The call to decolonise higher education: copyright law through an African lens

by

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ACADEMIC DECLARATION

Declaration: .....

1. I understand what academic dishonesty entails and am aware of Unisa's policies in this regard.

2. I declare that this dissertation is my own, original work. Where I have used someone else's work I have indicated this by using the prescribed style of referencing. Every contribution to, and quotation in, this dissertation from the work or works of others has been referenced in accordance with this style.

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Summary

This dissertation reflects critically on the calls for the decolonisation of South Africa's higher education sector by studying the historical development of legal pedagogy in South African law faculties. It focuses in particular on the intellectual property law curriculum broadly, and more specifically on the copyright law module. Africa's colonisation by Western powers ravaged it in various ways. This is starkly illustrated in the areas of knowledge production and research. Against this background the dissertation teases out the prevailing extent, depth, and reach of colonialism in the copyright law curriculum with the aim of identifying possible ways to give practical effect to the calls for the curriculum to be decolonised.

To achieve this, the dissertation examines leading South African intellectual property law textbooks through an African lens in an express attempt to assert the pluriversal, epistemicological traditions of the global South. In each chapter and with each theme the dissertation proposes how an envisaged decolonised copyright curriculum could look.

The dissertation grapples with the various theories underpinning the decolonial discourse, laying groundwork for an academically sound basis on which to decolonise the copyright law curriculum. It provides an African critique of the Eurocentric intellectual property law 'justifications debate' and posits communal modes of property ownership in Africa to counter Western individualistic notions of property ownership which lend credence to the current justification debate. The dissertation analyses the nature of copyright in a work using the philosophy of Ubuntu as an alternative in teaching this theme within the curriculum. A decolonial analysis of the requirements for copyright is offered, and it is argued that the current sta-ndards and threshold used for the subsistence of copyright is colonial and furthers the onslaught on the Black Body, both in its practical application and in how it is taught. The dissertation concludes by studying copyright exceptions, critically urging the academy to apply a differentiated model of exceptions to different jurisdictions in light of their colonial history (and present).

Key words: Decolonisation, Africanisation, Epistemology, Mohlomism, Copyright law curriculum, Critical Pedagogy, Ubuntu, Transmodernity.

Isirhunyezo

Lomtlolo utjheja ihlangothi lokufuna bona kutjhugululwe iimfundo zemkhakheni wezefundo ephakamileko yangeSewula Afrika ngokufunda ngetuthuko yokufunda kanye nokufundisa ngemNyangweni wabajameli. Utjheja khulu umthetho wepahla wezefundo khudlwana kanye nomthetho welungelo lokukhuphela. Ukuthunjwa kweAfrika ngabamhlophe kone ngeendlela ezinengi. Lokhu kutjengiswa kumbi mikhakha ekhiqiza ilwazi kanye nerhubhululako. Ngalesi isendlalelo lomtlolo utjheja ngokudephileko ukobana ukuthunjwa kweAfrika ngabamhlophe kulethe muphi umuthelela ngehlangothini lomthetho welungelo lokukhuphela lezefundo ngomqopho wokufumana iindlela nofana iinzathu zokobana kutjhugululwe ifundo yangeemfundweni eziphakamileko. Ukuphumelelisa lokhu, lomtlolo uhlahluba iincwadi zobuhlakaniphi bomthetho wepahla ngokutjheja indlela yokwenza izinto ngeSewula. Isahluko esinye nesinye kanye nommongo omunye nomunye utjheja bona ifundo etjhugululwako ingaba njani.

Lomtlolo utjheja amathiyori atlolweko kanye nekukhulunywa ngawo lawo akhe umkhanyo wokutjhugulula zefundo. Utjheja isiphoqo seAfrika ngobuhlakaniphi babamhlophe ngomthetho wepahla ‘ikulumopikiswano yesizathu sokwenza okuthileko’ begodu ibeka ngaphambili indlela yokwabelana ipahlo eAfrika ukulwisana nendlela yabamhlophe yokungabelani ipahlo ekubange ikulumopikiswano yesizathu sokwenza okuthileko. Lomtlolo uhlaziya isisusa sokukhuphela ngokutjheja ikolelo yegama elithi ‘Ubuntu’ njengegama elisetjenziswa lokha nakufundiswa lommongo eemfundweni. Indlela etjhugululweko yokuhlaziya iimfuneko sokukhuphela yindlela yabamhlophe begodu igandelela indlu enzima, ngendlela yokwenza kanye nangendlela efundiswa ngayo.

Lomtlolo uphetha ngokufunda isiphambuki sokukhuphela, ngokubawa isikolo ukobana sisebenzise indlela ehlukileko kunaleyo ebegade isetjenziswa ngabamhlophe ekadeni kanye nesikhathini sanje.

Amagama aqakathekileko:

Ukutjhugulula umbuso ukobana uzijamele, ukwenza izinto ngendlela ye-Afrika, ikolelo epilweni ehlahla indlela yokuziphatha neyokwenza izinto, uMohlomi, umthetho wokukhuphela wezefundo, indlela yokufunda nokufundisa eqakathekileko, ubuntu, iTransmodernithi.

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I bask in the confidence of the unconditional support of my parents, Mr JV Sindane and Mrs Matlou 'Koti' Sindane. There are no words to adequately express how grateful I am for your love, kindness, and patience. *Ngiyanithokoza babelethi bam' ngakho koke eningenzel' khona. Kwanga uZimu nabezimu banganipha itjhudu nepilo. Hlokohloko lomlambo!*

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I graduated on 6 April 2017 (LLB). Two weeks later I undertook the sacred journey that has changed my life forever, when I went to the traditional isiNdebele cultural initiation school, *Ingoma*. Shortly after returning home in July, I enrolled for this LLM degree. The research undertaken here is inspired by and a continuation of all the lessons gained in my time *eNgomeni*. The entire process has contributed immensely to my intellectual, spiritual, and emotional growth. For this, I wish earnestly to thank my ancestors, *uMabhoko usinde mhla kunethuli, mhla kungana thuli kuyaliwa!*

My involvement in the People's Revolution, including the #FeesMustFall and #OutsourcingMustFall movement, continues to teach me that academia is a strategic site and key front of the struggle - it is a battle that must be waged fiercely, and with the firm commitment to intellectualize the proletariat and proletariatize the intellectuals. It is my sincere prayer that that this dissertation will contribute towards taking the decolonisation discourse to the next level. *Aluta!*

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CHAPTER 1

INTRODUCTION

1.1 Introduction

The chaotic student protests that engulfed South Africa between 2015 and 2016 under the banner of #FeesMustFall were a clarion call for the academy to engage in the continuing process of intellectual introspection.[1] This is in light of the calls by students for fee-free, quality, and decolonised education.[2] The dialogue is nuanced by demands of university and TVET students in 2015/2016, protesting for free education – free not only as regards access, but also free from capitalist, Eurocentric, and colonial demands.[3] Admittedly, the calls for decolonisation pre-date the #FeesMustFall protests,[4] however, where the Bachelor of Laws (LLB) is concerned, these events brought two vital questions to the fore: (1) What is the content taught to students? and (2) How is it taught?[5]

This chapter provides a background to the calls for the decolonisation of higher education, linking these calls to the LLB curriculum as taught in South African universities. The background sets the basis for the chapters that follow by providing context to the research undertaken in this dissertation.

After setting out the aims of the research, preliminary assumptions are identified and the methodology applied to come to the research findings is explained. This chapter also briefly narrates extant theorising on the challenges facing legal education in South Africa, pointing to those aspects which are the focus of the dissertation. The

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1 Mabasa K 'The rebellion of the Born Un-frees: Fallism and the Neo-Colonial Corporate University' (2017) 39/2 *Strategic Review for Southern Africa* 95.

2 Ibid 101.

3 Le Grange L 'Decolonising the university curriculum' (2016) 30/2 *South African Journal of Higher Education* 2. The author quotes one of the leading figures of the #FeesMustFall movement and now EFF member of parliament, Vuyani Pambo, verbatim: 'We don't want to treat the symptoms, we want to decolonise the university – that is at the heart of the cause.' Pambo's statement comports with that of his comrade, Alex Hotz: 'As a law student, I believe decolonising the law faculty goes beyond the faculty and the institution. It speaks to what the law is and how it is used within society.' See Himonga C & Diallo F 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20/1 *Potchefstroom Electronic Law Journal* 2.

4 Manzini NZ 'Reflections on the presence of police and private security at the University of the Witwatersrand, Johannesburg' (2017) 33/3-4 *Agenda* 78.

5 Himonga C & Diallo F 'Decolonisation and teaching law in Africa with special reference to living customary law' 4–5.

chapter lays ground for deepened analysis of the meaning of decoloniality which is done in the second chapter.

1.2 **Background**

The recent decade sounds in various debates about the quality of LLB graduates produced by the seventeen law faculties in South Africa. The debate initially stemmed from judges who complained that most LLB graduates could neither read nor write[6] and lacked basic numeracy skills.[7] This brought legal education under scrutiny and prompted diverse concerned groups to probe the potential causes. This reality laid bare the truth that there were challenges facing the LLB curriculum which were in urgent need of attention.[8] In 2017, the Council on Higher Education (CHE) set ball rolling to review the LLB curriculum, culminating in a comprehensive report titled: *The State of the provision of the Bachelor of Laws (LLB) qualification in South Africa.*[9] Broadly, the report shows that all South African law faculties face different challenges and all have weaknesses in their delivery of the LLB degree. The weaknesses vary from the number of modules in the programme, the type of modules taught, the different pedagogical ideologies, the programme's ability to train critical thinking skills, reading and writing skills, and other graduate-related attributes. The report, inter alia, finds that the purpose of the LLB programme is to prepare its graduates adequately for legal practice, for the world of work, and for postgraduate studies (academe).[10] However, while all the institutions were engaging with these aspects, an imbalance in the focus areas of the LLB programme was

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6 Bauling A 'Towards a Sound Pedagogy in Law: A Constitutionally Informed Dissertation as Capstone Course in the LLB Degree Programme' (2017) 20/1 *Potchefstroom Electronic Law Journal* 3. The author argues that most existing skills courses in South African law faculties is inadequate as regards remedying the skills crisis, and as a result many graduates enter legal practice without mastering basic skills required for legal practice.

7 Modiri J 'The Crises in legal education' (2014) 46/3 *Acta Academica* 8-9. The author responds to this complaint by judges saying that it is facile merely to complain about skills of law graduates, without interrogating deeper issues about the foundations of post-apartheid South African law, the substantive content of the courses taught in law schools, and the political/ideological perspective that informs them. He posits that the genesis should be critical theory, thus calling for a thorough reconceptualization of the content, culture and practices in legal education.

8 Sedutla M 'Time to change the LLB degree?' (2019) July *De Rebus* 3.

9 Council on Higher Education *The State of the provision of the Bachelor of Laws (LLB) qualification in South Africa* https://www.che.ac.za/media_and_publications/accreditation-and-national-reviews/state-provision-bachelor-laws-llb (date of use: 10/08/2019).

10 These three purposes are the abridged version of the purpose of the LLB qualification as provided in the South African Qualifications Authority (SAQA) framework. See generally, SAQA Online Portal http://regqs.saqa.org.za/viewQualification.php?id=22993

identified. Certain law faculties were found to be stuck in 'old habits' of focusing on preparing students for practice, but neglected the other two focus areas.[11]

The report calls for an extensive transformation of legal education in South Africa. In its recommendations as regards curriculum reform, it states:

> Decolonisation speaks to the need to transform the LLB curriculum and the teaching and learning content of applicable modules in a manner that, while mindful of constitutional norms and principles, steers a clear path between the need to 'Africanise' the curriculum and the need to educate students on the globalised environment within which law is practised. African-based themes and an African context must permeate law teaching far more than is currently the case – but in a way that does not neglect the importance of maintaining a global perspective on national and international law.[12]

On decolonisation of the LLB curriculum, the report further finds that:

> SALDA currently plays a facilitative role in discussions on and designs of decolonised LLB curricula within the respective law faculties/schools. SALDA should continue to play this role, and faculties/schools should be encouraged to pay dedicated attention to this important component of LLB re-curriculation.[13]

The report's findings point to a new way of thinking about how the law is taught, insisting on transformative constitutionalism[14] as a bedrock of a transformed LLB curriculum while also expressly paving the way for decolonised articulations of legal pedagogy.

Discussions problematising South Africa's legal education predate the CHE LLB report, and various scholars have grappled with this topic since the dawn of democracy in South Africa.[15]

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11 Council on Higher Education *The State of the provision of the Bachelor of Laws (LLB) qualification in South Africa* 21-22.

12 Ibid Section D-1.9, 54.

13 Ibid.

14 Ibid 18. The report sets out, in its terms of reference, to use four standards to measure the suitability of the various LLB programs: Transformative constitutionalism; Responsiveness to social justice; Responsiveness to globalisation; and Responsiveness to ever-evolving information technology. The standards of globalisation as well as social justice expressly justify the decolonial project where the LLB curriculum is concerned.

15 See generally, Greenbaum L 'Current issues in legal education: A comparative review' (2012) 23/1 *Stellenbosch Law Review* 16-39. See also, Field T 'Demystifying and problematising the paradigm shift affecting legal education' (2005) 16/2 *Stellenbosch Law Review* 324-348, and Dlamini C 'The law teacher, the law student and legal education in South Africa' (1992) 109/4 *South African Law Journal* 595-610. See further Klare K 'Legal Culture and Transformative Constitutionalism' (1998) 14/1 *South African Journal of Human Rights* 146-188, and Modiri J 'Transformation, tension and transgression: Reflections on the culture and ideology of South African legal education' (2013) 24/3 *Stellenbosch Law Review* 455-479.

Dlamini acknowledges that the fundamental question in the LLB curriculum lies in honestly grappling with the purpose of legal education. He, insists that law teachers should always look to the end-goal.[16] Beyond the expectation that law graduates should be able to think logically and critically,[17] legal education should engender a strong sense of social justice in a student.[18] Dlamini argues that colonial and apartheid legal education is not in a position to realise this ideal, especially for black students.[19]

Instead of producing graduates who think and reason critically, law faculties are producing graduates who are dogmatic – albeit with knowledge of black letter law.[20] This reality is born of positivist[21] and formalist legal traditions which continue to define South African law faculties; an ingrained belief in two ideologies – (1) that law is immune to politics and questions of morality; and (2) that one legal rule results in one legal answer, so insisting that the law is value-neutral.[22]

Quinot proposes transformative legal education as an alternative to the current situation:

> In my view transformative legal education can help us to realize that the changes facing legal education in South Africa do not result in relativism, but rather in the recognition of, and the subsequent identification of, ways to cope with the complexity inherent in the endeavor of legal education.[23]

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16 Dlamini ibid 596.

17 South African Qualifications Authority (SAQA) Online Portal *PURPOSE AND RATIONALE OF THE QUALIFICATION* 1 http://regqs.saqa.org.za/viewQualification.php?id=22993 (date of use: 06/06/2018).

18 Dlamini 'The law teacher, the law student and legal education in South Africa' 595. This view is echoed by Modiri that in the discussion about South African legal education the stakes are the ideal of justice itself. See Modiri J 'The crises in legal education' 3.

19 Dlamini ibid 597. The author specifically retells of the story of former apartheid student leader, Onkgopotse Tiro's iconic speech at the University of the North's graduation ceremony on 29 April 1972. For the full speech see Azanian Peoples Organization '*Graduation Speech by Onkgopotse Tiro at the University of the North, 29 April 1972'* http://azapo.org.za/graduation-speech-by-onkgopotse-tiro-at-the-university-of-the-north-29-april-1972/ (Accessed on 06/11/2019). Dlamini (at 606), argues that Tiro's speech was indicative of the reality that the education that black people were receiving at universities was not 'real education'. From this argument it can be drawn that an LLB curriculum that follows apartheid patterns can be likened to the education bemoaned by Tiro.

20 Modiri J 'The crises in legal education' 4 where he argues that the cognitive poverty of legal theory resulted in the study of law as an entomolgy of rules and a science of what legally exists.

21 Modiri ibid defines positivism as the epistemological recasting of law as a science or as a pure discipline as well as the construction of a discursive opposition between the legal and the non-legal.

22 Zitzke E 'Stop the illusory nonsense! Teaching transformative delict' (2014) 46/3 *Acta Academica* 61.

23 Quinot G 'Transformative Legal Education' (2012) 129/3 *South African Law Journal* 431.

Transformative legal education is drawn from existing theorising on the concept of transformative constitutionalism,[24] and means that new areas of law must be accommodated in the curriculum, and that the curriculum should shift paradigms to become Constitution based.[25] This type of legal education represents a move from positivism and formalism in that it transcends merely teaching the substance of the law to inculcate newer methods of reasoning which include morality, policy, and politics.[26]

Quinot summarises transformative legal education as an action of moving from transmission to construction – the former being the pedagogy of the teacher who transmits knowledge to an empty student; the latter being teaching through constructing new knowledge with both the teacher and the student acting as knowledge creators[27] and partners in knowledge production.[28]

Zitzke opines that legal education in South Africa has reached a 'code-red' status,[29] problematising conservative legal traditions in terms of which teachers train students to become docile bodies fit to serve at the behest of capitalist interests.[30] Most crucially, this type of legal education embraces positivist ideals and urges students to be indifferent towards South Africa's apartheid and colonial reality.[31]

Modiri intervenes that the crisis is not merely with the law curriculum, but also with the law itself; like Zitzke, he posits that legal education is linked to profit and the marketability of law graduates.[32] Modiri insists that the response to the challenges

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24 Ibid 422.

25 Ibid 414. This is an opinion that Modiri is diametrically opposed to, insisting that critical legal theory should be a solution to the challenges facing the LLB curriculum, and that this is more expansive than simply affirming the supremacy of the Constitution. See Modiri J 'The crises in legal education' 10.

26 Quinot ibid 415

27 Modiri J 'The crises in legal education' 14, where he opines that critical legal education, which combines both critical legal theory and critical pedagogy, accords the relationship between the teacher and a student a degree of integrity and sacredness which affirms students, insisting that students should be allowed to bring their experiences and thoughtful reflections in the classroom, and that this would enrich the teaching and learning experience.

28 Quinot G 'Transformative Legal Education' 419, 421 and 423.

29 Zitzke E 'Stop the illusory nonsense! Teaching transformative delict' 53.

30 Ibid 64.

31 Ibid. The author uses the law of delict as an example of the prevalence of capitalist interests in the LLB curriculum. He argues that the delict module expressly assumes free market system ideology actively excluding alternative views such as Marxism or Socialism. This is an argument made by Modiri who insists that many South African law teachers, especially from private and mercantile law departments, tend to teach students that law is value-neutral and ignore the historical racist, colonial, and apartheid contexts. See Modiri J 'The crises in legal education' 6.

32 Modiri 'The crises in legal education' 2.

faced by the LLB curriculum should go beyond superficial changes and adopt an alternative and more critical approach to legal education.[33] This proposes a law curriculum geared towards the pedagogy of the humanities and aims to infuse a more expansive and imaginative conception of certain concepts currently taught in law – a curriculum which turns its back on the annexation of the law by capitalist ideals and interests.[34]

Bauling contributes to the discourse by proposing that a capstone dissertation module be introduced in the LLB curriculum. She opines that such a module can resolve many of the challenges identified in the CHE report, including critical thinking, research skills, and reading and writing skills.[35] She proposes that,

> [t]he capstone course should aim to assess both theoretical and practical knowledge, help students to identify valid and important issues in a particular field, provide them with the opportunity to evaluate the interaction and interrelatedness of the subcategories of a field, and open their minds to the fact that there may be more than one approach to every problem.[36]

Bauling agrees with the views of both Quinot and the CHE report that transformative constitutionalism should be central in reshaping the LLB curriculum.[37]

Zitzke is at odds with the proposal that transformative legal education is the solution for the LLB curriculum, and instead argues that the constitutional approach enjoys support from some lawyers because it carries legal weight, however it also entrenches neo-colonialism. This he bases on three factors: (1) the ideas that underpin human rights and private law are born from the intellectual work of Hugo de Groot and the subjective-rights tradition which represent an outdated understanding of individualistic natural law; (2) South African human rights, common law, and the supremacy of the Constitution subordinate customary law; and (3) the

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33 Ibid 7.

34 Ibid 17.

35 Bauling A 'Towards a Sound Pedagogy in Law: A Constitutionally Informed Dissertation as Capstone Course in the LLB Degree Programme' 4.

36 Ibid 6.

37 Ibid 9, 13 where she argues that, '[b]y aligning the proposed dissertation module with the requirements inherent in TLE (transformative legal education) approach to teaching and learning, the student will have a more enriching learning experience which is better suited to instil the required graduateness attributes in the student.'

constitutional order is subjected to Western paradigms and the epistemic traditions of the global North.[38]

Heyns does not reject transformative constitutionalism and transformative legal education. However, she notes the paradox between change and stability, arguing that transformation requires change whereas constitutionalism assumes stability – ideologically contradictory ideals which may lead to varying outcomes.[39]

Zitzke proposes a decolonial turn in the LLB curriculum, defining decolonisation as, '[a] commitment to Africanization through conceptual decolonization.'[40] He explains that Africanisation means centering African thought in the study of each discipline to make it contextually sensitive to Africa's epistemological traditions and related ontologies.[41] In the same breath, Zitzke defines conceptual decolonisation as the effort to ensure that there is no blanket acceptance of any concept, regardless of its point of origin.[42]

This dissertation notes all these arguments, and specifically investigates the calls for higher education to be decolonised with the focus falling on the copyright law curriculum in the LLB degree. The dissertation describes the concerns that plague copyright law and offers ways in which copyright can be presented.

1.3 **Research aims**

The aim is, inter alia, to offer an African perspective (an African voice) on the various aspects of the copyright law curriculum. African solutions, deduced by applying an African lens to copyright law concepts, may contribute to the task of decolonising university curricula.[43] Conversations about decolonising legal education are

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38 Zitzke E 'A decolonial critique of private law and human rights' (2018) 34/3 *South African Journal on Human Rights* 502, 504, 506.

39 Heyns A 'The inoperative Community of Law Students: Rethinking foundations of legal culture' (2014) 46/3 *Acta Academica* 85.

40 Zitzke E 'A decolonial critique of private law and human rights' 494.

41 Ibid 509.

42 Ibid 512.

43 Nabudere D 'Towards the Establishment of a Pan-African University: A Strategic Concept Paper' (2003) 8/1 *African Journal of Political Sciences* 1-3. Nabudere grapples with the idea of establishing a Pan-African university as a response to the need to decolonise higher education in Africa, he opines: 'The challenge is that such a university must be a new university, not only in the approach to teaching and research, but more fundamentally, in its strategic conception and its placement at the base of African and human emancipation and liberation. In being a new university, it has to play the vital role of freeing knowledge production from narrow class, technical, and instrumentalist dominance by a few specialists to a broader theatre of recognition of other producers of knowledge, which matters in their lives and has validity in their cultural contexts. This is what has made the creation of such a

centered on two probes, and these are (1) What is the content taught to students? and (2) How is it taught?[44] This dissertation focuses only on the former, and not the latter. A curriculum is inclusive of more than just a student textbook, and entails teaching methods, sciences and other varied pedagogical frameworks,[45] however this dissertation limits itself to the two student textbooks that are meant for undergraduate students in South African law faculties. These two textbooks are Dean, Owen & Dyer, Alison. (2014). *Introduction to intellectual property law* Oxford University Press and Van der Merwe, A. (2016). *Law of intellectual property in South Africa* (2nd ed.) Lexis Nexis. The two textbooks are entry-level introductory/foundational books that are meant for students, lawyers, academics and anyone who wishes to understand the basics of Intellectual Property Law.

The reliance on the two textbooks comports with the dissertation's aim to focus solely on the content that is taught to students. This does not mean that these two textbooks are the embodiment of the copyright law curriculum in its entirety but is rather a representation of the content taught to students.

This research aims to persuade law teachers to adopt an African lens when teaching copyright law.[46] The dissertation preliminarily assumes that the curriculum follows

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university more difficult because its creation would not only undermine existing dominant interests, but also challenge the citadel of Eurocentric paradigms and western "scientistic" epistemologies of knowledge.' Nabudere's conception suggests that a completely new university should be established and while this dissertation does not apply Nabudere's conceptualization, it notes that the approach is legitimately one of the various approach through which decolonisation of higher education can be achieved.

44 Himonga & Diallo (2017) 20/1 *Potchefstroom Electronic Law Journal* 4–5.

45 Indeed, a curriculum means more than merely the two textbooks that are used in this dissertation. Moreover, the dissertation appreciates that the structure of higher education in South Africa suggests that each university enjoys institutional autonomy and that each law faculty designs its own LLB programme. As a result, there is no uniformity/universality in how the law is taught in South African universities or even the content taught. The two textbooks give a good synopsis of the general content taught to students, but does not give the full picture of the curriculum because respective law faculties may also have study guides usually designed by the lecturers responsible for the module concerned. This is crucial to note because in certain parts of the dissertation (such as chapter 5 where material form and originality are discussed) law concepts are criticized for being Eurocentric, and thus colonial, as they appear in the textbooks, but such a shortcoming might reasonably be cured in lecture rooms by the lecturer's additional material.

46 Higgs P 'The African Renaissance and the Decolonisation of the Curriculum' 7-8 in Msila V. & Gumbo M. (eds) *Africanising the Curriculum: Indigenous Perspectives and Theories*. The author frames an African lens in the decolonial project as the need to reconstruct the curriculum in an African context. He argues that the context of Africa is attentive to the legacy of colonial period and seeks to assert both the teacher and the student as active role players in knowledge production, thus empowering them to gain confidence in their own capabilities. See further Kamwendo G 'Unpacking Africanisation of higher education curricula: Towards a framework' 18 in Msila V & Gumbo M. ibid 18. The author sets out a few meanings of Africanisation, arguing that its objective is, inter alia, to intergrate issues of concern to

on from the colonial history and present of South Africa's copyright law regime. The most notable feature of a colonial copyright law is its lack a receptiveness to alternative ways of knowing,[47] and its rejection of the pluriversal epistemic traditions of the global South. The aim of the dissertation is thus to dismantle and deconstruct the colonial lack of receptiveness to alternative epistemologies.[48] The dissertation aims to investigate the prevailing extent, depth, and reach of colonialism in the copyright law curriculum and identifies possible ways to give practical effect to the calls for the curriculum to be decolonised.

The end product of this dissertation seeks to challenge law teachers to consider fresh ways of teaching the law which will lead to the gradual transformation of the LLB curriculum. The calls to decolonise higher education in South Africa require a substantive response from the academy in general, and from law academics in particular.

1.4 **Methodology**

Trite academic strictures compartmentalize research methodology into either qualitative or quantitative research methodology. In limited instances, research may take a hybrid approach that infuses both methodologies. This dissertation deliberately breaks free from these trite strictures, preferring instead to give practical application to the 'critical approach' methodology that is proposed by Modiri.[49] This methodology allows law researchers to cast critical theory as an alternative normative teaching methodology and includes subjects such as resistance

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Africans into the curricula, Africanise the student body by actively recruiting black student, changing institutional culture by amending existing institutional instruments such as its mission statement and Africanising an institution's research agenda.

47 Santos B de S *Epistemologies of the South: Justice against epistemicide* Boulder: Paradigm Publishers 2014 196, 'Be that as it may, epistemological diversity is not the simple reflection or epiphenomenon of ontological diversity or heterogeneity. There is no essential or definitive way of describing, ordering, and classifying processes, entities, and relationships in the world. The very action of knowing, as pragmatist philosophers have repeatedly reminded us, is an intervention in the world, which places us within it as active contributors to its making. Different modes of knowing, being irremediably partial and situated, will have different consequences and effects on the world.'

48 Modiri J 'The time and space for Critical Legal Pedagogy' (2016) 27/3 *Stellenbosch Law Review* 507-508 where the author argues that in transforming legal pedagogy there is a need to break free from the monochromatic logic of accepting a singular epistemology. He therefore, 'call[s] for a new imagination: new definitions, new categories, new lines of enquiry, new practices and new mindsets'.

49 Modiri J 'The crises in legal education' 9.

pedagogy, feminism, critical race theory, queer theory, postmodern criticism, and Marxism.[50]

This methodology applies a critical approach in a textual analysis of various texts which include legislation, textbooks, journal articles, case law, internet sources, and reports. For each of these aspects, the following list of sources is engaged. (The chronology is not of particular significance.)

> Human rights instruments (both local and international).

> The Constitution of the Republic of South Africa, 1996.

> International intellectual property (IP) instruments.

> The law of other (African) countries – when undertaking a comparative analysis.

> South African (SA) Acts, Bills, and Regulations.

> SA case law.

> Traditional law.

> Textbooks.

The dissertation tests current concepts against their historical counterparts with a view to merging the two to find a new product. The totality of the information gathered is viewed through the lens of decoloniality and the expected outcome will be to bring both Africanised and novel ideas to the copyright curriculum.

To give practical application to this critical methodology, the dissertation uses concepts such as 'heterarchical thinking' and relational theory to study and analyse the various texts referenced above.

Kelbrick calls for deeper thinking in embracing new ways of teaching intellectual property law – what decolonial scholarship terms 'heterarchical thinking', which is the idea that there is neither an autonomous nor a single logic, but multiple and complex ways of thinking within a single historical reality.[51] Whereas Kelbrick speaks of the developed and developing nations dichotomy, decolonial scholars

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50 Ibid 13.

51 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System' 217.

refer to the developing countries as colonised nations, and to developed countries as colonisers.

This dissertation uses relational theory to provide a detailed analysis of some copyright law topics; the theory expressly sets out to critically posit copyright law as an instrument to serve humanity and not to regulate the individual rights of private owners of property.[52] This reasoning does not suggest that the protection of individual rights to property is inimical to the communal normative commitments of humanity, but rather that a greater good arises from a system of law which views any right in relation to and in concert with other rights. In so doing, relational theory asserts communitarian values over individualistic values, and in its most radical formulation proposes a shift away from individualised, rights-based thinking towards a focus on the resultant social relations.[53] This discourse invites us to rethink the content of copyright law that is taught in South African law faculties and to break with its Eurocentric conceptualisation and the epistemic foregrounding it entails.[54]

Relational theory contributes towards decolonising the pedagogy as it relates to copyright law. The basic tension in copyright emerges when individual rights are posited as competing with the rights of the community (generally termed 'public interest').

1.5 **Scope**

Decoloniality and decolonisation predate both the #FeesMustFall protests and the CHE report on the LLB. It is a discourse that has long been advanced globally. Most

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52 Serving humanity and sane humanity is a theme that emerges prominently in this dissertation. See Chapter 3 on the proposed philosophy of Mohlomism, where it is argued that a decolonised copyright law curriculum is one that teaches of intellectual property rights that advance love, compassion, respect, recognition of the other, and sane humanism.

53 This must not be confused with communist values – although the two are related, they mean two different things. Communist values are ideological ideas that include the left-leaning approaches towards how society should be organized. This school of thought that stems from the communist literature of the late 1800s. It was posed to the world to act as an anti-thesis to capitalism, opposing global capital, private property, and the free market system. In its place, communist values proposed for a shared wealth model wherein any country's means of production would be owned by the state on the behalf of the people. In turn, the state would use its ownership of the means of production to distribute wealth evenly and lead to the eradication of poverty, inequalities, and all other forms of class oppression. Communitarian values are more universal and slightly liberal. In the context of Africa, communitarian values are those that signify the value systems of the community as superseding the values of the individual.

54 Craig C *Copyright, Communication and Culture: Towards a relational theory of copyright law* 70: 'Author-based reasoning, compounded by theories of private entitlements, gives rise to a rights-based vision of copyright, which affects both our basic characterization of the copyright regime and the extent of the rights that we expect it to accord.'

notably, it has been canvassed more rampantly in fields of the humanities such as political sciences, sociology, development studies, and anthropology. As a result, there are varying meanings of the concept of decolonisation, and debates around how it can be practically implemented in the context of curriculum reform and transformation. This dissertation limits itself to the sphere of epistemic and conceptual decolonisation in that it advances research specifically on the law curriculum[55] and not the law.

