

ROUTLEDGE RESEARCH IN INTELLECTUAL PROPERTY

# Intellectual Property Policy, Law and Administration in Africa

Exploring continental and  
sub-regional co-operation

Caroline B. Ncube



ROUTLEDGE

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# List of abbreviations

ABS	Access Benefit Sharing
ACTRIPS	Advisory Council on Trade-Related Innovation Policies
AEC	African Economic Community
ALI	The American Law Institute
AMCOST	African Ministerial Conference on Science and Technology
APEC	Asia-Pacific Economic Cooperation
ARIPO	African Regional Intellectual Property Organisation
ASEAN	Association of South East Asian Nations
ASPEC	ASEAN Patent Search and Examination Cooperation
AU	African Union
AU-STRC	Scientific, Technical and Research Commission
AWGIPC	ASEAN Working Group on IP Co-operation
BRICS	Brazil Russia India China South Africa
CCM	MERCOSUR Council of the Common Market
CDIP	WIPO Committee on Development and Intellectual Property
CDR	Community Design Regulation
CEN-SAD	Community of Sahel-Saharan States
CEPA	UN's Committee of Experts in Public Administration
G-FTA	Continental Free Trade Area
CMA	MERCOSUR Common Market Group
CMG	Common Market Group
CMTR	Community Trade Mark Regulations
COHRED	Council on Health Research for Development
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organization
CTI	Committee on Trade and Investment
CTM	Community Trademark
CU	Customs Union
DA	Development Agenda
DAG	Development Agenda Group
DFID	UK Department for International Development
DPADM	UN Division for Public Administration and Development

- Management
- DRC Democratic Republic of the Congo
- DST South Africa's Department of Science and Technology
- DTI South Africa's Department of Trade and Industry
- EAC East African Community
- ECCAS Economic Community of Central African States
- ECJ European Court of Justice
- ECOWAS Economic Community of West African States
- ECSA-HC East, Central and Southern African Health Community
- EFTA European Free Trade Association
- EPA Economic Partnership Agreement
- EPO European Patent Office
- ESARIPO Industrial Property Organization for English-speaking Africa
- EU European Union
- FDI Foreign Direct Investment
- FTA Free Trade Agreement/Free Trade Area
- GATS General Agreement on Trade in Services
- GATT General Agreement on Tariffs and Trade
- GR Genetic Resources
- HIV/AIDS Human Immunodeficiency Virus/Acquired Immune-Deficiency Syndrome
- HRS&T AU Human Resources, Science and Technology
- ICT Information and Communications Technology
- IGAD Intergovernmental Authority on Development
- IGC Intergovernmental Committee
- IGOs Intergovernmental Organizations
- IK/IKS Indigenous Knowledge/Indigenous Knowledge System
- INPI French National Patent Rights Institute
- IOC Indian Ocean Commission
- IP/IPR Intellectual Property/Intellectual Property Right
- IPDP Intellectual Property Development Plan
- IPEG IPR-Experts Group
- IPR-GT Intellectual Property Rights Get Together
- JPO Japan Patent Office
- LDC Least Developed Country
- MERCOSUR Mercado Común del Sur (Common Market of the South)
- MTC MERCOSUR Trade Commission
- NEPAD New Partnership for Africa's Development
- NRS National Recordal System
- OAMPI L'Office Africaine et Malgache de la Propriété Industrielle
- OAPI Organisation Africaine de la Propriété Intellectuelle (African Intellectual Property Organization)
- OAU Organization of African Unity
- OECD Organisation for Economic Co-operation and Development

OHADA	L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (Organization for the Harmonization of Business Law in Africa)
OHIM	EU Office for Harmonization in the Internal Market
PAIPO	Pan-African Intellectual Property Organization
PBR	Plant Breeders Rights
PCT	Patent Cooperation Treaty
PRA	Property Rights Alliance
PSA	Partial Scope Agreements
PTA	Preferential Trade Agreement
PVP	Plant Variety Protection
R&D	Research and Development
REC	Regional Economic Community
RIA	Regional Integration Arrangement
RISDP	Regional Indicative Strategic Development Plan
RSTI	Research, Science, Technology and Innovation
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordination Conference
SARPAM	Southern Africa Regional Programme on Access to Medicines and Diagnostics
SCCP	APEC Sub-Committee on Customs Procedures
SIPO	State Intellectual Property Office of the People's Republic of China
SME	Small and Medium Enterprises
STI	Science, Technology and Innovation
STISA	Science, Technology and Innovation Strategy
T-FTA	Tripartite Free Trade Area
TIDCA	Trade Investment and Development Cooperation Agreement
TK	Traditional Knowledge
TMD	Trademark Directive
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods
UMA/AMU	Arab Maghreb Union
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNIDROIT	International Institute for the Unification of Private Law
UPOV	International Union for the Protection of New Varieties of Plants

