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Abezimu/Badimo (ancestors) and copyright law: a decolonial exploration of the literary exception¹

Abstract

Heeding to the call to decolonise higher education and the law, in this article, I embrace a decolonial lens to grapple with copyright law in South Africa, and specifically the subject of authorship. The central claim is that *Abezimu/Badimo* (ancestors) are an author in a decolonised notion of copyright law. Whilst this claim is supported by scholarly interventions, as regards the essence of a pluriversal author, the objective is to substantively authenticate the central claim by drawing from contemporary African literature. Specifically, the article engages two of Mphuthumi Ntabeni's works, these are his debut novel, *Broken River Tent*, and as well as his subsequent novel, *The Wanderers*. As part of this authenticating exercise, I contend

¹ Portions of this article are drawn from my PhD thesis titled: "*Abezimu/Badimo* (ancestors) and copyright law: From the *Decolonial Turn* to the *Pluriversal Author*". I wish to thank my former supervisor, Prof Caroline B. Ncube for her guidance and intellectual support throughout the course of the PhD journey. This article is dedicated to her. I also wish to thank Ms Nobusi Mkhize for research/editorial assistance. The usual disclaimers and caveats apply.

with Johan van der Walt's insights in relation to what he calls "the literary exception". The latter proffers an incisive critique of some approaches in the field of law and literature. I figure that van der Walt requires some engagement, especially if one is to succeed in relying on African literature to authenticate/qualify the central claim that *Abezimu/Badimo* (ancestors) are an author in a decolonial understanding of copyright law.

Keywords: copyright law, authorship, ancestors, decolonisation, African literature, literary exception

Introduction

In the years 2025 and 2026, South Africa commemorates the 10th anniversary of the #FeesMustFall and #RhodesMustFall protests. This anniversary affords the South African academy an opportunity to reflect on the meaning and import of these protests on the present and future of South Africa's higher education. As has been previously demonstrated by various decolonial scholars and activists,² these protests specifically called for the decolonisation of the university.³ These calls presented a profound provocation particularly to law teachers because, unlike academics from other academic disciplines, those of us who

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- 2 With the advent of the #RhodesMustFall, #FeesMustFall and #OutsourcingMustFall moment, there was a revival of decolonial literature and scholarship. The prominent scholars of decoloniality include Walter Dignolo, Ramon Grosfoguel, Maria Lugones, Enrique Dussel, Sabelo Ndlovu-Gatsheni, Nelson Maldonado-Torres, Boaventura de Sousa Santos, Arturo Escobar, and many others. I consider the prominence of this brand of decolonial critique (in the aftermath of the #MustFall moment) as an addition to decolonial intellectual traditions that already existed before them. For example, there already existed strong decolonial schools in Africa, and among African scholars in Africa and the diaspora, inclusive of works that spoke to Afrocentricity, African history and the need to re-center African ways of knowing, doing and Being. Some of the Afrocentric scholars include the likes of Molefe Kete Asante, Walter Rodney, Ali Mazrui, Issa Shivji, Peter Ekeh, Mwalimu Julius Nyerere, Dani Wadada Nabudere, Kwame Nkrumah, Simphiwe Sesanti, Takatso Mofokeng, Allan Boesak, Itumeleng Mosala, W.E.B Du Bois, George Padmore, Amílcar Cabral, Cheik Anta Diop, and many others. My reliance on latter-day decolonial scholars, particularly those from the Latin-American and Afro-Marxist intellectual traditions, must not be misconstrued as a rejection of the work that has already been done by Afrocentric and African decolonial scholars. I am comfortable that latter-day decolonial scholars proffer a useful grammar for us to be able to decisively critique the vestigial force of colonialism.
 - 3 Martinez-Vargas C "Decolonising higher education research: from a uni-versity to a pluri-versity of approaches" (2020) *South African Journal of Education* at 112, see also Vorster J & Quinn L "The 'decolonial turn': What does it mean for academic staff development" (2017) *Education as Change* at 31.

teach the law were called upon to not only reflect on pedagogical questions, but also on the relationship between law and society.⁴ The #MustFall protests, and the voices of students were loud in reminding us that the law is, and has always been, an instrument used by the ruling class elites to preserve and maintain their control over society. This claim compelled us to reflect deeply on questions such as, what does teaching and doing law mean, in the context of coloniality and the afterlife of apartheid. Moreover, law teachers were invited to confront the continuing dominance of white/European intellectual traditions in the law, even after over three decades of the supposed end of apartheid and colonialism.⁵

In the quest to decolonise copyright law in South Africa,⁶ I make the claim that *Abezimu/Badimo* (ancestors) are an author. To defend this claim, I begin by qualifying the epistemic conditions that foreground it. These are the coloniality of knowledge and the coloniality of power, which have confined the development of copyright law doctrine to Eurocentric/colonial ways of Being and knowing. It is my argument that to move close towards succeeding in the task of attaining the desired goal of a decolonised copyright, these conditions must be dismantled. Thus, a different thinking about concepts/themes/subjects that define the essence of copyright is imperative. As will be observed later, beyond strictly scholarly literature, I rely on the theoretical approaches proffered in the field of Law & Literature, specifically contemporary African literature to substantively authenticate and demonstrate the authoring hand of *Abezimu/Badimo* in copyright. The scholarly soundness of Law & Literature methodology is itself contested, as a result, it requires some engagement. As

4 Zitzke E "A decolonial critique of private law and human rights" (2018) *SAJHR* at 494

5 This assertion must not be misconstrued to mean for an inclusionist/vindicationist conception of decoloniality. As will be demonstrated throughout the course of this article, the argument that *Abezimu/Badimo* (ancestors) are an author is not meant to say that the present copyright framework needs to "include" African epistemologies. On the contrary, the argument is a critique, not of incompleteness, but rather of universalistic colonial conceptions of law. Simply put, I am not merely concerned with what the law is or even what it should be, in the aftermath of colonial disturbance, but I am also contending with problematic Eurocentric conceptions of law.

6 Discussions about decolonising intellectual property in South Africa are not new, there has been some work that has been done, for example, see Ncube CB "Decolonising intellectual property law in pursuit of Africa's development" (2016) *The WIPO Journal* at 34, where she proffers an extensive yet introductory synopsis of how to actualise/realise Africanisation in the sphere of intellectual property law/rights. See also, Dladla N "African Approaches to Intellectual Property: Intellectual Property, Development and the Contested Meanings of Decolonisation" (2025) *International Journal of Critical Diversity Studies* at 111.

a point of entry, I rely on some aspects of decolonial theory to briefly engage Johan van der Walt's *The Literary Exception and the Rule of Law*, not as a rebuttal but rather as an attempt to qualify my reliance on the approaches of Law & Literature, and specifically contemporary African literature.

Accordingly, the argument of this article is propounded in six segments. Following this introduction, the second segment tentatively introduces the method of Law & Literature and uses a decolonial lens to qualify its suitability in the task of authenticating the authoring hand of *Abezimu/Badimo* (ancestors) in copyright law. The third segment proffers a broad overview of the prevailing copyright and authorship definitional paradigm in South Africa's legislative schema. The fourth segment foregrounds the central claim of this article, that *Abezimu/Badimo* (ancestors) are an author in a decolonial conception of copyright law. The fifth segment turns towards African Literature to epistemically authenticate the authoring hand in a decolonised conception of copyright. The sixth and final segment concludes this article.

Law & literature: qualifying a decolonial exploration of the 'literary exception'

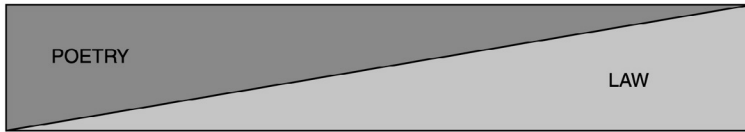
Whilst it is difficult to wholly unpack van der Walt's argument as regards what he calls the 'literary exception', I tentatively sum up his insights to reflect a summarised version of his argument. He opines that there are constitutive characteristics that make law & literature to be fundamentally different from each other – this is what he refers to as the "law-literature divide".⁷ Notwithstanding this divide, van der Walt observes that law and literature take leave from each other, yet do not meet each other.⁸ Furthermore, he insists that the fundamental contradictions are caused by the active refusal of literature to be law.

At best, it (literature) can be a mundane accomplice of regular law but can never be law itself.⁹ This argument is broadly illustrated by way of the image below:

7 Van der Walt *The Literary Exception and the Rule of Law* United Kingdom: Routledge (2023) at 4.

8 Van der Walt (2023) at 4.

9 Van der Walt (2023) at 7.



To be sure, in the image above poetry/literature and the law are always existing side by side and sometimes come very close to each other but they never mix. Accordingly, literature is always the exception, either to explain the law or for illustrative purposes, but it can never be the law. Van der Walt explains that law, in whatever format it may be, is always something very different from poetry and art.¹⁰ Fundamentally, this is because, according to him, the law is not a form of discourse, and it is not in search for any openness or emptiness – unlike literature.

