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The Unusual Extension of Imperial Intellectual Property Laws to Colonies in Africa

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Abstract

This chapter examines the unusual extension of imperial intellectual property laws to British colonies in Sub-Saharan Africa from the late nineteenth century to the early twentieth century, critically appraising how British dominion shaped domestic intellectual property laws and culture, and its impact on the social and economic development of African nations. It argues that contrary to the narrative that there was no apparent imperial strategy as to the development of colonial intellectual property laws, there seems to have been a certain arrangement regarding Africa, which cannot be merely coincidental. Intellectual property laws were imposed on Sub-Saharan Africa, not borrowed, and there must have been a reason for this. Yet unlike other Crown colonies, the Imperial government did not build local capacity nor institutions for intellectual property in Africa. This led to displaced local knowledge governance and innovation systems, and countries ill-equipped to handle the pressures of the twenty-first-century intellectual property system – leading to adherence and compliance overdrive in the post-TRIPS era.

Keywords: Intellectual property, colonialism, imperialism, innovation, development, Africa

1. Introduction

Despite a growing body of scholarship on the history of intellectual property law in Great Britain, little has been said about the history of intellectual property law in the British colonies. Scholarship that explores the issue has focused on the "white settler" colonies like Australia and New Zealand, those American colonies who attained independence in the eighteenth and early nineteenth centuries, or the Caribbean and Asia[1] (unless otherwise

[1] See for instance, Lionel Bently (2011), 'The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century', 12 Theoretical Inquiries in Law 1; Lionel Bently (2007), 'Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries', 82 Chicago-Kent Law Review 3, 1181; Uma Suthersanen and Ysolde Gendreau (eds) (2013), 'A Shifting Empire: 100 Years of the Copyright Act 1911, (Edward Elgar Cheltanham, UK); Daniel Gervais (2018), 'The Emergence and Development of Intellectual Property Law in Canada', in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law*, OUP; Pierre-Emanuel Moyse (2008), 'Canadian Colonial Copyright: The Colony Strikes Back', in Ysolde Gendreau (ed), *An Emerging Intellectual Property Paradigm: Perspectives from Canada*, (Edward Elgar); Catherine Bond (2018), '"Cabined, Cribbed, Confined, Bound in": Copyright in the Australian Colonies', in Isabella Alexander and H. Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar).

studied from a global perspective).[2] The picture is rather grim when one turns attention to Africa. Compared to other British colonies, the history of intellectual property in Africa is the least explored. The few scholarships that focus on the subject either approach the issue at a more general level (that is, from the perspective of European imperialism), a survey of regional intellectual property organizations and economic communities, or by way of specific treatment of individual countries or topics.[3]

This chapter contributes to the literature by examining the extension of Imperial intellectual property laws in the field of technology and culture – namely patents and copyrights – to British colonies in Sub-Saharan Africa[4] from the late nineteenth century to the early twentieth century, critically appraising how British dominion shaped domestic intellectual property laws and culture, and its impact on the social and economic development of Sub-Saharan African nations. It argues that contrary to the narrative that there was no apparent imperial strategy as to the development of colonial intellectual property laws, there seems to have been a certain arrangement regarding Africa, which cannot be merely coincidental. Intellectual property laws were imposed on Sub-Saharan Africa, not borrowed,[5] and there must have been a reason for this. Yet unlike other Crown colonies,[6] the Imperial government did not build local capacity nor institutions for intellectual property in Africa. This led to displaced local knowledge governance and innovation systems, and countries ill-equipped to handle the

[2] Carolyn Deere-Birkbeck (2008), 'The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries', (Oxford University Press, New York).

[3] George Sipa-Adjah Yankey (1987), 'International Patents and Technology Transfer to Less Developed Countries: The Case of Ghana and Nigeria', (Gower Publishing Co.); Ruth L. Okediji (2003), 'The international relations of intellectual property: narratives of developing country participation in the global intellectual property system', 7 Singapore Journal of International & Comparative Law; Tsimanga Kongolo (2014), 'Historical evolution of copyright legislation in Africa', 5 The WIPO Journal 2; Tsimanga Kongolo (2013), 'Historical developments of industrial property laws in Africa', 5 The WIPO Journal 1; George M. Sikoyo, Elvin Nyukuri and Judi W. Wakhungu (2006), 'Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda', Acts Press, Nairobi, Kenya; Caroline B. Ncube (2018), 'Three Centuries and Counting: The Emergence and Development of Intellectual Property Law in Africa', in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law*, OUP.

[4] While the specific scope for this article is Sub-Saharan Africa, for the sake of convenience, I use Sub-Saharan Africa interchangeably with Africa.

[5] An exception to this was the South African colonies, which became a dominion in 1910, known as the Union of South Africa, some of the states who had their local copyright laws by 1880. According to the Encyclopaedia Britannica, dominion was the status, prior to 1939, of each of the British Commonwealth countries of Canada, Australia, New Zealand, the Union of South Africa, Eire, and Newfoundland. Although there was no formal definition of dominion status, a pronouncement by the Imperial Conference of 1926 described Great Britain and the dominions as 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.'

[6] According to an internet source, the term "Crown colony" was, until the mid-19th century, used primarily to refer to colonies that had been acquired through wars, such as Trinidad and Tobago. After that time it was more broadly applied to every British territory other than British India, and self-governing colonies, such as the Province of Canada, Newfoundland, British Columbia, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, and New Zealand.

pressures of the twenty-first-century intellectual property system – contributing to adherence and compliance overdrive in the post-TRIPS era.

To address these points, the chapter draws attention to four developments during this period. Since imperialism and imposition of law underlies aspects of the argument in this chapter, the first Section explores briefly a theory of imperialism and imposition of law. The second Section then examines Africa's pre-colonial contact with European countries, the systems of innovation and knowledge governance in place and how this system stood in contrast to the Western conception of intellectual property. Section three addresses the question of the devolution of Imperial intellectual property laws in the dominions (and some Crown colonies) during the nineteenth century, pointing to the degree of autonomy that these "special" colonies enjoyed from Britain. This permits to compare the variations in how Imperial intellectual property laws were extended to the African colonies during the latter part of the nineteenth century and early twentieth century. Section four focuses on the unusual[7] extension of Imperial intellectual laws to the British colonies in Africa. Section five reflects on the implication of the imposition of colonial intellectual property laws on Africa. In the final section, I conclude.

2 A Theory of Imperialism and the Imposition of Law

European imperialism reached its height during the nineteenth century,[8] the period that many agree international law became a global legal order.[9] For the peoples and scholars of the colonized world, international law expanded when international legal rules, doctrines or ideas were imposed outside Europe to enable and justify formal or informal colonialism.[10] International lawyers, mostly from Europe, eager to make their contribution to the management of colonial relations had to grapple with questions about the personality of non-European entities, the relationship between law and "civilization" and the universality of norms they associated with international law.[11] For them, international law expanded when non-European nations were added as new members of the international community.[12] In this regard, Antony Anghie argues that colonial questions or problems were seen as largely incidental, practical or administrative.[13] In recent times, there has been a call for the recognition of the expansion of international law to be seen both as an expansion through

[7] By "unusual", I mean to uncover the level of deviation of Britain when it comes to the extension or application of intellectual property laws to the African colonies during the period under investigation - compared to, for instance, how it was done in the dominions.

[8] Antony Anghie (2016), 'Imperialism and International Legal Theory', in Anne Orford and Florian Hoffmann (eds), The Oxford Handbook of the Theory of International Law (OUP), p. 158.

[9] Arnulf Becker Lorca (2010), 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', 51 Harv International Law Journal 475; Antony Anghie (1999), 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', 40 Harvard International Law Journal 1. *See Generally* Antony Anghie (2005), 'Imperialism, Sovereignty, and the Making of International Law', (Cambridge University Press).

[10] Anghie, Finding the Peripheries, n 9 above. Also see generally Anghie, Imperialism, Sovereignty, n 9 above.

[11] Anghie, n 8 above, p. 158. (Emphasis added).

[12] Lorca, n 9 above, p. 476.

[13] Anghie, n 8 above, p. 158

admission and imposition, that is, acknowledging the coexistence of the regimes of equality and inequality.[14]

Indeed, during the period when the non-European world was colonized or subjected to informal imperialism, international law recognized the sovereignty of Western states while denying legal personality to non-Western polities, legalizing the acquisition of overseas territories, based on discovery and occupation, or through treaties in which the polities ceded sovereignty or jurisdiction to Western powers.[15] For example, international law redefined overseas territories as *terra nullius* – that is, territories that are not subjected to the authority of any sovereign and thus can be acquired through occupation. Once an overseas territory was occupied either through conquest or a treaty, the colonizer could then impose its laws from the metropole on the colonized. Each major colonial power developed a legal rationalization for the imposition of laws – in one form or another of a doctrine of the colonizers' superiority and the alleged inferiority of the colonized.[16] As Schmidhauser asserts, "fundamentally, it was the convergence of modes of conquest and subsequent policies of the imposition of the colonizer's legal culture and institutions which established the enduring influence of the imposed legal system."[17] The struggle of many African countries in dealing with the post-World War II era intellectual property system and their underdevelopment is a glaring example.

