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# COPYRIGHT AND DEMOCRATIZATION IN AFRICA

*John Mukum Mbaku\**

## I. INTRODUCTION

In the United States, copyright law grants authors “proprietary rights” in the works that they create. Congress created copyright laws to encourage and sustain the creation and dissemination of original literary and artistic works.<sup>1</sup> By providing incentives, like proprietary rights, that enhance and encourage the creation and dissemination of knowledge, copyright law can contribute significantly to civic engagement. However, for robust civic engagement to exist, citizens must be able to have effective access to the diverse literary and expressive works created by authors. Hence, copyright law should not only be used to enhance the creation of knowledge but should also be employed to facilitate the dissemination of privately created expressive works to the public. This balance between promoting the private economic activities and interests of authors—through the grant of limited monopolistic control of their creations—and making certain that the public has adequate and effective access to these expressive creations is essential to a successful law.<sup>2</sup> U.S. copyright law achieves this balance by granting authors exclusive rights to their creative expression while expressly imposing limitations on these rights to provide the public access to authors’ creative works.<sup>3</sup> Through fair use and other limitations on authors’ rights, copyright facilitates and strengthens the type of public discourse necessary to support the development of a robust civil society, as well as deepen and institutionalize democracy.<sup>4</sup>

During the last several years, various researchers have argued that copyright is critical to promoting the creation of diverse expression and

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<sup>1</sup> Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283, 285 (1996). *See also* U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

<sup>2</sup> Joshua S. Bauchner, *Globalization and Democratization: The Reclaiming of Copyright*, 4 TUL. J. TECH. & INTELL. PROP. 93, 94–95 (2002).

<sup>3</sup> *See generally* The Copyright Act, 17 U.S.C. §§ 101–1332 (2006).

<sup>4</sup> Bauchner, *supra* note 2, at 94–95. *See also* Netanel, *supra* note 1.

the dissemination of knowledge to members of a democratic society.<sup>5</sup> According to Professor N. W. Netanel, copyrights are the bedrock of democratic governance.<sup>6</sup> Therefore, “copyright should be evaluated primarily by how well it promotes [democratic governance].”<sup>7</sup> Attorney J. S. Bauchner argues that during the last several decades, U.S. copyright has strayed from its “original purpose of promoting the development of creative works necessary to the public good” and that it has been “captured” by corporate interests that are interested primarily or exclusively in profit maximization.<sup>8</sup> Bauchner proposes that copyright should be used to “promote a democratic ideology fostering the dissemination of individual expressive works.”<sup>9</sup> Both Bauchner and Professor Netanel argue that copyright can provide the tools necessary to foster the type of robust civic engagements that undergird a vibrant democratic system.<sup>10</sup>

Copyright promotes and enhances democratic discourse in three ways according to Professor Netanel. First, copyright provides the necessary incentives for the production of creative expression. Second, copyright can be used to sustain a non-state sector of authors and publishers. Finally, copyright can be used to help citizens appreciate the value of individual creative contributions to public discourse. Creative expression, however, is characterized by the problem of non-excludability. Hence, owners of these so-called “public goods,” who bear the full costs of creating these products, are not able to efficiently extract all the benefits of their productive efforts; some of these benefits “spill over” to nonpaying third parties and, as a consequence, these individuals may not be willing to invest the time, skills, and financial resources required to create these works. Copyright can remedy this problem by granting authors proprietary rights in certain defined uses of their creations.<sup>11</sup> Armed with this limited “monopolistic” right, authors can recoup what would otherwise be “lost” benefits (of their creations) by granting access to the content only to paying clients.<sup>12</sup>

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<sup>5</sup> Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 226 (1998).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Bauchner, *supra* note 2, at 94.

<sup>9</sup> *Id.*

<sup>10</sup> See Bauchner, *supra* note 2, at 94-96. See also Netanel, *supra* note 1, at 341; Netanel, *supra* note 5.

<sup>11</sup> Netanel, *supra* note 5, at 227-29.

<sup>12</sup> *Id.*

As shown by the aforementioned U.S. copyright law, copyright can also be used to enhance democratization in Africa by helping develop and sustain the robust civil society that is needed to lead Africa's transition to democratic governance. Before proceeding, however, it is necessary to briefly examine Africa's struggle to establish, deepen, and institutionalize democracy in the post-independence period.

The colonial enterprise in Africa was a militaristic, cruel, repressive, and despotic system designed to allow Europeans to exploit African resources for the benefit of their own metropolitan economies.<sup>13</sup> Thus, the institutional arrangements imposed on the colonies by the Europeans were not designed to enhance the ability of Africans to govern themselves or maximize their values. Rather, these laws and institutions were part of a comprehensive colonial institutional structure designed to maximize the flow of resources, primarily raw materials, from Africa to Europe. As argued by Lord Frederick Lugard, a distinguished British colonial officer in Africa, the colonies represented an important source of raw materials for Britain's industrial effort and critical markets for excess output from its industries.<sup>14</sup> Hence, colonial policies, including incentives for creativity and inventiveness, strictly limited the production and dissemination of knowledge to that which was beneficial to the colonial enterprise.

It was never the European colonialists' intention to foster the creation and dissemination of knowledge that could have enhanced the development of a cohesive national identity within any of their colonies. This was evidenced in virtually all the European colonies in Africa where severe restrictions were placed on the practice of indigenous African cultures and local languages were either banned or their use allowed only in very limited situations. Within each colony, the language and culture of the resident European power emerged as the dominant and, to a certain extent, only legally accepted means of producing literary works.<sup>15</sup> Africans interested in producing original creative works faced many problems, of which, two stood out as the most problematic. First,

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<sup>13</sup> See generally Robert Fatton, Jr., *Liberal Democracy in Africa*, 105 POL. SCI. Q. 455 (1990).

<sup>14</sup> SIR FREDERICK LUGARD, *THE DUAL MANDATE IN BRITISH TROPICAL AFRICA* (3rd ed. 1926).

<sup>15</sup> See *Constitutionalism and the Transition to Democratic Governance in Africa*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* 103, 103 (J.M. Mbaku & J.O. Ihonvbere eds., 2003) [hereinafter *THE CONTINUING STRUGGLE*]. See, e.g., J.M. MBAKU, *CULTURE AND CUSTOMS OF CAMEROON* 72 (2005) [hereinafter *CAMEROON*] (In the German colony of Kamerun, King Rudolph Douala Manga Bell, a ruler of the Duala ethnic group, who had studied law in Germany and had risen to become an expert in the German legal system, was executed by the German colonial government in 1913 for, inter alia, producing literature that was considered treasonable or detrimental to German interests in the colony.).

viable markets for original creative expression catered only to works produced in the European languages.<sup>16</sup> Furthermore, most of the creative works produced at this time were not accessible to the public, most of whom were not literate in the European languages. This prevented the effective dissemination of creative works and made the very process of creation extremely difficult. While literary expression in the African languages was still being created in the colonies, such creative works did not enjoy colonial state support or approval. This was due to the fact that many of these works were critical of colonialism and as a result, they were disseminated to a very limited audience. The dissemination of these works also suffered either because of language and cultural problems or the lack of a mechanism through which such materials could be made available to a broader audience. Second, creative expression, whether in the form of literature, music and dance, or visual art, that was critical of or opposed to colonialism was strictly prohibited. Hence, it was difficult for Africans to produce the type of pluralist expression that enhanced the development of a democratic civil society.<sup>17</sup>

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<sup>16</sup> See, e.g., SUZANNE P. BLIER, *THE ROYAL ARTS OF AFRICA: THE MAJESTY OF FORM 169–72* (1998); MONICA B. VISONÀ ET AL., *A HISTORY OF ART IN AFRICA* (2001); RICHARD BJORNSON, *THE AFRICAN QUEST FOR FREEDOM AND IDENTITY: CAMEROONIAN WRITING AND THE NATIONAL EXPERIENCE* (1991); CLAUDE TARDITS, *LA ROYAUME BAMOUN* (1996) [THE KINGDOM OF BAMOUN] (Of course, in several African countries, there existed markets for “ethnic” literature and other related expressive works (such as art and sculpture). However, these productions were sponsored and supported by religious groups (including Christian churches), tribal kings, and cultural organizations and hence, were not of an independent and pluralist character. Perhaps, more important is the fact that these expressive works did not enjoy the kind of universal dissemination that is essential for the development of a robust civil society and the development of a democratic culture. Sultan Njoya-Arouna (c. 1870–1933), King of the Bamoun of Cameroon, is considered one of Africa’s most important art patrons. Within his palace, artists, whose work was underwritten by the King, produced exquisite art objects, including the famous throne, which now sits in a German museum. Other Cameroon ethnic sovereigns also supported the arts and produced various “objet d’arts” that can now be found in famous museums around the world. In addition, King Njoya developed a new script and writing system based on Arabic, Western forms, and traditional Bamoun divination signs and used it to record the kingdom’s precolonial history and cultural practices. He then established schools in which the new script was taught, along with other subjects, notably, art, sculpture, history of the Kingdom, and culture. A significant amount of literature was produced using the script).

<sup>17</sup> See *THE CONTINUING STRUGGLE*, *supra* note 15, at 72–73 (By the time the German colony of Kamerun was captured by British and French expeditionary forces following the end of World War I, Sultan Njoya, King of the Bamoun had developed a written script for the Bamoun language and established royal schools throughout the kingdom. However, after the Kingdom of Bamoun became part of the League of Nations Mandate under French administration after World War I, the colonial authorities introduced a new educational system, one that fostered French objectives in the colony. French was made the official (and only legally permissible) language of instruction and only a French curriculum was permitted in the schools. The French colonial government subsequently destroyed the King’s printing press, closed down all the royal schools, prohibited publications in the Bamoun language, and forced the King into internal exile.)

Each European colony inherited from its former ruler a sense of liberal democracy. However, given the fact that decolonization was “reluctant, repressive, and opportunistic,” there was no “fundamental transformation in the economic, cultural, or bureaucratic domains.”<sup>18</sup> Moreover, during the colonial period the Europeans did not make any effort to develop a viable and robust civil society within each colony and creation was strictly controlled and designed to maximize European objectives in the colony. This resulted in a “shaky, hesitant, and ultimately short-lived” post-independence commitment to the deepening and institutionalization of democracy.<sup>19</sup>

Many of today’s pro-democracy activists and political theorists believe that a “robust, pluralist civil society” is the bedrock of effective “democratic governance in a complex modern state.”<sup>20</sup> One such activist, Professor Netanel, stated that “[c]ivil society bolsters representative democracy in a number of ways. First, a robust, participatory, and pluralist civil society is the wellspring of . . . a ‘democratic culture,’ a belief in and understanding of the democratic process that becomes embedded in the minds, habits, and character of a people.”<sup>21</sup> Thus, a civil society can serve as a forum for the education and indoctrination of the people in democratic governance.

Second, a civil society can serve as a check on the exercise of government agency. Through their participation in “intermediate associational and communicative networks, citizens discover, refine, and articulate their interests, enabling them to vote with deliberate judgment and petition government officials with greater effectiveness.”<sup>22</sup> A robust civil society can act as a “learning laboratory” in which citizens can acquire the skills (e.g., the ability to resolve conflict through peaceful means) they need to participate fully and effectively in democratic governance. This is especially important for most countries in Africa because many, if not all of them, have extremely diverse populations.<sup>23</sup>

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<sup>18</sup> Fatton, *supra* note 13, at 457.

<sup>19</sup> *Id.*

<sup>20</sup> Netanel, *supra* note 1, at 342.

<sup>21</sup> *Id.* at 343.

<sup>22</sup> *Id.* at 343–44.

<sup>23</sup> For example, Cameroon has more than 250 ethnic groups, each with its own language, religion, culture and customs, as well as political system. Christianity penetrated Cameroon from the southern coast and Islam from the north. Both religions have had significant influence on the country’s cultural, political, and economic diversity. During the colonial period, the colonial government did not provide the wherewithal for these groups to engage each other in productive dialogue. This is evident in the fact that since independence, inter-ethnic rivalry has emerged as an important challenge to post-independence governance in Cameroon. The government has not been able to provide an appropriate institutional environment within which these groups can live together

Finally, a civil society offers citizens opportunities to resolve issues without engaging in or relying on the “formal institutions of government.”<sup>24</sup> Through civil society organizations, individuals can get together and “determine their preferences and commitments and assert control over resources, without state direction” and generally engage in self-governance.<sup>25</sup>

Copyright, as Professor Netanel argues, can be used to support and sustain a democratic civil society.<sup>26</sup> By granting authors a “limited proprietary entitlement,” copyright promotes and “encourages creative expression on a wide array of political, social, and aesthetic issues.”<sup>27</sup> Creating new knowledge and effectively disseminating it among the populace is a critical component of democratic civil society. In addition, by granting authors limited monopoly rights to their creative expression, copyright relieves authors and other knowledge creators of the need to depend on “state or elite largess” and hence, creates space outside government for robust public engagement or discourse.<sup>28</sup> Nevertheless, copyright also limits the rights of authors in their creative expression in order to enhance public access to these works. Thus, by helping establish and sustain a forum for public discourse, which is not sponsored or controlled by either the state or private patrons, and by granting authors of creative expression only limited proprietary rights to their works, copyright “promotes the democratic character of public discourse” and can enhance the deepening and institutionalization of democratic governance.<sup>29</sup>

Since the late 1980s, there have been concerted efforts by many grassroots organizations in Africa to transition their countries from authoritarian to democratic governance systems.<sup>30</sup> The new push for democratization in Africa is part of the struggle that started during the colonial period to improve public discourse among Africans and enhance their ability to govern themselves. Recent studies of democratization in

peacefully. In other words, in Cameroon, there now does not exist a robust, integrated civil society that can enhance the ability of citizens from all the country’s various ethnic groups to undertake productive discourse and generally engage in self-governance. See CAMEROON, *supra* note 15, at 1, 61-64.

<sup>24</sup> See Netanel, *supra* note 1, at 344.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 347.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 347-48.

<sup>30</sup> See generally DEMOCRACY AND POLITICAL CHANGE IN SUB-SAHARAN AFRICA (J.A. Wiseman ed., 1995); J. A. WISEMAN, THE NEW STRUGGLE FOR DEMOCRACY IN AFRICA (1996).

