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Comparative intellectual property law distinguishes between two systems of protection. On the one hand, the “Copyright” system, and on the other, the “Droit d’auteur” system. Through a process of legal acculturation, the opposition between these two systems has been transposed to Africa, despite similar cultures and socio-economic conditions. This opposition is tending to become less pronounced, but closer resemblances are worth considering.

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Comparative intellectual property law distinguishes between two systems of protection. On the one hand, the "Copyright" system, and on the other, the "Droit d'auteur" system. Through a process of legal acculturation, the opposition between these two systems has been transposed to Africa, despite similar cultures and socio-economic conditions. This opposition is tending to become less pronounced, but closer resemblances are worth considering.

Keywords: africa, copyright, droit d'auteur, literary and artistic property, oapi, aripo, acculturation.

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'[Laws] must be adapted to the character, customs, of the people for whom they are made'
(Portalis)

I. INTRODUCTION

Law is, at least in principle, a reflection of a given culture. This is well expressed by the Roman adage *ubi societas ibi jus*. This adage can be interpreted to mean that there can be no society without law, but also that each society secretes or generates its own law. This second interpretation refers to the differences between legal systems in space and time.

Law is the result of a more or less slow historical evolution. It may be the result of the reception of an exogenous system, particularly through

colonisation¹. This reception of a foreign law may be more or less successful². It may contribute to the overall transformation of a legal system. It may simply be a factor of improvement. This is known as legal *acculturation*. This acculturation may be more or less complete. In this case, unfortunately, it sometimes leads to "deculturation". Nevertheless, there are often phenomena of "counter-acculturation", particularly in a field such as family law³.

In Africa, the various States first received laws from the former metropolises by colonisation and then voluntarily⁴. In many areas at least, a phenomenon of legal acculturation can be observed on this continent. In the field of literary and artistic property, for example, the "Copyright" system on the one hand and the "Droit d'auteur" system on the other have been received in Africa.

For a long time, the laws of the metropolises were applied on the African continent, including in matters of literary and artistic property. Then the various states gradually gained independence and, over the years, adopted their own laws on literary and artistic property. In general, these laws are inspired by those of the former metropolises. Other States have simply continued to apply the law of their former metropolis for a long or even

¹ V. Papachristos, *La réception des droits privés étranger comme phénomène de sociologie juridique*, LGDJ 1975. - E. Agostoni, *Droit comparé*, PUF, 1988.6 N. Rouland, *Anthropologie juridique*, PUF 1988, n° 206 et seq.

² J. Carbonier, *Sociologie juridique*, PUF, coll. Quadrige, 3th edition 2016, p. 377 et seq.

³ Family laws incorporate a great deal of Customary laws

⁴ Papachristos, *op. cit.*

very long time. Examples include the Comoros⁵, Madagascar⁶ and Chad.⁷

After their independences, African countries began to harmonize or unified their systems for protecting intellectual property in general and literary and artistic property in particular. This led to the creation of two organisations. The first is the African Intellectual Property Organisation (OAPI)⁸, whose members are mainly French-speaking, and the second is the African Regional Intellectual Property Organisation (ARIPO), whose members are mainly English-speaking. The first organisation was created in 1962⁹ and the second in 1976.¹⁰

Both organisations aim to harmonise literary and artistic property law in their respective areas. Concerning OAPI, a supranational text constituting a conventional minimum was adopted in 1977 and amended in 1999 and again in 2015. This is Annex VII of the Bangui Agreement¹¹. As for ARIPO, it has chosen to harmonise literary and artistic property by means of a model law on Copyright¹²

It might have been expected that on a cultural issue of such importance, the various African states would adopt the same system of protection. However, despite considerable convergence, there is opposition between the OAPI States and the

ARIPO States. On the one hand, there is the influence of the so-called "Copyright" system, and on the other, that of the "Droit d'auteur" system.

This raises the question of whether « counter-acculturation » might not be useful, both to respect many traditions and to adapt the law to African society or societies. Is not the similarity of the cultures of the various African states an argument in favour of greater harmonisation, even if, on many points, it has already been possible to attenuate many differences ?