Writing in the context of international law and poverty creation, Jason Beckett fervently argues that "international law was forged in the heat of the colonial encounter with others, in the need to justify the exploitation of those others and the expropriation of their natural resources and wealth."[18] In the field of intellectual property, the Paris and the Berne Conventions could be said to have further facilitated this process regarding Africa.[19] The

[14] Lorca, n 9 above, p. 476.
[15] Lorca, n 9 above, p. 477. In fact, Lorca argues that Western international lawyers and diplomats, representing their merchants' interests or their states' expansionist policies, deployed the idea of an exclusively European international law to justify the exclusion of non-European entities from the privileges of an international legal order based on sovereign equality.
[16] John R. Schmidhauser (1992), 'Legal Imperialism: Its Enduring Impact on Colonial and Post-colonial Judicial Systems', 13 International Political Review 3, p. 331. Also, see Section IV below.
[17] Ibid.
[18] Jason Beckett (2016), 'Creating Poverty', in Anne Orford and Florian Hoffmann (eds), The Oxford Handbook of the Theory of International Law (OUP), p. 989.
[19] The two principal international treaties for intellectual property protection were concluded in 1880s respectively: the first was the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303 [hereinafter Paris Convention]. The Paris Convention governed 'patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and repression of unfair competition.' The second was the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter Berne Convention], which governed copyright and related rights. (For detail discussion of the Paris and the Berne Conventions, see Section IV.2 below).

award of patents in, for instance, the Gold Coast[20] (now Ghana) and Nigeria at a time when there were no local inventions or industrial activities that would meet the requirements for the grant of patents are a telling example.[21] Patenting, which was concentrated in wealthy plantation or gold mining colonies that sought greater productivity, was, therefore, a key part of the economic development of the British Empire.[22] Critics of the intellectual property system, therefore, lament that while the system generates revenue for developed countries, it represents a cost for developing countries that have to pay to access technologies developed by the former.[23]

Yet, British colonial policy was also pragmatic in terms of adaptation of British law. Bryce, for instance, has remarked that British law was imposed in those sectors of each colony where stability, tax revenue, and the flow of inter-colonial and transitional commerce were needed.[24] In Africa, the British could not also eliminate indigenous legal systems. Instead, they generally imposed major elements of their legal system upon the indigenous systems reducing the latter to a secondary status, and further leading to a dual legal system[25] in many areas of law. Considering the enduring impact of the colonial imposition of intellectual property laws on Africa, it is legitimate to ask whether there was any plausible basis for the extension of Imperial intellectual property laws to Africa. Imperialism, when viewed from the perspective of those who have been its subjects, "generates a new epistemology and a new set of questions."[26]

I. Africa's Contact with Europe, Innovation and Knowledge Governance Systems in the Pre-colonial Era

In 1553 the first British ship reached the shores of the Benin River, following the Portuguese who had been trading with the Binis since 1485.[27] The primary reason for the European presence in West Africa was trade, from the time of the Portuguese arrival in the late fifteenth

[20] In 1821, the United Kingdom Parliament, acting under pressure from anti-slavery interests, dissolved the Company of Merchants and assumed direct control of the Gold Coast forts. On October 17, 1821, Letters Patent were issued giving effect to 1 & 2 Geo IV c.28 and creating a colony called the West African Settlements consisting of the Gold Coast settlements, Sierra Leone and the Gambia with its seat at Freetown. See Neal M. Goldman (2016), 'Fallible Justice: The Dilemma of the British in the Gold Coast, 1874-1944', City University of New York (CUNY) Academic Works. For convenience, I use Gold Coast and Ghana interchangeably.

[21] Yankey, n 3 above. (For detailed discussion on the subject, see Section IV).

[22] Graham, Aaron (2020), 'Patents and Invention in Jamaica and the British Atlantic Before 1857', 73 The Economic History Review 4, pp. 940-963. (Emphasis added); Yankey, n 3 above, p. 104.

[23] Billy A. Melo Araujo (2016), 'The EU Deep Trade Agenda: Law and Policy', (Oxford University Press, UK), p. 139; Daniel Acquah (2017), 'Intellectual Property, Developing Countries and the Law and Policy of the European Union: Towards Post-colonial Control of Development', (IPR University Center).

[24] James Bryce (1901), 'Studies in History and Jurisprudence', (Oxford University Press, London).

[25] For a detailed discussion on the duality of colonial legal regime in Africa, see Sally Engle Merry (1991), 'Law and Colonialism', 25 Law & Society Review 4.

[26] Anghie, n 8 above, p. 159.

[27] A.F.C. Ryder (1970), 'Benin and The Europeans 1485-1897', (New York: Humanities Press); Taslim Olawale Elias (1988), Africa and the Development of International Law', (Second Revised Edition by Richard Akinjide), (Martinus Nijhoff Publishers, Dordrecht, Netherlands), p. 12.

century until the end of the nineteenth century.[28] An ancillary objective was to spread Christianity as part of the European civilizing mission.[29] Thus much of what is known about the innovation and knowledge governance systems of ancient African states and kingdoms come from the works of African historians who rely on the records of the European traders and missionaries,[30] archaeologist, anthropologist, and development economist.[31] Ryder, for instance, shares an interesting detail about the city of Benin from the account of a missionary who sent a letter through Lourenco Pinto, the captain of a Portuguese ship that carried missionaries, to the Sacra Congregazione at the instance of one Father Montelcone:

> Great Benin, where the king resides, is larger than Lisbon; all the streets run straight and as far as the eye can see. The houses are large, especially that of the king which is richly decorated and has fine columns. The city is wealthy and industrious. It is so well governed that theft is unknown and the people live in such security that they have no doors to their houses. The artisans have their places carefully allocated in the squares which are divided up in such a manner that in one square he counted all together one hundred and twenty goldsmith's workshops, all working continuously.[32]

Taking the period into consideration, the above description reflects an innovative community. Indeed, as noted by Austen and Headrick, the introduction of agriculture and metallurgy to Africa is prehistoric, autonomous and revolutionary process. Ironmaking developed alongside agriculture in West Africa, Ethiopia and the Great Lakes area, and the craft rapidly reached a level of sophistication which rivalled contemporary European and Middle Eastern metallurgy in at least its smelting processes.[33] Forbes account supports the above claim: "outstanding among the negroid African's industries is his work in smelting iron and in manufacturing from the crude metal the tools and weapons upon which depend his agriculture, the fabrication of his wooden utensils, and his supply of weapons for fishing, hunting, and warfare."[34]

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[28] H. M. Feinberg (1971) (Book Review), 'Benin and the Europeans 1485-1897 by A.F.C. Ryder', 4 African Historical Studies, No. 2.

[29] The doctrine of the 'standard of civilization' has a particular genealogy. As the law of peoples, it emerged in the fifteenth century under a natural law conception and shifted progressively to become a formalized legal order underpinned by positivist legal thought. Western legal scholars developed the doctrine of the standard of civilization to delimit international law's scope and validity. The nineteenth-century positivist international law of civilized nations did not include any formal procedure to determine the 'civilized' status, leaving the admission of new members to the determination of international legal scholars. Positivism and the distinction between civilized and uncivilized peoples served the interest of Western imperialism and colonialism. See Lorca, n 9 above, pp. 495-6.

[30] Ibid.

[31] Ralph A. Austen and Daniel Headrick (1983), 'The Role of Technology in the African past', 26 African Studies Review 3/4, p. 165.

[32] Ryder, n 27 above at p. 113.

[33] Austen and Headrick, n 31 above, p. 165.

[34] Robert J. Forbes (1933), 'The Black Man's Industries', 23 Geographical Review 2.

On the water, we hear of the dugout canoe, some of which measured up to 80 feet in length and was capable of carrying 100 men or more.[35] There were other types of craft with limited diffusions such as reed boats on Lake Chad, plank boats on the Niger River and dhows on the East African coast.[36] Some of these crafts were said to have reached the size of Viking long-boats or Greek galleys although not as seaworthy as their European counterparts.[37] A structure in Namoratunga, a megalithic site in northwestern Kenya, constructed around 300 B.C. suggested that a prehistoric calendar based on detailed astronomical knowledge was in use in eastern Africa.[38] Similarly, Africans possessed wide-ranging knowledge about the therapeutic or medicinal value of plant and biological materials, which is known today as traditional medicinal knowledge, rich cultural life in the art, music, dance, and artefacts, commonly referred to as traditional cultural expressions or folklore.[39]

Arguably, while the mode and systems of technological innovation in medieval Africa was analogous to contemporaneous development in other regions of the world, the communal way of life and systems of social organization as governed by indigenous law – what would later become known as "customary law" in colonial times[40] – would lead to the outcome that while advances were being made in, for instance, technological innovations in Europe, the opposite was happening in Africa.[41] For example, as early as the 15th century, patents were being awarded to inventors in the Republic of Venice.[42] Pamela Long even assert that there is evidence of a few patents in the 13th century.[43] In Africa, pre-colonial commercial legal arrangements with European powers marked its first encounter with Western practices related to intellectual property.[44] Thus, intellectual property rights as conceived in the

[35] Ibid.
[36] Ibid..
[37] Austen and Headrick, n 31 above, p. 167.
[38] Lynch, B. M. and Robbins, L. H. (1978), 'Namoratunga: The First Archeoastronomical Evidence in Sub-Saharan Africa', 200 Science.
[39] Ncube,n 3 above, p. 411.
[40] Merry, n 25 above, pp. 897-98. Who argues that the law of colonized peoples recognized by colonial governments was generally labelled "customary law" and was considered to be indigenous law. Hence, far from being rules handed down from the precolonial period, customary law was a historical product created by the colonial institutions -- the outcome of complex intersections of pre-colonial African polities, British law as understood by early administrators, and the creative efforts of emerging African elites who shaped the law to meet needs under changing political and economic conditions.
[41] Austen and Headrick, n 31 above, p. 165. They asked the difficult question that has also preoccupied historians of the ancient Greek and Roman technology, why Africans failed to adopt various "free-floating" technologies that were available to them in pre-colonial and colonial times. To answer this, they identify three stages in the development of African technology to shed light on why things are the way they are: first, the fairly rapid and autonomous emergence and spread of what may be called classical African agricultural and metal-using technologies. Second, a long period of contact with the outside world in which various elements of European and Asian proto- industrial technology (most notably the wheel and the plough) were not adopted, and finally, the last century of colonial and post-colonial regimes, when imported advanced industrial technology entered Africa without being effectively integrated into locally-based system.
[42] Pamela O. Long (1991), 'Invention, Authorship, "Intellectual Property," and the Origin of Patents: Notes toward a Conceptual History', 32 Technology and Culture 4, pp. 875-880.
[43] Ibid.
[44] Okediji, n 3 above at p. 323.

modern sense did not exist in pre-colonial Africa[45] — although pre-colonial Africans innovated, just as their modern constellations.

