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The Comprador Complex: Africa's IPR Elite, Neo-colonialism and the Enduring Control of African IPR Agenda by External Interests

*Ikechi Mgbeoji**

Despite the presence of well-trained African IPRs practitioners, IPR law practice and administration in Africa has for decades been dominated by a clientelist focus. The clients include Western corporations, institutions, and stakeholders. The triage of local elite, foreign clients and international IPR institutions has a long history in the colonial origins of IPR in Africa. Recent developments, especially, the emergence of a new cadre of IPR scholars, institutions, and NGOs suggest that the status quo may be upended soon.

Malgré la présence de praticiens africains bien formés sur le DPI, l'application et la pratique du droit relatives au DPI en Afrique ont été, pendant des décennies, dominées par un accent clientéliste. Les clients comprennent les entreprises occidentales, les institutions et les intervenants. Le triage des élites locales, des clients étrangers et des institutions internationales en matière de DPI possède une longue histoire dans les origines coloniales du DPI en Afrique. Les développements récents, en particulier l'émergence d'un nouveau groupe d'universitaires, d'institutions et d'ONG en matière de DPI, suggèrent que le statu quo pourrait bientôt être bouleversé.

1. INTRODUCTION

Intellectual property rights (IPR) concern that branch of law dealing with the regulation of the creation, protection, ownership, transfer, use, and access to intangible and tangible creations of the human mind.¹ From its modest origins in trademarks, IPR today traverse the gamut of copyright, patents, industrial designs, trade secrets, integrated circuits and topography, plant breeders' rights, geographical indications, and other emerging categories of IPR,² including folklore.³ The vast majority of countries across the world have IPR laws on their statute books. Beyond

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¹ Robert Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011).

² For a comprehensive overview, see, David Vaver, *Intellectual Property Law: Copyright, Patents, Trade Marks* (Toronto: Irwin Law, 2011).

³ Adebambo Adewopo, "Protection and Administration of Folklore in Nigeria" (2006) 3:1 Script-ed 1–16.

statutory provisions, states have also created administrative and institutional organs to deal with the manifold aspects of IPR such as the registration of applications, records of various transactions, renewals and collation of data.

Intellectual property rights are often promoted as useful for stimulating and encouraging creativity, economic development, innovation, and technology transfer. Yet, for more than a century, African states have participated in IPR regimes with little or nothing to show for it in terms of economic development and transfer of technology. It would seem that IPR have different impact in countries at different stages of industrial development. African countries have not enjoyed most of the positive claims attributed to strong IPR regimes. Like a mirage, domestic innovation and technological development recede from grasp no matter how long African states tread on the hard paths of strong IPR regimes. Beyond the meagre harvests from its long and expensive investments in IPR institutions, personnel and statutes, the most worrisome aspect of contemporary IPR issues in Africa is that the development of more progressive IPR regimes in the continent has been resisted indeed stunted not only by external factors but by local actors and institutions.

Despite the significant number of well-trained and highly educated Africans in the IPR sector, much of the debate on the roles of IPR in Africa is championed by foreign scholars, non-governmental organizations and stakeholders. In some of the contemporary debates on the content, structure, and processes of modern IPR regimes, the voices of indigenous African IPR administrators and practitioners have been muted or silent. If and when African IPR administrators and practitioners speak, they tend to champion the interests of foreign business entities at the expense of domestic concerns. For instance, controversies over manifold IPR issues such as access to crucial patented drugs, compulsory licensing, fair use in copyright, the scope of rights given to rights holders and apparent inequities of international arrangements for IPR protection, have witnessed little or no critical intervention by African IPR experts and administrators. Considering the high levels of education and experience in IPR possessed by the leading lawyers and administrators on the African continent, one would expect Africa's IPR practitioners and administrators to be at the forefront marshalling the need for progressive rebirth of IPR in the continent.

In this article, I argue that a more "developmentally progressive" rebirth of IPR regimes in Africa is highly unlikely unless the comprador complex which sustains contemporary IPR law practice and administration is interrogated and dismantled. By "comprador complex," I mean the intimate, client-focused, economic and professional relationship between local African IPR elites and their foreign clients and international institutions. The thesis of this article is that Africa's IPR bar and administrators are too steeped in the defence of their clients, paymasters and foreign validators for any progressive ideas to be expected from them.

Notwithstanding the excellent academic pedigrees of individual IPR practitioners and administrators, deeply entrenched cultures of clientelism, coupled with an arid intellectual landscape have combined to frustrate an adaptation of IPR tools and regimes to promote developmental interests in the continent. The continued existence of a comprador complex can only be dismantled or checked by democratizing the epistemic community and sources of norm-creation in IPR matters in the continent. This could be achieved by wider teaching of IPR courses in African institutions and placing greater reliance on scholars, ordinary rights-holders and pub-

lic-spirited activists rather than IPR practitioners and administrators. In sum, this article charts avenues by which the comprador complex and clientelist structure of IPR law in Africa may be dismantled.

The article is divided into five parts including the introductory section. Part 2 briefly introduces the comprador complex as a metaphor and framework of analysis of the alienation of African IPR practitioners from the concerns of the continent. Part 3 relates the comprador metaphor to the historical under-development of African IPR regimes and practices. Part 4 analyzes some of the current debates in IPR regimes vis-à-vis the silence of African IPR practitioners and administrators. Part 5 summarizes the essay and provides possible options for breaking the comprador complex.

