CONVERGENCE OF INTELLECTUAL PROPERTY AND COMPETITION LAW OBJECTIVES FOR AFRICA: A TWAIL RECONSIDERATION OF THE COPYRIGHT ISSUES ARISING FROM THE SIXTH AMENDMENT OF THE NIGERIAN BROADCASTING CODE

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ABSTRACT

Enacting the sixth amendment of the Nigerian Broadcasting Corporation Code (NBC Code) in January 2020, Nigerian policymakers arguably had an opportunity for the first time to purposefully grapple with the complex and rigorous interaction between intellectual property rights and competition law. However, they missed this chance. In 2022, the Lagos Judicial Division of the Federal High Court struck down the sixth amendment to the NBC Code, finding that it had been improperly developed through a stakeholder consultation process dominated by copyright-intensive industries, which failed to engage the competition authority, and that the Code was in apparent conflict with the rights conferred under the Copyright Act. Before being struck down, the Code had attracted significant criticism from Nigerian intellectual property scholars and practitioners, primarily due to its inconsistencies with copyright law. By the Court's ruling, the NBC Code and the copyright issues it generated could rightly be considered dead. However, the lessons learned in 'how not to apply competition law principles in IP' and the Euro-American ideology underpinning both IP and competition law remain. Therefore, this paper undertakes a critical and reflective mission by revisiting the copyright issues generated by the defunct code and exploring how a Euro-colonial copyright ideology should be confronted through a purposeful convergence of copyright and competition law in an African country like Nigeria.

The paper considers this mission necessary for several reasons. First, the issues present Nigerian policymakers with an opportunity to creatively and purposefully engage with

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the complex complementarity of IP and antitrust or competition law in the context of a developing nation. Second, the arguments raised in opposition to the Code, which ultimately led to its demise in court, aptly demonstrate the ideological stronghold of Eurocentric and colonial IP orthodoxy, as well as the recent influence of competition law in Nigeria. Third, global experiences, particularly in Europe and the Americas, demonstrate that IP and competition law issues frequently interact purposefully and progressively, specifically to achieve developmental objectives such as access to cultural and copyrighted content. Therefore, Nigeria and Africa must understand how to navigate this interaction by devising a customised strategy that works for them, rather than dismissing one in favour of the other, and which does not necessarily rely on Euro-American intellectual property or competition law orthodoxy.

KEYWORDS: Nigeria, South Africa, competition law, copyright, intellectual property, TWAIL

1. Introduction

In January 2020, under the former President of Nigeria, Mohammed Buhari, the Federal Government of Nigeria issued a directive terminating the exclusive rights to live broadcasts of sporting events in Nigeria.[1] Communicating the directive via a press release, a media aide to the then Minister of Culture and Information, Alhaji Lai Mohammed (the 'Minister'), specifically directed the Nigeria Broadcasting Corporation (NBC) to enact a new regulation mandating broadcasters and exclusive licensees to share such exclusive rights with other broadcasters (the 'Ministerial Directive').[2] According to the Minister, the policy justification of such regulation is to 'prevent the misuse of monopoly or market power or anti-competitive and unfair practices by a foreign or local broadcaster to suppress other local broadcasters in the television and radio markets.'[3]

Immediately after the regulation, known as the Sixth Amendment to the NBC Code, was proclaimed, it naturally elicited reactions from the Nigerian Copyright Legal Academy and creative industry stakeholders, including copyright and entertainment lawyers. For example, one of the entrepreneurs in the video streaming platform sub-sectors of the Nigerian creative industry described the Sixth Amendment to the NBC Code as 'champagne socialism' and 'ridiculous' for making [copyright] exclusivity illegal.[4] Olubiyi and

1 'Exclusivity rights: Nigerian Govt moves against Multichoice' *The News* (9 January 2020), available at: https://www.thenewsnigeria.com.ng/2020/01/09/exclusivity-rights-nigerian-govt-moves-against-multichoice/ (viewed on 26 July 2025).

2 Ibid.

3 Ibid.

4 'NBC's Sixth Amendment: A Review, *ThisDay* (19 June, 2020), available at: https://www.thisdaylive.com/2020/06/19/nbcs-sixth-amendment-a-review/ (viewed on 26 July, 2025) (quoting Jason Njoku, one of the business men in Nollywood, 'Nigerian Broadcasting Commission [is] making exclusivity illegal, compelling sublicensing of content and regulating price, are effectively turning private enterprises into government property. Interference distorts market. If implemented, this, 100%, destroys PayTV in Nigeria.' Iroko CEO, Jason Njoku wrote about his rejection of the policy on Twitter. He continued, 'This our champagne socialism and zero input style of policy is the reason Nigeria is stunted in everything. I invest billions [in] naira [on] content, then I am compelled to share with everyone else as NBC sets the price, why? Dark forces or incompetence is at play here. Ridiculous.'

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Oriakhogba, both Nigerian intellectual property (IP) law professors, in their paper, while acknowledging that the regulation has some policy merit, criticised it primarily for flouting international copyright standards.[5] Professor Okorie's scholarly commentary on the Sixth Amendment to the NBC Code on *IPKAT* argued that the question of the anti-competitive effect the Code targeted should have been left for the Federal Competition and Consumer Protection Act (FCCPC), the Nigerian Competition-Antitrust enforcer.[6] Relatedly, Okorie argued that the Sixth Amendment to the NBC Code

> ostensibly rejects a balancing approach that considers each… arrangement on its merits through a careful observation of the relevant market and leverage on the competition expertise of the Federal Competition and Consumer Protection Commission.[7]

Like Okorie, Olubiyi and Oriakhogba, Nigerian IP legal practitioners also took their turn to critique the Sixth Amendment to the NBC Code and the competition or antitrust policy underpinning it.[8] First, and consistently resoundingly, is that the Sixth Amendment to the NBC Code contravenes the provisions of the Copyright Act. Secondly, relying on several decisions settled by the Nigerian courts, the Sixth Amendment to the NBC Code, being a subsidiary of the Nigerian Broadcasting Act — a general legislation on broadcasting — is unlikely to be enforced as a compulsory licensing mechanism for broadcasting rights, specifically legislated in the Copyright Act.[9] Thirdly, the provisions of the Sixth Amendment to the NBC Code are far-reaching and will discourage investment in the already prosperous entertainment and broadcasting industry.[10]

Primarily based on the concerns expressed by lawyers and legal scholars above, the Sixth Amendment to the NBC Code was judicially challenged by a Lagos-based journalist at the Federal High Court (FHC), the court clothed with jurisdiction in copyright and other IP-related matters under the Nigerian Constitution, in suit number FHC/L/CS/1152/2020.[11] At the time of writing, the

5 IA Olubiyi & DO Oriakhogba 'Implications of the Nigerian Broadcasting Code on broadcast copyright and competition' (2021) 70 *GRUR International* 644.

6 C Okorie 'Windowing, anti-competition and the amendments to the 6th edition of the Nigerian Broadcasting Code' *The IPKat* (2020), available at: https://ipkitten.blogspot.com/2020/08/windowing-anti-competition-and.html (accessed on 25 June 2024).

