Abezimu/Badimo (ancestors) and copyright law: from the *Decolonial Turn* to the Pluriversal Author

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By

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ABSTRACT

'A spectre is haunting Europe – the spectre of Communism' is the sentence that opens Karl Marx's and Friedrich Engels' iconic text, *The Communist Manifesto*. Marx and Engels set out what was to become the primary program of action for all communist parties in Europe. *The Communist Manifesto's* cardinal observation was that Communism was an epochal certainty and that all revolutionaries had to ensure conditions were befitting for a Communist reality. Although in a completely different context, this thesis accepts that the spectre currently haunting Africa and the Global South is Decoloniality and Decolonisation. This thesis studiedly perceives the #MustFall moment as one that presented South Africa with a *Decolonial Turn* – an epochal inevitability seeking to complete the incomplete task of decolonising society. To respond to the *Decolonial Turn*, this thesis methodologically employs decolonial theory, Black consciousness philosophy and Black Marxism to study the essence of copyright law's authorship from the perspective of people on the other side of Western modernity. The basic contention of this thesis, and its original contribution to the corpus of literature as regards authorship in copyright, is that the logical aftermath of the *Decolonial Turn* leads to a 'pluriversal author' – this is a type of author that is reflective of the pluriversal epistemic and ontological patterns of a decolonised world. This is a world where many worlds exist. One of those worlds is inhabited by people whose epistemic traditions suggest that an author in copyright is inclusive of 'Abezimu/Badimo', that is, the non-human author who is represented in an onto-triadic edifice of Being: the living, the dead and the yet-to-be-born. The thesis defended in this doctoral project is that Abezimu/Badimo are an author in copyright and should be accepted, embraced, and reflected in prevailing copyright law legislative frameworks.

Key words: Abezimu/Badimo, Onto-triadic Being, Ancestors, Copyright Law, Authorship, African Epistemologies, Decolonial Turn, Decolonisation, Decoloniality.

OPSOMMING

“'n Spook spook in Europa – die spook van Kommunisme” is die sin wat Karl Marx en Friedrich Engels se ikoniese teks, *The Communist Manifesto*, open. Marx en Engels het uiteengesit wat die primêre program van aksie vir alle kommunistiese partye in Europa sou word. *The Communist Manifesto* se kardinale waarneming was dat Kommunisme 'n epogale onvermydelikheid was, en dat dit die taak van alle revolusionêres was om te verseker dat toestande gepas is vir 'n Kommunistiese werklikheid. Alhoewel dit in 'n heeltemal ander konteks is, aanvaar hierdie tesis dat die spook wat tans in Afrika en die globale Suide spook, dié van dekolonialiteit en dekolonisering is. Hierdie tesis beskou bestuderend die #MustFall-oomblik as een wat Suid-Afrika met 'n Dekoloniale Wending gebied het – dit is 'n epogale onvermydelikheid wat poog om die onvoltooide taak van die dekolonisering van die samelewing te voltooi. Om op die Dekoloniale Wending te reageer, gebruik hierdie tesis metodologies dekoloniale teorie, Swartbewussynsfilosofie, en Swart Marxisme om die essensie van outeursreg se outeurskap vanuit die perspektief van mense aan die ander kant van Westerse moderniteit te bestudeer. Die basiese stelling van hierdie tesis, en sy oorspronklike bydrae tot die literatuurkorpus met betrekking tot outeurskap in kopiereg, is dat die logiese nasleep van die Dekoloniale Wending lei tot 'n “pluriversale outeur” - dit is 'n tipe outeur wat die pluriversale epistemiese en ontologiese patrone van 'n gedekoloniseerde wêreld weerspieël. Dit is 'n wêreld waar baie wêrelde bestaan. Een van daardie wêrelde word bewoon deur mense wie se epistemiese tradisies suggereer dat 'n outeur in kopiereg “Abezimu/Badimo” insluit – dit is die nie-menslike skrywer wat verteenwoordig word in 'n onto-triadiese stelsel van oortuiging van Wese; die lewendes, die dooies, en die wat nog gebore moet word. Hierdie tesis wat in hierdie doktorale projek verdedig word, is dat Abezimu/Badimo 'n outeur in kopiereg is, en dat dit aanvaar, omhels, en weerspieël behoort te word in heersende kopieregwetgewende raamwerke.

Sleutelwoorde: Abezimu/Badimo, Onto-triadiese Wese, Voorouers, Outeursreg, Outeurskap, Afrika-epistemologieë, Dekoloniale Wending, Dekolonisering, Dekolonialiteit.

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LIST OF ABBREVIATIONS

AI	Artificial Intelligence
ATR	African Traditional Religious
CAB	Copyright Amendment Bill
CDPA	Copyright, Design, and Patent Act
ES	Epistemologies of the South
EU	European Union
IKS	Indigenous Knowledge Systems
ILW	Indigenous Law Systems
IP	Intellectual Property
IPLAA	Intellectual Property Laws Amendment Act
JJS	Journal for Juridical Science
NAGIP	Neo-Colonial Aspects of Global Intellectual Property Protection
NGOs	Non-governmental Organisations
NP	National Party
PAC	Pan African Congress
PELJ	Potchefstroom Electronic Law Journal
PPDM	Protection, Promotion, Development, and Management of Indigenous Knowledge Act

SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
SAPS	South African Police Service
SCA	Supreme Court of Appeal
TK	Traditional Knowledge
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TVETs	Technical and Vocational Education Training Colleges
TWAIL	Third World Approaches to International Law
VMFA	Virginia Museum of Fine Arts

When you are alone and brooding deeply,

do all your teachers and loved ones desert you?

Stand on a road when the fence is whistling.

You say, It's the wind, and if the dust swirls,

Wind again, although you never see it.

The shades work like the wind, invisibly

And they have always been our companions,

dressed in the flesh of the children they reared,

gossiping away from the books they wrote,

a throng who even in the strongest light

are whispering, You are not what you are,

remember us, then try to understand.

They come like pilgrims from the hazy seas

that shimmer at the borders of a dream,

not such spirits that they can't be scolded

not such mortals that they can be profaned,

for scolding them, we honour each other,

and honouring them, we perceive ourselves.

- *'In Praise of the Shades'* by Christopher Zithulele Mann

CHAPTER ONE: MAPPING THE DISCOURSE

1.1 Introduction and background

Curiosity about the world, its intricate systems and the granularities that define it often necessitate scholarly philosophical enquiries. Indeed, doctoral dissertations are prepared to investigate the known and unknowns of this world, all with the specific intention to make sense of academic subjects and the events of existence. This thesis engages in studying the definition of an author in copyright law in the context of the *Decolonial Turn.*

As is shown in successive chapters, this thesis accepts a fundamental relationship between copyright, people, and culture, and as such, a people-centred study of copyright law concepts is salient.

The 2015/2016 #MustFall[1] protests that gripped South African universities and TVETs (Technical and Vocational Education Training colleges) was a pivotal moment in the post-1994 polity. A brief analysis/recount of the events of 2015-2016 shows that the #MustFall moment is a legitimate point of entry - the moment was not only epochal but also representative of what various scholars call the *Decolonial Turn*. The praxis and contextual relevance of the *Decolonial Turn* is such that it presents an invitation, particularly to law teachers and academics, to begin (and continue) thinking about the meanings of concepts such as freedom and justice in South Africa after the 1994 [democratic] breakthrough.

The *Decolonial Turn* places a positive duty on copyright law academics and thinkers to reflect on what #MustFall means for their respective discipline areas. This means that the legal academy must ascertain the opportunities the *Decolonial Turn* presents to the epistemic foundations/compositions of copyright law.

Having firmly made the resounding calls for South Africa's epistemic systems to be decolonised, the #MustFall moment places a duty on critical academics to read, think, and investigate the

[1] In the context of this thesis, '#MustFall' is an umbrella representation of the different banner and clarion calls that defined the 2015-2016 protests, this includes #RhodesMustFall, #FeesMustFall, #OutsourcingMustFall and others.

conceptual possibilities that decolonisation would/could present to a subject like copyright law. This thesis embraces #MustFall's invitation for copyright law to be thought about anew, and such thinking ought to be done from the prism of decoloniality. The thesis accepts that intellectual property law, broadly and copyright law specifically, are not insulated from the call for decolonisation.

The thesis extensively argues and illustrates that the #MustFall moment constituted a *Decolonial Turn* in South Africa. In the period between 2015/2016 to date, academics and thinkers alike have been at pains to carve out substantive and academically sound responses to the call to decolonise the academy. Although notable strides have been made in the legal academy,[2] it is rather the scholars in the humanities that have applied themselves much more emphatically to the calls for decolonisation.[3]

There are chiefly two reasons why the wheels of change are slow in addressing questions of decolonisation among law scholars, namely (1) the age-old positivist-formalist spectre that haunts law faculties, wherein law academics insist on using 'the law to explain the law', or deliberately steering clear of intersectional intellectual discussions that compel them to broaden their inquiry from just law sources, to include disciplines such as politics, sociology, and other humanities, and (2) the lack of definitional clarity about the meaning of decolonisation and its implications

[2] In the period after the #MustFall moment, there are a few seminal texts that grapple with the idea of decolonising the law and its curriculum see for example, Khanya Motshabi 'Decolonising the University: A Law Perspective' (2020) 40 *Strategic Review for Southern Africa* 104; see also Chuma Himonga & Fatima Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *PELJ* 1; see also Mohsen al Attar & Shaimaa Abdelkarim 'Decolonising the curriculum in international law: Entrapments in praxis and critical thought' (2021) 32 *Law and Critique* 1; see also Emem Anwana 'Decolonising the law curricula at universities of technology: Students' perspective on content' (2022) 36 *South African Journal of Higher Education* 59; see also Joshua Mawere 'Decolonising legal education in South Africa: A review of African indigenous law in the curriculum' (2020) 14 *Pretoria Student LR* 31.

[3] For examples of scholars in the humanities who have grappled with decoloniality and decolonisation in South Africa recently, see generally, Kelebogile Boleu, Nombulelo Tholithemba Shange & Busisiwe Ntsele 'Wrestling to Exist: Womanist Struggles of Junior Scholars in South African Higher Education Institutions' (2023) 1 *Pan-African Conversations* 122; see also Nombulelo Shange 'Mappings of feminist/womanist resistance within student movements across the African continent' (2017) 31 *Agenda* 60; Pedro Mzileni & Nomalanga Mkhize 'Decolonisation as a spatial question: The student accommodation crisis and higher education transformation' (2019) 50 *South African Review of Sociology* 104; see also, Siyabulela Tonono 'Crafting a decolonial economic order for ReAfrikanisation in the context of South Africa' (2018) 48 *Africanus: Journal of Development Studies* 1; see also, Mlamuli Hlatshwayo 'Decolonising the South African university: First thoughts' (2023) 37 *South African Journal of Higher Education* 100; see also, Oscar Eybers 'Coloniality as appropriation of indigenous ontologies: Insights from South Africa and Ethiopia' (2023) 54 *Journal of Black Studies* 45; see also, Paul Maluleka 'Fallism as decoloniality: Towards a decolonised school history curriculum in Post-colonial-apartheid South Africa' (2021) 26 *Yesterday and Today* 68.

specifically for intellectual property law and copyright law. The former is dubbed as an age-old spectre because legal positivism and formalism pre-date the #FeesMustFall demand for decolonisation.

Positivist and formalist habits are deeply imbued within apartheid conservative/racist traditions and purist notions of the law. Positivism perceives the law as value-neutral and assumes that the legal system is made certain through tested scientific formulaic conceptualisations that allow jurists to predict the outcomes of a legal dispute. This type of thinking, which has since been proven to be largely unsound,[4] still permeates the walls of law faculties wherein law teachers teach their students that the law can be understood through a singular lens and that it will always produce the same result when applied to the same set of facts. Mercantile, procedural and private law teachers are most guilty of this habit because they wrongly assume that the subjects they teach have nothing to do with politics or anything else outside of the law.[5]

The rigidity of positivist-formalist thinking deepens the lack of definitional clarity about the meaning of decolonisation because of the false assumption that intellectual property law has nothing to do with politics (and, therefore, people and culture).[6] This attitude has the impact of unwittingly justifying an intellectual property law lawyer's avoidance of concepts such as decolonisation, which culminates in the entrenching of the lack of definitional clarity on the subject.[7]

At a broad level, these are some of the persisting intellectual and ideological problems that bedevil the epistemic centres of intellectual property law and copyright law today. At a much more direct and narrowed level, the Copyright Act 98 of 1978 (hereinafter the Act) and the Intellectual

[4] See generally, Emile Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina Journal for Legal History* 185.

[5] Joel Modiri 'The Crises in legal education' (2014) 46 *Acta Academica* 6.

[6] See generally, James Boyle 'A politics of intellectual property: Environmentalism for the Net?' (1997) 47 *Duke LJ* 87, where Boyle comprehensively argues that intellectual property is not always laden with politics, but this is only because intellectual property lawyers and scholars lack what he calls a 'conceptual map of issues', he insists that where politics seem to be missing, there is a need to develop a theoretical archive to discover them. He uses the rapid development of the internet and cyberspaces to drive home his argument that it is not cyber regulation that provides the key to the distribution of wealth, power, and access in the information society, but intellectual property. He figures that this is just one example of how politics are (or should be) an inherent feature in intellectual property discourse and analysis.

[7] Ibid at 90, 'With a few exceptions, lawyers have assumed that intellectual property is an esoteric and arcane field, something that is only interesting [and comprehensible] to practitioners in the field.'

Property Laws Amendment Act 28 of 2013 (hereinafter IPLAA) present specific conceptual challenges that are deserving of scholarly problematising; one of these is the prevailing definition of an author. As a result, this thesis critically studies the meaning of an author in copyright law against the backdrop of the *Decolonial Turn*.

The thesis argues that current conceptions of authorship are Eurocentric, colonial and inherently incomplete because they are representations of only the epistemic traditions of Europe, whiteness, and the global North. The thesis further demonstrates that the *Decolonial Turn* ultimately leads to conceptions of authorship that reflect the pluriversal traditions of the world and that a decolonial author is a 'pluriversal author'. In the context of Africa and South Africa specifically, an author is inclusive of Abezimu/Badimo (also known as ancestors in the English language).

1.2 Problem statement

There is a conceptual and epistemic problematic that is worth scholarly inquisition in the field of copyright law generally and authorship specifically. This problematic can be laid at the door of how authorship is defined and understood.

As will be canvassed with greater depth in subsequent chapters, current copyright law definitional paradigms are illegitimately skewed/biased towards Western and European thinking patterns and neglect the epistemic traditions of people from the global South, particularly Africans and Black people. Narrowly, this is evidenced in the markers/requirements for authorship as demanded by South African legislative strictures.

An approach that studies and argues for the acceptance that ancestors are authors entails the operative function of appreciating the *Decolonial Turn* as a demand to shift from the universe to the pluriverse. To defend this thesis, the research draws from the Africana existential philosophy as a theoretical lens to study existing strictures that govern copyright law. Specifically, it uses two theories to achieve this objective: (1) Decolonial theory and (2) Black Consciousness Philosophy. To marry the fronts presented by this dual theoretical offering, the thesis will conclude by presenting two potential practical measures that may be taken to give praxis to an epistemically sound copyright law theory. These are (1) the acceptance (not inclusion/recognition) of ancestors

as authors in copyright law legislation and (2) the opening of epistemic spaces in intellectual property legislative making that would allow nuances in understanding the meaning of an author beyond extant colonial knowing.

1.3 Research question

Having laid out the background that informs the intended thesis, this project seeks to respond to three research questions. The first research question seeks to ascertain the meaning of copyright law's authorship from a decolonial perspective, the second question relates to the role of the epistemic traditions of the global South and their relationship with copyright law legislation-making, and the third question probes the intellectual authenticity of the claim that Abezimu/Badimo (ancestors) are authors in the context of a communal author as understood by African communities.

These research questions are set out as follows:

1. How is copyright law's 'author' defined from the prism of decolonial theory?

2. Do the epistemic traditions of the global South play a role in informing the post-apartheid transformation of copyright law?

3. Is there intellectual authenticity to the claim that Abezimu/Badimo (ancestors) are authors and should be accepted as such in South African copyright law?

These questions are born from the assumption that current copyright law strictures are colonial Eurocentric and, therefore, perpetuate Eurocentric universalist tropes. A thorough response to these questions will lead to the diversification of knowledge production spaces in copyright law episteme and thus transform the universe into the pluriverse.

1.4 Methodology

The methodology engaged in this study primarily accepts that this doctoral project is intrinsically text-based. This means that the thesis follows the approach of analyzing nominal legal texts. These include legislation, textbooks, journal articles, case law, internet sources, et cetera. However, there is an existential caveat in this study – the thesis concerns itself with a fundamental relationship between copyright, people, and culture, and thus a people-centred study of copyright law. This caveat calls for a methodology that allows a people-centred approach by way of a text-based analysis. This reality necessitates Black Marxism as the most appropriate method in this regard.

Why and how is Black Marxism a methodology that is fit for piecing together the argument of this thesis? To respond to this question, it is apt first to understand what Marxism is, how it lends itself to Black Marxism, and eventually to the argument of this thesis. Once this question is responded to, it becomes easier to show the methodological applicability and appropriateness of this doctoral project.

Some describe Karl Marx as the greatest thinker of our times – this is a claim that stems from his sterling critique of global capitalism. Some of his seminal works include Theses on Feuerbach in 1888, The poverty of Philosophy in 1847, The Manifesto of the Communist Party in 1848, The Eighteenth Brumaire of Louis Bonaparte in 1852, The Critique of the Gotha Program 1891 and the three volumes of Capital (in 1867,1884 and 1894 respectively).[8] All these works contribute to a family of intellectual traditions that are broadly referred to as Marxism.

Marxism, as philosophy and political theory, can be understood by studying the first volume of Marx's *Das Kapital*.[9] The volume is divided into four parts. Each part discusses the following topics respectively, (1) commodities and money, (2) the transformation of money into capital, (3) the production of absolute surplus value, and (4) the production of relative surplus value.

[8] All of Karl Marx's writings have been subject to extensive academic analysis by scholars from different parts of the world, for general reading of major analysis of Marxist principles and theories, see for example, David McLellan *The Thought of Karl Marx* (1973); see also Hal Draper *Karl Marx's Theory of Revolution Volume 1* (1977).

[9] Karl Marx *Das Kapital: A Critique of Political Economy* (1887).

Cumulatively, *Das Kapital* proffers an extensive critique of the system of capitalism. In the first three parts, Marx exposes the contradictions between what he coins "value" and "pricing".[10] He does this to lay the ground for a deepened critique of the contradictions that basically define capitalism. For example, Marx argues that money essentially plays two roles in our society; the first is that it is a measure of value, and the second is that it facilitates the exchange of commodities. However, in a capitalist system, you have two evils that devil the money system; the first is that some people hoard money, thus making the exchange of commodities stifled and thus creating a global shortage, and the other is that you have a group of people (usually elites) who use the money to make more money, instead of its intended use (the measure of value and the exchange of commodities). It is at this point that money ceases to be money and instead becomes capital. This exploitation of the money system leads to an inherently uneven society – where some hoard, to the detriment of others, and where an elite few unduly dictate the exchange of commodities. This is the basis of Marxism; in theory, it provides us with a language to explain the anomalous phenomena of the wealth of some at the expense of the rest.

Methodologically, Marxism gives us an approach called Dialectical Materialism and Historical Materialism. Marx draws the dialectical method from a formula that was developed by W.G.F Hegel, colloquially known as "Hegelian Dialectics".[11]

The essence of Hegelian dialectics is threefold: (1) society and everything in it is a product of the marriage between inherent contradictions, (2) each reality is a product of a prior reality, which was contradicted and cancelled out by an opposing reality, and (3) this unity and struggle of opposites is an unending cycle that persists in perpetuity.[12] Hegelian Dialectics is encapsulated in the formula that reads as follows: Thesis + Antithesis = Synthesis. The thesis is the reality, the antithesis is the contending reality, and the synthesis is the product of the thesis and antithesis cancelling each other out.

Marx studied Hegelian Dialectics and, from them, produced a philosophical rejoinder, that is Dialectical Materialism – the difference between Hegelian Dialectics and Dialectical Materialism

[10] Ibid at 38.
[11] For a deepened analysis of Hegelian Dialectics see generally, Charles Taylor *Hegel* (1975).
[12] Hegel explains dialectics in his seminal pamphlet titled "*Encyclopaedia of Philosophical Sciences"* originally written and published in 1830 and translated into English by William Wallace in 1873.

is that the latter is based on materialism, whilst the former is based on idealism. What this means is that Hegel's formulation is drawn largely from an acceptance of the inevitability of social progress and the triumph of mankind as a natural process. In contrast, Marx's approach is rooted in material reality. Marx notes that material reality and the historical process are based on a history of class struggles, which is an argument that society is inherently divided between those who own the means of production (he calls them the bourgeoisie) and those who are coerced to sell their labour as a means of survival (he calls them the working class or the proletariat).[13] As a result, Marx applied the Hegelian "Thesis + antithesis = Synthesis" formula to read as follows: Capitalism (thesis) + Socialism (antithesis) = Communism (synthesis). This becomes a dialectically material method because it disabuses itself from the idealist dialectics and rather imprints the materiality of capitalism as a prevailing reality that is to be countered by socialism as an anti-thesis.

Linked to dialectical materialism, Marx then introduced the concept of Historical Materialism, where he polemically argued that the economic base of society shapes its superstructure (political, social, legal, and cultural institutions). Accordingly, he insisted that if there were to be any changes that occur to the economic base, such a change would be mirrored in the superstructure.

Apart from providing an incisive rejection of global capitalism, Marxism has been instrumental in exposing and rebuking the vulgarity of global institutions that exacerbate the oppression of all marginalised peoples of the world.

Marxism becomes important for this thesis because one of the arguments advanced here is that the unduly mercantilist(corporatist) character of intellectual property laws (and the global copyright regime) is at the behest of capitalist interests and desires and that this presents a firm resistance to understandings/conceptualisations of an author beyond human beings. It becomes necessary for the thesis to have a theoretical tool to be able to study and even critique this aspect of the prevailing global intellectual property law regime.

[13] Op cit note 9 at 33.

Relying on Marxism as a method towards critiquing the law is something that is not completely new. For example, Motimele has studied Marx's critique of the law and human rights and has explained Marx's insights in the following way:

> Marx does not wish to critique law per se but the manner in which the law is used to perpetuate the interests of a particular class and concretise the alienation of the working class. Marx seeks to dismiss the illusion of equality and freedom achieved through citizenship and rights.[14]

The thesis, however, departs from classical Marxism and instead relies on Black Marxism as a methodology.

In his resignation letter from the French Communist Party, Aimé Césaire addresses the then Party General-Secretary, Maurice Thorez, to explain his basis for departing from classical Marxism and embracing Black Marxism:

> In any case, it is clear that our struggle—the struggle of colonial peoples against colonialism, the struggle of peoples of color against racism— is more complex, or better yet, of a completely different nature than the fight of the French worker against French capitalism, and it cannot in any way be considered a part, a fragment, of that struggle.[15]

Césaire continues:

> For my part, I believe that Black peoples are rich with energy and passion, that they lack neither vigor nor imagination, but that these strengths can only wilt in organisations that are not their own: made for them, made by them, and adapted to ends that they alone can determine.[16]

This resignation letter is fundamental in setting out the meaning of Black Marxism because of its ability to underscore several shortcomings of classical Marxism, some of these include its pseudo-value-neutral approach to the particularity of Africa's situation – that is, the anomaly of racism, colonialism, and now coloniality. This is amplifying the correctness of the action in that Césaire decisively asserts that the problem does not lie with Marxism per se:

[14] Moshibudi Motimele *Statelessness: Precarity or Potentiality* (Unpublished MA Thesis, University of Witswatersrand, 2015) at 13.
[15] Aime Césaire 'Letter to Maurice Thorez 1956' (2010) 28 *Social Text* 147.
[16] Ibid at 148.

> I believe I have said enough to make it clear that it is neither Marxism nor communism that I am renouncing, and that it is the usage some have made of Marxism and communism that I condemn. That what I want is that Marxism and communism be placed in the service of Black peoples, and not Black peoples in the service of Marxism and communism.[17]

Black Marxism, therefore, implies a type of Marxism 'in the service of Black people, and not Black peoples in the service of Marxism.' By extension, and certainly, within the context of the thesis of the argument of this doctoral project, Black Marxism lends itself to an enunciation of Blackness as emblematic of all colonised, oppressed, and disenfranchised peoples of the world, whose knowledge patterns have been subjected to the ongoing tragedy of epistemicides, historicides, linguisticides and other related colonial horrors.

The most comprehensive theoretical account of Black Marxism is pieced together a few decades after the Césaire resignation letter – Robinson does it in his seminal text titled: 'Black Marxism: The Making of the Black Radical Tradition'.[18] Among other things, in formulating a conceptual analysis of Black Marxism, Robinson sought to demonstrate how the logic of capitalism fundamentally shapes capital accumulation. Accordingly, Black Marxism is presented as a methodology to unravel and uncover the complicity/unity of systems in the advancement of a single/universalistic capitalist agenda.

Black Marxism appears at the most opportune moment to stretch classic Marxism and take it to heights that serve the purpose of colonised Black peoples of the Global South. Kelley saliently underscores this in his foreword to the newly reproduced Penguin Books edition:

> Cedric takes Marx and Engels to task for underestimating the material force of racial ideology on proletarian consciousness, and for conflating the English working class with workers of the world . . . Cedric's point is that Marx and Engels missed the significance of the revolt in the rest of the world, specifically by non-Western peoples who made up the vast majority of the world's unfree and nonindustrial labor force.[19]

Perhaps one of the most important aspects of Robinson's formulation of Black Marxism emerges quite sharply in the very first few pages of his introductory chapter – where he argues that classical

[17] Ibid at 149-150.
[18] Cedric J. Robinson *Black Marxism: The Making of the Black Radical Tradition* (1983).
[19] Ibid at xvii.

Marxism suffers from universalism.[20] He contends that Black Marxism and the Black radical tradition are best suited to punctuate this universalism – this is important for the task of this thesis because the thesis seeks to dismantle the universal tropes that define the global copyright regime and replace them with a pluriverse, which would culminate into a pluriversal author.

Mignolo reads Frantz Fanon's *'Black Skin White Masks'* to explain that when Black men, working in inherently oppressive conditions, revolt, they do so not as a result of merely a classic Marxist analysis but because they cannot conceive otherwise.[21] Mignolo does not deny the brilliance of Marx's critique of global capitalism, but he rather illustrates that in the context of Africa, other influences define the relation between Black people and capitalism – such as institutional racism.[22] Therefore, Black Marxism comprises a reading of Karl Marx's from a decolonial perspective.

Black Marxism, as an embodiment of decolonial thought, is something that is carefully studied by Grosfoguel when he observes that the old Marxist paradigm of infrastructure/superstructure is replaced by 'heterarchy', which is a study of multiple forms of entangled hierarchies, where race and racism are not superstructural or instrumental to an overarching logic of capitalist accumulation; they are constitutive of capitalist accumulation at a world-wide scale.[23]

The thrust of Grosfoguel's observation rests in its ability to contradict the classic Marxist assumption that the present world is capitalist - he contends that this claim is reductionist because capitalism is only one of the multiple entangled constellations of colonial power matrix of the 'European modern/colonial capitalist/patriarchal world-system'.[24] Thus, Black Marxism not only places the struggle of Black people at the zenith of Marxist critiques of society but also embraces an articulation of dialectical materialism that identifies the motive forces in the class as not just the working class but specifically as Black people whose struggle against their oppressor transcends pure class reasoning/logic.

[20] Ibid at 2.
[21] Walter D Mignolo *Local Histories/Global Designs: Coloniality, Subaltern Knowledges and Border Thinking* (2012) at 85.
[22] Ibid.
[23] Ramon Grosfoguel 'The epistemic decolonial turn' (2007) 21 *Cultural Studies* at 218.
[24] Ibid at 219.

Peffer reads some of Karl Marx's early works, demonstrating that Marx was initially concerned with what he called Alienation.[25] The concept of Alienation is important to this study because it is a product of the capitalist political economy alienating workers from the product of their labour.[26] Peffer explains that Alienation occurs when people are prevented from 'human wholeness', wherein the demands and desires of capitalists always hinder their selves. The fleshing out of this concept may allow for a critique that locates the resistance to recognise Abezimu/Badimo as the author in copyright as the Alienation of African communities that believe in the living, the dead and the yet-to-be-born as authors.

Marx's theory of freedom shows that communism means the unfettered attainment of human dignity.[27] This is indeed crucial to study for two reasons: firstly, parallels can be fairly drawn between decolonial theory and Marxism, specifically as regards their shared demand for freedom and human dignity(re-humanisation) and, secondly, the project of recognising Abezimu/Badimo as author in copyright law is underpinned, among other things, by the need to re-member colonised peoples cultures, beliefs and epistemic traditions, which invariably speaks to their attainment of freedom.

As the literature review will show, the law conceives of rights and accords to them certain types of 'persons', and none of these includes the dead and the yet-to-be-born. The crux of extant definitions of author in copyright law is embedded in the legal subject and legal object dichotomy – this is a model that sets out that only natural 'persons' and juristic persons can be the bearers of rights.

Rahmatian observes that current copyright law protections of traditional cultural expressions are paternalistic, arguing that universalist conceptions of intellectual property law insist that once an intellectual property right has been established, there automatically follows an immediate need to confer such a right on 'a person':

> The paternalistic aspect of the protection of traditional cultural expressions shares many features with the British indirect rule in colonial times. Similar to the colonial era, the justification of this measure is based

[25] Rodney G Peffer *Marxism, Morality and Social Justice* (1990) at 52.
[26] Ibid.
[27] Ibid at 119-123.

> on the construction of otherness, which, although no longer regarded as being inferior, should be preserved or isolated and administered, and the advocates for implementation believe in the ethical rightness of their mission to guard and protect indigenous cultures. The protection of the tradition would presumably be administered by leaders of indigenous communities (or other entities of authority) for a central government, which is a European/Western one in nature.[28]

Peffer's reading of Karl Marx's critique of rights[29] illustrates ways to problematise not just the legal subject-object dichotomy but also the 'persons' expectations as per the prescripts of legal norms and standards:

> Since rights are integrally related to the conception of man as the egoistic individual, according to Marx, even their complete realiszation (i.e political emancipation) will not result in genuine human emancipation. Human emancipation is the release from the condition of being an egoistic individual, not emancipation of some sort within this condition.[30]

Marx's critique deepens the understanding that the rights discourse is laden with egoistic conceptualisations that limit rights to individuals and neglect communities. Even when they extend to communities, as with IPLAA, such an extension persists in limiting itself to the 'persons' analogy, therefore silencing Abezimu/Badimo. As regards rights, Peffer observes that rights are generated to protect underlying political goals, sometimes captured in theories of social justice, and the content of the political theory determines the validity and legitimacy of the legal protections.[31]

Peffer develops a theory of social justice in light of Marx's critique of rights. He lists four principles to underpin such a theory: (1) everyone's security rights and subsistence rights should be protected, (2) there is no maximum system of equal basic liberties, (3) there is to be a right to an equal opportunity to attain social positions and offices, and (4) social and economic inequalities are justified if they advantage the least advantaged.

None of Peffer's principles of social justice are specific to the concerns of colonised, oppressed, and Black working-class people. Peffer's limited reading of both rights and social justice is indeed

[28] Andreas Rahmatian 'Neo-colonial aspects of global intellectual property protection' (2009) 12 *The Journal for World Intellectual Property* at 62.
[29] Peffer op cit note 25 at 324, where Peffer reflects on Karl Marx's 'On the Jewish Question'.
[30] Ibid at 325.
[31] Ibid at 367.

helpful, but lacks definitional clarity as regards the struggles of specifically colonised people, and thus creates an opportunity for Black Marxism to fill the missing gap.

What makes Black Marxism a methodology and not a political theory per se? This question is responded to quite comprehensively by Rodney in 'Decolonial Marxism: Essays from the Pan-Afrikan Revolution'.[32] He fervently insists that Marxism is not merely a dogmatic political theory but is also a method of critique:

> I would suggest two basic reasons why I believe that Marxist thought, Scientific Socialist thought, would exist at different levels, at different times, in different times, in different places, and retains its potential as a tool, as a set of conceptions that people should grasp. The first is to look at Marxism, as methodology, because methodology would, virtually by definition, be independent of time and place. You will use the methodology at any given time, at any given place. You may get different results, of course, but the methodology itself would be independent of time and place . . . A methodology that begins its analysis of any society, of any situation, by seeking the relations that arise in production between men.[33]

Rodney's insistence that Marxism is a methodology stems from his appreciation of the fact that some may want to confine Marxism to the fields of historical social/political/philosophical analysis and denude it from its methodological capabilities. As a methodology, Marxism is useful to help expose the vulgarity of a web of entangled systems that define the global copyright regime today.

Apart from being a method of critique, Black Marxism calls for a race-infused application of Marx's dialectical materialism. What this means is that whereas Marx developed Hegelian dialectics from idealism to materialism, intellectuals from the Black Radical Intellectual Tradition build on Marx's work to expand dialectical materialism to have a starting point that does not erase the question of race, which is largely absent from Marx's method. To be sure, Marx's conception of the material is that the history of all mankind has been a history of class struggle, where the proletariat is constantly and inherently at odds with the bourgeoisie. Black Marxism exposes that whilst this may be true, it is not a universal reality. Apart from the class struggle, Black and colonised people have also had to contend with slavery and colonialism, which are not instances of mere historical aberration but are within the material conception of reality and history. This is important to underscore because, whilst Marx contended that the dialectical formula is capitalism

[32] Walter Rodney *Decolonial Marxism: Essays from the Pan-African Revolution* (2022).
[33] Ibid at 37.

(thesis) + socialism (antithesis) = communism (synthesis), the approach embraced in this doctoral thesis is a Black Marxist formulation of dialectical materialism which reads as follows: Eurocentric Copyright Law (thesis) + The *Decolonial Turn* (antithesis) = Pluriversal Author (synthesis).

Whilst Black Marxism is the overarching methodology that is applied in this thesis, certain chapters draw from the theoretical currents proffered by Black Marxism to apply methodologies that are unique to that chapter. For example, the third chapter, which studies the history of the development of copyright law and the concept of an author, applies a decolonial methodology to study history. The decolonial methodology, as is shown in chapter 3, demonstrates the Eurocentricity in each epoch of copyright law's historical development in South Africa. On the same score, the fourth chapter uses an arts-based methodology, which draws from music, visual art (mostly in chapter 5), poetry, and works of African literature/fiction to achieve the objectives of the chapter.

1.5 Literature review

1.5.1 Setting out the literature

There is vast literature as regards authorship in copyright law. The verbosity of the literature stems from the reality that the idea of an author, at a conceptual level, has always been subject to rigorous debate and related discourse. This segment of the chapter traces reviews and proffers a balanced overview of existing literature in the study of authorship in copyright.

Married to the literature on the meaning of an author, in the context of the study engaged in this thesis, is the literature as regards conceptions of 'community' in intellectual property law discourses. The latter literature is crucial to scrutinise closely because the thesis of this doctoral project's argument is that even with the legislation's explicit recognition of a communal author, this recognition inherently falls short. After all, prevailing legislation fails to accept the definition of a community as inclusive of Abezimu/Badimo (ancestors). On the same score, this segment of the chapter briefly reviews conceptions of legal personhood in intellectual property law discourses. Whilst it is important to demonstrate that the meaning of a community is construed differently

when studied from the perspective of people from the Global South, it is also crucial to study and contrast the same as regards legal personhood.

Beyond definitional clarity as regards authorship and related conceptions of community/personhood in copyright law discourse, this literature review demonstrates and distinguishes between areas of convergence and divergence in the literature. Convergence and divergence mean those areas in the literature where there's broad consensus and those areas where there are differences and debates in the literature, respectively. The task of clearly delineating areas of convergence and divergence is crucial because it helps demarcate the gap(s) in literature and thus qualify the contribution to the literature that this thesis seeks to make.

1.5.2 Authorship in copyright law

As canvassed in greater detail/depth in the third chapter, prominent copyright law literature traces the genesis of modern copyright[34] at the beginning of the 18th century.[35] Of course, this is with reference to British copyright, which ultimately became applicable copyright policy/law in South Africa and the rest of the commonwealth because of colonialism and related histories of conquest.

The first known copyright legislation was the Statute of Anne, which is linked to the commercial activities of the printing press of the 16th century.[36] Successive developments and the evolution of history inevitably led to newer legislations that include the Copyright Act of 1710, Fine Arts Copyright Act of 1862,[37] Copyright Act of 1911, Copyright Act of 1956, Copyright Designs and Patents Act of 1988, and others. All these British legislations are the direct and immediate ancestor of South Africa's present copyright legislation, the Copyright Act 98 of 1978. The basis of local conceptions of authorship is drawn from how it is set out in the Act.

[34] Take note that this is specifically in relation to authorship as giving rise to an exclusive copyright to the creator of a work. The idea of copyright itself pre-dates the 18th century.
[35] David Llewelyn & Tanya Aplin *Intellectual Property: Patents, Trademarks and Allied Rights* 9ed (2019) at 395.
[36] Lionel Bently & Brad Sherman *Intellectual Property Law* 5ed (2018) at 37.
[37] This was a novel piece of legislation because its provisions meant that it was the first time that photographs and artworks enjoyed copyright protection under statutory law.

The Act specifically defines an author in relation to the work upon which copyright is claimed; the author of literary, musical, or artistic work is provided for by section 1(1)(a): 'the person who first makes or creates the work'.[38] Although the Act is the basis of authorial conceptions, the definition of an author, as provided for in section 1(1)(a), is nuanced and punctuated with kindred legislations that the South African legislature has put in place to supplement/complement the Act's definition.[39] Beyond the Act[40] and its various predecessors, the meaning of an author gains a global/universalistic meaning when read with the background of Articles 1 and 2 of the Berne Convention:[41]

> The Contracting States are constituted into a Union for the protection of the rights of authors over their literary and artistic works. . . Authors who are subjects or citizens of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives. The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work and must not exceed in the other countries the term of protection granted in the said country of origin. The country of origin of the work shall be considered to be that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them the laws of which grant the shortest term of protection. For unpublished works the country to which the author belongs shall be considered to be the country of origin of the work.

These two articles proffer the basis of authorship at an international level and pave space for the Berne Convention's principle of National Treatment; according to this principle, each member state of the Convention must accord to nationals of other member states the same level of copyright

[38] Section 1(1)(b)-(f) defines an author in similar terms with reference to other types of works. These are not discussed in this thesis.

[39] IPLAA and Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 (hereinafter the PPDM Act) – both provide for a communal author to supplement already existing single and joint authors. The PPDM Act focuses specifically on the meaning of an indigenous community. Both legislations are discussed at greater length/depth in the fourth chapter.

[40] Apart from definitional questions unto authorship, the Act's foundational chassis describes the nature of copyright by way of listing the type of works that are eligible for protection, section 2(1)(a) to (g), the Act then proceeds to set out the requirements for subsistence of copyright in literary, musical, or artistic work in section 2(2)(a) and (b), providing that a work shall not be eligible for copyright unless two conditions are present, (1) effort or skill has been expended in making the work to give it a new and original character, and (2) the work has been written, recorded or otherwise reduced to material form. The latter requirement is known as the material form or the material embodiment requirement. The Act qualifies two types of persons as authors in section 3(1)(a) and (b), these are citizens/residents of South Africa and juristic persons incorporated under the laws of the Republic of South Africa. These are some of the most important provisions of the Act.

[41] Berne Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works.

protection provided to its citizens. The principle of National Treatment does not speak to the essence of authorship per se[42] but rather to the global handling of copyright protection.

Based on these legislative definitions of authorship, various international and local copyright law scholars have problematised authorship in diverse ways. Although all these scholars make their observations from different jurisdictions and legislative settings,[43] the commonality between them is that all of them are in copyright settings that derive their epistemic traditions from the United Kingdom. As a result, in reviewing the literature, this segment of the chapter moves back and forth between the various scholars without making an express distinction between local and international scholarship, except where it is necessary.

Prior to reviewing the literature from copyright law scholars, it is prudent to primarily (albeit briefly) broach an overview of this concept from a broad philosophical lens. To this end, this chapter canvasses three notable philosophical interlocutors:

Foucault proffers the first philosophical supposition. He authors a seminal essay titled, 'What is an author?' where he philosophically investigates the idea in the concept of authorship.[44] Foucault observes that the conceptual emergence of authorship is rooted in Euro-modernity's valorisation of the individual and individualism.[45] From the focus on an individual stems the notion that 'a man's work must be attributed to him'.[46]

At an abstract and philosophical level, the emergence of authorship in the era of Euro-modernity was also linked to the idea that the act of writing is rationally connected to death. Simply put, authors are said to write with the intention to ward off death.[47] This relationship between writing

[42] It is somewhat interesting that the Berne Convention, being the most comprehensive copyright treaty, does not define authorship, but leaves it to member states to craft their own definitions.
[43] The literature reviewed in this section is drawn from scholars from South Africa, the United Kingdom, the United States of America, Canada and select parts of the European Union.
[44] Michel Foucault 'What is an author?' in James D Faubion (ed) *Aesthetics, Method, and Epistemology* (1998) 205-222.
[45] Ibid at 205.
[46] Ibid.
[47] Ibid at 206.

and death is central to what Foucault observes to be the essence of an author.[48] Foucault argues that the 'universal' is inherently not a characteristic of the foundations of authorship:

> The author function does not affect all discourses in a universal and constant way, however. In our civilization, it has not always been the same type of texts that have required attribution to an author. There was a time when texts we today call 'literary' (narratives, stories, epics, tragedies, comedies) were accepted, put into circulation, and valorized without any question about the identity of their author; their anonymity caused no difficulties since their ancientness, whether real or imagined, was regarded as a sufficient guarantee of their status. On the other hand, those texts we now would call scientific – those dealing with cosmology and the heavens, medicine and illnesses, natural sciences and geography – were accepted in the Middle Ages, and accepted as 'true', only when marked with the name of their author.[49]

The observation that the universal conception of authorship is not inherent is crucial to underscore because it not only comports with the argument of the thesis that the *Decolonial Turn* inevitably leads to a pluriversal author, but it saliently demonstrates that authorship is ubiquitously reflective of the epistemic currents of every historical epoch. Dialectically speaking, if there is an intellectual acceptance that the present epoch is the aftermath of a *Decolonial Turn* that was presented by the #MustFall moment, then logic dictates that present conceptions of authorship must reflect the epistemic currents of the present.

Beyond proffering a critique of the universalist conception of authorship, Foucault presents a characteristic of authorship that is particular to academic discourse. It was not merely a function to identify the originator(s) of a work. Still, it was to give authoritative credibility to the work in question.[50] This observation is somewhat inimical to prevailing copyright law discourses that link authorship more to the person rather than the work; instead, pre-copyright era (or pre-18th century) conceptions of authorship placed the work before the person, and thus the person (in the make of an author) served a function/service to the work, more than the work serving them as a person. Simply put, according to Foucauldian logic, in the era prior to formal copyright legislation, the act of attaching an author to a literary work was for the benefit of the work itself rather than to benefit

[48] Jane Ginsburg 'The author's place in the future of copyright' (2009) 45 *Willamette LR* 381. Ginsburg figures that the notion of the 'Death of an Author' is a significant turning point in philosophical suppositions about the concept of authorship. She insists that the question of authorship in the aftermath of the 'Death of an Author' is an existential issue because it produced a syllogism in copyright rhetoric: Copyright is a consequence of the romantic conception of authorship; romantic authorship is dead; therefore, copyright is (or should be) dead, too.
[49] Foucault op cit note 44 at 212.
[50] Ibid.

the person (author of the work). Indeed, this pre-copyright reality is inimical to present-day definitions of authorship because prevailing definitional paradigms centre the author (and owner) over the work, wherein copyright is said to be put in place to allow authors exclusive rights over the product of their craft, and the related material benefits that accrue accordingly.

Another crucial point that Foucault raises is how peoples of the Middle Ages distinguished between truth and myth by whether a treatise had an author's name attached to it:

> 'Hippocrates said,' 'Pliny recounts,' were not really formulas of an argument based on authority; they were markers inserted in discourses that were supposed to be received as statements of demonstrated truth.[51]

This begs the question as to the prevailing attitudes of people, especially as regards works/pieces of knowledge from the Global South, such as intellectual property claims and suppositions that do not have the name of an author/originator attached to them. The epistemicides/historicides (as extensively studied in Chapters 3 & 4) that accompanied the colonial episode may have drawn from the logic of the Middle Ages, which relegated all pieces of knowledge/works that did not have an author to sub-knowledges, myths and even voodoo. If followed to the tee, this logic of the Middle Ages would relegate many of Africa's oral traditions, customs, idioms, sayings, and stories to the category of myths/voodoo because none of these African archives[52] have an author attached to them – they are epistemologies that are formulated communally[53] and are passed through from one generation to the next.[54]

Foucault notes a paradigm shift in the 17th to the 18th century, wherein the attaching of the name of an author was no longer significant to establish the authenticity and/or truthfulness of scientific work.[55] This shift jettisoned the norm of using authorship to distinguish between truth and myth.

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[51] Ibid.

[52] On the meaning of the African/Black Archive, see generally Siseko H Kumalo 'Resurrecting the Black archive through the decolonisation of philosophy in South Africa' (2020) 5 *Third World Thematics: A TWQ Journal* 19.

[53] I am not suggesting, in any manner, that communal modes of living are inherent and unique to Africa. Indeed, this is something that features and emerges in other societies too. On the same score, I am not suggesting that there is no individualism and individual enterprises in Africa – as with other societies, there is a strong history of the individual as an embodiment of African ontologies. Strict adherence of singular or markers of Africa that lack nuance goes against the very argument of this thesis that suggests that a society that embraces the *Decolonial Turn* accepts that the world is inherently pluriversal because it allows difference and diversity in all its facets and manifestations.

[54] I am not suggesting, in any manner, that all of Africa's epistemologies are embodied in orature – there is a known history of reading and writing in Africa, and there is an extensive corpus of indigenous knowledges that is embodied in written form and/or literature.

[55] Foucault op cit note 44 at 213.

In fact, it moved from using authorship in service of the work and inversely used the work to serve the function of placing the writer/originator at the centre of authorship.[56] Where authorship is concerned, the 17th to 18th century can reasonably be touted to be the turn towards the individual.[57]

Although Foucault's focus is on the author, he insists that there is a distinction between the author (as a person) and their work.[58] What this means is that Foucault recognises that an author and a work can exist as single and non-composite entities. This division between an author and their work comports with most contemporary literature about authorship.[59] In summation, Foucault exhorts scholars not to neglect the incredibly important task of critically studying the 'ideological status' of an author.[60] This Foucauldian exhortation is an epistemic invitation to think anew about what authorship could mean beyond legislative strictures:

> The author is the principle of thrift in the proliferation of meaning. As a result, we must entirely reverse the traditional idea of an author. We are accustomed, as we have seen earlier, to saying that the author is the genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations. We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely.[61]

This being a doctor of the philosophy of law project, there must be a frank engagement with not just legislative provisions as regards copyright and authorship but also philosophical suppositions such as the one posited by Foucault.

Biron proffers the second philosophical supposition. She authors a text titled 'Creative Work and Communicative Norms: Perspectives from legal philosophy',[62] where she investigates the conceptual challenges that beset authorship in copyright, considering how the concept is a misfit in certain situations. Biron asserts that these conceptual challenges to authorship in copyright will

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[56] Ibid.
[57] Ibid.
[58] Ibid at 207.
[59] See generally, Desmond Oriakhogba 'Authorship, ownership and enforcement of copyright: The Nigerian situation' (2015) 3 *SAIPLJ* 40, where Oriakhogba demonstrates that recent legislative developments in Federal Republic of Nigeria mirror global trends insofar as the demarcations between owner and first author where copyright is concerned.
[60] Foucault op cit note 44 at 221.
[61] Ibid.
[62] Laura Biron 'Creative work and communicative norms: Perspectives from legal philosophy' in Mireille van Eechoud (ed) *The Work of Authorship* (2014).

remain unresolved when approached from a single and universalistic lens – and that there is a pressing need for hybrid theories on authorship:

> The chapter argues that we should not fall into the trap of assuming that one set of theories (based, for example, on communicative norms) can provide a complete answer to the complex questions at stake, but rather that we should be aware of the need to develop 'hybrid' theories of authorship, drawing together the key premises from communicative, labour and personality theories which have application to the questions at stake.[63]

Biron's intervention is crucial for the argument of this thesis, especially considering that the thesis (in subsequent chapters) argues that the *Decolonial Turn* inevitably leads to a pluriversal author – that is, an acceptance of an author that is encompassing the epistemic traditions of peoples from the global South, and Africa. The closeness of Biron's argument with the argument of this thesis is crucial to underscore because it implies that although this argument entails this thesis' novel contribution to literature, it is an idea that legal philosophers have previously engaged with, albeit in limited terms.[64] For example, the theorisation as regards the *Decolonial Turn* and pluriversality is not part of Biron's lexicon. Yet, she is able to use existing literature to problematise the limited conceptions of authorship and the fickle dichotomies that are placed between individualistic and communal as well as the proprietary and non-proprietary conceptions of authorship.[65]

Compagno proffers the third and last philosophical supposition in a text titled 'Theories of Authorship and Intention in the Twentieth Century: An Overview'.[66] In this text, Compagno discusses some of the most important theories about authorship and the author's intentions developed during the last century. He begins this treatise by noting that the concept of authorship has undergone several significant shifts in the 20th century.[67] He lays these shifts at the door of different verbose philosophical engagements with the very subject of authorship.[68] There are two

[63] Ibid at 20.
[64] The limited nature of Biron's intervention stems from her sole reliance on classical European philosophers – the entire argument of her paper is based on the philosophical assertions of Immanuel Kant, Georg Wilhem Hegel and John Locke. All three are bastions of European thought and its epistemic traditions. If the world was Europe, theirs would be the universal truth, but as argued in this thesis, Europe is but one of the many facets/components of the pluriversal world.
[65] Ibid at 21.
[66] Dario Compagno 'Theories of authorship and intention in the twentieth century: An overview' (2012) 1 *Journal of Early Modern Studies* 37.
[67] Ibid at 37.
[68] Ibid at 38.

aspects that the 20th century introduced to the discourse on authorship: *subjectivity and intention* (my emphasis).[69] Indeed, these two concepts are formative of Compagno's first thoughts on the meaning of authorship in the 20th century:

> Today some philosophers and literary critics simply dismiss the author and his or her capacity to manage meaning for a conscious end; they tend to pay attention to words alone, almost as if writing were an unintentional or unconscious activity, like dreaming. And it seems that the author's intentions – that is, what s/he really wanted to say with a text – has been plainly excluded by many philosophical and analytical disciplines (from phenomenology to hermeneutics, semiotics and literary theory). This also seems to be true for those disciplines not dealing with written texts (like art and cinema studies), but that entirely exclude all considerations about authorial intentions from their objects of study. Throughout the century, a number of complex theories on subjectivity and its linguistic and semiotic expression have been elaborated.[70]

It could be logically said that drawing from the chronology laid out by Foucault, the conception of an author epochally changed face from the Middle Ages to the 17th and 18th centuries and then to the 20th century. Recall that in the Middle Ages, authorship was said to have been concerned mainly with the work itself, more than the person that has authored the work, whilst the 17th to 18th centuries saw a shift towards a conception of authorship that centres the person over the work. A careful reading of Compagno's elucidation of history shows that authorship still maintained its individualistic characteristic in the 20th century.

The individualistic trait is evidenced in the 20th century's concern with subjectivity and intention. Prominent philosophical interlocutory of the 20th century rationally connected authorship with ascertaining the sensitivities of the person that authored the work, in the make of their subjectivity, and therefore seeking to ascertain what their intention was. This sort of appreciation of authorship gives rise to a teleological reading of texts, one that links the work with the intention of the author – thus, the 20th century, although within individualistic paradigms, suggests that the function of authorship is to help readers to understand the essence of the text better.

The experience of the 20th century, in some way, ties together both the experience of the Middle Ages and that of the 17th and 18th centuries in the sense that the latter focused on the person who

[69] Ibid.
[70] Ibid.

authored the work, whilst the former centred the work itself – the experience of the 20th century dialectically suggests that the person serves the work, and the work serves the person. Simply put, the person who authors the work (their subjectivity) helps us understand the intention of the work, whilst the work itself helps us appreciate the subjectivity of the person who authored it.

Compagno is attentive that the subjectivity and intention feature of the 20th century is not without exceptions or caveats because philosophers in North America maintained that an objective analysis/reading of texts is most plausible.[71] To demonstrate this point, Compagno refers to Roland Barthes' seminal essay titled 'The Death of an Author' – he figures that Barthes was primarily fixated on literature.[72] Compagno observes that Barthes was arguing that literary texts should be read as if they do not have an author because the focus on the author's intention has the habit of hedging an undue limit to the reader's freedom.[73] The Barthes argument[74] means that texts should be grappled with in their terms, without focusing on the intention of the author, because this stifles a reader's ability to dialogue with the text.[75]

Having briefly laid out a philosophical interlocutory of authorship, this chapter now lays out an overview of the literature on authorship, beginning with some insights from contemporary copyright law scholarship. Ginsburg is among the most prominent scholars[76] who have consistently engaged with the subject of authorship in copyright law from various perspectives and situations. As early as 1997, Ginsburg responded to the habit of some thinkers and activists of

[71] Ibid at 41.
[72] Ibid.
[73] Ibid.
[74] Many thanks to Ms Fortunate Jwara for introducing me to the Roland Barthes text. I discussed both Foucault and Barthes with her, and some of my ideas stem from those long discussions on Whatsapp.
[75] Ginsburg op cit note 48 at 386, 'If the author is dead, or must be dethroned, then the reader not only lives, but reigns supreme. Readers give meaning to the texts they peruse; reading itself becomes a creative act. The Internet gives concrete effect to the postmodernist theory of the reader as creator, for all readers can remanipulate the text, and none can impose unilateral significance. Reception becomes regeneration. . . the reader is no longer a 'sponge' passively ingurgitating other people's creativity Or, to belabor the aqueous metaphor, the reader no longer merely draws from the well of others' authorship; she casts the contents of her bucket into the constantly changing stream of reader-modified creations.'
[76] See generally Peter Jaszi 'Toward a theory of copyright: the metamorphoses of "authorship"' (1991) 1 *Duke Law Journal* 455, see also Peter Jaszi 'Is there such a thing as postmodern copyright?' (2009) 12 *Tulane Journal of Technology and Intellectual Property* 106, see also Martha Woodmansee & Peter Jaszi *The construction of authorship: Textual appropriation in law and literature* (1994) Duke University Press, Durham , see also Mark Rose *Authors and Owners: The Invention of Copyright* (1993) Harvard University Press, Cambridge Mass.

disparaging the very idea of copyright protection by arguing that most of their concerns are based on a limited appreciation of the essence of copyright and, therefore, authorship.[77]

The timing of Ginsburg's observations is worth noting because the period between the mid-80s to the late 90s saw a sizable boom in technological advancements and, therefore, had some implications for cultural products and copyright protections. This period is what could be realistically accepted as the genesis of the 'digital era'. The technological advancements in the inception of the digital era culminated in the 'user vs. author' debate that lacked thorough appreciation of the goal of copyright and the demands of a rapid technological evolution.[78]

As a point of entry, Ginsburg insists that whenever there are conceptual tensions/disputes between authors and users' rights, credence must be given to constitutional provisions and the constitution's intention as regards copyright policy. Although this is from the perspective of the United States of America, this is an approach that is synonymous with our own in South Africa because of the supremacy of the constitution and its transformative demands.[79]

Interestingly, specifically as regards discussions on authorship, Ginsburg begins her intervention by drawing from similar insights as canvassed in this chapter; she notes Foucault's assertions that the author does not precede the work.[80] In line with both Foucault and Barthes, Ginsburg figures that the assertion of the 'Death of an author' precisely comports with the role of the user in the digital era.[81] Put differently, a conception of authorship that does not centre the person (author) means that the reader not only lives but reigns supreme because readers give meaning to the texts they peruse and reading itself becomes a creative act.[82] At a practical level, Ginsburg exhorts that the 'death of an author' should not be read literally in the sense that it must not be construed to mean a move towards a complete denigration of copyright and the elevation of user rights.[83]

[77] Jane Ginsburg 'Authors and users in copyright' (1997) 45 *Journal of the Copyright Association of the USA* 2.
[78] Ibid at 4.
[79] The Constitution and its transformative demands are addressed at a greater length in the third chapter.
[80] Ginsburg op cit note 77 at 7.
[81] Ibid at 8.
[82] Ibid.
[83] Ibid at 9.