2. AFRICA'S IPR COMPRADOR COMPLEX

The comprador phenomenon, as a metaphor, is useful in explaining the relationship between Africa's local IPR elite and the international IPR system. The key operators of IPR regimes in African states are very much like the Asian compradors of the 19th century. During the 19th century, foreign business enterprises in China's coastal ports employed local Chinese to act as their middlemen and agents in dealing with customers and employees.⁴ These local Chinese commercial elites owed their privileged position to the imperial structure of commerce. While the goods and merchandise they traded in were manufactured overseas, they retained domestically at huge profits. They frequently amassed great wealth,⁵ attaining social and political pre-eminence in the process. These affluent agents of imperial producers, compradors as they were called, acted not only as "agents, employees, informants, and customers of foreign business, but also provided large amounts of investment capital in foreign and Chinese controlled shipping, insurance, and mining enterprises."⁶

Whilst the colonial relationship visited hardship and misery on the preponderant indigenous populations, the privileged local elite who derived economic and political power from the colonial structure often tended to be invested in the colonial structure. It was a relationship that profited both sides to the exclusion of the indigenous denizens. The symbiotic relationship between empire and the commercial elites in the colonies shuttered the latter from critical engagement with the colonial project. Thus, regardless of the wider damage wrought by the colonial project on the general population, the colonial project could not have survived for long without the enabling support of a powerful, yet fractional segment of the populace committed to the project. It was in the best interest of the compradors to protect the colonial structure. In consequence, even though they were locals by birth, skin colour and appearance, their political and economic interests were more aligned with the colonial project. In the anti-colonial stance of Chinese nationalists, the compradors were often accused of "traitorously abetting the economic exploitation of

⁴ Yen-Ping Hao, *The Comprador in Nineteenth Century China: Bridge Between East and West* (Cambridge: Harvard University Press, 1970).

⁵ Many of the individual compradors were millionaires.

⁶ Thomas Rawskin, "The Comprador" (1971) 45:01 *Business History Review* 96–97.

China.”⁷ Even when anti-colonial sentiments became dominant and irresistible, in the vast majority of cases, the preferred option of the local elite was to supplant foreign colonial lords while maintaining much of the structure itself. Uprooting the colonial roots was largely out of the question.

The comprador phenomenon was not limited to British China. Indeed, the phenomenon of comprador systems was manifest and entrenched in virtually all the coastal towns of Asia in pre-industrial Japan, Korea, and colonial India.⁸ The Indian compradors, as the Bombay Chamber of Commerce wrote, were “either agents for or constituent branches of other firms at home, which again are frequently connected with other parts of the world, their transactions which often influence the orders they transact here.”⁹

Another characteristic of the comprador system was the near exclusive class it created and sustained. In many ways, the compradors became a business community of sorts, a kind of ecosystem seizing upon available business opportunities; and in many cases, setting up hurdles for new entrants while protecting their members from perceived external threats to their business interests. Their markets brought them together on the same platform, both for organization and agitation for special privileges. This class of bourgeoisie consolidated their privileges and deployed it to the fullest for purposes of making profit. As the next section demonstrates, Africa’s elite IPR practitioners and administrators are by history, habit and vested interests similar to Asia’s colonial compradors. Despite their sophisticated educational and professional training in some of the finest schools in Europe and North America, their ideological and intellectual preoccupation has been on maintaining the status quo on IPR practice and administration in Africa.

3. THE ENDURING COLONIAL STRUCTURE OF CONTEMPORARY AFRICAN IPR REGIMES

It must be noted at the outset that despite appearances of modernity, contemporary African IPR regimes are continuities of the colonial order. Consider the Nigerian Trademarks and Patents Office: it was established in 1901 through the Trademarks Ordinance, predating the amalgamation of the North and South Protectorates of Nigeria by Lord Lugard in 1914. The patent system was extended across the territory now known as Nigeria through conquest and amalgamation of the constitutive units of Nigeria. The various laws provided for the recognition, registration and protection in Nigeria of patents already granted in the U.K. by U.K. authorities. The Nigerian law itself was modelled on the draft law prepared by the United International Bureau for the Protection of Intellectual Property (BIRPI), the precursor of the World Intellectual Property Organization (WIPO).

⁷ *Ibid.* In some cases, the compradors actually made more money than the foreign principals.

⁸ Amalendu Guha, “The Comprador Role of Parsi Seths, 1750–1850” (1970) 5:48 *Economic and Political Weekly* 1933–1936.

⁹ *Ibid.* See also, Amalendu Guha, “More About the Parsi Seths: Their Roots, Entrepreneurship and Comprador Role, 1650–1918” (1984) 19:3 *Economic and Political Weekly* 117–119.

There were amendments to the ordinance in 1910 and 1914,¹⁰ all modelled after the laws and preferences of imperial Britain.¹¹ Nigerians or other applicants had first to apply to the U.K. Patent Office to be granted a patent for an invention before proceeding to Nigeria to have it registered. As Kent Nnadozie observed,

this state of affairs persisted until 1992. The re-registration system could be said to have worked adversely for patents in the country because it primarily shows the low value placed on patents and IP issues generally. A system where local inventors obtain local protection by first obtaining a UK patent can hardly encourage local innovation or research and development, which is a key rationale for intellectual property rights protection.¹²

As Shafiu Yauri equally observed,

the introduction of patent law in the colonies was never intended to encourage indigenous inventive activities, or local research and development, but rather to assist the protection of relevant technology for the exploitation of minerals and other resources of interest and value to the colonial system administration.¹³ To date, despite attracting [a] large number of foreign patents, the Nigerian Patent system does not positively encourage domestic inventive and innovative activities.¹⁴

For South Africa, IPR statutes were guided by the equivalent British and European Convention legislation.¹⁵ The same pattern is repeated in Uganda and much of the African Commonwealth countries. For example, the patent system was introduced to Ghana by the British colonial authorities in 1899. Patents granted in Britain were entitled to automatic re-registration in Ghana. No laws to limit the scope of these rights were passed, except for the provision in the 1972 amendment act precluding patents over chemicals. The Copyright Ordinance of 1911 extended all laws in the U.K. to the colony of Ghana (Gold Coast, as it was then called).¹⁶ Outside these developments, as some commentators observed, “IPR laws, except

¹⁰ See, *The Laws of the Colony of Southern Nigeria, 1908* at 675; Osita Eze, “Trade marks in Nigeria” (1979) *World Development* 727 at 727–736.

¹¹ Shafiu Yauri, “The Patent System in Nigeria” (2012) 34 *World Patent Information* 213–215.

¹² Kent Nnadozie, “Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Ghana and Nigeria” in George Sikoyo, *et al.*, *Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda* (2006) ACTS Ecopolity Series no. 16 at 8–9.