Academic literature on the justificatory theories of intellectual property law is vast. However, this dissertation limits itself to the incentive theory (also known as incentive-to-innovate) and the labour theory to provide an African critique of Eurocentrism which continues to dominate this area of legal theory.[56]

This dissertation is written at a time when the legislature, lawyers, academics, and concerned stakeholders are debating the controversial Copyright Amendment Bill. Although the Bill is referenced in some chapters, the dissertation deliberately does not study it in detail for the obvious reason of the uncertainty and contestation surrounding it eventually becoming law. This slight omission is more glaring in Chapter 6 when studying copyright limitations and especially in contrasting fair dealing and fair use because of the Bill's introduction of fair use to South African jurisprudence. This omission is, however, justified by the dissertation's approach of studying concepts at their abstract intellectual level instead of doctrinally, meaning that it is possible to study fair use for purposes of decolonising the copyright law curriculum without interpreting it as articulated in the Copyright Amendment Bill.

The dissertation explores the various themes, topics, subjects, and concepts currently taught in the copyright law curriculum. These include, but are not limited to, authorship, copyright infringement, copyright duration, indigenous knowledge systems, traditional cultural expressions, and moral rights. The study provides a detailed analysis of these copyright law topics, using the tools of decoloniality, multi-

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55 The curriculum is represented by the two textbooks that are meant for undergraduate LLB students. This is sufficient to represent the curriculum because the dissertation limits itself to, and focuses on, the content taught students, and not how it is taught.

56 See generally, Du Bois M 'Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism' (2018) 21/1 *Potchefstroom Electronic Law Journal* 8-30. Other justificatory theories include: revised labour theory, reward theory, spiritual theories, economic theory, and theory of natural monopoly.

culturism, Transmodernity, Africanisation, Afrocentricity, centricity, hetararchical thinking, and curriculum transformation.[57]

1.6 **Overview of chapters**

The dissertation begins, in Chapter 1 (the current chapter), by setting out current theorising on the concepts of decolonization, transformative legal education and decoloniality. Chapter 2 distinguishes between colonialism and coloniality, examines the essence of the calls for South African higher education to be decolonised, and links these calls to the LLB curriculum in general, and the copyright law module in particular. It further provides a theoretical framework on which subsequent chapters will rely.

Chapter 3 approaches two intellectual property law justificatory theories by way of an African critique, using Africanisation to insert decolonial articulations into the incentive theory and the labour theory. It provides a brief historical background to the intellectual property law justificatory debates and shows that the discourse has been narrated only through a Eurocentric lens. The chapter further uses an African lens to reconstruct copyright authorship, arguing that African modes of communal ownership necessitate a renewal in teaching authorship in the copyright context.

Chapter 4 addresses the idea of copyright in a work using the framework of the philosophy of Ubuntu. It defines copyright and explains the exclusive rights of a copyright owner. The chapter studies Ubuntu and argues that this philosophy has been vulgarised in South African jurisprudence, and needs to be restored to its true meaning. The chapter further studies moral rights in copyright, insisting that they can be taught using Ubuntu to link them with the cultural-appropriation discourse. It argues further that a decolonised copyright law curriculum has the potential to guide society in responding to the anomaly of cultural appropriation. The chapter concludes by advancing three indigenous knowledge expression scenarios, to show that there is an intersection between copyright law and cultural appropriation, and

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57 Mamdani M 'Between the public intellectual and the scholar: Decolonization and some post-independence initiatives in African higher education' (2016) 17/1 *Inter-Asia Cultural Studies* 74-75. The author samples how African universities, in the quest to transform and decolonise curricula, relied on inter-disciplinary methodologies, further lending credence to the approach that this dissertation seeks to employ.

that the complexity in these expressions may provide nuanced dialogues in a decolonised copyright law curriculum.

Chapter 5 analyses selected aspects of the extant requirements for copyright protection. It locates both the originality and material-embodiment requirements within Eurocentric epistemic traditions, and argues that they could be understood differently to be inclusive of expressions that do not meet the copyright threshold. It concludes by studying the Swakopmund Protocol and the South African Intellectual Property Laws Amendment Act 28 of 2013 (the IPLAA), to assert decolonial articulations into the originality and material-embodiment requirements. The statutory requirements for copyright are divided into two categories: inherent features; and external circumstance. Chapter 5 considers requirements for copyright protection but limits the study to originality and material embodiment. The other requirements not covered in this dissertation are that the author must be a qualified person, and the first publication or manufacture of the work must have taken place in South Africa.

Chapter 6 investigates the fair-dealing exceptions, the limitation on moral rights, and the limited duration of copyright, and contrasts these with the social, economic, political, and historical realities of the coloniser and the colonised. The chapter points out that current intellectual property law pedagogy assumes a uniformity in the varying jurisdictions, which is indicative of the fact that the curriculum neglects the apartheid and colonial context of South Africa as well as other countries from the global South.

Chapter 7, which concludes this dissertation, narrates how the research question and hypothesis have been addressed in the preceding chapters. It reviews and summarises how various copyright law concepts could be approached in a decolonised copyright law curriculum and identifies potential areas of further research.

CHAPTER 2

THE CASE FOR DECOLONISATION

2.1 Introduction

> The goal [of decolonising] is to better understand the nexus of knowledge, power, and being that sustains an endless war on specific bodies, cultures, knowledge(s), nature, and peoples, as well as to help evade and oppose multiple forms of decadent responses,[58] including narrow views within decolonial movements themselves.[59]

This research seeks to inform the inclusion of newer ideas[60] in the LLB curriculum and ensure the gradual transformation of the qualification.[61] The end product will be

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58 On this subject, see broadly, Gordon L 'Disciplinary Decadence and the Decolonisation of Knowledge' (2014) 39/1 *Africa Development* 81-92. By decadent responses, Maldonado-Torres may be construed to mean a strictly discipline-centred approach to societal issues. In other quarters it is called disciplinary decadence. In essence it is the urge to wish to respond to law conundrums using only the law, while deliberately avoiding other helpful disciplines such as anthropology, psychology, sociology, sciences and others.

59 Maldonado-Torres N 'Outline of ten theses on coloniality and decoloniality' 2 retrieved from the Frantz Fanon Foundation 2016 www.frantzfanonfoundation.com (date of use: 28/07/2017)

60 Fagbayibo B 'Critical pedagogy of international legal education in Africa: An exploration of Fela Anikulapo-Kuti's music in Adeola R, Nyarko M, Okeowo A & Viljoen F (eds) *The Art of Human Rights – Human Rights and The Law in Africa* 1-22. The author explores new ideas in teaching international law in the LLB curriculum, arguing that the music of iconic Nigerian musician, Fela Anikulapo Kuti, can be used to assert a Pan-Africanist approach to international law pedagogy. He insists that: 'Fela was able to position both his personal conduct and music, which were in most cases intertwined, as a better, counterculture alternative to settled societal normative values. As far as Fela was concerned, laws must be subjected to the rigorous test of the principles of Africanism, and if they fail, there must be a resistance.' This, therefore, makes Fela's music applicable to the demand to introduce new ideas to the LLB curriculum.

61 Quinot G 'Transformative Legal Education' (2012) 415. The discussion on transformed legal pedagogy is not new, it is one that South African law academics have sought to grapple with since the dawn of democracy. Quinot, for example, argues that, '[s]tudents should be educated not only in the new substance of the law but also in the new legal method or reasoning mode… [t]he new constitutional dispensation calls for a substantive mode of legal reasoning. Matters of morality and policy, even politics, can no longer be excluded from legal analysis. This means that such matters should also enter the law lecture hall.' Modiri makes a similar assertion. See Modiri J 'The crises in legal education' 2, '[t]hese crises are manifest in the political implications of law's separation from morality, and hence from justice, and its own participation in the construction, perpetuation and legitimation of hierarchy and inequality as well as its complicit affiliation to injurious social powers'. Among others, Quinot calls for a new approach to law as a subject of education. He opines that there ought to be marked difference in pre-constitutional and post-constitutional pedagogy. The constitutional era, presents a shift from a culture of authority to a culture of justification (borrowed from Etienne Mureinik). See Mureinik E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10/1 *South African Journal of Human Rights* 31-48. Other scholars, such as Klare, argue that a transformed legal pedagogy means that there should not be discord between legal culture and the Constitution's demand for social change. See Klare K 'Legal Culture and Transformative Constitutionalism' (1998) 14/1 *South African Journal of Human Rights*.

seen in the increase[62] of 'graduate-ness' of LLB graduates.[63] The object is not the law but the curriculum, it is not to point out the inadequacies of the law, but rather the ineptitude in the current curricula used in teaching copyright law.[64]

In its quest to decolonise the curriculum, the dissertation revisits the question of epistemicide[65] in terms of which – metaphorically speaking – the coloniser killed the knowledge(s)[66] of Black Bodies.[67] Santos accordingly defines epistemicide by describing the condition of the knowledge(s) of Black bodies:

> 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.[68]

Santos' description of the knowledge systems of the colonised helps us comprehend that the knowledge(s) of colonised people and those of the coloniser are positioned

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62 Shako F 'Decolonizing the Classroom: Towards Dismantling the Legacies of Colonialism & Incorporating TWAIL into the Teaching of International Law in Kenya' (2019) 3/1 *Journal of Conflict Management and Sustainable Development* 28. The author argues that the international law module shows signs of being incomplete, opining that, '[t]he pedagogy used therefore remains rife with exclusions and distortions of indigenous knowledge, voices, critiques and scholars'. She further insists that a law curriculum should be inclusive of alternative epistemologies and that this will increase the graduate-ness of the graduates.

63 Van Marle K 'Reflections on legacy, complicity, and legal education' (2014) 46/3 *Acta Academica* 197 where the author argues that in transforming how we think about the law and legal pedagogy, students and academics alike should reflect on legal education's complicity in upholding the racist and segregationist ideas that ensured the survival of an evil apartheid regime.

64 It is crucial to distinguish conceptually between the law and the law curriculum in order to be able to arrive at an intra-specific inquiry as opposed to a blanket approach.

65 On epistemicide, see generally, Santos B de S *Epistemologies of the South: Justice against epistemicide* 1-236. 'Unequal exchanges among cultures have always implied the death of the knowledge of the subordinated culture, hence the death of the social groups that possessed it. In most extreme cases, such as that of European expansion, epistemicide was one of the conditions of genocide. The loss of epistemological confidence that currently afflicts modern science has facilitated the identification of the scope and gravity of the epistemicides perpetrated by hegemonic Eurocentric modernity' The author defines epistemicide as a genocide of knowledge(s). This definition understands that the impact of coloniality means the continued othering, and dismembering of the knowledge systems of the colonised.

66 Decoloniality embraces different ways of knowing, doing, and teaching. This culminates in the plurality of knowledge into knowledge(s). On plurality of knowledge see, Whitt L *Science, Colonialism and Indigenous People: The Cultural Politics of Law and Knowledge* 32: 'The dominant knowledge system tends to embrace anti-pluralism, a lack of receptiveness to alternative epistemologies, to other ways of knowing the world. Other knowledge systems are usually reduced to "superstition", the very anti-thesis of knowledge.'

67 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order*'* (2015) 36/2 *Australasian Review of African Studies* 32.

68 Santos B de S *Epistemologies of the South: Justice against epistemicide* 12.

differently in the global knowledge economy. The 'Othering' of the knowledge(s) of the colonised, is the essence of epistemicide, that Santos defines as:

> The energy that propels diatopical hermeneutics comes from a destabilizing image that I designate epistemicide, the murder of knowledge. Unequal exchanges among cultures have always implied the death of the knowledge of the subordinated culture, hence the death of the social groups that possessed it. In the most extreme cases, such as that of European expansion, epistemicide was one of the conditions of genocide. The loss of epistemological confidence that currently afflicts modern science has facilitated the identification of the scope and gravity of the epistemicides perpetrated by hegemonic Eurocentric modernity.[69]

To reverse the epistemicidal legacy is to go to the graves where African knowledge(s) have been interred, open them up, and resuscitate this African knowledge(s).[70] This methodology, although submitted in the metaphorical sense, is one response to the fundamental decolonial questions that Ndlovu-Gatsheni raises: 'How can the "dismembered" people be "remembered"? How can they relaunch themselves from the world of "non-Being" into the world of language and knowledge?'[71]

The reversal of epistemicide and subsequent re-membering of the dismembered, involves a restorative recovery project in which Black Bodies are given the power to own and name their own realities using their own epistemic perspectives.[72] This

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69 Ibid 92. See also at 152-153 where Santos argues that the knowledge(s) of the coloniser are embodied in 'modern science', and the knowledge(s) of the colonised are dismissed as myth or ignorance. Such a colonial setting privileges the former over the latter, he further argues that this privilege is definitive of epistemicide: 'The epistemological privilege that modern science grants to itself is thus the result of the destruction of all alternative knowledges that could eventually question such privilege. It is, in other words, a product of what I called in a previous chapter epistemicide. The destruction of knowledge is not an epistemological artifact without consequences. It involves the destruction of the social practices and the disqualification of the social agents that operate according to such knowledges.'

70 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order*'* 23, 'as one of the undying liberation discourses, decoloniality is concerned with how a "dismembered" people should relaunch themselves into the world.' Here the author posits decolonisation as a liberational agenda, arguing that the ethics of liberation engender justice instead of retribution, revenge, or vengeance. Note further that at 24 he paraphrases Ngugi Wa Thiongo, saying that 'decoloniality [should be understood] to be a search for a liberating perspective aimed at facilitating self-understanding (seeing ourselves clearly) after centuries of suffering dismemberment and alienation.'

71 Ibid 23.

72 Ibid 32.

research sets out possible ways in which the Black Body may be re-membered as a Being worthy of producing knowledge.

The chapter provides clarity on the concepts colonialism, coloniality, decolonisation, and decoloniality. The aim is further to clarify and correct some of the misconceptions regarding the legacy of colonialism in education.

The chapter begins by distinguishing between colonialism and coloniality. Understanding the difference between these two concepts is crucial as it lends credence to the assumption that the project of decolonisation is a response to coloniality and not to colonialism. The three localities of coloniality and how they manifest in the copyright law curriculum are discussed. A deepened engagement with these three localities provides a synopsis of the anomalies in the copyright law curriculum to which this dissertation seeks to respond. The localities are the colonaility of Being, of Knowledge, and of Power. The chapter considers calls for a decolonised higher education in South Africa, which includes reading dominant themes that tend to emerge in the decolonisation discourse together with political, historical, and racial questions.

In closing, a brief history of South African copyright law is presented and linked to the copyright law curriculum's colonial make-up. These discussions provide a theoretical framework on which the dissertation relies to examine the calls for the decolonisation of the copyright law curriculum through an African lens.

2.2 **Distinguishing between history and present (colonialism v coloniality)**

Colonialism refers to the subjugation of one society by another. The conquered society is known as a colonial subject, whereas the conquering country is termed the colonial master. The aim of colonisation is for the colonial master to plunder the colonial subject's mineral, cultural, human resources, and any other material wealth on which it can lay its hands, so to expand its economy.[73] The colonised society loses its sovereignty and its right to self-determination. The capital city of the coloniser becomes the *de facto* and *de jure* capital of the colony.

[73] For further reading on colonialism, see Cesaire A *Discourse on Colonialism* 1-31. This work was originally published as *Discours sur le colonialisme* by Editions Presence Africaine, 1955.

South Africa's first interaction with colonial modes of governance dates as far back as 1652.The Dutch annexation of the Cape by Dutch-East India Company (VOC) lasted from 1653 to 1822. The VOC initially aimed to use the Cape as a refreshment station for its ships travelling around the Cape en route to the East. The Cape became a hub of the slave trade, and annexation of black people's land, resources, and livestock signalled the beginning of the end for the Black Body in South Africa.

When the British took over from the Dutch, they abolished some of the laws the Dutch had put in place and replaced them with laws of their own. Among the changes that came with British colonisation was the introduction of the Abolition of Slavery Act of 1833.[74] This Act of the British Parliament applied to all its colonies and was consequently law in South Africa, with all subsequent legislation applying automatically in all British colonies. Heleta argues that:

> Eurocentrism, racism, segregation and epistemic violence at South African universities were not products of the apartheid state. Rather, these problems began with the establishment of the universities by the British colonialists and further evolved after 1948.[75]

Although colonialism is at the root of the calls for decolonisation, the response is not to colonialism but rather coloniality. Decolonisation seeks to act as an antithesis to coloniality, not colonialism. The concept of coloniality is the emphasis of this research.

Maldonado-Torres qualifies the distinction between colonialism and coloniality as follows:

> Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of people, in aspirations of self, and so many other aspects of our modern experience.[76]

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74 Long title: An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves.

75 Heleta S 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) 1/1 *Transformation in Higher Education* 2.

76 Maldonado-Torres N 'On the Coloniality of Being' (2007) 21/2-3 *Cultural Studies* 4.

The appreciation of this distinction is critical as it acknowledges the reality that although colonialism has been defeated in Africa, its effects, legacy, and remnants remain deeply entrenched in all aspects of our present experience.[77] Colonialism presents the past; coloniality remains the present.[78] Coloniality is thus known as 'the end of colonialism without an end.'[79]

Even though coloniality can be practically located, it is a shade more subtle than actual colonialism. This subtlety is reason enough for some wrongly to assume that the end of colonialism immediately marked the end of its patterns of oppression.[80]

Ndlovu-Gatsheni identifies four levers of colonaility: (1) control of the economy; (2) control of authority; (3) control of gender and sexuality; and lastly, (4) control of knowledge and subjectivity.[81] Grosfoguel elaborates that coloniality involves entangled hetahierarchies, complex class formations, and core periphery divisions.[82] Coloniality is realised in the continued patterns of subjugation of the colonised through extant institutionalised racism and the sustained hegemony of Eurocentric epistemologies.[83]

Maldonado-Torres likens coloniality to the radicalisation and naturalisation of the non-ethics of war.[84] The image of the 'non-ethics of war' relates to those atrocities committed by the army that has won a battle and then proceeds to enslave, kill, rape, and maim the people of the conquered territory. He suggests that once the colonial war is over, it is the race of the colonised people which will justify[85] their continued serfdom, slavery, and rape.[86] Coloniality is thus a vestigial force of

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77 Ncube CB 'Decolonising Intellectual Property Law in Pursuit of Africa's Development' (2016) 8/1 *WIPO Journal* 36.

78 Ramose M 'The Bewaji, Van Binsbergen and Ramose Debate on Ubuntu' (2003) 22/4 *South African Journal of Philosophy* 407 who argues that there are two points of critique that necessitate decolonisation; the first is that the injustice of colonialism makes decolonisation an ethical and political imperative, the second is that decolonisation seeks to facilitate the restoration and modification of consensus politics.

79 Santos B de S *Epistemologies of the South: Justice against epistemicide* 26.

80 Grosfoguel R 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' (2011) 1/1 *Journal of Peripheral Cultural Production of Luso-Hispanic World* 12.

81 Ndlovu-Gatsheni S 'Decoloniality as the Future of Africa' (2015) 13/10 *History Compass* 485-496.

82 Ibid.

83 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System' (2002) 25/3 *Review Fernand Braudel Center* 205.

84 Maldonado-Torres N 'On the Coloniality of Being' 247.

85 This means that race became a qualifier for subjugation, persons are therefore oppressed on the basis of the [black] colour of their skin.

86 Maldonado-Torres 'On the Coloniality of Being' 248-249.

colonialism which continues to enslave, kill, displace, rape, maim, and disenfranchise the colony long after the war (or rather, the direct colonial period) is over.[87]

Coloniality and modernity are two sides of the same coin.[88] Eurocentric colonial culture is an ideology that is not limited to Europe which means that modernity is always constituted by coloniality.[89] Modernity has crucial implications for how the world conceives of social change, struggles against inequality, for democracy, and scientific disciplines; whereas coloniality is a lived experience of subaltern groups to conceive of these realities.[90] However, with coloniality, white racism and the subjugation of the Black Body contends that colonised groups are of inferior intelligence and culture and have barbaric cultural habits.[91]

Universities continue to teach the Eurocentric education imposed by the coloniser; the curriculum, research practices, and anything related to knowledge production remains Eurocentric long after the colony has gained independence.[92]

Asante defines Eurocentric education as a superstructure that seeks to impose European consciousness and ideas on other people's consciousness.[93] Mulder agrees with this definition of Eurocentrism and adds that it is a pervasive ideology that sneaks into every aspect of life and attempts to erase the diverse history of

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87 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order' 31.

88 Grosfoguel R 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' 11.

89 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System' 213.

90 Ibid.

91 Ibid.

92 Mbembe A 'Decolonizing the University: New directions' (2016) 15/1 *Arts & Humanities in Higher Education* 32 states: 'We all seem to agree that there is something anachronistic, something entirely is wrong with a number of institutions of higher learning in South Africa. There is something profoundly wrong when, for instance, syllabuses designed to meet the needs of colonialism and Apartheid should continue well into the liberation era.'

93 Asante M 'Reconstituting curricula in African universities: In search of an Afrocentric design' in C Alvares & SS Faruqi (eds) *Decolonising the university: The emerging quest for non-European paradigms* 33-47. See further, Mbembe A 'Decolonizing the University: New directions' 32: 'So, today the consensus is that part of what is wrong with our institutions of higher learning is that they are 'Westernized'. What does it mean "they are Westernized"? They are "Westernized" in the sense that they are local instantiations of a dominant academic model based on a Eurocentric epistemic canon. A Eurocentric canon is a canon that attributes truth only to the Western way of knowledge production. It is a canon that disregards other epistemic traditions. It is a canon that tries to portray colonialism as a normal form of social relations between human beings rather than a system of exploitation and oppression.'

peoples and supplant their outlook on life and understanding of the world.[94] She posits:

> [Colonised education] reproduces the racist status quo,[95] by institutionalizing the premises on which enslavement and colonialism were built for hundreds of years. Furthermore it reinforces the racist belief that people of colour [blacks in particular] have less or no right to agency and self-determination, because the colonizing country supposedly knows what's best for them.[96]

Eurocentric ideas about education and the curriculum are the only recognised forms of knowledge(s) in South African universities;[97] everything else is relegated to the status of sub-knowledge or non-knowledge. Mulder emphasises that this reality indicates that the coloniser suffers from an 'epidermisation' of superiority which is an ingrained belief that, consciously or unconsciously, whiteness entails superiority over all those who are not white.[98] Mulder explains that this unfounded sense of superiority does not arise through natural forces but rather is a consequence of daily exposure to institutionalised racism upheld by colonised education.[99]

To persist in the current colonised methods of teaching and learning is to entrench coloniality. The locality and reality of coloniality in South African higher education generally, and the LLB curriculum in particular, gives rise to the calls for decolonisation.[100]

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94 Mulder L 'Frantz Fanon, Internalized Oppression and the Decolonization of Education' 1 https://www.researchgate.net/publication/308773706_Frantz_Fanon_Internalized_Oppression_and_the_Decolonization_of_Education (date of use: 07/04/2018).

95 Biko S 'Black Souls in White Skins' 24 in *I write what I like – Selected Writings* where the author makes the point that the racist status quo in colonial territories in South Africa is that the education system follows a pattern of superior-inferior white-black stratification wherein the white person is the perpetual teacher and the Black Body is a perpetual student. The author further bemoans white arrogance, suggesting that white people should desist from the false thinking that they should always lead in innovation, research and knowledge production, but rather be attentive of alternative epistemologies.

96 Mulder L 'Frantz Fanon, Internalized Oppression and the Decolonization of Education*'* 1.

97 Modiri J 'Transformation, Tension and Transgression: Reflections on the Culture and Ideology of South African Legal Education' (2013) 456. The author argues that legal pedagogy embraces a colonial logic of wanting to divorce the law from its socio-political context, further insisting that 'teaching law is a performative and political act that has implications for transformation and democracy within the South African legal culture'.

98 Mulder L 'Frantz Fanon, Internalized Oppression and the Decolonization of Education' 6.

99 Ibid.

100 Yousuf I '*Burdened by a Beast: A brief consideration of social death in South African universities*' (2019) 1/1 *Journal of Decolonising Disciplines* 84 where the author links the call to decolonise the university to the tragedy of social death, explaining that coloniality has the effect 'whereby a person [or university student] believes that they are as good as dead'.

Bhambra argues that both post-colonialism and decoloniality[101] are necessary because of the depredations of colonialism – both offer the possibility of a new geopolitics of knowledge.[102]

Decolonising is an imperative antithesis to the locality and reality of coloniality. Fanon characterises decolonisation as an inevitably violent phenomenon in that it entails the de-centering of long-standing hegemonic orders[103] and the dismantling Eurocentrism within higher education and the curriculum,[104] and presents a violence to both the colonised and the coloniser.

2.3 **Localities of coloniality**

2.3.1 *Coloniality of Being*

In conversations on the impact of colonial relations of power, it is necessary to revisit the standard understanding of Being.[105] Maldonado-Torres uses Descartes's

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101 On the difference between decoloniality and post-colonialism see generally, Grosfoguel R 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' 18-19. He states: 'Post-colonial criticism characterizes the capitalist system as a cultural system. They believe that culture is the constitutive element that determines economic and political relations in global capitalism… [w]e have yet to develop a new decolonial language to account for the complex processes of the modern/colonial world-system without relying on the old liberal language of the three arenas.'

102 Bhambra G 'Post-Colonial and Decolonial dialogues' (2014) 17/2 *Postcolonial Studies Journal* 120.

103 Santos B de S *Epistemologies of the South: Justice against epistemicide* 120, wherein the author gives an example of one hegemonic order as it appears in the legal system of the colony, he argues that coloniality is evidenced through 'abyssal thinking' which creates a visible line between what is legal and what is not legal, whence the latter usually means the knowledge(s) of the colonised. He argues that '[i]n the field of modern law, this side of the line is determined by what counts as legal or illegal according to the official state or international law. The legal and the illegal are the only two relevant forms of existing before the law; for that reason, the distinction between the two is a universal distinction. This central dichotomy leaves out a whole social territory where the dichotomy would be unthinkable as an organizing principle, that is, the territory of the lawless, the a-legal, the nonlegal, and even the legal or illegal according to nonofficially recognized law. Thus, the invisible abyssal line that separates the realm of law from the realm of nonlaw grounds the visible dichotomy between the legal and the illegal that organizes, on this side of the line, the realm of law'

104 Eybers O 'A social realist ontology for developing Afrocentric curricula in Africa' (2019) 1/1 *Journal of Decolonising Disciplines* 49. The author argues that universities require an Afrocentric curriculum which reflects the social ontologies of its students. He points out that one of the leading cause of the #RhodesMustFall protests at the University of Cape Town was that the colonial images of architects of apartheid colonialism, such as Cecil John Rhodes, continue to alienate and ontologically exclude Black Bodies. Although the student protests were focused on statues, the decolonial project goes beyond the statues, to critically grapple with the very same images in the content of the curriculum that is taught in these universities.

105 Bewaji J 'The Bewaji, Van Binsbergen and Ramose Debate on Ubuntu' 393. As will be shown in greater detail in Chapter 4, Being in Africa is evidenced through the philosophy of Ubuntu, which represents the essence of Africa. Bewaji argues that without Being there would be no language, culture, religion, philosophy, medicine, law, politics but only a vacuum. See further

formulation of the existential statement, *cogito, ergo sum* – I think, and therefore I am. The question of Being arises from the latter part of this ontological axiom. Descartes means that before a person can be, that person needs to think. To think is cast as a prerequisite to Being. The essence of Being is embedded in a person's ability to think or to possess mental faculties. Animals, plants, and other living and non-living things are not Being precisely because they cannot think. They cannot think and so they are not Being.[106]

Descartes's formulation on what Being is and what should define it, when inverted, is used to exclude Black Bodies from Being. Maldonado-Torres insists that the coloniser was able to exclude its colonial subjects from Being. The colonial project included the rejection of the 'Beinghood' of Black Bodies, insisting that they have a different make-up to that of white people.[107] It is consequently not possible to divorce the colonial aspect of Being from colour.[108] For Fanon racism is the very object of colonial conquest. He argues that the Black Body is subjugated specifically because it is not white, and this a precondition for it to be colonised.[109]

The most crucial aspect of Being is that it emerges as subjective consciousness of the self, that is the Being of self. The next step is for the Being to be conscious of other Beings,[110] the consciousness of others as Beings must be reciprocated by others accepting one's Beinghood. The Being of an individual's self is validated by the Being of others.

The coloniser was conscious of itself as Being and was aware that this consciousness included the deliberate dismembering of the Being of the Black

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Taylor D 'Defining Ubuntu for Business Ethics – A deontological approach' (2014) 33/3 *South African Journal of Philosophy* 333 who argues that Ubuntu is at the centre of the ontological question of Being, meaning that people only exist in relation to others.

106 Maldonado-Torres N 'On the Coloniality of Being' 252.

107 Ibid 251.

108 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System' 213. As long as 150 years before Descartes' ontological formulation, European thinking was in the maxim *Ego conquistus* which means, 'I conquer, therefore I am'. This reading suggests that Europe had assumed a God-like status, placing itself at the foundation of knowledge, acting as an imperial-being at the centre of the world because it had already conquered the world.

109 Fanon F *Black Skin, White Masks* 73.

110 On the concept of Being, see further Martin Heidegger's 'Being and Time' and 'Introduction to Metaphysics' in Macquarrie J. & Robinson E. *Martin Heidegger Being and Time* Blackwell Publishers 1962.

Body.[111] In this way the Black Body was reduced to a non-thinking species; it is not a Being, it is simply nothingness.[112] The misconception of self as non-Being serves as a starting point when thinking about the coloniality of Being, which proves enigmatic for the Black Body.[113] Fanon explains this using the lexicon of the 'Zone-of-Being' and the 'Zone-of-non-Being'.[114] These concepts bear testimony to the dismemberment of a Black Body's Being by the coloniser. This anomaly must be addressed by engaging in the decolonisation project.

Just as genocide is the deliberate killing of a large group of people, especially of a nation or ethnic group, epistemicide is the deliberate killing of those people's knowledge systems.[115] The non-being of the Black Body allows the coloniser to dispense with the knowledge(s) of local communities. The term 'epistemicide' in decoloniality derives from the word 'epistemology' or the theory of knowledge. Epistemological enquiries are encapsulated in the questions: What is knowledge? How do we know? How do we know that we know the things that we know?

The responses to these questions contribute to the theory of knowledge. Epistemicide means that the coloniser never asked these questions about the knowledge(s) of the colonised, nor indeed did it conceive of the Black Body's ability to engage.[116]

In similar vein, Wa Thiongo recounts of the violence of the classroom in which, in an epistemic inquiry, the Black Body was met with the violence of having to be taught in a foreign language and be tacitly conditioned to accept that their own language

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111 Biko S 'Black Consciousness and the Quest for a True Humanity' in *I write what I like – Selected Writings* 88. 'White people [the colonizers] now despise black people, not because they need to re-inforce their attitude and so justify their position of privilege but simply because they actually believe that black [knowledge(s)] is inferior and bad.'

112 Fanon F *Black Skin, White Masks* 73 states '[t]he white man imposes discrimination on me, makes me a colonized slave, robs me of all worth, all individuality, tells me that I am a parasite on the world and that I must bring myself as quickly as possible into step with the white world.'

113 Maldonado-Torres N 'On the Coloniality of Being' 253.

114 Fanon F *Black Skin, White Masks* 143. The author makes specific reference to the non-Being of the Bantu people of South Africa.

115 Zitzke E 'The history and politics of contemporary common-law purism' (2017) 23/1 *Fundamina UKZN Journal for Legal History* 191: 'But the process of colonisation did not only involve the displacement of African political and economic power. It also involved epistemicide - the killing of existing forms of knowledge and the subsequent prevention of the development of that knowledge.'

116 Lembede A 'Freedom in our lifetime' 43 in R Edgar & L Ka Msumza (eds) *Freedom in our lifetime* who argues that the cure for the colonial epistemic juniorization of the Black Body is poltical freedom, prescribing several intermediate steps which Africans could take to reassert an identity free from colonial domination.

does not matter or is not good enough for higher education or literature.[117] The epistemic concerns of the Black Body would have been anomalous given the colonial assumptions that Black Bodies are incapable of thought – they are not Beings.[118]

To reverse the epistemicidal legacy, law teachers, researchers, and historians need to return to pre-colonial[119] Africa and uncover the knowledge(s) used by African societies[120] pre-epistemicide.[121] The task of researching pre-colonial Africa is important as the colonial disruption is understood as one that not only killed African knowledge(s), but also stifled its natural growth and development.[122] Zitzke suggests that, '[p]art of the epistemicidal effects of colonization certainly related to the death of culture and language[123] – it must be emphasised that a crucial effect

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117 Wa Thiongo N *Decolonizing the Mind: The politics of language in African literature* 9.