There may be an interest in understanding or explaining the import of the opposition between "Copyright" system and "Droit d'auteur" system in Africa before justifying the interest of greater approximation between African laws relating to intellectual property.

II. THE REASONS OF AN IMPORTANT OPPOSITION

When it comes to literary and artistic property, if we look at the various African national and supranational texts, we can see that there is opposition both in terms of the scope of protection and its content and enforcement.

2.1. *The scope of Protection*

A comparative study of African texts reveals opposition between the "Copyright" and "Droit d'auteur" systems, both in terms of the rules governing the protection of works and those governing the beneficiaries of protection, i.e. the ownership of rights. However, this opposition could disappear in many respects if the socio-cultural similarities between many African countries were taken into account.

2.1.1 *Eligibility for Protection*

With regard to protected creations, most African laws bear the imprint of either French or English texts. French and English law have historically taken two different approaches to the conditions for protection of intellectual works. This has an influence on the often indicative list of protected works.

⁵ To date, the Comorian text on copyright is the 1957 French law on copyright. In fact, as the Comoros is a member of the OAPI, the OAPI text (Annex VII of the Bangui Agreement) is supposed to apply there. French law incorporated into the legal system of the Comoros can only be applied on a subsidiary basis.

⁶ For a long time, Madagascar applied the French law of 1957. This law has now been extended to include the protection of "works of folklore".

⁷ Chad only adopted its own law in 2003.

⁸ Organisation africaine de la propriété intellectuelle

⁹ Office africain et malgache de propriété intellectuelle (OAMPI), Septemeber 13, 1962. It becomes, in 2, february 1977, Organisation africaine de la propriété intellectuelle (OAPI).

¹⁰Industrial Property Organization for English-speaking Africa (ESARIPO) December 9, 1976. Itt becomes latter African regional intellectual property Organisation (ARIPO).

¹¹ The Bangui Agreement wich i s the OAPI Treaty has, today, ten Annexes. The Annex VII is related to literary and artistic property.

¹² ARIPO Model-Law on Copyright and Related Rights (2019)

With regard to the conditions of protection, it should be noted that the English Copyright system, or at least the legacy of this system, includes a condition of protection that is absent from the French "Droit d'auteur" system: the material fixation of the creation. Furthermore, there is a common condition for protection in both systems, originality, but with different approaches. This opposition between the French and English systems has been transposed to the African continent.

2.1.1.1. Fixation on a tangible medium

There are two approaches to the physical fixation of a work. The first is that the work is protected whether or not it is recorded on a tangible medium. This is the approach adopted by the "Copyright" system and by several laws of the African States in the OAPI area. Examples include the laws of Cameroon¹³ and Côte d'Ivoire¹⁴. This is also the choice made in Annex VII of the Bangui Agreement (text related to literary and artistic property in the OAPI space). As early as 1977, the principle of protection irrespective of the physical fixation of the work was affirmed in Article 2 of Annex VII to the Bangui Agreement. The revision of the text in 1999 merely confirmed this choice in Article 4 paragraph 2. The revision of Annex VII of the Bangui Agreement did not make any changes¹⁵

The other approach is that a creation can only be protected as literary and artistic property if it has first been fixed on a tangible medium. This is the British approach adopted by many African countries, including Ghana¹⁶, Kenya¹⁷ and Uganda¹⁸. In these countries, for an intellectual

work to be protected, it must be recorded in writing or registered or fixed in some other way on a tangible medium. The ARIPO Model Law also proposes this rule.¹⁹

In our view, there is no reason for this difference between African laws as regards the requirement of material fixation. It can only be explained by the reception of English law on the one hand and French law on the other. In reality, the cultural and socio-economic similarity in the majority of African countries should lead to an identical condition. The oral tradition should logically have led all African states to adopt the rule that the work is protected regardless of its physical fixation. We might also wonder whether this condition is not a financial obstacle for many creators. A number of cases have demonstrated the rigour and unfairness of this rule.²⁰

2.1.1.2. Two approaches of Originality

A study of some of the African texts that define the concept of originality reveals the influence of both the copyright system and the « Droit d'auteur » system. In the "Copyright" system, originality is defined objectively, whereas in the "Copyright" system, a subjective approach is adopted²¹. On the one hand, originality is synonymous with the absence of copying and is the result of skill, labour and effort. On the other, it is the manifestation or expression of the author's personality.