Africa allude to the fact that the process is “difficult, frustrating, treacherous, and ‘extremely fragile.’”<sup>31</sup> The extreme bullishness or optimism that characterized the immediate post-Cold War period, especially the mid-1990s, following the demise of apartheid in South Africa, has since ceased, and many observers and analysts now point to possible rollbacks in most of the democratic gains that the continent has made since the mid-1980s.<sup>32</sup> The question of why Africa failed to deepen and institutionalize democracy in the post-independence period remains unanswered. However, of all the reasons offered to explain the failure of post-independence political liberalization to establish democratic governance within the African countries, the most convincing one is the absence of a robust and viable civil society, which was co-opted, suffocated, and effectively rendered non-functional by the post-independence State.<sup>33</sup> Today, many African countries still struggle to institutionalize democracy. The remainder of this article argues that unless these countries provide themselves with environments that enhance and support the growth and nurturing of a democratic civil society, democratic governance will continue to evade them. Such a civil society can be achieved by inclusive, participatory, and people-driven public discourse, “fed” by diverse, indigenous, original, and creative expression. It is hoped that this discourse will be undertaken in a sphere that is independent of State, or elite-patronage, and has the capacity and wherewithal to effectively challenge State and non-state actors with a propensity for non-democratic behaviors.<sup>34</sup> Copyright can be used to create the necessary conditions, within each African country, for the emergence of a robust and viable democratic civil society and the institutionalization of democratic governance on the continent.

This article examines how copyright use can create the conditions necessary for institutionalizing democracy in Africa. First, Part II provides an overview of the concept of copyright, while Part III is devoted to an examination of copyright’s role in promoting and sustaining democratic governance. Part IV discusses how copyright can be used to enhance democratization in Africa. Part V is devoted to a

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<sup>31</sup> J.M. Mbaku & J.O. Ihonvbere, *Introduction: Issues in Africa’s Political Adjustment in the “New” Global Era*, in

THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING 1, 9 (J.M. Mbaku & J.O. Ihonvbere eds., 2003).

<sup>32</sup> Jeffrey Herbst, *Political Liberalization in Africa After Ten Years*, 33 COMP. POL. 357 (2001).

<sup>33</sup> See, e.g., J.O. Ihonvbere, *A Balance Sheet of Africa’s Transition to Democratic Governance*, in THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 33, 38–40 (J.M. Mbaku & J.O. Ihonvbere eds., 2003) [hereinafter *A Balance Sheet*].

<sup>34</sup> See Netanel, *supra* note 1, at 353–54.

discussion of the international aspect of intellectual property protection with special emphasis on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and how this agreement impacts the availability of intellectual property in Africa. In this section, there will be a review of the major dilemma that many African countries face today—to either pirate the technology that they need to deal with multifarious development problems, or to respect the rights of patent and copyright holders and continue to swelter in extreme poverty. While pirating of technology may provide short-term benefits to these countries and allow them to deal with some societal ills, in the long run, countries that ignore their obligations under TRIPS are likely to forestall local efforts to create private expression. Furthermore, ignoring those obligations will hinder foreign investment and the transfer of the technology that these countries need for long-term economic development. Perhaps, more important is the fact that pirating technology, rampantly infringing copyrights, and ignoring international conventions to which these countries are signatories, are not activities that can support the development of a democratic civil society. Democracy in Africa must be based on the creation of institutional environments that respect copyright, and hence, enhance the creation of the diverse private original expression that is critical for democratic governance.

## II. A CONCEPTUAL VIEW OF COPYRIGHT

Copyright law, as it has developed in the United States, attempts to strike a balance between creating an incentive for the creation of knowledge and constraining authors of creative works to make certain that society is granted adequate access to those creations.<sup>35</sup> U.S. copyright law is designed to provide prospective authors incentives that enhance privately-created expression while at the same time making certain that public access to authors' creative works is preserved and enhanced. Such public access is critical not only for civic engagement and cultural development, but is also necessary for further creative pursuits—new authors use existing creative works as an impetus for their own creative activities.<sup>36</sup>

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<sup>35</sup> See, e.g., The Copyright Act, 17 U.S.C. §§ 106-112 (2006).

<sup>36</sup> See Netanel, *supra* note 1, at 285; The Copyright Act, 17 U.S.C. § 107 (2006) (explaining that new authors can use existing copyrighted creative expression either with permission from copyright holders or their assigns or without permission under the “doctrine of fair use”).

New digital technology has created significant instability in the copyright regime. While this new technology appears to grant the public almost unrestrained access to creative works and hence, may threaten the traditional protection granted authors by copyright law, it also provides authors with the wherewithal to build formidable and perhaps impenetrable fences around their digital content that can “raise the specter of all-consuming copyright owner control.”<sup>37</sup> The ease with which one can “make perfect digital copies and limitless digital variations, and can electronically distribute them to the ends of the earth,” as well as the fact that authors can use the new technology to build virtually impenetrable fences around their digital content, effectively eliminating all forms of uncompensated public access, has created a destabilizing force to copyright law. This force has attracted the interest of policymakers, entrepreneurs, and various other groups on both sides of the fence—those who are concerned about the impact of such developments on investment in knowledge creation, and those who believe that authors’ ability to build fences around their digital content could further constrain public access to creative expression and negatively impact civic engagement and the development of a robust civil society.<sup>38</sup>

Some individuals and groups within the U.S. economy have responded to the anticipated impact of the new digital technology on creative pursuits by seeking to expand the reach of copyright law.<sup>39</sup> These supporters of an expanded copyright who are informed by an “emerging scholarship that applies an amalgam of neoclassical and new institutional economic property theory to copyright,” argue that besides serving as an incentive for the “creation and dissemination of new [original] expression,” copyright can also serve as “a vehicle for directing investment in existing works.”<sup>40</sup> Critics of an expanded copyright argue that the social cost of devoting resources to the “production of original expression” must be considered in order to make certain that resources are not taken away from other more productive social uses.<sup>41</sup> Put another way, allocation of resources to the production of creative works should be based on a cost-benefit analysis that ensures that resources are allocated to the production of original expression only

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<sup>37</sup> Netanel, *supra* note 1, at 285.

<sup>38</sup> *Id.* at 286.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 287.

to the point where the marginal social cost of the last creative expression produced is equal to its marginal social benefit.

Additionally, supporters of a minimalist approach to copyright protection argue that while copyright may have had some social value in the “hard copy world,” that value no longer exists in today’s digital technology world and hence, creation of original expression no longer needs copyright.<sup>42</sup> Yet, other critics of the expanded copyright do not go so far as to seek the abolition of copyright. Instead, these critics support a form of “utopianism” for digital content, while nevertheless arguing that the protections granted authors by copyright before the advent of digital network technologies, should be retained.<sup>43</sup> The utopianists’ support of “predigital ‘free use zones’” would conflict with one of copyright’s most important functions—to support the “autonomous creation and dissemination of expression in the digital environment.”<sup>44</sup>

In recent years, Professor Netanel has developed a radically different framework for copyright which, according to him, “stands in opposition to both the expansionism of neo-classicist economics and the minimalism of many critics.”<sup>45</sup> He calls this new framework the “democratic paradigm.”<sup>46</sup> According to this paradigm, “copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society.”<sup>47</sup> Copyright, Professor Netanel argues, enhances democracy in a society through two important ways. First, copyright provides the incentives that authors need to undertake the production of the various types of original expression that can enhance civic engagement and the development of a democratic culture.<sup>48</sup> Second, through copyright, there can be created within society a forum for the creation and dissemination of creative expression that is “free from reliance on state subsidy, elite patronage, and cultural hierarchy.”<sup>49</sup>

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<sup>42</sup> Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 625–27 (1996) (writing critically of “free riding” entrepreneurs, or “hackers,” who consider copyright law anachronistic and a direct constraint to further creative pursuits).

<sup>43</sup> Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 264–67 (1996) (stating that dissemination of private expression by digital means, as well as the decision of libraries to stop granting patrons free access to information, could significantly increase existing socioeconomic inequalities).

<sup>44</sup> Netanel, *supra* note 1, at 288.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

The potential of copyright to enhance the development of a democratic culture was quite apparent to the Framers of the U.S. Constitution. According to Professor Bruce W. Bugbee, when a U.S. Senate committee called for the passage of the country's first federal copyright statute in 1790, it pointed to the critical and nurturing role that creation and dissemination of knowledge could have on the country's embryonic democracy, concluding that "[l]iterature and [s]cience are essential to the preservation of a free Constitution."<sup>50</sup> However, for copyright to serve effectively as an instrument for the developing and nurturing of a democratic civil society, it must be capable of adapting well to changing technology, especially to the new "means for disseminating authors' works and to the coming upheavals in the markets for many such works that will accompany the large-scale electronic distribution of pictures, sound, and text in digital form."<sup>51</sup>

In this period of rapid technological advances, copyright remains a critical tool for the provision of a "sector" within the polity, which is free of state, elite, and interest group (and in the case of Africa, ethnic-group) patronage, for the creation and dissemination of the original creative expression that is critical for the maintenance of a free society. Within such a sector, authors can freely create the knowledge that is essential for the development of a democratic civil society. The grant to authors of limited monopoly rights to their original creative expression will serve as an incentive for them to undertake knowledge creation. However, placing statutory limits on these rights will ensure that the public can effectively access these expressive works and use them for the type of civic dialogue that significantly enhances the practice of democratic governance. Accordingly, the challenge in today's fast changing technological environment is to continue to make certain that copyright law strikes a balance between the need to incentivize authors to create knowledge and the desire to make certain that those creative works are widely disseminated to the populace.

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<sup>50</sup> BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 137 (1967). See also Netanel, *supra* note 1, at 289 n.17.

<sup>51</sup> Netanel, *supra* note 1, at 289–90.

III. COPYRIGHT AS AN INSTRUMENT FOR PROMOTING AND SUSTAINING  
DEMOCRATIC GOVERNANCE*A. Introduction*

One of the most important developments of the post-Cold War era in Africa was the resurgence of the struggle for free expression and political and economic participation, especially by historically marginalized and deprived individuals and groups. Shortly after the end of the Cold War and the demise of apartheid in South Africa, many Africans who had been oppressed and brutalized by authoritarian post-independence governments, were no longer willing to suffer in silence. Many of these groups and individuals took to the streets to demand that their governments engage in institutional reforms to provide the people with more opportunities for economic and political participation. Specifically, these groups were seeking transition to democratic governance and economic systems that guarantee all citizens the right to freely engage in exchange and contracting.<sup>52</sup> Unfortunately, Africa's transition to democratic governance remains still-born. While there are many reasons advanced to explain the failure of post-Cold War African societies to effectively develop and sustain democratic governance systems, one of the most important is the absence of civil society, or the inability of these countries to successfully revive robust civil societies which had been suffocated by many years of colonialism and post-independence authoritarian rule. The deepening and institutionalizing of democracy requires a robust and viable civil society.<sup>53</sup> As will be argued in this paper, copyright can provide the wherewithal to develop or revive and sustain such a democratic civil society.

Educating the masses about peaceful civic engagement and democratic practice is critical to a successful transition to democracy. In Africa, where most countries have extremely diverse cultures and customs, effective democratic practice requires great tolerance for expressive diversity. Copyright can serve a very critical role in Africa's democratization project by "promoting public education and expressive diversity."<sup>54</sup> To fully understand how copyright can contribute to the

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<sup>52</sup> See generally THE CONTINUING STRUGGLE, *supra* note 15; J.M. MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA (2004) [hereinafter INSTITUTIONS AND DEVELOPMENT]; J.M. Mbaku, *Entrenching Economic Freedom in Africa*, 23 CATO JOURNAL 217 (2003).

<sup>53</sup> See generally THE CONTINUING STRUGGLE, *supra* note 15. See especially *A Balance Sheet*, *supra* 33, at 40-41.

<sup>54</sup> Netanel, *supra* note 1, at 341.

democratic effort in Africa, it is necessary to begin with a definition of “civil society.” Civil society, according to Professor Netanel, “is the sphere of voluntary, nongovernmental association in which individuals determine their shared purposes and norms.”<sup>55</sup> Civil society may include [labor] “unions, churches, political and social movements, civil and neighborhood associations, schools of thought, educational institutions, and certain forms of economic organization.”<sup>56</sup> In each country, civil society “incorporates formal and informal organizations, group identities and the shared purposes, histories, and discursive norms that hold groups together.”<sup>57</sup> For civil society to function effectively and achieve its purposes, it must appropriate various methods or systems of communication and discourse, including “cultural expression, the mass media, and, increasingly, the proliferating welter of Internet user groups, bulletin boards, and Web sites.”<sup>58</sup>

Given Africa’s repressive and divisive past, as well as its extremely diverse population, a “robust, pluralist civil society” is a “necessary, proactive foundation for democratic governance.”<sup>59</sup> First, as many political theorists have argued, a “robust, participatory, and pluralist civil society is the wellspring of . . . a ‘democratic culture,’ a belief in and understanding of the democratic process that becomes embedded in the minds, habits, and character of a people.”<sup>60</sup> For democracy to function effectively, there must exist within the polity a “domain” or “arena,” independent of the state, within which individuals can develop “the independent spirit, self-direction, social responsibility, discursive skill, political awareness, and mutual recognition” which is critical to a democratic culture.<sup>61</sup> In countries, such as many of those in Africa, where citizens have not yet developed and effectively “internalized these skills and values,” democracy cannot be institutionalized.<sup>62</sup> Within these countries, there is an absence of self-governance, and each country’s laws and institutions are basically elite impositions—that is, the polity’s institutional arrangements do not originate in or are outcomes of participatory and inclusive discourses among all the relevant stakeholder

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<sup>55</sup> *Id.* at 342.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 343. *See also* ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 30 (1985). *See generally* *A Balance Sheet*, *supra* note 33, at 38-40 (discussing a brief overview of the importance of civil society to democratization in Africa).

<sup>61</sup> Netanel, *supra* note 1, at 343.

<sup>62</sup> *Id.*

groups, but are imposed by a few urban-based elites. In the case of many African countries today, the construction of national institutions is dominated and controlled by center elites, most of whom are members of ethno-regional alliances that often insure that minority ethnic groups, women, rural inhabitants, and other historically marginalized and excluded stakeholders do not participate.<sup>63</sup>

Second, a democratic civil society also serves as a learning laboratory in which citizens can acquire the skills to be able to effectively serve as a check on the exercise of government agency. Individuals must be able to recognize and accept the critical role that they, as citizens, play in making certain that state custodians (i.e., civil servants and politicians) function only within the law. To do so, citizens must have the skills and competency to be able to “pass judgment on decision makers, petition government officials, and influence political agendas.”<sup>64</sup> Finally, there must be some domain independent of the state within which citizens can carefully articulate their interests, aspirations, and concerns, and make these known to their leaders. A democratic civil society provides such a domain.<sup>65</sup>

### *B. Civil Society is Not Completely Independent of the State*

In colonial Africa, state policies intentionally suffocated civil society and made it virtually impossible for an African-centered democratic civil society to develop.<sup>66</sup> Given colonialism’s objectives in Africa,<sup>67</sup> it was inevitable that the colonialists would promote policies that stunted the

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<sup>63</sup> J.M. MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 186–87 (2007) [hereinafter CORRUPTION IN AFRICA]. For an overview of the failure of African countries to engage their citizens in participatory constitution making processes and how that failure has affected the continent’s transition to democratic governance, see generally J.M. Mbaku, *Constitutionalism and Governance in Africa*, in SOCIO-POLITICAL SCAFFOLDING AND THE CONSTRUCTION OF CHANGE: CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA 35 (Kelechi A. Kalu & Peyi Soyinka-Airewele eds., 2009) [hereinafter *Constitutionalism and Governance in Africa*].