¹³ Yauri, *supra* note 11. See also, G.S. Yankey, *International Patents and Transfer of Technology to Less Developed Countries: The Case of Ghana and Nigeria* (Aldershot: Avebury Press, 1987).

¹⁴ Yauri, *supra* note 11.

¹⁵ R. Wolson, *Towards TRIPs Compliance: South Africa’s Experience and Legislative Reforms* (ICTSD, ACTS & QUNO, 2001)

¹⁶ B. Mould-Idrissu, “Copyright Protection and the Journalist” in K. Kwame & Kumado, eds., *The Law and the Media in Ghana* (Legon: University of Ghana Press, 2001) at 18–21.

for copyrights, have remained largely static in Ghana.”¹⁷ Yet, Ghana has produced some of the oldest IPR law firms in Africa with a substantial number of the lawyers trained in some of the most prestigious universities in the world.

Again, IPR laws in Kenya, until very recently, were a colonial heritage.¹⁸ It is important to point out that “copyright laws applied to Kenya by the colonial authorities were designed to protect the monopoly rights of British publishers 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.”¹⁹ Amendments to the *Copyright Act of Kenya* have not unyoked the colonial substance of the law. As Chege argues, “the main thrust of these amendments were to make Kenya law more aligned to emerging international treaties (especially, TRIPs) on subject-matter of coverage, enhancing penal sanctions for copyright infringement and providing civil remedies for infringement.”²⁰ The time-consuming and expensive patent system in Kenya was equally designed to cater to foreign interests.²¹ Again, some of the leading IPR law firms in Kenya have been in existence for several decades predating colonial independence from Great Britain.

It is no secret that contemporary African engagement with the global IPR regimes was on the basis of colonial fiat. Before African countries gained political independence, much of the superstructure of the global IPR structure was already in place. Under the principle of state succession to treaties,²² Nigeria and other former colonies had the option of succeeding to the IPR treaties originally signed by the imperial states or withdraw from those treaties. Most post-colonial African states have, since the celebration of independence, remained signatories to the Paris Convention. A few others withheld their memberships but subsequently acceded to some of those IPR treaties. For example, Ghana withheld accession for a while but signed on 1976 and Botswana did the same and signed on in 1998. In many ways,

¹⁷ George Sikoyo, *et al.*, *Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda* (2006) ACTS Ecopolicy Series no. 16 at 11.

¹⁸ P. Kameri-Mbote, “Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Ghana and Nigeria” in George Sikoyo, *et al.*, *Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda* (2006) ACTS Ecopolicy Series no. 16.

¹⁹ J.W. Chege, *Copyright Law and Publishing in Kenya* (Nairobi: Kenya Literature Bureau, 1978).

²⁰ *Ibid.*

²¹ J. Kingarui, “Towards a National Patent Law for Kenya” in Calestous Juma & J.B. Ojwang, eds., *Innovation & Sovereignty: The Patent Debate in African Development* (Nairobi, ACTS Press, 1989).

²² Article 7, Vienna Convention on Succession of State in Respect of Treaties, Vienna, August 1978.

as Jackson argued, “Africa became an overseas extension of European sovereignty”²³ on matters pertaining to IPR.

However, the real problem with the IPR regimes in Africa was not their colonial origins *per se*, but the creation and sustenance of an IPR elite economically wedded to the huge financial gains accruable from IPR transactions with overseas rights-holders. Matters have not been helped by the incurious and clerical nature of IPR law and practice in the continent which creates enormous wealth for individual IPR lawyers and administrators for work that is largely clerical in nature. The fact of the matter is that the colonial authorities deliberately created an IPR system that was structured to be intellectually incurious, clerical in temperament, and client-focused.

On the latter, African IPR offices were statutorily and procedurally designed to be mere receptacles for foreign applications with little or no intellectual interventions by domestic IPR practitioners and administrators. For example, in the granting of patents, under colonial patent law, there was no requirement for domestic examination in the processes leading to the grant of patents. Most patent offices in Africa were merely engaged in the mechanical stamping and sealing of foreign applications without ever questioning whether the application for patent is meritorious or not. Yet, the local patent agents charged handsome fees for what was essentially a clerical task.

In the colonial and immediate post-colonial eras, most of Africa’s IPR laws did not require special training or qualification for lawyers in patent drafting or prosecution. In contemporary times, not much has changed in this regard. A brief survey of the number of patent applications filed in Africa shows that local inventors hardly file for patent protection in Africa.²⁴ Even if they tried to, they would be hard put to find an African lawyer who can draft the requisite application. The reason why few African lawyers practising in African States may not draft patent claims is largely because Africa’s patent laws do not require domestic input or substantive examination of patents. In the absence of any incentive or requirement to acquire some of these skills, local capacity has not developed beyond clerical recordals and running of errands. The few institutions in the continent where patent agents can be trained in the techniques of claims drafting are hardly put to serious use.

For much of the past century, the bulk of the work was done overseas and the end products were mailed to local lawyers in Africa for filing. Indeed, virtually all of the Patent Cooperation Treaty (PCT) applications filed in African states are drafted by foreign patent lawyers and mailed to lawyers in African States for entry into the National Phase. The system created by the colonial forces for the re-registration of foreign patents in African States without any examination or questions asked by the African municipal offices has barely changed more than 50 years after

²³ R. Jackson, “Sub-Saharan Africa” in R. Jackson & A. James, eds., *States in a Changing World: A Contemporary Analysis* (Clarendon: OUP, 1993).

²⁴ R.S. Eckaus, “Notes on Invention and Innovation in Less Developed Countries” (1996) 56 *The American Economic Review Papers & Proceedings* 98–109.

the formal end of colonialism in Africa.²⁵ Africa is largely a dumping ground for foreign patents.

