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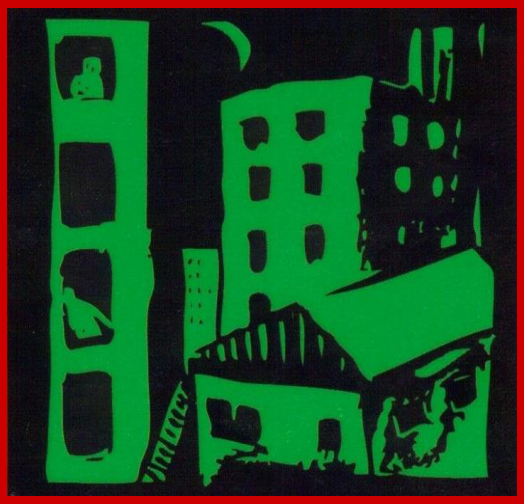

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State and intergovernmental organisations: Copyright, public domain, and the public interest in Africa*

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ABSTRACT

States and intergovernmental organisations (IGOs) in Africa produce and control materials that may be eligible for copyright protection. Thus, some national laws vest copyright in states and IGOs, which may be exercised to prevent access to the information contained in the materials and forestall the promotion of the public-interest objectives as articulated in sustainable development agendas (such as the African Union Agenda 2063). This makes it imperative to examine effective strategies for managing the materials produced and controlled by states and IGOs in order to promote public-interest objectives in Africa. To this end, this article determines whether the materials produced and controlled by states and

* This article expands and builds on Oriakhogba DO "The scope of copyright in materials produced and controlled by intergovernmental organisations in Africa" (1 June 2023) Data for Governance Alliance Policy Brief No. 11 available at https://africanlii.org/akn/za/doc/briefing-paper/2023-06-01/the-scope-of-copyright-in-materials-produced-and-controlled-by-intergovernmental-organisations-in-africa/eng@2023-06-01 (accessed 18 June 2023).

IGOs are indeed eligible for copyright protection, or whether they constitute public domain resources. If the materials are subject to copyright protection, then, for instance, are claims to copyright by states and IGOs in Africa justifiable, especially given the public-interest objectives articulated in Agenda 2063? What strategies should states and IGOs adopt to manage their materials in the public interest? Reviewing relevant primary and secondary sources in Africa, and drawing useful insights from institutional practices outside Africa, this article unpacks the issues, while X-raying states' and IGOs' materials from two perspectives: works created under their direction and control; and works created independently by third parties but transferred to states and IGOs.

Keywords: access to information; copyright; intergovernmental organisations; public domain; public interest; states; AU Agenda 2063.

1 INTRODUCTION

Like states – both national and subnational – intergovernmental organisations (IGOs) in Africa, including the African Union (AU) (as well as sub-regional bodies, and their agencies and judicial bodies), produce and control a substantial number of documents. These can be official documents (legislative, judicial or administrative in nature), as well as legal instruments such as statutes, regulations, official records of private information, treaties, protocols, resolutions, declarations, decisions, general comments, judgments and judicial opinions, and recommendations, guidelines, model laws, special rapporteur reports, opinions of experts, official reports of studies, and policy documents, along with multimedia materials such as video and audio recordings. These materials, which may be in print or digital format (as single resources or as parts of a database), are usually produced by persons acting under the direction and control of the states or IGOs (i.e., direct employees or external commissioned experts), or by persons acting independently, but who have transferred the materials to the states or IGOs.

The materials may be eligible for copyright protection, depending on their nature. Copyright is a bundle of intangible rights granted by law to creators of literary works (books, articles, compilations, databases, photographs, and so on), sound recordings, videos, musical and artistic works, and computer programs. Copyright includes the right to reproduce, publish, translate, adapt, or communicate the work to the public. Such rights enable the creators to control the exploitation of their materials by ensuring that only authorised third parties can access and make use them.[1] However, such rights do not extend to the control of materials that form part of public domain information: these can be freely used by third parties.

Within the context of this article, public domain materials include works that (a) are statutorily declared non-eligible for copyright protection; (b) were once eligible for protection but for which their legal duration has lapsed; and (c) are protected but can

[1] WIPO *Intellectual property handbook* Geneva: WIPO (2004) at 40–46 available at https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf (accessed 18 June 2023).

be used without the permission of the copyright owner to the extent covered by copyright exceptions (such as fair use), where the owners have made them available subject to open access licenses, or choose not to assert copyright.[2]

Do the materials accrued by states and IGOs form part of the public domain? The answers to this apparently simple question have significant impacts on the public interest. As has been stated elsewhere:[3]

> the public interest is the concern that copyright law and policy should be formulated to achieve the ultimate goal of promoting creativity and societal welfare through mechanisms that ensure adequate balance between the immediate commercial benefits for authors (and their beneficiaries) and the broader demand of the promotion of creativity, and equal and equitable access to knowledge and information to foster education and effective exercise of the right to freedom of expression, among others, especially in the digital era. The public-interest objective has both development and human rights dimensions. Its considerations do not create conflicting goals for copyright users and authors. Rather, the public interest seeks to make the copyright system whole and more development friendly by proffering legal and policy options that secures adequate balance between the interests of authors and users alike, especially in this digital era.[4]

Indeed, given the quality, integrity, accuracy and sheer volume of the information that states and IGOs produce and control, this information is an important resource that can be harnessed to promote the public interest (through ensuring access to information). In addition, it can help in realising the aspirations (especially those relating to education) that have been articulated in various national development plans,[5] the AU

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[2] Erickson K, Kretschmer M & Mendis D "An empirical approach to the public domain" in Drexl J & Sanders AK (eds) *The innovation society and intellectual property* Cheltenham: Edward Elgar (2019) at 87–117.

