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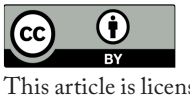
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Abstract
Among the key justifications for protecting intellectual property rights (IPRs) is that they incentivise and reward human creativity and innovation. The incentive/reward rationale is expected to foster a culture of innovation across jurisdictions and to provide sufficient motivation for further research and innovation. In this thematic report, the author explores the practical relevance of the incentive/reward justification for intellectual property (IP) protection in situations of employment. The author argues that in employment situations under Ghanaian law, the employer enjoys the economic benefits of the fruits of mental exertion to the detriment of the employee; the party actually engaged in the enterprise of creating IP materials receives insufficient incentives. This reality, the author argues, undermines the practical relevance of the core justification for IPRs protection.

Keywords
intellectual property rights (IPRs), protection, justification, incentive, reward, employment, benefit-sharing, Ghana

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1. Introduction

One theoretical foundation for protecting intellectual property rights (IPRs) is that they provide incentive and reward for human ingenuity. In prosaic terms, the argument is that IPRs protection is a reward for creative and innovative work, and that without IP protection, fewer people would devote their efforts to intellectual activities, because they need the incentive and reward of the legal protection (Gervais & Judge, 2011, pp. 8-9). IPR theorists bolster this foundational justification with various linked proclamations, including: that the efforts that persons put into the creation of intellectual materials often demand enormous expertise, creativity and capital investment, which the law should endeavour to protect (Stiglitz, 2008, p. 1695);[1] that IPR protection promotes the transfer of technology and the creation of wealth; and/or that IPRs provide incentives for the advancement of local knowledge and innovation. The corollary is that the incentives to innovate and invest in high-risk research and development could suffer significant setbacks without a legal framework to secure creative endeavours. Accordingly, deliberate efforts have been made in both policy and academic discourse to craft or construe IP laws and regulations in a manner that advances this vision of a just and attractive creative culture (Fisher, 2001, p.10).

This thematic report explores the practical relevance of the incentive/reward justification for IPR protection in situations of employment in Ghana, and argues that there exists a wide chasm between the justification *de jure* (i.e., positive law justification) and the justification *de facto* (i.e., the real motivation to be creative and innovative) in situations of employment under Ghanaian law. The existing Ghanaian IP legal framework provides no real motivation for employees to create and innovate, and claims that sufficient incentive arises from the salaries paid to employees are untenable. The underlying juridical foundations for securing IPRs are undermined by inequities in the allocation of proprietary rights over knowledge goods created in the course of employment. The reality is that the prevailing modes for protecting IPRs in employment situations serve the needs of employers more than those of employees. The employer is fed the largest portion of the metaphorical carrot of incentive/reward, to the detriment of the employee who is actually engaged in the enterprise of creating intellectual assets, and thus deserves the largest share of the carrot. The result is an undermining of the foundational theoretical justification for protecting IPRs.

Section 2 briefly outlines the general and global theories advanced to rationalise the ideology of the IP system in Ghana. Theories such as the natural rights theory, the incentive/economic theory, the reward theory, and the disclosure/social contract theory have somewhat influenced the architecture of the intellectual property law order in Ghana. Section 3 provides the legal realities of IP ownership in situations

1 See also *Diamond v Chakrabarty* at 304.

of employment under Ghanaian law, and makes suggestions as to how to make the incentive/reward justifications more tangible to employees engaged in creating IP in the course of employment. Section 4 discusses potential means by which benefit-sharing can become more firmly established in Ghana in respect of IP generated by employees.

2. Basic rationales for IP rights protection

The rationale for protecting the fruits of mental exertion finds potent articulation in a number of theories propounded by scholars and policymakers (Fisher, 2001; Merges & Ginsburg, 2004). Theories proffered in defence of IP law systems include the natural rights theory, the reward theory, the incentive theory, and the contract/disclosure of secret theory (see Adusei, 2013, pp. 111-129). These theories have cumulatively influenced the trajectory of the regimes of IPRs and their related jurisprudence in Ghana.