The immediate consequence of this regime was the emergence and strengthening of a professional class cocooned and sheltered from the demands of intellectual exertions and curious inquiries. The paradox here is that the first, second, and third generations of IPR lawyers in Africa were formidable intellectuals trained in some of the best universities in the world. Curiously, as Sikoyo observed, there is only “minimal academic or research oriented practice as most activities are focused on routine procedural aspect and negotiated settlement of disputes. The lack of a robust and litigious constituency leads to a very sluggish development of IPR law and practice.”²⁶

In terms of quality of IPR administration, the system was shielded from public gaze. Since the emergence of Trademarks Offices in colonized African territories more than a century ago, the current administrative processes at the Trademarks Registries have barely changed. Records of filings in African IPR offices are often kept in dog-eared files. Important data are often stored on pieces of cardboard paper.²⁷ Due to inadequate funding and/or indifference, it is not uncommon for files to disappear or become unavailable when needed.²⁸ It is not uncommon for files to be ruined by the elements such as rain, excessive exposure to sunlight, *etc.* As Harms J.A., of South Africa’s Court of Appeal recently observed, “the lost-file epidemic, moving through our legal landscape like the bubonic plague and sweeping us back into the Middle-Ages, has also, it seems, infected the (Trademarks) Registry.”²⁹ In many African countries, searches of IPR database are still conducted today in the same manner as they were done a century ago.

As noted in the preceding pages, the structure and processes of Africa’s IPR practice was from the beginning premised on close economic relationships between African IPR lawyers and their foreign clients. The first generation of IPR lawyers in Africa were Europeans. Interestingly, the Africanization of legal practice which swept through the decolonization process in Africa in the 1950s and 1960s changed little as regards IPR practice.

IPR legal practice was arguably the last field of law practice to witness significant African numbers. A cursory look at the IPR law firms in Kenya, Nigeria, Ghana, South Africa confirms this fact. The leading IPR law firms were largely European, even at a time when African lawyers had become experts in constitutional law, land law, chieftaincy law, and administrative law. In the heated anti-colonial rage and rhetoric, focus was largely placed on constitutional issues and land law. To many African states, regaining political control over the continent and reclaiming land hitherto occupied by European colonialists were the most pressing

²⁵ Peter Drahos, *The Global Governance of Knowledge-Patent Offices and their Clients* (Cambridge: Cambridge University Press, 2010).

²⁶ Sikoyo, note 17 at 29.

²⁷ See, for example, the lamentations of Harms J.A., in the South African case of *SAFA v. Stanton Ltd. & Registrar of Trademarks* (2002), ZASCA 142.

²⁸ *Weltevrede Nursery Ltd. v. Keith Kirsten Ltd & Anor* (2003), ZASCA 136.

²⁹ *Ibid.* See also *Levi Strauss & Co. v. Coconut Trousers Manufacturers Ltd.* (2001), ZASCA 60.

issues of the laws. IPR regimes were not on the radar. It is therefore not a coincidence that the vast majority of newly trained African lawyers were versed in constitutional law and land law issues rather than IPR. Not surprisingly, IPR practice in Africa was perhaps the last bastion of European control of legal practice in Africa.

The second generation of IPR lawyers in the 1960s and 1970s were well-trained African lawyers who had returned from Europe and worked in European-owned IPR law firms. This generation of lawyers, as noted in the preceding pages, inherited a lucrative but intellectually dull practice. Like their European predecessors, the vast majority of their briefs and instructions emanated from overseas law firms, corporations, and clients. This created a privileged class of lawyers more attuned to the protection of foreign interests to the detriment of a critical and progressive engagement with modern IPR. To date, the vast majority of IPR work done in Africa emanates from Europe and North America and is often routed through South African law firms. It is not a coincidence that the largest IPR law firms in Africa with the largest portfolio of clients are based in South Africa.

Like the compradors of Asia, Africa's IPR practitioners naturally became deeply embedded in international clientelist groups including International Trademark Association (INTA), and other networks devoted to the sourcing of clients and promotion of the client's interests. These clientelist networks are often replicated at the domestic level where they act like an echo-chamber for foreign commercial interests. As an official of Nigeria's Trade Marks registry observed, "Nigeria has robust professional IP associations existing side by side with the national bar association. These are: the Intellectual Property Law Association (IPLAN), with about 100 law firms as members, and the International Association of Industrial Property Attorneys (AIPPI), with over 75 law firms as members."³⁰

These associations are often committed to the protection of foreign interests, the economic interests of their clients.³¹ The ability of international NGOs on IPR to champion progressive and developmental objectives in Africa and elsewhere is constrained by the fact that such organizations are largely the creation of global capitalism.³² The elitist opportunism inherent in international IPR international NGOs such as INTA, AIPPI, *etc.* is perhaps what scholars need to explore, especially, as the socialization aspect tends to create IPR lawyers whose preoccupation is with the chasing of briefs and defence of their clients.³³ This phenomenon has given to what David Kennedy has characterized as the "professional assimilation and intellectual invisibility"³⁴ of modern IPR practitioners in Africa.

³⁰ Yauri, *supra* note 11.

³¹ J. Kraus, "Capital, Power and Business Associations in the African Political Economy: A Tale of two Countries, Ghana and Nigeria" (2002) 40:3 *Journal of Modern African Studies* 395–436.

³² R. Joseph, "Affluence and Underdevelopment: The Nigerian Experience" (1978) 16:2 *Journal of Modern African Studies* 221.

³³ Eghosa F. Osaghae, "The State of Africa's Second Liberation" (2005) 7:1 *Interventions* 1–15.

³⁴ David Kennedy, "The TWAIL Conference: Keynote Address, Albany, New York, April 2007" (2007) 9 *International Community Law Review* 333 at 335.

Perhaps, the most disturbing aspect of the colonial capture and detention of Africa's IPR regimes is the colonial mind-set of IPR administrators in the continent.³⁵ Since the 19th century, the vast majority of international treaties and agreements on IPR have the WIPO office in Geneva as their administrative headquarters or secretariat. Geneva, therefore, is a metaphor for the centrifugal pull of international IPR administration, administrative socialization, and norm-making. As a result of the colonial set up of African IPR administration, too often Africa's IPR policies are designed to impress Geneva.