[3] Oriakhogba DO & Adeola-Adedipe GK "Posthumous control of copyright, its limitations and the public interest" (2021) 8(2) *Journal of Comparative Law in Africa* 32–62.

[4] Oriakhogba & Adeola-Adedipe (2021) at 34–5. For a general discussion of the public interest in copyright, see Cross JT & Yu PK "Competition law and copyright misuse" (2007) 56 *Drake Law Review* 427–62; Okediji RL "The international copyright system: Limitations, exceptions and public interest considerations for developing countries" (2006) 5 *UNCTAD – ICTSD Project on IPRs and Sustainable Development* 1–52; Giblin R and Weatherall K "Making sense of 'the public interest' in copyright" in Geiger C (ed) *Intellectual property and access to science and culture: Convergence or conflict?* (2016) 66; Ncube C "Calibrating copyright for creators and consumers: Promoting distributive justice and ubuntu" in Giblin R and Weatherall K *What if we could reimagine copyright?* (2017) 253; Sun H "Copyright law as an engine of public interest protection" (2019) 16(3) *Northwestern Journal of Technology and Intellectual Property* 123–88; Mason A "The public-interest objectives and law of copyright" (1998) 9 J*ournal of Law and Information Science* 7–21; Nwauche ES "The public interest in Namibian copyright law" (2009) *Namibian Law Journal* 57–80.

[5] For instance, see South Africa *National Development Plan 2030: Our future – make it work* (2012) available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 18 June 2023); Malawi *Vision 2063: Transforming our nation* (2020)

Agenda 2063,[6] and the United Nations (UN) SDGs.[7] In Africa, the right of access to information is guaranteed under article 9 of the African Charter on Human and Peoples' Rights (ACHPR),[8] while, in a recent Declaration,[9] the African Commission on Human and Peoples' Rights underscored the importance of the right of access to information to the actualisation of other rights,[10] such as the right to education. In addition, the promotion of the right of access to information by states and IGOs in Africa is an important strategy for ensuring support for open data initiatives. These work to facilitate the operationalisation of some key recommendations on open data standards and data-sharing systems contained in the AU Data Policy Framework.[11]

Moreover, the materials produced and controlled by states and IGOs contain important data for non-governmental organisations (NGOs) and other independent bodies involved in the development of innovative solutions. Public access to digital repositories of important official materials can help to achieve public-interest objectives.[12] Despite this, some IGOs in Africa, such as the African Regional Intellectual Property Organisation (ARIPO) and the African Union Development Agency (AUDA-NEPAD), continue to claim copyright and make licensing demands for third-party uses of their materials (including model laws, reports of official studies, and official guidelines).[13] This practice tends to

available at https://npc.mw/wp-content/uploads/2021/02/MW2063-VISION-FINAL.pdf (accessed 18 June 2023); Zambia *Vision 2030* (2006) available at https://www.nor.gov.zm/?wpfb_dl=44 (accessed 18 June 2023); Zimbabwe *Vision 2030* (2018) available at http://www.zim.gov.zw/index.php/en/government-documents/category/1-vision-2030 (accessed 18 June 2023); Namibia *Vision 2030* (2004) available at https://www.npc.gov.na/wp-content/uploads/2021/11/vision_2030.pdf (accessed 18 June 2023).

[6] See African Union *Agenda 2016: The Africa we want* (2015) available at https://au.int/sites/default/files/documents/36204-doc-agenda 2063_popular_version_en.pdf (accessed 18 June 2023).

[7] UN Sustainable Development Goals (undated) available at https://sdgs.un.org/goals (accessed 18 June 2023).

[8] African Charter on Human and Peoples' Rights 27 June 1981 CAB/LEG/67/3 rev5 21 I L.M. 58 (1982).

[9] Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019 (undated) available at https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration_of_Principles_on_Freedom_of_Expression_ENG_2019.pdf (accessed 18 June 2023).

[10] Declaration of Principles (2019) principle 1.

[11] AU Data Policy Framework (2022) available at https://au.int/sites/default/files/documents/42078-doc-AU-DATA-POLICY-FRAMEWORK-ENG1.pdf (accessed 18 June 2023).

[12] An example of these digital repositories is AfricanLII, run by the Democratic Governance and Rights Units, Department of Public Law, University of Cape Town available at https://africanlii.org/about/ (accessed 18 June 2023).