A rather subjective concept is affirmed, for example, in Benin's law²², Djibouti's²³ and Côte

the work has been written down, recorded or otherwise reduced to material form whether with or without consent ».

¹⁹ Art. 4.2 "Works shall be protected for as long as they are original and fixated irrespective of their mode or form of expression, as well as of their content, quality and purpose".

²⁰ Suprême Court of Ghana, *CFAO v Archibald*, February 28, 1964, *Ghana Law Reports* 1964, p.718 (refusal to protect the works of a composer who was unable to transcribe his melodies in written form or prove that they had been fixed on any medium)

²¹ D. Gervais "Originalité (s)", *Mélanges en l'honneur du Professeur André Lucas*, LexisNexis 2014, p.389.- A. Strowel, *Droit d'auteur et Copyright : Divergences et Convergences. Etude de droit comparé*, Brulant/LGDJ, 1993, n°335

²² Benin Copyright Act, art. 1^{er}

²³ Djibouti Copyright Act, art.6

¹³ Cameroon, Copyright Act, art. 13

¹⁴ Côte d'Ivoire, *Copyright Act*, art. 11: "Copyright protection is acquired from the moment the work is created, even if it is not recorded on a tangible media".

¹⁵ Art. 3.1 "The author of any original work of the mind shall enjoy, by the mere fact of its creation, an exclusive incorporeal property right in the work which shall be enforceable against all persons. This right shall encompass intellectual and moral attributes as well as economic attributes, as determined by this Annex".

¹⁶ Ghana Copyright Act, art. 1.2. b.

¹⁷ Kenya Copyright Act, art. 22.3. b

¹⁸ Uganda Copyright Act, art. 3.2. b : « A literary, musical or artistic work shall not be eligible for copyright unless— [...]

d'Ivoire's²⁴. These laws define an original work as one whose characteristic elements and form, or only its form, make it possible to identify its author. The reference to the individualisation of the author through the work evokes the imprint of personality and means that the laws of these States have opted for a subjective approach. The influence of French law on Malian law is clearest when it states that an original work is one "which is the manifestation of the imprint of the personality of its author"²⁵. According to Ivorian case law, this may result from the choice of a specific material.²⁶

The objective approach is found in English-speaking African countries. For example, the definition of originality can be found in the Kenyan law, which provides that protection of a work presupposes that:

"Sufficient effort has been expended on making the work to give it an original character".²⁷

Originality here seems to be defined, implicitly, not in terms of the author's personality but with reference to sufficient effort. In other words, any resemblance with the English approach is not accidental. To determine whether a work is original and therefore protectable, the judge will check that sufficient effort has been made to ensure that it is not a copy of an earlier creation.²⁸

According to Ghanaian law, a work is original if it is the fruit of the author's independent labour. Here too, the notion of the author's independent work is rather close to the objective meaning of originality.

²⁴ Côte d'Ivoire Copyright Act, art. 1^{er}

²⁵ Mali Copyright Act, art. 8

²⁶ Commercial Court of Appeal of Abidjan, RG n°308/2018, February 14, 2019, *Revue internationale du droit d'auteur (RIDA)* July 2022, p. 92 comment Ngombé

²⁷ Kenya Copyright Act, art. 22.3.a

²⁸ For an example, in Namibia, see *Southern Sun Africa v Sun Square Hotel (Pty)*, High Court of Namibia, Main Division Windhoek, April the 23rd 2018 [Namibia], *Revue Internationale du Droit d'auteur (RIDA)* January 2019, p.122, comment Ngombé. - see also *Prof. NzeleDavid Nzomo v Moses Nayami Anyangu and Competitive Edge Kenya*, High Court of Nairobi [Kenya], March the 16th, 2018, *Revue Internationale du Droit d'auteur (RIDA)* January 2019, p. 119, comment Ngombé

To find the approach best suited to Africa, the solution is undoubtedly not to be searched in tradition. Indeed, if we start from the principle that traditional artistic creation was not individualised, it will be difficult to accept the subjective notion of originality. As for the objective notion of originality, even if it does not appeal to the notion of the personality of the creator, it nevertheless implies the individualisation of the work

Instead, we should be looking at the aspirations of authors. Many of them expect fame and income not for the community but for themselves, personally and for their families. An analysis of case law shows that the difficulty of interpreting the notion of originality seems to arise more in African countries that have adopted the "Copyright" system²⁹.

