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Intellectual Property and the Judicialisation of Cultural Production: An Anthropological Perspective

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Abstract

From the 1980s, with the introduction of digital technology for creating and reproducing cultural productions, international intellectual property law became of increasing importance in the countries of the Global South. Both developments transformed people's ideas about immaterial cultural goods. The law served to amplify incentives for competition in cultural production, enabling new social actors to become creators of artwork through its concept of exclusive ownership of an individual's artistic work. At the same time the law disadvantaged established owners and ignored collaborative understandings – in these societies and elsewhere – of immaterial cultural goods. Few anthropologists had researched the legal aspects of immaterial cultural goods in these countries until the 1980s. This article highlights the contribution from anthropology to an appreciation of the processes triggered in African countries by the introduction of intellectual property law. It discusses aspects of scholarly debate on intellectual property, examines local approaches employed in protecting cultural production and considers ownership of immaterial cultural goods in the context of competing interests in a local arena. It also investigates whether international intellectual property law is the only reasonable way of protecting immaterial cultural goods.

Keywords: intellectual property, digital technology, immaterial goods, cultural production, Global South

Introduction[1]

From the 1980s, international intellectual property law became of increasing importance in the countries of the Global South[2], particularly with the growing availability of digital technology. Digitisation facilitated copying, production, uploading and streaming of various artistic formats, especially music and video and amplified the awareness of rights in ownership of cultural productions, promoted above all by such international organisations as the World Intellectual Property

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[2] The term Global South is here used as a collective term for what in developmental discourse has been termed 'least developed countries'. The term has been criticised for being imprecise and misleading (see for example, Röschenthaler and Jedlowski 2017).

Organisation (WIPO) and the World Trade Organisation (WTO). These two organisations encouraged, in the name of development, the countries of the South, to implement intellectual property laws as part of their efforts to create sustainable economies (OAPI 2020; www.wipo.int). An ulterior motive was the intention of protecting (Western) cultural industries and markets; this included the signing of the 1994 Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement which requires WTO member states to comply with both the Paris and Berne Conventions.

About the same time, scholars began to discuss how cultural productions and local knowledge of the Global South could be protected from Western economic interests, which prompted questions about the identity of the legitimate owners of immaterial cultural goods. The Southern regions are well-known for their rich and manifold immaterial cultural goods and productions, including African music, performance, designs and local knowledge (Hirsch and Strathern 2004; Röschenthaler and Diawara 2016). Scholars concluded that intellectual property law by favouring exclusive individual ownership, failed to adequately recognise local perceptions of ownership that they considered to be rather collective than individualised (Brown 2003; Brush and Stabisky 1996, and others).

It is, however, important to keep in mind that awareness of the value of immaterial cultural goods existed in these societies long before the implementation of intellectual property law and other international regulatory institutions. Local communities considered cultural productions and local knowledge as assets owned by families, by specialised groups of people, or otherwise nurtured and controlled by patrons. People had developed their own various measures designed to protect the value of their immaterial cultural goods while concurrently circulating them to neighbouring groups (Harrison1993). International intellectual property law challenged these established ways of managing cultural productions and circulation by introducing a new and frictional approach that henceforth was to be implemented and sanctioned by national governments.

The organisations and music companies promoting this law were especially successful in devising persuasive narratives that employed particular rhetoric and metaphors in respect of intellectual property designed to convince the public that the strict observance and enforcement of the law were the most appropriate means to safeguard cultural production, particularly in the digital age (see also Reyman 2010: 44-58). These considerations entail a preference for professionalisation rather than collective popular creations with free distribution, which has consequences for cultural production in countries of the Global South as well as in Western societies.

This article considers the contribution made by anthropology to furthering an understanding of the growing importance of the concept of intellectual property in African countries. It discusses aspects of scholarly debate, examines local approaches to protect cultural production and understands ownership of immaterial cultural goods as contested, between competing interests in a local arena.

Beginning from this point, the article seeks to understand the lack of anthropological interest in questions of intellectual property before the 1980s (section 1). It explores events following the widespread use of digital gadgets and pervasive practices of recording and copying of artistic productions and the issues of intellectual property subsequently ensuing (section 2). Section 3 examines the creation of the institutions established to protect immaterial cultural goods, including a brief outline of the history of such institutions in Europe, their subsequent transfer and implementation in African countries and their classification of African immaterial cultural goods. This classification largely follows the regulatory framework of Western notions of property but has difficulties when considering established owners of immaterial cultural goods.

Two examples will illustrate the confrontation between international copyright and local approaches to immaterial cultural productions: first, the ownership of performances of cult associations in Cameroon (section 4) and second, the production of Kente fabrics in Ghana (section 5), followed by a discussion of alternative approaches to managing immaterial cultural goods (section 6).

These examples highlight how an anthropology of intellectual property can contribute to an understanding of immaterial cultural goods by taking local approaches seriously and by shedding light on the transformations that the introduction of intellectual property law has brought about in African societies. They illustrate how the law has amplified the incentives for competition in cultural production in African countries but disadvantaged the interests of established owners and ignored concepts of collaborative ownership of immaterial cultural goods in these societies, and beyond.