USPTO United States Patent and Trademark Office  
WHO World Health Organization  
WIPO World Intellectual Property Organization  
WTO World Trade Organization

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# Preface

This book seeks to examine efforts to harmonize IP policy, law and administration in Africa. The last several years have seen heightened interest in IP matters as they pertain to Africa. Two recent developments spurred me to write this book. The first is the current sub-regional attempt to operationalize the IP provisions found in the Southern African Development Community (SADC)'s Protocol on Trade (1998) and its Protocol on Science, Technology and Innovation (2008). SADC's efforts are augmented by the SADC, East African Community (EAC) and Common Market for Eastern and Southern Africa (COMESA) Tripartite Free Trade Agreement (T-FTA) and its IP Agenda, as contained in an Annex to the T-FTA Agreement. The T-FTA was launched in June 2015 and is slated to merge with the Economic Community of West African States (ECOWAS), as a major step towards the establishment of a continental FTA (C-FTA). These regional economic communities have already incorporated IP into their integration agendas, making IP a focal point for sub-regional and regional integration. Any further IP initiatives emanating from the C-FTA will have an impact on the 35 African states that constitute it.

The second development is the escalation of long-standing efforts to establish a Pan-African Intellectual Property Organization (PAIPO), a continental initiative. The AU has passed a decision for its creation and an offer has been made by Tunisia to host its Secretariat. Therefore, all indications are that PAIPO will be operationalized in the short-to-medium term. This will create a continental IP organization. If it eventuates, IP will take a new continental significance. In view of these far-reaching developments, this is an opportune time to evaluate African states' approach to IP and its alignment to their development aspirations. Such an evaluation will proffer some suggestions as how best to manage both developments in a way that ensures that socio-economic development on the continent is not compromised.

*Unless where indicated otherwise, this book discusses the law and events, as known to the author, as at 1 March 2015.*

# Foreword

Caroline B. Ncube has written an important and most welcome book. It is the first comprehensive examination of the substantive intellectual property (IP) regimes and institutional as well as policy frameworks in Africa. It examines efforts at the sub-regional and continental levels to harmonize and cooperate around IP issues. In so doing, Professor Ncube has made visible the tensions and trade-offs in pursuing substantive harmonization of IP regimes, on the one hand, and unification, on the other. She also examines how these regimes, institutions and policies are suited to the many varied African conditions and the challenges harmonization and cooperation raises in light of the differing legal traditions, for example civil as opposed to common law, overlapping sub-regional trading frameworks and competing sub-regional IP regimes. For some regimes such as the Organisation Africaine de la Propriété Intellectuelle, (OAPI), and the Organization for the Harmonization of Business Laws in Africa (OHADA), unification has been the choice. That is why the book endorses 'malleable harmonization models' as opposed to unification and in the process recommends looking to the ASEAN region for inspiration for structuring such a process of enabling 'appropriate calibration of national IP systems.' The author also critically explores the divergence between the support African countries have given to the World Intellectual Property Organization's Development Agenda with what she considers to be their surprising support of proposed Pan-African Intellectual Property Organization (PAIPO) that has no similar developmental objectives.

A major strength of the book is the way in which it examines the extent to which existing IP regimes, institutions and policies are appropriate fits for different African experiences. Ncube argues that to suit IP regimes, policies and institutions to these diversity of circumstances requires 'policy and legislative space for national nuancing.' The overall framework the book adopts is based on viewing the international IP regime complex as anchored in the WTO as one in which there is a balance between the rights of IP holders and the interests of IP users. That balance, reflected in various flexibilities embodied in the TRIPS Agreement and related instruments inspires the manner in which the book discusses IP regimes in Africa. Understandably therefore the book raises the question of why many African LDCs have already adopted WTO TRIPS type laws even though they are not yet legally required to do so. That question is all the