Instead, there should rather be an appreciation that the digital era brings about new types of authors.[84]

In a different text, Ginsburg grapples with authorship's definitional paradigm from the perspective of how it emerges in varying common law and civil law jurisdictions.[85] Crucial to the crux of the argument of this thesis, Ginsburg opines that it is fundamental that an author be a 'human being who exercises subjective judgment in composing the work and who controls its execution.'[86] She accordingly insists:

> Despite these variations, I nonetheless conclude that in copyright law, an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work. Because, and to the extent that, she moulds the work to her vision (be it even a myopic one), she is entitled not only to recognition and payment, but to exert some artistic control over it. If copyright laws do not derive their authority from human creativity, but instead seek merely to compensate investment, then the scope of protection should be rethought and perhaps reduced.[87]

The centrality of a human author[88] and the demand of subjective judgment on their part is the heart[89] of what this thesis seeks to disprove. As will be seen in successive chapters, this thesis will substantively demonstrate that an author is not always 'human' in the sense explained by Ginsburg. Even prevailing additional or alternative authorial characteristics, as explained by Ginsburg,[90] tend not to be encompassing of authorship as may be understood by Black peoples, Africans, and peoples of the Global South generally.

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[84] Ibid.
[85] Jane Ginsburg 'The concept of authorship in comparative copyright law' (2003) 52 *DePaul LR* 1063.
[86] Ibid at 1064.
[87] Ibid.
[88] Daniel J. Gervais 'The machine as author' (2020) 105 *Iowa LR* 2053, this is a common theme in the scholarly interlocutory of various notable international intellectual property law academics, for example, see at 2055, where Gervais categorically insists on the centrality of the human author in copyright, notwithstanding the seemingly rapid developments in digital and artificial intelligence. Gervais considers the question whether autonomously created Al machine productions in the literary and artistic field should be protected by copyright. Interestingly, one of the reasonings posited by Gervais for his stance against granting authorship to machines stems from the economic incentive aspect of copyright – he figures that authors often want pecuniary benefits, and that machines do not have the same desire, and therefore granting authorship to them would be an exercise in futility.
[89] Ibid at 2075, Gervais traces the roots of authorship to the Statute of Anne, where he observes that the entirety of British Copyright history places the human author at the center of the normative stage.
[90] Ginsburg op cit note 85 at 1064.

In studying authorship in jurisdictions such as the United States, the United Kingdom, Canada, Australia, France, Belgium and the Netherlands, Ginsburg observes that an analysis of each country's conception of authorship reveals considerable variation, not only in the comparison of common law and civil law systems but within each legal regime.[91] For example, she notes the difference between the United Kingdom's[92] and Australia's legislative assertions on authorship; the former defines authorship in relation to the work, whereas the latter emphasizes the creation of a work as the genesis of authorship.[93] Whereas both the United Kingdom and Australia emphasise a human author, Ginsburg observes that Dutch laws explicitly allow for the authorship status, rather than mere ownership, of employers or certain hiring parties even outside the context of machine-assisted creation, and they do not limit this 'author' category to humans.[94] In summation, Ginsburg sets out six principles that she believes are definitive of authorship:

First - Authorship places mind over muscle – this means that the person who conceptualises and directs the development of the work is the author rather than the person who simply follows orders to execute the work.[95] This principle is incredibly important to underscore, especially for the argument of this thesis. For example, in chapters 4 and 5, the thesis carefully demonstrates that in authorship, the authoring hand is not always an author. The importance of this principle lies in the salient fact that the thesis, having recognised that Abezimu/Badimo (ancestors) are authors even though they do not have an authoring hand, does not preclude them from being duly accepted as an author for copyright. Indeed, this is the most important of the six principles because it goes against the grain where prevailing definitions are concerned. This principle admittedly deviates

[91] Ibid at 1066.
[92] The UK's legislative approach to authorship of computer-generated works under the CDPA is worth brief mention because section 178 defines authorship to be able to mean that a work is generated by computer in circumstances such that there is no human author of the work. This is an incredibly important part of the legislation to underscore because it demonstrates that even within prevailing Eurocentric legislative paradigms, there is somewhat of an acceptance of authorship beyond humans. Section 178 of the CDPA should be read in concert with section 9 of the Act, which sets the tone/standard in the definition of an author, where other types of works are concerned, this part of the legislation insists on the essence/ubiquity of a human author.
[93] Ginsburg op cit note 85 at 1070.
[94] Ibid at 1071.
[95] Ibid at 1072.

from how normative national legislative frameworks conceptualise authorship, yet they all distinguish between the authoring hand and the actual author.[96]

Second - Authorship vaunts the mind over the machine – the participation of a machine or device, such as a camera or a computer, in the creation of a work need not deprive its creator of authorship status.[97] This means that the machine (like a camera in photography or even an AI instrument) does not take anything away from the authorship of the person who exercises intellectual control over the creation of the work.

Third - Originality[98] is synonymous with authorship – this is a principle that requires very little explanation, considering that it is widely accepted and attracts little contestation globally.[99]

Fourth - The author need not be creative as long as she perspires – this principle is not too far from the originality principle because it primarily speaks to the standard required for copyright protection. Generally, originality in copyright law requires the author/creator to prove that they have expanded some sort of labour in creating the work. This labour need not be creative or novel. Although the central premise of both modern copyright and patent law is that creators of innovative works need to be economically incentivised on the assumption that this incentive will encourage

[96] Ibid. 'French courts also distinguish between "authors" and *"simp/es ex&utants,"* those who merely carry out others' instructions. Thus, while the French law lists film directors as presumptive authors of audiovisual works, the presumption was successfully rebutted when the producer proved that the directors followed a precise and detailed list of instructions, so that each director's contribution would become integrated into a uniform collection; the court held that under those circumstances, 'everything which demarcates creative liberty and the author's personality eluded the directors, who were only the mere executants of the producer's will."

[97] Ibid at 1074.

[98] In the context of South Africa originality is introduced, but not defined by the Act. Local conceptions of originality are gleaned from successive judgements, for example in *Moneyweb (Pty) Ltd v Media 24 Ltd & Another* 2016 (4) SA 591 (para 16) the court held that the determination of originality involves the work in its entirety and not only specific parts of the work: '[o]ur law still regards the time and effort spent by the consideration in determining originality.' Furthermore, the court in *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ) grappled with the standard used to establish originality in copyright law. The court found that the activity of putting together a fixture of soccer games to be played in a soccer season, requires skill and judgment. See also, *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) where the court held that, '[c]reativity is not required to make a work original. Save where specifically provided otherwise, a work is original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.' There are recent scholarly reflections as regards the essence of originality in South Africa's copyright jurisprudence, see for example, Sunelle Geyer 'Determining originality in South African copyright law: Is it 'or', 'and', or something 'more'?' (2022) 85 *THRHR* 176, where she considers that there are varying standards for copyright originality in different jurisdictions, and proceeds to pinpoint South Africa's position, whilst engaging in historical empiricism to demonstrate why South Africa embraces its standard. Interestingly, Geyer also links originality with authorship in its South African specificity, of course, this expressly comports with the third principle as laid out by Ginsburg above.

[99] Ginsburg op cit note 84 at 1078.

greater innovation, patent law has a higher standard than copyright law because it requires novelty and inventiveness. The lower copyright standard is encapsulated in the 'skill and labour' and the 'sweat of the brow' maxims – these two essentially mean that for one to meet copyright's originality standard, they must be able to demonstrate that they expanded some form of physical labour in crafting the work.

Fifth - Intent to be an author – this intent is not to be confused with the 'intention and subjectivity' that is canvassed in earlier pages; instead, this principle means that a work will only have an author where authorship is claimed. If a putative author rejects authorship of the work for any reason, then they cannot reasonably be said to be an author.[100]

Sixth - Money talks: maybe it also writes, composes, paints, et cetera – this principle is exemplified in instances where an employee is commissioned they are employed to do a specific task. When they perform such tasks, they are the author of the work, but the employer owns the copyright. A good example of this is usually commissioned works, e.g. photography, drawing architectural plans. Still, even in that case, the photographer or architect remains the author, but the commissioner owns the copyright. The employer is not the author but the owner of the copyright.[101] Ginsburg figures that the justification for employer/commissioning party 'authorship' is primarily pragmatic: concentration of authorship as well as of ownership in employers and commissioning parties certainly facilitates exploitation by fully alienating potentially pesky creators.[102]

Summarily, Ginsburg figures that the above six principles constitute the definitional chassis upon which authorship is conceptually based. Having mapped these six principles, Ginsburg concludes that, regardless of the various conceptions of an author, definitionally speaking, an author is a human creator who, notwithstanding the constraints of their task, succeeds in exercising minimal personal autonomy in their fashioning of the work.[103]

[100] Ibid at 1085.
[101] Dutch laws explicitly allow for the authorship status, rather than mere ownership, of employers or certain hiring parties even outside the context of machine-assisted creation and they do not limit this 'author' category to humans.
[102] Ginsburg op cit note 85 at 1088.
[103] Ibid at 1092.

Ginsburg's six principles are indeed a valuable intervention[104] insofar as they describe the essence of copyright. Still, her foundational definition of an author as meaning a 'human' is something that has been the subject of robust scholarly debate. Understandably, the text was authored in 1997 and, therefore, presents Ginsburg's earlier thoughts on this subject. Indeed, in later texts, she begins to shift somewhat from the somewhat rigid 1997 definition of authorship.

As recently as 2019, she authored a text titled 'Authors and Machines'.[105] In this epic text, Ginsburg and Budiardjo carefully study the often-perplexing question of copyright authorship in the context of both artificial intelligence[106] and the fourth industrial revolution.[107] They begin this text by noting that authorship has always been a contested concept.[108] The contestations have tended to be deepened in the digital era because artificial intelligence is said to be supplanting human artists, writers and composers.[109]

To tease out some of the conceptual contestations, Ginsburg and Budiardjo pose the question: What is authorship in copyright law, and how do its precepts apply to machine-enabled outputs?[110] They study successive case law from the USA to give a 3-pronged response to this question in a descriptive manner: (1) they find that authorship requires more than a disembodied idea of the work. Suppose the 'author' is the 'maker' or 'one who completes a work of science or literature'. In that case, authorship conjoins conception and execution,[111] (2) they observe that the author may delegate the physical embodiment of her conception, that is, the execution of the work, to an assistant, yet still retain authorship, at least where the execution hews closely to the author's

[104] Oriakhogba op cit 59 at 42, certainly goes further than the definition as given by United Kingdom legislation, which Oriakhogba accuses of being unbecomingly ambiguous.
[105] Jane C Ginsburg & Luke Ali Budiardjo 'Authors and machines' (2019) 34 *Berkeley Technology LJ* 343.
[106] Gervais op cit note 88 at 2064, where he points out, and makes a rebuttal against, four arguments in favour for the protection (and therefore according of copyright authorship) of works produced by machines, these four arguments are: (1) some machine productions are worth something to someone, then they should be protected by law, (2) a consequentialist argument that says that machine productions should be protected because, if machine-productions are copyright-free, then machines produce free goods, (3) copyright doctrine does not care about the quality or merit of a copyrighted work, this has been a tenet of copyright law for well over a century -machine productions should be protected, and (4) because humans will remain proxy authors even when authorship is granted to machines.
[107] For a study on the relationship between authorship, copyright law, artificial intelligence and the fourth industrial revolution, see generally, Simphiwe Dlamini *Authorship in copyright law: A critique in the context of the fourth industrial revolution* (unpublished LLM thesis, University of the Free State, Forthcoming).
[108] Ginsburg & Budiardjo op cit note 105 at 345.
[109] Ibid.
[110] Ibid at 346.
[111] Ibid at 357.

conception,[112] and (3) they insist that the law attributes authorship to the 'mastermind,' whose detailed conception so controls its subsequent execution that the individuals carrying out the embodiment exercise no creative autonomy.[113]

The most important aspect of the 2019 intervention is that Ginsburg shifts somewhat from her previous 1997 conception of an author as rigidly being human (because there is a greater appreciation of the influence of machines and artificial intelligence in the authoring process).[114] This is important, not only because of its timing but because it comports with the overarching argument of this thesis that a pluriversal author is representative of the natural/inevitable shifts and nuances that define the very concept of authorship in copyright. Indeed, as canvassed by the theoretical framework in Chapter 2, the conceptual/epistemic shift that the Decolonial Turn necessitates is a shift from the universe to the pluriverse.

This shift is evidenced in their concession that there may be random and faunal/meteorological forces that may intervene/emerge in the creative lap of the authoring process.[115] To demonstrate this phenomenon, they recount two versions of the famous 'Monkey Selfie' controversy. The first version is as follows:

> [N]ature photographer David Slater was photographing macaques in a wildlife reserve in Indonesia, when 'Naruto,' a particularly curious monkey, snatched Slater's camera away, and began snapping pictures, including the remarkably accomplished self-portrait that quickly garnered viral celebrity.[116]

The second version is as follows:

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[112] Ibid at 358.
[113] Ibid.
[114] To be fair to Ginsburg (and, in this case, Burdiadjo), they set out to query whether recent developments in artificial intelligence pose a novel problem for copyright law and for authorship doctrine – they find that today's generative machines do not earn the mantle of authorship because they do not have enough computational creativity and they are largely 'faithful agents' of humans who interact/control them. For example, see Ibid at 397, 'The idea that a machine could be an 'author' of a work must rest on the assumption that a machine is capable of carrying out the required elements of authorship: conception and execution. But today's machines are fundamentally sets of processes designed by humans to accomplish specific tasks. Their outputs may appear to be 'creative' and may even be aesthetically equivalent to works produced by human authors, but to attribute a work's expressive value to the machine that physically generated that work is to indulge in a fiction. One should not reason backward from the apparent equivalence of the output to assume equivalence of the creative processes.'
[115] Ginsburg & Budiardjo op cit note 105 at 361.
[116] Ibid at 362.

> [A]s told by Slater, counters that Slater had been studying the macaques in the reserve; realizing that the monkeys had been observing his activities, but would not cooperate in a portrait-sitting, Slater positioned the camera to frame the shot, including setting lighting and perspective, and waited for a curious monkey to come along, stare at the camera, and push the button, which Naruto obligingly did.[117]

An acceptance of the first version would trounce the controversy because merely supplying the camera does not make one an author.[118] However, Naruto (the monkey) not only pushed the button but also selected the subject (to be shot), independently operated the camera and originated the conception of the image.[119] As a result, the controversy remains because prevailing conceptions of authorship preclude assigning authorship to proximate primates or other species.[120] Notwithstanding his version (version 2), Slater did not know which of the monkeys would wander over to the camera nor how the monkey would pose before pushing the button.[121] When Naruto pushed the button, he perfected Slater's creative plan and executed the work on behalf of Slater.[122]

The second version nudged copyright authorial conceptions into disarray because a non-human was now in a position where they meet the key elements of the requirements of an author. In essence, the authorial edifice was probed to respond to the question that asks: what happens in an instance where an author is not human?

The complexities that cleavage this question and prevailing definitions of authorship are studied by Ncube and Oriakhogba in a text titled 'Monkey Selfie and Authorship in Copyright Law: The Nigerian and South African Perspectives'.[123] Ncube and Oriakhogba consider the Monkey Selfie controversy in all its facets and investigate the questions about authorship that it may present to South Africa and Nigeria. Chiefly, the duo observes that both South African and Nigerian copyright legislations have a common colonial ancestry and, therefore, reflect closely similar definitional standards where authorship is concerned.[124]

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[117] Ibid.
[118] Ibid.
[119] Ibid at 363.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Caroline B Ncube & Desmond Oriakhogba 'Monkey selfie and authorship in copyright law: The Nigerian and South African perspectives' (2018) 21 *PELJ* 1.
[124] Ibid at 3.

Ncube and Oriakhogba's intention is to read the decision of the (United States of America) court in *Naruto v David Slater*, with the background of local (Nigeria and South Africa) legislation and tease out the implications that this decision would have in the local context. From the onset, the court had the hurdle of determining whether a non-human (a monkey) could be an author[125] and if such a non-human had standing in a court of law. The court found that Naruto does not have standing and cannot make a claim under the US Copyright Act.[126] The court further said that a non-human is not within the ambit of authorship insofar as is provided for by legislation.[127] Notwithstanding the court's finding that non-humans are not within the ambit of authorship, it is worth noting that the court did not proceed to declare Slater as the author and owner of the photograph.[128]

Ncube and Oriakhogba insist that to be able to appreciate the granular aspects of *Naruto v David Slater*, the primary question that needs to be responded to is: who is an author?[129] To this end, they posit that:

> The author and owner of a copyright work are often the same person. The author is generally regarded as the first owner of a copyright work, but the author is not always the owner of a work. The distinction lies in the difference between one who expresses an idea in a material form and the other who invests in the trading of the material form in which an idea is expressed.[130]

[125] In investigating a non-human author, Ncube and Oriakhogba help to establish a basis for a question that will naturally arise in response to the claim that ancestors are an author; that is a question that would seek to ascertain the practical consequence of such an acceptance. This is specifically in relation to legislative implications – for example, if legislation is amended to reflect ancestors as authors, will their authorship be limited to certain types of work? What of the duration? Will they enjoy similar moral rights as human authors? Of course, ancestors are not a Monkey, but they share a similarity in the sense that both ancestors and Monkeys are 'non-human', and therefore the Ncube and Oriakhogba analysis is important, precisely for the argument about ancestors being author, and its legislative practicability. Although the thesis leans towards a conceptual/epistemic/axiological analysis, questions about practicality are warranted and inevitable. Perhaps responses in relation to practicality are beyond the scope of this thesis, however having laid out the argument in the various chapters, the concluding chapter should be able to proffer some substantive musings on potential practical implications and/or solutions.

[126] Ncube & Oriakhogba op cit note 123 at 5.

[127] Ibid at 6.

[128] Ibid at 7.

[129] Ibid at 9.

[130] Ibid at 10.

Notwithstanding this definition, Ncube and Oriakhogba accept that there isn't a generally accepted[131] answer to the question of who an author is.[132] Interestingly, Ncube and Oriakhogba revert to Ginsburg's six principles[133] and insist that these principles are useful in determining the author's question in relation to the monkey selfie from Nigerian and South African perspectives.[134] Specifically, as regards authorship under the auspices of the Nigerian and South African copyright legislations, Ncube and Oriakhgoba observe that both legislations do not offer precise definitions of authorship, and this makes it somewhat complex to resolve the authorship question.[135]

Concretely, Ncube and Oriakhogba correctly observe that a thorough reading of both legislations (and successive case law) makes it apparent that the authorship question is generally limited to natural and juristic persons.[136] This legislative frontier of both legislations is salient because it foregrounds the fact that South African (and African) copyright law legislative conceptions, in their current format, are not allowing/accepting/receptive to conceptions of authorship that embody the epistemic tradition of Black people, Africans and peoples of the global South – i.e. that Abezimu/Badimo (ancestors) are an author.

At the heart of the claim that Abezimu/Badimo (ancestors) are an author lies the complexity of extending authorship to non-humans. This is a complexity that Ncube and Oriakhogba recognise as one that will have serious implications on the exercise of ownership rights over copyright works.[137] As regards these said implications, they posit:

> The implications may be better explained through the lens of the concept of subjective rights. The concept of subjective rights connotes the relationship or correlation between a legal subject and a legal object. A legal subject can be either a natural or a juristic person, but it cannot be a non-human animal. On the other hand, legal objects are things: movable or immovable (including non-human animals); corporeal or incorporeal. The meaning of the concept of subjective rights is two-fold. First, it is the right or entitlement which a legal subject, supported by a legal regime, possesses over a legal object. This right empowers the

[131] Roberta Rosenthal Kwall 'Originality in context' (2007) 44 *Houston LR* 871, Kwall insists that there is no universally applicable view of authorship and demonstrates that conceptions of authorship have shifted/changed over time and each conception mirrors the ideological position of a respective interlocutor (e.g post modernists, et cetera).
[132] Ncube & Oriakhogba op cit note 123 at 10.
[133] Ginsburg op cit note 84 at 1072 to 1088.
[134] Ncube & Oriakhogba op cit note 123 at 11.
[135] Ibid at 14.
[136] Ibid at 15.
[137] Ibid at 18.

> legal object to use, enjoy and/or dispose the legal object within the boundaries of the law conferring the right. Secondly, and flowing from the first, the concept connotes the capacity of the legal object to sue third parties against undue interference with the object, or to authorise third parties to use the object.[138]

Ncube and Oriakhogba's handling of the implications of an acceptance of a non-human author begs the question of applicability and suitability in the context of Abezimu/Badimo as authors. Despite the subjective and objective rights demarcation, they conclude that assuming the monkey selfie case arose in Nigeria or South Africa, Naruto would not be regarded as the author of the photograph.[139] Their conclusion is based on the reality that the whole idea of authorship under the Nigerian Copyright Act and the SA Copyright Act centres on a legal person (a human being or a corporation).[140]

The difference between Naruto and artificial intelligence (even though both are spoken about in the context of non-human authors) is that the latter finds its genesis in human beings. As a result, Ginsburg and Budiardjo firmly reject the notion that machines could be authors because it is untrue that machines can carry out the required elements of authorship: conception and execution.[141] Even though some of these machines may produce outputs that appear to be creative and somewhat equivalent to works produced by human authors, they still do not meet the authorship threshold because their output is directly attributable either to the code written by the programmers who designed and trained the machine or to the instructions provided by the users who operate the machine.[142] Indeed, this is applicable even to those instances where an output appears to be the result of some unseen creative force.[143]

As to whether there is a possibility that machines could be authors, Ginsburg and Burdiardjo speculate that this matter will always be subject to rife debate, but they are comfortable that

[138] Ibid at 18-19.
[139] Ibid at 25.
[140] Ibid.
[141] Ginsburg & Budiardjo op cit note 105 at 397.
[142] Ibid at 398.
[143] Ibid.

machines will never be authors,[144] at least not in the foreseeable future because machines will always be subservient to the humans who delineate their instructions and tasks.[145]

In summation, they assert that instead of searching for an author in a machine, the more logical/honest search should be for the search of a human author in a machine.[146] It follows inevitably that Ginsburg and Burdiadjo reject the authorship of machines, and then humans remain as the only authors. However, this is not always straightforward, particularly in the sphere of artificial intelligence.[147]

The tension with machines of artificial intelligence lies in whether authorship vests in the designer/inventor of the artificial intelligence tool or the user of the tool/machine(who immediately presides over it and gives instruction/training).[148] To this end, Ginsburg and Budiardjo advise that the answer lies in discerning between the types of artificial intelligence generative machines.[149] In certain instances, it will be the user that is the author, whilst, in other instances, it will be the designer/inventor of the artificial intelligence tool, and all of this is dependent on factors such as machines which rely solely on the creative contributions of their users, and for which the creative contributions of the machines' designers are minimal, nonexistent, or not apparent in the resulting work-form one end of the spectrum.[150]

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[144] Gervais op cit note 88 at 2084, 'Asking if Al machines can create might be asking, in their view, whether Al machines have mental states or free will. To a certain degree, this poses a circular definitional problem: If 'mental' is defined in human terms, then Al machines cannot, by definition, have mental states or agency.'

[145] Ginsburg & Budiardjo op cit note 105 at 400.

[146] Ibid at 404.

[147] Ibid, this conclusion mirrors the stance taken by the Copyright Office of the United States of America, which issued guidelines in 2023, confirming that AI cannot be an author. In the end of 2022, USA Senators Thom Tillis and Chris Coons wrote a letter to the Director of the U.S. Patent and Trademark Office, Kathi Vidal and the Register of Copyrights and Director U.S. Copyright Office, Shira Perlmutter, where they agreed that these two institutions were correct in their continued rejection of applications for intellectual protection of works that are alleged to have been authored by AI generative systems, but asked them to be open to the reality that such a rejection might not mirror the demands of the future, a portion of the letter reads as follows: 'We understand that both of your agencies have taken the position that under existing intellectual property laws AI generated inventions are not eligible for protection. We agree and support your position that this is the correct interpretation and understanding of **current law** (their emphasis). However, we are equally as interested in **what the law should be** (their emphasis) in the future. In other words, we are considering what changes, if any, may need to be made to our intellectual property laws in order to incentivize future AI related innovations and creations.' For the full letter see: United States Senate 'Letter to USPTO-USCO on National Commission on AI' available at https://www.copyright.gov/laws/hearings/Letter-to-USPTO-USCO-on-National-Commission-on-AI-1.pdf, accessed 16 September 2023.

[148] Ibid.

[149] Ibid at 405.

[150] Ibid.

Various other South African academic interlocutors substantively grapple with the concept of authorship from various angles. However, the discussion canvassed above ought to be sufficient in laying out the literature on copyright law as regards authorship.

1.5.3 Conceptions of 'community' in intellectual property discourses

Beyond authorship, this thesis argues that there is something primarily amiss in how community is defined/described and understood in intellectual property law. Thinking about the meaning of a community[151] is crucial for the study that is undertaken in this thesis because, although the argument is that ancestors are authors, in the individual authorial sense, the argument (as evidenced precisely in the fourth chapter) insists that ancestors are also a community. Simply put, some works will be authored by a specific individual ancestor, whilst other works will be authored by the physical hand of an individual author, whilst the intellectual author is a community of ancestors.[152] The latter is traversed in detail and greater length in the fifth chapter.[153] As a result, conceptual musings on the meaning of a community are important for this study.

This segment briefly studies some conceptions of 'community' in selected intellectual property law discourses. As a point of entry, it is worth noting that the concept of community finds resonance in intellectual property law discourse, mainly when Traditional Knowledge (TK) and Indigenous Knowledge Systems (IKS) are discussed. Although these are legitimate discussions, this thesis discusses authorship not just in TK and IKS but in copyright generally.[154] In the doctrinal sphere,

[151] The most prominent legislative definition of 'community' in post-apartheid South Africa is gleaned from the Traditional Leadership and Governance Framework Act of 2003, specifically section 2(1)(a)-(b), which defines community as: 'A community may be recognised as a traditional community if it is subject to a system of traditional leadership in terms of that community's customs and observes a system of customary law.' It ought to be underscored that this definition is purely for the purposes of African Customary law, and specifically the regulation of traditional/customary leadership, as per the demands of section 211 and 212 of the Constitution of the Republic. As a result, although this definition is helpful in giving a synoptical portrait of how the legislature figures as regard the meaning of a community, it is purely limited to traditional leadership, and fails to extend itself to other areas of law, such as copyright law.

[152] The 'physical author' vs 'intellectual author' dichotomy is carefully explained (and argued for) in the fifth chapter.

[153] By way of illustration, the fifth chapter uses the craftwork of iconic Ndebele artist, Esther 'NoStokana' Mahlangu to demonstrate the emergence of ancestors as a communal author.

[154] At first glance, it may seem that the discourse on Abezimu/Badimo is rationally linked to existing discussions on Traditional Knowledge (TK) and Indigenous Knowledge Systems (IKS), however this is not the case. As is explained

two pieces of legislation attempt to grapple with 'community' in the context of South African intellectual property - Section 3(f) of IPLAA defines community:

> Any recognisable community of people originated in or historically settled in a geographic area or areas located within the borders of the Republic, as such borders existed at the date of commencement of the Intellectual Property Laws Amendment Act, 2013, characterised by social, cultural and economic conditions which distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective.

Section 1(a)-(c) of the PPDM Act defines indigenous community as:

> Any recognisable community of people developing from, or historically settled in a geographic area or areas located within the borders of the Republic; characterised by social, cultural and economic conditions, which distinguish them from other sections of the national community; and who identify themselves as a distinct collective.

These two definitions are commendable, considering that they are the product of years of legislative ponderings[155] that saw the need to substantively define the meaning and essence of

in different parts of this thesis, the Abezimu/Badimo discourse finds resonance in the paradigm of Epistemologies of the South as developed by Santos, see generally Boaventura de Sousa Santos *Epistemologies of the South: Justice against Epistemicide* (2014) Paradigm Publishers, Boulder. This notwithstanding, it is crucial to demonstrate that there are discussions within the TK and IKS phraseology that speak to the question of 'community' in Africa, and specifically as it has to do with intellectual property rights, for example see Paul Kuruk 'Protecting folklore under modern intellectual property regimes: reappraisal of the tensions between individual and communal rights in Africa and the united states' (1999) 48 *American University Law Review* 769, where he broadly speaks about folklore and the tensions that exist between modern intellectual property rights and African customary law, see also Paul Kuruk 'The role of customary law under SUI generis frameworks of intellectual property rights in traditional and Indigenous knowledge' (2007) 17 *Indiana International & Comparative Law Review* 67, where he recognises that has been global efforts to protect traditional knowledge from capitalist exploitation, and cultural appropriation. The question of cultural appropriation emerges quite sharply in a few of Riley's works, see for example, Angela Riley 'Straight stealing: Towards an indigenous system of cultural property protection' (2005) 80 *Washington Law Review* 69, where, in the context of the United States of America, she argues that there is a need for a stronger study/focus on indigeneity, and a move towards strengthening tribal law – she insists that this will go a long way in alleviating cultural misappropriation.

[155] Both legislations emerge against the backdrop of immense skepticism and criticism from some academic quarters, for example, see Sadulla Karjiker *IP: Politics and Beyond* (unpublished Inaugural Lecture, Stellenbosch University, 2017) at 6-7, where he proffers a scathing criticism of both IPLAA and the Copyright Amendment Bill, Karjiker accuses government (specifically the department of Trade and Industry, which is the custodian of copyright in South Africa) of 'inept, and dysfunctional, management of intellectual property law', he further observes that these legislations appear as though they were written by people who simply do not know what they are doing, and have no basic appreciation of the fundamentals of copyright law. Specifically, as regards IPLAA, Karjiker describes the legislation as 'disastrous', he posits that it is: 'a glaring example of a failure to understand the structure of the relevant species of intellectual property law, and the bases for their recognition. It smacks of a politically motivated sop, without regard for legal principles.'

community in the sphere of intellectual property.[156] Prior to the promulgation of IPLAA, Geyer investigated the meaning of community – she primarily observes that there is a habit of using 'indigenous community' and 'community' interchangeably, with the latter being largely unregimented.[157] She argued that this served to only muddy the waters where definitional clarity is concerned.[158] By way of definition, she figures that 'community' should be defined in terms of the area in which a group of people lives or in terms of a group of people's common background or shared interests, or it can refer to the public or society in general.[159]

In a subsequent text, and certainly after IPLAA's promulgation, Geyer considers the question of community much more closely.[160] Having considered some of the criticisms of IPLAA,[161] Geyer observes that the legislation makes three distinct provisions in relation to the question of community: (1) indigenous communities are deemed to be juristic persons,[162] (2) communities can also be co-authors/co-owners,[163] and (3) for indigenous works, the indigenous community is the first copyright owner, and in the case of derivative indigenous works, the person who did the work is its first copyright owner.[164]

Beyond South Africa, and indeed in Euro/American traditions, notions of community often emerge when the 'Material Form' vs. 'Traditional Knowledge' dichotomy is discussed.[165] An example of

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[156] There has not been much academic literature in South Africa that responds to the question of community in intellectual property generally, and copyright law specifically. Viscerally, I can surmise that perhaps this paucity in scholarly deliberations on community is because of South Africa's diverse history and present, which translates to potential differences in how a community is conceptualised – simply, the heterogeneity of South Africa's identity makes it difficult for South Africans to find a common ground on what it means to be a community. Law scholars 'play it safe' in their varied discussions about community, see for example Ushenta Naidoo *A Comparative Assessment of South Africa's Proposed Legislation to Protect Traditional Knowledge* (unpublished LLM thesis, University of Pretoria, 2019), where she broadly considers various legislations that speak unto the question of community – in all the dissertation's remarks, it limits all of its understanding(s) of community to what is provided for in legislation.

[157] Sunelle Geyer 'Towards a clearer definition and understanding of 'indigenous community' for the purposes of the Intellectual Property Laws Amendment Bill, 2010: An exploration of the concepts 'indigenous' and 'traditional'' (2010) 13 *PELJ* 128.

[158] Ibid.

[159] Ibid at 132.

[160] Sunelle Geyer 'Copyright in traditional works: Unravelling the Intellectual Property Laws Amendment Act of 2013' (2017) 29 *SAMLJ* 43.

[161] Ibid at 44.

[162] Ibid at 54.

[163] Ibid.

[164] Ibid.

[165] The World Intellectual Property Organisation (WIPO) has been actively engaged in the task of thinking about ways to reform/reshape how community is understood within intellectual property frameworks, especially in the context of

this can be gleaned from Gervais' text titled 'Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge'.[166] The nub of his inquiry seeks to ascertain whether sacred crafts and practices should/must be protected[167] and if the response is positive. The probe proceeds to investigate the place of intellectual property in the context of sacred practices.[168]

Although Gervais does not define what a community is, he makes some notable remarks that describe what he thinks/feels a community represents. For example, he defines the meaning of 'sacred' and links its genesis to its recognition by 'a community'.[169] Simply put, Gervais observes that for something to be considered sacred, it ought to derive its sacredness from a specific community.[170] He adopts a similar approach when defining 'Traditional Knowledge'. He argues that its genesis stems from the traditions of a community, is representative of the cultural values of a people and is generally held collectively.[171]

Laden in the phrases 'cultural values' and 'held collectively' is a definitional cue – one can be able to appreciate that these two phrases are used for the purpose of defining Traditional Knowledge. Still, they inversely speak to what 'a community' is. Most importantly, and certainly more relevant to the argument of this thesis, Gervais observes that the 'communal authorship' of copyright does

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traditional knowledge and folklore. This can be evidenced in the developments and strides that are made by WIPO Intergovernmental Committee on IP and Genetic Resources, TK and Folklore, which has been conducting fact-finding missions, regional consultations, workshops and roundtables on GRs, TCEs and TK, to ascertain the needs and expectations of Indigenous Peoples and also local communities, as well as representatives of government, industry and civil society around the world. The work done by work certainly comes in the aftermath of decades of scholarly critique at the lack of protective measures for TK and IKS, see for example, Angela Riley 'Recovering collectivity: Group rights to intellectual property in indigenous communities' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 175, where she generally argues that a group rights model can help protect the integrity of intangible cultural expressions from the commercial exploitation by "dominant societies".

[166] Daniel J. Gervais 'Spiritual but not intellectual? The protection of sacred intangible traditional knowledge' (2003) 11 *Cardozo Journal of Intellectual & Competition Law* 463.

[167] Ibid at 484, where Gervais insists that to be able to respond to this question, the first step is to set out the fundamental characteristics of intellectual property and compare them against the characteristics of Traditional Knowledge, he finds that there is a glaring mismatch between the two, owing to several technical/conceptual issues. Having made this assessment, he opines that the most logical question should be geared towards ascertaining the elasticity of intellectual property rights system, in terms of its ability to potentially cover Traditional Knowledge. Having made these preambular musings, he proffers a more conclusive response, see at 488, 'Applying intellectual property to Traditional Knowledge requires the recognition of communal ownership of the object of the right. It does not require the precise identification of the author or originator.' The existence of an object that could not exist but for an act of creative authorship should suffice to obtain copyright protection.'

[168] Ibid at 469.

[169] Ibid at 470.

[170] Ibid.

[171] Ibid at 472.

not seem to conform to existing ownership methods.[172] He argues that this non-conformity is because of the paucity of possible economic philosophies to justify a communal author in the context of a copyright system that is fixated on ensuring that individual creativity is compensated.[173] Gervais argues that applying intellectual property to Traditional Knowledge requires the recognition of communal ownership, and such recognition would not require the precise identification of the author or originator.[174]

Conclusively, Gervais rigidly dismisses the claim/argument/proposal that an ancestor is an author in copyright:

> At best, the community is the source of 'inspiration' for the traditional knowledge that underpins the creation of the work. An author *cannot be joint author with her ancestors* (my emphasis) because the intent to merge the contributions must be present at the time the contribution is made. Alternatively, rights of individual authors could be transferred to the 'community' especially if the community created a corporate or similar structure to administer its rights. Several national laws require that such an assignment be in writing.[175]

This rejection of the potential joint authorship between a human author and their ancestor is purely based on the capitalist trappings of the global copyright system, which wrongly insists that copyright is in place mostly for the profit-seeking interests of authors and its related maximisation. The original premise of capitalist notions of authorship is that a work is accorded an author with the objective of identifying the person(s) to be rewarded/remunerated for the work.[176] Inversely, the 'non-human' nature of ancestors places this capitalist logic into disrepute; if there is no human author, there is nobody to exploit the work commercially, and therefore there is no author.

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[172] Ibid at 481.
[173] Ibid.
[174] Ibid at 488.
[175] Ibid at 482.
[176] Several intellectual property law scholars have laboured to substantively demonstrate how capitalism has vulgarised the intent of copyright law and made it to tilt purely towards an overly mercantilist/trade agenda that sees intellectual property as instruments of trade and profit maximization and nothing much else. These scholars have argued that this vulgarization of copyright forecloses, and indeed limits the function of copyright, for examples of some of these arguments, see Rahmatian op cit note 28 at 41-42, see also Madhavi Sunder *From goods to a good life: Intellectual property and global justice* (2012).

1.5.4 Conceptions of legal personhood in intellectual property discourses

Having reviewed literature as regards conceptions of community in intellectual property law discourses, it inevitably becomes crucial to do the same as regards legal personhood. Where the law is concerned, definitions of personhood are rather thin because they are usually limited to doctrinal and legislative definitions. For example, in South Africa's law curriculum, personhood is primarily dealt with in the law of persons module.[177] The module, housed in the department of private law, is concerned with the determination of legal subjectivity, the rights and duties associated with legal personality, and issues of legal status.

Prominent scholars of the law persons, such as Cronjé & Heaton, Barrat et al., Kruger & Shelton et al., Davel & Jordaan, and others, converge at the scholarship of legal personhood to proffer different yet very similar conceptions of what it means to be a person from the perspective of South African law: for example, their definitional suppositions lead to three indubitable conclusions, (1) a distinction is drawn between living and non-living things, where the latter is accorded the label 'legal object'[178] , and the former is labelled 'legal subject',[179] (2) a person is defined as a legal subject because they are an entity that can have rights, duties and capacities, and (3) legal subjectivity has a beginning and an end, it begins at the birth of a person, and ends at their death.

These three conclusions as regards the legal definition of personhood are worth some brief comment: the law is immediately at odds with the African conception of Being because it has a very strict demarcation between living and non-living. This strictness is accompanied by an overly technical definition of who/what a person is – the law expressly places two technical requirements for the subsistence of personhood. The first is that the birth must be fully completed, in the sense that the foetus must be completely separated from the mother's body, and the second is that the foetus must have lived independently after separation from the mother's body.[180] These prevailing strictures as regards the essence of legal subjectivity are justified by the fact that human beings are

[177] Strictly speaking, the law of persons limits itself to the definition of a person for purposes of the law, and does not engage the philosophy of personhood per se.
[178] Accordingly, a legal object is anything in respect of which a legal subject may have rights, duties and capacities, whereas a legal subject is an entity that can have rights, duties and capacities.
[179] Hanneretha Kruger & Ann Skelton *The Law of Persons in South Africa* (2010) ch 2.
[180] Ibid at 22.

capable of acts that give rise to legal consequences.[181] The justification further holds that legal subjects (persons) control and deal with legal objects and thus acquire rights and duties against other legal subjects in relation to legal objects.[182] Even where the strictness somewhat eases, it still maintains its strict demands for legal subjectivity to vest only between mortal birth and death – the only caveat is in the bifurcation between 'natural' and 'juristic'[183] persons.[184] The latter are not persons in the sense that they do not fit the technical requirements mentioned above. However, they find their 'Being' because they are social entities that derive their existence from the associations created by people.[185]

Although it is widely accepted among scholars of private law that the prevailing conceptions of personhood exclude 'non-humans', there is a fair concession that this is not cast in stone. For example, Davel and Jordaan demonstrate that in Germanic law, there was an instance where deceased persons were buried with their possessions to satisfy their needs even after their death.[186] This concession follows a logic that suggests that the custom of burying people with their belongings implies that they (the deceased persons) are still bearers of subjective rights and thus continue to maintain legal subjectivity.[187] This concession is incredibly important for the argument of this thesis, for it specifically refers to the practices of the peoples of the Global South, specifically in Southern Africa:

> In indigenous law systems occurring in *Southern Africa,* (my emphasis) there are also legal institutions which pose the question whether or not people retain legal subjectivity in such instances . . . In this regard it must be born in mind that the views of the community at a certain time and place do indeed influence legal systems.[188]

[181] DSP Cronjé & Jacqueline Heaton *The South African Law of Persons* (1999) at 3.
[182] Ibid.
[183] Where juristic persons are concerned, scholars in the United States of America have considered the curious contrast in United States law that corporations can be author but not inventors, see generally Sean O'Connor 'The curious contrast between corporate authorship and inventorship in the United States' in Niklas Bruun & Marja-Leena Mansala (eds) *Research Handbook on Intellectual Property and Employment Law* (2021) Edward Elgar, Cheltenham.
[184] CJ Davel & RA Jordaan *Law of Persons Students' Textbook* 2ed (1998) at 3.
[185] Ibid.
[186] Ibid at 5.
[187] Ibid.
[188] Ibid.

In essence, Davel and Jordaan insist that although the law of persons is strict in its conception of personhood, this is just one worldview, and it is not mirrored in certain parts of the world, specifically in Africa or among Africans.

Barratt et al. explain that the law's strict conception of personhood stems from the law's inherent desire for certainty – the definition of who/what a person needs to be strictly defined so that the law can accord rights, duties, capacities, and status to specific persons, and be able to ascertain as to the identity of persons liable for legal transactions.[189] Notwithstanding this reality, they take the discussion slightly further when they argue that humans create the legal system to serve the needs of humanity; however, if the needs of humanity are dependent on the interests of non-human species, it makes sense for the legal system to regulate these and even incorporate these non-human interests in the system.[190]

The ninth chapter of Barratt et al. is aptly titled 'Law and the dead', and it begins with some intellectual provocations that are worth a brief discussion; it asserts that even though there is no legal subject and legal personality to the dead, there are some realistic concessions that the law can make therein.[191] These concessions do not only stem from the fact that legal subjectivity is a legal creation but also from the lived reality that suggests that society realistically recognises that what happens after death is fundamentally a question of *boni mores* and/or public interest.[192]

In the context of the United States of America, Carpenter, Katyal, and Riley discuss the question of personhood in a text titled, 'In Defense of Property'.[193] The thesis of their argument stems from the notion that it is incorrect to treat IKS within the same framework as other property because IKS was not meant to be protected using existing legal tools. They are at odds with this notion and instead argue that IKS is vulnerable to cultural appropriation and undue commercial exploitation and thus needs protection.

[189] Amanda Barratt & Wesahl Domingo *Law of Persons and the Family* 2ed (2017) at 7.
[190] Ibid at 37, a disclaimer is in order; the authors here are in no way referring to ancestors, instead they are referring to the argument that animals ought to enjoy some level of legal subjectivity.
[191] Ibid at 146.
[192] Ibid.
[193] Kristen Carpenter, Sonial Katyal & Angela Riley 'In defense of property' (2009) 118 *Yale Law Journal* 1022.

Relevant to the argument of this thesis, Carpenter, Katyal and Riley argue that the protection of the pieces of knowledge of traditional/indigenous communities does not only have to do with their pieces of knowledge but also with their very personhood. Thus, they demonstrate that to indigenous people, some of these pieces of knowledge are intricately linked to their personhood: 'that some properties are so constitutive of one's identity that they demand treatment that transcends - and surpasses that of an ordinary market transaction.'[194] Even more radically, they call for a shift from 'personhood to peoplehood', arguing that the former tends to be steeped in Eurocentric individualistic tropes that fail to imagine the existence of a person within the setting of a community of people.[195]

Personhood, as a concept in the discipline of the humanities, is highly contested. In the main, there are three criticisms levelled against the concept: (1) it fails to embody a just social order where men and women are equal because the concept is intrinsically patriarchal. After all, it reproduces gender-based inequalities, (2) it fails to embody sound animal ethics because it is essentially speceistic, and (3) it fails to embody social egalitarianism because it is a performance-based ethical system.[196] These criticisms do not hold when studied through Samaradiwakera-Wijesundara's intersectional study of personhood, which demonstrates that personhood is largely represented and interpreted by the person themselves or the next person, which determines its meaning.[197] It is in its conceptual fluidity and ambiguity that personhood staves off the above three criticisms; its very nature lends itself to an intersectional reading.[198]

Samaradiwakera-Wijesundara's intersectional reading of personhood is not only important in terms of vanquishing the three criticisms above but also in how it remarkably demonstrates how personhood is a question of power.[199] Simply put, the question of deciding who a person is and what it means to be a person is rationally connected to the power relations/systems of the day. In

[194] Ibid at 1048.
[195] Ibid at 1053.
[196] Motsamai Molefe *African Personhood and Applied Ethics* (2020) at 1.
[197] Charmika Samaradiwakera-Wijesundara 'Intersectionality and/or multiple consciousness: Re-thinking the analytical tools used to conceptualise and navigate personhood.' (2023) 36 *Agenda* 199.
[198] Ibid.
[199] Ibid.

the context of the South, and as demonstrated in the law of persons scholarship above, the law has the power to determine who a person is and what the consequences of Being a person are.[200]

The inference that can be logically drawn from Samaradiwakera-Wijesundara's illustration of personhood as a question of power helps to ponder on the implications of the law having the reach insofar as defining and asserting who a person is – because if the law falls into the hands of bigots and tyrants (such as colonialists), it will serve the purpose of excluding/othering people that it deems non-human.

At a definitional level, personhood takes two distinct characters; there are normative conceptions of personhood, and there are also ontological conceptions. The latter deals with the fact of being human in the sense that it concerns itself with the descriptive features that constitute human nature.[201] In a sense, personhood is underpinned by three distinct concepts: (1) personal identity, (2) moral status, and (3) moral virtue.[202] Simply put, personhood seeks to explain what it means to be a person. As can be imagined, definitional conceptions of personhood take varying shapes in the humanities, particularly in the discipline of philosophy.

Prevailing literature reveals that both legal and Western conceptions of personhood construe 'a person' to mean a human being or a person who is living. This is pivotal for the argument of this thesis because the thesis prefers an alternative conception of personhood, specifically one that mirrors the epistemic traditions of peoples from the global South and Black people.

Ramose grapples with the idea of personhood from the lens of the African philosophy of Ubuntu, where he coins the concept of an 'onto triadic Being'.[203] This concept is a bedrock upon which the argument of this thesis is advanced – in the main, Ramose argues that in African epistemological perspectives, a Being (and therefore, a person) is defined as an onto-triadic Being, the 'triadic' stands for three components, these are the living, the dead and the yet-to-be-born.[204] He defines this paradigm as follows:

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[200] Ibid.
[201] Molefe op cit note 182 at 2.
[202] Ibid.
[203] Mogobe B Ramose *African Philosophy Through Ubuntu* (2009) at 46.
[204] Ibid.

> *Umuntu* is the embodiment of the ontology and epistemology of *Ubu* . . . A specific element of the experience and concept of whole-ness in ubuntu philosophy is the understanding of being in terms of three interrelated dimensions. We find the dimension of the living – *umuntu* – which makes speech and knowledge of being possible. The second dimension is that of those beings who have passed away from the world of the living. These beings departed from the world of the living through death. It is thus understood that death discontinued their existence only with regard to the concrete, bodily and everyday life as we know it. But it is believed that death does not totally discontinue the life of the departed beings. Instead, they are believed to enter into and continue living in a world unknown to those left behind. On the ground of this belief the departed are called the living-dead (*abaphansi*). . . The third dimension is that of the yet-to-be-born. These are being of the future. It is the task of the living to see to it that the yet-to-be-born are in fact born.[205]

In totality, Ramose's conception of personhood suggests that, in the context of African epistemologies, *Umuntu* (a person) is constituted (or finds the wholeness of their being) by three essential components, the living, the dead (also known as the living-dead) and the yet-to-be-born.

As shown in the overview of literature as regards conceptions of community, this conception of Being is non-existent. It does not feature in intellectual property rights discourses broadly and copyright law epistemologies specifically. This glaring lack in the literature justifies, and indeed, vindicates the study that this thesis undertakes – it further makes the doctoral project's overarching argument worthwhile and academically authentic.

1.5.5 Areas of convergence

This overview of the literature reveals one undeniable fact: although there are raging debates in normative intellectual property law discourses, and even though there may be shades of definitional variances in its doctrinal assertions, most of these discourses reach a consensus on fundamental conceptual questions, especially as regards authorship. Principally, the literature, as canvassed above, reveals four key areas of convergence:

First, the centrality of a human author is sacrosanct. Notwithstanding the development of the technologies sponsored by artificial intelligence and the fourth industrial revolution, scholars of

[205] Ibid at 45.

copyright law have converged at the nexus of robust global copyright law discourse to assert that authorship will always derive its conceptual characteristic from humans and that the discussion on non-human authors does not arise logically, let alone epistemically. The Ginsburg and Budiardjo text is most emphatic in underscoring this point.[206] Summarily, Ginsburg and Budiardjo make a two-fold argument: (1) the question of authorship in artificial intelligence does not arise because the person (human) always vaunts over the machine – machines do not act voluntarily or out of their natural intellect; they are able to function because of human input, and (2) the only legitimate question that arises is whether authorship should subsist in the person that invented the machine or the user who has bought it, and gives it instructions to author a specific work. What can be gleaned from these two arguments is that the question of a non-human author is rigidly rejected in prominent scholarship about authorship.

Second, the function of authorship may shift from time to time, but the concept itself remains largely unmoved. At a conceptual level, authorship has always been within the remit of persons and the products of their craft/skill/talent. Different from the inviolable centrality of the human author, conceptual rigidity speaks to how the telos of authorship shifted back and forth, between emphasising the actual work outside of its creator vis-à-vis emphasising the creator of the work over the work itself yet has remained squarely within that ambit. Put differently, philosophical interlocutors who have grappled with the reasons for authorship have demonstrated how the varied justifications for authorship have changed from time to time, and in those demonstrations, it becomes clear to deduce that authorship is always boxed in the 'person' and 'their work' paradigm. It follows that the literature as regards authorial justifications is pronounced through the question, 'What is authorship?'. However, upon closer inspection, the actual responses seem to be rather responding to the question, 'Why authorship?'. The 'why' question does well to give a clear account of the need for an author (both in works of fiction and copyright) but does very little to intricately study the essence of authorship and the potential diverse conceptions that could arise.

Third, arguments that have sought to challenge the very epistemic/conceptual foundations of copyright law and its essentialist definition of authorship have either been disregarded in total or warded off into different disciplines or even relegated into *sui generis* types of legislation – all in

[206] Ginsburg & Budiardjo op cit note 105 at 343-448.

the name of keeping authorship as it is currently known and accepted. The overview of the literature reveals that the efforts that sought to synchronise prevailing intellectual property legislation with intellectual property that does not adhere to strict legislative requirements have been met with scorn and disdain. A good example of this can be evidenced in the varied scholarly criticism of IPLAA. Notwithstanding some of the valid concerns as regards legal technicalities, there seems to be an overarching rejection of IPLAA because it seeks to bring to the sphere of intellectual property, newer types of works that do not fit presently accepted legislative norms. At best, this spoke to how scholars of intellectual property were unprepared to imagine intellectual property beyond its current paradigmatic chassis but insisted on assuming the positivist/formalist approach that complacently rejected anything and everything that was outside of the norm. At worst, they assumed the stance of saying that such types of works ought to be catered for under *sui generis* types of legislation, with the strong caveat that such legislation should not contradict prevailing intellectual property norms.

Fourth, notwithstanding the general acceptance of the sacred and largely intrinsic nature of Traditional Knowledge, and it is born from indigenous communities, there's a rigid insistence on a meaning of 'community' that is marked by geography, culture, consanguinity, traditions, interests, and related markers. All these markers fall squarely within the positivist/formalist expectations that demand the law to be certain and confined to strict meanings. To be sure, as with the centrality of a human author, prevailing authorship limits its imagination of 'community' to humans.

1.5.6 Areas of divergence

Contrary to the richness of prevailing debates in intellectual property law discourses, there is very little difference/debate on key concepts and, indeed, authorship. Albeit brief and nuanced, there are two diverging currents in the literature:

First, civil law and common law traditions hold different tunes as regards the definition of an author. In studying authorship in civil law and common law jurisdictions, the literature demonstrates that conceptualisation of authorship reveals marked differences, not only in the

comparison of common law and civil law systems but within the legal regime of each country within some of these jurisdictions. For example, the canvassed overview of literature demonstrates that between the United Kingdom's and Australia's legislative assertions on authorship, the former defines authorship in relation to the work, whereas the former places emphasis on the creation of a work as the genesis of authorship. On the same score, whilst both the United Kingdom and Australia emphasise a human author, scholarly observations show that Dutch laws explicitly allow for the authorship status, rather than mere ownership, of employers or certain hiring parties even outside the context of machine-assisted creation and they do not limit this 'author' category to humans.

Second, philosophical ponderings on authorship show stark differences as regards the essence of authorship – this is true even when considering the similar articulations/readings of the history of the development of the concept of authorship in copyright. In the main, two positions are accepted and rejected from time to time, and with the change of each epoch. The first position holds that authorship serves to validate and authenticate the text, whilst the second position insists that authorship serves to ensure that the creator of a work is to be fully reimbursed for their work. The diverging aspect in this part of literature lies in the debate about whether authorship serves the interests of the creator of the work or whether it serves the work itself. In the present epoch, and indeed in the era of rampant capitalism,[207] authorship serves the interests of the creator of a work, who is seen as one worthy of the benefits of profit maximisation, which is a by-product of capitalism and its sensitivities.

1.5.7 Concluding analysis

Conventional academic lexicon prefers to use the phrase 'the gap that needs to be filled' to underscore the saliency of the proverbial gap in the literature that requires further theorization/elucidation, thinking, inquisition and critical analysis. This chapter steers clear of this

[207] A critique of capitalism is inherently laden in decolonial scholarship, see for example, Foluke Adebisi 'Should we rethink the purposes of the law school? A case for decolonial thought in legal pedagogy' (2021) 2 *Amicus Curiae* 482 where she broadly demonstrates that capital interests and power direct the ontology of law and, therefore, legal education, causing a seeming commitment of doctrinal law to 'rules rationality' and protection of capital.

conventional lexicon and instead prefers to frame this as a pronunciation of those areas in the literature that require extensive critical development.

Setting out the literature above demonstrates that three areas in the literature have a ubiquitous need for development: (1) there is a need to think differently about the literature on non-human authors in copyright law – present suppositions wrongly foreclose this discussion, insisting that it is not ripe. However, the literature does not consider claims that ancestors can be an author in copyright, (2) both conceptions of 'community' and 'personhood' in copyright law are not only framed within the Western/Eurocentric lens but limit themselves purely to legislative offerings. There is a need for a deeper discourse on the question of community/personhood – and this needs to happen beyond Traditional Knowledge and Indigenous Knowledge Systems, but in copyright law generally and (3) the overview of the literature reveals that there is a glaring missing voice in the discourse on authorship in copyright, this is the voice of Africans, Black people, peoples from the Global South and the rest of the colonised world. Present literature is thus unevenly skewed because it is wholly representative of the epistemic patterns of just one part of the epistemic community, denying authorship its natural pluralistic identity. In place of such a pluralistic outlook, present literature is heavily steeped in capitalist logic and its related sensitivities.

The above three areas in the literature that have a dire need for development logically set out the literary contribution that this doctoral project intends to make.