1. An anthropological approach to intellectual property

Intellectual property remains a neglected topic in anthropology. In the introduction to her edited volume *Law and Anthropology*, Sally Falk Moore mentions social, political, economic and intellectual norms among the enforceable legal regulations which have been explored by anthropologists (2005: 1). However, it contains 28 articles of which only one (by Rosemary Coombe) discusses issues of intellectual property, in the USA (see also Coombe 1998). It seems that in their research on the countries of the South during colonial and post-colonial times, questions of ownership of immaterial cultural goods escaped the notice by anthropologists of law.

Classical anthropologists of law were primarily concerned with the study of land tenure systems, the interaction of local people with state law, the resolving of conflict, and the defining force of European colonial legal understandings on local societies (Bohannan 1957; Gluckman 1955; Malinowski 1926). More recently legal anthropologists focussed on human rights, disadvantaged people, citizenship and nation building (Merry 2001; Nader 1995; Wilson 2001).

Moore (2005: 346-350) concludes that the approaches used by anthropologists specialising in legal issues during the past half century can be divided into three groups: first, those who understand "law as culture" and make cultural contexts responsible for legal differences; second, those who see "law as domination" arguing its introduction is largely about serving elite interests; and third, those understanding "law as problem-solver", providing a helpful means to resolve social problems. She notes that the three approaches often appear intertwined.

Over the course of the 20th century, anthropologists have of course produced numerous studies on cultural production, including music, dance, performance, oral history, poetry, local theatre, cloth design, and environmental knowledge (Colleyn 2001; Drewal and Drewal 1983; Ottenberg 1975; Strother 1998, to name just a few). However, most of these anthropologists – and also art historians – did not consider the issue of their ownership an essential field of study.

Various reasons can be identified for this lacuna: immaterial cultural goods were considered communally owned by ethnic groups (see Kasfir's 1984 critique); or intellectual property was seen as a legal framework introduced from outside and therefore uninspiring for anthropologists; indeed, the most plausible reason is that international intellectual property law was not regarded as an important issue in these societies until the late 1970s and 1980s (Röschenthaler and Diawara 2016).

Signs of interest in questions of ownership emerged during the past three decades accompanying discourse about intellectual property and when cultural productions became subject to international law. An anthropological approach to intellectual property will be less concerned with the forms and functions of the law itself but will focus on how local people perceive its introduction, how its introduction and existence transforms cultural practices, who makes use and takes advantage of it, and which alternative local ideas about owning immaterial cultural goods exist. The local perspective reveals that many cultural practices are not owned by all members of a community in the same way, but perceived to be the property of families, specialised groups of people, i.e. artisans, or the property of particular interest groups. Rarely are they the exclusive property of an individual or even an entire ethnic group.

Since the publication of Moore's volume, studies dealing with local ideas on how to manage immaterial cultural goods by anthropologists have grown in number (Aragon and Leach 2008; Goodman 2005, Hirsch and Strathern 2004; Röschenthaler 2011). There were a few studies before the 2000s that noted ownership and sale of rights in immaterial cultural goods and further descriptions can be found dispersed in anthropological literature. These include Simon Harrison (1993) on the commercialisation of Melanesian rituals, names, designs and cults, Robert Lowie (1928) on the same subject but in Latin America and Gerhard Kubik (1993) in Central Africa. These studies document the importance attributed by people across the globe from early on to the ownership of knowledge, local cults and performances,

which they perceived as valuable assets worth defending. Studies by anthropologist and legal scholar Rosemary Coombe (1998) show that similar considerations of cultural production are also applicable in Western societies.

Referring to Moore's three approaches by legal anthropologists, my own research could be located in an updated and refined version of the second. As will be shown, international intellectual property law does not necessarily appear "as a problem-solver" but rather contributes to creating those problems that it later attempts to resolve. The various engaged stakeholders are confronted with having to participate in a contested arena, in which the law seems to serve certain economic and political interests rather more than those of artists and local people. Thus, the various understandings regarding immaterial cultural goods found in communities is less a consequence of cultural differences but rather an outcome of different more or less socially sustainable approaches to their management; this will become clearer in the course of this article.

2. The introduction of intellectual property organisations in Africa

In African countries, intellectual property law was first introduced during the colonial era, but served only to protect the interests of Europeans (Peukert 2016), ignoring the existence of local rights in ownership of immaterial cultural goods. After independence, most African countries signed the 1886 Berne convention, the decrees of which continued to favour Western rather than African interests by insisting on exclusive ownership of a work in a fixated form (Okediji 2006; Peukert 2016: 49-58). But it was not until the late 1970s and the early 1980s that national offices for intellectual property were created in African countries, encouraged by the WIPO. The new institutions included separate offices for author rights and trademarks, industrial design and patents. Author rights offices remained independent institutions in each country, representing the rights of authors and collecting royalties in their names. The offices for trademarks, industrial design and patents were united in transnational African umbrella organisations, largely according to their respective colonial legacies. In Francophone countries this was the Organisation africaine de la propriété intellectuelle (OAPI), created by the 1977 Bangui agreement, with headquarters in Yaounde; in Anglophone countries the African Regional Intellectual Property Organisation (ARIPO), established by the 1976 Lusaka Agreement, with headquarters in Harare[3].

