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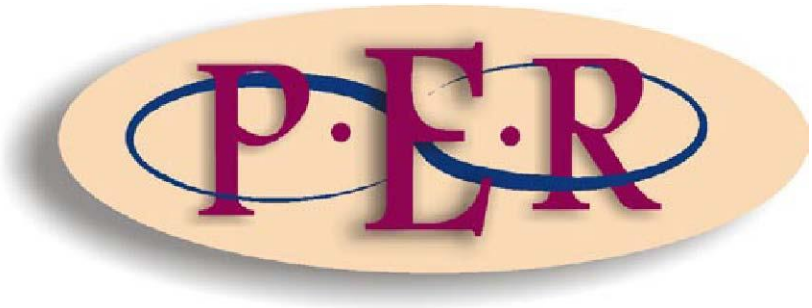

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DEMYSTIFYING THE ROLE OF COPYRIGHT AS A TOOL FOR ECONOMIC DEVELOPMENT IN AFRICA: TACKLING THE HARSH EFFECTS OF THE TRANSFERABILITY PRINCIPLE IN COPYRIGHT LAW

JJ Baloyi*

1 Introduction

Much has been written about the positive role that intellectual property rights play in enhancing economic development.[1] Part of this positive role has been identified in the area of technology transfers made possible through foreign direct investment (FDI).[2] Notwithstanding this, the (supposed) positive role that intellectual property plays in enhancing economic development needs to be interrogated more closely. For one thing, it is trite fact that for a long time no viable model existed for the determination of the role of intellectual property in enhancing the economic growth of a country.[3] It appears that WIPO has now designed a fairly satisfactory model of assessing the economic role of copyright, in particular, which has been used widely in many countries.[4]

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1 See generally in this regard WIPO 2012 http://www.wipo.int/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf; Idris *Intellectual Property*; Janjua date unknown http://www.pide.org.pk/psde23/pdf/Pervez%20Zamurrad%20Janjua.pdf; Hayes 2003 *Vand J Transnat'l L* 793-798; UNCTAD 2008 http://unctad.org/fr/Docs/ditc20082cer_en.pdf.

2 See for example in this regard Hindman 2006 *Ariz J Int'l & Comp Law* 467-492; also Nunnenkamp and Spatz 2003 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=425240. The role of foreign direct investment in bringing about technology transfers has, however, been a subject of much heated debate. In this regard Maskus 1998 *Duke J Comp & Int'l L* 15 observes that "[w]hile there is evidence that strengthening IPRs can be an effective means of inducing additional inward FDI, it is only one component among a broad set of important factors".

3 See in this regard UNESCO 2007 http://www.intracen.org/uploadedFiles/intracenorg/Content/About_ITC/Where_are_we_working/Multi-country_programmes/CARIFORUM/stat_clt_industries.pdf; UNESCO 2008 http://www.uis.unesco.org/StatisticalCapacityBuilding/Workshop%20Documents/Culture%20workshop%20dox/Background%20paper_Bangkok%202008.pdf para 24.

4 WIPO 2006 http://www.wipo.int/freepublications/en/copyright/893/wipo_pub_893.pdf.

Notwithstanding the foregoing, what cannot escape attention is the fact that not many countries in the less-developed world having intellectual property legislation depict the type of economic growth attributable to the intellectual property system in the developed world. This is certainly true in respect of many countries in Sub-Saharan Africa, many of which have, for some time, had some or other form of intellectual property laws which they inherited from the colonial period.[5] To these countries the positive role that intellectual property laws play in promoting economic growth and development (including through technology transfers)[6] remains obscure.[7]

It is submitted that where studies have revealed positive economic growth arising from the exploitation of intellectual property in less-developed countries, it would be easy to detect the fact that such growth is not significant in "real numbers". Where such "real number" growth can be detected, the growth would largely be attributable to the activity of (and thus mainly benefit) foreign enterprises from developed countries or larger developing countries.[8] It needs to be noted that all of

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5 Many have, of course, since developed their own custom-made intellectual property law systems. In the majority of the cases, however, these are based on the colonial laws applicable at the time when these countries attained independence (in the main English or French law). In the case of copyright and the related rights, this would, with respect to English law, either be the 1911 so-called British Imperial Copyright Act or the 1956 British Copyright Act. As will be shown below, both the English and French copyright law systems embody the transferability (or alienability) principle (although the latter in a limited manner, applying only in respect of economic instead of moral rights). An overview of the current copyright laws of many countries in Sub-Saharan Africa reveals the fact that the majority of these countries (whether former English or French colonies) provide for the transferability principle in their copyright laws. See in this regard generally Du Plessis, Brown and Tanziani *Practical Guide to Intellectual Property*.

6 On the evasive nature of the role of foreign direct investment in bringing about technology transfers, see fn 2 above.

7 The irony of African countries having intellectual property laws in place and yet not deriving a benefit from these laws is also dealt with by Schultz and Van Gelder 2008-2009 *Ky LJ* 90-92. Dealing with the issue from the perspective of compliance with TRIPS obligations the authors observe (Schultz and Van Gelder 2008-2009 *Ky LJ* 91): "Merely enacting TRIPS-compliant legislation and meeting obligations toward trading partners is not sufficient to create an 'enabling environment' for the development of intellectual property-based industries." Such an "enabling environment", it is contended, includes a healthy entrepreneurial environment.

8 For example in South Africa the WIPO Guide on Surveying Economic Contribution has revealed that the copyright industries contribute some 4% to the GDP and employment (WIPO 2006 http://www.wipo.int/freepublications/en/copyright/893/wipo_pub_893.pdf 23). It has, however, been noted elsewhere, in the area of royalties collected by copyright societies in South Africa, that 43% of such royalties are distributed by SAMRO directly to its foreign sister societies. This is clearly a high percentage, but does not take into account money paid by the copyright societies to local representatives of foreign publishers, which is also passed on to these foreign publishers.

this happens against the backdrop of a rich cultural and creative heritage in the developing world. This situation cannot therefore be attributed to a dearth of creative talent or material capable of being exploited in economic activity. In view of this, it is important to probe why this phenomenon (ie the lack of any real significant growth) and the concomitant limited contribution of local rights holders to growth attributable to the copyright industries is prevalent among these nations.

A review of available literature in the discipline of entrepreneurship will reveal that it is the lack of an environment capable of nurturing entrepreneurial endeavours that would explain the limited economic impact of intellectual property laws in many developing countries. Generally the role of entrepreneurship in economic growth and development has been recognised.[9] Economic development, "'a process of structural transformations' leading to an overall higher growth trajectory", is distinguished from economic growth, which is concerned only with expanding the economy based on its current structure.[10] The concept of economic development thus more aptly captures the process that would unfold as a result of intellectual property-based entrepreneurship in developing countries, seeing that many of them do not have an established formal market for intellectual property goods and services.

It has been observed that entrepreneurship exists at both the macro and individual levels, with varying antecedents applicable in respect of each of the levels.[11] At the macro level government support is required, while at the individual level motives such as the need for achievement (for example, owning one's own enterprise), a desire for financial gain, freedom, control and employment security have been identified as being the necessary antecedents.[12] Barriers to entrepreneurship or

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See in this regard Copyright Review Commission 2011 http://www.info.gov.za/view/DownloadFileAction?id=173384. In the same vein, the Commission on Intellectual Property Rights 2002 http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf 94 noted not so long ago, that DALRO, South Africa's reprographic rights society, had distributed some €74 000 to its local rights holders, including €20 000 received from foreign societies, while at the same period it distributed €137 000 to foreign rights holders.

9 See in this regard Acs and Virgill 2009 *Jena Economic Research Papers* 23-29.

10 Acs and Virgill 2009 *Jena Economic Research Papers* 5.

11 Bizri *et al* 2012 *World Journal of Social Sciences* 80-81.

12 Bizri *et al* 2012 *World Journal of Social Sciences* 81.

"entrepreneurial inclination"[13] include both psychological deterrents to entrepreneurial endeavour and certain accentuating variables relating to the business environment.[14] These can further be broken down into: psychological barriers, barriers in relation to the business environment, barriers relating to external ability and barriers in relation to the influence of demographics.[15] In this regard it has further been observed that entrepreneurship follows a different pattern in the developing world than it does in developed countries.[16]

This article focuses on the role that intellectual property laws, in particular copyright and related rights, play (or fail to play) in the entrepreneurial process, with a focus on Sub-Saharan Africa. This is done with a view to understanding why many Sub-Saharan African countries, though having copyright and related rights laws and though generally endowed with rich cultural resources, have not been able to realise significant economic development and growth from the economic exploitation of intellectual property works and legally-protectable expressions emanating from such resources. In particular the article seeks to understand why the intellectual property law system in Sub-Saharan Africa has not spurred any significant entrepreneurial drive capable of enhancing economic development in these countries. Why has Africa not as yet experienced its "Nashville experience"?[17]

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13 "Enterpreneurial inclination" has been defined as "the tendency of a population to engage in entrepreneurial activity, at any stage of entrepreneurship, whether nascent, start-up or established" (Bizri *et al* 2012 World Journal of Social Sciences 82). Autio and Acs 2010 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646954 3 dealing with this in the context of young or new start-up firms, refer to "entrepreneurial growth aspirations", which they see as "rational, utility-maximizing considerations of risks and expected return".

14 Bizri *et al* 2012 *World Journal of Social Sciences* 82.

15 Bizri *et al* 2012 *World Journal of Social Sciences* 85.

16 See in this regard Lingelbach, De la Vina and Asel 2005 http://papers. ssrn.com/sol3/papers.cfm?abstract_id=74260. In this paper the authors assert that "entrepreneurship in developing countries is distinctive from that practised in developed countries…" (Lingelbach, De la Vina and Asel 2005 http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=74260 2). See also Acs and Virgill 2009 *Jena Economic Research Papers* 5, and Bizri *et al* 2012 *World Journal of Social Sciences* 80-81.

17 For a discussion of how the development of the African music industry could be patterned after the development of the Nashville music industry, see Penna, Thornmann and Finger "Africa Music Project" 97. Schultz and Van Gelder 2008-2009 *Ky LJ*, generally, also deal comprehensively with this Nashville phenomenon and how African countries can learn from it. It needs, at this juncture, to be stated that the concern of the present paper is with regard to "home-bred" or "home-grown" entrepreneurship rather than entrepreneurial activities conducted by foreign entities, which abound in the developing world. The issue that this paper wishes to bring to the

2 Understanding the relationship between entrepreneurship and copyright within the context of cultural entrepreneurship

To acquire a clearer understanding of the role that intellectual property - in this case copyright - plays in spurring entrepreneurship, it would be useful to do so within the context of understanding the entrepreneurial process. By juxtaposing the essential aspects of the entrepreneurial process with relevant features of the copyright regime it should be possible to understand why the existence of copyright laws in Sub-Saharan Africa has not led to an entrepreneurial revolution in the cultural industries of these countries (or even given birth to such industries).[18] In turn, by scrutinising the barriers to entrepreneurship referred to above it would be possible to determine their effect on the entrepreneurial process.[19] The focus here is on cultural, and more specifically, musical entrepreneurship. As highlighted above, these entrepreneurial barriers include psychological barriers, barriers in relation to the business environment, barriers relating to external ability and barriers in relation to the influence of demographics. I propose to deal with these barriers in the following order:

2.1 Lack of external stability

The barrier of the lack of external stability relates to both the lack of political stability and the lack of economic stability.[20] It is possible to see an interconnectedness between political stability and economic stability, expressed in the fact that political instability is likely to reduce investment and the speed of economic development,

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fore is the fact that, although foreign-led entrepreneurial endeavours can spur economic growth (from the perspective of GDP growth), this does not necessarily result in the economic upliftment of individual, local creators and will thus not result in poverty alleviation.

18 It is expected that such a revolution would contribute immensely to the economic development of these countries, as it has proven to do in countries like the United States of America. In this regard see Andersen, Kozul-Wright and Kozul-Wright 2002 http://unctad.org/en/docs/dp_145.en.pdf. See also WIPO 2004 http://www.wipo.int/ip-development/en/creative_industry/pdf/ecostudy-usa.pdf, where it is shown that the "core" copyright industries contributed 6% to the US economy in 2002, while the "total" copyright industries contributed a staggering 12%.

19 See Bizri *et al* 2012 *World Journal of Social Sciences* 82.

20 Bizri *et al* 2012 *World Journal of Social Sciences* 85.

while economic instability is likely to lead to government collapse and political unrest.[21] Political instability has been defined as "the propensity of a change in the executive power, either by constitutional or unconstitutional means".[22] Political instability has a negative effect on "entrepreneurial intentions", while political stability has been seen to stimulate entrepreneurship in developing nations.[23]

If this is the case then this would explain the historical low levels of economic development in many Sub-Saharan Africa countries, with their histories of coups, counter-coups and other forms of political instability. It would, on this basis, also partly explain why these countries, though having copyright laws, and even though these laws have been seen to spur economic growth and development elsewhere, have not experienced significant growth and development. This, it is submitted, illustrates the role that government plays in creating an environment conducive for economic growth and entrepreneurial endeavour.[24]

On the other hand, economic instability expresses itself in the nullification of the general upward trend of developing nations' growth, and creating conditions where "it [becomes] difficult for a start-up to pull off and survive", and where entrepreneurship is generally negatively affected.[25] In this regard it should also be noted that economic instability would also arise as a result of inadequate laws (in this case copyright laws) which make it difficult for creative entrepreneurs to engage

21 See Alesina *et al* 1996 *Journal of Economic Growth* 189-190.
22 Alesina *et al* 1996 *Journal of Economic Growth* 191.
23 Bizri *et al* 2012 *World Journal of Social Sciences* 84.
24 It needs to be pointed out that the government's role in this regard is one of creating a conducive environment through political (and economic) stability, and not one of actually controlling the entrepreneurial process. See in this regard Acs and Virgill 2009 *Jena Economic Research Papers* 2, where it is indicated that after failing to attain meaningful economic development through the policies of import substitution (including the use of infant industry protection measures), as well as export promotion - policies which relied on strong state intervention - "developing countries are beginning to focus on their business environments and creating an economic space which is conducive to private enterprise - both domestic (ie local entrepreneurs) and foreign (ie foreign direct investment)".
25 Bizri *et al* 2012 *World Journal of Social Sciences* 84.

in growth-oriented entrepreneurial endeavours.[26] In this regard Ford and Swedberg[27] argue:

> [E]verything economic also has a legal dimension … [meaning] that every economic phenomenon is addressed by law, either in the form of positive prescription or prohibition, or in giving contractual freedom to parties to determine its shape and direction.

The inference to be drawn from the foregoing would be that copyright law, through the economic rights vesting in the owner of copyright, is capable of giving the copyright owner freedom to determine the shape and direction of entrepreneurial endeavours (the "economic phenomenon") relating to the economic exploitation of these rights. In other words, through the copyright law system the copyright owner would be empowered to determine what economic activities he or she would like to undertake within the discipline of entrepreneurship. The laws therefore need to be adequate to achieve this end. In this regard Schultz and Van Gelder[28] argue that:

> [i]t would be more effective to concentrate on making the legal system, particularly copyright law, function more effectively and on removing obstacles from paths of creators and entrepreneurs.

In this regard the focus should be on reforms aimed at utilising copyright and the creative industries "to help poor people by removing obstacles *at the local level*."[29] Schultz and Van Gelder further suggest that to achieve this objective it would be important to have specifically-designed and enforced copyright laws.[30] The authors recommend as constituting such design the fact that copyright and related rights laws need to (i) provide for effective injunctive remedies against infringement; (ii) create and make use of monetary remedies capable of deterring infringement; (iii)

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26 For a general discussion of the role of law in the economy, see Ford and Swedberg 2009 *Economic Sociology* 3-7.

27 Ford and Swedberg 2009 *Economic Sociology* 3.

28 Schultz and Van Gelder 2008-2009 *Ky LJ* 80. The authors argue that the role of government in this regard is in fostering an enabling environment - providing a stable legal foundation and business environment - leaving creators and the creative industry to "do most of the work" (Schultz and Van Gelder 2008-2009 *Ky LJ* 81, 82).

29 Schultz and Van Gelder 2008-2009 *Ky LJ* 81 (emphasis added). The local level is where entrepreneurship should take place.