The Geneva-centric orientation of IPR laws administration in Africa partly accounts for the failure of Africa's IPR administrators to design and implement IPR laws and policies tailored³⁶ to meet the needs and aspirations of Africans and the cultural heritage of Africa. Scarce resources are deployed by Africa's IPR administrators in defence of foreign IPR³⁷ while African IPR languish in the doldrums.³⁸ In my personal encounters with Nigerian IPR officials, great pride is often shown in how many trips to Geneva an administrator has undertaken in his/her career. Junior and mid-level officials place great premium on lobbying for such trips. Senior officials often use enlistment in trips to Geneva to condition the behaviour of junior officials. Foreign trips to overseas conferences, meetings, and trainings can be very lucrative for government officials as they receive allowances and honoraria in foreign currency. The lobbying for such trips can be quite fierce.

In brief, the problem with enthrallment to foreign influence, as two commentators recently observed, "is that it rests on a misplaced need for external validation, and the concomitant reliance on ways of addressing life through law that have not been put through the crucible of one's own local experience."³⁹ Thus, despite the abundance of African well-trained experts in matters pertaining to IPR policy-making, government officials who are pre-occupied with validation by the peers in Geneva or in the economic benefits from overseas trips are often ill-prepared for substantive interventions in IPR policy-making at the global level. As two recent commentators presciently observed,

colonization works surreptitiously because colonized institutions either do not realize their subservient status, or they relish the thought of acceptance by the dominating off-shore institutions. Its success also depends not just on a belief in its inevitability, but on the presumption of its necessity — a presumption often grounded in a sense of inferiority.⁴⁰

³⁵ But see, B.S. Lundvall, *et al.*, "National Systems of Production, Innovation and Competence Building" (2002) 31 *Research Policy* 213–231.

³⁶ Kilian Bizer, *et al.*, "Sui Generis Rights for the Protection of Traditional Cultural Expressions" (2011) *Journal of JIPITEC* 114.

³⁷ Peter Yu, "The TRIPS Enforcement Dispute" (2011) 89 *Neb. L. Rev.* 1046–1131; Peter Yu, "Enforcement, Economic and Estimates," (2010) 6 *Occasional Papers in Intellectual Property Law* 1–20.

³⁸ W. Kingston, "Innovation Needs Patents Reform" (2001) 30 *Research Policy* 403–423.

³⁹ Ron Macdonald & Thomas McMorow, "Decolonizing Law School," paper presented at the University of Alberta, 2013 at a conference on "The Future of Law Schools" (2014) 51:4 *Alta. L. Rev.* 717.

⁴⁰ *Ibid.*

Indeed, with the recent conclusion of several TRIPs-plus treaties, the subordination of African needs to imperial IPR dictates has intensified.⁴¹ This Geneva-centric approach to IPR administration fails to take into account the historical contingencies of IPR and the lessons immanent in the histories of states such as the United States of America, India, Italy, Brazil, and China.

From the foregoing, the vast comprador complex on which the structure and processes of IPR practice and administration are currently premised requires a re-think. The colonial roots of IPR law and practice are alive and strong largely because the current operators of the system see nothing wrong with the system itself. Indeed, most stakeholders in the domestic IPR regime in Africa are quite happy with the status quo.

4. MISSING IN ACTION: AFRICAN STATES AND MODERN IPR REGIMES

The consequences of the vast comprador complex underpinning IPR law practice, norm-making and administration are all obvious to see. While African countries have invested in establishing IPR regimes, there is little evidence that the investments made in IPR administration have impacted the economic and technological development of African states.⁴² Africa remains a net importer of foreign technology. African arts, cultural heritage and other forms of intellectual property continue to suffer exploitation in the hands of foreign actors. As Sikoyo, *et al.* observe, “the argument that intellectual property contributes to development has not been proved in most African countries which have had IPR regimes dating back to the early 1900s.”⁴³ The promises of IPR in terms of spurring technological development in Africa have largely been illusory.⁴⁴ The unfulfilled promises of IPR regimes in Africa are particularly acute in the context of the minimal pharmaceutical industry base in Africa,⁴⁵ lack of industrial manufacturing capacity, heavy dependence on subsistence agriculture, inadequate physical infrastructure, and near-total dependency on foreign technology.⁴⁶ Worse still, Africa continues to suffer brain drain as its best and brightest minds continue to work, live, and thrive overseas.

From most indices, nothing has changed in terms of enhanced public access to technological information which ought to have enlarged and enriched the African public domain through the instrumentalities of IPR regimes. The vast majority of

⁴¹ Peter Yu, “Trips Enforcement and Developing Countries” (2011) 26:3 Am. U. Int’l L. Rev. 727–778.

⁴² Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge: Cambridge University Press, 2010).

⁴³ *Supra* note 17 at 9.

⁴⁴ Peter Drahos, “‘Trust me’: Patent Offices in Developing Countries” (2008) 34 Am. J. L. & Med. 151–70.

⁴⁵ F.M. Abbott, “The TRIPs Agreement, Access to Medicines, and the WTO Doha Ministerial Conference” (2002) 5.1 Journal of World Intellectual Property 15–52.

⁴⁶ C. May, “The World Intellectual Property Organization and the development agenda” (2008) 11:22 Global Society 97–130.