This meaning of the literary exception could be explored and studied by way of using a decolonial lens. By “decolonial lens”, I am referring to the radical, critical and left-leaning scholarly approaches¹¹ that are employed by various young Black South African academics in their respective fields and disciplines of study.¹² At the heart of these approaches lays four indubitable objectives, (1) to honor the invitation of the #MustFall movement to question all presently accepted colonial structures,¹³ norms and systems,¹⁴ (2) to undo and reverse colonial racist theft of colonised people’s cultures, languages and

10 Van der Walt (2023) at 19.

11 Tamale S *Decolonization and Afro-Feminism* Ottawa: Daraja Press (2020) at 2.

12 See for example Boleu B, Shange NT & Ntsele B “Wrestling to Exist: Womanist Struggles of Junior Scholars in South African Higher Education Institutions” (2023) *Pan-African Conversations* at 122. See also Shange NT “Mappings of feminist/womanist resistance within student movements across the African continent” (2017) *Agenda* at 60; Tonono S “Crafting a decolonial economic order for ReAfrikanisation in the context of South Africa” (2018) *Africanus: Journal of Development Studies* at 1; Motimele M “The Rupture of Neoliberal Time as the Foundation for Emancipatory Epistemologies” (2019) *South Atlantic Quarterly* at 205; Shange N “African Ubuntu Humanness Ontology and Ecological Connection” (2024) *Environmental Justice* at 4; and Mzileni P “Informal Education and Collective Conscientisation in the #FeesMustFall Movement at Nelson Mandela University” (2020) *Educational Research for Social Change* at 15.

13 See generally, Maluleka P “Fallism as decoloniality: Towards a decolonised school history curriculum in post-colonial-apartheid South Africa” (2021) *Yesterday and Today* at 68

14 Behari-Leak K & Chetty R “Drawing a line in the sand: social mapping of responses to calls to decolonise the university” (2021) *Journal of Decolonising Disciplines* at 9.

knowledges,¹⁵ (3) to creatively chart an alternative path for worldmaking¹⁶ outside of colonial strictures and sensibilities, and (4) work towards building a new face for humanity,¹⁷ where the dehumanized are re-membered into the family of humans. Accordingly, this is what constitutes a decolonial lens, and it is with such a lens that the literary exception could be explored. A decolonial exploration of the literary exception, as will be shown later, allows space for a decisive reliance, specifically on African fiction, to ascertain the law(s) of the colonised.

Various scholars in the field of Law & Literature contend that the field's *raison d'être* is multi-pronged. The most incisive aspect of literature is that it affords writers a lot more freedom to grapple with societal issues, as compared their academic and non-fiction contemporaries. Writers of fiction often have the epistemic freedom to engage with topics without the strict demands of empiricism and other (albeit necessary) scholarly peer-review hurdles. Whereas all forms of writing are intended to engage society, fiction authors are said to be burdened with the task of being the mirror of society. This burden is even heavier on writers of African Literature, whose mirror must reflect not only the violence of colonial disturbance, which continues to shape the epistemic and ontological patterns that define the lives of African peoples but must also show that African peoples have epistemologies/axiology that pre-date and have survived colonial disturbance, erasure, epistemicides, historicides and linguisticides. A good example of this can be evidenced in how various generations of African authors have gone to great lengths to mirror ancestral veneration/acquiescence/deference/reverence in African societies. As argued in this article, the reverence/deference to *Abezimu/Badimo* (ancestors) can be associated with faith systems, and even religiosity, however it may take the component of being an epistemic tradition. Simply put, the deference/reverence to *Abezimu/Badimo* (ancestors), may be a way of knowing, and a way of being.

Epistemic freedom, as defined by various decolonial scholars, takes different shapes and meanings. Epistemic freedom is evidenced in the ability of thinkers and writers to express themselves freely, without the fear of error and without relying on prevailing colonial/Eurocentric epistemic curtailments. I

15 See generally, Sindane N "Decolonial Musings about Constitutionalism, the Constitution, and Democratic Future(s)" (2024) *Law and Critique* at 553-570.

16 See generally, Escobar A *Designs for the Pluriverse* Durham, North Carolina: Duke University Press (2017) at 19.

17 Biko S *I write What I like* London: Bowerdean Press (1978) at 96.

contend that, in the context of authenticating *Abezimu/Badimo* as an author in copyright law, it is crucial to rely on African writers of fiction precisely because they tend to enjoy a higher level of epistemic freedom than their non-fiction (and indeed academic) counterparts.

The approach of using African¹⁸ fiction¹⁹ as an effort to establish the basis of an argument is a method that is proposed by some South African critical legal scholars – they have argued that part of decolonising the law school includes using music, visual art, idioms, sayings, poetry and African fiction to articulate the law.²⁰ Modiri explains that the quest to transform the LLB curriculum requires a decisive shift from traditional sources/content/methods of teaching:

To read, one must be able to read not only words and sentences but also to read and interpret worlds and senses, to trace the effect, histories and narratives that structure legal texts, to be attentive to complexity, to absences and to the constitutive power of language. Students should be exposed to more than just cases, textbooks and journal articles, but also novels and poems. Analytical skills on this view ought to consider not only the logic of an argument but also the ideology and world-sense it represents.²¹

18 See generally, Lushaba L *Theoretical Reflections on the Epistemic Production of Colonial Difference* (Doctoral Dissertation, University of Kwazulu-Natal, 2015). Lushaba begins the prologue of his thesis with an excerpt from Chinua Achebe's classic novel, *Things Fall Apart*, he then proceeds to use this excerpt to relay Achebe's storyline as it comports to the thesis of the argument of his dissertation. As regards using African literature and Achebe specifically, Lushaba counsels: 'The novel should be read not as a eulogy for an idyllic Igbo past. Its main concern which the present study shares is the life of colonial cultures in the era of Empire.' In this image, Lushaba explains that there is a multipronged function to novels, they do not only serve to preserve the history/imagery of a people, but they embody the study of colonial cultures.

19 See also, Achebe C *Things Fall Apart* London: Heinemann (1958). I cite this novel specifically because, apart from how it is handled in the Lushaba thesis above, it holds true as regards the central argument of this article. For example, there are numerous accounts in the novel where Achebe demonstrates the visible hand of ancestors in the lives of African people – this emergence of ancestors does not appear as an episode or a once-off occurrence, but it is a way of life. As early as the fifth page of the first chapter, Chinua relays how Unoka broke the kola nuts and prayed to ancestors for life and health, and for protection against enemies. In the third chapter, similar themes emerge where Africans are said to be consulting seers who were able commune with the spirit of the departed. This is a common thread through the varying facets of the storyline.

20 Modiri J "The time and space of critical legal pedagogy" (2016) 27 *Stellenbosch Law Review* at 527.

21 Modiri (2016) at 527.

In Modiri's considered analysis, efforts to comprehend legal texts require a deeper imagination and must involve interrogation and searching.²² This includes a commitment to a legal intellectual inquiry that moves beyond legislation, case law, textbook, heads of argument, summons, particulars of claim, founding affidavit, responding affidavit, and other usually accepted legal practice material.²³ Any attempt to think anew about law concepts, such as authorship in copyright law, would be unserious if it assumes a superficial box-ticking exercise where the underlying formalist, liberal legal, Eurocentric and modernist paradigm of law is maintained,²⁴ in the sense that it insists on only drawing from traditional sources of law.²⁵

Some critical legal scholars have advanced the approach of using music, art, idioms, sayings and African fiction in various ways. Fagbayibo explains that the idea of using music to provide a multidimensional perspective of international law does not seek to do away with traditional academically published scholarship. Instead, it appreciates that extratextual materials are key to challenging the self-contained, esoteric conception of mainstream international law.²⁶ Fagbayibo's argument appreciates that the epistemic traditions of African peoples perceive knowledge systems as conjoined rather than disjointed intellectual arenas. He makes a similar argument in 'Critical Pedagogy of International Legal Education in Africa: An Exploration of Fela Anikulapo-Kuti's Music', where he demonstrates that music (and therefore art and literature) has a particular place and a significant role in the societal configurations and pedagogical mechanisms in the African context.²⁷ At a practical level, Fagbayibo

22 Modiri (2016) at 528.

23 Modiri (2016) at 528.

24 Modiri (2016) at 529.

25 The call by decolonial and critical legal scholars for a turn to non-law material to interpret the law is something that is not always accepted in South Africa's academy, see for example Gravett W "Pericles should learn to fix a leaky pipe – why trial advocacy should become part of the LLB curriculum (Part 2)" (2018) *PELJ*, where he argues that the proposal of critical legal scholars is unworkable because it places law faculties at the risk of offering an LLB curriculum that is unbecomingly focused on theory rather than praxis. Specifically, Gravett opines that law faculties should emphasise practical legal skills and training, and therefore there is very little need for non-law sources such as poetry, African literature, idioms, sayings, visual art et cetera.

26 Fagbayibo B "Choral intervention: reimagining international law pedagogy in Africa through music" (2022) *The Law Teacher* at 57.