1.6 Hypothesis

Against the background laid above, the thesis to be defended in this work is three-fold: (1) that the genesis of intellectual property law as well as copyright law, is colonial, at the behest of capitalist desires, and is unjustly mercantilist (2) that copyright law theory neglects the epistemic traditions of the Global South, and that (3) the *Decolonial Turn* presupposes a re-membered copyright law theory that leads to a pluriversal conception of authorship, one that accepts that there are different worlds in one world, and therefore different types of authors, and these may include Abezimu/Badimo.

1.7 Scope

The thesis has various limitations and areas that it does not cover or attend to. This segment sets them out as follows:

First, the thesis is written/prepared at a time when the legislature, lawyers, academics, and concerned stakeholders are debating the controversial Copyright Amendment Bill. Although the Bill is referenced in certain instances, the dissertation deliberately does not study it in detail for the obvious reason of the uncertainty and contestation surrounding it eventually becoming law.

Second, even though the thesis sets out to study authorship in copyright law generally, it is apt to assert that, in the context of this thesis, 'author' refers only/mainly to the literary, artistic, and musical author. This, therefore, excludes the industrial author. The latter author attracts some complexities whose reach far exceeds the intended scope of this doctoral thesis.

Third, the thesis boasts a chapter that sets itself the task of studying the history of copyright law development from the perspective of decolonial theory. This study of the history, although verbose, is still not comprehensive because it does not cover the entirety of the history of copyright. The chapter that deals with the history of copyright only attends to the generality and not the specificity of certain historical epochs, mostly because the chapter seeks to not only read the history but to demonstrate that there are decolonial (and therefore pluriversal) ways of reading history.

Fourth, decolonial theory and decolonisation, although defined extensively in the second chapter, are concepts that have varied meanings/definitions. Not only are these meanings subject to contestation, but they are also rejected in certain quarters, with some arguing that they find no resonance nor applicability in the sphere of legal studies and the legal academy in general.[208] This thesis does not have the scope to respond deeply to all the pushback that there is against

[208] Willem Gravett 'Pericles should learn to fix a leaky pipe – why trial advocacy should become part of the LLB curriculum (Part 2)' (2018) 21 *PELJ* 1, where he argues against the curriculum transformation proposals that are made by scholars from the critical jurisprudence tradition. Gravett argues with his colleagues from the University of Pretoria's department of jurisprudence, who collectively argued that efforts to transform the curriculum should lean towards decolonial and similar critical approaches, see also, Willem Gravett 'Of "deconstruction" and "destruction" - why critical legal theory cannot be the cornerstone of the LLB Curriculum' (2018) 135 *SALJ* 285, where he argues that critical approaches to teaching the law are an agenda to completely do away with the legal academy and have it become a humanities subject.

decolonisation and decolonial theory. In that sense, the aspects of decolonial theory and decolonisation that are canvassed in this thesis are not exhaustive.

Fifth, most intellectual property law discourses that focus on the global South (mostly Africa) tend to unduly place their interlocutory on Traditional Knowledge, Indigenous Knowledge Systems and intangible property. Although these are valid and useful discourses, there's a wrong assumption that any and every form of knowledge from Africa should fit within these discourses. Indeed, this doctoral thesis studies ancestral deference/reverence in the context of copyright law. Although it argues that ancestral deference/reverence constitutes an epistemic tradition of the people of Africa, this should not be confused with prevailing discourses on Traditional Knowledge as currently canvassed in intellectual property literature.

Sixth, which is the most important limitation, is this thesis' outright conceptual/ abstract/ philosophical argument. This means that the thesis will not extend to responding to questions about practical implications that follow an acceptance of the thesis of Abezimu/Badimo as authors in copyright. These questions include: How would authorship then be attributed? How do we name them (Abezimu/Badimo) as authors? How should authorship be attributed to ancestors? Whose names would be on the protected works? For example, who would be indicated as the author of a literary or artistic work? How is the term of copyright to be calculated (since the formula of life plus 50 is unworkable in cases where the work is created posthumously and the date of death is unknown)? How and by whom are decisions about the commercial exploitation of the work to be made? Once the commercial benefit is reaped, how is it to be shared with Abezimu/Badimo or their other descendants? If the answer is always to have recourse to a natural living person, then why should we even think about reconceptualising the understanding of an author? Given the philosophical and theoretical aspirations of this doctoral project, none of these questions are responded to in this thesis.

Although crucial, these questions would require a deepened engagement, one whose scope far exceeds the reach of this thesis. Although some concerns about the practicability of these theoretical and philosophical approaches are addressed in a limited fashion in some chapters of this thesis, it ought to be borne in mind that the task of this thesis is to argue for a conceptual acceptance of the theory/philosophy of Abezimu/Badimo as authors in copyright. It is with this

background that the thesis figures that a conceptual/theoretical engagement with the idea of Abezimu/Badimo as authors is a primary hurdle that must be crossed before we can substantively give meaning to practical considerations.

Some aspects of these limitations are discussed at length in the concluding analysis of Chapter 5 because the said chapter logically invites questions about praxis and the practicability of the acceptance of the thesis of Abezimu/Badimo as ancestors.

1.8 Overview of chapters

1.8.1 Chapter 1

The first chapter synoptically lays out the introduction and background of the doctoral project. It illustrates the research problem, research questions, methodology, overview of literature and the scope and limitations of the study.

1.8.2 Chapter 2

The second chapter is the theoretical framework. The chapter lays out the theoretical lens with which authorship in copyright law is studied. The chapter begins with giving a broad layout of the *Decolonial Turn* as a concept, and it maps the concept to outline definitional clarity and demonstrate its relevance to the argument of the thesis. In mapping the *Decolonial Turn*, the chapter traces its historical foundations, the debates that define it, and as well as its applicability to the African context. This aspect of the second chapter is crucial because it substantively qualifies the supposition that South Africa is currently undergoing a *Decolonial Turn* and that this turn has direct ontological, epistemic, and intellectual consequences/implications for the field of intellectual property law broadly and copyright law specifically.

The chapter then proceeds to argue that there is a two-pronged theoretical possibility in the effort to grapple with the *Decolonial Turn* in the context of copyright law and, indeed, authorship. This two-pronged theoretical possibility, framed as Decolonial Options, entails Decolonial Theory and

Black Consciousness Philosophy. As regards Decolonial Theory, the chapter embraces the probative approach that asks the following three questions: what is decolonisation? Why decolonise? How do we decolonise?

1.8.3 Chapter 3

The third chapter is titled 'A Decolonial Reading of the History of Copyright Law in South Africa.' It intends to achieve two objectives: the first is to provide a comprehensive background of the history of the genesis and development of copyright law in South Africa, and the second is to proffer a decolonial reading of the history of copyright law.

The third chapter accepts that a different reading of history is not only possible but is imperative – it problematises a singular conception of history as a product of universalist colonial tropes that urgently need to be undone. Following its introduction, the chapter proceeds to definitionally qualify the idea of reading history through the lens of decolonial theory. The chapter's decolonial reading of the history of copyright is divided into three epochal compartments: the pre-1910 era, the 1910 to 1996 era and the post-constitution era. The chapter insists that it is important to study the history of copyright in South Africa using this three-epoch method because these three cardinal points defined numerous socio-political changes in South Africa.

1.8.4 Chapter 4

The fourth chapter is titled 'Authenticating Abezimu/Badimo as an Author in Copyright Law.' It sets itself the task to respond to the research question that probes the intellectual/academic/epistemic authenticity of the claim that ancestors are authors in copyright law. The fourth chapter is the most important chapter of this thesis. After all, it helps clarify the argument that the current definition of authorship in copyright law is incomplete because it does not reflect the epistemic traditions of the global South (and of African and Black people) and that it is replete with Eurocentric reasonings and sensitives.

The fourth chapter has the task of authenticating ancestral belief, not only as a religious/spiritual belief system but as a valid centre and bearer of a people's knowledge system. This is an important task because the reverence and deference of ancestors are usually mistaken to be merely representative of religico-cosmological beliefs and never of their epistemological characteristics. The fourth chapter thus demonstrates that there's an aspect in the image of 'Abezimu/Badimo' that does not exist in the image of 'ancestors'. This nuance is not only in terms of meaning but in the essence of the difference in language and, thus, conception.

To achieve its task, the chapter begins by providing an overview of current conceptions of authorship in copyright law and related meanings that are attached to 'community' in the context of intellectual property law jurisprudence in South Africa. The chapter then proceeds to specifically apply a decolonial methodology to study the essence of ancestors as authors. This is done in two ways: (1) it draws from scholarship that speaks to this subject in the vernacular of African people – this is done against the background that some concepts (such as ancestors) can be better understood when studied from the source, and that the language of the bearers of the knowledge, and (2) it uses works of African literature, particularly fiction, to demonstrate that the visible hand of ancestors in the lives of Africans is not an episode, but rather a constitutive element of their very Being and existence.

1.8.5 Chapter 5

The fifth chapter is titled 'Abezimu/Badimo and alternative conceptions of copyright law's author.' It sets out to decisively demonstrate that there are alternative ways to figure out and grapple with the idea of authorship in copyright law. The purpose of the fifth chapter is to demonstrate that even in prevailing conceptions of authorship, it is possible to imagine differently designed meanings of authorship – specifically one that does not demand an in-person or outright human author.

The chapter holistically responds to the research question that asks, 'How is copyright law's 'author' defined from the prism of decolonial theory?' To achieve this task, the chapter studies two court judgments, *Peter Ross v Ramesar* and *Cummins v Bond* – it argues that the facts of the case and the finding of the respective courts, studied alongside scholarly interlocutory, demonstrate

that, contrary to prevailing universalist legislative offerings, the nature of authorship is inherently pluriversal. The argument that is advanced in the chapter validates the contention of the thesis that the aftermath of the *Decolonial Turn* inevitably leads to a pluriversal author. The chapter then investigates the authorship of Ndebele's artwork as produced/authored by the legendary Gogo Esther Mahlangu – it argues that although she remains a legitimate individual author, the community of amaNdebele also have an authoring hand in her work. This argument presents a decolonial realisation of the pluriversal author.

1.8.6 Chapter 6

The sixth and final chapter concludes this thesis. The chapter provides a summary of the arguments propounded in the different chapters of the thesis. It demarcates key findings and makes proposals/recommendations where appropriate.

1.9 Conclusion

This chapter has introduced and succinctly laid out the various components that are constitutive of the intellectual inquiry that this doctoral thesis engages in. Most importantly, the chapter has set out an expansive overview of the literature, which has demonstrated that there are gaps in prevailing literature that need to be filled. The next chapters lay out the theoretical framework that foregrounds the argument propounded in this thesis.

CHAPTER TWO: THE THEORETICAL FRAMEWORK

2.1 Introduction

'Queremos un mundo donde quepan muchos mundos'[1] – Arturo Escobar

The idea of decolonising the law generally, and copyright law specifically, is not new. Although some work has been done to lay the ground for theoretical engagement with the decolonisation of the law, this is an area that requires further and deepened clarification. This chapter is deliberately the largest chapter of this doctoral thesis because it not only sets out a theoretical framework but also has the task of bringing together the multidisciplinary facets of this thesis. Although decolonial theory and the decolonial discourse are sufficiently traversed in the fields of sociology, history, anthropology, and other social sciences, it remains somewhat of an enigma in the field of law.

It is against this background that this chapter comprehensively assembles definitional clarity as regards the meaning of decolonial theory, critical legal studies, and Black consciousness philosophy and illustrates how they are relevant to the thesis of the argument advanced throughout the chapters of this doctoral project.

Following this introduction, the layout of this theoretical framework is propounded in three further segments. The second segment theorises the *Decolonial Turn*, demonstrating its meaning, relevance and applicability as regards the object of this doctoral thesis. In the main, this segment argues that, with the advent of the #MustFall moment,[2] South Africa is undergoing a *Decolonial Turn* and that this turn has epistemic/ontological implications on how society thinks, perceives, and grapples with specific legal concepts, including the concept of authorship in copyright law.

[1] Translation: 'We want a world where many worlds fit'.

[2] Studying decolonising by way of using 'moments' is a method that is employed by Keenan, where she argues that despite law's continual historicization of Indigenous Australia, there have nonetheless been 'moments of decolonisation,' as there have been since the colonization of Australia began, in which Indigenous Australia asserts its contemporary presence in opposition to and outside of colonial Australia, see generally, Sarah Keenan 'Moments of decolonizatrion: Indigenous Australia in the here and now' (2014) 29 *Canadian Journal of Law and Society* 163.

The third segment introduces the decolonial theory and Black Consciousness Philosophy as the theoretical cardinal points that carry through this thesis' critique of copyright law's prevailing conception of authorship. This segment of the chapter is deliberately verbose in its effort to define concepts because it appreciates that, although these concepts are largely trite in the discipline of the social sciences, they are still largely enigmatic in legal research and thus require full discussion/enunciation.

The fourth and last segment concludes this chapter.

2.2 Theorising the *Decolonial Turn* (the theoretical framework)

The call to shift the meaning of authorship in copyright law from its current definitional paradigm to be inclusive of Abezimu/Badimo is done in line with the conception of decolonisation as meaning a transformation of the world from the universe to the pluriverse. The study of ancestors as author accordingly entails the operative function of appreciating the *Decolonial Turn* as a demand to shift from the universe to the pluriverse. The *Decolonial Turn* is a valid locus of enunciation and, thus, a starting point in thinking about the shift that needs to happen in the epistemic foundations that define current conceptions of authorship in copyright law.

Mignolo's 'Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking' serves as an appropriate starting point when historicising discussions about the *Decolonial Turn* – he explains that in the 16th century, Spanish missionaries came into contact with people from the Global South, and declared that people should be judged (engaged with) on the basis of their (in)ability to read/write and use the alphabet.[3] Mignolo figures that this was the beginning of the colonial difference and the Atlantic imaginary.[4] Towards the 18th century and the beginning of the 19th century, the yardstick was no longer the ability to read/write in alphabets, but rather 'history' – the resultant effect of this was that those who could read/write in the alphabet

[3] Walter D Mignolo *Local Histories/Global Designs: Coloniality, Subaltern Knowledges and Border Thinking* (2012) at 3.

[4] Ibid at 13, he defines colonial difference to mean 'the classification of the planet in the modern/colonial imaginary by enacting coloniality of power to transform differences into values.'

were said to have had a history. Those who could not read/write in the alphabet had no history.[5] The function of relegating to 'sub-human' people who could not read/write the alphabet and declaring that their inability to read/write the alphabet also means that they do not have a history is at the centre of the coloniality of knowledge. It is what Mignolo refers to as the 'subalternization of knowledge'.[6]

The thesis' mapping of the *Decolonial Turn* relies on another of Mignolo's works, 'Epistemic Disobedience and the Decolonial Option: A Manifesto', to understand the meaning of the *Decolonial Turn*:

> The decolonial turn is the opening and the freedom from the thinking and the forms of living (economies-other, political theories-other), the cleansing of the coloniality of being and of knowledge; the de-linking from the spell of the rhetoric of modernity, from its imperial imaginary articulated in the rhetoric of democracy.[7]

Maldonado-Torres follows through quite extensively in providing definitional clarity as regards the meaning of the *Decolonial Turn*. Maldonado-Torres does this by way of successive articles, essays, books, and book chapters. In this chapter, only three of his works are studied.

The first is entitled 'Thinking through the Decolonial Turn: Post-continental Interventions in Theory, Philosophy, and Critique—An Introduction'.[8] Maldonado-Torres illustrates that the *Decolonial Turn* emerges in theory as resulting from the reality that Modernity and Modernization have meant the incomplete project of decolonisation. He accordingly posits:

> The decolonial turn does not refer to a single theoretical school, but rather points to a family of diverse positions that share a view of coloniality as a fundamental problem in the modern (as well as postmodern and information) age, and of decolonization or decoloniality as a necessary task that remains unfinished.[9]

He adds:

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[5] Ibid at 3.
[6] Ibid at 12-13.
[7] Walter Mignolo 'Epistemic disobedience and the decolonial option: A manifesto' (2011) 1 *Transmodernity* 48.
[8] Nelson Maldonado-Torres 'Thinking through the decolonial turn: Post-continental interventions in theory, philosophy, and critique—an introduction' (2011) 1 *Transmodernity* 1.
[9] Ibid at 2.

> The concept of the 'decolonial turn' first came to light in a conference at the University of California, Berkeley in 2005. I was the main organizer and the concept reflected a long interest of mine in finding a way of articulating the massive theoretical and epistemological breakthroughs in the works of Third World figures, such as, for instance, Frantz Fanon, Enrique Dussel, Aníbal Quijano, and Sylvia Wynter. It was the kind of breakthrough that I also identified in the works of a younger but not less illustrious generation of scholars, including Linda Martin Alcoff, Lewis Gordon, María Lugones, Walter Mignolo, Chela Sandoval, and Catherine Walsh, and in collectives such as the modernity/coloniality/decoloniality network, the Caribbean Philosophical Association, and in a varied group of Latina/o philosophers and critics.[10]

Recall that the thesis frames its argument as follows: South Africa is undergoing a *Decolonial Turn*. This turn necessitates a theoretical commitment to the praxis of shifting from one ideological paradigm to another – the shift proffered by this thesis is a move from prevailing universalistic conceptions of authorship in copyright law to a pluriversal epistemic conception. Maldonado-Torres' explanation of the *Decolonial Turn* as meaning a family of diverse positions that share an opinion that coloniality is the fundamental problem facing post-colonial societies falls squarely in line with the argument of this thesis. In fact, the argument of the thesis presents a logical outcome of what the *Decolonial Turn* presupposes: that a society that seeks to decolonise its situation must be willing to shift from the colonially engineered setting of the universe into becoming a pluriverse.

The intellectual introspection that the Decolonial Turn calls upo*n* means that copyright law scholarship should embrace the epistemological breakthrough in the intellectual contributions of decolonial academics from the global South. As will be evidenced in subsequent chapters, this thesis prefers to map its argument further than just decolonial academics and scholars. Still, it relies on other types of interlocutors, such as writers of fiction and social commentators, to illustrate why the hypothesis that ancestors are authors is an academically/intellectually authentic claim.

The second of Maldonado-Torres' works as regards the meaning of the *Decolonial Turn* is entitled 'Enrique Dussel's Liberation Thought in the Decolonial Turn.'[11] in this treatise, he unpacks the meaning of the *Decolonial Turn* by profiling the insights and decolonial intellectual interlocutory of Enrique Dussel. Maldonado-Torres maps the epistemic transitions from the classical Greek and

[10] Ibid at 6.
[11] Nelson Maldonado-Torres 'Enrique Dussel's liberation thought in the decolonial turn' (2011) 1 *Journal of Peripheral Cultural Production of the Luso-Hispanic World* 1.

Roman worlds to the European Enlightenment, to the European Renaissance, up until Modernity, explaining that the latter has a 'darker side', and this side is known as coloniality.[12] He observes that whilst Modernity is an era that presents a decisive shift from classical antiquity, it is laden with the lived reality of a colonial matrix of power that reproduces racial and gender hierarchies on the global and local levels, functioning alongside capital to maintain a modern regime of exploitation and domination.[13]

The resultant reality in the era of Modernity is that both Modernity and Coloniality simultaneously co-exist, and the perception is dependent on one's positionality in this colonially bifurcated society and within the global colonial matrix of power. This means that those who reside/positioned in the zone of Being use the lexicography of Modernity to articulate their experience of art, life, love, culture, economics, and everything else, whereas those who reside in the zone of non-Being use the language of (de)coloniality to do the same. This theorization about Modernity and Coloniality, as meaning two sides of the same coin, comports with the conceptualization of three colonialities (the three localities of coloniality and the difference between the zone of Being and the zone of non-being are unpacked later in this chapter), that insists that the transition from official colonialism to political independence, as the transition from classical antiquity to Modernity, is merely a shift to a subtler type of colonialism.

The third of Maldonado-Torres' works as regards the meaning of the *Decolonial Turn* is entitled 'Frantz Fanon and the Decolonial Turn in Psychology: From Modern/Colonial Methods to the Decolonial Attitude'.[14] In this text, Maldonado-Torres unpacks the *Decolonial Turn* in the context of the discipline of psychology, recognising that unlike the other disciplines in the humanities (such as sociology, anthropology, political science, history and literature), psychology has been left behind as regards the epistemic opportunities that the Decolonial Turn presents. Psychology's reality, as observed by Maldonado-Torres, is not too dissimilar from that of the legal discipline. Efforts to transform the law and legal culture are particularly slow – this is due to several reasons.

[12] Ibid at 6.
[13] Ibid.
[14] Nelson Maldonado-Torres 'Frantz Fanon and the decolonial turn in psychology: from modern/colonial methods to the decolonial attitude' (2017) 47 *South African Journal of Psychology* 432.

Some include constitutional avoidance, the dominance of legal formalists/positivists in law schools as well as in the judiciary, et cetera.

The genesis of Maldonado-Torres' argument is that modern psychology is rooted in the Western notion of science as a method that allows the subject to produce and secure true knowledge.[15] The obsession with Western scientific methods in psychology has established a culture that forecloses the discipline's potential to learn from epistemic traditions that use non-Western methods to articulate the core thrust of their ways of knowing, thinking, and Being. Maldonado-Torres observes that this is the biggest challenge that faces psychology scholarship today and that the discipline could benefit from the epistemic opportunities presented by the *Decolonial Turn*. Crucial to the argument advanced in this chapter, Maldonado-Torres argues that a *Decolonial Turn* in the context of the discipline of psychology means opening space for the discipline to be reshaped, re-thought, and redefined so as to become pluriversal – that is, to shift from the universe to the pluriverse.[16]

Maldonado-Torres insists that a commitment to decolonisation, and therefore embracing the *Decolonial Turn,* requires a substantial change in attitude – the meaning of attitude speaks to the dimension of the subject by virtue of which the subject can seek to challenge [established] knowledge, power, and Being.[17] The image 'attitude' should be understood in its value-laden, sociological sense, and especially how it is canvassed by Frantz Fanon instead of how it may be used in ordinary language:

> Before analyzing Fanon's approach to attitudes in relation to method, it is important to clarify that, for him, attitude is far from being simply a matter of subjective intention or purpose as opposed to structural conditions and power struggles. This would be a subjective, maybe psychological, reductionism of attitude. Fanon engages in a non-reductionistic psychology that, as we will see, is highly inter- and trans-disciplinary. Taking a different direction from psychological reductionism, Fanon approaches attitudes

[15] Ibid at 432.
[16] Ibid at 438, the call for a departure from the Western method is necessitated by its apparent insistence on 'absolute truths' – the obsession with science as a representation of knowledge that is absolute and uncontested is inherently a colonial idea of the world as universal instead of pluriversal. Maldonado-Torres' argument basically points to the direction where Western scientific methods are rightly understood as just one epistemic offering out of the many epistemic traditions that exist. Current science and mathematical formulae are the embodiment of universal truths, but not pluriversal realities, because the universe is a mythical concept that is currently sustained by colonially engineered epistemic patterns that reject other ways of thinking, knowing and Being.
[17] Ibid at 434.

> considering what he refers to as sociogeny, which accounts for the genesis of modes of subjectivity, meaning, and power relations with attention to the interplay between subjectivity and sociality. For Fanon, social structures both reflect and reinforce collective attitudes, both of which play a role in the formation of subjectivity. Subjectivity is, therefore, partly formed at the nexus of social structures and collective attitudes, which is why cultural and structural analysis are part of Fanon's psychology.[18]

The invocation of 'attitude' in its Fanonian sense is important because it demonstrates the ideological depth of the *Decolonial Turn*.[19] The specific attitude that the legal academy should have is that of accepting that the era of coloniality means that colonised peoples of this world remain dehumanised by prevailing epistemic patterns that continue to reflect the racist colonial stratagems of the era of Modernity. This acceptance is an attitude that lends itself to the intricate demands of the *Decolonial Turn* that seeks to re-humanise the historically/presently dehumanised.[20]

Drawing from Mignolo's and Maldonado Torres' insights helps to demonstrate that the *Decolonial Turn* is a fundamental rupture that happens when a specific colonial society undergoes a notable action that seeks and calls for radical change. This rupture may be evidenced in different epochs of history – for example, the youth uprising of June 1976 could legitimately be understood as a form of a *Decolonial Turn* because the uprisings brought about a precise rupture that had the impact of changing South Africa's course of history. The June 16 generation of students precipitated a rupture that had South African society questioning (with the intention to de-link) the colonial modes of control that insisted that a colonial and regressive Afrikaans language should become the medium of instruction in South African schools. This *Decolonial Turn* presented (and continues to present) the academy with an opportunity to extensively grapple with the epistemic toxicity of language in colonies – wherein the oppressor used language as a weapon to replicate and reinscribe their image in the imaginations of the colonised and thus deepen their colonial malady.

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[18] Ibid.

[19] Ibid. 'Fanon's approach to attitude is, therefore as I already pointed out, far from a form of psychological reductionism. It reflects a view of the subject as dynamic inter-relationality and therefore as always-already part of a larger field of social and cultural arrangements.'

[20] Ibid at 325.

South Africa is currently undergoing a *Decolonial Turn* – this reality comes in the aftermath of the 2015/2016 #FeesMustFall student protests in TVETs and universities. Whereas scholars have grappled with the nuanced and varied thrusts of these student protests, it is scarcely ever canvassed that #FeesMustFall was a fundamental rupture that questioned all South Africa's knowledge production institutions.

Having firmly made the resounding calls for South Africa's epistemic systems to be decolonised, the #MustFall moment places a duty on critical academics to read, think, and investigate the conceptual possibilities that decolonisation would/could present to a subject like copyright law. This thesis embraces #MustFall's invitation for copyright law to be thought about anew and from the prism of decoloniality. This chapter specifically accepts that intellectual property law, broadly and copyright law specifically, are not insulated from the call for decolonisation.

Several South African scholars have thought about the meaning of the *Decolonial Turn* in the context and situation of South Africa's academy.[21] For example, Behari-Leak and Chetty underscore the *Decolonial Turn* as historicised by the advent of the #MustFall moment:

[21] For some South African scholars that have grappled with the meaning of the *Decolonial Turn* see, Carmen Martinez-Vargas 'Decolonising higher education research: from a uni-versity to a pluri-versity of approaches' (2020) 34 *South African Journal of Education* 112, where she carefully observes that student protests and subsequent demand for higher education to be decolonised constitutes a legitimate engagement with the fiction and poetics called upon by the *Decolonial Turn*. Most importantly, Martinez-Vargas observes that a critical component of decolonising higher education includes dismantling prevailing objective and universal worldview, that assess knowledge according to its own standards of truth and thus, ignore other knowledge systems. The article addresses a misperception of decolonisation as meaning the doing away of Western epistemic system, Martinez-Vargas correctly argues that a turn to the pluriverse does not mean dismantling Western knowledges, instead it says that there should be diversity in the knowledge systems that exist. See also, Jo-Anne Vorster & Lynn Quinn 'The 'decolonial turn': What does it mean for academic staff development' (2017) 21 *Education as Change* 31, where they note that the #MustFall moment as one that presents a *Decolonial Turn* in South Africa's academy. They observe a disturbing reality in South African higher education wherein universities engage in practices that mirror and perpetuate the cultures, norms, and habits of the pre-colonial era. By way of example, they observe that universities have extended degree programs that are almost exclusively for Black students. They observe that these extended programs are reserved for Black students, whilst white students are accepted into conventional programs. At first year, the Black students are taken to a different campus than their white peers, and therefore are subjected to different facilities. Vorster and Quinn observe that this is a manifestation of coloniality because it is a continuation of a subtler form of colonialism long after the official demise of legislated colonialism and apartheid. To Vorster and Quinn, the *Decolonial Turn* means undoing this sort of reality and putting in place systems and mechanisms to ensure that this does not happen in future. In their own words, see at 37, 'We have identified a constellation of four complementary and interconnected discourses related to the decolonial turn: 1) a strong discourse calling for the decolonisation of higher education, 2) a discourse of alienation, 3) a discourse of epistemological access explicitly understood as integrally linked to that of ontological access, and 4) a discourse of powerful knowledge. A strong discourse calling for the decolonisation of higher education is now

> Some students and academics responded to decolonisation as the new 'turn', similar to the linguistic turn in early 1800s or the cultural turn in the 1970s, where the 'turn' describes a shift in emphasis away from a positivist epistemology toward meaning in contemporary debates. The decolonial turn has at its theoretical centre, a focus on coloniality as the basis for inequality in the modern world and seeks to respond and 'correct' this through a deep understanding of decoloniality as theory and praxis (Maldonado-Torres, 2011). The 'decolonial turn' embraces a pluralistic engagement with epistemologies and pedagogies that defy being constructed as 'uni-versal' knowledge, applicable to all, irrespective of context.[22]

The thesis of this doctoral project is that the *Decolonial Turn*, in the context of intellectual property law generally and copyright law specifically, means a shift towards the pluriverse. The pluriverse is explained by Behari-Leak and Chetty as encompassing a pluralistic engagement with epistemologies and pedagogies that expressly undo/dismantle universalistic and one-world knowledge.[23] The conception of the *Decolonial Turn* as meaning a practical shift from one paradigm to another is important to crystalise because decolonisation is inherently underpinned by its calls for practical actions.[24]

The praxis of the *Decolonial Turn* is sometimes mishandled by bourgeois academics who produce endless peer-reviewed academic publications that are thin on practice and lead one to believe that decolonisation can be academicised as a cognitive activity only, without commitment to following through in the field of practice and its context.[25]

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evident. There are indications that the discourse of transformation needs to be replaced by stronger discourses of change, such as the decolonising discourse, if the structural and cultural stasis in higher education is to be disrupted.' See also, Gerrie Snyman 'Responding to the decolonial turn: Epistemic vulnerability' (2015) 43 *Missionalia: Southern African Journal of Mission Studies* 266, where he approaches the question of the *Decolonial Turn* from the perspective of a settler in post-Apartheid South Africa, see at 267 where he observes that 'The decolonial turn challenges the white community's sense of racial identity: it challenges the supremacy with which our framework fundamentally embeds our lives by contradicting the masking that goes with it by socialising us into the belief that race is meaningless.' Snyman's perspective is extremely crucial because it brings to the fore the question of white racism in discussions about the *Decolonial Turn* – it expressly shows that anti-Black racism remains one of the lingering realities in South Africa long after official demise of colonialism. The danger of racism is that it breeds epistemic denialism, the same sort that breeds constitutionalism and wrongly casts subjects such as copyright law as neutral or untouched by colonial stratagems – as a result, the *Decolonial Turn* places specific focus on the question of racism.

[22] Kasturi Behari-Leak & Rajendra Chetty 'Drawing a line in the sand: social mapping of responses to calls to 'decolonise the university'' (2021) 3 *Journal of Decolonising Disciplines* 9.

[23] Ibid.

[24] Ibid at 10, 'We saw how new hybrid spaces mushroomed to shift the traditional space of academic labour. New subjectivities foregrounding 'who we are' and 'from where we speak' lead to the link between epistemological relevance and ontological depth that is critical to decoloniality. In this sense, decolonising knowledge is about shifting the geography of reason, which means opening reason beyond Eurocentric and provincial horizons, as well as producing knowledge beyond strict disciplinary impositions.'

[25] Ibid.

Behari-Leak and Chetty observe that the *Decolonial Turn* finds its academic authenticity precisely because it is a theory of practice – it is not merely a theory that levels a critique of colonial societies, but it also provides substantive and practical measures of how decolonial aspirations can be realised.[26]

Although the focus of this thesis is the praxis of a *Decolonial Turn* that leads the episteme from the prevailing colonial universality to a decolonised pluriversality, Behari-Leak and Chetty give examples of other possible practical shifts potentiated by the *Decolonial Turn* – one of this is a conception of decolonisation as an active theory of resistance.[27] The *Decolonial Turn* as a bulwark of resistance means a conception of decolonial theory as a tool that lends itself to critical legal theories that continue to resist and call for the dismantling of colonial and Eurocentric epistemic systems in intellectual property rights discourse.

Reading Memmi's 'The Colonizer and the Colonized' helps to restrict the granular functions of the colonial order that necessitate the *Decolonial Turn*. Memmi paints the portrait of the coloniser and juxtaposes it with that of the colonised to demonstrate that the former's colonial conquests included the making of laws that entrench their privilege and make these laws morally acceptable.[28] The making of laws and their epistemic positioning is at the heart of the *Decolonial Turn* because it presupposes the need to radically de-link from these sorts of colonial stratagems.

To sum up the theorisation about the *Decolonial Turn* – this segment has laboured to illustrate the theoretical significance of the *Decolonial Turn* and how it is relevant to the project of this doctoral thesis.

A turn to where? In the next segment, this chapter discusses and theorises the pluriverse. The theorisation of the pluriverse advances and strategically deepens the theoretical framework upon which the thesis is based. The next segment introduces the idea of the pluriverse in copyright law,

[26] Ibid, 'The danger here is that decolonisation becomes a textbook activity, relegated to 'armchair academics' who are able to churn out journal papers and books, commenting and theorising about the decolonisation moment, while others see themselves at the frontline, as it were, re-writing history and actually making things happen.'
[27] Ibid at 10.
[28] Albert Memmi *The colonizer and the Colonized* (1974).

unpacks decolonial theory, and explains why Black Consciousness is also a valid theoretical supposition for this thesis' subsequent chapters.

2.3 Decolonial options – to the pluriverse

2.3.1 Introduction

Having mapped the *Decolonial Turn*, the chapter proceeds to argue that in the context of copyright law, the rupture points to the direction of what decolonial scholars refer to as the 'epistemic pluriverse'.

This chapter draws its understanding of 'epistemic pluriverse' from Escobar's 'Designs for the Pluriverse'.[29] In this largely comprehensive book, Escobar draws from a vast body of decolonial and radical intellectual traditions to explain that one of the aims of decolonisation is to create a world where diversity, multiplicity, difference, and democracy are reflected in all aspects and facets of worldmaking. The decolonial agenda has many goals and functions, and some of these are explained in this segment - Escobar focuses solely on decolonisation's demand for the attainment of a pluriverse. He introduces this idea by insisting that there is a crisis in how the design in Modernity conceives of the world because it prefers a single narrative instead of a pluriverse and that it wrongly forecloses alternative imaginations of the world.[30] This crisis is a result of deeply entrenched ways of Being, knowing and doing.[31] For example, the proposal(s) made in this doctoral thesis may easily be scoffed at and rejected by some (if not many) precisely because the setting of intellectual property law scholarship, in the era of Modernity, is fixated in a universalistic/singular conception of how things are, what is currently known, and how the law is adjudicated.

[29] Arturo Escobar *Designs for the Pluriverse* (2017).
[30] Ibid at 17.
[31] Ibid at 19. See also at 67, 'Perhaps the best starting point for our purposes is the maxim that *we are facing modern problems for which there are no longer modern solutions*. Ontologically speaking, one may say that the crisis is a crisis of a particular world or a set of worldmaking practices, the dominant form of Euro-modernity (capitalist, rationalist, liberal, secular, patriarchal, white, or what have you), or as already mentioned, the oww – the world that arrogated itself the right to be 'the' world, subjecting all other world to its own terms or, worse, to nonexistence.'

The *Decolonial Turn,* meaning a turn towards the pluriverse, is a deliberate intention to actuate the decolonial demand for the academy to rid itself of universalistic inclinations. In the context of copyright law, a turn to the pluriverse means understanding that copyright law's present history (as canvassed in Chapter 3) is a singular history that reflects European history and not the history of all peoples of the world. In a copyright pluriverse, a reading of history would seek to ascertain the history of peoples from the global South and want to understand how they dealt with the question of copyright protections broadly and authorship specifically.

Escobar observes that the *Decolonial Turn* necessitates a shift from the universe to the pluriverse by way of dismantling what he calls the 'oww' ontology – this is a universalistic world, designed by Europe to claim universal truths, presenting itself as the *only world* (my emphasis), subjugating other worlds to its terms/standards, or even to nonexistence.[32] Escobar further insists that the only way to resolve the colonial anomaly of the oww ontology is to de-centre Eurocentrism and de-periphery the epistemologies of the global South:

> If the crisis largely caused by this oww ontology, it follows that addressing the crisis implies transitioning towards the pluriverse. This is precisely another of the major premises of ES [epistemologies of the South], that the diversity of the world is infinite; succinctly, the world is made up of multiple worlds, multiple ontologies or reals that are far from being exhausted by Eurocentric experience or being reducible to it … Another principle of ES brings up the connection between theory and ontology. This is that the understanding of the world is much broader than the Western understanding of the world. This means that the transformation of the world, and the civilizational transitions adumbrated by many indigenous, peasant, and Afro-descendant activists might happen along pathways that might be unthinkable from the perspective of Eurocentric theories.[33]

A careful reading of Escobar's assertion on the meaning of the pluriverse shows that decolonisation[34] and its emphasis on shifting definitional paradigms may seem largely

[32] Ibid at 67.
[33] Ibid 68.
[34] Ibid 117. 'Thinking decolonially indicates a critique of the notion of a world made of One World, conversely, upholds the notion that 'while the planet is singular, world is plural – for it is formed and seen in difference – as we are'. The sensitivity to difference is crucial here, since it refers to the pluriverse and contributes to the argument that what needs to be sustained is precisely the pluriverse.'

unthinkable, bizarre, and unscientific when viewed from a Eurocentric prism precisely because Modernity is not accustomed to thinking outside of Eurocentric cannons.[35]

Escobar illustrates the four fundamental beliefs in modern onto-epistemic order, these are beliefs that foreground universalism, and they are: (1) the belief in the individual – born from the offshoots of neo-liberal globalisation, the perception of individual as superseding the interests of the community affirms the modern onto-epistemic order that continues to de-center the knowledges of communities that are outside of the epistemic traditions of the global North, (2) the belief in the real – born from the rationalistic tradition, this belief has solidified a metaphoric black and white approach as regards what is real and what isn't, as a result Eurocentrism places its own conceptual formulations as real, whilst relegating everything else to unreal, (3) the belief in science – born from the untested notion that Eurocentric conceptions of science are the foundation of knowledge, and that anything that contradicts modern science is voodoo and is a product of inconsequential thinking, and (4) belief in the economy – born from colonial civilisational development and based on the fiction of a self-regulating market, this belief centers Eurocentric and capitalist aspirations, and insists that its skewed economic patterns of control are the only viable method of wealth creation and sharing (or lack thereof).[36]

In an earlier text, Escobar presents a simplified definition of the epistemic pluriverse when he says that it is 'a world where many worlds fit.'[37] Escobar understands that an analysis of all the varying challenges that are facing the world today points to the anomaly of a 'single world'. Simply put, the problem with industrialism, capitalism, modernity, neo-liberalism, rationalism, patriarchy, and secularism is that they all assume that humans reside in a single world.[38] The 'single world' is a product of Euro-American historical experience and worldview, exported to the many worlds in the last 600 years through colonialism, development and globalisation. Accordingly, the 'single world' paradigm has come to dominate local conditions in jurisdictions around the globe, either as active remnants of imperial ambitions or by means of international state and corporation-based

[35] Maria Lugones 'Toward a decolonial feminism' (2010) 25 *Hypatia* 742, where she broadly explains that even in its articulation questions of gender and sexuality, modernity has a universalist paradigm that neglects the need for an intersectional analysis.
[36] Escobar op cit note 29 at 83-91.
[37] Arturo Escobar 'Transiciones: a space for research and design for transitions to the pluriverse' (2015) 13 *Design Philosophy Papers* 14.
[38] Ibid.

power structures that advance selfish priorities by demanding their democratic imposition in the home territories of all subservient member states.

Escobar explains that the pluriverse is a vision of the world that echoes the autopoietic dynamics and archive of Earth, underscoring the indisputable fact that no living Being exists independently on Earth and that the world is inherently plural because there is no single answer for a single question – the different cultures and traditions respond to questions differently. All these responses are valid, genuine and legitimate.[39] He concludes by positing 'Pluriversal studies' as a response and anti-thesis to the 'one world' myth because these studies investigate the potential limitations of modern Western social theory and how it stifles the episteme.

The anomaly of epistemic universality can be understood better when reading Mignolo's summary of the 'myth of modernity', which is underscored by seven realities: (1) European civilization regards itself as the most developed and superior civilization, (2) their sense of superiority obliges them to 'develop' the primitive and underdeveloped nations, (3) this path of development takes the same epistemic pattern as Europe, (4) where barbarians or the primitive oppose the civilising process, modernity takes violence as recourse, (5) the violence causes multiple trauma, victims embody it with the character of Being participants in their undoing, (6) whilst the barbarian undergoes a state of guilt, modernity presents itself as innocent, and (7) modernity achieves to mask the violence of the civilising process to seem necessary and inevitable.[40]

Grosfoguel's 'The epistemic decolonial turn' is crucial to this discourse because it marries the *Decolonial Turn* with the demand for the pluriverse – Grosfoguel argues that Eurocentrism is inherently laden with fundamentalisms and that they share one thing in common, and that is the false belief that there is one sole epistemic tradition from which to achieve truth and universality.[41] Grosfoguel puts forth three suppositions to crystalise his critique of 'one world' fundamentalisms: (1) that a decolonial epistemic perspective requires a broader canon of thought than simply the Western canon, (2) that a truly universal decolonial perspective cannot be based on an abstract universal (one particular that raises itself as universal global design), but would have to be the

[39] Ibid.
[40] Mignolo op cit note 7 at 116-117.
[41] Grosfoguel op cit note 22, ch 1.

result of the critical dialogue between diverse critical epistemic/ethical/political projects towards a pluriversal as opposed to a universal world, and (3) that decolonisation of knowledge would require to take seriously the epistemic perspective/cosmologies/insights of critical thinkers from the Global South thinking from and with subalterniseds racial/ethnic/sexual spaces and bodies.[42]

The *Decolonial Turn,* meaning a turn towards the epistemic pluriverse, is an appreciation of one of the goals of decolonisation. The epistemic pluriverse embosoms the urgent need to punctuate existing colonial ways of knowing with subaltern epistemic perspectives. These perspectives are knowledge from below and are an alternative to hegemonic knowledge production and the power relations involved. Grosfoguel adds:

> The hegemonic Eurocentric paradigms that have informed western philosophy and sciences in the 'modern/colonial capitalist/patriarchal world-system' for the last 500 hundred years assume a universalistic, neutral, objective point of view… The 'ego-politics of knowledge' of Western philosophy has always privilege the myth of a non-situated 'Ego'. Ethnic/racial/gender/sexual epistemic location and the subject that speaks are always decoupled. By delinking ethnic/racial/gender/sexual epistemic location from the subject that speaks, Western philosophy and sciences are able to produce a myth about a Truthful universal knowledge that covers up, that is, conceals who is speaking as well as the geo-political and body-political epistemic location in the structures of colonial power/knowledge from which the subject speaks.[43]

Even in the sphere of intellectual property rights, universalism has been subject to critical scholarly scrutiny.[44] For example, Drahos probes the essence of epistemic universality in 'The universality

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[42] Ibid.

[43] Ibid at 213.

[44] The critique of the universalism and/or one dimensional enunciation of intellectual property rights is vast, for example, there are scholars who have probed the seeming undue distance between intellectual property and human rights, see for example Desmond Oriakhogba *The right to research in Africa: Exploring the copyright and human rights interface* (2023) Springer, Cham, where he demonstrates that different African states have embraced the human rights order in their post-colonial constitutions, and that even though the right to research is sometimes not explicitly provided for in the respective constitutions, it is recognized in implied terms, and thus creates a substantive interface between copyright and human rights, see also Christopher Geiger 'Constitutionalising intellectual property law: The Influence of fundamental rights on intellectual property in the European Union' (2006) 37 *International Review of Intellectual Property and Competition Law* 371, where he demonstrates that "constitutionalising" intellectual property ensures that there is a fair balance between the need to protect IP rights and the needs of the broader community, where the economic development of society is not pitted against the prosperity of individual IP rights holders, see also Peter Yu 'Reconceptualizing intellectual property interests in a human rights framework' (2007) 40 *UC Davis Law Review* 1039, where he demonstrates that, the protection of moral and material interests in intellectual creations is mentioned in a number of international and regional human rights instruments, and this creates a logical relationship between human rights and IP rights, see also, Laurence Helfer 'Human rights and intellectual property: Conflict or

of intellectual property rights: origins and development', where he observes that the genesis of intellectual property law can be divided into three epochs. These are (1) the territorial period, (2) the international period, and (3) the global period.[45] The latter is what is now known as the TRIPS era because of the enactment of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – the global period saw the marriage between intellectual property rights and international trade.

Drahos explains that TRIPS originates from the extensive lobbying of American capitalist institutions, whose conception of intellectual property is derived from capitalist greed and desire. An argument could be canvassed that it is in the TRIPS era when intellectual property assumed a universalist character, thus losing its trait outside of the schemes and machinations of capitalism. The logic of capitalism is inherently singular because it insists on the maximisation of profits above any other value:

> We now live in an era when capitalist economies, led by the U.S.A., have progressively become information economies. Intellectual property regimes have moved to the center stage of trade regulation and global markets. The old capitalism was a capitalism of goods, factories and labor. These days, factories and labor, even skilled labor, are in abundant supply. The new capitalism is at its core about the control of information and knowledge.[46]

Drahos poses a pertinent question, 'are intellectual property rights universally protected, or are they universal rights?'[47] He frames this question to probe that, although intellectual property rights enjoy universal recognition, are they realistically indicative of universal norms? He begins by asserting that it would be unbecomingly facile to merely respond in the affirmative because, even within Western philosophical paradigms, there's an ongoing debate about the type of rights in intellectual property rights. Drahos observes that some argue that intellectual property rights are

coexistence?' (2003) 47 *Minnesota Intellectual Property Review* 47, where he demonstrates that intellectual property and human rights were largely different areas of law that have no relation to each other, but the establishment of WIPO and the advent of numerous treaties have forced a logical interface between IP rights and human rights.

[45] Peter Drahos 'The universality of intellectual property rights: Origins and development' (1998) 1 *The Journal for World Intellectual Property* 3.

[46] Ibid at 25.

[47] Ibid at 21.

natural rights, whilst others argue that they are personal rights. It follows that the universality of intellectual property law theories presents a problematic anomaly:

> The problem we face in the present time is that the institution of intellectual property has globalized without some set of shared understandings concerning the role that that institution is to play in the employment, health, education and culture of citizens around the world.[48]

By 'shared understandings', Drahos is alluding to the fact that current intellectual property is fixated on a universalist over-arching capitalist logic instead of finding meanings that allow different voices and epistemic traditions:

> One factor which helps to explain this neglect is the fact that the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded lawyers. In their hands intellectual property has grown into highly differentiated and complex systems of rules. The development of these systems has been influenced in important ways by the narrow and often unarticulated professional values of this particular group.[49]

Rahmatian deepens the discussion in 'The Neo-Colonial Aspects of Global Intellectual Property Protections', where he observes that an essential instrument in the process of neo-colonisation is the establishment of a legal framework of international trade, which confers legally enforceable rights that support and safeguard capitalist economic penetration and control.[50] Rahmatian not only echoes Drahos' observations about the universality of global intellectual property rights, but he also decidedly argues that the implementation of TRIPS is one of the major devices that entrenches neo-colonialism.[51]

Rahmatian uses the USA-China feud over the latter's (then) poor IP enforcement, where he argues that the impasse was based on the USA's complete vulgarisation of China's culture and epistemic traditions.[52] It follows that whenever the USA uses TRIPS to bully other nations into compliance,

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[48] Ibid at 25.
[49] Ibid at 26.
[50] Rahmatian op cit note 28, ch 1 at 41-42.
[51] Ibid.
[52] Ibid at 49, see for example at 51: 'China cannot be expected to appreciate the Western concerns because the notions of originality and authorship are apparently alien to Chinese culture and tradition… The yardstick and reference point is the system of Western intellectual property laws that conveys progress and is perceived as the product and safeguard of superior Western culture. One may have to show leniency towards the non-Westerners who are currently ''behind'', but it is imperative to define them as being ''behind'', and there is a self-imposed duty to entice them into the more prosperous, and morally better, Western economic system.'

what is actually at play is the gross universalisation of Western standards without realising that such a universalisation is an outward expression of colonial prejudices.[53] For example, because of widespread piracy of American goods in China, particularly in the mid-70s, America wrongly assumed that piracy constitutes Chinese norms and cultures – a complete vulgarisation.

As regards Africa, Rahmatian observes that there is no benefit for African countries to sign into the TRIPS agreement and argues that African countries only signed into TRIPS because of four reasons: (1) pressure from Western countries, (2) a lack of understanding of their interests, (3) poor representation at the negotiating table, and (4) a capitalist-sponsored fallacy that signing into TRIPS will result in them attracting foreign investment, and their inclusion in the so-called knowledge economy.[54]

Rahmatian illustrates the practical enactment of the colonial matrix of power and the ugliness of capitalism in the sphere of global intellectual property rights by way of relaying the incident when the USA, the European Union and American pharmaceutical companies aggressively bullied the South African government in the early 90s to do away with its progressive pro-poor legislation:

> South Africa was faced with high priced pharmaceuticals and that was particularly critical in respect of the HIV/ AIDS, malaria and tuberculosis crises. Section 15(c) [of the Medicines and Related Substances Control Amendment Act of 1997] permitted the parallel importation of cheaper patented drugs that had been put onto the market elsewhere with the consent of the patent owner. Although South Africa's measure was legal under TRIPS, article 6 (exhaustion rule for parallel imports), article 28 (patent rights conferred subject to article 6 as referred to in the accompanying footnote) and article 31 (compulsory licensing rules), the lobby of the pharmaceutical industry and US government agencies applied great pressure on South Africa to have the law changed.[55]

Rahmatian adds:

> In 1998, over 40 pharmaceutical companies sued the South African government in the South African courts. Political pressure and the threat of trade sanctions (particularly by the US under its ''special 301'' regime) increased until April 2001, when the pharmaceutical companies withdrew from litigation and the United States government relented. The reason for this unexpected move was a public campaign, instigated by

[53] Ibid.
[54] Ibid at 54.
[55] Ibid.

> several non-governmental organizations (NGOs) and experts with large media coverage, which resulted in widespread public condemnation of the attitude of the pharmaceutical companies and led to an enormous damage to public relations for the industry. These events contributed to the Doha Declaration on the TRIPS Agreement and Public Health in November 2001.[56]

This sort of capitalist greed and bullying is emblematic of the universalist, global conceptions of intellectual property law that entrench a singular worldview and stifle the prospects of a world where many worlds fit, indeed, a world where the author in copyright law could be understood to mean something more nuanced than single-author, joint author, and communal author.

Rahmatian demonstrates that even where capitalist bullies deviate from TRIPS, they do not do so with the objective of allowing for subaltern voices to feature. Still, they do so to extend the thrust of their greed and control.[57] For example, the USA has had the habit of entering into trade agreements with various nations, where the USA would seek intellectual property rights protections whose threshold is higher than that prescribed in the TRIPS agreement. This is something that Rahmatian refers to as 'TRIPS-plus'.[58] In essence, TRIPS is relied on by the USA and its allies insofar as it is expedient to support Western interests, but where it curtails these interests, they rely on 'TRIPS-plus'. Rahmatian thus concludes:

> Formal imperialism has come to an end with decolonization, but informal economic colonialism continues to exist and increases in its importance, and intellectual property rights play a far more significant role in this process than in the past. Informal colonialism does not seek formal political control in the dependent states, most commonly developing countries. This phenomenon can therefore be termed as neo-colonialism as opposed to the historical situation in the formal colonial (and later imperial) epoch, when, unlike today, national pride, international political power and prestige were at least as important as commercial success. Modern informal neo-colonialism establishes a network of economic, social and consequently political dependence that is increasingly based on licensing and enforcement of intellectual property rights.[59]

Mignolo counsels that one of the ways to respond to epistemic universality potentially is the building of 'macro-narratives.' – These are not the counterparts of the world's universal history but

[56] Ibid at 54-55.
[57] Ibid at 54.
[58] Ibid.
[59] Ibid at 63-64.

are a radical departure from such global projects.[60] Mignolo explains that micronarratives are grounded in two crucial concepts, and these are (1) double critique and (2) 'an other thinking'.[61] The latter refers to a type of thinking that departs from Hegelian dialectics because Hegel conceives of history as linear, whereas 'an other thinking' is based on the spatial confrontations between different conceptions of history.[62] Double critique refers to the action of responding to two questions, and these are (1) 'What did we do?' the other is (2) 'Have we not reproduced the very systems that we seek to undo?'[63] Double critique serves as an inward/outward introspection of the efforts to decolonise knowledge systems. Mignolo explains:

> In this sense, a double critique is the criticism of the imperial discourses as well as the national discourses asserting identity and difference as articulated in and by imperial discourses. At this point, double critique is a crucial strategy to build macronarratives from the perspective of coloniality…Macronarratives from the perspective of coloniality are precisely the places in which 'an other thinking' could be implemented, not in order to tell truth over lies, but think otherwise, to move toward 'an other logic' – in sum, to change the terms, not just the content of the conversation.[64]

The double critique will lead to the openness of the diversity of the world, wherein epistemic traditions of the Global South are re-membered into the body of existing knowledge.[65] Mignolo's macro-narratives solution is relevant to the study that the thesis seeks to engage in because it is a solution that is aimed at liberating the 'silenced voices' from underdeveloped societies.[66]

The epistemic universe is also bedevilled by the centre and periphery stratification, wherein Western knowledge is at the centre, and everything else is relegated to voodoo, myth, or sub-knowledge – this is particularly true as regards the idea of ancestors as author in copyright law:

> In the context of the creation of indigenous works, communalism needs to be studied in light of the reverence for ancestors in African philosophy. The inclusion of the element of reverence to ancestors is

[60] Mignolo op cit note 7 at 22, he adds, that micronarratives are 'neither revisionist narratives nor narratives that intend to tell a different truth, but rather narratives geared toward the search for a different logic.'
[61] Ibid at 66.
[62] Ibid at 67. Hegelian dialectics are drawn from the seminal works of Georg Wilhem Hegel. They are important for the decolonial critique that this thesis engages in because prior to Marxist and Critical approaches to philosophy, Hegelian formulations were accepted as the universal truth insofar as philosophically studying the nature and development of history.
[63] Ibid at 68.
[64] Ibid at 69-70.
[65] Ibid at 81.
[66] Ibid at 71.

> important in that it debunks and deconstructs the colonial myth that ancestral reverence is voodoo, barbaric, uncivilised or unscientific.[67]

It is against this literature that the thesis intellectually tests the authenticity of the call to decolonise copyright law by way of dismantling/deconstructing its present definition of an author and transmuting it from the universe into the (epistemic) pluriverse.

2.3.2 Decolonial theory

Following the *Decolonial Turn*, the South African academy has had to contemplate the meaning of decolonisation and how to articulate decolonial theory. However, the preceding segments have introduced some writings from the decolonial school, from scholars such as Walter Mignolo, Ramon Grosfoguel, Arturo Escobar and others. This segment foregrounds and pitches definitional clarity as it relates to decolonial theory. This segment also shows why decolonial theory is critically important for transforming intellectual property law generally, but also for the argument that this thesis canvasses. To foreground decolonial theory, this segment uses the probative approach that asks the following three questions: what is decolonisation? Why decolonise? How do we decolonise?[68]

What is decolonisation?

Defining decolonisation is a difficult task, especially in South Africa and after the #MustFall moment, because decolonisation is a hotly contested topic.[69] Sylvia Tamale proffers a succinct

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[67] Ntando Sindane *The call to decolonise higher education: copyright law through an African lens* (unpublished LLM thesis, University of South Africa, 2020) at 52.

[68] I am indebted to Babatunde Fagbayibo for this probative approach. He used this approach in his guest lecture at the UFS Faculty of Law, Private International Law module lecture session under the theme: 'Decolonising International Law: Some introductory ideas' (2022).