[13] For instance, see ARIPO Model Law on Copyright and Related Rights (2019) at 4 available at https://www.newaripo.online/storage/copyright-publication/1674828801_phpUcbyKV.pdf (accessed 18 June 2023). A further example can be found on p II of AUDA-NEPAD *AI for Africa: Artificial Intelligence*

create access barriers, and undermines the harnessing and deployment of the necessary materials for innovation in pursuit of the public-interest objectives that the IGOs are established to achieve. This is so despite the fact that the IGOs are run largely on contributions from member states and derived from domestic taxes (with other sources of funding including donor funds and import levies).[14]

State governments and their agencies also support claims to copyright over materials produced and controlled by them. For instance, there is evidence to suggest that national government agencies have been relying on copyright claims to restrict access to government works in South Africa,[15] despite the provision of section 12(8) of the Copyright Act (which excludes legislative, judicial and legislative documents from copyright protection). This issue is discussed further in 2.1 below. It suffices now to note that this South African national government practice is supported by the copyright policy of the Government Printing Works (GPW).[16] The GPW is a division of the South African Department of Home Affairs. In terms of Proclamation 24 GG 6299 of 9 February 1979 made pursuant to section 5(6) of the South African Copyright Act,[17] the GPW is vested with state copyright for the purpose of administration on behalf of the national government. Generally, the policy seeks to administer state copyright subject to the exceptions under the South African Copyright Act. Thus, by virtue of paragraph 13 of the policy, permission of the GPW is required for access to state works, and any such permission is to be granted on a non-exclusive license valid for 12 months from the date of the license. The copyright policy is not explicit as to whether the GPW should charge licensing fees before granting access (whether for commercial or non-commercial, private or public purposes) to government materials. Even so, the stipulation of the requirement for licenses to access such works may be exploited by the relevant government agency to unduly prevent access to the information contained in the materials produced and controlled by the South African state.

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for Africa's Socio-economic Development (August 2021) https://www.nepad.org/publication/ai-africa-artificial-intelligence-africas-socio-economic-development (accessed 4 September 2023).

[14] For instance, see "African Union sustainable funding gains momentum" (undated) available at https://au.int/en/articles/african-union-sustainable-funding-strategy-gains-momentum (accessed 18 June 2023); AU "Financing the union: Towards the financial autonomy of the African Union" (undated) available at https://au.int/sites/default/files/pages/35739-file-financing_the_union_6.pdf (accessed 18 June 2023)

[15] Eyal A "Public data in South Africa: Time to claim what's ours" (2013) available at https://www.dailymaverick.co.za/opinionista/2013-04-12-public-data-in-south-africa-time-to-claim-whats-ours/#.Wv7GUMi-kXq (accessed 18 June 2023); Thornton L "Copyright in state documents in South Africa" (2003) available at http://thornton.co.za/resources/lti-State%20and%20Copyright.SALJ.pdf (accessed 18 June 2023).

[16] Government Printing Works *Copyright policy* (2016) [on file with author].

[17] Copyright Act 98 of 1978.

The foregoing makes it imperative to determine effective strategies for managing the materials produced and controlled by states and IGOs in order to promote public-interest objectives in Africa. In this regard, questions such as whether the materials produced and controlled by states and IGOs are eligible for copyright protection, or whether they constitute public domain resources, will be addressed in this article. Are claims to copyright of such materials by states and IGOs in Africa justifiable given the public-interest objectives articulated in the development policy documents mentioned above? What practices should states and IGOs adopt to manage their materials in the public interest? These issues have neither been judicially addressed nor examined in the literature. However, there are institutional practices outside Africa from which useful insights can be drawn.

To resolve these issues, the materials produced and controlled by states and IGOs in Africa will be divided into two classes: works created under their direction and control, and those created independently by third parties but transferred to them. Section 2 addresses the question of whether the materials held by states and IGOs are or should be eligible for copyright protection. Section 3 examines the practices that states and IGOs in Africa might adopt to manage their materials in the public interest. Section 4 contains the concluding remarks.

Before even approaching these issues, it is important to note that there is no international legal instrument that confers copyright on IGOs in Africa. Indeed, copyright is granted by national laws. As a result, this article will refer to national copyright regimes when discussing the right of IGOs to assert copyright over their materials. The relevant statutes can include materials created by IGOs within their ambit. It should be noted that it is not possible to examine the copyright legislation of all 55 AU member states here, but research data does exist that highlights the relevant provisions from the copyright laws of the member states.[18]

Of the 55 AU member states, only Equatorial Guinea and Guinea lack specific provisions for declaring official documents to be in the public domain, while Sahrawi Republic and Somalia do not have any legislation protecting copyright. As such, it can be said that the materials of states and IGOs in these countries are public domain resources. The remaining countries enjoy different forms of provision, though these appear to be similar in effect. This article draws from that data but focuses on, and samples from, the copyright laws of Nigeria,[19] Uganda,[20] Kenya,[21] South Africa,[22] and Morocco,[23] as well as

[18] Open.Law.Africa available at https://www.openlawafrica.org/copyright-in-legal-information-africa (accessed 18 June 2023).

[19] Copyright Act 2022 (NCA).

[20] Copyright and Neighbouring Rights Act 2006 (CNRA).

[21] Copyright Act 12 of 2001 (KCA).

[22] Copyright Act 98 of 1978 (SACA).

the copyright regime of the Organisation Africaine de la Propriété Intellectuelle (OAPI).[24] Of these, Kenya, Uganda and South Africa have judicially construed aspects of their provisions (as will be discussed below); Nigeria has the copyright law and most recently enacted copyright legislation in Africa,[25] while Morocco may represent north Africa as a whole. The OAPI is a sub-regional intellectual property (IP) organisation, composed mainly of francophone states.[26] The African Regional IP Organisation (ARIPO) is another sub-regional IP institution.[27] The OAPI strives to unify the IP laws of its member states.[28] Consequently, their copyright laws are similar, as they are framed after Annex VII of the Bangui Agreement[29] which established the OAPI.

2 MATERIALS PRODUCED AND CONTROLLED BY STATES AND IGOS

As stated above, there are two sets of materials produced and controlled by states and IGOs in Africa. These are (1) the materials created under the direction and control of states and IGOs; and (2) those created independently by third parties.