For instance, the natural rights theory and reward theory played a crucial rhetorical role in the design of the copyright law of Ghana. The tenor of the protection of economic rights under the Copyright Act, 2005 (Act 690) reflects this reality: the law grants exclusive economic rights in respect of the exploitation of copyrightable works to the copyright-owner.[2] It requires that the protection for the economic rights of the copyright-owner should subsist for the life of the author and 70 years after the death of the author.[3] The Copyright Act of 2005 also grants authors perpetual protection of the moral rights of authorship and integrity in the work.[4] For proponents of such an approach, "the labours of the mind and productions of the brain are as justly entitled to the benefit and emoluments that may arise from them, as the labours of the body are" (Smith, 2003, p. 103).

The incentive theory, which attempts to establish a causal relationship among IP incentives, inventiveness, and economic progress, has also found ardent articulation in Ghanaian IP law through a number of judicial decisions. In *Copyright Society of Ghana v Afreh*, the Court of Appeal in Ghana set out the underlying motivation to be creative in the following words:

> […] public patronage of [intellectual property] work augurs well for the national economy and it is imperative that every effort be made to let this phenomenon serve as an incentive to authors […]. We must recognize that wherever there are adequate incentives there flourishes a healthy competition as a catalyst for economic growth of any country. (*Copyright Society of Ghana v Afreh* [1999-2000] 1 GLR 135 at 142-143)

2 See section 5 of Act 690.
3 Section 12 of Act 690.
4 Section 6 and 18 of Act 690.

The Supreme Court of Ghana, in *Pearson Education Ltd v Adzei*, stated that "[the] law endeavours to strike a balance between protecting the economic rights of owners […] and the need to encourage the free exchange and dissemination of ideas which is vital for the development and progress of any society" (*Pearson Education Ltd v Adzei* [2011] 2 SCGLR 864 at 867). The expectation, as captured in the 2003 Memorandum to the Copyright Bill that led to Ghana's 2005 Copyright Act, is that "the protection offered by the revision of [intellectual property] law will nurture and promote the creative talents of the citizenry and thus contribute to the development of this country" (Republic of Ghana, 2003b, at i). Following a similar logic, the 2013 Memorandum to Ghana's Plant Breeders' Bill stated that the object of the proposed law was to "acknowledge the achievements of breeders of new varieties by making available to them an exclusive right on the basis of a set of uniform and clearly defined principles" (Republic of Ghana, 2013, at i.). It is thus envisaged that such legal safeguards will promote the growth of the seed industry and safeguard the lawful right and interest of plant breeders.

The belief, as articulated by Locke in his just deserts principle for physical property and extended by others to immaterial goods, is that, "every *Man* has a *Property* in his own person. The *Labour* of his body, and the *Work* of his hands, we may say, are properly his" (Locke, 1690, in Locke & Macpherson, 1980, para. 27, emphasis in original).[5]

The architecture of the regime of patents in Ghana is influenced by the disclosure/social contract theory. The idea of this theory is that the grant of a patent right constitutes a bargain between the inventor/creator and the public, in which the creator obtains exclusive IPR protection for 20 years in exchange for giving the public information about the work. Under the Patents Act, 2003 (Act 657), this disclosure is expected to take place in the form of publication of the invention and the details of how it works in the course of the application process (sect. 5(5) of the Patents Act, 2003). This theory also assumes that the information disclosed in return for the grant of an exclusive legal right is enough for the public to work the invention. As Amani (2009, p. 46) explains, "the disclosure essentially functions as
a 'how-to' guide providing information so that others are able to make and use the invention".

5 The full text of Locke's famous paragraph 27 of the *Second Treatise* reads: "Though the earth, and all inferior creatures, be common to all men, yet every *Man* has a *Property* in his own *person*: this nobody has a right to but himself. The *Labour* of his body, and the *Work* of his hands, we may say, are properly his. Whatsoever then he removes then he takes out of the state that nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state nature hath placed it in, it hath by this *Labour* something annexed to it, that excludes the common right of other men: for this *Labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others" (emphasis in original).

My focus in this exploration is on what I regard as the core justifications for IPRs in Ghanaian law: the incentive/reward theories. The point is that, of the many justifications available, the incentive/reward justifications are the predominant ones in policy and in judicial decisions in Ghana. The study then examines whether or not the workings of IP protection in employment situations in Ghana actually correspond to the theoretical incentive/reward rationale.