7 Ibid.

8 D Oturu & K Takuro 'Regulating Nigerian content on broadcasting platforms: An examination of the amendments to the 6th edition of the Nigeria Broadcasting Code' *Mondaq* (June 2020), available at: https://www.mondaq.com/nigeria/broadcasting-film-tv-radio/954936/regulating-nigerian-content-on-broadcasting-platforms-an-examination-of-the-amendments-to-the-6th-edition-of-the-nigeria-broadcasting-code (viewed on 25 July 2025); A Odofin, S Sogbetun & T Akeju 'A review to the amendment to the Nigerian Broadcasting Code', available at: https://alp.company/sites/default/files/A%20Review%20of%20the%20Amendment%20to%20the%206th%20Edition%20of%20the%20Nigerian%20Broadcasting%20Code.pdf (viewed on 25 July 2025).

9 A Ijaodola & I Olawumi 'A legal analysis of the amendments to the sixth edition of the Nigeria Broadcasting Code', available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3901868 (viewed on 25 July 2025).

10 Ibid.

11 'Court nullifies NBC code, gives broadcast industry hope' *ThisDay* (2022), available at: https://www.thisdaylive.com/2022/06/05/court-nullifies-nbc-code-gives-broadcast-industry-hope/ (viewed on 25 July 2025).

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certified true copy of the judgment could not be obtained. Therefore, reliance has been placed on the newspaper reports of the judgment.[12] In their response to the suit, NBC reportedly defended the Sixth Amendment to the code as necessary to protect local operators, promote creativity, and maximise local content due to the antitrust provisions in the amendment.[13] Unlucky for the NBC, the FHC was not convinced. In striking down the code, Justice Lewis-Allagoa held that the Sixth Amendment to the NBC Code is 'a violation of the principle of fair hearing and natural justice, adding that the acquisition of exclusive rights to broadcast a particular programme is an investment for returns which no one should be forced to surrender same when it is lawfully acquired'. In addition, the Court held that the 'NBC lacks the power to prohibit exclusivity on privately acquired intellectual property rights in programme contents of a right-holder vis-a-vis the salient provisions of the constitution and the copyright act.'[14]

By the FHC's decision, the Sixth Amendment to the NBC Code and the associated IP issues could be rightly considered defunct. However, this paper aims to explore the broader issues raised by the Sixth Amendment to the NBC Code through the lens of Third World Approaches to International Law (TWAIL). I consider this reconsideration mission significant for several reasons. First, the issues presented Nigerian policymakers with an opportunity to creatively and purposefully engage with the complex relationship between IP and antitrust or competition law in the context of a developing nation. It was indeed a missed opportunity! Second, the arguments presented against the Sixth Amendment to the NBC Code, which ultimately led to its judicial demise, adeptly illustrated the ideological dominance of Eurocentric and colonial IP orthodoxy, as well as competition law, in Nigeria. Third, experiences from around the world demonstrate that IP and competition law issues often intersect. Therefore, Nigeria and Africa must understand how to navigate this complex interaction, rather than dismissing one in favour of the other, by developing a customised strategy that works for them and is not solely rooted in Euro-American orthodoxy. In addition to this introduction, the paper is structured as follows:

Before a TWAIL reassessment of the Eurocentric framework of copyright in broadcasting and competition law, and how it was successfully applied in undermining the Sixth Amendment to the NBC Code in Nigeria, part 2 will begin with a brief analysis of the core copyright doctrines featured in the code. Specifically, it will briefly examine the nature of copyright exclusivity in broadcasting rights under the Copyright Act that was in force during the passage of the NBC Code.

Setting the tone for a TWAIL reappraisal in part 4, part 3 substantiates the assertion that, overwhelmingly, the arguments opposing the Code exemplify the lingering influence of colonial dominance over African perspectives

12 Ibid.
13 Ibid.
14 Ibid.

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concerning notions of right and wrong within the realm of copyright. Drawing on the concept of colonial hangover as discussed in Olufunmilayo Arewa's 'Disrupting Africa',[15] the section contends that Nigeria, along with other African nations, must transcend reliance on Eurocentric norms — perceived as international standards — when formulating copyright policies aimed at national development. While acknowledging procedural flaws in the process leading to the Code, it is argued that the Code constitutes a deliberate policy initiative by the Nigerian state to address persistent challenges related to copyright exclusivity in the broadcasting sector. To substantiate this argument, examples are cited of hegemonic European countries that have adopted interventionist policies grounded in competition law, which originally served to protect copyright law and have historically been regarded as sacrosanct in debates opposing the Sixth Amendment to the NBC Code of Nigeria.

Part 4 of this paper delineates the theoretical principles of Third World Approaches to International Law (TWAIL) as a framework for reinforcing the arguments advanced in parts 1 and 3. It does so by advancing a pro-African perspective through which competition law may be deliberately employed to engage with the exclusive rights conferred by copyright law in a Third World context, using the Sixth Amendment to the NBC Code as a case study. Part 5 summarises the core arguments in this paper and concludes.

The author draws the reader's attention to the 'for Africa' in the first part of the title of this paper. The choice of 'for Africa', rather than 'in Africa', is a deliberate attempt to think about a home-grown or African approach to synergise the objectives of copyright and competition law for Africa. While the core Euro-American doctrines will serve as the starting point for the analysis in this paper, the author's goal is not necessarily to be bound or shaped by them.

2. A Brief Doctrinal Analysis

2.1 Copyright in broadcasting

The act of broadcasting, unlike art, literature, or movies, is not about creating a specific object. Instead, it is about facilitating communication.[16] Therefore, recognising broadcasting rights under copyright law reflects an appreciation of the importance of communication, rather than the content or creative work being transmitted.[17] Although some authors claim that broadcasting rights entered the discussion of international copyright law with the introduction of art 11bis of the 1928 version of the Berne Convention,[18] this is not entirely accurate, as the works protected by the wording of the 1928 Act of the Berne Convention are literary and artistic. The provision in that article only extends the copyrights of authors of artistic and literary works to include the exclusive right to authorise

15 OB Arewa *Disrupting Africa: Technology, Law, and Development* (2021).

16 L Bently et al *Intellectual Property Law* (2022).

17 J Love 'The trouble with the WIPO Broadcasting Treaty' [2023] Joint PIJIP/TLS Research Paper Series, available at: https://digitalcommons.wcl.american.edu/research/88.

18 L Vyas et al 'The (long) road to the broadcast treaty: A brief history' *Infojustice,* available at: https://infojustice.org/archives/46093 (viewed on 26 July 2025).