Customary law provided and, to an extent, continues to provide knowledge governance systems.[46] Customary law is an established system of immemorial rules which has evolved from the way of life and natural wants of the people.[47] It is said to be living in the sense that communities adapt the rules to their changing circumstances and needs.[48] A distinction can be made between this pre-colonial, organic customary law and the one historically constructed in the colonial era – fixed, formal and written rules enforced by native courts.[49] Oguamanam has argued that traditional knowledge is affirmed in the customary laws and norms of indigenous peoples and categories of local communities as an aspect of their sovereignty and self-determination.[50] Thus, in many indigenous worldviews, for example, the conceit of humankind as an unbridled determiner of the fate of all biotic and abiotic resources is renounced.[51] This may explain why the appropriation logic does not have an exact parallel in indigenous worldviews.[52] In these communities, knowledge is produced and largely held in a context akin to a trust, with balance and sensitivity to virtually all recognized interests in the prevailing socio-cultural and socio-legal order.[53] Also, intangible assets like know-how (for example, knowledge of medicinal products or active ingredients from aerial or underground parts of plants or other plant material or the combination of them, whether in the crude state or as plant preparation or containing natural organic or inorganic active ingredients which are not of plant origin) were often kept as trade secrets or confidential information traditionally.[54]

While there are many commonalities in the customary laws of indigenous communities, they are all unique. Among these are usually special rules about knowledge governance, the bulk of which is not reduced to writing or even disclosed orally beyond that community,[55] and dating back to the pre-colonial times. An example is the kente cloth of Ghana whose manufacture is the preserve of the Ashanti and Ewe tribes of Ghana. There are rules about

[45] See Kongolo, n 3 above at p. 105; Ncube, n 3 above.
[46] Ncube, n 3 above, p. 412.
[47] Ibid. (Citing J.C. Becker (1959), 'Seymour's Customary Law in Southern Africa (5th edition, Juta)).
[48] Merry, n 25 above, p. 897; C. Himonga and T. Nhlapho (eds) (2014), 'African Customary Law in South Africa: Post- Apartheid and Living Law Perspectives (OUP South Africa), p. 27.
[49] Merry, n 25 above, pp. 897-98.
[50] Chidi Oguamanam (2018), 'Wandering footloose: Traditional knowledge and the "Public Domain" revisited', The Journal of World Intellectual Property, p. 2.
[51] Ibid, p.6.
[52] Ibid.
[53] Ibid; Ruth L. Okediji, (2017),' Negotiating the public domain in an international framework for genetic resources, traditional knowledge and traditional cultural expressions', in D. F. Robinson, A. Abdel-Latif, & P. Roffe, (Eds.), Protecting traditional knowledge: The WIPO intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore. New York, NY: Routledge.
[54] Peter J. Houghton and Abraham Y. Mensah (2003), 'Herbal Practitioners and Pharmacists in Ghana', 271 The Pharmaceutical Journal 7258, pp. 93-94. Also see Samuel O. Manteaw (2008-2010), 'Patents and Development in Ghana: Proposals for Change', 24 University of Ghana Law Journal 111,pp. 13-14.
[55] Ncube, n 3 above, p. 412.

when to wear Kente cloth and how to wear them for both male and female adults. Similarly, the special *Kete* and *Adowa* dance of Ghana and the *Nwumkoro* music ensemble has been designated as the preserve of Akan tribes. In East Africa, specific composers are regarded to be the custodians of their musical compositions, and some types of artwork and designs are owned by specific community members.[56] Such examples (and countless others which cannot be enumerated here due to their oral nature) are what has led some scholars to advocate that customary law continue to have a key role in the regulation of traditional knowledge. In particular, in the design of the appropriate regimes for traditional knowledge, especially, sui generis systems, regardless of the community's location.[57]

II. Variations in Imperial Devolution of Intellectual Property Laws in the Nineteenth Century – Focus on the Dominions and other Colonies other than Africa

The extension and application of Imperial intellectual property laws to the colonies varied according to region. A review of some of the literature on the role of law in the colonial process reveals that the British treated their colonies differently in place, time and situation.[58] This is particularly apparent when one looks at the history of intellectual property law in some of the British dominions and colonies. Lionel Bently, however, argues that colonies under British tutelage in the nineteenth century experienced a period in the development of intellectual property law that was uncoordinated and unplanned.[59] Accordingly, there was no imperial law of patents, designs or trademarks.[60] However, upon payment of a small additional fee, letters patent could be extended to include "all His [after 1837 'Her'] Majesty's Colonies and Plantations abroad,"[61] reflecting a desire that the grant has imperial application.[62] The only exception, however, was copyright in books although not without considerable controversy.[63] The above claim gives reason for a closer look at how Britain related to its colonies in intellectual property law-making and the variations thereof. To be

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[56] M. Ouma (2014), 'The Policy Context for a Commons-Based Approach to Traditional Knowledge in Kenya', in J. de Beer, C. Armstrong, C. Oguamanam, and T Schonwetter (eds), Innovation and Intellectual Property Collaborative Dynamics in Africa (University of Cape Town Press 2014), p. 132.

[57] Ncube, n 3 above 412; Paul Kuruk (2007), 'The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge', 17 Indiana International & Comparative L Rev 67, pp. 81–83; Graham Dutfield (2014), 'Traditional Knowledge, Intellectual Property and Pharmaceutical Innovation: What's left to discuss?', in M. David and D. Halbert (eds), The Sage Handbook on Intellectual Property (Sage).

[58] Merry, n 25 above, p. 891.

[59] Bently, n 1 above, p. 162. This Section relies heavily on Bentley's contributions to the topic and also, Gervais work in n 1 above. It is therefore not entirely original.

[60] Ibid, p. 163.

[61] R. H. Barrigar and C Robinson (1990), 'Some Notes on the Historical Development of Patent law in Colonial Canada and Other British Colonies', 5 Intellectual Property Journal 391, 392; Bently, n 1 above, p. 163. Citing Christine Macleod (1988), Inventing The Industrial Revolution: The English Patent System, 1660-1800, (Cambridge University Press), p. 28; Select Committee on the Law Relative to Letters Patent for Inventions, 1829, H.C. 332, at 173-75 (examples), 213-16 (forms).

[62] Bently, n 1 above, p. 163.

[63] Ibid.

able to strike the appropriate comparison, the remainder of this section will focus on the dominions and other colonies apart from the African colonies.

1. Patents

In the early to the mid-nineteenth century, there emerged serious discussion about the value and effectiveness of extending a patent granted in England to the colonies.[64] One camp advocated for the need for the colonies to choose for themselves whether to grant patent rights and, if so, their scope.[65] The other camp argued for patents to be applied in the colonies – justifying that the colonies would benefit from such a regime while its absence could undercut businesses in Britain.[66] In the aftermath of the 1852 Patent Law Amendment Act, which streamlined the grant of a single British patent, the question arose within the Patent Office whether these unitary patents should be extended to the colonies. It was decided that British grants should not, in general, be extended and none were.[67]

Despite the decision not to extend British patents, there was certain indirect coordination of legislation with the colonies. Even if "unintended", a consequence of the latter was the formulation of local laws. Bently has noted, for example, how a circular issued by the Colonial Office could "inform a colony of a particular change in British law, inspiring perhaps a local legislative response, or request information on the protection available to a British citizen, thus suggesting, perhaps, that such protection was necessary or desirable."[68] In the early 1850s, for example, the Lord Chancellor, Lord St. Leonards, sent a circular to the colonies asking for information concerning local laws. Many of the colonies responded by formulating

[64] Bently, n 1 above, p. 163. Noting that in evidence to the Select Committee on Patents of 1829, the patent agent John Farey suggested that such rights were of limited value and, in many cases, had no legal effect.

[65] *See* the Select Committee of the House of Lords Appointed to Consider of the Bill, Intituled, "An Act Further to Amend the Law Touching Letters Patent For Inventions"; And also of the Bill, Intituled, "An Act For The Further Amendment of the Law Touching Letters Patent For Inventions"; And to Report Thereon to the House, Report and Minutes of Evidence, 1851, H.C. 486, at 305-06 (Lieut-Col Reid, QQ. 2268-69). The different colonies had different populations (in terms of size, wealth, racial makeup, and literacy), different cultures, languages, economies, industries, legal traditions and neighbors. Action might be needed in Britain, but have wholly different effects in a colony. Protection of patents in a colony might, equally, increase the prices of commodities, placing the colony at a disadvantage vis-a`-vis a foreign neighbour (to which the patent would not apply). Moreover, levels of mechanical knowledge varied from place to place, so that it was not possible to assume that an invention that lacked novelty in Britain would also lack novelty in a colony, or vice versa.

[66] *See* ibid*,* the Select Committee of the House on the Bill, at 151 (Robert Macfie, Qq. 980, 997).

[67] Bently, n 1 above, p. 163. Citing the Royal Commission, Report of the Commissioners Appointed to Inquire into the Working of the Law Relating to Letters Patent for Inventions, 1864, C. (1st series) 3419, at 30 (Lewis Edmunds).

[68] Bently, n 1 above, p. 186.

patent laws modelled after the English Act of 1852 so that by 1864, seventeen British colonies had patent laws,[69] ahead of many European countries.