30 Schultz and Van Gelder 2008-2009 *Ky LJ* 108.

empower trade associations to institute infringement actions on behalf of their members; (iv) provide for reasonable criminal penalties for copyright piracy, and (v) make rights and the transfers of rights easy to record and track.[31]

While the present author is in full agreement with the aforementioned recommendations of Schultz and Van Gelder, the thrust of this paper is to highlight how the last point in particular, relating to the transfer of rights, which is an essential aspect of the English copyright law heritage,[32] presents complications for creators in the developing world.

2.2 The influence of demographics

We now turn to consider barriers relating to the influence of demographics. Demographic factors include age, gender, education, employment status and income.[33] It has been said that though it can be expected that these factors are likely to have an influence on entrepreneurial inclination, the studies conducted in this regard have not yielded conclusive results.[34] However Rosa, Kodithuwakku and Balunywa,[35] analysing the hypothesis that entrepreneurship in the developing world is motivated by necessity rather than opportunity,[36] found that there was little support for such a view.[37] In this regard the authors write:

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31 Schultz and Van Gelder 2008-2009 *Ky LJ* 140.

32 As well as the French dualist civil law system (as contrasted with the German monist system). See in this regard the discussion below under 3.

33 Bizri *et al* 2012 *World Journal of Social Sciences* 84.

34 Bizri *et al* 2012 *World Journal of Social Sciences* 84-85.

35 Rosa, Kodithuwakku and Balunywa 2006 *Frontiers of Entrepreneurship Research*.

36 Necessity theory is invoked in an attempt to understand the trends of entrepreneurial endeavour in developing countries. The theory suggests that entrepreneurs in developing countries engage in entrepreneurial endeavours out of necessity, driven by poverty, survival and a lack of choice in work. Developing-nation entrepreneurs, so the theory goes, exhibit low levels of education and their entrepreneurial activities are poverty and subsistence driven, "mainly motivated to earn just enough to live" since they cannot find jobs. This is contrasted with entrepreneurs in the developed world, who, the theory goes, are motivated by opportunity, innovation and a boom in services. Necessity entrepreneurship can therefore be seen as an inferior form of entrepreneurship not capable of leading to economic development. Rosa, Kodithuwakku and Balunywa 2006 *Frontier of Entrepreneurship Research* 531-532.

37 Rosa, Kodithuwakku and Balunywa 2006 *Frontier of Entrepreneurship Research* 539.

> One of the trends that stood out was that the more vigorous and enterprising people (irrespective of size of income) were using savings to start additional businesses. The most common source of capital to start businesses was from having a regular job.[38]

This study shows that demographics such as having an income (arising from having a regular job) - rather than necessity - serve to create the right opportunity for persons in Africa to engage in entrepreneurial activities. Because of limited funding for entrepreneurs generally (as dealt with below), it is those people who are in a position of control of their personal circumstances (eg by having a regular job and savings) who tend to engage in entrepreneurial activities.

In the music business this would mean that unless artists have enough savings to incorporate and market their own publishing and recording companies they would find it difficult to engage in entrepreneurial activities relating to their copyrights, in spite of being the owners of such copyrights.[39] As a matter of fact, the copyrights do not in themselves therefore create opportunities for the rights holders to engage in entrepreneurship - rather the rights holders must themselves create opportunities for the exploitation of the copyrights.[40] A narration of the entrepreneurial trends of certain music entrepreneurs in the SADC region highlights some of the factors relating to demographics:

> A significant number of independent music producers, in South Africa, Zambia and Zimbabwe in particular, are being set up and driven by individual entrepreneurs who have prior experience running commercial ventures, but share a common

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38 Rosa, Kodithuwakku and Balunywa 2006 *Frontier of Entrepreneurship Research* 535.

39 An ILO study conducted in respect of the SADC music industry confirmed the fact that the majority of persons working in the SADC music industry, namely composers "and musicians" (this is put in inverted comas because composers are also musicians. The study however clearly uses this word to distinguish it from "composers", ie in reference to performers), work in the music industry on a part-time basis. Ambert *Promoting the Culture Sector* 30.

40 The value of copyright in a work will often be determined after the work concerned would have proven to be on demand in the market, or, in respect of a newly-created copyright, if such copyright was created by an author known to create successful copyright works. Models for the valuation of intellectual property are mainly limited to the valuation of industrial property (eg patents and trademarks) rather than copyright. See for example in this regard University of Virginia Darden School 2002 http://faculty.darden.virginia.edu/chaplinskys/PEPortal/Documents/IP%20Valuation%20F-1401%20_watermark_.pdf; Malackowski *et al* 2007 *Licensing Journal* 1-11. See, however, Corbin 2008 *VUE Magazine* 24 for a practical guide to copyright valuation. The guide is of no practical assistance for present purposes.

> passion and historical involvement in the music industry on an amateur basis. This enables them to source sufficient capital to set up production facilities. Further, these individuals have often been educated outside of their country of origin, in the United Kingdom and in the United States, and been exposed to the workings of the entertainment and music business in areas where it has operated successfully.[41]

The foregoing supports the proposition that those creators who do not have savings or other sources of income find it difficult to embark on entrepreneurial activities in respect of their copyrights. It is thus not for lack of entrepreneurial inclination that these creators fail to embark on entrepreneurial activities early in their musical careers. It is instead the lack of means to finance their entrepreneurial endeavours, which in turn stifles their entrepreneurial motivation and renders them vulnerable to others (such as music publishers) who may come with the promise of creating a platform for them to derive income from their works - in most cases in exchange for the transfer of ownership in their (ie the creators') copyrights. Later in life, however, when they would have accumulated enough savings, the desire to engage in independent entrepreneurial activities in relation to their copyrights is rekindled, often leading to tensions and conflicts with those to whom they had earlier transferred the copyrights.[42]

2.3 Psychological barriers

Psychological barriers entail such variables as aversion to risk, aversion to stress and hard work, and fear of failure.[43] We shall discuss these separately.

2.3.1 Aversion to risk

Aversion to risk may include a scenario where not only the entrepreneur but also the lender or investor is averse to risk, thus leading to a "risk-averse society".[44] As discussed above, failure by artists to engage in entrepreneurial activities can most

41 Ambert *Promoting the Culture Sector* 36.
42 For support of this observation, see for example Yanover and Kotler 1989 *Loy LA Ent L Rev* 211-235; Zucconi 1996 *Pace Int'l L Rev* 161-197.
43 Bizri *et al* 2012 *World Journal of Social Sciences* 85.
44 Bizri *et al* 2012 *World Journal of Social Sciences* 83.

appropriately be attributed to factors such as an adverse business environment and the influence of demographics, rather than the lack of entrepreneurial motivation on the part of the artist.

2.3.2 Aversion to stress and hard work

Regarding the issue of aversion to stress and hard work, which involves aspects such as stressful work activities, follow-up work, meeting timelines and "dealing with exhaustive demands of the start-up and its ups and downs",[45] it would be useful to pause and remember that in giving to us the great musical pieces that we have come to be accustomed to, artists in fact exert work - skill, labour and judgment.[46] They must present to us works originating from their own efforts, rather than slavish copies of works produced by the efforts of others.[47] In view of this, to suggest that artists are averse to stress and hard work would amount to not fully recognising the efforts that artists exert in creating their works.

It should be recognised that in expecting artists to be entrepreneurs in addition to being creators - and while still expecting them to create hit songs - we are in fact requiring more than the ordinary from them. Consequently where others fail to meet this expectation this cannot, and should not be ascribed to their being averse to stress and hard work. Artists should be encouraged to be entrepreneurs, but it needs to be accepted that not all artists will be entrepreneurs, just as not everyone in other business sectors is an entrepreneur. Under those circumstances it would be

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45 Bizri *et al* 2012 *World Journal of Social Sciences* 83.

46 These are the criteria recognised by Lord Reid as establishing the requirement for originality in copyright works, in the English case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd* 1964 1 ALL ER 465 (HL). Writing on the requirement of originality Copeling *Copyright Law* 48-49, while acknowledging the fact that originality does not entail novelty or inventiveness, observed, "'Originality', for the purpose of copyright, refers … to original skill or labour in execution. [This means that] … the work should emanate from the author himself and not be copied. … [T]he work must be more than simply a slavish copy; it must in some measure be due to the application of the author's own skill and labour. … [A]s a general rule, he will have to expend sufficient skill or labour to impart to his work some quality or character which the material he uses does not possess and which substantially distinguishes the work from that material". For the position in the Berne Convention, TRIPs, EC Directives and the United Kingdom see Garnett, Davies and Harbottle *Copyright* 137-140.

47 Garnett, Davies and Harbottle *Copyright* 141.

reasonable to require of artists only to be business-savvy - to acquire enough knowledge and skills concerning the music business to understand what is involved in the day-to-day aspects of their careers, as a way of safeguarding themselves from being taken advantage of. In this regard artists can display an entrepreneurial mind-set even if they do not themselves engage in entrepreneurial activities. In such a case, surrounding themselves with good advisers is a fool-proof way of protecting themselves from those inclined to overreach them.[48]

2.3.3 Fear of failure

Regarding fear of failure it would be reasonable to expect that all entrepreneurs experience some form of fear of failure as they contemplate involvement in entrepreneurial endeavours. It is when this failure evolves into crippling fear that this should become a matter for concern, as this has the effect of stifling entrepreneurial motivation. There is no basis for suggesting that musicians have a particularly crippling fear of failure - namely a fear that results in them shunning entrepreneurial endeavour. Put differently, it would be difficult to prove that the reason why musicians do not engage in entrepreneurial activities is as a result of a unique, crippling fear of failure.

Further to the foregoing, it has been shown that the possession of intellectual property within an environment where there is a strong intellectual property protection regime is a strong determinant of entrepreneurial growth aspirations - even more than education, and in augmentation of resources, where those exist.[49]

Intellectual property, for those who possess it, is thus a very significant asset capable of moderating any considerations that a potential entrepreneur might have regarding the decision as to whether or not to engage in entrepreneurial

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48 For further thoughts on whether the artist should also be an entrepreneur see E-Myth Business Coach 2010 http://www.e-myth.com/cs/user/print/post/entrepreneurial-artist-to-business-owner; Daniel 2010 http://artmarketingsecrets.com/2010/09/artist-or-business-person-can-they-be-one.html. For information on how a musician can build a team of advisors, see Passman *All You Need to Know* 13-70.

49 See Autio and Acs 2010 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646954 generally.

endeavour.[50] Ownership of copyright therefore should serve as a strong motivation for artists to be involved in entrepreneurial activities, and when this does not happen, the question would need to be asked as to why this is so.

2.4 Barriers relating to the business environment

Barriers relating to the business environment include a lack of social networking and a lack of resources.[51] We deal with these separately below.

2.4.1 A lack of social networking

Social networking is important where "an entrepreneur's connections are … a critical success factor".[52] In the music business this would be applicable in cases where the need to collaborate with other creators becomes necessary, as is often the case. For example, one person may be good at creating lyrics suitable for use in a musical composition. The person can collaborate with another who is gifted in music

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50 Loosely expressed, Autio and Acs 2010 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646954 deal with this complex matter (generally and at 10-14 in particular) within two contexts: (a) the utility of education as a determinant of entrepreneurial growth. Aspirations become less relevant or important where an educated person possesses intellectual property and where the regime for intellectual property protection is strong. That is, highly educated persons will be more likely to get involved in entrepreneurial endeavour - ie to aspire for growth - and to expect high returns, but if the intellectual property regime in a country is weak, such persons will rather focus on their inalienable human intellectual capital (ie their cognitive abilities and skills) - that is, will stay in formal employment - or "'grow their ventures organically"' - where their investment in education is realised, rather than focussing on their alienable human intellectual capital (namely, the exploitation of their intellectual property, the product of their abilities and skills) through entrepreneurial endeavour. If the intellectual property regime is strong, the value placed in the utility of education as being a determinant of entrepreneurial growth aspirations is modified by the role that the possession of intellectual property plays as a utility-maximising factor. Thus intellectual property possesses greater utility as a determinant of entrepreneurial growth aspirations than education. In the same breath, (b) the utility of household income as being a determinant of entrepreneurial growth aspirations is enhanced by a strong intellectual property regime. A person who has good household income, a factor having great utility in determining entrepreneurial growth aspirations, will have more motivation to engage in growth-oriented entrepreneurial endeavours in such an environment, seeing that he would be able to buy the intellectual property he needs to grow his business at the technology market. Although Autio and Acs deal with this issue within the context of a person who has education and/or high household income, the important role that intellectual property plays as a determinant of entrepreneurial growth aspirations (where the regime for intellectual property protection is strong) is clear.

51 Bizri *et al* 2012 *World Journal of Social Sciences* 85.

52 Bizri *et al* 2012 *World Journal of Social Sciences* 83.

composition, who may not be very gifted in writing the lyrics for such compositions. There can also be collaboration in respect of the same type of copyright work, as when different persons all contribute towards the composition of a song. In this regard the copyright principle of joint authorship facilitates this entrepreneurial activity, as it ensures that all parties are recognised for their contribution in the composition, in this way serving as an incentive for such collaboration.[53]

Another scenario where social networking becomes crucial is where the creator decides to market his own musical works (ie he decides to become a music entrepreneur who is not dependent on music business intermediaries such as publishers and record companies). To do this the music entrepreneur will need to have connections with a variety of persons and entities crucial to the success of the enterprise. These include music distributors, music retail stores (including online stores), TV executives (in respect of the licensing of songs for use on television programmes), film producers and directors, concert promoters etc. In carrying out these activities the music entrepreneur's unfettered copyright remains his most important asset.

Notwithstanding the foregoing, it should be noted that copyright in itself is not the main factor in the networking required to license the works. Instead variables such as hard work and working under stress, dealt with above when considering psychological barriers, may have more relevance.

2.4.2 Lack of resources

The question of lack of resources deserves separate focus, in particular because it goes to the core of the main argument advanced in this paper.[54] It has been

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53 In this regard the parties must, however, be wary of the fact that "[a]uthorship is a question of status and fact, not agreement and each person must [therefore] answer the description of author". Garnett, Davies and Harbottle *Copyright* 248.

54 Namely the assertion that the system of transferability of copyright, which is at the core of the English or Anglo-American system of copyright (as well as the French dualist civil system), has the inadvertent harsh effect of stifling copyright-based entrepreneurial endeavour in the developing world in general, and Africa in particular.

observed that the need for resources, in particular adequate funding, is the universal need of entrepreneurs.[55] In particular the difficulty experienced by entrepreneurs in developing countries in respect of securing funding for their entrepreneurial endeavours has been highlighted.[56] This need, it is submitted, is even more pronounced in the area of cultural (including musical) entrepreneurship.[57]

The nature of copyright in a work is that it vests in the owner an exclusive right capable of being exploited economically in respect of certain defined acts associated with the work, which the owner of copyright has the right to exercise or to authorise others to exercise.[58] Thus the singer-songwriter may decide to personally perform a song that he or she has composed, or to record it using his or her own facilities. In all of these cases the singer-songwriter would be entitled to the full enjoyment of the proceeds arising from the exploitation of his or her work (eg ticket sales revenue from the live performance of the song, and the proceeds from the sales of copies of the sound recording). However, copyright does not only vest in the owner the right to personally exploit the work, but more importantly, the right to authorise others to do so, generally in the expectation of financial benefit. Thus copyright has been said to be a system "giving rise to rents", resulting in "a market price [which is] higher than its marginal cost *(which tends to zero)*".[59]

This rent-creation role of copyright is made possible through the regime of copyright licensing, in terms of which the copyright owner may grant either an exclusive or a non-exclusive licence to a user, generally in exchange for payment or compensation

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55 Bizri *et al* 2012 *World Journal of Social Sciences* 84.

56 Bizri *et al* 2012 *World Journal of Social Sciences* 84.

57 Schultz and Van Gelder 2008-2009 *Ky LJ* 113, writing within the context of musical entrepreneurship in Africa, briefly considers this "resource problem".

58 In the South African *Copyright Act* 98 of 1978 (as amended), these acts, in respect of a literary or a musical work are: (i) to reproduce the work in any manner or form, (ii) to publish the work if it was hitherto unpublished, (iii) to perform the work in public, (iv) to broadcast the work, (v) to cause the work to be transmitted in a diffusion service, (vi) to make an adaptation of the work and (vii) doing, in respect of the adaptation of the work, any of the acts mentioned in (i)-(v).

59 Andersen, Kozul-Wright and Kozul-Wright 2002 http://unctad.org/en/docs/dp_145.en.pdf (emphasis added).

in the form of "royalties".[60] Thus the singer-songwriter in our example, rather than performing the song himself, may, for a fee, give a licence to a well-known performer to sing the song at a concert,[61] or allow a record company to use the song in one of its recordings in exchange for the payment of "mechanical royalties".