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the communication of their works to the public via radio-diffusion.[19] The right was further expanded by the 1948 Act of the Berne Convention.[20]

The first international copyright instrument to recognise or protect broadcasting as a communication service provided by broadcasters or broadcasting organisations is the Rome Convention of 1961,[21] which followed intense lobbying by broadcasters. Echoing the views of authors such as Bentley, Sherman, Gangjee, and Johnson,[22] James Love recounts the lobbying effort — despite their non-creative elements — that led to the creation of the Rome Convention notes:

> Broadcasting organizations made a discrete case for inclusion in the treaty as a beneficiary, even when making no creative contribution. Backed by sheer lobbying power, broadcasters claimed that, unlike theatre owners, record or bookstores, they were tasked with creating works available to the public without direct compensation from listeners, often with additional public service obligations, and were entitled to rights, even when none existed for the works broadcast.[23]

Following the adoption of the Rome Convention in 1961, broadcasters were officially recognised as beneficiaries of copyright in both domestic and international copyright instruments. Copyright exclusivity has also been acknowledged under the Agreements on the Trade-Related Aspects of Intellectual Property Rights.[24] It is worth noting that, in addition to the TRIPS Agreement and the Rome Convention, there is an ongoing discussion at the World Intellectual Property Organization (WIPO) level regarding a new copyright treaty.[25]

In compliance with these international instruments, Nigerian copyright law also recognises broadcast as one of the works eligible for copyright protection. However, for this article, the Nigerian Copyright Act (hereafter referred to as the Copyright Act 2004), in effect when the Sixth Amendment to the NBC Code was introduced, will serve as the basis of the analysis, rather than the 2022 Amended Act that followed.

19 S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886 - 1986* (Centre for Commercial Law Studies, Queen Mary College [u.a] 1987).

20 Ibid.

21 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, UNTS, vol 496, 43 (1961) (Rome Convention).

22 Bently et al (n16).

23 Love (n17).

24 Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S 299, 22 I.L.M 1197 (1994) (TRIPS Agreement).

25 L Schirru et al 'Documentary history of the broadcast treaty in the SCCR (Global Version)' [2025] Joint PIJIP/TLS Research Paper Series, available at: https://digitalcommons.wcl.american.edu/research/145.

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2.1.1 Broadcasting under the Nigerian Copyright Act

Section 1 of the Copyright Act 2004,[26] like in many jurisdictions worldwide, recognises copyright as one of the eligible works for protection.[27] Therefore, there is no controversy regarding the recognition of the work as copyright eligible.

The nature of exclusive rights in broadcasting is described in s 8 of the Copyright Act, 2004. According to this section, copyright in broadcast grants the exclusive economic rights to control activities such as recording and re-broadcasting, communication to the public in whole or a substantial part, either in its original or derivative form, and distribution to the public for commercial purposes through rental, hire, loan, or similar arrangements.[28] Specifically, regarding television broadcast, the economic or exclusive right in broadcasting also extends to the right to control the taking of photographs from such broadcasts.[29]

More importantly for scholarly inquiry in this article is the broadcast owner's right to assign or license, similar to other eligible works. Under s 11 of the Copyright Act, 2004, the copyright owner of a broadcast has the authority to assign or license that right either exclusively or non-exclusively. This broad economic power includes the right to assign or license specific aspects of the suite of economic rights or the entire rights. The authority also extends to the right to permit or assign future or existing broadcasts. Under the Act, the copyright owner in a broadcast can even assign on a geographic basis. In other words, as worded by the Act,

> An assignment or testamentary disposition of copyright may be limited so as to apply to only some of the acts which the owner has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area.

To understand the nature and scope of the economic rights granted to the owner of a broadcasting right by the Copyright Act, it is helpful to examine relevant cases where these rights have been judicially upheld. Due to the limited number of decided copyright cases in Nigeria, this paper will, out of necessity, refer to decided cases from selected common law jurisdictions. These jurisdictions, owing to their shared colonial heritage and legal traditions, will still serve as a guide for Nigerian courts in interpreting these rights.

In the Australian case of *TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2)*,[30] the Australian High Court held that, specifically with respect to broadcasting rights, the interest protected by copyright is the interest in the 'cost and skill in the assembling or preparing and transmitting programmes to the public'.[31] Such programmes, whose interests are safeguarded by copyright

26 Copyright Act Cap C28 Laws of the Federation of Nigeria 2004.
27 Section 1(F) of the Copyright Act, 2004.
28 Section 8(1) of the Copyright Act, 2004.
29 Section 8(2) of the Copyright Act, 2004.
30 [2005] FCAFC 53.
31 Ibid.

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in broadcasting, include recorded and live news and sports programmes, studio-recorded programmes, and the transmission of films or television series.[32]

More relevant to the overall objective of this paper is the controversial decision of the Kenyan Supreme Court in *Communications Commission of Kenya v Royal Media Services Limited*.[33] One of the questions the Court confronted was whether the Communications Commission of Kenya was entitled to issue Broadcasting Signal Distribution (BSD) licenses and frequencies to the Respondents. At the trial Court, the matter was resolved in favour of the Appellants. The High Court held that the Respondents were not entitled to be issued a BSD license, and that they had not established the infringement of their copyright.[34] The Respondents appealed the decision to the Court of Appeal, which found in their favour. Finding for the Respondents (the Appellants at the Court of Appeal), the Court of Appeal held that the granting of a license permitting the fourth to seventh Respondents to air the Appellants' 'free to air (FTA) programmes without their consent is a violation of the Appellants' copyright', and the order was subsequently declared void.[35] The Respondent (now the Appellant at the Supreme Court) appealed the decision. To resolve the issue of copyright concerning the grant of the BSD license, the Kenyan Supreme Court set out the issue for determination in the following words:

> Did the CCK violate the intellectual property rights of Royal Media, Nation Media, and Standard Group by authorizing PANG, Signet, StarTimes, GOtv and West Media to transmit their broadcasts without their consent?[36]

One of the contentions of the first to third Respondents is that the Appellant's regulatory instrument, which mandated it to grant the license in dispute, cannot override the provisions of the Kenyan Copyright Act, which grant such exclusive rights to the owners of the copyright in their content.[37] The Supreme Court after reviewing the relevant contracts between the first to third Respondents and some of the parties to the suit including the fourth Appellant, the fifth Respondent, the sixth Appellant, the sixth Respondent, and the fifth Appellant, concluded that there is no factual grounding to the claim of the first to third Respondent that the first Appellant breached their copyright by authorising the fourth Appellant, sixth Appellant, fifth Respondent, and sixth Respondent to transmit their broadcasts without authorisation.[38] Staying on the copyright issue, the court addressed the next important copyright question: whether a 'must-carry' rule infringes copyright in broadcast content?

A 'must-carry' rule is the colloquial way of describing a regulatory requirement that mandates cable television companies to carry locally licensed

32 Ibid.
33 Petition 14, 14A, 14B & 14C of 2014 (Consolidated) [2014] KESC 53 (KLR) (29 September 2014).
34 Ibid para 4.
35 Ibid para 8.
36 Paragraph 210.
37 Paragraph 212.
38 Paragraph 223.

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TV stations on their cable systems.[39] This is especially required when the cable networks are the essential means of receiving radio and TV channels for a significant number of end users. Rooted in public interest, one of the policy justifications for the rule is to facilitate access to information through national public channels or private channels deemed critical.[40] It was based on the exercise of this 'must-carry' rule implemented by the first Appellant in its letter to the fourth and sixth Appellants, fifth Appellant and fifth Respondent (all jointly known as Wanachi Group), copying the first to third Respondents, that the first to third Respondents are claiming copyright infringement in their broadcast right is based.[41] The first to third Respondents argued that the letter mandating the Wanachi Group to provide local free-to-air channels from their platform, even in situations where their subscribers had failed to make payment for their subscriptions, was a permission to re-broadcast their content without their permission, which was an infringement of their intellectual property rights. The Supreme Court disagreed with the first to third Respondents.