<sup>64</sup> Netanel, *supra* note 1, at 343.

<sup>65</sup> *See id.*

<sup>66</sup> *See generally A Balance Sheet*, *supra* note 33, at 38–40.

<sup>67</sup> *See* POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES 18 (J.O. Ihonvbere & J.M. Mbaku eds., 2003) [hereinafter POLITICAL LIBERALIZATION] (Arguing that colonialism’s main interest was not the developing and sustaining of democratic systems in Africa, but the exploitation of Africa’s resources for the benefit of the metropolitan economies. Hence, there was no incentive on the part of the European colonizers of Africa to help develop democracy-enhancing structures (e.g., a democratic civil society), which could effectively impede full exploitation of the colonies.). *See also* LUGARD, *supra* note 14 (arguing that the colonies were a critical source of raw materials and an important market for excess output from British industries). For an overview of the objectives of German colonialism in Africa, see HARRY R. RUDIN, *GERMANS IN THE CAMEROONS, 1884–1914: A CASE STUDY IN MODERN IMPERIALISM* (1938).

development, within each colony, of a democratic civil society. In the colonies that had large populations of European settlers, all of whom intended to make the colonies their permanent homes,<sup>68</sup> the effort to prevent the development of an African civil society was more intense, extremely brutal, and quite effective.<sup>69</sup>

The state can significantly affect the developing and sustaining of civil society—the state can either stunt the evolution of a democratic civil society (as was the case in Africa during the colonial period) or provide the institutional environment within which civil society can grow and be strengthened. Hence, civil society is only “partly autonomous from the legal and political institutions of government.”<sup>70</sup> For civil society organizations to emerge and function well, the state must provide the necessary institutional “infrastructure,” one that enhances civic engagement and provides citizens with the opportunity to participate fully and effectively in governance.<sup>71</sup>

While state intervention is needed to provide the enabling environment for the sustaining of a democratic civil society, it is also important for the state to make certain that civil society organizations do not develop into instruments of private oppression. That is, the state must make certain that civil society provides opportunities for democratic self-governance and not serve as a constraint or obstacle to the deepening and institutionalization of democracy. The state can use the law to promote civil society’s democracy-enhancing role and make certain that civil

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<sup>68</sup> See generally MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 52, at 225 (explaining that these colonies included French Algeria, Portuguese Mozambique and Angola, the four colonies that became the Union of South Africa in 1910, the Rhodesias (Northern Rhodesia, which gained independence as Zambia and Southern Rhodesia which became Zimbabwe at independence), the U.N. Trust Territory of South West Africa under South African administration (which became Namibia at independence), and the British colony of Kenya).

<sup>69</sup> See, e.g., G.M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981) (Discussing the efforts of Afrikaners (white South Africans of German-Dutch-French origin) to prevent the emergence of an African civil society in the four colonies that became the Union of South Africa in 1910. This was accomplished through the official imposition, in 1948, of a public policy referred to as “apartheid” or separate development.). For an overview of the apartheid system and how it affected African participation in economic and political activities, see generally G. V. DOXEY, THE INDUSTRIAL COLOR BAR IN SOUTH AFRICA (1961); H.W. HUTT, THE ECONOMICS OF THE COLOR BAR (1964); B.M. MAGUBANE, THE POLITICAL ECONOMY OF RACE AND CLASS IN SOUTH AFRICA (1979); J. NATTRASS, THE SOUTH AFRICAN ECONOMY: ITS GROWTH AND CHANGE (1981) (explaining the apartheid system and how it affected African participation in economic and political activities).

<sup>70</sup> Netanel, *supra* note 1, at 344.

<sup>71</sup> Part of that infrastructure includes: “(1) a professional and neutral armed force; (2) a properly constrained police force; (3) an independent judiciary; (4) independent news media; (5) an independent central bank; (6) a professional civil service; and (7) an efficient and representative parliament.” J.M. Mbaku, *Constitutional Engineering and the Transition to Democracy in Post-Cold War Africa*, 2 INDEP. REV. 501, 515 (1998).

institutions are not captured and used by special interests for purposes that do not promote democratic self-governance.<sup>72</sup> This is very important in Africa where membership in most interest groups is based on ethnicity. If such “*permanent*” interest groups are allowed to dominate and control the non-governmental domain created by civil society, they may engage in forms of agenda-control processes that effectively frustrate the type of civic engagement necessary for fostering democratic self-rule.<sup>73</sup>

Post-independence civil society throughout Africa is typically dominated by ethno-regional groups that have produced extremely unequal power relationships. These relationships are antithetical to the practice of democratic self-rule and have made it impossible to promote democratic governance. In fact, much of the violent political confrontation that has occurred in countries such as Rwanda, Kenya, Nigeria, Democratic Republic of Congo, Sierra Leone, Liberia, and Côte d’Ivoire (Ivory Coast) during the last two decades has been attributed to the domination of civil society by one or a few politically and economically dominant ethnic groups or ethno-regional alliances.<sup>74</sup> Government intervention must be used to make sure that there does not evolve in these polities social arrangements that constrain or undermine the contribution of all relevant stakeholders to democratic self-rule. This is a balancing game—the government must constrain civil society while simultaneously providing civil society with the wherewithal to engage in the types of independent, and participatory, inclusive, and bottom-up processes that enhance democratic practice.<sup>75</sup>

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<sup>72</sup> Netanel, *supra* note 1, at 345.

<sup>73</sup> Nantang Jua, “*Specialization*” and *Valorization of Identities, in Contemporary Cameroon, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA* 298 (J. M. Mbaku & J. Takougang eds., 2004) [hereinafter *LEADERSHIP CHALLENGE*] (One of the arguments given for the failure of the post-Cold War democratization project in Cameroon is that civil discourse has been dominated and controlled completely by Francophones and elites from President Paul Biya’s Beti ethnic group. In the process, the Anglophone minority and many ethnic groups have been relegated to the political and economic periphery and hence, public policies do not reflect the interests and values of all relevant stakeholder groups.)

<sup>74</sup> See generally *POLITICAL LIBERALIZATION*, *supra* note 67; *AFRICA AND THE THIRD MILLENNIUM* (George Klay Kieh, Jr. ed., 2008); *SOCIO-POLITICAL SCAFFOLDING AND THE CONSTRUCTION OF CHANGE: CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA* (Kelechi A. Kalu & Peyi Soyinka-Airewele eds., 2009).

<sup>75</sup> See Netanel, *supra* note 1, at 346.

*C. The Role of Copyright in the Development of a Democratic Civil Society*

Copyright can be seen as a bundle of state-created proprietary rights, which the state can use to achieve certain public policy objectives. One such objective is the support and, to a certain extent, underwriting of a democratic civil society. As argued by Professor Netanel, there are two ways in which copyright law can provide support to civil society.<sup>76</sup> First, copyright can encourage “creative expression on a wide array of political, social, and aesthetic issues.”<sup>77</sup> For democracy to function effectively, there must be continuous creation and dissemination of the creative expression that “feeds” the type of civic engagement necessary to nurture and sustain a democratic society. Second, copyright can help ensure that public discourse remains democratic. Through copyright, the state grants authors a “proprietary entitlement” and in the process enhances the “development of an independent sector for the creation and dissemination of original expression, a sector composed of creators and publishers who earn financial support for their activities by reaching paying audiences rather than by depending on state or elite largess.”<sup>78</sup> However, the rights that the state grants the author through copyright are not open-ended; the state places a set of limitations on them in order to achieve critical public policy goals. One such goal is to make certain that the expression created is allowed to flow freely into the public arena to enhance public discourse and strengthen democracy. Another public goal is to make certain that the existing creative works are allowed to continue to serve as the foundation for the efforts of future generations of authors.<sup>79</sup>

The U.S. Copyright Act of 1976 protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>80</sup> Extension of federal copyright protection in the United States today is no longer contingent on the author making his or her privately created expression available to the public. However, the copyright system provides an incentive structure that encourages public

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<sup>76</sup> *Id.* at 347.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> THE COPYRIGHT ACT OF 1976, 17 U.S.C. § 102(a).

dissemination of creative expression.<sup>81</sup> By enhancing and encouraging the production and dissemination of “fixed original expression” on a wide range of issues, copyright “promote[s] the democratic character of civil society.”<sup>82</sup> The type of civic engagement that is needed to sustain democracy requires a free flow of information and ideas, whether through “face-to-face dialogue,” books and newspapers, radio and television, Internet, “talking drums,” or other means of communication.<sup>83</sup>

Unlike the U.S. copyright law above, the Europeans who colonized Africa discouraged the creation and dissemination of fixed original expression. They knew that their continued domination of African societies could not be sustained if Africans were allowed to develop democratic associations and therefore, they discouraged the creation and dissemination of fixed original expression.<sup>84</sup> European colonialists in Africa recognized the importance of the free exchange of ideas and information to the development of a fully functioning democratic system. Hence, they implemented policies that made it virtually impossible for colonial Africans to create and disseminate knowledge, engage in any meaningful form of civic dialogue that would have allowed them to learn of the various interests of the several ethnic groups that made up the population of each colony, articulate common interests, and determine strategies that could be used to effectively confront the problems they faced, which included colonial exploitation.<sup>85</sup>

Students of democratic practice have long recognized that a democratic association cannot survive, let alone flourish, without

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<sup>81</sup> Netanel, *supra* note 1, at 348.

<sup>82</sup> *Id.*

<sup>83</sup> See generally ROBERT GARDNER & DENNIS SHORTELE, FROM TALKING DRUMS TO THE INTERNET: AN ENCYCLOPEDIA OF COMMUNICATION TECHNOLOGY (2008); CHRISTINE PRICE, TALKING DRUMS OF AFRICA (1973) (A “talking drum” is an hour-glass shaped African drum, probably of Nigerian origin, that can be used for communication purposes by regulating its pitch.).

<sup>84</sup> See, e.g., CAMEROON, *supra* note 15, at 73 (discussing the efforts of French colonialists to stunt the production of creative expression among Cameroonians in the U.N. Trust Territory of Cameroons under French administration).

<sup>85</sup> For example, in the U.N. Trust Territory of Cameroons under French administration, media laws were not designed to enhance production of private creative expression but to help the French control the colonial population. Hence, the laws specifically inhibited the creation and dissemination of any creative expression that was considered injurious to the colonial enterprise. All magazines and newspapers were owned and controlled by either the colonial government or European-based Christian missions, and African contributions were only accepted for publication if they promoted France’s policy of assimilation, were apolitical folk materials, or literary pieces praising the benefits of Christianity and the civilizing aspects of colonialism. The production and dissemination of the type of fixed original expression that would have enhanced the development of an African democratic civil society was strictly prohibited. This is evident in the brutal destruction of Sultan Njoya’s school system and printing press by the French colonial government. See *id.* at 73, 91–95, 104.

structures for the effective communication of information and ideas.<sup>86</sup> As Professor Netanel puts it, “[t]he millions of fixed works of authorship that are regularly broadcast, distributed, and transmitted every day across such communicative systems are the lifeblood of civic association.”<sup>87</sup> Copyright can make certain that this critical “lifeblood” of democratic “civic association” remains viable by contributing to the creation of “fixed original expression” and providing appropriate incentives to enhance its dissemination to as wide an audience as possible.<sup>88</sup>

If copyright enhances the creation of knowledge but does not provide appropriate incentives for its subsequent distribution, robust civic engagement would be severely constrained. Hence, mass education is critical to democratic practice. In order for citizens to make themselves aware of others’ interests, values, and concerns, be they economic, social, or political, they must have full and effective “access to the rich store of the accumulated wealth of mankind in knowledge, ideas, and purposes.”<sup>89</sup> Such access to knowledge must not be based, as during Africa’s colonial period, on opportunistic efforts by state actors to “spoon-feed” the population with selected ideas designed to achieve objectives of the ruling oligarchy. Nor, as during most of post-colonial Africa, must access to knowledge be based on the interests of politically dominant ethno-regional elites. Education for the purpose of promoting democracy must be based on free and independent thinking and those who receive the information must be granted the opportunity “to reformulate ideas and transform expressive works, as well as simply to contemplate them.”<sup>90</sup> Where, as in colonial Africa and to a great extent most of post-colonial Africa, the creation of fixed original expression is dependent on state or elite largess, creative activities are most likely to be restricted to areas favored by the ruling elite or private patrons. Such a process, especially in countries with extremely diverse populations, cannot allow for the type of creative diversity necessary for the building and sustaining of a democratic culture. However, copyright law, working through private markets, can provide authors from all population groups within the polity the wherewithal to engage in the type of creative diversity that can significantly enrich the existing store of knowledge and advance education in democratic practice.

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<sup>86</sup> See, e.g., JOHN B. THOMPSON, *THE MEDIA AND MODERNITY: A SOCIAL THEORY OF THE MEDIA* (1995).

<sup>87</sup> Netanel, *supra* note 1, at 348.

<sup>88</sup> *Id.*

<sup>89</sup> JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 52 (1963).

<sup>90</sup> Netanel, *supra* note 1, at 349.

During the colonial period in Africa, governance was based on brute force.<sup>91</sup> The type of independent thinking that would have allowed Africans to freely receive knowledge, reformulate and transform it into new forms of knowledge, disseminate it, and engage in productive dialogue with their neighbors, was strictly prohibited.<sup>92</sup> The formulation of public policy was not based on participatory forms of public debate and deliberation that produced outcomes favored by each polity's relevant stakeholders. Instead, the Europeans imposed their will on the Africans using their comparative advantage in the employment of military and police force.<sup>93</sup>

Similarly, in post-colonial Africa, governance was based on a combination of brute force and bribery as authoritarian rulers used force to crush public dissent and used bribes to co-opt opposition political elites.<sup>94</sup> Many of Africa's post-independence ruling elites adopted colonialism's approach to governance and continued to use force to suffocate civil society and prevent the institutionalization of democracy. Virtually no effort was made to provide an institutional environment in each country within which the production of fixed original expression and its subsequent dissemination could be maximized. Creative effort remained, as it was during the colonial period, hostage to state and private-elite patronage. As a consequence, the only creative works produced were those that did not threaten government control of political spaces or advanced the interests of private patrons.<sup>95</sup> The result is that

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<sup>91</sup> Fatton, *supra* note 15, at 457.

<sup>92</sup> For example, when Sultan Njoya of the Bamoun kingdom established a non-French-based school system for his kingdom which emphasized education in Bamoun language, culture, and customs, the French destroyed it and forced the King into internal exile. See CAMEROON, *supra* note 15, at 73.