3. IP in situations of employment in Ghana: Justifications and legal realities

As outlined above, a central argument in policy, legal and academic discourse is that the incentive/reward offered to IP owners serves as a morale booster of sorts, encouraging persons to apply their creative and innovative talents. It follows that without the "prize" under the legal system, IP, creative and innovative materials would not be made in abundance.

This argument has, however, been undermined by studies that indicate that the IP system administered today is unable to ensure, in many instances, that the reward goes where it is most deserved (Penrose, 1973, p. 27). This is especially true in situations of employment, where the intellectual property rights are predominantly granted to employers-commissioners instead of the rights being granted to the persons actually employed to undertake the job. There is, thus, a wide chasm between the justification *de jure* (i.e., positive law justification) and the justification *de facto* (i.e., the real motivation to be creative) in situations of employment.

In the Ghanaian context, some of the relevant provisions in the country's IP legislation deserve cooptation and analysis *in extensor*. Section 7 of the Ghana's Copyright Act, 2005, broadly in line with the approach taken in copyright laws in many other countries, provides as follows:

> **Employed authors**
> In the absence of any contract to the contrary, the economic right of a work shall vest in an employer or a person who commissions the work where the employed or commissioned author has created the work in the course of employment or commission.

As Amegatcher (2013, p. 54) correctly points out, this standard provision unsettles the core principle in copyright law that the first owner of copyright is the person who created the work. In terms of this section 7 in Ghana's Copyright Act, the basic rule is that the employer enjoys the economic benefits of the IP works created by the employee in the course of employment. The *raison d'être* for this exception in copyright is the assumption that the employer has paid remuneration to the employee, and as a result, the employer ought to benefit from the outcome of such expenditure. The law vests the economic interests in the employer-commissioner, and only the moral interests vest in the employee-author. The employer enjoys the

pecuniary benefits of the intellectual property material, while the employee retains the non-economic/moral interests.

The only potential saving graces for the employee in section 7 are the specifications "in the absence of any contract to the contrary" and "in the course of employment or commission". In the event of a dispute, the employer would have to provide evidence to establish that the work was created in the course of employment. In respect of the matter of a potential "contract to the contrary", reliance has been made in judicial proceedings (see the English case *Beloff v Pressdram* [1973] 1 All E.R 241) on technicalities to distinguish between a contract *of* employment and a contract *for* employment. In Australia, in *University of Western Australia v Gray* [2009] FCAFC 116, the phrase "in the course of employment" was interpreted strictly in favour of the employee to mean that the employment contract ought to expect the employee to invent before the employer can lay claim to the ownership of the IP materials. Thus, where the employer is able to provide credible evidence to the effect that the IP-generating work was created in the course of employment, the labourer will have arguably laboured in vain, except for the salaries earned.

In interpreting the section 7 "employed authors" provision in Ghana's copyright law, Cecilia Koranteng-Addow J., in *Musicians Union of Ghana v Abraham & Another*, held that:

> Where the work was made in the course of the author's employment the copyright became vested in the author's employer. The Plaintiffs who were *mere employees* of either the first defendant or T. Ltd, had no right assigned to them under the agreement between the defendants and thus they could not be owners of the copyrights of the work so as to control its release. Being *mere employees*, they were also not entitled to five percent of the fee payable to owners of the copyright of a musical work [...] and neither could any benefit be discerned in their favour from the contract between the two defendants so as to bring them under the Contracts Act, 1960 (Act 25). (*Musicians Union of Ghana v Abraham & Another* [1982-83] GLR 337 at 338, emphasis added)

The facts on which the above decision was rendered were briefly as follows: the plaintiffs (musical band members) had been engaged to play for a band by the first defendant. During the existence of the employment relationship, the first defendant entered into an agreement with the second defendant, a recording company, granting that company the sole and exclusive right to make recordings of the performances of the band. The plaintiffs, claiming that the first defendant was their agent or manager, sought an order of interim injunction in the High Court to restrain the second defendant from (i) making any further releases of their recorded musical works, and (ii) making any further royalty payments to the first defendant.