The Court held that the steps involved in a must-carry rule do not qualify as rebroadcasting under the Rome Convention and the Kenyan Copyright Act. In addition, the Apex Court justified the must-carry rule by applying the fair-dealing concept under the Kenyan Copyright Act and the Rome Convention.[42] Strangely, the Court proceeded to characterise the must-carry rule it had earlier held not to infringe the first to third Respondents' rebroadcasting rights as an act in fair dealing.[43] The basis of the Court's characterisation is that the must-carry rule and fair dealing serve the same purpose of facilitating public access to information.

Like the Sixth Amendment to the NBC Code in Nigeria, which directly challenged the exclusivity of copyright holders in the broadcasting industry, the Kenyan Supreme Court decision attracted criticism from stakeholders in the country's copyright industry, including the Kenyan Copyright Board (KECOBO).[44] This paper will comment on the merit or otherwise of this criticism in a different section.

The central competition doctrines underlying the controversy surrounding the Sixth Amendment to the NBC Code — such as abuse of dominant position and the essential facilities doctrine — have been thoroughly discussed by Olubiyi and Oriakhogba.[45] Consequently, this paper will not revisit these doctrines at a doctrinal level. Instead, it will examine the applicability of these competition law doctrines, especially their purposeful synergy with copyright objectives for Africa, through the framework of TWAIL in part 4. To set the

39 Paragraph 234.
40 Paragraph 234.
41 Paragraph 225.
42 Paragraph 243.
43 Paragraphs 246 to 249–252.
44 V Nzomo 'Supreme Court of Kenya addresses "fundamentals" of copyright law in digital migration case' *IP Kenya* (1 October 2014), available at: https://ipkenya.wordpress.com/2014/10/01/supreme-court-of-kenya-addresses-fundamentals-of-copyright-law-in-digital-migration-case/ (accessed 24 July 2025).
45 Olubiyi & Oriakhogba (n5).

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stage for a TWAIL analysis, part 3 of this paper will conceptualise the defunct Sixth Amendment to the NBC Code as a victim of colonial hangover.

3. The Defunct Sixth Amendment to the NBC Code as Another Victim of Copyright's 'Colonial Hangover'

The core ideology and practices of Nigerian copyright law, along with many foundational legal, political, and economic structures across Nigeria and much of Africa, are rooted in Euro-colonial traditions. The core argument of this section of the paper is to illustrate how such Euro-colonial orthodoxy has endured in Nigeria, using the copyright issues generated by the Sixth Amendment of the NBC Code as an example. In the next section, I further ground this argument by explaining how colonial epistemological dominance is robbing Nigeria and Africa of their indigenous policy initiatives at the intersection of copyright and competition law.

The longstanding Eurocentric nature of the global intellectual property (IP) framework, including international copyright norms, is well documented in academic research.[46] The origins and principles undergirding the nature of copyright are both Eurocentric and still so.

Okediji classified the origins of the Eurocentric and colonial nature of the international IP framework, including copyright, into three different epochal systems — the era of imperialism, the era of formalism, and the era of consolidation.[47]

The era of imperialism, as explained by Okediji, refers to the period when European nations were responsible for finalising the core international IP conventions, including the Berne Convention, which now serves as the standard for evaluating copyright laws both in European and non-European countries.[48] What also marked that era was the subsequent use of these core conventions as tools of suppression and indoctrination of the colonies by Europeans, with little or no consideration for the needs of their colonies, such as Africa.[49]

During the period of formalism, newly independent nations such as Nigeria and other regions within the colonised world were incorporated into the international legal framework governing intellectual property. These nations were officially recognised as independent and sovereign entities. However, the principles and objectives that shaped the development of global copyright systems, as well as their integration into these countries' national legal frameworks, mainly reflected Euro-colonial interests.[50] Essentially, both the global copyright regime and the emerging global economic order limited the

46 RL Okediji 'The international relations of intellectual property: Narratives of developing country participation in the global intellectual property system' (2003) 7 *Singapore Journal of International and Comparative Law* 315; J Kouletakis 'Decolonising copyright: Reconsidering copyright exclusivity and the role of the public interest in international intellectual property frameworks' (2022) 71 *GRUR International* 24.

47 Okediji (n46).

48 Okediji (n46) 325–334.

49 Okediji (n46).

50 Okediji (n46) 335.

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sovereignty of these nations concerning intellectual property and copyright laws. By legitimising Eurocentric copyright laws, the laws enacted during this period in former colonies did not necessarily align with the needs of these newly independent countries.[51] For instance, it was during this era that Nigeria's first 'indigenous' copyright legislation was enacted by the military government in 1970, shortly after emerging from a 30-month civil conflict.[52] Beyond reducing the copyright protection period from 50 years to 25 years, the 1970 Copyright Decree[53] echoed the principles of the 1911 English Copyright Act,[54] upon which it was modelled. For example, both laws abolished common law rights.[55] A more notable example of the colonial dogma of the 1970 decree is the non-recognition or protection of folklore, a body of traditional expressive culture that Nigeria has in abundance. This lack of recognition may have stemmed from the fact that folklore, by its nature, is oral and communal and does not fit into the largely Euro-colonial model of individualised, fixed, and 'original' creation. Rather, the 1970 Decree sustained the concepts of fixation[56] and originality into the Nigerian copyright psyche, reflecting the Eurocentric mindset of the Berne Convention and the English Copyright Act of 1911.

The Eurocentrism underlying the era of formalism has now extended into what Okediji describes as the era of consolidation.[57] This era saw the consolidation of the dominant Eurocentric or colonial copyright regime, which claims to be international, achieved through harmonisation under the auspices of the World Trade Organization.[58] Besides integrating core copyright regimes and other IP norms into a binding multilateral grading system, this period was also marked by the strengthening of IP laws, often regardless of whether they aligned with the developmental needs and socioeconomic contexts of developing countries.[59]

The influence of the era of consolidation has endured and strengthened the argument against a colonial or Eurocentric copyright system. In other words, dissatisfaction with the Euro-colonial, maximalist principles of IP, rooted in exclusive rights and largely misaligned with the socio-economic development priorities of many third-world countries, has continued to drive an alternative, decolonised, or adjusted approach to governing IP, including copyright.[60] For example, interrogating a hegemonic IP legal system in Africa, Caroline Ncube asks, 'Had our law developed with the national public interest at its core, rather than colonial and neo-colonial interests, what would it look like?'[61]

51 Okediji (n46) 333.
52 JO Asein *Nigerian Copyright Law & Practice* 2 ed (2012) 29–31.
53 Copyright Decree 1970 (61).
54 Copyright Act 1911.
55 Section 16 of the Copyright Decree; s 31 of the Copyright Act 1911.
56 Section 2 of the Copyright Decree.
57 Okediji (n46) 334–341.
58 Ibid.
59 Ibid.
60 Kouletakis (n46) 5–7.
61 C Ncube 'Decolonising intellectual property law in pursuit of Africa's development' (2016) 8 *World Intellectual Property Law Journal* 34.