more poignant because the book shows that many African national IP regimes have colonial origins and their development has continued to be transplants of European and American IP regimes rather than adapting them to fit local circumstances and priorities. Perhaps the efficacy of these transplanted regimes can only be as effective as they reflect local circumstances and priorities. As Funmi Arewa has recently shown, the rise of digital technologies resulted in the rise of a global movie industry in Nigeria at a time when there was very weak copyright protection there. Entrepreneurs, pirates and creators worked together in ways that have now created opportunities to monetize this industry that has a global reach. Ncube's book contributes to how the interests and concerns of creators, users and society ought to be taken into account in IP regimes. For taking this perspective, the book is a welcome, refreshing and important addition to understanding IP regimes in Africa. The book represents a new generation on IP scholarship that takes seriously and as a central objective the interests and concerns of a broad swath of stakeholders in the IP regime complex in Africa. Others must follow suit and take forward the research agenda this book wonderfully sets out.

James Thuo Gathii

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# Contents

<i>List of abbreviations</i>	ix
<i>Acknowledgements</i>	xiii
<i>Preface</i>	xiv
<i>Foreword</i>	xv
<b>1 Introduction</b>	<b>1</b>
<i>The Intellectual Property landscape in Africa</i>	1
<i>Overview and history of national IP laws</i>	2
<i>IP and the public interest</i>	5
<i>African states' diversity and the need for flexible and nuanced IP systems</i>	10
<i>African states' contribution to the articulation and formulation of the Development Agenda at WIPO</i>	12
<i>TRIPS implementation by African states</i>	14
<i>Book overview</i>	31
<b>2 IP policy frameworks in Africa</b>	<b>40</b>
<i>Introduction</i>	40
<i>The importance of IP policies in Africa</i>	43
<i>Factors affecting IP policy design</i>	44
<i>Technical assistance</i>	46
<i>REC IP policies</i>	51
<i>Country profiles</i>	52
<i>Conclusion</i>	60
<b>3 Sub-regional trade co-operation and integration</b>	<b>68</b>
<i>Introduction</i>	68
<i>Theories of regionalism</i>	69
<i>The AU and the AEC</i>	73
<i>The relationship between community laws and national laws</i>	76
<i>COMESA</i>	78
<i>EAC</i>	79
<i>ECOWAS</i>	82
<i>SADC</i>	83

*T-FTA* 86  
*Conclusion* 90

**4 Sub-regional IP co-operation** 97

*Introduction* 97  
*ARIPO* 98  
*OAPI* 109  
*Conclusion* 121

**5 Continental IP co-operation: PAIPO** 126

*Introduction* 126  
*Historical overview of the AU's efforts to establish PAIPO* 126  
*How PAIPO will function* 131  
*Policy imperatives – the PAIPO statute and the WIPO development agenda* 139  
*Conclusion* 139

**6 Key considerations in the development of IP harmonization models** 145

*Introduction* 145  
*IP co-operation* 146  
*Harmonization* 153  
*Lessons from existing harmonization efforts* 160  
*Conclusion* 165

**7 General conclusions** 176

*Index* 181

# 1 Introduction

## The Intellectual Property landscape in Africa

*Africa is not a country: it is a very heterogeneous continent comprised of . . . nations with great variations in physical, economic, political, and social dimensions.*<sup>1</sup>

This book considers the viability of the creation of a harmonized African continental and sub-regional Intellectual Property (IP) framework, keeping in sight the fact that African states<sup>2</sup> have different socio-economic, cultural and political contexts.<sup>3</sup> Their history is diverse, albeit with the widely held common experience of colonization<sup>4</sup> and the legal transplants it brought with it. Unsurprisingly, they each have unique national IP environments, which are comprised of statute and case law, policies and practices.<sup>5</sup> It is important to point out, at the outset, that the African IP landscape is multi-layered. In addition to relevant global and national frameworks, there are regional and sub-regional IP frameworks to consider, located either in an IP sub-regional organization or a Regional Economic Community (REC). This terrain is further complicated by the multiplicity of RECs, which currently number about 14,<sup>6</sup> of which only eight are recognized by the African Union as constituent elements of the African Economic Community (AEC).<sup>7</sup>

1 Broadman and Isik (2007) p. 5.

2 Africa has 57 states, 54 of which are members of the African Union (AU). Morocco is not an AU member state. The two disputed states – the Sahrawi Arab Democratic Republic and Somaliland – are also not AU member states. For a history of the Sahrawi Arab Democratic Republic see Jensen (2005) and Shelley (2004).