The court, however, refused the application on the grounds that the plaintiffs were "mere employees" of the first defendant.

There are significant flaws inherent in granting the employer the economic benefits derived from IP materials created by employees in the course of employment. First, by presumptively vesting the economic rights in the employer, the law fails to fully appreciate the investments made by the employee in creating the intellectual work. This is especially so in the context of copyright, where no provision is made for returns that are much higher than anticipated – and when the employee is not sufficiently compensated by salary payments alone.

Second, the reality is that most employment contracts are either drafted by the employer or are standard-form contracts, and tend to contain provisions that priortise the interests of the employer, who is in the dominant position during contractual negotiations. A contract influenced by unequal bargaining positions will be generally unable to address the inequities inherent in vesting the pecuniary benefits of intellectual creations in the employer. Additionally, the low level of IP law consciousness in Ghana militates against the desire by persons to insist on express beneficial stipulations prior to their signing of an employment contract.

Third, the treatment of employed creator under section 7 of the Copyright Act has the potential to trigger labour/post-labour disputes if an employee insists on the protection of his/her moral interests. In essence, the enjoyment of the moral interest may draw in the economic interests, thereby creating disputes, and vice versa. The relatively dominant employer's interests stifle the somewhat docile moral interests of the employed author: the real labourer becomes a "mere employee" as adumbrated in the above-cited case. In *Ransome-Kuti v Phonogram Ltd* [1976] 1 GLR 220, the High Court found that the moral rights of the author are merely secondary.

A reported example of a dispute that turned on the tension between the economic and moral IP rights of creators working in employment situations occurred in 2006 between Elizabeth Ohene (a well-known Ghanaian journalist) and the Graphic Communications Group Ltd (GCGL). The Plaintiff, GCGL, sued Ohene, a former employee and a former editor of the *Daily Graphic*, for infringement of the company's copyright. GCGL asked the High Court for an injunction to restrain Ohene from incorporating – in her books – articles, editorials and news items published by Ohene in the *Daily Graphic*. The gravamen (i.e., essence) of GCGL's case was that even though Ohene wrote the articles and participated in the writing of the editorials, she did so as an employee, for which her services were paid. The parties eventually settled the matter amicably and the case did not go to trial, with the GCGL Board deciding that having regard to the unique role played by Ohene at a critical time in the history of the *Daily Graphic* and Ghana, she should be granted permission to use the said

materials for the publication of her two books, namely *Thinking Allowed* and *Stand Up and Be Counted* (Amegatcher, 2013, p. 56).

Turning to the patent sphere, the analogous provision in Ghana's Patents Act, section 4, is significantly more favourable to employees than what is contained in the Copyright Act. While section 4(5) provides that "[w]here an invention is made in execution of an employment contract, the right to the patent belongs in the absence of any contractual provisions to the contrary, to the employer," section 4(6) takes it a step further by providing that:

> Where the invention has an economic value much greater than the parties could have reasonably foreseen at the time of the conclusion of the contract, the inventor shall be entitled to a special remuneration, which shall be fixed by the court in the absence of an agreement between the parties.

The Patents Act thus provides avenues for the sharing of the benefits of IP works created in the course of employment. Such a provision is, to my knowledge, unique across the common law world. With this benefit-sharing provision, employees can be assured that where the IP benefits of their labours are substantial, not all of the benefits will go to the employer alone. In the context of copyright, no provision is made for situations where the returns are much higher than anticipated – and at least in situations when the employee is not sufficiently compensated by salary payments alone.

It is my view that this unique benefit-sharing approach contained in the Patents Act should be accorded to all manner of intellectual assets created in the course of employment in Ghana. Furthermore, the benefit-sharing should not be limited by the law to inventions of high economic value, i.e., it should not be limited to cases where the employee-created IP has, as the Patents Act puts it, "an economic value much greater than the parties could have reasonably foreseen at the time of the conclusion of the contract". It is submitted that the benefit-sharing should apply to all benefits, regardless of their economic value.