2.1 Materials produced under the direction and control of states and IGOs

States and IGOs produce materials produced by the natural persons running their organs and agencies and also by third parties commissioned to undertake work under specific terms of reference. As noted above, works created under the direction and control of IGOs are generally official texts or documents. These are legislative, judicial and/or administrative in nature, and copyright treaties and national statutes do not specifically cover such texts or documents. However, in the case of *Moneyweb (Pty) Limited v Media 24 Limited and Another*,[30] a South African high court defined texts or documents that are legislative, judicial and administrative in nature to include statutes, regulations, court judgments, government notices, and rulings of administrative tribunals.[31] In addition, the court noted further that this list was not exhaustive.[32]

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[23] Law No. 2-00 on Copyright and Related Rights (MCA).

[24] Annex VII of the Bangui Agreement Instituting an African Intellectual Property Organization Act 2015.

[25] Oriakhogba D "Nigeria's new Copyright Act 2022: How libraries can benefit" (2023) available at https://ipkitten.blogspot.com/2023/04/guest-post-nigerians-new-copyright-act.html (accessed 18 June 2023).

[26] Mupangavanhu Y "African Union rising to the need for a continental IP protection? The establishment of Pan-African Intellectual Property Organization" (2015) 59 *Journal of African Law* 1.

[27] Mupangavanhu (2015).

[28] Mupangavanhu (2015).

[29] Bangui Agreement Instituting an African Intellectual Property Organization Act of December 14, 2015, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property (Bangui March 2 1977).

[30] *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] 3 All SA 193 (GJ).

[31] *Moneyweb* (2016) at para 60.

[32] *Moneyweb* (2016) at para 60.

Indeed, for the purposes of this article, it is not difficult to establish what the legislative and judicial documents of states and IGOs are.

Further insight into what constitutes administrative texts may be drawn from the Angolan Law on Access to Documents held by Public Authorities,[33] a non-copyright statute. Article 4 of this law broadly defines administrative documents to include any:

> information media, be it print, audio, visual or digital, or any records of another nature, produced or held directly, indirectly or autonomously by public bodies, to wit, case files, reports, studies, opinion pieces, minutes, official records, circulars, ministerial memoranda, internal orders, internal normative decisions, instructions and guidelines for the interpretation of the law or setting the framework for an activity, as well as other pieces of information.

Generally, for any such documents, there is nothing like international copyright. International copyright treaties set minimum standards for, and enable territorial reciprocity in, the national protection of copyright.

Apart from the specific grant of copyright vested in respect of materials produced by the UN, its agencies and the Organisation of American States (OAS) in article 1 of Protocol 2 to the Universal Copyright Convention,[34] there is no special protection for materials produced and controlled by states and IGOs under international copyright law. The Berne Convention,[35] for instance, neither provides any minimum standard nor grants any special protection for materials produced and controlled by states and IGOs. Instead, in article 2(4), the Berne Convention leaves it to member countries to "determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts".

Other international treaties, such as the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs Agreement)[36] and the World Intellectual Property Organisation (WIPO) Copyright Treaty 1996 (WCT),[37] incorporated the provisions of the Berne Convention. The European Union (EU) as an IGO is not a party to the Berne Convention. The EU as an IGO has, however, conceded to be bound by articles 1–21 of the Berne Convention by virtue of its membership of the WCT.[38] Interestingly, EU law does not expressly grant copyright protection in respect of

[33] Law 11/02 of 16 August 2002.

[34] Protocol 2 Annexed to the Universal Copyright Convention as Revised at Paris on 24 July 1971 concerning the Application of that Convention to the Works of Certain International Organizations.

[35] Berne Convention for the Protection of Literary and Artistic Works 1886 1161 UNTS 3.

[36] Agreement on Trade-Related Aspects of Intellectual Property Rights April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1C 1869 UNTS 299 33 ILM 1197 (1994).

[37] WIPO Copyright Treaty 1996.

[38] The European Union acceded to the WIPO Copyright Treaty on 14 December 2009 available at https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=16 (accessed 4 September 2023).

materials created under the direction and control of EU institutions.[39] The majority of EU member states (with the exception of Ireland) appear to exclude materials, and especially official texts (those created under the control and direction of states and IGOs), from copyright protection.[40]

Similarly, in Africa, there is no protection for the materials produced and controlled by states and IGOs under the regional system. The two IP treaties[41] adopted at the continental level, and ARIPO's Protocol on Voluntary Registration of Copyright,[42] fail to provide protection for such materials. This means that there is no international framework regulating copyright in the materials produced under the direction and control of states and IGOs.

In Africa, the approach adopted nationally in respect of copyright over such materials is informed by the historical and colonial lineage of the countries. For instance, former British colonies, such as Nigeria, South Africa, Uganda and Kenya, grant special copyright to states and IGOs based on the "crown copyright"[43] concept that originated in English common law. Crown copyright is the vesting of exclusive rights in the British monarch over works created by officials under the Crown's control and direction.[44] The former French colonies (OAPI members and Morocco, for instance), with a civil law tradition, do not make such special provision (see below). States and IGOs works are treated like other eligible materials in those countries. While crown copyright, as with state and IGO copyright, flows from the special recognition granted to the British monarchy and the need to enable it to derive revenue from works created under its direction and control, no such recognition was historically given to France.[45]

The copyright statutes of Nigeria, South Africa, Uganda and Kenya grant special copyright to states and IGOs in respect of the materials created under their direction and control.[46] In Nigeria and Uganda, this provision applies in the absence of an

[39] This point was made by Advocate-General Medina. See Opinion of the Advocate General Medina in *Public.Resource.Org, Inc. and Right to Know CLG v European* Commission, Case C-588/21P (22 June 2023) at paras 62 and 76–77 available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=274881&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=23687542#Footnote43 (accessed 23 June 2023)

[40] Opinion of Advocate-General Medina.