[69] Although various decolonial scholars have sufficiently traversed the meaning of decolonisation and decolonial theory, it remains a hotly contested subject in the South African academy. For example, see Gravett op cit note 208(?) ch 1 at 289, where he argues that decolonial and critical approaches to teaching the law are an agenda to completely do away with the legal academy, and have it become a humanities subject. Gravett's conception of decolonisation and decolonial theory is one that suggests that decolonial theory is not rooted in valid and authentic academic strictures, instead, he observes that decolonial critical legal scholarship is laden with undue 'Marxist/Anarchist' rhetoric and is bound to fail. See also, Jackie Dugard, 'Bringing gender and class into the frame: An intersectional analysis of decoloniality-as-race critique of the use of law for social change' (2021) 32 *Stellenbosch LR* 29, where Dugard argues

definition of decolonisation, and she argues that decolonisation entails various processes of deconstructing colonial interpretations and analyses of the social world.[70] Although this is just one of the many prevailing definitions, it is a good starting point because the phrase 'interpretations and analyses'[71] constructs a meaning of decolonisation that lends itself to an acceptance of decolonisation to theorisation, thus paving space for the existence of a decolonial theory.

A definition of decolonisation, and therefore decolonial theory, begins with distinguishing between colonialism and coloniality. This is done quite cogently by Nelson Maldonado-Torres:

> Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of people, in aspirations of self, and so many other aspects of our modern experience.[72]

Decolonial scholars explain that decolonisation is a project that seeks to respond to the reality of coloniality. Decolonisation appreciates that although official colonialism is a thing of the past, there exists a vestigial colonial reality that survives and outlives official imperial conquests. Decoloniality, therefore, studies, probes, and uncovers the patterns of power and control that persist in so-called post-colonial societies long after colonialism has been defeated.

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that decolonial suppositions are unjustly laden with an overly race-centering analysis that ignores other aspects such as gender and class. See at 30, 'Our aim is to highlight that apartheid's deeply racialised model of capital accumulation and enduring legacy of socio-economic exclusion should not be examined merely from the single-ground hierarchisation of race but rather as the conglomerate of intersecting axes of disadvantage that perpetuate, contour and deepen poverty and inequality. Consequently, in response to the critique of the constitutional order and rights as functional both to the renewal and maintenance of racial exclusion in an anti-Black society, and to contribute towards the completeness of an account of contemporary oppression, we submit that a substantive account of injustice needs to be formulated on the grounds of multi-faceted and intersectional oppression.'

[70] Sylvia Tamale *Decolonization and Afro-Feminism* (2020) at 2.

[71] Ibid.

[72] Nelson Maldonado-Torres 'On the coloniality of being' (2007) 21 *Cultural Studies* 243.

The meaning of decolonisation, and therefore decolonial theory, finds its genesis in two seminal works written by psychiatrist and political philosopher Frantz Fanon. These two works are 'Black Skin, White Masks'[73] and 'The Wretched of the Earth'.[74]

Although Fanon was observing the material/colonial conditions of his time, his work continues to be relevant today for several reasons – for example, the world might have undergone technological evolutions aplenty, and culture and other sectors may have also changed. However, the living conditions of the historically colonised have hardly changed, thus making Fanon's analysis relevant today. Slavery and colonialism are no longer legislated systems that define political relations between peoples and nations. However, the world has yet to resolve the anomaly of white racism, white supremacy, and white privilege and how these translate to an uneven share of the wealth of the world.

Fanon's first work was 'Black Skin, White Masks', where he engaged in a verbose psychoanalytic study of racism in the colony - as a point of entry, the book begins with a caution, 'The explosion will not happen today. It is too soon … or too late'.[75] From the onset, Fanon warns that the colonial society is facing a crisis of white racism and that this will eventually lead to a rupture. Racism creates a society that is divided into two distinct realities: the zone of Being and the zone of non-Being. Fanon explains that, first and foremost, coloniality is a dehumanising experience that places humans (white people) in the zone of Being and subsequently places colonised bodies (Black people) in the zone of non-Being.[76]

The colonial world bestows humanity on the white race and dehumanises Black people. As a result, Black (and other colonised) people spend all of their lives trying to attain humanity or trying to be white because the colonial world has made whiteness the standard of what it means to be human.[77] Decolonisation, in this instance, becomes a project wherein colonised bodies mete out ways to rid

[73] Frantz Fanon *Black Skin, White Masks* (1952).
[74] Frantz Fanon *The Wretched of the Earth* (1967).
[75] Fanon op cit note 73 at 1.
[76] Ibid at 2, 'There is a zone of nonbeing, an extraordinarily sterile and arid region, an utterly naked declivity where an authentic upheaval can be born. In most cases, the Black man lacks advantage of being able to accomplish this descent into a real hell … The Black is a Black man; that is, as a result of a series of aberrations of affect, he is rooted at the core of a universe from which he must be extricated. The problem is important. I propose nothing short of the liberation off the man of color from himself. We shall go very slowly, for there are two camps: the white and the Black'
[77] Ibid at 3.

themselves of everything that dehumanises them long after the official defeat of official colonialism. Decolonial theory provides solutions on how to re-member the dismembered colonised bodies and shift them from the zone of non-Being to the zone of Being.

Following the introduction, the first chapter of 'Black Skin, White Masks' is titled 'The negro and language' – Fanon explains that language is an important aspect of the colonial project because it speaks to the self-image of colonised peoples.[78] Colonised people develop two daily languages: the language of the self and the language of the other – the latter is a language that the colonised uses to appease and satisfy what is deemed appropriate by the colonial society.[79] These two languages are a direct product of the colonised person's unceasing search for humanity and related acceptance into the world of humanised peoples, the zone of Being.[80] Because white people inhabit the zone of Being, the colonised person cannot help but aspire for whiteness and to be white, for there exists an innate acceptance that humanity is directly proportional to whiteness.[81] This sort of double language invariably leads to a process where colonised people move from just speaking a language that appeases whiteness. Still, they also actively attempt to rid themselves of anything that likens them to themselves or other colonised peoples. Fanon illustrates:

> I have known – and unfortunately, I still know people born in Dahomey or the Congo who pretend to be natives of Antilles; I have known, and I still know, Antilles Negroes who are annoyed when they are suspected of being Senegalese. This is because the Antilles Negro is more 'civilized' than the African, that is, he is closer to the white man; and this difference prevails not only in back streets and on boulevards but also in public service and the army.[82]

Fanon spends the following two chapters probing the racialised individual relations between Black people and white people. The first of these two chapters is titled 'The Woman of Color and the White Man', whilst the second is titled 'The Man of Color and the White Woman'. In the former, Fanon introduces the concept of lactification – he explains that this occurs when Black people do everything in their might to assimilate into white society. At an extreme level, lactification is evidenced in colonial society when Black women go out of their way to become romantically

[78] Ibid at 11.
[79] Ibid.
[80] Ibid at 15.
[81] Ibid.
[82] Ibid.

involved with white men under the guise that this will have the effect of humanising them.[83] Lactification is closely related to what Fanon refers to as 'affective erethism':

> It is because the Negress feels inferior that she aspires to win admittance into the white world. In this endevour she will seek help of a phenomenon that we shall call affective erethism. The Negro enslaved by his inferiority; the white man enslaved by his superiority alike behave in accordance with a neurotic orientation.[84]

Decolonisation is thus a project that seeks to rid society of the colonial malady where Black people aspire for whiteness.

In 'Man of color and white woman', Fanon retells a fiction where a Black man (Jean Veneuse) was in a setting of a social event with the brothers of his white girlfriend.[85] Jean undergoes an existential crisis in a conversation with the brothers when they say to him that they approve of his relationship with their white sister because Jean is an educated Black man and is not like other savage Black people:

> In fact, you are like us – you are 'us'. Your thoughts are ours. You behave as we behave, as we would behave. You think of yourself – others think of you – as a Negro? Utterly mistaken! You merely look like one. As for everything else, you think as a European. And so it is natural that you love as a European. Since European men love only European women, you can hardly marry anyone but a woman of the country where you have always lived, a woman of our good old France, your real and only country.[86]

From this account, it becomes clear that, for colonised people to be accepted into the colonial world, they must undress their blackness/Africanness. In the context of copyright law, it is crucial to demonstrate that coloniality expects African law scholars to assimilate to Euro-global lexicology in how they articulate copyright law concepts. For copyright law academics of the global South to be accepted into the Euro-global copyright law episteme, it becomes a foregone conclusion that they should abandon their ways of knowing, thinking and Being.

[83] Ibid at 35.
[84] Ibid at 42-43.
[85] Ibid at 50: 'When the question is put directly, then, the white man agrees to give his sister to the black – but on one condition: You have nothing in common with real Negroes. You are not black, you are "extremely brown"'.
[86] Ibid at 49.

Read together with lactification and affective erethism. Fanon demonstrates that the racist colonial world problematises and refuses to accept the humanity of Black/colonised people. The colonial racist crisis is such that a normal Black person leads a relatively normal lifestyle and that this will only become abnormal at the slightest contact with the white world.[87]

After 'Black Skin, White Masks', Fanon followed through with 'The Wretched of the Earth.' – in this book, Fanon deals with two broad topics: (1) the reality and material conditions of the colony moments before political independence and shortly after that, and (2) the impact of colonial wars on the psyche of the coloniser and the colonised, as evidenced through varying degrees of mental disorders.

Whereas the focus of Fanon's first book was on the crisis of racism in colonial societies, in this book, he focuses more intently on decolonisation. Interestingly, at the time when this book was written, many African countries were either newly independent from official colonial rule or in the process of attaining their independence. This is important to note because it validates the definitional paradigm of decolonisation as a project that is aimed at the vestigial force of colonialism rather than colonialism itself. Fanon offers the most lucid definition of the meaning of decolonisation in the very first chapter of this book:

> Decolonization is quite simply the replacing of a certain 'species' of men by another 'species' of men. Decolonization, which sets out to change the order of the world, is, obviously, a programme of complete disorder. But it cannot come as a result of magical practices, nor of a natural shock, nor a friendly understanding. Decolonization, as we know, is a historical process: that is to say that it cannot be understood, it cannot be intelligible nor clear to itself except in the exact measure that we can discern the movements which give it historical form and content. Decolonization is the meeting of two forces opposed to each other by their very nature, which in fact owe their originality to that sort of substantification which results from and is nourished by the situation in the colonies.[88]

Fanon's definition of decolonisation is worth a deeper delineation; the image of replacing one species of men with another species speaks to the decolonial agenda's pursuit of a complete

[87] Ibid at 111. See also at 147: 'When European civilization came into contact with the black world, with those savage peoples, everyone agreed: Those Negroes were the principle of evil. In the collective unconscious of homo occidentalis, the Negro – or, if one prefers, the color black – symbolizes evil, sin, wretchedness, death, war, famine. All birds of prey are black'.

[88] Fanon op cit note 74 at 27-28.

uprooting of the society we live in. This image leads to an imagination of society beyond the settings, standards, and strictures that we are currently accustomed to. Relevant to copyright law, it becomes appropriate to argue that decolonisation, unlike other transformative projects, is concerned with the complete rethink and overhaul of copyright as we know it. Simply put, whereas transformative projects such as transformative constitutionalism may take issue with some aspects of post-apartheid law, decolonisation opens itself to a fundamental rethink of the schematic compositions of all law, including copyright law. This makes decolonisation to be a more radical approach because it seeks not to reorder society but to completely disorder it.

Decolonisation, as a project to completely disorder society, is naturally at odds with basic legal strictures because the law is fundamentally set out to maintain order and stability in society. However, decolonisation appreciates that for society to rid itself of coloniality (the vestigial remnants of colonialism), there exists a need to disorder society. This disorder is necessary for copyright law epistemic spaces.

In the context of post-Apartheid South Africa, it is timely and appropriate to shift from transformative approaches that seek to reorder society and instead assume/embrace decolonial approaches because the latter seeks to disorder society.

With the benefit of hindsight and the present experience, it is not difficult to observe that transformative approaches have failed to transform the South African reality radically. This failure is evidenced in all sectors of society, especially in the episteme. Whereas Black and colonised peoples of South Africa got the right to vote in 1994, thus ushering in a majority government, this has not translated into substantive freedom.

The lack of substantive freedom does not only refer to economic freedom, neither does it solely refer to the defeat of chronic unemployment and inequalities, but it also speaks to the need for epistemic spaces to be reflective of epistemic democracy.[89] It follows logically that [copyright]

[89] Ibid at 41, where Fanon explains that when colonised people are confronted with persisting colonial order of things, they are in a state of permanent tension. The conditions are inherently hostile, and this spurns colonised people into an action that seeks to change their conditions of existence.

law is one such epistemic space that has failed to reflect substantive freedom because it continues to mirror apartheid and colonial modes of Being and knowing.

In the latter-most sentence of Fanon's definition of decolonisation, he introduces the image of decolonisation as meaning 'the meeting of two forces opposed to each other'.[90] This illustrates that decolonisation is concerned with the creation of a new humanity – at an epistemic level. The creation of a new humanity at an epistemic level is the task of law academics, who must mete out academically sound methods of crafting a new humanity.[91] Decolonisation would want to probe the genesis of copyright law, the meanings of concepts such as originality, the sweat of the brow, material embodiment, authorship and others from the lens of African thinkers, knowers and communities. Decolonisation would engage in this probative exercise because it appreciates that one of the elements of attaining substantive epistemic freedom in the field of copyright includes uncovering the voices of colonised peoples whose epistemic traditions continue to be othered long after the formal cessation of official colonialism.

Fanon explains that decolonisation is a 'historical process'.[92] This means that the decolonial project seeks to end the history of colonisation and the history of pillage effectively and to bring into existence the history of a new humanity and that this can only be achieved by way of decolonisation.[93]

Some scholars have argued that works such as that of Frantz Fanon and that of decolonial critical legal scholars constitute an intellectual prophetic engagement because of their ability to proffer a critique of the prevailing constitutional polity and predict the material conditions that continue to define the lives of colonised people of the world.[94] On the same score, other scholars have ventured to assess Frantz Fanon's intellectual contributions to the body of decolonial theory. For example, Hudis explains that Fanon's thrust into philosophical discourse is evidenced in his prolonged

[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid at 40.
[94] Ntando Sindane 'Prophecy and the pandemic: The vindication of decolonial legal critical scholarship' (2022) 37 *SAPLJ* 1.

argument that racial pride and national culture are not minor terms but rather conduits to the universal on the part of those facing colonial oppression and racial domination.[95]

From Fanon's earlier works, it becomes easier to deduce that he places racial pride and national culture as central in the quest to wrestle with the anomaly of a colonial world that is defined by the binaries that continue to dehumanise historically colonised people. Racial pride is perhaps one of Fanon's most important contributions to the discourse on colonialism because it produced an offshoot in terms of theory, and this culminated in the Black Consciousness philosophy. This philosophy is dealt with extensively in the segment that follows this one.

Hudis explains that Fanon was committed to studying the inner psychic life of racism whilst understanding that racism is not part of the human psyche per se but is rather a social construct that has a psychic impact.[96] As regards decolonisation, Hudis understands Fanon's conception of coloniality as one that is preceded by what he labels as colonial 'fixation':

> Colonial domination is so overpowering that the oppressed often respond by becoming reified into their forms of opposition. This is a form of fixation, but not one imposed by existing society; it arises from their response to it. But it is fixation all the same, and Fanon has always believed [that] 'there should be no attempt to fixate man, since his destiny to be unleashed.' He is therefore by no means uncritical of wearing the veil: 'The doctrinal assertions of colonialism in its attempt to justify the maintenance of its domination almost always push the colonized to the position of making uncompromising, rigid, static counter-proposals.' The colonized exists in negative self-relation to the colonizer. Its initial act of resistance is therefore dependent on the object of its critique.[97]

A careful analysis of the concept of fixation allows framing of coloniality as a post-colonial reality where not only patterns of oppression/subjugation persist but where oppressed peoples themselves hang on to images, truths, cultures and norms of the colonial period long after its official demise. Hudis' reading of Fanon, when understood with the background of Maldonado-Torres' distinction between colonialism and coloniality, maps decolonisation and, indeed, decolonial theory as

[95] Peter Hudis *Frantz Fanon: Philosopher of the Barricades* (2015) at 9.
[96] Ibid at 35. See also at 136 where Hudis correctly explains that Fanon's recounting of the crisis of racism went beyond Black essentialism.
[97] Ibid at 102.

responses to the lived reality of a subtle type of colonialism that persists after the official attainment of political freedom/independence.

Contemporary scholars of decolonial theory have produced the definition of decolonisation a notch higher; they have demonstrated that following the scholarly discernment between colonialism and coloniality, the next step is to qualify the three localities of coloniality. These three localities are known as the coloniality of Being, the coloniality of knowledge and the coloniality of power. It is important to briefly explain these three localities because they are crucial to the definition of decolonisation as a project that is a response to the vestigial force of colonialism, not colonialism per se.

The first locality is the coloniality of Being. Decolonial scholars draw from the scholarly contributions of philosophers that define Being as meaning the essence of what makes people to be. To tease the meaning of Being, philosophers ask: do you exist, and how do you know that you do? Fundamentally, the concept of Being speaks to those things that make human beings to be human, it probes the humanity of people and invites each human to identify that which qualifies them to be human. Maldonado-Torres describes the coloniality of Being as follows:

> The emergence of the concept 'coloniality of Being' responded to the need to thematize the question of the effects of coloniality in lived experience and not only in the mind. From here that the idea resonated so strong with me, who was working on phenomenological and existential philosophy and critiques to such approaches from the perspective of racial and colonial 'sub-alterity'. When one reflects on the term 'coloniality of being' in the context of Levinas and Dussel's debate with Heidegger, it provides an important clue to clarify the specific ties between what Heidegger referred to as Being and the colonial project.[98]

From the Descartian ontological axiom 'I think, therefore I am', we are able to deduce that the entire European ontological is based on the ability to think. Eurocentric colonial project was based on the idea that Europeans are humans precisely because they can think. The rest of the world can be colonised because they cannot think, and therefore they are not human.

Descartes's formulation of what Being is and what should define it, when inverted, is used to exclude people from the global South from Being. Maldonado-Torres insists that the coloniser was

[98] Maldonado-Torres op cit note 72 at 242.

able to exclude its colonial subjects from Being. The colonial project included the rejection of the 'Beinghood' of Black people, insisting that they have a different make-up to that of white people.[99]

The second locality is the coloniality of Power. Behari-Leak and Chetty describe the coloniality of Power as follows:

> Coloniality of power characterised by capitalism and neoliberal commodification, locates knowledge within the context of a racist, Euro-America-centric, Christian-centric, patriarchal, hetero-normative, hegemonic, asymmetrical, and modern global power structure ... Coloniality of power is a critical concept underpinning decolonial epistemic perspectives in Africa. For example, development, a dominant discourse in the humanities, is not innocent of power. Development cannot be reduced to simple real-life problems of hunger, water scarcity, disease, malnutrition and poverty, as if these were unshaped by broader questions of power, epistemology, representation and identity construction. [100]

Because coloniality marks the vestigial power of colonialism, the coloniality of Power speaks to the saturation of colonial patterns of control that is evidenced in colonial institutions that continue to exist long after the demise of official colonialism. South Africa, as a relatively young democracy, has a litany of examples that illustrate the practical enactment of colonial and apartheid institutions of power that continue to affect colonial power patterns long after the demise of apartheid. The South African Police Service (SAPS) is one such example - consider the mass brutality of the South African Police Force pre-1994, recall the Langa Massacre, the Uitenhage Massacre, the Sharpeville Massacre and other massacres where police officers exerted brutal and deadly force on defenceless Black people. All of these massacres are representative of a colonial instrument of exerting state power, the Police Service. How, then, does one explain the same sort of deadly brutalization of Black people's bodies in Marikana in 2012 at the hands of a police service in a democratic South Africa? The theorisation of decolonial scholars about the coloniality of power assists us in appreciating that the South African Police Service is a colonial institution that outlives colonialism, persists in democratic South Africa, and functions in the same way as it

[99] Ibid at 252. This must not be confused for suggesting that the decolonial argument is for the pursuit of sameness – it is rather for the pursuit of a new face of shared humanity, where both the coloniser and the colonised are human, whilst thriving in a pluriversal world that caters for their diversity.
[100] Kasturi Behari-Leak & Rajendra Chetty op cit note 22 at 3.

would have under colonial rule. Colonial institutions of power continue to use their power to subjugate colonised [Black] people long after the demise of official colonialism.

The third locality is the coloniality of Knowledge.[101] Perhaps this locality is the most relevant to the thesis of this exposition's argument – because the law is generally an embodiment of a knowledge system. The coloniality of knowledge speaks to the persisting colonial fixation/rigidity in knowledge production spaces. An inquiry into power relations between the coloniser and the colonised includes establishing the patterns of knowledge production. Ndlovu-Gatsheni asserts that decoloniality requires critical thinking about who generates knowledge, how it is generated, and what purpose it serves.[102] He elaborates that '[the] concept of coloniality of knowledge, which focuses on teasing out epistemological issues, the politics of knowledge generation, as well as questions of who generates which knowledge, and for what purpose'.[103]

Coloniality of knowledge speaks to how centres of knowledge production, including the law, still reflect the aspirations of the coloniser and continue to reproduce knowledge that is biased to the colonial worldview and worldmaking. The theorization of the coloniality of knowledge acknowledges that, in a colonial setting, knowledge is never neutral – instead, it is used to advance and cement colonial expansionist stratagems.

In summation, and as regards the meaning of decolonisation, this segment of the chapter has illustrated multiple meanings/conceptions of decolonisation. At the heart of these nuanced conceptions of decolonisation are three definitional suppositions: (1) decolonisation is a project to completely disorder society, (2) decolonisation seeks to bring about a brand new humanity – that is, to rehumanise the dehumanised, and thus re-member the dismembered, and (3) decolonisation finds resonance in epistemic spaces such as copyright/intellectual property law because these spaces remain firmly steeped in Eurocentric/colonial modes of knowing and Being.

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[101] Before the advent of decolonial studies, there have been scholars who have considered the crisis of the undoing of knowledges of people on the underside, and how those knowledges continue to be trapped on the other side of Western modernity, see for example Chidi Oguamanam 'Local knowledge as trapped knowledge: Intellectual property, culture, power and politics' (2008) 11 *The Journal of World Intellectual Property* 29, see also Sampie Terreblanche *Western Empires: Christianity and the Inequalities Between the West and the Rest 1500 - 2010* (2014) Penguin Random House, Johannesburg.

[102] Sabelo Ndlovu-Gatsheni 'Perhaps decoloniality is the answer? Critical reflections on development from decolonial epistemic perspective' (2013) 43 *Africanus: Journal of Development Studies* at 5.

[103] Ibid.

Why decolonise?

There is a popular phrase/quote that has been attributed to Frantz Fanon. It reads as follows: 'When we revolt it's not for a particular culture. We revolt simply because, for many reasons, we can no longer breathe.'[104] – it is widely accepted to have been Fanon's words. Still, they are paraphrased/abridged from a statement that Fanon made in relation to a specific colonial context.[105] Alas, these words aptly enunciate the reason why the South African society, and indeed the academy/episteme, need to be decolonised. The image 'we can no longer breathe' refers to how dire the situation has become in former colonies – colonised peoples of the world have reached a point where they demand a change to happen, not because of any other reason except that anything less than substantive freedom will not suffice. In essence, radical change, encapsulated in decolonial methods, appears to be an inevitable outcome of over 500 years of the systemic exclusion, killing, raping, maiming, othering, dismembering, thingifying, and zombifying of colonised peoples of the world.

The situation is not only fussy, but it has also become untenable. Sharp focus is usually on the perennial service delivery protests that have become a mainstay in Black South African communities. These violent uprisings and community protests are indicative of the incomplete project of decolonisation and the lack of substantive freedom. Madlingozi carefully explains that these protests are probably telling of the fact that transformative approaches have failed and that the constitutional arrangement fails to live up to the demands of decolonisation:

> My two-fold thesis is, firstly, that perennial protests by marginalised communities are impelled by the fact that post-1994 constitutional re-arrangements did not rise to the decolonisation challenge of re-membering the land/world. These re-arrangements have thus perpetuated homelessness, pariahdom and worldlessness. Secondly, I demonstrate that the cause of this failure is partially the fact that ruling party elites - who were

[104] Molaodi wa Sekake *Meditations from the Gutter* (2021) at 385, where the author uses this exact quote to close of the various chapters/contributions of his book.

[105] Hudis op cite note 94 at 1, where Hudis illustrates Fanon's exact words as follows: 'Actually, it turns out that the quotation from Fanon was somewhat truncated. The actual statement, made in The Wretched of the Earth [Fanon op cite 74], reads: 'It is not because the Indo-Chinese discovered a culture of their own that they revolted. Quite simply this was because it became impossible to breathe, in more than one sense of the word.' Still, the fact that Fanon's words were quoted a bit out of context – a problem that has arisen repeatedly since his death in 1961 – is less important that the fact that his ideas are seen by many to speak to the urgency of the moment.'

> beneficiaries of partial inclusion into the settler-constituted polity - failed to overcome their liminal-status induced conditions of double consciousness and racial melancholia. The result is that they elaborated terms of constitution and belonging whose eventual outcomes are, on the one hand, assimilation of 'native' elites into the white-dominated world, and on the other, continuing pariahdom and worldlessness for the majority.[106]

Madlingozi sharply criticises South Africa's constitutional polity, arguing that it is founded on elitist pacts that do not reflect the material and spiritual aspirations of the people on whose behalf it claims its genesis. The situation, as described by Madlingozi, inevitably culminates into a stage where people have no choice but to revolt. This reality manifests precisely because the people can no longer breathe - they seek out ways to improve their conditions, one of which is to engage in a wholesale program of action fashioned through decolonial tools of analysis and, therefore, decolonisation.

Community protests and uprisings are emblematic and mirror the situation in spaces of knowledge production (academy/episteme) and, indeed, professions such as legal practice. For example, in the area of international law, several concrete illustrations have been put forward to demonstrate this situation; Shako argues that international law shows signs of being incomplete, opining that '[t]he pedagogy used, therefore, remains rife with exclusions and distortions of indigenous knowledge, voices, critiques and scholars.'[107] She further insists that a law curriculum should be inclusive of alternative epistemologies and that this will increase the graduate-ness of the graduates.[108] Shako's intervention is done from the perspective of a law teacher in another British colony, Kenya. Deducible from Shako's observation is the reality that both the law and its curriculum are laden with colonial distortions and reflect the epistemic traditions, desires, aspirations, and sensitivities of the coloniser. Of course, this is also true for the South African legal academy and profession, thus making the totality of the local situation one that makes it difficult for colonised bodies to breathe.

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[106] Tshepo Madlingozi, *Mayibuye iAfrika? Disjunctive Inclusions and Black Strivings for Constitution and Belonging in 'South Africa'* (unpublished PhD thesis, Birbeck University of London, 2018) at 3.

[107] Florence Shako 'Decolonizing the classroom: Towards dismantling the legacies of colonialism & incorporating TWAIL into the teaching of international law in Kenya' (2019) 3 *Journal of Conflict Management and Sustainable Development* at 28.

[108] Ibid.

In summation, and as regards the reasons why decolonisation is imperative, this segment of the chapter has illustrated multiple reasons for decolonisation. These reasons can be summarily unpacked in three ways: (1) decolonisation and its radical approaches to society and the episteme are an inevitable and unavoidable outcome of the reality of the material conditions that define the lives of colonised bodies and institutions long after the official cessation of colonial conquests, (2) there is a need to complete the incomplete task of substantive freedom and to make explicit what is implicit in existing transformative approaches to both the legal academy and as well as the profession, and (3) because decolonisation inter alia means the establishing of a new humanity, it becomes crucial to intellectually grapple with different conceptions/proposals of a new humanity in the context of intellectual property law broadly, copyright law narrowly, and the concept of authorship specifically.

This segment of the chapter appreciates that one of the reasons for the need to engage in epistemic decolonisation rests in the task of uncovering how copyright law concepts can be altered to reflect a new humanity.

How do we decolonise?

This is by far one of the most important questions as regards decolonisation: to a large extent, there have been several scholars who have questioned the applicability of decolonial theory in disciplines outside of the humanities. In the legal academy itself, decolonisation has been under severe criticism and scepticism for this reason.[109] It is against this background that the 'how' question needs to be responded to thoroughly and decisively.

In the main, decolonial theory has placed most of its focus on demonstrating the colonial trappings that continue to throttle society long after the official cessation of colonial conquests. However, it

[109] Gravett op cit note 208 ch 1 at 289, where Gravett passionately argues that the whole decolonial project in law and legal education is Marxist agenda that intends to destroy the pure and traditional values that underpin the legal academy. Gravett's major criticism of the prominent South African legal critical theorists is that they fail to precisely explain what decolonisation is, how it can be practically implemented, and why it is necessary.

has gone further than just problematising the colonial malady. It has proffered several options and solutions to resolve the ongoing crisis and, therefore, decolonise society.

This chapter canvasses only two potential solutions, and these are Africanisation and Pluriversalization. These two are not in any way exhaustive because there are various other methods towards achieving decolonisation that have been developed in several academic writings.[110] These two are used for illustrative purposes – the second method, Pluriversalization, is particularly important for the project of this thesis. After all, the argument defended in this treatise is that the appreciation of Abezimu/Badimo as an author in copyright law is an act of decolonising copyright law because it achieves the ends demanded by Pluriversalization.

The first potential solution and response to the question of how to effect/implement decolonisation is Africanisation.[111] Africanisation is defined differently by several scholars. However, the difference is merely in wording and semantics because all their definitions of Africanisation arrive at the same operative detail and praxis. The different articulation in hedging definitional clarity as it relates to Africanisation comports with the existential reality that the very idea of Africa is contested.[112] Thus, it is no surprise that African scholars define Africanisation by way of a different lexicography. For example, Seepe defines Africanisation as follows:

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[110] Poka Laenui 'Processes of decolonisation' (2000) 1 *Reclaiming Indigenous Voice and Vision* 150. For example Laenui produces a formulaic method towards decolonisation where he argues that there 5 stages/phases in the decolonisation process and these are rediscovery/recovery, mourning, dreaming, commitment, and action. Similar to the approached use in this chapter, Laenui concedes that these phases are not exhaustive, and that more work needs to be done to uncover other workable solutions, see at 155, 'The process of colonization, and of decolonization deserves closer consideration in attempt to refashion societies. Otherwise, we may find we are entrenching ourselves deeper in the systems, values and controls put here by the colonizer.'

[111] Note that this chronology is not sacrosanct, neither is it cast in stone. For purposes of this thesis, it is appropriate that Africanisation is the starting point because the thesis' central argument, among others, is that ancestors are authors in copyright law and should be recognised as such. This argument is drawn from the epistemic traditions of the global South, which is inclusive of the ways of knowing of African people (their mythologies, cosmologies, ontologies, et cetera). Further note that Africanisation is studied in the context of another concept, that is re-Africanisation – whenever the former is invoked, the reader should appreciate that it is laden with the critique/methodology espoused by the latter.

[112] Mogobe Ramose 'I doubt, therefore African philosophy exists' (2003) 22 *South African Journal of Philosophy* 113. Although the question of whether African philosophy exists has been debated and settled by contemporary African philosophers, Ramose demonstrates something that is very crucial in this treatise. Ramose uses 'doubt' to argue that the ability to doubt presupposes existence. His argument is that African thinkers, in their various contemplations about the meaning of Africa, or what constitutes Africa, an African, and Africanness indicates that Africans were capable of doubt, and that if doubt has been historically accepted as a measure of one's existence, then this means that African

> Africanisation of knowledge … refers to a process of placing the African world view at the centre of analysis … [and] advocates for the need to foreground African indigenous knowledge systems to address [Africa's] problems and challenges.[113]

In the context of the philosophy curriculum, Sesanti defines Africanisation as follows:

> The Africanisation project is an act of 'epistemic liberation' which is part of the African renaissance project, taking into cognisance that Lebakeng argues that 'epistemic liberation can only be achieved by transformation that seeks to reverse epistimicide through reclamation of an indigenous African epistemology' … It is against this recognition of loss of culture, that African intellectuals have called for an African renaissance so as to reclaim their lost sense of self-respect and destiny. The call for the Africanisation of the philosophy curriculum is seen as an intervention to help Africans in their quest for an African renaissance.[114]

Boesak reads Sesanti's definition of Africanisation and unpacks it in the context of Black Liberation Theology. He contends that what can be gleaned from Sesanti is conception of Africanisation is that it is inclusive of recovering African humanity against the ravages of Eurocentricism and coloniality.[115] Boesak's reading of Sesanti is important because it links Africanisation to a scholarly historicisation of the colonial situation that prevails beyond the

philosophy exists. Outside of this sterling analysis, Ramose demonstrates the varied manifestations of 'doubt', and these illustrated that the essence of what it means to be African is (and has always been) contested and therefore, is a subject of doubt.

[113] Sipho Seepe 'Black perspective(s) on tertiary institutional transformation' in P Higgs, NCG Vakalisa, TV Mda, & NT Assie-Lumumba (eds) *African voices in education* (2000) at 119.

[114] Simphiwe Sesanti 'Africanising the philsophy curriculum through teaching African culture modules: An African renaissance act' (2016) 35 *South African Journal of Philosophy* at 431. Interestingly, elsewhere, Sesanti makes the point that sometimes the term 're-Africanising' is preferred over Africanisation because some scholars have argued that the former appreciates that before there is a project to center African epistemic traditions, there is a need to first discover and rediscover Africa, and to correct all the distorted conceptions of Africa. This argument does not suggest that there is a conceptual conflict between re-Africanisation and Africanisation, instead it illustrates that in the process of Africanisation there remains an inherent need to consistently investigate notions of Africanism and Africanness, to ensure that Afrocentric scholars do not center colonially distorted ideas in the name of Africanistion, see Simphiwe Sesanti 'Teaching ancient Egyptian philosophy (ethics) and history: Fulfilling a quest for a decolonised and afrocentric education.' (2018) 7 *Educational Research for Social Change* at 2. The concept of re-Africanisation in the context of African Renaissance is also studied with extensive depth by Rabaka when he shows that Fanonism and Cabralism are viable theoretic tools to achieve the ends sought by re-Africanisation, see Reiland Rabaka 'Return to the source: Cabral, Fanon, the dialectic of revolutionary decolonization/ revolutionary re-Africanization, and the African renaissance' (2022) 53 *Journal of Black Studies* at 423: 'In defining their position in relation to, or, better yet, against the colonial and imperial powers, each member of the colonized society—individually and collectively—chooses, must as a matter of life or death, will themselves into becoming revolutionary participants, active anti-colonial agents in the dialectical process of revolutionary decolonization and revolutionary re-Africanization, the protracted process of rescuing, reclaiming, and reconstructing their own sacred humanity, history, and heritage.'

[115] Allan Boesak 'In search of our human face: Black consciousness, Black spirituality, inclusive humanity and the politics of vulgarity' (2020) 76 *HTS Teologies Studies/Theological Studies* at 2.

official period. Moreover, it illustrates that Africanization is not a value-neutral project, but it is instead born from the reality of Eurocentrism, racism and related colonial trappings. Boesak adds:

> At the core of Unisa's Simphiwe Sesanti's discussion on these matters is the argument that tapping into (subjugated) African knowledge is essential to dismantling neocolonialism in education and other spheres. For him, in this process, Afrocentrism is the absolute key. Sesanti speaks of an almost universal, historically unbroken African culture as 'central' to an Afrocentric education. Afrocentricity is interested in what Africans traditionally regarded best in education before colonial invasion. Sesanti pleads for a return to 'African concepts' such as Ubuntu, and 'traditional African precepts' such as the seSotho proverb *feta kgomo o tshwaremotho*, which 'informed Africans' approach to economics, the giving of compassion', and the work towards the 'elimination of poverty, criminality and greed'.[116]

Reading both Sesanti's own words and from Boesak's interlocutory of his work, three key points can be deduced as regards the meaning of Africanisation: (1) it is an activist project that seeks to restore, repair, and re-member Africa and the people of Africa, what was violently stolen from them, this includes culture, language and ways of knowing, (2) it places epistemic traditions of African peoples at the zenith of a project to change the colonially engineered patterns of knowledge production, and (3) it seeks to provide viable epistemic tools that can used to dismantle and eradicate whiteness/Eurocentrism.

The constitutive part of Boesak's reading of Sesanti that is most relevant to the argument advanced in this thesis is found in Boesak's insistence that a return to the values of Ancestors (Abezimu/Badimo) is constitutive of the project of Africanisation:

> I am in agreement with Sesanti when he posits that the aim of all our work should indeed be that striving towards that gift of a human face for Africa and the world. And whilst Sesanti's Bikonian self-critical awareness is clear and highly laudable, it seems to me that if our aim is to remain true to Biko's legacy – perhaps especially in truthfully following the logic of his thinking whilst confronting the challenges of race, ethnicity and nationalism as they present themselves in our time – we should think more carefully about the forms our resistance to Eurocentrism should take. So, our 'ancestral values' should be more vigorously interrogated … So perhaps the wisdom of an African plurality and a decolonial humanism would be more true to Biko's quest for a human face for the world as we wrestle with his thinking in our times.[117]

[116] Ibid.
[117] Ibid at 3.

Although it is not framed in the context of copyright law, and specifically the definition of authorship, this link between Africanisation and ancestral values and African plurality validates this thesis' basic argument. This thesis makes an expansive argument that can be summed up in four cardinal points: (1) that South African copyright law is Eurocentric and is a production and perpetuation of colonial epistemic traditions, (2) that authorship should be understood through the lens of African peoples, and from their conceptions of author/owner of crafts of art, (3) that Ancestors (Abezimu/Badimo) is an author in copyright law when it is understood through the lens of decolonial theory, and that (4) a project to decolonise copyright law would allow Africans to return to the self, to rid traces of coloniality from their situation and to develop/transform copyright law epistemic schematic compositions fundamentally.

The praxis of Africanisation is evidenced in a response to the 'how do we decolonise' question. This praxis can be tested in engaging with the first cardinal point of the thesis's argument – if indeed it is established that South African copyright law is Eurocentric and perpetuates colonial epistemic traditions; Africanisation is a practical 'how' response because it suggests that African epistemic traditions need to be central in designing newer meanings of authorship in the post-colonial era.

Africanisation is a popular response to the question of how to decolonise the episteme. This is evidenced in the number of law academics who have ventured to ponder on how Africanisation can be a viable method towards decolonising both the law and its curriculum. One such legal scholar who has proposed Africanisation as a viable option toward decolonising the law and its curriculum is Zitzke. He observes that decolonisation may mean a longstanding and practical commitment to Africanisation through conceptual decolonisation.[118] To this end, he provides what is a comprehensive definition of Africanisation from the perspective of a law academic:

> In simple terms, for the purposes of academic enquiry, Africanisation means placing African thought central to a study of a particular discipline in order for that discipline to be contextually sensitive to Africa and the 'characteristics, experiences, practices, beliefs, values and ways of life' of its 'autochthonous black

[118] Emile Zitzke 'A decolonial critique of private law and human rights' (2018) 24 *SAJHR* at 494.

> peoples to the south of the Sahara desert', usually with reference to knowledge produced by African people.[119]

From Zitzke's definition of Africanisation, it can be deduced that even in the area of law, just as in philosophy and the humanities, Africanisation speaks to centring African knowledge that has been de-centred by colonial conquests. This sort of academic contemplation is indeed relevant to this thesis' central argument because the thesis insists that the belief/reverence/deference to ancestors is an integral/constitutive cog in the ontological make-up of African peoples. The thesis further argues that this ancestral belief system was done away with due to the colonial imposition of Western logic.[120]

Zitzke believes that a project to decolonise the law should be inclusive of Africanisation because this will help resolve the law's epistemic dependency and mimicry of Western ways of thinking and knowing:

> However, even comparative constitutional law on the continent does not necessarily aid the process of breaking free from Western mimicry in legal thought. Many other African jurisdictions also rely on Western conceptions of rights and constitutional interpretation, and so our comparison with other African courts might lead to indirect Westernisation. Furthermore, sometimes other African countries are still struggling with the colonial hangover to the extent that conservative religious morality (imposed by the conquerors on the First Nation peoples) still influences judicial interpretation of human rights.[121]

The most important segment of Zizke's treatise is found in his sterling demonstration of Africa's natural propensity towards pluralistic ways of knowing and Being. Zitzke makes three

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[119] Ibid at 509. See also at 510 where Zitzke specifically alludes to what philosophers refer to as re-Africanisation. Ziztke appreciates that the meaning of Africa is contested, and that there is a need to consistently revisit epistemic conceptions of Africanisation to ensure that they are not a repetition of colonial segregationist stratagems.

[120] Ibid at 497, where Zitzke unpacks the extent of European influence, imposition and universalism which was cast as the law of South Africa following this country's conquering by Europeans: 'Legal historians teach us that the Dutch afforded no respect to African law and completely ignored its existence while Roman-Dutch law was imposed on African people during the period of Dutch colonisation in the mid to late-1600s. During the period of English colonisation of the Cape Colony (first in 1795 followed by intermittent Dutch control that was finally vanquished in 1806), limited recognition was afforded to African law, but it was subject to testing against English standards of justice, equity and fairness. An English repugnancy clause applied to African law was bound to advance the project of European cultural and intellectual supremacy. Under English rule, Dutch private law mostly remained unscathed with some English garnishing. At no point was it accepted that, being in Africa, African law should predominate the legal system. Conquest thus fuelled (sic) the flourishing of European private law on the African continent. What is more, it was not only African rules and principles of private law that were destroyed and replaced by European versions in the process of colonization.'

[121] Ibid at 507.

observations: (1) there is no unified African voice, (2) there isn't a single philosophy because the philosophy of Zulu people differs from the philosophy of BaSotho people, and (3) Africans embrace these pluralities and never seek to coerce others into a universalist paradigm.[122] These insights are relevant to this thesis because the thesis argues that the *Decolonial Turn* inevitably leads to a move from an epistemic universe to an epistemic pluriverse.

Other law scholars that have argued for the Africanisation of the law and its curriculum are Mollema and Naidoo in 'Incorporating Africanness into the legal curricula: The case for criminal and procedural law'.[123] They describe Africanness and Africanisation as follows:

> Africanness is generally understood as comprising African philosophy, ontology and epistemology. However, there is no single knowledge system that subsumes the many African world views as ethnicity and a plurality of cultures provide for variances in the African paradigm. This absence of African universals extends to African law, which is 'more than any other family of laws a truly extended family, due to the absence of centralising political and religious forces. This inherent plurality has made the study of African laws an immensely fragmented experience'.[124]

What is important about Mollema and Naidoo's treatise is that they use a specific discipline of law (criminal and procedural law) to practically test and tease out the academic authenticity of the calls for the Africanisation of the law.[125] This approach is relevant to this thesis' argument because the thesis also uses a specific area of law (intellectual property law) to show the academic authenticity, viability and practicality of decolonised authorship in copyright law. Mollema and Naidoo note that South African law schools have incorporated African Customary Law and Indigenous Law as modules in their LLB programs. They observe that this is a move in the right direction, but it is not enough, and more needs to be done to re-centre African epistemic systems. They opine that the weakness of this approach is that it relegates African laws into a single discipline; instead, they

[122] Ibid at 510.
[123] Nina Mollema & K Naidoo 'Incorporating Africanness into the legal curricula: The case for criminal and procedural law' (2011) 36 *JJS* 49.
[124] Ibid at 50.
[125] Ibid. Although this is an important intervention, it must be noted that Mollema and Naidoo tend not to engage particularly the question of Africanisation with sufficient depth. Beyond definitional clarity, they largely fail to substantively demonstrate how Africanisation can be practically implemented in seeking to transform and reshape the disciplines of criminal and procedural law. This lack of depth is a missed opportunity to help advance this discourse.

argue that African customary law should form part and be taught in all law modules, including those in mercantile and private law.[126]

It should be noted that the Mollema and Naidoo article was written prior to the #FeesMustFall moment. Therefore, before the *Decolonial Turn* – this is evidenced by how the duo use 'overhaul' rather than 'decolonise' in their proposal as to what should be done to transform criminal and procedural law.[127] The difference is lexicology validates the thesis' argument that the *Decolonial Turn* brings about a new meaning to the approach that is taken in the ongoing task to transform society and decolonise the situation of its colonised peoples.

Other scholars that have weighed in on the discourse about the Africanisation of the law and its curriculum include Maithufi and Maimela in 'Teaching the 'other law' in a South African University: Some Problems Encountered and Possible Solutions'.[128] The duo begin their treatise by noting South Africa's inherent pluralistic/diverse belief systems that inevitably lend themselves plural legal normative inclinations.[129]

The broad (and potential) analysis that can be read from Maithufi and Maimela's observation is that the areas of legal epistemic thought that are albeit part of the legal system but not from Roman-Dutch and English law traditions can be classified as 'other' law. Although they do not make this analysis from a decolonial perspective, it is plausible to illustrate that 'othering' is conceptually defined by decolonial and critical scholarship/theory as one of the impacts of ongoing colonial patterns of power and control.[130] The post-Apartheid reality is such that the centre and periphery phenomenon continues to exist long after the official demise of apartheid – English law and Roman-Dutch epistemic traditions remain the centre whilst everything else remains the 'other'.

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[126] Ibid at 53.
[127] Ibid at 54.
[128] Papa Maithufi & Charles Maimela 'Teaching the 'other law' in a South African university: Some problems encountered and possible solutions' (2020) 41 *Obiter* 1.
[129] Ibid at 2, for example the demonstrate that section 211 and 212 of the Constitution of 1996 recognise African Customary Law as an integral part of South African law, and it gives instruction to both the judiciary and the legislature to apply customary law principles and promulgate legislation to create a framework for the seamless administration of customary law. Beyond the constitution's recognition of African customary law, the two authors make mention of the reality that there are other belief systems in South Africa, and these culminate in other types of law such as Hindu law, Muslim law et cetera.
[130] On othering, see generally, Lajos Brons 'Othering, an analysis' (2015) 6 *Transcience* 69.

Maithufi and Maimela unpack several problems that are facing law teachers in their quest to teach 'other' law. These include interpretation in the medium of instruction of concepts used, lack of knowledge to describe concepts in a language other than English or Afrikaans, and the resultant frustration of students and lecturers.

Ncube provides an extensive yet introductory synopsis of how to actualise/realise Africanisation in the sphere of intellectual property law/rights in the treatise entitled 'Decolonising Intellectual Property Law in Pursuit of Africa's Development'.[131] Preliminarily, there are three reasons why Ncube's intervention is crucial and relevant to the argument advanced in this thesis: (1) it is written in the aftermath of the #MustFall moment, and it expressly acknowledges this moment as having presented a turn of some sort in the academy, and tertiary education,[132] (2) it is a decolonial musing that is directly focused on the sphere of intellectual property, and (3) it studies the calls to decolonise intellectual property law, and illustrates some of the practical efforts that have already been put in place to achieve this.[133] Ncube describes Africanisation as follows:

> Implicit in this question is the assumption that the colonial legacy of African legal systems has resulted in laws that continue to further colonial and neo-colonial interests. In other words, in wa Thiong'o's lexicon, it is not Africa-centred. One of the first steps of decolonising law would be to first examine current legal systems to determine to what extent they are influenced by colonial and neo-colonial interests. Such an examination would also entail a scrutiny of scholarship on those systems through 'research process (and political practices) that seek to change the hegemonic ordering of knowledge production'. Such 'decolonizing methodologies' are an essential tool in the deconstruction of 'a canon that attributes truth only to the Western way of knowledge production'.[134]

[131] Caroline B Ncube 'Decolonising intellectual property law in pursuit of Africa's development' (2016) 8 *The WIPO Journal* 34.
[132] Ibid at 34.
[133] Ibid at 40.
[134] Ibid at 36. See also at 38 where she specifically creates a link between the decolonisation of intellectual property law, and its university curriculum. We are able to appreciate that she insists that the decolonisation of the law is impossible without the decolonisation of the LLB curriculum, to this end she posits: 'The project of decolonising curriculum requires deep reflection about what is taught, from which perspective (Eurocentric or Afrocentric) it is taught and by whom it is taught. These aspects speak to the source and authorship of learning materials and its distribution models. These are important considerations because they infuse the learning materials with a particular worldview and impact the accessibility of the material. The perspective adopted has far-reaching consequences because it schools a future generation in a particular way about IP law and this in turn will impact society generally when those schooled in these perspectives take up positions in government, industry and other areas in the future.'

The exercise of stocktaking of pre #MustFall efforts is important because it speaks to the fact the *Decolonial Turn* builds on from existing sites and projects of resistance among African intellectual property rights academics, practitioners, and lobbyists. Ncube illustrates this when she recounts how 'The African Group' lobbied various global intellectual property rights institutions to embosom liberation ethics and developmental approaches in their policy outlook and formulation.[135] The efforts are evidenced in how the 'African Group' lobbied for the adoption of the Doha Declaration in the TRIPS Agreement and Public Health 2001, which would imply securing access to medicines in the face of a severe disease-burdening Africa that included HIV/AIDS.[136]

The efforts of 'The African Group' are an example of some of the work that has been done to try to dismantle and undo the globality of Western and Eurocentric epistemic compositions of intellectual property rights. Most importantly, these efforts fall squarely within the remit of decolonisation because of two reasons: (1) the setting and timing – they are ongoing efforts that antithetically oppose an ongoing oppressive force (coloniality), thus appreciating that even though colonialism has been officially defeated, its vestigial power remains firmly intact and, (2) it is defined by liberation ethics, meaning that it is value-laden, thus appreciating the historicity of overtly Afrocentric approaches to the law in general, and intellectual property law in particular.

To illustrate her argument that there are existing efforts to Africanise the sphere of intellectual property law, Ncube recounts the inception of the Open-AIR project at the University of Cape Town.[137] This project is aimed at, among other things, actively making means to undo the colonially engineered bottlenecks that stifle development, growth, and progress. It marries practical efforts with pedagogical imperatives by offering a postgraduate course that offers modules that speak to this Afrocentric agenda. These modules include innovation, development and intellectual property rights, globalization, patents, copyright, communal trademarks,

[135] Ibid at 37.
[136] Ibid.
[137] Ibid at 39, 'The project is a long-term partnership of IP experts and researchers, the majority of whom are Africa-based, who have an express interest in African IP systems that commenced in 2008 and is now in the third phase of its research. The first phase (2007–2011) focused on copyright and access to learning materials in eight African studies. The second phase (2011–2014) focused on open innovation and development in nine African countries. The development of the course curricula began towards the end of this phase'

Traditional Knowledge, intellectual property and agriculture, and intellectual property rights from the Publicly Financed Research and Development Act of 2008.[138]

Ncube's understanding of the Africanisation of intellectual property law is gleaned from her argument that intellectual property policy/legal framework must be set in such a way that it advances Africa's development goals, aspirations and ideals.[139] From Ncube's account of the approach that needs to be taken as regards Africa's program of action to meet its developmental goals, it is logical to appreciate that the centring of African scholarship in intellectual property rights discourse is a practical enactment of Africanisation, and it gives rise to home-grown solutions therein.[140]

Lastly, Sindane, in 'Morena Mohlomi le Badimo: Reading Decolonial Articulations into the Intellectual Property Law Curriculum'.[141] From the onset, Sindane's treatise is incredibly important to both the broader argument made in this thesis because, just as Ncube's intervention,[142] Sindane also teases the possibility of Africanisation in the context of intellectual property law and copyright law specifically. Crucially, this article is drawn from and is an abridged version of Sindane's Master of Law dissertation, a critical component of which is the basis of the fundamental

[138] Ibid.

[139] This appears to be the mainstay of Ncube's scholarship because it is an argument that emerges quite prominently in some of her later scholarly contributions – she does not always coin it in decolonial lexicology, but she argues that there needs to be a change in how intellectual property rights framework is set up in Africa, for the purpose of advancing Africa's developmental agenda. Although she does not always utilise the sociological methodology to make this pro-Africanisation argument, it naturally lends itself to some of the solutions that are argued for by decolonial critical legal scholars, see for example Caroline B. Ncube *Science, Technology & Innovation and Intellectual Property: Leveraging Openness for Sustainable Development in Africa* (2021).

[140] Shelton Makore, Patrick Osode & Nombulelo Lubisi 'Reconfiguring South African patent laws in search of an Afrocentric approach for expanding access to essential patented medicines in the Covid-19 Era' (2021) 10 *Perspectives of Law and Public Administration* at 274, where they unpack a number of existing intellectual property law justificatory theories and proceed to illustrate how these theories are largely colonial, and within a Eurocentric epistemic paradigm. To remedy this anomaly, they collectively argue that South African patents law regime must embrace the African value/philosophy of Ubuntu, see at 279, 'It can be strongly argued that the development of a comprehensive humanised Intellectual Property regime informed by the values and principles of Ubuntu is crucial for ameliorating the problem of patent-induced inaccessibility of essential medicines in South Africa. The concept of Ubuntu is an acclaimed African philosophical construct and value system subscribed to mainly by indigenous communities throughout sub-Saharan Africa. The meaning of this construct is captured in the isiZulu phrase, 'umuntu ngumuntu ngabantu' translated as a person is a person through other people. Ubuntu as a philosophical concept date back to precolonial days and constitutes part of a long African oral tradition of how communities should be ordered.'

[141] Ntando Sindane 'Morena Mohlomi le Badimo: Reading decolonial articulations into the intellectual property law curriculum' (2020) 2 *Journal of Decolonising Disciplines* 1.

[142] Ncube op cite note 131 ch 1 at 8.

argument that is made in this thesis. He understands Africanisation as an effort to reverse the epistemic killing[143] of African knowledge systems:

> To reverse epistemicide, law teachers, researchers and historians need to go back to pre-colonial Africa and look for those knowledge(s) of African societies prior to colonial disturbance. The act of going back to pre-colonial Africa does not mean that decoloniality seeks to go to the stone-age; it instead seeks epistemic justice by way of uncovering those knowledges that were silenced through epistemicide.[144]

The crucial aspect of Africanisation, among other things, involves the restorative project wherein intellectual property scholars concern themselves with the hidden truths about how African peoples grappled with the very idea of intellectual property rights prior to colonial disturbance. This move to pre-colonial Africa does not mean that African peoples stopped thinking at the instance of colonial disturbance; instead, it recognises that there are African epistemic systems that were deliberately undone/killed during colonial wars/conquests. On the same score, the act of going back to pre-colonial Africa does not suggest that post-colonial Africans did not develop any systems of knowledge-making – in essence, the reversal of epistemicide is not only concerned with the pre-colonial but is also attentive to existing African knowledge that continues to be de-centred and jettisoned to the periphery of present-day epistemic systems.

To illustrate the practical enactment of the Africanisation of intellectual property epistemologies, Sindane revisits existing intellectual property law justificatory theories, specifically the incentive theory.[145] The body of intellectual property justificatory theories is a theoretical/philosophical discipline wherein scholars put in place a philosophical justification for the very existence of intellectual property rights. John Locke developed the Incentive Theory, and the theory suggests that creators of innovative works need to be economically incentivised on the assumption that this incentive will encourage more innovation.[146] Those who believe in this theory accept that

[143] Sindane op cit note 142 at 3, 'The overarching theme in decolonial articulations presents a discourse on epistemicide, framing the coloniser as the killer of the knowledge(s) of colonised bodies. To reverse the epistemicidal legacy is to go to the graves wherein African knowledge(s) are buried, open them up and resuscitate this African knowledge(s).'
[144] Ibid at 4.
[145] Ibid at 9.
[146] Ibid. For further reading on the theories that underpin intellectual property, see generally William Fisher *Theories of Intellectual Property* (1987) 1-29 (unpublished essay).

innovation only happens when the protection against economic exploitation by others incentivises works of intellectual property.[147]

Sindane posits Africanisation as a viable method towards decolonising the present conceptions of the Incentive theory. He opines that its method is laid in the following three steps: (1) An Afrocentric critique shows that the incentive theory is limited because it valorises pecuniary interests[148] and wrongly assumes that people are inherently motivated by the desire to make money, and nothing much else,[149] (2) Capitalist interests, which are representative of a Western-centric and colonial worldview, are wrongly placed at the zenith of intellectual property rights framework, thus failing to acknowledge interests outside of the capitalist paradigm, (3) the African philosophy of Mohlomism could be used to provide an Afrocentric conception of the Incentive Theory in terms of which the teachings of Lesotho Philosopher, Morena Mohlomi, are used to explain that incentive may mean something more than money.