2.1.2. Overview of protected works

Although there are a few, admittedly rare, differences between the various laws as regards the list of protected works, it should be noted that this list is not exhaustive. However, there is a difference on this point between "Copyright" and "Droit d'auteur" which is recreated in Africa, namely the understanding of sound recordings as a work admitted in one system and refused in the other.

Under the Copyright system, a phonogram is considered to be a work. In England, the 1988 Copyright Act lists sound recordings among the protected works. By sound recording is meant in particular the recording of the whole or any part of a literary, dramatic or musical creation, from which sounds reproducing the work or any part thereof can be obtained, whatever the medium or method of recording. In so-called "Droit d'auteur" countries, the phonogram is not considered a work because it does not meet the conditions of originality. However, its protection is not excluded. It is protected under neighbouring rights.

Here again, it can be seen that the former British colonies can be linked to the Copyright system,

²⁹ Ngombé, « News from Africa », *Revue Internationale du Droit d'auteur*, January 2019, p. 61.

whereas the majority of other African States are closer to the French *Droit d'auteur* system. In fact, only the laws of former British colonies list sound recordings among the protected works. For example, Ghanaian law³⁰ and Kenyan law³¹. The laws of former colonies of "*Droit d'auteur*" countries only provide for the protection of phonograms as neighbouring rights. This is the case of Congolese law³² or Senegalese law.³³

Rather than adopting a slavish or almost slavish copy of the English law, it was in our view possible to provide in these laws for the protection of phonograms solely under neighbouring rights. This would already result in the approximation of all African laws providing for the protection of neighbouring rights; the same approximation could be sought with regard to the beneficiaries of the protection. It should be noted that several laws of States in "Copyright" countries now provide for the protection of related rights. This is also the case concerning ARIPO model law.

2.1.3. Beneficiaries of protection

In both the "Copyright" and "*Droit d'auteur*" systems, it is stated that legal protection benefits the author of the work. However, this rule is not always applied with the same rigour in the two systems, so that the notion of author is understood in a rather broad sense in the Copyright system.³⁴

In the Copyright system, employment contracts and commission contracts change the rules for assigning ownership of rights. In French law, the central place occupied by the author and the so-called humanist approach to literary and artistic property have led the legislator adopt the opposite rule. Article L111-1 paragraph 3 of the French Intellectual Property Code states that the existence or conclusion of an employment contract or a commission contract does not entail

any derogation from the enjoyment of the rights granted to the author.

A cursory reading of African texts on literary and artistic property reveals the influence of the Copyright system, particularly in the former British colonies on the one hand, and that of "*Droit d'auteur*" in French-speaking countries on the other. However, in recent years there has been a noticeable rapprochement.

2.1.3.1. Influence of the two systems

Among the African laws bearing the imprint of English « Copyright » we can mention the law of Ghana, which provides that where a person creates a work in the course of employment under a contract for the provision of services or on commission for a third party, the rights in that work belong, in the absence of a legal provision or contractual stipulation to the contrary, to the employer or the person who commissioned the work. Similarly, the law of Kenya provides that Copyright initially belongs to the author except when the work is commissioned by a person who is not the employer or when the work is created under an employment contract. In such cases, the Copyright is deemed to have been transferred to the person who commissioned the work or to the employer, unless otherwise agreed.

Benin is a good example of the influence of « the *Droit d'auteur* » system on former French colonies. Under Beninese law, the author of an intellectual work is the person who created it. As such, he or she is the owner or, rather, the holder of the rights. This text specifies that copyright, even in a creation created under an employment contract or a commission contract is owned by the author. The influence of the French system can also be seen in Ivorian law, which also provides that the conclusion of an employment contract or a commission contract has no effect on the ownership of rights, this right being granted to the author.