IPR which are afforded protection in African states originate from Europe, North America, South America and Asia. As recently confirmed, “[the] statistics available indicate that most patent applications emanate from North America and Europe⁴⁷ while Africa accounts for less than two per cent of the total patent applications.” This raises the question of whether the investments that African countries have made in establishing intellectual property protection systems are justified.⁴⁸

Beyond the unrealized promises of IPR regimes, perhaps most problematic is Africa’s minimal intellectual and policy contributions to the pressing issues in current IPR regimes. The issue of traditional knowledge in the context of IPR is troubling.⁴⁹ Although Africa’s wealth in biological resources and traditional knowledge make the application of IPR to these resources an important issue for discussion and resolution, there is little push by policy makers and African IPR practitioners and administrators to articulate responsive and workable IPR policies.⁵⁰

In contrast to Africa’s minimal contributions to the debate on such important issues, Asian and Latin American states have made significant policy interventions in the field of protection of bio-cultural resources through innovative IPR regimes.⁵¹ For example, Peru,⁵² Brazil, Costa Rica,⁵³ and Bolivia have developed legal regimes for the protection of bio-cultural knowledge. In these countries, domestic legal regimes, *inter alia*, now require that patents on bio-cultural resources cannot be granted unless the applicant presents a Certificate of Origin. These requirements often require the applicant to demonstrate that the materials were sourced in a legal and ethical manner. In contrast, there are few adequate domestic provisions regulating access to and exploitation of African bio-cultural knowledge. The lack of adequate legal regulation of access to bio-cultural resources enables unscrupulous and foreign entities to profit from African bio-cultural knowledge. Many African research institutes are far too excited to be seen “collaborating” with foreign bio-prospectors while little regard is paid to the legal and economic ramifi-

⁴⁷ International Centre for Trade and Sustainable Development & UNCTAD, *Intellectual Property Rights: Implications for Development*, Policy Discussion Paper, UNCTAD-ICTSD Project on IPR and Sustainable Development, Geneva (2003).

⁴⁸ R. Acharya, *The Emergence and Growth of Biotechnology: Experiences in Industrialised and Developing Countries* (Cheltenham: Edward Elgar, 1999).

⁴⁹ David Lea, *Property Rights, Indigenous People and the Developing World: Issues from Aboriginal Entitlement to Intellectual Ownership Rights* (Leiden: Martinus Nijhoff, 2008). For a definition of traditional knowledge, see, Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (Vancouver: UBC Press, 2005).

⁵⁰ Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity* (London: Earthscan, 2000).

⁵¹ *Supra*.

⁵² Manuel Ruiz, *et al.*, “The Protection of Traditional knowledge in Peru: A Comparative Perspective” (2004) 3 Wash. U. Global Studies L. Rev. 755.

⁵³ Michael Miller, “Biodiversity Policy Making in Costa Rica: Pursuing Indigenous and Peasant Rights” (2006) 15:4 *The Journal of Environment & Development* 359–381. Costa Rica’s Biodiversity law of 1998 is arguably the most comprehensive legislation implementing the Convention on Biological Diversity. Much of Costa Rica’s success owes to the role of NGOs, social movements in spite of opposition from traditional political powers.

cations of such “collaboration.”⁵⁴ Sadly, African IPR laws and institutions remain tools and mechanisms for the colonial capture of African bio-cultural knowledge.⁵⁵

As in Latin America, India has in the past decade created an impressive database of medicinal bio-cultural knowledge which has been used as a bulwark against biopiracy and appropriation of Indian traditional knowledge. India has a comprehensive database of bio-cultural knowledge collated by a team of science graduates most of whom hold doctorate degrees in such fields as pharmacy, botany, pharmacology, *etc.* The Traditional Knowledge Digital Library (TKDL) seeks to document in digitized format the *Ayurveda*, *Unani Tib*, and other medical systems, based on documents that are already in the public domain. The TKDL is a classification system based on the International Patent Classification structure and is designed to assist patent examiners in their search for novelty and inventiveness in patent classifications.⁵⁶

In addition, India’s drug regulatory agency has been focused on the efficacy of herbal medicine sold in India rather than compelling Indian herbalists to disclose the secrets of their herbal remedies. These developments stand in contrast to the situation in several African States where little or no initiatives have been seized by the IPR administrators in Africa to tailor the operational mechanisms of IPR enforcement in ways that reflect national priorities and concerns.⁵⁷

Given Africa’s wealth in biological diversity and bio-cultural knowledge,⁵⁸ one would have thought that coherent efforts should have been geared towards adapting some of the amenable IPR regimes including Certification Marks, Geographical Indications,⁵⁹ and Indications of Origin to promote and protect such bio-cultural knowledge including the medicinal and industrial uses of various species of yams, the Shea butter tree, palm oil trees, bitter-kola, alligator pepper, *etc.*⁶⁰

⁵⁴ WIPO *Technical Study on Patent Disclosure Requirements Related to Genetic Resources and Traditional Knowledge*, Study No. 3 (2002).

⁵⁵ Bankole Sodipo, *Piracy and Counterfeiting: GATT, TRIPs and Developing Countries* (London: Kluwer Law International, 1997).

⁵⁶ Anil Gupta, “The Honey Bee Network: Transforming the Paradigm of Benefit Sharing” in Sarah Laird., ed., *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (India: SRISTI, 2002).

⁵⁷ But see, Johnson Ekpere, “The African Union Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and the Regulation of Access to Biological Resources” in Christophe Bellman, *et al.*, eds., *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability* (2003).

⁵⁸ *Convention on Biological Diversity*, entered into force on December 19, 1993, reprinted in (1992) 31 *International Law Materials* 813.

⁵⁹ Jo Recht, “Intellectual Property in Indigenous Societies: Culture, Context, Politics and Law” (2006) 6 *Dartmouth Law Journal* 277–298.

⁶⁰ See, for example, Chidi Oguamanam, “Genetic Resources & Access and Benefit Sharing: Politics, Prospects, and Opportunities for Canada after Nagoya” (2011) 22 *J. Envtl. L. & Prac.* 87.

While other regions of the world have taken important steps towards the regulation of access to bio-cultural knowledge⁶¹ as demonstrated in the Nagoya Protocol,⁶² African IPR administrators are more like pedestrian bystanders, apparently more interested in watching events unfold rather than participate actively and decisively.⁶³ On the occasions when government officials entrusted with administration of IPR attend conferences, meetings, *etc.*, there is rarely an organized intellectual engagement with the issues. It is hard to read the transcripts of official meetings on IPR issues and find any substantive and serious contributions made by African delegates.⁶⁴ Yet, there are Africans both in the continent and in diaspora versed in the issues.