Sindane explains the philosophy of Mohlomism at length:

> Historical accounts show that Mohlomi was a mentor to the King of Lesotho, Moshoeshoe I. Mohlomi would also travel around Southern Africa teaching people about his philosophy of truthfulness, justice, peace, the love of mankind and the pursuit of sane humanism (Sesanti 2014). When he was not travelling, Mohlomi ran a 'leadership academy' in southern Africa; he has been dubbed as the Socrates of Africa, because he best illustrates the brilliance of pre-colonial African leadership (Mahao 2015). The teachings of Mohlomi are crucial as he represents African intellect and wisdom prior to colonial contact, because he had never set eyes on a European nor was he influenced by Eurocentric epistemic traditions.4 The current LLB curriculum, in the legal philosophy modules, makes mention of most of the Western philosophers who lived during the time of Mohlomi. Due to deliberate erasure and epistemicide, the philosophical thinking of Mohlomi is not included in the LLB curriculum. Mohlomi's teachings were like those of Western thinkers aimed at the problems of his community, but naturally the circumstances of different communities can differ radically.[150]

The method laid above is but one of the many potential examples to show how Africanisation (and, therefore, decolonisation) can be practically implemented. Most importantly, the insights of

[147] Ibid.
[148] Makore, Osode & Lubisi op cit note 140 at 274.
[149] Sindane op cit note 142 at 10.
[150] Ibid at 12.

various scholars, as regards the meaning of Africanisation, demonstrate that the praxis of Africanisation is multipronged because it proffers a critique and accompanies that critique with a proposed practical measure to potentiate a remedy.

The summative account of Africanisation's definitional paradigm, when grasped with the background of this thesis' core argument(s), assists in showing why Africanisation is a valid response to the question of how to decolonise or engage in decolonisation practically.

The second potential solution and response to the question of how to effect/implement decolonisation is Pluriversalisation. This solution has been unpacked in great detail in earlier segments of this chapter. In the main, it has to do with seeking out multiple ways to build our society and dismantle the one-world colonial setting that centres the West and de-centres everything else.

In summation, this segment has provided a comprehensive and detailed response to the question: 'How do we decolonise?'. The response is that to decolonise, there is a need for the academy/episteme need to engage in, inter alia, Africanisation and Pluriversalization. These two are just a few of the many practical methodological accounts of how to practically engage in decolonisation, especially in the space of intellectual property rights pedagogy and episteme.

2.3.3 Black consciousness

Steven Bantu Biko is considered one of South Africa's foremost revolutionary philosophers and political thinkers of our times. Often, when his name is invoked, it is the image of the political activist and organiser that is spoken about, completely neglecting that Biko was an avid thinker, too. His political, philosophical, and intellectual prowess is demonstrated in his framing and mapping of the philosophy of Black Consciousness as a philosophy of liberation. In his own words, Steve Biko defines Black Consciousness at length as follows:

> This is the first truth, bitter as it may seem, that we have to acknowledge before we can start on any programme designed to change the status quo. It becomes more necessary to see the truth as it is if you realise that the only vehicle for change are these people who have lost their personality. The first step therefore is to make the black man come to himself; to pump back life into his empty shell; to infuse him

> with pride and dignity, to remind him of his complicity in the crime of allowing himself to be misused and therefore letting evil reign supreme in the country of his birth. This is what we mean by an inward-looking process. This is the definition of "Black Consciousness" … No doubt, therefore part of the approach envisaged in bringing about 'Black Consciousness' has to be directed to the past, to seek to rewrite the history of the black man and to produce in it the heroes who form the core of the African background … A people without positive history is like a vehicle without an engine.[151]

Black Consciousness, in the context of South Africa and in the quest to decolonise copyright law, is an important theoretical tool because it helps situate the pluriverse and give it a uniquely South African context, especially when considering that decolonial theory on its own, hails from various parts of the global South, that sometimes do not enjoy the set of material conditions in the specificity of South Africa.

The philosophy of Black Consciousness is discussed in this study for one essential reason: the thesis maps the discussion from the *Decolonial Turn* to the epistemic pluriverse. The former alludes to the resounding call to free Africa's polity from the trappings of colonial power, and the latter means a world where many worlds fit.[152] As regards the latter, Black Consciousness is drawn for its demand for colonised Black people to return to their selves. A return to the self means uncovering and unravelling all of those aspects of Blackness that have been killed and stolen through epistemicides and linguisticides. It is against this background that Black Consciousness is the theoretical basis upon which Chapter 4 is based.

A study about indigenous and local epistemic systems involves the restorative projective of returning to the self. In this context, when engaging the meaning of an author to be emblematic of the ancestors of Black people, the insistence is that Black people must return to themselves and to what makes them Be.

It becomes relevant to use Steve Biko's philosophy of Black Consciousness because the thesis expressly uses macro-narratives and 'an other thinking' as an endeavour to illustrate the anomaly of the coloniality of knowledge. At the core of this approach is the question of race. Black

[151] Steve Biko *I write What I like* (1978) at 29.
[152] See earlier definition by Escobar op cit note 37 at 14.

consciousness is helpful because it frames the discussion about race beyond the canons that the legal academy is currently accustomed to:

> Black Consciousness as a social and political philosophy provides a conceptual framework to diagnose, theorise and transform the existential and experiential situation of Black people in racially unequal, white-dominated and symbolically antiblack societies. Insofar as race and racism continue to shape relationships, institutions and subjectivities in South Africa and insofar as the terrors and tremors of white supremacy still define and structure the psyche and social reality of all South Africans in different ways, Black Consciousness remains an instructive tool of analysis.[153]

The legal academy negotiates with race/coloniality using two distinct schools of thought: the first, which is most dominant, is the liberal legalist/Constitutionalist school, and the second is the critical political/leftist school.[154] The former is born from liberal jurisprudential thought. It stems from the belief that the state is value-neutral, has the maximum protection of individual rights, including property rights, and sees free-market capitalism as necessary for the attainment of true freedom. The latter questions the current state of affairs, critically asserting that South Africa's rainbow nation is based on the myth of freedom without justice, reparations and redress.

It has become crystal clear that the liberal legalist intellectual traditions have failed to grapple with coloniality decisively, and this necessitates a turn towards a critical/leftist political school, of which Black Consciousness forms part. This approach presents a clarion call for the academy to embrace a counter-hegemonic legal consciousness that is laden with the radical intellectual politics of critical jurisprudence.

> In contrast to law reform, the leftist approach calls for a radical socio-economic, political and cultural re-structuring of society. It also seeks to directly confront, transform and democratise – even decolonise – the social powers that produce inequality. This approach does not restrict itself to a juridical account of power and is therefore able to apprehend the multiple sites of power as well as the capacity of oppressive powers to reconfigure themselves, to reappear in disguise despite their seeming legal or formal abolition.[155]

Black Consciousness helps to theoretically craft meanings of authorship in copyright that precisely make space for forgotten and marginalised voices in the global intellectual property law discourse.

[153] Modiri op cit note 5 ch 1 at 3.
[154] Ibid at 42.
[155] Ibid at 46.

2.3.4 Concluding analysis

Although this theoretical framework is set out in a dualistic fashion that presents Decolonial Theory and Black Consciousness as the theoretical approach to the thesis, they are complemented by a Black Marxism methodology that is rich in theory and which finds resonance in some of the practical arguments that are advanced in the chapters that follow this one. Black Consciousness philosophy and Black Marxism methodology will be applicable to the arguments that are made in Chapter 4 and Chapter 5, respectively. In contrast, the Decolonial Theory is a common thread in all of the chapters of this thesis.

2.4 Conclusion

This chapter has extensively and substantively set out the theoretical framework on which this entire doctoral project is based. The chapter introduced and comprehensively unpacked the idea of the *Decolonial Turn* and its implications for the South African legal academy. Having explained the *Decolonial Turn*, the chapter showed epistemic opportunities presented by the turn, arguing that one of these is a turn to the epistemic pluriverse. An epistemic pluriverse is but one of the many intended results of the calls to decolonise society. This pluriverse is a world where many worlds fit and co-exist. The chapter demonstrated that South Africa's *Decolonial Turn*, when closely studied and in the context of the legal episteme, leads to the creation of a legal epistemic space that reflects the diverse ways of thinking, knowing and Being, and, therefore, the pluriverse – hence 'from the *Decolonial Turn* to the Pluriversal author'.

CHAPTER THREE: A DECOLONIAL READING OF THE HISTORY OF COPYRIGHT LAW IN SOUTH AFRICA

3.1 Introduction

> *To study history means to search for and discover the forces that are the causes of those results which appear before our eyes as historical events. The art of reading and studying consists in remembering the essentials and forgetting what is not essential. Probably my whole future life was determined by the fact that I had a professor of history who understood, as few others understand, how to make this viewpoint prevail in teaching and in examining.*

- Unknown author, 1925.

Chapter 1 reviewed existing literature as regards authorship in copyright law, and Chapter 2 laid out the theoretical framework upon which this thesis' argument is based - it follows logically that the present chapter sufficiently sets out the history of copyright and authorship in South Africa.

This chapter discusses the historical foundations of the development of copyright law in South Africa. The history of South Africa is important to briefly canvass because the subject of epistemic and conceptual decolonisation cannot be divorced from the historical-political events that shaped pre-democratic South Africa. Among the arguments to be defended in this thesis is that courts and the law have always had the habit of mirroring the political currents of the day. For example, apartheid courts/law reflected the racist/segregationist politics that defined South Africa's polity between 1948 and 1994.[1]

[1] Numerous examples can be drawn from world history/present to illustrate this point: the laws of Nazi Germany were reflective of Nazi fascism which was rooted, among other things, in the hatred/discrimination of Jewish people. The coordinated killing of Jewish people in the holocaust was not a mere political act, but it was also legal. This disdain and disregard to the universally enshrined right to life was sanitised by German law in the reign of the Nazi party. In a similar vein, the on-going illegal occupation of Palestine and the horrendous killing, raping, maiming, displacement, dispossession, and related atrocities on Palestinian people is by reason of the Zionist Apartheid project and gains its legitimacy from Israeli law. Nazi Germany and the illegitimate state of Israel are just two examples that illustrate the unholy marriage between politics-of-the-day and the law. Not only does the law mirror political ideas of the ruling class of the epoch but, in most instances, the law is used to give a semblance of moral authority and justification to actions of the political elite. On the laws and politics that define the on-going occupation of Palestine, see generally, Ilan Pappe *Ten Myths About Israel* (2017).

Legal positivists and common law purists argue that the law is above politics. They insist that the law is a set of mechanical rules that are meant to govern relations between private individuals and between them and the state.[2] The actual reality is contrary to formalist/positivist claims that the law is a science and, therefore, insulated from the politics of the day. In fact, the law is a product of the politics and sensitivities of every epoch's ruling class. This is indeed applicable to copyright law in South Africa and the world. To prove this claim, it is important to study the political history of South Africa with the objective of linking it with the history of the development of copyright law. Therefore, a decolonial reading of copyright law history is imperative.

It becomes crucial to expansively discuss the history of copyright law from a decolonial prism precisely for two reasons: the first is that it helps lay the ground and justify the historicity of the decolonial critique that this thesis engages in, and second, it is in the fact that there is already a paucity of in-depth historicisation of copyright law in South Africa.

This chapter is subdivided into four constitutive segments. Following this introduction, the next segment briefly qualifies and authenticates the meaning of reading history from a decolonial prism. It responds to the question: 'What entails a decolonial reading of history?'. The subsequent segment historicises the history of copyright law by way of dividing the history into three epochs. The last segment concludes this chapter.

As regards an in-depth historicisation of copyright law in South Africa, this chapter draws largely from Dean's LLD thesis of 1988 titled: *The Application of the Copyright Act 1978 to Works Made Prior to 1979.*[3] In this thesis, Dean extensively unpacks the history of copyright, using the 18th century as a starting point.[4] This chapter's discussion of copyright's historical development draws from Dean's LLD thesis and builds on it by way of similar scholarly writings. Whereas Dean's reading of copyright history is purely from a legalistic/formalist school of thought, this chapter's

[2] As regards common law purism, see generally, Zitzke op cit note 4 ch 1.

[3] Owen Dean *The Application of the Copyright Act 1978 to Works Made Prior to 1979* (unpublished LLD thesis, University of Stellenbosch, 1988).

[4] This does not mean that it is only Owen Dean that has written about the historical development of copyright in South Africa. There are other scholars that have done this; however, Owen Dean is considered to have given this subject an expansive treatment.

reading of copyright history is fused with the recounting of the various political changes in South Africa.

This chapter understands that there's an unbreakable bond between politics and the law, and therefore, a decolonial reading of copyright law history that is not laden with socio-political narrative is incomplete. The task of decolonising society and the law requires a reading of history that engages in wanting to complete the incomplete narrative of history. As is shown later in this chapter, the history of copyright law is fraught with distortions, chasms and epistemological commitments that are worth a thorough inquiry.

3.2 What entails a decolonial reading of history?

History, just like philosophy, is one of the disciplines whose definition is hotly contested.[5] Indeed, history, as a concept, is central to decolonial suppositions. Chapter 2 recounted how, at the point of colonial contact, missionaries reduced humanity to a people's ability to read and write in the alphabet and declared that peoples of the global South are not humans because they cannot read and write in the alphabet and that this automatically lends itself to meaning that they also do not have a history.[6]

Tamale accordingly observes:

> Colonial intellectualism deliberately denigrated Indigenous oral traditions and wisdom as illegitimate methodologies and tools of storing records. Given that Western knowledge systems use the indicator of the written record to separate the human eras of 'prehistory' and 'history,' it is no wonder that traditions that depend on oral wisdom are perceived as lacking history.[7]

The phrase 'colonial intellectualism' refers to a component of colonial worldmaking that places Eurocentric subjectivity at the zenith of global epistemologies. Tamale demonstrates that this component of colonial worldmaking had the impact of undoing, killing, and erasing different ways

[5] Percy Mabogo More *Biko: Philosophy Identity and Liberation* at 56: 'One of the peculiar features of philosophy, as Hegel acutely observed, is that it is a discipline with the capacity to define everything except itself. Its complexity, breadth, width and nature render it extremely difficult – if not impossible- to define.'

[6] Mignolo op cit note 7 ch 2 at 3.

[7] Tamale op cit note 70 ch 2 at 7.

of knowing, thinking and Being, with the precise objective of denying the history of colonised societies.[8] It follows logically that one of the aims and aspirations of decolonisation is to rewrite, rethink and relook how history is understood and explained in prevailing epistemic systems.

Although there are various conceptions of history, this chapter relies on Mudimbe's conception of history as a discourse of knowledge and power. He defines history as follows:

> …the concept of history, which in a first approximate definition could be described as an intellectual effort of ordering human activities and social events chronologically. Specialized investigations have indeed generated important issues. I shall note only two that directly confront African gnosis discourses. One is the postulation that history reflects or should translate the dynamics of human needs through time.[9]

As carefully laid out in the first two chapters, decolonial theory paves space for a complete re-imagination of society. The trip that starts from the *Decolonial Turn* to the epistemic pluriverse means that there exists more than one story in history – appreciating that prevailing conceptions of history are a representation of a universalist paradigm that fails to accept that many worlds can exist in one world. From this account of the meaning of the *Decolonial Turn*, it is logical to surmise that a trip from the *Decolonial Turn* to the pluriverse requires a reading of history that retells history from the perspective of not just European subjectivity but also from the epistemic traditions of Black, African and colonised peoples. This is the essence of what entails a decolonial reading of history: an acceptance that history is an embodiment of the political/social aspirations of the ruling elite of the day and that there exists a need to dismantle and deconstruct a single narrative of history.

Drawing from the theoretical framework laid out in Chapter 2, this chapter primarily posits Steve Biko's philosophy of Black Consciousness as a credible source in the task of reading history from a decolonial prism:

> No doubt, therefore part of the approach envisaged in bringing about 'Black Consciousness' has to be directed to the past, to seek to rewrite the history of the black man and to produce in it the heroes who form

[8] Ibid.
[9] Ibid at 187.

> the core of the African background … A people without positive history is like a vehicle without an engine.[10]

Black Consciousness Philosophy generally concerns itself with exposing history's lack of neutrality/objectivity. This concern stems from Black Consciousness' appreciation that an integral part of colonial worldmaking includes crafting conceptions of history that present the imagination of the West as the universal truth and everything else as peripheral.

Biko's insights comport with Mignolo's supposition as regards the beginning of what he calls Colonial Difference and the Atlantic imaginary: that at the instance of first colonial contact, missionaries insisted that people who were unable to read and write did not have valid knowledge, and therefore did not have a history at all.[11]

Both Biko and Mignolo's[12] assertions as regards prevailing colonial framings of history resonate with Mudimbe's observations about the workings of early missionaries, anthropologists, and historians at first contact with Africa:

> In order to 'save souls,' the missionary undertakes the task of integrating his understanding of the local community into a process of reduction grounded in a theology of salvation defined within Western historicity. On the other hand, the anthropologist wants to contribute to the history of humankind by paying careful attention to all of its regional peculiarities and interpreting them according to a methodological grid and generalization which also, depends upon the same Western historical experience.[13]

Mudimbe observes that, at colonial contact, white people failed to make sense of Africa because they wanted to 'rationalise' and domesticate it to Western ways of knowing, thinking and Being, including in using European languages, which are an embodiment of European thinking patterns and epistemic historicity.[14]

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[10] Biko op cit note 152 ch 2 at 29.
[11] Mignolo op cit note 7 ch 2 at 3.
[12] Both Biko and Mignolo proffer what could be genuinely understood as a decolonial reading of history, however it is important to note the slight difference in articulations: this is evidenced in that Biko's chief concern is about rewriting a history that exists, whereas Mignolo figures that the distorted history of colonised peoples is not a history, precisely because the colonial project insisted that colonised people do not have a history at all.
[13] VY Mudimbe *The Invention of Africa: Gnosis, Philosophy, and The Order of Knowledge* (1988) at 66.
[14] Ibid.

Biko, Mignolo and Mudimbe not only illustrate history's lack of objectivity/neutrality but also brandish it as a weapon in the hands of the architects of the colonial project and colonial worldmaking. This is amplified even in the framing of legal history and development: whenever the history of law is unpacked, it entails two characteristics: (1) the story and legal epistemic patterns of Europe and (2) it erases Africa, Black people, and the rest of the third world. These characteristics are not in any way natural but are born from a deliberate colonial worldmaking stratagems.

In the context of the history of copyright law, the philosophy of Black Consciousness posits a reading of history that illuminates the triumph of Western schemes of knowing, thinking, and Being and the subsequent neglect of the epistemic traditions of the global South, Black people and African peoples. For example, and as it is shown later in this chapter, present historical foundations of copyright law development reflect a story that spans from the mid-1500s in the United Kingdom and how copyright law traditions were transplanted into lands outside of the UK and Europe, whilst neglecting to investigate how peoples outside of Europe may have thought about the idea of copyright specifically, and intellectual property rights generally.

Numerous contemporary scholars from radical Black intellectual traditions have proffered conceptual readings of history that can be likened to a decolonial reading of history. One of them is Dladla. He invites a debate about South Africa's history, where he argues that this history could be read and understood quite differently when approached from the lens of what he calls 'Azanian critical philosophy'.[15] He does this by way of recounting the history of South Africa, drawing from the articulation of the Pan Africanist Congress of Azania's (PAC) distillation of South Africa's constitutional polity as a representation of the unity of the British and the Afrikaners in 1910.[16]

Dladla asserts that to be able to read history from the lens of Azanian critical philosophy,[17] one must, for example, pay attention to how South Africa, its provinces, cities, and towns are named.

[15] Ndumiso Dladla 'The liberation of history and the end of South Africa: some notes towards an Azanian historiography in Africa, South' (2018) 34 *SAJHR* at 416.
[16] Ibid.
[17] Ibid at 420, where he defines Azanian critical philosophy as follows: 'Azanian critical philosophy also meets the minimum criteria set by Mogobe Ramose, Tsenay Serequeberhan and Theophilus Okere, among others, for the practice of African philosophy, namely that it has its basis upon 'the culture and experience of African peoples' and

He finds that prevailing names[18] reflect an unbroken chain of the conquest of indigenous people because the names are a product of the architects of the colonial project and thus embody their history.[19] Reading history from this perspective leads to a realisation that the naming of South Africa and its various territories exposes that the settler colonial project sought to create a 'little Europe' when establishing South Africa and thus had first to strip it of its epistemological sovereignty.[20]

Dladla echoes Biko, Mignolo and Mudimbe's observation that a thorough study of history makes it clear that history is always laden with politics and values of varied specificity.[21] Much like a decolonial reading of the history of copyright law, the Azanian critical philosophy's reading of history demonstrates the colonial project's ideological devaluation and ignorance of African history, the unethical process by which historical facts are fabricated and selected, and the political compromising of historical objectivity.[22]

Other scholars who have investigated the meaning of a decolonial reading of history include Dube and Moyo: they jointly argue that a decolonial reading of the secondary school history curriculum constitutes a paradigm shift in rethinking and reconstituting the geography and biography of

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the 'African philosopher would at the very minimum be arguing for the liberation of African philosophy from the yoke of dominance and enslavement under the European (Western) epistemological paradigm.'' See also at 421, 'Azanian critical philosophy, then, may be understood as a discourse of outstanding liberation that understands its task in its contemporary guise as the exposition of this on-going un-freedom and its history and philosophy. Its sources include the very struggle for liberation since 1652 and its various artefacts in the form of oral literature, struggle songs, poetry, speeches and political pamphlets, as well as lengthier treatises and theoretical elaboration by its proponents.'

[18] Alton J. Templin 'The ideology of a chosen people: Afrikaner nationalism and the Ossewa Trek, 1938' (1999) 5 *Nations and Nationalism*, where Templin demonstrates that the great northwards migration of Afrikaaner people (also known as the Great Trek of 1834-1838) entailed various wars, skirmishes and altercations between the settlers and indigenous peoples – at the instance of each of these altercations, the Afrikaaner would always conquer and then (re)name the lands wherein the altercation unfolded. These new names were deliberate ploy to lay a cultural and symbolic claim of ownership of the newly conquered lands. Templin makes this argument by way of showing how some towns were named after the different leaders of the different leaders of the Voortrekkers, for example Louis Trigardt who had a town in the Northern Transvaal (now Limpopo province) named after him. In the Oranje Vrijstaat (now Free State Province) there is still a town named Vegkop which means 'Battle Mountain', this was named by the Afrikaaner grouping that was led by Sarel Cilliers, whom various streets are currently named after. Similar stories exist about other Voortrekker leaders such as Gerrit Maritz and Piet Retief (whom Pietermaritzburg is named after), Andries Pretorius (whom Pretoria, South Africa's capital city is named after).

[19] Dladla op cit note 15 at 471, '…are names that do not reflect the historical, political and cultural significance of these places in the history of their historical inhabitants.'

[20] Ibid.

[21] Ibid at 426.

[22] Ibid at 439.

knowledge.[23] This reading of history is one that specifically appreciates and is attentive to the problem of the hegemonic geo-epistemic configuration of the prevailing neo-colonial world.[24] The image 'geo-epistemic configuration' speaks to how the global setting prefers historical narratives and historiographies that emerge from the West and Europe whilst neglecting anything and everything that does not come from the West and Europe.

The core thrust of Dube and Moyo's insights is in their framing of the totality of a decolonial reading of history as a practical antithesis to what they refer to as 'historicide':

> …then historicide, located within the broader scope of epistemicide, connotes the extermination of and 'theft' of the histories of indigenous people. The decolonial epistemic perspective constitutes a central trope that denotes, in the words of Dastile and Ndlovu-Gatsheni (2013, 107), an 'alternative way of knowing, producing knowledge and imagining the world'.[25]

Dube and Moyo tease out the prevailing distortions and triumph of colonial normative curricula schemes in Zimbabwean schools, insisting that this is an anomaly,[26] considering that Zimbabwe has been politically decolonised since 1980. The exercise carried out by Dube and Moyo constitutes a valid illustrator of what it means to read history from a decolonial perspective and is thus relevant to what this chapter seeks to achieve.

[23] Bekithemba Dube & Nathan Moyo 'A decolonial reading of the history curriculum: towards undoing historicide for curricular justice for the Zimbabwean learner' (2022) 37 *Research Papers in Education* at 3.
[24] Ibid.
[25] Ibid at 4.
[26] This post-colonial anomaly validates the theoretical framing done in this thesis' chapter 2, where the chapter demonstrated that decolonisation concerns itself with prevailing vestigial force of colonialism more than colonialism itself per se.

3.3 Historicising copyright law in South Africa

3.3.1 Introduction

This chapter's decolonial reading of the history of copyright is divided into three epochal compartments: the pre-1910 era, the 1910 to 1996 era and the post-constitution era. The chapter insists that it is important to study the history of copyright in South Africa using this three-epoch method because these three cardinal points defined numerous socio-political changes in South Africa, and all of these were a product of changes in political ideology and the changes in personnel among the ruling political elite. In keeping with the Black Marxist methodology and Dialectical Materialism, in each of the three epochs, this chapter demonstrates the thesis of the centrality of Eurocentric copyright, the antithesis of the *Decolonial Turn*, and the synthesis of the pluriversal author.

The first epoch is the pre-1910 era. The foundations of copyright law are in the mid-1500s. However, most of the pre-1910 study of the history of copyright in South Africa spans between 1652 and 1910 because the year 1652 recorded the arrival of European settlers in South Africa. Between 1652 and 1910, the country underwent various stages of settler colonialism. This translated into the imposition of European laws on South Africa and her people and resulted in the Roman-Dutch and English Law common law traditions and heritages that persist to prevail to this day.

The colonial disorder is compounded by the numerous wars that factions of colonisers fought among each other, fighting for land, mineral wealth and political control of a country that did not belong to them in the first place.[27] Although there was a diversity in nationality and ethnicity of these settler colonial factions, the two dominant factions were the British and the Afrikaners.[28] The latter preferred Roman-Dutch common law traditions, which were in line with their common ancestry, whereas the former preferred English common law.[29] Depending on who had the upper hand at a specific time, Roman-Dutch Law and English Law enjoyed resonance in South Africa's

[27] Templin op cit note 18 at 398.
[28] Ibid.
[29] Frederik Daniël Jacobus Brand 'The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution.' (2009) 126 *SALJ* at 72.

legal setting.[30] The situation took a different turn in 1910 when South Africa was divided into four provinces under a state that was known as the Union of South Africa. The Union of South Africa came in the aftermath of the unity between British and Afrikaner colonial settlers following over a century of wars and bitter territorial disputes among each other.

Some critical legal scholars have argued that the 1910 moment signalled the unity of European colonial settlers in their quest to advance and deepen the racist subjugation of Black and other colonised people of South Africa.[31] In a similar vein, the period after 1910 transmuted into the harmonising of the legal traditions of the British and the Afrikaner.[32] It, therefore, is inevitable that this period of white settler unity had an impact on pre-1910 legislation in that it now had to reflect the epistemic ambitions and desires of this newfound romance between the British and the Afrikaner.[33]

Although South Africa was officially declared a republic in 1961, the second epoch spans from 1948 to 1994 – this is so because 1948 is the year when South Africa underwent an Afrikaner Right Wing turn following the victory of the National Party.[34] The National Party was a political formation whose ideological genesis eventually led to the creation of Apartheid South Africa,[35]

[30] Templin op cit note 18 at 402.
[31] Dladla op cit note 15 at 417.
[32] Joel Modiri *The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the 'Afterlife' of Colonial-apartheid* (unpublished PhD thesis, University of Pretoria, 2017) 111.
[33] Ibid at 112.
[34] Templin op cit note 18 at 415: 'The Nationalist [Party] victory of 79 to 74, although narrow, now allowed the Afrikaners to implement some of their major emphases of the past century. The continuing pro-Afrikaner emphasis on Republic, the deep uncertainty of future relations with the majority black population, and the new economic strengths of the Afrikaner middle class over the previous three or more decades, coalesced to make the year 1948 a major turning point in their culture.'
[35] Ibid at 405, Afrikaaner Nationalism may have officially triumphed in 1948, but this was only a culmination of a largely strong Afrikaaner nationalist sentiment that had been brewing in the British-Afrikaaner 1910 arrangement. Having formed the Union of South Africa in 1910, and divided the country into 4 territories, the Union still needed a united central government, this proved somewhat difficult to achieve, considering the bitter wars between the two factions, and inherent enmity. The first two presidents of the Union were Louis Botha (1910-1919) and Jan Christiaan Smuts (1919-1924) who were both considered as mediators between the varying factions. Things began to take a turn when James Barry Munnik Hertzog became president, he was a staunch Afrikaaner nationalist, and believed that Afrikaaner Nationalism should be definitive/constitutive of the post-1910 South Africa, this laid the ground for the 1948 moment. However, the National Party was formed outside of Hertzog, it was rather formed by a worser nationalist in the make of Daniel Francois Malan, who then won the 1948 elections and began to actively implement *gesuiwered* type of nationalism (purism/purist), one that aggressively advocated for segregation and brazen anti-Black racism.

rooted in the theory and praxis of segregation and the so-called 'separate development'. This turn also had an inevitable effect on legislation and the legal culture of the day.

The third epoch spans from 1996 to date. This epoch can be aptly referred to as the constitutional era because it is underpinned by the 1994 democratic breakthrough that led to the promulgation of South Africa's world-acclaimed Constitution, the Constitution of 1996. In many respects, the constitution of South Africa is very special – for example, it ended Apartheid political segregation, abolishing parliamentary sovereignty and substituting it with constitutional supremacy. The constitution also introduced a bundle of rights in the Bill of Rights; chief among these is its insistence on equality, human dignity, and various other human rights. This progress, particularly the supremacy of the Constitution, had the inevitable effect of ensuring a drastic change in legislation and legal culture because any law that was/is inconsistent with the values and ethos of the Constitution automatically became null and void.

3.3.2 Pre-1910

Pechacek lays down a brief history of South Africa's present-day legal order in his study titled 'The Past, Present, and Future of South Africa's Patent System'.[36] Pechacek notes that in the mid-17th century, settlers from the Netherlands colonised a territory of South Africa that is currently known as the Western Cape province.[37] In 1806, the British defeated the Dutch and annexed the Cape, making it fall into the control of the British Empire.[38] Even though the British had won the war against their fellow Dutch settlers, they did not immediately impose British law. As a result, the new colony continued to rely on Roman-Dutch common law legal traditions.[39] Although Roman-Dutch Law remained in place, it became overlaid with a heavy English law influence.[40]

Almost 100 years later, the Dutch fought another war against the British. Yet again, they were defeated – this was known as the Anglo-Boer war, which led to the British taking over the entire

[36] James T. Pechacek 'The past, present, and future of South Africa's patent system' (2012) 3 *Cybaris: An Intellectual Property Law Review* 188.
[37] Ibid at 190.
[38] Ibid.
[39] Ibid.
[40] Ibid.

territory of present-day South Africa.[41] It is this moment that led to the 1910 creation of the Union of South Africa.

British copyright law traces its origins to the Statute of Anne. This is linked to the commercial activities of the sixteenth century that had to do with the book trade.[42] The beginning of the eighteenth century is said to be the period where the notion that an author should be given an exclusive 'copyright' over their creation took shape.[43]

Although the Statute of Anne is said to be the first type of copyright law legislation in the world, Dean draws attention to the late 15th century in the city of Venice, where there was a developing system of granting monopolies and privileges for printing books.[44] In the United Kingdom, stationers (modern publishers were earlier known as stationers) were the proponents of exclusive rights against copiers, and they found an ally in the crown.[45] In 1534, stationers were granted secured protection against the importation of foreign books. In 1556, they were granted a charter which gave them the authority of craft to search and destroy books that were printed in contravention of statute or proclamation.[46] This charter allowed stationers to have some sort of a licensing system wherein lawfully printed books were entered into their register.[47]

Dean describes the eventual promulgation of the Statute of Anne as a watershed moment in the development of copyright law:

> [b]ecause for the first time the author was recognized as the cornerstone of a system for protecting literary works and the term of the monopoly granted by the state was of limited duration, namely twenty-eight years. The Statute of Anne thus changed the fundamental concepts of the protection of works of the intellect and it exercised a far reaching effect on the development of copyright throughout the civilized world.[48]

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[41] Ibid at 191.
[42] Bently & Sherman op cit note 36 ch 1 at 37.
[43] Llewelyn & Aplin op cit note 35 ch 1 at 395.
[44] Dean op cit note 3 at 4.
[45] Llewelyn & Aplin op cit note 35 ch 1 at 395.
[46] Ibid at 396.
[47] Ibid.
[48] Dean op cit note 3 at 6. The image 'civilised world' of course belongs in the colonial lexicography, and is unsurprising in this instance, considering that Dean wrote this thesis at the height of apartheid colonialism, wherein such language was acceptable. Dean uses this language throughout the thesis, sometimes using 'civilised countries' instead of

The Statute of Anne did not just grant a monopoly and related privileges, but it introduced the idea of copyright law duration. This development quickly spread through Europe, and it was evidenced in Denmark's copyright legislation in 1741, as well as French legislation in 1793.[49] Dean demonstrates that the first copyright law legislation that was applicable to South Africa was the British Literary Copyright Act of 1842, which effectively replaced/repealed the Statute of Anne.[50] The operative function of this legislation was to give copyright law protection to all works published in the United Kingdom, regardless of the nationality of the author. Due to imperial and colonial conquests, the legislation was also automatically applicable to all British Dominions.[51]

As regards South Africa's copyright law history prior to 1910, Dean demarcates the history of the adoption of copyright law legislation in South Africa's four pre-1910 self-governing[52] republics:

> The first of the South African colonies or republics to adopt copyright legislation was the Cape Colony which passed Act No. 4 of 1854 authorizing the importation of foreign reprints of books. This Act was followed by the Copyright Act, No. 2 of 1873, The Books Registry Act, No. 2 of 1888, The Copyright Protection and Books Registration Act, No. 18 of 1895, and The Copyright in Works of Art Act, No. 46 of 1905. The Natal Colony followed after the Cape Colony in introducing copyright legislation. The earliest copyright legislation in Natal was Ordinance 14 of 1856 which was to the same effect as Act No. 4 of 1854 adopted in the Cape Colony. This Ordinance was repealed by Act 9 of 1896 which was in turn repealed by the Copyright Act, No. 17 of 1897. This Act was followed by the Play Right's Act, No. 44 of 1898 which was subsequently amended by Act No. 18 of 1899. The Transvaal Republic followed the example of the Cape and Natal and introduced copyright legislation. The first statute was The Copyright Act, No. 2 of 1887. This law was modified slightly in the First Volksraad Resolution of June 20, 1895 - Article 420. This was followed by Proclamation No. 24 of 1902 which dealt with copyright in military maps. The Orange Free State Republic passed no copyright legislation during its existence as a separate territory.[53]

These four self-governing republics were to be united in 1910 and form the Union of South Africa – this is dealt with in the next subsection of this chapter. This bit of history, when studied through a decolonial lens and when applying Black Marxist methodology, exposes two salient realities: (1)

'civilised world'. Part of colonial worldmaking included the othering of peoples and countries from the global South, by insisting that they are primitive and subhuman, and that civilization (or the civilised world) means Europe and white.

[49] Ibid.

[50] Ibid at 7.

[51] This refers to all colonies and territories conquered by the United Kingdom.

[52] The four self-governing republics were: The Cape of Good Hope, Die Oranje Vrijstaat, Transvaal and the Natal.

[53] Dean op cit note 3 at 8.

colonial worldmaking, which sought to establish a global copyright system that only reflected Euro-American contingencies, and (2) the point of colonial contact, the coloniser sought to re-create Europe on African lands, and thus ignored to study local pieces of knowledge and systems as regards the protection/handling of intellectual property, particularly copyright.

3.3.3 From 1910 to 1996

Although this chapter frames 1910 to 1996 as a single epoch, it is important to mention that in 1948, South Africa underwent an Afrikaner turn. This is when apartheid became an official system of government.[54] This means that the Union of South Africa officially changed into the Republic of South Africa in 1961, following the triumph of the National Party and the creation of an apartheid state, which was eventually dissolved by the popular democratic elections of 1994.

Following the unity of Afrikaners and the British, the Union of South Africa was formed, and as a result, there was a move to unify the laws of the four former self-governing republics – in the context of intellectual property law, and indeed copyright law the change was affected as follows:

> Not long after the formation of the Union of South Africa in 1910, the Union Parliament passed the Patents, Trade Marks, Designs and Copyright Act, No. 9 of 1916. This Act repealed all the copyright legislation which had previously existed in the provinces which composed the Union. This Act marked the beginning of modern copyright in South Africa. The 1916 Act was a composite Act dealing with the laws of patents, designs, trade marks and copyright. Copyright was dealt with in Chapter 4 of the Act, in Sections 141 to 160, and in the Third Schedule to the Act. The Third Schedule consisted of the text of the Copyright Act 1911 of the Imperial Parliament, the 'so-called 'British Copyright Act'. Section 143 of the 1916 Act declared the British Copyright Act to be in force in South Africa, subject to certain modifications and additions provided for in Sections 141 to 160 of the 1916 Act. In other words, subject to minor alterations, the British Copyright Act was incorporated holus bolus into South African law. The 1916 Act and the Third Schedule contained provisions perpetuating copyright which subsisted in South Africa in works in existence prior to 1917. Such copyright was derived from the earlier South African legislation, i.e. the so-called 'Provincial Copyright Acts', the British Copyright Act of 1842, or from the Roman-Dutch common law.[55]

[54] Templin op cit note 18 at 415.
[55] Dean op cit note 3 at 9.

The 1916 legislation, although a local statute of the 'new' South Africa, still drew immensely from the British Copyright Act of 1911, which was promulgated in the United Kingdom just a year after the establishment of the Union of South Africa.[56] The 1911 Act was important in the following respects: (1) it abolished the rights to unpublished works that were often called copyright under common law, (2) it established a single code that conferred copyright protection on a number of works, and (3) it abandoned all requirements concerning formalities.[57] Another evolutionary aspect of the 1911 Act is that it reflected the global (European) currents in that it introduced a multi-national recognition and protection of copyright in works created by authors connected to a Member State of the Berne Convention for the Protection of Literary and Artistic Works of 1886, or if the works were first published in the territory of a Member State – this was within the perimeters of what is known as the principle of national treatment.[58] Cornish, Lewellyn and Aplin accordingly explain:

> Berne's first requirement is that each Member State must follow the principle of national treatment, itself a product of the idea of territoriality. This is organised through the concept of 'country of origin' of the work. Where possible this is the country of first publication, rather the author's nationality or habitual residence, an approach which makes for simplicity, particularly where there is more than one author. Where the country of origin is a Berne State, other members must accord to the work the same treatment as they offer their own nationals.[59]

The promulgation of the Copyright Act of 1956 eventually repealed the 1911 Act. The 1956 Act was fraught with ineptitudes such that it had to be amended a couple of times between its inception and 1977 when it was finally put under review, which proposed a general revision of the Act.[60] The 1977 review process inevitably led to the promulgation of the Copyright, Designs and Patents Act of 1988 (CDPA). The CDPA is said to be a product of leaps in technological development

[56] Bently & Sherman op cit note 36 ch 1 at 37.
[57] Ibid.
[58] Llewelyn & Aplin op cit note 35 ch 1 at 400. The Berne Convention deals with the protection of works and the rights of their authors. The convention based on three basic principles, (1) the reciprocal recognition of copyright between member states – this means that a state is compelled to protect the copyright vesting in the work of an author from a different state in the same way that it would protect the copyright of an author from their own state, (2) automatic protection – this means that there must be no prescribed formalities to be complied with for protection to subsist, and (3) independence of protection – this means that protection is independent of the existence of protection in the country of origin of the work.
[59] Ibid at 411.
[60] Bently & Sherman op cit note 36 ch 1 at 38.

post-World War II and the necessity for copyright law adjustments.[61] CDPA's difference from both the 1911 and 1957 legislations is that it considers a technological advancement that presupposed a digital future – it understood that if copyright was to survive the impact of modern technology, the praxis of copyright law had to be adapted.[62]

The process of streamlining the laws of the 'new' South Africa entailed the inevitable struggle between British law and Roman-Dutch law influences. In some areas of law, British legal traditions emerged superior, whilst in others, Roman-Dutch law traditions prevailed. In limited instances, the two were able to merge to create unified legal systems that mirror the political currents of the day.

The 1948 moment is important for this segment's canvassing of history because it marked a specific shift in the legal epistemic currents that defined law-making in South Africa. Although the 1910 Union of South Africa presented a romantic relationship between the British and the Afrikaner, the 1948 moment tilted things towards Afrikanerdom. The Afrikaners were no longer in perpetual conflict with the British. Still, they felt the need to assert themselves as independent of the crown, and this was reflected in the promulgation of their home-grown legislation.[63] Crucial to copyright law development, by the time the British promulgated the CDPA in 1988, Apartheid South Africa already had the Copyright 98 of 1978. This Act remains the primary legislation that governs copyright law in South Africa to date.

In keeping with the Black Marxist methodology, the reading of dialectical materialism as represented in the formula "Eurocentric Copyright + the *Decolonial Turn* = Pluriversal Author", I argue that the decolonial reading of history as regards the 1910 to 1996 epoch suggests that Eurocentric Copyright is the thesis. The antithesis, as presented by the *Decolonial Turn,* requires that we demonstrate that other histories of copyright development spoke specifically to the exigencies of Black and colonised peoples. These are stories that do not feature in the official

[61] Llewelyn & Aplin op cit note 35 ch 1 at 405.
[62] Ibid.
[63] The Apartheid era had a few notorious unique homegrown legislations, examples of these include The Prohibition of Mixed Marriages Act of 1949, The Immorality Amendment Act of 1950, Industrial Conciliation Act of 1956, Native Laws Amendment Act of 1952, The Bantu Authorities Act of 1952, Group Areas Act of 1957 and others.

history of the development of copyright law. Instead, the lived experiences of Black and colonised peoples are ignored and never taken into account when copyright is historically developed.

Although numerous examples can be made, I shall only rely on the Solomon Linda story.[64] In brief detail, the story is as follows: Linda was a popular South African singer/artist from 1931 until he died in 1962. Linda worked for a recording company, Gallo Records, to whom he sold the rights to his iconic song "Mbube" for 10 shillings (less than US$2). The original South African recording of the song was discovered during the early 1950s by American musicologist Alan Lomax, who shared it with his friend, Pete Seeger. The song was refashioned into a somewhat different song but kept its original phonetics. Renamed from *Mbube* to "The Lion Sleeps Tonight", the song became a Top 20 hit in the United States of America in 1952.

Controversy arose only in 2004 when Linda's descendants initiated legal action against The Walt Disney Company for using the song in the Lion King movie without paying royalties to them. Whereas most discussions about the Linda story centre on the eventual outcome of the matter, I invoke it in this chapter to demonstrate Linda's disenfranchisement, not merely as an artist, but also as a Black person existing under racist colonial conditions. As explained in this segment of the chapter, there were advances in the development of copyright in South Africa during this period. Yet, those developments were inattentive to the particularity of racist/colonial subjugation of black people, which, like Linda, made them even more vulnerable to products of their craft being unfairly misappropriated. The thesis is able to posit this critique by way of dialectically presenting the *Decolonial Turn* as an anti-thesis. This sort of approach, especially to the Linda story, is supported by scholars like Erlmann, who call for an anthropological/ethnographic study of copyright.[65]

[64] The Solomon Linda story has been written about widely, although not from a decolonial perspective, it has been studied by numerous scholars, see for example Veit Erlmann *Lion's Share: Remaking South African Copyright* (2022) Duke University Press, Durham, see also Dalinyebo Shabalala 'Do we need exit rules for traditional knowledge? Lessons from Solomon Linda and the 'Mbube/The Lion Sleeps Tonight' case' (2023) 12 *Queen Mary Journal of Intellectual Property* 532, see also Matome Ratiba '"The sleeping lion needed protection" – lessons from the Mbube (Lion King) debacle' (2012) 7 *Journal of International Commercial Law and Technology* 1.

[65] See generally, Erlmann op cit note 64. Erlmann's insights are explained in more succinct detail by Stacey in Cara Stacey 'Erlmann, Veit. Lion's Share: Remaking South African Copyright' (2024) 20 Yearbook for Traditional Music 1.

3.3.4 The Constitutional era

Following the historic democratic elections on the 27th of April 1994, South Africa took a new political path that eventually led to the promulgation of its world-acclaimed constitution, the Constitution of 1996. There are various historical accounts of this watershed moment. Still, the most important aspect of the promulgation of the constitution was that it transformed South Africa from a system of parliamentary sovereignty to a system of constitutional supremacy.

There are several notable critiques of South Africa's constitution – these vary in many respects,[66] but none disagrees that it was an epoch-defining moment.[67] Notwithstanding all the criticism against it, the constitutional order brought about drastic changes to the South African legal system. Apart from ending segregation, the Constitution introduced provisions that recognise traditional leadership and the acceptance of traditional customary law into the broader legal system. These are provided for in sections 211 and 212 of the Constitution. The latter specifically provides for the recognition of traditional leaders, and it is ground breaking in the sense that it sought to reconcile the constitutional moment with the fact that the colonial order did away with traditional systems of leadership. The glaring limiting of this constitutional recognition of traditional leaders and African customary law is that it ignores restoring property that was stolen from traditional leaders, including land. On the same score, some scholars have argued that constitutional recognition makes a complete mockery of the institution of traditional leadership precisely because

[66] For examples of critiques of South Africa's constitution (and constitutionalism generally) see, Mogobe Ramose, 'Towards a post-conquest South Africa: Beyond the Constitution of 1996' (2018) 34 *SAJHR* 326; see also Ntando Sindane, 'Why decolonisation and not transformative constitutionalism' (2021) 15 *Pretoria Student LRJ* 236, see also Ntando Sindane 'Contested legacies of the South African Constitution: An engagement with Albie Sachs's Oliver Tambo's Dream' (2019) 34 *SAPLJ* 1; see also Tshepo Madlingozi, 'Post-Apartheid social movements and the quest for the elusive 'New' South Africa' (2007) 34 *Journal of Law and Society* 77; see also Tshepo Madlingozi, 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stellenbosch LR* 123; see also Joel Modiri, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *SAJHR* 300-325, see also Joel Modiri, 'The colour of law, power and knowledge: Introducing critical race theory in (post-)apartheid South Africa' (2012) 28(3) *SAJHR* 405; see also Dladla op cit note 15; see also Karin van Marle 'Hold onto critical jurisprudence' (2019) 23 *Law, Democracy & Development* 202.

[67] The constitution as an epoch defining moment is discussed at length by Delport, see for example, Terblanche Delport 'An ethical (anti-)constitutionalism? Transformation for a transfigured public' (2014) 46 *Acta Academica* 104, where he broadly borrows from Enrique Dussel's 'ethics of liberation' to study the constitutional moment, he argues that constitutional supremacy is a performative system in the sense that it claims superiority yet does not create a specific legal infrastructure that can put it into force.

it mocks and distorts African epistemology by saying that African ideas are accept- able only insofar as they can be reconciled with the Western conception of law.[68]

The idea of constitutional supremacy in a constitutional democracy presupposes a complete change in legal culture – this means that institutions of the state and their functionaries must align themselves to the politics of the Constitution and jettison pre-constitutional norms. This is encapsulated in a theory of Transformative Constitutionalism as developed and advanced by scholars such as Karl Klare, Ettienne Muereinik,[69] Andre van der Walt,[70] Pius Langa CJ,[71] Karin

[68] Zitzke op cit note 118 ch 2..

[69] Etienne Mureinik 'A bridge to where - introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

[70] Andre van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina Journal of Legal History* 1. For example, van der Walt uses this article to retell the history of South Africa's transition between 1989-1994 from the lens of privileged white South Africans. See at 4, he explains that there was a large grouping of white people who were fearful of the prospects of a Black majority government, this translated into their distrust of the constitutional project and its transformative aspirations. The thesis of van der Walt's argument is that there are e links between legal history, legal tradition and legal culture. See at 17, he draws from Karl Klare to lay out a definitional framework of Transformative Constitutionalism: 'In a particular legal culture, Klare argued, lawyers are trained and socialised to regard the intellectual sensibilities and assumptions of that culture as normal; to see the authority and force of its arguments as something innate to the types of argument used and not as contingent cultural artifacts. In the absence of critical reflection, lawyers become so deeply embedded in their legal culture that they are 'unaware or only partially attentive to' the power of the cultural code to shape their ideas and steer their reaction to legal problems – lawyers often do not even realise that their unarticulated assumptions and their expressed views about what constitutes a legal problem, a source of legal authority or a convincing legal argument are culturally determined. As a consequence, lawyers are often unaware of the difficulties involved in envisioning or developing the legal processes that would constitute or promote legal transformation, because they do not acknowledge the restraining and inhibiting effect of legal culture on their thinking about the law.'

[71] Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch LR* 351. See at 353, Langa illustrates the transformative constitutionalist expectation that a transformed legal culture requires a shift from the culture of authority to that of justification: 'The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values'

van Marle,[72] Dikgang Moseneke,[73] Dennis Davis,[74] Henk Botha[75] and others. Klare defines Transformative Constitutionalism as follows:

> By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.[76]

Klare particularly explains that Transformative Constitutionalism, as a theory of adjudication, translates into a substantive change in how courts preside over all the matters before them. This transformation is underpinned by constitutional values as contained in the Bill of Rights:

> Among types of law-making, adjudication is, or is supposed to be, the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule, and principle. We may therefore legitimately expect constitutional adjudication to innovate and model intellectual and institutional practices appropriate to a culture of justification. Continued attention to adjudication should accordingly illuminate South Africa's steps across the bridge. Adjudication uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice. On the other hand, that South Africans opted to accomplish some significant portion of their law-making through adjudication is a decision fraught with institutional consequences. At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as yet unknowable extent. Assigning any significant amount of lawmaking functions to judges (there is room for debate about how

[72] Karin van Marle 'Transformative constitutionalism as/and critique' (2009) 20 *Stellenbosch LR* 286. The genesis of Karin's argument is that beyond being a theory of adjudication and a clarion call for a shift from a culture of authority to justification, Transformative Constitutionalism should be understood as the need for a deepened judicial introspection and continuing/unceasing critique of societal structures of power and control.

[73] Dikgang Moseneke 'Transformative constitutionalism: Its implications for the law of contract' (2009) 20 *Stellenbosch LR* 3. Moseneke draws from his earlier lecture/writings on this subject to drive point the argument that constitutionalism in the pretext of Transformative Constitutionalism is not just a public law instrument but is the mainstay in all areas of law, including private law.

[74] Dennis M Davis & Karl Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403.

[75] Henk Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *SAJHR* 249.

[76] Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* at 150.

> far South Africa has actually gone in this direction, but surely the steps are significant) likely has additional, if less obvious, consequences.[77]

Klare bases his formulation of Transformative Constitutionalism on Mureinik's earlier metaphor of 'the bridge', where Mureinik likens the democratic constitution to a metaphorical bridge from a culture of authority to a culture of justification.[78] Another important feature of Transformative Constitutionalism is that it calls for a value-laden polity that jealously embraces social justice, fairness, equality, democracy, and human dignity.[79] These constitutional values can be referred to as the politics that should guide the adjudication of the law in South Africa – these are a measure of the collective goals, morals and aspirations of the people of South Africa as they continuously seek to chart a new path and break free from the racist polity of their apartheid past. Transformative Constitutionalism entails a post-liberal reading of the constitution – this is a comprehension of the constitution as neither emphasising collective rights over individual rights or vice versa, but rather understanding that the two are not mutually exclusive.[80]

Transformative Constitutionalism calls for intellectual, political, and ideological candidness in how lawyers, judges and academics relate to legal questions. Klare insists that neutrality is a mythical fiction that belongs in the past, that there should be honesty about each's predispositions, and that this will lead to a progressive reading of the ideals contained in the Constitution.[81]

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[77] Ibid at 147.

[78] See for example Mureinik op cit note 70 at 32, 'What the bridge is from is a culture of authority. Legally, the apartheid order rested on the doctrine of Parliamentary sovereignty. Universally, that doctrine teaches that what Parliament says is law, without the need to offer justification to the courts. In South Africa, since Parliament was elected only by a minority, the doctrine taught also that what Parliament said was law, without a need to justify even to those governed by the law. The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience…If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.'

[79] Klare op cit note 77 at 150. Klare is attentive of the fact that values are a contested concept in legal discourse, see for example at 158, 'But any mention of "values external to the text" or "extra-legal considerations" risks catering to a breach of the norm of interpretive fidelity, an unsettling prospect for mainstream thinking about adjudication. Most of contemporary jurisprudence consists of efforts to suppress or minimize this danger. The goal is to maintain the law/politics boundary by describing rational decision-procedures (deduction, balancing, purposive reasoning, etc.) with which to arrive at determinate legal outcomes from neutral, consensus-based general principles expressed or immanent within a legal order'.

[80] Ibid at 153.

[81] Ibid at 163.

One of the more recent writings about Transformative Constitutionalism is penned by Davis in 'Transformative Constitutionalism: What does it mean in 2021'.[82] Davis begins this treatise by demonstrating how conceptions of Transformative Constitutionalism have developed immensely since the concept was first introduced by Klare in 1998.[83] He immediately opines that some intervening interlocutory has had the habit of misreading and limiting Transformative Constitutionalism to merely a theory of adjudication and thus fail to appreciate it as a call for a deepened sociological imagination which would develop a jurisprudence to ensure the vindication of South Africa's constitutional promises.[84] Klare's fundamental argument, according to Davis, is that the constitution has an untapped potential to be a definitive tool to transform South Africa from its racist and sexist present into an egalitarian society.[85]

Of course, Transformative Constitutionalism, as a theory of adjudication, emphatically speaks to the need for a transformative approach and a constitutionally infused interpretation of legislation. However, this is just one aspect of the concept, one that the interlocutors of Klare tend to over-emphasise. Davis observes that, as a result of this religious-like focus on the interpretative aspirations of Transformative Constitutionalism, many law scholars have neglected to grapple with other meanings/conceptions of Transformative Constitutionalism fully.[86] Davis is at pains to explain that the thrust of a transformative theory of adjudication would be an exercise in futility if a broader societal transformation does not accompany such a theory.[87] The egalitarian society that is envisioned by the constitution means that beyond the defeat of common law purist and positivist jurisprudence, there is a need for a socio-legal polity that radically resolves the colonial architecture of poverty, unemployment, racism, sexism, landlessness, et cetera.[88]

At a practical level and with relevance to the subject of copyright law, the Transformative Constitutionalist notion of a change in legal culture means that the constitution transmutes from being merely invoked in public law adjudication to become an all-encompassing instrument that

[82] Dennis Davis 'Transformative constitutionalism: What does it mean in 2021.' (2021) 4 *South African Juridical Education Journal* 19.
[83] Ibid at 20.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid at 22.
[88] Ibid.

courts should heed in all disputes before them.[89] This means that in the constitutional era, copyright law, just like other intellectual property laws, ceased from being merely matters of private/mercantile law but became part of the all-encompassing constitutional realm. However, the reality is that there exists a habit of constitutional avoidance in intellectual property law adjudication. Intellectual property law, and indeed copyright law jurists, are steeped in apartheid and positivist habits of neglecting their obligation to always adjudicate cases before them from a constitutional law lens and methodology.

Van der Walt and Shay observe that the constitutional court has nurtured a robust methodology for determining the validity of state regulation of new and existing property rights. Yet, there seems to be a neglect of intellectual property law and intellectual property rights.[90] Shay and Van der Walt[91] proffer a constitutional analysis of intellectual property rights[92] that, among other things, demonstrate a perfunctory adjudication of intellectual property rights as they relate to the Constitution – this is what is known as constitutional avoidance.[93]

Constitutional avoidance is a common feature in the post-1994 dispensation – it appears that there continues to exist a disciplinary decadence where private/mercantile law is still perceived as distant from constitutional law expectations/obligations. This is indeed true to intellectual property law, to the extent that various scholars have ventured to show that intellectual property law is property under the auspices of section 25 of the constitution. Du Bois is one such scholar. She observes that

[89] Moseneke op cite note 74 at 5: 'Put otherwise, our constitutional dispensation does not limit its reach to the classical liberal divide between private and state action. It recognises that breaches of fundamental rights ought to be vindicated even if they occur between private parties. There are of course obligations that the Constitution imposes on the state only. But fundamental rights may apply to natural and juristic persons. This is so because 'law or conduct' inconsistent with the Constitution is invalid and because the Bill of Rights applies to 'all law' and may bind natural or juristic persons.'