The creation of both organisations was supported by the WIPO. Representing the Union of Berne and Paris conventions, and thus, former colonial powers, the WIPO pursued its vested interests in the continuation of membership of the former

[3] www.oapi.int; www.aripo.org. These are the major organisations, for more details, see Peukert 2016, Röschenthaler 2022.

colonies and their adherence to the existing copyright agreements. Nevertheless, they promised to find ways to protect "folklore": aspects having aesthetic qualities were meanwhile categorised as "immaterial cultural expressions" whilst those having medicinal and agricultural applications were classified as "traditional knowledge" (Boateng 2013; Deere 2009; Peukert 2016; Röschenthaler and Diawara 2016). Some years later, the World Bank advocated a functional intellectual property law as a requirement for development (OAPI 2020, see for a discussion, Netanel 2009). The bias inherent in international intellectual property legislation became especially obvious when African countries were asked to sign the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); it requires member states to conform to WTO laws and protect internationally recognised trademarks (Baroncelli et al. 2004).

The adoption of the international intellectual property law brought a number of changes: it introduced an entirely new vocabulary, including the idea of the completed work (oeuvre) as presented in a fixed, material form, and the concept of an Individual's exclusive ownership of a work. Accompanying the concept of intellectual property was that of piracy, its necessary twin (Sundaram 2010), the unauthorised copying of work, for which no permission or licence has been obtained. Thus, the law integrated into the global market economy African immaterial cultural goods and made them subject to bureaucratic procedures, including registration, the payment of fees, the establishment of collecting societies, the employment of lawyers, and furnishing the civil courts with business. By doing this, the law opened up new understandings of immaterial cultural goods, transferring them into the property of individuals, and subject to state law. It broadened the spectrum of people wishing to become owners and authors, and several notions as to how to manage immaterial cultural goods coexisted. I return to this in the following sections. Additionally, the law required works were the exclusive property of an identifiable creator. This had the effect of enabling other cultural actors to assert rights and to profit, frequently at the expense of previous owners.

The intellectual property offices were established around the same time as the new affordable technical devices were introduced, enabling African creators and consumers to generate marketable copies of various immaterial works of art. From then, intellectual property law assumed relevance in African countries. In the 1980s, technical devices such as cassette recorders and VHS players became available, enabling the copying of music and video, which was at first carried out on a small scale. From the 1990s, when China began to export affordable digital gadgets, such equipment was imported into Africa, encouraging the easier and more diverse production of copies and their widely-spread distribution on the African markets (Röschenthaler 2021).

These practices were critical issues for African musicians and film creators confronted with their work being copied and sold by others without themselves being

compensated. They appropriated the international discourse of piracy of artistic work and began complaining that they were unable to make a living from their art, and certainly, those involved in film and music production within the incipient cultural industries faced significant economic challenges in many African countries (Tcheuyap 2016; Wane 2016).

The Nigerian video industry – Nollywood – is the pre-eminent example of the emergence of an entirely new cultural industry (Jedlowski 2017; Larkin 2008; Krings and Okome 2013). Beginning in the early 1990s, Nollywood grew by using extensive piracy networks to disseminate their products, which contributed to its quick growth and popularity (Larkin 2008). Its outreach soon extended across the continent (see Krings and Okome 2013). Nigerian creators considered the piracy networks to be more advantageous and efficient in distributing copied, low-budget videos and music than those of legal producers and distributors (Gani 2020: 80, Jedlowski 2016: 300; Tade and Akinleye 2012). However, increasing professionalisation brought commensurate production cost increases and piracy in the video industry created a crisis (Jedlowski 2016).

With the ready availability of inexpensive digital gadgets, increasing numbers of people found it affordable to copy, produce, publish, upload and download popular music and videos (Wikström 2013). Soon sharing platforms, major international music producers and royalty collecting societies came to dominate the music industry, such that the creation of popular music was no longer possible without conforming to their licencing systems (Simmert 2020). Transnational streaming platforms held by a few major media companies who own production, distribution and the sale of licences soon dominated the market and demanded the compliance of cultural producers in Nigeria (Gani 2020: 60).

To fully understand this development in its apparent inevitability, it may be helpful to examine how cultural creativity had previously been managed. As mentioned earlier, prior to the introduction of international intellectual property law, most African societies considered immaterial cultural goods to be valuable assets. Only rarely was the whole range of immaterial cultural expressions free to use for all members of a community, nor were they owned by the members of an entire ethnic group. Rather particular individuals cultivated knowledge, skills, or a performance as a kind of family asset, or as a service offered by a group of people, an association, or a craft guild, to the community in exchange for gifts and valuables. They had also developed methods to prevent others from appropriating these assets without paying compensation.

This was accomplished by either rarefying immaterial cultural goods, by keeping some of their components secret, by requiring long periods of apprenticeship which included fees and services, such as did the Kente weavers in Ghana (Boateng 2011: 55-57; Asmah 2008) and the griots in the Mande world (Charry 2000; Diwarara 2016; Hofmann 2000). Otherwise, copiers were forced to comply with local rules and

if they did not, they were punished. The owners of cult associations in Cameroon and Nigeria adopted such practices when others violated their interests, appropriating their performances. If culprits did not comply, they would be attacked (Röschenthaler 2011; Sodipo 1997).

3. Categorising immaterial cultural goods

Before elaborating on these examples, I briefly outline how the specific, above-mentioned international organisations categorised African immaterial cultural goods in order to protect and preserve them and support their assumed owners and creators. To understand this development, it will be helpful to examine how these organisations began their work in Europe.