The colonial governments assumed that what was appropriate in Britain was also appropriate in the colony. This was particularly the case in the non-white colonies since, in many cases, their colonial legislatures or Councils were dominated by British appointees.[70] For example, the first Indian patents Act VI of 1856, which had the objective of encouraging inventions of new and useful manufactures, was subsequently repealed by Act IX of 1857 since it had been enacted without the approval of the British Crown.[71] Yet, India was a colony that also enjoyed some goodwill and freedom from Great Britain. In this regard, India's patent Act of 1859 established an independent grant system such that it required an invention to be new in the sense that it had not been used in Britain nor India.[72] It also excluded the possibility of the invention by "importation" (unless the importer was the inventor).[73] Some colonies specifically passed local laws as alternatives to any British grant that had explicitly been made applicable to the colony.[74] Others also gave no effect to British grants made after the introduction of the colonial law unless they complied with conditions under the colonial law.[75]

Canada was an example of legislative autonomy. It showed early on that it wanted to forge its policies irrespective of how far the laws deviated from Britain.[76] In 1824, Lower Canada adopted the first general legislation for the grant of local patents.[77] It was followed by similar legislation adopted in Upper Canada,[78] Nova Scotia,[79] New Brunswick,[80] and Prince Edward Island.[81] All of these statutes provided that patents could only be granted to residents of the colony (province) concerned.[82] The problematic nature of such a provision led to the 1850 case of *Adams v Peel*, where it was held that a British patent had no force in Canada after the

[69] Ibid. Citing the 1864 Royal Commission On Patents, n 50, at 30 (Lewis Edmunds). For instance, Patent Acts and Ordinanaces adopted in New South Wales and Barbados in 1852, Victoria in 1854, India in 1856, Jamaica in 1852 and 1857, Tasmania in 1858, Ceylon and South Australia in 1859, New Zealand and the Cape of Good Hope in 1860, British Guinea in 1861, and British Honduras in 1862, among others.
[70] Bently, n 1 above, p. 184. (Emphasis added).
[71] See 'History of Indian Patent System', Office of the Controller General of Patents, Designs and Trademarks, Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India. Available http://www.ipindia.nic.in/history-of-indian-patent-system.htm.
[72] Act No. 15 of 1859, § 19 (India).
[73] Ibid, § 17.
[74] Ordinance to Regulate the Granting of Patents in This Colony, No. 13 of 1861, § 19 (British Guiana).
[75] Patent Law Amendment Act, 1862, 26 Vict., c. 2, § 44 (British Honduras); Act to Provide for the Granting, in this Colony, of Patents for Inventions, No. 17 of 1860, §§ 14, 35 (Cape of Good Hope) (section 35 was entitled "English patents subject to this Act").
[76] Gervais, n 1 above; Bently, n 1 above, p. 186.
[77] Gervais, n 1 aboove, p. 285, citing SLC 1824 c 25.
[78] SUC 1826 c5.
[79] SNS 1833 c 45.
[80] SNB 1834 c 27.
[81] SPEI 1837 c 21.
[82] Barrigar and Robinson, n 61 above, p. 393.

passing of the provincial Patent Act of 1824.[83] Consequently, "Her Majesty's subjects in England or other Colonies could not obtain patents in the Colonies unless they proceeded by private bill."[84] In 1929, the Lower Canada Act was amended to allow residents to obtain a patent on an invention imported from abroad but not invented by the applicant.[85] Even so, the colonial legislatures could and did make special exceptions to the residency requirement.[86] In 1869 when Canada adopted its first federal patent statute,[87] it became unique among British colonies in adopting the first-to-invent standard.[88] The Act also required applicants to have been residents of Canada for at least one year before the date of application.[89]

2. Copyright

At the outset, British dominions and colonies were not subject to British copyright. The statute of Anne 1710, which introduced a statutory right to control the reprinting of books only applied throughout Britain.[90] Following the Union of the two kingdoms of Great Britain and Ireland, the Statute of Anne was extended by the copyright Act of 1801 so that it applied throughout the United Kingdom and "any part of the British dominions from Europe."[91] This changed in 1814 when the passage of the Literary Copyright Act[92] finally extended copyright in books to British dominions and colonies. This Act provided that where a book was first published in Britain, the owner of copyright was able to bring an action against "any bookseller or printer, or other person whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey or Guernsey, or in any other part of the British Dominions, [who] shall... print, reprint, or import... any such book or books...."[93] From then on, the copyright for works published in Britain was capable of being infringed anywhere in the British Empire,[94] thus securing protection within the imperial market. The imperial scope of copyright was reaffirmed in the Literary Copyright Act of 1842,[95] which extended coverage

[83] Gervais, n 1 above, p. 285. Citing 1850, 1 LCR 130. This seems to have been confirmed by the English Act of 1852. See Henry Lund (1851), 'A Treatise on the Substantive Law relating to Letters Patent for Inventions', (republished by Gale 2010) xxi.

[84] Gordon Asher (1965), 'The Development of the Patent System in Canada Since 1767', 43 Canadian Patent Reporter 60, pp. 57–58 (reviewing the exchanges of the letters between various officials and the inventors desiring to obtain the colonial patents in the 1850s).

[85] 9 Geo IV c 47. See also Asher. n 84, p. 61; Barrigar and Robinson, n 61, p. 396. A survey of the first 62 patents granted in Lower Canada showed that 20 of those patents were for imported, not locally invented technology.

[86] Gervais, n 1 above, p. 286. See also Barrigar and Robinson, n 61, p. 395; Asher, n 84, p. 64.

[87] SC 1869 c 11.

[88] Gervais, n 1 above, p. 286.

[89] Ibid, p. 286.

[90] Act for the Encouragement of Learning, 1710, 8 Ann., c. 19.

[91] Copyright Act, 1801, 41 Geo. 3, c. 107, § 1. For a detailed discussion, see Bently, n 1 above.

[92] Act to Amend Several Acts for the Encouragement of Learning, 54 Geo. 3, c. 156, § 4.

[93] Ibid.

[94] Bently, n 1 above, p. 172.

[95] Literary Copyright Act, 1842, 5 & 6 Vict., c. 45 (Imperial). Under this Act, if a book was first published in the United Kingdom by an author who was a resident in one of the British possessions, the book would benefit from copyright throughout the British dominions, defined as "all parts of the United Kingdom of Great Britain

to even future colonies. In short, the Act extended copyright protection to books first published in the United Kingdom throughout the colonies but did not protect colonial works in Britain or other colonies.[96]

Despite it being uniquely imperial in its application, Bently argues that there was considerable room for the exercise of colonial variation in copyright – citing three reasons. Firstly, the 1842 Copyright Act was significantly modified through the Foreign Reprints Act of 1847 – based on protest from the Canadian colonies. Secondly, the 1842 Act only applied to books first published in the United Kingdom, and colonies were free to formulate laws for books first published in their jurisdictions. Thirdly, the Act only applied to books and music, allowing colonies the room to develop their regimes for the protection of artistic works, dramatic works and related rights.[97] However, in 1847, when India considered adopting a local copyright law, having regarded the Imperial Copyright Act of 1842 as being insufficient, the chief minister involved recommended that the local legislation mirror the imperial, explaining that it would be "improper in a subordinate legislature" to deviate from the imperial regime.[98] Similarly, when in 1872, a Bill was tabled in the Canadian Parliament to allow reprints of British books to be subject to a flat duty of 12.5 per cent[99] – something we might today call a compulsory license – it received significant opposition in Britain on the basis that it conflicted with Imperial copyright. The Bill was disallowed.[100]

Two possible scenarios can be deduced from the development of colonial copyright: either the local government in the colonies enacted copyright laws in protest to imperial copyright or as a supplement to it. For example, Canada remonstrated the effects of the 1842 Imperial Copyright Act,[101] which led the United Kingdom to pass the Foreign Reprints Act of 1847.[102] Canada, however, again protested the Foreign Reprints Act by adopting a Copyright Act in 1847, signalling that it wanted to bring copyright (and book importation) policy back to Canada.[103] The Canadian Act protected British authors, but only if they printed and published

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and Ireland, the islands of Jersey and Guernsey, all part of the East and West Indies, and all the colonies, settlements and possessions of the Crown which are now or hereafter may be acquired.

[96] Gervais, n 1 above, p. 270.

[97] Bently, n 1 above, p. 174.

[98] Ibid. Citing the Minute of Charles Hay Cameron, Legal Member of the Council (1843-48), and President of the Council of Education (July 5, 1847) (IOL F4/2256 Board's Collections (1847-48), vol. 2256 113858-114023, at No. 113864).

[99] Catherine Seville (2006), 'The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century', (CUP), p. 103.

[100] Gervais, n 1 above, p. 271 (citing John McKeown (2003), Fox on Canadian Law of Copyright and Industrial Designs (4th edn, Carswell, p. 30.)

[101] Seville, n 99 above, p. 79-86. Purportedly, the 1842 Act had been accompanied by a Customs Act (Customs Act 1842, 5 & 6 Vict., c. 24 (Imperial)) that required customs authorities to enforce imperial copyright law by preventing the importation of books that had been printed without the authorization of the copyright holder.

[102] Act to Amend the Law Relating to the Protection in the Colonies of Works Entitled to Copyright in the UK, 1847, 10 & 11 Vict., c. 95 (Imperial).

[103] Gervais, n 1 above, p. 270.

their works in Canada. This text could not legally supersede the existing Imperial Act adopted by Westminster and thus had little practical legal effect.[104]

New Zealand was another example of a colony that adopted a local copyright law for books in 1842.[105] This law was modelled after the British Act of 1814 and, and unlike the Lower Canada law of 1832[106] (or the Province of Canada law of 1841),[107] which only conferred copyright where the author was a person ''resident in the province",[108] the New Zealand law contained no explicit restriction on residence.[109] The above examples show the degree of autonomy or room for manoeuvre granted to some of the colonies on intellectual property policy and legislation. It also shows the level of resistance to imperial laws in the colonies. Arguably, for autonomy (be it political or economic etc) or resistance to thrive, it requires some level of human development and institutional capacity, the very constituents lacking when one looks at the African colonies in terms of the development of intellectual property laws.

III. The Unusual Extension of Imperial Intellectual Property Laws to Africa

Law has been described as the cutting edge of colonialism.[110] It was central to the "civilizing mission" of imperialism, particularly British imperialism of the nineteenth and early twentieth centuries.[111] For the British colonies in Africa and India, British law represented to the colonizers a substantial advance over the "savage" customs of the colonized.[112] Law was thus conceptualized as "the gift we gave them."[113] This gift of law inherently challenged and transformed traditional conceptions of property, time, space, marriage, work and the state.[114] Intellectual property law was part of this colonial legal apparatus. As Okediji notes, "intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions with each other in regions beyond Europe."[115]

[104] Ibid, p. 270.
[105] Ordinance to Secure the Copyright of Books to Their Authors, No. 18 of 1842 (N.Z.), *reprinted in* Copies of the Law and Ordinances Passed by the Governor General of New Zealand, 1841-42, 1844, H.C. 61, at 51.
[106] Act for the Protection of Copy Rights, 1832, 2 Will. 4, c. 53 (Lower Can.).
[107] An Act for the protection of Copy Rights in this Province 1841 (4-5 Vict c 61).
[108] Bently, n 1 above, p. 176; Gervais, n 1 above, pp. 269-270.
[109] Bently, n 1 above, p. 178.
[110] Merry, n 25 above. Citing Martin Chanock (1985), 'Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia', (Cambridge: Cambridge University).
[111] Philip Darby (1987), 'The Three Faces of Imperialism', (New Haven, CT: Yale University Press).
[112] Merry, n 25 above, p. 890; Bently, n 1 above.
[113] Peter Fitzpatrick ((1990), 'Custom as Imperialism', in J. M. Abun-Nasr and U. Spellenbert (eds.), Law, Society and Identity in Africa, (Hamburg: Helmut Buske Verlag).
[114] Merry, n 25 above, p. 891.
[115] Okediji, n 3 above at p. 324.