2.1.3.2. Possibilities of reducing differences African laws

The difference highlighted above between African laws has no explanation other than the colonial

³⁰ Ghana Copyright Act, art. 1.1.e

³¹ Kenya Copyright Act, art. 22.1. e

³² Congo Copyright Act, art. 8

³³ Senegal Copyright Act, art. 2.1

³⁴ A. Strowel, *op. cit.*, n°276. – A. Françon, *Le droit d'auteur : aspects comparatifs et internationaux*, éditions Yvon Blais, Comansville, 1992

legal heritage. It is a reception without adaptation of a foreign law. It is in no way the result of a different conception of literary and artistic property between the African States. Therefore, it seems possible to envisage a uniform rule for all African States sharing the same culture.

It has been written that, since African society is based on "collectivism", the rule whereby rights are transferred to the employer or the person commissioning the work should be adopted³⁵. In truth, this adoption of a rule specific to the Copyright system has nothing in common with traditional African collectivism. Indeed, adopting the rule according to which in the case of a commission contract or an employment contract the rights do not arise on the author's head or are automatically transferred is not a rule for the benefit of a collectivity but for the benefit of an individual other than the creator of the work or a third party

In reality, such a rule should be set aside in favour of better protection for the author whenever they can be identified individually. The rule seems to meet the current expectations of creators of intellectual works, particularly in the field of music. It seems almost sure to us that the majority of African authors, if they were better informed, would opt for a solution closer to an individualist conception than to a so-called collectivist conception - society having evolved, it is not on this point that traditional African collectivism should manifest itself. If, moreover, we wish to respect the rule or the notion of "collectivism", it is perhaps not by granting ownership of the rights to the investor to the detriment of the creator that we find the solution, all the more so as the creator is already in an economically weak position.

To a certain extent, Annex VII of the Bangui Agreement may be considered to have come closer to the English system. In its 1999 and 2015 versions, this text provides that a work created under a commission contract or an employment contract is considered to be transferred to the employer to the extent justified by the usual

activities of the employer or the person who commissioned the creation of the work

Annex VII of the Bangui Agreement therefore reflects both the influence of French law on concerning the ownership of audiovisual works and that of English law on the automatic transfer of copyrights as for creation under an employment contract or a commissioning contract.

In our opinion, it is simpler, if we wish to preserve the imprint of French copyright, to provide that even in the event of a transfer of rights by operation of law, the creators of the work will receive separate and, in principle, proportional remuneration

2.2. The content of the protection and the enforcement of the protection

Numerous rules relating to the content and enforcement of literary and artistic property rights give rise in Africa to an opposition between the "Copyright" system and the "Droit d'auteur" system. They mainly concern the exploitation of works and exceptions.

2.2.1. Exploitation

Among the rules that characterise copyright we can mention those protecting the author concerning his relations with the assignee of his rights. These rules include the prohibition of the global assignment of future works except in favour of the societies of collective management organisations. They also include the existence of proportional remuneration, the enumeration of the rights assigned and the determination of the field of exploitation of the assigned works.

Under French law, for example, each of the rights assigned must be noted separately. Thus, providing that the transfer of the reproduction right alone does not constitute transfer of the performance right, and vice versa. If the various rights assigned must be noted, the same applies to the various methods of exploitation. Any ambiguity in the wording of the contract will be interpreted in favour of the author. The same provisions can be found in many African laws,

³⁵ D. Wafo "La protection du logiciel en Afrique", *Penant* 1995, p.170

mainly those of former colonies of "Droit d'auteur" countries, such as the laws of Senegal, Benin and Burkina Faso³⁶. There are no similar provisions concerning the remuneration or the global assignment of future works.

2.2.2. Exceptions

To illustrate the difference between the spirit of the Copyright system and the spirit of « Droit d'auteur » system, it is generally taught that in the copyright system the public interest is paramount, whereas in the « Droit d'auteur » system the public interest is confined within narrow limits³⁷. This difference is reflected in a broader acceptance of exceptions in the public interest in Copyright countries, whereas in "Copyright" the approach is more restrictive. This is reflected in the texts and in practice by the notion of "fair use" or "fair dealing" applied in English-speaking countries. On this point too, there is a difference between the former British colonies and the majority of other African states.