Intellectual property law was created in Europe following the development of the technical means of unlimited reproduction (Briggs and Burke 2001; Frith 1993; Johns 2009; Rose 1994). The idea was, or let's say the narrative of justification (Du Bois 2018; Reyman 2010: 26-43) was, that the authors of immaterial cultural goods should be rewarded for their creative efforts, for the time and money invested, and for making available their product to the public. This, so the argument goes, could encourage the creation of artwork (and inventions) and availability to an interested public in exchange for royalties received from users (Reyman 2010: 50).

It seems however, that – at least in Anglophone countries (Macmillan 2021) – it was initially not the authors but rather the publishers of books and music who lobbied for recognition of rights and wanted to ensure their interests were respected and that others could not copy and publish the same creations (Kretschmer 1997). And soon collecting societies emerged, the objective of which was the collection and distribution of royalties on behalf of creators. The various European countries had their own understandings of intellectual property and how to protect it. Two variations emerged from these understandings (that were later exported to the colonies): continental Europe focussed on the creative inspiration of an author, whilst within the UK and North America, copyright law emerged with its focus on more prosaic utilitarian objectives – a steadfast emphasis on the business and economic aspects such as the commercial value associated with the sale of author rights to a producer (Baldwin 2014).

In 1886, European countries agreed to mutually protect the artistic creations in member countries by establishing the Berne convention; this was followed by numerous later agreements that detail and update the means of cooperation. China, the Soviet Union and the USA were among the last countries to sign the Berne convention, implying their decisions were calculated to defend their own commercial interests. The USA signed as late as 1989, when protection of American productions from international piracy became more rewarding than pirating freely from other countries (Löhr 2010: 77, 131, 140), in any case, they wanted shorter protection terms

(Kretschmer 1997). Following an earlier conflict with the USA in 1979, China became a member of WIPO, then amended its copyright law and eventually signed the Berne convention in 1992. Having joined the WTO in 2001, it then had to sign the TRIPS Agreement and submit to its regulations (Li 2014: 99; Mertha 2005: 127, 229-230).

The introduction of copyright law gradually had an impact on existing ideas of immaterial cultural production in African countries as everywhere across the globe. To qualify for protection under the law, artistic creations henceforth had to possess an identified creator and a date of production; an individual could claim a work as their exclusive intellectual property and entitlement to royalties in exchange for its use by other parties. In Europe, copying by hand was of no concern to the law, except when it was about paintings (Benjamin 1970; Kretschmann 2001). The law was concerned with practices that involved substantial profit through unlimited reproduction. Copyright and author rights covered creations that were to be original and claimed by individual owners as their property. In parallel efforts to encourage commercialisation and shift control in favour of the state, craft guilds were also targeted to make their professional knowledge public and gradually lost their privileges and power (Somers 1996). This process began with regulations in Venice in the late 18th century (Baldwin 2014: 23, 54); bakers in England were forced to mark their bread at an even earlier date to identify producers and prevent adulteration (Schechter 1925: 49).

So we can see that at first the focus was on particular rewarding activities that were controlled. This was also the case in African countries where only economically valued sectors were highlighted. Local notions of ownership of immaterial cultural goods were not considered initially by the international law, hence the largest proportion of African production was not protected against exploitation by international companies. This was further complicated by the requirement to identify those individual creators considered to be the exclusive owners. In African societies, notions of individual ownership of immaterial cultural goods rarely existed prior to the introduction of intellectual property law. However, whilst exclusive owners rarely existed, there were owners of intangible assets. International organisations such as WIPO began to explore ways to protect cultural expressions and to accommodate them within legal categories, or to render them copyrightable (Macmillan 2021: 9). However, it was problematic to ensure the forthcoming regulations could adequately consider the dynamic interactions between producers and audiences and among cultural specialists (Barber 1997; Röschenthaler and Diawara 2016). Such complicities occurred in Africa, and everywhere else, including Western countries and reveal the inadequacy or inability of the law to account for them (Reyman 2010).

WIPO was assigned to develop regulations to protect the remaining large bodies of folklore, cultural performances and local knowledge (Brush and Stabisky 1996). Apart from intellectual property law and cultural heritage, WIPO promised to establish the means to protect traditional immaterial cultural expressions and

environmental knowledge for the benefit of local communities. It would allow all members of a community to exploit these assets whilst foreign companies had to compensate them (www.wipo.int). Among the international regulations, protection of cultural property and traditional knowledge were rather promoted by organisations wanting to assist communities against exploitation by western companies (Rowlands 2002).

The assumption was that such immaterial cultural expressions were communally or ethnically owned. It remains difficult, of course, to define who belongs to an ethnic group or community, especially in contexts of ubiquitous cultural diffusion, imitation, copying and migration which has always existed and continues to increase due to global mobility (Appadurai 1996). Those goods that did not fit the international categories could still be included in the UNESCO heritage lists via their national governments. UNESCO, created following the end of the Second World War, issued internationally binding rules for the protection of cultural heritage, at first only regarding natural and material heritage sites such as landscapes and architectural structures. After observing how few African countries appeared on the world heritage list, the 2003 convention for the safeguarding of Intangible Cultural Heritage acknowledged that most African cultural heritage was immaterial (https//ich.unesco.org). Henceforth, countries could apply for the inclusion and protection of their immaterial cultural heritage; increasing numbers of immaterial cultural goods from African countries have since been included in the list.