<sup>93</sup> See *id.* at 457–58.

<sup>94</sup> See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 63.

<sup>95</sup> Lyombe Eko, *Hear All Evil, See All Evil, Rail Against All Evil: Le Messenger and the Journalism of Resistance in Cameroon*, in LEADERSHIP CHALLENGE, *supra* note 73, at 123 (For example, as Professor Lyombe Eko has shown, journalists who published stories criticizing corruption and other forms of malfeasance in President Paul Biya's regime in Cameroon were severely punished. Punishment for producing so-called "subversive" literary expression ranged from seizure of the particular issue of the newspaper or book to death under mysterious or, as is often mentioned in the press, "unexplained circumstances."). See generally FRANCIS B. NYAMNJOH, AFRICA'S MEDIA: DEMOCRACY AND THE POLITICS OF BELONGING (2005) (While the newspapers of independent journalists who published articles considered injurious to the image of the president and his associates were seized and the publishers of these papers often forced out of business (*e.g.*, by denying them access to the government-owned printing press), newspapers that regularly sang the president's praises and utilized government press releases for their content were subsidized generously and their reporters given many other privileges. Ahmadou Ahidjo, Cameroon's first president, regularly banned expressive works that were considered injurious to the "state," which, as Cameroonians knew, meant any form of private expression that was critical of Ahidjo and his policies. In 1972, for example, Ahidjo banned Mongo Beti's *Main basse sur le Cameroun* (1972), a

few African countries have been able to develop the type of democratic civil societies needed for the deepening and institutionalization of democracy during the post-colonial period. It is no wonder, then, that in most African countries today, democracy has been reduced to periodic elections that, in the majority of countries, are “won” by “reformed” military and civilian dictators.<sup>96</sup> During these elections, there is not the type of robust public discourse that can allow all relevant stakeholder groups to effectively articulate their concerns, learn about the issues that are of interest to other constituents within the polity, confront those running for public office, and, working as a group, put forth a political and/or economic platform that reflects their hopes for future governance. For one thing, throughout most of these countries, the production of original creative expression is still limited to the efforts of a few well-placed individuals, a process that effectively eliminates any reasonable form of creative diversity. In addition, whatever is created does not enjoy widespread distribution, either because the content of these works is carefully tailored to meet the needs of a narrowly defined group or avenues for dissemination such as newspapers, radio, television, and the Internet are strictly controlled by the government.

These constraints to the development of a democratic civil society in particular and democratization in general can be overcome by adopting an effective copyright regime. The following section will examine ways in which Africa’s post-independence governmental regimes can use copyright law to (1) enhance the production of diverse fixed original expression; (2) encourage the mass dissemination of that expression; and (3) generally promote the emergence of a democratic civil society, which is the foundation for a free constitution. The main thesis of this section and, indeed, of this paper, is that copyright can be used to help African countries develop and bring about those institutions that enhance democratization and the practice of democratic governance. Copyright’s most important function is to enhance the creation of the diverse original expression that can foster the kind of robust public discourse that is critical for the sustaining of a democratic system of governance.

treatise chronicling the persecution by the Ahidjo regime of ethnic Bamiléké political and economic elites. Biya, who inherited the presidency from Ahidjo in 1982, proceeded to adopt the same methods used by Ahidjo to make the creation of fixed original expression dependent on government approval.)

<sup>96</sup> See generally J.O. Ihonvbere, *Dismantling a Discredited One-Party Regime: Populism and Political Liberalization in Zambia*, in *POLITICAL LIBERALIZATION*, *supra* note 67, at 51.

## IV. COPYRIGHT AND DEMOCRATIZATION IN AFRICA

*A. Introduction*

The transformation of the European colonies in Africa from political and economic despotism to a system based on participatory and inclusive self-governance in both the economic and political realms was reluctant and opportunistic.<sup>97</sup> For one thing, the European colonizers, especially those in colonies with significant populations of European settlers, either did not want Africans to be granted autonomy or were only willing to grant independence to Africans on condition that the Europeans were allowed to control governance structures and the allocation of resources in the post-independence society.<sup>98</sup> While it is true that the transition from colonial oppression to post-independence participatory democracy was “reluctant, repressive, and opportunistic” and hence failed to achieve any “fundamental transformation in the economic, cultural, or bureaucratic domains,” it is important to recognize that by the time independence was granted to the colonies, most of Africa “lacked those objective criteria that have historically been associated with the rise of bourgeois forms of representation elsewhere.”<sup>99</sup> First, the fact that colonialism was an exploitative and repressive political and economic system, designed to enhance European exploitation of African resources for the benefit of the metropolitan economies, meant that there was deliberate effort by the colonial powers to prevent and stunt the emergence of “both a hegemonic bourgeoisie and a strong proletariat—the two classes whose conflicts and confrontations are critical in striking the political compromises and bargains necessary to the establishment of liberal democracy.”<sup>100</sup> Second, European colonialism significantly transformed African societies and introduced a virulent type of racism and violence that effectively prevented the development or sustaining of any type of indigenous civil society. In fact, during the entire colonial period, Africans were “infantilized [and] stigmatized by their color” and “denied the most basic rights.”<sup>101</sup> While racial stigmatization appears to have been most pronounced in the colonies that became the Union of South Africa in 1910, Africans in virtually all colonies were subjected to

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<sup>97</sup> Fatton, *supra* note 13, at 457.

<sup>98</sup> INSTITUTIONS AND DEVELOPMENT, *supra* note 52, at 225. See also J. M. MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 73–90 (1997) [hereinafter INSTITUTIONS AND REFORM IN AFRICA].

<sup>99</sup> Fatton, *supra* note 13, at 457.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 458.

degrading and extremely cruel and brutal treatment.<sup>102</sup> By the time independence was granted, most Africans, including even those who had been granted permission to study outside the country, were reduced to “powerless units of labor who had been deprived of the basic attributes of adult social beings.”<sup>103</sup>

While the “infantilization of Africans facilitated the imposition of the colonial dictatorship and contributed to the relative hegemony of a submissive culture of obedience and compliance to authority,” it effectively forestalled any chances for the development of an indigenous democratic civil society.<sup>104</sup> In fact, colonialism’s preferred form of governance left no “room for resistance, challenge, and revolt, and even less for democratic accountability.”<sup>105</sup> Regardless of their level of maturity, Africans were considered and treated as children, too immature to handle their own affairs or engage in any form of reasoned civic engagement and, of course, not ready to handle the intricacies of self-governance.<sup>106</sup>

Though extremely slow, the emancipation of the African’s consciousness did arrive and led to the intense struggles for independence that confronted the colonial project in the 1950s. As has been argued by many scholars, the impetus for that emancipation “stemmed from the opportunistic convergence of interests between the small petty-bourgeois elite and the masses.”<sup>107</sup> The elites, most of whom had been educated in Europe, were aware of the fact that they could not successfully seize control of the apparatus of government and the allocation of resources from an entrenched European political and entrepreneurial class without the help and support of the African masses. On the other hand, the African masses, quite aware of the European ruling classes’ comparative advantage in the employment of force, recognized that their only hope for successful liberation from continued degradation at the hands of colonialism was “dependent on the elite’s

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<sup>102</sup> See generally MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 52, at 78–80, 141–65. The four colonies were Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony. For critical treatments of racial policies in colonial and apartheid South Africa, see generally DENIS V. COWEN, THE FOUNDATIONS OF FREEDOM: WITH SPECIAL REFERENCE TO SOUTH AFRICA (1961); T.R.H. DAVENPORT, SOUTH AFRICA: A MODERN HISTORY (1977); FREDRICKSON, *supra* note 69; HUTT, *supra* note 69; MAGUBANE, *supra* note 69; DOXEY, *supra* note 69.

<sup>103</sup> Fatton, *supra* note 13, at 458.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See generally ALBERT MEMMI, THE COLONIZER AND THE COLONIZED (1967); FRANTZ FANNON, THE WRETCHED OF THE EARTH (Constance Farrington trans., 1968).

<sup>107</sup> Fatton, *supra* note 13, at 458.

capacity to articulate their grievances and organize their struggles.”<sup>108</sup> Thus, while Africa’s petty-bourgeoisie and its masses formed an opportunistic alliance that helped end colonialism, the alliance failed to effectively and adequately transform the critical domains to provide institutional arrangements capable of supporting a democratic civil society. Instead, what emerged in the post-independence society were varied forms of personal rule that achieved varied degrees of successes with varied degrees of coercion. Where there was success, however, it was precarious, temporary, and crippled by its class and ethnic limitations; where there was failure, it was egregious, massive, and tragic. Where there remained civil liberties, they were fragile, vulnerable, and under constant threat of sudden death; where despotism prevailed, it was cruel, murderous, and incompetent.<sup>109</sup>

### *B. The Struggle for Democracy in Post-Independence Africa*

One of the most important things that the newly independent African countries had to do was choose a political system. Many of Africa’s independence leaders argued that the unitary political system with a strong central government was the most effective institutional arrangement to deal with rising ethnic conflict and to provide the enabling environment for the creation of the wealth needed to confront mass poverty and deprivation.<sup>110</sup> At this time, most African elites considered competitive political structures, especially Western-style multiparty governance structures, an arrangement that could significantly enhance the politicization of the various divisions within the country (ethnic, religious, and other) and endanger the type of peaceful coexistence that was needed for rapid economic growth and development.<sup>111</sup> In fact, as the former president of Tanzania, Julius Nyerere, stated at that time, “where there is one party, and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can ever be where you have two or more parties, each

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<sup>108</sup> *Id.* at 458. See generally BASIL DAVIDSON, LET FREEDOM COME: AFRICA IN MODERN HISTORY 227-28 (1978) (arguing that the African masses recognized that their struggle for a better life, including the restoration of their rights to land that had been seized from them by colonists, depended on the elite’s ability to articulate the masses’ interests and organize them for the fight against continued domination by the colonialists).

<sup>109</sup> Fatton, *supra* note 13, at 459.

<sup>110</sup> See POLITICAL LIBERALIZATION, *supra* note 67, at 17–49.

<sup>111</sup> Samuel Decalo, *The Process, Prospects, and Constraints of Democratization in Africa* 91 AFR. AFF. 7, 10 (1992).

representing only a section of the community.”<sup>112</sup> Armed with this belief, many African countries chose the single party political system with a strong central government.<sup>113</sup> As a consequence, “personal rule” came to be the most pervasive system of governance in post-independence Africa.

As has been described by Professors Robert Jackson and Carl Rosberg,

[p]ersonal rule is a system of relations linking rulers not with the ‘public’ or even with the ruled (at least not directly), but with patrons, associates, clients, supporters, and rivals, who constitute the ‘system.’ . . . The system is ‘structured,’ so to speak, not by institutions, but by the politicians themselves. In general, when rulers are related to the ruled, it is indirectly by patron-client means.<sup>114</sup>

Within such a political system, the relationship between the governors and the governed is not one of “genuine reciprocity,” but one of “coercive dependence.”<sup>115</sup> In Africa, the patron-client relationship undermined “solidarity among the oppressed by ligating them as individuals to their oppressors; clients are hard put to identify with each other as a class and tend to behave as individuals incapable of cohering their grievances into collective resistance.”<sup>116</sup> More important, perhaps, is that this approach to governance proved incapable of fostering the development of a productive economic system, one that would have enhanced indigenous entrepreneurial activities and led to the rapid production of the wealth needed to deal with poverty and deprivation. Wealth creation and rapid economic growth require “political and procedural predictability” which are highly dependent on a set of “rational rules.”<sup>117</sup> In these African economies, what emerged was “unpredictability and inconsistency on the part of court and local officials, and variously benevolence and disfavor on the part of the ruler and his servants.”<sup>118</sup> Within these countries highly bloated bureaucracies

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> ROBERT H. JACKSON & CARL G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA: PRINCE, AUTOCRAT, PROPHET, TYRANT* 19 (1982).

<sup>115</sup> Fatton, *supra* note 13, at 460.

<sup>116</sup> *Id.*

<sup>117</sup> MAX WEBER, *ECONOMY AND SOCIETY* 1095 (Guenther Roth & Claus Wittich eds., 1978).

<sup>118</sup> *Id.*

emerged, staffed by parasitic and corrupt bureaucrats who used the apparatus of state as instruments for their private capital accumulation activities. Venality became endemic in the public sectors of these countries, accountability and transparency suffered, and the ruling elites made a concerted effort to prevent the development of a civil society that could later challenge them for the control of the apparatus of governance.<sup>119</sup>

The laws and institutions that the majority of African countries adopted at independence enhanced the ability of the ruling elites to suffocate whatever democratic civil society was emerging in these countries after many years of colonial exploitation. Thus, even after more than fifty years of independence, most African countries still have not been able to deepen and institutionalize democracy. Before examining how copyright can enhance democratic development in Africa, a brief examination of the concept of democracy will be made.

### *C. The Concept of Democracy*

Professor Robert A. Dahl has provided one of the most useful ways to examine *political* democracy.<sup>120</sup> According to Dahl, one of the most important determinants of a democratic political system is “the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”<sup>121</sup> So that it does, indeed, maintain the required responsiveness, the government must create within the polity an institutional environment that enhances the ability of the citizens to effectively articulate their preferences, make known these preferences to both their government and fellow citizens (either through private or collective action), and have the government accord those preferences equal treatment without any prejudice against the individual or group making the request.<sup>122</sup> It is clear from Professor Dahl’s approach to democracy that a robust civil society plays a very important role in the maintenance of a fully functioning democratic system. For one thing, civil society can provide the non-state forum that citizens need to fully articulate their preferences, engage freely in debate with their

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<sup>119</sup> See Fatton, *supra* note 13, at 461; MBAKU, CORRUPTION IN AFRICA, *supra* note 63.

<sup>120</sup> See ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1-2 (1971) [hereinafter DAHL, POLYARCHY] (Professor Dahl’s definition does not deal with *economic* democracy, which includes the nature of the distribution of income and wealth within the polity). See also ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 10-11 (1982) [hereinafter DAHL, PLURALIST DEMOCRACY].

<sup>121</sup> DAHL, POLYARCHY, *supra* note 120, at 1.