Of particular note is the lack of engagement by African countries in international IPR arrangements such as TRIPs.⁶⁵ As the African Union lamented, “a smaller part of humanity, represented by 40 States concluded the negotiations for the creation of the World Trade Organization (WTO) in 1994. African countries had negligible or no inputs into the negotiations.”⁶⁶ Delegates from “smaller” but better organized States have been known to make notable and important contributions towards international policy instruments in IPR. There is simply too much “ad-hocry” in the African approach to IPR governance. Much of the critical and progressive voices on Africa’s IPR policy come from liberal scholars and NGOs from the West.

The lack of critical engagement with contemporary developments on IPR content and regimes is further evidenced by the paucity of domestic regulations on patent disclosure requirements. As I have argued elsewhere, the administration of patent systems in Africa leaves the impression that Africa’s IPR administrators would rather be doing something else than engage critically with IPR policies.⁶⁷

In the area of copyright law, the situation is equally parlous. As I had observed elsewhere, limited resources the state has are often deployed to apprehend, prosecute and jail copyright infringers. Copyright administrators in the African conti-

61 Traci McClellan, “The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples” (2001) 19 Wis. Int’l L.J. 249.

62 “Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization” (Tenth Meeting Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18–29 October 2010).

63 See, for example, *African Model Legislation for the Protection of the Rights of Local Communities, Framers, and Breeders, and for the Regulation of Biological Resources*, OAU Model Law, 2000 (on file with the author).

64 S. Wiessner & M. Battiste, “The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous Knowledge” (2000) 13 St. Thomas L. Rev. 383.

65 See Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. 1197.

66 Michelle Gravelle & John Whalley, “Africa and the Uruguay Round” (1996) 6 Transnational Law and Contemporary Problems 123.

67 Ikechi Mgbeoji, “Patent Offices in Africa Not Fit For Purpose” in De Beer, J., *et al.*, eds., *Innovation and Intellectual Property: Collaborative Dynamics in Africa* (Cape Town: UCT Press, 2013).

ment, at the behest of foreign entities, often show great zeal in arresting illegal copiers and making public bonfires of their seizures.⁶⁸ Ironically, Africa has some of the highest levels of adult and childhood illiteracy stemming partly from limited access to books.

In the area of folklore where contemporary copyright regimes have proven inadequate to protect African interests, there is little initiative from the IPR establishment in the continent. African folklore bears eloquent testimony to the civilization and culture flourishing in Africa before the colonial era.⁶⁹ Yet, this patrimony of states faces existential threats. As one commentator lamented, “this aspect of African cultural heritage has, for some time now, suffered from the syndrome of cultural atrophy and opportunistic invasion. It grieves the heart to learn that Nigerian folklore is fast becoming extinct and anachronistic — no thanks to the school system, particularly the primary school curricula.”⁷⁰ Commenting further, Olueze laments that, “the illegal exportation of folklore materials and antiquities to Europe has dealt a severe blow to Nigerian cultural development. The result is that a great number of folk arts, particularly drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, handicrafts, costumes and indigenous textiles, are hidden away in museums across Europe and America.”⁷¹ In fact, there is more African art in cities like New York than in African cities.⁷² African art is ubiquitous in many malls in the United States and Europe.⁷³ The incompetence of IPR administrators in respect of folklore in Africa is well-documented.⁷⁴ The protection of folklore in Africa has simply stagnated.⁷⁵

Little African case law on IPR has been important or seminal enough to command the scholarly attention or judicial notice of courts outside the continent. In countries with a functional and responsive IPR regime, the vast majority of IPR disputes arise from contested decisions of administrative tribunals and/or industrial disputes between two or more users/creators of IPR. Given that African laws do not

⁶⁸ Ikechi Mgbeoji, “TRIPS and TRIPS Plus Impacts in Africa” in Daniel Gervais, ed., *Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007) at 259–296.

⁶⁹ N. Okigbo, “Promotion of Indigenous Technologies in Sustainable Development in Africa” in Johnson, *et al.*, *Role of Indigenous Technology in the Socio-Economic Development of Africa* (Nigeria: OAU/STRC, 1998) at 16–64.

⁷⁰ Ikechukwu Magnus Olueze, “Protection of Expressions of Folklore as a Vehicle for Cultural Dissemination Under Nigerian Law” (2000) 25 *Int’l Leg. Practitioner* 64.

⁷¹ *Ibid.*

⁷² Babacar Ndoye, “Protection of Expressions of Folklore in Senegal” (1989) 25 *Copyright Monthly Rev. World Intell. Prop. Org.* 374–375.

⁷³ Paul Kuruk, “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States” (1999) 48:4 *Am. U. L. Rev.* 769–850.

⁷⁴ Ayoyemi Lawal Arowolo, “Copyright Law and the Recognition of ‘Folkloric Creations’ and ‘Folk Medicine’ in Africa” (2011) 5:1 *Journal of Black and African Arts and Civilization* 33.

⁷⁵ Olalere Oladitan, “Of Folklore and the Law in Nigeria: The Copyright Decree 1988” (1995) *Journal of Nigerian Folklore* 19.

promote an intellectual intervention by African lawyers in the practice of IPR, it should surprise no one that IPR practice in Africa is rarely animated by serious intellectual debates.⁷⁶ Obviously, the environment in which IPR law practice and administration are undertaken in most African states seems devoid of serious intellectual exertions. Consequently, the vast majority of what passes for IPR practice and administration in Africa is an exercise in clerical drudgery; little more than running errands for the major law firms and business entities of Europe and North America.

Given the superior-inferior relationship between the colonial order and the colonized peoples, the foundation of early IPR regimes, especially patents and copyrights, was not designed to acknowledge and protect the staggering achievements of pre-colonial Africa,⁷⁷ in the areas of folklore,⁷⁸ music, sculpting, bronze-work, and agriculture. For centuries therefore, traditional knowledge frameworks and its credentialing mechanisms were denied legitimacy, scholarly recognition and legal protection.⁷⁹

5. CHARTING ESCAPE ROUTES

The question that arises from this depressing state of affairs is what are the pathways to a break-out? In order to chart the way forward, we should, as Chinua Achebe once counselled, determine from whence the rain started to beat us. The first and most important task is the teaching of IPR courses in Africa's institutions. There is a crying need for the teaching of IPR courses in Africa's universities and tertiary institutions of learning. For nearly 100 years, the branch of law known as IPR has been treated by many African universities as an after-thought, an appendage to other disciplines of law such as real property. In this digital age, the significant divide between Africa and the rest of the world can be bridged through information technology. There are hundreds of tertiary institutions in Europe and North America willing, via information technology, to teach IPR courses in Africa's tertiary institutions. Existing curriculum in universities has yet to adopt critical approaches to IPR.