118 Biko S 'Black Consciousness and the Quest for a True Humanity' 96 in *I write what I like – Selected Writings* who argues that the epistemic concerns of the Black Body are encapsulated in a black culture that implies a freedom for Black Bodies to innovate without recourse to Western hegemonic values.

119 It is important to stress that the objective of decolonisation is not to move Africa back into the Stone Age. The move to pre-colonial Africa is rather an effort to undo and reverse the legacy of epistemicide, it is not to assume that pre-colonial Africa holds grand ideas or solutions to all of society's challenges, but rather to find those knowledge(s) that were deliberately killed in order to deepen the dismembering of a Black Body's Being.

120 Chikaonda G 'To decolonise our LLB degrees, we have to understand and incorporate the roots of African law' Daily Maverick Opionista 2019 https://www.dailymaverick.co.za/opinionista/2019-07-09-to-decolonise-our-llb-degrees-we-have-to-understand-and-incorporate-the-roots-of-african-law/amp/?__twitter_impression=true (date of use: 10/08/2019), she argues that the LLB curriculum would attain a semblance of decoloniality if it were to be attentive of the epistemologies of African scholars prior to colonial disturbance, she asserts that going back to pre-colonial Africa is one of the immediate tasks of any decolonial legal research, further arguing that, '[m]aking the links between how those perceptions have developed from pre-colonial times until this very moment is necessary for students to understand their legal history more comprehensively and to see the role of factors outside of black letter law on its trajectory in South Africa and on the continent — factors such as socio-economics, politics, globalisation and technological advancement.'

121 On Pre-Colonial Africa, see generally, Anta-Diop C *Pre-Colonial Black Africa.* The author makes an incisive analysis of pre-colonial Africa, detailing the social and political systems of Africa from antiquity to modern states. This work is crucial because it exemplifies Africa's epistemic and ontological identities prior to colonial disturbance.

122 Biko S 'Black Consciousness and the Quest for a True Humanity' 95: 'We accept that when colonisation sets in it devours the indigenous culture and leaves behind a bastard culture that may thrive at the pace allowed it by the dominant culture.'

123 Fatemi R, Ghajar SR & Bhaktiari S 'De-colonizing English Language Education in Iran: The need for Islamic educational heritage' (2018) 21/1 *Journal of English Language Teaching and Learning* 88, the authors point out that language forms an essential part of the Being of the Muslim body, and that through globalization, westernization and Eurocentric modernity, sacred Islamic texts have been translated into various other languages. This has contributed to the effective dismembering of the Being of Islam. The authors therefore call for decolonised teaching of the English language in the Islamic Republic of Iran, with the intention to re-member the dismembered Being of the Muslim body.

was the discarding of African law and its replacement with a Dutch-inspired legal system'.[124]

The essence of decolonisation becomes to re-member the Black Body as a Being by engaging in practical action that affirms it as a thinker capable of producing knowledge.[125]

2.3.2 *Coloniality of knowledge*

An inquiry into power relations between the coloniser and the colonised includes establishing the patterns of knowledge production. Ndlovu-Gatsheni asserts that decoloniality requires critical thinking about who generates knowledge, how it is generated, and what purpose it serves.[126] The study must take account of how knowledge(s) have been used in the past to disempower communities and peoples.[127] He elaborates that, '[the] concept of coloniality of knowledge, which focuses on teasing out epistemological issues, the politics of knowledge generation, as well as questions of who generates which knowledge, and for what purpose'.[128]

New thinking on how the law is taught in South African universities is imperative for the decolonisation project.[129] Decoloniality suggests heterarchical thinking as an endeavor to conceptualise social structures with a new vocabulary that breaks ranks with the prevailing definitional paradigm.[130] Heterarchical thinking insists that extant

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124 Zitkze E 'The history and politics of contemporary common-law purism' 191.

125 Focault teaches that the voice that speaks is important because it presents the perspective of subaltern groups. See Focault M *What is an Author?* 101 in *The Focault Reader*.

126 Ndlovu-Gatsheni S 'Perhaps Decoloniality is the Answer? Critical Reflections on Development from Decolonial Epistemic Perspective' (2013) 43/2 *Africanus: Journal of Development Studies* 5.

127 Ibid. See further Mbembe A 'Decolonizing the University: New directions' 33: 'For these reasons, the emerging consensus is that our institutions must undergo a process of decolonization both of knowledge and of the university as an institution.'

128 Ndlovu-Gatsheni S 'Perhaps Decoloniality is the Answer? Critical Reflections on Development from Decolonial Epistemic Perspective' 5.

129 Mgqwashu E 'Education for public good in the age of coloniality: Implications for pedagogy' (2019) 1 *Journal of Decolonising Disciplines* 66 where the author argues that part of cultivating a new thinking on legal pedagogy is to deeply understand that '[e]ducation, at least within the human rights discourse, cannot be seen as a commodity whose provision is determined by market forces and dependent on demand'.

130 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System' 217.

law and social sciences follow a colonial logic of assuming a single overarching hierarchy[131] in knowledge production.[132]

Decoloniality utilises critical concepts such as core-periphery divisions, male-female hierarchies, heterosexual-homosexual hierarchies, religious-spiritual divisions, and epistemic and linguistic hierarchies to denote the nature of coloniality and its manifestations.[133]

The needs of the colonised and the coloniser differ vastly, and clearly these needs demand differentiation in the protection provided by intellectual property law. The effect of differentiated protection for the developed and developing will equally require differentiation in the teaching methods and curricula in the two respective groups. Although developing countries may attempt to exploit intellectual property in their own right, they find themselves faced with the inherited protectionist laws of a colonial past.[134]

The liberation-centered aspect of differentiation is that hetararchical thinking proposes the reintroduction of previously silenced forms of knowledge.[135] Differentiation is a methodology that allows African ways of protecting creative works that currently fall under the scope of copyright law, to be uncovered.

Grosfoguel advocates differentiation as expressed in the concept of Transmodernity, arguing that 'trans' represents an invitation to move beyond Eurocentric modernity.[136] Transmodernity asserts the decolonial demand for the

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131 Biko S 'Black Consciousness and the Quest for a True Humanity' 89 who argues that the colonizer (whites) inherently believes that the Black Body cannot formulate their thoughts without white guidance and trusteeship thus insisting on a single hierarchy in knowledge production, and entrenching systems that catapult the epistemologies of white people, and negating the epistemic traditions of the Black Body.

132 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System' 217.

133 Ndlovu-Gatsheni S 'Decoloniality as the Future of Africa' 487.

134 Cornish WR *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* 13-14. This comports with Kelbrick's opinion, see Kelbrick R 'The need for different perspectives'. (2008) 39/8 *International Review of Intellectual Property and Competition Law* 883-884.

135 Grosfoguel draws from feminist scholarship to emphasize the need for scholars to recognize that they speak from a specific location in gender, class, racial, and sexual hierarchies of a particular region in the modern colonial world. See Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System*'* 208.

136 Grosfoguel R 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' 29.

academy expressly to move beyond Eurocentric canons of thought and allow subaltern voices a space in the curriculum.

The objective of moving beyond European modernity requires decolonisation of power relations.[137] Transmodernity calls for epistemic diversity as a precursor to critical thinking about the epistemic traditions of the global South.[138] Transmodernity does not assume a value-neutral posture towards the curriculum, it expressly sets out to transcend European Modernity.[139] Grosfoguel insists that Eurocentric Modernity monopolised the definitions of democracy, human rights, economy, and others, and that Transmodernity seeks to provide a space for these definitions to be recast in accordance with pluriversal epistemic traditions.[140]

2.3.3 *Coloniality of power*

The coloniality of power is illustrated by Quijano's explanation of patterns of control; it invites a study of how the world is divided into the Zone-of-Being and the Zone-of-non-Being.[141] Decolonial scholars use this concept to analyse the modern operations of power and how the world works. Coloniality of power is used as a reference point in assessing how the global political setting is constructed along sexist, patriarchal, capitalist, and/or hegemonic lines to create a hetero-normative, imperial power structure.[142]

Grosfoguel insists that the masculine Western myth that knowledge production is neutral, universal, and un-positioned has been discredited by decolonial scholarship which shows that the production of knowledge is inextricably intertwined with global politics and Eurocentric hierarchies.[143]

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137 Grosfoguel ibid 24.

138 Grosfoguel R. *The Structure of Knowledge in Westernized Universities: Epistemic Racism/Sexism and the Four Genocides/Epistemicides of the Long 16th Century.* 88

139 Grosfoguel ibid.

140 Ibid.

141 Madlingozi T 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28/1 *Stellenbosch Law Review* 124-125. Ndlovu-Gatsheni differentiates the two in that the zone of Being indicates the world of those who benefitted from colonialism and Western modernity, whereas the zone of non-Being denotes the world of slaves, victims of imperialism, colonialism, and apartheid. See Ndlovu-Gatsheni S 'Decoloniality as the Future of Africa' 489.

142 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order' 32.

143 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System*'* 208.

The coloniality of power situates the production of knowledge within the network of the global power struggles which define curriculum development and transformation. According to Grosfoguel, coloniality of power posits the culture versus economy dilemma which emerges when economic relations in social processes are privileged over cultural and ideological aspirations.[144] Coloniality of power integrates the multiplicity of cultural, political, and economic relations that are mediated in a neo-liberal capitalist dispensation.[145]

2.4 **Calls for decolonised higher education in South Africa**

The dissertation establishes an academic response to the calls for decolonised higher education in South Africa.[146] Decoloniality is largely unknown in law and consequently this research borrows from sociology and the political sciences.[147] It is important to craft a lexicon to articulate decolonial questions as they relate to intellectual property and copyright law curricula.

Three points[148] in history are relevant to this study: the 1803 copyright of the then law of the Batavian Republic;[149] the 1842 British Copyright Act;[150] and 1978 South African Copyright Act.[151]

Terreblanche's[152] three-fold explanation of apartheid colonialism is instructive in its ability to create a basis for the law curriculum to be decolonised. Zitzke[153] paraphrases Terreblanche in saying that apartheid and colonialism are grounded

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144 Ibid 218.

145 Ibid 219.

146 Mamdani M 'Between the public intellectual and the scholar: decolonization and some post-independence initiatives in African higher education*'* 69 where the author argues that epistemic decolonisation begins with investigating the relation between the university and the national state, this comports with the calls for a deepened analysis of coloniality of power as a locality of coloniality.

147 This is true notwithstanding recent contributions by the likes of Motshabi, Himonga, and Diallo. See Himonga C & Diallo F 'Decolonisation and teaching law in Africa with special reference to living customary law*'*. See further, Motshabi B 'Decolonising the University: A Law Perspective' (2018) 40/1 *Strategic Review for Southern Africa*. See further, Le Grange L 'Decolonising the university curriculum'

148 This is not to suggest that the history of copyright begins and ends with these three points.

149 Die Wet van de Bataafasche Republiek van Juni 1803.

150 The Copyright Act 1842 was an Act of Parliament in the United Kingdom, which received the Royal Assent on 1 July 1842 and was repealed in 1911. It revised and consolidated the copyright law of the United Kingdom. It was one of the Copyright Acts 1734 to 1888.

151 Copyright Act 98 of 1978. This includes subsequent bills, drafts, amendments and laws connected with the subject. For instance, Intellectual Property Laws Amendment Act 28 of 2013 (IPLAA), Draft Intellectual Property Policy of the Republic of South Africa Phase 1, and others.

152 Terreblanche S *A History of Inequality in South Africa 1652-2002*.

153 Zitzke E *'*The history and politics of contemporary common-law purism' 202.

on the common theme of triadic oppression: (1) both the colonial and apartheid powers claimed political powers over black South Africans; (2) economic forces disempowered black South Africans by taking away their land; and (3) black South Africans were locked into in various forms of cheap and free labour for white masters. However, both Terreblanche and Zitzke are referring to colonialism, not coloniality.[154]

Intellectual supremacy lies at the heart of the coloniality of knowledge and this results in a systematic dismembering of a Black Body's intellect. Zitzke discusses how intellectual supremacy manifested and notes that colonisers subjugated African forms of law-making so relegating African law to a position where it remained largely underdeveloped and disrespected.[155] The point of entry for decoloniality is that colonialism dismembered the Black Body and rendered it a non-Being lacking adequate mental faculties to produce knowledge.[156] It follows that 'African law'[157] is not actual law as non-Beings are incapable of producing any credible product requiring intellectual thought.[158]

Decolonial scholarship impels law teachers to encourage students to think deeply, broadly, and more critically about the law and how it is taught. The essence of decolonisation is to promote epistemic pluriversality[159] within the academy. This

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154 This distinction is ideologically and theoretically crucial because, as has been said previously, the decolonising discourse is an anti-thesis, in the main, not to colonialism but rather to coloniality. These two concepts, although largely related and historically chronological, must never be confused.

155 Zitzke E 'The history and politics of contemporary common-law purism*'* 202.

156 Yousuf I 'Burdened by a Beast: A brief consideration of social death in South African universities' 86, argues that universities continue to exclude the voices of black students in curriculum development, further deepening the social death of the Black Body. He further opines that, '[b]y excluding their narratives and encouraging them to cherish and exhibit gratitude for the privilege of being *allowed in*, students are coerced into dislodging from their memory the insufferable realities of the past. Subconsciously, and reinforced through institutional cultures and mores, students are sternly reminded that being *allowed in* means they must quietly submit and glorify colonial and "apartheid architecture"'.

157 Zitzke E 'The history and politics of contemporary common-law purism' 202.

158 Ramose uses this argument about African philosophy but in a different context. He problematizes how Africa is politically defined and the historicity of the claims of homogeneity in the epistemic traditions of Africa. He further argues that coloniality denied Africa its humanity, and this ontological denial of being an African means that Africans are not humans and therefore they cannot have a philosophy. See Ramose M 'I doubt, therefore African philosophy exists' (2003) 22/3 *South African Journal of Philosophy* 11.

159 Santos B de S *Epistemologies of the South: Justice against epistemicide* 199, 'Intercultural and postcolonial approaches have allowed for the recognition of the existence of plural systems of knowledge that are alternative to modern science or that engage with it in new knowledge configurations. Accessibility to a plurality of ways of knowing and to new kinds of relations among them has been going on for some time with fertile results, especially in the

counters colonial thinking about the law as something that is either purely English law or merely Roman-Dutch law.[160] Indeed, decoloniality accepts ontological pluralism as a reality that requires 'ecologies of knowledge' to be understood.[161]

According to Venter, the reconstruction of African culture will enable Africans better to respond to politics, economics, art, and/or education. The image reconstruction could be understood in line with the metaphor of raising the corpses of African knowledge(s) and cultures from their graves in order to re-member them in the body of existing knowledge(s).[162]

Dismemberment follows the logic that states that colonial conquest removed (read dis-membered) the Black Body from the family of human beings. The totality of dis-memberment is the dehumanising and 'Thingifying' of the Black Body so condemning it to the Zone of non-Being.[163] Displacing one epistemology by the other and replacing one legal system with another is a brazen enactment of colonial ethics; its antithesis is decolonisation.

2.5 **Political, historical, and racial questions**

Does decolonising the curriculum in South Africa, mean that students will be taught a different type of copyright law to the rest of the world?[164] This is a question not to be dismissed as frivolous. Although decolonisation presents a radical shift in how the law is taught, it does not in any way mean that the graduate of a decolonised curriculum will be of an inferior standard.[165] If anything, in embracing epistemic

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global South, where the encounter between hegemonic and nonhegemonic knowledges is more unequal and the limits of each are more obvious.'

160 See generally, Zitkze E 'The history and politics of contemporary common-law purism' 185-230 where the author generally argues that the colonial wars between the British and the Afrikaner community tended to impact on how jurists interpret the law. He contended that these jurists were factional in their approach because in formulating South African judicial precedence those jurists with British background tended to rely heavily on English law, while tacitly avoiding Roman-Dutch law, while their Afrikaner counterparts tended to use Roman-Dutch law and avoid English law.

161 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order' 43.

162 Venter E 'The notion of Ubuntu and Communalism in African educational discourse' (2004) 23/2-3 *Studies in Philosophy and Education* 156.

163 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order*'* 25: 'It captures not only physical fragmentation but also epistemological colonisation of the mind, as well the cultural decapitation that resulted in deep forms of alienation among Africans.'

164 Mbembe A 'Decolonizing the University: New directions' 31. The author addresses the limits of the decolonial project, arguing that some of these are set by neo-liberals, whilst the true intention of decolonisation is to reverse the tide of bureaucratization in universities, therefore a question of international standards does not arise.

165 Kamwendo G *Unpacking Africanisation of higher education curricula: Towards a framework* 24, 27 in Msila V & Gumbo M (eds) *Africanising the Curriculum: Indigenous Perspectives*

perspectives from the global South the envisaged pluriversality will establish localised intellectual traditions and so increase the graduate-ness of students.[166]

The reductionist themes on race in the decolonisation discourse have made the historical blunder of blurring the lines.[167] Mulder reiterates Fanon's warning that decolonisation can never succeed if the only visible change is the replacement of white people with black people. She argues that before coloniality, actual colonialism created local elites, mostly educated, upper middle-class black people who had been compelled to assimilate European etiquette, and who thought and acted like Europeans.[168]

Varma agrees with Mulder that the cultural and intellectual consequences of colonialism do not end with the achievement of political freedom.[169] The mere replacement of the white man by the black man is therefore not decolonisation.

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and Theories, addresses this political question by assessing prospects of graduate employability in an Africanised curriculum. He posits that Africanisation increases the graduate-ness of students because it empowers them by making them more knowledgeable about their immediate environment. He further warns that there should not be a perception that Africanisation means a rejection of anything that is not African; it is instead an attempt to assert Africa's place in the development and internationalization of the knowledge economy. He responds to this political question by asking two further questions: (1) is Africanisation a passing fad? and (2) is Africanisation sustainable, and if so, how? To the former he responds that Africanisation is a fair attempt by African academic institutions to give their curricula local relevance and identity. To the latter, he responds by saying that there need to be resources put in place to ensure that the Africanisation dialogue is sustainable.

166 Mbembe A 'Decolonizing the University: New directions' 32. 'The harder I tried to make sense of the idea of "decolonization" that has become the rallying cry for those trying to undo the racist legacies of the past, the more I kept asking myself to what extent we might be fighting a complexly mutating entity with concepts inherited from an entirely different age and epoch. Is today's Beast the same as yesterday's or are we confronting an entirely different apparatus, an entirely different rationality – both of which require us to produce radically new concepts?'

167 Pailey R 'How to truly decolonise the study of Africa*'* ALJAZEERA online News portal. 2019 https://www.aljazeera.com/amp/indepth/opinion/decolonise-african-education-190610111758402.html (date of use: 28/11/2019). The author finds that one of the reductionist themes in the decolonial discourse includes misguided narratives that seek to exclude white people from the discourse. She further argues that the mere action of removing white authors from reference lists in academic student textbooks does not achieve any of the goals set out in the decolonial project. 'Still others erroneously contend that "decolonial" street credibility can be acquired by simply adding non-whites to their reading lists, journal editorial boards, speaking panels, research collaborations, book contracts, etc.'

168 Mulder L 'Frantz Fanon, Internalized Oppression and the Decolonization of Education' 2.

169 Varma P *Decolonising the University: The Emerging Quest for Non-Eurocentric Paradigms* 21-30.

Mphahlele bemoans how Africans insist on using Eurocentric tools to decolonise their situation.[170] These tools include the exclusion of others and an obsession with 'whiteness', which lead to radical projects that re-centre what they claim to challenge.[171] An example of colonial re-centering is the use of the coloniser's ideas as regards the inherent differences between blacks and whites and the uniqueness of black culture.[172]

The reality of coloniality presents an epistemic, ontological, and physical violence on Black Bodies and their knowledge(s). It may be a phenomenon adversely affecting all of society, but its effects are felt more keenly by what Fanon refers to as 'racialised subjects'.[173] The discursive decolonial project should re-centre Black Bodies as agents of knowledge production, and foster an inclusive dialogue that elicits robust debate among all communities within the academic space.

2.6 **History of copyright law**

The Greeks and Romans are said to have been among the first to want their authorship to be recognised and attributed to them. Cornish locates the origin of copyright not in the author's desire to hold an exclusive right over his or her work, but rather with the stationers at whose behest the first policies on copyright law emerged.[174] The concern of the stationers was to have rules that regulated the number of reprints and reproductions that could be made of their work. The basis of modern copyright law can be attributed to the development of the printing press between the 1440s and late 1500s.

In the Cape of Good Hope, copyright was governed by the common law – ie, by Roman-Dutch law. It is only after the arrival of the British and the introduction of their colonial order by way of the Copyright Act[175] – a law of the colonial master applied automatically to the territory of the colonised – that statutory control entered the

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170 Madlingozi T 'Decolonising "decolonisation" with Mphahlele' New Frame. 1 November 2018. https://www.newframe.com/decolonising-decolonisation-mphahlele (date of use: 29/11/2018).

171 Ibid.

172 Ibid.

173 Fanon F *Black Skin, White Masks* 41

174 Cornish W*R Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* 245. The author explains that "stationers" was the name used to refer to what is currently known as publishers. Cornish uses the phrase "forefathers of the modern publishers".

175 Copyright Act 2 of 1873

picture. At that time South Africa was divided into four self-governing republics[176] and whenever the British introduced a law in the Cape Colony, it would take approximately five years for the other three republics to adopt the same provisions.

In 1910[177] the four republics united to form the Union of South Africa which eventually became the Republic of South Africa.[178] Even during the period after the Union of South Africa, copyright law continued to take its cue from British law.[179] Examples include The Patents, Designs, Trade Marks and Copyright Act 9 of 1916[180] which was annexed to the British Copyright Act of 1911.[181] In 1965 South Africa promulgated the Copyright Act, 1965,[182] which deviated from the 1916 Act[183] but still evidences British influence in that one may argue that it was adopted in light of the British Copyright Act of 1956[184] and was subsequently modelled around it.[185]

The law of copyright has followed this pattern of colonial domination, alternating between English and Dutch masters. Contemporary case law indicates that the legal system continues to rely on Commonwealth precedent when interpreting domestic legislation.[186]

Additionally, international treaties play a definitive role in the historical trajectory of copyright law. The biggest influencer must be the Berne Convention for the Protection of Literary and Artistic Works of 1886.[187] The French Copyright Decree

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176 The Cape of Good Hope, the Orange Free State, Natal, and the Zuid-Afrikaanse Republiek, which was later known as the Transvaal.

177 For further reading on some of the pivotal moments in the history of the Union of South Africa see Fisher J *The Afrikaners*.

178 See Packenham T *The Boer War*.

179 Pistorius T *Law of Intellectual Property in South Africa* (2 ed) Part 4 'Copyright Law' 182-185.

180 Wet op Patenten, Modellen, Andelsmerken en Auteursrecht wet nommer 9 van 1916. See WIPO online for original text of the Act http://www.wipo.int/edocs/lexdocs/laws/en/na/na014en.pdf. (Accessed on 06/11/2017)

181 Also known as the Imperial Copyright Act of 1911, is an Act of the Parliament of the United Kingdom (UK) which received Royal Assent on 16 December 1911. The Act established copyright law in the UK and the territories colonized or under the political control of the British state.

182 Copyright Amendment Act 63 of 1965.

183 The Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

184 The Copyright Act 1956 is an Act of the Parliament of the United Kingdom which received its Royal Assent on 5 November 1956.

185 Pistorius T *Law of Intellectual Property in South Africa* 183.

186 For instance, the court held in *Waylite Diary CC v National Bank Ltd* 1995 (1) SA 645 (A) 653F-G that English case law wields considerable persuasive force in the absence of local authority, and is construed as properly enacted legislation.

187 Visser C (Gen ed) *South African Mercantile and Company Law (*8 ed) 704.

issued in 1852[188] is also an era of copyright history which deserves a firm mention as it was pioneering in shaping some of the current widely-accepted definitions of copyright concepts such as works eligible for copyright protection, the primary sources of copyright, and many other copyright concepts.

2.7 **Copyright law curriculum's colonial make-up**

South African higher education is colonial in its totality, and this includes the LLB curriculum.[189] Wa Thiongo counsels that the language question is vital to the decolonial project.[190] Copyright law is not immune to the politics of language as Wa Thiongo posits that 'the choice of language and the use to which language is put is central to a people's definition of themselves in relation to their natural and social environment, indeed in relation to the entire universe.'[191] His assertions validate what scholarship around the coloniality of Being and of knowledge embodies in its calls for the re-membering of Black Bodies. Coloniality marks the continued patterns of the subjugation of the colonised through the enactment of a global racial hierarchy and the hegemonic Eurocentric epistemologies in the present-day world system.[192] To break these patterns, re-members the Being and de-centres the knowledge(s) of the colonisers by paying serious attention to the politics of language.

2.8 **Conclusion**

This chapter set out to establish a basis for decolonising higher education in South Africa by explaining the essence of the calls to decolonise the curriculum. It studied the difference between colonialism and coloniality, clarifying the misconceptions that tend to surround the decolonial discourse. The chapter digs deep in locating the

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188 For further reading on this bit of history see Seville C *The internationalization of Copyright law: Books, Buccaneers and the black flag in the Nineteenth century.*

189 Gumbo M *'*A model for indigenising the university curriculum: A quest for educational relevance' 45 in Msila V & Gumbo M (eds) *Africanising the Curriculum: Indigenous Perspectives and Theories*, who uses former Tanzanian President, Julius Nyerere's philosophical model on indigenization of the curriculum to explain the depth of colonial legacy in higher education. He observes that colonial education is based on the assumptions of colonialist and capitalist society, designed to transmit the values of the colonizing power to the colonized state. Julius Nyerere's solution to this anomaly was to turn education around completely, by ensuring that it addresses the reality of the poor and underdeveloped and seeks a socialist transformation.

190 Wa Thiongo N *Decolonizing the Mind: The politics of language in African literature* 4.

191 Ibid.

192 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System' 205.

three sites of coloniality so as further to grapple with its manifestation in the copyright law curriculum.

Coloniality manifests, in the main, in three forms: the coloniality of knowledge; the coloniality of power; and the coloniality of Being. These three manifestations provide a guide to investigating the colonial nature of the copyright law curriculum. This chapter has shown that there are racial, political, and historical questions that always need to be carefully negotiated in any project that seeks to bring about a transformed legal pedagogical framework. It concludes by setting out the history of copyright law and linking this to colonial aspirations which continue to be entrenched in the curriculum. The decolonised copyright law curriculum incorporates teachings of respecting traditional knowledge, traditional cultural expressions, intangible traditional expressions, indigenous knowledge, folklore, and/or any similar form of intellectual property. These must be respected as an embodiment of the culture and heritage of the Black Body.

The chapter lays a basis for the work in the chapters that follow as it firmly construes coloniality as a dis-membering experience for the colonised. This is a theoretical framework that which this dissertation is based – it establishes decoloniality and decolonisation as an intellectual foundation to critically study copyright law concepts as taught by the two student textbooks. In the next chapter the dissertation studies two intellectual property law justificatory theories and uses this theoretical framework to present Afrocentric alternatives.

CHAPTER 3

INTELLECTUAL PROPERTY JUSTIFICATORY THEORIES: AN AFRICAN CRITIQUE

3.1 Introduction

This chapter briefly engages two justificatory debates and brings an African lens[193] to these discussions. It shows that current justificatory debates are Eurocentric and neglect other forms of thinking and knowledge(s) while specifically excluding African philosophies. This leaves no space for African thinkers. The chapter also relies on Sunder,[194] Craig,[195] Ndlovu-Gatsheni, and Sesanti, to give a brief critical analysis of central themes in current Eurocentric justifications.

This research does not make a philosophical argument but rather advances the basic contention that renewed philosophical debate which actualises an Afrocentric approach by embracing localised epistemic traditions, is essential in rethinking the foundations of intellectual property law. This culminates in an African critique of these colonial philosophies and how they shape the philosophy underlying intellectual property. This, in turn, re-members the dismembered Black Body.[196]

For purposes of this research it is sufficient to examine the two most prominent justifications – the labour theory of property; and the incentive theory.

The chapter concludes by consulting African modes of communal ownership and considers the need to define authorship in terms that are applicable to Africa's reality. This consultation decisively posits African ways of knowing as an endeavour to achieve the decolonial desire for pluriversal epistemic traditions in in higher education generally, and the copyright law curriculum specifically.

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193 Msila V 'Africanisation of education and the search for relevance and context' 63 in Msila V. & Gumbo M *Africanising the Curriculum: Indigenous Perspectives and Theories*. African lens, as applied in this chapter, refers to what the author defines as Africanisation as emancipatory education, in terms of which the curriculum seeks to use African philosophies alongside Western forms.

194 See generally, Sunder M *From Goods to a Good Life: Intellectual Property and Global Justice*.

195 See generally, Craig C *Copyright, Communication and Culture: Towards a relational theory of copyright law*.

196 See Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order*'* (2015) 36/2 December *Australasian Review of African Studies* 25 who states: 'It [dismemberment] captures not only physical fragmentation but also epistemological colonization of the mind, as well the cultural decapitation that resulted in deep forms of alienation among Africans.'

3.2 **Historical background**

African societies traditionally derive their societal value systems, which also influenced pre-modern African legal philosophies, from practices of cultural production imbued with the principles of custodianship which render culture inalienable.

The property law module, which is a prerequisite for intellectual property law modules (copyright law included), teaches students that property can either be corporeal or incorporeal, the former denoting tangible and the latter intangible.[197] Intellectual property is classified as incorporeal due to the nature of property of objects.[198] The current South African LLB curriculum begins the discussion of property in ancient Rome.[199]

Du Bois explains the theory of natural law[200] and labour theory by invoking the Roman-law concept *pictura*, which applies when a painter, and not the owner of the canvass upon which the painting was done, becomes owner of the finished work.[201] *Pictura* is a suitable Roman-law example, derived from the Roman-law tradition of thought as an expression of the heritage and culture of the Romans at a specific point in history. Romans are regarded as civilised beings[202] who were capable of developing theories and philosophies which came together in the outward expression of Roman Beinghood. Decolonisation asserts that Black Bodies, too, are Beings and, therefore, African epistemic traditions need to be developed to assert the outward Being of the Black Body.

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197 Van der Walt AJ & Pienaar GJ *Introduction to the Law of Property* (6 ed) 13. See further, Mostert H et al *The Principles of Law of Property in South Africa* 21.

198 De Zulueta F *The Institutes of Gaius* 12-14: 'Corporeal things are tangible things, such as land, a slave, a garment, gold, silver, and countless other things. Incorporeal are intangible, such as exist merely in law, for example an inheritance, a usufruct, obligations however contracted.'

199 Du Bois M 'Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism' 7 who states: 'At least for South African law, Roman law may be the starting point in the development of a natural-law theory for the recognition of intellectual property.'

200 Although not for purposes of this dissertation, it is important to note that even in Eurocentric studies of the law, the concept of 'natural law' has been largely discarded as a legal misnomer. Du Bois ibid cites it as a principle that determined ownership for *specificatio, scriptura, picture,* and *occupatio.*

201 Du Bois ibid 7.

202 By virtue of their whiteness, Romans and all Europeans are accorded the status of Beings among other Beings, in contrasts to Black Bodies who are Non-Beings. See Chapter 2 on the Coloniality of Being.

Drahos argues that the exercise departing from Gauis by construing *pictura* as a first step towards recognising intellectual property on natural-law principles illuminates the reality that Roman private law is the origin of the discussion on justificatory theories of intellectual property law.[203] Transmodernity calls for a justificatory debate that includes nuanced African epistemic perspectives.[204] Drahos takes the discussion further and says that there should be critical historical investigations which would make examination of intellectual property less Eurocentric.[205]

3.3 **Justificatory theories**

3.3.1 *Incentive-to-innovate theory*

> The challenge to the privileging of class antagonism as the exclusive site of contradiction requires a critique of Western Marxism's assumption of the universality of capitalist development.[206]

The central premise of modern copyright (and patent) law is that creators of innovative works need to be economically incentivised on the assumption that this incentive will encourage greater innovation.[207] It is accepted, in terms of this theory, that innovation only occurs when works of intellectual property are incentivised by the protection against economic exploitation by others.

'Incentive' is interpreted in this narrow sense because it refers only to monetary reasons to create, meaning that it is seen as the driver of individual economic interests in the market setting.[208] The capitalist interpretation of 'incentive' suggests that the individual who is incentivised in monetary terms is the driver of innovation, giving impetus by the capitalist tenets of the Agreement on Trade-Related Aspects

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203 Drahos P *A philosophy of Intellectual Property* 15.