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Despite the inapposite nature of the Euro-colonial nature of Nigerian laws, including copyright, some critics argue that the concept of coloniality has been overemphasised, suggesting that post-colonial nations should focus on utilising remaining resources from their colonial past to foster development.[62] This perspective is valid when considering the importance of adopting progressive and emancipatory approaches suited to African or Third World nation-building efforts. However, this view oversimplifies the reality that Euro-American colonial laws primarily form the basis of international law, which all nations, including those in Africa, are compelled to follow to gain legitimacy on the global stage. An example of this is the evolution of international copyright law, which enforces a global order that leaves little room for national policy sovereignty — even when such policies could promote domestic development. This persistent influence of colonial legacies, often termed a 'colonial hangover' by Professor Olufunmilayo Arewa, exemplifies how colonialism continues to shape Africa's legal and international landscape.[63]

The term 'colonial hangover', as articulated by Arewa, denotes the pervasive and enduring influence of colonial-era laws, policies, and practices that continue to shape postcolonial governance, legal frameworks, and societal norms in African nations. This phenomenon impacts every aspect of the legal and political infrastructure in Nigeria and Africa as a whole, ranging from the uncritical evaluation of the use of the mace — a symbol of British royalty — in legislative proceedings in Nigeria, to the adoption of English gowns by advocates in Nigerian courts, to regulations governing business conduct and the curriculum of legal education delivered in Nigerian educational institutions. The downside of the colonial hangover in African legal systems, including their copyright laws, as posited by Arewa, is the tendency of these laws to favour international or external commercial interests over a deliberate, thorough, and context-specific adaptation to meet the developmental needs of African populations. However, she asserts that there is no inherent issue with borrowing or retaining foreign legal systems; the critical challenge is that such systems and practices must be rigorously scrutinised to assess their suitability for local needs. Arewa further contends that the international system has played a significant role in perpetuating these colonial laws. Arguing that international law, and law in general, played a core and facilitating role in entrenching colonialism, Arewa also contends:

> Colonizing powers also played a key role in the development of international law, which was used to provide legal justifications for varied acts by colonial powers. International law has typically been written thus far as a "history of rules developed in the European state system since the 16th century which then were spread to other continents and eventually the entire globe", which reflects an incomplete and Eurocentric story of international law that generally

62 AN Nyamnjoh 'Is it time to abandon decolonisation?' *African Arguments* (17 November 2022), available at: https://africanarguments.org/2022/11/is-it-time-to-abandon-decolonisation/ (accessed 26 July 2025); O Táíwò *Against Decolonisation: Taking African Agency Seriously* (2022)

63 Arewa (n15).

> ignores the violence, ruthlessness, and arrogance which accompanied the dissemination of Western rules, and the destruction of other legal cultures…[64]

A brief review of authoritative texts, such as Ricketson[65] on the evolution of international copyright law and its dissemination into various parts of the world, including Nigeria, lends further validity to Arewa's claim that colonial-international law confers validity on African laws, including copyright law. In other words, as colonial or European influence became internationally dominant, the colonised found themselves entangled in an international system alien to their cosmology, culture, and epistemology. Despite this cultural incompatibility, the colonised are not merely expected to adopt the European or coloniser's viewpoint; they derive validity from it. The laws and policies of the colonised, despite their benefits to citizens, are deemed invalid and cannot prevail if they contradict the colonisers, who have now assumed an international character.

Another instance that lends credence to Arewa's concept of colonial hangover is the body of arguments canvassed by most of the Nigerian IP academy and Bar against the defunct Sixth Amendment to the NBC Code. Although briefly reviewed in the introductory section of this paper, these arguments, maintained by scholars and practitioners, will now be examined in detail.

One significant element of the colonial legacy, as articulated by Arewa, pertains to the integration of colonial legal principles and the international recognition they have garnered as the basis for justifying or conferring validity or invalidity on local laws. Accordingly, in their assessment of the Sixth Amendment to the NBC Code, Professors Olubiyi and Oriakhogba substantiated their arguments concerning the amendment's validity through its alignment or misalignment with relevant international copyright instruments, such as the Rome Convention and the Trade-Related Aspects of Intellectual Property Agreement (TRIPS Agreement). Olubiyi and Oriakhogba, stating the core purpose of their argument, write, 'this article examines the provisions of the amendment of the NBC Code in the light of the Copyright Act and Nigeria's obligations under international treaties, such as the Rome Convention, and the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).'[66] By deploying the Euro-colonial as the standard of measuring the validity of an African or Nigerian legislative effort, Olubiyi and Oriakhogba's objective in their work aptly lends credence to Arewa's point about how colonial or imperial laws that have assumed powerful enforceable status like the TRIPS Agreement, the Rome Convention, and other core international IP laws are being deployed by post-colonial legal elite to 'shape current conceptualizations of law in theory and the application of law in practice in real-world contexts'. Following this objective, they outlined the various provisions of the exclusive rights in broadcasting that the Rome Convention and the TRIPS Agreement prescribe that member states

64 Arewa (n15) 99–100.
65 Ricketson (n19).
66 Olubiyi & Oriakhogba (n5).

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must provide for. In addition, these international instruments, as argued by the authors, also provide minimum exceptions and limitations to broadcasting rights.

Regarding the rights provided for broadcasting and their limitations, the authors argued that the Copyright Act complies with the Rome Convention. This compliance, according to Olubiyi and Oriakhogba, was achieved because the exclusive rights of broadcasting organisations provided under the Act, alongside its limitations, exceed those stipulated by the Rome Convention. The authors also analysed the provisions of the Sixth Amendment to the Code about the three-step test as prescribed under the TRIPS Agreement and as judicially interpreted by the Dispute Resolution Panel of the WTO.

While noting that the no-exclusivity provisions of the Sixth Amendment to the NBC Code may or may not address certain exceptional cases, which is one of the requirements of the cumulative three-step test, the authors caution that using competition intervention, such as the Sixth Amendment to the NBC Code, to limit exclusive rights under copyright law should be approached with care. The authors' warning again emphasises their concern regarding the external or neo-colonial interpretation of the three-step test. To buttress their point, the authors urged their readers to take a cue from European jurisprudence, where courts have upheld the mandating of copyright licensing. The author further contends that for the relevant provision of the Sixth Amendment to the NBC Code to meet a specific special case requirement, it must be given a restrictive interpretation, just like the European cases they relied on.[67] In the authors' assessment of the Sixth Amendment to the Code vis-à-vis the prescriptions of the three-step test on exceptions and limitations, the Sixth Amendment to the Code, if interpreted and implemented restrictively and with caution, meets the first test. However, concerning the second test, the Sixth Amendment to the Code has no chance at validity under international copyright law. According to the second step, any limitation or exception to copyright, such as broadcasting rights, must not conflict with the normal exploitation of the subject matter of the Sixth Amendment to the Code. Rightly argued by the authors, the relevant provisions of the Sixth Amendment to the Code will affect the normal exploitation of the broadcasting rights of the authors. Given the cumulative nature of the test, this paper will not consider the authors' assessment of the last portion of the three-step test.

Beyond its conflict with the local and international positivist Copyright Act, the authors critiqued the Sixth Amendment to the Code on other grounds. Still, those non-copyright grounds are no different from the core colonial logic sold to developing countries for embracing IP; this logic is embedded in the incentive logic.