The laws of some former British colonies mention fair use as an exception to Copyright. For example, Kenyan law provides that the copyright owner may not restrict or control acts covered by the law by way of fair dealing for the purposes of research, private use, criticism or news reporting if any public use is accompanied by mention of its title and the name of its author, except where the work is incidentally included in a broadcast³⁸. On the other hand, the former colonies of "Droit d'auteur" countries use a restrictive list, as is the case in France. Examples include Senegalese law and Ivorian law³⁹.

On a continent where the need for access to knowledge for as many people as possible must take account of the socio-economic and cultural situation, an Anglo-Saxon approach would seem to be the most appropriate

³⁶ Senegal, art. 60 sq., Benin, art. 24 sq, Burkina Faso, art. 46 sq.

³⁷A. Françon, «Authors' rights beyond frontiers: a comparison of civil law and common law conceptions », *Revue internationale du droit d'auteur (RIDA)*, July 1991, p.2

³⁸ Art. 26.1.a

³⁹ Senegal, art. 38 sq. – Côte d'Ivoire, art. 24 sq.

III. JUSTIFICATIONS FOR SIMILAR LAWS

The opposition between "Copyright" and "Droit d'auteur" in Africa is attenuated. Firstly, the factors leading to harmonisation at international level have had their effect in Africa. Secondly, on some specific points, the African states and other developing countries have decided to adopt common rules for the continent as a whole. In Africa specifically, regional harmonisation shall be underlined.

3.1. The influence of international Conventions

On the whole, the influence of international conventions on African countries is the same as that experienced by other countries with one or the other system. For the essence of this rapprochement concerns the rights conferred, but we can briefly mention the question of formalities.

3.1.1. Formalities

In the laws of the former French and Belgian colonies, for example, formalities are not generally required as a condition of protection. On the contrary, the principle of automaticity of protection is used, as in the laws of Congo, Benin, Côte d'Ivoire, Cameroon and Togo.

It should be pointed out, however, that even some laws of former British colonies do not require formalities as a condition of protection. This is the case with Zambian law, which may be explained by the fact that Zambia, like most of African states, is a party to the Berne Convention. This convention provides for the principle of protection regardless of formalities, but this can also be explained by the influence of English law, which long ago abandoned the requirement of formalities as a condition of protection.

3.1.2. Content of the Protection

The accession of African states to the Berne Convention has led to the recognition of resale rights and moral rights in all African states, and the rules governing the duration of rights are virtually all.

With regard to the droit de suite, it should be noted that one of the distinctive features of the

French system, at least since 1920, has been to include a *droit de suite* among the author's economic rights. This right is an inalienable right to remuneration of creators of graphic and plastic works. Authors can receive a percentage of public resale of their works. Historically, this right was not recognised in the British states or in the United States, except in some states such as California.

This right is conferred by some African laws, including those of former British colonies, such as the Nigerian law, which stipulates in the 1988 version that authors of graphic and plastic works and manuscripts have an inalienable right to share in the proceeds of any sale of the work or manuscript made at public auction or through a vendor of any sale of this work or manuscript made at public auction or through a vendor. This is the influence of the Berne convention. This right is also provided for by Annex VII of the Bangui agreement. The question is whether such a right is compatible with African culture and. And if so, is it useful ?

In Africa the art market is not as developed as that in Europe. It is also true that we do not attend auctions such as those held at the Hôtel Drouot in Paris, for example. However there is a great deal of African artistic creation. It should also be noted that the rule adopted by the majority of African States is in line with the current reality of artistic creation in Africa: painters and sculptors today hope to make a good living from their art.

The other element of rapprochement concerning the content of protection relates to moral rights, which were rather emblematic of the French system of protection of intellectual works. Both African laws inspired by the copyright system and those inspired by « *Droit d'auteur* » contain provisions relating to moral rights. However, it could be said that some countries recognise a French-style moral right, while others only

recognise an embryo of moral rights as provided for by the Berne Convention⁴⁰.

In countries inspired by the French model, moral rights have the same characteristics and the same attributes, namely the right of disclosure, the right of paternity, the right to respect the creation and, in some countries, the right of withdrawal and repentance.