27 Fagbayibo B "Critical pedagogy of international legal education in Africa: An exploration of Fela Anikulapo-Kuti's music" in Adeola R and others (eds) *The Art of Human Rights: Commingling Art, Human Rights and the Law in Africa* (2019) at 8.

illustratively grapples with the music of iconic Nigerian artist Fela Anikulapo-Kuti; he observes that Fela was a politically subversive artist who used his craft to raise the consciousness of his society and to speak to the conscience of the ruling powers of the day. Fela's music embodies the crux of the issues raised by scholars from Third World Approaches to International Law (TWAIL). It thus can be used to appreciate concrete ways to disrupt the hegemonic mainstream of international law.²⁸

Copyright and authorship in South African law

The first known copyright legislation was the Statute of Anne, which is linked to the commercial activities of the printing press of the 16th century.²⁹ Successive developments and the evolution of history inevitably led to newer legislation, including the Copyright Act of 1710, Fine Arts Copyright Act of 1862,³⁰ Copyright Act of 1911, Copyright Act of 1956, Copyright Designs and Patents Act of 1988, and others. All these British statutes are the direct and immediate ancestors of South Africa's present copyright legislation, the Copyright Act 98 of 1978 (hereinafter the Act). The basis of local conceptions of authorship is drawn from how copyright is set out in the Act. The Act does not define copyright. However, many scholars posit various definitions of copyright with a large degree of similarity. Ncube defines copyright law as follows:

Copyright law has the dual 'economic instrumentalist' purpose of enabling 'the orderly production and distribution of, and access to, works of art and intellect'. These works must be of 'sufficient substance', to warrant protection, fall into an eligible category and meet certain criteria, as outlined below. Copyright law rewards authors, through control of exclusive economic rights, to encourage them to produce work for the benefit of society.³¹

This definition neatly summarises the core components of the provisions of the Act that specifically deal with the requirements for subsistence, authorship, and others.

28 Fagbayibo (2019) at 8.

29 Bently L & Sherman B *Intellectual Property Law* 5ed Oxford: Oxford University Press (2018) at 37.

30 This was a novel piece of legislation because its provisions meant that it was the first time that photographs and artworks enjoyed copyright protection under statutory law.

31 Ncube CB (2016) at 39.

Ncube's definition of copyright law comports with the definitions given by other notable scholars of intellectual property law. For example, Cornish, Llewelyn & Aplin describe copyright as follows:

Copyright sustains a triangle of relationships. While property tends to establish bi-polar linkages – between the right-owner and the user – copyright has, on the right-owner side, both creators and entrepreneurs. As against users, their interests are largely the same: to ensure that the use of works is licensed and the returns on use are maximised. But between themselves, there will exist tensions over how works may be exploited and how returns are to be divided ... It is the cultural value attaching to authorship which provides such copious moral legitimacy for legal protection. Not only are authors given longer-lasting right than could possibly be needed by way for economic incentive; entrepreneurs are also able to justify related rights which protect their own investment in cultural productions.³²

A combined reading of Ncube, Cornish, Llewelyn and Aplin's definition of copyright leads to four conclusions as regards the essence of copyright: (1) copyright inherently exists to serve a double-pronged function, the first is economical, and the other is the public interest in cultural products, (2) copyright is concerned with relationships between creators, users, consumers and the state – although copyright appears to be in the discipline of private/mercantile law, it has an inherently composite public law aspect, (3) although its origin is based in the desire to maximise the protection of the author's/owner's economic interests, copyright has shifted significantly to balance an author's/owner's interests with those of the public, (4) central to the concept of copyright are specific markers, these are material embodiment, originality, and authorship.

There is no copyright without authorship – it logically follows that in seeking to decolonise copyright law, there is a need to speak directly to those components that define it. Bently and Sherman describe copyright authorship as follows:

The author of literary dramatic, musical or artistic work is the person who creates it. No further guidance is given in the 1988 Act as to what this means [...] Having said that, problems occasionally

32 Llewelyn D & Aplin T *Intellectual Property: Patents, Trademarks and Allied Rights* 9ed United Kingdom: Sweet & Maxwell Ltd (2019) at 421-422.

arisen in determining whether a person involved in the production of a literary, dramatic, musical, or artistic work is to be regarded as an author. The way this is answered is similar to the way in which the originality of a work is determined. Basically, in order for someone to be classified as an author, it is necessary for them to be able to show their contribution to the work is of the type and amount that is protected by copyright – that is, that the contribution would be sufficient to confer originality on the relevant work.³³

Bently and Sherman's description of copyright is based on how authorship is understood in the United Kingdom – this conceptualisation is appropriate by virtue of South Africa's reliance on British copyright law traditions, owing to colonialism and coloniality. Bently and Sherman link the test for authorship with the one for originality.

In terms of the test set out by Bently and Sherman, to be classified as the author of a work, just as with originality, two conditions must be present: (1) the person claiming authorship must show that they expended some form of labour in the production of the work, and (2) that the work they are claiming authorship over is a work in terms of legislation. These two conditions are directly relevant to the South African context because the court in *Waylite Diary CC v National Bank Ltd*³⁴ held that if an expression does not constitute a work, the question of originality does not arise.³⁵ This means that authorship (of a work) and originality are intricately intertwined.

The Van der Merwe student handbook on intellectual property law defines an author in the context of section 1(1) of the Act as follows:

It should be noted that the popular and ordinary meaning of 'author' as a maker or creator of a work only applies to literary, musical or artistic works. The authors of all other works are defined with reference to persons who are not authors in the ordinary sense of the word but who have financial interest in the end result. This means that more often than not someone other than the person involved in actually making or creating the work

33 Bently & Sherman (2018) at 126–127.

34 1995 (1) SA 645 (A).

35 *Waylite Diary CC v National Bank Ltd* at 6: "The types of works listed in sec 2(1) of the Act are 'eligible for copyright' provided they are 'original'. The categories relevant to this case are artistic and literary works. The subsection presupposes, as a general rule, two different inquiries: first, whether the work relied upon falls within one of the categories and, if so, whether it was original."

may qualify as its author ... The person who reduces the work to material form is normally the author, but if his or her activity is purely of mechanical nature, he or she is not the author of the work.³⁶

Section 1(1) of the Act specifically defines an author in relation to the work upon which copyright is claimed. For example, as regards literary, musical, or artistic work, section 1(1)(a) defines an author as “the person who first makes or creates the work”. Section 1(1)(b)-(f) defines an author in similar terms with reference to other types of works, except that in this instance, it is not the person who makes/creates the work. Still, it is in reference to people who are not authors in the ordinary sense but rather those who have a financial interest in the result of authorship, namely the resultant work.³⁷

The most important aspect of authorship as presented in van der Merwe’s textbook is the fact that an author is not always the person who physically creates the work – in specific occasions, the author is someone that commissions the work, and in specific instances, the author is a juristic person. This is important to note because it demonstrates that the concept of author has, over the years, transmuted to encompass other types of authors outside of the first author and person. The different shades and meanings of the author tell of the potential that exists in the desire to reshape and stretch current meanings of authorship, as sought by the decolonial project.

The call to decolonise the meaning of an author, means crafting a new dimension of an author that shifts somewhat from current meanings. Accordingly, through the prism of decolonial theory, authorship means single author, joint author, and communal author; however, the community as an author takes a different dimension in the sense that it encompasses the African conception of a community as the living, the dead, and the yet-to-be-born. Simply put, the meaning of a community, as it is currently understood in intellectual property law scholarship, is severely limited because it is done along the lines of Eurocentric and Western notions of personhood and what it means to be human – and therefore neglecting African epistemic traditions to conceive of the same. This meaning/definition/formulation/conceptualisation

36 Van der Merwe et al *Law of Intellectual Property in South Africa* Cape Town: LexisNexus (2017) at 221-222.

37 Van der Merwe (2017) at 221.

of a community is incomplete in its current presentation/framework because it does not reflect the epistemic traditions of Africans and Black peoples.

Currently, three types of authors are provided for by legislation. These are single author, joint author, and communal author. Over the last decade, legislators have attempted to expand the definition of an author to shift from the single-author and joint-author as provided for by the Act so that the definition can be inclusive of a communal author. For example, the Intellectual Property Law Amendment Act of 2013 (hereinafter IPLAA) provides for this. Although this shift is significant, it is still within the Eurocentric paradigm because it uses colonially accepted chassis to define a community in the context of authorship.

To shift authorship from the clutches of single and joint authors, South African legislation has ventured into appreciating that a community can be an author for the purposes of copyright law. Currently, the community is defined by the IPLAA and the Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 (hereinafter PPDM). The definition of community in section 3(f) of the IPLAA and section 1(a)-(c) of the PPDM Act are both limited, in the sense that they have a limited perception of what a community is in the context of Africa and peoples of Africa.

The Act specifically defines an author in relation to the work upon which copyright is claimed; the author of literary, musical, or artistic work is provided for by section 1(1)(a): “the person who first makes or creates the work”. Although the Act is the basis of authorial conceptions, the definition of an author, as provided for in section 1(1)(a), is nuanced and punctuated with kindred legislation that the South African legislature has put in place to supplement/complement the Act’s definition.³⁸ Beyond the Act³⁹ and its various

38 IPLAA and Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 (hereinafter the PPDM Act) – both provide for a communal author to supplement already existing single and joint authors. The PPDM Act focuses specifically on the meaning of an indigenous community.