Meanwhile UNESCO acknowledges the dynamics of immaterial cultural heritage, that concerns living – preservable, whilst also adaptable – cultural practices. UNESCO conceptualises such heritage as being owned by one or several communities, capable of even extending across national boundaries, and may be protected alongside the landscapes in which it is performed (De Jong 2007). Whilst national governments may apply for the inclusion of cultural productions on the heritage list, this often has political implications. Many African countries comprise various diverse ethnic groups, each seeking to enhance their standing in the nation and, when confronted with a nomination, may feel prioritised or otherwise rejected (Scholze 2008). The state has an obligation to adhere to the rules of preservation established by UNESCO and to encourage accessibility for tourists, which commercialises immaterial cultural goods, turning them into enterprises which in many cases disadvantages their local owners (Brumann and Berliner 2016). By this outcome, the approach taken by UNESCO resembles the complications associated with the protection of immaterial cultural goods from international commercial interests.

These legal regulations divide immaterial cultural practices into various categories each of which follow their own logic. The boundaries between these categories, however, remain blurred: one and the same cultural good can in principle

become subject to the legal constructions of intellectual property law, cultural heritage, and communally owned cultural property.

When it came to immaterial cultural goods, African concepts of ownership resembled those of material objects and land, before the introduction of European property law; in some cases land was freely available to use by all, sometimes it was shared by families and communities, but rarely owned by individuals, or entire ethnic groups, except for clans. Individuals had rights to inherit and rights to the fruits of their labour, but not exclusively to own the land as such. Land was controlled and distributed by those in power. The same people also controlled most of those valuable immaterial cultural goods, considered resources that were not free for anyone to tap. They were regarded as assets and rights to own and use them had to be acquired, were re-sold and defended. But unlike material objects, they could be possessed, alienated and kept at the same time by their legitimate owners who would practice a form of shared ownership (Röschenthaler 2011).

I will now look at some examples, each illustrating the collision of local rights regimes with intellectual property law, where the ownership of existing immaterial cultural goods has been ignored. The law was superimposed on contexts, previously governed by other local rules and regulations, which had enabled artists and specialists to earn a living from their artwork, knowledge and skills. However, many young urban artists did welcome the new law, for they aspired to earn a living through the changes it brought. Their aspirations thus conflicted with existing norms and regulations.

4. South-west Cameroon: Ownership of cult associations and the rise of the urban performance artists

In the 1990s in Cameroon, increasing numbers of young people migrated for work to the cities. Some became performance artists, combining "traditional" performance elements – often owned by their home village cult associations – with video clips of urban dance styles and music and images of the natural environment.

They recorded and sold their performances on DVDs, uploaded them on YouTube, and registered them with the Cameroonian author rights office in the expectation of claiming and receiving royalties. Royalties, however, if there were any, were almost certainly few and it was frequently unclear how they were distributed. In Cameroon, there were several successive collecting societies, all of which came into conflicts over management of royalties (Tcheuyap 2016). The artists had to pay fees to register their creations and were then entitled to royalties. Artists, however, made the majority of their proceeds from public performances as commissioned performers at funerals, marriages, or at "guests of honour events". For many of these performances they travelled to their home villages (Röschenthaler 2011).

On the occasion of one of these artists performing in his home village with his dance group, the cult association owners – in this case, Ekpe, the most important and respected men's society – challenged the dance group, made a local court case, arguing that the performance artists were earning money, executing performances owned by Ekpe, that they should pay initiation fees and compensate the cult association. In response, the performance artists argued that their art served to advertise the cult associations among the young in the coastal towns and that they were not earning money at the owners' expense, because there were different performance types and distribution circuits involved (Röschenthaler 2016).

In southwest Cameroon where, since the late 1980s, I have been engaged in extensive research, men's and women's cult associations have, since the 18th century, been elaborated from pre-existing local cults and numerous new variations of such associations have emerged. They offer services to their communities and perform at festivities for which they are compensated with food, drinks and formerly valuables, and more recently, with cash payment. They claim ownership of secret knowledge and rights in some elements of their performances, which they have either invented, or acquired by purchase from other owners (for their history, see Röschenthaler 2011).

After labourious negotiations, the association owners eventually accepted these arguments but, nevertheless, demanded that the urban artists should not employ their lead songs, nor any performance involving secrets (particularly, the performance of the "secret voice of Ekpe" and the sign language). This the urban artists agreed to observe and the controversy was amiably resolved. In other cases, the artists would have been forced to pay damages, initiate into the society and obey all its rules which would have prohibited independent performances in the cities and the keeping of revenues for themselves (Röchenthaler 2011, 2016).

The performance artists, however, also had to deal with copiers of their work. After they had sold to their fans DVDs, or USBs, containing their work, some of these fans copied the contents and distributed them among their own friends. Copiers and their customers did generally not consider their activity to be piracy or unfair, claiming that they were contributing to building the artists' fan base, popularity and fame (see also Tade and Akinleye 2012). In such contexts, it is not clear whether unauthorised copying is actually depriving the artists of income or whether it is in fact beneficial to them, for any increase in popularity is likely to secure more invitations to perform at festivities (Röschenthaler 2016).