Among moral rights, Ghanaian law, for example, provides for the right to respect, which allows the author to oppose any distortion, mutilation or other modification that might damage his honour or reputation. Ghanaian law provides that moral prerogatives are perpetual. This law also provides that the holder of rights may transfer all or part of his rights, with the exception of moral rights, which brings Ghanaian law very clearly into line with French law, with the exception of the reference to injury to honour or reputation (like in Berne Convention)

If we look closely at the laws of countries influenced by French law, for instance Beninese and Congolese law and Gabonese law, we see that the term of protection is the same as that provided for in France. We can also see that moral rights are inalienable and imprescriptible. However, there is a reference to honour and reputation concerning the right to respect, which shows that the text is mainly influenced by the Berne Convention. Moreover in many African laws there is no mention of the right of withdrawal and repentance, which these laws have borrowed from French law.

It is to be welcomed that the adoption of moral rights is not complete. It should be remembered that the theory of moral rights is the result of a slow evolution, so moral rights as currently enshrined in African countries seem to be sufficient, and the relative rapprochement between former British colonies on the one hand and former French and Belgian colonies (for

⁴⁰ Ngombe, « Les droits moraux dans les lois africaines – Regard synoptique sur les textes des États membres de l'OAPI et de l'ARIPO », *Cahiers de la propriété intellectuelle*, vol. 25, n°1 (2013), p. 1

example) on the other is only the result of the accession of these States to the Berne Convention.

What about African culture concerning moral rights? The collectivist vision of traditional society does not sit well with a right attached to the person of the author and aimed at ensuring respect of the link between that person and his work. For this reason, one author proposed that in Africa moral rights should be reduced to their simplest expression, but today's literary and artistic creation has entered the individualist sphere, at least in many areas.

In our opinion, moral rights are not in keeping with African realities. How many African authors will renounce the authorship of their works under the pretext of traditional collectivism? How many African authors will see their works mutilated or altered without being moved by this?

We will conclude on this point by saying that the differences between African laws are not so significant that harmonization is indispensable. It would be wise to wait for what practice will teach. If we absolutely wish to take into account traditional « collectivism », we can grant a more significant role to the community after the author's death. After the term of protection of the moral right, it would be exercised by the community via the national copyright office, which would thus defend its national heritage.

However, the OAPI has adopted a different solution since, under the Bangui Agreement, moral rights are unlimited in time. As for the attributes of moral rights, the revised Annex VII of the Bangui Agreement has adopted the four rights provided for under French law.

3.2. Closer links at regional level

Harmonizations at regional level is bringing « Copyright countries » and « Droit d'auteur » countries closer together in Africa reduces both legal acculturation and the differences between the two systems in Africa: on the one hand, non-voluntary licences and, on the other, the protection of traditional cultural expressions and the paying public domain.

As far as non-voluntary licences for translation and reproduction are concerned, we can simply point out that, generally speaking, African texts include a non-voluntary licence among the exceptions and that, on this point, the divide between « Copyright » and « Droit d'auteur » completely disappears in favour of a common need on the part of African States. This common need, which exists in all developing countries, has led African states to demand and obtain the right to derogate from specific rules of the Berne Convention. This has enabled states to include provisions on non-voluntary licences, but these exceptions do not seem to be applied and their usefulness has been questioned. We can now predict that they will inevitably disappear from the legislative corpus of many of the African states.

Among the provisions characterising African texts relating to literary and artistic property are those relating to the protection of traditional cultural expressions. On this point, there is no difference between former British colonies and former colonies of copyright countries former French colonies.

This protection responds to a common concern of African States, which is also shared with other countries. Many texts list traditional cultural expressions among the protected creations. Ownership of the rights to these creations is exercised on behalf of the national community by the organisation responsible for the collective management of rights. The use of creations from the national heritage is in principle subject to the payment of a royalty collected by the collective management organisation. These rules are set out both in texts inspired by copyright law and in those borrowed from the Copyright system⁴¹.

It has been argued that the inclusion of traditional cultural expressions in copyright protection would call into question the principle of the free circulation of ideas⁴², on the grounds that

⁴¹ Ngombe, « Protection of Folklore by Copyright Law : Questions that Are Raised in Practice », *Journal of the Copyright Society of the USA*, Winter 2004, p.437.