[90] Andre van der Walt & Richard Shay 'Constitutional analysis of intellectual property' (2014) 17 *PELJ* 52.

[91] Ibid at 63, for example, they observe, 'However, the purpose of the property clause must be kept in mind when applying it to intellectual property interests. One obvious factor that sets intellectual property apart from land and one of the causes for a property clause being included in the Constitution is that land was previously the subject of extensive state abuse by means of unjust eviction, whereas similar injustices cannot be said to have occurred with intellectual property, or at least not on the same scale.'

[92] Ibid at 64, where they observe, 'One consideration that should feature prominently in the constitutional inquiry as applied to intellectual property is the role of the property rights regime. The purpose of awarding property rights in creative works, inventions, and commercial names and marks is naturally very different from the function of property rights in corporeal property. The private property status of intellectual property rights tends to afford it moral and legal primacy in many parts of the world.'

[93] As regards the essence of constitutional avoidance, see generally, Zitzke op cit note 118 ch 2.

there is confusion[94] about whether intellectual property is property in terms of section 25 of the constitution and engages in a study to establish definitional clarity as regards this purported confusion.[95] Du Bois' point of entry illustrates that the protection of intellectual property rights in private law differs from that in constitutional law – she observes:

> In private law, the purpose is to obtain strong property rule-type protection for private rights against competing private parties. In constitutional law, recognition and protection provide a Bill of Rights-type protection for private interests against the state or competing constitutional and other rights of other private parties. This is done by weighing up the competing rights. South African intellectual property law already protects intellectual property rights reasonably strongly by way of legislation. The important question is whether these rights could enjoy constitutional protection in addition to their private law or statutory protection, because the private law or statutory protection does not extend to the purposes of constitutional threats and conflicts.[96]

Du Bois' remarks allow for a logical, and yet metaphorical, deduction that says there is a very thin line between private law rights and rights that arise from the constitution where intellectual property law is concerned.

An illustration of a brazen form of constitutional avoidance in intellectual property adjudication is verbosely unpacked by Shay and Moleya's methodological critique of the court's decision in

[94] There shouldn't be any confusion as regards the constitutional recognition of intellectual property because this was cogently clarified by the constitutional court in *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26, the *'Certification case'* see par 75, 'A further objection lodged was that the NT fails to recognise a right to intellectual property. Once again, the objection was based on the proposition that the right advocated is a 'universally accepted fundamental right, freedom and civil liberty'. Although it is true that many international conventions recognise a right to intellectual property it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies. It is also true that some of the more recent constitutions, particularly in Eastern Europe, do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted. In the circumstances, the objection cannot be sustained.' The courts findings are carefully unpacked by Du Bois, see Mikhalien Kellerman *The Constitutional Property Clause and Immaterial Property Interests* (unpublished LLD thesis, Stellenbosch University, 2011).

[95] Mikhalien du Bois 'Intellectual property as a constitutional property right: The South African approach' (2012) 24 *SAMLJ* 177.

[96] Ibid at 178.

Discovery Ltd v Liberty Group Ltd[97] 2020 4 SA 160 (GJ).[98] The duo take issue not with the court's final findings but rather with how the court arrived at its decision:

> Although we have no qualms about the outcome of the case, and indeed we generally agree that the correct outcome was reached in this decision, the methodological approach adopted in arriving at the outcome is unattractive. The court sidelined significant constitutional questions regarding the applicability of competitors' commercial speech and other provisions supporting the public interest. The argument developed here is that the court should have formally identified Liberty's use (and assess the impact of competing rights on it) and consequently located it on the constitutional normative framework, as opposed to simply categorising it as non-trademark use. A similar approach (which formally recognises Liberty's use as a protectable interest) should have been adopted when resolving the competition law claim. The court's approach on the trade mark dispute arguably veered off the path charted by the Constitutional Court in *Laugh It Off* and undermines the constitutional injunction, clearly enunciated in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* In re: *Hyundai Motor Distributors (Pty) Ltd v Smit* and *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Afric*a, to interpret all law in line with the Constitution.[99]

Shay and Moleya observe that the court accepted and applied a methodologically flawed approach that is embraced by the Supreme Court of Appeal[100] in that it ignored potential countervailing and

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[97] Although this is a case in patent law (instead of copyright law), it is relied on purely for illustrative purposes, and although the argument advanced is that there is general constitutional avoidance in intellectual property law jurisprudence, it does not mean that our courts have completely neglected responding to constitutional questions in relation to intellectual property. There have been court judgments where the court asserted itself on intellectual property disputes decisively, see for example, *Laugh It Off Promotions CC v South African Breweries International (Finance) B.V. t/a Sabmark International* CCT 42/04, where the court had to decide on a dispute about the proper interpretation of the anti-dilution provision, section 34(1)(c), of the Trade Marks Act in light of section 16 of the Constitution. See also *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33, where the court handed down a judgment to confirm the order of constitutional invalidity that was made by the High Court in Pretoria, which declared that unconstitutionality of sections 6 and 7, read with section 23, of the Copyright Act 98 of 1978. The court further confirmed that this unconstitutionality stems from the fact that the aforesaid provisions infringed the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution.

[98] Richard Shay & Ndivhuwo Moleya 'Discovering the value of liberty in intellectual property adjudication: A methodological critique of the reasoning in Discovery Ltd v Liberty Group Ltd 2020 4 SA 160 (GJ)' (2021) 24 *PELJ* at 1.

[99] Ibid at 3.

[100] Ibid at 14: 'A similarly flawed approach was adopted by the SCA in *Laugh It Off* SCA. The court anteriorly determined whether the applicant's conduct infringed section 34(1)(c) and considered whether the infringement was excused by freedom of expression only secondarily. The approach was unanimously rejected by the Constitutional Court on appeal. The Constitutional Court reasoned that a finding of infringement hinged on 'whether the offending expression is protected under section 16(1) of the Constitution or not.' If protected, 'what is unfair or detrimental, or not' under section 34(1)(c) must 'be mediated against the competing claim for free expression.' The Constitutional

complementary constitutional interests when determining whether there was an infringement of the trademark rights under section 34(1)(a) and section 34(1)(c) of the Trade Marks Act 194 of 1993 in a different matter.[101] This speaks to the heart of the crisis of constitutional avoidance in intellectual property rights jurisprudence, where judges stick to pre-1994 habits of relying on legislation and common law without regard to the Constitution. What can be gleaned from Shay and Moleya's analysis is that although courts can arrive at legally sound outcomes without relying on the constitutional imperatives, commitments, and obligations, this is methodologically flawed because it is not in line with the politics of the post-1994 dispensation, the politics of constitutionalism. The supremacy of the constitution makes it compulsory for courts to rely on constitutional methodology when hearing cases before them – this is inclusive of those cases where they could have arrived at a just conclusion even without considering constitutional imperatives.

Shay and Moleya appreciate that the court's insistence on a somewhat positivist reading and conception of trade mark infringement is a missed opportunity for the court to give effect to constitutional jurisprudence.[102] Constitutional avoidance is particularly dangerous because it fails to appreciate that pre-democracy legislation may appear as not espousing apartheid racist and segregationist values, but upon closer inspection, it becomes clear that Apartheid legislation was never intended for the new South Africa – under the value systems of the constitution.[103] As a result, it becomes very important for courts to always consider constitutional values whenever adjudicating matters before them, regardless of the possibility of relying solely on legislation.

In the constitutional era, copyright is presently adjudicated by way of its primary legislation, the Copyright Act 98 of 1978. Apart from the fact that this is apartheid legislation, there exists an uncontested hypothesis that when this legislation was promulgated, its drafters never imagined that South Africa would one day become a constitutional democracy:

Court reasoned that the SCA's flawed approach 'prevents an understanding of the internal requirements of the section through the lens of the Constitution.' The approach clearly privileges trademark rights as it considers only the effect of the expressive conduct on the well-known trade mark and allows this outcome to determine the constitutional protectability of the speech.'

[101] Ibid at 7-8.

[102] Ibid at 8.

[103] Ibid at 10.

> It is obvious that the Copyright Act-promulgated in 1978 and only scantly revisited since was not intended to give effect to a constitutional right or value, and thus exposes itself to purposive interpretation or, failing that, to direct challenge.[104]

This background allows for an appreciation of why constitutional avoidance in intellectual property adjudication is such a crucial issue. Constitutional avoidance and sole reliance on legislation and common law effectively become a stumbling block in the transformative work that the Constitution seeks to do. For example, pre-democracy legislation, when not studied through the lens of constitutionalism, is secluded from transformative development. Concepts such as authorship in copyright law remain epistemically stagnant and thus undeveloped precisely because intellectual property jurisprudence cleavages them from constitutional imperatives and obligations.

The concept of Transformative Constitutionalism presupposes that all legislation, including that which governs copyright law, should be read in a manner that not only promotes the values espoused by the Bill of Rights but also the transformative aspirations of the Constitution. This becomes a difficult task when considering that some legislation, including the Copyright Act 98 of 1978, was never intended for the democratic, non-racial, and non-sexist society that we currently exist in. This reality wrongfully justifies the brazen constitutional avoidance that defines intellectual property law jurisprudence currently – moreover, copyright law concepts, such as authorship, remain steeped in racist pre-democracy (and therefore colonial) epistemic and intellectual traditions.

The constitutional era is rife with opportunities and possibilities for substantive growth and development, but the lack of constitutionalist culture in intellectual property jurisprudence stifles these. Whereas other areas of law have embraced the democratic breakthrough as the coming into being of a new culture, intellectual property jurisprudence has remained firmly in apartheid positivist and constitutional denialist attitudes. This reality implies that intellectual property law concepts, including copyright law, remain largely unchecked – they continue to reflect the epistemic desires, aspirations, and norms of the racist pre-democratic era.

[104] Van der Walt & Shay op cit note 91 at 77.

To compound the issues, it is within this very constitutional era that intellectual property law has been called upon to not only transform by way of constitutionalist demands but also to undergo wholesale conceptual and epistemic decolonisation. As explained in the introductory segment of this chapter, and as unpacked in Chapter 2, South Africa underwent a *Decolonial Turn* in the 2015/2016 period, wherein university[105] and TVET students demanded higher education to be decolonised. The demand for higher education to be decolonised meant that every facet of South Africa's tertiary-level education system had to be put under academic, intellectual and ideological scrutiny and introspection. These included systems of education management, institutional culture, fee structures, funding models, and, eventually, the curriculum in its entirety.

This *Decolonial Turn* poses a challenge to the epistemological framework of copyright law in the context of the 1994 democratic breakthrough and its accompanying constitutional promise. The *Decolonial Turn* takes the legal transformative project a step slightly further than Transformative Constitutionalism because it *inter alia* critiques the very notion of equality as espoused by the Constitution.[106] Decolonial suppositions assert that the constitutional moment did not resolve the colonial dehumanization of colonised people and that there thus can never be a substantive realization of equality between the coloniser and the colonised in the afterlife of colonialism precisely because the latter remain dehumanised.[107]

The implications of constitutional avoidance, when studied through the reality of the *Decolonial Turn,* provide a bleak synopsis as regards the transformation of copyright law specifically and intellectual property rights generally. Simply put, rampant constitutional avoidance in intellectual property rights jurisprudence makes it largely untransformed, and its failure to recognise the constitutional moment makes it ripe for the sort of intellectual scrutiny called upon by the *Decolonial Turn*.

[105] The problematic of a colonised university continues to persist, even in the aftermath of the #MustFallMoment, this is studied carefully by Sooliman and Yousuf in Quraysha Ismail Sooliman & Iram Yousuf 'Space and approach in 'The Virtuous City': A tale of two universities: Re-imagining and reconstruction of the westernised South African university' (2021) 43 *Strategic Review for Southern Africa* 125.
[106] Sindane op cit note 67 at 243.
[107] Ibid.

3.3.5 Concluding analysis

This segment's reading of history is helpful in laying a firm foundation for the critique of existing conceptions of the meaning of an author in copyright law. History lends perspective, and this cannot be explained better than by way of an isiZulu idiom that says *'indlela ibuzwa kwabaphambili'*, loosely translated. This means that details about the road should be asked of those who are ahead and those who have travelled the road before. This isiZulu idiom underscores the importance of extensively grappling with history, both in its generality and specificity, when seeking to chart a way forward. The project to decolonise copyright law and its definitional paradigm as it relates to authorship is a forward-looking endeavour and, therefore, requires a careful mapping out of selected aspects of history.

This chapter used the Black Marxist dialectical method (as laid out in the first chapter) to study the history of the development of copyright law from a decolonial perspective. Drawing from the three-epoch method historicization of copyright law history, four takeouts can be observed:

The first is that copyright law, as currently understood, finds its genesis in Europe and, therefore, leans heavily on Eurocentric conceptions, formulations, and related developments for its progress. The second is that the history of copyright is effectively the history of European copyright because this history places Europe at the centre and the rest of the world in the periphery – for example, this history concerns itself with how Europeans sought to protect copyrightable works without investigating how societies outside of Europe achieved the same. The third is that South Africa's socio-political transitions make its copyright law conceptions a unique mix of different legislative imperatives, each depending on the powers that be at a specific epoch of South Africa's state. Simply put, copyright law reflected British epistemic traditions at the height of British colonialism whilst reflecting Roman-Dutch epistemic traditions when the Afrikaner were at the helm of the South African state. The fourth is that, on paper, current copyright law conceptions should reflect constitutionalist epistemic patterns, but they do not because the intellectual property episteme has yet to transition from apartheid to constitutionalism ideologically – this is what is known as constitutional avoidance.

3.4 Conclusion

In summation, this chapter has done two things: (1) explain and qualify the essence of the decolonial reading of history – it found that there is a need to reflect and think anew about how the history is read because present readings are reflections of the singular/universalist worldview. This is indeed true as regards the history of copyright law, and (2) the story of copyright law can be understood better when told by way of a three-epoch method because this method situates developments in copyright law in the context of the politico-historical shifts in South Africa.

Having canvassed the history of copyright law in South Africa from the lens of decolonial theory and other critical radical perspectives, it is apt to conclude that this doctoral project's objective is crucial in the sense that it sets out to tell an alternative history of how colonised peoples, Africans, Black people and peoples from the global South conceive of concepts such as copyright generally and authorship specifically. As set out in the first two chapters, this thesis insists that the *Decolonial Turn* leads to an epistemic pluriverse: this is a world where many worlds exist and, therefore, a world where many histories exist alongside each other. These first three chapters lay the ground for the telling of histories and epistemologies of other worlds – these histories tell an alternative (hi)story of the essence and form of an author in copyright law. Alternative histories and conceptions of authorship in copyright law allow for Abezimu/Badimo (ancestors) to be accepted as an author in epistemically-pluriversal copyright law epistemologies – this is argued in the next chapter.

CHAPTER FOUR: AUTHENTICATING ABEZIMU/BADIMO AS AUTHOR IN COPYRIGHT LAW

4.1 Introduction

Then I heard a voice from heaven say, 'Write this: Blessed are the dead who die in the Lord from now on.'

'Yes,' says the Spirit, 'they will rest from their labor, for their deeds will follow them.'

- Revelations 14:13 (New International Version)

The claim that, in a decolonised copyright law, Abezimu/Badimo (ancestors) are an author is canvassed in this chapter - it is sufficient to assert that this thesis argues that the current definition of authorship in copyright law is incomplete because it does not include and reflect the epistemic traditions of the global South. In this intervention, the specific epistemic tradition of the global South that is being referred to is the African reverence/deference in Abezimu/Badimo (ancestors).

Africans and Black peoples believe in the very visible hand of ancestors in their lives.[1] This thesis defines and delineates the essence of Abezimu/Badimo – this is to qualify why there is a shade of difference in the meanings and translations of ancestors as understood in English and ancestors (Abezimu/Badimo) as understood in African epistemic systems.

Authorship, as per current copyright law strictures, is limited to legal subjects. Legal subjects are human beings who are capable of being bearers of rights (crucial to note that although the emphasis is on human authors, current copyright law strictures allow for a non-human author; this is catered for within the ambit of section 1(1), which provides for juristic persons as author). Authorship is, therefore, directly proportional to how legal subjectivity is understood in existing legal philosophy.[2]

[1] In shying away from making sweeping generalisations, this chapters notes that statements as regards African belief in ancestors are nuanced. What this means is that I recognize the vastness and diversity of Africa and its people, thus some of these statements may not find universal applicability.

[2] There is recent academic literature on giving legal personhood to spirits/ancestors, and developing this area of law, see for example Matthias Kramm 'When a river becomes a person' (2020) 21 *Journal of Human Development and Capabilities* 307, where he studies the according of Whanganui River the status of a legal person in New Zealand,

A decisive shift from current legal philosophy appreciates that to posit ancestors as authors in copyright law is something that normatively contradicts existing knowledge about legal subjectivity.

The dialectical praxis of the *Decolonial Turn*, as an antithesis to Eurocentric copyright, is evidenced in its steadfast calls for the implementation of practical measures to decolonise centres of knowledge and worldmaking. This chapter appreciates the law as a valid site of knowledge and worldmaking and insists that a practical measure in decolonising copyright law, specifically, begins with rethinking the definitional and ideological conceptions of authorship. The chapter argues that to shift authorship from its universalistic conceptions to the pluriverse, there is a need to draw from the epistemic traditions of the global South, African, and Black peoples. The specific tradition proffered in this chapter is African people's belief in ancestors as having a very visible hand in their daily lives and, therefore, an author in terms of copyright law.

The chapter has the task of authenticating ancestral belief, not only as a religious/spiritual belief system but as a valid centre and bearer of a people's knowledge system (episteme). Moreover, the chapter demonstrates that there's a depth/dimension in Abezimu/Badimo that does not exist in ancestors – as a result, the chapter studies the essence of Abezimu/Badimo to situate it outside of the prevailing conception of ancestors in the academy and current universalistic lexicography.

Having studied the history of copyright law in the previous chapter, which demonstrated a single/universal reading of history, this chapter embraces a decolonial approach to provide a conception of copyright history that presents a break from existing readings.

The argument of this chapter is propounded in five segments. Following this introduction, the second segment synoptically discusses the definition of an author by way of studying existing

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Kramm observes that this legal personhood is based on the ontological understanding that the reiver is an indivisible and living whole, and it is the embodiment of the ancestors of the Whanganui Iwi community. This is a good example of how the philosophy that foreground legal personhood is amenable to conceptual shifts. Hopefully, the idea of recognizing ancestors as an author in copyright, and in the context of South Africa, will not take as long as 150 years, as was the case in New Zealand. There are other scholars that have closely studied this New Zealand case, for example, see Aikaterini Argyrou & Harry Hummels 'Legal personality and economic livelihood of the Whanganui River: a call for community entrepreneurship' (2019) 44 *Water International* 752, see also, Abigail Hutchison 'The Whanganui River as a legal person' (2014) 39 *Alternative LJ* 179, see also Erin O'Donnell & Elizabeth Macpherson 'Voice, power and legitimacy: the role of the legal person in river management in New Zealand, Chile and Australia' (2019) 23 *Australasian Journal of Water Resources* 35.

legislative offerings. The segment lays down the foundation for this chapter's central argument, illustrating that the definition of an author in copyright is inherently stifled by how a communal author is described by intellectual property law legislation in South Africa.

The third segment addresses the thesis' second research question that probes whether there is an intellectual authenticity to the claims that Abezimu/Badimo (ancestors) are authors and should be recognised as such in South African copyright law.

The methodology followed in this chapter appreciates that, for the authenticity of the claim that Abezimu/Badimo are authors to be validated, three conditions need to be present: (1) the chapter needs to outline ancestral belief as a legitimate epistemic tradition clearly, and not just a religious belief, (2) the historicity of ancestral belief must lend itself to be rationally connected to the very idea of intellectual property in pre-colonial Africa, and (3) academic/intellectual literature must be able to substantively authenticate the historicity of ancestral belief as a lived experience of the people of Africa.

The third segment unpacks the intellectual/academic essence of ancestral belief, arguing that this not only constitutes a religious/spiritual belief but is an embodiment of the epistemic traditions of African, Black peoples and the people of the Global South. Crucially, this segment illustrates the definitional variance between Abezimu/Badimo and ancestors – insisting that the difference is not just translation but rather a definitional paradigm.

The fourth segment engages in the decolonial methodology of drawing from outside ex-cathedra sources to defend the thesis of this doctoral project's argument – it relies on African literature (fiction) to demonstrate that ancestral belief is part and parcel of African people's Being. It relies on excerpts from four different African contemporary authors: Mphuthumi Ntabeni, Adekeye Adebajo, Panashe Chigumadzi, and Thenjiwe Mswane. All these African novelists assist in validating the claim that ancestors are a common feature and a mainstay in the lives of African peoples, their epistemologies, and cosmologies.

The last segment concludes this chapter.

4.2 The Law, community, copyright and authorship

The claim that ancestors are the authors of copyright law requires a semi-doctrinal inquiry as regards the meanings of the law, community, copyright, and authorship. This inquiry is important because it is sacrosanct to fully understand the prevailing meanings of concepts before levelling a critique or even proposing a conceptual reshaping/redefinition. Meanings, definitions, nuances, additions, distortions, form, and essence are at the very heart of this doctoral thesis' objective/argument.

Prior to zoning into a conceptual analysis of authorship in copyright, it is appropriate first to define and thus understand what is meant by 'copyright'. The Act does not define copyright. Although many scholars posit various similar definitions of copyright, this chapter leans towards Ncube's definition:

> Copyright law has the dual 'economic instrumentalist' purpose of enabling 'the orderly production and distribution of, and access to, works of art and intellect'. These works must be of 'sufficient substance', to warrant protection, fall into an eligible category and meet certain criteria, as outlined below. Copyright law rewards authors, through control of exclusive economic rights, to encourage them to produce work for the benefit of society.[3]

This definition neatly summarises the core components of the provisions of the Act that specifically deal with the requirements for subsistence, authorship, and others.

Ncube's definition of copyright comports with the definitions given by other notable scholars of intellectual property law. For example, Cornish, Llewelyn & Aplin describe copyright as follows:

> Copyright sustains a triangle of relationships. While property tends to establish bi-polar linkages – between the right-owner and the user – copyright has, on the right-owner side, both creators and entrepreneurs. As against users, their interests are largely the same: to ensure that the use of works is licensed and the returns on use are maximised. But between themselves, there will exist tensions over how works may be exploited and how returns are to be divided … It is the cultural value attaching to authorship which provides such copious moral legitimacy for legal protection. Not only are authors given longer-lasting right than could

[3] Ncube op cit note 139 ch 2 at 39.

> possibly be needed by way for economic incentive; entrepreneurs are also able to justify related rights which protect their own investment in cultural productions.[4]

A combined reading of Ncube, Cornish, Llewelyn and Aplin's definition of copyright leads to four conclusions as regards the essence of copyright: (1) copyright inherently exists to serve a double-pronged function, the first is economical, and the other is the public interest in cultural products, (2) copyright is concerned with relationships between creators, users, consumers and the state – although copyright appears to be in the discipline of private/mercantile law, it has an inherently composite public law aspect to it, (3) although its origin is based in the desire to maximise the protection of the author's/owner's economic interests, copyright has shifted significantly to balance an author's/owner's interests with those of the public, (4) central to the concept of copyright are specific markers, these are the material embodiment, originality, and authorship. The latter is the focus of this doctoral thesis – the thesis appreciates that authorship is a core component that constitutes the very idea of copyright. There is no copyright without authorship – it naturally follows that in seeking to decolonise copyright, there is a need to speak directly to those components that define it.

Bently and Sherman describe copyright authorship as follows:

> The author of literary dramatic, musical or artistic work is the person who creates it. No further guidance is given in the 1988 Act as to what this means … Having said that, problems occasionally arisen in determining whether a person involved in the production of a literary, dramatic, musical, or artistic work is to be regarded as an author. The way this is answered is similar to the way in which the originality of a work is determined. Basically, in order for someone to be classified as an author, it is necessary for them to be able to show their contribution to the work is of the type and amount that is protected by copyright – that is, that the contribution would be sufficient to confer originality on the relevant work.[5]

Bently and Sherman's description of copyright is based on how authorship is understood in the United Kingdom – this conceptualisation is appropriate for this thesis by virtue of South Africa's reliance on British copyright law traditions, owing to colonialism and coloniality. Bently and Sherman link the test for authorship with the one for originality.

[4] Llewelyn & Aplin op cit note 35 ch 1 at 421-422.
[5] Bently & Sherman op cite note 36 ch 1 at 126-127.

In terms of the test set out by Bently and Sherman, to be classified as the author of a work, just as with originality, two conditions must be present: (1) the person claiming authorship must show that they expended some form of labour in the production of the work and (2) that the work they are claiming authorship over is a work in terms of legislation. These two conditions are directly relevant to the South African context because the court in *Waylite Diary CC v National Bank Ltd*[6] (hereinafter the *Waylite case*) held that if an expression does not constitute a work, the question of originality does not arise.[7] This means that authorship (of a work) and originality are intricately intertwined.

The Van der Merwe student handbook on intellectual property law defines copyright author in the context of section 1(1) of the Act as follows:

> It should be noted that the popular and ordinary meaning of 'author' as a maker or creator of a work only applies to literary, musical or artistic works. The authors of all other works are defined with reference to persons who are not authors in the ordinary sense of the word but who have financial interest in the end result. This means that more often than not someone other than the person involved in actually making or creating the work may qualify as its author … The person who reduces the work to material form is normally the author, but if his or her activity is purely of mechanical nature, he or she is not the author of the work.[8]

Section 1(1) of the Act specifically defines an author in relation to the work upon which copyright is claimed. For example, as regards literary, musical, or artistic work, section 1(1)(a) defines an author as 'the person who first makes or creates the work'. Section 1(1)(b)-(f) defines an author in similar terms with reference to other types of works, except that in this instance, it is not the person who makes/creates the work. Still, it is in reference to people who are not authors in the ordinary sense but rather those who have a financial interest in the result of authorship, namely the resultant work.[9]

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[6] 1995 (1) SA 645 (A) 653F-G.

[7] *Waylite Diary CC v National Bank Ltd*, see par 10, 'The types of works listed in sec 2(1) of the Act are 'eligible for copyright' provided they are 'original'. The categories relevant to this case are artistic and literary works. The subsection presupposes, as a general rule, two different inquiries: first, whether the work relied upon falls within one of the categories and, if so, whether it was original.'

[8] Van der Merwe et al *Law of Intellectual Property in South Africa* (2017) at 221-222.

[9] Ibid at 221.

The most important aspect of van der Merwe's reading of the meaning of authorship is that they show that an author is not always the person who physically creates the work – in specific occasions, the author is someone that commissions the work, and in specific instances, the author is a juristic person. This is important to note because it demonstrates that the concept of author has, over the years, transmuted to encompass other types of authors outside of the first author and person. The different shades and meanings of the author tell of the potential that exists in the desire to reshape and stretch current meanings of authorship, as sought by the decolonial project of this thesis.

The call to decolonise the meaning of an author means crafting a new dimension of an author that shifts somewhat from current meanings. This new dimension is carefully explained thoroughly in the framework laid down in the first three chapters of this thesis. Through the prism of decolonial theory, authorship means single author, joint author, and communal author; however, the community as an author takes a new dimension in the sense that it encompasses the African conception of a community as the living, the dead, and the yet-to-be-born. Simply put, the meaning of a community, as it is currently understood in intellectual property law scholarship, is limited because it is done along the lines of Eurocentric and Western notions of personhood and what it means to be human – and therefore neglecting African epistemic traditions to conceive of the same.

The zenith of the thesis to be defended in this chapter is that the meaning/ definition/ formulation/ conceptualisation of a community is incomplete in its current presentation/framework because it does not reflect the epistemic traditions of Africans and Black peoples. If the meaning of an author is to be developed beyond its current framework, the locus on enunciation rests on how the episteme grapples with the meaning of the community.

Currently, three types of authors are provided for by legislation. These are single author, joint author, and communal author. Over the last decade, legislators have attempted to expand the definition of an author to shift from the single-author and joint-author as provided for by the Act so that the definition can be inclusive of a communal author - IPLAA provides for this. Although this shift is significant, it is still within the Eurocentric paradigm because it uses colonially accepted chassis to define a community in the context of authorship.

To shift authorship from the clutches of single and joint authors, South African legislation has ventured into appreciating that a community can be copyright law's author. Currently, the community is defined by the IPLAA and the PPDM Act.[10] Both IPLAA's section 3(f) and PPDM Act's section 1(a)-(c) definitions of a community are limited in the sense that they have a limited perception of what a community is in the context of Africa and peoples of Africa. To be sure, in African epistemologies, a community means three things. (1) the living, (2) the dead, and (3) the yet-to-be-born. This epistemic supposition is unpacked at length in the segment below.

4.3 The intellectual authenticity of Abezimu/Badimo epistemic suppositions

4.3.1 Introduction

In the main, this chapter uses two approaches/methodologies to authenticate the claim that ancestors are authors in copyright law: (1) the first approach/methodology relies on scholarly work,[11] then (2) the second approach/methodology relies on African literature (fiction). This segment of the chapter canvasses the first approach/methodology.

Two broad sub-questions are investigated. The first locates the epistemic/ontological basis of ancestral deference/reverence in the image of 'Abezimu/Badimo' – the thesis of this argument is that the vernacular articulation of 'Abezimu/Badimo' presents different dimensions when compared to the image 'ancestors'. This segment of this chapter engages scholarly interlocutory to show that although 'Abezimu/Badimo' is a direct translation of the word ancestors, these two enjoy different meanings. The latter refers merely to people who have lived before, whereas the former refers to people who live among us long after they have passed on. These are also known as 'the living dead'.[12] This differentiation is crucial to illuminate, and it is the first step in the course to

[10] See full definitions of both sections of IPLAA and PPDM respectively, in the first chapter.
[11] This means academically published work, in the form of articles, books, essays, dissertations et cetera.
[12] John Mbiti *African Religions and Philosophy* (1969) 25, the phrase 'the living dead' is introduced into the academy by Kenyan Anglican Theologian, John Mbiti to precisely explain the phenomena canvassed in this thesis. There are other, and more recent, accounts of the use of the phrase 'the living dead', for example see Derrick Mashau & Themba Ngcobo 'Christian mission in creative tension with African worldview(s): A post-colonial engagement regarding life after death and ancestry' (2016) 44 *Missionalia* 34.

substantively authenticate the claim that ancestors are authors in copyright law – and thus comprehensively respond to one of this doctoral project's research questions.

As a point of entry, it is appropriate to assert that the assertion that ancestors are a constitutive element of the lives of Africans and Black people is born from Ramose's seminal text titled 'African Philosophy Through Ubuntu'.[13] This text is the most important writing that discusses the African concept of Ubuntu. Ramose explains that, from the perspective of African philosophy, a person is constituted by three composite parts: the living, the dead (also known as the living dead) and the yet-to-be-born.[14] This conception of African personhood is known as the onto-triadic conception of Being and is drawn from what Ramose refers to as the metaphysics of ubuntu philosophy.[15] Ramose accordingly explains:

> In *ubuntu* philosophy a human being in the world of the living must be umuntu in order to be give a response to the challenge of the fundamental inability of be-ing. *Umuntu* cannot attain ubuntu without the intervention of the living-dead. The living-dead are important to the upkeep and protection of the family of the living. This is also true with regard to the community at large. For this reason, it is imperative that the leader of the community together with the elders of the community must have good relations with their living dead. This speaks to the *ubuntu* understanding of cosmic harmony. . . Thus, African religion, politics, and law is based on and suffused with the experience and concept of cosmic harmony.[16]

This presentation of ubuntu as meaning a cosmic harmony that features the onto-triadic conception of Being is incredibly crucial to underscore, especially when considering that most post-Ramose writings about ubuntu tend to focus on its relational aspect[17] and neglect its insights on a person as meaning the living, the dead, and the yet-to-be-born. The sub-segments below expansively detail the essence of the onto-triadic conception of Being and demonstrate how this theorization is sacrosanct for the broader argument of this thesis.

[13] Ramose op cit not 203 ch 1.
[14] Ibid at 45.
[15] Ibid.
[16] Ibid at 46.
[17] Indeed, there has been an undue focus on Ubuntu as regards its relational aspects, that is usually gleaned from the aphorism '*umuntu ngumuntu ngabantu*'. Various scholars have shown that there is more to the concept of Ubuntu than this aphorism, see for example, Nyasha Mboti 'May the real ubuntu please stand up?' (2015) 30 *Journal of Media Ethics* 125, where he argues that conceptions of Ubuntu are part of a definitional superstructure that is set on maintaining the existing hegemonic order.

4.3.2 Why Abezimu/Badimo and not just ancestors?

The title of this doctoral project prefers 'Abezimu/Badimo' instead of 'ancestors' precisely because there is an epistemic distance (and, therefore, difference) between these two concepts. Notwithstanding that these concepts are colloquial translations from English to isiNdebele/Sesotho and vice versa, this chapter argues that ancestors in African vernacular means more than just people that have passed on. This difference in meanings constitutes a legitimate epistemic variance that is worth intellectual inquisition. The inquiry about the difference between English and vernacular illustrates an epistemic distance between the meanings of concepts in the different translations. This chapter argues that the distance between these meanings entails a verbose epistemological archive. This archive consists of the knowledge patterns and intellectual traditions of colonised peoples, whose knowledge(s) are victim to epistemicides,[18] historicides, and linguisticides.[19] The task of illustrating the epistemic distance between Abezimu/Badimo and ancestors is crucial because the chasm between these concepts entails an epistemic opportunity worth thorough study.

Epistemic conceptions of 'Abezimu/Badimo' as meaning more than just ancestors can be gleaned from scholarly work that is written in African vernacular; two such works include a BA Honours dissertation written by Makhanya entitled '*Isiko lokuthethwa kweDlozi*'[20] the other is a MA thesis written by Mdlalose entitled '*Zindaba Zakho Mngoma: Ingonyuluka.*'.[21]

Credence must be given to the fact that both dissertations are written in isiZulu[22] and were submitted to the University of Zululand's faculty of human sciences. Mudimbe specifically makes

[18] Boaventura de Sousa Santos *Epistemologies of the South: Justice against Epistemicide* (2014) at 12, where he defines epistemicide as follows, 'Our knowledge flies at low altitude because it is stuck to the body. We feelthink and feelact. To think without passion is to make coffins for ideas; to act without passion is to fill the coffins. We are voracious in getting the diversity of the knowledges we are interested in. There are many knowledges looking for people eager to know them.'

[19] Historicides is explained in extensive detail in the previous chapter. Both epistemicides and linguisticides are explained in chapter 2.

[20] Ntokozo Favourite Makhanya *Isiko lokuthethwa kweDlozi* (1997).

[21] Busowakhe Jethro Mdlalose *Zindaba Zakho Mngoma: Ingonyuluka* (2009).

[22] There is a noteworthy isiZulu idiom that says 'isiZulu asitolikwa', loosely translated, 'it is impossible to translate isiZulu into different languages'. The idiom does not mean that the language cannot be translated per se, instead it means that the essence of the language is sometimes lost when it must be translated into a different language, especially English.

the case that historians, philosophers, missionaries, academics and anthropologists from the West continue to fail to make sense of concepts from outside of Europe precisely because Western scholarship does not invest in studying the language/grammar of the subject that they seek to study.[23] Mudimbe suggests that white scholars are acutely aware that the only language that they understand is English (and/or Afrikaans, in the context of South Africa) and that this causes an unspoken sense of insecurity among them, and although they feel like impostors,[24] they still forge ahead.[25]

Although Mudimbe does not make this argument per se, this chapter insists that 'language', in this instance, means more than just English/isiZulu/Sesotho but refers to the praxis of the grammar of a people beyond the spoken and written word.[26] Mudimbe observes what he calls 'epistemological determinism' to explain a colonial architecture that uses the English (or any other colonial) language to attempt to make sense of other worlds.[27] The image 'determinism' speaks to how colonial anthropological investigations set out to pursue deeper truths and hidden meanings about

[23] Mudimbe op cit note 13 ch 3 at 146, 'However, *Bantu Philosophy* should be revised because Tempels was not a scholar. He did not pay attention to Bantu languages, and moreover, his synthesis, based strictly on his experience within the Luba-Shaba community, does not offer comprehensive understanding of Bantu cultures.'

[24] For an example of an academic impostor, see how Bryant attempts to study ancestral reverence in A.T Bryant 'The Zulu Cult of the Dead' (1917) 17 *Royal Anthropological Institute of Great Britain and Ireland* 140, because of his lack of understanding of the isiZulu language, Bryant hastily conflates meanings of essential aspects of the tradition of ancestral reverence. This is a good example to illustrate the complexity in appreciating the epistemic depth of a group of people when such an inquiry is done in the English language and a Eurocentric locus of enunciation. The very fact that he reduces ancestral belief to a 'cult' explains the attitude that early colonial anthropologist had towards epistemic traditions of colonised people. See at 144, where Bryant refers to Black research participants as 'our kafirs'. Alas, the work is still crucial precisely when considering that it was published in 1917, which was at the height of South Africa's colonialism and Black subjugation, wherein colonised people were not allowed to tell their own stories, considering that the academy and spaces of knowledge production were the absolute reserve of white people. What this work does is indicate that even in the height of brazen colonialism, Black people hung onto their core belief in ancestors, and the living dead.

[25] Mudimbe op cit note 13 ch 3 at 67.

[26] This positing of language as a grammatical expression of a people's praxis beyond written and spoken word is studied by Radebe, see Nompumelelo Zodwa Radebe 'Learning from Indigenous Communities: The Case of Esihlengeni in Vryheid, KwaZulu-Natal, South Africa' (2022) 17 *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity* at 2, where she engages in an anthropological ethnographic study to observe the cultural practices of Zulu speaking people of Esihlengeni homestead, in Vryheid town of KwaZulu Natal province of South Africa. Radebe observes that the Western/European methods that are used to access knowledge from this community, namely paying attention to their language, cultural practices, and belief system yields incomplete and wayward findings precisely because they use Western/Eurocentric subjectivity to establish a worldmaking that presupposes their subjectivity to be global objectivity. Radebe proposes that these methods must be decolonised, and therefore other ways of studying indigenous communities need to be employed so that the knowledges of indigenous communities are understood in their own accord.

[27] Mudimbe op cit note 13 ch 3 at 73.

Africa yet are wired to fail or lead to inconclusive findings precisely because they rely on a colonial language, grammar and lexicography to study Africa:

> To add commentaries or exegeses on black cultures which are essentially mystical, religious, and sensuous, is to decipher a possibly controversial myth and, at any rate, to elaborate on what is not the immanent significance of the subject studied. The anthropologists did not seem to respect the immanence of human experience and went on to organize, at scientific expense, methods, and ways of ideological reduction: concrete social experiences were looked at and interpreted from the normativity of political discourse and its initiatives.[28]

Epistemological determinism is linked to another concept, that is, 'cultural autonomy',[29] which speaks to the efforts of African intellectuals[30] to correct colonial distortions about the essence and meanings of African cultures, knowledge, and histories. Mudimbe explains that, sometimes, African intellectuals must use African languages[31] to assert cultural autonomy and thus explain the African setting to the academy.[32] Mudimbe's decided critique of relying solely on English (and other colonial languages) highlights the importance of Makhanya and Mdlalose's writings, which not only study the epistemic depth of ancestral reverence but do so in the vocabulary of the people of Africa.

Makhanya begins her dissertation with '*Kuyisiko elibalulekile kithina maZulu ukuthethwa kwedlozi. Amadlozi siyawakhumbula siwahloniphe ngoba aphathelene nabaphansi. Kufanele kucace, kumbe kubesobala ukuthi sikhuluma nabakithi asebekwelingafelwa nkonyane.*'[33] Makhanya's opening already delineates the epistemic distance between 'Abezimu/Badimo' and

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[28] Ibid at 89.
[29] Ibid at 90.
[30] Such as Kwame Nkrumah, W.E.B Du Bois, Julius Nyerere, George Padmore, C.L.R James, Amilcar Cabral, Joseph Ki-Zerbo, Mamadou Dia, Frantz Fanon, M. Ngouabi, Aime Cesaire, Kwei Armah, Kofi Awoonor, Cameron Duodu, Ngugi wa Thiongo, Tierno Monenembo, Ahmadou Kourouma, and others.
[31] J.B Ngubane 'The role of Amadlozi/Amathongo as seen in the Writing of W.B Vilakazi' (1984) 5 *Association for the Study of Religion in Southern Africa* at 56, to effectively study the emergence of ancestral reverence in the scholarly work written by W.B Vilakazi, Ngubane insists that some of these concepts must be explained in vernacular otherwise they risk completely losing their intended meaning: 'In this paper I have retained the Zulu forms, amadlozi/ amathongo,,for what some writers call ancestors, ancestral spirits, shades, the living dead and so forth, because I am of the opinion that these Zulu forms are not adequately translatable into English.'
[32] Mudimbe op cit note 13 ch 3 at 90.
[33] Makhanya op cit note 20 at 1. Translation: 'It is an important custom, for us Zulu people, to pay homage and reverence to our ancestors. We commemorate and respect them because they link us to the dimension of the transitioned. It must be clear that we do this precisely to communicate with those of us who have departed yet are still with us, the *living-dead* (my emphasis).'

ancestors because it gives life to the dead beyond their death – this is evidenced in *'siyawakhumbula siwahloniphe',* which means 'we commemorate and respect them, in the present'. The hallmark of Makhanya's thesis rests in its response to two questions, the first is *'Liyini isiko?*' and the second is *'Liyini idlozi?*', loosely translated, 'What is culture?' and 'What is an ancestor?', respectively. Makhanya defines *isiko*/culture as follows:

> *'Isiko yiloko osekujwayelwe ukwenziwa (isijwayezi), osekuze kwamukeleka njengomthetho Isiko lingumkhuba oqala ngesigigaba esithile, esiya ngokudlondlobala, sijule Lo mkhuba unikezelwa ngalokho umuntu angabambelela kuko, okuyothi-ke ngokudlondlobala kwawo, bese uba yisiko. Lokhu kwenzeka uma sekunabadala mkhuba owaqala kubona, okunye kuthi uma bengasekho emhlabeni, bafune kuqhutshekwe lapho bagcina khona.'*[34]

She accordingly defines idlozi/ancestor as:

> *'Idlozi umuntu womndeni ongasekho, kodwa osebona kangcono njengoba esengale kwelingafelwa nkonyane. Abantu abangasekho bayimimoya ebizwa ngamagama amaningi. Abanye bathi abaphansi, amathongo, izinyanya noma amadlozi. Bonke abantu abangasekho bayahlonishwa.'*[35]

As can be followed from the translations given in the footnotes, Makhanya's definitions of culture and Abezimu/Badimo reasonably lead to three logical conclusions: (1) culture is central to the Being of Black and African people, (2) there is a link between culture and reverence to ancestors, and (3) the people do not consider ancestors as people that have merely passed on, but rather as people who continue to have an active role in the lives of those that they have left behind.

Mdlalose's study differs slightly from Makhanya's because Mdlalose specifically studies what it means to be 'called' (this is known as *ubizo* or *ukungenwa*) by ancestors to practice as a

[34] Ibid at 5. Translation: 'Culture is those things that we do that have become trite flowing from custom, such that it has become acceptable as a law. Culture is a product of various specific occurrences, and gains resonance over time, and is passed on from one generation to the other. It is crucial that culture is given birth by our elders who came before us. As result, after they have passed on, they insist that we must hang on to culture, and continue to embrace it from where they left off.'

[35] Ibid at 7. Translation: '*Idlozi* is a member of one's family who has passed on, but now can see better because they have now transitioned into a different realm. The departed are referred to in various names, some refer to them as *abaphansi,* others refer to them as *amothongo*, whilst others refer to them as *izinyanya* or *amadlozi*. The rule is that all ancestors must be respected.'

healer/seer.[36] Albeit a study about ancestral calling, Mdlalose still succeeds in responding to the question: '*Liyini idlozi*?' and he defines Abezimu/Badimo (*idlozi*) as follows:

> *'Lena imimoya yabaleleyo engena kubantu abaphilayo. Le mimoya imikhakha mibili, kukhona leyo engena kubantu ngenjongo yokubapha izinhlanhla nje, kubekhona leyo engena ngoba ifuna ukubasebenzisa ekubhuleni nasekwelapheni abagulayo. Nokho-ke yonke Ie mimoya iyadinga ukwenzelwa imicimbi yayo ukuze ingabahlukumezi labo ehlezi kubo.'*[37]

Mdlalose's definition of *idlozi* is not too different from that of Makhanya. However, Mdlalose brings forth the dimension of *idlozi* as an embodiment of the spirits of the dead that continue to live on long after their death. Spirits are indeed one of the forms within which Abezimu/Badimo manifest in the lives of the descendants of the dead. These spirits practically ensure that the dead are not merely ancestors, but they are Abezimu/Badimo in the sense that they live even in their death and, therefore, are the living dead. Zulu's definition of ancestors is instructive:

> Ancestors are believed to be those who have died but continue to exist in the land of the dead. They continue to influence the living, mostly positively. This belief arises from a feeling that the role of parents (or anyone elderly) is crucial to African society. Elderly parents are believed to be the custodian of moral values. Which is why they are highly venerated in life. For this reason, death will not remove this respect for elders/parents in any way. This explains the continued veneration of elders beyond death when they attain ancestor status. Ancestors in Africa form part and parcel of one's family.[38]

Studying Abezimu/Badimo as an embodiment of the epistemic traditions of the global South is fraught with conceptual difficulties because ancestral reverence/deference was/is directly

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[36] On the calling by ancestors to work as a healer/seer, see generally, Steve Edwards, Nomahlubi Makunga, Jabulani Thwala & Buyi Mbele 'The role of ancestors in healing' (2009) 8 *Indilinga – African Journal of Indigenous Knowledge Systems* 1.

[37] Mdlalose op cit note 21 at 9. Translation: 'These are spirits of the departed that enters people that are alive. These spirits can be differentiated into two categories, the first is that which enters people with the intention to merely increase/enhance their fortunes and general wellbeing, the second is the one that enters people with the intention to turn them into healers and seers. Crucially, all these spirits require specific rituals and ceremonies, to ensure that there's a good relationship between the spirits and the person(s) it has entered.'

[38] Edwin Zulu 'Reverence for ancestors in Africa: Interpretation of the 5th Commandment from an African perspective' (2002) 81 *Scriptura* at 479. See also, Ngubane op cit note 31 at 57, 'The terms *idlozi* (plural: *amadlozi*) and *ithongo* (plural : *amathongo*) denote the dead who, according to Zulu thought patterns, maintain a close and intimate relationship and association with the living, especially their survivors, descendants or dependents. They are also called *abaphansi* (the subterranians) to indicate their abode and their proximity to the living on whom they, though invisible, exercise their influence and power.'

subjected to epistemicides in the advent of colonial contact.[39] Various scholars demonstrate that colonial contact included the action of killing the indigenous knowledge. The colonial project sought to implant Western religious subjectivity, mostly Christianity.[40]

Colonial worldmaking as a 'Christianisation' project is worth some brief comment and analysis - Mudimbe is at pains to explain that a constitutive part of colonial worldmaking included the active Christianisation of colonised people:

> The more carefully one studies the history of missions in Africa, the more difficult it becomes not to identify it with cultural propaganda, patriotic motivations, and commercial interests, since the missions' program is indeed more complex than the simple transmission of the Christian faith. From the sixteenth century to the eighteenth, missionaries were, through all the 'new worlds', part of the political process of creating and extending the right of European sovereignty over 'newly discovered' lands.[41]

Although many scholars have shown that colonial worldmaking was a Christianisation effort, Mudimbe takes the discussion a bit further in how he demonstrates that colonial Christianisation was inclusive of entangled processes that entailed the implanting of European cultures, sensitivities, aspirations and desires.[42] For example, Christian missionaries not only helped the colonial architecture by introducing European faiths to newly found lands but violently enforced a norm wherein it was in God's name that the Pope considered the planet (especially conquered territories) as his franchise, thus denying non-Christian natives the right to an autonomous political existence and the right to own or transfer ownership.[43]

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[39] Although the argument about ancestoral veneration is presented from the prism and perspectives of the epistemologies of the global South, it must be noted that even in the West and the global North, there have been scholars who have studied the question of ancestral veneration as a way of life, see for example Lyle B. Steadman, Craig T. Palmer & Christopher F. Tilley 'The Universality of Ancestor Worship' (1996) 35 *Ethnology* 67, see also Eric Hill & Jon Hageman 'Leveraging the Dead: The Ethnography of Ancestors' in Eric Hill & Jon Hageman (eds) *The Archaeology of Ancestors: Death, Memory and Veneration* (2016) University Press of Florida, Gainesville.

[40] Ramose op cit note 203 ch 1 at 49, 'Historically, Christianity may be seen as part of a culture foreign to Africa. For this reason the introduction of Christianity in Africa was ineluctably the introduction of foreign culture to Africa.'

[41] Mudimbe op cit note 13 ch 3 at 45.

[42] Ibid.

[43] Ibid.

In the name of God, missionaries actively worked towards the destruction of pre-colonial societies and their replacement by new Christian societies in the image (not of God but)[44] of Europe.[45] To find acceptance into the new colonial polity, colonised and conquered people were compelled to jettison their pre-colonial selves and embrace Eurocentric subjectivity, thus doing away with epistemic systems such as reverence/deference to Abezimu/Badimo.

Notwithstanding the Christianisation project, some African intellectuals have extensively ventured to carefully demonstrate that colonised people have always jealously hung onto the belief in Abezimu/Badimo.[46] For example, Wanamaker demonstrates that Africans (and South Africans

[44] Ibid at 148, take note that the concept of a God (or a deity and higher power) was not new African people, and is thus not an invention of colonial worldmaking, Mudimbe demonstrates that the *Bantu Philosophy* of African peoples has always been reflective of African people's belief in a God, see also, MR Masubelele 'Missionary interventions in Zulu religious practices: The term for the supreme being' (2009) 12 *Acta Theologica Supplementum* 64, where he argues that the translation of the Christian bible into isiZulu has had the impact of wrongly inculcating a norm where the idea of a God is seen as something new to African people, whereas in truth, African people have always believed in a supreme being, and this being was closely linked in their belief in ancestors. See at 69, 'Most missionaries were convinced that a foreign term would amply serve the purpose. What most of them did not grasp was that the word *uNkulunkulu* had existed even before the advent of white men to the shores of this country — as is evidenced by the use of the term in myths such as the one that explains the origin of death: *uNkulunkulu* sent a chameleon to the people and he said: 'Go and say to men: Let men not die.' The chameleon set out; but it went very leisurely; loitering on the way; and as it went, it ate of the *ubukhwebezane* (lantana salifolia) fruit tree. At length *uNkulunkulu* sent a lizard after the chameleon. The lizard went; it ran at great haste, for *uNkulunkulu* had said, 'Lizard, when you have arrived, say to the people: 'Let men die.' So the lizard went and said: 'Let men die.' The lizard went back to *uNkulunkulu,* before the chameleon had reached his destination. When he finally arrived, the people said: 'We have heard the word of the lizard.' This also attests to the fact that the Zulu people believed in a Deity to whom they referred as *uNkulunkulu.*'

[45] Mudimbe op cit note 13 ch 3 at 47.

[46] Some have gone to the lengths of delicately asserting ancestral reverence from the perspective of biblical scripture. For example, see Zulu op cit note 38 see at 479, where he argues that the strong belief in ancestors translates into an acceptance of ancestors as spiritual functionaries and source of blessings in a particular society – most importantly, Zulu observes that the deference/reverence of ancestors could realistically be understood from an Africanised reading of the 5th Commandment of the 10 Commandments as laid out by God to his followers in the book of Exodus 20 verse 12, see also, Joel Mokhoathi 'From contextual theology to African christianity: the consideration of Adiaphora from a South African perspective' (2017) 8 *Religions* 1, where he studies the emergence of 'African Christianity' in the aftermath of colonial disturbance, this brand of Christianity is a product of the deep seated tensions that are inherent between a Eurocentric Christology that demands of African converts to abandon their cultures in order to find acceptance in the eyes of God, and the African Belief system that robustly insist on hanging onto its cultures, customs and traditions – Mokhoathi argues that African Christianity embodies a type of theology that is contextual and not dismissive of the unique nature of African epistemic traditions and their ontological validity in the broader global epistemological framework, see also Mashau & Ngcobo op cit note 12, where they argue that the tension that exists between three distinct worldviews (Western Christian Missionaries Worldview, Biblical worldview and African worldview) can be reconciled by an acceptance that there are a different ways of being, thinking and knowing, and that Africans are justified in their resolve to bring about a type of Christianity that is reflective African characteristics, sensitivities, moralities and epistemic patterns, see also Joel Mokhoathi 'Jesus Christ as an ancestor: A critique of ancestor christology in Bantu communities' (2018) 99 *Pharos Journal of Theology* 1, where he studies what he coins 'Ancestor Christology', he explains that this is a type of Christianity that takes the task of reconciling African beliefs with Eurocentric Christianity – this task is laden with the appreciation that instead of jettisoning their Africanity and

specifically) have had to grapple with over two hundred years of the co-existence between European Christianity and the African Belief in ancestors; he remarks that these are two distinct beliefs that stem from differing worldviews and cultures.[47] Wanamaker illustrates that although the colonial project succeeded in implanting European Christian beliefs in Africa, African Christians continue to acknowledge the very visible hand that ancestors play in their lives – this speaks directly to how ancestral deference is more than just a spiritual/religious belief,[48] but rather a way of life and thus an epistemic tradition.[49] Wanamaker's observation about how Africans have hung onto ancestral reverence/deference despite the colonial Christianisation project is better explained by Mudimbe when he argues that Black Theology (also known as Black Liberation Theology)[50] was a crucial moment in theological suppositions because it firmly insisted that Africans must be given the space to accept Christianity without having to do away with their Africanity and African selves.[51]

Wanamaker makes another extremely important observation; he observes that there has been a conceptual difficulty in the study of ancestors because of a longstanding debate[52] about whether Africans 'worship' ancestors or merely observe/honour them.[53] This observation is important

African selves, Africans can still find space in the kingdom of God by marrying the two contradicting worldviews. Mokhoathi reads scripture (1 Corinthians 15:45-47 and Genesis 2:7, and Luke 1:28-31) to argue that Jesus himself is an ancestor because he is the embodiment of the rebirth of Adam (the first man on Earth), except Jesus was born from divinity whereas Adam was born for an earthly purpose.

[47] Charles Wanamaker 'Jesus the ancestor: Reading the story of Jesus from an African christian perspective' (1997) 63 *Scriptura* 281.

[48] Tshidiso Moletsane *Junx* (2021) at 117, in fact, Moletsane correctly argues that the main difference between religion and ancestral deference/reverence is that the former does not have the 'God-versus-Satan' dynamic, there isn't even a heaven or hell, instead ancestral deference trumps religiosity in the sense that it centers a cosmic entity that existed as some sort of guardian or kind of benevolent, eternal Oneness that all human beings belong to. Moreover, unlike formal religions such a Christianity and Islam, ancestral deference (as a way of life and a way of knowing) insists that when people die, they do not cease to exist but they transition into a different realm, and this places them closer to our shared Oneness.

[49] Wanamaker op cit note 47 at 281.

[50] Some prominent scholars and activists of Black Theology include Allan Boesak, Fundiswa Kobo, Takatso Mofokeng, Itumeleng Mosala, Tinyiko Maluleka, Boitumelo Senokoane, Vuyani Vellem, Puleng LenkaBula, Barney Pityana, James Cone, Basil Moore, Dwight Hopkins, Katie Cannon, Buti Tlhagale, Jeremiah Wright, Orfelia Ortega, Mokgethi G. Motlhabi, Lerato Mokoena, and others.