Similarly, Professor Okorie's discussion of the propriety of the Sixth Amendment to the Code is featured on the well-known intellectual property blog *IPKat* as part of her contribution to the platform. Unlike Olubiyi and

67 Ibid.

https://doi.org/10.47348/SAIPL/v13/i2a2

Oriakhogba, whose responses devoted considerable space to debating the validity or invalidity of the Sixth Amendment to the Code based on international copyright norms, Okorie's approach was comparative. She drew insights from similar approaches employed by South Africa's Independent Communications Authority of South Africa (ICASA) and the publication issued by the European Audiovisual Observatory. However, her conclusion aligns with one of the conclusions reached by Olubiyi and Oriakhogba — 'the exploitation/exercise of copyright protection is not regarded as inherently anti-competitive, but is addressed ex post by competition agencies'. Okorie argues that, instead of a regulation like the Sixth Amendment to the NBC Code that outrightly prohibits exclusive licenses, a case-by-case analysis of each broadcasting license offers a more effective way to scrutinise exclusive licenses in copyright-heavy markets, including broadcasting, under antitrust or competition law. The commentary by Okorie at the end opens a conversation about a decolonised and home-grown approach to applying competition law. However, the discussion on a home-grown or decolonised approach is not fully developed, which is understandable given the platform on which she was writing — a blog. Her suggestion of a decolonised approach — meaning the ability of a developing country to exercise its agency by determining how it wishes to apply its competition law to meet its developmental needs — raises a critical question not explored by other commentators, especially IP lawyers in Nigeria's major law firms, whose stance is understandably solely pro-client or pro-business. Okorie interrogates

> Each country determines their own approach to the application of competition law, and there are several scholars urging developing countries such as Nigeria to apply competition law principles in a manner that takes cognizance of their unique developmental stage. The question is whether outright prohibition of windowing truly takes cognisance of Nigeria's developmental stage, especially in its creative sector. [68]

Okorie's interrogation outlines a broader critical approach rooted in the methodological and theoretical principles of TWAIL, aiming to explore a synergy between Afrocentric copyright and competition law for Africa, rather than merely adhering to international or colonial norms. The next section of this paper examines TWAIL and its potential usefulness in the copyright-competition dialogue within the context of the Sixth Amendment to the NBC Code.

4. Curing the Colonial Hangover — A TWAIL Reassessment of the Intersecting Copyright and Competition Issues in the Sixth Amendment to the Nbc Code

TWAIL is a theoretical and methodological movement that highlights and exposes the colonial, Eurocentric, unjust, and unequal aspects of international

68 Okorie (n6).

https://doi.org/10.47348/SAIPL/v13/i2a2

law in its various forms.[69] TWAIL scholars and affiliated academics apply their theories, frameworks, and methodologies to demonstrate how Euro-American international law has historically facilitated the dominance, underdevelopment, and oppression of third-world populations, along with their philosophies, languages, and cultures. Given the diversity of themes, strands, and perspectives within TWAIL, multiple approaches have also arisen.[70] Due to space constraints, this paper cannot address all these approaches. Instead, it will primarily focus on the aspect of TWAIL that examines the role of international law in shaping order, particularly the strand that investigates how Euro-American powers have utilised the global system and its organisations to extend the ideological empire of capitalism.[71]

One of the theoretical approaches of TWAIL highlights the role of international law and organisations in promoting Western capitalist and neoliberal economic and legal ideas.[72] These ideas are rooted in the traditional episteme and worldviews of the Euro-American context. As Obiora Okafor states, this notion centres on the West's ideals and overlooks the experiences, epistemologies, challenges, and developmental needs of the Third World.[73] Due to colonisation and globalisation, Western legal, economic, and political philosophies have become deeply embedded in the subconscious of the rest of the world, especially Africans. These ideas have become so ingrained that we sometimes adhere to them by default, influencing everything from how we evaluate the validity of our laws to our attire and approaches to problems.

The history of international economic law, even as technological innovation continues to permeate human life, is marked by how Western-controlled global organisations, such as World Intellectual Property Organization, the World Trade Organization, and the International Monetary Fund (IMF), promote, sometimes in a manner non-conforming to the realities of the third world, Euro-American capitalist ideas.[74] According to BS Chimni, one of those ideals includes the internationalisation of strong property rights and contracts, including intellectual property rights.[75] In the realm of IP, we have seen this internationalisation expressed in provisions like the national treatment principles in TRIPS and the Rome Convention.

69 M Mutau 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31; JT Gathii 'The agenda of Third World Approaches to International Law (TWAIL)' in JL Dunoff & MA Pollack (eds) *International Legal Theory* (2022), available at: https://www.cambridge.org/core/product/identifier/9781108551878%23CN-bp-7/type/book_part (accessed 20 May 2023); OC Okafor 'Critical Third World Approaches to International Law (TWAIL): Theory, methodology, or both?' (2008) 10 *International Community Law Review* 371.

70 Gathii (n69).

71 BS Chimni 'Third world approaches to international law: A manifesto' (2006) 8 *International Community Law Review* 3.

72 Ibid.

73 OC Okafor 'Newness, imperialism, and international legal reform in our time: A TWAIL perspective' (2005) 43 O*sgoode Hall Law Journal* 171.

74 C Deere *The Implementation Game: The Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (2011); Chimni (n71).

75 Chimni (n71).

One of the direct effects of international law promoting Western capitalist ideals as the standard for socio-economic organisation and rights allocation is the threat to the policy sovereignty of the governments of less powerful or third-world countries, especially in Africa. As argued by Chimni, this sovereignty is relocated within international institutions that are influenced and largely funded by hegemonic states.[76] Consequently, the capitalist norms, such as national treatment and exclusive rights, imposed by international organisations controlled by powerful states, serve as benchmarks against which the policies and laws of third-world states are evaluated. Therefore, even though Third World countries are sovereign, they lack policy autonomy in relation to the norms set by these international institutions. The copyright arguments raised in opposition to the Sixth Amendment to the NBC Code demonstrate the erosion of a Third World nation's policy sovereignty and its independence to legislate in a manner it considers suitable to promote access to cultural content and foster a robust, competitive broadcasting market through competition law-informed regulation. While the process leading to the adoption of the Sixth Amendment to the NBC Code may have been marred by procedural irregularities due to the then Nigerian government's lack of effort to reach consensus with relevant stakeholders in the broadcasting industry, it still reflects an exercise of sovereignty.

This exercise of sovereignty directly conflicts with the hegemonic ideology of exclusive rights in broadcasting that Euro-American powers have extensively internationalised through primary copyright instruments, such as the TRIPS Agreement and the Rome Convention. As observed in the commentary of Olubiyi and Oriakhogba, the provisions of these instruments legally restrict the legislative powers of the Nigerian government. For example, the authors (Olubiyi and Oriakhogba) compared the provisions of the Sixth Amendment to the NBC Code, which mandates the sharing of exclusive licences, against the national treatment provisions of the Rome Convention and art 13 of the TRIPS Agreement. The effect of the national treatment provision in the Convention requires member nations to treat foreign broadcasting organisations based in another country the same way as they treat their local broadcasters. Therefore, Nigeria's copyright regime must protect the copyrights of international broadcasting firms in the same manner as it does for domestic broadcasters. As rightly noted by Olubiyi and Oriakhogba, these rights can only be overridden if the legislative measures, such as the Sixth Amendment to the NBC Code, comply with the provisions of art 13 of TRIPS, known as the three-step test.