Apart from licensing the usage of his work the author may decide to sell or otherwise dispose of the copyright in his work by means of assigning the copyright to another. Under such circumstances the author is completely divested of his ownership in the copyright, and such ownership is then transferred to the assignee.[62] In all of these cases the author has the freedom to decide if he wants to license the usage of his work; whether he wants to do so through an exclusive licence or a non-exclusive licence; whether he wants to do so for any consideration or for no consideration; or whether he wants to divest himself of ownership in the copyright by means of assignment.[63]

From the aforementioned description of the process of the exploitation of copyright it may seem that the author is not faced with any hurdles with respect to the exploitation of his copyright. After all, the copyright is his and he has the sole right to deal with it as he wishes.[64] As has been noted, "[c]opyright creates the possibility of economic independence, but it does not require the creator to pursue this opportunity".[65] The question would, however, soon have to be asked as to why

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60 For an in-depth discussion of the system of licensing in the area of music, see Kohn and Khon *Music Licensing* generally.

61 Or he may authorise a collecting society to do so on his behalf in exchange for payment of a public performance royalty, after the society has deducted its administration costs.

62 For the effect or extent of assignment see Garnett, Davies and Harbottle *Copyright* 295, where the following is noted, "As an item of property, copyright can in principle, and in the absence of express restriction on its assignability, be disposed of in any lawful way that the owner wants".

63 The assignment may also be a partial assignment, whereby only certain of the bundle of rights associated with a copyright work may be assigned. In this regard it needs to be noted that "an assignment of 'copyright' will operate, in the absence of a contrary intention, to convey to the assignee all the rights which go to make up the copyright. An assignor should therefore always take care that the assignment is drawn in such a way as not to carry rights in excess of those intended to be assigned". Garnett, Davies and Harbottle *Copyright* 295.

64 Generally the common-law system of copyright provides that the first owner of copyright is an author. See in this regard s 11 of the *Copyright, Designs and Patents Act* of 1988 (c 48) (hereinafter the British *Copyright Act*) and § 201 of the United States Copyright Act USC 17 §§ 101 *et seq* (hereinafter the United States *Copyright Act*).

65 Schultz and Van Gelder 2008-2009 *Ky LJ* 120.

authors would so easily part with their copyright by assigning it to others, if the copyrights are capable of earning them (and their heirs) income in the nature of rents (i.e. royalties) for the duration of the copyright.

It would be expected that under such circumstances the author should be getting a substantial financial consideration to compensate for the potential loss of this "rental income". As a matter of fact, however, authors have assigned their copyrights in circumstances where the consideration for such assignment was extremely negligible.[66] What is the explanation for this situation? It is submitted that the answer to this lies in the phenomenon of their lack of the resources necessary to engage in entrepreneurial activities, as dealt with above - a situation which is very prevalent in the developing world. Thus, although it has been noted that copyright creates the possibility of economic independence while not requiring the creator to pursue the opportunity,[67] it needs to be observed that, owing to a lack of resources (i) the supposed economic independence is not always easy to attain, and (ii) the fact of the creator's not pursuing the "opportunity" for economic independence is often not as a result of his choice but as a result of being compelled to forego the opportunity by this lack of resources to exploit his copyright.

In this regard it needs to be noted that while the cost involved in the creation of songs often "tends to zero", the costs involved in the marketing of the songs can be prohibitive.[68] Banks and other funding agencies are reluctant to give funding for

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66 Solomon Linda, the South African composer of "Mbube", the original version of "The Lion Sleeps Tonight", the main theme song in Disney's "Lion King" movie and stage musical, sold the copyright in his song for a meagre ten shillings, in spite of the fact that records of "Mbube" eventually sold over 100 000 copies. See SAHO date unknown http://www.sahistory.org.za/dated-event/solomon-popoli-linda-singer-and-composer-dies. "The Lion Sleeps Tonight" earned (and continues to earn) millions of dollars through its use in "Lion King" alone.

67 Schultz and Van Gelder 2008-2009 *Ky LJ* 120.

68 See in this regard Chace 2011 http://www.npr.org/blogs/money/2011/07/05/137530847/how-much-does-it-cost-to-make-a-hit-song, where it is reported that the cost of making Rihanna's recent hit single, "Man Down", amounted to a staggering $1,078,000! This of course is not the norm as this particular case involves an international pop star. However, it does illustrate the high costs involved in the marketing of songs. In this case the biggest part of the cost ($1,000,000) related to the song "roll-out" which, according to the information, includes marketing, flying the artist around for promotions and "courting radio programme directors with fancy dinners etc".

music projects because they consider them to be highly risky. The contention herein is that, as a result of this lack of support, many authors of musical works have found that they cannot act entrepreneurially in respect of the copyright in these musical works. Consequently they find themselves with no option but to assign, i.e. transfer ownership in, their copyright to music publishers.[69] Almost invariably this happens in circumstances where the authors have little bargaining power to influence the outcome of the "deal".[70] Can this endless cycle ever be broken?

3 The transferability principle in copyright law - divestment of ownership from the author to others

In the English or Anglo-American tradition copyright is seen as being in the nature of a property right.[71] Thus, at the very beginning of the British *Copyright Act* the statement "Copyright is a property right" is made.[72] It has been observed that the effect of this is that copyright "may be freely traded and transferred, and enforced by legal action".[73] Furthermore, the economic rights relating to this property right "adhere in the work, not the author", and are thus freely transferable to the new owner of the work.[74] This is an integral part of the English or common law tradition of copyright.[75] In this regard Rahmatian[76] writes:

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69 In this regard Kretschmer, Klims and Wallis 1999 *Prometheus* 163, write: "Although the copyright is first vested in the author, it rarely remains there for long. A composer might want to bring his/her work to the market. Thus, he/she might turn to a publisher who might buy the work outright or, more typically, take on the work against a share of future income generated".

70 In this regard see generally Yanover and Kotler 1989 *Loy LA Ent L Rev* 211-235; Zucconi 1996 *Pace Int'l L Rev* 161-197.

71 In this regard, however, see Stern 2012 *UTLJ* 29-91, who argues generally that the doctrinal literature shows that there was a shift of attention by English copyright law historians from seeing copyright as an "author's right", namely a "dignitary right", to seeing it as a "property right". In this regard the author continues (Stern 2012 *UTLJ* 32), "The shift from author's right to property right is a shift from a view of copyright that may include protections available only to the author, to a view in which there is no room for personal protections and all rights may be transferred along with the copyright".

72 S 1(1)of the British *Copyright Act*.

73 Parker *Music Business Infrastructure* 6-11.

74 Chinni 1992 *W New Eng L Rev* 147. See also in this regard Monta 1958-1959 *S Cal L Rev* 177.

75 Consequently many copyright acts within this tradition contain specific provisions regarding the transferability of copyright ownership. See for example §201(d)(1) of the United States *Copyright Act*, which provides the following: "The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession". S 90(1) of the British *Copyright Act* provides:

> The proprietary nature of copyright manifests itself particularly in the ability to transfer or alienate the copyright, since in contrast to tangible *res*, possession and use in a physical sense are impossible with a pure intangible. … Assignment is the outright transfer of a copyright as a whole or in part and effects a change of ownership. From the first assignment onwards, authorship and ownership are split, provided the author became owner in the first place when he created the work. With the first assignment the copyright in a work has a life of its own, independent and divorced from the creator of the work.

It has been said that the principle of alienability is:

> [a]n essential attribute of ownership … [and] refers to the transmissibility or transferability of whatever forms the object of the property right in question …[77]

The transferability or alienability of copyright through the mechanism of assignment results in a situation where the author - the original owner of the copyright - is completely divested of ownership in the copyright in such a way that there is no longer any relationship between the author and his work except, where applicable, some or other form of remuneration right[78] relating to the fruit of the copyright. The transferee or assignee becomes the new owner of the copyright and may, without the consent, opinion or notification of the author, further transfer the copyright to others.[79]

In tracing the history of copyright it has been shown that although the first privileges (precursors to copyrights) were granted to an author (in Milan), "authorship was not required for the grant of a privilege, and printers and publishers obtained monopolies over existing books as well as new works".[80] In England the

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"Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property." Similarly the South African *Copyright Act* 98 of 1978 (as amended) (the South African *Copyright Act*) provides in s 22(1): "… [C]opyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law". An observance of the copyright acts of the majority of African countries reveals that the laws of many of these countries embody these transferability provisions. See fn 5 above.

76 Rahmatian *Copyright and Creativity* 201, 203.

77 Balganesh "Alienability and Copyright Law" 162.

78 Usually in the form of payment of a royalty.

79 In this tradition the only rights that would, normally, remain with the author are the moral rights (borrowed from the *droit d' auteur* system), which are generally not assignable, unless the author waives his right in this regard. Note, however, that the United States does not provide for moral rights except in limited cases.

80 Khan 2002 http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf 31.

monopoly rights vested in the Stationers' Company (the Worshipful Company of Stationers of London), and authors "were, for the most part, forced to rely on the beneficence of the Stationers, a group not contemporaneously associated with generosity".[81]

It has been observed that this earlier form of copyright existed in both France and England to benefit and regulate the printers' guild.[82] Although the original copyright law, the *Statute of Anne* of 1710, aimed (for the first time) to grant rights to authors of works in respect of ownership of these works, the printers continued to vehemently fight for the continuation of their perpetual rights in what has been termed "the battle of the booksellers", until the House of Lords ruled in *Donaldson v Becket*[83] that copyright was an author's right created by statute and durable for a limited period after publication.[84] However, soon commercial concerns prevailed, resulting in the phenomenon where copyrights are inevitably almost always controlled by commercial enterprises through transfers of copyright. In many cases this is as a result of strong market forces that operate in the commercial environment (including the force of unequal bargaining), resulting in the most productive copyrights often being snapped up by large and powerful corporate commercial concerns.[85]

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81 Patry *Copyright Law* 7-8 (emphasis added). It seems that not much may have changed with regard to the generous nature of many modern-day publishers!

82 Khan 2002 http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf 33.

83 *Donaldson v Becket* 4 Burr 2408, 98 Eng Re 257 (HL 1774).

84 See generally in this regard Baloyi 2012 *SA Merc LJ* 218-232.

85 This scenario of unequal bargaining can be better explained by what Rahmatian *Copyright and Creativity* 226 sees as the curtailing of the individual freedom of the author, when he writes: "It has been argued frequently that democracy with its systemic transparency enables and regulates the operation of the markets, and free competition that reflects the principle of checks and balances in liberal democracy safeguards individual freedom. The successful operation of the markets entails free creation and acquisition or alienation of (intellectual) property. *In fact, neither the free alienation of intellectual property nor the satisfactory operation of markets creates or protects individual freedom. … [C]opyright, as well as the alienability of copyright, may serve as an ideal legal instrument to implement a perhaps functioning capitalist free market with no freedom of the individual person*." (Emphasis added)

In view of this it has been conjectured that:

> the concept of the author underlying Western copyright legislation is perhaps no more than the 'functional principle' of a global music market exceeding $US40 billion - although the multinational media groups claim that 20 - 30% of music revenues will eventually flow back to the artists.[86]

Even more bluntly, Stern[87] submits that the concept of copyright as being property - in disregard of the commercial reality where eighteenth century transactions between publishers and authors "usually involved a one-time transfer of copyright, with no royalties or other provisions related to the book's success" - was premised on "the concern to ensure that copyright was easily assignable".[88] Proceeding, Stern argues that proponents of this view rationalised the concept of authors' rights as a premise, while glossing over the question of how this applied to publishers, because they understood that the concept of authors' rights "commanded more support than would a justification that conceptualised copyright as a publisher's right from the outset".[89]

The English law system of copyright is to be contrasted with the system of authors' rights (*droit d' auteur*) that exists in Continental Europe. Unlike the English copyright law system, "[t]he focal point of protection in author's rights systems is the author, a

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86 Kretschmer, Klims and Wallis 1999 *Prometheus* 164. Under normal circumstances, an environment where just "20-30% of music revenues" flow back to original rights holders could more appropriately be characterised as premised on faulty assumptions and a convoluted ethos and paradigm.

87 Stern 2012 *UTLJ* 5.

88 Obviously to the benefit of the publishers.

89 Stern 2012 *UTLJ* 5. Taking this point further Stern 2012 *UTLJ* 5 argues: "Hence the need for an assignable property right: once a persuasive explanation could be found to show why authors had such a right, no further work would be needed to show why publishers should enjoy the same protection after assignment of the copyright. Conversely, if the right were not assignable - as would usually be true for dignitary rights - the exercise in justification would achieve nothing for publishers. Even a hybrid approach to copyright, seeking to integrate dignitary rights and property rights, would likely diminish the power of the latter. The point is a simple one, but it may be hard to discern in the legal arguments frequently rehearsed by publishers, acting as plaintiffs and providing explanations that speak to the rights of authors who were not parties to the litigation". These arguments clearly run against the standard arguments, where it is believed that "a key step in the creation of a music industry is the release of the copyright by the original creator all the way down the music supply chain and across the various broadcast media" (Andersen, Kozul-Wright and Kozul-Wright 2002 http://unctad.org/en/docs/dp_145.en.pdf 13).

human being".[90] In the origins of this system, authors who did not alienate their works in France were granted perpetual exclusive rights in respect of such works by means of decrees passed in 1777.[91] Even in this system, however,

> Since few authors had the will or resources to publish or distribute books, their privileges were likely to be sold outright to professional publishers. However, the law made a distinction in the rights accorded to publishers, because if the author sold his right the privilege was only accorded a limited duration of at least ten years, the exact term to be determined in accordance with the value of the work. Once the publisher's term expired the work passed into the public domain.[92]

The French system of authors' rights is to be contrasted with that applicable in, for example, the German system. In France a dualist approach to author's rights is followed, where there is a complete separation of moral and economic rights, with the latter being freely assignable, "with or without payment".[93] In relation to economic rights the French system thus clearly embraces the transferability principle and is similar to the common law system.

In contrast, the German system is a monist system where the economic rights are seen as being interwoven with the moral rights, "cannot be separated out" and are therefore not assignable.[94] An economically similar effect is achieved with an exclusive licence granted on the basis of the economic rights as part of the author's

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90 Rahmatian *Copyright and Creativity* 48. See further regarding the contrast between the two systems of copyright, Monta 1958-1959 *S Cal L Rev* 177-186.

91 Khan 2002 http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf 32.

92 Khan 2002 http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf 32. Khan dubs the French concept of "authors' rights" a "rhetoric" which "[d]uring the Ancien Regime … had been promoted by French owners of book privileges to deflect the criticism of monopoly grants and to protect their profits; the same arguments were used by their critics as a means of attacking the publishers' monopolies and profits". Khan continues to express the opinion that when the moral rights of authors were formally recognised by France in the twentieth century as perpetual, inalienable and thus bequeathable, "regardless of whether or not the work was sold to someone else … [t]he self-interested rhetoric of the owners of monopoly privileges had now emerged as keystone of the 'French system of literary property' that would shape international copyright laws in the twenty-first century" (Khan 2002 http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf 33). It appears therefore from this that the oft monopolistic, profit-driven demeanour of publishers was exhibited from an early beginning of the recognition of authors' rights.

93 Rahmatian *Copyright and Creativity* 205.

94 Rahmatian *Copyright and Creativity* 205.

right.[95] The exclusive licensee is granted a right to sue and the author is normally excluded from the economic rights forming part of the exclusive licence, "but it can be agreed that the licensor-author is not precluded from exercising these rights".[96] The author retains his right to sue, and the assignment of licences, though permissible, normally requires the consent of the author.[97] Furthermore, unlike in the English and French systems of transferrable rights, in the monist system the author "can rescind the contract in case of failure of the licensee to exercise the economic right or in case of a change in the heart of the author".[98]

Generally it has been observed regarding the common and civil law systems that whereas in the common law system "everything is 'transferrable' [and] 'assignable'", where "authors can sign away all their mechanical rights to their publishers", "[c]ivil law legislation ensures that the publisher or producer does not get everything".[99] Vaver goes further, in even stronger terms, to suggest that while in the civil law system "the author is front and centre stage", the common law view cares less about the author or authorship, "despite lip service to the concept", and "any solicitude for authors is less a driving force".[100]

4 The changing paradigm of international copyright law

In spite of what has been said above, it needs to be noted that, to a large extent, the distinction between the common and civil law systems of copyright is

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95 Rahmatian *Copyright and Creativity* 205, 207.