<sup>122</sup> *Id.* at 2.

neighbors, resolve conflict peacefully, and participate fully in the design and implementation of public policies affecting their lives.<sup>123</sup>

Electing government officials is an essential characteristic of a democratic society. Professor Tatu Vanhanen argues that democracy is a “political system in which ideologically and socially different groups are legally entitled to compete for political power and in which institutional power holders are elected by the people and are responsible to the people.”<sup>124</sup> In his definition of democracy, Professor Seymour Lipset argued that democracy is a “political system which [sic] supplies regular constitutional opportunities for changing the governing officials, and a social mechanism which permits the largest possible part of the population to influence major decisions by choosing among contenders for political office.”<sup>125</sup> Professor Lipset’s definition of democracy places emphasis on elections as a way for citizens to take part in governance.<sup>126</sup>

While Professor Dahl also emphasizes elections in his definition of democracy, he provides criteria which can be used to determine if an election is carried out democratically. First, each vote should be counted equally—that is, granted equal weight. Second, all voters should be granted access to the same information regarding the issues to be determined by the election. Finally, when the election is completed, the results should be respected and the orders of the newly-elected officials should be carried out.<sup>127</sup> In his study of democracy, Anthony Downs argued that there must be periodic elections where more than one political party is allowed to compete for capture of leadership positions in the government and that in each election, each voter should be allowed to cast only one vote and that the results of the election should be decided by a majority voting rule.<sup>128</sup>

Gerhard Lenski argued that while elections were important to democratic political systems, the guarantee of other political liberties to citizens was equally important.<sup>129</sup> For example, where citizens are granted the power to organize political parties, other political liberties serve as an effective tool for them to articulate their preferences more

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<sup>123</sup> Netanel, *supra* note 1, at 344.

<sup>124</sup> TATU VANHANEN, *THE PROCESS OF DEMOCRATIZATION: A COMPARATIVE STUDY OF 147 STATES, 1980-88*, 11 (1990).

<sup>125</sup> SEYMOUR LIPSET, *POLITICAL MAN* 27 (1963).

<sup>126</sup> *Id.*

<sup>127</sup> ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 67–90 (1956). *See also* Kenneth A. Bollen, *Issues in the Comparative Measurement of Political Democracy*, 45 *AM. SOC. REV.* 370, 371 (1980).

<sup>128</sup> ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 23–24 (1957).

<sup>129</sup> GERHARD E. LENSKI, *POWER AND PRIVILEGE* 319 (1966).

effectively, present them to the electorate, and participate more fully in the democratic process.<sup>130</sup>

All these scholars suggest minimum conditions necessary to allow individuals within each polity to avail themselves of the opportunities to participate fully and effectively in governance. Professor Dahl is more specific and provides a list of these minimal conditions or what he calls “institutions”:<sup>131</sup>

1. Control over government decisions about policy is constitutionally vested in elected officials.
2. Elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon.
3. Practically all adults have the right to vote in the election of officials.
4. Practically all adults have the right to run for elective offices in the government, though age limits may be higher for holding office than for the suffrage.
5. Citizens have the right to express themselves without the danger of severe punishment on political matters broadly defined, including criticism of officials, the government, the regime, the socio-economic order, and prevailing ideology.
6. Citizens have the right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law.
7. To achieve their various rights, including those listed above, citizens also have a right to form relatively independent associations or organizations, including independent political parties and interest groups.<sup>132</sup>

Professor Netanel has noted that Professor Dahl’s “requirements for democracy” or “institutions” are made up of both “procedural elements” as well as “individual liberties.”<sup>133</sup>

Dahl’s “institutions” are critical for democratization in Africa because they emphasize the participatory and inclusive nature of democratic governance. However, since the colonial period, governance

<sup>130</sup> *Id.* See also MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 98, at 182.

<sup>131</sup> DAHL, PLURALIST DEMOCRACY, *supra* note 120, at 10–11.

<sup>132</sup> *Id.*

<sup>133</sup> Netanel, *supra* note 5, at 240. The procedural elements are “universal suffrage and eligibility for public office, free and fair elections, and state responsiveness to citizen preferences.” The individual liberties include “freedom of assembly, freedom of expression, and the right of access to alternative sources of information.” *Id.*

systems in Africa have been notorious in making it very difficult for citizens to participate in the design and implementation of public policy. In fact, the typical governance model in Africa, even after more than fifty years of independence, is still the elite-driven, top-down, non-participatory model inherited from the colonial government.

One of the most important problems for democratization in post-Cold War Africa has been the fact that many regimes, which came into power through elections, eventually became extremely repressive, authoritarian, and non-democratic. For example, labor union activist and former chairman of the Zambian Trade Union Congress, Frederick Chiluba, who was elected into power in 1991, became increasingly autocratic as he and his political party, the Movement for Multiparty Democracy (MMD), sought ways to monopolize political spaces in the country.<sup>134</sup> A major fault of Chiluba and his regime was that, like many other post-Cold War African leaders who had overthrown, through democratic processes, long-running and well-established authoritarian regimes, Chiluba had resorted to using the same repressive and non-democratic tactics that had been employed by his predecessors to consolidate their power and monopolize legislation supply.<sup>135</sup> Throughout the continent, these so-called “new democrats” went on to engage in behaviors that revealed their complete disdain and disrespect for democratic institutions and the rule of law.<sup>136</sup> They rejected constitutionalism as the basis for organizing society and, in the process, prevented the emergence of those institutions, including civil society, that are critical for the process of democratization.<sup>137</sup>

Some still question whether democracy, as defined by Professor Dahl’s general requirements, is appropriate for Africa. Is not this a Western creation that does not reflect the specificities of Africa’s diverse populations? Would such an approach to political governance not conflict with Africa’s diverse cultures and customs? Some scholars have argued that were developing countries, including those in Africa, to grant their citizens certain democratic freedoms, exercise of these freedoms may interfere greatly with and, to a large extent, constrain the ability of

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<sup>134</sup> Ihonvbere, *supra* note 96, at 65.

<sup>135</sup> *Id.* at 69–78.

<sup>136</sup> *Id.* (In fact, within just a few years after he came to power, Zambians began to accuse President Chiluba and his regime of the same abuses of public office, corruption, and repressive policies that had led to the collapse of the regime of Kenneth Kaunda.)

<sup>137</sup> See Kidane Mengisteab, *Eritrea’s Aborted Democratization*, in POLITICAL LIBERALIZATION, *supra* note 67, at 309–18. See also J.O. Ihonvbere, *Overcoming a One-Man Dictatorship: Political Liberalization and Democratization in Malawi*, in POLITICAL LIBERALIZATION, *supra* note 67, at 243–76.

the government to promote rapid economic growth and development.<sup>138</sup> As Julius Nyerere and other African leaders of the immediate post-independence era argued, granting citizens the right to form independent political parties may politicize ethnicity and constrain national integration.<sup>139</sup> Yet, despite the fact that governments in many African countries used various strong-arm tactics to discourage citizens from forming independent political parties, supposedly in order to encourage and enhance national integration, the latter remains essentially unattainable as many citizens continue to affiliate very strongly with their ethnic group.<sup>140</sup>

Africans want participatory, transparent, inclusive, and people-driven political and economic systems; this has been shown by the struggles against apartheid in South Africa and against authoritarian regimes in other parts of the continent.<sup>141</sup> They want institutional arrangements that enhance and ensure (1) peaceful coexistence of all of each country's diverse population groups; (2) indigenous entrepreneurship and wealth creation; (3) popular participation in governance; (4) equitable and socially optimal allocation of resources; and (5) non-discriminatory treatment, by the state, of individual and group preferences.<sup>142</sup> To make possible such an institutional set-up calls for the establishment of a political system that implicates most or all of the seven "requirements for democracy" advanced by Professor Dahl.<sup>143</sup> Thus, whether one calls the system "democracy" or something else, peaceful coexistence and economic development in Africa requires a governance model that maximizes citizens' participation in governance, makes allowance for the development of a robust civil society, and can provide citizens with an independent forum to articulate their preferences and present them to the government, either on an individual or collective basis. The model should also guarantee that alternative sources of information exist, that citizens are provided access to these alternative sources, and that state institutions are fully and effectively responsive to the needs of citizens. Putting aside the question of whether Western-

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<sup>138</sup> See generally Bhikhu Parekh, *The Cultural Particularity of Liberal Democracy*, in PROSPECTS FOR DEMOCRACY: NORTH, SOUTH, EAST, WEST 156, 171 (David Held ed., 1993).

<sup>139</sup> Decalo, *supra* note 111, at 10. See also JULIUS NYERERE, FREEDOM AND UNITY/UHURU NA UMOJA: A SELECTION FROM WRITINGS AND SPEECHES, 1952–1965 (1967).

<sup>140</sup> See Walter O. Oyugi, *Ethnicity in the Electoral Process: The 1992 General Elections in Kenya*, 2 AFR. J. POL. SCI. 41 (1997) (arguing that ethnicity continues to be a major force in Kenyan elections).

<sup>141</sup> POLITICAL LIBERALIZATION, *supra* note 67, at 17–49.

<sup>142</sup> *Id.* at 17.

<sup>143</sup> DAHL, PLURALIST DEMOCRACY, *supra* note 120, at 10–11.

inspired liberal democracy is suitable for Africa, it is important to recognize that democracy, as outlined by Professor Dahl's minimum conditions, is a positive contributor to the maintenance of African values, such as peaceful coexistence and social and economic development.

The next issue concerns whether and how copyright law can be used to enhance the positive development of a lasting democratic culture in Africa. The following section seeks to show how copyright can be used to help the continent's democratization project by accelerating the deepening and institutionalization of democracy within each country.

#### *D. Copyright as a Tool for Democratization in Africa*

Africa is a continent of extreme diversity. Each African country consists of several ethnic groups, each with its own language, culture and customs, religious practices, and political and economic systems.<sup>144</sup> In addition to the aforementioned influences, diversity in the continent has also been affected by colonialism, Christianity, Islam, globalization, and other external factors. Any effort to democratize African societies must take into consideration not just the impact of each of these influences, but also their cumulative effects. For example, Christian religions established schools and seminaries in Africa that had a profound affect on future African leaders. Young Africans were taught a moral idealism and intellectual rigor that helped them lead the struggle against colonial domination. In fact, in the UN Trust Territory of Cameroons under French administration, some of the most important leaders of the decolonization project were educated at mission schools.<sup>145</sup> On the other hand, these religious groups were also instrumental in promoting Europe's so-called "civilizing" mission in Africa. In colonial Cameroon, some of the most important assimilationist scholars were educated at Christian mission schools and seminaries.<sup>146</sup>

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<sup>144</sup> Cameroon, for example, is made up of 250 ethnic groups that are further grouped into five major regional-cultural groupings: (1) "western highlanders," (2) "western tropical forest peoples," (3) "southern tropical forest peoples," (4) "predominantly Islamic peoples of the northern semi-arid regions (the Sahel) and central highlands," and (5) "the Kirdi, non-Islamic or recently Islamic peoples of the northern desert and central highlands." CAMEROON, *supra* note 15, at 1-2.

<sup>145</sup> The Cameroon nationalist, Ruben Um Nyobé, trade unionist and leader of colonial Cameroon's most important indigenous political organization, the *Union des Populations du Cameroun* (UPC), and a prodigious producer of literature criticizing colonialism and its dehumanizing treatment of Africans, was educated at various mission schools operated by the American Presbyterian Church. *See id.* at 81-82.

<sup>146</sup> *See id.* at 79-80 (mentioning assimilationist writer, Pouka, who left Cameroon and went to France and was faced with the realities of French colonialism).

Such exceptional and ethnic diversity poses many challenges for effective communication and the dissemination of diverse expression. A system that maximizes the production of private original expression and the subsequent dissemination of that expression to the populace is needed in order to democratize a society or deepen and institutionalize democracy. Were such a system to be funded or underwritten by state- or private-patronage, the outcome would necessarily be expression designed to serve exclusively the interests of the patron and not those of society at large. Such “creative” expression would be narrowly focused and fail to reflect the diversity of the population; its dissemination would be designed not to enhance productive civic engagement, but to advance the interests and objectives of the patron.<sup>147</sup>

Let us now return to Professor Dahl’s seven “minimal conditions” for effective functioning of democracy.<sup>148</sup> Note that condition six, that citizens have the right to seek out alternative sources of information that are protected by law, is very critical for the realization of the rights implied in the other conditions.<sup>149</sup> For unless “alternative sources of information exist and are protected by law,” citizens will find it virtually impossible to maintain control of the electoral process, as well as engage freely in any form of productive public discourse.<sup>150</sup> Hence, copyright can promote Africa’s democratization effort by (1) replacing the state and the private patron as underwriters of diverse private creative expression and making certain that such creative works are disseminated to the populace; (2) helping establish a publishing industry that is

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<sup>147</sup> *Id.* at 77–95; BJORNSEN, *supra* note 16, at 34–36. (Such an approach to the production of expressive works was quite common during the colonial period and most of post-independence Africa. In colonial Cameroon, for example, funding and publication outlets were only available to authors whose creative expression praised the French policy of assimilation and portrayed colonialism as a civilizing force in the lives of Africans. For example, *Etudes Camerounaises*, which for many years was the only literary journal in colonial Cameroon, did not accept submissions by Cameroonians unless the work was considered to be beneficial to the colonial enterprise. In fact, during its 20 years of existence, it only published one full-length article by a Cameroonian author. Publications of the *Union des Populations du Cameroun* (UPC), the indigenous political organization that led the struggle for independence, were banned and the colonial government actively promoted policies that made it very difficult for UPC intellectuals to publish and disseminate their creative works. Any literature that called for immediate independence for the territory and subsequent withdrawal from the French union was banned.)

<sup>148</sup> DAHL, PLURALIST DEMOCRACY, *supra* note 120, at 10–11. (It is important to note that these are necessary but not sufficient conditions for securing a democratic system). *But see* Natanel, *supra* note 5, at 247 (Arguing that “a determinant is merely a contributory factor in bringing about a given state of affairs. It need not be a sufficient condition, or even a necessary condition affecting that result.” Need, alone, does not “[g]uarantee . . . any of the three possible democratic determinants . . . the free flow of information and diverse expression, an independent media, and respect for individual creativity.”).

<sup>149</sup> DAHL, PLURALIST DEMOCRACY, *supra* note 120, at 10–11.

<sup>150</sup> *Id.*

independent of the state or private patronage and is dedicated to publishing the privately-created original expressions of indigenous authors; and (3) promoting the value of literary creativity and the contributions of individuals to civic engagement.<sup>151</sup> The general understanding in the literature is that copyright makes possible one or more of these three contributory factors to democratization and by doing so, has a significant impact on democracy and democratization. The critical issue here is not whether copyright can single-handedly underwrite Africa's transition to democratic governance but whether copyright, working with other factors, can "significantly enhance the opportunities for democratic development" in Africa.<sup>152</sup>

Copyright can perform three functions that are critical to the democratization effort in Africa. Copyright can be used to underwrite: (1) the effective distribution of "information and diverse expression" to the various individuals and population groups in each African country; (2) the creation and sustaining of a publishing industry relatively free of state or private patronage and consisting of indigenous African authors and publishers; and (3) "the widespread recognition" and appreciation of "the value of innovative thought and individual contributions to social discourse."<sup>153</sup> Below, each one of these three social phenomena is examined to determine how it can advance the cause of democratization and democracy in Africa.