[41] Protocol on Intellectual Property Rights to the Agreement Establishing the African Continental Free Trade Area 2022; Statute of the Pan African Intellectual Property Organization 2016.

[42] Kampala Protocol on Voluntary Registration of Copyright and Related Rights 2021.

[43] Okediji (2020); Fitzgerald (2011).

[44] Okediji (2020); Fitzgerald (2011).

[45] Fitzgerald (2011).

[46] Sections 7 and 28(1) of the NCA; ss 5 and 21(2) of the SACA; ss 25 and 31(2) of the KCA; ss 8(2) and (3) of the CNRA.

agreement between the original author and the state or IGO to the contrary, as the case may be.[47] Ugandan and South African courts[48] too have interpreted the phrase "created under the direction and control". Although the cases related to state copyright, the interpretation of the courts is relevant if the material was created by IGOs since the provisions also applies to them. The Ugandan case relates to the claim to copyright in the national anthem, the original piece of which was written and composed by the plaintiff (appellant), submitted for consideration in a competition organised by the government and eventually chosen as the winning song.[49] Ruling that copyright in the national anthem belongs to the Ugandan government, the Ugandan Court of Appeal stated that, under section 8 of the Ugandan Copyright and Neighbouring Rights Act, the copyright in materials created and produced by private persons under the direction and control of the government vests in the government. According to the Court of Appeal, "control" is "the act of restricting, limiting or managing something", while "direction" means "the art of managing or guiding somebody/something".[50]

For its part, the South African case relates to claims to copyright in a medicine package approved by the relevant government agency in South Africa (the Medicines Control Council (MCC), now known as the South African Health Products Regulatory Agency). The defendant (appellant) sought to escape liability for copyright infringement by claiming that copyright in the package vests in the South African state, by the mere fact of approval by the MCC, and not in the plaintiff (respondent).[51] For this, the defendant relied on section 5(2) of the SA Copyright Act, which provides that "[c]opyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the State or such international organisations as may be prescribed." Dismissing the argument, the South African Supreme Court of Appeal stated, through Harms JA, that for a material to have been created under the control and direction of the state:

> the production of the work needs to be the principal object of State direction and control and not merely an incidental or peripheral consequence of some generalised governmental licensing or monitoring power; the direction and control should be directly and specifically expressed with respect to the work in question and should not be inferred from the fact of some residual or ultimate government veto.[52]

[47] Sections 7 and 28(1) of the NCA; ss 8(2) and (3) of the CNRA.

[48] *Kakoma v Attorney General*, Court of Appeal (Kampala), decision of 15 July 2019 – 50 of 2011; *Biotech Lab. v Beecham Group & Ors.* (494/2000) [2002] ZASCA 11 (25 March 2002).

[49] See *Kakoma* (2019).

[50] As quoted by "Government as the Copyright Holder of the National Anthem" (2020) 69(9) *GRUR International* 964 at 968.

[51] *Biotech* (2002) at para 11.

[52] *Biotech* (2002) at para 22.

Annex VII to the Banjul Agreement (which established the OAPI) and the Moroccan Copyright Act contain no provisions such as those described above. Instead, like any other entity, states and IGOs may claim ownership of copyright under the rule in respect of works made in the course of employment or in the execution of a commission under the Banjul Agreement and the Moroccan Copyright Act.[53] In such circumstances, article 35 of Annex VII to the Banjul Agreement (for instance) vests first ownership of copyright in the author in respect of such works. However, the economic right is deemed to be transferred to the employer or commissioner of the work so long as the work was created in the course of the employee's duties.[54]

Whatever the approach, despite the recognition of states and IGO's copyright in the national laws and the regional treaty under reference, materials created under their direction and control can be regarded as public domain resources to the extent that they are legislative, judicial and administrative in nature. This is because both the copyright statutes and the treaty considered in this article explicitly exclude official documents that are legislative, judicial, and administrative in nature from copyright protection. This exclusion extends to the translated versions.[55] The provision under section 2 of the Kenyan Copyright Act has been given judicial imprimatur.[56] Similarly, while commenting on section 12(8)(a) of the South African Copyright Act, a South African high court held that such works "do not enjoy copyright at all and are indeed in the public domain. They are thus free for use by all, in their entirety, without restriction and without authorisation being required from anyone".[57] The court then noted that it made "perfectly good sense" to include such works in the public domain, "since it is in the public interest that the general public should be easily aware of information and edicts disseminated by government during the course of carrying out its basic functions".[58]
Thus, it can be said that the recognition of the copyright of states and IGOs in respect of the materials created under their direction and control is to enable them to manage and preserve the materials in the public interest given the quality, integrity, accuracy and

[53]Article 35 of Annex VII to the Bangui Agreement; article 35 of the Law No. 2-00 on Copyright and related Rights of 15 February 2000 (MCA).