96 Rahmatian *Copyright and Creativity* 207.

97 Rahmatian *Copyright and Creativity* 207.

98 Mengenli 2010 *Ankara Bar Review* 90.

99 See Kretschmer, Klims and Wallis 1999 *Prometheus* 172. Regarding the civil law system, this of course is truer with respect to the monist system.

100 Vaver 2001 *EJCL* III. In this regard Vaver, commenting on complaints that EU Directives, influenced by the civil law tradition, have incorporated bad civil law elements into English copyright law (and rejecting the idea of a perfect English copyright law, namely that prior to this, English copyright law had reached its "legal nirvana" - its "apogee"), writes: "In any event, a more general response is that bad law is bad law, whatever its origin or basis. If UK copyright law is in some respects bad (as the editors of *Copinger* fairly contend), then improvement should be welcomed and embraced. The fact that improvement may originate in Brussels, Westminster, Berne or Marrakesh, or that its inspiration may trace back to Kant, Locke, Diderot, or the US Trade Commissioner, is interesting geographically and genealogically, but seems otherwise irrelevant" (Vaver 2001 *EJCL* II).

increasingly becoming blurred. At this stage such a distinction may only be a theoretical one, as both systems have clearly borrowed from each other.[101] With regard to the music industry the following observation has, and it is believed correctly, been made:

> … [A]lthough the countries may differ in ways of organising music copyright at the national level, the way in which they are monitored within industrial structures reflects greater similarities in ways of capturing and monitoring rents from music rights.[102]

The greatest shift from the traditional paradigm of a dual system of international copyright law is arguably expressed in the adoption of moral rights - the *les droits moral,* which are traditionally seen as being the major distinctive element of the *droit d'auteur* system - into both English and American copyright law.[103] This can be seen as a positive step towards the harmonisation of international copyright law because, as has been observed,

> [a]n … important consequence of the rift between common law and civil law with respect to moral rights is its negative impact on the harmonisation of copyright laws, which affects all creators wishing to assert their rights on an international level.[104]

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101 For example, both the American and British systems have introduced the concept of "moral rights" within their laws, which is essentially a *droit d'auteur* concept. Thus the copyright systems of these countries can, in some respects, be compared to the dualist system of author's rights as practised in France. Indeed others have expressed the view that the United States and the United Kingdom need to completely embrace the concept of moral rights in their copyright laws, and that this would result in greater harmonisation of copyright laws. See for example Chinni 1992 *W New Eng L Rev*; Kilian 2003 *J Marshall Rev Intell Prop L* 321-336. Vaver 2001 *EJCL* II further recounts how several English law systems have now incorporated moral rights provisions in their national laws, such as Australia - which had earlier rejected the move to embrace moral rights on the ground that they were alien to a common law system - and India, Israel, Canada and New Zealand.

102 Andersen, Kozul-Wright and Kozul-Wright 2002 http://unctad.org/en/docs/dp_145.en.pdf 20. In fact Khan 2002 http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf 33 sees the "French system of literary property", a civil law system, as providing protection to "the self-interested rhetoric of the owners of monopoly privileges", and as having shaped international copyright laws in the twenty-first century.

103 In English law moral rights were first introduced by the British *Copyrights Act* (see in this regard Garnett, Davies and Harbottle *Copyright* 707). In American law they were introduced, in respect of visual rights, by the *Visual Artists Rights Act* of 1990.

104 Kilian 2003 *J Marshall Rev Intell Prop L* 322. Killian specifically decries herein the failure to incorporate moral rights in the TRIPs Agreement, observing with reference to the commercial value that moral rights (in particular integrity rights) can have, that this failure has diminished

Vaver[105] further gives the example of Canada where the copyright law has been amended:

> ... in a way that is deliberately intended to accommodate Canada's civilian and common law traditions … [and where both] common law- and civil law-trained judges sitting in provincial and federal courts cite and rely on precedents from either tradition in interpreting the Act …

Vaver[106] concludes that in principle no cogent reason exists preventing a single, even unilingual, law from accommodating both the common law and civil law traditions, "without creating undue strain on either". In particular the European Union, a region consisting of jurisdictions that were traditionally aligned to both the common law and the civil law forms of copyright, has had to contend vehemently with the issue of harmonisation.[107] The European Union is thus another example of how copyright law was moulded in the light of the unique circumstances prevailing there, to produce what could be called a home-grown solution - a hybrid dual-copyright or *sui generis* form of protection.[108]

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the overall economic value that an author can derive from a work, and thus calling generally for the "softening" of "the dichotomy of economic versus personal rights".

105 Vaver 2001 *EJCL* II.

106 Vaver 2001 *EJCL* IV. Herein Vaver further argues that civil law underpinnings are observable in the original development of the common law copyright regime (as well as common law premises in the civil law tradition). This convergence of the two systems, Vaver argues, is also evident in the international copyright framework embodied in the *Berne Convention* (and later the *TRIPs Agreement*), which is premised on author's rights rather than copyright, the term "copyright" first appearing only in the English version of the *Berne Convention* text. In any dispute on the interpretation of the Convention, Vaver argues, the French version, which uses the *droit d'auteur* concept, would prevail. Moreover, the *Berne Convention* has tended to minimise the differences between the two systems and to emphasise the similarities. From 1911 "the UK law has been structured to reflect the imperatives of [the Berne Convention] and its periodic revisions. *Common law drafting style cannot obscure the substance of the law, which is in essence that of authors' rights*" (emphasis added). Vaver further refers to the Canadian case of *Tele-Direct (Publications) Inc v American Business Information, Inc* 1998 2 FC 22 (CA), where it was observed that the use of the word "copyright" in the English version of the *Copyright Act of Canada* of 1921, "which still bears the structural imprint of its former model, the Copyright Act 1911 (UK)", "has obscured the fact that what the Act fundamentally seeks to protect is *le droit d'auteur*".

107 See in general Bitton 2008 *BTLJ* 1411-1470 for a discussion of how the European Union has contended with the issue of harmonisation in the area of database protection.

108 Bitton 2008 *BTLJ* 1427.

Bitton[109] explains how, initially, anti-*sui generis* sentiments prevailed in the development of the EU Database Directive, as:

> … the EU may have wished to avoid potential conflicts with non-EU states and the international community in general [as] a sui generis regime would have constituted a departure from accepted forms of protection under international intellectual property law.

The EU did, however, adopt a *sui generis* solution, because it was seen as a way of dealing with the marked differences between the two copyright traditions.[110] Notably, it has been observed that another important reason why the EU opted for a *sui generis* solution in respect of the protection of databases was because the European Commission (i) had realised the possible economic contribution of the information sector; (ii) was concerned about the dominance of US companies in the sector and thus (iii) "wanted to improve the EU market share … both in European markets and worldwide".[111]

Thus concerns relating to the internal conditions and developmental needs of the European Union led this world power to pass a legislative instrument that it was aware "constituted a departure from accepted forms of protection under international intellectual property law". With regard to criticism of the EU Database Directive,[112] Vaver[113] argues that the legal "complexity here is as much attributable to faulty law-making tout simple as to faulty civilian-inspired law-making".

What is observable in this regard is that there has been a trend, especially amongst the major powers,[114] to adopt positions, in particular in relation to copyright law,

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109 Bitton 2008 *BTLJ* 1428-1429.

110 Bitton 2008 *BTLJ* 1429. This has resulted in a situation where "there are now two different approaches" in the United Kingdom with regard to the question of originality, where the criterion for originality in respect of all categories of literary, dramatic, musical and artistic works (apart from databases) "is still based on the traditional 'skill, judgment and labour'", while in the case of databases however, the criterion "is fulfilled only where the database results from 'the author's own intellectual creation". Sterling *World Copyright Law* 19.

111 Bitton 2008 *BTLJ* 1429.

112 In this regard it needs to be noted that Bitton writes very critically of the Database Directive.

113 Vaver 2001 *EJCL* II.

114 The United States can be criticised in this regard in relation to the so-called *Sonny Bono Act (Copyright Term Extension Act)* of 1998, which extended the term of copyright to between 70 to

that can be seen as constituting a deviation from existing norms. This may also, however, be reflective of the dynamic nature of copyright law as a regime that can be moulded in line with national needs, provided that this does not fall foul of a nation's obligations in respect of the international copyright treaties.[115]

A view to the effect that copyright is a dynamic, progressive regime that needs to be adapted and has in fact been adapted to the needs of the time (while of course maintaining the agreed minimum standards of protection) would not be outrageous.[116] On the other hand, views that involve pontificating about "historical traditions" of copyright and insist on the dualistic classification of international copyright are, in the author's view, out-dated, impractical and only theoretically relevant. Thus, with regard to the English common law system of copyright, not even the United Kingdom can claim to have maintained, in all respects, the original tenets of the system.[117]

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120 years. The United States is, however, not unique in this in that the European Union had already extended its copyright term to 70 years in 1993. There is, however, a possibility that should raise eyebrows. Mooted by the US Supreme Court in *Eldred v Ashcroft* 537 US 186 (2003), it is that the US Congress could make further extensions of the term, for periods that may be excessively long, as long as such periods are "finite" and not forever, as that would be seen as being in line with the *Berne Convention* requirement that member states could increase the minimum period of protection (namely the life of the author plus fifty years after the author's death) for "limited periods".

115 In this regard Bitton 2008 *BTLJ* 1467-1468 argues that the Database Directive would fall foul of the EU's obligations in terms of both the *Berne Convention* and the *TRIPs Agreement*, in particular the national treatment principle embodied in these agreements. This is because the Directive contains a reciprocity provision, "a useful negotiating chip in bilateral negotiations with trading partners" and possibly also "a potent tool for pressuring other countries to adopt similar legislation".

116 A close example in this regard is the use of the system of reversion of copyright, which in the English tradition was first introduced in the *Statute of Anne* of 1710, was dropped from the statute books, reintroduced, and then finally buried alive, as it were. ("Buried alive" because though current UK copyright law does not contain provisions in relation to the reversion of copyright, the reversionary interest is "alive and kicking" in respect of works created under the British *Imperial Copyright Act* of 1911, both within the United Kingdom and in the former British dominions where the law was applicable). On the other hand, the United States has undertaken to maintain these reversion provisions in its current Act (§203 of the US *Copyright Act*). For the history of the reversion right from the *Statute of Anne* to its demise in English law in the eighteenth century as well as modern US law, see Bently and Ginsburg 2010 http://ssrn.com/abstract=1663906.

117 In this regard Vaver 2001 *EJCL* III notes that neither the common law nor the civil law systems can be thought of as being monolithic, as English law differs from American law, with American law displaying strong common law tendencies, while on the other hand the French authors' rights system represents stronger civil law tendencies than others in that system. Sterling *World Copyright Law* 17 also speaks of a third system of copyright that exists, "embracing laws of what

5 Implications for Africa

5.1 General observations

What are the implications for Africa in all of this? Many countries in Sub-Saharan Africa inherited the English common law system of copyright from the United Kingdom during the colonial era. This would either be the *Imperial Copyright Act* of 1911 or the British *Copyright Act* of 1956. Some inherited the French law system, which, as was observed, can be distinguished from the monist system of Germany in that whereas the latter prohibits the transfer of author's rights, the former boldly embodies the transferability principle. Even after independence many African countries continued to model their copyright laws in the copyright law traditions of their erstwhile colonial masters, whether England or France, with their emphasis on the transferability or alienability of copyright.[118]

Sub-Saharan Africa constitutes one of the world's poorest regions, with its having been observed that in 2010 this region constituted "a third of the world's poor".[119] It goes without saying therefore that the constraints and barriers to entrepreneurship dealt with above would be more pronounced in this region.[120] In an environment where there is widespread poverty, authors who cannot exploit their copyright works themselves because of lack of resources find that they generally have to transfer

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may be called the *composite system*, that is, laws (such as those of China and Japan) which draw elements from both the copyright and the author's right systems, *and also add distinctive features of their own"* (emphasis added).

118 Kameri-Mbote 2005 http://www.ielrc.org/content/w0502.pdf, recounting the historical development of copyright law in Kenya, argues that the British copyright laws "applied to Kenya … were designed to protect the monopoly rights of British publishers in Kenya, restrict the growth of the publishing industry in the country, provide censorship for publications that colonialists termed seditious, blasphemous, immoral or contrary to government policy and propagate the ideology of colonial superiority among the natives".

119 See Olinto and Uematsu date unknown http://www.worldbank.org/content/dam/Worldbank/document/State_of_the_poor_paper_April17.pdf. See also Sahn and Younger 2009 https://academiccommons.columbia.edu/catalog/ac%3A154009.

120 A recent study on the state of entrepreneurship in Africa showed that while the culture of entrepreneurship is growing, the business landscape in Africa presents many hurdles that entrepreneurs have to deal with. See Omidyar Network 2013 http://www.omidyar.com/about_us/news/2013/04/25/omidyar-network-report-reveals-challenges-faced-African-entrepreneurs-and-0.

their copyright (most often to foreign entities), if they are to derive any form of benefit from such copyrights. While in some instances the relationships created have been mutually beneficial, in many more instances authors do not see the benefit deriving from the exploitation of these copyrights. Furthermore, it is submitted that the phenomenon of lack of resources has created an endless circle in which creators are incapacitated from utilising their copyright works in entrepreneurial activities. Because these creators do not have the means to economically exploit their copyrights, they find themselves thus compelled to transfer ownership of these copyrights to others,[121] in the hope of deriving some economic benefit.

It is submitted that this situation has generally led to the stifling of home-grown entrepreneurship in the cultural sectors of these countries, as the creators cannot themselves act entrepreneurially with respect to their copyright works. Because of this barrier to entrepreneurial activity, the transfer of copyright by authors to third parties has almost become the norm. Because of this, when these authors do reach a stage where it would be possible for them to start their own creative enterprises,[122] they awaken to the reality that they no longer own any copyright in their musical works.[123] The irony about this, however, is that the assignees are often not compelled or obliged to exploit such copyrights.[124] It is important, therefore, on this basis, that solutions are developed by African countries to ensure that the copyright law system works for them not only in theory but in practice.

Having indicated the above, the solution would not be to discard the intellectual property law system, which would amount to throwing the baby out with the bath water. Doing so would be suicidal for African countries.[125] The solution lies in

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121 Because these "benefactors" usually demand that the copyright is assigned to them.

122 Either because they have accumulated enough savings to do so, or where their music careers have reached a certain level of success.

123 There may also be restraint of trade issues where the creators are tied to long-term publishing and recording agreements that they cannot easily get out of. This was the case in the so-called *English trilogy* cases. See generally in this regard Yanover and Kotler 1989 *Loy LA Ent L Rev* 211-235; Zucconi 1996 *Pace Int'l L Rev* 161-197.

124 In the leading English case of *A Schroeder Music Publishing Co Ltd v Macaulay* 1974 3 ALL ER 616 (HL) the practice of music publishers acquiring copyrights from authors, with no concomitant duty to publish such works, was dealt with at length.

125 See on this note Baloyi *Intellectual Property* generally.

working within this system to craft a solution that would be suited to the conditions of these countries and the needs of their rights holders, just as the United States and the European Union have done and continue to do.[126] Such a structuring and orchestration of the copyright system to ensure balance and fairness is possible and does not have to fall foul of these countries' international obligations under the *Berne Convention* and the *TRIPs Agreement*.[127] Beyond the minimum standards required in these treaties, it should be possible for African nations to craft provisions that would safeguard the interests of their creators while not offending their international obligations.[128]

Furthermore, African nations should not feel compelled to adhere to their colonial connection to the English (or French) patrimonial system of copyright where this does not help to improve their economic conditions and instead creates an endless cycle of economic domination by Western countries. In particular, African countries that were formerly colonised should not, because of this, feel constrained from incorporating provisions in their copyright legislations that lean towards the monist civil law system of authors' rights. They should not feel compelled to adhere rigidly to waning concepts of artificial distinctions between the common and civil law systems, or feel duty-bound to strictly adhere to patrimonial concepts of copyright, if this does not advance their quest for economic development. Instead they should feel free to borrow from each tradition in order to construct their own unique systems of copyright suitable to their conditions.

5.2 South Africa as a case in point

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126 In this regard it needs to be noted that the US *Copyright Term Extension Act* (the "Sony Bono Act") was enacted primarily because of lobbying from Disney Enterprises and to protect Disney's interests. See in this regard Grzelak 2002 *J Marshall Rev Intell Prop L* 95-115.