39 Apart from definitional questions unto authorship, the Act’s foundational chassis describes the nature of copyright by way of listing the type of works that are eligible for protection, section 2(1) (a) to (g), the Act then proceeds to set out the requirements for subsistence of copyright in literary, musical, or artistic work in section 2(2)(a) and (b), providing that a work shall not be eligible for copyright unless two conditions are present, (1) effort or skill has been expended in making the work to give it a new and original character, and (2) the work has been written, recorded or otherwise reduced to material form. The latter requirement is known as the material form or the material

predecessors, the meaning of an author gains a global/universalistic meaning when read against the background of Articles 1 and 2 of the Berne Convention:⁴⁰

The Contracting States are constituted into a Union for the protection of the rights of authors over their literary and artistic works. . . . Authors who are subjects or citizens of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives. The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work and must not exceed in the other countries the term of protection granted in the said country of origin. The country of origin of the work shall be considered to be that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them the laws of which grant the shortest term of protection. For unpublished works the country to which the author belongs shall be considered to be the country of origin of the work.

These two articles proffer the basis of authorship at an international level and pave space for the Berne Convention's principle of National Treatment. According to this principle, each member state of the Convention must accord to nationals of other member states the same level of copyright protection provided to its citizens. The principle of National Treatment does not speak to the essence of authorship *per se*,⁴¹ but rather to the global handling of copyright protection.

Based on these legislative definitions of authorship, various international and local copyright law scholars have problematised authorship in diverse ways. Although all these scholars make their observations from different jurisdictions and legislative settings, the commonality between them is that all of them are in settings that derive their epistemic traditions from the United Kingdom.

embodiment requirement. The Act qualifies two types of persons as authors in section 3(1)(a) and (b), these are citizens/residents of South Africa and juristic persons incorporated under the laws of the Republic of South Africa. These are some of the most important provisions of the Act.

40 Berne Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works.

41 It is somewhat interesting that the Berne Convention, being the most comprehensive copyright treaty, does not define authorship, but leaves it to member states to craft their own definitions.

As alluded above, IPLAA and PPDM attempt to grapple with “community” in the context of South African intellectual property. Section 3(f) of IPLAA defines community as follows:

Any recognisable community of people originated in or historically settled in a geographic area or areas located within the borders of the Republic, as such borders existed at the date of commencement of the Intellectual Property Laws Amendment Act, 2013, characterised by social, cultural and economic conditions which distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective.

Section 1(a)-(c) of the PPDM Act defines indigenous community as:

Any recognisable community of people developing from, or historically settled in a geographic area or areas located within the borders of the Republic; characterised by social, cultural and economic conditions, which distinguish them from other sections of the national community; and who identify themselves as a distinct collective.

These two definitions are commendable, considering that they are the product of years of legislative pondering,⁴² that saw the need to substantively define the meaning and essence of community in the sphere of intellectual property.⁴³

42 Both statutes emerge against the backdrop of immense skepticism and criticism from some academic quarters, for example, see Sadulla Karjiker “IP: Politics and Beyond” (unpublished Inaugural Lecture, Stellenbosch University, 2017) at 6–7, where he proffers a scathing criticism of both IPLAA and the Copyright Amendment Bill, Karjiker accuses government (specifically the department of Trade and Industry, which is the custodian of copyright in South Africa) of “inept, and dysfunctional, management of intellectual property law” he further observes that these statutes appear as though they were written by people who simply do not know what they are doing, and have no basic appreciation of the fundamentals of copyright law. Specifically, as regards IPLAA, Karjiker describes the legislation as “disastrous”, he posits that it is “a glaring example of a failure to understand the structure of the relevant species of intellectual property law, and the bases for their recognition. It smacks of a politically motivated sop, without regard for legal principles.”

43 There has not been much academic literature in South Africa that responds to the question of community in intellectual property generally, and copyright law specifically. Viscerally, I can surmise that perhaps this paucity in scholarly deliberations on community is because of South Africa’s diverse history and present, which translates to potential differences in how a community is conceptualised – simply, the heterogeneity of South Africa’s identity makes it difficult for South Africans to find a common ground on what it means to be a community. Law scholars “play it safe” in their varied discussions about community. See for example Naidoo U “*A Comparative Assessment of South Africa’s Proposed Legislation to Protect Traditional Knowledge*” (unpublished LLM thesis,

Prior to the promulgation of IPLAA, Geyer investigated the meaning of community – she primarily observes that there is a habit of using “indigenous community” and “community” interchangeably, with the latter being largely unregimented.⁴⁴ She argued that this served to only muddy the waters where definitional clarity is concerned.⁴⁵ By way of definition, she figures that “community” should be defined in terms of the area in which a group of people lives or in terms of a group of people’s common background or shared interests, or it can refer to the public or society in general.⁴⁶ In a subsequent text, Geyer considers the question of community much more closely.⁴⁷ Having considered some of the criticisms of IPLAA,⁴⁸ Geyer observes that the legislation makes three distinct provisions in relation to the question of community: (1) indigenous communities are deemed to be juristic persons,⁴⁹ (2) communities can also be co-authors/co-owners,⁵⁰ and (3) for indigenous works, the indigenous community is the first copyright owner, and in the case of derivative indigenous works, the person who did the work is its first copyright owner.⁵¹

The totality of existing academic literature and analysis of the copyright framework clearly demonstrates that prevailing meanings of authorship in copyright do not lend themselves to anything outside of a human author. Even where there is an effort to deepen and broaden the scope, by making way for a communal author, such authors still refer only to the human author(s). Unsurprisingly, this culminates into a copyright paradigm that is at odds with any and every suggestion that an author could be anything outside of the living human author.

University of Pretoria, 2019), where she broadly considers various statutes that speak unto the question of community – in all the dissertation’s remarks, it limits all of its understanding(s) of community to what is provided for in legislation.

44 Geyer S “Towards a clearer definition and understanding of ‘indigenous community’ for the purposes of the Intellectual Property Laws Amendment Bill, 2010: An exploration of the concepts ‘indigenous’ and ‘traditional’” (2010) 13 *PELJ* at 128.

45 Geyer (2010) at 128.

46 Geyer (2010) at 132.

47 Geyer S “Copyright in traditional works: Unravelling the Intellectual Property Laws Amendment Act of 2013” (2017) 29 *SAMLJ* at 43.

48 Geyer (2017) at 44.

49 Geyer (2017) at 54.

50 Geyer (2017) at 54.

51 Geyer (2017) at 54.

The central claim: *Abezimu/Badimo* (ancestors) as authors

At the heart of the quest for a decolonised university, legal system, and society, is the need to re-member African epistemologies, ontologies, axiology, and cosmologies; with an appreciation that they were undone by way of epistemicides, historicides and linguisticides in the long colonial episode. As demonstrated above – existing copyright law strictures insist that an author is always in the form of a human (except in the case of a juristic/industrial author). I accept that this is a valid expression of what *is*, in copyright law, but not necessarily *what ought to be*. The latter, I argue, embodies a copyright that is decolonial, one that embraces the pluriversal (as opposed to universal) epistemic traditions of the world. Accordingly, a decolonial copyright system accepts that, from the perspective of the epistemic traditions of the global South, Africa and Black people, an author is also embodied in/by *Abezimu/Badimo* (ancestors). This is because, in Africa, the image “human” is inclusive of three components, the living, the dead and the yet-to-be-born.

Below, I foreground this central claim in three ways: (1) I illustrate that there is a difference between *Abezimu/Badimo* and ancestors – the latter can never be authors because it refers only to the dead, the former are capable of being authors precisely because they are embodied in a triad of the onto-triadic being; (2) I briefly explain the thesis of an onto-triadic being; and (3) I draw from the theorizations and illustrations in (1) and (2) to proffer a practical and historical example of where *Abezimu/Badimo* authored works are worth copyright protection.