The scholar of law, Mary Gani, noted that musicians in Nigeria indeed preferred pirates selling their popular Afrobeats music because their distribution networks were by far the more extensive and efficient than those of the legal distributors (Gani 2020: 80). Here, pirates, are able to ensure artwork is promoted more effectively and thus becomes well-known more rapidly, and result in more commissions to perform at concerts, from which performers earn most of their living.

In respect of the Cameroonian urban performance artists, three points should be noted: first, they must manage two rights regimes: the local regime operated by the cult association owners and international copyright law issued by the national government and operated by the collecting societies. It should be kept in mind that cult associations and their local concepts of ownership rights, had not always existed but rather that they were developed in a specific context during the transatlantic slave trade era (Röschenthaler 2011, 2016), and their creation brought new economic incentives, rules and regulations to the region. These rules were fashioned by economically viable actors and were based on local understandings and the established order. The cult associations were disseminated across the region, creating dense memberships and ownership networks, developed from local cults uniting smaller clan groups, which were integrated into a regional network of cultural, economic and political exchange (Röschenthaler 2011).

Second, international intellectual property law only considers the performance artists as candidates for royalties; it is not concerned with the interests of the cult association owners, whose performances are rather more regarded as contenders for UNESCO immaterial cultural heritage listings. Encouraged by UNESCO, the Cameroonian government assigned the listing of potential immaterial cultural heritage to the various Regional governments in the early 2000s, but has not so far applied for any of the immaterial cultural heritages to be included on the UNESCO list. A possible reason for this apparent hesitation is the ethnically diverse composition of the country which has since independence been of great political concern (Yenshu 2003).

Third, the cult association owners accepted the arguments of the urban dance group, but not because their influence is limited to the rural area. Their outreach extends to the diaspora groups in the country's cities. As my research shows, they have the power to delimit the performances of the diaspora artists by preventing them from performing the secret and restricted elements of their cult associations. They are even able to extend their influence to diaspora groups in Europe, North America and other continents to where younger members of cult associations have migrated. Members report violations of the rules at diaspora meetings held in these countries; and pending the return to their home village – which will almost certainly occur sooner or later, for example, to attend a funeral, they will be challenged and fined by the local cult association for disregarding the rules (Röschenthaler 2011).

In other cases, as my second example, the Kente cloth production in Ghana shows, local artists are less influential in terms of international intellectual property law, but the situation is no less complicated.

5. Kente fabrics in Ghana

Kente refers to a form of strip weaving with characteristic patterns produced by Asante and Ewe weavers. In 1973, a law designed to provide protection and registration for the patterns employed by textile manufacturing companies was issued by the Ghanaian government. However, the designs of artisanal cloth productions such as Kente were only considered under the terms of the revised law, issued in 1985 (Boateng 2013: 950). The law acknowledged Kente weavers as the custodians of the craft but it appears that the state was rather more interested in considering the designs as national cultural heritage than compensating the weavers for their artistry (Axelsson 2012: 164; Boateng 2011: 50; Mohan 2008: 285), which illustrates the tension between ethnic – or better still the artisanal guild of weavers – and the national heritage. The 2003 Act finally included Kente as a "protected geographical indication", with copyright protection beginning from the date of publication or registration of the design, the creator being awarded pre-eminence under the law from that date, ignoring the creative process of developing the craft by other contemporary and previous artisans (Boateng 2013: 950, 961).

By the 18th century, this craft was introduced to the Asante court – probably from the northern savannahs – and wearing Kente fabrics became a royal privilege (Aronson 2007: 16-18; Boateng 2011: 23-24, 50). The Asante king, the Asantehene, performed the role of patron to the weavers; production was restricted and apprentices had to pay fees to receive training in the craft. The fabrics were produced for the court and the king distributed them as gifts of honour – a widespread practice in the savannah region to the Muslim north and beyond – to his most loyal followers and allies (Boateng 2011: 139).

Then in the 1980s, Ghanaian women traders started travelling to Côte d'Ivoire to commission fabrics with Kente designs from local textile factories for resale in Ghana. Thereby, affordable imitation Kente became available to social groups other than the royalty and its entourage and the national political elite. In the 1990s, imitation Kente cloth was produced in the country by Ghanaian textile factories, and in the 2000s, traders began to sell cheap versions of Kente cloth that they imported from China. The Chinese-manufactured imitation products reduced cloth prices further and posed a severe threat to Ghanaian hand-woven and machine-manufactured productions (Axelsson 2012). Female traders and local manufacturers sought inspiration for their designs from the repertoire created by previous generations of weavers. Having first slightly modified these designs, they then registered them as their own exclusive intellectual property. Meanwhile, Ghanaian designers living in the USA commissioned factory-made cloth and created Kente fashion industry in the diaspora (Boateng 2004).

The weavers complained that all these developments endangered their livelihoods. Handwoven fabrics are very expensive to produce and attract commensurate prices which, since independence, even among the royalty has risen to

the point where it is often unaffordable. In addition, because cotton cloth is lighter to wear and cheaper than the genuine article, it became increasingly popular and sold well. The weavers believed the Ghanaian state was not particularly interested in helping them at a time when they could no longer rely on royal patronage to provide them with the means to earn a living; and their interests were not protected under the terms of the intellectual property law (Asmah 2008; Boateng 2004, 2011, 2013).