1. *Copyright and the transition to democratic governance in Africa: enhancing the free flow of information and diverse expression*

The U.S. Constitution empowers Congress to grant copyrights and patents through legislation.<sup>154</sup> The Constitution states that "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>155</sup> Countries that have enacted copyright laws commonly reason that by granting "authors and their assigns" *limited* monopoly rights in their creative original expression, such laws provide incentives which encourage and enhance the creation of knowledge.<sup>156</sup> Conversely, it is

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<sup>151</sup> See generally Netanel, *supra* note 5, at 246.

<sup>152</sup> *Id.* at 247.

<sup>153</sup> *Id.* at 246.

<sup>154</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>155</sup> *Id.*

<sup>156</sup> Netanel, *supra* note 5, at 248. For example, copyright law in Mexico is based on similar principles as that in the United States. The major difference between the two systems is that unlike

also argued that by granting authors limited monopoly rights in their creative works, the government is impeding competition in the market and significantly increasing the price consumers must pay to access the creative expression. However, it is important to note that authors, who bear the full costs of creating, producing, and disseminating these works, may not be able to recover their costs due to competition from free riders.<sup>157</sup> By granting authors limited monopoly rights in certain well-defined uses of their works, authors, or their assigns, can recover their costs by limiting access to their works to paying customers.<sup>158</sup> Copyright, thus, grants authors of creative works monopoly rights in their creations and allows them to charge monopoly prices.<sup>159</sup> However, such a “tax on readers,” as Professor Netanel calls it, may be necessary.<sup>160</sup> Without it, the market for creative expression could virtually “dry out” as *most* prospective authors of creative works would consider investing in privately created expression unprofitable.<sup>161</sup> Creative expression in the market would then be restricted primarily to that underwritten either by state or private patronage. The diverse creative expression needed for the type of robust public discourse that enhances democratic governance would necessarily fail to be produced.<sup>162</sup>

U.S. law, federal law in Mexico expressly recognizes and protects an author’s “moral rights.” See generally U.S. CONST. art. I, § 8, cl. 8; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 28. See also Alejandro Pérez-Serrano, *Overview of Copyright Protection in the United States and Mexico*, <http://www.natlaw.com/pubs/spmxi12.htm> (last visited on March 14, 2009).

<sup>157</sup> The “free rider” entrepreneur would not have to bear the fixed costs of producing a creative work, which in the case of a book would include, but are not limited to, research, preparation of drafts (including selecting material for each chapter and organizing the chapters), selecting a title, seeking reviewers to read and comment on the material, making revisions to the work, seeking a publisher, preparing an index, type-setting, printing, binding, marketing, and distribution. The free-rider competitor only has to copy the work and sell it. In fact, the free rider may not have to bear the costs of advertising and promotion since such an entrepreneur is likely to select, for copying, only books or creative works that already have been widely accepted by the market—that is, popular works.

<sup>158</sup> See generally Netanel, *supra* note 5.

<sup>159</sup> *Id.* at 248–49.

<sup>160</sup> *Id.* at 249.

<sup>161</sup> *Id.*

<sup>162</sup> For example, the underwriting of the production of private creative expression during the colonial and post-colonial periods in Africa by state and private (primarily ethnic organizations or traditional kings) patronage resulted in the production of creative works that served the needs of extremely narrow interests—the European colonialists, including their Christian missions, during the colonial period; and authoritarian, corrupt and repressive regimes in the post-colonial period. Several African kings underwrote significant productions of literary and artistic works but these were primarily ethnic-oriented creations whose dissemination was limited to the group. Perhaps, more important was the fact that most of these creations were not of the kind that could have enhanced political discourse since the creation of any literary or artistic works that threatened colonial domination was strictly prohibited. See, e.g., CAMEROON, *supra* note 15, (discussing the efforts of

It has been suggested, however, that even without the incentives provided by copyright, many individuals would still invest in the creation of literary and artistic works. These people would do so even without the expectation of pecuniary gain.<sup>163</sup> In addition, scholars have argued that other ways currently exist to deal effectively with free rider competition and allow authors of creative expression to reap the monetary benefits of their works.<sup>164</sup> Some of these mechanisms include: “creators’ lead-time advantages, consumer preferences for originals over copies, industries’ informal and collaborative rights allocation, technological fences, provider-consumer contracts, and the building of expressive products with other goods or services.”<sup>165</sup>

While it is true that there may be individuals who are willing to create private expression and allow it to go directly into the public domain, virtually every author depends on a publishing industry. Such an industry would remain operational so that it might publish and disseminate these creative expressive works to consumers through (1) operating profitably in the marketplace, (2) relying on state- and/or private-patronage, or (3) benefiting from copyright protection.<sup>166</sup> Even if individuals are willing to engage in creative activities without the need to be protected against free rider competition, they must depend on a private publishing industry that depends heavily on profit maximization

French colonialists to stunt the production of creative expression among Cameroonians in the U.N. Trust Territory of Cameroons under French administration). Of special note is the struggle between French colonial officers and Sultan Njoya, sovereign of the Kingdom of Bamoun, over creative works in the king’s palace. Christian missionaries opposed the king’s educational system, which involved instruction in the Bamoun language, as well as emphasis in the curriculum on Bamoun history, culture and customs. In addition to destroying the kingdom’s educational system and replacing it with one based on the French educational system with instruction in French, the French also dethroned the king, destroyed his printing press, and forced him into exile. Production of art objects and literature at the Palace was strictly prohibited by the French colonial government. *Id.* See also SUZANNE P. BLIER, *THE ROYAL ARTS OF AFRICA: THE MAJESTY OF FORM* (1998); RICHARD BJORNSON, *THE AFRICAN QUEST FOR FREEDOM AND IDENTITY: CAMEROONIAN WRITING AND THE NATIONAL EXPERIENCE* (1991).

<sup>163</sup> See Steven Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 322–23 (1970); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198 (1996). It is argued that even if society does not have a copyright law that protects authors’ right to “exploit their works, artists would still create art, academics would write articles, and people would write letters,” and, of course, students would still doodle. STEPHEN M. MCJOHN, *INTELLECTUAL PROPERTY: EXAMPLES & EXPLANATIONS* 38 (3d ed. 2009). Of course, copyright protection is not limited only to creative expression that would not be produced if protection is not granted. *Id.*

<sup>164</sup> The lead paper discussing the various non-copyright ways to protect authors against free rider competition is Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261 (1989). See also Netanel, *supra* note 5, at 249–52 (providing a review of the literature on extra-copyright mechanisms for dealing with free rider competition).

<sup>165</sup> Netanel, *supra* note 5, at 249.

<sup>166</sup> *Id.* at 250.

in order to remain operational. For example, in post-independence Africa, indigenous authors have either created only that expression which is favored by state-owned publishing houses or submitted their works to foreign publishers, primarily in Western Europe and the United States.<sup>167</sup>

As Professor Netanel argues, significant improvements in technology, including especially digital technology have “enable[d] the nearly-instantaneous original-quality reproduction and worldwide dissemination of many expressive works, effectively eliminating lead-time and original copy advantages.”<sup>168</sup> Despite improvements in the technology of “fence building,” or methods authors use to protect their works, such fences remain quite susceptible to penetration by free riders.<sup>169</sup> Additionally, two-party contracts do not offer any protection to authors against infringement by third parties.<sup>170</sup> Thus, without any empirical studies providing evidence to support the proposition that “production and dissemination of original expression” would not diminish if copyright were abolished, there is no sound basis on which to eliminate copyright’s incentive system.

In Africa, where most countries are imbued with significant ethnic and religious diversity, ethnic-based political parties and organizations remain important players in governance.<sup>171</sup> If the production of original expression were underwritten either by state- or private-patronage,

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<sup>167</sup> *Id.* at 249. Of course, some creative works, such as love letters, personal greetings written on home-made cards, doodles, etc., may not need a publisher in order to reach their ultimate destination. In general, African authors have found it quite difficult to publish their works domestically, since in most of these countries, the publishing houses are owned by the government. Most of the privately-owned publishing houses belong to religious organizations, whose interest is limited primarily to church-related materials. Submitting creative works to foreign publishers has been quite challenging for African authors, especially since many of these Western publishers do not consider the market for original creative expression in Africa profitable. One exception is Heinemann, the United Kingdom based publisher, who in 1962, launched the African Writers Series (AWS), which was designed to publish exclusively original creative expression authored by Africans and for dissemination in Africa. In creating the AWS, Heinemann made a significant financial commitment to publishing in Africa and helped produce some of the continent’s most important post-colonial literary talent. On the African Writers Series, *see, e.g.,* Loretta Stec, *Publishing and Canonicity: The Case of Heinemann’s “African Writers Series,”* 32 *PACIFIC COAST PHILOLOGY* 140, 141 (1997).

<sup>168</sup> Netanel, *supra* note 5, at 250.

<sup>169</sup> The easy availability of digital technology allows individuals to make “perfect digital copies” once the creative work has been placed online. Unless this digital technology is regulated, it threatens to undermine traditional copyright markets. Nevertheless, digital technology provides owners of creative works the “technical means to restrict access to, and uses of, digitized works to a far greater extent than is possible in the analog and hard copy world.” The deployment of this protective technology is called “fence building.” Netanel, *supra* note 1, at 285.

<sup>170</sup> *Id.*

<sup>171</sup> *See generally* MWANGI S. KIMENYI, *ETHNIC DIVERSITY, LIBERTY AND THE STATE: THE AFRICAN DILEMMA* (1997); KENYA: *THE STRUGGLE FOR DEMOCRACY* (Godwin R. Murunga & Shadrack W. Nasong’o eds., 2007).

politically dominant ethno-regional coalitions would determine the type and nature of expression produced and disseminated and hence, in the process, control the nature and content of public discourse.<sup>172</sup> Copyright cannot only ensure that original expression is produced and disseminated to the population, but can make certain that the *right mix* of literary and artistic works is produced, since such a mix would be determined by the market and not by civil servants and politicians or ethnic barons.<sup>173</sup> Copyright can also ensure that a relatively diverse mix of expressive works will be created and disseminated to the population so that the type of public discourse necessary to sustain, deepen, and institutionalize democracy can occur.

The type of expression from which authors expect to recover costs or make a profit is likely to be in the realm of commercial entertainment, lacking in serious examination of issues critical to governance.<sup>174</sup> In African countries, where civil servants and politicians have more information about the operations of government than most of the population, a model could be effective under which state custodians take on the primary responsibility for producing or underwriting the production of necessary information and disseminating it to the population. Yet, as was discussed earlier, such a state-sponsored system is likely to constrain, not enhance, democratization. Moreover, politically dominant ethno-regional coalitions, determined to maintain a monopoly on power, would produce and disseminate only information that enhances their ability to hold on to power.<sup>175</sup>

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<sup>172</sup> For example, from independence and reunification in 1961 to 1982, Cameroon was ruled by an ethno-regional coalition led by Ahmadou Ahidjo, a Muslim from the North. Although Ahidjo's government was a north-south alliance, the government was controlled by a group of northern Muslim men. In 1982, Ahidjo was replaced by Paul Biya, a Christian from the South, who, together with members of his Beti ethnic group, has monopolized governance in Cameroon since then. See generally CAMEROON, *supra* note 15; THE LEADERSHIP CHALLENGE IN AFRICA, *supra* note 73. Similar patterns of ethno-regional domination of political economy in Africa can be found in the majority of countries in sub-Saharan Africa. For military domination of governance in Nigeria during most of the country's existence as a sovereignty, see Pita Ogaba Agbese, *Keeping the Military at Bay: Current Trends in Civil-Military Relations*, in THE CONTINUING STRUGGLE, *supra* note 15, at 153–77. For a view of ethnic domination of politics in general, see the case studies in POLITICAL LIBERALIZATION, *supra* note 67.

<sup>173</sup> An ethnic baron in the African context is a political elite whose legitimacy within the ruling government derives from the support that he gets from his ethnic group. Such an elite serves in some capacity in the government (e.g., governor of a province or minister in the government). In exchange for making certain that members of his ethnic group vote for the president of the country during each national election, the president guarantees the baron a permanent and lucrative position in the administration. CORRUPTION IN AFRICA, *supra* note 63, at 54–55.

<sup>174</sup> Netanel, *supra* note 5, at 250.

<sup>175</sup> For example, during the presidency of Ahmadou Ahidjo in Cameroon (1960–1982), the government regularly banned literary expression that was considered a threat to Ahidjo's control of political spaces in the country. Thus, while the state routinely subsidized the publication of literature

Expression produced for commercial purposes may generally be geared towards entertaining, rather than informing the public. However, in Africa, where mediums for serious discussion of issues critical to the welfare of the masses are scarce, commercial expression has often been effectively used to inform the populace about the operation of their government.<sup>176</sup>

If copyright can enhance the production and dissemination of diverse private expression, it is important to determine how copyright might advance Africa's democratization project. In other words, how can copyright's incentive system enhance Africa's transition to democratic governance? Africa's recent transition to democratic governance, which began in the mid-1980s, was spurred by a few independent media organizations that evolved into a "counterpower [sic] to the centralized, authoritarian regimes" in the various states in Africa.<sup>177</sup> Throughout most of the early independence period, Africa's authoritarian rulers had controlled the media, silenced independent creators of expression, intentionally created information distortions, and maintained complete monopolization of information in an effort to maintain power. However, beginning in the late 1980s and early 1990s, there emerged within the continent a small group of independent newspapers that were able to challenge the state's monopoly.<sup>178</sup>

The end of the Cold War, along with advances in information technology, specifically the invention of the fax machine and the Internet, contributed significantly to the emergence of publishing houses outside the government. These factors provided writers and other creators of expression the wherewithal to challenge African governments. Notably, the press became an important player in the transition to democratic governance, which began in Africa in the late

designed to praise the president and the one-party state, books, such as Mongo Beti's *Main basse sur le Cameroun*, which exposed state corruption and maladministration, were summarily banned. Bjornson, *supra* note 16, at 325-26.

<sup>176</sup> For example, during the pro-democracy demonstrations of the early 1990s in Cameroon, the incumbent government became increasingly agitated as the commercially successful *Le Messager* newspaper emerged as an important medium for attacking government corruption and other opportunistic policies. Yet, it was not the newspaper editorials that provoked government anger. Instead, it was the paper's very entertaining cartoons, which while poking fun at various public officials, kept the population informed about the goings-on in the government. In fact, the government of Paul Biya was so angry about the cartoons that it forced the paper's editor, Pius Njawé, into exile in the United States. See Eko, *supra* note 95, at 136-48.

<sup>177</sup> *Id.* at 124.