[51] Mudimbe op cit note 13 ch 3 at 63.

[52] Wanamaker op cit note 47 at 286, this is just one of the many debates that exist in this scholarship, for example Wanamaker unpacks the debate between African religions and Christian religion as it relates to life and death. African religious systems and accompanying epistemic traditions of the global South insist that there is life after physical death, this is firmly contradicted by Eurocentric Christology, which draws from scripture (Ecclesiastes 9:5-6, Joshua 24:15, Isaiah 45:20, Judges 10:14, and others) to argue that there is no life after death, and that when people die, they cease to exist completely and thus cannot have any role in the life of their descendants beyond death.

[53] Ibid at 284.

because it illustrates a historical account of how missionaries deliberately distorted ancestral reverence into being a 'worship of ancestors'; they did this with the sinister intention to wrongly claim that ancestral reverence amounts to 'worship of false gods', thus backward, taboo and barbaric.[54] Colonial distortions of African people's reverence for Abezimu/Badimo to mean worshipping[55] false gods are done precisely to deny, refute and rebut that ancestral reverence is a valid epistemic tradition.[56]

In their conscious and erudite expressions, the varied interlocutors canvassed in this segment illustrate the authenticity of the claim that ancestors play an active role in the lives of African peoples.

4.3.3 Ancestors and the law

The idea of ancestors and the law is not novel. Various scholars have debated about it over the last three decades. Although defined by general paucity, a handful of scholars have grappled with the delicate relationship between the law and ancestors. Triebel argues that ancestor veneration may

[54] Ibid.

[55] Although it is one of this chapter's central arguments, the fact that ancestral reverence/deference is an epistemic belief and not a religious belief, it is important that this must not be misconstrued to mean that this thesis derides ancestral worship. If some people choose to worship ancestors, they are correct to do so because in a pluriversal world, each has the right to choose their own belief system without fear of being discriminated against.

[56] I presented an earlier version of this chapter to the University of South Africa's IP law group working-paper-series organised by Dr Richard Shay, I benefited immensely from the feedback received from all group members, in particular Professor Eddie Hurter who brought to my attention the fundamental contradiction between Eurocentric Christology's rejection of AbeZimu/Badimo, specifically in them brandishing the idea of the living-dead as barbaric and backwards, when the entire Christian edifice is firmly based on the notion of life after death. More directly, the New Testament, whose main theme is the idea that people who receive the gospel of Christ and dedicate their entire lives to him will continue to live even after their physical/mortal death. This theme does not only appear from the verbatim teachings of Jesus himself (see generally, John 3:16, John 10:28-30, John 4:14, Mark 10:29-30) but also from the subsequent interlocutory of his disciples such as Paul, John, Simon-Peter and others (see generally, 2 Corinthians 4:17-18, 1 John 5:13, John 17:3, Romans 6:23, Revelations 21:3-4, Galatians 6:8, 2 Timothy 2:11, Jude 1:20-21). This begs the question of a glaring and somewhat antagonistic contradiction in Christianity's rejection of the idea of life after death when it is presented from an African epistemological perspective yet find the same notion acceptable when it is promised by Jesus and his disciples. I am equally indebted to Rev. Mathapelo Tebele (Dean for Teaching and Learning: Nazarene Theological College) with whom I had a long Whatsapp video call to precisely discuss Professor Hurter's suggestion as regards the fundamental contradiction in Christianity's rejection of Abezimu/Badimo. Throughout our discussion, Rev. Tebele confirmed the emergence of double standards of Eurocentric Christology, and the influence of missionaries in distorting the gospel of Christ to suit the whims of the architects of the colonial project. As a disclaimer, and for purposes of keeping in line with appropriate research ethics, I assert that this Whatsapp video call was not an interview but a discussion with a theologian-scholar to elucidate a thought process.

be regarded as the centre of African traditional religions and that this is intricately linked to how Africans perceive a higher Being – his observation about ancestors and the law is instructive:

> It is important to understand this inter-dependence, this mutual relationship of living people and ancestors. This is the only way to understand the subject of ancestor veneration or ancestor cult. This inter-dependence can be shown especially in two areas: the African understanding of family and the understanding of law and order.[57]

Having travelled to various parts of Africa, Triebel gains an understanding of how pre-colonial societies (and prior to colonial disturbance) peoples of Africa always perceived the rule of law as something that exists in relation to other social systems and networks of relationships. These include family units, community, culture, economy, and social life. Pertaining to the rule of law, Africans always accepted legal norms as part and parcel of the epistemic tradition of reverence and deference to ancestors. Differently put, in the setting and context of an Africa that is not disturbed by colonial disturbance, the legitimacy of the law is gained from it being a product of ancestors, who constitute an integral part of the lives of Africans.

Triebel's most important observation, which is most relevant to this thesis' argument, is that Africans perceive ancestors not merely as a religious belief but as a source of life itself.[58] On the same score, this chapter insists that if the rule of law stems from the event of existence and, therefore, life, then the law, too, is sourced from ancestors.

The law that is sourced from ancestors is not a claim about prevailing legal norms but is precisely an offering from another world, that is, the world inhabited by colonised people, whose epistemic traditions radically differ from present universalistic conceptions of law. In line with the trip from the *Decolonial Turn* to the pluriversal author, the claim that the law is sourced from ancestors is not representative of current colonial copyright (or any other) law but is an expression of other worlds – it embodies the pluriversal demand that decolonisation seeks to create a world where many worlds exist. This observation is at the heart of the argument propounded in this chapter because it decisively demonstrates that ancestral reverence and deference genuinely lend

[57] Johannes Triebel 'Living together with the ancestors: Ancestor veneration in Africa as a challenge for missiology' (2002) 30 *Missiology: An International Review* at 188.
[58] Ibid 189.

themselves to being an epistemic tradition of the global South and not just a religious/spiritual belief.

Lindstrom teases a discussion about ancestors as authors in copyright law in 'Big Men as Ancestors: Inspiration and Copyrights on Tanna (Vanuatu)', where he argues that some people continue to live on long after their physical death and through various means, they are able to author work worthy of copyright protection.[59] Lindstrom decisively asserts that ancestors (Abezimu/Badimo) have a very active hand in the lives of their descendants and those that they have left behind:

> Ancestors are known to interfere frequently in the lives of their descendants, meting out assistance on the one hand and punishment for misbehavior on the other. There is an obvious relationship between big man status and big ancestor status. Only some of the dead graduate to become notable ancestral ghosts. The most favored ghostly candidates are those individuals, like big men, who enjoyed a measure of renown and repute during their lifetimes.[60]

Boateng questions the modernity vs. tradition stratification in 'The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law', where she argues that some works of traditional expressions struggle to find copyright law protections because they do not conform to Western (and therefore Eurocentric) individualistic standards of authorship.[61] She specifically refers to the Ghanaian Andikra and Kente cloth, asserting that these two are protected by copyright law only insofar as they are 'authored' by certain individuals. This model does not take into account that these clothes are also authored by the dead (AbeZimu/Badimo). The question of authorship becomes very serious when considering that those who own copyright may possess a monopoly over cultural products, regardless of the work's authorship truly vesting elsewhere (in ancestors specifically). Boateng insists that a study about ancestors is very important because it weighs in on persisting academic debates about cultural work and the quest for freedom through decolonisation:

[59] Lamont Lindstrom 'Big men as ancestors: Inspiration and copyrights on Tanna (Vanuatu)' (1990) 29 *Ethnology* 313.
[60] Ibid at 314.
[61] Boatema Boateng 'The hand of the ancestors: Time, cultural production, and intellectual property law' (2013) 47 *Law & Society Review* at 994.

> Locating the examination of the relationship between the temporalities of traditional knowledge and intellectual property law in this context makes it possible to link the question of time, cultural production, and intellectual property law to wider debates about the importance of cultural work in relation to ongoing struggles of political and economic liberation and sovereignty.[62]

It becomes important to note that Boateng uses the philosophical concept of 'time and temporality' to locate the nexus of her study – she differentiates between time and temporality by saying that the former is concerned with the constants of the things that we are able to physically observe and measure (such as day and night, passing of weeks, and seasons). In contrast, temporality refers to the meaning/essence of, also, the things we cannot see.[63] This approach insists that to be able to sufficiently grapple with a topic as the one investigated in this thesis. It is necessary to borrow from (and also rely on) non-law sources - this includes philosophy, sociology, psychology, mythology and related humanities.

Specifically, as regards temporality, Boateng conducted interviews with manufacturers of the Kente and Andikra cloth, seeking to probe what they mean when they keep claiming that there was a 'hand of their ancestors' in the manufacturing of the designs on the Kente and the Adinkra.[64] The manufacturers would respond by saying that, whereas in the Western paradigm, works worth copyright protection are merely works without intrinsic cultural importance. The situation differs for them because not only is it about asserting their Being, but it also includes the broader nationalist project of establishing a distinguished cultural origin for Ghana while also emphasising the distinctiveness of Asante culture:

> The invocation of ancestors thus refuses an absolute demarcation between the cultural production of the living and the dead, and while such demarcation certainly occurs, it is frequently de-emphasized by cloth producers in order to draw attention to the work of the ancestors.[65]

Scherzinger makes similar observations in 'Music, Spirit Possession and the Copyright Law: Cross-Cultural Comparisons and Strategic Speculations', where he studies the culturally specific

[62] Ibid at 947.
[63] Ibid at 952.
[64] Ibid at 957.
[65] Ibid at 958.

contours of the current copyright law.[66] Scherzinger observes that authorship is understood differently in certain communities. For example, he studies how traditional Shona music, produced in Zimbabwe, is a product of the collective Shona community – in this instance, community means the dead, the living and the yet-to-be-born.[67] It is against this background that there exists a tension between Eurocentric copyright law and the lived experience of colonised people from the Global South and the Third World. Scherzinger thus uses the word 'uncopyrightable' to refer to the music that is produced by communities in Africa precisely because copyright does not recognise an author beyond the remit of the living.[68]

Although all these scholars have laboured to show the hand of ancestors in cultural production and ventured into making varied proposals as to what this should mean - they fall short in three ways: First, they allow for their nascent analysis to scientifically legitimate a call for a radical shift in legislation-making patterns that will see the practical implementation of the recognition of ancestors as the author in copyright law yet do not expressly assert this, second, they study this anomaly without correctly linking it to the imperialist project whose goal is to deepen and refine colonialist conquests, and lastly, they do not show the unholy marriage between colonial norms and capitalist desires, which is the basic force of resistance in efforts to transform authorship in copyright law specifically, and intellectual property law generally. This doctoral thesis addresses these three shortcomings, and this chapter specifically and thus constitutes this thesis' novel contribution to the body of knowledge in the literature about the concept of authorship in copyright law. This chapter demonstrates the prevailing conceptions of authorship in copyright.

4.3.4 Concluding analysis

In the task of authenticating the claim that Abezimu/Badimo are an author in copyright law, this segment of the chapter has relied on academic literature to demonstrate that ancestral reverence is not merely a religious/spiritual belief. Still, it is a way of life and, thus, an epistemic tradition. This

[66] Martin Rudoy Scherzinger 'Music, spirit possession and the copyright law: Cross-cultural comparisons and strategic speculations' (1999) 31 *Yearbook for Traditional Music* 102.
[67] Ibid at 103.
[68] Ibid.

segment posits that the generality and specificity of the epistemic traditions of Africa and the global South indicate that ancestors have an authoring hand in cultural production and that this is not reflected in extant legislative-making and related policy framework because of the global colonial matrix of power that hangs onto to Eurocentric subjectivity, and frame it as a universality. This segment has extensively argued that the trip from the *Decolonial Turn* to the epistemic pluriverse should thus mean an acceptance that many worlds exist and that in the world of colonised peoples, an author is defined as encompassing the visible authoring hand of the living, the dead, and the yet-to-be-born (thus Abezimu/Badimo).

4.4 Abezimu/Badimo as an author in copyright drawing from African Literature

4.4.1 Introduction

Epistemic freedom, as defined by various decolonial scholars, takes different shapes and meanings. In the context of this chapter, epistemic freedom is evidenced in the ability of thinkers and writers to express themselves freely, without the fear of error and without relying on prevailing colonial/Eurocentric epistemic curtailments. This chapter contends that, in the context of authenticating Abezimu/Badimo as an author in copyright law, it is crucial to rely on African writers of fiction precisely because they tend to enjoy a higher level of epistemic freedom than their non-fiction (and indeed academic) counterparts.

The approach of using African[69] fiction[70] as an effort to establish the basis of an argument is a method that is proposed by some South African decolonial critical legal scholars[71] – they have argued that part of decolonising the law school includes using music, visual art, idioms, sayings, poetry and African fiction to articulate the law.[72] Modiri explains that the quest to transform the LLB curriculum requires a decisive shift from traditional sources/content/methods of teaching:

> To read, one must be able to read not only words and sentences but also to read and interpret worlds and senses, to trace the effect, histories and narratives that structure legal texts, to be attentive to complexity, to absences and to the constitutive power of language. Students should be exposed to more than just cases, textbooks and journal articles, but also novels and poems. Analytical skills on this view ought to consider not only the logic of an argument but also the ideology and world-sense it represents.[73]

In Modiri's considered analysis, efforts to comprehend legal texts require a deeper imagination and must involve interrogation and searching.[74] This includes a commitment to a legal intellectual inquiry that moves beyond legislation, case law, textbook, heads of argument, summons, particulars of claim, founding affidavit, responding affidavit, and other usually accepted legal practice material.[75] Any attempt to think anew about law concepts, such as authorship in copyright law, would be unserious if it assumes a superficial box-ticking exercise where the underlying

[69] Lwazi Lushaba *Theoretical Reflections on the Epistemic Production of Colonial Difference* (2015). Lushaba begins the prologue of his thesis with an excerpt from Chinua Achebe's classic novel, *Things Fall Apart*, he then proceeds to use this excerpt to relay Achebe's storyline as it comports to the thesis of the argument of his dissertation. As regards using African literature and Achebe specifically, Lushaba counsels: 'The novel should be read not as a eulogy for an idyllic Igbo past. Its main concern which the present study shares is the life of colonial cultures in the era of Empire.' In this image, Lushaba explains that there is a multipronged function to novels, they do not only serve to preserve the history/imagery of a people, but they embody the study of colonial cultures.

[70] Ibid, see also, Chinua Achebe *Things Fall Apart* (1958), I cite this novel specifically because, apart from how it is handled in the Lushaba thesis above, it holds true as regards the argument of this chapter. For example, there are numerous accounts in the novel where Achebe demonstrates the visible hand of ancestors in the lives of African people – as argued in this chapter, this emergence of ancestors does not appear as an episode or a once-off occurrence, but it is a way of life. As early as the fifth page of the first chapter, Chinua relays how Unoka broke the kola nuts and prayed to ancestors for life and health, and for protection against enemies. In the third chapter, similar themes emerge where Africans are said to be consulting seers who were able commune with the spirit of the departed. This is a common thread through the varying facets of the storyline.

[71] And critical legal scholars, generally.

[72] Joel Modiri 'The time and space of critical legal pedagogy' (2016) 27 *Stellenbosch LR* at 527.

[73] Ibid.

[74] Ibid at 528.

[75] Ibid.

formalist, liberal legal, Eurocentric and modernist paradigm of law is maintained,[76] in the sense that it insists on only drawing from traditional sources of law.[77]

Some critical legal decolonial scholars have advanced the approach of using music, art, idioms, sayings and African fiction in various ways. Fagbayibo explains that the idea of using music to provide a multidimensional perspective of international law does not seek to do away with traditional academically published literature. Instead, it appreciates that extratextual materials are key to challenging the self-contained, esoteric conception of mainstream international law.[78] Fagbayibo's argument comports with the approach taken in this chapter because he appreciates that the epistemic traditions of African peoples perceive knowledge systems as conjoined rather than disjointed intellectual arenas. He makes a similar argument in 'Critical Pedagogy of International Legal Education in Africa: An Exploration of Fela Anikulapo-Kuti's Music', where he demonstrates that music (and therefore art and literature) has a particular place and a significant role in the societal configurations and pedagogical mechanisms in the African context.[79]

At a practical level, Fagbayibo illustratively grapples with the music of iconic Nigerian artist Fela Anikulapo-Kuti; he observes that Fela was a politically subversive artist who used his craft to raise the consciousness of his society and to speak to the conscience of the ruling powers of the day. Fela's music embodies the crux of the issues raised by scholars from Third World Approaches to International Law (TWAIL). It thus can be used to appreciate concrete ways to disrupt the hegemonic mainstream of international law.[80]

Fictional writing is largely considered to be themed in leisure reading, more than anything else, but this thesis notes a didactic element to literature. Indeed, the objective of this chapter is to use

[76] Ibid at 529.

[77] The call by decolonial and critical legal scholars for a turn to non-law material to interpret the law is something that is not always accepted in South Africa's academy, see for example Gravett op cit note 208 ch 1 'Pericles', where he argues that the proposal of critical legal scholars is unworkable because it places law faculties at the risk of offering an LLB curriculum that is unbecomingly focused on theory rather than praxis. Specifically, Gravett opines that law faculties should emphasise practical legal skills and training, and therefore there is very little need for non-law sources such as poetry, African literature, idioms, sayings, visual art et cetera.

[78] Babatunde Fagbayibo 'Choral intervention: reimagining international law pedagogy in Africa through music' (2022) 56 *The Law Teacher* at 57.

[79] Babatunde Fagbayibo 'Critical pedagogy of international legal education in Africa: An exploration of Fela Anikulapo-Kuti's music' in Romola Adeola and others (eds) *The Art of Human Rights: Commingling Art, Human Rights and the Law in Africa* (2019) at 8.

[80] Ibid.

African fiction (maintaining that fiction is for the sake of fiction). However, there should be an appreciation that fiction is mostly a mirror of society, from which valuable reflective lessons can be gleaned. This didactic element is explained by Poho's foreword to Moletsane's debut novel, 'Junx'.[81] Poho's foreword draws from African existential philosophy to explain that African fiction (particularly written by young Black South Africans) is often a juxtaposition of literary devices and Black life itself.[82] Poho observes that Moletsane's book is fictional 'yet [a] honest depiction of our society and our psychology'.[83] Poho's assertions as regards Moletsane's novel are equally applicable to the fiction that is used in this chapter – all the books visited in this chapter may be purely fictional, yet at the same time, they reflect some deeper truths and hidden meanings as regards African people's deference/reverence to ancestors, and therefore its implications for authorship in copyright law.

The exercise of using fiction to ascertain the intellectual authenticity of the claim that ancestors have a visible role in the lives of the people they have left behind is not new. For example, Ngubane's 'The role of Amadlozi/Amathongo as seen in the Writing of W.B Vilakazi' serves as an important text, especially in light of this chapter's argument, because Ngubane demonstrates how W.B Vilakazi's writings were actively authored through the hands of ancestors:

> We have said that the *amadlozi/amathongo* are always very close to diviners. But it appears that, according to Vilakazi, they are also always very close to people with a special mission for the community or nation: people with special charismata for the common good. Vilakazi considered himself as one of such people. For example, in the poem 'Mamina' (a female personal name given by Vilakazi to the Spirit of Inspiration), Vilakazi says the *amathongo* inspire him when he is both awake and asleep.[84] Mamina represents all the inspiring *amathongo*. Vilakazi is aware of the great burden the *amathongo* have placed upon his shoulders. He must listen to them. They commune with him constantly, during the day, in his wakeful nights and in

[81] Moletsane op cit note 48.
[82] Koketso Poho 'Foreword' in Tshidiso Moletsane *Junx* (2021) at 5.
[83] Ibid at 6.
[84] Communicating with ancestors by way of dreams is a phenomena that is thoroughly unpacked by Mbiti, see generally, John Mbiti 'Dreams as a Point of Theological Dialogue Between Christianity and African Religion' (1997) 24 *Missionalia* 511, where he argues that there is a tension/contradiction between Eurocentric Christology and African Tradititional Religious(ATR) systems as they relate to the role of ancestors in the lives of their descendants, and their ability to give direct messages to them by way of dreams. What can be gleaned from Mbiti's argument is that colonial conceptions of the kingdom of the God tend to be dismissive of African ways of engaging to/with deities, and thus lack an appreciation of the very idea that ancestors can be anything else other than dead people.

> his dreams. Often, he has to get up in the middle of the night *to put on paper* (my emphasis) the information and messages thus communicated.[85]

Ngubane's reading of Vilakazi's account as regards Vilakazi's relationship with his ancestors not only demonstrates the visible hand of ancestors in his life but the authoring hand, too. To be sure, Vilakazi is said to have been woken in the middle of the night to 'put on paper' the information and messages that his ancestors have communicated to him.[86] Owing to extant copyright law strictures, and as well as prevailing legislative definitions of authorship in copyright law,[87] ancestors (Abezimu, Badimo, Amadlozi, Amathongo, et cetera) are not recognised as an author – instead, in these set of facts, copyright law only recognises Vilakazi as an author, when he clearly isn't.

This segment of the chapter qualitatively samples four works of fiction to demonstrate intellectual authenticity in the claim that Abezimu/Badimo are authors in copyright law from the perspective of the epistemic traditions of the global South, Black people, and Africa. These four samples are Mphuthumi Ntabeni's 'The Wanderers', Adekeye Adebajo's 'The Trial of Cecil John Rhodes', Panashe Chigumadzi's 'These Bones Will Rise Again', and Thenjiwe Mswane's 'All Gomorrahs are the Same'.[88]

This segment seeks to achieve the aim of demonstrating the intellectual authenticity of ancestral deference and thus specifically relies on these four books because of the two distinct commonalities among them: (1) the main storyline in all of these books is hardly connected to ancestors nor ancestral deference; instead, the writers use literary tools to illustrate that ancestral deference emerges naturally and organically in the day-to-day lives of African people, (2) all of these writers are Africans from different political, ideological, social and spiritual backgrounds, yet they all unknowingly converge at the conclusion that no long drawn story reflects African lives without illuminating ancestral deference.

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[85] Ngubane op cit note 31 at 63.
[86] Ibid.
[87] Section 1(1)(b) -(f) of Copyright Act 98 of 1978, Section 3 (f) of Intellectual Property Law Amendment Act 28 of 2013, and Section 1 (a)-(c) of Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.
[88] Whilst it may appear that choosing modern writers weakens the argument of this chapter, it must be noted that all four authors write in a long tradition and are doing the very decolonial task of reaching to the pre-colonial era in their choice of method, and subject matter.

The first distinct commonality between these four books is worth some brief comment: these books show that African people's deference to Abezimu/Badimo is not an event, nor is it an episode; instead, it is an embodiment of their daily lived experience. This commonality is important because it comports with this chapter's supposition that Abezimu/Badimo is an ideological and epistemic commitment and is thus different from ancestral belief as meaning religion or a related belief in a deity. This is not to say that the latter is immaterial and intellectually insignificant because it is. Still, the former is linked to this doctoral project's argument because the thesis insists that Abezimu/Badimo as an author is not a matter of choice/option (as is belief) but is intricately definitive of the Being of Black people, Africans and peoples of the global South.

The method applied in this segment of the chapter is as follows: each of the four novels is discussed in three parts. The first part lays out an abridged synopsis of what the general storyline is about and links it with the thesis of this chapter's argument. The second part quotes two different excerpts from the book. These two excerpts specifically speak to the question of ancestors having a visible hand in the lives of Black people and Africans. The third part entails a brief unpacking and analysis of the excerpts drawn from the four books. At the end of this segment, a summary of observations is made to solidify the intellectual authentication that, indeed, ancestors play an active and ongoing role in the lives of Black peoples and Africans and thus validate a claim that ancestors are authors in copyright law.

4.4.2 Mphuthumi Ntabeni – The Wanderers[89]

a) A synopsis of the storyline

In this story, the protagonist, Phakamile Maseti, joins the anti-apartheid struggle, leading him to exile before his daughter, Ruru, is born. Following the 1994 democratic moment, Phakamile does not return to South Africa but instead chooses to stay in Tanzania, where he ultimately meets his death. Ruru grows to become a medical doctor and decides to travel to Tanzania to search for her father's remains. Upon arriving in Tanzania, Ruru meets Phakamile's widow (he re-married whilst

[89] Mphuthumi Ntabeni *The Wanderers* (2021).

in exile), who shares his 'pillow books' with Ruru. These 'pillow books' are a series of letters and journal entries that Phakamile used to write when he was bedridden and nearing his death. These letters reveal an explosive account of Phakamile's ideological, spiritual, political, and emotional insights. Ruru uses these letters to reflect on the letters that she used to write as a young girl growing up without a father. In this exercise, Ruru does not only experience the presence of her 'dead' father, but she also gets to undergo a spiritual journey of self-discovery by way of meeting the self, as she comes into contact with the lived spirit of *Abezimu bekhabo* (her ancestors).

The Wanderers is a story about parting, longing, love and belonging – the author invites readers to think about and imagine the meaning of untold dimensions of this world. In specific pockets of the storyline, Ntabeni introduces and eloquently canvasses the very visible hand that ancestors play in the lives of Black people and Africans. Two things make the book special: (1) it meticulously fuses fiction with politics, history, philosophy, theology, romance & poetry/prose, and (2) the author writes in multi-narrations.

In his many bedside letters, Phakamile gets to muse and reflect on a lot of things randomly. In some instances, he toys with the idea of the existence of a God. He wages an extremely potent critique of Christian logic and its myths.

b) Excerpt 1

> Don't kill the spontaneity of it. We're black people, my sister, we know everything by feeling, deep feeling, maan, not by head. We use feeling to take part in realms beyond time. That is why we have use of diviners and spiritual guides. But you don't get that because you are too invested in the Western obsession with the Intellectual.[90]

Sandi utters these words to Ruru in the setting of an evening social event at the house of a mutual colleague. Sandi persuades Ruru to join her on the dance floor, urging her to allow herself to feel the music from within. Anecdotally, Sandi refers to the tension that sometimes exists between Western subjectivity and the epistemic traditions of the global South. Most importantly, Ruru shrugs off Sandi's invitation for her to join the dance floor, but she does not dispute, nor scoff at, the suggestion that African people have a distinct conception of Being, thinking and knowing; that

[90] Ibid at 19.

Africans use 'feeling[s] to take part in realms beyond time', and this is done through the medium of diviners and spiritual guides.[91] This part of their conversation authenticates one of this chapter's claims that the belief in Abezimu/Badimo is not just a religious/spiritual belief but constitutes an epistemic tradition because it is a way with which African people 'know everything by feeling'. Knowing by feeling is an idea that is largely unacceptable to Eurocentric norms and sciences. This further validates the argument canvassed in earlier chapters that the *Decolonial Turn* insists that for the trip from the universe to the pluriverse to happen, disciplines like psychology and the law must expressly accept global South concepts of worldmaking, such as the idea of 'knowing by feeling'.[92]

c) Excerpt 2

> Your mother of the clan *AmaCirha amhlophe*, which she loved to mention, reminding you that she came from the scion of prophets like *Ntsikana*. Their clan was not supposed to come close to river mouths, lest their ancestors lured them in. If they were lured into the water deeps by the ancestors, they'd spend the rest of their days caught in between worlds as *abantu bomlambo*, which one could translate as 'mermaids', though they are not the same. For one, *abantu bomlambo* are not only females but guides caught up in the numinous divide between this world and that of ancestors. They're closer to the Catholic saints … You'd never thought much about that day before, nor understood its significance, until your path crossed with of the old man who told you he had been given directions to Johannesburg by the river people. At that moment you knew, somehow, that you were receiving a message from your mom. That she had found a way to filter it through the old man. In your culture, the mentally challenged especially seeming schizophrenic, are respected because of their ability to cross over the divide between the living and the dead. They're taken care of by everyone in the community in the same manner that other cultures protect their totem animals, like the Hindus do with cows or monkeys.[93]

This excerpt combines two scenes. The first is a narration by Ruru, where she recounts the roots of her clan as it was taught to her by her mother. Her clan, *'AmaCirha amhlophe'*, as explained in the excerpt, is intricately linked to the visible hand of their ancestors. The very essence of the existence of *AmaCirha amhlophe* is based on the lived experience of ancestors. These are a group of people who have an ontological appreciation of the composite existence of the dead, the living,

[91] On the use of spiritual guides and diviners in ancestral healing, see generally, Edwards *et al*. op cit note 36.
[92] See in chapter 2, Maldonado-Torres op cit note 72.
[93] Ntabeni op cit note 89 at 260-262.

and the yet-to-be-born. This excerpt vindicates the scholarly suppositions that are made in earlier parts of this Chapter in the sense that, prior to colonial Christianization, African people knew themselves as intricately linked and intertwined with their ancestors.[94]

The second part of the excerpt relates to a scene where Ruru comes across a mentally ill stranger at a train station – in a moment of shock and confusion, the stranger communicates messages to Ruru that appear to be from her late mother. The sincerity, genuineness and accuracy of these messages remind Ruru of the Abezimu/Badimo epistemic tradition that insists that mentally ill persons are said to be conduits of messages between the living and the dead. The message that is sent to Ruru may not have instructed her to author a work that is worthy of copyright protection as per the criticisms of the Act[95] because the message was about directions for Ruru's trip to Johannesburg from the Eastern Cape province. The message from Ruru's ancestor is different from the instance of W.B. Vilakazi above. Still, it could easily have been an authoring hand (had Ruru's mother directed her to reduce any part of her message into a material form). In that case, prevailing Eurocentric copyright epistemologies would insist that it is factually and legally incorrect to claim that Ruru's mother is an author; however, in a copyright epistemology that has embraced the *Decolonial Turn*, Ruru's mother would be recognised as an author, because a decolonised copyright law accepts that ancestors are an author.

These two scenes are helpful in the task of authenticating two of this chapter's claims: (1) that culture is central to the Being of Africans, and the Being of Africans is directly proportional to the reverence/deference to Abezimu/Badimo, and (2) that, from the African worldview, there is an unbroken relationship/commensalism/reciprocity in the lives of the living, the dead, and the yet-to-be-born, and thus the authoring hand of the living should never mean the erasure of the dead and the yet-to-be-born.

[94] Mudimbe op cit note 13 ch 3 at 45.
[95] Authorship is defined in section 1(1)(a) and Section 1(1)(b)-(f) of the Copyright Act 98 of 1978.

4.4.3 Adekeye Adebajo – The Trial of Cecil John Rhodes[96]

a) A synopsis of the storyline

Adebajo utilises creative non-fiction to proffer a potent commentary on various figures in the history, present and future of Africa; he engages in this task from the perspective and historicity of the colonization of Africa. The book is categorised as creative non-fiction because, although Adebajo engages in pure fiction, he uses non-fictional characters and non-fictional events to piece together the plot. The setting is a fictional place called 'After Africa' and is only fictional because it is set in a place where Abezimu/Badimo reside. This is the context of Africa, where departed souls have transitioned to and continue to live beyond their physical death.

In this story, the protagonist, Cecil John Rhodes,[97] is woken up after 120 years of death,[98] in 'After Africa', and is taken through a post-grave trip that is divided into three phases: (1) The Counsel for Damnation (2) The Counsel for Salvation and (3) Judgment Day. These three phases constitute a quasi-criminal trial where Rhodes is tried and made to account for his countless colonial atrocities before he became an ancestor.[99] Throughout the three phases of Rhodes' criminal trial, he encounters fellow ancestors in the making of distinguished African luminaries[100] from various fields and disciplines, and all of them play varied roles in the trial.

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[96] Adekeye Adebajo *The trial of Cecil John Rhodes* (2020).

[97] Cecil John Rhodes was a racist British imperialist, responsible for colonizing most of Southern Africa from1871 to date (because coloniality persists/prevails), also responsible for the brazen theft of Africa's mineral, natural and human resources, the architect countless atrocities, that include mass murders, rapes, killings, displacements and dispossession.

[98] Already at its genesis, the story begins with the act of 'waking' the dead which is a definitive aspect in African people's reverence/deference of Abezimu/Badimo. This epistemic tradition insists that when people die, they do not die but continue to live beyond their death, and thus can be woken up or evoked.

[99] As the story is told, it is said that prior to his trial, Rhodes was in a 'limbo' for 120 years after his death. This is an extremely important fictional claim because it comports with an existing epistemic tradition that insists that there is a limbo in the transitions between the worlds of the living, the dead, and the yet-to-be-born, meaning that after their death, and before they transition into becoming Abezimu/Badimo, the dead go through a limbo, or a trip that leads them into the world of ancestors. As expected, there is a paucity in scholarly research as regards this epistemic tradition, but it emerges in works such as that of Stevenson, see generally, Ian Stevenson 'The Belief in Reincarnation Among the Igbo of Nigeria' (1985) 20 *Journal of Asian and African Studies* 15, where he observes that although Igbo Christians have accepted Eurocentric Christology, they continue to hang onto to their pre-colonial beliefs, one such belief includes Igbo people's acceptance that there are varied ancestral realms in the afterlife, and that transitioned persons enter a discarnate limbo before they can become fully fledged ancestors, and that this is a long drawn process.

[100] These include people like Oliver Schreiner, Stanlake Smakange, Nelson Mandela, Harry Oppenheimer, Ruth First, Wangari Maathai, Boutros Boutros-Ghali, Patrice Lumumba, Taslim Elisas, Maya Angelou, Toussaint l'Ouverture and others.

Adekeye does something quite remarkable in this book, in the sense that he intellectually toys with the idea of seeking accountability, not just from the individual in Rhodes, but the entire colonial architecture, for all their colonial crimes long after the official fall of colonialism. This approach to fiction is an act of decolonisation because it innately appreciates that although colonialism has been defeated, coloniality remains a vestigial, albeit subtle, force of colonialism. Part of the reason why Africa continues to grapple with the vestiges of colonialism is the very fact that the coloniser has never accounted for and atoned for their atrocities. Moreover, the colonised are yet to get what is due to them in terms of reparations, restitution and restoration on the material, social, political, and spiritual planes. Indeed, decolonisation (as extensively unpacked in Chapter 2) is a project to complete the incomplete task of attaining substantive freedom for colonised people. A decolonial reading of history (as extensively unpacked in chapter 3), when studied with the prevailing epistemic realities, shows that this incomplete task of decolonisation rears its ugly head in copyright law conceptions, which continue to mirror Eurocentric thinking patterns and related epistemic sensitivities.

What is more relevant to the argument of this thesis is that Adekeye's storytelling taps into the epistemic tradition of the global south, in their reverence/deference of Abezimu/Badimo, to take readers to an alternative world, that is, a world that is inhibited by the departed souls of Africa, who continue to live beyond their physical death. As the two excerpts below will show, there is a completely new world, one that is unknown in prevailing colonial epistemologies. This is a world wherein Rhodes is made to travel, where he experiences the impact of his colonial conquests from the lens of colonised peoples. The image of a 'new world' gives credence to two decolonial suppositions that were canvassed in chapter 2: (1) the Fanonian claim that decolonisation invariably includes the creation of a new world that embraces and espouses a new type of humanity[101] and (2) the claim by Escobar that 'new' world and old worlds co-exist in the pluriversal visions of the world, thus creating a world where many worlds exist.[102] The latter supposition carries through the thesis' central argument, in the sense that it firmly allows the thesis to argue that Abezimu/Badimo are an author in a copyright law from the world/universe of colonised

[101] Fanon op cit note 74 ch 2 at 41.
[102] Escobar op cit note 29 ch 2 at 117.

peoples, and this should be accepted because the *Decolonial Turn* shifts the world from a universe to a pluriverse.

b) Excerpt 1

> Mr Rhodes, I presume? Welcome to After Africa. This is where all the departed souls from Africa and its diaspora end up. It is often said here that 'death is an exercise in Pan-Afrikanism.' As the Kenyan political scientist, Ali Mazrui noted, death is the most horizontal form of Pan-Afrikanism.[103]

On his very first trip, Rhodes is accompanied by Efua Sutherland. Stunned after being woken up from his sleep that lapsed for over 120 years, Rhodes is introduced to 'After Africa'. Sutherland explains to Rhodes that, to Africans, death is a form of Pan-Afrikanism, in the sense that Africans appreciate that there is life after physical death. Although there is no authoring hand in this specific excerpt (unlike in D.W Vilakazi and Mphuthumi Ntabeni above), Adekeye authenticates the claim that Africans have a life beyond death and that this life has an active hand in the lives of those who remain behind.

Crucially, the invocation of death as meaning a form of Pan-Afrikanism lays the ground for an interesting dimension; it authenticates ancestral reverence/deference as an epistemic tradition because Pan-Afrikanism is an intellectual tradition. This authentication solidifies this chapter's basic argument that the belief in Abezimu/Badimo is more than just a religious/spiritual belief but entails a valid epistemic tradition of the global South. Adekeye's remark about death meaning a 'horizontal (form of Pan-Afrikanism)' further speaks to how Africans perceive death as a move from left to left or right to right or vice versa, as opposed to the Eurocentric (and Christian) belief that death means a move from existence to inexistence.

c) Excerpt 2

> Anyone living in Africa beyond the grave can be a judge. In fact, we have had several white judges in the past. But you will have to be patient to discover their identity. You will have to wait to learn the nature of the crimes for which you will be tried. We have to wander through the four heavens before arriving at the

[103] Adebajo op cit note at 98 at 20.

> fifth. Truth is revealed only slowly, in After Africa, and much patience is required to discover its mysteries.[104]

The latter sentence of this excerpt is most important; Adekeye posits some anecdotal facts about After Africa when he opines that After Africa is a place that holds deeper truths, but these truths require a considerable amount of patience. Adekeye also demonstrates that Africa is a world of mysteries. To assert 'mysteries' as a way to describe 'After Africa' is not to say that it is a mystery to Africans. Instead, it is a mystery to prevailing one-world universalisms. This chapter understands Adekeye to be subtly calling for a deepened analysis and study of African epistemic traditions in order to make sense of them and relate them to existing epistemic patterns.

4.4.4 Panashe Chigumadzi – These Bones will Rise Again[105]

a) A synopsis of the storyline

Chigumadzi utilises creative non-fiction to weave together a personal and collective memoir of the time when the people of Zimbabwe experienced a regime change in November 2017 following the forced resignation of then-president Robert Gabriel Mugabe. The memoir fuses both fictional and non-fictional devices to recount some of the events in the lead-up to Mugabe's removal. Three dominant threads link the book's narrative: Firstly, Chigumadzi posits that the present Zimbabwean state always resorts to violent means when interacting with its citizens because violence is the most common language that the state has ever known. She illustrates the historicity of the present as stemming from the two-pronged violent reality that has a violent colonial state on the one hand and an equally violent liberation movement on the other hand. Although the violent means of the latter are a justified response to the violence of colonialism, they still count as violence, and violence inevitably begets violence.

Secondly, Chigumadzi grapples with the essence of the legitimacy of each epoch's political elite. Succinctly, she probes the question of whether or not the removal of Mugabe constitutes a *coup*

[104] Ibid at 21-22.
[105] Panashe Chigumadzi *These Bones Will Rise Again* (2018).

de tat. Whereas there are different theories and conceptualisations of the meanings of coups, Chigumadzi uses a slightly different approach in that she observes that a coup only happens when it results in a complete change of regime. The change of one personality by another does not necessarily mean a change of regime. Therefore, regardless of the means by which power changes hands, a change in personnel does not automatically translate into a coup.

Thirdly, Chigumadzi critically imagines the meaning of the spiritual involvement of the ancestors of the people of Zimbabwe in the continuing life of the country – she practically illustrates samples with the ancestral spirit of Mbuya Nehanda and the spirit of her grandmother.

b) Excerpt 1

> As a people who believe that a person is both flesh and spirit and lives on after death, we often commune with our ancestors, but it is especially in times of crisis and need that we look to them for answers about ourselves.[106]

The plot and narrative in 'These Bones will Rise Again' do not centre around ancestral reverence/deference, yet Chigumadzi makes remarks such as the one in this excerpt. In this context, Chigumadzi introduces the storyline, explaining that the people have faced numerous challenges and problems in various epochs of their existence and that whenever this has happened, they have always looked towards their ancestors for guidance and solutions. Not only does this authenticate this chapter's claim, but it also comports with some of the research findings made by the scholars studied in the earlier parts of this chapter. For example, recall Zulu's argument that Abezimu/Badimo have the task of guiding a spiritual functionary and a source of blessings.[107]

Chigumadzi qualifies the phrase 'answers about ourselves' in an incredibly illuminating way. She opines that guidance sought from ancestors transcends time, space, death, and birth.[108] Although worded differently, the expression of answers that transcend these markers speaks to the epistemic tradition that perceives a community to mean the triad of the living, the dead, and the yet-to-be-born.

[106] Ibid at 12
[107] Zulu op cit note 38.
[108] Chigumadzi op cit note 107 at 12.

To illustrate the act of asking questions and seeking solutions from the spirit of ancestors, Chigumadzi, as an example, samples the spiritual and military leadership of Mbuya Nehanda, who led the Ndebele-Shona uprisings (from 1896 to 1897) against Cecil John Rhodes' Pioneer Column and colonial expansionism; this is what is known as The *First Chimurenga* by the Shona and *Umvukela* by the Ndebele. Unlike Adekeye, who uses creative non-fiction to enter the world of After Africa, Chigumadzi uses the same to go back into history to piece together a narrative about how the spirit of Mbuya Nehanda continued to carry the people of Zimbabwe through further years of struggle and resistance against colonial and imperialist conquests.

c) Excerpt 2

> In a spiritual tradition that believes the ancestors lives on, watching over the living, the belief in *vadzimu* holds that ancestral spirits can choose to return, in times of family or national crisis, through living mediums.[109]

In the image *'vadzimu',* Chigumadzi introduces the idea of Abezimu/Badimo in the context and vocabulary of the people of Zimbabwe. This is yet another authentication of the claim/argument made earlier in this Chapter that language plays a central role in the collective understanding of concepts, such as the reverence/deference in Abezimu/Badimo. What AmaZulu call amadlozi, or Basotho call Badimo, or amaNdebele call Abezimu, is called vadzimu by the Shona people of Zimbabwe. This is an authentic demonstration that where ancestral reverence/deference is concerned, there is near uniformity among Africans, regardless of the specificity of their local language, ethnicity, and related diversities.

The latter part of this excerpt is worth some brief comment; Chigumadzi illustrates that *vadzimu* have the power to choose return/manifest in the form of mediums. Yet again, this authenticates and comports with academically researched findings that speak to the use of mediums such as izangoma, izanusi and izinyanga.[110]

[109] Ibid at 70.
[110] See generally, Edwards *et al*. op cit note 36.

4.4.5 Thenjiwe Mswane – All Gomorrahs are the Same[111]

a) A synopsis of the storyline

Makhosazane, the protagonist, weaves together the narrative, telling a story of the interplay of the lives of three women: Makhosi, her mother Duduzile, and her younger sister Nonhle. Most of the story is set in Mooi River in the KwaZulu Natal province of South Africa. Although related, the interplay of their stories shows how the three women experience and navigate life differently and from different vantage points.

Mswane's storytelling demonstrates the generality and specificity of positionality as a determinant in how people grapple with life. Although in completely different formats, Mswane's assertions as regards positionality are like the theoretical insights proffered by Black Marxism in the methodology chapter. Black Marxism stretches classic Marxist insights on proletarian positionality to insist that the ongoing class struggle presents a diverse locus of enunciation as regards the positionality of oppressed persons. Whereas classic Marxism limits the struggle to the antagonism between the capitalist class (also known as the bourgeoisie) and the working class, Black Marxism insists there are other markers such as race, gender, sexuality and the like, and these markers are a representation of valid positionalities in the struggle and resistance against capitalist machinations and stratagems.

Drawing from a similar approach and methodology as Black Marxism, Mswane uses Makhosazane's positionality as a queer woman, Duduzile as a conservative, Christian-raised wife, and mother of four, and Nonhle a naïve young woman who gets to experience being a second-generation university student, in the aftermath of her big sister having already been a university student. Their specific positionalities mean that they experience diverse challenges, prejudices, and oppressions at varying levels. The essence of their articulations, feelings, and ability to negotiate with life's varied challenges whilst dialoging with each other is at the heart of Mswane's book.

b) Excerpt 1

[111] Thenjiwe Mswane *All Gomorrahs Are the Same* (2021).

> I remember *Ma* convincing him that this was what *uMalume* wanted. That it was his wishes, and they needed to be respected. It was still far, *uMkhulu* insisted, but *uMa* gathered her mother and sisters to rally behind her and *uMkhulu* was outnumbered. Although I always thought he was right. It was far on the day of the funeral, and it was far after the funeral, when he had to go fetch him from many places and bring him home with *ihlahla.*[112]

In this part of the story, Mswane refers to the act of fetching the spirit of the dead from their place of death by way of using what is known as *ihlahla*. Loosely translated, *ihlahla* refers to the branch of a tree or anything like it. African people believe that when a loved one has passed on owing to a tragedy (such as a car accident), family members must converge at the place/scene where the death occurred and perform a ritual to fetch their soul from that place and take it with them back home, this is known as the ritual of *ihlahla*. The crux of this practice rests in the epistemic tradition that people do not die but transition into a different realm (the same sort of realm that Adekeye refers to as 'After Africa'). The practice thus logically appreciates that when the spirits of transitioned people are left to wander around, this may lead them to be lost or to wreak havoc. As a result, African people engage in the ritual of *ihlahla* to fetch and return them home or to a familiar environment.

c) Excerpt 2

> 'No, but for real. For that short space of time, I believed ancestors could have been real, you know,' she says. 'I know you believe their real now, and things from the past haunt us and all. But, I promise you, friend, I promise: the blood of Jesus cleanses all. Renews all. Even Fear Factor doesn't scare me now, you know. I could do all these things, because I know the blood covers me.'[113]

In this part of the story, Mswane fictionally grapples with the tension between African people's belief in Abezimu/Badimo and Eurocentric Christology. Makhosazane meets up with her ex-lover (and best friend) from the time when they were both very young. The lover, Zama, is now a medical doctor and stays in an upper-class apartment in Balito, KwaZulu Natal. In one of their many catch-up conversations, it emerges that they have grown apart and have differing views on a lot of things. For example, whereas Makhosazane has jealously hung onto the epistemic tradition of revering and deferring to ancestors, Zama has 'found' God and, as a result, scoffs at the idea of ancestral

[112] Ibid at 7.
[113] Ibid at 230.

deference. This bit of conversation comports and validates the academic insights canvassed earlier in this Chapter about the antagonistic relationship between African people's reverence/deference to ancestors and Eurocentric Christology.

4.4.6 Concluding analysis

These four books, as eminent works of African literature, deserved greater discussion. However, this is not possible, given the limited scope of a doctoral thesis. Although they are discussed in this limited fashion, they succeed in exercising epistemic freedom to assert and firmly emphasise the academic and intellectual authenticity of this chapter's central claim that Abezimu/Badimo play an active role in the lives of their descendants and that they may realistically have a direct/indirect and/or active/inactive authoring hand in the works that are legible for copyright protection.

4.5 Conclusion

The argument of this Chapter was propounded in 5 segments. Apart from the introduction and conclusion, the three substantive segments proffered distinct yet related methodological functions to respond to the research question: what is the intellectual authenticity of the claim that ancestors are authors in copyright law?

The first substantive segment laid down the foundations of prevailing copyright law strictures as they relate to the relationship between copyright law generally, authorship broadly, and community specifically. Drawing from the approach used in the third chapter, this segment found that prevailing definitional paradigms reflect Eurocentric epistemologies and thinking patterns. The segment further found that although South African lawmakers have done considerable work to reform the meanings/definition of some intellectual property law concepts, with the intention to make them suitable to the situation and context of Africa, these efforts are sadly not enough because they are done within the ambit and grammar of Eurocentric legislative lexicography. For example, the segment demonstrated that the prevailing definition of a community, as per IPLAA

and PPDM, both limit a community only to mean human beings that are alive, thus neglecting that humans in the context of Africa mean the living, the dead, and the yet-to-be-born.

The second substantive segment relied on academically published work to demonstrate that ancestors are authors in copyright law. However, to succeed in making this argument, the segment had to cross two hurdles. The first was that it had to substantively demonstrate that there is a valid intellectual relationship between ancestors and the law. The second was that it had to show that an alternative conception of authorship in copyright law is a product of the 'many worlds' hypothesis that was canvassed in the theoretical framework (expansively laid out in Chapter 2). This segment made two crucial findings: (1) in the context of the discussion about decolonising the meanings of an author and community in copyright law, there is a difference between how ancestors are understood in English and how they are understood in African vernacular – this necessitated that the chapter lean towards academically published works that are written in isiZulu, and (2) that ancestral reverence/deference is not merely a religious/spiritual belief, but is an epistemic tradition of the global South.

The third substantive segment relied on four works of African literature to respond to the research quest of authenticating the claim that ancestors are authors in a decolonised conception of copyright law. All these works of African literature succeeded in this task. They all, in their varied ways, showed that ancestral deference is not an event nor an episode in the lives of African peoples but is rather an embodiment of their very essence and continued existence. Most importantly, in some of the works studied, this segment was able to demonstrate the actual visible authoring hand of ancestors. For example, fiction brought about examples of how there were instances where people authored works that were eligible for copyright protection. Yet, they received an instruction to author these works directly from the spirit of their ancestors. The crux of this specific instance is that prevailing colonial and Eurocentric conceptions of authorship only recognise the hand that physically authored the works, neglecting and denying the direct and active involvement of the ancestor. This segment thus found that this neglect and denial constitutes a continuation of colonial Eurocentric tropes, effectively justifying the need for copyright law to be radically changed to reflect the epistemic patterns and traditions of Africans, Black people and peoples of the global South.

This Chapter set out to achieve two tasks: (1) to intellectually qualify the essence of the decolonial claim that ancestors are authors in copyright law, and (2) to use decolonial methodology, such as relying on African literature, to canvass the chapter's central argument. These tasks have been sufficiently achieved.

CHAPTER FIVE: ABEZIMU/BADIMO AND ALTERNATIVE CONCEPTIONS OF COPYRIGHT LAW'S AUTHOR

5.1 Introduction

This chapter draws from the groundwork theorisation done in the previous chapters to study the possibilities and alternatives in the definition of an author. The purpose of this chapter is to demonstrate that even on current Eurocentric conceptions of authorship, it is possible to imagine a newer meaning of authorship – specifically, one that does not demand an in-person or outright human author. To achieve this aim, the segment studies two court judgments, *Peter Ross v Ramesar* and *Cummins v Bond.* The task of illustrating alternative possibilities of an author in copyright is done to proffer a response to the research question that probes: How is copyright law's 'author' defined from the prism of decolonial theory? As a point of entry, and drawing from the insights canvassed in Chapter 2, decolonial suppositions in their varying articulations all point to pluriversalism as the legitimate aftermath of the *Decolonial Turn*. The theoretical insights thus proffer the praxis of a copyright law author that fits into the 'many worlds argument'.

The argument of this Chapter is propounded in 7 segments. Following this introduction, the second segment introduces the essence of copyright law's author from the prism of decolonial theory, arguing that such authors are pluriversal because they reflect the pluriversal epistemic traditions of the world. The second segment uses this thesis' dual theoretical framework to intellectually illustrate copyright law's author that embodies the object of decolonial theory and Black Consciousness Philosophy.

The third and fourth segments are a study of two court decisions and related commentaries about them. Both these court decisions present historical and contemporary grappling with the idea of an author that tends to move beyond what is currently accepted by a strict reading of copyright law legislative strictures.

The fifth segment investigates the authorship of Ndebele artwork as produced/authored by the legendary Gogo Esther Mahlangu – it argues that although she remains a legitimate individual author, the community of amaNdebele also have an authoring hand in her work. This argument

presents a contemporary realisation of the pluriversal author – one that embraces that a community means the living, the dead, and the yet-to-be-born.

The last segment concludes this chapter.

5.2 In a world where many worlds exist – The Pluriversal Author

The articulation of the *Decolonial Turn* as leading to the pluriversal author is an expression of decolonial theory's concern, not just with reacting to persisting vestiges of Eurocentrism and colonial racism, but mostly with defining and discovering the lost cultures, traditions, and customs that define the very Being and essence of colonised people.

The aim of decolonisation is not merely to proffer a decided critique of the history of colonial worldmaking (as done in Chapter 3) and prevailing realities of coloniality (as done in Chapter 2) but to be equally forward-looking. Chapter 4 briefly demonstrated the intellectual authenticity of the claim that Abezimu/Badimo are an author in copyright law and ventured to illustrate that this is true because it represents a specific epistemic tradition. The claim that Abezimu/Badimo are an author in copyright is just one of the many claims about copyright law in general and authorship specifically. This chapter draws from the theoretical framework laid down in Chapter 2 to accept that the *Decolonial Turn* leads us to a world where many worlds exist and, therefore, a copyright epistemology where many types/definitions of authorship exist concurrently. This is the gravamen of what a pluriversal author is – an author whose very essence embodies a pluriverse instead of a universe, thus receptive to varying conceptions of what peoples of different worlds conceive of authorship.

Although the claim made in Chapter 4 represents the African/Black point of view, this chapter insists that even within Eurocentric conceptions of authorship, the definition of an author has had the habit of shifting from normative strictures and requirements. These shifts are logically born from the critique of this thesis and its many worlds argument. The subsequent segments of this chapter bear testament.

5.3 Peter-Ross v Ramesar

The court in *Peter-Ross v Ramesar and Another*[1] (herein after *Peter-Ross*) was called upon to adjudicate a copyright dispute in relation to the authorship of an academic paper. The applicant, Mrs Elizabeth Peter-Ross, is a senior lecturer at the University of Cape Town (the second respondent), and the first respondent is a professor and director at the second respondent's Human Genetics Research Unit.[2] In 1996, the Unit launched a research project led by the first respondent. The project focuses on the connection between bipolar psychiatric disorders and the genetic makeup of patients.[3] The applicant joined the project in 2001 with the specific function of exploring the idea that the genetic location of bipolar disorders can be improved by concentrating on patients who were not only bipolar but also had some other genetic disorder.[4] The applicant and first respondent collaborated in developing this idea until early 2005, and this culminated in the first draft of an academic paper.[5] After having put the first draft, the relationship between the applicant and the first respondent began to break down owing to a disagreement about the publication of the paper's hypothesis.[6] The applicant felt that the hypothesis needed to be published as soon as possible, whilst the respondent felt that more empirical evidence was needed before publication.[7] This disagreement is formative of the crux of the dispute before the court.

On the 20th of January 2006, the applicant told the first respondent that *Molecular Psychiatry* (a journal) published the paper that she had submitted.[8] The first respondent, under the belief that this paper embodied the work done by him in collaboration with the applicant, informed the journal and the publication was stopped.[9] The applicant thus launched an application to the court for the court to order the publication of the paper and sought a declaratory order that she has sole copyright in the article.[10]

[1] (2064/06) [2008] ZAWCHC 39.
[2] *Peter-Ross v Ramesar and Another* at 1
[3] Ibid at 2.
[4] Ibid.
[5] Ibid.
[6] Ibid at 3.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.

The first respondent contended that he is a joint author of the article even though he did not 'contribute to the written formulation of the article' and justified this by arguing that he and the applicant engaged in a scientific collaboration that culminated in the article.[11] The phrase 'did not contribute to the written formulation of the article'[12] is at the heart of the argument of this chapter. The chapter argues that there are various conceptions of authorship whose enunciation differs somewhat from prevailing legislative offerings. As canvassed in previous chapters, the Act, IPLAA and PPDM[13] all have similar demands as regards the definition of an author; they all insist that in literary works, for example, an author must have expanded some form of labour, usually in the form of physically contributing to the writing of the work.[14] In this set of facts, the first respondent conceded that he did not 'do any work on the *Molecular Psychiatry* article', which ordinarily would have settled the dispute in favour of the applicant.[15] However, the court considered factors other than the requirement of having to expand some work on a work for it to be a work.

The court's findings in *Peter-Ross* are important because they nuanced the definition of an author to shift from the strict/formalist expectation that an author must expand some form of physical labour in terms of which they must have the writing hand in a literary work.

The court observed that it would have been impossible for the article's hypothesis to be developed without the active collaboration of both the applicant and the first respondent.[16] Having analysed the evidence in totality, the court held that:

[11] Ibid at 4.