According to the Ghanaian intellectual property law, only those who register a particular design in Ghana are allowed to produce Kente, or to sell it in the country. The process of registering designs was encouraged in the mid-1960s by the United Africa Company, a major stakeholder in the GTP factory in Tema which intended to protect its designs against its main competitor at the time, Akosombo Textiles Ltd. Whilst they could do so, it is unlikely that the weavers would have the money available to meet the cost of the registration fees – unregistered textile designs (or trademarks) are open to public use – let alone suing anyone in court. The fabrics produced in China under the auspices of Chinese brokers, and/or commissioned by African traders, are similarly unregistered but are generally smuggled into the country (Axelsson 2012: 134-138). The Ghanaian state is most unlikely to have the capability of successfully pursuing legal action against manufacturers in China, despite having signed up to the TRIPS Agreement (Boateng 2013)

This is the second example highlighting the involvement of various stakeholders, each having competing interests with the others in the creation and marketing of immaterial cultural goods. Here, too, compensation for the original artists is not guaranteed by the law but which is more concerned with protecting the interests of the more powerful and commercial entities in the country and abroad. Also, in this example, new creators benefit from the law and, despite international conventions, the Ghanaian government experiences difficulties in defending its interests abroad.

Where do the conflicts and frictions arise from in these two examples? Is it the way the international intellectual property law is conceptualised, namely the idea of the exclusive ownership by an individual? Is it people's interpretation of the law? Is it the usual course of events that whilst some stakeholders will benefit from new laws, others will flounder and their craft will not survive? At the root of the problem, is it that immaterial cultural goods become a commodity integrated in the market economy? The discussion below offers further examples that will elucidate a few useful indications that may provide tentative answers to these questions.

5. Intellectual property law and cultural change

The issue of social and cultural change is usually explained in terms of cultural contact, colonisation and economic development. Intellectual property law backs such developments by protecting individual creators at the expense of the established

owners of a craft, or an art form that was not hitherto owned by an individual but by a group of people, its custodians or stewards. Many examples have been documented all over the continent and beyond, under the label "traditional arts and crafts" including cloth and mat weaving, sculpture, pottery, calabash decoration, smithing, ecc. These crafts share the fate experienced by the Kente weavers. The skills required to produce them will be lost to the new conditions operating in the urban and global context, led at least partially by the preferences expressed by consumers for industrially manufactured, more practical, "modern" and affordable products. Specialists responsible for the organisation of initiation rituals and cult association owners are also confronted with a similar fate, potentially losing their influence in society as young people no longer desire to be initiated, regarding the practice as an obstacle to development. Furthermore, the younger generation of musicians and singers – including the Cameroonian performance artists – who stage their music and songs and earn a living without sharing their revenues with the former owners and custodians of these art forms.

Similarly, Jane Goodman (2005) documented the loss of older Algerian women, of control over their songs to younger singers who acquired ownership of these songs as their exclusive property, and also earn royalties from the sales of their productions. The guild or social category of the griots in Mali are gradually losing their privilege of performing praise songs for their patrons at marriages and other social events to young artists who perform irrespective of their family history. Digital technology has enabled them to imitate the songs of established giots and griottes without having to serve many years of tedious and costly apprenticeship. Thus, they are able to publish their creations and receive the royalties with the backing of intellectual property law (Diawara 2016). As a result of such cultural changes, established artists and craftspeople are no longer sufficiently able to earn a living from their specialisation because demand has changed. Former patrons are no longer able to sustain their protégés. And other young artists and designers have appropriated the art or craft and profited from the commercial opportunities, effectively promoted by the international legal regulations.

Cultural heritage listings had a similarly modifying effect. Following their addition to the list of immaterial cultural heritage mediated by the government, it was observed that immaterial cultural goods underwent transformation. For example, Ferdinand de Jong (2007) noted that the Kankurang masquerades of Senegal and Gambia – acting as non-public messengers of a men's association in a sacred grove – were transformed, after nomination as cultural heritage, into a public performance by the younger generation. This is just one example of a nomination enabling a window of opportunity to be opened for people other than their established owners to profit (Brumann and Berliner 2016).

Immaterial cultural goods have thus become commodities integrated into the market economy. The development also implies that intellectual property law has

become an integral part of this same market economy: a result of the law being designed with the clear intention of encouraging commercialisation. Whether it is appropriate to consider immaterial cultural goods as the exclusive property of an individual or whether there are other options available within which to conceptualise them is discussed in the last section.

6. Alternative ways of conceptualising cultural creations and the management of intangible property

Intellectual property law is accepted under the terms of several conventions to which member countries have agreed. The law, under its various national interpretations, was established as the internationally predominant means of managing immaterial cultural goods (see also Boateng 2013: 946). China, for example, protects the folklore and other immaterial cultural expressions of minorities as collective ethnic property, but is confronted with conceptual difficulties when dealing with individuals of an ethnic minority performing some of these songs outside of their community (Li 2014). In South Africa, some ethnic groups and kingdoms have claimed rights over land and local knowledge by registering themselves as a company and assisted by lawyers successfully defending their resources and cultural property against usurpation by the government (Comaroff and Comaroff 2009). The San successfully defended their local environmental and botanical knowledge against the interests of pharmaceutical companies (Comaroff and Comaroff 2009). These victorious examples of cultural rights claims, however, do entail difficulties in deciding how to distribute the royalties internally. In a kingdom, those in power usually profit the most. Among the San, whose habitat extends across several countries in southern Africa (South Africa, Namibia, Angola, Botswana, Zimbabwe, Lesotho), the questions arise as to which individuals should be entitled to claim San ethnic identity and exactly how any royalties due will be distributed across multiple countries.