3 Collins and Burns (2013) p. 4.

4 With the exception of Ethiopia and Liberia, all of Africa was colonized by 1914 per Boahen (1990) p. 1. Liberia had been a colony of the United States from 1820–1847 per Kongolo (2014) pp. 163, 168.

5 Armstrong, de Beer, Kawooya, Prabhala and Schonwetter (2010) p. 5.

6 Kolbeck (2014) p. 3; African Union (AU) Study for the Quantification of RECs: Rationalization Scenarios, 2009 p. 34.

7 Kolbeck (2014) p. 3; Gathii (2011) p. 362; AU Decision on the Moratorium on the Recognition of RECs DOC.EX.GL/278 (IX). AU Doc. Assembly/AU/Dec. 111–132 (VII). The eight RECS are the Arab Maghreb Union (AMU/UMA); Community of Sahel-Saharan States (GEN-SAD); Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC);

Many African states are members of more than one REC,<sup>8</sup> which compounds the situation.

The book adopts Akokpari's conceptualization of a region as consisting of states in geographical proximity<sup>9</sup> and uses the word interchangeably with 'continental', to refer to Africa. The term 'sub-regional' refers to various continental sub-groupings. Legal harmonization is the approximation of legal standards across a defined community that permits national divergence, whilst unification is the imposition of exactly the same standards with no scope for national variances.<sup>10</sup> Whilst both approaches are currently in use in Africa, the African Union (AU)'s preferred approach is harmonization. This preference is shared by some RECs such as the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC). Similarly, harmonization is the mode of choice for the African Regional IP Organization (ARIPO), one of the continent's two sub-regional IP organizations. In contrast, the other sub-regional IP organization, the African Intellectual Property Organization, *Organisation Africaine de la Propriété Intellectuelle* in French (OAPI) and the Organization for the Harmonization of Business Laws in Africa (OHADA) have taken the unification approach.

This introductory chapter will provide an overview of existing IP laws in Africa and their historical development. The chapter will then introduce the concept of the public interest in IP and highlight African countries' unique challenges with an emphasis on the diversity of circumstances across the continent. This wide range of diversity necessitates an IP framework that permits sufficient flexibility to enable the appropriate calibration of national IP systems and equally malleable harmonization models. It will then turn to an overview of African states' contribution to the articulation and formulation of the Development Agenda (DA) at the World IP Organization (WIPO) which signaled a commitment to advancing the public interest in IP. Finally, it will briefly outline the status of African states' implementation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), with particular emphasis on how this implementation has been nuanced to meet African circumstances and needs through the use of flexibilities.

## **Overview and history of national IP laws**

Most African states currently have separate statutes providing for the different types of IP rather than one piece of omnibus legislation catering for all types of

Economic Community of Central African States (ECCAS/GEEAC); Economic Community of West African States (ECOWAS); the Inter-Governmental Authority of Development (IGAD); and Southern African Development Community (SADC).

<sup>8</sup> Gathii (2011) p. 65.

<sup>9</sup> Akokpari (2008) p. 88.

<sup>10</sup> Rachlitz (2014) p. 50.

IP. OAPI member states share the same body of IP laws as provided for in the Bangui Agreement Relating to the Creation of an African Intellectual Property Organization of 1977. The Bangui Agreement includes a series of Annexes that regulate copyright, patent, trademarks and designs, amongst other types of IP protection. OAPI's Anglophone counterpart, ARIPO's Protocols, do not have direct application in member states and have to be domesticated by party states. Consequently, each ARIPO member state has its own national IP framework. A detailed overview of the content of OAPI's Bangui Agreement and its Annexures, ARIPO's Protocols and the rest of Africa's individual IP laws has been given elsewhere<sup>11</sup> and thus falls outside the ambit of this book. Select laws are considered, as examples, where appropriate throughout the text.