[54] See also article 35 of Law No. 2-00 on Copyright and related Rights of 15 February 2000 (MCA)

[55] Sections 3 and 108(1) of the NCA; s12(8) of the SACA; s 7 of the CNRA; s 2 of the KCA; article 8 of the MCA; article 6(1) of Annex VII to the Bangui Agreement. Note that compilations of legislative and administrative documents, law reports, are eligible for protection in Nigeria. See ss 3 and 108(1) of the NCA.

[56] *Tumaz and Tumaz Enterprises Limited & 2 others v National Council for Law Reporting* [2022] KEHC 14747 (KLR) (1 November 2022) at para 123. See also Okorie C "Round-up of intellectual property decisions and other developments in Africa 2022" (2023) 18(3) *Journal of Intellectual Property Law and Practice* 235–50.

[57] *Moneyweb* (2016) at para 57.

[58] *Moneyweb* (2016) at para 60.

vastness of the information the materials contain, and not to assert copyright in them since they are public domain resources.[59]

It is, though, important to recognise that, where express provisions are made for states and IGOs copyright, national courts in Africa can draw inspiration from the Canadian Supreme Court's decision in the case of *Keatley Surveying Ltd v Teranet Inc.*[60] when interpreting such provisions. In that case, the appellant instituted a class action against the respondent on behalf of all land surveyors in Ontario, Canada, who registered or deposited plans of survey in the provincial land registry offices. The appellant claimed that the respondent, which manages Ontario's electronic land registry system as a service provider to the government pursuant to statutory authority and in accordance with the terms of implementation and licensing agreements with the province, infringed the surveyors' copyright. It did so by digitising, storing and copying the plans of survey created by the surveyors and registered or deposited in the electronic land registry system. When plans of survey are registered and deposited at a physical land registry office in Ontario, the respondent scans the plans of the survey and adds this electronic information to its databases. One of the issues for determination by the Canadian Supreme Court was whether the copyright in the plans of survey belongs to Ontario pursuant to section 12 of the Canadian Copyright Act[61] (which recognises crown copyright) as a result of the registration or deposit of those plans in the Ontario land registry office by the surveyors. While holding that the Province of Ontario owns the copyright in the survey plans under section 12 of the Canadian Copyright Act, the Canadian Supreme Court stated that the rationale and purpose of crown copyright (state and IGOs copyright, that is) is to:

> protect works prepared or published under the control of the Crown where it is necessary to guarantee authenticity, accuracy and integrity in the public interest. But Crown copyright cannot be so expansive in scope that it allows for the routine expropriation of creators' copyright in their works. There is also a danger of Crown copyright undermining the very purpose it was meant to serve if interpreted too expansively. Sweeping classes of works into the scope of Crown copyright, when such rights were heretofore unacknowledged as being subject to copyright at all, risks impeding the public interest in accessing these works and could compromise the existence of a robust public domain. Put differently, the Crown's public interest in ensuring the accuracy and integrity of government documents cannot lead to such an expansive Crown copyright regime that the public interest in accessing information is harmed.[62]

2.2 Independently created works transferred to states and IGOs

[59] *Keatley Surveying Ltd v Teranet Inc.* [2019] 3 RCS 418–81 at para 54.

[60] *Keatley* (2019) at 54.

[61] Copyright Act RSC 1985 C-42.

[62] *Keatley* (2019) at 54.

States and IGOs can, and often do, obtain copyright in respect of eligible works made independently by third parties through assignments and licenses (exclusive and non-exclusive).[63] Such copyright-protected works form the materials that are controlled by the IGOs. National copyright regimes, such as those of Nigeria, South Africa, Kenya, Uganda, Morocco, and OAPI member states, create mechanisms that enable the transfer of copyright from one person to another through assignments, licenses, testamentary disposition and operation of law.[64] The rights obtained by states and IGOs through such transfers will, however, be subject to copyright exceptions and limitations, in certain special circumstances. These can be explored by NGOs seeking to harness and deploy the materials to provide innovative solutions to address access to information challenges in Africa.[65]

Examples of some very useful copyright exceptions include the fair-dealing exceptions contained in section 20(1) of the Nigerian Copyright Act 2022. This permits the use of works for purposes such as non-commercial research and private study, as well as review of current events, provided the use satisfies the fairness tests expressly provided for in the Act. These state that the use must be non-commercial; transformative (purpose and character of usage); not restrict the profit reasonably expected by the rights' owner; and not substantially impair the value of the work. The provision also allows the use of works for reporting judicial and legislative proceedings; provision of accessible formats for persons with disabilities by non-commercial documentation centres; the reproduction of a work for purpose of research and private study by libraries and archives; and the use of works by libraries, archives and museums for effective service delivery.

In circumstances where proposed uses of states and IGOs' materials eligible for copyright are not covered by exceptions and limitations, is it justifiable for states and IGOs to claim copyright protection and make licensing demands?

3 STRATEGIES TO MANAGE MATERIALS PRODUCED AND CONTROLLED BY STATES AND IGOS IN THE PUBLIC INTEREST

The copyright assigned to states and IGOs is justified mainly on the grounds that this is necessary for them to provide, preserve and maintain the integrity, quality, and accuracy of the materials over which the rights subsist.[66] It is also intended to enable states and IGOs to prevent any third parties from exploiting the materials commercially. However, it is important to note that states and IGOs can deploy copyright as a censorship tool, one that helps them to negatively impact public opinion, chill public

[63] Richter (2021).