Unless the pool of IPR scholars and activists in Africa is increased, the hegemony of Africa's IPR elites will continue. Many African states have complained about the lack of adequate personnel who have in-depth knowledge and grasp of the various issues at stake. IPR are technical and require people who know and understand their intricacies. Regrettably, negotiators from most African states are civil service officials lacking technical knowledge of the issues. Scarcity of human and material resources is compounded by absence of consistent and progressive

⁷⁶ B. Michael, "Constitutional Fair Use" in Copyright Law Symposium, No. 28 (New York, Columbia University Press) 144.

⁷⁷ Basil Davidson, *The African Past: Chronicles from Antiquity to Modern Times* (New York: Grosset & Dunlap, 1967); Cheikh Anta Diop, *Precolonial Black Africa* (Brooklyn: Lawrence Hill Books, 1987).

⁷⁸ Isidore Okpewho, *The Epic in Africa: Toward a Poetics of the Oral Performance* (New York: Columbia University Press, 1975).

⁷⁹ Martha Johnson, ed., *Lore-Capturing Traditional Environmental Knowledge* (Ottawa: IDRC, 1992).

IPR policy. Countries often attend negotiating summits without a clear idea of what their national IPR policy is or should be, “leaving countries vulnerable to positions taken by developed countries; this was clearly evidenced at the Uruguay Rounds.”⁸⁰

This second task is for IPR administrators in African states to recognize the need for a critical engagement with the structure and process of global IPR regimes.⁸¹ Historically, all states with strong stakes in IPR have been known to adapt their IPR regimes, especially, the administrative component of IPR regimes, to suit and serve their domestic industrial needs depending on their domestic imperatives and stages of industrial prowess.⁸²

Although African states have treaty obligations in the realm of IPR, the margins of discretion in the areas of administration have been left fallow. While most states may have similar statutory provisions in IPR laws, the real difference often resides in the way and manner in which IPR laws are administered. There is enormous room for discretion and policy initiatives in the area of administration. The lamentable rot in Africa’s IPR regimes is largely a direct result of the uninspired manner in which IPR laws have been administered in the post-colonial era.⁸³ Unlike other former colonies such as India and Brazil which have exercised their discretion in the domestic administration of IPR treaties and conventions to advance domestic agendas, little has changed in the metropolis-colony relationship between the imperial powers and the African IPR landscape. A business-as-usual approach, in which IPR administration in African states is no more than filing and registering all manners of IPR applications is simply antiquated and counter-productive.

In addition, it is high time the neo-colonial⁸⁴ orientation of Africa’s IPR administrative bodies was addressed. For too long, our IPR administrative institutions have operated as extensions of imperial states by devoting substantial resources to projects and issues that are of interest to foreign states and interests while ignoring or failing to adapt IPR laws and procedures to matters of importance to Africa.⁸⁵ IPR are inescapable in the current global context. The real issue is that “African countries need a consideration of their historical, cultural, and socio-economic as well as resource endowment with a view to having alternate approaches to IPR rather than the current regime that constrains them.”⁸⁶ Much can be achieved by building meaningful coalitions with countries that have successfully broken the yoke of colonial agenda-setting on IPR issues.⁸⁷

⁸⁰ Sikoyo, *supra* note 17 at 25.

⁸¹ Peter Yu, “TRIPs and Its Achilles’ Heels” (2011) 18 J. Intell. Prop. L. 481–530.

⁸² Peter Yu, “The Global Intellectual Property Order and its Undetermined Future” (2009) 4 Occasional Papers in Intellectual Property Law.

⁸³ K.J. Arrow, *Economic Welfare and Allocation of Resources for Invention* (New York: National Bureau of Economic Research) 609–625.

⁸⁴ Grace Woo, *Ghost Dancing with Colonialism* (Vancouver: UBC Press, 2011).

⁸⁵ Sungjoon Cho, “The Demise of Development in the Doha Round Agreements” (2010) 45 Tex. Int’l L.J. 573.

⁸⁶ Sikoyo, *supra* note 17 at 28.

⁸⁷ Peter Yu, “Building Intellectual Property Coalitions for Development” (2009) 3 Occasional Papers in Intellectual Property Law.

Third, African states need a clear industrial policy which should articulate precisely what it is they intend to achieve from their engagement with IPR regimes. It is very hard, perhaps impossible to have a responsible and responsive IPR regime without a credible industrial policy. It is not for nothing that some forms of IPR are described as industrial property. An industrial policy must of necessity determine and locate the roles which IPR are expected to play in the various sectors including healthcare, agriculture, industrial production and manufacture, environmental protection, education, *etc.*

Fourth, Africa needs a home-grown civil society presence in matters pertaining to IPR governance. All over the world, significant developments in IPR have been animated or even originated from the insights, pressures, and agitations of civil society groups. These organizations possess the expert, global connections, and resources to help improve IPR regimes. The creation and sustenance of domestic African pressure groups on IPR with requisite expertise and international links is perhaps one of the most pressing needs of our times. Thankfully, there is an emerging cadre of African IPR scholars, activists, and policy-makers who are breaking out of the shadows of the status quo. These groups and entities need adequate support, encouragement, and visibility.

Finally, the emergence of a significant cadre of African IPR scholars in many universities and research centres across the continent is bound to have a dramatic impact on the status quo. IPR courses are today taught in several institutions dotted across the continent. The dominance of IPR practitioners and government officials in policy-making is gradually waning and giving room to more critical and independent voices. This is a positive development and a harbinger of improved situations in the generations to come.