⁴² J.-F. Gaudreault-Desbiens, « La critique autochtone de l'appropriation culturelle comme défi à la conception

recognising the protection of myths or epics is tantamount to recognising the protection of ideas. To avoid going into the matter at length, we can simply object that traditional cultural expressions, even as defined by the Bangui Agreement or the Swakopmund Protocol⁴³ or the texts of many African States, are not limited to myths or epics. There can be no doubt, for example, that the protection of a traditional song celebrating twins is indeed the protection of the expression of an idea and not the protection of the idea itself.

In reality, the protection of traditional cultural expressions leads not to contempt for the non-protection of ideas by copyright, but rather to the setting of a paying domain public for creations generated long before the recognition of literary and artistic property in Africa.

In fact, some works were created many years ago and whose author is unknown but with whom the community identifies. Moreover, a cultural traditional expression could have been created by an author which is still known. The most important is that works are considered to belong to the community in perpetuity and must be respected in their integrity or authenticity.

We can still consider that some of the works created in recent years have gradually become part of the national heritage and will be the property of the national community.

According to the Annex VII of the Bangui Agreement, the royalties that will be paid for the exploitation of works in the public domain will be half of the rate usually allocated. It would have been simpler to provide for this royalty by reference to that collected by the collective management organisation for the performance

occidentale de la propriété intellectuelle: le cas de l'appropriation critique », *Cahiers de la propriété intellectuelle*, (1999) 11 (available online : <https://www.lescpi/s/2041>).

⁴³ E.S. Nwauche « The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa », *Journal of World Intellectual Property* (2014) Vol. 17 (5-6) 191.- Y.L. Ngombé, « The Protection of Folklore in the Swakopmund Protocol Adopted by the ARIPO » , (2011) Vol. 14(5) *Journal of World Intellectual Property* 403.

and reproduction of its members' works. In this way, everything would be more easily defined and known.

The idea of a paying public domain can be both in keeping with African tradition and useful in today's context. Its justification may be as follows: one person benefits from a creation bequeathed to the community by another. The community can expect the creator of the second work or the new user to reward it. In concrete terms, this can take the form of the payment of a royalty which will be paid back to a social fund for artistic creators - a distribution key that meets a concern for equity can be found - for example, it can be envisaged that the income generated by musical works will benefit the community of musicians. Such social funds would enable creators and performers to have a better standard of living - this type of fund should be an element of the cultural policy of African States. In the same way that the collecting societies of the various States reciprocally collect rights on behalf of their sister societies, so too should they collect rights relating to the use of the cultural expressions of other states.

Today, a new issue offers African States the opportunity to adopt a uniform text. Indeed, artificial intelligence could be the subject of a regional text on literary and artistic property. Such a text could transcend the often unjustified opposition between "Copyright" and "Droit d'auteur" in Africa.

IV. CONCLUSION

Legal acculturation in the field of literary and artistic property is not in itself open to criticism. It is not the adoption of one or other exogenous system that is to be rejected, but rather one of its consequences. There are no cultural differences to justify them at a time when European States are increasingly trying to harmonise their legislations. However, there is no question of sticking to traditional laws.

Rather, while respecting traditions, it is advisable to be enriched by external contributions. As has been written, it is a logic of cultural accumulation that should be adopted, because "no culture

remains if it is not open to other.⁴⁴ This observation applies to the legal field in general and to literary and artistic property in particular.

In short, legal acculturation in the field of literary and artistic property raised at least two issues. First of all, we can wonder about its effects at domestic level. Secondly, at continental level we can note that this acculturation has the effect of opposing « Copyright » system and « Droit d'auteur » system in Africa.

At a time when there is increasing talk of harmonisation, it is to be hoped that the rejection of both « Copyright » and « Droit d'auteur » will lead to the emergence of common rules that are more in tune with Africa's socio-cultural reality. However, the artificial nature of imported rules should not be exaggerated, as there are many rules that meet the needs of those who contribute to the creation and dissemination of intellectual works in Africa. The important thing is to find laws that best correspond to the realities and aspirations of the African States. The right “*Jus*” for the “*societas*” concerned.

⁴⁴ G. Bidima, *Philosophie la philosophie négro-africaine*, PUF, coll. Que-sais-je ?, 1995, pp. 103 sq.

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