[64] Section 28 of NCA; s 22 of SACA; s 14 of CRNA; s 32 of KCA; articles 39–43 of MCA; articles 39–43 of Annex VII to the Bangui Agreement.

[65] This statement is supported by the general copyright legal framework, which subjects the exercise of copyright to explicit limitations and exceptions defined in the relevant copyright legislation.

[66] Generally, see Richter (2021).

discourse, and prevent or delay access to information.[67] Such actions from states and IGOs have the potential to ultimately violate the right of access to information guaranteed in article 9 of the ACHPR and prevent the attainment of the objectives articulated in the various national and regional sustainable development plans in Africa. Thus, in situations where copyright subsists (such as in cases where the copyright works created by third parties is transferred to states and IGOs, as discussed in 2.2 above), copyright by states and IGOs should be exercised to ensure full and free access to their materials.[68] Indeed, the assertion of copyright and licensing demands by states and IGOs would amount to a form of double taxation for Africans since these activities are largely funded by public taxes in their member states.[69] While generally accepting the double-taxation argument, scholars such as Okediji have argued for access to state (and IGO) works at lower costs that are necessary to enable the relevant agencies to continue performing their role in the preservation and maintenance of the integrity, quality, and accuracy of the materials over which the copyright subsists.[70]

Arguably, states and IGOs' copyright can have negative implications for innovation. The setting-up of valuable open databases to promote access to information can be costly, especially for non-commercial ventures. As such, it is common for innovators to seek access to those maintained by national governments and IGOs. Undue restriction of access to these through copyright can have a negative impact on the public-interest objectives articulated in Agenda 2063. These are objectives which African states and IGOs are obligated to pursue. They stand as contrary to the preservation and maintenance justifications for IGO copyright.

Agenda 2063 has since formed the basis and focus for developmental strategies on the continent.[71] It has been incorporated into and continues to shape the policy articulation of the AU, its organs, agencies and subregional IGOs, and states in Africa.[72] Agenda 2063 contains seven key aspirations, anchored to 20 developmental goals. Through Agenda

[67] Generally, see Richter (2021).

[68] Atkinson B *The true history of copyright: The Australian experience 1905–2005* Sydney: Sydney University Press (2007) at 277; Fitzgerald B et al *Internet and e-commerce law: Technology, law, and policy* Australia: Thomson Reuters Lawbooks (2007) at 267–8.

[69] Nicholson N & Kawooya D "The impact of copyright on access to public information in African countries: A perspective from Uganda and South Africa" (2008) available at https://archive.ifla.org/IV/ifla74/papers/087-Nicholson_Kawooya-en.pdf (accessed 18 June 2023).

[70] See Okediji (2020) at 356–60.

[71] Generally, see AUDA-NEPAD *Second Continental Report on the Implementation of Agenda 2063* (2022) available at https://au.int/sites/default/files/documents/41480-doc-2nd_Continental_Progress_Report_on_Agenda_2063_English.pdf (accessed 18 June 2023).

[72] See AUDA-NEPAD *Second Continental Report on the Implementation of Agenda 2063* (2022) available at https://au.int/sites/default/files/documents/41480-doc-2nd_Continental_Progress_Report_on_Agenda_2063_English.pdf (accessed 18 June 2023).

2063, Africans aspire, among other things, to a "prosperous Africa based on inclusive growth and development". This is to be ensured by a well-educated citizenry and a "skills revolution underpinned by science, technology and innovation for a knowledge society".[73] These aspirations can only be achieved through the promotion of equal, equitable and easy access to information for all,[74] and especially by including the information contained in the materials produced and controlled by states and IGOs. Reliance and assertation of copyright by states and IGOs has the potential to undermine national commitment to achieving the Agenda 2063 aspirations.

Furthermore, today's digital reality easily dispels the preservation and maintenance justification of states' and IGOs' copyright because the accuracy of information contained in IGO materials that are available online can be easily verified. In addition, the integrity and quality of the resources can be preserved through digital technology rather than by copyright.[75] All in all, states and IGOs can make use of digital technology to preserve and maintain their materials while contributing to the achievement of the public interest aspirations central to Agenda 2063. To this end, states and IGOs in Africa can partner with NGOs and other public interest organisations to provide the digital infrastructure for the maintenance and preservation of their materials in the public interest. Such infrastructure will not only preserve and maintain the materials effectively, but also ensure easy and quick access for the promotion of the public interest. Moreover, it will support the development and deployment of innovative tools that will ensure access to information for education in Africa. The digital infrastructure can incorporate open-access initiatives. Open-access initiatives ensure the free use, re-use and distribution of resources online by anyone, subject mostly to the attribution rights of those who invested in putting the data together.[76]

At the national level, state copyright "must be exercised in accordance with established government policies relating to the use of public sector materials"[77] in the public interest. Such policies exist in countries such as the UK, Canada and Australia, and these may provide useful guides for African countries.[78] The approach adopted by these

[73] AU Agenda 2063 (2015) at 2.

[74] UNESCO et al. *Education 2030: Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal 4* (2016) available at https://uis.unesco.org/sites/default/files/documents/education-2030-incheon-framework-for-action-implementation-of-sdg4-2016-en_2.pdf (accessed 4 September 2023)

[75] Richter (2021) at 13.

[76] Ruther D "Government data and copyright protection in South Africa" (2015) 3 *South African Intellectual Property Law Journal* 55–74.