The history of IP law in Africa is inextricably linked to colonial history. Some of the first iterations of African states' IP laws were legal transplants introduced by former colonialists well before the conclusion of the Paris and Berne conventions.<sup>12</sup> In other cases, the first colonial IP legislation was introduced after the conclusion and entry into force of these conventions.<sup>13</sup> The precise method of the enactment of these laws was comprised of two steps. The first entailed the submission, by the colonizing state, of a declaration of the application of the applicable international agreement to the colonized state. Declarations of the application of the Berne Convention were made in accordance with article 19 of the original text of the convention.<sup>14</sup> Declarations of the applicability of the Paris Convention were made in terms of article 16 bis (1)–(2) of the London Act of 1934 and the Lisbon Act of 1958 of the convention.<sup>15</sup> Second, the declaration of applicability of the international conventions was then followed by the extension of the colonizing state's copyright or patent legislation to the colony, or the enactment of legislation applicable only to the colonized territory.<sup>16</sup> In either case the law was created by the colonizing, rather than the colonized, state. Therefore, the goals and interests of the former, rather than the latter state, informed these IP laws.<sup>17</sup>

Many African states continued to adhere to these colonial laws after their independence<sup>18</sup> and the relevant international agreement upon which they were based. However, in some instances, after their independence some states did not immediately accede to the Berne Convention and enacted their own copyright law that repealed the colonial copyright legislation. A case in point is Ghana, which enacted its first post-independence Copyright Act in 1961 and chose to accede to the Universal Copyright Convention in 1962 instead of the Berne Convention, to which it only acceded in 1991.<sup>19</sup> The drafting of post-independence copyright

11 du Plessis (2012).

12 Okediji (2003a) p. 323.

13 Kongolo (2014) pp. 168–170; Kongolo (2013b) pp. 115–116.

14 Kongolo (2014) p. 165.

15 Kongolo (2013b) p. 107.

16 Kongolo (2013b) p. 106.

17 Kongolo (2013a) p. 1.

18 Kongolo (2013a) p. 1; Joireman (2001) p. 576.

19 Kongolo (2014) p. 173.



laws was informed to a large extent by the UN Educational, Scientific and Cultural Organization (UNESCO)–WIPO Tunis Model Copyright Law for Developing Countries, 1976.<sup>20</sup>

Since their independence African states have, to varying degrees, sought to revise existing IP laws<sup>21</sup> or to enact their own IP laws.<sup>22</sup> However, in some ways these post-independence efforts have been constrained by the current international IP framework, primarily through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>23</sup> The TRIPS framework has served as ‘a powerful mechanism for transplanting European and American law’<sup>24</sup> and some scholars characterize it as a ‘device that drives economic neo-colonialism forward.’<sup>25</sup> Whilst African states participated in its negotiation and conclusion, they did so at a disadvantage, lacking adequate representation and resources (human and otherwise) to ensure that the agreement was truly to their benefit.<sup>26</sup>

In spite of these disadvantages African and other developing states successfully lobbied for the inclusion of some provisions in the agreement which seek to meet their unique circumstances. Of these, articles 7 and 8 are discussed further below in this chapter. Another important mechanism was the inclusion of a transition period for the full implementation of TRIPS by least developed countries (LDCs). This period, initially set to expire in 2005, has been extended twice and is currently set at 1 July 2021 or sooner if a country ceases to become an LDC before that date.<sup>27</sup>

In their revision or crafting of IP laws, African states have relied upon technical assistance from the World Trade Organization (WTO), the World IP Organization (WIPO) and other United Nations specialized agencies such as UNESCO and the World Health Organization (WHO). However, as noted by Ndulo, such assistance can become a Trojan horse that brings in detrimental ideas.<sup>28</sup> Therefore the nature, scope and content of such assistance need to be carefully structured and developed because it may exacerbate existing problems. Many UN agencies subscribe to progressive development theories that are informed by human rights considerations. However, concerns have been raised about whether WIPO shares this common developmental approach. These concerns culminated in the adoption of the WIPO DA that it is hoped will realign the organization’s approach by making it more development-orientated.

20 Kongolo (2014) pp. 172–173.

21 Kongolo (2013a) pp. 1, 9.

22 Okediji (2003a) p. 335.

23 Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (1994) 33 ILM 81 (TRIPS).

24 Seuba (2014) p. 3 citing Dreyfuss (2004) p. 21.

25 Rahmatian (2009) pp. 41–42.

26 Kongolo (2013a) p. 2; Watal (2011) p. 25.

27 WTO Decision of the Council for Trade-Related Aspects of Intellectual Property Rights *Extension of the Transition Period under Article 66.1 for Least Developed Country Members* (11 June 2013) IP/C/64. For an overview of the genesis and extent of the original extension period as well as the latest extension request made in 2012, see Abbott (2013).

28 Ndulo (2007) p. 333.