127 See Andersen, Kozul-Wright and Kozul-Wright 2002 http://unctad.org/en/docs/dp_145.en.pdf 15-18.

128 For a discussion of the minimum standards provisions provided in TRIPs, see generally Reichman 1995 *International Lawyer* 345-388; and with regard to the relation between the principle of non-discrimination (ie national treatment) in intellectual property and the principle of non-discrimination under human rights, see generally Von Lewinski 1998 http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_6.pdf.

The proposition discussed above was attempted, but quickly aborted, in respect of South African copyright law. Although the enactment of the current *Copyright Act* in South Africa[129] was hailed as marking a departure from a dependence on British copyright law, and as amounting to "our legislature departing on an independent course in the field of copyright law",[130] this noble attempt was clearly short-lived. This reality was vividly captured[131] by Harms JA, a judge of the Supreme Court of Appeal, in *Biotech Laboratories (Pty) Ltd v Beecham Group Plc*,[132] in the following words:

> The current Act, in its original form, attempted to be kinder to authors. The concept of copyright was replaced with an author's right, the ownership of which vested principally in the author. In this and other regards the object was to move in the direction of Continental law where the emphasis is on the rights (moral and other) of the author and not on the economic rights of employers and entrepreneurs. The good intentions did not last and hardly a year had passed when the Legislature (by amending section 21), reverted, as far as ownership was concerned, to the Anglo-American model where commercial rights tend to reign supreme.[133]

This remark was made by Harms JA as a retort to an argument advanced in the case in relation to:

> ... a philosophy allegedly underlying the Act, namely that it seeks to create a system whereby the creator of an original work is afforded a qualified exclusive right to compensate him for the effort, creativity and talent expended and to act as an incentive for the creation of further and better works.[134]

After colourfully recounting the historical development of copyright in England, the honourable judge concludes by remarking that, although the original intention (as expressed in the language of the *Statute of Anne*) was to vest ownership of copyright in the author, in the end it was publishers who benefited from the

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129 *Copyright Act* 98 of 1978, as amended.

130 Dean *Copyright Law* 1-4.

131 Albeit, admittedly, *obiter*.

132 *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) 791-792.

133 *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) para 12.

134 *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) para 11. This philosophy relates to the so-called incentive theory of copyright which emanates largely from an interpretation of the US *Constitution* in US court judgments. In this regard see the US case of *Twentieth Century Music Corp v Aiken* 422 US (1975) 156, where it was said, "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labour. But the ultimate aim is to, by this incentive, stimulate artistic creativity for the general public good". Dean *Copyright Law* 1-1 interestingly clearly relies on the US *Constitution* in lending credence to this theory.

system.[135] In the end the honourable judge expressed scepticism, quipping that "[o]ne … does not have to be a cynic in order to be sceptical about the philosophical premise".[136]

Further to this, it is noteworthy that some have relied upon the notion of copyright as being a fundamental human right in support of, or rather as a corollary to this alleged philosophical premise of copyright.[137] In the so-called *Certification* case,[138] the Constitutional Court ruled that intellectual property rights did not qualify as a universally-accepted fundamental human right[139] - a position met with sharp criticism.[140] The so-called *Laugh it Off* case[141] is hailed as making progress "towards rectifying the situation created by the court previously refusing that the right to hold intellectual property is a universally accepted fundamental right".[142]

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135 In this regard the honourable judge observed: "The booksellers who were behind the Act had no thought of bringing prosperity to the trade of author; it was a monopoly-breaking move for the benefit of the bookselling trade and authors were merely the excuse for it. By the wording of the Act an author owned the copyright of his work, but the action of having it published gave the bookseller fourteen years exclusive rights in the work, after which the rights were supposed to revert to the author. In effect this meant that once the booksellers had paid the authors a few guineas for the copyright, they could exploit the property, or barter it among themselves, for a period of fourteen years without necessarily paying anything more to the author …" (*Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) para 11).

136 *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) para 12.

137 See Dean *Copyright Law* 1-3.

138 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).

139 See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 75 where the court held that while "it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies. It is also true that some of the more recent constitutions, particularly in Eastern Europe, do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted".

140 See for example Dean 1997 *THRHR* 115, where the learned author expressed concern that not recognising intellectual property rights as fundamental rights could lead to intellectual property rights being seen as subservient to other fundamental rights, in the event of a conflict with such other rights.

141 *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 1 SA 144 (CC) (the *Laugh it Off* case). In this case the court appeared to accord similar status to trademarks as it did to freedom of expression, despite the former not being included amongst the rights entrenched in the Bill of Rights.

142 Dean 2005 *De Rebus* 19.

It is submitted that the issue should not be whether or not copyright is recognised as a fundamental right.[143] Rather the issue should centre on what such recognition entails within a human rights paradigm. It is noteworthy that those who are very vocal regarding the view that copyright is a fundamental human right often place reliance in this regard on Article 27(2) of the *Universal Declaration of Human Rights* of 1948 (the *Universal Declaration*), as well as Article 15 of the *International Covenant on Economic, Social and Cultural Rights*, of 1966 (the *International Covenant).*[144] What is often not mentioned is the position that the scope of the authors' rights as provided for in Article 15(1)(c) of the *International Covenant* "does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements".[145]

A number of differences, such as "differences in philosophy, regulatory objectives and the subject matter and scope of legal protection", have been highlighted.[146]

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143 Even before the Constitutional Court ruling in the *Laugh it Off* case, Harms JA appears to have accorded weight to copyright as having constitutional status, when he remarked, with regard to State-owned copyright, "Allowing the State without more ado to reap what it did not sow does not appear to be in the spirit of our constitutional values". *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) para 16. The emphasis thus seems to be the safeguarding of the interests of he who has sown (meaning, within the present context, the author or performer of music). Again in the Supreme Court of Appeal judgment of *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2005 2 SA 46 (SCA) (successfully taken on appeal to the Constitutional Court), Harms JA recognised trademarks as property, remarking that "[t]he fact that property is intangible does not make it of a lower order" (*Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2005 2 SA 46 (SCA) para 10). The honourable judge proceeded to say, however, "But then, intellectual property rights have no special status. The Constitution does not accord them special protection and they are not immune to constitutional challenge. Even if constitutional, their enforcement must be constitutionally justifiable" (*Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2005 2 SA 46 (SCA) para 11).

144 See for example Dean *Copyright Law* 1-3. A 27(2) of the *Universal Declaration on Human Rights* (1948) provides: "Everyone has a right to the protection of the moral and material interest resulting from any scientific, literary or artistic productions of which he is the author". While the *Universal Declaration* did not create enforceable obligations, A 27(2) was echoed in A 15 of the *International Covenant on Economic, Social and Cultural Rights* (1966). South Africa was not a party to the *Universal Declaration* but is party to the *International Covenant*.

145 See Helfer "Collective Management" 83, quoting from General Comment No 17 (2005) of the International Covenant's Committee on Economic, Social and Cultural Rights. Helfer prefers to use the phrase "creators' rights", "[t]o avoid confusion with terms such as *droit d'auteur*', and in view of the fact that the phrase describes 'the legal entitlements for authors … recognised in international human rights law", and seeing that "these legal protections are not conterminous with those of copyright or *droit d'auteur*". Helfer "Collective Management" 76. The *International Covenant* itself however, uses the term "author". What perhaps should be at issue therefore is the redefinition of the term "author" as used in the *droit d'auteur* system, to conform to its use in international human rights law.

146 Helfer "Collective Management" 80.

Furthermore, whereas intellectual property rights are temporary, may be "revoked, licensed or assigned", and may be "traded, amended or even forfeited", creators' rights apply only to individuals (and in some cases to groups of individuals and communities), while "[c]orporations and other legal entities are expressly excluded".[147]

If the effect of the *Laugh it Off* judgment is to entrench intellectual property rights within the Bill of Rights,[148] then the effect of such entrenchment also needs to be interrogated. In this regard the point of departure would be that the constitutional protection given in respect of intellectual property rights is as provided for in existing intellectual property law.[149] Section 25(1) of the South African *Constitution*[150]

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147 Helfer "Collective Management" 84. In this regard, Helfer notes that "[t]his represents a profound departure from Anglo-American copyright laws, which have long recognised that legal entities can enjoy the status of authors of intellectual property products, for example of works made for hire". It is submitted that this position deals a serious blow to the expectations of many who advocate for the recognition of intellectual property as a human right within national law. It is ironic that the Association of Marketers, in its quest to have intellectual property rights included within the Bill of Rights during the certification process in relation to the *Constitution*, proposed to use language "based on the text of Article 27(1) of the Universal Declaration of Human Rights". Dean 1997 *THRHR* 114. Since A 15(1)(c) of the *International Covenant* (which, as Dean *Copyright Law* 1-3 has acknowledged, echoes A 27 of the *Universal Declaration*) is fundamental, inalienable, and a universal entitlement applying "only to 'individuals …'" (Helfer "Collective Management" 84), it is not clear if this is what the Association of Marketers and its allied parties had in mind when they proposed to use language based on the *Universal Declaration* in their lobby for the inclusion of intellectual property rights within the Bill of Rights. What is clear, however, is that the use of such language when entrenching intellectual property rights within the Bill of Rights would very likely have led to an interpretation leaning more on the monist system of civil law, where no corporate copyright is permissible, the economic rights are seen as being interwoven with the moral rights, "cannot be separated out" and are non-assignable - with the only option left to the corporate entity being the grant of an exclusive licence (see Rahmatian *Copyright and Creativity* 205, 207).

148 It is doubtful that this is in fact the effect of the judgment. If that were the case the court, in recognising intellectual property as a constitutional property right without (in the case of copyright), recognising the author's moral rights, would in fact have crafted a new form of intellectual property right that is (in not recognising moral rights) an ultra version of the Anglo-American system of intellectual property. This, it is submitted, would militate against everything that the South African *Constitution* stands for. Dean 1997 *THRHR* 113 recognises this when he remarks, "To the extent that … [IP] creates material interests or economic rights it is analogous to the law of things. However, to the extent that it creates moral interests it is comparable to personality rights and more particularly the right of privacy and the right relating to defamation". Until such time as the Constitutional Court would have recognised intellectual property (in particular copyright) not only as a property right but also as a personality (moral) right, the question as to whether the South African *Constitution* gives protection to intellectual property rights must remain open.

149 See Currie and De Waal *Bill of Rights Handbook* 537, where the authors note, with regard to the interpretation of the term "property" in a constitutional sense: "In interpreting the term, the courts will obviously be guided by the existing ambit of the law of property. Property, in other

provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".[151]

In view of this it would seem plausible that a constitutional interpretation of the ownership of copyright would be disposed towards the Continental, in particular the monist concept of "authors' rights", and lend itself to the human rights approach dealt with by Helfer.[152] This, it is submitted, would inevitably point to the author (or creator) as being the recognisable, *inalienable* owner of copyright.[153] Furthermore,

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words, *is something recognised as property in the existing law*." (Emphasis added). The same authors, even before the *Laugh it Off* judgment, recognised intellectual property as falling within the definition of "property" in s 25 of the South African *Constitution* and argued, "'Property' for purposes of s 25 should therefore be seen as those resources that are generally taken to constitute a person's wealth, and that are recognised and protected by law … [including] intellectual property rights in the case of intellectual property." Currie and De Waal *Bill of Rights Handbook* 539.

150 *Constitution of the Republic of South Africa*, 1996.

151 This enquiry has to take place before the enquiry in terms of s 36 of the *Constitution* - what has been termed "the general limitation clause" - takes place. This is in line with the two-fold approach to Bill of Rights litigation, which requires that the interpretation of the rights needs to precede a consideration of the limitation of rights. See Currie and De Waal *Bill of Rights Handbook* 561. S 36 provides that the rights in the Bill of Rights may be limited only "in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", taking into consideration a number of factors. With regard to copyright law, it is likely that the justification for the limitations and exceptions inherent in copyright law under the three-step test would be probed in terms of ss 25 and 36. (In this regard while it has been recognised that "a human rights framework for intellectual property puts the public's interest front and centre and on an equal footing with property rights in intangibles", it has further been recognised that it is "far more constraining than the now ubiquitous 'three-step test' used to assess the treaty-compatibility of exceptions and limitations in national copyright laws." Helfer "Collective Management" 81, 85). Furthermore, however, any scenario of the deprivation of ownership of intellectual property on the part of the author would also have to be probed in terms of these sections. In this regard Currie and De Waal *Bill of Rights Handbook* 561 highlight the difficulty that arises in applying the two-stage analysis to the limitation of the property right under s 25 and s 36, namely the fact that "many of the criteria which justify the limitation of rights have been included in the demarcation of the s 25 rights themselves". (For a full discussion of the property right as provided for in the *Constitution of the Republic of South Africa*, 1996, see Currie and De Waal *Bill of Rights Handbook* 531-565).

152 In this regard Helfer, referring to this human rights approach, suggests (Helfer "Collective Management" 86) "the existence of an irreducible core of rights - *a zone of personal autonomy in which creators can achieve their creative potential, control their productive output and lead independent intellectual lives that are essential requisites of any free society*" (emphasis added). This accords with the arguments made in this work for authors to be afforded an environment in which they can act entrepreneurially in respect of their creations.

153 It is of course recognised that the South African *Constitution* entitles juristic persons to the rights in the Bill of Rights (s 8(4) of the *Constitution*). This is, however, so "to the extent required by the nature of the rights and the nature of the juristic person". It has, for example, been held that juristic persons "are not the bearers of human dignity", and only to a less extent enjoy the right to privacy - *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors*

any "law of general application" (in this case copyright legislation) limiting the author's right to ownership (such as in cases of "copyright by operation of law") would need to be justified, and any such law must not permit arbitrary deprivation of property. "Deprivation" will be arbitrary if the law of general application does not provide sufficient reasons for the deprivation, or rather is procedurally unfair.[154] Deprivation has also been said to refer to "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society".[155] It is submitted that Currie and De Waal correctly query

(Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit 2001 1 SA 545 (CC) para 18. Human dignity has been said to relate to "a human being's right to self-determination" (Glensy 2011 *Colum Hum Rts L Rev* 68). In a human rights dispensation requiring a purposive interpretation aimed at gleaning the core values underpinning fundamental rights in order to discover the purpose and scope of such rights, dignity plays a pivotal role as "a value that informs the interpretation of possibly all other fundamental rights and that is of central significance in the limitations enquiry". See Currie and De Waal *Bill of Rights Handbook* 149, 275. Stern recounts a neglected aspect of the historical development of copyright law in which copyright was seen as a dignitary right and in which "… the basis and scope of copyright has emphasized the importance of authorial rights that turn on notions of dignity rather than property". Stern 2012 *UTLJ* generally, and 30 in particular. If it is recognised that the nature of authors' rights is such that they are a fundamental human right vesting in the person of the author and bordering on dignity and the need for self-determination, it would then be easy to conclude that such rights should not be separable from the author. (In this regard Stern 2012 *UTLJ* 32 further speaks of non-assignable dignitary rights.)

154 See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 4 SA 768 (CC) para 100. Compare this requirement with the obligations imposed upon States in terms of the *International Covenant*, which have been described as follows: "The *obligation to respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The *obligation to protect* requires States to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the *obligation to fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c)". Helfer "Collective Management" 82 (emphasis added).

155 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 2 BCLR 150 (CC) para 32. Currie and De Waal *Bill of Rights Handbook* 541 have questioned the court's use of the expression "normal restrictions", arguing that "[m]ost legal restrictions on property use … are routinely encountered in 'open and democratic societies' and could be considered 'normal'". One would in this regard, for example, think of the provisions in copyright law in relation to "non-human author" copyright, ie copyright created by operation of law (eg in relation to commissioned works and works created in the course of a person's employment). In a human rights framework, where ownership should vest in the "creator" of the work, justification would have to be given regarding the deprivation of the creator of ownership of copyright in such works. Furthermore, a limitation of rights has to be proportionate and must employ "less restrictive measures … when several types of limitations may be imposed". Helfer "Collective Management" 85. Thus it could be argued that a regime making use of exclusive licences instead of the assignment of copyright in respect of deals between authors and publishers (as in the German monist system) would be a less restrictive measure than the Anglo-American system of copyright.

this position and rightly observe that "[o]ne would have thought that the point of s 25(1) is to test the justifiability of even routine state interference with property".[156]

This brings to the fore the regime of transmission of copyright, which is an integral part of the Anglo-American and French copyright systems. With the tradition of unequal bargaining that is rife in the copyright environment and the helplessness of authors in this regard,[157] could the modes of transmission of copyright which are an integral part of many copyright laws[158] be seen as constituting a "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society"? Would the transferability rule itself be seen, under certain circumstances, to constitute a normal restriction on property use or enjoyment found in an open and democratic society?