There are three related reasons why I consider the extension of Imperial intellectual property laws to Africa as unusual.[116] First, as discussed above, the United Kingdom to a large extent devolved intellectual property law-making to its colonies. However, with regards to its African colonies, there was no devolution of intellectual property law-making and administration (except South Africa, which became a self-governing dominion in 1910).[117] Second, the latter part of the nineteenth century saw the conclusion of two international agreements in the field of intellectual property. International harmonization of intellectual property law came with consequences for the African colonies and protectorates. Third, there emerged efforts at uniform imperial intellectual property laws after international harmonization of intellectual property became a reality in the nineteenth century. Whiles uniformity in law further led to increased autonomy in legislation for the British dominions (and some colonies), it further perpetuated the imposition of imperial laws on Africa.

1. No Devolution of Intellectual Property Law-making and Administration in Africa

As noted earlier, during the nineteenth century, many of the particularly white settler colonies had gained increasing amounts of autonomy and practical independence from Westminster,[118] perhaps, due to deep concerns about Britain's imperial mandate, and the reaction of some of the colonies to the revision of laws, especially, copyright law.[119] One would think that this devolution would naturally transfer to the African colonies. Except for a slight deviation in the case of the Gold Coast, this was not the case.[120] Contrary, it was a situation of Great Britain looking for new territories to expand its power and claim sovereignty, impose its laws and further its economic interest.

The development of patent law in the Gold Coast makes an interesting case study. Until 1899, the Gold Coast had no patent law. In January 1898, the British Secretary of State for the Colonies sent a dispatch to the then Acting Governor of the Gold Coast enquiring about the procedure for obtaining patent protection in the Gold Coast colony.[121] Since there was no

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[116] From 1871-1900, Britain gained control over or occupied what is now known as Egypt, Sudan, Kenya, Uganda, South Africa, Gambia, Sierra Leone, northwestern Somalia, Zimbabwe, Zambia, Botswana, Nigeria, Ghana, and Malawi. Great Britain also got southern and northeastern Africa from the Berlin conference 1844-1845.

[117] In what is today the Republic of South Africa, the provinces of Cape Colony, Natal, Orange Free State, and the Transvaal were united to form the Union of South Africa, which was granted autonomy and thus began to be self-governed in 1910.

[118] Bently, n 1 above, p. 191.

[119] Uma Suthersanen (2012), 'The First Global Copyright Act', Queen Mary School of Law Legal Studies Research Paper No. 106/2012, p. 9. Available at SSRN: https://ssrn.com/abstract=2022878.

[120] Again, an exception to this was some of the self-governing South African colonies. Most of them already had local patent and copyright laws by 1860-1880. See for example, Law to Provide for the Granting in this Colony of Patents for Inventions, No. 4 of 1870, (Natal); Act to Provide for the Granting, in this Colony, of Patents for Inventions, No. 17 of 1860, (Cape of Good Hope); Act to Protect and Regulate the Rights of Authors in Respect of their Works, No. 2 of 1873 (Cape of Good Hope).

[121] Yankey, n 3 above, p. 98. (Citing Dispatch No.52 of January 28, 1898 in C.O. 96 Gold Coast 1898 Vol. XXVII, 336, and noting that the dispatch so transmitted was a copy of a letter inquiry from patent agents Messrs. H. & W. Pataky.)

patent legislation in the colony, the Secretary of State for the Colonies asked the Board of Trade for advice on the need for a patent law for the Gold Coast.[122] In the following year, the British Parliament passed the Gold Coast Patent Ordinance in 1899[123] – modelled on the British Patents, Designs and Trade Marks Act 1883.[124] Exceptionally, this Ordinance operated as an independent patent registration system with a Patent Office under the control of a registrar.[125] It had provisions for patent applications and procedures for obtaining patents in the Gold Coast without recourse to the United Kingdom Patent Office.[126]

However, after more than two decades in operation, the 1899 Ordinance was repealed in 1925 and replaced by the Patents Registration Ordinance (Cap. 179).[127] This Ordinance restructured the patent system of the Gold Coast by effectively terminating the autonomous system of the 1899 Ordinance, and merely extended the validity of all patents registered in the United Kingdom to the Gold Coast colony.[128] In so doing, it incorporated the Gold Coast's patent system into that of the United Kingdom and rendered the existing local patent office a mere registration centre for the United Kingdom patents.[129] Section 4 of Cap 179 provided that:

> Any person being the grantee of a patent in the United Kingdom, or any person deriving his right from such grantee by assignment, transmission or other operation of law, may apply within three years from the date of issue of the patent, to have such patent registered in the Gold Coast.

What this meant was that the grant of a patent in Ghana was only to United Kingdom patent holders and that to have patent protection for an invention made in Ghana, one needed to apply for the grant first in the United Kingdom before having it re-registered in Ghana. The application for registration of such a grant in Ghana had to be made within three years from the date of issue of the United Kingdom patent. This procedure applied to Ghanaian and non-Ghanaians, that is, other Africans desiring patent protection in Ghana. The privileges and rights of such a patent grant in Ghana dated from the date of the patent in the United Kingdom, "and shall continue in force only so long as the patent remains in force in the United

[122] Manteaw, n 54 above, p. 4.
[123] *See* Gold Coast Patent Ordinance 1899, No. 1 of 1899.

[124] Yankey, n 3 above, p. 100. (Citing the Board of Trade's letter dated 16 May 1898 in C.O. 96 Gold Coast 1898, Vol. xx, 329).

[125] Manteaw, n 54 above.
[126] Yankey, n 3 above, p. 114; Manteaw, n 54 above.
[127] Patents Registration Ordinance, 1925 (Cap. 179).
[128] Robert M. Yawson (2002), 'Technology commercialisation and intellectual property rights in Ghana', The International Conference on TRIPS – Next Agenda for Developing Countries Paper, p. 7. Available https://mpra.ub.uni-muenchen.de/id/eprint/33185.
[129] Manteaw, n 54 above.

Kingdom…."[130] Thus, any extension or annulment of the United Kingdom grant automatically applied to the Ghana registration.[131]

Reflecting on the rationale for the enactment of patent legislation for the Gold Coast, a significant factor was the protection of the imperialist interest in the mining industry, especially, gold mining.[132] Communication between the Colonial Office and the Board of Trade points to this. In a letter dated April 30 1898, the Colonial Office noted that:

> There is at present no patent legislation in force in the colony (Gold Coast), but in view of the development of the gold mining district of Tarkwa, and the consequent introduction of machinery etc. Mr Chamberlain (Colonial Secretary) thinks it would be well to take steps to afford protection to invention.[133]

A second letter to the Acting Governor of the Gold Coast colony from the Secretary of State for the Colonies was even more precise and conclusive: "I have under consideration, the advisability of enacting patent legislation for the Gold Coast in view of the introduction of patented machinery and processes which will probably follow on the development of the mining industry."[134] Thus, patent protection was provided for the machinery necessary for the exploitation of gold and other mineral resources."[135] All the patents registered during this period belonged to foreign individuals or firms.[136] For 70 years and almost 36 years after Ghana's independence,[137] the country maintained the colonial law on patents and continued the tedious process of prosecuting patents through the United Kingdom and merely registering the United Kingdom-granted patent in Ghana until 1993 when the Patent Law (1992 (P.N.D.C.L. 305A) was adopted. This law has been replaced by the Patents Act, 2003 (Act 657).

The 1899 Patent Ordinance of the Gold Coast was replicated in other British West African colonies. Its replication in other colonies and protectorates, however, raised questions about its benefits since the legislation was not meant to spur local innovation, research and development, or transfer of technology, which would have enhanced, for example, access to medicines and other technologies.[138] For example, the above ordinance became the

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[130] Section §7(2) of the Patents Registration Ordinance, 1925 (Cap. 179).
[131] Manteaw, n 54 above, p. 5.

[132] Yankey, n 3 above, p. 104; Manteaw, n 54 above, p. 6.
[133] Yankey, n 3 above, p. 105. (Quoting Colonial Office‟s letter of April 30, 1898 to the Board of Trade in C.O. 96 Gold Coast 1898, Vol. IV, March 9-31, 313).
[134] Ibid. (Quoting Colonies‟ Sec. of State letter, 25 May 1898, C.O. 98 G.C. 1898, Vol. XX, 329).
[135] Okechukwu T. Umahi (2011), 'Access to Medicines: the Colonial Impacts on Patent law of Nigeria', SSRN, p. 7. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975928.
[136] Yawson, n 128 above.
[137] Ghana gained her independence from Great Britain on 6 March 1957.
[138] Umahi, n 135 above, pp. 7-8. (Emphasis added).

foundation of patent law in Nigeria. The colonial office sent copies of the legislation to the colony of Lagos, the Southern and Northern protectorate Nigeria (now constituting present-day Nigeria)[139] with the specific instruction to pass a similar ordinance.[140] It is on record that the Governor of the Lagos Colony stated that the Patent Ordinance of Lagos Colony was "based on the imperial statute and Gold Coast Ordinance dealing with the matter."[141] Until this development, however, patents registered in the United Kingdom in the late nineteenth to early twentieth centuries were by Order in Council made applicable in Nigeria.[142]

In 1914, the Southern and Northern Nigeria colonies and protectorates were merged to form the Colony and Protectorate of Nigeria. This amalgamation resulted in the repeal of the Patents Ordinance for Lagos and the Patents Proclamation Ordinances for Northern and Southern Nigeria, ushering in the Patents Ordinance No. 30 of 1916, which was amended in 1925 to become the Registration of United Kingdom Patents Ordinance No. 6 of 1925. The Ordinance of 1925 provides for the registration in Nigeria of patents granted in the United Kingdom provided the application for registration was made within three years from the date of the issue of the patent. The rights conferred in Nigeria dated from the date of the grant of the patent in the United Kingdom and remained in force so long as the patent was in force in the United Kingdom. This remained the status quo even long after Nigeria became independent in 1960.