204 On the concept of Transmodernity see generally Chapter 2.

205 Drahos P *A philosophy of Intellectual Property* 15.

206 See generally, Lowe L & Lloyd D *The Politics of Culture in the Shadow of Capital*.

207 Du Bois M 'Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism' 22 provides a rationale for the incentive theory: 'The incentive theory advocates promoting the creation of valuable intellectual works by granting property rights in such works since copyright, patent, and trade secret property protection provide the only adequate incentives for the creation of a socially optimal output of intellectual products.' See further, Dreyfuss R & Frankel S 'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property' (2015) 36/4 *Michigan Journal of International Law* 560-561.

208 Ibid 562-563.

of Intellectual Property Rights (the TRIPS Agreement[209]).[210] This is a justification that suggests that money is the strongest driver of innovation. Sunder illustrates that this is a unidimensional and narrow economic discourse that has seldom been challenged. It postulates that there can only be innovation when works of intellectual property are incentivised.[211] In a United States' (US) experiment on the value of the paternity right (moral right) it emerged, among other things, that '[p]eople's innovation decisions are not strongly influenced by objective assessment of the costs and benefits of their choices. Instead, creators' internal beliefs and preferences about innovation contexts matter much more.'[212]

Given that innovation was taking place long before the advent of intellectual property rights, and further that profits and sustained innovation are present in areas with relatively weak intellectual property protection, it is illogical to perceive economic incentive as the only driver of innovation.[213] Sunder problematises the narrow definition of incentive and questions its rationale. She asserts that the Eurocentric rationale of the incentive theory should never be construed as a means to generate profits because this reduces intellectual property law to a money-making scheme which negates the non-monetary aspects of life.[214] Rather, law should enable citizens to live a good life and not merely protect private capitalist interests.

Intellectual property scholars should not insist on using the narrow lens of economic interests to construct a holistic vision of intellectual property law. Human flourishing[215] depends on the developing world's access to food, textbooks, and essential medicines. The capacity to earn a livelihood from one's intellectual contributions to our global culture transcends the narrow economic-incentive lens that underpins the Eurocentric incentive-to-innovate theory.[216]

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209 The Agreement on Trade Related Aspects of Intellectual Property, see full document from World Trade Organization website,(Date of use: 18/06/2020) https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

210 Ibid 563-566.

211 Sunder M *From Goods to a Good Life: Intellectual Property and Global Justice* 25.

212 Bechtold S, Buccafusco C & Springman C 'Innovation Heuristics: Experiments on Sequential Creativity in Intellectual Property' (2016) 1251/91 *Indiana Law Journal* 1253.

213 Searle N & Brassell M *Economic Approaches to Intellectual Property: Economics of Copyright* 34.

214 Sunder M *From Goods to a Good Life: Intellectual Property and Global Justice* 3 states: 'But copyright and patent laws do more than just incentivize creation of more goods. They fundamentally affect human capabilities and the ability to live a good life. These laws go beyond gross domestic product.'

215 It is not the primary objective of decolonisation but is not inimical to it.

216 Sunder M *From Goods to a Good Life: Intellectual Property and Global Justice* 5.

Ghosh finds that intellectual property is commonly viewed as a matter of private law and private rights, whereas there are in fact parallels between the natural-monopoly theory and theories that justify intellectual property; this points to the involvement of public law.[217] He observes that the incentive theory predicts very little about the structure of intellectual property rights, save for the implication that intellectual property rights need to be as strong as possible in order to maximise incentives.[218] He opines that the incentive-to-innovate theory is either entirely false, or at best misguided, in shaping an understanding of intellectual property systems.[219]

The non-binary nature of the justificatory debate allows for the development of the incentive-to-innovate theory and for it to be extended to accommodate Africanised epistemic inquiries. For example, the incentive theory falls short in justifying intellectual property when it comes to works of art, in that many artists create art for the sake of art and not primarily because of the motivation offered under the incentive theory. Creative industries are unique insofar as the incentive rationale is concerned, because of the so-called 'starving-artist' argument that points to intrinsic motivation to create instead of financial motivation.[220]

The argument against the incentive/ innovate theory does not necessarily mean that artists do not want to be compensated for their works.[221] However, the argument that this chapter makes is that even though artists rightly demand to be remunerated for their works, this does not mean that they will not produce art without a monetary incentive. This argument suggests that financial income is not proportionate to the level of creation.

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217 Ghosh S 'The intellectual Property Incentive: Not So Natural as to warrant Strong Exclusivity' (2006) 3/2 June *SCRIPT-ed* 108.

218 Ghosh S 'The intellectual Property Incentive: Not So Natural as to warrant Strong Exclusivity' 97.

219 Ibid 98 who states that 'basing intellectual property law on a consideration of cost overemphasizes the importance of cost and trivialises the role of distribution and consumption'.

220 Searle N & Brassell M *Economic Approaches to Intellectual Property: Economics of Copyright* 76, with reference to Caves R *Creative Industries: Contracts between Art and Commerce* 2000.

221 See, PEN 'Afrikaans South African authors protest against Copyright Amendment Bill' 23 November 2018. Litnet Online. ISSN 1995-5928 Ingesluit LitNet Akademies. https://www.litnet.co.za/south-african-authors-protest-against-copyright-amendment-bill/ (date of use: 10/09/2019). A group of South African writers under the banner of PEN Afrikaans organisation recently publicly rejected/opposed Parliament's draft Copyright Amendment Bill because the group claims that the Bill takes away some of the author's rights to make money from their works, by introducing concepts such as fair use and others to South Africa's copyright regime.

Justificatory theories are built on individualism which originates from the great intellectual movement associated with the Enlightenment of the Renaissance[222] and Aufklarung periods.[223] This is one of the biggest reasons why the justificatory theories tend to be ill suited to Africa's situation. Furthermore, the incentive theory is directed at fostering innovation, whereas indigenous knowledge systems frequently aim to protect against exploitation of traditional cultural expressions.[224]

Roodt insists that contemporary law faculties should actively investigate the central questions that distinguish the discourse on indigenous knowledge(s) from the discourse on intellectual property law.[225] Therefore, the paucity of comparative studies which incorporate African philosophies in intellectual property law is regrettable and calls for a change in academic thinking.

In an effort to Africanise the incentive theory as taught in the LLB curriculum, Transmodernity proffers the African philosophy of Mohlomism. Sesanti provides an incisive account of Mohlomism, defining its central tenet as the outlook on life among the Basotho; it is the lens that the people use to navigate various complex societal questions.[226]

Historical accounts show that Morena Mohlomi (1720–1815) was a mentor to the King of the Kingdom of Lesotho, King Moshoeshoe I.[227] Mohlomi also travelled around Southern Africa teaching people about his philosophy of truthfulness, justice, peace, the love of mankind, and the pursuit of sane humanism.[228] When he was not travelling, Mohlomi headed a leadership academy in Southern Africa. He has been

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222 The revival of European art and literature under the influence of classical models in the 14th–16th centuries.

223 Mostert F *The Development of the Natural-Law Principle as One of the Principles underlying the Recognition of Intellectual Property: A Historical Survey from Roman law to Modern-Day Law.* 495. See 'the Century of Lights' in German: Aufklärung, 'Enlightenment' and the revival of European art and literature under the influence of classical models in the 14th–16th centuries.

224 Du Bois M 'Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism*'* 24.

225 Roodt C 'Legal aspects of African Knowledge systems: Curriculum design in higher education' (2004) 18/3 *South African Journal for Higher Education* 163.

226 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' (2014) 35/4 *South African Journal of Philosophy* 434.

227 For further history of Morena Mohlomi and his philosophy, see Max Du Preez's Chancellor's Address at a University of Free State, under the theme *The Socrates of Africa and his Student: A Model of Pre-Colonial African Leadership.* http://www.ufh.ac.za/files/max_dupreez.pdf (Date of use: 16/06/2018). See also the video and audio on YouTube online portal, https://youtu.be/WNxxLOaAzTQ (date of use: 16/06/2018).

228 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 434.

dubbed the 'Socrates of Africa' in that he epitomises the brilliance of pre-colonial African leadership.[229] The teachings of Mohlomi are crucial as he represents African intellect and wisdom prior to colonial contact; in fact he never set eyes on a European, nor was he influenced by Eurocentric epistemic traditions.[230]

The legal philosophy modules in the current LLB curriculum mention most Western philosophers who lived during the time of Mohlomi, but due to deliberate exclusion and epistemicide, the philosophical thinking of Mohlomi is strikingly absent from the LLB curriculum. Mohlomi's teachings, like those of Western thinkers, were aimed at the problems of his community. Of course, circumstances in different communities tend to differ radically. Yet, the Eurocentric South African curriculum assumes that Western scholarship is without fail suited to regulating African situations and responding to African challenges.

Mohlomism is based not only on Mohlomi's individual musings, but also on the wisdom of the Supreme Being, *Molimo*, and on ancestral spirits, *Balimo*.[231] Mohlomism should rather be approached as a product of the mental and physical experience of Basotho society.[232]

The most important aspects of Mohlomism which Transmodernity inserts in the incentive theory – and so too, the LLB curriculum – are the elements of truthfulness, justice, peace, and the pursuit of sane humanism.[233] While innovation should be

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229 Mahao N 'The King Moshoeshoe I Memorial Lecture' (2014) 22/1&2 *Lesotho Law Journal* 6-8. See further, Max Du Preez's *The Socrates of Africa* http://www.ufh.ac.za/files/max_dupreez.pdf (Date of use: 16/062018). See further Mofuoa K 'Explaining attributes of responsible leadership in society: Chief Mohlomi, the African Socrates' Conference paper delivered at First International Conference in Responsible Leadership 18 - 20 May 2010, University of Pretoria, and Centre for Responsible Leadership.

230 On the history of Mohlomi, see generally, Machobane L *Government and Change in Lesotho, 1800–1966: A Study of Political Institutions*.
See further, Max Du Preez's *The Socrates of Africa* http://www.ufh.ac.za/files/max_dupreez.pdf: 'Mohlomi lived during the same time as famous Western Philosophers Montesquieu, who died in 1755, when Mohlomi was 35 years old, and Voltaire and Jean-Jacques Rousseau, who both died in 1788, when he was 68, and Immanuel Kant, who died sixteen years before Mohlomi.'

231 The belief in/of ancestors is prevalent in various African cultures. *Molimo*, in the isiNdebele language is *uZimu*. This is what may be referred to as God, or Allah, or any higher power. The latter, *Balimo*, refers to ancestors or their spirit. In the isiNdebele language this is known as *Abezimu*. There is a long history of Africa's reverence for both a higher power, that is God, and as well as the power of ancestors.

232 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 434.

233 See Max Du Preez *Tafelberg Short: A chief is a chief by the grace of his people: Once we had leaders*. Du Preez gives an incisive account about the history of Morena Mohlomi from birth, to his journeys, up until to his death.

incentivised to stimulate economic growth and protect individual claims to the fruits of the creator's intellectual labour, this should be done in light of what is true, what is just, and what is humanely sane. For example, allowing for a longer copyright duration may bode well for copyright owners, but not so well for those reliant on the public domain. In this regard, Mohlomism invites an inquiry into whether it is more just and humanely sane to have a copyright endure for a longer or a shorter period. Given that the incentive to innovate is not paramount in the creation of indigenous knowledge systems, the concepts of justice, peace, love, and striving for sane humanism can be used as justificatory theories to describe the protection afforded indigenous knowledge systems and traditional cultural expressions.

Colonial education deliberately ignores African philosophy and assumes that African people had neither a philosophy nor an epistemology. Including the thinking of Mohlomi in the curriculum could deconstruct colonial education.[234] Odora-Hoppers argues that: 'It [decolonial education] needs to expose the established hegemony of Western thought and beseech it to feel a measure of shame and vulgarity at espousing modes of development that build on silencing of all other views and perceptions of reality.'[235]

Mohlomism contributes to decolonisation, not by being inserted into the justificatory debate merely to provide a nuanced conception of the incentive theory, but to rid the theory of certain of the characteristics which are alien to the African situation. Moreover, it seeks to reverse epistemicide by asserting the Black Body as a Being among other Beings, capable of producing knowledge and worthy of legal recognition. This engenders an approach to Mohlomism laden with an attitude of justice and liberation which deeply appreciates decolonisation as a project to dismantle didactic Western hegemonic orders.

It must be borne in mind that African knowledge(s) should be elevated to the same platform as the Eurocentric knowledge(s) which dominate the academy. The proposal to incorporate Mohlomism in the incentive theory does not mean that

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234 Ramose M 'In search of an African philosophy of education' (2004) 18/3 *South African Journal of Higher Education* 138-160.

235 Odora-Hoppers C 'Poverty, Power and Partnerships in educational development: A post-victimology perspective*'* (2001) 31/1 *Compare: A journal for comparative and International Education* 21-38. The point is reiterated by Higgs P 'The African Renaissance and the Decolonisation of the Curriculum' in Msila V & Gumbo M (eds) *Africanising the Curriculum: Indigenous Perspectives and Theories* 2.

Moholomism should be accepted as is and without criticism or academic peer engagement. Indeed, academics should be encouraged to grapple with the philosophy of Mohlomism in the copyright curriculum, just as with the ideas of male European thinkers. Mapesela argues that the contestation surrounding Basotho indigenous knowledge(s) as a science stems from a lack of knowledge of some Sesotho philosophies.[236] He contends that Sesotho philosophies should be introduced into higher education, and that deconstruction[237] should be vehicle by which some of the mysteries and hidden meanings that have shrouded these philosophies in controversy may be explained.

Intellectual property law as currently taught is premised on systematic tension between the incentive to innovate and access to the products of innovation. Sunder argues that, '[f]or most critics of intellectual property law today, these two values: incentives and access, are the two that matter. Other values are subsumed by these two broad categories.'[238] Sunder exposes how narrow the debate has become, as it concentrates on productivity which then translates to incentives. Mohlomism, on the other hand, argues that the values of access and incentive should be interpreted in light of the demands of justice and sane humanism.[239]

3.3.2 *Labour theory of property*

The labour theory of property originates in the work of John Locke that provides that as persons own their own labour, they are entitled to the fruits of that labour.[240] This is the principle of first appropriation.[241]

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236 Mapesela M 'The Basotho indigenous knowledge (IK): Do we understand it well enough to employ it as a tool in higher education teaching?' (2004) 18/3 *South African Journal for Higher Education* 321

237 Ibid where Mapesela correctly attributes the theory of deconstruction to the French Jacques Derrida: 'Derrida sees deconstruction as a way of looking at the double meaning of words to understand the message they transmit rather than what they actually mean.'

238 Sunder M *From Goods to a Good Life: Intellectual Property and Global Justice* 30.

239 Mohlomism teases out a broader articulation of the concept of humanism, adding that it must exude sanity, meaning that not only should there be a focus on the rationalist outlook of what makes humans human, but whether such a conceptualisation is just and sane.

240 Locke J *Second Treatise of Government* as cited in Craig C 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law' (2002) 28/1 *Queen's Law Journal* 9.

241 Locke J *Second Treatise of Government* as cited in Searle N & Brassell M *Economic Approaches to Intellectual Property: Economics of Copyright* 30.

According to Locke, inventions and creations are products of an individual's toil and labour.[242] The labour theory is significant to this study as it plays a major role in the recognition of modern intellectual property rights;[243] although postmodern thinkers have deconstructed this thinking exhaustively.[244]

Roodt points out that, '[f]ormal regimes [like the current labour theory] are characterised by adaptability, but individualised rights are not fully responsive to the cultural nature of traditional and indigenous knowledge.'[245] The individualistic framework on which the labour theory is built proves unable to respond adequately to the African situation because the natural-rights discourse begins and ends with an individualistic proprietorial focus.[246]

Locke produced a theory of property that is amenable to various interpretations. On intangible property, the question is whether natural rights exist and if they do, how do they operate?[247] Locke's response is three-fold. First, he presupposes a pool of communal rights which he refers to as the 'state of nature' which originates in the will of God. Second, adding labour to the state of nature results in individual claims

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242 Craig C 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law' 10. See further, Ghosh S 'The intellectual Property Incentive: Not So Natural as to warrant Strong Exclusivity' 104 states: 'Artists and research scientists often must spend many hours and use much capital intensive resources to experiment with various techniques and produce multiple first drafts and prototypes before reaching the final product. In the language of economics, there are highly fixed costs to creation and invention.'

243 Mostert F *The Development of the Natural-Law Principle as One of the Principles underlying the Recognition of Intellectual Property: A Historical Survey from Roman law to Modern-Day Law.* 495, 'As evidenced by the writings of the legal authors during the 18th century and later, the principle that what a person has created by his intellectual effort and exertion should be accorded to him as property played a major role in the recognition of intellectual property rights.'

244 Craig C 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law' 12-13. See also, Mostert F ibid 'The doctrine of intellectual property is predicated on the principle that the creator of a work of intellect has an absolute and exclusive right to it, just as property as a tangible thing would grant unfettered dominion to the owner.'

245 Roodt C 'Legal aspects of African Knowledge systems: Curriculum design in higher education' 168.

246 Craig C 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law' 13.

247 See generally, Einhorn B Arthur C *Law and Marxism: A General Theory*. Marx did not respond to this, because his concern, in the main, was not natural rights or their existence in intangible property but their impact on the development of the capitalist society. Marx argued that applying historical materialism shows that intellectual property is a super-structural phenomenon responding to the industrial phase in the development of capitalist machinery.

to private property.[248] And, third, labour only gives rise to a property right where the remaining 'state of nature' is sufficient to serve the interests of others.[249]

Drahos rightly asks why labour should be the criterion to qualify property rights in preference to, for example, intention or possession.[250] Both Tully and Macpherson attempt to reconcile the inconsistencies in Locke's arguments, each concluding that Locke's ideologically amoebic formulation leads to confused interpretations of the labour theory.[251] The former argues that Locke's philosophy represents a philosophy of religious praxis, whereas the latter construes Locke as a crusader for capitalist hopes and desires.[252]

Further, the labour theory is overly individualistic[253] and assumes – incorrectly – that all works are authored by an individual.[254] This is untrue in the context of African indigenous knowledge(s) and indigenous cultural expressions.[255] The individualistic[256] bent of Locke's labour theory opens up a dialogue on the meaning of community and its social context.[257]

3.4 **Authorship and African modes of communal ownership**

One antithesis to the current Eurocentric[258] and individualistic labour theory, is an engaged study of authorship in the context of African indigenous knowledge(s) and African modes of communal ownership.[259] A deepened study of African modes of

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248 Drahos P *A Philosophy of Intellectual Property* 22-33. Therefore, the equation is: State of Nature + Labour = Private Property.

249 Ibid.

250 Ibid 42-43.

251 Tully J *A discourse on property* 53-54.

252 Drahos P *Justifying Intellectual Property*. 44

253 Craig C 'Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law' (2007) 14/2 *Journal of Gender, Social Policy & the Law* 209-210.

254 Craig C. 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law' 35-36.

255 Roodt C 'Legal aspects of African Knowledge systems: Curriculum design in higher education' 168: 'The individualized nature of formal intellectual property rights - the formal remedies do not fit neatly into the indigenous paradigm.'

256 See generally, Coombe R 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 15/207 *Canadian Journal of Law & Jurisprudence*

257 Craig C 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law' 43-44.

258 In Eurocentric scholarship authorship is always a matter of an individual or individuals; an individual as an author then individuals in joint authorship. See s 1(1) of the Copyright Act 98 of 1978, the definition of an author in relation to the various works from s 1(1)(*a*) to (*i*). See further s 21(1)(*a*) of the Copyright Act 98 of 1978.

259 Mabovula N 'The erosion of African communal values: a reappraisal of the African Ubuntu philosophy' (2011) 3/1 *Inkanyiso Journal of Human and Social Sciences* 40: 'African

communal ownership in relation to works of authorship provides a richer perspective of the current labour theory.

The South African Intellectual Property Laws Amendment Act 28 of 2013 (the IPLAA) defines an indigenous community as:

> 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.[260]

This definition of an indigenous community means that the owner of the copyright in an indigenous work is the author, and that the author of an indigenous work is the indigenous community. The legislative concept of community renders traditional labour theory even less relevant to indigenous knowledge(s) as it makes it impossible for the author to be either an individual or a joint author as defined in the Copyright Act.[261]

The Eurocentric intellectual property (and specifically copyright law) regime poses a concept of authorship which accommodates only single authors and joint-authors. In African culture and mythology, authorship may also extend to ancestors and the yet-to-be-born – a perception which should feature in teaching the concept of authorship in the LLB curriculum.

The fruits of one's labour as defined by the labour theory, means that the community that authors a work by way of African belief systems of *Balimo* and *Molimo*, cannot resonate with Locke's logic as under the labour theory 'fruits' do not take ancestors and the yet-to-be-born into account.[262] Equally, the concept of joint authorship fails to define a community in that it does not include *Badimo* and the yet-to-be-born.[263]

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societies place high value on human worth, but it was humanism that found expression in a communal context rather individualism.'

260 IPLAA, s 3(*f*).

261 Copyright Act 98 of 1978.

262 Lembede A *Freedom in Our Lifetime* 19 states: 'Africans had to rely on their inner resources to overcome inequities and that spiritual beliefs were a necessary component of economic and political advancement.'

263 This is notwithstanding that Geyer insists that a closer reading of s 28D(3)(*c*) of the Copyright Act shows that communities could be co-authors. The technical reading of the Act means

Geyer posits that: 'Indigenous community does not refer to the public or society in general, that is, to South Africans generally, but to a plurality of groups.'[264] She argues that the community needs to be understood as encompassing plural and nuanced factors rather than focusing on a set definition.[265] Geyer defines the image of community as one that, 'can, inter alia, be defined in terms of the area in which a group of people lives or in terms of a group's common background or shared interests'.[266] She addresses the definitional gaps presented by the Intellectual Property Laws Amendment Bill, 2010. Although there have been more recent drafts of this Bill subsequent to the text relied on by Geyer, the definition of a community does not appear to have changed.

The Copyright Act always defines an author as a 'person'[267] and uses the term 'co-authors' in the case of joint authorship. The IPLAA[268] deviates slightly from the Copyright Act's individualistic definition by providing that the author of an indigenous work is the indigenous community from which the work originated and acquired its traditional character.

Sesanti provides an 'Africanised' definition of community: 'In African traditional culture, "community" is defined as the departed souls (the dead), the living and those yet to come (the unborn).'[269] This means that in African culture the death of a person does not break the bond that exists between the living and the dead – hence, the inclusion of the dead.[270]

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that Geyer is correct, however, in light of the labour theory and the subsequent definition of an indigenous community, the conception of joint-authorship, co-authorship is a misfit in decoloniality. See Geyer S 'Copyright in Traditional Works: Unravelling the Intellectual Property Laws Amendment Act of 2013' (2017) 27/1 *South African Mercantile Law Journal* 54.

264 Geyer S 'Towards a clearer definition and understanding of "Indigenous Community" for purposes of the Intellectual Property Laws Amendment Bill, 2010: an exploration of the concepts "Indigenous" and "Traditional"*'* (2010) 13/4 *Potchefstroom Electronic Law Journal* 132-180.

265 This lends credence to an argument that the single, joint, and communal authors may not be sufficient to define the African community.

266 Geyer S 'Towards a clearer definition and understanding of "Indigenous Community" for purposes of the Intellectual Property Laws Amendment Bill, 2010: an exploration of the concepts "Indigenous" and "Traditional"*'* 132-180.

267 The person, always denotes an individual, which means that the Copyright Act only views authorship as that which can only be attributed to an individual or individuals.

268 Intellectual Property Laws Amendment Act 28 of 2013, s 3(*a*)-(*k*).

269 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 437.

270 Bewaji J 'The Bewaji, Van Binsbergen and Ramose Debate on Ubuntu*'* (2003) 22/4 *South African Journal of Philosophy* 393, states that the idea of a community meaning the onto-triadic alive, dead, and yet-to-be-born, does not come without criticism, for example Bewaji

The amendment effected by the IPLAA does not dismantle the individualism of modern intellectual property law; nor does it address the particularities of Africa's unique situation. Instead, it defines a community and indigenous works by fusing individual authorship and geographic proximity, and frames joint authorship in relation to cultural similarity.[271] Students need to be brought to see that an author of indigenous works is sometimes neither an individual nor a composite group of individuals, but a community which includes ancestors and the yet-to-be-born.[272]

3.5 **Conclusion**

This chapter set out to show in practical terms how African philosophies such as Mohlomism can be included in the LLB curriculum. The chapter also critically analysed two Eurocentric justification theories to illustrate that the current theories fail to understand that, in the context of Africa, culture cannot belong to an individual person.[273] It provides nuances specifically as regards the incentive theory, arguing that the current incentive-to-innovate approach lacks the epistemic depth to accomodate the Black Body. One intervention made in the chapter is that the incentive element should transcend monetary gain but encompass other factors.

The economics of innovation are as important as calls for access, but the discussion ought not to end there. Mohlomism offers a nuanced and a more engaged dialogue in the incentive-to-innovate theory. As Sunder posits: 'The fight over intellectual property should consider values beyond simply incentivising production.'[274] Sunder

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argues that the idea is problematic because he does not see '[h]ow translating a phenomenon that is purely utilitarian value into a religious linchpin for the construction of a theory of existence.' It appears in Bewaji's scholarship that the idea of 'living dead' is self-contradictory.

271 See, Intellectual Property Laws Amendment Act 28 of 2013, s 3(*f*): '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'.

272 See generally, Ginsburg J 'The concept of Authorship in Comparative Copyright law' (2002) 52 *DePaul Law Review*. Ginsburg makes headway in a comparative analysis of the concept of authorship in various jurisdictions. She acknowledges that copyright laws in the United State of America and the rest of the world recognise the author only as the human creator of the work and nothing else. A decolonised copyright pedagogy goes into the deeper meanings of an author, transcending the definition of an author as someone who is alive, with the understanding that the dead (ancestors) play an authorship role in African communities either physically or spiritually. In African mythology, a person never dies, his or her spirit lives on and has practical application in the lives of the people that he/she has left behind.

273 Note that although copyright does not protect culture, but rather works, this dissertation argues that in Africa's situation there are instances in which works are an embodiment of the culture of the peoples of Africa. Therefore, when discussing the protection of some of these works you are also invariably discussing the protection of culture.

274 Sunder M *From Goods to a Good Life: Intellectual Property and Global Justice.*31.

calls for cultural analysis in order to ensure a consideration of values that go beyond the simplistic incentive-to-innovate route.

The chapter also examined the labour theory of property, illustrating that it was crucial in the creation of the theory of intellectual property. The argument advanced is that the labour theory in its current form is inadequate to describe African modes of communal authorship. It became essential for this chapter to problematise John Locke's observations and formulation of the labour theory. Problematising Locke is important for two reasons: he represents the archetypical example of Eurocentric ideas which have been disproved by disuse in current legal philosophy; and critical analysis of Locke's work also shows that European ideas alone are insufficient.[275]

In the context of the creation of indigenous works, communalism needs to be studied in light of the reverence for ancestors in African philosophy. The inclusion of the element of reverence to ancestors is important in that it debunks and deconstructs the colonial myth that ancestral reverence is voodoo, barbaric, uncivilised or unscientific.

Sesanti pleads for an understanding of the reverence for ancestors as 'an act of appreciation [of] past achievements for future civilization'.[276] The liberation-centred aspects of a decolonised copyright law curriculum should guide students to appreciate African spirituality and that communal authors of indigenous works derive some of their skills from ancestors.[277]

This chapter offered two Afrocentric alternatives to extant Eurocentric intellectual property law justificatory theories. This sets the tone for the inquiry that follows in chapter 4, wherein the dissertation expressly posits the philosophy of Ubuntu as an alternative in teaching moral rights in copyright law.

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275 Carys Craig argues that notwithstanding its wide acceptance by some scholars, the reliance on Lockean theory in copyright law is unhelpful and harmful to the development of a sound and effective copyright system. See Craig C 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law' 22-23.

276 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 436.

277 Ramose M 'The Bewaji, Van Binsbergen and Ramose Debate on Ubuntu' 408 notes two implications of the recognition of the living-dead: (1) the living-dead belong in a different sphere of Being, and that is the domain of the ontology of invisible beings, even though they are recognised as real and not a phantom of the imagination; and (2) the relations that the living-dead have with the alive directly contradict the Eurocentric theology in which there is one God with which the entire community identifies.

CHAPTER 4

COPYRIGHT IN A WORK: AN UBUNTU APPROACH

4.1 Introduction

This chapter explores how the nature of copyright is taught in law faculties using the Dean and Dyer[278] and Van der Merwe[279] undergraduate student textbooks. The nature of copyright is an important topic in that it details the ambit of the protections afforded by copyright law. Where an expression fails to meet copyright requirements that expression will not attract copyright protection and will fall outside of the scope of the copyright regime.

This chapter focuses on the exclusive rights of the owner – the notable privileges a copyright owner enjoys in relation to a work. This chapter's dialectical significance is two-fold: (1) it establishes the scope and ambit of protections; and (2) it proposes strategies to make these protections fit the African situation.

The chapter suggests that decolonised teaching of the concept of moral rights must embody the pillars of Ubuntu, recognition, and respect. These pillars deliberately cast moral rights as central to the social-justice agenda; indeed, '[a]t the centre of the "remembering" process is the restorative recovery project that is ranged against dismemberment and Europhonism'.[280] In Africa, the coloniser-colonised dichotomy is omnipresent in the operations of cultural appropriation where the appropriator is always the dominant culture, and the appropriate the colonised culture as illustrated in the example of *Die Antwoord*. All of this is an enactment of coloniality which persists long after colonialism retreats.

The renaming and owning[281] concepts are essential to the decolonial project as they serve as an antithesis to coloniality steeped in images that entrench the symbolism

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278 Dean O & Dyer A *Introduction to Intellectual Property Law*.

279 Van der Merwe A *Law of Intellectual Property in South Africa* (2 ed).

280 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order' (2015) 36/2 *Australasian Review of African Studies* 32.

281 Note that 'owning' in this instance is used in light of its decolonial application, rather than ordinary copyright law jargon. Therefore, this owning has nothing to do with copyright ownership, but rather the decolonial demand for the Black Body to own the narrative in knowledge production and related epistemic endeavours. See Ndlovu-Gatsheni S ibid cited Chapter 2: 'The reversal of epistemicide and subsequent re-membering of the dismembered involves a restorative recovery project of Black Bodies being given the power of owning and naming their own realities using their own epistemic perspectives.'

of the colonial worldview. Moreover, the three pillars allow for the practical enactment of re-membering the dismembered.

Haunss and Shadlen point out that the current literature on intellectual property suffers from two fundamental weaknesses: (1) the field is overly generalised, with too much attention paid to the conflicts over international rules and legal provisions at the expense of analysis of what is happening within countries; and (2) the field is insufficiently theorised in the political sense: insufficient attention is given to how the politics of intellectual property may be informed by distinct dynamics and logics.[282]

Francis raises nuanced questions which still await an academic response or in-depth research. On cultural appropriation, he asks whether indigenous people themselves can or have been complicit or active players in the cheapening of their own traditional works – who has the legitimacy to speak on behalf of the 'tribe'.[283]

The chapter concludes by turning to three contemporary examples of indigenous knowledge(s) and the forms it can take.[284] These case studies demonstrate the complex nature of the relationship between indigenous knowledge systems and copyright law. Some of the complexities include the inherent anomaly of commodifying and appropriating culture. The case studies further show that there is a definite overlap between intellectual property rights and cultural appropriation. The aim of the case studies is to unravel a specific complexity as regards the sphere of indigenous knowledge. Even though African communities derive their work ethic from communalism and collectivism, this is not always the case. In a nutshell, the story of *NoStokana* shows the intersectionality between the community and the individual as there are no fixed binaries between the community and the individual.[285]

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282 Haunss S & Shadlen K *Politics of Intellectual Property. Contestation over the Ownership, Use, and Control of Knowledge and Information* 2-5.

283 Francis S *Who speaks for the tribe? The arogyapacha case in Kerala* in Haunss S. and Shadlen K. *Politics of Intellectual Property. Contestation over the Ownership, Use, and Control of Knowledge and Information* 81-86.