It is submitted, with regard to copyright conferred by operation of law, that a human rights paradigm as discussed above would dictate that individual cases of such conferment of copyright be probed to determine if the limitation imposed by this regime "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[159] This, it is submitted, should justify an intervention by the courts to strike out such provisions in copyright legislation if these are seen to run foul of the constitutional imperative. On the other hand, in the case of the assignment of copyright (and other contract-based dealings in

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156 Currie and De Waal *Bill of Rights Handbook* 541.

157 Regarding instances of unequal bargaining in the music industry, see generally in this regard *A Schroeder Music Publishing Co Ltd v Macaulay* 1974 3 ALL ER 616 (HL), the leading case in the United Kingdom, and *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A), a leading South African case.

158 In particular the assignment of copyright and the transmission of copyright "by operation of law" (notably the ownership of copyright by the employer where such copyright is created by the author in the course of employment, and the ownership of copyright by the person who commissions the making of a work or makes arrangements for its making. See in this regard ss 21 and 22 of the South African *Copyright Act*, as well as s 1(1) in respect of the definition of "author", bearing in mind the fact that the author is the initial owner of copyright in a work in terms of s 21(1)(a)).

159 Such a probe needs to go beyond the normal questions asked in such cases, which border on issues such as whether there was in fact an employment relationship or if an agreement constitutes a commissioning agreement (the cases referred to as 'work for hire' in the United States). In a human rights paradigm the probe would have to ask if, in spite of the existence of such an employment relationship or commissioning arrangements, there is justification for depriving the author of his ownership of copyright.

copyright), it is very unlikely that the regime for assignment can be seen as going "beyond the normal restrictions on property use or enjoyment found in an open and democratic society." The probe would have to be dealt with within the confines of the doctrine of the sanctity of contracts (*pacta sunt servanda*) viewed against considerations of public policy.[160]

In *Barkuizen v Napier*[161] Ngcobo J noted that while in the past the determination of public policy "was fraught with difficulties", this is no longer the case with the advent of constitutional democracy, since public policy is now deeply rooted in the *Constitution* and its constituent values of human dignity, the achievement of equality, the advancement of human rights and freedoms, and the rule of law.[162] In this regard any term of a contract that is inimical to the values enshrined in the *Constitution* would be contrary to public policy and thus unenforceable.[163] In explaining the role of public policy in relation to the doctrine of the sanctity of contracts Ngcobo J averred:

> In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values *even though the parties may have consented to them.*[164]

There are two tests to determine fairness in contracting, namely (i) whether the clause in question is reasonable and if so, (ii) whether it should be enforced in the light of the circumstances that prevented compliance.[165] The first test relates to the objective terms of the contract and if it is found that these do not violate public policy "on their face", the second enquiry, which focuses on the circumstances that prevented compliance with the relevant clause, is to be made. This is to determine

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160 See in this regard *Barkuizen v Napier* 2007 5)SA 323 (CC) in general and para 28 in particular.
161 *Barkuizen v Napier* 2007 5 SA 323 (CC).
162 *Barkuizen v Napier* 2007 5 SA 323 (CC) para 28.
163 *Barkuizen v Napier* 2007 5 SA 323 (CC) para 29.
164 *Barkuizen v Napier* 2007 5 SA 323 (CC) para 30. (Emphasis added)
165 *Barkuizen v Napier* 2007 5 SA 323 (CC) para 56.

if, in the light of the relative situation of the contracting parties, the terms in question are not contrary to public policy.[166] In this regard the court held that unequal bargaining, "in a society as unequal as ours", is a very important consideration in determining whether a contract is in line with public policy or not.[167] In the light of this, it is submitted that many cases of the conventional assignment transaction[168] would fall foul of public policy considerations. It would, under those circumstances, become necessary to strike off some of the harsh terms in such assignment deals, or under certain circumstances, completely nullify the transaction.

Furthermore, the unsavoury history of overreaching assignment "deals" would, in the author's opinion, warrant the development of a rebuttable presumption (in favour of the author of copyright), against the use of assignments, as an extension of the common law presumption that the legislature "does not intend that which is harsh, unjust and unreasonable".[169] Under such circumstances, the assignee would need to prove that the particular assignment was neither harsh, nor unjust or

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166 *Barkuizen v Napier* 2007 5 SA 323 (CC) paraS 58-59.

167 *Barkuizen v Napier* 2007 5 SA 323 (CC) para 59. Relying on the case of *Mohlomi v Minister of Defence* 1997 1 SA 124 CC para 64, Ngcobo J highlights the fact that the harshness of the statutory provisions (as with those relating to the assignment of rights) needs to be determined with due regard to "the realities that prevail in our country" - realities given to us by our history. Quoting from *Mohlomi* Ngcobo J highlights these realities to include the fact that we are '"… a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons". Ngcobo further observes, "Indeed many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness". Regarding this practice in the music business Zucconi 1996 *Pace Int'l L Rev* 161 notes that "[a]rtists sign … contracts at the beginning of their careers, when they have little bargaining power". It is submitted that, under such circumstances, and generally in cases involving the assignment of copyright, the courts need to adopt the approach advocated for by Ngcobo J herein. In the first instance a determination as to whether or not the terms of the assignment, on an objective basis, fall foul of the doctrine of public policy would have to be made. Secondly, if such provisions are seen not to contradict public policy, a court would have to look at the circumstances of the parties (in this case the author), when entering into the contract, in line with the relevant circumstances of the case.

168 In the sense of an unfettered and an irrevocable transfer of ownership, completely divesting the author of any further commercial interest in the work, regardless of whether or not the assignee economically exploits the work.

169 For a discussion of this and other presumptions in the light of the *Constitution*, see Singh 2012 *THRHR* 74-95.

unreasonable. "[I]n a society as unequal as ours"[170] such a presumption would, it is submitted, be justifiable and accord with the principles of equality enshrined in the Constitution, and in line with the view that presumptions can "… augment, enrich and enhance the Constitution".[171] Its effect would be that the relevant copyright regime would be more closely aligned with the ethos of the monist system discussed above.[172]

If the aforementioned guidelines are taken into consideration, it is contended that South African copyright law (and those of other African countries) can be shaped and recast into the (now-abandoned) vision of the South African legislature when the current *Copyright Act* was enacted. It is further submitted that if South Africa had not abandoned its author-centric approach to copyright[173] this country would have set a good example for many African and other developing countries with regard to developing copyright law for the greater benefit of authors. As elaborated on, African countries have to a large extent not taken advantage of the dynamic, evolutionary nature of copyright law and have stuck to out-dated colonial constructs of copyright law. As already said, many Sub-Saharan African nations modelled their copyright laws on those of earlier colonial laws, largely British or French. This is the situation in spite of the fact that, for example, the United Kingdom has itself in many respects moved away from that regime.[174] Rather than mimicking the West with regard to what constitutes a model copyright law, thus copying and pasting from these laws, African countries need to construct home-grown solutions that are capable of adequately addressing their unique needs. This would also accord with the development agenda that developing nations have been pushing for within WIPO. An important developing nation that has "taken the bull by its horns" in this

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170 Per Ngcobo J in *Barkuizen v Napier* 2007 5 SA 323 (CC) para 59.

171 Singh 2012 *THRHR* 95 and generally.

172 And thus, in the case of South Africa, achieve the original intent of the legislature to be "kinder to authors", in the tradition of Continental law, when passing the current *Copyright Act*, as Harms JA observed in *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) para 12. For an in-depth evaluation of the monist system with an emphasis on its practical effects, see Mengenli 2010 *Ankara Bar Review* 87-91.

173 As dealt with above in the discussion of *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) 791-792.

174 Even if as a result of compromises necessitated by its being part of the European community.

regard is India, which in 2012 passed amendments "to bring about revolutionary changes to the Indian copyright law",[175] in particular with regard to India's long history of unfair practices to authors in the Indian music and film industries. In this regard it has been noted that through these amendments, Indian copyright law has undergone a "… shift … from an Anglo-Saxon model of copyright law to a more European style of *droit d'auteur* model, wherein the authors' rights are now protected under very strong statutory remuneration rights".[176] India has blazed the trail for the less-developed world in this regard and others can now follow her example.

It is important that the international advisers advising African countries (eg WIPO consultants and officials) should be sensitive to the unique circumstances of African nations when advising on intellectual property legislation. In this regard the consultants should not insist on adherence to the tenets of a waning system that was part of the colonial era, where such adherence does not advance the developmental needs of these countries.

175 As noted by Reddy 2012 *NUJS L Rev* 470-471.
176 Reddy 2012 *NUJS L Rev* 471.

6 Some possible solutions

As to the reforms that African countries need to make in their copyright laws to ensure that they empower, rather than disempower, their authors, to act as entrepreneurs, there can clearly be no hard-and-fast rules. It is furthermore not the aim of this paper to address this issue in depth. The aim of the paper was simply to posit the idea and make the case for the need for African nations to take steps to actively design their copyright and related rights laws to ensure that they truly become agents of entrepreneurial endeavour and thus economic development and growth. This paper has sought to highlight what, it is believed, is a real problem. The fact that the problem needs to be attended to, should not be in dispute. The method of solving the problem may take one or other form, however, ranging from the radical stance of completely overhauling or redesigning the copyright laws, as dealt with above, to the employment of other mechanisms that may, in one way or another, address the situation. The following is a description of some of these possible options:

6.1 The use of reversionary provisions

One area in which African countries are lagging behind is the use of reversionary provisions in their copyright legislations to temper the harsh effects of the transmission rule. This will ensure that African rights holders, who parted with their rights under circumstances of necessity, or even unequal bargaining,[177] can retrieve their copyrights. It has been observed that often artists desire to negotiate better terms in their recording (including of course, publishing) agreements, once they become successful[178] - ie at a time in which they are in a position to engage in

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177 In this regard Menell and Nimmer 2009-2010 *J Copyright Soc'y USA* 802 notes: "Due to the difficulties of predicting winners and the costs of these other functions, publishers have historically driven a hard bargain, especially with new authors. They typically demand full assignment of the copyright in the work. Similarly, record labels have traditionally required recording artists to assign their sound recording copyright in exchange for advances against future royalties (subject to recoupment). … But for almost as long as copyright has existed, there has been concern about creators getting the short end of the stick in their dealings with distributors".

178 Zucconi 1996 *Pace Int'l L Rev* 161.

entrepreneurial activities. This is in line with what was said above regarding the entrepreneurial barrier of lack of resources (as well as the demographical barrier of income) - namely the fact that people are empowered to engage in entrepreneurial endeavours when an opportunity arises (when made possible by the acquisition of such resources or other income).

Sanderson[179] observes[180] that the purpose of reversionary provisions "is to protect authors whose works achieve an increase in value not anticipated and bargained for at the time of the original grant".[181]

In the case of Africans this would, as said above, occur when they would have accumulated enough savings to engage in entrepreneurial endeavours in respect of their copyright works. For entrepreneurial people, the entrepreneurial instinct is stirred when they have the means to engage in entrepreneurial activities. It is suggested that this is the same instinct that instigated the famous pop star, George Michael, to attempt unsuccessfully to get out of his recording agreement with Sony Music.[182] While it is possible to create reversionary provisions in the contract assigning copyright to the assignee,[183] the problem of unequal bargaining remains a serious impediment for authors in this regard. Under these circumstances the best solution would be to create reversionary provisions in the copyright law itself.

Reversionary provisions were part of English copyright law from the *Statute of Anne* until they were removed in 1814, only to be restored in the 1911 *Imperial Copyright Act.*[184] Since the enactment of the 1956 *Copyright Act*, however, UK copyright law

179 Sanderson *Musicians and the Law*.

180 In respect of the reversionary provisions contained in Canadian copyright law.

181 Sanderson *Musicians and the Law* 11.

182 See generally in this regard Zucconi 1996 *Pace Int'l L Rev* 161-197.

183 The effectiveness of such contractually-created reversion clauses was demonstrated in the recent English case of *Crosstown Music Company 1 LLC v Rive Droite Music Ltd* 2010 EWCA Civ 1222, where the UK Court of Appeal held that a provision in a song-writing agreement to transfer copyright back to the composer in the event of a failure by the publisher to remedy a breach operated automatically, in spite of the original publisher having further assigned the copyright to another publisher.

184 See generally Bently and Ginsburg 2010 http://ssrn.com/abstract=1663906. The proviso to s 5(2) of the *Imperial Copyright Act* provided that "where the author of a work is the first owner of

has not contained any provisions relating to the reversionary interest. Likewise, many of the former British dominions have followed the UK's example[185] and abolished any reference to the reversionary interest in their copyright laws.[186] In these countries reversionary provisions would thus apply only in respect of works created when the 1911 *Imperial Copyright Act* was still in force in those countries. The United States of America has made provision for reversionary rights of one form or another since early times,[187] and the current US *Copyright Act* has retained such provisions,[188] albeit not without controversy.[189]

Regrettably, reversionary provisions are difficult to find in the copyright laws of Sub-Saharan African countries. Apart from the historical application of the reversionary interest provisions of the 1911 British *Imperial Act* in this regard, it appears that not a single copyright legislation in this region contains provisions relating to the reversionary interest.[190] This has probably been brought about by the fact that

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the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, *notwithstanding any agreement to the contrary*, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of a copyright in a collective work or a licence to publish a work or part of a work as part of a collective work". (Emphasis added)

185 Canada is the exception in this regard, having retained the original provisions of the British *Imperial Copyright Act*. See in this regard Sanderson *Musicians and the Law* 10-11.

186 See Alter 2008 http://www.wixenmusic.com/coyright_reversions.htm.

187 See in this regard Bently and Ginsburg 2010 http://ssrn.com/abstract=1663906 58-96.

188 Ss §§203-204 of the US *Copyright Act*.

189 For an account of this controversy see Menell and Nimmer 2009-2010 *J Copyright Soc'y USA* 799, generally. This situation is, hopefully, now becoming less of a controversy, as resolved in *Scorpio Music SA v Victor Willis* (RBB) case number 11cv1557 BTM, a case involving a declaratory judgment against the defendant, the original lead singer of the Village People, challenging Willis's attempt to terminate his post-1977 grants of his copyright interest in 33 musical compositions under §§203(a)(1) of the US *Copyright Act*. The court dismissed the complaint for "failure to state a claim", ruling that the purpose of the Act was to "safeguard authors against unremunerative transfers" and to address "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited".

190 From an assessment of the situation and the review of available material, this appears to be the case. It needs to be noted, however, that "[r]eliable and up-to-date information on the copyright laws and their application in individual countries on the African Continent is not always generally available" - as observed generally in Du Plessis, Brown and Tanziani *Practical Guide to Intellectual Property*. A form of reversionary interest is provided for in s 33(7) of the Kenya

subsequent British copyright legislations, which formed the basis of the copyright laws of many Anglophone African countries, have not incorporated provisions in relation to the reversionary interest. That the reversionary interest can be a powerful tool for African authors has been amply demonstrated recently in the case of the South African author, Solomon Linda, who composed the original version of the theme song for the popular Disney musical drama film, "The Lion King", titled "The Lion Sleeps Tonight".[191] A settlement in this regard has resulted in the song being recognised as deriving from Linda's original composition, "Mbube", and Linda being recognised as the co-composer of the derivative version, "The Lion Sleeps Tonight".[192]

It is very obvious that the reversionary interest can be a very effective tool in enabling African artists to "make up for lost time" with regard to entrepreneurial endeavours in relation to their copyrights, and thus to contribute to economic development. Furthermore, by this time the true value of the copyrights would have been determined and either the erstwhile assignee would be prepared to renegotiate better terms with the artist, or where the work was not fruitful, be relieved to be released from the obligations in terms of the assignment. For the artist, the opportunity to be able to determine, apart from any form of undue influence, the manner in which he would want the work to be exploited would be a moment of much longed-for freedom, especially where the assignee had not cared to exploit usage opportunities in respect of the work.