[77] Fitzgerald (2011) at 178.

[78] Generally, see the National Archives "Copyright" (undated) available at https://perma.cc/C4WM-ZVC8 (accessed 18 June 2023); Government of Canada "Crown Copyright Request" (undated) available at https://www.canada.ca/en/canadian-heritage/services/crown-copyright-request.html (accessed 18

countries includes access to state works for (in some cases) very minimal fees;[79] free and open access for personal and public non-commercial use;[80] and use subject to Creative Commons Attribution-only licenses.[81] At the continental level, WIPO offers an example of an open-access strategy that IGOs in Africa can adopt to preserve and maintain their materials while promoting the public-interest objectives in Agenda 2063. WIPO operates a database called WIPO Lex that contains legislative, judicial and administrative materials, including resources that were transferred to it by third parties. The materials in WIPO Lex are open-access and can be used and reused free of charge. They can be reproduced, distributed and publicly used for academic research and non-commercial purposes, subject to attribution of WIPO Lex as the source. However, the permission of third parties is required where use relates to materials in which copyright resides in third parties.[82]

The EU offers another example for IGOs in Africa. It operates a database called EUR-Lex that contains its legislative, judicial and administrative materials. Its terms of use go beyond those allowed by WIPO Lex.[83] EUR-Lex's terms of use allow the re-use of its materials for both commercial and non-commercial purposes.[84] The terms of use are based on the legal infrastructure provided by the EU's Directive on open data and the re-use of public sector information.[85] The Directive is hinged on the human right of access to information; the instrumental role of public sector information to the realisation of this right through the development of new applications for consumers; and the capacity of public sector information to transform the economy by intelligent data usage, including the processing of data through artificial intelligence applications.[86] Essentially, the standards set by the Directive for the re-use of public sector documents are geared towards promoting "the use of open data" and stimulating "innovation in products and services".[87]

June 2023); Department of Communications and Arts "Australian Government Intellectual Property Rules" (undated) available at https://www.infrastructure.gov.au/department/media/publications/australian-government-intellectual-property-rules (accessed 18 June 2023)

[79] The National Archives.

[80] Government of Canada.

[81] Department of Communications and Arts.

[82] WIPO "Lex database: Terms of use" (undated) available at https://www.wipo.int/wipolex/en/info/terms-of-use.html (accessed 18 June 2023).

[83] EUROPA "Legal Notice" (undated) available at https://eur-lex.europa.eu/content/legal-notice/legal-notice.html#2.%20droits (accessed 18 June 2023).

[84] EUROPA "Legal Notice".

[85] Directive 2019/1024 of the European Parliament and of the Council of 20 June 2019 on Open Data and the Re-use of Public Sector Information (undated) available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1024 (accessed 18 June 2023).

[86] Preambles 5 and 9 of Directive 2019/1024.

[87] Article 1 of Directive 2019/1024.

4 CONCLUDING REMARKS

As argued above, materials produced and controlled by states and IGOs in Africa can be viewed from two perspectives within the copyright context. First, the materials created under the direction and control of states and IGOs are generally official documents of legislative, judicial and administrative nature. Although some national statutes specially confer copyright on states and IGOs in respect of works created under their direction and control, all copyright regimes in Africa declare official documents of legislative, judicial and administrative nature ineligible for copyright. As such, they are viewed as public domain materials and neither states nor IGOs can assert copyright over such materials. Secondly, states and IGOs can gain control over materials transferred to them by third parties who created the materials independently. In such cases, the copyright over the materials may be transferred exclusively to the states and IGOs (through assignments and exclusive licenses) or non-exclusively (by non-exclusive license), with the third-party retaining part of the copyright. In this situation, the states and IGOs can assert copyright subject to the copyright exceptions and limitations defined in the relevant copyright statute.

The recognition of states and IGOs' right to copyright is based on the thinking that it will enable them to preserve and maintain the integrity, accuracy and vastness of the information contained in the materials over which copyright subsists (as discussed in 2.2 above). However, this reasoning is considerably undermined by the potential for states and IGOs to exercise copyright as censorship tool and as an instrument to restrain access to knowledge and justice. In addition, as pointed out (in 1 above) states and IGOs in Africa (such as ARIPO and AUDA-NEPAD) continue to lay claim to materials that are otherwise excluded from copyright protection. Such claims to copyright will result in effective double taxation for Africans and negatively impact on innovation. Furthermore, the exercise of copyright by states and IGO's is antithetical to Agenda 2063 commitments. Importantly, the reality of the contemporary moment implies that the accuracy, integrity and quality of materials produced and controlled by states and IGOs can be easily preserved and maintained through digital technology, rather than through claims to copyright. However, it is conceded that the assertation of copyright by states and IGOs would be necessary to prevent unauthorised commercial exploitation of the materials.

The current digital milieu offers African states and IGOs an opportunity to build a strong legal and digital infrastructure, one that will support the open-access initiatives necessary for tackling the access-to-information challenges in Africa and contributing to the actualisation of Agenda 2063 aspirations on the continent. Instead of asserting copyright, African states and IGOs should work towards developing and operating open access programmes. The approach adopted for the preservation and maintenance of their materials by countries such as the UK, Canada, and Australia (as well as regional

and international organisations such as the EU and WIPO) is strongly recommended for African states and IGOs. This can be achieved through partnership with NGOs and other independent entities that are involved in the creation and provision of open-access programmes geared to promoting access to information in Africa.

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