In Kenya, until 1989 when the first national Industrial Property Act was passed,[143] the Patents Registration Act Cap. 508 established a registration procedure similar to Ghana.[144] A certificate of registration conferred on the applicant privileges and rights as though the patent had been granted in the United Kingdom with an extension to Kenya.[145] An application had to be made within three years from the date of the United Kingdom grant and the patent would remain in force as long as the patent remained in force in the United Kingdom.[146] Concerning copyright, the 1897 East Africa Order in Council extended the application of the 1842 English Copyright Act, the International Copyright Act of 1844, the Fine Arts Copyright Act of 1862 and the Copyright (Musical Compositions) Act of 1888 to Kenya.[147] As Sikoyo et al put it, these laws were essentially designed and extended to protect the monopoly rights of British publishers in Kenya, restrict the growth of the publishing industry in the country, provide

[139] See Ibid. This extension resulted in the enactment of the Patents Ordinance No. 17 of 1900 for the Lagos Colony; the Patents Proclamation Ordinance No. 27 of 1900 for Southern protectorate Nigeria, amended by the Patents Amendment Ordinance No. 19 of 1901; and the Patents Proclamation Ordinance No. 12 of 1902 for Northern Protectorate Nigeria.
[140] Yankey, n 3 above, p. 104. Citing C.O. 96 Gold Coast 1899.
[141] Yankey, n 3 above, p. 107. Citing C.O. 147 Lagos 1900, Vol. 14 151 Despatches Nos. 235-332, 21 Sept-31 Dec.
[142] Sikoyo et al, n 3 above, p. 19. (Emphasis added).
[143] The Industrial Property Act Cap 509 (Kenya). Repealed by Industrial Property Act, No 3 of 2001 .
[144] Patents Registration Act, Cap 508, § 4 (Kenya).
[145] Ibid, § 7.
[146] Ibid, § 8.
[147] Chege, J. W. (1978). Copyright Law and Publishing in Kenya, Kenya Literature Bureau, Nairobi.

censorship for publications that colonialists termed seditious, blasphemous, immoral or contrary to government policy and propagate the ideology of colonial superiority among the natives.[148] Kenya adopted her first national copyright law in 1966[149] after the country had gained independence.[150] This Act has been amended severally to meet the needs and demands of the local market and the country's international obligations under international treaties.[151]

2. International Harmonization of Intellectual Property

What Happened in the Late Nineteenth-Century to Early Twentieth Century: In the late nineteenth century, a distinct legal development on intellectual property happened at the international level that would impact African countries as well. Countries which were net exporters of knowledge and information goods began to seek international agreements for the protection of intellectual property, as it had become obvious that transnational commercial activities required more than mere national intellectual property protection. Initial agreements included mainly European countries, most of whom were then major colonial powers (United Kingdom, France, Germany, Spain, Italy and Belgium). The first agreement was the Paris Convention and the second was the Berne Convention.[152] The Paris and the Berne Conventions further consolidated the participation of developing countries and Africa, for that matter, in the international intellectual property system through the agency of colonial rule. Simultaneously, the continent was annexed through the Berlin West Africa Conference of 1884-1885. Chief among the goals for the Berlin Conference was the control of African markets.[153] Intellectual property was used to control creative and industrial markets in the interest of European rights holders.[154]

In the absence of their African colonies (except Tunisia and Liberia[155] in Berne) and without their consent,[156] the contracting European countries to the Paris and Berne Conventions decided to incorporate their colonial territories into the new intellectual property Unions as

[148] Sikoyo et al, n 3 above, p. 17. (Emphasis added).

[149] The Copyright Act, Chapter 130, 1966 (Kenya).

[150] Kenya gained her independence from Great Britain on 1 June 1963.

[151] See Act No. 5 of 1975; Act No. 5 of 1982; Act No. 14 of 1989; and Copyright Act Chapter 130 of the Laws of Kenya (CAP 130).

[152] See n 19 above.

[153] General Act of the Berlin Conference, 26 February 1885, C 4361 1885 (Preamble).

[154] Alexander Peukert (2016), 'The Colonial Legacy of the International Copyright System', in Ute Röchenthaler and Mamadou Diawara (eds), Copyright Africa: How Intellectual Property, Media and Markets Transform Immaterial Goods (Canon Pyon, UK: Sean Kingston Publishing).

[155] Liberia was officially colonized by the United States from 1820 to 1847 – the date of its independence. In 1886, Liberia as an independent country signed the Berne Convention and ratified it in October 1908. Liberia had its first copyright law in 1911 (Libéria, Loi concernant le droit d'auteur du 22 décembre 1911, Droit d'auteur, August 1912, p. 106.).

[156] Peukert, n 154 above; Also, see Kongolo, n 3 above, p. 105.

'Countries of the Union' without being regarded members thereof.[157] In the case of Tunisia, it is asserted that a French law professor represented the country in Berne, while French diplomats represented Tunisia in Madrid and The Hague.[158]

The precise method of utilizing this procedure comprised two steps. The first entailed the submission, by the colonizing state, of a declaration of the application of the applicable international agreement to the colonized state. Declarations of the application of the Berne Convention were made following Article 19 of the original text of the convention.[159] Declarations of the applicability of the Paris Convention were made in terms of Article 16 *bis* (1)-(2) of the London Act of 1934 and the Lisbon Act of 1958 of the convention.[160] Today, this provision can be found in Article 24 of the 1979 Act of the convention – albeit in a refined language. This procedure was further adopted in Article XIII of the 1952 Universal Copyright Convention (UCC)[161] and Article 27 of the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.[162] It is noteworthy, however, that Great Britain sought the consent of Canada, the other dominions and India before acceding to the Berne Convention on their behalf.[163]

Secondly, the declaration of applicability of the international conventions was then followed by the extension of the colonizing states copyright or patent legislation to the colony, or the enactment of legislation applicable only to the colonized territory.[164] The Berne Convention was extended to the colonies in Africa through declarations made by Great Britain, France, and Spain at the time of signing or ratification.[165] Consequently, as Kongolo asserts, "the British Copyright Laws of 1911 and 1956, the French Copyright Laws of 1791, 1793 and 1957, the Spanish Copyright Law of 1847 and the Belgian Copyright Law of 1886 were deemed to be mutatis mutandis the copyright laws of their colonies unless otherwise provided."[166] This act of incorporating the colonies made it possible for right holders from the Member Countries to enjoy protection not only within Member Countries of the Unions but in all

[157] Ibid. It should be noted that this procedure was mostly utilized in the Berne Convention, for that matter, copyright. However, as noted, it applied in the case of patents as well.
[158] Jeremy de Beer, Jeremiah Baarbé, and Caroline B. Ncube (2017), 'The Intellectual Property Treaty Landscape in Africa, 1885 to 2015', Open AIR Working Paper 4, p. 16.
[159] Kongolo, n 3 above, p. 165 ff. Art.19 carried that "the countries acceding to this Convention also have the right to accede at any time for their colonies or foreign possessions."
[160] Kongolo, n 3 above, p. 115.
[161] http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=172836. The Universal Copyright Convention (UCC), adopted in Geneva in1952, is one of the principal copyright conventions. It was developed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as an alternative to the Berne Convention for those countries that disagreed with aspects of the Berne Convention, but still wished to participate in some form of multilateral copyright protection. The UCC was responsive to the specific needs of developing countries but also stressed the fundamental principle of exclusive copyrights.
[162] http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=289795.
[163] Bently, n 3 above, p. 1217.
[164] Kongolo, n 3 above, pp. 106-107.
[165] Kongolo, n 3 above, p. 163.
[166] Ibid.

overseas territories. Such actions would lay the foundation for an enduring influence on legal and economic development in African countries and on how law and development are perceived and understood.

What Happened After the Mid Twentieth Century When Colonies Became Independent[167]: The decolonization process in the 1950s and 1960s subjected the fate of the numerous contracts between post-colonial states and private investors from European countries to the mercy of transnational law.[168] As newly independent states moved to promulgate national intellectual property laws, one question that arose was whether the new states had to formally accede to the intellectual property Unions or whether they were already members of the club. The former colonial powers took action to ensure stability and continuity of their colonial agenda. Various legal and political efforts were undertaken to stabilize the foundations of the colonial intellectual property regime during the decolonization period. Fearing that the international intellectual property system might break down, the United International Bureaux for the Protection of Intellectual Property (BIRPI), in charge of administering the Berne and Paris Unions, moved swiftly to facilitate a system whereby newly independent states in Africa and Asia that were no longer bound by Berne's colonial clause could issue 'declarations of continued adherence'.[169] Many developing countries declared their adherence to or acceded to the Berne Convention.[170]

In the area of patent law, BIRPI did not assume that newly independent states were still bound by colonial obligations.[171] Instead, it came out with a Model Law for Developing Countries on Inventions in 1964, whose emphasis was on inventions for developing countries.[172] This model law had been drawn in response to pressure from industrialized nations for developing countries to join the "community of nations" in the Union. This Model Law was forwarded to 69 developing countries[173] and many them modelled their patent and design laws on BIRPI's

[167] While the period under discussion goes beyond the early twentieth century, it nonetheless cover issues that relates to development in the late nineteenth century and early twentieth century. It thus sets the context for understanding the implication of some of these early development and the issues being discussed in this chapter.
[168] Prabhakar Singh and Benoît Mayer (2014), 'Critical International Law: Postrealism, Postcolonialism, and Transnationalism', (OUP, India, New Delhi), p. 12.
[169] Sam Ricketson (1987), 'The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986, (London: Kluwer Centre for Commercial Law Studies). pp. 799-806.
[170] Peukert, n 154 above; Deere, n 2 above; and Kongolo, n 3 above; Caroline B. Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation', (Routledge, Oxon, 2016).
[171] Bodenhausen, Georg H.C. (1968), 'Guide to the Application of the Paris Convention for the Protection of Industrial Property', Geneva: United International Bureaux for the Protection of Intellectual Property (BIRPI), p. 19.
[172] United International Bureaux for the Protection of Intellectual Property (BIRPI), Model Law for Developing Countries on Inventions, BIRPI Pub. no. 801(E) (1965); Suzanne F. Greenberg (1985), 'The WIPO Model Laws for the Protection of Unpatented Know-How: A Comparative Analysis', 3 International Tax and Business Law 52, p. 54.
[173] Michael J. Harbers (1968), 'International Patent Cooperation', 20 Stanford Law Review 5, p. 1013; Edith. T. Penrose (1973), 'International Patenting and the Less-developed Countries', 83 The Economic Journal 331, pp. 779-98.