Copyright Act 12 of 2001, which, however, is limited to the rare cases where the period of assignment has not been specified. The section reads: "Where an agreement for the assignment of copyright does not specify the period of assignment, the assignment shall terminate after three years". It is interesting to note that the South African government's Copyright Review Commission Report (Copyright Review Commission 2011 http://www.info.gov.za/view/DownloadFileAction?id=173384 102) has noted the absence of reversionary provisions in South African copyright law and recommended that the South African *Copyright Act* be amended "to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 [sic] years after the copyright came into existence".

191 The original version was a Zulu composition titled "Mbube", meaning "Lion".

192 See in this regard Dean 2006 *De Rebus* 18-22. See also *Disney Enterprises Inc v Griesel* 2006 BIP 299 (T) for the court ruling on Disney's application to set aside the executor's *ex parte* application *ad fundandam jurisdictionem*.

African countries can employ a number of flexibilities with regard to the form that the reversionary interest needs to take. As an example, the original reversionary provision under the *Statute of Anne* gave the author a further period of 14 years to exploit his work after the initial period of protection, provided the author was still alive. Earlier US legislation followed a similar system, with copyright reverting to the author for a further period of 28 years. Current US copyright law provides for an inalienable termination right for authors after a period of 35 years in respect of all grants of rights made after 1977,[193] and after a period of 56 years in respect of grants made prior to 1978.[194] African countries can work around these periods and make provision for a reversionary regime that is conducive to their prevailing conditions. Kretschmer,[195] in a proposal for the restoration of the reversionary interest in English copyright law, proposes a term of 10 years after publication.[196] Kretschmer also proposes a number of drafting techniques in this regard, within a framework in which the author would have a choice (i) to reassign or re-license the work if there is demand, (ii) to join a collective management scheme (in effect converting the exclusive right into a remuneration right) or (iii) to abandon the work.[197]

193 § 203 of the US *Copyright Act*.
194 § 304 of the US *Copyright Act*.
195 Kretschmer 2012 *IJMBR* 44-53.
196 Kretschmer 2012 *IJMBR* 46-48. Kretschmer refers to "empirical data" showing that "the investment horizon in cultural industries is well below 10 years", and that compelling evidence has shown that the most intensive commercial exploitation takes place at the beginning and the end of the exclusive term. Thus "[t]erm reversion could be a key tool for opening up un-exploited back catalogues, *and enable artist-led cultural and social innovation*". (Emphasis added)
197 Kretschmer 2012 *IJMBR* 46-48.

6.2 Changing the regime from that of the assignment to that of the licensing of copyright

African countries could take the revolutionary step of following the example of the German monist system by not splitting the personal (moral) right from the economic rights,[198] and on this basis do away with the system of transfer of ownership and replace it with a purely licensing regime (whether through the use of exclusive or non-exclusive licences). Thus, rather than assigning their copyright to publishers and record companies African artists would only license the usage of their works, preferably for shorter, renewable periods.

6.3 Structuring music business contracts to safeguard the interests of artists[199]

A possible solution to mitigate the harsh effects of unequal bargaining would be the use of model contracts for the music industry that are structured to ensure that grantees of rights do not overreach artists. In a recent report of the UK Intellectual Property Office,[200] which purports to recognise "that the world we live in has changed",[201] the proposal is made by the UK government "to support fair treatment

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198 See further in this regard Rahmatian *Copyright and Creativity* 49.

199 Although the present study is primarily concerned with copyright (and related rights), it is appropriate to address the issue of music business contracts here, because the assignment and licensing of copyright is often effected through contracts and must generally conform with contractual principles. In this regard see Dean *Copyright Law* 1-142, who, on dealing with the formalities required with respect to copyright assignments, writes: "… [N]o assignment of copyright … will be effective unless it is in writing, and signed by or on behalf of the assignor. There must, however, be an agreement to assign or cede, ie there must be a mutual intention to transfer rights by offer and acceptance. If the underlying agreement which gives rise to the assignment is invalid - for instance there was no consensus *ad idem* between the parties or there had been a *justus error* on the part of the parties - no valid assignment can take place even if on the face of it the requirements set forth in the Act have been met". Likewise, dealing with a non-exclusive licence the learned author writes (Dean *Copyright Law* 1-148): "A non-exclusive licence under the copyright in a work may be written or may even be inferred from conduct or implied. An implied licence is essentially an implied contract and it can be deduced from the conduct of the parties"; and on exclusive licence the author writes (Dean *Copyright Law* 1-149): "An exclusive copyright licence can be inferred from an agreement even though no specific mention is made of copyright".

200 UK Intellectual Property Office 2009 http://www.ipo.gov.uk/c-strategy-digitalage.pdf.

201 UK Intellectual Property Office 2009 http://www.ipo.gov.uk/c-strategy-digitalage.pdf 3.

through new model contracts and clauses and fair returns for use of their work …"[202] Similarly, the recent report of the Copyright Review Commission established by the South African government[203] to probe concerns and allegations regarding the music industry concluded that there were significant areas for improvement in contracts between recording entities and artists, as "[t]he transparency around the flow of funds between the various sources of income and the recording companies, and the computations of income available for distribution to the artists [was] limited".[204]

Consequently the report recommended the drawing up of standard recording contracts "that are fair to both sides … as a matter of urgency". The agreements are to be drawn up preferably by representatives of the music industry and musicians,[205] and made available to musicians, who should be urged to use them. They should be made available online and be referred to in educational courses for musicians as well as information pamphlets distributed by the dti[206] and the DAC.[207]

It is doubtful whether such "model contracts", apart from any sanction of law, would be widely used by parties on a voluntary basis. There would need to be some form of recognised structure, such as that used in the United States through the system of the American Federation of Musicians (AFM),[208] for the system to work. A system of mandatory, legislated material terms of such contracts, though poised to be controversial, would curtail any circumvention of the use of such contracts and the creeping in of publisher and record company "hard bargaining".[209] The appointment of a music industry ombudsman, as recommended by the Copyright Review

202 UK Intellectual Property Office 2009 http://www.ipo.gov.uk/c-strategy-digitalage.pdf 47.
203 Copyright Review Commission 2011 http://www.info.gov.za/view/DownloadFileAction?id =173384.
204 Copyright Review Commission 2011 http://www.info.gov.za/view/DownloadFileAction?id =173384 79.
205 Copyright Review Commission 2011 http://www.info.gov.za/view/DownloadFileAction?id =173384 104.
206 Department of Trade and Industry.
207 Department of Arts and Culture.
208 See in this regard American Federation of Musicians 2012 http://www.afm.org/.
209 This can be fashioned in a manner similar to consumer protection legislation, such as the recently-enacted *Consumer Protection Act* 68 of 2008 in South Africa.

Commission of South Africa,[210] would be good, as the ombudsman would be able to bridge any gaps that could arise in the negotiation of contracts by ensuring that these are consistent with any regulations or industry-agreed terms.

Taking a rather more radical stance, Reece-Davis[211] proposes a change in the law of contract itself in order to take into account:

> ... the relationship, the intensity of mutual respect and areas which will beg compromise, sensitive and personal issues of character development and personality shifts.[212]

In this regard Reece-Davis argues that artists consider the ownership of the signed paper contract and the application of their signatures to such paper as being "the manifestation of success", and that:

> ... [t]he ensuing relationship is taken for granted in that it is expected to flow, by both parties it seems, as if by magic from the signature to an idyllic future of creative satisfaction.[213]

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210 Copyright Review Commission 2011 http://www.info.gov.za/view/DownloadFileAction?id=173384 102.

211 Reece-Davis *Unconscionable Contracts*.

212 Reece-Davis *Unconscionable Contracts* 90-91.

213 Reece-Davis *Unconscionable Contracts* 90-91. In this regard Reece-Davis proposes that contract law needs to "provide a governance structure which would include provision of clear behavioural rules, *co-operation in mutual good faith* being key among them" (Reece-Davis *Unconscionable Contracts* 115). Reece-Davis relies, *inter alia*, on Roger Brownsword, who criticises "the standard western market-economics model … for distorting reality", and calls for a "new co-operative model of contract" (Reece-Davis *Unconscionable Contracts* 115-116). To illustrate this apparent co-operation, the case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* 1989 EWCA Civ 5 is cited, "where the Court of Appeal … saw the behaviour of the main contractor, in offering financial relief to a sub-contractor as of 'practical benefit' at the time. … [T]he carpenter [sub-contractor] realised that he had underestimated the cost of the work and he did not have the finances to cover the difference himself. When these financial difficulties came to light the main contractor agreed to pay a further £10.300 at the rate of £575 per flat, as each flat was completed." (Reece-Davis *Unconscionable Contracts* 116-118). When the main contractor reneged on this promise the question that had to be asked was whether the main contractor "was ever co-operating or only ever deceiving". To this Brownsword has responded by arguing that the presence of moral motivation "is the only clear basis by which co-operation can be distinguished, encouraged and treated as governable contractual conduct" and that the concept of co-operation "can only serve as a significant theoretical construct if it breaks free from the model of action-guided-by-self-interest which is central to the classical view of contract" (Reece-Davis *Unconscionable Contracts* 118).

Reece-Davis' views seem to accord with the position advanced by Okorocha[214] who, noting that courts have consistently refused to acknowledge that the relationship between the artist and the record label establishes a fiduciary duty between the parties because such relationship is based on contract and thus governed by traditional contractual principles,[215] argues that the new 360 recording deal has transformed the relationship between the parties into a fiduciary one because it gives rise to a partnership in respect of which parties to the relationship owe a fiduciary duty to each other.[216] Having said this, we perhaps need to accept that mandatory contractual rules in the field of authors' rights may not be sufficient to appropriately protect the author.[217]

6.4 Strengthening the role of collective management organisations (CMOs)

The role that the system of collective management of copyright - in this case music rights - plays has been spoken of on many an occasion.[218] This role has been seen to include (i) preventing the infringement of creators' copyrights and (ii) collecting royalties and distributing them to rights holders.[219] It has been said that this role of CMOs accords with the human rights nature of the rights of creators as provided for in the *International Covenant on Economic, Social and Cultural Rights*.[220] Notwithstanding this, the system of the collective management of copyright has not been without criticism.[221] However, Von Lewinski has argued that the criticism of the

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214 Okorocha 2011 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707679.

215 And further that additional factors would be required to change the relationship into a fiduciary one.

216 Okorocha 2011 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707679_1-2 and generally. For a more critical view of the 360 deals see Pierson 2010 *Entertainment and Sports Lawyer* 31-35; Basofin 2010 http://www.kentlaw.edu/perritt/courses/seminar/Basofin-360%20Deals-FINAL.pdf; Brereton 2009 *Cardozo Arts & Ent LJ* 167-197. For a view that seems to balance the pros and cons of 360 deals, see Karubian 2009 *S Cal Interdisc LJ* 395-462.

217 See Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf 2.

218 See for example WIPO *Intellectual Property Handbook* 387-400; UNESCO 2010 http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf 72-79.

219 See Helfer "Collective Management" 88.

220 Helfer "Collective Management" 87-90.

221 See generally in this regard Kretschmer 2009 *EIPR* 126-137.

system of the collective management of copyright generally emanates from competitors, "such as exploiting businesses who have an own interest in acquiring and exercising certain authors' rights"'; as well as those who are under legal obligation to pay a remuneration.[222]

CMOs - in particular performing rights societies, the first type of music rights societies - generally administer rights on the basis of the assignment of the rights by the rights holder to the society.[223] In this regard the society becomes the legal owner of the assigned copyright, while the author has the right to receive remuneration (in the form of royalties) from the society.[224] This basis for the administration of copyright by CMOs has often been criticised as being restrictive on "authors' possibilities".[225] It is submitted that this view is erroneous and, as Lewinski has noted, it is mostly vocally pronounced by music publishers, as they "have an own interest in acquiring and exercising certain author's rights".[226] An opposing - and it is submitted, correct - view in this regard is to the effect that CMOs play an important role by making it possible for rights holders "to retain exclusive control over their creative output".[227]

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222 Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771 svl_e.pdf/svl_e.pdf 1.

223 See WIPO *Intellectual Property Handbook* 391-392, in particular paras 6.143-6.145; and Kretschmer 2009 *EIPR* 134.

224 In the United States "an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees" is termed a beneficial owner, and is entitled to sue for infringement, in terms of § 501(b) of the US *Copyright Act*. See in this regard *Warren v Fox Family Worldwide Inc* 328 F3 d 1136 (2003) 25.

225 See Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771svl _e.pdf/svl_e.pdf 2. See also Kretschmer 2009 *EIPR* 132, who recounts how "the most thorough study of the internal workings and competitive environment" was conducted by the British Monopolies and Mergers Commission (MMC) in 1994-5 as a result of a complaint from the pop group U2, "that they were forced, under the terms of membership, to assign all performing rights to the PRS". Note that it is generally performing rights societies that administer copyright on the basis of the assignment of rights. In the case of mechanical rights, publishers, who "have always had the upper hand" (Kretschmer 2009 *EIPR* 129), generally own the rights, and societies mainly operate as agents. In some secluded cases (such as in the United States) performing rights societies have also administered rights on the basis of licences (whether exclusive or non-exclusive).

226 Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/ svl_e.pdf 1.

227 Helfer "Collective Management" 88.

In this regard it could be argued that CMOs are important "regulatory instruments"[228] in ensuring that authors' copyrights are preserved and insulated from the predatory actions of certain entities[229] having no interest in forming mutually-beneficial partnerships with authors. Von Lewinsky notes the scenario where "exploiting businesses" (ie publishers and record companies) often lobby in favour of exclusive rights rather than the remuneration right controlled by societies, knowing that they would control the exclusive rights "and exercise pressure on authors to revoke rights from the collecting society in order to assign them to the exploiting businesses".[230] This pressure from publishers is all too common, and though it has been resisted again and again, continues to gain momentum. In South Africa, SAMRO[231] has in recent times, experienced this pressure from publishers.[232]

Contrary to what the publishers are alleging, in the society system authors have true freedom and control over their rights. As an example, the rights assigned to SAMRO are of a reversionary nature, devolving back to the author upon the termination of the author's membership of the society. In this regard SAMRO acts as a repository of the member's rights, as it would seem, keeping them for the member until such time as the member feels that he or she can administer the performing rights on his/her own. On the other hand, once copyright has been assigned to a music publisher the

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228 The phrase "regulatory instrument" is borrowed from Kretschmer 2009 *EIPR* 126-137, who argues that if copyright societies are to survive, there should be a coherent move to transform them into regulatory instruments (Kretschmer 2009 *EIPR* 136).

229 Eg some music publishers.

230 Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf 1, n 5.

231 The Southern African Music Rights Organisation, a multi-purpose CMO whose main function and expertise has been in the administration of performing rights. (It has since taken on the administration of mechanical rights and needle-time rights). SAMRO is the largest and most functional CMO in Africa in terms of both size and revenue.

232 The author is aware of this through his previous involvement with SAMRO as Corporate Counsel and Secretary, as well as his continued involvement with the music industry. The publishers demand that SAMRO (whose only concern should, according to them, be the distribution of royalties to its members), should not administer the rights on the basis of a deed of assignment but rather on the basis of an exclusive (or even non-exclusive) licence. Some have argued that in basing the relationship with members on assignments, SAMRO is competing against its own members (i.e. the publishers of course!). As Von Lewinski has noted (Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf 1), it is very clear that the publishers' motivation in this regard is not to give authors control over their copyrights, but rather to get an opportunity to own these rights by pressurising the authors to assign the rights to them.

author is completely divested of any form of control and ownership thereof, and unless the copyright law contains reversionary provisions,[233] will not be able to regain ownership of the copyright unless the author buys back the rights from the publisher.[234] Moreover, once the copyright is assigned to the publisher, the publisher may further assign it to others without the consent or input of the author. Rights assigned to societies may, however, not be assigned to other parties except in reciprocal agreements with other societies, to ensure the protection of the author's works in foreign territories. Such assignment to foreign societies is linked to the assignment of the rights to the author's CMO, however, so that if the author terminates his or her membership of the CMO, the assignments to the foreign societies are also withdrawn. In this regard, as Lewinski has noted, CMOs strengthen the position of authors with regard to their weak bargaining position vis-à-vis publishers, and thus:

> ... [a performing] right administered by a collecting society is likely to benefit the author more than an exclusive right assigned to the exploiting businesses.[235]

According to Kretschmer, criticism against the current collective management system would relate to the fact that in this system copyright is seen as a transferable property right resulting in the transaction cost approach to collective administration, and that this "has led to an inherently unstable situation, littered with governance problems".[236] For the system of collective administration to survive there would therefore have to be either (i) a more thorough application of economic analysis and competition law, acknowledging "an individualised property entitlement premise" or (ii) a rethinking of the "substance of the law of copyright itself"'.[237] In the first instance Kretschmer argues that societies would have to discard their cultural and

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233 The South African law does not, except in respect of those rights that may still be protectable in terms of the British *Imperial Copyright Act* (and its incorporation into South Africa through the *Patents, Trademarks, Designs and Copyright Act* 9 of 1916).

