation of African writers would not simply contribute to a vulnerable publishing industry, but provide an intellectual stimulus and literary substance for the emergence of cultural and civic institutions across Africa.

### Conclusion

While this article has been arguing for the need for an intellectual property framework across Africa, it has also offered examples of context. Africa is place-sensitive and context-specific, in the sense that abstract legal systems alone cannot be expected to generate uniform and predictable social and economic outcomes. Any IPR regime needs to be implemented by way of negotiation with its context of implementation, and the dynamics of the creative economy it seeks to structure, regulate, protect and cultivate. And, how indeed should rights be (or not be) enforced, given other patterns of law enforcement prevalent in Africa? As asserted above, there is and should not take place a superimposition of a Western individualised model of IPR on Africa. There should be no illusion of a one-size-fits-all law or regulation, which seems to have the appearance of consistency and therefore equity. I have indicated how arguments for and against IPRs can both provide useful insights into the complex socio-cultural landscape of Africa. The often heard

<sup>44</sup> Ibid.

<sup>45</sup> Mairi Mackay, 'Nollywood Loses Half of Film Profits to Piracy, Say Producers', CNN, June 24, 2009: <http://edition.cnn.com/2009/SHOWBIZ/Movies/06/24/nollywood.piracy/>

(accessed 25 December 2015)

<sup>46</sup> Ibid.

<sup>47</sup> Ashley Lime, 'Sh 2bn Lost to Book Piracy Every Year', *Daily Nation / In2 East Africa*, July 18, 2011: <http://in2eastfrica.net/sh2bn-lost-to-book-piracy-every-year/>. (now expired).

perspectives that intellectual property is a Western tool being adopted in Africa to its detriment, or that the concept of intellectual property simply has no relevance in Africa because of its communal social systems, both miss critical issues.

The legitimacy and illegitimacy of intellectual property rights need to be assessed critically in terms of how they both adapt to local realities, cultivate cultural production by empowering producers, and protect exchange mechanisms enabling a self-sustaining economy to emerge. The historical roots of intellectual property ownership – through differentiation or guarding valuable secrets – as I indicated with ancient Egypt, demonstrates that intellectual property is an historically evolving set of distinctions emerging out of the requirements of production itself. It is not simply a machination of advanced Western economies, keen to commodify uncolonised cultures and generate new markets. The African continent has its own histories or practices of intellectual property, perhaps difficult to detect given its strong investment in the communal and shared ownership, or at least shared access. These observations I deem important for debates on whether intellectual property is a Western instrument whose application in Africa can only be exploitative – something also said of other legal frameworks deemed foreign. Yet the lack of the rule of law in Africa is omnipresent in areas that must convince that law is necessary and must be adapted – in commerce, in landownership, and in the judicial system itself. What is at stake in the implementation of intellectual property is the rule of law itself, but this rule must be defined and implemented in ways that are productive not prohibitive and empowering not repressive. It is required not only to secure for artists an economic agency but cities and regional economies a means of consistent and systematic growth. African nations – lawmakers, government and business leaders, religious and arts organizations – will only see this if they work together to generate a nuanced and place-sensitive legal regime. It cannot simply be imposed, as an already prefabricated system of law, by the State downwards. It must be defined through dialogue and negotiation – by all agencies involved.

To achieve what Penna calls the “economic justice of intellectual property”, African artists, creators and consumers therefore need to be

educated about the rights and nature of benefitting artistic creation and consistent cultural production. In Senegal for example, as Finger and Penna observed, many musicians were unaware about the potential for protecting their intellectual property; many had never heard of copyright or a trademark.<sup>48</sup> Even if laws are enacted, if they are not enforced, and the artists are ignorant of them, it is difficult to break the cycle of “Big Fish Eat Little Fish.”<sup>49</sup> Even the benefit-sharing schemes, which Penna describes as akin to Fair Trade, are impossible to streamline. As broadly acknowledged, public opinion influences public policy. How could artists influence public policy if they cannot articulate the very subject in their interest?

Governments and arts organizations need to introduce preliminary education mechanisms, and thus empower people at grassroots level. This empowerment could in turn help the public educate government officials not just about the benefits of intellectual property rights but the forms of social conduct by which those benefits are sustained. This can help avert disasters like what occurred in the 1950s, in Ghana, for example, where a thriving music industry was effectively destroyed by taxation. The government imposed a tax on the use of traditional music as a way of enforcing intellectual property rights, with the impact that many local musicians were simply driven out of business. Ghana’s music industry was almost wiped out.<sup>50</sup>

Governments are responsible for educating their citizens, but riddled with other priorities, and corruption, it is often not in their interests. This is where engaging non-state actors is crucial. NGOs, such as economic development foundations, local and international charitable and arts groups, as well as religious organizations, must play a role in the preliminary task of education that must be prior to developing intellectual property rights for African artists and their respective industries.