Why ‘*Abezimu/Badimo*’ and not ‘ancestors’

The image ‘*Abezimu/Badimo*’ is preferred instead of ‘ancestors’ precisely because there is an epistemic distance (and, therefore, difference) between these two concepts. Notwithstanding that these concepts are colloquial translations from English to isiNdebele/Sesotho and vice versa, I argue that ancestors in African vernacular means more than just people that have passed on. This difference in meanings constitutes a legitimate epistemic variance that is worth intellectual inquisition. The inquiry about the difference between English and vernacular illustrates an epistemic distance between the meanings of concepts in the different translations. The distance between these meanings entails an epistemological archive that consists of the knowledge patterns and intellectual traditions of colonised peoples, whose knowledge(s) are victim

to epistemicides,⁵² historicides, and linguisticides. Epistemic conceptions of 'Abezimu/Badimo' as meaning more than just ancestors can be gleaned from scholarly work that is written in African vernacular; two such works include a BA Honours dissertation written by Makhanya entitled '*Isiko lokuthethwa kweDlozi*'⁵³ the other is a MA thesis written by Mdlalose entitled '*Zindaba Zakho Mngoma: Ingonyuluka*'.⁵⁴

Credence must be given to the fact that both dissertations are written in isiZulu,⁵⁵ and were submitted to the University of Zululand's faculty of human sciences. Mudimbe specifically makes the case that historians, philosophers, missionaries, academics and anthropologists from the West continue to fail to make sense of concepts from outside of Europe, precisely because Western scholarship does not invest in studying the language/grammar of the subject that they seek to engage.⁵⁶ Mudimbe suggests that white scholars are acutely aware that the only language that they understand is English (and/or Afrikaans, in the context of South Africa) and that this causes an unspoken sense of insecurity among them, and although they feel like impostors, they still forge ahead.⁵⁷

Although Mudimbe does not make this argument per se, I insist that "language", in this instance, means more than just English/isiNdebele/Sesotho but refers to the praxis of the grammar of a people beyond the spoken and

52 De Sousa Santos B *Epistemologies of the South: Justice against Epistemicide* Boulder: Paradigm Publishers (2014) at 12, where he defines epistemicide as follows: "Our knowledge flies at low altitude because it is stuck to the body. We feelthink and feelact. To think without passion is to make coffins for ideas; to act without passion is to fill the coffins. We are voracious in getting the diversity of the knowledges we are interested in. There are many knowledges looking for people eager to know them."

53 Makhanya NF *Isiko lokuthethwa kweDlozi* (Bachelor of Arts Honours thesis, University of Zululand 1997).

54 Mdlalose BJ *Zindaba Zakho Mngoma: Ingonyuluka Kwazulu-Natal*: University of Zululand (2009).

55 There is a noteworthy isiZulu idiom that says 'isiZulu asitlikwa', loosely translated, 'it is impossible to translate isiZulu into different languages'. The idiom does not mean that the language cannot be translated per se, instead it means that the essence of the language is sometimes lost when it must be translated into a different language, especially English.

56 Mudimbe VY *The Invention of Africa: Gnosis, Philosophy, and The Order of Knowledge* Bloomington, Indianapolis: Indiana University Press (1988) at 146: "However, Bantu Philosophy should be revised because Tempels was not a scholar. He did not pay attention to Bantu languages, and moreover, his synthesis, based strictly on his experience within the Luba-Shaba community, does not offer comprehensive understanding of Bantu cultures."

57 Mudimbe (1988) at 67.

written word.⁵⁸ Mudimbe observes what he calls “epistemological determinism” to explain a colonial architecture that uses the English (or any other colonial) language to attempt to make sense of other worlds.⁵⁹ The image “determinism” speaks to how colonial anthropological investigations set out to pursue deeper truths and hidden meanings about Africa yet are wired to fail or lead to inconclusive findings precisely because they rely on a colonial language, grammar and lexicography to study Africa.

Epistemological determinism is linked to another concept, that is, “cultural autonomy”,⁶⁰ which speaks to the efforts of African intellectuals to correct colonial distortions about the essence and meanings of African cultures, knowledge, and histories. Mudimbe explains that, sometimes, African intellectuals must use African languages⁶¹ to assert cultural autonomy and thus explain the African setting to the academy.⁶² Mudimbe’s decided critique of relying solely on English (and other colonial languages) highlights the importance of Makhanya and Mdlalose’s writings, which not only study the epistemic depth of ancestral reverence but do so in the vocabulary of the people of Africa.

58 This positing of language as a grammatical expression of a people’s praxis beyond written and spoken word is studied by Radebe, see Radebe NZ “Learning from Indigenous Communities: The Case of Esihlengeni in Vryheid, KwaZulu-Natal, South Africa” (2022) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* at 2, where she engages in an anthropological ethnographic study to observe the cultural practices of Zulu speaking people of Esihlengeni homestead, in Vryheid town of KwaZulu Natal province of South Africa. Radebe observes that the Western/European methods that are used to access knowledge from this community, namely paying attention to their language, cultural practices, and belief system yields incomplete and wayward findings precisely because they use Western/Eurocentric subjectivity to establish a worldmaking that presupposes their subjectivity to be global objectivity. Radebe proposes that these methods must be decolonised, and therefore other ways of studying indigenous communities need to be employed so that the knowledges of indigenous communities are understood in their own accord.

59 Mudimbe (1988) at 73.

60 Mudimbe (1988) at 90.

61 Ngubane JB “The role of Amadlozi/Amathongo” as seen in the Writing of W.B Vilakazi’ (1984) *Association for the Study of Religion in Southern Africa* at 56. To effectively study the emergence of ancestral reverence in the scholarly work written by BW Vilakazi, Ngubane insists that some of these concepts must be explained in vernacular otherwise they risk completely losing their intended meaning: “In this paper I have retained the Zulu forms, amadlozi/ amathongo, for what some writers call ancestors, ancestral spirits, shades, the living dead and so forth, because I am of the opinion that these Zulu forms are not adequately translatable into English.”

62 Mudimbe (1988) at 90.

Makhanya begins her dissertation as follows:

Kuyisiko elibalulekile kithina maZulu ukuthethwa kwedlozi. Amadlozi siyawakhumbula siwahloniphe ngoba aphaathelene nabaphansi. Kufanele kucace, kumbe kubesobala ukuthi sikhuluma nabakithi asebekwelingafelwa nkonyane.”⁶³

Makhanya’s opening already delineates the epistemic distance between ‘Abezimu/Badimo’ and ancestors because it gives life to the dead beyond their death – this is evidenced in “siyawakhumbula siwahloniphe”, which means “we commemorate and respect them, in the present”. The hallmark of Makhanya’s thesis rests in its response to two questions, the first is “Liyini isiko?” and the second is “Liyini idlozi?”, loosely translated, “What is culture?” and “What is an ancestor?”, respectively. Makhanya defines isiko/culture as follows:

*Isiko yiloko osekujwayelwe ukwenziwa (isijwayezi), osekuze kwamukeleka njengomthetho Isiko lingumkhuba oqala ngesigigaba esithile, esiya ngokudlondlobala, sijule Lo mkhuba unikezelwa ngalokho umuntu angabambelela kuko, okuyothi-ke ngokudlondlobala kwawo, bese uba yisiko. Lokhu kwenzeka uma sekunabadala mkhuba owaqala kubona, okunye kuthi uma bengasekho emhlabeni, bafune kuqhutshekwe lapho bagcina khona.*⁶⁴

She accordingly defines idlozi/ancestor as:

*Idlozi umuntu womndeni ongasekho, kodwa osebona kangcono njengoba esengale kwelingafelwa nkonyane. Abantu abangasekho bayimimoya ebizwa ngamagama amaningi. Abanye bathi abaphansi, amathongo, izinyanya noma amadlozi. Bonke abantu abangasekho bayahlonishwa.*⁶⁵

63 Makhanya (1997) at 1. Translation: “It is an important custom, for us Zulu people, to pay homage and reverence to our ancestors. We commemorate and respect them because they link us to the dimension of the transitioned. It must be clear that we do this precisely to communicate with those of us who have *departed yet are still with us, the living-dead* (my emphasis).”

64 Makhanya (1997) at 5. Translation: “Culture is those things that we do that have become trite flowing from custom, such that it has become acceptable as a law. Culture is a product of various specific occurrences, and gains resonance over time, and is passed on from one generation to the other. It is crucial that culture is given birth by our elders who came before us. As result, after they have passed on, they insist that we must hang on to culture and continue to embrace it from where they left off.”

65 Makhanya (1997) at 7. Translation: ‘Idlozi is a member of one’s family who has passed on but now can see better because they have now transitioned into a different realm. The departed are referred to in various names, some refer to them as abaphansi, others refer to them as amothongo, whilst others refer to them as izinyanya or amadlozi. The rule is that all ancestors must be respected.’

As can be followed from the translations given in the footnotes, Makhanya's definitions of culture and *Abezimu/Badimo* reasonably lead to three logical conclusions: (1) culture is central to the Being of Black and African people, (2) there is a link between culture and reverence to ancestors, and (3) the people do not consider ancestors as people that have merely passed on, but rather as people who continue to have an active role in the lives of those that they have left behind.

Mdlalose's study differs slightly from Makhanya's because Mdlalose specifically studies what it means to be "called" (this is known as *ubizo* or *ukungenwa*) by ancestors to practice as a healer/seer.⁶⁶ Albeit a study about ancestral calling, Mdlalose still succeeds in responding to the question: "*Liyini idlozi?*" and he defines *Abezimu/Badimo* (*idlozi*) as follows:

Lena imimoya yabaleleyo engena kubantu abaphilayo. Le mimoya imikhakha mibili, kukhona leyo engena kubantu ngenjongo yokubapha izinhlanhla nje, kubekhona leyo engena ngoba ifuna ukubasebenzisa ekubhuleni nasekwelapheni abagulayo. Nokho-ke yonke le mimoya iyadinga ukwenzelwa imicimbi yayo ukuze ingabahlukumezi labo ehlezi kubo."