According to the analysis by Olubiyi and Oriakhogba, the Sixth Amendment to the NBC Code fails the three-step test. As a method to reduce monopolisation in the broadcasting sector, particularly for programmes with high viewership, para 9 of the Sixth Amendment to the NBC Code requires sub-licensing. Therefore, as Olubiyi and Oriakhogba argue, the Sixth Amendment to the NBC Code hampers the normal exploitation of broadcasters' rights.

76 Ibid.

https://doi.org/10.47348/SAIPL/v13/i2a2

From a doctrinal perspective, this paper agrees with their assessment; however, it raises concerns from a TWAIL perspective about the ideological foundation underlying their doctrinal evaluation.

From a TWAIL perspective, applying the three-step test reveals how international norms extend the ideological influence of capitalist ideas and how this expansion reduces the policy independence of states, especially those in the Third World. Indeed, regarding the three-step test, even scholars outside TWAIL have argued that it fundamentally limits the legislative independence of nations regarding exceptions and limitations to copyright, regardless of the nobility of the legislative intent. For instance, Silke Von Lewinski, in her influential work, notes that the test guides national legislatures to adopt a restrictive approach to exceptions and limitations.[77]

The inequality or unfairness of this internationalised system becomes clear when powerful nations or entities exercise control over the same exclusive rights that are expected to be jealously protected in the Global South. Indeed, some hegemonic nations have intervened by using competition law-informed regulation to promote public interests and competitive aims in their copyright-intensive industry in 2020, as seen in the Sixth Amendment to the NBC Code. For instance, in 2006, a German broadcasting authority halted the takeover of one of the country's largest TV stations by the nation's largest newspaper company. The acquisition was stopped to maintain media diversity, a core value of the German federation. A more notable example is the merger involving EMI/Sony, where the European Commission insisted on approving the merger only if there was a divestiture of the copyrights of several labels and key authors, such as Robbie Williams.[78]

The examples cited above, where powerful states have freely exercised their policy autonomy to legislate and even intervene in copyright-intensive industries, aptly demonstrate, from a TWAIL perspective, the inequality and double standard inherent in the international system, including the global IP system. At the core of the methodological enterprise of TWAIL is the emphasis on the equality of the Third World and treating it with seriousness. According to one of its leading theorists, one way to prioritise the equality of the Third World is to resist the ideological dominance of Euro-American powers. Furthermore, the Third World and its peoples do not deserve less than the rest of the world or the First World on matters concerning international law and policy.

77 Ibid.

78 J Drexl 'Copyright, competition, and development- report by the Max Planck Intitute for Intellectual Property and Competition Law, Munich' (2013) Commissioned Report 195, available at: https://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf (viewed on 20 July 2025).

4.1 TWAIL at the crossroads of the Sixth Amendment to the NBC Code, copyright, and competition law

The logical foundation of TWAIL is not entirely nihilistic about the international legal system, even though it remains critical of the dominant Euro-American ideals that support it. It seeks to challenge, expose, and potentially reform these ideals. This author is convinced by the TWAIL logic that the same Euro-American-dominated international system, which has been accused of hindering the development of the Third World, can also serve as a tool for liberation. It is from this non-nihilistic perspective of TWAIL that this paper proceeds to discuss the copyright issues in the NBC Code and how they intersect with competition law, a field 'arguably'[79] rooted in Euro-American traditions.

The main concern of Nigeria's copyright legal community regarding the Sixth Amendment to the NBC Code is that it conflicts with the core incentive principle of copyright, which relies on exclusive rights. Implicit in this argument is that, since these exclusive rights are granted by law through the Copyright Act and are part of Nigeria's role in the international community, they are inviolable, and any competition goals should be secondary. Challenging this Western orthodoxy, this paper uses a core TWAIL methodology that aims to shift the focus of validity from Eurocentric views to those of the rest of the world, especially the Third World.

4.1.1 *Centring the rest, and not the West*

A TWAIL approach in evaluating the merits or demerits of the Sixth Amendment to the NBC Code from the lens of copyright will not centre on its conflicts with Euro-American or colonial copyright law, which masquerades as international law. Instead, the focus will be on how the amendment aligns with the nation's developmental needs, considering the disparities in access to cultural and copyrighted works exacerbated by socio-economic inequalities in Nigeria. The predominant Eurocentric belief propagated by the West to the rest of the world posits that a set of exclusive rights under copyright law inherently promotes development and industrial growth. While this perspective possesses certain validity, it has not proven to be a definitive solution in all instances. For example, the emergence of the Nigerian movie industry, known as Nollywood, which is often celebrated, was not the result of copyright exclusivity. Rather, the industry emerged using a home-grown indigenous model that does not necessarily align with the received wisdom of copyright from the Global

79 The author believes that there are customary rules in ancient non-Western communities that regulate business conduct and economic relations. These rules might not have been named 'competition' or 'antitrust' law, but they surely existed. However, this conversation is beyond the scope of this article.

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North.[80] According to Oguamanam, Nollywood emerged through a creative rethinking of intellectual property (IP) issues, 'circumventing conventional copyright assumptions by embracing the collaborative production of knowledge within a national context where lax law enforcement is prevalent'.[81] Geographically, Nigeria is a large country characterised by a high population density and significant socio-economic inequalities. The distribution and accessibility of copyrighted content through broadcasting require a highly competitive market environment, allowing consumers from diverse social backgrounds to access content of national or cultural importance. In fact, the country's vast size and economic disparities have been identified as major obstacles to content distribution within Nigeria. To effectively reach a wide audience across the country, including both major urban centres and rural areas, it is essential to establish an open and competitive market environment where entities of various economic capacities can operate.[82] Although the mere existence of copyright exclusivity does not inherently hinder competition within the broadcasting sector, its enforcement could potentially act as a barrier to entry for industry players capable of serving different regional markets. Considering the socioeconomic conditions and lived experiences of Nigerians when the Sixth Amendment of the Code was enacted, there may have been justification for introducing a compulsory licensing scheme inspired by regulatory interventions based on competition law. To clarify, Olubiyi and Oriakhogba, unlike the practitioners, did not challenge this policy justification. However, their position — which employs global copyright standards as the main yardstick for assessing the validity of the NBC Code — highlights concerns in TWAIL scholarship regarding how the colonial global economic order undermines the sovereignty of the Third World. Specifically, it questions the policy sovereignty of Third World nations to legislate according to their socioeconomic realities.

4.1.2 *Reclaiming policy space limited by colonial international copyright through context-specific competition law*

As mentioned earlier, one reason for revisiting the Sixth Amendment to the NBC Code from a TWAIL lens is to reflect on the missed opportunity to engage constructively with the intersection of copyright and competition law it presents. The opportunity was partly lost because a dominant colonial international copyright orthodoxy overshadowed the interaction that should have involved a strong contextual policy discussion.

80 C Oguamanam 'The Nollywood phenomenon: Innovation, openness and technological opportunism in the modeling of successful African entrepreneurship', available at: https://static1.squarespace.com/static/5c5f29f04d546e3b8a4880c8/t/5da9f37b6e1010293d423055/1571419005851/WP-19-The-Nollywood-Phenomenon.pdf (accessed on 29 January 2023).