284 Shava S 'The application/role of indigenous knowledges in transforming the formal education curriculum: Cases from Southern Africa*'* 124-125 in Msila V & Gumbo M (eds) *Africanising the Curriculum: Indigenous Perspectives and Theories*, where the author posits that the subject of indigenous knowledge is at the epicenter of the decolonial project because colonialism's theorectical underpinnings are heavily steeped in the domination, colonisation, devaluation, appropriation, misappropriation, primitivisation, invalidation, exclusion and rejection of indigenous knowledge(s) of the Black Body.

285 Visser C 'Some Thoughts on Making Intellectual Property Law Work for Traditional Knowledge*'* (2002) 14/4 *SA Mercantile Law Journal* 660.

4.2 **What is copyright?**

The Copyright Act 98 of 1978 (the Act) does not define what copyright is, and the same applies to both the Van der Merwe and Dean and Dyer textbooks. All nine editions of Cornish's textbook also do not define what copyright is. He instead begins the discussion by tracing the steps in the development of history of copyright law in the United Kingdom. The action of detailing copyright history without defining copyright may be laid at the door of the fact that the meaning of copyright has shifted significantly from what it was at its inceptions. Today copyright no longer applies purely to the printing press and has developed to encompass far more than merely the right to make copies of literary texts.[286]

Dean describes the systematic operation of copyright:

> Copyright law, like other branches of intellectual property law, seeks to create a system whereby the creator of an original work is afforded a qualified monopoly in the use or exploitation of his work in order, firstly, to compensate and reward him for the effort, creativity and secondly, to act as an incentive for him to use his talents and efforts to create more and better works or intellectual products.[287]

The Act does not expressly define copyright but merely sets out which works are protected and the rights that subsist in them. Copeling defines copyright as, 'that right which vests in the author of every original literary and artistic work and enables him to prevent the unsolicited copying of his work, provided always that the work is not of a kind which is contrary to public morality'.[288] Copeling's definition speaks more to the rights of the owner/holder/author of a copyright, than to the actual definition of the copyright itself.

There is a difference between copyright law and copyright as a concept. The Van der Merwe textbook accordingly states that:[289] 'Copyright belongs to a category of subjective rights which is distinct from categories constituted by real, personal and personal rights.' The textbook references *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* (40/2010) [2010] ZASCA 96, 2010 (6) SA 329 (SCA), [2011] 1 All SA 449 (SCA) [para 19] where the court noted that copyright is an incorporeal

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286 See generally Chapter 2 on the history of copyright law.

287 Dean O *Handbook of South African Copyright Law* (Online version) 1-1 https://juta.co.za/products/3760-handbook-of-south-african-copyright-law/ (date of use: 01/09/2019)

288 Copeling AJC *Copyright Law in South Africa* 2.

289 Pistorius T 'Copyright Law' 179 in A Van der Merwe (ed) *Law of Intellectual Property in South Africa* (2 ed).

immovable property. The image of 'incorporeal immovable property' places the rights derived from copyright law in their own unique genus of rights, and this stands in contrast to section 22(1) of the Act which provides that, '[s]ubject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or by operation of law'.

Pistorius lists five characteristics of the concept of copyright. First, copyright is territorial in nature, meaning that it enjoys protection in the country in which the works were made and is territorially extended by way of treaties.[290]

Second, copyright is a negative right[291] and prohibits[292] others from performing certain actions. Copyright originally attained its negative nature in England where it was formulated as way for the printing press companies to prevent others from reproducing their publications.

Third, copyright comprises a bundle of rights that protect both economic and moral rights. The economic rights vest in the owner, whereas moral rights vest in the author. These two clusters of rights have overlapping application and are conceptually intertwined.[293]

Fourth, it sets the requirement for material embodiment which means that it applies to expressions presented in material form.[294]

Finally, copyright is an exclusive right of limited duration.[295]

The demands of creators of works in the global North differ from those of creators of works in Africa (and rest of Global South), especially where traditional cultural expressions are concerned. The pedagogical enquiry must be sensitive to the needs and realities of developed and developing countries respectively. Accordingly, the differentiation concept should be applied when teaching intellectual property, and

290 Ibid.
291 Ibid.
292 *Feldman v EMI Music Publishing SA (Pty) Ltd* 1035 JOC (W) 1037: 'In essence copyright prohibits unauthorised copying by third parties. It has been described as a right enforceable against other, prohibiting them from performing infringing acts in relation to copyright work.'
293 Pistorius T 'Copyright Law' 180 in A Van der Merwe (ed) *Law of Intellectual Property in South Africa* (2 ed).
294 Ibid.
295 Ibid 181.

students should be encouraged to question the uniformity of intellectual property law around the world.[296]

The characterisation of copyright as comprising negative rights is misleading because copyright law has developed beyond its negative connotations.[297] Copyright law should not only prohibit certain actions, but also pronounce on indigenous knowledge systems. If this is heeded, the understanding of copyright could be transformed from being purely a collection of negative entitlements to a system that regulates social interaction more broadly than a subject matter of copyright protection. A broader conceptualisation of copyright is one that is attentive to the colonial epistemic realities of the global South.[298]

The material-embodiment requirement is a mandatory provision in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which insists that, '[c]opyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'.[299] There is general consensus that the material-embodiment requirement operates to exclude African indigenous knowledge from protection.[300] To this end, some propose that African indigenous works should enjoy *sui generis* protection while others insist that the material-embodiment requirement should be amended to allow for current copyright legislation to also protect African indigenous knowledge(s).[301] These aspects of copyright are indicative of its diverse nature, and justify a broader debate on moving the curriculum away from teaching copyright as a bundle of negative rights that prevent people from doing certain things.

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296 Kelbrick R 'The need for different perspectives' (2008) 39/8 *International Review of Intellectual Property and Competition Law* 883-886.

297 As it had in the mid-1400s because the intention of copyright may have been to prevent the reproduction and/or copying of the products that were made by the print press. This is no longer the case.

298 Pistorius agrees that copyright is a misnomer because the concept entails more than just the right to copy (or make copied reproductions of a work) because it includes the right to publish, perform, adapt, translate and transmit the work. See Pistorius T 'Copyright Law' 181 in A Van der Merwe (ed) *Law of Intellectual Property in South Africa* (2 ed).

299 Article 9.2 of the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)

300 Visser C 'Some Thoughts on Making Intellectual Property Law Work for Traditional Knowledge*'* 669-670.

301 For a further discussion see Ncube C & Du Plessis E *'Sui generis* legislation for the protection of traditional knowledge in South Africa: An opportunity lost' in Ncube C & Du Plessis E (eds) *Indigenous Knowledge & Intellectual Property: Contemporary Legal and Applied Research Series*.

4.3 **Exclusive rights of the owner**

Exclusive rights are those advantages that accrue to the owner of the copyright in a work. The Act sets out these rights in sections 6 to 11B of the Act. The rights vary in accordance with the type of work involved. The exclusive rights that vest in literary or musical works are not the same as those that vest in artistic or other works.

The American (US) Constitution describes why a copyright owner should be accorded rights over his or her work as '[to] promote the progress of science and useful arts, by securing for a limited time to authors and inventors, the exclusive right to their respective writings and discoveries.'[302] The reasoning in the US Constitution is unidimensional as it centres the incentive theory as the only reason for the rights of copyright owners to be protected. This view is limited in that it negates all other aspects of social interaction regulated by the copyright system.

Section 22 of the South African Bill of Rights provides that '[e]very citizen has the right to choose their trade, occupation or profession freely… [t]he practice of a trade, occupation or profession may be regulated by law'.[303] This right to choose one's profession rests in the author's legitimate pursuit of the given creative industry. However, it does not guarantee any particular copyright system, but merely that a reasonable regulatory scheme must exist to allow free choice. Further, it is clear that intellectual property rights form part of constitutional property.[304] Section 25(1) provides: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'[305] These two provisions in the Bill of Rights are not as precise and direct as the provision in the US Constitution, but they can be construed as the constitutional basis for the protection of a copyright owner's rights.

The Constitutional Court has confirmed the status of intellectual property for purposes of section 25 on numerous occasions. Du Bois narrates the findings of the court on the first such occasion, *Ex Parte Chairperson of the Constitutional*

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302 Constitution of USA, art. 1, § 8, cl. 8. See generally, James H 'Rights of a Copyright Owner' (1942) 17/373 *Notre Dame Law Review*

303 Section 22, Chapter 2, of the Constitution of the Republic of South Africa, 1996.

304 On constitutional property law see generally Van der Walt AJ *Constitutional Property Law* and Van der Walt AJ & Shay R 'Constitutional analysis of intellectual property' (2014) 17/1 *Potchefstroom Electronic Law Journal*

305 Section 25(1), Chapter 2, of the Constitution of the Republic of South Africa, 1996.

Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC).[306]

> The Court decided that there exists no internationally recognised norm to protect intellectual property separately from the general property clause and that the general property clause is wide enough to include property interests that require protection according to international human rights norms.[307]

In *First National Bank of SA t/a Westbank v Commissioner, South Africa Revenue Service* 2001 (4) SA 768 (CC), the Constitutional Court held that section 25 could be used to prevent the unlawful divestment of property rights by the state. The findings of the court provide a basis for the protection of intellectual property rights generally.[308] Du Bois agrees with this sentiment saying that, '[t]here is no separate constitutional clause providing for intellectual property rights, and so only the constitutional property clause could provide recognition and protection'.[309] Recognising intellectual property rights in the constitutional property clause is appropriate as the rights are recognised as property in private law.[310]

4.4 **Moral rights and cultural appropriation**

Two types of right flow from copyright: economic rights; and non-economic rights. Economic rights serve to provide patrimonial reward for the author's skill and labour, while the author's non-economic rights – sometimes termed 'moral rights' derived from the French phrase '*droit moral*'[311] – protect the personality and professional dignity interests of the author.[312]

Moral rights are provided for in section 20(1) of the Act:

> Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author:

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306 Du Bois M 'Recognition and Protection of Traditional Knowledge Interests as Property in South African Law' (2013) 2/2 *European Property Law Journal* 144-170.

307 Ibid 145 para 75

308 Pistorius T 'Copyright Law' 180 in A Van der Merwe (ed) Law *of Intellectual Property in South Africa*.

309 Du Bois M 'Intellectual property as constitutional property: the South African Approach' (2012) 24/2 *SA Mercantile Law Journal* 178.

310 Ibid 180.

311 Bently L & Sherman B *Intellectual Property Law* (4 ed) 272.

312 Adeney E *The moral rights of authors and performers: An international and comparative analysis*.

> Provided that an author who authorizes the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.

The section currently protects the right of attribution (also known as the right of paternity), and the right to integrity. Seeking to decolonise the teaching of moral rights, this chapter proposes that moral rights need to be taught in light of the African values of respect, recognition, and Ubuntu.

The paternity right allows authors to claim authorship of their works. This right has a number of symbolic, economic, and cultural consequences.[313] The right to be named the author of one's works is intricately linked to asserting one's Being as it is an innate desire for every person to have his or her Being affirmed.[314]

Bentley and Sherman list a number of roles that the naming of the author play. Some of these roles may be used to assert the dismembered and silenced African Black Body, because they involve the management of intellectual works, the channelling of royalties, the interpretation of the work, the celebration of and reward for the author's talent and genius, and the construction of the individual as the creator of an intellectual *oeuvre*.[315] Students should be taught that the paternity right can be used to assert the Being of the Black Body. The Black Body is inclusive of those authors[316] whose works have been silenced by way of the violence inherent in epistemicide, and these works continue to be under the continued stress of cultural appropriation.

The right to integrity is the right to object to distortive and derogatory treatment of the work.[317] The main focus is on the integrity of the work rather than the integrity of the person. This is paradoxical as this moral right understands that the protection of

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313 Bently L & Sherman B *Intellectual Property Law* 275.

314 This is something that is not unique to Africans; it is a characteristic inherent in mankind generally. I am stressing this point because the point of decolonising is also to return the Black Body to the family of human beings. Africa and Africans are therefore unique in their uniqueness but, they are still members of mankind generally. It is crucial to the Black Body because it is dismembered from the family of humans. The recovery project seeks not to re-center the very colonial ideas that decolonisations seeks to decenter. See Madlingozi T 'Decolonising 'decolonisation' with Mphahlele*'* New Frame 1 Nov 2018 https://www.newframe.com/decolonising-decolonisation-mphahlele/ (date of use: 28/22/2018).

315 Bently L & Sherman B *Intellectual Property Law* 275.

316 Including traditional, ethnic and native communities.

317 Bently L & Sherman B *Intellectual Property Law* 282-283.

the integrity of the work also upholds the good standing of the author's reputation. The right to integrity is closely linked to the right to object to false attribution in that objecting to false attribution allows individuals not to be named authors of work they have not created.[318] The nexus between the two is that both are concerned with the integrity (or lack thereof) of a work, and the reciprocal effect on the reputation of the author.

One of the ways in which cultural appropriation occurs is when an author creates a work and attributes it to a certain cultural grouping to which it does not belong. Rogers defines cultural appropriation as,

> [t]he use of a culture's symbols, artefacts, genres, rituals, or technologies by members of another culture, is inescapable when cultures come into contact, including virtual or representational contact. Cultural appropriation is also inescapably intertwined with cultural politics. It is involved in the assimilation and exploitation of marginalized and colonized cultures and in the survival of subordinated cultures and their resistance to dominant cultures.[319]

Very little has been theorised about cultural appropriation and its intersection with law in the LLB curriculum, even though cultural appropriation features prominently in the area of copyright law. Current copyright law, in its negative make-up, does not quell cultural appropriation because present legislation fails even to define the phenomenon. Carlin explains:

> There are two distinct types of source material used in Appropriation: commercial imagery culled from pop culture media, and existing artistic imagery in which the source is manipulated within a larger ensemble of imagery and artistic styles and pure appropriation where the artist simply copies the original and reattributes it to him or herself.[320]

The world as we currently know it reflects two types of culture which are in a constant tussle: colonised culture; and dominant culture. The colonised rightly seek to decolonise their condition, whilst the dominant culture seeks to entrench its dominance, ensuring that the situation of the colonised remains unchanged. One of the numerous ways in which this is effected is by the immoral taking of one's culture by another.

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318 Ibid 280.

319 Rodgers R 'From Cultural Exchange to Transculturation: A Review and Reconceptualization of Cultural Appropriation' (2006) 16/4 *Communication Theory* 474-503.

320 See generally, Carlin J 'Culture Vultures: Artistic Appropriation and Intellectual Property Law' (1988) 13/103 *Columbia-VLA Journal of Law & the Arts* 107.

There are two common tensions that should arise when the subject of cultural appropriation is discussed. First, the tension between the development of a culture, which arises from the flow of the interracial and intercultural mix between people from different cultures, in different parts of the world, and the need to protect the cultures of the colonised from being appropriated by the coloniser. And second, the tension between narrow nationalist, regionalist, tribal, xenophobic, racist ideas that masquerade as a drive to protect the dignity of the colonised while in reality advancing its own non-liberational ideas, and the genuine need to protect the cultures of the colonised from being appropriated by the coloniser. These two tensions are a product of both Eurocentric modernity and globalisation.

Decoloniality perceives these tensions as colonial stratagems which seek to use globalisation to cast doubt on the reality of cultural appropriation. The appropriation of the cultures of Black Bodies can be likened to what Ndlovu-Gatsheni terms the 'objectification and dehumanisation of black people' on a world scale.[321] The excuse that different cultures mix, and thus instances of cultural appropriation are unavoidable, is an example of the colonial resistance that Ndlovu-Gatsheni warns against as a worldwide dehumanisation of black people.

A contemporary example of cultural appropriation is the iconic TV-series on the life of King Shaka Zulu KaSenzangakhona.[322] Henry Cele, the actor who plays the role of King Shaka, is seen in this series doing things that are attributed to be characteristics of the Zulu culture and the people of KwaZulu. Most of these things are tantamount to false attribution and also overlap with cultural appropriation. King Shaka is depicted in the TV series, as a ruthless killer and a merciless king who slaughtered his own people with impunity. He is also shown speaking fluent English with British colonisers. The image of a Zulu King, who is the embodiment of the isiZulu language, displayed as one who negotiates with the British in fluent English, is, apart from absurd, also cultural appropriation.[323] The screenplay creates a false impression of Zulu culture and the people of KwaZulu. The people of KwaZulu are

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321 Ndlovu-Gatsheni Sabelo J 'Decoloniality as the Future of Africa' (2015) 13/10 *History Compass* 490.

322 See, Shaka Zulu 1986. Rotten Tomatoes Online Movie critic. https://www.rottentomatoes.com/m/shaka_zulu/ (date of use: 01/02/2020).

323 For further reading on this topic see, Rosemary J Coombe 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy, (1993) 6/July *Canadian Journal of Law and Jurisprudence* 249-285.

a proud people, proud of their language, and proud of their victories, yet none of this pride emerges from the TV series. The story of Shaka Zulu in all its distorted depictions, presents an immoral taking of one's culture, its distortion, and hence a firm case for cultural appropriation.

Biko argues that the essence of colonial education is that it always depicts the Black Body as subservient to the coloniser.[324] He alleges that colonial hegemonic orders always recount triumphant stories of Europeans, while telling distorted stories of failure and defeat of African people.[325] Biko proposes intense research to provide an alternative truth of the history of African people – a history that does not depict Africans as losers, failures, and those who voluntarily spoke the language of the coloniser instead of their own.[326]

A decolonised copyright curriculum creates an opportunity to use existing copyright law concepts, such as the right against false attribution in moral rights, to teach of the need not only not to falsely attributing to the Black Body what is not its culture, but also for the culture of the Black Body not to be distorted. This type of curriculum re-members the dismembered Black Body, expressly using what exists to assert a decolonial vision of re-humanising the Black Body by restoring its misappropriated and distorted culture.

4.5 **Ubuntu in moral rights**

4.5.1 *Introduction*

A colonial mentality suggests that African concepts and philosophies are optional and should, therefore, not enjoy a status equal to Roman-Dutch or English law in the LLB curriculum.[327] There has been a colonial attitude towards the philosophy of Ubuntu in our law,[328] one that contends that Ubuntu has been proverbially put in a

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324 Biko S 'Black Consciousness and the Quest for a True Humanity' in *Steve Biko I write what I like. Selected Writings* 95.

325 Ibid.

326 Ibid.

327 Bennet T 'Ubuntu: An African Equity*'* (2011) 14/4 *Potchefstroom Electronic Law Journal* 31. A colonial frame of mind features prominently in the scholarship of Bennet who argues that Ubuntu is a 'newcomer in a strange environment' (referring to the law) and as such it should be made to 'fit in with existing legal terms and concepts'. See further Bennet ibid 49.

328 Mokgoro Y & Woolman S 'Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts*'* (2010) 25/1 *South African Public Law* 403 where the authors note the importance of Ubuntu for South Africa and her people, positing that more needs to be done to infuse Ubuntu into South African jurisprudence than it is currently the case.

bottle and placed on a shelf, only to be used when it is convenient for the user,[329] this is a phenomena that Cornell and Van Marle refer to as the unidimensional treatment of Ubuntu.[330] This notwithstanding, Ncube asserts that Ubuntu is applicable to constitutional, criminal, delictual, contractual, and defamation matters and that it is part of the legal canon.[331] Taylor finds that many authors write about Ubuntu but are reluctant to acknowledge it as a principle of what he terms 'right action'.[332]

This chapter proposes that the African philosophy of Ubuntu must be used as a cornerstone in teaching moral rights in a decolonised copyright law curriculum. It analyses Ubuntu critically, showing some of its shortcomings as expressed in South African jurisprudence. It problematises current scholarship on Ubuntu and argues that it follows colonial archetypal modalities to articulate African philosophies, trivialising African philosophy to vernacular maxims, and reducing the epistemic traditions of the Black Body to a series of catchphrases. In this way it centres the very ideas that decoloniality seeks to de-centre.[333] Moreover, the praxis of Ubuntu is not well served in the courts which interpret it but fail to offer any substantive guide on its judicial application in all matters brought before them.[334] Decolonial articulations allow for clear theorisation of the concept of Ubuntu[335] and its practical

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329 I am indebted to Emile Zitzke for this metaphorical expression of Ubuntu and the bottle on a shelf. This emerges from scholarly conversations in a Unisa Mercantile Law departmental reading group (2018) at which Zitzke was an invited speaker under the topic 'Common-law purism'. On common-law purism, see generally Zitzke E 'The history and politics of contemporary common-law purism'.

330 Cornell D & Van Marle K 'Exploring Ubuntu: Tentative reflections' (2005) 5/2 *African Human Rights Law Journal* 196. See also Ncube who describes the meaning of Ubuntu as 'elusive' in Ncube C 'Calibrating copyright for creators and consumers: Promoting distributive justice and Ubuntu' 262 in Giblin R & Weatherall K (eds) *What if we could reimagine copyright?*

331 Ibid. see further Mokgoro Y & Woolman S 'Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' 402. The authors are of the opinion that Ubuntu should provide a distinctly South African lens through which judges and lawyers should determine the extension of the actual provisions of the law.

332 Taylor D 'Defining Ubuntu for Business Ethics – A deontological approach' 332.

333 See Madlingozi T 'Decolonising 'decolonisation' with Mphahlele' New Frame 1 Nov 2018 https://www.newframe.com/decolonising-decolonisation-mphahlele/ (28/11/2018) who argues that sometimes decolonial projects make the mistake of centering the very ideas they initially sought to de-center.

334 Taylor D 'Defining Ubuntu for Business Ethics – a deontological approach' 333 states: 'So many authors give lists of characteristics but no ground rules as to why these characteristics and not others constitute Ubuntu.'

335 Gade C 'What is Ubuntu? Different Interpretations among South Africans of African Descent' (2012) 31/3 *South African Journal of Philosophy* 488. The author observes that there are two clusters of answers in responding to the question: What is Ubuntu? The one cluster defines Ubuntu as a moral quality of a person, whereas the second cluster defines Ubuntu as a philosophy and an ethic of African humanism. It is interesting that the author frames these

application in teaching moral rights in copyright law. It identifies respect and recognition as the key aspects of Ubuntu available to produce a moral-rights pedagogy which reflects the epistemological aspirations of the Black Body.

4.5.2 *The praxis of Ubuntu*

The entrenchment of the colonial order sees South African jurists attempting to interpret the philosophy of Ubuntu using a Eurocentric mode of thought.[336] The decolonial project is obliged to provide a sound account of the philosophy of Ubuntu[337] which reflects the importance of moral rights in the copyright law curriculum – especially in the African context.

The concept of Ubuntu has been interpreted by many South African courts.[338] For example, in *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004) [Para 37] the Constitutional Court defined and interpreted Ubuntu to mean:

> The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

Tshoose echoes the Constitutional Court in offering a comparable definition:

> Ubuntu is a literal translation of collective brotherhood (personhood) and collective morality. It originally implied a sense of hospitality and the integration of strangers. This was, however, understood as something to be encouraged, as opposed to a description of an extant virtue or type of community. Similarly,

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two clusters without appreciating that there might be a third cluster, because Letseka has argued elsewhere that Ubuntu means both personhood and a philosophy guiding personhood. See Letseka M 'Educating for Ubuntu/Botho: Lessons from Basotho Indigenous Education' (2013) 3/2 *Open Journal of Philosophy* 340.

336 Cornell D 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation' (2004) 19/1 *South African Public Law* 670, observes that Ubuntu is an irreducible ideal that could be used to promote the different set of ideals for interpreting the Bill of Rights, yet it has to swim upstream against resistance from Western notions of social contract traditions.

337 Cornell D 'Is there a difference that makes a difference between uBuntu and dignity?' (2010) 5/1 *South African Public Law* 394, insists that Ubuntu should be grasped as part of African jurisprudence and view of law, with the appreciation that it is a representation of a different story of law than the one imagined in the West. She continues (at 396): 'In a profound sense, uBuntu encapsulates the moral relations demanded by human beings who must live together…[i]t implies a fundamental moralisation of social relations, and what never changes is that society is inherent moral.'

338 See *City of Johannesburg v Rand Properties (Pty) Limited and Others* [2006] ZAGPHC 21, 2007 (1) SA 78 (W), [2006] 2 All SA 240 (W), 2006 (6) BCLR 728 (W) (3 March 2006).

> Ubuntu could be used to request solidarity, which is often a necessary precondition for survival in communities, like South African townships, that are characterized by poverty.[339]

Radebe and Phooko[340] agree with the judicial definition of Ubuntu but also claim that jurists '[f]all short by overlooking many of the components that form part of the substantive content of Ubuntu'.[341]

The courts all tend to commit three similar mistakes in their definition of Ubuntu.

(1) They fail to establish a link between values underpinned by the concept of Ubuntu and how these values influence courts in adjudicating matters before them or how law teachers should teach the law to students at universities. For example, Tshoose posits that: 'Everybody should contribute to the community and generosity from others, particularly relatives, should be reciprocated in the future.'[342] This fails to show how the community and communitarianism values of Ubuntu can be applied by the courts.[343]

(2) They use popular African vernacular maxims to explain Ubuntu, without critically engaging those maxims to establish their application to the law. Examples of these maxims include, *umuntu ngumuntu ngabanye abantu or motho ke motho ka batho*

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339 Tshoose C 'The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa*'* (2009) 3/1 *African Journal of Legal Studies* 13.

340 Radebe S & Phooko M 'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of Ubuntu*'* (2017) 36/2 *South African Journal of Philosophy* 240.

341 Ibid. They offer a prime example demonstrating that Ubuntu's relevance to the law remains largely limited and thus bottled on a shelf, because the article premises itself on providing a substantive definition and application of the concept of Ubuntu in the law, yet does not succeed in doing so.

342 Tshoose C *'*The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa' 13.

343 This study has taken note and heed of case law such as *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC), wherein the court held: 'The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction....To treat it with the dispassionate attention one might give a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi Constitution in Germany'. Here the court speaks of fundamental rights that can be likened to the values which are underpinned by Ubuntu, yet this can never be claimed to be a case which sets out a framework for the use of Ubuntu by our courts.

ba bangwe;[344] *ingane yami yingane yakho*;[345] and *simunye*[346]. These vernacular maxims should be interpreted in the context of the rights to paternity and integrity. One such example is the maxim *izandla ziyagezana*[347] – loosely translated as "hands wash each other". The essence of this isiZulu saying is that in washing one's hands, the left hand washes the right hand (and vice versa), and therefore that actions are reciprocal. We could use the *izandla ziyagezana* element of Ubuntu in the copyright curriculum to explain to students the need for an author to be acknowledged as a true author of a work even after the currency of the copyright has lapsed, or even in a situation where the copyright is owned by someone else. Although one may hold the copyright in a work and enjoy the benefits this confers, this very act of 'holding' gives rise to the reciprocal obligations embodied in the concept of ubuntu.

Radebe and Phooko also borrow a Sesotho vernacular maxim from Mogobe Ramose: *Feta kgomo o tshware motho*[348] – loosely translated: pass the beast and focus on the person. Its deeper symbolic meaning is that when one is faced with a situation in which one must choose between the acquisition of wealth and the preservation of another human being's life, one should choose to preserve the life. In the context of moral rights – and integrity in particular – this should be likened to the need for copyright owners not to distort the integrity of the original works of an author for material gain, but respect the integrity of the author.

An engaged discussion of how these maxims could be used to develop an Afrocentric doctrine of the law, or even to create an Afrocentric common law, the lack of a critical engagement has reduced current scholarship to an exercise of translating the terms without slotting them into the South African legal discourse.

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344 Radebe S & Phooko M 'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of Ubuntu' 240. These are isiZulu and Setswana maxims which mean that a person is a person because of others

345 Ibid. This is an isiZulu maxim which means my child is your child. And therefore, it takes a community to raise a child.

346 Tshoose C 'The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa'13. This is an isiZulu term which means we are one, or we are united.

347 Radebe S & Phooko M 'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of Ubuntu' 241.

348 Ibid 243.

When issues of Ubuntu are relevant in the courts,[349] it appears that it is called upon as no more than a convenient means by which to justify extant legal doctrines from the English and Roman-Dutch law tradition. South African courts are yet to see a case in which counsel has – either successfully or unsuccessfully – raised the concept of Ubuntu to argue against common-law logic. Ubuntu continues to be applied as a by-the-way concept or afterthought, or as a concept to give an 'African feel' to existing Eurocentric legal concepts.

(3) They analyse the concept of Ubuntu, almost as a sociological and non-legal construct rather than asserting it as a concept of inherent justice.[350] This is a reductionist approach which attempts to illustrate how African communities lead their lives. The use of African lifestyles and/or living arrangements, does not necessarily define Ubuntu. This is a mistake often made by decolonial scholars who re-centre the very ideas that they are seeking to de-centre.[351]

Lenkabula opines that the current limited definitions of Ubuntu lead to actions that are inadequate:

> Anthropocentric interpretations, that is, interpretations which regard human beings as the most significant entities for the universe; or interpretations that tend to assess reality and religious experiences or life exclusively in terms of human values, needs, etc., are inadequate.[352]

She points to ecological degradation as an example and suggests that Ubuntu need not be responsive solely to human relations, but is also relevant to questions such as capitalism and ecological degradation. This use of the concept of Ubuntu requires it to be a concept of continuous application in our daily lives, in our activism, and in our policy-making.

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349 Note the listing of the court in *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 23: 'here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio economic rights to all people therefore enables them to enjoy the other rights enshrined in the Bill of Rights. The realisation of these rights is also critical to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.'

350 Ramose M '*Ubuntu'* in Giacomo D, Federico D, and Giorgos K (eds) *DeGrowth: A vocabulary for a new Era* 212-214. Ramose correctly argues that Ubuntu is a philosophy of social justice, redress and equality.

351 Madlingozi T 'Decolonising 'decolonisation' with Mphahlele*'* New Frame 1 November 2018 https://www.newframe.com/decolonising-decolonisation-mphahlele (date of use 28/11/2018)

352 LenkaBula P 'Beyond Anthropocentricity – Botho/Ubuntu and the Quest for Economic and Ecological Justice in Africa*'* (2008) 15/3 *Religion and Theology* 375-394.

In the context of legal discourse, Ubuntu must be taken out of the bottle on the shelf, and be developed by the courts, the legislature, and academics, as theory and concept to be used by the courts in their daily adjudication. For example, Bewaji does something worthwhile with the concept of Ubuntu, opining that it has sound therapeutic value for the souls of the oppressed and wretched of the earth in that it affords them a way to come to terms with their humiliation and defeat by the colonisers.[353]

4.5.3 *Recognition*

The Black Body is calling to be heard, to be seen, and to be recognised. The Ubuntu value of recognition should not be misconstrued and conflated with the right to be recognised as an author. Rather, this pillar of moral rights recognises Black Bodies as a people who are thinkers, capable of knowledge production, who can feed into creative industries and the academy.

The teaching of moral rights must be geared at re-membering epistemic traditions of the global South and reversing epistemicide. This contributes to decolonisation as it nullifies epistemicide and resuscitates the knowledge(s) of the Black Body and places it at the apex of existing knowledge(s). This results in the knowledge(s) and works of the colonised sharing the same platform and status as Western knowledge(s).

The paternity right and the right of integrity must be taught within the framework of the recognition of the 'Other' and the dis-membered. These two moral rights involve attributing the work to the author, and preserving the integrity of the work respectively, this shifts the focus from the work to the authors – it is not a call to recognise the author's work, but rather to recognise the author him, her or themselves.

4.5.4 *Respect*

A decolonised copyright law curriculum is to be infused with the teachings of respect for traditional knowledge, traditional cultural expressions, intangible traditional expressions, indigenous knowledge, folklore, and any similar form of intellectual

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353 Bewaji J 'The Bewaji, Van Binsbergen and Ramose Debate on Ubuntu' 381, and (at 385): 'Being prophetic, Ubuntu philosophy seeks to address fundamental ills in the make-up of urban, globalised Southern Africa: the social life world of its academic authors.'

property. These types of work must be respected as they are more than mere 'work' – they are an embodiment of the culture and heritage of the African people and a representation of the Black Body. The ethereal nature of these works means that they fall outside of the scope of mainstream intellectual property law protection.

Western intellectual property laws demand strict observance of the material embodiment requirement. But in the African context, so strict an application results in disjuncture between traditional cultural expressions and copyright law protection.[354]

Respect is posited in this instance, not on its generic value-neutral normative framework, but rather expressly to rebuke the contempt with which traditional cultural expressions are excluded from copyright protection simply for not meeting the material-embodiment threshold.[355]

4.6 **Indigenous Knowledge: Case Studies**

4.6.1 *Louis Vuitton and the Basotho Blanket*

City Press Tags: Basotho Plaid menswear range, cultural appropriation, Designer Thabo Makheta, French luxury brand Louis Vuitton.[356]

The original prints on the Basotho blankets hold deep meaning for the Basotho people from the Kingdom of Lesotho. Louis Vuitton used the traditional, iconic, and

354 See generally, Picart C & Fox M 'Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I' (2013) 15/3 *International Community Law Review*.