<sup>178</sup> *Id.*

1980s.<sup>179</sup> Throughout the continent, emerging independent media exposed government corruption and other forms of malfeasance. Furthermore, it helped citizens understand political processes, disseminated information about local and international pro-democracy struggles, and generally enhanced the ability of citizens to participate in public discourse.<sup>180</sup>

In Africa, the independent media was not only instrumental in exposing the evils of authoritarianism, but also in providing Africans with the opportunity to see what was happening in other African countries and the world. Africans were able to get an insight into how people in democratic states lived, and by observing the democratic struggles of former Soviet bloc countries came to the realization that they were not alone in their struggle for freedom and self-determination. Additionally, the infiltration of commercially produced movies, TV, and music programs from the West into the homes of many Africans had a significant impact on the struggle for democratization in Africa.<sup>181</sup>

Now that copyright's incentive system has produced a viable publishing industry with local authors, the question is whether copyright

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<sup>179</sup> Chris Ogbondah, *Media and Democratic Change in Africa: An Analysis of Recent Constitutional and Legislative Reforms for Press Freedom in Ghana and Nigeria*, in SOCIO-POLITICAL SCAFFOLDING AND THE CONSTRUCTION OF CHANGE: CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA 147, 147–82 (Kelechi A. Kalu & Peyi Soyinka-Airewele eds. 2009) (discussing the importance of press freedom to democratization and making recommendations on how to constitutionally entrench press freedom in the African countries); Wisdom J. Tettey, *The Media and Democratization in Africa: Contributions, Constraints and Concerns of the Private Press*, 23 MEDIA, CULTURE & SOCIETY 5 (2001) (arguing that the private press has made a significant impact on democratization, democratic governance, and accountability and transparency in government); Eko, *supra* note 95, at 123–51 (arguing that at a time when Cameroon lacked the necessary institutional constraints on government, a small number of newspapers, led by *Le Messenger*, served effectively as the main check on the exercise of government agency).

<sup>180</sup> Kunle Amuwo, *The State and the Politics of Democratic Consolidation in Benin, 1990–1999*, in POLITICAL LIBERALIZATION, *supra* note 67, at 160–61 (During the height of the struggle for multiparty politics in Benin, the private press, although still in its embryonic stages of development, played a critical role in uncovering corruption in the public sector, especially as it related to the government's financing of elections.).

<sup>181</sup> The supply of these works, however, was often through free riding entrepreneurs. Given the extremely low per capita incomes of many African countries, it has been suggested that forcing African consumers to pay royalties to copyright owners in the West would effectively deny access to works created in the West to these consumers. Thus, the “imposition of copyright protection for [Western-produced democracy-inducing creative expression] would seem to have a detrimental, not positive, effect on democratic transition.” Netanel, *supra* note 5, at 256–57. I believe, however, that if African countries insisted on respect for copyright for their own and foreign authors, that should begin the process of developing a market for domestically produced expression and minimize the dependence of the local economy on state-sponsored works. Thus, while local poverty might still constrain the ability of citizens to adequately access foreign created expression, an effective copyright system, which protects both foreign and domestic created expression, should significantly enhance the growth of local publishing and local authors.

will be able to enhance dissemination of created expression, given the level of domestic poverty in Africa. Moreover, will the domestic economy be able to generate enough discretionary income to support a market for locally created expression? Some researchers have argued that most countries in Africa, especially those in the sub-Saharan region, do not presently have the resources to support commercial production and dissemination of creative works.<sup>182</sup> As a consequence, critics argue that granting copyright protection to authors now may not really help these countries deepen and institutionalize democracy.<sup>183</sup> In addition, most African countries are not able to import foreign-produced creative expression because the local economies do not have the resources to pay the necessary royalties to the foreign copyright owners. Furthermore, Western publishers allegedly do not see African markets as viable places for them to market their works.<sup>184</sup>

Western publishers do, however, see Africa as a viable market in which to invest. During the last sixty years, several Western publishing houses have been quite successful in doing business in some of the poorest of African countries. Perhaps the most notable is the success of Heinemann's African Writers Series (AWS), which for over forty years has published some of the most important literature of the post-colonial period in Africa authored by Africans. Established in 1962, AWS gave a voice to some of Africa's most important writers.<sup>185</sup> Virtually every book published by the AWS has been a commercial and literary success and has enjoyed wide readership, even in poverty-stricken rural Africa.<sup>186</sup> Thus, despite a myriad of socioeconomic problems, local publishing industries and reading communities have been able to emerge in virtually every African country since the end of the Cold War. For example, until 1996 there were no private media outlets in Cameroon. Today there are many private newspapers, radio stations, and television stations operating

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<sup>182</sup> Henry M. Chakava, *International Copyright and Africa: The Unequal Exchange, in* COPYRIGHT AND DEVELOPMENT: INEQUALITY IN THE INFORMATION AGE 13, 13, 18 (Philip G. Altbach ed., 1995).

<sup>183</sup> *Id.* at 13–18.

<sup>184</sup> Netanel, *supra* note 5, at 258–59.

<sup>185</sup> Among them are Chinua Achebe, Cyprian Ekwensi, Ngugi wa Thiong'o, Steve Biko, and Ama Ata Aidoo.

<sup>186</sup> As a child growing up in a rural village in Cameroon, I was able to have access to some of this literature, despite the fact that my parents were extremely poor. My friends and I engaged in various entrepreneurial activities during the summer holidays and then pooled our profits to purchase a book as equal owners. The book was then circulated amongst members and after all the members had finished reading the book, it was turned to the school "library." To protect the book, we "laminated" its cover with plastic. Any student checking the book out of the school library had to promise not to harm it.

there. Unfortunately, these publishing enterprises remain extremely fragile and are likely to fail unless an effective copyright regime is established. Such a scheme could enhance profitability and contribute significantly to the sustainability of the industry.<sup>187</sup>

It has been argued that the “political liberalization” that has taken place in Africa since the late 1980s, including the introduction of competitive political parties, should be considered only as an introduction to democratization and democratic governance.<sup>188</sup> Effective democratization must involve “the steady and systematic empowerment of people and their communities in a direction that emphasizes popular participation in decision making, accountability, transparency, social justice, human rights, environmental protection, gender equality, and other pro-people issues of nationality, identity, difference, and pluralism.”<sup>189</sup> This implies the transformation of the post-colonial state and the introduction of institutional arrangements that enhance and support robust civic engagement. The “ruthless asphyxiation of civil society” and the “subversion of the people’s will,” characteristic of Africa’s military and civilian dictatorships of the immediate post-independence era, must be abandoned.<sup>190</sup> Instead, the state must actively seek the establishment of institutions that enhance democracy through contributions to public discourse in the pursuit of a vibrant and democratic civil society. Copyright is one such institution.<sup>191</sup>

There is a possibility that many Africans will choose to remain *rationaly ignorant* with respect to political issues because they struggle to meet their basic needs. Due to this “low-information rationality,” these societies are not likely to maintain the “ever vigilant, well-informed, and deliberative democratic polity proffered by some theorists.”<sup>192</sup> While this form of free riding is quite common in well-entrenched democratic

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<sup>187</sup> Although government harassment of journalists continues as it has since the 1960s, the government’s monopoly on the production of expression has been broken and as information technology continues to change, the ability of the government to effectively control production and dissemination of expression is no longer absolute. Nevertheless, effective copyright protection is still needed in order to ensure that a robust private publishing industry is sustained. *See Cameroon Africa*, TRAVEL DOCUMENTS SYSTEMS, INC., <http://www.traveldocs.com/cm/govern.htm> (last visited on March 16, 2009).

<sup>188</sup> *Constitutionalism and Governance in Africa*, *supra* note 63, at 47.

<sup>189</sup> THE CONTINUING STRUGGLE, *supra* note 15, at 138.

<sup>190</sup> *Id.* at 137–38.

<sup>191</sup> Netanel, *supra* note 5, at 262.

<sup>192</sup> *Id.* at 264 (the idea of rational ignorance is that, given the high costs of keeping oneself informed on the country’s political processes, and especially, on issues to be decided by each election, some voters may decide that, based on a cost-benefit calculation, they would rather remain uninformed).

systems, many people suffering under the yoke of extreme authoritarian rule do not share this practice. The high level of informed participation by Africans at the end of the apartheid regime in South Africa and by poor and disenfranchised groups in other parts of the continent serves to illustrate this point. Since the late 1980s, Africa's population has been quite successful in keeping themselves informed about political and social issues through song, drama, and other informal avenues. By doing so, they have been able to participate quite effectively in public discourse. This level of participation, while significant, does not rise to that needed to sustain a democratic political system. An effective copyright regime can enhance the creation of such diverse expression.<sup>193</sup>

Professor Netanel has suggested a number of ways in which commercial expression can contribute to the enhancement of democracy. First, despite the fact that commercial expression's main focus is profit-maximization, it nevertheless, can provide a "forum for information and debate on important social and political issues for those persons . . . who do take a proactive role in democratic governance."<sup>194</sup> While collectively citizens may not be interested in all issues that affect the public interest, there may be those within the polity who are interested in staying informed.<sup>195</sup> Second, the media can assist "policy experts and opinion elites," who then inform the electorate.<sup>196</sup> Third, "the commercial media's agenda-setting role may help to form the basis for meaningful citizen deliberation, to the extent that is possible in a highly pluralist, advanced democratic state."<sup>197</sup> The media can shape public opinion as to which issues need to be emphasized in public discourse. In Africa's pluralist societies, an independent media outlet can play the role of agenda-setting and help bring to the table of public discourse those issues that are critical to the nation as a whole.<sup>198</sup> Fourth, commercial

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<sup>193</sup> INSTITUTIONS AND DEVELOPMENT, *supra* note 52, at 264–65 (In Cameroon, during the pro-democracy strikes of the early 1990s, "side walk radio," an informal communication structure, was widely used by the masses to keep themselves informed of developments in the struggle. In fact, the so-called "rumor mill" was so successful that anti-government forces were able to design a massive strike action against the government without the security forces finding out.).

<sup>194</sup> Netanel, *supra* note 5, at 265.

<sup>195</sup> For example, laborers might be quite interested in labor issues in general and wage rates in particular. The media is in a position to "sell" its analysis of these issues to laborers, which in turn may organize to lobby Parliament regarding these issues.

<sup>196</sup> Netanel, *supra* note 5, at 265.

<sup>197</sup> *Id.*

<sup>198</sup> For example, by continuously hammering away at venality in the government, especially through their cartoons, Cameroon newspapers, led by *Le Messenger*, made corruption and government malfeasance and its impact on governance in general and the welfare of the people in particular, a very important issue in public discourse. Eko, *supra* note 95, at 134-36.

expression can and does “help modify prevailing attitudes and values.”<sup>199</sup> The media can shape public opinion as to which issues need to be emphasized in public discourse. Therefore, commercially produced popular culture programs such as TV shows, movies, and music can be appreciated by consumers. The authors of these works often utilize prevailing popular “practices, ideologies, and stereotypes,” a process that may either challenge or re-enforce these images.<sup>200</sup> While entertaining, these programs can force the people to engage in the type of public discourse that actually enhances the deepening and institutionalization of democracy.<sup>201</sup>

Despite its focus on gaining profit, commercial expression can serve as an important contributing vehicle through which citizens can access information about political and social issues. Nevertheless, it is important to understand that commercial expression’s principal motivation is profit maximization, not public service. As such, copyright’s incentive system should be seen as the “positive factor in enhancing democracy, especially when one views democracy not as a republic of ideal citizens, but as the collective self-rule of intermittently-virtuous, cognitively-limited, real life human beings.”<sup>202</sup>

## 2. *Copyright and the transition to democratic governance in Africa: a non-state sector of authors and publishers*

Copyright’s incentive system can also help nurture indigenous authors and publishers who can then operate without reliance on state or private patronage. A publishing industry independent of state control is critical for Africa’s democratization project in several ways. First, the lack of judiciary independence has impeded attempts to prosecute senior bureaucrats, particularly those connected to the head of state, for their alleged complicity in corrupt activities.<sup>203</sup> Agencies (e.g., media, police, judiciary) that are not independent from the state cannot be expected to serve as effective checks on the exercise of government agency. Hence, a publishing industry that is dependent on the state for its existence would

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<sup>199</sup> Netanel, *supra* note 5, at 266.

<sup>200</sup> *Id.* at 227.

<sup>201</sup> Commercial theater played a very important role in educating black South Africans about apartheid and how to fight for the dissolution of the racist regime. *See generally* Isidore Diala, *Theater and Political Struggle: Trends in Apartheid South African Drama*, 33 *NEOHELICON* 237 (2006) (explaining how theater was used as an effective tool, along with armed struggle, in the fight against apartheid in South Africa).

<sup>202</sup> Netanel, *supra* note 5, at 267.

<sup>203</sup> *See generally*, CORRUPTION IN AFRICA, *supra* note 63.

not be able to effectively provide the type of analysis of political and social issues that can help inform the public about governance.<sup>204</sup>

Second, copyright's incentive system can allow Africans to avoid a major problem of state- and private-patronage underwriting creative expression—the lack of diversity in literary and artistic works produced. Since the continent's colonial period, sponsors have carefully monitored and controlled the production of creative expression to make certain that only expression that supports and enhances the sponsor's viewpoint is produced. Hence, during the colonial period in Cameroon, for example, only assimilationist literature was allowed to be produced and disseminated in the colony.<sup>205</sup> Ahmadou Ahidjo, who became president of a united and independent Cameroon in 1961, continued the strict regulation of creative expression. As a result, there was a significant lack of creative expression that did not “toe” the party-line established by the president and his Cameroon National Union political party.<sup>206</sup>

Third, the control of publishing by the colonial government meant that local issues, that is, those of interest to Africans, like deteriorating sanitary conditions in the “African areas” of the urban sectors, could not be brought to the public arena for discussion. In fact, the absence of an independent African publishing industry made it very difficult for Africans to examine issues of importance to them and to develop a culture of democratic discourse within the colonial environment. Whether through newspapers or public lectures, public discourse in the colonies was limited exclusively to imported expression, usually from Europe.<sup>207</sup> Copyright can help provide an “indigenous sector of political

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<sup>204</sup> See Charles Manga Fombad, *The Dynamics of Record-breaking Endemic Corruption and Political Opportunism in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA*, *supra* note 73, at 357–94 (discussing Cameroon under Paul Biya).

<sup>205</sup> Literature produced by Marie-Claire Matip and Jacques Kuoh-Moukouri examining the lives of native Cameroonians who had been “saved” from the pestilence of their undisciplined and backwards lives by colonially-sponsored assimilationist education and had been helped to evolve to the European/French cultural ideal was praised and actively supported and their authors rewarded handsomely by the colonial government. However, works that revealed the atrocities of colonialism and called for its abolition were banned and their authors imprisoned, executed, or forced into exile. See *CAMEROON*, *supra* note 15, at 79–81.