Model Law, Nigeria being an example.[174] Umahi suggests that Nigeria, just like many other developing countries, adopted the Model Law because they believed that it was an opportunity for them to gain access to patented foreign technology, increase competitiveness in trade and foreign direct investment.[175] However, it seems to achieve the essence of the policy behind the patent system proved elusive for many African countries.

In Africa, regional arrangements in the aftermath of independence facilitated the enduring influence of former colonial powers and the World Intellectual Property Organization (WIPO) on intellectual property laws. Today the only continent to have two regional intellectual property organizations is Africa. In 1970, WIPO and the United Nations Economic Commission for Africa (UNECA) facilitated the creation of the African Regional Intellectual Property Organization (ARIPO) for Anglophone countries and served jointly as the Secretariat of ARIPO until 1981 when the organization established an independent Secretariat.[176] Similarly, the French National Patent Rights Institute and WIPO assisted former French colonies to create the Organization Africaine de la Propriété Intellectuelle (OAPI), establishing a unified intellectual property system with a central patent office for Francophone countries. The OAPI system serves as the equivalent of regional intellectual property law for most aspects of intellectual property and derives primarily from French intellectual property laws. The ARIPO system co-exists with the national intellectual property laws in its member states and draws primarily from British intellectual property law.[177] Besides, since their inception to date, WIPO has offered technical assistance to the two organizations. WIPO's assistance has been criticized as a basis for the adherence and compliance overdrive being witnessed in the majority of African countries regarding intellectual property law in recent times.[178]

3. The Move Towards Uniformity in Empire Intellectual Property Laws

The latter part of the nineteenth century and the early part of the twentieth century saw a shift in favour of uniformity concerning just about all fields of intellectual property within the Empire.[179] One explanation for this development was the advent of international intellectual property relations – the Paris and the Berne Conventions. By signing on to these treaties (and especially, concerning subsequent revisions), the United Kingdom was required to make some adjustments to its laws and in particular, its relations to its colonies. The idea of uniformity shifted the interest away from imperial devolution of laws to a more unified system,

[174] Umahi, n 135 above, p. 5; Graeme B. Dinwoodie et al (2001), International Intellectual Property Law and Policy (Matthew Bender & Company, San Francisco 2001), p. 412.
[175] Umahi, n 135 above, p. 5. (Emphasis added).
[176] Acquah, n 23 above.
[177] Deere, n 2 above, pp. 38-39.
[178] Daniel Acquah (2021), 'Technical Assistance as a Hedge to Intellectual Property Exclusivity', in Jonathan Griffiths and Tuomas Mylly (eds), Constitutional Hedges of Intellectual Property (Oxford University Press) (Forthcoming).
[179] Bently, n 1 above, p. 188.

especially, at a time when the self-governing dominions enjoyed increasing independence.[180] In Africa, this could have been a catalyst for devolution or no extension of Imperial intellectual property laws.

From 1887 to about 1922, a series of colonial conferences were held to fashion out a possibility for uniform patent law. While the idea of imperial patent law came close to being realized,[181] it never materialized. However, uniformity in the area of copyright law did materialize.[182] Canada is credited to have been the cause of the failure for the consideration of the possibility of creating a unified patent system for the British Empire at the London Imperial Economic Conference in 1923.[183] As Wadlow notes, all of the Dominions "instinctively took a negative and defensive attitude to patents, reflected in the fact that the main preoccupation of their legislation was less to reward or encourage innovation, than to avoid having their economy dominated by foreigners."[184] Copyright came up in colonial conferences at the beginning of the twentieth century, gathering momentum especially after the struggles of the United Kingdom during the Berlin revision of Berne.[185] The Berlin revision of the Berne Convention provided a reason and an opportunity to fix the United Kingdom's domestic copyright law and to attempt to address questions of British copyright relations with its colonies.[186] A committee set up to consider whether British copyright law should be reformed to enable the Government to give effect to the Berlin revision, called the Gorell Committee, recommended that Britain should adhere to the Berlin revision and that there needed to be uniform copyright law throughout the empire.[187] This led to a conference in 1910.

Only the self-governing colonies were invited to the colonial conferences.[188] Thus, the African colonies were not invited or represented – except for South Africa. India, although not a self-governing dominion, was invited at the last minute to join the conference. It did so by assigning Sir Thomas Raleigh, former legal member of the government of India's Legislative Council[189] to attend on its behalf.[190] Agreements and commitments made at the conference

[180] ibid.
[181] Christopher Wadlow (2006), 'The British Empire Patent 1901-1923: The 'global' patent that never was', Intellectual Property Quarterly. (Noting that an interim scheme came within one vote of being adopted at the 1923 international conference).
[182] Bently, n 1 above , pp. 188-198.
[183] Gervais, n 1 above, p. 288.
[184] Wadlow, n 181 above, p. 335.
[185] Ibid, p. 269 and 272.
[186] Bently, n 1 above, p. 1220.
[187] Bently, n 1 above, p. 190. Citing Report of the Committee on the Law of Copyright, 1910, Cd. 4976, p. 29.
[188] Bently, n 1 above, p. 1221.
[189] Ibid. Noting that Raleigh (1850-1920) had been in India between 1899 and 1904, where he had spearheaded Lord Curzon's reforms of the university system (much to the dislike of the educated Indian constituency). He joined the Council of India in 1909. Prior to his appointment to the Viceroy's Council, Raleigh had been a Fellow of All Souls College, Oxford, and Reader in English Law.
[190] Ibid. Citing Letter from Herbert Hope Risley, India Office, to Gov't of India (Apr. 22, 1910) (India Office Library, located in the British Library, St. Pancras, London,, L/PJ/6/993, file 898 with file 4609/11).

led to Bills being introduced in the House of Commons in 1910 and 1911.[191] Thereafter, the 1911 Copyright Act was adopted[192] to replace a tapestry of existing statutes on 4th June 1912.[193] This Act came with variations in the treatment of colonies. For instance, while the self-governing dominions had complete freedom as to whether to accept or reject the whole or part of it, all colonies were bound by the terms of the Act.[194]

Section 27 of the Copyright Act, however, provided British possessions with a little leeway to vary the operation of that Act in its application to the colony in question. As Bently notes, "this flexibility was primarily intended to allow for adaptations necessary in the light of differences in matters relating to legal procedure and remedies. Insofar as a colony wished to tamper with the substance, the Act limited such variations to 'works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.'"[195] India took advantage of this provision in 1914.[196] However, it is to be noted that India was an exception in that among other colonies, she received preferential treatment from Great Britain.[197]

Except for South Africa, the extension of the 1911 Copyright Act was a one-way-street for the colonies in Africa. (the instance of Kenya described earlier is a good example). In Ghana, the Copyright Ordinance of 1911 made the United Kingdom Copyright Act applicable to the Gold Coast colony. A post-independence copyright Act of 1961 brought an end to the application of the Imperial Copyright Act.[198] However, this Act was essentially a mere re-enactment of the existing law in the United Kingdom[199] – providing somewhat limited protection for authors in their works. The 1961 Act was repealed and replaced by the Copyright Law 1985, PNDC Law 110 (Law 110). Section four of the latter law expanded the scope of copyright to include "expressions of folklore," defining the folklore very broadly to include not only oral culture

[191] See Bill to Amend and Consolidate the Law Relating to Copyright, 1910, Bill [282] (Imperial). This was only introduced with a view to consideration. For 1911, see Bill to Amend and Consolidate the Law Relating to Copyright, 1911, Bill [149] (Imperial). After Amendments by Select Committee, Bill to Amend and Consolidate the Law Relating to Copyright, 1911, Bill [296] (Imperial). After House of Lords Amendments, Bill to Amend and Consolidate the Law Relating to Copyright, 1911, H.L. Bill [384] (Imperial).
[192] Copyright Act 1911, 1 & 2 Geo. 5., c. 46.
[193] Gervais, n 1 above, p. 269.
[194] Copyright Act 1911, 1 & 2 Geo. 5., c. 46. § 25(1). This Act… shall extend throughout His Majesty's dominions.
[195] Bently, n 1 above, p. 1225.
[196] Proclamation, Oct. 31, 1912 (India); Copyright Act, 1914 (India).
[197] Even though India was not self-governing dominion, it was consulted and its consent was sought by the United Kingdom for the International Copyright Act of 1886 , the Act giving effect to the Berne Convention in the United Kingdom. It was also invited to the series of colonial conferences on uniform copyright law – paving way for the 1911 Copyright Act. India's consent was also sought for the ratification of the Berlin Act of the Berne Convention, and colonial administrators did take measures to foster the development of a cadre of local intellectual property experts. For details about this and others, see Bently, n 1 above, p. 1217 ff.
[198] The Copyright Act, 1961 (Act 85). Section 17 provided that 'the Copyright Act, 191 1 of the United Kingdom shall cease to have enact in Ghana and the Copyright Ordinance (Cap. 126) is accordingly hereby repealed.'
[199] Sikoyo et al, n 3 above, p. 16.

but also elements of material culture like adinkra and kente cloth designs.[200] This was the first time Ghana moved to wean itself of colonial copyright. The 1985 law has been replaced with the Copyright Act, 2005 (Act 690).[201]

The situation in Nigeria was not very different. By an Order in Council No. 912 of 29th June 1912, the English Copyright Act of 1911 was extended and became applicable in the Southern Protectorate of Nigeria.[202] According to Ola, it is without contention that the extension of the English Copyright Act formally introduced a copyright framework into Nigeria's legal system.[203] While providing the first legislative framework for Nigeria's administration of copyright, it also served as a basis for further development of Copyright law in Nigeria. This Act remained in force through independence in 1960 until 1970 when the first indigenous Copyright Act was promulgated. The Copyright Act 1970 being the first indigenous act was expected to protect the Nigerian interest and be reflective of the peculiarities of her people as well as their culture and traditions. However, concerning the administration of copyright, there was no effective structure under the 1970 Act until a new Copyright Act was adopted in 1988, which is embodied in the laws of the Federation 2004.[204]

IV. The Implication of the Imposition of Imperial Laws on Africa

The imposition of British institutions, norms, and systems - including copyright and the patent system - on the cultural, economic, and legal landscape of its African colonies was an expansion of the colonial enterprise and had nothing to do with stimulating indigenous creativity and innovation.[205] If anything, imperial intellectual property laws dissipated local innovation and knowledge governance systems in Africa since they did not fit the Western concept of privately held rights over intellectual property. Colonial administrators held customary laws of their colonies in low regard, particularly because they did not serve the commercial interests of colonizers determined to extract as much wealth from the colonies as they could.[206] Thus, local laws were enacted specifically not to protect (or promote) the cultural knowledge, creations and innovations of the citizens of the colonies. Rather, they were promulgated to benefit British inventors, creators and writers.