355 The subject of material embodiment is discussed in Chapter 5.

356 Van Niekerk G 'Louis Vuitton wants to wrap you up in a blanket' City Press Online https://city-press.news24.com/Trending/louis-vuitton-wants-to-wrap-you-up-in-a-blanket-20170701 (date of use: 28/05/2018).

sacred prints from a traditional Basotho blanket to create men's fashion wear and to sell it for exorbitant sums of money.[357] Mbete notes that the *Seanamarena*-design which features on the blankets sold for R33 000, are generally worn by young brides during wedding ceremonies and have been used in sacred rituals for centuries.[358]

The controversy of Louis Vuitton's actions has enticed debate on whether the luxury brand was exploiting the Basotho culture or merely appreciating it.[359] The contention of this dissertation is that when works of traditional cultural expression are used in the way Louis Vuitton has used them, it amounts to exploiting them for profit.

Louis Vuitton ought to go out of its way to make it known to its customers that the *Seanamerena* prints on its fashionwear, are not a product of its own genius but were taken from the Basotho people and the Sesotho culture. The damage can be cured through recognition so that the people of Lesotho, who are the legitimate originators of this cultural work, can enjoy the spin-offs that come with being branded and marketed by an international company.

Copyright law currently has moral rights which are an example of non-pecuniary recognition that could be expanded to communities that produce works of traditional cultural expression.

The *Seanamarena* prints on the Basotho blankets hold a deeper meaning for the people of Lesotho; fashion companies like Louis Vuitton should not be permitted to distort these prints merely to increase their sales as this intrudes on the integrity of the Basotho people.

Students must be taught that, in line with the principle of Ubuntu, Louis Vuitton should rather *feta kgomo o tshware motho*, which means respect, recognise and show Ubuntu towards the people of Lesotho instead of distorting their work solely for its financial gain.

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357 Mbete B 'Louis Vuitton appropriates Basotho blanket into R33k shirt' Destiny Connect.Com 10 July 2017 http://www.destinyconnect.com/2017/07/10/louis-vuitton-appropriates-basotho- blanket-r33k-shirt/ (date of use: 28/07/2018)

358 Ibid.

359 Luvhengo P 'Why is Louis Vuitton's Basotho blanket 'appropriation' controversial?' http://www.destinyconnect.com/2017/07/18/louis-vuitton-basotho-appropriation-controversial/ (date of use: 28/07/2018)

4.6.2 *Esther 'NoStokana' Mahlangu's Ndebele artwork.*

013Mpumalanga news Online Portal. Gogo Esther Mahlangu nominated for South African of the Year award. 22 September 2017. [360]

The amaNdebele people of South Africa have a long history of wonderful paintings which symbolise various cultural, spiritual, and sacred isiNdebele messages. These paintings are called *Umgwalo*. Janse van Vuuren provides an incisive account of the intangible value behind Ndebele architecture and artwork such as *Umgwalo.*

> These designs constitute specific cosmological or religious concepts, and are representations of ethnic identity which were developed within a specific socio-political environment in South Africa – Ndebele mural art has earned this community a distinguished cultural identity.[361]

Van Vuuren's explanation establishes two things: (1) that works such as *Umgwalo* represent a common heritage of the amaNdebele; and (2) the works assert the identity of the amaNdebele as an embodiment of their Being.

Gogo Esther Mahlangu, or '*NoStokana'* as she is affectionately known in her community of the former KwaNdebele homeland, in the now Mpumalanga Province of South Africa, is a world-acclaimed artist who produces unique artwork. Her artwork has gained international prominence and she has been awarded numerous

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360 Masina M 'Gogo Esther Mahlangu nominated for South African of the Year award' 013News Mpumalanga https://013.co.za/2017/09/22/gogo-esther-nominated-south-african-year-award/ (date of use: 22/09/2017).

361 Van Vuuren CJ 'The intricacy of intangible cultural heritage: Some perspectives on Ndebele earthen architecture' (2008) 23/2 *South African Journal of Art History* 20-21.

accolades both locally and internationally.[362] *NoStokana's* work is revered the world over because of its uniqueness which stems, for the most part, from the traditional and artistic expressions of the Ndebele cultural community.

Janse van Vuuren provides a clear account of how the works created by *NoStokana* are both for the individual and for the community:

> Since the mid-1980s the success of another Ndebele icon has received further impetus when a single mother, Esther Mahlangu, accepted an invitation by the French embassy in Pretoria to paint a mural in the Pompidou centre. Steadily the Ndebele image shifted to the prowess of the individual creative artist, as other Ndebele women also received international invitations.[363]

These complexities between the individual and communal authorship in the context of indigenous works raise questions which must be brought to students' attention.

Even if a work is based on the collective authorship of the community, it can still be authored by an individual. The collective authorship of indigenous works denigrates neither the labour of the individual nor the contribution of the community as it is understood that the interests of the individual and those of the community are not in competition. However, it is simplistic to claim that indigenous works are always a product of the community without acknowledging the contribution of the individual. This complexity must be illustrated in the copyright law curriculum because a hard-line understanding of community and the individual, downplays the relation between the two.

Traditional cultural expressions and indigenous knowledge(s) need to be protected, not merely from the usual exploitation of other works protected under copyright law, but also from what Whitt calls the '[c]ommodification of culture'.[364] When the world comes into contact with *Umgwalo,* it seeks ways to commercialise it for financial gain. When the rituals and objects of colonised nations and cultures are transformed and modernised into commodities, political and economic powers converge to perpertuate cultural imperialism.

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362 See 013Mpumalanga news Online Portal 22/09/2017 'Gogo Esther Mahlangu nominated for South African of the Year award' https://013.co.za/2017/09/22/gogo-esther-nominated-south-african-year-award/ (date of use: 22/09/2017)

363 Van Vuuren C 'Iconic bodies: Ndebele women in ritual context' (2012) 27/2 *South African Journal of Art History* 327.

364 Whitt L *Science*, *Colonialism and Indigenous People: The Cultural Politics of Law and Knowledge* 6-7.

One international corporation that latched onto the opportunity for cultural commodification is the German automobile manufacturer, *Bayerische Motoren Werke AG* (BMW). BMW partnered with *NoStokana* to use isiNdebele artwork to redesign both the interior and exterior of a special edition of the company's iconic flagship model. She used the indigenous knowledge of *Umgwalo* to create these artistic designs for the company. A partnership of this nature is important because it may help assert the Being of amaNdebele. While the aspect of commercialisation is not in itself a problem, it become problematic when commercialisation means distorting the authorship and integrity of the work for economic gain.[365] Van Vuuren recounts:

> The intangible dimension in Ndebele mural art is woven into the wall surface art product. Ndebele mural art has become a well-known tourist commodity since the 1950s, and Esther Mahlangu has catapulted this art form into the global arena. An Ndebele woman paints from memory, and her knowledge of pigment mixtures and designs is based on oral knowledge passed down from elderly women. The process is essentially a repertoire as is clear from the performance of intangible culture.[366]

Those who use traditional cultural expressions which hold sacred meaning must be taught not to distort these expressions as this vulgarizes the cultural sentiment they express and further entrenches colonial subjugation of these cultures. For example, if the *Seanamarena* blanket has yellow prints or lines to symbolise sacred meaning, Louis Vuitton must not change those prints to a different colour or design as this will effectively mutilate the artwork.[367]

NoStokana's work has raised both the individual and the Kwa-Ndebele community to the international platform and her story is an example of how the Black Body can

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365 Van Vuuren CJ 'The intricacy of intangible cultural heritage: some perspectives on Ndebele earthen architecture*'* 22-23. Van Vuuren admits to the prevalence of the commercialisation of culture and that Ndebele women embrace it: 'Clearly, the ability to "read" change in the world of commodity gave Ndebele women an edge and has added new meaning to the notions of ethnic art, identity and the life history of mural art.'

366 Ibid 22.

367 This is a moral right that is catered for under s 20(1) of the Copyright Act 98 of 1978 which provides: 'Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorises the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.'

be re-membered.[368] Commodification of culture is typically to the detriment of the culture as it entrenches the essence of coloniality. But the story of *NoStokana* shows that the opposite can also be true. This means that instead of detriment, the commodification of culture when approached through a decolonial praxis can serve the purpose of preserving cultural heritage for the people of South Africa, while simultaneously recognising their Being.

4.6.3 *Die Antwoord and the AmaXhosa initiation school blanket*

(Photo taken by Highsnobiety/ *Die Antwoord*)[369]

Die Antwoord is a South African duo of white Afrikaans musicians, Ninja and Yolandi Visser, known for producing racist and provocatively controversial music.[370] The duo produced a music video in which one of them is seen wearing a blanket usually worn by amaXhosa boys who are undergoing the sacred traditional initiation school, *ulwaluko*. He (the musician) is also wearing the traditional Basotho thatch hat and

368 Ncube C 'Calibrating copyright for creators and consumers: Promoting distributive justice and Ubuntu' in Giblin R & Weatherall K (eds) *What if we could reimagine copyright?* 279. The author seeks to highlight the complexity of finding a balance between public interest (community) and the interests of the individual which will satisfy both creators and users. See further Cornell D & Van Marle K 'Exploring Ubuntu: Tentative reflections*'* 206.

369 Mvandaba Z '"*Die Antwoord"* Continues to Offend ond Outrage South Africans through their controversial antics*'* Huffington Post UK 28/06/2017 http://www.huffingtonpost.co.za/zimkhitha-mvandaba/die-antwoord-continues-to-offend-and-outrage-through-their-contra_23005690/ (date of use: 22/09/2018)

370 Ibid.

carrying traditional amaXhosa sticks, while streams of blood appear to be gushing from his mouth and neck.

Apart from their clear disrespect towards the AmaXhosa, their music routinely features overtly racist slurs. The male singer has described himself as 'die wit kaffir'[371] on a separate occasion when they were called out for performing a song titled 'Fatty Boom Boom'[372] in which Yolandi Visser donned the infamously racist, 'black face' symbol. Mvandaba problematises this method of cultural appropriation:

> The band appropriated a part of Xhosa tradition, using it as a means of creative expression, to add insult to injury they have shown absolutely no respect for the rite of passage of initiates, which is a core belief system of the amaXhosa … [t]his age-old tradition, although a topic of debate, should be respected as a tradition of amaXhosa and should not be reduced to a tool of appropriation.[373]

Not only does *Die Antwoord* claim to be creating art, they are also wrongly using traditional cultural expressions to boost their commercial brand and sell their music. The copyright framework does not allow space to mediate such problems.[374]

4.7 **Conclusion**

This chapter defines copyright by showing some of the exclusive rights of a copyright owner. The chapter proposes that the topic of moral rights in copyright should be taught in line with the three pillars of recognition, Ubuntu, and respect. The novelty in the proposal of these pillars of moral rights is supplemented by the inclusion of Ubuntu, and is a radical departure from how moral rights are currently taught. Decolonisation does not begin and end with changing the way we think about certain concepts; it also involves the renaming and redefinition of those concepts using an African lens. The concept of Ubuntu should be used, not as an afterthought but as a mainstay in the copyright module when teaching moral rights.

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371 See 'Lyrics Freak Online Portal. *Die Antwoord – Never Le Nkemise 1 Lyrics'* https://www.lyricsfreak.com/d/die+antwoord/never+le+nkemise+1_21081777.html (date of use: 21/01/2020)

372 See also, '"Die Antwoord" *Fatty Boom Boom* YouTube on Google https://www.youtube.com/watch?v=AIXUgtNC4Kc (date of use: 21/08/2018)

373 Mvandaba Z '"Die Antwoord" Continues To Offend And Outrage South Africans Through Their Controversial Antics' Huffington Post South Africa. Online Portal. https://www.huffingtonpost.co.za/zimkhitha-mvandaba/die-antwoord-continues-to-offend-and-outrage-through-their-contr_a_23005690/ (date of use: 29/09/2018). Mvandaba does not mention cultural appropriation but it is apt to assume that she is referring to it when mentioning the image 'reduced to a tool of appropriation'.

374 This is the reality notwithstanding the IPLAAs ambitious amendments and its wider recognition of indigenous knowledge systems.

The chapter concludes by presenting three indigenous knowledge case studies as examples of how complex this subject is and that it is currently under-theorised. From the discussion it emerges that the missing commonality between the IPLAA and the three indigenous knowledge case studies, is that IPLAA misses the opportunity to explain the extent, meaning, and depth of the sacred nature of items as the amaXhosa initiation school blanket, and the Basotho *Seanamarena* blanket. The roots of this sacred and spiritual character can only be traced by teaching students not merely about who authored them, but also how they were authored.

Although both Louis Vuitton and *Die Antwoord* were obviously doing this for material and financial gain, it is conceivable that they could easily deny knowledge of the sacred nature of these works in that neither the law nor the curriculum offers adequate guidance in this regard.

The decolonial project impels an Afrocentric conceptualisation of rights and how they relate to each other. This is a view advanced by Asante who argues that:

> Afrocentric education represents a new interpretation of productive transmission of values and attitudes [in which] students are made to see with new eyes and to hear with new ears.[375]

The image 'see with new eyes and to hear with new ears'[376] comports with the theoretical framework as set out in the previous two chapters, as it calls for a copyright curriculum that embraces new ways of knowing. This sets the ground for the next chapter which offers a critique of the requirements for subsistence of copyright.

375 Molefi K Asante *An Afrocentric Manifesto: Toward an African Renaissance* 83.
376 Ibid.

CHAPTER 5

REQUIREMENTS FOR THE SUBSISTENCE OF COPYRIGHT

5.1 Introduction

The Copyright Act[377] (the Act) lists nine types of work, excluding everything that does not conform to the legislative definition.[378] Any expression that is eligible for protection must still comply with both inherent requirements and one of two formal requirements.[379] This chapter focuses only on the inherent features – originality and material form.[380]

This chapter uses Dean and Dyer's Introduction *to Intellectual Property Law* and Van der Merwe et al, *Law of Intellectual Property in South Africa* as the basis to explain how copyright law is taught at various South African law faculties.

The decolonising inquiry builds on the discussion in previous chapters by analysing the inherent requirements for the subsistence of copyright and how these exclude traditional cultural expressions which are, in the main, not regarded as 'works' under the Eurocentric copyright law regime. The paucity of African epistemologies is at the core of the call to decolonise the LLB curriculum. Notwithstanding the findings of the court in *Waylite Diary CC v National Bank Ltd* 1995 (1) SA 645 (A) 653F-G (the *Waylite* case), if an expression does not constitute a work the question of originality does not arise. This shows that originality and work are inextricably intertwined. This chapter intentionally construes works of traditional knowledge (TK), indigenous knowledge systems (IKS), and Traditional Cultural Expressions (TCEs), as bona fide works when defined using an African lens, despite their not conforming to the conceptual strictures of the Act.

The nine types of works, and the originality and material form requirements, are examined in light of both section 3(*k*) of the Intellectual Property Laws Amendment Act 28 of 2013 (the IPLAA), and section 1.3 of the Swakopmund Protocol.[381] The

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377 Copyright Act 98 of 1978

378 Geyer S 'Towards a clearer definition and understanding of "Indigenous Community" for purposes of the Intellectual Property Laws Amendment Bill, 2010: an exploration of the concepts "Indigenous" and "Traditional"' 127, 180.

379 Pistorius T 'Requirements for the subsistence of copyright' in Van der Merwe A (ed) *Law of Intellectual Property in South Africa* (2 ed).

380 The Act lists formal requirements in ss 3 and 4.

381 ARIPO 'Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore' Swakopmund, Namibia, 2010 (hereafter the Protocol).

final section of this chapter discusses the IPLAA and the Swakopmund protocol, to study how these two can be used as a stepping stone towards better understanding the complex nature of traditional cultural expressions as they relate to the requirements for the subsistence of copyright.

Traditional knowledge and expressions of folklore do not always conform to inherent requirements. The chapter deconstructs the concept of copyright as a purely negative right.[382] It contends that a decolonised copyright law curriculum should teach students not to perceive copyright law as something which solely restricts or prohibits conduct, rather law should be conveyed as something that educates, defines, and is proactive in fostering just social interaction. This chapter applies an African lens to copyright law exposing the consequences of an overly rigid approach to copyright protection.

5.2 **Inherent features**

5.2.1 *Originality*

Originality is introduced, but not defined, by the Act and its meaning has been clarified by the courts in successive judgments. Given South Africa's colonial history, copyright law has inherited the attitudes of the United Kingdom – the sweat of one's brow is sufficient for a work to meet the originality requirement. In the recent decision in *Moneyweb (Pty) Ltd v Media 24 Ltd & Another*,[383] (hereinafter *Moneyweb v Media 24*) the court held that the determination of originality involves the work in its entirety and not only specific parts of the work.[384] The court further held that, '[o]ur law still regards the time and effort spent by the consideration in determining originality.'[385]

Pistorius compares US and United Kingdom (UK) law. The US demands that a work should have a distinct degree of creativity, or rather the so-called 'creative spark' in

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382 See previous chapter on the nature of copyright. Copyright is a negative right, which means that copyright is largely a right that prevents or prohibits others from taking certain actions. This is due to the history of the foundations of copyright law in Britain in the mid-1400s. Pistorius T 'Introduction' in Van der Merwe A (ed) *Law of Intellectual Property in South Africa* 179-181. See further, *Feldman v EMI Music Publishing SA (Pty) Ltd* 1035 JOC (W) 1037: 'In essence copyright prohibits unauthorised copying by third parties. It has been described as a right enforceable against other, prohibiting them from performing infringing acts in relation to copyright work.'

383 [2016] 3 ALL SA 193 (GJ), 2016 (4) SA 59.

384 [2016] 3 ALL SA 193 (GJ), 2016 (4) SA 591 para 16.

385 Ibid para 15.

order to meet the originality requirement. The UK, on the other hand, requires no form of creativity,[386] but '[r]equires a substantial (not trivial) degree of labour and judgment to meet the requirement of originality'.[387]

In line with the sweat-of-the-brow doctrine, it is the effort or the labour that counts and not the skill applied in a work or any level of creation.[388] The court in *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* (10/48519) [2014] ZAGPJHC 33, [2014] 2 All SA 461 (GJ) grappled with the standard used to establish originality in copyright law. The court found that the activity of putting together a fixture of soccer games to be played in a soccer season, requires skill and judgment.[389] It held further:

> Under certain circumstances, extensive effort in making a compilation may be enough to render it original, even where there may be less skill involved. Accordingly, there is merit in the submission (by plaintiff) that where enough effort has been put in compiling a work, that is sufficient to make the work original and susceptible to copyright protection.[390]

In *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd and Others* (118/05) [2006] ZASCA 40, 2006 (4) SA 458 (SCA) the court held that,

> [c]reativity is not required to make a work original. Save where specifically provided otherwise, a work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.[391]

There is consensus in the textbooks that the sweat-of-the-brow standard is appropriate for originality – 'the question as to whether the work is original is a factual inquiry and, where appropriate, evidence to support this proposition must be adduced'.[392] However, neither of the textbooks addresses the purpose served by originality requirement; they are more concerned with defining originality than

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386 Pistorius T 'Requirements for the subsistence of copyright' 204-208.

387 Ibid where the author paraphrases Harms J in explaining the test used for the 'sweat of the brow' principle.

388 This is the opinion of the court in *Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd and Another* 1985 (4) SA 882 (C) 893C (hereafter the *Bosal Africa* case) where the court felt that the onerous task of compiling a list of numbers on a price list and the compilation of a telephone directory, although not requiring much skill, requires a considerable amount of labour, and therefore qualifies as original in light of the sweat of the brow principle. See also, *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* (10/48519) [2014] 2 All SA 461 (GJ) (28 February 2014) para 62.

389 Ibid para 37.14.

390 Ibid para 63.

391 *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd. and Others* para 35.

392 Dean O & Dyer A *Introduction to Intellectual Property Law* 16.

historicising and taking the student through the underlying reason behind the requirement. Teaching the purpose of originality is important to show how it differs from the requirements of 'novelty' and 'an inventive step' that we find in patent law.

The Act's silence on the meaning of originality opens the concept up to differing interpretations. This may be illustrated with Esther Mahlangu's isiNdebele mural paintings. The originality requirement is only applicable insofar as she is the individual author of the work who expended skill and labour in its creation.[393] If the author of the paintings is construed as the amaNdebele community, the originality requirement does not accommodate the situation as it must be borne in mind that, in the African community and African mythology, the community includes not only a specific group of people, but also ancestors and the yet-to-be-born, and this falls outside of the normative copyright law paradigm.[394] However, from a natural-rights perspective as encountered in continental European law, the originality requirement is satisfied when the author's personality is reflected in the work.[395] Although, the meaning of personality remains individualistic and so excludes communal authorship, it could be argued that the traditional expression reflects the cultural history, identity, and personality of amaNdebele community which includes the living, the dead, and the yet-to-be-born.[396]

An Africanised conception of the originality requirement is divorced from both individualistic constructions of the individualised personality test and the skill-and-labour standard, and is also a conception which expressly asserts the spiritual and intangible labour of ancestors and the yet-to-be-born.

The foundations of the history of copyright show that its initial purpose was to benefit authors and the print press.[397] It is trite that this single objective has multiplied over

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393 On the standard of 'skill and labour', see generally, *Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd*

394 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 436.

395 Bently L & Sherman B *Intellectual Property Law* (5 ed) 95. Bently and Sherman teach this distinction cogently opining that '[f]rom a natural rights perspective, the requirement of originality merely reflects the premise that copyright ought to protect the personality of authors as expressed in their works'. This means that the test for originality is formulated as determining whether an author's personality is reflected in the works. The Bently handbook gives various other perspectives, these include the reward, utilitarian, and others. The book speaks with greater depth, a depth that is not necessarily tailored for LLB-level students. However, teaching a concept, without teaching its purpose, renders the concept incomplete.

396 Ibid and see generally, Kopytoff I 'Ancestors as Elders in Africa' *International African Institute (IAI)* Volume 41, No. 2. 1971

397 Pistorius T *Law of Intellectual Property in South Africa* 177.

the years to cover a wider scope of interests and industries. The Western conception of originality mirrors this development: both in its reflection of the personality-based vision (wanting to assert the author's rights) as well as in the industriousness threshold (wanting to reward the author for his or her labour). Critical scholarship, however, points to the fact that these two themes do not include public interest. In modern copyright law the urge to reward the author and recognise his or her personality, is accompanied by the ubiquitous need to disseminate creative and cultural works.[398] Decoloniality argues that the dissemination of these works, if achieved, should not be to the only encapsulation of public interest. Decolonial articulations of law generally demand the recognition of 'the Other'. From this perspective, copyright law should include ancestors and the yet-to-be-born as originators of a work. In so doing, the dismembered Black Body is re-membered and the 'Other' morphs into the 'us'.[399]

While the West uses a combination of pure industriousness and personality-based doctrine to establish originality,[400] decoloniality calls for a radical reconstruction of the authorship logic as applied to the originality concept – it proposes the introduction of a non-individual (communal) author in copyright. Esther Mahlangu's craft has been passed down to her by generations of her ancestors and assert the dismembered Being of the Black Body in the amaNdebele community. Decoloniality demands the recognition of amaNdebele community as part originators of the works.[401] Decoloniality demands that the community of Ndebele people be seen to have infused the work of the individual (Esther Mahlangu) with their skill, judgement, labour, and knowledge.

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398 See generally, Craig C 'The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest' 2005 *University of Ottawa Law & Technology Journal* 425.

399 Ibid 427. Decoloniality introduces a new aspect in the determination of public interest by insisting that it should open for the widened meaning of the relationship between the author and his work. On a discussion of personality, individuality, and authorship, see Ginsburg J 'Creation and Value: Copyright Protection of Works of Information' 1990 *Columbia Law Review* 1881-1888. Decoloniality seeks to make an abrupt entry into the two-sided debate between the personality-based theories (the author's personality reflected in the works and therefore having a right over the work) and the labour-based theories (the author's labour in the work distinguishes it from other works), by re-defining personalities to define a community in broad terms which include ancestors and the yet-to-be-born.

400 Craig C 'The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest' 430.

401 Esther Mahlangu's skill, judgment, labour and knowledge are not contested when they pertain to establishing the originality of works as individually authored by her. The individual exists in African mythology, and is worthy of the traditional copyright protection, as it were.

As regards originality, it may be helpful to consider the Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019, as it embodies a threshold which differs from that in the Copyright Act although it is aimed at protecting the same type of work.[402] Section 11 of the Act sets three criteria for eligibility for protection, none of which is originality or material embodiment.[403] This new legislation is suggestively, peculiar in that it paves way for the protection of indigenous knowledge systems and traditional knowledge, within the intellectual property framework but outside of the strictures of the copyright regime.

5.2.2 *Material form*

The second inherent requirement is that to qualify for copyright protection an expression must exist in material form. This requirement is encapsulated in section 2(2)(b) of the Act which provides that, '[a] literary, musical or artistic work shall not be eligible for copyright unless the work has been written down, recorded or otherwise reduced to material form'. This definition, although not exhaustive, stems from international obligations[404] and means that, generally, copyright cannot reside in ideas, thoughts, or facts alone, but rather in the material expression of those ideas.[405] Dean and Dyer sum it up saying that, '[t]he concept of having to be in a material form is often expressed in the maxim that 'there is no copyright in ideas'.[406]

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402 Section 3(*a*) of Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 provides: 'The objects of this Act are to — protect the indigenous knowledge of indigenous communities from unauthorised use, misappropriation and misuse.'

403 Section 11(*a*)–(*c*) of Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 provides that, '[t]he protection of indigenous knowledge contemplated in section 9 applies to indigenous knowledge, which — has been passed on from generation to generation within an indigenous community; has been developed within an indigenous community; and is associated with the cultural and social identity of that indigenous community.'

404 See generally, the TRIPS Agreement art 9.2. The TRIPS Agreement is an international legal agreement between all the member nations of the World Trade Organization (WTO). Significant herein is that Pistorius makes use of art 9 of the TRIPS Agreement and art 2 of the World Copyright Treaty (WCT) in the discussion about the material embodiment requirement.

405 See *Kalamazoo Division (Pty) Ltd v Gay and Others* 1978 (2) SA 184 (C).

406 Dean O & Dyer A *Introduction to Intellectual Property Law* 18-19. This is in line with guidelines in art 2(2) of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886: 'It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.'

Pistorius approaches the discussion by introducing it as the '[i]dea versus expression dichotomy'.[407]

Although Africa has a history of written literature that predates colonial contact, it also boast a wealthy oral culture.[408] Inter-generational traditions that are passed down through an oral culture remain unrecorded in either writing or digitally. The songs sung by maidens participating in the traditional annual isiZulu reed dance ceremony (*Umkhosi woMhlanga*) are an example of such oral expressions. Because of their sacred nature, these songs remain unrecorded. They consequently do not meet the material embodiment threshold which would qualify them for copyright protection. This renders them vulnerable to exploitation by those who may wish to profit from them.

A different form of exploitative action is what may be termed 'cultural imperialism'.[409] This happens when cultural expressions are given material expression so exploiting their till then unrecorded form to make a profit. For example, a Western recording company records the songs sung during the *Umkhosi WoMhlanga* and sells the recordings for commercial gain. The expressions produced by African communities, such as *Umkhosi WoMhlanga* songs, need to be protected from capitalist exploitation.

While the fact of a material embodiment is crucial to establishing authorship and subsequent ownership of works, the failure of the law to recognise traditional expressions which are not materially embodied, perpetuates the coloniality of Being and commodifies Black Bodies. The call to decolonise copyright law seeks to expand the understanding of copyright beyond merely protecting the rights of the individual author, to protect the cultural dignity of Black Bodies and of Africa. Decolonial articulations, as reflected in Transmodernity, necessitate a change in

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407 Pistorius T *Law of Intellectual Property in South Africa* 216.

408 On Africa's literary and oratory traditions pre-colonial disturbance, see generally, Anta Diop C *Pre-Colonial Black Africa*. See further Anta Diop C *The African Origin of Civilization*.

409 On cultural imperialism and its intersectionality with copyright law, see generally Whitt L *Science, Colonialism, and Indigenous Peoples: The Cultural Politics of Law and Knowledge* 6-7. The essence of cultural imperialism is that it allows for the exploitation of traditional knowledge that vulgarises the sacred aspects of indigenous cultures. An example of exploitation that does not entrench the coloniality of Being is when such IKS expressions are exploited for commercial use but without distorting them, and are expressly attentive to their intrinsic sacred value.

how material embodiment is conceptualised so as to reflect the epistemic traditions of the global South.

5.3 Decolonial discussions on originality and material embodiment

5.3.1 *The Swakopmund Protocol alternative*

The Swakopmund Protocol (the Protocol) is a regional international intellectual property law treaty, the product of the African Regional Intellectual Property Organization (the ARIPO). The Protocol follows the adoption of the Protection of Traditional Knowledge and Expressions of Folklore at the 11th session of the ARIPO Council of Ministers, held in Maseru in the Kingdom of Lesotho, on 23 November 2007.[410] The ARIPO's adoption of the Protocol set the ground for member states to contract into it, which South Africa is yet to do.[411]

The preamble to the Protocol emphasises that the intellectual property protection flowing from the Protocol must be tailored to the particular characteristics of its subject matter, be sensitive to the unique collective or communal context, and to the intergenerational nature of its development.[412]

The preamble affirms the ARIPO's commitment to creating an intellectual property law environment that allows for an engaged dialogue on traditional cultural expressions, traditional knowledge, traditional cultures, folklore, and all their uniquely African attributes.[413] The Protocol claims to be mindful of the need to respect cultural dignity and integrity inhering in these expressions.[414] It paves the way for protection to be extended to cover expressions of spiritual values.[415] The concept of 'spiritual values' speaks to the need for law to accommodate expressions that do not conform to the expectations of material embodiment and originality. This recognition of the spiritual component of African indigenous knowledge systems

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410 Jeremy B 'Swakopmund Protocol: History made, but have you got a copy?' http://afro-ip.blogspot.com/2010/08/swakopmund-protocol-history-made-but.html (date of use: 01 September 2010).

411 Tong L 'Aligning the South African intellectual property system with traditional knowledge protection' (2017) 12/3 *Journal of Intellectual Property Law & Practice* 181. South Africa is not party to the Protocol, and the signatories are Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia and Zimbabwe.

412 Preamble, Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 6.

413 Ibid 5.

414 Ibid.

415 Ibid.

validates the claim that works can be authored by ancestors and the yet-to-be-born, thus advancing a decolonised approach. Consequently, traditional works that hold sacred spiritual value are protected despite their not being materially embodied. Although the preamble does not use either plain language or the decolonial lexicon of Molimo and Balimo, it affirms the African reality.[416]

However, the phrase 'custodianship, guardianship, or collective cultural responsibility' could feasibly be construed to include such traditional knowledge. Section 4 (iii), provides:

> Protection shall be extended to traditional knowledge that is integral to the cultural identity of a local community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility.[417]

Unfortunately, the words 'local' and 'traditional' do not clarify what constitutes a community in light of the complexities that define the subject of traditional and indigenous knowledge systems.

Collective guardianship is in line with communalism and must be a mainstay in how intellectual property law is taught. Communal intellectual property law rights, as rights of both the community and the individual, should be taught as mechanisms that benefit relationships within the community as a whole.

5.3.2 *The case for the IPLAA*

The previous chapter, showed that the concept of an African community as explained in the IPLAA is largely facile and articulated within the individualistic confines of the predominant intellectual property law framework. In keeping with this theme, the IPLAA introduces indigenous knowledge as a species of intellectual property.[418]

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416 See Chapter 3, Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 436. The latter part of Chapter 3 is at pains to address the culture of Africa's reverence to ancestors and the intersectionality with copyright law and the concept of authorship therein.

417 See Swakopmund Protocol 8, s 4(*iii*) which compensates for the simplistic definition of community in s 2.1

418 Ncube CB 'Intellectual Property Protection of Traditional Knowledge and Access to Knowledge in South Africa' in Matthew Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* 543-564

The long title and the preamble to the Act recognise that manifestations of indigenous knowledge can qualify as a species of intellectual property and should be protected under the current intellectual property law framework. This recognition comes notwithstanding that some of these manifestations fall short of meeting the material embodiment and originality requirements. This presents a radical shift in respect of both pre-conditions for protection.