<sup>206</sup> For example, in 1972 the president banned *Main basse sur le Cameroun*, a book written by internationally acclaimed Cameroon writer Mongo Beti. The book was critical of the government's continued persecution of members of the *Union des Populations du Cameroun* (UPC) political party, which had spearheaded the bloody fight for independence from France. Although the UPC had single-handedly forced the French to grant independence to Cameroon, it was Ahidjo's relatively unknown political party, the *Union Camerounaise*, which, with the help of the departing French, captured the apparatus of government. See *id.*

<sup>207</sup> See, e.g., Netanel, *supra* note 5, at 268 (“[P]resence of an indigenous sector of political and cultural expression creates greater possibilities for addressing local issues and developing a local democratic culture.”)

and cultural expression” that can allow not only for issues to be discussed that are important to all of a country’s relevant stakeholders, but also for the development of a democratic culture.<sup>208</sup>

Fourth, civil society is considered one of the most important institutions for the effective democratization of any society.<sup>209</sup> Civil society can provide a forum wherein individuals and groups can articulate their preferences, share them with others, and petition the state to address these preferences. Civil society can also serve as a “classroom” to educate the masses in democratic governance and to help them develop a culture for peaceful conflict resolution. Civil society organizations, such as a free press, can serve as an important check on the government and also as a source for critical political information and analysis.<sup>210</sup>

If an African country does not offer copyright protection to local and foreign expression, the economy could be subjected to relatively cheap and pirated expression from abroad, significantly hindering or stunting indigenous creative activities.<sup>211</sup> Hence, policy makers should ensure that both imported and local creative expressions are provided copyright protection. Of course, extending copyright protection to foreign works, especially in poor African countries, could render those works too expensive for local consumption. However, it is important to note that in the absence of copyright protection for foreign works, free riding entrepreneurs could flood the markets with pirated or illegally copied works from abroad, effectively destroying opportunities to establish an independent local publishing industry in the long run.

In sum, copyright may enhance the ability of African countries to develop an independent publishing industry that can help nurture a diverse crop of indigenous authors and ensure that the public discourse reflects each country’s ethnic and religious diversity, therefore allowing for the development of civic engagement that is critical for democratic governance.

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<sup>208</sup> *Id.*

<sup>209</sup> A civil society consists of the various private groups and institutions that provide the foundation for a functioning society and is indispensable for checking the power of the government. The civil society is distinct from those institutions and structures backed by the state. George Klay Kieh, Jr., *Unsteady Steps and Uncertain Politics: Political Democratization in Post-Civil War Liberia*, in *POLITICAL LIBERALIZATION*, *supra* note 67, at 199.

<sup>210</sup> *Id.* at 265–68.

<sup>211</sup> *Id.* at 268–69. See also Larry Diamond, *Nigeria: Pluralism, Statism, and the Struggle for Democracy*, in 2 *DEMOCRACY IN DEVELOPING COUNTRIES: AFRICA* 33, 70–71 (Larry Diamond et al. eds., 1988) (examining the role of the independent press in Nigeria’s democratization effort).

3. *Copyright and the transition to democratic governance in Africa: the value of individual contributions to social discourse*

Copyright's incentive system works at the margin—it provides individuals rewards for adding their private original expression to the existing national stock of knowledge.<sup>212</sup> Copyright is not designed to reward individuals or groups who make available to others material previously authored by someone else, even if the process of bringing previously authored works to the public is expensive and requires significant levels of skill. Copyright is designed to reward individuals for bringing forth *original* works, which can then become part of society's existing stock of knowledge. Copyright does not judge the merit of the original contribution. Thus, certain individuals and groups are prevented from dominating and monopolizing the market of ideas that feed the polity's "cultural heritage."<sup>213</sup> This is critical for societies such as those in Africa, which are extremely diverse—copyright can make certain that the expression used to "feed" public discourse is diverse enough to reflect the values of all of the polity's relevant stakeholder groups.<sup>214</sup> Furthermore, by promoting an "inclusive" approach to the production of creative expression, copyright enhances democratic discourse.

It is also important to note that copyright may make it possible for the individual, no matter his or her social, political, or ethnic background, to contribute his or her original expression to the national stock of knowledge. Perhaps, if apartheid South Africa's copyright policy had extended protection to all original expression instead of banning original creative expression authored by Africans, the country would have had a more robust discussion of the evils of apartheid and the system would have been abolished much earlier than 1994.<sup>215</sup>

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<sup>212</sup> Netanel, *supra* note 5, at 272.

<sup>213</sup> *See id.*

<sup>214</sup> A stakeholder group, as used here, refers to a group whose welfare or well-being will be affected by public discourse. Such a group would be very interested in the type of creative expression that is used to feed public discourse. Mbaku, INSTITUTIONS AND DEVELOPMENT, *supra* note 52, at 10-11.

<sup>215</sup> Although racially-based policies had perverted South African society since Jan van Riebeeck established the first permanent European settlement in what would later become Cape Town in 1652, apartheid became official policy in South Africa in 1948. Since a critical part of the apartheid system was the establishment of permanent black inferiority, original black expression, which by necessity opposed apartheid's violent and dehumanizing oppression and exploitation of blacks and promoted positive images of blacks, was banned and not allowed to be included in the "collective discourse" and national stock of knowledge. *See generally* CHRISTOPHER MERRETT, A CULTURE OF CENSORSHIP, SECRECY AND INTELLECTUAL REPRESSION IN SOUTH AFRICA (Mercer Univ. Press 1995) (1994) (chronicling the banning of books and other acts of intellectual repression in South Africa from 1950 to 1990).

Copyright produces other democracy-enhancing benefits besides ensuring that diverse original expression is produced within the polity. It provides individuals with the opportunity to become authors of new ideas, regardless of their social merit, instead of forcing them to simply “feed” on the ideas and works of others. Thus, individuals do not have to simply submit to the intellectual status quo—they may actually challenge that status quo with their own ideas and, in the process, help shape both the nature and content of society’s norms. This process contributes to democratic self-rule.<sup>216</sup>

By insisting that only author’s original expression be granted protection, copyright is extending to *all* of a polity’s citizens, who are potential authors, an invitation to join those who determine, and to a certain extent elaborate, the “ideas” that will effectively shape the society’s cultural, economic, and political values. Thus, each author, no matter their station in life, can participate in shaping the nature of social and political discourse and governance, whether they are a peasant or an aristocrat, a member of a minority ethnic group, or a member of a historically marginalized group, such as women. As was evident during the struggle against apartheid rule in South Africa, individual authors of creative expression can inspire the “type of public vigilance against tyrannical encroachment” that can defeat tyranny and bring about transition to democratic governance.<sup>217</sup>

## V. TRIPS AND INTELLECTUAL PROPERTY IN AFRICA

### A. Introduction

At independence, most African countries retained the legal systems imposed on them by their former colonizers.<sup>218</sup> For example, English common law is the foundation of intellectual property law in former British colonies.<sup>219</sup> In essence, the intellectual property law regimes found in most of the countries in sub-Saharan Africa today can trace their

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<sup>216</sup> Netanel, *supra* note 5, at 272.

<sup>217</sup> See, e.g., BRYCE COURTENAY, *THE POWER OF ONE* (1989) (discussing, although from a fictional perspective, how one individual had a significant impact on the fight against the apartheid system in South Africa). See generally FATIMA MEER, *HIGHER THAN HOPE: THE AUTHORIZED BIOGRAPHY OF NELSON MANDELA*, (Harper & Row, Publishers 1990) (1988) (giving a fact-based account of how the ideas of one individual helped shape the struggle against apartheid in South Africa, and indeed, post-apartheid society).

<sup>218</sup> See generally THE CONTINUING STRUGGLE, *supra* note 15, at 110-11; Adebambo Adewopo, *The Global Intellectual Property System and sub-Saharan Africa: A Prognostic Reflection*, 33 U. TOL. L. REV. 749 (2002).

<sup>219</sup> Adewopo, *supra* note 218, at 749.

origins to the laws imposed on them by the Europeans during the colonial period.<sup>220</sup>

Formal international efforts to protect intellectual property began with the Paris Convention of 1883<sup>221</sup> and the Berne Convention of 1886.<sup>222</sup> Prior to these conventions, many countries had already engaged in local efforts to enhance the creation of knowledge by granting monopoly protection to authors and inventors.<sup>223</sup> However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was signed on April 15, 1994 in Marrakesh, Morocco, is arguably the most important modern effort to protect intellectual property at the global level. Although many African countries were among the approximately 144 countries that signed the TRIPS Agreement, its implementation in Africa has been met with a variety of problems.<sup>224</sup> While developed industrial countries, the net exporters of intellectual property, favored a strong global intellectual property regime, developing countries, primarily net importers of intellectual property, preferred a much weaker global intellectual property regime that would enhance their ability to import the technology needed for rapid economic growth and development.<sup>225</sup>

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<sup>220</sup> *Id.* For example, trademark law in many former British colonies in Africa is influenced significantly by the British Trademark Act of 1938. See generally Nigeria's Trade Marks Act of 1967, Chap. (436), Laws of the Federation of Nigeria (1990).

<sup>221</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 307.

<sup>222</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 22. The Paris Convention protected industrial property and the Berne Convention protected literary and artistic works through copyright.

<sup>223</sup> On March 19, 1474, Venice passed the first known patent act. In 1624, England passed the Statute of Monopolies to protect the rights of inventors in their creations. The U.S. Constitution granted power to Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8.

<sup>224</sup> See generally Adewopo, *supra* note 218, at 756; Matthew Kramer, *The Bolar Amendment Abroad: Preserving the Integrity of American Patents Overseas After the South African Medicines Act*, 18 DICK. J. INT'L L. 553, 556-62 (2000). Although the TRIPS Agreement was signed in 1994, by 2000 only South Africa had enacted legislation to reflect its obligations under the new treaty. The TRIPS did offer so-called least developing countries (LDCs) additional time to prepare themselves before complying with the treaty. In Africa, these include Angola, Benin, Burkina Faso, Burundi, Central African Republic, Democratic Republic of Congo, Djibouti, The Gambia, Guinea, Guinea-Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sierra Leone, and Tanzania. See also Jamie Eisenfeld & François Serres, *African Legal Developments in the United States and Sub-Saharan Africa*, 35 INT'L LAW. 869, 872 (2001).

<sup>225</sup> Adewopo, *supra* note 218, at 757.

*B. TRIPS and the African Dilemma*

Faced with mass poverty, most African countries are met with a troubling dilemma: whether to pirate the technology needed to enhance the creation of wealth required to ameliorate poverty and deprivation, or to honor their obligations under TRIPS and thus remain in poverty.<sup>226</sup> Conversely, however, pirating activities could forestall local knowledge creation efforts, generally derail the ability of the governments to develop effective public policies, frustrate efforts by local entrepreneurs to engage in creative and productive activities, and hinder foreign investment and the transfer of the technology that these countries actually need. TRIPS, nevertheless, allows signatory states to “adopt measures necessary to . . . promote the public interest in sectors of vital importance to their socioeconomic and technological development.”<sup>227</sup> Although TRIPS was designed primarily from the point of view of developed countries, the agreement does impose limitations on the rights of patentees, enhancing the ability of developing countries to access technology from the global economy.<sup>228</sup>

*C. The South African Dilemma, TRIPS and Lessons for Copyright Law in Africa*

Confronted with a devastating AIDS pandemic, the South African government realized that it did not have the financial resources to purchase drug “cocktails” that had been developed in Europe and the United States to allow AIDS patients to live relatively normal lives. The South African government’s solution was to ask Parliament to enact legislation that effectively granted the executive the power to infringe the rights of patentees in order to make such drugs available to citizens at an affordable price.<sup>229</sup>

Ignoring the country’s obligation under international law to protect intellectual property could have a significantly negative impact on the country’s ability to access the global stock of intellectual property, as well as constrain local efforts to create private original expression. If African governments are unwilling to protect intellectual property, they cannot establish and sustain a non-state sector of indigenous authors and

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<sup>226</sup> *Id.*

<sup>227</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights part 1, art. 8(1)*, WORLD TRADE ORGANIZATION (Apr. 15, 1994), [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

<sup>228</sup> Adewopo, *supra* note 218, at 761.

<sup>229</sup> Kramer, *supra* note 224, at 553–54.

publishers, which are critical for deepening and institutionalizing democracy.

Rather than infringe the rights of copyright holders, African countries should work within TRIPS and other global agreements to legally secure the literary and artistic works needed for domestic development. This would encourage domestic creativity and enhance the ability of citizens to create the diverse private literary and artistic works that each country needs to advance democracy.

## VI. CONCLUSION

After the collapse of the Soviet Union and the subsequent cessation of super-power rivalry, Africans engaged in what has been referred to as the “second revolution” or the “third wave of democracy.”<sup>230</sup> Unfortunately, while some level of political liberalization took place in many African countries, these countries failed to undergo the type of institutional transformation that would have effectively paved the way for the deepening and institutionalization of democracy.<sup>231</sup> Africa’s post-Cold War leaders failed to significantly improve their national institutional arrangements.<sup>232</sup> Only a handful of leaders who came to power in the 1990s were able to deliver on promises made to their citizens.<sup>233</sup>

Many studies have attempted to identify the factors that contribute to the institutionalization of democracy in Africa.<sup>234</sup> Two of the most important of these factors are (1) a robust civil society; and (2) a democratic culture nurtured and supported by the “widespread dissemination of information and opinion, an independent and pluralist media, and a belief in the efficacy of individual contributions to public discourse.”<sup>235</sup> Copyright law can be used to make these democratic aspirations a reality. Each country should adopt a copyright regime that,

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<sup>230</sup> J.O. Ihonvbere, *Where is the Third Wave? A Critical Evaluation of Africa’s Non-Transition to Democracy*, in

MULTIPARTY DEMOCRACY AND POLITICAL CHANGE: CONSTRAINTS TO DEMOCRATIZATION IN AFRICA 9, 9 (J.M. Mbaku & J.O. Ihonvbere eds., 2004).

<sup>231</sup> *Id.*

<sup>232</sup> See generally J. M. Mbaku, *Postscript*, in MULTIPARTY DEMOCRACY AND POLITICAL CHANGE, *supra* note 230, at 351–72.

<sup>233</sup> See generally MULTIPARTY DEMOCRACY AND POLITICAL CHANGE, *supra* note 230; POLITICAL LIBERALIZATION, *supra* note 67; THE CONTINUING STRUGGLE, *supra* note 15; Stephen N. Ndegwa, *A Decade of Democracy in Africa*, 35 J. ASIAN & AFR. STUD. 1 (2001).

<sup>234</sup> See THE CONTINUING STRUGGLE, *supra* note 15.

<sup>235</sup> Netanel, *supra* note 5, at 329.

given the country's collective historical experiences and specificities, can enhance the development of a robust civil society and a democratic culture, both of which can enhance the introduction of democracy, its deepening, and its institutionalization.