A regime of IP protection that takes due account of the labour of an employee in the distribution of the benefits derived from the IP would better serve as an incentive than the present regime that treats the employee as a "mere employee". At present, the law's inability – particularly in the case of the Copyright Act, and to a lesser degree in the Patents Act – to take due account of the IP interests of employees undermines the practical relevance of the incentive/reward justifications that are much-trumpeted in IP policy and in legal discourses.

I now turn to an examination of the ways in which benefit-sharing could become more firmly established in Ghana in respect of IP generated by persons in the course of employment.

4. Benefit-sharing modalities

Contracts

One option for attaining a fair allocation of benefits accruing from IP works created in the course of employment is through the adoption of enforceable contracts. Such express arrangements take away the discretion that the law accords to judges, in the course of judicial proceedings, in interpreting the phrase "in the course of employment" or "in the course of the commission", or, in the case of the Patents Act, "an economic value much greater than the parties could have reasonably foreseen at the time of the conclusion of the contract". There is a need to sensitise the public about the position of the law with regard to the ownership of IP works created in the course of employment. Such sensitisation would potentially generate insistence by prospective employees on express IP benefit-sharing terms as part of their employment contracts.

Institutional policies

To obviate the challenge of finding a solution after a conflict has arisen, the University of Ghana developed and adopted its Intellectual Property Policy of 2015.[6] This Policy serves as the guiding contract between the University and its employees/students, and it also applies to visiting academics and visiting students at the University (in the absence of any contract to the contrary). The Policy attempts to define benefit-sharing approaches that would satisfy the needs of both the University and its IP-creating researchers (employees and students).

Paragraph 4.1 of the Policy allows employees to own IP works created without a significant use of the University's resources. Conversely, the University holds the rights over IP works created in the course of employment and with significant use of the University's resources. A "significant use of University resources" is defined to include the use of University-administered funds, University facilities, equipment, resources, time, office space, personnel, and administrative support. In the particular instance of inventions – which are commercialised through the University's Office of Research, Innovation and Development (ORID) – the Policy provides the following formula for sharing royalties that may accrue from such inventions: 40% to the inventor, 25% to the University, 15% for the support of research grants or fellowships, 10% to the inventor's College and its constituents, and the remaining

6 See University of Ghana (2015). Unlike countries such as South Africa, Ghana has no special arrangements in regard to the sharing of benefits from publicly funded research. In the absence of any contract to the contrary, the laws of Ghana treat all institutions equally in regard to IP works created in the course of employment.

10% to an Intellectual Property Fund to be established in support of IP protection, marketing and commercialisation activities.[7]

Legislation

As explained above, potential employees in Ghana are typically not in a position favourable to negotiation of the IP terms of their employment contracts. And the University of Ghana IP Policy only applies to a single, albeit important, institution. Given these limitations with the first two benefit-sharing approaches discussed – contracts and institutional policies – the ideal situation would be to have national legislative amendments to codify benefit-sharing from IP created in the course of employment. Such legislative amendments, and amendments to accompanying regulations, would need to be based on due consideration of both economic and moral rights, would need to provide a formula for recognising both employer and employee contributions to IP, and for sharing of the benefits. Such legislation would also need to contain provisions for non-adversarial mechanisms of dispute resolution, so as to minimise labour disputes and to preserve healthy working relationships between employers and employees.

5. Conclusions

This thematic report has shown that the incentive/reward justifications commonly advanced for protecting intellectual assets in Ghana are not – outside of specific contexts such as the University of Ghana – given practical effect in terms of accrual of benefits from IP created by employees. To reverse this trend, there is a need to sensitise the public about the position of the law with regard to the ownership of IP works created in the course of employment. Such sensitisation would potentially generate insistence by prospective employees on express IP benefit-sharing terms as part of their employment contracts. And at a more fundamental level, because of the inequality of bargaining power between employers and employees, consideration needs to be given to legislative amendments requiring the establishment of regulatory formulas and procedures for fair sharing, between employers and employees, of benefits from all IP created in the course of employment. The use of legislation, and accompanying regulations, to correct the imbalances would ensure that the justification *de jure* translates into justification *de facto* in spurring on human creativity in situations of employment. For now, the incentive/reward justifications have theoretical importance only.

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