Tong narrates that the development of intellectual property law has been swamped by discussions seeking to find ways to secure legal protection for expressions with unique characteristics which deviate from the individualist notions currently dominating copyright. This has led to calls for a *sui generis* approach to certain expressions of traditional knowledge.[419] Tong posits that, '[a]lthough the IPLAA introduces specific provisions dealing with eligibility criteria, in some instances, the criteria for protection of traditional version is similar to that of the existing subject matter in the specific statute.'[420] This causes confusion as to the boundaries between the IPLAA and existing legislation, including the Act.

Various scholar have pointed to the IPLAA's shortcomings. They argue that it fails cogently to address the myriad of traditional cultural expressions that continue to be exploited and are largely unprotected.[421]

Before addressing whether or not the IPLAA offers a form of *sui generis* protection for traditional knowledge, it is important to revisit certain questions. These include the definition of an indigenous community and its part in the authorship of traditional knowledge. Geyer opines that, "the complexities and inconsistencies of the IPLAA

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419 Tong L 'Using intellectual property rights to protect traditional rights' 555 in Van der Merwe (ed) *Law of Intellectual Property in South Africa*. The author further asserts (at 556) that intellectual property laws (including the IPLAA) are not suited to the task of protecting traditional expressions.

420 Ibid 567

421 See, for instance, Sibanda OS 'The Prospects, Benefits and Challenges of Sui Generis Protection of Geographical Indications of South Africa*'* (2016) 51/3 *Foreign Trade Review* 219. The author illustrates the IPLAA's shortcomings in the subject of geographical indications: 'Unfortunately, the provisions of IPLAA on GI protection are inadequate and offer no strengthened protection of GI as already provided by various legislations discussed above. To begin with, a cursory reading of the preamble of IPLAA reference to "further protection" of GI is made specifically to IK. Surely, products befitting of GI registration and protection extend far beyond IK products.' See further Tong L 'Aligning the South African intellectual property system with traditional knowledge protection*'* (2017) 12/3 *Journal of Intellectual Property Law & Practice* 184. See further Nwauche E *The sui generis and intellectual property protection of expressions of folklore in Africa* 157 LLD Thesis, North-West University 2016.

go beyond the basic misfit between intellectual property and traditional knowledge'.[422] This means that the definitional paradigm under the IPLAA is wide and seeks to group together various intellectual property law concepts. The IPLAA can, therefore, not be validly construed as offering *sui generis* protection – notwithstanding its objective of improving the living conditions of traditional communities.[423]

5.4 **Conclusion**

The central inquiry in the decolonisation discourse is to conceive a curriculum that engenders critical thinking; a curriculum which not only challenges students to engage with various concepts, but also to bring their own knowledge(s) to the course content. This is the sentiment that this chapter has sought to apply to the traditional requirements for copyright. The two which formed the basis for discussion are incomplete insofar as they address the definition of originality, and fail to offer an explanation of *why* works are original. A decolonial engagement requires the teacher to focus not only on the *techno* (how), but also on the *telos* (purpose) of a concept.

The contention of this chapter is that Transmodernity demands a paradigm shift in the conceptualisation of the material embodiment and originality requirements for copyright. This may be achieved in two ways: (1) by understanding that the variations of these two concepts are defined by the British and Americans, in light of an African lens and with the intention to nuance these definitions; and (2) that the copyright protections provided for works should not apply to the individual author only, but also the community – including ancestors and the yet-to-be born.

The chapter concludes by analysing the Swakomund Protocol and the IPLAA. It finds that the Protocol is progressive in its proposals and contains wider definitional clarity on concepts that South African legislators are struggling define. The chapter suggests that South Africa debate whether it either signs the protocol, or learns from it in its quest to develop a vocabulary of its own by which to articulate and navigate within indigenous knowledge systems, traditional expressions, and their spiritual,

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422 Geyer S 'Copyright in Traditional Works: Unravelling the Intellectual Property Laws Amendment Act of 2013*'* 44.

423 Tong L 'Using intellectual property rights to protect traditional rights' 566 in Van der Merwe (ed) *Law of Intellectual Property in South Africa*.

intangible, and ancestral content as regards copyright law. A genuine *sui generis* instrument for traditional knowledge ought to be concise, considered, and clear in its understanding of these central terms. Students should be taught to grapple with questions such as why South Africa is not a signatory to the Swakopmund Protocol, how the Protocol differs from the IPLAA, and whether the Protocol can be used to achieve certain of the goals of the IPLAA.

CHAPTER 6

COPYRIGHT LIMITATIONS

6.1 Introduction

Copyright owners have exclusive rights over their works guaranteeing them the right to exploit these in the ways listed in sections 6–11B of the Copyright Act 98 of 1978. Copyright owners can themselves exploit these rights or can authorise others to do so. They may also prevent others from engaging in the conduct prohibited by the Act. However, the owner's rights are not absolute and are subject to various legislative limitations. These exceptions and limitations represent statutorily sanctioned copyright infringements. Limitations present a synthesis between the two conflicting interests: the copyright owner's inherent monopoly; and the public's claim to access to cultural commodities. The primary objective of copyright law is to balance these contending interests through a variety of limitations and exceptions. The statutory exceptions in sections 12–19B of the Act are the most important, but are supplemented by certain inherent limitations to copyright – eg, duration.

This chapter addresses fair-dealing exceptions, limitations on moral rights, and the limited duration of copyright, and contrasts these with the social, economic, political, and historical realities of the coloniser and the colonised. The approach is conceptual rather than black letter in that it focuses on copyright limitations on an abstract, theoretical level rather than on their doctrinal application, which is only invoked for illustrative purposes.[424]

6.2 Exceptions

6.2.1 *Fair dealing*

This chapter considers the sections on copyright in Dean and Dyer,[425] and Van der Merwe's[426] works on intellectual property law. Van der Merwe provides a broad

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424 The subject of exceptions on its own, is worthy of a stand-alone study and some work has been done by various local and international scholars. For further reading see Shay R *Entitlements under the Fair Dealing Exceptions to Copyright* LLM dissertation Stellenbosch University, South Africa 2012. See further, Schonwetter T, De Beer J, Kawooya D & Prabhala A 'Copyright and Education: Lessons on African Copyright and Access to Knowledge*'* (2010) *African Journal of Information and Communication* and Andanda P 'Copyright law and online journalism: A South African perspective on fair use and reasonable media practice*'* (2016) 6/4 *Queen Mary Journal of Intellectual Property*.

425 Dean O & Dyer A *Introduction to Intellectual Property Law.*

426 Van der Merwe A.*Law of Intellectual Property in South Africa*. (2 ed).

overview of exceptions and limitations, largely referencing the Copyright Act 98 of 1978 and listing the three exceptions provided under fair dealing.[427] He explains that what must be established is whether the work in question receives fair treatment in light of the stated purposes.[428]

Dean and Dyer follow the same pattern and frame the exceptions as they appear in the Copyright Act 98 of 1978, save that – unlike Van der Merwe – they list the types of work and how these are specifically affected by the fair-dealing limitation.[429]

The first edition of Cornish's work defines fair dealing by dividing it into three grounds. He claims that the use of any work is covered by the fair dealing exception if: (1) it is for purposes of research and/or private study; (2) involves specific literary, dramatic, and musical works used for reporting current events; and (3) is for purposes of criticism or review.[430] The three grounds, as set out by Cornish, accord with South African law as reflected in the Copyright Act 98 of 1978. Cornish opines that such use is termed 'fair dealing' as, among other things, the courts are left to judge the fairness in light of the circumstances. As an example, he cites as a condition for fairness, that the source should be sufficiently acknowledged.[431]

Cornish's understanding of fair dealing was based on the 1911 UK Copyright Act[432] which introduced fair dealing under the heading, 'Exemption of Innocent Infringer from Liability to Pay Damages, etc'.[433] The Act referred specifically to an 'innocent infringer' as a person who was deemed 'innocent' if he or she infringed the copyright-protected work without being aware of infringement. For exemption under this exception, therefore, the infringer must have been ignorant and that ignorance must qualify as reasonable.

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427 Ibid 289-310 for research, private study, personal or private use, criticism, review, and reporting of current events.,

428 Pistorius T 'Exceptions and Limitations' in *Van* der Merwe ibid 290-291.

429 Dean O & Dyer A *Introduction to Intellectual Property Law* 45. Note that unlike Van der Merwe, this textbook relies heavily on Dean's handbook

430 Cornish WR *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* 364.

431 Ibid 363.

432 For full text, see World Intellectual Property Organization (WIPO) online archives. http://www.wipo.int/edocs/lexdocs/laws/en/il/il013en.pdf

433 Article 8, Copyright Act of 1911 (UK) 5/16: 'Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to a remedy other than an injection or interdict in respect of the infringement if the defendant proves that at the date of infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.'

Cornish's latest edition no longer uses the 'three-ground definition'. He merely lists specified fair dealing purposes: research or private study; reporting current events; criticism or review, parody, pastiche and caricature, quotation and illustration for instruction.[434]

In *Moneyweb v Media 24*, the court held that fair dealing for purpose of reporting on current events – qualifying section 12(1)(*c*)(i) of the Act – will only be established if three distinct elements are proved: (1) the dealing must be for a specified purpose; (2) the dealing must be fair; (3) the source, including the name of the author, must be mentioned.[435] This definition follows the same logic as Cornish's three-ground definition and shows that there has been little movement since his first edition in 1981. The reliance on English case law, although a consequence of the history of copyright law, has the effect of entrenching coloniality in the curriculum.[436]

The court stated that the list of factors which contribute to the determination of fairness[437] in the context of section 12(1)(*c)*(i) is not exhaustive. This opens up the possibility of arguing for more factors to be considered in determining the fairness aspect of fair dealing.[438]

Decolonisation of the copyright law curriculum invites students to think critically about circumstances that are uniquely African. The court's admission that the list of factors for determining fairness is not exhaustive, not only open the door to critical

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434 Cornish WR, Llewelyn D & Aplin T *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (9 ed) 494-502.

435 Shay R '*Moneyweb (Pty) Ltd v Media 24 Ltd & Another'* (2017) 5/1 *South African Intellectual Property Law Journal* 167.

436 *Moneyweb (Pty) Ltd v Media 24 Ltd & Another* [2016] 3 ALL SA 193 (GJ), 2016 (4) SA 591 para 103. The court held: 'As before, there does not appear to be any South African decision on this point. Both sides referred me to decisions and writings from several foreign jurisdictions on the meaning of the phrase "fair dealing". I understand that foreign authorities are referred to for guidance only. I also accept that I must be cautious in considering foreign law because each jurisdiction has its own particular history and, in many cases, is bound or influenced by domestic statutory precepts. I therefore intend, for historical reasons, to focus on English authority.'

437 Shay R '*Moneyweb (Pty) Ltd v Media 24 Ltd & Another* [2016] 3 ALL SA 193 (GJ); 2016 (4) SA 591' (2017) 5/1 *South African Intellectual Property Law Journal* 167*.* The court held in para 113: 'In my view, the factors relevant to a consideration of fairness within the meaning of section 12(1)(c)(i) include: the nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work. One factor may be more or less important than another, given the context in which publication occurs. The list of factors is not exhaustive.'

438 *Moneyweb (Pty) Ltd v Media 24 Ltd & Another* [2016] 3 ALL SA 193 (GJ), 2016 (4) SA 591 para 113.

thinking about Afrocentric exceptions, but also problematises Africa's reliance on English case law in the absence of local authority.

Bently and Sherman[439] offer a broad overview of copyright exceptions in the UK which, given South Africa's reliance on English-law traditions, is crucial to this dissertation. The authors posit that the restricted fair-dealing approach can be contrasted with the approach in the US,[440] which recognises a general defence of *fair use* which provides that if the court is satisfied that the use is fair, there is no infringement.[441]

The decolonisation of copyright law necessitates contrasting fair dealing with fair use as this indicates to students not only that there are alternatives, but also that the open-ended nature of the US courts' conception of fair use allows for a robust engagement with its normative content.[442] Fair use has a wider scope than fair dealing in that it does not restrict potential exemption to pre-defined acts.[443]

Contrasting the two concepts propels the discussion towards a purposive reading of the fair-dealing exceptions. The curriculum ought to make express reference to the different socio-economic conditions of the coloniser and the colonised, respectively, and move towards raising awareness of the need for these two groups to enjoy context-specific protections and exceptions. In this vein, Andanda contrasts fair use and fair dealing by studying the findings of the court in the *Moneyweb* case and the US case, *Associated Press v Meltwater US Holdings Inc* 931 F Supp 2d 537, 543 (SDNY 2013). She argues that in the news industry one aspect that needs to be noted is the different types of news aggregators.

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439 Bently L & Sherman B *Intellectual Property Law* (5 ed).

440 US Copyright Act of 1976, s 107.

441 Bently L & Sherman B *Intellectual Property Law* 224.

442 Section 107 of the US Copyright Act of 1976. See online archives https://www.copyright.gov/title17/title17.pdf. (Accessed on 06/11/2017)

443 Ibid. 'In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) The nature of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work.'

Andanda's central thesis is that both fair use and fair dealing require reasonableness from the user which must be determined in its own context.[444] Kelbrick argues in similar vein that,

> Intellectual property is currently viewed as means – either the only one or the best available – to deal with many new problems. In developing countries, intellectual property protection has been identified as a possible solution to the appropriation of traditional knowledge [and indigenous culture] and other indigenous property. Developed countries view intellectual property protection as means to prevent counterfeiting and to control markets.[445]

Kelbrick's intervention proposes that all intellectual property laws should be taught in relation to the context, socio-economic reality, and locality of the jurisdiction to which they apply. This emphasises the different needs of different jurisdictions and how appropriate the protection is in responding to these needs.

It is the contention of this chapter that South Africa's current experience necessitates that copyright exceptions be given a wider interpretation.

The textbooks considered in this study limit their student instruction to fair dealing alone, and very seldom expand on fair use. This entrenches a colonial mindset in the sense that it does not acknowledge that the fair dealing exception ought to be responsive to local social, economic, cultural, and political needs. The dissertation does not suggest that contrasting fair dealing with fair use automatically decolonises the curriculum, it rather posits that the inclusion of fair use will realise the decolonial demand for a pluriversal epistemic community in the curriculum.

On a conceptual level, fair use is neither an African idea nor is it an embodiment of the epistemic traditions of the global South. This renders it vulnerable to the same colonial characteristics that define fair dealing; this is one of the factors that needs to be taken into account when teaching students about fair use, notwithstanding its greater emphasis on flexibility and a context-specific fairness threshold.

The two textbooks, in the main, draw on fair dealing from English law and the its pedagogy as set out by English thinkers such as Cornish. A decolonised LLB curriculum which teaches critical thinking skills, argues against this reasoning, and

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444 Andanda P 'Copyright law and online journalism: a South African perspective on fair use and reasonable media practice' 412.

445 Kelbrick R 'The need for different perspectives' (2008) 39/8 *International Review of Intellectual Property and Competition Law* 883.

emphasises the need for both fair dealing and fair use to be included in the curriculum. This becomes imperative in light of the Copyright Amendment Bill B13-B 2017, which extensively amends existing legislation by introducing fair use to local jurisprudence.[446]

6.2.2 *Limitations on moral rights*

Moral rights protect owners' non-pecuniary interests.[447] Moral rights co-exist with the economic rights in copyright and inhere in the author even after transfer of the economic interests.[448] The curtailment of moral rights falls under copyright limitations because copyright includes moral rights.

The Copyright Act 98 of 1978 does not address the duration of moral rights which invites debate on how long they subsist. Dean and Karjiker argue that moral rights subsist for the life of the author.[449] This conservative argument stems from the common-law tradition that links moral rights and authorship and, therefore, first ownership of a copyright.[450] Their argument is that moral rights are akin to common-law personality rights, and so cease to exist with the cessation of an individual's personality. Tong agrees with Dean and Karjiker's sentiment that moral rights are akin to personality rights, but argues further:

> Note that in South Africa they are statutory rights and not personality rights. It is possible that the effect of an author's protection of his or her personality rights,

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446 See generally amendments bringing about fair use, Copyright Amendment Bill [B 13B—2017], insertion of s s 12A, 12B, 12C and 12D in Act 98 of 1978.

447 Tong L 'The Effect of Employee-Authors' Moral Rights on Employer-Owned Copyright: Surviving Article 6bis of the Berne Convention*'* (2014) 26/2 *SA Mercantile Law Journal* 213. See further Chapter 4 on Moral Rights and Ginsberg J 'Moral Rights in a Common-Law System*' 274* in Bently L & Sherman B *Intellectual Property Law*.

448 See s 20(1) of the Copyright Act 98 of 1978: 'Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorises the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.' See further, on moral rights generally Chapter 4.

449 Dean O *Handbook of South African Copyright Law* 113-114 (Online version) https://juta.co.za/products/3760-handbook-of-south-african-copyright-law/ (date of use: 16/09/2017)

450 Tong L 'The Effect of Employee-Authors' Moral Rights on Employer-Owned Copyright: Surviving Article 6bis of the Berne Convention*'* 215 states: 'The value of first ownership of copyright lies in the control over the economic exploitation of the work that it affords the owner. He or she may, for example, license the work and earn royalties, sell or assign the rights in exchange for payment, or decide to hold the rights defensively.'

> for example, the right not to be defamed, may coincide with the exercise of moral rights – in this case, the integrity right.[451]

Tong distinguishes the legal nature of moral rights from personality rights, also showing areas of convergence between the two. Dean concedes that there are jurisdictions where the transfer of moral rights on the death of the author is recognised, yet persists in his original argument[452] on the basis that the majority of countries agree that moral rights are inalienable.[453] The view that moral rights cease to exist on the death of the author flows into the debate on the transferability of moral rights. Dean's insistence that moral rights are personal and that authors may not transfer their moral rights to a person of their choosing, could well be an unjustified limitation for an author.[454]

Dean's analogy is inimical to the communal ethic among Africans, specifically values such as sharing and choice.[455] The flaw in his argument is that it assumes that moral rights can only be granted to individuals. This dissertation argues that individual notions of authorship fit ill with certain traditional cultural expressions as the personality evident in these works is immeasurable in practical terms, and certainly not individuated.[456] If an author ought to be recognised for his or her work, in his or her absence the moral rights to the work should fall to any person of his or her choosing to protect his or her paternity posthumously. In both African culture and pre-colonial Africa, the belief was in customary succession and inheritance of wealth that comes with the death of an elder in the family. Given that moral rights have an intrinsic value the owner of a moral right should be permitted to transfer the right to his or her descendants in line with African succession practices. These pre-colonial

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451 Ibid 217 n 18.

452 Dean O *Handbook of South African Copyright Law* (Online version) 1-113.

453 Tong L 'The Effect of Employee-Authors' Moral Rights on Employer-Owned Copyright: Surviving Article 6bis of the Berne Convention*'* 221.

454 Pistorius T 'The transfer of copyright and licensing' in Van der Merwe A *Law of Intellectual Property in South Africa* 254.

455 Gudeman S 'Sketches, Qualms, and other thoughts on Intellectual Property Rights*'*102-103 in Steven B Brush & Doreen Stabinsky (eds) *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*: 'The expression "intellectual property rights" makes it appear as if the property and rights are products of individual minds. This is part of a Western epistemology that separates mind from body, subject from object, observer from observed, and accords priority, control, and power to the first half of the duality.'

456 See Chapter 4, as with the Ndebele artwork, the isiXhosa initiation school blanket and the Sesotho *Seanamarena*, are examples of some of the works whose authors cannot be defined by the current individualistic narrative applied by Dean.

African norms validate the view that communal authorship[457] warrants a type of a moral right that can be transferred for perpetual enforcement after the owners' passing.[458]

Dean argues that because the paternity right is the right to be identified as the author of the work, that right can only attach to in the author. However, he neglects to reconcile the technical view of the law with the situation that when the author dies heirs have personal and communal interests in legally enforcing the paternity right.[459]

Visser differs from Dean. He is of the view that that because moral rights are derived from copyright it follows that their duration is rationally linked to the duration of the copyright, given that a different term for moral rights is not specified in the Act.[460] Moral rights are accessory in nature because no moral right can arise where a copyright does not exist**.**[461]

A third argument is advanced by Copeling who asserts that '[m]oral rights subsist for the duration of the copyright because this is in line with article 6*bis* of the Berne

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457 The communal nature of pre-colonial African communities does not mean that all works derived from African communities are always property of the community. See Visser C 'Some thoughts on making Intellectual Property Work for Traditional Knowledge*'* 658 who states: 'While many indigenous and local communities generate and transmit knowledge from generation to generation collectively, there are situations in which individual members of these communities can distinguish themselves and be recognised as informal creators or inventors distinct from their communities.'

458 Gudeman S 'Sketches, Qualms, and other thoughts on Intellectual Property Rights*'* 102-103: 'In contrast to this modernist construction [of Western epistemology], in a community economy innovations are cultural properties in the sense that they are the product and property of a group.'

459 Pistorius T 'The nature and scope of copyright' in Van der Merwe A *Law of Intellectual Property in South Africa* 251.

460 Visser C, Pretorius JT and others *Gibson: South African Mercantile and Company Law* (8 ed) 732.

461 Ibid.

Convention'.[462] His reasoning is that article 6*bis* should be the final arbiter on the debate.[463] Geyer holds the same opinion as Copeling, arguing that she,

> find[s] this perspective, recorded so close to the promulgation of the 1978 Copyright Act, very insightful. It is also in line with how article 6*bis* of the Berne Convention had developed over the years. It therefore appears that the moral rights in a work subsist for the full copyright term.[464]

Tong clarifies that, '[t]he formulation of article 6*bis* is a compromise of sorts that reflects the difference in importance placed on moral rights by countries of the civil-law tradition and those that have been influenced by Anglo-American common-law approach'.[465] It is against this background that the reliance on article 6*bis* to advance Copeling's textual argument is problematic.[466] This dissertation rejects this textual approach to article 6*bis* in that such reasoning does not take into account that the article should be interpreted in light of its political history and aims.[467]

As shown in Chapter 3, in prominent African cultures a person never dies but rather becomes an ancestor, thus continuing to live after his or her physical death. The

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462 Copeling AJC *Copyright Law in South Africa* 67. Article 6*bis*: '(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.'

463 Although this is not expressed outrightly by Copeling, his use of art 6*bis* of the Berne Convention almost seems to suggest that he intended for it to be the unfettered authority in settling the debate. If this is truly the case, then Copeling commits a gross error, not only in decolonial terms, but also about the fact of the function, object, and scope of operation of the Berne Convention. The provisions of the Convention are wide and only act as guidance for its member states or signatories. The express operation of the Convention becomes that those who adhere to it must go back to their respective countries and democratically adopt laws that are in line with Convention. There is no logical precedent where the Convention has been used as the final authority on the interpretation of any local legislation especially in light of s 20's silence on the duration of moral rights.

464 Geyer S 'Copyright in traditional works: Unravelling the intellectual property laws amendment Act of 2013' 56.

465 Tong L 'The Effect of Employee-Authors' Moral Rights on Employer-Owned Copyright: Surviving Article 6bis of the Berne Convention*'* 218.

466 There are further arguments in the debate on the duration of moral rights. See Copeling AJC *Copyright Law in South Africa.* Here the argument seems to be a centralist position which tends to mediate between the positions held by Dean and Visser. Copeling contends that moral rights endure for the full term of the copyright in accordance with art 6*bis* of the Berne Convention.

467 Tong L 'The Effect of Employee-Authors' Moral Rights on Employer-Owned Copyright: Surviving Article 6bis of the Berne Convention*'* 218.

expansive conception of the author as inclusive of the living, the dead, and the yet-to-be-born propounded in Chapter 3, demands recognition of moral rights beyond individual lifespans. Extending moral rights to be transferable and exist beyond the life of the author, decolonises this epistemic anomaly. Using an African lens to assert the unending and transferable nature of moral rights, redefines the concept to transcend its current individualistic bounds.[468]

6.3 **Comparative analysis of copyright duration**

6.3.1 *Introduction*

The duration of copyright differs depending on the type of work involved. Domestic legislation draws from the international obligation contained in article 12 of the TRIPS Agreement and section 7 of the Berne Convention, which stipulate the standard of 50 years for the duration of copyright.

Copyright is of limited duration, and when its term expires, the work is no longer protected and falls into the public domain which allows the public to use the work freely.[469] Notwithstanding the uniformity of international obligations, duration differs between jurisdictions.[470] Unlike most copyright doctrines, duration is already differentiated in terms of the type of work and in most instances perpetuates the coloniser-colonised and developed-developing dichotomy. This is exemplified in the US's lawmakers extending the duration of copyright at the behest of industry lobbyists – most prominently perhaps Disney's demands for extended protection of its cartoon character Mickey Mouse:

> Until the 1970s, copyright terms only lasted for 56 years. But Congress retroactively extended the term of older works to 75 years in 1976. Then on October 27, 1998—just weeks before works from 1923 were scheduled to fall into the public domain—President Bill Clinton signed legislation retroactively

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468 The transferability of moral rights must not be reliant on the inevitable death of the author, but ought to have regard to the fact that an author should be able to assert his or her rights in light of the African belief system of *Modimo* and *Badimo.* The isiZulu adage follows, 'Umuntu, ngumuntu ngabantu' which means that a person is a person in relation to other people. Others have translated it loosely to mean, 'I am, and therefore you are'. Dean's conception of personhood begins and ends with the individual, which tends to be unfortunate and misleading, especially for purposes of recognition, attribution, and non-distortion in the African situation.

469 Pistorius T 'The duration of copyright' 231 in Van der Merwe A (ed) *Law of Intellectual Property in South Africa.*

470 See art 12 of the TRIPS Agreement.

> extending the term of older works to 95 years, locking up works published in 1923 or later for another 20 years.[471]

As a result, before the 1970s copyright subsisted for 56 years, was extended to 75 years in 1976, and in 1998 was extended further to 95 years. During this period, major film studios joined forces with the estates of famous authors and musicians to push for a copyright extension. This historical context is not conveyed to students in the copyright law curriculum.[472]

A decolonised curriculum construes this history as reflecting the ideological dominance of a specific worldview. It argues that a Transmodernity-centred worldview of copyright duration should rather be adopted.[473] Under such an approach students are encouraged to study uniquely African examples of all works – including works of indigenous knowledge. Such works are the products of traditional cultural expression and should, as regards questions of copyright duration – the dominant narrative in capitalist demands – be approached via Afrocentric reasoning. A decolonised pedagogy should question and interrogate the reasoning supporting an imported epistemology.[474]

Mulder argues that '[t]he second way in which colonization damages the advancement of knowledge is the creation of a kind of "cram and vomit" ethos with

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471 Timothy B 'Why Mickey Mouse's 1998 copyright extension probably won't happen again' ARS Technica online Magazine https://arstechnica.com/tech-policy/2018/01/hollywood-says-its-not-planning-another-copyright-extension-push/ (date of use: 21/12/2018). The owners of Mickey Mouse have had the tendency to persuade American law makers to legislate in favour of a copyright law that extends copyright duration for works of the same type as Mickey Mouse. The copyright for the first Mickey Mouse film, *Steamboat Willie*, is scheduled to expire in 2024, though Disney would still hold a trademark for the Mickey Mouse brand.

472 Ibid. On Mickey Mouse and capitalist lobbying, see generally, Collins S '" Property talk" and the revival of Blackstonian copyright' (2006) 9/4 *M/C Journal*, See further, Lessig L 'The Creative Commons' (2004) 65/1 *Montana Law Review*. See also, Depoorter B 'The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law' (2004) 9/4 *Virginia Journal of Law & Technology.*

473 On Transmodernity see Chapter 2. See further, Grosfoguel R 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' 12.

474 Duration has always been a subject of great debate and as with the Walt Disney and Mickey Mouse case, the centrality of the debate has always been directed at the interests of private property holders and of the public at large. See Bently L & Sherman B *Intellectual Property Law* 177. They state: 'Similar debates have always been shaped by the particular circumstances under discussion, they are similar in that they have attempted to mediate between the private interests of owners and the interests of the public in ensuring access to creative works – that is, they have attempted to coordinate and balance the various interests that coexist in copyright law.'

the emphasis on exams and an absence of independent thinking and innovation.'[475] The cram-and-vomit method is colonial and prejudices the advancement of knowledge in all disciplines by focusing on the 'how' rather than the 'why'. Decolonising the LLB curriculum requires that students be encouraged to debate and question the law, not merely consume it as is, only to regurgitate it in their summative assessments as evidence of learning.[476]

6.3.2 *Literary, musical, and artistic works*

Copyright in literary, musical, and artistic works (excluding photographs) subsists for the lifetime of the author and for a further 50 years his or her death.[477]

The situation in the UK differs slightly from that in South Africa in that in the UK copyright subsists for 70 after the death of the author.[478] Bently and Sherman, Dean and Dyer, Cornish, and Van der Merwe are all silent on why this duration differs in various jurisdictions and from one work to another. This silence opens up an avenue for students to debate and contrast the different approaches, especially as South Africa is a former British colony and one would expect the duration to be uniform. The economic difference between developed and developing countries is that the former are producers whereas the latter are users, which justifies a differentiated model of protection.

6.3.3 *Duration of traditional works*

A careful reading of the IPLAA shows that for traditional works copyright subsists in perpetuity. This is because the Act equates traditional works and indigenous works.[479] This is in contrast to derivative indigenous works which are protected for

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475 Mulder L 'Frantz Fanon, Internalized Oppression and the Decolonization of Education' 18 https://www.researchgate.net/publication/308773706_Frantz_Fanon_Internalized_Oppression_and_the_Decolonization_of_Education. (date of use: 11/06/2018)

476 Ibid 19.

477 Section 3(2)(*a*) of Copyright Act 98 of 1978. This follows on from the guidance given by art 12 of the TRIPS Agreement. See Van der Merwe A *Law of Intellectual Property in South Africa* 231: 'But if, before the death the author, a literary, musical, or artistic work or an adaptation of it has not been published, performed in public, broadcast or offered for sale to the public in the form of records copyright continues to subsist for a period of fifty years from the year in which the first of these acts was done.'

478 Section 12(2) of the Copyright Design and Patents Act (CDPA). See further, Bently L & Sherman B *Intellectual Property Law* 180: 'Subject to exceptions (listed below), copyright in a literary, dramatic, musical or artistic work expires 70 years from the year in which the author dies.'

479 Intellectual Property Laws Amendment Act 28 of 2013, s 28B(3)(*b*).

50 years from the end of the year in which the work was first communicated to the public, or the death of the author, whichever occurs first.[480]

Van der Merwe textbook uses the terms 'traditional works' and 'indigenous works' interchangeably.[481] Dean and Dyer posit that it is important to distinguish between the two types of traditional works, namely derivative indigenous works and indigenous works because different terms of protection apply in each.[482] Bently and Sherman, as well as Cornish are silent on the duration of traditional works. The IPLAA is crucial because it provides a radical shift from the normative copyright law framework by providing perpetual protection for traditional works. This radical departure is in line with the proposal made in this chapter regarding the duration of moral rights. It is thus conceivable to suggest that the aspect of duration in traditional works as provided by section 28F (1)(*b*) of the IPLAA accords with the ethos of the decolonial demand where the duration of protection of indigenous works is concerned.

6.3.4 *Duration of works of joint authorship*

Copyright in works of joint authorship subsists for a period of 50 years from the end of the year of the death of the last surviving author.[483] Dean and Dyer, Cornish, and Bently and Sherman are silent on the duration of works of joint authorship. Van der Merwe textbook discusses the Copyright Amendment Bill's proposed introduction of the duration of the resale of rights pertaining to artistic works of joint authorship.[484] This resale right which subsists in a co-authored work endures 50 years after the year in which the last of the authors dies.[485] The teaching relating to duration of works of joint authorship does not take into account the definition of an indigenous community in section 3(*f*) of the IPLAA which may present overlaps between a community and joint authors, especially where the identity of some of the authors is

480 Ibid s 28B(3)(*a*).

481 Pistorius T 'The duration of copyright' in Van der Merwe A *Law of Intellectual Property in South Africa* 232 n 7: 'The traditional work is an indigenous work.' There is a debate about the correctness of this interchangeable use of these two terms. For further discussion, see Geyer S 'Copyright in traditional works: unravelling the intellectual property laws amendment Act of 2013' 47.