Mdlalose's definition of *idlozi* is not too different from that of Makhanya. However, Mdlalose brings forth the dimension of *idlozi* as an embodiment of the spirits of the dead that continue to live on long after their death. Spirits are indeed one of the forms within which *Abezimu/Badimo* manifest in the lives of the descendants of the dead. These spirits practically ensure that the dead are not merely ancestors, but they are *Abezimu/Badimo* in the sense that they live even in their death and, therefore, are the living dead. Zulu's definition of ancestors is instructive:

Ancestors are believed to be those who have died but continue to exist in the land of the dead. They continue to influence the living, mostly positively. This belief arises from a feeling that the role of parents (or anyone elderly) is crucial to African society. Elderly parents are believed to be the custodian of moral values. Which is why they are highly venerated in life. For this reason, death will not remove this respect for elders/parents in any way. This explains the continued veneration of elders beyond death

66 On the calling by ancestors to work as a healer/seer, see generally, Edwards S, Makunga N, Thwala J & Mbele B "The role of ancestors in healing" (2009) *Indilinga – African Journal of Indigenous Knowledge Systems* at 1. See also, Shange NT "Collective African memory as restorative healing and relearning: a storytelling and dreams discussion" (2025) *SAFUNDI* at 4.

when they attain ancestor status. Ancestors in Africa form part and parcel of one's family.⁶⁷

Studying *Abezimu/Badimo* as an embodiment of the epistemic traditions of the global South is fraught with conceptual difficulties because ancestral reverence/deference was/is directly subjected to epistemicides in the advent of colonial contact. Various scholars demonstrate that colonial contact included the action of killing indigenous knowledge. The colonial project sought to implant Western religious subjectivity, mostly Christianity.⁶⁸ Mudimbe is at pains to explain that a constitutive part of colonial worldmaking included the active Christianisation of colonised people:

The more carefully one studies the history of missions in Africa, the more difficult it becomes not to identify it with cultural propaganda, patriotic motivations, and commercial interests, since the missions' program is indeed more complex than the simple transmission of the Christian faith. From the sixteenth century to the eighteenth, missionaries were, through all the 'new worlds', part of the political process of creating and extending the right of European sovereignty over 'newly discovered' lands.⁶⁹

Although some scholars have shown that colonial worldmaking was a Christianisation effort, Mudimbe takes the discussion a bit further in how he demonstrates that colonial Christianisation was inclusive of entangled processes that entailed the implanting of European cultures, sensitivities, aspirations and desires.⁷⁰ For example, Christian missionaries not only helped the colonial architecture by introducing European faiths to newly found lands but violently enforced a norm wherein it was in God's name that the Pope considered the planet (especially conquered territories) as his franchise, thus denying non-Christian natives the right to an autonomous political existence and the right to

67 Zulu E "Reverence for ancestors in Africa: Interpretation of the 5th Commandment from an African perspective" (2002) *Scriptura* at 479. See also, Ngubane (1984) at 57: "The terms *idozi* (plural: *amadlozi*) and *ithongo* (plural: *amathongo*) denote the dead who, according to Zulu thought patterns, maintain a close and intimate relationship and association with the living, especially their survivors, descendants or dependents. They are also called *abaphansi* (the subterraneans) to indicate their abode and their proximity to the living on whom they, though invisible, exercise their influence and power."

68 Ramose MB *African Philosophy Through Ubuntu* Harare: Mond Books (1999) at 49, 'Historically, Christianity may be seen as part of a culture foreign to Africa. For this reason, the introduction of Christianity in Africa was ineluctably the introduction of foreign culture to Africa.'

69 Mudimbe (1988) at 45.

70 Mudimbe (1988) at 45.

own or transfer ownership.⁷¹ In the name of God, missionaries actively worked towards the destruction of pre-colonial societies and their replacement by new Christian societies in the image (not of God but)⁷² of Europe.⁷³ To find acceptance into the new colonial polity, colonised and conquered people were compelled to jettison their pre-colonial selves and embrace Eurocentric subjectivity, thus doing away with epistemic systems such as reverence/deference to *Abezimu/Badimo*.

Notwithstanding the Christianisation project, some African intellectuals have extensively carefully demonstrated that colonised people have always jealously hung onto the belief in *Abezimu/Badimo*. For example, Wanamaker demonstrates that Africans (and South Africans specifically) have had to grapple with over two hundred years of the co-existence between European Christianity and the African Belief in *Abezimu/Badimo*; two distinct beliefs that stem from differing worldviews and cultures.⁷⁴ Wanamaker illustrates that although the colonial project succeeded in implanting European Christian beliefs in Africa, African Christians continue to acknowledge the very visible hand that *Abezimu/Badimo* play in their lives – this speaks directly to how ancestral deference is more than just a spiritual/religious belief,⁷⁵ but rather a way of life and thus an epistemic tradition.⁷⁶ Wanamaker's observation about how Africans have

71 Mudimbe (1988) at 45.

72 Mudimbe (1988) at 148, take note that the concept of a God (or a deity and higher power) was not new African people, and is thus not an invention of colonial worldmaking, Mudimbe demonstrates that the Bantu Philosophy of African peoples has always been reflective of African people's belief in a God. See also, Masubelele MR "Missionary interventions in Zulu religious practices: The term for the supreme being" (2009) *Acta Theologica Supplementum* at 64, where he argues that the translation of the Christian bible into isiZulu has had the impact of wrongly inculcating a norm where the idea of a God is seen as something new to African people, whereas in truth, African people have always believed in a supreme being, and this being was closely linked in their belief in ancestors.

73 Mudimbe (1988) at 47.

74 Charles Wanamaker "Jesus the ancestor: Reading the story of Jesus from an African Christian perspective" (1997) *Scriptura* at 281.

75 Moletsane T *Junx* Cape Town: Penguin Random House South Africa (2021) at 117. Moletsane correctly argues that the main difference between religion and ancestral deference/reverence is that the former does not have the "God-versus-Satan" dynamic, there isn't even a heaven or hell, instead ancestral deference trumps religiosity in the sense that it centers a cosmic entity that existed as some sort of guardian or kind of benevolent, eternal Oneness that all human beings belong to. Moreover, unlike formal religions such as Christianity and Islam, ancestral deference (as a way of life and a way of knowing) insists that when people die, they do not cease to exist, but they transition into a different realm, and this places them closer to a shared Oneness.

76 Wanamaker (1997) at 281.

hung onto ancestral reverence/deference despite the colonial Christianisation project, is better explained by Mudimbe when he argues that Black Theology (also known as Black Liberation Theology) was a crucial moment in theological suppositions because it firmly insisted that Africans must be given the space to accept Christianity, without having to do away with their Africanity and African selves.⁷⁷

Wanamaker makes another important observation. He notes that there has been a conceptual difficulty in the study of ancestors because of a longstanding debate⁷⁸ about whether Africans “worship” ancestors or merely observe/honour them.⁷⁹ This observation is important because it illustrates a historical account of how missionaries deliberately distorted ancestral reverence into being a “worship of ancestors”; they did this with the sinister intention to wrongly portray ancestral reverence as something that amounts to the “worship of false gods”, thus backward, taboo and barbaric.⁸⁰ Colonial distortions of African people’s reverence for *Abezimu/Badimo* to mean worshipping⁸¹ false gods are done precisely to deny, refute and rebut that ancestral reverence is a valid epistemic tradition.

The onto-triadic edifice of Being

The thesis of the onto-triadic Being is gleaned from the notion that, in the context of Africa and the global South, personhood or the sense of being human, is defined as embodying a three-fold level of existence: the living, the dead, and the yet-to-be-born. It follows that the “onto” represents the ontological make

77 Mudimbe (1988) at 63.

78 Wanamaker (1997) at 286. This is just one of the many debates that exist in this scholarship, for example Wanamaker unpacks the debate between African religions and Christian religion as it relates to life and death. African religious systems and accompanying epistemic traditions of the global South insist that there is life after physical death, this is firmly contradicted by Eurocentric Christology, which draws from scripture (Ecclesiastes 9:5-6, Joshua 24:15, Isaiah 45:20, Judges 10:14, and others) to argue that there is no life after death, and that when people die, they cease to exist completely and thus cannot have any role in the life of their descendants beyond death.

79 Wanamaker (1997) at 284.

80 Wanamaker (1997) at 284.

81 Whilst accepting the fact that ancestral reverence/deference is an epistemic belief and not a religious belief, it is important that this must not be misconstrued to mean that this I deride ancestral worship. If some people choose to worship ancestors, they are correct to do so because in a pluriversal world, each has the right to choose their own belief system without fear of being discriminated against.

up, the “triadic” represents the three-fold characteristic, and the edifice of Being represents the essence or event of existence. Ramose carefully explains:

Umntu is the embodiment of the ontology and epistemology of *Ubu* . . . A specific element of the experience and concept of whole-ness in ubuntu philosophy is the understanding of being in terms of three interrelated dimensions. We find the dimension of the living – *umuntu* – which makes speech and knowledge of being possible. The second dimension is that of those beings who have passed away from the world of the living. These beings departed from the world of the living through death. It is thus understood that death discontinued their existence only with regard to the concrete, bodily and everyday life as we know it. But it is believed that death does not totally discontinue the life of the departed beings. Instead, they are believed to enter into and continue living in a world unknown to those left behind. On the ground of this belief the departed are called the living-dead (*abaphansi*). . . The third dimension is that of the yet-to-be-born. These are being of the future. It is the task of the living to see to it that the yet-to-be-born are in fact born.⁸²

In totality, Ramose’s conception of personhood suggests that, in the context of African epistemologies, *Umntu* (a person) is constituted (or finds the wholeness of their being) by three essential components, the living, the dead (also known as the living-dead) and the yet-to-be-born.