[12] Ibid at 7, the court accepts that the first respondent did not having the writing hand in the draft of the article itself but, it notes that the first respondent contributed to the work 'orally' and by way of conversation conveyed by way of emails. Considering the court's eventual order, it is worth noting that an acceptance of the first respondent's claim to authorship means that the court was warm to 'oral' contributions to authorship in a work. This is notwithstanding the longstanding principle that copyright does not subsist in ideas, but in the expression given to those ideas.

[13] Section 1(1)(b) -(f) of Copyright Act 98 of 1978, Section 3 (f) of Intellectual Property Law Amendment Act 28 of 2013, and Section 1 (a)-(c) of Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.

[14] It is important to underscore that mental labour itself is a physical labour, however in the context of the above discussion, 'physical' refers to manual labour that is outside of mental labour.

[15] *Peter-Ross* supra note 2 at 11, counsel on behalf of the applicant made the argument that the first respondent cannot be joint author precisely because he did not make any contribution in terms of the 'writing' of the article. This argument is in line with normative expectations of labor from anyone that claims authorship of literary works.

[16] Ibid at 6.

> A person can 'make' or 'create' a work by dictating to a scribe or, at the other end of the spectrum, a person may verbally express an idea which another then embodies in a written form. In the latter instance the person who does the writing is the sole author. It is this type of case in which one finds ***dicta*** to the effect that there is no copyright in ideas.[17]

Two important aspects are important to note: (1) the court affirms the long-held principle that there is no copyright in ideas, thus asserting the significance of the material embodiment principle, but insists that this principle must always be studied in the context of prevailing facts, and (2) that the hand that physically holds the pen/pencil to write down work will not always be an authoring hand,[18] for example in the instance of a stenographer or a writer whose writings are a product of being 'dictated to'.[19] The latter aspect finds applicability to the examples about Abezimu/Badimo that were made in the previous chapters, for example, where it was shown that some literary works were written by people who directly received instructions from their ancestors.[20]

In a bid to explain that the hand that writes is not always the hand that authors, the court further observed:

> Where the ideas to be recorded are the product of collaborative endeavour and the one has undertaken the physical recording of the ideas the collaborators could properly be regarded as having jointly 'made' or 'created' the work. What distinguishes this type of case from the situation where it is said that there is no

[17] Ibid at 18.

[18] Foucault op cit note 44 ch 1 at 209, where Foucault explains that the focus on the authoring hand is unduly misplaced, he invites readers to imagine writing as a 'simple repetition, in transcendental terms'. What can be gleaned from this philosophical analysis of authorship is Foucault's deepened argument that the action of writing goes beyond just the authoring hand but is inclusive of other non-physical aspects.

[19] It is worth taking into account that following the *Peter-Ross* court judgment, the University of Cape Town developed a policy document titled: 'Authorship Practices Policy' (available at: https://uct.ac.za/sites/default/files/content_migration/uct_ac_za/39/files/Policy_Authorship_Practices.pdf), broadly this policy document is underpinned by the university's task as a socially responsible institution, with the task to engage in academic research and disseminate it in a way that behoves an institution of high ethical standards. Precisely as regards potential contestation as regards the true nature of authorship where co-authors are concerned the policy accordingly provides: 'Authorship practices should reflect the integrity of the research process by honestly indicating the actual contributions to the publication. The reputation of both the institution and individual researchers is negatively affected by poor authorship practices. When more than one person is involved in research, an ethical judgment must be made as to who should be included as an author and as to the sequence of names of the authors on the publication.' Moreover, the policy proceeds to outline the responsibilities and expectations of university researchers, outline their roles and specifically providing the scope within which they should function. Of interest to the argument of this thesis, albeit at a limited level, the policy defines eligibility for authorship by using the phrase 'makes a meaningful contribution', which can be interpreted to mean that there must some level of labour that is expanded on the work, and it must meet the 'meaningful' threshold. Lastly, the policy closes off by introducing a set of dispute resolution mechanisms and as well as practical/procedural considerations.

[20] See for example, Ngubane op cit note 31 ch 4 at 63.

> copyright in ideas is that there is collaboration from the outset and the contributing of ideas does not occur ***in vacuo*** but is directed towards the creation of a literary work.[21]

Various scholars[22] have grappled with the court's revolutionary stance as regards the meaning of an author outside of the normative expectation of physical labour.[23] Chief among these scholars is Ginsburg and Budiardjo's critique of the author's 'conception':

> One might imagine that an author's 'conception' – her *mental* work, as distinguished from her execution or *physical* work – consists of the pre-execution notion formulation of an overall perception of the finished product. This notion of conception reflects the traditional mode of authorship: the novelist or artist who envisions a work and then employs her skill to transfer it from the mind's eye to the canvas or the page. We have shown that the principles underlying copyright's execution requirement accommodate modes of authorship outside of this model: the author who removes herself from the physical process of creation, relying on mechanical tools, amanuenses, or natural forces, does not necessarily forego authorship status. . . [and therefore] an 'author' need not maintain absolute control over the execution of her work and may instead rely on external forces, like randomness and nature, to complete her work, so long as she bends

[21] *Peter-Ross* supra note 2 at 18-19.

[22] A thorough assessment of various commentaries indicates that the court's assertions in *Peter-Ross* were a legitimate turning point in epistemological and judicial conceptions of the idea of an author in copyright law, and this has been subject to rigorous scholarly interlocutory.

[23] Beyond South Africa, and indeed Peter-Ross, international scholars have suggestively pondered about the problematics that define the essence of copyright generally, and authorship specifically, see for example, William E. Dougherty 'The protection of ideas in the tort of copyright' (1939) 18 *Oregon LR* 207, where he observes that the longstanding principle that copyright does not protect ideas but the expression given to them is inherent to the very concept of copyright because the originality requirement does not have the novelty and inventiveness standard, thus it would stifle cultural production if copyright granted exclusive protection of matters of common knowledge. See also, June Cohan Lazar 'Protecting ideas and ideals: Copyright law in the People's Republic of China' (1996) 27 *Law and Policy in International Business* 1185, where he recounts the tumultuous history of the development of copyright law in the People's Republic of China, he observes that China moved from a socialist policy of zero copyright protections in 1949, to a nascent copyright system in the early 90s. The transition from the early 90s was a product of two things, (1) China's desire to be incorporated into global markets and the global economy, and (2) pressure and threats of sanctions from the United States of America. Relevant to the essence of copyright, Lazar demonstrates that present Chinese copyright law is a combination of the universal demand to protect the basic rights of authors with traditional Chinese attitudes about the social role of copyright and of the law in general. See also, Abraham Drassinower 'Capturing ideas: Copyright and the law of first possession' (2006) 54 *Cleveland State LR* 191, where he distinguishes between property law's intention vs action dichotomy in determining ownership, with copyright law's idea vs expression dichotomy, he argues that just there is a thin line between intention in determining ownership of property, there also exists an almost invisible line between idea and expression, and thus courts should be careful not to hold onto strict/formalist classifications when called upon to differentiate between the two. See also, Justin Hughes 'Created facts and the flawed ontology of copyright law' (2007) 83 *Notre Dame LR* 43, where studies the problematic ontology of copyright law by way of exploring how courts conflate facts with expressions of fact and explains the difference between social facts created by expression and the 'facts' of literature and fiction, which demonstrates the complicated task of ascertaining the essence of authorship in copyright law.

> those forces to her will. By the same token, those processes may develop the work in ways that the author did not conceive in detail before their intervention.[24]

Ginsburg and Budiardjo's critique of the author's conception directly speaks to the court's assertions that the hand that writes is not always the hand of that author. Moreover, their critique is even more important for the argument of this thesis because of their observation that it needn't even be a 'hand' that does the authoring but could even be external forces such as randomness and nature. Indeed, an acceptance of Abezimu/Badimo as an author in copyright is a progressive epistemic realization that embraces a decolonial and pluriversal authoring hand that is not physical. To take matters further, Ginsburg and Budiardjo observe that even the elements that define authorship need not follow a specific chronology.[25] This observation presents a radical conceptualisation of authorship because it breaks ranks from prevailing formalist strictures in the copyright framework.

In the context of South Africa, Alberts opines that the principle that there is no copyright in ideas is not absolute and is thus open to a contextual and situated enunciation.[26] He draws attention to the distinction between the 'physical author' and the 'intellectual author'. Although he does not extensively qualify them, it is apt to surmise that, in the context of similar circumstances as *Peter-Ross*, physical labour refers to that which is done by the person who physically writes the work. In contrast, the intellectual author refers to the person who verbally directs what needs to be written. The differentiation between physical and intellectual authors is a shift from normative conceptions of authorship, especially considering the prevailing legislative framework and policy commitments.

Beckmann and Prinsloo engage with the physical author and intellectual author dichotomy, as tested in *Peter-Ross*, by posing the question, 'Who pushed the pen?'.[27] They recognise that the court was correct in its findings that the focus on 'who' pushed the pen leads to an unjustifiably narrow conception of authorship.[28] Most relevant to the argument of this thesis, Beckmann and

[24] Ginsburg & Budiardjo op cit note 105 ch 1 at 366.
[25] Ibid at 367.
[26] Wim Alberts 'Copyright in ideas' (2008) 16 *Juta's Business Law* at 58.
[27] Johan Beckmann & Justus Prinsloo 'On pushing a pen and questions about academic freedoms and restrictions in a transitional setting' (2014) 29 *SAPLJ* 135.
[28] Ibid.

Prinsloo insist that the pushing of the pen as an authoring action is inclusive of not just 'a human being but also by various other factors and influences'.[29] Of course, Beckmann and Prinsloo are not referring to Abezimu/Badimo because such is not within the scope of their research and epistemic bandwidth; however, their acceptance of an author as meaning a person beyond a human being opens up and indeed comports with this thesis' central argument that ancestors are an author in copyright law.

Geyer, Kelbrick and Visser study *Peter-Ross* to grapple with the idea of copyright in ideas:

> 'There is no copyright in ideas' is like a hot-air balloon, always burning to rise higher. But our courts keep a steady hand on the propane valve ... *Peter-Ross*, then, confirms the well-established principle that ideas captured in material form can be protected. Significantly, the court noted that the scientific content of the article was of far greater importance than its literary expression. But on the facts of the case, it was held that, through his [the first respondent's] critical review of the earlier drafts, the first respondent also made a material contribution to the form of the article.[30]

Their fundamental observation comports with that of Beckmann and Prinsloo because they also interpret *Peter-Ross* to have paved space for a pronunciation of copyright authorship that takes non-physical action as a valid contribution to the authoring of a literary work.[31]

Woker briefly discusses *Peter-Ross* in an article titled 'Copyright Infringement, Plagiarism, An Unseemly Spat or a Case of Academic Bad Manners'. She distinguishes between copyright infringement and plagiarism by demonstrating that the latter is not within the purview of the legislation. In contrast, the former is strictly governed under the auspices of the Act.[32] Woker recognises that plagiarism was not at issue in *Peter-Ross*, yet she argues that the respondent's claim to joint authorship suggested an implicit argument that the applicant plagiarised him.[33]

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[29] Ibid.

[30] Sunelle Geyer, Roshana Kelbrick & Coenraad Visser 'Intellectual property law' (2008) 1 *Annual Survey of South African Law* at 631, Interestingly, the trio opine that Peter-Ross should not be dragged into ongoing debates about the idea/expression dichotomy and proffer no reasoning/justification for this opinion.

[31] Ibid.

[32] Tanya Woker 'Copyright infringement, plagiarism, an unseemly spat or a case if academic bad manners' (2015) 36 *Obiter* at 246.

[33] Ibid attaching 251.

In summation, *Peter-Ross* serves as a good starting point to illustrate a couple of things that are the object of the thesis of this chapter's argument: (1) even within the confines of prevailing Eurocentric and colonial copyright strictures, there is an acceptance that an author does not always have to be a person that expands physical labour on work, meaning that the supposition of ancestors as authors logically benefit from this offshoot, (2) the court recognised that the first respondent is a joint author in the absence of physical labour, only on the basis that the court was persuaded of his non-physical contribution to authorship – this chapter, and the preceding ones, have argued that ancestors, just like the first respondent, are an author in copyright law precisely because they contribute to authoring by non-physical means.

5.4 Cummins v Bond

The findings of the court in *Cummins v Bond [1927] 1 Ch. 167* (hereinafter *Cummins v Bond*) are subject to plenty of academic writings because of the peculiar nature of the facts that the court had to deal with.[34] Although many scholars have discussed *Cummins v Bond* at length, none have discussed the case with the background of the argument that is made in this thesis, that ancestors are authors in copyright law.

The facts in *Cummins v Bond* are as follows: a spirit medium, Miss Geraldine Cummins (the plaintiff), sought an injunction against publication by Mr Frederick Bligh Bond (the defendant).[35] The plaintiff covered her eyes with her left hand, took a pencil in her right hand, and began to write on a sheet of foolscap, which culminated into a play/novel that later became known as *'The Chronicle of Cleophas'*.[36] During that time, she was only partially conscious, and what was written she only partially remembered afterwards.[37] Two things were apparent: (1) even though she was

[34] For example, see Annemarie Bridy 'Coding creativity: copyright and the artificially intelligent author' (2012) 5 *Stanford Technology LR* 1; see also Shyamkrishna Balganesh 'Causing copyright' (2017) 117 *Columbia LR* 1; see also Faizanur Rahman and Mohd. Amir 'Exploring the interfaces between artificial intelligence and intellectual property rights' (2021) 12 *Indian Journal of Natural Science* 31955; see also Niloufer Selvadurai and Rita Matulionyte 'Reconsidering creativity: copyright protection for works generated using artificial intelligence' (2020) 15 *Journal of Intellectual Property Law & Practice* 526.

[35] Blewett Lee 'Copyright of automatic writing' (1926-1927) 13 *Virginia LR* 22.

[36] Ibid.

[37] Ibid.

partially conscious during the writing of the manuscript, she expanded sufficient labour and thus qualified as the sole author of the manuscript in terms of normative copyright strictures; (2) however, she testified that she took no part in the writing and that the manuscript was a product of an 'external force'.[38] The claim of the 'external force' as having an authoring hand is at the heart of this doctoral project's central argument.

Having considered the evidence presented, the court in *Cummins v Bond* was called upon to respond to the question: who, if anyone, was the owner of the copyright in the work in the make of *'The Chronicle of Cleophas'*?[39] It appears simple to assert that the plaintiff is the sole author because she expanded sufficient labour in the text and thus met the originality requirement, but matters are slightly more complex than that:

> The plaintiff and her witnesses and the defendant were all of opinion, which they no doubt honestly held, that the true originator was one who was no longer an inhabitant of this world, and certainly one would think that he had no hope of revisiting it. But, according to their view, it was he who had revisited it at the ancient abbey of Glastonbury and had spoken in a language more appropriate to the sixteenth or seventeenth century after his death.[40]

The image that the 'true originator was no longer an inhabitant of this world' is unexplained by scholars from Europe precisely because the lexicon of Abezimu/Badimo does not exist in Eurocentric epistemologies, not to mention European court systems. Accordingly, the court held that the plaintiff is the sole author of *'The Chronicle of Cleophas'*. Precisely because the court was inattentive to this epistemic tradition of the global South, it held that it could not extend authorship to persons who were no longer inhabitants of this world.[41] The court believed that its jurisdiction is limited to what is legislatively allowable in terms of the Copyright Act of 1911 and is thus confined to the authorship of the plaintiff, owing to her meeting the labour and originality threshold.[42] Regardless of whether the court was right or wrong, it must be noted that it chose a positivist/formalist approach (as discussed in earlier chapters), as it refused to expand itself to the context, situations, and ideas that are outside of the scope of what is normatively known, where

[38] Ibid at 23.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.

the definition of an author is concerned. The act of falling back to legal positivism/formalism, as unpacked in Chapter 3's decolonial reading of copyright law history, prevails in South African intellectual property rights jurisprudence in the fashion of constitutional avoidance.

The approach taken by the court in *Cummins v Bond* is mirrored in recent court judgments, and this affirms the ubiquity of the formalist/strict legal traditions whose tentacles continue to define court attitudes to this day. For example, these formalist traditions can be evidenced in a recent court judgment[43] in *Thaler v Perlmutter*[44] (hereinafter *Thaler*). In the main, this case dealt with a challenge to copyright's human authorship requirement in the context of a work produced by a generative AI program. The facts in Thaler are as follows: In 2018, Dr Stephen Thaler applied for copyright registration in a work of visual art produced by a generative AI system he created.[45] The copyright office denied the application on the grounds that the work did not have a human author, which is an essential requirement for the subsistence of copyright.[46] Primarily, the legal question that the court had to respond to is: should a work generated entirely by an artificial system where there's no human involvement be eligible for copyright? The court held that human authorship is an essential part of a valid copyright claim and, therefore, moved to dismiss Dr. Stephen Thaler's application:

> United States copyright law protects only works of human creation. Plaintiff correctly observes that throughout its long history, copyright law has proven malleable enough to cover works created with or involving technologies developed long after traditional media of writings memorialized on paper. . . In fact, that malleability is explicitly baked into the modern incarnation of the Copyright Act, which provides that copyright attaches to 'original works of authorship fixed in any tangible medium of expression, now known or later developed.' 17 U.S.C. § 102(a) (emphasis added). Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channelled through new tools or into new media.[47]

[43] I wish to thank Sunelle Geyer for bringing this court judgement to my attention. This stems from discussions about this chapter at our Unisa IP law reading group.
[44] Case no. 22-1564 of 18 August 2023 (BAH) USA, DC in District of Columbia.
[45] Ibid at 1.
[46] Ibid.
[47] Ibid at 7-8.

As was the case in *Cummins v Bond*, the court in *Thaler* strictly emphasised that human authorship is a bedrock requirement of copyright[48] and that this is something that has been accepted even before the advent of modern copyright. The most striking similarity between *Cummins v Bond* and *Thaler* is that, even in the latter, the court held that even where the claim that a copyrightable work was a product of some divine intervention, copyright/authorship would not arise because of the centrality of a human author.[49] To this end, the court cited various previous court decisions (including *Naruto v Slater*, which we dealt with in Chapter 1) where courts have had to decide on claims for copyright where the claimants argued that their work is a product of a 'voice which would speak to her whenever she was prepared to listen'.[50] In a separate case, another claimant said that his literary works were a product of words dictated to him by a spirit named Phylos the Thibetan. The claim was that the 'spiritual world messages for recordation and use by the living' culminated in the production of the copyrightable work.[51] In all of these cases, the various courts rejected the claim of authorship, citing the centrality of a human author.

All the court decisions cited in *Thaler* are reasonable only because, at present, courts do not have the language of Abezimu/Badimo at their disposal – the emergence of 'voices' and 'spiritual world messages' is unheard of in the Euro-Western world. All these courts are correct in the context of the United States (and especially Europe) because their epistemological and ontological traditions suggest that there is no life after death. However, as this PhD thesis has laboured to demonstrate, such a reality is not true in the African context. This thesis has provided a grammar for courts to be able to substantively grapple with the emergence of 'voices' and 'spiritual world messages', for these are a direct exemplification of the Abezimu/Badimo thesis and, indeed, the pluriversal author.

There are numerous differences in the approaches taken by the court in *Cummins v Bond* and *Peter-Ross*. The most notable difference is how *Peter-Ross* allowed for a nuanced, contextual, and situated analysis of authorship, whilst *Cummins v Bond* insisted on a strict reading of legislation.

[48] Ibid.
[49] Ibid at 11.
[50] Ibid.
[51] Ibid at 12.

The chapter does not argue that the approach in *Peter-Ross* is inherently decolonial. However, the court's approach legitimately lends itself to the argument that authorship could reasonably open itself to a conceptual shift, owing to prevailing contexts. As carefully demonstrated in Chapter 2, South Africa's prevailing context is that of a *Decolonial Turn*. This context leads to a pluriversal author, that is, a conception of authorship that embraces the plural/diverse epistemic traditions of the world.

What we have seen with both *Cummins v Bond* and *Peter Ross* is that they remarkably shifted from the norms of copyright authorship. However, they did not have the impact of shifting normative legislative frameworks as regards authorship, both in South Africa and the United Kingdom. This rigidity comports with this thesis' argument about how Eurocentric copyright (as a thesis in the Black Marxist dialectical formula) continues to entrench a universality paradigm.

5.5 Gogo Esther 'noStokana' Mahlangu and isiNdebele artwork

Arguably, one of South Africa's most iconic artists, Mrs Esther Mahlangu, or *'Gogo noStokana',* as her community affectionately knows her, is important to illustrate the argument of this chapter. Here are some iconic depictions of a few of her artworks:

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[52] Photo courtesy of The Melrose Gallery.
[53] Photo courtesy of Ocula Art Gallery.

[54]

[55]

[54] Photo courtesy of the Gentleman's Journal.
[55] Photo courtesy of Gist.

 [56]

[56] Photo courtesy of Forbes.

 [57]

The artworks of Gogo noStokana are incredibly important in suppositions and academic inquiries about decolonising aspects of copyright law and its curriculum. This is evidenced in 'The call to decolonise higher education: Copyright law through an African lens',[58] where these works are used to unpack the single-author vs. communal author complexity that is inherent in some artworks. In my LLM dissertation, I unpack this complexity and demonstrate the intersectionality between the community and the individual, arguing that there are no fixed binaries between the community and the individual.[59] The dissertation focuses on the curriculum rather than the practice of copyright and argues that a decolonised copyright law curriculum must be able to uncover some of these complexities and expose students to prevailing caveats where artworks from indigenous peoples are concerned. The dissertation further problematised the crisis of cultural appropriation, specifically in the context where peoples of the West and Europe encounter isiNdebele artwork:

> Traditional cultural expressions and indigenous knowledge(s) need to be protected, not merely from the usual exploitation of other works protected under copyright law, but also from what Whitt calls the '[c]ommodification of culture'. When the world comes into contact with *Umgwalo,* it seeks ways to

[57] Photo courtesy of BMW Group.
[58] Sindane op cit note 67 ch 2.
[59] Ibid at 54.

> commercialise it for financial gain. When the rituals and objects of colonised nations and cultures are transformed and modernised into commodities, political and economic powers converge to perpetuate cultural imperialism.[60]

To take the discourse slightly further, this thesis draws from the dissertation[61] to argue that, by her own account, the production of Gogo noStokana's artwork is a culmination of a collaboration between herself and her community and that her community does not only entail living persons but is inclusive of Abezimu/Badimo (ancestors). The focus of this thesis is not the curriculum *per se* (even though it has implications for the curriculum) but rather the praxis and epistemological foundations of the idea and concept of copyright. The thesis appreciates that to be effective in the quest to embrace the *Decolonial Turn* as meaning a shift to the pluriversal author means venturing towards positing alternative conceptions of authorship, and Gogo noStokana's cultural products are a good starting point.

To demonstrate the authoring hand of Abezimu/Badimo in the authoring of Gogo noStokana's artworks, this chapter analyses two excerpts from different speeches where Gogo noStokana is interviewed about her craft. The object of this exercise is to show, from her account, that in many instances. However, she is the physical author. She is actively guided by her community (and ancestors), who are intellectual authors and thus fit perfectly into the thesis' pluriversal author argument.

The first speech was done in the United States of America at the Virginia Museum of Fine Arts – VMFA (accessed on YouTube).[62] Gogo noStokana was interviewed by the museum's curator of African Art, Richard Woodward. This interview followed VMFA's invitation to Gogo noStokana to put together seminal art pieces for the museum. After having introduced her work to the audience and briefly explaining the uniqueness of isiNdebele art craftwork and the work that she had done specifically for the museum. Woodward then begins the interview by asking Gogo noStokona if she has anything to say to the audience.[63] Her response is remarkable; she thanks

[60] Ibid at 73.
[61] Ibid, where Sindane explains that, 'NoStokana's work is revered the world over because of its uniqueness which stems, for the most part, from the traditional and artistic expressions of the Ndebele cultural community.'
[62] 'Esther Mahlangu (South African Ndebele, b. 1935) Ibala leSindebele (Ndebele Design), 2014 Acrylic on linen 2014.224 VMFA', https://youtu.be/IeYsnrGr340 (accessed on 11 October 2022).
[63] Ibid.

VMFA for inviting her and expresses sincere joy about the fact that *her community* (my emphasis) was, and is, getting recognition globally.[64] This response is important to note because it speaks directly to decolonial theory's claim that coloniality presents an ongoing struggle between the old and the new, where colonised bodies continue to work their Being into the Beings of the world – as a ploy to reverse colonial dehumanisation.

Theorisation, as regards the coloniality of Being (as explained in Chapter 2), insists that colonial worldmaking denied the Beinghood of colonised peoples, insisting that they are not Beings because they cannot think, do not know, and do not have a history. To reverse this aspect of colonial worldmaking and thus decolonise the prevailing situation entails a commitment to uncovering the knowledge and traditions of colonised peoples and to recognise their work.

Gogo noStokana's excitement at being recognised traverses beyond appreciation of her craft, but she innately appreciates that this is a recognition of a group of people and community whose Being has been subjected to the colonial dismembering of their Being. She may not articulate this in the lexicon of decolonial scholars. Still, a careful analysis of her speech at VMFA clearly demonstrates that Gogo noStokana understands that her work embodies the values of her community and that its acceptance and recognition is an enactment of the praxis of decolonisation.

Specifically, as regards ancestors, Gogo noStokana stated in no uncertain terms that she learnt how to do this artwork from her mother, grandmother, aunts and all the women in her family. She told Woodward that her work is a product of those who lived before her, the young, and those who are yet to be born.[65] This bit of her speech settles the arguments and claim of this entire thesis; she effectively confirms that although she is the physical author, there is an element of an intellectual author, and they jointly constitute the authoring hand. This chapter thus argues that the acceptance of the thesis of a pluriversal author means that a decolonised conception of authorship in copyright law will reflect that works, such as those produced by Gogo noStokana, are also authored by her community, which is inclusive of the living, the dead, and the yet-to-be-born.

[64] Ibid.
[65] Ibid.

The second speech is in an interview that Gogo noStokana did with Scoop Makhathini in a podcast called Slikour Onlife (accessed on YouTube).[66] The interview begins on an interesting note; the interviewer, Scoop Makhathini, asks to kneel before Gogo noStokona to thank her for all that she has done for Black people generally and the Ndebele community specifically.[67] The act of kneeling before Gogo noStokana is a traditional way to show reverence and deference to ancestors (for ways of showing reverence to ancestors, see Chapter 4). This act by Makhathini not only demonstrates his acceptance of the thesis of ancestral reverence/deference as not just a religious belief for African people but a way of Being, thinking and knowing.[68]

Although there are other definitive moments in the interview with Makhathini, the most prominent and noteworthy moment is when Makhathini asked Gogo noStokana about the roots of her talent. She responded in isiNdebele: 'Intw' le ngikhula nayo',[69] he retorts, 'isegazini mama!'[70]they both laughed, and she boldly agreed, 'Iye ingegazini mntanami!'[71] This brief part of the conversation reveals the essence of the thesis of this doctoral project that in the question of communally produced works of art in Africa, there is always the question of the contribution of ancestors and that this has to be reflected in decolonised legislation, including copyright law. Makhathini's and Gogo noStokana's reference to the craft being 'egazini' (in her blood) is an inference that this is hereditary and thus recognises the very visible hand of her ancestors.

Of course, these are just two speeches from many that she has given over the last decade. What is important to note, as done in chapter 4, is that Gogo noStokana tends to always insist on being interviewed in her mother tongue, isiNdebele. Regardless of where she is in the world or who she is addressing, she does so in isiNdebele. Drawing from the theorisation done in both chapter 4 and the theoretical framework in chapter 2, it becomes easy to understand why she insists on speaking isiNdebele even at international events; there is an appreciation in her that some things can never be explained in English, particularly those that have to do with Black people's cultures and epistemic traditions. Although they can be translated, they lose their essence when explained and

[66] Esther Mahlangu, 'Scoop Makhathini sits down with Dr. Mahlangu about her life story, her work, and her hopes for the future', https://youtu.be/0bJ4BqsRt6c (accessed on 11 October 2022).
[67] Ibid.
[68] Ibid.
[69] Translation: 'I have grown up with this craft.'
[70] Translation: 'It is in your blood!'
[71] Translation: 'Yes, my child, it is in my blood!'

unpacked in English. Apart from this reality, Gogo noStokana intricately understands the historicity of the politics of language; those African languages find themselves 'othered' in the broader scheme of languages of the world because of epistemicides, historicides and linguisticides (as explained in Chapters 2, 3 and 4), and thus insisting on making her speeches in isiNdebele constitutes an act of decolonial resistance.

In summation, an analysis of Gogo noStokana's insights and utterances leads to three indubitable conclusions: (1) her artwork is clearly a product of the amaNdebele cultural community of Mpumalanga province of South Africa and not merely a talent that arises naturally, the artworks embody the histories and epistemic traditions of her community, (2) there exists a clear distinction between a physical author and intellectual author in Gogo noStokana's artworks, regardless of the fact that in all the set of facts, it is always her hand that pushes the pen (the paint brushes and chicken feathers in this instance) and (3) she takes the culture, customs and traditions of the Ndebele cultural community very seriously, and is always concerned with preserving isiNdebele and its epistemic traditions for future generations.

Gogo noStokana's deep concern with the preservation of isiNdebele cultures and traditions is worth some brief comment: the Philosophy of Black Consciousness, as one of the two theoretical frameworks on which this thesis is based, is helpful in unpacking the intellectual granularities that define Gogo noStokana's concern with the preservation of isiNdebele culture. Part of the expanded definition of the Philosophy of Black Consciousness, as canvassed in Chapter 2, includes engaging in a longstanding intellectual/academic project of returning to Black people that which was taken from them. This is inclusive of their cultures, customs, and epistemic traditions:

> The first step therefore is to make the black man come to himself; to pump life into his empty shell; to infuse him with pride and dignity, to remind him of his complicity in the crime of allowing himself to be misused and therefore letting evil reign supreme in the country of his birth. This is what we mean by an inward-looking process. This is the definition of 'Black Consciousness'.[72]

A thorough analysis of Gogo noStokana's concern with the need to preserve isiNdebele culture, when read within the lens of the Philosophy of Black Consciousness, allows for an appreciation that the acceptance that ancestors are an author and should be recognised as such in copyright law,

[72] Biko op cit note 152 ch 2 at 29.

merges the demands of the *Decolonial Turn* and the aspirations of the Philosophy of Black Consciousness. Moreover, it is worth noting that in all of noStokana's reflections about her artworks, she hardly mentions material/financial gain as a motivator for her to produce this artwork. This speaks directly to the theoretical tools preferred by Black Marxism, which is the methodology adopted in engaging the study of this thesis. Black Marxism accepts classic Marxist criticisms of capitalism and its greedy aspirations to maximise profits over everything but also takes the discussion slightly further to demonstrate that a critique of capitalism from a Black people's perspective also entails rejecting the racialised nature of capitalism, and its specific impact on the cultures, customs and traditions of Black people, especially on the spiritual plains:

> Unfortunately, the relegation of consciousness in the Marxian logic to reflex of the relations of production and the frequent preoccupation with capitalism as a system determined by its own objective laws and the motivating force of historical change, most consistently led to the conclusion that nationalism among working classes was contrary to the historical movement of modern societies. In this sense, nationalism was a backward ideology, often a means of deflecting the class struggle into imperialist wars, and in any case not fit subject for serious study in its own right since it was merely a politically convenient conduit of other forces and interests…The dismissal of culture, that is, a transmitted historical consciousness, as an aspect of class consciousness, did not equip Marxian movement for the political forces that would not only erupt in Europe and the Third World but within the movement itself.[73]

What can be reasonably gleaned from Gogo noStokana's lifetime of artwork and her insights in totality is that there is a nascent opportunity for alternative conceptions of authorship and that it wouldn't be illogical to re-design prevailing copyright law strictures to reflect a pluriversal author, one that accepts that ancestors are an author and should be recognised as such.

[73] Robinson op cit note 18 ch 1 at 62.

5.6 Concluding analysis

The object of this chapter was two-fold. First, it sought to illustratively respond to the research question: How is copyright law's 'author' defined from the prism of decolonial theory? And secondly, it laboured to demonstrate that a pluriversal author entails the acceptance of authorship that shifts from time to time, that is flexible, and that is reflective of the diverse epistemic traditions of the world.

As regards the first task, the chapter has demonstrated that an author in copyright law, when studied from the prism of decolonial theory, is a pluriversal author. The chapter leans on the expansive definition of decolonisation and the *Decolonial Turn* in Chapter 2 to posit that although there are various articulations of the object of decolonisation. Thus, numerous articulations of its intended outcomes. For this chapter, the outcome of decolonisation as regards authorship is pluriversalisation. The chapter demonstrated that a pluriversal author is an acceptance of authorship that reflects the diverse and multifaceted conceptions of authorship that stem from the pluriversal traditions of the world. Simply put, this is an acceptance that an author is open to different meanings and that all of these depend on context, situation, and positionality.

The thesis of this doctoral project's basic argument is indeed that the *Decolonial Turn* inevitably and logically leads to the epistemic pluriverse. This means a world of knowing where different/divergent ways of knowing are embraced and co-exist. The pluriversal world, meaning a world where many worlds exist, is home to a pluriversal author – that is, a conception of copyright law's authors that embraces, embodies and reflects multiple epistemic/ontological traditions. In the context of the global South, and specifically Africa, the specific epistemic/ontological tradition is that of a conception of authorship that embraces Abezimu/Badimo as authors.

In practical terms, the acceptance of a pluriversal author is a game changer because it gives rise to genuine questions as regards the practical implications for copyright adjudication. How would authorship then be attributed?[74] How do we name them (Abezimu/Badimo) as authors? In the

[74] This is a secondary question which emerges after the question that is posed by Gert Helgesson, William Bülow, Stefan Eriksson and Tove E Godskesen in Helgesson *et al* 'Should the deceased be listed as authors?' (2019) 45 *Journal of Medical Ethics* 331, where they engaged in an empirical study to attempt to ascertain to the best course of action to

example of Gogo NoStokana, how should authorship be attributed to her ancestors? The names on the protected works would be whose names.

These questions reasonably lead to even more questions about praxis: How is the term of copyright to be calculated? The formula of life plus 50 becomes almost impossible to reckon since the work is created posthumously.[75] Or, to return to the above example, is the life to be used in the

be taken in an instance where a participant in a research project dies before the work is published. They wanted to consider the ethically sound response to the question whether such participant should be listed as an author at publication, even though they are now dead. Whilst their intervention is important insofar as demonstrating how the issue of deceased authors is dealt with by academic journals presently, it is somewhat irrelevant to the argument of this thesis because the thesis does not consider death as an event that alters their personhood. However, it is of great interest that they concluded that deceased persons must not be listed as authors, where the deceased cannot approve the final version of the paper. However, they have some exceptions, one of them is that the deceased may be included as an author only if the submitted version is approved by all collaborators before the death occurs if they (the deceased) contributed substantively to the final draft and if the extent of their contribution is clearly outlined.

[75] It ought to be born in mind that there is a practical differentiation between this thesis' argument as regards Abezimu/Badimo and the prevailing concept of posthumous rights. Although there are similarities in the two discourses, the latter is triggered by the death of persons, whereas the former insists that an Onto-triadic conception of Being means that death is not an event that should alter one's rights. The argument of this thesis is that the dead are not dead, instead they are the living-dead, thus their rights cannot be asserted in the same light as posthumous rights. Notwithstanding this reality, it is befitting to note that there are some nascent scholarly discussions about posthumous rights, the law and authorship, see for example Dorothy Grover 'Posthumous harm' (1989) 39 *The Philosophical Quarterly* 334, where she broadly discusses the possibility that persons can suffer harm beyond their death, if such a thing is possible, whether it is plausible for them to have any legal recourse. The most important aspect of Grover's argument is that it insists that the discussion of harm (as a legal concept) must not be foreclosed but must rather be open to also encompass the rights of the dead. Most of Grover's insights are drawn from her engagement with Patridge's arguments, for example see also Ernest Patridge 'Posthumous interests and posthumous respect' (1981) 91 *The University of Chicago Press* 243, where he poses the following questions: Can dead persons be harmed? Can they be said to have interests? Can any justification be made for the claim that the reputations or wills of the dead should be respected? He recognises that both affirmative and negative responses are possible for these questions but insists that the dead have no interests and are beyond both harm and benefit. Patridge's view is shared by Winter, see for example Stephen Winter 'Against posthumous rights' (2010) 27 *Journal of Applied Philosophy* 186, where he vehemently argues that there is a logical separation between a person's person and person's persona, the former is constituted by sensation(so our abilities to believe, learn, and so on), whilst the latter is constituted by their public image (including that which is said, thought, and written about the person — subsisting in the speech and memory of living persons as well as in information held in impersonal media). Based on this separation, he then argues that the urge to proffer rights to the dead protects only their persona, and not themselves per se. As a result, posthumous rights are rights for the persona and not the person. Winter's argument is a decisive break from prevailing philosophies as regards posthumous rights whose justificatory arguments insists that posthumous rights are in place to protect dead from future harm – he opines that such a threat does not arise because the dead cannot be harmed, for their sensation has ceased to exist, it is only their persona that can be harmed. For a more recent explorative discussion on this topic see also Guy Rub 'The challenges of posthumous moral rights' in Sharon Hecker & Peter J Karol (eds) *Posthumous Art, Law and the Art Market*, where he discusses posthumous rights specifically in the context of moral rights. He notes that moral rights protection varies between the United State of America and Europe, because in the former there are no posthumous moral rights, whereas in the latter posthumous moral rights are provided for. What is crucial and somewhat relevant to the argument of this thesis is Guy's observation that posthumous moral rights create a host of difficulties insofar as it is unclear whether that group of heirs can preserve the artists' visions concerning their works, and whether it is even just or desirable for the law to require it. This is a challenge that an acceptance of Abezimu/Badimo as author might face, especially at a practical level. However, such a challenge is beyond the scope of this thesis.

calculation that of the living person – Gogo Nostokana? How and by whom are decisions about the commercial exploitation of the work to be made? Once the commercial benefit is reaped, how is it to be shared with Abezimu/Badimo or their other descendants? If the answer is always to have recourse to a natural living person (Gogo NoStokana), then why should we even think about reconceptualising the understanding of an author?

As alluded to in the first chapter and as will be evident in the concluding chapter, these questions about praxis/practicability far exceed the scope of this doctoral project. In fact, the concluding chapter asserts that these questions will potentiate a completely new school of research as regards ascertaining the precise practicability of a decolonised copyright epistemology. In the immediate, the task of this thesis is to argue for a conceptual acceptance of the theory/philosophy of Abezimu/Badimo as authors in copyright, and the thesis figures that this is an important (and primary) hurdle to cross before we can venture to proffer substantive meanings to practical considerations.

The generality of a pluriversal author may appear somewhat abstract/academic and philosophical. However, its specificity proffers nascent practical implications for future adjudication of future copyright law disputes where authorship is at issue. For example, the acceptance of a pluriversal author allows courts to deviate from normative conceptions of authorship as demanded by the prevailing Eurocentric legislative framework. This sort of deviation not only feeds into the calls by decolonial theory for copyright law to be decolonised, but it also comports with the demands of the constitutional epoch (as explained in Chapter 3) that insist that courts must steer clear from positivist/formalist habits when adjudicating matters before them. To be sure, the constitutional epoch espouses the theory of transformative constitutionalism (as explained in Chapter 3), which impels judges to appreciate that the 1996 moment meant a radical change in legal culture; that is, a shift from the culture of authority to a culture of justification.[76] Although decolonisation and transformative constitutionalism sometimes utilise divergent ideological tools of analysis,[77] this

[76] Mureinik op cit note 70 ch 3, where he introduces the phrase 'from a culture of authority to a culture of justification' to explain the Interim Constitution's intention to transform South Africa's legal culture.
[77] Sindane op cit note 67 ch 3.

thesis claims that relation to a pluriversal author allows a rare opportunity for a praxis that merges the ideals of both decolonisation and transformative constitutionalism.

The argument that Abezimu/Badimo are an author in a decolonised conception of copyright law is this thesis' novel contribution to the existing body and family of knowledge(s). Although this argument is an original claim/supposition to the literature on authorship, this chapter has demonstrated that an expansion of the definition of an author is within the logical and intellectual development in the discourse of authorship in copyright law. Epistemically speaking, and at a radical level, the argument that Abezimu/Badimo are an author in copyright law is drawn from intellectual traditions outside of present normative intellectual property rights discourses; however, this chapter has demonstrated that such an argument is not uncommon even within prevailing paradigms.

CHAPTER SIX: CONCLUSION

6.1 Background

This thesis set itself the task of studying the meaning/definition of copyright law's author in the context and aftermath of the *Decolonial Turn*. In this concluding chapter, the thesis summarily rehashes its research questions and objectives and then proceeds to lay out some of its key findings and subsequent recommendations therein. Precisely, this chapter briefly canvasses four key findings and then makes three recommendations. The chapter concludes with synoptically presenting aspects from this thesis that may require further inquisition and thus lay a firm foundation for future research.

6.2 Summary and overview of chapters

The argument of the thesis was propounded in six chapters.

The first chapter broadly introduced the subject of this thesis and gave a background from which the argument of the thesis stems. The chapter outlined its problem statement – in the main, it demonstrated that one of the biggest problems facing copyright law currently is that its epistemological set-up is unduly biased in favour of Euro-Western epistemic patterns and ways of knowing. Indeed, the first chapter synoptically demonstrated that this problem emerges quite prominently in the definition of an author in copyright. The chapter proceeded to review existing literature on authorship. The overview of literature generally revealed that the copyright law regime and its conception of authorship are heavily steeped in colonial universalist tropes that do not allow for different ways of knowing.

Most importantly, and particular to the subject of this thesis, the reviewed literature revealed that the idea of a non-human author is unknown in prevailing copyright paradigms. Even where it may emerge in discourses such as that which relates to artificial intelligence, there is broad agreement among copyright scholars that the question of a non-human author does not arise legitimately. This was incredibly important to uncover because it vindicated the object of this doctoral project. This

is the gap in the literature that this doctoral project sought to advance because the argument made here was that the acceptance of the thesis of a pluriversal author would realistically advance and enhance existing literature, for it would introduce some original insights as regards a non-human author.

The second chapter theorised the *Decolonial Turn* – hedging a nascent theoretical discourse to explain what it is and how it is relevant to the argument of this thesis. Dialectically speaking, the *Decolonial Turn* and its theoretical offering is the nexus between the old and the new. This means that the *Decolonial Turn* is what connects the old (and colonial) definition of authorship in copyright and the new (proposed) pluriversal author. The second chapter further canvassed the theoretical framework upon which the argument of this thesis was studied. The chosen theoretical framework is two-pronged: the first is the decolonial theory, and the second is the Black Consciousness philosophy. The chapter extensively studied the meaning of decolonisation in the context of law because it felt that there was a need for this concept to be fully studied. Although decolonisation has been studied and defined in broad terms in the humanities, it is still enigmatic in the field of law. It has been subject to resistance and scepticism in some quarters of the legal academy. That is why it was important for the chapter to expand decolonisation in the detail that it did.

The third chapter concerned itself with canvassing the historical development of copyright law, with a specific focus on the concept of authorship. To be able to fully appreciate the essence of the *Decolonial Turn* as leading to a pluriversal author, the chapter specifically historicised copyright law development from the perspective of decolonial theory. A decolonial reading of history entailed a handling of history that, among other things, exposes prevailing colonially distorted conceptions of history. The chapter methodologically divided its reading of history into three political epochs –: the pre-1910 era, the 1910 to 1996 era, and the post-1996 era. The chapter found it plausible to demarcate these eras in this way because each epoch had profound and unique implications on the development of copyright law (and, by extension, authorship) in South Africa.

The fourth chapter, which is this thesis' most important chapter, was seized with the task to respond to the research question that sought to ascertain the intellectual authenticity of the claim that Badimo/Abezimu are an author in copyright law. To achieve this momentous task, the chapter

used a decolonial method that entailed, among other things, the use of African literature and fiction to demonstrate the essence of ancestral deference in Africa and its implications for copyright's prevailing conception of authorship. The chapter's underlying and synoptical driving argument is that ancestral deference/reverence is not just a religious belief or faith-based system but is an epistemic pattern. Simply put, ancestral deference is an expression of African people's ways of thinking (epistemic traditions) and Being (ontological formations).

The fifth chapter studied the possibilities and alternatives in the definition of an author. The chapter sought to demonstrate that even on current Eurocentric conceptions of authorship, it is possible to imagine newer/different meanings of authorship – specifically one that does not demand an in-person or outrightly human author. The task of this chapter was vital for two purposes: (1) it demonstrates that, at a conceptual level, authorship continues to evolve from time to time and that a further development into a pluriversal author does not lend itself to scholarly absurdity, and (2) it uses case law and as well as the lived experience of iconic Ndebele artist/author to attempt to weave together a response to the question: how is copyright law's 'author' defined from the prism of decolonial theory?

The sixth and last chapter summarises and concludes this thesis accordingly.

6.3 Research question and objectives

Broadly, the thesis set out to probe three questions, and they were set out in the first chapter as follows:

1. How is copyright law's 'author' defined from the prism of decolonial theory?

2. Do the epistemic traditions of the global South play a role in informing the post-apartheid transformation of copyright law?

3. Is there intellectual authenticity to the claim that Abezimu/Badimo (ancestors) are authors and should be accepted as such in South African copyright law?

Indeed, these three questions were put forth with the objective to tease out some conceptual issues concerning the essence of authorship in copyright law. Collectively, responding to these questions assisted in both advancing a nascent definitional inquiry where the concept of authorship is concerned and as well as carrying through the broader argument of the thesis.

As will be shown in the key findings below and the subsequent recommendations, these three questions created legitimate conceptual overlaps that wove together the thread of the entire argument of the thesis. For example, a response to the question as to how an author is defined in the prism of decolonial theory (the first question) lends itself to the response to the question about the extent of the role that the epistemic traditions of the global South play in informing the transformation of copyright law. On the same score, both the responses to the first two questions comport with the response to the third question, which sought to ascertain the authenticity of the claim that ancestors are authors in copyright law.

The different chapters of this thesis were carefully organised to achieve a two-pronged objective: (1) to present a newer/different conception of authorship in copyright law, one that is articulated from the perspective of the epistemological patterns of peoples from the global South, and (2) to argue into the literature, specifically the idea of a pluriversal author – that is, a type of author that embraces the *Decolonial Turn's* call for a pluriversalisation, simply put, a legal/copyright academy that completely accepts that the world is not universal and that many worlds can exist in harmony in one world, and such a plural existence ought to reflect in present/future conceptions of authorship, hence a pluriversal author.

6.4 Key findings

6.4.1 On non-human authors

The thesis finds that the biggest ongoing contestation in copyright law presently can be laid at the door of the academy's refusal to accept the meaning of an author outside of human beings. This question has been settled for a long time, certainly from the inception of modern copyright. It re-emerges quite sharply in the advent of the fourth industrial revolution and its rapidly developing products that stem from artificial intelligence.

Where claims of authorship have been made, they have been correctly dismissed by prominent copyright law scholars both locally and globally on account of two salient realities, the first being that artificial intelligence machines cannot realistically be authors because they do not function independently; they derive their skill/creativity from the instruction/control of humans, regardless of how little it may be, and secondly, the only realistic question that concerns authorship where artificial intelligence machines are concerned is whether authorship vests in the creator/inventor of the machine or the user.

The 'new' challenge of authorship as strictly being derived from human beings began and ended with machines in the era of artificial intelligence. This means that prior to the argument of this thesis, the centrality of the human author remained largely unchallenged. Although the idea of ancestors as playing a role/part in making crafts worthy of copyright protection is not new, present scholarship does not use this argument to challenge the rigid insistence of a human author. Accordingly, this thesis finds that the arguments laid out in the varying chapters warrant a decisive relook of the essentiality of a human author. This sort of embracing of a non-human author requires a radical imagination from the academy and certainly some measure of political will to extensively rethink the foundational setting that heeds the objective of the *Decolonial Turn*.

6.4.2 On African conceptions of person and community in copyright law

The thesis finds an unbecoming paucity in how intellectual property law scholars grapple with the concepts of person and community. The latter is often confined to discussions about Traditional Knowledge and Indigenous Knowledge Systems. Although there have been attempts to define a community legislatively, the global uniformity in terms of community and person continues to persist. As shown in various chapters, efforts to define a community continue to be limited to things such as geographic location, cultural connections, and related affinities.

Certainly, prevailing conceptions of community perpetuate the universalist tropes that continue to define the global community of knowledge. The universalism at the helm of global epistemic systems was precisely what this thesis sought to expose and demonstrate the need for it to be dismantled and replaced with a pluriverse.

This thesis finds that peoples of the Global South conceive of personhood and community to be inclusive of the living, the dead, and the yet-to-be-born. This is an embodiment of their knowledge patterns and traditions.[1] By extension, this thesis decidedly finds that there is an authenticity to the claims that Abezimu/Badimo are an author in copyright because this is reflective of how peoples of the global South perceive personhood and community.

6.4.3 On the relationship between global copyright and capitalism

The thesis finds that modern copyright law is unduly steeped in not just Eurocentricism but also capitalist logic, sensitivities, and desires. This is evidenced in how the global intellectual property rights setting almost always sets out all intellectual property instruments through the prism and language of trade. This is a reality that is omnipresent in all international intellectual property law (and copyright) treaties, and it permeates the different legislations of different individual countries. There is a unity of laws, treaties, and scholarship with capitalism at the nexus of the global copyright regime, and this leads to all copyright concepts being couched and articulated by way of mercantilist enunciations.

The prevailing capitalist reality forecloses the potential of copyright, and indeed authorship, to lend itself to functions outside of trade and its related profit-making characteristics. On the same score, the thesis finds that the triumph of capitalism in our society is one of the main causes of conceptual rigidity where authorship in copyright is concerned. In essence, copyright scholars are unable to imagine authorship beyond its current strictures because capitalist logic has conditioned them to think that the function of copyright and the centrality of authorship is to remunerate creators of works. As a result, by recognising a non-human author, in the make of Abezimu/Badimo, the capitalist-sponsored question would be: 'How do we remunerate the dead?' or 'What are the pecuniary implications of recognising the authorship of people that are dead?' The slightest difficulty in responding to these questions would lead to a rejection of the thesis that

[1] This conclusion as regards the epistemologies of the global South is made with the usual caveats that are applicable to the academic cautions against generalizations about the belief systems and identities of groups of people, especially when considering the plural, diverse and multiplicity of our world. As explained in earlier chapters, the argument about epistemologies of the South is largely drawn from the work of Boaventura de Sousa Santos, see generally De Sousa Santos op cit note 154 ch 1.

Abezimu/Badimo is an author. Such a rejection would not be justified in the context of the *Decolonial Turn* and its pluriversal demands but would make sense only through the universalist, Eurocentric, and capitalist vision. It follows quite logically that this thesis finds that for authorship to be realistically transformed, there is an immediate need for the global copyright regime to either distance itself from capitalist logic or to at least accept that capitalism/Eurocentricism is just one worldview amid many other legitimate worldviews and epistemic traditions.

6.4.4 On the prospects/potential of a pluriversal author

The thesis finds that the future of authorship in a decolonised copyright regime is one that wholly embraces a pluriversal author. The thesis used the metaphor of a trip, carefully illustrating that there is a trip that begins at the *Decolonial Turn* and leads to (but does not end at) the pluriversal author. Dialectically speaking, a pluriversal author cannot exist in a universal world – therefore, the world needs to shift from the universe to the pluriverse. A pluriversal author embodies and is reflective of the plural nature of the epistemic traditions of the world – an enunciation of authorial practices that move beyond colonial, Eurocentric, capitalist, and Western ways of knowing/doing/Being.

6.5 Recommendations

6.5.1 For legislative consideration

Although the thesis of this doctoral project's argument is mainly posited at a conceptual level, which does not lend itself to obvious legislative implication, the first recommendation is directed towards legislation/legislators: for a pluriversal author to be achieved, legislative framings of authorship ought to be couched in flexible terms. To be sure, for authorship to be able to reflect the epistemic knowledge patterns of the world, there must be a conceptual caveat in legislative definitions of authorship that all this diversity to come through. The immediate consequence of such an amendment is that authorial definitions would break from the formalist/positivist demands for uniformity/universalism in the guise of certainty.

6.5.2 For broader social/political consideration

Having authenticated the authorship of Abezimu/Badimo (ancestors) in copyright, this thesis recommends that this authentication should inform not just the area of copyright law but the very foundations of the law in its totality. The task of authenticating the claim that Abezimu/Badimo constitute not just a belief system but rather an epistemic tradition of African people is instructive to all areas of law in the context of the *Decolonial Turn*, simply put, the legal systems, principles and frameworks in Africa remain incomplete when they do not reflect the epistemic patterns of African peoples. Indeed, efforts to transform all our laws should reflect the knowledge of its people, and suppositions about Abezimu/Badimo are a good place to begin.

6.5.3 For legal education and the law academy

Most scholarly writings in the sphere of decolonisation and decoloniality in the aftermath of the #MustFall moment, and indeed in the context of the *Decolonial Turn,* correctly place their emphasis on the need to decolonise higher education broadly and legal education specifically. Indeed, this is important because the root of most epistemological suppositions stems from what is taught at institutions of higher learning and then begins to take shape in society generally. It is against this background that this thesis recommends that there be a decided focus on the copyright law curriculum, precisely on how authorship is taught. This recommendation insists that the attainment of a pluriversal author lies in the academy's openness to teaching future copyright lawyers about the diverse and pluriversal characteristics of the world and how this informs the real nature of authorship.

6.6 Future research

As recounted at the beginning of this thesis, some conceptual questions reasonably lead to questions about praxis – these are not within the scope of the study that was carried out in this thesis. Questions about the praxis (meaning a marriage between theory and practice) of accepting the thesis of ancestors as authors in copyright are warranted and valid. Notwithstanding their

validity, it ought to be borne in mind that this thesis fixed itself to the limited task of traversing a conceptual and theoretical argument. From a lengthy theoretical offering, there exists a strong launchpad for scholarly interlocutory as regards practicality. These questions present a developing opportunity for future research – in the main, four such questions are worth setting out:

First, the foremost question that arises in the recommendation that Abezimu/Badimo must be accepted as authors regard the practical implications that are intertwined with the authorial chassis – for example, if ancestors are an author, what would it mean for copyright duration, especially when considering that one of the fundamental principles of copyright is that exclusive rights must not exist in perpetuity. The same sort of question could be posed where infringement and moral rights are concerned. Where infringement of a copyright of a work authored by an ancestor, who would enforce compliance, and how would they achieve it? Where moral rights are concerned, how will ancestors be able to, for example, dispute against false attribution or distortion?

Second, the extent of the involvement of Abezimu/Badimo in the authorial process is another legitimate question. This question arises with the background of the nominal skill and labour demands for the subsistence of copyright. Usually, when authorship is disputed, courts are called upon to weigh the amount of skill and labour that a purported author put into the authorial process.

Third, linked to the second question, there is a greater need to substantively discern between the involvement of Abezimu/Badimo as authors or as a muse. The latter refers to an instance where a work is authored by an individual who claims inspiration from ancestors. In contrast, the former refers to ancestors themselves as being authors, perhaps having used their descendants as a medium or instrument of authorship. Scholars, particularly in strictly mercantile law traditions, would realistically want to concern themselves with differentiating between the two.

Fourth, although this thesis engaged in a decolonial study of the history of the development of copyright law, there still exists a need for a deepened study of copyright law prior to colonial contact. African peoples, prior to the colonial episode, had their systems of knowing/doing. These included ways to confront and grapple with intellectual property rights. These systems of knowing/doing ought to be researched and studied – not with the reactionary intention to bask in pre-colonial nostalgia but to expressly re-member that African knowledge that was undone because of epistemicides, historicides and linguisticides.

The four questions listed above are not exhaustive, not by any stretch of the imagination. As can be surmised, the acceptance of Abezimu/Badimo as an author in copyright law and the general embrace of a pluriversal author will lead to many other conceptual/theoretical questions. All of these are an opportunity for further/future research.

Aluta!

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