482 Dean O & Dyer A *Introduction to Intellectual Property Law* 72.

483 Section 3(4) of the Copyright Act 98 of 1978.

484 Pistorius T 'The duration of copyright' 233 in Van der Merwe A *Law of Intellectual Property in South Africa*.

485 Clause 5 of the Copyright Bill which proposes cl 7C(2)(*b*)(i) and (ii), if the identity of the artist is known or if the identity of one or more, but not all of the artists are known, until the end of the period of 50 years after the death of the last known author.

not known. This dissertation has proposed in the preceding chapters that an African indigenous community means more the definition in the IPLAA, it follows that the logic applied to traditional works should be applied to works of joint authorship if it is established that these constitute works of indigenous knowledge.

6.4 **Conclusion**

This chapter set out to examine copyright law limitations and exceptions using an African lens. Although there are various exceptions, the chapter limited its inquiry to fair dealing and fair use, pointing out that exceptions are an instrument to curtail the copyright owners' exclusive rights to their work. Following from fair dealing, the chapter considered the limitations on moral rights and their transferability (or lack thereof) in light of Africanised communal modes of living. The duration of copyright in each work lapses depending on the type of work involved. This chapter contrasts the various durations to establish why each work is given its specific copyright duration. It also specifically considered the African context and the types of works unique to Africa. It is contended that the copyright regime determines duration in line with the demands of global capital, big business, and general capitalist desires.

To this end, it becomes clear that, as with fair dealing, copyright duration follows British colonial patterns, and is hardly ever informed by the contextual realities of African peoples. If anything, the chapter illustrates that the legislature has largely been influenced by capitalist desires rather than the needs of the community when determining copyright duration. The chapter is guided by Kelbrick's approach of differentiation, and appreciates Africa's distinct cultural situation, its economic and social needs, as well as its history of colonial influence, and uses this as a background to study the various examples of the duration of a copyright.

Having noted that the coloniser is conscious of itself as a Being and is at pains to ensure that this consciousness includes the deliberate dismembering of the Black Body, the coloniser gives itself reason to engage in the act of dispensing with the knowledge systems of local communities. It is contended that in contrasting fair dealing with fair use and applying the purposive approach hinted at in *Moneyweb,*[486]

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[486] The court noted that the Copyright Act must be capable of being interpreted in a manner that is consistent with the Constitution. Shay argues that the fair dealing exception must be interpreted holistically in light of the guarantee of the freedom of expression as espoused by our Constitution in a purposive manner. See Shay R '*Moneyweb (Pty) Ltd vs Media 24 Ltd & Another* [2016] 3 ALL SA 193 (GJ); 2016 (4) SA 591' *South African Intellectual Propertly*

a student of copyright law will be in a position to assert his or her Being. The student is not seen as an empty vessel but rather as an entity with sufficient mental faculties not only to consume knowledge, but also generate it. The dense yet limited wording of section 20 of the Copyright Act 98 of 1978 affords an opportunity to bring the debate to the transferability and duration of moral rights to students and allows them to articulate and/or assert their own views, beliefs, personalities, and localised logic in the discussion. Questioning and interrogation are means that can be called upon to assert and involve students in the content of the curriculum, as an active way of decolonising copyright pedagogy.

Law Journal, 168. *See* further Shay R 'Exclusive rights in the news and the application of fair dealing*'* (2014) 26/3 *SA Mercantile Law Journal* 604. His assertions regarding the *Moneyweb* case are in line with his earlier opinion that, '[t]he liberal application of the fair dealing provisions and argues that this is the best-suited approach in the South African instance, as well as in foreign jurisdictions, if it followed in purposive fashion.' He alludes to our courts' current inclination to liberal application of fair-dealing provisions and proposes that the solution is to move towards a purposive application and/or conception.

Chapter 7

Conclusion

7.1 Introduction

This dissertation set out to study the calls for South African higher education to be decolonised using Africanisation as a lens through which to assess the copyright law curriculum and test the academic theories that underpin decoloniality as part of the copyright curriculum. Copyright law topics were identified and their place in the pedagogical scheme in South African law faculties was analysed.

Applying an African lens to copyright law demands constant reference to historical analysis of the development of copyright law. This is important as no study of decolonisation can be credible without in-depth historical background. Ndlovu-Gatsheni paraphrases Ngugi wa Thiongo, to explain that colonialism was not merely an episode; rather, it is a continuing exertion of power and societal reconstitution of the production of knowledge and subjectivity.[487] This pervasive nature of coloniality has necessitated this dissertation to go beyond the law and academic legal sources, and to have recourse to literature from sociology, political science, philosophy, and other humanities adequately to unravel the concepts of coloniality, decolonisation, and others.

7.2 Transformation of legal education

Drawing from the drawn-out discussions on the LLB curriculum since the dawn of democracy, Chapter 1 cogently evaluated the various proposals emerging from the discourse. These proposals vary between transformative legal education,[488] critical legal studies,[489] decolonisation, and general transformative pedagogy. A careful reading of existing theorising shows that although the academy has grappled extensively with transformative constitutionalism,[490] this has not extended to the

487 Ndlovu-Gatsheni S 'Decoloniality in Africa: A Continuing Search for a New World Order' 27.

488 Quinot G 'Transformative Legal Education' (2012) 431.

489 Modiri J 'The Crises in legal education' 8-9.

490 See generally Mureinik E 'A Bridge to Where? Introducing the Interim Bill of Rights' 31-48. Other scholars, such as Klare, argue that a transformed legal pedagogy means that there should not be discord between legal culture and the Constitution's demand for social change. See generally, Klare K 'Legal Culture and Transformative Constitutionalism' (1998) 146-188.

decolonisation of the LLB. This is notable in the wording of the CHE report,[491] which sets out the envisaged application of the concept of transformative constitutionalism in the LLB curriculum in detail, but merely mandates the SALDA to take the discussion on decolonisation forward.[492] It appears that decolonisation is something of an after-thought in the report, inserted only to tick a box. This should come as no surprise precisely because the legal academy tends to steer clear of concepts that are not born of traditional legal theorising, legislation, and/or the courts.[493] This type of disciplinary decadence[494] lies at the heart of calls for the curriculum to be decolonised; a proposal for disciplines (such as the law) to break free of their current conservative strictures where law remains strictly law, science remains strictly science, and Africanisation remains strictly irrelevant.

To date the SALDA has released a book on the decolonisation of the LLB curriculum pursuant to its mandate in the CHE report.[495] The work states that it is foundational and presents SALDA's early thinking on the question of decolonisation and Africanisation.[496] The six chapters that make up the book provide unique conceptualisations of decolonisation and how it can be applied in LLB pedagogy. However, all these conceptualisations make the same error: either they liken transformative constitutionalism to decolonisation; or they assert that the two concepts are synonymous.[497]

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491 Council on Higher Education *The State of the provision of the Bachelor of Laws (LLB) qualification in South Africa* 18.

492 Ibid 54.

493 The report does not engage the concept of decoloniality, only mentioning it towards the end when making its final recommendations. The recommendation itself does not provide practical plans and decisive definitional clarity on what decolonisation entails, or how it should be engaged in the LLB curriculum. It instead shifts this task to the hands of the SALDA.

494 See generally, Gordon L 'Disciplinary Decadence and the Decolonisation of Knowledge*'* 81-92.

495 Tshivase E, Mpedi L & Reddi M (eds) *Decolonisation and Africanisation of Legal Education in South Africa.*

496 Ibid 1.

497 See generally, De Villiers D 'Residuary Sections, Stare Decisis, Customary Law and the Development of Common Law – How do these concepts affect decolonisation?' 76 in Tshivase E, Mpedi L & Reddi M ibid: 'The question on the decolonisation of the law cannot be separated from the decolonisation of legal education and the latter cannot be divorced from transformative constitutionalism.' See also, Tshivase E 'Principles and Ideas for the Decolonisation and Africanisation of Legal Education in South Africa*'* 6 in Tshivase E, Mpedi L & Reddi M (eds) ibid who states: 'The preamble of the Constitution is of particular relevance. Its framing supports the call for decolonisation and Africanisation in general.'

This dissertation has sought to take the decolonisation dialogue on legal education forward, clarify some of the questions surrounding decolonisation, and show its practical application in the LLB curriculum in general, and in the copyright law curriculum specifically. To this end, the dissertation has addressed two student textbooks on intellectual property law and adopted them as a matrix within which to re-examine selected copyright law concepts at undergraduate level.

7.3 **Decolonial articulations in copyright law**

Chapter 2 argued that both the copyright curriculum and the Copyright Act are essentially Eurocentric. It contends that Africanising the copyright curriculum will not necessarily automatically mean the curriculum will have been decolonised. The chapter approached conceptual Africanisation as an endeavour to analyse the curriculum though the context-specific lens of the Black Body and in the context of the unique experiences and epistemologies of Africa.[498] Chapter 2 framed Africanisation[499] though the decolonial project by explaining the difference between colonialism and coloniality, asserting that coloniality marks the continued patterns of the subjugation of the colonised through the enactment of global racial hierarchy and the hegemonic Eurocentric epistemologies in the present-day world system.[500]

This chapter revealed that decolonisation speaks to the complete experience of the Black Body in an anti-black world, and casts this as a starting point for any dialogue on decolonising the curriculum. For example, on the question of coloniality of Being,

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498 Lembede A. 'Congress Youth League Manifesto' 90-91 in Edgar R & Ka Msumza L (eds) *Freedom in Our Lifetime*. The author sets out two different worldviews of Africans and Westerners respectively. He argues that the West views the world as a gigantic machine, in which individuals are tiny private actors, personal power, successes and fame are the measure of values presenting an ideal that each person should live for. He further argues that, on the other hand, the African views the world as a composite whole, within which individuals are in a constant struggle to arrive at a harmonious collective community. This contrast in worldviews is crucial because it validates the urge to use an African lens to study copyright law and its pegagocial framework. See generally, Biko S 'Black Consciousness and the quest for a True Humanity' in Steve Biko *I write what I like – Selected Writings.* Biko argues that white racism and the colonial order has robbed the world of the Black Body's contribution to the development of global culture and community. He follows on from Lembede's assertions, positing that Africa can contribute to the world by teaching it the true value of humanity and humility.

499 On conceptual Africanisation see generally, Zitzke E 'A decolonial critique of private law and human rights' 492-516.

500 Grosfoguel R 'Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System*'* 205.

the chapter applied Maldonado-Torres's formulation in which Descartes's philosophy was inverted to explain the essence of decolonisation:

> The 'I think, therefore I am' presupposes two unacknowledged dimensions. Beneath the 'I think' we can read 'others do not think', and behind the 'I am' it is possible to locate the philosophical justification for the idea that 'others are not' or do not have being.[501]

As long as 150 years before Descartes's ontological formulation, European thinking can be located in the maxim *ego conquistus* – I conquer, therefore I am.[502] This reading suggests that Europe had assumed a God-like status, placing itself at the foundation of knowledge, acting as an imperial being at the centre of the world; a world it had already conquered.[503] The coloniser assumed that the Black Body are not thinkers, not Beings, and therefore asking questions about their theories of knowledge was pointless.[504]

Having studied the two other manifestations of coloniality (power and knowledge) in Chapter 2, this dissertation finds that the question of the coloniality of Being is central to efforts to decolonise the curriculum and higher education in general.

Colonial atrocities were all justified by the deliberate normalisation of the non-Being of the Black Body.[505] The assertion that Being is central to the decolonial project in higher education tends to be contrary to the dominant narrative in the area of curriculum development where the focus is, as a rule, on the coloniality of power and knowledge.

It is trite that universities are centres of knowledge – institutions of colonial power. Any inquiry regarding the curriculum should therefore strongly emphasise Being as the point of departure in the students' engagement with the world around them, the university structure, and the content of the curriculum. The chronology of application

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501 Maldonado-Torres N *On the Coloniality of Being* 252.

502 Grosfoguel R *Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality* 6.

503 Ibid.

504 Fanon F *Black Skin, White Masks* 73 where the author states, '[t]he white man imposes discrimination on me, makes me a colonised slave, robs me of all worth, all individuality, tells me that I am a parasite on the world and that I must bring myself as quickly as possible into step with the white world.' See further, Biko S. 'Black Consciousness and the Quest for a True Humanity' 96. He argues that the epistemic concerns of the Black Body are encapsulated in a black culture that implies a freedom for Black Bodies to innovate without recourse to Western hegemonic values.

505 Fanon F *Black Skin, White Masks* 143 where the author makes specific reference to the non-Being of the Bantu people of South Africa.

does not negate the importance of grappling with knowledge and power, but insists that the decolonial project begins with re-humanising the dismembered Black Being prior to addressing questions of power and knowledge, which naturally follow after the re-membering of the dismembered.[506]

The chapter further found that Africa is saddled with irrelevant knowledge that serves to disempower rather than empower, and alienate rather than re-member individuals and communities, thus laying a firm basis for decolonisation of the copyright law curriculum.[507]

The chapter concluded by briefly analysing the history of the development of copyright law globally, and pointing out some of the colonial legacies dominating the copyright law curriculum.

7.4 Decolonised intellectual property law justificatory theories

Justificatory theories are not generally seen as a starting point in the LLB curriculum. None of the textbooks studied in this dissertation make mention of these theories. This is in the main due to their theoretical and ideological nature.[508] The theories are a subject of academic writings by various scholars.[509] Chapter 3 contends that justificatory theories are the basic building blocks upon which the system of intellectual property law stands, thus insisting that it should be inserted in the copyright law curriculum at undergraduate level.

Chapter 3 considered the colonial nature of current theorisation on the justificatory discussion using the incentive theory and the labour theory. Under the former, the chapter proposed the African philosophy of Mohlomism as an alternative in critically analysing the concept of incentive in intellectual property.[510] Mohlomism not only

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506 On the process of re-membering the dismembered Black Body, see Chapter 2 generally.

507 Ndlovu-Gatsheni S *Decoloniality in Africa: A Continuing Search for a New World Order* 33.

508 See generally, Sunder M *From Goods to a Good Life: Intellectual Property and Global Justice*. See also, Drahos P *A Philosophy of Intellectual Property.*

509 Du Bois M 'Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism' 1-37. See further, Craig C *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* Edward Elgar Publishing.

510 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 434. For further history of Morena Mohlomi and his philosophy, see Max Du Preez's Chancellor's address at a University of Free State, under the theme, '*The Socrates of Africa and his Student: A Model of Pre-Colonial African Leadership'* http://www.ufh.ac.za/files/max_dupreez.pdf (date of use: 27/05/2018). See also the video and audio on YouTube online portal https://youtu.be/WNxxLOaAzTQ (date of use: 24/12/2018)

decolonises the curriculum by its inclusion, but also offers an alternative to the extant Eurocentric understanding of incentivisation.[511] The dissertation intervenes in the decolonial project by introducing the philosophy of Mohlomism which is important in that it allows for the practical application of Transmodernity in the decolonisation project and in the copyright law curriculum; inserting into the incentive theory, the African values of truthfulness, justice, peace, and the pursuit of sane humanism.[512]

As regards the labour theory, Chapter 3 argued that Eurocentric paradigms emphasise the individual while neglecting Africa's strong emphasis on communal living. It thus introduced the African idea of ancestors as authors,[513] and argued that the labour theory's assumption that intellectual property is born of the labour and skill of an individual is archaic and unworkable when explaining authorship in the context of some artistic products reflecting traditional cultural expressions and African indigenous knowledge systems.[514]

7.5 **Indigenous knowledge, Ubuntu and moral rights**

Chapter 4 starts by defining copyright as a concept and showing the basic taxonomy it follows outside of legislative provisions. This is crucial as to decolonise the copyright curriculum it is important first to understand its essence. To achieve this, the chapter relies on Pistorius's five characteristics of copyright.[515] It then argues that these five characteristics are in fact a representation of a system of copyright still steeped in colonial epistemological patterns which deliberately neglect the context of Africa's epistemologies. This reality was exemplified by the negative

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511 Mahao N 'The King Moshoeshoe I Memorial Lecture*'* 6-8.

512 Sesanti S 'Africanizing the Philosophy curriculum through teaching African culture modules: An African Renaissance act' 434.

513 The belief in ancestors and other forms of spirituality is at the heart of African and its people since time immemorial, an African lens through which all concepts are looked at is incomplete when it is bereft of a deepened understanding of ancestors. See Lembede A 'Freedom in Our Lifetime*'* 19: 'Africans had to rely on their inner resources to overcome inequitites and that spiritual beliefs were a necessary component of economic and political advancement.'

514 Craig C 'Locke, Labour and Limiting the Author's Right: A warning against a Lockean Approach to Copyright Law*'* (2002) 28/1 *Queen's Law Journal* 12-13. See also, Mostert F *The Development of the Natural-Law Principle as One of the Principles underlying the Recognition of Intellectual Property: A Historical Survey from Roman law to Modern-Day Law* 495. 'The doctrine of intellectual property is predicated on the principle that the creator of a work of intellect has an absolute and exclusive right to it, just as property as a tangible thing would grant unfettered dominion to the owner.'

515 Pistorius T 'Introduction' 179 in Van der Merwe A *Law of Intellectual Property in South Africa*.

characteristic of copyright. Thus was countered in Chapter 4 by proposing that copyright shift from its negative orientation and assume a positive stance which will allow it to become proactive and open rather than merely an instrument for the prohibition of predetermined acts in relation to a work. The chapter found that a shift from a negative to a positive characterisation of copyright, allows it to respond decisively to those instances in which cultural appropriation overlaps into copyright law. Cultural appropriation is an anomaly that society is yet to eradicate. It features in copyright when works that enjoy copyright protection amount to the undue taking of a people's culture for perverted commercial gain; this is one practical enactment of the coloniality of knowledge. The chapter found that a positive copyright law is enabled to mediate incidents of cultural appropriation thus achieving decolonisation.

The chapter also studied the concept of moral rights as currently provided for by section 20 of the Copyright Act as well as it is taught in Bently and Sherman.[516] Broadly, it showed how moral rights could be taught using the African philosophy of Ubuntu, it recommends that the aspects of recognition and respect should be read through the prism of Ubuntu. This would not only make the concept context-specific, but inserting Ubuntu into the curriculum achieves decolonisation by way of reversing epistemicide, wherein concepts such as Ubuntu are deliberately dispensed away with.

The inclusion of Ubuntu in the pedagogy of moral rights does not come without necessary criticism in that the chapter argues that existing theorisation on Ubuntu is laden with ideological, political, and intellectual inaccuracies. To this end, the chapter recommends a decolonial approach towards Ubuntu. On a practical level, the chapter proposes that moral rights should be taught on the basis of the pillars of Ubuntu: recognition and respect. This recommendation ties in, and is validated by, the intervention that coloniality of Being is the primary inquiry in the project to decolonise higher education as Ubuntu speaks to the very ontological and epistemic traditions of the Black Body.

The chapter concludes by turning to three indigenous knowledge case studies to show the complexity of colonial copyright's attempt to regulate expressions that fall outside of its traditional strictures. These cases studies are crucial in understanding

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[516] Bently L & Sherman B *Intellectual Property Law* (4 ed) 272.

three things about copyright law and the Black Body: (1) there is a relationship between the individual author and the community, and simply because an expression is authored by the community does not negate the skill, labour, and effort of the individual; (2) that recognition as espoused by existing moral rights theory should not be limited to the personality of the author but to the work itself as an act of re-membering the Being of the Thingified Black Body; and (3) copyright has a role to play in stemming cultural appropriation.

7.6 **Requirements for copyright**

Chapter 5 examined the requirements for the copyright focusing on originality and the material embodiment requirements. The chapter opens with an important disclaimer which says that although the courts have found that once an expression does not meet the material embodiment threshold, it is not a work and thus falls outside of the realm of copyright.[517] A decolonial inquiry construes some products of traditional cultural expressions as worthy of copyright protection and applies a decolonial critique to material embodiment as a basis. This critique showed that traditional cultural expressions may reflect Africa's diverse history which includes a rich oral culture thus excluding much of its cultural products on the basis of the current strictures governing copyright law – eg, the material embodiment threshold. Following on from Chapter 4, the threshold was found to be purveyor of cultural imperialism in terms of which international corporations record sacred African cultural expressions (such as the songs sung in the isiZulu annual *Umkhosi womhlanga*) for commercial purposes without due regard of their sacred nature.[518]

Chapter 5 critically analysed the originality requirement, asserting that the concept is not defined by legislation and that courts rely on the skill and labour threshold. It found that decoloniality would seek copyright to shift from understanding these definitions through the colonial and Eurocentric lens which individualises an author's skill and labour. The chapter picked up the theorisation of the African belief in ancestors in Chapters 3 and 4 and argued decisively that an author's skill and labour ought to include communal authors that include the dead, alive, and the yet-to-be-

517 See generally, *Waylite Diary CC v National Bank Ltd* 1995 (1) SA 645 (A) 653F-G.

518 On cultural imperialism and the commodification of culture, see generally, Whitt L Science, *Colonialism and Indigenous People: The Cultural Politics of Law and Knowledge*.

born. This is a new concept which will contribute greatly to an Africanised copyright law curriculum.[519]

The chapter concludes by looking to the IPLAA, the Swakopmund Protocol, and the Indigenous Knowledge Act as potential alternatives for finding definitional clarity on questions that relate to copyright law and the intangible, sacred, and communal nature of some products of traditional cultural expression. In relation to the IPLAA, the chapter recommends that the meaning of an indigenous community should be read not only in light of the provisions of the IKS Act, but also instruments such as the Swakopmund Protocol to find greater definitional clarity on the ever evolving sphere of indigenous knowledge systems and the indigenous community. As regards the Swakopmund Protocol, the chapter commended the Protocol's wider definition of indigenous community, intangible works, and products of sacred cultural expression, and notes with regret that South Africa is not yet a signatory to the Protocol. This contextual and purposive reading of the meaning of an indigenous traditional community comports with the decolonial imperative of ensuring that the marginalised epistemologies are re-centred within the knowledge production space despite their not conforming to Eurocentric copyright law strictures.

7.7 **Copyright limitations and exceptions**

In Chapter 6, Kelbrick's observation that there is a need to differentiate how intellectual property law is taught in developed countries and developing countries, is supported.[520] Kelbrick's assertion on differentiation is a departure from the framing of intellectual property law protections as espoused by the TRIPS Agreement,[521] which requires that all countries, whether developing or developed, should provide the same minimum level of protection for intellectual property rights.[522]

There is no better topic to illustrate Kelbrick's assertions than copyright limitations and exceptions. Chapter 6 found that, drawing from Kelbrick's insights, a decolonised copyright curriculum will require an engaged study of the varying socio-

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519 On the African meaning of persons as the alive, dead, and yet-to-be-born see generally, Taylor D 'Defining Ubuntu for Business ethics – Deontological approach' (2014) 33/3 *South African Journal of Philosophy*.

520 Kelbrick R 'The need for different perspectives' 39.

521 This is an agreement establishing the World Trade organization (WTO) which reflects the outcome of the Uruguay round of the GATT negotiations that lasted from 1986 through 1994.

522 Visser C 'Some thoughts on making Intellectual Property Work for Traditional Knowledge' 657.

economic, social, political, economic, and cultural situations in developing countries and contrast these with those in the developed countries. With the appreciation of the varying conditions and situations, the dissertation recommends that the curriculum should present copyright limitations and exceptions in the context of the needs of a specific country. This represents a radical shift in the current teaching methods which seek to paint a picture of intellectual property rights as following the same set of patterns the world over.

Bently and Sherman[523] posit that,

> the restricted approach [to fair dealing] adopted in the United Kingdom should be contrasted with the United States of America's copyright law,[524] which has a general defence of *fair use* such that if the court is satisfied that the use is fair, then there will be no infringement.[525]

The court noted that the Copyright Act must be capable of being interpreted in a manner that is consistent with the Constitution.[526] The dissertation recommends that a decolonial copyright law curriculum needs to take heed of the argument made by Shay, where he insists that in light of the guarantee of the freedom of expression as espoused by our Constitution, the fair dealing exception must be interpreted holistically and in a purposive manner.[527] Fair dealing, and all other copyright exceptions and limitations are already an expression of the contradictions inherent in the interests of the individual and of the community.

7.8 **Recommendations**

Having laboured into an enquiry of the content of copyright law as taught in South African law faculties, with a specific aim to decolonise this specific aspect of the copyright law curriculum, this dissertation makes various concrete recommendations for copyright law teachers.

As regards the transformation of higher education broadly, and the LLB curriculum specifically, the dissertation recommends that implementers of transformation

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523 Bently L & Sherman B *Intellectual Property Law* 224.

524 US Copyright Act of 1976, s 107.

525 *Hyde Park Residence Ltd v Yelland, News Group Newspapers Ltd, News International Ltd, Murrell* CA 10 Feb 2000 EMLR 363 para 21.

526 *Moneyweb (Pty) Ltd v Media 24 Ltd & Another* [2016] 3 ALL SA 193 (GJ), 2016 (4) SA 591 para 124.

527 Shay R '*Moneyweb (Pty) Ltd v Media 24 Ltd & Another* [2016] 3 ALL SA 193 (GJ), 2016 (4) SA 591' *South African Intellectual Property Law Journal* 168.

should break free from formalist and positivist perceptions, and instead appreciate that the law is a discipline that is not divorced from broader society and it should be studied in conjunction with, and with the context of, non-legal subjects such as philosophy, politics, sociology, sciences, theology and others. It further recommends that law teachers should desist from any approach that centres or deifies the Constitution of the republic. The dissertation makes this recommendation in light of theorisation that locates the deification of the Constitution in apartheid and related colonial schools of thought. The dissertation appreciates the Constitution as forming part of the varying contestations about the true meaning of the legacy of South Africa's democratic project.

As regards decolonisation of the curriculum, the dissertation recommends that law teachers should begin by distinguishing between colonialism and coloniality when teaching students about the depth, and reach of colonialism in the curriculum. It further recommends that students should be made aware of the three localities of coloniality, and that the scholarly work about the coloniality of Being serves as a good example to make students understand the subtle nature of the operations of the global colonial system that continues to exist even after the demise of legislated colonialism.

The dissertation revealed that students experience colonial education as alienating as they are unable to identify with the content that is taught. To remedy this, it is recommended that decoloniality should be understood to mean, inter alia, that the curriculum ought to be structured in a way that students are given an opportunity to immerse themselves in the curriculum; to be encouraged to think, reason, and write critically, guided by their lived experiences.[528] Decolonisation allows the student a voice to critique, reason, and insert him/herself in the curriculum. The student is thus empowered to question a Eurocentric copyright law, and to add to the discourse of reforming the law.

As regards the justificatory theories, the dissertation recommends that the African philosophy of Mohlomism should be used to teach the incentive to innovate theory, and that a deepened study of African modes of communal living should be used to

[528] The research deliberately uses the word 'guided' because the image of guiding is different from that of dictating. The current Eurocentric curriculum in its format dictates to the student what is right and what is wrong. A truly decolonial curriculum allows the student to be and it uses existing literature to guide rather than to restrict, dictate, or confine the student.

teach the labour theory. These two theories are posited as alternatives to Eurocentric intellectual property law justificatory theories.

As regards the nature of copyright, the dissertation recommends that the current five characteristics of copyright as used to define copyright by student textbooks should be studied through a decolonial lens. It understands that decoloniality will achieve to, for example, transform the 'negative' nature of copyright law from one that merely prohibits people from certain actions to become instructive, proactive and helpful in mediating competing societal interests that sometimes emerge through instances of cultural appropriation.

The dissertation further recommends that moral rights in a decolonised copyright curriculum should be taught using three pillars, these are respect, recognition and Ubuntu. It specifically recommends that the philosophy of Ubuntu should be rescued from the current neo-colonial habits with which it is currently canvassed in the academy and the courts.

As regards the requirements of originality and material embodiment, the dissertation recommends that law teachers should make students attentive of the colonial nature of originality, as it draws its being from individualistic labour theory, which assumes that an author is always an individual, or a group of individuals (either as co-authors or communal authors). Law teachers should also create an environment of pluriversal[529] epistemic reasoning in discussions about the material embodiment requirement, showing students that this requirement assumes that expressions only fit the ambit of intellectual property only when it is materially embodied which makes most traditional cultural expressions to fall out of copyright protection. This Eurocentric conception of the material embodiment requirement makes traditional cultural expressions to be vulnerable to colonial and commercial exploitation.

As regards copyright limitations and exceptions, the dissertation recommends that the curriculum should embrace a context-sensitive approach in teaching students

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529 Santos B de S *Epistemologies of the South: Justice against epistemicide* 172, the author stresses that a crucial part of the decolonial dialogue is appreciating the epistemic need for a pluriverse in place of a universe, he argues that '[t]here is no single, univocal way of not existing. The logics and processes through which metonymic reason produces the nonexistence of what does not fit its totality and linear time are various. Nonexistence is produced whenever a certain entity is disqualified and rendered invisible, unintelligible, or irreversibly discardable. What unites the different logics of the production of nonexistence is that they are all manifestations of the same rational monoculture.'

about the various statutory limitations. It recommends that a decolonial copyright curriculum should explicitly differentiate between the global South and the global North, and use this differentiation to teach students to be critical of the uniformity of global intellectual property regime which is driven by capitalist expansionist aspirations.

7.9 Concluding remarks

This dissertation poses a two-fold question to invite decolonial dialogue in the copyright law curriculum: (1) What is the starting point in seeking to decolonise higher education? and (2) What does the practical project of decolonisation entail as regards the curriculum and copyright law pedagogy? The various chapters have responded decisively by critically examining extant Eurocentric theories which underpin the current copyright regime. It has assessed existing legislation and juxtaposed it with the content of the curriculum as presented in South African law faculties.

The dissertation observes that the starting point in seeking to decolonise higher education is a deepened theoretical, abstract, philosophical, and intellectual understanding of the entrenchment of the colonial order post the official colonial period. This steers clear of disciplinary decadence, instead preferring to grapple with the prevailing conditions holistically. In other words, a copyright law curriculum is not studied in isolation or exclusively, but rather in light of its position in the global coloniality project. The dissertation thus insists that no logical decolonial enquiry can be undertaken before there has been a proper analysis of the three manifestations of coloniality – Being, power, and knowledge. Furthermore, where the curriculum and higher education in general are concerned, the systematic operation of the coloniality of Being must be the first target, with the coloniality of power and knowledge following naturally.

On a practical level, decolonisation of the copyright law curriculum recognises the missing voices (epistemology) of the Black Body, Africans, the subaltern, and the global South. This is exposed by various copyright law concepts that contradict the basic values of the proverbial ‘Other’. Even where contradictions are not apparent, the copyright narrative, on a conceptual level, remains obscenely skewed as it reflects only the epistemic traditions of, mostly white males from Europe. The

immediate task is to engage in deliberate research which will disinter and resuscitate the silenced epistemologies of the Black Body and re-member them in the family of existing knowledge(s).

Decolonisation studies the role of the different actors in the curriculum. At the centre of this study is how colonial education has created fixed classroom roles in which the teacher is omniscient and the student is the perpetual infant who must be spoon-fed (if not suckled) by the teacher.[530] The decolonial project demands a radical break with this type of didactic to a pedagogical framework that embraces both the teacher and the student as bearers of knowledge and in which assessment methods are structured to reflect this reality.

The intended outcome of epistemic decolonisation and conceptual Africanisation that is the African lens, is to achieve a pluriversal epistemic tradition in an academy which embraces different ways of knowing, doing, and thinking, and which appreciates that superior logic is divorced from the colour of the skin and the geographic, political, and historical positioning of the source. Such an approach succeeds in re-humanising the dismembered Black Body whose knowledge(s) continue to be regarded as sub-knowledge, at best, or just plain voodoo, at worst.

The copyright law curriculum offers the academy a rare opportunity to practically test in practice, the application of the proposals and recommendations brought to the fore by the decolonial discourse. This dissertation sets a firm basis upon which further work can be undertaken to achieving a truly decolonised higher education and copyright law curriculum.

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530 Biko S 'Black Souls in White Skins' in Steve Biko *I write what I like – Selected Writings* 24. The author makes the point that the racist status quo in colonial territories in South Africa is that the education system follows a pattern of superior-inferior white-black stratification in which the white person is the perpetual teacher and the Black Body is a perpetual student. The author further bemoans white arrogance, suggesting that white people should desist from the false thinking that they should always lead in innovation, research, and knowledge production, but rather be attentive of alternative epistemologies. This is a point that is strongly made by Lembede A 'Freedom in Our Lifetime' 91 where he argues that the effect of colonial education is that it reduces the (black) student to a perpetual minor, thus negating his or her Being and ability to produce knowledge.

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