BW Vilakazi as the hand that authors on behalf of ancestors

The exercise of using fiction to ascertain the intellectual authenticity of the claim that *Abezimu/Badimo* have a visible role in the lives of the people they have left behind is not new. It is demonstrated carefully in Ngubane’s “The role of *Amadlozi/Amathongo* as seen in the Writing of W.B Vilakazi”,⁸³ where he studies the writings of iconic South African writer, B.W Vilakazi. Vilakazi is recorded as among the very first generation of South Africa’s Black academic intellectuals and writers.⁸⁴ Ngubane’s intervention serves as an important text

82 Ramose (1999) at 45.

83 Ngubane (1984).

84 Historical records show that Benedict Wallet “BW” Vilakazi was the first Black South African to teach university classes to white South Africans. In 1946, he was also the first Black South African to receive a PhD. As a result, he is already an important figure in the Black community.

because he demonstrates how B.W Vilakazi's writings were actively authored through the hands of ancestors:

We have said that the amadlozi/amathongo are always very close to diviners. But it appears that, according to Vilakazi, they are also always very close to people with a special mission for the community or nation: people with special charismata for the common good. Vilakazi considered himself as one of such people. For example, in the poem 'Mamina' (a female personal name given by Vilakazi to the Spirit of Inspiration), Vilakazi says the amathongo inspire him when he is both awake and asleep.⁸⁵ Mamina represents all the inspiring amathongo. Vilakazi is aware of the great burden the amathongo have placed upon his shoulders. He must listen to them. They commune with him constantly, during the day, in his wakeful nights and in his dreams. Often, he has to get up in the middle of the night to put on paper (my emphasis) the information and messages thus communicated.⁸⁶

Ngubane's reading of Vilakazi's account as regards Vilakazi's relationship with his ancestors not only demonstrates the visible hand of ancestors in his life but the authoring hand, too. To be sure, Vilakazi is said to have been woken in the middle of the night to "put on paper" the information and messages that his ancestors have communicated to him.⁸⁷ Owing to extant copyright law strictures, and as well as prevailing legislative definitions of authorship in copyright law,⁸⁸ ancestors (*Abezimu*, *Badimo*, *Amadlozi*, *Amathongo*, et cetera) are not recognised as an author – instead, in these set of facts, copyright law only recognises Vilakazi as an author, when he clearly isn't.

85 Communicating with ancestors by way of dreams is a phenomena that is thoroughly unpacked by Mbiti J "Dreams as a Point of Theological Dialogue Between Christianity and African Religion" (1997) *Missionalia* at 511, where he argues that there is a tension/contradiction between Eurocentric Christology and African Traditional Religious (ATR) systems as they relate to the role of ancestors in the lives of their descendants, and their ability to give direct messages to them by way of dreams. What can be gleaned from Mbiti's argument is that colonial conceptions of the kingdom of the God tend to be dismissive of African ways of engaging to/with deities and thus lack an appreciation of the very idea that ancestors can be anything else other than dead people.

86 Ngubane (1984) at 63.

87 Ngubane (1984) at 63.

88 S 1(1)(b) –(f) of Copyright Act 98 of 1978; s 3 (f) of Intellectual Property Law Amendment Act 28 of 2013; and s 1 (a)–(c) of Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.

This misrecognition of Vilakazi as an author, instead of his ancestors, appears to be a contradiction in terms. Especially when you consider that the court has previously ruled that authorship can be extended to mean an author outside of the physical authoring hand. For example, the court in *Peter-Ross v Ramesar*⁸⁹ (*herein after Peter-Ross*) was called upon to adjudicate a copyright dispute in relation to the authorship of an academic paper. The applicant, Mrs Elizabeth Peter-Ross, is a senior lecturer at the University of Cape Town (the second respondent), and the first respondent is a professor and director at the second respondent's Human Genetics Research Unit. In 1996, the Unit launched a research project led by the first respondent. The project focuses on the connection between bipolar psychiatric disorders and the genetic makeup of patients. The applicant joined the project in 2001 with the specific function of exploring the idea that the genetic location of bipolar disorders can be improved by concentrating on patients who were not only bipolar but also had some other genetic disorder. The applicant and first respondent collaborated in developing this idea until early 2005, and this culminated in the first draft of an academic paper. After having completed the first draft, the relationship between the applicant and the first respondent began to break down owing to a disagreement about the publication of the paper's hypothesis. The applicant felt that the hypothesis needed to be published as soon as possible, whilst the respondent felt that more empirical evidence was needed before publication. This disagreement is formative of the crux of the dispute before the court.

On the 20th of January 2006, the applicant told the first respondent that *Molecular Psychiatry* (a journal) published the paper that she had submitted. The first respondent, under the belief that this paper embodied the work done by him in collaboration with the applicant, informed the journal and the publication was stopped. The applicant thus launched an application to the court for the court to order the publication of the paper and sought a declaratory order that she has sole copyright in the article.

The first respondent contended that he is a joint author of the article even though he did not "contribute to the written formulation of the article" and justified this by arguing that he and the applicant engaged in a scientific collaboration that culminated in the article. The phrase "did not contribute to the written formulation of the article" is at the heart of the argument of this case. There are various conceptions of authorship whose enunciation differs

89 Ross v Ramesar & another [2008] JOL 21933 (C); 2008 JDR.

somewhat from prevailing legislative offerings. The Act, IPLAA and PPDM all have similar demands as regards the definition of an author; they all insist that in literary works, for example, an author must have expended some form of labour, usually in the form of physically contributing to the writing of the work. In this set of facts, the first respondent conceded that he did not “do any work on the Molecular Psychiatry article”, which ordinarily would have settled the dispute in favour of the applicant. However, the court considered factors other than the requirement of having to expand some work on a work for it to be a work.

The court’s findings in *Peter-Ross* are important because they nuanced the definition of an author to shift from the strict/formalist expectation that an author must expend some form of physical labour in terms of which they must have the writing hand in a literary work. The court observed that it would have been impossible for the article’s hypothesis to be developed without the active collaboration of both the applicant and the first respondent. Having analysed the evidence in totality, the court held that:

A person can ‘make’ or ‘create’ a work by dictating to a scribe or, at the other end of the spectrum, a person may verbally express an idea which another then embodies in a written form. In the latter instance the person who does the writing is the sole author. It is this type of case in which one finds dicta to the effect that there is no copyright in ideas.⁹⁰

Two important aspects are important to note: (1) the court affirms the long-held principle that there is no copyright in ideas, thus asserting the significance of the material embodiment principle, but insists that this principle must always be studied in the context of prevailing facts, and (2) that the hand that physically holds the pen/pencil to write down work will not always be an authoring hand, for example in the instance of a stenographer or a writer whose writings are a product of being “dictated to”.

In a bid to explain that the hand that writes is not always the hand that authors, the court further observed:

Where the ideas to be recorded are the product of collaborative endeavour and the one has undertaken the physical recording of the ideas the collaborators could properly be regarded as having jointly ‘made’ or ‘created’ the work. What distinguishes this

90 Ross v Ramesar & another at 18.

type of case from the situation where it is said that there is no copyright in ideas is that there is collaboration from the outset and the contributing of ideas does not occur in vacuo but is directed towards the creation of a literary work.⁹¹

Qualifying the central claim: turning to African literature

Below, I read through Mphuthumi Ntabeni's *Broken River Tent* and *The Wanderers* to specifically demonstrate the mirror that not only illuminates the ubiquity of ancestral reverence/deference in African lives, but how it constitutes a way of knowing and Being.

There should be an appreciation that fiction is mostly a mirror of society, from which valuable reflective lessons can be gleaned. A didactic element in fiction is explained by Poho's foreword to Moletsane's debut novel, "Junx".⁹² The foreword draws from the Africana existential philosophy tradition to explain that African fiction (particularly written by young Black South Africans) is often a juxtaposition of literary devices and Black life itself.⁹³ Poho observes that Moletsane's book is fictional "yet [a] honest depiction of our society and our psychology".⁹⁴ This lends itself to the two works of literature that are studied in this article – although they may be purely fictional, at the same time, they reflect some deeper truths and hidden meanings as regards African people's deference/reverence to ancestors, and therefore its implications for authorship in copyright law. Crucially, this segment of the article is the heart of the decolonial exploration of Johan van der Walt's literary exception. To be sure; this turn towards African literature breaches van der Walt's strict law-and-literature divide, which says that whilst law and literature may sometimes come close to each other – they can never mix.