81 Ibid.

82 J Nguyen 'Unlocking Nigeria's TV market potential with satellite-powered distribution' *Satellite World* (17 December 2024), available at: https://satelliteworldtoday.com/unlocking-nigerias-tv-market-potential-with-satellite-powered-distribution/ (accessed on 7 October 2025).

As previously stated, a core idea of the TWAIL argument is that the dominance of Eurocentric international economic law, including standards for intellectual property, weakens the sovereignty of developing countries in creating policies they see fit to address socio-economic development issues within their borders. For example, the Copyright Act 2004, which was in effect when the sixth amendment of the NBC Code was introduced, did not permit the compulsory licensing of broadcasts. Consequently, any efforts to improve access or develop a market for a program with a large audience in Nigeria are prohibited under the copyright laws related to broadcasting. The fair dealing exemptions within the Act, although generally intended to support such goals, come with limitations. For instance, the fair use provision in the Act is restricted to four specific purposes: research, private use, criticism, or review of current events. This narrow scope is insufficient to serve a downstream market where lower-income citizens need access to popular content. As a result, under current copyright laws, the government lacked the legal and policy flexibility to develop a downstream broadcasting market that could serve its large and diverse population. Therefore, from a TWAIL perspective, the Sixth Amendment to the NBC Code could be justified and viewed as a policy-reclaiming or sovereignty-asserting tool to legislate outside an Euro-colonial global copyright bottleneck, thereby creating a competitive broadcast market.

4.1.3 *Using the Warder's tool to escape from prison*

Presenting a competition-inspired intervention as a way to bypass some copyright challenges initially seems contradictory. It raises the question: why is an equally Eurocentric norm, such as competition law, used as a means to address issues related to copyright exclusivity, which is also a colonial Eurocentric legal norm? The answer to this paradox is two-fold.

First, the author challenges the idea that the origins of competition law are exclusively Euro-Western. While its modern form, called antitrust or competition law, may have roots in America or Europe, it did not start from these regions. If competition law is understood as the regulation and promotion of a competitive market, marked by competitive pricing and a variety of product choices, then its origins cannot be solely linked to Western traditions. Pre-colonial African societies, although based on communal or subsistent systems, had structures that achieved similar goals as 'modern' competition law.[83] This will be the focus of another research project.

Second, even if it is reluctantly accepted that antitrust-competition law is rooted in Western or Euro-American culture, it does not mean that a non-Euro-American country cannot pursue the emancipatory path it offers. Indeed, one of the key theoretical and methodological aspects of TWAIL is a commitment to discovering reformative routes for the third world within the same Eurocentric

83 W Rodney *How Europe Underdeveloped Africa* (1972) 39–48.

https://doi.org/10.47348/SAIPL/v13/i2a2

or colonial international law.[84] In doing so, the TWAIL approach does not necessarily reinvent the Eurocentric wheel but rather emphasises the agency of the Third World.

Competition law presents an opportunity for reform due to the lack of a global enforcement mechanism comparable to the one in the IP field, like TRIPS. As previously stated, many Euro-American countries have leveraged this to address specific developmental needs or uphold values they deem essential to their nations. The sovereignty of these European countries is no more significant than that of Nigeria or any other country in the Global South. The question we should confront, from a TWAIL perspective, is how Nigeria and indeed Africa engage with competition law, especially in its IP-intensive or specifically copyright market. Procedurally, the Nigerian Government did a lackadaisical job in tackling this complex issue. The complexity of this issue was not appreciated, or, more accurately, drowned by the dominant Eurocentric or colonial narrative on the supremacy of copyright.

Having addressed the paradox of using a colonial instrument to deal with a colonial issue, the question then becomes how, from a TWAIL perspective, the Nigerian government should have approached the complex copyright and competition issues arising from the Sixth Amendment of the NBC Code. Answering this question would require a decolonial, people-first, and context-specific approach to competition law and policy itself. While conceptually, and in effect, this was exactly what the amendment to the Sixth edition of the NBC Code achieved, it does, in fact, fall short procedurally. This procedural shortcoming is fatal because it defeats the purpose. For example, it was not clear from the inquiry leading to the Sixth Amendment of the NBC Code how content intended for a compulsory license would be considered a genre of compelling viewership by Nigerians. Essential for the national and cultural development of the nation. For example, if a relevant market study was conducted and certain content is deemed to have compelling viewership or is useful for fostering media plurality, it would have been procedurally justifiable to exercise the policy space mandating compulsory licensing, regardless of copyright restrictions. As alluded to earlier in this paper, even jurisdictions historically hawkish about copyright law and other parts of IP have deployed a similar interventionist approach based on competition law to address specific developmental needs or promote values such as media plurality. These nations are no more sovereign than Nigeria or any other country in Africa.

5. Conclusion

According to a recent World Bank report, 139 million Nigerians are living in poverty. History has shown that citizens or consumers tend to spend disposable income on accessing copyright materials, such as broadcasting content, cinemas, and other entertainment services, during periods of economic prosperity rather than periods of deep abject poverty. Therefore, during such

84 Gathii (n69) 166.

a period of hardship, any policy aiming to regulate access, distribution, and competition in a market historically tied by exclusive copyright — particularly when this market is crucial for accessing content with high viewership — should consider the country's socio-economic conditions. Such a decision requires the exercise of policy sovereignty. In 2020, the Federal Government of Nigeria attempted to assert the required policy sovereignty within its broadcasting sector. However, it faced ideological shaming characteristic of a Eurocentric colonial global economic order, which includes the global copyright regime.

In this paper, the author has, from a TWAIL perspective, challenged this dominant Eurocentric ideological shaming rooted in a colonial copyright regime presented as international. It has been demonstrated in this paper that the dominance of such an ideological narrative, as seen in the copyright conversation on the Sixth Amendment to the NBC Code, can constrain the local and context-specific policy initiatives of a third-world nation. The conversation that should have led to such a homegrown initiative at the intersection of copyright and competition law was overshadowed by a dominant narrative that reinforces or reproduces the hegemonic Eurocentric epistemology of copyright.

To challenge the Eurocentric hegemonic ideology that has become the default framework for understanding access to and dissemination of knowledge and copyright content, including broadcasting, this paper advocates for a re-evaluation from a TWAIL perspective. A TWAIL re-evaluation involves centring the rest, rather than the West, as Okafor indicates. It involves posing the decolonisation question as Ncube asks, 'Had our law developed with the national public interest at its core, rather than colonial and neo-colonial interests, what would it look like?' Guided by this, TWAIL principles are applied in this paper, inviting the Nigerian and broader African IP legal community to reconsider the emphasis on the incentive-driven ideology of copyright, especially when other vital public objectives require attention. Instead of viewing the intersection of IP and competition law as a realm where exclusive rights should always prevail, it advocates seeing it as a space for resistance and reclaiming the policy sovereignty that African countries have, one way or another, conceded to the international IP norm-producing system. In this space, national goals such as cultural access, media diversity, and a dynamic broadcasting market should be given their deserved space. This reclaiming mission is the justification behind the phrase 'for Africa', and not 'in Africa' in the title of this paper.

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