There is also a variety of alternative approaches to managing immaterial cultural goods (Altbach 1986): There is the religious perspective that as God is the one responsible for all creations, human beings cannot own them; under this perspective individuals can create only by God's grace; therefore, creations are not perceived as signs of individual merit. There are no individual owners of immaterial property, and in particular, there is no monopoly on designs, names and artwork. This idea is proclaimed in the Old Testament (Theisohn 2009) and it resonates well with the Muslim religion. Muslim countries also favour a more liberal attitude towards the practice of downloading music, discouraging social inequality and the monopolising of material and immaterial assets (Bayoumi and Rosman 2018; Elmahjub 2015).

A variation on this principle has also been practiced by socialist governments. They tend to acknowledge the custodians of creations, but conceptualise creations as belonging to all the people in a country, who are permitted to use them freely.

Authors are not rewarded for their creations, rather creations are managed in the name of the people by the state. Under this regime, the state acts as patron and the authors are commissioned to work (Mertha 2005). This principle also exists in some circumstances in Western countries where the patron (a company, or organisation) is the legal owner of the work they commission (Reyman 2010: 48).

On a similarly fragmented level, patrons played a role in some of the examples discussed in previous sections. They nurtured the arts, enabling the artists and producers to earn a living, most notably the griots in the Mande world, the Kente weavers of Ghana, and the organisers of festivities inviting the cult association owners in Cameroon. These artists and craftspeople share ownership in their products and acknowledge the contribution of previous generations. They paid apprenticeship fees to learn their skills and recognise them as their teachers and knowledgeable ancestors. They all keep aspects of their specialisation secret that can only be acquired through paying fees, and in the case of the cult association owners in Cameroon, the entire institution may be acquired from their owners, including the secrets and the rights of performance ownership; they also actively defend their rights. European craft guilds possessed similar principles, keeping parts of their craft secret and claiming rights and privileges of production and sale in order to protect their means of earning a living (Polanyi 1944; Somers 1986).

Intellectual property law has brought about circumstances whereby creators, craftspeople and inventors had had their privileges removed on the strength of the argument that their inventions and knowledge should be made available to the public so that business can make use of them to enhance the wider economy and social progress (Reyman 2010: 47, 51), in the name of competition and the free market economy. On the local level, however, it is striking that in all the scenarios outlined in the previous sections, there are several interest groups involved: the government, collecting societies, producers and publishers, recent generations of authors and creators and the older generations of custodians of the relevant art or craft, who were in competition with each other and also endeavoured to defend their interests. Also on the global level, the more influential stakeholders seek to impose their interests on the less powerful ones and, with the backing of government, change the law. The more recent media conglomerates are a speaking example (Rogers 2013). Thus, the issue is not simply of artists being unable to earn a living due to rampant piracy.

Conclusion

International intellectual property law – originally developed in Europe – with the concept of an identifiable author or owner having exclusive property rights has become the primary means of protecting immaterial cultural goods. Underpinning its predominance are economic interests which have shaped the law and lobbied for its prevalence (Kretschmer 1997). Intellectual property law should, however, not be

regarded as the most conclusive means of managing immaterial cultural goods and assisting creators to earn a living. The law may thus be seen as obstructive to earlier practices that encouraged artistic creation, such as improvisation and established practices of mutual referencing and sharing, and the circulation of cultural products to create and consolidate social relationships. It also fails to acknowledge the debt owed to previous generations of creators. Nor does it recognise the important interaction between artists and audiences whom Barthes (1977) and Foucault (1984) considered to be the true authors.

Intellectual property law, as a market economy institution, promotes the judicialisation of creativity, involving expensive bureaucratic procedures, which increase the commercialisation of knowledge and art forms, making artwork more expensive and difficult to obtain rather than making it more accessible to audiences. This law brings a general and – in the digital era – intensified legal uncertainty in the relationship between copyright and creativity (Macmillan 2021: 9).

Intellectual property law with its tendency to increase commercialisation and judicialisation fosters competition at the expense of community building and equal distribution of resources. Intellectual property law rigidises cultural goods and the related discourses of its usefulness alienate people from the lived daily practices that guide and inspire cultural production, in Africa as it does in the rest of the world.

Some of the alternative approaches discussed earlier represent more socially sustainable ways of managing immaterial cultural productions. Additionally, they better resonate with existing ideas and norms but do of course possess their own shortcomings. It is, however, important to consider how people interpret and accommodate the law, especially to what extent they allow less powerful stakeholders to articulate their interests regarding creation in the context of a competitive arena, where each party is pursuing their own objectives and seeking to gain influence.

An anthropology of intellectual property can contribute to an understanding of the rhetoric, economic interests and power relations (Reyman 2010) involved in the implementation of intellectual property law. The strong points of anthropology include its concern with the perspectives, interests and activities of local people and how they manage past and present immaterial cultural goods. Anthropologists can highlight how local people respond to intellectual property law. Anthropologists may also investigate which individuals in a community embrace the introduction of the law as a useful tool, and which perceive it as merely a hindrance that obstructs established ways of earning a living, in the contested arena of stakeholders.

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