In the two works of literature below, I tentatively demonstrate two salient factors, the first is that *Abezimu/Badimo* appear ubiquitously in the lives of African people. This feeds into the assertion that ancestral reverence/deference is not merely a religious belief but it is a way of knowing and a way of Being. The second is that, to people from the global South, Black people and Africans, the divide between law and literature is not strict, and that in instantiations

91 Ross v Ramesar & another at 18–19.

92 Moletsane (2021).

93 Poho K 'Foreword' in Tshidiso Moletsane *Junx* (2021) at 5.

94 Poho (2021) at 6.

such as the ones carried in this article, literature embodies the laws of colonised peoples, these are laws have had to find refuge outside of prevailing legal canons.

Broken River Tent

In *Broken River Tent*, Ntabeni marries fiction with history. The storyline raises from the dead, the legend of *AmaXhosa* Chief Maqoma, who was at the helm of several frontier wars in the Eastern Cape during the nineteenth century, where the Xhosa people squared off against British colonisers/settlers. The protagonist in the story is Phila, a young Black South African man, who suffers and struggles from a rare mental illness which allows him to cross the divide between the living and the dead. In crossing this divide, Phila is in constant conversation with Maqoma, where they have epic discussions that range from contemporary South African politics, culture, religion, culture and history.

In raising Maqoma from the dead, Phila can remarkably present an anti-thesis to colonial epistemicides, linguisticides and historicides, in the sense that that in the various conversations, we are able to learn of the grammar and morals of *amaXhosa* prior to colonial disturbance. From the very first parts of the book, the essentiality of *Abezimu/Badimo* emerges in a conversation that Phila has with Nandi, his girlfriend:

You keep missing the point. I'm not treating this as a sickness. It's something that has always happened in Xhosa history, especially during the times of extreme pressure. It is produced what the *Nxeles*, *Ntsikanas*, *Mqantis*, *Mlanjenis* and *Nongqawuses* of this world. . . They say he derived his strength from the strict observance of ancestral worship. The dead live! You see? They've certain powers over their descendants. They communicate with the living through mediums like dreams and diviners, who must in turn minister to their needs.⁹⁵

This is a theme that Ntabeni carries throughout the book. In various parts of the book, there is a clear demonstration of the authoring hand of ancestors in the lived experience of their descendants. The very methodology of raising Chief Maqoma and have him converse with Phila is an enactment of epistemic freedom on the part of Ntabeni; to decisively illustrate the authoring hand of

95 Ntabeni M *The Broken River Tent* Belton: Blackbird Books (2018) at 35 and 47.

ancestors. In a much more robust manner, Ntabeni grapples with the thesis of *Abezimu/Badimo* in his subsequent book, *The Wanderers*.

The Wanderers

In this story, the protagonist, Phakamile Maseti, joins the anti-apartheid struggle, leading him to exile before his daughter, Ruru, is born. Following the 1994 democratic moment, Phakamile does not return to South Africa but instead chooses to stay in Tanzania, where he ultimately meets his death. Ruru grows to become a medical doctor and decides to travel to Tanzania to search for her father's remains. Upon arriving in Tanzania, Ruru meets Phakamile's widow (he re-married whilst in exile), who shares his "pillow books" with Ruru. These "pillow books" are a series of letters and journal entries that Phakamile used to write when he was bedridden and nearing his death. These letters reveal an explosive account of Phakamile's ideological, spiritual, political, and emotional insights. Ruru uses these letters to reflect on the letters that she used to write as a young girl growing up without a father. In this exercise, Ruru does not only experience the presence of her "dead" father, but she also gets to undergo a spiritual journey of self-discovery by way of meeting the self, as she comes into contact with the lived spirit of *Abezimu bekhobo* (her ancestors).

The Wanderers is a story about parting, longing, love and belonging – the author invites readers to think about and imagine the meaning of untold dimensions of this world. In specific pockets of the storyline, Ntabeni introduces and eloquently canvasses the very visible hand that ancestors play in the lives of Black people and Africans.

From very parts of the story, the specificity of African ways of knowing and Being emerges:

Don't kill the spontaneity of it. We're black people, my sister, we know everything by feeling, deep feeling, maan, not by head. We use feeling to take part in realms beyond time. That is why we have use of diviners and spiritual guides. But you don't get that because you are too invested in the Western obsession with the Intellectual.⁹⁶

Sandi utters these words to Ruru in the setting of an evening social event at the house of a mutual colleague. Sandi persuades Ruru to join her on the dance

96 Ntabeni M *The Wanderers* Cape Town: Kwela Books (2021) at 19.

floor, urging her to allow herself to feel the music from within. Anecdotally, Sandi refers to the tension that sometimes exists between Western subjectivity and the epistemic traditions of the global South. Most importantly, Ruru shrugs off Sandi's invitation for her to join the dance floor, but she does not dispute, nor scoff at, the suggestion that African people have a distinct conception of Being, thinking and knowing; that Africans use "feeling[s] to take part in realms beyond time", and this is done through the medium of diviners and spiritual guides. This part of their conversation helps to authenticate one of the central claim that the belief in *Abezimu/Badimo* is not just a religious/spiritual belief but constitutes an epistemic tradition because it is a way with which African people "know everything by feeling". Knowing by feeling (among other things) is an idea that is largely unacceptable to Eurocentric norms and sciences. Later in the book, the essence of *Abezimu/Badimo* emerges even more conspicuously:

Your mother of the clan AmaCirha amhlophe, which she loved to mention, reminding you that she came from the scion of prophets like Ntsikana. Their clan was not supposed to come close to river mouths, lest their ancestors lured them in. If they were lured into the water deeps by the ancestors, they'd spend the rest of their days caught in between worlds as abantu bomlambo, which one could translate as 'mermaids', though they are not the same. For one, abantu bomlambo are not only females but guides caught up in the numinous divide between this world and that of ancestors. They're closer to the Catholic saints ... You'd never thought much about that day before, nor understood its significance, until your path crossed with of the old man who told you he had been given directions to Johannesburg by the river people. At that moment you knew, somehow, that you were receiving a message from your mom. That she had found a way to filter it through the old man. In your culture, the mentally challenged especially seeming schizophrenic, are respected because of their ability to cross over the divide between the living and the dead. They're taken care of by everyone in the community in the same manner that other cultures protect their totem animals, like the Hindus do with cows or monkeys.⁹⁷

This excerpt combines two scenes. The first is a narration by Ruru, where she recounts the roots of her clan as it was taught to her by her mother. Her clan, "*AmaCirha amhlophe*", as explained in the excerpt, is intricately linked to the

97 Ntabeni (2021) at 260–262.

visible hand of their ancestors. The very essence of the existence of *AmaCirha amhlophe* is based on the lived experience of ancestors. These are a group of people who have an ontological appreciation of the composite existence of the dead, the living, and the yet-to-be-born. The second part of the excerpt relates to a scene where Ruru comes across a mentally ill stranger at a train station – in a moment of shock and confusion, the stranger communicates messages to Ruru that appear to be from her late mother. The sincerity, genuineness and accuracy of these messages remind Ruru of the *Abezimu/Badimo* epistemic tradition that insists that mentally ill persons are said to be conduits of messages between the living and the dead. The message that is sent to Ruru may not have instructed her to author a work that is worthy of copyright protection, as per the criticisms of the Act,⁹⁸ because the message was about directions for Ruru's trip to Johannesburg from the Eastern Cape province. The message from Ruru's ancestor is different from the instance of B.W Vilakazi above. Still, it could easily have been an authoring hand (had Ruru's mother directed her to reduce any part of her message into a material form). In that case, prevailing Eurocentric copyright epistemologies would insist that it is factually and legally incorrect to claim that Ruru's mother is an author.

Concluding analysis

The #MustFall movement of 2015–2016 has left with us a legacy of decolonial reason and questioning. A sense of opening, and a newer tradition of critique was experienced by the South African academy in the aftermath of the #MustFall moment; this has had varying interpretations/manifestations in scholarly legal interlocutory. In this article, I have drawn from this tradition, to modestly contribute to the discussion of how to decolonise copyright law. The argument defended in this article is that *Abezimu/Badimo* (ancestors) are an author in copyright law. Logically, this argument follows an expression of the need to transcend from *what is*, to *what ought to be*, as a decisive decolonial shift from a colonial to a decolonial copyright. Whilst this argument could have been defended by employing various existing academic methodologies, this article used decolonial theory to explore the literary exception – demonstrating that even if literature is not the law, it can be used as either an interpretative source, or even an archive to draw from, especially where the existence of epistemologies/ontologies are claimed, after the colonial episode. Ultimately,

98 As explained above, authorship is defined in s 1(1)(a) and s 1(1)(b)–(f) of the Copyright Act 98 of 1978.

decolonial options are only worth engaging if they radically shift existing paradigms, and polemically subvert actual knowledge hegemonies, instead of making proposals that tinker with some aspects of the colonial structures without uprooting its very foundations. In this context, authorship is the very foundation of global copyright.

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