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[200] Boatema Boateng (2013), 'The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law', 47 Law & Society Review 4, p. 943.

[201] The purpose of the new Copyright Act was to bring Ghanaian copyright law into conformity with the Ghanaian Constitution, to help strengthen protection of copyrights and related rights in Ghana and to bring Ghana into compliance with its international obligations.

[202] Kunle Ola (2015), 'Evolution and Future Trends of Copyright in Nigeria', in Fitzgerald B. and Gilchrist J. (eds) Copyright Perspectives (Springer, Cham). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619040, p. 7.

[203] Ibid, p. 8. (Emphasis added).

[204] First Schedule, Copyright Act Cap C28 Laws of the Federation 2004.

[205] G. Ezejiofor (1980), 'Sources of Nigerian Law', in C. O. Okonkwo (ed.), *Introduction to Nigerian Law* (Sweet & Maxwell, London). (Emphasis added).

[206] Carolyn Deere Birkbeck (2009), 'Developing Country Perspectives on Intellectual Property in the WTO: Setting the Pre-TRIPS Context', in Carlos Correa (ed.), Research Handbook on Intellectual Property Law and the WTO (Edward Elgar: Oxford), p. 2. Available at SSRN: https://ssrn.com/abstract=1405430.

For example, it is obvious from the discussion above that the 1899 Gold Coast Patent Ordinance, which was adopted in its entirety in the remaining former British West African colonies, was never meant to encourage either indigenous inventive activity, local research and development, innovation or to accomplish an effective technology transfer. Rather, it was geared towards the protection of property rights in machine technology relevant to the exploitation of the gold and other mineral resources of the Colony.[207] In this regard, it sanctioned a policy of protecting the transfer of technology to the colony in pursuit of an extractive scoop and ship investment policy. [208] Samuel Manteaw has, for instance, argued that the nature of the patent legislation might have contributed to Africa's asymmetrical vulnerability dependence on raw materials and natural resources.[209]

The above development affected indigenous participation in the patent and copyright system. It also affected local and indigenous creativity and innovation, especially those embedded in traditional knowledge and biodiversity, as they were not regarded as worthy of protection and hence were not encouraged. However, Africa is most likely to receive substantial benefits from the protection of traditional knowledge, traditional cultural expressions and genetic resources. Since the 1960s, there has been agitation for and a growing sense in developing countries that folklore embodied creativity and was part of the cultural identity of indigenous and local communities.[210] It was therefore seen as worthy of intellectual property protection, especially since new technologies were making folklore increasingly vulnerable to exploitation and misuse.[211] Yet, for more than twenty years, Africa and other developing countries have engaged the West at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for recognition of what they see as their intellectual property.[212] To date, there is no end in sight that an agreement will be reached.

A colonial recognition of indigenous creations and inventions could have laid the foundation for subsequent international law reception. This would have been particularly useful for local innovators and creators such as traditional artists and custodians of traditional medicine,

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[207] Yankey, n 3 above, p. 106.
[208] Manteaw, n 54 above, p. 7.
[209] Ibid. Also see generally, Yelpaala, Kojo (2007), 'In Search of a Model Investment Law for Africa', African Development Bank Law for Development Review, Available at SSRN: https://ssrn.com/abstract=1011166.
[210] WIPO Publications (2016), 'The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', Background Brief No. 2. https://www.wipo.int/publications/en/details.jsp?id=3861&plang=EN.
[211] Ibid.
[212] Ibid. Established in 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is a forum where WIPO member states discuss the intellectual property issues that arise in the context of access to genetic resources and benefit-sharing as well as the protection of traditional knowledge and traditional cultural expressions. The IGC holds formal negotiations with the objective of reaching agreement on one or more international legal instruments that would ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions.

among others, who at present, have difficulty in taking advantage of the property rights system to protect their work. Besides, it could have led to high value horizontal foreign direct investment and technology transfer in areas such as indigenous scientific knowledge, research into plant medicine, and other creations and innovations resulting from the exploitation of traditional knowledge.[213] Yet, it seems this vision of local development was not the focus of the colonial project.

Also, the colonial legal system of the British failed to build local intellectual property expertise (or intellectual property "culture") and institutional capacity among their subjects. While the British had a greater emphasis on socializing the legal profession in its colonies and generating an English legal culture, this practice rarely extended to the realm of intellectual property, which remained largely administered from London.[214] Neal Goldman in an extensive study of the British judicial system in the Gold Coast insinuates that the focus of the British government on trade and commerce in the Gold Coast explain its unwillingness to develop local capacity in intellectual property justice and administration. For instance, the British government failed to respond to repeated pleas by the colonial governors for additional judicial personnel or to spend money on infrastructure improvements or operations.[215]

Instead of training the indigenes to administer the local patent system at the inception of patent law in Ghana, the colonialist took the easy option of no training with the intent of cutting down cost.[216] There was also a lack of trust in the local elite.[217] This showed in the expression of doubt by the Board of Trade in the capability of the Chief Registrar of the Gold Coast to conduct the type of patent examinations envisaged in the 1899 Patent Ordinance.[218] Thus, the paucity of technical expertise to operate an independent patent system in the Gold Coast was highlighted as a reason for the 1925 Patent Ordinance.[219] A similar reason was given by the Attorney General of Nigeria in his advocacy for the adoption of the Patents Ordinance, No. 30 of 1916 for Nigeria.[220] Local intellectual property offices thus served as

[213] Manteaw, n 54 above, p. 7.
[214] Deere, n 206 above.
[215] Goldman, n 20 above.
[216] Yankey, n 3 above, p. 102. (Noting, for instance, that in the Board of Trades letter dated 25 January 1899 addressed to the secretary of state for the colonies (C.O. 96 Gold Coast 189, 349) the Attorney General for the colony had expressed the desire that 'the ordinance must be worked at the least possible expense to the Government).'
[217] Goldman, n 20 above, pp. 3-6; Merry, n 25 above.
[218] Yankey, n 3 above, p. 102.
[219] Manteaw, n 54 above, pp. 4-5.
[220] Yankey, n 3 above, p. 115. (Citing the Report on the draft Patents Ordinance, 1916 by the Attorney-General of Nigeria dated 18.2.1916 in C.O. 583, 44, Despatches (Jan-Feb) Nigeria 1916, p546). The Attorney General noted that 'it is frequently impossible to obtain locally that expert advice which is required by the authority responsible for deciding whether or not a patent should be granted, and in the circumstances it is submitted that persons desiring to obtain protection in Nigeria, for an alleged invention may probably be required to satisfy first the Patents Office in the United Kingdom that his invention is one for which a patent should be granted.'

"clerical outpost"[221] for the colonial intellectual property office and merely rubber-stamped or extended intellectual property rights granted in Great Britain to the colony.[222] It can also be said that the colonial patent and copyright system were not comprehensive enough, or, backed by adequate education to ensure proper understanding of both systems and their institutions for socio-economic development. What it rather did was to create a biased perception that the intellectual property system was merely about adopting the laws of developed nations.[223]

The combined effect of all of the above (and many more, especially, the postcolonial development, which cannot be captured due to the limitation in the period to the nineteenth and early twentieth centuries) has been the persistence of legal imperialism in most countries of Sub-Saharan Africa. This has in a way, led to adherence and compliance overdrive in intellectual property law-making, and a colonial legacy of independent African states grappling with how to fashion out a unified legal system from a dual system of laws, deficiency in local experts and institutions, and underdevelopment.

V. Conclusion

This chapter explored the unusual circumstances under which the United Kingdom extended its intellectual property laws to its colonies in Africa in the nineteenth and early twentieth century, permitting to explore the variations in treatment in comparison to other colonies – such as the white settler colonies – and the consequences thereof on Africa. It is found that the extension and application of Imperial intellectual property laws to the colonies indeed varied according to region. The British treated their colonies differently in place, time and situation. The African colonies received the treatment that was in the eyes of the British colonizers deserving of them: the imposition of Imperial intellectual property laws was seen as a gift to the continent in all of its civilizing glory. This gift of the law, however, inherently challenged and transformed traditional conceptions of property, time, space, marriage, work and the state. Colonial intellectual laws sidelined local innovation, creativity and knowledge governance systems in Africa as they did not fit the Western concept of privately held rights over intellectual property.

Besides, colonial legal systems failed to tailor laws to build the innovation and technological capacity of their colonies or to develop local expertise in intellectual property among the colonized. To this end, intellectual property law instituted at the height of colonialism were not well adapted to the needs, priorities and situations of African countries. This in a way, contributed to Africa's asymmetrical vulnerability dependence on raw materials and natural resources. The outcome is a crisis of confidence among many African countries, especially, in

[221] Ikechi Mgbeoji (2014), 'African patent offices not fit for purpose' in J de Beer, C Armstrong, C Oguamanam, and T Schonwetter (eds), Innovation & Intellectual Property Collaborative Dynamics in Africa (University of Cape Town 2014) pp. 234-236.
[222] Ncube, n 3 above, p. 419.
[223] Manteaw, n 54 above, p. 7. (Emphasis added).

the aftermath of independence as they set about achieving compliance with differing and overlapping intellectual property regimes. The overall impact is the persistence of legal imperialism in most of Sub-Sahara Africa, leading to adherence and compliance overdrive in intellectual property law-making to date. In this regard, Africa is a unique intellectual property laboratory in relation to colonization and its engagement with the international intellectual property system.