234 That is, if the publisher would be willing to sell!

235 Von Lewinski 2004 http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf 2.

236 Kretschmer 2009 *EIPR* 135.

237 Kretschmer 2009 *EIPR* 135.

social services to members,[238] leaving collective management as much as possible to the market and "perhaps allowing publisher-dominated societies and competition for the services of rights administration".[239]

According to Kretschmer, under such circumstances the term of protection for copyright would have to be reduced to take into account the product cycle of cultural products, which is between five and twenty years - a proposition that would be illusory in view of inclusion of copyright within the WTO system.[240] In the second instance copyright societies would function as regulatory instruments operating on a different copyright rationale based on the principle that "wherever commerce is generated through the use of creative content, a share of revenues should flow back into creative production".[241]

7 Conclusion

The present article has sought to unravel the enigmatic phenomenon of failure by developing nations, in particular countries in Sub-Saharan Africa, to realise economic development based on the copyright industries, in particular the music industry. The enigma, or mystery, is accentuated by the fact that these countries have a rich endowment of cultural resources and, in most cases, have enacted modern copyright laws. The region is endowed with many creators whose works are eligible for copyright protection. If entrepreneurship leads to economic development and growth, as studies have shown, the question then has to be asked as to why Sub-Saharan African countries have not used copyright-based (and in this case, music-based) entrepreneurship to realise this development and growth. Why have Africans, although richly endowed with copyrightable material which can easily, at zero-level

238 Such as support for music education programmes and pension funds for musicians, which though forming an integral part of European societies based on the *droit d'auteur* system, enrages Anglo-American rights holders (Kretschmer 2009 *EIPR* 134) (it could be added, "publishers in particular"). In this regard Kretschmer has noted that while European societies were generally started by authors, the English societies were started by publishers (Kretschmer 2009 *EIPR* 128-130).

239 Kretschmer 2009 *EIPR* 135.

240 Kretschmer 2009 *EIPR* 135.

241 Kretschmer 2009 *EIPR.* 135.

costs, be converted into rent-bearing copyright capital, not drawn from this rich pool of copyright resources in order to turn Africa's fortunes around?

An analysis of the factors that induce or inhibit entrepreneurial motivation has shown that there are no special conditions that attach to the copyright system *per se* that could be said to explain this failure to realise economic growth and development as other countries have. What has emerged, however, is that the special conditions prevailing in these countries, namely deep-rooted poverty levels, have accentuated the recognised barriers to entrepreneurship in these countries, thus stifling entrepreneurial endeavour. This has, perhaps inadvertently,[242] led to a situation where the copyright systems used in these countries,[243] in particular the transferability principle integral to these systems, have proven to work to the disadvantage of these countries. Because of the entrepreneurial barriers endemic to these countries, in particular the lack of resources to exploit copyright works in the commercial market, African authors have to look for benefactors to help them exploit their works.

Under these circumstances, the transferability rule intrinsic in the prevailing copyright systems induces a situation where the would-be benefactors "require" the authors to assign (meaning transfer ownership of) their copyright to them, usually in exchange for some uncertain, possible future royalty income.[244] Because of their

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242 Although it could be argued that this unfairness is inherent in the historical development of the patrimonial copyright system itself, in respect of which it has been observed that although the book publishers who lobbied for the enactment of the *Statute of Anne* employed rhetoric that seemed to favour authors, arguing that "failure to continue exclusive rights of printing had resulted in disincentives to writers" (Garnett, Davies and Harbottle *Copyright* 37-38), in reality they thought only of benefiting themselves and "had no thought of bringing prosperity to the trade of author". Per Harms JA in *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 786 JOC (A) para 11.

243 Which are largely based on the English common law system and the French dualist system.

244 Admittedly there are those established music publishers who give "advances" (ie advance payments) to authors. However, in such instances authors have often found that they remain in an "unrecouped" state - ie, they remain indebted to the publishers for the advances, and rather than starting to count the income received from real royalties, they get entangled in an endless cycle of having to ask for more advances, repaying them through future royalties and thus, being without money, asking for further advances. For this phenomenon in the recording industry (which works similarly in the publishing industry) see Passman *All You Need to Know* 94-96. To illustrate this situation, the well-known and celebrated R&B star, Whitney Houston, who passed away recently, would be the envy of many for her fame - and wealth. In actual fact, however,

position of disadvantage, the authors often "negotiate"[245] from a point of low bargaining power and inequality, and cannot counter the strong market forces that seek to derive the best benefit from this situation of weakness. The problem that arises is that when these authors do later attain the ability to embark on entrepreneurial activities (as a result of having accumulated savings to do so), they are not able to engage in entrepreneurial activities in respect of their copyright works because these would have been assigned to others. The lack of reversionary provisions in the copyright laws of these countries exacerbates this situation.

It is therefore submitted that the system of alienable copyright is not conducive for countries in Sub-Saharan Africa and cannot, unless the legislatures of these countries intervene, ever give rise to a sustainable, home-bred and poverty-alleviating industry.[246] African nations should free themselves from the shackles of this system, with its sacrosanct rule of alienability, which creates an endless cycle of impoverished creators who cannot participate meaningfully in entrepreneurial activities relating to their copyrights. Rather than holding to the tenets of a system that has so far failed their countries, it would be responsible for the legislators of these countries to start thinking of those elements in other copyright systems (in particular the monist system) that they can incorporate into their laws to unshackle their authors from the harsh effects of the transferability rule. As shown above, India has blazed the trail in this regard.

Likewise, a call is made for legislatures in Sub-Saharan Africa to take advantage of the evolutionary nature of copyright and its changing paradigm internationally, in which the distinction between the common law and civil law system of copyright is

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the star is reported to have died broke and to owe her record company, Sony Music, millions in advances (despite the fact that her albums have, themselves, sold many millions). It has been reported in this regard that she would need to sell 5 million albums posthumously "to repay her advances and start to receive royalty checks". See Rosso 2012 http://www.waynerosso.com/2012/02/29/whitney-to-sony-i-will-always-owe-you/.

245 If any negotiation does in fact, take place. Often the author is given a bulky contract strewn with Inns of Court "legalese", the terms of which are in the main held to be standard and near sacrosanct.

246 The emphasis is not on GDP growth or numbers here, which can be easily achieved through the activities of foreign firms, but on home-bred entrepreneurship that uplifts the standards of living of creators.

becoming blurred. In this regard they should feel free to incorporate elements of the civil law authors' rights system into their copyright laws, as many developed countries have also done. This will ensure that their copyright laws make it possible for their artists to better benefit from the exploitation of their works. Furthermore, it is submitted that this will make it possible to achieve the copyright-based economic development that has so far evaded these countries. Aspects of the monist system of authors' rights would, in particular, be best suited for the conditions that prevail in Sub-Saharan Africa. The benefit to authors of the civil law system (in particular the monist system) has been well-identified. In this regard no less eminent authors than the authors of the equally seminal work, *Copinger and Skone James on Copyright,*[247] have remarked:[248]

> In relation to his economic rights, the civil law systems recognise that authors *may have a weak bargaining position* and so tend to place obstacles in the way of out-and-out alienation of the author's right.

Thus, while the common law system "has taken a more commercial … view towards copyright",[249] the civil law system "finds expression in restrictions on the market transfer and waiver of copyright".[250]

Certain recommendations were made as to how to deal with the situation, namely (i) making use of copyright reversionary provisions; (ii) doing away with the transferability rule (making provision for the transmission of copyright to be done solely by way of licences)", (iii) structuring music rights contracts with government intervention to ensure their fairness to all parties concerned, and (iv) strengthening the role of copyright societies.

The question may be asked as to why, if the transferability principle is to blame, Hollywood (or even Bollywood), have been successful, seeing that both the laws of the United States and those of India are based on this principle. This question

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247 Garnett, Davies and Harbottle *Copyright.*
248 Garnett, Davies and Harbottle *Copyright* 228. (Emphasis added)
249 Garnett, Davies and Harbottle *Copyright* 229.
250 Netanel 1994 *Cardozo Arts & Ent LJ* 2.

would, however, miss the central argument advanced in this paper, namely that because of the conditions that prevail in Sub-Saharan Africa, in particular the strong barriers to entrepreneurship, many authors are not able to engage in entrepreneurial activities in relation to their copyright works. This leads to situations of unequal bargaining when negotiating with would-be benefactors, who take advantage of the transferability principle in the copyright system to completely divest the author of his copyright in conditions that are generally not beneficial to the author.

It is not herein contended that the system of transferable copyright is inherently evil, but that it is not suited to the conditions that prevail in Sub-Saharan Africa. In the same vein it is submitted that the monist system of inalienable rights would be more suited to such an environment. The transferability principle works well in the United States (and arguably in many other developed nations) for the following reasons: (i) the United States has a strong support system for budding entrepreneurs, including creative entrepreneurs[251] and (ii) owing to better standards of living, the problem of unequal bargaining can be better dealt with in such an environment.[252]

The question will then be asked as to why Bollywood has been "successful", seeing that India is a developing country and does not display the features mentioned in relation to the United States. Regarding this question, the aim of this paper needs to be more clearly understood. This paper is concerned with artist-led entrepreneurship. In other words, it is concerned with economic development rather than economic growth *per se*, as expressed in GDP growth and market productivity. It is concerned with an entrepreneurial revolution sparked by the grassroots activities of authors, which would ultimately result in both economic growth and the improvement of living standards, thus alleviating poverty.

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251 The US remains the "dominant force in global entrepreneurship". See in this regard Clifford 2013 http://www.entrepreneur.com/article/228128. Initiatives like the JOBS Act in the United States (the *Jumpstart Our Business Start-ups Act* of 2012) ensure that an environment conducive to entrepreneurial endeavours exists in the United States, and enables budding entrepreneurs to take advantage of such entrepreneurial revolutions as the new trend of "crowd-funding", which has been used very successfully in the creative industries.

252 I.e. people are more knowledgeable about their rights; they can afford lawyers to represent them in such deals, and their levels of competition are high, minimising exploitation through unequal bargaining.

Despite the "success" of Bollywood in relation to its contribution to GDP growth,[253] it needs to be noted that this success has generally been a success of the few, in many cases riding on the backs of creators.[254] It is interesting to note that in this case it was particularly the transferability principle contained in the Indian *Copyright Act* 14 of 1957 that came under strong criticism for having contributed to the exploitation of authors by Bollywood producers, and which formed the subject of many of the 2012 amendments to the Indian *Copyright Act*.[255] Thus, while it can be said that Bollywood has been successful, this success has generally been at the expense of authors and goes counter to the arguments advanced in this paper. In this regard, whether in India, Ethiopia, Francophone Africa, Anglo-phone Africa or elsewhere, the transferability principle always rears its (ugly) head.

Furthermore, the question may be asked as to whether, if there is an accused (namely the transferability principle), there should also not be a co-accused - or even if the complainant (ie countries in Sub-Saharan Africa, duly represented by the current author!) should not also share in the blame. That, indeed, would be a valid question. In the current work, it is the condition of barriers to entrepreneurship endemic in Sub-Saharan Africa that must answer to the charge of co-accused. If this condition were not prevalent in this region the arguments advanced herein would have been rendered redundant.

As to also blaming the complainant, indeed the complainant should not completely go without blame. African countries need to work with dogged determination to improve their plight and to create healthy environments for entrepreneurial activity.

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253 See in this regard PriceWaterhouseCoopers 2010 http://www.mpaa-india.org/press/EconomicContribution.pdf, where it is shown that these industries contributed 0.532% of the GDP, beating the advertising industries.

254 See for example in this regard Banerjee and Gokhale 2010 *NUJS L Rev* 53-76, where the authors highlight the problem of inadequate bargaining power in the Indian film industry (see in particular Banerjee and Gokhale 2010 *NUJS L Rev* 76, where the authors lament the fact that "… controversies like the one that arose regarding '*3 Idiots*' will continue to arise where even widely read and popular authors are ripped of credit … for a paltry amount of money just because of absence of adequate bargaining power". For other examples of exploitation see Yeluri 2013 http://artistiklicense.wordpress.com/2013/08/07/coming-soon-minimum-basic-agreement-for-screenwriters-in-india/; Child *The Guardian.*

255 See in this regard Reddy 2012 *NUJS L Rev* 469-527, for an impressive narration of this historical exploitation of artists and how this led to the 2012 amendments.

In this regard it is, however, submitted that the world (and especially Africa's erstwhile colonisers) needs to be sympathetic to Africa's struggles. Although weight should be attached to the argument that Africa needs to cease blaming its ills on its colonial past, voices arguing that external, international forces remain to blame for Africa's current condition need also to be given audience.[256]

[256] See for example in this regard Alemazung 2010 *JPAS* 62-84

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LIST OF ABBREVIATIONS

AMF	American Federation of Musicians
Ariz J Int'l & Comp Law	Arizona Journal of International and Comparative Law
BTLJ	Berkerly Technology Law Journal
Cardozo Arts & Ent LJ	Cardozo Arts & Entertainment Law Journal
CMO	Collective management organisation
Colum Hum Rts L Rev	Columbia Human Rights Law Review

DAC	Department of Arts and Culture (South Africa)
DALRO	Dramatic, Artistic and Literary Rights Organisation
DTI	Department of Trade and Industry (South Africa)
Duke J Comp & Int'l L	Duke Journal of Comparative & International Law
EIPR	European Intellectual Property Review
EJCL	Electronic Journal of Comparative Law
FDI	Foreign direct investment
IJMBR	International Journal of Music Business Research
ILO	International Labour Organisation
J Copyright Soc'y USA	Journal of the Copyright Society of the USA
J Marshall Rev Intell Prop L	John Marshall Review of Intellectual Property Law
JPAS	Journal of Pan African Studies
Ky LJ	Kentucky- Law Journal
Loy LA Ent L Rev	Loyola of Los Angeles Entertainment Law Review
NUJS L Rev	NUJS Law Review
Pace Int'l L Rev	Pace International Law Review
S Cal Interdisc LJ	Southern California Interdisciplinary Law Journal
S Cal L Rev	Southern California Law Review
SADC	Southern African Development Community
SAHO	South African History Online
SAMRO	Southern African Music Rights Organisation
SA Merc LJ	South African Mercantile Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UTLJ	University of Toronto Law Journal
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
W New Eng L Rev	Western New England Law Review
WIPO	World Intellectual Property Organisation

DEMYSTIFYING THE ROLE OF COPYRIGHT AS A TOOL FOR ECONOMIC DEVELOPMENT IN AFRICA: TACKLING THE HARSH EFFECTS OF THE TRANSFERABILITY PRINCIPLE IN COPYRIGHT LAW

JJ Baloyi*

SUMMARY

In the English common law tradition copyright is seen as being in the nature of a property right and thus alienable and transmissible from one person to the other. In contrast, the *droit d'auteur* system of Continental Europe sees copyright as being an author's right, which attaches to the personality of the author. However, even in this system a distinction can be made between the monist system (as applies in Germany), which treats both moral rights and economic rights as being inseparable and thus equally inalienable, and the dualist system applicable in France, which distinguishes between moral and economic rights, with the former considered inalienable, while the latter is freely alienable. In this way French law embodies the transferability principle in respect of economic rights, in the same way as the Anglo-American system does. Many countries in Sub-Saharan Africa have inherited copyright laws from their erstwhile colonial masters (whether England or France), resulting in the laws of these countries also embodying the transferability principle. It is argued, however, that the transferability principle has had the inadvertent effect of stifling copyright-based entrepreneurship, and thus economic development in these countries. Because of the conditions of impoverishment prevailing in these countries, authors find that they do not have the material resources to economically exploit their copyright works. They thus have no option but to assign their copyrights to others, mainly foreign entities, resulting in an endless cycle where they can never act entrepreneurially in respect of their copyrights. The paper seeks to explore this phenomenon and make proposals of possible solutions.

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KEYWORDS: Entrepreneurship; Barriers to entrepreneurship; Copyright; Authors' rights; *Droit d'auteur;* Anglo-American law; Continental system; Monist; Dualist; Transferability; Sub-Saharan Africa