In Senegal, Finger and Penna report that the Ford Foundation sponsored training program for musicians, involved education on the basics of intellectual property. The program drafted contract

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<sup>48</sup> J. Michael Finger and Frank J. Penna, interview by the author (see notes 4 and 15).

<sup>49</sup> The term depicts the exploitation of poor musicians by their rich counterparts; see *Poor People’s Knowledge*: 102.

<sup>50</sup> J. Michael Finger, interview by the author (see note 4).

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templates and taught musicians negotiation skills, and how to write a basic contract. These were basic skills, but such knowledge can make a difference. The musicians became better equipped to effectively negotiate with private entities, the collections agency, and the ministry of culture. As Finger points out, many foundations want to work on “big news” items and tend to neglect nuts and bolts projects such as this Ford Foundation initiative.<sup>51</sup> The Ford Foundation’s involvement in Senegal, however, shows that NGOs can play a significant role in training and promoting intellectual property laws.

Africa has many religious groups and organizations. Places of worship, which provide opportunities to showcase musical talent, could also work to promote and educate their performers. Also, a number of African schools are affiliated with religious institutions, and these schools could also train their young musicians and artists, not only in the arts but also in artists’ property rights. Religious groups can also promote the moral implications of intellectual property rights.

In today’s digital era, strong leadership to promote copyright enforcement in Africa is crucial today more than ever before. As Penna notes, intellectual property law connects politics, economics and culture. Penna, who worked with lawyers<sup>52</sup> to improve Senegal’s local copyright code, helpfully identifies the conditions required for developing an intellectual property regime: (i) identifying markets for products, (ii) recalibrating the regulatory mechanisms and local intellectual property laws, (iii) investment capital for businesses, and (iv) engaging non-profit organizations such as musicians’ associations.<sup>53</sup> But none of those factors would work effectively without effective leadership, given the complexity, diversity of spaces and places of implementation, and the tendency to communal and collective values. In fact, while the role of aid agencies and NGOs is important, a coordinated effort by governments, multilateral organisations and the private sector is badly needed.

With respect to the Africa Music Project, as Finger and Penna point out, there was considerable improvement in the enforcement of copyright law, at least in Senegal. The extent to which that spread to other countries is unknown. Nonetheless, in Senegal the improvement was notable particularly in the efficiency of the collection agency and supervision by the Ministry of Culture. This was partly because Senegal’s Minister of Finance Makhtar Diop (now Vice President for Africa at the World Bank) took a strong interest in the project. His input was politically and juridically important. When Abdoul Aziz Dieng, president of the Senegal Music Works Association, suggested improvements, the Finance Minister (a musician himself) insisted that the government pay attention to this group and their economic contributions. The combined leadership from top to the bottom contributed to Senegal’s overall copyright enforcement.<sup>54</sup>

In 2000, back in Washington, D.C., for the first time in the history of the World Bank an African Music project was launched. This was partly because the Bank’s president at the time, James D. Wolfensohn (an accomplished cellist) created “political space” for Penna. Penna was able to orchestrate his work on the music project, cutting through intricate policies at the Bank and in African governments.<sup>55</sup> With leadership from Wolfensohn who, like Amartya Sen, believes that cultural contributions to development go beyond industrial benefits, even an African music project was considered. These examples from Dakar and D.C. illustrate how leadership and commitment from the top and the bottom is vital.

Africa’s future intellectual property regime is impossible to envisage, and could be cumbersome to develop and enforce. The continent, however, has potential to generate huge leaps in cultural production, and reap immense rewards from the arts and creative industries if intellectual property rights so provide carefully calibrated set of protections and enablements. The challenge is to emancipate what lives within Africa’s creative capital. Burkina Faso, one of the most important cultural centers in Africa means “the land of upright (or honest) people.” Maybe all of Africa can be seen as Burkina Faso. As “the land of

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<sup>51</sup> J. Michael Finger and Frank J. Penna, interview by the author (see notes 4 and 15).

<sup>52</sup> The lawyers were affiliated with the Max Planck Institute for Foreign and International Social Law, now called the Max Planck Institute for Social Law and Social Policy.

<sup>53</sup> Frank J. Penna, interview by the author (see note 15).

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<sup>54</sup> J. Michael Finger and Frank J. Penna, interview by the author (see notes 4 and 15).

<sup>55</sup> Frank J. Penna, interview by the author (see note 15).

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upright people,” Africa can honor the rule of law, yet must find its own way in doing so. Intellectual property rights can be a powerful framework for understanding the complex, place-based, interrelations between cultural production, distribution, markets and the geo-politics of trade that impacts artists, cultural enterprises and culturally-engaged development organisations at every level.

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